PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. Lilly*, 2022 NSPC 32

Date: 20221019
Docket: 8371592, 8371593, 8371594, 8371595
Registry: Halifax

Between:

His Majesty the King

v.

Jacob Matthew Lilly

Judge:	The Honourable Judge Elizabeth Buckle
Heard:	June 22, 24, 28, 29, 30, July 9, 22; September 2, 3, 10, 13, 17, November 24 2021; January 26, 27; May 26, 27, 30; June 20, 2022 in Halifax, Nova Scotia
Decision	October 19, 2022
Charge:	239, 268(1), 267(a), 88(1) of the *Criminal Code*
Counsel:	Rick Woodburn, Michael Berrigan, for the Crown Ian Hutchison, for the Defence

By the Court:

Introduction

[1]   In the early morning hours of July 7, 2019, Cameron Diggs was stabbed in downtown Halifax. As a result, Jacob Lilly was charged with attempted murder, aggravated assault, assault with a weapon and possessing a weapon for a dangerous purpose or for the purpose of committing an offence.

[2]   The main issues are whether the Crown has proven beyond a reasonable doubt that Mr. Lilly is the person who stabbed Mr. Diggs and, if so, whether he had the specific intent required for attempted murder.

[3]   Mr. Diggs testified but did not identify Mr. Lilly. The potential identification of Mr. Lilly relies primarily on video surveillance collected from various establishments in downtown Halifax and witnesses who were permitted to testify that they recognized Mr. Lilly in those videos. The videos showing the attack on Mr. Diggs are dark and recorded from a distance. In the absence of other evidence, they would not allow for identification of the attacker. However, the Crown argues that Mr. Lilly is clearly identifiable in other video clips and can be tracked through these clips such that the only reasonable inference from the entire sequence, is that it is Mr. Lilly who attacked Mr. Diggs.

[4]   The Defence argues that the evidence does not establish that Mr. Lilly is the person in any of the video clips and even if he is proven to have been in the area that night, the Crown has not proven that he was the person who stabbed Mr. Diggs.

General Principles

[5]   There are general principles that apply to every criminal trial.

[6]   Mr. Lilly is presumed to be innocent of these charges. The Crown bears the burden of proving each and every element of the offences beyond a reasonable doubt. There is no burden on Mr. Lilly to prove his innocence

[7]   Proof beyond a reasonable doubt is a high standard. 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 nor is it an imaginary or frivolous doubt. It is 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.).

[8]   The charges can be proven through direct or circumstantial evidence or a combination.

[9]   The burden on the Crown in a circumstantial case is to prove beyond a reasonable doubt that guilt is the only reasonable inference to be drawn from the evidence (*R. v. Griffen*, [2009] S.C.J. No. 28, paragraph 34). There is no burden on the defence to persuade me that there are other more reasonable or even equally reasonable inferences that can be drawn**.** A reasonable doubt may be logically based on a lack of evidence (*R. v. Vilaroman***,** 2016 SCC 33, at para. 36).   I am permitted to draw logical or common sense inferences, but only where those inferences are grounded in or flow from the evidence (*R. v. Pastro*, 2021 BCCA 149). The question is "whether the circumstantial evidence, viewed logically and in light of human experience, is reasonably capable of supporting an inference other than that the accused is guilty" (*Vilaroman*, at para. 38). If so, then the accused must be acquitted.

[10]   Finally, a word must be said about bad character evidence. In the context of a Defence application to have Mr. Lilly sit at counsel table, the Crown provided a great deal of information about Mr. Lilly that would be characterized as 'bad character' evidence. Most would be entirely inadmissible in the trial. In deciding whether the Crown has proven the charges against Mr. Lilly, I have entirely disregarded that information.

Charges and Law

[11]   Mr. Lily is charged that on or about July 7, 2019 he did:

1. Unlawfully attempt to murder Claude Diggs, contrary to s. 239 of the *Criminal Code;*

2. Unlawfully wound, maim, disfigure or endanger the life of Claude Diggs, thereby committing an aggravated assault, contrary to s. 268(1);

3. In committing an assault on Claude Diggs, use or threaten to use a weapon, or imitation thereof, to wit, a knife, contrary to s. 267(a);

4. Unlawfully have in his possession a weapon or imitation of a weapon, to wit, a knife, for a purpose dangerous to the public peace or for the purpose of committing an offence, contrary to s. 88(1).

[12]   Each of the offences has its own elements which must be proven by the Crown beyond a reasonable doubt. There is no real dispute that the injuries to Mr. Diggs – multiple stab wounds – constitute an "aggravated assault", that in assaulting Mr. Diggs, the perpetrator used a knife; that in this context a knife is a weapon; and; that the perpetrator possessed that knife for a dangerous purpose or for the purpose of committing an offence (evidence of Mr. Diggs and Dr. Chris McCrossin; Ex. 1). As such, if Mr. Lilly is proven to be the perpetrator, he is guilty of counts 2, 3 and 4.

[13]   Attempted murder requires the Crown to prove the intent to commit murder and that the accused took some steps for the purpose of carrying out that intention that go beyond mere acts of preparation (*Criminal Code,* ss. 24 and 239). There is no doubt here that the person who stabbed Mr. Diggs took steps beyond mere acts of preparation. The issue is whether the Crown has proven he had the specific subjective intent to cause Mr. Diggs' death. In other words, that his purpose was to kill; recklessness of the consequences or knowledge that death may or probably will result from his actions is not enough (*R. v. Boone,* 2019 ONCA 652).

[14]   I will first address whether the Crown has proven beyond a reasonable doubt that Mr. Lilly is the person who stabbed Mr. Diggs and, if I am so satisfied, I will go on to consider whether the Crown has proven that he had the requisite intent for attempted murder.

Has the Crown proven that Mr. Lilly Stabbed Mr. Diggs

[15]   The evidence that directly impacts identification includes: eye-witness testimony of Mr. Diggs; surveillance videos along with an enhanced compilation video and enhanced still photographs (Ex. 6 – 15 & 17 – 20, 26, & 27); recognition evidence from witnesses who were permitted, following '*Leaney*' *voir dires*, to testify about whether they recognized Mr. Lilly in the surveillance videos (Jean Francois Neveau and D/Cst. James Bennett); testimony from an officer who arrested Mr. Lilly about two weeks before the incident and video recordings of Mr. Lilly from that day (Cst. Mark Maxwell, Ex. 25); video of Mr. Lilly from his post-arrest

interview about a month after the incident (Ex. 21; D/Cst. Terry Poole); and, descriptions of Mr. Lilly from people who were previously familiar with him (Cst. Sarah Carter, Mr. Neveau, and D/Cst. Bennett).

[16] There is also additional evidence that helps me weigh the identification/recognition evidence, put the surveillance videos into context and decide what inferences are reasonable: evidence relating to the pre-identification procedure (D/Cst. Mark Doyle, D/Cst. Trina Gillis and Ex. 2 – 5); photographs of the area and evidence of D/Cst. Michel Marchand who measured distances (Ex. 22 and 23); and, a Google map of the area (Ex. 24)

Identification/Recognition Evidence

[17] This case includes different types of identification evidence: pure identification evidence (where a witness is asked to identify a stranger); recognition evidence in the context of witnesses who testify they recognize a person who is previously known to them in a video (*R. v. Leaney,* [1989] 2 S.C.R. 393; *R. v. Brown,* 215 C.C.C. (3d) 330 (ONCA); *R. v. Berhe*, 2012 ONCA 716; and, *R. v. Hudson,* 2020 ONCA 507); and, identification in the context where the judge is permitted use video of a suspect to make their own comparison with the accused before the Court (*R. v. Nikolovski,* [1996] 3 S.C.R. 1197).

[18] I will first discuss some principles that generally apply to identification and recognition. These were summarized by the Nova Scotia Court of Appeal in *R. v. Downey* (2018 NSCA 33) and more recently applied in *R. v. Al-Rawi,* 2021 NSCA 86 and *R. v. Newman* (2018 NSSC 113).

[19] In *Downey*, the Court recognized "the inherent dangers of identification evidence, especially where the witness appears both honest and convincing (para. 57). Cases involving wrongful convictions are full of honest but mistaken identification evidence. As such, when assessing this type of evidence, it is important to consider both the credibility of the witness and the reliability of their observations. As the Court accepted in *Downey,* the correctness of the identification must be found from the evidence of circumstances in which it was made or in other supporting evidence. A witness' honesty or confidence in their identification or recognition would not elevate the evidence to the level required for conviction if the circumstances surrounding the identification "are unfavourable" or the "supporting evidence is lacking or weak" (*R. v. Atfield*, 1983 ABCA 44, para 3, cited with approval in *Downey,* at para. 57).

[20]   The Court in *Downey* confirmed that recognition evidence is "merely a form of identification evidence" and accepted that many of the same concerns apply such that, when dealing with recognition evidence, courts should still treat the evidence cautiously (*R. v. Campbell,* 2017 ONCA 65, cited with approval in *Downey*, at para. 55).

