# COURT OF APPEAL OF YUKON

Citation: *R. v. Penner*,
2025 YKCA 14

Date: 20250929
Docket: 19-YU852

Between:

**Rex**

Respondent

And

**Edward James Penner**

Appellant

Before: The Honourable Madam Justice DeWitt-Van Oosten
The Honourable Mr. Justice Grauer
The Honourable Justice Donegan

On appeal from: An order of the Supreme Court of Yukon, dated September 19, 2019 (conviction) (*R. v. Penner*, Whitehorse Docket 18-01502).

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| Counsel for the Appellant: | V. Larochelle |
| Counsel for the Respondent (via videoconference): | J. Hyman |
| Place and Date of Hearing: | Vancouver, British Columbia<br>June 9, 2025 |
| Place and Date of Judgment: | Whitehorse, Yukon<br>September 29, 2025 |

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

**Concurred in by:**
The Honourable Mr. Justice Grauer
The Honourable Justice Donegan

***Summary:***

*A jury found the appellant guilty of first degree murder. The victim died from a single gunshot wound to the head. No one witnessed the shooting. The Crown sought to prove an execution-style killing through circumstantial evidence. There were also witnesses who placed the appellant at the scene and in possession of a gun, and who testified to things he said to them about the killing and the reasons for it. The credibility and reliability of those witnesses were at issue. The Crown adduced Facebook evidence of the appellant in possession of one or more guns in the days leading up to the murder. On appeal, the appellant raised multiple issues, including that the trial judge failed to assist the jury in understanding what evidence it had to consider in deciding the issues of planning and deliberation, and the competing inferences the jury might draw.*

*HELD: Appeal allowed and a new trial is ordered. The trial judge correctly explained the meaning of planning and deliberation but did not relate the evidence to those essential elements of the charged offence. He was obliged to do so. After the judge delivered his final instructions, the jurors returned with questions about planning and deliberation, revealing that they were struggling with applying the legal issues to the evidence. The trial judge reiterated his earlier instructions about the meaning of planning and deliberation and again, did not relate the evidence to those elements of the offence. Instead, he provided the jury with hypothetical factual scenarios to consider, one of which failed to distinguish properly between an impulsive and deliberated act. The distinction between first and second degree murder was a live issue at trial with significant implications for the appellant, and the jury was not adequately equipped to address that issue.*

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

## Introduction

[1] In September 2019, a jury found Edward James Penner (the appellant) guilty of first degree murder in the shooting death of Adam Cormack. Mr. Cormack died from a single gunshot wound to the head.

[2] The offence occurred outside of Whitehorse in June 2017. At trial, there were three main issues for the jury to decide: the identity of the shooter; whether the Crown proved the intent for murder; and whether the murder was planned and deliberate.

[3] The Crown's case involved considerable circumstantial evidence. However, there were also witnesses who directly interacted with the appellant before and

after the shooting. They testified about the fact that he was in Whitehorse, that he possessed a gun, and some witnesses said he told them that he shot Mr. Cormack or said things from which it could be inferred he was the shooter. At trial, the defence asked the jury to find that the circumstantial evidence did not establish what the Crown said it did and that the testimony of these witnesses was neither credible nor reliable. From the defence perspective, the Crown's evidence was wholly insufficient to prove that the appellant committed murder, let alone first degree murder.

[4] The appellant challenges the jury's verdict on multiple grounds. He says highly prejudicial evidence was improperly admitted at trial; the final instructions to the jury contained errors of law; the judge incorrectly answered questions posed by the jury; and there was a reasonable apprehension of juror bias.

[5] I would allow the appeal from conviction and order a new trial. The judge erred in law in his final instructions by failing to relate the evidence at trial to the essential elements of planning and deliberation. The prejudice flowing from that error was then compounded by a problematic response to the jury's questions about planning and deliberation and a second failure to relate the evidence.

[6] In the result, the jury received no assistance in identifying the evidence that was germane to planning and deliberation, its frailties, or possible competing interpretations. It was not adequately equipped to determine a critical issue that made the difference between a conviction for first and second degree murder.

## Factual Background

[7] I do not consider it necessary to detail the whole of the evidence. Rather, a general overview of the Crown's key evidence will suffice. The appellant did not testify at trial or call any other evidence in support of a defence.

[8] Mr. Cormack's body was found on June 28, 2017, near a gravel pit sometimes used as an informal shooting range. He was fully dressed and had a bullet wound to his head.

[9] The body was discovered by a civilian who then called 911. This witness (Jonathan Olsen) testified that while driving on the road leading to the gravel pit, he saw a stopped vehicle. There was a man standing at the back of the car and the trunk was open. Someone was lying on the ground behind the car (Mr. Cormack). The driver of that vehicle got back in and took off.

[10] The police eventually located the driver (Cyril Golar). Unfortunately, he passed away before trial. A statement he provided to the police was admitted into evidence under the principled exception to the rule against hearsay. After an admissibility *voir dire*, the judge found that the statement met the test for threshold reliability (both procedurally and substantively). Mr. Golar's statement did not implicate the appellant in the shooting. However, it did assist in establishing the likely date of Mr. Cormack's death.

[11] In his statement, Mr. Golar said he was in the area collecting abandoned items and saw the body. Initially, he thought it was a mannequin. The body was "lifeless" and there was a "dark spot on the head". He did not touch Mr. Cormack's body because he did not want to "muck things up". He told police he left the scene shortly after seeing Mr. Olsen's vehicle drive up. He denied having anything to do with Mr. Cormack's death. He said he had been in the same area around 6:00 pm the day before and did not see a body.

[12] A Crown witness (Clarence Haryett) testified that he drove the appellant, Mr. Cormack, and another individual to a location outside of Whitehorse. It was nighttime. The appellant and Mr. Cormack got out of the vehicle and walked up a road or trail out of sight. Mr. Haryett heard a gunshot. The appellant returned alone, carrying a black "rifle-size" gun. He was in a rush. He told Mr. Haryett they had to leave and admitted to shooting Mr. Cormack.

[13] In direct examination, Mr. Haryett was asked whether there was conversation in the vehicle about what was going to happen when the group got outside of Whitehorse. He said the plan was "… just to go smoke a joint". He was asked if people were angry in the vehicle or harsh words were exchanged. He said no:

"[e]verything was normal, like, friendly". In cross-examination, Mr. Haryett repeated that the group just "went for a ride … to go and smoke a joint somewhere around the highway". He acknowledged the place they drove to was known as a "casual shooting range".

