For Publication

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

AMOS W. CARTY, JR., Appellant/Defendant, v. **PEOPLE OF THE VIRGIN ISLANDS,** Appellee/Plaintiff.	**S. Ct. Crim. No. 2020-0001** Re: Super. Ct. Crim. No. 426/2008 (STT)

On Appeal from the Superior Court of the Virgin Islands
Division of St. Thomas-St. John
Superior Court Judge: Hon. Michael C. Dunston

Argued: October 12, 2021
Filed: February 24, 2022

Cite as: 2022 VI 2

BEFORE: **RHYS S. HODGE**, Chief Justice; **MARIA M. CABRET**, Associate Justice; and **CURTIS V. GOMEZ**, Designated Justice.[1]

APPEARANCES:

Gordon C. Rhea, Esq.
Mt. Pleasant, S.C.
Attorney for Appellant.

Ian S.A. Clement, Esq.
Assistant Attorney General
St. Thomas, U.S.V.I.
Attorney for Appellee.

OPINION OF THE COURT

HODGE, Chief Justice.

¶ 1 Appellant Amos W. Carty, Jr., appeals from the Superior Court's January 9, 2020 judgment

[1] The Honorable Ive Arlington Swan is recused from this matter. The Honorable Curtis V. Gomez, a former judge of the United States District Court of the Virgin Islands, sits by designation pursuant to title 4, section 24 of the Virgin Islands Code.

and commitment, which adjudicated him guilty of numerous offenses stemming from his employment at the Roy L. Schneider Hospital ("RLSH"). For the reasons that follow, we reverse all of his convictions and direct entry of a judgment of acquittal on all counts.

I. BACKGROUND

¶ 2 Carty commenced his employment as General Counsel to the RLSH on October 25, 1999, at a salary of $80,000. As General Counsel, Carty performed numerous legal services for the RLSH, including reviewing its contracts for legal sufficiency.

¶ 3 In 2002, the St. Thomas-St. John District Governing Board of the Virgin Islands Government Hospitals and Health Facilities Corporation hired Rodney E. Miller, Sr. as the Chief Executive Officer of RLSH. Miller began his employment on May 13, 2002, pursuant to a three-year contract set to expire on May 13, 2005, which was endorsed by Carty for legal sufficiency and executed by Beverly Chongasing in her capacity as Chair of the District Governing Board. Pursuant to the 2002 agreement, Miller was to receive a $135,000 annual salary, as well as numerous benefits, including a housing allowance. However, on September 4, 2002, and June 12, 2003, respectively, the District Governing Board approved amendments to Miller's contract which, among other things, increased his salary to $150,000 and authorized payment of a $15,000 bonus subject to an annual review of his performance.

¶ 4 On November 27, 2002, Miller promoted Carty to the position of Chief Operating Officer and General Counsel but did not change his $80,000 salary. However, on January 27, 2003, Carty and Miller executed an agreement, retroactive to December 1, 2002, which provided Carty with a $40,000 annual stipend in addition to his $80,000 salary. In 2004, the District Governing Board appointed Peter R. Najawicz as the RLSH's Chief Financial Officer, who commenced his employment on April 19, 2004. As he had done with Carty, Miller executed an agreement with

Najawicz providing him with an annual stipend that exceeded his salary. At various times, Miller also authorized the payment of incentive bonuses to Carty and Najawicz. Although Miller, Carty, and Najawicz had their salaries processed by the Executive Branch through its Department of Finance, their stipends and bonuses were paid from a separate RLSH account and were not reflected on the Notice of Personnel Action ("NOPA") form maintained by the Executive Branch.

¶ 5 In advance of Miller's employment contract expiring, the District Governing Board—now led by June A. Adams, who succeeded Chongasing as Chair—established a Compensation Committee and retained a consulting firm to recommend a salary and benefits package. On May 14, 2005, Miller and Adams signed a new two-year contract. However, in a letter dated June 21, 2005, Adams proposed new terms, apparently in response to ongoing negotiations between the RLSH and Miller, which Miller accepted. In September 2005, Miller and Adams signed another contract, backdated to May 14, 2005, which incorporated the terms of the June 21, 2005 agreement, as well as various other terms. While all three documents were signed by Adams in her capacity as Chair of the Board, and were endorsed by Carty for legal sufficiency, the record contains no evidence that the District Governing Board held a formal vote to ratify any of these agreements.

¶ 6 Over the next two-years, Miller received various payments pursuant to these agreements, which were distributed directly to him from RLSH accounts rather than through payroll processed by the Department of Finance. In addition, Miller increased Carty's salary to $189,600, although Carty's NOPA form continued to only reflect a $80,000 salary. Carty also continued to receive stipends and bonuses authorized by Miller in the same manner. Moreover, in February 2006, Najawicz received permission from Miller to "write-off" a $10,768 debt Carty owed to RLSH, in the form of an unpaid salary advance.

¶ 7 At an unspecified point between May 17, 2007, and August 13, 2007, Miller and Adams

executed another new contract for Miller to remain as Chief Executive Officer. Again, the compensation provided to Miller under this agreement exceeded the salary on his NOPA form, and such excess compensation was paid from RLSH accounts rather than through the payroll process conducted by the Department of Finance. As with the 2005 agreement, the District Governing Board never held a vote to approve the 2007 agreement.

¶ 8 Despite signing the 2007 agreement, on September 19, 2007, Miller announced that he would resign as Chief Executive Officer effective November 3, 2007, to take a position at another hospital. During this period, Miller received multiple payments to his personal account from RLSH accounts, totaling nearly $1.8 million, which had been disbursed by Najawicz and approved by Carty for legal sufficiency. In addition, Miller urged Carty to succeed him as Chief Executive Officer and offered him a $160,000 loan to help Carty pay outstanding tax obligations to the Virgin Islands government which could have been an impediment to that appointment.

¶ 9 The District Governing Board appointed Carty to succeed Miller effective November 5, 2007. After succeeding Miller as Chief Executive Officer, Carty continued the practice of providing stipends and other non-salary compensation to Najawicz.

¶ 10 During Carty's tenure as Chief Executive Officer, the Virgin Islands Office of Inspector General conducted an audit of the RLSH's finances. The Inspector General issued its final report on July 28, 2008, identifying numerous instances where it concluded that payments to Miller, Carty, and Najawicz were made without authorization or were excessive. The District Governing Board terminated Carty as Chief Executive Officer on August 5, 2008.

¶ 11 On October 6, 2008, the People charged Carty, Miller and Najawicz with numerous offenses stemming from their tenure with the RLSH. After more than a decade of proceedings, including a trial that resulted in a mistrial, a six-week jury trial commenced on October 9, 2019,

and concluded on November 14, 2019. Ultimately, the jury found all the defendants guilty of all charges, totaling 44 counts between them.

¶ 12 The Superior Court held a forfeiture and sentencing hearing on December 13, 2019. At the conclusion of the hearing, the Superior Court orally sentenced all the defendants. The Superior Court dismissed two of Carty's convictions pursuant to title 14, section 104 of the Virgin Islands Code, and with respect to the remaining convictions sentenced him to a combined period of one year of incarceration and ordered certain collateral consequences, such as forfeiture of certain funds and disqualification from public office. The Superior Court memorialized its oral decision in a January 2, 2020 special verdict and order of forfeiture and a January 9, 2020 judgment and commitment. Carty timely filed a notice of appeal with this Court on January 8, 2020. *See* V.I. R. APP. P. 5(b)(1).

II. DISCUSSION

A. Jurisdiction and Standard of Review

¶ 13 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." Because the Superior Court's January 9, 2020 judgment and commitment resolved all of the charges presented in the People's seventh amended information, it is a final judgment under section 32(a). *Joseph v. Daily News Publishing Co., Inc.*, 57 V.I. 566, 578 (V.I. 2012); *see also* 48 U.S.C. § 1613a(d).

¶ 14 This Court exercises plenary review over all questions of law, including the sufficiency of the evidence. *Brathwaite v. People*, 60 V.I. 419, 426 (V.I 2014).

B. Sufficiency of the Evidence

¶ 15 Carty challenges the sufficiency of the evidence for all his remaining convictions. Specifically, he maintains that the People failed to prove that any of his conduct was unauthorized, and that even if it was, he lacked the intent to violate the law or commit fraud due to his reliance on advice from numerous lawyers, auditors, and accountants. We address each conviction in turn. However, given the nature of the charged conduct, we must first consider the legal framework that governed the operations of public hospitals during the pertinent period.

1. The Virgin Islands Government Hospitals and Health Facilities Corporation

¶ 16 Between 1986 and 1994, the RLSH, along with other medical facilities, was owned and operated by the Government of the Virgin Islands, through two Government Hospital Facilities Boards, one on St. Croix and one on St. Thomas and St. John, which were established within the Department of Health. *See Governor Juan F. Luis Hosp. & Medical Ctr. v. Titan Medical Group, LLC*, 69 V.I. 873, 880 (V.I. 2018). In 1994, the Legislature, dissatisfied with the separate facilities boards within the Department of Health, *see* 19 V.I.C. § 240(d), enacted Act No. 6012 to dissolve those boards and replace them with the Virgin Islands Government Hospitals and Health Facilities Corporation (hereafter the "Corporation"). Act No. 6012 identified the Corporation as "a body corporate and politic constituting a public health corporation of the Government of the Virgin Islands," and vested it with "those powers and duties expressly provided by law and no others." 19 V.I.C. § 243(a).

¶ 17 Act No. 6012 also set forth the purposes of the Corporation. In addition to providing quality and comprehensive health care, "attain[ing] grater self-sufficiency in health care delivery through enhanced collection of health care costs," "demonstrat[ing] through fiscal responsibility and efficient management its ability to effectively operate the territorial health care delivery

system," and "maintain[ing] a partnership with the V.I. government for as long as a significant portion of the cost of health care delivery constitutes uncompensated care" were all identified as express purposes of the Corporation. 19 V.I.C. § 242.

¶ 18 Consistent with the description of its relationship with the Government as a "partnership," Act No. 6012 granted the Corporation significant independence from the Executive Branch. The Corporation was authorized to employ its own legal counsel, *see* 19 V.I.C. § 245(d), and to establish and maintain its own personnel administration system based on merit principles separate from that utilized for the Executive Branch, *see* 19 V.I.C. § 245(e)(1). The Government was directed to "continue to include in its Executive Budget Acts an appropriation for the operation of the hospitals and health facilities under the jurisdiction of the corporation," 19 V.I.C. § 245(b), and the Corporation was prohibited from "commit[ting] unappropriated Government funds," *see* 19 V.I.C. § 247(c). However, the Corporation was expressly authorized to "establish and maintain separate bank accounts and [to] make direct fiscal disbursement from such accounts to pay all necessary costs and obligations of the health care facilities under its jurisdictions," and the Legislature directed that "[r]evenues generated by each hospital and health facility under its jurisdiction shall be deposited in its account(s)." 19 V.I.C. § 261(a). Nevertheless, Act No. 6012 provided that "the Department of Finance shall continue to be responsible for the payrolls of [the hospitals] subject to the appropriation and allotment process," 19 V.I.C. § 261(b), and that "[a]ll deposits and disbursements from the accounts created herein shall comply with the appliable provisions of the Virgin Islands Code regarding the deposit and disbursements of funds from government bank accounts." 19 V.I.C. § 261(c).

¶ 19 At all times pertinent to this appeal,[2] the Corporation was administered by a 15-member Board of Directors, who were empowered to elect a chairman and other officers as it may deem appropriate, and which was required to meet not less than once a quarter. *See* 19 V.I.C. § 242(b), (e)-(f). However, the Corporation also "ha[d] two district governing boards, one for the District of St. Croix and one for the District of St. Thomas-St. John," consisting of nine members representing their respective district. 19 V.I.C. § 243(g).

¶ 20 Under this bifurcated governance system, the Board of Directors had the authority to "formulate and determine hospital policy and planning for health care delivery at the territorial level," including "coordinat[ing] hospital policy, planning and decisions between the two districts to ensure efficient and coordinated hospital policy direction between the districts." 19 V.I.C. § 243(j). The District Governing Boards, however, were given the authority to "formulate and determine hospital policy and planning for health care delivery for their respective districts consistent with the hospital policy and planning established by the Board of Directors for the Territory." *Id.* "In the event of a dispute between the District Boards, or between a District Board and the Board of Directors, the Board of Directors [would] resolve the dispute by majority vote." *Id.*

¶ 21 Among the enumerated duties of the Corporation is the power to "manage, operate, superintend, control, and maintain the hospitals and health facilities of the Government of the Virgin Islands in partnership with the Government," 19 V.I.C. § 244(e), and to "make and execute

---

[2] Effective December 30, 2020, the Legislature enacted Act No. 8438, which made several structural changes to the operation of the Corporation, including changing the composition of the Board of Directors and eliminating the district governing boards. Because the conduct at issue in this case all occurred between 2002 and 2008, all quotations and citations are to the version of the statute that was in effect prior to the amendments made by Act No. 8438.

contracts and leases and all other agreements or instruments necessary or convenient for the exercise of its powers and the fulfillment of its corporate purposes." 19 V.I.C. § 244(d). However, Act No. 6012 did not contemplate that the Board of Directors or the District Boards would directly manage the Territory's public hospitals. In fact, the Legislature expressly provided that "[n]o Board member or District Board member shall become involved in the day-to-day management operations of the hospitals or health care facilities." 19 V.I.C. § 243(j). Rather, the Legislature directed the "[t]he Board of Directors and the District Governing Boards [to] delegate management operations to the appropriate staff and hold the staff accountable for the execution of hospital policy decisions." *Id.*

¶ 22 To that end, the Corporation possessed the power to "employ and remove through the District Governing Boards the Chief Executive Officers." 19 V.I.C. § 244(h). Similarly, the Chief Executive Officer, serving "as the head of the hospital to which he is appointed," possessed the statutory duty to "appoint and remove the Medical Director, and the Chief Financial Officer with the advice and consent of the respective District Board," and to "appoint and remove all managerial personnel, health care providers and all other professional and nonprofessional personnel" subject to various provisions of Virgin Islands law. 19 V.I.C. § 244a(a)-(b).

¶ 23 The Corporation was also given the express power to "adopt, alter, amend or repeal bylaws or rules or regulations for the organization, management, and regulation of its affairs consistent with [its enabling statute] and all other applicable law." 19 V.I.C. § 244(c). The St. Thomas-St. John District Governing Board adopted such bylaws pursuant to this statutory grant of authority. Pursuant to Article VI, section 8(a) of those bylaws,

> The Chairperson [of the District Governing Board] shall be the official head of the Board and shall have general care, supervision, and direction of its affairs, subject to the authority of the Board. He/she shall be responsible for carrying into effect

> the policies, programs, and resolutions approved or adopted by the Board, for the conduct and management of the affairs of the Board, for coordinating all phases of its professional and business activities, and for directing the preparation of the annual operating plans and longer term objectives of the Board. Subject to his/her overall executive control, he/she shall delegate operating management functions and medical functions to appropriate officers, appointees, agents and employees of the Hospital.

