For Publication

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

JIM WALLACE, Appellant/Plaintiff, v. **PEOPLE OF THE VIRGIN ISLANDS,** Appellee/Defendant.	))))))))	**S. Ct. Crim. No. 2015-0073** Re: Super. Ct. Crim. No. 165/2010 (STX)

On Appeal from the Superior Court of the Virgin Islands
Division of St. Croix
Superior Court Judge: Hon. Douglas A. Brady

Argued: October 11, 2016
Dated: June 28, 2019

Cite as: 2019 VI 24

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

APPEARANCES:

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OPINION OF THE COURT

CABRET, Associate Justice.

¶ 1 Jim Wallace appeals the Superior Court's October 24, 2014 order denying his motion for a new trial and its August 5, 2015 judgment and commitment, alleging inadequate jury instructions,

insufficient evidence to support his convictions for third-degree assault, first-degree reckless endangerment, and unauthorized possession of a firearm during the commission of a crime of violence, and that the Superior Court abused its discretion by denying his motion for a new trial. Although Wallace's convictions are supported by sufficient evidence and the Superior Court did not abuse its discretion in denying Wallace's motion for a new trial, the Superior Court erred in instructing the jury on the elements of first-degree reckless endangerment. Accordingly, we affirm Wallace's third-degree assault and unauthorized possession convictions, but vacate Wallace's conviction for first-degree reckless endangerment and remand this matter for a new trial on that count.

I. FACTUAL AND PROCEDURAL BACKGROUND

¶ 2 On March 1, 2010, a shooting occurred near the dump site in the Williams Delight housing community in Frederiksted, St. Croix. The Virgin Islands Police Department arrested Wallace in connection with this shooting, and the People charged him with reckless endangerment in the first degree, 14 V.I.C. § 625(a), assault in the third degree, 14 V.I.C. § 297(2), and unauthorized possession of a firearm during the commission of a crime of violence 14 V.I.C. § 2253(a).

¶ 3 The matter proceeded to trial on September 8, 2014. The People first called Ray Webster, the victim. Webster testified that, on March 1, 2010, he was at his parents' house, where he observed Wallace and two other men walking by his parents' yard while putting their shirts on their heads and heading into the bushes that were situated behind the backyard. Frightened, Webster called his father, who returned home and phoned the police. After the police left, Webster testified that he saw Wallace emerge from the bushes with a silver-colored gun and point it at him before disappearing again back into the bushes.

¶ 4 Webster then proceeded to the house of his girlfriend, Tajaira Gomes. While there, Webster saw Wallace and several other men waiting outside, approximately 25 feet from Gomes's house. Webster left Gomes's house with Gomes and their two-year-old son in order to return a movie, and observed Wallace and the other people walk behind a nearby empty house. Webster testified that Gomes drove the trio out of the Williams Delight housing community and approached a speedbump. He further testified that, as their vehicle approached the speedbump, he heard gunshots and observed Wallace shooting at them. According to his testimony, Webster attempted to shield his son amidst flying bullets and shattering glass by moving his car seat, and then attempted to exit the vehicle in order to draw fire away from Gomes and his son. Webster stated that Gomes held him in the vehicle, and proceeded to drive past a second speedbump near some dumpsters.

¶ 5 The People then called Gomes to the stand. Gomes testified that she lived in the private section of the Williams Delight housing community. Like Webster, Gomes testified that, as she approached the first speedbump, she heard gunshots and felt glass shattering around her. She corroborated Webster's testimony that Wallace fired upon the car and further testified that she observed a silver-color gun in Wallace's hand.

¶ 6 Next, the People called Detective Leon Cruz of the Virgin Islands Police Department. Detective Cruz testified that the shooting occurred in a public housing community. The parties then stipulated that Wallace was not licensed to carry a firearm in the U.S. Virgin Islands, and the People rested its case. Wallace called two alibi witnesses who each testified that they were with Wallace on the night of the shooting, and then rested his defense.

¶ 7 Following closing arguments, the court instructed the jury on the elements of reckless endangerment in the first degree, assault in the third degree, and unauthorized possession of a

firearm during the commission of a crime of violence. On September 11, 2014, following deliberation, the jury returned a unanimous verdict, finding Wallace guilty of all three offenses. On September 17, 2014, Wallace filed a motion for a new trial, arguing that newly discovered evidence necessitated a retrial. In support of his motion, Wallace attached the affidavit of Angel "Bebo" Sanes. In his affidavit, Sanes swore that he engaged in a gunfight with Webster by the dumpsters near the second speedbump around the same time that Wallace fired upon Gomes's vehicle at the first speedbump. The Superior Court heard oral argument on this motion on October 15, 2014. Unpersuaded that Sanes's affidavit contradicted the timeline of events testified to by Webster and Gomes, the Superior Court issued a written opinion and order denying Wallace's motion on October 23, 2014. Wallace moved for a reconsideration of the Superior Court's October 23, 2014 order, but the Superior Court denied that motion by order entered December 3, 2014.

¶ 8 The Superior Court held a sentencing hearing on July 29, 2015. On August 5, 2015, the Superior Court entered its judgment and commitment, adjudicating Wallace guilty on all counts and imposing concurrent sentences of 5 years' incarceration for both his first-degree reckless endangerment and third-degree assault convictions, and 15 years' incarceration for his unauthorized possession of a firearm conviction, plus a total fine of $25,500 on the third-degree assault and firearm possession convictions and court costs of $75. Wallace filed a timely notice of appeal on September 4, 2015.

II. JURISDICTION

¶ 9 This Court has jurisdiction over "all appeals arising from final judgments, final decrees or final orders of the Superior Court, or as otherwise provided by law." V.I. CODE ANN. tit. 4, § 32(a). It is well established that in a criminal case, the written judgment embodying the adjudication of guilt and the sentence imposed based on that adjudication constitutes a final judgment for purposes

of this statute. *Williams v. People*, 58 V.I. 341, 345 (V.I. 2013) (collecting cases). Accordingly, because the Superior Court's August 5, 2015 judgment and commitment constitutes a final judgment, this Court possesses jurisdiction over Wallace's appeal. *Francis v. People*, 63 V.I. 724, 732–33 (V.I. 2015); *Codrington v. People*, 57 V.I. 176, 183 (V.I. 2012); *Williams v. People*, 55 V.I. 721, 727 (V.I. 2011).

III. DISCUSSION

¶ 10 Wallace presents five arguments on appeal. First, he argues that the Superior Court erred in instructing the jury on the elements of third-degree assault. (Wallace's Br. 10–19). Second, he challenges the sufficiency of the evidence to sustain his conviction for first-degree reckless endangerment. (Wallace's Br. 19–23). Third, he claims that the Superior Court erred when instructing the jury on the elements of reckless endangerment. (Wallace's Br. 23–26). Fourth, he argues that the Superior Court abused its discretion in denying his motion for a new trial. (Wallace's Br. 26–29). Finally, he challenges the sufficiency of the evidence to sustain his conviction for the unauthorized possession of a firearm during the commission of a crime of violence. (Wallace's Br. 29). We address each argument in turn.

A. Jury instructions on third-degree assault

¶ 11 Wallace argues that the Superior Court erred in instructing the jury on the elements of third-degree assault because the Superior Court "did not instruct the jury to find Wallace not guilty if the circumstances amount to first or second degree assault." (Wallace's Br. 13). "[A] jury instruction will generally not be invalidated unless it is shown that the instruction substantially and adversely impacted the constitutional rights of the defendant and impacted the outcome of the trial." *Frett v. People*, 66 V.I. 399, 419 (V.I. 2017) (quoting *Freeman v. People*, 61 V.I. 537, 544 (V.I. 2014) (citing *Prince v. People*, 57 V.I. 399, 405 (V.I. 2012)). "A claim of improper instruction

will rarely justify reversal of a criminal conviction when no objection has been made in the trial court." *Id.*

¶ 12 Wallace did not challenge the adequacy of the third-degree assault instruction before the Superior Court, so we review the instructions for plain error. *Velazquez v. People*, 65 V.I. 312, 318 (V.I. 2016) (citations omitted). For this Court to reverse under a plain error standard of review, four conditions must be met. First, there must be an error; second, the error must be "plain"; third, the error must "affect substantial rights"; and finally, the error must "seriously affect the fairness, integrity, or public reputation of judicial proceedings." *Rawlins v. People*, 58 V.I. 261, 268 (V.I. 2013) (quoting *Johnson v. United States*, 520 U.S. 461, 466-67 (1997) (citing *Francis v. People*, 52 V.I. 381, 390 (V.I. 2009)); *see also Molina-Martinez v. United States*, 578 U.S. ___, 136 S. Ct. 1338, 1343 (2016).

¶ 13 "To determine whether the Superior Court erred in its jury instructions, we must view the instructions as a whole to determine whether they were misleading or inadequate to guide the jury's deliberation." *Christopher v. People*, 57 V.I. 500, 513 (V.I. 2012) (citation and internal quotation marks omitted); *see also Davis v. People*, 69 V.I. 619, 631 (V.I. 2018) (citing *Monelle v. People*, 63 V.I. 757, 763 (V.I. 2015) (citations omitted)) (a challenge to jury instructions must be considered in light of the entire instructions and the record as a whole). "[T]he jury is to be instructed on each and every essential element of the offense charged." *Nanton v. People*, 52 V.I. 466, 479 (V.I. 2009) (citing *Screws v. United States*, 325 U.S. 91 (1945)). To obtain a conviction for third-degree assault under 14 V.I.C. § 297 (a)(2), the People must prove that the defendant committed an assault, and that the assault was committed "with a deadly weapon." *See Cascen v. People*, 60 V.I. 392, 407 (V.I. 2014) (quoting *Phipps v. People*, 54 V.I. 543, 550 (V.I. 2011)); 14

V.I.C. § 297 (a)(2). An assault is "any unlawful violence upon the person of another with an intent to injure him, whatever be the means or degree of violence used." 14 V.I.C. § 292.

The Superior Court issued the following instructions to the jury:

> The government must prove the following elements beyond a reasonable doubt:
> A. That the Defendant used unlawful violence upon the person of Ray G. Webster;
> B. That the Defendant did so with the intent to cause injury;
> C. That the Defendant used a deadly weapon to commit the act; and
> D. That the event occurred on or about March 1, 2010 in the judicial district of St. Croix.

When read together, elements A and B require the People to prove that Wallace used unlawful violence upon Webster with intent to injure him—the definition of assault provided by 14 V.I.C. § 292. Point C requires the People to prove that Wallace assaulted Webster with a deadly weapon—one circumstance that elevates simple assault to assault in the third degree. 14 V.I.C. § 297 (a)(2). Therefore, points A through C require the People to prove beyond a reasonable doubt all elements necessary to sustain a conviction for third-degree assault set forth in 14 V.I.C. § 297 (a)(2) and our precedent in *Cascen* and *Phipps*. Accordingly, the jury was instructed on each and every essential element of third-degree assault, and we find nothing misleading or inadequate in the Superior Court's instruction that would support a finding of plain error.

¶ 14 But in addition to the elements listed by the Superior Court, Wallace argues that the Superior Court must also instruct the jury that it must find the defendant not guilty of first- and second-degree assault before it may convict a defendant of third-degree assault. To support this argument, Wallace points to the introductory paragraph of section 297(a), which prefaces the class of assaults criminalized under section 297 with the language "[w]hoever, under circumstances not amounting to assault in the first or the second degree[.]" He argues that the legislature employed this language in order to ensure that "nobody is convicted for third degree assault where the

circumstances amounted to first degree assault." (Wallace's Br. 15). This argument misapprehends the plain language of section 297.

¶ 15 "The first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning. If the statutory language is unambiguous and the statutory scheme is coherent and consistent, no further inquiry is needed." *In re Adoption of L.O.F.*, 62 V.I. 655, 661 (V.I. 2015) (quoting *In re Reynolds*, 60 V.I. 330, 333 (V.I. 2013)). By its plain language, section 297 criminalizes a class of assaults and states the penalty for committing one of those assaults. Subsections (a)(1) through (a)(4) define the class of assaults criminalized by section 297. The statute provides that, if a defendant is convicted of an assault defined in subsections (a)(1) through (a)(4) "under circumstances not amounting to an assault in the first or second degree . . . [then that defendant] shall be fined not less than $500 and not more than $3,000 or imprisoned not more than 5 years or both." 14 V.I.C. § 297(a). In other words, section 297 only prescribes penalties for third-degree assault, not first- or second-degree assault. *See* 14 V.I.C. § 295 (stating the penalty for first-degree assault); 14 V.I.C. § 296 (stating the penalty for second-degree assault). Thus, when the introductory clause of section 297(a) is read in tandem with the flush text that follows subsections (a)(1) through (a)(4), it is clear that the language "under circumstances not amounting to an assault in the first or second degree" is a limitation on the sentencing power of the Superior Court, and not an element of the offenses listed in subsections (a)(1) through (a)(4).[1] "[I]n the full context of the statute, the language 'under circumstance not amounting to an assault

[1] Although the text of section 297 is plain and does not require us to evaluate sources beyond the text of the statute itself, the revision note to section 297 supports our interpretation. Specifically, the 1957 revision note states that the purpose of the language "and which does not amount to assault in the first or second degree" is "to make clear that the punishment prescribed by this section did not apply to any assault with the intent to commit any of the felonies dealt with in sections 295 [first-degree assault] and 296 [second-degree assault] of this title."

in the first or second degree' *does not establish an additional, substantive element of the offense*, but rather constitutes a *condition precedent* to the Superior Court's application of the sentencing range prescribed in § 297." *Davis*, 69 V.I. at 632 (emphasis and alteration added). Accordingly, we reject Wallace's argument that the Superior Court erred when instructing the jury on the elements of third-degree assault.[2]

B. Sufficiency of the evidence to sustain a reckless endangerment conviction

¶ 16 Wallace next challenges the sufficiency of the evidence to sustain his conviction for first-degree reckless endangerment. He first argues that "[t]here is no evidence that the shooting occurred 'under circumstances evidencing a depraved indifference to human life,' as a matter of law." (Wallace's Br. 20). We disagree.

¶ 17 To obtain a conviction for reckless endangerment, the government must prove that the defendant: "(1) recklessly engaged in conduct (2) in a public place[,] that (3) created a grave risk of death to another person (4) under circumstances evidencing a depraved indifference to human life." *Davis*, at 635 (citing 14 V.I.C. § 625; *Woodrup v. People*, 63 V.I. 696, 711 (V.I. 2015) (alteration added) (internal citations and quotations omitted)).

¶ 18 "When reviewing the sufficiency of the evidence, this Court reviews the Superior Court's determination *de novo*." *Davis*, at 635 (V.I. 2018) (citing *Woodrup*, 63 V.I. at 707) (emphasis in original) (internal citation omitted)). "[We apply] the same standard the Superior Court should have applied—viewing the evidence in the light most favorable to the People and affirming the

[2] Wallace also contends that the People's decision to charge him with third-degree assault amounts to prosecutorial misconduct because his actions "are indisputably circumstances amounting to first-degree assault." (Wallace's Br. 18). Wallace's argument rests solely on the proposition that a defendant cannot be convicted of third-degree assault if he or she is guilty of first- or second- degree assault, but as discussed above, innocence of first- or second-degree assault is not an element of third-degree assault under 14 V.I.C. § 297. Consequently, Wallace's prosecutorial misconduct argument is meritless.

conviction if any rational finder of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *Id.*

¶ 19 "[T]he testimony of one witness is sufficient to prove any fact [and a] conviction may be sustained on the testimony of a single witness or victim, even when other witnesses may testify to the contrary." *See Francis v. People*, 57 V.I. 201, 236 (V.I. 2012) (citation and internal quotation marks omitted)). Wallace only challenges the sufficiency of the evidence to prove that he acted "under circumstances evidencing a depraved indifference to human life," (Wallace's Br. 20), and we limit our review of the evidence accordingly.

¶ 20 We have previously stated that "the act of firing a loaded gun at or near someone is, by definition . . . reckless conduct creating a grave risk of death under circumstances evincing an extreme indifference to human life." *Augustine v. People*, 55 V.I. 678, 689 (V.I. 2011) (quoting *State v. Coward*, 972 A.2d 691, 702–03 (Conn. 2009)) (internal quotation marks omitted).

¶ 21 We have relied upon this statement as a touchstone for determining whether a defendant has acted with depraved indifference under section 625(a). *See, e.g.*, *Freeman v. People*, 61 V.I. 537, 542 (V.I. 2014) (concluding that a defendant acted with depraved indifference by discharging a firearm in proximity to a large crowd because "the act of firing a loaded gun at or near someone is, by definition, the epitome of reckless conduct creating a grave risk of death under circumstances evincing an extreme indifference to human life" (quoting *Augustine*, 55 V.I. at 689)). Yet this statement derives from a citation to Connecticut case law, *see Augustine*, 55 V.I. at 689 (quoting *Coward*, 972 A.2d at 702–03), and we have never examined whether the statement has any foundation in the plain text of title 14, section 625(a). Therefore, before analyzing whether there was sufficient evidence to find that Wallace acted with depraved indifference, we must first ascertain the meaning of section 625(a)'s "depraved indifference" requirement.

¶ 22 If it is not ambiguous, the plain text of a statute governs its meaning. *See In re Adoption of L.O.F.*, 62 V.I. at 661. By its plain text, section 625(a) criminalizes reckless behavior, i.e. behavior undertaken intentionally but with indifference to the outcome, that creates a certain risk to others. *See* 14 V.I.C. § 625(c)(1) (explaining that a person engages in reckless behavior under section 625 "when a person consciously and knowingly engages in conduct or behavior that *may* pose intentional harm or physical injuries to another human being or property." (emphasis added)); *Estick v. People*, 62 V.I. 604, 622 (V.I. 2015) ("The reckless endangerment statute . . . speaks in terms of a person recklessly engaging in conduct, indicating that the Legislature has prescribed that the conduct creating a substantial risk of death or serious injury is the focus of the statute[.]"); *see also* BLACK'S LAW DICTIONARY 1385 (9th ed. 2009) (defining "reckless" as "[c]haracterized by the creation of a substantial and unjustifiable risk of harm to others and by a conscious (and sometimes deliberate) disregard for or indifference to that risk"). If reckless behavior occurs in a public place and creates "a substantial risk of serious physical injury to another person," the actor may be guilty of second-degree reckless endangerment. *See* 14 V.I.C. § 625(b). However, if reckless behavior occurs in a public place, "creates a grave risk of death to another person," and occurs under "circumstances evidencing a depraved indifference to human life," the actor may be guilty of first-degree reckless endangerment. *See* 14 V.I.C. § 625(a).

¶ 23 Although section 625 does not define "depraved indifference," the Virgin Islands Legislature has provided that, with respect to language appearing in the Virgin Islands Code, "[w]ords and phrases shall be read with their context and shall be construed according to the common and approved usage in the English language." 1 V.I.C. § 42. Accordingly, "depraved" means "corrupt; perverted[,] . . . heinous; morally horrendous." BLACK'S LAW DICTIONARY 506 (9th ed. 2009). "Indifference" refers to "[a] lack of interest in or concern about something; apathy."

Id. at 842. Because the word "indifference" refers to a state of mind, the addition of the requirement that a defendant act "under the circumstances evidencing a depraved indifference to human life" must be understood to be a component of the *mens rea* criminalized by the act. Given that section 625 elevates second-degree reckless endangerment to first-degree reckless endangerment based on the presence of "depraved indifference," and because the statute treats first-degree reckless endangerment as a felony but only treats second-degree reckless endangerment as a misdemeanor, one must possess a greater degree of indifference to be convicted of first-degree reckless endangerment under section 625(a) than one must possess to act "recklessly" under section 625(b).

¶ 24 New York's interpretation of its own reckless endangerment statute supports this reading of section 625. *See Ottley v. Estate of Bell*, 61 V.I. 480, 494 n.10 (V.I. 2014) (when interpreting our statutes, we may look to statutes from other jurisdictions that employ language similar to our own).[3] New York's statute criminalizing reckless endangerment in the first degree is nearly identical to our own, omitting only the requirement that conduct occur in a public place. *Compare* N.Y. PENAL LAW § 120.25 (McKinney 2016), *with* 14 V.I.C. § 625(a). Under New York law, the requirement that conduct occur under circumstances evidencing "a depraved indifference to human life" refers to "a culpable mental state" in which one acts with "an utter disregard for the value of human life, . . . not because one intends harm, but because one simply doesn't care whether

[3] This principle of statutory interpretation differs from the principle that, when the Virgin Islands Legislature adopts a statute that is identical or similar to the one in effect in another state, Virgin Islands courts will typically adopt the original jurisdiction's construction of the statute prevailing at the time of its adoption. *See, e.g.*, *Rivera-Moreno v. Gov't of the V.I.*, 61 V.I. 279, 295 – 96 (V.I. 2014); *Percival v. People*, 61 V.I. 187, 196 n.9 (V.I. 2014). Here, there is no evidence that the language of section 625 was adopted from a specific state's statute. In the absence of such evidence, this Court treats decisions from other jurisdictions construing statutes that feature language substantially similar to the language used in a Virgin Islands statute as persuasive authority only. *See, e.g.*, *Rivera-Moreno*, 61 V.I. at 296 (in the absence of evidence that our habeas statute was patterned after the habeas statute of a specific jurisdiction, the Court considered statutory interpretations from four jurisdictions with similar statutory language to be persuasive).

grievous harm results or not." *People v. Feingold*, 852 N.E.2d 1163, 1168 (N.Y. 2006). "Depraved indifference," as used in New York's reckless endangerment statute, "is something even worse" than an action that is merely reckless. *People v. Lewie*, 953 N.E.2d 760, 766 (N.Y. 2011). One who is depravedly indifferent "is not just willing to take a grossly unreasonable risk to human life [as required for a finding of recklessness]—that person does not care how the risk turns out." *Id.*; *see e.g.*, *People v. Heidgen*, 3 N.E.3d 657, 667 (N.Y. 2013) (concluding that sufficient evidence of depraved indifference existed where the defendant continued driving "at full speed" after striking a pedestrian and before crashing into another vehicle, because the defendant "set out to drive as fast as she could go"); *People v. Green*, 958 N.Y.S.2d 138, 129–30 (N.Y. App. Div. 2013) (concluding that sufficient evidence of depraved indifference existed where the defendant had thrown objects from his 26th-floor balcony because he was aware of the risk his activity created, but did not care "whether or not that risk came to fruition"); *cf. Lewie*, 953 N.E.2d at 766 (a mother who knew that her child had life-threatening injuries and failed to seek help was not depravedly indifferent because the evidence illustrated that she was fearful for the safety of her child, not indifferent to the child's wellbeing). *Feingold*, 852 N.E.2d at 1167–68 (defendant could not be guilty of reckless endangerment in the first degree because the jury concluded that the defendant was not depravedly indifferent when he attempted suicide in a manner that caused an explosion in his apartment). New York courts reached this conclusion because acting with indifference toward human life is different than acting with the specific intent of ending it—if one is indifferent toward human life, one does not care whether another lives or dies. *See Feingold*, 852 N.E.2d at 1165–67 (collecting cases).

