

YOUTH JUSTICE COURT OF NOVA SCOTIA

Citation: *R v. K.W.*, 2019 NSPC 6

Date: 2019-01-18

Docket: 8119274

Registry: Halifax

Between:

Her Majesty the Queen

v.

K.W.

RESTRICTION ON PUBLICATION:

**section 110 YCJA - Identity of Young Person and section 111 – Identity of
Victim or Witness**

DECISION TRIAL

Judge: The Honourable Judge Elizabeth Buckle

Heard: September 4, 5, 6, 10, 11, 12, 13, 14, 17, 18, 19, 20, 21,
October 24, 25, 2018 in Halifax, Nova Scotia

Decision: January 18, 2019

Charge: Section 235(1) Criminal Code

Counsel: Jamie VanWart, Steven Degen, for the Crown
Brandon Rolle, Josh Bearden, for the Defence

By the Court:

Overview

[1] On the evening of June 6, 2017, Chelsie Probert was stabbed while walking down a footpath in Dartmouth. A short while later, she died from her injuries.

[2] K.W. was charged with her murder. At trial, Rory Taylor was the Crown's main witness and K.W. testified in his own defence. Both testified that they were together that evening and met Chelsea Probert on the path. Each testified that the other, armed with two weapons, attempted to rob Ms. Probert and attacked her after she refused to surrender her belongings.

[3] The ultimate issue in this case is whether the Crown has proven beyond a reasonable doubt that K.W. stabbed Chelsie Probert to death. Only K.W. and Mr. Taylor were present when she was killed, so my decision turns on their credibility. However, deciding whether K.W. is guilty is not about simply picking whether I prefer the evidence of K.W. or Mr. Taylor. The presumption of innocence and the burden on the Crown to prove the case beyond a reasonable doubt means that I can only convict K.W. of murder if I reject his denial and am persuaded beyond a reasonable doubt by the Crown's evidence, specifically, Mr. Taylor's evidence.

[4] If I am not persuaded that K.W. is the person who stabbed Chelsie Probert, I must decide whether his proven involvement is sufficient to convict him of manslaughter. That will require me to decide whether he is a party to attempted robbery and whether bodily harm was reasonably foreseeable in all the circumstances.

[5] There are fundamental principles that apply to every criminal trial:

1. K.W. is presumed to be innocent of these charges. He remains innocent unless and until the Crown can prove each and every element of the offence beyond a reasonable doubt;
2. Proof beyond a reasonable doubt is a high standard. It requires more than just a preference for the Crown's evidence over the defence's, it is more than suspicion of guilt or probable guilt. It is not proof to an absolute certainty but falls much closer to absolute certainty than to proof on a balance of probabilities. It is not proof beyond any doubt or an imaginary or frivolous doubt. It is doubt based on reason and common sense, and not on sympathy or prejudice. (*R. v. Starr*, [2000] S.C.J. No. 40. *R. v. Lifchus*, [1997] 3 S.C.R. 320.).

[6] The trial proceeded over 13 days but in advance of the trial, Crown and defence counsel clearly spent a considerable amount of time preparing. Their hard work resulted in agreements that significantly shortened the trial and allowed me to focus on what was truly in issue. As I said, Mr. Taylor and K.W. were the only direct witnesses to the killing of Ms. Probert. However, testimony from the other witnesses, surveillance videos, information from cell phones, and physical evidence all shed light on the circumstances surrounding her death and assisted me in assessing the credibility of Mr. Taylor and K.W. Unfortunately, B.B., who was with Mr. Taylor and K.W. up until about 20 minutes before Ms. Probert was killed, did not testify.

Evidence

[7] As of June 6, 2017, K.W. was three months past his 16th birthday. He had completed grade nine and part of grade 10 but was not in school or working. He testified that he has some mental health issues relating to anxiety and obsessive-compulsive tendencies. At the time, he and B.B., who was also 16, were close friends and he and Mr. Taylor were regularly hanging out.

[8] When they'd been together before that night, they had smoked marijuana and drank alcohol but had not been involved in any other criminal activity and K.W. wasn't aware of Mr. Taylor being involved in criminal activity with others except perhaps selling marijuana.

[9] Mr. Taylor was 19 years old. He was in the process of finishing his last credit needed to graduate from high school and was working.

[10] Neither of them had a prior criminal or youth court record.

General Narrative and Timeline for Evening of June 6, 2017

[11] An objective timeline for the evening of June 6th, 2017 is available from video surveillance and information from cellular devices. The times reflected in some of the video surveillance were found to be inaccurate but have been adjusted by the appropriate factor (Statement of Admitted Facts, Exhibit 1). In this decision, I will refer only to the adjusted times. Mr. Taylor and K.W. agree that during the evening of June 6th, they drank alcohol, smoked some marijuana, went out with weapons and pursued or confronted four people, including Chelsie Probert. They each claim that the other was the leader or driving force behind this activity and disagree on many of the details of the evening. Most significantly,

their evidence about who confronted and killed Chelsie Probert is diametrically opposed.

[12] Mr. Taylor, B.B. and K.W. decided to hang out on June 6th. Mr. Taylor took the bus to Northend Dartmouth and the three met at around 5:30 p.m. Mr. Taylor went to the liquor store and then they all went to Sobeys and then to K.W.'s apartment on [street name removed in electronic version]. K.W. lived there with his mother but she was in hospital at the time.

Events at the Apartment

[13] While at the apartment, they ate and drank some Fireball whiskey that Mr. Taylor had purchased. K.W. testified that he didn't like Fireball and didn't want to drink it, but Mr. Taylor called him a pussy, so he drank some. Mr. Taylor says K.W. happily drank the Fireball. K.W. testified that Mr. Taylor had brought marijuana with him, a pre-rolled joint and some loose marijuana, and while at the apartment, they smoked the pre-rolled joint. Mr. Taylor denies that he had any marijuana with him. He said that he intended to bring some but left it at home or lost it.

[14] K.W. testified that at some point, he went to the bathroom and when he returned, he saw a kitchen knife and a tire reamer (a device with a corkscrew shaped metal prong and a black handle which he referred to as a "corkscrew", Exhibit 25) on the coffee table. He believed Mr. Taylor must have gotten the kitchen knife from a drawer and the tire reamer from his bedroom. He said the tire reamer was normally kept in a drawer under his bed along with other miscellaneous items but must have been left out when he was taking things out

earlier in the day to get dressed. He explained that Mr. Taylor might have seen it there when he was showing him the apartment when they first arrived.

[15] Mr. Taylor denied taking the weapons out and testified that K.W. was showing them off. He said K.W. had the tire reamer in his pocket and took it out to show them and got a knife with a blade approximately 8" long from the kitchen. When Mr. Taylor was asked what the context was for this, he responded that there was no context, it was "just his nature", he just liked to show his weapons.

Origin of the Tire Reamer

[16] K.W. testified that he had acquired the tire reamer from Dawson Sproule. Mr. Sproule had given him a bookbag and the tire reamer was in it. He told Mr. Sproule it was there and offered to pay for it, but he wouldn't take money. He said he used the tire reamer to remove/replace the pegs from his BMX bike. He denied that he had purchased it as a weapon.

[17] Mr. Sproule confirmed that K.W. had acquired the tire reamer from him. He believed this occurred in the spring or early summer of 2017. He candidly acknowledged that at that time he was a heavy drug user, including using Xanax every day. He said Xanax impacted his memory and his ability to recall events in a coherent order. He testified that K.W. had wanted something to use for protection so he provided him with the tire reamer. In his direct testimony, he said he'd sold it to K.W. for either a small amount of money or marijuana. In cross-examination, he recalled that he'd been living at a shelter and received five bookbags for free. He gave one to K.W. He did not believe that the tire reamer would have been in the bag when he gave it to K.W. or that K.W. came back later to ask if he wanted

money for it. He recalled it as a single transaction but agreed it was possible that he had not taken money for it.

The Video Chat with Derek Amero

[18] Between 7:30 p.m. and 7:51 p.m., while at K.W.'s apartment, Mr. Taylor had two video-chats with Derek Amero. K.W. and Mr. Amero testified that during these chats, Mr. Taylor and Mr. Amero were discussing doing frauds, that Mr. Taylor showed Mr. Amero weapons (a corkscrew like item, a kitchen knife and a folding knife) and Mr. Amero showed him a machete. Mr. Amero also testified that Mr. Taylor was talking about "car hopping" and doing robberies that night and was bossing the kids around, telling them to "pass the fucking joint". K.W. testified that during this call, Mr. Amero and Mr. Taylor discussed the possibility of Mr. Taylor buying a converter kit for a gun from Mr. Amero. Mr. Taylor denied much of this and testified that Mr. Amero had been trying to get him to cash cheques for him.

