SUPREME COURT OF YUKON

Citation: *R v Tuel and Wuor*, 2023 YKSC 12

Date: 20230217
S.C. No. 21-01503
Registry: Whitehorse

BETWEEN:

HIS MAJESTY THE KING

AND

MALAKAL KWONY TUEL

and

JOSEPH WUOR

Before Chief Justice S.M. Duncan

Counsel for the Crown	Leo Lane
Counsel for Defendant Malakal Tuel	Dale Fedorchuk (by videoconference)
Counsel for Defendant Joseph Wuor	Lynn MacDiarmid

This decision was delivered in the form of Oral Reasons on February 17, 2023. The Reasons has since been edited for publication without changing the substance.

REASONS FOR DECISION

[1] DUNCAN C.J. (Oral): John Thomas Papequash was shot in the head in the early morning of December 1, 2019, outside the entrance to the 202 bar in downtown Whitehorse. Remarkably, he is alive but has no memory of the events of that evening. The identity of the shooter is disputed.

[2] Malakal Tuel was charged with attempted murder of John Thomas ("JT") Papequash. In the alternative, he was charged with other offences related to the

shooting. The evidence of the Crown in support of the charges is circumstantial. At trial, many witnesses testified but no one who testified saw who shot JT Papequash.

[3] The Crown argues that the evidence leads to the only reasonable inference that Malakal Tuel shot JT Papequash with the requisite intent to establish attempted murder.

[4] Malakal Tuel argues that there are other reasonable inferences that can be drawn from the evidence consistent with his innocence and the absence of evidence does not support the charges related to the shooting. He says the circumstantial evidence on which the Crown's theory is based is derived from conflicting narratives of the Crown's witnesses and equivocal, inconclusive physical evidence.

[5] The Crown has also charged Malakal Tuel and Joseph Wuor with other offences: possession of cocaine for the purpose of trafficking; possession of cash obtained by crime; occupying a vehicle in which they knew there was a prohibited firearm; possession of a loaded prohibited firearm without authorization or licence. Joseph Wuor is charged with possessing a firearm while prohibited from doing so by court order, as is Malakal Tuel. The evidence in support of these charges, for the most part, is circumstantial.

[6] Both Joseph Wuor and Malakal Tuel argue the evidence is insufficient to establish the essential elements of any of these offences.

[7] I will summarize the background briefly, review the relevant legal principles, review the evidence on Counts 6 to 10, review the theories of the Crown and defence, set out the elements of those offences and provide my findings of facts and outcome. I will then review the elements of the drug and firearm offences, assess the evidence in relation to those offences, provide my findings and outcome.

Brief Background

[8] The shooting incident occurred outside the 202 bar at closing time just before 2 a.m. on December 1, 2019. The two accused men and JT Papequash and his friends had been there for several hours. The two accused were initially friendly and buying drinks for people in the bar and talking to some of JT Papequash's friends. The two accused had not met JT Papequash's friends before that evening.

[9] Another group of six friends came into the bar later that evening. They did not know JT Papequash and his friends or the accused men. Their observations of events in the bar that evening and outside before and after the shooting were evidence in this case.

[10] There were several altercations that evening between JT Papequash and the accused men. They were of short duration and unknown cause. The two accused left the 202 bar together near closing time approximately five minutes before JT Papequash. When JT Papequash walked out of the bar, he was seen speaking with the shorter of the two men. Eight seconds later, a shot was heard and JT Papequash was on the ground.

[11] Before the shooting, a man was seen walking towards the 202 entrance carrying a gun. After the shooting, a man was seen running towards Second Avenue (east) from the 202 entrance with a gun. That man was seen to stop at the corner of the 202 building, point the gun towards the 202 entrance without firing, and then continue running towards the off-sales at the east side of the 202 building. Another man was seen running away from the 202 entrance towards Third Avenue (west).

[12] An empty shell casing was found that night in the location of the shooting. It came from a cartridge that was ejected from a Taurus PT 709 handgun that was found in the front passenger seat floor of the Toyota Tacoma owned by Malakal Tuel. Malakal Tuel, who was driving, and Joseph Wuor, who was in the passenger seat, were taken into custody from the Toyota Tacoma as they were leaving Malakal Tuel's residence the following evening. The truck was packed with bags and bedding.

[13] An unfired cartridge of the same kind as in the loaded Taurus PT 709 handgun seized from the Tacoma was found at the corner of the 202 building, where the man with a gun had stopped after the shooting.

[14] On the search of the Toyota Tacoma incidental to arrest, crack cocaine and phenacetin, an adulterant, were found in magnetic keyholders in some of the bags in the Tacoma. Cash in the amount of $7,480 was found in a bag with Malakal Tuel's wallet. Neither of the two accused had any drugs or weapons on their person when they were searched. Malakal Tuel had $1,505 in cash on his person and Joseph Wuor had $333 in cash on his person on arrest.

Legal Principles

Proof beyond a reasonable doubt

[15] The accused may be convicted of an offence only if, on all the evidence in the case, the Crown establishes there is no reasonable doubt that they are guilty of the offence. Until that time, the accused are presumed innocent of any offence with which they are charged. The Crown must prove each essential element of the offence beyond a reasonable doubt. The standard does not apply to each individual piece of evidence, but to the total body of evidence on which the Crown relies to prove guilt (*R v Bouvier*

(1984), 11 CCC (3d) 257 at 264 Ont.CA). The burden of proof is on the Crown and it never shifts to the accused.

[16] A reasonable doubt of the accused's guilt is not a far-fetched or frivolous doubt. It is not a doubt based on sympathy or prejudice (*R v Lifchus*, [1997] 3 SCR 320 ("*Lifchus*") at para. 36). It is not a doubt based on speculation. It is a doubt based on reason and common sense. It is a doubt that logically arises from the evidence or absence of evidence (*Lifchus* at para. 36). Whether evidence exculpating the accused raises a reasonable doubt must be assessed in the context of the evidence as a whole (*R v Ryon*, 2019 ABCA 36; *R v Morin*, [1988] 2 SCR 345; and *R v Thomas*, 2012 ONSC 6653).

[17] A reasonable doubt may arise from the factors relating to the sincerity or reliability of the testimony of the Crown witnesses, undermining the Crown case (*R v W(D)*, [1991] 1 SCR 742).

[18] Proof of guilt beyond a reasonable doubt does not require a standard of absolute certainty. However, it is closer to absolute certainty than it is to proof on a balance of probabilities (*R v Starr*, 2000 SCC 40 at para. 242).

Circumstantial evidence

[19] The court in *R v Beckman*, 2022 ABQB 298 ("*Beckman*") at para. 93, provided a comprehensive summary of the law on circumstantial evidence. A summary of the main points follows.

[20] An assessment of circumstantial evidence requires two steps. The first is the same as the determination required with direct evidence, such as eye-witness testimony and admissions, that is, whether the evidence is to be believed. If the evidence is

believed, the next step with circumstantial evidence is whether or not to draw an inference from that evidence. Arguments may arise as to whether the evidence supports the inference to be drawn or whether the same evidence may support other inferences.

[21] In a circumstantial case, an accused may only be convicted if the sole reasonable inference from the evidence is that the accused is guilty. The evidence must not support reasonable exculpatory inferences. As stated by the court in *R v Villaroman*, 2016 SCC 33 ("*Villaroman*") at paras. 18-22 and 25, if the evidence supports a reasonable inference that the accused is innocent, the accused cannot be convicted (*R v Griffin*, 2009 SCC 28 at para. 33; *R v Mayuran*, 2021 SCC 31 at para. 38; *R v Cooper*, [1978] 1 SCR 860 at 865-66).

[22] The court in *R v Donison*, 2021 ONSC 2297, expressed the question this way:

> [17] … the issue is whether guilt is the ***only*** reasonable inference, not the ***strongest*** reasonable inference to be drawn from the circumstantial evidence. An accused is entitled to an acquittal if there are reasonable inferences other than guilt, even if such alternative inferences are not as strong or compelling as an inference of guilt. **Put another way, a reasonable inference other than guilt is, by definition, a reasonable doubt** [italics in original, bold added].

[23] There is a risk with inferential reasoning that the trier of fact may ignore gaps in the evidence, ignore alternative explanations, or ignore evidence inconsistent with a preferred conclusion. The trier may rely on assumptions rather than evidence. As noted by the Supreme Court of Canada in *Villaroman*:

> [26] … There is a special concern inherent in the inferential reasoning from circumstantial evidence. The concern is that the jury may unconsciously "fill in the blanks" or bridge gaps in the evidence to support the inference that the Crown invites it to draw. …

[24] The Supreme Court of Canada in *Villaroman* stated the trier of fact must consider "other plausible theor[ies]" and "other reasonable possibilities" which are inconsistent with guilt. These alternatives must be reasonable.

> [37] … the Crown thus may need to negative these *reasonable* possibilities, but certainly does not need to "negative every possible conjecture, no matter how irrational or fanciful, which might be consistent with the innocence of the accused": *R. v. Bagshaw*, [1972] S.C.R. 2, at p. 8. "Other plausible theories" or "other reasonable possibilities" must be based on logic and experience applied to the evidence or the absence of evidence, not on speculation. [emphasis already added]

[25] The court in *Beckman* tackled the distinction between reasonable inference and speculation, stating:

> [99] … Whether a proposed inference is or is not reasonable depends on (e.g.)
>
> - the evidence (or lack of evidence) claimed to support the inference, including the nature or scope and reliability of the supporting evidence (see *R v Farnsworth*, 2017 ABCA 358 at para 9).
> - the relationship of the supporting evidence to the claimed inference ("given this, we may infer that"), keeping in mind that an inference need not be based on "proven fact" (*Villaroman* at para 35).
> - the relationship of the claimed inference to other evidence and other reasonable inferences arising from the evidence; whether or not inferences are drawn must "accord with common sense, intuitive notions of probability and the unlikelihood of coincidence" (*R v Handy*, 2002 SCC 56 ["*Handy*"], Binnie J at para 42).
> - whether any assumptions of fact, themselves not supported by evidence, must be relied on to draw the claimed inferences.
> - the degree of complexity or coincidence required for the inference to be viable, keeping in mind that
>   - human events may occur at intersections of coincidence – life may be surprising
>   - reasonable inferences need not be the simplest or most easily drawn – "To hold

> otherwise would lead to the untenable conclusion that a difficult inference could never be reasonable and logical:" *R v Katwaru*, 153 CCC (3d) 433 (ONCA) … .

[26] A reasonable inference arising from the absence of evidence must be based on the evidence admitted at trial and the absence of evidence that would be expected as a matter of common sense to have accompanied that admitted evidence. In other words, it is a contextual analysis. In order for a reasonable inference to be drawn from the absence of evidence, that absence of evidence must be significant in relation to the evidence that was admitted.

[27] In a circumstantial case, as in any case, the evidence must be considered as a whole. The court in *R v Hudson*, 2021 ONCA 772, described this concept well as follows:

> [70] The assessment of circumstantial evidence … does not involve an examination of individual items of circumstantial evidence in isolation and separately from the rest, adjudging them against the criminal standard of proof and rejecting them if they are found wanting, as surely they will be. No individual item of circumstantial evidence is ever likely to do so. They are the building blocks of proof, not the final product. It is commonplace that individual items of evidence adduced by the Crown examined separately and in isolation, have not a very strong probative value. But all the pieces have to be considered. Each one in relation to the whole. And it is the whole of them, taken together, whose cumulative force must be considered and may constitute a basis for conviction: *Coté v. The King* (1941), 77 CCC 75 (SCC) at 76.

[28] Inferences consistent with innocence do not have to arise from proven facts. This wrongly obliges the accused to prove facts. The assessment of reasonable doubt is made by considering all of the evidence. If there are reasonable inferences other than

guilt, the Crown's evidence does not meet the standard of proof beyond a reasonable doubt (*Villaroman* at para. 35).

[29] In order to convict in a circumstantial case, it is necessary to determine whether explaining the indications of guilt as coincidence would "be an affront to common sense" (*Handy* at paras. 41, 45, 47, 110). It is necessary for the co-existence and interaction of facts pointing towards guilt to defy exculpatory explanation.

[30] An individual "evidential element" that has no probative value because of its irrelevance or unreliability, should not be considered in the holistic assessment of the evidence.

Eyewitness Identification

[31] It is a generally accepted principle that identification evidence is inherently unreliable. The court in *R v Gough*, 2013 ONCA 137, wrote:

> [35] Being notoriously unreliable, eyewitness identification evidence calls for considerable caution by a trier of fact: *R. v. Nikolovski*, [1996] 3 S.C.R. 1197, at pp. 1209-10; *R. v. Bardales*, [1996] 2 S.C.R. 461, at pp. 461-62; *R. v. Burke*, [1996] 1 S.C.R. 474, at p. 498. **It is generally the reliability, not the credibility, of the eyewitness' identification that must be established.** The danger is an honest but inaccurate identification: *R. v. Alphonso*, 2008 ONCA 238, [2008] O.J. No. 1248, at para. 5; *Goran*, at paras. 26-27.
>
> [36] The trier of fact must take into account the frailties of eyewitness identification in considering such issues as whether the suspect was known to the witness, the circumstances of the contact during the commission of the crime (including whether the opportunity to see the suspect was lengthy or fleeting) and whether the circumstances surrounding the opportunity to observe the suspect were stressful; *R. v. Carpenter*, [1998] O.J. No. 1819 (C.A.), at para. 1; *Nikolovski*, at 1210; *R. v. Francis* (2002), 165 O.A.C. 131, [2002] O.J. No. 4010, at para. 8.
>
> [37] As well, the judge must carefully scrutinize the witnesses' description of the assailant. Generic descriptions

> have been considered to be of little assistance; *R. v. Boucher*, 2007 ONCA 131, [2007] O.J. No. 722, at para. 21. The same can be said of in-dock or in-court identification; *R. v. Hibbert*, 2002 SCC 39, [2002] 2 S.C.R. 445, at 468-69; *R. v. Tebo* (2003), 172 O.A.C. 148 (Ont. C.A.), at para. 19. [emphasis added]

[32] It is a well-accepted principle that the usual test of credibility of witnesses does not apply in identification cases. An honest, convinced, and convincing witness may be mistaken. A trier of fact must test the accuracy of the evidence of the identity of the accused by closely scrutinizing other evidence. The trier must be satisfied of both the honesty of the witness and the correctness of the identification.

> [3] … If the accuracy of the identification is left in doubt because the circumstances surrounding the identification are unfavorable, or supporting evidence is lacking or weak, honesty of the witnesses will not suffice to raise the case to the requisite standard of proof and a conviction so founded is unsatisfactory and unsafe and will be set aside. … [*R v Atfield*, 1983 ABCA 44]

[33] A summary of the factors to guide the assessment of the value of eyewitness identification was set out in *R v Powell*, 2007 OJ No 4196 ("*Powell*"). They include: time lapse between the identification and the events described; whether the witness is identifying a stranger or someone they have seen before; the physical circumstances of the sighting including sight lines, lighting, and whether the witnesses were moving or stationary; duration of the observation; the emotional state of the witness; whether they were distracted; how generic was the description; how did the description compare to others; has the identification been influenced by others; and finally if there is other reliable circumstantial evidence capable of confirming or supporting the identification evidence. The existence of such evidence "can go a long way to minimizing the dangers inherent in eyewitness identification" (*Powell* at para 15).

Cross-racial identification

[34] The dangers inherent in cross-racial identification have also been recognized by the courts. It arises when the witness and the accused person being identified are of different racial backgrounds. There is an increased risk of error with cross-racial identifications and a greater degree of scrutiny is required (*R v AC*, 2009CanLII 46651; see also *R v Jack*, 2013 ONCA 80; and *R v Yigzaw*, 2013 ONCA 547). Courts are urged to be vigilant in assessing such evidence and to look for other corroborating evidence in the determination of whether to accept it and how much weight to give it. (*R v MacLellan*, 2017 NSSC 307 at paras. 47-48; aff'd 2019 NSCA 2).

In-dock identification

[35] Identification of a stranger in court by a witness has limited evidentiary value. This is especially the case in a cross-racial identification, and/or where the accused is the only racialized person in the courtroom. There are significant dangers in relying on such evidence.

The Offences

General

[36] For each of the offences, the Crown must prove each essential element of the offence. These include that the accused is the person who committed the alleged offence, the time and date of the alleged offence, and as well as the elements of the offence set out in the *Criminal Code*.

[37] I will first address counts 6 to 10 on the Indictment. I will review the evidence, the theories of the Crown and defence, and my findings of facts and drawing of inferences. I will first determine whether or not the Crown has proved beyond a reasonable doubt

that Malakal Tuel was the shooter. Then, I will review the elements of the offences, apply them to the evidence in this case, and state my decision on each of the counts.

Evidence

[38] The evidence in this case consisted of testimony from witnesses who attended at or near the 202 that night, police officers who attended at the scene of the 202 after the shooting, police officers who conducted scene security at the residence where the accused were arrested, and police officers who examined the contents of the accused's vehicle. Witnesses who saw or interacted with one or both of the two accused either before or after the shooting that night also testified.

