

SUPREME COURT OF NOVA SCOTIA

Citation: *R. v. Brown*, 2022 NSSC 284

Date: 20221007

Docket: *Halifax*, No. 508492

Registry: Halifax

Between:

Her Majesty the Queen

Plaintiff

v.

Thomas Joseph Lyle Brown, Joshua David Eye, Emily Sara Holman and Jeffrey
Gordon Hilchie

Defendants

Decision

Judge: The Honourable Justice Ann E. Smith

Heard: June 27 and June 29, 2022

Final Written Submissions: July 27 and September 29, 2022 (Defendant Brown)

Counsel: Stephanie Morton, for the Nova Scotia Public Prosecution
Service
Stanley W. MacDonald, K.C., for the Defendant Thomas
Joseph Lyle Brown

By the Court:

[1] Mr. Thomas Joseph Lyle Brown (“Mr. Brown” or “T.J. Brown”) faces a multiple count indictment dated December 22, 2021, arising out of his alleged participation in a home invasion, a break and enter, at a location on Highway 2 in Wellington, Nova Scotia on December 24, 2020. He faces charges for possession of a firearm, without a licence to do so, assaulting one of the occupants of the home, Anthony Cooper, and stealing firearms from Anthony Cooper. Mr. Brown is also charged with breach of terms of probation, including a term which prohibited him from possessing a firearm.

[2] The Defendants Joshua David Eye and Jeffrey Gordon Hilchie were charged on the same indictment as Mr. Brown, with various offences. At the commencement of the trial, Mr. Eye and Mr. Hilchie each entered guilty pleas pursuant to section 606(4) of the *Criminal Code* to break and enter of Anthony Cooper’s home and common assault. The Crown called no evidence with respect to the other charges against Mr. Eye and Mr. Hilchie; each is acquitted of the remainder of the charges on the indictment.

[3] The Defendant Emily Sara Holman is also named on the same indictment. At the conclusion of the Crown’s evidence, Crown counsel indicated that it would not

be proceeding with the case against Ms. Holman. The Court therefore entered an acquittal of all charges against her.

Overview of Basic Principles

[4] This is a criminal trial and therefore the Crown has the burden throughout. The Crown must prove all the elements of the offences charged to a standard of proof beyond a reasonable doubt. There is never any burden on an accused to prove his innocence.

[5] The Supreme Court of Canada has explained in *R. v. Starr*, 2000 SCC 40 and earlier decisions in *R. v. Lifchus*, [1997] 3 S.C.R. 320 and *R. v. Bisson*, [1998] 1 S.C.R. 306 that the phrase, “beyond a reasonable doubt” has a special meaning in a criminal trial. The Supreme Court in these decisions explains that the standard of proof beyond a reasonable doubt is more than proof on a balance of probabilities, which is the standard which applies in civil trials.

[6] Rather, proof beyond a reasonable doubt requires more than proof that the accused is probably guilty. It does not involve proof to an absolute certainty, and it is not proof beyond any doubt. Proof beyond a reasonable doubt is logically connected to the evidence or lack of evidence.

Credibility and Reliability

[7] A trial judge must assess the testimony of witnesses in light of their credibility and the reliability of their evidence. Credibility has to do with the veracity or truthfulness of a witness' testimony. Reliability has to do with its accuracy. A witness who is credible may provide unreliable evidence because honest witnesses can misperceive events, have poor memory or simply be wrong.

[8] The Crown must establish that the offences contained in the indictment were committed. Specifically, in order to establish Mr. Brown's guilt with respect to each of the alleged offences, the Crown must establish that Mr. Brown was a party to these offences.

[9] The Crown called three civilian witnesses – Luke Cooper, Anthony Cooper's son, Meaghan Morris, Anthony Cooper's partner and Anthony Cooper. The Crown also called two police witnesses – Detective Constable Christopher Graham and Detective Constable Joshua McNeil. The evidence of each of these witnesses will be reviewed later in this decision. The Defence did not call any witnesses.

Applicable Legal Principles – Recognition Evidence

[10] The identify of the accused person, Mr. Brown, is an essential element that the Crown must prove with respect to each of the offences.

[11] In this case, the proof of this element rests almost exclusively on the evidence of Anthony Cooper and Meaghan Morris.

[12] In other words, this case comes down to whether the eye-witness testimony of Anthony Cooper and that of Meaghan Morris is sufficiently credible and reliable to support a finding of guilt beyond a reasonable doubt for the offences with which Mr. Brown is charged.

[13] The Nova Scotia Court of Appeal considered the law on identification evidence in *R. v. Downey*, 2018 NSCA 33, [2018] N.S.J. No. 136. The case involved a home invasion by several masked individuals, one of whom shot several of the victims. One victim identified the accused – whom she knew – as the shooter to the police in the ambulance immediately after the event. She repeated the identification at trial, saying she particularly recognized him by his eyes (his face being partly masked) and his voice.

[14] The accused was acquitted at trial, largely on the basis of what the trial judge considered to be frailties in the identification evidence. On the Crown appeal, Saunders J.A., for the Court of Appeal, reviewed the principles governing identification evidence, and distinguished it from “recognition” evidence:

52 Ordinarily, "identification evidence" is used to describe the kind of evidence offered by eyewitnesses who are strangers to an accused but who later testify that

the person on trial is the individual they observed at the scene of the crime, and which eyewitness reporting is perhaps later confirmed after pointing out that same individual in a police photo line-up during the course of the investigation.

53 That kind of eyewitness identification evidence offered by strangers is to be distinguished from voice or visual identification evidence offered by witnesses who are "familiar" with the accused. Such evidence is properly characterized as "recognition evidence" because the witness is able to verify their identification of the accused from recognizing the voice and/or appearance of the accused based on their familiarity and interaction one with the other.

[15] Justice Saunders quoted, with approval, the remark of Neilson, J.A., in *R. v. Bob*, 2008 BCCA 485, that “[w]hile caution must still be taken to ensure that the evidence is sufficient to prove identity, recognition evidence is generally considered to be more reliable and to carry more weight than identification evidence” (para. 54, citing *R. v. Bob* at para. 13). Justice Saunders also referred, at para. 55, to the Ontario Court of Appeal decision in *R. v. Campbell*, 2017 ONCA 65 (some citations omitted):

[10] This court has confirmed that "recognition evidence is merely a form of identification evidence" and, as such, "[t]he same concerns apply and the same caution must be taken in considering its reliability as in dealing with any other identification evidence": *R. v. Olliffe*, 2015 ONCA 242, 322 C.C.C. (3d) 501, at para. 39. This court also noted in that paragraph, however, that "[t]he level of familiarity between the accused and the witness may serve to enhance the reliability of the evidence." Unlike cases involving the identification of a stranger, the reliability of recognition evidence depends heavily on the extent of the previous acquaintanceship and the opportunity for observation during the incident... Recently, in *R. v. Charles*, 2016 ONCA 892, at paras. 50-51, this court noted the "critical difference" between recognition cases and cases involving identification by a witness of a complete stranger, and referred to the relevance of the "timeline of the identification narrative"...

[emphasis added]

[16] Justice Saunders acknowledged the “inherent dangers of identification evidence, especially where the witness appears both honest and convincing. Consequently, factfinders (whether trial judges or juries) must be satisfied as to both the credibility and the reliability of the eyewitness testimony” (para. 57). He cited *R. v. Atfield*, 1983 ABCA 44, where the Court of Appeal said, at para. 3:

... the jury (or the judge sitting alone) must be satisfied of both the honesty of the witness and the correctness of the identification. Honesty is determined by the jury (or judge sitting alone) by observing and hearing the witness, but correctness of identification must be found from evidence of circumstances in which it has been made or in other supporting evidence. If the accuracy of the identification is left in doubt because the circumstances surrounding the identification are unfavorable, or supporting evidence is lacking or weak, honesty of the witnesses will not suffice to raise the case to the requisite standard of proof and a conviction so founded is unsatisfactory and unsafe and will be set aside. It should always be remembered that in the famous Adolph Beck case, twenty seemingly honest witnesses mistakenly identified Beck as the wrongdoer.

[17] Justice Saunders noted that the same point was made by Paciocco, J. (as he then was) in *R. v. Ambrose*, 2015 ONCJ 813 (citations omitted):

... In dealing with identification evidence, it is imperative that judges not focus solely or unduly on the credibility of identification witnesses, since neither their honesty nor confidence ensures accuracy... Most inaccurate identifications occur because honest identification witnesses are wrong. The reliability of identification evidence is therefore of deep concern, and deserves emphasis... A judge must recognize and allow for the fact that case-specific problems with the opportunity to observe the identified individual, as well as variable limits in the ability of witnesses to discriminate between individuals, or to recall details, contribute together to the risk that honest identification witnesses will be mistaken... In addition, the quality of description of the suspect by the witness requires attention... If there are notable dissimilarities between features of the description and the accused, the identification will have no probative value without other evidential support... [*Ambrose* at para. 4, cited in *Downey* at para. 58.]

[18] The Court of Appeal in *R. v. Downey* held that the trial judge applied the wrong test to the victim's identification evidence by searching "the record for both significant connections establishing Ms. MacLean's familiarity with the accused as well as distinguishing features which would serve to demonstrate the accused's "peculiarity" or uniqueness" (para. 62; emphasis by Saunders J.A.). Justice Saunders cited *People of the State of Michigan v. Bozzi*, 36 Mich. App. 15 (1971), 193 N.W. 2d 373, where the court "rejected the argument that in order to be reliable, voice recognition depended upon both familiarity between the witness and the accused and some peculiar characteristic of the person's voice. The Court said this duality of requirements was wrong and stemmed from a misreading of a leading American text on criminal evidence" (para. 63; emphasis by Saunders J.A.). The Court of Appeal held that the trial judge had committed the same error in assessing the reliability and probative value of the evidence (paras. 64-66). Justice Saunders said:

66 ... The trial judge ought to have recognized that based upon the preponderance of evidence, there was nothing unique about the respondent. He was described by his victims as "average" and that there was really nothing (except seeing his eyes and cheekbones reminding Ms. MacLean of a pit bull) to set him apart from other people. Accordingly, the reliability of Ashley's testimony regarding the appearance and voice of the shooter would depend upon her familiarity with the respondent based on the extent of their relationship (which could be gauged by the quality and/or the quantity of their interactions with one another) during the years they knew one another at school, and as neighbours. To insist upon some form of additional elaboration and articulation of things which were "distinctive" about the shooter ignored Ms. MacLean's positive identification based upon her familiarity with the respondent and imposed an impossibly high and unattainable burden of proof upon the Crown.

[19] The Court of Appeal in *R. v. Downey* also referred to Paciocco J.'s observation in *R. v. Ambrose* that “[t]he reason lay witnesses are permitted to provide a conclusion about identification is that the human capacity for recognition, while imperfect, outstrips the human ability to describe what has been observed. Not only is language inadequate to articulate and communicate ordinary facial observations in a discriminating way, the human memory can capture details unconsciously that can appropriately inform conclusions, including about identification” (para. 67, citing *Ambrose* at para. 29). Justice Saunders also referred with approval to *R. v. Berhe*, 2012 ONCA 716, where the court quoted, in turn, the following passage from *R. v. Panghali*, 2010 BCSC 1710, [2010] B.C.J. No. 2729:

Common experience teaches that people have vastly different abilities to identify and articulate the particular features of the people in their lives that they know, recognize, and distinguish on a regular basis. Where a witness has but little acquaintanceship with the accused, his or her recognition evidence may be of little value unless the witness can explain its basis in some considerable detail. But at the other end of the spectrum, the bare conclusory recognition evidence of a person long and closely familiar with the accused may have substantial value, even where the witness does not articulate the particular features or idiosyncrasies that underlie the recognition. [para. 68, citing *Berhe* at para. 22, citing *Panghali* at para. 42; emphasis by Saunders J.A.]

[20] Also in *R. v. Downey*, Saunders, J.A. noted that a witness’ ability to identify without hesitation enhances the reliability in identification cases, citing *R. v. Quercia*, 60 C.C.C. (3d) 380 (Ont. C.A.) at 18, 21; *R. v. Keenam*, 22 B.C.A.C. 72 at 20; *R. v. Roach*, 2011 NSCA 95 at 40; *R. v. MacKinaw*, 2010 ABCA 359 at 9; *R. v. Coutu*, 2008 MBCA 141 at 87 and *R. v. Berhe* (*supra*) at 11.

[21] Justice Saunders summarized:

69 To summarize then, the importance of articulating identifiable features or idiosyncrasies will vary depending upon the level of familiarity the witness has with the person to be identified. In some cases a witness may be sufficiently familiar with the person, so as to render the identification by the witness of any unique identifiable feature unnecessary, in order for a court to properly assign substantial value to that evidence. Common sense and one's life experience reminds us that people have vastly different abilities when it comes to identifying or expressing the particular features of people they know and recognize, through their contact with one another. Where contact is fleeting, a person's recognition evidence may be of little value unless the witness can explain its basis in some detail. On the other hand, a simple conclusory recognition without additional elaboration of any points of distinctiveness, may still be highly probative in the case of a person who is closely familiar with the accused. See for example *R. v. Panghaia*, 2010 BCSC 1710 (CanLII), [2010] B.C.J. No. 2729; *R. v. Benson*, 2015 ONCA 827; and *R. v. M.B.*, 2017 ONCA 653.

[22] As such, Justice Saunders concluded that the trial judge's "demanding search for markers of peculiarity and distinctiveness when they did not exist, caused him to downplay or ignore the highly probative value of Ms. MacLean's positive identification of the respondent based on their familiarity with one another and her immediate recognition of his appearance and his voice. What the judge perceived as a "failure" on Ms. MacLean's part skewed the judge's analysis and caused him to ignore the force of her testimony and its corroboration by other significant evidence" (para. 70). Rather than being "distracted by an unnecessary search for idiosyncrasies", the trial judge should have limited his focus to "the evidence that was relevant to the reliability of their testimony, both in terms of positively

identifying him as the shooter, as well as the other direct and circumstantial evidence which bolstered their testimony” (para. 71).

[23] The Court of Appeal considered identification again in *R. v. Al-Rawi*, 2021 NSCA 86, [2021] N.S.J. No. 466, leave to appeal denied, [2021] S.C.C.A. No. 487. Bourgeois J.A., for the Court, reaffirmed *Downey* as the guiding authority on identification evidence (paras. 46-47). The Court of Appeal held that the trial judge had not erred in dealing with the evidence of a former roommate and a former building manager who were familiar with the accused: “It was not an error for him to view the evidence of the two witnesses who had familiarity with Mr. Al-Rawi from their past contacts with him as being different from a stranger identifying a previously unknown suspect from a police line-up” (para. 47). The Court went on to review the principles governing the assessment of in-court dock identifications (paras. 48-54), holding that the trial judge had not erred in relying on the building manager’s “in-court identification of Mr. Al-Rawi as the former tenant he knew as Abdul” (para. 50). The court confirmed that there was “no absolute prohibition against the consideration of in-court identification of an accused” (para. 54).

[24] In *R v. Newman*, 2018 NSSC 113, [2018] N.S.J. No. 181, a store owner was robbed and hit with a wrench by an assailant wearing a white toque, but not in

disguise. He identified the accused, who he had seen in neighbourhood, as the attacker. Campbell J. described the identification:

3 Kye Dorey says that on February 23, 2017 at around noon he was in his store. A person came in. The person was known to him. He had not met the guy and didn't know his name. But Mr. Dorey had seen him walk by the store with his girlfriend many times. He had seen him in places like Sobeys and Shoppers Drug Mart. He had seen the man standing outside his store when the man's girlfriend had come in to do business at the store. He "felt like" he knew the man. He didn't know him by name and had never spoken with him but nonetheless he "felt like" he knew him. His facial features were the same and his "body language" such as his gait, was the same. The person was wearing a white toque that Mr. Dorey said he typically wore, had on dark track pants, a black sweater that zippered at the neck, and black sunglasses. There was nothing unusual about that. Mr. Dorey recognized the man in the same way that people routinely recognize other people whom they have seen before. When Kye Dorey said that he "felt like" he knew the person he was expressing that sense a familiarity that one has with a person whom one sees regularly without knowing the person's name or anything about them, beyond their appearance.

