FOR PUBLICATION

SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

PEOPLE OF THE VIRGIN ISLANDS,	)	**CASE NO. SX-14-CR-136**
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
EUGENE ROBERTS,	)	
	)	
Defendant.	)	
	)	

Cite as: 2019 VI SUPER 20

Appearances:

ERIC CHANCELLOR, ESQ.
R. OLIVER DAVID, ESQ.
Assistant Attorney General
U.S. Virgin Islands Department of Justice
Christiansted, VI 00820
For People of the Virgin Islands

RENEE DOWLING, ESQ.
Christiansted, VI
For Eugene Roberts

MEMORANDUM OPINION
(Filed February 21, 2019)

DONOHUE, SR., Senior Sitting Judge:

¶1 **BEFORE THE COURT** is a motion filed by Eugene Roberts for judgment of acquittal or in the alternative for a new trial. The People of the Virgin Islands oppose the motion. For the reasons stated below, Roberts's motion will be denied.

FACTUAL AND PROCEDURAL BACKGROUND[1]

¶2 On or about April 19, 2014, multiple shots were fired at the vicinity of the Frontline nightclub on St. Croix, U.S. Virgin Islands, resulting in the death of Matthew Vernege, Jr. and injury to several

[1] Excerpts of certain witness's trial testimony were requested and prepared by court reporters. However, complete transcripts of the entire trial were not requested by the parties. Citations are to official transcript, albeit only excerpts in some instances.

others. The perpetrators rode off in a vehicle that later got into a car accident in the vicinity of Estate Morning Star. Elijah Felix, Derrick Liburd, Eugene Roberts, Lester Roberts, and Larry Williams, Jr. were later arrested and charged on May 20, 2014 with murder in the first degree, attempted murder in the first degree, assault in the first and third degrees, unauthorized possession of a firearm, possession of ammunition, reckless endangerment in the first degree, robbery in the first degree, grand larceny, possession of stolen property, and conversion of government property.[2]

¶3 Prior to trial, a dispute arose between parties about the discoverability of the record of the Internal Affairs Bureau within the Virgin Islands Police Department pertaining to Sergeant Anthony Hector, who ran Frontline and who had engaged the shooters, injuring several of them. In particular, Roberts filed a notice on April 22, 2016, to join the motion filed by Williams to compel the personnel records and internal affairs files for Hector. The Court conducted an *in camera* review of the file and decided what documents were discoverable.

¶4 After a delay unrelated to Roberts's motion, jury selection commenced on October 18, 2016. The jury was empaneled on October 20, 2016 and trial commenced immediately thereafter, concluding on November 14, 2016. Prior to trial, Liburd had filed a notice of intent to offer a redacted DNA lab report (hereinafter "DNA Report") in his defense.[3] In response Williams filed a motion to sever. which Roberts joined on October 13, 2016, and which the Court denied. *See generally People v. Roberts*, SX-14-CR-136, 2016 V.I. LEXIS 232 (V.I. Super. Ct. Oct. 25, 2016).

¶5 Roberts was found not guilty of first-degree murder and the lesser-included offense of second-degree murder as to Matthew Vernege, Jr., not guilty of third-degree assault as to Kenya Stanley, but guilty of attempted murder in the first degree, first-degree assault, (as to Roscar Hurtault), and guilty

---

[2] Elijah Felix, Lester Roberts, and Derrick Liburd were also charged. Felix agreed to plead guilty to unauthorized possession of a firearm and was sentenced to two years incarceration. Lester Roberts agreed to a dismissal of all charges against him without prejudice. Liburd was acquitted of all charges by the Court after the close of the People's case-in-chief.

[3] The DNA Report, dated May 27, 2014, was prepared by Forensic DNA Analyst Crystal Oechsle F-ABC, whom the People ultimately decided they would not call as a witness.

of three counts of unauthorized possession of a firearm, one count of possession of ammunition, and one count of first-degree reckless endangerment. Williams was found not guilty of first-degree murder and third-degree assault and guilty of the lesser-included offense of second-degree murder, guilty of two counts of unauthorized possession of a firearm, possession of ammunition, and first-degree reckless endangerment. The evidence in support of the charges in the third amended information, filed on November 9, 2016, showed the following.

¶6 Kenya Stanley and Matthew Vernege were at the Frontline nightclub on Midland Road, Estate Calquohoon on April 19, 2014. walking out of the nightclub around 2am, Stanley was in front and Vernege was behind her. Five guys were coming in as they were leaving. One guy approached her and whispered in her ear, which startled her, catching her off-guard. She jumped back, hitting the wall. Vernege confronted him and they started to argue. "[F]ace-to-face cursing." (Trial Tr. Excerpt 14:18, Oct. 21, 2016.) Kenya pulled Vernege away and they left, walking towards Vernege's truck.

¶7 Stanley went to the passenger side and Vernege went into the driver's side. Just then a guy exited the club and walked towards them, pointing a silver gun at them. Vernege pushed Stanley down, and shots rang out. Vernege had a gun and he returned fire. He got up and was shot twice. He later succumbed to his wounds. Stanley did not identify the shooter by name or in court, but through a photo array that was admitted into evidence. She also testified that the person who tried to talk to her and the person who shot at them was the same individual and confirmed, Lester Roberts's cross-examination, that only one person shot at her and Vernege.

¶8 Virgin Islands Police Sergeant Anthony Hector was at the Frontline club on the night of April 19, 2014. He "used to run the nightclub." (Trial Tr. 6:25, Oct. 24, 2016.) Around 3am, he turned on the lights in the club to signal the patrons that it was closing time. Two ladies then approached him to tell him there was a shooting outside. He drew his gun and "ran outside to see what was going on." (Trial Tr. 8:25.) When Hector reached outside, he "saw this guy, Larry Williams . . . and this gentleman

. . . Mr. Roberts, in front of a truck, with a gun pointing to the truck, firing shots." (Trial Tr. 10:1-4.) Hector announced himself as a police officer and told them to drop their guns, but "they just ignored" him. (Trial Tr. 10:5-6.) Hector then decided that he "had to neutralize the threat." (Trial Tr. 10:15-16.) He aimed at Williams and fired and "saw how he buckle." (Trial Tr. 10:17.) Hector aimed at Roberts next and fired and "saw when he buckle." (Trial Tr. 11:2, Oct. 24, 2016) Hector was then struck from behind, knocking the gun from his hand and him to the ground. Lester Roberts got on top of him and grabbed his gun. Hector started to run away, but he was shot multiple times.

¶9 Roscar Hurtault had been at the casino on the night of April 19th and stopped at Frontline on the drive home around 3:00 in the morning. Two or three minutes later, gunshots erupted. Hurtault dropped to the ground to take cover. He saw a guy inside the porch area exchanging gunshots with someone outside in a pickup truck. (Trial Tr. Excerpt 9:4-15 (Oct. 25, 2016.) Hurtault then saw Hector, whom he knew, exit the club, "take a stance," and call out to the guys. (Trial Tr. Excerpt 23:7 (Oct. 25, 2016).) Then "pandemonium broke out," *id.* at 23:10, with multiple gunshots being fired. Hurtault took cover behind truck, thinking the engine block would protect him, but Eugene Roberts came around and shot him twice. Hurtault rolled underneath the truck for protection. Hurtault could not see the person shooting at the pickup truck. But he identified Eugene Roberts as the person who shot him because Roberts was only two or three feet away at the time.

¶10 Approximately fifteen minutes later, the police received a call of shots fired near Salt River and a car accident in the Estate Morning Star area. Virgin Islands Police Officer Melford Murray was dispatched to the accident scene. He was the first office to arrive. The driver identified himself as Derrick Liburd, whom Murray identified in court. Liburd said he was driving near the entrance to Salt River when another vehicle approached and fired shots at his car, causing him to lose control and run off the road. At least two other men were with Liburd, both were outside the vehicle on the ground,

crying and in pain. They had blood on them. On cross-examination, Murray confirmed that the blood was from gunshot wounds.

¶11 Virgin Islands Police Officers Arthur Joseph, Gregory Bennerson, Luis Encarnacion, Rolando Huertas, and Herminia Rivera were also dispatched to the vehicle accident at Estate Morning Star. Joseph and Bennerson combed the scene and discovered multiple firearms, including one discovered by Huertas under the front seat, near the passenger side. Three men were taken to the hospital, one of whom was identified as Williams by EMT Jacqueline Greenidge-Payne. Rivera took Liburd into custody, securing him in the back of a police cruiser. He told her that he had been at Frontline and was concerned about his friends who had been shot.

¶12 Virgin Islands Police Officer Karen Stout testified that Larry Williams and Eugene Roberts were not licensed to carry firearms in the Virgin Islands. Forensic technicians and expert testimony also established that the shell casings retrieved from Frontline matched the firearms retrieved from the Morning Star accident scene.

¶13 At the close of the People's case-in-chief, Roberts made a motion for judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29, which the Court granted in part and denied in part. The jury heard testimony from witnesses offered by Williams. Roberts rested without presenting any evidence. Roberts renewed him motion at the close of all of the evidence, which the Court granted in part and denied in part.

¶14 The jury deliberated on a Third Amended Information, which charged nine counts: Count One: Murder in the First Degree/Principals and the lesser included offense of Murder Second Degree/Principals (Eugene Roberts and Larry Williams, Jr.) pertaining to Vernege; Court Two: Attempted Murder in the First Degree (Eugene Roberts only) pertaining to Hurtault; Count Three, Assault in the First Degree/Principal (Eugene Roberts only) pertaining to Hurtault; Count Four: Assault in the Third Degree/Principals (Eugene Roberts and Larry Williams, Jr.) pertaining to Stanley;

Count Five, Unauthorized Possession of a Firearm During the Commission of a Crime of Violence/Principals (Eugene Roberts and Larry Williams, Jr.); Count Six, Unauthorized Possession of a Firearm During the Commission of a Crime of Violence/Principal (Eugene Roberts only); Count Seven, Possession of Ammunition/Principals (Eugene Roberts and Larry Williams, Jr.); Count Eight, Reckless Endangerment in the First Degree/Principals (Eugene Roberts and Larry Williams, Jr.); and Count Nine, Unauthorized Possession of a Firearm/Principals (Eugene Roberts and Larry Williams, Jr.). The jury found Roberts not guilty of Counts Two and Four and guilty of Counts Two, Three, Five, Six, Seven, Eight and Nine on November 14, 2016.

