For Publication

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

KENNETH MILLIGAN, Appellant/Defendant, v. **PEOPLE OF THE VIRGIN ISLANDS,** Appellee/Plaintiff.	))))))))	**S. Ct. Crim. No. 2016-0090** Re: Super. Ct. Crim. No. 480/2009 (STX)

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

Argued: February 13, 2018
Filed: September 11, 2018

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

APPEARANCES:

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OPINION OF THE COURT

HODGE, Chief Justice.

[1] Associate Justice Maria M. Cabret is recused from this matter. By order of this Court entered November 21, 2017, Judge Michael C. Dunston, a sitting judge of the Superior Court of the Virgin Islands, sits in her place by designation pursuant to title 4, section 24(a) of the Virgin Islands Code.

Kenneth Milligan appeals the Superior Court's denial of his renewed motion for judgment of acquittal and, in the alternative, new trial for his reckless driving conviction. Milligan also appeals his conviction and sentencing. For the reasons that follow, we reverse the judgment below entered upon his conviction.

I. BACKGROUND

Between 4:00 and 5:00 p.m. on August 14, 2009, Kenneth Milligan, Clint Ferris, and Kevin Williams convened to set-up a stage and transport various items to a scholarship fundraising dance event at a community center on St. Croix. All three were responsible for breaking down the equipment and cleaning the venue after the event concluded at approximately 4:00—4:30 a.m. the following morning. After returning the equipment, the three men sat around talking until approximately 5:30 a.m., when all three left in their separate vehicles in a westward direction on a local highway, with Milligan trailing behind the others.

At approximately 6:00 a.m., Milligan's truck veered off the Melvin H. Evans highway and onto the shoulder. Soon thereafter, Milligan called Williams to tell him that he had driven his truck off the road. Williams drove to the scene and called Ferris, who arrived shortly thereafter, and called 911 to report the accident. Milligan called a tow truck service to remove his truck from the bushes. As the tow truck was pulling Milligan's truck out of the bushes, an unknown person driving by called out that the body of a woman—later identified as Augusta Alcindor—lay along the same westbound shoulder. The body was approximately 181 feet behind where Milligan's truck came to rest. It was apparent to Sergeant Arthur Joseph, who responded to the accident, that Alcindor was deceased. As a result, the People filed a six-count information against Milligan, alleging the following charges: (1) negligent homicide by means of a vehicle; (2) involuntary manslaughter;

(3) driving under the influence of an intoxicating liquor; (4) driving with a blood alcohol content of .08 percent or more; (5) reckless driving; and, (6) failure to report an accident.

At trial, Sergeant Joseph testified that he observed damage to the front right bumper and hood of Milligan's silver Nissan Frontier pick-up truck. He also described a trail of debris between the stopped position of the truck and Alcindor's body, which included a scarf, shoe, scuffmark, and silver paint chips. Sergeant Joseph further testified that he did not see any tire skid marks on the roadway. Andria Mahltretter, an FBI supervisory chemist examiner, testified that she analyzed paint chips taken from the scene, Milligan's truck, and from Alcindor's clothing, and concluded that they came from the same source. Virgin Islands medical examiner Dr. Francisco J. Landron, who performed Alcindor's autopsy, testified that Alcindor's cause of death was "multiple injuries due to blunt force trauma," and that the "manner of death was consistent with a vehicular accident." (J.A. 829.)

Ferris testified that when he, Williams, and Milligan departed their separate ways from the Generation Now headquarters, Milligan did not seem drunk. Pressed on direct examination, Ferris stated that if Milligan had seemed drunk or impaired, he would not have allowed Milligan to drive. Williams corroborated Ferris' sentiment, stating that he did not observe Milligan drinking alcohol, and that "in no way, form, or fashion did [he] believe that [Milligan] was under the influence or intoxicated." (J.A. 838, 864.) Neither witness was asked whether he thought Milligan appeared tired or sleepy. The record is also devoid of testimony regarding what time Milligan woke up the day of the event, or how much sleep he had the night before. Williams did testify, however, that he stated to the 911 dispatcher his "assumption" that "basically [Milligan] could have [fallen] asleep and ran off the road[.]" (J.A. 851.) When asked on direct examination why he assumed

Milligan had fallen asleep at the wheel, Williams stated that he used "logic," and that he could not think of another reason why Milligan would run off the road. (J.A. 851-52.)

At the conclusion of evidence, the Superior Court granted a portion of Milligan's Rule 29 motion, dismissing two counts: driving under the influence of an intoxicating liquor, and driving with a blood alcohol level in excess of .08 percent. The Superior Court found, however, that there was "evidence that Mr. Milligan perhaps [fell] asleep" and "a jury could determine that such action [was] willful or wanton in the sense that Mr. Milligan continued to drive knowing that after having been awake all night with no sleep, that he was drowsy." (J.A. 48-49.) The court therefore allowed the reckless driving count to go to the jury, after the charging language regarding intoxication was removed from the remaining counts.[2]

On September 2, 2016, the jury returned its verdict, which acquitted Milligan of negligent homicide and involuntary manslaughter, but convicted him of reckless driving and failure to report an accident. Thereafter, Milligan filed a timely renewed motion for judgment of acquittal or, in the alternative, a new trial. On October 14, 2016, the Superior Court granted the motion as to failure to report an accident, but upheld Milligan's reckless driving conviction. The Superior Court

[2] As we discuss further in notes 4, 6, and 7 *infra*, we note here the alarming liberty the dissent takes with what it describes as "facts" of the case. This includes the dissent's erroneous description of the alcohol content, which was stricken from the amended information and was not included in the final jury instructions reciting the elements of the remaining charges. Our review of the record on appeal is strictly limited to the facts properly admitted and presented to the jury at trial; facts or speculation falling outside the scope of the record are likewise outside the scope of our review. *See Bryan v. Fawkes*, 61 V.I. 416, 473 (V.I. 2014) ("This Court, as an appellate court, may not issue a decision based on speculation, 'but rather must consider the evidence of record and base its decisions on facts in the record.'") (quoting *Cross v. Kansas Dept. of Revenue*, 110 P.3d 438, 446 (Kan. 2005)); *see also Akins v. Tedder*, No. 87-227-II, 1988 WL 109150, at *2 (Tenn. Ct. App. 1988) (unpublished) ("[T]he Court of Appeals has appellate jurisdiction only. We may not properly base our decisions on evidence neither considered by the trial court nor contained in the record on appeal.").

sentenced Milligan to six months imprisonment, with all but 30 days suspended, which Milligan could serve on weekends beginning November 25, 2016, and to six months supervised probation, served consecutively. Additionally, the Superior Court imposed a $1,000 fine and $75 court costs. The Superior Court entered the judgment and commitment against Milligan on November 16, 2016, and two days later, Milligan filed a timely notice of appeal with this Court. V.I. R. APP. P. 5(a)(1).

II. DISCUSSION

A. Jurisdiction and Standard of Review

This Court has appellate jurisdiction over "all appeals from the decisions of the courts of the Virgin Islands established by local law[.]" 48 U.S.C. § 1613a(d); *see also* 4 V.I.C. § 32(a) (granting this Court jurisdiction over "all appeals arising from final judgments, final decrees or final orders of the Superior Court"). Because the Superior Court's October 17, 2016 order partially denying Milligan's renewed motion for judgment of acquittal or new trial was a final order, this Court has jurisdiction over this appeal. *Allen v. HOVENSA, L.L.C.*, 59 V.I. 430, 434 (V.I. 2013).

This Court exercises *de novo* review over the Superior Court's application of law, and reviews factual findings for clear error. *St. Thomas—St. John Bd. of Elections v. Daniel*, 49 V.I. 322, 329 (V.I. 2007). We review Superior Court denials of post-verdict motions for judgment of acquittal *de novo*. *People v. Thompson*, 57 V.I. 342, 349 (V.I. 2012). Additionally, we review denial of post-verdict motions for new trial challenging a conviction based on the weight of the evidence for abuse of discretion. *Stevens v. People*, 52 V.I. 294, 304 (V.I. 2009). Finally, this Court exercises *de novo* review over sufficiency of the evidence challenges. *Francis v. People*, 63 V.I. 724, 733 (V.I. 2015).

