For Publication

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

JOSE RODRIGUEZ, Appellant/Defendant, v. **PEOPLE OF THE VIRGIN ISLANDS,** Appellee/Plaintiff.	))))))))	**S. Ct. Crim. No. 2015-0118** Re: Super. Ct. Crim. No. 195/2007 (STX)

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

Argued: April 11, 2017
Filed: June 12, 2019
Cite as: 2019 VI 19

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

APPEARANCES:

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

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OPINION OF THE COURT

CABRET, Associate Justice.

¶ 1 Jose Rodriguez appeals his convictions for kidnapping premised on the abduction, taking or carrying away of the victim, S.A., with the intention to commit rape, first-degree unlawful sexual contact, and interfering with officer discharging his duty, arguing that he was deprived of

his right to speedy trial and his right to an impartial jury, and that the evidence was insufficient to sustain his convictions. For the reasons that follow, we affirm Rodriguez's convictions for first-degree unlawful sexual contact and interfering with officer discharging his duty, but vacate his conviction for kidnapping and his sentence for interfering with an officer discharging his duty. We also vacate in part the Superior Court's denial of Rodriguez's motion for acquittal and new trial, and remand for an evidentiary hearing to investigate possible juror misconduct.

I. FACTUAL AND PROCEDURAL BACKGROUND

¶ 2 On April 23, 2007, S.A., a fifteen-year old run away from a girls' group home on St. Croix, received medical treatment at Juan F. Luis Hospital following a reported rape occurring earlier that morning. (J.A. 270, 286–90). S.A. informed the Virgin Islands Police Department ("VIPD") that a police officer, Rodriguez, was the perpetrator. (J.A. 289–90). The prosecution charged Rodriguez with kidnapping, 14 V.I.C. § 1052(b); first-degree rape, 14 V.I.C. § 1701(3); first-degree unlawful sexual contact, 14 V.I.C. § 1708(1); child abuse, 14 V.I.C. § 505; and two counts of interfering with officer discharging his duty, 14 V.I.C. § 1508. (J.A. 25–27).

¶ 3 Over the next two months, the VIPD obtained blood, semen, and other DNA samples from S.A. and Rodriguez, and submitted them to the Federal Bureau of Investigation ("FBI") for analysis. (Super. Ct. Transmittal 7.28.17(2), at *1–3, 44–46). The FBI issued a report on February 12, 2008, identifying Rodriguez as the source of semen taken from S.A. on April 23, 2007. (Super. Ct. Transmittal 7.28.17(2), at *1, 44–45). After receiving the report, Rodriguez submitted two discovery requests, one on May 5, 2008, and one on October 6, 2008, seeking various materials relating to the testing, analysis, and chain of custody of the DNA samples. (Super. Ct. Transmittal 4.3.17(2), at *39–49). The prosecution did not respond to Rodriguez's requests and on November 6, 2008, he moved to dismiss his charges or in the alternative, exclude the prosecution's DNA

evidence at trial. (J.A. 14; Super. Ct. Transmittal 4.3.17(2), at *27–49). Following a hearing on December 11, 2008, the Superior Court entered an order compelling the prosecution to provide the requested discovery by February 10, 2009. (J.A. 13).

¶ 4 The prosecution did not comply with the court's order, and on February 11, 2009, Rodriguez renewed his earlier motion. (J.A. 13; Super. Ct. Transmittal 4.3.17(2), at *24–26). The prosecution responded by seeking a continuance on February 18, 2009, and later, on February 26, 2009, by providing the requested discovery. (J.A. 13). The court held another hearing on March 6, 2009, and in a March 10, 2009 order, excluded the prosecution's DNA evidence at trial, explaining that the prosecution's extremely "dilatory" conduct would "prejudice Rodriguez in light of [his] April 2009 trial date." (J.A. 12–13; S. Ct. Crim. No. 2009-0028, at *J.A. 24–25). The prosecution filed an interlocutory appeal, (J.A. 12), and this Court, in a two-to-one decision, *People v. Rodriguez* (*Rodriguez I*), S. Ct. Crim. No. 2009-0028, 2010 WL 1576441 (V.I. Apr. 14, 2010) (unpublished), reversed the Superior Court's exclusion of the prosecution's DNA evidence. *Id.* at *7 (Cabret, J.); *id.* at *17 (Swan, J., concurring in part and dissenting in part). And although this Court did not provide a majority reason for that result, two justices agreed that the court failed to consider whether a less drastic sanction such as a continuance could eliminate any prejudice to Rodriguez arising from the prosecution's conduct. *Id.* at *5–6 (Cabret, J.) (explaining that the court failed to consider "whether some action, short of exclusion, could cure whatever prejudice resulted from the [prosecution's] conduct"); *id.* at *13 (Swan, J., concurring in part and dissenting in part) (explaining that the court failed to consider "the curative effect of granting a continuance"). On remand, the Superior Court first addressed unresolved motions to withdraw filed by Rodriguez's attorney. Once Rodriguez was appointed new counsel, the court held a hearing and heard additional argument on his remanded motion to dismiss the charges or in the alternative, exclude the DNA

evidence at trial. (J.A. 10; Super. Ct. Transmittal 7.28.17(2), at *6–7, 9–10). Rodriguez also moved to dismiss on an alternative ground, arguing that his right to a speedy trial was violated by the delay in his case. (Super. Ct. Transmittal 4.3.17(3), at *1–21). The court held another hearing on April 6, 2011, and in a February 17, 2012 memorandum opinion, denied Rodriguez's motion to dismiss based on speedy trial grounds. *See People v. Rodriguez* (*Rodriguez II*), Super. Ct. Crim. No. 195/2007 (STX), 2012 WL 12896259 (V.I. Super. Ct. Feb. 16, 2012) (unpublished). The court reasoned that despite a nearly five-year delay, Rodriguez had "not suffered a level of prejudice warranting dismissal of the underlying charges against him." *Id.* at *7. Also on February 17, 2012, the court denied Rodriguez's remanded motion to dismiss or in the alternative, exclude the DNA evidence at trial. (J.A. 10).

¶ 5 After a series of continuances, the court entered a final scheduling order on December 2, 2014, setting trial for May 11, 2015. (J.A. 4). Shortly before trial, however, the prosecution moved to substitute its DNA expert witness—the FBI technician who authored the February 12, 2008 report—with her supervisor. (J.A. 6; Super. Ct. Transmittal 7.28.17(2), at * 39–43). The court held a hearing and in an April 27, 2015 order, denied the prosecution's motion, explaining that allowing the new expert to testify about the report would violate Rodriguez's right to confront the report's author under the doctrine established in *Crawford v. Washington*, 541 U.S. 36 (2004). (J.A. 6, 4.23.15 Record of Proceeding).

¶ 6 The Superior Court presided over jury trial between May 11 and May 13, 2015. (J.A. 56–669). A number of witnesses testified on behalf of the prosecution, including: S.A., Officer Richard White, Detective Antoinette Sergeant, Kishawn Lopez, Takicia Thomas, and Nancy Crane.

¶ 7 S.A. testified that when she was fifteen years old, having recently transferred from the Youth Rehabilitation Center ("YRC"), which she described as "staying behind bars," to a less

restrictive girls' group home, she and another girl ran away and went to the home of Jamal Lopez and his two brothers. (J.A. 270–73, 299–300, 305–07). She explained that early the morning of April 23, 2007, she hid behind a door in one of the bedrooms when she heard three police officers enter the Lopez brothers' home. (J.A. 277–78, 309–12). A few minutes later, Rodriguez entered the bedroom, saw her, and told her that she "was in a lot of trouble." (J.A. 277, 279). S.A. immediately recognized Rodriguez, noting that she knew him because he had previously disciplined her "many times" for acting rudely and talking back to her grandmother, Gloria Estephane, before she was placed at the YRC. (J.A. 277–79, 294–98, 322). And although her relationship with Rodriguez arose from her misbehavior, including for example, one instance in 2005 when she "threatened" him, (J.A. 297–98), she still felt relieved, believing that she "would be in less trouble" because she knew him. (J.A. 279). But after she asked Rodriguez not to say anything, (J.A. 279–80, 314), he replied by telling her "then you know what you're going to have to do" as he grabbed his crotch. (J.A. 279–80). S.A. protested, telling Rodriguez: "no, I don't go down like that." (J.A. 280, 315). Rodriguez insisted, threatening that "it's either that or back to [the] YRC." (J.A. 280, 314). S.A. relented and Rodriguez informed her that he would return after his shift ended. (J.A. 280, 315). Rodriguez then grabbed and licked S.A.'s breast before he left the bedroom. (J.A. 280).

¶ 8 According to S.A., once the officers left the home, she came out from the bedroom and began packing her bag, telling the Lopez brothers that she intended to leave before Rodriguez returned. (J.A. 282–83, 320). But before she could finish, Rodriguez returned and told her to get into his car. (J.A. 283, 315). She complied, and Rodriguez drove her to "the Woodson area," which she described as a secluded bush area, away from the road and houses. (J.A. 284–85). Rodriguez directed her to get out of the car, telling her that "he's been waiting a long time for this." (J.A.

285–86). S.A. explained that she again complied, and Rodriguez pulled down her shorts, engaged in sexual intercourse with her, and then drove her back to the Lopez brothers' home, arriving "about ten minutes" after she had left. (J.A. 286–87). S.A. also explained that once she entered the home, she immediately told the Lopez brothers about what had happened. (J.A. 287–88). The Lopez brothers eventually persuaded her to seek assistance, and later that afternoon, she contacted a friend from the Women's Coalition, who reported the incident to the VIPD. (J.A. 288–89). S.A. then went to Juan F. Luis Hospital where she underwent a physical examination, which included the collection of various DNA samples, and met with members of the VIPD to report the incident. (J.A. 289, 303).

¶ 9 Officer White testified that he, along with Detective Sergeant and his partner, Officer Rodriguez, went to the Upper Love Area of St. Croix on behalf of Detective Sutton of the Juvenile Bureau early in the morning of April 23, 2007, searching for two runaway girls. (J.A. 191–93, 202). After finding one of the girls, Officer White received information from Detective Sutton that the second girl, S.A., was residing at a home in the area. (J.A. 193). Once the home was located after 12 midnight, Officer White knocked on the door and received permission from a "young gentleman" to enter and search the residence. (J.A. 195–97, 201–02). Officer White stationed himself near the man and two other male residents in the living room while Detective Sergeant and Officer Rodriguez searched the home's three bedrooms. (J.A. 196–97, 208–09). According to Officer White, both Detective Sergeant and Officer Rodriguez finished their respective searches and reported that S.A. was not in the home. (J.A. 197–98). Unable to locate S.A., the group returned to the command station in Frederiksted at around 2:00 a.m. (J.A. 193, 198–99, 206). Officer White immediately signed out, whereas Rodriguez remained in the parking lot to talk with his girlfriend "Taki." (J.A. 199, 204–05).

¶ 10 Detective Sergeant largely corroborated Officer White's testimony, explaining that she accompanied Officers White and Rodriguez to a home in the Upper Love area and searched one of the bedrooms, discovering "some panties." (J.A. 212–17, 219–22). When asked about the remaining bedrooms, she noted that although she was unable to search a second, locked bedroom, Officer Rodriguez assured her that he had checked it and that it was empty. (J.A. 217–18, 222–23, 227, 233–34). Detective Sergeant returned to the command station with Officers White and Rodriguez, and continued her shift until 7:00 a.m. (J.A. 219, 232–33).

¶ 11 Kishawn Lopez, one of the three Lopez brothers, testified that in April 2007, S.A., along with another young woman, came to stay with him and his two older brothers Jamal and Luis Lopez at their home in Upper Love. (J.A. 328–29, 430–31). He further testified that early the morning of April 23, 2007, three officers came to the house searching for S.A. (J.A. 332–33). After the officers were allowed into the home, Officer Rodriguez searched the bedroom where S.A. was staying for about "five" minutes and then announced that the room was "clear." (J.A. 333–35, 435–36). The officers then left and S.A. came out of the bedroom appearing "frightened," "scared," and "in shock." (J.A. 335–36, 371, 388–89). S.A. immediately told Kishawn Lopez that Rodriguez had "touch[ed]" and "suck[ed]" her breast. (J.A. 371–72, 389–90). Kishawn Lopez estimated that Rodriguez came back "no more than an hour" later and took a "frightened" S.A. with him. (J.A. 372–73). When S.A. returned "about a[n] hour" later, she was "shaking" and "crying" and sat huddled with her knees pulled to her chest. (J.A. 373–74, 390, 432–33). S.A. later disclosed to the Lopez brothers that Rodriguez engaged in sexual intercourse with her. (J.A. 374, 433–34).

¶ 12 Thomas, Rodriguez's former girlfriend, also testified. (J.A. 439–52). She explained that she went to the command center in Frederiksted at about 1:00 a.m. on April 23, 2007, intending to talk with Rodriguez about their relationship. (J.A. 440–42). About an hour later, Rodriguez

returned and ended his shift. (J.A. 442–43, 447–49). Rodriguez agreed to meet her at her home, and about fifteen minutes later, he arrived at her home, remaining there until about 3:00 a.m. (J.A. 442–43, 447–48). According to Thomas, he called her later that morning sometime before 5:00 a.m. to confirm that he had reached his home. (J.A. 450–51).

¶ 13 After the prosecution rested, Rodriguez moved for judgment of acquittal, arguing that the evidence was insufficient to demonstrate "force or threat" for kidnapping, (J.A. 465–70), "fear of immediate and great bodily harm" for first-degree rape, (J.A. 470–71), "force" for first-degree sexual contact, (J.A. 471–77), "physical, mental or emotional injury" for child abuse, (J.A. 478–82), and "obstruct[ion] or interfere[nce]" for his second count of interfering with officer discharging his duty. (J.A. 482–86). Rodriguez did not move for acquittal on his first count of interfering with officer discharging his duty, conceding that "if you believe the testimony of [S.A.] and [] Lopez, I think the government has . . . put forth enough evidence for that charge to go to the jury[.]" (J.A. 482). The Superior Court deferred ruling on Rodriguez's motion. (J.A. 498).

¶ 14 During Rodriguez's case-in-chief, the Superior Court heard testimony from Officer Reginaldo Pedro, Estephane, and Kishawn Lopez. Officer Pedro partly corroborated Thomas's testimony, explaining that when he was on duty at the command station in Frederiksted "early" the morning of April 23, 2007, he observed Thomas waiting in the parking lot and later talking with Rodriguez after his shift ended. (J.A. 520–23).

¶ 15 Estephane testified that she had raised S.A. since she was young. (J.A. 527–28). She also testified that S.A. began having problems when she turned fourteen-years old, explaining that S.A. often ran away to meet her boyfriend. (J.A. 528, 533, 538). Estephane also explained that because of S.A.'s behavior, she often contacted the VIPD, including Rodriguez, for assistance. (J.A. 528–30, 534). When asked about a specific disciplinary instance involving Rodriguez in 2005,

Estephane stated that S.A. was "aggressive, tried to "fight [Rodriguez]," and threatened to send her boyfriend "after him" to "beat [him] up." (J.A. 536–39, 546–47).

¶ 16 After Rodriguez rested, he renewed his earlier motion for acquittal, relying on his earlier arguments. (J.A. 581–82). The Superior Court granted Rodriguez's motion regarding his second count of interfering with officer discharging his duty, but deferred ruling on Rodriguez's motion. (J.A. 582–84). The jury returned a verdict finding Rodriguez guilty of kidnapping, first-degree rape, first-degree unlawful sexual contact, child abuse, and interfering with officer discharging his duty. (J.A. 660–62).

¶ 17 On June 29, 2015, Rodriguez renewed his motion for acquittal and moved for new trial, relying in large part on his earlier arguments, but further explaining that, under the second amended information, the prosecution failed to prove that he had engaged in "forced sexual intercourse" for child abuse. (J.A. 4, 836–43). Rodriguez also argued that he was entitled to a new trial because a newspaper article discussing excluded DNA evidence was published the final day of trial.[1] (J.A. 843–45). He emphasized that the article, "whether read or not by any individual juror, was in the

[1] The newspaper article provided in relevant part:

> Assistant Attorney General Kippy Roberson, who is prosecuting the case before Judge Robert Molloy, said during a recess that he had *a sample of Rodriguez's semen that was collected from the alleged victim as evidence to present in the case*.
>
> Roberson said, however, the court ruled against him being able to present the DNA evidence during trial because the FBI analyst who processed it is no longer employed with the agency and the law requires the analyst who processed the evidence to present it in court. Roberson said the law doesn't even allow the FBI supervisor to testify about the evidence, so he wasn't allowed to offer it during trial.

Tom Eader, *Witness IDs Cop as Rapist*, ST. CROIX AVIS, May 13, 2015, at 2 (J.A. 832 (emphasis added)).

public domain, and therefore a juror would not have to personally read it to have knowledge of the information." (J.A. 844).