The Decision to Go Out to the Woods

[19] Over the course of the evening, Mr. Taylor, B.B. and K.W. decided to go out to the woods. K.W. testified their intent was to light a bonfire. Mr. Taylor testified that he originally thought they were going to stay in and play video games but K.W. had a plan of robbing and scaring people with weapons and recruited him and B.B. to go along. Before they went out, K.W. changed out of a red Jordan sweater and red hat he'd been wearing into a black puffy jacket and black hat and B.B., who had been wearing shorts, put pants on. Mr. Taylor was wearing a black Adidas track suit with white stripes and Adidas shoes. The three of them left the apartment and had weapons with them. Mr. Taylor had an orange-handled knife

with a curved blade (Exhibit 24) that he testified he carried for self-protection. Two other weapons, the tire reamer and a black handled kitchen knife with a straight blade, were put in B.B.'s book bag. Mr. Taylor testified that taking the weapons was K.W.'s idea to scare people and K.W. testified it was Mr. Taylor's idea to use the knife to cut branches for the fire and to use the tire reamer in case anyone bothered them.

The Bandanas

[20] It is clear from what happened later that K.W. and Mr. Taylor both had bandanas with them when they went out. K.W. testified that he always carried a blue bandana with him out of respect for his cousin who had always carried one and who had protected him from bullies when he was younger. K.W. testified that he and Mr. Taylor covered their faces with the bandanas when approaching people that evening.

[21] Mr. Taylor did not mention the bandanas in his direct testimony at all and did not say where his came from or why he had it. In cross-examination he said he could not recall whether he'd had it up when approaching people but acknowledged that he'd been wearing one when he posed for a snapchat picture that evening. K.W. testified that he had given Mr. Taylor a bandana a few days earlier but could not say if this was the one Mr. Taylor used on the 6th.

Lawtons, the Bonfire and the Aborted Pursuits/Confrontations

[22] At 8:06 p.m., the three of them went to Lawtons drug store on Primrose Street to buy batteries for a flashlight. In the Lawtons video, they are wearing dark clothing, dark peaked caps and have their hoods up.

[23] K.W. and Mr. Taylor disagree on the sequence of events immediately after they left Lawtons. K.W. testified that they went to the bleachers near John Martin School and then into the woods where they lit a fire. Mr. Taylor testified that they first went into the woods and lit a fire and then went to the bleachers. One of them is mistaken or purposefully not telling the truth. Normally, a mistake about this would not be a significant factor in assessing their credibility but it becomes significant here because of their evidence about what happened while they were at the bleachers and how each version fits with the objective evidence from photographs and video surveillance.

[24] They agree that while at the bleachers, they smoked from K.W.'s pipe. K.W. says they were smoking loose marijuana that Mr. Taylor had brought. Mr. Taylor says they were smoking oil or residue that was left in K.W.'s pipe.

[25] They also agree that one of them followed a man but discontinued the pursuit before there was a confrontation. Each says the other was the person who did this.

[26] Photos and video of the fire on Mr. Taylor's phone show that they were at the fire at 8:31 p.m. (Exhibit 29). Video surveillance from the Dartmouth North Community Centre shows them walking past John Martin School toward the community centre at 9:05 pm and returning at 9: 15 pm. They are walking relatively quickly and K.W. is ahead of the other two.

[27] Mr. Taylor says that the video from the community centre is from when K.W. was pursuing the man they saw when sitting on the bleachers. He says that K.W. can be seen walking ahead because he had followed the man and the other

two were trying to catch up. The surveillance that was presented in evidence doesn't show a man.

[28] K.W. testified that while at the fire, B.B. became ill and they left to go up to the Community Centre to get him water. He says that the community centre video is from when they went to get the water. Mr. Taylor says that B.B. did not get sick and they did not go to get water.

[29] After they are seen on the video at 9:15 p.m., they crossed a pedway and ended up near an apartment complex on Trinity Avenue. K.W. testified that Mr. Taylor used the orange handled knife and the kitchen knife to try to cut a screen on a window there. He said that when he and B.B. walked away, Mr. Taylor again called him a pussy. Mr. Taylor says that B.B. was the one who removed the screen.

[30] They then walked to Farrell Street and ended up in the area of a paved footpath that runs parallel to Clarence Street, from Farrell Street to Albro Lake Road ("the Path"). In June of 2017, portions of the Path went through wooded areas and in places there were smaller dirt paths that lead into the woods and to the backyards, houses and street behind.

[31] Mr. Taylor testified that K.W. said this would be a good place to scare people. As they approached the Path, they saw a man. K.W. put his bandana over his face, approached him with the tire reamer and kitchen knife in his hands and asked for his stuff. The man said he didn't have anything and K.W. let him leave. K.W. says he didn't want to do this, but Mr. Taylor took the weapons out and pressured him. Mr. Taylor says that it was K.W.'s idea and he was surprised by it.

[32] Around 9:40 p.m., B.B. left because he had to be home for 10:00 p.m. curfew. Mr. Taylor and K.W. stayed in the area of the Path. K.W. said they went off the main Path into a clearing in the woods and smoked more of the marijuana that Mr. Taylor had brought. He put the weapons on the ground and told Mr. Taylor he wasn't having any more to do with it. He said they were in there when they heard loud music and saw a man on the Path carrying a pizza box. Mr. Taylor said they went into the woods off the path because he wanted to de-escalate things and with the intention of smoking marijuana he thought he'd brought but he couldn't find it and figured he'd left it at home or lost it. They then left the woods and were standing on or near the Path when they saw the man carrying the pizza box.

[33] K.W. testified that it was Mr. Taylor who took the weapons and ran after this man. Mr. Taylor said it was K.W. The man with the pizza box, with K.W. and Mr. Taylor behind, were seen at the Farrell Street end of the Path by Marshal Rising and Sarah MacDonald. Mr. Rising testified he saw two people and identified the taller person as Jesse Pallaser. Mr. Rising is clearly mistaken about this. Video surveillance confirms that at the time, Mr. Pallaser was elsewhere and the evidence of both Mr. Taylor and K.W. about their interactions with the man carrying the pizza confirm that they were the two individuals Mr. Rising saw. Mr. Rising and Ms. MacDonald had gotten off the bus at the Farrell/Victoria street stop at 9:42 pm and were walking down Farrell Street (bus 1149 Victoria, Exhibit 4, tab 5).

Chelsie Probert's Movements

[34] Chelsie Probert and Jesse Pallaser had been communicating by text message and made plans for her to visit him at his residence. Mr. Pallaser was living on Clarence Street, near the Path. They agreed that she would take the bus and he would meet her at the bus stop. Ms. Probert got off the bus at the Farrell Street/Victoria Road stop at 9:45 p.m. (Video surveillance, Bus 1201, Exhibit 4, Tab 5). Unfortunately, Mr. Pallaser went to the wrong bus stop to meet her. When she wasn't there, he texted to ask where she was and realized he'd gone to the wrong stop. Apparently, Ms. Probert started to walk. At 9:49, she responded to a message from Mr. Pallaser. That was the last outgoing message on her phone. After that message, Mr. Pallaser sent her repeated messages asking where she was and if she was ok, but she didn't respond.

The Attack of Chelsie Probert and Immediate Aftermath

[35] K.W. testified that after they left the man with the pizza box, they went back to the clearing in the bushes. They smoked the last bit of marijuana in the pipe. K.W. told Mr. Taylor he wanted to go home but Mr. Taylor didn't want to. K.W. then started walking out to the Path and Mr. Taylor cut ahead of him and put up his mask. Then K.W. saw Chelsie Probert walking on the Path from the direction of Farrell Street. He put up his mask too because he didn't want to be identified.

[36] Mr. Taylor also testified that they went into the woods after leaving the man with the pizza box but denies that they smoked any marijuana and denies that K.W. wanted to go home. He said that K.W. saw Chelsie Probert walking down the Path, then Mr. Taylor saw her and K.W. left the woods and walked up to her with the tire reamer and knife in each hand.

[37] K.W. testified that Mr. Taylor approached Ms. Probert with the knife and the tire reamer and said, “give me all your shit”. She brushed him off and literally brushed up against him as she went by him. Mr. Taylor walked around in front of her again. He wasn’t touching her but was standing in the Path in the direction she wanted to go. Mr. Taylor asked her where she was going and again said “give me all your shit”. She kind of laughed and he, again, told her to give him her shit. At this point, K.W. was about 4 metres away. While Mr. Taylor was speaking to Ms. Probert, K.W. went around them because he wanted to go home. Mr. Taylor was close to her but not touching her and said, “give me all your shit”, with emphasis. She said no. K.W. called to Mr. Taylor. Then, Mr. Taylor hit her in the head with the tire reamer and switched the knife to his right hand and stabbed her.