(J.A. 3267.) In addition, section 8(c) of Article VI authorized the Chairperson to appoint all Standing and Special Committees subject to the approval of the Board, while section 8(d) provided that

> Whenever the execution of deeds or other legal instruments is directed by the Board, or becomes necessary and proper in carrying out the business of the Board, the Chairperson is authorized and empowered, in the name of the Board, to execute the same and to have the Board's seal affixed thereto.

(J.A. 3268.) With respect to such legal instruments, section 10(b) granted the Treasurer of the Board to sell securities and take certain other specified actions in the name of the Board. Article XVI provided further guidance on execution of such instruments, providing that

> In the absence of any action by the Board, or unless otherwise determined by the Board, the Chairperson and the Treasure[r] of the Board shall have the power, in the name and on behalf of the Board, to execute and deliver any and all instruments, except to the extent otherwise required by law in the case of the purchase, sale, mortgage, or lease of real property.

(J.A. 3294.)

¶ 24 Article V, section 5(j)-(l) of the bylaws also addressed the relationship between the Chief Executive Officer and the District Governing Board, including delegating several duties of the District Governing Board to the Chief Executive Office:

> (j) The Board shall appoint a full-time Chief Executive Officer, who shall be continuously responsible for the management of the Hospital, commensurate with the authority conferred upon him by the Board and consistent with its expressed aims and policies.
>
> (k) The Board shall, through the Chief Executive Officer, take all reasonable steps

> to conform to all applicable federal and local laws, ordinances, codes and regulations, including but not limited to licensure, fire inspection and other safety measures.
>
> (l) The Board shall, through the Chief Executive Officer, provide for control and use of the physical and financial resources of the Hospital.

(J.A. 3264-65.) And while Article VII, section 10 of the bylaws provides for the Executive Committee of the District Governing Board—whose members include the Chairperson—to "cooperate and consult" with the Chief Executive Officer with respect to matters such as appointments and salary levels, it expressly provides that "[n]o individual member of the Committee shall have any veto power over decisions of Chief Executive Officer." (J.A. 3274.)

¶ 25 Article VIII of the bylaws, titled "Chief Executive Officer," further delineates the duties of the Chief Executive Officer and that position's relationship with the District Governing Board. Section 1 of Article VIII reiterates that the Chief Executive Officer is selected and appointed by the Board, while section 2(a) provides that the Chief Executive Officer shall "receive such compensation, as the Board shall determine." (J.A. 3280.)

2. No Deference to the Jury on Pure Questions of Law

¶ 26 Ordinarily, when reviewing a challenge to the sufficiency of the evidence supporting a conviction, this Court views 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," this Court will affirm. *DeSilvia v. People*, 55 V.I. 859, 865 (V.I. 2011) (quoting *Mendoza v. People*, 55 V.I. 660, 667 (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) (quoting *United States*

v. Carr, 25 F.3d 1194, 1201 (3d Cir. 1996)). A defendant seeking to overturn his conviction on this basis thus bears "a very heavy burden." *Latalladi*, 51 V.I. at 145 (quoting *United States v. Losada*, 674 F.2d 167, 173 (2d Cir. 1982)).

¶ 27 This extraordinary deference to the jury when assessing the sufficiency of the evidence is due to the well-established principle in the American criminal justice system that juries decide questions of fact while judges resolve questions of law. *See Sparf v. United States*, 156 U.S. 51, 100-03 (1895); *see also People v. Bruner*, 175 N.E. 400, 403-04 (Ill. 1931) ("The great preponderance of authority in the courts of the several states likewise denies that by the common law jurors in criminal cases are the judgers of law.") (collecting cases). This division of power between jury and judge is necessary to ensure due process and equal protection, for if juries were permitted to conclusively decide both the law and the facts "the result would be that the enforcement of the law against criminals, and the protection of citizens against unjust and groundless prosecutions, would depend entirely upon juries uncontrolled by any settled, fixed, legal principles," which "would bring confusion and uncertainty in the administration of the criminal law." *Sparf*, 156 U.S. at 101-02.

¶ 28 This necessary separation, however, did not occur in this case. Throughout trial, the jury heard substantial testimony on disputed issues of law, almost exclusively elicited by the People and largely relating to the legal relationship between the Corporation and the Executive Branch and the legal authority of the Chief Executive Officer, the Chief Financial Officer, the District Governing Board, and the Board Chair. In fact, at one point the prosecution even read portions of the Virgin Islands Code to a lay witness—Kenneth Hermon—and asked him whether that language authorized the defendants to take the specific actions that formed the basis for the charged offenses. (Trial Tr. 10/10/19 at 101). Perhaps most significantly, the Superior Court seemingly believed

these purely legal questions were properly before the jury, and during final jury instructions restated, sometimes verbatim, many of the pertinent provisions of Act No. 6012 without providing any instruction on what that language meant – in effect conveying to the jury that it was their responsibility to determine the law and decide for themselves how Act No. 6012 and other statutes and legal doctrines allocated the powers of the District Governing Board, the Board Chair, the Chief Executive Officer, and other employees vis-à-vis each other and the Executive Branch. But this contravenes the well-established principles that lay testimony offering a legal conclusion is generally not helpful to the jury and is thus usually inadmissible as evidence, *e.g.*, *United States v. Noel*, 581 F.3d 490, 496 (7th Cir. 2009), and that it is exclusively the role of the judge to instruct the jury on the applicable principles of law in a case. *United States v. Tartaglione*, 815 Fed. Appx. 648, 650 (3d Cir. 2020) (observing that "the articulation of governing law is within the sole province of the judge"); *Commodores Entm't Corp. v. McClary*, 879 F.3d 1114, 1128 (11th Cir. 2018) (admonishing that "the court must be the jury's only source of law"); *United States v. Milton*, 555 F.2d 1198, 1203 (5th Cir. 1977) (a "witness may not substitute for the court in charging the jury regarding the applicable law"). Accordingly, when assessing the sufficiency of the evidence on appeal in this case, the Court will not exacerbate the Superior Court's error, but instead comports with the proper allocation of authority between judge and jury deciding all questions of law independently without deferring to how the jury may or may not have interpreted the law.

3. Embezzlement or Falsification of Public Accounts

¶ 29 Counts 37, 40, and 41 of the seventh amended information charged Carty with embezzlement or falsification of public accounts in violation of title 14, section 1662(1) of the Virgin Islands Code. That statute provides, in pertinent part, that

> Whoever, being a public officer or person charged with the receipts,

> safekeeping, transfer or disbursement of public monies—
>
> (1) appropriates the same, or any portion thereof to his own use or the use of another without authority of law;
>
> . . . .
>
> shall be fined not more than ten thousand ($10,000) dollars or imprisoned not more than ten (10) years, or both, and shall be disqualified from holding any public office.

Carty does not dispute that he was a public officer, that funds were appropriated, or that any of the pertinent funds constituted public monies. Rather, he maintains that his actions were authorized by law. Each transaction is addressed in turn.

a. Count 37: Disbursements to Miller from August 3, 2005, to June 30, 2006

¶ 30 The People charged Carty, in his capacity as Chief Operating Officer and Legal Counsel, with fraudulently appropriating funds to Miller between August 3, 2005, and June 30, 2006, without authority of law, "through the false and fraudulent pretense of a 'June 21, 2005 employment agreement' not known to exist." (J.A. 1076.) As a threshold matter, it is not fully clear on what basis the People charged, or the jury convicted, Carty, in that the seventh amended information does not explain how he fraudulently appropriated these funds to Miller. In fact, in both their trial presentation and their appellate brief, the People appear to alternate between two different theories of guilt: (1) that the June 21, 2005 agreement was a complete fabrication; and (2) that the June 21, 2005 agreement was not authorized by law yet had been approved by Carty for legal sufficiency. Regardless of which theory the jury relied upon in convicting Carty on this charge, the People failed to introduce sufficient evidence to sustain the conviction.

i. Existence of June 21, 2005 Agreement

¶ 31 Like at trial, in their appellate brief the People imply that the June 21, 2005 agreement did not exist because Carty, in response to a June 13, 2008 subpoena, stated that he "found no June 21, 2005 agreement between [RLSH] and Rodney Miller Sr." and that "[i]t is [his] belief that the

reference to a June 21, 2005, agreement [in other documents] [is] erroneous," J.A. 3247-50, with Najawicz similarly responding that he "found no June 21, 2005, employment agreement between Schneider Regional Medical Center and Rodney E. Miller, Sr." (J.A. 3251-57.) But the fact that Carty and Najawicz said in a pretrial subpoena response that the agreement could not be "found" and that Carty had a "belief" that references to that agreement in other documents may be erroneous is not evidence that the agreement never existed. *Accord, State v. McFall*, 439 P.2d 805, 807 (Ariz. 1968).

¶ 32 Of course, if a June 21, 2005 agreement had never been produced, a jury certainly could reasonably infer that Carty's response to the June 13, 2008 subpoena was not truthful and was instead calculated to cover up that he knew such a document never existed in the first place. After all, a jury possesses the right to disbelieve a witness's statement in whole or in part. *See Ostalaza v. People*, 58 V.I. 531, 556 (V.I. 2013). However, "neither the court nor the jury should be permitted to stubbornly ignore and refuse to be guided by competent, credible and uncontradicted evidence." *Arnold Machinery Co. v. Intrusion Prepakt, Inc.*, 357 P.2d 496, 497 (Utah 1960). Indeed, "although a trier of fact must determine the weight of the testimony and the credibility of witnesses, it may not arbitrarily disregard uncontradicted evidence of unimpeached witnesses which is not inherently incredible and not inconsistent with facts in the record, *even though such witnesses are interested in the outcome of the case*." *Bradner v. Mitchell*, 362 S.E.2d 718, 723 (Va. 1987) (emphasis added); *Cheatham v. Gregory*, 313 S.E.2d 368, 370 (Va. 1984) (same) (citing cases). As the Supreme Court of the United States has explained,

> A jury cannot arbitrarily discredit a witness and disregard his testimony in the absence of any equivocation, confusion, or aberration in it. It is not proper to submit uncontradicted testimony to a jury for the sole purpose of giving the jury an opportunity to nullify it by discrediting the witness, when nothing more than mere interest in the case exists upon which to discredit such witness. [Rather, t]he

> testimony must inherently contain some element of confusion or contrariety, or must be attended by some circumstance which would render a total disregard of it by a jury reasonable rather than capricious.

Chesapeake & Ohio Ry. Co. v. Martin, 283 U.S. 209, 219-20 (1931). In other words, a jury is not permitted "to reach [a] conclusion [that] is entirely too tenuous" given the evidence actually presented "and goes beyond reasonable inferences to mere speculation." *People v. Clarke*, 55 V.I. 473, 478 (V.I. 2011).

¶ 33 Here, the June 21, 2005 agreement was actually introduced into evidence by the People at trial. Although taking the form of an offer letter from Adams to Miller, the document is dated June 21, 2005, sets forth numerous terms and conditions of employment, including bonuses, incentive payments, and cost of living increases on top of base salary. The letter states that the offer is being made by the Board, is signed by Adams in her capacity as Chair of the District Governing Board and contains a signature by Miller under the text "Please signify your acceptance of the terms outlined herein by signing below." (J.A. 1740.) It is clear, therefore, that a June 21, 2005 agreement did in fact exist. As such, a rational jury could not convict Carty of embezzlement or falsification of public accounts on a theory that this agreement never existed.

ii. Legality of June 21, 2005 Agreement

¶ 34 The People also failed to introduce sufficient evidence to prove that the June 21, 2005 agreement was invalid as a matter of law. The June 21, 2005 agreement was signed by Adams in her capacity as Chair, issued on hospital letterhead, expressly states that it is an official offer from the Board, repeatedly uses the pronoun "we" when explaining its terms, and is signed by Miller under a sentence stating that his signature signifies his acceptance. Nevertheless, the People maintain that the June 21, 2005 agreement was not legally valid because it had never been approved by the St. Thomas-St. John District Governing Board.

¶ 35 We disagree. It is well-established that "contract construction, that is, the legal operation of the contract, is a question of law" reserved for the court, and not the jury. *See Phillip v. Marsh-Monsanto*, 66 V.I. 612, 624 (V.I. 2017); *see also Gaede v. SK Invs., Inc.*, 38 S.W.3d 753, 757 (Tex. App. 2001). This principle, while typically arising in civil suits for breach of contract, remains applicable even in criminal cases. *See, e.g., Smith v. State*, 68 N.E.2d 549, 436-37 (Ind. 1946) (rejecting testimony that the defendant had "sold" a controlled substance since it "was a legal conclusion of no evidentiary value as to the nature of the transaction," and instead analyzing the sufficiency of the evidence by determining whether the facts, when viewed in the light most favorable to the prosecution, met the legal definition of a "sale"). Therefore, we are not required to give any credit or deference whatsoever to the legal interpretations and conclusions that various prosecution witnesses testified to at trial.

¶ 36 As outlined earlier, Act No. 6012 granted each District Governing Board the statutory authority to "employ and remove" the Chief Executive Officer. 19 V.I.C. § 244(h), and the bylaws of the St. Thomas-St. John District Governing Board gave it the power to set the Chief Executive Officer's compensation. (J.A. 3280.) But while there is no direct evidence that the District Governing Board formally approved, by an official vote at a duly noticed meeting, the terms of the June 21, 2005 agreement, neither Act No. 6012 nor any other provision of Virgin Islands law required the District Governing Board to affirmatively approve, by formal vote, the salary or other conditions of employment of the Chief Executive Officer. However, the June 21, 2005 agreement is signed by Adams in her capacity as Board Chair, and says that "we are pleased to officially offer you the following terms." (J.A. 1739.) The question, then, is whether this was sufficient to constitute a legally binding contract between Miller and the District Governing Board.

¶ 37 In addition to granting the District Governing Board the authority to employ and remove

the Chief Executive Officer, Act No. 6012 authorizes the Boards to "make and execute contracts and leases and all other agreements or instruments necessary or convenient for the exercise of its powers and the fulfillment of its corporate purposes." 19 V.I.C. § 244(d). But Act No. 6012 does not set forth a procedure for how the District Governing Boards may exercise this power to create contracts. Nevertheless, the bylaws of the St. Thomas-St. John District Governing Board expressly and unambiguously grant this authority to the Chairperson:

> Whenever the execution of deeds or other legal instruments is directed by the Board, or becomes necessary and proper in carrying out the business of the Board, the Chairperson is authorized and empowered, in the name of the Board, to execute the same and to have the Board's seal affixed thereto.

(J.A. 3268.) Certainly, entering into an employment agreement with the individual selected by the Board to serve as Chief Executive Officer is "necessary and proper in carrying out the business of the Board." But even if this were not the case, section 1 of Article XVI expressly provides that

> In the absence of any action by the Board, or unless otherwise determined by the Board, the Chairperson and the Treasure[r] of the Board shall have the power, in the name and on behalf of the Board, to execute and deliver any and all instruments, except to the extent otherwise required by law in the case of the purchase, sale, mortgage, or lease of real property.

