For Publication

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

SHANDOS POWELL, Appellant/Defendant, v. **PEOPLE OF THE VIRGIN ISLANDS,** Appellee/Plaintiff.	))))))))	**S. Ct. Crim. No. 2015-0008** Re: Super. Ct. Crim. No. F515/2013 (STT)

On Appeal from the Superior Court of the Virgin Islands
Division of St. Thomas & St. John
Superior Court Judge: Hon. Denise M. Francois

Argued: October 13, 2015
Filed: January 16, 2019

Cite as: 2019 VI 2

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

APPEARANCES:

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OPINION OF THE COURT

HODGE, **Chief Justice**.

¶1 Appellant Shandos Powell appeals from his convictions for second-degree murder and

other offenses. For the reasons that follow, we affirm.

I. BACKGROUND

¶2 On November 18, 2013, the People of the Virgin Islands charged Powell with numerous offenses stemming from the shooting death of Akil K. Greig, Sr. at the St. Thomas office of the Bureau of Motor Vehicles ("BMV"), including first-degree murder. The matter was tried before a jury from November 14 to 26, 2014.

¶3 At trial, Powell did not dispute that he killed Greig, and witnesses for both the prosecution and the defense provided largely consistent testimony as to what transpired before the shooting occurred. On the morning of the shooting, Powell drove to the BMV and parked his car in the BMV parking lot. Powell went to speak to Nyere Francis, an employee at the BMV, who was located in an office at the rear of the building near the BMV's inspection lane. After knocking on the office window, Francis waved to Powell, inviting him in, and they had a brief conversation.

¶4 Almost immediately after their brief conversation, Greig entered the office. Greig walked directly to Powell and asked him "what's up." Powell told Greig that he needed to give him what was his. An argument then ensued, wherein both men were "up in each other's face . . . and there was a little shoulder pushing." Francis tried to calm the situation and break up the argument, telling them "this is not the place for this." Greig told him not to worry about Powell because "he ain't going to do nothing. He is not going to do me anything." Powell then said "let's go in the Knolls," and exited the office, but returned shortly thereafter.

¶5 It is at this point that the witness testimony diverges. Powell testified that Greig had threatened him and his family, and because of that he walked back in the office to tell him to cease the threats. He claims that another argument ensued that lasted four to six minutes, and that when he tried to leave, Greig was blocking the door so that he could not do so. Powell further testified

that he believed that Greig was trying to reach for something in his front waistband, as if he was trying to pull something out. Powell claims that he rushed Greig, pushed him against the doorway, and hit him. Powell testified that during the scuffle, he saw Greig pull out a firearm, and that he managed to take the gun from Greig's hand. Powell further testified that while standing about two or three feet away, he asked Greig to let him leave the office, but Greig did not let him leave. According to Powell, Greig continued to block the door and appeared to reach for something else, which Powell believed was another firearm. Powell testified that he fired the gun at Greig because he believed Greig was going to kill him, and that Greig continued to try to pull something out of his waistband while Powell shot him.

¶6 In contrast, Francis testified that as Powell was leaving the room, Greig actually pointed at Powell and told him to stop threatening his family. At the time, Francis could not see Powell, because Powell had stepped outside. Francis testified that he picked up his cell phone, and then heard gunshots, at which point he ran for cover and hid behind a cabinet. Francis stated that he saw a gun in Powell's hands as he was standing by the door of the room only a few feet away from Greig, that he heard eight shots, and then saw Powell run out the door after the shots were fired. Francis testified that he never saw Greig with a firearm.

¶7 A surveillance video was introduced into evidence showing some of the events from the morning of the shooting. It depicts Powell lifting up his shirt near his waistband just before walking back into the office at the BMV. Neil Edwards, who drove in with Powell that morning, but did not enter the BMV, testified that he saw Greig shirtless and did not see him carrying a weapon. Other witnesses testified that Greig had been shot numerous times, including Dr. Francisco Landron, who testified that he examined Greig's body and found that it had been shot seven times on the right side of his chest, had four wounds on the left side of his chest, and two entrance wounds

on the right side of his abdomen. Several other witnesses provided forensics testimony, revealing that while Greig had a firearm on his person, it had not been drawn, had not been recently fired, and that none of the casings on the scene were from the kind of gun found on Greig's body.

¶8 Powell moved for a judgment of acquittal both after the People rested its case, and after he concluded his own case, on the grounds that the killing was a justifiable homicide. The Superior Court denied Powell's motions for judgment of acquittal premised on this justification defense. The matter was submitted to the jury, which ultimately acquitted Powell of first-degree murder, one count of possession of a firearm during the commission of a crime of violence, and voluntary manslaughter. However, the jury found Powell guilty of second-degree murder, four counts of possession of a firearm during the commission of a crime of violence, and reckless endangerment.

¶9 The Superior Court orally sentenced Powell on January 23, 2015, to thirty years' incarceration for second-degree murder and fifteen years' incarceration for one count of possession of a firearm during the commission of a crime of violence, to be served consecutively. It further stayed imposition of punishment on Powell's other convictions in accordance with title 14, section 104 of the Virgin Islands Code. The Superior Court memorialized its sentence in a February 4, 2015 written judgment and commitment. Powell timely filed his notice of appeal with this Court on January 26, 2015. *See* V.I. R. APP. P. 4(b)(1) ("A notice of appeal filed after the announcement of a decision, sentence, or order – but before entry of the judgment or order – is treated as filed on the date of and after the entry of judgment.").

II. DISCUSSION

A. Jurisdiction and Standard of Review

¶10 Pursuant to the Revised Organic Act of 1954, this Court has appellate jurisdiction over "all appeals from the decisions of the courts of the Virgin Islands established by local law[.]" 48 U.S.C.

§ 1613a(d). Title 4, section 32(a) of the Virgin Islands Code vests this Court with jurisdiction over "all appeals arising from final judgments, final decrees, [and] final orders of the Superior Court." The Superior Court's February 4, 2015 judgment and commitment constitutes a final order; as such, this Court has jurisdiction over this appeal. *See Percival v. People*, 62 V.I. 477, 483 (V.I. 2015).

¶11 We review the Superior Court's factual findings for clear error, and we exercise plenary review over its legal determinations. *Francis v. People*, 56 V.I. 370, 379 (V.I. 2012).

B. Sufficiency of the Evidence

¶12 In his appellate brief, Powell maintains that the People failed to introduce sufficient evidence to sustain his convictions for second-degree murder and reckless endangerment.[1] We address each offense in turn.

1. Second-Degree Murder

¶13 To sustain a conviction for second-degree murder, the People were required to prove beyond a reasonable doubt that Powell killed Greig with malice aforethought. *See* 14 V.I.C. §§ 921, 922(b). In the Virgin Islands, malice aforethought

> does not mean simply hatred or particular ill will, but extends to and embraces generally the state of mind with which one commits a wrongful act. It may be inferred from circumstances which show a wanton and depraved spirit, a mind bent on evil mischief without regard to its consequences. And where the killing is proved to have been accomplished with a deadly weapon, malice can be inferred from that fact alone.

Nicholas v. People, 56 V.I. 718, 731-32 (V.I. 2012) (quoting *Gov't of the V.I. v. Sampson*, 42 V.I. 247, 253 (D.V.I. App. Div. 2000)).

[1] Although he was also found guilty of first-degree assault, third-degree assault, and four counts of possession of a firearm during the commission of a crime of violence, Powell does not challenge those convictions on appeal, and we decline to review them *sua sponte*. *See* V.I. R. APP. P. 22(m).

¶14 Here, Powell does not dispute that he killed Greig with a firearm, and this Court has already held that "the use of a gun alone could be sufficient for a finding of actual malice." *Nicholas*, 56 V.I. at 736. However, Powell renews his claim that he must be acquitted because the homicide was justified. *See* 14 V.I.C. § 928 ("Whenever a homicide appears to be justified or excusable, the person charged must, upon his trial, be acquitted and discharged."). Specifically, Powell contends that he was justified in killing Greig because the homicide occurred "when resisting any attempt to murder any person, or to commit a felony, or to do some great bodily injury upon any person." 14 V.I.C. § 927(2)(A). Under Virgin Islands law, the People were required to disprove Powell's justification defense beyond a reasonable doubt.[2] *Jackson-Flavius v. People*, 57 V.I. 716, 726 (V.I. 2012).

¶15 When reviewing a challenge to the sufficiency of the evidence supporting a conviction, we view all issues of credibility in the light most favorable to the People. *Latalladi v. People*, 51 V.I. 137, 145 (V.I. 2009). If "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt," we will affirm. *DeSilvia v. People*, 55 V.I. 859, 865 (V.I. 2011). The evidence offered in support of a conviction "need not be inconsistent with every conclusion save that of guilt, so long as it establishes a case from which a jury could find the defendant guilty beyond a reasonable doubt." *Mulley v. People*, 51 V.I. 404, 409 (V.I.2009) (internal quotation marks omitted). A defendant seeking to overturn his conviction on this basis bears "a very heavy burden." *Latalladi*, 51 V.I. at 145.

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[2] In his appellate brief, Powell implies, but does not explicitly argue, that the Superior Court, through its jury instructions, impermissibly shifted the burden of proof onto him to prove his justification defense. To the extent this issue is not waived, *see* V.I. R. APP. P. 22(m), it is wholly without merit, since the Superior Court specifically instructed the jury: "If you find that the People have failed to prove beyond a reasonable doubt that the Defendant did not act in self-defense, then you must find the Defendant not guilty."

¶16 To support his justification defense, Powell relies on his own testimony at trial, in which he stated that he and Greig had a verbal altercation in the BMV office, that Greig had threatened his children (who were not present), that Greig blocked his exit while holding the front of his waist, and that he rushed him and pinned him against the doorframe when Greig tried to pull something out of his waist. Powell further maintains that he took Greig's firearm during this physical confrontation, and that he shot Greig when he reached for his waistband again because he believed Greig was reaching for a second gun.

¶17 As a threshold matter, we reject Powell's claim "that there is no limit to the amount of force to be used, and there is no duty to retreat." (Appellant's Br. 13.) While section 927(2) does not set forth any limitations on the use of deadly force, that statute must be read in conjunction with other statutes that set forth limitations on the justifiable use of force generally, whether deadly or non-deadly. *See Ritter v. People,* 51 V.I. 354, 360 (V.I. 2009); *see also McIntosh v. People*, 57 V.I. 669, 685-86 (V.I. 2012) (providing that statutes governing general and specific acts should be harmonized whenever possible). The statutes that govern the use of justifiable force generally provide that such force may not exceed that necessary to prevent the unlawful act. *See, e.g.,* 14 V.I.C. § 41 ("Any person about to be injured may make resistance sufficient to prevent . . . an offense against his person or his family or some member thereof."); 14 V.I.C. § 42 ("Any person, in aid or defense of the person about to be injured, may make resistance sufficient to prevent the offense."); 14 V.I.C. § 43 ("The right of self-defense does not extend to the infliction of more harm than is necessary for the purpose of defense."); 14 V.I.C. § 44(b) ("In determining whether a person is justified in the use of justifiable force, the finder of fact shall consider all relevant circumstances . . . ."); 14 V.I.C. § 293(b) ("[W]here violence is permitted to effect a lawful purpose, only that degree of force must be used which is necessary to effect such purpose."). To construe section

927(2) in a vacuum as Powell proposes would be tantamount to holding that the Legislature intended to place limitations on the use of non-deadly force, but envisioned no such limitation for the use of deadly force. However, well-established principles of statutory construction foreclose such a conclusion, because it would be an absurd result that the Legislature could not have possibly intended. *See Gilbert v. People*, 52 V.I. 350, 356 (V.I. 2009); *Defoe v. Phillip*, 56 V.I. 109, 132 (V.I. 2012) (observing that if the outcome of a proposed interpretation of a statute "would clearly be absurd," it "would foreclose such an interpretation"), *aff'd*, 702 F.3d 735 (3d Cir. 2012). Therefore, it is clear that the use of deadly force cannot be justified if the killing is unnecessary to repel an immediate and real threat, or is unnecessarily disproportionate to the threat posed.[3]

¶18 In this case, the People introduced sufficient evidence for the jury to conclude that killing Greig was not justified. The People introduced into evidence a surveillance video, which was

[3] In his appellate brief, Powell also argues that the Superior Court erroneously instructed the jury when it told them that

> Any person is justified in using force when they are resisting an attempt by another to kill or seriously injure him or another. The force used to deflect an aggressor's threatening harm must be reasonable and necessary. An application of greater force than that which is necessary is unlawful.

The gravamen of Powell's argument is that section 927(2) does not contain the limitations found in section 41, 44, 43, and 293, and that the Superior Court therefore erred when it included those limitations in its instruction. We reject this argument because, as explained above, the limitations in the statutes governing use of justifiable force necessarily apply to the defense of justifiable homicide provided for in section 927(2).

Similarly, we reject Powell's related claim that the Superior Court was required to issue separate jury instructions for each statute. While we have previously recognized that defenses to violent crimes under the Virgin Islands Code are similar, "they are not duplicative, and an instruction on one defense does not necessarily encompass the instruction on another," we have nevertheless held that separate instructions on each statute are not required if the instruction given is a correct statement of the law and encompassed the requirements of all the pertinent statutes. *Prince v. People*, 57 V.I. 399, 412, 414-15 (V.I. 2012). As in *Prince*, the instruction given by the Superior Court in this case was a correct statement of law that encompassed the elements of all the defenses that Powell raised at trial.

viewed by the jury. That video shows that Powell returned to the office after arguing with Greig, and showed Powell lifting his shirt on the left side before re-entering the office immediately before the shots were fired. That Powell left the office after arguing with Greig was corroborated by the testimony of Francis, as well as Powell himself. Moreover, Francis testified that he had heard Powell threaten Greig's family, rather than the other way around. The jury could reasonably credit this evidence over Powell's testimony, and conclude that the use of deadly force was not warranted because Powell had separated himself from Greig before he shot him, *see Ritter*, 51 V.I. at 361, or even that Powell was the initial aggressor who threatened Greig and shot him with his own firearm. Moreover, the jury heard testimony from Dr. Landron, who performed an autopsy on Greig's body and testified that Greig had been shot sixteen times, specifically, seven gunshot wounds on the right side of his chest, a smaller cluster of four gunshot wounds on the left side of his chest, two gunshot wounds on the right side of the abdomen, and three gunshot wounds to his right arm. The jury could properly conclude that shooting someone sixteen times is not consistent with self-defense or other justifiable use of force. *See Ritter*, 51 V.I. at 361; *see also Louisiana v. Dietrich*, 567 So.2d 623, 626–27 (La. Ct .App. 1990) (evidence that defendant stabbed victim sixteen times in throat, chest and upper back supports lack of self-defense); *Commonwealth v. Peoples*, 319 A.2d 679, 682 (Pa. 1974) (jury could infer from "numerous gunshot wounds" that killing was not done in self-defense); *accord, Gov't of the V.I. v. Lake*, 362 F.2d 770, 775 (3d Cir. 1966) ("We think it inconceivable anyone could stab another 43 times without an intent to kill."). Therefore, we conclude the Superior Court committed no error when it denied Powell's motion for a judgment of acquittal predicated on the justification defense.