[14] Mr. Cormack was shot once through the head. The bullet entered the right side of his head and exited the neck, showing a downward trajectory. There were no other signs of injury or trauma to his body.

[15] An expert forensic witness testified that the bullet was likely shot from within three feet of Mr. Cormack. Neither the bullet nor any cartridge remained in Mr. Cormack's body. No murder weapon was found; however, a green-tipped bullet and a cartridge were recovered proximate to Mr. Cormack's body and were consistent with having been fired from an AR-15 style gun.

[16] Multiple photographs and/or Facebook posts were admitted into evidence showing the appellant with what appeared to be an automatic rifle (AR-15 style) and green-tipped bullets prior to the date of the murder. Facebook messages between the appellant and other individuals were included, depicting the appellant's involvement in drug dealing. These messages included an exchange dated June 25, 2017 (two or three days before the murder), that accompanied an image of the appellant holding a gun and describing it as a "[f]ull auto AR15 …". In the June 25 exchange, he said: "[y]eh bro well go shoot sum shit dog" followed by "[h]uman huntin".

[17] The Crown said the Facebook evidence was relevant to identity of the shooter, opportunity to commit the offence, motive, intent, and planning and deliberation. The defence took no issue with the authenticity of the Facebook evidence and conceded that it was "highly probative" of live issues at trial. However, defence counsel strongly objected to any photographs or messages involving the possession and use of guns because of their prejudicial effect. From his perspective, these parts of the Facebook evidence were "very dangerous" and should not go to

the jury. Defence counsel described the photographs as “very graphic”. He submitted that:

> … comments about use of weapons or showing them off or the bravado or [willingness to use them] goes directly not just to character, but to propensity and [would] potentially [drive] the jury to a conclusion that if this guy’s got all these guns, he must be willing to use them. He must in fact use them, and in fact he must be the killer here, as alleged by the Crown.

[18] After an admissibility *voir dire*, the judge admitted select portions of the Facebook evidence, acknowledging that it was “clearly prejudicial”. However, he was satisfied the prejudice could be sufficiently addressed through a “proper instruction” to the jury. From the judge’s perspective, linking the appellant to the type of gun likely involved in the murder and to drug dealing in Whitehorse was “highly probative” of “narrative, motive, means, and identity”.

[19] In its closing submissions to the jury, the Crown made specific reference to the Facebook exchange about “Human huntin”. Relying on the Facebook evidence, in combination with other evidence adduced at trial, the Crown urged the jury to infer that the appellant brought a firearm to Whitehorse in the days before Mr. Cormack’s murder and did not do so “to send out Facebook photos”. In other words, he had a different purpose: to use it against someone.

[20] Two Pepsi cans were recovered approximately 80 metres from Mr. Cormack’s body. One of those cans contained the appellant’s fingerprints and DNA.

[21] In addition to Mr. Haryett, other Crown witnesses testified that the appellant told them he shot Mr. Cormack or said things from which his identity as the shooter could be inferred.

[22] One Crown witness (Juanita Johnson) said the appellant described Mr. Cormack as lying face down naked with a bullet in his head. Mr. Cormack was not naked when his body was discovered.

[23] Another witness (Alain Bernier) said that in the days before Mr. Cormack’s death, the appellant was in Whitehorse and told him Mr. Cormack had stolen a gun

from someone and sold it. He said Mr. Cormack "was going to deal with some consequences" because of those actions and the consequences would be delivered by the appellant. Mr. Bernier testified that one or two days before the murder, he saw the appellant with an AR-15—a "very intimidating piece of machinery … an assault rifle … about two and a half feet long". Mr. Bernier was shown one or more photographs of the appellant with a gun. He identified the gun as the AR-15 he saw in the appellant's possession.

[24] Mr. Bernier said the appellant admitted to shooting Mr. Cormack. Among other things, Mr. Bernier overheard the appellant telling someone else that "[t]hey went out to shoot some guns, and just went out to a back road to share a bottle of booze and shoot some guns". They were "passing the bottle back and forth, taking drinks". The appellant shot Mr. Cormack "in the neck, shot him in the head, and he went down to the ground and [he] kicked him in the head".

[25] In cross-examination, Mr. Bernier admitted to having told the police the appellant said he "blew [Mr. Cormack's] head off" and shot him in the head and face more than once. He also told the police the appellant said: "We went out to the bush … to shoot some guns. I just looked over at him and fucking shot him". Multiple shots to the head were inconsistent with the forensic evidence about the state of Mr. Cormack's body when located. On appeal, the appellant submits that the manner of the shooting as described to Mr. Bernier allowed for the possibility of an impulsive shooting, not one that was planned and deliberate.

**Jury Charge**

[26] The judge left three possible verdicts with the jury: (1) not guilty of any offence; (2) not guilty of first degree murder but guilty of second degree murder (a lesser and included offence); or (3) guilty of first degree murder.

[27] The jury was not asked to consider manslaughter. At trial, the appellant acknowledged there was no air of reality to manslaughter. Indeed, he specifically asked that manslaughter not be included as a possible verdict: "there's just no place for it". Understandably, the Crown agreed, "given the nature of the killing".

[28] The judge began his final instructions by explaining the presumption of innocence and proof beyond a reasonable doubt. He made it clear that if the jury had a reasonable doubt about the appellant's guilt, it must give him the benefit of that doubt and acquit. The jury was told that if it had "a reasonable doubt about [the appellant's] guilt arising from the credibility of the witnesses, [the jury] must find him not guilty".

[29] The judge explained the difference between "direct" and "circumstantial" evidence. He told the jury it could consider both kinds of evidence. However, the jury could not "reach a verdict of guilt[y] based solely or substantially on circumstantial evidence unless [it was] satisfied beyond a reasonable doubt that [the appellant's] guilt [was] the only reasonable conclusion to be drawn from the whole of the evidence".

[30] The judge reviewed the evidence of the expert witnesses. He told the jury it could give this evidence as much or as little weight as it deserved. When an expert assumes or relies on facts in support of their opinion, the "closer the facts assumed or relied on by the expert are to the facts as [the jury] find them to be, the more helpful the expert's opinion may be …". Where an expert relies on facts that the jury did not find supported by the evidence, the "less helpful" their evidence may be.