When determining whether the People proved each element of every crime charged beyond a reasonable doubt, this Court must consider the evidence "in the light most favorable to the government." *Gilbert v. People*, 52 V.I. 350, 354 (V.I. 2009). Our review of sufficiency of the evidence challenges is narrow; we must affirm a conviction if "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *George v. People*, 59 V.I. 368, 384 (V.I. 2013); *see also Charles v. People*, 60 V.I. 823, 831 (V.I. 2014) ("An appellant who challenges the sufficiency of the evidence bears a very heavy burden.") (citation and internal quotation marks omitted). Therefore, we review Milligan's sufficiency of the evidence challenge with great deference to the jury.

B. Sufficiency of the Evidence

Milligan argues that the Superior Court erred when it denied his renewed motion for judgment of acquittal or new trial on the reckless driving charge because the People failed to introduce any evidence of his willful or wanton disregard for the safety of another person or property. Specifically, Milligan cites the People's lack of evidence of his intoxication or impairment to support this claim as originally charged. Conversely, the People assert that Milligan's decision to drive after having not slept the night before, and subsequently hitting Alcindor with his truck, is sufficient evidence for a jury to determine that Milligan operated his vehicle recklessly.[3] Because we find that the People failed to elicit sufficient evidence to support the elements of our reckless driving statute, this Court agrees with Milligan.

Title 20, section 492 of the Virgin Islands Code, titled "Operating motor vehicles in a reckless manner," provides that,

[3] We address Milligan's sufficiency of the evidence challenge first because an acquittal on that ground renders the remaining jury instruction and sentencing challenge moot.

> [i]t shall be unlawful for any person to operate a motor vehicle in a reckless manner over and along the public highways of this Territory. For the purpose of this section *to 'operate in a reckless manner' means* the operation of a vehicle upon the public highways of this Territory in such a manner as to indicate *either a willful or wanton disregard for the safety of person or property*.

20 V.I.C. § 492 (emphases added). The Superior Court instructed the jury that "the term 'willfully' . . . describe[s] the alleged state of mind of the Defendant mean[ing] that he knowingly performed an act on purpose, as contrasted with accidentally, carelessly, or unintentionally," and defined "wanton" as "unreasonably or maliciously risking harm while being utterly indifferent to the consequences." (J.A. 1050.)

Authority across jurisdictions supports "a finding of criminal recklessness where a defendant chooses to drive an automobile knowing he suffers from a [medical] condition that could cause him to fall asleep or lose consciousness at the wheel." *People v. Botsis,* 902 N.E.2d 1092, 1098 (Ill. App. Ct. 2009) (collecting cases) (emphasis added). Courts have also found evidence of willful, wanton, or reckless conduct when a defendant without a medical condition falls asleep at the wheel—but in such cases, the evidence must demonstrate that the defendant perceived signs of drowsiness and nonetheless continued driving. *See e.g.*, *Kennedy v. Commonwealth*, 339 S.E.2d 905, 907 (Va. Ct. App. 1986) (finding sufficient evidence of reckless driving where defendant briefly pulled off the road to rest because he was sleepy, then continued driving, and proceeded to fall asleep at the wheel); *Perkins v. Roberts*, 262 N.W. 305, 546 (Mich. 1935) ("A driver overcome by sleep is not guilty of wanton or willful misconduct unless it appears that he continued to drive in reckless disregard of premonitory symptoms.").

Assuming that the jury in this case concluded that Milligan struck Alcindor with his truck because he fell asleep at the wheel, this fact, without more, could only be sufficient to convict

Milligan of negligence and possibly of negligent homicide.[4] *See State v. Olsen*, 160 P.2d 427, 428 (Utah 1945) (finding that a driver's failure to perform her duty of staying awake while driving is prima facie evidence of negligence). This is because, although evidence that a defendant fell asleep at the wheel is sufficient proof of negligence, it is well-settled that the mere act of falling asleep while driving does not *per se* demonstrate a willful or wanton disregard for the safety of others. *See Clancy v.* State, 829 N.E. 2d 203, 207 (Ind. Ct. App. 2005) ("[M]erely falling asleep while driving is insufficient evidence of recklessness. Instead, there must be some proof that the driver consciously ignored, for a period of time, substantial warnings that he or she might fall asleep, and continued to drive despite the warnings, before actually falling asleep and causing an accident.");

[4] The dissent incorrectly opines that the sole fact that Milligan struck Alcindor with his truck constitutes *per se* evidence of reckless driving. The dissent supports its position by ascribing undue weight to the fact that Milligan was up the night preceding the early-morning accident. The dissent assumes that this must mean that Milligan was (1) sleep deprived, and (2) recklessly ignored signs of sleep deprivation when he got behind the wheel. Moreover, the dissent assumes that because someone in Milligan's position *could* have been too fatigued to drive under the circumstances, Milligan in fact *was* in such as state. Disconcertingly, the dissent offers a list of absent alternative explanations and dangerously stands for the presumption that *absence* of exonerating evidence equates to *positive evidence* of guilt. As we explain – and the dissent admits – this case contains a severe lack of incriminating evidence and fails to prove the elements of reckless driving beyond a reasonable doubt. If we were to follow the dissent's argument to its logical conclusion, Milligan would be guilty until proven innocent. Naturally, this Court cannot – and will not – adopt such an unconstitutional position. *See e.g.*, *Estelle v. Williams*, 425 U.S. 501, 503 (1976) ("The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice."); *Coffin v. United States*, 156 U.S. 432, 453 (1895) ("The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law."); *accord Santiago v. People*, 51 V.I. 283, 300 (V.I. 2009) (per curiam) (noting that the fact that Appellant continually maintained his innocence was "of no consequence[] because [Appellant] is deemed innocent until proven guilty"); *cf. e.g.*, *Francis v. People*, 63 V.I. 724, 733 (V.I. 2015) (reviewing sufficiency of the evidence challenges for whether the People overcame the defendant's presumption of innocence by affirmatively proving the existence of *every essential element* of the crime charged beyond a reasonable doubt); *Cascen v. People*, 60 V.I. 392, 401 (V.I. 2014) (same); *Webster v. People*, 60 V.I. 666, 678-79 (V.I. 2014) (same).

c.f. Hargrove v. Commonwealth, 394 S.E.2d 729, 731-32 (Va. Ct. App. 1990) (finding that evidence failed to support an involuntary manslaughter conviction because the simple fact of falling asleep at the wheel did not meet the requisite standard of grossly negligent, wanton, or reckless malperformance of a lawful act). Significantly, the jury in this case acquitted Milligan of negligent homicide. The negligent homicide charge in this case required the People to demonstrate that Alcindor's death ensued "by [Milligan's] operation of [his] vehicle in a reckless manner or with disregard for the safety of others." 20 V.I.C. § 504. Notably, the negligent homicide statute, section 504, does not specifically require a defendant to exhibit *willful* or *wanton* disregard for the safety of others, as does section 492. This is because "ordinary negligence and willful and wanton misconduct are different in kind and character." *Antonen v. Swanson*, 48 N.W.2d 161, 166 (S.D. 1951).

