

PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. Gray*, 2020 NSPC 27

Date: 20200618

Docket: 8296660

Registry: Dartmouth

Between:

Her Majesty the Queen

v.

Jerrico Nathan Gray

Judge:	The Honourable Judge Theodore Tax,
Heard:	November 4, 2019; January 13, 2020; January 21, 2020; January 30, 2020 and February 13, 2020, in Dartmouth, Nova Scotia
Decision	June 18, 2020
Charge:	Section 249(1)(a) of the Criminal Code
Counsel:	Jennifer Mickelson, for the Nova Scotia Public Prosecution Service Derek Brett, for the Defence Counsel

By the Court:

[1] Mr. Jerrico Gray entered not guilty pleas and proceeded to trial on two charges, namely, having care or control of a motor vehicle while his ability to operate that vehicle was impaired by alcohol or drug contrary to section 253(1)(a) of the **Criminal Code** and operating a motor vehicle in a manner dangerous to the public contrary to section 249(1)(a) of the **Criminal Code** on or about December 2, 2018 in Middle Sackville, Nova Scotia. The Crown elected to proceed by way of summary conviction on those charges.

Background:

[2] The Information in this case was sworn on December 20, 2018 and it contained a total of four charges for which Mr. Gray had entered not guilty pleas. The trial date for the four count Information was initially set for June 11, 2019, but on May 22, 2019, Defence Counsel advised that he had been recently retained and requested an adjournment of the trial. The Court granted the defence request and the new trial date was scheduled for November 4, 2019.

[3] In addition, on May 22, 2019, the Crown Attorney advised the Court that no evidence would be offered in relation to two charges on the Information, namely, failing or refusing to comply with a breath demand contrary to section 254(5) of the **Code** and failing to stop his vehicle while being pursued by a peace officer in order to evade that peace officer, contrary to section 249.1(1) of the **Code**. As a result, the Court dismissed those two charges on May 22, 2019.

[4] During a pre-trial conference held on June 17, 2019, counsel requested that an additional day be scheduled for the trial. The Court scheduled November 18, 2019 as that additional day for trial. However, on September 16, 2019, Defence Counsel made an application to adjourn that second day and the Court scheduled the trial continuation on January 13, 2020.

[5] Trial evidence was heard in this matter on November 4, 2019 and continued on January 13, 2020. However, the trial evidence had not been completed, as anticipated, on January 13, 2020 and the Court secured 2 additional days for trial evidence to be heard on January 21, 2020 and January 30, 2020.

[6] After the Crown Attorney closed her case on January 30, 2020, Defence Counsel made a motion for a directed verdict in relation to both charges before the Court. After hearing the submissions of counsel with respect to that motion, the Court granted the application made by Defence Counsel in relation to the charge that Mr. Gray had operated a motor vehicle while his ability to do so was impaired by alcohol or drug contrary to section 253(1)(a) of the **Criminal Code**.

[7] As a result, the only remaining charge before the court for this trial decision relates to the allegation that Mr. Jerrico Gray operated a motor vehicle on or about December 2, 2018 at or near Middle Sackville, Nova Scotia in a manner that was dangerous to the public contrary to section 249(1)(a) of the **Criminal Code**. The closing submissions of the Crown Attorney and Defence Counsel were made on February 13, 2020 and the court reserved its decision until today's date.

Positions of the Parties:

[8] The position of Defence Counsel in relation to the dangerous driving charge, was that the Crown had not established all of the essential elements of the charge beyond a reasonable doubt. Defence Counsel submits that the Court ought to be left in reasonable doubt as to whether the direct and circumstantial evidence established that Mr. Jerrico Gray has been identified as the person who drove the white Mercedes onto Avebury Court in Middle Sackville and crashed into an electrical box and wires supporting a power pole on December 2, 2018.

[9] Defence Counsel submits that there was no positive identification of the person who walked away from the scene of the crash or whether the driver was the only person in that Mercedes. He also points to the fact that no photo lineup was done, and civilians only provided a very general description of height, weight and clothing of the suspected driver. Defence Counsel also noted that police had observed sneaker footprints during the track by the police dog and his handler, but no analysis or comparison of those sneakers was done with the shoes of Mr. Gray. For all of those reasons, he submits that the Crown has not established, beyond reasonable doubt, that Mr. Jerrico Gray was identified as the driver of the white Mercedes at the relevant time.

[10] Defence Counsel also submits that, even if the Court concluded that Mr. Jerrico Gray was identified as the driver of the white Mercedes at the relevant time, the Crown has not established, beyond reasonable doubt, the *actus reus* and *mens rea* of the dangerous driving offence. He submits that this was not a marked

departure from the standard of care of a reasonable person in the circumstances. The only evidence before the court is a car going at a high rate of speed in a cul-de-sac and a car crash, but no one was threatened by that speed as there were no other cars or pedestrians in the area, the driver was not being pursued by the police and the road conditions were clear with no snow or ice.

[11] The Crown Attorney submits that the white Mercedes being driven at a high rate of speed and accelerating in a residential area on a relatively short, dead-end cul-de-sac at 3 o'clock in the morning, spinning out of control, smashing a tree, going over a sidewalk and crashing into an electrical box and wires supporting a power pole a short distance from a house, clearly establishes the *actus reus* and objective *mens rea* of the dangerous driving charge.

[12] With respect to the identification of the driver, the Crown Attorney submits that the Court heard the evidence of three eyewitnesses who heard the noise of the car crash shortly after 3 a.m. and then saw that a white Mercedes had hit an electric box and wrapped itself round guy wires to a lamp pole. Those three witnesses also stated that only one person left the scene of that accident and that a 911 call was made to report the incident to the police before that person left the area. Witnesses gave a description to the police of the one male person who walked away from the white Mercedes and pointed out the precise location where he had walked between houses to leave Avebury Court. An agreed statement of fact [Exhibit 1] confirmed that the registered owner of that 2012 white Mercedes with Nova Scotia license plate FRA 267, was Mr. Jerrico Gray.

[13] The Crown Attorney also points out that Const. Jamie Cooke and Police Service Dog "Recon" were both qualified as experts by the Court following a contested *voir dire*. Const. Cooke was qualified to provide opinion evidence and interpretation of canine behaviour in the tracking and locating of human scent and at the same time, "Recon" was declared to be an expert in tracking human scent.

[14] The Crown Attorney submits that the evidence established that Const. Cooke arrived at the accident scene, within 20 minutes after it had occurred, and witnesses pointed to the exact location where they had seen the sole person leave the area. Then, Const. Cooke and his police service dog went to that location and once Recon detected the scent of that person at that location on Avebury Court in Middle Sackville, Nova Scotia, they commenced the track. Const. Cooke related the details to the Court of the 10-kilometre track that he and Recon followed for about 3 hours. Const Cooke also plotted the exact route of the track on Google

Maps which were filed as Exhibits 5 and 6. The track ended at 102 Caribou Road in Upper Sackville, Nova Scotia, which is where Mr. Gray was arrested.

[15] The Crown Attorney submits that when the Court considers all of the direct evidence and circumstantial evidence, there is only one reasonable and rational conclusion to be drawn from the totality of that evidence. She submits that the Crown has established beyond a reasonable doubt that Mr. Jerrico Gray was the driver of the white Mercedes at the relevant time and that he drove his vehicle in a manner dangerous to the public on or about December 2, 2018 at or near Middle Sackville, Nova Scotia.

[16] Based upon the trial evidence and the submissions of the Crown Attorney and Defence Counsel, the key issues in this trial are as follows:

1. Has the Crown Established the *actus reus* and modified objective *mens rea* of the offence of operating a Motor Vehicle in a Manner Dangerous to the Public contrary to section 249(1)(a) of the **Code**? and
2. Was the Identity of the Driver of the White Mercedes Sedan Established by the Crown Beyond a Reasonable Doubt?

[17] In determining those issues, I agree with both counsel that this will require an analysis of the direct evidence and the circumstantial evidence from which facts in issue may be inferred.

Trial Evidence:

[18] At the outset of the trial on November 4, 2019, the parties filed Exhibit 1 which was an Agreed Statement of Facts, which were admitted by the accused without the necessity of calling evidence. The two facts which were admitted by the Accused pursuant to section 655 of the **Criminal Code** were as follows:

1. On December 2, 2018, Jerrico Nathan Gray was the registered owner of a white, 2012 Mercedes four-door sedan with Nova Scotia license plate FRA 267 [“White Mercedes”] and
2. on December 2, 2018, at 03:12 hours, the front door surveillance video from 64 Avebury Court captured the White Mercedes driving on Avebury Court. That video surveillance was provided to the police by the resident of 64 Avebury Court, Mr. Mark Vien.

