**PROVINCIAL COURT OF NOVA SCOTIA**

**Citation:** *R. v. Fox*, 2023 NSPC 49

**Date:** 20231031
**Docket:** 8532391
8532392, 8532393,
8532394, 8532395
**Registry:** Dartmouth

**Between:**

His Majesty the King

v.

Brody Fox

| | |
|---|---|
| Judge: | The Honourable Judge Bronwyn Duffy |
| Heard: | September 5 and October 5, 2023, in Dartmouth, Nova Scotia |
| Decision: | October 31, 2023 |
| Charges: | s. 177, 266, 267(a), 434, 433(b) *Criminal Code of Canada* |
| Counsel: | Hartwell Millett, for the Public Prosecution Service<br>Bruce Muir, for the Defence |

**By the Court:**

[1] The Court has for trial judgment the matter of R. v. Brody Fox. Mr. Fox is charged with a 5-count Information alleging prowling at night contrary to section 177, assault contrary to s. 266, assault with a weapon, namely a knife, contrary to s. 267(a), and two arson allegations - intentionally or recklessly causing damage by fire, contrary to s. 434, and intentionally or recklessly causing damage by fire and causing bodily harm, contrary to s. 433(b). The two arson allegations are straight Indictable process and the Crown elected to proceed by Indictment on the remaining dual procedure counts. The 177 charge is straight summary process.

[2] The Crown's case consisted of two witnesses, Troy Rhude and Cst. Joanne Sweeney, and four exhibits. Exhibit 1 was a map of the subject area that Troy Rhude drew upon; Exhibit 2, a USB stick with surveillance video from a neighbour's property security camera; Exhibit 3, a book of photos depicting Mr. Rhude's car and the damage to it; and Exhibit 4, three Facebook photo screenshots in colour. The authenticity of the video, Exhibit 2, is admitted.

[3] This case rests on identification; that is the pivotal issue for determination.

[4] The first witness for the prosecution was Troy Rhude. On the evening in question, around 11pm, he testified that he was upstairs in his house on 6 Thompson Street, Dartmouth, NS, watching television. He heard his car horn beep. He looked out his window and there was a man in his car; he was leaning over the driver's side of Mr. Rhude's white 2005 Ford Focus wagon. Mr. Rhude hollered out the window. The man in his car turned around and gave him the middle finger, and went down the street toward the end of Thompson, down the hill toward Pleasant Street. Mr. Rhude went down to follow. His car door was shut. He said there was a flicker in his car, and he thought the dome light was on. Troy Rhude's *viva voce* evidence was that he walked up to the man, and asked what he was doing in his car. The male started walking towards Five Corners, and he was asking Mr. Rhude to leave; Troy Rhude said he was not scared and was not going to leave. As the witness described it, they had some words back and forth, and then the male hit Mr. Rhude in the mouth. He lost two teeth and split his lip. The assailant hit him again in the top part of his jaw above his eye. Mr. Rhude said he grabbed him and they wrestled around. Mr. Rhude described the man as having a blue coat on, a wool hat, a dark pair of pants and a dark backpack. They hit each other and then,

Mr. Rhude says, the man pulled something out of his pocket, and "I backed off then". It was a shiny object; Mr. Rhude said he thought it was a knife, and testified: "I backed off and left – he went the other way". The subject male lost his hat during the scuffle. His hair fell down, and Troy Rhude describes it as dirty blonde hair, longer than his shoulders.

[5] Mr. Rhude took the hat home with him. It took him about three minutes to get back to his house. He saw smoke and flames emerging from his car. The passenger side of the car was on fire. The blaze was quite big, half the dash was melted down, the floor was on fire, the door was on fire, and the windshield was melted. Mr. Rhude opened the door, and threw water from his dog's dish on the blaze. He called 911, and ran out with more water to put the fire out.

[6] Troy Rhude sustained injuries – he said he burned his hand and wrist when trying to put the fire out, from the bottom of his thumb to past his wrist.