[21]   The Court also endorsed principles that apply to recognition evidence, specifically:

- recognition evidence is generally considered to be more reliable and to carry more weight than identification evidence (para. 54, relying on *R. v. Bob,* 2008 BCCA 485 and the cases cited therein);

- the reliability of recognition evidence will depend on the familiarity between the accused and the witness and the opportunity for observation during the incident (para. 55, relying on *Campbell*, para. 10 and the cases cited therein); and,

- A witness' capacity to recognize another person is not perfect but "outstrips the human ability to describe what has been observed" such that evidence of recognition may, depending on the level of familiarity, have value even where the witness doesn't describe unique features or provide a detailed description (para. 67, relying on *R. v. Ambrose,* 2015 ONCJ 813*,* at para. 29).

[22]   In assessing the reliability of identification or recognition evidence, the Court has to pay careful attention to the case-specific factors that impact that evidence (*Downey,* para. 58, relying on *Ambrose*, at para. 4). The reliability of both pure identification and recognition evidence can be impacted by pre-identification procedures, the specific circumstances under which the identification was made and any personal attributes of the witness that might impact their ability to observe or recall. For recognition evidence, reliability is also impacted by the extent and circumstances of the prior familiarity.

[23]   Following '*Leaney*' *voir dires*, two witnesses were permitted to give their opinion about whether they recognized anyone in the surveillance videos as Mr. Lilly. In oral decisions, I concluded that each met the threshold for admissibility of that kind of evidence – meaning that they each had a prior acquaintance with Mr. Lilly and as a result of that acquaintance was in a better position than I was, meaning that they had some advantage, that would assist in identifying him in the video (see generally: *Leaney, Brown, Berhe* and *Hudson*).   The admission of this

type of 'recognition evidence' does not determine weight or the ultimate reliability of the witness' evidence. That must still be assessed in light of the general principles I've already discussed and in the context of all the evidence.

[24]   It is important for me to remind myself that even if I find that a witness honestly believes the person they see in the surveillance video is Mr. Lilly, I have to carefully consider the circumstances to determine whether that evidence is reliable.

[25]   Finally, in this case the various surveillance videos were either proven to be or conceded to be authentic and were admitted in the trial. In *Nikolovski*, the Supreme Court of Canada held that in cases involving good quality video, the trier of fact may use it to make their own identification of the accused. The video in this case is of varying quality which I will discuss in more detail later in my reasons. Following a *voir dire*, I admitted a 'compilation video', essentially as an aid (Ex. 27). That compilation video was created by a professional film/digital media editor who took the various clips and put them together in what the Crown argues is chronological order. Ultimately, I will have to decide whether the evidence and available inferences establish that chronology. That video also includes some 'enhancement' in the sense that the editor has zoomed in on specific individuals and sharpened some of the images. I also admitted three enhanced still photos taken from that video (Ex. 26).

[26]   In applying *Nikolovski*, I also have to caution myself that I am not immune to the frailties of identification or recognition evidence and need to assess my own recognition opinion using the same principles that I would apply to that of any witness.

The Surveillance Videos

[27]   I will start with the surveillance videos since that evidence sets the stage for much of the other evidence.

[28]   I do not believe the video showing the actual attack is of sufficient quality to permit anyone, in the absence of other evidence, to identify the attacker with certainty. The most that could be said is that the assailant's appearance is consistent or inconsistent with Mr. Lilly. The Crown argues that, when viewed in sequence, the video clips show that Mr. Lilly and his associates 'stalked' Mr. Diggs for hours before the stabbing, that Mr. Lilly can be tracked through these

clips up to and including those that show him stabbing Mr. Diggs and then running away.

[29]   Assessing that argument requires me to examine all the videos to determine whether, with the assistance of the *Leaney* witnesses, I am satisfied that Mr. Lilly is in any of them and, if so, whether I am satisfied of the 'continuity' of that person through the various video clips up to and including the video of the attack.

[30]   D/Cst. Doyle used the following to reference individuals in the various surveillance videos: S1 to refer to the person alleged to be Mr. Lilly in each of the videos; S2 to refer to a person with short dark hair and a beard, wearing a black jacket, black pants and shoes with no socks; S3 to refer to a heavyset man wearing a light coloured shirt and blue shorts with a white stripe; and, S4 to refer to a person wearing white pants and a blue short-sleeved top. These references reflect the Crown theory – that S1 is Mr. Lilly, that these individuals were associated and worked together to follow Mr. Diggs, and that each individual can be identified and tracked through the various clips. For ease of reference, I will use D/Cst. Doyle's terms. However, what I mean in each instance is, "the person alleged to be S1 etc.".

[31]   The significant events occurred within a couple of city blocks in downtown Halifax, bounded by Argyle Street, Blowers Street, Grafton Street and Prince Street.

[32]   I am satisfied that Mr. Diggs route that evening was as follows (evidence of Mr. Diggs and surveillance videos):

-   He entered the Toothy Moose Nightclub where he remained for about two hours

-   He left the Toothy Moose and walked south on Argyle toward Blowers Street

-   He entered the Subway restaurant at the corner of Blowers and Argyle where he remained for a few minutes

-   He walked back, north on Argyle, where he met an acquaintance

-   He and his acquaintance walked back south on Argyle, turned right (west) on Blowers and briefly entered Johnny K's

- They then crossed Blowers to the northeast corner of Blowers and Grafton where they met a third person and then walked north on Grafton

- They paused near an open lot on the east side of Grafton where Mr. Diggs was attacked.

[33]   The Crown alleges that the surveillance shows that S2 followed Mr. Diggs into the Toothy Moose, exiting shortly before he did, that Mr. Lilly and S2 were waiting nearby when Mr. Diggs left the Toothy Moose, then, with the assistance of S3 and S4, they followed him on his route until he stopped at the empty lot on Grafton where Mr. Lilly stabbed him, then ran away north on Grafton and east on Sackville Street.

[34]   The Surveillance video that tracks Mr. Diggs' movements and those of the suspects is from many different establishments. Starting at the beginning of his route and moving south on Argyle from Sackville to Blowers, the cameras are: The Toothy Moose (Ex. 7 & 11); Durty Nelly's (Ex. 6); Neptune Theatre (Ex. 8); and, The Pint Public House (Ex. 9 & 10). Then, moving west on Blowers, they are: Smoke's Poutinerie (Ex. 12); Johnny K's (Ex. 13); and HRM (Ex. 17/20). Then, moving north on Grafton, they are: Symcor (ex. 14); and, Benigno Group (Ex. 15). Finally, moving west on Sackville, they are: The Nova Centre (ex. 18); Durty Nelly's; and Neptune Theatre (Ex. 8).

[35]   The 'Toothy Moose' is a nightclub located on the east side of Argyle Street, between Sackville and Prince Streets. It had multiple cameras: inside the bar area; interior front stairwell top and bottom (ch. 6 & 10); interior back stairwell (ch. 1); exterior front door (ch. 8); and, exterior back door (ch. 7). While the exterior cameras are marked "front" and "back", both are located on Argyle Street, with the 'back' door being south of the 'front' door. The camera on the back door faces slightly north on Argyle toward the front door and the camera on the front door faces slightly south toward the back door. The quality of the footage is relatively good for individuals who are close to the cameras (referred to in the detailed chronology that follows as "TM")

[36]   Durty Nelly's Pub is located on the corner of Argyle and Sackville Streets, south of the Toothy Moose. It had two camera angles: one facing north on Argyle toward the Toothy Moose (ch. 1); and, the other facing almost directly west across Argyle, showing a bit of the sidewalk to the south (ch. 6). The quality of the video is relatively good, especially for people who are relatively close to the cameras. (referred to in the detailed chronology that follows as "DN")

[37]   Neptune Theatre is located at the corner of Argyle and Sackville Streets with its main entrance on Argyle, south of Durty Nelly's Pub. Its camera was located inside the lobby. It faces out through the glass entrance showing a section of the east side of Argyle Street and also captures a portion of Sackville Street through a side window. Its video was relatively good quality (referred to in the detailed chronology that follows as "NT")

[38]   The Pint Public House is located on Argyle, south of Neptune Theatre, between Sackville and Blowers Streets. It has one camera facing north along Argyle toward Neptune Theatre (Vinyl/Cue) and one facing south along Argyle toward Blowers Street (Sidewalk Patio). (referred to in the detailed chronology that follows as "TP – VC" and "TP-SP")

[39]   'Smoke's Poutinerie' is located on the south side of Blowers, just west of the intersection with Grafton Street. It has one camera facing northeast on Blowers Street, showing part of the street and north sidewalk, including a 'Subway' restaurant located on the northwest corner of Blowers and Argyle Streets (camera 1) and one camera facing northwest on Blowers showing the street and north sidewalk, including the intersection and north corners of Blowers and Grafton (camera 2). Both are relatively good quality with clear images, however, camera 1 is in colour and camera 2 is in black and white. (referred to in the detailed chronology that follows as "SP"- "C1" or "C2")