[25] While the accused denied any involvement, there was circumstantial evidence supporting the identification. Campbell J. reviewed the Court of Appeal decision in *Downey* (paras. 20-21), and said:

22 A judge has to assess of the reliability of a witness' statement that he or she can identify or recognize another person. It is not enough that the witness believes what he or she has said. Firmly convinced and credible people are often wrong. Credibility is not a substitute for reliability. Reliability can be assessed by examining at least four variables. One of those is the opportunity for observation and with respect to the incident giving rise to the purported recognition or identification. Another involves the ability of the witness to recall that incident. Another involves the degree of familiarity between the witness and the person whom they are purporting to recognize or identify. And the fourth is the extent to which the person purporting to identify another can articulate identifying features.

23 Each of those variables or factors can be described as a point along a continuum. The opportunity to observe may range from a glimpse in poor lighting of a partially obscured face to some minutes of interaction. The ability of the witness to recall the incident may range from an alcohol impaired person's vague memory of the

incident itself beyond the identification or recognition to a reliable description of the details surrounding incident. The degree of familiarity may be anywhere from an intimate friendship or close family connection to being an acquaintance to being a stranger. The description may range from a simple conclusory statement saying who the person was, to providing a description of clothing to a detailed description of the characteristics used to allow for the identification or recognition. All those things must be considered in assessing the reliability of the evidence.

24 Eyewitness identification or recognition is far from infallible. People make mistakes even when they believe that they've recognized a friend on the street. Yet people are also able to recognize others in a wide variety of circumstances.

[26] After noting that the witness had a good opportunity to observe the person who assaulted him, and that his recall was not impaired by injury or shock (paras. 25-26), Campbell J. addressed his prior knowledge of the accused:

27 Kye Dorey was not a friend nor even an acquaintance of Shawn Newman. They had never spoken to each other before the day of the robbery. They had never met or been introduced. But they were not strangers in the sense that Kye Dorey had never seen this person before. Mr. Dorey said that the person who robbed him was the guy who walked by his store at least a couple of times a day. He was the guy whose girlfriend had come in a few times to sell some things. And, indeed, Shawn Newman was a person who walked by the store at least twice a day. Kye Dorey said that he had seen Shawn Newman around the community in the drugstore or at the grocery store. He was not known by name but he was sufficiently familiar with Mr. Newman to be able to recognize him when he saw him.

28 Kye Dorey's description of the robber was not merely conclusory. He gave a general description of the height and weight of the person. He mentioned a very light reddish complexion. He described the clothing the person was wearing. He did not simply say that it was the guy with the girlfriend and the baby.

29 That evidence still has to be treated carefully. There is always a risk that once the person is identified the characteristics of that person become part of the witness' description, perhaps entirely unintentionally. Seeing the white toque might cause Kye Dorey to rush to the conclusion that the person wearing the toque was the person who he had seen before typically wearing the same white toque. The description of the robber could then unintentionally be made to fit with the description of the person whom he had seen on the street wearing the white toque.

30 Kye Dorey did not simply say the robber was wearing a white toque. He provided a physical description. He recognized the person who robbed him and told the police immediately who it was, without providing a name, within the hour of the robbery occurring. That still carries the risk that the white toque prompted a

recollection of the other features of the person who usually wore that toque. But Kye Dorey also described the other clothing that the person was wearing. He provided a description that was accurate in terms of what Mr. Newman happened to be wearing in the moments after the robbery took place. Mr. Newman said that he just put on the dark track pants to run out to get the cigarettes. He changed out of those pants later in the day before he was arrested. Ms. Pearce said that Mr. Newman always wears jeans. Had Mr. Newman not been in the store, Mr. Dorey would have to have made a remarkably accurate guess about what he had been wearing at that time. He did not describe Mr. Newman's typical clothes, but the clothes he was wearing very close to the time that the robbery took place.

[27] Justice Campbell thus concluded that the recognition was reliable. In conjunction with the circumstantial evidence linking the accused to the incident, Campbell J. found him guilty of robbery and assault with a weapon (paras. 32-42). The Court of Appeal affirmed the decision, noting that “it was open to the judge to find, as he did, that this circumstantial evidence supported the victim's recognition evidence”: 2020 NSCA 24, at para 36.

A Review of the Evidence of the Witnesses

The Evidence of Constable Christopher Graham

[28] Constable Graham is a member of the RCMP. He has been with the Lower Sackville, Nova Scotia detachment for three years and has been a constable for three years.

[29] Cst. Graham completed an Initial Occurrence Report and took photographs at the scene. These photographs were of Anthony Cooper's face, depicting his injuries,

as well as of the bedroom in the Cooper residence where Mr. Cooper was assaulted. The photographs also depicted the gun cabinets in the bedroom from which rifles were allegedly stolen by T.J. Brown.

[30] Constable Graham was working the night shift (7 p.m. to 6 a.m.) starting on the evening of December 23, 2020. He said that he received a call over the radio from dispatch. He was advised that there was a call made at 2:04 a.m. from 4591 Highway 2, Wellington, Nova Scotia regarding an assault that took place there. Constable Graham stated that the caller, Anthony Cooper, was at his residence, and said that two males and a female entered his home, that he was assaulted by one of the males and five firearms and some marijuana were stolen. Constable Graham's evidence was that he arrived at the scene at 2:22 a.m. on the morning of December 24, 2020. At the start of his shift the weather temperature was minus 4 degrees, and it was cloudy.

[31] When he arrived, Cst. Graham entered the home, which he described as single level, i.e., without an upper level or basement, Constable Scott Murray was present. Constable Jenna Boutilier, Constable Chad Power and Staff Sergeant Jeff Sanford were also present. Cst. Graham said that the caller's son, Luke Cooper, and the caller's girlfriend Meaghan Morris were also present.

[32] Cst. Graham described the bedroom as being in disarray, with clothes strown about on the floors, dresser drawers on the floor and what he perceived to be blood on the bedding sheets close to the pillows. Cst. Graham also described seeing two green gun lockers against the wall, with one of these open and empty and the other closed.

[33] Cst. Graham recalled speaking with Anthony Cooper in the bedroom. Cst. Graham testified that he took an audio statement from Anthony Cooper, eight minutes in length. Cst. Graham testified that he noticed that on the right side of Mr. Cooper's face, just below his right eye, there was extensive swelling and a laceration above his right eye.

[34] Cst. Graham was asked about Mr. Cooper's demeanour while giving his statement. He said that Mr. Cooper was cooperative but said that he didn't remember much because he was knocked out. Mr. Cooper said that he had been playing cards with his girlfriend, and recalled that one of the males was T.J. Brown, who came into his room and assaulted him. Cst. Graham testified that Mr. Cooper described the person who assaulted him, who he said was T.J. Brown, as being a white male, 5 ft. 10, with a beard, a larger build, wearing a grey hoodie and a baseball hat. Mr. Cooper told Cst. Graham that there was another male with T.J. Brown, who was his

neighbour across the street and a female who he believed was T.J. Brown's girlfriend. Cst. Graham didn't recall Mr. Cooper giving him the name of this female.

[35] Crown counsel asked Cst. Graham whether Mr. Cooper told him how he knew that the person who entered his bedroom and assaulted him was T.J. Brown. Cst. Graham's evidence was that Mr. Cooper told him that he knew T.J.'s father and mentioned that T.J. was the owner of a tow truck company in Enfield.

[36] Cst. Graham's evidence was that he obtained digital photographs of the injuries to Mr. Cooper's face and the bedroom where the alleged incidents took place. These photographs were entered into evidence. Cst. Graham testified that after taking the photographs he obtained information from Mr. Cooper as to the firearms he said were stolen. Statements were then taken by other officers from other individuals in the house and their plan was to attempt to arrest T.J. Brown.

[37] Cst. Graham testified that he obtained an address which he thought was for T.J. Brown's parents since it was thought that T.J. Brown might be staying there. Cst. Graham as well as Staff Sergeant Sandford and Csts. Jenna Boutilier and Chad Power attended at that address at 3:30 a.m. Cst. Graham's evidence was that they spoke to individuals at that residence whom they believed to be T.J. Brown's parents. They asked if T.J. Brown was present and were told that he was not, that he was residing at another address in Enfield. Cst. Graham and the other officers went to

that address at 3:56 a.m. He observed a Nissan Titan pickup truck in the driveway and made note of the Nova Scotia licence plate of that vehicle which he said came back as “Brown’s Towing”, Enfield. Cst. Graham stated that there was another vehicle in the driveway, a Chevy Silverado pick-up truck which had frost on it. He said that that vehicle’s plates came back to a K.C. Cst. Graham said that the Nissan truck did not have frost on it, which led him to believe it had been recently used. The officers knocked on the door of this residence, but no one came to the door.

[38] The officers then departed and went to the residence of K.C. They were told by an individual who answered the door that K.C. was not there, that he no longer lived there, and the individual did not know where he was.

[39] Cst. Graham said that he was cleared from the investigation at 4:20 a.m.

[40] Cst. Graham’s evidence in cross-examination was that he did not call the RCMP’s Identification Service to take photographs, that he took the photographs himself. He stated that to his knowledge no DNA testing was carried out, or samples taken from the bedroom for such testing. No fingerprints were taken, and Mr. Brown’s fingerprints or any of his DNA was not found at the residence.

[41] In cross-examination, Cst. Graham was asked if he listened to the 911 call before he took Mr. Cooper's statement. He responded that he did not, and has not listened to the audio of that call.

[42] Defence counsel put questions to Cst. Graham about the audio statement he took from Mr. Cooper. The transcript recorded that at the outset Cst. Graham asked Mr. Cooper, "What happened tonight?". Mr. Cooper then said to his son, Luke Cooper, who was present, "How many guys was there Luke?". Defence counsel read to Cst. Graham, part of the statement where Mr. Cooper says, "And I guess they came in through the back door where Luke was sitting watching T.V." Cst. Graham agreed with Defence counsel that Mr. Cooper told him that he didn't see anyone come through the front door, that he was in his bedroom playing a game on his phone. Further in the statement Defence counsel read to Cst. Graham, "Luke was sitting watching TV and just like pushed their way in and come in here, like I said he started yelling something and then buddy, I guess I stood up, I don't remember standing up, and she said he just fucking smoked me, and she said I went down on the bed".

[43] Further in the statement, Cst. Graham asked Mr. Cooper, "Can you describe the person who did this to you?". The transcript records Mr. Cooper's response as, "Yeah, he was well, your height, stockier build with a beard. His name was T.J.

Brown”. Cst. Graham asked, “Is that his given, legal name, T.J. Brown?”. Mr. Cooper responded, “I think so”. He added, “That’s all I know”. Mr. Cooper added that the person was a white male in his thirties. Cst. Graham then asked, as recorded in the transcript of the statement, “What did he look like other than having a beard?”. Mr. Cooper said, “A long, long, scruffy beard, a heavy-set guy”. The transcript records Cst. Graham asking Mr. Cooper, “Do you recall what he was wearing?”. Mr. Cooper’s response was, “No, a sweatshirt or something. I like really, I just seen his face there just for one”, at which point the transcript is cut off.

[44] Defence counsel put this portion of the transcript of Mr. Cooper’s statement to Cst. Graham, “So you’re in there playing a game, and this guy comes in and just starts beating you up”? Mr. Cooper’s answer was, “I, I guess so, he, he...”. “I just remember saying, ‘what the fuck’ one time, and I looked, and it was like”, at which point the answer stops. Cst. Cooper then asked, “OK, what occurred in the room? The right side of your face is swollen”. Mr. Cooper’s answer was, “I don’t remember any hitting whatsoever, like I figured he must have just hit me in the head like that”. Mr. Cooper then said, “She said I went down on the bed”. Cst. Graham understood Mr. Cooper to be referring to Meaghan Morris because she was in the bedroom at the time. Mr. Cooper also said, as recorded in the transcript, “I don’t remember him coming into the room, I remember seeing his face, I’m not sure if that was like I

mean when I was kind of come to, or it might've been beforehand on the bed". Cst. Graham said that he understood "beforehand" referred to before Mr. Cooper was knocked out or after. Mr. Cooper's statement also records, further along, that he told Cst. Graham, "I don't remember saying anything, I don't remember standing up".

[45] The statement also records that Mr. Cooper told Cst. Graham that a neighbour was involved, 'J.D', but added, "that's what they say, I never seen him". Cst. Graham then asks Mr. Cooper, "OK, you just heard he was there from other people in the house?" His answer was, "Yes". When asked by Cst. Graham about whether there was just the one person in his bedroom and whether someone had ushered his son Luke away from the bedroom, Mr. Cooper agreed with Cst. Graham that he wasn't totally clear on everything. Cst. Graham then asked Mr. Cooper whether that was a result of being hit". Mr. Cooper responded, "one hundred percent. Yeah".

[46] Further in the statement Mr. Cooper said that he had been knocked out and that "she" told him that he was out for a good few minutes. Mr. Cooper also told Cst. Graham, "I might have seen him, like, I remember seeing his face and like beard, I don't remember him having a hat on, she said he had a hat on".

The Evidence of Detective Constable Joshua McNeil

[47] Constable McNeil testified as a witness for the Crown.

[48] He testified that on December 24, 2020, he was the officer assigned to the home invasion at Anthony Cooper's residence which had happened earlier that morning.

[49] Cst. McNeil's evidence was that after reviewing the file, he went to Mr. Cooper's residence to speak with him. He said that he arrived around 11:30 a.m. and spoke to Meghan Morris and Anthony Cooper about what had happened earlier that night and they gave him a brief run-down. Cst. McNeil observed that Mr. Cooper's face was severely swollen and bruised and his eye was shut. When asked what Mr. Cooper told him about the suspect in the matter, Cst. McNeil said that he was told by Anthony Cooper that three males and a female came into the home, that he was in bed and was struck in the face and six firearms and a bag of marijuana and a compound bow with arrows were taken. Cst. McNeil said that Mr. Cooper identified the main aggressor as T.J. who he believed was Thomas Brown. Cst. McNeil said that Mr. Cooper told him that he knew T.J. Brown's father and that he owned a tow truck company. Cst. McNeil said that Mr. Cooper told him that he knew T.J. Brown from seeing him around and that he had seen him at J.D.'s house and knew him from the Wellington/Enfield area.

[50] Cst. McNeil did not take a formal statement from Mr. Cooper.

[51] Cst. McNeil said that Meaghan Morris told him that J.D. was there and another male by the name of Jeff, who she had seen with J.D. His evidence was that he didn't believe that Meaghan Morris named the main aggressor at that point. Cst. McNeil did not take a formal statement from Ms. Morris, since an audio statement had already been obtained.

[52] Cst. McNeil's evidence was that the firearms which were taken from the home that night were never located.

[53] In cross-examination, Cst. McNeil agreed that the notes that he took when he spoke with Mr. Cooper recorded what he was told by Mr. Cooper and read, "Knows TJ from around, more knows him to see him, even said, 'Who are you?' when he came into the room". Cst. McNeil testified that it was his understanding that when Anthony Cooper got off the bed, he saw this person and said, "Who are you?" before he was assaulted.

[54] Cst. McNeil said that Mr. Cooper did not appear to be intoxicated at the time he spoke to him. When asked if Mr. Cooper told him how much marijuana had been stolen, Cst. McNeil's evidence was that Mr. Cooper didn't know, he said a bag, maybe 200 grams.

[55] Cst. McNeil testified that the police obtained a search warrant for Mr. Eye's house, that the house was searched on December 24, 2020, and no firearms related to this incident were found. Cst. McNeil stated that where Mr. Cooper had showered immediately after the assault, a decision was made not to obtain DNA evidence.

The Evidence of Luke Cooper

[56] Luke Cooper was called as a Crown witness.

[57] Luke is presently 21 years old. He was 18 years old at the time of what he described as the home invasion of his father, Anthony Cooper's house in Wellington. He said that he lived there with his father and his father's girlfriend, Meghan Morris and around midnight on December 23/24, the house was broken into, and his father was stolen from and beaten up. Luke agreed in cross-examination that he had told the police in the aftermath of the incident, later that night, that the incident had happened around 11:45 p.m.

