

SUPREME COURT OF NOVA SCOTIA

Citation: R. v. Shephard, 2013 NSSC 447

Date: 20130607

Docket: CRH 407765

Registry: Halifax

Between:

Her Majesty the Queen

v.

Jerrell Ervin Shephard

Restriction on publication: 486 CCC Publication Ban

486.6 (1) Every person who fails to comply with an order made under subsection 486.4(1), (2) or (3) or 486.5(1) or (2) is guilty of an offence punishable on summary conviction. (2) For greater certainty, an order referred to in subsection (1) applies to prohibit, in relation to proceedings taken against any person who fails to comply with the order, the publication in any document or the broadcasting or transmission in any way of information that could identify a victim, witness or justice system participant whose identity is protected by the order.

Judge: The Honourable Justice Glen G. McDougall

Heard: April 2, 3, 4, 5, 8, 9, 16, 2013, in Halifax, Nova Scotia

Oral Decision: June 7, 2013

Written Decision: July 14, 2014

Counsel: Paul Carver and Scott Morrison, on behalf of the Crown
Alfred Seaman, on behalf of Jerrell Ervin Shephard

By the Court:

[1] The accused, Jerrell Ervin Shephard is charged:

1. that he on or about the 1st day of January, 2012 at, or near Dartmouth, in the County of Halifax in the Province of Nova Scotia, did attempt to murder KG while using a firearm by discharging the said firearm at the said KG, contrary to Section 239(1)(a) of the Criminal Code.
2. AND FURTHER THAT HE AT THE SAME TIME AND PLACE AFORESAID, did unlawfully wound, maim, disfigure or endanger the life of KG thereby committing an aggravated assault, contrary to Section 268(1) of the Criminal Code.
3. AND FURTHER THAT HE AT THE SAME TIME AND PLACE AFORESAID, did in committing an assault on KG use or threaten to use a weapon, or imitation thereof, to wit., a firearm, contrary to Section 267(a) of the Criminal Code.
4. AND FURTHER THAT HE AT THE SAME TIME AND PLACE AFORESAID, did use a firearm, while committing the indictable offence of aggravated assault, contrary to Section 85(1)(a) of the Criminal Code.
5. AND FURTHER THAT HE AT THE SAME TIME AND PLACE AFORESAID, did without lawful excuse point a firearm at KG, contrary to Section 87(1) of the Criminal Code.
6. AND FURTHER THAT HE AT THE SAME TIME AND PLACE AFORESAID, did possess a loaded prohibited or restricted firearm and was not the holder of an authorization of license under which he may possess the said firearm in that place, contrary to Section 95 of the Criminal Code.
7. AND FURTHER THAT HE AT THE SAME TIME AND PLACE AFORESAID, did have in his possession a firearm while he was prohibited from doing so, by reason of an Order of Prohibition, pursuant to Section 109 of the Criminal Code dated at Halifax on the 15th day of July, 2009, contrary to Section 117.01(1) of the Criminal Code.
8. AND FURTHER THAT HE AT THE SAME TIME AND PLACE AFORESAID, did have in his possession a firearm while he was prohibited from doing so, by reason of an Order of Prohibition, pursuant to Section 109

of the Criminal Code dated at Halifax on the 15th day of July, 2010, contrary to Section 117.01(1) of the Criminal Code.

9. AND FURTHER THAT HE AT THE SAME TIME AND PLACE AFORESAID, did discharge a firearm with intent to wound or endanger the life of KG, contrary to Section 244(1) of the Criminal Code.

[2] The trial of these charges got underway before me on Tuesday, April 2, 2013 and continued for an additional five days ending on Tuesday, April 9, 2013. Closing arguments were presented on Tuesday, April 16, 2013.

[3] Over the course of the trial the Court heard from a total of 18 Crown witnesses. Prior to calling the first witness the accused and his counsel agreed to a series of admissions pursuant to s. 655 of the Criminal Code which states:

655. Admissions at trial – Where an accused is on trial for an indictable offence, he or his counsel may admit any fact alleged against him for the purpose of dispensing with proof thereof.