¶ 18 On September 29, 2015, Rodriguez submitted a *pro se* letter to the Superior Court, requesting, among other forms of relief, acquittal because of the prejudicial impact of the newspaper article. (Super. Ct. Transmittal 7.28.17(2), at *47–50). He explained that, on the morning of May 13, 2015, he "observed juror number one exit her vehicle, a red car, and [read a newspaper] while she was walking towards the court[,] . . . which she tried to conceal when she saw [him] looking at her." (Super. Ct. Transmittal 7.28.17(2), at *47–48). According to Rodriguez, he "also observed a male juror who was talking to another juror in the parking lot, also having a newspaper in his right hand[.]" (Super. Ct. Transmittal 7.28.17(2), at *48).

¶ 19 The Superior Court held a hearing on October 23, 2015, and after oral argument, acquitted Rodriguez of first-degree rape, explaining that the prosecution failed to prove that "[S.A.'s] resistance was prevented by fear of immediate and great bodily harm." (J.A. 740–42). But the court denied Rodriguez's remaining acquittal motion, finding first, that evidence that Rodriguez threatened to return S.A. to the YRC if she refused his sexual demands was sufficient to sustain his conviction for kidnapping, (J.A. 738–40), second, that evidence that Rodriguez intentionally touched S.A.'s breast and threatened to return her to the YRC was sufficient to sustain his conviction for first-degree unlawful sexual contact, (J.A. 742–43), and third, that evidence that Rodriguez engaged in sexual intercourse with S.A. was sufficient to sustain his conviction for child abuse. (J.A. 743–45). The court also denied Rodriguez's alternative motion for a new trial, explaining that Rodriguez failed to overcome the presumption that the jurors followed its many admonishments to avoid news accounts relating to the trial because he did not provide any "evidence that any juror read any newspaper coverage[.]" (J.A. 736). Before proceeding to

sentencing, Rodriguez's attorney requested a continuance, explaining that Rodriguez had informed him that he had recently received information that juror number one read the newspaper in question. (J.A. 749–50, 753–54). When asked about the source of Rodriguez's information, his attorney clarified that Rodriguez did not personally observe juror number one, but learned from another inmate, who in turn learned from a visitor, that juror number one had read the newspaper. (J.A. 752–55). The court denied Rodriguez's request, concluding that Rodriguez failed to "proffer[] sufficient information" because "[t]here [was] no evidence that . . . the juror . . . read that particular article pertaining to the [suppressed] evidence[.]" (J.A. 757).

¶ 20 After a brief recess, the court proceeded with sentencing. Rodriguez, when given an opportunity to address the court, argued first, that his right to speedy trial was violated by the delay in his case and second, that his right to an impartial jury was violated by the release of the newspaper article. (J.A. 761–62). Unlike his attorney, Rodriguez claimed that he *personally* observed a juror, although not juror number one, holding a newspaper the morning of May 13, 2015. (J.A. 762). Rodriguez also claimed that he witnessed a change in that juror, explaining that during the previous two days of trial the juror had greeted him in the mornings, whereas after Rodriguez saw him with the newspaper, the juror "turn[ed away] from [him] and spit." (J.A. 762). Despite these additional factual allegations, the court reaffirmed its earlier ruling, noting again that Rodriguez's allegations were insufficient to overcome the presumption that the jurors followed its admonishments. (J.A. 763–64). The court then sentenced Rodriguez to 20 years of incarceration for kidnapping, 7.5 years of incarceration for first-degree unlawful sexual contact, 10 years of incarceration for child abuse, and 1 year of incarceration and a $1000 fine for interfering with officer discharging his duty. (J.A. 23, 779–80). The court ordered that all of Rodriguez's sentences run concurrent, except for his conviction for kidnapping. (J.A. 780). The court memorialized its

sentence in an October 27, 2015 judgment and commitment, and its corresponding denial of Rodriguez's motion for acquittal and new trial in an October 27, 2015 order. (J.A. 22–24; Super. Ct. Transmittal 3.22.16, at *1). Rodriguez filed a timely notice of appeal. (J.A. 19–20).

II. JURISDICTION AND STANDARD OF REVIEW

¶ 21 "The Supreme Court [has] jurisdiction over all appeals arising from final judgments, final decrees or final orders of the Superior Court." V.I. CODE ANN. tit. 4, § 32(a). The Superior Court's October 27, 2015 judgment and commitment was a final judgment under section 32(a), and thus we have jurisdiction over Rodriguez's appeal. *Woodrup v. People*, 63 V.I. 696, 707 (V.I. 2015) (citing *Percival v. People*, 62 V.I. 477, 483 (V.I. 2015)).

¶ 22 Generally, we engage in plenary review of "all constitutional questions of law." *Carty v. People*, 56 V.I. 345, 354 (V.I. 2012). When reviewing a denial of a motion for a new trial, this Court "will not interfere with the Superior Court's ruling absent an abuse of discretion." *Percival*, 62 V.I. at 490. However, where the denial of a motion for a new trial is based on an application of a legal precept, our review is plenary. *Thomas v. People* (*Thomas II*), 60 V.I. 688, 693 (V.I. 2014). We also review the court's investigation into any extraneous information, and its findings regarding the effect of any such information on the verdict, for an abuse of discretion. *Id.* (citing *United States v. Lloyd*, 269 F.3d 228, 237 (3d Cir. 2001)). Although we generally we review the wording of a jury instruction for abuse of discretion, in the absence of an objection to an instruction, we review for plain error. *Monelle v. People*, 63 V.I. 757, 763 (V.I. 2015). Finally, when reviewing the sufficiency of the evidence, this Court reviews the Superior Court's determination *de novo*, applying the same standard the Superior Court should have applied—viewing the evidence in the light most favorable to the People and affirming the conviction if any

rational finder of fact could have found the essential elements of the crime beyond a reasonable doubt. *Woodrup*, 63 V.I. at 707 (quoting *Percival*, 62 V.I. at 484).

III. DISCUSSION

¶ 23 Rodriguez makes several arguments on appeal. First, he argues that his right to a speedy trial was violated by the more than eight-year delay between his arrest and trial. Second, he argues that the Superior Court erred by denying his motion for new trial because his right to an impartial jury was violated when the jury considered excluded DNA evidence. Third, he argues that the Superior Court erred when it instructed the jury regarding kidnapping because it failed to include the modified test for asportation adopted by the Third Circuit. Fourth, he argues that the evidence was insufficient to support his convictions for first-degree unlawful sexual contact and interfering with officer discharging his duty.[2] We address each argument in turn.

A. Right to Speedy Trial

¶ 24 Rodriguez argues that his right to a speedy trial under the Sixth Amendment[3] was violated, explaining in part that he was prejudiced by the more than eight-year delay between his arrest and

[2] Rodriguez does not challenge his conviction for child abuse. But even were his challenge to that conviction not waived, V.I. R. APP. P. 22(m) (providing that "[i]ssues that were . . . not briefed, or . . . are . . . unsupported by argument and citation to legal authority, are deemed waived for purposes of appeal"), we note that the evidence was sufficient to sustain his conviction. *See Webster v. People*, 60 V.I. 666, 679 (V.I. 2014) (addressing sufficiency argument despite defendant's failure to preserve it on appeal). S.A.'s testimony that she was fifteen years old when Rodriguez engaged in sexual intercourse with her is clear evidence of child abuse under title 14, section 505. *See Rawlins v. People*, 61 V.I. 593, 605 (V.I. 2014) (explaining that testimony that a child engaged in oral sex with defendant was sufficient to establish child abuse); *see also Charles v. People*, 60 V.I. 823, 836 (V.I. 2014) (noting that "sexual intercourse" constitutes "abuse" under title 14, section 505); *Brathwaite v. People*, 60 V.I. 419, 434–35 (V.I. 2014) (same); *LeBlanc v. People*, 56 V.I. 536, 544 (V.I. 2012) (same).

[3] The Sixth Amendment to the United States Constitution applies to the Virgin Islands pursuant to section 3 of the Revised Organic Act. *See* Revised Organic Act of 1954, § 3, 48 U.S.C. § 1561,

trial. (Rodriguez's Br. 15–18; Rodriguez's Reply Br. 7). The right to a speedy trial protects a defendant by "'preventing undue and oppressive incarceration prior to trial, minimizing anxiety and concern accompanying public accusation, and limiting the possibilities that long delay will impair the ability of an accused to defend himself.'" *Betterman v. Montana*, 578 U.S. ___, 136 S. Ct. 1609, 1614 (2016) (quoting *United States v. Marion*, 404 U.S. 307, 320 (1971)) (brackets and ellipses omitted); *accord Ventura v. People*, 64 V.I. 589, 610 (V.I. 2016); *Francis v. People* (*Francis II*), 63 V.I. 724, 744 (V.I. 2015); *Carty*, 56 V.I. at 361. To determine whether a speedy trial violation occurred under the Sixth Amendment, we consider four factors established in *Barker v. Wingo*, 407 U.S. 514 (1972), including: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his rights; and (4) prejudice to the defendant. *Id.* at 530; *accord Francis II*, 63 V.I. at 746; *Carty*, 56 V.I. at 364. We review each factor *de novo*, but review the Superior Court's findings of fact for clear error. *Francis II*, 63 V.I. at 746.

1. Length of Delay

¶ 25 The length of delay is measured from the earlier period of the date of an arrest or an indictment. *Carty*, 56 V.I. at 365. "The longer the delay, the more 'presumptively prejudicial' the delay is considered and weighs in favor of the defendant." *Rivera v. People*, 64 V.I. 540, 582 (V.I. 2016). Rodriguez was arrested on May 2, 2007, (J.A. 18, 41), and his trial began on May 11, 2015. (J.A. 56–669). Under our precedent, this more than eight-year delay is "'presumed to be sufficiently prejudicial to require evaluation of the three remaining factors.'" *Francis II*, 63 V.I. at 748 (quoting *Carty*, 56 V.I. at 365) (approximately 15 months); *see United States v. Loud Hawk*,

reprinted in V.I. CODE ANN., Historical Documents, Organic Acts, and U.S. Constitution at 87–88 (1995 & Supp. 2014) (preceding V.I. CODE ANN. tit. 1); *Heyliger v. People*, 66 V.I. 340, 362 n.12 (V.I. 2017); *Rivera v. People*, 64 V.I. 540, 581 (V.I. 2016).

474 U.S. 302, 314 (1986) (90 months); *Rivera*, 64 V.I. at 582 (approximately 23 months); *Carty*, 56 V.I. at 365 (25 months); *Brown v. People*, 55 V.I. 496, 503–04 (V.I. 2011) (more than 12 months), *overruled on other grounds*, *Williams v. People*, 56 V.I. 821, 832–834 & n.8 (V.I. 2012); *Hakeem v. Beyer*, 990 F.2d 750, 760 (3d Cir. 1993) (more than 14 months).

2. Reason for Delay

¶ 26 With this more than eight-year delay in mind, we must determine whether the prosecution or Rodriguez is more responsible for the delay and why the delay occurred. *Rivera*, 64 V.I. at 582; *Francis II*, 63 V.I. at 748. Delays attributable to the prosecution weigh in Rodriguez's favor, while delays attributed to him do not. *Vermont v. Brillon*, 556 U.S. 81, 90 (2009); *Rivera*, 64 V.I. at 582. The reason for delay is also important. *Francis II*, 63 V.I. at 748. A deliberate attempt to delay the trial in order to hamper the defense weighs heavily against the prosecution, but a more neutral reason such as negligence or overcrowded courts weighs less heavily, and a valid reason, such as tracking down a missing witness, need not be given any weight at all. *Loud Hawk*, 474 U.S. at 315; *Barker*, 407 U.S. at 531; *United States v. Frye* (*Frye II*), 489 F.3d 201, 210 (5th Cir. 2007). We now review the procedural history of this case, *Francis II*, 63 V.I. at 746; *Carty*, 56 V.I. at 361; *United States v. Oriedo*, 498 F.3d 593, 597 (7th Cir. 2007), remaining cognizant that ultimately the prosecution "bears the burden to justify the delay." *United States v. Battis*, 589 F.3d 673, 680 (3d Cir. 2009) (citation and internal quotation marks omitted); *accord Amos v. Thornton*, 646 F.3d 199, 207 (5th Cir. 2011); *United States v. Ingram*, 446 F.3d 1332, 1337 (11th Cir. 2006); *Jackson v. Ray* (*Ray*), 390 F.3d 1254, 1261 & n.3 (10th Cir. 2004) (collecting cases); *McNeely v. Blanas*, 336 F.3d 822, 827 (9th Cir. 2003) (collecting cases); *United States v. Brown*, 169 F.3d 344, 349 (6th Cir. 1999); *State v. Morris*, 749 P.2d. 1379, 1382 (Mont. 1988). And where delay remains unexplained on the record, we weigh it against the prosecution. *See Goodrum v. Quarterman*, 547

F.3d 249, 258–59 (5th Cir. 2008) (weighing unexplained delay against the government); *United States v. Schreane*, 331 F.3d 548, 556 (6th Cir. 2003) (same); *Jones v. Morris*, 590 F.2d 684, 686 (7th Cir. 1979) (same); *Brannen v. State*, 553 S.E.2d 813, 814 (Ga. 2001) (same); *State v. Curtis*, 787 P.2d 306, 315 (Mont. 1990) (same).

¶ 27 Between May 2, 2007, and December 10, 2007, delay arose from the prosecution's continuing investigation and its related motion for continuance. (Super. Ct. Transmittal 7.28.17(1), at *2–3, 6–9; Super. Ct. Transmittal 7.28.17(2), at *1–3, 44–46). Delay caused by prompt, reasonable investigation is often justified. *See Doggett v. United States*, 505 U.S. 647, 656 (1992) (explaining that "pretrial delay is often both inevitable and wholly justifiable" because, among other reasons, "[t]he government may need time to collect witnesses against the accused"); *United States v. Frye* (*Frye I*), 372 F.3d 729, 738 (5th Cir. 2004) (explaining that "reasonable investigative delay" is justified); *Howell v. State*, 418 So. 2d 1164, 1172 (Fla. Dist. Ct. App. 1982) (same); *Hayes v. State*, 680 S.E.2d 182, 187 (Ga. Ct. App. 2009) (same). In evaluating whether investigative delay is reasonable, we consider the prosecution's conduct, the complexity of the case, the seriousness of the underlying charges, and the need for the additional evidence. *See United States v. Bieganowski*, 313 F.3d 264, 284 (5th Cir. 2002) (explaining that the reasonableness of a pretrial delay "will necessarily vary with the complexity of the case"); *Howell*, 418 So. 2d at 1172 (explaining that "[t]he legitimate need for additional time in preparing for a highly complex multi-defendant . . . prosecution would appear to be far more justified than preparing for a relatively straight-forward sale of a small quantity of illegal contraband by a single defendant"). The prosecution may not simply "hold back its prosecution . . . to gain some impermissible advantage at trial." *Doggett*, 505 U.S. at 656; *accord Carty*, 56 V.I. at 366.

¶ 28 In this case, the delay arising from the prosecution's investigation and related request for a

continuance was reasonable. The prosecution, having timely collected and submitted its DNA evidence to the FBI for analysis, (Super. Ct. Transmittal 7.28.17(2), at *1–3, 44–46), requested additional time for the FBI to finish its report. (Super. Ct. Transmittal 7.28.17(1), at *2–3, 6–7). And although the underlying case was not particularly complex, it was also not some "ordinary street crime." *Barker*, 407 U.S. at 531 (explaining that "the delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge"). Rodriguez was charged with several serious crimes against a fifteen-year-old child, many of which occurred while he was on duty. (J.A. 31–39). Moreover, the evidence at issue was important in proving the prosecution's case against Rodriguez, which rested largely on the credibility of a single witness, S.A. *See Rodriguez I*, 2010 WL 1576441, at *6 (noting that excluding the prosecution's DNA evidence "would substantially prejudice [its] ability to vindicate the rights of the public and would likewise have a tremendously distorting effect on the search for truth" (citation and internal quotation marks omitted)). Under these circumstances, particularly where there is no reason to believe that the prosecution acted to "gain some impermissible advantage," we conclude that the prosecution's initial investigative delay was justified. *See Frye I*, 373 F.3d at 738 (explaining that "reasonable investigative delay" does not confer an "impermissible advantage"). As a result, because this 286-day delay was justified, we do not weigh it in Rodriguez's favor. *See id.* (declining to weigh delay arising from reasonable investigation against the government).