[58] Luke said that he was in the TV room by himself watching basketball on the TV when people entered through the side door of the house, which led into the TV room. Luke's evidence was that the side door leading to the outside was closed, but not locked. He stated that he believed that his father and Meaghan were in the bedroom together at that time.

[59] From where he was sitting watching television, Luke said that he could see the side door totally and that he was about seven or eight feet from it. Luke said that the side door has a sliding window which was closed because it was cold outside.

[60] When asked what happened next, Luke's evidence was that Thomas came through the door first, that he just opened the door, looked around, and J.D. followed him, then a girl and he thought Jeff came in last. When asked who Thomas was, Luke's evidence was "T.J.". He said that he didn't know T.J.'s last name. Luke stated that Joseph, or J.D. was the neighbour across the street. He thought that J.D.'s last name was Eye. He said that he did not know the identity of the "girl". Luke said that the last person was Jeff and that he knew him because of J.D., the neighbour. He said that he thought Jeff's last name was Hilchie.

[61] Luke's evidence was that at the time, he did not know Thomas' name. Luke said that this person was white and had a hat on and a hood over it. Luke described his height as about 6 feet and weight as about 200 lbs. He thought that the man was in his mid-thirties. Luke said that he thought that this person had his sleeves rolled up. He said that the person had a dark brown beard. Luke said that he could see his face partially, because he didn't see him for that long.

[62] In cross-examination, with reference to the statement that Luke gave to the police several hours later, he said that he could not see the colour of the person's

eyes, any logo on the hat or describe what kind of pants the person was wearing. He thought that the person's hoodie was blue, but he wasn't sure.

[63] Luke said that he recognized J.D. Eye when he saw him. Luke gave a description of the female that he did not know by saying that she was white, tiny, 5'5" with blonde hair to her shoulders.

[64] Luke said that he knew the fourth person, Jeff, from somewhere and had seen him before, but at that moment he didn't recognize that it was Jeff.

[65] When asked by Crown counsel how he came to know the first person who came into the room as "Thomas", Luke said that after they left Meaghan said that she recognized him. Luke said that he had never seen Mr. Brown before.

[66] Luke's evidence was that the person he now says was Mr. Brown, came in the room, looked around and saw him, asked him where his father was and stepped closer to him. Luke said that he was watching the people come into the room, and Mr. Brown asked him again where his father was. Luke said, "He's in his room". Luke said that Mr. Brown seemed angry. He wasn't screeching, but his voice was loud. Luke said that he saw the rest of them come in the room. Mr. Brown asked again where his father was, and Luke said before he could reply, Mr. Brown slapped him on the right side of his face with his left hand. Luke said that he started to get

up and Mr. Brown slapped him again. His evidence was that he started going towards his father's bedroom which was about five paces away. Luke said that he was shoved out of the way as he reached his father's bedroom. He did not know who shoved him, but they put both their hands on his shoulders. Luke said that he turned around and J.D. Eye ushered him down to his bedroom. He also turned and saw the person he says is Mr. Brown go into his father's bedroom.

[67] Luke's evidence was that after he went into his bedroom J.D. stood at the door, and he sat on his bed and started to talk to J.D. He said that he was confused about what was happening. Luke said that he asked J.D. what was going on, and what was he doing. Luke said that he heard crashing and banging coming from his father's bedroom and Meaghan hollering and screeching. Luke said that he also heard metal banging, which he thinks was from the gun cabinet. Luke said he knew that the gun cabinets were in the corner of his father's bedroom. Luke said that he did not hear any words spoken coming from the bedroom. Luke estimated that he talked to J.D. for about thirty seconds and then J.D. took off down the hallway. Luke told him that he was going to stay in the bedroom. Luke said that he didn't go back into his father's room until Meaghan did so. His evidence was that he heard the four people leave and the door close, and then walked down to his father's bedroom and went in. Luke said that his dad was on his bed holding his face.

[68] Luke said that he saw that one of his father's gun cases was open. The dresser drawers were open, and he saw a hole in the wall.

[69] Luke said that his father's face was very bruised, red, and swollen. He said that he went to the kitchen, got some ice, and brought it to his father in his bedroom. Luke said that he then saw a truck backing out of J.D. Eye's house.

[70] Luke said that after a few minutes his father got off the bed and went to the washroom to check his face. Luke's evidence was that while his father was doing so, he was talking to Meaghan, asking her what that was about and what had just happened. Luke stated that his father then took a shower.

[71] Luke's evidence was that while his father was in the shower, he was in the kitchen talking with Meaghan. He stated that Meaghan smoked, so he drove down to a gas station nearby and then came back. In cross-examination Luke said that it was 7.4 kilometers from his home to the gas station and back, so that it took him about 15 minutes to go there and return.

[72] When asked by Crown counsel why he drove to the gas station, Luke stated, "They needed cigarettes". Luke said that he came home immediately from the gas station, that his father then called the police and the police showed up.

[73] Luke said that he saw both Meaghan and his father smoking cigarettes after he returned from the gas station.

[74] Luke was asked by Crown counsel whether there was any discussion about calling the police. He said “yes”. He was asked what his opinion was in that discussion. Luke’s evidence was that they needed to call the police.

[75] Luke said that he gave a statement to the police close to 1 a.m. or just after 1 a.m.

[76] Luke said that he thought it was not more than five minutes from the time the people first entered the TV room and when he heard the side door close.

[77] Luke’s evidence was that he had nothing to drink that night, but he smoked some weed to help him sleep around 9:30 p.m. He said that he has trouble falling asleep and the weed helped him to do so. Luke’s evidence was that he didn’t see his father drink alcohol that night. He said that he didn’t know if his father or Meaghan had smoked weed.

[78] Luke was asked by Crown counsel if he thought he would recognize the person who was the first male who entered in the TV room that night. He said that he could and identified Mr. Brown as the individual sitting in the courtroom.

[79] Luke agreed in cross-examination that when he gave an audio statement to the police later that night, at around 2:30 a.m. he referred to the person who came through the door first, as “the guy”. Luke did not refer to T.J. Brown in this statement.

[80] With reference to the audio statement that Luke gave to the police, he agreed in cross-examination that J.D. Eye and his friends would sometimes show up at his house, unexpectedly, at midnight. Luke’s testimony was that “they come in to get liquor or something else”. He said that they borrowed liquor that they didn’t buy it. Luke’s evidence was that “something else” meant to see his dad. Luke said that he would have no way to tell if his father was selling drugs out of his home in December 2020.

[81] Luke stated that the police did not show him a line-up of photographs.

The Evidence of Meaghan Morris

[82] Meaghan Morris was called as a Crown witness. She was thirty-five years old when she testified. She has been in a relationship with Anthony Cooper for four years. Ms. Morris was present at Mr. Cooper residence on December 23, 2020, when there was, in her words, “a home invasion”. She resided there with Anthony Cooper and Mr. Cooper’s 18-year-old son, Luke Cooper.

[83] Immediately before the incident, Ms. Morris stated that she was in the master bedroom with Mr. Cooper, laying in bed, playing a game on her phone, and watching TV. Ms. Morris was lying on the right side of the bed. She was closer to the bedroom door than Mr. Cooper who was lying on her left on the bed. Ms. Morris said that she wasn't sure what time it was when the incident began, she said "maybe around midnight" i.e., December 24, 2020. Ms. Morris said that Luke was home at the time and was in the first living room by the side door of the house.

[84] Crown counsel asked Ms. Morris what happened from there. Her evidence was, "T.J. came in yelling and Tony went to stand up and then T.J. hit him a bunch of times and Tony fell back onto the bed and T.J. still kept hitting him and then I had left the room and Jeff was outside the door and I asked him to stop and he wouldn't and then I went into the same living room that I thought Luke was in and J.D. and Emily were there and I asked them to stop it and then Emily eventually went in and got him to come out." Ms. Morris said that J.D. Eye lived across the street from Mr. Cooper. Ms. Morris said that she believed that Emily Holman, was T.J.'s girlfriend at the time. Ms. Morris' evidence was that Emily said that she could stop him, and she asked Emily how she could do so, and Emily said that if we didn't call the police, she could calm him down. Ms. Morris testified that she said, "Go do it. Go stop it".

[85] When asked by Crown counsel who “T.J.” was, Ms. Morris said “T.J. Brown”. Ms. Morris was asked if she knew his full name. She responded, “Thomas something”. She said that she did not recall what T.J. was yelling when he first came into the bedroom. In terms of the lighting in the bedroom, Ms. Morris said that a lamp was probably on but there was no overhead lighting. Ms. Morris said that T.J. punched Tony in the face with his fist; she couldn’t recall which hand.

[86] Ms. Morris was asked by Crown counsel if Mr. Cooper said anything. Her evidence was that she didn’t think Tony knew it was T.J. at first, so he was “kind of saying, ‘who are you’ maybe, I don’t know”. She recalled that Tony stood up and that T.J. hit him. She said that Tony fell back onto the bed and was knocked unconscious, and T.J. just kept hitting him, punching him at least five or six times in the face/head. Her evidence was that when he fell onto the bed, Tony’s head was, she thought, up by the pillows. When asked by Crown counsel when it was that she first observed Mr. Cooper as being unconscious, she said that she thought it was after the first hit, when he fell back onto the bed. When asked what she was doing at this point, Ms. Morris said that she stood up by the bed and yelled or screamed, “Stop, what are you doing? Stop.” When asked if there was any response, she said that T.J. yelled in her face for a couple of seconds, that this scared her, and she left the room. She didn’t remember what T.J. yelled. Ms. Morris said that when T.J.

Brown was “in her face” she was a few inches away from him with their faces facing each other. Ms. Morris did not remember what Mr. Brown was doing at the point when she left the bedroom. She said that there was a lot of stuff being banged around and she could hear a lot of noise coming from the master bedroom.

[87] Crown counsel asked Ms. Morris if she made any observations of what Mr. Brown was wearing. She said that she thought, maybe, a hoodie. She said that his hood was up, and he might’ve had a hat on under the hood. Her evidence was that she saw his face. She was asked to describe his face. She stated that she was not really looking at his face a whole lot to describe it. She didn’t remember if he had facial hair.

[88] Crown counsel asked Ms. Morris at what point she recognized that the person was T.J. Brown. Her answer was, “Pretty much as soon as he started hitting Tony”.

[89] Ms. Morris was asked by Crown counsel if she was able to describe Mr. Brown’s build. She stated, “medium height, she guessed, and maybe medium build and maybe kind of stocky”. She said that she was 5 feet 6 in height and Mr. Brown was probably a bit taller than she was. She said that Mr. Brown was white skinned.

[90] Ms. Morris’ evidence was that after she left the bedroom, she went into the first living room, by the side door. That was where she thought Luke Cooper was

and she heard other people there and was trying to get anyone to help or do something. When she first left the bedroom, she said that Jeff Hilchie was outside the door, and she asked him to stop T.J. hitting Tony and Mr. Hilchie just ignored her. When asked how she knew Jeff Hilchie, Ms. Morris said, "I just seen him around a couple of times". She added that she didn't "know, know" him, but had met him a couple of times.

[91] Ms. Morris said that after the female said that she could calm T.J. Brown down, if they didn't call the police, she said, "Go do it", and the female went into the bedroom. She said that she didn't know how long Emily was in the bedroom, but when they came out, they had a "bunch of guns", a bow and arrow and a "garbage bag which had some weed in it" and they, T.J., Emily, Jeff, and J.D. left by the side door.

[92] Ms. Morris said that at the time she was upset, anxious and scared. She could not say who carried which items out of the house as she wasn't really paying attention to that. She said that the guns were kept in a gun cabinet in the master bedroom.

[93] Ms. Morris' evidence was that after the individuals left, "we saw them walk across the street" to "J.D.'s house" through a window in one of the living rooms.

She said that shortly afterwards, a car left from that house. She could not describe the vehicle or say who was in it.

[94] Ms. Morris testified that after they left, she went into the master bedroom to see if Tony was okay. She said that Tony was sitting up, talking, and was “saying, like, ‘what the heck just happened’”. She thought that Luke was probably in the master bedroom too at that point. Ms. Morris said that Tony Cooper’s face was a mess, that he had a lot of bruising, and his eye was swollen shut and was bleeding. She stated that there was a lot of blood on the bed. She said that the room was “a disaster”, with things thrown everywhere, with tables and dressers knocked over and ‘holes in the wall’. Ms. Morris stated that the gun cabinet was open but had been locked before the incident.

[95] When asked by Crown counsel to comment on “their” sobriety that night, Ms. Morris responded, “we were pretty drunk”. Ms. Morris was asked if she recalled what she had to drink that night. She said, “No”. When asked what “pretty drunk” meant to her, Ms. Morris’ evidence was “we were not like incoherent, or anything like that, we had a few drinks”. She said that they probably starting drinking at suppertime, around 5 p.m., but she didn’t really remember exactly. She said that the drinks that she had did not impact her level of awareness. She estimated that she had five or so drinks through the whole night. But added, “I don’t remember”. She said

that she did not know the type of alcohol she drank, that it could have been wine or vodka. Crown counsel asked Ms. Morris if Anthony Cooper had consumed any other substances that night apart from alcohol. She hesitated and then said, "I don't remember". She then added, "Definitely weed, I'd say". She stated that she could not remember when he had the weed.

[96] Ms. Morris said that after seeing Anthony Cooper in the bedroom, he then cleaned himself up and took a shower and then they "called the cops". She could not say what time the police were called.

[97] Ms. Morris was asked by Crown counsel whether, before the police were called, there was a discussion about calling them. Her answer was, "We knew we were going to call the police as soon as they took the guns".

[98] Ms. Morris was asked by Crown counsel whether they talked about who had come into the home that evening. She said they did. Ms. Morris said that it was T.J., J.D., Jeff, and a female who she didn't know.

[99] Ms. Morris gave a statement to the police, outside the house, while sitting in a police car. She didn't know what time it was. She described feeling shocked and scared when she did so. She thought that her statement took seven minutes or so.

[100] Crown counsel asked Ms. Morris whether, before this night, she had ever interacted with Mr. Brown before. She said she had, but not very many times, “like maybe two or three. Probably less than five”.

[101] Ms. Morris was asked if she recalled the first time that she met or interacted with Mr. Brown. Her evidence was that “it was probably when I was renting from another guy, Shannon, who lives down the street where we were, and he would come over there once, a few times, I’m not sure”. This, she said was in Wellington, down the street from their current residence. She thought that this was about six years ago, i.e., in 2016 or 2017. When asked by Crown counsel who introduced her to Mr. Brown, she said she didn’t know, that T.J. just came over one night when there were people over and they were having some drinks.

[102] Ms. Morris was asked if she had any conversation with T.J. Brown that evening. She said that she was sure they probably did. Crown counsel asked Ms. Morris if she became aware of T.J. Brown’s name that night. She said that she did because someone “would’ve told me”, but she had no specific recollection of that. Ms. Morris was not sure how long she and Mr. Brown were in the same area that night. Ms. Morris was asked if she could recall Mr. Brown’s appearance that night. Her evidence was that he was “maybe a little bit smaller than he is now”. By smaller she said that she meant, “in his frame, skinnier maybe”. Ms. Morris was asked about

Mr. Brown's facial features on the night she met him for the first time. Her evidence was that she thought he had a full-faced beard and brown hair.

[103] Ms. Morris was asked about the second time that she met Mr. Brown. She said that this was probably at "Shannon's again, I don't know". She added, "I didn't really pay a whole lot of attention to him". Ms. Morris had no specific recollection of this second time.

[104] Ms. Morris was asked if there was a time after that. She responded, "There could have been, I don't remember exactly how many times I've met him, I wasn't friends with him or anything like that it was just kind of he might be at a place where I was or, but I'm not 100% sure exactly how many times". Ms. Morris said that she had been to J.D. Eye's house and had seen T.J. Brown there. She described this as a regular night, they were having drinks and hanging out and there might have been a bonfire in the back yard. She could not recall when in time this took place but said that she was in a relationship with Anthony Cooper at the time and was residing with him. She said that she "maybe" had some conversation with T.J. Brown that evening, but nothing that she remembered. She said that there were a "bunch of people there". Crown counsel asked Ms. Morris if she recalled observing Mr. Brown's appearance that night. She said that she did and that he looked similar to "how he looks today".