[4] This series of admissions were entered and marked Exhibit No. 1. Exhibit No. 1 contains the following admissions:

1. All material events occurred between the evening hours of December 31, 2011 and the early morning hours of January 1, 2012;
2. All material events occurred in the Regional Municipality of Halifax, Province of Nova Scotia;
3. In the early morning hours of January 1, 2012 KG was shot twice with a loaded firearm. The first bullet entered his chest and remains lodged in his body. The second bullet went through the brim of his ballcap and then ricocheted off the cap itself;
4. The clothing worn by KG at the time he was shot was seized by police. Forensic testing confirmed the presence of a gunshot residue pattern. The contents of a report prepared by Jacques Rioux dated February 2, 2012 are admitted;
5. There is no issue related to continuity of any of the exhibits to be introduced at the trial;

6. The photographs and videos to be introduced fairly and accurately depict their respective contents;
7. At no material time was the accused the holder of any authorization or license to carry or be in possession of a firearm;
8. At no material time was the accused in possession of a registration certificate for any firearm;
9. At all material times the accused was prohibited from possession a firearm by reason of an [sic] two Orders of Prohibition pursuant to s. 109 of the Criminal Code. The first is dated at Halifax on the 15th day of July, 2009. The second is dated at Halifax on the 15th day of July 2010.

[5] The two Orders of Prohibition referred to in paragraph 9 of the “Admissions” were separately marked as exhibits. Exhibit No. 2 is the Order of Prohibition granted by His Honour Provincial Court Judge Jamie S. Campbell on 15 July, 2009; Exhibit No. 3 is the Order of Prohibition granted by His Honour Provincial Court Judge John G. MacDougall on 15 July, 2010.

[6] The first prohibition order was for a period of five years (a minimum of two years) after the expiration of the custodial portion of a sentence given to Mr. Shephard on July 15, 2009. The second prohibition order was for life. It prohibited Mr. Shephard “from possession any prohibited firearm, restricted firearm, prohibited weapon, prohibited device or prohibited ammunition and from possessing any other firearm, other than a prohibited firearm or restricted firearm, or ammunition or any cross-bow, restricted weapon or explosive substance.”

[7] The Prohibition Orders also required Mr. Shephard “to surrender any firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device, ammunition or explosive substance in (his) possession and any authorization, license or registration certificate (he) has for any of the prohibited things to a peace officer, within ten days.”

[8] In addition to the foregoing, three large aerial maps or photographs showing a portion of the former City of Dartmouth, the Metro Transit Bus Terminal located in the vicinity of Wyse Road and Nantucket Avenue, as well as the location of four

security cameras mounted at the Bus Terminal were admitted in evidence by agreement of counsel and marked as Exhibits No. 4, 5 and 6 respectively.

[9] Crown and Defence counsel also agreed to admit in evidence a booklet of photographs consisting of 45 separate photos. These photographs were taken by Constable Colin O'Brien. The booklet of photographs was entered and marked as Exhibit No. 36.

[10] As well, a small container of black elastic bands found at the apartment of the accused, Jerrell Shephard, located at 51 Joseph Young Avenue, in Dartmouth, Nova Scotia was entered and marked Exhibit No. 37.

[11] These admissions were put to print and marked Exhibit No. 38.

[12] As a result of these admissions and agreements between counsel the need to call Cst. O'Brien and some other witnesses was avoided thereby saving court time. I thank counsel for their efforts in this regard.

[13] At the conclusion of the Crown case, the Defence elected not to call evidence.

[14] The Defence is not required to call evidence. The accused is presumed innocent until such time as the Crown proves, beyond a reasonable doubt, that he committed some or all of the offences of which he has been charged.

[15] If the Crown fails to discharge the burden that rests upon them then the accused would be found "Not Guilty." This right that Mr. Shephard has is a right that all accused have. It is a right that has existed in Canada long before it was enshrined in paragraph 11(d) of the *Canadian Charter of Rights and Freedoms* It is a right that is fundamental to our Criminal Justice System.