[40]   'Johnny K's' is located on the southwest corner of Blowers and Grafton Streets. That establishment has one interior camera showing the entrance and one exterior camera facing north across Blowers Street showing the business on the northeast corner of Blowers and Grafton (Sicilian Pizza), part of the intersection and part of the east sidewalk of Grafton Street. The footage from the interior camera is of very good quality. The footage from the exterior camera is not so good; it is black and white, the contrast is not good so things appear in shades of gray and from time to time, the image becomes very dark (perhaps when headlights are directly on the camera). (referred to in the detailed chronology that follows as "JK" – "IC" or "EC")

[41]   The HRM camera is located on the roof of a building on the northwest corner of Blowers and Grafton. It faces southeast and shows Johnny K's and the intersection commonly referred to as 'Pizza Corner'. Because of its position, it is capable of showing vehicles and individuals but not facial features. (referred to in the detailed chronology as HRM)

[42]   The 'Symcor' camera was located on the west side of Grafton Street facing south toward Blowers and showing part of the east side of Grafton, including the opening of the empty lot where Mr. Diggs was stabbed. (referred to in the detailed chronology that follows as "S")

[43]   The 'Benigno Group' camera was located at the eastern end of the empty lot on Grafton where Mr. Diggs was stabbed. It faces west through the lot toward the opening and shows the portion of Grafton Street immediately in front of the lot. The video is relatively good quality – it is black and white but the picture is crisp – it can be shown in full screen and frame-by-frame or reduced speed. (referred to in the detailed chronology that follows as "BG")

[44]   The 'Nova Centre' camera faces east on Sackville and shows the intersection of Sackville and Grafton from a height and distance (referred to in the detailed chronology that follows as NC)

[45]   Each of the videos are timestamped, however, most were not synchronized with each other. Ultimately, the actual time of the events is not particularly relevant but the sequence, or relative time, is. The Defence made no concessions concerning accuracy of any timestamp or the margin of error between them and no witnesses were called to establish that. After viewing all the video multiple times, I have determined what I believe to be the correct sequence of clips by tracking the movement of distinctive individuals as they move out of view on one camera and into view on another. These distinctive people or markers include: Mr. Diggs who is a large man, dressed all in white with a distinct gait; a man wearing a trench coat and carrying a placard; specific taxi cabs; two uniformed foot patrol officers; a marked police SUV; a marked police car; a police car with emergency lights activated; and, the attack itself which is caught on two cameras.

[46]   In doing that, I was guided by D/Cst. Doyle's testimony, but ultimately I conducted my own analysis of each clip. I commend D/Cst. Doyle for his hard work in collecting the video and the hours it must have taken him to put it together, given the lack of a reliable time reference.

[47]   When referencing the videos, I will use the timestamps within each video to identify the frame, but am not relying on them to establish actual time or relative time except for images from the same camera or where I have been able to sync times based on clear markers.

[48]   Detailed Chronology:

- Mr. Diggs walks north on Argyle, passing Durty Nelly's, then enters the Toothy Moose through the front door (DN – ch. 1 @ 1:12; TM - ch. 7, 8 & 10 @ 1:14)

- 50 minutes later, S2 enters the Toothy Moose through front door (TM - ch. 10 @ 2:03)

- About an hour and 40 minutes after Mr. Diggs enters the Toothy Moose and about 55 minutes after S2 enters, S1 and S4 turn from Sackville onto Argyle and walk north, past the Toothy Moose. They move to the west side of Argyle where they remain, sometimes talking with others, sometimes sitting together. During this time they are joined by a male wearing a black shirt, with no sleeves and a white logo on the back. The male appears to become angry with them – he makes an angry gesture, then crosses to the east side of Argyle where he punches something and continues to point in the direction of S1 and S4, making angry gestures. Eventually he attracts the attention of uniformed police and is escorted away from the area (TM - ch. 7 @ 2:59:05 – 3:11; DN – ch. 6 @ 2:56:20; DN – ch. 1 @ 2:56:37)

- About an hour after he entered the Toothy Moose, S2 exits and walks south on Argyle. He looks in the direction of S1 and S4 who are still across Argyle street and then stands at a light pole, apparently using his phone. While he is standing at the light pole, two individuals are standing against a planter nearby – one with a beard with his hair in a bun and one wearing a gray t-shirt and black pants. Those two are of some significance because later in the evening, after the attack on Mr. Diggs, one of them is seen running and both are seen interacting with the man wearing the black shirt with no sleeves and a white logo who is also seen running. (TM - ch. 10 @ 3:11:41; TM - ch. 7 @ 3:12:05)

- About 2 minutes after S2 exited the Toothy Moose, Mr. Diggs also exits (TM - ch. 10 & 8 @ 3:12:43)

- S1 and S4 remain on the west side of Argyle across from the Toothy Moose. S2 remains on the east side as Mr. Diggs walks south on Argyle passing behind S2. When Mr. Diggs appears, S2 briefly looks over his right shoulder toward Mr. Diggs' location but then continues to face the other direction and does not turn to watch Mr. Diggs as Mr. Diggs walks away (TM – ch. 7 @ 3:14:14)

- About a minute after Mr. Diggs walks away to the south, S1 stands and also walks south on Argyle. S2 remains on the west side of Argyle, looking at his

phone and then using it for about a minute before he also walks south on Argyle. S4 remains seated on the west side of Argyle. (TM - ch. 7 @ 3:15:25 – 35:50)

- Mr. Diggs continues walking south on the east side of Argyle, passing Durty Nelly's. S1 crosses to the east side of Argyle where he stops to greet unknown males in front of Durty Nelly's. S2 then passes Durty Nelly's walking south on the east side of Argyle. Mr. Diggs then crosses Sackville and continues to walk south on the east side of Argyle, past Neptune Theatre. S2 crosses Sackville about one minute after Mr. Diggs. S1 is immediately behind S2, separated by about 15 feet. Both continue south on the east side of Argyle, past Neptune Theatre and start to cross to the west side. When they pass Neptune Theatre, S2 is about a minute behind Mr. Diggs and S1 is about 5 seconds behind S2 (DN – ch.1 @ 3:12:44 – 3:14:50; DN – ch. 6 @ 3:13:09 – 3:14:30; NT @ 3:17 – 3:19)

- Mr. Diggs crosses to the west side of Argyle. S1 and S2 are about 40 seconds behind him, together and talking, walking south on the west side of Argyle (TP - VC @ 3:16:09 – 3:17:06)

- Mr. Diggs appears to turn right (west) on Blowers. S1 and S2 continue walking south on west side of Argyle and reach the corner of Blowers but are at times obscured by obstructions and it is not clear from the Argyle Street camaras whether they turn onto Blowers (TP – SP @ 3:16: 37 – 3:17:24)

- Mr. Diggs appears on the Blowers Street cameras at the northwest corner of Blowers and Argyle. S2 and S1 also appear on the corner almost immediately after. (SP - C1 @ 3:17:25)

- Mr. Diggs enters the Subway restaurant at the northwest corner of Blowers and Argyle and remains inside for about 6 minutes. S1 remains near the corner outside the Subway and S2 walks west on Blowers, glancing into the Subway, and then walks back closer to the corner. Both S1 and S2 remain near the Subway for about 2 minutes, from time to time they look through the large window into the restaurant. D/Cst. Doyle suggests they appear to be speaking to each other. They are standing near each other for a short time and their body language is consistent with some interaction. About 2 minutes after Mr. Diggs entered the Subway, S2 leaves the vicinity of the Subway, heading north on Argyle and then about 30 seconds later S1 crosses Blowers Street to the south side and disappears from view. D/Cst. Doyle suggests he enters an alley. S4

appears from Argyle Street, and turns right (west) onto Blowers. He walks west on Subway, passing the Subway and glancing in as he does. (SP - C1 @ 3:17:40 – 3:23:30)

- Mr. Diggs leaves Subway but seems to remain around the corner for a couple of minutes. (SP - C1 @ 3:23:30)

- S3 appears with an unknown male on the east side of Argyle and they stand near The Pint. Then, the male walks north and S3 walks south, crossing Argyle and reaching the southwest corner of Blowers and Argyle (TP – SP @ 3:24:18 – 3:25:00)

- S3 turns right (west) on Blowers from Argyle and continues to walk west on the north side of Blowers. Mr. Diggs appears to have stayed around the corner near Subway as, about a minute and a half after leaving Subway, Mr. Diggs can be seen briefly at the corner and then starts to walk back north on Argyle. It seems S3 would have passed him. S3 then walks back east on Blowers, pausing just before reaching the corner of Argyle. S1 then appears on Blowers, just east of Argyle. He walks across Blowers to the northwest corner of Blowers and Argyle and then walks north on Argyle. He passes S3 but they do not appear to interact. Then, S3 turns left (north) on Argyle and appears to also walk north (SP - C1 @ 3:25:05 – 3:26)