¶15 Roberts filed a timely motion for judgment of acquittal or for new trial on November 29, 2016.[4] Over Roberts's objection, the People filed their response on January 11, 2019. Roberts filed his reply on February 1, 2017.

DISCUSSION

¶16 Roberts moves for judgment of acquittal and, in the alternative, for a new trial and raises ten claims of error in support: that the prosecution committed misconduct during closing arguments by arguing to the jury that he had been shot in the leg; that the Court erred when it refused to compel disclosure of the internal affairs file for Virgin Islands Police Sergeant Anthony Hector; that the prosecution committed misconduct when it withheld until trial a use of force report prepared by a police officer pertaining to Hector; that the Court erred when it denied Roberts's motion for a mistrial after the use of force report was disclosed; that the Court erred when it denied Williams's motion to sever; that the Court erred when it precluded Roberts from introducing Liburd's redacted DNA report; that the Court erred when it denied Roberts's pre-conviction acquittal motions as to attempted murder and first-degree assault; that the Court erred when it denied Robert's *limine* motion to preclude the

[4] The deadline for Roberts to file his motion was November 28, 2016. However, because the Superior Court was closed on November 28, 2016 as a result of a fire at HH Tire and Battery, Roberts' motion for judgment of acquittal is deemed timely.

prosecution from arguing that he was at the Morning Star accident scene; that the evidence was insufficient for every count he was found guilty of; and finally that the Court erred when it decided not to use Roberts's guilt-by-association instruction.

¶17 Except for his challenge to the sufficiency of the evidence, the other challenges Roberts raises are in support of his motion for a new trial.[5] Courts "may grant a new trial to a defendant if required in the interest of justice." Super. Ct. R. 135.[6] Unlike a motion for judgment of acquittal, the trial court "exercises its own judgment in assessing the [prosecution's] case." *Stevens v. People*, 52 V.I. 294, 305 (2009). That is, "[w]hen deciding a motion for a new trial, the Superior Court is uniquely situated to weigh the credibility of witnesses—as opposed to when deciding a motion for a judgment of acquittal." *Ventura v. People*, 64 V.I. 589, 617 (2016). "However, even if [the trial court] believes that the jury verdict is contrary to the weight of the evidence, it can order a new trial only if it believes that there is a serious danger that miscarriage of justice has occurred-that is, that an innocent person has been convicted." *Stevens*, 52 V.I. at 305. Trial courts must exercise their discretion "'with extreme caution.'" *People v. Encarnacion*, SX-10-CR-342, 2015 V.I. LEXIS 16, *7 (V.I. Super. Ct. Feb. 11,

---

[5] In his motion, Roberts stated that he "now hereby moves for judgment of acquittal or in the alternative for a new trial after the jury verdict." (Mot. 2.) But the words "new trial" appear only in the passage just quoted, in the title of his motion, and in the conclusion. *Cf. id.* at 14 ('For the reasons presented and the authorities cited, this Motion for Judgment of Acquittal or for a New Trial should be GRANTED."). Because a motion for a judgment of acquittal necessarily challenges the sufficiency of the evidence, the Court assumes that the other errors Roberts raised go to his motion for a new trial. *Cf. United States v. Hope*, 487 F.3d 224, 227 (5th Cir. 2007) ("A motion for judgment of acquittal challenges the sufficiency of the evidence to convict. Indeed, as the text of the rule, all of our case law and the relevant practice guide make clear, the only proper basis for a motion for judgment of acquittal is a challenge to the sufficiency of the government's evidence." (quotation marks, citations, and brackets omitted)). *Accord Sapp v. State*, 913 So. 2d 1220, 1223 (Fla. Dist. Ct. App. 2005) ("A motion for judgment of acquittal challenges the legal sufficiency of the evidence" (citation omitted)); *.State v. Lyles*, 517 A.2d 761, 768 (Md. 1986) (Eldridge, J., concurring) ("[T]he only issue which the defense may raise by a motion for judgment of acquittal is the sufficiency of the evidence. The making of the motion itself is an assertion that the evidence is legally insufficient to be considered by the jury.").

[6] This Court previously concluded that "Superior Court Rule 135 was repealed by implication when the Supreme Court of the Virgin Islands decreed that the Virgin Islands Rules of Criminal Procedure, promulgated on October 16, 2017, took effect on December 1, 2017." *People v. Rivera*, 68 V.I. 393, 402 n.3 (Super. Ct. 2018) (citations omitted). However, because "[a]pplying rules of procedure retroactively may implicate due process and *ex post facto* concerns," *id.* (citations omitted), particularly in criminal cases, the Court will apply Superior Court Rule 135 because that was the rule in effect when Roberts filed his motion. *But cf. Davis*, ___ V.I. at ____ n.24; 2018 V.I. Supreme LEXIS 23 at *48 n.24 (observing that "the rules in effect *at the time the Superior Court decide*[s an]issue" govern, not the rules in effect at the time when a motion is filed).

2015) (quoting *Gov't of the V.I. v. Grant*, 19 V.I. 440, 445 (Terr. Ct. 1983)). "'[T]he power to grant a new trial should be invoked only in exceptional cases in which the evidence preponderates heavily against the verdict.'" *Id.* (quoting *Grant*, 19 V.I. at 445). Because many of the claims of error intersect or overlap, the Court will consider related claims together.

A. Closing Arguments

¶18 In his motion, Roberts claims that the prosecution committed misconduct during closing arguments first, by arguing that he had been shot in the leg and then, by arguing that he was present at the scene of the accident in Morning Star. (*See* Def.'s Mot. for Jgmt of Acquittal or New Trial 4, filed Nov. 29, 2016 (hereinafter "Mot.") ("Here, as where Eugene Roberts was not placed on the scene at the vehicle accident at Estate Morning Star, nor shown to have gotten a gunshot injury as a result of a shooting at Frontline Night Club on April 19, 2014, by any evidence whatsoever. It was prejudicial to allow the People to argue facts that were not in evidence, and that it had failed to prove in its case in chief.").) The Supreme Court of the Virgin Islands explained in *Castor v. People*, 57 V.I. 482, 495 (2012), that "[a] prosecutor may argue any reasonable inference drawn from the evidence presented at trial, but the People are forbidden to make arguments based on evidence not presented at trial, to misstate the evidence presented, or to mislead the jury as to the inferences it may draw." (quotation marks and citations omitted). But the Supreme Court has also recognized that even if the prosecution does err by misstating or mischaracterizing evidence, the misconduct does not *ipso facto* translate into a denial of due process. *E.g.*, *Davis v. People*, S. Ct. Crim. No. 2015-0121, ___ V.I. ___, ____; 2018 V.I. Supreme LEXIS 23, *14 (V.I. July 27, 2018) ("[E]ven had the comment been improper, we presume that the jury followed the curative instruction given immediately to them." (citing *Monelle v. People*, 63 V.I. 757, 770 (2015)); *United States v. Vaulin*, 132 F.3d 898, 901 (3d Cir. 1997)). Instead, the question is first, "whether the prosecutor's comments were in fact improper and, if so, whether the

remarks prejudiced the defendant's right to a fair trial." *Davis*, ___ V.I. at ____; 2018 V.I. Supreme LEXIS 23 at *10 (citing *Monelle*, 63 V.I. at 770); *see also DeSilvia v. People*, 55 V.I. 859, 872 (2011).

(1) Being Shot and Shot in the Leg

¶19 During closing arguments, counsel for the People and counsel for Roberts both referred to Roberts as having been shot. In fact, counsel for Roberts questioned whether Roberts must be "the bionic man" because, according to the People's witnesses, he had been shot but was still able to chase after Hector. In attempting to rebut Roberts' "bionic man" argument, counsel for the People asked the jury to reject Roberts's recollection of the evidence—that he could not have been the person who ran after Hector because he had been shot in the leg. At that point, counsel for Roberts objected and the Court sustained the objection. Roberts now argues that remarks about him being shot, and shot specifically in the leg, were not reasonable inferences the prosecution could draw from the evidence at trial. *Cf. Castor*, 57 V.I. at 495. ("[A] prosecutor may argue any reasonable inference drawn from the evidence presented at trial").