[39] At trial, there was video evidence from inside the 202, video and audio evidence from a dashcam of a taxicab outside of the 202, and video evidence from the Casa Loma bar, where the accused had been earlier that evening. Other exhibits included numerous photographs taken inside and outside of the 202; photographs of the residence where the accused were arrested; and the two vehicles in the name of Malakal Tuel and items found in each of those vehicles. There were also witness statements, drawings, and maps. Three expert witnesses testified: a forensic firearms specialist; a DNA expert; and a police officer expert in drug dealing.

[40] As is their right, neither of the accused testified nor called any evidence.

Admissions and concessions

[41] Two agreed statements of facts have been filed in this case. These will be referred to in my review and assessment of the evidence.

[42] Other admissions were made by Malakal Tuel in the course of the trial.

[43] Malakal Tuel admits that he was the person seen on the 202 video surveillance footage identified by various witnesses as “the shorter black man” wearing a puffy beige or tan winter coat, a light grey baseball cap, dark pants and light shoes.

[44] Malakal Tuel further admits that the 9 mm empty shell casing found outside the entrance of the 202 after the shooting came from a shot fired by the Taurus PT 709 semi-automatic handgun seized from the Toyota Tacoma vehicle.

[45] Malakal Tuel admits that his DNA is on the Taurus PT 709 handgun.

[46] Malakal Tuel concedes that that Taurus PT 709 handgun was a prohibited weapon within the meaning of the *Criminal Code*.

[47] Malakal Tuel concedes the $7,480 in the Hugo Boss shoulder bag inside the Air Jordan backpack seized from the Toyota Tacoma belonged to him.

[48] Joseph Wuor admits the 8.28 grams of crack cocaine in his black suitcase seized from the Toyota Tacoma is his, for personal use.

[49] The Crown concedes that the in-dock identification of the accused Malakal Tuel by three witnesses (Lea Imbeau, Katherine Gallagher, Kamille Lemay) should be disregarded for lack of probative value. The Crown further concedes that John Singh’s testimony that he heard Malakal Tuel threaten to shoot JT Papequash should be disregarded.

[50] I have reviewed and considered all of the evidence and the absence of evidence in this case. In the following, I will review the evidence related to counts 6 to 10 chronologically that is most pertinent to my decision.

Presence of the accused at the Casa Loma

[51] Lorraine Young testified that while she was at the Casa Loma Bar, located in the Porter Creek subdivision north of Whitehorse, around 11 p.m. on November 30, 2019, two black men entered. She did not know them. The video entered into evidence shows that there were two black men wearing the same clothes as the two black men seen on video at the 202 bar. The taller man was wearing a yellow hooded sweatshirt, black track pants with a white mottled stripe down each leg, and "Champion" brand running shoes with a thick white sole and dark upper material. The shorter man was wearing a puffy tan-coloured coat, light-grey baseball cap, dark blue pants that appear to be jeans, and light-coloured shoes.

[52] The men left the Casa Loma shortly after entering, as they were asked to do so. They went to their vehicle in the parking lot. Lorraine Young and her partner left the bar around the same time. She testified that the accused's vehicle backed up in the parking lot and waited deliberately to follow her and her partner. A silver Toyota Tacoma drove immediately behind them, coming close to her partner's vehicle. It passed Lorraine Young and her partner on Two Mile Hill on the way into downtown Whitehorse. Lorraine Young recognized the two men in the truck as the same ones who had been at the Casa Loma bar. She took photos showing a licence plate HZV11. Later, she called police at the urging of her friend to report the incident of being followed too closely.

[53] Lorraine Young's evidence is not particularly relevant. However, the video evidence from the Casa Loma showing the clothing of the two men and the Toyota Tacoma in the parking lot, followed by the photos from Lorraine Young of the two men

in the Toyota Tacoma with the licence plate HZV11 heading to downtown Whitehorse after 11 p.m. that evening forms part of the relevant circumstantial evidence in this case.

Interactions inside the 202 bar

[54] The evidence about these interactions comes primarily from the 202 video surveillance tapes. Excerpts from 5 different cameras in the 202 bar were introduced as exhibits at trial. I have reviewed only the excerpts that were set out in the index agreed to among counsel and filed as Exhibit A to their submissions. Some narrative was provided by various witnesses in court about these excerpts and I have also considered that evidence.

[55] The times on the 202 video surveillance were confirmed to be accurate within three to five minutes of real time by Donald Tutin, one of the 202 doormen who testified at trial.

[56] JT Papequash arrived at the 202 bar on November 30, 2019, at approximately 10:40 p.m. with four or five friends.

[57] Malakal Tuel and his friend entered the 202 bar on November 30, 2019, at approximately 11:05 p.m.

[58] Destyn Aird, one of the friends who arrived with JT Papequash, testified at trial that she met two African men that night at the 202 bar, one taller and one shorter. She learned the taller one was named Joseph. He was wearing the yellow hooded sweatshirt, track pants with a stripe, and dark running shoes. At some point during the evening after he went outside of the bar, he returned wearing a winter jacket that was blue, red, and white. Destyn Aird testified that both men were friendly and nice and buying drinks for everyone. She spoke more to Joseph than to the shorter man. She is

seen on the video excerpts on several occasions talking and laughing with Joseph. On at least one occasion, she was seen going outside the 202 entrance with him and re-entering a few minutes later.

[59] Destyn Aird was a credible and reliable witness for the most part. When discrepancies in her testimony were pointed out, she conceded where appropriate. She maintained her composure and her calmness when testifying about matters that were difficult. Her memory was good.

[60] The video evidence, the yellow hoody in the black suitcase found in the Toyota Tacoma truck on Joseph Wuor's arrest, and Destyn Aird's testimony that the name of the taller man was Joseph, all confirm that the taller man referred to by the witnesses in the 202 bar is Joseph Wuor.

[61] Several witnesses testified about altercations between the two accused and JT Papequash inside the 202 that evening. The 202 video surveillance shows three altercations consistent with the evidence of the witnesses. They happened at 12:33:50 to 12:34:00 a.m., 12:38:09 to 12:38:25 a.m., and 1:17:01 to 1:17:20 a.m. The first two occurred near the pool tables. JT Papequash shoved Malakal Tuel and slapped him on the upper arm or shoulder. Joseph Wuor who was sitting in a chair by a pool table got up and stood beside Malakal Tuel. The altercation ended by Malakal Tuel and Joseph Wuor moving away from JT Papequash.

[62] The second altercation occurred when JT Papequash walked up to Joseph Wuor and shoved him backwards with both hands. Malakal Tuel was standing beside Joseph Wuor, near the pool tables. The altercation ended when one of the off-duty staff

of the 202, who was playing pool, separated them with the help of some of JT Papequash's friends.

[63] The third altercation occurred as JT Papequash and Joseph Wuor were walking past each other in opposite directions near the bar. As they passed each other, JT Papequash intentionally bumped into Joseph Wuor, knocking him off balance. They both continued walking in the opposite direction and Joseph Wuor rejoined Malakal Tuel.

[64] The video evidence also shows the bar manager, John Singh, who testified at trial, having a conversation with Malakal Tuel at 1:35:00 to 1:36:25 a.m., after the altercations. John Singh testified that earlier in the evening the atmosphere was easy-going and mellow, and everyone, including Malakal Tuel and his friend, and JT Papequash and his friends, were having a good time. This changed with the altercations around the pool tables. John Singh had no knowledge of how it started or who started it and did not hear what the men were saying. He said he told both groups to walk away from each other or leave. He testified that he told Malakal Tuel to "take any fights outside the bar". He testified that Malakal Tuel told him that he was going to shoot JT Papequash outside and after that mimed the gun sign that I will describe in a moment. However, this is inconsistent with John Singh's preliminary inquiry testimony. It is also inconsistent with the friendly discussion he had with Malakal Tuel apparent from the video. John Singh also did not call police or ask Malakal Tuel to leave the bar after hearing the alleged threat.

[65] I have disregarded this aspect of his testimony and place minimal weight on his evidence that is outside of the video evidence. John Singh appears to have

reinterpreted earlier events in the evening based on the shooting, resulting in discrepancies between his preliminary inquiry testimony and his trial testimony. As a result, I will rely on his evidence that is supported by the video evidence.

[66] After his conversation with John Singh, the video evidence shows Malakal Tuel continued his dancing moves and looked towards a group of people that included Destyn Aird and others who had come to the bar with JT Papequash. Destyn Aird testified that JT Papequash was outside the bar at that time, likely smoking a cigarette. Malakal Tuel made signs with his hand in the shape of a pistol and mimicked firing it. This was shown clearly on the video at 1:36:25 to 1:36:45 a.m. Destyn Aird and John Singh also described it in their testimony.

[67] The six friends who did not know the accused men or JT Papequash and his friends entered the 202 bar at 11:55 p.m. and sat together at a table in between the pool tables and the dance floor. They were Lea Imbeau, Josiane Lavoie, Kamille Lemay, Camille Gendron-Rossignol, Alberto Giminez, and Jaaved Singh. One other person named Adrien joined them at some point, but he did not testify so I will refer to them as the six friends.

[68] Two of the six friends testified that they saw at least one of the altercations between JT Papequash and Malakal Tuel and Joseph Wuor.

[69] Lea Imbeau described seeing an altercation inside the bar between two black men, one shorter and one taller, and the victim of the shooting. She said she was about 2 metres away from the men. She heard angry tones of voice from the men but could not hear the words. It lasted a minute or so and there was no punching. She said the shorter man was trying to pick a fight with the shooting victim and the taller one was

holding him back. When she saw the victim after he had been shot she recognized him as the same person involved in the altercation.

[70] Alberto Giminez testified he saw an altercation inside the 202 around the pool table between two black men, one of whom was taller than the other, and another group of people who included two native men, a blonde young woman, and another young woman with darker curlyish hair. This matches the description of JT Papequash and four of his friends. Alberto Giminez did not know what the altercation was about and it ended when bar staff separated them and the black men left. His evidence was consistent with the video evidence.

[71] There is no evidence about the reason for the altercations or about whether the men knew each other before that night.

[72] Two of the six friends testified that they observed and briefly interacted with the shorter of the two black men inside the 202 that night. Lea Imbeau remembered noticing the shorter black man because of a young woman in a pink sweater who was with them and quite intoxicated. She was moving in between the table with the six friends and the area where the two men were. Lea Imbeau spoke with the shorter man to tell him that she was bringing the intoxicated woman back to their table. The woman in the pink sweater can be seen on the video excerpts.

[73] Kamille Lemay testified that Lea Imbeau pointed the two men out to her because there was a woman in a pink sweater who was intoxicated and trying to get the attention of the two men. She was moving back and forth between the table where Kamille Lemay and her friends were and the two men. One of the men pushed the woman in the

pink sweater away and told her to sit with Kamille Lemay and her friends. The woman sat with the six friends for a bit until she said she was going home.

Events occurring outside the 202 from 1:48 a.m. to 1:56:39 a.m.

Lahcen Amzoug

[74] Lahcen Amzoug, a Whitehorse taxi driver, pulled up just west of and approximately 10 to 12 feet away from the 202 entrance at 1:48:16 a.m. He had a dashcamera with audio in his cab, excerpts of which were entered as exhibits at trial. There were both interior and exterior facing cameras, so that he is visible on the video, in addition to the external view. When he drove up to the 202, his dashcam view frame ended immediately west of the 202 entrance, that is, the 202 main door is not in view of the frame.

[75] It is not disputed that the time on the dashcam is incorrect. It is agreed that the time is one hour, five minutes, and 21 seconds ahead of the time on the 202 video surveillance.

[76] The Crown synchronized the video surveillance from Channel 2 in the 202 (the camera inside the 202 lobby with a view of the inside main door) with the video from the taxi dashcam. The Crown set out the times from both videos of the events in question from that evening. They are not in dispute. Where the times are in bold, they indicate it is that camera that shows the activity. I have replicated it here as an appendix to these reasons and I accept the times as accurate. I will refer to the 202 surveillance video times in these reasons.

[77] Lahcen Amzoug was in his taxicab outside the 202 for approximately eight minutes before the shooting, waiting for fares from patrons emerging from the bar. The

windows of his cab were down. While he was waiting outside the 202, Lahcen Amzoug, who is Moroccan, was speaking with a friend in Arabic on a hands-free phone.

[78] At 1:56:22 a.m., a man walked quickly from the westerly direction of Third Avenue in front of the cab towards the 202 entrance. It is not disputed and it is clear from the dashcam that this is Joseph Wuor. Lahcen Amzoug testified that he specifically remembered seeing Joseph Wuor walk in front of his cab because he recognized him from the night before in the parking lot behind the 202 building. The night before, he had noticed Joseph Wuor's walk. It was fast with lengthy strides and he had the same walk the night of the shooting.

[79] Lahcen Amzoug watched Joseph Wuor walk to the 202 entrance and speak to a shorter black man in a puffy, light coloured winter coat. The shorter man was standing by himself outside the door of the bar. He sometimes had his hands in his pockets of his coat: it was cold. After Joseph Wuor spoke to the shorter man, the shorter man nodded his head.

[80] At 1:56:29 a.m., seven seconds after Joseph Wuor walked in front of the taxicab, another man came out of the 202 door and immediately approached and began to speak with the shorter black man in the puffy coat. Lahcen Amzoug could not hear what they were saying.

[81] Lahcen Amzoug agreed at trial that he said in his police statement "it seemed like they didn't know each other but to me it seemed like just somebody who was having drinks and he's stepping out and just introducing himself to strangers you know what strangers just uh chat you up…." and "he just went straight to the short guy I don't know what he said to, to him I thought it's one of those guys who were having two drinks,

happy just chatting strangers." At trial, he testified that JT Papequash, who was identified later as the man who came out of the door, was moving his shoulders side to side and had his hands up in the air. He said he looked kind of agitated. He watched this conversation for approximately five to eight seconds.

[82] A fellow cab driver and friend then pulled up beside Lahcen Amzoug. At the very moment Lahcen Amzoug turned his head to his left, away from the 202 entrance, to speak with his friend, he heard a loud bang. This was at 1:56:38 a.m. This time was confirmed on the basis of the reaction of the doorman, Donny Tutin, at that second, as well as by the sound of the shot on the dashcam audio/video and the reaction of Lahcen Amzoug. The interior dashcam shows him immediately looking towards the 202 entrance.

[83] Lahcen Amzoug saw Joseph Wuor running west towards Third Avenue away from the 202 entrance in front of his cab, at 1:56:41 a.m., three seconds after the shot. He said Joseph Wuor looked surprised and panicked. Lahcen Amzoug saw the shorter black man run the opposite direction towards Second Avenue and the river. This is not visible on the dashcam.

[84] Lahcen Amzoug did not see a gun. He did not see anyone fire a shot. He testified at trial he saw a bright flash like a muzzle flash from his cab when the shot occurred. In cross-examination, he conceded, after watching the video at the time of the shot, there was no evidence of any muzzle flash. He was also clear that he knows nothing about guns.

[85] Lahcen Amzoug was a credible and reliable witness. He was working at his job driving a cab that night and was sober. He was straightforward and careful in answering

questions. He conceded where appropriate, such as with the muzzle flash. He did not know any of the other witnesses. He had a close and direct view of the 202 entrance from where he was parked. He testified from a hotel room in Portugal, where he was on a family vacation that had been planned for many months. I accept his evidence.

Tiffany Law

[86] Tiffany Law was visiting her boyfriend who was working the night shift at the Elite Hotel located adjacent and to the west of the 202 bar. An acquaintance, Katherine (Katie) Gallagher, messaged her to join her in her vehicle outside the 202 for a smoke. Katie had stopped there because her friend Hannah had gone to use the washroom at the 202. Tiffany Law was not sure of the time. Katie's car was parked approximately three paces east of the main door of the bar, facing the bar with its headlights towards the bar. It was the second car from the east end of the line of cars in front of the 202.

[87] Tiffany Law got into the back seat of Katie's car behind the driver's seat, where Katie was sitting. Tiffany and Katie were talking and smoking a cigarette with the car doors closed and windows open. Tiffany heard Katie say, "O my god, he's got a gun", which made Tiffany look through the front windshield of the car. She saw a man walking briskly from the direction of Second Ave to the east, towards the 202 entrance. He had a gun in his left hand and, as she watched him, he moved it to his right hand and put it down to his side. She testified it looked like a hand pistol. After he passed in front of Katie's vehicle, Tiffany could no longer see him because an SUV or truck on her left (west) side blocked her view.

[88] She described the man with the gun as dark-skinned, possibly African-Canadian, stocky, not super-tall, and looked strong. She believed he was wearing a dark hoody -

dark grey or blue colour- and darker jeans, but she was not sure. She said he was walking pretty fast.

[89] She and Katie shared a joke about bringing a knife to a gunfight. A minute or two later, she heard two gunshots and the sound of breaking glass and screaming. Possibly, she said, there was a third shot.

[90] She saw the same man she had just seen carrying a gun running back in front of the car, now heading towards Second Ave. She described him as maybe hobbling on one leg or running as fast as he could, not smoothly. She had not noticed this gait before. However, she confirmed her certainty that it was the same man she had seen walking from Second Avenue a few minutes earlier. She saw a bouncer, whom she knew as Donnie, running after the man. She saw the man turn the corner of the 202 building towards the off-sales and then lost sight of him. After Donnie ran past, she got out of the car. She did not see the man standing at the corner of the 202 building pointing the gun towards the 202 door.