(J.A. 3294 (emphasis added).) In these provisions, the bylaws establish a default rule where the Chairperson (or the Treasurer, in the case of securities and other legal instruments which the bylaws permit the Treasurer to buy, sell, or otherwise dispose of) may exercise his or her authority to execute a contract in the name of the Board when the Board has not taken a contrary action.[3]

---

[3] None of the parties have challenged as part of this appeal the authority of the District Governing Board to enact bylaws which delegate these duties to individual members such as the Chair. However, it is well-established that "[w]hen a statute delegates authority to a [public] officer or agency, subdelegation to a subordinate [public] officer or agency is presumptively permissible absent affirmative evidence of a contrary [legislative] intent." *See United States Telecom Ass'n v. FCC*, 359 F.3d 554, 565 (D.C. Cir. 2004) (collecting cases). Such subdelegation is permissible "even in the absence of explicit statutory authorization permitting delegation of a particular

¶ 38 The uncontradicted evidence in the record established that the District Governing Board had created a Compensation Committee as a special committee pursuant to Article VII of the bylaws, and delegated to it various duties, including approval of executive compensation contracts, and that the Compensation Committee would routinely exercise this authority to approve contracts without presenting those contracts to the entire Board for approval. Importantly, Adams testified that the June 21, 2005 agreement "reflects what the Compensation Committee recommended." Moreover, the bylaws do not require that the entire District Governing Board approve each contract or other legal instrument signed by the Chairperson or approved by the Compensation Committee or any other standing or special committee pursuant to this bylaws provision. Under these provisions, testimony by Chongasing and other Board members that they had not seen the June 21, 2005 agreement, even if credited by the jury, is not relevant to the question of whether that agreement was authorized by law.

¶ 39 The record further contains absolutely no indication that Adams or anyone else concealed the existence of the June 21, 2005 agreement from the District Governing Board so as to prevent it from disavowing the agreement. On the contrary, the uncontradicted evidence—elicited by the

---

function" due to "the impossibility of personal performance of every statutory duty." *People v. Murrell*, 56 V.I. 796, 803-04 (V.I. 2012) (collecting cases).

Certainly, the authority to delegate is not without limits; most significantly, a delegation cannot "constitute[] divesting or transferring a fundamental responsibility of the office." *Murrell*, 56 V.I. at 804. Here, no such divestment or transfer occurred since the District Governing Board delegated certain powers internally to individual board members and subcommittees, which is a practice consistent with well-established law in the Virgin Islands and elsewhere governing corporations and boards. *See* 13 V.I.C. § 32(5); *Schoonejongen v. Curtiss-Wright Corp.*, 143 F.3d 120, 127 (3d Cir. 1998); *San Antonio Joint Stock Land Bank v. Taylor*, 105 S.W.2d 650, 654 (Tex. 1937); *see also* 2 JAMES D. COX & THOMAS LEE HAZEN, TREATISE ON THE LAW OF CORPORATIONS § 9:17 (3d ed. 2010). The Legislature was therefore certainly aware that in choosing such a governance structure, a District Governing Board would have the authority to enact bylaws that further delegate certain powers to one of its officers or committees.

People during their direct examination of Chongasing—established the opposite. Chongasing testified that the Compensation Committee advised the full Board at its June 15, 2005 session that it was negotiating with Miller. She further testified that the District Governing Board had been informed of the agreement and had the opportunity to discuss it, testifying that at an executive session held on July 20, 2005, "we were given an update as to what it was," with her even stating, "I remember voicing my opinion that I thought it was wrong."

¶ 40 That the District Governing Board apparently took no formal vote on the June 21, 2005 agreement at the July 20, 2005 executive session is of no legal significance, since Article XVI, section 1 of the bylaws permits the Chairperson to execute a contract in the absence of any action by the Board. Moreover, it is well-established that "a formal resolution need not be passed, nor a formal vote taken in order to validate acts done at the meeting, unless so required by statute, the articles of incorporation, or the bylaws," and "[t]he ratification or adoption of a contract by a corporation through its board of directors may be implied," including "by conversation, without formal votes." 2 WILLIAM MEADE FLETCHER, CYCLOPEDIA OF CORPORATIONS § 418 (Perm. Ed. 1990) (collecting cases); *see also CDB Software, Inc. v. Kroll*, 902 S.W.2d 31, 39 (Tex. App. 1998) ("The ratification or adoption of a contract by a corporation through its board of directors may be implied."). As such, the failure of the Board to formally vote on the June 21, 2005 agreement did not render the agreement invalid – on the contrary, the Board's failure to take action is precisely what authorized Adams to sign the contract pursuant to her powers under Article XVI of the bylaws.

¶ 41 Yet even if the June 21, 2005 agreement were not authorized by law, that would not be the end of the matter. Although section 1662(1) does not specify a required level of criminal intent, this Court has already held that "where the Legislature leaves out a specific mens rea requirement

. . . the correct mens rea requirement is that the defendant knowingly acted." *Duggins v. People*, 56 V.I. 295, 305 (V.I. 2012) (citing *Gov't of the V.I. v. Rodriguez*, 423 F.2d 9, 12-14 (3d Cir. 1970)). Therefore, the People were required to establish not just that the June 21, 2005 agreement was not authorized by law, but that Carty had an "awareness or understanding" that it was unauthorized yet nevertheless took some action to effectuate the transfer of funds to Miller. *Id.* at 201 (quoting BLACK'S LAW DICTIONARY 950 (9th ed. 2009)).

¶ 42 The People maintain that Carty violated section 1662(1) by approving the June 21, 2005 agreement for legal sufficiency. However, it is unconstitutional for a government to criminalize the giving of good-faith legal advice by a duly licensed lawyer to a client, even if that legal advice is ultimately incorrect. *See National Ass'n for Advancement of Colored People v. Button*, 371 U.S. 429 (1963); *Vinluan v. Doyle*, 873 N.Y.S.2d 72, 82 (N.Y. App. Div. 2009); *see also* Julian Ku, *The Wrongheaded and Dangerous Campaign to Criminalize Good Faith Legal Advice*, 42 CASE W. RES. J. INT'L L. 449 (2009); Peter J. Henning, *Targeting Legal Advice*, 54 AM. U. L. REV. 669 (2005).

¶ 43 Perhaps in recognition of these authorities, the People maintain that Carty did not act in good faith, and knew that the June 21, 2005 agreement was not authorized by law and yet nevertheless approved it for legal sufficiency. The People, however, are unable to point to any evidence in the record to support their contention. Rather, they simply emphasize that "Carty was an experienced and respected attorney in the Virgin Islands" and it "strains credibility that he did not understand the plain meaning of the statutes." (Appellee's Br. 58.) However, this argument is entirely circular, and essentially amounts to asserting that Carty knew the agreement was unauthorized by law because it was unauthorized by law. In fact, given that the People assert that the agreement was not authorized by law because it had not been approved by the District

Governing Board, it is not clear how Carty could have known, at the time he reviewed the contract for legal sufficiency, that it would not be presented to the Board for such a vote.

¶ 44 And while the People emphasize that the jurors had the opportunity to evaluate Carty's credibility and maintain that they necessarily rejected his claim to have acted in good faith, the People do not recognize that a jury cannot "stubbornly ignore and refuse to be guided by competent, credible and uncontradicted evidence," *Arnold Machinery Co.*, 357 P.2d at 497, and that a jury lacks the authority "to reach [a] conclusion [that] is entirely too tenuous . . . and goes beyond reasonable inferences to mere speculation." *Clarke*, 55 V.I. at 478. Specifically, this means that while the jurors "must determine the weight of the testimony and the credibility of witnesses," in doing so they "may not arbitrarily disregard uncontradicted evidence of unimpeached witnesses which is not inherently incredible and not inconsistent with facts in the record, *even though such witnesses are interested in the outcome of the case*." *Bradner*, 362 S.E.2d at 723 (emphasis added); *Cheatham*, 313 S.E.2d at 370 (same) (citing cases); *accord*, *Chesapeake & Ohio Ry. Co.*, 283 U.S. at 219-20. Here, the People failed to present evidence contradicting Carty's assertion that he acted in good faith, i.e, that he lacked the intent to violate the law or commit fraud due to his reliance on advice from numerous lawyers, auditors, and accountants, and likewise failed to impeach Carty as a witness. Nor did the People establish that Carty's assertion of good faith, despite its self-serving nature and Carty's status as an interested witness, was inherently incredible and inconsistent with the facts in the record. Accordingly, the jurors were not free to simply disregard Carty's assertion that he acted in good faith.

¶ 45 Perhaps most significantly, the People fail to recognize that Carty is not required to prove that he acted in good faith; rather, the People must affirmatively prove beyond a reasonable doubt each element of the charged offense. *Todmann v. People*, 59 V.I. 926, 938 (V.I. 2013)

(acknowledging "[a] defendant's due process right to have the burden remain with the government to prove the defendant's guilt beyond a reasonable doubt" (citing *In re Winship*, 397 U.S. 358, 364 (1970)). Thus, even if the jury rejected Carty's exculpatory testimony, this would not excuse the complete failure of the People to present any evidence at all—whether direct or circumstantial—that Carty did not act in good faith when he approved the June 21, 2005 agreement for legal sufficiency. Accordingly, we reverse Carty's conviction under Count 37 of the seventh amended information.

b. Count 40: Write-Off or Waiver of $10,000 Salary Advance

¶ 46 Count 40 of the seventh amended information alleges that Carty violated section 1662(1) "by arranging a write-off or waiver of the repayment of his debt of $10,000.00 to [the RLSH] under the false pretense that the debt was not collectable, without authority of law." (J.A. 1076.) The $10,000 debt referred to is a $10,768 salary advance payment that Carty received from the RLSH's operating account shortly after he first commenced his employment as General Counsel on October 25, 1999. At the time this salary advance payment was made, a policy had been in place—since rescinded—that precluded government employees from being paid from the General Fund until their NOPA form has been fully processed. It is undisputed that the purpose of the $10,768 salary advance payment from the RLSH operating account was to allow Carty to get paid while the Executive Branch processed his NOPA form, and that Carty was to repay the $10,768 advance to the RLSH once he began to receive salary payments from the Executive Branch after his NOPA form had been processed.

¶ 47 The People failed to introduce sufficient evidence to sustain this conviction. As a threshold matter, the uncontradicted evidence at trial established that Carty's $10,768 debt had not been waived but only written-off. In the emails Miller and Najawicz exchanged with each other on

February 6, 2006, Najawicz had requested that the RLSH "write-off" ten employee receivables, including Carty's $10,768 debt, to which Miller replied, "You may proceed in writing off these accounts." (J.A. 2771.) At trial, every witness—including prosecution witnesses—asked about the effect of a "write-off" testified that it is a term of art in accounting which does not forgive, waive, or otherwise extinguish a debt, but only designates it as unlikely to be collected, so that it does not appear as an active account receivable. Moreover, Carty himself testified that the $10,768 debt had not been forgiven and was still owed by him to the RLSH, and that he had not repaid it because he believed the RLSH owed him a greater amount of money. This is supported by a May 24, 2001 resolution passed by the St. Thomas-St. John District Governing Board, which states that it is "customary to remove inactive and uncollected account balances periodically," that "on average, industry standards for active account receivables do not exceed two (2) years," that "old account receivables inflate the gross account balance of the Hospital's assets" which "result[s] in a distorted balance sheet," and therefore "authorize[d] the Hospital Administration to establish a write-off policy, for accounting purposes only, for all outstanding account receivables that exceed two (2) years in age." (J.A. 247-48.)

¶ 48 In fact, the only evidence—that term being used loosely—the People cite in their appellate brief to support the idea that the $10,768 debt had been forgiven is a February 23, 2006 email exchange between Carty and Najawicz in which Najawicz states that he wishes to "forgive" a $45,500 housing allowance to Miller to get it "off the books" and asks Carty for language to effectuate that intent, to which Carty suggested that the housing advance be "waived." (Appellee's Br. 26.) Not only is this not evidence that the $10,768 salary advance debt had been waived, but it supports the opposite proposition, in that Carty, when asked for language to provide language to "forgive" Miller's debt, chose the word "waived" rather than "written-off," further emphasizing

that these are different concepts.

¶ 49 Yet even if Najawicz and Miller had waived rather than written-off $10,768 debt, the People nevertheless failed to introduce any evidence that Carty engaged in any conduct to facilitate this. The sole evidence introduced by the People on this point consists of emails exchanged between Najawicz and Miller, and there is no indication whatsoever that this had been requested by Carty or that he otherwise participated in procuring this benefit for himself, let alone did so with a fraudulent intent. This is particularly significant given that Count 40 does not charge Carty with participating in a conspiracy with Miller and Najawicz yet charges him with directly arranging the write-off or waiver of the $10,768 debt. Accordingly, we reverse Carty's conviction on Count 40.

c. Count 41: Disbursements to Miller from May 17, 2007, to November 30, 2007

¶ 50 In Count 41, the People charged Carty with violating section 1662(1) by fraudulently disbursing over $1,500,000 to Miller from the RLSH bank account to Miller's personal account between May 17, 2007, and November 30, 2007. Although these payments had been purportedly made pursuant to his 2005 agreement and a later May 14, 2007 agreement signed by Miller and Adams, the People allege that this May 17, 2007 agreement had not been authorized by law yet had been approved for legal sufficiency by Carty. Moreover, they allege that even if the agreement was valid, that Miller was nevertheless not entitled to collect these payments. Each argument is addressed in turn.

i. Legality of 2007 Agreement

¶ 51 Like the June 21, 2005 agreement, the People contend that the May 14, 2007 agreement was not authorized by law because it had never been formally approved by vote of the District Governing Board. But the May 14, 2007 agreement was signed by Adams in her capacity as Chair

of that Board. As explained earlier in the context of the June 21, 2005 agreement, Adams possessed the express authority, pursuant to the bylaws of the District Governing Board, to execute contracts on behalf of the Board "[i]n the absence of any action by the Board," J.A. 3294, or when executing such a contract "becomes necessary and proper in carrying out the business of the Board." (J.A. 3268.) Moreover, nothing in Act No. 6012, the bylaws, or the law generally applicable to corporations mandated that the District Governing Board formally ratify, by official vote, a contract executed by the Chair pursuant to this authority.

ii. Legality of Disbursements

¶ 52 The People further maintain that Miller was not entitled to receive these disbursements. Although not specifically identified, it appears that the transfers referred to in the Seventh Amended Information are transfers to Miller of (1) $966,456.45 on May 17, 2007; (2) $111,759.62 on August 13, 2007, as well as bi-weekly payments of $6,153.84 effective the pay period ending August 18, 2007, and monthly payments of $3,333.33 beginning on September 1, 2007; and (3) $789,660 on October 24. 2007. Each transfer is addressed in turn.

a. May 17, 2007 Transfer

¶ 53 The record reflects that on May 16, 2007, Adams signed a letter directing Najawicz to pay all outstanding monies due to Miller pursuant to his 2005 contract. Although Adams did not specify a specific amount in her May 16, 2007 letter, Miller directed Najawicz in a May 17, 2007 letter to transfer $966,456.45 to him, which he represented as the outstanding amount owed. While the People maintain that the 2005 agreement was unauthorized by law, the contract was in fact authorized, for the reasons discussed earlier. Therefore, to determine whether the People introduced sufficient evidence to prove embezzlement, this Court must first ascertain whether this $966,456.45 was in fact authorized by the 2005 agreement.