[31] The judge instructed the jury on what it could do with evidence that reflected badly on the appellant's character, such as the Facebook material. In this instruction, the judge warned the jury three times against using evidence of bad character to engage in propensity reasoning:

> [70] You have heard evidence that [the appellant] was in a correction facility and thus might infer that he has a criminal record.
>
> [71] You have also seen Facebook postings in the form of photos as well as messages. You might conclude that those photos and messages sent under the Facebook account name of "James Tanner" were authored by [the appellant].
>
> [72] If you conclude that [the appellant] did author the messages sent under the name of Tanner, you might conclude that [the appellant] is a person of bad character.

> [73] You have also heard witnesses, such as Juanita Johnson, from which you might conclude that [the appellant] is a man of bad character.
>
> [74] I instruct you as a matter of law that even if you believe that [the appellant] is a person of bad character, you cannot use that information to conclude that he committed this murder or that he has a disposition to commit murder.
>
> [75] As I told you earlier, this evidence was only admitted, and you can only use it, for narrative explana[tion] to help you understand how or why [the appellant] came to be in the Yukon or as some evidence concerning identity, means or motive.
>
> [76] You cannot use this evidence to reason that [the appellant] has the disposition or is the type of person, to commit the crime he is charged with. You cannot use this evidence to conclude that he is a bad person and therefore more likely to have committed murder.
>
> [77] In summary, you cannot use this evidence to reason that because the accused is a bad person or has engaged in wrong-doing in the past, he is therefore the kind of person who could have or would have committed the crime with which he is charged.
>
> [78] With respect to Facebook records, you only have up to June 26th. You will recall I had indicated to you that I had vetted the Facebook messages and edited out messages that were duplicitous or irrelevant. You must therefore not speculate as to what other Facebook messages do or do not exist.
>
> [Emphasis added.]

[32] As noted, some witnesses testified the appellant spoke to them about the shooting. The judge highlighted these conversations in his charge:

> [109] In this case, there is no direct evidence from anyone who actually saw [the appellant] shoot Mr. Cormack. You do have evidence from Mr. Clarence Haryett that he drove [the appellant], Mr. Cormack and Bubbles out to the area where Mr. Cormack's body was ultimately discovered, that [the appellant] and Mr. Cormack walked down the trail, he heard a shot, [the appellant] alone returned to the car carrying a rifle size gun, and that [the appellant] said he had shot Mr. Cormack. There is also evidence from Alain Bernier who testified that he heard [the appellant] say that he had shot Mr. Cormack on a back road after they had been driven out there by Mr. Haryett and Bubbles. And there is some evidence from Juanita Johnson who testified that [the appellant] threatened her saying that she would end up like Adam and when she asked him what he had done to Adam he responded that Adam was lying face down, naked on a dirt road with a bullet in his head.
>
> [Emphasis added.]

[33] The judge told the jurors it was up to them to decide whether these witnesses told the truth about what the appellant said to them. The jurors were told that in

assessing this evidence, they should consider the "condition" of the appellant and the witnesses at the time of the alleged conversations. They were to consider the "circumstances in which the conversations took place" and bear in mind "anything else" that might make the witnesses' evidence "more or less reliable". Unless the jurors found the appellant made the remarks or statements attributed to him, they could not use this evidence against him.

[34] The judge provided the jury with an overall review of the evidence. This included the evidence of Alain Bernier, who said the appellant told him he shot Mr. Cormack. The judge reminded the jury of Mr. Bernier's "[extensive] cross-examin[ation]" and the fact that his credibility was at issue:

> [149] … You will recall that Mr. Bernier was extensively cross-examined by defence counsel and challenged on his evidence. Mr. Bernier admitted on cross-examination that he had given three versions of what he said [the appellant] had told him: that he had shot him in the head, that he had shot him in the head multiple times and that he had kicked Mr. Cormack when he was down. Mr. Bernier also admitted that he was consuming drugs at this time.

[35] The judge told the jury that in assessing and weighing the out-of-court statement from Cyril Golar, it must keep in mind that it did not have the opportunity to watch Mr. Golar testify under oath or be cross-examined by the defence. These were factors to consider in deciding how much weight, if any, it gave to this evidence.

[36] The judge instructed the jury on the essential elements of first degree murder. He told the jurors that to find the appellant guilty of the charged offence, they had to be satisfied beyond a reasonable doubt that: a) he was the shooter; b) the shooting was unlawful; c) the shooting caused Mr. Cormack's death; d) when he shot Mr. Cormack, the appellant had the intent for murder; and e) the murder was both planned and deliberate.

[37] After identifying these elements, the judge went through them individually. For all but planning and deliberation, he highlighted material parts of the evidence the

jury should consider in deciding whether the Crown proved each element beyond a reasonable doubt.

[38] On proof of identity, the judge noted there was “no direct evidence from anyone” that they saw the appellant shoot Mr. Cormack. However, the evidence of Mr. Haryett, Ms. Johnson, and Mr. Bernier was relevant to this determination.

[39] The judge told the jury there was “no suggestion in th[e] case that there was any justification for shooting Mr. Cormack”. As such, the shooting was an “unlawful act”.

[40] Specific to causation, the judge referred the jury to the evidence of an expert forensic witness who testified that the cause of Mr. Cormack’s death “was a gunshot to the head and that no disease contributed to [the] death”.

[41] On the issue of intent, the judge told the jury it must consider all the evidence in assessing this issue, including the nature of the harm inflicted on Mr. Cormack and the circumstances surrounding the shooting. The jury was entitled to infer that a person usually knows the predictable consequences of their actions and intends to bring them about. As a matter of common sense, “if someone shoot[s] another person in the head with a [high-powered gun], he intends to kill him or cause him bodily harm that he knows is so dangerous and serious as to likely cause that person’s death”. However, the jury was not required to draw this inference about the appellant, and the judge made it clear that if the jury had a reasonable doubt about the intent for murder, it must not draw this inference.