[91] Tiffany Law was a credible witness. She was straightforward in her testimony. Her sense of timing was not reliable, as she admitted when testifying, “when you’re scared everything seems longer”. She did not know any of the other witnesses except Katie Gallagher. I accept her evidence, with appropriate caution around her evidence about times.

Katherine (Katie) Gallagher

[92] Katie Gallagher drove to the 202 bar with her friend Hannah in the early morning hours of December 1, 2019. She parked her beige Chevy Cobalt car to the east of and

facing the 202 entrance, the second car in from the east end of the parked cars, confirmed by the photo taken on December 1 and entered into evidence.

[93] After Hannah went into the 202, Katie's friend Tiffany Law came to her car to smoke a cigarette with her. Katie Gallagher stayed in the driver's seat and Tiffany was behind her. They smoked and talked for five or 10 minutes. She said it was dark outside, with brightness coming from the door and windows in front of her, making it hard to see. During that time, she saw a man on the sidewalk walking in front of her car from Second Ave towards the 202 entrance.

[94] In direct examination, Katie Gallagher said it was Tiffany Law who said, "he's got a gun". In cross-examination at trial, after reviewing her police statement, where she said she told Tiffany "he's got a gun", Katie Gallagher said, "perhaps it was me who said it."

[95] She described the man as dark-skinned, wearing a work jacket that was tan or mustard colour. She was unsure if he had a hood on his jacket. He was taller than her height of 5'6". She testified he had an angry, determined, tense look on his face.

[96] She saw him pull a gun from his pocket/hip area, raise it to his shoulder, and shoot. In cross-examination, she adopted her police statement that the shot came approximately five seconds after the man took the gun out, not immediately after he raised the gun.

[97] In direct examination at trial, she said the gun was in his right hand. In cross examination, initially, she said she could not recall in which hand he held the gun, but later said that, after she had thought about it, it was the right hand. She described the gun as a handgun, dark metal, not shiny, like a .45 in the movies.

[98] She said she heard one shot but was not able to see anything. She saw the man run away towards Third Avenue after the shot. She said everything was chaotic after that, with someone on the ground and people crying.

[99] Her videoed statement to Corporal Jill McLaren, taken December 1, 2019, around 4 a.m., was played at trial. It was admitted for the purpose of assessing credibility and reliability of her testimony at trial. In that statement, she identified the shooter as CJ/Craig, someone she knew because she had brought crack from him before. She described him as Somalian, approximately six feet tall, late 30s, without a lot of hair. She said she could see his face - his eyes, cheekbones, nose, and mouth.

[100] She then testified at trial that she was mistaken: it was not CJ (Craig). Even though she told police on December 1, 2019, that she was sober, she said at trial that she had meant she had not been drinking alcohol. In fact, she said that, at the time on December 1, 2019, she was high on cocaine and weed, was “not in her body”, and her statement was an expression of her fears, and was “all very embarrassing”.

[101] She said at trial she could not remember doing the interview with police. She said she was coming down from using cocaine that night and was distraught, unable to think, and stressed. She testified at trial that she does not believe CJ/ Craig was the shooter, even though she acknowledged that she believed strongly at the time it was CJ/ Craig. When asked why she did not think now it was CJ/Craig, she said she did not know. She disputed defence counsel’s suggestion that she was changing her evidence about the identity of the individual because she was afraid for her safety and of retribution.

[102] Corporal Jill McClaren testified she had not met Katie Gallagher before that night and did not recall if she showed signs of impairment by alcohol. She said that she would

not have continued the interview if she felt the witness were incapable of providing the information requested. Corporal McClaren said that she did not believe Katie Gallagher showed signs and symptoms of cocaine intoxication, such as super-human strength and bizarre behaviour.

[103] From my observation of Katie Gallagher's video-taped interview with police, she did appear anxious, fearful, and reluctant to provide certain information. She appeared high-strung and upset. This was different from her demeanour in court, which was relatively calm and measured, although uncertain. I cannot exclude the possibility that she was suffering from some kind of impairment or after-effects of drug ingestion on the night of December 1, 2019.

[104] However, there were credibility and reliability issues with this witness' evidence at trial. She was unsure, suggestible, and her memory was not strong. She identified the man with the gun she saw that night as one person during the police statement, then withdrew that identification at trial and did an in-dock identification of Malakal Tuel. She referred to her intoxication on December 1, 2019. And although she did not demonstrate those classic symptoms during the police interview, she did appear very anxious, scared, and tense. She flipped back and forth on details at trial, such as in which hand the man held the gun and whether Tiffany or she said first, "he's got a gun".

[105] The contradictions between her testimony at trial and her testimony to police, and between her direct examination evidence and cross-examination evidence, as well as her general uncertainty in providing evidence makes her evidence unreliable and raises credibility issues. I do not place weight on her evidence.

Donny Tutin

[106] Donny Tutin was one of the doormen, also referred to as a bouncer, at the 202 bar on the night of the shooting. He confirmed from checking his cell phone clock regularly at the 202 that the time on the 202 video surveillance is accurate within three to five minutes.

[107] Donny Tutin was in the 202 bar lobby, near or at the front door, just before the shooting. The video surveillance evidence shows him standing near the front window and then suddenly turning his head to look outside at 1:56:38 a.m. He said he heard a loud pop at that time and then heard a co-worker, Barry Lee, say “gunshot”. He motioned people to get outside and his instinct was to find his boss, John Singh, to let him know.

[108] Donny is seen on video leaving the 202 bar at 1:56:46 a.m. He testified he saw JT Papequash on the ground, moving around, trying to get up. He said he thought he saw him stand up at one point. He saw Barry Lee running and he started running behind him, towards Second Avenue, in support. At the off-sales, he turned around and came back to the 202 entrance. He wondered to himself what he was doing chasing after someone who may have a gun and he also knew he could not keep up to Barry. He did not see anyone with a gun.

[109] Donny Tutin’s evidence was not particularly relevant except to confirm the timing of the gunshot and to contribute to the evidence leading to an inference about the direction the shooter fled. He went outside the 202 bar eight seconds after the shot, and it is not clear how long it took before he started running towards Second Avenue.

[110] I reject his evidence that he saw JT Papequash standing up after he was shot. This contradicts every other witness' evidence that JT Papequash was on the ground after the shot and did not stand up.

John Singh

[111] From the video evidence, John Singh, whose self-described nickname is "Brownie," was speaking with JT Papequash at the 202 front lobby around 1:55:07 a.m. He testified he was telling JT Papequash that he could call a cab for him and he could leave out the back. He said he was concerned for JT Papequash because of the altercations earlier that evening, his knowledge that JT Papequash does not back down from people, and his fear that he would make bad choices. He had observed earlier in the evening that the women who arrived with JT Papequash were moving back and forth between that group and the two African men.

[112] JT Papequash left the bar out the front door.

[113] John Singh ran out the front door at 1:56:45 a.m., around the same time as Donny Tutin. He testified he saw JT Papequash on the ground and he saw Donny run to the left. John Singh said he saw both men at the corner by the 202 building, with Joseph Wuor being at the corner and Malakal Tuel halfway there. He said he heard two shots: one at the 202 entrance; and one around the corner where the two men went.

[114] As noted above, I have some difficulty with the credibility and reliability of John Singh's evidence that is not supported by video surveillance evidence. Along with the example already noted, his evidence about seeing Joseph Wuor at the corner of the 202 building six seconds after the shot is contradicted by the dashcam video from the

taxi which shows Joseph Wuor running in the opposite direction three seconds after the shot.

[115] I do not place much weight on John Singh's evidence beyond the video evidence, as a result.

The Six Friends

[116] The six friends left the 202 at 1:51:21 a.m. Their testimony was consistent in the following points:

- Immediately on leaving the 202 bar, they turned west towards Third Avenue together because Alberto Giminez's bicycle was locked to a structure directly in front of Lahcen Amzoug's taxi cab.
- They stood around the bicycle for a few minutes discussing which way they were going to walk home, as they all lived in Riverdale, and whether to get something to eat.
- They decided to walk to Riverdale along the river, so they turned east and started to walk towards Second Avenue and the river along the sidewalk beside the 202. All of them passed the 202 entrance at 1:56:14 a.m.
- All of them heard a loud bang they recognized as a gunshot as they were walking towards Second Avenue. They were in various places along the route: some had crossed Jarvis Street already, some were about to enter the cross walk, and some were further west along Jarvis Street, closer to the 202 building.
- All of them had passed the entrance of the 202 when they heard the shot.

- All of them looked back towards the 202 entrance after they heard the loud bang.
- All of them heard one shot.
- No one saw anyone fire a gun.
- No one saw the shooting.

[117] The following sets out the testimony of each of the friends and my assessment of their credibility and reliability.

Lea Imbeau

[118] When Lea Imbeau walked past the 202 entrance, she saw people out in front but does not remember seeing anyone she recognized from inside the bar.

[119] She heard the shot after she had stepped off the curb at the corner of Jarvis and Second Avenue. She thought it was fireworks and realized it was a gunshot when people began running towards her from the 202 entrance. She ran south across Jarvis Street towards the courthouse, away from the 202, noticed that not all of her friends were there, so ran back towards the liquor store (identified as the off-sales on the east facing side of the 202 building). Camille, Kamille, and Alberto were not there. She saw movement around the back corner of the 202 building, so she ran in that direction. It might have been a silhouette in the parking lot. After she took a few steps behind the building, she felt uneasy and could not see anyone clearly and realized her friends were not there. She then ran back to the 202 entrance and saw one of her friends with the shooting victim, whom she recognized from inside the bar. She did not see the shot or anyone with a gun. She did not see the accused outside the bar at any point.

[120] Lea Imbeau's testimony is credible and reliable. It provides some evidence about what was occurring at the 202 before the shooting. It is not surprising, given this account, that she did not see anyone as the others did because she was crossing the street and running away from the 202 building when she heard the shot.

Josiane Lavoie

[121] When she and her friends passed the 202 entrance after Alberto retrieved his bicycle, she saw a black male and a non-white, possibly Indigenous male approximately a metre or two from the 202 entrance. They were talking to each other. She said the possibly Indigenous male was the shooting victim she saw later that night. She had seen both men in the bar earlier that night.

[122] After she walked past the 202 entrance, she heard a pop, like a cap gun. She was on the sidewalk beside Lea, not very far past the 202 entrance, and when she looked back towards the 202 entrance, she saw someone lying on the ground.

[123] At trial, she testified she felt someone running beside her on her left and described him as the shorter man she had seen in the bar and talking to the shooting victim at the door. This testimony contradicted her police statement where she did not say a man ran past her.

[124] In the police statement, she drew a diagram showing her location as across Jarvis Street almost at the courthouse, not further up on the 202 side of the street. At trial, she explained the difference in terms of timing. The police statement diagram she said showed her location after the man ran away, not her location just after the shooting.

[125] Her description at trial of her position at the time of the gunshot was different than Lea Imbeau's testimony, who said she was at the corner with Josiane about to cross the street.

[126] Josiane Lavoie described the man she saw as a black man with no head covering and a bald or shaved head. She was not sure what he was wearing- possibly beige pants and a light brown colour jacket. She said her friends told her he had a grey hoody. She said the taller black man she saw inside the 202 bar was wearing a puffy jacket.

[127] The man she saw stopped at the corner of the 202 building a couple of metres away from her. He had a gun small enough to fit in one hand. It had a grey part and its grip was small. He made a motion that looked like recharging or reloading by putting his hand on top of the gun and moving it backwards and forwards. He pointed it towards the 202 entrance but did not fire. He then ran away towards the off-sales at the back of the 202 building. She noticed Lea Imbeau running in the same direction as the man and then turning around to come back.

[128] She described the lighting outside as quite bright because the streetlights were on.

[129] Josiane Lavoie had consumed no alcohol or drugs that night. She explained the difference in her location on the street between her evidence at trial and her police statement satisfactorily. In her police statement, she referenced her position across Jarvis Street by the courthouse as, "I was right here when I didn't see him anymore", meaning when he ran away in the direction of the off-sales.

[130] The fact that she did not tell the police officer that a man ran by her is surprising. She admitted on cross-examination that she and her friends discussed what happened in the 202 while they were waiting to provide police statements. She said she and her friends had talked about the case about a dozen times over the last two and a half years. She did not provide any detail about what they discussed. However, she differentiated in her evidence about what her friends had told her – that is, the man was wearing a grey hoody- and her own recollection that he was wearing beige pants and light brown jacket.

[131] Her testimony was credible. There is some question about the reliability of her testimony, as a result of her failure to tell the police officer than a man ran past her. I do not accept that a man ran past her, as this is something that she would have told police that night if it had happened. However, aside from this, I found she was a reliable witness. The difference between her description of the location of her position and Lea Imbeau's description of their position is not so material that it undermines the reliability of her evidence. The distance between those two positions is not far, as evidenced in the photos of the area entered as exhibits at trial. I accept that even if she were at the location that Lea described, she would have been able to see what she described.

Alberto Giminez

[132] When he and his friends left the 202, they went to get his bike and they finished a bottle of gin they had stashed earlier in the evening. They began walking towards Second Avenue. He does not remember if there were any people outside the bar when he passed.

[133] He was at the corner of Second Avenue on the sidewalk and was about to cross Jarvis Street when he heard a loud bang. He kept walking because he did not realize it was a gunshot. After two or three seconds, he turned around and saw a man on the ground and another man at the corner of the 202 building holding a gun and pointing it at the 202 bar entrance. The man did not fire the gun and he ran away along the side of the 202 building with two or three guys running after him.

[134] He said the lighting was good.

[135] Alberto Giminez described the gun as a small semi-automatic black handgun, with a horizontal silver stripe running the full length. It was not a revolver.

[136] He could see the side of the man's face and he thought it was one of the two black men he had seen earlier in the bar, possibly the taller one, but he could not be sure. He testified at trial it could have been the shorter man. He also said in cross-examination it could have been a completely different man than who he saw in the bar.

[137] His evidence was credible. He was forthright and honest about what he could and could not remember. He said he was at a 2 to 3 sobriety level out of 10, as he had approximately three drinks over the course of the evening. His evidence was reliable.

Kamille Lemay

[138] Kamille Lemay remembered seeing two men inside the 202, one shorter and stockier, and one taller and skinnier, and both with black-coloured skin and short hair. She remembered them because of observing their interactions with the woman in the pink sweater. She could not remember what they were wearing.

[139] When Kamille Lemay and her friends left the 202 bar, she said she felt weird tensions among the people in the bar and she did not like the vibe. They turned right first, where one of her friends smoked a cigarette. This is evident on the video.

[140] When they walked towards Second Avenue past the 202 entrance, she saw the shorter black man whom she had seen inside the 202, outside the door. He was talking face to face to the guy who got shot, whom she did not recognize at that time, from inside the bar. She was in “alert mode” because of the energy inside the bar. She heard the guy who got shot say something like “I know who you are” to the shorter black man. The tone was not agitated. She did not see the taller black man.

[141] She was past the corner of the 202 building, almost at the corner of Jarvis Street and Second Avenue when she heard a big bang, like a car backfiring. She turned back towards the 202 and saw a man with a gun running towards her, about two metres away. The gun was a darker coloured handgun. It looked like the same man who was in the 202 bar talking to the woman in the pink sweater and who she had just seen talking to the victim outside the entrance. The man got to the corner of the 202 building and looked right at her but she does not know if they made eye contact. He then pointed the gun back towards the 202 entrance, holding it with two hands for about a second. He did not fire the gun. She thought he did a movement like recharging it from the top with both hands (she made the motion of pulling back the slide on a semi-automatic pistol). She knows she told the police this in her statement but at trial she said she had a hard time remembering if she had seen that movement.

[142] She saw Lea Imbeau running toward the end of the 202 building. She also saw a bouncer running after the man with the gun. She does not know where the man with the gun went after this.

[143] She said it was dark but the streetlights were on.

[144] In cross-examination, she said the shorter black man was wearing a grey zipped up sweater, like a sweatshirt or hoody. She also agreed that she said at the preliminary inquiry he was wearing a black toque. She thought the shorter man was around six feet. She agreed that she said at the preliminary inquiry that she would not recognize either man if she saw either of them again.

[145] She provided an in-dock identification of Malakal Tuel, which I will disregard because of the inherent difficulties of in-dock identification. As well, she admitted at the preliminary inquiry she would be unlikely to recognize the two black men again, and in cross-examination she could not identify Malakal Tuel on the 202 video surveillance excerpt.

[146] Kamille Lemay's evidence was credible. She admitted where there were discrepancies between her trial testimony and earlier testimony. She admitted her identification challenges. She testified she had one drink at the 202 bar and on the sobriety scale was 1 to 2 out of 10.

[147] Counsel for Malakal Tuel urged the reliability of all her evidence be treated with caution, suggesting that she has been influenced by her friends. The Crown agrees that little weight should be placed on the reliability of her identification evidence at the scene as well as in the courtroom. I agree that little weight will be given to her identification evidence at the scene. However, aside from this, I find her evidence to be reliable.

Camille Gendron-Rossignol

[148] When she and her friends walked towards Second Avenue after leaving the 202 that night, she saw a group of people talking in front of the 202 entrance. Just before she reached the corner of the 202 building, she heard a loud noise that she thought was a gunshot, but she was not sure. She saw a man punch a glass door.

[149] Kamille Lemay was almost beside her. Camille Gendron-Rossignol turned back toward the 202 and saw someone lying on the ground and heard a girl screaming and crying on top of the body.