¶ 54 Miller's May 17, 2007 letter did not explain how he arrived at the $966,456.45 figure. However, the evidence introduced at trial established that it represented a $55,650 retention incentive, a $83,475 annual incentive, a $13,250 cost of living increase, a $41,660 one-time retirement plan contribution for December 2005; a $22,260 retirement plan contribution for 2005; a $23,373 retirement plan contribution for 2006; $20,384.61 representing the value of unused vacation in 2005; $21,403.07 representing the value of unused vacation in 2006; a $30,000 contribution to his 403(b) plan for 2005; a $30,000 contribution to his 403(b) plan for 2006; and $625,000 representing five years of annual $125,000 payments to the Rabbi Trust.

¶ 55 While it appears that some of these payments were in fact authorized by the 2005 contact, several were not. Although the 2005 agreement provided Miller with the opportunity to earn an annual incentive of up to 30% of annual base salary, the payment of the annual incentive was to be "determined by the Compensation Committee." (J.A. 17434.) The record contains no evidence that the Compensation Committee ever determined that Miller was entitled to receive any incentive, let alone the full 30% incentive provided for in the agreement. And while Adams, as Chair of the Board, possessed the authority to act on the Board's behalf, her May 16, 2007 letter to Najawicz did not state that the Compensation Committee approved an incentive or that Miller should receive the incentive provided for in the agreement, but only that Miller be paid "all outstanding amounts due." (J.A. 1784.) Consequently, Miller was not authorized to receive the $83,475 annual incentive.

¶ 56 Likewise, Miller was not entitled to receive $625,000 representing payments that purportedly should have been made to the Rabbi Trust. The 2005 agreement provided for "[a]nnual contributions of $125,000.00 to an Irrevocable Rabbi Trust in the name of Mr. Miller (with Miller's named beneficiaries) for the next five years." (J.A. 1757.) However, at the time

Najawicz made the May 17, 2007 transfer, Miller had only been employed under the 2005 contract for two years. Moreover, the agreement required that the contributions be made to the trust, rather than to Miller directly. For similar reasons, Miller was not entitled to have the $60,000 in 403(b) plan contributions deposited into his personal bank account, for the agreement expressly directed that the contributions be made "to a 403(b)(7) individual retirement account in the name of Mr. Miller." (J.A. 1757.)

b. Transfers Based on August 13, 2007 Letter

¶ 57 The record reflects that on August 13, 2007, Miller submitted a letter to Najawicz directing him to transfer $111,759.62 to him from the appropriate RLSH bank account, to transfer $6,153.84 to him bi-weekly beginning with the conclusion of the August 18, 2007 pay period, and to transfer $3,333.33 to him on a monthly basis beginning on September 1, 2007. In that letter, Miller stated that these payments were "[i]n accordance with the May 14, 2007 employment agreement" between him and the RLSH. (J.A. 1786.) While the People maintain that the 2007 agreement was unauthorized by law, the contract was in fact authorized, for the reasons given earlier. Therefore, to determine whether the People introduced sufficient evidence to prove embezzlement, this Court must ascertain whether these transfers were authorized by the 2007 agreement.

¶ 58 Miller did not indicate in the letter what any of these payments represented. However, the uncontradicted evidence at trial established that monthly $3,333.33 payment represented a housing allowance of "$40,000 annually, payable in equal monthly installments," J.A. 1782, while the biweekly payments of $6,153.84 represented the portion of his $310,000 annual salary—$160,000—that was paid from RLSH accounts rather than processed through the Department of Finance. Because this compensation was expressly provided for in the 2007 agreement, Miller was authorized to receive these funds.

¶ 59 As with the earlier request for $966,456.45, Miller did not explain in his letter what the $111,759.62 payment represented. However, at trial, it was established at trial that it represented a $77,500 signing bonus, a $10,000 education allowance, a $10,000 spousal travel allowance, a $3,875 cost of living adjustment, and $10,384.62 in retroactive pay. The signing bonus and cost of living adjustment were expressly provided for in the 2007 agreement, and $10,384.62 properly represents retroactive payment of his increased salary under the agreement retroactive to its May 14, 2007, effective date. Consequently, these payments were authorized by law.

¶ 60 The same cannot be said, however, for the $10,000 educational allowance and $10,000 spousal travel allowance. While the 2007 agreement provided for a $10,000 educational allowance, it also provided that the allowance was "[s]ubject to Compensation Committee approval." (J.A. 1770.) Moreover, the 2007 agreement did not provide Miller with a $10,000 spousal travel allowance, but instead stated that "Miller shall receive a spouse travel allowance of up to $10,000 annually." (J.A. 1782 (emphasis added).) Importantly, the 2007 agreement expressly mandated that "Miller shall submit to Schneider Regional such vouchers or expense statements that satisfactorily and reasonably evidence such expense in accordance with Schneider Regional's travel and expense reimbursement policy." (J.A. 1770.) Here, the record contains no evidence indicating that the Compensation Committee approved the $10,000 educational allowance, or that Miller submitted vouchers or expense statements to support that he had already incurred the maximum educational and spousal travel expenses by August 13, 2007. Consequently, these $20,000 payments were not authorized by law.

c. October 24, 2007 Transfer

¶ 61 The record reflects that on October 24, 2007, Miller submitted a letter to Najawicz directing him to transfer $789,660 to him from the appropriate RLSH bank account "[i]n accordance with

the May 14, 2007 employment agreement." (J.A. 1787.) As with the May 17, 2007 and August 13, 2007 letters, the October 24, 2007 letter did not explain what the $789,660 represented. However, at trial, it was established that it represented a $625,000 payment to the Rabbi Trust; a $30,000 contribution to his 403(b) plan; $93,000 in annual incentive pay; and a $41,660 retirement plan contribution.

¶ 62 The evidence, when viewed in the light most favorable to the People, established that none of these payments were authorized by the 2007 agreement. Like the 2005 agreement, the 2007 agreement provided for "[a]nnual contributions of $125,000.00 to an Irrevocable Rabbi Trust in the name of Mr. Miller (with Mr. Miller's named beneficiaries) for the next five years," and for "[a]nnual contributions of $30,000 to a 403(b)(7) individual retirement account in the name of Mr. Miller." (J.A. 1781.) In addition to these provisions requiring that payments be made, respectively, to the trust and to the retirement account rather than to Miller personally, at the time of the October 24, 2007 letter, Miller had only been employed under the terms of the 2007 agreement for approximately five months. Moreover, the 2007 agreement specified that Miller would receive "[c]ontributions equal to $41,660 in December 2007." (J.A. 1781 (emphasis added.). Not only had the obligation to pay the $41,660 not yet been triggered, but it would not trigger, since Miller had already announced on September 19, 2007, that he would resign as Chief Executive Officer effective November 3, 2007, to take a position at another hospital. And like the 2005 agreement, the 2007 agreement did not make payment of his 30% annual incentive award a matter of right, but only to be "determined by the Compensation Committee." (J.A. 1769.) Not only did the record lack any evidence that the Compensation Committee authorized an annual incentive award, but it is also not clear how it even could have, given that Miller had only been employed under the 2007 agreement for five months at the time of the October 24, 2007 letter. In fact, the 2007 agreement

expressly provided that "[n]o Incentive Compensation will be paid to Miller following the date of a Voluntary Resignation other than Incentive Compensation earned but not paid." (J.A. 1774.)

iii. Carty's Conduct and Intent

¶ 63 It was not sufficient, however, for the People to simply prove that Miller received monies that he was not entitled to between May 17, 2007, and November 30, 2007. This is because Count 41 charges *Carty* with embezzlement in violation of section 1662(1). To sustain a conviction under that statute, the People were required to prove beyond a reasonable doubt that Carty "appropriate[d]" these funds to Miller without authority of law. "The verb 'appropriated' means '[t]o prescribe a particular use for particular moneys; to designate or destine a fund or property for a distinct use.'" *Malyon v. Pierce County*, 935 P.2d 1272, 1282 (Wash. 1997) (quoting BLACK'S LAW DICTIONARY 101 (6th ed. 1990)).

¶ 64 Here, the People failed to introduce sufficient evidence to prove that Carty appropriated these funds to Miller. The uncontradicted evidence at trial established that the transfers to Miller had been authorized either by Najawicz or Miller himself, and that the transfers were made from RLSH accounts to Miller's personal accounts by Najawicz. The only evidence introduced reflecting that Carty performed any role in these transfers is the presence of his initials on the May 17, 2007, August 13, 2007, and October 24, 2007 letters that Miller had sent to Najawicz. The People ignore, however, that Carty, in his role as General Counsel and Chief Operating Officer, lacked any control or authority over RLSH funds. Neither the RLSH bylaws nor any other governing document provides the General Counsel or the Chief Operating Officer with any role in disbursing or authorizing the disbursement of funds. Rather, this authority is vested in the Chief Financial Officer—who is responsible for all fiscal affairs—and the Chief Executive Officer who serves as the administrative head of the hospital. In other words, Carty could not have appropriated

funds by initialing Miller's letters to Najawicz if the act of placing his initials on those letters had absolutely no significance. *Cf. Williams v. United States*, 208 F.2d 447, 450 (5th Cir. 1953) (distinguishing between embezzlement by a government employee with theft by a government employee, noting that one is guilty of theft and not embezzlement when one obtains possession of property one was never authorized to possess in the first place).

¶ 65 Moreover, even if Carty initialing Miller's letters constituted an appropriation, the People failed to introduce sufficient evidence that he possessed the requisite criminal intent to sustain a conviction under section 1662(1). As noted earlier, because section 1662(1) does not specify a mens rea requirement, this Court presumes that "the correct *mens rea* requirement is that the defendant knowingly acted." *Duggins*, 56 V.I. at 305. The People do not dispute that Carty placed his initials on the letters to indicate that he had reviewed them for legal sufficiency. But as explained earlier, the government may not criminalize the giving of good-faith legal advice even if it turns out to ultimately have been wrong. *National Ass'n for Advancement of Colored People*, 371 U.S. at 429; *Vinluan*, 873 N.Y.S.2d at 82.

¶ 66 Here, the People failed to prove that Carty did not act in good faith when he initialed Miller's letters. As a threshold matter, Miller was entitled to receive many of the funds that were transferred to him because of those letters. While Miller was not entitled to receive all the funds, Carty certainly could, in good faith, determine that he was authorized. The record reflects that each one of the benefits was in fact authorized by his 2005 and 2007 employment agreements, with the only questions being whether they had all been earned by Miller or whether they were payable to Miller's personal accounts. Some of the provisions, such as those calling for payments

to a so-called Rabbi Trust,[4] were certainly subject to interpretation, particularly given that a Rabbi Trust had not actually been established as had been provided for in the 2005 and 2007 agreements. And perhaps most importantly, Carty's review was necessarily limited to questions of legal sufficiency, rather than fiscal sufficiency, and the record contains no indication that he was expected to essentially serve as a "super Chief Financial Officer" and determine whether all mathematical calculations were accurate. Accordingly, we reverse Carty's conviction on Count 41.

4. Embezzlement by Public and Private Officers

¶ 67 Counts 38, 39, and 44 of the seventh amended information charged Carty with embezzlement by public and private officers in violation of title 14, section 1089 of the Virgin Islands Code. That statute provides, in its entirety, that

> Whoever, being an officer of the Virgin Islands or a subdivision thereof, or a deputy, clerk, or servant of such officer, or an officer, director, trustee, clerk, servant, attorney, or agent of any association, society, or corporation (public or private), fraudulently appropriates to any use or purpose not in the due and lawful execution of his trust, any property which he has in his possession or under his control by virtue of his trust, or secretes it with a fraudulent intent to appropriate it to such use or purpose, is guilty of embezzlement.

Each conviction is addressed in turn.

a. Counts 38 and 39: Payments to Himself Exceeding NOPA Salary

¶ 68 Counts 38 and 39 charged Carty, respectively, with "purposefully circumvent[ing] the government employee payroll process" through receipt of annual stipends (Count 38) and bonuses (Count 39). Carty does not dispute that he qualifies as an officer or attorney, or that these monies

[4] "A rabbi trust, so called because its tax treatment was first addressed in an IRS letter ruling on a trust for the benefit of a rabbi, is a trust created by a corporation or other institution for the benefit of one or more of its executives (the rabbi, in the IRS's original ruling)." *Bank of America, N.A., v. Moglia*, 330 F.3d 942, 944 (7th Cir. 2003) (internal citations omitted).

were appropriated. Rather, he asserts that the disbursements charged in Counts 38 and 39 were lawful, and even if they were not, that the People failed to prove that he acted with fraudulent intent.

¶ 69 The People maintain that these payments were not lawful for two reasons. First, the People contend that Miller, as Chief Executive Officer, lacked the authority to set Carty's compensation. Furthermore, the People assert that even if Miller could determine Carty's compensation, it was illegal for Carty to accept these payments from the RLSH account without having that compensation reflected on his NOPA form and paid by the Executive Branch through its payroll process. To determine whether these disbursements were lawful, it is necessary to again examine the structure, powers, and duties of the Corporation, as well as its relationship with the Executive Branch.

i. Authority of the Chief Executive Officer to Set Salaries for Subordinates

¶ 70 Act No. 6012 established the Corporation as a public corporation that possesses a substantial degree of autonomy and independence from the Executive Branch. The Legislature did so intentionally to divest the Department of Health of its direct administration of the territory's public hospitals. 19 V.I.C. § 240(d). In addition to granting the Corporation significant autonomy from the Executive Branch, Act No. 6012 provides each hospital's Chief Executive Officer and staff with considerable independence from both the Corporation's Board of Directors as well as its District Governing Board. While each District Governing Board possesses the statutory authority to "employ and remove" a Chief Executive Officer, *see* 19 V.I.C. § 244(h), the Legislature expressly and unambiguously provided that "[n]o Board member or District Board member shall become involved in the day-to-day management operations of the hospitals or health care facilities" and instead directed the "[t]he Board of Directors and the District Governing

Boards [to] delegate management operations to the appropriate staff and hold the staff accountable for the execution of hospital policy decisions." 19 V.I.C. § 243(j).