2. Reckless Endangerment

¶19 "In order to obtain a conviction for first-degree reckless endangerment, the People must

prove that the defendant (1) recklessly engaged in conduct (2) in a public place that (3) created a grave risk of death to another person (4) under circumstances evidencing a depraved indifference to human life." *Davis v. People*, S. Ct. Crim. No. 2015-0121, __ V.I. __, 2018 WL 3695089, at *8 (V.I. July 27, 2018). On appeal, Powell maintains that the People failed to establish that the conduct occurred in a public place, since Greig was killed in a portion of the BMV office accessible only to staff and not the general public.

¶20 We disagree. "A 'public place' is defined as 'a place to which the general public has a right to resort; but a place which is in point of fact public rather than private, and visited by many persons and usually accessible to the public.'" *Estick v. People*, 62 V.I. 604, 615 (V.I. 2015) (quoting 14 V.I.C. § 625(c)(2)). However, courts have repeatedly held that a "public place" may include ostensibly private areas that are nevertheless actually accessible to the public, or which are so close to areas that are used by the public that the defendant's conduct could cause a grave risk of death to those in the public area. *Davis*, 2018 WL 3695089, at *9 (collecting cases). Here, the People introduced evidence that the area where the shooting occurred, although an area ordinarily accessible only to BMV employees, was next to the main door of the BMV office, and next to the BMV's inspection lane, areas which members of the public can—and do—access. Thus, the People proved that the shooting occurred in a place "where a discharged gun could easily result in injury to innocent people who regularly pass close by." *Id.* (quoting *State v. DeLegge*, 390 N.W.2d 10, 12 (Minn. Ct. App. 1986)). Thus, we affirm Powell's conviction for reckless endangerment.

III. CONCLUSION

¶21 The People introduced sufficient evidence to sustain the conviction for second-degree murder because the jury could reasonably reject Powell's testimony and credit other evidence that indicated that Powell was the initial aggressor or used disproportionate force against Greig.

Moreover, the People established that the place where the shooting occurred was a "public place" within the meaning of the reckless endangerment statute. Accordingly, we affirm the Superior Court's February 4, 2015 judgment and commitment.

Dated this 17th day of January, 2019.

BY THE COURT:

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

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

SWAN, **Associate Justice, concurring in judgment only.**

¶22 Appellant, Shandos Powell, seeks reversal of his convictions for second degree murder and first degree reckless endangerment. Powell argues that there was insufficient evidence to sustain his convictions, that the jury instructions did not instruct the jury appropriately on the available defenses, and that the location of the shooting was not a public place. While I reach the same result as the majority and would affirm both the convictions challenged in this appeal, the analysis propounded fails to provide accurate guidance as to the many statutes involved in this matter. Therefore, I write separately providing that statutory analysis and adumbrating the specific statutory elements of the crimes considered. *See M. Davis v. People*, S. Ct. Crim. No. 2015-0121, ___ V.I. ___, 2018 WL 3695089, at *10 (V.I. July 27, 2018) (Swan. J., concurring) ("Importantly, 'before discussing whether there was sufficient evidence supporting the challenged elements, the elements of each crime should be considered, as any evidentiary or jury instruction analysis is necessarily framed by the elements being challenged.'" (quoting *Ubiles v. People*, 66 V.I. 572, 590 (V.I. 2017); citing *Duggins v. People*, 56 V.I. 295, 307 (V.I. 2012))).[1]

I. FACTS AND PROCEDURAL HISTORY

¶23 After a jury trial, Powell was found not guilty on Counts I and II of the information but was found guilty of the following: Count III – "Second Degree Murder" (14 V.I.C. §§ 921, 922(b)), Count IV – "Possession of a Firearm During the Commission of a Crime of Violence," Second

[1] *Cf. A. Davis v. People*, S. Ct. Crim. No. 2015-0124, ___ V.I. ___, 2018 WL 3691737, at *9 (V.I. July 27, 2018) (Swan J., concurring); *Vanterpool v. Gov't of the V.I.*, 63 V.I. 563, 579-80 (V.I. 2015) (rejecting past decisions that mechanistically and uncritically applied past precedent stating that such precedents should be reconsidered under more defined rubric of a Banks Analysis (quoting *Gov't of the V.I. v. Connor*, 60 V.I. 597, 602 (V.I. 2014); citing *Dunn v. HOVIC*, 1 F.3d 1371, 1392 (3d Cir. 1993)); *Connor*, 60 V.I. at 600 (clarifying the analytical framework for determination of the common law of the Virgin Islands, as originally articulated in *Banks v. Int'l Rental & Leasing Corp.*, 55 V.I. 967, 979 (V.I. 2011)); *Miller v. People*, 54 V.I. 397 (V.I. 2010); *In re Callwood*, 66 V.I. 299, 303 (V.I. 2017) (noting that "Parties may not explicitly or implicitly stipulate to the law" and proceeding to interpret the statutory provision in question "rather than blindly follow the lead of the parties" (quoting *Bryan v. Fawkes*, 61 V.I. 201, 2224 (V.I. 2014)).

Degree Murder (14 V.I.C. § 2253(a)), Count V – "First Degree Assault" (14 V.I.C. § 295(1)), Count VI – Possession of a Firearm During the Commission of a Crime of Violence, First Degree Assault (14 V.I.C. § 2253(a)), Count VII – "Third Degree Assault" (14 V.I.C. § 297(4)), Count VIII – Possession of a Firearm During the Commission of a Crime of Violence, Third Degree Assault (14 V.I.C. § 2253(a)), Count IX – Third Degree Assault (14 V.I.C. § 297(2)), Count X – Possession of a Firearm During the Commission of a Crime of Violence, Third Degree Assault (14 V.I.C. § 2253(a)), and Count XI – "First Degree Reckless Endangerment" (14 V.I.C. § 625(a)).[2]

¶24 All charges related to allegations that Powell murdered Akil K. "Bumpa" Greig, Sr., an employee of the Bureau of Motor Vehicles ("BMV"), on November 8, 2013, at the BMV in Subbase on St. Thomas. Officer Monsanto of the Virgin Islands Police Department ("VIPD") testified that, on November 8, 2013, the day of the shooting, she was on duty and happenstancely at the Department's motor pool, which is located adjacent to BMV's inspection lanes. Officer Monsanto was two to four car lengths from the inspection lane inside her police cruiser at approximately 11:15 a.m. when she heard several rapid gun shots and immediately saw a woman hurriedly exiting the BMV screaming that someone had been shot and police assistance was needed. Officer Monsanto proceeded to the scene of the shooting and saw a male lying on his back on the floor of the office,[3] which was at the rear of the BMV inspection lane. The VIPD's

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[2] The People of the Virgin Islands filed this case against Shandos Powell on November 18, 2013. On November 24, 2014, the People filed an amended information enumerating 11 counts. Sentence was imposed on January 23, 2015, after a pre-sentence investigation. Powell was given a consecutive sentence of 30 years of incarceration on Count III – Second Degree Murder and 15 years of incarceration and a $25,000 fine on Count IV – Possession of a Firearm During the Commission of a Crime of Violence. Pursuant to 14 V.I.C. § 104, imposition of sentences on Counts V to XI was stayed with Counts V, VII, IX, and XI being merged into Count III and Counts VI, VII, and X being merged into Count IV. The evidence adduced at trial is summarized below.

[3] Throughout the trial, the room in which the shooting occurred was referred to both as an office and as a lounge. It is clear from the record that the room served both purposes, and the mixed terminology should not create confusion,

forensic unit arrived at the scene. After a member of the forensic unit had untucked the victim's shirt, Officer Monsanto saw a firearm secreted in the victim's waistband.

¶25 One eyewitness, Richard Vernon, was at the BMV registering his vehicle. He had completed his vehicle inspection and registration and was exiting the BMV when he saw a car, a metallic blue-gray BMW with ostentatious rims, and stopped to admire it. After he had re-entered his jeep, about 100 to 150 feet from the office where the shooting occurred, he heard two gun shots and, maybe a second later, a series of rapid gun shots, which prompted him to look in the direction of the sound. Vernon saw a man walking at a brisk pace with his right arm straight down. However, Vernon could not see what, if anything, the man had in his right hand; the man continued to walk briskly to the blue-gray BMW and quickly sped off, "sort of peeled out."

¶26 Detective Smith of the VIPD testified as the forensic officer assigned to investigate the shooting. When she arrived at the BMV, she saw a male, whom she identified as Greig, lying on the floor of the office at the inspection lanes. She could not see any apparent injuries on Greig; therefore, she lifted his shirt and found a firearm, a Glock 27 pistol with a round in the chamber, together with a 15-round extended magazine holding 13, .40-caliber rounds. However, only a single gun holster was found on Greig. Detective Smith, with the assistance of another member of the VIPD's forensic unit, processed the scene by taking photos and making a sketch of where different items of evidence were found, and they then proceeded to collect the evidence. Evidence retrieved from the crime scene included 15 casings and two projectiles from firearms ammunition designed to be discharged from a 9mm Luger. However, Greig's gun was a .40 caliber. No .40-

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as both terms refer to the same room at the BMV. For convenience, I will use the term "office" throughout the remainder of this opinion.

caliber casings or projectiles were recovered from the crime scene. Importantly, Greig's gun appeared not to have been fired.

¶27 The Territorial Medical Examiner then testified. In conducting Greig's autopsy, the Examiner found a cluster of seven gunshot wounds on the right side of his chest, a smaller cluster of four gunshot wounds on the left side of his chest, and two gunshot wounds on the right side of the abdomen. Greig also suffered three gunshot wounds to his right arm. The two wounds on the right side of the abdomen exhibited gunpowder tattooing, indicating the shots were fired from a distance of three feet or less. Three bullets were extracted from Greig's body and one from the armpit. Additionally, four bullets were recovered under Grieg's body inside his clothing. The same bullets had perforated both lungs and the heart, aorta, spleen, liver, intestines, and stomach and caused multiple rib and vertebrae fractures. The wounds were inconsistent with suicide.

¶28 Corporal Burke, the supervisor of the VIPD's firearm's office, was responsible for maintaining records for all firearms licenses in the Territory. Burke confirmed that Powell was not licensed to possess a firearm. The Assistant Director of the BMV then testified. As part of her duties, she maintained records at the BMV, including records of vehicle registration, vehicle ownership, driver's licenses, etc. The BMV's records disclosed that Powell was licensed to drive a motor vehicle and had registered a BMW. Corporal Potter, who is the Evidence and Property Clerk for the VIPD, also testified and authenticated the gun, the bullet casings, and the bullets that were recovered from the crime scene.

¶29 Maurice Cooper, a firearms examiner for the VIPD, also testified. He testified that no two firearms are exactly alike because there are microscopic imperfections in the metal that create a distinct pattern on the bullet as it is fired. Cooper analyzed the gun found on Greig as well as the bullet casings and the bullets retrieved from the crime scene. The gun was found to be operable,

but the caliber of the gun was too large to have held the casings or fired the bullets that were recovered at the scene. Additionally, the gun that was recovered from Greig's body had not been fired, as verified by an accumulation of lint in the barrel. However, it was not determined what type of lint was in the gun or how long it would have taken for the lint to accumulate, though it was unlikely to have happened in one or two days. As a firearms expert, Cooper explained that people would want an extended magazine in this particular weapon because of a desire to have a better grip or to carry more ammunition or both. All of the ammunition casings recovered from the crime scene were from the same firearm, but the bullets were too damaged to make a comparison.

¶30 Nyere Francis, a co-worker of Greig's, who was in the office at the time of the shooting, also testified. Francis was acquainted with Powell because they both owned BMW cars, and Powell had contacted him about obtaining wheels for his BMW, because Francis had a part-time business in which he procured wheels and rims for BMW owners. Francis had just completed inspecting a vehicle and had entered the employee office when he heard a knock on the office window; he invited the gentlemen who had knocked into the office. The man immediately asked if Francis and Greig, who was not in the office at that time, "were cool," to which Francis responded that they were. The man then asked Francis to tell Greig "to give us our stuff or deal with me for my stuff." Francis declined to relay the message and told the man to speak directly with Greig. Less than a minute after Powell had entered the office, Greig came in and proceeded directly to Powell asking why he was there and initiated a confrontation. Powell responded by stating that Greig needed to "give me what's mine, or give me my stuff."

¶31 During this pugnacious exchange, which occurred immediately inside the door to the office, the men were "in each other [sic] face" and engaging in "a little pushing" such that the

argument "was getting very heated." Therefore, Francis intervened and told the men to separate and deal with their issues elsewhere. In response, Powell said to Greig, "Let's go in the Knolls." Greig responded by warning Powell to stop threatening him and his family "or else you're going to see what you're going to get." Close to the end of this exchange, Powell left the office. Francis then retrieved his cellphone, and while unlocking the screen, he heard shots.

¶32 In response to comments by Greig, Powell, who had earlier departed the office, returned, and was "right by the entrance of the door" such that Powell was standing "by the door" and Greig was "on the side to the entrance" only a couple feet apart when shots were fired. However, Francis later said he did not see what Greig did immediately before shots were fired and could not explain how chairs and other objects were overturned in the office.