[19] The first witness called by the Crown was Mr. Chad Eisan, who lived at 30 Avebury Court in Middle Sackville, Nova Scotia on December 2, 2018. He indicated that Avebury Court is a cul-de-sac and that day, he finished work, drove home, parked his car and went in the house sometime just after 3 AM. He just got upstairs when he heard a car screech on the street and then heard the sound of a crash. He went outside to see if everything was okay and saw a person walking on the street who he could hear talking on his phone. He thought the person was phoning the police to report the accident.

[20] Although it was dark outside, he saw a black male individual, walking down the street in a direction away from the accident. Mr. Eisan said that they stared at each other briefly, for about 15 to 20 seconds, as he walked toward the accident at the end of the cul-de-sac and the man walked away from the accident on the other side of the street. After the man passed by him, he then “took off” between two houses and Mr. Eisan called the police. The black male individual was the only other person on the street at that time.

[21] Mr. Eisan described the black man, who he saw as being about 5’6” or 5’7” in height, with a “bulky” physique, wearing a “whitish” coloured hat, T-shirt with a pattern and light-coloured jeans. He described the “bulky” physique as being “well-built, stocky and muscular.”

[22] The black male individual who was walking away from the scene of the accident did not appear to be injured and although it was dark, Mr. Eisan believed that he had some “sort of a limp” that was not prominent. As the man was walking by him on the other side of the street, Mr. Eisan asked him if he was okay while that man was on his cell phone and then he “speed walked” out of the area between two houses.

[23] Mr. Eisan then walked up to the top of the cul-de-sac and observed what he described as a “really wrangled” White Mercedes. He had called the police and waited on the street until they arrived, approximately 30 minutes later, spoke to them and then went home. He confirmed that no other individuals were in the area, but he did indicate that just before the police arrived, a red Toyota Corolla with a white male driver and female passenger in their mid 30s drove into the cul-de-sac. They stopped by him and looked at the accident, never got out of their car and then left the area.

[24] Rhonda Chetwynd was the next witness who indicated that on December 2, 2018, she lived at 81 Avebury Court in Middle Sackville. She stated that their

house located at 81 Avebury and their driveway is at the very end of that small cul-de-sac. She was sleeping in the master bedroom of their house which has a large window at the front of their house over their garage. She was awakened by the loud noise of a car crash, near the end of their driveway. She looked out the window and saw a white or beige car on top of a green box which had underground cables and tangled up in the wires supporting a lamp pole.

[25] When Ms. Chetwynd looked out the large master bedroom window, she saw that the driver's door was open and the interior light of the car was on, but no one was in the car. She said that she woke immediately with the sound of the crash and looked outside within seconds.

[26] At first glance, Ms. Chetwynd did not see anyone around the car but after a few moments someone came out of the vacant lot next to their house and went into the car, in her view, to get something. At that point, she saw the back of a person who looked to be a man dressed in a light-coloured T-shirt, light-coloured jeans and sneakers. She described man's build as being "muscular" and being about 5'8" or 5'9" in height, but added it was hard to tell when looking down to the street from about 40 feet away. She added that she never saw the man's face from her vantage point.

[27] She stated that the man reached into the car for a few moments, but she couldn't tell if he took anything out of it. After the man finished looking in the car, he walked to the back of the car. He slipped and fell but got up and walked away from their house down the cul-de-sac on the sidewalk. As the man was walking away, she saw a neighbour on the street come up to the accident and a little later a red car came into the cul-de-sac, circled and then left the area.

[28] Ms. Chetwynd said that she stayed at the large front window of their master bedroom the whole time looking out at the scene of the accident while her partner, Patrick Bolivar was on the phone talking to the 911 operator, letting the police know what Ms. Chetwynd was describing. She saw the man walk about halfway down the cul-de-sac in lost sight of him when he went into a path which cut over to a street above them.

[29] Mr. Patrick Bolívar stated that he resided at 81 Avebury Court with his partner Rhonda Chetwynd on December 2, 2018. They live in a semi-detached house at the very end of the cul-de-sac. There is a vacant lot to the left of their house as viewed from the cul-de-sac.

[30] Mr. Bolívar was sleeping on December 2, 2018 when he was awakened by the sound of tires squealing, engine revving and the sound of a crash. He got up immediately, went to the front window of their master bedroom and saw that the car crash was “almost in our front yard.” A light-coloured four-door car had hit the support wires for the lamp in front of their house. He called 911 and his partner, Rhonda Chetwynd also got up and began looking out the window. After a few moments with the 911 operator, Mr. Bolívar went over to the window to also look out at the scene of the accident.

[31] Mr. Bolívar said that he saw male wearing a light-coloured T-shirt and jeans come from the vacant lot next to their house and walk down the sidewalk of Avebury Court. He did not see the male go to the car or see his face. Mr. Bolívar described the man’s build as “stocky” and “muscular.” He saw the man walk away on the sidewalk in not normal manner, staggering from one side to the other, correcting himself and then continue. Mr. Bolívar did not notice if the man had anything in his hands and then he disappeared out of his sight.

[32] Following Mr. Bolívar’s testimony, the Crown Attorney entered the short video from the front door surveillance camera of Mr. Mark Vien, who resides at 64 Avebury Court. The video surveillance clip which was filed as Exhibit 2 in the trial, is dated December 2, 2018, starting at about 0312 hrs. and it was entered as part of the Agreed Statement of Facts between the parties. The video itself is eight seconds in duration with the date stamp of 2018-12-02 with a timestamp start at 03:13:08 from the “front door” camera.

[33] The video clip from the front door surveillance camera of 64 Avebury Court was played in court. At the start of that brief video, there is initially the sound of a car engine, revving up, then screeching, a blur of a white car starting to slide sideways as it goes past that residence, the sound of a crash and then ending with some revving of the engine.

[34] Const. Jason Trites of the RCMP started his shift on December 2, 2018 at 6 AM and immediately began dealing with this investigation. He had been told that the night shift officers had been dealing with containment of the suspect as other members were assisting with the dog track in the Upper Sackville area. He had been informed that Const. Cooke and his police service dog had tracked an individual to 102 Caribou Drive and he proceeded to that address.

[35] When Const. Trites arrived at that residence, he saw Const. Cooke and Const. Reid knock at the door and a female came to the door. She said that there

was a child in the house. She was asked to step back by the other officers who went into the vestibule while he stayed outside on the step. He saw a black male come down the stairs and be taken into custody by the other police officers.

[36] After that, he went to Avebury Court where he met with Const. Chiasson who had been securing the scene at the white Mercedes. Const. Chiasson handed Const. Trites a wallet that he had retrieved out of the car, which contained the driver's licence and photo identification of Mr. Jerrico Gray.

[37] While Const. Trites was standing near the car, Mr. Vien approached and told him that he had video surveillance from his front door and the officer went to the house to watch that audio/video clip which ultimately became Exhibit 2. In court, Const. Trites stated that on the video, you could hear the engine revving as the car was moving quickly as it crossed in front of the surveillance camera. Then, the rear end of the car starts to slide out near the house, and there is the sound of the accident. Const. Trites said that he could not see the license plate number of the car on the video.

[38] Const. Trites observed skid marks on the street which matched what he had seen on the video and where the white Mercedes crashed into the electric box and the wires supporting the lamp pole. He took 24 photos of Avebury Court, the road on the cul-de-sac, the location where the white Mercedes crashed into the wires and an electric box, the interior of the car as well as the damage to the vehicle. Const. Trites stated that the photos taken by him on the morning of December 2, 2018 were a true and accurate representation of what he had seen on Avebury Court and were marked as Exhibit 3.

[39] Going back to his involvement at 102 Caribou Drive, Const. Trites repeated that he had arrived at that location in the early morning hours and that on arrival all lights in the house were off. When he got closer to the house, he noticed that the door was open and that a person was in custody of the other officers. He described the person who had been arrested as being "stocky guy and very well-built", also saying that the man was "physically fit" and was "large with big shoulders." He had not seen the man since that day but identified Mr. Gray in court.

[40] Const. Trites said that he gave the wallet with the identification to Const. Schofield as she was investigating a possible charge for impaired operation. Const. Trites also indicated that the person who he had seen being placed under arrest at the house located at 102 Caribou Drive and the photograph that he had observed on

the license, “appeared to be the same person” and that is why he gave the licence to Const. Schofield to continue her investigation.

[41] On cross-examination, Const. Trites confirmed that he did not really have any dealings with Mr. Gray at 102 Caribou Drive. He confirmed that he arrived at that location after other officers were already at the door. He did, however, confirm that he knew there had been a K-9 track done by Const. Cooke as the dog handler with Const. Reid as the cover officer and he saw them at 102 Caribou Drive.