¶ 29 Between December 10, 2007, and June 2, 2008, delay arose from a second continuance. (Super. Ct. Transmittal 7.28.17(1), at *1). It is not clear from the record whether this continuance was requested or if the Superior Court ordered this continuance *sua sponte*. *Rodriguez I*, 2010 WL 1576441, at *1. And without any explanation from the prosecution, we weigh this delay against the prosecution. *See Amos*, 646 F.3d at 207 (weighing unexplained delay against the government);

Brannen, 553 S.E.2d at 814–15 (same). As a result, we weigh this 175-delay in Rodriguez's favor. *See Amos*, 646 F.3d at 207; *Schreane*, 331 F.3d at 556.

¶ 30 Between June 2, 2008, and November 10, 2008, delay arose from Rodriguez's motion for continuance based on his attorney's scheduling conflict and her need for additional trial preparation. (J.A. 14–15; Super. Ct. Transmittal 7.28.17(1), at *10; Super. Ct. Transmittal 7.28.17(2), at *4–5). Delay caused by a defendant's motion for continuance is generally attributable to that defendant. *See Ashburn v. Korte*, 761 F.3d 741, 752 (7th Cir. 2014) (weighing delay arising from defendant's motion for continuance against defendant); *Battis*, 589 F.3d at 679 (same); *United States v. Batie*, 433 F.3d 1287, 1291 (10th Cir. 2006) (same); *Robinson v. Whitley*, 2 F.3d 562, 569 (5th Cir. 1993) (same). As a result, because this 161-day delay is attributable to Rodriguez, we do not weigh it in his favor. *See Ashburn*, 761 F.3d at 752.

¶ 31 Between November 10, 2008, and March 30, 2009, delay arose from the Superior Court's *sua sponte* continuance of the trial date, presumably to accommodate its busy docket. (J.A. 13; 11.14.08 Order ("due to circumstances not involving the above mentioned matter, [the trial will be] continued until 4.20.09")). Delay caused by a court's *sua sponte* continuance, like an unexplained delay, is attributable to the prosecution. *See Maples v. Stegall*, 427 F.3d 1020, 1029 (6th Cir. 2005) (weighing delay arising from *sua sponte* continuances against government); *United States v. Gomez*, 67 F.3d 1515, 1522 (10th Cir. 1995) (same); *Burkett*, 951 F.2d at 1440 (same); *Burkett v. Fulcomer*, 951 F.2d 1431, 1440 (3d Cir. 1991) (same). And although Rodriguez also had a pending motion to dismiss at that time, (Super. Ct. Transmittal 4.3.17(2), at *27–37), we decline to attribute any delay to him because his motion was based on the People's unexplained failure to provide discoverable materials relating to the FBI's analysis of the People's DNA samples. *See State v. Elswick*, 693 S.E.2d 38, 48–49 (W. Va. 2010) (weighing delay arising from

defendant's motions for continuance against government because those motions "were precipitated by late production of discoverable material such as delayed production of forensic testing results"); *cf. Colby v. McNeil*, 595 So. 2d 115, 117–18 (Fla. Dist. Ct. App. 1992) (same, but under FLA. R. CRIM. P. 3.191); *Commonwealth v. Taylor*, 12 N.E.3d 955, 964–65 (Mass. 2014) (explaining under MASS. R. CRIM. P. 36, that "[w]here there is no reasonable dispute that the discovery in question is, in fact, mandatory . . . and where the Commonwealth cannot justify its delayed production, the [delay] ordinarily should [weigh against the government]"); *State v. Allen*, 227 P.3d 219, 227 (Or. Ct. App. 2010) (explaining under OR. REV. STAT. §§ 135.747 and 135.750, that delay arising from the government's discovery violation is attributable to the government). As a result, because this 140-day delay is attributable to the prosecution, we weigh this delay in Rodriguez's favor. *See Maples*, 427 F.3d at 1029; *Gomez*, 67 F.3d at 1522; *Burkett*, 951 F.2d at 1440.

¶ 32 Between March 30, 2009, and April 14, 2010, delay arose from the prosecution's interlocutory appeal of the Superior Court's order excluding the DNA evidence taken from Rodriguez and S.A. (J.A. 12). Delay caused by an interlocutory appeal is ordinarily justified. *Loud Hawk*, 474 U.S. at 315. But if the underlying appeal is filed with "bad faith or dilatory purpose" or is "clearly tangential or frivolous," then it will be weighed against the prosecution. *Id.* at 316; *accord United States v. Carpenter*, 781 F.3d 599, 610 (1st Cir. 2015); *Frye II*, 489 F.3d at 210; *State v. Robles-Nieves*, 306 P.3d 399, 404 (Nev. 2013); *State v. Zmayefski*, 836 A.2d 191, 195 (R.I. 2003). In assessing the purpose and reasonableness of such an appeal, we consider the strength of the prosecution's position on the appealed issue, the importance of the issue in the posture of the case, and in some instances, the seriousness of the crime. *Loud Hawk*, 474 U.S. at 315.

¶ 33 There is little doubt that the prosecution's position was justified. As reflected in our earlier decision reversing the Superior Court's order excluding the DNA evidence, the prosecution's

appeal was reasonable. *Rodriguez I*, 2010 WL 1576441, at *1, 7; *see Loud Hawk*, 474 U.S. at 316 ("[R]eversals by the Court of Appeals are prima facie evidence of the reasonableness of the Government's action."); *Carpenter*, 781 F.3d at 611 (explaining in part that an appeal was reasonable because it "garnered an actual vote by a circuit court judge in favor of the appeal"); *United States v. Young*, 657 F.3d 408, 417 (6th Cir. 2011) (explaining in part that an appeal was reasonable because it "ultimately prevailed"). It is also clear that the prosecution's use of the DNA evidence, which included semen samples taken from S.A., was germane to proving its case against Rodriguez for kidnapping, first-degree rape, and child abuse, and to bolstering S.A.'s credibility. *See United States v. Sims*, 847 F.3d 630, 635 (8th Cir. 2017) (explaining under *Loud Hawk* that DNA evidence taken from a firearm was central to the government's felon-in-possession charge); *cf. State v. Samora*, 387 P.3d 230, 238–39 (N.M. 2016) (explaining under *Loud Hawk* that an excluded statement was "important because, if admitted, it served as evidence that Defendant [had] sex with someone who had the specific characteristics of the alleged victim"). Further, because the underlying case charged Rodriguez with abusing, raping, and kidnapping a fifteen-year-old child, it involved serious crimes. *See People v. Holmes*, 48 N.E.3d 185, 210 (Ill. Ct. App. 2016) (concluding that charged offenses relating to sexual assault were "serious" under *Loud Hawk*); *compare* 14 V.I.C. § 1052(b) (imposing a minimum sentence of 15 years of incarceration, but no maximum sentence for kidnapping), *with Carpenter*, 781 F.3d at 611 (concluding that charged offenses for mail fraud and wire fraud under 18 U.S.C. §§ 1341 and 1343, which each imposed a maximum sentence of 20 years of incarceration, were "very serious" under *Loud Hawk*). As a result, because this 380-day delay was justified, we do not weigh it in Rodriguez's favor. *See Loud Hawk*, at 316 (declining to weigh delay arising from interlocutory appeal against the government); *United States v. Trueber*, 238 F.3d 79, 89 (1st Cir. 2001) (same); *State v. Flores*, 355 P.3d 81, 91

(N.M. Ct. App. 2015) (same); *Commonwealth v. DeBlase*, 635 A.2d 1091, 1095 (Pa. Super. Ct. 1994) (same).

¶ 34 Between April 14, 2010, and February 10, 2011, delay arose from Rodriguez's attorney's motion and renewed motion to withdraw. (J.A. 11–12). Delay caused by a defendant's attorney's motion to withdraw, like delay caused by a defendant's motion for continuance, is generally attributable to the defendant unless, for example, the delay is caused by "a breakdown in the public defender system," in which case, the delay is attributable to the prosecution. *Brillon*, 556 U.S. at 85; *accord O'Quinn v. Spiller*, 806 F.3d 974, 978 (7th Cir. 2015); *Battis*, 589 F.3d at 679. The record here supports no such institutional breakdown, but merely an unwillingness by Rodriguez's assigned counsel to move the case forward. *See Brillon*, 556 U.S. at 85, 92–93 (concluding that a nearly 18-month delay in resolving defendant's representation did not establish an institutional breakdown). Once this Court resolved the prosecution's interlocutory appeal, Rodriguez's counsel moved to withdraw and reassign the case to the Virgin Islands Public Defender's Office, explaining first, that he was unfamiliar with the case and second, that Rodriguez's former attorney was more familiar with the case and had recently taken a position with the Public Defender's Office. (J.A. 12; Super. Ct. Transmittal 7.28.17(1), at *18–20). After receiving a one-week continuance, the Public Defender's Office opposed Rodriguez's counsel's motion, noting that he had nearly two years to familiarize himself with the case and had been acting as sole counsel since January 2010. (J.A. 11; Super. Ct. Transmittal 7.28.17(1), at *14–16, 18–22). The Superior Court at first denied Rodriguez's attorney's motion, but later, granted his renewed motion, reassigned the case to the Public Defender's Office, and continued oral argument on Rodriguez's pending motion to dismiss or in the alternative, exclude the prosecution's DNA evidence at trial. (J.A. 10; Super. Ct. Transmittal 5.24.17, at *9; Super. Ct. Transmittal 7.28.17(1), at *23–24; Super. Ct.

Transmittal 7.28.17(2), at *6–7, 9–10). As a result, because this 302-day delay is attributable to Rodriguez, we do not weigh it in his favor. *See Francis II*, 63 V.I. at 749–50 (weighing delay arising from defendant's attorney's motion to withdraw and associated *sua sponte* continuance against defendant (collecting cases)); *Carty*, 56 V.I. at 365–66 (same); *United States v. Roggio*, 863 F.2d 41, 42 (11th Cir. 1989) (same); *cf. State v. Curry*, 790 N.W.2d 441, 450 (Neb. Ct. App. 2010) (explaining under NEB. REV. STAT. § 29-1207, that "in the case of a motion of counsel to withdraw, the clock does not start again until new counsel has been appointed").

¶ 35 Between February 10, 2011, and April 16, 2012, delay arose from Rodriguez's motion to dismiss based on speedy trial grounds. (J.A. 10). Delay caused by a defendant's motion to dismiss, like delay caused by a defendant's motion for continuance, is generally attributable to that defendant. *See Carpenter*, 781 F.3d at 612 ("It is well-established that it cuts against a defendant's speedy trial claims when his own motions contribute to the delay." (collecting cases)); *United States v. Jones*, 524 F.2d. 834, 850 (D.C. Cir. 1975) ("A defendant should not be able to take advantage of a delay substantially attributable to his own motions when the court acts upon them within a reasonable period of time."). If it were otherwise, defendants could simply abuse motion practice to secure acquittal. *See Brillon*, 556 U.S. at 90 ("[D]efendants may have incentives to employ delay as a 'defense tactic': delay may work to the accused's advantage[.]" (citation and internal quotation marks omitted)); *Loud Hawk*, 474 U.S. at 316 ("Having sought the aid of the judicial process and realizing the deliberateness that a court employs in reaching a decision, the defendants are not now able to criticize the very process which they so . . . called upon." (citation and internal quotation marks omitted)); *State v. Wasson*, 879 P.2d 520, 526 (Haw. 1994) (noting that "a defendant who believes that a delay in his or her trial is advantageous might move for dismissal on speedy trial grounds, hoping that if the motion is denied, trial will continue to be

postponed"). At some point, however, it becomes unreasonable to attribute delay caused by a defendant's motion to that defendant, as opposed to the court's busy docket. *See United States v. New Buffalo Amusement Corp.*, 600 F.2d 368, 377 (2d Cir. 1979) (explaining that delay arising from "the trial court's failure to rule expeditiously on [defendants'] motions" must be weighed against the government); *cf. Nicholson v. Superior Court of Guam*, 2007 Guam 9 ¶¶ 27–28 (explaining under 8 GUAM CODE ANN. § 80.60, that "[w]here the length of time taken to resolve a motion is inordinate and unreasonable, such time shall not be attributed to the defendant"); *Watts v. Fleischman*, 778 P.2d 1232, 1233–34 (Ariz. 1989) (en banc) (explaining under ARIZ. R. CRIM. P. 8.4, that delay arising from a court's "inadequate case management procedures" should not be attributable to the defendant). And although delay arising from a busy docket is not afforded substantial weight, it is still attributable to the prosecution. *Barker*, 407 U.S. at 531; *Maples*, 427 F.3d at 1029; *Gomez*, 67 F.3d at 1522; *Burkett*, 951 F.2d at 1439–40.

¶ 36 In this case, the Superior Court entered its eleven-page memorandum opinion denying Rodriguez's motion to dismiss nearly one year after it received briefing and heard oral argument. (J.A. 10; Super. Ct. Transmittal 5.24.17, at *9; Super. Ct. Transmittal 7.28.17(2), at *6–7, 9–10, 13–20). And despite this Court's reluctance—in the absence of an applicable rule or statute[4]—to recognize a reasonable amount of time for a court to deliberate and consider an issue, we simply cannot attribute the entirety of this 431-day delay to Rodriguez. As emphasized in Supreme Court precedent, we must balance the competing concerns of orderly, deliberate review with a speedy

[4] The Virgin Islands Legislature has not adopted a Speedy Trial Act and if the Superior Court has adopted time standards for the disposition of cases, those standards are simply "encouraged" and do not apply to this case because it was filed before June 1, 2013. *Francis II*, 63 V.I. at 745 & n.13; In re Adoption of Time Standards, Super. Ct. Misc. No. 39/2013, 2013 WL 9581094, at *1 (V.I. Super. Ct. Apr. 23, 2013) (unpublished).

trial. *Loud Hawk*, 474 U.S. at 313–14; *see United States v. Ewell*, 383 U.S. 116, 119 (1966) ("[T]his Court has consistently been of the view that [t]he right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public justice." (citation and internal quotation marks omitted)). In striking this balance, a number of jurisdictions have concluded that 30 days is generally a reasonable time for a court to rule on a motion to dismiss following briefing and oral argument. *See* 18 U.S.C. § 3161(h)(1)(H) (excluding from speedy trial calculation any "delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the court"); *Crawford v. State*, 337 P.3d 4, 11 (Alaska Ct. App. 2014) (same, but under ALASKA R. CRIM. P. 45(d)(1)); *Gwin v. State*, 9 S.W.3d 501, 503–04 (Ark. 2000) (same, but under ARK. R. CRIM. P. 28.3); *State v. Cote*, 922 A.2d 322, 324 n.3 (Conn. App. Ct. 2007) (same, but under CONN. PRACTICE BOOK § 43-40(1)(E)); *Commonwealth v. Roman*, 18 N.E.3d 1069, 1077 (Mass. 2014) (same, but under MASS. R. CRIM. P. 36(b)(2)(A)(vii)). And without any attempt by the prosecution to explain why the court's delay was reasonable under the circumstances—for example, a motion's novelty, complexity, and procedural posture may justify additional delay, *cf. Nicholson*, 2007 Guam 9 ¶ 25 (explaining under 8 GUAM CODE ANN. § 80.60, that the novelty or complexity of a motion can impact whether good cause exists to justify additional delay in "working towards a prompt disposition of a motion"); *State v. Johnson*, 557 P.2d 1063, 1067 (Ariz. 1976) (en banc) (explaining under ARIZ. R. CRIM. P. 8.4, that delay arising from defendant's related motion before a different court could be attributed to the defendant)—we see little reason to depart from the thirty-day balance struck in these jurisdictions. As a result, because we afford the court 30 days for deliberation after oral argument on April 6, 2011, we attribute an 85-day delay extending between February 10, 2011,

and May 6, 2011, to Rodriguez, *see Ashburn*, 761 F.3d at 752 (weighing delay arising from defendant's motion to dismiss against defendant); *cf. United States v. Williams (Williams I)*, 557 F.3d 943, 947–48 (8th Cir. 2009) (same, but under 18 U.S.C. § 3161), and we weigh the remaining 346-day delay in his favor. *Cf. United States v. Scott*, 270 F.3d 30, 55–57 (1st Cir. 2001) (weighing delay extending beyond 30-day deliberation period against the government under 18 U.S.C. § 3161); *Commonwealth v. Bourdon*, 863 N.E.2d 88, 93 (Mass. App. Ct. 2007) (same, but under MASS. R. CRIM. P. 36).

¶ 37 Between April 16, 2012, and November 26, 2012, delay again arose from Rodriguez's attorneys' motions to withdraw. (J.A. 9–10). The Superior Court granted the first motion, which was premised on a bar complaint filed by Rodriguez against his attorney, and appointed him new counsel. (J.A. 9; Super. Ct. Transmittal 5.24.17, at *8; Super. Ct. Transmittal 7.28.17(1), at *28; Super. Ct. Transmittal 7.28.17(2), at *21–25). Rodriguez's new attorney subsequently sought to withdraw and to continue the existing trial date. (J.A. 8–9; Super. Ct. Transmittal 7.28.17(1), at *29–30, 34–35). In August, the court appointed Rodriguez a new attorney and continued the trial date until November 26, 2012. (Super. Ct. Transmittal 5.24.17, at *7; Super. Ct. Transmittal 7.28.17(1), at *39; Super. Ct. Transmittal 7.28.17(2), at *26–27). As a result, because this 224-day delay is attributable to Rodriguez, we do not weigh it in his favor. *See Francis II*, 63 V.I. at 749–50; *Carty*, 56 V.I. at 365–66.

