For Publication

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

CHARLESWORTH GONSALVES, Appellant/Defendant, v. **PEOPLE OF THE VIRGIN ISLANDS,** Appellee/Plaintiff.	))))))))	**S. Ct. Crim. No. 2016-0058** Re: Super. Ct. Crim. No. 400/2013 (STX)

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

Considered: July 11, 2017
Filed: February 6, 2019

Cite as: 2019 VI 4

BEFORE: **RHYS S. HODGE**, Chief Justice; **IVE ARLINGTON SWAN**, Associate Justice; and **JOMO MEADE**, Designated Justice.[1]

APPEARANCES:

Martial A. Webster, Sr., Esq.
Law Office of Martial A. Webster, Sr.
St. Croix, U.S.V.I.
Attorney for Appellant,

Dionne G. Sinclair, Esq.
Assistant Attorney General
St. Thomas, U.S.V.I.
Attorneys for Appellee.

OPINION OF THE COURT

SWAN, **Associate Justice**.

[1] Associate Justice Maria M. Cabret is recused from this matter. By order of this Court entered June 28, 2017, the Honorable Jomo Meade, a judge of the Superior Court of the Virgin Islands, is designated to sit in her place pursuant to title 4, section 24(a) of the Virgin Islands Code.

¶1 Appellant, Charlesworth Gonsalves, seeks reversal of his convictions in the Superior Court of the Virgin Islands ("Superior Court") for Second Degree Aggravated Rape and Child Abuse. Gonsalves argues that there was insufficient evidence to sustain his convictions, that the trial court committed reversible error when it denied his motion for a mistrial, and that the trial court committed reversible error when it allowed the prosecution to amend the information after the close of presentation of evidence. For the reasons elucidated below, we affirm the convictions.

I. FACTS AND PROCEDURAL HISTORY

¶2 On September 9, 2013, a criminal case was filed against Gonsalves. Subsequently, an amended information alleged that, on August 30, 2013, on St. Croix, U.S. Virgin Islands, Gonsalves committed two criminal acts for which he was ultimately tried and convicted; namely: Count One—"Second Degree Aggravated Rape" (14 V.I.C. § 1700a(a)) as an act of domestic violence (16 V.I.C. § 91(b)(6)) and Count Two—"Child Abuse" (14 V.I.C. § 505).[2] The Superior

[2] The initiating information was filed on September 24, 2013, and contained charges that were dismissed by the prosecution. The charges read as follows:

> **COUNT ONE**
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> The **CHARLESWORTH GONSALVES**, did perpetrate an act of sexual intercourse or sodomy with a person, namely, D.G., a minor, being under eighteen years old, but thirteen years or older, not the perpetrator's spouse, to wit: by sucking and inserting his tongue inside D.G.'s vagina; **CHARLESWORTH GONSALVES** and the minor **D.G.**, having a familial relationship, father and daughter, an act of domestic violence, in violation of Title 14 V.I.C. § 1700a(a) and Title 16 V.I.C. § 91(b)(6), (**AGGRAVATED RAPE SECOND DEGREE/DOMESTIC VIOLENCE**).
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> **COUNT TWO**
>
> That **CHARLESWORTH GONSALVES**, being over eighteen years of age, did engage in sexual contact with a person who is over thirteen but under sixteen years old, namely, D.G., a minor, not the perpetrator's spouse, to wit: by sucking on D.G.'s vagina with his mouth; **CHARLESWORTH GONSALVES** and the minor **D.G.**, having a familial relationship, father and daughter, an act of domestic violence, in violation of Title 14 V.I.C. § 1709 and Title 16 V.I.C. § 91(b)(5), (**UNLAWFUL SEXUAL CONTACT SECOND DEGREE/DOMESTIC VIOLENCE**).

Court's judgment and commitment (a single document) was entered on the trial court's docket on September 15, 2016, and the notice of appeal was filed on October 3, 2016.

¶3 Prior to the trial's commencement, on March 7, 2016, an in camera hearing was held, during which the People sought leave of court to amend the information. The amendments to which Gonsalves objected were the addition of the words "and finger" to the "to wit:" clauses of the two counts of the amended information. The original phraseology stated "to wit: by sucking and inserting his tongue inside D.G.'s vagina," and the amended charges stated "to wit: by sucking and inserting his tongue *and finger* inside D.G.'s vagina." The basis for the objection was that the amendment would deprive Gonsalves of notice of the charges and "substantially affect[ed the] defense." In explicating the objection, defense counsel argued that the amendment "basically adds . . . another fact to the mental and emotional injury or physical injury portion . . . of the charge of child abuse." Because of this addition, Gonsalves asserted that he was belatedly given notice—which made such notice inadequate—that he had to defend against an allegation of inserting his finger, in addition to his tongue, inside of D.G.'s vagina.

¶4 The jury was selected, and the trial commenced later that morning. The jury was given preliminary instructions, but the statement of charges did not include the language regarding Gonsalves having inserted his finger into the victim's vagina. After the preliminary instructions were given, the trial court proceeded to consider the proposed amendment to the charges. Gonsalves reiterated his objection that the amendment violated his right to notice of the charges; therefore, the amendment was denied at that time.

Count three of the original information was dismissed prior to trial. The "Amended Information," which contained the entirety of the charges upon which Gonsalves was tried, was filed on March 14, 2016, after the beginning of Gonsalves' trial.

¶5 After counsels' opening statements, Marsha Harrigan testified. Harrigan was the mother of the victim, D.G., and since childhood, she had known Gonsalves. The following line of questioning was pursued to establish the background relationship of Gonsalves, Harrigan, and D.G. and is noteworthy in that the examination presents a pivotal issue raised on appeal that Gonsalves asserts justified a mistrial:

> Prosecutor: So, how do you know [Gonsalves]?
> Harrigan: When I was a child he used to live in La Reine. We was like neighbors.
> Prosecutor: Okay. So he was your neighbor growing up?
> Harrigan: Well, he used to live in the back of our building in another building.
> Prosecutor: All right.
> Harrigan: And he also was my brother['s] friend.
> Prosecutor: Did you have a relationship with Mr. Gonsalves?
> Harrigan: Yes.
> Prosecutor: What type of relationship?
> Harrigan: A intimate relationship.
> Prosecutor: How old were you when--
> Defense Counsel: Objection to relevance.
> Court: What's the relevance of that, [prosecutor]?
> Prosecutor: Well, this is background information as to her knowing this individual in developing that this individual is, in fact, the father of the young lady, Your Honor.
> Court: [Defense Counsel?]
> Defense Counsel: What her age has to do with it? Ask her that question, but not how old she was.
> Court: I am going to overrule the objection. You may proceed.
> Prosecutor: Can you answer the question, please?
> Witness: Fourteen.
> Prosecutor: You were 14-years old—
> Defense Counsel: Objection. Your Honor, I have a motion. I have a motion for mistrial.

At sidebar, the following colloquy ensued:

> Defense Counsel: Your Honor, the Prosecution intentionally knew she was going to say 15—14 and he did that. That's grounds for mistrial. He is trying to say that he had information about this woman when she was 14-years old and that's ground for mistrial.

> That's bad act evidence prejudicing my client right away from the jump.
> Court: How old was the Defendant when he first had a relationship with this individual? Attorney Chancellor, please speak into the microphone?
> Prosecutor: Oh, I believe he was older than her.
> Court: How old?
> Prosecutor: Probably in his twenties.
> Defense Counsel: Your Honor, this jury is tainted. I move for a mistrial.
> Prosecutor: Your Honor, I don't see—I am asking the question to develop background and to develop me case. I don't see that this has anything to do with anything except to say that—
>
> . . . .
>
> Court: Attorney Chancellor, we are at sidebar, please use a lower voice.
> Prosecutor: Except to say that she is the mother of [D.G.], that he is the father; that he has authority over her; that they had an intimate relationship. We have to establish those things in this case, Your honor. We have to. How long she's know him, the length of time she's known him, those are all relevant.

The prosecutor further explained her purpose for calling Harrigan as a witness, stating:

> Prosecutor: Well, Your Honor, this is—one, Your Honor, we have to present a case. We have to give the jury our story. How D.G. came to be where she was at on that particular night. What the relationship of this individual is to D.G. What her—his authority is over D.G.

The court denied the motion for a mistrial, but "sustain[ed] any objection as it relates to how old the Defendant was at the time he began a relationship with the witness."

¶6 The prosecutor continued questioning Harrigan and established that D.G. was her daughter with Gonsalves. Gonsalves had been an involved father seeing D.G. multiple times a week, even though Gonsalves did not reside with Harrigan and D.G. D.G. was allowed to spend time at Gonsalves' house as often as four or five nights a week.

¶7 The prosecution then focused on the night the crimes allegedly occurred. Harrigan testified that D.G. needed to purchase new school uniforms, but Harrigan was scheduled to work and was

unavailable to assist D.G. Therefore, Harrigan asked Gonsalves if he could take D.G. to buy a new skirt for her school uniform. Gonsalves agreed and met D.G. at Harrigan's workplace at approximately 11:50 p.m. on August 29, 2013. After a few days, on about September 3, 2013, D.G. informed her mother about what had occurred that night after Gonsalves had picked her up. D.G. was crying and distraught when she explained to her mother what transpired between Gonsalves and her. Ultimately, Harrigan called the Virgin Islands Department of Human Services ("Human Services") to report what had occurred. Human Services' employees then contacted the Virgin Islands Police Department ("VIPD"), prompting police officers to meet with D.G. and Harrigan in order to complete a police report. Subsequently, Harrigan took D.G. to a gynecologist because Human Services personnel instructed her to do so. The trial court excluded all of D.G.'s statements made to the doctor during the exam because they did not qualify for admission under any hearsay exception.[3]

¶8 Harrigan explained that, prior to the alleged crimes, D.G. had been outgoing and happy, mature, and responsible; doing chores as she was instructed to do; and studious in school. However, after the night of the molestation, D.G. became withdrawn and angry, often times agitated, and generally sought solitude instead of the company of others. After August 30, 2013, D.G. terminated her relationship with her father. Her relationship with her half-siblings on her father's side deteriorated to the level of being non-existent.

[3] *But see* V.I.R.E. 803(4)(A)-(B) ("A statement that . . . is made for—and is reasonably pertinent to—medical diagnosis or treatment; and . . . describes medical history; past or present symptoms or sensations; their inception; or their general cause.").

¶9 Because of what Harrigan learned from D.G., she eventually confronted Gonsalves. When Harrigan asked Gonsalves about what D.G. had said he had done to D.G., Gonsalves remained silent and simply lowered his head.

¶10 On cross-examination, Defense Counsel elicited potential weaknesses in Harrigan's testimony. For example, Harrigan failed to ask Gonsalves whether what D.G. had said occurred was true. Harrigan explained that her daughter was not a liar and would not lie about something of such importance. Harrigan also omitted from her statement to police the facts that she contacted Human Services and the Women's Coalition to obtain counseling for D.G.

¶11 The victim, D.G., then testified that her parents were Marsha Harrigan and Charlesworth Gonsalves and identified the defendant as her father. D.G. was 16 at the time of the molestation. D.G. resided with her mother during her childhood but had significant contact with her father and described their relationship as "very close." D.G. testified that she had a close relationship with her father prior to the day she was molested, spending significant time with him, almost daily. However, after the molestation, D.G. no longer spoke to Gonsalves. D.G. further stated that it "hurts a lot" to think of what happened because she was so close to her father. Additionally, she testified that her siblings no longer converse with her since the molestation.

¶12 D.G. also testified concerning what occurred on the night of August 29, 2013, which continued into the early morning of August 30, 2013. On August 29, 2013, Harrigan told D.G. that she needed supplies for school and to have her school uniforms altered and cleaned, and Gonsalves, her father, would pick her up at her mother's place of employment to assist her in preparing what she needed in order to attend school.

¶13 In the late night of August 29, 2013, Gonsalves picked up D.G. at Harrigan's workplace, and the two proceeded to his home. When they arrived at Gonsalves' home, D.G. watched

television in Gonsalves' bedroom while he showered. D.G. had planned to sleep in her father's bed that night, as she had customarily done in the past. When Gonsalves emerged from the bathroom, he was wearing underwear and had a towel covering part of his body. He approached D.G., and they talked and watched T.V. During the conversation, Gonsalves asked if D.G. had a boyfriend. When she said she did, Gonsalves stated that he did not want anyone to take advantage of her. Gonsalves then followed up his question by asking D.G. if she was still a virgin, to which she responded affirmatively. The conversation continued, with Gonsalves repeating that he loved D.G. and wanted no one to take advantage of her.