[42] Also specific to intent, the judge drew the jury’s attention to the evidence of the expert forensic witness who opined the gun would have been two to three feet away from Mr. Cormack when fired. The same witness testified that “the extent of the skull fracturing was more indicative of a high-powered weapon”. The judge additionally referred to the evidence of Mr. Haryett and Mr. Bernier. He told the jurors they were “entitled to ask [themselves] why [the appellant] would intend to

shoot Mr. Cormack" (in other words, whether there was evidence of motive). He then said:

> [124] … As I recall the testimony of the various witnesses, there was no evidence that Mr. Cormack owed any money to [the appellant] or that he had stolen any property belonging to [the appellant]. Ms. Johnson described [the appellant] and Mr. Cormack sitting on the bed at a party at Jessica's house in Hillcrest late June 2017, and that Mr. Cormack and [the appellant] were playing with what she described as a "little machine gun," and that Mr. Cormack's mood was happy and laughing. There is evidence from Mr. Bernier that [the appellant] said there would be consequences for Mr. Cormack for having sold a 9 mm gun belonging to someone else.

[43] After addressing the Crown's burden to prove intent, the judge turned to the last two elements of first degree murder: planning and deliberation. He explained the meaning of these terms:

> [129] To prove first degree murder, the Crown must prove beyond a reasonable doubt not only that [the appellant] had the intent required for murder, but also that the murder was both planned and deliberate. "Planning" and "deliberation" are not the same as "intention". For example, a murder committed intentionally, but on a sudden impulse or without prior consideration, is not planned and deliberate.
>
> [130] It is the murder itself that must be both planned and deliberate, not something else that [the appellant] did.
>
> [131] The words "planned" and "deliberate" do not mean the same thing.
>
> [132] "Planned" means a calculated scheme or design that has been carefully thought out, the nature and consequences of which have been considered and weighed.
>
> [133] The plan does not have to be complicated. It may be very simple. Consider the time it took to develop the plan, not how much or little time it took between developing it and carrying it out. One person may prepare a plan and carry it out immediately. Another person may prepare a plan and wait awhile.
>
> [134] "Deliberate" means "considered, not impulsive", "slow in deciding".
>
> [135] It is for you to say whether the murder of Mr. Cormack was both planned and deliberate. To decide this issue, you must consider all of the evidence and anything said or done in the circumstances.

[44] The judge told the jury that if it had a doubt about whether the murder was planned and deliberate, it must find the appellant "not guilty of first-degree murder but guilty of second-degree murder".

[45] Unlike his approach to the other elements of the charged offence, the judge did not refer the jury to any evidence he considered germane to planning and deliberation.

[46] The judge then turned to an overall review of the evidence. He told the jury he was doing this to "jog [their] collective memories". During this review, the judge did not relate any of the evidence to the elements of the offence that required proof beyond a reasonable doubt. He simply listed various of the witnesses and provided a brief synopsis of their testimony.

[47] The judge then summarized the Crown and defence theories for the jury.

[48] The Crown's theory was that the appellant believed Mr. Cormack to have stolen and sold someone's gun, and that he "went down that trail with [him] planning to kill him and deliberately did so". In his summary of the defence theory, the judge highlighted defence concerns about the credibility and reliability of the Crown's evidence:

> [170] The defence position on behalf of [the appellant] is that the Jury cannot convict him in the circumstances of this case where the evidence called by the Prosecution falls short of proof beyond a reasonable doubt of the specific intentions required for first degree murder.
>
> [171] Further [the appellant] should not be convicted of any offence at all where the circumstantial evidence before the jury is severely compromised by issues of both credibility and reliability.
>
> [172] The Prosecution's position as elaborated in the Crown theory is composed of wishful thinking, and reporting as factual what is no more than allegations by witnesses whose reliability is compromised by drug use and memory issues and whose credibility must be questioned as all these witnesses know each other and are party to numerous rumors and speculation immediately following Cormack's death.

## Questions From the Jury

[49] After the judge delivered his final instructions, the jury returned with two questions, both of which related to planning and deliberation:

> Does 'weighing the consequences' mean considering the outcome (i.e. death of another person) or possible punishment, or both?
>
> Could you please provide an example?

Could you please elaborate on ‘deliberate’? Please provide an example.

[50] The judge answered the questions this way:

I take it from the questions that you are relating it to that portion of my charge dealing with, "Was [the appellant’s] murder of Mr. Cormack both planned and deliberate?" That's the area that you're interested in.

You're all nodding vigorously.

What I'm going to do is re-read those few paragraphs and then give you the response to your question so that everything is taken together.

Starting at paragraph 128:

> Was [the appellant’s] murder of Mr. Cormack both planned and deliberate? To prove first degree murder, the Crown must prove beyond a reasonable doubt not only that [the appellant] had the intent required for murder, but also that the murder was both planned and deliberate.
>
> Planning and deliberation are not the same as intention. For example, a murder committed intentionally but on a sudden impulse or without prior consideration is not planned and deliberate. It is the murder itself that must be both planned and deliberate, not something else that [the appellant] did.
>
> The words 'planned' and 'deliberate' do not mean the same thing.
>
> 'Planned' means a calculated scheme or design that has been carefully thought out, the nature and consequences of which have been considered and weighed. The plan does not have to be complicated. It may be very simple. Consider the time it took to develop the plan, not how much or little time it took between developing it and carrying it out. One person may prepare a plan and carry it out immediately, another person may prepare a plan and wait a while.
>
> 'Deliberate' means considered, not impulsive, slow in deciding. It is for you to say whether the murder of Mr. Cormack was both planned and deliberate. To decide this issue, you must consider all of the evidence and anything said or done in the circumstances.
>
> Unless you are satisfied beyond a reasonable doubt that the murder of Mr. Cormack was both planned and deliberate, you must find [the appellant] not guilty of first degree murder but guilty of second degree murder. If you are satisfied beyond a reasonable doubt that the murder of Mr. Cormack was both planned and deliberate, you must find [the appellant] guilty of first degree murder. (as read)

With respect to your note — can I have the note back, please?

I’m going to answer the questions in reverse order.