¶ 71 Title 19, section 244a of the Virgin Islands Code, at the time of all events pertinent to this appeal, read, in its entirety, as follows:

> The Chief Executive Officer shall serve as the head of the hospital to which he is appointed and shall:
>
> (a) appoint and remove the Medical Director, and the Chief Financial Officer with the advice and consent of the respective District Board;
>
> (b) appoint and remove all managerial personnel, health care providers and all other professional and nonprofessional personnel, subject to the provisions of Title 3, chapter 25, section 530 relating to procedures for employee dismissals, demotions and suspensions and 531 relating to the prohibition against discrimination on account of non-merit factors, the rules and regulations of the Corporation promulgated pursuant to section 245(e)(2) of this chapter, any collective bargaining agreements and subject to the V.I. Government's budget constraints and allotment process; and
>
> (c) with the assistance of the Chief Negotiator, negotiate all non-economic provisions of collective bargaining agreements which affect the management and operation of the hospital. The Chief Negotiator, in consultation with the Chief Executive Officers, shall negotiate all economic provisions of collective bargaining agreements which obligate the General Fund. All collective bargaining agreements shall be subject to the approval of the Governor. The Chief Executive Officers and the Chief Negotiator shall develop administrative polices and procedures to implement the provisions of this subsection.

At trial and in their appellate brief, the People place extraordinary emphasis on the fact that section 244a does not expressly state that the Chief Executive Officer may set the salaries for hospital employees. According to the People, the failure of the Legislature to enact a statute specifically stating that the Chief Executive Officer may do so means that the Chief Executive Officer lacks that authority. The People base this highly restrictive interpretation on a single sentence in title 19, section 243 of the Virgin Islands Code stating that the Corporation "shall have those powers and duties expressly provided by law and no others." 19 V.I.C. § 243(a).

¶ 72 The People have grossly misinterpreted the pertinent statutory provisions. Section 243(a),

by its own terms, limits the power of the Corporation. As explained earlier, the Corporation is a complex organization where various authority is allocated internally—both through statutes and bylaws—between a Board of Directors, two District Governing Boards, and Chief Executive Officers and other managerial staff for each public hospital and health facility. Title 19, section 244 of the Virgin Islands Code, which delineates the powers of the Corporation, expressly provides that

> The V.I. Government Hospitals and Health Facilities Corporation shall have the power to:
>
> . . . .
>
> (d) make and execute contracts and leases and all other agreements or instruments necessary or convenient for the exercise of its powers and the fulfillment of its corporate purposes; [and]
>
> (e) manage, operate, superintend, control, and maintain the hospitals and health facilities of the Government of the Virgin Islands in partnership with the Government[.]

19 V.I.C. § 244(d)-(e). Unquestionably, these provisions vest the Corporation with the power to determine the compensation of the employees hired to manage a hospital under its jurisdiction.

¶ 73 The question, then, is *who within the Corporation* is authorized to exercise the Corporation's power to set the compensation for hospital employees. While the People place great emphasis on the omission of the power to set salaries from the powers of the Chief Executive Officer delineated in section 244a, there is nothing in section 244a that provides that the Chief Executive Officer may only exercise the powers enumerated in that statute.

¶ 74 On the contrary, section 244a does not even appear to enumerate powers at all. The first sentence of the statute identifies the Chief Executive Officer as "the head of the hospital to which he is appointed." 19 V.I.C. § 244a. However, the enumerated list that follows does not grant powers to the Chief Executive Officer. Subsection (a) provides that the Chief Executive Officer may appoint and remove the Medical Director and Chief Financial Officer only with the advice

and consent of the District Governing Board. Subsection (b) provides that the Chief Executive Officer may appoint and remove personnel subject to complying with numerous specific limitations in the Virgin Islands Code, such as the prohibition against discrimination on account of non-merit factors. Subsection (c) permits the Chief Executive Officer to negotiate the non-economic provisions of collective bargaining agreements, but only with the assistance of the Chief Negotiator, and for the Chief Negotiator to negotiate the economic provisions of collective bargaining agreements which obligate the General Fund in consultation with the Chief Executive Officer.[5] In other words, these are all affirmative limitations on powers that would otherwise be inherent to the position of Chief Executive Officer as "head of the hospital." 19 V.I.C. § 244a. As such, section 244a effectively provides that the Chief Executive Officer may exercise the powers stemming from his or her position as head of the RLSH, except for the enumerated situations where that power is restricted in some manner.

¶ 75 This construction of section 244a is also consistent with the overall statutory framework established by Act No. 6012. Since it is a power of the Corporation to enter into contracts for managerial personnel, that power must necessarily be exercised by someone within the Corporation. But Act No. 6012 expressly and unambiguously precludes the Board of Directors, the District Governing Boards, and individual Board members from participating in the day-to-day management operations of the hospitals, and mandates that they delegate such duties to "appropriate staff." 19 V.I.C. § 243(j). Since the Chief Executive Officer serves as "the head of the hospital," 19 V.I.C. § 244a, it stands to reason that this and other managerial functions would

[5] Notably, that the Chief Executive Officer lacks the power to unilaterally negotiate the economic provisions of collective bargaining agreements which obligate the General Fund would seem to imply that the Chief Executive Officer would have the power to unilaterally negotiate economic provisions in all other instances.

be within the purview of the Chief Executive Officer or his or her authorized designees.

¶ 76 Yet to the extent any doubt remains as to the power of the Chief Executive Officer to set employee compensation, it is obliviated by the bylaws of the St. Thomas-St. John District Governing Board. Article VII, Section 10 of the bylaws, titled "Personnel Practices and Compensation meetings of the Executive Committee," reads, in its entirety as follows:

> (a) The Personnel Practices and Compensation meetings of the Executive Committee shall cooperate and consult with the Chief Executive Officer/Administrator of the Hospital and other administrative officers in regard to appointments, welfare, and working conditions of employees, labor relations recommendations for establishment and revision from time to time of salary levels, and the maintenance of proper relations between employees and the Board.
> (b) No individual member of the Committee shall have any veto power over decisions of Chief Executive Officer/Medical Director of the Hospital or the Administrative Staff of the Hospital (nor shall any Director make or maintain contact with employees except through the Chief Executive Officer/Medical Director or the Administrative Staff).

(J.A. 3274-75.) The plain language of this bylaws provision clearly contemplates that the District Governing Board, acting through its Executive Committee, would only "consult" and "make recommendations" to the Chief Executive Officer with respect to "salary levels" and other conditions of employment, subject to the District Governing Board's statutory authority to "hold the staff accountable for the execution of hospital policy decisions." 19 V.I.C. § 243(j).

¶ 77 Consequently, as a matter of law, Miller, as Chief Executive Officer of the Schneider Hospital, possessed the legal authority to set compensation for subordinate hospital employees, subject only to the retained authority of the District Governing Board as the policy-making body for the RLSH. To hold otherwise would not only be inconsistent with the plain language of Act No. 6012 and the St. Thomas-St. John District Governing Board bylaws, but effectively render the

territory's hospitals unmanageable.[6]

ii. Authority of the Executive Branch with Respect to Hospital Salaries

¶ 78 The People further argue that even if Miller as Chief Executive Officer had the requisite legal authority to determine the compensation of subordinate employees Carty nevertheless engaged in embezzlement. Specifically, they allege that Carty committed the crime of embezzlement by receiving those payments from a hospital account without having the additional compensation reflected on the NOPA form maintained by the Executive Branch.

¶ 79 As a threshold matter, the People are correct that Virgin Islands law required all of Carty's compensation to be included on his NOPA form, and not just his salary. Title 3, section 452 of the Virgin Islands Code provides that "[t]he Director of Personnel under the general supervision of the Governor . . . shall . . . establish and maintain a roster of all employees in the Government Service, in which there shall be set forth, as to each employee, the class title of the position held; the compensation; any change in pay or status; and any other necessary data, including the enrollment of the employees in the Group Health Insurance Program." 3 V.I.C. § 452(b)(4). As used in section 452, "'Government Service' means the Government of the United States Virgin Islands, including governmental activities administered by boards, commissions, and authorities." 3 V.I.C. § 451 (emphasis added). Therefore, Miller was unquestionably required to inform the Director of Personnel of the total amount of compensation given to Carty, including the value of any bonuses or stipends in addition to his salary.

---

[6] It is important to emphasize that the People's interpretation of Act No. 6012 with respect to salaries—that any action taken by the Chief Executive Officer that is not affirmatively vested in that position by statute is illegal and unauthorized until and unless it is approved by a formal vote of the District Governing Board—would appear to apply to *any* situation where Act No. 6012 does not affirmatively delineate authority.

¶ 80 Counts 38 and 39, however, do not charge Carty with simply accepting stipends and bonuses that were not reported to the Director of Personnel. Nor could the People have charged Carty on this basis, since section 1089 requires that funds be "fraudulently appropriate[d]" or "secrete[d] it with a fraudulent intent." 14 V.I.C. § 1089. Consequently, Counts 38 and 39 of the Seventh Amended Information charged Carty with "purposefully circumvent[ing] the government employee payroll process" when receiving these stipends and bonuses. (J.A. 1076-77.)

¶ 81 Even though Carty received payments that exceeded the salary identified on the NOPA form maintained by the Division of Personnel, the People failed to introduce sufficient evidence to prove that he circumvented the employee payroll process to receive those payments. Act No. 6012 mandated the Corporation to "establish and maintain separate bank accounts and [to] make direct fiscal disbursement from such accounts to pay all necessary costs and obligations of the health care facilities under its jurisdictions." 19 V.I.C. § 261(a). Moreover, Act No. 6012 provided for "[r]evenues generated by each hospital and health facility under its jurisdiction [to] be deposited in its account(s)." *Id.*

¶ 82 The establishment of separate bank accounts, and for disbursements to be made from such accounts to pay necessary costs and obligations, is consistent with the overall purpose of Act No. 6012, which was to make the public hospital system achieve "financial self-sufficiency" with the goal of having the hospitals funded to the greatest extent possible through patient care revenue rather than the General Fund or other accounts maintained by the Executive Branch. 19 V.I.C. §§ 240, 242. However, because financial self-sufficiency was the ultimate goal rather than the then existing reality, Act No. 6012 directed the Executive Branch to "continue to include in its Executive Budget an appropriation for the operation of the hospitals and health facilities under the jurisdiction of the corporation." 19 V.I.C. § 245(b). Consequently, the clear intent of this statutory

scheme is for the Executive Branch, through the appropriation it receives for the Executive Budget from the General Fund and other funding sources, to fund the costs that the Corporation is unable to pay from its own accounts.

¶ 83 In addition to requiring the Executive Branch to continue to fund the hospitals, Act No. 6012 provides that

> [n]otwithstanding the establishment of separate bank accounts under this section, the Department of Finance shall continue to be responsible for the payrolls of the Governor Juan F. Luis and Roy L. Schneider Hospitals subject to the appropriation and allotment process[,]

19 V.I.C. § 261(b). The People maintain that this provision requires the Department of Finance to process all payrolls of the hospitals, and that Carty therefore circumvented the payroll process by not receiving the additional compensation from the Department of Finance.

¶ 84 Again, the People have misinterpreted these statutory provisions. If section 261(b) only stated that "the Department of Finance shall continue to be responsible for the payrolls of the Governor Juan F. Luis and Roy L. Schneider Hospitals," the People would likely be correct that all payrolls for both hospitals must be processed by the Department of Finance. But that is not what section 261(b) says – after that language, it contains the additional phrase "subject to the appropriation and allotment process."

¶ 85 Under traditional rules of English grammar, the phrase "subject to" modifies only the noun it immediately follows, and not the entire sentence. In legal parlance, this principle, as it applies in the context of statutory construction, is known as "the rule of the last antecedent." Under this rule, "a limiting clause or phrase [in a sentence within a statute] … should ordinarily be read as modifying only the noun or phrase that it immediately follows." *Fontaine v. People*, 59 V.I. 1004, 1009 (V.I. 2013) (quoting *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003)). And while this rule "is

not an absolute and can assuredly be overcome by other indicia of meaning," *id.* at 1010 (quoting *United States v. Hayes*, 555 U.S. 415, 425 (2009)), the People have neither argued, nor established, that the phrase "subject to the appropriation and allotment process" in section 261(b) "is applicable as much to the first and other words [in that section] as to the last," *id.* (quoting *Porto Rico Ry., Light & Power Co. v. Mor*, 253 U.S. 345, 348 (1920) and citing *Gov't of the V.I. v. Thomas*, 9 V.I. 17, 24 (V.I. Super. Ct. 1971) (same)), such that the interpretive presumption embodied in the rule does not limit the applicability of the phrase to just the last antecedent. *See, e.g., Payless Shoesource, Inc. v. Travelers Cos., Inc.*, 585 F.3d 1366, 1371 (10th Cir. 2009) (observing that "th[e] last antecedent principle is . . . an interpretive presumption based on the grammatical rule against misplaced modifiers"). Nor have the People contended that a related rule, the "series-qualifier canon," which applies to a statutory term or phrase at the end of a series "when there is a straightforward, parallel construction that involves all nouns or verbs in a series," should apply to permit the phrase "subject to the appropriation and allotment process" in section 261(b) to act as a modifier that would apply to the entirety of the language in section 261(b), rather than to solely the last antecedent. *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163, 1169 (2021) (acknowledging this canon) (citing *Paroline v. United States*, 572 U. S. 434, 447 (2014); *Porto Rico Railway, Light & Power Co.*, 253 U. S. at 348; and *United States v. Bass*, 404 U. S. 336, 339-40 (1971)).

¶ 86 Thus, section 261(b) does not make the Department of Finance responsible for all payrolls – rather, it only makes it "responsible for the payrolls . . . subject to the appropriation and allotment process." In other words, section 261(b) mandates that the Department of Finance process the payrolls that are to be paid from the appropriation the Executive Branch receives from the General Fund for the purpose of hospital operations pursuant to section 245(b) but does not mandate that the Department of Finance process any payrolls that are funded from sources other than the

General Fund, such as the separate hospital accounts in which patient care revenue is deposited. This construction of section 261(b) is consistent with how this Court and other courts have applied the last antecedent rule. *See, e.g., Fontaine*, 59 V.I. at 1010 (holding that by operation of the rule, "the language in [5 V.I.C. §] 3524 [that the territorial Public Defender] relies on — 'that he considers to be in the interest of justice' — would only modify 'other remedies before or after conviction,' and not 'appeals' or 'every stage of the proceedings against him'"); *Dennis v. Watco Companies, Inc.*, 631 F.3d 1303, 1305-06 (10th Cir. 2011) (holding that in the statutory phrase "any employee of an employer engaged in the operation of a rail carrier subject to part A of subtitle IV of Title 49," the phrase "subject to part A" modifies "rail carrier" and not "employer"); *Northwest Forest Resource Council v. Glickman*, 82 F.3d 825, 831-32 (9th Cir. 1996) (holding that in a statute stating that "all timber sale contracts offered or awarded before that date in any unit of the National Forest System or district of the Bureau of Land Management subject to section 318" the phrase "subject to section 318" modifies "any unit . . . or district," and not "all timber sales contracts").