¶33 As soon as Francis heard shots, he sought refuge by attempting to break through the sheetrock wall of the office and, ultimately, by hiding behind a file cabinet. Francis recalls seeing Powell with the gun at the time of the shooting while the two men (Powell and Greig) "had a little struggle." After the shooting (about eight shots), Francis saw Powell outside the office and exiting the building while Greig was lying on the floor. He immediately summoned help. Francis never saw a gun in Greig's possession at any time prior to the shooting and did not see what occurred after the shooting began. On cross-examination, Francis testified that he and Powell had BMW's that were the same or very similar model. Likewise, Francis admitted he was Greig's friend.

¶34 Detective Espirit testified thereafter. He had been called to the crime scene to collect surveillance videos of the shooting. He was instructed to retrieve the footage of a grey BMW entering the BMV inspection yard and, thereafter, a male immediately entering the inspector's office. The footage was reviewed by the jury.

¶35 At the close of the evidence, Powell moved for a judgment of acquittal. The Court denied this motion partly because the video footage confirmed that Powell returned to the office after an argument with Greig, and after the shooting, he exited the office with a gun in his left hand. The video also revealed that Powell lifted his shirt on the left side before re-entering the office immediately before the shots were fired. It was also apparent from the footage that Greig was already on the floor of the office when the majority of the gun shots were discharged.

¶36 The defense presented Neil Edwards as its first witness. He and Powell had met on the morning of the shooting. It appears the two were meeting to simply "hang out" that day, but Powell had some errands. Therefore, Edwards joined Powell in proceeding to purchase a part for Powell's car and thereafter proceed to the BMV. Powell was wearing jeans but no shirt, which he had in the car. They proceeded to the auto parts store, at which time Powell exited his car and put on his shirt. When questioned about what Powell was wearing, Edwards stated he was wearing pants with a belt and had put on a shirt, but he did not mention a gun or undershirt. Upon departing the auto parts store, they proceeded to the BMV where Powell parked alongside the inspection booth, about 20 to 30 feet away, and entered the inspection booth while Edwards waited in the car. At no time before the shooting did Edwards see Powell with a gun. After a few minutes, a man followed Powell into the office. When Powell returned to the car, he appeared shaken and had a gun. At that juncture, Powell entered the car, and they drove away. They proceeded up Crown Mountain Road where Powell disposed of the gun in a garbage bin. Edwards also testified that he had never known Powell to previously carry a gun.

¶37 Powell then testified. He stated that, on November 8, 2013, Edwards called him. They agreed to meet at Four Corners intersection. Powell picked up his friend, and they proceeded to Bevin's Autoparts to purchase a part for Powell's car. When he arrived at Bevin's, he donned his

shirt and entered the establishment. Not finding the car part in stock, he purchased a couple of sodas and left for the BMV. At approximately 10:55 a.m., Powell arrived at the BMV where he went to the inspection lanes to converse with Francis concerning some rims for his vehicle about which they had spoken two or three months prior to that day. Powell approached the office, and Francis made a waving gesture for him to enter. Shortly thereafter Greig entered the office and immediately accused Powell of having "this money" and other "things" while simultaneously assuming a truculent posture towards Powell.

¶38 Powell also claimed that Greig began bellicosely poking him in his chest. A raucous argument ensued, with Greig pushing and "booting up" on Powell. However, Powell and Greig were only acquaintances, and he had no intention of speaking to Greig that day. As Powell was leaving the office, Greig threatened Powell's children. In response, Powell returned to the office to confront Greig about the threats he made. The verbal altercation continued to escalate. After about 4 to 6 minutes, Francis separated them. Powell testified that he tried to leave the office because Greig was holding "the front of his waist like he is carrying two pistols." Greig blocked Powell's exit while holding the front of his waist. As Greig was trying to pull something out of his waist, Powell stated that he rushed him and pinned him against the doorframe, causing Greig to lose his grip. According to Powell, he took the gun from Greig; however, Greig prevented him from leaving the office. Greig then reached for something in his waistband. Because of Greig's actions of reaching to both sides of his waist, Powell claimed that he thought Greig was reaching for a second gun. Therefore, he began to shoot while moving toward Greig. As Powell moved toward Greig, Greig fell to the floor. Powell asserted that Greig continued to try and retrieve whatever he had in his waistband.

¶39 At this time in his testimony, Powell narrated the surveillance footage. Powell explained that, once he was in the office, he waited for Francis to terminate his phone conversation. However, before that happened, Greig came into the office behind Powell about 15 seconds later. Powell testified that, at time stamp 7:04:42, this was when he had exited the office but returned because Greig threatened him and his children. Powell noted that he was "going in my pocket" in reference to when he reached to his lower back and lifted his shirt just before re-entering the office. Powell was then asked, with reference to timestamp 7:05:06 in the video recording, "What were you doing from the time that you, from the time where we saw you, you say lift your shirt in the back, and the time that's 7:04:06? What were you doing?" In response, Powell testified that, from 7:05:06 to 7:09:02, about 4 minutes, he returned to the office and continued arguing with Greig. He asserted that, at about 7:09:02, Greig was blocking his departure from the office, and they wrestled over the gun. Powell also claimed that, in the approximately 24 seconds that followed, he gained control of the gun and started firing as he tried to leave the office. Powell further stated that, simultaneously, Greig was attempting to pull out what he believed to be Greig's second gun.

¶40 On cross-examination, the People covered the subject of the video footage and questioned Powell about certain discrepancies that appeared between his testimony and the recording. For example, the video recording appeared to show Powell, upon his arrival, gesturing to someone out in the yard—who does not appear on camera—shortly before Greig entered the office. Powell explained that he had just knocked on the door and was lowering his hand. Similarly, the People attempted to prove that Powell, not Francis, allowed Greig into the office, presumably to show that Powell knew Greig better than as merely acquaintances. Powell further denied that he asked Francis if he and Greig were "cool" with each other.

¶41 The People repeatedly asked Powell about his prior interactions with Greig, but Powell maintained that he only knew Greig from seeing him around Contant Knolls, on St. Thomas. The People further questioned Powell's testimony that he had no idea why Greig was upset, posing the question: "You're arguing with a man this long and you have no idea what he is talking about?" Powell admitted he could have left the premises once he exited the office, but he also maintained that they were still arguing and that, in response to threats against him and his children, Powell returned to the office. Powell further testified that, as he was returning to the office, he "was going in my back pocket" but never did. The People inquired regarding what was under Powell's shirt. Powell responded that it was his belt and boxer shorts. He further maintained that, after he re-entered the office, Greig refused to permit him to leave. Similarly, Powell maintained that they struggled, and he managed to take a gun from Greig's possession.

¶42 Again, the People tried to emphasize the discrepancy between Powell's explanation and what the video recording showed by underscoring that the door to the office remained unlatched but closed at all times, even though Powell asserted that he pushed Greig into the same door. When questioned about whether Francis had been telling the truth, Powell responded by claiming that Francis' testimony was that Powell shot Greig within seconds of Powell returning to the office, whereas the video shows over four minutes elapsing. He concludes his answer, asserting, "So, he has to be telling something different."

¶43 The Defendant requested a jury instruction on self-defense, which the court did not utilize. The full text of the self-defense instruction actually given is as follows:

> The Defendant has asserted self-defense as a defense to the charges. If the Defendant was not the aggressor and had reasonable grounds to believe and actually did believe in his own mind that he or another was in imminent danger of death or serious bodily harm, he had the

> right to use such force as was necessary to defend himself or the other person.
>
> Virgin Islands law defines "self-defense" as follows: The right of self-defense does not extend to the infliction of more harm than is necessary for the purpose of defense. To justify a homicide on the grounds of self-defense there must be not only the belief but also reasonable grounds for believing that at the time of killing the party killing was in imminent or immediate danger of his life or great bodily harm.
>
> The danger must be real or honestly believed at the time and founded upon reasonable grounds.
>
> Generally, the right to use deadly force in self-defense is not available to one who is the aggressor or provokes the conflict. However, if one who provokes a conflict thereafter withdraws from it in good faith and informs his adversary by words or action that he desires to end the conflict and he is thereafter pursued he is justified in using deadly force to save himself or others from imminent danger or death or serious bodily harm.
>
> Any person is justified in using force when they are resisting an attempt by another to kill or seriously injure him or another.
>
> The force used to deflect an aggressor's threatening harm must be reasonable and necessary. And an application of greater force than that which is necessary is unlawful. You should consider all of the relevant circumstances including the time of day, the location, the visibility conditions and the type of weapon, object or instrument involved.
>
> If you find that the People have failed to prove beyond a reasonable doubt that the Defendant did not act in self-defense, then you must find the Defendant not guilty of homicide.

II. JURISDICTION

¶44 "Before this Court can decide the merits of [this] appeal, we must determine if we have jurisdiction." *Brown v. People*, 49 V.I. 378, 379 (V.I. 2008); *First Am. Dev. Group/Carib, LLC*, 55 V.I. 594, 601 (V.I. 2011) ("Prior to considering the merits of an appeal, this Court must first determine if it has appellate [subject matter] jurisdiction over the matter." (citing *V.I. Gov't Hosp. & Health*

Facilities Corp. v. Gov't of the V.I., 50 V.I. 276, 279 (V.I. 2008)). We have appellate subject matter jurisdiction over "all appeals from the decisions of the courts of the Virgin Islands established by local law[.]" 48 U.S.C. § 1613a(d).

¶45 Pursuant to this grant of authority from Congress, the Legislature of the Virgin Islands has established this Court and granted it jurisdiction over all appeals arising from a "Final Order" of the Superior Court. 4 V.I.C. § 32(a); *see* 4 V.I.C. § 33(a) ("Appealable judgments and orders . . . shall be available only upon entry of final judgment in the Superior Court.").[4] "'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 v. Stewart*, 67 V.I. 931, 939 (V.I. 2017) (quoting *Ramirez v. People*, 56 V.I. 409, 416 (V.I. 2012) (citations omitted)). In a criminal matter, the written judgment embodying the adjudication of guilt and sentence imposed constitutes the Final Order. *Percival v. People*, 62 V.I. 477, 483 (V.I. 2015) (citing *Cascen v. People*, 60 V.I. 392, 400 (V.I. 2014); *Williams v. People*, 58 V.I. 341, 345 (V.I. 2013)).

¶46 Powell was sentenced on January 23, 2015, and a written judgment and commitment was entered on February 4, 2015. Although Powell prematurely filed his appeal on January 26, 2015, V.I.R. APP. P. 5(a)(9), we nonetheless treat it as if it was filed "on the date of and after entry" of the written judgment and consider it timely filed. V.I.R. APP. P. 5(b)(1); *Tyson v. People*, 59 V.I. 391, 399 n.5 (V.I. 2013). Therefore, I would also find that this Court has jurisdiction to hear this

[4] *See also Enrietto v. Rogers Townsend & Thomas PC*, 49 V.I. 311, 315 (V.I. 2007) (quoting 4 V.I.C. § 32(a)); *Toussaint v. Stewart*, 67 V.I. 931, 939-40 (V.I. 2017) (discussing what constitutes a "Final Order"); *see generally Penn v. Mosley*, 67 V.I. 879, 891 n.4 (V.I. 2017) (discussing the distinctions between a judgment, order, and decree); *Miller v. Sorenson*, 67 V.I. 861, 871-72 (V.I. 2017) (discussing the distinctions between a judgment and decree); *Cianci v. Chapu*t, 68 V.I. 682, 688 (V.I. 2016) (quoting *In re Estate of George*, 59 V.I. 913, 919 (V.I. 2013)).

appeal, which was timely perfected on January 26, 2015. V.I. R. App. P. 5(a)(1); *Allen v. HOVENSA, L.L.C.*, 59 V.I. 430, 434 (V.I. 2013); *see* V.I.R. APP. P. 5(a)(4).[5]

III. STANDARD OF REVIEW

¶47 First, Powell challenges the sufficiency of the evidence establishing that his shooting of Greig was not justifiable. Second, he argues that the evidence was insufficient to prove he had the intent, i.e., mens rea, of malice aforethought. Finally, he challenges the sufficiency of the evidence proving his actions were unlawful.

¶48 Initially, this Court must determine whether Powell fairly presented his sufficiency of the evidence arguments. *Percival v. People*, 62 V.I. 477, 486 (V.I. 2015) (citing former V.I.S.CT.R. 4(h); 22(m)); *cf.* V.I.R. APP. P. 4(h), 22(m). An issue not fairly presented at trial is generally deemed to have been forfeited. *Id.* Powell's argument for acquittal asserting a failure of proof of the mental intent (mens rea) element of his conviction for Second Degree Murder, 14 V.I.C. § 921(b), fairly presented the issue of sufficiency of the evidence of disproving beyond a reasonable doubt Powell's affirmative defense of justification. The two issues are inextricably intertwined

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[5] This Court also possess an independent obligation to determine that the trial court properly exercised subject matter jurisdiction over the case. *See Rivera-Moreno v. Gov't of the V.I.*, 61 V.I. 279, 304 (V.I. 2014) (citing *In re Guardianship of Smith*, 54 V.I. 517, 525-26 (V.I. 2010)). The reason for this is that the presence of subject matter jurisdiction goes to the very power of a court to act; therefore, parties to litigation may not stipulate to either presence or absence of subject matter jurisdiction. *J. Williams*, 58 V.I. at 347 (citing *H&H Avionics, Inc. v. V.I. Port Auth.*, 52 V.I. 458, 460 (V.I. 2009)); *see also Hodge v. Hodge*, 15 V.I. 154, 164-65 (D.V.I. 1979) (quoting *Alton v. Alton*, 207 F.2d 667, 677 (3d Cir. 1953) and citing *Am. Fire & Casualty Co. v. Finn*, 341 U.S. 6, 16-17 (1951)); *People's Bank of Belleville v. Calhoun*, 102 U.S. (12 Otto) 256, 262 (1880)). In the Virgin Islands, a criminal information is defective for failing to allege subject matter jurisdiction if it fails to allege facts showing that the allegedly criminal conduct: (1) occurred in the Virgin Islands and (2) involved a violation of a criminal statute at the time of the conduct. *Tindell v. People*, 56 V.I. 138, 147-48 (V.I. 2012) ("Pursuant to Section 21(b) of the Revised Organic Act and title 4, section 76(b) of the Virgin Islands Code, the Superior Court has subject matter jurisdiction to hear criminal cases that (1) arise from the Virgin Islands and (2) involve violations of Virgin Islands criminal statutes."); *cf. United States v. Peters*, 9 U.S. (5 Cranch) 115, 136 (1809). The information alleged that Powell's criminal acts occurred November 18, 2013, on the island of St. Thomas. These same facts were proved at trial and established a violation of a Virgin Islands' criminal statute as to each count; therefore, the Superior Court properly exercised subject matter jurisdiction.

because justification/self-defense necessarily negates intent (mens rea) and unlawfulness. *Percival*, 62 V.I. at 486.[6] Because Powell raised these issues at trial by making a motion for judgment of acquittal pursuant to Superior Court Rule 7 and Federal Rule of Criminal Procedure 29,[7] this Court has plenary review over the denial of the motion and applies the same standard as the trial court. *See Williams v. People* (*A. Williams*), 55 V.I. 721, 727, 734 (V.I. 2011).