[150] She noticed a person coming towards her from the direction of the 202 entrance, holding a gun in his right hand. He was approximately three metres away. They made eye contact briefly and then she went to hide behind a black car. She believes the man went around the corner of the building. When she looked back from behind the car, he was gone and she returned to the sidewalk and went with two of her other friends to help the victim.

[151] She did not recognize the man with the gun. She did not know what ethnicity he was but he was a person of colour, not Caucasian. He had a round face, short hair, possibly some kind of beard, and was approximately 5’5”. She did not pay attention to his clothing but thought he might have been wearing a pale long-sleeved shirt.

[152] She described the gun as small, black, round not square, and it fit in his hand. When shown a photo of a revolver, she agreed that it looked similar.

[153] She said the lighting was good, but not good enough to see a person’s eye colour.

[154] She had approximately two drinks earlier that night and none at the 202 bar.

[155] She was a credible witness and her evidence was reliable.

Jaaved Singh

[156] Jaaved Singh testified about interactions in the 202 bar earlier that evening with JT Papequash and one of his friends, both of whom he had never met. They asked Jaaved Singh if he had any drugs for sale twice: once when he was going to his table on arrival at the 202 and the second time in the washroom. They asked if he had "blow", which he understood to mean cocaine. He told them twice he did not have any drugs and testified that he was not selling drugs in November 2019 or on the night in question. He said JT Papequash and his friend were quite aggressive and he felt threatened by them.

[157] Jaaved Singh testified that as he was passing by the 202 entrance after they retrieved Alberto Giminez's bicycle, he noticed the shooting victim, whom he recognized from their interactions earlier that night in the bar. He described him as wearing a sport jacket in blue and white, in intense conversation with a black man who was wearing a beige puffy weather-resistant jacket. He seemed to be a stockier build, although it was hard to tell because of the jacket. He was shorter than the man he was talking to. There was not much of a distance between them and the whole area around them seemed tense. It made Jaaved Singh feel uncomfortable; he did not want to be around them. He did not see a taller black man. In cross-examination, he agreed that he told police he observed them talking like drunk people at a bar.

[158] Jaaved Singh testified that he had seen the shorter black man in the bar earlier multiple times, mostly around the pool tables and the area around the ramp. He was with another black man who was taller and skinnier. He had no interactions with these

men in the bar that night. He described the shorter black man inside the 202 bar as wearing a beige sweater. On re-examination, he said it could have been a beige sweater or a jacket- the material was reflective or weather resistant.

[159] As he continued walking along the sidewalk past the 202 entrance, he heard a loud bang. He was about halfway between the 202 entrance and Second Avenue on the sidewalk. He saw the victim on the ground and he saw the man who had been talking with the victim outside the 202 running towards Third Avenue. He crossed Jarvis Street to the courthouse and called 911. His back was to the scene at the 202. He stayed there until the police came and then left the area.

[160] He did not see anyone with a gun.

[161] Jaaved Singh was a credible witness. He admitted when he did not know the answers to questions or when he was uncertain. He had more to drink than the others. He testified he had two to three rum and cokes before getting to the 202. At the 202, he had a few more rum and cokes and was a little bit buzzed.

[162] He had his back to the 202 shortly after the shot because he was crossing the street south towards the courthouse and then calling 911. His testimony is consistent with seeing Joseph Wuor running toward Third Avenue immediately after the shot and then him (Jaaved) turning to cross the street to make the call, which explains why he did not see what the others saw at the corner of the 202 building.

Events after the shooting

Chevrolet Cruze

[163] The admissions of fact filed at trial contain a number of facts about a Chevrolet Cruze found by police at 5 a.m. on December 1, 2019, abandoned on the Robert

Service Way. It was registered to Malakal Tuel. The doors were locked, the front tire was flat with a damaged rim, and there were footprints in the snow by the driver's side.

[164] At the traffic circle at the south end of Fourth Avenue, not far from where the Cruze was abandoned, there were tire marks on the sidewalk, leading to a small bank of snow and a broken tree, and then down onto the sidewalk again, passing a pole at close proximity.

[165] The Crown theorizes from this that Malakal Tuel and Joseph Wuor used the Cruze to flee downtown frantically after the shooting. The Cruze became undriveable, they abandoned it, and began walking the trails on foot until Harold Demarais picked them up.

[166] I am unable to draw these inferences from the evidence at trial. There is nothing that links the two men to the Cruze that night. While some of its contents and the registration links the Cruze to Malakal Tuel, anything more is pure speculation.

[167] I do not rely on the evidence related to the Cruze in my findings of facts or drawing of inferences in the matters to be considered in counts 6 to 10.

Harold Demarais

[168] Harold Demarais identified Malakal Tuel, known to him as Sonny, as someone he had known for eight months or so, possibly longer. They met through carpentry work. Harold Demarais saw Sonny working near the High Country Inn and asked if he could get work. Sonny and he used to hang out and drink together — approximately 10 to 15 times — and sometimes Sonny would crash at his apartment on Jarvis Street downtown.

[169] The night of the shooting, Harold Demarais was drinking and gaming with a neighbour. He finished a 6-pack of beer during the evening. He saw the police cars outside the 202. He thought it was around 11:30 p.m. Approximately one and a half to two hours after he noticed the police cars, Harold Demarais said he phoned Sonny because he wanted to "hang out". Sonny told him he was walking and drinking so he needed a ride. Harold Demarais met him and a taller black man, whom he did not know, at the bottom of the clay cliffs at the Black Street stairs. He said he did not know if they had a vehicle but they were on the trail when he picked them up. He laughed because they were in relatively deep snow in running shoes. He thought Sonny was wearing a winter coat.

[170] Sonny asked Harold Demarais to drive them to the airport. Sonny directed him on a circuitous route through town. Harold Demarais said he could still see police lights on Jarvis Street.

[171] At the airport parking lot, Sonny got out of the car and went for a walk. He returned to the car and then went for a walk again. His friend stayed in the car. Sonny asked Harold Demarais to drive around the airport twice, which he did, and did not know why Sonny asked him to do this. He was becoming annoyed because he was burning up gas and he thought it looked suspicious to be driving around the airport in circles. Sonny asked him to go around one more time and Harold Demarais then said he wanted to go home as he did not have much gas. They left the airport and travelled downtown via the south access/Robert Service Way. Harold Demarais dropped the men off at their vehicle parked in Rotary Park. He said this was a white or grey pick-up Dodge truck with a canopy. He had seen Sonny in it before.

[172] Harold Demarais described Sonny and his friend as not drunk when he picked them up, although Sonny had sounded drunk when Harold had spoken to him earlier on the phone. They were talking excitedly in their language but this was not unusual.

[173] Harold Demarais said one of the times Sonny had come to his apartment on Jarvis Street, before December 1, 2019, he had asked Harold if he could leave a bag there. Harold agreed and when Sonny left, Harold opened the bag and found a silver handgun. He looked at it, pulled back the slide, saw it was not loaded, put the clip in so it was loaded, then unloaded it and put it back in the bag. He said in cross-examination he did this because he was curious. He thought the gun was made to kill people. He asked Sonny not to bring it into his house anymore, and Sonny respected his wishes.

[174] Harold Demarais' testimony was at times difficult to follow as he talked continuously and was not always focussed or answering questions directly. His initial police statement about the events that night was not provided until October 2020. He said he had drunk a 6-pack of beer over the course of the evening and was not impaired at the time he went to pick up the men. His assessment that the police cars arrived at the 202 that night at 11:30 p.m. was not correct. His evidence on times therefore was not reliable. He was also mistaken about the make of the Malakal Tuel's vehicle. It is clear from the Casa Loma video and the photographs of Lorraine Young and the arrest that the vehicle was a Toyota Tacoma. He was, however, otherwise consistent in his testimony and honest when he was unsure of details. But for the exceptions noted, I accept his evidence as reliable.

Julie Boily

[175] Julie Boily lived at 3036 South Klondike Highway, near Caribou Crossing, with her family. This is the address at which Malakal Tuel and Joseph Wuor were arrested at approximately 6:10 p.m. on December 1, 2019.

[176] Julie Boily has a rental unit on her property, adjacent to and connected to her house. She rented it to Sonny, who messaged her on Facebook, beginning August 1, 2019. He paid his rent of $900/month on time every month by e-Transfer through the name of Chudier Alfa. He did not sign the one-year lease until November 2019. He signed it Malakal Tuel.

[177] She described him as a black, muscular man with square shoulders. He had a grey or silver Toyota Tacoma truck. She saw him only five or six times while he was renting from her because of their busy schedules and the first month he went back to Edmonton. He told her he was doing carpentry work and starting his own business. She said he was always very pleasant, nice, and clean.

[178] At approximately 5:15 a.m. on December 1, 2019, Julie Boily was wakened by a knock on her door and the dog barking. Sonny was there asking for the spare key to his apartment. She testified his demeanour was calm. She gave him the spare key and returned to the couch where she was sleeping. She heard him talking to at least one other man and possibly two through the thin door that separated the room in the house, where she was sleeping on the couch, and the apartment. No one else lived in the apartment except Sonny. She did not see him again on December 1, 2019. His Toyota Tacoma was in the driveway at the house on that day.

[179] Julie Boily was a credible witness and her testimony was reliable.

The Arrest

[180] The police received a tip in the early afternoon of December 1, 2019, that Malakal Tuel may be at 3036 South Klondike Highway. When the police arrived at that location, they noted a silver Toyota Tacoma with a canopy, licence HZV11, parked in front of the duplex and registered to Malakal Tuel. The officers observed Malakal Tuel and Joseph Wuor going back and forth several times between the Tacoma and Malakal Tuel's apartment between 5:24 p.m. and 6:10 p.m. The two men were loading the Tacoma's box and cabin with various items and garbage bags, including a mattress and bedding. The Tacoma was running and they got inside the truck at approximately 6:10 p.m. Malakal Tuel was in the driver's seat and Joseph Wuor was in the front passenger seat. There was no one else in the vehicle. After about two minutes, the Tacoma started moving south down the driveway towards the Klondike Highway.

[181] The police officers activated their emergency lights and drove into the driveway to apprehend the Tacoma. A second police vehicle came up behind the Tacoma and rear-ended it, bringing it to a stop. Malakal Tuel and Joseph Wuor were taken into custody. The residence where Malakal Tuel was staying was secured by police until it was later searched by police.

[182] Both men were arrested and searched incidental to arrest. No weapons or drugs were found on either man.

Securing the Scene After Arrest

[183] Two police officers, Constable Geremy Newbury and Corporal Martin Fry, secured the scene after Malakal Tuel and Joseph Wuor were taken into custody. They

drove their police vehicle into the driveway and parked nose to nose with the Toyota Tacoma. All four doors were open and its headlights were on.

[184] The police officers could not see, because of the headlights from the Tacoma, so Constable Newbury went to the truck to turn them off. He used his flashlight to locate the switch for the headlights on the driver's side. While doing so, he leaned in on the driver's side and shone his flashlight on the passenger side of the truck. He saw a portion of a firearm on the floorboards of the passenger side – approximately a half inch of the slide. He then walked around to the passenger side of the truck and could see the gun from where he was standing outside the vehicle. He did not touch or adjust anything in the vehicle.

[185] Corporal Fry also went to the vehicle at the same time as Constable Newbury. He went to the passenger side and observed the firearm on the floor of the passenger side after Constable Newbury told him to look there. He did not touch or adjust anything in the vehicle. Corporal Fry advised the sergeant on duty of the existence and location of the gun. They continued to maintain security until other police officers arrived.

[186] On December 2, 2019, Sergeant Ian Fraser, a 26-year veteran of the RCMP and a firearms instructor, attended at 3036 South Klondike Highway to assist in making the firearm found in the vehicle safe for transport, at the request of the forensic identification services officer and the exhibits officer, Corporal Philpott and Corporal McLaren (as she then was). He described it as a black semi-automatic handgun. There was no ammunition in the chamber when he opened the slide. He removed the magazine, which had live, unfired ammunition in it. He provided the gun and magazine to Corporal Philpott, who secured it in an evidence box and then gave it back to him for transport.

Securing the Scene at the 202

[187] Corporal Shannon Stelter of the RCMP was one of the first officers to arrive at the 202 after the 911 call was received at 1:57 a.m. on December 1, 2019. The victim was lying on the ground in front of the 202 entrance. EMS had not yet arrived and, as a result, he called them several times as he could see the victim he was alive. There were many people at the scene trying to help.

[188] Another police officer, Constable Lenssen, used his police jacket to make JT Papequash more comfortable. When the ambulance came, Constable Lenssen went with JT Papequash and left his jacket at the scene. There was a pool of blood on the ground with the jacket. Once JT Papequash got medical attention, Corporal Stelter's focus was to contain the scene, get people back into the bar and collect names of witnesses, tape the area, and keep vehicles out of the area. He made calls to his supervisor and to request other police resources, including forensic identification services.

[189] Corporal Stelter returned to the area where JT Papequash had been lying to look for anything of interest. He saw a bullet casing on the ground near the area of the blood and advised his supervisor by phone at 2:55 a.m. He could not say how long the casing had been on the scene before he noticed it. He monitored it from the 202 entrance and tried to keep people from going in and out that door, not always successfully. His intention was to leave it where he found it to allow the identification officers to process it. He did not believe he touched it and he did not see anyone else touch it. He did not know if the tape was already up at the time he noticed it or whether they were in the

process of doing that. He noticed at one point that the wind blew and the casing rolled slightly.

[190] The role of the forensic identification unit officers is to attend and document crime scenes through photographs and notes; and to collect, preserve, and analyse evidence. At 2:25 a.m. and 3:10 a.m. on December 1, 2019, Corporal Leduc, a forensic identification officer from Manitoba providing relief assistance in the Yukon, was called. Her advice was to ensure the area was taped off and any located items protected with tarps until a forensic identification services member could attend.

[191] Corporal Leduc arrived at the scene at 9:15 a.m. on December 1. The crime scene tape was up and she requested that it be extended from Third Avenue along the back alleyway to the parking lot and Jarvis Street. There were no tarps over the evidence. She placed scene markers outside and took photos. She took a photo of the empty shell casing where she found it by the sleeve of the police jacket. She could not say whether the empty shell casing had been moved and allowed that it was possible.

[192] She also found an unfired 9 mm cartridge at the corner of the 202 building, towards the off-sales. She did not know whether any other police officer had found it or whether it had been moved before she arrived.

[193] Corporal Jill McLaren, the exhibit officer, seized the empty shell casing and the intact bullet as exhibits when she arrived on the scene at 9:15 a.m. on December 1, 2019.

[194] The expert forensic firearms specialist, Megan Evoy, concluded that the expended cartridge case seized as an exhibit in this case was fired from the Taurus

PT 709 handgun seized from the Toyota Tacoma vehicle. Malakal Tuel has admitted this.

[195] Megan Evoy confirmed that an expended cartridge is lighter than a live cartridge. It is cylindrical and its trajectory is unpredictable when it falls on hard surfaces. It is not possible to draw conclusions about where the shooter was standing from where the expended shell casing is found. Megan Evoy could also not comment on where the projectile from the expended shell casing ended up in this case.

[196] She opined that the unexpended cartridge that was found was also a 9 mm Luger cartridge manufactured by Sellier & Bellot, the same as the empty shell casing. Megan Evoy testified there were three live rounds of 9 mm Luger ammunition in the magazine of the Taurus PT 709 seized from the Tacoma, with headstamps identical to the live round found at the corner of the 202 building and the spent casing near the 202 entrance.

[197] Sergeant Ian Fraser opined, based on his expertise, that an expended shell casing is expelled from a handgun like the Taurus PT 709 towards the right of the gun at a distance of six to eight feet.

DNA evidence

[198] The DNA evidence from the Taurus PT 709 handgun was inconclusive. Malakal Tuel admitted his DNA was on the gun. The conclusion of the DNA expert, Connie Leung, was only that at some time Malakal Tuel had handled the Taurus PT 709 handgun found in the Tacoma. The DNA on the gun cannot connect him to the shooting. The DNA evidence does not exclude Joseph Wuor.

Theory Of The Crown

Attempt Murder

[199] The Crown's theory begins with the evidence of the 9 mm empty shell casing found at the scene outside the 202 that Malakal Tuel admits was fired from the Taurus handgun found in the Toyota Tacoma. The Crown combines this with the evidence of the unfired cartridge found at the southeast corner of the 202 building facing Second Avenue and the Yukon River that is the same as the empty shell casing. The Taurus gun found in the Tacoma contained three live rounds of 9 mm Luger ammunition in the magazine that matched the live round found at the corner of the 202 building and the spent casing near the 202 entrance. The Crown says the only reasonable inference is that the Taurus gun found in the Toyota Tacoma was used to shoot JT Papequash.

[200] The Crown says this narrows the question of who shot JT Papequash to two people: either Malakal Tuel or Joseph Wuor.

[201] Both men left the 202 within five seconds of each other for the last time at 1:51:43 and 1:51:48 a.m. on December 1. Lahcen Amzoug's taxi cab was parked to the west of the 202 entrance, approximately three to four metres away. The taxi dashcamera did not capture directly outside the main door; the frame began just west of the door. The Crown says the two men must have turned east, towards Second Avenue and the river, or crossed the street to go south when they left the bar, as otherwise they would have been captured on the taxi cab's dashcam.