¶ 25 Wallace urges this Court to adopt New York's understanding of depraved indifference, and given the similarity of the language used in New York's reckless endangerment statute and

that featured in our own reckless endangerment statute, we are persuaded to do so. Accordingly, to be depravedly indifferent within the meaning of section 625(a), a person must act with "an utter disregard for the value of human life," not because he or she intends harm, but because "one simply doesn't care whether grievous harm results or not." *See Feingold*, 852 N.E.2d at 1168 (citing *People v. Suarez*, 844 N.E.2d 267, 298 (N.Y. 2006). This ruling specifically rejects the overbroad notion that "the act of firing a loaded gun at or near someone is [always], by definition, the epitome of reckless conduct creating a grave risk of death under circumstances evincing an extreme indifference to human life." *Augustine*, 55 V.I. at 689 (quoting *Coward*, 972 A.2d at 702–03) (internal quotation marks omitted).[4]

¶ 26 Under today's holding, the act of firing a loaded gun at or near someone *may* evidence a depraved indifference to human life, so long as the People prove beyond a reasonable doubt that the shooter in fact acted with depraved indifference toward the lives of those affected. *See, e.g.*, *Woodrup*, 63 V.I. at 711 (defendant "fired several gunshots on a public street populated by several members of the public, including [the victim]"); *Estick*, 62 V.I. at 615 (defendant opened fire in the vicinity of a restaurant, "creating a grave risk of death to the patrons of that establishment"); *Cascen v. People*, 60 V.I. 392, 408 (V.I. 2014) (defendant "fired a gun into a gathering of people outside the Harvey Housing Community"); *Tyson v. People*, 59 V.I. 391, 417 (V.I. 2013) (defendant opened fire on a victim "as he walked *with others* down [a] public road toward [a] burial procession") (emphasis added). Ultimately however, we cannot infer simply from the fact

[4] Although we reject the proposition that the act of firing a gun always constitutes reckless conduct evidencing an extreme indifference to human life as a matter of law, there was still sufficient evidence to conclude that the defendant in *Augustine* acted with depraved indifference. *See Augustine*, 55 V.I. at 690 (the defendant opened fire on three police officers on a street "directly in front of and around [a] restaurant and mini mart" while attempting to flee from the officers).

that a shooter intends harm, that the shooter was also depravedly indifferent to the other people in the crowd. We cannot make such an automatic, slippery slope conclusion.

¶ 27 Moreover, this case did not involve the "one on one" shooting that Wallace claims it to be. (Wallace's Br. 21). Here, both Webster and Gomes testified that Wallace shot at a vehicle containing two adults and a two-year-old child. Even if Wallace intended to shoot Webster, a jury could still conclude from either Webster's or Gomes's testimony that Wallace acted under circumstances demonstrating a depraved indifference to human life by jeopardizing the lives of Gomes and her child with gunfire. Since Wallace has not challenged the sufficiency of the evidence with respect to any other element of reckless endangerment in the first degree, we conclude that there is sufficient evidence to sustain his conviction for reckless endangerment in the first degree.

C. Jury instruction on reckless endangerment

¶ 28 Wallace next challenges the Superior Court's jury instruction on the first-degree reckless endangerment charge. As we explained above in section III.A., because Wallace also did not object to this instruction during trial, we review the Superior Court's instruction for plain error only. (See *supra* section III.A., ¶¶ 11-13).

¶ 29 "[T]he jury is to be instructed on each and every essential element of the offense charged," *Nanton*, 52 V.I. at 479, and we consider the jury instructions as a whole to determine whether they were "misleading or inadequate to guide the jury's deliberation." *Christopher*, 57 V.I. at 513 (citation and internal quotation marks omitted). "[T]he omission of an element from the court's charge is harmless where other facts found by the jury are so closely related to the omitted element that no rational jury could find those facts without also finding the omitted element." *Nanton*, 52 V.I. at 509 (citing *Neder v. United States*, 527 U.S. 1, 14 (1999) (internal quotation marks omitted). Additionally, "jury instructions that relieve the prosecution of its burden of proving every element

of an offense beyond a reasonable doubt 'subvert the presumption of innocence accorded to accused persons and also invade the truth-finding task assigned solely to juries in criminal cases.'" *Francis v. People*, 52 V.I. 381, 405 (V.I. 2009) (quoting *United States v. Korey*, 472 F.3d 89, 93 (3d Cir. 2007) (citing *Carella v. Cal.*, 491 U.S. 263, 265 (1989)).

¶ 30 The People charged Wallace with first-degree reckless endangerment. "A person is guilty of reckless endangerment in the first degree when, under the circumstances evidencing a depraved indifference to human life, he recklessly engages in conduct in a public place which creates a grave risk of death to another person." 14 V.I.C. § 625(a). Accordingly, the Superior Court instructed the jury as follows:

> The essential elements, reckless endangerment in the first degree are:
> A. That the Defendant under circumstances demonstrating a depraved [indifference] to human life;
> B. Recklessly engage[d] in conduct in a public place;
> C. That the conduct creates a grave risk of death to another person; and
> D. The act occurred on or about March 1, 2010, in the judicial district of St. Croix.

The Superior Court further instructed the jury that

> Before you may find the Defendant guilty of reckless endangerment in the first degree you must find that the Defendant acted recklessly. An act is done recklessly if done voluntarily and intentionally exhibiting a lack of caring for the potentially harmful results to another human being located nearby. An act such as shooting at another human being is reckless because it exhibits a depraved indifference to human life. You must also find that the incident occurred in a public place. A residential street is a public place.

Wallace claims that the Superior Court "converted critical facts into the law, binding the jurors" when it stated that "[a]n act such as shooting at another human being is reckless because it exhibits a depraved indifference to human life. You must also find that the incident occurred in a public place. A residential street is a public place." (Wallace's Br. 24). We share Wallace's concern.

¶ 31 In prohibiting someone from "recklessly engaging in conduct," section 625 proscribes "conduct creating a substantial risk of death or serious injury." *Estick*, 62 V.I. at 622 (indicating

that such conduct is the focus of our reckless endangerment statute); *see also* 14 V.I.C. § 625(a) (prohibiting reckless conduct that creates a "grave risk of death"); 14 V.I.C. § 625(b) (prohibiting conduct that creates "a substantial risk of serious physical injury"). Section 625 also requires that the reckless endangerment occur in a "public place." 14 V.I.C. § 625(a). A public place is a place "to which the general public has a right to resort; but a place which is in point of fact public rather than private, and visited by many persons and usually accessible to the public." 14 V.I.C. § 625(c)(2). On many occasions we have found that reckless endangerment occurred in a public place where the conduct at issue occurred on a public road. *E.g.*, *Estick*, 62 V.I. at 615; *Phillip v. People*, 58 V.I. 569, 591 (V.I.), *cert. denied*, 134 S. Ct. 798 (2013). It does not follow, however, that all "residential streets" will be "in point of fact public." Residential streets may also exist within private communities—places to which the general public may not have a right to resort or which are not, "in point of fact public." *See, e.g.*, 20 V.I.C. § 7 (acknowledging the existence of private roadways in the Virgin Islands); *Forest Hills Gardens Corp. v. Baroth*, 555 N.Y.S.2d 1000, 1002 (N.Y. Sup. Ct. 1990) (plaintiff housing community had a legal right to apply immobilizing boot on unauthorized vehicles parked on its private streets); *Bauer v. Harn*, 286 S.E.2d 192, 193 (Va. 1982) (housing community included residential lots, streets, parks, and recreational facilities, all privately owned). The question of whether a specific area constitutes a "public place" under section 625 necessarily turns on the facts of each case. *See, e.g.*, *Woodrup*, 63 V.I. at 711 (the shooting occurred on a public street "populated by several members of the public"); *Tyson*, 59 V.I. at 417 (the defendant fired upon the victim while the victim walked down a public road with others toward a burial procession).

¶ 32 When viewed in light of this interpretation of section 625, the Superior Court's reckless endangerment instructions are erroneous in three respects. First, the Superior Court' instruction

that "[a]n act is done recklessly if done voluntarily and intentionally[,] exhibiting a lack of caring for the potential harmful results to other humans located thereby" is only partially accurate because it fails to instruct the jury that the defendant must disregard "a substantial risk of death or serious injury" to others. *See Estick*, 62 V.I. at 622. Second, the Superior Court's example that "[a]n act such as shooting at another human being is reckless because it exhibits a depraved indifference to human life" is incorrect because, as discussed above, not every shooting will occur under circumstances evidencing a depraved indifference to human life, and it falls to the jury to determine if a shooting was reckless. *Cf. People v. Gonzalez*, 807 N.E.2d 273, 276 (N.Y. 2004) ("[A] person cannot act both intentionally and recklessly with respect to the same result."). The Superior Court's failure to instruct the jury that a defendant must disregard "a substantial risk of death or serious injury" to others in order to be reckless is harmless because the Superior Court separately instructed the jury that the People were required to prove "[t]hat the conduct creates a grave risk of death to another person." Thus, if the jury found that Wallace's conduct created a grave risk of death to another, they must have implicitly found that Wallace's conduct created a substantial risk of death or serious injury to another. *See Nanton*, 52 V.I. at 509. But the Superior Court's instruction admonishing the jurors that shooting at another human is reckless renders the instruction misleading and inadequate to guide the jury's deliberation, because it directs the jury to conclude that all shootings are reckless, despite the fact that the People were required to prove, beyond a reasonable doubt, that Wallace's shooting was the product of a conscious disregard for a grave risk of death, and not merely the product of a specific intent to kill. Since the jury—and not the court—must determine whether a shooting is reckless, this portion of the Superior Court's instruction "invade[s] the truth-finding task assigned solely to juries in criminal cases," *Francis*, 52 V.I. at 405 (citing *Francis v. Franklin*, 471 U.S. 307 (1985)).

¶ 33 Finally, the Superior Court's instruction on the "public place" element of reckless endangerment also invades the province of the jury, as the instruction obligates the jury to conclude that the residential street on which the shooting in question occurred was, "in point of fact," public. When read in light of the instructions as a whole, the Superior Court's instruction impermissibly removed the People's burden of proving, beyond a reasonable doubt, that the "residential street" in question fell within the definition of "public place" set forth in section 625. *See Augustine*, 55 V.I. at 686 ("[W]e do generally presume that juries follow their instructions") (quoting *United States v. Liburd*, 607 F.3d 339, 344 (3d Cir. 2010)). Since the jury heard testimony that the Williams Delight housing community had both public and private sections, and since the jury would otherwise have been free to disregard testimony that the residential street in question was a public place, we cannot conclude that this error is harmless. Like the instruction concerning recklessness, this portion of the Superior Court's instruction "invades the truth-finding task assigned solely to juries in criminal cases." *Francis*, 52 V.I. at 405. Accordingly, we must vacate Wallace's conviction for reckless endangerment in the first degree and remand for a new trial on that count if the People are disposed to pursue that charge.

D. Motion for a new trial

¶ 34 Fourth, Wallace challenges the Superior Court's denial of his motion for a new trial. He claims that Sanes's affidavit constitutes evidence that, if presented at a new trial, would probably produce an acquittal. (Wallace's Br. 29). The Superior Court concluded that the interests of justice did not necessitate a new trial because the evidence proffered in Sanes's affidavit—even if true—was neither material to the issues involved nor likely to produce an acquittal if presented at a new trial.

¶ 35 We review the denial of a motion for a new trial for an abuse of discretion. *Ventura v. People*, 64 V.I. 589, 614 (V.I. 2016) (citing *Percival v. People*, 62 V.I. 477, 490–91 (V.I. 2015)). An abuse of discretion occurs when the trial court makes a decision that rests upon a clearly erroneous finding of fact, an errant conclusion of law, or an improper application of law to fact. *Thomas v. People*, 60 V.I. 688, 697 (V.I. 2014) (quoting *Petrus v. Queen Charlotte Hotel Corp.*, 56 V.I. 548, 554 (V.I. 2012)) (internal quotation marks omitted). "The court may grant a new trial to a defendant if required in the interest of justice." SUPER. CT. R. 135. In making such a determination, the court "may weigh the evidence and credibility of witnesses, and if the court determines that there has been a miscarriage of justice, the court may order a new trial." *Fahie v. People*, 62 V.I. 625, 632 (V.I. 2015) (citation omitted). "Courts justifiably look upon after-discovered evidence . . . with skepticism and suspicion and do not generally grant new trials based on such grounds." *Phillips v. People*, 51 V.I. 258, 280 (V.I. 2009) (citing *United States v. Meyers*, 484 F.2d 113, 116 (3d Cir. 1973)). Motions for a new trial "are not favored and should be granted sparingly and only in exceptional cases." *Stevens v. People*, 52 V.I. 294, 305 (V.I. 2009) (citation and internal quotation marks omitted).

¶ 36 The Superior Court correctly recognized that this is not one of those exceptional cases justifying a new trial. Not only did the Superior Court weigh evidence produced during trial, the Superior Court also assumed the truth of Sanes's affidavit. But even assuming its truth, the Superior Court concluded that Sanes's affidavit did not contradict the evidence produced at trial. We agree with the Superior Court's analysis**.** Webster and Gomes testified that Wallace began shooting at Gomes's vehicle when it approached the first speedbump. Webster's testimony also establishes that there was a second speedbump down the road near some dumpsters. In his affidavit, Sanes alleges that he exchanged gunfire with Webster near the dumpsters, and that

Wallace was not around when that shooting took place. That Wallace first fired upon Webster and Gomes as they passed the first speedbump, and that Sanes shortly thereafter exchanged fire with Webster as Webster and Gomes passed the second speedbump near the dumpsters, is not inconsistent with the testimony admitted at trial. Consequently, whether Webster exchanged fire with Sanes while driving past the dumpsters is irrelevant to a determination of whether Wallace fired on Webster and Gomes as they passed the first speedbump. Because Sanes's affidavit presents a version of events that is wholly consistent with the testimony adduced during trial—and because the Superior Court recognized this fact—we are not convinced that the Superior Court abused its discretion in denying Wallace's motion for a new trial. *See Phillips*, 51 V.I. at 281 (concluding that the Superior Court did not abuse its discretion in denying a motion for a new trial because newly-discovered evidence designed to contradict earlier in-court testimony "is viewed with the 'utmost suspicion.'" (citing *United States v. DiPaolo*, 835 F.2d 46, 49 (2d Cir. 1987)).

E. The conviction for unauthorized possession of a firearm

¶ 37 Finally, Wallace contends that his conviction for unauthorized use of a firearm during the commission of a crime of violence cannot stand because "[a]n essential element of third[-]degree assault was not [covered in the instructions] given in this case and the jury was deprived an opportunity to find facts." (Wallace's Br. 29). This bald statement—unsupported by any citation to binding authority—comprises the totality of Wallace's argument on his final point. Accordingly, his final argument is waived pursuant to our rules. *See* V.I.S.Ct.R 22(m) ("Issues that were . . .

only averted to in a perfunctory manner or unsupported by argument and citation to legal authority[] are deemed waived for purposes of appeal.").[5]

IV. CONCLUSION

¶ 38 The Superior Court did not err in instructing the jury on the elements of third-degree assault, and did not abuse its discretion in denying Wallace's motion for a new trial. Accordingly, we affirm Wallace's convictions for third-degree assault and unauthorized possession of a firearm during the commission of a crime of violence. But since the Superior Court erred in instructing the jury on the elements of first-degree reckless endangerment, we vacate Wallace's conviction for first-degree reckless endangerment and remand this matter for a new trial on that count.

Dated this 28th day of June, 2019.

BY THE COURT:

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

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

[5] If not waived, Wallace's argument is meritless. As explained above, the Superior Court properly instructed the jury on the elements of third-degree assault. Consequently, the premise of Wallace's final argument is flawed, and must be rejected.

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

¶39 Appellant, Jim Wallace, was convicted of three crimes following a three-day jury trial in the Superior Court of the Virgin Islands ("Superior Court") and seeks reversal of his convictions for "First Degree Reckless Endangerment," V.I. CODE ANN. tit 14, § 625(a); "Third Degree Assault," 14 V.I.C. § 297(2); "Possession of a Firearm During a Crime of Violence," 14 V.I.C. § 2253(a).

¶40 Wallace advances a plethora of issues on appeal. First, he argues that the trial court abused its discretion when it failed to instruct the jury that "under circumstances not amounting to an assault in the first or second degree" was an essential element to Third Degree Assault and that his conviction for Possession of a Firearm During a Crime of Violence must likewise be reversed because the jury could not have found Third Degree Assault beyond a reasonable doubt. Wallace next argues that there was insufficient evidence to sustain his conviction for First Degree Reckless Endangerment because the evidence was not such that a jury could conclude beyond a reasonable doubt that Wallace acted with "depraved indifference to human life." He then asserts that the trial court improperly relieved the prosecution of its burden of proof when instructing that "shooting another human being evidences both recklessness and depraved indifference" and "a residential street is invariably a public place." (App. Br., 23.) Finally, Wallace argues that the trial court abused its discretion when it denied his motion for a new trial based on newly discovered evidence.

¶41 For the reasons elucidated below, I would affirm Wallace's convictions. However, because I reach this result by a divergent analysis, I write separately. Furthermore, because of the "entire circumstances of the trial" analysis required under Plain Error Review of jury instructions, I provide a detailed summary of the trial as it unfolded. *See United States v. Jones*, 713 F.3d 336, 341 (7th Cir. 2013) ("Since this case turns on whether the inferences leading to a guilty verdict

based on circumstantial evidence were reasonable or speculative, we must review the government's evidence in detail").

I. BACKGROUND

¶42 On April 1, 2010, an arrest warrant, based on the People's March 30, 2010 information and probable cause affidavit, was issued by the Superior Court for the arrest of Wallace, who was arrested on April 3, 2010, and arraigned on April 13, 2010, after having been advised of his rights on April 3, 2010. On September 9, 2014, the people filed a motion to amend the initiating information, which was unopposed, "as it [was] more of a variance," and it was granted.[1] This first amended information alleged that, on March 1, 2010, on St. Croix, U.S. Virgin Islands, Wallace engaged in conduct that had violated three separate provisions of the criminal laws of the Virgin Islands for which he was ultimately tried and convicted. The crimes charged were namely: Count One—First Degree Reckless Endangerment (14 V.I.C. § 625(a)), Count Two—Third Degree Assault (14 V.I.C. § 297(2)), and Count Three—Possession of a Firearm During a Crime of Violence (14 V.I.C. § 2253(a)).

¶43 Trial began with jury selection on September 8, 2010. As part of this process, the trial court informed the jury that the information was not evidence against Wallace and was, instead, "the written document that presents those charges" "simply describing the charges that are filed so that he knows what criminal charges are being made against him by the People." The judge then read the contents of the information to the jury venire. Upon completion of jury selection, the court adjourned for the day.

[1] The initiating information had alleged that the conduct of the accused occurred on March 19, 2010; and the amendment alleged the conduct occurred on March 1, 2010. Similarly, the amendment alleged that the victim was a passenger in the car; whereas, the initiating information had alleged the victim was the driver.

¶44 On the morning of the second day of trial, the court addressed Wallace's complaint that one of the jurors, number eight, had been seen by Wallace's cousin frequently speaking with police officers but had failed to identify himself as a person who had family members and friends who worked in law enforcement. As a precaution, Wallace requested further voir dire of this juror. After voir dire, counsel for Wallace stated, "I'm satisfied with the juror." At this juncture, Wallace requested an interpreter for his witness, Ortiz.

¶45 After addressing the motion to amend the information and the question regarding juror number eight, the court provided the jury with preliminary instructions. The jury was specifically advised that it was their "solemn responsibility . . . to determine the guilt or innocence of the defendant" and that the "verdict must be based solely on the evidence presented to you in this trial and the law on which I will instruct you during and at the close of trial." The judge further explained the general trial process and, after reading the amended information to the jury, again instructed that the information enumerating the charges was not evidence.

¶46 Additionally, the court provided in its instructions that it was the People's burden to prove each essential element of each offense charged in the information beyond a reasonable doubt and that the purpose of the jury trial was to determine if the People had met that burden. The court unequivocally informed the jury that "the defendant is presumed innocent and may not be found guilty by you unless all of you unanimously find that the People have proven the defendant's guilt beyond a reasonable doubt." As part of this instruction, the jury was told, "In considering the testimony in the case, you must look at the testimony and view it in the light of the presumption of innocence which the law affords to Mr. Wallace. Remember, the Defendant is presumed innocent throughout the trial of this case until the evidence convinces you to the contrary beyond

a reasonable doubt." Additionally, the jury was informed that "the evidence in this case will consist of testimony of witnesses, exhibits received in evidence, and any facts on which the lawyers agree, or which I instruct you to accept. . . . I told you about the opening and closing arguments of the lawyers not being evidence. The questions that lawyers ask to the witnesses also do not constitute evidence. The evidence is the answers that the witnesses give to those questions."

¶47 The judge proceeded to give standard preliminary instructions relating to objections by lawyers, questions by the judge, judicial notice of evidence, the irrelevance of the potential sentence to be imposed, etc. The judge also advised that "in considering the weight and value of the testimony of any witness, you may consider the appearance, the attitude and behavior of the witness and whether or not the witness has any interest in the outcome of the case," in addition to providing other factors to guide the jury with credibility determinations and weighing evidence in general. Finally, the jurors were provided with guidance as to how to conduct themselves (not discussing the case with others, etc.) during the proceedings. Following this, the attorneys made their opening statements.

¶48 The People's first witness was the complaining victim, Ray Webster. According to Webster's testimony, on the afternoon of March 1, 2010, he was relaxing in the yard of his parents' home, after having been dropped off by Tajaira Gomes, when Webster received a call from his neighbor. In response, Webster called his father and inquired what time he would be home. At that time, Webster was in the back yard of the home and saw three men walking past "putting their shirts on their heads" and "going behind in the bushes." Webster had seen these men when he previously visited Gomes "in the project." His father assured Webster he was "right up the road" "coming right away." Webster then identified Exhibit 3, which was ultimately admitted in

evidence, as a photo of the front of the residence accurately reflecting the appearance as it was on March 1, 2010.

¶49 After about ten minutes, Webster's father arrived and came to the back yard of the home. The police, who had been contacted, arrived, and the three men in the bushes ran "going up the road." Webster then showed the police where these guys had been hiding in the bushes, seeing the grass matted down from where they had been lying down. The police left without inspecting the area with a canine unit.

¶50 Webster and his father were later sitting in the same back yard when his father announced he was leaving to pick up Webster's niece. At this time, Wallace came out of the bushes wearing a black shirt, brown pants, and a "plaided" shirt, "with a strap." Wallace was then identified by Webster in the presence of the jury. In reaction to Wallace pointing a silver firearm at him, Webster fell backwards in his chair and knocked into the door of his father's truck as his father was reversing out of the back yard where he had parked.