¶49 Powell also challenges the construction of 14 V.I.C. § 625(c)(2), which defines a "Public Place" as it relates to the crime of First Degree Reckless Endangerment,[8] arguing that the office within the BMV in which the shooting occurred was not a Public Place. This issue was not fairly presented at trial and is thus subject to "Plain Error Review."[9] *A. Williams*, 55 V.I. at 727. To the extent this is a challenge to the sufficiency of the evidence, Powell bears the burden of establishing that reversal of his convictions is warranted. *Rawlins v. People*, 58 V.I. 261, 269 n.3 (2013).

¶50 Lastly, Powell asserts that the jury instructions were erroneous because 1) they limited his justification defense to "resisting an attempt by another to kill him or to do serious bodily injury

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[6] *See, e.g.*, *Dunlop v. People*, S. Ct. Crim. No. 2008-0037, 2009 V.I. Supreme LEXIS 41, at *8-13 (V.I. Sept. 15, 2009) (unpublished) (analyzing in the same discussion the sufficiency of the evidence as to both disproving unlawfulness and proving intent); *see generally Gov't of the V.I. v. Isaac*, 50 F.3d 1175 (3d Cir. 1995).

[7] Superior Court Rule 7 previously made the Federal Rules of Criminal Procedure applicable in the Superior Court. Subsequently, Rule 7 was amended and the Virgin Islands Rules of Criminal Procedure become operative. *M. Davis*, 2018 WL. 3695089, at *18 n.24 (V.I. July 27, 2018) (Swan, J. concurring) (providing the procedure history of the amendment and adoption of these rules).

[8] As subsection (c)(2) provides the general definition of a Public Place with regards to the application of section 625, this is also the definition of a Public Place for Second Degree Reckless Endangerment. 1 V.I.C. § 42 (noting that when, in context, a word has a specific definition, that word must be "construed and understood according to their peculiar and appropriate meaning").

[9] I would note that this terminology is often confusing given the multiple uses in multiple combinations of the words "plain" and "error." For clarity's sake, in the present opinion, the Court will employ the term "Plain Error" to refer to the presence of the first three factors of this test and will employ the term Plain Error Review to refer to the analysis that is conducted when the fourth factor is found and the Court exercises its discretion to notice an error. *E.g.*, *Cornelius v. Bank of N.S.*, 67 V.I. 806, 816 n.2 (V.I. 2017) (citing *Francis v. People*, 52 V.I. 381, 391 (V.I. 2009)).

upon him or another" and 2) they omitted separate instructions on resistance by one who is about to be injured (14 V.I.C. § 41), justifiable use of force (14 V.I.C. § 44), lawful violence (14 V.I.C. § 293), and justifiable homicide (14 V.I.C. § 927). None of these issues were fairly presented to the trial court; therefore, they are subject to Plain Error Review. *A. Williams*, 55 V.I. at 727.

IV. DISCUSSION

A. Sufficiency of the Evidence

¶51 When the prosecution fails to present sufficient evidence, a guilty verdict will be reversed. *United States v. Dobbs*, 629 F.3d 1199, 1203 (10th Cir. 2011). However, when an appellant seeks to have his conviction overturned for lack of evidence, he bears a heavy burden. *Ritter v. People*, 51 V.I. 354, 359 (V.I. 2009). This standard of review is highly deferential to the jury's verdict and "formidable[,] and 'defendants challenging convictions for insufficiency of evidence face an uphill battle.'" *United States v. Santos-Rivera*, 726 F.3d 17 (1st Cir. 2013) (citation omitted); *see Augustine v. People*, 55 V.I. 678, 684 (V.I. 2011). A conviction will be affirmed if there is substantial evidence supporting each essential element of the crime beyond a reasonable doubt. *Augustine*, 55 V.I. at 683.

¶52 There is no requirement that the evidence be consistent with only the conclusion of guilt because a conviction must be affirmed if a rational trier of fact, taking the evidence in the light most favorable to the verdict, could have found the defendant guilty beyond a reasonable doubt, and the conviction is supported by substantial evidence. *Coleman v. Johnson*, 132 S. Ct. 2060, 2064 (2012); *Ritter*, 51 V.I. at 359. Any concern with the credibility of witnesses and weighing of evidence is not for this Court to second guess. *A. Williams*, 55 V.I. at 734; *see also Ritter*, 51 V.I. at 359; *United States v. Alaboudi*, 786 F.3d 1136 (8th Cir. 2015); *cf. Rivera v. People*, S. Ct. Crim. No. 2014-0027, 2016 WL 2643349, at *6-8 (V.I. May 4, 2016) (standard for credibility

determination on appeal). Evidence is not insufficient because testimony from witnesses may be contradictory; contradictory testimony instead means that the finder of fact made a credibility determination. *Marcelle v. People*, 55 V.I. 536, 547 (V.I. 2011); *Smith v. People* (*Smith I*), 51 V.I. 396, 401 (V.I. 2009). Evidence need not exclude every hypothesis of innocence, and if the evidence rationally supports two conflicting conclusions, the conviction will not be reversed. *United States v. Jimenez-Serrato*, 336 F.3d 713, 715 (8th Cir. 2003); *see also United States v. Shoemaker*, 746 F.3d 614 (5th Cir. 2014).

1. Sufficiency of the Evidence: Second Degree Murder and its Defenses

¶53 The elements of Second Degree Murder are 1) the defendant, *see Gilbert v. People*, 52 V.I. 350, 356 (V.I. 2009); *Hiibel v. Sixth Judicial Dist. Ct.*, 542 U.S. 177, 191 (2009), 2) killed another person, 3) that killing was unlawful, and 4) that killing was with malice aforethought. 14 V.I.C. §§ 921, 922(b).[10] In a prosecution for murder, *inter alia*, if a defendant raises, through either cross-

[10] *See Woodrup v. People*, 63 V.I. 696, 707 (V.I. 2015); *see generally Nicholas*, 56 V.I. at 731-32; *Gov't of the V.I. v. Carmona*, 422 F.2d 95, 99 (3d Cir. 1970) (acknowledging that there is no indication in the Virgin Islands Code to alter the elements of common-law crimes). Section 921 of title 14 provides, "Murder is the unlawful killing of a human being with malice aforethought." 14 V.I.C. § 922 provides:

> (a) All murder which—
> (1) is perpetrated by means of poison, lying in wait, torture, detonation of a bomb or by any other kind of willful, deliberate and premeditated killing;
> (2) is committed in the perpetration or attempt to perpetrate arson, burglary, kidnapping, rape, robbery or mayhem, assault in the first degree, assault in the second degree, assault in the third degree and larceny; or
> (3) is committed against (A) an official, law enforcement officer, or other officer or employee of the Government of the Virgin Islands while working with law enforcement officials in furtherance of a criminal investigation (i) while the victim is engaged in the performance of official duties; (ii) because of the performance of the victim's official duties; or (iii) because of the victim's status as a public servant; or (B) any person assisting a criminal investigation, while that assistance is being rendered and because it is first degree murder;
> is murder in the first degree.
> (b) All other kinds of murder are murder in the second degree.

examination or putting on evidence, one or more affirmative defenses (*e.g.*, self-defense (14 V.I.C. § 43), justifiable homicide (14 V.I.C. § 927(2)), defense of others (14 V.I.C. § 42), etc.), it is the People's burden to disprove those affirmative defenses beyond a reasonable doubt. *Petric v. People*, 61 V.I. 401, 410 (V.I. 2014); *Phipps v. People*, 54 V.I. 543, 548 (V.I. 2011).

¶54 Because Powell testified at trial that he shot Greig, the inquiry on appeal focuses on whether there was substantial evidence from which the jury could plausibly have found all the elements of the crimes for which Powell was convicted, s*ee Ritter*, 51 V.I. at 360 ("Ritter admitted at trial that he used a knife to stab Powell several times . . . ."), and concluded beyond a reasonable doubt that the People had disproved Powell's affirmative defenses, *see Powell v. People* (*A. Powell*), 59 V.I. 444, 458-59 (V.I. 2013). Powell has not challenged the first two elements, and they are not considered in this appeal. *See Blyden v. People*, 53 V.I. 637, 664 (V.I. 2010).

a. Sufficiency of the Evidence: Second Degree Murder—Element 3—Unlawfulness

¶55 Powell challenges the sufficiency of the evidence to prove the unlawfulness of his killing of Greig. This argument is specious. Powell relies on 14 V.I.C. § 927(2) [11] and 14 V.I.C. § 43 to

[11] 14 V.I.C. § 927 provides as follows:

> Homicide is justifiable when committed by—
> (1) public officers and those acting by their command in their aid and assistance,
> (A) in obedience to any judgment of a competent court;
> (B) when necessarily committed in overcoming actual resistance to the execution of some legal process, or in the discharge of any other legal duty; or
> (C) when necessarily committed in retaking felons who have been rescued or have escaped, or when necessarily committed in arresting persons charged with felony, and who are fleeing from justice or resisting such arrest;
> (2) any person—
> (A) *when resisting any attempt* to murder any person, or *to commit a felony*, or to do some great bodily injury upon any person;
> (B) *when committed in defense of* habitation, property, or *person, against one who manifestly intends or endeavors, by violence*

argue that his actions were lawful and that the People failed to prove they were unlawful beyond a reasonable doubt. An act is lawful when it is "[n]ot contrary to law; permitted by law." BLACK'S LAW DICTIONARY 965 (9th ed. 2009). Multiple provisions of the Virgin Islands Code provide a basis for arguing that a killing is lawful. *Cf. Gov't of the V.I. v. Frett*, 14 V.I. 315, 323 (V.I. Super. Ct. 1978) (utilizing section 293 of title 14 and section 87 of title 17 to determine the Legislature's definition of "lawful violence" in the context of an aggravated assault upon a child).

¶56 Under the general provisions of title 14, section 41,[12] a defendant is authorized to make resistance sufficient to prevent an offense against him or his family. Something is sufficient when it is "adequate for the purpose; enough." RANDOM HOUSE WEBSTER'S COLLEGE DICTIONARY 1305 (2d ed. 1999). Title 14, section 42 also limits defense of others to only such resistance as is

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> *or surprise to commit a felony*, or against one who manifestly intends and endeavors, in a violent, riotous or tumultuous manner, to enter the habitation of another for the purpose of offering violence to any person therein;
>
> (C) when committed in the lawful defense of such person, or of a wife or husband, parent, child, master, mistress, or servant of such person, when there is reasonable ground to apprehend a design to commit a felony, or to do some great bodily injury, and imminent danger of such design being accomplished; but such person, or the person on whose behalf the defense was made, if he was the assailant or engaged in mortal combat, must really and in good faith have endeavored to decline any further struggle before the homicide was committed; or
>
> (D) *when necessarily committed* in attempting by lawful ways and means to apprehend any person for any felony committed or in lawfully suppressing any riot, or *in lawfully keeping or preserving the peace*.

(Emphasis added).

[12] 14 V.I.C. § 41 provides as follows:

> Any person about to be injured may make resistance sufficient to prevent—
>
> (1) an illegal attempt by force to take or injure property in his lawful possession; or
>
> (2) *an offense against his person* or his family or some member thereof.

(Emphasis added).

sufficient to prevent the offense. Section 293(b) of title 14,[13] though arguably available only as a defense to charges of assault or battery, limits the use of force to only so much force as is necessary to prevent the assault or battery. As discussed above, something is necessary when it is "essential, indispensable, or requisite." WEBSTER'S COLL. DICT. at 882. Section 43 of title 14 also places several limits on when a defendant may be found to have acted lawfully in self-defense.[14] For example, the first sentence of this section explicitly limits self-defense to the use of only so much harm as is necessary. Moreover, the defendant must have had a reasonable ground to believe he was in immediate danger of great bodily harm. Therefore, sections 41, 42, 43, and 293 of title 14 all have the limitation that lawful violence is only that amount of violence necessary to prevent

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[13] 14 V.I.C. § 293 provides as follows:

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

(Emphasis added).

[14] 14 V.I.C. § 43 provides as follows:

> The right of self-defense does not extend to the infliction of more harm than is necessary for the purpose of defense. To justify a homicide on the ground of self-defense, there must be not only the belief but also reasonable ground for believing that at the time of killing the deceased, the party killing was in imminent or immediate danger of his life or great bodily harm.

death or serious bodily injury. Any violence that is disproportionate to the threatened injury is, therefore, unlawful.

¶57 Section 44 of title 14 does not use the words necessary or sufficient in providing for justifiable use of force.[15] However, subsection 44(a)(1), provides that force is justified only in resisting attempted murder or an attempt to inflict serious bodily injury. Additionally, subsection 44(b) provides that a determination of justifiable use of force under that section requires a consideration of all relevant circumstances including the type of weapon used and the conditions affecting one's ability to see. Subsection 44(b) places the same limitations on lawful violence as those in sections 41, 42, 43, and 293. Justifiable use of force under section 44 of title 14 is, therefore, limited to only that amount of force necessary to prevent an attempted murder or serious bodily injury. If the force used is disproportionate to the threat posed, the force is unlawful.