¶20 First, Roberts is patently incorrect insofar as he argues that he "was not . . . shown to have gotten a gunshot injury as a result of a shooting at Frontline Night Club on April 19, 2014, by any evidence whatsoever." (Mot. 4.) And this Court joins the other courts that have held that a party who raises a challenge about an aspect of trial must obtain an official transcript. *See Titone v. State*, 882 N.E.2d 219, 221 (Ind. Ct. App. 2008) ("In Criminal Appeals, the Notice of Appeal must request the Transcript of the entire trial or evidentiary hearing, unless the party intends to limit the appeal to an issue requiring no Transcript." (emphasis omitted) (quoting Ind. R. App. P. 9(F)(4)); *Commonwealth v. Preston*, 904 A.2d 1, 7 (Pa. Super. Ct. 2006) ("It is not proper for either the Pennsylvania Supreme Court or the Superior Court to order transcripts nor is it the responsibility of the appellate courts to obtain the necessary transcripts." (citing *Commonwealth v. Williams*, 715 A.2d 1101, 1105 (Pa. 1998)); *accord Flanagan v. Chambers*, No. 354852, 1991 Conn. Super. LEXIS 2811, *2 (Super. Ct. Oct. 23,

1991) ("If counsel is making a claim concerning the charge, he should order a transcript of the court's charge before arguing the motion." (quotation marks and citation omitted)); *Fallowfield Dev. Corp. v. Strunk*, Civ. No. 89-8644, *et seq.*, 1993 U.S. Dist. LEXIS 248, *4-5 (E.D. Pa. Jan. 8, 1993) ("Within ten (10) days after filing any post-trial motion, the movant shall either (a) order a transcript of the trial . . . or (b) file a verified motion showing good cause to be excused from this requirement." (quoting E.D. Pa. Local R. Civ. P. 20(e)). Hector identified Roberts at trial as the second person at whom he shot and whom he hit and saw buckle. (*See* Trial Tr. 11:2, Oct. 24, 2016) Moreover, Roberts's counsel extensively cross-examined Hector about Hector's testimony that he shot Williams and Roberts. (*E.g.*, Trial Tr. Excerpt 27:7-11, Oct. 25, 2016 ("Sergeant Hector, so that if you got – shot them and they never were behind you before you shot them and you ran after you shot them, then the answer to my question is they never got behind you; is that correct?").

¶21 Just as it is "not the judge's *post hoc* personal recollections . . . that constitutes the record," but rather "the transcript . . . prepared by the court reporter," *People ex rel. M.R. and W.V.*, 64 V.I. 333, 346 (2016) (*per curiam*) (citations omitted), it is also not the recollections of the parties or their counsel that constitutes the record. Although, when courts speak of transcripts and records, they typically speak from an appellate perspective. *Cf. id.* (referring to the record as the record "on appeal"). But the record is the record, whether at trial, or on appeal, or in an ancillary proceeding such as petition for a writ of certiorari or for a writ of habeas corpus. Arguments and errors generally must be raised to the trial court in the first instance so as to allow the trial court the opportunity to correct its own errors. It stands to reason then, that the parties should obtain transcripts at the trial-court level if the issue is to be raised and if the judge's personal recollection cannot control. And the record contradicts what Roberts claims. Had the parties obtained transcripts, Roberts would have seen that this claim is frivolous. Raising frivolous claims, particularly when based on the recollections of counsel, is itself in error. Thus, the Court rejects this claim as a basis for granting a new trial.

¶22 The other claim Roberts raised is that there was no testimony that he was shot in the leg. Roberts is correct in this regard. Hector testified he fired his gun at Williams and at Roberts, further that both men were "hit," and that both men "buckled" after they were hit. But no one testified as to where on his body Roberts was shot. It was only the prosecutor who stated in rebuttal in closing arguments that Roberts was shot in the leg. Although technically that remark was not based on the evidence, this Court cannot conclude that the misstatement "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *DeSilvia*, 55 V.I. at 872.

¶23 Roberts claims the prosecutor's reference to his leg was "highly prejudicial" because "the People had presented not one scintilla of evidence that . . . [he] received a gunshot to his right leg." (Mot. 4, 3.) Again, Roberts is correct. But as Roberts himself concedes, the prosecutor's statement came in response to defense counsel remarking that Roberts must be the "bionic man" to have been able to run after Hector after being shot. In rebuttal, the prosecutor argued that the jury should reject defense counsel's version because the testimony was that Roberts ran after Hector even though he had been shot in the leg. But no evidence not identified where Roberts was shot. Again, the Court cannot find prejudice here. If anything, the prosecutor's misstatement could have worked in Roberts's favor insofar as it bolstered defense counsel's argument that Roberts could not have run after anyone after being shot. But as the People point out, "the exact location of Roberts' gunshot wound was inconsequential and had no bearing on the jury's determination of his guilt." (People's Opp'n 4, filed Jan. 10, 2017 (hereinafter "Opp'n").) The Court instructed the jury that their recollection controls, not the recollections of counsel, and further that arguments of counsel are not evidence. "When a jury is given an instruction . . . the presumption is that the jury will follow the instruction." *Monelle*, 63 V.I. at 770 (citations omitted). This claim of error is also rejected.

(2) Being at the Scene of the Morning Star Car Accident

¶24 Roberts claims the prosecutor committed further misconduct by arguing that he was at the Morning Star car accident scene even though "was not placed on the scene at the vehicle accident at Estate Morning Star." (Mot. 4.) "Absent the People's argument that Eugene Roberts was on the ground at Morning Star, no witness testified that Eugene Roberts was there," which "is exactly what the jury had to find in order to convict Eugene Roberts for the shooting at Frontline Night Club because the persons alleged responsible for the shooting at Frontline took off in a car that got into an accident at Morning Star." (Def.'s Reply 1, filed Feb. 1, 2017 (hereinafter "Reply").) Roberts contends that "[t]he fact that . . . [he] was never named by any law enforcement personnel or emergency medical services workers [wa]s crucial to his defense." *Id.* The People acknowledge that they "did argue that there was testimony that Eugene Roberts was at Morning Star on April 19, 2014, from . . . Huertas, . . . Murray, and the paramedics who treated the injured." (Opp'n 11.) The People then concede (though not in so many words) that they did misspeak because, in their opposition, they respond, noting that it is the jury's recollection that controls. *See id.* ("At the time of the argument it was pointed out that it was the jury's recollection of the testimony that controlled."). But that's not the point Roberts was making.

¶25 No testimony placed Roberts at the scene of the Morning Star car accident. Murray was the first officer to arrive, followed by Joseph, Huertas, and Rivera as well as Greenidge-Payne who treated passengers with gunshot wounds. She identified Williams and Huertas and Rivera identified Liburd as the driver. But no one testified as to who the other persons were, who were taken away by ambulance. Nevertheless, even though the People mischaracterized the evidence, the Court does not find the mischaracterization to be dispositive here. The case agent, Dino Herbert, testified that he later saw Roberts and Williams getting treated at the hospital. And as the People point out in their opposition,

> Hector testified that he shot Eugene Roberts and that the perpetrators of the shooting left the scene together in a vehicle. . . . Larry Williams was found at Morning Star with a gunshot wound next to a black SUV that had crashed into a tree. . . .Under the circumstances the jury could infer from the evidence that Eugene Roberts, who left the scene with Larry Williams, was one of those individuals.

(Opp'n 11.) Accordingly, the Court finds that the misstatement was harmless and does not warrant a new trial. Roberts's claim of error is rejected.

B. Internal Affairs File of Police Officer

¶26 Next, Roberts raises three errors concerning the reports and papers prepared by Internal Affairs ("IA") during its investigation of Roberts's use of force on April 19, 2014. Specifically, Roberts claims the Court erred in denying Williams's motion to compel, which he joined; that the People violated *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972), by withholding the use of force report prepared by Office Naomi Joseph; and finally, that the Court erred when it denied Roberts's motion for a mistrial after the report became known. Each will be considered in turn.

(1) Motion to Compel

¶27 Roberts raises a general claim of prejudiced because he was not able "to establish bias and a motive to testify falsely," (Mot. 5), during Hector's testimony without the IA file. He "needed the disclosure of the IA investigation so that he may cross-examine . . . Hector effectively," he argues. *Id.* But Roberts fails to identify any specific harm or show how he was prejudice. Moreover, as the People point out, "there is no authority for [a] wholesale inspection of . . . Internal Affairs files." (Opp'n 5 (citing *Commonwealth v. French*, 578 A.2d 1292 (Pa. Super. Ct. 1990)).) Further,

> Roberts was not denied disclosure of the Internal Affairs file of Sergeant Hector. The court ordered the People to produce any and all statements, reports, or other documentation contained in Internal Affairs Unit files regarding Sergeant Anthony Hector, which the Attorney General or his designee deems may be material, exculpatory, or otherwise contains discoverable information in the above-styled matter so that the Court may make an *in camera* review of same. The People did in fact submit the Internal Affairs file for in camera review, and pursuant to that review several documents from Sergeant Hector's Internal Affairs file were released to Roberts. All recorded statements of witnesses made during the investigation were also released to Roberts.

Id. In reply, Roberts finds it "curious that the People would cite . . . *French* . . . [as t]his case stands for the proposition that the court should have permitted the defense to inspect *statements* in the IA[] file." (Reply 2 (emphasis added).) And herein lies the distinction that Roberts misunderstands.

¶28 First, this Court agrees with *French* insofar as when the prosecution "has in its possession pretrial statements of its witnesses which have been reduced to writing and which relate to the witness' testimony at trial, it must, upon request, furnish copies of the statements to defense." 578 A.2d at 1301 (citations omitted). The Court also agrees that this right "does not extend to the defense request for wholesale inspection of the entire IA[] file . . . [or] create a general rule of access to all of the [government's] files." *Id.* On appeal, the Supreme Court of Pennsylvania affirmed. *See Commonwealth v. French*, 611 A.2d 175 (Pa. 1992). The court explained that the trial court's error was in

> denying the defense access to the witnesses' statements in the IA[] file . . . . Relevant, pre-trial statements of witnesses in the possession of the [government] must be made available to the accused, upon request, during trial. Moreover, a determination of whether the statements of the prosecution witnesses would have been helpful to the defense is *not to be made by* the prosecution or the trial court. Matters contained in a witness' statement may appear innocuous to some, but have great significance to counsel viewing the statements from the perspective of an advocate for the accused about to cross-examine a witness.

Id. at 179 (quotation marks and citations omitted).

¶29 In ruling from the bench on April 28, 2016 on Williams's motion to compel, this Court directed the People to investigate Hector's personnel records and to disclose all statements he may have made in response to the IA investigation, any disciplinary actions taken against him, anything that may be impeachable. In fact, the Court used the specific example of a prior instance where, for example, Hector may have been found to have false statements, that too would have to be disclosed. The Court expressly rejected Williams's request for all reports including disciplinary reports, citizen complaints, departmental and agency complaints, and so forth of the type authorized by Rule 16.1 of the Local Rules of Criminal Procedure promulgated by the District Court of the Virgin Islands, which might have applied at that time in the Superior Court of the Virgin Islands through Superior Court Rule 7.