Given that the jury determined that it did not have sufficient evidence to convict Milligan under the negligent homicide standard, there is likewise no way the evidence was sufficient to convict him of the same or higher willful and wanton conduct necessary for a finding of reckless driving.[5] *See Turner v. Schaefer*, 174 N.E.2d 690, 695 (Ind. App. Ct. 1961) ("Driving while asleep,

[5] Moreover, the jury acquitted Milligan of involuntary manslaughter. Section 924, title 14 of the Virgin Islands Code defines involuntary manslaughter as "the unlawful killing of a human being without malice aforethought . . . in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection." 14 V.I.C. § 924(b). In order for the jury to convict Milligan of involuntary manslaughter, the People would have had to prove beyond a reasonable doubt that Alcindor's death resulted from Milligan having committed the act of driving without due caution or circumspection – an apparent lesser level of culpability than the willful or wanton disregard for the safety of person or property that reckless driving requires. But as this Court has previously stated, it is a well-settled principle of law that an inconsistent verdict may stand where there is sufficient evidence to support the conviction. *See e.g.*, *Phillip v. People*, 58 V.I. 569, 596 (V.I. 2013); *People v. Faulkner*, 57 V.I 327, 335 (V.I. 2012) ("An inconsistent verdict is not a sufficient reason for setting a verdict aside."); *see also United States v. Craig*, 358 Fed. Appx. 446, 451 n.5 (4th Cir. 2009) (stating that courts should "not infer innocence when a jury, whether through mistake, compromise, or lenity, reaches inconsistent verdicts"). Therefore,

without more is not negligence although it is a proper basis for an *inference* of negligence, but as to willful and wanton misconduct, it is not even that."); *Antonen*, 48 N.W.2d at 167 (explaining that while recovery for negligence may be had under an allegation of willful and wanton misconduct, the same is not true in reverse). Simply put, to convict Milligan of the essential elements of reckless driving, the jury would also have had to draw from the trial record evidence sufficient to support a finding beyond a reasonable doubt that Milligan felt, but disregarded, signs that he was too tired to drive. Unlike negligence, which only requires a showing of carelessness, reckless driving requires the defendant to have demonstrated a malicious and purposeful indifference, *i.e.* willful or wanton disregard, for the safety of others.[6] We hold that the People failed to elicit any such evidence.

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if the People had introduced sufficient evidence of Milligan engaging in willful or wanton conduct, we could properly uphold Milligan's reckless driving conviction despite his acquittal of negligent homicide and involuntary manslaughter. *See Phillip*, 58 V.I. at 596 (refusing to infer that a jury was wholly irrational when it acquitted Appellant of second degree murder but convicted him of first degree murder, where there was nonetheless sufficient evidence proving the elements of first degree murder beyond a reasonable doubt). Because we conclude, however, that there is simply no evidence to support Milligan's reckless driving conviction, and in light of his acquittals of other charges requiring the same or less level of culpability, we cannot sustain his conviction and must reverse. *See id.*; *Faulkner*, 57 V.I. at 335.

[6] The dissent errantly asserts that because Milligan did not maintain control of his vehicle, he must be guilty of reckless driving. It supports this presumption with a slew of cases in which the defendant faced charges of negligence, *not* reckless driving. *See MacGibbon v. Smalls*, 443 F.2d 522, 524 (3rd Cir. 1971) (involving negligence and making no mention of recklessness); *Baumann v. Canton*, 7 V.I. 60, 67 (D.C.V.I. 1968) (same); *Estate of Carter v. Szymczak*, 951 N.E.2d 1, 3 (Ind. Ct. App. 2011) (same); *Tillotston v. Schwarack*, 143 N.W.2d 284, 287 (Iowa 1966) (same); *Sheehan v. Frith*, 138 So.2d 76, 78 (Fla. Dist. Ct. App. 1962) (same); *Adams v. Allstate Ins. Co.*, 212 So.2d 204, 208 (La. Ct. App. 1968) (same). Although these cases may be instructive for matters involving negligent driving, they lack persuasive weight with respect to reckless driving charges.

The three reckless driving cases that the dissent cites for the proposition that this Court should consider "all facts circumstances"—presumably including those not properly presented to the jury such as Milligan's *stricken* blood alcohol level and his *suspected* fatigue—are wholly distinguishable. The first, *United States v. MacIntosh*, 979 F. Supp. 1329, 1333 (D. Kansas 1997),

Moreover, sufficient proof of causation was lacking in this case, since there was no direct or circumstantial evidence sufficient to support a rational conclusion that Milligan hit Alcindor *because he fell asleep*. Neither Williams nor Ferris testified that Milligan appeared tired when they parted ways. To the contrary, both witnesses insisted that Milligan was unimpaired, albeit in the context of questions relating to intoxication.[7] Therefore, the only way the jury could have found

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includes *evidence* that: (1) "Defendant was speeding well in excess of the posted speed limit and illegally passing a number of cars"; (2) "testimony that a number of cars, both oncoming and the defendants—traveling in the same direction as the defendant's vehicle had to pull on to the shoulders when the defendant engaged in illegal passing"; and, (3) evidence that "defendant was engaged in conversation with drivers of other vehicles in the same lane of traffic at a speed of up to 65 miles per hour." *Id*. at 1332-1333. Unlike *MacIntosh*, and as explained throughout this opinion, the People here failed to elicit any such evidence that Milligan engaged in such willful or wanton disregard for the safety of person or property. The same holds true for the second case, *City of Jackson v. Rapp*, 700 S.W.2d 498, 500 (Mo. Ct. App. 1985). *Rapp* involved testimony from a police officer who *observed* the defendant driving on the shoulder, veering over the center line and back multiple times, and generally zig-zagging across the road—causing the officer to pull over to avoid a collision. Moreover, the defendant admitted to the officer that he had fallen asleep. Unlike *Rapp*, the record here is devoid of any such evidence of Milligan's driving apart from the aftermath of the accident itself which, as we have explained, is not sufficient to demonstrate Milligan possessed a *willful* or *wanton disregard* for the safety of people or property when he decided to drive. Finally, *State v. Kingman*, 247 A.2d 858, 860 (R.I. 1968) is wholly uninstructive, considering that it is a short *per curium* opinion involving a repealed statute, and turns on defendant's inconsistent statements about what caused the accident. The case does not include any statements, explanations, or circumstances that the trial or appellate court considered. It also does not include the elements of the charging statute. Moreover, the current statute, the latest in the charging statute's progeny, does not require that the People prove the elements of willful or wanton disregard for the safety of person or property. *See* R.I. GEN. LAWS ANN. § 31-27-4 (West) ("Any person who operates a motor vehicle recklessly so that the lives or safety of the public might be endangered, or operates a vehicle in an attempt to elude or flee from a traffic officer or police vehicle, shall be guilty of a misdemeanor for the first conviction and felony for the second and each subsequent conviction."). Therefore, none of the cases the dissent cites are analogous, instructive, or dispositive, and thus bear no weight on our analysis.

[7] Moreover, Officer Joseph, who observed Milligan at the scene of the accident, did not offer any testimony indicating that he had any suspicion that Milligan was driving under the influence. He did not conduct a field sobriety test, or otherwise note that Milligan appeared intoxicated. Granting Milligan's motion for judgment of acquittal on the charges of driving under the influence of an intoxicating liquor and driving with a blood alcohol content of .08 percent or more, the Superior Court noted that the only evidence the People presented to the jury indicating that Milligan was

that Milligan was sleep-deprived—and that he disregarded feelings that sleep was imminent when he got behind the wheel—is through circumstantial evidence. *See Galloway v. People*, 57 V.I. 693, 700 (V.I. 2012) (internal citation omitted) ("[T]his Court has consistently held that circumstantial evidence may support a guilty verdict . . . so long as that circumstantial evidence is sufficient for a jury to infer the elements of the charged offense."). We find that the People failed to produce circumstantial evidence that supports this conclusion for two reasons.