¶14 While conversing, Gonsalves began touching D.G. and squeezing her breast. When this occurred, D.G. became shocked and scared, explaining her fear "because that's my dad. I don't know what he is capable of and he have authority over me." When questioned why she did not scream and ask her brother and cousin for help, D.G. explained that she had never thought her father would do something like that, and she was afraid. Gonsalves continued touching D.G., parting her legs and touching her vagina. D.G. attempted to keep her legs closed, but Gonsalves opened them anyway, explaining that he did not want anyone to take advantage of her and was "doing it to show [her] how it feels." Once Gonsalves opened D.G.'s legs and pulled down her pants and underwear, he proceeded to position himself and then inserted his tongue into D.G.'s vagina. After approximately a minute, Gonsalves then used "his fingers to penetrate in [D.G.'s] vagina." After another minute or two, Gonsalves stopped and asked D.G. if she knew he loved her and explained that he only did what he did to show her how it feels. At some point, Gonsalves told D.G., "you see it's not hard because I don't want you." Once the molestation ended, D.G. was scared and felt that her life would be ruined. D.G. testified that she is "not the same anymore." She becomes upset easily since the molestation, and she withdraws from others because she no

longer enjoys the company of other people and often awakes feeling depressed. The destruction of her relationship with her father has also distressed her because they were very close before the molestation.

¶15 D.G. waited until Gonsalves fell asleep and then went to the living room to text her boyfriend because she needed to talk to another person. She informed her boyfriend that someone had touched her inappropriately, but she failed to tell him it was Gonsalves, her father, because she was not prepared to discuss the molestation. After three days and because of her boyfriend's encouragement, D.G. told her mother what occurred.

¶16 Following Gonsalves' arrest and while he was in pre-trial detention, a relative of D.G.'s half-sister approached her stating that D.G.'s half-sister wanted to speak to her, but when D.G. answered the phone, both her half-sister and Gonsalves were on the phone. During this telephone call, Gonsalves apologized to D.G. for what he did to her.

¶17 The same half-sister began making overtures to D.G. to gain her trust and confidence in order to influence D.G. to make a written statement declaring that the events she reported to the police were all a dream. These contacts and communications resulted in the half-sister transporting D.G. to meet with Yohanna Manning, an attorney, in order for D.G. to make a statement to the same effect—that the sexual molestation was a dream. Upon arrival at the law office, Manning already had the statement prepared for D.G. to sign. However, D.G. later testified that Manning "typed up the letter" after she told him it was a dream, but defense counsel's cross-examination implied that Manning could have been taking notes instead. D.G. explained that she made the statement to Manning because she believed Gonsalves was sorry for sexually molesting her. D.G. contradicted much of the content of the statement prepared by Manning for her to sign. For instance, the document stated that she had reviewed the probable cause affidavit of the arresting

officer, but she stated she did not review any documents in Manning's law office. D.G. was 17 when she signed the document; however, her mother was not present.

¶18 D.G. further stated that she had witnessed her father "beat" her siblings and would listen when her father talked sternly because of how she had seen him "deal with the other children" so seriously. D.G. also sought spiritual counseling from the chaplain in her national guard unit in order to cope with how she felt because of the sexual molestation committed upon her.

¶19 Jamal Brewster, D.G.'s boyfriend at the time of the molestation, testified next. On the night of August 29, 2013, and into the early morning of August 30, 2013, Brewster was at his brother's house with friends and family when he received a text from D.G. between 4:00 a.m. and 5:00 a.m. Brewster concluded that D.G. was sad because she was using a large number of "frowning faces" in her texts. Brewster continued texting, and D.G. told him what was bothering her. He advised D.G. to tell her mother what had happened. Before the molestation, Brewster felt D.G. was an honest person who did not lie and loved her father very much and was excited to be readying herself to return to school. After August 30, 2013, D.G. "hated everything," "stopped loving herself," "became antisocial," and "didn't care for anyone to be around her."

¶20 Naomi Joseph, a supervisor of detectives and investigator with the VIPD with 30 years of experience, was the next person to testify. On September 3, 2013, Officer Joseph was on duty and was dispatched to Human Services where a social worker had received information of a sexual assault. At Human Services, Detective Joseph spoke with the social worker, D.G., and D.G.'s mother. After asking some basic questions to develop an idea of what had occurred, Detective Joseph arranged for the victim and her mother to proceed to the police station to be interviewed, and their statements were recorded on video. Detective Joseph directed another officer to retrieve the call log and text messages from D.G.'s phone at this time. Detective Joseph later interviewed

Gonsalves, and his statement corroborated all of the events as described by D.G. except as to the sexual molestation, and in that regard he denied ever touching D.G. Following the interviews with D.G., Gonsalves, and other witnesses, Detective Joseph arrested Gonsalves.

¶21 The prosecution then called Officer Stevens of the VIPD, who was dispatched to Human Services on September 3, 2013, after D.G. had made her report to a social worker. When he arrived, the social worker directed him to two females in her office; the younger of the two appeared to be emotional, had been crying, and had red eyes. The two women were D.G. and her mother, and after Officer Stevens listened to them describe what had occurred to D.G., he transferred the case to the specialized unit which had responsibility for sex crimes investigations.

¶22 After the prosecution rested its case, defense counsel moved for a judgment of acquittal. During counsel's argument, the issue arose as to whether an amendment to the information, in order to reflect the evidence produced, was allowed. The trial court then directed the parties' counsel to address the issue the next day by filing with the court supplemental research.

¶23 Manning, Gonsalves' prior counsel, testified next. Manning represented Gonsalves from September 2013 until being relieved as counsel in 2014. In November of that year, Manning was informed that D.G. wished to make a statement. According to Manning, D.G. contacted him by telephone at his office, and they scheduled a meeting to discuss what D.G. wished to say in the statement. D.G. did not attend the first scheduled meeting but did attend the rescheduled meeting later in November of 2014. D.G. arrived at the meeting with her sister, but Attorney Manning met only with D.G. The meeting lasted an hour, and Manning asserted that, during the meeting, he spoke with D.G. to first determine whether she was there voluntarily. Manning further asserted that they reviewed documents in the case file, specifically the text and call exchanges of D.G.'s cellphone on the night of the molestation and the statements made to police by various witnesses.

Manning did not remember reviewing the probable cause fact sheet with D.G. at that meeting, or any other meeting. Likewise, Manning remembered having his laptop at the meeting but could not remember if he "wrote down" any notes. During the meeting, Manning prepared D.G.'s affidavit, but Manning could not remember if he read the contents of the affidavit to D.G. or if she ever read it.

¶24 D.G. was provided a printed copy of the affidavit and left the office with it, but the affidavit was not executed that day. D.G. later contacted Manning, wishing to bring the affidavit in for notarization. D.G. ultimately brought the affidavit to Manning's office where it was signed and notarized. Exhibit 1 was shown to Manning, and he identified it as the affidavit he prepared that had been executed by D.G. Manning confirmed that D.G. provided the information in the affidavit and further confirmed that no parent was present when D.G. met with him and executed the affidavit. Manning further confirmed that he did not consult D.G.'s identification documents to verify her age when she executed the affidavit.

¶25 Shanisha Gonsalves, D.G.'s half-sister, then testified. Shanisha hired Manning to represent her father, Gonsalves. Shanisha stated that D.G. requested Manning's phone number, which she provided. She and D.G. then attempted to meet with Manning one evening, but Manning was not in his law office. She and D.G. then succeeded in meeting Manning at a later date. At this meeting, Shanisha waited in the lobby while D.G. met with Manning. Shanisha claimed that D.G. never discussed with her the reasons she wished to meet with Manning, and Shanisha did not know the reasons.

¶26 On cross-examination, Shanisha admitted that she was close with her father but did not feel she was closer to her father than D.G. Upon Gonsalves' arrest, Shanisha went to D.G.'s workplace and informed her of the arrest; at that time, D.G. began crying. While D.G. told Shanisha she was

the cause of her father's arrest, Shanisha asserted that D.G. never told her anything beyond that brief statement, and Shanisha never inquired of D.G. concerning this statement. Shanisha admitted that, at the time she took D.G. to meet Manning, she wished that Gonsalves would be released from jail.

¶27 Deshaun Gonsalves, D.G.'s brother, who was home with D.G. and Gonsalves on the night of the molestation, testified next. Deshaun was awake when D.G. arrived and did not see her again until the next morning. Deshaun testified that D.G. did not appear to be out of the ordinary that morning, as Deshaun did not notice any visible signs of emotion. The prosecution attempted to expose any weaknesses in this testimony on cross-examination asking questions that, if true, would have indicated Deshaun's testimony was mendacious.

¶28 Another of D.G.'s brothers, Jade Gonsalves, testified. He stated that D.G. would frequently come to her father's home and spend the night when she was growing up. Jade did not reside with Gonsalves at the time of the molestation. Jade further testified that the morning following the molestation he spoke with D.G., and she was distraught and had a "swollen" face from crying.

¶29 D.G. was then recalled to the witness stand for the prosecution's rebuttal presentation. D.G. did not recall much of what occurred prior to her meetings with Manning and did not add any new facts to what was already disclosed. D.G. further testified that she had been to Unique Auto, a business establishment, to visit her father prior to his arrest.

30 At the beginning of the third day of trial, the Superior Court reconsidered the People's motion to amend the information. The court applied Rule 7(e) of the Federal Rules of Criminal

Procedure[4] and concluded that there was no dispute "that the People are not intending to add an additional or different offense." Therefore, the trial court focused its inquiry on whether Gonsalves had adequate notice of the crime charged in the amended information such that he was not surprised by the amendment. The court ruled that the information could not allege that Gonsalves used "intimidation" to perpetrate the crimes because "there was no [such] evidence provided in discovery." Gonsalves registered no objection to the admission of the words "and finger" to both counts. The court concluded that Gonsalves had sufficient notice that the addition of the words "and finger" to the two counts was not prejudicial. The court further ruled that the facts did not establish that Gonsalves used "force" to accomplish the crime. However, the court also found that Gonasalves had ample notice that the prosecution would argue that he used his position of authority to perpetrate the sex act upon D.G. The court denied the motion to amend "with regards to including language of force and intimidation."

¶31 The court also ruled that, with regard to a sixteen-year-old victim, to charge Second Degree Aggravated Rape, there must be an aggravating factor in addition to the victim's age. After allowing this amendment, the court ruled that there was evidence that Gonsalves had sexual intercourse with D.G. who was 16 at the time and that he used his position of authority as her father to perpetrate the crime. With regards to count two, child abuse, the court found it was alleged that Gonsalves had sexual intercourse with D.G. and the statute was not unconstitutionally

[4] The previous version of Superior Court Rule 7 made the Federal Rules of Criminal Procedure applicable in the Superior Court. Effective December 1, 2017, the Virgin Islands Rules of Criminal Procedure became operative and were subsequently amended on December 19, 2017. S. Ct. Prom. Orders 2017-010 (Dec. 1 & 19, 2017). Further, Promulgation Order 2017-0006 amended Superior Court Rules 1 and 7 and repealed rules 12, 27, 29, 31, 36, 38, 29, and 50. *Toussaint v. Stewart*, 67 V.I. 931, 943 n.6 (V.I. 2017); *M. Davis. v. People*, S. Ct. Crim. No. 2015-0121, 2013 WL 3695089, at *18 n.24 (V.I. July 27, 2018).

vague because a reasonable person would know that it was a violation of the statute to engage in sexual intercourse with a minor.

¶32 Following closing arguments, the court provided the jury with instructions. With regard to count one, which charged a violation of section 1700a(a) of title 14 as an act of domestic violence under section 91(b)(6) of title 16, the court instructed that the following elements must be proven:

> 1. That the defendant perpetrated an act of sexual intercourse or sodomy with D.G.
> 2. That D.G. was under 18 years of age, but 13 years or older at the time of the sexual intercourse;
> 3. That the Defendant used a position of authority over D.G. to accomplish the sexual act;
> 4. That the events occurred on or about August 30, 2013, in the Judicial District of St. Croix, U.S. Virgin Islands, in the vicinity of Number 39B estate Grove Place, Frederiksted.

With regards to the charge of child abuse, a violation of section 505 of title 14, the court instructed that the following elements had to be proven:

> 1. The defendant engaged in intercourse with D.G.; or knowingly or recklessly cause D.G. to suffer mental or emotional injury;
> 2. That D.G. was a child at the time the sexual conduct occurred;
> 3. That the events occurred on or about August 30, 2013, in the Judicial District of St. Croix, U.S. Virgin Islands.

Gonsalves failed to object to either instruction. The trial court provided legal definitions of various words used in these elements and provided the standard general instructions given in a criminal trial. The jury returned a verdict of guilty on both counts. Sentencing was then held on September 8, 2016. The court denied Gonsalves' renewed motions for judgment of acquittal and a new trial and proceeded to sentence Gonsalves. The judgment and commitment was entered in the Superior Court on September 15, 2016, and Gonsalves filed his notice of appeal on October 3, 2016.