¶ 87 In this case, the undisputed evidence in the record established that the stipend and bonus payments received by Carty which exceeded the salary indicated on his NOPA form did not come from the General Fund or any other account maintained by the Department of Finance or the Executive Branch, but from the separate hospital accounts the Corporation is authorized to maintain and make disbursements from pursuant to section 261(a). Because Miller was authorized by law to set Carty's compensation, and the Department of Finance is not responsible for payrolls which are not subject to the appropriation and allotment process, the People failed to introduce sufficient evidence that Carty circumvented the payroll process or otherwise fraudulently appropriated or secreted these funds to himself in violation of law. Consequently, we reverse

Carty's convictions for Counts 38 and 39.

b. Count 44: Attachment of Schedule A to Miller's Employment Agreement

¶ 88 Count 44 of the seventh amended information charged Carty with fraudulently attaching a document, labelled Schedule A, to Miller's 2005 and 2007 agreements, which included benefits and other perquisites that had allegedly never been authorized by the District Governing Board. Carty maintains that the People failed to introduce any evidence—let alone sufficient evidence—that Schedule A had not been included as an attachment to these contracts or had otherwise been surreptitiously added by Carty afterwards.

¶ 89 Before considering whether the People introduced sufficient evidence, it is important to again examine the legal standard we employ when reviewing a claim that the People failed to prove a charge beyond a reasonable doubt. In undertaking this review, we view all issues of credibility in the light most favorable to the People, *Latalladi*, 51 V.I. at 145, and affirm the conviction if "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *DeSilvia*, 55 V.I. at 865.

¶ 90 The requirement that the People prove a criminal charge beyond a reasonable doubt is mandated by the United States Constitution. *In re Winship*, 397 U.S. at 362 (collecting cases). The purpose of this standard is to safeguard the presumption of innocence and to protect against "dubious and unjust convictions, with resulting forfeitures of life, liberty, and property." *Id.* While the Supreme Court of the United States has described a "reasonable doubt" as a doubt "based on reason which arises from the evidence or lack of evidence," *Johnson v. Louisiana*, 406 U.S. 356, 360 (1972), it has also acknowledged that the concept remains amorphous and cannot be distilled to "any particular form of words." *Victor v. Nebraska*, 511 U.S. 1, 6 (1994).

¶ 91 The legal standard for assessing the sufficiency of the evidence thus cannot be divorced from the reasonable doubt standard. While an appellate court must presume that the jury resolved any conflicting evidence in favor of the prosecution, this "does not mean that whenever the record supports conflicting inferences, no matter how weak, the prosecution wins." *Cosby v. Jones*, 682 F.2d 1373, 1383 n.21 (11th Cir. 1982). The Supreme Court of the United States has emphasized that it is not enough for there to simply be a modicum of evidence that supports a guilty verdict, for

> [a]ny relevance that is relevant—that has any tendency to make the existence of an element of a crime slightly more probable than it would be without the evidence, could be deemed a "mere modicum." But it could not seriously be argued that such a "modicum" of evidence could by itself rationally support a conviction beyond a reasonable doubt.

Jackson v. Virginia, 443 U.S. 307, 320 (1979) (internal citations omitted). To hold otherwise, and affirm a criminal conviction based on only a mere modicum of evidence, would cause appellate review of the sufficiency of the evidence in a criminal case to "be no more stringent than the standard of review in a civil case" and effectively erase the distinction between proof beyond a reasonable doubt and proof based on a mere preponderance of the evidence. *Cosby*, 682 F.2d at 1383 n.21.

¶ 92 Moreover, the remedy of setting aside a conviction due to the failure of the prosecution to prove the charge beyond a reasonable doubt "is not limited to those facts which, that if not proved, would wholly exonerate the accused," for "[u]nder our system of criminal justice even a thief is entitled to complain that he has been unconstitutionally convicted and imprisoned as a burglar." *Jackson*, 443 U.S. at 323-24 (internal quotation marks omitted) (quoting *Mullaney v. Wilbur*, 421 U.S. 684, 697-98 (1975)). Thus, if the "beyond a reasonable doubt standard is to have any meaning, we must assume that when the choice between guilt and innocence from 'historical' or

undisputed facts reaches a certain degree of conjecture and speculation, then the defendant must be acquitted." *Cosby*, 682 F.2d at 1383 n.21. In fact, this Court has itself recognized these principles, and held that a jury cannot draw "one inference upon another to reach [a] conclusion," for doing so "is entirely too tenuous, and goes beyond reasonable inferences to mere speculation." *People v. Clarke*, 55 V.I. 473, 482 (V.I. 2011); *see also United States v. Pettigrew*, 77 F.3d 1500, 1521 (5th Cir. 1996) ("[A] verdict may not rest on mere suspicion, speculation, or conjecture, or on an overly attenuated piling of inference on inference."). Consequently, an appellate court should reverse a conviction on sufficiency of the evidence grounds "when the evidence, so viewed, is sufficiently inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime of which he or she was convicted." *State v. Nielsen*, 326 P.3d 645, 651 (Utah 2014) (quoting *State v. Maestas*, 299 P.2d 892 (Utah 2012)). In doing so, however, we must remain vigilant to avoid substituting our own assessment of the evidence for the jury's permissible weighing of the proof, since it remains the responsibility of the jury, as the trier of fact, to "fairly resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inference from basic facts to ultimate facts." *Jackson*, 443 U.S. at 319.

¶ 93 Applying this standard, the People failed to introduce sufficient evidence to establish that Carty fraudulently added Schedule A to the 2005 and 2007 agreements after they had been executed. This is not to say that there was absolutely no evidence whatsoever. At trial, three former members of the District Governing Board—Chongasing, Frank Jackson, and Doradean Williams—testified in various formulations that they had never seen Schedule A at the time the 2005 and 2007 agreements had been executed. This testimony, however, is precisely the sort of "mere modicum" or inconclusive evidence that the Supreme Court of the United States and other

courts have emphasized cannot establish proof beyond a reasonable doubt to sustain a criminal conviction.

¶ 94 As a threshold matter, it is not clear how the testimony of these three former Board members could establish that Schedule A had not existed. The factual premise of Count 44 is that the 2005 and 2007 agreements had existed, but Schedule A was surreptitiously added to them after they were signed by Adams. But as explained earlier, the District Governing Board was not required to approve any portion of the 2005 and 2007 agreements; rather, it was sufficient for Adams, as Chair of the Board, to sign them on behalf of the Board. The overwhelming evidence introduced at trial established that no Board member other than Adams had seen the 2005 or 2007 agreement when they were executed, but only became aware of them long after the fact as part of the Inspector General audit. In fact, Chongasing, Williams, and Jackson all testified themselves they had not seen Miller's 2005 or 2007 agreements until after receiving the results of the Inspector General audit in 2008.[7] Moreover, when asked by the People, "Were you given a May 14, 2005 contract that didn't have a Schedule A contract on it?" Chongasing replied "No." Consequently, the testimony of these Board members that they had not seen Schedule A is not conclusive evidence that Schedule A had not been part of the 2005 or 2007 agreements since those witnesses had not seen the 2005 or 2007 agreements at or around the time of their execution, and thus could not possibly have known whether those agreements contained or did not contain Schedule A at the time they were signed by Adams. And while Adams testified that she did not remember seeing

[7] Chongasing also testified to seeing Schedule A in late 2007 as an attachment to Carty's proposed contract to serve as Chief Executive Officer. However, the uncontradicted evidence at trial established that the Schedule A that Carty attached to his proposed contract was identical in every way to the Schedule A that had been included in Miller's 2007 contract, and so Chongasing seeing a document labelled "Schedule A" as part of Board discussions of Carty's contract is not probative of whether Schedule A was or was not properly part of Miller's 2005 or 2007 contracts.

Schedule A, as explained earlier, "[a]n answer by a witness that [s]he does not remember . . . is not a denial," and is not evidence that the event did not occur, or that a document did not exist. *McFall*, 439 P.2d at 807.

¶ 95 Perhaps more significantly, the People themselves introduced evidence indicating that Schedule A did in fact exist. The 2005 and 2007 agreements were introduced into evidence by the People, were signed by Miller and Adams, and were recognized by Adams and other Board members. The text of both agreements expressly references the "list of Benefits which is incorporated by reference and attached hereto as Schedule A." (J.A. 1744; 1770.) Therefore, the People were required not just to produce evidence that the jury could properly credit to determine that Schedule A did not exist, but to also introduce evidence that would provide an explanation for its own evidence indicating that it did exist – that is, the People needed to show that the 2005 and 2007 agreements were themselves both altered after the fact to reference a Schedule A that had never been attached; that the 2005 and 2007 agreements both had a Schedule A attached which was later replaced with a different Schedule A; or that Adams signed agreements in both 2005 and 2007 that referenced a Schedule A but did not actually have a Schedule A attached.

¶ 96 The People failed to introduce sufficient evidence to indicate—let alone establish—that any of these scenarios occurred. The only evidence to even remotely support the theory that any contract had been fraudulently altered is the admission of two contracts—respectively admitted as People's Exhibits 13 and 13a—both bearing the date May 14, 2005, but containing different terms; among other differences, Exhibit 13 referenced Schedule A, while Exhibit 13a did not. But the existence of two contracts—without more—is not evidence that a contract had been fraudulently altered. *Scaffidi v. United Nissan*, 425 F.Supp.2d 1172, 1185 (D. Nev. 2005). Moreover, it is well-established, however, that evidence must not be viewed in isolation, but considered in its

totality. *See, e.g., United States v. Hooks*, 780 F.2d 1526, 1532 (10th Cir. 1986). The uncontradicted evidence at trial established that the agreement admitted as Exhibit 13a had been an interim agreement the parties executed to go into effect May 14, 2005, given that Miller's 2002 employment agreement had expired on May 13, 2005, to allow Miller to continue to serve as Chief Executive Officer while the parties continued to negotiate the terms of a new contract. While the agreement introduced as Exhibit 13 had also been dated on May 14, 2005, the uncontradicted testimony is that all parties to the agreement backdated their signatures so that the terms of the agreement would go into effect retroactively to the date the 2002 agreement expired. This uncontradicted testimony was then further bolstered by the fact that Exhibit 13, in addition to including Schedule A, contains all the terms that were set forth in the June 21, 2005 agreement that had been signed by Adams and Miller, corroborating further that the agreement admitted as Exhibit 13 represented the final agreement between the parties.

¶ 97 Nevertheless, even if the jury could somehow properly infer that Schedule A had not been part of the 2005 or 2007 agreements, to sustain a conviction on Count 44, the People were not just required to prove that Schedule A had been surreptitiously added or altered after execution, but that either act had been accomplished by Carty. The record contains absolutely no direct evidence whatsoever that indicates that Schedule A had been inserted by Carty after the fact. While the jury heard testimony that Carty, in his capacity as General Counsel, had responsibility for the drafting of contracts, the factual basis of Count 44 is not that the 2005 and 2007 agreements contained Schedule A and Adams signed them without reading the agreements or understanding what Schedule A entailed – nor could it be, since it is "the basic responsibility of contracting parties to review a document before signing it," and fraud based on ignorance of a contract's terms can only be established if the individual signing a contract "did diligently review what he was about to sign,

but [had] his diligence thwarted" by some fraudulent act, such as "a quick and undetected switch of documents immediately after his review and prior to his putting pen to paper." *Hetchkop v. Woodlawn at Grassmere, Inc.*, 116 F.3d 28, 34 (2d Cir. 1997). *See also Love Peace v. Banco Popular de P.R.*, 2021 VI 15, ¶14 (observing that "courts have long required contracting parties to act with reasonable prudence by reading . . . [a contract] document prior to signing it") (citing cases).

¶ 98 Here, when directly asked who had presented her with the contracts to sign, Adams testified that she "cannot remember" who did but speculated that it "had to be . . . Karen Rennie, Allison Spencer, or Attorney Carty." In other words, Adams never testified that Schedule A had never been presented to her, and in fact never even identified Carty as the individual who provided her with the contracts to sign. And two of the individuals Adams identified as possibly giving her the contracts—Carty and Spencer—had both testified that Schedule A had been included with the agreements given to Adams.

¶ 99 The People also contend that the jury, having heard Carty and Spencer testify, could have found their testimony not credible, but concluded that they were lying and inferred that the opposite of their testimony was the truth. It is certainly true that the jury could believe or disbelieve any witness either in whole or in part. *Ostalaza v. People*, 58 V.I. 531, 557 (V.I. 2013). However, "[t]here is a big difference between believing the content of a witness's testimony to be untrue and believing the witness to be lying to exonerate [him]self." *Bassil v. United States*, 147 A.3d 303, 318 (D.C. 2016). But even if we were to determine that the jury could reasonably believe Carty and Spencer were intentionally lying, the issue before this Court is not whether the jury *could* make this finding, but whether that finding, combined with all the other evidence introduced at

trial, was sufficient for the People to prove *beyond a reasonable doubt* that Carty fraudulently attached Schedule A to Miller's 2005 and 2007 agreements.

¶ 100 We agree with the courts that have held such a conclusion impermissible. As the United States Court of Appeals for the District of Columbia Circuit eloquently explained in a case where the only evidence that a defendant possessed cocaine that had been locked in her boyfriend's briefcase would have been if the jury disbelieved her own testimony and determined, based on that testimony alone, that the opposite had occurred:

> Juries in criminal cases, like juries in civil actions, may and should take a witness's demeanor into account. . . . If it made "negative" inferences, these would have supplied enough evidence to convince any rational juror of [the defendant's] guilt beyond a reasonable doubt. Inferring the opposite of what [the defendant] testified—as the government supposes the jury did—would mean that for months [the defendant] had been living full-time with [her boyfriend] in the apartment; that she ventured throughout the apartment; that she saw cocaine and guns in the apartment; that she knew of the laundry room, knew it was locked and knew who had the combination to the lock; and—most important—that she had the combinations to the locks on the briefcase containing the cocaine.
>
> This raises an obvious problem. It is not only impossible to determine whether the jury made all or any of these negative inferences, but also impossible to judge whether it would have been justified in doing so. Jury deliberations are secret. Demeanor evidence is not captured by the transcript; when the witness steps down, it is gone forever. An appellate court cannot evaluate it, and therefore cannot determine how a rational juror might have treated it. The situation would be different if the defendant's testimony, on its face, were utterly inconsistent, incoherent, contradictory or implausible. Then an appellate court would have some assurance that when the defendant said "black" the jury reasonably could have concluded that the truth was "white." [The defendant's] testimony relating to the cocaine in the briefcase was hardly implausible.
>
> Because we cannot evaluate demeanor, a decision along the lines the government proposes would mean that in cases in which defendants testify, the evidence invariably would be sufficient to sustain the conviction. We would in each such case assume the jury correctly evaluated the evidence. In explaining how this could be so in light of the defects in the government's proof, we would reason backwards to the only explanation available—the defendant's demeanor. This sort of approach, beginning with the hypothesis that the jury must have gotten things right, contradicts the reason why appellate courts review convictions for sufficiency of evidence—that juries sometimes get things wrong.
>
> . . . .