First, the series of events contained in the record are limited to a fourteen-hour time span between 4:00 p.m. and 6:00 a.m. While the evidence shows that Milligan worked through the night and may not have slept during those fourteen hours, the People did not introduce any evidence illustrating when Milligan woke up the day before, how much sleep he had gotten, or whether he was unaccustomed to working nights. *Cf. Conrad v. Commonwealth*, 521 S.E.2d 321, 324 (Va. Ct. App. 1999) (upholding an involuntary manslaughter conviction where defendant's decision to get behind the wheel after twenty-two hours without sleep demonstrated an "indifference to the safety of others"); *Commonwealth v. Smoker*, 203 A.2d 358, 360 (Pa. Super. Ct. 1964) (finding that

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intoxicated was Officer Joseph's testimony reading the number "203," with no decimal point, written on a medical document. The Superior Court explained that, although the number "203" was written under a box labeled "high" on a blood alcohol test report, "[t]here [was] no explanation in the People's case that 203 is some kind of reference to blood alcohol by weight in Mr. Milligan's body, or that 203 is more than 0.08 percent." (J.A. Vol. IV at 937.) Because the People did not present an expert witness or medical professional to interpret the report, the Superior Court held that the People failed to provide sufficient evidence for the jury to find the necessary elements of the charges beyond a reasonable doubt. Accordingly, the language relating to intoxication in the remaining charges was stricken from the amended information and were not included in the final jury instructions reciting the elements of the remaining charges. Although the jury was made aware of the medical report during trial, we must assume that the jury adhered to the judge's instructions and based its conclusions on the evidence relating strictly to the elements dictated in the amended information. *See Frett v. People*, 66 V.I. 399, 413 (V.I. 2017) ("[T]his Court 'must assume that juries for the most part understand and faithfully follow instructions.'") (quoting *Cascen v. People*, 60 V.I. 392, 414 (V.I. 2014)).

defendant acted recklessly and was properly convicted of involuntary manslaughter when he decided to drive at 10:00 p.m., after waking up at 6:00 a.m. and working a fourteen-hour shift, and having only slept seven hours in the previous forty hours). Evidence that merely establishes that Milligan was awake for fourteen hours during the night instead of the day, without context, does not support the inference that he was sleep-deprived when he drove. *See Clancy*, 829 N.E. 2d at 209 (finding no evidence that defendant was sleep-deprived at the time of the accident, and reversing a criminal recklessness conviction, where the record was devoid of "evidence that [the defendant] was dozing off intermittently before the accident, [and no one] observed other erratic driving by him before he . . . struck [the victim]"). To hold otherwise would set the dangerous precedent that anyone who drives after fourteen waking hours, *per se* does so with willful and wanton disregard for the safety of persons and property. Certainly, a person who wakes up at 4:00 a.m. for work does not demonstrate a willful or wanton disregard for the safety of person or property by simply driving home fourteen hours later at 6:00 p.m. Accordingly, we find that the People failed to meet its burden of establishing that Milligan acted with willful or wanton disregard for the safety of others under 20 V.I.C. § 492, where the only evidence it elicited to that fact was that Milligan drove after being awake for approximately fourteen hours.

Second, apart from the fourteen hours Milligan was awake before the accident, the only other relevant evidence from which a jury could infer Milligan's recklessness was Williams' testimony pertaining to his statement to the 911 operator that "[Milligan] could have [fallen] asleep and ran off the road[.]" (J.A. 851.) The People mischaracterize this statement as Williams' present sense impression. A present sense impression is "a statement describing or explaining an event or condition, made while or immediately after the declarant perceived it." V.I. R. EVID. § 803(1). Unlike a present sense impression derived from direct observation of an event, Williams' statement

is his own after-the-fact *speculation* about the cause of an event *he did not perceive* as it was occurring.[8] Indeed, it is unclear how Williams arrived at that inference—which he admitted to drawing because he could not think of another explanation—since Williams also testified that Milligan seemed normal and unimpaired the last time Williams saw him before the accident. Moreover, even if we accepted Williams' speculation that Milligan fell asleep at the wheel, as discussed above, that alone would not support a conviction for reckless driving. *See, e.g.*, *Clancy*, 829 N.E.2d at 209; *Antonen*, 48 N.W.2d at 166; *Turner* 174 N.E.2d at 695.

For the jury to reach a finding in this case that Milligan was (1) sleep deprived and (2) recklessly disregarded signs of sleep deprivation when he got behind the wheel "requires [the jury here] to draw[] one inference upon another." *People v. Clark*, 55 V.I. 473, 481-82 (V.I. 2011). Indeed, this Court has cautioned that a verdict cannot rest on the "'mere suspicion, speculation, or conjecture, or on an overly attenuated piling of inference on inference.'" *Id*. (quoting *United States v. Pettigrew*, 77 F.3d 1500, 1521 (5th Cir. 1996)); *see also Hughes v. People*, 59 V.I. 1015, 1020

[8] In addition to not being a present sense impression, Williams' conclusion does not qualify as circumstantial evidence either. Circumstantial evidence, although inference, must be rooted in fact, and cannot be supported by a mere hunch. *See* BLACK'S LAW DICTIONARY 636 (9th ed. 2009) (defining circumstantial evidence, also called indirect evidence, as "that which is applied to the principal fact, indirectly, or through the medium of other facts, by establishing certain circumstances or minor facts, already described as evidentiary, from which the principal fact is extracted and gathered by a process of special inference"). In *Galloway*, this Court upheld a conviction where two police officers faced a green light as they approached an intersection and observed a car drive through the intersection from a perpendicular road. *Galloway*, 57 V.I. at 700. The police officers' observation of the green light necessarily inferred that the opposing light through which the defendant drove was red. *Id*. Here, unlike *Galloway* where the facts supported reasonable inferences, Williams' testimony that Milligan seemed fine before he drove, coupled with an absence of evidence that Milligan appeared tired to any witness before driving, provides no factual circumstances from which Williams could infer that Milligan fell asleep at the wheel. Mere guesses are not circumstantial evidence, and accordingly cannot support a conviction for reckless driving. *See, e.g.*, *People v. Clark*, 55 V.I. 473, 481-82 (V.I. 2011) ("The drawing of one inference upon another to reach [a] conclusion is entirely too tenuous, and goes beyond reasonable inferences to mere speculation.").

(V.I. 2013) (same). A conviction on the present record would require such an impermissible inferential leap. *See Clark*, 55 V.I. at 481-82; *Hughes*, 59 V.I. at 1020. While this Court is cautious in considering whether to overturn a jury verdict, after carefully reviewing the trial transcript and viewing the evidence in the light most favorable to the People, this Court concludes that the People produced insufficient evidence to uphold Milligan's reckless driving conviction.

III. CONCLUSION

For the foregoing reasons, we conclude that the People's evidence was insufficient to support the necessary elements of reckless driving under 20 V.I.C. § 492. Accordingly, we reverse Milligan's conviction. Further, because this conclusion results in an acquittal, it is unnecessary to address the other issues raised on appeal.

Dated this 11th day of September 2018.

BY THE COURT:

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

ATTEST:

VERONICA J. HANDY, ESQ.
Clerk of the Court

SWAN, Associate Justice, dissenting

This case is uncomplicated. It involves a motorist, the sole occupant of a truck, barreling down the Melvin H. Evans Highway on St. Croix at approximately 5:30 a.m., hurdling the shoulder of the highway and violently crashing into the vegetation contiguous to the highway, while foolhardily imperiling humans who were foreseeably in the area adjoining the highway, and all with absolute impunity. This traffic rule cannot be the best rule for the Virgin Islands because it condones a galling and disconcerting legal precedent for our traffic laws. The majority has licensed all motorists to drive their vehicles off the roadway and crash them into the adjacent bushes and vegetation without any responsibility for their dastardly conduct. Accordingly, I dissent.

Appellant Kenneth Milligan seeks reversal of his conviction for reckless driving in the Superior Court of the Virgin Islands. His appeal asserts that there was insufficient evidence to support the verdict and prejudice based on surplus language contained in the People's amended information. Milligan further seeks reversal of the split sentence imposed by the court because it exceeds the maximum penalty allowed under Virgin Islands law. For the reasons elucidated below, the reckless driving conviction should be affirmed and the case remanded to the Superior Court for resentencing on the split sentence that was imposed.