¶ 38 Between November 26, 2012, and June 16, 2014, delay arose mainly from the Superior Court's *sua sponte* continuances of the trial date. (Super. Ct. Transmittal 5.24.17, at *6; Super. Ct. Transmittal 7.28.17(1), at *40–41; Super. Ct. Transmittal 7.28.17(2), at *28–31). As explained above, delay caused by a *sua sponte* continuance is attributable to the prosecution. *See Maples*, 427 F.3d at 1029; *Gomez*, 67 F.3d at 1522; *Burkett*, 951 F.2d at 1440. Here, the Superior Court's

sua sponte continuances moved trial from November 26, 2012, to March 24, 2014. (Super. Ct. Transmittal 5.24.17, at *6; Super. Ct. Transmittal 7.28.17(1), at *40–41; Super. Ct. Transmittal 7.28.17(2), at *28–31). But delay also arose in part from Rodriguez's February 21, 2014 motion for continuance based on his attorney's calendar conflict. (Super. Ct. Transmittal 5.24.17, at *5; Super. Ct. Transmittal 7.28.17(2), at *32–33). And the Superior Court, despite the prosecution's opposition, granted Rodriguez's motion and continued trial from March 24, 2014, to June 16, 2014. (Super. Ct. Transmittal 5.24.17, at *5; Super. Ct. Transmittal 7.28.17(2), at *29–31, 34, 36–38). As a result, because an 84-day delay is attributable to Rodriguez's motion for continuance, *see Ashburn*, 761 F.3d at 752–53 (weighing delay arising from defendant's motion for continuance against defendant); *Batie*, 433 F.3d at 1291 (same); *Robinson*, 2 F.3d at 569 (same), we weigh 483 days—and not 567 days—in his favor. *See Maples*, 427 F.3d at 1029; *Gomez*, 67 F.3d at 1522; *Burkett*, 951 F.2d at 1440.

¶ 39 Between June 16, 2014, and May 11, 2015, the first day of trial, delay arose from the prosecution's motion to continue trial based on the unavailability of its key witness, S.A. (Super. Ct. Transmittal 5.24.17, at *5; Super. Ct. Transmittal 7.28.17(2), at *36). The Superior Court granted the prosecution's motion on June 18, 2014, and continued trial until May 11, 2015. (J.A. 6; Super. Ct. Transmittal 5.24.17, at *5; Super. Ct. Transmittal 7.28.17(2), at *37–38). Delay caused by a missing witness may, depending on the circumstances, be justified. *See generally Doggett*, 505 U.S. at 656 (emphasizing that "[t]he government may need time to collect witnesses against the accused"); *Barker*, 407 U.S. at 531 ("[A] valid reason, such as a missing witness, should serve to justify appropriate delay."). In evaluating whether such delay is justified, this Court has considered the importance of the witness's testimony in proving the prosecution's case and the reason for the witness's absence. *Francis II*, 63 V.I. at 750–51; *see United States v. Souza*, 749

F.3d 74, 82 (1st Cir. 2014) (declining to weigh delay arising from "medical leave of an IRS agent who was needed to produce certain documents" against the government); *United States v. Twitty*, 107 F.3d 1482, 1490 (11th Cir. 1997) (same, but delay arising from the illness of a witness described as "essential" by the trial court); *United States v. Tranakos*, 911 F.2d 1422, 1428 (10th Cir. 1990) (same, but delay arising from the government's inability to locate a codefendant characterized as a "necessary individual"). Since the testimony of the S.A. was critical to proving the prosecution's case, we will focus on the prosecution's stated reason for her absence. *See United States v. Howard*, 218 F.3d 556, 563–64 (6th Cir. 2000) (declining to weigh delay arising from the unavailability of a sexual-assault victim against the government where she "had been hospitalized after going into premature labor").

¶ 40 In its motion to continue trial, the prosecution explained that, despite numerous attempts to contact S.A. since her relocation off island, it had only reached her on June 10, 2014, and that she was reluctant to appear voluntarily because of the many continuances in the underlying case. (Super. Ct. Transmittal 5.24.17, at *5; Super. Ct. Transmittal 7.28.17(2), at *34–37). The prosecution also explained that it would be "unable to make the arrangements necessary to secure her appearance by June 16, 2014[.]" (Super. Ct. Transmittal 7.28.17(2), at *36). Without more information, however, neither assertion is sufficient to justify delay under the Sixth Amendment. As explained by the Supreme Court of Idaho, "[t]here is an enormous difference between being inconvenienced and being unavailable. True unavailability suggests an unqualified inability to attend, while inconvenience merely implies that . . . attendance would be burdensome." *State v. Clark*, 16 P.3d 931, 936 (Idaho 2000). From the prosecution's motion, it is unclear whether it exercised due diligence in securing S.A.'s appearance, *see United States v. Schlei*, 122 F.3d 944, 987 (11th Cir. 1997) (declining to weigh delay arising from unavailable witnesses against the

government where it had been diligent in its effort to obtain their presence at trial); *cf. Commonwealth v. Hyland*, 875 A.2d 1175, 1191–92 (Pa. Super. Ct. 2005) (same, but UNDER PA. R. CRIM. P. 600), let alone whether S.A.'s reluctance to appear rose to the level of an *unqualified inability* to attend. *See Isaac v. Perrin*, 659 F.2d 279, 283 (1st Cir. 1981) (explaining that delay arising from the "psychological unpreparedness of a nine-year-old victim" was justified); *Gelfand v. People*, 586 P.2d 1331, 1333 & n.1 (Colo. 1978) (same, but "witness was hospitalized and too ill to bear the stress of testifying"); *Bell v. State*, 651 S.E.2d 218, 220 (Ga. Ct. App. 2007) (same, but witness was deployed on active duty for the military); *cf. United States v. Faison*, 679 F.2d 292, 297 (3d Cir. 1982) ("[A] witness who cannot testify because of then-existing temporary physical or mental illness or infirmity is unavailable for purposes of calculation of time under the Speedy Trial Act."). Further, in its earlier opposition to Rodriguez's motion to continue, the prosecution notified the court that between March and November 2014, S.A. was unavailable for trial *during the month of April*—not June. (Super. Ct. Transmittal 7.28.17(2), at *34–35). Based on this record, we conclude that the prosecution failed to make an adequate showing that S.A. was *unavailable* for trial. *See Clark*, 16 P.3d at 936–37 (explaining that the government's concern that a witness would "travel from out of state only to face postponement of . . . trial" was insufficient to rise "to the level of a legal excuse for the delay"). As a result, because this 286-delay is attributable to the prosecution, we weigh it in Rodriguez's favor. *See Francis II*, 63 V.I. at 751 (weighing delay arising from the prosecution's motion for continuance against the prosecution); *Gomez*, 67 F.3d at 1522 (same).

¶ 41 In sum, we conclude that of the more than eight-year delay between Rodriguez's arrest and trial, the prosecution was responsible for nearly three years and eleven months (1430 days), Rodriguez was responsible for nearly two years and five months (856 days), and the remaining

delay—nearly one year and ten months (666 days)—was justified and is not attributable to either party. And although the prosecution was more responsible than Rodriguez for the underlying delay, we weigh this factor less heavily in his favor because, as explained above, the delay attributable to the prosecution arose from negligent conduct and overcrowded courts, not deliberate conduct intended to hamper his defense. *See Barker*, 407 U.S. at 531; *Frye II*, 489 F.3d at 211.

3. Defendant's Assertion of his Rights

¶ 42 Next, we "examine whether the defendant asserted his rights, evidencing a deprivation of his constitutional rights." *Rivera*, 64 V.I. at 584 (citing *Carty*, 56 V.I. at 366–67); *accord Francis II*, 63 V.I. at 752. As noted in our precedent,

> A defendant shows that he has asserted his right to a trial (1) when he is represented by counsel and he can identify a motion or evidence of direct instructions to his counsel to assert that right at a time when a formal assertion of his rights would render some chance of success; or (2) if defendant is proceeding *pro se*, he is not required to make a procedurally perfect assertion of his right to a speedy trial; instead, he must make a reasonable assertion of his right to a speedy trial in a manner that would place authorities on notice of his claim.

Francis II, 63 V.I. at 752 (quoting *Carty*, 56 V.I. at 366).

¶43 Rodriguez filed a motion asserting his right to speedy trial on February 10, 2011. (J.A. 4, 10, 13–14; Super. Ct. Transmittal 4.3.17(3), at *1–14); *Rodriguez I*, 2010 WL 1576441, at *1–2. He also asserted his right to speedy trial in a series of *pro se* letters submitted to the Superior Court on July 16, 2010, January 31, 2012, and June 4, 2012. (Super. Ct. Transmittal 7.28.17(1), at *27, 33, 44). And although "[t]he timing and number of instances in which the accused objects to pretrial delay are not talismanic," *State v. Ariegwe*, 167 P.3d 815, 841 (Mont. 2007), Rodriguez's conduct evidenced at least some "desire to commence trial as soon as possible." *Rivera*, 64 V.I. at 584 (explaining that where a defendant "requested his right to a speedy trial at his arraignment" and "repeatedly referred to his speedy trial rights and opposed motions for extension of time"

throughout his proceedings, he "clearly evince[ed] a desire to commence trial as soon as possible").

But we do not view Rodriguez's conduct by itself. As we explained before,

> The accused's various responses to the delays must be evaluated based on the surrounding circumstances—such as the timeliness, persistence, and sincerity of the objections, the reasons for the acquiescence, whether the accused was represented by counsel, the accused's pretrial conduct (as the that conduct bears on the speedy trial right), and so forth.

Francis II, 63 V.I. 753 (quoting *Ariegwe*, 167 P.3d at 841) (alterations omitted); *Loud Hawk*, 474 U.S. at 655–56 (emphasizing that a defendant's assertions of his right to speedy trial "must be viewed in the light of [his] other conduct); *Guam v. Flores*, 2009 Guam 22 ¶ 47 (same); *State v. Lau*, 890 P.2d 291, 300 (Haw. 1995) (same). When viewed in light of the surrounding circumstances, particularly Rodriguez's own role in delaying his trial, his failure to assert his right until more than three years after his arrest, and his failure to continue to assert his right for a nearly three-year period between June 4, 2012, and his first day of trial, May 11, 2015, Rodriguez's desire for an immediate trial appears less sincere.[5] *See Francis II*, 63 V.I. at 753 (explaining that defendant's failure to "persistent[ly]" assert his right to trial "until a year after he was arrested" undermined the sincerity of his assertion); *United States v. Parker*, 505 F.3d 323, 330 (5th Cir. 2007) (same, but defendant waited 14 months); *People v. Beard*, 648 N.E.2d 111, 116 (Ill. Ct. App. 1995) (explaining that defendant's stipulation to a number of continuances undermined the sincerity of his assertion); *Dunaway v. Commonwealth*, 60 S.W.3d 563, 571 (Ky. 2001)

[5] We note that from the record, Rodriguez first notified the Superior Court that he was ready to proceed to trial in this case in November 2013. (*See* 11.5.13 Record of Proceeding). But as explained above in section III(A)(2), by the following February, he requested an additional continuance, which the court granted over the People's opposition. *See Dunaway v. Commonwealth*, 60 S.W.3d 563, 571 (Ky. 2001) (explaining that, notwithstanding defendant's assertion of readiness for trial, his subsequent continuances "belie[d] his claim of being prepared and further deflate[d] his speedy trial claim").

(explaining that defendant's requests for continuances undermined the sincerity of his assertion). As a result, even though we accord "strong evidentiary weight" to Rodriguez's assertions of his right to a speedy trial, *Barker*, 407 U.S. at 531–32, we weigh this factor only slightly in his favor because his assertions were first made well after his arrest and were intertwined with his own numerous continuances and related motions. *See Francis II*, 63 V.I. at 753 (weighing third *Barker* factor "slightly" in defendant's favor because he was not persistent in his request); *Flores*, 2009 Guam 22 ¶ 48 (same, but defendant was responsible for a number of delays arising from his various motions); *Dunaway*, 60 S.W.3d at 571 (weighing third *Barker* factor "not as heavily" in defendant's favor because he was responsible for a number of delays arising from his own acquiescence and motions).

4. Prejudice to the Defendant

¶ 44 The last factor—prejudice caused by the delay—is the most important of the four and must be demonstrated by the defendant.[6] *Rivera*, 64 V.I. at 582; *Francis II*, 63 V.I. at 746; *Brown*, 55 V.I. at 504. In evaluating prejudice, we consider the three interests the right to speedy trial is

[6] We note that a number of courts—including the Supreme Court of the United States—presume prejudice where the delay between indictment and trial attributable to the government's negligence is sufficiently long. *Compare Doggett*, 505 U.S. at 658 (presuming prejudice where 6-year delay was attributable to the government's negligence), *United States v. Velazquez*, 749 F.3d 161, 181 & n.19, 186 (3d Cir. 2014) (same, but 5-year delay); *United States v. Bergfeld*, 280 F.3d 486, 491 (5th Cir. 2002) (same), *United States v. Brown*, 169 F.3d 344, 351 (6th Cir. 1999) (same), *United States v. Shell*, 974 F.2d 1035, 1036 (9th Cir. 1992) (same), *State v. Johnson*, 734 S.E.2d 12, 16–17 (Ga. 2012) (same, but approximately 5.2-year delay), *State v. Palacio*, 212 P.3d 1148, 1156 (N.M. Ct. App. 2009) (same, but 7-year delay), *with Ray*, 390 F.3d at 1263–64 (declining to presume prejudice where 4.3-year delay was attributable to the government's negligence); *United States v. Serna-Villarreal*, 352 F.3d 225, 232 (5th Cir. 2003) (same, but 3.6-year delay). Nonetheless, under the circumstances here, we conclude that the less than four-year delay attributable to the People's negligence did not "exceed[] a point where there is a probability of substantial prejudice." *Humphrey v. State*, 185 P.3d 1236, 1246 (Wyo. 2008). Thus, we decline to relieve Rodriguez of his burden of proving particular prejudice under the fourth *Barker* factor. *See Ray*, 390 F.3d at 1263–64.

designed to protect: "'(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired.'" *Francis II*, 63 V.I. at 753 (quoting *Carty*, 56 V.I. at 367); *accord Barker*, 407 U.S. at 532. "Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system." *Barker*, 407 U.S. at 532; *accord Doggett*, 505 U.S. at 654; *Williams I*, 557 F.3d at 949. Rodriguez relies on the second and third interests, arguing first, that he was "miserable," "anxious," "divorced," and "could not find a job" when he was out on bail, and second, that the delay hampered his ability to defend himself because three witness—Detective Sutton, Luis Lopez, and Jamal Lopez—were unavailable to testify at trial and S.A. admitted to impaired memory. (Rodriguez's Br. 17–18).

