SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Grabosky*, 2019 NSSC 231

Date: 20190801
Docket: 487948
Registry: Halifax

Between:

Peter Paul Frederick Grabosky

Appellant

v.

Her Majesty The Queen

Respondent

Judge:	The Honourable Justice Peter Rosinski
Corrected Decision:	The text of the original decision has been corrected according to the attached erratum dated **August 7, 2019**.
Heard:	July 18, 2019, in Halifax, Nova Scotia
Counsel:	Jamie Violande, for the Appellant Cory Roberts, for the Respondent

By the Court:

Introduction

[1] Mr. Grabosky was convicted of having assaulted (Anne Catherine Leydon) his wife on April 12, 2018 contrary to section 266(b) *Criminal Code* ["CC"]. He appeals to this court, constituted as a summary conviction appeal court. [1]

[2] I dismiss his appeal. Let me explain why.

[1] This Court has jurisdiction based on the following: sections 813 and 822 CC and Civil Procedure Rule 63.01 – 63.11 [Summary Conviction Appeal].

Background

[3] There were three witnesses to the alleged assault: Mr. Grabosky, his wife, and their 17-year-old daughter, Mackenzie. All three testified. Each of them agreed that Mr. Grabosky had struck his wife causing her glasses to be dislodged from her face.

[4] *Mr. Grabosky* testified that he and his wife were having a verbal argument in their small kitchen, which escalated, and that his wife took a mug in her hand as if she was going to strike him with it. To defend himself he admits he struck her in the face causing bruising around her left eye area.

[5] *Mackenzie* testified in direct examination that she was seated with her back to her parents in the dining room, trying to do some school-related work, when she heard loud arguing going on immediately behind her. She estimated she was no more than 3 feet away from her parents. The argument was in relation to dirty dishes that her older sister had left in the sink. Her mother started to clean them "as usual… And that's what kind of set it, kind of, off, the whole thing… So he wanted my sister to clean it, so he asked my mom to call her to come back [from work] and my mom didn't want to, like, call her because it wouldn't make sense over a frying pan to call someone to come back and clean it… I still had my back towards them… until, like, it started to get wilder that I was, like, I need to see what's

happening. *So, I stood up and I was facing my dad and my mom's back was towards me.* And it was kind of like a quick, like, not even like two minutes … that *he punched her in the face and that's when I saw her glasses fly off towards the water jug*. And then my mom kind of was in shock after the whole thing because you would be, I guess, if you just got hit.… It would have hit her right here because when I – she looked over at me, it just looked like something broke, I can't really explain it, like, her face [the witness indicated by gestures that Ms. Leydon was hit in the area of her left eye or the cheek just below the left eye]… *My mom was kind of in shock and she said, like' why would you do that?'* And then I just kind of tried to get in the middle of it because it kept going… [Question – when you turned around, what if anything did you see your mom do? Answer – I don't remember"].

[6] In cross-examination, she stated that "it was mostly my dad yelling over, and my mom would just sit there listening."

[7] She was not directly asked whether at any time her mother had a mug in her hand which she dropped or set down.

[8] She did see her father strike her mother but did not say what immediately preceded his action.

[9] *Ms. Leydon* testified that between 5 and 6 PM they were having heated words in the kitchen, culminating with her telling him she wanted a divorce and for him to leave the house; he pushed a chair dramatically and came back towards her pushing her with one hand, she pushed him back and said "this is crazy you've got to stop this" and then with that "his right hand struck me in the face… *My glasses flew off to the corner of the kitchen*. My daughter got up and was quite upset and was crying and trying to grab me. *I did pick up a cup from the dishes that I was doing and was going to swing it at him, just because I was so upset and mad that that happened, that he'd actually hit me in the face. I didn't."*

[10] Ms. Leydon is adamant that she picked up the mug "after he hit me in the face… He punched me with his right hand, closed fist, in the face… Left side cheek area… [Question – what did you do with the coffee mug?] *I picked it up to go to swing at him, but I didn't. I just put it back down. It was one of the dishes that I was doing.*"

[11] Photographs taken show bruising around Ms. Leydon's left eye. She did go to the hospital and the police that day.

[12] Constable Rideout testified about his involvement in the case. He took on the investigation at 7 PM that same day. He determined he had reasonable grounds to arrest Mr. Grabosky. Upon his arrival at 7:30 PM at a home in Prospect, Mr.

Grabosky presented himself at the door, identified himself, and invited the officers in. The officers advised him they were there to arrest him. Mr. Grabosky stated he understood and had already packed a bag of his personal effects ready to go. The following evening, he took photographs of Ms. Layton's left blackened eye, a red abrasion on her left forearm, and on her right wrist.

[13] *Mr. Grabosky agreed that it was largely a "one-sided conversation basically from me saying that we need to do something about this* [their older daughter's unruliness]. She got upset. She hit the counter [when she was doing dishes] with the palm of her hand and said "that's it, I've had it, I want a divorce and get out of the house. And I said 'no'."… I was standing maybe a foot or two away from her, and she told me to get out. I started walking past – to my bedroom, and that's where *I pushed the high-chair*, probably pretty hard against the table and it did make a noise and bang around. I went down the hallway, *halfway down the hall* to try to get away from the – de-escalate the situation, then I thought, and which was a mistake, *I turned around and went to the kitchen and said 'no – I'm not getting out of my house, this is my house*… It's my house too, you don't like it, you get out.'… Anne was in front of me, I was about a foot, 2 feet away, and we were going back and forth arguing… There's a counter directly to her left side… *She went to go walk past a bit and brushed me, and I pushed her this way, and she*

pushed – and she pushed me in with our, you know, just brushing back past each other. And virtually that's – started the physical issue there… It was just, as indicated earlier, *hand flailing… both of us and basically what, within a couple of seconds from there* I remember… backing up and standing against the stove and the refrigerator… When *she was looking left and right, I actually made a joke to myself 'she's going to look for the marble rolling pin', which subsequently ended up being the coffee mug she took from the thing as she went at me with the coffee mug*. And *when she was swinging at the coffee mug I was, obviously, trying to protect her – myself, and push her away*, and and yes, there are marks on her arms but that self-defensive wounds in my opinion. And at one point, *she came towards me because we were wrestling basically with our hands*, and I remember going with my open hand on her left shoulder pushed her a bit, and then with my other hand I got her on the cheek. And immediately the glasses fell to the floor. I bent down and picked the glasses up and handed them to her. And I said: 'I'm sorry I didn't mean to hit you, I'm sorry'. *She goes, 'why did you hit me?'* And I said, 'I'm sorry I didn't mean to hit you, you know, you're at – *you're coming at me with a mug*'…. once that happened, everything subsided."

