COURT OF APPEAL OF YUKON

Citation: *R. v. Sheepway,*
2022 YKCA 3

Date: 20220428
Docket: 18-YU824

Between:

Regina

Respondent

And

Darryl Steven Sheepway

Appellant

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Corrected Judgment: The title page of the judgment was corrected on April 29, 2022.

Before: The Honourable Mr. Justice Frankel
The Honourable Madam Justice Fenlon
The Honourable Madam Justice DeWitt-Van Oosten

On appeal from: An order of the Supreme Court of Yukon, dated January 30, 2018 (conviction) (*R. v. Sheepway*, 2018 YKSC 4, Whitehorse Docket 16-01511).

Counsel for the Appellant (via videoconference):	V. Larochelle
Counsel for the Respondent (via videoconference):	M. McKay
Place and Date of Hearing:	Vancouver, British Columbia January 27, 2022
Place and Date of Judgment:	Vancouver, British Columbia April 28, 2022

Written Reasons by:
The Honourable Madam Justice DeWitt-Van Oosten

Concurred in by:
The Honourable Mr. Justice Frankel
The Honourable Madam Justice Fenlon

Summary:

After a trial by judge alone, the appellant was found guilty of second degree murder. He alleges several errors, including that the judge: misdirected himself on the use of the common-sense inference; erred in his application of that inference; failed to properly analyze evidence relevant to intent; wrongly required corroboration as a pre-requisite to accepting the appellant's testimony; misapprehended evidence; and erred in allowing the Crown to call a rebuttal expert. Held: Appeal dismissed. The appellant has not established reversible error. His grounds of appeal largely seek to challenge the judge's interpretation of the evidence, the inferences he drew, and his assessment of the appellant's credibility. The conclusions reached by the judge were reasonably open to him on the evidence considered as a whole. The appellant has not established a principled basis for appellate interference with the verdict.

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Reasons for Judgment of the Honourable Madam Justice DeWitt-Van Oosten:

Introduction

[1] The appellant, Darryl Sheepway, was found guilty of murdering Christopher Brisson. On August 28, 2015, the appellant shot Mr. Brisson with a 12-gauge pump-action shotgun while the latter was sitting in the cab of his truck.

[2] The appellant was charged with first degree murder. With the Crown's consent, he was tried by a judge alone in the Supreme Court of Yukon. The appellant admitted that he killed Mr. Brisson. However, he said he did not have the specific intent required for murder.

[3] The appellant was acquitted of first degree murder because the Crown failed to prove planning and deliberation. However, the judge found beyond a reasonable doubt that the appellant shot Mr. Brisson with the intent to cause bodily harm that he knew was likely to cause death and was reckless as to whether death ensued. Consequently, he entered a conviction for second degree murder contrary to s. 229(a) of the *Criminal Code*, R.S.C. 1985, c. C-46.

[4] The appellant says the judge committed several errors that warrant a new trial. For the reasons that follow, I would dismiss the appeal.

Background

[5] The reasons for conviction are indexed as *R. v. Sheepway*, 2018 YKSC 4. I will not detail the entirety of the evidentiary background. Rather, I will set out only those parts that I consider necessary to provide sufficient context for these reasons.

The Trial Findings

[6] There were two main issues for determination at the trial: (a) whether the Crown proved the specific intent for murder; and (b) if so, whether the murder was planned and deliberate.

[7] In deciding these issues, the judge made the following findings.

[8] In the two or three weeks leading up to the shooting, the appellant was using crack cocaine on a daily basis. “His days were spent fighting off, or indulging in, cravings for more cocaine” (at para. 18).

[9] On the day of the shooting, the appellant called Mr. Brisson to obtain drugs. They arranged to meet at a motel. The appellant told Mr. Brisson that he did not have any money and asked for crack cocaine on credit. Mr. Brisson gave the appellant $50 worth of crack cocaine and they parted ways.

[10] The appellant used the cocaine. He decided that he needed more drugs and he called Mr. Brisson. He told Mr. Brisson that he had money to buy additional drugs. They agreed to meet at a pullout on a road outside of Whitehorse. The appellant had a loaded shotgun with him.

[11] The appellant was the first to arrive. He backed his truck up to a gate at the entrance to a gravel pit and parked, facing the road. Mr. Brisson arrived and pulled up in the opposite direction. The driver’s side windows of the two trucks were adjacent to each other and within arm’s reach.

[12] The two men remained seated in their vehicles. The appellant had the loaded shotgun on his lap, covered by a jacket. He told Mr. Brisson that he wanted $250 worth of crack cocaine. When Mr. Brisson looked down to get the drugs, the appellant raised the shotgun and told Mr. Brisson to hand over whatever he had.

[13] Mr. Brisson grabbed the shotgun and the two men struggled. The shotgun discharged and the slug blew out the passenger-side window of Mr. Brisson’s truck. The judge had a reasonable doubt whether this shot was intentional.

[14] At least two more shots were fired by the appellant.

[15] The judge found that one of these two slugs went through the driver’s side headrest of Mr. Brisson’s truck, low and slightly right of centre. The slug travelled from the rear of the truck to the front. The judge concluded this was the slug that killed Mr. Brisson.

[16] The other of the two shots left a “perforating projectile hole” in the right edge of the driver’s sun visor (at para. 108). This slug also travelled from back to front, at a horizontal or flat vertical angle.

[17] The judge found that these shots were fired into the back of Mr. Brisson’s truck. The evidence was unclear whether the fatal slug originated from the first or second of these shots. However, the judge found that for each of these shots the appellant “would have had to have cocked and loaded his 12-gauge shotgun” (at para. 179). He fired “two 12-gauge slugs into the back of Mr. Brisson’s truck, on the driver’s side, with Mr. Brisson seated in the driver’s seat” (at para. 180).

[18] At some point in the altercation, Mr. Brisson’s truck reversed away from the gate and travelled across the road. It crashed into a bush on the opposite side of the road. The appellant approached the scene of the crash. Mr. Brisson was deceased and lying on the ground about ten feet away from his truck. The appellant took cocaine and cash from Mr. Brisson’s pocket.

[19] The appellant then drove home, stopping a couple of times to smoke some of the drugs. Once he got home, he called his spouse, changed his clothes and drove back to the scene. He picked up some spent shotgun shells, found some baggies of cocaine on the ground and loaded Mr. Brisson’s body into the bed of his truck. The appellant drove to an area with a canyon. He backed his truck up to a steep slope above the canyon and pushed Mr. Brisson’s body out of the truck. It rolled down the hill and came to rest against some trees.

[20] The appellant then drove to a self-service car wash and sprayed the blood out of his truck. He discarded the shell casings in a garbage bin at a recreational centre and drove to where his spouse was visiting at a friend’s house, collected his young daughter and travelled home.

[21] Mr. Brisson’s DNA was found on the driver’s side floor mat of the appellant’s truck. A 12-gauge pump-action shotgun was seized from the appellant. The slugs

from that shotgun were consistent with the one retrieved from Mr. Brisson's body and with ammunition seized from the appellant's home.

[22] An autopsy revealed that a slug entered the rear of Mr. Brisson's left shoulder and lodged in the right side of his jaw. He died from catastrophic blood loss caused by this wound.

[23] After the offence, the appellant told a third party that he had killed Mr. Brisson. When asked if it was an accident, he said, "No, I shot him" (at para. 102). In a statement to police, the appellant acknowledged that he "purposefully" shot at the rear of Mr. Brisson's truck (at para. 178).