But cf. Roberts, 2016 V.I. LEXIS 232 at *1 n.2 (citing *Vanterpool v. Gov't of the V.I.*, 63 V.I. 563 (2015), and explaining that federal rules and local rules of the District Court do not apply as of right in the Superior Court through Rule 7 but only as a last resort). *See also* V.I. R. Crim. P. 16-1 (promulgated subsequently).

¶30 Following the April 28, 2016 hearing, the attorney for the prosecution at that time, Andrette Watson, complied, and in a May 2, 2016 letter, advised the Court that she was submitting for *in camera* review a DVD with three recorded statements: an October 27, 2014 videotaped statement of Hector; a July 10, 2014 videotaped statement of Hurtault; and a May 30, 2014 audiotaped statement of Scott Gilbert. Also produced was an April 23, 2014 alcohol test report. The Court did not review those files, however, because the clerk's office docketed the letter and placed it in the case file. The Court did trust that its bench ruling—to disclose the statements to the defense—was followed. Cf. French, 611 A.2d at 178 ("[T]he determination of whether the statements of the prosecution witnesses would have been helpful to the defense is not to be made by . . . the trial court.").

¶31 Unfortunately, counsel for the prosecution did not comply, which prompted Williams to file a motion for an order to show cause, which the Court heard on June 22, 2016. During the June 22, 2016 hearing, the Court learned that the May 2, 2016 letter was only submitted to the Court. Courtesy copies were provided to defense counsel at the hearing, following which the Court ordered the prosecution to review its files, including the IA files of Hector, and certify in writing whether any exculpatory information was contained therein. Subsequently, counsel for the prosecution, Daniel H. Houston, Esq., complied and certified in a July 29, 2016 informational motion that, in his opinion, "there is no information material to the preparation of the defense, or that could reasonably bear on Sgt. Anthony Hector's credibility or character for truthfulness, with the possible exception of the clinical laboratory report dated April 23, 2014, that was provided to counsel . . . on July 26, 2016."

¶32 Again, as stated above, Roberts does not point to any specific prejudice or harm in his motion, which he suffered at trial. Instead, in reply to the People, Roberts reiterates that he had the right "to review and inspect all reports, forms or documents which contained all statements of any witnesses, that were known to [I]nternal Affairs." (Reply 2.) This Court does not agree. Moreover, while there was a delay in learning that there was no discoverable information in the IA file, that delay did not prejudice Roberts. Defense counsel thoroughly cross-examined Hector, including as to whether he had been drinking on night when he used force to shoot Roberts and Hector. Since there were no statements to produce, Roberts's general objection to the denial of Williams's motion is rejected.

(2) Motion for Mistrial

¶33 Next, Roberts contends that the Court erred when it refused to declare a mistrial after Roberts learned from Police Officer Naomi Joseph that she had taken a statement from Hector shortly after the Frontline shooting. Roberts explains that "[a]fter the close of the People's case, during the presentation of Larry Williams, Jr's case in chief, the existence of an 8 page 'Use of Force Report' became known to the defense." (Mot. 7.) Roberts became aware of the report through an independent investigator who stated under oath outside the presence of the jury that he spoke with Joseph and she confirmed that she took a statement from Hector. Roberts then moved for a mistrial, which the Court denied. In his motion, Roberts claims the denial was in error.

¶34 The Supreme Court of the Virgin Islands recognized in *Najawicz v. People*, 58 V.I. 315, 324 (2013), that "if a defendant consents to a mistrial—and is not coerced into agreeing to a mistrial as a result of prosecutorial or judicial misconduct—a retrial is permitted even in the absence of manifest necessity. This is because the protections afforded by the Double Jeopardy Clause — like all other constitutional rights — may be waived by the defendant, through his counsel" (citations omitted). But no motion is granted solely because it is made. *Cf. Ayala v. Lockheed Martin Corp.*, 67 V.I. 290, 303 (Super. Ct. 2017) ("[A] 'motion is not automatically granted simply because it is unopposed.'"

(quoting *In re: Alumina Dust Claims*, 67 V.I. 172, 187 (Super. Ct. 2017)). Instead, a motion for mistrial should "be declared only when the ends of justice so require and a fair trial is no longer possible." *State v. Franklin*, 580 N.E.2d 1, 9 (1991) (citing *Arizona v. Washington*, 434 U.S. 497, 505-506 (1978)); *Illinois v. Somerville*, 410 U.S. 458, 462-463 (1973)).

¶35 The Court reviewed the Use of Force Report during trial and did not find it exculpatory, noting that it was not impeachment of Hector because Officer Naomi Joseph testified that the summary is what she gathered from various officers on the scene and Hector never adopted any part of the report as his own statement. Moreover, the Court found that the summary in the report was similar to what was testified to at trial. And for this reason, the denied Roberts's motion for mistrial. Roberts has not presented any new arguments in his motion. Accordingly, his claim of error is rejected.

(3) *Brady / Giglio* Violation

¶36 The last issue Roberts raises concerning the Use of Force Report is that the People's failure to produce the report prepared by Officer Naomi Joseph "was a clear violation of the People's obligation under *Brady* and *Giglio* as . . . [it] contained both exculpatory and impeachment materials: much of the information in the report contradicted key government witnesses, and some of the information was exculpatory to Eugene Roberts." (Mot. 6) "More importantly, the report contained information regarding other potential witnesses who were not called by the People in their case, but whom Eugene Roberts would have called had he had notice of their existence." *Id.* However, because the report was not obtained by Roberts until after the close of the People's case, Roberts had no opportunity, he argues, "to utilize the impeachment nature of the report as all of the People's witnesses had completed their testimony." *Id.* Hence, Roberts concludes that he "was denied the right to put forward a full and complete defense." *Id.*

¶37 In *Brady v. Maryland,* 373 U.S. 83, 87 (1963), the Supreme Court of the United States held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due

process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." And in *Giglio v. United States,* 405 U.S. 150, 154 (1972), the Court extended *Brady* to include any information that could be used to impeach the credibility of a witness for the prosecution. To prevail on a claim of a *Brady* violation, "the defendant must show that the evidence was (1) suppressed, (2) favorable, and (3) material to the defense." *Williams v. People*, 59 V.I. 1024, 1039 (2013) (quoting *People v. Ward*, 55 V.I. 829, 842 (2011)).

¶38 Suppression occurs "when . . . the prosecution failed to disclose the evidence in time for the defendant to make use of it, and . . . the evidence was not otherwise available to the defendant through the exercise of reasonable diligence." *Carvajal v. Dominguez*, 542 F.3d 561, 567 (7th Cir. 2008) (citation omitted); *accord Wearry v. Cain*, 136 S. Ct. 1002, 1007 n.8 (2016) ("'*Brady* suppression occurs when the government fails to turn over even evidence that is known only to police investigators and not to the prosecutor.'" (quoting *Youngblood v. West Virginia*, 547 U.S. 867, 869-870 (2006) (*per curiam*))). "Evidence is material if there is a reasonable probability that the outcome would have been different had the evidence been disclosed to the defense." *Bowry v. People*, 52 V.I. 264, 274 (2009) (quotation marks and citations omitted). But "[t]he ultimate inquiry 'is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.'" *Stevens v. People*, 55 V.I. 550, 556 (2011) (citing *Kyles v. Whitley*, 514 U.S. 419, 437-38 (1995)).

¶39 Under the *Williams* factors, the prosecution's failure to disclose the Use of Force Report does constitute a suppression, even though the evidence was known only to the police or a few officers. It is imputed to the prosecution. *See Wearry*, 136 S. Ct. at 1007 n.8. The evidence was also favorable to Roberts. As the Court explained in denying Roberts's motion for a mistrial, the Use of Force Report could have been used for cross-examination purposes. But the Court cannot find that it was material because similar information was elicited on cross-examination by defense counsel. Defense counsel

repeatedly asked Hector if he had been drinking before he used force to "neutralize" Williams and Roberts. Counsel for Roberts played a recording of the call Hector made to 911 as well as portions of a videotaped statement he gave to the police. The inconsistencies were brought out at trial and the Use of Force Report was cumulative and, more importantly, was never adopted by Hector. So, Roberts's claim of error is rejected.

C. Severance / DNA Report

¶40 Next, Roberts contends the Court erred by denying Williams's motion to sever as well as his request to introduce a redacted DNA report in his case-in-chief. Both issues overlap because what prompted Williams to move to sever was a notice filed by Liburd "that he intend[ed] to offer a redacted version of the DNA lab report . . . prepared by Forensic DNA Analyst Crystal Oeshsle, F-ABC." *Roberts*, 2016 V.I. LEXIS 232 at *1. "The People had already represented on the record that they w[ould] not be calling the forensic DNA analyst(s) that prepared the DNA Report."[7] *Id.* Liburd wanted to use the DNA Report at trial because it showed "that no DNA matching him was detected on any of the recovered weapons," *id.* at *7, even though samples were taken from him. In short, Liburd believed the report helped exonerate him. Williams moved to sever out of concern that "a jury could speculate that DNA samples were also taken from him and thus, concludes that DNA matching Defendant Larry Williams, Jr. was detected on the recovered weapons." *Id.* at *8. Roberts, who also objected to the use of the DNA report, joined in Williams's motion. The Court disagreed and denied the motion to sever.