[42] On further cross-examination, Const. Trites confirmed that the lady had said there was a child in the house, but police officers did not enter the house, because, as far as he knew, they did not have a warrant authorizing them to do so. He also confirmed that no fingerprints were taken from the car and although he looked for blood or open liquor in the white Mercedes, neither were observed. Const. Trites also confirmed that the police did not search 102 Caribou or interview anyone at that location. He also confirmed that when he looked up the stairs he saw a black male, who was naked and stumbled a bit as he walked down the stairs.

[43] Const. Craig Trudel of the Halifax Regional Police became involved in this investigation to assist in “containment” of areas to ensure that no one came into or left the designated areas. He moved to other locations based on the information related to him by the dispatch operator who had received information from Const. Cooke on the K-9 track. Ultimately, he ended up at 102 Caribou Drive as a “cover officer” for Const. Cooke and Const. Reid who were at the door to the house.

[44] Const. Trudel said that the door was open, a female was in the doorway with at child in her arms, and the other two officers announced that they were Halifax Regional and RCMP officers. Shortly after that, Mr. Gray, who he identified in court, came to the top of the stairs, he was naked and then came down to the front entry where the other officers were located. Const. Trudel said that Mr. Gray had his right hand against the wall as he walked down the stairs as he seemed to be a little unsteady on his feet. He confirmed that Mr. Gray was very cooperative, the other officers placed him under arrest and that he did not speak to him.

[45] Const. Trudel confirmed that Mr. Gray was taken into custody at 6:32 AM and that he had made note of a number of cuts that Mr. Gray had on the forearms of both arms. He also noted that the cuts were “fresh and bleeding.” He also recalled seeing some blood on the front door of the entry.

[46] Const. Trudel also confirmed that the name of the woman who came to the door was Shayla Parsons and that she was the registered owner of the Honda Civic which was parked in the driveway of the house.

[47] On cross-examination, Const. Trudel recalled that he had seen blood on the middle of the front door and on the arms of Mr. Gray, but confirmed that he did not know how it got there as he did not have any conversation with Mr. Gray. Const. Trudel also confirmed that he did not notice any blood on the police officers who were at the door of the house.

[48] With respect to the car in the driveway, which had Nova Scotia license plate number GGD 268, Const. Trudel confirmed that he had not done a computer check of that license plate himself and the vehicle could have been a Honda Accord. Defence Counsel drew Const. Trudel's attention to Exhibit 7 which had a photograph of the back end of the car with that license plate and he agreed that it was a photograph of a Chevrolet Cruze. He stated again that the information about the car and Shayla Parsons being the owner, was relayed to him by someone else.

[49] Const. Tim Reid was on his way to the Millwood area on December 2, 2018 when he received a radio bulletin from Sergeant Barrett that he had just broken off pursuit of a white car which had been driving at a high rate of speed. Shortly thereafter, he was informed that a 911 call had reported the crash of the white Mercedes on Avebury Court and that one person had left the area.

[50] Const. Reid proceeded to Avebury Court and on arrival, there was no one in the area. He asked for other officers to assist in setting up containment in the area and called for Const. Cooke and police service dog to do a track from that location. He left with Const. Cooke as the "cover officer" and stayed with him until the track ended at 102 Caribou Drive in Middle Sackville, Nova Scotia.

[51] Const. Reid indicated that while Const. Cooke followed his dog Recon, he was keeping an eye on safety issues for both of them and advising dispatch from time to time where they were in order to change the location of the containment officers. The track that they followed was over all types of terrain, through yards, grass, crossing roads or along the shoulder of roads and through bushes. The track was approximately 3 to 3 ½ hours, before ending up at 102 Caribou Dr.

[52] When they arrived at the yard of 102 Caribou Dr., he saw a female in the door and the door was open, and they announced that it was the police. With that,

the door closed and the light at the front door was turned off. Const. Cooke and Const. Reid went to the door and knocked, but initially, there was no reply.

[53] Through a window to the house, he saw that the floor was wet and there was a wet hoodie on the stairs. Const. Reid also saw a picture on the fridge of the female and a male, who matched the description of the person they were looking for. Then, again looking through the window, he saw the female at the top of the stairs with a child in her arms and it looked like she was talking to someone. He knocked at the door again and this time, the woman came down and opened the door and the police officers explained why they were there.

[54] A few moments later, a naked male came out of the area where the female had just been. Mr. Gray was given time to get dressed, then he came downstairs and was arrested by the officers and turned over to Const. Schofield and Const. St. Pierre. Const. Reid said that the description of the suspect that had been provided to the police was of a “heavy set, short African Canadian male.” On seeing Mr. Gray in the house, he realized that the description of “heavy set” meant “muscular.”

[55] On cross-examination, Const. Reid said, with respect to the dog track, that they started at Avebury Court and while they were on the track, other police officers had radioed a description of the suspect male. Const. Reid confirmed that although the dog track could have been considered as being in “hot pursuit” of the suspect, they did not search inside the house.

[56] On cross-examination with respect to his observations of blood on the door at 102 Caribou Dr., Const. Reid had asked for a photograph of that to be taken, but he did not believe any sample was taken for analysis. Similarly, with respect to questioning about fingerprints in the car, he did not believe that the white Mercedes was examined for fingerprints. Const. Reid agreed with Defence Counsel that he had seen shoe impressions during the track and confirmed that he did not see if they matched Mr. Gray’s shoes or any shoes that were in the house.

[57] At the conclusion of Const. Reid’s testimony, there was an oral agreement between the Crown and Defence Counsel that was related to the Court that the Identification Section of the police had checked the white Mercedes for fingerprints, but none were located.

[58] Const. Travis Gallant testified that he was not on duty on December 2, 2018, but he was asked by the Crown to see if he could obtain statements from two

named individuals. The Crown Attorney had made that request after Defence Counsel served notice of potential alibi evidence. Const. Gallant said that he went to 102 Caribou Dr. in Middle Sackville and spoke to Shayla Parsons, who he estimated to be in her mid-30s. She declined to give a statement.

[59] Staff Sergeant Terry Barrett was the RCMP watch commander on December 2, 2018. He happened to be driving on Sackville Drive around 3 AM headed towards the Beaverbank extension when a white sedan driving at a high rate of speed approached him from the Millwood area. He activated his emergency lights, but by the time he turned around, the white car was a distance away. He felt that the car was trying to evade being stopped by the police but decided not to pursue the white car.

[60] Rather than pursue the white vehicle, Sergeant Barrett pulled to the side of the road and let dispatch know that the white car had taken off at a high rate of speed and radioed other cars to be on the lookout for that vehicle. A few minutes later, he received a call that a white Mercedes had crashed on Avebury Court. He proceeded directly to Avebury Court which is a cul-de-sac off Sackville Drive. On arrival, he saw the white Mercedes wrapped around the guy wires to a pole with a streetlight at the end of the cul-de-sac.

[61] Sergeant Barrett was not certain that it was the same vehicle that he had seen a little earlier, as he did not get a good description of the white sedan, as it went by him going quite fast. In addition, he could not tell whether there were other people in the white sedan besides the driver. Sergeant Barrett had talked to a couple of witnesses at the cul-de-sac and based on their information, he gave a description of the suspect individual over the radio. In referring to his notes, Sergeant Barrett stated that the description provided over the radio by him was of a stocky, black male, who was wearing a light shirt and jeans.

[62] Since the white Mercedes was empty when he arrived there, he decided to set up containment of the area as the driver had fled from the scene. In addition to the containment of certain locations in and out of that area as a perimeter, he called the K-9 unit of the Halifax Regional Police to conduct a track of the suspect from Avebury Court. He didn't note the specific time that he arrived at Avebury Court, but was there when Const. Cooke and his police service dog arrived.

[63] Const. Remi Chaisson was on duty on December 2, 2018 in another location of the city but was asked to come to Avebury Court to secure the scene where the white Mercedes had crashed. He also took audio statements from people in the area

and some photographs of the area, the car's exterior and interior. He also seized two wallets from the car and handed them over to Const. Trites between 6 and 7 AM. The wallets contained the IDs and bank cards for Jerrico Gray and Shayla Parsons.

[64] With respect to the evidence of Const. Jamie Cooke, the Crown Attorney had previously served notice on the defence that they intended to call him as an expert witness and also served a copy of his curriculum vitae. The Crown Attorney sought to have Const. Cooke qualified as an expert dog master in order to provide opinion evidence on the interpretation of canine behaviour in the tracking and locating of human scent. The Crown Attorney also sought to have Const. Cooke's police service dog, named Recon, a five-year-old German shepherd also qualified as an expert based upon the dog's training and experience in tracking human scent,

[65] Since the qualifications of Const. Cooke and of Recon as experts were both contested by Defence Counsel, on January 13, 2020, the Court entered into a *voir dire* to determine the issue. Following a very detailed direct examination of Const. Cooke and an equally thorough cross-examination by Defence Counsel, the Court reserved its decision and asked the parties to forward any case law in support of their positions. The Court indicated that the decision would be made at the outset of the trial continuation on January 21, 2020.