I. FACTS AND PROCEDURAL HISTORY

On August 15, 2009, Kenneth Milligan was operating his silver colored Nissan Frontier truck when it veered off the westbound lane of Melvin H. Evans Highway on St. Croix. The truck crashed into bushes contiguous to the road at approximately 5:30 a.m. Prior to the crash, Milligan and his friends, Kevin Williams and Clint Ferris, had spent most of August 14, 2009 preparing for a scholarship fundraiser sponsored by Generation Now, a local nonprofit organization. The men,

who were members of the organization, brought supplies to the venue at D.C. Canegatta Ballpark and removed those supplies at the conclusion of the event. The men started preparing for the 10 p.m. event at approximately 4 p.m., and all three remained at the venue as the social event progressed. Following the event's conclusion, the men loaded their individual vehicles with furniture and supplies, drove to Generation Now's Estate Peter's Rest headquarters, and unloaded the supplies. Subsequent to a 20 minute discussion, the men departed the headquarters with Milligan and Williams proceeding in one direction and Ferris in another. Although Milligan was directly behind Williams for the majority of the drive to Frederiksted, Williams eventually lost sight of him. Soon thereafter, Williams received a call from Milligan informing Williams that Milligan's truck had veered off the road. Williams turned around his vehicle and proceeded to Milligan's location in order to assist him. Williams contacted Ferris and urged him to assist Milligan. Williams also called 911 to inform the police of Milligan's accident.

Williams found Milligan on the shoulder of Melvin H. Evans Highway with his truck immersed in some bushes. When Ferris arrived, the three men contemplated on how to extricate the truck from the bushes. They eventually contacted a tow truck business to assist them. Police arrived on the scene at 6:30 a.m. to find them and the tow truck driver exploring ways to dislodge the truck from the bushes. However, the responding officer and lead investigator, Arthur Joseph, soon learned of a human body in the immediate vicinity of the vehicular crash, approximately 181 feet away, and endeavored to secure the scene and to preserve evidence. After his investigation, Joseph concluded that Milligan was responsible for Augusta Alcindor's dead body which was discovered in proximity to the accident scene, therefore, he sought the assistance of the Attorney General's office in having an information filed against Milligan. In a September 3, 2009

information, Milligan was charged with negligent homicide, V.I. CODE ANN. tit. 20, § 504; driving under the influence of intoxicating liquor, 20 V.I.C. § 493(a)(1); driving with a blood alcohol content greater than .08, 20 V.I.C. § 493(a)(2); failure to report an accident, 20 V.I.C. § 541; reckless driving, 20 V.I.C. § 492; and involuntary manslaughter, 14 V.I.C. § 924.

After multiple delays and an order excluding the People's use of any evidence from Milligan's impounded Nissan truck, the jury trial commenced in August 2016. At trial, Officer Joseph, Williams, and Ferris testified for the People. Williams and Ferris confirmed they and Milligan assisted in organizing the August 14 Generation Now event, provided assistance during the function, and transferred supplies from D.C. Canegatta Ball Park to Estate Peter's Rest following conclusion of the function. Officer Joseph testified that Milligan's damaged Nissan truck was found adjacent to the western lane of Melvin H. Evans Highway together with Alcindor's body and trace evidence. He also said Milligan confirmed he was the driver of the vehicle.

At the close of the People's case, Milligan made a Rule 29 motion for a judgment of acquittal. Essentially, after the government rested its case and after the close of all evidence, the court on the defendant's motion must enter a judgement of acquittal of any offense for which the evidence is insufficient to sustain a conviction. FED. R. CRIM. P. 29(a). Milligan argued that the People had little or no evidence to sustain the charges against him. Although Alcindor died within a year of the accident, Milligan surmised that the victim's unknown time of death made it impossible for the People to convict him for negligent homicide. He further asserted that a lack of intoxication evidence warranted dismissal for involuntary manslaughter, driving under the influence of intoxicating liquor, and driving with a blood alcohol level greater than .08. Finally, he contended that the charge of failure to report an accident should have been dismissed because

he complied with the statute's requirements by contacting the police authorities and specifically contacting Police Commissioner Novelle Francis through Kevin Williams who informed the commissioner of the accident. The People argued that all charges against Milligan were supported by the evidence. They argued that the charges of negligent homicide and involuntary manslaughter were satisfied by Milligan's indifference to persons and property by his driving under the influence of intoxicating liquor after socializing all night. The People asserted that the charge of driving under the influence and driving with a blood alcohol level greater than .08 were proven by Milligan's medical records which were admitted into evidence and proved a blood alcohol content of .203. Finally, the People surmised that failure to report an accident was satisfied by Milligan's failure to report striking the victim and moving his truck from the vicinity of the victim's body. The court concluded that the People failed to offer sufficient evidence to prove driving under the influence of intoxicating liquor or with a blood alcohol level greater than .08 because Williams and Ferris said Milligan never appeared intoxicated, exhibited no indicia of intoxication, nor did they observe him consume any alcohol at the gala. The court also stated that no witness interpreted the blood alcohol evidence. Therefore, the court dismissed the charges of driving under the influence of intoxicating liquor and driving with a blood alcohol content greater than .08. However, the court allowed the other charges to be submitted to the jury but with an amended information that deleted any reference to driving under the influence despite Milligan's renewed Rule 29 motion. With neither party objecting to them, the jury instructions, inter alia, reiterated the remaining charges, the elements needed for a conviction on each charge, and a discussion of reasonable doubt.

On September 2, 2016, the jury returned a guilty verdict for reckless driving and for failure to report an accident, but acquitted Milligan of all other charges. Following the verdict, Milligan renewed his motion for a judgment of acquittal on September 15, 2016. In an October 17, 2016 order, the court granted his motion to dismiss the charge of failure to report an accident, but denied his motion to dismiss the charge of reckless driving. Milligan was sentenced on November 16, 2016. He perfected a timely appeal of his conviction on November 18, 2016.

II. JURISDICTION

"The Supreme Court [has] jurisdiction over all appeals arising from final judgments, final decrees or final orders of the Superior Court." 4 V.I.C. § 32(a). In a criminal case, a judgment embodying the adjudication of guilt and the sentence imposed based on that adjudication constitutes a final judgment for the purposes of this statute. *Williams v. People*, 58 V.I. 341, 345 (V.I. 2013) (collecting cases). Accordingly, the Superior Court's November 16, 2016 judgment is a final judgment over which we may exercise jurisdiction.

III. STANDARD OF REVIEW

An appellate court reviews a trial court's denial of a motion for a judgment of acquittal de novo. In assessing the sufficiency of evidence to sustain Milligan's conviction, "we must view the evidence in the light most favorable to the People, and affirm the conviction if 'any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt'" *Cascen v. People*, 60 V.I. 392, 401 (V.I. 2014) (quoting *George v. People*, 59 V.I. 368, 384 (V.I. 2013)) (internal citations omitted); *see Fleming v. People*, 55 V.I. 1016, 1020 (V.I. 2011) ("A claim of insufficiency of the evidence places a heavy burden on an appellant." (quoting *United States v.*

Gonzalez, 918 F.2d 1129, 1132 (3rd Cir. 1990)) (internal citations omitted); *see also United States v. Silveus*, 542 F.3d 993, 1002 (3rd Cir. 2008) (holding that an appellate court exercises "plenary review over a [trial] court's grant or denial of a motion for acquittal based on the sufficiency of the evidence, applying the same standard as the [trial] court")). *Compare United States v. Newman*, 773 F.3d 438, 455 (2nd Cir. 2014) (explaining where the evidence viewed in the light most favorable to the prosecution gives equal or nearly equal circumstantial support to a theory of innocence as a theory of guilt, the evidence fails to establish guilt beyond a reasonable doubt), *with United States v. DiRosa*, 761, F.3d 144 (1st Cir. 2014) (stating if the jury could find beyond a reasonable doubt that the essential elements of the crime were proved a motion for acquittal may not be granted in the interests of justice).