II. JURISDICTION

¶33 This Court has jurisdiction over all appeals arising from a "Final Order" of the Superior Court. 48 U.S.C. § 1613a(d); V.I. CODE ANN. tit. 4, § 32(a); *Toussaint v. Stewart*, 67 V.I. 931, 939 (V.I. 2017). "'A [Final Order] is a judgment from a court which ends the litigation on the merits, leaving nothing else for the court to do except execute the judgment.'" *Toussaint*, 67 V.I. at 939 (quoting *Ramirez v. People*, 56 V.I. 409, 416 (V.I. 2012) (citations omitted)). The entry of a Final Order implicitly denies all pending motions, and all prior interlocutory orders merge with the Final Order. *Toussaint*, 67 V.I. at 940 n.3 (citing *Simpson v. Bd. of Dirs. of Sapphire Bay Condos. W.*, 61 V.I. 728, 731 (V.I. 2015); *In re Estate of George*, 59 V.I. 913, 919 (V.I. 2013)).

¶34 In a criminal case, the written judgment embodying the adjudication of guilt and sentence imposed based on that adjudication constitutes a Final Order for purposes of 4 V.I.C. § 32(a). *Percival v. People*, 62 V.I. 477, 483 (V.I. 2015). Therefore, this Court obtained jurisdiction to hear this appeal timely filed on October 3, 2016, following the September 15, 2016 judgment and commitment entered by the Superior Court. V.I.R. APP. P. 4(a), (5)(b)(1); *see* V.I.S.CT.R. 4(a), 5(b)(1); *Billu v. People*, 57 V.I. 455, 461 n.3 (V.I. 2012) (noting that, where an amended rule utilized the same language as the rule in effect at the time the notice of appeal was filed, the amended rule is applied).

III. STANDARD OF REVIEW

¶35 Gonsalves presents a plethora of issues for consideration. First, he challenges the sufficiency of the evidence to sustain his convictions for Second Degree Aggravated Rape as an act of domestic violence in violation of 14 V.I.C. § 1700a(a) and 16 V.I.C. § 91(b)(6) and for Child Abuse in violation of 14 V.I.C. § 505. A challenge to the sufficiency of the evidence is reviewed *de novo*, and this Court applies the same standard as the trial court. *Ramirez*, 56 V.I. at 417; *see*

generally Elizee v. People, 54 V.I. 466, 482 (V.I. 2010) ("'[A] reversal for evidentiary insufficiency is considered to be the equivalent of an acquittal.'" (quoting *McMullen v. Tennis*, 562 F.3d 231, 237 (3d Cir. 2009)). We "must not serve as the usurper of the jury's role as judges of credibility and must also not engage in reweighing the evidence." *Brathwaite v. People*, 60 V.I. 419, 432 (V.I. 2014) (citing *Stanislas v. People*, 55 V.I. 485, 494 (V.I. 2011); *United States v. Walker*, 657 F.3d 160, 171 (3d Cir. 2011)). As such, this is a standard of review that is extremely deferential to the jury's verdict and requires that we view the evidence in the light most favorable to the People, and reversal is "confined to cases where the failure of the prosecution is clear." *Mulley v. People*, 51 V.I. 404, 409 (V.I. 2009) (quoting *United States v. Carr*, 25 F.3d 1194, 1202 (3d Cir. 1996) and citing *Latalladi v. People*, 51 V.I. 137, 145 (V.I. 2009)).

¶36 It is unnecessary for the evidence to be consistent only with the conclusion of guilt because conflicts in evidence are credibility determinations exclusively within the province of the jury. *Ambrose v. People*, 56 V.I. 99, 106 (V.I. 2012) (quoting *Latalladi*, 51 V.I. at 145); *Brito v. People*, 54 V.I. 433, 441-42 (V.I. 2010) (observing that "the jurors were free to disbelieve [the defendant's] testimony" (citing *Smith v. People*, 51 V.I. 396, 401 (V.I. 2009)).[5] So long as circumstantial evidence allows for a logical and rational inference based on common sense and every day experience, it will support a finding of guilt beyond a reasonable doubt as to the relevant element of the crime. *Galloway v. People*, 57 V.I. 693, 700 (V.I. 2012) (citing *Alfred v. People*, 56 V.I. 286, 293 (V.I. 2012); *Codrington v. People*, 57 V.I. 176, 199-200 (V.I. 2012)); *e.g.*, *McIntosh v.*

[5] *Cf. Rivera v. People*, 64 V.I. 540, 553-57 (V.I. 2016) (standard for credibility determination on appeal); *Phillip v. People*, 58 V.I. 569, 583-84 (V.I. 2013) (recognizing that "an appellate court may disregard a jury's reliance on a witness's testimony when that testimony is 'inherently incredible or improbable.'" (quoting *Williams v. Gov't of the V.I.*, 51 V.I. 1053, 1086 (D.V.I. App. Div. 2009)); 29A AM. JUR. 2D *Evidence* § 1375 (2008) ("Testimony is deemed inherently incredible or improbable where it is 'either so manifestly false that reasonable [people] ought not to believe it, or it must be shown to be false by object or things as to the existence and meaning of which reasonable [people] should not differ.").

People, 57 V.I. 669, 680 (V.I. 2012). However, a jury's verdict cannot be founded upon suspicion, speculation, conjecture, or any overly attenuated piling of inferences upon inferences. *Ventura v. People*, 64 V.I. 589, 601 (V.I. 2016) (quoting *Todman v. People*, 59 V.I. 675, 861 (V.I. 2013)). Therefore, we must affirm a conviction if the elements of the crime could have been found beyond a reasonable doubt by a rational trier of fact. *Charles v. People*, 60 V.I. 823, 831-32 (V.I. 2014).

¶37 Second, Gonsalves also argues that the trial court committed error when it allowed the People to amend the information after it had rested its case. This decision is reviewed for abuse of discretion unless the ruling involves application of a legal precept, which then requires this Court to exercise plenary review. *See Rawlins v. People*, 61 V.I. 593, 607 (V.I. 2014).

¶38 Third, Gonsalves further asserts that the trial court abused its discretion when it failed to grant a mistrial after the prosecution elicited testimony from Harrigan that she and Gonsalves had started their relationship when she was only 14. If a defendant has fairly presented the issue of prosecutorial misconduct by properly objecting to—or otherwise raising—the issue at the trial level, *e.g.*, *Francis v. People*, 56 V.I. 370, 387 n.8 (V.I. 2012), we review for abuse of discretion. *Connor v. People*, 59 V.I. 286, 299 (V.I. 2013); *e.g.*, *Francis v. People*, 59 V.I. 1075, 1077-79 (V.I. 2013) (reviewing a properly raised claim of vouching under the two-factor prosecutorial misconduct abuse of discretion standard). Reversal of a conviction is warranted if, in light of the entire proceeding: (1) the remarks or conduct of the prosecutor were legally improper and (2) the prosecutor's actions so fundamentally undermined the trial as to make it unfair and a denial of due process. *Frett v. People*, 66 V.I. 399, 409 (V.I. 2017); *see Monelle v. People*, 63 V.I. 757, 770 (V.I. 2015) ("A claim of prosecutorial misconduct during trial requires a court to resolve two questions: whether the prosecutor's comments were in fact improper and, if so, whether the

remarks prejudiced the defendant's right to a fair trial." (citing *Brathwaite*, 60 V.I. 426; *DeSilvia v. People*, 55 V.I. 859, 872 (V.I. 2011)).[6]

¶39 If the error is a constitutional error, we will affirm the conviction only if we find the error to be harmless beyond a reasonable doubt. *Frett*, 66 V.I. at 409; *Connor*, 59 V.I. at 299; *see Brathwaite*, 60 V.I. at 425-26 ("We engage in a harmless error analysis when determining whether improper prosecutor comments necessitate a new trial."). If the error is a trial error, i.e., a non-constitutional error in the proceeding, we affirm the conviction if it is highly probable that the error did not contribute to the conviction. *Frett*, 66 V.I. at 409; *Connor*, 59 V.I. at 299.

¶40 Finally, Gonsalves argues that the trial court abused its discretion when it refused to grant a new trial[7] based on asserted prosecutorial misconduct and evidentiary inconsistencies. The decision of whether to grant or deny a motion for a new trial is reviewed for an abuse of discretion, unless the decision is based on a legal precept. *John v. People*, 63 V.I. 629, 637 (V.I. 2015); *Thomas v. People*, 60 V.I. 688, 693-94 (V.I. 2014). If the denial of a motion for a new trial is based on a legal precept, the denial is subject to plenary review. *Thomas*, 60 V.I. at 694; *see Elizee*, 54 V.I. at 474 ("We exercise plenary review over questions of law and statutory construction." (citing *Gilbert v. People*, 52 V.I. 350, 354 (V.I. 2009)); *Browne v. Gore*, 54 V.I. 195, 202-03 (V.I. Super. Ct. 2011) (explaining that plenary means full, complete, entire, and with the power to

[6] *See also James v. People*, 59 V.I. 866, 883 (V.I. 2013); *Francis*, 56 V.I. at 388; *DeSilvia*, 55 V.I. at 872; *Farrington v. People*, 55 V.I. 644, 656 (V.I. 2011).

[7] Under the Virgin Islands Rules of Criminal Procedure, it is Rule 33 that now governs motions for new trials. Because this case was tried before the adoption of the Virgin Islands Rules of Criminal Procedure, we apply Federal Rule of Criminal Procedure 33 to this appeal. *See Toussaint*, 67 V.I. at 941 n.5 (explaining that the rule in effect at the time of entry of the order appealed from is the rule applied on appeal). We note that Rule 33 of the Virgin Islands Rules of Criminal Procedure and its federal counterpart, Rule 33 of the Federal Rules of Criminal Procedure, are identical. *Compare* V.I. SUPER. CT. R. 135 ("if required in the interest of justice"); FED. R. CRIM. P. 33 ("if the interest of justice so requires"), *with* V.I. R. CRIM. P. 33(a) ("if the interest of justice so requires").

conduct plenary review goes the responsibility to fully and completely consider the issue—both legally and, when required, factually (quoting *Huan v. United States*, 620 F.3d 372, 388 (3d Cir. 2010); BLACK'S LAW DICTIONARY 1273 (9th ed. 2009)).[8]

IV. DISCUSSION

A. Sufficiency of the Evidence

1. Sufficiency of the Evidence: Second Degree Aggravated Rape

¶41 Gonsalves challenges the sufficiency of the evidence to support his convictions. Gonsalves was charged with a violation of subsection 1700a(a) of title 14 as an act of domestic violence pursuant to subsection 91(b)(6) of title 16. This section provides, in relevant part, that:

> Whoever perpetrates an act of sexual intercourse or sodomy with a person who is under eighteen years but thirteen years or older, or by force, intimidation, or the perpetrator's position of authority over the victim is used to accomplish the sexual act . . . .

[8] A new trial must be granted when the verdict is against the interests of justice. V.I. SUPER. CT. R. 135. Gonsalves' two arguments that a new trial was warranted focus on the amendment of the information and the factual inconsistencies in D.G.'s (and others') testimony. Finding no error in the trial court's grant of leave to file the amended information, as explained below, Gonsalves' argument for a new trial also fails for the same reason.

With regard to asserted factual inconsistencies in D.G.'s testimony, we have established that inconsistencies in witness testimony constitute a factual issue for the jury to determine, and this Court will only reverse a conviction due to incredible testimony if the record establishes that it was physically impossible for the observations to have been made by the witness, what was testified to have occurred violates the laws of nature, or if the testimony is "incredibly dubious"—it is inherently improbable with a complete lack of corroborating evidence or is wholly uncorroborated and coerced. *Rivera*, 64 V.I. at 554-55; *see Phillip*, 58 V.I. at 584 ("An appellate court may disregard the jury's reliance on a witness's testimony when that testimony is 'inherently incredible or improbable.'" (quoting *Williams v. Gov't of the V.I.*, 51 V.I. 1053, 1086 (D.V.I. App. Div. 2009)); *e.g., Penn*, 67 V.I. at 893 (applying these factors in the civil context where sufficient evidence was challenged because the testimony was asserted to be incredible). D.G.'s testimony was corroborated by multiple witnesses verifying that D.G. spent the night at Gonsalves' apartment, sent text messages to her boyfriend, communicated her emotional disturbance, etc. While there were inconsistencies, none of these rose to such a level as to make the testimony so lacking in credibility as to warrant reversal; rather, these were simply credibility determinations within the province of the jury. *Brito*, 54 V.I. at 441-42 (citing *Smith*, 51 V.I. at 401). Moreover, Gonsalves admits, (App. Br., 27), the evidence is equipollent, RANDOM HOUSE WEBSTER'S COLLEGE DICTIONARY 445 (2d ed. 1999) ("equal in power, effect, etc.; equivalent"), and when evidence presents two plausible interpretations, this presents a factual determination within the exclusive province of the finder of fact. *See Nicholas v. People*, 56 V.I. 718, 741-42 (V.I. 2012). Because neither of the asserted grounds justify a new trial, the judgment is affirmed.