[7] Exhibit 2 was a video taken from a neighbour's security camera. During the direct examination of Troy Rhude, the video was played by the prosecution. Mr. Rhude watched, and described, as the video played, the "fellow who went across my driveway by my car"… and the then car "showed some sort of light or something"… and then "the person leaving probably after I hollered at him". Troy Rhude said: "that is me coming out" of the house, in the video, and then the "computer and wires in the car lighting up", and then, returning to the video frame, walking to his car, and visible smoke when he got to the car. Under cross-examination and then redirect, Mr. Rhude confirmed that his roundtrip travel from his home following the male, and then returning, was roughly six to eight minutes.

[8] Exhibit 3 was a photobook, depicting pictures of the car that was parked. Mr. Rhude identified that the photos were an accurate representation of the car at the time. The photographs revealed extensive damage.

[9] When questioned whether he knew who the person was, Mr. Rhude's *viva voce* evidence was that his daughter, Tessa Black, showed him a Facebook photo, and she wondered whether the photo depicted the person with whom he had the incident. Mr. Rhude looked at the three or four photos, and his reaction was "it was him or he had a twin". Those photos were included in the photobook – this was Exhibit 4. Troy Rhude also offered an in-dock identification.

[10] Under cross-examination, Mr. Rhude agreed he had never seen the male prior to the incident. He clarified on questioning by defence counsel that he spoke

to his daughter about the incident the following day, September 28, and it was at that time that he viewed the Facebook photos. He estimates he spent roughly 10-15 minutes reviewing the photos. He gave a statement to police on 1 October 2021.

[11] During that statement to officers, he said that he did not recall mentioning the height of the subject male, he did not describe his features, he did not say whether he was clean shaven, he did say he was young, about 20, and that his hair was blonde and curly. He described the man having a blue jacket and dark pants. He agreed that his daughter was the first person to mention the name, Brody Fox. A picture of Brody Fox was shown to Mr. Rhude by his daughter. It was suggested to Mr. Rhude on cross-examination that his daughter had shown him the photo, because a couple of weeks prior she had been waiting for a ride to work and she had seen a fellow leaving a driveway at the neighbour's house in the early hours; he agreed that sounded accurate.

[12] Mr. Rhude confirmed under cross-examination that there was no photo line-up. There was no request of Mr. Rhude by police to compare similar-looking persons to identify the subject. Upon it being suggested to Mr. Rhude that he was only "pretty sure" it was Mr. Fox, he answered in the affirmative – "yes".

[13] The second witness for the prosecution was Sgt. Joanne Sweeney, a patrol supervisor who responded to a call for service to a vehicle fire at 6 Thompson Avenue in Dartmouth, which involved an assault with a knife. On arrival, the officer said she saw the white Ford Focus "still smouldering", heavily damaged in front, and the owner, identified as Troy Rhude, standing by the vehicle. Sgt. Sweeney said her primary concern was for Mr. Rhude, who had what she described as serious burns on his hands, which required medical attention, and she drove him to Dartmouth General Hospital. She reviewed the photographs of the car in Exhibit 3 while giving evidence, and agreed they were an accurate depiction of its state at the time. Under cross-examination, Sgt. Sweeney agreed that the whole of her police notes as it relates to the description of the subject was "a white male, with long curly blonde hair, a blue, puffy jacket and a backpack". That was the description provided to her by the complainant, in its entirety. The prosecution closed its case with the two witnesses and tendering of the four noted exhibits.

[14] The defence elected to call evidence. Mr. Fox testified in his defence. His *viva voce* evidence was brief. He said he was 25 years old, from Halifax, Nova Scotia, and when asked to describe his living situation in the fall of 2021, his response was, "I think I was homeless." He said he did not know where he was on

27 September 2021, the date of the allegations. When asked in direct examination to respond to the evidence from Mr. Rhude that he lit Mr. Rhude's car on fire, Mr. Fox's response was: "I don't think I did". He says he did not get in a fight. He acknowledged his criminal record for theft, which comprises roughly 20 convictions. He went on to testify that he is very confident he did not light the car on fire, and became aware of the incident at least six months after it happened. Cross-examination elicited that Mr. Fox did not have a clear memory of this period, that he was using drugs during that time, that he usually stayed in Halifax but acknowledged it was possible he was in Dartmouth. It was suggested to him that he went through this neighbourhood and checked car doors. He said "I don't think so". He maintained that he did not think he lit the car on fire, and said he has not been to the neighbourhood of Thompson Street, in Dartmouth.