¶41 Later, after the Court acquitted Liburd of all charges once the People rested, and after Williams had rested, Roberts advised the Court and counsel that he intended to introduce the same DNA Report that had prompted him to join Williams's motion to sever. Williams and the People objected. The People objected because there had been no testimony to that point about DNA, including no expert

[7] The People were forced to not use the DNA Report after the DNA analyst refused to travel to St. Croix. She was pregnant at the time of trial and a zika outbreak had occurred in the Caribbean, including on St. Croix. *Cf. Munn v. Hotchkiss Sch.*, 165 A.3d 1167, 1179 n. 12 (Conn. 2017) ("Pregnant Women Advised to Avoid Travel to Active Zika Zone in Miami Beach." (citation omitted)).

testimony. Williams objected for the same reasons as before, the risk that the jury might infer that his DNA was found on the firearms and could raise a *Bruton* issue. *Cf. Bruton v. United States*, 391 U.S. 123 (1968). Williams also objected because he too had rested by that point. Additionally, neither party requested the appearance of the chemist who performed and authored the DNA report in question.

¶42 The Court initially advised Roberts's counsel that it would need to see how Roberts redacted the report before deciding and then granted him time to prepare the redactions. But the arguments of counsel continued at sidebar and Roberts did not take the time allotted. Ultimately, after hearing from counsel, evaluating the issues raised, including potential *Bruton* issues, and considering the absence of an expert through whom the report would be admitted, the Court concluded that it could not allow the report in. It could be prejudicial to Williams, the Court reasoned. It also might be misleading without expert testimony, the Court explained. Roberts then rested without putting on a case. He now argues that the Court erred in denying Williams's motion to sever and in preventing him from introducing a redacted version of the DNA report.

¶43 Roberts's first claim of error is rejected for the same reason as stated previously, which the Court incorporates herein. Severance is a matter vested within the discretion of the trial court. See Roberts, 2016 V.I. LEXIS 232 at *5-6 ("Under Superior Court Rule 129, a judge may order that two or more complaints be tried together if the offenses arose out of the same facts and circumstances, regardless of the number of defendants. However, if the Court finds the consolidation for trial to prejudice a defendant or the government, the Court has the discretion to order separate trials of counts, sever the defendants' trials, or provide any other relief that justice requires if the Court finds the consolidation for trial to prejudice a defendant or the government." (quotation marks, brackets, and citation omitted)).

¶44 Roberts's second claim of error is also rejected as an attempt at whipsawing the court. *See Najawicz*, 58 V.I. at 337 (warning against "the trial court's prospects of being whip-sawed by

assertions of error no matter which way it rules." (quotation marks and citation omitted). The twelve-page report, prepared on May 27, 2014, by Crystal Oechsle, F-ABC with DNA Labs International, detailed the results of DNA testing performed on samples taken from twenty different items, including blood stains on Liburd's pants, blood found on an ice machine at Frontline, and firearms and live rounds of ammunition. Roberts's DNA was found to match only a sample taken from a black Dodge Caliber, presumably the same vehicle that crashed in Morning Star. Otherwise, he was excluded from all other samples taken; Liburd was excluded entirely. Only Williams matched the majority of samples taken.

¶45 However, rather than join with Liburd before trial, Roberts joined with Williams in asking for severance. He then had a change of heart and asked to introduce the report he implicitly opposed by joining Williams. This is an attempt at whipsaw, claiming error no matter which way the court ruled. Roberts and Williams sought severance if Liburd was going to be allowed to introduce the redacted DNA report. The Court denied that motion, finding the issue premature, since Liburd had only given notice and "*limine* rulings are 'necessarily tentative because the court retains discretion to make a different ruling as the evidence unfolds.'" *In re: Asbestos, Catalyst & Silica Toxic Dust Exposure Litig.*, 68 V.I. 507, 532-33 (Super. Ct. 2018) (quoting *People v. Rodriguez*, 885 P.2d 1, 67 (Cal. 1994)) (remaining citations omitted)).

¶46 But more importantly, Roberts was not diligent in presenting this evidence in his defense. Rather than present it in the form he intended to use, Roberts raised the issue "on the fly," so to speak, just as Williams concluded his case, but without redacting the report in advance. And even though the Court said that it would grant him some time to prepare the document, Roberts did not take that time. Then, as the discussion continued and further complications arose, the Court indicated that it was not inclined to allow the DNA report in, without a foundation. Roberts did not request a continuance. He accepted the Court's ruling and then rested. Raising the issue at the last possible moment and then

claiming error after-the-fact constitutes whipsaw to this Court. If "[t]he fact that Eugene Roberts was excluded as an individual who handled any of the guns discovered at the Morning Star accident site on April 19, 2014, was crucial to his defense," (Mot. 9), as Roberts now claims, then he should have been more diligent and not waited until the last possible moment to present the evidence in an unredacted form. Counsel knew well in advance of trial of the existence of the DNA Report and certainly by October 7, 2016, the date when Liburd gave notice that he intended to use a redacted version of the report in his defense at trial. It is of interest to note that while Roberts wanted to use the DNA report to show that none of the firearms had his any evidence of his possessing them. That same report shows the presence of blood matching his DNA within the vehicle involved in the accident at Estate Morning Star.

D. Jury Instruction

¶47 Next, Roberts claims that the Court erred when it failed to give the following instruction Roberts proposed: "'You may not infer that any defendant was guilty of participating in criminal conduct merely from the fact that he associated with other people who were guilty of wrongdoing.'" (Mot. 14 (quoting Leonard B. Sand, *et al.*, *Modern Federal Jury Instructions: Criminal* 6-5 (2005 ed.)).) Following the charging conference, Roberts notified the Court that he wanted a guilt by association instruction given in addition to a mere presence instruction. Roberts argued that there was a distinction between the two because mere presence instructs the jury that they may not infer guilt because someone happens to be present at the scene whereas a guilt by association instruction instructs the jury that they cannot infer wrongdoing based on who someone associates with. Williams joined in Roberts's request. The People opposed. The Court rejected the request, finding the mere presence instruction sufficient. Roberts now argues that, because the testimony established that he and Williams "had been at the Frontline together in a group drinking at the bar," and "were associating together," (Mot. 14.), the Court should have given the guilt by association instruction.

¶48 To prevail on a challenge to the trial court's refusal to give a proposed jury instruction, Roberts must show that the instruction was legally correct and not covered by other instructions, and that its omission was prejudicial. *See Phillips v. People*, 51 V.I. 258, 269 (2009) ("evaluate[] whether the proffered instruction was legally correct, whether or not it was substantially covered by other instructions, and whether its omission prejudiced the defendant.'" (quoting *United States v. Pitt*, 193 F.3d 751, 755-56 (3d Cir. 1999)); *accord United States v. Fallen*, 256 F.3d 1082, 1090 (11th Cir. 2001) ("To prevail on this challenge, Fallen must show that the district court failed to give an instruction that was (1) correct; (2) not substantially covered by other instructions that were given; and (3) so vital that failure to give the requested instruction seriously impaired the defendant's ability to defend himself." (quotation marks and citation omitted)). Roberts cannot satisfy these requirements.

¶49 First, Roberts has not shown that the instruction he proffered was correct under Virgin Islands law. He took it from a treatise with model federal jury instructions, not from a Virgin Islands decision. *Cf. Najawicz*, 58 V.I. at 328-29 ("[T]this Court has previously indicated that the Third Circuit Model Jury Instructions are, at best, advisory." (citing *Fontaine v. People*, 56 V.I. 571, 595 n.19 (2012)). Moreover, no binding precedent has not embraced guilty by association jury instructions. Courts in the Virgin Islands have long held that "[m]erely being present at the scene of the crime, or merely knowing that a crime is being committed, or is about to be committed, is not sufficient conduct . . . to find that a defendant aided or abetted the commission of . . . [a] crime." *Gov't of the V.I. v. Motta*, No. 260/2001, 2002 V.I. LEXIS 49, at *6 n.1 (Sep. 30, 2002), *aff'd* D.C. Crim. App. No. 2002/163, 2004 U.S. Dist. LEXIS 25112, *22 (D.V.I. App. Div. Nov. 30, 2004); *accord Gov't of the V.I. v. Davis*, 35 V.I. 72, 80 (Terr. Ct. 1997) ("Mere presence at the scene of a crime is not sufficient to establish that a defendant aided and abetted the crime unless the Government proves beyond a reasonable doubt that the defendant was a participant and not merely a knowing spectator." (citing *United States v. Wright*, 742 F.2d 1215, 1221 (9th Cir. 1984)). And Virgin Islands courts also recognized that persons may not be

found guilty by association. *Cf. People v. Howson*, 48 V.I. 299, 302-03 (Super. Ct. 2007) (acquitting after a bench trial) ("Guilt, however, cannot be established by association."); *see also People v. Elmes*, 55 V.I. 342, 347-48 (Super. Ct. 2011) (granting motion for new trial after repeated references and innuendos during trial and closing arguments to gang affiliations). But binding precedent has not explicitly endorsed instructing the jury that they may not find someone guilty by association. Since the instruction has not been endorsed, Roberts cannot show that the instruction was warranted by Virgin Islands law.

¶50 Second, the instruction that Roberts wanted the Court to give was substantially covered by other instructions. The jury was instructed to consider the evidence for each defendant separately; further, that they must find each defendant guilty beyond a reasonable doubt; and lastly, that merely being present at the scene of the crime, or merely knowing that a crime is being committed, or is about to be committed, is not sufficient conduct to find that a defendant aided or abetted the commission of a crime.

¶51 Lastly, even if it were error to not give a guilt by association instruction, the error did not impair Roberts's ability to defend himself. "[A] defendant is entitled to an instruction on any cognizable defense for which there exists evidence sufficient for a reasonable jury to find in his favor." *Prince v. People*, 57 V.I. 399, 411-12 (2012) (quotation marks and citations omitted)). Liburd may have prevailed here because the evidence did show that he was merely present and faced a risk of being found guilty by association. But the evidence established that Roberts shot Hurtault twice from approximately three feet away. He was not found guilty because he associated with Williams. Giving a guilt by association instruction was might have confused the jury because it was not supported by the evidence and jury instructions should instruct not confuse.