> Could you please elaborate on 'deliberate'? Please provide an example. (as read)

> Deliberate means considered, not impulsive, carefully thought out, not hasty or rash. A deliberate act is one that you have taken time to weigh the advantages and disadvantages of before you do it.
>
> You've asked me to provide an example, and here's one.
>
> Suppose someone insults you in a bar and you react immediately, impulsively by punching him. Compare that to a situation where someone insults you in a bar and your response is to challenge him to come outside the park — into the parking lot where then you immediately punch him.
>
> The first example would not be a deliberate act. It was impulsive. The second example was a deliberate act. You have taken some time to consider your action. It was not impulsive.
>
> Does that assist? You're nodding in the affirmative.
>
> The second — or actually, your first question, which I'm answering second, is weighing the consequences. You have asked about the meaning of the phrase 'weighing the consequences'.
>
> Weighing the consequences means that the consequences of one's actions have been thought over, considered and sized up prior to acting. In the case of murder, the consequences would include that by one's actions you are taking a human life, that you might be caught and that you might be punished for your actions. You do not have to know or consider what your punishment might be.
>
> You've asked for an example, and I will give you one.
>
> Remember, this is weighing the consequences.
>
> You are terminally ill and in great pain. You have a pill which, if you take it, will end your life. The decision is yours. You must weigh the consequences of taking the pill. If you take it, your pain will be over, as will your life. If you don't take it, your life will go on for some period, but so will your pain. So you weigh the consequences as to whether you take the pill or not.
>
> Does that help? Everybody's nodding vigorously.
>
> All right. Thank you, then. I invite you to return to your room to consider the case.

[51] After receiving these answers, the jury continued to deliberate. It had no further questions for the judge and returned a verdict of guilty for first degree murder.

## Issues on Appeal

[52] The appellant has raised multiple issues on appeal. They fall into four main categories: (1) wrongfully admitted evidence; (2) erroneous jury instructions; (3) erroneous answers to questions posed by the jury; and (4) a reasonable apprehension of juror bias.

[53] I will start with the errors alleged in the final instructions and the judge's answers to the jury's questions.

## Discussion

### Erroneous jury instructions

[54] The appellant contends that several aspects of the judge's final instructions to the jury reflect reversible legal error, including: failing to relate the evidence to the elements of planning and deliberation; failing to explain the permissible use of evidence of bad character (discreditable conduct); failing to identify the most germane of the circumstantial evidence and properly instruct the jury on how to analyze that evidence; failing to provide adequate instructions on how to approach Mr. Golar's out-of-court statement; and failing to leave the jury with the lesser or included offence of manslaughter.

#### *Standard of review*

[55] To obtain a new trial based on erroneous instructions, the appellant must persuade this Court that the instructions did not properly equip the jury to decide the case according to the law and the evidence. In deciding whether that burden has been met, we must consider the impugned parts of the instructions in the context of the entire trial. Jury instructions are not measured against a standard of perfection. One ambiguous or problematic statement will not justify appellate interference if the charge, viewed as a whole, properly equipped the jury to decide the case: *R. v. Abdullahi*, 2023 SCC 19 at paras. 35–37, 41–42; *R. v. P.A.*, 2024 BCCA 93 at paras. 20–23.

#### *Failure to relate the evidence to planning and deliberation*

[56] The first challenge to the final instructions is that the judge failed to relate the evidence to the elements of planning and deliberation. The appellant says the jurors did not receive assistance in deciding which parts of the evidence were germane to assessing whether the Crown met its burden of proof on this aspect of the case.

[57] To sustain a conviction for first degree murder, the Crown had to prove that Mr. Cormack's killing was both planned and deliberate: *Criminal Code*, R.S.C. 1985, c. C-46, s. 231(2). These are separate essential elements of first degree murder and the Crown must prove each element beyond a reasonable doubt: *R. v. Aalders*, [1993] 2 S.C.R. 482, 1993 CanLII 99.

[58] The Alberta Court of Appeal recently considered the legal test for a "planned" murder in *R. v. Underwood*, 2024 ABCA 267, aff'd 2025 SCC 14:

> [63] The essential question posed by section 231(2) is whether the murder was planned and deliberate. To answer that question, all evidence of planning and deliberation leading up to the murder must be examined. Of course, advance planning and deliberation is essential … The timing of the formation of the plan relative to the murder can be relevant, but the law has not established any minimum temporal cut-off. Planning and deliberation can be brief … "The important element ... so far as time is concerned, is the time involved in developing the plan, not the time between the development of the plan and the doing of the act" …
>
> …
>
> [66] The rationale behind section 231(2) is that "there is an added moral culpability to a murder that is planned and deliberate which justifies a harsher sentence". To constitute first degree murder, the planning and deliberation must relate to "the intention to take a human life". The added culpability is found in "the planning and deliberation with relation to the taking of a human life" … It is the process of *planning* to take a life that attracts enhanced culpability for first degree murder.
>
> …
>
> [68] It is the objective of the planning and deliberation, rather than the exact performance of details of the original plan, that must be examined. "It is, for example, untenable to find that if a person plans to kill another with a gun, but finds that the gun malfunctions and consequently strangles his victim, the killing is not planned and deliberate" …
>
> [69] While the jurisprudence and standard jury instruction models explain a plan as a "design" or "scheme", we are aware of no authority holding that a plan to kill must, as a matter of law, include finalized details as to the method of killing – in the trial judge's words, the "how, when or where". A plan need not be complicated; it may be very simple … The existence of a finalized plan or scheme may be valuable evidence of the process of planning or scheming, but it is not the only way to establish the accused planned to take a life.
>
> …
>
> [Italics in the original; internal references omitted.]

[59] As to the meaning of “deliberate”, the Supreme Court of Canada accepted the following definition of the term as a “classic instruction” in *R. v. Nygaard*, [1989] 2 S.C.R. 1074 at 1084, 1989 CanLII 6:

> As far as the word “deliberate” … the Code means that it should also carry its natural meaning of "considered," "not impulsive," "slow in deciding," "cautious," implying that the accused must take time to weigh the advantages and disadvantages of his intended action.
>
> [Emphasis added, quoting from *R. v. Widdifield* (1961), Ontario Supreme Court, unreported, as excerpted in 6 Crim. L.Q. 152 at 153.]

See also *R. v. Jacquard*, [1997] 1 S.C.R. 314 at para. 26, 1997 CanLII 374.