> Only speculation supports [the defendant's] conviction. We cannot determine whether [the defendant], by her demeanor on the stand, supplied the evidence needed to support her conviction. It is true that the traditional method of reviewing the sufficiency of evidence in criminal cases itself involves some speculation. We take the evidence in the light most favorable to the government, yet we cannot be sure the jury took it that way. But at least we draw inferences from the record. We do not begin and end on nothing more than a guess about what the jury might have observed at trial. Appellate review of the sufficiency of evidence protects against wrongful convictions. We refuse to destroy the protection in cases in which defendants testify.

Untied States v. Zeigler, 994 F.2d 845, 849-50 (D.C. Cir. 1993) (citing *Jackson*, 443 U.S. at 317). This rule—that inferring the opposite of a witness's testimony can, without more, affirmatively establish one or more elements of a charged offense—has been rejected by virtually every court to consider the question.[8] *See, e.g., Nishikawa v. Dulles*, 356 U.S. 129, 136 (1958) ("Nor can the district judge's disbelief of petitioner's story of his motives and fears fill the evidentiary gap in the Government's case."); *Untied States v. Williams*, 390 F.3d 1319, 1326 (11th Cir. 2004) ("Where some corroborative evidence of guilt exists for the charged offense (as is true in this case) and the defendant takes the stand in her own defense, the Defendant's testimony, denying guilt, may establish, by itself, elements of the offense."); *United States v. Sliker*, 751 F.2d 477, 495 n.11 (2d Cir. 1984) ("The jury may also have been influenced by Carbone's demeanor, which twice led the

[8] In reaching this decision, we do not retreat from the principle that a defendant who testifies in his own defense at trial assumes "the risk that in so doing he will bolster the Government's case enough for it to support a verdict of guilty," such as by providing testimony to support an element of the offense that the prosecution failed to prove during its case-in-chief. *See McGautha v. California*, 402 U.S. 183, 215 (1971) (citing *United States v. Calderon*, 348 U.S. 160, 164 & n.1 (1954)). But this is not what occurred in this case, since Carty did not, through his testimony, provide affirmative evidence in support of an unproven element. Rather, the People contend that the jury can negatively credit Carty's exculpatory testimony to establish the opposite proposition. It is this principle—that the jury could find that Carty surreptitiously added Schedule A to the agreements solely because Carty testified that he had not surreptitiously added Schedule A to the agreements—that we resoundingly reject.

judge to reprimand him. Although it is a legitimate factor for the jury to consider, this could not remedy a deficiency in the Government's proof if one existed.").[9]

¶ 101 In this case, we cannot conclude that the People introduced sufficient evidence to sustain Carty's conviction on Count 44. The People failed to introduce any evidence affirmatively showing that Carty fraudulently attached Schedule A to Miller's 2005 and 2007 agreements. Rather, the entirety of their case is based on nothing more than pure and unadulterated speculation. For the beyond a reasonable doubt standard as elucidated by the United States Supreme Court in *Jackson* to have any meaning, we are compelled to reverse Carty's conviction on this charge.

5. Obtaining Money by False Pretenses

¶ 102 Counts 42 and 43 of the seventh amended information charged Carty with obtaining money by false pretenses in violation of title 14, section 834(2) of the Virgin Islands Code. That statute provides, in pertinent part, that

> Whoever knowingly and designedly, by false or fraudulent representation or pretenses, defrauds any other person of money or property shall—
>
> . . . .
>
> (2) if such property or money was $100 or more in value, be imprisoned not more than 10 years.

In Count 42, the People allege that Carty violated section 834(2) by, while serving as legal counsel and preparing Miller's 2005 employment agreement, "insert[ing] a clause waiving repayment to [the RLSH] of any amounts 'advanced' to Miller, which would include a prior unauthorized

---

[9] We recognize that the United States Court of Appeals for the Eleventh Circuit, in a series of decisions relying on precedents which themselves relied on prior precedents issued before the Supreme Court of the United States decided *Jackson* in 1979, had appeared to adopt a rule that "[a] false explanatory statement may be viewed by a jury as substantive evidence tending to prove guilt." *United States v. Eley*, 723 F.2d 1522, 1525 (11th Cir. 1984) (citing cases from 1946, 1972, and 1978). However, the Eleventh Circuit clarified in *Williams* that it applies this rule only "[w]here some corroborative evidence of guilt exists for the charged offense" besides the negative inference. 390 F.3d at 1326.

$45,000.00 housing 'advance', without the authority to do so and without the knowledge and consent of the [District] Board of Directors." (J.A. 1079.) In Count 43, the People charged Carty with fraudulently adding Schedule A to both the 2005 and 2007 employment agreements "in order to generate additional payments of money to Rodney Miller, Sr. without the authority of law and without the knowledge or consent of the [District] Board of Directors." (*Id.*) Each charge is addressed in turn.

a. Count 42: Waiver of Repayment of Housing Advance

¶ 103 The record reflects that on October 1, 2004, Adams authorized a payment to Miller in "the amount of $45,000 from his housing allowance," noting on the check request voucher that this was authorized pursuant to section 3 of Miller's April 17, 2002 employment agreement. (J.A. 1840-43.) Section 3 provided, in addition to other compensation, that Miller would receive temporary housing upon arrival in St. Thomas for a period not to exceed three months, and thereafter would "receive an annual housing allowance of $20,000 which shall be payable in monthly installments to commence upon the termination of the temporary housing period." (J.A. 1709.)

¶ 104 Although the April 17, 2002 agreement provided that Miller would be employed as Chief Executive Officer for a period of three years commencing on May 13, 2002, and ending on May 13, 2005, the $45,000 one-time advance, when combined with other housing allowance payments Miller received pursuant to the housing allowance provisions of section 3, was three quarters of the total $60,000 he would have been entitled to over that three-year period. Consequently, Miller unquestionably received substantial payments that he was not entitled to receive under section 3 of the contract.

¶ 105 The People, however, do not allege that Carty authorized these excessive housing allowance payments. Nor could they, since the payments were requested by Adams and issued

through checks signed by Miller and Najawicz. Rather, the People contend that Carty violated section 834(2) by inserting a waiver of repayment clause in Miller's 2005 employment agreement.

¶ 106 As a threshold matter, as explained earlier in the context of Count 44, it is a "basic responsibility of contracting parties to review a document before signing it" and fraud based on ignorance of a contract's terms can only be established if the individual signing a contract "did diligently review what he was about to sign, but [had] his diligence thwarted" by some fraudulent act, such as "a quick and undetected switch of documents immediately after his review and prior to his putting pen to paper." *Hetchkop*, 116 F.3d at 34; *see also Love Peace*, 2021 VI 15, ¶14 (contracting parties are obligated to take the reasonable step of reading a contract before signing it). Even if Carty inserted the repayment clause as the People allege, that—without more—cannot establish that Carty engaged in fraud, since Adams, as the contract's signatory, is ultimately responsible for reviewing the contract to ensure that it is consistent with the Board's agreement with Miller.[10]

¶ 107 In any event, the evidence introduced at trial does not even establish that Carty was the source of this language. People's Exhibit 11, which represents an edited draft of Miller's 2005 employment agreement with the sentence "[t]he Employer expressly agrees to waive the repayment of any amounts advanced to Miller prior to the execution of this agreement" highlighted

---

[10] That Carty certified the proposed contract as being legally sufficient is also not evidence that he obtained money by false pretenses in violation of section 834(2). As a threshold matter, there is no indication that the agreement or the waiver of repayment clause was actually unlawful, given that the Board, acting through its Chair, possessed the right to enter into such an agreement with Miller. But even if this were not the case, as explained above in the context of Count 37, for legal advice to rise to the level of being false or fraudulent, it is not enough for the lawyer to simply be incorrect. This is because "[t]he law is an art as well as a science," and it is expected that "[n]o two [lawyers] can be exactly alike in the practice of the profession" and may reach different legal conclusions when presented with the same set of facts. *Williams v. Beto*, 354 F.2d 698, 706 (5th Cir. 1965).

as one of many changes, J.A. 1721, does not expressly identify who made the change. However, the email to which the document was attached is from Spencer to Miller and Carty stating that the document is for their "review and comments." (J.A. 1717.) Moreover, when presented with Exhibit 11 at trial, Spencer testified that it was "[a] document that I made corrections to," and when asked by People what, if any, involvement she had in the creation of the document, she testified that she "prepared this document." While Spencer had been employed as Carty's assistant, the record contains no evidence that Carty directed Spencer to include this language in the agreement, and no evidence that otherwise contradicts her testimony that she prepared the document and had made the corrections to it. On the contrary, the only evidence introduced at trial established that the idea to waive repayment of Miller's housing advance did not originate from Carty, but from Najawicz in a February 23, 2006 email exchange, where Najawicz tells Carty that he wishes to "forgive" a $45,500 housing allowance to Miller to get it "off the books" and asks Carty for language to effectuate that intent, to which Carty suggested that the housing advance be "waived." (Appellee's Br. 26.) And although this language was ultimately incorporated into the final agreement, Carty did not sign the agreement as a party to the contract, or attest that the contract reflected the actual agreement of both parties. Rather, he signed it only to indicate that he approved the agreement for legal sufficiency. Section 834, by its own terms, requires that the defendant act "knowingly and designedly, by false or fraudulent representation or pretenses," and the evidence introduced at trial does not in any way support a finding that Carty did so. Thus, we reverse his conviction on Count 42.

b. Count 43: Insertion of Schedule A

¶ 108 The People alleged in Count 43 of the seventh amended information that Carty fraudulently added Schedule A to Miller's 2005 and 2007 employment agreements. But as extensively

analyzed earlier in the context of Count 44, which charged Carty with fraudulently attaching Schedule A to those same agreements in violation of title 14, section 1089 of the Virgin Islands Code, the People failed to introduce sufficient evidence to prove that Carty engaged in this conduct. Therefore, we reverse the conviction under Count 43 for the same reasons that we reverse the conviction under Count 44.

6. Criminally Influenced and Corrupt Organizations Act

¶ 109 In Count 36, the People charged Carty with violating title 14, section 605(a) of the Virgin Islands Code, the Criminally Influenced and Corrupt Organizations Act ("CICO"). "Pursuant to CICO, '[i]t is unlawful for any person employed by, or associated with, any enterprise . . . to conduct or participate in, directly or indirectly, the affairs of the enterprise through a pattern of criminal activity.'" *Gumbs v. People*, 59 V.I. 784, 788 (V.I. 2013) (quoting 14 V.I.C. § 605(a)). CICO defines "criminal activity" as

> engaging in, attempting to engage in, conspiring to engage in, or soliciting, coercing, or intimidating another person to engage in the crimes, offenses, violations or the prohibited conduct as variously described in the laws governing this jurisdiction including any Federal criminal law, the violation of which is a felony and, in addition, those crimes, offenses, violations or prohibited conduct as found in the Virgin Islands Code as follows:
>
> . . . .
>
> (16) Title 14, chapter 41, Virgin Islands Code, relating to fraud and false statements;
>
> . . . .
>
> (19) Title 14, chapter 55, Virgin Islands Code, relating to larceny and embezzlement;
>
> . . . .
>
> (38) Any conspiracy to commit any violation of the laws of this Territory relating to the crimes specifically enumerated above.

14 V.I.C. § 604(e). "And CICO further defines a 'pattern of criminal activity' as 'two or more occasions of conduct (1) that (A) constitute criminal activity; (B) are related to the affairs of the enterprise; and (C) are not isolated; and (2) where . . . at least one of the occasions of conduct

constituted a felony under the Virgin Islands Code. . . .'" *Gumbs*, 59 V.I. at 788 (quoting 14 V.I.C. § 604(j)).

¶ 110 In this case, the seventh amended information identified the RLSH as the enterprise, and Carty does not dispute that characterization. Rather, he maintains that the People failed to introduce sufficient evidence to prove that he engaged in a pattern of criminal activity. The seventh amended information alleged that the following acts constituted the pattern of criminal activity Carty engaged in:

> a. Defendant obtained or appropriated numerous payments or wire transfers of funds, for thousands of dollars each from RLSH bank accounts to his personal bank accounts above his payroll (NOPA) salary, on the pretext of so-called "stipends" or "bonuses" which he arranged with Peter Najawciz or Rodney Miller, Sr., which he unlawfully collected and secreted in gross payments outside of the government employee payroll process without authority of law or without substantiation or regard to its legality or correctness and contrary to the due and lawful execution of his trust to RLSH;
>
> b. Defendant on two or more occasions, circumvented the government employee payroll process and repeatedly endorsed or approved without authority of law, electronic transfers of money in gross payments over $100 each, from the RLSH bank account to the personal bank accounts of Defendant Rodney Miller, Sr., or Defendant Peter Najawciz, under the guise of employee compensation or so called "stipends", salaries, or "bonuses", or other perks arranged with Miller or Najawicz, without legal authority, without any substantiation or regard to the legality or correction of such payments, and contrary to the due and lawful execution of his trust to RLSH;
>
> c. Between August 3, 2005 and May 24, 2006 Defendant, without authority of law, endorsed or approved payments to the RLSH CEO Rodney Miller, Sr., in four wire transfers of money each in excess of $100, from the RLSH hospital Scotia Bank account to Miller's personal account, totaling $409,788.46, under the false pretense of a "June 21, 2005 employment agreement" which did not exist or without any supporting documentation justifying said payment of RLSH funds, contrary to the due and lawful execution of his trust to RLSH;
>
> d. Defendant fraudulently endorsed and approved payments totaling over 1.5 million dollars cash to Rodney Miller from RLSH bank accounts in several electronic transfers, between May 2007 through November 2007, without authority of law, under the false pretense of monies owed, without any lawful substantiation

> or regard to the legality or correctness of each payments, without the knowledge and consent of the RLSH Board of Directors and contrary to the due and lawful execution of his trust to RLSH.

(J.A. 1074-76.)

¶ 111 Before proceeding to the merits, we note that it is impossible to determine what acts the jury found constituted the pattern of criminal activity required under the CICO statute. During final jury instructions on the CICO charge, the Superior Court did not provide the jury with the elements of the predicate offenses. This, standing alone, is permissible, for "a trial court may 'charge a predicate [CICO] offense by a generic description rather than giving the jury the elements in full,' even though fully setting forth the elements 'is the best practice.'" *Gumbs*, 59 V.I. at 790 n.2 (quoting *United States v. Carrillo*, 229 F.3d 177 (2d Cir. 2000)). But in this case the seventh amended information never expressly stated which provisions of federal or Virgin Islands law were violated, and the Superior Court did not even provide a generic description of the elements of the predicate offenses. Rather, the Superior Court simply read the language from the seventh amended information nearly verbatim. This is problematic since many of the acts identified could potentially violate more than one of the laws identified in the CICO statute.