[66] The evidence on the *voir dire* had covered Const. Cooke's training as a dog master and experiences in over 9 years as a police dog handler, the number of times he testified in court and been qualified as an expert, work that he had done in the past with Recon and Recon's record of accuracy. In addition, Const. Cooke related the ongoing training that he conducts with Recon, how and where the police dog is deployed and how the track is conducted, how the police dog communicates that he is tracking the scent to the handler, how climate and terrain may affect the track as well as how the police dog focuses on the scent rather than any number of distractions.

[67] On January 21, 2020, the Court concluded that, during the *voir dire* the Crown had established Const. Cooke's expertise as a "dog master" skilled in the handling of a police service dog and in the interpretation of the police service dog's behaviour while tracking for or locating human scent. The Court also concluded that the Crown had established that the police service dog, in this case, Recon had the necessary training and experience to be qualified as an expert, who had been trained to track or locate human scent.

[68] At the outset of Const. Cooke's testimony in the trial, the Crown Attorney filed 2 exhibits which had been prepared by Const. Cooke using photographs from Google Earth to show the overall track that he followed with Recon from the start at 45 Avebury Court to the track "end" at 102 Caribou Rd.

[69] The Google Earth higher level view of the overall track from the "start" at 45 Avebury Court to the "end" which outlined the police service dog's track was marked as Exhibit 5. In addition to that higher-level view, Const. Cooke also prepared a series of 4 images which were zoomed in closer to the ground to provide greater details of track that he followed in four segments, which clearly showed the houses and businesses, roads, street names and some key civic addresses as well as forested areas where "Recon" had tracked a scent on December 2, 2018. Those images were marked as Exhibit 6.

[70] Const. Cooke stated that he was on duty during the early morning hours of December 2, 2018 and that around 3:19 AM, he was on his way to the Sackville area to assist in another investigation. He was monitoring his radio when he heard that there had been a major accident at Avebury Court and that someone had left the scene of the crash. He arrived at Avebury Court at 3:31 AM and was informed that the person who had left the white Mercedes, had walked down the street and left the area between 2 houses. He was pointed to the specific location where the person had left the Avebury Court area.

[71] Const. Cooke was informed of the last known location of the person in that area and he had been informed by other police officers at the scene that no one else had gone through that area. He placed Recon in his tracking harness and deployed the police service dog at that location. Const. Cooke stated that Recon immediately gave him a "strong indication" that he had picked up the scent and began to pull hard as they ran off. Const. Reid followed them as the "cover officer."

[72] In referring to his plotting of the track on Exhibit 6, Const. Cooke stated that the track went behind the residence and through a wooded area and crossed over the road to the gravel shoulder on the East side of Sackville Drive and then proceeded North on that gravel shoulder. At certain locations when they crossed over roads, he noted that he could see the wet footprints of one person on the road near the roundabout then crossed over Sackville Drive through a grass field and brush exiting back out onto Sackville Dr. proceeding toward 1755 Sackville Dr. [as shown on Exhibit 6, Page #2]. He noted that the time at the crossroads just before 1755 Sackville Dr. was about 3:52 AM on December 2, 2018.

[73] Shortly after 1755 Sackville Drive the track went to the right through wooded area into an industrial area. From there, the track continued parallel to Sackville Drive in a grass and wooded area, coming back onto Sackville Drive near 1823 Sackville Dr. and then continued on the side of the road. At about 4:19 AM, the track went into a large gravel area at the back of a car/camper storage location and Const. Cooke noted the circle on both exhibits to indicate a so-called "dead-end" so he had to assist Recon to determine if the person was still in that area or they had initially missed the person's "escape route."

[74] At 4:22 AM, Const. Cooke said that Recon signalled that he had located the original scent that they were tracking, and he pointed out that, at this point, they had no idea who they were actually tracking. At 4:31 AM, the track took them into an auto storage lot at 1933 Sackville Dr. and once again there was a "dead-end" and they had to see if the person was still in the area or they had initially missed the "escape route." At 4:37 AM, Recon located the scent again and the track continued on Sackville drive proceeding in a northwesterly direction.

[75] The track continued along Sackville Drive and on Exhibit 6, page# 3, Const. Cooke pointed out that there were 2 more "dead ends" essentially one after the other where the track went off Sackville Drive behind houses into thick, dark woods, where he saw footprints in the snow. There was a "dead-end" in the bush behind houses located at 23 and 29 Patton Rd. as it appeared that the person was walking around in circles and Const. Cooke could see the flashing emergency lights of police cars in the distance on the road.

[76] Const. Cooke continued casting and circling in a wider circular fashion in that area and at about 5:31 AM, he noted that Recon signals that he picked up the scent again and they proceeded along Sackville drive for a short distance into a property, again seeing footprints in the snow, which in his opinion, were the same as the previous footprints which he had observed, which had a "unique gait." From there, at about 5:32 AM the track went across to the other side of Sackville drive and into the Car Star's gravel lot, where he could again see the police cars emergency lights flashing. There was another "dead-end" in that gravel area.

[77] Once again, Const. Cooke cast Recon in a circular fashion and the police dog found the "escape route" and then Recon proceeded to track the scent. The track had doubled back out of the lot and crossed over the road to continue on Patton Road in a northwesterly direction. The track went off the road around 213

Patton Rd. at about 6:02 AM going back into thick dark woods where, once again, he could see the flashing emergency lights of the containment police cars.

[78] When they came out of the thick dark woods, at about 6:21 AM, the track went along the Caribou Rd for some distance and then entered the driveway at 86 Caribou Rd. Then, Recon followed the scent through the front yards of 86, 92 and 96 Caribou Rd. going in between those yards in unlit areas where there was heavy foliage and thick brush.

[79] Const. Cooke observed that Recon had become very excited and was taking deep breaths which indicated to him that they were very close to the person they had been following. Then, Recon started breathing through his mouth in a raspy fashion and was very excited at the driveway of 102 Caribou Rd. As they came out of the bush next to 102 Caribou Rd. at about 6:27 AM, Const. Cooke said that he was only about 10 feet away from the front of the house when he saw a female standing in the open door, who immediately slammed it shut.. As he got to the front door, he could see that there was what he believed to be “fresh blood” on the door which he observed with his flashlight.

[80] At that point in time, Const. Cooke did not know exactly where they were, but he saw a vehicle in the driveway, and he let dispatch know the license plate number of that vehicle so he could be located by other officers. Just after doing that, Recon was pulling hard to the front door of the house. Const. Cooke then took Recon around the house and was satisfied based on his dog’s indications that the suspect who was being tracked, had not departed from that residence.

[81] While he was in the back of the house, Const. Cooke looked up to a window on the 2nd floor, he noticed a light in the room and he saw a black male, without a shirt on, looking out the window. He went back around to the front of the house and told the female that the male was arrestable and asked if he needed any assistance because of the impact of the crash. This short discussion occurred around 6:31 AM and Const. Cooke stated that he had no doubt in his mind that the person who they had been tracking was in that house. Other officers arrived and then dealt with the individual who was cooperative and came out of the house.

[82] In summary, Const. Cooke said that Recon’s track of the scent of the person started at 3:34 AM and they had continued on that track for approximately 3 hours over a distance of about 10 km through all types of terrain. He stated that he was cold, wet and tired and received scratches and cuts from going through brush in the

darkness. Const. Cooke stated, once again, that he had “no doubt” in his opinion that Recon had followed the same person throughout the track.

[83] On cross-examination, Const. Cooke stated that a civilian at the scene of the crash walked to and then pointed out the exact location, where the one individual who had been seen walking away from the car crash, had walked between houses and left the area. It was between those houses where he deployed Recon and they commenced the track. He agreed that he had no idea how many people might have been in the car when it crashed but added that there was no information that anyone else had gone off in a different direction from the car.

[84] Const. Cooke acknowledged, as he pointed out during his direct examination there were a few short “dead ends” where Recon lost the scent of the track and then picked it up in a few minutes or a more significant one of about 15 minutes in the Car Star lot. He agreed that this was a fairly significant time, which was due to the size of the lot and the time it would take to deploy the Recon in a circle to re-establish the track. Const. Cooke opined that the suspect had entered the Car Star lot and went around the back and circled before doubling back and going onto Patton Road again after probably seeing the emergency lights flashing on the containment police cars. After that, the track proceeded along Patton Road for quite a distance.