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[15] 14 V.I.C. § 44 provides as follows:

(a) *Any person is justified in the use of force when*:
  (1) *the person is resisting an attempt by another to kill him or to inflict serious bodily injury upon him*; or
  (2) the person is resisting an unlawful or forcible entry by another into his residence and he reasonably believes that there is an imminent threat of harm to him or his family.

(b) *In determining whether a person is justified in the use of justifiable force, the finder of fact shall consider all relevant circumstances including, but not limited to*:
  (1) *time of day*;
  (2) *location;*
  (3) *visibility conditions;*
  (4) *type of weapon, object or instrument; and*
  (5) *brandishing of a firearm or other dangerous or deadly weapon, as defined in Section 2251 of this Title, by the perpetrator.*

(c) A person who uses justifiable force while within his residence against another unlawfully in the residence or attempting to unlawfully or forcibly enter the residence shall be presumed to have held a reasonable belief that there is an imminent threat of harm to his person, provided:
  (1) that he knew or had reason to believe that an unlawful and forcible entry had occurred or was about to occur; or
  (2) he knew or had reason to believe that the perpetrator had a dangerous weapon on his person or within his reach.

(Emphasis added).

¶58 Likewise, section 927(2) is structured in the same manner as the other provisions of title 14 that provide for lawful violence. Justifiable homicide is limited, under subsection (2)(A), to resisting an attempted murder, a felony, or great bodily injury. Under subsection (2)(B), as applicable in this case, homicide is justified only when defending against a person who manifestly intends by violence to commit a felony against another person. Subsection (2)(C) likewise requires that there be reasonable grounds to believe there is imminent danger of great bodily harm or of being a victim of a felony. Additionally, subsection (2)(C) provides the added limitation that any person who was the initial aggressor in an altercation must really and in good faith retreat from the fight. Finally, subsection (2)(D) expressly requires that the means of keeping the peace be lawful. These limitations evidence a clear legislative intent to limit justifiable homicide to only those situations where the killing was necessary to defend against such violence. Therefore, a killing is unlawful if the violence used was unnecessary or unnecessarily disproportionate to the threat posed.

¶59 Powell testified that Greig brandished a gun, and he wrestled it from Greig. Powell testified further that, after he got the gun from Greig, he believed Greig was attempting to retrieve a second gun. Consequently, Powell shot Greig 16 times, many of which occurred as Greig lay on the floor. Considering the other testimony and video evidence, a jury could unhesitatingly have concluded that shooting a person that had already been shot and had already fallen to the ground was greater force than necessary to disarm him or to prevent him from inflicting any harm upon others.

¶60 A similar situation was addressed in *Ritter*. 51 V.I. at 360. In that case, two teenagers had become involved in a fracas at school. The defendant claimed self-defense because he had been injured, with blood running into his eyes, and the victim had placed him in a chokehold, restricting his breathing. In upholding Ritter's conviction, this Court noted that self-defense is limited to only

that amount of force necessary to defend against the attack and concluded that the use of a weapon, the number and severity of the wounds, the photographs of the injuries, and the fact that, even though the fight momentarily ceased, the evidence confirmed that the defendant returned to the fracas and utilized force disproportionate to the threat posed, all justified a finding beyond a reasonable doubt that the defendant's actions were unlawful. *Id.* at 361. Based on similar facts presented here, such as Powell leaving and returning to the office just prior to the shooting and continuing to shoot Greig after he had been effectively neutralized and was lying on the floor, there was substantial evidence from which a reasonable jury could have found Powell's killing of Greig to be unlawful beyond a reasonable doubt. [16]

¶61 Additionally, the jury could have convicted Powell on another factual basis. The jury could have rejected Powell's testimony completely. In so doing, the jury could have readily concluded beyond a reasonable doubt from the facts presented that Powell went to the BMV that day to confront Greig. Further, they could have concluded that Powell went armed and prepared to use the firearm if the confrontation with Greig did not unfold as he would have desired. Then, when Powell became perturbed with Greig, he shot him. This version of events is amply supported by the record. As discussed above, the video footage is open to interpretation. A reasonable interpretation was that Powell saw Greig at the BMV and waved him into the office. The confrontation occurred, and Powell decided to initially walk away. Prior to the recommencing of the altercation and in response to some statements by Greig, Powell returned to the office after

[16] *Ritter* focused its self-defense discussion around 14 V.I.C. §§ 293(a)(6) and 293(b). The full text of section 293 is reproduced above, in footnote 13. Section 293(a)(6) states, in effect, that homicide is lawful when conducted in self-defense, and section 293(b) merely provides the limitation of proportional force, both of which are legal precepts existing in 14 V.I.C. § 43. The varied statutory text relied upon is a distinction without a difference as applied to the facts of this case.

verifying he had a gun in his belt. While in the office, Powell shot Greig twice. Once those two shots caused Greig to fall to the floor, Powell emptied the magazine of bullets into Greig's body. These factual conclusions can reasonably be garnered from the record and confirm that the jury had ample evidence to find Powell's killing of Greig to be unlawful beyond a reasonable doubt.

b. Sufficiency of the Evidence: Second Degree Murder—Element 4—Malice Aforethought

¶62 Powell further challenges the sufficiency of the evidence to prove malice aforethought. This argument is meritless. Malice aforethought is not limited to hatred or particular ill will. *Nicholas v. People*, 56 V.I. 718, 731-32 (V.I. 2012). Malice aforethought

> extends to and embraces generally the state of mind with which one commits a wrongful act. It may be inferred from the circumstances which show a wanton and depraved spirit, a mind bent on evil mischief without regard to its consequences. And "where the killing is proved to have been accomplished by a deadly weapon, malice can be inferred form that fact alone."

Id. (citations omitted). Malice is to be inferred from the totality of the facts and circumstances surrounding a killing. *Stevenson v. United States*, 162 U.S. 313, 320 (1896); *Pendergrast v. United States*, 332 A.2d 919, 925 n.2 (D.C. 1975). Circumstantial evidence from which a jury may infer malice, i.e. the mens rea element of the crime charged in this case, include the following: the facts and circumstances surrounding the acts charged; the nature and extent of the violence; the type, location, and severity of wounds; the acts and declarations of the parties; the objects to be accomplished; the situation of the parties; the use of a deadly weapon to accomplish the acts charged, etc. *Ritter*, 51 V.I. at 370; *Drew v. Drew*, 971 F. Supp. 948, 951 (D.V.I. App. Div. 1997) (citing *Frett*, 14 V.I. at 325); *Commonwealth v. York*, 50 Mass. 93, 103 (Mass. 1845) ("So, where a dangerous and deadly weapon is used, with violence, upon the person of another, as this has a direct tendency to destroy life, or do some great bodily harm to the person assailed, the intention

to take life, or do him some great bodily harm, is a necessary conclusion from the act."). In particular, "where the force applied is clearly excessive or 'so cruel as to be shocking to every right thinking man,' the intent to injure" may be inferred. *Frett*, 14 V.I. at 324-25 (quoting *State v. Lutz*, 113 N.E.2d 757, 730 (C.P. Ohio 1953)).

¶63 Furthermore, it is well-established that the requisite malice aforethought need only exist for a "brief moment" and that "[i]t is not necessary to demonstrate that [the defendant] entertained and brooded over a plot to kill for any extended period of time." *Alexander v. People*, 60 V.I. 486, 511 (V.I. 2014). Here, the facts allowed a reasonable jury to conclude that Powell used a gun to shoot Greig 16 times while he lay on the floor, which is sufficient to find malice aforethought beyond a reasonable doubt. *Nicholas*, 56 V.I. at 735.

c. Sufficiency of the Evidence: Second Degree Murder—Defenses—Justifiable Homicide (14 V.I.C. § 927)

¶64 As an initial matter, I would address what appears to be an argument as to the proper interpretation of section 928 of title 14 of the Virgin Islands Code. Powell's argument on this issue is not well articulated, but it could be interpreted as an argument that section 928 required the trial judge to acquit Powell upon any suggestion of justification. 14 V.I.C. § 928 ("Whenever a homicide appears to be justifiable or excusable, the person charged must, upon his trial, be acquitted and discharged.") However, Powell's proposition that it is the judge's responsibility to decide the factual issue of justification is contrary to established law, namely that it is the exclusive province of the jury to find the facts and that justification is a factual determination. This section is nothing other than a codification of the burden of proof that the People must prove beyond a reasonable doubt that the killing was not justified. Therefore, unless there was a complete failure of evidence, something discussed in the body of this opinion, section 928 requires the trial court

to submit the factual determination of justification to the jury. *See Pendergrast*, 332 A.2d at 926 ("The court's duty is merely to determine the preliminary question of law-whether there was such a complete absence of evidence upon the issue of manslaughter as to require that it be taken from the consideration of the jury." (citations omitted)).

¶65 Addressing what I believe to be the more likely and plausible argument, Powell can be taken to contend that there was sufficient evidence to establish that the shooting of Greig was justifiable. Essentially, Powell asks this Court to reweigh the evidence, which we are unable to do. *Ritter*, 51 V.I. at 359. A homicide is justifiable, *inter alia*, when a victim resists any present attempt by another to murder or do great bodily harm to any person or to resist the commission of a felony, 14 V.I.C. § 927(2)(A); defends himself against a person who immediately intends to commit a felony by violence or surprise, 14 V.I.C. § 927(2)(B); or acts in the lawful defense of himself or another, so long as there is a reasonable ground to believe that the attacker has a design to commit a felony or do great bodily injury and there is imminent danger of that design being accomplished, 14 V.I.C. § 927(2)(C); *cf.* 14 V.I.C. § 42.

¶66 First, immediacy of the threat is required by 14 V.I.C. § 927(2)(A)-(C). 14 V.I.C. § 927(2)(A) includes the language "when **resisting** any attempt." (Emphasis added). The use of the participle of the verb indicates the person must presently be resisting the attempt. *Cf. United States v. Hull*, 456 F.3d 133, 145 (3d Cir. 2006) ("[U]se of the present participle . . . connotes present, continuing action." (citations omitted)); *Commonwealth v. Javier*, 594 N.E.2d 556, 557 (Mass. App. Ct. 1992) ("The present participle bespeaks contemporaneous activity."). Likewise, 14 V.I.C. § 927(2)(B) includes the limiting language that the homicide must be committed only against a person "who manifestly intends or endeavors" to do violence, etc. A person's intention is manifest when it is "readily perceived by the eye or the understanding; evident." WEBSTER'S

COLL. DICT. at 805. Therefore, subsection (2)(B) requires that any threat must be readily perceived and evident at the time of the homicide in order for it to be justified.

¶67 Section 927(2)(C) also requires that there be an "imminent danger of such design being accomplished." A danger is imminent when it is "likely to occur at any moment; impending." WEBSTER'S COLL. DICT. at 658. Subsections (2)(A), (2)(B), and (2)(C) of section 927 all require the threat to Powell or his family to have been immediate and real. However, while Powell claims he shot Greig because he was threatening Powell's family, Powell never suggested that Greig had said anything or taken any actions indicating he would immediately leave the scene to do harm to Powell's family. Similarly, Powell had exited the office where Grieg was but had voluntarily returned to the same office, a fact the jury may have found indicated that any threat Greig may have posed toward Powell had ceased when Powell initially exited the office. Therefore, Powell was no longer defending himself when he voluntarily returned to the office but, rather, had become the aggressor. *See Ritter*, 51 V.I. at 361.

¶68 Section 927(2)(D) limits justifiable homicide to only those situations where it is "necessarily committed" under the circumstances therein provided.[17] Something is necessary when it is "essential, indispensable, or requisite." WEBSTER'S COLL. DICT. at 882. Pursuant to 14 V.I.C. § 927(2)(D), justifiable homicide is committed, *inter alia*, when it is essential to lawfully keeping or preserving the peace. Again, because there was no immediate threat to Powell's family, the shooting of Greig was not essential to preventing harm to them. As previously discussed, Powell had left the area of the fracas and chose to return to it. His actions illustrate that his shooting

[17] 14 V.I.C. § 927(2)(D) also requires that the actions be taken "by lawful ways and means" or "in lawfully keeping or preserving the peace." The non-italicized portions of section 927, as shown in footnote 6 above, are factually inapplicable.

of Greig was not essential to defending himself. Finally, even assuming the jury credited Powell's version of events, the actions of firing so many shots in such a small area and in proximity to an innocent bystander, Francis, could summarily have been regarded as irresponsible and unnecessary to preserve the peace because these actions placed the bystander in more danger.

¶69 Under 14 V.I.C. § 927(2)(C), where the defendant was the initial aggressor, he must have "really and in good faith" attempted to decline any further struggle before committing homicide. There was evidence presented from which the jury could reasonably have concluded that Powell was the initial aggressor and that he did not "really and in good faith" attempt to decline any further struggle. The prosecution reviewed the surveillance footage and questioned Powell on what was depicted therein. In the video footage, Powell is seen raising his hand just after Francis waved him into the office. Powell asserted the gesture meant nothing. However, the jury could have summarily disregarded the testimony of a defendant, testimony that is inherently self-serving, *United States v. Gaines*, 457 F.3d 238, 244 (2d Cir. 2006) ("[A] testifying defendant in a criminal trial has a personal interest in its outcome that is as deep as it is obvious."), and interpreted the gesture to be Powell calling Greig into the office, an equally reasonable conclusion given the timing of Greig's arrival in the office after Powell was already in the same office.