14 V.I.C. § 1700a(a).[9] In order to prosecute a crime as an act of domestic violence, such facts must be alleged in the information. 16 V.I.C. § 99(f); *Bernhardt v. Bernhardt*, 51 V.I. 341, 349

[9] The full text of section 1700a at the time Gonsalves committed the acts alleged in the information was as follows:

> (a) Whoever perpetrates an act of sexual intercourse or sodomy with a person who is under eighteen years but thirteen years or older **and not the perpetrator's spouse**, or by force, intimidation, or the perpetrator's position of authority over the victim is used to accomplish the sexual act, is guilty of aggravated rape in the second degree and shall be imprisoned for life or for any term in years, but not less than 10 years. 'Position of authority' shall include, but not be exclusive to the following: an employer, youth leader, scout leader, coach, teacher, counselor, school administrator, religious leader, doctor, nurse, psychologist, guardian ad litem, baby sitter, or substantially similar position, and a police officer or probation officer other than when the officer is exercising custodial control over a minor.
>
> (b) Whoever is convicted of a second or subsequent offense of aggravated rape in the second degree shall be punished by imprisonment for life or for any term of years, but not less than 20 years. Notwithstanding the provisions of title 5, chapters 313, 405 and 407 of this Code, or of any other law, imposition or execution of the twenty-year minimum period of incarceration shall not be suspended; nor shall probation, parole, or any other form of release be granted for the minimum period of incarceration prescribed in this section.
>
> (c) Whoever is convicted of attempted aggravated rape in the second degree shall be punished by imprisonment for not more than 25 years, but not less than 5 years. Notwithstanding the provisions of title 5, chapters 313, 405 and 407, or any other provision of law, imposition or execution of the five-year minimum period of incarceration shall not be suspended, nor shall probation, parole or any other form of release be granted for this minimum period of incarceration.
>
> (d) Whoever is convicted of an offense under this section shall receive a psychiatric evaluation and participate in psychosocial counseling.
>
> (e) Spousal consent shall be an affirmative defense in the event the persons are legally married pursuant to the provisions of title 16, chapter 1 of the Virgin Islands Code.

14 V.I.C. § 1700a (emphasis added). On October 15, 2013, subsection 1700a(a) was revised to remove the language emphasized above, "and not the perpetrator's spouse," from subsection (a) and adding subsection (e) creating the "Spousal Consent" affirmative defense. *Francis v. People*, 63 V.I. at 734 n.1 (citing Act No. 7517 s. 1(a); *Rawlins*, 61 V.I. at 603 n.5). Because the acts under question occurred in August of 2013, prior to the repeal of this portion of subsection 1700a(a), the People were required to prove that Gonsalves was not D.G.'s husband, and we address this element. *Rawlins*, 61 V.I. at 603 n.5. Both D.G. and her mother testified that Gonsalves was D.G.'s father, and multiple of D.G.'s siblings testified that they were D.G.'s brother or sister and that Gonsalves was their father. Further, a marriage between a parent and his (or her) child is void. 16 V.I.C. § 1(a)(1) ("A marriage is prohibited and void . . . when it is between a man and his . . . daughter . . . ."); *see also* 16 V.I.C. § 1(a)(2) (declaring same as between "a woman and . . . her son"). A rational jury could have readily concluded that Gonsalves and D.G. were not married at the time of the criminal acts. *See Francis*, 63 V.I. at 737 n.3 ("Throughout the trial testimony, Francis

(V.I. 2009). Guilt of Second Degree Aggravated Rape required proof beyond a reasonable doubt that: (1) the defendant;[10] (2) knowingly, *Duggins*, 56 V.I. at 301 (citing 14 V.I.C. § 14; *Rodriguez*, 423 F.2d at 12-14, nn.4-17); (3) used force, intimidation, or a position of authority, *Gilbert*, 52 V.I. at 360;[11] (4) to commit an act of sexual intercourse or sodomy; (5) upon a victim who is 16

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was referred to as J.T.'s uncle, or even as the brother of J.T.'s mother, but never as J.T.'s spouse. There is simply no evidence in the record that [the victim] had married his uncle."); *Rawlins*, 61 V.I. at 604 ("[A] reasonable jury could have found beyond a reasonable doubt that [the victim] was not [the defendant's] spouse at the time of the [criminal acts]."); *see also Francis v. People*, 57 V.I. 201, 211-12 (V.I. 2012) ("The testimony of one witness is sufficient to prove any fact.").

[10] 14 V.I.C. § 1700a(a) ("Whoever . . . ."); 1 V.I.C. § 41 (defining "whoever"); COMPACT AM. DICT., at 920 ("whoever" defined as a word indicating "whatever person or persons" or "who,"); BLACK'S LAW DICTIONARY 1324 (10th ed. 2014) (defining "person" as "A human being. — Also termed *natural person*." (emphasis in the original)); *see Ubiles v. People*, 66 V.I. 577, 592 V.I. 2017).

[11] In *Gilbert*, 52 V.I. at 361 n.8, we specifically reserved the question of whether an aggravating factor must be charged and proved with regard to a victim who was 16 years old. There we held that the defendant's use of force, intimidation, or his position of authority to engage in sexual intercourse or sodomy was a necessary element with regard to a 17-year-old victim in order to prove a violation of subsection 1700a(a) of title 14. The trial court ruled that the same aggravating factor must be proved for a 16-year-old victim as a 17-year-old victim.

Section 1700 of title 14 provides that anyone who engages in sexual intercourse or sodomy with a victim under the age of 13 is guilty of "First Degree Aggravated Rape," making the victim's age alone the aggravating factor. 14 V.I.C. § 1700(a)(1). Section 1700 also provides that anyone who uses force, intimidation, or their position of authority over the victim to engage in sexual intercourse or sodomy with a person who is under 16 years of age, *i.e.*, 13, 14, and 15 year-olds, and residing in the same household as the defendant is guilty of First Degree Aggravated Rape, adding the aggravating factors of force, intimidation, or position of authority plus residing in the same household as the victim. 14 V.I.C. § 1700(a)(2). Additionally, in *Francis v. People*, 63 V.I. at 725, we held that, for 13, 14, and 15 year-old victims, the victim's age alone is the only aggravating factor to be proved in cases of Second Degree Aggravated Rape under subsection 1700a(a). Victims 16 or older but not yet 18, *i.e.*, 16 and 17 year-olds, are protected by section 1702(a) with the aggravating factor of the defendant's age being over 18 and more than 5 years older than the victim. 14 V.I.C. § 1702. Similarly, with victims that are older than 13 but not yet 16, *i.e.*, 14- and 15-year-olds, 1703(a) prohibits anyone who is not yet 18 but older than 16, *i.e.*, 17 year-olds, from having sexual intercourse, making the defendant's age the aggravating factor. 14 V.I.C. § 1703(a). Moreover, the change between First Degree Aggravated Rape in 1700(a)(2) and Second Degree Aggravated Rape in 1700a(a) is a logical reduction in aggravating factors from First Degree to Second Degree, eliminating proof of residing in the same household. Likewise, Second Degree Rape requires proof that the victim was 16 or 17 and the defendant was 5 years, or more, older than the victim such that the only aggravating factor to be proved is that the defendant was more than four years older than the victim. 14 V.I.C. § 1702(a). It is logical that, for defendants ages 18-24, within the 5-year age gap, the legislature would require proof of an aggravating factor; otherwise, there would be no distinction between the crimes of Second Degree Aggravated Rape and Second Degree Rape with regard to 16 and 17 year-old victims, an illogical and absurd result. There is no discernable reason why, under 1700a(a), a conviction would not require proof of an aggravating factor for a 16-year-old victim just the same as when the victim is 17. The other provisions of title 14 chapter 85 work to protect minors from sexual abuse and comprehensively provide for the circumstances under which various crimes are committed, and nothing in the scheme renders the holding in *Gilbert* absurd or superfluous as applied to a 16-year-old victim. *See generally Francis v. People*, 63 V.I. 735-36. Given the overall statutory scheme and the holding in

years of age or older but younger than 18 years of age, 14 V.I.C. § 1700a(a); and (6) the existence of a familial relationship between the victim and the defendant. 16 V.I.C. § 91(c).[12]

¶42 Gonsalves was identified as the person at the defense's table in the courtroom by at least one witness (element 1), and there was ample testimony proving beyond a reasonable doubt the attendant circumstance of D.G.'s age being under the age of 18 but 16 or older (element 5).[13] A familial relationship exists if the defendant is any of the following: a spouse, former spouse, parent, child, any other person related by blood or marriage to the victim, a member of the victim's household, a former member of the victim's household, a person with whom the victim has a child in common, a person who is currently in a sexual or otherwise intimate relationship with the victim, or a person who has been in the past in a sexual or otherwise intimate relationship with the victim. 16 V.I.C. § 91(c). The evidence establishing the familial relationship domestic violence element (element 6), as charged, was obviously sufficient, as both D.G. and her mother testified that Gonsalves was D.G.'s father. *See Charles*, 60 V.I. at 834 ("The uncorroborated testimony of the victim is sufficient to sustain the conviction." (citing *Stevens v. People*, 52 V.I. 294, 308 (V.I. 2009)).

Gilbert, we agree with the Superior Court; there is no logical reason to distinguish a 16-year-old victim from a 17-year-old victim under section 1700a(a).

[12] The full text of subsection 91(c) is as follows:

> 'Victim' includes any person who has been subjected to domestic violence by a spouse, former spouse, parent, child, or any other person related by blood or marriage, a present or former household member, a person with whom the victim has a child in common, or a person who is, or has been, in a sexual or otherwise intimate relationship with the victim.

16 V.I.C. § 91(c).

[13] *See Brathwaite*, 60 V.I. at 430 ("[Defendant] further implies that direct sworn testimony, which is uncontradicted, uncontroverted, and unimpeached, from an individual regarding the individual's age, and the testimony of the individual's mother, who was obviously present during the birthing process, are not sufficient evidence of age. This argument is inconsistent with rational thought and well-established common law.").

a. Sufficiency of the Evidence: Second Degree Aggravated Rape—Element 3—Aggravating Factor

¶43 Subsection 1700a(a) requires that, with regards to 16- and 17-year-old victims, the sexual intercourse or sodomy be accomplished "by force, intimidation, or [use of] the perpetrator's position of authority over the victim." 14 V.I.C. § 1700a(a); *Gilbert*, 52 V.I. at 362*; see generally Francis v. People*, 63 V.I. 724, 735-36 (V.I. 2015); *Gilbert*, 52 V.I. at 365 n.13 ("[T]he use of one's position of authority to achieve such a goal would constitute a form of coercion."). Rather than providing a definition of "position of authority," the Legislature of the Virgin Islands determined that the better practice was to provide a nonexclusive list that includes an employer, youth leader, scout leader, coach, teacher, counselor, school administrator, religious leader, doctor, nurse, psychologist, guardian ad litem, and baby sitter. 14 V.I.C. § 1700a(a).[14] A police officer or corrections officer who is not the custodial guardian of a minor is also considered to be in a position of authority. 14 V.I.C. § 1700a(a).

¶44 Finally, those in "substantially similar position[s]" to the foregoing adumbration are in a position of authority. *Id.* Authority is "the right and power to enforce laws, **exact obedience**, **command**, determine, or judge." COMPACT AM. DICT., at 56 (emphasis added). Therefore, a person in a "substantially similar position" is someone who has the right and power to exact obedience from or command the victim. *Cf.* 14 V.I.C. § 293(a)(1) (providing that a parent exercising moderate force may restrain or "correct" a child).

[14] *See generally Rivera-Moreno v. Gov't of the V.I.*, 61 V.I. 279, 294 n.5 (V.I. 2014) (holding that a listing of terms without language—such as "only"—indicating the list is exhaustive or exclusive should not be interpreted as such (citing *Connor*, 59 V.I. at 296 n.8)); BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 38 (2d photo. reprint. 1961) (Yale University Press 1921) ("Example, if not better than precept, may at least prove to be easier.").