¶ 45 As for the second interest, there is little doubt that even though Rodriguez was only incarcerated for a short period before trial, he was "still disadvantaged by restraints on his liberty and by living under a cloud of anxiety, suspicion, and often hostility." *Barker*, 407 U.S. at 533; *accord Marion*, 404 U.S. at 320; *Francis II*, 63 V.I. at 753–54; *Williams I*, 557 F.3d at 949; *United States v. Munoz-Franco*, 487 F.3d 25, 61 (1st Cir. 2007); *United States v. Jackson*, 542 F.2d 403, 409 (7th Cir. 1976). Still, he cannot rely on "[v]ague allegations of anxiety to state a cognizable claim" under the Sixth Amendment. *Hakeem*, 990 F.2d at 762; *accord United States v. Simmonds*, 536 F.2d 827, 832 (9th Cir.), *cert. denied*, 429 U.S. 854 (1976); *United States v. Shepherd*, 511 F.2d 119, 123 (5th Cir. 1975); *State v. Flowers*, 503 A.2d 1172, 1178 (Conn. 1986); *Wasson*, 879 P.2d at 422; *State v. Bailey*, 572 A.2d 544, 556 (Md. 1990). Instead, he needs to demonstrate a "particular prejudice," *Francis II*, 63 V.I. at 754; *accord Turner v. United States*, 622 A.2d 667, 679 (D.C. 1993), such as a "severe mental disturbance," *United States v. Dreyer*, 533 F.2d 112, 116–17 (3d Cir. 1976); *see State v. Wheaton*, 528 A.2d 1109, 1111–12 (R.I 1987) (explaining that

defendant demonstrated prejudice where testimony described "the deterioration of defendant's mental and physical well-being"), or some other "specific impact on his health or personal or business affairs" caused by the delay. *Gayden v. United States*, 584 A.2d 578, 585 (D.C. 1990) (alteration, citation, and internal quotation marks omitted); *see Morris v. Wyrick*, 516 F.2d 1387, 1391 (8th Cir. 1975) (explaining that anxiety and concern do not establish prejudice, where "the defendant neither asserts nor shows that the delay weighed particularly heavily on him in specific instances"); *Weis v. State*, 694 S.E.2d 350, 362 (Ga. 2010) ("[A]nxiety and concern will not weigh in a defendant's favor in the absence of unusual circumstances suggesting he suffered excessive anxiety and concern impacting his health or finances."). And as the Superior Court correctly found, Rodriguez's assertions that he was "miserable" and "anxious" are insufficient under this particularity standard. *Rodriguez II*, 2012 WL 12896259, at *5; *see Jackson*, 542 F.2d at 409 ("Allegations of anxiety and depression alone . . . do not result in a constitutional violation."); *United States v. Avalos*, 541 F.2d 1100, 1115 (5th Cir. 1976) (same); *United States v. Graham*, 538 F.2d 261, 265 (9th Cir.) (same), *cert. denied*, 429 U.S. 925 (1976); *Bailey*, 572 A.2d at 556 (same). The Superior Court also correctly found that Rodriguez's assertion that he was "divorced" because of "[his] charges," (Super. Ct. Trans. 4.3.17(3), at *11; Rodriguez's Br. 17)), was insufficient under this particularity standard because it was not caused by the underlying delay. *Rodriguez I*, 2012 WL 12896259, at *5; *compare United States v. Netterville*, 553 F.2d 903, 916 (5th Cir. 1977) (explaining that defendant failed to demonstrate prejudice where his divorce was attributable to his indictment, not the delay between his indictment and trial), *with Wheaton*, 528 A.2d at 1111–12 (explaining that defendant demonstrated prejudice where he presented testimony describing, among other things, the breakup of his marriage and the deterioration of his mental and physical well-being).

¶ 46 But Rodriguez did assert one aspect of anxiety-related prejudice with greater particularity—he claimed that he lost his job with the VIPD and later, lost his job with Hovensa because the Transportation Security Administration ("TSA") refused to issue him a Transportation Worker Identification Credential ("TWIC")[7] because of his pending charges in this case. (Super. Ct. Transmittal 4.3.17(3), at *12–13). Loss of employment, particularly where an individual is unable to work in his or her chosen profession, is relevant in evaluating prejudice if the loss arises from the *underlying delay*—such as when a defendant's job loss arises from additional court appearances, *Lambert v. State*, 692 S.E.2d 15, 19 (Ga. Ct. App. 2010)—and not from the information or indictment itself. *See United States ex rel. Spina v. McQuillan*, 525 F.2d 813, 818 (2d Cir. 1975) (explaining that defendant failed to establish prejudice where his job loss was attributable to his indictment, not the delay between his indictment and trial); *State v. DeRouen*, 678 So. 2d 39, 42 (La. Ct. App. 1996) (same); *State v. Blair*, 103 P.3d 538, 543 (Mont. 2004) (explaining that defendant failed to demonstrate prejudice where he failed to prove his job loss was attributable to the delay between his information and trial); *State v. Spearman*, 283 P.3d 272, 280 (N.M. 2012) (same).

¶ 47 The Superior Court, in evaluating Rodriguez's employment-related prejudice, correctly rejected his claim relating to the VIPD. (J.A. 790–91); *Rodriguez II*, 2012 WL 12896259, at *5. Rodriguez, by failing to make any effort to explain how the loss of his position with the VIPD was attributable to the delay in his underlying case, as opposed to the information charging him with abusing, raping, and kidnapping a fifteen-year-old child while employed as an officer, failed to

[7] A TWIC is a "biometric credential, issued to an individual, when TSA determines that the individual does not pose a security threat." 49 C.F.R. § 1570.3; *accord State v. Patin*, 150 So. 3d 435, 438 n. 3 (La. Ct. App. 2014).

demonstrate prejudice. *See Spina*, 525 F.2d at 818. And to the extent that he generally asserted that he was unable to secure employment in law enforcement, "it would be unrealistic to expect any employer to hire and put into a [law enforcement] position," someone who was charged with serious crimes while in uniform. *State v. Fortier*, 427 A.2d 1317, 1323 n.9 (R.I. 1981). Rodriguez's assertion relating to Hovensa presents a similar, although closer issue.

¶ 48 The Superior Court accepted Rodriguez's claim relating to Hovensa, concluding that the underlying delay prejudiced him, although not enough to warrant dismissal of the charges against him. (J.A. 791–92); *Rodriguez II*, 2012 WL 12896259, at *5–6. It is unclear from the record why the court attributed Rodriguez's job loss to the delay in his underlying case, as opposed to the information itself. *See Rieara v. People*, 57 V.I. 659, 668 (V.I. 2012) (explaining that although factual findings are reviewed for clear error, "meaningful review is not possible where the trial court fails to sufficiently explain its reasoning"). Moreover, according to Rodriguez's own motion, he was unable to secure a TWIC card "due to [his] pending criminal action." (Super. Ct. Transmittal 4.3.17, at *12). But even were we willing to adopt the court's factual findings, this prejudice, without more, weighs only slightly in Rodriguez's favor. *Compare Ben v. State*, 95 So. 3d 1236, 1246–47 (Miss. 2012) (explaining that defendant was "entitled to a slight degree of prejudice" where he lost his job and "was unable to find employment elsewhere due to the allegations against him"), *with Sell v. United States*, 525 A.2d 1017, 1025–27 (D.C. 1987) (explaining that a defendant demonstrated "severe personal prejudice" where he was suspended without pay after a nine-year, spotless record with his police department, was unable to find another job, and "*began to drink heavily, took tranquilizers, saw a psychiatrist until he could no longer afford it, began to have problems in his relationship with his wife, and was denied the chance to adopt a child because of the pending charges*" (emphasis added)).

¶ 49 As for the third and most serious interest, Rodriguez argues that his ability to defend himself was hampered by the passage of time, explaining that Detective Sutton's death deprived him of a "critical" alibi testimony, and that Luis Lopez's illness and Jamal Lopez's death deprived him of "critical" testimony that he believed would have benefitted his defense. (Rodriguez's Br. 18). To demonstrate prejudice arising from the unavailability of a witness, a defendant must state with particularity what exculpatory testimony would have been offered and present evidence that the delay caused the witness's unavailability. *Ray*, 390 F.3d at 1265 (citations omitted); *accord Schlei*, 122 F.3d at 988; *United States v. Neal*, 27 F.3d 1035, 1043 (5th Cir. 1994); *State v. Morrill*, 498 A.2d 76, 89 (Conn. 1985).

¶ 50 Here, we question whether Rodriguez's characterization of Detective Sutton as a "critical alibi witness" is sufficient. *See United States v. Margheim*, 770 F.3d 1312, 1331 (10th Cir. 2014) (emphasizing that "criminal defendants [must] show definite and not speculative prejudice, and in what specific manner missing witnesses would have aided the defense"). But even were we willing to accept Rodriguez's characterization of Detective Sutton, he has still failed to prove particular prejudice. *See Neal*, 27 F.3d at 1043 (rejecting speedy trial claim where defendant failed to "adequately explain[] . . . why the facts to which the lost witnesses would have testified could not have been elicited from other witnesses"). According to Rodriguez's notice of alibi, he intended to call Detective Sutton to establish that he accompanied "Officers White and Sergeant to go search" for the missing girls, and that "around 2:45 [a.m., he] was outside the Frederiksted police station speaking with a young woman."[8] (Super. Ct. Transmittal 7.28.17(2), at *11). And although

[8] We note that Rodriguez's notice of alibi differs from Detective Sutton's April 29, 2007 statement, in which she asserted that she observed Rodriguez in the parking lot at "about 2:30 a.m. or 2:40 a.m. [on] April 23, 2007." (Super. Ct. Transmittal 4.3.17, at *16).

Detective Sutton was unavailable to establish either component of Rodriguez's purported alibi, three witness, including Officer White and Detective Sergeant, testified that Rodriguez accompanied them in their search, (J.A. 192, 212–13, 332), whereas three witnesses, including Thomas, who was the "young woman," testified that Rodriguez talked with her outside the police station early the morning of April 23, 2007. (J.A. 199, 207, 442, 447, 449, 521–22). Thomas also testified that Rodriguez was with her between 2:00 a.m. and 3:00 a.m., except for the brief period of time it took Rodriguez to drive to her home. (J.A. 441–43, 447–49). Therefore, even if Rodriguez needed Detective Sutton to establish his purported alibi, the testimony of other witnesses, including Thomas, was sufficient to eliminate any prejudice arising from Detective Sutton's unavailability. *See United States v. Koller*, 956 F.2d 1408, 1414 (7th Cir. 1992) (explaining that a defendant was not prejudiced by the unavailability of an alibi witness where another witness "testified at trial to the same events"); *Howard v. State*, 678 So. 2d 302, 304 (Ala. Crim. App. 1996) (same); *Johnson v. State*, 723 S.E.2d 100, 111 (Ga. Ct. App. 2012) (same); *People v. McCracken*, 298 N.W.2d 734, 375 (Mich. Ct. App. 1980) (same); *Moffett v. State*, 49 So. 3d 1073, 1087 (Miss. 2010) (same); *Commonwealth v. Williams*, 726 A.2d 389, 395–96 (Pa. 1999) (same).

¶ 51 Nor are we convinced that Rodriguez demonstrated particular prejudice with respect to the testimony of either Luis or Jamal Lopez. Rodriguez may very well believe that the testimony of both witnesses would have aided his defense by "contradicting" Kishawn Lopez's testimony, (Rodriguez's Br. 18), but without more, his unsubstantiated belief is merely speculation that is insufficient under the Sixth Amendment. *See Nelson v. Hargett*, 989 F.2d 847, 853 (5th Cir. 1993) (explaining that defendant's "vague allusions" to the unavailability of two witnesses was insufficient to demonstrate prejudice); *Tranakos*, 911 F.2d at 1429 (explaining that defendants'

assertion that an unavailable witness "would have testified on their behalf" was insufficient to demonstrate prejudice); *Ex parte Anderson*, 979 So. 2d 777, 782 (Ala. 2007) (explaining that petitioner's assertion that "lost testimony would have been sufficient to refute the state witness" was insufficient to demonstrate prejudice); *State v. Johnson*, 461 A.2d 981, 985–86 (Conn. 1983) (explaining that defendant's assertion that "the testimony of two witnesses" was "essential to the presentation of the defense" was insufficient to demonstrate prejudice). Reviewing the record, it is unclear whether Rodriguez even contacted Luis Lopez to determine whether his testimony would have aided his defense, *see Schlei*, 122 F.3d at 988 (emphasizing that defendant's failure to contact a deceased witness over a more than one-year period undermined his assertion of prejudice); *McCracken*, 298 N.W.2d at 737 (rejecting assertion of prejudice where defendant failed to contact an unavailable witness), let alone whether any effort was made to preserve his testimony. *See Robinson*, 2 F.3d at 571 (explaining that the unavailability of two witnesses was insufficient to demonstrate prejudice where defendant and his attorney did not take "adequate steps to preserve their testimony for trial"); *Smith v. Mabry*, 564 F.2d 249, 253 (8th Cir. 1977) (explaining that defendant's "failure to establish that [unavailable] witnesses could have been located if appellant had been able to attempt to do so at an earlier time" undermined his assertion of prejudice), *cert. denied*, 435 U.S. 907 (1978). Further, the prosecution included Luis Lopez on its witness list as early as 2012, which suggests that rather than harm Rodriguez, Luis Lopez's illness actually benefited his defense. (*See* Super. Ct. Transmittal 4.3.17, at *32, 42, 45); *Preston v. Commonwealth*, 898 S.W.2d 504, 507 (Ky. Ct. App. 1995) (explaining that without any proof, it was "just as likely that the [deceased] witness would have been hostile to the defense"); *cf. Tranakos*, 911 F.2d at 1429 (explaining that the memory lapse of the prosecution's witness impaired the *prosecution*'s case, not the defendant's case). There is, however, evidence that

Rodriguez's investigator contacted Jamal Lopez before he died. (*See* Super. Ct. Transmittal 7.28.17(1), at *42–43). Notwithstanding that contact, Rodriguez still did not "present [any] proof that [Jamal Lopez] would have benefitted his defense," *Wells v. State*, 319 S.W.3d 82, 90 (Tex. Ct. App. 2010); *see Ex parte Anderson*, 979 So. 2d at 782 (explaining that unsupported general assertions were insufficient to establish prejudice), or, as with Luis Lopez, that he made any effort to preserve Jamal Lopez's testimony. *See Robinson*, 2 F.3d at 571.

¶ 52 Rodriguez also argues that his ability to defend himself was hampered by the passage of time because S.A.'s memory became impaired, noting first, that S.A. could not remember specific threatening statements made while he disciplined her on or about 2005, (Rodriguez's Br. 18 (citing J.A. 298)), and second, that S.A. reviewed her April 23, 2007 police statement shortly before trial. (Rodriguez's Br. 18 (citing J.A. 304)). Contrary to Rodriguez's argument, neither identified lapse in memory is sufficient to establish prejudice. Even assuming that the specific nature of statements made in 2005 or 2006 by S.A., a child at the time, were relevant and admissible for purposes of impeachment, it is unclear how Rodriguez was prejudiced where S.A. admitted to threatening him, and a defense witness, Estephane, described those alleged threatening statements in detail, testifying for example, that S.A. threatened to send her boyfriend "after him" to "beat [him] up." (J.A. 297–98, 536–37, 539). Rodriguez's second identified memory lapse fares no better. Witnesses, whether they be called by the prosecution or a defendant, may review previous statements to refresh their memories regarding the events at issue. *See* Prom. Order No. 2017-0002 (V.I. Apr. 3, 2017) (adopting Virgin Islands Rule of Evidence 612, which authorizes a witness to use a writing to refresh memory); Act No. 7161, § 15(b) (V.I. Reg. Sess. 2010) (adopting the Federal Rules of Evidence, including Rule 612, which authorizes a witness to use a writing to refresh memory), *amended by* Prom. Order No. 2017-0002 (V.I. Apr. 3, 2017); 5 V.I.C. § 737 ("A

witness is allowed to refresh his memory, respecting a fact, by anything written by himself, or under his direction, at the time when the fact occurred or immediately thereafter, or at any other time when the fact was fresh in his memory and he knew that the same was correctly stated in the writing."), *repealed by* Act No. 7161, § 15(b) (V.I. Reg. Sess. 2010). The fact that S.A. reviewed her statement before trial does not, without more, constitute prejudice under the Sixth Amendment. *See generally United States v. Hayes*, 40 F.3d 362, 366 (11th Cir. 1994) (explaining that conclusory allegations that a witness "was unable to recall certain events" was insufficient to demonstrate prejudice). If anything, S.A.'s inability to recall specific statements and her admission that she needed to refresh her memory undermines her credibility, thereby *benefiting* rather than prejudicing Rodriguez. *See Barker*, 407 U.S. at 521 (explaining that "[a]s the time between the commission of the crime and trial lengthens, witnesses['] . . . memories may fade" and "[i]f the witnesses support the prosecution, [the prosecution's] case will be weakened, sometimes seriously so"); *United States v. Tercero*, 640 F.2d 190, 195 (9th Cir. 1980) (explaining that the memory lapse of the prosecution's witness impaired the prosecution's case, not the defendant's case) (collecting cases); *Shepherd*, 511 F.2d at 124 (same); *State v. Ossana*, 739 P.2d 628, 632 (Utah 1987) (explaining that "the fading memories of the prosecution's witnesses" was not prejudicial to the defendant because "the few instances of fading memories concerned insignificant facts" and, "if there was prejudice to anyone by faded memories, it was to the prosecution, not to [the] defendant"). And to the extent that Rodriguez relies on the mere passage of time, "[g]eneral allegations that witnesses' memories have faded are insufficient to create prejudice[.]" *Hakeem*, 990 F.2d at 763; *accord Nelson*, 989 F.2d at 853; *Graham*, 538 F.2d at 265; *Reed*, 383 A.2d at 320.