[15] I turn to counsel's submissions. The defence led evidence, and in accordance with section 651 addressed the Court first in argument. Mr. Muir cites the bedrock case of *R. v. Tat*, [1997] O.J. No. 3579 (ONCA), for the proposition that concerns about identification are particularly problematic where (a) the person identified is a stranger; (b) the circumstances are not conducive to an accurate identification; (c) pre-trial identification processes are flawed; and (d) there is no corroborative evidence (para. 100). On these points, defence counsel argues that the evidence discloses that Mr. Rhude and Mr. Fox are strangers, and that this identification occurred in the context of a fight at night. The pre-trial processes are flawed, primarily by lacking a photo line-up, and there is no corroborating evidence. As such, he submits all four factors exist here.

[16] Mr. Muir argues *R. v. Bao*, also from the Ontario Court of Appeal, 2019 ONCA 458, and specifically references paragraph 27, which directs that presenting a potential identification witness with a single photograph of a suspect is dangerous and improper, as the witness may have the photo stamped on his mind, rather than the true perpetrator. Here, it is not a single photo that was presented to the witness, but rather three or four photos, though of the same person.

[17] The defence emphasizes what is an insidious feature of false identification cases, that the witness may appear to be - and often indeed is - telling the truth as they believe it to be.

[18] *R. v. Powell*, [2007] OJ No. 4196, details a collection of factors that should guide courts in assessing the value of identification. Defence highlights a few of them; namely, urging the Court to consider how the witness can be influenced by

others. In this case, Mr. Rhude learned that his daughter had seen the accused in someone's driveway. Counsel submits that this could taint his evidence, as he is not a neutral bystander, and that he has an interest in the outcome. Counsel for Mr. Fox asks the Court to focus on the absence of distinctive features, the lack of particular detail that comprises the complainant's description of the subject. This is the "bereft of detail" issue, raised as a concern in *Bao*, and again in *R. v. EA*, 2023 PESC 34, at paragraph 54.

[19] Another *Powell* factor raised by the defence is the emotional state or psychological stress experienced by the complainant. This was a situation in the context of a fight, where, ostensibly, a knife was pulled. Mr. Rhude was not able to say with confidence, however, whether it was a knife. As a corollary point, the defence argues Mr. Rhude's lack of clarity on this point also speaks to his ability to accurately identify the subject, and this should give the Court pause.

[20] Finally, Mr. Muir hearkens to the flaws in the investigative process, the failure to engage the complainant in a photo line-up, and instead to rely on the identification by the photos provided by the complainant's daughter, which he characterizes as a "tunnel vision enhancement process". Notably, he argues that the evidence of the complainant himself is that he can only be 'pretty sure', which does not rise to the criminal standard of proof. With respect to Mr. Fox's evidence, the submission of the defence is that he was credible, was not impeached on any major point, made concessions against his interest, and emphasizes that the arrest was made six months after the allegation date.

[21] The Crown Attorney, Mr. Millett, argues that Mr. Rhude had a significant period of time to observe the subject, during the period where he followed him, and then particularly when they were engaged in a scuffle, which involved the parties being in close proximity. He submits that the security video provides corroboration to the *viva voce* evidence of Mr. Rhude; it shows the culprit in a backpack, coat, pants, hat, and while the identity of the subject cannot be made out, it does provide a degree of corroboration. He points out that Mr. Rhude can also be seen in the video wearing a T-shirt, as an additional element of corroboration.

[22] The prosecution argues that Mr. Rhude was clear in his testimony that he examined several photos, one of them a close-up, one of them where Mr. Fox had different coloured hair – bright red. The Crown Attorney acknowledges, fairly, the frailties that accompany both in-dock identification, and the problematic identification issues raised by the defence. However, he argues that the key witness

for the prosecution, Mr. Rhude, presented as honest and forthcoming, he says there are no substantial reliability issues. He explained the circumstances as he saw them to be; he was not self-serving or tailored in his evidence. The Crown highlights there are no cross-racial identification issues; he emphasizes that during the examination of Mr. Rhude, he commented that "it is either him or he has a twin." The prosecution marshals all of this to substantiate that the identification evidence is strong. With respect to the testimony of Mr. Fox, he characterizes his evidence as not so much a flat denial as a lack of memory, and notes that the accused admits that his use of substances could affect his memory of the events. The prosecution says Mr. Fox's memory that he didn't commit the arson is self-serving and a tactic to remove himself from blame. Mr. Millett ultimately submits that the case rests on Troy Rhude's evidence. While the prosecution concedes certain frailties, he argues the collection of photographs and the strength of Mr. Rhude's evidence is sufficient to satisfy proof beyond a reasonable doubt.