¶45 Gonsalves, as D.G.'s father, clearly enjoyed a position of authority and had the right and power to exact obedience from D.G. and to command her.[15] Additionally, the evidence clearly established that Gonsalves used his position of authority as D.G.'s father to perpetrate the sexual act. D.G. testified that her father disciplined his children. Moreover, Gonsalves told D.G. that his entire purpose for molesting her was to ensure that no one would take advantage of her because he loved her. Furthermore, the molestation occurred late at night or in the early morning, in Gonsalves' bedroom while D.G. was visiting Gonsalves. Additionally, Gonsalves came out of the shower in his underwear and a towel while she was relaxing on his bed because that is where she slept when she visited her father. *E.g.*, *Castor v. People*, 57 V.I. 482, 492 (V.I. 2012) ("[Defendant] had access to [the minor victim], when she was vulnerable with the entire house asleep late at night only because of his position as her stepfather."). It is difficult to imagine a clearer example of a parent using his position of authority over his child to accomplish his purpose than a parent expressly telling his child he is going to molest her in order to "show her how boys take advantage of girls." The evidence was overwhelmingly sufficient for a jury to have found this element beyond a reasonable doubt. *E.g.*, *Castor*, 57 V.I. at 492 ("[T]he jury could rationally conclude that, absent the stepfather relationship, Castor would have lacked access to the child to perpetrate the sexual assaults."); *Charles*, 60 V.I. at 833 n.4.

[15] *See* 14 V.I.C. § 507 ("Nothing in this chapter shall be interpreted to prevent a parent, guardian, or person acting at the direction of a child's parent or guardian, from using reasonable and moderate physical discipline to correct, restrain or discipline a child."); 14 V.I.C. § 502(c) ("[I]t is the policy of the Government of the Virgin Islands to protect children from assault, abuse and neglect, and to encourage parents . . . to use methods of correction, restraint and discipline that are not dangerous to children."); 14 V.I.C. § 293(a)(1).

b. Sufficiency of the Evidence: Second Degree Aggravated Rape—Elements 2 and 4—Knowingly Committed Sodomy or Sexual Intercourse (*Actus Reus*)

¶46 The *actus reus* of the crime defined in subsection 1700a(a) is that of perpetrating an act of sexual intercourse or sodomy. 14 V.I.C. § 1700a(a) ("Whoever perpetrates an act of sexual intercourse or sodomy . . ."). Subsection (a) provides varying modes of conduct that establish this element, *see Gov't of the V.I. v. Clarke*, 572 Fed. Appx. 138, 142 (3d Cir. 2014); therefore, if the prosecution proves that the defendant engaged in sexual intercourse, sodomy, or both, this element has been proved beyond a reasonable doubt. *See Ubiles v. People*, 66 V.I. 572, 592 (V.I. 2017).

¶47 To perpetrate is "[t]o be guilty of or responsible for; commit." COMPACT AM. DICT., at 618. Sexual intercourse is "vaginal intercourse or any insertion, however slight, of a hand, finger, or object into the vagina, vulva, or labia." 14 V.I.C. § 1699(e).[16] Sodomy is "carnal knowledge of any person by mouth, . . . anus, . . . or insertion, however slight, of any object into the victim's anus" as well as submission to any of these acts. 14 V.I.C. § 1699(f). The statute specifically includes within this definition cunnilingus and fellatio. *Id.* Carnal knowledge is "sexual intercourse, esp. with an underage female.—Sometimes shortened to knowledge." BLACK'S L. DICT., at 256 (10th ed. 2014.) Intercourse is "physical sexual contact, esp. involving penetration of the vagina by the penis." *Id.* at 827. Sexual intercourse is "sexual union between two human beings, gen. involving physical union of the sexual organs." COMPACT AM. DICT., at 750. Further,

[16] For the sake of clarity, we note that, in 2013, "sexual intercourse" and "sodomy" had been defined in subsections 1699(d) and (e). However, in 2014, when then subsection 1699(c) was replaced with the current 1699(c) and a new 1699(d) added, former subsections 1699(d) and (e) were re-designated as the present subsections 1699(e) and (f). Jan. 31, 2014, No. 7579, § 3(2), Sess. L. 2014, p. 2. Therefore, it is appropriate for us to apply the definitions of "sexual intercourse" and "sodomy" in this matter. We note that these definitions are limited in application to the crimes defined in Chapter 85, "Rape and Related Offenses," in Title 14 of the Virgin Islands Code. 14 V.I.C. § 1699 ("As used in this chapter . . . ."); *e.g.*, *LeBlanc v. People*, 56 V.I. 536, 543 n.6 (V.I. 2012) (holding same for 14 V.I.C. § 1027(b)); *McIntosh*, 57 V.I. at 684 (holding that the language "As used in this chapter" under section 593 of title 19 limits the applicability of that provision to that chapter).

even the slightest penetration by the forgoing methods "is sufficient to complete the crime." 14 V.I.C. § 1704. An exception to the forgoing prohibitions is "insertion for medical treatment or examination." 14 V.I.C. § 1699(e), (f).

¶48 Therefore, if a defendant penetrates—however slightly—a victim's vagina, vulva, or labia with his/her hand, finger, penis, or a foreign object, he/she has engaged in sexual intercourse. Further, when a defendant uses his or her sexual organs or a foreign object to penetrate the victim's mouth or anus, the defendant has engaged in sodomy. Therefore, when a defendant forces the victim to submit to cunnilingus or fellatio, the defendant has also engaged in sodomy. D.G. testified that Gonsalves performed cunnilingus on her and inserted his finger into her vagina. Gonsalves' insertion of his finger into D.G.'s vagina was sexual intercourse as defined in subsection 1699(e) of title 14. Gonsalves' performing of cunnilingus on D.G. was an act of sodomy within the definition provided in subsection 1699(f). Furthermore, the record is devoid of even a suggestion that Gonsalves was somehow acting involuntarily. Gonsalves was awake, conscious, and functional and able to concoct a devious, though ostensible, explanation for his dastardly conduct upon his daughter D.G. at the time, which obviously proved he was aware of what he was doing to her. The testimony provided at trial was undeniably sufficient to establish Gonsalves' knowing commission of sodomy or sexual intercourse. The prosecution having presented sufficient evidence upon which a jury could have found each element of the crime beyond a reasonable doubt, Gonsalves' conviction for Second Degree Aggravated Rape is affirmed

2. Sufficiency of the Evidence: Child Abuse

> Any person who abuses a child, or who knowingly or recklessly causes a child to suffer physical, mental or emotional injury, or who knowingly or recklessly causes a child to be placed in a situation where it is reasonably foreseeable that a child may suffer physical, mental or emotional injury or be deprived of any of the basic

> necessities of life, shall be punished by a fine of not less than $500, or by imprisonment of not more than 20 years, or both.

14 V.I.C. § 505. To prove the crime of "Child Abuse" in violation of section 505 of title 14, the prosecution must prove: (1) the defendant,[17] (2) knowingly or recklessly (*mens rea*), (3) engaged in "abuse" against (*actus reus*), (4) a child, 14 V.I.C. § 503(c) ("'Child' means any person under the age of eighteen (18) years."). 14 V.I.C. § 505. As discussed above, there was sufficient evidence establishing that Gonalves was the defendant and that D.G. was a minor.

a. Sufficiency of the Evidence: Child Abuse—Element 2—Intent (*Mens Rea*)

¶49 A defendant must possess one of two states of mind when acting in order to violate section 505; the defendant must either act with knowing intent or reckless intent. 15 V.I.C. § 505. Persons act knowingly when they have "personal knowledge." 1 V.I.C. § 41 (defining knowingly). However, to act knowingly "does not require any knowledge of the unlawfulness of an act or omission." *Id.*; *Duggins v. People*, 56 V.I. 295, 301 (V.I. 2012) (defining knowing as "having or showing awareness or understanding" (citing BLACK'S LAW DICTIONARY 950 (9th ed. 2009)); *cf. People v. Clarke*, 55 V.I. 473, 479 (V.I. 2011). Gonsalves' conduct was undeniably knowing, as he was conscious when he physically engaged in the sexual contact with D.G., and the record is devoid of any evidence suggesting that Gonsalves otherwise lacked an awareness of his actions.

¶50 Furthermore, the Model Penal Code provides a useful definition for crimes with a *mens rea* element of "reckless," or that require a defendant to have acted "recklessly," and provides that a person acts recklessly with respect to a material element of an offense

[17] 14 V.I.C. § 505 ("Any person who . . . ."); 1 V.I.C. § 41 (defining "person" and "whoever" to "respectively include corporations, companies, associations, joint stock companies, firms, partnerships, and societies, as well as individuals"); COMPACT AM. DICT., at 920 ("whoever" defined as a word indicating "whatever person or persons" or "who,"); BLACK'S L. DICT., at 1324 (defining "person" as "A human being. — Also termed *natural person*." (emphasis in the original)); *see Ubiles*, 66 V.I. at 292.

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

MODEL PENAL CODE § 2.02(2)(c) (emphasis added). Having sexual relations with one's child is unquestionably, at a minimum, conduct that is reckless as it relates to potentially causing mental or emotional harm to the minor victim. *See Francis*, 63 V.I. at 740 ("[W]hen a man exposes his penis to a child, . . . his conduct is 'so lewd or obscene that a normal person would unhesitatingly be irritated by it'" (quoting *People v. McNair*, 279 P.2d 800, 801 (Cal. Ct. App. 1955))).

b. Sufficiency of the Evidence: Child Abuse—Element 3—Abuse (*Actus Reus*)

¶51 Section 505 provides four modes by which the criminal act of the crime of Child Abuse can be accomplished. *Brathwaite*, 60 V.I. at 433 n.8. A defendant violates section 505 of title 14, if the defendant: (1) abuses a child; (2) causes a child to suffer physical, mental, or emotional injury; (3) places a child in a situation where it is reasonably foreseeable that a child may suffer physical, mental or emotional injury; or (4) places a child in a situation where it is a reasonably foreseeable possibility that the child may be deprived of any of the basic necessities of life. 14 V.I.C. § 505.

¶52 At the time of the acts committed in the present case, "abuse," the first mode of violating section 505, was defined as "the infliction of physical, mental or emotional injury upon a child, or maltreatment, sexual conduct or sexual contact with a child, or exploitation of a child . . . ." 14

V.I.C. § 503(a).[18] Conduct is "the way one acts." COMPACT AM. DICT., at 182. "Sexual" is an adjective "implying or symbolizing erotic desires or activity." *Id.* at 750. "Erotic" is an adjective describing actions "concerning, or tending to arouse sexual desire." *Id.* at 288. An emotional or mental injury is "psychological injury or harm which impairs the mental or emotional health or functioning of a child." 14 V.I.C. § 503(d).

¶53 Gonsalves licked and inserted his tongue into D.G.'s vagina in addition to inserting his finger. Furthermore, there is no modicum, scintilla, or iota of evidence that Gonsalves had any connection to either the medical profession or was employed as a medical professional. The record is devoid of evidence indicating that this penetration was for a medical (or some other non-sexual) purpose, and Gonsalves' stated purpose was "to show her how boys take advantage of girls." Irrefutably, Gonsalves' actions tended to arouse sexual desire and fell within the prohibition of section 505. Gonsalves' conduct was simply lascivious and immoral. Therefore, there was sufficient evidence for the jury to have found beyond a reasonable doubt that Gonsalves abused D.G. within the meaning of section 503(a). *See Francis*, 63 V.I. at 740 ("[S]exual motivation is proven when a man exposes his penis to a child, because his conduct is 'so lewd or obscene that a normal person would unhesitatingly be irritated by it.'" (quoting *McNair*, 279 P.2d at 801); *e.g.*,

[18] Because the conduct under consideration here occurred prior to when the Legislature amended section 503 to add subsections (i) and (j), which provided the definitions for sexual conduct and sexual contact that were lacking, No. 7579, §§ 1, 2, Sess. L. 2014, p.1 (Jan. 31, 2014), we must consider the plain meaning of the statute as written in 2013. Presently, sexual conduct and sexual contact are defined. "Sexual conduct" is actual or simulated (1) sexual intercourse; (2) penetration of the vagina or rectum by hand, finger, or foreign object; or (3) sexual bestiality. 14 V.I.C. § 503(h). Sexual intercourse includes actual or simulated genital-genital contact, oral-genital contact, anal-genital contact, or oral-anal contact. 14 V.I.C. § 503(h)(i)(1). With regards to sexual conduct, if the penetration is for medical purposes in a recognized medical procedure, the conduct is excepted from the prohibition in section 505. 14 V.I.C. § 503(h)(i)(2). "Sexual contact" also has three modes of occurring. First, the touching of another person with one's genitals is sexual contact. 14 V.I.C. § 503(j). Second, it is sexual contact when a defendant touches the genitals or anus of another person. *Id.* Finally, when a defendant, with the purpose of sexual desire or gratification, touches another person's lips, groin, inner thighs, buttocks, or breast, whether clothed or naked, that is sexual contact. *Id.*

Charles, 60 V.I. at 834 n.6 ("There was also testimony that Charles touched X.P. on the breast and buttocks. Both instances are clear evidence of sexual contact as defined.").