In reviewing a motion for a new trial, this Court applies Superior Court Rule 135, which states a defendant may obtain a new trial if it is in the interest of justice or there's newly discovered evidence. SUPER. CT. R. 135. Rule 135 uses the same standard as its federal counterpart, Federal Rule of Criminal Procedure 33. "We will not interfere with the Superior Court's ruling absent an abuse of discretion." *Stevens v. People*, 52 V.I. 294, 304-05 (V.I. 2009); *see Silveus*, 542 F.3d at 1005 (stating abuse of discretion [is the] standard for reviewing denial of Rule 33 motion) (internal citations omitted)); *c.f. United States v. Hassan*, 844 F.3d 723, 725 (8th Cir. 2016) ("A motion for a new trial does not require the court to view the evidence in the light most favorable to the verdict . . . .") (internal punctuation omitted). "The burden of justifying a new trial rests with the defendant." *United States v. Geders*, 625 F.2d 31, 33 (5th Cir. 1980).

IV. DISCUSSION

Milligan argues the Superior Court erred in denying his renewed motion for a judgment of acquittal or, alternatively, a motion for a new trial for his reckless driving conviction and asserts insufficient evidence as the basis for his appeal. He also asserts surplus language in the amended information affected his substantial rights and changed the character of the offense not intended by 20 V.I.C. § 492.[1] Finally, he argues that the Superior Court erred in sentencing him to a combination of incarceration and probation that exceeded the maximum sentence for reckless driving under Virgin Islands law.

A. SUFFICIENCY OF THE EVIDENCE

Under 20 V.I.C. § 492, the elements for reckless driving are the accused was driving, operating, or in physical control of a motor vehicle, while on a public highway or road in the territory, and with *willful or wanton disregard for safety of people or property*. Milligan contends the People's evidence was insufficient to substantiate these elements to a jury beyond a reasonable doubt.

In interpreting 20 V.I.C. § 492, one looks at the intent of the legislature. "[I]f the intent of the legislature is clear, that is the end of the matter." *Gilbert v. People*, 52 V.I. 350, 356 (V.I. 2009) (citing *In re Infant Sherman*, 49 V.I. 452, 456 (V.I. 2008)). However, ambiguity in a criminal statute should resolved in favor of a criminal defendant. *Id*. (internal citations omitted). "A statute should not be construed and applied in such a way that would result in injustice or absurd consequences." *Id*. (internal citations omitted). *See Heyliger v. People*, 66 V.I. 340, 350 (V.I. 2017)

[1] "It shall be unlawful for any person to operate a motor vehicle in a reckless manner over and along the public highways of this Territory. For the purposes of this section 'to operate in a reckless manner' means the operation of a vehicle upon the public highways of this Territory in such a manner as to indicate a willful or wanton disregard for the safety of person or property." 20 V.I.C. § 492.

("The first step when interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning."); *Lamie v. United States Trustee*, 540 U.S. 526, 534 (2004) ("[W]hen the statute's language is clear, the sole function of the courts—at least where disposition required by the text is not absurd—is to enforce it according to its terms."); *United States v. Long Elk*, 805 F.2d 826, 828 (8th Cir. 1986) ("Absent a clearly expressed legislative intent to the contrary, that [statutory] language must ordinarily be regarded as conclusive.").

In *United States v. MacIntosh*, 979 F. Supp. 1329, 1333 (D. Kansas 1997), the District Court applied a similar reckless driving statute and found the defendant guilty of reckless driving. Although the facts of *Macintosh* are dissimilar to this case, the *Macintosh* court noted that "to obtain a conviction for reckless driving . . . it is only necessary to establish the vehicle was driven in a willful or wanton disregard for the safety of others. . . . In determining whether the defendant is guilty of reckless driving, it is clearly appropriate to consider all facts and circumstances concerning his conduct . . ." *Id*. *See City of Jackson v. Rapp*, 700 S.W.2d 498, 500 (Mo. Ct. App. 1985) (explaining that a reckless driving conviction will be upheld if there was, at minimum, conduct, under all circumstances that existed at the time, which demonstrated danger to people or property).

In *State v. Kingman*, 247 A.2d 858, 860 (R.I. 1968), the court upheld a reckless driving conviction based on the severity of the damage to the defendant's vehicle, the seriousness of defendant's injuries, and the inconsistencies of his statements before and during trial. In *Kingman*, the defendant was prosecuted for reckless driving after his car struck a utility pole on the sidewalk and the automobile sustained considerable damage. The defendant, himself, suffered several

broken ribs, a concussion, and required medical attention for three months after the collision. The appeals court affirmed the conviction because of the evidence deduced at trial. *Id*. at 859-60.

Here, the reckless driving statute is not at issue because neither Milligan nor the People have asserted any argument against its validity. Moreover, in the jury instructions, the trial judge provided key definitions for both willful and wanton that neither side disputed. "Wanton . . . is defined as unreasonably or maliciously risking harm while being utterly indifferent to the consequences. . . . Willfully . . . describe[s] the state of mind of the Defendant means that he knowingly performed an act on purpose as contrasted with . . . unintentionally." (J.A. 1050-1051). Black's Law Dictionary confirms the definition of these terms.[2] [3] Accordingly, the reckless driving statute can be read literally for its plain meaning because, in this case, it is undisputed and key terms were sufficiently defined by the court.

Under a literal interpretation of the statute, the prosecution only needed to present enough evidence to establish beyond a reasonable doubt that Milligan operated his vehicle on the public highways of the territory in a willful or wanton manner. This operation must have posed harm to people or property. Although direct evidence on either prong may be lacking, there is certainly adequate circumstantial evidence of Milligan's wanton or unreasonable operation of a vehicle when one considers all the circumstances that led to him to drive up the embankment of Melvin H. Evans Highway. *See Galloway v. People*, 57 V.I. 693, 700 (V.I. 2012) (explaining circumstantial evidence may support a conviction as long as the circumstantial evidence is

[2] "Wanton" is defined as "[u]nreasonably or maliciously risking harm while being utterly indifferent to consequences." BLACK'S LAW DICTIONARY, 1719-20 (9th ed. 2009). "Willful" is defined as [v]oluntary and intentional, but not necessarily malicious." *Id*. at 1737

[3] "[W]illful or willfully, when applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit an act, or make the omission referred to." 1 V.I.C § 41.

sufficient for the jury to infer the elements of the charged offense); *Tin Thang v. State*, 10 N.E.3d 1256, 1260 (Ind. 2014) (explaining that when determining whether the elements of an offense are proven beyond a reasonable doubt, a fact-finder may consider both the evidence and the resulting reasonable inferences).

At trial, the People called Ferris and Williams to testify. Ferris said he began preparing for Generation Now's 10 p.m. Old School Jam at 4 p.m. on August 14 and Milligan later assisted him by transporting ice. He said Milligan was at the door when he arrived at the party shortly after 10 p.m. and they, along with Williams, transported supplies to Generation Now headquarters after the event's 4 a.m. conclusion (JA 298-301). Following a brief discussion, the three men departed in separate vehicles with Milligan driving a silver colored Nissan Frontier. Shortly after leaving, Ferris said he received a call from Williams who informed him of a problem in the Estate Williams Delight area. (JA 302-310). Upon arrival in the area, Ferris discovered Milligan's truck was completely off the highway and entangled in the adjacent dense growth of bushes with Milligan and Williams standing nearby.