¶51 At around 5:30 or 6:00 p.m., Gomes came to bring Webster to their home in Williams Delight, and as they were choosing a movie for their son to watch later while spending that night at the home of Webster's parents, Webster was looking out the window. About 25 feet away, near the cistern, Webster saw "all these guys outside like they was plotting something," Wallace among them. Webster and Gomes, upon seeing Wallace and the others, waited for the men to leave so they could return to his parents' home and spend the night. After the men started walking away "going behind an empty house," Webster and Gomes proceeded to leave Williams Delight with their son in their vehicle; Webster was in the front passenger seat and his son in a car seat directly behind. As Gomes was driving the three of them out of Williams Delight, Webster heard gunshots

as the car slowed down to traverse the first speed bump in their path. At this time, Exhibit 14 was admitted in evidence over Wallace's objection that the photograph did not accurately reflect the conditions at the time of the alleged crime.[2] Webster explained that this picture was a picture of the road where the shooting occurred near the first speed bump; Wallace specifically preserved his request to voir dire Detective Cressley, the person who had taken the photo.

¶52 Utilizing the exhibit, Webster explained where the car had been parked and the path they had driven relative to the home of Gomes and the speed bump. There were street lights ensuring the area was well light, which were shown in the exhibit, and the gunfire began as Webster and Gomes were passing over the first speed bump. Webster exclaimed that someone was firing at them and immediately felt glass hitting him as the vehicle's windows began to shatter as bullets struck. Webster looked and saw Wallace "coming towards the car shooting," and Webster identified on the exhibit exactly where he remembered Wallace—wearing brown pants, a white shirt, and "an orange shirt on top of his head, but you could see his face"—to be when he fired. Webster knew Wallace from previously seeing him and meeting him through mutual acquaintances. People's Exhibit 5, which depicted a bullet hole in the back passenger side of the vehicle where Webster's son had been seated in the car when the shooting occurred, was identified and entered in evidence. At a side bar conference, People's Exhibit 6 was admitted without objection. Ex. 6 showed broken glass near Webster's son's car seat in the back of the vehicle, and

[2] There appears to be an error in what the prosecution said to Webster. The prosecution stated it was going to show Webster People's Exhibit 3, but Webster describes the picture as being of the area of Williams Delight where the first speed bump was located. Yet, Webster's prior description of Exhibit 3 was that it depicted his parents' back yard. Additionally, when the prosecution moves to have the exhibit admitted in evidence, it was requested that "People's Exhibit No. 14" be admitted. Given the timing and context in which this questioning occurs, it appears the prosecution simply misspoke as to the exhibit number.

People's Exhibits 7-8, admitted in evidence, showed the driver's side of the vehicle where Gomes had been sitting. Webster further testified that, during this shooting, Gomes pointed out that there were some men "under the cistern" shooting, as well. Webster was trying to leave the car in order to draw the gun fire away from where his child and girlfriend were, but Gomes stopped him and sped away, "She fly over the speed bump."

¶53 After Webster identified People's Exhibit 12 and it was admitted in evidence, he explained that this photo depicted the second speed bump in Williams Delight—located just past the first speed bump where the shooting had occurred—as well as the first speed bump, the dumpster, and the cistern. People's Exhibit 13 was also identified and depicted the dumpster, though trash had accumulated between the time of the shooting and when the photo was taken.

¶54 On the night of the shooting, Webster spoke with different officers of the Virgin Islands Police Department ("VIPD"), some of them when he went to the police station to make a report. However, a neighbor of Webster's was a police officer, and Webster contacted him immediately. While Webster was giving a statement, he was shown a photo array and identified Wallace as the shooter. At this time in the proceedings, People's Exhibit 1 was admitted; Wallace stipulated that the photo in the array that was identified by Webster was of him.

¶55 Upon cross-examination, Webster's testimony, as to the scene of the shooting, was thoroughly canvassed for inconsistencies. For example, Webster explained that he neither took any of the photographs nor was he present when they were taken, but he further explained that the photos accurately depicted the location of landmarks, e.g., speed bumps, house, etc., he had discussed during his testimony. During this questioning, Webster identified the location of Wallace's mother's home near the location of the shooting. Webster was further cross-examined

as to the location of the bullet holes and his perceptions supporting his conclusion as to the direction from which the bullets were being fired.

¶56 Similarly, defense counsel questioned Webster regarding his statement to the police, which said simply that Wallace had a gun "in his hand," as compared with his testimony in court that Wallace was pointing the gun at the vehicle and firing. Webster was shown Defendant's Exhibit A and confirmed that he signed that statement, which he had given to the VIPD on March 19, 2010. Defense counsel further questioned Webster about potential hostility toward Wallace because, a week or two prior, Wallace had been among a group of men whom Webster had confronted for having "cat-called" Webster's girlfriend, and Webster had identified this as a possible motivation for Wallace.

¶57 Upon re-direct examination, Webster clarified that he saw Wallace firing his gun but only saw the muzzle flashes of the firearms being discharged by the others and further clarified that Wallace was in a different location (near the dumpster) than the location of the source of the other shots (near the cistern). Further, during re-cross examination, it was elicited that Wallace's cousin had previously been involved with Gomes.

¶58 Tajaira Gomes was the People's next witness. On March 1, 2010, Gomes had gone to pick up Webster at his mother's home located in "the private section of Williams Delight." They returned to Gomes's apartment, and after a while, Gomes remembered that she needed to return a video. She and Webster loaded their son in the car; Gomes had seen Wallace (and his friends) near his mother's home and decided to take an alternate route to exit the neighborhood. Gomes then identified Wallace in the presence of the jury. Gomes explained that, on the night of the shooting, she was strapping her son into his car seat and had noticed Wallace and the others, one

house away, but when she had finished, Wallace and his friends were nowhere to be seen. Because Wallace was no longer congregated with friends along the route Gomes had initially wanted to take, Gomes decided to take that more direct route to return the movie and pass in front of the home of Wallace's mother.

¶59 As Gomes was traversing the first speed bump, she heard gun shots and realized it was she who was being fired upon because the glass of the car started to shatter. Gomes panicked and drove off and told Webster to put their son, car seat and all, on the floor in order to protect him. Gomes, utilizing one of the photographic exhibits, explained that the firing came from an abandoned home. Gomes had known Wallace for years, as her uncle was married to Wallace's grandmother. Gomes further explained that, after the shooting began, she saw Wallace, and "he was already coming from the side of the building" firing his gun. After she passed the first speed bump, Gomes explained, "I just continued driving off while I was holding Ray by his shirt." She then drove "through the Crucian Rum highway" and went back to Webster's parents' home. Gomes specifically stated the shooting occurred on St. Croix and confirmed that the VIPD forensics officers inspected the car that night.

¶60 During cross-examination, through leading questions, Gomes confirmed that, when she heard the shots fired, she panicked, shouted, and screamed as she saw a silver gun. Gomes was further questioned about her trial preparation as a witness, which she engaged in with the prosecutor. Defense counsel further questioned Gomes about the shooting, and Gomes confirmed that she held Webster as he tried to get out of the car. However, Gomes maintained that Webster was not carrying a gun at the time of the shooting. Indeed, defense counsel used this opportunity to question Webster's prior testimony. Defense counsel questioned Gomes about whether it would

have been faster for Webster (and his family) to drive away rather than get out of the car and travel on foot. Similarly, Gomes was asked if she knew Wallace's girlfriend or whether she was pregnant at the time of the shooting—ostensibly to suggest Gomes was dishonest in stating that she knew Wallace from around the neighborhood.

¶61 On the third day of trial, Gomes was recalled to the witness stand. Gomes confirmed she was shown the photo array on March 19, 2010, and had identified Wallace on that array as the man who shot at her and her family. Defense counsel cross-examined Gomes as to an apparent conflict between when she testified she had signed the photo array, March 19, and the date by her signature, March 20.

¶62 Leon Cruz, a detective assigned to the VIPD's investigation bureau on St. Croix was the next witness for the People. At the time of trial, Cruz had eleven years of experience with the VIPD and had been a detective for six years. On March 1, 2010, Cruz was working on road patrol, which required that he take phone calls reporting crimes and then travel to the scene and assist in the investigation. Cruz was dispatched to 117 Williams Delight, the residence of Webster's parents, which he verified on Ex. 3, where he spoke with Webster. When Cruz arrived, Webster was speaking with another officer.[3] Cruz did speak with Webster that night, and a photo array was prepared in response to Webster having identified Wallace as the shooter. Cruz, though not

[3] At this point, defense counsel objected to the testimony as offering hearsay. The prosecutor specifically explained she was offering the testimony as background to explain Cruz's actions stating, "I just want to put on the record, statements offered for background other than the truth of the matter asserted are not hearsay." As this Court explained previously, statements that are offered, not for the truth, but to put conduct in a proper context and to help facilitate understanding a person's conduct, are not hearsay. *LeBlanc v. People*, 56 V.I. 536 (V.I. 2012); *see* V.I.R.E. 801(c)(2) (requiring that, in order to constitute hearsay, the statement must be offered "to prove the truth of the matter asserted in the statement"). Given prior precedent and the rules of evidence, it is difficult to understand how this objection consumed ten pages of transcript. As the objection was based on hearsay grounds rather than an assertion that the evidence was unduly prejudicial, this objection should not have so thoroughly distracted from the trial process.

preparing the array, later presented it to Webster and Gomes, and Webster identified Wallace. On that night, Cruz was unable to contact Wallace. On March 19, 2010, Cruz again interviewed both Gomes and Webster and took their complete statements. Wallace was arrested later, in April. The parties then stipulated to the admission of People's Exhibits 9, 10, 11, 13, 16, and 17.

¶63 Following Gomes's testimony on the third day of trial, the direct examination of Cruz was resumed. Cruz verified that he took Gomes's statement in relation to this matter, and the parties stipulated that this interview process began on March 19, 2010, at around 11:15 p.m. and finished early the next morning on March 20, 2010. Cruz explained that no firearm was recovered when Wallace was arrested. He further testified that the housing community in which the shooting occurred was public.

¶64 The People then read a stipulation as to the content of Exhibits 9, 10, 11, 13, 16, and 17. It was stipulated that the VIPD's custodian of records for firearms licensure would testify that there was no record indicating Wallace had been issued a firearms license. It was further stipulated that the VIPD's forensic technician took the photograph marked as Ex. 9, which showed a fragmented firearms projectile inside the rear passenger door of a vehicle. Likewise, it was stipulated that Exhibits 11, 16, and 17 showed glass and ammunition casing at the scene of the shooting.

¶65 The People rested their case, and Wallace made a motion for judgment of acquittal. The court found that viewing "the evidence presented in the light most favorable to the People, at this time I find that the People have made a prima facie case as to all three counts . . . ."

¶66 Wallace then put on his defense and called Cruz as his first witness. Cruz verified that he had been trained to take witness statements verbatim and had done so when taking Webster's

statement. In response to a question from a juror, it was stipulated that the shooting was reported to have occurred at 7:45 p.m. on March 1, 2010.

¶67 Joann Romel Felix was the next witness for the defense. Felix was employed as a customer service agent with Cape Air. She was visiting a neighbor to Wallace's mother on the night of the shooting and recalled hearing gunshots—identifying the home of Wallace's mother in Ex. 14. Felix explained that the shooting occurred directly adjacent to a baseball park, but the park was not visible in the photo due to the lighting. Indeed, she had seen Wallace near the baseball park on the night of the shooting. Felix explained that she and her mother had been visiting a Mrs. Ortiz, who lived in a home down the street from the home of Wallace's mother, on the night of the shooting. Felix had seen Wallace at this time, dressed rather nicely, speaking with both her mother and Mrs. Ortiz. Wallace was walking when the ladies hailed him, and the four were speaking when they suddenly heard gunshots coming from down the street in the area of the dumpster near the home of Wallace's mother.

¶68 The prosecutor then cross-examined Felix, during which it was explained that none of these three women, despite being scared (one even throwing her food in the air and running away) ever contacted the VIPD to report the shooting. Further, when asked if she recalled the date of the shooting, she could only recall it was four years prior in February or March. Felix further explained that she had never contacted the police, even after Wallace was arrested, because it was "only rumor" and she did not know reasons why Wallace was "actually" arrested. Indeed, it was defense counsel who had contacted Felix. Felix was further cross-examined as to her assertion of the lack of lighting in the area—she asserted that "some of the lights are not even on." Yet, she maintained, after four years, the accuracy of her memory of this fact.

¶69 The defense then called Anna Rosa Ortiz. Ortiz was the cousin of Felix's mother, and explained that, at the time of the shooting, she was speaking with Wallace, Felix, and Felix's mother. Ortiz noted that she had heard shots fired near the basketball court. Ortiz also explained that she was scared from the shooting but did not contact the police, and she did not remember when she learned of Wallace's arrest. Both parties then rested.

¶70 At the jury instruction conference, defense counsel requested that the instruction explaining reasonable doubt state that a jury "must" acquit if they have a doubt that the defendant is guilty. Beyond this, defense stated "that is my only comment on the jury instructions. The verdict forms are okay with me." The trial court then, of its own initiative, explained further revisions to other instructions.[4]

¶71 Closing summation was presented by counsel. The court then provided jury instructions. The jury was informed it was their duty to follow all the instructions without singling out any specific one on which to focus or disregarding any others. The court instructed that it was the duty of each of the jurors "to accept the law as stated" by the court and to apply the law to the facts as they find them. It was explained that the jurors have complete discretion in making any factual determination but that they "have no discretion with respect to the law or to legal rules." After giving a comprehensive reasonable doubt instruction, the court instructed the jury of the elements of each crime charged.

¶72 Having read count one of the information, the court instructed:

[4] Having reviewed the record, at no point can there be found the objections to the jury instructions Wallace raises on appeal: (1) defining "Public Place" and stating "A residential street is a public place." and (2) stating that "shooting at another human being is reckless" because "it exhibits a depraved indifference to human life."

> The government must prove each of the following essential elements beyond a reasonable doubt. The essential elements [of] reckless endangerment in the first degree are:
> A. That the Defendant under circumstances demonstrating a depraved indifference to human life;
> B. Recklessly engaged in conduct in a public place;
> C. That conduct creates a grave risk of death to another person; and
> D. The act occurred on or about March 1, 2010, in the judicial district of St. Croix.
>
> Before you may find the Defendant guilty of [First Degree Reckless Endangerment] you must find that the Defendant acted recklessly. An act is done recklessly if done voluntarily and intentionally exhibiting a lack of caring for the potentially harmful results to other human being located nearby. An act such as shooting at another human being is reckless because it exhibits a depraved indifference to human life. You must also find that the incident occurred in a public place. A residential street is a public place.

On the second count, Third Degree Assault, it was explained that the essential elements were as follows:

> The government must prove the following elements beyond a reasonable doubt:
>
> A. That the Defendant used unlawful violence upon the person of Ray G. Webster;
> B. That the Defendant did so with the intent to cause injury;
> C. That the Defendant used a deadly weapon to commit the act; and
> D. That the event occurred on or about March 1, 2010, in the judicial district of St. Croix.
>
> Whoever uses any unlawful deadly weapon upon the person of another with intent to injure that person, whatever the reason or degree of violence used, commits an assault and battery upon a person. A deadly weapon is an object that is used or may be used in such a manner that it is calculated to or likely to produce death or serious bodily harm. A gun is a deadly weapon.

Finally, after reading count three, the jury was instructed that, in order to prove Possession of a Firearm During a Crime of Violence:

> The government must prove each of the following elements beyond a reasonable doubt.
>
> A. That Defendant possessed a firearm;
> B. That Defendant was not legally authorized to possess a firearm;
> C. That Defendant possessed a firearm during the commission of a crime of violence, to wit, assault in the third degree, and,
> D. That the event occurred on or about March 1, 2010, in the judicial district of St. Croix.
>
> A person who necessarily has direct physical control over a thing at a given time is then in actual possession of it. You may find that the elements of possession used in these instructions is present if you find, beyond a reasonable doubt, that the Defendant had actual possession of a firearm. Firearm means any device of whatever named, known capable of discharging ammunition by means of gas-generated explosions from an explosive combustion, including any air, gas or spring gun, or any [B-B] gun that is used to discharge projectiles as to fire.
>
> A crime of violence means the crime of or attempted—attempt to commit a crime of murder in any degree, voluntary manslaughter, rape, arson, assault in the first degree, assault second degree or third degree, robbery, burglary, unlawful entry or larceny.
>
> Unlawfully means any act of violence which is not in self-defense, or defense of another against unlawful violence offered to his person or property.

After the instructions were given, defense counsel stated, "I am satisfied with the jury instructions." On the third day of trial, the jury returned a verdict of guilty as to all three charges. The jury was polled, and all jurors confirmed it was their independent verdict.

¶73 Wallace subsequently sought a new trial based on newly discovered evidence, which was denied. The "newly discovered evidence" was presented by affiant Angel "Bebo" Sanes, who, having sworn under penalty of perjury, informed the court that, when out searching for his horse on March 1, 2010, at approximately 5:00 p.m., he was in Williams Delight near Webster's house. At that time, Webster threatened to kill Sanes, and then Webster called the police on Sanes.

Following this encounter, two hours later, or there about, Sanes was in Williams Delight to visit Wallace at his home when Webster saw Sanes as Webster "was driving near the trash dumps" and fired three shots at Sanes. Sanes returned fire "with [his] unlicensed 9mm firearm, emptying its clip." Sanes further informed the court that Wallace "was not around where the shooting took place." Finally, in an apparent effort to bolster the credibility of the affidavit, Sanes affirmed "I did not contact Jim Wallace's attorney until I heard he was convicted although I KNOW he is innocent." (J.A. at 28 (emphasis in original)).

¶74 The Superior Court, applying the factors outlined in *Gov't of the V.I. v. Sampson*, 42 V.I. 246, 265-66 (D.V.I. App. Div. 2000),[5] denied this motion. Comparing the evidence in Sanes's affidavit with that produced at trial, the trial court explained, "To be material, Defendant's newly

[5] In this appeal, Wallace does not challenge the application of this standard. It is true that prior decisions of the Appellate Division remain binding upon the Superior Court unless overturned by this Court. *Defoe v. Phillip*, 56 V.I. 109, 119 (V.I. 2012) ("This Court is not required to follow . . . decisions of the District Court or the Third Circuit interpreting local Virgin Islands law. In addition to previously holding that decisions of our predecessor court, the Appellate Division of the District Court of the Virgin Islands, are not binding on us, we have also recently held that this Court—unlike the Superior Court—is not compelled to treat the Third Circuit's interpretation of Virgin Islands law as binding precedent: 'Although the establishment of this Court has changed the relationship between the local Virgin Islands judiciary and the Third Circuit, this Court's creation did not erase pre-existing case law, and thus precedent that was extant when the Court became operational continues unless and until this Court address the issues discussed there. Accordingly, decisions rendered by the Third Circuit and the Appellate Division of the District Court are binding upon the Superior Court even if they would only represent persuasive authority when this court considers an issue.'" (quoting *Judi's of St. Croix Car Rental v. Wes*ton, 49 V.I. 396, 403 n.7 (V.I. 2008); *In re People of the V.I.*, 51 V.I. 374, 389 n.9 (V.I. 2009))). However, this Court has recognized a different standard for reconsideration as articulated in *Stevens v. People*, 52 V.I. 294, 305 (V.I. 2009) (quoting *Untied States v. Silveus*, 542 F.3d 993, 1004-05 (3d Cir. 2008)), applying former Superior Court Rule 135. *Billu v. People*, 57 V.I. 455, 469-72 (V.I. 2012); *Banks v. Int'l Rental & Leasing Corp.*, 55 V.I. 967, 975 (V.I. 2011))). As the issue of the applicability of the *Sampson* factors has not been fairly presented, nothing in today's decisions should be understood to approve the standard applied by the Superior Court. *See Ubiles v. People*, 66 V.I. 572, 589 (V.I. 2017) (quoting *Phaire v. Phaire*, 17 V.I. 236, 239 (V.I. Super. Ct. 1981))); *see generally Phillip v. People*, 58 V.I. 569, 587 n.22 (V.I. 2013) ("Phillip also argues that there was insufficient evidence because killing a person with a firearm is insufficiently like killing them with poison, or after lying in wait, to satisfy the 'other . . . willful, deliberate and premeditated killing' provision of the first-degree murder statute. The Court definitively rejected this same argument. Phillip acknowledges this, but presented the argument anyway because at the time of his brief, neither Codrington nor Billu's appeal to the Third Circuit Court of Appeals had concluded. However, the law of this Court, at this time, is the law as stated in [our prior cases], regardless of whether the appeals proceed." (citing *Miller v. French*, 530 U.S. 327, 244 (2000); *Codrington v. People*, 57 V.I. 176, 185-86 (V.I. 2012))).

adduced evidence would need to address, for example, whether the Defendant was present when shots were fired at Mr. Webster in the vicinity of the first speed bump adjacent to Defendant's mother's house. As Mr. Sanes' affidavit speaks only to a shootout that he had with Mr. Webster 'near the trash dump,' it cannot be said that this 'newly discovered evidence' is material to the issues involved." Further, in considering whether this "newly discovered evidence" undermined the court's confidence in the jury verdict such that there was a serious concern that an innocent person was convicted, the court explained:

> The new evidence, accepted at face value, does not negate the trial evidence to the effect that Defendant fired an initial volley of shots at Mr. Webster near the first speed bump and Defendant's mother's house, up the street from the area "near the trash dumps" where Mr. Sanes claims to have encountered Mr. Webster. Even if probative, taking into consideration the reliable eyewitness testimony adduced at trial and the total evidentiary record, the Court cannot find that this additional evidence would "probably produce an acquittal if presented at a new trial." . . . Examining the totality of the evidence and considering the credibly of the witnesses, the Court does not find the existence of such exceptional circumstances which requires, in the interest of justice, that this Court vacate the jury's September 9, 2014 verdict and grant Defendant a new trial.

Wallace then filed a motion for reconsideration, which was denied on December 3, 2014.

¶75 The judgment and commitment (one document) was entered in the Superior Court on August 5, 2015, following a sentencing hearing on July 29, 2015. Wallace was adjudged guilty of First Degree Reckless Endangerment, Third Degree Assault, and Unauthorized Possession of a Firearm During a Crime of Violence and given concurrent sentences on all three counts, with the maximum sentence imposed being 15 years on Count 3, the firearms conviction. Wallace filed his notice of appeal on September 2, 2015, and an amended notice of appeal was filed on September 4, 2015.

II. DISCUSSION

A. Issues and Standard of Review

¶76 While Wallace presents his issues in a different order, because a reversal of a conviction for insufficient evidence is the appellate equivalent of a judgment of acquittal, I consider this issue first, as it has the potential to provide greater relief than the other issues presented. *Elizee v. People*, 54 V.I. 466, 482 (V.I. 2010) ("'[A] reversal for evidentiary insufficiency is considered to be the equivalent of an acquittal.'" (quoting *McMullen v. Tennis*, 562 F.3d 231, 237 (3d Cir. 2009))); *see Galloway v. People*, 57 V.I. 693, 700 n.3 (V.I. 2012).