E. Sufficiency of the Evidence

¶52 Finally, Roberts challenges the sufficiency of the evidence for each offense he was convicted of. When a defendant challenges the sufficiency of the evidence following conviction, "the Superior Court . . . views the evidence in the light most favorable to the prosecution to determine whether any rational trier of fact could have found proof of guilt beyond a reasonable doubt based on the available evidence." *Stevens*, 52 V.I. at 305 (internal quotation marks and citations omitted)). Trial courts must uphold the jury's verdict "if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Codrington*, 57 V.I. at 189 (quotation marks and citation omitted). "The reasonable doubt which will prevent conviction must be the jury's doubt and not that of this Court. If there are conflicts in the testimony, such conflicts present credibility issues for the jurors to resolve. Courts cannot substitute their own credibility determinations for those of the jury." *People v. Ventura*, SX-12-CR-076, 2014 V.I. LEXIS 53, *15 (V.I. Super. Ct. July 25, 2014) (quotation marks, brackets, and citations omitted), *rev'd in part on other grounds*, 64 V.I. 589 (2016). However, when evidence is truly insufficient, then the trial court must set aside the verdict.

(1) Attempted Murder / First-Degree Assault

¶53 In his motion, Roberts argues that there is "no evidence of any willful, premeditated, deliberation . . . Nothing in the record suggests that the shooting of Roscar Hurtault was anything other than what the witness described: a crime of opportunity." (Mot. 12.) But Roberts forgets that "'although the mental processes involved must take place prior to the killing, a brief moment of thought may be sufficient to form a fixed, deliberate design to kill.'" *Velazquez v. People*, 65 V.I. 312, 321 (2016) (brackets omitted) (quoting *Nicholas v. People*, 56 V.I. 718, 734 (2012)). "Moreover 'it is not the length of time or reflection that determines whether an act of murder was premeditated, but rather it is the act of deliberation before the murder.'" *Id.* (quoting *James v. People*, 60 V.I. 311, 327 (2013)).

¶54 Furthermore, to show an attempt, "the government has the burden of proving the following: (1) an intent to commit the crime, (2) and overt act toward its commission, (3) failure of consummation

and (4) the apparent possibility of the commission." *Parson v. Gov't of the V.I.*, 167 F. Supp. 2d 857, 860 (D.V.I. App. Div. 2001) (*per curiam*) (citing *Cheatham v. Gov't of the V.I.*, 30 V.I. 296, 303 (D.V.I. App. Div. 1994)). Whereas to prove an assault in the first degree, the People had to show that Roberts assaulted Hurtault with the intent to commit murder. *Cf. Fahie v. People*, 62 V.I. 625, 632 (2015) ("To convict Fahie of first degree assault, the People were required to prove, beyond a reasonable doubt, that Fahie assaulted another with the intent to commit murder.").

¶55 Here, the evidence established both crimes beyond a reasonable doubt. Roberts was approximately two to three feet away from Hurtault, who was crouching down taking cover behind the engine block of a truck, when Roberts approached and shot him twice. Hurtault heard five shots in total. Clearly, firing shots at someone shows both intent to commit murder and assault because the firing of shots would place another in reasonable apprehension of a battery. *Cf.* 14 V.I.C. § 291 (defining assault as an attempted batter or threating gesture showing intent to commit a battery). A reasonable jury could find that Roberts acted with intent to commit murder when he shot Hurtault, thus taking an overt step toward its commission. *Cf. Parson*, 167 F. Supp. 2d at 860. Roberts also failed to consummate the crime of murder because Hurtault survived. But by shooting Hurtault, it was "apparently possible" that Hurtault could have died. Further, firing multiple shots at an unarmed individual from two to three feet away is sufficient for a jury to find premeditation. *Accord Brown v. People*, 54 V.I. 496, 506-07 (2010) (identifying "the nature of the weapon used," "lack of provocation," and "the use of a deadly weapon on an unarmed victim" as factors supporting a finding of premeditation).

¶56 Roberts contends that, pursuant to *Simmonds v. People*, 59 V.I. 480 (2013), he cannot be convicted of both assault in the first degree as well as attempted murder in the first degree. (*Cf.* Mot. 12 ("Count Three is a crime charging the same incident as that in Count Two, i.e., the shooting of Roscar Hurtault.").) But Roberts is mistaken on two bases. First, *Simmonds* did hold, albeit in a

footnote, that "the plain language of the statute," meaning Section 295 of Title 14 of the Virgin Islands Code, "precludes simultaneously charging and convicting a defendant of both first-degree murder and first-degree assault." *Simmonds*, 59 V.I. at 488 n.5. But the Virgin Islands Supreme Court qualified its holding, explaining the preclusion applies only when "the assault charge is brought pursuant to section 295(2)." *Id.*; *see* 14 V.I.C. § 297(2) ("Whoever . . . with intent to kill, administers or causes to be administered to another, any poison or other noxious or destructive substance or liquid, and death does not result."). The Court specifically declined to address "the propriety of simultaneously charging and convicting a defendant of first-degree murder and first-degree assault for the same act." *Simmonds*, 59 V.I. at 488. Instead, the Court reasoned that, because the defendant had fired multiple shots at the victim,

> the jury could reasonably find that Simmonds committed first-degree assault when he fired his first volley of shots from a distance—resulting in wounds only to Rouse's arms and buttocks—and then initiated a second first-degree assault when he moved closer to Rouse and shot him in the head, which transformed into a first-degree murder once Rouse died from those injuries.

Id. at 489. This case is similar to *Simmonds* insofar Hurtault testified that Roberts fired five shots at him, only two of which struck him. As in *Simmonds*, the jury could have found that Roberts committed assault in the first degree when he fired the other shots at Hurtault that did not hit him.

¶57 But Roberts claims that first-degree assault and attempted murder are one and the same because "[b]oth counts require[proof of] the intent to murder," (Reply 5), and therefore being convicted of both violates the Double Jeopardy Clause as interpreted in *Blockburger v. United States*, 284 U.S. 299 (1932). *See id.* at 304 ("[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not."). Assuming that Roberts is correct,[8] the question becomes whether being punished for the crime attempted as well as the crime

[8] Because Roberts failed to provide any authority from this or any other jurisdiction that attempt crimes should be treated differently, the Court could presume that none exists. *Accord State v. Martinez*, No. 30,637, 2010 N.M. App. Unpub.

committed violates *Blockburger*. But "[t]he *Blockburger* test . . . 'is a rule of statutory construction, and because it serves as a means of discerning legislative purpose the rule should not be controlling where, for example, there is a clear indication of contrary legislative intent." *Williams v. People*, 56 V.I. 821, 831 (2012) (brackets omitted) (quoting *Albernaz v. United States*, 450 U.S. 333, 340 (1981)). The Legislature has given some indication for attempt crimes, *see* 14 V.I.C. § 332, but whether that intent is "clear" and "contrary" is unclear. *Cf. Williams*, 56 V.I. at 831 (considering "*clear* indication of *contrary* legislative intent." (emphasis added) (quotation marks and citation omitted)).

¶58 Section 332 of Title 14 of the Virgin Islands Code provides that "[w]hoever attempts unsuccessfully to commit an offense and accomplishes the commission of another and different offense, whether greater or lesser in guilt, shall be punished as prescribed by law for the offense committed, *notwithstanding* the provisions of section 331 of this title" (emphasis added). Section 331 provides as follows:

> Whoever unsuccessfully attempts to commit an offense, shall, unless otherwise specially prescribed by this Code or other law, be punished by—(1) imprisonment for not more than 25 years, if the offense attempted is punishable by imprisonment for life; or (2) in any other case, imprisonment for not more than one-half of the maximum term, or fine of not more than one-half of the maximum sum prescribed by law for the commission of the offense attempted, or by both such fine and imprisonment.

14 V.I.C. § 331. Generally, when construing statutes, courts first "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." *Ubiles v. People*, 66 V.I. 572, 590 (2017) (quotation marks and citations omitted). "This canon of interpretation exists because the Legislature is presumed to have expressed its intent through the ordinary meaning of the language of

---

LEXIS 454, *3 (Ct. App. Dec. 16, 2010) ("Defendant provides no authority from this or any other jurisdiction to support his argument that attempt crimes should be treated differently from completed crimes for double jeopardy purposes, and he provides no authority from this or any other jurisdiction to support his argument that the Legislature did not intend that attempted second degree murder would be punished separately from the offense of shooting at or from a motor vehicle. We therefore assume that no such authority exists." (citing *In re: Adoption of Doe*, 676 P.2d 1329, 1330 (N.M. 1984)). However, because it is not clear "whether a similar waiver principle [as applies on appeal] can, or should, apply at the trial court level," *Ventura*, 2014 V.I. LEXIS 53 at *32 n.5, the Court will consider Roberts's argument since he does make a perfunctory claim. *Cf. id.*

the statute" and courts generally "take the plain language as an accurate reflection of the legislative intent underlying the statute and . . . give effect to all the words of the statute, if reasonably possible, unless to do so would undermine the statute's purpose." *Id.* (citations omitted). Courts also "apply any specific definitions that are statutorily prescribed. [But w]hen no statutory definition is provided, words that have an accumulated legal meaning will be given that meaning, and other words will be given their common, dictionary, meaning." *Id.* (citations omitted).