The Defence Theory

[24] As noted, the appellant admitted to shooting Mr. Brisson. His primary defence was that when he caused Mr. Brisson's death, the appellant was "either intoxicated by crack cocaine … or was suffering from extreme cravings and withdrawal" (at para. 4). He said this evidence raised a reasonable doubt about whether the shot that killed Mr. Brisson was discharged with the specific intent for murder.

[25] A secondary defence focused on the uncertainty surrounding which of the three shots killed Mr. Brisson, whether the shots were intentional and whether the appellant was aiming at Mr. Brisson or at the truck when he discharged the fatal shot.

[26] The appellant testified at the trial.

[27] He said two shots were fired while he and Mr. Brisson struggled over the gun. Both men were in their vehicles. They were each holding on to the gun through their windows and it was being pulled back and forth between them. Mr. Brisson was "trying to pull [the gun] away from [the appellant]" and the appellant was "pulling back". The gun accidentally discharged as part of the back and forth momentum.

[28] The appellant said he "regained control" of the gun after the second shot. Mr. Brisson let go and the appellant pulled the gun back into his truck. Mr. Brisson's

vehicle rolled a “few feet” forward. At that point, the appellant said he “leaned out” of the driver’s side window of his vehicle and fired a “third shot into the back of [Mr. Brisson’s] truck”.

[29] The appellant testified that he did not want Mr. Brisson to leave with the crack cocaine that he had in his vehicle. The appellant said he “wasn’t thinking when [he] fired [the] third shot”. It was a “reaction to what had happened seconds before”. He could see Mr. Brisson, who was “pretty much laying down in the … front seat” of his vehicle, and he “shot into the back of the truck … on the driver’s side”. He shot “at the metal that would have been between the lip of the [truck] box and the base of the [cab] window”.

[30] On the basis of this testimony, the appellant argued that the first two shots were accidental (unintentional) and if one of those shots killed Mr. Brisson, the appellant could not be found culpable of murder. If the third shot was found to be the fatal shot, the appellant intended to shoot at the truck, not at Mr. Brisson. From his perspective, this too should have raised a reasonable doubt about whether he discharged the gun with the specific intent required for murder.

[31] As noted, the judge rejected the theory that two shots were discharged during the struggle over the gun. Instead, he found that the appellant twice fired at the back of Mr. Brisson’s truck. He also did not believe the appellant’s evidence that he was “not thinking” or “did not know” what he was thinking when he shot into the rear of the truck (at para. 172). Instead, the judge concluded that the appellant “… meant to cause Mr. Brisson bodily harm that he knew was likely to cause his death and was reckless whether death ensued or not” (at para. 180).

[32] The judge also rejected the suggestion that at the time of the shooting, the appellant had an impaired mental state sufficient to raise a reasonable doubt about the specific intent for murder. Neither the “evidence of [the appellant’s] crack cocaine consumption [nor] the evidence of his craving for the drug” left the judge with a doubt as to whether the appellant “knew that death would likely result if he shot towards

Mr. Brisson through the back of his pickup cab at a relatively close range of approximately six feet or two metres" (at para. 180).

[33] The evidence of an "abnormal mental state" was, however, "sufficient to negative the elements of planning and deliberation" (at para. 185). The judge was not satisfied beyond a reasonable doubt that the shooting reflected a "carefully thought out … plan beforehand to kill or cause foreseeably fatal bodily harm to Mr. Brisson" (at para. 185). Nor was he satisfied the appellant "thought about the consequences of his actions or contemplated the advantages and disadvantages of committing the offence of murder" (at para. 185).

Grounds of Appeal

[34] The appellant does not claim the murder verdict is unsupported by the evidence or vitiated by illogical or irrational reasoning. In other words, it is a verdict that a properly instructed jury, acting judicially, could reasonably have rendered: *R. v. Yebes*, [1987] 2 S.C.R. 168 at 185; *R. v. Biniaris*, 2000 SCC 15 at paras. 36–37; *R. v. Beaudry*, 2007 SCC 5; *R. v. Sinclair*, 2011 SCC 40; *R. v. C.P.*, 2021 SCC 19 at paras. 28–30.

[35] Instead, the appellant contends the judge committed a number of legal errors in his approach to the case that irreparably tainted his reasoning process. More specifically, it is alleged the judge:

a) misdirected himself on the use of the common-sense inference that a sane and sober person intends the natural consequences of their actions;

b) erred in his application of that inference to the evidence;

c) failed to properly analyze whether the Crown proved the *mens rea* for murder;

d) wrongly required corroboration as a prerequisite to accepting the appellant's evidence;

e) misapprehended material evidence; and,

f) erred in admitting the evidence of a rebuttal expert called by the Crown.

Standards of Review

[36] Where the appellant alleges an error of law, the standard of review is correctness: *Housen v. Nikolaisen*, 2002 SCC 33 at para. 8. Questions of fact are reviewed on a standard of palpable and overriding error: *Housen* at para. 10. The same is true for matters of mixed fact and law unless the appellant is able to demonstrate an extricable legal error. In the latter circumstance, a standard of correctness applies: *Housen* at paras. 26–28.

Discussion

[37] Before addressing each ground of appeal, there are two issues of overarching importance that require mention.

[38] First, at the trial, the defence admitted that the appellant was culpable of manslaughter. The judge referred to this admission in his reasons (at para. 1).

[39] When he testified, the appellant acknowledged responsibility for the death of Mr. Brisson and confirmed that he had "offered to plead guilty to a charge of manslaughter".

[40] An admission to manslaughter is also readily apparent from the closing submissions of defence counsel:

> Mr. Sheepway is a killer, Your Honour, but he's not a murder[er]. And that, in essence, is the defence's position in these proceedings.
>
> Now, make no mistake that the crime to which Mr. Sheepway is essentially admitting is a very serious crime, the crime of manslaughter, one which, especially in the circumstances in which it has been committed, will carry a hefty term of incarceration, but as for the crime of murder, well, he states emphatically that he did not commit that crime. And that is the defence's position.
>
> …
>
> … without any doubt whatsoever, the single most important issue from the defence's perspective is going to be what is the answer to the following question, "Did Mr. Sheepway intend to cause death or serious bodily harm likely to result in death to Mr. Brisson on August 28th?"

> …
>
> … the issue is essentially one which is the dividing line in law between manslaughter and second-degree murder. From the defence's perspective, that's the question, is this manslaughter or second-degree murder.
>
> [Emphasis added.]

[41] In making this admission, the appellant accepted that in shooting Mr. Brisson, he voluntarily committed an unlawful act that caused Mr. Brisson's death. Furthermore, he accepted that, at a minimum, a reasonable person in all of the circumstances would have known or foreseen a risk of bodily harm that was neither trivial nor transitory: *R. v. Creighton*, [1993] 3 S.C.R. 3 at 42–45; *R. v. Javanmardi*, 2019 SCC 54 at paras. 30–31.