¶77 Wallace argues there was insufficient evidence from which the jury could have found beyond a reasonable doubt that his actions of discharging a firearm at a car with three people inside it on a road in a public housing community constituted a "depraved indifference to human life." Wallace made a motion for judgment of acquittal at the close of the people's case. As such, he fairly presented this issue, and we exercise plenary review applying the same standard as the trial court. *Thomas v. People*, 60 V.I. 183, 191 (V.I. 2013) ("'In reviewing the Superior Court's denial of [Thomas's] motion for judgment of acquittal based on the sufficiency of the evidence, we exercise plenary review and apply the same standard as the trial court.'" (quoting *Francis v. People* (*S. Francis*), 56 V.I. 370, 379 (V.I. 2012); *Augustine v. People*, 55 V.I. 678, 684 (V.I. 2011); *Williams v. People*, 56 V.I. 821, 835 (V.I. 2012); and citing *Stevens v. People* (*Stevens I*), 52 V.I. 294, 304 (V.I. 2009); *Smith v. People*, 51 V.I. 396, 401 (V.I. 2009))).[6]

[6] *See generally People v. Browne*, No. SX-10-CR-059, 2013 WL 2996442, at *4 (V.I. Super. Ct. June 7, 2013) (unpublished) ("A judgment of acquittal must be entered for any offense for which the evidence is insufficient to sustain a conviction. The rule allows courts to 'reserve decision on the motion . . . submit the case to the jury, and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without

¶78 Wallace further argues that the jury instruction addressing Third Degree Assault was erroneous because it failed to instruct the jury that they must find beyond a reasonable doubt, as an essential element of the crime, that Wallace's actions occurred "under circumstances not amounting to an assault in the first or second degree" and that, because of the failure of this instruction, there was no basis for his conviction for Possession of a Firearm During a Crime of Violence. Similarly, as his third issue, Wallace argues the jury instruction stating that "An act such as shooting at another human being is reckless because it exhibits a depraved indifference to human life" and that "A residential street is a public place" conclusively determined these two factual issues and relieved the prosecutor of its burden to prove every element of each crime charged beyond a reasonable doubt. The interpretation of the factual elements of a crime as provided by a statute is a question of law over which this Court's review is plenary, and assuming the instruction stated the proper legal standard, we review the trial courts granting or denial of a jury instruction for abuse of discretion. *Gov't of the V.I. v. Isaac*, 50 F.3d 1175, 1180 (3d Cir. 1995) ("We turn next to Isaac's assertion that the district court erred when it declined to instruct the jury on excusable homicide . . ., justifiable homicide in resisting any attempt to commit a felony . . ., or offering resistance by a person about the be injured . . . . Generally, we review the district

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having returned a verdict.' Under the standard for a judgment of acquittal, the sufficiency of the evidence presented at trial is reviewed in the light most favorable to the People. Courts are tasked with reviewing all issues of credibility under the province of the jury. However, a court is not called upon to assess witness credibility or weigh evidence. A conviction will be affirmed if a rational trier of fact could have found the defendant guilty beyond a reasonable doubt and the conviction s are supported by substantive evidence. Nevertheless, 'this evidence does not need to be inconsistent with every conclusion save that of guilt in order to sustain the verdict.' A trial court has the duty to grant judgment of acquittal when the evidence is so sparse that the fact finder could only speculate as to the defendant's guilt." (quoting *Bowry v. People*, 52 V.I. 264, 268 (V.I. 2009); and citing *United States v. Gonzalez*, 918 F.2d 1129, 1132 (3d Cir. 1990); *Gov't of the V.I. v. Joseph*, 770 F.2d 343, 348 (3d Cir. 1985); *Latalladi v. People*, 51 V.I. 137, 145 (V.I. 2009); *People v. Clark*, 54 V.I. 154, 157 (V.I. Super. Ct. 2010))).

court's refusal to give certain jury instructions on an abuse of discretion basis. However, where, as here, the question is whether the jury instructions failed to state the proper legal standard, this court's review is plenary." (citing 14 V.I.C. §§ 41(s), 926, 927(a)(A); *Savarese v. Agriss*, 883 F.2d 1194, 1202 (3d Cir. 1989))).[7]

¶79 Furthermore, an asserted error in jury instructions is usually reviewed for abuse of discretion only if fairly presented at the trial level. *Ostalaza v. People*, 58 V.I. 531, 556 (V.I. 2013); *Jackson-Flavius v. People*, 57 V.I. 716, 721 (V.I. 2012). Because Wallace failed to raise either of these objections at the trial level, they are subject to Plain Error Review; this requires that this court initially determine if Plain Error exists. *See Cornelius v. Bank of N.S.*, 67 V.I. 806, 816 n.2 (V.I. 2017) (defining "Plain Error" and "Plain Error Review"). The first consideration is whether there is (1) an error (2) that is plain. Then, if we find the jury instruction to have improperly stated the elements of the crime and that such misstatement of the law was obvious, this court considers the question of the impact of the erroneous instruction on the jury verdict—whether it (3) affected substantial rights. If these three factors exist, thus establishing the existence of Plain Error, we then consider whether the error (4) affected the fairness, integrity, or public reputation of the proceeding. If such Plain Error is present and had such an effect, we will exercise our discretion and reverse the conviction.

¶80 As his final issue, Wallace argues that the trial court abused its discretion when it denied his motion for a new trial when it found the proposed new evidence was not material and was not

[7] *See also Gov't of the V.I. v. Smith*, 949 F.2d 677, 680 (3d Cir. 1991) ("We exercise plenary review over the interpretation of Virgin Islands law." (citing *Saludes v. Ramos*, 744 F.2d 922, 993-94 (3d Cir. 1984))); *Gov't of the V.I. v. Knight*, 989 F.2d 619, 626 (3d Cir. 1993) ("We exercise plenary review over this question of statutory construction." (citing *Electronic Lab. Supply Co. v. Cullen*, 977 F.2d 798, 801 (3d Cir. 1992))).

of such probative force as to so undermine confidence in the jury verdict as to believe a new trial is likely to result in an acquittal in light of the alleged new evidence. This is reviewed for an abuse of discretion. *Sampson*, 94 F. Supp. 2d at 643 ("The denial of a motion for new trial is reviewed for abuse of discretion." (citing *Colbourne v. Gov't of the V.I.*, Crim. No. 95-214, 1997 WL 45326, at *1 n.3 (D.V.I. App. Div. Jan. 10, 1995) (per curiam); *Maduro v. P & M Nat'l, Inc.*, 31 V.I. 121, 125 (D.V.I. App. Div. 1994))). Generally, a court abuses its discretion if it acts arbitrarily or irrationally. *Alexander v. People*, 60 V.I. 486, 494 (V.I. 2014) (citing *S. Francis*, 56 V.I. at 379).

¶81 The trial court acts arbitrarily or irrationally if its ruling is founded upon "a clearly erroneous finding of fact, an errant conclusion of law[,] or an improper application of law to fact'" "or its actions were 'clearly contrary to reason and not justified by the evidence." *Appleton v. Harrigan*, 61 V.I. 262, 268 (V.I. 2014) (quoting *Stevens v. People* (*Stevens II*), 55 V.I. 550, 556 (V.I. 2011)); *Smith v. Gov't of the V.I.*, 67 V.I. 797, 803-04 (V.I. 2017); *Billu v. People*, 57 V.I. 455, 461-62 (V.I. 2012) (quoting *Petrus v. Queen Charlotte Hotel Corp.*, 56 V.I. 548, 554 (V.I. 2012)); *Pelle v. Certain Underwriters at Lloyd's of London*, 66 V.I. 315, 318 (V.I. 2017); *Gore v. Tilden*, 50 V.I. 233, 236 (V.I. 2008). Furthermore, a court cannot "exercise its discretion" by choosing to ignore a claim or issue that was properly before it. *Bryan v. Fawkes*, 61 V.I. 416, 476 (V.I. 2014) (citing *Garcia v. Garcia*, 59 V.I. 758, 771 (V.I. 2013)). "It is axiomatic that, when a court with discretion fails to balance the pertinent factors required for it to properly exercise that discretion, such failure constitutes an abuse of discretion." *Rivera-Mercado v. Gen. Motors Corp.*, 51 V.I. 307, 330 (V.I. 2009) (Swan, J., concurring); *see Beachside Assocs., LLC v. Fishman*, 53

V.I. 700, 719 (V.I. 2010).[8] "'The denial of a motion for a new trial will be upheld so long as the trial court did not abuse its discretion or fail to exercise it.'" *Brown v. People* (*Brown I*), 54 V.I. 496, 511 (V.I. 2010) (quoting *United States v. Friedland*, 660 F.2d 919, 931 (3d Cir. 1981); and citing *United States v. Rush*, 749 F.2d 1369, 1372 (9th Cir. 1984))).

B. Jurisdiction

¶82 "Before this Court can decide the merits of [this] appeal, we must determine if we have jurisdiction." *Brown v. People*, 49 V.I. 378, 379 (V.I. 2008); *First Am. Dev. Group/Carib, LLC*, 55 V.I. 594, 601 (V.I. 2011) ("Prior to considering the merits of an appeal, this Court must first determine if it has appellate [subject matter] jurisdiction over the matter." (citing *V.I. Gov't Hosp. & Health Facilities Corp. v. Gov't of the V.I.*, 50 V.I. 276, 279 (V.I. 2008)). We have appellate subject matter jurisdiction over "all appeals from the decisions of the courts of the Virgin Islands established by local law[.]" Act to Revise the Organic Act of the Virgin Islands of the United States, Pub. L. 517, 68 Stat. 497, 497 (1954) (as amended) (48 U.S.C. § 1613a(d)). Pursuant to this grant of authority from Congress, the Legislature of the Virgin Islands has established this Court and granted it jurisdiction over all appeals arising from a "Final Order" of the Superior Court. 4 V.I.C. § 32(a); *see* 4 V.I.C. § 33(a) ("Appealable judgments and orders . . . shall be

[8] *See generally Diaz v. State*, 740 A.2d 81, 86 (Md. Ct. Spec. App. 1999) ("Judicial discretion is a composite of many things, among which are conclusions drawn from objective criteria; it means sound judgment exercised with regard to what is right under the circumstances and without doing so arbitrarily or capriciously. Where the decision or order of the trial court is a matter of discretion it will not be disturbed on review except ion a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. A proper exercise of discretion involves consideration of the particular circumstances of each case. . . . '[T]he discretion being for the solution of the problem arising from the circumstances of each case as it is presented, it has been held that the court could not dispose of all cases alike by a previous general rule.' Hence, a court errs when it attempts to resolve discretionary matters by application of a uniform rule, without regard to the particulars of the individual case." (quoting *Gunning v. State*, 701 A.2d 374, 3.83-84 (Md. 1997); *Lee v. State*, 157 A. 723 (Md. 1931))).

available only upon entry of final judgment in the Superior Court."); *Enrietto v. Rogers Townsend & Thomas PC*, 49 V.I. 311, 315 (V.I. 2007) (quoting 4 V.I.C. § 32(a)); *Toussaint v. Stewart*, 67 V.I. 931, 939-40 (V.I. 2017) (discussing what constitutes a "Final Order").[9]

¶83 "'A [Final Order] is a judgment from a court which ends the litigation on the merits, leaving nothing else for the court to do except execute the judgment.'" *Toussaint*, 67 V.I. at 939 (quoting *Ramirez v. People*, 56 V.I. 409, 416 (V.I. 2012) (citations omitted)). The entry of a Final Order

[9] *See generally Penn v. Mosley*, 67 V.I. 879, 891 n.4 (V.I. 2017) (discussing the distinctions between a judgment, order, and decree); *Miller v. Sorenson*, 67 V.I. 861, 871-72 (V.I. 2017) (discussing the distinctions between a judgment and decree); *Cianci v. Chaput*, 68 V.I. 682, 688 (V.I. 2016) (quoting *Estate of George*, 59 V.I. at 919); *Williams v. People*, 58 V.I. 341, 347-48 (V.I. 2015) (holding that a stay of execution of judgment does not render an order non-final).

This Court also possesses an independent obligation to determine that the trial court properly exercised subject matter jurisdiction over the case. *Farrell v. People*, 54 V.I. 600, 607 (V.I. 2011) ("The agreement of the parties 'does not relieve the court of the need to conduct an independent analysis of the jurisdictional question." (quoting *H&H Avionics v. V.I. Port Auth.*, 52 V.I. 458, 460 (V.I. 2009))); *see Rivera-Moreno v. Gov't of the V.I.*, 61 V.I. 279, 304 (V.I. 2014) (citing *In re Guardianship of Smith*, 54 V.I. 517, 525-26 (V.I. 2010)). In the Virgin Islands, a criminal information is defective for failing to allege subject matter jurisdiction if it fails to allege facts showing that the allegedly criminal conduct: (1) occurred in the Virgin Islands and (2) involved a violation of a criminal statute at the time of the conduct. *Tindell v. People*, 56 V.I. 138, 147-48 (V.I. 2012) ("Pursuant to Section 21(b) of the Revised Organic Act and title 4, section 76(b) of the Virgin Islands Code, the Superior Court has subject matter jurisdiction to hear criminal cases that (1) arise from the Virgin Islands and (2) involve violations of Virgin Islands criminal statutes."); *United States v. Wilson*, 28 F. Cas. 699, 717 (E.D. Pa. 1830) ("The place in which the crime was committed is essential to an indictment, were it only to show the jurisdiction of the court. It is also essential for the purpose of enabling the prisoner to make his defense." (internal quotation marks omitted)); *cf. United States v. Peters*, 9 U.S. (5 Cranch) 115, 136 (1809). The initiating information was filed March 30, 2010, and the amended information, filed September 8, 2014, alleged that Wallace's criminal acts occurred March 1, 2010, on the Island of St. Croix. *United States v. Gibert*, 25 F. Cas. 1287, 1311 (D. Mass. 1834) ("[I]f it were otherwise at the common law, we are to consider that, in the jurisprudence of the United States, the present is a statute offence, and that the jurisdiction is given also by statute; and if the offence is so laid in the indictment as to bring the case within the language of the statute in point of jurisdiction and certainty of description, that is all which can be properly required . . . . . And there are direct and positive allegations in the present indictment to all these facts. So that the jurisdiction is upon the face of the indictment made out in the most positive manner."). These same facts were proved at trial, and the evidence established a violation of a Virgin Islands' criminal statute as to each count; therefore, the Superior Court properly exercised subject matter jurisdiction. *Wilson*, 28 F. Cas. at 716 ("The indictment alleges the offence in the words of the [statute]—charges on the prisoners the robbery of the carrier of the mail, proceeding from Philadelphia to Reading—to have been committed within the Eastern district of Pennsylvania, and within the jurisdiction of this court. These facts being found true by the jury, give judicial knowledge that an offence has been committed, which is punishable by law, as well as at the place over which we have jurisdiction and power to try consistently with the constitution and amendment.").

implicitly denies all pending motions, and all prior interlocutory orders merge with the Final Order. *Toussaint*, 67 V.I. at 940 n.3 (citing *Simpson v. Bd. of Dirs. of Sapphire Bay Condos. W.*, 61 V.I. 728, 731 (V.I. 2015); *In re Estate of George*, 59 V.I. 913, 919 (V.I. 2013)). In a criminal matter, the written judgment embodying the adjudication of guilt and sentence imposed constitutes the Final Order. *Percival v. People*, 62 V.I. 477, 483 (V.I. 2015) (citing *Cascen v. People*, 60 V.I. 392, 400 (V.I. 2014); *Williams v. People*, 58 V.I. 341, 345 (V.I. 2013)). Wallace filed his notice of appeal with this Court on September 2, 2015, and on September 4, 2015, an amended notice of appeal was filed. The judgment and commitment was entered in the Superior Court on August 5, 2015, following a sentencing hearing on July 29, 2015. The notice of appeal having been timely filed, we have appellate subject matter jurisdiction. V.I.R.APP.P. 5(b)(1); *Allen v. HOVENSA, L.L.C.*, 59 V.I. 430, 434 (V.I. 2013).

C. Sufficiency of the Evidence

¶84 "The question is not, whether the defendant is guilty of an offence against some law of the United States [Virgin Islands]; but whether [the defendant] is guilty of the very offence charged . . . ." *United States v. Battiste*, 24 F. Cs. 1042, 1044 (D. Mass. 1835); *see, e.g., United States v. Keen*, 26 F. Cas. 686, 692 (D. Ind. 1839) ("[I]f in this case the jury had found the defendant guilty of purloining from the mail a letter, no judgment could have been entered, for he is charged in the indictment, with stealing a letter which contained a bank note and a draft."). When the evidence put forth by the prosecution is insufficient to prove beyond a reasonable doubt every element of the crime (or crimes) charged, the jury's guilty verdict must be vacated. *See, e.g., United States v. Osborne*, 886 F.3d 604, 617-18 (6th Cir. 2018); *United States v. Dobbs*, 629 F.3d 1199, 1209 (10th

Cir. 2011).[10] When an appellant seeks to have his conviction overturned for lack of evidence, he bears a heavy burden. *Ritter v. People*, 51 V.I. 354, 359 (V.I. 2009); *see also United States v. Mi Sun Cho*, 713 F.3d 716, 720 (2d Cir. 2013). "This standard of review is formidable and 'defendants challenging convictions for insufficiency of evidence face an uphill battle on appeal.'" *Powell v. People*, 2019 VI 2, ¶51 (Jan. 16, 2019) (Swan, J., concurring) (quoting *United States v. Santos-Rivera*, 726 F.3d 17, 23 (1st Cir. 2013)) .[11] There must be a logical and convincing nexus between the evidence, both direct and circumstantial, and the guilty verdict. *Gov't of the V.I. v. Williams*,

[10] *See generally, cf. Powell*, 2019 VI 2, ¶64 (Swan, J., concurring); ("As an initial matter, I would address what appears to be an argument as to the proper interpretation of section 928 of title 14 of the Virgin Islands Code. Powell's argument on this issue is not well articulated, but it could be interpreted as an argument that section 928 required the trial judge to acquit Powell upon any suggestion of justification. However, Powell's proposition that it is the judge's responsibility to decide the factual issue of justification is contrary to established law, namely that it is the exclusive province of the jury to find the facts and that justification is a factual determination. This section is nothing other than a codification of the burden of proof that the People must prove beyond a reasonable doubt that the killing was not justified. Therefore, **unless there was a complete failure of evidence**, something discussed in the body of this opinion, section 928 **requires the trial court to submit the factual determination** of justification **to the jury**." (emphasis added) (citing 14 V.I.C. § 928 ("Whenever a homicide appears to be justifiable or excusable, the person charged must, upon his trial, be acquitted and discharged."); *Pendergrast v. United States*, 332 A.2d 919, 926 (D.C. Ct. App. 1975) ("The court's duty is merely to determine the preliminary question of law-whether there was such a complete absence of evidence upon the issue of manslaughter as to require that it be taken from the consideration of the jury." (citations omitted))).

[11] Because Wallace challenged the sufficiency of the evidence by making a motion for judgment of acquittal, this Court exercises plenary review over the denial of such motion and applies the same standard as the trial court. *Stanislas v. People*, 55 V.I. 485, 491 (V.I. 2011); *see also Prince v. People*, 57 V.I. 399, 405 (V.I. 2012). When conducting a review of the sufficiency of the evidence, this Court is required to consider all evidence presented, including any evidence that is ultimately determined to be inadmissible. *Fontaine v. People*, 56 V.I. 571, 585 n.9 (V.I. 2012); *see also United States v. Truman*, 688 F.3d 129, 139 (2d Cir. 2012) ("When a defendant has been prejudiced by improperly admitted evidence, the proper remedy is not a judgment of acquittal but a new trial." (citing *Lockhart v. Nelson*, 488 U.S. 33, 39-40 (1988); *United States v. Bruno*, 383 F.3d 65, 90 n.20 (2d Cir. 2004); *United States v. Cruz*, 363 F.3d 187, 197 (2d Cir. 2004))); *see generally Mi Sun Cho*, 713 F.3d at 720 ("Although we review sufficiency challenges de novo, the evidence must be viewed in the light most favorable to the government, with all reasonable inferences drawn in its favor. The question is 'not whether this court believes that the evidence at trial established guilt beyond a reasonable doubt,' but rather, whether 'any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" (quoting *United States v. Persico*, 645 F.3d 85, 105 (2d Cir.2011); *United States v. Brown*, 937 F.2d 32, 35 (2d Cir.1991); and citing *Jackson*, 443 U.S. at 319; *United States v. Henry*, 325 F.3d 93, 103 (2d Cir.2003))).

739 F.2d 936, 940 (3d Cir. 1984).[12] A verdict is irrational if there is a lack of connection between the facts offered in evidence and the essential elements of the crime charged. *Jackson v. Virginia*, 443 U.S. 307, 317 (1979) ("The *Winship* doctrine[, see 397 U.S. 358 (1970),] requires more than simply a trial ritual. A doctrine establishing so fundamental a substantive constitutional standard must also require that the factfinder will rationally apply that standard to the facts in evidence."); *see Tot v. United States*, 319 U.S. 463, 467-68 (1943). Said differently, when the logical connection between the record evidence and the elements of the crime is so strained as not to have a reasonable and rational relation to everyday experience, common sense, and the circumstance of life as they are in reality, the verdict cannot stand. *See Thompson v. Louisville*, 362 U.S. 199, 204

[12] *See generally United States v. Jones*, 713 F.3d 336, 340 (7th Cir. 2013) ("The government's case against Jones was entirely circumstantial. No witnesses testified that they saw Jones in possession of any cocaine, and the intercepted telephone calls that the government relies upon were not tied directly to actual or constructive possession of any cocaine. Entirely circumstantial cases are not unusual, of course, and they certainly can provide constitutionally sufficient proof beyond a reasonable doubt. 'A verdict may be rational even if it relies solely on circumstantial evidence.' In such cases we, like the district court here, must carefully consider each inference necessary to prove all elements of the offense. We do not suggest that there is a bright line between reasonable and unreasonable inferences from circumstantial evidence, but there is a line. The government may not prove its case, as we have said, with 'conjecture camouflaged as evidence.' A . . . motion [for judgment of acquittal] calls on the court to distinguish between reasonable inferences and speculation. Each step in the inferential chain must be supported by evidence that allows the jury to 'draw reasonable inferences from basic facts to ultimate facts.' 'Although a jury may infer facts from other facts that are established by inference, each link in the chain of inferences must be sufficiently strong to avoid a lapse into speculation.' We 'will overturn a jury verdict for insufficiency of the evidence only if the record is devoid of evidence from which a reasonable jury could find guilt beyond a reasonable doubt.'" (quoting *Coleman v. Johnson*, 566 U.S. 650, 651 (2012); *United States v. Moore*, 572 F.3d 334, 337 (7th Cir.2009); *Piaskowski v. Bett*, 256 F.3d 687, 693 (7th Cir.2001); *United States v. Stevenson*, 680 F.3d 854, 855–56 (7th Cir. 2012))); *State v. Kelly*, 15 N.W. 2d 554, 562 (Minn. 1944) ("[R]eason, as well as respect for the rights of accused persons so firmly engrafted upon our system of jurisprudence, would prompt us to adopt the view taken by the United States Supreme Court, even were its views not binding upon us so far as federal constitutional requirements are concerned. The requirement of rationality appears to us a necessary safeguard to the constitutional rights of our citizens—a safeguard which is far more important than the practical advantage gained by our prosecutors in a few extreme cases where, under the Wigmore rule, a statutory presumption would be sustained notwithstanding its unreasonableness." (citing 4 WIGMORE, EVID., § 1356 (3d ed. 1940))).