¶59 Here, the term "notwithstanding" in Section 332 as well as the words "shall be punished" in both sections are not defined and can lend themselves to conflicting interpretations. "'Shall normally suggests something mandatory not discretionary.'" *Chaput v. Scafidi*, 66 V.I. 160, 187 (Super. Ct. App. Div. 2017) (quoting *Dennie v. People*, 66 V.I. 143, 152 n.6 (Super. Ct. App. Div. 2017)). By contrast, "notwithstanding" means "[d]espite; in spite of." *Black's Law Dictionary* 1231 (10th ed. 2014); *accord Cisneros v. Alpine Ridge Grp.*, 508 U.S. 10, 18 (1993) ("[I]n construing statutes, the use of such a 'notwithstanding' clause clearly signals the drafter's intention that the provisions of the 'notwithstanding' section *override* conflicting provisions of any other section." (emphasis added) (citing *Shomberg v. United States*, 348 U.S. 540, 547-48 (1955)). One way to construe the statutes is to read Section 331 as criminalizing an attempt to commit a crime and Section 332 as criminalizing the crime that is actually accomplished, since an attempt to commit one crime does not always result in the commission of another crime. But if a crime is actually accomplished, "whether greater or lesser in guilt," 14 V.I.C. § 332, then the defendant must be punished for that crime, "notwithstanding" that it also constituted an attempt to commit "another and different offense." *Id.* Another way to construe the statutes is to read them in harmony, namely that, "notwithstanding" whether someone attempts to commit one crime, if he "accomplishes the commission of another and different offense, whether greater or lesser in guilt," he must also be punished for the crime committed. The question here is whether Roberts "shall be punished" for first-degree assault, pursuant to Section 332, and, pursuant to

Section 331, "shall [also] . . . be punished" for attempted murder, or must Roberts only be punished for first-degree assault, because he actually "accomplishe[d]" that offense, "notwithstanding" that he attempted to commit murder. Unfortunately, the plain language is ambiguous and Virgin Islands courts have not construed Section 332 of Title 14 of the Virgin Islands Code, meaning this issue is one of first impression.

¶60 The United States Court of Appeals for the Third Circuit, sitting as the *de facto* court of last resort for the Virgin Islands, reported that they had "discovered no judicial interpretation of this provision," Section 322 of Title 14 of the Virgin Islands Code, but nonetheless concluded "that § 332 relates only to sentencing." *Gov't of V.I. v. Douglas*, 812 F.2d 822, 828 (3d Cir. 1987). The historical source note of Section 322 explains that the statute was carried forward into the Virgin Islands Code from the Code of Laws for the Municipality of St. Thomas / St. John and the Code of Laws for the Municipality of St. Croix, specifically Title IV, Chapter 2, Section 12, which provided that "[t]he last two sections do not protect a person who, attempting unsuccessfully to commit a crime, accomplishes the commission of another and different crime, whether greater or less in guilt, from suffering the punishment prescribed by law for the crime committed." Code of Laws for Munic. of St. Thomas / St. John, tit. IV, ch. 2, § 12 (1921), *repealed by* 1 V.I.C. § 5(2). "Last two sections" referred to Section 10, which specified the punishment for attempt, currently codified as amended and revised at Section 331 of Title 14 of the Virgin Islands Code, and Section 11, which is no longer found in our criminal code. *See* Code of Laws for Munic. of St. Thomas / St. John, tit. IV, ch. 2, § 10 (1921) ("A criminay [sic] act is not less punishable as a crime because it is also declared to be punishable as a contempt."), *repealed by* 1 V.I.C. § 5(2).

¶61 So far as the Court can discern from its limited research, Title IV, Chapter 2, Section 12 of the 1921 Code may have been borrowed from the Puerto Rico Penal Code. *Cf. People v. Rivera*, 36 P.R. Dec. 194, 194 (1927) ("The last two sections do not protect a person who, attempting unsuccessfully

to commit a crime, accomplishes the commission of another and different crime, whether greater or less in guilt, from suffering the punishment prescribed by law for the crime committed."); *accord* P.R. Penal Code, tit. III, § 51, *reprinted in* Rev. Stat. & Codes of P.R. 479-80 (1902) (same). However, because another Superior Court judge recognized that "the duty of a trial court regarding borrowed legislation is first to determine which jurisdiction the statute was borrowed from, then to discern whether the highest court of that jurisdiction settled the meaning of its statute, and finally to apply the settled meaning, if any," *Jones v. Lockheed Martin Corp.*, 68 V.I. 158, 173 (Super. Ct. 2017) (citations omitted), the Court also notes that New York had a statute similar to the version the Virgin Islands enacted in 1921. *Cf. People v. Pisano*, 142 A.D. 524, 527 (N.Y. App. Div. 1911) ("Section two hundred and sixty-one supra does not protect a person who, in attempting unsuccessfully to commit a crime, accomplishes the commission of another and different crime, whether greater or less in guilt, from suffering the punishment prescribed by law for the crime committed." (quotation marks, brackets, and citation omitted)). But so do California, Idaho, Oklahoma, Nevada, and South Dakota.[9] The language of the Puerto Rico statute mirrors the language of the 1921 statute the closest, however. And other sections within Chapter 12 of Title IV of the 1921 Codes mirror similar statutes within Title III of the 1902 Puerto Rico Penal Code, lending further support to the conclusion that the Puerto Rico was the "lending jurisdiction." *Accord Berkeley v. W. Indies Enterps., Inc.*, 10 V.I. 619, 625 (3d Cir. 1973) (borrowed from Puerto Rico); *People v. Simmonds*, 58 V.I. 3, 25 (Super. Ct. 2012) (same).

---

[9] *See* Cal. Penal Code § 665 (Deering) ("Sections 663 and 664 do not protect a person who, in attempting unsuccessfully to commit a crime, accomplishes the commission of another and different crime, whether greater or less in guilt, from suffering the punishment prescribed by law for the crime committed."); Idaho Code § 18-307 ("The last two (2) sections do not protect a person who, in attempting unsuccessfully to commit a crime, accomplishes the commission of another and different crime, whether greater or less in guilt, from suffering the punishment prescribed by law for the crime committed."); Okla. Stat. Ann. tit. 21, § 43 (enacted 1910) ("The last two sections do not protect a person who in attempting unsuccessfully to commit a crime, accomplishes the commission of another and different crime, whether greater or less in guilt, from suffering the punishment prescribed by law for the crime committed."); Nev. Rev. Stat. Ann. tit. 15, ch. 193.330, § 2 ("Nothing in this section protects a person who, in an unsuccessful attempt to commit one crime, does commit another and different one, from the punishment prescribed for the crime actually committed."); S.D. Laws Ann. tit. 22, ch. 22-4, § 2 ("The provisions of § 22-4-1 do not protect a person who, in attempting unsuccessfully to commit a crime, commits another and different crime, whether greater or less in guilt, from suffering the punishment prescribed by law for the crime committed.").

Nevertheless, because neither the Supreme Court of Puerto Rico, nor the Supreme Courts of California, Idaho, Oklahoma, Nevada, or South Dakota construed their statutes before 1921, it leaves the Court without any binding precedent to turn to. *Cf. Antilles Sch., Inc. v. Lembach*, 64 V.I. 400, 419 (2016) ("[W]here a Virgin Islands statute is patterned after a statute from another jurisdiction, the borrowed statute shall be construed to mean what the highest court from the borrowed statute's jurisdiction, prior to the Virgin Islands enactment, construed the statute to mean." (quotation marks and citations omitted)).

¶62 But courts may still consider decisions rendered after the date a statute was borrowed, even though "decisions rendered after a statute is borrowed are only persuasive." *Jones*, 68 V.I. at 176. Here, the Court finds persuasive the decision of the Supreme Court of Nevada in *Jackson v. State*, 291 P.3d 1274 (Nev. 2012) (*en banc*). In *Jackson*, the Nevada Supreme Court considered the same question at issue here:

> A single act can violate more than one criminal statute. When it does, the question arises whether the defendant can, in a single trial, be prosecuted and punished cumulatively for that act. These appeals present specific applications of that question: When the elements of both crimes are met, can a defendant who shoots and hits but fails to kill his victim be convicted of and punished for both attempted murder and battery? If he shoots and misses, can he be convicted of and punished for both attempted murder and assault?

Id. at 1276. In answering these questions, the court observed, that "[w]hether conduct that violates more than one criminal statute can produce multiple convictions in a single trial is essentially a question of statutory construction, albeit statutory construction with a constitutional overlay." *Id.* at 1277. The court further observed that the Supreme Court of the United States "presumes that where two statutory provisions proscribe the same offence, a legislature does not intend to impose two punishments for that offense." *Id.* at 1278 (quoting *Rutledge v. United States*, 517 U.S. 292, 297 (1996)). But when legislation "clearly authorize[s] multiple punishments for the same offense—as routinely occurs when a statute authorizes incarceration and a fine for a given crime—dual

punishments do not offend double jeopardy, even though they are imposed for the 'same offence.'" *Id.* (brackets omitted) (citing *Whalen v. United States*, 445 U.S. 684, 688-89 (1980)). Construing the Nevada statute, the court concluded that if it "expressly authorizes punishment for both attempted murder (the 'unsuccessful attempt to commit one crime') and assault and/or battery (the crime[] actually committed'), the double jeopardy analysis ends there: The Legislature has authorized cumulative punishment." *Id.* (citing *Missouri v. Hunter*, 459 U.S. 359 366 (1983)).

¶63 Although the court ultimately decided the appeal under *Blockburger*, *see id.* at 1280, this Court believes the interpretation given to the Nevada statute to be correct. "'[T]he law of attempt is complex and fraught with intricacies and doctrinal divergences.' 'As simple as it is to state the terminology for the law of attempt, it is not always clear in practice how to apply it.'" *People v. Bailey,* 279 P.3d 1120, 1128 (Cal. 2012) (brackets omitted) (quoting *Moorman v. Thalacker*, 83 F.3d 970, 974 (8th Cir. 1996), and *People v. Super. Ct. of Los Angeles Cty*, 157 P.3d 1017, 1022 (Cal. 2007)). The Virgin Islands Legislature has decreed that the attempted commission of a crime and the commission of a crime are distinct offenses, and that a punishment must be imposed for each. Thus, the Court cannot acquit Roberts of first-degree assault or attempted murder. And further, since Sections 331 and 332 are more specific—pertaining only to crimes attempted and accomplished—they govern to the exclusion of Section 104 of Title 14 of the Virgin Islands Code. *Cf. Velazquez v. People*, 65 V.I. 312, 319 (2016) ("'[T]the more specific statute takes precedence over the more general one, unless it appears the Legislature intended for the more general to control.'" (quoting *Rohn v. People*, 57 V.I. 637, 647 (2012)). Therefore, Roberts's claim is rejected.