[42] To the extent that the submissions on appeal suggest something different—for example, that the fatal shot was discharged involuntarily or without the objective foreseeability required for unlawful act manslaughter—that position would be contrary to what was admitted in the court below. In the absence of an argument alleging the ineffective assistance of trial counsel (which was not made here), I would not give effect to any such submission. The appellant did not seek an outright acquittal at the trial. Indeed, on appeal, he seeks a new trial based on alleged errors with the judge's conclusion about the specific intent for murder, or, in the alternative, a substituted conviction for manslaughter under s. 686(3) of the *Criminal Code.*

[43] Second, in assessing the errors said to have been committed by the judge, this Court must read the reasons as a whole and in the context of the record. The obligation to apply a functional and contextual approach to reasons for conviction was re-affirmed by the Supreme Court in *R. v. G.F.*, 2021 SCC 20:

> [69] This Court has repeatedly and consistently emphasized the importance of a functional and contextual reading of a trial judge's reasons when those reasons are alleged to be insufficient …. Appellate courts must not finely parse the trial judge's reasons in a search for error …. Their task is much narrower: they must assess whether the reasons, read in context and as a whole, in light of the live issues at trial, explain what the trial judge decided and why they decided that way in a manner that permits effective appellate review. …

> [70] This Court has also emphasized the importance of reviewing the record when assessing the sufficiency of a trial judge's reasons. This is because "bad reasons" are not an independent ground of appeal. If the trial reasons do not explain the "what" and the "why", but the answers to those questions are clear in the record, there will be no error ….
>
> [71] The reasons must be both factually sufficient and legally sufficient. Factual sufficiency is concerned with what the trial judge decided and why …. Factual sufficiency is ordinarily a very low bar, especially with the ability to review the record. Even if the trial judge expresses themselves poorly, an appellate court that understands the "what" and the "why" from the record may explain the factual basis of the finding to the aggrieved party ….
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> [Emphasis added; internal citations omitted.]

[44] It is not the role of this Court to "search [the reasons] for error": *G.F.* at para. 69. Rather, the appellant bears the onus of establishing a principled basis for appellate intervention. That onus is not met by "merely pointing to ambiguous aspects of the trial decision. Where all that can be said is a trial judge may or might have erred, the appellant has not discharged their burden to show actual error": *G.F.* at para. 79.

a) No Misdirection on the Common-Sense Inference

[45] The principles governing use of the common-sense inference are well-established. As explained by Justice Watt in *R. v. Debassige*, 2021 ONCA 484:

> [79] It is commonplace for jurors to be instructed that in deciding whether the mental or fault element in murder has been proven beyond a reasonable doubt, they are entitled to rely on the common-sense inference that a person intends the natural and probable consequences of their acts. However, the jurors must also understand that the inference can only be drawn after they have considered the whole of the evidence, including evidence of the accused's consumption of alcohol and drugs: [*R. v. Daley*, 2007 SCC 53] at para. 58; *R. v. Seymour*, [1996] 2 S.C.R. 252 at para. 23.
>
> [Emphasis added.]

[46] This same point was emphasized in *R. v. Walle*, 2012 SCC 41. Writing on behalf of the Supreme Court, Justice Moldaver held it is "critical" that the jury:

> [65] … be made to understand, in clear terms, that in assessing the specific intent required for murder, it should consider the whole of the evidence that could realistically bear on the accused's mental state at the time of the alleged offence. The trial judge should alert the jury to the

> pertinent evidence. How detailed that recitation should be will generally be a matter for the trial judge, in the exercise of his or her discretion.
>
> [66] After the jurors have been alerted to the pertinent evidence, they should be told that if, after considering the whole of the evidence, they believe or have a reasonable doubt that the accused did not have one or the other of the requisite intents for murder at the time the offence was committed, then they must acquit the accused of murder and return a verdict of manslaughter.
>
> [67] If, however, there is no evidence that could realistically impact on whether the accused had the requisite mental state at the time of the offence, or if the pertinent evidence does not leave the jury in a state of reasonable doubt about the accused's intent, then the jury may properly resort to the common sense inference in deciding whether intent has been proved.
>
> [Emphasis added.]

See also *R. v. Spence*, 2017 ONCA 619 at para. 45.

[47] The appellant says the judge erroneously treated the common-sense inference as mandatory rather than permissive. He also wrongly instructed himself that in the absence of evidence establishing severe intoxication or mental abnormality at the time of the shooting, the court was duty-bound to apply the inference. This misdirection, says the appellant, resulted in the judge not asking himself whether—on the whole of the evidence in this case—the common-sense inference *could* be drawn.

[48] The Crown says there was no misdirection. The judge understood that the common-sense inference is permissive and may only be relied upon after a thorough assessment of the entirety of the evidence, including any evidence of intoxication or other form of mental impairment. There is also no indication the judge imposed a burden on the appellant to displace the inference by establishing a particular level of intoxication or mental impairment.

[49] I agree with the Crown that the judge's reasons reflect a correct understanding of the common-sense inference, its permissive nature and how it is to be applied.

[50] Before analyzing the evidence relevant to the issue of intent, the judge instructed himself with reference to *R. v. Robinson*, 2010 BCSC 368. In that case, it

was noted that intent can be proved based on inferences drawn from established facts. *Robinson* went on to explain that in deciding intent, "use may be made of the common sense inference that a sane and sober person intends the natural consequences of [their] acts." In other words, the inference is permissive. Furthermore, "there may be circumstances that cast doubt on whether one can safely rely on the common sense inference". This includes evidence of intoxication or a "mental condition that falls short of a mental disorder that renders the accused not criminally responsible": *Robinson* at para. 107.

[51] The judge also referred to *R. v. Harding*, 2008 BCSC 265, which states:

> [122] The legal inference that a person intends the natural consequences of his actions is relevant to proof of intention. When the accused raises issues that call this into question, the Crown must prove beyond a reasonable doubt that the accused actually foresaw the natural consequences of his act, i.e. the death of the victim ….
>
> [123] The adequacy of proof is a question of fact, based upon the whole of the evidence relevant to the issue of intent.
>
> [Emphasis added.]

[52] After reviewing these cases, the judge said this: "Thus, the common sense inference can be rebutted either by evidence of intoxication or by evidence of a mental condition relevant to intent" (at para. 10, emphasis added).

[53] The appellant says use of the word "rebutted" shows that contrary to the principles canvassed in *Robinson* and *Harding*, the judge treated the common-sense inference as a presumption, rather than permissive. In doing so, he improperly placed an onus on the defence.

[54] In my view, the appellant has made too much of the use of the word "rebutted". Indeed, this is language the Supreme Court itself has used more than once when addressing the common-sense inference. See *R. v. Daley*, 2007 SCC 53 at paras. 50, 141, and *R. v. Seymour*, [1996] 2 S.C.R. 252 at para. 23.

[55] In *R. v. Gould*, 2008 ONCA 855, use of the word "rebut" was held to not translate into a defence onus (at para. 15). In *Spence*, cited earlier, a passage from

jury instructions telling jurors that evidence of mental impairment may "rebut the common sense inference" was described as "unobjectionable" (at paras. 35–36). The Court of Appeal for British Columbia has also used the word "rebut" when discussing the common-sense inference. See, for example: *R. v. Arjun*, 2015 BCCA 273 at para. 29, and *R. v. Kahnapace*, 2010 BCCA 227 at para. 42.

[56] In any event, I am satisfied that in this case, the judge appreciated that the common-sense inference is permissive, and, importantly, he did not apply the inference as a presumption.

[57] Instead, before relying on the inference, the judge asked himself whether the evidence of the appellant's drug consumption or withdrawal raised a reasonable doubt about his subjective foresight at the time of the shooting. It was only after he found it did not that the judge considered it "appropriate" to invoke the common-sense inference:

> [180] In the result, I do not find that the evidence of Mr. Sheepway's crack cocaine consumption or the evidence of his craving for the drug leaves me in a state of reasonable doubt as to whether he knew that death would likely result if he shot towards Mr. Brisson through the back of his pickup cab at a relatively close range of approximately six feet or two metres. In those circumstances, I am persuaded that it is appropriate to rely upon the common sense inference that a sane and non-intoxicated person intends the natural consequences of their acts. In my view, the natural consequence of Mr. Sheepway firing two 12-gauge slugs into the back of Mr. Brisson's truck, on the driver's side, with Mr. Brisson seated in the driver's seat, and especially given Mr. Sheepway's proficiency with the weapon, was that Mr. Sheepway meant to cause Mr. Brisson bodily harm that he knew was likely to cause his death and was reckless whether death ensued or not.
>
> [Emphasis added.]