[202] Approximately five minutes later, Joseph Wuor is seen on the dashcam video and by Lahcen Amzoug walking quickly alone in front of Lahcen Amzoug's taxi, east towards the main door of the 202. He was behind the six friends who were in the 202

together and walking in the same direction, towards Second Avenue. Joseph Wuor spoke to a shorter black man wearing a puffy white winter coat who was standing outside the 202 main door. JT Papequash came out of the 202 and spoke to the shorter black man. Approximately eight seconds later, and 15 seconds after Joseph Wuor had passed in front of the taxi cab, a shot is heard. Approximately three seconds after the shot, Joseph Wuor is seen on the dashcam video and by Lahcen Amzoug running west, towards Third Avenue. The shorter black man is seen by Lahcen Amzoug and others running the opposite direction, towards Second Avenue. Joseph Wuor is seen on the dashcam continuing to run west.

[203] Four of the six friends testified they saw a black man with a gun running east along Jarvis, towards Second Avenue and the river. Three of the six friends testified he stopped at the corner of the 202 building, turned back towards the 202 entrance where the victim was, pointed the gun but did not fire. Two witnesses testified they saw the man do a reloading action with the gun. This explains the presence of the unfired round at the corner. The friends then saw the man turn and begin to run north, beside the off-sales, towards the A&W. Three of the witnesses said they saw the man at the 202 entrance talking to the shooting victim as they passed by seconds earlier.

[204] The Crown says this evidence should be accepted and where necessary the reasonable inferences be made, leaving no reasonable doubt that Malakal Tuel was the shooter. It is not necessary to rely on DNA evidence or classic eyewitness identification evidence. The evidence of the altercations in the bar between JT Papequash and the two accused as well as the conversation outside the 202 provide additional circumstantial evidence of motive for the shooting.

Theory of Malakal Tuel

[205] The theory of Malakal Tuel is that the Crown's circumstantial evidence is inconclusive because it is based on conflicting narratives from the witnesses and equivocal physical evidence, as well as an absence of evidence.

[206] The defence notes there is no evidence of the bullet that entered JT Papequash's head. Counsel questions the reliability of the location of the empty shell casing. It was not noticed by the police officer responsible for monitoring the scene until approximately an hour after the shooting and it is possible the original location of the shell was disturbed. The location of the shell is not helpful in determining the location of the shooter, the proximity of the shooter to the victim, the angle of the shot, or whether the bullet came from that shell.

[207] The DNA results are inconclusive. They show that at some point Malakal Tuel handled the gun, and they do not exclude Joseph Wuor.

[208] Counsel for Malakal Tuel raises the defence of third party suspects. The first is Joseph Wuor. The altercations earlier in the bar were between JT Papequash and Joseph Wuor on two of the three occasions. Joseph Wuor approached the 202 entrance 15 seconds before the shot. Although he immediately ran west towards Third Avenue after the shot, counsel for Malakal Tuel says there is a reasonable possibility that Joseph Wuor checked his flight to the left and ran back towards the corner of Jarvis Street and Second Avenue. This is supported by several witnesses who describe a man with the gun going towards Second Avenue consistent with Joseph Wuor's description. The gun was found on the passenger side floor of the Toyota Tacoma, where Joseph Wuor was sitting on arrest.

[209] The second reasonable possibility of a shooter other than Malakal Tuel rests on Katherine Gallagher's testimony. She identified the man with the gun walking to the 202 entrance just before the shooting to two police officers hours after the shooting as CJ/Craig. He was a Somalian man with whom she was acquainted because she had bought cocaine from him in the past. At trial, she testified she was mistaken. Counsel for Malakal Tuel theorizes that she retracted her identification of the shooter as CJ /Craig out of fear of retribution if she provided his name to police. Counsel for Malakal Tuel asks the Court to disregard her retraction and consider CJ/Craig as a third party suspect.

[210] The defence argues this reasonable possibility is supported by the testimony of Camille Gendron-Rossignol who described the gun she saw as similar to a revolver when a photograph was shown to her. A revolver does not expel cartridge casing shells when shot. Defence says it is therefore plausible that CJ/Craig was the shooter, using a revolver.

[211] The defence argues that the evidence of the witnesses to the event that evening and early morning was a "tapestry of chaos". In particular, the differences in the testimony included the description of the man at the corner of the 202 building as the taller black man or the shorter black man or both; wearing long sleeves with a pale collar or a grey zip-up sweatshirt hoodie or a puffy light coloured winter jacket; walking or running or hobbling; being chased by others or not. There was differing evidence about the number of shots and the description of the gun. There was evidence that the six friends discussed the events together while they were waiting at the 202 bar after

the shooting before they gave their police statements. There were concerns about other conditions affecting eye-witness identification, including cross-racial identification.

[212] All of this evidence creates uncertainty, which gives rise to a reasonable doubt as to the guilt of Malakal Tuel, according to counsel for Malakal Tuel.

Findings of Fact and Reasonable Inferences

[213] Applying the legal principles and considering the whole of the evidence leads me to the conclusion that the only reasonable inference is that the shooter was Malakal Tuel. I base this on all of the facts that I have accepted in the above description of evidence but in particular upon the following facts and inferences from the facts.

[214] Malakal Tuel is 5'9" and Joseph Wuor is 6'4".

[215] Malakal Tuel was the man in the 202 bar that night in question wearing a white puffy winter coat, a baseball cap, dark pants, and light coloured shoes. He is referred to as the "shorter black man" by the witnesses. He arrived with his friend, Joseph Wuor, at the 202 at 11:07 p.m. Joseph Wuor is the "taller black man" referred to by the witnesses, wearing a yellow hoody, black track pants, running shoes and, later, a winter jacket that was white, blue, and red.

[216] Earlier in the evening, both Joseph Wuor and Malakal Tuel had been in the Casa Loma bar briefly. They drove from there to downtown Whitehorse in a silver Toyota Tacoma truck, licence plate HGV11, owned and driven by Malakal Tuel.

[217] John Thomas Papequash and four or five friends arrived at the 202 that night at 10:40 p.m.

[218] A different group of six friends arrived at the 202 that night at 11:55 p.m.

[219] Malakal Tuel and his friend Joseph Wuor, were involved in three short altercations between 12:33 and 1:17 a.m. in the 202 bar with JT Papequash. The physical contact was initiated by JT Papequash. On one occasion, he pushed Malakal Tuel. On another occasion, he pushed Joseph Wuor. Bar staff and friends intervened on those occasions to separate the men. On the third occasion, JT Papequash walked by Joseph Wuor and knocked him off balance.

[220] After the altercations and after bar staff spoke to him, Malakal Tuel made the shape of a gun with his hand and mimed a shooting as he was dancing and pointed his hand towards the group of JT Papequash's friends.

[221] Malakal Tuel is known by the name Sonny.

[222] Joseph Wuor left the 202 at 1:51:43 and Malakal Tuel left at 1:51:48 a.m. and turned left towards Second Avenue. I infer this because they were not seen on Lahcen Amzoug's taxi dashcam, and also from the evidence I will address shortly of them coming from opposite directions towards the 202 entrance approximately five minutes later.

[223] The six friends left the 202 at 1:51:21 a.m. and stood in front of the taxi for approximately five minutes where Alberto Giminez's bicycle was locked. They then proceeded to walk towards Second Avenue starting at 1:56:14.

[224] The six friends passed the front entrance of the 202. Josiane Lavoie, Jaaved Singh, and Kamille Lamay noticed the shorter black man they had seen earlier in the bar that night standing at the 202 entrance. They recognized him from the bar earlier in the evening because of their observations and interaction with him relating to the woman in the pink sweater as well as the altercations around the pool tables. I infer this

man was Malakal Tuel from the description given by Lahcen Amzoug of the shorter black man standing at the 202 entrance wearing a puffy white winter jacket. I also infer it from Lahcen Amzoug's testimony that Joseph Wuor spoke to the shorter man as soon as he got to the 202 entrance seconds later. This is consistent with the 202 video surveillance showing the two men together throughout the evening.

[225] None of the friends saw the taller black man from the 202 bar as they passed the entrance. This is because Joseph Wuor walked in front of the taxi cab at 1:56:22 towards the 202 entrance, coming from Third Avenue, directly behind the six friends as they began to walk east.

[226] Joseph Wuor proceeded to the 202 entrance and spoke to Malakal Tuel.

[227] Tiffany Law described a shorter, stocky black man walking towards the entrance of the 202 from the direction of Second Avenue, carrying a small black gun that he had transferred from his left to his right hand and put down by his right side. I infer this was Malakal Tuel from the description provided by Tiffany Law and the time she saw the man walk by a minute or two before she heard the shot. Given Tiffany Law's admitted difficulty with time estimates, this may have been shorter or longer time. What is important is that it was before the shot.

[228] Counsel for Malakal Tuel argues there is a reasonable possibility that the man with the gun seen by Tiffany Law and Katie Gallagher may not have been Malakal Tuel. An alternative reasonable inference he asks me to draw is that when Joseph Wuor and Malakal Tuel left the 202 at 1:51:43 and 1:51:48 a.m., Malakal Tuel could have remained standing outside the 202 entrance, while Joseph Wuor turned left toward Second Avenue. This would be consistent with Lahcen Amzoug's testimony that the

shorter black man was standing by himself at the 202 entrance. It would mean that Malakal Tuel was not the person seen by Tiffany Law and Katie Gallagher walking towards the 202 with the gun; it was someone else. Alternatively, Tiffany Law and Katie Gallagher were mistaken and did not see any man with a gun walking in front of their car.

[229] There is no evidence to support this theory. First, Lahcen Amzoug was never asked whether he saw the shorter black man walk up to the 202 entrance at some point before Joseph Wuor arrived there. Although he testified the shorter man was standing at the entrance before Joseph Wuor arrived, with his hands in his pockets some of the time, he was not asked how long he had been standing there. Tiffany Law's time estimates were admittedly not reliable, but she testified that after she saw the man walk past with a gun it was another minute or two before she heard the shot. Lahcen Amzoug's testimony does not conflict with Tiffany Law's testimony, even if her timing was off. Her evidence that the man with the gun walked up to the entrance and she heard a shot a minute or two later is consistent with Lahcen Amzoug's testimony that the same man was standing by himself outside the 202 entrance for some unspecified time before Joseph Wuor arrived.

[230] But even if I do not accept Tiffany Law's evidence on this point, it does not exculpate Malakal Tuel as the shooter. It eliminates one additional piece of circumstantial evidence — that is, of a man with a gun walking towards the 202 entrance from the direction of Second Avenue before the shot — but it does not follow that if Malakal Tuel remained outside the 202 entrance, between 1:51:48 when he left the bar and the time of the shooting, that he was not the shooter. There is enough

other evidence, including the empty shell casing from the seized Taurus PT 709 handgun found at the 202 entrance, the matching unexpended shell found at the corner of the 202 building, leading to the only reasonable inference that Malakal Tuel was the shooter.

[231] JT Papequash left the 202 bar at 1:56:29. When he went outside, he immediately began talking to the shorter black man that I have inferred is Malakal Tuel. I can make no finding of fact nor draw any inference about the nature of their conversation, that is, whether it was hostile or friendly. The two black men and JT Papequash were all in front of the 202 entrance.

[232] Nine seconds after JT Papequash came out of the 202 bar, at 1:56:38, a shot was heard. This can be inferred from the reaction of Donny Tutin and Lahcen Amzoug at the moment the shot was heard.

[233] All of the witnesses who heard the shot looked towards the entrance of the 202. I infer from this that the shot was fired at an unspecified location outside the 202 entrance. I also infer that this shot injured JT Papequash, as he immediately fell to the ground. This was confirmed by Lahcen Amzoug and four of the six friends. It is unclear if any further shots occurred and if so, how many. All of the six friends and Lahcen Amzoug say they heard one shot only.

[234] Three seconds after the shot, Joseph Wuor ran in front of the taxi cab towards Third Avenue. At the same time, another black man ran towards Second Avenue. I infer that he was Malakal Tuel from the evidence of Lahcen Amzoug, who said the same man he had just seen talking with Joseph Wuor and JT Papequash outside the 202 entrance ran towards Second Avenue. I also infer it from the evidence of

Tiffany Law, who said the same man she saw approach the 202 entrance with the gun ran past her towards Second Avenue. Finally, I infer it from the evidence of Donny Tutin, who ran left when he left the 202 bar eight or nine seconds after the shooting, chasing after another doorman who Donny believed was running after the shooter.

[235] Malakal Tuel was carrying a small black gun in his hand. I infer this from the descriptions of the gun by Tiffany Law, Alberto Giminez, Kamille Lemay, and Josiane Lavoie. All of them described a small black handgun. Alberto Giminez said it was a semi-automatic handgun with a silver stripe. Josiane Lavoie said the gun was partially grey. These descriptions are consistent with the Taurus PT 709 handgun.

[236] Camille Gendron-Rossignol identified the gun she saw as a revolver, when shown a photo of a small black revolver at trial. Someone not familiar with small guns may confuse a revolver with a handgun. I do not consider this evidence to be significant enough to discount her evidence or to find that the gun was a revolver, especially in the context of the other firearms evidence.

[237] Malakal Tuel turned and pointed the gun towards the 202 entrance when he reached the corner of the building. He made a recharge or reloading motion. I accept this evidence of Josiane Lavoie and Kamille Lemay. I accept their evidence that the man with the gun was within two to three metres of them. Both women were near the corner of the 202 building and were looking right at the man. The fact that others did not see this action can be explained by other actions that the others were taking at the time, that is, Lea was running across the street to the courthouse and then back towards the 202 building and did not see anyone there, so it was likely after the man had run out of sight; Camille Gendron-Rossignol was trying to find a parked car to hide behind;

Alberto Giminez did not turn around right away because he did not realize it was a gunshot and when he did he saw the man at the corner of the 202 building pointing the gun and then running away; and Jaaved Singh was crossing the street and then calling 911 so did not see the man with the gun. I also infer that this occurred from the unexpended shell found at the corner of the 202 building that was the same as the ammunition found in the Taurus PT 709 seized from the Tacoma. There is a reasonable inference that the reloading or recharging motion ejected the unexpended cartridge.

[238] Malakal Tuel then continued running north, towards the off-sales and disappeared from sight. This was the consistent evidence of all of the witnesses who saw the man running in that direction.

[239] JT Papequash was shot once in the head at close range. The treating emergency physician noted an entry wound on his right eyebrow and an exit wound on his right ear. There was brain material, bone, and blood coming out of his right ear. A CT scan revealed massive trauma to JT Papequash's brain with hemorrhage and fragmented skull on the right side. There were some bullet fragments in his brain.

[240] Immediately after the shooting, a large group of people from the bar gathered around the entrance to the 202 bar, including five of the six friends. They were trying to help JT Papequash who was on the ground, bleeding, but still alive, by administering first aid, and calling 911. When the police arrived, they asked the people outside and around the 202 entrance to go inside the bar so they could obtain names and contact information. Joseph Wuor and Malakal Tuel were not among the group of people at the entrance to the bar or in the bar after the shooting.

[241] The police continued to call for an ambulance. A police officer took off his jacket to make JT Papequash more comfortable. After the ambulance took JT Papequash to the hospital, the police continued to clear the area and secure the scene. Yellow police tape was put up around the area. No tarps were laid over any part of the area. The forensic identification services unit officer and exhibit officer arrived at 9:15 a.m. that morning to set up the scene markers and collect the exhibits.

[242] A 9 mm empty shell casing was found in the area of the 202 entrance at 2:55 a.m. It was beside the police jacket where JT Papequash had been lying on the ground. It is not clear where it originally landed, as the wind made it roll at least once and a number of people had been moving around the area especially immediately after the shooting. Without a doubt, it came from the Taurus PT 709, the gun found in the Toyota Tacoma belonging to Malakal Tuel after his arrest.

[243] An unexpended shell was found at the corner of the 202 building. It matched the cartridges found in the magazine of the Taurus PT 709 handgun in the Tacoma.

[244] After the shooting, Malakal Tuel and Joseph Wuor were walking along the trails near the clay cliffs around the Black Street stairs. They were wearing running shoes and walking in deep snow. Harold Demarais, a friend of Malakal Tuel's, drove them to the Whitehorse airport at Malakal Tuel's request. They travelled a circuitous route through town and avoided the 202. They circled the airport three times and Malakal Tuel walked in the parking lot at the airport before they left to return downtown. Malakal Tuel's truck was parked at Rotary Park and Harold Demarais left them there. Although Harold Demarais called it a Dodge, I believe he was mistaken. His description of the truck was consistent with the Toyota Tacoma and he had seen Malakal Tuel in the truck before.

[245] By 5:15 a.m. on December 1, 2019, Malakal Tuel was at the residence he was renting at 3036 South Klondike Highway. At least one other man was with him.

[246] Between 5:24 p.m. and 6:10 p.m. on December 1, 2019, Joseph Wuor and Malakal Tuel were loading bags and other belongings, including a mattress and bedding, into Malakal Tuel's Toyota Tacoma truck, which was running outside Malakal Tuel's place of residence. They were then taken into custody and arrested.

Absence of evidence

[247] I have considered the absence of evidence in this case.

[248] First, no one heard what the men said to one another when JT Papequash came out of the bar; nor had any witness heard what they had said to one another and to Joseph Wuor earlier in the evening, especially during the altercations. The reason for the altercations is unknown.