¶ 53 In sum, we conclude that Rodriguez failed to demonstrate any substantial, particular prejudice arising from the delay here. As explained above, Rodriguez was largely unable to show that he had suffered "anxiety and concern" beyond that inherent in any criminal prosecution. But even more important, Rodriguez was unable to show that his ability to defend himself was impaired by the delay. Therefore, we weigh this final and most important factor against him. *See Francis II*, 63 V.I. at 754–55 (explaining that, despite a demonstration of some actual prejudice under the first interest relating to defendant's "financial loss and curtailment of [] associations," defendant failed to demonstrate "substantial prejudice" under the fourth *Barker* factor); *Margheim*, 770 F.3d at 1330–31 (same); *State v. Garza*, 212 P.3d 387, 399 (N.M. 2009) (same, but under first interest).

5. Balancing *Barker* Factors

¶ 54 Balancing all four *Barker* factors, we conclude that Rodriguez's trial was not delayed to the extent that his Sixth Amendment right to a speedy trial was violated. And while we are undoubtedly concerned with the more than eight-year delay in this case, including nearly four years attributable to the prosecution, Rodriguez was neither consistent in asserting his right to speedy trial nor able to demonstrate more than minimal prejudice arising from that delay. *See Barker*, 407 U.S. at 534 (explaining that defendant's failure to both assert his right to a speedy trial and to demonstrate prejudice counterbalanced an unexcused delay greater than four years in his case); *United States v. Palmer*, 537 F.2d 1287, 1289 (5th Cir. 1976) (explaining that "the tepid nature of the government's conduct, the tardiness of [defendant's assertion of his right], and the lack of substantial personal or defense prejudice . . . convince[s] us that the lengthy delay here . . . did not deny [defendant] his sixth-amendment right to a speedy trial"). Thus, we agree with the Superior Court that Rodriguez's right to a speedy trial was not violated.

B. Right to an Impartial Jury and Fair Trial

¶ 55 Rodriguez argues that the Superior Court erred by denying his motion for a new trial because his right to an impartial jury under the Due Process Clause[9] and the Sixth Amendment was violated when the jury considered a newspaper article published the final day of trial asserting that the court prevented the prosecution from introducing "a sample of Rodriguez's semen that was collected from [S.A.] as evidence" at trial. (Rodriguez's Br. 18–22); *supra* n.1. The Superior Court may grant a defendant a new trial if required in the interest of justice. SUPER. CT. R. 135; *Thomas II*, 60 V.I. at 693. We review the court's denial of a motion for new trial for an abuse of discretion unless the court's denial is based on the application of a legal precept, in which case our review is plenary. *Thomas II*, 60 V.I. at 693 (quoting *Phillips v. People*, 51 V.I. 258, 280 (V.I. 2009)).

¶ 56 "[A]n impartial jury consists of nothing more than 'jurors who will conscientiously apply the law and find the facts.'" *Lockhart v. McCree*, 476 U.S. 162, 178 (1986) (quoting *Wainwright v. Witt*, 469 U.S. 412, 423 (1985)); *accord Rivera-Moreno v. Gov't of the V.I.*, 61 V.I. 279, 315 (V.I. 2014); *Cascen v. People*, 60 V.I. 392, 415 (V.I. 2014). "The jury's verdict [must] be based on evidence received in open court, not from outside sources." *Sheppard v. Maxwell*, 384 U.S. 333, 351 (1966); *accord Thomas v. People* (*Thomas I*), 56 V.I. 647, 656 (V.I. 2012) ("[E]vidence against a defendant that comes from someone other than a witness, and is considered by the jury, may violate a defendant's right . . . to a fair trial." (citation and internal quotation marks omitted));

[9] The Due Process Clause of the Fifth and Fourteenth Amendments to the United States Constitution applies to the Virgin Islands pursuant to section 3 of the Revised Organic Act. *See* Revised Organic Act of 1954, § 3, 48 U.S.C. § 1561, *reprinted in* V.I. CODE ANN., Historical Documents, Organic Acts, and U.S. Constitution at 73–77 (1995 Supp. 2013) (preceding V.I. CODE ANN. tit. 1); *Frett v. People*, 66 V.I. 399, 422 n.4 (V.I. 2017); *Rivera-Moreno v. Gov't of the V.I.*, 61 V.I. 279, 315 n.11 (V.I. 2014).

Commonwealth v. Sero, 387 A.2d 63, 67 (Pa. 1978) ("[T]he viability of the jury as a judicial decision-making body [can be maintained] only by guaranteeing that a verdict is reached by evidence and argument in open court, not by outside influences that might strip the jury of . . . impartiality[.]"). When a defendant asserts a challenge to the impartiality of a jury based on circumstances occurring outside of *voir dire*, the remedy is generally a hearing in which the court "determines the circumstances of what transpired, the impact on the jurors, and whether or not it was prejudicial.'" *Thomas I*, 56 V.I. at 656 (quoting *United States v. Angulo*, 4 F.3d 843, 847 (9th Cir. 1993)); *accord Cascen*, 60 V.I. at 415; *see generally Dowdye v. People*, 55 V.I. 736, 771 (V.I. 2011) ("When a non-frivolous suggestion is made that a jury may be biased or tainted by some incident, the trial court must undertake an adequate inquiry to determine whether the alleged incident occurred and if so, whether it was prejudicial." (alteration, citation, and internal quotation marks omitted)). But a hearing is "necessary only when reasonable grounds exist to believe that the jury may have been exposed to an extraneous influence.'" *Cascen*, 60 V.I. at 416 (quoting *Ritter v. People*, 51 V.I. 354, 371 (V.I. 2009)); *accord Thomas I*, 56 V.I. at 656 ("[T]here is no obligation for the trial judge to conduct an evidentiary hearing when no legitimate foundation has been established."); *United States v. Sun Myung Moon*, 718 F.2d 1210, 1234 (2d Cir. 1983) ("[A] trial court is required to hold a post-trial . . . hearing only when . . . . there is clear, strong, substantial and incontrovertible evidence . . . that a specific, nonspeculative impropriety has occurred which could have prejudiced the trial of a defendant." (citations omitted)). In determining whether reasonable grounds exist, a trial court "should consider numerous factors, including 'the content of the allegations, the seriousness of the alleged misconduct or bias, and the credibility of the source.'" *Thomas I*, 56 V.I. at 657 (quoting *United States v. White Bull*, 646 F.3d 1082, 1095 (8th Cir. 2011)); *accord Angulo*, 4 F.3d at 847.

¶ 57 In this case, the Superior Court did not consider the factors outlined in *Thomas I*. Instead the court based its analysis on Rodriguez's failure to overcome the general presumption that jurors follow admonishments to avoid news accounts relating to trial. (J.A. 757). But the general presumption that empaneled jurors follow instructions, *see Rivera-Moreno*, 61 V.I. at 316, does not relieve the court of its obligation to conduct the proper factual inquiry. *See Thomas I*, 56 V.I. at 656 ("'If there is reason to believe that jurors have been exposed to prejudicial information, the trial [court] is obliged to investigate the effect of that exposure on the outcome of the trial.'" (quoting *Angulo*, 4 F.3d at 847) (alteration omitted)); *Gov't of the V.I. v. Dowling*, 814 F.2d 134, 139 (3rd Cir. 1987) ("In every case where the trial court learns that a member or members of the jury may have received extra-record information with a potential for substantial prejudice, the trial court must determine whether the members of the jury have been prejudiced."); *see generally Smith v. Phillips*, 455 U.S. 209, 215 (1982) ("[T]he remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias."). Moreover, a presumption is "precisely that—[a] presumption[], i.e.[,] [a] procedural device[] to force the party against whom the presumption operates to come forward with rebuttal evidence." *Rivera-Moreno*, 61 V.I. at 316 (alteration, citations, and internal quotation marks omitted). Rodriguez presented the court with specific allegations of misconduct— that two jurors read the newspaper article the final day of trial asserting that his semen had been collected from S.A. as evidence—which if substantiated, could potentially require a new trial. *See Gibson v. Clanon*, 633 F.2d 851, 855 (9th Cir. 1980) (reversing and remanding for new trial where the jury considered inadmissible evidence regarding the rarity of defendant's blood type). And although we share the court's concerns with Rodriguez's presentation of those allegations—including his reliance on unverified and unsworn hearsay and his own unsworn assertions of fact—we nonetheless conclude that the importance of

the integrity of jury proceedings outweighs such concerns under the circumstances. *See Thomas I*, 56 V.I. at 565 (noting that "[a]llegations of juror misconduct implicate grave interests"); *see generally Remmer v. United States*, 347 U.S. 227, 229 (1954) ("The integrity of jury proceedings must not be jeopardized by unauthorized invasions."). Rodriguez's allegations, particularly when he is available to confirm his own observations under oath, are sufficient to require a limited evidentiary hearing. *See Thomas I*, 56 V.I. at 658–59 (remanding for limited evidentiary hearing on juror misconduct where defendant submitted an affidavit based on double hearsay, but also asserted that one of the hearsay declarants was willing to testify under oath). Therefore, because the court failed to conduct even a limited evidentiary hearing, we vacate in part the court's denial of Rodriguez's motion for acquittal and new trial, and remand for further proceedings.[10] On remand, the court must hold an evidentiary hearing to determine whether juror misconduct occurred, make appropriate findings, and upon those findings decide to either grant or deny the defendant's motion for a new trial. *Thomas I*, 56 V.I. at 658–59.

C. Jury Instruction

¶ 58 Rodriguez argues that the Superior Court erred in instructing the jury regarding kidnapping because the court failed to include the modified test for asportation required under 14 V.I.C. § 1052(b) as adopted by the Third Circuit in *Gov't of the V.I. v. Ventura*, 775 F.2d 92, 97-98 & nn.9–10 (3d Cir. 1985). (Rodriguez's Br. 11–15; Rodriguez's Reply Br. 4–6). Because Rodriguez did

[10] The prosecution argues that this Court should nonetheless affirm the trial court on this issue because there was "substantial evidence of [Rodriguez's] guilt." (People's Br. 17). That argument lacks merit. As we explained in *Rivera-Moreno*, the "strength of the evidence supporting [a defendant's] convictions is simply not relevant . . . [if the court] empaneled a biased juror[.]" 61 V.I. at 320.

not object to the jury instructions at trial, we review his argument for plain error.[11] *Monelle*, 63 V.I. at 763. To establish plain error, Rodriguez must show an error, which was plain, that affected his substantial rights, i.e. the error must have been prejudicial. *Id.* at 763 (citing *Phipps v. People*, 54 V.I. 543, 546 (V.I. 2011)); *Fahie v. People*, 59 V.I. 505, 511 (V.I. 2013). If we determine that the error meets these requirements, we may grant relief in our discretion if the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. *Monelle*, 63 V.I. at 763 (citing *Francis v. People* (*Francis I*), 52 V.I. 381, 390–91 (V.I. 2009)).

¶ 59 To determine whether the Superior Court's instruction adequately informed the jury of the elements of kidnapping, we first look to the statute. *Fahie*, 59 V.I. at 514. In the Virgin Islands, kidnapping occurs when someone "abducts, takes or carries away any person by force or threat with the intent to commit rape[.]" 14 V.I.C. § 1052(b). And although this Court has not yet interpreted section 1052(b), the Third Circuit has rendered several decisions interpreting section 1052(b) that are binding upon the Superior Court. *Fahie*, 59 V.I. at 515 & n.4. In *Ventura*, the Third Circuit held that whether a defendant has engaged in kidnapping under section 1052(b) must be determined in light of two factors: (1) the duration of the asportation and (2) whether the asportation created a significant danger to the victim independent of that posed by the separate offense. 775 F.2d at 98; *accord Gov't of the V.I. v. Martinez*, 620 F.3d 321, 329 (3d Cir. 2010); *Gov't of the V.I. v. Alment*, 820 F.2d 635, 637 (3d Cir. 1987). The Third Circuit reasoned,

[11] Rodriguez argues that he is entitled to *de novo* review on this issue because he raised it before the Superior Court. (Rodriguez's Br. 5–6). We disagree. Rodriguez did not raise this issue after the close of the prosecution's case-in-chief, nor at the end of his own case. (J.A. 465–70; 581–82). And although he did cite *Gov't of the V.I. v. Martinez*, 620 F.3d 321 (3d Cir. 2010), which itself quoted *Ventura*, in his motion for acquittal and new trial, he did not proffer any asportation argument, instead focusing exclusively on the prosecution's failure to demonstrate "force or threat" under title 14, section 1052(b). (J.A. 838–41). As a result, we review his argument for plain error. V.I. R. APP. P. 4(h); V.I. R. APP. P. 22(m).

consistent with its earlier decision in *Gov't of the V.I. v. Berry*, 604 F.2d 221 (3d Cir. 1979), that it could not "assume that any asportation, however slight (such, for example, as pulling the victim from an upright position onto the floor or across a room) constitutes kidnapping with intent to commit rape." *Ventura*, 775 F.2d at 97–98 & n.10; *see Berry*, 604 F.2d at 227 (noting that "not every asportation or detention rises to the level of a kidnapping"). The court explained that such an assumption was insensible as it would subject defendants to "sentence[s] disproportionately larger than the underlying crime" because a sentence for kidnapping "may be far more severe than the sentence for first degree rape." *Ventura*, 775 F.2d at 97 & n.9 (noting that first-degree rape under title 14, section 1701 imposed a maximum sentence, while kidnapping under title 14, section 1052(b) did not). We agree with this reasoning and adopt *Ventura*'s two-factor test for determining whether an asportation is of sufficient duration and danger to constitute kidnapping under title 14, section 1052. *See Fahie*, 59 V.I. at 515 (agreeing with the reasoning in *Berry* and adopting its four-factor test for determining whether a defendant has violated title 14, section 1051).

¶ 60 Here, the Superior Court did not instruct the jury to consider the duration of S.A.'s asportation or whether that asportation created a significant danger to her independent of the intended rape under the *Ventura* test.[12] (*See* J.A. 647–48). Because *Ventura* binds the Superior

[12] The Superior Court instructed the jury as follows:

> Count 1: The People have charged . . . Rodriguez . . . with a crime of Kidnapping For Rape, in violation of Title 14, Section 1052(b) of the Virgin Islands Code.
>
> Before you find that this crime has been committed, you must find the People have proved each of the following elements beyond a reasonable doubt:
>
> One, that [Rodriguez] abducted, took, or carried away [S.A.]. Two, that [Rodriguez] did so by force or threat. Three, that [Rodriguez] intended to commit

Court, and because *Ventura* has construed title 14, section 1052(b) to require a jury to consider whether an asportation is of sufficient duration and danger to constitute kidnapping under title 14, section 1052, the court erred and that error is plain. *See Fahie*, 59 V.I. at 516 (holding that the trial court's failure to instruct the jury under *Berry* constituted an error that was plain).

¶ 61 But our plain error inquiry is not finished. Reversal is warranted only if that error is prejudicial—meaning that it must have affected the outcome of the trial—and if it seriously affects the fairness, integrity, or public reputation of the judicial proceeding. *Fahie*, 59 V.I. at 516. A jury instruction that omits a required element of the offense will be disregarded if it is not prejudicial and is harmless beyond a reasonable doubt. *Freeman v. People*, 61 V.I. 537, 544 (V.I. 2014) (quoting *Prince v. People*, 57 V.I. 399, 405 (V.I. 2012)); *accord Fahie*, 59 V.I. at 517. If, at the end of our evaluation, we cannot conclude beyond a reasonable doubt that the jury verdict would have been the same without the error, the error is not harmless. *Fahie*, 59 V.I. at 517 (quoting *Neder v. United States*, 527 U.S. 1, 19 (1999)). But if we conclude that the erroneous instruction did not contribute to the verdict, then the error is harmless and did not prejudice Rodriguez. *Id.*

¶ 62 Rodriguez claims that he demonstrated prejudice, arguing first, that S.A.'s "brief[] five minute[]" car ride from Lopez's home to an isolated, dirt area was too short to constitute kidnapping under section 1052(b), and second, that her ride alone posed no significant danger to her independent of the intended rape. (Rodriguez's Br. 13–14). Turning first to Rodriguez's duration argument, we note that *two* witnesses testified about the length of S.A.'s absence—S.A. *and* Kishawn Lopez. S.A. estimated that it took "about ten minutes" for Rodriguez to drive her to

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> rape while doing so. Four, that the offense took place on or about April 23, 2007, in the Judicial District of St. Croix, United States Virgin Islands.

(J.A. 647–48).

the secluded area, engage in sexual conduct with her, and return her to the Lopez brothers' home, (J.A. 387), whereas Kishawn Lopez estimated S.A. was absent for "about a[n] hour." (J.A. 373). Under either time estimate, the duration is likely sufficient because Rodriguez also transported S.A. from one environment: the interior of a house, to another: an outdoor, isolated, "bush area." *See Alment*, 820 F.2d at 638 (concluding that between "fifteen minutes . . . [and] one hour" was sufficient to satisfy the duration factor where the defendant "transported his victim from one environment, a lighted interior office, to another, an outside corridor and a dark area of bushes"); *Ventura*, 775 F.2d at 98 (concluding that a "few minutes" was sufficient to satisfy the duration factor where "[defendant] transported his victim from the outdoors to the interior of [a] house, thus taking her from one environment to another"). As a result, we conclude that the court's omission of *Ventura*'s first factor did not affect the outcome of Rodriguez's trial. *See Ventura*, 775 F.2d at 98. Rodriguez's remaining argument regarding danger presents a much closer issue.