[38] K.W. testified that he initially froze but then ran and stopped or paused to look back twice. Once, he saw Mr. Taylor still on her and the second time he saw Mr. Taylor running, dropping his folding knife and phone and stopping to pick it up.

[39] Mr. Taylor testified that K.W. approached Ms. Probert and said, “give me all your stuff”. She “had a smirk on her face” and brushed past him. She was walking fast and K.W. asked her where she was going. He caught up to her and they were facing each other on a diagonal with K.W. to her left and Mr. Taylor to her right. K.W. told her to give him her phone and she said no. Mr. Taylor noticed her purse was Michael Kors. He said it was black with a gold MK emblem on it. He asked her if it was real. There was more conversation during which Mr. Taylor told her that he worked at Costco. She asked if it was a joke, Mr. Taylor told her it wasn’t and K.W. said “it’s no joke”. K.W. then struck her. Mr. Taylor thought the

first blow was to her head and neck area and believed it was with the hand holding the tire reamer but could not recall which hand that was. He said she screamed.

[40] Mr. Taylor testified that he left and yelled to K.W., “K., get off her. Get the ‘expletive’ off her”. Mr. Taylor then ran, and something fell out of his pocket which he stopped to retrieve. When he got to near Farrell Street, he yelled to K.W. again and said “let’s fucking go, K. Get off her”. When he turned, K.W. was still on top of her.

[41] Pamela Fisher lived at the intersection of Lahey Road and Clarence Street. She testified that the Path was in the backyard of her home and she could see it from her bedroom which was on the second floor. On the evening of June 6th, it was quiet and she was reading. She heard a young girl’s voice saying “ow”, four or five times. Then everything was quiet. Then she heard the girl say, “oh my god”. Ms. Fisher then looked out her window and saw something moving toward Farrell Street very fast. She thought it might be the girl who’d fallen and was getting back up. She did not hear any male voices. She estimated the time as around 10:30 p.m. because that’s when she would normally go to bed. Within 15 minutes she heard sirens.

[42] K.W. testified that he stopped again just before Farrell Street because he thought he would be sick. Mr. Taylor caught up to him, put the knife to his ribs and told him if he told anyone he’d kill him and his girlfriend. They started walking and Mr. Taylor told him to take the weapons. He took them and wrapped them in his jacket.

[43] Mr. Taylor testified that K.W. caught up to him near Farrell Street. K.W. handed him the tire reamer, he looked at it for a few seconds and handed it back. He didn't see the knife again.

[44] A little before 10:00 p.m., Travis Jackson was walking on the Path and found Chelsie Probert laying on her back, unconscious. He checked to see if she was breathing and at 9:58 p.m. called 911 (Recording of 911 call, Exhibit 4, tab 2). He started to perform CPR and yelled to a passerby, Greg MacDonald, to go to the end of the Path to wait for the ambulance. At the time of the 911 call, Mr. Jackson was reporting that Ms. Probert was still breathing. The ambulance arrived within minutes and police arrived not long after. She was taken to hospital where she was pronounced dead.

[45] Assuming the accuracy of the times in the surveillance video from the bus (as adjusted), the cell phone of Chelsea Probert and the 911 call, Ms. Probert was attacked between 9:49 p.m., when she sent her final text message, and 9:58 p.m., when Mr. Jackson called 911.

Back at the Apartment and Remainder of the Evening

[46] K.W. and Mr. Taylor went back to K.W.'s apartment. K.W. testified that he was upset, shaking and feeling sick. Mr. Taylor asked him to wash the knife. He washed it at the sink and put it back in the kitchen drawer. Mr. Taylor wiped off the tire reamer and told him to find somewhere to hide it. He went to his room and Mr. Taylor followed. Mr. Taylor pointed to a bin and told him to put it in there. The metal part of the tire reamer was now bent up against the handle whereas it

had been straight (at a 90-degree angle to the handle) before. Dawson Sproule confirmed that the metal portion was not bent when he gave/sold it to K.W.

[47] Mr. Taylor testified that K.W. was upset because he believed he'd killed the girl. He denies being involved in cleaning the weapons or putting them away.

[48] K.W. and Mr. Taylor changed their clothing while back at the apartment. Mr. Taylor took off the Adidas track suit he'd been wearing and borrowed a pair of K.W.'s pants and K.W. took off the black puffy jacket. They also switched shoes, despite that Mr. Taylor's shoes were two sizes smaller than K.W.'s.

[49] Mr. Taylor wanted to buy cigars, so they went out to Needs at 11:06 p.m. Later they went to K.W.'s uncle's apartment to see if they could get some marijuana and then returned to K.W.'s apartment where they spent the night.

June 7, 2017 and Following

[50] K.W. and Mr. Taylor spent much of the next day together. Before they left K.W.'s apartment, they again changed clothing so that Mr. Taylor was wearing K.W.'s Jordan sweater and K.W. was wearing Mr. Taylor's Adidas suit. They continued to wear each other's shoes. They went to Halifax where Mr. Taylor bought marijuana from a dispensary, then to Mr. Taylor's mother's apartment where he was living at the time. K.W. changed out of Mr. Taylor's Adidas suit, leaving it there. He also left both the grey Nikes that he'd been wearing the night before and the shoes Mr. Taylor had been wearing. K.W. then went to his girlfriend's.

[51] K.W. and Mr. Taylor saw each other one more time after that. About a week later, they were with a group of people, including B.B. K.W. and Mr. Taylor had a private conversation using the notes feature on Mr. Taylor's phone. They agree the conversation was about the tire reamer but disagree about the details.

[52] Shortly after, Mr. Taylor moved out of his mother's apartment to his father's. The two pair of shoes that he and K.W. had worn during the attack on Chelsie Probert went with him.

[53] On June 12th, 2017, police came to Mr. Taylor's father's house and interviewed Mr. Taylor. During that interview he admitted being in north end Dartmouth that night but denied any involvement in the offence, saying he'd left by bus earlier in the evening. After that interview, he gave the two pair of shoes to his girlfriend, Rosalynd Lopic. He provided another statement to police on June 17, 2017. At that time, he admitted being present and told police that K.W. had stabbed Chelsie Probert.

[54] On June 18th, 2017, police executed search warrants at K.W.'s house, Mr. Taylor's father's house and Rosalynd Lopic's house. At Mr. Taylor's house they seized a black Adidas track suit with white stripes, a black Adidas hat, an orange handled folding knife and Mr. Taylor's phone. At K.W.'s house, they seized a black puffy jacket, various black hats and caps, black jeans, kitchen knives and a tire reamer with a bent prong. At Rosalynd Lopic's house they seized grey Nike shoes (size 8 1/2) and black and white Adidas shoes (size 6 1/2).

Evidence of the Medical Examiner

[55] Dr. Matthew Bowes, the Chief Medical Examiner testified, and his report was admitted into evidence (Exhibit 4, Tab 10). He was qualified as an expert in forensic pathology capable of providing opinion evidence as to cause and manner of death and mechanism of injury in the human body. He conducted the post mortem on Chelsie Probert and found that she had suffered seven independent injuries: (1) a small round puncture on her left scalp; (2) an abraded bruise on her left forehead; (3) a cluster of abrasions/contusions/lacerations near her left ear; (4) a very shallow laceration on her left neck; (5) a stab wound on her left breast which punctured her left lung and her aorta (the artery for her heart); (6) a stab wound on her left chest which punctured her left lung, left and right ventricle (heart's chambers) and pericardium (sac around the heart); and (7) a stab wound on the outer side of her upper left arm which went through the arm, exiting on the inside of her arm and possibly nicked her upper chest near her armpit. He could not provide an opinion about the order in which these wounds were inflicted.

[56] In Dr. Bowes' opinion, both stab wounds on her chest (# 5 and #6) were grave, life threatening and survival would have been minutes without medical intervention and correction.

[57] He testified that injuries #2 and #3 could have been caused by the tire reamer (Exhibit 25) but he could not rule out other objects with similar characteristics. Injury #1 also could have been caused by the tip of the tire reamer, but he couldn't exclude many other objects. Chelsie Probert's DNA was found on the metal portion of the tire reamer (DNA Report, Exhibit 4, tab 12) and both Mr. Taylor and K.W. testified that it was present during the attack so I am satisfied that it is the weapon that caused injuries #1, #2 and #3.