(1960) ("The city correctly assumes here that if there is no support for these convictions in the record they are void as denials of due process."); *Tot*, 319 U.S. at 468.[13]

¶85 In order to sustain the jury's verdict, the credibility of witnesses and the weighing of evidence is not for this Court to second guess on appeal, and we view the evidence in the light most favorable to the jury verdict. *Gonsalves v. People*, 2019 V.I. 4, ¶35; *Williams v. People* (*A. Williams*), 55 V.I. 721, 734 (V.I. 2011).[14] "'[W]here a cause fairly depends upon the effect or weight of testimony, it is one for consideration and determination of the jury, under proper directions as to the principles of law involved. It should never be withdrawn from them unless the testimony be of such conclusive character as to compel the court, in the exercise of a sound legal discretion, to set aside a verdict retuned . . . .'" *Connecticut Mut. Life Ins. Co. v. Lathrop*, 111

[13] *Cf. United States v. DiRosa*, 761 F.3d 144, 150 (1st Cir. 2014) ("We review the district court's denial of a motion for acquittal *de novo*, and must 'decide whether, after assaying all evidence in the light most amiable to the government, and taking all reasonable inferences in its favor, a rational factfinder could find, beyond a reasonable doubt, that the prosecution successfully proved the essential elements of the crime.' We 'need not believe that no verdict other than a guilty verdict could sensibly be reached, but must only satisfy ourselves that the guilty verdict finds support in a plausible rendition of the record.' We have described the barriers to challenging a motion for acquittal as 'daunting.'" (quoting *United States v. Hatch*, 434 F.3d 1, 4 (1st Cir.2006))).

[14] *See also Ritter*, 51 V.I. at 359; *Santos-Rivera*, 726 F.3d at 25; *cf. Rivera v. People*, 64 V.I. 540, 553-57 (V.I. 2016) (standard for credibility determination on appeal); *Phillip*, 58 V.I. at 583-84 (recognizing that "an appellate court may disregard a jury's reliance on a witness's testimony when that testimony is 'inherently incredible or improbable.'" (quoting *Williams v. Gov't of the V.I.*, 51 V.I. 1053, 1086 (D.V.I. App. Div. 2009))); 29A AM. JUR. 2D *Evidence* § 1375 (2008) ("Testimony is deemed inherently incredible or improbable where it is 'either so manifestly false that reasonable [people] ought not to believe it, or it must be shown to be false by object or things as to the existence and meaning of which reasonable [people] should not differ."); *see generally Jones*, 713 F.3d at 340 ("When reviewing the sufficiency of the evidence, we ask 'whether, after viewing the evidence in the light most favorable to the government, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' The inquiry does not ask what we would have decided if we were on the jury. [The court] need not be convinced by the evidence . . . . Our inquiry is whether a reasonable jury considering the evidence in the light most favorable to the government could have found each element of the offense beyond a reasonable doubt." (quoting *Jackson*, 443 U.S. at 319; *United States v. Presbitero*, 569 F.3d 691, 704 (7th Cir. 2009); and citing *Moore*, 572 F.3d at 337)).

U.S. 612, 615 (1884) (quoting *Phoenix Ins. Co v. Doster*, 106 U.S. 30, 31 (1882)).[15] In other words, there is no requirement that the evidence be consistent with only the conclusion of guilt, and the evidence is not insufficient because testimony from witnesses may be in conflict or contradictory, which, in reality, means that the finder of fact was required to make a credibility determination or otherwise weigh the evidence. *Marcelle v. People*, 55 V.I. 536, 547 (V.I. 2011); *Smith*, 51 V.I. at 401.[16]

¶86 Conversely, evidence need not exclude every hypothesis of innocence. If the evidence rationally supports two conflicting conclusions, the conviction will not be reversed because a conviction must be affirmed if, in light of common sense and every-day experience, the conviction

[15] *See also Truman*, 688 F.3d at 139-40 (A motion for judgment of acquittal "'does not provide the trial court with an opportunity to substitute its own determination of ... the weight of the evidence and the reasonable inferences to be drawn for that of the jury.' 'The proper place for a challenge to a witness's credibility is in cross-examination and in subsequent argument to the jury,' not in a motion for a judgment of acquittal. [E]ven the testimony of a single accomplice witness is sufficient to sustain a conviction, provided it is not 'incredible on its face,' or does not 'defy physical realities.' . . . Although [certain] factors surely impaired Truman, Jr.'s credibility, none of them rendered his testimony incredible as a matter of law. Assessing his credibility was the province of a jury properly instructed, as was the case here, on those aspects of his testimony that might bear on the question. His failure to testify fully, as required under the cooperation agreement, his troubled background, any inconsistencies in his testimony, 'and the inferences to be drawn from the evidence, are factors relevant to the weight the jury should accord to the evidence, and do not on this record justify the grant of a judgment of acquittal.'" (quoting *United States v. Guadagna*, 183 F.3d 122, 129 (2d Cir.1999); *United States v. Roman*, 870 F.2d 65, 71 (2d Cir.1989); *United States v. Florez*, 447 F.3d 145, 155 (2d Cir.2006); *United States v. Coté*, 544 F.3d 88, 100-01 (2d Cir. 2008); and citing *United States v. O'Connor*, 650 F.3d 839, 855 (2d Cir. 2011); *United States v. Santana*, 503 F.2d 710, 716 (2d Cir. 1974))).

[16] *See also Cavazos v. Smith*, 565 U.S. 1, 2 (2011) (*per curiam*) (quoting *Renico v. Lett*, 559 U.S. 766, 773 (2010)); *United States v. McIntosh*, 860 F.3d 624, 628 (8th Cir. 2017) ("'[W]eighing the evidence and assessing the credibility of witnesses are exclusively for the jury.' McIntosh raised these credibility issues at trial, and they 'were for the jury—not the court—to resolve.'" (quoting *United States v. Ellis*, 817 F.3d 570, 577 (8th Cir. 2016); and citing *United States v. Kirk*, 528 F.3d 1102, 1111 (8th Cir. 2008); *United States v. Butler*, 594 F.3d 955, 964 (8th Cir. 2010))); *United States v. Shoemaker*, 746 F.3d 614, 619, 623 (5th Cir. 2014); *United States v. Atkins*, 881 F.3d 621, 625 (8th Cir. 2018) (per curiam) (quoting *United States v. Morris*, 817 F.3d 1116, 1119 (8th Cir. 2016); *United States v. Whitlow*, 815 F.3d 430, 435 (8th Cir. 2016)); *United States v. Taylor*, 816 F.3d 12, 22 (2d Cir. 2016) (quoting *United States v. Kozeny*, 667 F.3d 122, 139 (2d Cir. 2011); *United States v. Espaillet*, 380 F.3d 713, 7189 (2d Cir. 2004); and citing *United States v. Leslie*, 103 F.3d 1093, 1100 (2d Cir. 1997)).

is logically and rationally supported by substantial evidence, and a rational trier of fact, taking the evidence in the light most favorable to the verdict, could have found the defendant guilty beyond a reasonable doubt. *United States v. Jimenez-Serrato*, 336 F.3d 713, 715 (8th Cir. 2003); *see Coleman v. Johnson*, 566 U.S. 650, 655-56 (2012); *Ritter*, 51 V.I. at 359.[17]

¶87 Count two charged Wallace with First Degree Reckless Endangerment for his conduct on March 1, 2010, when he fired his gun into Gomes's car as she was driving along a road in Williams Delight, a public housing development. Reckless Endangerment is defined in subsection 625(c)(1) of title 14 of the Virgin Islands Code, and this definition is modified in subsection 625(a) to define the crime of First Degree Reckless Endangerment. *See Commonwealth v. Bean*, 80 Mass. 52, 53 (Mass. 1859) ("We are first to ascertain, by a careful examination of the statute, what act the legislature had in view, and intended to make penal, and then [determine] if that act, thus ascertained, is charged in the compliant or indictment. If there is nothing in the context or in other parts of the statute, or in statutes *in pari materia*, to control or modify the sense and meaning of the terms in which the offence is defined, then it may be presumed that the terms in the compliant

[17] *See also United States v. Serrano-Lopez*, 366 F.3d 628, 634 (8th Cir. 2004) ("We review the denial of a motion for judgment of acquittal de novo. We evaluate the evidence in the light most favorable to the government and draw all reasonable inferences in its favor. 'We reverse only if no reasonable jury could have found the defendant guilty beyond a reasonable doubt.' This standard is quite strict; "we will not lightly overturn the jury's verdict." 'If the evidence rationally supports two conflicting hypotheses, the reviewing court will not disturb the conviction.' 'The government's 'evidence need not exclude every reasonable hypothesis of innocence.'" (quoting *United States v. Frank*, 354 F.3d 910, 916 (8th Cir. 2004); *United States v. Cruz*, 285 F.3d 692, 697 (8th Cir. 2002); *Ortega v. United States*, 270 F.3d 540, 544 (8th Cir. 2001); *United States v. Butler*, 238 F.3d 1001, 1004 (8th Cir. 2001); and citing *United States v. Baker*, 98 F.3d 330, 338 (8th Cir. 1996); *United States v. Jolivet*, 224 F.3d 902, 907 (8th Cir. 2000))); *United States v. Acevedo*, 882 F.3d 251, 259 (1st Cir. 2018) ("We must, however, consider the evidence in the light most favorable to the verdict. In addition, 'if the evidence can be construed in various reasonable alternatives, the jury is entitled to freely choose from among them.'" (quoting *United States v. Smith*, 680 F.2d 255, 259 (1st Cir. 1982); and citing *United States v. Hernández*, 218 F.3d 58, 64 (1st Cir. 2000); *Untied States v. Ortiz*, 966 F.2d 707, 711 (1st Cir. 1992))).

are used in the same sense with those in the statute, and whatever that prohibits the complaint charges. In such a case, the offence may be described and charged in the words of the statute. Otherwise, it may be necessary to frame the complaint in such terms as to designate the offence intended with precision.").[18]

¶88 The focus of this statute[19] is to proscribe conduct that has potential to put unsuspecting people who may be in a "Public Place" at risk of injury, with the degree of potential injury serving as the factor that distinguishes the degree of the crime. *See* 14 V.I.C. § 625(c)(1) ("conduct or behavior that **may** pose" (emphasis added)); COMPACT AM. DICT.: A CONCISE DICT. OF AM. ENGLISH 514 (1998) ("May" is "[u]sed to indicate [the] possibility" of something coming to pass.).

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[18] *See also M. Davis v. People*, 69 V.I. 619, 653-54 (V.I. 2018) (Swan, J., concurring in part, dissenting in part) ("Importantly, 'before discussing whether there was sufficient evidence supporting the challenged elements, the elements of each crime should be considered, as any evidentiary [or jury instruction] analysis is necessarily framed by the elements being challenged.'" (quoting *Ubiles*, 66 V.I. at 590; and citing *Duggins v. People*, 56 V.I. 295, 307 (V.I. 2012); *Miller v. People*, 54 V.I. 398 (V.I. 2010))); *Powell*, 2019 VI 2, ¶22 (Swan, J., concurring).

[19] The full text of section 625 provides as follows:

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

14 V.I.C. § 625 (emphasis added).

A complete analysis begins with the basic definition of the crime, "Reckless Endangerment," 14 V.I.C. § 625(c)(1).

¶89 The full text[20] of this definition provides as follows:

> (c) The terms as used in this section shall have the following meaning unless the context clearly indicates otherwise:
> 1. 'reckless endangerment' means when a person consciously and knowingly engages in conduct or behavior that may pose intentional harm or physical injuries to another human being or property.

14 V.I.C. § 625(c)(1). The general definition of "Reckless Endangerment" requires a mens rea, mental intent, of acting "knowingly or consciously." 14 V.I.C. § 625(c)(1).[21] Under this definition, a person has engaged in "Reckless Endangerment" if he has "knowingly" engaged "in conduct or behavior that may pose intentional harm or physical injuries to another human being or property." *Id.* Therefore, the definitional elements of Reckless Endangerment are: (1) the defendant; (2) knowingly or consciously; (3) engaged in conduct; and (4) that conduct, under the circumstances, had the possibility of causing intentional harm or physical injury to another person

[20] *See, e.g.*, *Codrington*, 57 V.I. at 184 ("To determine whether the information or the jury instructions improperly omitted one of the elements of first degree murder, we begin by analyzing the statute governing first degree murder in the Virgin Islands . . . ."); *see Isaac*, 50 F.3d at 1181 ("[W]e must decide first whether, as a matter of law, the defenses of excusable homicide, justifiable homicide and resistance by a person about the be injured are encompassed in self-defense and were therefore covered by the self-defense charge. If not, we must decide whether the separate requested charges were warranted on the basis of the evidence presented. Each of the defenses for which an instruction was sought is covered by a separate second of the Virgin Islands Code. . . . Thus we are faced with four separate statutory provisions, each detailing an ostensibly independent defense that on its face intersects to some extent with one or more of the others." (citing 14 V.I.C. §§ 41(2); 43; 926; 927(2)(A), (C))).

[21] To act "knowingly" does not require any knowledge that the act or omission are unlawful but simply requires personal knowledge of the act on the part of the defendant. 1 V.I.C. § 41 (defining knowingly). "Consciously" is an adverb form of the adjective conscious. COMPACT AM. DICT., 186. To be "conscious" is to have an awareness of one's own environment and one's own existence, to be "not asleep; awake" and "capable of thought, will or perception." *Id.*; *see generally, e.g.*, *United States v. Dodd*, 225 F.3d 340, 344 (3d Cir. 2000) ("The requirement that the government must show that the defendant 'knowingly possessed a firearm' means only that the government must prove the defendant's awareness that he possessed the firearm; the government need not demonstrate that eth defendant possessed the firearm with an intent to cause harm, or with knowledge that such possession was unlawful.").

or to property. 14 V.I.C. § 625(c)(1). However, in defining First Degree Reckless Endangerment, subsection 625(a) modifies this definition as follows:

> (a) A person is guilty of reckless endangerment in the first degree when, under the circumstances evidencing a depraved indifference to human life, he recklessly engages in conduct in a public place which creates a grave risk of death to another person. Reckless endangerment in the first degree shall be considered as a felony.

14 V.I.C. § 625(a).

¶90 Indeed, both First Degree Reckless Endangerment and Second Degree Reckless Endangerment alter the mens rea of definition of Reckless Endangerment to that of acting "recklessly." *Compare* 14 V.I.C. § 625(a) ("he recklessly engages in conduct") & (b) ("he recklessly engages in conduct") *with* 14 V.I.C. § 625(c)(1) ("a person consciously and knowingly engages in conduct or behavior"). This altered mens rea demonstrates a conscious choice by the Legislature to require proof of a heightened mental intent so as to avoid criminalizing conduct that only has the potential to cause minor injuries, as the definition in subsection 625(c)(1) by its terms encompasses any conduct resulting in any physical injury to a person or property. *Cf. Screws v. United States*, 325 U.S. 91, 100-01 (1945). In contrast, a person acts recklessly with respect to a material element of an offense

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

MODEL PENAL CODE § 2.02(2)(c) (emphasis added).[22]

¶91 Additionally, both First Degree Reckless Endangerment and Second Degree Reckless Endangerment add the additional element that the proscribed conduct, the actus reus, occur in a "Public Place." *Compare* 14 V.I.C. § 625(a) ("engages in conduct in a public place") & 625(b) ("engages in conduct in a public place") *with* 14 V.I.C. § 625(c)(1) ("consciously and knowingly engages in conduct or behavior that may pose"). The Legislature mandated a definition of a Public Place in section 625(c)(2) that makes a given location a Public Place first, if it is a place that is, in fact, intended to be used for public use and accessed by the public. 14 V.I.C. § 625(c)(2) ("a place which is in point of fact public rather than private"); *e.g.*, *Powell*, 2019 VI 2, ¶79 (Swan, J., concurring); *M. Davis v. People*, 69 V.I. 619, 670 (V.I. 2018) (Swan, J., concurring in part, dissenting in part). A "public place" is "any location that the local, state, or national government maintains for the use of the public, such as a highway, park, or public building." BLACK'S LAW DICTIONARY 1266 (8th ed. 2004); COMPACT AM. DICT., at 668. (defining "Public" as an adjective describing a place as "maintained for or used by the people or community" and alternatively describing something as "Of or affecting the community or the people."). Not only does this

[22] *See also* COMPACT AM. DICT., 689 (defining "reckless" as "heedless or careless," "headstrong: rash"); BLACK'S LAW DICTIONARY 1298 (8th ed. 2004) (defining the adjective "reckless" as "characterized by the creation of a substantial and unjustifiable risk of harm to others and by a conscious (and sometimes deliberate) disregard for or indifference to that risk; heedless; rash. Reckless conduct is much more than mere negligence: it is a gross deviation from what a reasonable person would do.").

> Intention cannot exist without foresight, but foresight can exist without intention. For a man may foresee the possible or even probable consequence s of his conduct and yet not desire them to occur; none the less if he persists on his course he knowingly runs the risk of bringing about the unwished result. To describe this state of mind the word 'reckless' is most appropriate. The words 'rash' and 'rashness' have also been used to indicate this same attitude.

BLACK'S L. DICT., 1298 (quoting J.W. CECIL TURNER, KENNY'S OUTLINES OF CRIMINAL LAW § 28 (16th ed. 1952)).

definition of Public Place include public highways and roads, public bridges, and such similar infrastructure, it includes "private roads dedicated to public use." 20 V.I.C. § 1(a) ("The duty of keeping public highways, bridges, courses, breastwalls, handrails, and **private roads dedicated to public use**, in good serviceable condition is incumbent upon the government." (emphasis added)).

¶92 For a road to be dedicated to public use, there must be "a showing . . . made that the road or roads to be dedicated are used by the public." 20 V.I.C. § 3a(b). Furthermore, any private encroachment onto a public road does not destroy the public nature of the road. *See* 20 V.I.C. § 7(c) ("No private road or driveway that intersects with a public road shall be constructed or surfaced in such a manner as to reduce the width of any public road . . . ."); *Hodge v. Bluebeard's Castle, Inc.*, 62 V.I. 671, 692 (V.I. 2015) (holding that a road dedicated as public remains public so long as it has not been abandoned by the government (citing *Malloy v. Reyes*, 61 V.I. 163, 180-81 (V.I. 2014)).

¶93 Additionally, a Public Place is a place that is open to the general public and visited by many people. 14 V.I.C. § 625(c)(2) ("a place . . . visited by many persons and usually accessible to the public"); *e.g.*, *M. Davis*, 69 V.I. at 671-72 (Swan, J., concurring in part, dissenting in part). "Place" is defined as "an area with or without definite boundaries, a portion of space." COMPACT AM. DICT., at 633. "Usually" is the adverb form of the adjective "usual," which is defined as "common; ordinary; normal" and alternatively as "habitual or customary." *Id.* at 885. "Accessible" is an adjective describing something as "easily approached, entered, or obtained." "Access" is defined as "a means of approaching or entering; passage" or alternatively as "the right to enter or make use of." *Id.* at 5. The word "public" in its noun form is defined as "the community or the people

as a whole." *Id.* at 668. So a place that is commonly entered or occupied by the public is a Public Place under subsection 625(c)(1).

¶94 With regard to private roads not dedicated to public use, "The Department of Public Works may pave private roads at the request of the owners when the Commissioner determines that the road is used substantially by the public." 20 V.I.C. § 3b. As a consequence of this provision and in light of everyday experience, the fact that a road is paved or has streetlights is probative as to the public access. Moreover, in light of everyday experience, a private road is a place "that is commonly entered by the public," since any member of the public may access[23] a private road for the myriad and multitudinous reasons for which people are motivated to engage in commerce and social intercourse. Indeed, section 3b of title 20 is an express recognition by the Legislature that private roads in this Territory, generally, are only that in title but are in practice public.[24]

¶95 Importantly, First Degree Reckless Endangerment requires proof beyond a reasonable doubt of conduct that creates a grave risk of death of another person. 14 V.I.C. § 625(a). The

[23] *See generally Antilles School, Inc. v. Lembach*, 64 V.I. 400, 411 (V.I. 2016) ("In today's society, it is eminently foreseeable that a person . . . might attend an event that is open to the public . . . ." (citations omitted)); *e.g.*, AM. JUR. 2D *Premises Liability* § 113 (2019) ("An injured person is a licensee where the person enters premises to seek a favor, to make inquiries or ask directions, to do volunteer work, to solicit, to attend a church service, to use recreational facilities without asking specific permission, to recover an item of personal property left on the premises, to collect money owed by the property owner, to obtain some article of value given to the licensee by the occupant, or while chasing his or her dog. A delivery driver is a licensee when the driver is not at the site for a purpose connected with or in furtherance of the defendant's alleged business or common interest of or mutual advantage of the driver and the defendant." (citations omitted)).

[24] It is noteworthy that nowhere in this definition of "Public Place" does it require that members of the public be actually present at the time of the proscribed acts, and this Court has repeatedly emphasized that the focus of the statute is the potential risk to the public who may be present, not the actual risk to those actually present. *E.g.*, *Tyson v. People*, 59 V.I. 391, 397 (V.I. 2013); *Joseph v. People*, 60 V.I. 338, 350 (V.I. 2013); *see Wilson*, 28 F. Cas. at 709 ("The court cannot depart from the plain meaning of a penal act of [the legislature] in search of [a meaning] the words do not suggest."). However, the presence of people would frequently be relevant to determining mens rea, i.e., whether the defendant acted recklessly.

noun "risk" is "[t]he possibility of suffering harm or loss; danger." COMPACT AM. DICT., at 710. "Grave," as used in the context of subsection 625(a), is an adjective describing a risk that is "fraught with danger or harm." *Id.* at 366. To be "fraught" is to be "filled with a specified element; charged; an assignment fraught with danger." *Id.* Therefore, conduct creates a "grave risk of death" when that conduct creates such a substantial risk of death that, should any people be present, they would be exposed to such a severe potential injury that they would likely die if actually injured. 14 V.I.C. § 625(a) ("creates a grave risk of death to another person"), (c)(1) ("may pose intentional harm or physical injuries to another human being or property").[25] Proof beyond a reasonable doubt of "Grave Risk" requires proof that the defendant's actions, under the circumstances, had the very real potential of causing the death of a bystander, either through injury to property that could result in injury to a bystander or through direct injury to the person. *Powell*, 2019 VI 2, ¶80 n.23 (Swan, J., concurring); *M. Davis*, 69 V.I. at 671 (Swan, J., concurring in part, dissenting in part); *see also A. Davis v. People*, 69 V.I. 600, 617 (V.I. 2018) (Swan, J., concurring in part, dissenting in part).