[249] Second, there is no evidence of the bullet from the empty shell casing entering JT Papequash's head.

[250] Third, there is no evidence of the precise location of the shooter so that the angle, proximity, and direction of the shot are not known.

[251] Fourth, no one who testified saw the actual shooting and the testimony of the eyewitnesses raises reliability concerns.

[252] None of these concerns is sufficient to raise a reasonable doubt in my mind of the guilt of Malakal Tuel as the shooter, and I will explain why.

[253] Information about the reasons behind the altercations or the content of the conversations between the two men might have provided evidence of motive. Motive is a reason for someone's action; it provides context for why a person acted in a certain

way. But motive is different from intent, which is an essential element of the offence of attempted murder that must be proved beyond a reasonable doubt. All motive can do in this case is provide circumstantial evidence that may be considered in determining the identity of the shooter. “From motive, conduct consistent with achieving the objective sought may be inferred” *Lewis v the Queen*, [1979] 2 SCR 821 at 837.

[254] The existence of the altercations provides some circumstantial evidence of a motive for a continuing altercation between JT Papequash and the two men. But it is not necessary to have motive proved beyond a reasonable doubt in order to convict.

[255] Second, the absence of a bullet is explained by the admission of facts, where it is stated there were bullet fragments in JT Papequash’s brain. This explanation of the absence of projectile evidence is consistent with the reasonable inference that the bullet came from the empty shell casing found at the 202 entrance.

[256] Third, it is not necessary for proof beyond a reasonable doubt in this case to have identified the precise location of the shooter and the shot. The Crown does not rely on the precise location in which the empty shell casing was found for its case that Malakal Tuel was the shooter. They rely instead on the location of the empty shell casing in the vicinity of the 202 entrance, where Malakal Tuel and JT Papequash were seen in conversation just before the shooting and where JT Papequash was shot. In the context of the other evidence, including the fact that the empty shell casing came from the Taurus PT 709 seized from the Toyota Tacoma, this is sufficient for a finding beyond a reasonable doubt that Malakal Tuel was the shooter.

[257] Finally, I will address the fact that no one saw the actual shot and the identification reliability concerns. I accept the concerns related to identification in this

case: the man identified was a stranger to the witnesses; the incident did not allow most of the witnesses more than a fleeting glance; the situation was emotionally stressful; there may have been some external influences among the six friends; the identification was cross-racial; and the descriptions provided were generic and they did not all match.

[258] Counsel for Malakal Tuel requested the exercise of caution, in my interpretation of the evidence of several of the six friends — in particular, Kamille Lemay and Josiane Lavoie — and generally with the testimony of all of them, in part because of a concern that their testimony was tainted by talking amongst themselves about the incident before being interviewed by police. Counsel suggests that they agreed amongst themselves who they believed the shooter was and suggests that they may have tailored their evidence accordingly. At the same time, counsel suggests that the "tapestry of chaos" of the differences in all of the witnesses' testimony, including the testimony of the six friends, is a reason not to convict.

[259] I reject both concerns. There are differences in the testimony of the six friends, for example, the type of clothing worn by the man with a gun, the colour of his clothing, his appearance and the actions they saw him do or not do. Two of them did not see anyone with a gun. If the friends indeed had decided who the shooter was amongst themselves, as defence suggests, then it would have been logical for them to agree on these details and be consistent with police and at trial. This did not happen, which supports their credibility. I do not find that their evidence was tainted by talking about the event that night. As I noted when reviewing the evidence, the differences in what they saw can be explained by where they were and what they were doing after the shot.

[260] Moreover, on the important parts of the evidence for the purpose of determining whether the only reasonable inference is that Malakal Tuel was the shooter, the testimony was consistent. They saw a man with a gun running away from the 202 entrance, towards Second Avenue, after the shot — seen by four witnesses. He pointed the gun back at the 202 entrance — seen by four witnesses. He moved the slide back and forth — seen by two witnesses. As a result, a reasonable inference can be drawn that the unexpended cartridge from the seized Taurus PT 709 found at that spot was ejected at that time.

[261] This is not an identification case like those in the cases that address the risks with eye-witness identification. Because of the totality of evidence in this case, especially the forensic firearms evidence, a specific positive identification of Malakal Tuel as the shooter by the witnesses is not necessary in order to convict. The witnesses' evidence of seeing a man with a gun running in the direction of Second Avenue, stopping at the corner of the 202 building, and reloading or recharging the gun, and running away, immediately after hearing the shot and seeing the victim on the ground is all part of the circumstantial evidence to be considered with the other evidence.

[262] The inferences I have drawn from the facts to conclude the shooter was Malakal Tuel are based not only on the descriptions provided by the witnesses, although they form part of what I have considered. They are also based on the 202 video evidence, the taxi dashcam video evidence, the evidence of the empty shell casing outside the 202 entrance from the Taurus PT 709 in the Tacoma, the evidence of

the unexpended shell at the corner of the 202 building matching the ammunition in the Taurus PT 709, and the absence of any reasonable alternative inference.

Defence of third party suspect

[263] Malakal Tuel raises the defence of third party suspect. He says that the evidence shows two other people may have been the shooter.

[264] The test for admitting third party evidence has been described as follows in *R v Grandinetti*, 2005 SCC 5:

> [49] …
>
> > The cases establish that an accused may adduce evidence tending to show that a third person committed the offence. The disposition of a third person to commit the offence is probative and admissible provided that there is other evidence tending to connect the third person with the commission of the offence.

[265] Evidence of the potential involvement of a third party in the commission of an offence is admissible if it is relevant and probative. Courts have been unwilling to admit such evidence unless the third person is sufficiently connected by other circumstances to the offence to give that evidence some probative value. The evidence may be inferential, but the inferences must be reasonable, based on the evidence, and not speculative. If there is an insufficient connection, the defence of third party involvement will lack the requisite air of reality.

[266] The first third party suspect is Joseph Wuor. Counsel for Malakal Tuel notes two of the three altercations in the 202 bar earlier that night were between JT Papequash and Joseph Wuor, suggesting there was more hostility between the two of them than with Malakal Tuel.

[267] The shot was fired 15 seconds after Joseph Wuor reached the entrance of the 202 after coming from the direction of Third Avenue. The defence argues the Court can draw a reasonable inference that Joseph Wuor fired the shot and then ran to his right, towards Third Avenue, as shown on the taxi dashcam. The Court can then draw a reasonable inference that he checked his flight and ran back towards the corner of Jarvis Street and Second Avenue. This accords with the evidence of John Singh, who testified he saw both men run towards the river and saw Joseph Wuor standing at the corner of the 202 building.

[268] Tiffany Law's description of the man she saw passing by the car towards Second Avenue after the shot was that he might have been hobbling on one leg or might have been running as fast as he could. This was different from the gait of the man with the gun she had seen approach the 202 entrance. Counsel for Malakal Tuel argues that the gait she describes is like Joseph Wuor's gait seen in the taxi dashcam video.

[269] Alberto Giminez testified at the preliminary inquiry in April 2021 that the man he saw after the shooting raising a black, semi-automatic handgun towards the 202 entrance from the corner of the 202 building was the taller of the two black men. At trial, he said he was not sure if it was the taller or the shorter man.

[270] Constable Newbury, Corporal Fry, and Sergeant Fraser testified the Taurus PT 709 gun was found on the passenger side of the Toyota Tacoma, where Joseph Wuor was sitting when he was taken into custody.

[271] A further reasonable possibility consistent with Joseph Wuor as shooter is that he shot JT Papequash and then handed the gun to Malakal Tuel, who ran towards Second Avenue with it.

[272] The defence is not required to prove facts in order to raise a reasonable doubt. The Court must consider “other plausible theories” and “other reasonable possibilities” that are inconsistent with guilt. These alternatives must be reasonable and based on logic and experience applied to the evidence or lack of evidence, and not speculation.

[273] The suggestion that Joseph Wuor was the shooter is not reasonable on the evidence and considering the absence of evidence. It does not meet the air of reality test of third party suspect. The inferences the defence is asking to be drawn are not grounded in logic or experience.

[274] To suggest that Joseph Wuor turned around after running towards Third Avenue, ran back past the scene of the shooting where JT Papequash’s body was lying on the sidewalk and where people had congregated, stopped at the 202 building corner and pointed the gun towards the entrance, and then carried on running towards the off-sales is not a plausible theory or reasonable possibility for several reasons.

[275] First, Joseph Wuor was clearly seen three seconds after the shot was heard running towards Third Avenue. The man with the gun at the corner of the 202 building was seen by Tiffany Law, Alberto Giminez, Camille Gendron-Rossignol, Josiane Lavoie, and Kamille Lemay seconds after the shooting. It is not possible for Joseph Wuor to have made it to the corner of the 202 building that quickly if he did as defence suggested.

[276] Second, unless he also intended to help the victim and provide information about the events, there is no reason for him to run back towards the 202 entrance where the shooting occurred and where people had gathered. This would increase his chances of being noticed and followed.

[277] Third, the taxi dashcam was pointing west as Lahcen Amzoug pulled out and repositioned his taxi a few spots further west, just after Joseph Wuor passed in front of the taxi dashcam. As he backed out and turned his car, the camera swung into Jarvis Street from Third Avenue. There was no one visible on the road or on the sidewalk while he manoeuvred the car like this. If Joseph Wuor had changed directions to run towards Second Avenue then there was a good chance he would be visible in the taxi dashcam. He was not.

[278] The testimony of Alberto Giminez about the man with the gun possibly being the taller man is equivocal. He did not at trial adopt that statement made at the preliminary inquiry but instead maintained he was not sure.

[279] I have already indicated that I place little weight on John Singh's evidence apart from the video surveillance evidence and his narrative to interpret that evidence. His evidence that he was sure he saw Joseph Wuor running towards Second Avenue when he went outside the 202, which we know was seven seconds after the shot, is contradicted by the taxi dashcam video showing Joseph Wuor running in the opposite direction four seconds earlier.

[280] I disagree with the defence's suggestion that Tiffany Law's description of the man running towards Second Avenue as having a bit of a hobble or not running smoothly is consistent with the way Joseph Wuor ran. From the taxi dashcam video, Joseph Wuor does not appear to be hobbling. His strides were long and he is moving quickly.

[281] Counsel for Malakal Tuel also suggested Joseph Wuor could have shot JT Papequash and then handed the gun to the shorter man, who then ran towards

Second Avenue with it. This again is speculative and is not grounded in any evidence, logic, or experience. It does not meet the air of reality test either.

[282] The second third party suspect suggested by defence is CJ/Craig, the person Katie Gallagher identified to police that night in her statement. She retracted this identification at trial.

[283] Counsel for Malakal Tuel argues that Katie Gallagher was afraid to testify that CL/Craig was the shooter because it could put her in danger. Counsel says that as a result the Court should not accept Katie Gallagher's retraction evidence. Nor should the Court accept that she was impaired by drugs that night and when she gave the statement, as the video of her statement and the evidence of the police interviewer did not support this. Instead, the Court should consider her evidence given to police that CJ/Craig was the shooter, which she acknowledged at trial but did not adopt.

[284] The Crown argues that the defence cannot rely on Katie Gallagher's out-of-court hearsay statement identifying the shooter for the truth of its contents. The Crown says that none of the three exceptions which permit the admissibility of this evidence exists here.

[285] Prior statements identifying the accused are admissible where the identifying witness identifies the accused at trial; prior identification statements are admissible when the identifying witness is unable to identify the accused at trial but can testify that they gave an accurate description or made an accurate identification; and prior identification evidence can be admissible under the principled approach where it meets the threshold of necessity and reliability.

[286] In this case, the Crown notes that Katie Gallagher did not identify Malakal Tuel in her prior statement, but identified CJ/Craig, so the first exception does not apply. The second exception does not apply because this is not a situation where she was unable to identify Malakal Tuel at trial (she did an in-dock identification) but could testify that she made an earlier accurate description. Finally, defence made no application to admit Katie Gallagher's evidence under the principled approach.

[287] I accept the Crown's argument and note that the police statement was admitted as an exhibit for the limited purpose of impeaching credibility and questioning reliability, not for the truth of its contents. I have not accorded weight to Katie Gallagher's evidence in this trial, for reasons I have already stated.

[288] But even if I were to consider her previous statement for the truth of its contents, because of my assessment of her credibility and reliability, I cannot consider CJ/Craig to be a reasonable third party suspect. First, Camille Gendron-Rossignol's description of the gun she saw as a revolver that does not expend cartridges is not material enough in the context of her evidence to constitute reasonable support for CJ/Craig as the shooter. It also leaves no explanation about the 9 mm luger expended cartridge from the Taurus PT 709 and the unexpended matching cartridge found at the scene. There is no other evidence linking CJ/Craig to the circumstances of this case, and so there is no air of reality to this defence of this third party suspect.

Conclusion on Shooter

[289] My consideration of all of the evidence, the facts I have found, and the inferences I have drawn lead me to conclude that the only reasonable inference to be drawn is that Malakal Tuel was the shooter.

[290] I will now proceed to consider the specific offences in the Indictment.

Count 6: Attempt Murder – s. 239(1)(a)

Elements of the Offence

[291] The Indictment says that Malakal Tuel attempted to murder John Thomas Papequash while using a prohibited firearm, contrary to s. 239(1)(a) of the *Criminal Code*.

[292] The Crown must prove beyond a reasonable doubt the following essential elements for attempt murder, and I have included only those elements that are in dispute:

- Malakal Tuel is the person who committed the offence;
- Malakal Tuel intended to kill JT Papequash;
- Malakal Tuel did something to carry out his intention, whether or not it was possible to commit the offence of murder; and
- Malakal Tuel attempted to kill JT Papequash while using a prohibited firearm.

[293] This offence requires the Crown to prove beyond a reasonable doubt the specific intent by Malakal Tuel to kill JT Papequash. It is not enough for a conviction to prove that he had the intention to harm with consequences that could have led to death. It is not enough to prove that he intended to cause bodily harm that he knows was likely to

cause death and was reckless whether death ensued. Attempted murder requires a specific intent to kill (*R v Ancio*, [1984] 1 SCR 225; *R v Logan* (1990), 58 CCC (3d) 391).

[294] This has caused some courts to comment that it can be more difficult to prove attempted murder than to prove murder. For attempted murder, there must be some evidence from which the trier of fact may infer that the accused intended something more than the actual or natural consequence of his wounding act.

[295] In this case, there is no direct evidence of a specific intent to kill JT Papequash. Any finding of a specific intent to kill must be drawn from the circumstantial evidence. I must be satisfied that the only rational inference that can be drawn from the circumstantial evidence is that the accused is guilty (*R v Wielgosz*, 2018 ONCJ 666, para. 48).

[296] Some wounds, by themselves alone, can provide evidence of intent to kill. For example, if there is a shot is to the head, it might be evidence of intent to kill. A shot to the hand provides no evidence of intent to kill. It is a question of degree after considering all of the circumstances (*R v Roberts*, 2006 SKQB 441).

Specific Intent - application to this case

[297] The Crown argues that the evidence leads to the only reasonable inference that Malakal Tuel shot JT Papequash with the requisite intent to establish attempted murder.

[298] Here, it is not possible to find that the only rational inference from the circumstantial evidence is a specific intent to kill. Firing a handgun at close proximity to someone’s head may be enough for an attempt murder conviction in some cases. However, in cases where specific intent to kill is found in such a circumstance, there is

usually other evidence to draw on, such as previous threats, clear motive, or even previous attempts. In this case, there were brief altercations between the two men, but no reasons for those altercations were provided in evidence and no evidence of what was said was provided. There is no credible evidence of any threats made by Malakal Tuel. There is the miming of shooting a gun in the bar, but that is also consistent with a reasonable inference of Malakal Tuel's style of dancing. Further, JT Papequash was outside the bar at that time.

[299] It is reasonably possible that Malakal Tuel might not have been aiming directly at JT Papequash's head when he shot. It is reasonably possible that his intent was something less than killing. Without more evidence of a specific intent to kill, not to wound, not to maim, not to even endanger the life of, but kill, I am not able to find beyond a reasonable doubt that this specific intent existed. Therefore, I am not able to find beyond a reasonable doubt that Malakal Tuel is guilty of attempted murder.

[300] He will be found not guilty of Count 6.

Count 7: Wound JT Papequash thereby committing Aggravated Assault – s. 268

Elements of Offence

[301] The Crown must prove the following elements beyond a reasonable doubt:

- Malakal Tuel was the person who committed the offence;
- Malakal Tuel intentionally applied force to JT Papequash;
- Malakal Tuel knew that JT Papequash did not consent to the application of that force; and
- The intentional use of force wounded JT Papequash.

[302] A wound is defined in the law as a break in the continuity of the whole skin that constitutes serious bodily harm. Serious bodily harm is any hurt or injury that interferes in a substantial way with the integrity, health, or well-being of the complainant. (*R v Pootlass*, 2019 BCCA at para 113).

[303] The mental element of the offence is the intentional infliction of the assault itself and an objective foreseeability of bodily harm. In other words, the Crown must prove only that a reasonable person would realize the assault would subject another person to the risk of bodily harm (*R v Godin*, [1994] 2 SCR 484, at para 1). It is a general intent offence, meaning that it only requires an intention to commit the illegal act, not the intention to bring about certain consequences external to the act itself, that is, no specific intent to wound is required.