¶70 Additionally, only one gun was recovered in the investigation of this crime. This gun was found on Greig's body. Powell admitted he never saw this gun, although it was recovered from under Greig's shirt in his waistband. Moreover, the gun had not been fired. The ammunition casings and projectiles that were recovered at the crime scene were not a match to this gun. Also, only one firearm holster was found on Greig's body, indicating that the gun recovered from Greig's holster was the only gun Greig had. The same gun holster held the gun that was not fired. Further, Powell admitted he disposed of the alleged second gun. By disposing of this gun, a logical and

reasonable inference is that the gun would inculpate Powell rather than exculpate him. *See* BLACK'S LAW DICTIONARY 1531 (9th ed. 2009) (spoliation is "[t]he intentional destruction . . . of evidence"; explaining that "[i]f proved, spoliation may be used to establish that the evidence was unfavorable to the party responsible").[18] Powell's credibility was further undermined because he secreted himself from the police for ten days, while making telephone calls to police and others from a phone number in Tortola, British Virgin Islands, a foreign jurisdiction, thereby affording him ample time to ponder how to concoct a version of events consistent with his asserted self-defense. This fact would further undermine Powell's credibility with the jury. *Wilson v. United States*, 162 U.S. 613, 621 (1896) ("The destruction, suppression, or fabrication of evidence undoubtedly gives rise to [an inference] of guilt, to be dealt with by the jury." (citing *Commonwealth v. Webster*, 5 Cush. 295 (Mass. 1850); 1 SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE § 37 (15th ed. 1892); 3 GREENLEAF, EVIDENCE (15th ed.) § 24)).[19]

¶71 The video also reveals that Greig was physically the smaller of the two men, undermining Powell's claim that Greig was blocking him from leaving. Moreover, the video reveals that Powell reached or gestured with his left hand to his lower back at his waist immediately before he re-entered the office. Concededly, this footage does not clearly show a gun. However, there appeared to be more than just a belt visible when Powell's shirt lifted momentarily. The jury was free to

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[18] Spoliation is not referenced here to suggest that it is a legal principle that should be incorporated into criminal law. It is referenced only as an illustration of a civil legal concept that is equivalent to the inference the jury could reasonably have made from Powell's conduct.

[19] *Cf. Hickory v. United States*, 160 U.S. 408, 417 (1896) ("'To the same head may be referred all attempts on the part of the accused to suppress evidence, to suggest false and deceptive explanations, and to cast suspicion without just cause on other persons; all or any of which tend somewhat to prove consciousness of guilt, and, when proved, exert an influence against the accused. The consideration is not to be pressed too urgently, because an innocent man, when placed by circumstances in a condition of suspicion and danger, may resort to deception in the hope of avoiding the force of such proofs.'" (quoting *Webster*, 5 Cush. 295)).

interpret this gesture. They could have viewed it as Powell testified, that he was simply checking his pocket. Conversely, the jury could have just as easily rejected this interpretation and concluded that Powell was checking for his gun to confirm to himself he was armed, as he returned inside the office to confront Greig. Importantly, Powell testified that he concluded Greig had a gun, without seeing the gun, because Greig made a similar gesture by using both hands in attempting to reach for something in his waist. This is the same inference the jury was entitled to draw from Powell's actions, an inference further supported by the fact that Powell is seen in the surveillance footage discharging the gun by using his left hand to shoot Greig, which is the same left hand he used to check his back pocket immediately before he re-entered the office to confront Greig.

¶72 Powell also testified that Greig had pinned him, Powell, into the corner where the door to the office is hinged. Importantly, the door was mounted so that it opened outward. A jury could have disbelieved Powell because the force it would have taken to pin Greig could easily have forced the unlatched door to open, which did not happen. The surveillance footage depicts the office door opening, affording a clear view of Powell firing many shots in rapid succession at the floor of the office just inside the door, and Greig's body was found on the same floor just inside the same door.

¶73 Crucially, as Powell turns to leave the office, there is a clear view of the gun in his left hand and a clear view of his face. While Powell asserts that he was scared and angry, the jury was entitled to disregard this testimony and simply conclude that, considering Powell's demeanor and facial expression, he was not at all afraid or scared. These facts all support the conclusion that Powell, in anger, returned to the office, a confined space with only one exit, with the intention of shooting Greig with the firearm that Powell had secreted in his waistband. This directly negates

any inference that Powell genuinely and in good faith attempted to decline any further struggle with Greig.

¶74 Powell's testimony, while contrary to other evidence, was not sufficient to foreclose the jury's verdict. As stated in *Gov't of the V.I. v. Lake*, 362 F.2d 770, 775 (3d Cir. 1966),

> these facts were not sufficient to rebut the presumption of the existence of malice at the instant of the killing which is raised by [the defendant's] use of his knife to stab [the victim] 43 times. Whatever may have been the defendant's prior state of mind this action raised a clear inference of a desperate overpowering desire and intention to kill her when he stabbed her. We think it inconceivable anyone could stab another 43 times without an intent to kill.

Similarly, it is inconceivable that Powell's shooting of Greig 16 times was without an intent to kill him. The jury certainly could have plausibly concluded beyond a reasonable doubt that Powell acted with the intent to kill Greig and without justification, considering that Greig was found not to have a second empty gun holster on his body and the gun that was found on Greig's body was still in the holster. These facts presented a credibility determination well within the province of the jury. There was substantial evidence upon which a jury could have found beyond a reasonable doubt that there was no immediate threat to Powell's family, that Powell was the initial aggressor, that he did not make a good faith attempt to decline any further struggle, which he had an opportunity to do when he momentarily left the office before directly returning, and that Powell's actions were not necessary in order to lawfully keep the peace—thereby negating any claim of justification pursuant to 14 V.I.C. § 927(2).

¶75 Because there was video evidence and testimony that contradicted Powell's version of events surrounding the crimes and also confirmed that Powell's actions were disproportionate to the threat allegedly posed, the trial court's denial of Powell's motions for judgment of acquittal

was appropriate. Moreover, there was sufficient evidence, when taken in light most favorable to the jury verdict, from which a jury could have concluded, beyond a reasonable doubt, that Powell's actions were not justified, were motivated by malice aforethought, and were unlawful. Powell's conviction for Second Degree Murder should be affirmed.

2. Sufficiency of the Evidence: First Degree Reckless Endangerment

¶76 Because there was evidence taken in the light most favorable to the jury verdict establishing that Powell's conduct occurred within the inspection bay of the BMV and the inspection bay was a place open to the public and usually accessed by the public, Powell's conviction for First Degree Reckless Endangerment is affirmed. The following definition of "Reckless Endangerment" is provided in the Virgin Islands Code:

> when a person consciously and knowingly engages in conduct or behavior that may pose intentional harm or physical injuries to another human being or property.

14 V.I.C. 625(c)(1).[20] The focus of this statute is to proscribe conduct that has potential to put unsuspecting people who may be in a Public Place at risk of injury, with the degree of potential

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[20] When a **term is specifically defined within the Virgin Islands Code** or the term contains a specific legal meaning, those definitions control. 1 V.I.C. § 42. Barring this, words are given their common meaning. *Id.* Thus, where the language of the statute has a meaning that is explicit, no further inquiry is needed. *Rosenberg v. XM Ventures*, 274 F.3d 137, 141 (3d Cir. 2001). The full text of section 625 is as follows:

> (a) A person is guilty of reckless endangerment in the first degree when, under the circumstances evidencing a depraved indifference to human life, he recklessly engages in conduct in a public place which creates a grave risk of death to another person. . . . .
> (b) A person is guilty of reckless endangerment in the second degree when he recklessly engages in conduct in a public place which creates a substantial risk of serious physical injury to another person. . . . .
> (c) The terms as used in this section shall have the following meaning unless the context clearly indicates otherwise:
> (1) "reckless endangerment" means when a person consciously and knowingly engages in conduct or behavior that may pose intentional harm or physical injuries to another human being or property.

injury serving as the factor that distinguishes the degree of the crime. The general definition of "Reckless Endangerment" requires a mens rea, mental intent, of "knowingly or consciously." 14 V.I.C. § 625(c)(1).[21] Under this definition, a person has engaged in Reckless Endangerment if he has engaged "in conduct or behavior that may pose intentional harm or physical injuries to another human being or property." *Id.* "May" is "[u]sed to indicate [the] possibility" of something coming to pass. COMPACT AM. DICTIONARY: A CONCISE DICTIONARY OF AM. ENGLISH 514 (1998). Therefore, the definitional elements of Reckless Endangerment are: (1) the defendant; (2) knowingly or consciously; (3) engaged in conduct; and (4) that conduct, under the circumstances, had the possibility of causing intentional harm or physical injury to another person or to property. 14 V.I.C. § 625(c)(1).

¶77 However, both First Degree Reckless Endangerment and Second Degree Reckless Endangerment alter the mens rea of Reckless Endangerment to that of acting "recklessly." *Compare* 14 V.I.C. § 625(a) & (b) *with* 14 V.I.C. § 625(c)(1). This altered mens rea demonstrates a conscious choice by the Legislature of the Virgin Islands to require proof of a heightened mental intent so as to avoid criminalizing conduct that only has the potential to cause minor injuries, as the definition in subsection 625(c)(1) by its terms encompasses any conduct resulting in any physical injury to a person or property. In contrast, a person acts recklessly with respect to a material element of an offense

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> (2) "public place" means a place to which the general public has a right to resort; but a place which is in point of fact public rather than private, and visited by many persons and usually accessible to the public.

14 V.I.C. § 625.

[21] To act "knowingly" does not require any knowledge that the act or omission are unlawful but simply requires personal knowledge of the act on the part of the defendant. 1 V.I.C. § 41 (defining knowingly). "Consciously" is an adverb form of the adjective conscious. COMPACT AM. DICTIONARY: A CONCISE DICTIONARY OF AM. ENGLISH 186 (1998). To be "conscious" is to have an awareness of one's own environment and one's own existence, to be "not asleep; awake" and "capable of thought, will or perception." *Id.*

> 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).

¶78 Importantly, First Degree Reckless Endangerment requires proof beyond a reasonable doubt of conduct that creates a grave risk of death of another person. 14 V.I.C. § 625(a). The noun "risk" is "[t]he possibility of suffering harm or loss; danger." COMPACT AM. DICT., at 710. "Grave," as used in the context of subsection 625(a), is an adjective describing a risk that is "fraught with danger or harm." *Id.* at 366. To be "fraught" is to be "filled with a specified element; charged; an assignment fraught with danger." *Id.* Therefore, proof beyond a reasonable doubt of First Degree Reckless Endangerment requires proof that the defendant's actions, under the circumstances, had the very real potential of causing the death of a bystander, either through injury to the person or through injury to property that could result in injury to a bystander. 14 V.I.C. § 625(a) ("creates a grave risk of death to another person"), (c)(1) ("may pose intentional harm or physical injuries to another human being or property").[22] Therefore, conduct creates a "grave risk of death" when that conduct creates such a substantial risk of death that, should any people be present, they would potentially be exposed to such a severe injury that they would likely die from such injury.

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[22] A hypothetical example of injury to property with very real potential to create a grave risk of death would be a defendant knowingly shooting at a vehicle loaded with explosives in a place where the public has a right of access. The explosives are merely property, but the damage to them has the very real potential to kill innocent people within the blast radius of any explosion. In contrast, Second Degree Reckless Endangerment requires conduct that creates a substantial risk of serious physical injury to a person. 14 V.I.C. § 625(b) & (c)(1). Something is "substantial" if it is "[c]onsiderable; large; [e.g.] won by a substantial margin." COMPACT AM. DICT., at 809. Conduct creates "a substantial risk of serious physical injury" where a defendant's actions create a large risk of serious physical injury to a person but death is not likely.

¶79 Finally, both First Degree Reckless Endangerment and Second Degree Reckless Endangerment add the additional element that the proscribed conduct, the actus reus, occur in a Public Place. *Compare* 14 V.I.C. § 625(a) & (b) *with* 14 V.I.C. § 625(c)(1). The Legislature mandated a definition in section 625(c)(2) that makes a given location a Public Place if it is a place that is, in fact, intended to be used for public gatherings or it is a place that is open to the general public and visited by many people. It is noteworthy that nowhere in this definition does it require that members of the public be actually present at the time of the proscribed acts, and this Court has repeatedly emphasized that the focus of the statute is the potential risk to the public who may be present, not the actual risk to those actually present. *E.g., Tyson*, 59 V.I. at 397; *Joseph v. People*, 60 V.I. 338, 350 (V.I. 2013).

¶80 According to the plain language of section 625 of title 14 of the Virgin Islands Code, First Degree Reckless Endangerment requires proof beyond a reasonable doubt of the following: (1) the defendant, 14 V.I.C. § 625(a) ("A person . . ."); *see Gilbert*, 52 V.I. at 356; *Hiibel*, 542 U.S. at 191; (2) recklessly (mental intent/mens rea), 14 V.I.C. § 625(a) ("he recklessly engages . . . ."); (3) engaged in conduct or behavior (criminal act/actus reus); (4) which, under the circumstances, created the possibility of intentional harm or physical injuries to another human being or property thereby creating a grave risk of death to another person (grave risk of death/attendant circumstance); and (5) which occurred in a place that the public has a right to access or is usually accessible by the public (Public Place/attendant circumstance). 14 V.I.C. § 625(a), (c)(1); *M. Davis*, 2018 WL 3695089, at *29; *see also A. Davis v. People*, S. Ct. Crim. No. 2015-0124, ___ V.I. ___, 2018 WL 3691737, at *9 (V.I. July 27, 2018) (Swan J., concurring).[23]

[23] "The first step when interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning. If the statutory language is unambiguous and the statutory scheme is coherent and consistent, no further inquiry is needed." *In re L.O.F.*, 62 V.I. 655, 661 (V.I. 2015). The reason underlying this rule is that the Legislature is presumed to have expressed its intent through the ordinary meaning of the language of the statute. *Brady v. Gov't*

¶81 Powell does not challenge the sufficiency of the evidence as to the proof that he was the one who acted, the actions he took (actus reus), or his intent (mens rea). Indeed, Powell's argument expressly challenges proof that the office was a Public Place. However, Powell also argues that there is a failure of proof because his actions demonstrated "deliberateness, not recklessness, [because] in the small room with three people, only one person was shot." (Appellant's Br., 31.)