[16] With this rather cursory explanation of how the Criminal Justice System works in our Country, I will provide a brief summary of the evidence that was presented during the course of the trial.

[17] I do not propose to give a detailed summary of all the evidence presented by each and every witness who was called to testify.

[18] In discussing the elements of the various offences facing the accused I may discuss certain evidence in more detail. In doing so I do not intend to downplay any of the evidence heard but rather focus on what I believe is the most relevant in helping me to decide the accused's innocence or guilt. I may not mention certain testimony but that should not be taken to mean that I did not consider it in arriving at the appropriate verdict for each of the nine offences charged.

BRIEF FACTUAL OVERVIEW OF THE CASE:

[19] On the evening of December 31, 2011 a group of friends, including the victim in this case, gathered together at the apartment of DB in the Highfield Park area of Dartmouth. In all there were eight people in attendance.

[20] Most, if not all, were consuming alcoholic beverages and some were smoking marijuana. A few were using other forms of illegal drugs.

[21] At some point in the evening the group of friends decided to leave the apartment and walk to the Metro Transit Bus Terminal next to the Dartmouth Sportsplex with the intention of catching a bus to Downtown Halifax. The idea was to continue their New Year's Eve celebrations at one of the many bars in Halifax.

[22] A number of witnesses testified as to the route taken to walk from DB's apartment to the Bus Terminal. The group encountered a male person and two women near the Old Mill Tavern.

[23] They also stopped at the Convenience Store which forms part of the Esso Service Station on the corner of Wyse Road and Nantucket Avenue pretty well directly across the street from the Bank of Nova Scotia which is located on the other side of Nantucket Avenue next to the Bus Terminal. At least one member of the group entered the Esso Convenience Store to purchase some cigarette papers.

[24] The brief stop near the Old Mill Tavern also proved to be interesting. One of the women who they came across removed KG's baseball hat and threw it to the ground. It was picked up by SS who placed it back on KG's head with the cap's bib facing to the front of KG's head. Normally he wore the cap backwards with the bib facing behind. This might have later saved KG's life or at least saved him from sustaining even more serious injuries.

[25] The group of friends eventually made their way across Nantucket Avenue and through the Bank of Nova Scotia parking lot to the Bus Terminal.

[26] Video taken from the Bus Terminal Security Cameras along with still photographs captured from the videotape show the group arriving sometime after midnight. They were walking in several smaller groups of two or three spread out in a somewhat haphazard line.

[27] While the group of friends which included the victim – KG – were making their way from DB's apartment to the Dartmouth Bus Terminal, another group of individuals which included the accused – Jerrell Shephard – his girlfriend, Samantha Cornish, and three other females namely, Latisha Butt, Tanisha Graves and Robyn Rafuse were at Mr. Shephard's apartment also in the Highfield Park area of Dartmouth.

[28] Latisha Butt was a friend of Mr. Shephard's girlfriend, Samantha. On the evening of December 31, 2011 Ms. Butt testified that she went there to drink with her friend, Samantha. While there, Ms. Butt finished putting a series of approximately 80 small braids in Mr. Shephard's hair. She had started doing his hair the day before.

[29] Ms. Butt described it as like a checker board pattern with little braids protruding from the centre of each square. She indicated that she used elastics to hold the braids in place. She also testified that she had done Mr. Shephard's hair in this style before. She had also used it on other males. She said it wasn't really all that unusual. Ms. Butt was familiar with Mr. Shephard. She said she had met him five or six times before.

[30] The manner in which Ms. Butt did Mr. Shephard's hair is noteworthy in that a number of eye witnesses testified as to the uniqueness or, at least, unusualness of the hair style of the individual who shot KG. The descriptions given varied from witness to witness but there was a certain degree of consistency in the overall appearance.

[31] According to Ms. Butt the group of four women along with Mr. Shephard were all drinking while at Mr. Shephard's apartment.

[32] Eventually it was decided that they would call a taxi to go to the Holiday Inn which is located across Wyse Road from the Metro Transit Bus Terminal.