[14] He elaborated in cross-examination: "[when he is backed up against the stove and refrigerator area] that's when she was looking left and right for the

coffee mug. And that's where I thought she was looking for a rolling pin. And then *she came toward me with the mug and that's when I hit her...She swung, maybe two or three times, and maybe it was both hands, the one with the mug and the other one slapping…* My left hand, opened hand, with my palm, pushed her shoulder up against, and then my right hand opened right against the cheek and I hit her… Some of my training, when it comes down to riot control and so on and so forth, I have used palm … It's a less intrusive, let's just say force to be able to get someone away without causing too much damage"…. [Question – so, and I used the term "flailing back-and-forth" after the after push? *How long did it take before she's coming back at you with the mug? Answer – probably 30 seconds, it was very quick…"... [Question- you said you used an open hand because of the training you would received?] That's right… Because it is less of a damage if you're going to have to protect yourself... I didn't escalate it, I'm trying to stop it so I don't get hit anymore with a weapon.*].

[15] He conceded in cross-examination that Ms. Leydon "never hit you with the coffee mug, did she?" – "Of course not, because I'm defending myself, I'm protecting myself."

The Grounds of Appeal[2]

[16] Mr. Grabosky says the trial judge made reversible errors as follows:

1. by relying on evidence not before the Court in assessing credibility during his *R v. WD* credibility analysis;

2. by speculating as to how someone would react when struck and relied on that speculation when assessing evidence not before the court;

3. in determining that the explanation provided by Ms. Leydon was the only explanation accounting for what happened to a material fact [i.e. the presence or absence of a mug in her hand]; and

4. by placing the burden of proof to prove self-defence beyond a reasonable doubt upon Mr. Grabosky.

The Standard of Review

[2] At this juncture I wish to make two observations about the Appeal Book filed herein: The Appeal Book includes the Presentence Report from Mr. Grabosky's sentencing. Unless there is a sentence appeal or with permission of the court exceptionally, such materials should not be included in a conviction appeal. I have disregarded that by not reading it. Secondly, the Appeal Book has an unsigned and hence unsworn photocopy only of the information laid in this case. This is a not an uncommon occurrence, but improper practice. While the Rules (63.03, 91.02 and 91.15) strictly speaking only require a "copy" of the information to be included in the Appeal Book, the expectation is that a *certified* true copy of the relevant information as of the date of conclusion of proceedings in the summary conviction court is essential. Reasons therefor include that: another information may have been substituted; the information wording may have been amended; the endorsements on the information contain material information. While not included in this case, I am satisfied that if I had a certified copy of the information, it would have had no material bearing on the outcome.

[17] In *R v. Timmons*, 2011 NSCA 39, Justice Oland succinctly set out the standard of review in an appeal against conviction (albeit in the context of an indictable offence):

> *Standard of Review*
>
> 16 The jurisdiction of this court in this appeal against conviction is set out in s. 675 of the Criminal Code:
>
> > 675.(1) A person who is convicted by a trial court in proceedings by indictment may appeal to the court of appeal
> >
> > (a) against his conviction
> >
> > (i) on any ground of appeal that involves a question of law alone,
> >
> > (ii) on any ground of appeal that involves a question of fact or a question of mixed law and fact, with leave of the court of appeal or a judge thereof or on the certificate of the trial judge that the case is a proper case for appeal ...
>
> 17 For questions of law, the standard of review is correctness. For questions of fact, it is overriding and palpable error. For questions of mixed law and fact, it is also palpable and overriding error, unless a question of law is readily extricable. In that situation, the standard of correctness applies to that question of law. See *Housen v. Nikolaisen*, 2002 SCC 33.
>
> 18 Whether the correct legal standards were identified and applied is a question of law. If no such error was made, an appellate court then considers the evidentiary basis of the decision and the application of the legal principles to the facts of the case which, unless there are extractable legal questions, are questions of mixed fact and law.

[18] In *R v. RP*, 2012 SCC 22, the court stated the standard of review for an allegation of "unreasonable verdict":

> <u>Applicable Principles</u>

> 9 To decide whether a verdict is unreasonable, an appellate court must, as this Court held in *R. v. Yebes*, [1987] 2 S.C.R. 168, and *R. v. Biniaris*, 2000 SCC 15, [2000] 1 S.C.R. 381, at para. 36, determine whether the verdict is one that a properly instructed jury or a judge could reasonably have rendered. The appellate court may also find a verdict unreasonable if the trial judge has drawn an inference or made a finding of fact essential to the verdict that (1) is plainly contradicted by the evidence relied on by the trial judge in support of that inference or finding, or (2) is shown to be incompatible with evidence that has not otherwise been contradicted or rejected by the trial judge (R. v. Sinclair, 2011 SCC 40, [2011] 3 S.C.R. 3, at paras. 4, 16 and 19-21; R. v. Beaudry, 2007 SCC 5, [2007] 1 S.C.R. 190).
>
> [page751]
>
> 10 Whereas the question whether a verdict is reasonable is one of law, whether a witness is credible is a question of fact. A court of appeal that reviews a trial court's assessments of credibility in order to determine, for example, whether the verdict is reasonable cannot interfere with those assessments unless it is established that they "cannot be supported on any reasonable view of the evidence" (R. v. Burke, [1996] 1 S.C.R. 474, at para. 7).

[19] With these standards in mind, let me then review the alleged errors made by the trial judge.

The Restated Grounds of Appeal

[20] In summary, Mr. Grabosky argues that the trial judge erred in law “in that his decision was unreasonable and not supported by a fair and reasonable assessment of all the evidence leading to a failure to correctly apply the principles of reasonable doubt”.

[21] More precisely, Mr. Grabosky says that the judge speculated about material evidence, articulated the *WD* test correctly, but then failed to apply the test correctly particularly vis-à-vis his claimed self-defence.