¶96 Count two charged Wallace with First Degree Reckless Endangerment for his conduct on March 1, 2010, when he fired his gun into Gomes's car as she was driving along a road in Williams Delight, a public housing development. Wallace argues the evidence was insufficient to establish

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

that his shooting occurred "under circumstances evidencing a depraved indifference to human life."

¶97 Someone displays indifference—i.e., is indifferent—when they have "no particular interest in or concern for; apathetic." COMPACT AM. DICT., at 426; *see also* BLACK'S L. DICT., at 788 (defining "indifference" as "A lack of interest in or concern about something; apathy."). Finally, "depraved" means something that is "heinous; morally horrendous.—depravity." BLACK'S LAW DICT., at 473; *see also* COMPACT AM. DICT., at 231 (defining "deprave" as "To debase, esp. morally"). Therefore, the prosecution had to prove that Wallace's conduct occurred under circumstances demonstrating that he acted with a "morally horrendous lack of concern, i.e., apathy, to human life."[26]

¶98 To compare, conduct creates a "grave risk of death" when that conduct creates such a substantial risk of death that, should any people be present, they would be exposed to such a severe potential injury that they would likely die if actually injured, and "under circumstances evidencing a depraved indifference to human life" requires a showing that the actions under the circumstances showed a "morally horrendous lack of concern, i.e., apathy, for human life." As I noted in my concurrence in *Powell v. People* and,

> as shown in my discussion of the elements in *M. Davis*, [69 V.I. 619, 669-71] (discussing the meanings of risk and grave), the final two elements as stated [by the majority in that case], '(3) created a grave risk of death to another person (4) under circumstances evidencing a depraved indifference to human life,' are in no way analytically distinct. To create a grave risk of death is to evidence a depraved indifference to human life and reckless intent; as such, the statement

[26] A "circumstance" is a "condition or fact attending an event and having some bearing on it." COMPACT AM. DICT., 160. "Circumstances," the more commonly used form of the word, are "[t]he sum of determining factors beyond willful control." *Id.* The verb form of "evidence" is defined as "to indicate clearly." *Id.*, 294. Similarly, "evidence" is "something . . . that tends to prove or disprove the existence of an alleged fact." BLACK'S L. DICT., 595.

> of the final element[, 'under circumstances evidencing a depraved indifference to human life,'] is superfluous.

2019 VI 2, ¶80 n.23 (Swan, J., concurring). However, because the jury was instructed that the "first" element of First Degree Reckless Endangerment was "[t]hat the Defendant [acted] under circumstances demonstrating a depraved indifference to human life," this "element" must be proved beyond a reasonable doubt. Therefore, I will consider whether the evidence was sufficient.

¶99 The evidence, taken in the light most favorable to the jury verdict, establishes that, at approximately 6:00 p.m., in a housing community on St. Croix, Wallace saw Webster in the passenger seat of a car being driven by another person. There was testimony that the driver, Gomes, lived in the community and knew Wallace's mother and had known Wallace and other witnesses. Likewise, there was testimony that Wallace knew Gomes was Webster's girlfriend and the mother of his child, as Gomes testified she had met Wallace in the community and that Webster had confronted Wallace and others for making sexual overtures to Gomes.

¶100 Gomes provided comprehensive testimony as to the location of Wallace's mother's home, which was adjacent to the scene of the shooting, and other apartments in community, which demonstrated that this occurred in a populated area. Further, both Gomes and Webster testified to having only driven to Williams Delight shortly before the shooting and gotten out of the vehicle with their child and entered their home. Given the testimony as to both seeing Wallace and others outside their apartment just prior to the shooting, the jury could readily have inferred that Wallace knew that Webster was in Gomes's vehicle with their child. In spite of this information and the time of day and location, Wallace discharged his firearm directly at the vehicle. There was also testimony that there was a baseball field and a basketball court nearby. Finally, and more

importantly, there was testimony that there were people, other than those in Gomes's vehicle, traversing and congregating around the same area when the shooting occurred.

¶101 This evidence was sufficient for the jury to find beyond a reasonable doubt that Wallace's acted with a "morally horrendous lack of concern, i.e., apathy, to human life"; said differently there was sufficient evidence to establish Wallace's actions occurred "under circumstances evidencing a depraved indifference to human life." Therefore, assuming this language is an element of the crime of First Degree Reckless Endangerment in addition to the Grave Risk element, as discussed above, I would affirm Wallace's conviction on count one.[27]

D. Jury Instructions

¶102 Firstly, "[t]he trial by jury is justly dear to the [People of the United States so much so that this right] received an assent of the people so general, as to establish its importance as a fundamental guarantee of the rights and liberties of the people." *Parsons v. Bedford, Breedlove & Robeson*, 28 U.S. (3 Pet.) 433, 447 (1830). However, "[b]efore the jury can apply the facts to the law which it is their peculiar province to do, they must know what the law is." *See Stettinius v.*

[27] *E.g.*, *Brown I*, 54 V.I. at 505 ("The Third Amended Information charged Brown with first degree murder as a principal pursuant to 14 V.I.C. § 11(a), the aider and abettor statute, and not as the primary actor in the alleged homicide. Importantly, the trial judge instructed the jury that to find Brown guilty of first degree murder that it had to find as one of the elements that Brown aided and abetted another. Thus, in accordance with the trial judge's instructions, the People had to prove beyond a reasonable doubt that Brown aided and abetted another in unlawfully killing Halliday, willfully, deliberately and with premeditation and malice aforethought. . . . Therefore, in this case, the People were required to prove that someone else committed the first degree murder of Halliday, that Brown knew of and attempted to facilitate the first degree murder, and that Brown had the specific intent to facilitate the crime." (citations omitted)); *see also M. Davis*, 69 V.I. at 670 n.39 (Swan, J., concurring in part, dissenting in part) ("However, contrary to the explicit language of the statute, the trial court instructed that the people bore the durned of proving beyond a reasonable doubt an additional element, namely that other people were present at the time of the shooting. This error was precipitated by the People charging this element in the information, and it was the People's obligation to prove beyond a reasonable doubt the facts proving this additional 'element.'" (citing *Connor v. People*, 59 V.I. 286, 296 (V.I. 2013))).

United States, 22 F. Cas. 1322, 1332 (D.C. Cir. 1839). Jury instructions must be based on the law of the case and given orally by the judge, not by counsel. *United States v. Noble*, 155 F.2d 315, 316-17 (3d Cir. 1946) ("We think it self-evident that a jury cannot perform its duty of determining the guilt or innocence of a defendant accused of a crime unless they know the essential elements of the crime which he is alleged to have committed. We think it equally self-evident that the only appropriate source of that knowledge is the trial judge, whose traditional function has always included that of instructing the jury upon the law." (citations omitted)).[28] Therefore, "[t]he general common-law rule in criminal cases [is that it is] the right of the court to decide the law, and the duty of the jury to apply the law thus given to the facts, subject to the condition, inseparable from the jury system, that the jury, by a general verdict, of necessity determined in the particular case both law and fact, as compounded in the issue submitted to them." *Sparf v. United States*, 156 U.S. 51, 98 (1895).

¶103 "[T]he prosecution is bound, on every principle of correct pleading, and of **justice**, to maintain their allegations; and it is not in their power to shift the burden on the defendant. The presumption of innocence is as strong as the presumption of sanity. The burden of proof must, therefore, always remain with the prosecution to prove guilt beyond a reasonable doubt—a serious and substantial doubt, not the mere possibility of a doubt." *Hopps v. People*, 31 Ill. 385, 394 (Ill. 1863) (emphasis added) (citing *Commonwealth v. McKie*, 67 Mass. 61, 62 (Mass. 1854) ("The general rule as to the burden of proof in criminal cases is sufficiently familiar. It requires the government to prove beyond a reasonable doubt the offence charged in the indictment, and if the

[28] *See People v. Falco*, 17 N.E.3d 671, 674 (Ill. Ct. App. 2014) ("Jury instructions are necessary to provide the jury with the legal principles applicable to the evidence presented so that it may reach a correct verdict." (citing *People v. Hopp*, 805 N.E.2d 1190 (Ill. 2004))); *Medley v. United States*, 155 F.2d 857, 860 (D.C. Cir. 1946).

proof fails to establish any of the essential elements necessary to constitute a crime, the defendant is entitled to an acquittal.")). As such, jury instructions must fairly and adequately inform the jury of the legal standard by which guilt is to be determined and must contain accurate statements and explanations of any applicable legal principles. *A. Williams*, 55 V.I. at 729. Jury instructions must also conform to the charges in the information and be consistent with the evidence presented. *Id.* (citing *United States v. Martin*, 528 F.3d 746, 752 (10th Cir. 2008)). Importantly, even when a defendant requests specific language for a given jury instruction, the trial court still retains the discretion to determine the language to be used. The trial court's obligation is to correctly state the law so long as the instruction conveys the required meaning, not to use specific language requested by either side. *A. Williams*, 55 V.I. at 732.

¶104 The court's instructions to the jury must be viewed in their entirety, and the inquiry is whether the instructions on the whole were misleading or inadequate to guide the jury. *Prince v. People*, 57 V.I. 399, 409 (V.I. 2012). Jury instructions are not to be invalidated unless the instruction substantially and adversely impacted the constitutional rights of the defendant and affected the outcome of the trial. *Id.* at 405. Even when there is a contemporaneous objection to a jury instruction and even if it omits a required element of an offense or defense, it will not justify reversal where the error has not impacted the defendant's rights and is harmless beyond a reasonable doubt. *Prince*, 57 V.I. at 405. An error in jury instructions will only result in reversal of a conviction where the error: (1) was fundamental and highly prejudicial due to its failure to provide the jury with adequate guidance, and (2) this Court's refusal to consider the error would result in a miscarriage of justice. *A. Williams*, 55 V.I. at 727 (citing *Farrell v. People*, 54 V.I. 600, 618-19 (2011)).

¶105 Even though a defendant is entitled to an instruction where the factual record contains evidence that is sufficient for a reasonable jury to find in the defendant's favor on an issue, element, or defense, *Prince*, 57 V.I. at 412, and this Court typically reviews a decision to include or exclude a jury instruction for abuse of discretion, *A. Williams*, 55 V.I. at 727 (citing *Phillips v. People*, 51 V.I. 258, 269 (V.I. 2009)), when a defendant fails to object to or fails to request a jury instruction, the issue is subject to Plain Error Review. *Id.* (citing *Francis v. People*, 52 V.I. 381, 390 (V.I. 2009); *United States v. Petersen*, 622 F.3d 195, 202 (3d Cir. 2010)). However, as to whether a jury instruction stated the correct legal standard or definition, our review is plenary. *Isaac*, 50 F.3d at 1180. A finding of prejudice requires that "there is a reasonable probability that the error affected the trial's outcome, not that there is 'any possibility' however remote, that the jury could have convicted." *United States v. Marcus*, 560 U.S. 258, 262 (2010) (citing *United States v. Olano*, 507 U.S. 725, 734-35 (1993); *United States v. Dominguez Benitez*, 542 U.S. 74, 83 (2004)).

1. Third Degree Assault

¶106 Before any discussion of any error in the jury instructions can occur, this Court must first consider the statutory language defining each crime because the accuracy of the jury instructions is dictated by the content of the statute. *See Ubiles v. People*, 66 V.I. 572, 590 (V.I. 2017).[29]

a. Construing the Statutory Elements of the Crime

¶107 The Legislature of the Virgin Islands has declared that this Court must give effect to all the words and provisions of a statute by considering their plain language in light of any statutory

[29] *E.g.*, *Duggins*, 56 V.I. at 307 (noting that, in determining the applicability of a statute of limitations, "we were required to determine the elements of a violation of" the crime charged (citing *Miller*, 54 V.I. 398)); *see also Jacobson v. Massachusetts*, 197 U.S. 11, 23 (1905) ("What, according to the judgment of the state court, are the scope and effect of the statute? What results were intended to be accomplished by it? These questions must be answered.").

definitions, any words that have an accumulated legal meaning, and, absent such definitions, we apply the common definition, "Dictionary Meaning." *E.g.*, *Miller v. Sorenson*, 67 V.I. 861, 871 (V.I. 2017); *see Ubiles*, 66 V.I. at 590; 1 V.I.C. § 42; *see also* 1 V.I.C. § 41. However, determining the intended, exact meaning, i.e., definition, of a word (or phrase) requires consideration of the context, structure, placement, and other linguistic indicators in the statute. *Ubiles*, 66 V.I. at 590; *e.g.*, *Gilbert v. People*, 52 V.I. 350, 356 (2009) (discussing the legal effect of the grammatical meaning of an adjective); *Heyliger v. People*, 66 V.I. 340, 349-50 (V.I. 2017) (discussing the meaning of items in a series when the serial, "Oxford" comma was omitted in a series of amendments).[30] As such, the rules and canons of statutory interpretation and construction have the overarching objective that

> [a]ll laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language, which would avoid results of this character. The [underlying reasons and rationale for] the law in such cases should prevail over its letter.

Gov't of the V.I. v. Berry, 604 F.2d 221, 225 (3d Cir. 1979) (quoting *United States v. Kirby*, 74 U.S. (7 Wall.) 482, 486-87 (1868)).

¶108 Laws must be read, understood, and applied in light of the practical affairs of people in society as it exists and in such a manner as to effectuate the purpose of the statute, not undermine it. *See Commonwealth v. Regan*, 64 N.E. 407, 407 (Mass. 1902) ("The statute imposes a penalty

[30] Many words have multiple forms (i.e., they could be a noun or a verb, etc.), and, likewise, for any given form of a word, there may be multiple definitions, as well. As such, while the directive from the Legislature to apply the "common" dictionary meaning of a word is a good start, it does little to nothing to conclusively determine the choice of definition when there are many. As such, factors bearing on the context of the enactment of the statutory provision must be considered in order to choose from among the "common" dictionary meanings of a given word.

and it should be construed in a reasonable, practical way rather than so as to make the business impossible or a lottery."). Certainly, "the surest way to misinterpret a statute is to follow its literal language without reference to its purpose." *Viacom Int'l, Inc. v. FCC*, 672 F.2d 1034, 1040 (2d Cir. 1982). Interpretations that are unjust or lead to absurd results must be avoided because they are inconsistent with legislative intent. *Gilbert*, 52 V.I. at 356. An interpretation that renders a statute inoperative, nonsensical, or superfluous, or that defies rationality, is absurd. *Dupigny v. Tyson*, 66 V.I. 434, 440 (V.I. 2017) (citing *United States v. Fontaine*, 697 F.3d 221, 228 (3d Cir. 2012)).

¶109 Courts must assume that the legislature intends for the entirety of the statutory language, as well as the whole statutory scheme, to be effective, unless to do so would lead to unjust or absurd results or would otherwise undermine the legislative intent. *Cornelius*, 67 V.I. at 822 (citing *Gilbert*, 52 V.I. at 356); *see also Dupigny*, 66 V.I. at 440; *In re Visteon Corp.*, 612 F.3d 210, 226 (3d Cir. 2010). If statutes are interrelated, such as a licensing scheme, they must be read in reference to each other, i.e., *in pari materia*. *Phillip v. People*, 58 V.I. 569, 590 (V.I. 2013). Where a crime is derived from the many common law crimes or is closely related to a common law crime, the element of *mens rea* that existed at common law is presumed to be incorporated into the statute. *United States v. Wells*, 519 U.S. 482, 491 (1997) (When interpreting a statute, courts presume the legislature "incorporates the common-law meaning of the terms it uses if those 'terms . . . have accumulated settled meaning under . . . the common law.'" (citations omitted)).[31]

[31] *See also United States v. Gypsum Co.*, 438 U.S. 422, 436 (1978) ("We start with the familiar proposition that '[t]he existence of a mens rea is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence.'" (citations omitted)); *Morisette v. United States*, 342 U.S. 246, 251-52 (1952) ("Crime, as a compound concept, generally constituted only from concurrence of an evil-meaning mind with an evil-doing hand, was congenial

¶110 Words and phrases defined by statute must be applied when determining the meaning of the plain language of the statute, and in the instance of the Legislature's failure to provide a definition by statute, any commonly understood, specific legal or technical meaning must be utilized, failing which the words of the statute are given their commonly understood, "Dictionary Meaning." *Ubiles*, 66 V.I. at 594 (citing 1 V.I.C. § 42); *see also Wells*, 519 U.S. at 491; *e.g.*, *Mahabir v. Heirs of George*, 63 V.I. 651, 660 (V.I. 2015); *Cascen*, 60 V.I. at 403. To interpret a statute according to its plain meaning generally requires that the words be read in the common understanding of the average person from whose lexicon the language is taken. *United States v. Bhagat Singh Thind*, 261 U.S. 204, 209 (1923) ("The words of the statute are to be interpreted in accordance with the understanding of the common man form whose vocabulary they were taken." (citing *Maillard v. Lawrence*, 57 U.S. (16 How.) 251, 261 (1853)).[32]

¶111 Further, penal statutes are to be interpreted and construed strictly. *Ward v. People*, 58 V.I. 277, 287 (V.I. 2013) (citing *People v. Henley*, 1 V.I. 397, 398 (D.V.I. 1937)); *see also Sonson v. People*, 599 V.I. 590, 608 (V.I. 2013). If a penal statute is ambiguous, that ambiguity must be resolved in favor of lenity to the criminal defendant. *Ward*, 58 V.I. at 286-87 (explaining the rule

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to an intense individualism and took deep and early root in American soil. As the state codified the common law of crimes, even if their enactments were silent on the subject, their courts assumed that the omission did not signify disapproval of the principle but merely recognized that intent was so inherent in the idea of the offense that it required no statutory affirmation. Courts, with little hesitation or division, found an implication of the requirement as to offenses that were taken over from the common law.").

[32] *Cf. Screws*, 325 U.S. at 99 (Rutledge, J., concurring) ("[Defendants] were not puzzled to know for what they were indicted, as their proof and their defense upon the law conclusively show. They simply misconceived that the victim had no federal rights and that what they had done was not a crime within the federal power to penalize. That kind of error relieves no one from penalty." (footnote omitted)).

of lenity); *see also United States v. Enmons*, 410 U.S. 396, 411 (1973).[33] However, the failure to define a term does not *ipso facto* mean a statute is ambiguous, and such a determination requires a thorough consideration of the statutory language, the statutory design, and the object of and policy underlying the statute, controlled by a presumption that the ordinary meaning of the chosen words manifests the legislative intent. *Crandon v. United States*, 494 U.S. 152, 158 (1990). Likewise, when statutory language utilizes "elastic" words, i.e., words with several and varying definitions, the specific meaning of these words is gleaned from the context and surrounding language. *Lopez v. People*, 60 V.I. 534, 537-38 (V.I. 2014).

¶112 Moreover, when a statute defining or prescribing a punishment for a crime[34] is genuinely susceptible to two constructions, "'[t]he rule of lenity applies only if, 'after seizing everything from which aid can be derived,' . . . we can make 'no more than a guess as to what [the legislature] intended." *Wells*, 519 U.S.at 499 (citations omitted). More specifically, the Virgin Islands Code directs that "the location of a provision within the Code is not determinative, and that it should not

[33] For a better understanding of "ambiguity," *see generally Jones v. United States*, 526 U.S. 227, 239 (1999) (holding that, in constitutional terms, "'where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the later.'" (citations omitted)); *United States v. Harriss*, 347 U.S. 612, 618 (1954) (recognizing that, if the "general class of offenses can be made constitutionally definite by a reasonable construction of the statute, this Court is under a duty to give the statute that construction."); *Almendarez-Torres v. United States*, 523 U.S. 224, 238 (1998) (recognizing that the doctrine of constitutional doubt should only be applied when a statute is "genuinely susceptible to two constructions after, and not before, its complexities are unraveled. Only then is the statutory construction that avoids the constitutional question a 'fair' one").

[34] It is important to note that, even in distinguishing whether a statute is a criminal punishment or a regulatory sanction, legislative labels do not control; and a statute nominally entitled a civil penalty may be subject to the same statutory construction and constitutional due process restrictions that any other criminal statute would be subject. *United States v. Salerno*, 481 U.S. 739, 747 (1987) ("To determine whether a restriction on liberty constitutes impermissible punishment or permissible regulation, we first look to legislative intent. *Schall v. Martin*, 467 U.S. [253,] 269 [(1984)]. Unless Congress expressly intended to impose punitive restrictions, the punitive/regulatory distinction turns on 'whether an alternative purpose to which [the restriction] may rationally be connected is assignable to it, and whether it appears excessive in relation to the alternative purpose assigned [to it]." (citation omitted)).

defeat an otherwise clear and substantive provision which may have simply been assigned to an improper Title." *Knowles v. Knowles*, 354 F. Supp. 239, 243-44 (D.V.I. 1973) (citing 1 V.I.C. § 44); *see also* 1 V.I.C. § 45. Section 44 of title 1, though precluding a statute's location within the Code from being dispositive of the interpretation, should not be employed as a tool of statutory interpretation that would require a provision of the Code to be read contrary to its legislative intent. *Todman v. Todman*, 13 V.I. 599, 606 n.4 (D.V.I. 1977).

¶113 Taking into consideration these two rules, it is clear that sections 44 and 45 of title 1 require that provisions of the Virgin Islands Code be read so as to fully effect the legislative intent, and the headings, location, etc. are guides in determining legislative intent that may provide clarity to otherwise ambiguous statutory language. 1 V.I.C. §§ 44-45; *Rohn v. People*, 57 V.I. 637, 646 n.7 (V.I. 2012).[35] Therefore, clarification of the intended meaning of words and phrases is gleaned from other linguistic indicators such as subject matter, history, context, structure, and placement,

[35] In determining the meaning of the plain language, the Virgin Islands Code provides that words in singular form include the plural and vice versa, words of masculine gender include the feminine, and words in present tense include the future tense. 1 V.I.C. § 41; *see genera*lly 1 V.I.C. § 44 ("[T]he organization of the V.I. Code is "made for the purpose of convenient reference and orderly arrangement, and no implication, inference, or presumption of a legislative construction shall be drawn therefrom."); 1 V.I.C. § 45 (identify what is not part of the law even though contained in the Code, such as "descriptive headings or catchlines except that section numbers are part of the law). Headings and titles are not meant to take the place of the detailed provisions of the text. Nor are they necessarily designed to be a reference guide or synopsis. Where the text is complicated and prolific, headings and titles can do no more than indicate the provisions in a most general manner; to attempt to refer to each specific provision would often be ungainly as well as useless. As a result, matters in the text which deviate from those falling within the general pattern are frequently unreflected in the headings and titles. Factors of this type have led to the wise rule that the title of a statute and the heading of a section cannot limit the plain meaning of the text. *United States v. Fisher*, 5 U.S. (2 Cranch) 358, 386 (1805); *Cornell v. Coyne*, 192 U.S. 418, 430 (1904); *Strathearn S.S. Co. v. Dillon*, 252 U.S. 348, 354 (1920). "For interpretive purposes, they are of use only when they shed light on some ambiguous word or phrase. They are but tools available for resolution of a doubt. But they cannot under or limit that which the text makes plain." *First Am. Dev.*, 55 V.I. at 603 (quoting *Brotherhood of R.R. Trainmen v. Balt. & Ohio R.R.*, 331 U.S. 519, 528-29 (1947); and citing *Florida Dept. of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 47 (2008); *Pennsylvania Dept. of Corrections v. Yeskey*, 524 U.S. 206, 212 (1998)); *e.g.*, *In re Najawicz*, 52 V.I. 311, 324-25 (V.I. 2009) (applying this principal to the headings of section 33 of title 4).

and a word's meaning is "construed according to the common and approved usage of the English language." *Dupigny*, 66 V.I. at 440 (citing *Almendarez-Torres v. United States*, 523 U.S. 224, 228 (1998)); *Miller v. Sorenson*, 67 V.I. 861, 871 (V.I. 2017) (quoting 1 V.I.C. § 42; and citing *Ubiles*, 66 V.I. at 591).[36] Further,

> though penal laws are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the legislature. The maxim is not to be so applied as to narrow the words of the statute to the exclusion of cases which those words, in their ordinary acceptation, or in that sense in which the legislature obviously used them, would comprehend. The intention of the legislature is to be collected from the words they employ. Where there is no ambiguity in the words, there is no room for construction.