[33] When the cab arrived the group of five were driven to the Holiday Inn. There was a slight delay in their departure from Mr. Shephard's apartment while they waited for the accused to finish smoking a cigarette he had lit up just before the cab arrived.

[34] The cab driver refused to allow Mr. Shephard to smoke while in his cab. Apparently this irritated Mr. Shephard and he made this fact known to the cab driver on the way to the Holiday Inn.

[35] Upon arrival Ms. Butt and the other three females got out of the cab and entered the hotel lobby. Mr. Shephard was left to pay for the fare. After a bit of a delay, he also entered the hotel lobby. Security cameras at the hotel caught the five individuals arriving and then shortly after departing through the hotel's revolving doors.

[36] According to the testimony of Thomas Lepine, who was working as a Security Guard that evening at the Holiday Inn, there had been a number of parties going on which they had to break up just before Mr. Shephard, Ms. Butt and the other three women arrived.

[37] Mr. Lepine and taxi driver, Charles Burnell, identified the male individual who had entered the hotel and later left with the same four women that had been passengers in Mr. Barnell's cab when he drove them to the Holiday Inn in the hotel's security camera video.

[38] Ms. Butt also identified herself in the security camera video and her three female friends and Mr. Shephard. At trial Ms. Butt testified that she was only 85% sure that the male person she identified on the video was Jerrell Shephard. At the preliminary inquiry it was pointed out to her that she had positively identified Mr. Shephard in the video.

[39] After leaving the Holiday Inn Ms. Butt, Mr. Shephard, Ms. Cornish, Ms. Graves and Ms. Rafuse made their way across Wyse Road to the Bus Terminal with the idea of going to the McDonald's Restaurant which was located further up and across Nantucket Avenue.

[40] As Ms. Butt and her female friends walked along the sidewalk on the Bank of Nova Scotia side of the bus shelters, KG and his seven friends were making their way down the opposite side.

[41] Ms. Butt testified that she recalled seeing Jerrell Shephard on the opposite side from where she and her female friends walked along the sidewalk as they headed towards McDonald's Restaurant. She said she didn't actually see him cut through to go to the other side – she referred to it as the Sportsplex side.

[42] She recalled seeing Mr. Shephard speaking to two white males. One of them she described as “the little white boy.”

[43] Ms. Butt did not see anyone being shot but she recalled hearing a noise that to her sounded like a cap gun or firecrackers after which she saw the “little white boy” hold his ears. It was the same young, white male that she had earlier seen Jerrell Shephard speaking to. When she looked she saw Mr. Shephard with his hands in his pockets. Then she said she looked at the little white boy and when she turned back Mr. Shephard was no longer there.

[44] When she next saw Jerrell Shephard he was either jogging or running in the direction of McDonald's Restaurant. Shortly thereafter Ms. Butt and her three female friends also ran from the area in the same direction that she had last seen Mr. Shephard running. All of this is captured on the Bus Terminal security cameras.

[45] Eventually Ms. Butt, Samantha Cornish and Robyn Rafuse met up with Mr. Shephard at his apartment. The four of them spent the remainder of the night there.

[46] Not only did Ms. Butt point out the man she saw running from the scene after she heard the cap gun or firecracker sounds on the video, she also pointed him out in the courtroom – he is the accused, Jerrell Shephard. Ms. Butt also described the clothing Mr. Shephard was wearing that night including dark pants, a dark “poofie” jacket and white footwear. She testified that the jeans Mr. Shephard was wearing that night did not have a white design on the back pockets as did the jeans that were found later during the search of Mr. Shephard's apartment.

[47] Although the video lacks clarity it appears that the person identified as Mr. Shephard had on jeans that displayed a white pattern on the two back pockets.