[58] As I read this paragraph, the judge's understanding and application of the common-sense inference accords with *Walle*. He assessed whether the "pertinent evidence" left him in a state of reasonable doubt about the appellant's intent and, *once he determined it did not*, he "resort[ed] to the common sense inference in deciding whether intent [had] been proved": *Walle* at para. 67. The judge's use of the word "appropriate" in para. 180 is consistent with a contextually-informed discretionary determination to rely on the inference.

[59] The appellant's complaint that the judge considered himself duty-bound to apply the common-sense inference in the absence of evidence of severe intoxication or mental impairment or abnormality is also not borne out by the record.

[60] When setting out the legal principles that would govern his consideration of specific intent, the judge referred to *Daley*. In *Daley*, the majority noted that "for certain types of homicides, where death is the obvious consequence of an accused's act, an accused might have to establish a particularly advanced degree of intoxication to successfully avail himself or herself of an intoxication defence" (at para. 42, emphasis added).

[61] The judge's reference to *Daley* immediately followed his comment about "rebutt[ing]" the common-sense inference. However, he did not link *Daley* to the application of that inference and instruct himself, as suggested by the appellant, that the common-sense inference must be applied in the absence of evidence showing an advanced degree of intoxication. Rather, as I read his reasons, the judge referred to *Daley* in relation to the defence of intoxication *generally*, as it applies to offences of specific intent.

[62] Moreover, he did so as part of the overarching legal framework he set out for himself before engaging with the evidence to determine the facts and resolve the principal issues before him (at paras. 5–11). As part of that framework, the judge also recognized that "[t]he extent of intoxication and … the extent to which an accused is suffering from an abnormal mental state, sufficient to advance a successful defence to a specific intent offence may vary, depending upon the type of offence involved" (at para. 11, emphasis added). In other words, the issue is determined case-by-case and is contextually informed.

[63] After setting out the relevant legal principles, the next reference to *Daley* does not appear until para. 181 of the judge's reasons. By this time, he had determined that the evidence of the appellant's consumption of crack cocaine and the effect of his cravings for crack cocaine did not raise a reasonable doubt on the issue of

specific intent and, *in those circumstances*, the judge considered it appropriate to rely on the common-sense inference (at para. 180).

[64] It is apparent that in reaching this conclusion, the judge considered the majority's comment in *Daley* that in cases where death is the obvious consequence of an unlawful act, a "particularly advanced degree of intoxication" will generally be required to raise a reasonable doubt on the issue of specific intent. However, this was but one factor in his analysis and, importantly, the judge made factual findings that supported a *Daley*-like view of the material events.

[65] He found that after the first shot during the struggle over the gun, the appellant discharged "at least two additional shots" into the back of Mr. Brisson's vehicle (at paras. 141, 179), one of which caused Mr. Brisson's death. The judge also found that the "fatal shooting … was no accident" (at para. 177). For both shots, the appellant "would have had to have cocked and loaded his 12-gauge shotgun" in order to fire the shots (at para. 179). The appellant "shot towards Mr. Brisson through the back of [Mr. Brisson's] pickup cab at a relatively close range of approximately six feet or about two metres" (at paras. 180–181). He was "proficient with the shotgun" (at para. 181). Finally, he "exhibited numerous examples of rational, linear and goal-directed behaviour both immediately before and after the shootings" (at para. 176).

[66] In light of these findings, the judge's invocation of *Daley* was not misplaced. This was a homicide in which it was reasonably open to the trier of fact to find that death was an obvious consequence of the appellant's conduct (*Daley* at para. 42). I see no misdirection here.

b) Judge was Entitled to Invoke the Common-Sense Inference

[67] In addition to legal misdirection, the appellant says the judge was clearly wrong to invoke the common-sense inference. In particular, the appellant contends that in relying on the inference, the judge failed to give meaningful effect to the evidence relevant to drug cravings and the associated withdrawal symptoms. The judge considered the appellant's *consumption* of cocaine on the day in question;

however, he failed to consider the effect of *withdrawal* on the appellant's mental state. From the appellant's perspective, the evidence overwhelmingly pointed to impairment of the appellant's thinking processes at the time of the shooting, sufficient to negate a specific intent.

[68] The complaint is articulated this way in the appellant's factum:

> … there was powerful evidence surrounding crack cocaine withdrawal and cravings presented at trial that warranted critical examination, not [the] least of which [was] Dr. Lohrasbe's opinion evidence that the appellant's mental state was certainly abnormal in ways that would raise a reasonable doubt about whether the appellant possessed the requisite murderous intent.

[69] The Crown says that before invoking the common-sense inference, the judge did consider the evidence of the effect of the appellant's cravings for crack cocaine (at para. 180 of the reasons for judgment). Furthermore, on the entirety of this evidence, it was reasonably open to him to find that the common-sense inference was nonetheless available (at para. 180).

[70] The defence expert, Dr. Lohrasbe, opined that in August 2015, the appellant was suffering from severe "cocaine and marijuana dependency". He ruled out the possibility of psychosis at the time of the offence. However, the appellant's "mental state was most certainly abnormal". Prior to the offence, the appellant had been "thrown into some kind of dysfunction that was affecting him psychologically" and the dysfunction caused the appellant to be "mentally something other than his normal self":

> … the amount of time he was spending thinking about cocaine and planning to get his next high was increasing. The amount … he was using in order to get a high was also starting to increase, which is classic with dependency. And there was a sort of falling away of his involvement in the things that gave him joy and purpose in his life.
>
> So a very disorienting experience. Normality starts to fall away because all that matters is your preoccupation with the drug.
>
> And then—so he's got his suicidality. He's got his mood instability. He's not sleeping well. And the driving force behind his behaviours was the craving for more cocaine.

> I think that was the mindset that I would characterize as an abnormal mental state that built up to this offence.
>
> [Emphasis added.]

[71] In his testimony, Dr. Lohrasbe adopted a conclusion he previously set out in a report prepared for the purpose of trial, namely, that:

> Taken as a whole, the information [about the appellant] strongly suggests that he would likely have been hyper-reactive, abnormally sensitive to incoming stimuli at the time of the confrontation with [Mr. Brisson], with immediate impulsive behavioural responses. During that rapidly-evolving scenario … his capacities for making quick, rational decisions, much less for reflective thought, were almost surely very impaired.
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> …
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> [Cocaine craving] hijacks awareness …. It makes you preoccupied …. It disconnects you from the things that normally inform your judgment and your decisions.
>
> …
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> … the cocaine built up over the weeks prior had become the driving force in [the appellant's] life and the compulsion to get more was his total preoccupation ….
>
> …
>
> …The cravings were the driving force.
>
> …
>
> … in that mindset, [the appellant] did not have insight, he did not grasp the consequences. He reacted, the reaction being focused on obtaining more drugs.