Williams gave similar testimony. He stated that he, Milligan, and Ferris were involved with the logistics of the August 14 event which included preparing the event's venue and dismantling the temporary structure after the event. He further stated that they commenced preparing for the event at 8 p.m., that they attended the event, and that they returned supplies to headquarters after the event concluded. Upon leaving the venue, Williams testified that each of them operated a separate car with Milligan driving a gray Nissan truck. At Generation Now's headquarters, they unloaded the supplies, conversed for a while, and again left in separate vehicles. (JA 836-841). Soon after, Milligan called Williams to inform Williams that his truck had veered

off the highway. Williams said he turned around his vehicle and hastened to Milligan's location to assist him, and he called Ferris to do the same. When he arrived on the scene, Williams said he found Milligan's demeanor to be shaken, but he was without injuries. They contemplated on how to remove the truck from its entanglement with the bushes that were completely off the roadway. They ultimately decided to contact a tow truck business to assist in extricating the truck from the bushes and vegetation adjacent to the highway and pulling the truck back onto the highway. Williams further stated that he called the then Police Commissioner Novelle Francis and 911 to inform both of the accident. Williams said he told 911 that he surmised Milligan fell asleep while driving because it was the only reason he could deduce for the accident. (JA 841-851).

Crucially, no iota, modicum, or scintilla of evidence exists in the trial record to confirm or substantiate that any of the following circumstances ever existed at the time of Milligan's accident.

1. That the truck Milligan operated at the time of the accident had or suffered any mechanical failure or mishap.
2. That a pedestrian or animal entered Milligan's lane of travel before or during the accident, thereby contributing to the accident.
3. That a vehicle in an oncoming lane crossed over into Milligan's lane of travel, causing Milligan to swerve off the roadway to avoid an accident.
4. That there was any object or vehicle in the roadway that impeded or obstructed Milligan's lane of travel causing him to take evasive action and veer over the shoulder of the highway.

Accordingly, the absence of all the above conditions constitutes a "wanton disregard for the safety of person and property" when Milligan operated his truck in the manner he did when the accident

occurred. Commonsensically, no vehicle in the Virgin Islands would summarily run completely off the road on its own volition. However, a vehicle will run completely off the roadway endangering person and property because of the driver's reckless, wanton, or callous operation of the vehicle.

On cross examination, Williams admitted that he had talked to Milligan during the day of August 14 while they both were at work, and they congregated after work to begin transporting things to the program's venue. (JA 861). Williams also said he did not observe Milligan driving erratically or over the speed limit after they departed Estate Peter's Rest. (JA 865).

Here, Milligan went to his employment on August 14 and then assisted with preparations for Generation Now's 10 p.m. social event. He attended the social event and assisted Williams and Ferris in transporting supplies from D.C. Canegatta Ballpark to the organization's headquarters in Peter's Rest at 4 a.m. on August 15. After unloading the supplies and a 20 minute conversation, the men left the headquarters at approximately 5 a.m. Although Williams said he did not see Milligan speeding or driving erratically, it is conceivable that a man who worked all day on August 14, brought heavy supplies to an event at the end of the workday, attended the event, and transferred items to another location at 4 a.m. before driving home at 5 a.m. was quite fatigued. Such exertion could foreseeably exhaust anyone to a level that sleep deprivation was potentially an inevitable occurrence. Williams testified that the only plausible reason for Milligan's vehicular crash was that he fell asleep at the wheel. Thus, even if Milligan did not expect to fall asleep at the wheel, he should have known it was a possibility given the amount of work he did between August 14 and 15 and his lack of sleep and possible fatigue on those days. "[The] defendant's loss of consciousness at the wheel was not the result of some uncontrollable physical malady, but the

result of his own carelessness in driving his automobile in a state of voluntarily imposed exhaustion such that he fell asleep at the wheel." *Jackson*, 700 S.W.2d at 500-01. *See State v. Mundy*, 90 S.E.2d 312, 315 (N.C. 1955) ("[T]he focal point of the inquiry is whether the operator, because of drowsiness, previous tiring activities, or other premonitory symptoms of sleep, became aware of the likelihood of falling asleep, but nevertheless continued to operate the vehicle under circumstances evincing a thoughtless disregard of consequences or a heedless indifference to the right and safety of others upon the highway. . . ."); *Lee v. Moore*, 191 S.E. 589, 591 (Va. 1937) ("[W]hen there are evidential facts and circumstances shown which would lead an ordinarily prudent person to the conclusion that the defendant's act of falling asleep was the result of physical or mental exhaustion and no circumstances tending to excuse or justify his conduct are proven, the question [of the driver's culpability] then becomes one of fact and should be submitted to a jury for determination.").

Moreover, although Ferris was unsure of exactly who owned the car, both he and Williams said only Milligan drove the silver Nissan Frontier. They both stated he drove it to and from the headquarters. Also, Officer Joseph testified that he found a silver-colored Nissan truck in the bushes on the shoulder of Melvin H. Evans Highway when he arrived at the scene, and Milligan confirmed he drove it. (JA 434-39). Thus, there was sufficient evidence for a jury to find beyond a reasonable doubt that Milligan posed a danger to people and property by driving sleepily or fatigued after he left Generation Now's Peter's Rest headquarters. Therefore, the Superior Court's judgment on Milligan's reckless driving conviction should be affirmed. *See Norfolk v. State*, 360 P.2d 605, 606 (Wyo. 1961) (explaining that facts and circumstances on whether the defendant was

the driver of a car are sufficient for a jury to find the defendant was the driver absent direct evidence on the issue).

I have no hesitancy or compunction about affirming the guilty verdict for reckless driving in this case. The pivotal facts are uncontestable and undisputed.

The defendant was operating his pick-up truck in the early morning hours of August 15, 2009. He was the sole occupant of the vehicle. For whatever inexplicable reason, the truck left the roadway by veering off the road, hurdling the road's embankment and came to rest in the bushes contiguous with the roadway. In order to extricate the truck, a tow truck was summoned to the accident scene, which dislodged Milligan's truck from the bushes.

It matters not what any other jurisdiction opined in the circumstances here. Importantly, it is what is the best rule of law for the Virgin Islands. Essentially, competent motorists don't simply drive their vehicles into the bushes or trees contiguous to the highway or roadway. *See Gulf States Utilities Co. v. Guidry*, 183 So.2d 122, 126 (La. Ct. App. 1966) ("We deem it safe to say that ordinarily a careful and prudent driver will not permit his vehicle to leave the traveled portion of a street or highway and strike an immovable object or structure situated off that portion of the roadway reserved for the travel of vehicles.") All motorists are charged with operating their vehicles in a prudent and reasonable fashion. All motorists are best positioned to determine if they are experiencing sleep deprivation or otherwise have impairment in their vision, reflexes, or mental capacity before operating a vehicle. These circumstances endanger other motorists, pedestrians, and property.

It is callously wanton for a motorist with any significant impairment, and knowing of such impairment, to operate a vehicle on the highways and roadways of the Virgin Islands. The onus is on the motorist to safely operate the vehicle. A disconcerting legal traffic precedent will be established for the Virgin Islands if motorists are allowed to do what Milligan did, with impunity and with no responsibility.