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of the V.I., 57 V.I. 433, 441 (V.I. 2012); *Shoy v. People*, 55 V.I. 919, 926 (V.I. 2011). Any conflicting statement of elements should be expressly rejected. *E.g.*, *People v. Morton*, 57 V.I. 72, 85 (V.I. Super. Ct. 2012). In my concurring opinions in *M. Davis*, 2018 WL 3695089, at *29, and *A. Davis*, 2018 WL 3691737, at *9, I stated the mental intent/mens rea element of First Degree Reckless Endangerment as "consciously and knowingly." However, this was a scrivener's error in the writing of that opinion, as is made clear from the analysis therein and my discussion of the general definition of "reckless endangerment" provided for in subsection 625(c)(1) as compared to the provision of First Degree Reckless Endangerment in subsection 625(a), which provides for the defendant to have acted "recklessly." Therefore, the misstatement of the mens rea element of First Degree Reckless Endangerment in my *M. Davis*, 2018 WL 3695089, at *29, opinion is corrected by the present statement of elements. Additionally, in *M. Davis v. People*, 2018 WL 3695089, at *8, the elements of First Degree Reckless Endangerment are stated as "(1) recklessly engaged in conduct (2) in a public place that (3) created a grave risk of death to another person (4) under circumstances evidencing a depraved indifference to human life." The failure to identify the defendant as an element of the crime ignores the express language of the statute stating that "A person" is guilty under the circumstances specified therein. 14 V.I.C. § 625(a), (b); *Hiibel*, 542 U.S. at 191 ("In every criminal case, it is known and must be known who has been arrested and who is being tried." (citing *Pennsylvania v. Muniz*, 496 U.A. 582, 601 (1990))); *e.g.*, *Civil*, 591 F.2d at 259-60 ("While in his testimony Smith referred to Civil by name, he did not identify him and it was clear that despite the use of defendant's name, the victim never established that the individual in the courtroom was a participant in the robbery."). Moreover, the statement of the first element is an unconstitutional grouping of analytically distinct facts. This enumeration is problematic on its face because "a state must prove every [element] of an offense beyond a reasonable doubt, and . . . it may not shift the burden of proof to the defendant by presuming **[an element] upon proof of the other elements of the offense**" if there is no rational and logical connection. *See Tot v. United States*, 319 U.S. 463, (1943) ("[I]t is not permissible thus to shift the burden by arbitrarily making one fact, which has no relevance to guilt of the offense, the occasion of casting on the defendant the obligation of exculpation."); *Patterson v. New York*, 432 U.S. 197, 215 (1977). Plainly, a person's intent is an analytically distinct concept from that of his actions and conduct. While actions and conduct often prove intent, there are circumstances in which intent must be proved by facts independent of the defendant's conduct. Under such circumstance, the elements as stated in *M. Davis* would result in conviction upon proof of conduct when such conduct in no way proves intent—a conviction upon insufficient evidence. Finally, as shown in my discussion of the elements in *M. Davis*, 2018 WL 3695089, at *27-29 (discussing the meanings of risk and grave), the final two elements as stated, "(3) created a grave risk of death to another person (4) under circumstances evidencing a depraved indifference to human life," are in no way analytically distinct. To create a grave risk of death is to evidence a depraved indifference to human life and reckless intent; as such, the statement of the final element is superfluous. As the statement of elements in *M. Davis*, 2018 WL 3695089, at *8, creates unnecessary arbitrary groupings of elemental facts and fails to state the defendant as an essential element of a criminal conviction for First Degree Reckless Endangerment, I must reject this statement as an unconstitutional interpretation that involves unnecessary ambiguity in the Court's interpretation of a criminal statute that leaves open the obvious possibility of conviction upon insufficient evidence for no other reason than the elements are poorly identified and stated. *Cf. Jennings v. Rodriguez*, 138 S. Ct. 830, 869 (2018).

As such, a discussion of the "Grave Risk" element versus the Public Place element will provide a better understanding of the analytic factual distinction between the two elements of the crime, and both will be discussed.

a. Sufficiency of the Evidence: First Degree Reckless Endangerment—Element 4—Grave Risk of Death to Another

¶82 To describe something as grave is to say it is "[f]raught with danger or harm," and to be "fraught" is "[t]o be filled with a specified element; charged: *an assignment fraught with danger*." COMPACT AM. DICT., at 336, 366. Risk is "[t]he possibility of suffering harm or loss; danger." *Id*. at 710. The definition of the pronoun "another" is "[a]n additional or different one," "one of an undetermined number." *Id*. at 34. A defendant's conduct creates a "grave risk of death" when the physical injuries to "another" or to the property create a situation where "another" is put in a situation that is so "filled with danger" that a likely possibility of suffering death is created. *Woodrup v. People*, 63 V.I. 696, 711 (V.I. 2015); *Cascen v. People*, 60 V.I. 392, 408 (V.I. 2014); *Estick v. People*, 62 V.I. 604, 615 (V.I. 2015).[24] I see no obvious deficiency in the proof of this element. *See Blyden*, 53 V.I. at 664. Powell admits he discharged a firearm in a confined space with the only means of egress blocked while another person, not the victim, was trapped inside within firing distance. The discharge of a firearm under the circumstances presented here and in such proximity to a bystander, Francis, is sufficient proof of this Grave Risk element.

[24] *E.g.*, *Velazquez*, 2016 WL 442558, at *5; *Fontaine v. People*, 59 V.I. 640, 658 (V.I. 2013); *People v. Encarnacion*, Super Ct. Crim. No. SX-10-CR-342, 2015 WL 801075, at *4 (V.I. Super. Ct. 2015) (unpublished); *People v. Estick*, Super Ct. Crim. No. SX-09-CR-376, 2013 WL 4521682, at *6 (V.I. Super. Ct. 2013) (unpublished); *Alcindor v. Gov't of the V.I.*, D.C. Crim. App. No. 2004/84, 2006 WL 3526753, at *4 (D.V.I. App. Div. Nov. 28, 2006) (unpublished); *Gov't of the V.I. v. Davis*, Super. Ct. Crim. No. 01/2002, 2002 WL 35631589, at *5 (V.I. Super. Ct. 2002) (unpublished).

b. Sufficiency of the Evidence: First Degree Reckless Endangerment—Element 5—Public Place

¶83 A Public Place is one where the general public has a right of access and is, in fact, public rather than private. *Mulley v. People*, 51 V.I. 404, 412 (V.I. 2009) (citing 14 V.I.C. § 625(c)(2)). Stated differently, a Public Place is a place that is usually accessible to the public or where the public has a right to be. *Augustine*, 55 V.I. at 690; *see M. Davis*, 2018 WL 3695089, at *28; *see also A. Davis v. People*, S. Ct. Crim. No. 2015-0124, 2018 WL 3691737, at *9 (V.I. July 27, 2018) (Swan J., concurring).

¶84 For a place to be public, it must "[relate or belong] to an entire community, state or nation" or be "[o]pen or available for all to use, share, or enjoy." BLACK'S LAW DICTIONARY 1264 (9th ed. 2009). Alternatively, for a place to be public, it must be "[o]f or affecting the community or the people," "maintained for or used by the people or the community." COMPACT AM. DICT., at 668. Clearly, the first definition, belonging to the entire community, refers to any property owned or controlled by the Government that is held open to the public, such as parks, streets/roads, government offices, courthouses, etc. The other definitions encompass those privately owned places that are held open to and usually accessible to the public, as is made clear by the following review of the cases of this Court addressing this element.

¶85 In *Mulley*, this Court explained that a school bus is a Public Place because it is a public service provided by the government to transport children and to which special traffic laws apply. *Mulley*, 51 V.I. at 412. This Court concluded that the defendant's actions of shooting at a school bus that was being driven on a public road near the airport occurred in a Public Place. *Id.* In *Augustine*, 55 V.I. at 690, the act of firing a gun across a public street in proximity of a convenience

store, fruit stand, and restaurant with patrons present at those businesses was shooting in a Public Place.

¶86 In *Phillip v. People*, 58 V.I. 569, 591 (V.I. 2013), a shooting that occurred outdoors on a public road near a public basketball court in an urban community occurred in a Public Place. It was further explained that the shooting created a risk to the public in general, and protection of the public at large is the purpose of this statute. *Id.* ("Furthermore, shooting from a vehicle into the dark near a basketball court in a residential area risked killing not just the occupants of the [SUV], but any citizens who would be so unlucky as to be caught in the hail of bullets . . . .").

¶87 This holding was reaffirmed in *Tyson*, 59 V.I. at 417, where this Court reiterated that the focus of the statute is to protect members of the public. The Court also stated that a Public Place is one that is "open to the public or where the public has a right to be." *Id.* (citation omitted). The defendant in *Tyson* had been in his car on a crowded public road near a graveyard during a funeral procession when he fired from within his car at a pedestrian. The shooting was found to have occurred in a Public Place. *Id.* at 417-18.

¶88 In *Hughes v. People*, 59 V.I. 1015, 1022-23 (V.I. 2013), this Court noted in *dicta* that engaging in a high speed chase on a public road, breaking through a road block, and crashing into another vehicle "might support" a conviction for reckless endangerment. In *Burke v. People*, 60 V.I. 257, 263 (V.I. 2013), a conviction for reckless endangerment was affirmed where the defendant shot from the courtyard of an apartment building at the victim who was standing on the balcony of the building while there were people in the vicinity.

¶89 In *Joseph*, 60 V.I. at 350, the Court assumed the defendant's version of events to be true. However, even if the defendant and victim had been playing a game of "stick-up" with loaded

guns, playing this game in the vicinity of a ball park with members of the public present was still sufficient evidence to support a conviction.

¶90 *Cascen*, 60 V.I. at 408-09, involved the firing of a gun at a crowd of people gathered outside a public housing community. This act was found to be the factual archetype of reckless endangerment. In *Freeman v. People*, 61 V.I. 537, 542-43 (V.I. 2014), shooting on a public road in proximity to a crowded night club was found to have occurred in a Public Place.

¶91 In *Estick*, 62 V.I. 604, this Court affirmed two convictions for reckless endangerment. The first was for the act of firing a gun from his moving vehicle while operating it on a public street and creating a grave risk of death to others. This action by the defendant was found to have been shooting in a Public Place. The second conviction resulted from the defendant firing several shots from a public street in the vicinity of a restaurant that was immediately adjacent to the street with patrons in the restaurant. Again, this was found to have been a shooting that occurred in a Public Place.

¶92 In *Woodrup*, 63 V.I. at 711, we reiterated that the crime of reckless endangerment requires a showing of conduct that poses a risk of death to members of the public that occurred in a place that was either open to the public or where the public had a right to be such that anyone who may be in the area was at risk. It was also reaffirmed that "the act of firing a loaded gun at or near someone 'is, by definition . . . reckless conduct creating a grave risk of death under circumstances evincing an extreme indifference to human life.'" *Id.* (quoting *Cascen*, 60 V.I. at 408).

¶93 What the foregoing exhaustive summary of this Court's jurisprudence on what constitutes a Public Place demonstrates is that reckless endangerment is a crime that seeks to proscribe conduct that presents a grave risk to public safety, even if no member of the public is present at the time of the conduct. *Woodrup*, 63 V.I. at 711 (proscribing conduct that "pos[es] a risk of death

to members of the public who **may** be in the area" (emphasis added) (quoting *Cascen*, 60 V.I. at 408)).

¶94 For example, in *Mulley*, the Court's focus was not on whether there were children on the school bus. Instead, the focus was on 1) the potential for children to be on the school bus and 2) the general threat to the public of shooting at a school bus that was being operated on a public road. 51 V.I. at 412-13. Similarly, in *Estick*, the concern was that the firing of the gun in such proximity to a restaurant posed a grave risk to the public. 62 V.I. at 615-16. This conclusion is substantiated by prior precedent of this Court that has focused on whether the space is open to the public for access, as in *Tyson*, 59 V.I. at 417, and whether the conduct was in a place where members of the public were likely to be, as in *Phillip*, 58 V.I. at 591, and *Joseph*, 60 V.I. at 350. Conspicuously absent from the legislative definition is any limitation as to time of day or a requirement that people actually be present, considerations that bear on elements 2, 3, and 4, as these facts help to prove intent, the act, and the attendant circumstances. 14 V.I.C. § 625(c)(2).[25]

¶95 In this case, it is undeniable that Powell shot Greig in a Public Place. Irrefutably, the surveillance footage shows Powell in the inspection lane of the BMV shooting Greig. Powell and Francis testified that Powell walked up to the office, knocked, and was immediately allowed entry,

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[25] In *M. Davis*, 2018 WL 3695089, at *9, the Court was "not persuaded that the People presented sufficient evidence that the shooting occurred in a Public Place." *Cf. A. Davis*, 2018 WL 3691737, at *6. The record was devoid of evidence showing that the general public in fact utilized the private road upon which the shooting had occurred—instead showing that only a few people had utilized it—and was devoid of any evidence that the road was, in fact, public. *See* 20 V.I.C. § 1(a) ("The duty of keeping public highways, bridges, courses, breastwalls, handrails, and **private roads dedicated to public use**, in good serviceable condition is incumbent upon the government." (emphasis added)); 20 V.I.C. § 3a(b); 20 V.I.C. § 7(c); *see generally Hodge v. Bluebeard's Castle, Inc.*, 62 V.I. 671, 692 (V.I. 2015) (holding that a road dedicated as public remains public so long as it has not been abandoned by the government (citing *Malloy v. Reyes*, 61 V.I. 163, 180-81 (V.I. 2014)). In contrast, the facts in the present case readily established that the BMV office was in a public building and was readily, and regularly, accessed by the public. *Compare M. Davis*, 2018 WL 3695089, at *9, *with ante*, at 10 (quoting *Estick*, 62 V.I. at 615; *M. Davis*, 2018 WL 3695089, at *9).

confirming that the public had usual access to this place, even if it required someone to allow them in. Indeed, Francis testified that he and other BMV personnel regularly wait in this office, and customers regular come to the office to seek assistance from the staff. Likewise, Vernon testified he was there that day to have his car inspected and was only 100 feet from the scene of the shooting. According to Officer Monsanto, it was an open area with chairs where people could sit to complete the written portion of their driving test. The video footage shows that the building itself was very open so that automobiles could drive in to be inspected; it could be described as a series of bays that are open to the natural elements. Additionally, for the duration of the shooting, the door to the office was open—providing an unobstructed view of Powell as he discharged the firearm. Further, the shooting occurred during the regular, daytime, business hours at a government building on a weekday—as opposed to a Saturday, Sunday, or holiday—thereby increasing the "public" nature of the building at the time the shooting occurred.