**Analysis**

[23] In a criminal trial, the Crown must establish beyond a reasonable doubt that the accused committed the allegations levelled against him. The burden of proof remains always with the Crown. The prosecution must prove each essential element of the offence charged beyond a reasonable doubt (*R. v. Lifchus*, [1997] 1 SCR 320; *R. v. Starr*, [2000] 2 SCR 144). I have considered all of the evidence carefully. In evaluating the evidence, it is important to return to general principles. The Supreme Court reminds us of the fundamental importance of the onus resting upon the Crown at paragraph 13 of *Lifchus, supra*; it is inextricably linked to the presumption of innocence, as one of the principal safeguards to prevent wrongful convictions, and therefore essential to trial fairness (also see *R. v. Morin*, [1992] 1 SCR 771). Reasonable doubt is logically connected to the evidence or absence thereof, and that is the context within which I consider the evidence before me.

[24] Counsel are in accord on this: the issue of great import in this case is identification. I agree. Addressing first the uncontroverted elements - date, time, jurisdiction. I am satisfied the prosecution has led evidence that satisfies the Court on the criminal standard on each of these essential elements. The security video, Exhibit 2, shows an individual entering the vehicle of Mr. Rhude, Mr. Rhude exiting his house some moments later, and shortly thereafter, the vehicle emitting smoke and flame. All of this is synchronous with Mr. Rhude's evidence. The *viva voce* evidence of Mr. Rhude and Sgt. Sweeney satisfies the Court of the burn injuries sustained by Troy Rhude as a consequence of attempting to douse the

flames and salvage his vehicle, as well as the damage to his mouth sustained during the fight with the individual some distance down the street when Mr. Rhude followed him after witnessing the entry into his vehicle. Exhibit 3 details in photographic form the extensive damage to Mr. Rhude's Ford Focus. I am satisfied that an individual was prowling at night on Mr. Rhude's property, that Mr. Rhude sustained bodily harm in the way of burns to his hands as a result of the commission of arson – intentionally or recklessly causing damage by fire to property, essential elements of both the 434 and 433(b) counts. There is some evidence on the substantive elements of 266 and 267(a), the direct or indirect application of force without consent, while carrying a knife. I will not assess at this juncture whether these allegations, and particularly the elements of the assault *simpliciter* and assault with a weapon, have been proven beyond a reasonable doubt, because the pivotal issue vis-à-vis each of these charges is the identification of the perpetrator. Indeed, both counsel acknowledged the same.

[25] In *R. v. MB*, 2017 ONCA 653, the Court provides a helpful review of the principles to be considered in eyewitness identification and the associated frailties of this evidence. At paragraphs 29 and 31:

> **29** Eyewitness identification is inherently unreliable. It is difficult to assess, is often deceptively reliable because it comes from credible and convincing witnesses, and is difficult to discredit on cross-examination for those same reasons. Studies have shown that triers of fact place undue reliance on such testimony when compared to other types of evidence. As a result, many wrongful convictions result from faulty, albeit convincing, eyewitness testimony, even in cases where multiple witnesses identify the same person. See *R. v. Miaponoose (1996)*, 110 C.C.C. (3d) 445 (Ont. C.A.), at pp. 450-451, and *R. v. A. (F.)* (2004), 183 C.C.C. (3d) 518 (Ont. C.A.), at para. 39.
>
> **31** As stated by Charron J.A. (as she then was) in *Miaponoose*, at p. 422: "Eyewitness testimony is in effect opinion evidence, the basis of which is very difficult to assess." ….

[26] The Court goes on to review witness identification based on video recordings. This can be a more reliable form of identification, as there are no time constraints on its consideration. *R. v. Nikolovski*, [1996] 3 SCR 1197, at paragraph 23, contemplates a videotape of "sufficient clarity and quality" that it would be reasonable for the trier of fact to use it as the sole basis for identifying the accused. The case at bar is not a *Nikolovski* scenario.