[72] Dr. Lohrasbe was asked about goal-directed behaviour by the appellant before, during and after the shooting of Mr. Brisson, and whether this behaviour detracted from the possibility he was experiencing an abnormal mental state at the time of the offence. Dr. Lohrasbe said it did not. "[G]oal-directed behaviour can coexist with grossly abnormal mental states." The appellant had a lengthy history of managing his drug dependency by "maintaining a façade of normality"; as such, it would not be surprising to see goal-directed behaviour surrounding the offence. From Dr. Lohrasbe's perspective, the existence of that behaviour did not tell him much about what was going on in the appellant's mind when he shot Mr. Brisson.

[73] In cross-examination, Dr. Lohrasbe confirmed that he saw no evidence of cocaine-induced psychosis, delusionary thinking, abnormal perceptions or abnormal memory at the time of the shooting. Furthermore, one of the assumptions underlying his opinion about the appellant's mental state was that the appellant consumed "significant amounts of cocaine" in the "days and hours leading up to" the shooting. However, Dr. Lohrasbe acknowledged he did not know how much cocaine the appellant actually had in his system. He also acknowledged that without knowing the amount and purity of the cocaine, he could not be certain about the anticipated effects of the cocaine on the appellant.

[74] It was Dr. Lohrasbe's opinion that the "entire sequence of events" at the time of the shooting was "driven by [the appellant's] need to get more cocaine". Mr. Brisson's "unexpected reaction to the threat [of the shotgun] … mobilize[d] [the appellant's] hyper-reactivity that comes with cocaine intoxication and withdrawal." The discharging of the shotgun formed part of that hyper-reaction. The "whole scene, the whole situation once the confrontation began … got a hyper-reactive kind of response from [the appellant]."

[75] In his reasons at paras. 142–155, the judge thoroughly reviewed Dr. Lohrasbe's evidence (both his testimony and his written report, which was admitted into evidence). The judge understood that the "abnormal mental state" testified to by Dr. Lohrasbe was grounded in evidence relevant to the appellant's cocaine *use* on the day in question and to his ongoing *dependency* (at para. 143). The judge appreciated that either of those conditions carried the potential to trigger a level of irritability and hyper-reactivity that can "hijack" a person's awareness:

> [148] … because of the jagged natures of the highs and lows, there is a general kind of irritability as well as hyper-reactivity. This means that users respond very impulsively and very quickly to incoming stimuli when they are coming down from cocaine. At the same time they are often hyper-focused on getting more drugs, and in that sense their awareness is essentially hijacked by the craving.
>
> [Emphasis added.]

See also paras. 1, 4, 147 and 180 of the reasons for judgment.

[76] As correctly pointed out by the Crown, the judge was not bound to accept Dr. Lohrasbe's evidence or to assign it particular weight. Rather, the judge was entitled to consider whether this evidence rendered the common-sense inference improper in the circumstances of the case, based on the evidence as a whole.

[77] In my view, that is what the judge did.

[78] Although he appreciated the effect of Dr. Lohrasbe's evidence and its relevance to the issue of specific intent, the judge weighed that evidence in the context of other evidence adduced at the trial and his related findings. This is clear from his reasons.

[79] In not giving effect to the appellant's assertion of an "abnormal mental state", the judge considered: (1) his rejection of the appellant's testimony that he "wasn't thinking" when he fired at the back of Mr. Brisson's truck (at para. 172); (2) the "minimal" evidence surrounding the actual amount of cocaine in the appellant's system at the time of the shooting and its expected effect (at para. 174); (3) there was "nothing" about the appellant's "behaviour or self-described thought process immediately before the shootings" to indicate mental impairment (at para. 175); (4) the appellant's admission to a third party that the shooting of Mr. Brisson was not accidental (at para. 177); (5) his acknowledgment to the police that he "purposefully" shot at the back of the truck (at para. 178); and (6) the finding that the appellant shot twice at the rear of Mr. Brisson's truck with the latter sitting in the driver's seat, had to cock and load the shotgun for each of those shots, and discharged them at a "relatively close range" (at paras. 179–180).

[80] The judge also had before him the evidence of the Crown's rebuttal witness, Dr. Klassen. Dr. Klassen agreed with Dr. Lohrasbe's diagnosis of cannabis and cocaine dependence. He agreed that in some cases, linear, goal-directed behaviour can co-exist with an abnormal mental state. He also took no issue with the proposition that cocaine consumption can result in hyper-reactivity, both when high and when coming down from the drug. Dr. Klassen agreed, generally, with Dr. Lohrasbe's evidence about the effects of cocaine cravings. However,

Dr. Klassen testified that the appellant's description of the events surrounding the shooting, as relayed to him, was "not strongly imbued with acute effects of cocaine intoxication". Based on the material he reviewed and the appellant's self-report, Dr. Klassen did not see evidence of "an apparently disorganizing level of cocaine [consumption] or intoxication".

[81] I do not accept the appellant's proposition that in deciding to invoke the common-sense inference, the judge considered only the issue of consumption and did not turn his mind to the potential effect of withdrawal and cravings on the appellant's mental state.

[82] To the contrary, in addition to appreciating the nature of Dr. Lohrasbe's evidence, as set out at para. 148 of his reasons, the judge was alive to other evidence relevant to the appellant's drug use and the severity of his cravings. As made explicit in the reasons, this included the fact that: the appellant's "drive to get high daily was powerful and difficult to resist" (at para. 12); he had a propensity for "addictive behaviours" generally (at para. 13); in the months prior to the shooting, he was using crack cocaine once or twice a week (at para. 16); by the end of August 2015, his use of crack cocaine had "increased to a daily habit" (at paras. 18, 60); his days were "spent fighting off, or indulging in, cravings for more cocaine" (at para. 18); on the night prior to and the morning of the shooting, he had been smoking crack cocaine (at para. 60); after obtaining cocaine from Mr. Brisson on the day in question, he consumed the drugs, but did not feel he was "high enough" and wanted more (at para. 61); and the appellant's testimony that he did not know what he was thinking when he pulled the trigger, "other than he thought Mr. Brisson was about to leave with the drugs" (at para. 67).

[83] In *Walle*, Justice Moldaver noted that:

> [46] … A failure of a judge to consider all the evidence relating to an ultimate issue of guilt or innocence constitutes an error of law: *R. v. Morin*, [1992] 3 S.C.R. 286, at p. 296; *R. v. J.M.H.*, 2011 SCC 45, [2011] 3 S.C.R. 197, at paras. 31-32. However, as Sopinka J. made clear in *Morin*, there is "no obligation in law on a trial judge to record all or any specific part of the process of deliberation on the facts", and "unless the reasons demonstrate that [a consideration of all the evidence in relation to the ultimate issue] was

> not done, the failure to record the fact of it having been done is not a proper basis for concluding that there was error in law in this respect" (p. 296). …
>
> [Emphasis added.]

[84] I am satisfied, in this case, that the judge's reasons demonstrate he considered all of the evidence in deciding whether it was appropriate to apply the common-sense inference. Moreover, on the entirety of that evidence, it was reasonably open to him to invoke the inference.

c) Judge Did Not Err in His Analysis of Specific Intent

[85] Similar to the argument made in support of his second ground of appeal, the appellant contends the judge failed to properly analyze whether the evidence, considered as a whole, raised a doubt about the appellant's intention to cause death or to cause bodily harm that the appellant knew was likely to cause death and was reckless as to whether death would ensue. The appellant says this issue required a particularly close examination in light of: (1) the appellant's evidence that when he shot at the back of Mr. Brisson's truck, he was shooting at the metal beneath the window of the cab; (2) the trajectory and points of entry of the shots; (3) Mr. Brisson's position in the cab when shot; and (4) the evidence surrounding the cumulative effect of the appellant's consumption of and withdrawal from crack cocaine.