[58] Dr. Bowes testified that injuries #5, #6, and #7 were deep penetrative wounds which, in his opinion, were very unlikely to have been caused by the tire reamer. According to Mr. Taylor and K.W., two other weapons were present when Ms. Probert was attacked; an orange-handled folding knife with a curved blade (Exhibit 24 and Exhibit 5, tab 4, photos 47 & 48)) and a black-handled kitchen knife with a straight blade. Dr. Bowes could not rule out that these injuries might have been caused by a slightly curved blade. He testified length of wound track is not a reliable indicator of length of blade because it can vary depending on factors such as amount of force and position of the organs. As a result, a short blade can produce a longer wound track. Given the length of wound track for injuries #5, #6 and #7, he could rule out a blade that was 2 cm long but not one that was 15 cm long. Ms. Probert's DNA was not found on the orange-handled knife (DNA Report, Exhibit 4, tab 12) or any other knife. The blade on the orange-handled knife is curved and about 7 cm long (Exhibit 5, tab 4, photo 47 & 48).

[59] I am satisfied that the injuries that directly caused her death were not caused by the tire reamer or the orange-handled knife.

[60] All injuries were on Ms. Probert's left side so Dr. Bowes agreed that a reasonable common-sense standard might suggest that they were caused by a right-handed assailant who was facing her. However, given the dynamics of a physical altercation, he could not rule out other equally reasonable conclusions. He could not say whether the injuries were caused by one or two assailants.

[61] Injuries #5, #6 and #7 required a "non-trivial" amount of force and were not caused by a slashing motion.

DNA

[62] As I have said, Ms. Probert's DNA was found on the metal portion of the tire reamer. DNA found on the handle was of mixed origin and consistent with having originated from at least three individuals, but no meaningful comparison could be made. Ms. Probert's DNA was not found on any of the clothing tested.

Issue 1: Is K.W. Guilty of Murder?

[63] To convict K.W. of second degree murder, I have to be satisfied beyond a reasonable doubt that he:

1. caused Ms. Probert's death by an unlawful act; and,
2. intended to cause bodily harm which he knew was likely to be fatal; and,
3. was reckless about whether she died

(Criminal Code, s. 229(a); R. v. Cooper, [1993] 1 S.C.R. 146)

[64] There is no doubt that Chelsie Probert's death was caused by stabbing, an unlawful act. Along with other injuries, she was stabbed twice in the chest with enough force that her lungs and heart were punctured. The only reasonable inference from this evidence is that the person who stabbed her intended to cause her bodily harm, knew that the bodily harm was so serious that it was likely to be fatal and proceeded despite this knowledge that she would likely die as a result. Therefore, I also have no doubt that the person who stabbed her had the intent and knowledge necessary for second degree murder

[65] The only issue is whether the Crown has proven that K.W. is the person who stabbed her.

[66] K.W. testified. He denied that he stabbed Ms. Probert. In order to ensure that the presumption of innocence is not undermined, the Supreme Court of Canada has provided guidance to trial judges on how to assess credibility when an accused testifies (*W.(D.)*, [1991] 1 S.C.R. 742; *R. v. Dinardo*, 2008 SCC 24; and, *R. v. J.H.S.*, 2008 SCC 30).

[67] I am required to consider K.W.'s evidence within the context of all the evidence. Where his evidence is inconsistent with guilt, if I believe him or am left with a reasonable doubt by his evidence, I must acquit him. Even if I reject K.W.'s evidence, I must examine the remaining evidence, in particular the evidence of Mr. Taylor, and only convict K.W if I am convinced beyond a reasonable doubt that the Crown has proven either of the offences. If I do not know whether to believe K.W. or Mr. Taylor about who stabbed Ms. Probert, it means I have a reasonable doubt and must acquit K.W. of the charge of murder.

Reliability and Credibility

[68] I have to assess the reliability and credibility of all witnesses. I am entitled to accept all, some or none of the evidence of any witness. Reliability relates to the witness' ability to accurately observe, remember and recount what happened. Not every error in a witness' evidence is a lie. Factors which could impact the assessment of the reliability of a witness' evidence include the passage of time, whether they were under the influence of any substances, the significance of what they were observing at the time and the circumstances under which they made their observations. Credibility relates to whether the witness is being honest. Factors which could impact the assessment of a witness' credibility include the witness' demeanour, internal consistency, consistency with other evidence, especially

objective and independent evidence, motive to lie, the plausibility of their evidence, a history of dishonesty, and whether they were shown to have lied during their testimony.

[69] There are aspects of the testimony of both K.W. and Mr. Taylor that simply don't make sense to me. In some instances, I can't say whether they are purposefully lying or if I am unfairly assessing their behaviour and reasoning against my own measure of common sense. When assessing credibility, I have to take into account the individual circumstances of the witness, including their maturity and life experience. Here, the two main witnesses were a teenager and a young adult. What is common sense to me may not be common sense to them. So, I have to be careful not to conclude that they are lying, simply because their reasons don't make sense to me. For example, I don't understand why they switched shoes after the attack, especially given the difference in their shoe sizes, or why they switched clothing the next day so that K.W. was wearing the outfit that Mr. Taylor had been wearing the night before. I understand why, after being present at the scene of a crime, they would want to remove the clothing they were wearing but it doesn't make sense to just switch around footwear and clothing that had been at the scene. Neither provided an explanation for this that seemed reasonable to me. Similarly, neither had a reasonable explanation for why, after the attack, they waited for the other or why they spent the night and most of the next day together. K.W. attributes his behaviour to panic and fear of Mr. Taylor because he'd been threatened but this is inconsistent with much of his other behaviour. Mr. Taylor doesn't really offer an explanation. It may be that neither of them has told me the truth about that night, it may be that they don't, themselves, completely understand why they did certain things, or it may be that

their reasoning is impacted by their immaturity so is not perfectly logical or rational to me. Finally, and most troubling, I don't understand how one hour after committing or witnessing such a brutal attack, they are captured on video at a convenience store laughing and buying cigars.

K.W.'s Evidence

[70] The Crown argues that I should reject K.W.'s evidence for a number of reasons. The Crown argues that K.W.'s evidence was designed to put himself in the best possible light, to minimize his involvement and advance a story wherein he was just a follower of Mr. Taylor's plans. They argue that his credibility is undermined because: he was unwilling to take any responsibility or acknowledge any wrongdoing or bad judgement; his version is inconsistent, lacks common sense and is illogical; when presented with contradictions, he would change his story to further advance his narrative; and, it is more likely that K.W. would have been the leader that night because it was his neighbourhood and he was familiar with it whereas Mr. Taylor was not.

[71] The Crown also points to specific problems with his evidence which, when considered cumulatively, should cause me to reject his evidence as self serving and incredible.

[72] The defence argues that K.W. withstood a lengthy and skillful cross-examination while remaining firm on the crucial elements, that his version of events is plausible, that he didn't try to portray himself as innocent of any wrongdoing, and that he admitted he'd made poor choices, scared people, was present with Mr. Taylor and ran away without helping Chelsie Probert. The

defence argues that his emotions on that night and his demeanour in the witness box were consistent with what one would expect from a young person who had witnessed something horrific.

[73] The Crown acknowledges that K.W. had no glaring motive to commit this offence but a possible motive may have been to get money. The offence was committed after a botched robbery and K.W. needed money. He wasn't working, was addicted to cigarettes and used marijuana to cope with anxiety.

[74] There were problems with K.W.'s testimony and I do not believe all of it. I agree that in some areas K.W. may have downplayed his level of responsibility. For example, he refused to admit that approaching the man while masked, carrying weapons and demanding he hand over his "stuff" was a robbery as opposed to just scaring the man. This was clearly an attempted robbery and it is not believable that K.W. did not see it that way. Further his testimony that he would not have taken the stuff if the man had handed it over was just not believable. However, in many areas he candidly admitted wrongdoing. He admitted to smoking marijuana, approaching a man with weapons while wearing a bandana, and, being present while wearing a bandana when Chelsie Probert was attacked.

[75] K.W.'s evidence was not entirely consistent, internally or with the objective evidence. For example, the number of times he'd purchased marijuana in the past as opposed to just getting it from friends, how many times he'd previously consumed alcohol with Mr. Taylor, whether he could remember what he'd eaten for breakfast the morning of June 6th, whether he'd tried to contact Mr. Taylor after June 7th, and whether he'd followed the story in the media after the event. The Crown argues that these inconsistencies are significant, individually and

cumulatively, because they show a desire to be seen as having a perfect recollection, a willingness to change the story to suit the question or provide an answer that might make him look better. I don't disagree that there may have been some of that in K.W.'s testimony but that is not uncommon and is not necessarily indicative of overall deceit.