¶ 63 *Ventura*'s second factor requires consideration of whether the asportation created a significant danger to S.A. independent of that posed by the intended rape. 775 F.2d at 95, 98. There is little indication in the record that the car ride created any appreciable risk of injury to S.A. independent of the intended rape. She testified that Rodriguez drove her to a secluded "bush area," away from the road and houses, engaged in sexual intercourse with her, and then drove her back to the Lopez brothers' home. (J.A. 285). Location can no doubt play an important role under the danger factor, *Maynard v. Gov't of the V.I.*, 49 V.I. 718, 725 (D.V.I. App. Div. 2008) (noting that whether an area was "less well-lit or more deserted" was relevant to the danger factor), but by itself, it is not necessarily sufficient to establish significant danger under the *Ventura* test. *See Berry*, 604 F.2d at 629 (concluding that the evidence was insufficient under the danger factor "where there was no indication in the record that [a] brief [car] ride created any appreciable risk

of injury to [the victim]"); *Maynard*, 49 V.I. at 725 (same, but where "the record [did not] reflect any particular danger to which [the victim] was subjected by [] being [dragged up to one hundred feet away from his home]"); *Gov't of the V.I. v. Baron*, 48 V.I. 88, 96 (V.I. Super. Ct. 2006) (same, but where victim was transported from gas station to an alley between a cemetery sometime between 5:30 a.m. and 8:00 a.m.). Had S.A. also testified, for example, that Rodriguez used a firearm or some other weapon during the asportation, *see Martinez*, 620 F.3d at 915 (explaining that "the presence of [a] firearm" was relevant to the danger factor); *Ventura*, 775 F.2d at 98 (same); *Turbe v. Gov't of the V.I.*, Civ. No. 2005-34, 2009 WL 2431531, at *6 (D.V.I. Aug. 7, 2009) (unpublished) (same, but presence of a knife), that he bound or otherwise constrained her, *see Smith v. Gov't of the V.I.*, 51 V.I. 712 (D.V.I. App. Div. 2009) (explaining that the defendant, by binding the victim's limbs and placing a sock in his mouth, "risked slowing or evening cutting off [the victim's] blood flow. . . . [and] might well have choked or suffocated [the victim]"), that he abandoned her, *id.* (explaining that the defendant, by abandoning a victim, "exposed [him] to the eventuality of severe thirst and starvation"), or that he even drove in a reckless manner, *Martinez*, 620 F.3d at 915 (noting that defendant's "reckless driving" was relevant to the danger factor), then the court's omission of *Ventura*'s second factor may have been harmless. But without such additional testimony, we cannot conclude beyond a reasonable doubt on the record before us that the jury's verdict would have been the same had it been properly instructed. *See Berry*, 604 F.2d at 629. And because the court's omission of *Ventura*'s danger factor reduced the prosecution's burden in demonstrating asportation—an essential element of kidnapping under title 14, section 1502(b)—we also believe that the court's omission seriously affects the fairness, integrity, and public reputation of judicial proceedings. *See Phipps*, 54 V.I. at 549 (explaining that a court's erroneous instruction on an essential element adversely affected the integrity of judicial

proceedings); *Nanton v. People*, 52 V.I. 466, 477–78 (V.I. 2009) (explaining in part that a court's omission of an essential element "subvert[ed] the presumption of innocence afforded to accused persons and also invade[d] the truth-finding task assigned solely to juries in criminal cases"); *United States v. Ladish Malting Co.*, 135 F.3d 484, 491 (7th Cir. 1998) (explaining that an omission "that essentially removes an element of the offense from the jury's consideration . . . deprive[s] the accused of trial by jury"). Therefore, we vacate Rodriguez's conviction for kidnapping under title 14, section 1502(b) and remand for a new trial on that charge.

D. Sufficiency of the Evidence

¶ 64 Rodriguez argues that the evidence was insufficient to support his convictions for first-degree unlawful sexual contact and interfering with officer discharging his duty. (Rodriguez's Br. 5–7, 22–28; Rodriguez's Reply Br. 4–6, 8–11). In evaluating the sufficiency of the evidence to sustain Rodriguez's convictions, "we must view the evidence in the light most favorable to the People, and affirm the conviction[s] if any rational trier of fact could have found the essential elements of the crime[s] beyond a reasonable doubt." *King v. People*, 67 V.I. 903, 909 (V.I. 2017) (quoting *Petric v. People*, 61 V.I. 401, 407 (V.I. 2014)).

1. First-Degree Unlawful Sexual Contact, 14 V.I.C. § 1708(1)

¶ 65 Rodriguez challenges the sufficiency of the evidence supporting his conviction for first-degree unlawful sexual contact, claiming that the prosecution failed to demonstrate either force or coercion.[13] (Rodriguez's Br. 23–28). To obtain a conviction for first-degree unlawful sexual

[13] Rodriguez did not renew his earlier argument asserting that the prosecution failed to demonstrate under the second amended information that he "*forcibly* plac[ed] his hand and mouth on the breast of S.A. against her will." (J.A. 471–77 (emphasis added); *see* J.A. 36 (second amended information)). But even were that issue not waived, *see* V.I. R. APP. P. 22(m); *Rivera-Moreno*, 61 V.I. at 309 n.10 (declining to review argument not briefed on appeal); *Cascen*, 60 V.I. at 401 n.3

contact under former title 14, section 1708(1), the prosecution had to demonstrate that the defendant (1) used force or coercion (2) to engage in sexual contact[14] with (3) a person who was not his spouse. 14 V.I.C. § 1708(1), *renumbered and amended by* Act No. 7517, § 1 (V.I. Reg. Sess. 2013) (removing "not the perpetrator's spouse" as an element of the substantive offense and adding "[s]pousal consent" as an affirmative defense); *Francis II*, 63 V.I. at 737 ("[O]ne may be convicted of unlawful sexual contact if one engages in sexual contact with a person who is not the perpetrator's spouse when force or coercion is used to accomplish the sexual contact.'" (quoting *Gilbert v. People*, 52 V.I. 350, 362 (V.I. 2009))); *accord Ramirez v. People*, 56 V.I. 409, 426 (V.I.

(same), the Superior Court omitted those facts from its jury instruction, instead tracking the statutory language of the charged offense. (J.A. 649–50); *see Francis I*, 52 V.I. at 390 (emphasizing "that trial judges should carefully craft jury instructions that track the statutory language of the charged offense rather than rely on the language employed by the prosecution in the charging document"). And as discussed below in section III(D)(1), force is not an essential element in this case because the evidence was sufficient to sustain Rodriguez's conviction under section 1708(1) on the alternative basis of coercion. *See Galloway v. People*, 57 V.I. 693, 709 (V.I. 2010) (explaining that "Supreme Court precedent has consistently held that excess allegations in an [information] that do not change the basic nature of the offense charged should be treated as mere surplusage" (citation, ellipses, and internal quotation marks omitted)).

[14] Former title 14, section 1699(c) defined "sexual contact" as "the intentional touching of a person's intimate parts, whether directly or through clothing, to arouse or to gratify the sexual desires of any person," and "intimate parts" as "the primary genital area, groin, inner thighs, buttocks, or breasts of a person." 14 V.I.C. § 1699(c), *renumbered and amended by* Act No. 7579, § 3(1) (V.I. Reg. Sess. 2014) (changing definition of "sexual contact" to "any touching of another person with the genitals or any touching of the genitals, anus, groin, inner thighs, buttocks, lips or breasts of another person, or such touching through the clothing, for the purpose of arousing or gratifying sexual desire of any person"). And although the Superior Court instructed the jury under current section 1699(d), not former section 1699(c), (J.A. 653), any disparity in terminology did not prejudice Rodriguez because his alleged conduct—grabbing and licking S.A.'s breast under her clothing—undoubtedly satisfies both definitions. *Compare Francis II*, 63 V.I. at 737–38 (explaining under current section 1699(d), testimony that defendant "rubb[ed] against [the victim] with his hands, with his body, [and] pushed his hands inside of [her] drawers. . . . clearly amount[ed] to sexual contact" (alteration and internal quotation marks omitted)), *with Charles v. People*, 60 V.I. 823, 834 n.6 (V.I. 2014) (explaining under former section 1699(c), "testimony that [defendant] touched [the victim] on the breasts and buttocks. . . . [was] clear evidence of sexual contact").

2012); *Potter v. Gov't of the V.I.*, 48 V.I. 446, 457 (D.V.I. App. Div. 2006).

¶ 66 The nouns "force" and "coercion" are not defined in the Virgin Islands Code, and as a result, we resort to principles of statutory interpretation. *See Lopez v. V.I.*, 60 V.I. 534, 538 (V.I. 2014). We begin by examining the plain language of the statute and assume that the Legislature's intent is expressed through the ordinary meaning of the words chosen. *Id.* (citing *Sonson v. People*, 59 V.I. 590, 598 (V.I. 2013); *see also* 1 V.I.C. § 42 ("Words and phrases shall be read with their context and shall be construed according to the common and approved usage of the English language."). If the language is clear and unambiguous, then we end our inquiry. *Id.* (citing *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 236 n.3 (2010)).

¶ 67 "Force" is defined as "'[p]ower, violence, or pressure directed against a person,'" *Johnson v. United States*, 559 U.S. 133, 139 (2010) (quoting BLACK'S LAW DICTIONARY 717 (9th ed. 2009)); *see Francis II*, 63 V.I. at 738 (explaining that "force" includes physical restraint), while "coercion" is defined as "'the use of express or implied threats of violence or reprisal (as discharge from employment) or other intimidating behavior that puts a person in immediate fear of consequence to compel that person to act against his or her will.'" *Williams v. People*, 55 V.I. 721, 731 n.6 (V.I. 2011) (quoting MERRIAM-WEBSTER'S DICTIONARY OF LAW 82 (Collector's ed. 2005)); *see State v. Johnson*, 547 A.2d 213, 214 (N.H. 1988) (defining "coercion" as "actual, direct, or positive, as where physical force is used to compel act against one's will, or implied, legal or constructive, as where one party is constrained by subjugation to other to do what her free will would refuse" (alteration, citation, and internal quotation marks omitted)). This Court has interpreted coercion broadly in the past, explaining that "the use of one's position of authority to achieve [intercourse with a victim could] constitute a form of coercion" under section 1708(1)). *Gilbert*, 52 V.I. at 365 & n.13.

¶ 68 Viewing the evidence in the light most favorable to the People, we are satisfied that the People met its burden under its theory of coercion and as a result, we decline to reach Rodriguez's remaining argument relating to force. Both S.A. and Estephane testified that S.A. had known Rodriguez in his capacity as a police officer for a number of years, noting that he had disciplined S.A. at Estephane's request many times. (J.A. 277–79, 294, 297–98, 535–39, 545–46). According to S.A., on the morning of the incident in question, Rodriguez, while acting in his capacity as an officer, located her hiding in a bedroom and threatened to return her to the YRC if she did not comply with his sexual demands. (J.A. 279–80). S.A. explained that she initially protested, but relented when Rodriguez further threatened to return her to the YRC. (J.A. 280, 314–15). Rodriguez then grabbed and licked her breast before leaving the bedroom. (J.A. 280). S.A.'s testimony was corroborated in part by Kishawn Lopez, who explained that S.A. appeared "frightened," "scared," and "in shock" when she left the bedroom. (J.A. 336, 371–72). In light of this testimony, we conclude that a reasonable jury could find that Rodriguez used his position of authority to sexually touch S.A. *See Castor v. People*, 57 V.I. 482, 492 (V.I. 2012) (affirming conviction under title 14, section 1708(3) where defendant—the victim's step-father—used his position as step-father to sexually touch the victim "when she was vulnerable"). Therefore, we conclude that there was sufficient evidence to support Rodriguez's conviction for first-degree unlawful sexual contact.[15]

[15] Rodriguez did not challenge—either before this Court or the Superior Court—the remaining elements required for his conviction. But even were his challenge to those elements not waived, V.I. R. APP. P. 4(h); V.I. R. APP. P. 22(m), we note that the evidence was also sufficient to satisfy those elements. *See Webster*, 60 V.I. at 679. S.A.'s testimony that Rodriguez grabbed and licked her breast is clear evidence of sexual contact, whereas her testimony that she was unmarried is clear evidence that she was not Rodriguez's spouse at the time. (J.A. 271, 280); *see John v. People*, 63 V.I. 629, 649–50 (V.I. 2015) (explaining that testimony that defendant "tickled [the victim] and

2. Interfering with Officer Discharging his Duty, 14 V.I.C. § 1508

¶ 69 Rodriguez also challenges the sufficiency of the evidence supporting his conviction for interfering with officer discharging his duty, arguing under the jury instructions[16] that there was no evidence that he "secret[ed] . . . [S.A.] in a locked room" or that he "drove away with [her] during a police search for [her]."[17] (Rodriguez's Br. 22–23; Rodriguez's Reply Br. 8–11). Because

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caressed her breasts" was sufficient to establish sexual contact); *Charles v. People*, 60 V.I. 823, 834 n.6 (V.I. 2014) (same, but defendant "touched [the victim] on the breasts and buttocks"); *State v. Olson*, 951 P.2d 571, 578 (Mont. 1997) (explaining that testimony that defendant rubbed victim's breast was sufficient to establish sexual contact).

[16] The Superior Court instructed the jury in relevant part:

> Before you may find that [Interfering with Officer Discharging his Duty] has been committed, you must find the People have proven each of the following elements beyond a reasonable doubt:
> One, that the Defendant knew that a police officer . . . [was] performing his or her official duties as a police officer by searching for . . . [S.A.]. Two, that . . . [S.A.] was a runaway minor. Three, that [Rodriguez] purposefully prevented, hampered, or impeded an officer from performing his or her . . . duties by secreting . . . [S.A.] in a locked room.
> Four, that [Rodriguez] did not inform the officers that [S.A.] was in the room. Five, that [Rodriguez] drove away with [S.A.] during a police search for [S.A]. And six, that the act occurred sometime on or about April 23, 2007, in the Judicial District of St. Croix, United States Virgin Islands, in the vicinity of number 67 Upper Love, Frederiksted.

(J.A. 651–52).

[17] Rodriguez raised a number of additional arguments in his reply brief, including for example, that because "police" is customarily defined as a unit, section 1508 does not apply to communication between police officers, and also that because the collective knowledge doctrine imputes knowledge between fellow officers, Rodriguez's false statements were harmless. (Rodriguez's Reply Br. 8–11). "Because raising an argument for the first time in a reply brief deprives the prosecution of its opportunity to respond, we consider th[ese] argument[s] waived and decline to address [them]." *Destin v People*, 64 V.I. 465, 472 n.4 (V.I. 2016); *accord Christopher v. People*, 57 V.I. 500, 513 n.7 (V.I. 2012).

Rodriguez did not raise either issue before the Superior Court, instead conceding multiple times before the court that sufficient evidence existed, we review his argument for plain error. V.I. R. APP. P. 4(h); V.I. R. APP. P. 22(m); *Percival*, 62 V.I. at 484; (*see* J.A. 482 ("I think the government has basically put forth enough evidence for [count 5] to go to the jury, so I won't argue that."); J.A. 581 ("I still feel the same way [regarding count 5]. I haven't changed that."); J.A. 696 ("Yeah, I conceded [count 5].")).

¶ 70 In order to obtain a conviction for interfering with officer discharging his duty under former title 14, section 1508,[18] the prosecution was required to demonstrate that the defendant (1) willfully resisted, delayed, or obstructed a public officer (2) from lawfully discharging or attempting to discharge his official duties at the time of the offense. 14 V.I.C. § 1508, *repealed by* Act No. 7640, § 1 (V.I. Reg. Sess. 2014); *Murrell v. Gov't of the V.I.*, 51 V.I. 1095, 1107 & 1113 (D.V.I. App. Div. 2009). But, where as here, the jury instruction adds additional elements such as secreting the victim in a locked room or driving away with the victim during a police search, the prosecution was also required to prove those elements. *See United States v. Schwartz*, 899 F.2d 243, 248 (3d Cir. 1990) (explaining that an instruction including a nonessential element of the crime merely "placed an additional burden of proof upon the Government" (citation and internal quotation marks omitted)); *United States v. Felsen*, 648 F.2d 681, 686 (10th Cir. 1981) (same); *Fleming v. People*, 775 F. Supp. 2d 765, 770 (D.V.I. App. Div. 2011) (same).