[85] On further cross-examination, Const. Cooke acknowledged that, on some occasions, it can take longer to find the person’s “escape route.” He stated that this track was not abnormally long but there were many variables. Having said that, Const. Cooke added that in colder weather the scent seems to be better and he summarized that it “was a great night to do the track.” He had noted the weather and temperature conditions that morning as being -2 Celsius, with the 7 to 11 km wind from the northwest and 80% humidity.

[86] When questioned about the shoe imprint that he had seen during the track, Const. Cooke said that it was larger size shoe print, but he did not measure it then or go back later to measure the shoe print in the snow. He confirmed that after Mr. Gray was arrested at 102 Caribou Rd., he did not enter the house to inspect any of the shoes there or to search inside the residence. Const. Cooke also confirmed that no article was taken from the white Mercedes to give Recon a scent to track or a smell of the driver’s seat to pick up the scent of the suspect, as that is not how they conduct a track.

[87] Const. Patrick Gamache of the RCMP said that at about 6 AM on December 2, 2018 and was initially assigned to a containment role blocking certain streets with his police car and emergency lights flashing. However, about a half-hour later, he was told that a male had been arrested on Caribou Road and he went there to assist the other officers. On arrival, he took photographs which were marked as Exhibit 7 of the front door of 102 Caribou Road, a Chevrolet Cruze parked in the driveway with Nova Scotia license plate number GGD 268 and photographs of a 9 inch long blood mark, which he believed to have been freshly made, in the centre of the white door.

[88] On cross-examination, Const. Gamache confirmed that he did not swab that blood mark to get it analysed, nor did he touch or smell it to determine if it was blood. However, he believed it was blood but was not sure whose blood it was.

[89] The final witness called by the Crown was Const. Kelsey Schofield of the RCMP who was one of the officers involved in containment by stationing the police car at certain locations with emergency lights activated. After being advised that the suspect had been arrested at 102 Caribou Rd., Const. Schofield arrived at that location at 6:39 AM. Shortly thereafter, Mr. Gray was escorted away from the house by Const. Trites and placed in Const. Schofield's police car to be transported to the Lower Sackville detachment for processing. Const. Cooke Schofield did not interact with Mr. Gray on the way to the RCMP detachment office.

[90] Const. Schofield's evidence on direct related to, almost entirely, the charges of operating a motor vehicle while impaired by alcohol or drug as well as the charge of failing or refusing to comply with the demand to provide samples of breath for analysis. As I mentioned at the outset, the refusal charge had been dismissed by the court on May 22, 2019.

[91] On cross-examination, Const. Schofield confirmed that Mr. Gray did not require medical attention.

[92] After Const. Schofield's testimony, the Crown Attorney closed her case and tendered exhibits. It was at this point that Defence Counsel made the motion for directed verdict in relation to both of the remaining charges on the Information. On January 30, 2020, the Court granted the application by Defence Counsel for a directed verdict of not guilty with respect to operating a motor vehicle while Mr. Gray's ability to do so was impaired by alcohol or drug.

[93] The motion was only granted by the Court with respect to the charge of operating a motor vehicle while Mr. Gray's ability to do so was impaired by alcohol or drug.

[94] Following the Court's decision with respect to the directed verdict, Defence Counsel advised the court that they would be calling 2 witnesses.

[95] The first witness called by the defence was Constable Francis Courtmanche of the RCMP. Const. Courtmanche indicated that on December 2, 2018, he was doing containment on one side of Sackville Drive. He was not sure when he started that containment role, but about 10 minutes after he got to that location, a female drove up to his location and stated she was looking for her "little brother." The female did not identify herself or give the name of the person that she was looking for and left the area.

[96] On cross-examination by the Crown Attorney, Const. Courtmanche confirmed that containment stops people from going into or out of the control area, in this case, while a dog track is underway.

[97] Const. Yvette L'Heureux at the RCMP was called to come from a different detachment to assist the members of the Lower Sackville detachment in conducting the containment of a certain area. She indicated that the call came to assist with the containment at about 3:20 AM and the information was that the suspect had fled from the car that had recently crashed in the area. She was stationed at different points as the containment moved locations and she did stop and interact with people in many cars while conducting her containment role.

[98] On direct examination, Defence Counsel questioned Const. L'Heureux about one dark coloured minivan that she had stopped while doing containment. She said that the mini van had 6 or 7 people in it and one person, who was seated in the back matched the description of the suspect that had been provided over the air. She recalled that the description of the suspect, which had been provided over the air, was of a heavy set or thick build, black male, wearing a light-coloured shirt and pants.

[99] Const. L'Heureux asked the person, who was seated in the backseat and who she thought had matched the description of the suspect, to step out of the vehicle for a moment so she could identify him. The person who stepped outside of the van, identified himself. She asked him a couple of questions and then allowed the van to continue going in the direction away from the area of the car crash.

[100] On cross-examination, Const. L'Heureux confirmed for the Crown Attorney that the individual who had stepped out of the minivan from the back seat was cooperative. Once he was out of the van, she asked him to show his arms and there were no indications of any scratches or injuries to indicate that he had just been in an accident. On re-direct by Defence Counsel, Const. L'Heureux again stated that there was no indication that the male had been involved in a recent accident, he was not sweating or out of breath from recently running from the police, he had shown his arms and lifted his shirt to show his stomach to show that there were no injuries.

[101] On a question of clarification by the Court as to when and where this interaction with the male located in the backseat of a minivan had occurred, Const. L'Heureux stated that it was at about 3:45 AM and she was situated on Sackville Drive, but did not note the cross street where she had set up containment at that point in time.

Analysis:

[102] At the outset of my analysis, it is important to note that in a criminal trial, the burden is on the Crown to prove the charges against any accused beyond a reasonable doubt. Mr. Gray is also presumed to be innocent of the charge before the court unless I conclude that the Crown has proved his guilt beyond a reasonable doubt.

[103] The presumption of innocence and the requisite standard of proof beyond a reasonable doubt are fundamental principles in our criminal law. The Supreme Court of Canada has established in cases such as **R. v. Lifchus**, [1997] 1 SCR 320 and **R. v. Starr**, [2000] 2 SCR 144 that "reasonable doubt" does not require the Crown to prove the allegations to an absolute certainty. However, the standard of proof beyond a reasonable doubt falls much closer to absolute certainty than to proof on a balance of probabilities.

[104] The Supreme Court of Canada has also stated that a reasonable doubt is not based upon sympathy or prejudice, nor is it an imaginary or frivolous doubt. It is a doubt based upon reason and common sense which is logically connected to the evidence or the lack of evidence. Reasonable doubt may arise through the evidence presented by the Crown, if the court determines that the evidence was vague, inconsistent, improbable, or lacking in cogency. Of course, reasonable doubt can

also arise from testimony of an accused or any other evidence tendered by the Defence from any other sources.

Has the Crown Established that a Motor Vehicle was Operated in a Manner Dangerous to the Public contrary to section 249(1)(a) of the Code?

[105] The law in relation to the charge of operating a motor vehicle in a manner dangerous to the public contrary to section 249(1)(a) of the **Criminal Code** has been addressed by the Supreme Court of Canada on several occasions. In the case of **R. v. Thomas et al.**, 2012 NSPC 117 at paras 114-116, which dealt with the same charge, I briefly set out the Supreme Court of Canada's comments with respect to the *actus reus* and the *mens rea* for the offence which must be established by the Crown beyond a reasonable doubt.

[114] The law in relation to this charge has recently been reviewed by the Supreme Court of Canada in **R. v. Roy**, [2012] SCC 26 (CanLii). In that case, decided in June 2012, the Court confirmed and clarified their earlier decisions in **R. v. Beatty**, [2008] SCC 5 (CanLii) and **R. v. Hundal**, [1993] 1 SCR 867 with respect to the analysis to be conducted by the trier of fact to determine if the *actus reus* and *mens rea* of this offence have been established beyond a reasonable doubt.

[115] In **Roy**, *supra*, Justice Cromwell delivered the decision for the court and stated at para. 34 that:

“In considering whether the *actus reus* has been established, the question is whether the driving viewed objectively, was dangerous to the public in all of the circumstances. The focus of this inquiry must be on the risks created by the accused's manner of driving, not the consequences, such as an accident in which he or she was involved.”

As a result, there must be an objective inquiry into the risks created by the manner of driving in all of the circumstances of the case, without simply focusing on the consequences of the accused's driving.