[76] There are areas of K.W.'s evidence that are more concerning. For example, the circumstances under which the tire reamer was acquired. I agree that K.W.'s evidence about this was implausible and was contradicted by Devon Sproule. I accept that Mr. Sproule had problems with his memory because of drug consumption but I believe he was genuinely trying to tell the truth. I believe that he gave K.W. a bookbag but not that the tire reamer was accidentally left in it. At the time Mr. Sproule was taking things from his father's workshop and selling them to make money to live and buy drugs. It doesn't make sense that he would accidentally give one of those items away. I believe that K.W. acquired the tire reamer for protection. Once he had it, he may have also used it to change the pegs on his bike.

[77] I also don't believe that Mr. Taylor retrieved both the tire reamer and the kitchen knife from where they were kept without K.W.'s knowledge. K.W. testified that the tire reamer was normally kept in a drawer under his bed with miscellaneous items, including some clothing, but that he must have left it out on his bed when he was getting ready to go out that day. He testified that Mr. Taylor must have seen it when K.W. was showing him around his apartment. Then, while K.W. was in the bathroom, he went back to the bedroom to get it and went to the kitchen to get a knife from a drawer. Mr. Taylor had never been to K.W.'s

apartment and was planning to stay the night so it is not implausible that K.W. showed him around when they first arrived. However, it is not believable that in the time that K.W. was in the bathroom, Mr. Taylor went to the kitchen and got a knife and then into the bedroom to get the tire reamer. I believe that the tire reamer was either on the bed and the two of them got it when K.W. was showing Mr. Taylor around or that K.W. took it out, perhaps to show off.

[78] I do not believe K.W.'s evidence about why they left the apartment with weapons and bandannas. He said that he had the bandanna because he always wore one out of respect for his cousin. It may be that K.W. generally wore a bandanna out of respect for his cousin but I don't believe that is the only reason he and Mr. Taylor had them that night. His testimony about where the bandanna was generally kept, where it was that night and the circumstances under which he'd given one to Mr. Taylor was inconsistent and implausible. He testified that they took the knife to cut firewood and that Mr. Taylor wanted to take the tire reamer in case anyone bothered them. It doesn't make sense that they needed the tire reamer given that they had the kitchen knife and the orange-handled knife. I believe there was a discussion before they left the apartment about robbing people or scaring them with weapons. This is corroborated by Mr. Amero who testified that Mr. Taylor was talking about going out to "car hop" or rob people. I believe they wore dark clothing, took the weapons and the bandannas with them, and put their hoods up because they planned to scare or rob people.

[79] K.W. testified that before the attack, the metal prong on the tire reamer was at a 90-degree angle to the handle and after, it was parallel to the handle, the inference being that it was bent during the attack. Dawson Sproule confirmed that

it was not bent when he last saw it. The Crown argues that the metal prong is too strong to have been bent during the attack, so the only plausible explanation is that K.W. bent it after he acquired it to make it useable as a weapon and is lying about it to support his testimony that he didn't possess it as a weapon. This point loses significance because I have concluded that K.W. acquired the tire reamer as a defensive weapon and possessed it for that purpose. However, it is still relevant to K.W.'s credibility. Dr. Bowes' evidence indicates that Chelsea Probert was probably struck in the head with the tire reamer. I have absolutely no evidence about how strong the metal is, how much force would be required to bend it or how hard the human skull is. These are not matters of common knowledge that I can take judicial notice of. As such, I cannot say that K.W.'s evidence that it was bent during the attack is implausible and cannot conclude he was lying about this.

[80] The Crown argues that K.W. is not telling the truth about his dislike for fireball whisky, being pressured into drinking it and feeling sick after. The motive for this lie would be to further paint himself as a follower who was pressured by Mr. Taylor. A photo taken on Mr. Taylor's phone at the apartment shows him holding the bottle and looking happy (Exhibit 4, tab 15) which the Crown argues is inconsistent with not liking it. Further, video and photos from later in the evening all show him looking happy and energetic, not sick. K.W. said the photo of him with the Fireball was taken because they thought it was funny that he was wearing a red hat, red plaid shirt, holding a red backpack and the bottle is red, not because he likes Fireball. The caption of the photo supports his testimony. It says, "My guy read lmao". Apparently "read" was a typo for "red" and "lmao" means "laughing my ass off". This explanation is plausible. In photos and video from later in the evening, K.W. does appear to be having a good time. Whether he was

mildly queasy or exaggerated how the Fireball made him feel, is not particularly significant to his credibility.

[81] K.W.'s testimony about B.B. feeling sick at the fire is more significant because, as I've said, it relates to the credibility of K.W.'s evidence about who chased the man when they were all at the bleachers near John MacNeil school. The Crown argues that K.W. made up the story about B.B. being sick to explain the video from the community centre which confirms Mr. Taylor's evidence that K.W. had chased a man. The Crown submits that the video is inconsistent with K.W.'s version because it shows K.W. out in front of B.B. and Mr. Taylor which is not consistent with him being concerned about his friend, B.B. The Crown also argues that K.W.'s description of how fast he is walking in the two videos is self serving and inconsistent. Finally, the Crown argues that the flash that is seen in B.B.'s hand is consistent with him trying to light a pipe and this contradicts K.W.'s version since he said that Mr. Taylor had the pipe when they left the woods and started to go to the community centre. The defence argues that the video is inconsistent with Mr. Taylor's evidence because it shows them walking the opposite direction to that described by Mr. Taylor. Mr. Taylor testified that when K.W. chased the man, he went toward the woods and Brule street, then B.B. and Mr. Taylor caught up with him and they continued through Brule Street, out a path that leads to Victoria Road and a pedway. The Crown says that Mr. Taylor cannot be expected to know the street names because he wasn't familiar with the area. I agree, but he used the names and, initially appeared confident in what he was recalling. More important, the video shows them going in one direction and coming back in the opposite direction. My understanding of his evidence is that after K.W. chased the man, he and B.B. caught up to him and they continued in the

same direction. I cannot conclude the video is inconsistent with K.W.'s testimony. The fact that he is walking ahead of B.B. does not necessarily mean that B.B. was not ill. I might have expected him to walk with his friend but the fact that he didn't does not cause me to reject his explanation. The flash in B.B.'s hand is more concerning, given K.W.'s testimony that he thought Mr. Taylor had the pipe. However, it would not be surprising if Mr. Taylor gave the pipe to B.B. without K.W. being aware and it is also possible, as K.W. testified, that the flash is from a phone.

[82] Therefore, in my view the video is inconsistent with Mr. Taylor's evidence concerning the direction of travel and is not inconsistent with K.W.'s evidence that they went to the community centre to get water. Therefore, I reject Mr. Taylor's explanation for the video.

[83] Deciding whether I believe K.W.'s testimony or am left in a reasonable doubt requires me to consider his evidence in the context of all the evidence. I've addressed some of that evidence, but the most significant Crown evidence is the testimony of Mr. Taylor.

Rory Taylor's Evidence

[84] Mr. Taylor acknowledged that during the time leading up to June 6th, he was drinking fairly steadily and using marijuana daily. His mother was starting to become concerned about his behaviour and, shortly after the incident, he moved in with his father and then moved away.

[85] The Crown acknowledges that Mr. Taylor's demeanour negatively impacts his credibility, but correctly reminds me that, while I am entitled to consider

demeanour in assessing credibility, it is not determinative and is not a reliable indicator of deceit (see for example, *R. v. W.J.M.*, 2018 NSCA 54, at paras. 44 & 45).

[86] Mr. Taylor came across as a salesman who was trying to sell me on his version of events. He tried hard to give a good impression, but I was left with the feeling that he was putting on a production. He clearly sees himself as intelligent and somewhat superior. He showed absolutely no emotion during his testimony, even when describing horrific events. He used language that was consistent with empathy, like “that poor gentleman”, but I did not detect true empathy. Some of what I heard was startlingly cold. For example, in a text message to his mother, he referred to his former girlfriend as a “psychopath” because she “doesn’t even feel bad that she covered up a murder, and never even came forward”. In that text, he’s referring to the fact that he gave her the shoes he and K.W. had worn that night and she didn’t tell anyone. Recall that when he wrote that text, even on his own evidence, he was also covering up a murder.

[87] The defence argues that Mr. Taylor is an unsavory witness worthy of a *Vetrovec* ([1982] 1 S.C.R. 811) caution. That caution simply reminds the trier of fact that some witnesses are so untrustworthy that it would be dangerous to convict on their evidence without independent corroboration. I recognize that Mr. Taylor has many of the characteristics of a *Vetrovec* witness. However, because this is a judge alone trial, I don’t feel it’s necessary to make that determination. I can simply assess his evidence through the normal credibility lens.