- Mr. Diggs walks north on the west side of Argyle, coming from Blowers. About 20 feet from the corner of Blowers, he stops and turns around and appears to say something and make a gesture to someone behind him. Then S1 appears from the Blowers street direction walking north on the west side of Argyle. S3 than appears from the same area, also walking north on Argyle and crosses from the west side to the east side. (TP – SP @ 3:25:37 – 3:26:27)

- Mr. Diggs continues north on the west side of Argyle. S1, who is also walking north on the west side of Argyle is about 20 feet behind Mr. Diggs. Mr. Diggs crosses to the east side. S1 remains on the west side. S3 appears on the east side, behind Mr. Diggs and walks in the same direction. At this point, S3 is behind Mr. Diggs, S1 is almost abreast of him on the opposite side of the street and all are walking north. S1 the crosses toward the east side. All disappear from view of the Pint camera (TP – VC @ 3:26:25 – 3:27:25)

- While Mr. Diggs, S1 and S3 are walking north on Argyle, S2 appears on the west side of Argyle and stops across from Neptune theatre with a male. They

both walk north and pause on the corner of Sackville and Argyle apparently speaking to a couple of women. He and the male then cross Sackville, walking north (NT @ 3:26 – 3:28; DN – Ch. 6 @ 3:21:50 - 3:22:25)

- Mr. Diggs walks in the direction of Neptune Theatre but does not appear on that camera. It faces almost directly west across Argyle and captures a relatively narrow section of Argyle. However, the Durty Nelly's camera (ch. 6), faces south on Argyle, covering a portion of Argyle that is south of Neptune Theatre. Mr. Diggs can be seen on that camera walking north on Argyle on the east side. As he approaches Neptune Theatre, S1 can be seen walking north, moving from the west side to the middle of the street. Mr. Diggs pauses and looks around and then turns back and begins walking south on the east side of Argyle. S1 continues north, crossing to the east side, behind Mr. Diggs. Mr. Diggs continues south, passing S3 who is approaching on the east side from the south. Mr. Diggs continues south. S1 and S3 continue to walk north, just beyond where Mr. Diggs turned. They are captured by the Neptune Theatre camera walking beside each other and then pausing in front of Neptune theatre for a few seconds. Mr. Diggs continues walking south and starts to cross Argyle to the west. Then, about 15 seconds after passing Mr. Diggs, S1 turns and runs south on Argyle, in Mr. Digg's direction, crossing to the west side of Argyle and continuing south. S3 also crosses to the west side of Argyle and also walks south. (DN – Ch. 6 @ 3:25:10 – 3:26:17; NT @ 3:29:55 – 3:30:28)

- Mr. Diggs met an acquaintance near where he turned to walk back south on Argyle – a male, wearing a white t-shirt and two-toned jeans. He and Mr. Diggs walk south together on the west side of Argyle.   S1 appears behind them on the west side of Argyle, initially jogging for a few steps before he slows to a walk.   He continues to walk south on Argyle but stops on the west side. S3 is behind S1, also walking south on the west side of Argyle. (TP – VC @ 3:27:45 - 3:28:37)

- Mr. Diggs and his acquaintance continue to walk south. S1 continues to walk behind Mr. Diggs. S1 veers into the street and then returns to the west sidewalk, near the corner of Argyle and Blowers. S3 continues to walk south on the west side of Argyle to the corner of Blowers. All disappear from view of the Argyle cameras – either stopping behind an obstruction at the corner or going around the corner. (TP – SP @ 3:28:08 – 3:29:00)

- They are next seen by the cameras on Blowers. Mr. Diggs and his acquaintance turn right (west) from Argyle onto Blowers and walk west on the north side. About 10 seconds later, S1 also turns right (west) from Argyle onto Blowers and walks west on the north side. He is about 10 metres behind Mr. Diggs as they walk up Blowers. (SP - C1 @ 3:28:34 – 3:28:56).

- Mr. Diggs and his acquaintance continue walking west on Blowers. S1 continues to walk behind them.   (SP - C2 @ 3:28:46 – 3:28:57 and JK – EC @ 3:40:52)

- Mr. Diggs crosses Blowers to the south side. S1 continues walking west on the north side of Blowers. (SP - C2 @ 3:29:00)

- S3 turns right (west) from Argyle onto Blowers and also walks west (SP - C1 @ 3:29:08)

- Mr. Diggs and his acquaintance reach the southeast corner of Blowers and Grafton (Pizza Corner). S1 approaches the northeast corner and is sporadically visible but is sometimes lost behind others. (SP - C2 @ 3:29:16)

- S3 continues to walk west on Blowers. (SP – C2 @ 3:29)

- Mr. Diggs and his acquaintance enter Johnny K's where they greet a person and then leave about 30 seconds later. While Mr. Diggs is in Johnny K's, S1is hanging around on or near the corner outside Sicilian Pizza. He then moves closer and leans on a railing on what appears to be a patio immediately outside the business. A number of other people are also hanging around on the corner and in front of the business and others are passing by. It appears some are entering and exiting the business. S1 cannot be seen at all times. S3 passes S1's location near Sicilian Pizza but does not pause and there is no apparent acknowledgement of each other. He continues west on Blowers to the corner of Grafton, turns right (north) on Grafton. He disappears from the Blowers Street and HRM cameras and appears to continue walking north. (JK – EC & IC @ 3:41:16 – 3:41:44; SP - C2 @ 3:29:33 – 3:30:03; HRM @ 3:29:11 – 3:29:40)

- Mr. Diggs and his acquaintance leave Johnny K's and cross Blowers to the northeast corner. They appear to greet another person and then appear to continue north on Grafton in the same direction as S3, but behind him. They

also disappear from the Blowers Street cameras (JK – EC & IC @ 3:41:44 - 3:42:03; HRM @ 3:29:52 – 3:30:20)

- About 30 seconds after S3 disappears from the Blowers Street cameras, he reappears from Grafton Street at the corner near Sicilian Pizza, and turns left (east) on Blowers. S1 starts walking down the Sicilian Pizza patio toward the sidewalk. S3 walks east on Blowers. (JK – EC @ 3:42:18; SP - C2 @ 3:30:23 – 3:30:51; HRM @ 3:30:30)

- S1 walks toward the corner of Grafton and Blowers and appears to turn right (north) on Grafton but is lost from view on the Blowers Street cameras. The HRM camera, which has a broader view of the corner, does not capture him walking around the corner on the part of the corner that is visible (JK – EC @ 3:42:15 - 03:43:18; HRM @ 3:30:00 - 3:34)

[49]   Mr. Diggs was stabbed at the opening of an empty lot on the east side of Grafton Street about 25 metres north of the intersection of Grafton and Blowers (Evidence of Mr. Diggs and D/Cst. Marchand; Ex. 14, 15, and 23, pp. 8 &12). It was captured, from different angles, on two video cameras ('Symcor' camera - segment#...2523; and, 'Benigno' camera). They show:

- Mr. Diggs walks north on Grafton on the east sidewalk, now with two other individuals. A second later, the attacker can be seen walking behind Mr. Diggs from the same direction (segment #...2523). On the Symcor video, it is not possible to see where the attacker came from, specifically, whether he came around the corner from Blowers Street. The video was presented in short segments. Mr. Diggs and his acquaintances are visible at the corner at the end of the segment immediately preceding the segment showing the attack, but the attacker is not. After the attacker appears in segment #...2523, he can be seen walking quickly for seven seconds before he attacks Mr. Diggs. When attacked, Mr. Diggs appears to be on the sidewalk, perhaps in mid-stride. The attack lasts about 4 seconds and the attacker runs north on the east side of Grafton Street in the direction of Sackville Street. This video is grainy and, while it can be viewed frame-by-frame, there is some degradation in picture quality. (S @ 3:25:17 - 3:25:29)

- On the 'Benigno' video, Mr. Diggs also appears to be accompanied by two others as he reaches the opening to the lot. He is on the sidewalk when the attacker approaches. He takes a step and is approached from his left. He turns and faces his attacker. The attacker strikes him numerous times, then backs

away before turning to run away. Mr. Diggs appears to be facing his attacker during the attack. (BG @ 2:45:16 - 2:45:28)

- Immediately following the attack, a marked police SUV and two uniformed foot patrol officers arrive at Mr. Diggs' location and then continue north on Grafton. (BG @ 2:46 - 2:48; S @ 3:25:47)

- S3 walks to the corner of Blowers and Argyle, looks around and then walks back up (west) Blowers. He arrives at the northeast corner of Blowers and Grafton just after the two uniform patrol officers have run north on Grafton across Blowers toward the attack. S3 then turns right onto Grafton and the police SUV drives through the intersection, going north on Grafton (SP – C1 @ 3:31:26, SP – C2 @ 3:31:42 – 3:31:55)