[27] *R. v. Metzger* 2023 SCC 5 weighed in on identification evidence recently. The accused was convicted at trial of a number of offences arising from a home

invasion robbery. Neither of the two victims of the robbery clearly saw the perpetrators, who were masked. The Crown's case to identify the accused as a participant in the robbery relied entirely on two pieces of circumstantial evidence: (1) the accused's DNA found on a cigarette butt in the vehicle of one of the victims, which was stolen from the scene and found abandoned after the robbery; and (2) the testimony of that same victim that he may have heard the accused's last name spoken by one of the perpetrators during the robbery. In substituting verdicts of acquittal, the Court concluded the DNA evidence alone was insufficient to support a finding of guilt, and the victim's testimony that he heard the accused's last name during the robbery was fraught with frailties. The trial judge's acceptance of the reliability of the victim's evidence cannot be supported on any reasonable view of the evidence. The trial judge misapprehended an aspect of the victim's testimony and failed to meaningfully address many of the concerns surrounding the victim's physical or mental state, including, among other things, that he was fading in and out of consciousness and actively questioned his own recollection of what he had heard, even contemplating that the name may have been a false memory due to a childhood association.

[28] *Metzger*, while the factual circumstances do not map onto this case, provides an important note to courts about the evaluation of reliability of evidence in identification cases, including physical and mental state. This hearkens to one of the *Powell* factors, psychological stress, argued by defence counsel as relevant to the reliability assessment.

[29] At this stage, I will comment briefly on prior consistent statements as it relates to out-of-court identification. Troy Rhude's identification of Mr. Fox to police, a few days after he looked at the photos from his daughter, is an out-of-court statement. He adopted the statement during his testimony in court when he was shown the photos in Exhibit 4, and said it was Brody Fox, and offered an in-dock identification. Therefore, this would be classified as a prior consistent statement. They are typically inadmissible, in accordance with the authorities in *R. v. Stirling*, 2008 SCC 10, and *R. v. Dinardo*, 2008 SCC 24. However, when a prior consistent statement relates to identification, a prior statement *identifying* or "describing the accused" is admissible as *original evidence* where the identifying witness identifies the accused at trial as the person in question. See David M. Paciocco & Lee Stuesser, *The Law of Evidence*, 7th ed. (Toronto: Irwin Law, 2015) at p. 146:

> The courts have long recognized that witnesses should be asked to identify an accused at the earliest opportunity and under the fairest of circumstances. The identifications are the far better test of the witness's evidence. Therefore, as a matter of common sense, courts readily admit prior identifications to give credence to the in-court identifications.

[30] Indeed, as our Court of Appeal noted in *R. v. Downey*, 2018 NSCA 33, prior identifications are considered not as exceptions to the hearsay rule, but as non-hearsay (*R. v. Tat*, *supra*).

[31] Even where a witness is certain in his or her identification, certainty cannot be conflated with accuracy. As noted by the Court in *R. v. Drake*, 2020 NLSC 23, at paragraph 23:

> [23] Regardless of whether identification evidence is provided by a stranger or someone who knows and recognizes the accused, there is a difference between reliability of the identification evidence and the credibility of the witness providing that evidence. Unreliable identification evidence can be given by a credible witness.

[32] In this case, we are not dealing with recognition evidence, a subset of identification evidence, but rather what is oft-referred to as pure eyewitness identification.

[33] I will turn to an assessment of the evidence of the identification witness. Credibility relates to the veracity of the witness, the witness' sincerity, and willingness to tell the truth as they believe it. Reliability involves the capacity for accurate observation, recall and recounting of events or circumstances, and may be affected by factors, without limitation, such as flawed observation, defective recall or lack of understanding or ability to communicate. An incredible witness cannot give reliable evidence on the same point. A credible witness, however, may give unreliable evidence – a witness may be truthful in testifying but honestly mistaken (*R. v. DDS*, [2006] NSJ No. 103; *R. v. HC*, 2009 ONCA 56).

[34] In relying on Troy Rhude's identification, I must be alert to the caution of the Supreme Court in *R. v. Hibbert*, 2002 SCC 39 that the insidious quality of identification evidence is that "it is deceptively credible largely because it is honest and sincere". See also paragraph 65, *R. v. M.(B).*, *supra*, and *R. v. Miaponoose*. This also applies to his in-dock identification (see *R. v. Dorrington*, 2017 NSPC 40 for a review of cases considering the reliability of dock identification, at paragraph 12).