United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 95-96 (1820). The court must "seiz[e] everything from which aid can be derived,' but if we "can make 'no more than a guess as to what [the Legislature] intended,'" the statute must be interpreted in favor of lenity to defendants. *Ward*, 58 V.I. at 287-88 (quoting *United States v. Diaz*, 592 F.3d 467, 474-75 (3d Cir. 2010); *Muscarello v. United States*, 524 U.S. 125, 139 (1998)).

¶114 In summary, if the plain language of the statute discloses the legislative intent, that is the end of the interpretive inquiry. *In re Infant Sherman*, 49 V.I. 452, 456 (V.I. 2008). The principle underlying this rule of interpretation is that the Legislature is presumed to have expressed its intent through the statute as written. *Ubiles*, 66 V.I. at 590 (citing *Haynes v. Ottley*, 61 V.I. 547, 561

[36] Furthermore, "[w]hen the Virgin Islands Legislature adopts a statute that is identical or similar to one in effect in another state, Virgin Islands Courts will typically adopt the original jurisdiction's construction of the statute prevailing at the time of its adoption." *Rivera-Moreno*, 61 V.I. at 295-96 (citing *Chinnery v. People*, 55 V.I. 508, 519 n.6 (V.I. 2011); *Bryan*, 61 V.I. 416). Absent evidence that the Legislature of the Virgin Islands adopted a statute from a specific jurisdiction, decisions from jurisdictions interpreting statutes with like purposes and similar langue are considered persuasive. *Id.* at 296.

(V.I. 2014); *Bryan*, 61 V.I. at 462; *Rohn*, 57 V.I. at 646 n.6; *Murrell v. People*, 54 V.I. 338, 352 (V.I. 2010); *Rosenberg v. XM Ventures*, 274 F.3d 137, 141 (3d Cir. 2001)).[37]

¶115 While this rule of statutory construction is an easy starting point, courts should always be mindful that, even though a literal interpretation of statutory language is preferred, "the intention prevails over the letter" requiring that a literal reading of any statute be avoided if such a reading would be contrary to its objective—legislative intent. *Gilbert*, 52 V.I. at 356 (quoting *Gov't of the V.I. v. Knight*, 989 F.2d 619, 626 (3d Cir. 1993)). Said differently, the language of a criminal statute must be considered as the conclusive statement of legislative intent, unless the legislature has unequivocally shown its intent to be the contrary. *Wells*, 519 U.S. at 498-99; *United States v. Lanier*, 520 U.S. 259, 265 n.5 (1997); *e.g.*, *Gilbert*, 52 V.I. at 356; *Lopez*, 60 V.I. at 537. "Regard for these purposes should infuse the construction of the legislation if it is to be treated as a working

[37] This rule of statutory interpretation giving primacy to the plain meaning of a statute is, *inter alia*, an application of the principle that laws in derogation of individual rights guaranteed by the Constitution are subject to strict construction. *Wiltberger*, 18 U.S. at 95 ("To determine that a case is within the intention of a statute, its language must authorize us to say so. It would be dangerous, indeed, to carry the principle, that a case which is within the reason or mischief of a statute, is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of kindred character, with those which are enumerated."); *Bank of Columbia v. Okley*, 17 U.S. (4 Wheat.) 235, 241-42 (1819) ("We readily admit, that the provisions of this law are in derogation of the ordinary principles of private rights, and, as such, must be subject to strict construction."). The underlying principle for the rule of strict construction of laws in derogation of individual rights, e.g., criminal laws, is that a narrow application is most appropriate because the law favors free exercise of an individual's rights and because the courts are not the proper branch of government for passing laws, which is the practical effect of an expansive judicial interpretation of a statute. *Wiltberger*, 18 U.S. at 95 ("The rule that penal laws are to be construed strictly . . . is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the Court, which is to defined a crime, and ordain its punishment."); *Western Union Tel. Co. v. Kansas*, 216 U.S. 1, 44 (1910) ("We are not at liberty to read into the statute terms not found therein or necessarily implied, with a view to limiting the tax to local business, which the legislature, in the terms of the act, impose upon the entire business of the company.") Therefore, because the courts are not equipped with the capacity to legislate, they may only interpret a statute to apply according to its express language and by necessary implication; inserting limiting terms that are not necessarily implied is the equivalent of legislating. *Id.* at 44.

instrument of government and not merely as a collection of English words." *United States v. Dotterweich*, 320 U.S. 277, 280 (1943).

b. Analysis of the Third Degree Assault and the Instruction Given to the Jury

¶116 Count one charged Wallace with Third Degree Assault on March 1, 2010, and he argues that the failure to instruct the jury that "under circumstances not amounting to assault in the first or second degree" was an essential element of the crime of Third Degree Assault to be proved by the prosecution beyond a reasonable doubt constituted Plain Error warranting the exercise of this Court's discretion to reverse his conviction because the instruction omitted an essential element of the statutory definition of the crime. Therefore, I begin my analysis with the basic definitions, "Assault," 14 V.I.C. § 291, and "Assault and Battery," 14 V.I.C. § 292. Section 291 of title 14 defines Assault as follows:

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

14 V.I.C. § 291. Section 292 of title 14, Assault and Battery, provides as follows:

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

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

¶117 A person, 14 V.I.C. §§ 291 ("Whoever . . . ."), 292 ("Whoever uses . . . ."), 297(a) ("Whoever, ..."); *Hiibel v. Sixth Judicial Dist. Ct. of Nev.*, 542 U.S. 177, 191 (2004), commits

an Assault when he attempts to commit a battery or, under circumstances wherein the gestures made could be immediately carried out, makes gestures that in themselves communicate an immediate intent to commit a battery. 14 V.I.C. § 291. Under subsection 291(1), the elements of an Assault are: (1) the defendant; (2) attempted to use unlawful violence against another person; and (3) he attempted to use that unlawful violence with the specific intent to injure that person. 14 V.I.C. § 291(1); 14 V.I.C. § 292. Under subsection 291(2), the elements of Assault are: (1) the defendant; (2) made gestures; (3) under circumstances wherein the gestures made could be immediately carried out; and (4) those gestures communicated an immediate specific intent to use unlawful violence against another. 14 V.I.C. § 291(2). Despite the varying language, these are both statements of elements of Assault, as defined in section 291 of title 14.[38] A person commits an Assault and Battery if the following are proved beyond a reasonable doubt: (1) the defendant; (2) used unlawful violence against another person; and (3) the defendant used that unlawful violence with the specific intent to injure the intended victim. 14 V.I.C. § 292.

¶118 Unlawful violence is not defined explicitly, but it is defined by implication. *See* 14 V.I.C. § 293; *e.g.*, *Gov't of the V.I. v. Frett*, 14 V.I. 315, 323 (V.I. Super. Ct. 1978) (utilizing section 293 of title 14 and section 87 of title 17 to determine the Legislature's definition of "lawful violence" in the context of an aggravated assault upon a child).[39] Subsection 293(a) of title 14 adumbrates

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

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

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

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

violence if it is a degree of force in excess of that "necessary to effect such purpose." 14 V.I.C. § 293(b).

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

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

14 V.I.C. § 297. Both subsections 297(a) and 297(b) address assaults, and the elements of the crime of Third Degree Assault must be framed in terms of the definition provided in section 291 of title 14. 1 V.I.C. § 42; *see also* 1 V.I.C. § 41; *Ubiles*, 66 V.I. at 590; Subsections (1)-(4) of section 297 provide for, in addition to the elements as defined in sections 291 and 292 of title 14, aggravating factors that make the conduct involved the crime of Third Degree Assault. *Cf.* 14 V.I.C. § 299.

¶120 Section 297(a)(1) makes it Third Degree Assault to use violence upon another with the intent to commit a felony. While this provision necessarily requires reference to section 291(2) to define Assault, any person reading the statute would be informed that, if a person Assaults

someone while attempting to commit any crime defined in the Virgin Islands as a felony,[40] the person is guilty of Third Degree Assault. This is also true for subsections 297(a)(2-4). Subsection 297(a)(2) instructs that the use of a deadly weapon while committing an Assault is a crime. Subsection 297(a)(3) defines Third Degree Assault as any Assault whereby a person acts with premeditation and employs means calculated to cause great bodily injury. Finally, subsection 297(a)(4) informs that any person who Assaults another and causes that person serious bodily injury is guilty of Third Degree Assault. It is incontrovertible that the phrase "under circumstances not amounting to an assault in the first or second degree" does not serve to define or add an essential fact to the elements of Third Degree Assault as defined in subsections 297(a)(1)-(4) and is, therefore, not an element of the crime of Third Degree Assault. *M. Davis*, 69 V.I. at 632; *see also id.* at 660 (Swan, J., concurring in part, dissenting in part); *A. Davis*, 69 V.I. at 618.

¶121 The substance of sections 295, defining "Frist Degree Assault," and 296, defining "Second Degree Assault," of title 14 provide further support for the conclusion that "under circumstances not amounting to an assault in the first or second degree" is not an essential element of Third Degree Assault. As consideration of the elements of First Degree Assault and Second Degree Assault fully and comprehensively illustrate, subsections 297(a)(1)-(4) involve conduct similar to,

[40] "Crime" and "offense" are defined to be the same thing, "an act committed or omitted in violation of a law of the Virgin Islands and punishable by (1) imprisonment; or (2) fine; or (3) removal from office; or (4) disqualification to hold and enjoy any office of honor, trust, or profit." 14 V.I.C. § 1. Crimes are classified as felonies, "a crime or offense which is punishable by imprisonment for more than a year," and misdemeanors, which includes every crime that is not a felony. 14 V.I.C. § 2.

but distinct from, the conduct proscribed in sections 295[41] and 296.[42] For example, subsections 295(1) and (3) are addressed to the specific crimes of murder, rape, sodomy, mayhem, robbery, and larceny. Whereas, subsection 297(a)(1) is addressed to any felony. Sections 295(2) and 296(1) and (4) relate to the use of a specific deadly weapon, i.e., poison, and section 297(a)(2) governs assaults where any deadly weapon is used. Likewise, subsections 296(1) and (4) both require the specific intent to cause injury and are concerned with the specific means by which this is attempted, i.e., use of poison or chemicals that physically burn and injure a person. Section 297(a)(3) has the same specific intent requirement that the person desired to injure the victim but is only concerned

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

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

with assaults achieved through premeditated design in general and not the specific means employed, which is in contrast to subsections 296(1) and (4). The language "under circumstances not amounting to assault in the first or second degree" is not an element of Third Degree Assault.

¶122 Therefore, the elements of Third Degree Assault, subsections 297(a)(1)-(4), are: (1) the defendant; (2) under circumstances wherein the gestures made could be immediately performed; (3) made gestures; (4) those gestures communicated an immediate ability and specific intent to use unlawful violence against another; and (5) such actions (a) were taken with the specific intent to commit a felony, (b) were taken with the use of a deadly weapon, (c) were taken with a premeditated design and by use of means calculated to inflict great bodily injury, or (d) inflicted great bodily injury upon the victim. 14 V.I.C. § 297(a)(1)-(4); 14 V.I.C. § 291(2).[43] Because the omitted language—"under circumstances not amounting to an assault in the first or second degree"—is not an element of Third Degree Assault, there was no error in the trial court's jury instruction on Third Degree Assault. Likewise, because Wallace's argument for reversal of his conviction of Possession of a Firearm while Committing a Crime of Violence was derivative of his argument that his conviction for the predicate violent crime, Third Degree Assault, 14 V.I.C. § 2253(d)(1) (defining "Crime of Violence" as those defined in subsection 451(e) of title 23), there

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

was no error in that conviction. Therefore, I would affirm Wallace's convictions for Third Degree Assault (count one) and Possession of a Firearm During a Crime of Violence (count three).

2. First Degree Reckless Endangerment

¶123 "[This court] 'must assume that juries for the most part understand and faithfully follow instructions . . . ." *Cascen*, 60 V.I. at 414 (quoting *Galloway*, 57 V.I. at 711)).[44] Furthermore, "[i]t is not competent for the court, in a criminal case, to instruct the jury peremptorily to find the

[44] *See also United States v. Townsend*, 630 F.3d 1003 (11th Cir. 2011); *see generally Commonwealth v. Porter*, 51 Mass. 263, 276-77 (Mass. 1845) ("We consider it a well settled principle and rule, lying at the foundation of jury trial, admitted and recognized ever since jury trial has been adopted as an established and settled mode of proceeding in courts of justice, that it is the proper province and duty of judges to consider and decide all questions of law which arise, and that the responsibility of a correct decision is placed finally on them; that it is the proper provide and duty of the jury, to weigh and consider evidence, and decide all question of fact, and that the responsibility of a correct decision is placed upon them. And the safety, efficacy and purity of jury trial depend upon the steady maintenance and practical application of this principle. It would be alike a usurpation of authority and violation of duty, for a court, on a jury trial, to decide authoritatively on the questions of fact, and for the jury to deiced ultimately and authoritatively upon question of law. And the obligations of each are of a like nature, being that of a high legal and moral obligation to the performance of an important duty, enforced and sanctioned by an oath. This, as a general principle, is applicable alike to civil and criminal cases, though in both it must be varied in its practical application, according to the forms of proceeding and the mode in which the question arises. If the form of proceeding is such, that the law and the fact can be distinctly presented, then, after the fact is established, either by the pleadings or by a special verdict, the court decided the law and pronounce the judgment, without the further intervention of a jury; as in case of a demurrer or special verdict. Indeed, the whole system of special pleading, which, tough now disused in this Commonwealth by a recent statute, is intimately interwoven with the whole texture of the common law, was founded upon an apparently anxious desire of the common law so to separate questions of act form questions of law, as to enable courts to pronounce on matter of law, leaving contested facts only to be put in issue, and to be tried and decided by the jury. The whole doctrine of bills of exception, now in such general and familiar use, both in civil and criminal proceedings, is founded upon the same great and leading idea. It presupposes that it is within the authority, and that it is the duty of the judge to instruct and direct the jury authoritatively, upon such questions of law as may seem to him to be material for the jury to understand and apply, in the issue to be tried; and he may also be required so to instruct upon any pertinent question of law within the issue, upon which either party may request him to instruct. **The doctrine also assumes that the jury understand and follow such instruction in matter of law.** This results from the consideration, that if such instruction be either given or refused, it is the duty of the judge to state it in a bill of exceptions, so that it may be placed on the record; and if the verdict is against the party who took the exception, and it appears, upon a revision of the point of law, that the decision is incorrect, either in giving or refusing such instruction, the verdict is set aside, as a matter of course. To this conclusion the law could come, only on the assumption that it was the right and duty of the court to instruct the jury in matter of law, that the jury understood it, and, as a matter of duty, were bound to follow it; so that, if the instruction was wrong, the law assumes, as a necessary legal consequence, that the verdict was wrong, and sets it aside. The law could only assume this, upon the strength of the well known and reasonable presumption, that all person, in the absence of proof tot the contract, do that which it is their duty to do. It is presumed that the jury followed the instruction of the court in matter of law, because it was their duty so to do, and therefore, if the instruction was wrong, the verdict is wrong." (emphasis added)).

accused guilty of the offense charged, or of any criminal [lesser-included] offense . . . . 'In a criminal case, if the verdict is one of acquittal, the court has no power to set it aside.'" *Sparf*, 156 U.S. at 105 (quoting *United States v. Taylor*, 11 F. 470, 474 (D. Kan. 1882)). The trial court instructed the jury as follows:

> An act such as **shooting at another human being is reckless** because it exhibits a depraved indifference to human life. You must also find that the incident occurred in a public place. **A residential street is a public place.**

(emphasis added). Wallace argues that the emphasized language violated his due process rights including that of having the jury determine his guilt as to every element of First Degree Reckless Endangerment by proof beyond a reasonable doubt. Of course, the problem for Wallace in making this argument is that his counsel did not object to the inclusion of this language when asked if any revisions were needed at the jury instruction conference. *Henderson v. Kibbe*, 431 U.S. 145, 154 (1977) ("It is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court."). Therefore, this issue will only warrant reversal of the jury verdict of guilty if it satisfies the four elements of Plain Error Review. *Corneilus v. Bank of N.S.*, 67 V.I. 806, 816 n.2 (V.I. 2017) (defining "Plain Error" and "Plain Error Review"); *see generally United States v. Groysman*, 766 F.3d 147 (2d Cir. 2014) (discussing "plain error" versus "harmless error").

¶124 It is noteworthy that, under Plain Error Review, simply because a jury instruction used incorrect terminology, it does not *ipso facto* follow that Plain Error exists or that reversal is warranted. Instead, an incorrect statement of law in a jury instruction, without further analysis of the surrounding circumstances, is only, at most, an obvious error of law. Further consideration of

the rights implicated, the evidence in the record, the opportunity for defendant's counsel (or defendant) to have objected to or provided alternate jury instructions, whether the error relates to an issue that was an open question of fact that necessarily needed resolution by the fact finder, whether the defendant raised a defense relevant to the improper instruction, etc. *Gov't of the V.I. v. Smith*, 949 F.2d 677, 680 (3d Cir. 1991) (quoting *United States v. Young*, 470 U.S. 1, 16 (1985); *United States v. Frady*, 456 U.S. 152, 163 n.14 (1982); *United States v. Thame*, 846 F.2d 200, 205 (3d Cir. 1988); FED. R. CRIM. P. 52(b))).

a. "A residential street is a public place."

¶125 In light of the above discussion of the Public Place element of First Degree Reckless Endangerment (in my analysis regarding the proper interpretation of subsection 625(c)(2) of title 14), it is apparent that the trial court's instruction to the jury "decided" (used language directing a verdict of guilty) the Public Place element of First Degree Reckless Endangerment. *See Stettinius*, 22 F. Cas. at 1330 ("'[I]t would be a most unhappy case for the judge himself if the prisoner's fate depended upon his directions. Unhappy also for the prisoner; for if the judge's opinion must rule the verdict, the trial by jury would be useless.'" (quoting WILLIAM BLACKSTONE, 4 COMMENTARIES 361)). As noted above, a "private road" may be a Public Place under two different parts of the statutory definition. First, the location of a crime may be a Public Place if it is a place owned and operated by the government that allows members of the public to access it.[45] Second,

[45] While, generally, any property owned by a government is "public" in the sense that all the citizens of a given jurisdiction are shareholders in all the property owned by their government, it is also true any government has the authority to restrict access to government property for security reasons. This case presents no opportunity for analyzing the circumstances under which publicly owned property may not be a Public Place for purposes of providing sufficient evidence to sustain a conviction for First Degree Reckless Endangerment.

depending on various factors reflected in circumstances surrounding the actus reus, a given location may be a Public Place that is open to the public and, as a matter of fact, frequently visited or occupied by the public. 14 V.I.C. § 625(c)(2).

¶126 Nothing in either of these definitions provides that a "residential street" is a "private road," and there is certainly no definition equating a "residential street" with a Public Place. The instruction was incorrect in light of the plain language of subsection 625(c)(2) of title 14, and no "judicial gloss" or construction of the statute is necessary to make such a misstatement of the law any more obvious. Emphatically, the legal error contained is this instruction is obvious! *Stettinius*, 22 F. Cas. at 1334 ("'It is the duty of the judge, in all cases of general justice, to tell the jury how to do right . . . .'" (citations omitted))). To give an instruction stating, "A residential street is a public place" is to disguise a conclusion that an elemental fact is established beyond a reasonable doubt—a conclusion that must be drawn from the record evidence by the jury—as "legal guidance" meant to assist the jury in evaluating the facts. *See United States v. Fenwick*, 25 F. Cas. 1065, 1065 (D.C. Cir. 1839) ("[T]he judge should not have instructed the jury that the evidence was sufficient; that question was for the jury."); *Tucker v. State*, 57 Ga. 503, 506 (Ga. 1876) (Jackson, J., concurring) ("I think the fault usual among presiding judges on jury trials, is that they deal too much in generalities, the jury not understanding what they mean; always, they should make the law clear and easily to be understood by the jury, and to do this they must practically apply it to the facts by telling the jury that if you believe, form the evidence, such to be the facts, then such is the law.").

¶127 There are myriad factors bearing on the public nature of a roadway, for example: whether it is paved and maintained by the government or its agencies, whether the street (or the entire

community) is gated, whether there are street lights paid for by the government, whether government employees maintain the road, the presence or absence of speed bumps, the presence or absence of public transportation stops, etc. Additionally, factors such as those discussed in *Powell*[46] bear on the public nature of locations generally, e.g., the proximity to public amenities such as ball parks and basketball courts, whether people were in fact present, whether the public generally accesses the area where the crime occurred, how the different individuals involved in the specific case came to access the location, etc. The forgoing identification of factors is not an exclusive adumbration of evidence potentially bearing on the Public Place determination, and the facts as developed by the record evidence in a given case will provide the "law of the case" that must guide the trial judge's formulation of the appropriate instruction. *M. Davis*, 69 V.I. at 673-74 (Swan, J., concurring in part, dissenting in part) ("Jury instructions must fairly and adequately inform the jury of the legal standard by which guilt is to be determined and must contain accurate statements and explanations of any **applicable** legal principles. Jury instructions must also conform to the charges in the information and be **consistent with the evidence** presented." (emphasis added) (citing *A. Williams*, 55 V.I. at 727; *Martin*, 528 F.3d at 752)).

¶128 To further emphasize this legal error—and in order to provide guidance by way of example—I consider that the court could have given a jury instruction informing the jury as follows:

[46] 2019 VI 2, ¶¶81-97 (Swan, J., concurring); *see also M. Davis*, 69 V.I. at 630-32 (Swan, J., concurring in part, dissenting in part); *A. Davis*, 69 V.I. at 618 (Swan, J., concurring in part, dissenting in part).

> In this matter, there has been no testimony from a qualified[47] witness establishing which areas of which housing communities in the Virgin Islands are public and which are private. Therefore, while a residential street may be a Public Place, you must consider the circumstantial evidence bearing on this element and determine whether that evidence establishing the location of the shooting was a Public Place. Facts that bear on this determination as to whether the location of the shooting was a Public Place that are appropriate for your consideration include . . . and other similar facts.