¶96 Additional facts in the present record support the general conclusion that the shooting occurred in a Public Place. The BMV was a government building in which the public was invited to engage in obtaining permits to operate motor vehicles and to register such vehicles.[26] The uncontroverted language of the statute makes the BMV "open to the public." The structure of the office is situated in a public place. As demonstrated by the facts, any member of the public can enter the inspection bay and approach the office, something Powell did himself. The door opens into the inspection bay, as well. There is a window that looks into the office.

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[26] *E.g.*, 20 V.I.C. § 204(a) ("[E]very owner of a vehicle which is in the Virgin Islands . . . shall make application to the [BMV]]."); 20 V.I.C. § 332(a) ("Application for registration of a motor vehicle, bicycle or trailer shall be made to the Director of Motor Vehicles . . . ."); 20 V.I.C. § 371(a) ("[N]o person shall operate a motor vehicle upon the public highways without an operator's license issued by the Director of Motor Vehicles.").

¶97 Certainly the inquiry of whether a location is a Public Place and the closely related inquiry of whether the conduct constituted a Grave Risk of death to another person are heavily fact intensive. 14 V.I.C. § 625(a), (c)(1)-(2).[27] However, to take Powell's argument to its logical extreme, any public building that has security cameras and locks that are released electronically from a remote location could not be a public place because the public cannot simply walk in. That is not the test; the test is whether the place is visited by many people or the public usually has access to the place. Considering the testimony, the jury could reasonably have concluded beyond a reasonable doubt that the office was a public place with public access. Therefore, having determined there was sufficient evidence as to each element of the crime of First Degree Reckless Endangerment and having determined that the definition of a public place under section 625 of title 14 encompasses where the shooting occurred, Powell's conviction for First Degree Reckless Endangerment should be affirmed.

B. Jury Instruction

¶98 Because the defenses Powell asserts were omitted from the jury instructions were subsumed within the self-defense instruction given at trial, and the one potential defense that was not covered by the instruction that was given did not affect the outcome of the trial, Powell's convictions will be affirmed. Powell asserts the trial court committed reversible error in failing to give individualized instructions on certain affirmative defenses, in addition to a self-defense instruction based on 14 V.I.C. § 41, pertaining to resisting bodily harm. Powell asserts further errors in the trial court's asserted refusal to instruct on resistance by a person about to be injured

[27] However true that may be, the judiciary cannot ignore the unambiguous language provided by the Legislature, which provides that a Public Place is a place to which the public has common access, irrespective of whether any member of the public is present at any given time.

(14 V.I.C. § 41), use of force (14 V.I.C. § 44), lawful violence (14 V.I.C. § 293), and justifiable homicide (14 V.I.C. § 927).

¶99 None of these instructions were requested by Powell. Accordingly, even though a defendant is entitled to an instruction where the factual record contains evidence that is sufficient for a reasonable jury to find in the defendant's favor, *Prince v. People*, 57 V.I. 399, 405 (V.I. 2012), and this Court typically reviews a decision to include or exclude a jury instruction for abuse of discretion, *A. Williams*, 55 V.I. at 727, this Court will review only for Plain Error. *Id.* Plain Error requires a finding of three factors, (1) an error at the trial level; (2) that error is plain; and (3) that error affected substantial rights. *Francis v. People*, 52 V.I. 382, 390-91 (V.I. 2009); *see also Duggins*, 56 V.I. at 300. However, because Plain Error Review is discretionary, even if all three factors are present, the court must further determine if a fourth factor is present. That factor requires a finding that the Plain Error seriously affected either the fairness, integrity, or public reputation of the judicial proceedings, and if such a finding is made, the Court may then exercise its discretion and notice the error. *Francis*, 52 V.I. at 390-91; *see Johnson*, 520 U.S. at 467; *United States v. Olano*, 507 U.S. 725, 732 (1993); *United States v. Sarabia-Martinez*, 779 F.3d 274, 277 (5th Cir. 2015).

¶100 Error is a deviation from a legal rule. *Gov't of the V.I. v. Lewis*, 54 V.I. 882, 888 (3d Cir. 2010). An error is plain if the error is clear or, equivalently, obvious under current law. *Murrell v. People*, 54 V.I. 338, 366 (V.I. 2010); *see Henderson v. United States*, 133 S. Ct. 1121, 1126-30 (2013). An error affects substantial rights when there is a reasonable probability that the error had an effect on the trial outcome—it was prejudicial. *Fahie v. People*, 59 V.I. 505, 511 (V.I. 2013). In contrast to harmless error review, the burden falls on the appellant to show how the error prejudiced him under Plain Error Review. *Id.*

¶101 Jury instructions must fairly and adequately inform the jury of the legal standard by which guilt is to be determined and must contain accurate statements and explanations of any applicable legal principles. *A. Williams*, 55 V.I. at 729. Jury instructions must also conform to the charges in the information and be consistent with the evidence presented. *Id.*; *cf. United States v. Chi Mak*, 683 F.3d 1126, 1130 (9th Cir. 2012) (under Federal Rule of Criminal Procedure 30, an objection to a jury instruction or the failure to give a jury instruction must be made prior to when the jury retires to deliberate and must state with specificity both the objection and the grounds for it); *United States v. Zapata*, 540 F.3d 1165 (10th Cir. 2008) (same). However, even when a defendant requests specific language for a given jury instruction, the trial court still retains the discretion to determine the language to be used; the trial court's obligation is to correctly state the law so long as the instruction conveys the required meaning—not to use specific language requested by either side. *A. Williams*, 55 V.I. at 732.

¶102 Under Plain Error Review, an error in jury instructions will only result in reversal of a conviction where the error was fundamental and highly prejudicial due to its failure to provide the jury with adequate guidance and this Court's refusal to consider the error would result in a miscarriage of justice. *A. Williams*, 55 V.I. at 727. Jury instructions must be viewed in their entirety, and the inquiry is whether the instructions on the whole were misleading or inadequate to guide the jury. *Prince*, 57 V.I. at 409.

¶103 Jury instructions are not to be invalidated unless the instruction substantially and adversely impacted the constitutional rights of the defendant and affected the outcome of the trial. *Id.* at 405. Under Plain Error Review, a claim of improper jury instructions will rarely justify reversal. *Id.*; *Henderson v. Kibbe*, 431 U.S. 145, 154 & n.12 (1977). A Plain Error Review of a challenge to jury instructions requires this Court to

> look on a case-by-case basis to such factors as the obviousness of the error, the significance of the interest protected by the rule that was violated, the seriousness of the error in the particular case, and the reputation of the judicial proceedings if the error stands uncorrected – all with an eye toward avoiding manifest injustice.

Phipps, 54 V.I. at 546-47 (citations and quotation marks omitted). Even when there is a contemporaneous objection to a jury instruction, and even if that instruction omits a required element of an offense or defense, a reversal is not justified where the error has not impacted the defendant's rights and is harmless beyond a reasonable doubt. *Prince*, 57 V.I. at 405.

¶104 It is true that this Court has held that sections 41, 42, 43, 44, 293, and 927 of title 14 of the Virgin Islands Code "are not duplicative, and an instruction on one defense does not necessarily encompass the instruction on another, at least **when viewing these statutes on a whole**." *Id.* at 412 (citing *Isaac*, 50 F.3d at 1180) (emphasis added). However, this Court further explicated that separate instructions are only necessary where there is a factual record to support an instruction on those portions of each defense/section that varies from the other sections. *Id.* ("[A]lthough an instruction on one defense does not preclude the need for instruction on another, [the defendant] was entitled to instructions on these additional defenses only if the trial record contained evidence sufficient for a reasonable jury to find these defenses, and **if the defenses were not substantially covered by other defense instructions**." (emphasis added) (citing *Gov't of the V.I. v. Fonseca*, 274 F.3d 760, 766 (3d Cir. 2001)). In light of the foregoing, consideration of what defenses in sections 41, 44, 293, and 927 were not duplicative of the self-defense instruction given is necessary. If any is found, then further consideration of whether its omission affected a constitutional right and the outcome of the trial is warranted.

¶105 Section 41(2) provides that a person may make sufficient resistance to repel attempted immediate injury to his person or family.[28] *Id.* at 412 ("There is no evidence to suggest that [the decedent] forcibly entered [the] home or that he was an immediate threat to either property or persons present in [the] home, warranting a use of force instruction under section 41."). As was true under the facts in *Prince* and as discussed above, Powell never testified that Greig presented any immediate threat to Powell's family. Therefore, there was no evidence justifying a separate instruction as to defending Powell's family under section 41(2). Additionally, section 41(2)'s provision allowing force to repel attempted injury to oneself is duplicative of the principles of self-defense and was encompassed in the jury instructions on that issue. Likewise, sections 44(a)(1) and (b) overlap with the self-defense instructions the trial court gave.[29] In fact, the factors listed in subsection (b) were incorporated into the jury instructions.

¶106 The only potentially applicable provisions of section 293 are subsections (a)(3) and (6).[30] Subsection (a)(3) allows use of force to preserve the peace and prevent the commission of an offense, and subsection (a)(6) allows use of force in self-defense and defense of others. Although

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[28] The non-italicized portions of section 41 of title 14, reproduced in footnote 12 above, are factually inapplicable because there was no evidence indicating Powell was protecting any property that was in his lawful possession. Omission of this language from the jury instructions was not error. Further, it should be noted that section 41 has an immediacy requirement just like 14 V.I.C. § 927(2)(A-C) discussed above. *Marcelle*, 55 V.I. at 543-44 (discussing the "about to be injured" requirement of Section 41). Therefore, because there was no evidence that Powell's family was "about to be injured," it was not error to omit an instruction regarding defense of family.

[29] Because the facts of this case do not involve Powell's residence, the non-italicized portions of section 44 of title 14, reproduced in footnote 15 above, are factually inapplicable. No error was committed in omitting this language from the jury instructions.

[30] The non-italicized portions of section 293 of title 14, reproduced in footnote 13 above, are factually inapplicable. Subsection (a)(1) of section 293 of title 14 is inapplicable because Powell was not disciplining a child. Subsection (a)(2) is inapplicable because there was no religious or other lawful meeting being disrupted. Subsection (a)(4) is inapplicable because there was no intrusion upon the lawful possession of property. Subsection (a)(5) is inapplicable because there was no lawful order of a magistrate or court. Additionally, while Powell took the stand, he offered no testimony that he was trying to effect an arrest.

Powell testified to several facts indicating that he may have acted to preserve the peace, we do not find Plain Error in the trial court's omission of a preservation of the peace defense instructions, whereas here, the defendant failed to raise such a defense below, and the jury instructions, as given, adequately addressed self-defense, use of reasonable force, and other forms of lawful violence. Additionally, the principles applicable under section 293(a)(6) were explicitly encompassed within the jury instructions the trial court gave.

¶107 Finally, in the context of this case, the applicable portions of section 927 are duplicative of provisions already discussed or of the self-defense instruction given. Section 927(2)(A) is duplicative of 14 V.I.C. § 41(2) (resisting bodily harm) and 14 V.I.C. § 43 (self-defense). Likewise, 14 V.I.C. § 927(2)(B) is duplicative of 14 V.I.C. § 43 (self-defense), 14 V.I.C. § 293(a)(6) (self-defense and defense of others), and 14 V.I.C. § 44(a)(1) (lawful use of force to resist attempted murder or serious bodily injury). Similarly, 14 V.I.C. § 927(2)(C) is duplicative of self-defense, defense of others, and lawful use of force to resist attempted murder or serious bodily injury. Finally, 14 V.I.C. § 927(2)(D) is duplicative of 14 V.I.C. § 293(a)(3).

¶108 Because there was no factual basis in the present case warranting instructions on the majority of the defenses available in sections 41, 44, 293, and 927 of title 14, it was not error to exclude those matters from the jury instructions. Likewise, due to the overlap with all but one of the remaining applicable sections with the self-defense instruction already given, there was no error in failing to give separate instructions. Finally, assuming that a factual basis existed for an instruction regarding 14 V.I.C. § 293(a)(3), I am satisfied that the failure to give an instruction on this issue had no adverse impact on the outcome of the trial, considering the lack of evidence supporting this theory. Moreover, a jury could reasonably have concluded beyond a reasonable doubt that Powell's firing a gun in a confined space just a few feet from Francis, a bystander,

constituted a great risk of death to Francis and was not a lawful means of keeping the peace. Therefore, I would conclude that this omission, even assuming such omission may have been an error that was plain under established law, did not affect the outcome of the trial. Consequently, there was no Plain Error. Accordingly, I would affirm Powell's convictions.[31]

V. CONCLUSION

¶109 For the reasons indicated, I conclude that there was sufficient evidence to support a finding beyond a reasonable doubt that Powell was not justified in killing Greig, that he did it with malice aforethought, and that his actions were unlawful. Likewise, I conclude that there is no possibility that the jury instructions negatively affected the outcome of the trial, and would therefore affirm Powell's convictions on that basis. Finally, because the BMV office where the shooting occurred was open for public use and a place usually accessible to the public, I agree that his conviction for reckless endangerment should be affirmed. I therefore concur with majority opinion as to the judgment reached, but I arrive at that result based on a different analysis of the issues presented.

Dated this 17th day of January, 2019.

BY THE COURT:

/s/ Ive Arlington Swan
IVE ARLINGTON SWAN
Associate Justice

[31] Powell makes reference to the burden of proof in his argument regarding the jury instructions. While it is unclear what exactly the argument being advanced is, I note that the trial court gave the following instruction on burden of proof for self-defense, "If you find that the People have failed to prove beyond a reasonable doubt that the Defendant did not act in self-defense, then you must find the Defendant not guilty of homicide." While this instruction is inartfully drafted and includes double negatives that should have been avoided due to the confusion they can cause, the trial court also gave a general burden of proof instruction informing the jury that Powell had no obligation whatsoever to present evidence and that the burden was always on the People to prove their case. The aforementioned self-defense instruction, however inartful, when considered in conjunction with the other instructions given by the Superior Court, had no adverse impact on the trial outcome; and thus the conviction should be affirmed.

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

By: _____
Deputy Clerk

Date: _____