¶54 Additionally, the evidence was sufficient to support a finding that Gonsalves inflicted mental or emotional injury upon D.G. when he sucked, licked, and inserted his finger in D.G.'s vagina. Being sexually abused by her father undeniably impaired D.G.'s mental and emotional functioning as established by the testimony of D.G. and several other witnesses stating that she had become withdrawn, isolated, unhappy, depressed, etc. Ample testimony was presented that D.G. was not of this demeanor prior to the molestation. Finally, D.G. specifically testified that she suffered emotionally because of what occurred. Gonsalves' conduct established two of the several modes of violating section 505, abuse and infliction of emotional harm. *See Francis*, 63 V.I. at 740. As there was sufficient evidence to establish each of the elements of the crime of Child Abuse beyond a reasonable doubt, the conviction should be affirmed.[19]

[19] Gonsalves collapses his void for vagueness argument with his sufficiency of the evidence argument relating to the proscribed conduct and, as such, has waived this argument. *See* V.I. R. APP. P. 22(m); *In re Smith*, 54 V.I. at 524 ("Issues raised in a notice of appeal which are not argued in the appellants brief are waived."); *Ward v. People*, 58 V.I. 277, 282 n.2 (V.I. 2013) (holding that perfunctory and unsupported arguments are deemed waived (citing former V.I. S. CT. R. 22(m)). However, even if we were to entertain this argument, we would still affirm the conviction. In *LeBlanc v. People*, 56 V.I. 536 (V.I. 2012), we held that section 505 was unconstitutional as applied because there was no apparent definition of what acts on the part of the defendant constituted "sexual conduct" or "sexual contact." Therefore, it was unclear if the touching of genitals that are clothed fell within the proscribed conduct. *Id.* at 544-45. In contrast, we held that sexual intercourse was plainly proscribed by section 505 in *Brathwaite v. People*, 60 V.I. 419, 435 (V.I. 2014). Gonsalves licked and inserted his tongue into D.G.'s vagina in addition to inserting his finger. This is clearly conduct tending to arouse sexual desire and falling within the prohibition of section 505 and adequate "to put a person of ordinary intelligence on notice that [a parent licking and inserting one's tongue and finger into one's own child's vagina] constituted child abuse." *See Brathwaite*, 60 V.I. at 434; *e.g.*, *Rawlins*, 61 V.I. 605-06; *cf. In re Barrett*, Civ. App. No. 91-519, 1995 WL 450466, at *12 (D.V.I. App. Div. Jan. 31, 1995) (unpublished) ("The conduct described in the record, attempting to drown a child in the sink, failure to provide food, and maintaining a dangerously unsanitary living environment, is hardly behavior that would fall at the margins. Rather, such practices warrant a court's concern that the parent could not protect the child's safety.").

B. Amended Information

¶55 Any time prior to the verdict, the information in a criminal matter can be amended unless either of two conditions exist. FED. R. CRIM. P. 7(e).[20] The amendment of an information is prohibited if the amendment 1) adds a new or different offense than what was charged or 2) would prejudice a substantial right of the defendant. *Id.* A criminal information should be construed as a whole using common sense to interpret the information to include facts that are logically and rationally implied. *Charles*, 60 V.I. at 837 (quoting *United States v. Berger*, 473 F.3d 1080, 1103 (9th Cir. 2007); and citing *United States v. King*, 200 F.3d 1207, 1217 (9th Cir. 1999); *United States v. Vidaure*, 861 F.2d 1337, 1341 (5th Cir. 1988)); *cf. post* at 43-46 (Meade, D.J., dissenting in part). A charge in an information generally provides sufficient notice to a defendant if the offense is alleged "in the very terms of the statute." *United States v. Gooding*, 25 U.S. (12 Wheat.) 460, 474 (1827). In determining whether a defendant had been put on **notice** of the charges, "sources in the information extrinsic to the specific count can be used to determine whether the defendant was sufficiently apprised of the offense charged." *Charles*, 60 V.I. at 837-38 (citing *State v. Spigarolo*, 556 A.2d 112, 125-26 (Conn. 1989); *United States v. Staggs*, 881 F.2d 1527, 1531-32 (10th Cir. 1989)).[21] While each charge "must be established by legal proof, the

[20] At the time of the trial, Superior Court Rule 7 made the Federal Rules of Criminal Procedure applicable to criminal matters in the Superior Court. V.I. SUPER. CT. R. 7 ("[T]he practice and procedure in the Superior Court shall be governed by the Rules of the Superior Court and, to the extant not inconsistent therewith . . . the Federal Rules of Criminal procedure. . . ." (as written prior to being amended)); *e.g.*, *Brito v*, 54 V.I. at 440; *see Webster*, 66 V.I. at 518 n.3 (explaining that we apply the rule in effect at the time of entry of the judgment); *cf.* V.I. R. CRIM. P. 3(d) ("Unless an additional or different offense is charged or a substantial right of the defendant is prejudiced, the court may permit an information to be amended at any time before the verdict or finding.").

[21] To the extent notice is a concern in the present analysis, we note that "an information need not set forth the means by which the prosecution hopes to prove that the defendant committed the specified offense." *Gov't of the V.I. v. Commissiong*, 706 F. Supp. 1172, 1181 (D.V.I. 1989) (quoting *United States v. Haldeman*, 559 F.2d 31, 124 (D.C. Cir. 1976) (*en banc*)). Generally, an information provides sufficient notice if it "sets forth the offense in the words of the statute itself, as long as 'those words of themselves fully, directly, and expressly, without any uncertainty or

sufficiency of the [charging document] in substance and form is a matter of law, upon which, if drawn in question, it is the duty of the court to give an opinion. The general rule is, that no person shall be held to answer to a criminal charge, until the same is fully and plainly, substantially and formally described." *Commonwealth v. Webster*, 59 Mass. 295, 320 (Mass. 1850). Similar to considerations of notice, when considering the **prejudice**—if any—to the defendant for a claimed lack of notice of the charges, "sources in the information extrinsic to the specific count can be used to determine whether the defendant was sufficiently apprised of the offense charged." *Charles*, 60 V.I. at 837-38 (citing *Spigarolo*, 556 A.2d at 125-26; *Staggs*, 882 F.2d at 1531-32).

¶56 Count One of the initiating information, which charged Second Degree Aggravated Rape, alleged as follows:

> That **CHARLESWORTH GONSALVES**, did perpetrate an act of sexual intercourse or sodomy with a person, namely, D.G., a minor, being under eighteen years old, but thirteen years or older, not the perpetrator's spouse, to wit: by sucking and inserting his tongue inside D.G.'s vagina; **CHARLESWORTH GONSALVES** and the minor **D.G.** having a familial relationship, father and daughter, an act of domestic violence, in violation of Title 14 V.I.C. 1700a(a) and Title 16 V.I.C. 91(b)(6), (**AGGRAVATED RAPE SECOND DEGREE/DOMESTIC VIOLENCE**).

The amended information provided as follows:

> That Charlesworth Gonsalves, did perpetrate an act of sexual intercourse or sodomy with a person, namely, D.G., a minor, being under eighteen years old, but thirteen years or older, not the perpetrator's spouse, **through use of his position of authority over**

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ambiguity, set forth all the element necessary to constitute the offense intended to be punished" and "must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offence, coming under the general description, with which he is charge." *Id.* (quoting *Hamling v. United States*, 418 U.S. 87, 117-18 (1974)); *see generally, e.g.*, *Andersen v. United States*, 170 U.S. 481, 497-500 (1898) (indictment challenged therein held sufficient and cases cited). If a defendant is in need of more detail of the means encompassed in a particular count, a bill of particulars should be requested. *Commissiong*, 706 F. Supp. at 1181; *cf. post* at 43-46 (Meade, D.J., dissenting in part).

> **D.G.,** to wit: by sucking and inserting his tongue **and finger**[22] inside D.G.'s vagina; Charlesworth Gonsalves and the minor D.G. having a familial relationship, father and daughter, an act of domestic violence, in violation of Title 14 V.I.C. 1700a(a) and Title 16 V.I.C. 91(b)(6), (AGGRAVATED RAPE SECOND DEGREE/DOMESTIC VIOLENCE).

(J.A. at 31-32.) (emphasis added). As discussed above, Second Degree Aggravated Rape required proof that (1) the defendant; (2) used force, intimidation, or a position of authority; (3) to knowingly (4) commit an act of sexual intercourse or sodomy; (5) upon a victim who is 16 years of age or older but younger than 18 years of age, 14 V.I.C. § 1700a(a); and (6) the existence of a familial relationship between the victim and the defendant, 16 V.I.C. § 91(c). These essential elements of Second Degree Aggravated Rape were alleged in the information, stating that Charlesworth Gonsalves (element 1 "defendant"), the victim's father (elements 2 "aggravating

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[22] Gonsalves waived his argument that allowing the amendment of the information to allow insertion of the words "and finger" into both counts was an abuse of discretion. The following exchange demonstrates this waiver:

> THE COURT: What about the third and fourth amendment with regards to adding, "and finger"?
> MR. WEBSTER: I don't have a big—I am being honest with you, I don't have a huge objection to that because she testified to that. And it's just it doesn't change anything and we did receive the affidavit and the affidavit does say that so I can't say we are surprised by that, okay. So I don't have a strong argument against that, but I think with respect to the others, I do have a strong argument. I really believe that he shouldn't be allowed to amend the complaint with respect to that.
>
> . . . .
>
> THE COURT: He is okay with the Information being amended to add ["and finger"].

However, even if we were to entertain this argument on appeal, we would still affirm. Both the crimes of Second Degree Aggravated Rape and Child Abuse prohibit sexual conduct with a minor, which includes within the purview of its meaning the penetration of the vagina with one's tongue or one's finger, as discussed in the sufficiency of the evidence analysis above. Therefore, whether the information alleged that the defendant only inserted his tongue into D.G.'s vagina or that he inserted his tongue and finger into D.G.'s vagina did not matter because both allegations are simply varying modes of committing the crime. *See Ramirez*, 56 V.I. at 426 ("[Section 1708(2) of title 14 of the Virgin Islands Code's] only age requirement is that the victim be under thirteen years of age. Therefore, whether J.R. was eleven, as confirmed by her birth certificate, or twelve, as listed in the information, is irrelevant because in both instances she was under thirteen years of age, thereby proving the age element of the crime in Count One.").

circumstance" and element 6 "domestic violence"), perpetrated an act of sexual intercourse or sodomy (element 4 "actus reus") upon a victim who was 13 years of age or older but less than 18 years of age (element 5 "age of victim"). Finally, as reflected in the discussion above, implicit in the actus reus is the mental intent of knowing (element 3).[23] Indeed, the initiating information specifically stated that Gonsalves and D.G. "have[] a familial relationship, father and daughter, an act of domestic violence."[24]

¶57 With regard to the language stating the position of authority in count one, the fact is that the familial relationship of father and daughter was clearly stated in this count of the information charging Second Degree Aggravated Rape. Furthermore, there was no indication in the initiating information (or otherwise) that the People intended to pursue a theory of force or intimidation. Absent such language in the charge indicating the People intended to prove the use of force or intimidation, the identification of Gonsalves' familial relationship with D.G. should have been enough for the rational defendant to deduce that his position of authority over D.G. would be the aggravating factor the People intended to pursue. *See Powe v. State*, 597 So.2d 721, 728 (Ala. 1991) (holding that one could "reasonably infer" that a father "held a position of authority and domination with regard to his daughter"); *State v. Ethridge*, 352 S.E.2d 673, 681 (N.D. 1987) (concluding that a parent is inherently in a position of authority over a minor child).

[23] *See Ambrose v. People*, 56 V.I. 99, 105-06 (V.I. 2012) ("[I]t is not clear whether the Superior Court committed any constitutional error with respect to its addition of the 'during the commission of a crime of violence' language, given that (1) Count One of the information charged Ambrose with third degree assault and expressly references a gun; (2) the Superior Court expressly identified third degree assault as a crime of violence; and (3) all versions of the information prior to the state of trial contained the 'during the commission of a crime of violence' language." (citing *People v. Blanks*, No. E029005, 2002 WL 968851, at *6 (Cal. Ct. App. 2002) (unpublished)).

[24] While the Dissent notes the familial relationship language was included in the information to support the charge of domestic violence, it would still find a lack of notice to Gonsalves.