The comparison of this listing of potential factors and the bare conclusion of the instruction actually given in this case place beyond question the conclusion that the trial court's error in its instruction that "A residential street is a public place" was an error that was obvious under existing law, establishing the first two elements of Plain Error. 14 V.I.C. § 625(c)(2).[48]

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[47] Detective Cruz testified that Williams Delight was a public property; albeit, this testimony was conclusory at best. Moreover, this testimony was unaided by any jury instruction stating the legal status of the housing communities in the Virgin Islands. However, some housing communities are publicly run by the government, and others are actually housing cooperatives owned and run by the residents. *See generally* 29 V.I.C. § 191c ("The Governor with the approval of the Legislature is authorized to transfer to the jurisdiction of the Virgin Islands Housing Finance Authority, for disposal in accordance with the provisions of this subchapter, any plot or plots of land presently owned or hereinafter acquired by the Government of the United States Virgin Islands, if such land is not needed for any other public purpose."); 29 V.I.C. § 2 ("'Housing project' means any work, or undertaking, or activity to provide decent, safe, and sanitary urban or rural dwellings, apartments and other living accommodations for families of low income. Such work, undertaking, or activity may include buildings, land, equipment, facilities, other real or personal property for necessary, convenient, or desirable appurtenances, streets, sewers and other sanitary facilities and services, water supply, utilities, parks, site preparation, landscaping and administrative, community, health, recreational, welfare and similar facilities and services. The term also extends to the planning of buildings and improvements, the acquisition of property, the demolition of existing structures, the clearance of slum areas, the construction, reconstruction, alteration, or repair of the improvements, and all other work in connection therewith, as well as to all other real or personal property and tangible or intangible assets held or used in connection with the housing project."); *id.* ("'Project' means a housing project or an urban renewal project and extends to all properties, assets, cash, or other funds, used, received or held in connection with the development or operation or disposition of a project or any portion of a project."). There is a complete absence of evidence of Cruz's qualification to testify as to the status of Williams Delight as a public housing community. Therefore, without a stipulation that the public housing community was a housing community owned and controlled by the government, or testimony of a qualified witness to that effect, any finding that the location was in fact public was speculation. This left the question of elemental fact of the shooting having occurred in a Public Place to be determined by the jury.

[48] *See United Broth. of Carpenters & Joiners of Am. v. United States*, 330 U.S. 395, 408-09 (1947) ("No matter how clear the evidence, they are entitled to have the jury instructed in accordance with the standards which Congress has prescribed. To repeat, guilt is determined by the jury, not the court. The problem is not materially different from one where the evidence against an accused charged with a crime is well nigh conclusive and the court fails to give the

¶129 This absence of direct evidence supporting the finding of the elemental fact that the shooting occurred in a Public Place is not dispositive, though. Indeed, the statutory definition, already discussed, allows the Public Place element to be proved—in the absence of direct evidence that the location is "a place which is in point of fact public," 14 V.I.C. § 625(c)(2)—through circumstantial evidence establishing that the shooting occurred at a location "visited by many persons and usually accessible to the public," 14 V.I.C. § 625(c)(2). The jury was to determine whether the circumstantial evidence proved beyond a reasonable doubt that the location of the shooting was a place open to and visited by many people, 14 V.I.C. § 625(c)(2), i.e., a Public Place. The necessary circumstantial evidence of the public nature of the location of the shooting presented to the jury was ubiquitous, as demonstrated by the following discussion. Furthermore, when evaluating prejudice in these circumstances, the question of whether, as to this element, there was a genuine issue of fact for the jury to decide must be considered.

¶130 Witnesses referred to the area of the shooting in colloquial terms—on a road in a residential "public" housing community adjacent to residential buildings and a public dumpster all in proximity to a baseball field and basketball courts—providing factual matter from which a jury could conclude the public was invited to and regularly did access this roadway. Additionally, Gomes testified that, on March 1, 2010, she had gone to pick up Webster at his mother's home located in "the private section of Williams Delight" and had driven to her apartment in another portion of Williams Delight. Further testimony established that there were multiple groups of

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reasonable doubt instruction. It could not be said that the failure was harmless error." (citing *Battle v. United States*, 209 U.S. 36, 38 (1908); *Sparf*, 156 U.S. at 105; *Capital Traction Co. v. Hof*, 174 U.S. 1, 13 (1899); *Bird v. United States*, 180 U.S. 356 (1901); *Pierce v. United States*, 314 U.S. 306 (1941); *Weiler v. United States*, 323 U.S. 606 (1945); *Bruno v. United States*, 308 U.S. 287 (1939))); *e.g.*, *Murell v. People*, 54 V.I. 338, 365 (V.I. 2010) (finding an error to be obvious under existing law in light of the plain language of a statute).

people in proximity of the shooting. Various witnesses testified, *inter alia*, that, at the time of the shooting, (1) Webster and Gomes and their child had driven, on their way to Gomes's apartment to retrieve a video for their entertainment, over this very stretch of road, (2) there was a group of people gathered nearby in front of the home of Wallace's mother, (3) Wallace was in a location separate and apart from the others involved in the shooting, but still in proximity, and (4) there were at least two people, Ortiz and Felix, who were out socializing near the street and basketball courts. This evidence of the public nature of the location of the shooting certainly supported a jury finding beyond a reasonable doubt that it was a Public Place and warranted an appropriate instruction to the jury.

¶131 Finally, Wallace's defense at trial was an alibi defense presented through the testimony of Feliz and Ortiz who asserted that, when the shooting occurred, Wallace was speaking to them at a location distinctly separate and apart from the location of the shooting. This defense placed in issue the determination of whether Wallace was correctly identified as the shooter. However, once the jury made that determination, a determination amply supported by the record, the unchallenged evidence left no significant question of fact as to the public nature of the location for the jury to decide. *Cf. M. Davis*, 69 V.I. at 680 (Swan, J., concurring in part, dissenting in part) ("[E]ven assuming that the trial judge's failure to include a self-defense jury instruction was error that was plain, it does not appear that the failure to include self-defense in the jury instruction affected the outcome of the trial. Michael Davis chose an all-or-nothing alibi defense. . . . It takes a considerable leap of logic to believe that, had the trial court *sua sponte* given a self-defense jury instruction, the jury, acting on that instruction alone and without any argument at any time from

[Defendant's] counsel advancing such a defense, would have disregarded the primary focus of the alibi defense . . . .").

¶132 I do not find this error in the jury instructions warrants the exercise of this Court's discretion to reverse the conviction under Plain Error Review. Despite finding obvious legal error in the instruction,[49] and assuming a substantial right of Wallace's was infringed, I would not reverse Wallace's conviction for First Degree Reckless Endangerment due to the trial court instructing the jury that "A residential street is a public place," which is the functional equivalent of declaring all residential streets are public places, including residential streets in gated communities. Reversal of Wallace's conviction is unwarranted in light of the circumstances surrounding the trial court providing this instruction and the trial record as a whole, e.g., (1) the only factual challenge Wallace presented was whether or not the proper defendant was being prosecuted, (2) the common and ubiquitous nature of the inference of reckless intent from the "natural and probable consequences" of a person's conscious and knowing actions, and (3) Wallace's counsel's affirmative statement that there were no further objections to the jury instructions after having raised objections to other instructions. This affirmative representation as

[49] Indeed, had Wallace's counsel objected, such blatantly incorrect language in a jury instruction would constitute a manifest abuse of discretion, and only upon a finding of harmless error, requiring a finding beyond a reasonable doubt that the error did not impact the jury's verdict, could a conviction not be reversed. It is difficult to see how the prosecution could carry this burden in any appeal in which the defendant genuinely contested the element and requested such an instruction. *See generally* Hon. Mark A. Drummond, *What Judges Want*, LITIGATION: THE JOURNAL OF THE SECTION OF LITIGATION, Vol. 45, Issue 3, Spring 2019, at 17, 19 ("Ninety percent of the jury instructions should be completed before trial and given to the judge. Alternate instructions based upon how the evidence may shake out should be typed and ready to go for the instruction conference. If you don't do many jury trials, ask someone who does . . . ."); *cf. United States v. Shoemaker*, 27 F. Cas. 1067, 1069 (D. Ill. 1840) ("Before [they go] to trial the prosecutor should see that his witnesses are in attendance, and that he is prepared to try the issue.").

to the acceptability of the jury instructions raises issues of invited error, estoppel, and waiver.[50] I do not find that this error—no matter how obvious the misstatement of law was, a point that I do not believe can be over-emphasized—undermines the fairness, integrity, or public reputation of the proceeding and would not reverse on this basis.[51] *See Jones*, 713 F.3d at 351 ("The . . . court's decision to grant the . . . motion [for acquittal] without considering an aiding-and-abetting theory not argued before it did not compromise the integrity, fairness, or public reputation of the judicial proceedings." (citing *Jackson*, 207 F.3d at 922)).

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[50] *United States*, 25 F. Cas. at 1314 ("The regular course of practice . . . in all cases . . . is to state the points of law on which the counsel rely, and wish the instructions of the court in their argument to the jury, . . . at least at some time before the charge is given [to the jury such] that the court may have time to examine and consider them. It would otherwise happen that the court might be surprised into the necessity of expressing opinions, before due time was allowed to deliberate on them."); *see Lembach*, 64 V.I. at 414 ("The record, however, reflects that the Superior Court proposed a verdict form that would have required the jury to make separate findings on premises liability and ordinary negligence, only for Antilles School to request that he verdict form be changed to only provide for a single question on Antilles School's liability. Consequently, Antilles School's own request that the Superior Court change its proposed verdict form has made it effectively impossible for this Court to address its claim that it was prejudiced by the Superior Court's duplicative jury instruction, thus providing little choice but to affirm." (citing *Williams v. People*, 59 V.I. 1024, 1033 (V.I. 2013))); *Ubiles*, 66 V.I. at 588 ("Ubiles' stipulation removed the need to consider any of the very question he now complains he was denied the opportunity to ask. When one stipulates to the admission of scientific testing results, this stipulation eliminates the need to establish the reliability and accuracy of the results. . . . Ubiles' stipulation invited the prosecution to refrain from producing Lt. Jarvis, whose testimony would primarily have gone to the reliably and accuracy of the operation of the breath test machines, questions Ubiles' stipulation removed from consideration." (citing *Percival*, 62 V.I. at 490 & n.3)); *see also United States v. Currens*, 290 F.2d 751, 758-59 (3d Cir. 1961) ("Rule 30 of the Federal Rules of Criminal Procedure, Title 18 U.S.C., provides that, 'No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection.' . . . Rule 30 embodies a well recognized principle of sound judicial administration, viz., that no party ought to be allowed to assign as error on appeal a ruling by a trial judge that might have been corrected in the first instance had a timely objection been made. The rule encourages counsel to call the possibility of prejudicial error to a trial court's attention before the error irreparably taints the litigation." (quoting FED. R. CRIM. P. 30; and citing *United States v. Lang*, 239 F.2d 676 (3d Cir. 1956))); *see generally Gov't of the V.I. v. Connor*, 60 V.I. 597, 604 (V.I. 2014) ("[I]ndependent decisions of lower courts will improve the quality of appellate decisions." (citations and internal quotation marks omitted)); *Phaire*, 17 V.I. at 239 ("In order to decide this case in an impartial and enlightened manner, this Court called upon counsel to assist it by submitting in writing, an exposition of the legal position each party urged the Court to adopt and citation of the authorities upon which each party relied as the foundation for such legal position. The very purpose of the order has been defeated by plaintiff's failure to comply and the broad exposure of the law which is so necessary to judicial determination has been curtailed.").

[51] Given the obviousness of the error of the language, if Wallace's counsel felt there was a factual question to truly be decided by the jury, a timely objection would have been made.

b. "[S]hooting at another human being is reckless."

¶133 Regarding the instruction that "shooting another human being" is reckless, this instruction is problematic for several reasons. First, despite first instructing that recklessness, the mens rea, and depraved indifference to human life, an attendant circumstance, are separate elements, the trial court, in this instruction, equates the two, a misstatement of law that has implications for the jury's proper determination of guilt as to the element of a defendant's mental state—his intent. *See Perkins v. State*, 50 Ala. 154, 158 (Ala. 1874) ("The law does not deduce intent from the facts stated in the charge. The intent is matter of fact, to be ascertained by the jury from the evidence."). Second, this instruction also equates reckless intent with "shooting another human being." *Id.* ("By this charge, the court assumed to draw the inference for [the jury], and invaded their province.").

¶134 What this instruction did in reality was provide a single example—an example that happened to be the exact conduct of which the defendant stood accused—of one possible action that could constitute evidence of reckless intent. *See Stettinius*, 22 F. Cas. at 1327 ("'Surely, there is a wide and evident distinction between an abstract opinion upon a point of law, and an opinion applied to the facts admitted by the party accused or proven against him.'" (internal quotation marks omitted)). However, this fails to explain in broad terms the complete range of conduct that would fall within such a description. Whether or not this language constituted the judge deciding the Grave Risk element of the crime and thus usurping the jury's authority in the trial process in that specific regard, it is unquestionable that intent is always a question of fact for the jury, and the trial court's instruction equating reckless intent with shooting another human being "decided" this issue for the jury. *See Sparf*, 156 U.S. at 98; *Fenwick*, 25 F. Cas. at 1065; *Huffman v. State*, 29

Ala. 40, 44 (Ala. 1856) ("The evidence consists of the testimony of a single witness, who was examined in the presence of the jury. We cannot say from the record that the jury were bound by law to believe him; for, although his testimony as set forth before us contains nothing to excite distrust of him, yet hi manner, which is not and cannot ell be set forth in the record, may have excited doubt and distrust of him in the minds of the jury. His credibility was a question for them. That question was taken from them by the charge of the court; and in doing that, the court erred." (citing *Huff v. Cox*, 2 Ala. 310, 312 (Ala. 1841))).

¶135 Yet again, this is not the end of the inquiry, however. The question remains, assuming a substantial right of Wallace's was affected by this instruction, whether this instruction undermined the integrity, fairness, or public reputation of the proceeding or the court. On this point, it is worth noting that intent is almost exclusively proved by circumstantial evidence providing rational and logical inferences as to the defendant's state of mind. *See Perkins*, 50 Ala. at 158 ("[T]he intention of the defendant was the material inquiry. This intention was . . . to be inferred or not by the jury from the facts proved.").[52] Additionally, the jury is entitled to assume every person intends the natural and probable consequences of their actions and, thus, find the element of a defendant's intent based on circumstantial evidence.[53] Given that the only factual issue raised by Wallace was

[52] *See generally, e.g., Commonwealth v. York*, 50 Mass. 93, 101-02 (Mass. 1845) (Holding that cases involving "implied malice" are cases of common law homicides "where death ensues from acts done recklessly and wantonly, under circumstances of inhumanity and cruelty, indicated a heart devoid of social duty, and fatally bent on mischief. . . . [T]he malice must be an inference of fact from the circumstances [of the killing].").

[53] *Cramer v. United States*, 325 U.S. 1, 31-33 (1945) ("Since intent must be inferred form conduct of some sort, we think it is permissible to draw usual reasonable inferences as to intent from the overt acts. The law of treason, like the law of lesser crimes, assumes every man to intend the natural consequences which one standing in his circumstances and possessing his knowledge would reasonably expect to result from his acts. . . . While of course it must be proved that the accused acted with an intention and purpose to betray or there is no treason, we think that in some circumstances at least the overt act itself will be evidence of the treasonable purpose and intent. . . . Actions of the

the identity of the shooter, once the jury found beyond a reasonable doubt that the shooter was Wallace, no question as to intent remained. Moreover, Wallace's counsel specifically objected to other jury instructions but failed to object to this instruction at the conference and affirmatively stated he had no objections to the instructions provided except for the single objection that had been raised thus presenting issues of waiver, estoppel, and invited error. S*ee generally Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 596 (1993) ("[O]pen debate is an essential part of both legal and scientific analyses.").

¶136 In summary, given that Wallace did not challenge this jury instruction at the trial level and presented a defense challenging only his identification as the perpetrator of the criminal acts charged, and in light of the substantial evidence supporting each of the elements implicated by the erroneous language in the jury instructions, I do not find that this error adversely affected the fairness, integrity, or public reputation of the proceeding or court and would affirm Wallace's conviction for First Degree Reckless Endangerment. *See Jones*, 713 F.3d at 351-52 ("When an advocate . . . does not pursue an argument before a trial court, the plain error standard requires us to decide, in essence, whether the error was so obvious and serious that the trial judge should have overridden the normal function of the adversarial system to take action on her own. This was not such a situation. . . . This argument raised for the first time on appeal does not support reversal." (citing *Jackson*, 207 F.3d at 922)); *Tucker v. State*, 57 Ga. 503, 505 (Ga. 1876) ("[B]ut,

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accused are set in time and place in many relationships. Environment illuminates the meaning of acts, as context does that of words. What a man [intends] may be clear from consideration of the bare acts by themselves; often it is made clear when we know the reciprocity and sequence of his acts with those of others, the interchange between him and another, the give and take of the situation."); *see Ventura v. People*, 64 V.I. 589, 601 (V.I. 2016) ("'[W]here the killing is proved to have been accomplished with a deadly weapon, malice can be inferred from that fact alone.'" (quoting *Nicholas v. People***,** 56 V.I. 718, 732 (V.I. 2012))).

notwithstanding the court may have erred in its charge to the jury, still, the verdict was right under the evidence and the law applicable thereto, and we will not disturb it.").

E. New Trial

¶137 Finally, I address Wallace's challenge to the denial of his motion a new trial based on the information affirmed by Sanes. The trial court—applying *Sampson*, 42 V.I. at 265-66—concluded that the offer of proof[54] did not present evidence that materially contradicted the jury finding of Wallace's guilt. In other words, the evidence presented no conflict with the record evidence such that the trial court's faith in the jury's findings as to proof beyond a reasonable doubt of each element of the crimes charged was undermined to such a degree that it appeared the prosecution had failed in its burden as to at least one element or an innocent person had been convicted. *United States v. Gibert*, 25 F. Cas. 1287, 1314 (D. Mass. 1834) ("I lay no particular stress upon the affidavit of Dalrymple (which has been objected to) for two reasons—first, because he might have been produced as a witness on the stand at the trial, by the counsel for the prisoners, as [another witness] expressly pointed him out at the trial as having been spoken to by him; and, secondly, because I do not think, correctly considered, that anything contained in [the] affidavits does impugn what [the testifying witness] stated at the trial."); *see Stevens II*, 55 V.I. 550, 556 (V.I. 2011) ("Evidence is material if there is a 'reasonable probability' that, if the evidence had been disclosed, the result of the proceeding would have been different." (citing *Kyles v. Whitley*, 514 U.S. 419, 437-38 (1995); *Giglio v. United States*, 405 U.S. 150, 154 (1972))).

[54] *See generally State v. Bay*, 722 P2d 280, 283 (Ariz. 1986) ("An offer of proof is simply a detailed description of what the proposed evidence is." (citing *Jones v. Pak-Mor Mfg. Co.*, 700 P.2d 8919, 827 (Ariz. 1985); M. UDALL AND J. LIVERMORE, ARIZONA LAW OF EVID., § 13, p. 20 (2d ed. 1982))).

¶138 I first note that Wallace has waived any argument that the trial court abused its discretion in applying *Sampson* even though this court has never adopted that framework for its analysis of motions made pursuant to Superior Court Rule 135[55] and has explicitly stated that, under this rule, "the Superior court 'exercises its own judgment in assessing the Government's case. However, even if the Superior court believes that the jury verdict is contrary to the weight of the evidence, it can order a new trial only if it believes that there is a serious danger that a miscarriage of justice has occurred—that is, that an innocent person has been convicted.'" *Stevens I*, 52 V.I. at 305 (quoting *Untied States v. Silveus*, 542 F.3d 993, 1004-05 (3d Cir. 2008)).[56] As such, after considering the complete trial record, I cannot conclude that the trial court's denial of the motion for a new trial was arbitrary or irrational; it does not appear that the trial court's ruling was founded upon "a clearly erroneous finding of fact, an errant conclusion of law[,] or an improper application of law to fact'" or that its actions were "clearly contrary to reason and not justified by the evidence." *Alexander*, 60 V.I. at 494 (citing *S. Francis*, 56 V.I. at 379). Therefore, I would affirm the Superior Court's denial of Wallace's motion for a new trial. *Brown I*, 54 V.I. at 511.

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[55] Wallace's motion for a new trial was decided on October 24, 2014. "Effective December 1, 2017, the Virgin Islands Rules of Criminal Procedure became operative and were subsequently amended on December 19, 2017. S. Ct. Prom. Orders 2017-0010 (Dec. 1 & 19, 2017). Further, Promulgation Order 2017-0006 amended Superior Court Rules 1 and 7 and repealed rules 12, 27, 29, 31, 36, 38, 29, and 50." *Gonsalves*, 2019 V.I. 4, ¶ 30 n.4 (citing *Toussaint*, 67 V.I. at 943 n.6; *M. Davis*, 69 V.I. at 652 n.24 (Swan, J., concurring in part, dissenting in part)). "Because we apply the rules in effect at the time the Superior Court decided the issue under consideration, we apply former Superior Court Rule [135]." *M. Davis*, 69 V.I. at 652 n.24 (Swan, J., concurring in part, dissenting in part) (citing *Toussaint*, 67 V.I. at 941 n.5)). Subsections (a) and (b)(1) of Virgin Islands Rule of Criminal Procedure 33 now govern the Superior Court's determination of a motion for new trial due to newly discovered evidence. V.I.R. CRIM. P. 33(a), (b)(1).

[56] *Cf. Gibert*, 25 F. Cas. at 1315 ("[T]he court ought not, upon general principles, to grant a new trial, unless the fullest credit is given to the new evidence, and the court is of the opinion that it outweighs in strength and clearness and force the evidence on the other side. In short, . . . a new trial ought not to be granted . . . unless, taking into consideration the new evidence, the verdict, in the opinion of the court, ought to be the other way; and that, therefore, injustice has been done to the [defendant]." (citing *Sawyer v. Merrill*, 27 Mass. 16 (Mass. 1830); *State v. Duestoe*, 1 S.C.L. 377 (S.C. 1794))).

III. CONCLUSION

¶139 Because there was no error in the trial court's instruction to the jury regarding Third Degree Assault, and no error in denying the motion for a new trial, I would affirm Wallace's convictions on counts two and three, and therefore I concur in the judgment of this Court in regard to those counts. However, I dissent from the remainder of the Court's disposition. Because there was sufficient evidence to support a conviction for First Degree Reckless Endangerment I would affirm the judgment of the trial court on those charges. Finally, while finding obvious errors of law in the jury instruction defining First Degree Reckless Endangerment, I do not find these errors seriously affected the fairness, integrity, or public reputation of the proceeding and would, therefore, affirm the conviction on that charge.

Dated this 28th day of June, 2019.

BY THE COURT:

/s/ Ive Arlington Swan
IVE ARLINGTON SWAN
Associate Justice

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