[22] Mr. Grabosky elaborates upon his appeal grounds in his brief:

> "With respect to the application of the law to the facts, the learned Provincial Court Judge stated as follows:
>
> > 'Now this is an interesting case. I say that because *what convinces me what the sequence was with regards to that mug is what was and not mentioned in the testimony… There is no testimony from anybody about a coffee mug being dropped or smashed. There is no testimony from Mackenzie that she saw a coffee mug in her mother's hand. A practical and informed person would recognize that it would be reasonable that the reflect [sic] action would be to cover one's face or to feel where one was struck. It defies all logic to believe in that instant the person struck would've taken the time to carefully put down a mug that was in their hand. Logic would dictate to a practical informed person that in all probability the mug would have to have been dropped or tossed at Mr. Grabosky. But that wasn't the testimony of either Mr. Grabosky or Ms. MacKenzie [Leydon]. In fact, for both of them, their testimony was silent of any mention of the mug after the glasses went flying*.' [the trial judge's reasons at p. 122 AB]
> >
> > …
>
> [The judge] failed to provide a proper analysis of Mr. Grabosky's credibility throughout his *DW* analysis and ultimately placed the burden of proof upon Mr. Grabosky… found that there was nothing in the way in which the witnesses testified that would cause him to reject out of hand the evidence of any one witness, indicating that all the witnesses gave their evidence in a convincing manner. However, *in determining whether to believe Mr. Grabosky's evidence, he failed to undergo a comprehensive analysis and instead relied on his own speculations as to what an appropriate reaction would have been when struck with a mug. He then accepted the absence of that evidence as proof that the mug was not in Ms. Leydon's hand.… In doing so, his Honour erred and placed the burden of proof upon Mr. Grabosky*. It is his position that, with no evidence before the court, his Honour is not able to speculate as to what could have happened and must have had reasonable doubt...indicated that while Mr. Grabosky remains convinced of his sequence of events, *the absence of evidence about what happened to the mug was only explained by Ms. Leydon's version of events. He found that the Crown had met their burden by rejecting Mr. Grabosky's evidence where it conflicted with Ms. Leydon's on that issue… While he went*

> *through a vague analysis regarding Mr. Leydon's credibility he did not do so with respect to Mr. Grabosky… He simply rejected Mr. Grabosky's evidence as a result of believing Ms. Leydon's."*
>
> [My italicization added]

[23] Let me then restate the grounds of appeal as I understand them – the trial judge erred by:

1. not properly applying the *WD* credibility analysis to the testimony of the witnesses;

2. speculating about Ms. Leydon's reaction upon being struck, causing him to conclude that she did not have the mug in her hands when she was struck by Mr. Grabosky (including his reliance upon *Faryna v Chorny*, [1952] 2 DLR 354 (BCCA))[3];

3. effectively placing the burden of proof on Mr. Grabosky to prove his self-defence claim;

4. reaching an unreasonable verdict.

Why the trial judge did not err in his credibility analysis - (*R v (D) W.*, [1994] 3 SCR 521); nor speculate, or place the burden of proof regarding self-defence upon Mr. Grabosky, or reach an unreasonable verdict

[24] A very helpful examination of the Supreme Court's reasons in *WD*, and suggestions for refinements of the application of the test, can be found in *R v Ryon*, 2019 ABCA 36 per Martin JA[4].

[3] Which I note was cited with approval by Justice Saunders in *R v DDS*, 2006 NSCA 34 at paras.77-79.
[4] So as not to distract the reader I have attached these lengthy, though insightful, comments as Appendix "A".

[25] Mr. Grabosky concedes that he intentionally struck his wife without her consent. The sole basis presented by him which could lead to his acquittal was his claimed self-defence.

[26] Let me then briefly set out the law extant at the time of the trial regarding the most recent amendments, in force March 11, 2013, regarding "self-defence" of a person:

> Defence - use or threat of force
>
> 34(1) A person is not guilty of an offence if
>
> (a) they believe [*honestly/subjectively and*] on reasonable grounds that force is being used against them or another person or that a threat of force is being made against them or another person;
>
> (b) the act that constitutes the offence is committed for the purpose of defending or protecting themselves or the other person from that use or threat of force; and
>
> (c) the act committed is reasonable in the circumstances.
>
> Factors
>
> (2) In determining whether the act committed is reasonable in the circumstances, the court shall consider the relevant circumstances of the person, the other parties and the act, including, but not limited to, the following factors:
>
> (a) the nature of the force or threat;
>
> (b) the extent to which the use of force was imminent and whether there were other means available to respond to the potential use of force;
>
> (c) the person's role in the incident;
>
> (d) whether any party to the incident used or threatened to use a weapon;

(e) the size, age, gender and physical capabilities of the parties to the incident;

(f) the nature, duration and history of any relationship between the parties to the incident, including any prior use or threat of force and the nature of that force or threat;

(f.1) any history of interaction or communication between the parties to the incident;

(g) the nature and proportionality of the person's response to the use or threat of force; and

(h) whether the act committed was in response to a use or threat of force that the person knew was lawful.

No defence

(3) Subsection (1) does not apply if the force is used or threatened by another person for the purpose of doing something that they are required or authorized by law to do in the administration or enforcement of the law, unless the person who commits the act that constitutes the offence believes on reasonable grounds that the other person is acting unlawfully.

[My italicized words inserted in s. 34(1)]

[27] Next, let me cite some helpful jurisprudence dealing with the interpretation of the "new" self defence provision[5].

[28] In *R v Cunha*, 2016 ONCA 491, the court found the trial judge erred in rejecting the accused's self defence by parsing his reactions down to the split-second thereby holding him to a standard of perfection. It concluded that the

[5] Although neither the trial judge nor counsel expressly referred to the elements of self-defence, I must presume that since he was applying those provisions, and I note no argument was made that he was not, he must have known what they were.

victim/accused lacked reasonable grounds to believe the aggressor was using or threatening to use force against him; he did not shoot the aggressor for the purpose of protecting himself; his use of the gun was disproportionate to the situation.

[29] The court reviewed the law of self-defence:

1. The Legal Elements of Self-Defence

5 On March 11, 2013, the *Citizen's Arrest and Self-Defence Act*, S.C. 2012, c. 9, came into force, repealing the former ss. 34 to 37 of the *Criminal Code* and replacing them with a new s. 34 self-defence provision. At trial, the parties did not have the benefit of this court's decision in *R. v. Bengy*, 2015 ONCA 397, 325 C.C.C. (3d) 22, in which this court held that the new *Criminal Code* provisions regarding self-defence do not apply retrospectively. However, the parties submit, and I agree, there is no relevant difference, for the purposes of this case, between the old provisions and the new.

6 At para. 28 of *Bengy*, Hourigan J.A. set out the elements of self-defence:

> The test for self-defence was, therefore, simplified into three basic requirements, applicable to all cases:
>
> > Reasonable belief (34(1)(a))**:** the accused must reasonably believe that force or threat of force is being used against him or someone else;
> >
> > Defensive purpose (34(1)(b)): the subjective purpose for responding to the threat must be to protect oneself or others; and
> >
> > Reasonable response (34(c))**:** the act committed must be objectively reasonable in the circumstances.

7 As for the objective element of the defence, it is accepted that in considering the reasonableness of the defendant's use of defensive force, the court must be alive to the fact that people in stressful and dangerous situations do not have time for subtle reflection, as this court noted in *R. v. Mohamed*, 2014 ONCA 442, 310 C.C.C. (3d) 123, at para. 29:

> As Professor Paciocco notes at p. 36: The law's readiness to justify "mistaken self-defence" recognizes that those in peril, or even in situations of perceived peril, do not have time for full reflection and that errors in interpretation and judgment will be made.