The majority asserts the People failed to sufficiently develop evidence of Milligan's guilt for reckless driving. However, there are jurisdictions in which a motorist is charged with maintaining control of his vehicle once he decides to operate it. In *MacGibbon v. Smalls*, 443 F.2d 522, 524 (3rd Cir. 1971), the court said "[it] is a well-established rule that a motorist must operate his vehicle always with due regard for the safety of others on the highway. He is charged with the duty of keeping his automobile under such control that he can stop within the distance of the road ahead that he can clearly see. The law exacts of him constant care and attention and imposes on him certain positive duties." (citing *Baumann v. Canton*, 7 V.I. 60, 67 (D.C.V.I. 1968)). *See Estate of Carter v. Szymczak*, 951 N.E.2d 1, 3 (Ind. Ct. App. 2011) (stating that a motorist has a duty to maintain a proper lookout and to use due care to avoid collision and maintain his automobile under reasonable control); *Tillotston v. Schwarack*, 143 N.W.2d 284, 287 (Iowa 1966) (stating that "[p]erfect care or judgment is not given to mankind, and if a person, being exposed to danger, conducts himself with the caution which may reasonably be expected of a person of ordinary prudence and ordinary presence of mind, he is not to be charged with fault . . . .") (internal punctuation and citations omitted); *Sheehan v. Frith*, 138 So.2d 76, 78 (Fla. Dist. Ct. App. 1962) ("While the driver of a motor vehicle is not an insurer of the safety of those who project themselves into his pathway, he is charged with the responsibilities of his vehicle under control at all times

and maintaining a sharp, attentive lookout in order to keep himself prepared to meet . . . exigencies . . . within reason and consistent with reasonable care and caution.") (internal citations omitted); *Adams v. Allstate Ins. Co.*, 212 So.2d 204, 208 (La. Ct. App. 1968) (explaining that an operator of an automobile is required to maintain such control and lookout as to be able to avoid ordinary hazards that may appear in the road in front of him). However, Milligan failed to control his vehicle, prevent it from crossing Melvin H. Evans Highway, and striking the trees on its shoulder. This series of events occurred because he was conceivably experiencing sleep deprivation or fatigue, and the law charges him with being aware that there was a significant likelihood that he would be tired after the activities that he engaged in prior to the accident. Therefore, he demonstrated recklessness in consciously disregarding a potential desire for sleep or potential fatigue or any other existing physical shortcoming and operating his vehicle regardless of that desire or shortcoming.

B. MOTION FOR A NEW TRIAL

Milligan next argues that the Superior Court erred in denying his motion for a new trial. As noted above, Superior Court Rule 135 states a new trial will only be granted in the interest of justice or if new evidence is obtained and denial of such a motion is reviewed for abuse of discretion.[4] SUPER. CT. R. 135. "The decision to grant or deny a new trial is in the sound discretion of the trial court. It can be granted: when after weighing the evidence, the court determines there has been a miscarriage of justice and where there is a reasonable probability that trial error had a

[4] In *Emerson v. State*, 371 P.3d 150, 153 (Wyo. 2016), abuse of discretion is evaluated "on the reasonableness of the trial court. If the trial court could reasonably conclude as it did and the ruling is one based on sound judgment with regard to what is right under the circumstances, it will not be disturbed absent a showing that some facet on the ruling is arbitrary or capricious." (internal citations omitted).

substantial influence on the jury verdict." *People v. Gagliani*, 51 V.I. 81, 84 (V.I. 2009) (internal citations omitted)). The Superior Court was within its providence to deny Milligan's motion. At trial, the court made no statement that a miscarriage of justice had occurred. Milligan did not object on that basis, nor does he argue it on appeal. Similarly, there was nothing at trial to indicate palpable error that prejudiced Milligan. Although Milligan argues that the jury instructions contained prejudicial surplusage, we find such language to be harmless in its effect on the jury and the trial's outcome. Lastly, Milligan did not introduce new evidence to substantiate his motion or as foundation for his motion. Therefore, the Superior Court's denial of Milligan's motion for a new trial should be affirmed.

C. SURPLUS LANGUAGE

As mentioned above, Milligan asserts that surplusage[5] in the jury instructions affected his substantial rights by changing the character of the offense intended by statute. He failed to object to the instructions below and argues plain error on appeal. "Pursuant to Federal Rule of Criminal Procedure 30(d), the failure to object to a jury instruction before the trial judge precludes appellate review, except as permitted under Rule 52(b). Under Rule 52(b), "[a] plain error that affects substantial rights may be considered even though it was not brought to the court's attention. FED. R. CRIM. P. 52(b). Thus, before an appellate court can correct an error not raised at trial, there must be (1) 'error,' (2) that is 'plain,' and (3) that affect[s] substantial rights." *Francis v. People*, 52 V.I. 381, 390 (V.I. 2009) (quoting *Johnson v. United States*, 520 U.S. 461, 466-467 (1997) (internal citations and punctuations omitted)). If the three conditions are met, an appellate court may

[5] According to Merriam-Webster dictionary, surplusage means excessive or nonessential matter. *Surplusage Definition*, MERRIAM-WEBSTER.COM, http://www.merriam-webster.com/dictionary/surplusage (last visited Feb. 9, 2018).

exercise discretion over a forfeited error but only if it seriously affects the fairness, integrity, or public reputation of judicial proceedings. *Id*. at 390-91.

Milligan disputes the wording of the reckless driving charge in the jury instructions, specifically its reference to causing the death of Augusta Alcindor. He claims inclusion of the phrase "causing her death" changed the nature of the charge from one involving potential harm to people and destruction of property to one expressing death. Admittedly, Milligan is correct that surplusage was included in the jury instructions and such inclusion may have constituted error. However, the language did not affect his substantial rights because the jury heard the same language throughout trial. Accused of causing Alcindor's death, the original and amended informations both used language that alleged Milligan struck and killed her with his Nissan Frontier. The jurors were informed about the original information during voir dire which included language about Alcindor's death. They were also informed about the same language in the final jury instructions. Notwithstanding these facts, it acquitted Milligan of the felonies (negligent homicide and involuntary manslaughter) and convicted him of the misdemeanors (reckless driving and failure to report an accident). Considering the jury verdict, it is unlikely that the surplusage prejudiced Milligan to the extent that this court should exercise its discretion over a forfeited error. As noted in *Mulley v. People*, 51 V.I. 404, 413 (V.I. 2009), "if the language in the indictment is information which the government hopes to properly prove at trial, it cannot be considered surplusage no matter how prejudicial it may be . . . ." (quoting *United States v. Moss*, F.3d 543, 550 (6th Cir. 1993)).

Moreover, the court repeatedly told the jury the information was not evidence to be considered in its deliberations and enunciated the specific elements the People had to prove beyond

a reasonable doubt before it could find Milligan guilty of reckless driving. None of the elements for reckless driving included causing the death of Alcindor. "Because we must assume that juries for the most part understand and faithfully follow instructions," *Cascen*, 60 V.I. at 414 (internal citations omitted), and the surplusage did not affect Milligan's substantial rights, I find the surplusage in the jury instructions to be harmless and does not justify reversal of the Superior Court's judgment. *See United States v. Townsend*, 630 F.3d 1003 (11th Cir. 2011) (stating jurors are presumed to follow the court's instructions)). *See also United States v. Kleinman*, 859 F.3d 825 (9th Cir. 2017) (explaining the jury may be instructed that it is their duty to follow the law even if they disagree with it, but the court should not imply that the jury could be punished for jury nullification or that the verdict would be invalid).

D. SENTENCE

Milligan's last issue on appeal is that the Superior Court erred when it sentenced him to a combination of incarceration and probation that exceeds the maximum sentence allowed under 20 V.I.C. § 492. A sentence in which the combined period of incarceration and probation exceeds the maximum period of incarceration is improper. *Murrell v. People*, 54 V.I. 327, 336 (V.I. 2010). The maximum sentence for reckless driving is six months incarceration with a $1000 fine or both. 20 V.I.C. § 544(a). The court sentenced Milligan to six months incarceration to run consecutively with six months probation. (J.A. 1085). Because Milligan's sentence exceeded the maximum sentence under local law for reckless driving, the sentence must be vacated and remanded for further proceedings consistent with our sentencing laws.

V. CONCLUSION

The Superior Court did not err when it denied Milligan's motion for a judgment of acquittal or a new trial. There was sufficient evidence on the record for the jury to find him guilty of reckless driving beyond a reasonable doubt. Moreover, there was no miscarriage of justice or plain error to warrant granting him a new trial. However, the court erred when it imposed a sentence that exceeded the maximum allowed under Virgin Islands law. Therefore, I would affirm the trial court's November 16, 2016 judgment and commitment, but reverse the sentence imposed upon Milligan, and remand the case for further proceedings to address the sentence imposed.

Dated this 11th day of September 2018

/s/ Ive Arlington Swan
IVE ARLINGTON SWAN
Associate Justice

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