[48] After a *voir dire* to determine admissibility, a portion of the sworn statement given to the police by Latisha Butt was admitted in evidence. In it, Ms. Butt said she watched as Mr. Shephard looked around and appeared to see a security guard. Whereupon she recalled him saying: “*Oh Shit! I gotta go.*” This occurred just after Ms. Butt heard the firecracker sounds and saw the little white boy holding his ears and bending over. At trial, Ms. Butt testified that despite reading what she had said to the police in her statement and what she earlier testified to at the preliminary inquiry, it did not help her to recall this on the stand.

[49] The Court also heard from Dexter Fowler who is a security guard with Paladin Security. Prior to starting his employment with Paladin, Mr. Fowler worked for another security company. He also worked with the U.S. Navy’s submarine service for 17 years.

[50] On the night of December 31, 2011 and January 1, 2012 Mr. Fowler worked security at the Dartmouth Bus Terminal. Mr. Fowler testified that he saw a black male about 6 feet or 6 feet, 1 inch, raise his arm and point at a white, Caucasian male. He heard a bang. He described the object as being shiny. He said it was a revolver. He also testified that he heard one bang for sure but it could have been more than one.

[51] Mr. Flower watched as the person he saw point the shiny object at the white male took a few steps back and then began to, at first, trot then run away in the direction of McDonald’s restaurant. Mr. Fowler stated that he only saw one person running from the area. He tried to keep in visual contact with this individual as he ran away.

[52] On the bus terminal security camera video, Mr. Fowler pointed out the individual who he said he saw point the shiny object at the white male. The person he pointed out was the same individual Latisha Butts identified as the accused, Jerrell Shephard. Mr. Fowler was not asked to identify the person he saw holding the shiny object that was pointed at the white male while he was on the stand. Other than the fact that the person he saw running away after pointing the shiny object and after hearing the bang was a black male and giving a general description of his clothing,

Mr. Fowler could not recall any other discerning features that would identify that person as the accused.

[53] After hearing from Mr. Fowler, the Crown called Andrew Bugden to the stand.

[54] Mr. Bugden testified that he had been out celebrating New Year's and returned home around 12:30 a.m. on the morning of January 1, 2012. Mr. Bugden lived at 66 Symonds Street in Dartmouth at the corner of Victoria Road. He testified that he was out on his back deck drinking a beer when an individual who he described as a black male; about 6 feet tall; and weighing between 170 and 175 pounds; early 20's; with a chubby face; no facial hair; not wearing glasses; and having hair with braids that were tight to his head; and wearing a dark green or navy parka with fur around the hood came along and asked him if he had an extra beer.

[55] Mr. Bugden then invited him up. He gave the guy a beer and as they each drank their beer and smoked a cigarette the guy took out a handgun and showed it to Mr. Bugden.

[56] Mr. Bugden was not threatened in any way. He said the fellow just seemed to be bragging about it.

[57] Mr. Bugden described the handgun as a revolver. He said the guy was with him on the deck for about 10 minutes before leaving. Mr. Bugden said he gave the guy directions on how to get to Primrose Street and watched as the guy jogged away and then went out of sight around the corner.

[58] Mr. Bugden marked the direction that the fellow, who he identified in court as the accused, was walking in when he first approached his deck and the direction he walked in when he left. Mr. Bugden responded to a police request to contact them if anyone had seen a person who's photo was included with the newspaper article. He was never asked to identify the accused in a police line-up or photo line-up. The first time Mr. Bugden was asked to identify the person who came to his deck was in Court during the preliminary inquiry.

[59] As I indicated earlier this is not intended to be an exhaustive review of all the evidence that was heard. It is intended to provide an overview of the events that took

place on the evening of December 31st, 2011 and early on the morning of January 1st, 2012 that culminated in the shooting of KG, a boy of 16 years at the time.

[60] No one is disputing that KG was shot twice with a loaded firearm. Indeed that is admitted.

[61] It is also admitted that the first bullet that struck KG entered his chest and remains lodged in his body. The second bullet went through the brim of his ballcap and then ricocheted off the cap itself.

[62] The evidence of KG along with photographs showing the entry wound to his chest just above his heart and the wound to his head and scalp caused as the second bullet grazed along the top of his head as well as the expert evidence of Dr. Michael Biddulph all attest to the seriousness of these injuries.