[18] Former title 14, section 1508 provided:

> Whoever willfully resists, delays or obstructs any public officer in the discharge, or attempt to discharge any duty of his office, shall, when no other punishment is prescribed by this title, be fined not more than $500 or imprisoned not more than 1 year, or both.

14 V.I.C. § 1508, *repealed by* Act. No. 7640, § 1 (V.I. Reg. Sess. 2014).

¶ 71 When reviewing terms in a jury instruction, we interpret them "as a reasonable juror would have understood them." *State v. Tyler*, 973 A.2d 311, 313 (N.H. 2009); *accord Prince*, 57 V.I. at 409; *State v. Mills*, 789 P.2d 530, 533 (Idaho Ct. App. 1990); *State v. Deer*, 372 N.W.2d 176, 181 (Wis. Ct. App. 1985). Rodriguez argues that merely finding and leaving S.A. in the locked bedroom does not rise to the level of "secreting," explaining that the adjective "secret" is defined as "done, made, or conducted without the knowledge of others." (Rodriguez's Br. 23). Contrary to Rodriguez's argument, the jury was not charged with the adjective "secret," but with the *verb* "secreting." (J.A. 651). And although the verb "secreting" is not in the Virgin Islands Code, it is defined as "[t]o remove or keep from observation, or from the knowledge of others," *Commonwealth v. Hernandez*, 56 N.E.3d 767, 776 (Mass. 2016) (quoting Black's Law Dictionary 1557 (10th ed. 2014)); *cf. States v. Soto-Sanchez*, 623 F.3d 317, 323 (6th Cir. 2010) (explaining that several states "include in their definition of kidnapping[,] secreting or holding or intending to secrete or hold the victim where he or she is not likely to be found" (collecting statutes)), and is synonymous with "hide" and "conceal." THE MERRIAM-WEBSTER DICTIONARY 448 (2005); *see United States v. Powell*, 420 F.2d 949, 950 (6th Cir. 1970) (explaining that "conceal" is synonymous with "hide" and "secrete"); *In re Juvenile 2003-187*, 846 A.2d 1207, 1209 (N.H. 2004) (same). Viewing the evidence in the light most favorable to the People, the evidence was sufficient to demonstrate that Rodriguez "secreted" S.A. by concealing her presence from Officer White and Detective Sergeant, thereby obstructing them from performing their duties. *See People v. Baskerville*, 963 N.E.2d 898, 903 (Ill. 2012) (explaining that "obstruct" encompasses conduct that "impedes or hinders progress," including "[f]urnishing false information"). Officer White and Detective Sergeant both testified that Rodriguez, after searching one of the bedrooms, informed them that the room was empty. (J.A. 198, 204, 217–18, 227). Detective Sergeant even explained

that she declined to enter one of the bedrooms, because she "trusted Officer Rodriguez in what he said." (J.A. 233–34). And according to S.A., it was in this bedroom that Rodriguez located her and threatened to return her to the YRC if she did not comply with his sexual demands. (J.A. 27–77, 279–82).

¶ 72 Rodriguez also argues that he could not have "drive[n] away with S.A. during a police search" because no search "was on-going at the time of the ride because the officers' shift had ended." (Rodriguez's Br. 22–23). But again, we find his argument meritless. According to the testimony presented at trial, only *two* of the three officers who participated in the search of the Lopez brothers' home ended their shift at around 2:00 a.m. the morning of April 23, 2007. (J.A. 193, 198–99, 207, 442, 449). The remaining officer, Detective Sergeant, continued working another *five* hours, (J.A. 212, 219), which, when considered in light of her testimony and that of Officer White, S.A., and Kishawn Lopez, was well after the underlying incident took place. (J.A. 193, 207, 212, 219, 274, 283, 287, 319, 332, 372–73, 389–90). And to the extent that Rodriguez intends to interpret the word "search" narrowly, he fails to acknowledge that a reasonable juror could have concluded that the Juvenile Bureau's search for S.A. remained ongoing, particularly when it had received information that S.A. had been staying at the Lopez brothers' home and Detective Sergeant discovered women's underwear at that location during her search. (J.A. 192–93, 212, 217, 330); *see generally People v. Dawn*, 992 N.E.2d 1277, 1287 (Ill. Ct. App. 2013) (explaining that "the scope of a search is defined by its expressed object"); THE MERRIAM-WEBSTER DICTIONARY 447 (2005) (defining "search" broadly to include "seek"). Viewing the evidence in the light most favorable to the People, we conclude that the evidence was sufficient to demonstrate that Rodriguez "drove away with [S.A.] during a police search," thereby obstructing Detective Sergeant from performing her duties. *See Sharp v. State*, 621 S.E.2d 508, 510 (Ga. Ct.

App. 2005) (explaining that flight to avoid apprehension by the authorities was sufficient to establish obstruction); *Att'y Grievance Comm'n of Md. v. Sheinbein*, 812 A.2d 981, 992 (Md. 2002) (explaining that devising and facilitating a suspect's flight to avoid apprehension by the authorities was sufficient to establish obstruction). Even so, our inquiry is not finished because the jury was instructed under current section 1508(a) enacted in 2014,[19] not former section 1508 as charged in 2007. *See* Act. No. 7640, § 1 (V.I. Reg. Sess. 2014) (repealing and reenacting title 14, section 1508).

¶ 73 This Court has discretion under Supreme Court Rules of Appellate Procedure 4(h) and 22(m) to reach issues waived on appeal "when the interests of justice so require" and when such issues "affect[] substantial rights." *Phillip v. People*, 58 V.I. 569, 585–87 & n.19 (V.I. 2013) (reviewing waived argument under Rule 22(m)); *Brown*, 55 V.I. at 503–04 (reviewing waived argument). Rodriguez's conduct here occurred on or about April 23, 2007, and he was charged under former section 1508. (J.A. 25–27 (second amended information)). But at the close of trial on May 13, 2015, the jury was instructed under current section 1508(a). And although current section 1508 was intended merely to "provide a clearer definition for the crime of interfering with

[19] Current title 14, section 1508 provides:

> (a) No person, without privilege to do so and with purpose to prevent, obstruct, or delay the performance by a peace officer, firefighter, or first responder of any authorized act within the peace officer's, firefighter's, or first responder's official capacity, shall do any act that hampers or impedes a peace officer, firefighter or first responder in the performance of lawful duties.
>
> (b) Whoever violates this section is guilty of a misdemeanor and shall be punished by a fine of not more than $1,000, or imprisoned for not more than one (1) year, or both.

a peace officer," Act. No. 7640, § 1 (V.I. Reg. Sess. 2014), it altered both the intent and conduct associated with the crime, and authorized the imposition of an increased financial penalty.[20] As a result, this Court must determine whether the court's jury instruction, based on current section 1508(a), prejudiced Rodriguez by relieving the People of its burden to prove "beyond a reasonable doubt every element of the charged offense." *Carella v. California*, 491 U.S. 263, 265 (1989); *see Nanton*, 52 V.I. at 478–83 (reversing conviction where instruction omitted "pivotal element of the crime charged"); *United States v. Korey*, 472 F.3d 89, 93–97 (3d Cir. 2007) (same).

¶ 74 As for the intent component of the instruction, the jury was charged to consider whether Rodriguez's conduct was purposeful, not whether it was willful as required under former section 1508. (J.A. 651). In reviewing this disparity in terminology, this Court "takes a common sense approach and defers to the plain meaning of the term[s]." *Prince*, 57 V.I. at 409. Conduct is considered "purposeful" when a defendant intends to cause a result. *See, e.g.*, *Voisine v. United States*, 579 U.S. ___, 136 S. Ct. 2272, 2278 (2016); *accord Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co.*, 973 P.2d 527, 535 (Cal. 1999); *Lazard Tech. Partners, LLC v. Qinetiq N. Am. Operations LLC*, 114 A.3d 193, 195 n.8 (Del. 2015); *State v. Whalen*, 49 S.W.3d 181, 187 (Mo. 2001); MODEL PENAL CODE § 2.02(2)(a). As explained by one court, a defendant's "conscious object must be directed toward the result[.]" *State v. Granillo*, 384 P.3d 1121, 1125 (N.M. Ct. App. 2016). Unlike "purposeful," however, the meaning of "willful" is less clear. *See Ladish Malting Co.*, 135 F.3d at 487 (explaining that "[w]illfully is a notoriously slippery term" that "requires translation"); *United States v. M.W.*, 890 F.2d 239, 240 (10th Cir. 1989) (explaining that "willful"

[20] Act No. 7640 increased the maximum financial penalty under section 1508 from $500 to $1000. *Compare* V.I.C. § 1508(b), *with* 14 V.I.C. § 1508, *repealed by* Act. No. 7640, § 1 (V.I. Reg. Sess. 2014).

is "inherent[ly] ambigu[ous]"). In an effort to explain "willful," a number of courts equate it with another intent, "knowing," *see United States v. Youts*, 229 F.3d 1312, 1317 (10th Cir. 2000) (explaining that "many judicial decisions . . . declar[e] that knowing conduct is sufficient to establish willfulness" (collecting cases)),[21] which is widely recognized as including conduct taken while a defendant is aware that his or her conduct is almost certain to cause a result. *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 445 (1978); *State v. James*, 693 N.W.2d 353, 356–57 (Iowa 2005); *State v. Gunderson*, 812 N.W.2d 156, 161 (Minn. Ct. App. 2012); *In re Estate of Armstrong v. Armstrong*, 170 So. 3d 510, 514 (Miss. 2015); *State v. Wyatt*, 482 S.E.2d 147, 153 (W. Va. 1996); *State v. O'Dell*, 924 A.2d 87, 93 (Vt. 2007); MODEL PENAL CODE § 2.02(2)(b). And when compared with "purposeful" conduct, "knowing" conduct requires *less* culpability because the defendant is not charged with intending to cause a result, but merely with an awareness that the result is practically certain to occur. *See United States v. Bailey*, 444 U.S. 394, 404–05 (1980) (explaining that "knowing" conduct is less culpable than "purposeful" conduct); *State v. Trombley*, 807 A.2d 400, 405 (Vt. 2002) (same); MODEL PENAL CODE § 2.02(2) (same). As a result, because the court's inclusion of "purposeful" and omission of "willful" actually increased the prosecution's burden, we conclude that the court's error did not affect Rodriguez's substantial rights and is harmless beyond a reasonable doubt. *See Francis I*, 52 V.I. at 393 (explaining that an instruction's inclusion of "an even higher standard than required by the statute" benefited the defendant and did not affect his substantial rights); *United States v. Ford*, 821 F.3d 63, 75 (1st Cir. 2016) (explaining

[21] *See, e.g.*, *Ladish Malting Co.*, 135 F.3d at 490; *United States v. Adamson*, 700 F.2d 953, 962 (5th Cir. 1983); *United States v. Dreitzler*, 577 F.2d 539, 549 (9th Cir. 1978); *Boyd v. State*, 977 So. 2d 329, 335 (Miss. 2008) (same); *cf.* MODEL PENAL CODE § 2.02(8) ("A requirement that an offense be committed willfully is satisfied if a person acts knowingly with respect to the material elements of the offense[.]").

that a "defendant can be convicted if it is proved that he was more culpable than the definition of the offense requires" (citation and internal quotation marks omitted)); *State v. Stewart*, 122 P.3d 1269, 1278 (N.M. Ct. App. 2005) (same); MODEL PENAL CODE § 2.02(5) (same).

¶ 75 Regarding the conduct component of the instruction, the jury was charged to consider whether Rodriguez "prevented, hampered, or impeded" an officer from performing his duties, not whether he "resist[ed], "delay[ed,] or obstruct[ed]" as required under former section 1508. (J.A. 651). The instruction, by equating the conduct of the crime with "secreting" S.A. in a locked room and "dr[i]ving" away with [her] during a police search," (J.A. 651–52), clearly satisfied former section 1508 because both activities "obstruct" an officer from discharging his or her official duties. *See Baskerville*, 963 N.E.2d at 907 (furnishing false information); *Sheinbein*, 812 A.2d at 992 (facilitating flight to avoid apprehension). Furthermore, courts in the Virgin Islands have long recognized that former section 1508 "encompasse[d] a broad range of conduct," *Murrell*, 51 V.I. at 1113, including for example, refusing to exit a vehicle, *Allen v. People*, 59 V.I. 613, 639 (V.I. 2013), struggling during an arrest, *Murrell*, 51 V.I. at 1114; *People v. George*, Crim. No. 680/2010 (STT), 2012 WL 1484206, at *3 (V.I. Super. Ct. Apr. 23, 2012), refusing to keep one's hands on a steering wheel, *United States v. Turnbull*, Crim. No. 10-cr-0038, 2011 WL 578831, at *4 (D.V.I. Feb. 9, 2011), and pointing a loaded firearm. *Gov't of the V.I. v. Waggoner*, Crim. No. 82-154, 1984 WL 1075144, at *1, 3 (D.V.I. Mar. 26, 1984). Some of those courts even treated "prevent" and "impede" as synonymous with the conduct component of former section 1508. *See Murrell*, 51 V.I. at 1113 (explaining under former section 1508 that there must be "some overt act showing that the defendant intended to *impede* the officer in the performance of his duties" (emphasis added)); *Gov't of the V.I. v. Gilliam*, 17 V.I. 14, 20 (V.I. Super. Ct. 1980) (explaining under former section 1508 that "there must be acts clearly indicating an intention on the part of the accused to

prevent the officer from performing his duty" (citation omitted) (emphasis added)). And "hamper," the only verb of the three never to have been invoked within case law addressing former section 1508, is itself synonymous with "obstruct." *San Diego Gas & Elec. Co. v. Superior Court*, 920 P.2d 669, 683 & n.10 (Cal. 1996); *Newton v. State*, 698 P.2d 1149, 1152 (Wyo. 1985). Thus, because the instruction's inclusion of secreting" S.A. in the bedroom and "dr[i]ving" away with [her] during a police search" amounts to "obstruction," and because the terms "prevent," "hamper," and "impede" are commonly interchanged with the terms "resist," "delay," and "obstruct," the instruction's omission of the latter terms did not affect Rodriguez's substantial rights and is harmless beyond a reasonable doubt. *See Prince*, 57 V.I. at 411 (explaining that the "common interchangeable use of . . . terms . . . illustrates that the terms are sufficiently synonymous and that using one word instead of another would not create any misunderstanding for a reasonable jury"). But even though the Superior Court's omissions in the instruction do not warrant reversal, we must nonetheless vacate in part the court's judgment and commitment, and remand for resentencing because Rodriguez received a $1000 fine, which is greater than the $500 allowed under former section 1508.[22] *See Estick v. People*, 62 V.I. 604, 622–23 (V.I. 2015) (vacating illegal sentence and remanding for resentencing under plain error standard); *Williams v. People*, 58 V.I. 341, 355 (V.I. 2013) (same); *Brown*, 55 V.I. at 506–07 (same).

[22] The Ex Post Facto Clause of the United States Constitution, which prohibits the government from increasing the punishment for a criminal act after the act has been performed, *Lynce v. Mathis*, 519 U.S. 433, 441 (1997); *People v. Callejas*, 102 Cal. Rptr. 2d 363, 365 (Cal. Ct. App. 2000), applies to the Virgin Islands pursuant to section 3 of the Revised Organic Act. *See* Revised Organic Act of 1954, § 3, 48 U.S.C. § 1561, *reprinted in* V.I. CODE ANN., Historical Documents, Organic Acts, and U.S. Constitution at 86 (1995 & Supp. 2014) (preceding V.I. CODE ANN. tit. 1); *Rivera v. Gov't of the V.I.*, 183 F. Supp. 2d 770, 772–73 & n.2 (D.V.I. App. Div. 2002).

IV. CONCLUSION

¶ 76 Since Rodriguez was neither consistent in asserting his right to speedy trial nor able to demonstrate more than minimal prejudice arising from delay in his case, we are not persuaded that he was denied his right to speedy trial under the Sixth Amendment. And although there was sufficient evidence to sustain Rodriguez's convictions for first-degree unlawful sexual contact and interfering with officer discharging his duty, the Superior Court erred by omitting the asportation factors from its instruction on kidnapping and by denying Rodriguez's motion for acquittal and new trial without holding an evidentiary hearing to determine whether juror misconduct occurred. The Superior Court also erred by imposing a fine upon Rodriguez greater than that allowed under former title 14, section 1508. As a result, we vacate the Superior Court's October 27, 2015 judgment and commitment in part, including Rodriguez's conviction for kidnapping and his sentence for interfering with an officer discharging his duty. We also vacate the court's October 27, 2015 order in part, including its rejection of Rodriguez's arguments relating to his conviction for kidnapping and juror bias. On remand, the court must conduct an evidentiary hearing on juror bias, resentence Rodriguez for interfering with an officer discharging his duty, and if requested by the People, conduct a new trial on the charge of kidnapping.

Dated this 12th 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