[105] Ms. Morris identified Mr. Brown in Court. When asked by Crown counsel whether she had identified Mr. Brown in her audio statement that she gave the police, she said, “No. I don’t think I said his name”. When asked, “why is that?”, Ms. Morris responded, “They didn’t ask me his name”. She said that the police officer she was talking to asked her the names of all the other people but “he just didn’t ask me his”. Ms. Morris added that when the police first got to the house before they started taking her statement she had done so. Her evidence was that she spoke to a male police officer the following day, December 24, 2020, and told him that T.J. Brown had come into the house, hit Tony and stole stuff. Ms. Morris was asked whether, while Mr. Brown was in the house, she ever called him by name. Her evidence was that she didn’t remember, but “probably”. Ms. Morris was asked by Crown counsel whether she knew Mr. Brown’s last name before the incident. She said that she did, that this was probably the first time she met him, and that she knew of him, through other people.

[106] Crown counsel asked Ms. Morris if she had any knowledge of Mr. Brown’s age at the time of the incident. She said that she believed that Mr. Brown was two years younger than her, so 33 years of age. Ms. Morris’ evidence was that Mr. Brown had the same birthday as her sister. She said that she was aware of his birthday from one of the times they had met, that her sister was always with her, and

it was brought up that they had the same birthday, i.e., the same day, and probably the same year as well. She said that she thought this occurred when she was renting at Shannon's house, i.e., in 2016 or 2017.

[107] In cross-examination Ms. Morris agreed that she only saw the person who entered the bedroom and struck Mr. Cooper for two or three seconds before he was struck. Ms. Morris agreed with Defence counsel that Tony Cooper was drinking the night of the incident, as was she. She had testified in direct, that they were "pretty drunk". Her evidence in cross-examination was that she probably only smoked weed twice during that evening. Ms. Morris' evidence was that she didn't think that she was consuming other substances that night, apart from marijuana and alcohol. Ms. Morris then added, "We didn't have any other substances that night." She denied that they consumed other drugs. Ms. Morris denied that Mr. Cooper had been selling drugs or alcohol from his residence.

[108] In cross-examination Ms. Morris agreed that she had no first-hand knowledge that Emily was T.J. Brown's girlfriend and added that she should not have said that she was.

[109] Ms. Morris agreed in cross-examination that the times that she had met Mr. Brown in the past were at gatherings or parties of some kind. She also agreed that she had been consuming alcohol and possibly drugs on these occasions. Ms. Morris

also agreed in cross-examination that she couldn't quite remember if Mr. Brown had a beard or didn't have a beard the first time that she met him.

[110] In cross-examination, Ms. Morris said that she didn't recall contributing any answers given by Mr. Cooper to the 911 operator at 2:00 a.m. on the night of the incident.

[111] Defence counsel asked Ms. Morris questions about the statement which she had given to the police on December 24 at approximately 2:20 a.m. Ms. Morris agreed that in this statement she did not name T.J. Brown as a person who came into the house.

[112] In cross-examination, Ms. Morris agreed that she didn't notice anything about the person who beat Tony up in terms of eye colour. She stated that the person had a hoodie on so she couldn't see the colour of his hair. She testified that she was pretty sure that he had some rings on, but she couldn't say for certain. She did not see any tattoos. She said that she didn't notice any particular facial features, but added that she wasn't looking for any, "I knew who it was". She agreed that she didn't tell the police when she gave her statement but added, "I told them after".

[113] When asked whether the police ever showed her a photographic lineup in relation to Mr. Brown, Ms. Morris stated, "No, we knew it was him".

The Evidence of Anthony Cooper

[114] The Crown called Mr. Cooper as a witness.

[115] Mr. Cooper was 56 years old at the time he testified. He resides in a residence on Highway 2 in Wellington, Nova Scotia at the address named in the indictment and has for the past six and one-half years. He said that there was a home invasion at his house where three men and a lady came in, stole his rifles and some weed and beat him up quite badly. He said that this took place a year and a half ago right before Christmas. He said that he had three sons, with Luke Cooper residing with him at his home in Wellington.

[116] Crown counsel asked Mr. Cooper what he was doing immediately before the incident. He said he was lying in bed and he and Meaghan were about to go to sleep and were playing a game on her phone. Meaghan was lying on his left-hand side. He stated that the door to the bedroom was usually open, but he had no specific recollection as to whether it was that evening. He said that he didn't know what time it was at the time. He said that there was probably a table lamp on, and the TV would've been on. He said that Luke was home and watching a basketball game in the TV room.

[117] When asked what he remembered next, Mr. Cooper said that he remembered T.J. coming around the end of the bed and screeching something, he didn't know what. He said that he went to stand up but wasn't sure if he actually got to his feet, and said something like, "what the fuck", when he was hit and knocked unconscious down beside the bed. He didn't know how long he was unconscious. He said that he woke up lying beside the bed. Mr. Cooper said that he was hit on the right side of his face near his cheekbone. He assumed that T.J. hit him with his hand or fist.

[118] Mr. Cooper identified T.J. as Mr. T.J. Brown, sitting in the courtroom.

[119] Crown counsel asked Mr. Cooper at what point he recognized Mr. Brown when he came into the room. He said that it was about probably three steps to get to Meaghan's side of the bed and two steps to his side, that he looked and saw a beard and he knew that T.J. had a scruffy beard for a while. Mr. Cooper said it was at that point, probably two seconds after T.J. came into the room.

[120] Mr. Cooper testified that when he came to, he was down beside the bed and woke up, and he remembered T.J. Brown punching the gun locker with his fist. He said that he sat up on the bed and could see the image of a girl, who he did not recognize, in the left-hand corner, and he said, "What the fuck" and the girl said, "It's all right. Look what I found". Mr. Cooper testified that she was where he kept weed in a corner cabinet in the room. He said that he looked back and T.J. had two

or three rifles out of the gun locker and against the wall. He said that T.J. must have hit him again because he was knocked out on the bed. He described being awake for about 20 seconds between being knocked out and being hit and knocked out again. Mr. Cooper said that he remembered that T.J. had a bunch of “gold rings or something” on his right hand which he saw when T.J. was hitting the gun locker. The gun locker, he said was about a foot from the end of the bed. Mr. Cooper at first testified that he didn’t recall Mr. Brown saying anything during the 20 seconds that he was awake and then corrected his evidence, saying, “I heard the word ‘cops’, or ‘if you call the cops’ or something like that” and that Mr. Brown was loudly screeching. He said that during that 20 second period when he was awake, he said, “What the fuck”, or words to that effect. He did not recall if he used Mr. Brown’s name out loud.

[121] Mr. Cooper’s evidence was that the rifles were always locked in his gun cabinet and were locked there prior to Mr. Brown coming into the room. His evidence was that he had rifles in the right-hand side of the gun cabinet and shotguns in the left-hand side.

[122] When asked by Crown counsel if he had made any observations about what Mr. Brown was wearing that night, Mr. Cooper said that he had a ball hat on, but that he didn’t really see what else he was wearing. Mr. Cooper said that Mr. Brown

was white skinned, looked like a stocky guy with a beard that was the same colour as his hair, which was brown, maybe a bit lighter. Mr. Cooper was not sure of Mr. Brown's age; he said maybe between thirty or thirty-five years. He was not aware of Mr. Brown's eye colour.

[123] After waking from being knocked out the second time, Mr. Cooper's evidence was that Meaghan and Luke were hovering around the bed. He said that he was trying to assess the injuries to the left side of his face, lips, and the cut on the back of his head from being hit multiple times. He described being pummeled. He described the room being in disarray. When asked by Crown counsel what he did next, Mr. Cooper said that he thought that he got up, found his phone, and texted J.D. Eye, who he said was a neighbour who lived directly across the street from him. When asked why he texted J.D. Eye, he said that he knew that the only reason T.J. Brown would have been there was through J.D. His evidence as that T.J. and J.D. were friends. Mr. Cooper didn't recall speaking to Meaghan Morris or Luke before he texted J.D. Eye. When asked what time he texted J.D., Mr. Cooper said that he knows now that it was 12:03 a.m. on December 24 but wouldn't have known that at the time. When asked if he recalled what he said in the text message, Mr. Cooper testified that he texted, "What the fuck?" He said that J.D. texted him back right away. Mr. Cooper replied by text saying, "Bring my stuff back right away, or I'm

calling the cops”. Mr. Cooper said that he gave J.D. time to respond, but J.D. didn’t do so. Mr. Cooper’s evidence was that he texted J.D. back saying something like, “I guess you’ll be going to jail then”. Mr. Cooper said that when he sent those text messages, he was feeling very mad and vengeful.

[124] Mr. Cooper said that he thought that after sending the text he took a ten-to-fifteen-minute shower. Mr. Cooper said that he called the police about an hour later, but he couldn’t recall the exact time. He testified that he waited to call the police because he wanted his rifles back. He thought that he had a better chance of getting them back if he didn’t “go through the police”. When asked by Crown counsel what he meant by that, Mr. Cooper said that he didn’t know how the police were going to go and get the rifles. He said that he thought that if he warned “them” that he was going to call the police that they wouldn’t want to get in trouble for stealing the guns and his weed and would realize that they had an easier and cheaper way out of things than having police involved.

[125] Mr. Cooper testified that he told the police which firearms were taken either that night or the following morning. He said that he had paperwork for all the stolen guns, except for one rifle. The serial numbers and descriptions of the firearms were recorded on paperwork which Mr. Cooper said had been given to him by a court

about ten years previously. He showed this document to the police because it listed the stolen rifles. This document was an Exhibit at trial.

[126] At trial, Mr. Cooper described these five rifles in detail, some of which he said had belonged to his grandfather and had been passed down to him. He said that he also had a crossbow which was taken.

[127] Crown counsel asked Mr. Cooper if Meaghan Morris had indicated to him who she had observed in the home during the incident. His response was, “probably, I guess we both knew”. He added that she mentioned J.D. and Jeff, although he didn’t see them. He said, “I just knew it was T.J.”.

[128] Mr. Cooper gave a statement to the police at his home. He said that he had no idea how long his statement was, but guessed two, three minutes or five minutes. Mr. Cooper was asked by Crown counsel whether, when he gave his statement the police, he told them who he thought the suspects were that came into his home. He said “Yes”. He testified that he named Jeff Hilchie, J.D. Eye, T.J. Brown but he didn’t know the “girl’s” name. Mr. Cooper said that Mr. Hilchie was living with J.D. Eye, across the street from him, for a month or so prior to the incident.

[129] Crown counsel asked Mr. Cooper whether, before the evening of the incident, he had ever interacted with Mr. Brown. His evidence was “yes”, on probably three occasions.

[130] Mr. Cooper was asked whether he recalled the first time that he met Mr. Brown. His evidence was that he really didn't. He stated that it could have been fifteen years ago, and it could have been three or four years ago. Mr. Cooper's evidence was that he thought he might have met Mr. Brown years before when he was a kid while picking his daughter up from school near T.J. Brown's father's house in “Old Ham”. He added that his daughter is about the same age as Mr. Brown and that Mr. Brown had a friend or cousin who used to go out with his daughter's best friend.

[131] Mr. Cooper was asked if he remembered the second time that he met T.J. Brown. His evidence was that T.J. was “over at J.D.'s and we were going to a dance in Waverly”. He said that was three to four summers ago in the first week in September. Mr. Cooper said that he was at J.D.'s house about an hour before they left for the dance. They had some pre-dance drinks. There were six to ten people there. He thought that T.J. Brown was there before he arrived. He said that he was sure that he and T.J. Brown “spoke”. Mr. Cooper said that he knew who T.J. Brown was at the time. He said that he remembered saying to Mr. Brown that night, “I hear

you're the strongest man in Letterkenny". His evidence was that he was just joking, and T.J. Brown didn't say anything, just smiled but didn't do so as if he were bragging. He said that Mr. Brown was a "pretty able boy" and that he thought that T.J. Brown had run-ins before and that he didn't come out on the short end. Mr. Cooper said that he knew about 50% of the people at the dance, it being a small community. Mr. Cooper's evidence was that he remembered speaking with T.J. Brown at the dance, but he did not recall what they spoke about. He said that they probably spoke about the "girls" that were there but agreed that was mere speculation of his part.

[132] Mr. Cooper was asked if he remembered the next time that he saw Mr. Brown. He testified that he thought it was at a party the next summer at Grand Lake, although he added this party could have been the summer before the dance. He said that FM hosted this party and that he and his family and close friends were there with about thirty people attending. Mr. Cooper said that this party was an annual event and had taken place the last six to eight years. He added that it was the first time that he saw T.J. there. He recalled that T.J. Brown was sitting at a firepit beside the lake with his cousin, and it was the first time that he had ever met his cousin. The cousin's first name was "Frank", but Mr. Cooper didn't know his last name. Mr. Cooper said that his daughter's best friend used to go out with Frank, but he had never met Frank

before. He said that he talked to T.J. and his cousin for about ten to fifteen minutes. He didn't recall what they talked about and said that they were just having a good time, joking. He had consumed a couple of drinks. When asked by Crown counsel what he recalled about Mr. Brown's appearance at that time, he said that Mr. Brown didn't have a beard and doesn't now recall what he was wearing.

[133] Mr. Cooper said that if he sees Mr. Brown driving his truck and he's driving by, they wave, "It's not like we're strangers".

[134] When asked about the next time that he met Mr. Brown, Mr. Cooper testified he saw Mr. Brown across the street at J.D.'s house and was talking to him there. That was about three to four years ago, at some time "before Covid". Mr. Cooper said that T.J. may have been sitting in J.D.'s bar room with another guy that he hadn't met before. When asked why he was there, Mr. Cooper said that he thought that he might have gone over to "get some dope from J.D.". He said that he probably said "Hi" to T.J. and T.J. probably said "Hi" back, and not much more. Mr. Cooper said that T.J. Brown's appearance at that time was no different from what he looked like in Court. Mr. Cooper said that he was at J.D. Eye's house about ten minutes.

[135] When asked by Crown counsel about the next time that he saw Mr. Brown, Mr. Cooper stated, "just a vehicle passing by". He recalled a specific occasion a few years ago at the corner of Highway 2 and where one would come from Exit 8 at

Elmsdale. He said that T.J. was turning left onto the highway 2 and he was turning right onto highway 224. He said that he waved, and T.J. waved back. There was a woman in the passenger seat that he did not recognize. Mr. Cooper's evidence was that he recognized the person as T.J. driving his old pickup truck. He described the truck as "cool" a blue Ford, 1970 or 1972. His evidence was that later he asked someone, who he thought was probably J.D. about the truck, which he hadn't seen before and they said, "yes, T.J. owns that". Mr. Cooper said that this might have been the same summer as the Grand Lake event, i.e., three years ago. Mr. Cooper added that he thinks that he was on the way to cut a tree down for someone who he said was friends with T.J. When he arrived at this property, his evidence was that one of T.J.'s trucks was there – an older black Nissan Titan, which he had seen T.J. driving years before in Enfield. He assumed that when he waved to T.J., T.J. had been coming from this property. Anthony Cooper's evidence was that he saw Mr. Brown driving a new black Nissan Titan about ten times. He would see the truck and then look to see if he knew the driver. Mr. Cooper said that he saw Mr. Brown driving this newer truck before the home invasion.

[136] Mr. Cooper was asked by Crown counsel, based upon his interactions with Mr. Brown, if he could describe what, if any distinctive features he had. Mr. Cooper said he didn't know what he would classify as a distinctive feature.

[137] Mr. Cooper's evidence was that he knew T.J. Brown's father, who owned a tow truck which had towed his pick-up truck from Stewiacke on one occasion. He said that T.J.'s father had towed a lot of his friends' cars, that it was a small community. He said that everyone knew Norm, T.J.'s father, from towing.

[138] Mr. Cooper said that he did not know Mr. Brown's address on the night of the incident. His evidence was that they had never been to each other's homes. He knew T.J.'s last name before the home invasion.