[63] Upon admission to the Emergency department at the QE II Health Sciences Centre, KG had to be intubated as he had a collapsed lung.

[64] A bullet fragment was located near the posterior chest wall. It was decided to leave it where it was because to remove it might cause more damage and more harm than good. According to Dr. Biddulph, the bullet fragment just missed critical structures such as the aorta, the heart and the pulmonary artery as it passed through KG's chest. Dr. Biddulph testified that if the bullet had made contact with the tissue of the heart it would be 99.9% probable that it would have resulted in a fatality.

[65] Regarding the bullet wound, Dr. Biddulph opined that if it had penetrated the skull it would have resulted in significant brain damage that could have led to KG's demise. Luckily for him the bullet only cut a furrow through his scalp which was closed using stitches.

[66] As bad as things were for KG, it could have been so much worse.

[67] It is clear that the individual who fired two bullets at KG was not simply intending to scare or injure him – he was intending to kill him. Shooting someone at close range near the heart followed by a shot directed to that person's head can only lead to this one logical conclusion.

ANALYSIS OF THE CASE AGAINST JERRELL ERVIN SHEPHARD:

[68] The case against the accused is, for the most part, circumstantial. While there were a number of eye witnesses who identified Jerrell Shephard as the person who shot KG including KG himself, as well as JPL, CS and JB, eye witness identification without any other types of corroborating evidence might not be all that reliable.

[69] Indeed, it can be very problematic in that the witnesses honestly believe they can identify the guilty party with a degree of assuredness that approaches certainty but time and time again such evidence has been shown to be unreliable.

[70] In the case of the witnesses who pointed out the accused, in the courtroom, as the shooter none of them had ever seen Mr. Shephard before.

[71] In addition, they had all been drinking or using drugs and were exhibiting varying degrees of intoxication.

[72] Furthermore, all three of the eye witnesses had seen photographs of Mr. Shephard before being asked in court, at the preliminary inquiry, to identify him. Such in-dock identification of the alleged perpetrator of a crime who is probably the only person present displaying African-Nova Scotian racial features is, at best, weak.

[73] This is not to suggest that all of the eye witnesses' testimony is inherently unreliable. They can and did provide evidence that, when combined with or compared to the evidence of other witnesses, tends to create a complete picture of events as they unfolded and of those who played a role in their genesis and development.

[74] When one looks at the entirety of the evidence there appears to be one particular physical feature that distinguishes Jerrell Shephard as the person who was not only at the scene of the shooting of KG but which also points to him as the shooter. Pretty well all the witnesses who had the opportunity to observe Mr. Shephard that night remarked about his unique hair style. They could not all agree on the number of braids he had in his hair but they were pretty well all consistent in describing the pattern that covered his entire head. The braids were described to be short, perhaps an inch to an inch and a half long. They were not long. One witness, Daniel Bonin, described them as being "spikey."

[75] Ms. Butt was probably in the best position of anyone to describe the hair style. After all, she did Mr. Shephard's hair over the course of two days and although she said she had created similar hair styles for other people and even Mr. Shephard in the past I accept as a fact that it was a readily noticeable and distinguishing feature.

[76] The taxi driver, Charles Burnell, also commented on this when he identified Mr. Shephard as the front seat passenger he picked up and drove to the Holiday Inn.

[77] In the aftermath of the shooting, after the perpetrator fled the scene on foot, running, Mr. Bugden who testified that he spent approximately 10 minutes on his deck within a few feet of the person he identified in court as Mr. Shephard also commented on the uniqueness of that person's hairstyle. I temper this with the knowledge that Mr. Bugden had seen a photograph of Mr. Shephard in a newspaper before being called upon to identify him in court.

[78] Latisha Butt's testimony could not leave any doubt as to the identity of the person she saw talking to two white males including the little white male she saw clutching his ears after she heard what she said sounded like cap gun or firecracker noises. She could identify Mr. Shephard because she knew him. She had spent the evening as well as a part of the day before in his company. She had met him five or six times before.