> In a similar vein, Martin J.A. commented in *R. v.Baxter* (1975), 27 C.C.C. (2d) 96, at p. 111, that in deciding whether the force used by the accused was more than was necessary in self-defence under both s. 34(1) and (2), the jury must bear in mind that a person defending himself against an attack, reasonably apprehended, cannot be expected to weigh to a nicety the exact measure of necessary defensive action.

8 It is well established that self-defence can be invoked on the basis of reasonable mistakes of fact, including whether the putative assailant was armed. As this court noted in *R. v. Currie* [2002] O.J. No. 2191, 166 C.C.C. (3d) 190 (C.A.), at para. 43:

> The Supreme Court of Canada in *Cinous* [2002 SCC 29] confirmed the principle established in *R. v. Pétel*, [1994] 1 S.C.R. 3 that the existence of an actual assault is not a prerequisite for a defence under s. 34(2). The question that the jury must ask itself is not whether the accused was unlawfully attacked, but whether he reasonably believed in the circumstances that he was being unlawfully attacked. The question for the trial judge on the threshold evidential test is whether there is evidence upon which a jury acting reasonably could conclude that the accused reasonably believed he was about to be attacked and that this belief was reasonable in the circumstances.

9 It is also the law that a person who is defending himself, and other occupants of his house, is not obliged to retreat in the face of danger. In *R. v. Forde*, 2011 ONCA 592, 277 C.C.C. (3d) 1, this court considered the issue of retreat at some length, and concluded at para. 55: "a jury is not entitled to consider whether an accused could have retreated from his or her own home in the face of an attack (or threatened attack) by an assailant in assessing the elements of self-defence."

[30] In *R v Billing*, 2019 BCCA 237, the Court dismissed an appeal from conviction for aggravated assault. The application of the law regarding self-defence was determinative, since Mr. Billing admitted he stabbed the victim.

[31] The Court stated:

> 8 The *Criminal Code* provides:
>
> 34 (1) A person is not guilty of an offence if

(a) they believe on reasonable grounds that force is being used against them or another person or that a threat of force is being made against them or another person;

(b) the act that constitutes the offence is committed for the purpose of defending or protecting themselves or the other person from that use or threat of force; and

(c) the act committed is reasonable in the circumstances.

9 *Under s. 34(1)(a), either actual force, or a reasonable belief of force or a threat of force will suffice to meet the first element required to establish self-defence.* This reflects a fundamental tenet of criminal law that a person may take defensive action as a pre-emptive measure to prevent an assault if the person believes on reasonable grounds that he or she is about to be assaulted. In other words, a person in that situation is not required to stand by and wait to be assaulted before taking action: *R. v. Young*, 2008 BCCA 393 at paras. 30--37. *An accused will not be prevented from relying on self-defence even if he held a reasonable but mistaken belief of fact that he was being or was about to be assaulted: R. v. Pétel*, [1994] 1 S.C.R. 3 at 13.

…

18 The Supreme Court of Canada endorsed *Baxter* as an appropriate instruction as to what is encompassed by the term "excessive force" when viewed in the context of self-defence: *R. v. Hebert*, [1996] 2 S.C.R. 272 at paras. 16--18. The Ontario Court of Appeal revisited *Baxter* in *Sinclair*, characterizing the *Baxter* Instruction as relating to the reasonableness of an accused's belief in the necessity of killing or very seriously injuring the victim as the only means of self-preservation under the former section 34(2)(b) (at para. 117). In addition, under the former s. 37, the ultimate consideration was whether an accused had used proportionate force: *R. v. Richter*, 2014 BCCA 244 at para. 18; *R. v. Grandin*, 2001 BCCA 340 at para. 39.

19 The present case, of course, deals with the new self-defence provisions. The first question on this appeal is therefore whether a *Baxter* Instruction remains relevant in light of the substantial changes effected by the amendments to the *Criminal Code*. Proportionality is given less emphasis in the new provisions; it is but one factor among many to be considered under s. 34(2):

34 (2) In determining whether the act committed is reasonable in the circumstances, the court shall consider the relevant circumstances of the person, the other parties and the act, including, but not limited to, the following factors:

a) the nature of the force or threat;

(b) the extent to which the use of force was imminent and whether there were other means available to respond to the potential use of force;

(c) the person's role in the incident;

(d) whether any party to the incident used or threatened to use a weapon;

(e) the size, age, gender and physical capabilities of the parties to the incident;

(f) the nature, duration and history of any relationship between the parties to the incident, including any prior use or threat of force and the nature of that force or threat;

(f.1) any history of interaction or communication between the parties to the incident;

(g) the nature and proportionality of the person's response to the use or threat of force; and

(h) whether the act committed was in response to a use or threat of force that the person knew was lawful.

[Bold emphasis added.]

20 As the Ontario Court of Appeal noted in *Bengy*, the amendments converted mandatory prerequisites into discretionary considerations and removed a strict limitation on when fatal defensive force can be used. The ultimate question is whether the act was "reasonable in the circumstances".

21 The Crown submits that it would be contrary to the thrust of the new provisions to single out proportionality by requiring a *Baxter* Instruction when proportionality is no longer determinative, but rather one of many factors to be looked at in deciding whether the accused's action was reasonable. The Crown emphasizes that the concept of reasonableness itself depicts a range of responses, not a single right answer (citing *Sinclair* at paras. 123--124), and the jury system is predicated on the fact that collectively the jury possesses the ordinary common sense required to assess reasonableness.

22 There is in my view no reason to draw a hard line that says a *Baxter* Instruction should no longer be given under the new regime. A judge is to be allowed flexibility in instructing the jury: *R. v. Araya*, 2015 SCC 11 at para. 39. There may be cases in which a Baxter Instruction would be helpful to the jury in carrying out the task before it. I note that the current versions of *Watt's Manual of Criminal Jury Instructions*, 2d ed (Toronto: Carswell, 2015) at 1253 and *Canadian Criminal Jury Instructions*, 4th ed, looseleaf (Vancouver: The Continuing Legal Education Society of British Columbia, 2018 update) ch. 8.55 at 8.55.9(g) both include the instruction under s. 34(2)(g), although the *Model Jury*

> *Instructions* (online) prepared by the National Committee on Jury Instructions of the Canadian Judicial Council do not.
>
> 23 Recognizing that it may still be appropriate to give a *Baxter* instruction does not, however, mean that a charge will be deficient if the instruction is not given. Even under the previous version of the self-defence provisions, a *Baxter* Instruction was not mandatory. As Watt J.A. noted in *Sinclair*:
>
> > [119] Yet not every omission of a *Baxter* instruction is fatal to the validity of a conviction recorded without its inclusion. The authorities fail to reveal a single case in which such an omission, on its own, has been held sufficient to warrant appellate reversal. Each case depends on its own facts: The absence of a request for the instruction or an objection to its omission: The thoroughness of the judge's review of the relevant evidence: The emphasis laid on the subjective component of the excessive force element in former s. 34(2)(b): *Scotney*, at paras. 34-36.