[139] Crown counsel asked Mr. Cooper if he could comment on his level of sobriety on the night of the incident. He replied that he might have had two to three cans of beers that night. He said that that was since supertime, and that he might not have had any after ten o'clock. Mr. Cooper said that he knew that he had to get up and do his Christmas shopping for his kids the next day. He added, "I was not over-indulging, that's for sure". Mr. Cooper denied that he was consuming any other substances. Mr. Cooper said that Ms. Morris probably also had a few beers that night, although he had no specific recollection in that regard.

[140] Crown counsel asked Mr. Cooper to comment on his level of impairment, if any, when Mr. Brown entered his bedroom that night. He replied that he was not impaired.

[141] In cross-examination Mr. Cooper confirmed that he called 911 on the night of the incident. He said that he knows now it was shortly after 2. a.m., but it seemed like a shorter period of time to him at the time. Mr. Cooper also confirmed that he gave a recorded statement to the police that night.

[142] Mr. Cooper agreed with defence counsel that the times when he said he saw Mr. Brown driving on the highway when he was driving would have been very quick observations. He said that they each were probably driving around 70 km per hour. Mr. Cooper agreed with Defence counsel that most times when you meet on the road, it's the vehicle that one recognizes. Mr. Cooper also agreed that he's had the experience of waving to someone in such circumstances, and then realizing that it wasn't the "right" person. However, in redirect, Mr. Cooper's evidence was that he had never waved to T.J. and then realized the person was not T.J.

[143] In cross-examination, Mr. Cooper was asked whether he told the operator the truth when he called 911 on the night of the incident. He said, "I believe so, yes". He also testified in cross-examination that he believed that he told the truth when gave a statement to the police within an hour of the 911 call.

[144] Mr. Cooper's evidence, when asked if he gave accurate information to the 911 operator, was that he didn't think it was very important when he called, he just figured that they would send the police over. He stated that he wanted the police to

come so that he could explain. Mr. Cooper's evidence was that he gave accurate information to the police.

[145] Mr. Cooper agreed with Defence counsel that he only saw the person who came into the bedroom for about three seconds before he was struck and that when he was struck, he was knocked unconscious.

[146] Mr. Cooper maintained in cross-examination that he might have had two to three beers from 6 p.m. until 10 p.m. Defence counsel asked Mr. Cooper about Meaghan Morris' trial evidence that they were both "pretty drunk" that night. Mr. Cooper stated, "I would say that she's mistaken". Mr. Cooper denied consuming any marijuana that night.

[147] Mr. Cooper gave an audio statement to the police (Cst. Chris Graham) on December 24, 2020, at 2:24 a.m., and confirmed he had reviewed the transcript of that statement prior to trial. Defence counsel put Mr. Cooper's statement "And took the rifles out and I had some weed. Like we were smoking weed that I had there" to him, which he said suggested that he and Meaghan Morris had been smoking weed that night. Mr. Cooper paused before answering, "O.K.". Mr. Cooper said that he didn't believe that the statement really indicated that he was smoking weed that night, that "the words were directed in a different.....". Mr. Cooper said that he

didn't really understand that statement and didn't know why he would have said that they were smoking weed.

[148] Defence counsel asked Mr. Cooper how much weed he thought was taken. Mr. Cooper responded, "I believe they took 6000 grams, or somewhere right around there. Four garbage bags plus a bottle or two". His evidence was that you could get 50 to 60 grams in a bottle. Defence counsel put to Mr. Cooper, "You would never describe 6000 grams of weed as a couple of grams, would you". Mr. Cooper responded, "Um, no".

[149] Defence counsel again took Mr. Cooper to his police statement where Constable Graham asked him, "How much weed did they take?". His answer to the Constable was "I don't know what it was. It was, I don't know, there was probably a couple of, couple of grams, maybe, or". Defence counsel put to Mr. Cooper that he wasn't telling the constable the truth at that point. Mr. Cooper stated that he doesn't know why he would have said a couple of grams.

[150] Mr. Cooper denied in cross-examination that around the time of the incident he was selling drugs or liquor from his home.

[151] Mr. Cooper also talked to Cst. McNeil on the morning of December 24, 2020. In cross-examination he said that he did not recall telling the officer, or saying at the

time, that when the person came through the door into his bedroom he said, “Who are you?”.

[152] A recording of the 911 call that Mr. Cooper made on the evening was played at the trial. After Mr. Cooper told the operator that he was just assaulted in his house and gave him his address. The operator then asked him, “What happened?”. Mr. Cooper said, “Two guys come in and a girl, I don’t know, my girlfriend and I were sitting there playing Yahtzee and buddy come over and started yelling and sucker punched me and tore the bedroom apart and took off with some of my rifles”. The operator also asked Mr. Cooper if he knew who the two males and the female were. Mr. Cooper stated, “Ah, I could find that out”. The operator then asked Mr. Cooper how he could find out who the individuals were. Mr. Cooper responded, “Through the neighbours”. He added, “I’m pretty sure I know one guy’s name”. Mr. Cooper also told the operator, “I had some home grown weed, there wasn’t a whole pile of it. They took that too”.

[153] The operator then said to Mr. Cooper, “Let’s see if we can get some descriptions. Can you tell me what any of them looked like?” Mr. Cooper responded, “Yeah, one guy had a beard, that I saw”. When asked how old this person would be, Mr. Cooper responded, thirty, or thirty-five. He seemed to be asking someone for assistance in answering this question. Mr. Cooper told the operator that

this male was about 5'10" with a heavy build. Before answering this question, Mr. Cooper asked someone, "What was he wearing?" He then told the operator that the male was wearing a grey hoodie with a baseball hat. Again, he seemed to be obtaining assistance from someone in providing this answer. Mr. Cooper also gave the operator a description of the "second male" by way of age, height, build and skin colour. When asked what this male was wearing, Mr. Cooper asked someone, "What was J.D. wearing?". The operator then asked, "You said you didn't know who they were, but you just called one of them by name". Mr. Cooper said that Luke said that J.D. was outside apparently. Mr. Cooper could not provide a description of the female, without asking whoever was with him. The operator then asked, "So you know that the second male was J.D., what about the other two, the first male and the female. What are their names?". Mr. Cooper responded, "I don't know". The operator then told Mr. Cooper that officers would be by to see him. An ambulance was offered, but Mr. Cooper told the operator he didn't need one.

[154] Mr. Cooper agreed with defence counsel that he did not tell the operator at any time that T.J. Brown was the person who came into his bedroom that night and punched him, even when asked directly who the person was. This, despite the fact that Mr. Cooper said earlier in his trial testimony that he believed that he had told the operator the truth. Mr. Cooper then stated that he wasn't telling the truth to the

911 operator when he said that he didn't know who they were. He testified, "I knew who he was". His evidence was, "It was because I thought I might still have a chance of getting my rifles back". Mr. Cooper said that he was still giving J.D. a chance to text him back to bring his rifles back, between the 911 call and the police arriving. Mr. Cooper said that he just wanted the police to come so that he could talk to someone in person about it and take a written statement. Mr. Cooper agreed that he had to ask Luke and Meaghan what the person, who he says now was T.J. Brown, was wearing. He said that he saw the person, that he wasn't focused on what the person was wearing.

[155] Mr. Cooper said that if he sounded drunk on the 911 call, as suggested by Defence counsel, it was because he was "punch drunk", that he might have sounded disoriented because he had been beaten up.

[156] Mr. Cooper told the police that he didn't remember the person having a hat on, "she said he had a hat on". In direct examination he said that the person who came in the room had a hat on. Defence counsel put to Mr. Cooper that he had no idea whether the person had a hat on. Mr. Cooper replied, "That person was T.J. It wasn't anyone else, I'm sorry". He added, "I guess I shouldn't have said he had a hat on. I'm sorry".

[157] Anthony Cooper was asked in cross-examination about the dance in Waverly before Covid. He agreed that it could have been as long as five years ago. He agreed that he was drinking, and probably smoking marijuana and that the time he was talking with T.J. Brown was a few minutes and he didn't know what they talked about at the dance. At the Lake party, Mr. Cooper agreed that he had one or two drinks. In cross-examination Mr. Cooper volunteered that he didn't know if Frank and T.J. were related, just that they were buddies. He said that he thought that they were related, when asked by Defence counsel why he described them as cousins in his direct evidence.

[158] On the occasion when Mr. Cooper went to J.D. Eye's house and saw T.J. Brown there, he said that he went there to get cocaine. He agreed in cross-examination that his interaction with Mr. Brown at the time was just long enough to say hello.

[159] In his statement to the police, Mr. Cooper described T.J. Brown as a "casual acquaintance", and he agreed with that description in cross-examination. Mr. Cooper agreed that the police did not ask him to participate in a photographic line-up in this case.

The Position of the Crown

[160] The Crown says that it has proven that a home invasion occurred at Anthony Cooper's home in Wellington, Nova Scotia, at the address set out in the indictment, just before midnight on December 23, 2020, and that T.J. Brown entered the home with others, and assaulted Anthony Cooper. The Crown says that the evidence proves that T.J. Brown ransacked the bedroom where Anthony Cooper and Meaghan Morris had been lying in bed and playing a game on her cellphone, and that T.J. Brown stole multiple rifles and a quantity of cannabis. The Crown says that it has proven that Anthony Cooper suffered significant injuries to his face as a result of being assaulted by T.J. Brown.

[161] The Crown says Constable Graham's evidence was credible and reliable. His evidence included the fact that he went to Anthony Cooper's home after the incident, arriving at 2:22 a.m. on December 24. He took a short audio statement from Anthony Cooper, who said that the man who had come into his room and assaulted him was T.J. Brown. Cst. Graham said that Mr. Brown described the person who assaulted him as being a white male, 5 feet 10, with a beard, of larger build, wearing a grey hoodie and a baseball hat. Cst. Graham's evidence was that Anthony Cooper told him that he knew T.J.'s father who he said owned a tow truck business in Enfield.

[162] The Crown says that the evidence of Cst. McNeil was also credible and reliable. His evidence was that he attended Anthony Cooper's home mid-day on December 24, 2020, and that when he spoke with Anthony Cooper, he identified the main aggressor in the incident as T.J. Brown. Cst. McNeil testified that Mr. Cooper told him that he knew Mr. Brown from being "around", that he had seen him at J.D. Eye's house, and he knew him from the area of Wellington and Enfield.

[163] The Crown says that Luke Cooper testified in an honest and straightforward manner. The Crown says that Luke was forthright that he only knew the names of Joshua Eye and Jeffrey Hilchie prior to that night and had never met T.J. Brown before. He described the first person who entered the house that night as having dark brown hair, being white-skinned, weighing approximately 200 – 220 lbs and likely in his mid-thirties. The Crown says that Luke Cooper's evidence provided the Court with a reliable sequence of events that evening, and that his evidence should be believed.

[164] The Crown says that Meaghan Morris witnessed Anthony Cooper being assaulted. Counsel refers to her evidence that she and Anthony Cooper, "were pretty drunk" that evening. Counsel says that she also described not being incoherent, and stated that she had approximately five alcoholic beverages over the course of the evening.

[165] Crown counsel conceded that Ms. Morris exhibited issues with her reliability, and that while doing her best to be a credible witness, appeared to be unsure of herself. Counsel says that she was honest about the things that she remembered, but had difficulty recalling past dates and times with accuracy.

[166] Crown counsel says that Ms. Morris' evidence regarding the sequence and outcome of events was corroborated by the evidence of both Luke Cooper and Anthony Cooper and the photographs entered into evidence.

[167] The Crown says that Ms. Morris was able to describe an "acquaintance" type relationship with Mr. Brown and was able to recall, but not flesh out in detail, past interactions with him. These took place in her previous residence before her relationship with Anthony Cooper and also took place at the home of Joshua Eye. Crown counsel says that while lacking in detail the memories she was able to describe were not contrived.

[168] The Crown submits that these interactions did occur and that it was not a coincidence that Ms. Morris recalled Mr. Brown's specific birth date, February 23, 1989 (confirmed on the indictment) because it was the same birthday as her sister and because she had talked about this with Mr. Brown and her sister on an occasion before the night in question. The Crown says, that for Ms. Morris, this was something unique to her about Mr. Brown. The Crown counsel says that it is

noteworthy that Ms. Morris' recollection of this date of birth went unchallenged, and there is no question of any other source wherein she learned of Mr. Brown's date of birth.

[169] Crown counsel points out that when Ms. Morris was asked in cross-examination as to her knowledge of Mr. Brown and his facial features on the night of the incident, and why she wasn't looking at his features, her response was, "I knew who it was". Crown counsel says that Ms. Morris knew Mr. Brown and recognized him when he entered the bedroom that night, unmasked, observed him assault Anthony Cooper and continued to observe him when he came within inches of her face and scared her before she left the room.

[170] Crown counsel says that the Court should accept Ms. Morris' evidence that she knew Mr. Brown and recognized him as the person who assaulted Anthony Cooper on the night in question.

[171] The Crown says that Anthony Cooper gave his evidence in a calm and cooperative manner. The Crown says that his evidence provided a window into the world he lives in. The Crown says we know from his evidence that he liked to drink alcohol and smoke cannabis and cigarettes in his home.

[172] The Crown submits that we can identify the serial numbers of the firearms stolen through documents Mr. Cooper received from the Court ten years prior. The Crown counsel says that we know that he kept a large amount of cannabis in his home and that he grew cannabis. The Crown says that we know that part of his relationship or association with Joshua Eye involved buying cocaine from him. The Crown points out that Anthony Cooper described where he resides as a “small community”.

[173] The Crown conceded that Mr. Cooper admitted that he was not truthful on the 911 call and that he did not give complete detail on his short eight-minute statement to the police. The Crown says that this inevitably created inconsistencies, specifically with respect to the 911 call. Mr. Cooper’s explanation for these inconsistencies and why he was not truthful on the 911 call was that he wanted his rifles back.

[174] The Crown points out that on direct examination in terms of the time between the offences and calling 911, Mr. Cooper said that he knew it was a while after, that he wanted his rifles back and figured he had a better chance of getting them back if he didn’t go through the police. He also said that he figured if he warned them that he was going to the police, they wouldn’t want to get in trouble, that they’d realize that they’d really fucked up and they would see that there was an easier and cheaper

way out of this than having the police involved. The Crown says that in cross-examination, Mr. Cooper confirmed still giving them a chance to return his rifles between the 911 call and the police arriving.

[175] The Crown says that if the Court determines that Mr. Cooper's explanation is to be believed, that he was a credible and reliable witness in the courtroom when he testified under oath.

[176] The Crown points out that Mr. Cooper testified that the only male he saw that night was Mr. Brown and when asked on direct. "Before you spoke with Meaghan Morris who did you think was the male who came into the room and took the firearms?". He said, "T.J.", which is how he refers to Mr. Brown. Crown counsel says that Mr. Cooper was honest that he did not see Mr. Eye or Mr. Hilchie that night and that it wasn't him who thought he knew the female, but Meaghan Morris.

[177] The Crown says that it wasn't Mr. Cooper's assumption as to who assaulted him and took his firearms. He was cross-examined at length and asked about a point in his statement to the police where he said he didn't remember the person coming into the room. However, counsel points out that Mr. Cooper explained that he didn't see Mr. Brown until he was beside the foot of the bed. The Crown points out that Mr. Cooper testified that he remembers looking at him, and that he was looking into his eyes and that Mr. Cooper saw him in the room and recognized him.

[178] Crown counsel says that Mr. Cooper was able to name numerous occasions when he interacted with T.J. Brown in the past. Mr. Cooper gave evidence that he knew his family, the name of his father, the area where T.J. grew up, and was aware that T.J. was around the same age as his daughter. Mr. Cooper was aware that T.J.'s family owned a tow truck company and was aware that he drove a Nissan Titan, having seen him driving it on multiple occasions where they would wave to each other. Mr. Cooper knew that T.J. associated with J.D. Eye because he had seen him with J.D. Eye at Mr. Eye's house.

[179] The Crown submits that Mr. Cooper knew T.J. Brown as a familiar acquaintance and recognized him because of that.

[180] The Crown notes that when asked about distinctive features of Mr. Brown, Mr. Cooper indicated on direct that "no", he wasn't very observant about distinctive features and that he didn't know what to classify as distinctive. Mr. Cooper was asked if there was anything unique about Mr. Brown and he said "no".