[79] She watched as the person she saw talking to the two white males ran from the scene heading off in the direction of McDonald's Restaurant. She identified that person seen running away as Jerrell Shephard. She pointed him out in the video and the still photographs taken from the security cameras set up to monitor any activity including suspicious activity or criminal activity that might occur at or near the Bus Terminal.

[80] The person identified by Latisha Butt as Jerrell Shephard was also identified by Dexter Fowler as the person he saw pointing a shiny object at the shooting victim and the same person he saw fleeing the scene in the direction of the McDonald's Restaurant.

[81] Mr. Robin Zinck, the service supervisor for Metro Transit, testified that he saw this same individual running away from the scene. Using the video he pointed out the

individual he saw that might. Again, this is the person identified as the accused, Jerrell Shephard, by Ms. Butt.

[82] Neither Ms. Butt nor Mr. Fowler nor Mr. Zinck recalled seeing anyone else running from the scene of the shooting. I, too, have relied on my own viewing of the security camera video and still photographs that were entered in evidence throughout the course of the trial.

[83] I am satisfied, based on the totality of the evidence, that the person who fired the two bullets at KG – one penetrating his chest within millimetres of his heart and associated vital organs and one that burrowed its way through his scalp– could only have been the accused, Jerrell Ervin Shephard. There is no other logical conclusion.

[84] The fact that Mr. Shephard ran from the scene shortly after the shooting is evidence of “consciousness of guilt” [See *R. v. Turette* [2005] S.C.J. No. 51 at para. 38] which states:

38 The more traditional designation of such conduct, “consciousness of guilt” evidence, was changed by this Court to “post-offence conduct” evidence in *R. v. White*, [1998] 2 S.C.R. 72. Major, J. held, at para 20, that use of the phrase “consciousness of guilt” should be discouraged because it might undermine the presumption of innocence or may mislead the jury. In *White*, at para. 19, Major, J. provided a non-exhaustive list of conduct that is typically admitted as post-offence conduct evidence: flight from the scene of the crime or the jurisdiction in which the crime was committed, attempts to resist arrest; failure to appear at trial; and acts of concealment such as lying, assuming a false name, changing one’s appearance, and hiding or disposing of evidence. In *White*, the post-offence conduct was the accused’s running from the police to avoid arrest, the attempted disposal of one of the murder weapons, and fleeing the jurisdiction following the killing.

[85] This conduct – flight from the scene of the crime – helps to fashion my conclusion and really it is the only logical conclusion one can arrive at given the overwhelming evidence pointing to the accused as the individual who shot KG.

[86] Moreover, there really is not any other logical conclusion one could arrive at given the volume of direct and circumstantial evidence presented at trial.

A LOOK AT THE VARIOUS (9) OFFENCES OF WHICH JERRELL ERVIN SHEPHARD HAS BEEN CHARGED

[87] Jerrell Ervin Shephard faces nine separate counts. The first count in the indictment is by far the most serious.

[88] Mr. Shephard is accused that he attempted to murder KG while using a firearm, by discharging the said firearm at the said KG.

[89] There are three essential elements which the Crown must prove beyond a reasonable doubt, specifically:

- (i) that Jerrell Shephard's conduct was an attempt to murder KG;
- (ii) that he meant to kill his intended victim;
- (iii) that his intended victim did not die from anything that Jerrell Shephard did.

[90] As previously stated, shooting someone at close range – once in the chest near the heart and a second time striking the victim's head even though the bullet miraculously did not actually penetrate his head – is an attempt to murder that person.

[91] Mr. Shephard did not accidentally discharge the gun he was holding; not the first time nor the second. In any event there is no defence evidence to even suggest an accidental discharge.

[92] A number of witnesses testified as to the close proximity of the shooter to the victim. One witness described it as "point blank." Another said the firearm was close enough to be in contact with KG's clothing. Another, Mr. Fowler, said the shooter held the firearm at arm's length to the target. The Crown's expert, Jacques Rioux, expressed the opinion that based on testing results the victim was shot at close range. I accept his opinion in this regard.