- S3 walks north on Grafton to the opening of the empty lot, arriving just after the police leave Mr. Diggs. He leans over and appears to speak to Mr. Diggs, then stands around for about 15 seconds before walking back south on Grafton toward Blowers. (BG @ 2:46:16 – 2:46:46; S @ 3:26:11 – 3:26:50)

- Then, the foot patrol officers return to tend to Mr. Diggs and then a marked patrol car arrives. BG @ 2:46 - 2:48; S @ 3:27 – 3:28)

- S3 crosses Grafton toward the northwest corner, disappearing in a crowd of people (SP - C2 @ 3:33:33)

- S3 returns to the northeast corner of Blowers and Grafton and a marked police car with emergency lights activated turns right (north) on Grafton. S3 is joined by an unknown male. S2 appears, walking west on Blowers to the intersection of Grafton. He starts to cross Blowers before the intersection, passing S3 without pausing and with no apparent acknowledgement of each other. S2 crosses to the southeast corner where he speaks to a male. Large groups of people can be seen walking west on Blowers and lingering around. (SP - C1 @ 3:34:43 and C2 @ 3:34:46; JK – EC @ 3:45:25)

- S3 remains at the northeast corner of Grafton and Blowers for a couple of minutes. He then crosses Blowers and gets into a vehicle (described by D/Cst. Doyle as a tan/gold Honda Accord with a moon roof) with an unknown male. The vehicle leaves, driving east on Blowers (SP - C2 @ 3:35:15 - 3:37:55; HRM @ 3:37:53 – 3:37:55)

[50]   Following the attack, other potentially relevant activity was captured by the surveillance cameras:

- As the attacker is running north on Grafton, a vehicle identified by D/Cst. Doyle as the same tan/gold Honda Accord with the moon roof drives east on Sackville, signalling to turn right as it approaches Grafton. S1 appears on the Nova Centre camera at Sackville from Grafton and turns right (east) onto Sackville. He continues running east on the south side of Sackville. The vehicle goes past Grafton and stops on Sackville, just east of Grafton. S1 does not get into the vehicle, but continues running east. The vehicle then also continues east on Sackville and it appears that someone gets out of passenger side when the vehicle stops near Argyle Street. (NC @ 3:31:46 – 3:32:32)

- The marked police SUV also reaches the corner of Grafton and Sackville and turns right (east) onto Sackville (NC @ 3:32:36)

- Approximately while this is happening, the male wearing the black shirt with no sleeves and white logo walks south on the east side of Argyle. He is looking at his phone as he passes Durty Nelly's. He then begins to run south on Argyle, crossing Sackville and past Neptune Theatre where he stops and speaks briefly to two women. (DN – ch. 1 @ 3:30:07; DN – ch. 6 @ 03:30:12 – 3:30:17 and NT @ 3:34)

- About 7 seconds later, S1 crosses Argyle, running east on the south side of Sackville. This is about 4 minutes after he allegedly left the area in front of the Neptune Theatre following Mr. Diggs (DN – ch. 6 @ 3:30:12 -3:30:31 and NT - @ 3:34)

- Immediately after S1 crosses Argyle, another man runs south on the east side of Argyle. This man has a beard and thick hair. He is wearing loose clothing with white shoes. In the Durty Nelly's video, his clothing appears to be solid colour with medium gray top and black pants. In the Neptune video, it can be seen that he has long hair in a bun, his top can be seen to be short sleeved with a pattern, his pants appear black and he is wearing white socks and sneakers. He runs across Sackville and meets up with the man wearing the black shirt with no sleeves and white logo and another man, wearing a gray t-shirt and black pants, who has walked south on Argyle. The man with the bun and the man with the gray t-shirt were previously on Argyle near the Toothy Moose around the time that Mr. Diggs was leaving the Toothy Moose. The man with no sleeves and the two men then walk north on Argyle, passing Neptune doors.

They then remain around the southeast corner of Argyle and Sackville for about 5 minutes looking at a phone and talking (NT - @ 3:34:34 - 3:35:59; DN – ch. 6 @ 3:30:12 – 3:35)

- A vehicle identified by D/Cst. Doyle as the same tan/gold Honda Accord with the moon roof again drives east on Sackville, and turns right (south) onto Grafton (NC @ 3:36:47)

Eyewitness Identification

[51]   Mr. Diggs testified. There is no evidence to suggest he was anything other than a cooperative Crown witness. He responded to his subpoena and when he wasn't reached, returned on another day to give his evidence. He responded respectfully to all questions put to him by the Crown. Neither his demeanour nor the content of his testimony revealed any of the traditional indicators of deceit.

[52]   He testified that on the night he was stabbed, he went to a friend's birthday party at a downtown hotel. He left the party and went to the Toothy Moose, a nightclub in downtown Halifax. He was there with some acquaintances and friends. Nothing unusual happened while he was there and he had no issues with anyone while at the club. He had consumed alcohol during the evening but testified he did not have any while at the club. He left the club alone, went to 'pizza corner' where he met some acquaintances (there is no dispute that 'pizza corner' is commonly used to describe the intersection of Blowers and Grafton Streets). He left 'pizza corner' and walked down the street to an area he described as "the cut" to urinate (there is no dispute that he is referring to the empty lot on the east side of Grafton between Blowers and Sackville Streets). That is when he was stabbed. He said he was urinating and heard someone behind him, so glanced over his shoulder and was then stabbed multiple times. He saw the person. He testified that he did not know the person and described him as a male, about 6' to 6'1", "light skinned black guy" who was around 30 years old or maybe older.

[53]   He was shown some of the surveillance video. He recognized himself entering the Toothy Moose, at timestamp 1:17 a.m., but did not recognize anyone else. This video provides the best quality images of people and their faces. He was also shown video from The Pint. He watched from approximately timestamp 3:15 a.m. to approximately 3:28 a.m.. He did not recognize anyone in that video. Other witnesses identified Mr. Lilly as being in this video at various points (Mr. Neveau and D/Cst. Doyle). Mr. Diggs testified that he was wearing all white that night. He was asked if he recognized a person in the video who was wearing all

white. He said he couldn't tell whether it was himself. After watching the videos multiple times, observing Mr. Diggs in court and in the Toothy Moose video, I believe that Mr. Diggs is the person wearing all white in the Pint video, so he failed to recognize himself.

[54]   Mr. Diggs was also shown the video of the attack. He testified that he couldn't tell whether it was him in the video because it was hard to make out anything, but it looked like the area where he had been stabbed.

[55]   Mr. Diggs account of what happened is not entirely consistent with what I see in those recordings. He does not mention going into Subway and then walking back down Argyle before going to 'Pizza Corner'. Further, based on my review of the video showing the attack, it does not appear that Mr. Diggs was actually urinating when attacked. He was still on the sidewalk and appeared to be in mid-stride. However, one of the people with him, appears to be slightly inside the lot, facing the building, so it may be that he is urinating and it may be that Mr. Diggs went there to urinate but hadn't yet started. These discrepancies do not cause me concerns about the overall reliability of his testimony.

'Leaney' Recognition Evidence

[56]   Mr. Neveau and D/Cst. Bennett both testified that they recognized Mr. Lilly in the videos. The Defence argues that neither can be relied on because proper identification procedures were not followed and both were tainted or improperly influenced.

Possible Tainting of Identification/Recognition Witnesses

[57]   After reviewing the surveillance video, D/Cst. Doyle believed that four men had been involved and formed his own opinion about which one was the actual attacker. He then created still photos from the surveillance video of each of the four men.

[58]   No lineup was done for either Mr. Neveau or D/Cst. Bennett. In each case, they were sent a number of still photographs taken from surveillance of the person D/Cst. Doyle believed was the attacker and asked if they recognized the person.

[59]   A few days after the incident, D/Cst. Doyle received information that S1's nickname was "Vito" and that he had done time at Renous (Atlantic Institution in New Brunswick). As a result, he emailed Kevin White, a security officer with

Corrections Services Canada (CSC). He told Mr. White that he believed the suspect went by the name 'Vito' and had done time at Renous and attached the still photos of the suspect that he had created from the surveillance video (Ex. 2). Mr. White responded that two employees had identified the person as 'Jacob Lilly' with varying levels of confidence.

[60]   The Defence argues that if Mr. White included the information about the nickname in the correspondence he sent the employees with the photos, it would have tainted any subsequent identification. Mr. White didn't testify and the email he sent was not entered into evidence. Mr. Neveau received the email. In direct, he testified it said something like "can this person be identified by your department?" and said the email did not include the person's name. In cross-examination, he acknowledged that the email also included some information that it was Halifax police who were investigating and agreed that he could not recall the exact wording of the email. However, he maintained that he did not believe it had included a name or nickname.