(2) Unauthorized Possession of Firearms

¶64 Roberts was convicted of three counts of unauthorized possession of a firearm, two of which further charged that the possession occurred during the commission of a crime of violence. Following from his claim about first-degree assault and attempted murder, Roberts argues that "the corresponding

Counts Five and Six must also fail when Counts Two and Three fail since it is imperative that the underlying crimes be proven first to sustain convictions for possession of a firearm during the commission of a crime of violence." (Mot. 12.) Roberts offered no further argument and cites no law in support. The Court could find this argument waived. *But cf. supra*, note 8. However, courts "must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction." V.I. R. Crim. P. 29(a). Here, there evidence was sufficient for all three counts.

¶65 To prove the crime of unauthorized possession of a firearm during the commission of a crime of violence, "all that is required . . . is evidence that the defendant had an unlicensed firearm in his possession during a crime of violence." *Percival v. People*, 62 V.I. 477, 489 (2015). The evidence, when viewed in the light most favorable to the People, was sufficient to prove beyond a reasonable doubt that Roberts was guilty. Detective Stout testified that on or about April 19, 2014, Roberts did not have a license to possess a firearm. The evidence also showed that Roberts possessed a firearm during the commission of a crime of violence, namely the assault on, or attempted murder of, Hurtault. *See* 23 V.I.C. § 451(g) ("'Crime of violence' means the crime of, or the attempt to commit, murder in any degree . . . assault in the first degree."); 14 V.I.C. § 2253(d)(1). Therefore, even if Roberts were correct that he must be acquitted of attempted murder or first-degree assault, his conviction for Count Six, unauthorized possession while assaulting or attempting to murder Hurtault, stands.

¶66 Similarly, the evidence was also sufficient to show that Roberts possessed a firearm while assaulting Stanley or murdering Vernege. Admittedly, Roberts was acquitted of both crimes as well as aiding and abetting Williams in committing both crime. But courts cannot acquit based on inconsistent verdicts. *See People v. Faulkner*, 57 V.I 327, 335 (2012) ("An inconsistent verdict is not a sufficient reason for setting a verdict aside, even in situations where the jury acquits a defendant of a predicate felony, but convicts on the compound felony."). "[W]here truly inconsistent verdicts have been reached, the most that can be said is that the verdict shows that either in the acquittal or the conviction

the jury did not speak their real conclusions; but that does not show that they were not convinced of the defendant's guilt." *Id.* at 333 (quotation marks, brackets, and ellipsis omitted) (quoting *United States v. Powell*, 469 U.S. 57, 64-65 (1984)).

¶67 Here, the evidence was sufficient to show that Roberts assaulted Stanley or murdered Vernege, or that he aided and abetted Williams in committing either crime.

> [E]stablishing the offense of aiding and abetting requires the People to prove (1) that the substantive crime has been committed, and (2) the defendant knew of the crime and attempted to facilitate it. In addition, the People must prove that the defendant associated himself with the venture, that he participated in it as something he wished to bring about, and that he sought by his words or action to make it succeed.

Todmann v. People, 59 V.I. 675, 684 (2013) (quotation marks and citations omitted). Although Stanley was clear in her testimony that she only saw one person firing shots at her and Vernege and that the shooter was the same person who had whispered in her ear earlier as she was leaving the club, Hector testified that, at the time when he left the bar and engaged Williams and Roberts, they were firing at the truck. (See Trial Tr. 9:25-10-6 ("When I reach outside, I saw this guy, Larry Williams. I saw him, and I saw this gentleman in the plum-colored shirt, Mr. Roberts, in front of a truck, with a gun pointing to the truck, firing shots, and I -- I raised my weapon, and I said, police, drop your gun. And they just ignored me, so.").) It was the firing of shots at Vernege and Stanley which the People claimed constituted the crimes of murder and assault. Clearly the jury credited Hector's testimony and found Roberts guilty of possessing a gun without a license while committing a crime of violence, namely the assault on Stanley or the murder of Vernege. Again, acquitting Roberts of the predicate offenses was inconsistent, but "an inconsistent verdict may stand *where there is sufficient evidence* to support the conviction." *Milligan v. People*, S. Ct. Crim. No. 2016-0090, ___ V.I. ___, ___ n.5; 2018 V.I. Supreme LEXIS 27, *11 n.5 (V.I. Sep. 11, 2018) (citations omitted) (emphasis added). Therefore, Roberts's claim is rejected as to Count Five.

¶68 Turning to Count Nine, the People charged that Roberts and Williams, while aided and abetted by one another and others, did when unauthorized by law possess, bear, transport or carry either actually or constructively open or concealed a firearm. Roberts claims that "Count Nine has no evidence to sustain it where, as here, Eugene Roberts was never placed on the scene at Estate Morning Star, nor was there any evidence that he was shot on April 19, 2014." (Mot. 13) "To infer that he was there and responsible for the shootings is a big stretch which the law does not allow a finder of fact to make," he argues. *Id.* But again Roberts misstates or misremembers the evidence.

¶69 The evidence showed beyond a reasonable doubt that Roberts possessed a firearm without legal authorization on April 19, 2014 because Hurtault testified that Roberts shot him, and Stout testified that Roberts did not have a firearm license. This testimony was sufficient. *Cf. Francis v. People*, 57 V.I. 201, 224 (2012) ("[T]he testimony of a single witness, if credited by the jury, is sufficient to sustain a conviction."). Moreover, even though the Third-Amended Information did not charge Roberts with being in possession of a firearm unlawfully at Estate Morning Star specifically. As the People point out, "[e]ven if Roberts is correct that he was not placed on the scene at Estate Morning Star, the testimony at trial from Anthony Hector and Roscar Hurtault established that Roberts was in possession of a firearm on April 19, 2014, while at the Frontline Nightclub." (Opp'n 13.) However, because the evidence did not establish that Roberts possessed more than one firearm or that he lost and regained possession of a firearm, Roberts's conviction on Count Nine must merge with his conviction on Count Six. *See* 14 V.I.C. § 104 ("An act or omission which is made punishable in different ways by different provisions of this Code may be punished under any of such provisions, but in no case may it be punished under more than one.").

(3) Possession of Ammunition

¶70 Possession of ammunition is deemed a crime when a

> person who is not: (1) a licensed firearms or ammunition dealer; or (2) officer, agent or employee of the Virgin Islands or the United States, on duty and acting within the scope

> of his duties; or (3) holder of a valid firearms license for the same firearm gauge or caliber ammunition of the firearm indicated on such license; and (4) who possesses, sells, purchases, manufactures, advertises for sale, or uses any firearm ammunition.

14 V.I.C. § 2256(a). Roberts argues that "the People failed to prove and an essential element of the crime. Namely, the People failed to prove that Eugene Roberts were not employed by or a federal agent at the time he was alleged to have been in possession of ammunition." (Mot. 13.) But Roberts ignores that "[w]hether a defendant is . . . authorized by the exceptions to the statute is an affirmative defense on which he bears the burden of proof." *Hunt v. Gov't of the V.I.*, 46 V.I. 534, 538 (D.V.I. App. Div. 2005); *see also* 14 V.I.C. § 2256(f) ("An information based upon a violation of this section need not negate any exemption herein contained. The defendant shall have the burden of proving such an exemption.").

¶71 Roberts failed to cite this statute or raise a challenge to its burden-shifting provision. Therefore, any claim of error is waived. But more importantly, the evidence showed that Roberts used ammunition because he shot Hurtault and further showed that he was not licensed to carry a firearm. Further, the jury could reasonably infer that shooting someone who is unarmed and taking cover during an active shooter situation is not within the scope of the duties of an officer, employee, or agent of the United States Government or of the Government of the Virgin Islands. Hence, Roberts's claim of error is rejected.

(4) Reckless Endangerment in the First Degree

¶72 Concerning his conviction of reckless endangerment in the first degree, Roberts claims there

> was conflicting testimony that Eugene Roberts was the person shooting at Frontline. Sergeant Hector testified that he was tackled and shot by Lester Roberts. The People theorized that the person who shot Sergeant Hector ran after him and chased him down to shoot him. The evidence shows that the gun belonging to Sergeant Hector is responsible for the casings left at the area where Roscar Hurtault was shot. It stands to reason that the person who was recklessly endangering others was either Sergeant Hector or Lester Roberts who is alleged to have taken his gun.

(Mot. 13.) But again, Roberts ignores that the Third Amended Information charged him with reckless endangerment "by discharging several shots in the vicinity of Frontline Nightclub, a public establishment." A jury could find beyond a reasonable doubt that Roberts committed reckless endangerment in the first degree when he discharged several shots at Hurtault outside the Frontline club. It is beyond question that firing multiple shots constitutes an act and firing the shots outside a crowded night club adjacent to a road satisfies the "public place" requirement. *E.g.*, *Powell v. People*, S. Ct. Crim. No. 2015-0008, 2019 V.I. Supreme LEXIS 2, * 67-71 (V.I. Jan. 16, 2019) (Swan, J., concurring) (collecting cases). Roberts's claim of error is rejected.

CONCLUSION

¶73 For the reasons stated above, Robert's motion for judgment of acquittal or in the alternative for a new trial must be denied. An appropriate order follows.

DONE this 21st day of February, 2019.

DARRYL DEAN DONOHUE, SR.
Senior Sitting Judge

ATTEST:
ESTRELLA H. GEORGE
Clerk of the Court
By: _____
Court Clerk Supervisor
Dated: 2/21/19