¶ 112 More significant, however, is that we do not know which of the numerous acts set forth in Count 36 the jury determined constituted a pattern of criminal activity. Although the Superior Court stated in its preliminary jury instructions at the start of trial on October 9, 2019, that a pattern of criminal activity is two or more occasions of conduct that constitutes criminal activity under the CICO statute, it failed to include this instruction in its final instructions to the jury on November 13, 2019. But even if we were to make the highly unlikely assumption that the jury remembered the definition of pattern of criminal activity more than a month later and applied it despite its omission from the final jury instructions, the jury was not required to list in its verdict form which

of the conduct charged in the seventh amended information constituted criminal activity and which—if any—did not. Because "the [information] was sufficiently broad and the evidence sufficiently complex as to create a risk that different jurors voted to convict on the basis of different facts establishing different offenses," the failure of the Superior Court to properly instruct the jury and direct them to identify the underlying acts that constituted the pattern of criminal activity " creates an extraordinarily high likelihood that the jury did not issue a unanimous verdict on this charge. *United States v. Lapier*, 796 F.3d 1090, 1097 (9th Cir. 2015).

¶ 113 Nevertheless, it is not necessary for us to divine whether the jury unanimously agreed on the pattern of criminal activity element because the core premise of most of the acts—that RLSH funds were distributed without authority of law—is incorrect as a matter of law. While Counts 37(a) and (b) allege that Carty was without authority to obtain stipends or bonuses more than his NOPA salary, or to endorse such payments to Miller or Najawicz for stipends and bonuses, such payments were authorized, for the reasons set forth above in the discussion of Counts 38 and 39. Although Count 37(c) alleges that payments made to Miller were illegal because the June 21, 2005 employment agreement did not exist, the evidence established that such an agreement did in fact exist and was authorized by law, for the reasons set forth in the discussion of Count 37. And while Count 37(d) alleges that payments to Miller were made between May 2007 and November 2007 without authority of law, for the reasons explained in the discussion of Count 41, the People failed to prove any of the other elements of embezzlement, specifically, that Carty had actually appropriated these funds. Consequently, the People failed to introduce sufficient evidence that Carty engaged in a pattern of criminal activity—or any criminal activity for that matter—in violation of CICO. Accordingly, we reverse his conviction on Count 36.

7. Conspiracy

¶ 114 In Count 2, the People charged Carty with conspiracy in violation of title 14, section 551(1) of the Virgin Islands Code. Specifically, Count 2 alleged that Carty conspired with Miller and Najawicz

> to commit crimes of embezzlement by conspiring to appropriate thousands of dollars from RLSH bank accounts to their own use and benefit, without authority of law or not in the due and lawful execution of their trust. To wit: through agreements, arrangements and authorizations made with one another, without authority of law, Defendants circumvented the government employee payroll process and disbursed thousands of dollars of RLSH money in gross payments to themselves or to one another from RLSH bank accounts to their personal bank accounts, apart from their authorized (NOPA) compensation, without authority of law or without regard to their legality or correctness of payments, and contrary to the due and lawful execution of their trust to RLSH.

(J.A. 1053.)

¶ 115 "[T]he essential elements for a section 551 conspiracy are an agreement and an overt act done in furtherance of the conspiracy." *Francis v. People*, 52 V.I. 381, 389 (V.I. 2009). While the People may use circumstantial evidence to satisfy these elements, "[t]his circumstantial evidence must be sufficient to create a reasonable and logical inference that the activities of the participants could not have been carried on except as the result of a preconceived scheme or common understanding." *Id.* (internal citations and quotation marks omitted). And while not binding on this Court, the Supreme Court of the United States, in construing a federal conspiracy statute containing similar language, persuasively held that "[t]he overt act . . . may be that of only a single one of the conspirators and need not be itself a crime." *Braverman v. United States*, 317 U.S. 49, 52 (1942). Because the overt act is an element of the offense and need not be a criminal act, we agree that an information which charges a violation of section 551 must specify both the crime and the overt act, so as to meaningfully apprise the defendant of the factual predicate of the

offense. *Bigby v. Gov't of the V.I.*, 125 F.Supp.2d 709, 712-13, 716-17 (D.V.I. App. Div. 2000). *See also* V.I. R. CRIM. P. 3(a)-(b).

¶ 116 As a threshold matter, we again note the extraordinarily high risk that the jury rendered a non-unanimous verdict on this charge. The crime that is the subject of the conspiracy is only referred to as "embezzlement" despite the three defendants having been charged with embezzlement under different statutes. And while Count 2 appears to identify "circumvent[ing] the government employee payroll process" as the overt act, J.A. 1053, the theory of the case presented by the People had been that this had occurred in different ways by the conduct of different defendants over the course of approximately six years. While it is certainly permissible for the People to charge the defendants in such a manner, the Superior Court only instructed the jury that "[y]our verdict must represent the collective judgment of the jury, and in order to return a verdict, each juror must agree," and that "your verdict must be unanimous." Such an instruction, however, is insufficient in a case where the People present multiple theories of liability to support the same charge, in that it gives no indication to the jury that they were required to unanimously agree on the facts that support its verdict, as opposed to only unanimously agreeing only on the verdict. *United States v. Holley*, 942 F.2d 916, 926 (5th Cir. 1991). And while the Superior Court did instruct the jury, in the context of the conspiracy charge, that "[y]ou must unanimously agree on the overt act that was committed," it failed to extend that instruction to cover all the elements of conspiracy and did not give such an instruction for any other charge. This makes it effectively impossible for this Court to review the sufficiency of the evidence with respect to those elements since there is no way to determine what the jury actually found. *See, e.g., United States v. Gaddy*, 174 Fed.Appx. 123, 125 (3d Cir. 2006); *United States v. Sayan*, 968 F.2d 55, 65 (D.C. Cir. 1992); *United States v. Sanderson*, 966 F.2d 184, 187 (6th Cir. 1992); *United States v. Gilley*, 836 F.2d

1206, 1211 (9th Cir. 1988).

¶ 117 Despite the inability of this Court to meaningfully review the sufficiency of the evidence on those elements, we nevertheless reverse the conspiracy conviction. As explained earlier, it is not illegal for a RLSH employee to receive compensation that exceeds that listed on the NOPA form maintained by the Executive Branch. Rather, Virgin Islands law permits employees of the RLSH and other hospitals under the control of the Corporation to receive compensation—including compensation in the form of stipends and bonuses—from accounts maintained by the Corporation, regardless of whether such compensation exceeds the salary listed on the NOPA form. Thus virtually all of the conduct alleged in Count 2 does not constitute a crime at all, whether by Carty, Miller, or Najawicz.

¶ 118 We recognize, however, there were at least a few transactions which did constitute a crime. For the reasons explained earlier in this opinion, Miller was not entitled to receive many of the payments that were made to him by Najawicz between May 17, 2007, and November 30, 2007. But as also explained earlier, there is no evidence that Carty was a part of that conspiracy. This is significant because the seventh amended information charged an all-encompassing large conspiracy involving all three defendants. Both this Court and the federal courts have recognized that proof of smaller conspiracies involving some, but not all, of the same actors is not sufficient to establish a single, large conspiracy between all the actors when the defendants had been charged only with the latter and not the former. *See Duggins v. People*, 56 V.I. 295, 309-10 (V.I. 2012); *Kotteakos v. United States*, 328 U.S. 750, 765 (1946); *United States v. Perez*, 28 F.3d 318, 345 (3d Cir.2002). As the United States Supreme Court eloquently explained,

> Numbers are vitally important in trial, especially in criminal matters. Guilt with us remains individual and personal, even as respects conspiracies. It is not a matter of mass application. There are times when of necessity, because of the nature

> and scope of the particular federation, large numbers of persons taking part must be tried together or perhaps not at all, at any rate as respects some. When many conspire, they invite mass trial by their conduct. Even so, the proceedings are exceptional to our tradition and call for use of every safeguard to individualize each defendant in his relation to the mass. Wholly different is it with those who join together with only a few, though many others may be doing the same and though some of them may line up with more than one group.
>
> Criminal they may be, but it is not the criminality of mass conspiracy. They do not invite mass trial by their conduct. Nor does our system tolerate it. That way lies the drift toward totalitarian institutions. True, this may be inconvenient for prosecution. But our Government is not one of mere convenience or efficiency. It too has a stake, with every citizen, in his being afforded our historic individual protections, including those surrounding criminal trials. About them we dare not become careless or complacent when that fashion has become rampant over the earth.

Kotteakos, 328 U.S. at 773.

¶ 119 Here, there may be evidence, that, if credited by the jury, could arguably support a finding that Miller and Najawicz conspired with each other with respect to the unlawful 2007 disbursements. But the record, however, contains absolutely no evidence that Carty was a part of that conspiracy. The evidence, when viewed in the light most favorable to the People, established that Najawicz gave Adams the unsigned May 16, 2007 letter and asked her to sign it; that Miller drafted and signed letters to Najawicz requesting payments; that Najawicz disbursed the funds; and that Miller awarded Najawicz a bonus two and a half months before it was due shortly after Najawicz made the first transfer. In fact, there is no evidence that Carty had even been aware that Miller and Najawicz were engaging in embezzlement, let alone that Carty conspired with them to facilitate it.

¶ 120 It is important to emphasize again that although the People may use circumstantial evidence to satisfy the elements of conspiracy, "[t]his circumstantial evidence must be sufficient to create a reasonable and logical inference that the activities of the participants could not have been carried on except as the result of a preconceived scheme or common understanding." *Francis*, 52 V.I. at

389. While Carty initialed Miller's letters to Najawicz, it is uncontested that the purpose of his initials was to indicate that he had reviewed the request for legal sufficiency. Carty lacked disbursement authority, did not actually disburse any funds, and his approval was in no way required by law or the RLSH bylaws as a prerequisite to such payments. While it is certainly arguable that granting the imprimatur of legal sufficiency could in some way make the transactions appear legitimate or permissible, the record contains absolutely no evidence that Carty knew the transactions were illegal yet indicated that they were legal anyway, or that he otherwise did not discharge his duties as General Counsel in good faith. And although Carty testified that Miller offered him a loan from his personal funds in September 2007 to pay outstanding tax obligations, which he ultimately accepted, as part of this same testimony Carty explained that the loan was proposed in a meeting where Miller told him that he would be resigning as Chief Executive Officer and urged Carty to succeed him, with Carty concerned that his outstanding tax obligations might "create an issue." Importantly, evidence was introduced at trial of the close personal relationship between Miller and Carty, including Carty naming Miller as the godfather to his child. Given this relationship, as well as the fact that the loan was offered more than a month after the transaction in question, this Court cannot say—without more—that the jury could have reasonably and logically inferred that Carty's activities "could not have been carried on except as the result of a preconceived scheme or common understanding" to embezzle funds from the RLSH.[11] *Francis*, 52 V.I. at 389. Consequently, because the People failed to prove a conspiracy between Carty,

[11] We recognize, of course, that Miller may not have had the financial means to offer such a loan had these funds not been disbursed to him. We emphasize, however, that our inquiry focuses not on Miller's intent or conduct, but that of Carty, and the record contains absolutely no evidence to indicate that Carty assisted Miller in receiving these funds for the purposes of Miller using them to offer him a loan.

Miller, and Najawicz, we reverse the conspiracy conviction.

8. Dismissed Convictions

¶ 121 In its January 9, 2020 judgment and commitment, the Superior Court dismissed two of Carty's convictions pursuant to title 14, section 104 of the Virgin Islands Code. This statute provides, in its entirety, that

> An act or omission which is made punishable in different ways by different provision of this Code may be punished under any such provisions, but in no case may it be punished under more than one. An acquittal or conviction and sentence under any one bars a prosecution for the same act or omission under any other.

Although the jury had convicted Carty of Count One (CICO) and Count Forty-Four (embezzlement by public and private officers), the Superior Court dismissed those convictions pursuant to section 104 in accordance with this Court's decision in *Titre v. People*, 70 V.I. 797, 809 (V.I. 2019), which overruled prior case law mandating a merger-and-stay remedy and instead adopted the vacatur approach adopted by the Supreme Court of the United States in *Rutledge v. United States*, 517 U.S. 292 (1996) as the remedy for multiple convictions imposed in violation of the Double Jeopardy Clause.

¶ 122 We have previously held, under the former merger-and-stay procedure, that "if the conviction for the offense being punished was reversed on appeal or vacated in a habeas corpus proceeding, the defendant would be returned to the sentencing court so that punishment for a conviction previously stayed would be imposed." *Williams v. People*, 56 V.I. 821, 834 n.9 (V.I. 2012). However, we have not had the occasion to consider what should transpire to convictions dismissed under section 104 pursuant to the vacatur remedy.

¶ 123 Nevertheless, we are not without guidance. The United States Supreme Court in *Rutledge* endorsed the practice of "direct[ing] the entry of judgment for a [vacated] lesser included offense

when a conviction for a greater offense is reversed on grounds that affect only the greater offense." 517 U.S. at 306. This rule does not completely translate to the section 104 context since the statute "provides greater protections than the Double Jeopardy Clause of the United States Constitution" in that the focus is not on commonality of elements but whether the offenses arose from "an indivisible course of conduct." *Rawlins v. People*, 58 V.I. 261, 276 (V.I. 2013). Thus, as this very case demonstrates, section 104 will often require the vacatur of convictions that are not lesser-included offenses of a greater offense, simply because they all arose from the same act or omission. Yet despite this important difference, the same principle can easily be applied; that is, a conviction vacated under section 104 can be reinstated if the conviction that had been preserved by the Superior Court was reversed on grounds that affect only that offense. Adopting this rule would be consistent with the reason this Court abandoned the merger-and-stay procedure in favor of the vacatur approach: establishing uniformity between the remedies for violations of section 104 and the Double Jeopardy Clause. *Titre*, 70 V.I. at 809.

¶ 124 As the United States Supreme Court indicated in *Rutledge*, the power to reinstate a vacated conviction in such a manner belongs to the appellate court rather than the trial court. 517 U.S. at 306. For this reason, it is of no consequence that Carty did not expressly challenge the sufficiency of the evidence on Count 1 and Count 44 in his appellate brief. Not only would it be inconsistent with well-established appellate practice to mandate that Carty brief the sufficiency of the evidence of convictions that were dismissed and are not subject to a cross-appeal by the People, but the inquiry for this Court is ultimately a very simple one: do Count 1 and Count 44 fail for the same reasons as the other counts?

¶ 125 The answer is yes. Count 1 charged Carty for violating CICO based on entirely the same acts that were the subject of his other convictions. Likewise, Count 44 charged Carty with

embezzlement based solely on him purportedly fraudulently attaching Schedule A to Miller's 2005 and 2007 employment agreements. Consequently, we decline to reinstate Carty's convictions for Count 1 and Count 44, even though they had been dismissed by the Superior Court pursuant to section 104 rather than on the merits, since they suffer from the same infirmity as Carty's other convictions.

III. CONCLUSION

¶ 126 The People failed to introduce sufficient evidence to convict Carty of any of the offenses with which he was charged in the seventh amended information. Accordingly, we reverse the January 9, 2020 judgment and commitment, along with the accompanying January 2, 2020 special verdict and order of forfeiture, in their entirety, and direct the Superior Court on remand to enter a judgment of acquittal on all counts.

Dated this 24th day of February, 2022.

BY THE COURT:

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

ATTEST:

VERONICA J. HANDY, ESQ.
Clerk of the Court

By: _____
Deputy Clerk

Dated: 2/24/2022