[61]   He testified that he knew it was Jacob Lilly as soon as he saw one of the clear pictures. In his testimony, Mr. Neveau was very confident that he knew it was Jacob Lilly within seconds of seeing the photographs. In contrast, D/Cst. Doyle testified that he understood that correctional officers were not 100 % certain after viewing the photographs.

[62]   If Mr. Neveau was told that police believed the person in the photos went by 'Vito' and if he knew that Mr. Lilly went by that name, then from the outset his recognition of Mr. Lilly was tainted.

[63]   I believe it is possible that Mr. White's email included the nickname. D/Cst. Doyle sent it to Mr. White and there is no evidence that he told Mr. White not to further disseminate it. In the absence of that kind of instruction, it would make sense that Mr. White would have included it and Mr. Neveau had no specific recollection of what the email said.

[64]   I have no evidence that Mr. Neveau was aware of Mr. Lilly having any alias, nickname or 'street' name or, if so, what it was. I believe it is probable that if Mr. Lilly had a nickname, Mr. Neveau would have known it. That kind of information is generally included in CSC files and Mr. Neveau, in his role as intelligence officer, would generally know that kind of information. However, I have no evidence that Mr. Lilly's nickname was 'Vito'; neither Mr. Neveau nor any other witness was asked. As such, while I think it is possible that Mr. Neveau's initial

identification from the photos was tainted by being provided a name that he associated with Mr. Lilly, I can not say as a fact that it was.

[65]   After Mr. Neveau advised Mr. White that he could identify the person, D/Cst. Doyle and D/Cst. Todd Streatch went to Renous to meet with him and showed him surveillance video.

[66]   I am satisfied that that identification process was flawed. Mr. Neveau may have independently recognized the person in some of the sequences, but for others, D/Cst. Doyle directed his attention to a specific person and it is not possible to determine which. By the end of the process, Mr. Neveau knew which person in the sequences, D/Cst. Doyle believed was the attacker. This taints his recognition of Mr. Lilly in the video, especially given the importance in this case of 'tracking' S1 through the various video clips.

[67]   The other '*Leaney*' witness was D/Cst. Bennett. On July 17, 2019, D/Cst. Doyle also sent photos out to police officers in Halifax asking whether anyone recognized the person he believed was the attacker (Ex. 3). D/Cst. Doyle testified that D/Cst. Bennett responded almost immediately and said he thought it was Jake Lilly. D/Cst. Bennett testified that he did not immediately respond. He said he had not seen the email because he hadn't been in the office. He testified that on the 19th, Cst. Sarah Carter asked him if he'd seen the email from D/Cst. Doyle, he told her he hadn't and she told him to look at it when he got to the office. After looking at the photos, he told D/Cst. Doyle that he thought it was Jake Lilly – that he was 70 % sure based on the photos. Both Cst. Carter and D/Cst. Bennett denied that she had suggested to him that the person in the photos was Mr. Lilly. Cst. Carter also had previous familiarity with Mr. Lilly from her time as a school liaison officer and otherwise. While I think it makes sense that when she prompted him to look at the video, she might have said who she thought it was, I am not prepared to say they were being untruthful in their denials.

[68]   D/Cst. Doyle asked D/Cst. Bennett to watch the videos because it would help with a "more positive identification". D/Cst. Bennett then watched the videos on his own after being given access by D/Cst. Gillis. He chose which of the clips to watch and testified that he could identify Mr. Lilly in two. He watched more than that. He testified that he did not watch the video of the attack. I am satisfied that he was not provided with any guidance during that process so his identification of Mr. Lilly in the videos was not tainted. However, at some point after watching them, he spoke with D/Cst. Doyle who confirmed to him that Mr. Lilly was the

prime suspect and that he had been identified by others from "corrections" in 'Renous". This can also taint a witness's identification/recognition by increasing their confidence that they are correct.

[69]   Finally, D/Cst. Bennett was provided with a "montage" or compilation video which contained clips from various cameras, put together in what D/Cst. Doyle believed to be chronological order. That video included the attack. D/Cst. Bennett watched it when he received it and then also to prepare for trial. Again, in my view, the compilation video is capable of tainting the recognition evidence in a case like this because the witness is not simply being asked to look at an image or a discrete video and say if they recognize a person. Rather, there is a risk that they are led to believe a specific person is in a certain segment because of inferences from the time line created by someone else.

[70]   Both Mr. Neveau and D/Cst. Bennett denied that any of these flaws had any impact on their ability to identify Mr. Lilly in the video or their confidence level. However, in these matters, the honesty of that belief is not determinative. I have no doubt that their ability to identify Mr. Lilly in some of the video clips and the confidence with which they expressed their beliefs was impacted by the flaws in the process. The cases implicitly recognize that this kind of impact can be subconscious and a witness may honestly believe they have not been impacted.

[71]   Mr. Neveau confidently identified Mr. Lilly in the following videos: Durty Nelly's; Toothy Moose; The Pint; Smoke's Poutinerie; Symcor; and, Benigno.

[72]   In one clip from the Durty Nelly's video (DN, ch. 6 @ 3:29), he did not immediately identify Mr. Lilly. Rather, at the end of that segment, the Crown asked if there was anything of note in that video and he said it "appears to be" Jacob Lilly running.

[73]   In general, he based his identification using a number of features, some of which are compelling, detailed and distinctive and some are not: wearing sweatpants or loose clothing, broad shouldered / athletic build, hand on waistband, facial bone structure, way he walked and approached, his mannerisms, thin, well-trimmed beard, his distinctive walk, distinctive run, short hair, distinctive – almond shaped eyes, square jaw all of which were consistent with when he knew him.

[74]   He said he was making his identification individually in each video but also based on the entirety of the video, meaning that in each video he could see

different characteristics but also that the person was wearing he same thing throughout.

[75]   Importantly, when watching the videos of the attack from the Symcor and Benigno video, he testified he knew it was Mr. Lilly because of "the way he's approaching the situation", his "features and gait" when approaching and when running away, the structural features of his face and body and his side profile and back, and the way he fled the area.

[76]   Mr. Neveau was a very confident witness in all respects. He did not express any doubt or hesitation, even when, in my view, it would have been expected or warranted such as when making an identification in the videos showing the attack. I believe his identification of Mr. Lilly in those videos, was based in large part on his belief that he could track Mr. Lilly through the earlier videos.

[77]   D/Cst. Bennett testified that after seeing the Durty Nelly's video, he was 100 % certain it was Jacob Lilly. In court, he recognized Mr. Lilly in that video, the Neptune Theatre video and in the Pint video. He agreed that some of the video segments he watched in court were part of the compilation video he had watched prior to trial. He acknowledged that in part of the Pint video where he recognized Mr. Lilly, he could not see the face of the person but still believed it was him based on clothing.

[78]   He based his recognition on the 'totality' of his experience with Mr. Lilly but specifically his mentioned his walk, stature, hands in pockets, distinctive features, stocky/athletic build, short dark hair, thin beard, broad shoulders, jogging pants and white sneakers, tanned skin. He was 100% certain it was Mr. Lilly in the Neptune Theatre video and for other videos said he was confident.

His testimony did not appear to be over-reaching or over confident.

'Nikolovski' Recognition

[79]   The descriptors from witnesses who were previously familiar with Mr. Lilly are useful for me in weighing the evidence from the *'Leaney'* 'recognition' witnesses and in forming my own opinion.

[80]   In summary, the features the *'Leaney'* witnesses used to recognize him in the video were: stocky / athletic build with broad shoulders; white sneakers; short cropped / shaved head; receding hairline; distinctive facial hair; dark loose

clothing, including sweatpants; distinctive walk which was described as a swagger or sway; thumb or pinky in mouth; hand at waistband.

[81]   Mr. Neveau also noted Mr. Lilly's distinct facial structure - relatively flat face, almond eyes, square jaw, distinctive lips and eyebrows - and distinct manner of greeting people - joyful.

[82]   D/Cst. Bennett also noted that Mr. Lilly had a thick neck and described him as a "light skinned black male" / biracial / tanned skin. He said that Mr. Lilly's appearance on the surveillance video was identical to when he saw him at his mother's residence about 10 days earlier but a little different than when he saw him in court on September 10, 2021. When in court, his skin was lighter, he had no facial hair and his hair seemed shorter.

[83]   Cst. Carter also described Mr. Lilly. I concluded that she did not have sufficient previous familiarity with Mr. Lilly to pass the *Leaney* threshold. However, she did have some previous familiarity with him from her time as a school resource officer which began in 2016 and was able to describe him. She said he was generally stocky with a large neck, short hair, generally wearing loose/baggy clothing and a distinctive "sure" or "confident" walk. She also saw him in booking in June of 2019 after his arrest by Cst. Maxwell. She said he was heavier than he had previously been, had shorter hair similar to how it was in court and had a "chinstrap" beard and goatee. She said the only changes to his appearance between June of 2019 and when she saw him in court on July 22, 2021 was that in court, he was leaner / less stocky and had no facial hair. His hair and hairline were the same.