[181] Crown counsel says that *R. v. Downey*, at paragraph 66 is instructive (3rd sentence) "The trial judge ought to have recognized that, based on the preponderance of evidence there was nothing unique about the Respondent and there was nothing to set him apart from other people". The Crown says that the reliability of the

recognition in that case depended upon the familiarity with the accused and the extent of their relationship during the years that they knew each other.

[182] The Crown submits that in this case, those who knew Mr. Brown and those who observed him, including the police officers, did not describe anything unique about him as a person and that based on the evidence, if Ms. Morris and Anthony Cooper are believed, that they did recognize him because they knew him based upon their interactions with him on multiple occasions.

[183] The Crown submits that Anthony Brown and Meaghan Morris were able to recognize Mr. Brown in good lighting and they were able to communicate their observation of him. The Crown says that all witnesses came within close proximity to Mr. Brown on the night in question and there was no evidence that they had poor eyesight or were distracted at the time they were observing Mr. Brown.

[184] It is not disputed that Mr. Brown did not hold an acquisition license or permit at the time to possess a firearm. The Crown refers to the Agreed Statement of Facts which indicates that at the time of the offences Mr. Brown was bound by a firearms prohibition as well as a probation order.

[185] The Crown submits that if the Court accepts the recognition evidence of Mr. Cooper, that the Crown has proven, beyond a reasonable doubt, all the essential elements under which Mr. Brown was charged.

The Position of the Defence

[186] The Defence says that the Crown has not proven beyond a reasonable doubt that Mr. Brown was the person who entered the home and committed the offences with which he was charged.

[187] Defence counsel submits that in this case what the Crown is up against is that not only are there reliability issues for the civilian witnesses, but also there are credibility issues for those witnesses. The Defence does not concede that these are credible witnesses or reliable witnesses.

[188] Defence counsel says that the civilian witnesses who testified for the Crown, Anthony Cooper and Meaghan had at most an acquaintance with him; they knew “of” T.J. Brown. Counsel says they did not have a long-standing relationship with him that could give the Court confidence that in the extremely limited circumstances, in terms of time, and in the circumstances of the suddenness of the event, the confidence to know that these people are correct about who it was. Defence counsel

says that their recognition is completely undermined by the evidence each initially gave by way of the 911 call and statements.

[189] Defence says that Luke Cooper really offered no recognition evidence. Luke Cooper made an in-dock identification – the first time that he ever purported to identify Mr. Brown.

[190] Defence counsels says that Luke Cooper said the person had a hoodie on with a hood up over the hat. He notes that Luke gave no observation of the clothing the person was wearing and could not describe the type of hat. Luke said the person had a dark brown beard but also said the opportunity to observe the person's face was 10 seconds, perhaps 15 seconds. After the person went to his father's room, he didn't seem him again.

[191] Defence counsel refers to the statement which Luke Cooper gave to the police and nowhere in it does he purport to identify Mr. Brown or refer to him at all. Rather, he said "a guy barged through the door". He also said, "the guy who came in first" and later, "I'm not sure about anyone else's name except my neighbour". He agreed that he saw nothing distinctive about the person by way of eye colour, the colour of the hat, any markings on the hat, any jewellery.

[192] Defence counsel points out that none of the witnesses were asked to view a photographic line-up. Defence counsel says that the only identification evidence that comes from Luke Cooper was “that’s the guy; he’s sitting there” in the courtroom.

[193] Defence counsel says that what the Crown is asking the Court to accept is the mix of evidence of Luke Cooper, Anthony Cooper, and Meaghan Morris and that when you break it down, you can’t really determine what came from whom.

[194] Defence counsel says that an interesting part of Luke Cooper’s evidence was that he said in cross-examination that people came to get liquor and something else. He points out that Luke Cooper then completely backed away from that evidence. Defence counsel says that the important part of this evidence is that it ties into Anthony Cooper’s evidence about 6000 grams of marijuana. Defence counsel says that what the evidence of Luke Cooper actually shows is that Anthony Cooper was growing and selling marijuana. Defence counsel points out that Anthony Cooper had 6000 grams or 6 kilograms which would be 15 pounds of marijuana. Defence counsel suggests that for someone to have 15 pounds of marijuana for personal use is beyond belief. Counsel suggests that we have the evidence of Luke Cooper that people came to the home for “liquor and something else”.

[195] Defence counsel says that the major point which comes from this, is that if the Court is of the view that there is evidence before the Court that Anthony Cooper may have been selling marijuana, it opens up the avenue of all kinds of people coming to the home for various reasons and the home could have been targeted for home invasion because of the presence of that quantity of drugs.

[196] With respect to the evidence of Meaghan Morris, Defence counsel says that the Crown conceded that there is a significant difficulty with respect to the reliability of her evidence. The Defence says that, as a general observation, Ms. Morris was a particularly uncertain witness. Her answers to questions were often riddled with, “I don’t know”, “I don’t remember”, “I’m not sure”. Her answers were often framed as questions. Defence counsel interprets this as Ms. Morris questioning herself about her answers.

[197] Defence counsel says that Meaghan Morris was also a very unreliable witness. Defence counsel says that she agreed that everything occurred very quickly, very unexpectedly, that it was chaotic, that she was upset, anxious and that she was ‘pretty drunk’ when these things occurred. In fact, she said that “we were pretty drunk” and confirmed that Anthony Cooper had been drinking as well. Defence counsel says that Mr. Cooper has said that he wasn’t drinking extensively, but Ms. Morris’ very first evidence was “we were pretty drunk”.

[198] Defence counsel points out that when Meaghan Morris was asked to describe the person in the room she gave very uncertain answers, saying, “I think, maybe, he was wearing a hoodie” and “maybe a hat”. When asked to describe the face of the person, Meaghan Morris’ evidence was that she wasn’t really looking at his face to describe it. She then said, “I don’t remember any facial hair”.

[199] Defence counsel says that when we are dealing with identification evidence of a person who clearly would, at most, have known “of” Mr. Brown and was a casual acquaintance at best, when she says, “I wasn’t really looking at his face to describe it”, that completely undermines her evidence.

[200] Defence counsel says that there are also serious discrepancies in the identification features of the person. In her statement to the police, a little over two hours after the incident, Ms. Morris said, “someone walked into the room”. She said, “Tony stood up and the guy punched him”. Defence counsel says that when she was asked, in her statement, if she was allowed to go back into the room she said, “not until the other guy left”. Defence counsel says that at no point in her statement, did Meghan Morris ever name Mr. Brown. When asked why she didn’t name Mr. Brown, her evidence was that the police didn’t ask her for his name. Defence counsel says that that is not credible and borders on ludicrous when the very first question the officer asks in the statement is, “What can you tell me about the

incident that prompted the 911 call?”. Defence counsel says that Ms. Morris named other people.

[201] Defence counsel says that she didn’t name the person in the statement because she didn’t know who it was.

[202] Defence counsel says that Ms. Morris described no distinctive features of the person. She said she had seen Mr. Brown on two to three occasions, during a gathering or a party with other people around and that she was consuming liquor on each occasion. Defence counsel says that Ms. Morris had some recollection of a conversation involving her sister and Mr. Brown and Mr. Brown’s birthday. Defence counsel says that that gives the Court no confidence that Ms. Morris would recognize Mr. Brown as the person who came into the room.

[203] Defence counsel notes that on direct examination, Ms. Morris did not give evidence about knowledge of Mr. Brown’s birthday. Defence counsel says that it was two days later on continued direct examination that she said, “something about that”.

[204] Defence counsel refers again to the decision of the Ontario Court of Appeal in *R. v. M.B.*, 2017 ONCA 653, where he says the Court of Appeal stated to have confidence in recognition evidence that is devoid of any unique characteristics there

should be a long and closely familiar relationship with the accused person. Defence counsel says that Ms. Morris did not describe any idiosyncratic or particular features, which would give any confidence to her evidence.

[205] One aspect of Ms. Morris' evidence which, Defence counsel says, was corroborated by the police is that she testified that just before Anthony Cooper was struck by the person who entered the bedroom, she heard Mr. Cooper say, "Who are you?". Defence counsel says this was corroborated by Cst. McNeil who testified that Anthony Cooper told him the very same thing later that day, around mid-day on December 24. Defence counsel says that that evidence severely impacts Anthony Cooper's purported recognition of the person who he says struck him as Mr. Brown. Defence counsel points out that Anthony Cooper's evidence was that he recognized Mr. Brown within two seconds. Defence counsels says that that's not what he said at the time, according to Meaghan Morris and is not what he told the police the next day.

[206] Defence counsel says that the 911 call is the first opportunity we have to get an insight into Anthony Cooper's evidence. This was played in Court and is an exhibit. There was no mention whatsoever of Mr. Brown in that call. Counsel points out that it was made very close in time to the incident and was his first opportunity

to explain what had occurred. Before Defence counsel played the 911 call, he asked Mr. Cooper if he told the truth in that call. He said that he did.

[207] At the very outset of the call, Mr. Cooper said, “Two guys came in and a girl”. He does not say that Mr. Brown came in. Defence counsel notes that by the time he made this call he was claiming that he has recognized T.J. Brown. In describing what happened to him in the bedroom, he refers to “buddy” coming over and describes what occurred. The 911 caller asked Mr. Cooper outright, “Do you know who these males and the female were?”. Mr. Cooper says, “I could find that out”.

[208] Defence counsel says that after the 911 call Tony Cooper made efforts to try to figure out who the person was. Later in the 911 call, the operator said, “So you know that the second male was J.D., what about the other two, the first male and the woman, what are their names”. Tony Cooper says, “Don’t know”.

[209] Defence counsel submits that Mr. Cooper’s explanation for why he didn’t name someone is totally devoid of credibility because he named J.D. Eye in the 911 call. Counsel says that Anthony Cooper says that he didn’t tell the 911 operator because he was giving them an opportunity to come forward with the rifles. Defence counsel notes that over two hours had passed, and he had called 911, a call for emergency services for immediate attention. Defence counsel says that even if he wanted to get his rifles back, it doesn’t mean that Anthony Cooper knew who the

person was. This was totally contradicted by common sense and what he said on the phone.

[210] Defence counsel points out that on direct examination, Mr. Cooper said that 6000 grams of weed had been taken from his home. On cross-examination he agreed that he told the police in his statement that night that they had taken “a couple of grams”. Mr. Cooper also said in cross-examination that he told the truth in his statement to the police, but Defence counsel says he obviously didn’t. He lied to them about how much weed was taken. Defence counsel suggests that he did so because he knew that he had weed in his home for sale.

[211] Defence counsel suggests that Luke Cooper didn’t go to buy cigarettes, but rather he went to get rid of weed that was being kept in the house. Defence counsel admits that he can’t point to evidence which confirms this.

[212] Defence counsel says that Anthony Cooper has molded his evidence from time to time to what he sees fit as the appropriate thing to say.

[213] Defence counsel says that on re-direct Anthony Cooper was asked what he meant when he testified that he looked into the man’s eyes, he said, when I look at you, “I look at your eyes, not your skirt or your boobs or anything”. Defence counsel says that this shows a disrespect for the Court, Ms. Morton and the process.

[214] Defence counsel suggests that Mr. Cooper's evidence shows that he knew 'of' T.J. Brown. He suggests that Mr. Cooper said that he knew him "from the community". Mr. Cooper said that he knew T.J. Brown's truck, but Defence counsel says that that's a far cry from knowing that person, and as the case law says, "having a long and closely familiar relationship" such that the person is then able to make a recognition in a two second time frame. Defence counsel says that Mr. Cooper said in his own evidence to the police, and reiterated in Court that he knew 'of' T.J. Brown and that he was a casual acquaintance.

[215] Defence counsel points out that Mr. Cooper said that he had met Mr. Brown on three occasions. He said that one time was at Mr. Eye's house when they went to a dance. He said that it was a relatively brief encounter, that he was driving so he didn't have much alcohol to drink, that there were other people there and it was three to five years ago. Defence counsel says that Mr. Cooper said that the person he says was T.J. Brown that night had no beard and no jewellery.

[216] At the Grand Lake party, two to four years ago, Defence counsel says that Mr. Cooper said that he had been drinking and that it was at a fireplace and Mr. Brown was speaking with his cousin. But in cross-examination, he agreed that he didn't know if the person was his cousin.

[217] Defence counsel says that the third time that Mr. Cooper said that he met Mr. Brown was when he went to J.D. Eye's house to buy coke.

[218] Defence counsel suggests that, at most, Mr. Cooper would have had actual contact with Mr. Brown for less than half an hour in his entire life. He submits this is a far cry from a witness who had a long, closely familiar relationship with Mr. Brown such that he could make a recognition identification in two seconds.

[219] Defence counsel says that Mr. Cooper testified in direct examination that during the waking moment of awareness between being knocked out twice, he thought that the person was wearing a handful of rings while punching the gun case. However, in cross-examination he said that he assumed it was rings, but it could have been brass knuckles or gold paint. Defence counsel says that his evidence was also that during this waking moment he was holding his head in his hands and didn't really know what was going on. Defence counsel says that this is not trustworthy evidence.

[220] Defence counsel also says that for the first time, Mr. Cooper said in direct examination that during the waking moment he saw a male person punching the gun locker, that he saw an image of a girl, he said, "What the fuck" and she said, "Look what I found" and that the male had the guns leaning against the wall and had gold rings on. Defence counsel says that this is all completely new detail and is hugely

problematic because it speaks to an effort on Anthony Cooper's part to fill in blanks, blanks which were not filled in either with the police or with the 911 operator.

[221] Defence counsel says that in his statement to the police, Mr. Cooper told the officer that he didn't remember any hitting whatsoever, that he didn't remember the person coming into the room, saying anything and didn't remember standing up. However, Defence counsel says he testified on direct examination to remembering those things.

[222] Defence counsel points out that there is no corroborative evidence, that there is no DNA evidence of Mr. Brown, fingerprints, no personal items left at the scene, no recovered firearms, no admissions from Mr. Brown and no evidence that he was in the area at the time. Defence counsel says there were no distinctive features identified to separate him from the many other average build or heavy-set males in their thirties with a beard.

[223] In reply, Crown counsel says that there is no evidence to support a conclusion that Anthony Cooper was selling drugs illicitly from his home. There was no evidence from the police officers indicating that there were signs of drug trafficking being present. The questions to the witnesses in this regard were denied and it is not borne out on the evidence for the Court to be able to make that inference.

Analysis and Findings

Has the Crown Proven Beyond a Reasonable Doubt that T.J. Brown was the Person who Assaulted Anthony Cooper and Stole Property from him?

The Recognition Evidence

[224] As this Court's review of the law makes clear, there are frailties inherent in identification evidence, with recognition evidence being a subset of identification evidence. However, as noted above, "recognition evidence is generally considered to be more reliable and to carry more weight than identification evidence" (para. 54 of *R. v. Downey*, citing *R. v. Bob*, 2008 BCCA 485). The Court is cognisant of the need to carefully focus on the evidence that is relevant to the credibility and reliability of the evidence of each of Anthony Cooper and Meaghan Morris, in terms of their identification of Mr. Brown as the person who came into the bedroom of the home, assaulted Mr. Cooper and stole rifles and marijuana. The Court must also consider whether there is other direct or circumstantial evidence which corroborates their testimony.

[225] Before considering the evidence of these two witnesses, I note that no witness, either Luke Cooper, Anthony Cooper or Meaghan Morris said that T.J. Brown had any distinctive or unique features. He was generally described as a white male, in his mid-thirties, with brown hair, a medium or heavy build who was about 5 feet 9

in height. No doubt there are many people who fit that description who lived in the Wellington/Enfield area of this Province in December 2020.

[226] I also note that there is no DNA or fingerprint evidence taken from the scene which is that of Mr. Brown. Nor were any items of personal property linked to Mr. Brown found at the scene. The Court heard no evidence which suggested that Mr. Brown was in the vicinity of Mr. Cooper's residence on the night of the offences.

[227] Bearing in mind what the Court of Appeal said in *R. v. Downey*, this Court must look carefully at the evidence of Meaghan Morris and that of Anthony Cooper which speaks to the extent of their previous encounters with T.J. Brown. The Court must consider the opportunity each had to observe the person who committed the offences that evening and assess whether the evidence shows that they were under the influence of substances at the time.