[116] With respect to the *mens rea* analysis, the Court stated in **Roy**, *supra*, at para. 36, that the analysis will depend on whether the dangerous manner of driving was the result of a “marked departure from the standard of care which a reasonable person would have exercised in the same circumstances.” Cromwell, J. pointed out in para. 37, that simple carelessness does not represent a “marked departure” from the standard of care expected of reasonable person in the same circumstances and that “the marked departure” standard is a “modified objective standard,” which is the minimum fault requirement for a criminal offence. Mr. Justice Cromwell added that if there was proof of subjective *mens rea*, that is, “deliberately dangerous driving,” that would support a conviction for dangerous

driving, but proof of that subjective *mens rea* is not necessarily required (at para. 38).

[106] Even more recently on March 27, 2020, in **R. v. Chung**, 2020 SCC 8 (CanLII), the Supreme Court of Canada has again clarified issues relating to the objective nature of the *actus reus* and *mens rea* of the offence of operating a motor vehicle in a manner dangerous to the public. Mr. Chung was charged and ultimately convicted of offence contrary to section 249(4) of the **Code** which dealt with the dangerous operation of a motor vehicle and thereby causing the death of the driver of another motor vehicle at a major intersection in Vancouver.

[107] In **Chung**, Madam Justice Martin provided significant clarification on the issue of the analysis to be conducted by a trial judge in determining whether the accused's actions were a marked departure from the standard of care that a reasonable person in the same circumstances would have exhibited. In writing the majority (4-1) decision, Justice Martin stated as follows at:

“[19] .. the trial judge's fixation on the momentariness of the speeding demonstrates an error of law. Clearly, momentary excessive speeding on its own can establish the *mens rea* for dangerous driving where, having regard to all the circumstances, it supports an inference that the driving was the result of a marked departure from the standard of care that a reasonable person in the same circumstances would have exhibited (**Roy**, at para. 41).

[22] Although this court in **Roy** and **Beatty** determined that momentary lapses in attention and judgement would usually not raise criminal liability, this was because momentary lapses often result from the “automatic and reflexive nature of driving” (**Beatty**, at para. 34) or “(s)imple carelessness, to which even the most prudent drivers may occasionally succumb” (**Roy**, at para 37). These are examples of conduct that, when assessed in totality against the reasonable person standard, **only represent a mere departure from the norm**. Momentary conduct is not assessed differently from other dangerous conduct. **Conduct that occurs over a brief period of time** that creates foreseeable and immediate risks of serious consequences **can still be a marked departure from the norm** (**Beatty**, at para 48)” [*emphasis is mine*]

[108] Madam Justice Martin highlighted at para. 23 of **Chung**, *supra*, that the “core question” at issue for the trial judge was “whether the dangerous manner of driving was the result of a marked departure from the standard of care which a reasonable person would have exercised in the same circumstances” [**Roy**, at para. 36 (emphasis in original text)].

[109] In determining the objective *mens rea* for this offence, Martin J. observed, in **Chung**, *supra*, at para. 26, that it is essential that the trial judge, consider the totality of the circumstances, such as the duration of the speeding, the accused's control of the vehicle, the magnitude of the speeding, the location of the speeding and any other relevant circumstances which were present and then compare the accused's conduct to the conduct of a reasonable person in their circumstances and determine whether, in the totality of the circumstances, a reasonable person would have foreseen the risk of endangering the public by engaging in that conduct and taken steps to avoid it, presumably by not driving so fast.

[110] In this case, I find that the evidence of the civilian witnesses and the video surveillance footage of the area in front of 64 Avebury Court at about 3:12 AM on December 2, 2018 in Middle Sackville Nova Scotia clearly established that a white Mercedes Benz with Nova Scotia license plate number FRA 267 was driven at a high rate of speed on a relatively short dead-end, residential cul-de-sac and crashed into an electric box and guy wires supporting a lamp pole in the vacant lot next to 81 Avebury Court.

[111] The duration of the white Mercedes car being driven at a high rate of speed on that cul-de-sac was in reality a matter of seconds as the video surveillance recorded the sound of the engine gaining speed, being revved up, then the audio of the surveillance video records a loud screeching sound, from which I find it would be reasonable to infer that the sound was consistent with the brakes being firmly applied with the car starting to skid. In fact, I find that the photographs taken by the police clearly show the skid marks of the vehicle on the sidewalk side of Avebury Court, which start on the side of the road for oncoming traffic, then going up and over the curb on that side of the road, continuing to slide into and breaking a recently planted tree before finally impaling itself on the guy wires.

[112] Furthermore, looking at the photographs from Exhibit 3, the road conditions on Avebury Court on December 2, 2018 were clear and dry. It is evident from the photographs that there was only some small amounts of snow on the grass and in the vacant lot next to 81 Avebury Court, but no snow or ice on the street or on the sidewalk where the white Mercedes started to skid and slide towards its final resting place in the guy wires. The evidence of Constable Cooke established that during his dog track which lasted for three hours from about 3:30 AM to 6:30 AM, the temperature in the area was -2°C with a slight wind from the northeast and 80% humidity. Taking all of those circumstances into account, I find that there would be

absolutely no meteorological factors that caused or contributed to the white Mercedes going out of control and slide on the sidewalk and street until it crashed.

[113] Although the surveillance video shows a blur of the white Mercedes going by 64 Avebury at about 3:12:47 AM, it is clear that just as the car gets to the driveway of that address, it is starting to slide sideways with the driver's side wheels coming onto the sidewalk as it continues sliding sideways down the sidewalk. Based upon the audio of the screeching noise and the skid marks on the road, I find it is reasonable to infer from those facts that, at that point in time, the driver has just stopped accelerating to apply the brakes of the car. However, given the blurred image of the white Mercedes as it goes by 64 Avebury Court and the other facts that I have found to be established by the evidence, I find that it is reasonable to infer that the vehicle was still being driven at a very high rate of speed at that location on a relatively short, dead-end, residential cul-de-sac.

[114] Looking at the photographs in Exhibit 3 of the end of the cul-de-sac beside 81 Avebury Court, I find that they establish that there is only a relatively short distance between the guy wires where the white Mercedes crashed and the vehicle parked in front of 81 Avebury Court and for that matter, the house itself. I find it reasonable to infer that the white Mercedes was still travelling at a high rate of speed when it collided with the guy wires, despite applying the brakes, given the very significant damage, which completely totalled the front-end of the car. Furthermore, I find that if the white Mercedes had not collided with and been impaled on those wires, it is highly likely that the white Mercedes would have caused significant property damage to the house or one of the parked cars on the driveways at the end of the cul-de-sac.

[115] I also find that the driver of the white Mercedes certainly caused property damage by virtue of fact that the vehicle began skidding sideways towards the end of this cul-de-sac, causing the vehicle to essentially skid out of the driver's control, go up onto the sidewalk, snapping off a tree and crashing into and displacing an electric box.

[116] Having come to those conclusions, I find that the Crown has established the *actus reus* of this offence, beyond a reasonable doubt, that the white Mercedes Benz was driven in a manner that was dangerous to the public, having regard to all of the circumstances that were present during the early morning hours of December 2, 2018, including the nature, condition and use of the place at which the motor vehicle was being operated, even taking into account that there was no

evidence of other traffic moving on that cul-de-sac at that time of day. The manner in which the white Mercedes was operated damaged public property and posed a very significant risk of damaging the real and/or personal property of members of the public who resided at the end of Avebury Court.

[117] With respect to the modified objective *mens rea* of this offence, I also conclude and find that, based upon the proven facts and circumstantial evidence based upon inferences from those proven facts and the totality of the circumstances present around 3:12 AM on December 2, 2018, established that the white Mercedes was being driven in a highly dangerous manner at that time. I find that the Crown has established beyond a reasonable doubt that, based upon the facts as found on the totality of the circumstances present at that time, the driving of the white Mercedes at high rate of speed on a short, dead-end, residential cul-de-sac and ultimately causing damage to property before colliding with guy wires, was the result of a marked departure from the standard of care that a reasonable person in the same circumstances, would have exhibited.

[118] Put another way, based upon the recent **Chung** decision of the Supreme Court of Canada, I find that the Crown has established the modified objective *mens rea* beyond a reasonable doubt based upon my findings of fact with respect to the totality of the circumstances present at that time. Moreover, I conclude, beyond a reasonable doubt, that a reasonable person would have foreseen the risks of endangering the public by engaging in this high speed and dangerous driving even for a short period of time and would have taken reasonable steps to avoid that conduct, presumably by not driving so fast, especially on a short, dead-end, residential cul-de-sac.

Was the Identity of the Driver of the White Mercedes Sedan Established by the Crown Beyond a Reasonable Doubt?

[119] After having come to the conclusion that the white Mercedes was operated in a manner that was dangerous to the public during the early morning hours of December 2, 2018, the second key issue is whether the Crown has established, beyond reasonable doubt, that Mr. Jerrico Gray was the driver of that vehicle.