[84]   I also reviewed video of Mr. Lilly from about two weeks before the incident and about a month after the incident. The first, video from Halifax Regional Police booking on June 23, 2019, following his arrest for an unrelated matter by Cst. Mark Maxwell (Ex. 25). That video shows Mr. Lilly in various segments, sitting, standing and walking. He is wearing bright white shoes. His head is shaved or clipped short with a visible stubble, he has a pronounced widow's peak hairline (meaning it is receding at the corners) and he has a band of short facial hair extending from the sideburns across the chin, that would commonly be referred to as a 'chinstrap' beard. The second, video of an interview of Mr. Lilly conducted by D/Cst. Poole following his arrest for the matter before the Court, about a month after the incident. (Ex. 21).

Other Evidence

[85]   Cst. Carter was present when Mr. Lilly was in HRP Booking on June 23, 2020. She testified he was wearing white "air force" Nike sneakers. She recalled them because they were popular at the time. The video showing Mr. Lilly being released from custody that morning shows him wearing the same footwear.

[86]   Both Cst. Maxwell and Cst. Carter recalled that Mr. Lilly was limping when in booking on June 23, 2019. Cst. Carter testified that she did not make a note of the limp but it was significant enough that it stood out in her memory. The video from booking also shows a clear limp. He appears to be favouring his right leg, puts his hand on the wall to steady himself and stumbles a bit when going from standing to sitting, and still limping when released from custody the next day.

[87]   Neither had any further dealings with Mr. Lilly between that date and the date of the incident so could not say how long the limp persisted. D/Cst. Bennett testified he dealt with Mr. Lilly about 10 days before the incident. He went to Mr. Lilly's mother's house to see if he was living there. Mr. Lilly came to the door and they spoke face to face for a period of time. He agreed that he did not see Mr. Lilly walk any great distance (only three to four feet) but did not observe anything unusual about his walk.

Analysis

[88]   As I said in my decisions on threshold admissibility, each of the '*Leaney*' witnesses had experience with Mr. Lilly that I believed gave them some advantage over me in recognizing Mr. Lilly. In particular, I have only observed Mr. Lilly in person in a court setting and on video from the institution, whereas, they have each observed in settings that would be more similar to that in the video. Their interactions with him allowed them to describe Mr. Lilly's distinctive walk and habit of putting his hand and/or pinky finger to his mouth which helped them recognize him in the videos. I have seen Mr. Lilly walk but not over great distances and have not observed the habit they described. Finally, unlike some of the witnesses, I did not have the opportunity to personally interact with Mr. Lilly around July 7, 2020.

[89]   However, I have had the opportunity to see Mr. Lilly reasonably regularly, either on video or in person, over approximately two and a half years. He was present in court for trial on approximately 18 days, during which time he was within 10 feet of me in a well-lit setting for hours, communicating with his counsel, sheriffs or myself and moving to and from the courtroom. During much of that time he was wearing a Covid mask, however, I did have him remove his

mask to permit a witness to see his face. I have also viewed video of him that was recorded relatively close in time and had the opportunity to review that video multiple times. Finally, I have had the opportunity to view the surveillance video, enhanced compilation video and enhanced photographs more times than I could count.

[90]   First, I have some general observations about the content of the surveillance videos.

[91]   When reviewing the surveillance video, the focus of the witnesses and myself is mostly on the suspects and Mr. Diggs. That can distort the context. In considering the videos it is important to recognize that there were a lot of people in the area that night. The videos show that the streets are often crowded with people walking, standing around talking, waiting in line to enter businesses, looking into businesses etc. At times, there are 20 or more people with others alone or in smaller groups. That is relevant to my assessment of the weight to be given to the submission that the suspects can be seen walking around downtown and hanging around near Mr. Diggs.

[92]   Further in assessing the weight to be given to the submission that the suspects appear to look into the Subway restaurant while Mr. Diggs is in there, it should be noted that the restaurant has very large windows that are essentially glass walls and is very brightly lit. While Mr. Diggs is in the restaurant, there are a number of other people on the corner near Subway and others pass by or gather nearby. Some of these apparently unrelated individuals also look in as they pass by or stand around.

[93]   Finally, some of the video clips are in colour and some is in black and white. Those that are in black and white do not all show shades of black, gray and white in the same way. Even within video from a single camera, the shades seem to change depending on changes in lighting caused by variables such as car headlights.

[94]   Based on all the evidence, I am confident that S3 can be tracked through a number of the videos. His size and clothing are distinctive. In watching the videos, I did see others who resembled him in certain lighting conditions but was able to disregard them relatively quickly. I am reasonably confident that S2 can also be tracked through some of the videos. His appearance is much less distinctive, especially given the different lighting conditions in the different videos.

I am much less confident that S4 can be tracked. He appears less frequently and again, his clothing is less distinct given the lighting conditions.

[95]   I am also confident that there was some relationship between S1 and each of the other three suspects. He is seen with each of them in a context where he appears to know them. I am not confident that S2, S3 and S4 had a relationship with each other. In the videos, I did not observe them interacting with each other.

[96]   I am persuaded beyond a reasonable doubt that Mr. Lilly is the person identified as S1 in at least some of the videos. Specifically, in the Neptune Theatre video and portions of the Durty Nelly's video. I base that conclusion on my own review of the video using my observations of Mr. Lilly in court, video of him proximate in time to the event, the descriptions of him provided by the witnesses and on the recognition evidence of Mr. Neveau and D/Cst. Bennett.

[97]   I am also confident that I can track Mr. Lilly through some of the videos such that I am persuaded beyond a reasonable doubt that it is him in some videos where I would not be persuaded based on pure recognition alone.

[98]   In reaching the conclusion that it is Mr. Lilly in some of the video, I have considered the Defence argument that Mr. Lilly had an injury that caused a pronounced limp on June 23, 2019, two weeks before the incident, and the video of S1, even when running, shows no limp.

[99]   The evidence of the limp is of limited relevance, since I have no evidence of how long the injury persisted and even in the video where I am confident I see Mr. Lilly, without making any inferences or tracking him, I don't see a limp.

[100] I am also confident that Mr. Lilly and at least S2 and S3 were following Mr. Diggs that night.

[101] However, in watching the videos, I have also noted other unidentified individuals who connected to what was going on and that connection is not clear. I refer specifically to the man wearing a black shirt with no sleeves and a white logo, the man wearing the gray t-shirt and the man with the beard, bun, black pants and white shoes. They were around the Toothy Moose when Mr. Diggs was inside, the man with no-sleeves had some dispute with Mr. Lilly and two of them were running in the area immediately after the attack.

[102] As I said, I am convinced that Mr. Lilly was in the area but I also have to be convinced that he is the person who stabbed Mr. Diggs. I am not persuaded beyond a reasonable doubt based solely on the video showing the stabbing. The person who attacked Mr. Diggs and ran north on Grafton is wearing dark, loose clothing, and white shoes. It is not possible to see any features of the attacker's face or whether he has facial hair. It appears the attacker does not have long hair but it is not possible to see whether the he is bald or any details of his hairline (S @ 3:25:17 - 3:25:29; BG @ 2:45:16 - 2:45:28). That person is consistent with Mr. Lilly and with the person identified as S1 in the other videos.

[103] However, I also have to consider whether the other evidence, including the video, convinces me beyond a reasonable doubt that it is Mr. Lilly.

[104] That includes an assessment of whether Mr. Lilly can be tracked from the videos where I am certain it is him to the video showing the attack.

[105] There are four points where, the person alleged to be S1 is not visible on any video so cannot be directly tracked: when he is at the northwest corner of Blowers and Argyle the first time he is alleged to turn east onto Blowers from Argyle; when he walks east on Blowers and crosses to the south side, perhaps into an alley; when he is at the northwest corner of Blowers and Argyle the second time he is alleged to turn east onto Blowers from Argyle and when he is at the northeast corner of Blowers and Grafton. For the first two of these, I am reasonably confident that I can pick him up again in subsequent videos. In part because some of the subsequent videos are of sufficient quality to allow me to recognize Mr. Lilly myself and in part because I rely on the evidence of Mr. Neveau and D/Cst. Bennett who are more familiar with Mr. Lilly's walk and mannerisms.

[106] The third and fourth are more difficult – these are the last two turns before the attack.

[107] In the third, S1 follows Mr. Diggs south on Argyle and disappears from the Argyle street cameras. The Crown alleges that he then appears on the Blowers street cameras and continues to follow Mr. Diggs west on Blowers. The challenge is that detailed facial features are not visible so identification would be based primarily on colour and style of clothing, hair and facial hair. Due to the quality of the footage, these are the features that are not consistent between cameras.