[93] A firearm, even a low caliber firearm, such as the one that is suspected to have been used in committing this crime, can be lethal.

[94] I am satisfied beyond a reasonable doubt that Mr. Shephard did not simply intend to scare or intimidate or just injure KG. He intended to kill him.

[95] It seems strange to say that a person shot twice at close range was lucky but in this case, KG was extremely lucky. He was extremely lucky not to have been killed. He came so close but thankfully he did not die. He survived despite Jerrell Shephard's attempt to murder him.

[96] I find Mr. Shephard 'guilty' of this offence. In so doing, I will enter a conditional stay on the second charge in the indictment which involves aggravated assault, contrary to s. 268(1) of the *Criminal Code*. This is based on the "*Kienapple*" principle. [Reference *R. v. Kienapple* [1975] 1 S.C.R. 729] This reflects the submissions of both Crown and Defence in their closing arguments.

[97] For the same reasons I choose also to enter a conditional stay on counts three and four which pertain to assault with a weapon (s. 267(a)) and use of a firearm in the commission of an offence (s. 85(1)(a)).

[98] The same principle is applicable in entering a conditional stay on count nine in the indictment, discharging a firearm with intent contrary to s. 244(1) of the *Code*.

[99] As with count two, both Crown and Defence agreed that counts three, four and nine should be stayed if the accused was found 'guilty' of the more serious offence of attempted murder.

[100] In respect to count five in the Indictment, pointing a firearm contrary to s. 87(1) it, too, should be conditionally stayed based on *Kienapple*.

[101] With respect to count six, there is insufficient evidence to conclude that the firearm brandished by Jerrell Shephard was a prohibited weapon but based on the entirety of the evidence I am convinced, beyond a reasonable doubt, that it was a restricted weapon, to wit, a hand gun of some kind. Paragraph 9 of Exhibit No. 1 admits that Mr. Shephard was not "the holder of any authorization or license to carry or be in possession of a firearm." The essential elements of this offence have all been proved beyond a reasonable doubt and I find the accused, Jerrell Shephard, 'guilty' of possession of a loaded, restricted firearm contrary to s. 95 of the *Criminal Code*.

[102] In reference to counts seven and eight in the indictment, the accused agreed at paragraph nine of Exhibit No. 1 that he "was prohibited from possessing a firearm by

reason of two Orders of Prohibition pursuant to s. 109 of the *Criminal Code*. The first is dated at Halifax on the 15th day of July, 2009. The second is dated at Halifax on the 15th day of July, 2010.

[103] The first Order of Prohibition was for five years; the second was for life.

[104] The first Order was, in effect, subsumed in the second lifetime ban of possessing a firearm.

[105] I am satisfied that the Crown has proved, beyond a reasonable doubt, that Jerrell Shephard had possession of a firearm while prohibited from doing so by reason of an Order of Prohibition, pursuant to s. 109 of the *Criminal Code* dated at Halifax, on the 15th day of July, 2010 contrary to s. 117.01 of the *Criminal Code* and I find Jerrell Shephard ‘guilty’ of that offence.

[106] The similar charge for breaching the 15 July 2009 Order of Prohibition included in count seven is conditionally stayed based on the “*Kienapple*” principle.

[Mr. Shephard is asked to stand]

[107] Mr. Shephard, I find you guilty of:

- (1) Count 1, Attempted Murder contrary to s. 239(1) of the *Criminal Code*;
- (2) Count 6, possession of a loaded restricted firearm, contrary to s. 95 of the *Criminal Code*; and
- (3) Count 8, possession of a firearm while prohibited from doing so, by reason of an Order of Prohibition dated July 15, 2010 contrary to s. 117.01 of the *Criminal Code*.

[108] Counts 2, 3, 4, 5, 7 and 9 are all conditionally stayed to avoid multiple convictions arising from the same delict in accordance with the principle contained in *R. v. Kienapple, supra*.

Justice Glen G. McDougall