[120] As I indicated at the outset, the issue of the identification of the driver of the white Mercedes on the relevant date and time involves a consideration of eyewitness or visual identification evidence, the opinion evidence of Const. Cooke in interpreting and following the signals of his police service dog, Recon following

a track for several hours over a distance of several kilometres, the evidence called by Defence Counsel and determining what, if any, inferences may be drawn from the totality of the direct and circumstantial evidence.

[121] At this point, it is important to instruct myself on the issue of circumstantial evidence, and in particular, the facts in issue which may be inferred from that evidence. As with direct evidence, a piece of circumstantial evidence should be considered, not in isolation, but rather, together with all of the other evidence, to reach the verdict. It is a well-established principle that a conviction based upon circumstantial evidence requires the trier of fact to be satisfied, beyond a reasonable doubt, that the guilt of the accused is the only reasonable or rational inference to be drawn from the proven facts: See **R. v. Griffin**, 2009 SCC 28 at paragraph 33; **R. v. Liberatore**, 2010 NSCA 82 at para. 14.

[122] More recently, in **R. v. Villaroman**, 2016 SCC 33 (CanLii) the unanimous Court endorsed the comments of Charron J. in **Griffin**. However, the Court in **Villaroman**, *supra*, at paras. 35 to 38, Cromwell J. noted that, in circumstantial cases, it was often stated that “conclusions alternative to the guilt of the accused must be rational conclusions based upon inferences drawn from proven facts.” However, the Supreme Court added, at para. 35, that “in assessing circumstantial evidence, inferences consistent with innocence do not have to arise from proven facts, as requiring proven facts to support explanations other than guilt wrongly puts an obligation on an accused to prove facts.”

[123] In **Villaroman**, *supra*, at para. 36, Justice Cromwell also commented on the issue question of the range of reasonable inferences that can be drawn from circumstantial evidence in stating that: “(A) certain gap in the evidence may result in inferences other than guilt. But those inferences must be reasonable given the evidence and the absence of evidence, assessed logically and in light of human experience and common sense.”

[124] The Supreme Court of Canada stated, in **Villaroman**, *supra*, at para. 37 that “when assessing circumstantial evidence, the trier of fact should consider “other possible theories” and “other reasonable possibilities” which are inconsistent with guilt. The court added that “the Crown thus may need to negative reasonable possibilities, but certainly does not need to “negative every possible conjecture, no matter how irrational or fanciful, which might be consistent with the innocence of the accused.”

[125] In **Villaroman**, *supra*, at para. 38, Cromwell J. said that the “line between a “plausible theory” and “speculation” is not always easy to draw, however the key question is whether the circumstantial evidence, viewed logically and in the light of human experience, is reasonably capable of supporting an inference other than that the accused is guilty.”

[126] Justice Cromwell J. added, in **Villaroman**, *supra*, at para. 42 that “the trier of fact should not act on alternative interpretations of the circumstances that it considers to be unreasonable; and that alternative inferences must be reasonable, not just possible.” The Court concluded that this would be a helpful way of describing the line between plausible theories and speculation.

[127] Since a key part of the Crown’s case relates to eyewitness or visual identification evidence, it is also important to instruct myself on the inherent frailties of this type of evidence along with the factors that the Court should consider in evaluating the weight to be attributed to this evidence. The leading case which provides helpful guidance to trial courts is **Mezzo v The Queen**, [1986] 1 SCR 802 in which the Court adopted the reasoning of the English Court of Appeal in **R. v. Turnbull**, [1976] 1 All ER 549. Both of those cases pointed out the frailty of visual identification or eyewitness evidence and gave directions for a court to keep in mind when assessing the “quality” or the weight of this evidence.

[128] The Court in **Mezzo** stated that some of the factors which can clearly affect eyewitness evidence are the length of the observation, the distance at which the observations were made, lighting conditions, obstructions in the view, any prior or past recognition factors, time between the original observation and the subsequent description to the police and any discrepancies between the description and the accused’s actual appearance.

[129] The Supreme Court of Canada also acknowledged that there may be many other factors, depending on the specific circumstances of the case. Other factors, for example, would be the degree of attention and awareness of the witness at the time of the observation, together with the consistency of descriptions by different witnesses: see **R. v. Bigsky**, [2006] SKCA 145 at paras. 41 to 43

[130] During the closing submissions, the Crown Attorney highlighted several facts and circumstances which, in her submission, clearly identified Mr. Jerrico Gray as the driver of the white Mercedes. Since the driver of the white Mercedes was not apprehended by the police while still seated in the driver’s seat and no one was able to provide a description of the driver of the white Mercedes while it was

in motion leading up to the crash next to 81 Avebury Court, the determination of the identity of the driver requires a careful analysis of all the direct and circumstantial evidence in relation to that issue.

[131] In terms of the evidence of the three civilian eyewitnesses, I find that their undivided attention was immediately drawn to the scene of the accident by noise of the car's impact into the guy wires to a pole as well as the car's engine revving, probably in an effort to see if the white Mercedes could be extricated from the wires and possibly driven away. In terms of their evidence, I find that the following factors must be considered in assessing the weight or "quality" of their evidence:

- (a) Mr. Bolívar and Ms. Chetwynd viewed the scene of the accident from a relatively close distance, as the white Mercedes crashed into the wires only a few feet away from their large master bedroom window located at the front of their house. They had a clear and unobstructed view of the comings and goings from the white Mercedes as their viewing vantage point was only a short distance away from where the white Mercedes had impaled itself on the guy wires. Those guy wires, which supported a pole with a streetlight, were firmly connected to the ground a short distance from the edge of their property on the vacant property next to the driveway to their residence at 81 Avebury Court. This streetlight in that area was on that pole next to the driveway of their property and as a result, it was located directly above where the white Mercedes crashed.
- (b) Although both Mr. Bolívar and Ms. Chetwynd described the one and only person who they saw in and around the car and then walk away as a male, they were only able to provide a general description of the man's build, height and clothing as they only had a view of the man's back when he returned to the driver's side of the car and then walked away.
- (c) The other civilian eyewitness was Mr. Eisan, who lived about midway up the cul-de-sac. He had arrived home from work a few minutes before the white Mercedes crashed into the wires and immediately went outside his house after hearing the sound of the car crash which the video evidence established to have been at about 3:13 AM. Although it was dark, there were streetlights on the cul-de-sac and Mr. Eisan had a clear and unobstructed view from the other side of the

street, of the one and only person who was walking away from the accident.

- (d) All three of the civilian eyewitnesses concurred on the fact that they only saw one male person walk away from the white Mercedes. All three of those witnesses placed that one male person walking away from the location where the white Mercedes had crashed along the sidewalk and that he left the area of very short time after the crash.
- (e) Mr. Eisan described the only person on the street at that time of the day and walking away from the scene of the accident as a black man, who he viewed from the other side of the street as they were walking towards each other, with the black man walking away from the scene of the accident. At a certain point, although it was dark with some streetlight, their paths crossed, and Mr. Eisan stated that they stared at each other for about 15 to 20 seconds at a close enough distance to be able to hear the black man talking on the phone about an accident, as he thought it was a report to the police.
- (f) Mr. Eisan provided the most detailed description of the one and only person who was on the street and walking away from the car crash shortly after it occurred. In addition to stating that the only person on the street at that time was a black man, Mr. Eisan gave an estimate of the height of the man, described his body type and physique as being “well-built, stocky and muscular” and also described the clothing that he was wearing as being a hat, T-shirt and light-coloured jeans. Mr. Eisan also noted the two houses between which the black man” took off” and left the Avebury Court area.
- (g) All three civilian witnesses had essentially described a male individual with the identical body physique being “muscular and stocky”, and their description of the clothing was essentially identical. In terms of the height, Mr. Eisan had a view of the black man approaching him at street level and was able to stare at him for several seconds in estimating that the height of the black man was about 5’6” or 5’7”. Ms. Chetwynd had only observed the back of the male from their second-floor window which she estimated that her view was 40 feet away and she acknowledged that it might be difficult to estimate height from her vantage point, but indicated she believed the man’s height was between 5’8” and 5’9”.