[32] Whether Ms. Leydon was menacing Mr. Grabosky with a mug in her hand is a key consideration in this case.

[33] If there is an air of reality to Mr. Grabosky's claimed self-defence, a trier of fact must consider whether the Crown has disproved the claim beyond a reasonable doubt.

[34] By his testimony, Mr. Grabosky provided an air of reality to his claimed self-defence. He claimed that Ms. Leydon had the mug in her hand and was menacing him with it, and for that reason he struck her to defend himself.

[35] Therefore, I must consider whether the trial judge erred in concluding the Crown had proved beyond a reasonable doubt that his claimed self-defence could not succeed[6].

[36] Unfortunately, no direct questions were asked of Mackenzie regarding whether her mother at any time had a mug in her hand. She had been in a position to see her mother's face at the moment she was hit and stepped in between her parents to stop the physical contact between them. The trial judge did not have the benefit of MacKenzie's answers to questions like: did she see her mother with a mug in her hand before or after her father struck her mother? Did she see a mug on the floor, on a table, or on a counter, or elsewhere in the kitchen within the reach of her mother immediately before or after her father struck her mother?

[37] No similar questions were asked of Mr. Grabosky (namely, once struck where did Ms. Leydon put the mug, or did it fall?).

[38] The trial judge stated[7]:

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[6] A review of the factors in s. 34(2) and the evidence presented to the trial judge, leads me to conclude that he did not commit a palpable and overriding error in concluding that "the force he used was far in excess of what he faced, if any at all" from the threat posed by Ms. Leydon - p. 128 AB.

[7] I understand, and rely on, the positions of counsel at trial to be that without a mug being in her hand, there was no air of reality to Mr. Grabosky's self defence claim.

> "… did Mr. Grabosky strike Ms. Leydon while or for the purpose of defending himself against her assault or threatened assault, on him. That is the sole issue in this trial. Crown and Defence agreed that when assessing the evidence, I bear in mind the decision in, of *R v WD*.
>
> Mr. Grabosky has testified - if I believe him, he was defending himself and he would be entitled to an acquittal. If I do not believe him, but what he said could reasonably be true, I should acquit him unless the Crown can satisfy me beyond a reasonable doubt that self-defence was not available.
>
> I must find credible, trustworthy evidence from the Crown's case that establishes the offence and rebuts self-defence beyond a reasonable doubt [before he can be found guilty]."

[39] I see no error in the *WD* formulation by the judge. He clearly understood that Mr. Grabosky could only be found guilty if his self-defence was disproved beyond a reasonable doubt, and he was satisfied beyond a reasonable doubt of the elements of the offence.

[40] He correctly summarized the material evidence on its face. In his assessment of the evidence he cited from paras. 11-12 in *Faryna v Chorny*. Justice Saunders approved the application of *Faryna* to a criminal case, where very similar issues were raised (see para. 29): *R v DDS*, 2006 NSCA 34 at paras. 77-78:

> 77 Before leaving the subject and for the sake of future guidance it would be wise to consider what has been said about the trier's place and responsibility in the search for truth. Centuries of case law remind us that there is no formula with which to uncover deceit or rank credibility. There is no crucible for truth, as if pieces of evidence, a dash of procedure, and a measure of principle mixed together by seasoned judicial stirring will yield proof of veracity. **Human nature, common sense and life's experience are indispensable when assessing creditworthiness, but they cannot be the only guideposts. Demeanour too can be a factor taken into account by the trier of fact when testing the evidence but standing alone it is hardly determinative. Experience tells us that one of the best tools to determine credibility and reliability is the painstaking, careful and repeated testing of the evidence to see how it stacks up. How does the witness's account stand in**

harmony with the other evidence pertaining to it, while applying the appropriate standard of proof in a civil or a criminal case?

78 In this regard I find it helpful to repeat the lucid observations of Justice O'Halloran in the oft-cited case of *Faryna v. Chorny*, [1952] 2 D.L.R. 354 at 356:

> ... But the validity of evidence does not depend in the final analysis on the circumstance that it remains uncontradicted, or the circumstance that the Judge may have remarked favourably or unfavourably on the evidence or the demeanour of a witness; these things are elements in testing the evidence but they are subject to **whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time**; and *cf. Brethour v. Law Society of B.C.*, [1951] 2 D.L.R. 138 at pp. 141-2.
>
> …
>
> The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. **In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.** Only thus can a Court satisfactorily appraise the testimony of quick-minded, experienced and confident witnesses, and of those shrewd persons adept in the half-lie and of long and successful experience in combining skilful exaggeration with partial suppression of the truth. Again a witness may testify what he sincerely believes to be true, but he may be quite honestly mistaken. For a trial Judge to say "I believe him because I judge him to be telling the truth," is to come to a conclusion on consideration of only half the problem. In truth it may easily be self-direction of a dangerous kind.
>
> …

While his comments were not expressed in the context of a criminal trial, observations similar to Justice O'Halloran's have often been emphasized in criminal cases, with suitable allowance for the different standard of proof.

[I have left out some of the quotation cited by Justice Saunders, and bolded portions I would emphasize]

[41] The trial judge's reliance on the reasoning in *Faryna* was permissible and suited the circumstances here. In essence, he was focused on explaining why the evidence satisfied him beyond a reasonable doubt that Ms. Leydon was not menacing Mr. Grabosky with a mug in her hand when Mr. Grabosky struck her[8].

[42] He found Ms. Leydon's testimony to be believable and reliable on that point, in part because: neither Mackenzie (whose evidence he accepted- pp. 122 –3 AB) nor Ms. Leydon (whose evidence he accepted as otherwise credible and trustworthy and logically sound-p. 126 AB) testified that Ms. Leydon had a mug in her hand at the time; the undisputed evidence that Ms. Leydon was struck in the eye area, and if she had the mug in her hand upon Mr. Grabosky's striking her in the eye area with sufficient force to knock her glasses off, one would have expected her to immediately and reflexively have raised her hands to her face to protect herself or due to the pain of the blow, thus either making the mug clearly visible to Mackenzie, or if it was dropped, otherwise remarkable.