[60] In *R. v. McColeman* (1991), 5 B.C.A.C. 128 at para. 52, 1991 CanLII 338, the Court of Appeal for British Columbia approved of this instruction:

> The word deliberate, on the other hand, means well laid or considered, not impulsive, carefully thought out, not rash or hasty. From that definition you will see that the word deliberate connotes a studied decision to kill reached after a reflection for an appropriate time, a time sufficient to eliminate a sudden decision produced by impulse, passion, or emotion. The time need not be long, what is required must obviously [depend] upon all the circumstances. But *before convicting of first degree murder, you must be satisfied beyond a reasonable doubt that the killing was done after careful thought, and not on the spur of the moment, suddenly or impulsively, under the influence of some sudden emotion or passion* ...
>
> [Italics in the original, underlining added.]

See also paras. 48–49 of *McColeman*; *R. v. Chanthabouala*, 2011 BCCA 463 at paras. 16–17.

[61] The appellant does not take issue with the instructions provided on the meaning of planned and deliberate. The legal concepts addressed in *Underwood*, *Nygaard*, and *McColeman* were adequately conveyed to the jury. However, he says the judge erred in law by not relating the evidence to those concepts. The judge did not draw the jurors’ attention to the evidence germane to assessing planning and deliberation so that they understood how to apply the legal concepts to the facts of the case, as found by them. He did so for the other essential elements of the charged offence, but not planning and deliberation. The appellant says this was a significant misstep because the evidence relied upon by the Crown in support of

planning and deliberation had many frailties, and importantly, the capacity to support competing interpretations, including interpretations consistent with an impulsive shooting.

[62] In support of this alleged error, the appellant points to *R. v. Seymour*, 1999 BCCA 87 at paras. 7–9, a case in which the British Columbia Court of Appeal overturned a jury verdict for first degree murder because the judge failed to highlight all evidence germane to planning and deliberation and, in their closing submissions, the Crown and defence counsel did not fill that gap. See also *R. v. Newton*, 2017 ONCA 496 at paras. 9–25 and *R. v. Frisbee* (1989), 48 C.C.C. (3d) 386 at 427–430, 1989 CanLII 2849 (B.C.C.A.), leave to appeal to S.C.C. ref'd, [1989] S.C.C.A. No. 232.

[63] The Crown says there was no error here. Furthermore, defence counsel did not object to this portion of the final instructions. He did not ask the judge to direct the jury's attention to specific pieces of evidence when instructing on planning and deliberation. More importantly, the Crown says the evidence relevant to planning and deliberation overlapped with the evidence relevant to intent and the latter evidence was adequately canvassed elsewhere in the charge. Additionally, given the "highly damaging" nature of this evidence (the Crown's characterization), it would not have been in the appellant's interests to draw the evidence to the jury's attention more than once. The Crown says that on a fair reading of the final instructions in the context of the record, this jury would have clearly understood what it had to decide before it could find the appellant guilty of first degree murder, the evidence relied upon by the Crown in proving the elements of that offence, and its evidentiary frailties.

***Legal principles***

[64] In *R. v. Daley*, 2007 SCC 53 at para. 29, the Supreme Court of Canada held that jury instructions should:

a) instruct on the relevant legal issues, including the charges faced by the accused;

b) explain the theories of each side;

c) review the salient facts that support the theories and case of each side;

d) review the evidence relating to the law;

e) inform the jurors they are the masters of the facts and that it is for them to make the factual determinations;

f) instruct about the burden of proof and presumption of innocence;

g) identify the possible verdicts open to the jury; and,

h) make clear the requirement of unanimity for reaching a verdict.

[Citing B. Q. H. Der, in *The Jury — A Handbook of Law and Procedure* (loose-leaf), at p. 14.1].

[65] The fourth of these obligations, relating the evidence to the live issues at trial, is necessary because it "improves jurors' understanding of the particular aspects of the evidence that bear on their decision on each essential issue in the case": *R. v. P.J.B.*, 2012 ONCA 730 at para. 44.

[66] There is no mandated formula or structure to follow when crafting jury instructions. "The particular words used, or the sequence followed, is a matter within [the judge's] discretion … and will depend on the particular circumstances of the case": *Daley* at para. 30. Further, "long and detailed instructions" can be "more confusing than helpful". As such, judges are encouraged to simplify their charges to make them "more accessible to the jury": *R. v. Ménard*, [1998] 2 S.C.R. 109 at para. 27, 1998 CanLII 790; *Jacquard* at para. 13. They have considerable latitude in doing this, including in the manner and extent to which they review the evidence and relate that evidence to the live issues at trial.

[67] As explained in *Daley*:

> [54] One of the classic statements describing the trial judge's duty to review the evidence in the charge to the jury is found in this Court's decision in *Azoulay v. The Queen*, [1952] 2 S.C.R. 495, at pp. 497-98, *per* Taschereau J.:
>
> > The rule which has been laid down, and consistently followed is that in a jury trial the presiding judge must, except in rare cases where it would be needless to do so, review the substantial parts of the evidence, and give the jury the theory of the defence, so that they may appreciate the value and effect of that evidence, and how the law is to be applied to the facts as they find them …
>
> This statement, however, must be understood in the context of that particular case. There, the trial judge had not reviewed the evidence at all. He simply indicated that both counsel had elaborated on this matter sufficiently. A majority of this Court found the charge inadequate because it left the whole of the evidence for the jury in bulk for evaluation.
>
> [55] *Azoulay* does not stand for the proposition that all facts upon which the defence relies must be reviewed by the judge in the charge …
>
> …
>
> [57] The extent to which the evidence must be reviewed "will depend on each particular case. The test is one of fairness. The accused is entitled to a fair trial and to make full answer and defence. So long as the evidence is put to the jury in a manner that will allow it to fully appreciate the issues and the defence presented, the charge will be adequate": see Granger, at p. 249. The duty of the trial judge was succinctly put by Scott C.J.M. in *R. v. Jack* (1993), 88 Man. R. (2d) 93 (C.A.), aff'd [1994] 2 S.C.R. 310: "the task of the trial judge is to explain the critical evidence and the law and relate them to the essential issues in plain, understandable language" (para. 39).
>
> [Original emphasis omitted; internal references omitted; new underlining added.]

See also *R. v. Royz*, 2009 SCC 13 at para. 3; *Newton* at paras. 11–13; *R. v. G.W.*, 2016 BCCA 510 at paras. 19–29.