[108] This challenge becomes apparent when one looks at the enhanced stills that were created from the video (Ex. 26). In the first, S1 is standing in front of

Neptune Theatre and wearing what appears to be a dark navy or black loose top and dark navy or black loose sweatpants. He has thin facial hair and is almost bald. I am confident that image is of Jacob Lilly, the accused before the Court. In the second photo, the person alleged to be Mr. Lilly passes the window of the Subway, walking west on Blowers. That photo shows a person wearing black baggy clothing and white sneakers, but with a thick beard. The hairline appears to be receding at the temples but the hair appears thick and dark. The third photo is from Argyle Street. In it, the person alleged to be Mr. Lilly appears to be wearing a medium gray top and light gray pants with bright white shoes, he has a thick dark beard and thick dark hair with some recession at the temples. Neither #2 nor #3 are consistent with Mr. Lilly's appearance. I believe it is him in the photo from Argyle Street, but these issues simply demonstrate the challenge created by the variations in lighting and shading.

[109] This same challenge presents itself when attempting to track S1 when he allegedly makes the final turn from Blowers Street, onto Grafton, immediately before the stabbing. S1 is in a crowd at the intersection of Blowers and Grafton and disappears from time to time because he is behind people or because of the quality of video. It makes it difficult to know whether the same person is being picked out when people move and the video becomes clearer. Often that assessment is based solely on the white shoes or colour of the clothing. For the reasons I've mentioned, that is troubling because shades of white, gray and black are variable in the different videos or even within one video, depending on lighting conditions.

[110] Someone with dark clothing and white shoes is shown at the corner of Grafton and Blowers and disappears after Mr. Diggs walks north on Argyle. The man does not go west on Blowers, does not go east across Grafton and does not cross south across Blowers, so it appears he continues around the corner and north on Grafton. However, Sicilian Pizza, the business on the corner, appears to still be open and people are gathered around the entrance, and appear to be coming and going. Further, I believe there is an area just north of the intersection that is not captured on any of the video. I say this because in one instance, S3 is shown on the 'Johnny K's' video, HRM camera and 'Smoke's Poutinerie' video, camera 2, turning north onto Grafton street from Blowers. It appears he walks north on Grafton, returning to the corner about 30 seconds later. However, he never shows up on the Symcor video which shows Grafton to where it intersects with Blowers. S3 is very distinctive. He is a heavyset man, wearing a light t-shirt and blue shorts with a white stripe. He is the easiest to track through the different videos. I can't

say where he went but it is appears there is a space that is not visible on the cameras such that someone who appears to turn right from Blowers onto Grafton, doesn't necessarily continue walking down that street.

[111] So, using this video alone, I am not so confident that Mr. Lilly followed Mr. Diggs from Argyle onto Blowers and then from Blowers onto Grafton.

[112] The person who attacked Mr. Diggs and is then seen running away from the attack, north on Grafton and then east on Sackville is consistent with Mr. Lilly's appearance that night – dark loose clothing and white shoes.

[113] Further, the time that elapsed between when I can positively identify Mr. Lilly near Neptune Theatre and when the attacker is again seen running away from the attack is also not incompatible with Mr. Lilly being the attacker. Using the Neptune Theatre video to establish the times, it was about 4 minutes which is not inconsistent with the time required for the intervening events.

[114] Finally, I have to consider the testimony of Mr. Diggs.

[115] The Defence argues that Mr. Diggs' description of his attacker is entirely inconsistent with Mr. Lilly – that Mr. Lilly is shorter, younger and appears to be Caucasian. The Crown does not argue that Mr. Diggs was deceitful but argues essentially that to the extent that Mr. Diggs' description does not match Mr. Lilly, it should not be relied on. He had only a fleeting glimpse of his attacker, in an area that was not well lit and in traumatic circumstances. Further, descriptors that relate to skin tone or ethnicity are entirely subjective and I do not have sufficient information to know what Mr. Diggs meant by "light skinned black guy" in order to determine whether it is or is not consistent with Mr. Lilly.

[116] Mr. Diggs did not describe any distinctive characteristics of the person who stabbed him. Notably, he did not describe the person as having certain distinctive features that witnesses have used to describe Mr. Lilly. Most witnesses described Mr. Lilly as stocky or broad shouldered, having distinctive facial hair, described by some as a 'chin strap beard, and having short cropped hair or a shaved head and a receding hairline (Mr. Neveau; D/Cst. Sarah Carter; D/Cst. Bennett). Save for some change in facial hair, these features are also generally consistent with my observations of Mr. Lilly in person and/or in video of his police interview relating to this matter (Ex. 21) and during booking after his arrest on June 23, 2019 in relation to an unrelated matter (Ex. 25).

[117] Mr. Diggs did not say his assailant was stocky, did not refer to any facial hair and did not mention a distinctive hairline.

[118] Mr. Diggs said the person who attacked him was in his 30s or older. Mr. Lily's date of birth is November 24, 1997 so, at the time of the incident, he was 21 years old.

[119] Mr. Diggs said the person who attacked him was 6' or 6'1". Jean Francois Neveau, an employee of CSC who knew Mr. Lily from his time at the Atlantic Institute testified that he didn't know Mr. Lily's height but guessed it to be 5'10" to 5'11". D/Cst. James Bennett who knew Mr. Lily from his time as a community officer gave the same estimate of his height. I have observed Mr. Lily over many days of trial. During that time, I have seen him sitting, standing and walking accompanied by sheriffs of varying heights. I would estimate Mr. Lily's height at around 5' 9".

[120] Mr. Diggs also described the person who stabbed him as "a light skinned black guy". Neither Crown nor Defence sought clarification of that statement. Mr. Diggs testified that he did not know his attacker so I infer also did not know his ancestry. As such, he must have been using the phrase to describe physical characteristics. I infer that he intended, at least, to describe skin tone and to convey that the person had a darker skin tone than would normally be associated with a Caucasian person. With the exception of D/Cst. Bennett, no witness described Mr. Lilly as black or African-Nova Scotian. D/Cst. Bennett described him as a "light skinned black male" and as "bi-racial". He was cross-examined at length on the reasons he used that descriptor and I also asked questions to try to clarify his evidence. I am satisfied that in large part, D/Cst. Benett gave that description because of his belief about Mr. Lilly's ancestry – specifically, that Mr. Lilly's father is African Nova Scotian. Mr. Lilly's ancestry is entirely irrelevant. The descriptor is only relevant if it conveys information about his appearance. D/Cst. Bennett did say that Mr. Lilly has a darker complexion in the summer when tanned.

[121] I agree with the Crown, that descriptions of skin tone are subjective. I would describe Mr. Lilly's skin tone when he has appeared before me as 'light'. That is meaningless without a comparator - I would say his skin was no darker than mine and, in identification documents, I would be described as 'Caucasian'. Based on my observations of Mr. Lilly in court, in the absence of any other information, I would have assumed he was Caucasian. I accept D/Cst. Bennett's evidence that

Mr. Lilly is darker when tanned and it is supported by the videos of him around the time of this incident. However, Mr. Diggs is a person who's physical appearance leads me to believe that he is, himself, of African Nova Scotian descent. In my view, when he used the phrase "light skinned black guy", he was not referring to a tanned Caucasian person.

[122] As I said, there is no reason to doubt Mr. Diggs credibility. His evidence was not entirely consistent with the video – specifically, he testified he was urinating when approached, but the video does not show that. However, his evidence in other respects was reliable. In summary, in describing his attacker, Mr. Diggs did not mention features that are distinctive about Mr. Lilly's appearance, the description he did give is inconsistent with Mr. Lilly's appearance and he did not identify his assailant in the video from "The Pint" which, according to other Crown witnesses, included Mr. Lilly. However, as I said, he also did not recognize himself in that video so his failure to recognize anyone else could be the result of the quality of the video and the fact that he did not view it multiple times. I appreciate that Mr. Diggs' opportunity to observe his attacker was limited, the lighting wasn't ideal and it was a traumatic event. However, from the video, it appears he was face to face with him for 4 - 6 seconds during which time he would have had an opportunity to observe his hairline, facial hair and skin tone and assess his height as compared to his own.

[123] The evidence creates a great deal of suspicion. Mr. Lilly and the others were following Mr. Diggs for at least some time that night and the person who attacked Mr. Diggs and ran away is consistent with Mr. Lilly. I believe that Mr. Lilly probably stabbed him. However, that is not the criminal standard.

[124] As I have said, the quality of the video showing the attack, the challenges with tracking Mr. Lilly immediately before the attack, and the other individuals in the area of Mr. Diggs prior to the attack and seen running after the attack have troubled me. Those might not, on their own, create a reasonable doubt. However, I cannot reject Mr. Diggs testimony. His description of the person who stabbed him cannot be Mr. Lilly. That testimony, together with the other concerns raises a reasonable doubt.

[125] Therefore, I cannot be satisfied that the Crown has met its burden to prove beyond a reasonable doubt that Mr. Lilly stabbed Mr. Diggs and I find him not guilty on all counts.

Elizabeth Buckle, JPC