[35] In direct examination, Mr. Rhude was confident in his identification of Mr. Fox. In reviewing the Facebook photos, his *viva voce* evidence was "it was him, or he had a twin." Under cross-examination, upon confirming that no photo line-up was executed, when asked about the certainty of his identification, he agreed with the suggestion that he was 'pretty sure' it was Mr. Fox.

[36] The factors set out in *Tat*, and elaborated upon in *Powell* are a guide to courts in the assessment of identification evidence. With respect to the time between events and testimony: the incident occurred on 27 September 2021; he provided a description of the subject to Sgt. Sweeney that night, which she preserved in police notes; Mr. Rhude looked at Facebook photos presented by his daughter the following day; a couple of days later he gave a statement to police, on 1 October 2021; his evidence in court was provided in September and October of 2023. This is a case where the subject is a stranger to the witness. With regard to the physical circumstances, the liaison occurred at night, the duration being in the three to four-minute range; this timeframe is extrapolated from Mr. Rhude's evidence that his trip from his house following the subject, and then the return back to his house where he found his car on fire, was approximately six to eight minutes. Half of this time, then, roughly, he spent following the subject, and then engaged in a brief altercation with him.

[37] Defence counsel argues another *Powell* factor - the emotional state or psychological stress experienced by the complainant. This was a situation in the context of a fight, where, ostensibly, a knife was pulled, which, the defence argues would heighten the stress of the situation and could thereby undermine the reliability of the identification.

[38] With respect to the description itself, the entirety of the description was that the subject was a white male, long curly blonde hair, blue jacket, dark pants. There were no comparisons to other descriptions. The witness's exposure to photos of the subject was the 10-15 minutes he spent looking at three or four Facebook photos. The presentation of photos by Mr. Rhude's daughter is the sort of process that is vulnerable to suggestion, assistance or bias that can reasonably prejudice the accused, as warned against in *Miaponoose*.

[39] As noted by the Crown Attorney, this case does not involve the often problematic cross-racial identification. There is some degree of corroboration of the scene as a whole by the security camera video, demonstrating an individual prowling on Mr. Rhude's property, entering his car, Mr. Rhude exiting the home,

and then the car emitting flame. There is no corroborative evidence of identification, however. No witness in evidence attempted to make an identification from the security camera. The *Nikolovski* case confirms that where a videotape is of sufficient clarity and quality, a trier of fact can use it as the sole basis for the identification of the accused. The security camera video here is not of such quality where the Court can make an identification, and indeed, neither counsel made such a request or argued this manner of identification as a viable option.

[40] The single-photograph caution in *Bao* originates from cases in the 1940s (*R. v. Goldhar; R. v. Smokler*, [1941] OJ No. 92, which you can find referenced at paragraph 27 of *Bao*. In essence, the problematic feature is that by presenting a photograph, it is a suggestible process that can implant that image on the witness's mind, and thus contaminate the identification process in a way that prejudices the accused. That encapsulates the reasoning for Sophonow-compliant photo line-ups.

[41] The danger associated with eyewitness identification is that it is inherently unreliable, though deceptively credible, largely because it is honest and sincere. The witness is trying to tell the truth, as they believe it to be; their veracity is not at issue. The witness can be credible, but the reliability of the evidence is flawed at its core. That is why rigorous pre-trial identification procedures are particularly important for identification evidence, when it comes to assessing the weight of that evidence, and particularly so when there is little or no other evidence to validate the witness's identification (See *Miaponoose*, *supra*).

[42] There were recommendations that resulted from the Thomas Sophonow inquiry for both live and photopack line-ups, which included, among other items, that there be at least 10 subjects, that the subjects resemble the description given by the eyewitness as closely as possible, that the process is video/audio recorded, that the presentation of photos be issued sequentially rather than as a package. The line-up compiler must be different from the line-up presenter. The reasons for these particular pre-trial processes are fundamental to the proper administration of justice – to prevent miscarriages of justice, to ensure fairness of the proceedings, and to maintain confidence in eyewitness identifications as an effective evidentiary procedure.