[8] See his reasons at p.13 (19) AB – I conclude that he preliminarily found, on a balance of probabilities, that *she did not have a mug in her hand*; and that he made no palpable and overriding error in so deciding. In spite of this preliminary fact finding, by virtue of the circumstances in this case, during his credibility analysis he had to consider whether he was left in reasonable doubt by the exculpatory evidence of Mr. Grabosky – i.e. his claim that he struck Ms. Leydon while she was menacing him *with a mug*. Ultimately, he had to consider in light of all the evidence that he accepted, and the absence of evidence, whether he was satisfied beyond a reasonable doubt that the Crown had disproved his claimed self defence. Since Mr. Grabosky's self-defence claim required that Ms. Leydon had a mug in her hand menacing him proximate to the time he struck her, to allow the judge to find Mr. Grabosky guilty, the Crown effectively had to prove beyond a reasonable doubt that Mr. Grabosky struck his wife while she did *not* have a mug in her hand.

[43] Mackenzie, testified that: "It's kind of like a blur, but I would imagine it would have hit her right here because when I – *she looked over at me, it just looked like something broke, I can't really explain it, like, her face.*" (p.57(2)AB). Mackenzie did not see a mug. That she was not asked directly about the mug on cross-examination by Mr. Grabosky's counsel, could be seen to be a breach of the rule in *Browne v Dunn*[9], but no complaint was raised, and I will not go further. Moreover, Mackenzie stated her mother was immediately "kind of in shock and she said like, '*why would you do that?*'" (p. 57(21) AB). Mackenzie was not asked whether she heard her father say anything in response, regarding his testimony that her mother was menacing him with a mug in her hand.

[44] Mr. Grabosky testified to similar effect: "she came towards me because we were wrestling basically with our hands, and I remember going with my open hand on her left shoulder, pushed her a bit, and then with my other hand I got her on the cheek. And immediately the glasses fell to the floor. I bent down and picked the glasses up and handed them to her. And I said, 'I'm sorry I didn't mean to hit you, I'm sorry' she goes '*why did you hit me?*' And I said, 'I'm sorry I didn't mean to hit you, you know, you're at – you're coming at me with a mug'".

[9] Most recently referenced in *R v Willis*, 2019 NSCA 64 per Wood CJNS, and *R v Olusoga*, 2019 ONCA 565.

[45] Mr. Grabosky testified that immediately before he struck her, "we were wrestling basically with our hands…" (p.67(18)), also referenced as "hand flailing" (p. 66(22)), yet he repeatedly suggested she was also swinging the mug at him (pp. 71(5), 67(12)). Although he had no obligation to testify, once he did, Mr. Grabosky gave no accounting of what happened to the mug he said Ms. Leydon had been menacing him with.

[46] The trial judge found his evidence not to be "in harmony with the preponderance of probabilities which a practical and informed person would expect in those circumstances"[10]. In effect he was saying, Mr. Grabosky's evidence that Ms. Leydon had menaced him with the mug in her hand before he struck her did not sit well with a number of undisputed items in the evidence, the credible testimony of MacKenzie and Ms. Leydon, and the prudent application of reliable life experience to the evidence presented. Such reasoning is not speculation. Nor is the result an "unreasonable verdict".

[47] The trial judge concluded that Ms. Leydon was *not* menacing Mr. Grabosky with a mug in her hand at the time she was struck. He did so based on her direct evidence, and inferred it from other evidence. There is no palpable and overriding

[10] Using the language arising from a civil case (*Faryna*) with its balance of probabilities standard, is arguably only awkwardly directly applicable to a criminal case such as this where the absence or presence of the mug in Ms. Leydon's hands becomes heavily implicated in the credibility finding of Mr. Grabosky associated with the requirement for proof "beyond a reasonable doubt".

error in him doing so. Moreover, he had the benefit of seeing and hearing the witnesses, and I cannot say that he erred in concluding beyond a reasonable doubt that Ms. Leydon did not menace Mr. Grabosky with a mug in her hand at the time she was struck.

Conclusion

I find no reversible error made by the trial judge. The appeal is dismissed. No costs were requested, and none are ordered.

Rosinski J

Appendix “A”

A. Whether the trial judge erred in law in failing to assess credibility in accordance with W(D).

20 Whether "*W(D)*" was properly considered and applied is perhaps the most popular ground of appeal arising from criminal trials. On reflection, that cannot be a surprise. *The formula proposed in R v. W(D), [1991] 1 SCR 742, is, if applied verbatim and without explanation, misleading and confusing. Both jurists and academics have criticized the formula as inadequate*. Professor Don Stuart has gone so far as to suggest that in light of the "confusion and complexity" it has generated, "[i]t is time for the Supreme Court to bite the bullet and firmly abandon *W.(D.)* and indicate that this troublesome formula should not be used": Westlaw annotation to *R v. Vuradin*, 2013 SCC 38.

21 Prior to the Supreme Court's decision in *W(D)* juries were given a general instruction that the prosecution was required to prove every element of the offence beyond a reasonable doubt and that the burden of proof never shifted to the accused. It was hoped that juries would understand that this instruction also applied to determining issues of credibility when faced with conflicting evidence on a material point and that any exculpatory evidence need only give rise to a reasonable doubt to work in favour of the accused.

22 Over time, appellate courts and the Supreme Court of Canada became concerned that we may be expecting too much from this standard charge and that failing to refer directly to the relationship between credibility and reasonable doubt "leaves open too great a possibility of confusion or misunderstanding": *R v. JHS*, [2008] 2 SCR 152, at para 8. The particular concern was that when faced with conflicting testimony on a material point, juries may think that they had to make a finding of credibility and if that finding went against the accused, a guilty verdict should automatically follow.

23 Eventually the Supreme Court proposed what it expected would be a simple, coherent formula to ensure that juries applied a proper approach to the assessment of credibility: the three-pronged *W(D)* formula.

24 Our experience since then has shown that the matter cannot be resolved quite so easily. *There appear to be two problems. First, every trial is different and no standard instruction, recited verbatim and without modification, can properly inform juries of their responsibilities.* Indeed, it is clear that the Supreme Court did not intend the *W(D)* instruction to be a one-size-fits-all solution or a "magical incantation". But in practice trial judges regularly rely on that exact wording, without more, in the hope that juries will understand and that the instruction, or self-instruction, will pass appellate muster.

25 *Second, while the precise wording proposed in W(D) was a laudable attempt to distill nuanced legal principles into a concise and accessible formula, experience has shown that aspects of the instruction are, in fact, confusing and misleading*.

26 With respect, it is time to revisit the *W(D)* instruction and address some of the issues that have emerged. When the *W(D)* instruction is given without contextualization or elaboration the following concerns arise:

i. Jurors may be confused about the evidence to which the instruction applies.

ii. Where there are multiple or included offences, jurors may not understand that a reasonable doubt on one charge may not entitle the accused to an acquittal on the other charges or included offences.

iii. Jurors may be confused about how evidence that they have disbelieved may nonetheless give rise to reasonable doubt.

iv. Jurors may not understand that a trial is not a credibility contest and that they do not need to resolve conflicting evidence.

v. Jurors may be given the impression that the evidence of the accused should be evaluated first, in isolation from other evidence.