¶58 It is quite difficult to understand how Gonsalves did not have notice that he would have to defend against the issue of his position of authority.[25] Here, the original information clearly alleged—**in the same count**—that this was an act of domestic violence and asserted the requisite relationship of father-daughter between D.G. and Gonsalves. The original information also specifically cited to subsection 1700a(a) as the provision pursuant to which Gonsalves was charged. Additionally, the probable cause affidavit attached to the original information explicitly described the father-daughter relationship and indicated that Gonsalves' motive for his conduct was "to show her how boys take advantage of girls and then removed her pajama pants and underwear and spread her legs and started to suck on her vagina with his mouth and stuck his tongue inside her vagina." This explicit language in the probable cause affidavit—which was attached to the information that initiated this prosecution—elucidated ample additional detail of Gonsalves' sexual conduct, under the guise of providing fatherly advice, and is a compelling indication, providing notice to Gonsalves, that the prosecution was going to rely on Gonsalves' position of authority to prove the case. *See, e.g.*, *Woods v. State*, 980 N.E.2d 439, 334 (Ind. Ct. App. 2012) ("Since the charging information and probable-cause affidavit are filed together, they should be viewed in tandem to determine if they satisfy the goal of putting the defendant on notice of the crimes with which [he] is charged . . . so that [he] can prepare an appropriate defense."); *Spagner v. State*, 200 P.3d 793, 799 (Wyo. 2009) ("[T]he sufficiency of an information is determined 'from a broad and enlightened standpoint of right reason rather than from a narrow

[25] *See Charles*, 60 V.I. at 837 ("While the Information failed to specify a particular date or time period in which the acts were committed against A.C. in count twelve, . . . the details provided in the other counts in the Information alleged that Charles raped X.P. and A.C. while residing in the same household as them, on or about July 1999, December 1999, January 2004, and in May 2004. Accordingly, Charles was fairly informed of the charges against him because counts five and twelve contained the element of child abuse and—when read in context—provided sufficient notice to Charles of the time period in which the acts were committed."); *cf. post* at 43-46.

view of technicality and hairsplitting', finding the supporting affidavit provided sufficient information so that the 'defendant had not been misled to his prejudice'" (quoting *Gonzalez v. State*, 551 P.2d 929, 931 (Wyo. 1976); *Robbins v. United States*, 476 F.3d 26, 30 (10th Cir. 1973))).

¶59 Following Gonsalves' argument—that his defense was prejudiced by the People having never put him on notice of which aggravating factor it would pursue—to its natural conclusion, this Court would have to accept that Gonsalves willfully embraced ignorance throughout the entire trial towards one of the two necessary factors against which he would have to defend. To now ask this Court to overturn his conviction due to a purported deficiency that he was, or should have been, aware of from the beginning is nothing less than disingenuous. *See Robbins v. United States*, 476 F.2d 26, 340 (10th Cir. 1973) ("Imperfections of form that are not prejudicial are disregarded and common sense prevails over technicalities."). Moreover, Gonsalves has not identified any defense he would have pursued had the original information contained the specific language regarding Gonsalves' using his position of authority as D.G.'s father to accomplish the act of sexual intercourse.[26] Further, it is difficult to understand how Gonsalves might have changed his defense. At trial, Gonsalves' primary defense appears to have been D.G.'s affidavit stating that what occurred was a dream—in essence, a complete denial that anything happened. *See Gov't of the V.I. v. Bedford*, 671 F.2d 758, 766 (3d Cir. 1982).[27] Under either version of count one,

[26] *Charles*, 60 V.I. at 832 n.4 ("But because it is clear that Charles's position of authority over X.P. was used to accomplish the rape, we need not resolve this issue here. Indeed, at all times between 2003 and 2004, Charles—as step-father to X.P.—utilized his 'position of authority' over her to accomplish his sexual assaults including exploiting his authority as the minor's step-parent to remove her from school to perpetrate the sexual acts involved in this case."); *Castor*, 57 V.I. at 486 (discussing how a long-term, live-in boyfriend's position of authority allowed him to accomplish the prohibited act); *cf. post* at 43-46 (Meade, D.J., dissenting in part).

[27] Gonsalves' counsel explained as follows:

> THE COURT: Wait, hold on. Let me finish. It appears to me that the defense in this case is that the incident did not occur.

Gonsalves had to defend against allegations that he was D.G.'s father and had engaged in sexual conduct, within the meaning of subsection 1700a(a) of title 14, with her. Under the totality of the circumstances, Gonsalves had adequate notice of the charges, and the trial court did not abuse its discretion in allowing the challenged amendment.

C. Mistrial

¶60 The prosecution's solicitation of testimony from Harrigan, D.G.'s mother, that Harrigan and Gonsalves had begun an intimate relationship when she was only 14 years old was inappropriate, and the prosecutor's actions were legally improper. However, because it was an isolated question in response to which immediate curative actions were taken, it is highly unlikely that such error affected the trial outcome. Therefore, the trial court did not abuse its discretion when it denied the request for a mistrial. While prosecutors are permitted great leeway to allow vigorous advocacy, they may not venture into forbidden topics and are duty bound "to refrain from improper methods calculated to produce a wrongful conviction." *James v. People*, 59 V.I. 866, 883 (V.I. 2013) (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)). Therefore, the prosecution in a criminal case may argue the facts in evidence and reasonable/logical inferences that follow therefrom. *Castor*, 57 V.I. at 494; *James*, 59 V.I. at 888.[28] A prosecutor's remarks are improper if they appeal to a jury's emotions, passions, or prejudice(s), thus diverting the focus of the trial from the evidence presented and leading the jury to convict for reasons other than the properly presented evidence. *DeSilvia*, 55 V.I. at 872; *Castor*, 57 V.I. at 495; *Brathwaite*, 60 V.I.

MR. WEBSTER: Yes, the incident did not occur.
THE COURT: A complete denial of the allegations.
MR. WEBSTER: Of course.

[28] Indeed, the purpose of closing summation and arguments is to allow the parties to mold the facts as brought out through the trial process in the light most favorable to their respective positions. *James*, 59 V.I. at 888.

at 426. Arguments based on misstated evidence or evidence not in the record are prohibited, as are arguments that are designed to mislead the jury to draw unreasonable inferences or to shift the burden of proof to the defendant. *Castor*, 57 V.I. at 495.

¶61 However, a prosecutor's improper statements, either during summation or the trial, do not constitute *per se* reversible error. *Frett*, 66 V.I. at 410.[29] The touchstone and focus of any prosecutorial misconduct analysis is the fairness of the trial as a whole, *e.g.*, *Francis*, 59 V.I. at 1080, not the prosecutor's culpability. *Frett*, 66 V.I. at 410.[30] The relationship of the improper statement to the entire trial proceeding must be considered, including, *inter alia*, the ameliorative effect of any specific curative instruction to the jury, the preliminary instructions given at the outset of the trial, the general charges to the jury at the end of the trial, and the strength of the evidence in light of the enumerated analytically factually distinct elements of the crime. *Mulley v*, 51 V.I. at 414; *Castor*, 57 V.I. at 495-96.

¶62 The weight to be given any one item of evidence, and evidence in general, is determined by the quality of the testimony (or other evidence) rather than the number of exhibits or witnesses' testimony establishing a fact. *Brathwaite*, 60 V.I. at 432 (quoting *Francis*, 57 V.I. at 236). Evidence against a defendant is considered to be "overwhelming" when the testimony of the witnesses at trial establish that the defendant was in continuous view of those present. *Mulley*, 51 V.I. at 415-16.

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[29] *See also Estick v. People*, 62 V.I. 604, 617 (V.I. 2015); *Francis*, 59 V.I. at 1080; *Mulley*, 51 V.I. at 414; *cf. Farrington v. People*, 55 V.I. 644, 656 (V.I. 2011) ("Courts have held that it is improper for an attorney to vouch for the credibility of a witness." (citing *United States v. Francis*, 170 F.3d 546, 550 (6th Cir. 1999); *United States v. Roberts*, 618 F.2d 530, 533 (9th Cir. 1980)).

[30] *See also DeSilvia*, 55 V.I. at 873 (quoting *United States v. Liburd*, 607 F.3d 339, 344 (3d Cir. 2010)); *Castor*, 57 V.I. at 495 (quoting *Liburd*, 607 F.3d at 344); *Brathwaite*, 60 V.I. at 426; *Estick*, 62 V.I. at 617.

¶63 We also consider whether the statements were manifestly egregious, which requires considering whether the conduct or statement(s) were brief and isolated (rather than pervasive and emphatic) and whether the information contained in the improper statement(s) was otherwise properly before the jury. *DeSilvia*, 55 V.I. at 873 n.14.[31] A claim of prosecutorial misconduct that is not a constitutional error, *i.e.*, a trial error, will not warrant reversal when the statements objected to are founded on evidence before the court, a curative instruction was given, and there was overwhelming evidence to support the conviction. *Farrington*, 55 V.I. at 659; *Castor*, 57 V.I. at 495-96.

¶64 Here, the age of the victim's mother at the time she and Gonsalves began their relationship bore no evidentiary value in relation to a single element of the crimes charged. D.G.'s age was relevant, and Gonsalves' age was relevant at the charging stage to determine if he was within any age gap provision. *E.g.*, 14 V.I.C. §§ 1702(a), 1703(a). However, nothing about Harrigan's age at the time she began an intimate relationship with Gonsalves established an essential element of the crime. *Cf.* V.I.R.E. 401(a) (stating that evidence is only relevant if "it has any tendency to make a fact more or less probable . . ." and "is of consequence in determining the action."). As such, this testimony was irrelevant. *See* V.I.R.E. 402 ("Irrelevant evidence is not admissible."). Moreover, it was unfairly prejudicial, "as it served no other purpose than 'to lure the fact finder into declaring guilt on a ground different from proof specific to the offense charged.'" *Pickering v. People*, 66 V.I. 276, 294 (V.I. 2017) (quoting *Billu v*, 57 V.I. at 465).

[31] *E.g.*, *Connor*, 59 V.I. at 300 ("Given the strong evidence of Connor's guilt and the fact that the question was not answered, as well as the trial court's prompt admonition to the jury to disregard the question, and the final instruction that the jury must not consider attorneys' question as evidence, which we may presume the jury followed, it is highly probable that the prosecutor's questions did not contribute to Connor's guilty verdict." (citations omitted)); *see James*, 59 V.I. at 883; *Francis*, 56 V.I. at 389.

¶65 However, when the prosecutor asked Harrigan's age at the time she and Gonsalves began their intimate relationship, defense counsel immediately objected. For reasons that are entirely unclear—and utterly inexplicable to this Court—the trial court overruled this objection. The prosecutor then asked Harrigan the same question again, to which she responded that she was 14 at the time. Defense counsel immediately objected and moved for a mistrial. Most of the discussion as to why this was objectionable and the proffered reasons for the prosecution's soliciting the testimony occurred at side bar. Further, there was no indication during the entire trial that Gonsalves was an adult at the time he and Harrigan began their relationship. While the trial court should have sustained the initial objection and prohibited the prosecution from eliciting this testimony—**a point that this Court cannot emphasize enough**—the trial judge was correct when it reasoned that Harrigan's age becomes a significantly more prejudicial fact if there is evidence that Gonsalves was an adult at the time. Accordingly, although it is possible that jurors could have made assumptions that Gonsalves was an adult at the time, we presume the jury followed the instructions and decided the case solely on the evidence. *Monelle*, 63 V.I. at 770; *Galloway*, 57 V.I. at 508.

¶66 Additionally, within the context of the trial, this one isolated comment could not have had a significant effect. Once the improper testimony was elicited, the line of questioning was stopped before the more damaging testimony of Gonsalves' age was disclosed. The testimony was from the first witness in a trial that encompassed several days, and this fact was not the primary theme of the prosecution's case, as it was in *Pickering*, 66 V.I. at 291-93.

¶67 Moreover, the evidence of guilt was overwhelming. D.G. testified that she had gone to her father's house and was watching television on his bed when he came out of the shower. He then approached her. D.G. was awake when it began and was not sick or under the influence of any

medication that would have clouded her senses and hampered her memory. Furthermore, multiple aspects of her testimony were corroborated by other witness; for example, her boyfriend confirmed that she had communicated all the details of her being with her father and had demonstrated—through the use of emoji's in her text messages—she was upset. While she at one time recanted her statement to the police, at trial she offered a plausible explanation as to why she had recanted her statement to the police. This resulted in a credibility determination for the jury. *See Smith*, 51 V.I. at 401 ("To the extent that there were conflicts in the testimony, these conflicts presented credibility issues for the jurors to resolve."); *Cornelius v. Bank of Nova Scotia*, 67 V.I. 806, 818 (V.I. 2017) ("[A] finding of fact that adopts one view of the evidence is not clearly erroneous even if there are multiple conclusions that could be drawn from the same evidence.").