[86] The appellant says the evidence, taken in its entirety, points to "a knee-jerk reaction to shoot at a vehicle to prevent it from getting away, as a form of warning shot, rather than an intention to shoot at Mr. Brisson, much less to harm him" (appellant's factum at para. 136). The appellant acknowledges that in his reasons, the judge recited portions of the evidence that were relevant to the *mens rea* analysis (including the expert evidence about cocaine consumption and cravings); however, he says the judge failed to actually "engage" with this evidence in any meaningful way. In particular, the judge failed to appreciate:

> … [the] wider context of crack cocaine abuse leading to complete self-destruction, combined with a rapidly evolving situation of a robbery gone wrong calling for split-second decisions, an awkward shooting stance, a moving truck, a moving person, and clear testimony by the appellant that he

> did not shoot at Mr. Brisson when he turned around, but instead shot at the metal of the back of the truck thinking Mr. Brisson was not there, and without really thinking but instead being focussed on the drugs leaving.
>
> [Appellant's reply factum at para. 20.]

[87] The Crown contends the judge did not err in his analysis of specific intent. After considering the evidence, in its entirety, the judge made a specific finding that the "fatal shooting of Mr. Brisson was no accident" (at para. 177). He was satisfied beyond a reasonable doubt that two shots were fired at the back of Mr. Brisson's truck and that when the appellant discharged each of those shots, he intended to cause Mr. Brisson bodily harm, he knew the bodily harm was likely to cause Mr. Brisson's death, and he was reckless as to whether death would ensue (at para. 173). In reaching this conclusion, the judge considered the evidence the appellant says he ignored. While the appellant disagrees with the inferences drawn by the judge and the factual conclusions reached by him, a disagreement over the interpretation of evidence does not provide a principled basis for finding reversible error.

[88] The Crown says that in advancing this ground of appeal, the appellant has taken a selective approach to the trial record, emphasizing his own narrative without regard to other evidence that either directly contradicts the appellant's version or renders it objectively implausible.

[89] For example, on appeal, the appellant has emphasized his testimony that when he shot at the back of Mr. Brisson's truck, he was shooting at the "metal that would have been between the lip of the [truck] box and the base of the [cab] window". However, in cross-examination, the appellant acknowledged that in one of the statements he provided to the police, he said he was pointing the gun *at* Mr. Brisson. The ballistics evidence also showed that the slug that penetrated the driver's side headrest (found to be the fatal shot) did *not* go through the metal beneath the back window (at para. 92). In other words, the point of entry was not consistent with the object of the appellant's purported aim.

[90] The appellant has also emphasized his testimony that when he shot at the back of the truck, Mr. Brisson was “pretty much laying down in the … front seat” of his vehicle. However, in cross-examination, the appellant agreed with Crown counsel that he could see Mr. Brisson through the rear window. He could see Mr. Brisson “leaning over, like his head would have been in and around the passenger seat like he was leaning that way”. Mr. Brisson’s body was not “obscured by the seats”.

[91] The appellant has a view of how the shooting unfolded, explanations for why he acted as he did, and he believes that his thinking processes were substantially impaired at the time he discharged the shotgun. However, as the Crown notes, the veracity and reliability of the appellant’s narrative was a live issue at the trial and the judge decided that issue against him specific to the shots that entered through the back of Mr. Brisson’s truck.

[92] For substantially the same reasons I rejected the appellant’s second ground of appeal, I am of the view the challenge to the judge’s analysis of the evidence relevant to the specific intent for murder is not made out.

[93] It is apparent from the reasons that the judge understood the main arguments raised by the appellant in support of a reasonable doubt on the issue of intent. He understood that “[i]ntoxication by a drug or evidence of a mental condition that falls short of a mental disorder may raise a reasonable doubt as to … specific intent” (at para. 7). He also understood the appellant’s theory about the shooting, namely, that the first two shots occurred during the struggle with Mr. Brisson and were “essentially accidental” (at para. 113). He was alive to the appellant’s position that the “chambering of the shells on each [of the first two shots] was not intentional, but due to the fact that [the appellant] had one hand on the trigger and one hand on the pump slide action when the shotgun was being pulled back and forth” (at para. 113). Finally, the judge acknowledged the appellant’s testimony that when he shot at the back of Mr. Brisson’s truck, the shot was aimed at the metal beneath the cab’s rear

window and he was “not thinking” or “did not know” what he was thinking at the time (at paras. 92, 172).

[94] On my review of the reasons, I am satisfied the judge did not ignore the evidence that the appellant says was highly relevant to the issue of intent. Nor is there substance to the complaint that the judge “altogether failed to engage” with the possibility that when he shot at the back of the truck, the appellant did not intend to kill or harm Mr. Brisson (appellant’s reply at para. 21). Instead, I agree with the Crown that what the appellant is really complaining about here is the judge’s interpretation of the evidence, his assessment of the appellant’s credibility, and the weight he assigned to parts of the evidence that conflicted with the appellant’s narrative, including his own description of his state of mind. That is a difficult argument to make while at the same time impliedly accepting, by virtue of the way in which the appeal has been framed, that the verdict for second degree murder was not unreasonable within the meaning of s. 686(1)(a)(i) of the *Criminal Code.*

[95] Also underlying this ground of appeal is a complaint about the comprehensiveness of the judge’s analysis of specific intent and the fact that he did not explain in greater detail his reasoning path, each piece of evidence he took into consideration in making his findings of fact, and how that evidence informed his ultimate conclusion.

[96] The law is clear that judges are not obliged to advert to every piece of evidence in their reasons, address every conflict or issue raised by the parties, reconcile every alleged evidentiary frailty, or detail and explain each of the findings that led to a conviction: *R. v. R.E.M.*, 2008 SCC 51 at paras. 15–20, 48–57.

[97] I note that the judge did give the appellant the benefit of the doubt on planning and deliberation (at para. 185). In reaching this latter conclusion, the judge took the evidence about the appellant’s “abnormal mental state” into account (at para. 185). He clearly did not ignore the foundation adduced by the appellant relevant to his state of mind.

d) No Requirement for Corroboration

[98] In assessing the appellant's credibility, the judge said this:

> [117] … in this somewhat unusual situation, where a number of varying accounts have come from the accused, I feel I must be very cautious in accepting as plausible what Mr. Sheepway has said about the nature of the confrontation with Mr. Brisson, especially where certain alleged facts are uncorroborated or apparently inconsistent with uncontentious facts.
>
> [Emphasis added.]

[99] The appellant says this passage reflects legal error that irremediably tainted the judge's credibility assessment and, in turn, his rejection of the defence position that there was a reasonable doubt about whether the appellant intended to shoot at the back of the truck, rather than at Mr. Brisson. If the appellant did not intend to shoot at Mr. Brisson, then, at best, the fact that he shot into the back of the truck supported an objective foreseeability of bodily harm, not the specific intent required for murder.

[100] The appellant emphasizes that at law, the judge was entitled to give effect to his evidence even though parts of it may not have been corroborated. If the judge did not believe the appellant, the appellant's testimony could nonetheless raise a reasonable doubt. Rather than adhering to that principle, the appellant argues the judge rejected the appellant's narrative simply "because there [was] no other evidence besides Mr. Sheepway's say-so that it occurred" (at para. 118).