[304] The Crown also must prove that the wound occurred. The focus of an aggravated assault offence is on the consequence, not by how it is carried out. In other words, it does not matter how the assault occurs; what matters is the proof of the actual injury.

Application to this case

[305] In this case, Malakal Tuel fired a semi-automatic handgun after talking with JT Papequash outside the 202 entrance, that hit JT Papequash's right eyebrow. It caused a massive trauma to his brain with hemorrhage and fragmented skull on the right side. Bullet fragments were found in his brain.

[306] Firing a handgun towards a person in close proximity resulting in a bullet in the head and subsequent injury satisfies the elements of the offence of aggravated assault by wounding. A reasonable person would expect that bodily harm would result from such an act.

[307] As I have found that Malakal Tuel was the shooter, I find that he is guilty of aggravated assault by wounding under s. 268.

Count 8: Discharge a prohibited firearm at JT Papequash with intent to wound him – s. 244(2)(a)(i)

Elements of Offence

[308] The Crown must prove the following offence elements beyond a reasonable doubt:

- Malakal Tuel discharged a firearm;
- The discharge was at JT Papequash; and
- Malakal Tuel intended to wound JT Papequash.

[309] A person intends to wound when he or she means to injure someone in a way that breaks, cuts, pierces, or tears the skin or some part of the person's body. It must be more than something trifling, fleeting or minor, such as a scratch.

[310] This is a specific intent offence, like attempted murder. The Crown must prove beyond a reasonable doubt that Malakal Tuel had the actual intention to wound JT Papequash (*R v Foti*, 2002 MBCA 122 ("*Foti*") at para. 27). Not only did the accused intend to do the act of shooting, but there must also be evidence that he had the purpose of wounding JT Papequash. Whether or not the accused succeeds in achieving that purpose is not relevant; it is the fact that the accused acted with that specific intention to wound. An intention to threaten or frighten someone is not enough. Nor is objective foreseeability of a risk of harm sufficient.

[311] In determining whether an accused has the requisite intention to wound, a trier of fact will often have to infer such an intention from circumstantial evidence. A trier of fact is entitled to consider that a person generally intends the natural consequences of their

actions (*Foti* at para 25). This evidence must be inconsistent with any other reasonable conclusion. For example, if the evidence is equally consistent with firing a shot to scare the victim, then a conviction is not possible (*Foti* at para. 26).

[312] I can consider this offence even though it arises from the same act of firing the gun at JT Papequash. Each offence has distinctive elements separate from the other. As a result, the *Kienapple* principle (*R. v. Kienapple*, [1975] 1 SCR 729) of a person not being convicted multiple times for the same wrongful act does not apply to the aggravated assault charge and this count. Aggravated assault requires proof of an injury, but does not require the use of a firearm or the subjective intent to wound. Section 244(2)(a)(i) does require subjective intent to wound but does not require proof that an injury actually occurred. *R v Ivanic*, 2009 BCSC 931, and *R v Young*, [2007] OJ No 311 (ONSC), are examples of cases where convictions for both offences were entered.

Application to this case

[313] Here, the evidence of the forensic firearms expert is that the Taurus PT 709 handgun was a prohibited weapon as defined under the *Criminal Code*, and Malakal Tuel has conceded this.

[314] I find that Malakal Tuel discharged the Taurus PT 709 semi-automatic handgun at JT Papequash with intent to wound him.

[315] The circumstances of the shooting were that the two men were in close proximity outside the bar entrance. They were talking with one another at a normal range for two people engaged in conversation. There was evidence of previous altercations that night between the two men.

[316] A semi-automatic handgun is a lethal weapon. The firearms expert testified it was functioning normally. At the close proximity the two men were to one another discharging such a handgun would be expected to cause wounding. However, more is required than an objective test. In order to convict, I must be satisfied that Malakal Tuel had the specific intent to wound JT Papequash when he shot him.

[317] Defence counsel argues that the same evidence or lack of evidence as was considered for the attempt murder charge supports an inability to find the required specific intent under this offence. I disagree. This is different from the attempt murder charge because the offence here is wounding, not killing. I am also entitled to consider here that a person generally intends the natural consequences of their actions unlike in an attempt murder charge, where that is not sufficient unless from those actions a specific intent to kill may be inferred (*Foti* at para. 25).

[318] No reasonable inference other than an intent to wound can be drawn in these circumstances. If Malakal Tuel intended to threaten or frighten, he could have pointed the gun well over JT Papequash's head, towards his foot or leg, or even away from him altogether towards the street. He did not do this. He shot JT Papequash at close range with a semi-automatic gun in the head. This was sufficient to convince me beyond a reasonable doubt that he discharged the firearm with intent to wound.

[319] An acquittal on a charge of attempted murder and a conviction on a charge of discharging a firearm with intent to endanger life are not inconsistent verdicts, as the intent to endanger life is different from the intent to murder (*R v Boomhower* (1974), 20 CCC (2d) at 89). Similarly in this case, the charge is not discharging a firearm with intent to endanger life, but with an intent to wound and therefore an acquittal on a

charge of attempted murder and a conviction on a charge of discharging a firearm with intent to wound are not inconsistent verdicts.

[320] I find Malakal Tuel guilty on Count 8.

Count 9: Discharge firearm while being reckless as to the life and safety of another person – s. 244.2(1)(b)

[321] This is a lesser included offence of Count 8 on which I have convicted. It has no distinctive elements and so under the *Kienapple* principle this charge will be stayed.

Count 10: Use a firearm while committing aggravated assault - s. 85(1)(a)

[322] This charge will also be stayed. Section 244 (Count 8) includes the element of using a firearm. Parliament has disallowed a conviction under s. 85(1)(a) where the index offence is s. 244. Although the index offence here is s. 268, because I have convicted under s. 244, I cannot do so now under s. 85(1)(a) as well.

[323] I turn now to the drugs and guns offences. I will first review the elements of the offences, the evidence, and then my analysis and decision.

Malakal Tuel and Joseph Wuor

Count 1: Possession of cocaine for the purpose of trafficking – s. 5(2) of the *Controlled Drugs and Substances Act ("CDSA")*

[324] Malakal Tuel and Joseph Wuor are jointly charged with possession of cocaine for the purpose of trafficking. The Crown must prove beyond a reasonable doubt the following essential elements of the offence:

- Malakal Tuel and Joseph Wuor committed the offence on the date and in the place described in the indictment;
- The substance was a controlled substance, namely cocaine;
- Malakal Tuel and Joseph Wuor were in possession of the substance;

- Malakal Tuel and Joseph Wuor knew the nature of the substance; and
- Malakal Tuel and Joseph Wuor possessed the substance for the purpose of trafficking.

[325] There is no dispute over the date and place, and the Crown has proved these elements. Nor is there is a dispute that cocaine is a controlled substance and the certificate of analysis that has been filed as evidence showing that cocaine was found. There is no suggestion in argument and there was no evidence that Malakal Tuel and Joseph Wuor did not know that the substance was cocaine.

[326] Joseph Wuor has conceded that the cocaine found in his black suitcase was for personal use.

[327] The issues are whether the accused were in possession of the cocaine, outside of the admission by Joseph Wuor; and if so, whether they possessed it for the purpose of trafficking. The Crown's case is circumstantial.

[328] As noted earlier, to convict on circumstantial evidence, I must consider all of the evidence and be satisfied that it is consistent with the accused being in possession of cocaine. Second, the evidence must be inconsistent with any other reasonable inference except that the accused are guilty. The evidence must be considered with respect to each accused separately.

[329] Section 2 of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19, directs that the definition of "possession" is the same as in the *Criminal Code*. The section sets out three types of possession: personal, constructive, and joint. A person is in possession of a substance if he or she is aware that he or she has physical custody and control of it. Control means that the person has some power or authority over the

substance, whether or not he or she used that power or authority. More simply, the person has knowledge of the thing, intention to possess the thing, and control over the thing. Constructive possession exists where a person, while having some measure of control over a substance, knowingly puts or keeps it in someone else's possession, or puts or keeps it in any place for his or her benefit, or for the benefit of someone else. Joint possession, that is, where two or more persons are in possession of the same substance, exists when a person has a substance in his or her possession with the knowledge and consent of others, and each of them who has some measure of control over the substance is in possession of it. However, mere indifference or doing nothing does not constitute consent.

[330] The Crown must prove beyond a reasonable doubt that the possession of the substance by the accused was for the purpose of trafficking. "Traffic" means to sell, administer, give, transfer , transport , send, or deliver something to someone.

[331] In this case, the presence of the two men in the vehicle in which the cocaine was found does not prove beyond a reasonable doubt that either or both had knowledge that the cocaine was there, the intention to possess it or have control over it. The issue is whether the circumstantial evidence introduced by the Crown establishes the requisite degree of knowledge, intention, and control. The only reasonable inference to be drawn from the proven facts must be that either or both accused had knowledge, intention, and control over the cocaine (*R v Heiberg*, 2011 ABQB 211).

[332] The Crown argues that Malakal Tuel and Joseph Wuor were carrying on a joint trafficking operation. In the alternative, they argue that Malakal Tuel was in possession of cocaine for the purpose of trafficking.

Evidence

[333] The police officers who received the tip that Malakal Tuel may be at 3036 South Klondike Highway on December 1, 2019 observed on arrival a silver Toyota Tacoma with a canopy, licence plate HZV11, parked in front of the duplex residence. As noted earlier, Malakal Tuel and Joseph Wuor were observed going back and forth several times between the Tacoma and Malakal Tuel's residence between 5:24 p.m. and 6:10 p.m. They were loading the Tacoma truck with various items and garbage bags. The Tacoma was running. They loaded the Tacoma with a mattress and both got inside the truck at approximately 6:10 p.m. Malakal Tuel was in the driver's seat and Joseph Wuor was in the front passenger seat. No one else was in the vehicle. After about two minutes, the Tacoma began moving south down the driveway toward the Klondike Highway. At that point, the police officers intercepted the Tacoma and the two men were taken into custody. Malakal Tuel's residence was secured until it was later searched by police.

[334] The Toyota Tacoma was registered to Malakal Tuel.

[335] The Crown relies upon the following evidence:

- Contents of the Toyota Tacoma found at 3036 South Klondike Highway on December 1, 2019, and searched after the two were taken into custody as they were driving away in the Tacoma, including four bags:
    1) An Air Jordan backpack found in the back seat and containing a wallet with Malakal Tuel's health care card and a smaller Hugo Boss shoulder bag with $7,480 in cash;

2) A grey Hugo Boss fanny pack found on the front passenger seat floor near the console containing a magnetic hide-a-key holder and 18 rocks of crack cocaine weighing 4.83 grams; a large chunk of crack cocaine weighing 40.42 grams; chunks of crack cocaine weighing 26.84 grams; and a 79 gram bag of phenacetin;

3) A black suitcase found in the back seat containing Joseph Wuor's yellow hoody he had been seen wearing at the Casa Loma and the 202 the night of the shooting, as well as 38 rocks of cocaine weighing 8.28 grams in which phenacetin was detected (but not certified) in a magnetic hide-a-key holder; and

4) An Adidas bag on the ground that had fallen out of the rear passenger side of the car containing clothing.

- Also in the Tacoma were eight cell phones, a "spitball" of cocaine weighing approximately .21 grams in a plastic bag on the driver's seat floor.
- Contents of the residence rented by Malakal Tuel at 3036 South Klondike Highway: five cell phones, one tablet, two SIM cards, magnetic hide-a-key holders, baking soda, and plastic sandwich bags.
- Contents of the Chevrolet Cruze found abandoned on the Robert Service Way on December 1, 2019, and registered to Malakal Tuel: two cell phones, two SIM cards, one "spitball" of crack cocaine on the floor, .21 grams, Ontario government driver's licences, one of which appears to have a photo of Malakal Tuel with the name of Chudier Alfa and another

with a photo of a man with a strong resemblance to Joseph Wuor and the name Romeo Carter.

- Joseph Wuor had $333 cash on his person upon arrest.
- Malakal Tuel had $1,505 cash on his person upon arrest — this is the basis for Count 13.

[336] The Crown argues that all of this evidence demonstrates possession of cocaine for the purpose of trafficking. They rely on the evidence of Corporal Guy Lacroix, qualified to provide expert opinion evidence at trial on aspects of cocaine trafficking, including matters relating to the use, packaging, distribution, pricing, paraphernalia, jargon, and practices and habits of traffickers and users.

[337] Corporal Lacroix, a knowledgeable, fair, and balanced witness, opined that the evidence noted above was consistent with the distribution of cocaine. He based this on a number of factors but the two main factors were: 1) the presence of cocaine in individually wrapped consumer end portions and 2) the presence of the adulterant phenacetin in the cocaine, evident from the certificate of analysis.

[338] Corporal Lacroix testified that wrapping small rocks of cocaine in plastic bags is a common way of distributing it in the Yukon. He also testified that magnetic keyholders are a convenient way to store drugs to evade ownership, as they can be stored underneath cars, for example.

[339] Corporal Lacroix explained that phenacetin is a toxic, carcinogenic, regulated drug that is added by sellers to cocaine to augment its bulk and reduce its potency for users. It allows sellers to have more product to sell, increasing their profit. There is no purpose to be served by an end user adding phenacetin to crack cocaine they have

purchased. The presence of phenacetin is consistent with the selling of cocaine, not possession for personal use.

[340] Corporal Lacroix opined that the quantity of 38 rocks (8.28 grams) found in Joseph Wuor's suitcase was not a typical amount for an end user and not consistent with a personal use quantity, which is generally .1 or .2 grams. He confirmed a "spitball" is consistent with personal use. While 8.28 grams would not be an impossible amount to have for personal consumption, he said he had never seen this before in the personal use context. He estimated it would have to be consumed over at least three to four days in order not to constitute a dangerously lethal dose, and thus could be consistent with someone travelling. Corporal Lacroix noted the pieces were individually packaged and phenacetin was detected, although it was not certified.

[341] Corporal Lacroix also testified that approximately $8,000 was a significant amount of cash to hold, as dealers generally keep a balance between cash and product. Although it is a large quantity of cash for the Yukon, it could still be consistent with street level dealing. It is also significant for an individual to have $1,500 on their person. He confirmed that the main way that cocaine is sold is through cash transactions.

[342] Finally, Corporal Lacroix explained that drug dealers often have numerous cell phones to avoid detection from police and competitors. They will have different cell phones for different groups of clients, one phone for colleagues in their network, one phone for their supplier, and one phone for their personal life. If they feel a threat from using any of their phones, they will stop using them.

[343] The Crown relied on five factors to demonstrate a joint cocaine trafficking operation.

[344] First, the two men were constantly together before their arrest: the Casa Loma initially, and then driving together to the 202, where they were rarely apart, including at the time of the shooting. Later, they were together on the trails when they met Harold Demarais and he dropped them off at their truck. They were together the next day loading the Tacoma with their belongings and bedding, and driving away together when they were apprehended.

[345] Second, there was a small package of cocaine found in the Tacoma on the floor of the driver's seat and another one on the back seat floor of the Cruze, both registered to Malakal Tuel. The Cruze, the Crown theorizes, was used unsuccessfully to try to leave town after the shooting. The Crown argues that the cars were being used to transport cocaine.

[346] Third, there were fake Ontario driver's licences in the glove box of the Cruze. They each appeared to have photos of each man- in the names of Chudia Alfa on the Malakal Tuel photo, and Romeo Carter on the likeness of Joseph Wuor. They were in a bubble envelope with a Quebec postmark, recently received, not appearing to originate from a government source, and addressed to an address used by Malakal Tuel for documents associated with his vehicle- 381-108 Elliott Street. The Crown says these recent identification cards are evidence of a two-man illicit operation.

[347] Fourth, there were multiple cell phones found- eight in the Tacoma, two in the Cruze, and five in the residence. Joseph Wuor was using two cell phones at the 202.

[348] Fifth, there were magnetic keyholders containing drugs in the luggage found in the Tacoma and more magnetic keyholders found in Malakal Tuel's residence.

[349] The Crown says it is clear that Malakal Tuel possessed cocaine for the purpose of trafficking, given his ownership and control of the Toyota Tacoma and all of the drugs, cell phones, and keyholders found there; the $7,480 in cash in the same pack as his wallet; and the $1,500 found on his person.

[350] While the Crown concedes the case against Joseph Wuor is not as conclusive, they question his explanation that the drugs found in his suitcase were for personal use, based on the expert testimony.

[351] The Crown notes that there was a large quantity of drugs (72 grams) in the Hugo Boss fanny pack found on the floor of the passenger seat beneath Joseph Wuor's feet. Using the expert's valuation of the street worth of cocaine around that time, that is, $80 for a full gram, which is in reality a half gram because of how sellers operate, the value would be 144 grams x $80, amounting to $11,500. The Crown says it is not plausible that either of the two men would have left that much value in the bag in the car if they did not trust one another.

Malakal Tuel

[352] Counsel for Malakal Tuel argues the Crown has not proved the elements of this offence beyond a reasonable doubt.