[68] It is well-established a judge need not "state evidence twice where once will do": *Jacquard* at para. 14, citing *McColeman* at 137. What matters is whether "the jury was left with sufficient understanding of the facts as they relate to the relevant issues": *Jacquard* at para. 14; *Abdullahi* at paras. 35–37

***Application of principles***

[69] In the context of this case, the appellant has persuaded me the judge erred in not relating the evidence to the elements of planning and deliberation, even

though much of that evidence was also relevant to the issue of intent and canvassed elsewhere in the charge.

[70] Commendably, the judge kept his final instructions relatively brief, simple, and to the point. The parties agree the judge adequately explained the meaning of planning and deliberation. However, he did not direct the jury's attention to evidence that was germane to deciding whether those elements had been proved beyond a reasonable doubt. He did not single out evidence that uniquely supported (or potentially undercut) findings of planning and deliberation. He did not refer the jury to evidence already reviewed in relation to another element of the offence (such as intent), indicate that it also had the capacity to support (or potentially undercut) findings of planning and deliberation, and explain how. In contrast to the approach taken to other essential elements of the charged offence, the judge simply said: "To decide this issue, you must consider all of the evidence and anything said or done in the circumstances". That is, of course, correct. The jury was obliged to consider the whole of the evidence. However, in the circumstances of this case, I am of the view the judge was required to do more than remind the jury it had to consider all the evidence before finding the appellant guilty.

[71] In its closing submissions, the Crown highlighted three main parts of the record specific to planning and deliberation: the Facebook photographs of the appellant with one or more guns and messages attributed to him; Mr. Bernier's testimony about seeing the appellant with an AR-15 one or two days before the murder and being told about a need for "consequences" specific to Mr. Cormack; and the manner of the killing. When instructing on planning and deliberation, the judge did not review or refer to any of this evidence, explain its relevance, identify associated frailties, or provide guidance on how to assess its probative value relative to the formation of a plan to kill or the weighing of advantages and disadvantages specific to the intended action. He did not assist the jury in deciding whether the evidence highlighted by the Crown, in whole or in part, eliminated the reasonable possibility of an impulsive shooting. To the extent the judge did substantively

address this evidence, it was either in relation to proof of intent or as part of his overall review of the record.

[72] I consider the approach taken here to have been inadequate for several reasons.

[73] First, proof of planning and deliberation was the critical distinguishing feature between first degree murder and the lesser and included offence of second degree murder. As the judge correctly instructed the jury, a reasonable doubt on either of those elements meant the appellant could not be found guilty of first degree murder. A conviction for first degree murder carries mandatory life imprisonment with no eligibility for parole for 25 years. A conviction for second degree murder also carries mandatory life imprisonment; however, eligibility for parole can be set as low as 10 years. Given the significant difference in custodial jeopardy, I agree with Justice Doherty in *R. v. Maciel* that where the difference between first and second degree murder is a live issue at trial, it is "essential that the trial judge draw the jury's attention to the evidence that could assist them in distinguishing" between the offences: 2007 ONCA 196 at para. 96, leave to appeal to the S.C.C. ref'd, [2007] S.C.C.A. No. 258, 2007 CanLII 37213, emphasis added; see also *R. v. McPherson*, 2014 ONCA 223 at para 34. This is the case even when doing so means there will be repetition in the charge: *The Queen v. Mitchell*, [1964] S.C.R. 471 at 475, 1964 CanLII 42.

[74] Second, deciding whether the Crown has proved planning and deliberation requires that a jury consider the entirety of the evidence, including the accused's actions, statements, and their "capacity and ability to plan and deliberate": *Mitchell* at 479. However, that consideration must be "aided by [a judge's] instruction as to that evidence which is indicative of planning and deliberation and that [evidence], including circumstances and conditions affecting the capacity and ability to plan and deliberate, which indicates the contrary": *Mitchell* at 479, emphasis added. See also *R. v. Stiers*, 2010 ONCA 382 at para. 73.

[75] Regrettably, the judge did not provide this assistance, which has been described as “one of the most important tasks that a trial judge must undertake in crafting their jury instructions”: *R. v. Barreira*, 2020 ONCA 218 at paras. 30, 32, 40–41. The judge referred to evidence that was relevant to planning and deliberation when addressing the element of intent and elsewhere in the charge; however, instructions involving an allegation of planned and deliberate murder must “bring home to the jury that, in considering the evidence, they should keep in mind that planning and deliberation is a separate issue from that of whether the accused had the requisite intent for murder”: *Frisbee* at para. 117, emphasis added. In other words, the jury must understand that although certain pieces of evidence may be relevant to all three elements—intent, planning, and deliberation—finding that this evidence proves intent does not automatically mean it proves the latter two. A particular piece of evidence, viewed individually or in concert with other evidence, may support some inferences, but not others. The judge did not assist the jury in making this determination with specific reference to the evidence in the case, thereby running the risk of misleading the jury “into thinking that a finding of planning and deliberation necessarily follows from a finding of intention”: *Jacquard* at para. 30. He told the jury that “[p]lanning and deliberation are not the same as intention”; however, he did not assist the jurors in understanding what to think about when asking themselves about that distinction in their assessment of the evidence and its supportable inferences.

[76] Third, the evidence emphasized by the Crown in support of planning and deliberation was contested, challenged by the defence on the bases of credibility and reliability, and importantly, allowed for the possibility of an inference that the killing was not planned and deliberate.

[77] For example, the judge himself noted during the trial that the Facebook message about “Human huntin” (relied upon by the Crown), could be interpreted as something that was “clearly meant in jest” (emphasis added). Mr. Haryett testified that the reason for driving along a back road in the middle of the night with Mr. Cormack was to go for a ride and smoke a joint (arguably inconsistent with a

plan to kill). Mr. Bernier said the appellant told him the group travelled to the remote area to shoot guns (again arguably inconsistent with a plan to kill), and there was evidence the area was used as a casual shooting range. Mr. Bernier gave different versions of how the appellant described the shooting, including a version that allowed for the possibility of an intentional but spontaneous shot occurring while the two men were drinking near one another and passing a bottle back and forth. Ms. Johnson testified that in late June 2017, she saw the appellant and Mr. Cormack playing with a "little machine gun". Mr. Cormack appeared happy and was laughing. This evidence could support a finding of lack of animus towards Mr. Cormack, contrary to the Crown's theory.