[101] I agree with the Crown that on a fair reading of the reasons, the judge did not commit the error alleged. Rather, he considered the appellant's testimony in the context of the evidence as a whole, as he was obliged to do. Evidence provided by an accused is not assessed in isolation, even where the accused is the only witness to the events in question: *R. v. Conway*, 2021 BCCA 460 at para. 75; *R. v. Redden*, 2021 BCCA 230 at para. 81; *R. v. Van Deventer*, 2021 SKCA 163 at paras. 21, 24; *R. v. Wanihadie*, 2019 ABCA 402 at para. 31. A denial or defence that relies heavily on the testimony of the accused may be rejected "based on a considered and reasoned acceptance beyond a reasonable doubt of the truth of conflicting credible evidence": *R. v. D.(J.J.R.)* (2006), 215 C.C.C. (3d) 252, 2006 CanLII 40088 at

para. 53 (Ont. C.A.), leave to appeal to SCC ref'd, [2007]1 S.C.R. x; *Redden* at para. 81; *R. v. G.C.*, 2021 ONCA 441 at paras. 13, 15; *R. v. Hoohing*, 2007 ONCA 577 at para. 15.

[102] At the trial, the Crown encouraged the judge to "be cautious" about accepting the appellant's version of events where not corroborated (reasons for judgment at para. 21). The defence argued it was improper to take that approach. Instead, because the appellant was the only witness to the shooting and he cooperated with the police investigation, his version of events should attract considerable weight (at para. 21).

[103] The judge did not consider himself bound by either position. Instead, he properly recognized that it was up to him to "conduct [his] own credibility assessment of [the appellant's] evidence" (at para. 22). That is what he proceeded to do.

[104] During the course of the credibility assessment, the judge considered: the appellant's history of lying and deceit, as admitted and proved through other witnesses (at paras. 76, 80–81, 87–88); his acknowledgment that he lied to the police in statements about the offence (at para. 77–79); his admission to Dr. Lohrasbe that he "lied all over the place" (at para. 82); his lies told on the day of the offence (at paras. 84–86); and the fact that the appellant had committed offences of dishonesty (at para. 90). There were also inconsistencies between the appellant's testimony and objective evidence of the damage done to Mr. Brisson's truck (at paras. 92, 115, 117); inconsistencies between the statements he provided to the police and his testimony (at paras. 94, 96); and inconsistencies between his testimony and the evidence of others (at para. 96).

[105] The appellant furthermore testified that his ability to remember the events of August 28, 2015 had been affected by his drug use (at paras. 91, 93). Based on that, and for other reasons, the judge had understandable concerns about the reliability of the appellant's recollection (at para. 91).

[106] The judge's impugned comment that he had to be "very cautious in accepting as plausible" the appellant's version of events came after his consideration of issues relevant to an assessment of veracity and reliability (at para. 117). In my view, the caution was warranted. I see nothing improper, in the circumstances of this case, about the judge considering the existence or non-existence of independent corroborating evidence when conducting his credibility assessment of the appellant.

[107] At the same time, the judge instructed himself that the appellant bore *no onus* at the trial (at para. 117). He also correctly instructed himself on *R. v. W.(D.)*, [1991] 1 S.C.R. 742, principles, recognizing that even if he did not believe the appellant's evidence, that evidence could raise a reasonable doubt once considered in the context of the other evidence (at para. 170). Finally, it is readily apparent the judge gave effect to some parts of the appellant's testimony, even in the absence of corroboration. See, for example, para. 116 of his reasons in which the judge notes there was "no particular corroboration for [the appellant's] evidence that there was a struggle for the shotgun"; however, he was "prepared to give [the appellant] the benefit of the doubt on this point."

[108] As recently reiterated by the Supreme Court in *R. v. Brunelle*, 2022 SCC 5 at para. 8, a judge's assessment of the credibility of witnesses may be rejected only where it "cannot be supported on any reasonable view of the evidence" (citing *R. v. Burke*, [1996] 1 S.C.R. 474 at para. 7). This Court, standing in review, cannot "simply substitute its opinion [on credibility] for that of the trial judge" (at para. 9, citing *R. v. Gagnon*, 2006 SCC 17 at para. 23).

[109] Respectfully, that is what the appellant is asking us to do.

e) Judge Did Not Misapprehend Material Evidence

[110] The appellant alleges the judge failed to give proper effect to and thereby misapprehended the ballistics evidence adduced by the Crown. The appellant says a close examination of that evidence supported his position that the fatal slug came from one of two shots fired during the struggle with Mr. Brisson and that the appellant says was discharged without an intent to cause death or bodily harm.

[111] The Crown says the judge did not misapprehend the ballistics evidence and the inferences he drew from it were reasonably open to him. It is the Crown's position that in advancing this ground of appeal, the appellant has overstated the effect of the evidence. The inferences he says should have been drawn were not supported by the record. The appellant does not allege the judge was mistaken in his understanding of the ballistics evidence; rather, the appellant is simply re-arguing the interpretation he sought to have the judge adopt at the trial.

[112] The legal test for establishing a misapprehension of evidence is helpfully summarized in *R. v. Osinde*, 2021 BCCA 124. It is a stringent burden:

> [17] A misapprehension of evidence will warrant appellate intervention where the trial judge makes mistakes "as to the substance of material parts of the evidence and those errors play an essential part in the reasoning process resulting in a conviction": *R. v. Morrissey* (1995), 97 C.C.C. (3d) 193 at 221 (Ont. C.A.); *R. v. Lohrer*, 2004 SCC 80 at para. 1, [2004] 3 S.C.R. 732. A misapprehension of the evidence "may refer to a failure to consider evidence relevant to a material issue, a mistake as to the substance of the evidence, or a failure to give proper effect to the evidence": *Morrissey* at 218.
>
> [18] Where there is a material misapprehension of evidence that played an essential role in the reasoning process underlying a conviction, the appellant will not have received a fair trial and a miscarriage of justice will have occurred: *Morrissey* at 221; *Lohrer* at para. 1. One way to assess whether there has been a miscarriage of justice is to ask whether striking the error would leave the trial judge's reasoning that led to conviction on unsteady ground: *R. v. Sinclair*, 2011 SCC 40 at para. 56, [2011] 3 S.C.R. 3.
>
> [19] Although a trial judge is uniquely positioned to make credibility assessments, where those assessments are based on misapprehensions of evidence and played a critical role in reaching a conviction, the assessments and the verdict will be insupportable: *R. v. C.L.Y.*, 2008 SCC 2 at para. 21, [2008] 1 S.C.R. 5. This is so even when the evidence adduced at the trial was capable of supporting a conviction: *Lohrer* at para. 1.
>
> [20] Demonstrating a misapprehension is a high standard for an appellant. They must point to a plainly identifiable error, not merely suggest that the judge may have erred: "[t]he plain language or the thrust of the reasons must disclose an actual mistake": *Sinclair* at para. 53. Additionally, as noted, the error must be material. And, in deciding whether a material misapprehension resulted in a miscarriage of justice, an appellate court may ask itself whether the misapprehension, once removed, could plausibly have left the judge with a reasonable doubt: *Sinclair* at paras. 56–57, 59, 61–62. If so, then the reasoning that led to a conviction is based on "unsteady ground": *Sinclair* at para. 56. If not, then the misapprehension was likely not central to the judge's reasoning process.
>
> [Emphasis added.]

[113] The judge's general analysis of the ballistics evidence is set out at paras. 105–112 of his reasons. In reviewing this evidence, the judge acknowledged its frailties. In particular, he understood the expert could not specify the order in which the two projectiles that travelled from the back of the truck to the front were shot (at para. 106). He also understood that the opinion given on trajectorial angles "was very rough and could vary by plus or minus five degrees" (at para. 109). The judge appreciated that some of the observations made of Mr. Brisson's truck lacked a "solid explanation" (at para. 110).