27 I will address each in turn.

28 *i. The evidence to which the W(D) instruction applies*

The first prong of the *W(D)* instruction states:

> First, if you believe the evidence of the accused, obviously you must acquit.

29 With respect, that is not entirely accurate. *The statement is at once too broad and too narrow. It is too narrow in that it refers only to "the evidence of the accused."* In fact, the instruction is to apply to all exculpatory evidence that the Crown must negate beyond a reasonable doubt, whether found in the Crown or the defence case: *R v. D(B)*, 2011 ONCA 51, at paras 105-114, and *R v. Cuthill, Remple and Remple*, 2018 ABCA 321.

30 At the same time, *the statement is too broad. As noted in R v. Gray, 2012 ABCA 51, the W(D) instruction only applies to exculpatory evidence, not evidence that is inculpatory or neutral.* A jury may believe the accused's testimony about his antecedents - married, with two children, employed as a welder - and his activities on the day in question until the time of the offence, but then totally disbelieve the exculpatory evidence that he was not involved in the crime. It is only the latter evidence to which the instruction applies and failure to make that clear may leave the jury confused.

31 Also, *where the defence has both a subjective and objective component the accused will not be entitled to an acquittal merely by raising a reasonable doubt as to the subjective component. To explain, some defences like provocation and self-defence require, inter alia, that the accused's response to the situation he/she was facing be measured against the response expected of a reasonable person in the same situation.* So even if an accused's testimony is believed,

he/she may still not be entitled to an acquittal if the jury finds the accused's reaction to the situation was unreasonable.

32 Furthermore, the trial judge must remember that the principle of reasonable doubt underlying the *W(D)* instruction is not relevant to defences where the burden of proof lies with the accused. For example, where the accused relies on s 16 of the *Criminal Code* it is for him or her to establish the defence of not criminally responsible on a balance of probabilities. Thus the reasonable doubt referred to in *W(D)* would not be applicable: *R v. Mock*, 2016 ABCA 293.

ii. Where there are multiple charges or included offences.

33 The assertion in the first prong of the test that "obviously you must acquit" carries an additional concern. To illustrate, where the accused is charged with murder and raises a reasonable doubt that he lacked the requisite intent to kill as defined in s 229 of the *Criminal Code*, he would only be entitled to an acquittal on the murder charge but could still be convicted of the included offence of manslaughter.

34 In such situations the trial judge must instruct the jury as to the limits of the exculpatory evidence and that it may not apply to included offences or to other offences on a multiple charge indictment.

iii. How evidence that is disbelieved can give rise to a reasonable doubt.

35 The second prong of the *W(D)* test states:

> Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.

36 *This statement is also confusing.* Juries consist of lay people generally unfamiliar with the intricacies of the law. Although accustomed to making findings of credibility to guide their daily decisions, lay people are unaccustomed to disbelieving information yet acting on the possibility that it may be true. *As Binnie J observed in JHS at para 11: "some jurors may wonder how, if they believe none of the evidence of the accused, such rejected evidence may nevertheless of itself raise a reasonable doubt*."

37 McLachlin J (as she then was) echoed that concern in *R v. S (WD)*, [1994] 3 SCR 521 at 544:

> Certainly if the jury rejected (as opposed to merely being undecided about) all of the evidence of the accused, it is difficult to see how that very evidence, having been rejected, could raise a reasonable doubt.

38 It may be helpful to step back and consider the message intended to be delivered. In short, it is that when assessing exculpatory evidence *jurors should understand that they have three choices, not two: they may accept the evidence, they may reject it, or they may find themselves unsure whether the evidence is true or false. In other words, there is a "third alternative" to confident acceptance or confident rejection and if they find themselves in this middle ground that*

usually means they have a reasonable doubt that must benefit the accused. In *R v. Edwards*, 2012 ONSC 3373 at para 20, Code J. observed:

> [T]he so-called "second branch" of *W(D)* ... is an "alternative" to complete belief or complete rejection and arises where a trier cannot "resolve the conflicting evidence" and cannot find "exactly where the truth of the matter lay", as Morden J.A. and Martin J.A. put it in *Challice* and in *Nimchuk*. It refers to a state of indecision or uncertainty where the trier is not "able to select one version in preference to the other", as Cory J. put it in *W.D.S.*

39 The message may be *better conveyed with an instruction such as: "If you believe the accused's evidence denying guilt (or any other exculpatory evidence to that effect), or if you are not confident that you can accept the Crown's version of events, then ...".* That would relieve the jury of wrestling with the unnatural concept of having to give some credence to evidence they have already rejected as unbelievable.

iv. *Jurors may not understand that a trial is not a credibility contest*

40 A related concern is that while one object of the *W(D)* instruction is to avoid the "credibility contest" error, the instruction does not address that. The jury should be told that the trial is not a credibility contest requiring them to choose one version over the other and that if, after considering the conflicting evidence, they are unable to decide which version is true, that will usually indicate they have a reasonable doubt as to that evidence.

v. Jurors may be given the impression that the evidence of the accused should be evaluated first in isolation from other evidence.

41 Finally, there is some uncertainty as to whether the *W(D)* instruction requires jurors to assess the evidence of the accused first, in isolation from other evidence.

42 It is sometimes argued that since the prosecution carries the burden of proof, logic would suggest deliberations begin with a consideration of the prosecution evidence. While logic may support that approach, the authorities are divided. In *R v. Mann*, 2010 BCCA 569 at para 33, Chiasson JA offered the following analysis:

> *W.(D.)* recommends an approach that has the trier of fact commence by considering the accused's testimony, before assessing that of other witnesses. Such an approach is sensible. First, it provides the fairest process for the accused: his or her testimony may be evaluated with a fresh eye and an open mind, unencumbered by findings of credibility in relation to other witnesses. This helps to ensure that the burden of proof remains wholly with the Crown. It avoids the situation where the accused is expected to affirmatively prove his case in order to be acquitted (which of course amounts to a reversal of the burden of proof). Another advantage to having the accused's testimony considered first is that doing so is more consistent with the standard of proof beyond a reasonable doubt. By looking first to the accused's account and considering whether it raises a reasonable doubt or contributes with other evidence to a reasonable doubt,

> the focus remains on the proper question - whether a reasonable doubt arises in the case. A further benefit from the *W.(D.)* approach is rooted in logic and efficiency: if the accused's account raises a reasonable doubt, there is no need to go further into the analysis: the proper verdict is an acquittal.