[88] Mr. Taylor clearly had a motive to lie, both to police and in court.

[89] He acknowledged that he'd lied to several people about the events before he came to court: his father, his mother, the police and his girlfriend.

[90] On June 12th, the police went to interview him. He lied and told them he'd stayed at his girlfriend's house that night. He also made up things and told them he'd heard it was a girl, that he'd heard it was a black guy. During the interview, he became aware that the police had access to video. He told them he'd been in the area but had left earlier on one of two specific buses. The police told him that they could check surveillance for the buses. He knew, of course, that he would not be seen in the surveillance footage for either of those buses. I believe he knew this created a problem for him.

[91] Mr. Taylor's father was concerned by the police attendance and spoke to his son. He lied to his father.

[92] Mr. Taylor's mother became concerned after he'd told her different versions of where he'd been. He also didn't tell her the truth.

[93] He told his girlfriend that he'd been at the scene but told her that he'd walked away before Ms. Probert was attacked. This was also not the truth.

[94] On June 17, he went with his father to police and provided a lengthy recorded statement in which he told police that he'd been present but that K.W. had killed Chelsie Probert.

[95] The Crown argues that Mr. Taylor is a follower who suffers from low self esteem, talks a big game but is not someone who follows through. There is some support for this view that he "talks a big game". I saw some of it during his

testimony. He used language and descriptions that were somewhat grandiose and exaggerated his importance. His mother testified that he suffered from low self-esteem and one witness described him as a “facebook warrior”, someone who was tough online but not in person.

[96] I don't agree that there is evidence that he is a follower. In fact, the evidence suggests that, at 19, he was spending time with younger people, was providing them with marijuana and trying to get them to commit criminal offences for him. The defence brought out numerous examples from messages where Mr. Taylor was talking about trying to get younger teens of 15 or 16 to help him with cheque frauds and there is evidence that I will refer to in more detail later that he was bossing around K.W. and B.B. while at K.W.'s apartment before the attack.

[97] Mr. Taylor's evidence was at times internally inconsistent, inconsistent with his previous statement and inconsistent with other witnesses. For example, K.W. testified that Mr. Taylor had marijuana with him and they smoked it throughout the evening. Mr. Taylor denied that he brought any marijuana with him that night. He said he thought he had but must have forgotten it or lost it. He said the only marijuana they smoked that night was a bit of oil or residue in K.W.'s pipe. He admitted that he'd told police he brought some marijuana that night. Derek Amero testified that while they were on the video chat, Mr. Taylor was ordering the kids to “pass him the joint”. While I don't necessarily accept all of Mr. Amero's testimony, this was just a comment he made in passing and I believe it. This suggests that Mr. Taylor had brought at least a pre-rolled joint. Finally, Mr. Taylor said they smoked residue from the pipe while on the bleachers. He also said that later, they went into the woods to smoke marijuana and that's when he realized he

didn't have it with him. It doesn't make sense that he wouldn't have realized this earlier at the apartment or at the bleachers. I believe he brought marijuana with him and downplayed that in his testimony.

[98] Further, and more significantly, he described that after Ms. Probert was attacked by K.W., he twice yelled out to K.W., once from a few feet away and once from further down the path. Ms. Fisher who testified that she could hear a girl saying "ow" and "oh my god", did not hear any male voice.

[99] I have also concluded that he was not telling the truth about K.W. chasing the man when they were at the bleachers.

[100] There was also considerable evidence presented at trial of Mr. Taylor's previous deceit, previous criminal behaviour and lying about that past behaviour in court. I'll refer to some of that evidence but not all.

[101] In his statement to police, Mr. Taylor told the officer that he used weed but said he "don't fuck with really any other drugs at all". When asked about this in cross-examination, he explained that he meant he didn't use other drugs regularly. He acknowledged that he'd acquired ADHD pills twice and on occasion had taken a pill that someone gave him. However, in cross examination on text messages it became clear that his drug use or drug seeking went beyond that: on May 14th he was looking for pills from Dawson Sproule; on May 16th he was looking to buy pills from Dawson Sproule; on May 17th he was looking to buy 100 "classies" (pills) from Sheamus Mason and discussed snorting them (Mr. Taylor tried to say that this was a discussion about purchase of marijuana but eventually admitted that it was about the purchase of pills); on May 18th he told Aleisha Burgess that he'd

been “getting right into pills lately”; on May 23rd he was trying to buy Ritalin from Dylan Spence; on May 25th he was trying to buy pills from Jaden Jenkins, then reported to her that he’d liked them and that it made him feel “fucked up” when he stopped taking them; and, on May 25th he confirmed to Kayla Sierra that he had lots of Adderall.

[102] In his statement to police and in his testimony, he described himself as someone who would “never hurt a fly”. In cross-examination on text messages and photographs it became apparent that at least his persona was not quite so peaceful. On April 2nd, he communicated with Hailey who used to be a friend and told her that if she didn’t pay his “woman” the money she owed, he would let people know that she was a “scheming fuckin slut” and threatened to show people screenshots of sexual conversations with her. On April 12th, he communicated with another woman about the fact that Hailey owed him \$500. He says that he wants his money back and if not “I gotta see her hurt”. He describes himself as the nicest most peaceful person 99% of the time but “when that is taken [sic] advantage off [sic] fuck it sets me off”.

[103] He acknowledged that he carried a weapon, the orange handled knife, for self protection but denied carrying other weapons. However, in May of 2017, he had some trouble with Steven Roy. During text communication with Mr. Roy on May 16th, Mr. Taylor told him that he had two knives on him during a previous encounter they’d had but chose not to use them. He repeated this assertion in a subsequent conversation with a friend of Mr. Roy’s. Mr. Taylor said he was not being honest with Mr. Roy.

[104] At 11:20 a.m. on January 16, 2017, Mr. Taylor sent a message to a person asking if Sheamus was there because Mr. Taylor wanted to buy “that knife” off him. A photo of Mr. Taylor on January 16, 2017 at 6 pm, shows him with a knife on his belt that is not the orange-handled knife. He said that was a picture of Sheamus Mason’s knife. He acknowledged that they were in discussions about the purchase of the knife but denies that he acquired it.

[105] During this time, Mr. Taylor was also involved in cheque frauds. He denied this in his testimony and said he’d really been a victim of a cheque fraud. However, the evidence is overwhelming that he was committing or attempting to commit frauds. On May 26th, he messaged Dylan Spence to asking if he knew anyone “dumb enough to cash a couple checks me an u put a few grand in the account take as much as we can out give them like a hundo keep the rest for ourselves...”. He then texted that he had a girl who will do it. On March 22nd, he asked a 15 year old girl if she wanted to make \$100 by going to an ATM for him. He denied this was a cheque scam he was perpetrating but his explanation doesn’t put him in a better light. According to him, he’d been taken advantage of and wanted to get his money back from the ATM. However, because “he didn’t want to be on camera”, he asked her to do it. He knew there was a camera so there was a risk and wanted the young girl to take that risk. On April 18th, he messaged that same young girl to try to recruit her to be involved in a cheque scam. He sent a picture of money with the caption “my cut from last time”. He said the money was actually legal money, but he was trying to portray it to her as money from the cheque scam in order “to recruit her”. On June 15th, he again asked her if she would be involved in the cheque scam and asked if her boyfriend would also want to be involved.

[106] Mr. Taylor said that he would not describe himself as a “weed dealer” but it’s apparent that during this time he was buying marijuana in quantities up to the ounce level and selling it, including to young people. He defended this by saying that they would otherwise buy it from sketchy street dealers; he could get medical marijuana from the dispensary, so it was better for them to get it from him.

[107] He also discussed “doing licks”. This was a term used by a number of witnesses to refer to thefts of various types, including shoplifting, thefts from cars and robberies. Mr. Taylor admitted he’d stolen a bong from someone who was drunk at his house and that he’d been involved in shoplifting when he was younger. He also admitted that on May 18th, he was messaging a girl about possibly robbing Sheamus Mason, his friend, of the “classies” he had planned to buy from him. He acknowledged in court that he had enough money to buy the pills but didn’t want to give money to Sheamus. Apparently, the young woman told Sheamus about the possible robbery and Mr. Taylor later texted with Owen, Sheamus’ brother. In those texts, he expressed surprise that Sheamus would think he was going to rob him and said he hadn’t been talking to the young woman, claimed she was a compulsive liar and said he didn’t even have her number.