[114] The judge furthermore turned his mind to the defence theory in his review of the ballistics evidence. He acknowledged the appellant's position that some of the expert's observations were consistent with a second shot having been fired during the struggle with Mr. Brisson (at para. 112). He also considered the appellant's argument that some of the damage to the truck, as observed by the expert, may have been caused when the truck crashed into a bush, not by the shots discharged by the appellant (at paras. 120–130).

[115] Ultimately, the judge concluded that the "physical evidence", including the damage done to Mr. Brisson's truck, did not support the appellant's theory (at paras. 115, 118). The passenger side window of the truck had been "completely blown away", which was consistent with the appellant's theory that the first shot discharged during the struggle passed by Mr. Brisson while he was seated in the cab (at para. 115). However, contrary to the appellant's narrative, the judge accepted the ballistic expert's opinion that the two other established projectiles entered Mr. Brisson's truck from the back, one perforating the driver's side headrest and the other moving through the driver's sun visor, with a "corresponding" projectile hole in the windshield (at paras. 107, 108, 141).

[116] The ballistics expert was extensively cross-examined by defence counsel with a view to establishing a possibility that one or both of the headrest and visor projectiles entered the cab through the driver's side window. In re-examination, this question was directly put to the expert. Crown counsel asked him whether the two

projectiles that he said came through the rear of the cab might have been fired from a “sideways trajectory” into the driver’s side window of Mr. Brisson’s truck. The expert said, “No.”

[117] I accept that the ballistics evidence played a material role in the judge’s analysis of specific intent. The appellant does not allege that the judge made a mistake as to the substance of the evidence; rather, the misapprehension is said to arise from a failure to give the ballistics evidence meaningful consideration. On my review of the judge’s reasons, in the context of the record, the appellant has not established this error. Moreover, there was ample evidence from which the judge could infer that the fatal shot entered Mr. Brisson’s truck from the back and was not fired during the struggle through the driver’s side windows.

f) No Basis for Interfering with the Admissibility Ruling

[118] Finally, as discussed, the appellant called Dr. Lohrasbe to testify about the state-of-mind effects of consuming and craving crack cocaine. The judge allowed the Crown to call a forensic psychiatrist, Dr. Klassen, in rebuttal. The appellant says he erred in doing so. Dr. Klassen’s evidence is said to have: (1) usurped the judge’s role as fact finder; and (2) unduly prejudiced the defence by allowing the Crown to split its case.

[119] In response, the Crown points out that a *voir dire* was held to test the admissibility of Dr. Klassen’s evidence. There was a thorough canvassing of the defence objections. The appellant did not take issue with Dr. Klassen’s qualifications as an expert witness. Rather, the appellant opposed admissibility on the grounds of relevance, necessity and undue prejudice. The judge considered and rejected those arguments. The Crown says that on appeal the appellant does not point to any error committed by the judge; rather, he simply asks this Court to revisit his objection and to reach a different conclusion on admissibility.

[120] I have reviewed the submissions on the *voir dire.* Crown counsel took the position that if Dr. Lohrasbe’s evidence was relevant to a material issue at the trial, then so was the evidence of Dr. Klassen. He, too, would testify about the effects of

cocaine consumption and ongoing cravings, with a particular focus on "behaviour as an indicator of mindset". The defence raised two main concerns with Dr. Klassen's evidence. First, given the focus on behaviour, rather than the appellant's mental state, the testimony was neither relevant nor necessary. Second, Dr. Klassen's testimony would, in its effect, usurp the role of the judge as trier of fact, because it was within the exclusive domain of the judge to assess the appellant's behaviour before and after the shooting and to draw inferences from it. The defence argued that to allow Dr. Klassen to detail inferences that he drew from the appellant's behaviour would mean the judge would "hear not once, but twice … closing submissions on how to deal with" the evidence of the appellant's behaviour before and after the shooting.

[121] The judge allowed Dr. Klassen to testify, but restricted the scope of his evidence. Dr. Klassen was not allowed to offer his opinion on inferences to be drawn from the appellant's behaviour before and after the shooting, except to the extent necessary to respond to Dr. Lohrasbe's opinion. On appeal, the appellant does not allege that Dr. Klassen transgressed this limit.

[122] The admissibility ruling is indexed as *R. v. Sheepway*, 2018 YKSC 13. It is brief. However, it is considered and responsive to the issues raised by the defence in the court below. The judge correctly instructed himself on the threshold criteria for the admissibility of expert opinion evidence as established in *R. v. Mohan*, [1994] 2 S.C.R. 9, and affirmed in *White Burgess Langille Inman v. Abbott and Haliburton Co*., 2015 SCC 23. He also acknowledged his role as gatekeeper and the residual discretion to exclude otherwise admissible expert opinion evidence on the ground that its prejudicial effect overbears its probative value: *White Burgess* at paras. 19, 23–24, 54.

[123] As noted, the appellant did not contest that Dr. Klassen was a properly qualified expert. Nor did he argue there was an exclusionary rule precluding Dr. Klassen from testifying, nor challenge his independence or impartiality as a witness. Dr. Klassen was not expected to testify about novel or contested science,

such that the reliability of his evidence was a concern that necessitated additional inquiry: *White* at para. 23. The judge determined that similar to Dr. Lohrasbe's evidence, the opinion sought from Dr. Klassen was logically relevant to material issues at the trial, namely, the appellant's mental state when he shot at the back of Mr. Brisson's truck and planning and deliberation (at paras. 18, 20). He was also of the view that the evidence would assist him as the trier of fact as the forensic analysis of "abnormal psychological or psychiatric state[s]" was outside his expertise (at para. 25). As such, the evidence met the threshold criteria of necessity.

[124] Finally, the judge turned his mind to the prejudicial effect of Dr. Klassen's testimony:

> [28] … I am confident, as the trier of fact, that I am unlikely to be overwhelmed by this evidence. Indeed, rather than being left in a potential state of some confusion based upon solely having heard Dr. Lohrasbe's evidence, I expect it will likely be edifying to hear the counterpoint from Dr. Klassen. Second, this is especially the case in light of the direction this trial has taken to broaden the issue from simple intoxication to the potential for abnormal states arising from binging and craving. Third, allowing Dr. Klassen to testify will not significantly lengthen the trial process. Finally, I am restricting Dr. Klassen from testifying directly on the behavioural observations that he made in the middle four paragraphs on page 27 of [his] report. That should go some distance to alleviating the kind of prejudice that defence counsel alluded to here.

[125] The admissibility of expert opinion evidence attracts a deferential standard of review. As a result, absent an error in law, misapprehension of evidence, failure to consider relevant evidence or factors, or an abdication of the gatekeeper function, an appellate court will decline to interfere with the decision: *R. v. Nield*, 2019 BCCA 27 at para. 76; *R. v. Orr*, 2015 BCCA 88 at para. 65, citing *R. v. Pearce (M.L.)*, 2014 MBCA 70 at para. 74; *R. v. D.D.*, 2000 SCC 43 at paras. 11–13.

[126] None of that has been established here.

Disposition

[127] For all of the foregoing reasons, I would dismiss the appeal from conviction.

"The Honourable Madam Justice DeWitt-Van Oosten"

I AGREE:

"The Honourable Mr. Justice Frankel"

I AGREE:

"The Honourable Madam Justice Fenlon"