43 Fish J, speaking for the minority in *R v. CLY*, [2008] 1 SCR 5 at paras 26 and 30, tended to agree, explaining:

> And the risk of an inadvertent shift in the burden of proof materialized, as the reasons of the trial judge make plain. The trial judge accepted the evidence of the complainant without taking into account *at all* the contrary evidence of the appellant. Before even considering the appellant's evidence, the trial judge had concluded not only that the complainant's evidence was "credible", but that it was in fact true: "I believe the complainant", she stated...
>
> Unfortunately, the appellant's presumption of innocence had by that point been displaced by a presumption - indeed, a *finding* - of guilt. The trial judge could hardly believe *both* the appellant *and* the complainant. Before even considering the appellant's evidence, she had already concluded that she believed the complainant. In effect, the trial judge had thus decided to convict the appellant unless his evidence persuaded her to do otherwise.

44 These are compelling arguments. Still, *I respectfully disagree. In my opinion directing the jury to consider the exculpatory evidence first, in isolation, is wrong and should not be a part of this instruction.*

45 The following example illustrates my concern. An accused charged with sexual assault testifies that he was not the assailant and that he was elsewhere at the time of the offence. Following a direction that his evidence must be considered first, in an evidentiary vacuum, it is reasonable to think that a jury, impressed with his demeanor and the fact that his testimony was not compromised in cross-examination, may either accept his testimony as true or be unable to reject it as false and thus be left with a reasonable doubt. In the result, the accused would be acquitted notwithstanding the other evidence, including his DNA recovered from the complainant, a stranger to him, his wallet with identification found at the scene of the crime and the evidence of a former neighbour who positively identified him running away from the scene at the time of the offence. If the accused's evidence is considered first, this incriminating evidence would never be considered.

46 On this point *I prefer and adopt the approach proposed by Doherty JA in R v. Carrière* (2001), 151 OAC 115 (Ont CA) at paras 48 and 50:

> I do not think that *R. v. W.(D.),* supra, stands for that proposition [that the accused's evidence must be considered first*]. As a matter of common sense, a jury could not assess an appellant's evidence, except in the context of the rest of the evidence.* A jury's verdict must flow from an application of the burden of proof to the entirety of the evidence. The jury must apply the legal principles given to them by the trial

> judge. The trial judge must also provide certain instructions as to how the jury should assess credibility. *R. v. W. (D.), supra*, is one such instruction. The trial judge must not, however, tell the jury how to deliberate. The order in which a jury chooses to approach the evidence, like the other mechanics of deliberation, is for the jury...
>
> The instruction suggested by Cory J. does not advise the jury to begin with the evidence of the accused. Rather, it tells them that when assessing the credibility of the accused, they should approach it in the three stages outlined in the model charge. *Properly understood, R. v. W.(D.), supra, does not impose any limits on how the jury proceeds with its deliberative process*. [Emphasis added]

47 The Supreme Court in *R v. Dinardo*, 2008 SCC 24 at para 23, offered support for that approach:

> In a case that turns on credibility, such as this one, the trial judge must direct his or her mind to the decisive question of whether the accused's evidence, *considered in the context of the evidence as a whole*, raises a reasonable doubt as to his guilt. Put differently, the trial judge must consider whether the evidence as a whole establishes the accused's guilt beyond a reasonable doubt. [Emphasis added]

vi. Revisiting the W(D) instruction.

48 *In my opinion the terse three-prong W(D) instruction should be modified to meet the concerns identified above. I propose the following, mindful that the actual instruction will need to be contextual and responsive to the evidence.*

49 It may be prudent to begin by identifying, either generally or specifically, the evidence to which the instruction is to apply. As discussed, to say the instruction applies to "the evidence (or testimony) of the accused" will be inaccurate if it excludes other exculpatory evidence from the scope of the instruction. *Juries need to understand*:

i. that the instruction applies only to exculpatory evidence, that is, to evidence that either negates an element of the offence or establishes a defence (other than a reverse onus defence);
ii. that it applies to exculpatory evidence whether presented by the Crown or the accused.

50 While in some cases it may be enough to explain these points in general terms, the trial judge will need to decide whether juries should be left to identify for themselves the actual evidence to which the instruction applies. If there is risk of misunderstanding it would be better to refer to all of the relevant evidence.

51 *Then the charge should impart the following information*:

(i) The burden of proof is on the Crown to establish the accused's guilt beyond a reasonable doubt and that burden remains on the Crown so that the accused person is never required to prove his innocence or disprove any of the evidence led by the

Crown. (Subject to the caveat that this does not apply to defences, such as that found in s 16 of the *Criminal Code*, where the onus rests with the proponent of the defence.)

(ii) In that context, if the jury believes the accused's evidence denying guilt (or any other exculpatory evidence to that effect), or if they are not confident they can accept the Crown's version of events, they must acquit. (Subject to defences with additional elements such as an objective component discussed at para 31).

(iii) While the jury should attempt to resolve conflicting evidence bearing on the guilt or innocence of the accused, a trial is not a credibility contest requiring them to decide that one of the conflicting versions is true. If, after careful consideration of all the evidence, the jury is unable to decide whom to believe, they must acquit.

(iv) Even if the jury completely rejects the accused's evidence (or where applicable, other exculpatory evidence), they may not simply assume the Crown's version of events must be true. Rather, they must carefully assess the evidence they do believe and decide whether that evidence persuades them beyond a reasonable doubt that the accused is guilty. Mere rejection of the accused's evidence (or where applicable, other exculpatory evidence) cannot be taken as proof of the accused's guilt.

52 Finally, *where there are included offences or multiple charges*, the trial judge must ensure the jury understands that a reasonable doubt with regard to one offence will not necessarily entitle the accused to an acquittal on all charges.

53 Like *W(D)*, the foregoing is not intended to be an incantation that must be included in every trial where there is conflicting evidence to be resolved. Ultimately, the wording used is not critical so long as the trier is given sufficient information to understand the correct burden and standard of proof to apply: *W(D)* at para 30. See also *R v. Kristensen*, 2010 ABCA 37.

54 However, *reciting and relying solely on the wording of W(D), without elaboration, will not usually be sufficient in a jury trial.* That portion of the charge must be responsive to the evidence and explained in such a manner that the jury is able to understand the message intended to be conveyed.

SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Grabosky*, 2019 NSSC 231

Date: 20190801
Docket: 487948
Registry: Halifax

Between:

Peter Paul Frederick Grabosky

Appellant

v.

Her Majesty The Queen

Respondent

Judge:	The Honourable Justice Peter Rosinski
Corrected Decision:	The text of the original decision has been corrected according to the attached erratum dated **August 7, 2019**.
Heard:	July 18, 2019, in Halifax, Nova Scotia
Counsel:	Jamie Violande, for the Appellant Cory Roberts, for the Respondent

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ERRATUM

Erratum:

The spelling of Cory Roberts name on the cover page has been corrected.