[108] Mr. Taylor did not tell police in his statement about calls with Derek Amero during the evening of June 6th and did not mention it during his direct testimony. Derek and K.W.’s testimony about the call is not identical but is consistent in important respects: Mr. Taylor was showing weapons; Derek was showing a machete; and there was a discussion about frauds. Mr. Taylor denied much of this and said that the conversation was about Derek trying to get him to do cheque frauds. I don’t believe all of Mr. Amero’s testimony. He was mistaken about their

being four people present during the call instead of three but that is not significant. In my view, when he testified, he certainly exaggerated his own profits from criminal behaviour. However, his testimony about the call is confirmed in material respects by K.W. and Mr. Amero was candid about why he was trying to reach Mr. Taylor. He said they had been involved in doing cheque frauds together and he wanted to reach Mr. Taylor because he had a cheque. I accept that during the call there was a discussion about cheque frauds, that Mr. Taylor showed Mr. Amero a kitchen knife, a folding knife and a “corkscrew”, and that Mr. Taylor was bossing the kids around saying, “pass me the fucking joint”. I also accept Mr. Amero’s evidence that Mr. Taylor told him he was planning to go out and do robberies and “car hopping”.

[109] Mr. Taylor downplayed, left out or downright lied about some of his involvement that night. For example, he clearly left the apartment that night with a bandana but didn’t mention in direct examination that he’d had one or worn one. In cross-examination, he acknowledged that he had one with him and that it was over his face when he posed for a picture on snapchat. However, he testified that he couldn’t recall whether he’d worn it when K.W. approached the first guy or when they followed the guy with the pizza. I don’t believe he couldn’t recall whether he’d worn a bandana during the confrontations. Given his detailed recollection of other aspects of the night, this is not plausible. I believe he did and wouldn’t admit it.

[110] I also believe that he was the person who approached the first man at the bleachers, not K.W. I say this because his testimony is not consistent with the

video from the community centre and because of my overall concerns about his credibility.

[111]I also believe that he was more likely to have been the leader that night. I say that because of his age and personality and the specific evidence from Mr. Amero about his interactions with the younger people during the video-chat. The evidence that came out during cross-examination showed me that he is a bit of a bully who has no hesitation using people who are younger than him to advance his goals.

Conclusion Murder Charge

[112]I have assessed K.W.'s evidence that he did not stab Ms. Probert in the context of all the evidence. Mr. Taylor's evidence is most important to that task, but I have also considered the circumstantial evidence, the videos, the evidence of other witnesses and the forensic evidence. Much of this is equally consistent with either Mr. Taylor or K.W. being the attacker.

[113]The evidence of Ms. Probert's injuries and the expert opinion of Dr. Bowes does not rule out either Mr. Taylor or K.W. as the attacker. However, it is worth noting that all of Ms. Probert's injuries were on her left side. Mr. Taylor is right handed and K.W. is left handed. As Dr. Bowes said, a common-sense inference would be that if her assailant was facing her during the attack, a right-handed person caused the injuries. Of course, given the dynamic nature of a physical altercation, there are other possibilities. I accept that the attacker initially had a weapon in each hand and that the positions of the attacker and Ms. Probert could have changed during the attack, particularly after she was on the ground. However, the evidence of both K.W. and Mr. Taylor suggests that she was facing

her attacker when she was first struck. Both say there was a conversation between her and her assailant and neither of them describes her turning to run before she was attacked.

[114] As I have said, I have concerns about some of K.W.'s evidence and there are parts that I do not believe. Therefore, I cannot say that I fully believe that he didn't stab Ms. Probert. However, when I consider his testimony in the context of all the evidence, I am left with a reasonable doubt by it. Even if I rejected his testimony in its entirety, I would not be convinced beyond a reasonable doubt by the remaining evidence. This is predominantly because of the significant concerns I have with Mr. Taylor's credibility, but the fact that all her injuries were on her left side and K.W. is left handed contributes to my doubt that he was the assailant.

[115] In conclusion, while I do not believe that either K.W. or Mr. Taylor told the complete truth about the events of June 6th and 7th, 2017, I am not persuaded beyond a reasonable doubt that K.W. is the person who stabbed Chelsie Probert so find him not guilty of murder.

[116] It is important to remind everyone that this is not the same as saying that Mr. Taylor killed her. Mr. Taylor was not on trial, did not have the benefit of counsel or the presumption of innocence. If he had been charged, then a judge or jury would have decided if his guilt was proven beyond a reasonable doubt. He was not charged, and the purpose of this trial was not to determine whether he is guilty.

Issue 2: Is K.W. guilty of Manslaughter?

[117] The Crown argued that if I am not persuaded beyond a reasonable doubt that K.W. is the person who stabbed Chelsie Probert, I should convict K.W. of manslaughter because of his participation in the robbery which resulted in her death.

[118] A person who is a party to an unlawful act which results in death may be guilty of manslaughter if the unlawful act is inherently dangerous and a reasonable person in all the circumstances would have foreseen a risk of serious bodily harm (*R. v. Kirkness*, [1990] 3 S.C.R. 74; *R. v. Jackson* (1993), 86 C.C.C. (3d) 385; *R. v. Creighton*, [1993] 3 S.C.R. 3; and, *R. v. DeSousa*, [1992] 2 S.C.R. 944). In these circumstances, to convict K.W. of manslaughter the Crown must prove:

1. That K.W. was a party to the attempted robbery of Chelsie Probert;
2. The attempted robbery was inherently dangerous; and,
3. Serious bodily harm was, in all the circumstances, a reasonably foreseeable consequence of the attempted robbery.

1. Was K.W. a party to the attempted robbery?

[119] A person can be a party to an offence in different ways. Here the Crown argues that K.W. was a party to the robbery as an “aider” or “abettor” under s. 21(1) and/or because he and Mr. Taylor had a common purpose to commit robbery and to assist each other in the robbery under s. 21(2).

[120] Section 21 (1) says that everyone is a party to an offence who,

- (b) does or omits to do anything for the purpose of aiding any person to commit it; or

(c) abets any person in committing it.

[121] To find K.W. was an aider or abetter to robbery under s. 21(1)(b) or (c), I would have to be persuaded that he knew that Mr. Taylor intended to commit robbery and that he acted with the intention to assist or encourage Mr. Taylor in that offence (*Briscoe*, at paras. 14 and 16-18; *R. v. Pickton*, 2010 SCC 32, at para. 76).

[122] The Crown doesn't have to prove knowledge of all the details of the crime but does have to prove the person knew that a crime of a certain type was intended (*Briscoe*, at para. 17). "Aiding" means assisting or helping and "abetting" means encouraging, instigating or promoting (*R. v. Briscoe*, 2010 SCC 13, at para. 14, *R. v. Greyeyes*, [1997] 2 S.C.R. 825, at para. 26.). The act relied on can be any "act, gesture, or words" but simply being present at the scene of a crime is not enough, even if the person does nothing to prevent the crime (*R. v. Dunlop and Sylvester*, [1979] 2 S.C.R. 881; *R. v. Davy* (2000), 137 O.A.C. 53 (C.A.)). It can be difficult to differentiate between presence that is acquiescence and presence that could amount to assistance or encouragement. Acts such as keeping watch, preventing the victim from escaping, laughing or cheering, intimidating or standing ready to assist could allow for an inference that the person aided the principal offender in the offence.

[123] The Crown argues that, at the point when Ms. Probert was approached, K.W. knew that Mr. Taylor was planning to attempt to rob her and that K.W.'s clear intention was to assist in the robbery by intimidating Ms. Probert and impeding her movement. The Crown argues that this conclusion is supported by

K.W.'s own evidence and the reasonable inferences that must be drawn from the evidence.

[124] I agree that the only reasonable inference from the evidence is that when Mr. Taylor approached Ms. Probert with the weapons and put his mask up, K.W. knew Mr. Taylor was going to attempt to rob her. I say this because K.W. was present for the discussion between Mr. Amero and Mr. Taylor where Mr. Taylor talked about going out to "car hop" or rob that night; they left the apartment with bandanas and weapons and I reject K.W.'s explanation for this; Mr. Taylor had already pressured K.W. into attempting to rob a man that night; and, Mr. Taylor had followed two others.

[125] Discerning whether K.W. intended to assist or encourage him is more difficult. K.W.'s evidence was that he was behind Mr. Taylor when Mr. Taylor approached Ms. Probert. K.W. put his mask up and moved past them. In doing that, he was positioned in a triangle with Mr. Taylor and Ms. Probert (see exhibit 40, photos 37 & 38; transcript of K.W.'s testimony, September 14, 2018, pp. 187 - 193). I accept that his presence, in that position while wearing a mask would have had the effect of intimidating Ms. Probert and possibly blocking an avenue of escape but I cannot say that I am persuaded beyond a reasonable doubt that this was done for the specific purpose of intimidating her or impeding her movement. He said that he put the mask up so as not to be identified and initially moved past her because he wanted to leave. I cannot reject that explanation so am not persuaded beyond a reasonable doubt that the Crown has proven his intention to assist or encourage Mr. Taylor. Therefore, I am not persuaded that he is a party under s. 21(1)(b) or (c).