A Return to Credibility and Reliability Principles

[228] In every criminal trial the Court is required to make findings with respect to the credibility and reliability of witnesses. A Court can accept all of a witness' testimony, none of a witness' testimony or some of a witness' testimony. Among the factors that the Court can consider in determining credibility and reliability are whether or not a witness' evidence is consistent within itself and whether or not a

witness' evidence is consistent with known facts or the evidence of other witnesses. Also, the Court can consider whether or not a witness appears to be exaggerating or embellishing as compared to truthfully relating what they observed. The Court can also consider whether or not a witness' evidence appears to make sense.

[229] The credibility of a witness, as noted previously in this decision, relates primarily to the honesty of the witness, that is, to the veracity of his testimony. Many decisions of Nova Scotia Courts have followed the principles set out in the judgment of O'Halloran J.A. in *Faryna v. Chorny*, [1951] CanLII 252 (BCCA) where the Court emphasized the importance of the trial judge's careful analysis of a witness' evidence in light of the probabilities that are reasonable in the context, as well as the evidence's consistency with the evidence of other witnesses:

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. [At 357.]

[230] In *Baker v. Aboud*, 2017 NSSC 42, Forgeron J of the Nova Scotia Supreme Court set out a helpful list of factors, taken from the case law, for the trial judge to consider when assessing credibility:

- (a) What were the inconsistencies and weaknesses in the witness' evidence which include internal inconsistencies, prior inconsistent statements, inconsistencies between the witness' testimony and the documentary evidence and the testimony of other witnesses?
- (b) Did the witness have an interest in the outcome or was he or she personally connected to either party;
- (c) Did the witness have a motive to deceive;
- (d) Did the witness have the ability to observe the factual matters about which he or she testified;
- (e) Did the witness have a sufficient power of recollection to provide the Court with an accurate account;
- (f) Is the testimony in harmony with the preponderance of probabilities which a practical and informed person would find reasonable, given the particular place and conditions?
- (g) Was there an internal consistency and logical flow to the evidence;
- (h) Was the evidence provided in a candid and straightforward manner or was the witness evasive, strategic, hesitant, or biased, and;
- (h) Where appropriate, was the witness capable of making an admission against interest or was the witness self-serving?

[231] This is a list of factors. It does not purport to be an exhaustive list. However, it is certainly a helpful list to review when the Court is required to conduct a credibility assessment. I have considered these factors and others related to, or similar to these factors in assessing the evidence of the witnesses.

[232] Defence counsel referred this Court to the decision of the Ontario Court of Appeal in *R. v. M.B.*, 2017 ONCA 653 repeatedly in his closing submissions. The

Court of Appeal in *R. v. M.B.* distinguished the identification of a stranger from the identification of a person with whom the witness had a “long and closely familiar relationship”. Defence counsel submitted that neither Anthony Cooper or Meaghan Morris pointed to unique or distinguishing features of the person who they identified as T.J. Brown and that neither had a long and closely familiar relationship with him.

[233] However, a careful reading of *R. v. M.B.* demonstrates, that on the facts before the Court, the witnesses who gave identification evidence did not really have much familiarity with the accused at all, in addition to not pointing out distinctive features of the person. This Court does not read *R. v. M.B.* as the Ontario Court of Appeal stipulating that absent distinctive identifying features, there must be a close and familiar relationship between a witness who purports to identify a person and that person in order to find such evidence reliable. The witnesses who identified the accused in *R. v. M. B.* had very limited contact with him. I believe that this is evident from the following passages in *R. v. M.B.*:

[46] ...The importance of unique identifiable features varies with how well the witness knows the person he or she identifies. The court made this clear by endorsing the following comment by Holmes J. in *R. v. Panghali*, 2010 BCSC 1710 (CanLII), [2010] B.C.J. No. 2729 at para. 42:

Common experience teaches that people have vastly different abilities to identify and articulate the particular features of the people in their lives that they know, recognize, and distinguish on a regular basis. Where a witness has but little acquaintanceship with the accused, his or her recognition evidence may be of little value unless the

witness can explain its basis in some considerable detail. But at the other end of the spectrum, the bare conclusory recognition evidence of a person long and closely familiar with the accused may have substantial value, even where the witness does not articulate the particular features or idiosyncrasies that underlie the recognition.

[47] In my view, the trial judge was wrong to interpret *Berhe* as minimizing the importance of unique identifiable features in determining the weight of recognition evidence. Here, none of the witnesses had a “long and closely familiar” relationship with the appellant. Constable Howard had seen the appellant in the neighbourhood and had spoken to him once for minutes at the end of August. T.C. had served the appellant an unspecified number of times in the restaurant and had seen him there, had spoken to him only when taking his order and did not know his name. Constable Kay had the greatest acquaintance with the appellant – having observed him 10 to 15 times as an undercover officer and having spoken with him on one occasion for 35-40 minutes. This was a case in which the inability to “articulate the particular features or idiosyncrasies that underlie the recognition” was important and should have been weighted appropriately.

[emphasis added]

[234] After the completion of the trial in this matter, Defence counsel referred this Court to the decision of the British Columbia Supreme Court in *R. v. Gilbert*, 2022 BCSC 1352 which he says raises issues similar to those that were raised in Mr. Brown’s trial. This Court also reviewed other authorities submitted by counsel, including the decision of this Court in *R. v. George*, 2022 NSSC 42, *R. v. Hibbert*, 2022 SCC 39 and *R. v. Tebo*, 2003 CanLII (ONCA).

[235] In *R. v. Gilbert*, Ross J. determined that he could not rely on the eye-witness identification evidence of Chantelle Laplante. Michael Drynock, also known as “Mikey,” was charged with the first-degree murder of Branton Regner by assaulting Mr. Regner and forcing him off a bridge; the attempted murder of Chantelle Laplante

by assaulting Ms. Laplante and forcing her off a bridge and the kidnapping of Ms. Laplante and her confinement against her will inside a vehicle.

[236] Ross J. found Ms. Laplante to be a sincere and credible witness. In considering the reliability of her identification of Mr. Drynock, Ross J. reviewed the circumstances that existed when Ms. Laplante made her eyewitness identification of Mr. Drynock. He noted that on the night in question, when Ms. Laplante encountered the truck in which Mr. Drynock was a passenger at the trailer where she was, it was fully dark. The trailer had very limited lighting. Ms. Laplante had a limited interaction with Mr. Drynock by the truck. At the time, Ms. Laplante saw Mr. Regner being dragged away and she could hear him being beaten. She herself was kidnapped and later forced off a bridge. Ms. Laplante made her identification of Mr. Drynock during highly stressful circumstances.

[237] In terms of her prior meetings with “Mikey”, Ross J. notes that Ms. Laplante had three such encounters. During the first of these encounters, Ms. Laplante was using methamphetamine. Ross J. had the evidence of Ms. Laplante, 26 years old at the time of these events, which established that she had a lengthy history of drug using which started at an early age. Her drug use persisted, with few periods of sobriety, leading up to the events before the Court in the case.

[238] Ross J., relying upon *R. v. Downey*, found that Ms. Laplante was not “sufficiently familiar” with Mr. Drynock, so as to render the identification by her of any unique identifiable feature unnecessary. He stated, “I do agree that the absence of a description containing any distinguishing features will not on its own render the identification of no value”. (para. 278).

[239] Further, Ross J. found in *R. v. Gilbert* that the description Ms. Laplante provided of Mikey at the trailer on the night of her abduction was based, as Ms. Laplante acknowledged, upon a combination of what she actually observed on the night of the incident and what she had observed of Mr. Drynock on prior occasions. As noted by Ross, J, “Thus, there is no description that is purely a recounting of her observations of Mikey at the incident”. Of additional concern to Ross J. was that Ms. Laplante’s description of Mikey’s hair changed from “brown hair” to “he had a shaved head” after Ms. Laplante had been shown a photo pack picture by the police of Mr. Drynock in which he had a shaved head.

[240] I find that the decision of Ross J. in *R. v. Gilbert*, is distinguishable from the decision before this Court in the within case. Neither Anthony Cooper nor Meaghan Morris gave any evidence that suggested that their description of T.J. Brown was some kind of amalgam of their previous observations of him on other occasions. Nor were they asked if this was the case. Nor did the descriptions given by Anthony

Cooper and Meaghan Morris as to the appearance of the person who broke into their bedroom change over time, as was the case with Ms. Laplante who changed her description of Mikey from having “brown hair” to having a shaved head on the night in question, based upon being shown a picture of Mikey with a shaved head. Nor was the lighting in the bedroom in this case such that they could not see the person who came into the room. That was not the case in *R. v. Gilbert*, where it was noted by Ross J. to be “fully dark” outside by the truck and where the trailer had “very limited lighting”.

[241] Further, I do not read the Court of Appeal’s decision in *R. v. Downey* as saying that absent unique or distinctive features an eyewitness must have a long and closely familiar relationship with the person they identify, which seems to be what Defence counsel suggests.

[242] Rather, other variables or factors come into play, as noted by Campbell, J. in *R. v. Newman, supra*, such as the opportunity for observation, the ability of the witness to recall the incident, the degree of familiarity between the witness and the person whom they are purporting to identify and the extent to which the person can articulate identifying features, come into play with each of these variables or factors existing as a point along a continuum.

[243] I will now review the evidence of each witness as to their credibility and the reliability of their evidence, including their recognition evidence.

The Evidence of Det/Csts. Graham and McNeil- Credibility and Reliability Findings

[244] The evidence of each of these police witnesses was credible and reliable. There is no reason to question their veracity and the Court finds that their evidence is reliable.

The Evidence of Luke Cooper – Credibility and Reliability Findings

[245] The evidence of Luke Cooper set the stage for what happened that evening at the Cooper home. Luke Cooper was candid in his evidence that he did not know the man who broke into the TV room first, slapped him twice and headed to his father's room. Although he said at first in his direct evidence that this person was T.J. Brown, it was clear upon further questioning, that Luke Cooper had been told by others, including by Meaghan Morris soon after the incident, that the man was T.J. Brown.

[246] Luke Cooper's evidence in this regard did not cause me to question his credibility. He was a relatively young witness who I believed tried to answer the questions put to him truthfully. He was a witness who, in my estimation, did not at first appreciate that the questions put to him required him to speak from his own

independent recollection, and not from the perspective of what someone else had told him.

[247] Luke Cooper's evidence that the person who first came into the TV room that night was wearing a hat and a hoodie, with a visible face, was corroborated by both Meaghan Morris and Anthony Cooper. He described the person's weight as being approximately 200 – 220 pounds. That estimation varies slightly from Meaghan Morris' estimation, but that difference amounts to nothing. Approximating someone's weight is a guess and nothing more. Guesses can vary.

[248] Luke said that he could not do an in-dock identification of the person. The fact that he could do an identification of the involved female, as the female sitting in the courtroom, with that female, Emily Holman later being acquitted of all charges, does not cause me to doubt Luke's credibility. The point that in-dock identification can be problematic, however, is certainly noted.

[249] The one area of Luke Cooper's evidence that I do not accept, is that he made a midnight run for cigarettes in the aftermath of the home invasion. That makes no common sense at all. Whatever the reason for his leaving the house, I do not believe it was to purchase cigarettes. However, I believe the remainder of Luke Cooper's evidence and find that he was otherwise a credible witness and that I can rely upon his evidence.

The Evidence of Anthony Cooper – Credibility and Reliability Findings

[250] Anthony Cooper's evidence gave this Court a look into his lifestyle.

[251] For example, I heard no evidence that Anthony Cooper worked, although perhaps he did and does. Neither counsel asked him what he did for a living. Anthony Cooper smokes marijuana, as does Meaghan Morris and Mr. Cooper's son Luke, although in the case of Luke, his evidence was that he uses weed to help him sleep. Anthony Cooper also grows marijuana. His evidence was that there were 6000 grams of marijuana in his home on the night of the break-in. Defence counsel suggests that that amounts to fifteen pounds. This Court doesn't have to accept that approximation, and doesn't, but it does accept that that amount of marijuana is significant.

[252] Anthony Cooper was also the kind of witness, who while testifying in Court, felt it appropriate to refer to a woman's breasts as "boobs" in a completely nonchalant manner. Crown counsel asked him what he meant by looking into the eyes of the man who assaulted him. He said it was similar to looking at her, "I look at your eyes, not your skirt or your boobs or anything". That evidence is horribly offensive to Crown counsel and demonstrates a complete lack of respect for the Court and the Court's processes.

[253] Anthony Cooper and Meaghan Morris also lived in a world where it made sense to them, after a violent home invasion, to delay calling the authorities for nearly two hours. Anthony Cooper offered an explanation for this delay, which seemed to make perfect sense in his mind.

[254] The home of Anthony Cooper was the kind of place where people could show up at midnight to “borrow” alcohol from Anthony Cooper; this was the evidence of Luke Cooper. These people came to get alcohol or “something else” from his father, said Luke. When pressed about the nature of the “something else”, Luke maintained that he meant talking to his father.

[255] Anthony Cooper and Meaghan Morris both were drinking on the night of the incident. They admitted so. They each admitted to drinking at the various social situations they described where they had met Mr. Brown in the past. Mr. Cooper described one occasion when he said he met Mr. Brown while Mr. Cooper was at J.D. Eye’s house to “get some cocaine”.

[256] In assessing whether Anthony Cooper was a credible witness, this Court must consider the guidance to trial judges given in cases such as *Faryna*, referred to above. The Court must assess his evidence in the context and the conditions in which it was given.

[257] If Anthony Cooper's evidence at trial is to be believed, that it was T.J. Brown who entered his bedroom, assaulted him, and stole rifles and marijuana from him, that means that he must have lied to the 911 operator to whom he said, when asked, that he didn't know who had done these things, but offered that he could "find out". In cross-examination, Mr. Cooper first said, when asked by Defence counsel, that he had told the truth to the 911 operator. According to Luke Cooper, the incident happened around 11:45 p.m. on December 23, 2020. The 911 call was made at 2 a.m. on December 24. When he gave an audio statement to the police approximately twenty-five minutes later, at 2:24 a.m., Mr. Cooper identified T.J. Brown as the person who had assaulted him and stole his guns. Mr. Cooper gave an explanation to the Court as to why he didn't tell the 911 operator that it was T.J. Brown. From his evidence, it is clear that Anthony Cooper thought that if he told the people he says he knew took his guns that he was going to the police, they would realize that they had, in his words, "fucked up" and rather than face charges, they would voluntarily surrender the rifles to him, as being a cheaper and easier way of dealing with the matter. Well, that didn't happen, after Anthony Cooper texted Joshua Eye to this effect at 12:03 a.m. That was two hours before Anthony Cooper called 911. By the time he spoke with the Cst. Graham at 2:25 a.m., Mr. Cooper had apparently given up hope that the rifles would be returned, but in any event, was prepared to identify T.J. Brown.

[258] The fact that a witness is prepared to mold his evidence to serve his own purposes is very troubling. However, it is to be remembered that this Court can accept none, all, or parts of a witness' evidence.

[259] Anthony Cooper lived in a world where despite knowing the person who assaulted him, according to his testimony, he determined that it would nevertheless be a good idea not to inform the police of this, because in his mind this would thwart his goal of having his rifles returned to him by those who took them.

[260] Mr. Cooper also initially wanted to downplay the amount of marijuana he had in his home to police. In fact, he lied to police about the amount of marijuana that was in his home, initially saying that it was a "couple of grams, maybe" but at trial testifying that he believed "they took 6000 grams, or somewhere right around there".

[261] Suffice to say at this point, all of these matters serve to undermine Anthony Cooper's credibility, even before the Court gets to the reliability of his eye-witness identification of Mr. Brown.

[262] However, can this Court find that Mr. Cooper was sufficiently credible in his trial evidence, that I can rely on his testimony that it was T.J. Brown who assaulted him and committed the other offences with which he is charged?

[263] I conclude that I can. I accept Mr. Cooper's explanation for why he did not tell the 911 operator he knew who assaulted him. This Court watched Mr. Cooper carefully when he was giving his evidence, including the evidence he gave about the 911 call and why he was not truthful to the operator. He gave this evidence calmly. He was not agitated; his demeanour was calm. It is noted, however, that relying on demeanour alone, can be dangerous when assessing credibility.