[353] First, counsel for Malakal Tuel noted that he had no drugs on his person on arrest. Counsel conceded the $7,480 in the Hugo Boss shoulder bag inside the Air Jordan backpack was Malakal Tuel's but argued there is no evidence that it was used in drug trafficking. It is not unusual for people to carry larger amounts of cash when they are travelling. This also applies to the $1,500 found on his person on arrest. Counsel argued that Malakal Tuel had no knowledge of the contents of the bags in his car, in

particular Joseph Wuor's suitcase and the Hugo Boss fanny pack on the floor of the passenger front seat of the vehicle. He argued the fanny pack was not in plain view. It was difficult to see because it was dark, the bag was tucked in close to the console, and at Joseph Wuor's feet. He said there was no evidence of any drug trafficking as one would expect in such a case, such as wiretap intercepts, scales, ledgers, lists of clients, text messages, or other evidence that cell phones were being used for drug purchasing.

[354] In response to the allegation of joint operation, counsel for Malakal Tuel argues that two men going to the two bars in one night and a walk afterwards is not evidence of a joint operation. Travelling together in a vehicle likewise is not evidence of illicit activity. It is consistent with a friend visiting from out of town and a decision to go out and go for a drive.

[355] The small quantities of cocaine found on the floor of the vehicle are hard to see and are consisted with personal use.

[356] There is no evidence that the identification documents in the Cruze were fake, or that they were being used for illicit activity.

[357] Many people have multiple cell phones. There is no evidence in this case of their use for drug activity.

[358] Finally, magnetic key holders are not necessarily indicative of drug trafficking.

Joseph Wuor

[359] Counsel for Joseph Wuor likewise argues that the Crown has not proved this offence beyond a reasonable doubt. His counsel concedes the presence of cocaine in his black suitcase but says it was consistent with his personal use. His counsel notes no drug paraphernalia was found in his bag, nor were there any proceeds of crime. The

Hugo Boss fanny pack at Joseph Wuor's feet in the vehicle was not in plain view and was difficult to see, especially in the dark. There is no evidence about when it was placed there or by whom. There is no evidence from which an inference can be drawn that Joseph Wuor had knowledge, intention, or control over the fanny pack. He was helping to load the Tacoma at Malakal Tuel's residence, he did not live there, and there was no evidence that anything belonged to him except the black suitcase.

[360] In response to the five factors relied on by the Crown to support a joint operation, counsel for Joseph Wuor argues the evidence of their time spent together is consistent with casual acquaintances and Joseph Wuor visiting Malakal Tuel from Alberta.

[361] There was no link between Joseph Wuor and the Cruze, and the spitball in the Tacoma was very small, hard to see, and consistent with personal use.

[362] There was no link between the allegedly fake identification and Joseph Wuor.

[363] Having two cell phones is not unusual; many people carry two for different reasons.

Analysis

Malakal Tuel

[364] Determination of possession of cocaine for the purposes of trafficking is a fact-driven inquiry. Owning and operating a vehicle does not prove beyond a reasonable doubt, knowledge, intention, and control over any cocaine located in it. The question in this case is whether the additional circumstantial evidence establishes that the accused's knowledge, intention, and control of the cocaine is the only reasonable inference to be drawn from the proven facts.

[365] Here, I find that the following facts support a finding that Malakal Tuel possessed the cocaine that was found (other than that found in Joseph Wuor's suitcase):

- He owned the Toyota Tacoma which had a spit ball package of cocaine on the floor of the driver's seat.
- He was loading the Tacoma vehicle on December 1, 2019, with bags and bedding from his house at 3036 South Klondike Highway.
- The Air Jordan bag and the Hugo Boss shoulder bag inside the Air Jordan bag contained his wallet and $7,480 cash.
- The Hugo Boss fanny pack contained a large amount of cocaine with a street value estimated at $11,500 on the floor of the passenger seat matched the Hugo Boss shoulder bag containing his cash. It was on the front seat, although on the passenger side, within reach of the driver.
- The Hugo Boss fanny pack was beside the Taurus PT 709 handgun from which the 9 mm empty shell casing found in the location of the shooting of JT Papequash came.
- Only Malakal Tuel and Joseph Wuor were in the Tacoma.
- Seventy-nine (79) grams of phenacetin, an adulterant used in cocaine trafficking, was found in the Hugo Boss fanny pack.
- The cocaine in the Hugo Boss fanny pack was individually packaged for consumer end use.
- There were 15 cell phones in the two vehicles and Malakal Tuel's residence combined, magnetic keyholders found in his residence that were the same as the magnetic keyholders found with drugs in them in the

> Tacoma, and plastic bags in the residence. The expert testimony was that all of this evidence found in the Tacoma, the Cruze, and the residence was consistent with drug trafficking.

[366] These facts are sufficient for an inference of knowledge and control by Malakal Tuel to be drawn of the cocaine in his vehicle. His ownership and operation of the vehicle is one fact. Combined with all of the other facts noted above, it leads me to conclude that the only reasonable inference was that he knew of and had control over the cocaine.

[367] The defence raises possible exculpatory inferences for individual pieces of evidence, such as the cell phones, the magnetic keyholders, the plastic bags, and the money. However, as was noted in *Heiberg*, where the defence had raised possible innocent explanations for each of the factors referred to by the Crown in a similar case of possession for the purpose of trafficking:

> [34]… it was not necessary for the Crown to call evidence to disprove all of these possible explanations nor was it necessary for the accused to testify. However, in drawing an inference, the Court considers the constellation of facts in evidence. While each puzzle piece on its own might look as though it could fit in another puzzle, when all of the pieces in this case are assembled and taken as a whole, the resulting puzzle rationally illustrates only one picture: [the accused] had knowledge of the presence of the cocaine, he intended to possess it, and he had control over it.

[368] Here, even though there is some evidence associated with drug trafficking that is not present, the evidence that is there is consistent with drug trafficking beyond a reasonable doubt.

Joseph Wuor

[369] In order for Joseph Wuor to be convicted of possession of cocaine for the purpose of trafficking beyond a reasonable doubt, I have to find that that the only reasonable inference from his admitted possession of the 8.28 grams of cocaine was that it was possession for the purpose of trafficking and/or that he had joint possession of the cocaine found in the Hugo Boss fanny pack in the Tacoma.

[370] The evidence does not establish beyond a reasonable doubt that Joseph Wuor possessed cocaine for the purpose of trafficking. His possession of 8.28 grams in a magnetic keyholder in his suitcase is a large quantity for personal use and more consistent with dealing. Phenacetin was detected on this seized amount but it was not certified by an analyst. While not the strongest reasonable inference, a reasonable inference may be drawn that this amount was for his personal use over a number of days, especially in the context of his clear plan to travel with Malakal Tuel for more than one day, as evidenced by the luggage and the bedding in the vehicle.

[371] Joseph Wuor did not live at 3036 South Klondike Highway. Although he was loading bags and bedding from Malakal Tuel's residence into the vehicle, there is no evidence he knew what was in the bags other than his own, including the Hugo Boss fanny pack at his feet, beside the gun. The amount of cash on his person of $333 is not an unusual amount, especially when travelling.

[372] I do not accept the Crown's argument based on the five identified factors that this was a joint operation. While the two men were together the evening on November 30/December 1, 2019, and appeared to be more than casual acquaintances, and were clearly leaving town together that night, it was an insufficient period of time to support a joint drug trafficking operation.

[373] The material found in the Cruze does not provide evidence of a joint illicit drug operation. First, there is no connection between Joseph Wuor and the Cruze, other than a speculative one. The Crown's theory that the two men tried to flee downtown Whitehorse the night of the shooting has a tenuous evidentiary basis and cannot be inferred on the basis of the evidence. The allegedly fake identification documents found in the glove box also raises many questions. There is no evidence that they are indeed fake and their connection to drug trafficking is not clear.

[374] Joseph Wuor had only two cell phones and one magnetic key holder in which he held his drugs that he claimed are for personal use. These are consistent with personal use.

[375] While the Hugo Boss fanny pack was at Joseph Wuor's feet in the Tacoma, there is no evidence he had control over it or knew what was in it. I find Joseph Wuor not guilty of this count.

Count 2: Possession of cash exceeding $5,000 – s. 354(1)(a)

[376] The essential elements of this offence are:

- That the accused was in possession of the property, in this case, cash.
- That the property was obtained by crime.
- That the accused knew that the property was obtained by crime.
- That the value of the property exceeded $5,000.

Malakal Tuel

[377] The issue is whether the cash was obtained by crime and whether Malakal Tuel knew this. It is over $5,000 and he has admitted it was in his possession.

[378] For the same reasons as set out above, I find that the $7,480 was obtained by drug trafficking by Malakal Tuel. It is part of a constellation of evidence that I have considered in determining whether Malakal Tuel possessed cocaine for the purpose of trafficking. The expert evidence confirmed that cocaine trafficking is a cash business. The expert expressed surprise at the amount, calling it a high amount of cash to be holding. Even for someone travelling, this is a very large amount to be carrying. I find that the Crown has proved this offence beyond a reasonable doubt.

Joseph Wuor

[379] Because I have found that there is insufficient evidence that Joseph Wuor was involved in the drug trafficking and the cash was found in Malakal Tuel's bag, there will be no finding of guilt on this charge against Joseph Wuor.

Count 3: Occupants of a motor vehicle in which they knew there was a prohibited firearm - s. 94(1)

[380] The Crown must prove the following essential elements:

- The accused was occupying the vehicle.
- The accused knew there was a prohibited firearm in the vehicle.

[381] In this case, the only issue is whether the accused men knew the Taurus PT 709 was in the Toyota Tacoma. It was found by Constable Newbury when he and Corporal Fry attended at the vehicle while securing the scene after the arrest. Constable Newbury went to turn the headlights off on the vehicle because they were blocking his view. While looking for the headlight switch, he shone his flashlight into the vehicle and noticed the slide of the gun on the passenger seat floor. Once seized, it was analysed and found to be the Taurus PT 709 handgun. The firearms expert who testified at trial confirmed it was a prohibited weapon under the *Criminal Code*.

[382] Both defence counsel argued that the gun was difficult to see and not in plain view. It was black and small. It was lying beside the centre console separating the driver's side from the passenger's side of the vehicle. It was beside the Hugo Boss fanny pack.

Malakal Tuel

[383] I have found that Malakal Tuel used the Taurus PT 709 handgun in the shooting of JT Papequash. As a result, it follows that it would be in his vehicle with his knowledge. The Crown has proved beyond a reasonable doubt that Malakal Tuel knew the prohibited weapon was in the vehicle.

Joseph Wuor

[384] Joseph Wuor was present outside the 202 at the time of the shooting. He knew that a gun was used in the shooting. The gun was at his feet where he was sitting in the Toyota Tacoma.

[385] Although I agree the gun is small, it is not so difficult to see that Joseph Wuor would not know it was there. Further, given his presence at the shooting, he had direct knowledge that it was used by Malakal Tuel.

[386] While it is possible that Joseph Wuor might have believed that Malakal Tuel disposed of the gun after the shooting, the only reasonable inference in this case is that he knew it was there because of his proximity to it when sitting in the vehicle.

[387] I have no reasonable doubt that Joseph Wuor knew the Taurus PT 709 was in the vehicle at his feet.

[388] I find both accused guilty of this charge.

Count 4: Possess a loaded prohibited firearm without authorization or licence or registration certificate – s. 95(1)

[389] The essential elements of this offence are:

- The accused possessed a firearm.
- The firearm was a prohibited or restricted firearm.
- The firearm was loaded or unloaded with readily accessible ammunition capable of firing in the weapon.
- The accused did not have an authorization, licence, or registration certificate.

Malakal Tuel

[390] As a result of my finding that Malakal Tuel was the shooter using the Taurus PT 709 handgun, I find that he was in possession of that same prohibited firearm when it was in the Tacoma vehicle. When it was seized by police, it was found with three bullets in the magazine. The Crown has proved beyond a reasonable doubt that the essential elements of this offence have been met in the case of Malakal Tuel.

Joseph Wuor

[391] There is no evidence that Joseph Wuor possessed the Taurus PT 709 handgun. It was found at his feet in the Tacoma, but, given my finding that it was used by Malakal Tuel, there is no evidence that Joseph Wuor consented to it being there or exercised any control over it. As I noted above in the definition of joint possession, mere indifference or doing nothing does not constitute consent.

[392] There is also no evidence that Joseph Wuor knew it was loaded or unloaded.

[393] As a result, I am not satisfied beyond a reasonable doubt that Joseph Wuor is guilty of this charge. I find him not guilty.

Count 5: Possession of a firearm while prohibited by order under s. 109(1)

Joseph Wuor

[394] Following this finding that Joseph Wuor did not possess the prohibited firearm, I also find he is not guilty of the offence under s. 117.01(3), which requires possession of a firearm when prohibited from doing so by an order under s. 109(1).

Count 11: Fail to comply with no weapons condition of recognizance – s. 145(3)

Malakal Tuel

[395] The Crown must prove beyond a reasonable doubt the following elements of this offence:

- Malakal Tuel was bound by a recognizance at the time of the offence.
- Malakal Tuel was bound by a condition to not possess any firearm, crossbow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition, or explosive substance.
- Malakal Tuel failed to comply with this condition by carrying a firearm and ammunition.

[396] Ammunition means a cartridge containing a projectile designed to be discharged from a firearm and, without restricting the generality of the foregoing, includes a caseless cartridge and a shot shell.

[397] The admissions of facts #1 states that on December 1, 2019, Malakal Tuel was at large on a recognizance dated August 21, 2019, that, among other things, prohibited him from owning, possessing, or carrying any firearms. I have reviewed a copy of that recognizance.

[398] Based on my finding that Malakal Tuel possessed the Taurus PT 709 found in the Tacoma and the other evidence in the admissions of facts, I find Malakal Tuel guilty of Count 11.

Count 12: Possession of a firearm while prohibited by order under s. 109

Malakal Tuel

[399] The Crown must prove beyond a reasonable doubt the following elements of the offence:

- Malakal Tuel was in possession of a weapon ("firearm, a cross-bow, a prohibited weapon, a restricted weapon, a prohibited device, any ammunition, any prohibited ammunition or an explosive substance").
- Malakal Tuel was subject to a weapons prohibition order at the time of possession.

[400] The admissions of fact #1 states that on December 1, 2019, Malakal Tuel was prohibited from possessing firearms under a lifetime order made under s. 109 of the *Criminal Code* on February 2, 2006. I have reviewed a copy of that order.

[401] Based on my finding that Malakal Tuel possessed the Taurus PT 709 gun found in the Tacoma and the other evidence in the admissions of facts, I find Malakal Tuel guilty of Count 12.

Count 13: Possess cash not exceeding $5,000 obtained by crime

Malakal Tuel

[402] The Crown states this charge stems from the $1,505 found on Malakal Tuel's person on arrest.

[403] This is a significant amount of cash to be carrying, even in support of a road trip. Given my findings about possession of cocaine for the purpose of trafficking, I find that this offence has also been proven beyond a reasonable doubt and I find Malakal Tuel guilty of Count 13.

Conclusion

[404] To review all the counts and my findings:

- Count 1 - possession of cocaine for the purpose of trafficking: I find Malakal Tuel guilty; Joseph Wuor not guilty.
- Count 2 - possession of cash exceeding $5,000 knowing that it was obtained by crime: I find Malakal Tuel guilty; Joseph Wuor not guilty.
- Count 3 - occupants of a motor vehicle in which they knew there was a prohibited firearm: I find Malakal Tuel guilty; Joseph Wuor guilty.
- Count 4 - possession of loaded prohibited firearm without authorization or licence: I find Malakal Tuel guilty; Joseph Wuor not guilty.
- Count 5 - possession of firearm while prohibited from doing so: I find Joseph Wuor not guilty.
- Count 6 - attempted to murder JT Papequash while using a prohibited firearm: I find Malakal Tuel not guilty.

- Count 7 - committing aggravated assault by wounding JT Papequash: I find Malakal Tuel guilty.
- Count 8 - discharging a prohibited firearm at JT Papequash with intent to wound: I find Malakal Tuel guilty.
- Counts 9 and 10: I find Malakal Tuel guilty. Charges stayed, per the *Kienapple* principle.
- Count 11 - at large on a recognisance and failed to comply with a no weapons condition: I find Malakal Tuel guilty.
- Count 12 - possession of a firearm while prohibited from doing so: I find Malakal Tuel guilty.
- Count 13 -possession of cash not exceeding $5,000: I find Malakal Tuel guilty.

[DISCUSSIONS]

_____
DUNCAN C.J.

Appendix

Event	202 time	Taxi time
Lahcen Amzoug pulls up and parks taxi facing the sidewalk beside the 202 entrance	**01:48:16**	**02:53:37**
Kamille Lemay exits the 202, followed by her five friends	**01:51:21**	02:56:42
Kamille Lemay and friends congregate in front of taxi	01:51:24	**02:56:45**
Joseph Wuor exits the 202	**01:51:43**	02:57:04
Malakal Tuel exits the 202	**01:51:48**	02:57:09
Kamille Lemay and friends walk away from taxi towards 202 entrance	01:56:14	**03:01:35**
Wuor walks in front of taxi towards 202 entrance	01:56:22	**03:01:43**
JT exits the 202	**01:56:29**	03:01:50
Gunshots	**01:56:38**	**03:01:59**
Wuor runs back in front of taxi and out of sight towards 3rd Ave	01:56:41	**03:02:02**
Amzoug starts backing taxi away from curb and driving towards 3rd Ave away from 202	01:56:44	**03:02:05**
Donald Tutin exits the 202, moving frantically	**01:56:46**	03:02:07