¶68 While the general rule that the credibility of witnesses is not open to question on appeal holds true, courts of appeals are entitled to "disregard the jury's reliance on a witness's testimony when that testimony is 'inherently incredible or improbable.'" *Phillip v. People*, 58 V.I. 569, 583 (V.I. 2013). "Testimony is deemed inherently incredible or improbable where it is 'either so manifestly false that reasonable [people] ought not to believe it, or it must be shown to be false by objects or things as to the existence and meaning of which reasonable [people] should not differ'" *Id.* at 584 (quoting *Williams v. Gov't of the V.I.*, 51 V.I. 1053, 1086 (D.V.I. App. Div. 2009) and 29A AM. JUR. 2D *Evidence* § 1375 (2008)). *Rivera v. People* outlines factors that are relevant to attacking the credibility of testimony on appeal. 60 V.I. at 554. In this assessment, factors to be considered are: (1) whether it was physically impossible for the witness to have observed that to which she testified; (2) considering the laws of nature, whether it was impossible for the events to which the witness testified to have happened; and (3) whether the testimony is of incredible dubiousness. *Id.* at 554-56. To be "incredibly dubious," testimony must be inherently improbable

with a complete lack of circumstantial evidence or be coerced, equivocal, and wholly uncorroborated. *Id.* at 555. Nothing about D.G.'s testimony undermines the credibility determination implicit in the jury's verdict, and there was circumstantial evidence supporting D.G.'s testimony. For example, D.G.'s boyfriend corroborated that he received the text messages from D.G. immediately after the molestation, and continuing for at least the twenty-four hours following. Harrigan's testimony corroborated the timeframe in which D.G. testified this all occurred.

¶69 Because the evidence was comprehensive and the improper testimony was extremely brief and not compounded by further damaging testimony and appropriate curative and general instructions were given, the testimony did not affect the outcome of the trial, and the conviction is affirmed.

V. CONCLUSION

¶70 Because there was testimony that Gonsalves inserted his tongue into D.G.'s vagina, in addition to the other essential elements of the crimes of Child Abuse and Second Degree Aggravated Rape, there was sufficient evidence to support the convictions, and the judgment is affirmed. As Gonsalves had adequate notice of the charges pending and there is no indication anywhere in the record even suggesting how exactly he would have defended this matter differently, the Superior Court did not abuse its discretion when it allowed the prosecution to amend the information after it rested its case. Finally, because the evidence of guilt was overwhelming and the improper testimony insignificant in the context of the whole trial, it was not an abuse of discretion for the trial court to deny the motion for a mistrial.

Dated this 7th day of February, 2019.

BY THE COURT:

/s/ Ive Arlington Swan
IVE ARLINGTON SWAN
Associate Justice

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

MEADE, Designated Justice, dissenting in part.

¶1 I disagree with the majority's conclusion that Gonsalves' substantial rights under the Sixth Amendment, including his right to be reasonably informed of the nature of the charges against him, were not prejudiced by the last-minute amendment of the information in this case. Therefore, I respectfully dissent, as I would conclude that the trial court abused its discretion under Rule 7(e) of the Federal Rules of Criminal Procedure, in violation of the Sixth Amendment, by allowing the prosecution to amend the information against Gonsalves to include the language "through use of his position of authority over D.G."

¶2 First, in concluding that Gonsalves had sufficient notice that the prosecution intended to prove that he used his position of authority to perpetrate the sexual act, both the Superior Court and the majority rely heavily on the fact that the original information alleged that Gonsalves shared a familial relationship with the victim; that of father and daughter. In their view, this language is equivalent to an allegation that Gonsalves used his position of authority over the victim.[1] I disagree.

¶3 The language in the original information seized upon by the majority—"GONSALVES and the minor D.G. having a familial relationship, father and daughter, an act of domestic violence"—is nothing more than the standard language utilized by the prosecution in any information to indicate that the underlying crime is also being charged as an act of domestic violence under 16 V.I.C. § 91. Yet the majority contends that this bare assertion of a familial relationship should also have put defendant on notice that the prosecution intended to prove that

[1] The majority states that all elements of the charge of aggravated rape in the second degree were, in fact, included in the original complaint: "These essential elements were alleged in the information, stating that Charlesworth Gonsalves (element 1 'defendant'), the victim's father (elements 2 'aggravating circumstance' and element 6 'domestic violence') . . . ." This effectively conflates this essential element of aggravated rape in the second degree—that the "perpetrator's position of authority over the victim is used to accomplish the sexual act"—with the essential element of familial relationship required to prove a charge of domestic violence under Title 16.

Gonsalves utilized his position of authority over the victim to perpetrate the sexual act. And while it may generally be true that many, if not most, fathers do enjoy influence or authority over their children, the degree of that authority may vary drastically from case to case; ranging from nearly absolute to non-existent. Indeed, we have previously recognized that the existence of a familial relationship does not, by itself, automatically demonstrate either that the defendant enjoyed a position of authority, or that the defendant *used* that position of authority to perpetrate the sexual act. *See Francis v. People,* 63 V.I. 724, 734 (V.I. 2015) ("Unlike the factual context in *Charles*, it is not clear in this case that Francis—J.T.'s uncle with whom J.T. appeared to have only infrequent contact—utilized his 'position of authority' over J.T. to accomplish his sexual assaults. In fact, there is no evidence in the record that Francis used his relationship as J.T.'s uncle to force J.T. to do anything."); *cf. Charles v. People,* 60 V.I. 823, 832 n.4 (V.I. 2014) ("[A]t all times between 2003 and 2005, Charles—as step-father to X.P.—utilized his 'position of authority' over her to accomplish his sexual assaults, including exploiting his authority as the minor's step-parent to remove her from school to perpetrate the sexual acts involved in this case. Accordingly, X.P.'s testimony was sufficient to prove the elements required. . . ."). Thus, the mere assertion in the information that Gonsalves is D.G.'s father, while clearly sufficient to put Gonsalves on notice of the domestic violence charge, was insufficient to notify Gonsalves that the prosecution intended to prove that he accomplished the sexual act by utilizing his position of authority over D.G. Gonsalves had no way of knowing, based on the plain language of the information, that the prosecution intended to utilize the father-daughter relationship as anything more than proof of the relationship necessary to support a conviction for domestic violence.

¶4 Additionally, I disagree with the majority's conclusion that the citation to 14 V.I.C. § 1700a(a) in count one of the information, together with the statement in the attached probable

cause fact sheet that Gonsalves "told [D.G.] he was going to show her how boys take advantage of girls and then removed her pajama pants and underwear and spread her legs and started to suck on her vagina with his mouth and stuck his tongue inside her vagina," was sufficient to put Gonsalves on notice that the people intended to charge him with using his position of authority to accomplish the sexual act. Section 1700a(a) of title 14 of the Virgin Islands Code provides in relevant part: "Whoever perpetrates an act of sexual intercourse or sodomy with a person who is under eighteen years but thirteen years or older, ***or*** by force, intimidation, or the perpetrator's position of authority over the victim is used to accomplish the sexual act, is guilty of aggravated rape in the second degree." 14 V.I.C. § 1700a(a) (emphasis added). Thus, as this Court recognized in *Gilbert v. People*, 52 V.I. 350 (V.I. 2008), a literal reading of the statute provides that the People may prosecute a defendant for aggravated rape in the second degree by proving one of two alternate theories of the offense: either (1) that the defendant perpetrated the requisite act with a person who is under eighteen year but thirteen years or older—where the age of the victim alone would constitute the aggravating factor; or (2) that the defendant perpetrated the sexual act by force, intimidation , or the use of his position of authority over the victim—where the aggravating factor would be the use of force, intimidation, or authority. *See id.* at 356-61.

¶5 And although we held in *Gilbert* that, contrary to the plain language of the statute, with respect to a seventeen year old victim, the prosecution must prove both of these aggravating factors—age of the victim as well as use of force, intimidation, or authority—we expressly reserved the question of whether the age of a sixteen year old victim would itself constitute an aggravating factor sufficient to support a charge of aggravated rape in the second degree. *See id.* at 361 n.8. Only now, for the first time, does this Court hold that the reasoning underlying the *Gilbert* decision also applies to sixteen year old victims; in effect holding that the statute does not

mean what it says, and that as applied to sixteen year old victims the word "or"—emphasized in the above quoted statutory language— actually means "and." Even the Superior Court only delivered its decision on this critical issue after the close of evidence in the case and after granting the prosecution's motion to amend the information.

¶6 To be clear, I do not disagree with the Superior Court and the majority, that requiring proof of the additional aggravating factor—use of force intimidation or position of authority—is the correct decision under this Court's reasoning in *Gilbert*. However, given the uncertainty in the law with respect to the essential elements of aggravated rape in the second degree of sixteen year old victims at all times during the pendency of this matter, I cannot conclude that the prosecution's citation to 14 V.I.C. § 1700a in the original information was sufficient to put Gonsalves on notice that he was charged with using his position of authority to perpetrate sexual intercourse with D.G. Rather, I would hold that Gonsalves, relying upon his reasonable construction of the plain language of both the information and the charging statute, was properly notified only of the prosecution's intent to prove its case based upon the sole aggravating factor of the victim's age.[2] Although, in appropriate circumstances, an information may charge a defendant under alternate theories of commission of a crime, a defendant is neither expected nor required to anticipate and refute alternative theories of criminality that were never charged.

¶7 In this respect, Gonsalves' case is similar to *Goodloe v. Parratt*, 605 F.2d 1041, 1047 (10th Cir. 1979), in which the Tenth Circuit set aside the defendant's conviction for fleeing arrest,

[2] Indeed, the author of the majority opinion himself espoused this same, facially reasonable interpretation of the statute in his dissenting opinion in *Gilbert*, in which he concluded—noting the use of the disjunctive "or" in the statutory language—that "there is nothing in the language of the statute that explicitly refers to an aggravating factor" beyond the age of the victim, and that, under the plain language of the statute "[w]hoever perpetrates an act of sexual intercourse or sodomy… with a person who is under eighteen years but thirteen years or older… is guilty of aggravated rape in the second degree...." *See Gilbert*, 52 V.I. at 370-71, 379 (Swan, J., dissenting).

accepting his argument that it was the product of "[f]undamental unfairness, due to confusion as to the elements of the crime and lack of notice ['of what underlying violation the State had sought to prove']." *Id.* at 1047 n.15. In *Goodloe*, "[t]he State urged, as late as the conference on instructions, that the jury could find from its proof that the underlying violation was either failing to stop at a stop sign, speeding, careless driving or willful and reckless driving, even though the first three violations were never mentioned in a complaint, arrest warrant, or information." *Id.* at 1046. Thus, the court concluded that "because the State did not specify the element it sought to prove until the end of trial, [the defendant] had to prepare to meet, or without notice was unable to meet, proof of four possible statutory violations . . . . [He] was not given fair and reasonable notice of the offense charged and the case against which he had to prepare a defense." *Id.* at 1047.

¶8 Likewise, in this case the prosecution argued for the first time, in the middle of the trial, that the jury could find from the evidence that Gonsalves committed aggravated rape in the second degree either by the use of force, the use of intimidation, or the use of his position of authority, despite the fact that none of these aggravating factors were included or alleged in the information.

¶9 In turn, because Gonsalves was not properly notified of the prosecution's intent to charge him with the additional aggravating factor—that he used his position of authority to accomplish the sexual act—he had no reason to know that the evidence cited by the majority—that he "told [D.G.] he was going to show her how boys take advantage of girls and then removed her pajama pants and underwear and spread her legs and started to suck on her vagina with his mouth and stuck his tongue inside her vagina"—was offered to prove the use of his authority rather than merely to prove that he perpetrated an act of sexual intercourse or sodomy with D.G. as charged in the information. As such, this case is analogous to *Gov't of the V.I. v. Joseph*, 765 F.2d 394 (3d Cir.1985) and similar cases, in that the last-minute amendment to the information required the

People to prove a new and different element of the offense that Gonsalves was unable to sufficiently defend against due to the timing of the amber.ndment. Likewise, as in *Joseph*, "[t]here can be no question that, by not permitting [Gonsalves] the opportunity to prepare an adequate defense, the variance [between the original information and the amended information] in this case prejudiced [Gonsalves'] 'substantial rights.'" 765 F.2d at 398 n.6 (citing *Government of the V.I. v. Aquino*, 378 F.2d 540, 554 (1967)).

¶10 Accordingly, I would hold that the Superior Court abused its discretion by allowing the amendment under Rule 7(e) of the Federal Rules of Criminal Procedure, in violation of the Sixth Amendment, and would vacate Gonsalves' conviction for aggravated rape in the second degree.

/s/ Jomo Meade
JOMO MEADE
Designated Justice

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