[264] As the trial judge, it is my task to assess the credibility of witnesses from the unique standpoint that I have. For example, I can hear how the witnesses delivers his evidence and observe him as he does so.

[265] I conclude that on this point, Mr. Cooper was credible – that he honestly believed that it was T.J. Brown who entered his bedroom, assaulted him, and took his rifles and his marijuana. Despite the fact that Mr. Cooper lied to the 911 operator, his explanation for doing so made sense to him and makes sense to this Court, based upon the knowledge I have gleaned from the evidence I heard. In Mr. Cooper's world, not being truthful to the 911 caller, was of less importance to him then getting his rifles back, without the involvement of the police. His text to J.D. Eye at around midnight shows that his concern at that point was focused on having his rifles returned to him, not on involving the police.

[266] I also accept Mr. Cooper's evidence that the 911 call did not mean that much to him, that what he really wanted was for the police to come so that he could tell them what happened. In fact, by the time that Mr. Cooper met with the police twenty-five minutes after the 911 call, he named T.J. Brown as his assailant and as the person who broke into his home and stole his rifles. Lying to the police about the amount of marijuana stolen also, apparently, made sense to Mr. Cooper at the time, and does not, in my assessment, lead me to question the honesty of his identification of Mr. Brown.

[267] However, was Mr. Cooper's evidence also reliable? Can I rely upon his trial testimony that he recognized T.J. Brown as the person who assaulted him and stole his rifles? To answer this question, I must consider his opportunity for observing Mr. Brown, his ability to recall what happened, how familiar he was with T.J. Brown, the extent to which he could articulate any identifying features of Mr. Brown and whether he was under the influence of any substance at the time.

[268] The evidence established that Mr. Cooper had been drinking alcohol on the night of these events. He had, according to Meaghan Morris, also smoked weed. However, he said that he had not over indulged because the next day was Christmas Eve and that was when he planned to do his Christmas shopping.

[269] The 911 operator did not ask Mr. Cooper anything about his level of sobriety. Cst. Graham spoke to Mr. Cooper at around 2:25 a.m., about two and one-half hours after these events. Cst. Graham did not give any evidence which suggests that he found Mr. Cooper to be impaired. Cst. McNeil spoke to Mr. Cooper at approximately 11:00 a.m., the next morning, albeit some time after these events, and said that Mr. Cooper did not appear intoxicated to him.

[270] I find that Anthony Cooper was not inebriated to any point which would impair his ability to recognize the face of someone who assaulted him and who he says he saw punching his gun cabinet.

[271] Mr. Cooper said that he knew that the person who entered his room was T.J. Brown within two seconds of Mr. Brown coming into the room. His evidence was that it was probably three steps from the door to Meaghan's side of the bed and two steps to his side, that he looked up and saw a beard and he knew that T.J. had a scruffy beard for a while. He said that he didn't remember being struck by the man, but was knocked out for a while, he didn't know how long. When he woke up, he said that he saw T.J. Brown and saw that T.J. had placed two or three rifles from the gun locker against the wall. His testimony was that T.J. was hitting the gun locker. He said that he remembered that T.J. had a bunch of "gold rings or something" on

his right hand. Mr. Cooper did not definitively say, as suggested by Defence counsel, that Mr. Cooper's evidence was that he saw gold rings on the person's hand.

[272] Anthony Cooper's evidence was that he said that he thought he said, "What the fuck" and that he heard T.J. screeching the words "cops" or "if you call the cops" or "something like that". Anthony Cooper thought that he was awake for about 20 seconds, but agreed that he did not really know how much time passed. He said that T.J. must have hit him again, because he was knocked out again and woke up on the bed.

[273] In terms of what this person was wearing, Mr. Cooper said a ball hat, but that he didn't really see what else the person had on. He said that the man was white-skinned, stocky, with a beard the same colour as his hair, which was brown, maybe a bit lighter and maybe between thirty and thirty-five years old. He was not aware of Mr. Brown's eye colour. The Court notes that Mr. Cooper could not have seen the colour of Mr. Brown's hair, because both Luke Cooper and Meaghan Morris, as well as Mr. Cooper himself, said that the person was wearing a baseball hat. Anthony Cooper did not point to any distinctive or unique features of the person he says was T.J. Brown.

[274] Anthony Cooper's evidence was that the bedroom did not have an overhead light, but a table lamp was probably on, and the TV was on. Mr. Cooper did not

wear corrective lens at the time, although he did at the time of trial, albeit only for reading. Mr. Cooper was also very close to T.J. Brown when he was struck twice and was close enough to T.J. Brown to see him punching his gun locker.

[275] Mr. Brown was not a stranger to Anthony Cooper. He thought that he probably met Mr. Brown years before (as much as fifteen years) when picking his daughter up from school near T.J. Brown's father's house in Old Ham. He said that Mr. Brown and his daughter were about the same age.

[276] The next time that Mr. Cooper said that he interacted with T.J. Brown was "three to four summers ago" at J.D. Eye's house, where he gathered with six to ten other people prior to going to a dance at the Waverly firehall. Mr. Cooper described having some pre-dance alcoholic drinks. He denied that he was inebriated. Mr. Cooper said that he knew who T.J. Brown was at the time and said that he remembered saying to Mr. Brown that night, "I hear you're the strongest man in Letterkenny". That, according to Mr. Cooper, was a joke. He said that T.J. Brown just smiled, but he didn't interpret that as Mr. Brown bragging. His evidence was that he spoke to T.J. Brown again at the dance in Waverly, but he didn't know what they talked about.

[277] Mr. Cooper described another occasion when he met T.J. Brown at a house party at Grand Lake hosted by a friend of his. He said that he remembered talking

to T.J. Brown while Mr. Brown was sitting at a firepit. He thought that Mr. Brown was there talking with his cousin, whose first name he thought was “Frank”. He said that he talked to T.J. Brown on this occasion for about ten to fifteen minutes, but he could not recall what they talked about, just that they were having a good time and joking. He said that he had consumed a couple of drinks. His evidence was that T.J. Brown did not have a beard at the time.

[278] Defence counsel made much of the fact that, according to Meaghan Morris, Anthony Cooper had said at some point after the intruder entered the bedroom, “Who are you?”. Ms. Morris’ actual evidence was that she did not think Tony knew it was T.J. at first, “so he was kind of saying, ‘who are you’ maybe, I don’t know”. Defence counsel also referred to the fact that Anthony Cooper told Det/Cst McNeil, that he said, “Who are you” to his assailant, according to the officer’s notes which record, “Knows TJ from around, more knows him to see him even said, “Who are you?” when he came into the room”.

[279] To be noted is that both Meaghan Morris and Det/Cst McNeil refer to Anthony Cooper as saying, “Who are you” when the intruder first came into the room, and “at first”. Anthony Cooper’s own evidence was that he did not see the intruder come into the room and he recognized T.J. Brown when he came around the corner of the bed towards him.

[280] Mr. Cooper also said that before these events, he would see Mr. Brown driving his truck around, and sometimes they waved to each other. He added, “It’s not like we’re strangers”.

[281] Mr. Cooper also testified that he saw T.J. driving a “cool” blue Ford truck, from 1970 or 1972 and had seen him on multiple occasions driving a black Nissan Titan truck. There was no evidence to contradict any of that evidence.

[282] Mr. Cooper identified T.J. Brown as his assailant to the first police officer he spoke with, approximately two and one-half hours after the incident. He has maintained this identification and did so throughout a lengthy cross-examination.

[283] Mr. Cooper recalled a very specific encounter with T.J. Brown where he said, “I hear you’re the strongest man in Letterkenny.” He was able to testify about Mr. Brown’s reaction – that he just smiled but wasn’t bragging. Clearly, Mr. Cooper was close enough to observe T.J. Brown’s face and this evidence was quite unique.

[284] I conclude that Mr. Cooper was sufficiently familiar with T.J. Brown to identify him as his assailant.

The Evidence of Meaghan Morris – Credibility and Reliability Findings

[285] Meaghan Morris was generally an uncertain witness. Whether it is her natural way of speaking, or not, the fact is that she answered many questions put to her about details with an answer that had a question mark at its end.

[286] However, despite a lengthy cross-examination, Ms. Morris was not caught out in any direct lies. Of concern, however, is the fact that Meaghan Morris did not tell Cst. Graham when he took her audio statement on December 24, 2020, at approximately 2:20 a.m. that T.J. Brown was the person who entered the bedroom and assaulted Anthony Cooper. She referred to “someone” walking into the room, and that this “guy” had punched Tony. At no point in this statement did Ms. Morris name T.J. Brown. Her explanation for not doing so was that she wasn’t asked to give his name. She said that she was asked, and did give the names of others present, including J.D. Eye and Jeffrey Hilchie. Ms. Morris maintained that later that day, around noon on December 24, she told Det/Cst. McNeil that it was T.J. Brown who was the person who had broken in and assaulted Anthony Cooper. However, Det/Cst. McNeil’s testimony did not confirm that Meaghan Morris identified T.J. Brown as this person.

[287] However, Ms. Morris told Luke Cooper, whose evidence I have found to be credible, it was T.J. Brown who was the first person who came into the TV room and had hit his father. Luke Cooper so testified. Meaghan Morris did so shortly

after the incident occurred, before the 911 call and before the police arrived. Meaghan told Luke that she recognized the person as T.J. Brown, that she knew “of him” and had seen him before.

[288] I do not believe Ms. Morris’ explanation that she did not tell the police the identify of the person she told Luke that she recognized as T.J. Brown because they didn’t ask her. That simply makes no sense. She knew that the police were there to investigate the home invasion and she deliberately withheld from them the identity of the person whom she later said was T.J. Brown.

[289] However, I accept her evidence that she believed this person to be T.J. Brown at the time.

[290] Is Meaghan Morris’ evidence reliable?

[291] I accept Ms. Morris’ evidence that she and Anthony Cooper were coherent and not inebriated to any extent which would impair her ability to recognize the person who she says was T.J. Brown. She described consuming five or so alcoholic drinks between around 5 p.m. and the time of the incident at close to midnight. Ms. Morris told Crown counsel that they were both “pretty drunk”, but her later evidence clarified that she was coherent and the amount of alcohol she had actually consumed.

[292] I also accept the evidence of Meaghan Morris and that of Anthony Cooper that there was “probably” a table lamp on at the time of the incident, as well as the TV. She did not need corrective lens. Her evidence was that she could see the person who came into the room, and this was not eroded on cross-examination.

[293] Meaghan Morris described the incident as occurring very quickly, very unexpectedly, that it was chaotic, and stated that she was upset and anxious. She agreed in cross-examination that she only saw the person who entered the room for two to three seconds before Anthony was struck.

[294] All of that does not rule out that despite those circumstances, Ms. Morris could still identify the person. Her evidence was that she recognized the person as T.J. Brown, “pretty much as soon as he started hitting Tony”.

[295] Ms. Morris testified that after punching Tony and knocking him unconscious, she yelled or screamed, “Stop, what are you doing? Stop”. Her evidence was that T.J. then yelled “in her face”, which she said meant within a few inches of her face, and they were facing each other when he did so.

[296] When asked what the person was wearing, Ms. Morris’ evidence was that she thought, maybe, a hoodie. She stated that the hood was up and “he might’ve had a hat on under the hood”. She stated that she saw his face. Her description of the

person was maybe medium height, medium build and “kind of stocky”. She said that he was 5 feet 6 in height, perhaps a bit taller than she was and was white.

[297] In cross-examination Ms. Morris couldn’t say what the person’s eye colour was and couldn’t see the colour of his hair because he was wearing a hoodie. She testified that she did not notice any particular facial features, but added that she wasn’t looking for any, “I knew who it was”.

[298] Ms. Morris testified that she had interacted with T.J. Brown “maybe two or three times. Probably less than five”. T.J. Brown was not a stranger to Ms. Morris.

[299] Ms. Morris testified about a time, which she said was about six years previously, when she met Mr. Brown when she was renting from someone called “Shannon”, at a time when she was not involved with Anthony Cooper. She said that T.J. came over to that place and had some drinks with her and others. She testified that she thought that someone told her Mr. Brown’s name. She thought that he appeared “skinnier” that night than on the night of the incident. She said that she thought that he had a full-faced beard and brown hair. Ms. Morris testified that she thought that she met T.J. Brown on another occasion at the same place but gave no further details.

[300] Ms. Morris gave evidence about seeing T.J. Brown at places where she was with friends and seeing him at J.D. Eye's home after she and Tony were together. She recalled one evening where there was a bonfire in the backyard and said that T.J. Brown and others were there.

[301] When asked if she had knowledge of Mr. Brown's age by Crown counsel, Ms. Morris then said that she believed that he was two years younger than her, so about 33 years of age. She said that he had the same birthday as her sister. When asked how she knew this, Ms. Morris' evidence was that she knew his birthday from one of the times that she had met him, that her sister was always with her and "it was brought up that they had the same birthday", which she said meant the same day, and probably the same year. She thought that this occurred when she was renting at Shannon's house, i.e., in 2016 or 2017.

[302] I do not accept Defence counsel's suggestion, that Meaghan Morris only offered this evidence after a break in her evidence and didn't give this evidence early on. This evidence, as I have noted above, was occasioned by a question from Crown counsel about Mr. Brown's age, a question not previously asked.

[303] I find this evidence of Mr. Brown's birthday does much to strengthen the reliability of Ms. Morris' recognition of T.J. Brown. I say this, not because she happened to know his birthday, but because common sense tells me that a

conversation wherein it is revealed that two people's birthdates are the same is not a fleeting one. Common sense tells me that "small talk" at a party doesn't start with the question, "What's your birthday?". There has to be some level of interaction, surely, before the conversation veers to the area of birthdays. Ms. Morris' recollection of Mr. Brown's birthdate was unchallenged and there was no evidence from any other source wherein she learned of Mr. Brown's date of birth.

[304] I also find Ms. Morris' evidence that she was very close to Mr. Brown's unmasked face on the night of these incidents, the two being "face-to-face", strengthens the reliability of her recognition evidence.

[305] Further, Ms. Morris' evidence regarding the sequence and outcome of the events was corroborated by the evidence of both Luke and Anthony Cooper and the photographs taken by Cst. Graham of the bedroom and of Mr. Cooper's injuries.

[306] As stated previously in this decision, no witness identified anything unique or distinctive about the appearance of the person who broke into the Cooper home and assaulted Anthony Cooper. Ms. Morris' contact with T.J. Brown was not "fleeting", nor was it long and close. It was somewhere on the continuum of total stranger to close friend or family member. Her recognition was not a bald conclusion, without more.

[307] I find that this Court can rely upon Ms. Morris' recognition of T.J. Brown, even in the absence of other evidence linking him to the incident.

[308] In terms of in-dock identification made of Ms. Morris and Mr. Cooper, I do not rely upon these in coming to the conclusions that I have. There were few males or females in the courtroom during the trial, except for counsel, sheriffs, the Court clerk and Mr. Brown. Mr. Brown was, quite obviously, the accused.

Conclusions

[309] When I review all of the evidence, I conclude that I can rely upon the evidence of both Meaghan Morris and Anthony Cooper which identifies Mr. Brown. As such, I find that the Crown has proven, beyond a reasonable doubt, all of the essential elements of the offences with which Mr. Brown is charged. There is no reasonable doubt in my mind, based upon all of the evidence before the Court, that Mr. Brown broke into Anthony Cooper's house close to or after midnight on December 24, 2020, that he assaulted and injured Anthony Cooper and that he stole rifles, and marijuana from Anthony Cooper.

[310] With respect to the firearms stolen, as noted above, the serial numbers of these rifles were entered into evidence, on agreement by counsel. These serial numbers were provided to Anthony Cooper by the police some ten years before.

[311] Also noted is that the Crown has proven that Anthony Cooper suffered injuries to his face as a result of being assaulted by T.J. Brown. The condition of Mr. Cooper's face was shown in the photographs which Cst. Graham took on the night of the assault which were entered into evidence before this Court.

Smith, J.