[43] The defence has led evidence; accordingly, the direction of the Supreme Court in *R. v. W(D)*, [1991] 1 SCR 742, applies. It is important to keep in mind, however, that in assessing the ultimate issue of reasonable doubt, I must assess the

credibility of each witness, not just the defendant. Proof beyond a reasonable doubt applies to issues of credibility, and I must apply the three-step analysis to the evidence in this case. As discussed earlier in these reasons, a credibility assessment involves both credibility and reliability. An incredible witness cannot give reliable evidence on the same point. A credible witness, however, may give unreliable evidence (*R. v. DDS*, *supra*).

[44] Sgt. Sweeney was a secondary or supporting witness for the prosecution; the key Crown witness as it relates to the ultimate issue in this case, identification, is Troy Rhude. In evaluating Mr. Rhude's evidence, I agree with both counsel that his evidence is credible. The Crown Attorney properly noted that he was forthcoming, he did not finesse his evidence. While he has a stake in the outcome, as a victim of arson and bodily harm, his evidence was not evasive or strategic, and indeed his ultimate response as it related to identification was not overstated. He was not defensive under cross-examination, and he candidly explained the circumstances as he saw them. The concern I have with Troy Rhude's evidence is its reliability, which has everything to do with the investigative process and not with Mr. Rhude as a credible witness.

[45] Brody Fox testified in his defence. The best-case scenario for Mr. Fox is that I believe his evidence, the first stage of W(D) credibility assessment. Mr. Fox does not remember a great deal. During the time in question, he thinks he had no housing. As it relates to the car, he maintains throughout that he doesn't think he lit it on fire. Even if I believe his evidence, I must consider whether this evidence establishes a reasonable doubt and leads the Court to an acquittal. It is not a confident denial, in substance, but rather more an acknowledgment that he does not have a clear memory. This, at least in part, is a concession against his interest. I find that his evidence does not add or subtract much from the case, and, in believing his evidence, I am not satisfied that I must acquit. I am of the view, as counsel are, that this case largely rests on the evidence of Mr. Rhude.

[46] I return to the evidence as a whole, and consider whether the prosecution has proven the essential elements beyond a reasonable doubt. The perils inherent in eyewitness identification were plumbed earlier in these reasons. Reliability of this evidence is subject to pitfalls, and courts must be particularly fastidious in assessing it (*Hibbert, MB, Miaponoose, Powell, Bao*, and our Court of Appeal in *R. v. Hill*, 2005 NSCA 108). Several of the *Tat* and *Powell* factors are present here. The person identified is a stranger. The physical circumstances were not ideal; it was late at night, in the context of a stressful situation and a subsequent altercation.

The corroborative evidence is minimal, and is limited to the security video, which offers nothing in the way of identifying the subject. The clothing worn by the person in the video matches the clothing that Mr. Rhude said the subject was wearing, but that is not the issue – the issue is who is that subject. This is not the sort of confirmatory circumstantial or other evidence that rehabilitates eyewitness identification, a point our Court of Appeal made in *R. v. Muise*, 2016 NSCA 34.

[47] This is not a situation akin to *R. v. Cummings*, 2023 ABCA 288, released a couple of weeks ago by the Alberta Court of Appeal, in which the complainant viewed a facial photograph prior to the criminal act, and thereafter showed it to police, and then identified the appellant in a photo line-up approximately two weeks later. Before partaking in the photo line-up, he looked at the facial photograph. The Court of Appeal determined that the photo line-up had not been compromised by the facial photo the complainant compared to the individual he met before the sexual assault and again after the sexual assault. In the case at bar, there was no photo line-up at all.

[48] In this Court's view, the investigative process here was deficient. Rigorous pre-trial identification procedures are particularly important for pure identification evidence, particularly when there is little corroborative evidence, to counterbalance the inherent reliability limitations in eyewitness identification. The reasons for properly executed photo line-ups are essential to ensure trial fairness, to maintain confidence in eyewitness identifications, which operates to preserve the integrity and reliability of this very important evidentiary tool. Because of the inadequate pre-trial process, I am not satisfied that the identification of Mr. Fox can be relied upon, and therefore, as this element has not been proven on the criminal standard, acquittals are recorded on all counts.

Bronwyn Duffy, JPC