- (h) Since the police were called within seconds of the accident and arrived shortly thereafter all three civilian witnesses were able to provide their description to them so there was no difference between their original observations and the subsequent description to the police as they were provided only minutes apart from each other.
- (i) The police officers who arrested or interacted with Mr. Gray and provided a general description of him during the trial all concurred that his body type and physique was “well-built”, “stocky and muscular” and matched the description that had been provided by the eyewitnesses of the one black man who was seen walking away from the scene of the accident shortly after 3:13 AM on December 2, 2018.
- (j) The evidence of Const. Cooke established that the weather at that time on December 2, 2018 was -2°C with a 7 to 11 km wind from the northeast and 80% humidity. Given the description of the clothing worn by the black man who left the scene of the car crash on Avebury Court shortly after 3:13 AM, I find it would be highly unusual that a person would be out for a stroll at that time of the day, with that clothing in those weather conditions. Based upon those facts, I find that it is reasonable to infer that the one and only person dressed like that at that time of the day who happened to be walking away from the scene of an accident, was the driver of the white Mercedes.
- (k) On the dog track, Const. Cooke had observed the footprints of only one person with a certain gait – some being wet footprints on the road and others in the snow. I find that it is reasonable to infer, given the location and timing of seeing those footprints that they were recent and made by the one and same person that Const. Cooke and Recon were following on the track.

[132] When I consider this eyewitness evidence in terms of the foregoing factors which might affect the quality or weight to be attributed to this evidence, I find that their views of the man leaving the scene of the crash may have been different and relatively brief but given the fact that their undivided attention was completely focused on the car crash and the one person who returned to the car and then walked down the sidewalk away from the scene of the crash and the consistency of their descriptions of the man who walked away from the white Mercedes, I am prepared to accord significant weight to their evidence which was not undermined during cross-examination.

[133] In addition to the eyewitness evidence providing a general description of the height, body type and physique of the black man who walked away from the scene of the crash of the white Mercedes on Avebury Court around 3:15 AM on December 2, 2018, there are also the following facts and circumstances to consider in relation to the identification of the driver of that white Mercedes:

1. An agreed statement of fact in the trial was that on December 2, 2018 Jerrico Nathan Gray was the registered owner of a white, 2012 Mercedes four-door sedan with Nova Scotia license plate FRA 267;
2. Photographs of the scene of the accident which were filed as Exhibit 3 confirm that a white Mercedes, four-door sedan, model E350 with Nova Scotia license plate number FRA 267 crashed into the guy wires supporting a pole which were of very short distance away from the driveway and motor vehicle parked outside on the driveway of 81 Avebury Court;
3. The photographs in Exhibit 3 clearly show the significant damage to the front end of that white Mercedes as it impaled itself on the guy wires. Based upon the audio/video surveillance evidence from the front door camera of 64 Avebury Court which was part of the Agreed statement of facts and the audio/video evidence was filed as Exhibit 2, I find that it is reasonable to infer from the sound of the engine revving after the crash that the driver was making an unsuccessful attempt to extricate the impaled Mercedes from the guy wires to the pole;
4. The video evidence of the white Mercedes going by the house in a blur and then going out of control and skidding at a high rate of speed as shown in Exhibit 2 also clearly established the time of the accident as being about 3:13 AM on December 2, 2018;
5. The evidence also established that police officers attended at Avebury Court within minutes and one officer indicated that they had been directed to set up containment of all roads leading into her out of that area by 3:20 AM. In addition, of significant note, Const. Cooke and his police service dog Recon arrived at the scene of the accident at 3:31 AM and commenced the track of the suspect within minutes thereafter.
6. During the search of the white Mercedes by police officers, a wallet containing the driver's license and photo ID of Mr. Jerrico Gray was

located in the centre console of the vehicle. There was also a bankcard in the name of Shayla Parsons located in that centre console;

7. Just before Mr. Gray was arrested at 102 Caribou Road around 6:30 AM, Ms. Parsons had been seen standing outside the front door to the house as Const. Cooke, Recon and Const. Reid arrived in their yard. There was a Chevrolet Cruze car parked in the driveway and police officers confirmed that the registered owner of that car was registered owner of that car was confirmed to be Ms. Shayla Parsons.

[134] In addition to those proven facts, there was the circumstantial evidence of Const. Cooke who was qualified to give expert evidence about Recon's response to human scent and how he communicates his findings to his handler. The Court was also satisfied by the evidence on the *voir dire* that Recon's breeding made him suitable for tracking, he had undergone initial and ongoing training with Const. Cook, the *voir dire* also talked about their length of service, the reliability and experience and various factors that can affect tracking [such as the time delay and the terrain] and when there are ideal conditions for tracking.

[135] The evidence on the *voir dire* also established the signs and signals given by Recon and what Const. Cooke could interpret from those signs and signals. The Court had also concluded that based on the *voir dire* evidence that the police service dog, Recon would also be qualified as an expert as it was in reality his evidence that was being provided to Const. Cooke who interpreted the signs and signals of his police service dog.

[136] I find that the dog tracking evidence provided by Const. Cooke and for that matter by Const. Reid who was the "cover officer" for Const. Cook during the track is an important piece of circumstantial evidence which must be considered in totality with the other proven facts in this case.

[137] In this case, Const. Cooke described in very significant detail the exact route that Recon led him and Const. Reid on starting shortly after 3:30 AM on December 2, 2018, ending approximately three hours later after going about 10 kilometres over various terrain, wooded areas, grass, wet snow, crossing roads following along the side of the roads, doubling back at times starting at 45 Avebury Court in Middle Sackville and ending at 102 Caribou Road in Upper Sackville.

[138] Const. Cooke stated that that there were great tracking conditions during the three-hour track on December 2, 2018. In providing an overall opinion, based upon

Recon's level of excitement when they got to 102 Caribou Road in Upper Sackville, Const. Cooke had no doubt in his mind that Recon had followed the scent of the same person throughout the track and that the person whom they had followed was inside the house. In addition, I find that Const. Cooke had stated that he had no indications of the person's name or address where Mr. Gray lived and the only reason why he and Recon ended the track at 102 Caribou Road was because they had followed the scent of that person from Avebury Court for the last three hours.

[139] When I consider this very important circumstantial dog tracking evidence, it is important to bear in mind that the evidence does not stand alone. There is the eyewitness identification evidence which I have found to be highly credible and I have accorded that eyewitness evidence very significant weight. In addition, there is also the other circumstantial evidence relating to what I found to be proven facts and reasonable inferences that may be drawn from those proven facts.

[140] It is important to remember that this incident of dangerous driving occurred at 3:13 AM on December 2, 2018 when a quiet, dead-end, residential cul-de-sac was essentially deserted with no traffic on the street when the crash occurred. I find, based upon the proven facts, the eyewitness evidence that I have accepted and the circumstantial evidence from which reasonable inferences may be drawn that there was only one person in the white 2012 Mercedes when it crashed into the guy wires adjacent to 81 Avebury Court. Only one person was seen walking away from the car crash by the three eyewitnesses. The dog track followed the scent of one person from Avebury Court on a 10 km long at times winding route during the three-hour track, which ended at 102 Caribou Road around 6:30 AM.

[141] While Defence Counsel established during his cross examination of several police witnesses that no fingerprints or DNA testing was done of articles in the white Mercedes, no blood swabs were taken for DNA analysis of the blood on the door of 102 Caribou Road and no shoes were compared to the footprint that Const. Cooke had seen on the track, I find that those analyses may not have produced any results even if they were done, but in any event, the fact that they were not done does not, in my opinion, undermine in any way what I have found to be the very compelling and overwhelming nature of the circumstantial evidence and other confirmatory proven facts.

[142] I find that when I consider the totality of the direct evidence and the circumstantial evidence from which facts in issue may be inferred, I find that the

only reasonable or rational inference to be drawn from totality of the evidence in this trial, is that the Crown has established, beyond a reasonable doubt, that Mr. Jerrico Gray, has been identified as the driver of the white Mercedes at about 3:13 AM on December 2, 2018 when it was driven dangerously and ultimately crashed into guy wires adjacent to 81 Avebury Court.

[143] When I assess the totality of the evidence which I have accepted as proven facts and reasonable inferences that have been drawn from the circumstantial evidence, assessed logically and in light of human experience and common sense, I find that there are no other reasonable possibilities that are inconsistent with the conclusion that Mr. Jerrico Gray was the driver of the white Mercedes at all relevant times to the charge before the court.

[144] As a result, I find that the Crown has established, beyond a reasonable doubt, the identity of Mr. Jerrico Gray as the driver and sole occupant of the white Mercedes when it crashed into the guy wires on Avebury Court on December 2, 2018. Having previously concluded that the Crown had established, beyond a reasonable doubt, the actus reus and the modified objective mens rea of the offence, I find that the Crown has established, beyond a reasonable doubt, all of the essential elements of the charge of operating a motor vehicle in a manner that was dangerous to the public contrary to section 249(1)(a) of the **Criminal Code**.

[145] As a result, I find Mr. Jerrico Gray guilty of the offence contrary to section 249(1)(a) of the **Criminal Code**.

Theodore Tax, JPC