[126] Alternatively, the Crown argues that he and Mr. Taylor had a common purpose to commit the unlawful act of robbery or scaring people with weapons so he could be a party under s. 21(2). Section 21(2) says:

Where two or more persons form an intention in common to carry out an unlawful purpose and to assist each other therein and any one of them, in carrying out the common purpose, commits an offence, each of them who knew or ought to have known that the commission of the offence would be a probable consequence of carrying out the common purpose is a party to that offence.

[127] Mr. Taylor and K.W. both testified about what their purpose was when they left the apartment. I am entitled to accept all, some or none of the testimony of either. I believe that K.W. and Mr. Taylor left the apartment intending to scare or rob people. K.W. denies this but I don't believe him. Mr. Taylor testified that this was the plan and his testimony is corroborated by other evidence: Mr. Amero's testimony that Mr. Taylor was talking about robbing people; K.W. was present when Mr. Amero and Mr. Taylor were talking; they left the apartment with bandannas and weapons and I reject K.W.'s explanation for this; they wore dark clothing and are captured with their hoods up in video; and, during the evening, K.W., in fact, did try to rob someone.

[128] Mr. Taylor also testified that this plan was K.W.'s idea. I don't believe that. I think it is more likely that Mr. Taylor was the instigator, but I believe that K.W. knew about it and went along with it.

[129] If the original plan was just to scare people, as the evening progressed, that plan clearly developed into a plan that included robbing people. Mr. Taylor attempted to follow a man while wearing the mask. Then, according to K.W., Mr. Taylor convinced him to rob a man. He put his mask up, approached him wearing the mask and demanded his belongings. Then, Mr. Taylor followed the man

carrying the pizza box. K.W. was present for all of this. Finally, K.W. was present and standing nearby when Mr. Taylor approached Ms. Probert while masked and with weapons and attempted to rob her.

[130] There was no specific plan to rob Chelsie Probert but the attempted robbery of her was a continuation of their ongoing more general common purpose.

[131] The last part of the “common purpose” party analysis it to assess whether K.W. knew or ought to have known that the commission of the offence (the stabbing) was a probable consequence of carrying out the unlawful purpose (the robbery). “Ought to have known” simply means that a reasonable person in the circumstances would know that the principal offender would likely commit the offence while carrying out the unlawful purpose.

[132] This requires me to assess whether the unlawful act contemplated here, robbing people with weapons, is inherently dangerous and whether serious bodily harm was a reasonably foreseeable consequence of it.

2. Inherent Danger?

[133] Without reservation I can say that the act of robbing people with a knife and a tire reamer, while wearing masks is an inherently dangerous activity.

3. Was serious bodily harm foreseeable?

[134] The Supreme Court of Canada has said that liability “for manslaughter under s. 21(2) does not require foreseeability of death, but only foreseeability of *bodily harm*, which in fact results in death” (*Jackson*, at para. 32).

[135] When assessing foreseeability, the standard is that of a reasonable person in the same circumstances as the accused. This means that objective foreseeability must be assessed based on the facts known by the accused, having regard for personal qualities of the accused that may deprive him of the capacity to foresee the probable consequences. K.W. was 16 years old at the time so I have to examine foreseeability from the perspective of a reasonable 16-year old. I also have to take into account what K.W. knew at the time about Mr. Taylor's history, disposition, and character (*R. v. Vasil*, [1981] 1 S.C.R. 469, at pp. 496, 500; *R. v. Tennant* (1975), 7 O.R. (3d) 687, 23 C.C.C. (2d) 80 (C.A.); *R. v. Tutton*, [1989] 1 S.C.R. 1392, at pp. 1432-1434; *R. v. Waite* (1986), 28 C.C.C. (3d) 326 (Ont. C.A.), at pp. 329-344; *R. v. Creighton*, [1993] 3 S.C.R. 3; *R. v. Gosset*, [1993] 3 S.C.R. 76; *R. v. Finlay*, [1993] 3 S.C.R. 103).

[136] The defence argues that a reasonable 16 year old, in the circumstances of this case, would not have foreseen a risk of bodily harm because K.W. did not know Mr. Taylor to have a propensity for violence and because they had been involved with other people that night and no one had gotten hurt. However, on K.W.'s own evidence, he'd heard Mr. Taylor speaking with Mr. Amero that night about trying to buy a converter kit which would convert a pellet gun to a real gun. That would have been some indication of Mr. Taylor's propensity. Further, Mr. Taylor had pressured him into attempting to rob a man with weapons. Even with that limited knowledge of Mr. Taylor, in my view, a reasonable 16 year old would have appreciated that if you approach people at night, on a path, wearing masks, armed with a knife and another weapon, there is a risk that serious bodily harm will result.

[137] Therefore, I am convinced beyond a reasonable doubt that K.W. was a party to the robbery, which was inherently dangerous and where serious bodily harm was foreseeable.

Abandonment

[138] The defence argues that even if I were to conclude that K.W. had a common intention with Mr. Taylor to commit robberies, he abandoned that intention before they met Chelsie Probert when he told Mr. Taylor he was done and started to leave. The defence of abandonment may excuse a person from either type of party liability (*Kirkness; R. v. Gauthier*, 2013 SCC 32). It has four requirements (*Gauthier*, at para. 50:

- (1) There was an intention to abandon or withdraw from the unlawful purpose;
- (2) There was timely communication of this abandonment or withdrawal to those who wished to continue;
- (3) The communication served unequivocal notice on those who wished to continue; and,
- (4) The accused took reasonable steps in the circumstances to neutralize or cancel out the effects of his participation or to prevent the commission of the offence. These reasonable steps must be proportional to the accused's participation in the planned offence.

[139] There is an air of reality to the defence, so the Crown has to disprove it.

[140] According to K.W., he told Mr. Taylor he was through with scaring people before they saw the man with the pizza box, but he didn't leave. When Mr. Taylor approached that man, K.W. followed and put his mask up. He then went back into the bushes with Mr. Taylor and smoked more marijuana. Then he told Mr. Taylor he wanted to go home, and Mr. Taylor disagreed. K.W. said he then started to walk out to the Path to go home. However, he didn't go home. Mr. Taylor put up

his mask and approached Ms. Probert and K.W. put his mask up too. K.W. walked past Ms. Probert and could have kept going but he stopped. He said he didn't leave earlier because Mr. Taylor had his pipe, the tire reamer and his kitchen knife. I do not believe that, despite professed his discomfort with what was going on, he stayed because Mr. Taylor had these things. He stayed while Mr. Taylor attempted to rob her and didn't leave until after Mr. Taylor had hit her with the tire reamer and she fell to the ground.

[141] I do not believe that K.W. had a genuine intent to abandon the unlawful purpose. At best, I believe he was equivocal about what to do. If I had a reasonable doubt that he intended to abandon or withdraw from the unlawful purpose and communicated that intention to Mr. Taylor, the first two requirements of "abandonment" would be satisfied. However, the final two requirements for the defence of abandonment are not satisfied. K.W.'s communicated intent to withdraw, would not, in the circumstances, have given Mr. Taylor unequivocal notice that he was quitting. I say this because after the first time he said he was done, he put up his mask, followed Mr. Taylor and then stayed to smoke marijuana. After the second time, he again put up his mask and stayed while Mr. Taylor tried to rob Ms. Probert. He also took no steps to neutralize or cancel out the effect of his participation or prevent the commission of the offence. In fact, his presence with his mask up had the potential effect of adding to the intimidation and of impeding Ms. Probert from one avenue of escape, even if that was not his intent.

[142] I am satisfied beyond a reasonable doubt that K.W. did not abandon the common intention to commit robbery prior to or during the attempted robbery of Chelsie Probert.

Conclusion

[143] The Crown has not proven that K.W. stabbed Chelsie Probert causing her death. Therefore, I find him not guilty of murder. However, the Crown has proven that K.W. was a party to attempted robbery because he and Mr. Taylor had a common purpose to commit that unlawful act, K.W. did not abandon that common purpose, the attempted robbery was inherently dangerous, and, serious bodily harm was, in all the circumstances, a reasonably foreseeable consequence of the attempted robbery.

[144] Therefore, I find him guilty of the included offence of manslaughter in the death of Chelsie Probert.

Elizabeth Buckle, JPC.