[78] The Crown had a perspective on the inferences the jury should draw from the evidence in support of planning and deliberation; however, there were also other interpretations that might be brought to bear. Other interpretations or evidentiary frailties that had the realistic capacity to raise a reasonable doubt on planning and deliberation should have been flagged for the jury. The jurors may have rejected the alternate interpretations and been satisfied beyond a reasonable doubt that the Crown's interpretation of the evidence was the right one, but they had to be made aware of the competing possibilities. In this sense, the case is similar to *Frisbee*, in which the appeal court held the trial judge's failure to draw the jury's attention to "aspects of the evidence" that could raise a reasonable doubt on planning and deliberation required a new trial:

> [119] There was evidence which was capable of supporting a finding of planning and deliberation. On the other hand, there were weaknesses in that aspect of the Crown case and there was much in the circumstances of the killing which could create a basis for doubting that it was planned and deliberate. Of these matters, virtually nothing was said in the charge to directly relate them to planning and deliberation as distinct from intent.
>
> …
>
> [128] … it was important that the charge place some emphasis on those aspects of the evidence which could create doubt on the issue of planning and deliberation, even if the jury was satisfied on intent. The absence of that instruction was a significant non-direction amounting to misdirection.
>
> [Emphasis added.]

[79] As the Crown has correctly pointed out, the judge did highlight some evidentiary frailties elsewhere in the charge and caution the jury in relation to evidence relevant to planning and deliberation.

[80] For example, he warned the jury against propensity reasoning in relation to the Facebook material and noted that the jury only had Facebook records up to June 26 (the murder occurred on the 27th). He cautioned the jury on finding guilt based on circumstantial evidence unless it was the only rational conclusion to draw. He explained that if a witness has provided inconsistent statements about an event, this is relevant to assessing that witness's credibility. As part of the latter discussion, he reminded the jury that Mr. Bernier, Ms. Johnson, and Mr. Haryett were all cross-examined on inconsistencies. He highlighted that Mr. Bernier described different versions of what the appellant said about the shooting. The judge pointed out that when Mr. Haryett first spoke with the police, he "lied when he told them he had never met Adam Cormack and did not know anything about the murder". It was not until later when his own jeopardy was at risk that he admitted driving the appellant, Mr. Cormack, and a third individual to the place where the murder occurred. Specific to Ms. Johnson, the judge reminded the jury of her admission that she did not tell the police everything when she spoke with them. In other words, she was not a forthright individual.

[81] The judge told the jury there "was no evidence that Mr. Cormack owed any money to [the appellant] or that he had stolen any property belonging to [the appellant]". He reminded the jurors of Ms. Johnson's evidence of the two men playing with a "little machine gun" and Mr. Cormack laughing.

[82] However, these cautions, evidentiary references, and the judge's identification of frailties, occurred during his instruction on proof of intent or as part of his general overview of the evidence. The judge did not direct the jury to assess this evidence, to weigh it, and importantly, to ask whether it raised a reasonable doubt specific to planning or deliberation, which requires a different assessment than does the element of intent. In my view, this was an error.

[83] In *Seymour* at paras. 7–9, the British Columbia Court of Appeal asked whether the parties' closing submissions filled the gap left by a failure to relate the evidence to planning and deliberation before finding reversible error. Asking this question is consistent with a functional and contextual approach to review of a jury charge. I have done the same and conclude that this is not a case in which the closing submissions cured the defect.

[84] The Crown correctly told the jury that to convict the appellant of first degree murder, it had to be sure the appellant intended to kill Mr. Cormack and that he did so in a "planned and deliberate manner". The Crown submitted that the evidence in support of intention, planning, and deliberation was "intertwined". In other words, some of the prosecution's evidence was relevant to and probative of all three elements. This was also correct.

[85] As noted earlier, Crown counsel then highlighted the following evidence specific to planning and deliberation: the Facebook messages involving the appellant from which the Crown said the jury could infer he travelled to Whitehorse with a gun for the purpose of delivering "consequences" to Mr. Cormack; the testimony of Alain Bernier, who said he saw the appellant with an AR-15 before the shooting and had a conversation with him about the need for "consequences" (Crown counsel said this latter evidence showed the "formulation of [a] plan" to kill); and the forensic evidence about how the shooting likely unfolded, with Mr. Cormack "basically [falling] where he stood". According to the Crown, the latter evidence was consistent with a planned, execution style killing.

[86] Based on this evidence, considered cumulatively, the Crown said the jury could conclude the appellant had a plan to kill Mr. Cormack when he walked down a trail with him and "deliberately carried out that plan by putting one bullet in his head". In its closing submissions, the Crown did not highlight evidence or evidentiary frailties that could raise a reasonable doubt on its theory of a planned and deliberate murder. Its presentation of the evidence was, understandably, relatively one-sided and focused on incriminatory inferences.

[87] In his closing submissions, defence counsel described the Crown's case as a "house of cards"—structurally weak and easily pulled apart. It consisted of nothing more than "theories, lies, suggestions, and rumours". For example, according to the defence, the Crown's suggestion that the appellant travelled to Whitehorse because Mr. Cormack had wrongfully taken and sold a gun was speculative. The evidence was more consistent with him travelling to Whitehorse for drug dealing.

[88] Throughout his closing submissions, defence counsel challenged the credibility and reliability of the Crown's evidence, including the witnesses who testified about things said by the appellant. However, defence counsel made no submissions with explicit reference to the elements of planning and deliberation. Instead, he focused on the overall probative value of the evidence, emphasizing the Crown's burden of proof and arguing the prosecution's evidence came nowhere close to meeting that standard.

[89] The judge's summary of the parties' theories also did not fill the gap. He laid out the Crown's suggested pathway to first degree murder and highlighted the evidence it relied upon to get there. He reiterated the defence position that the circumstantial evidence was "severely compromised by issues of both credibility and reliability". However, nowhere in this summary did the judge identify the evidence germane to an assessment of planning and deliberation, and importantly, provide guidance on how to assess that evidence in deciding these elements of the offence, as distinct from the element of intent.

[90] Having reviewed the final instructions as a whole and in the context of the record, I have concluded there is a reasonable potential the judge's failure to relate the evidence to planning and deliberation impacted the jury's characterization of the murder as first degree and amounts to reversible non-direction. The Crown has taken the position that if we find error, we should apply the *curative proviso* under s. 686(1)(b)(iii) of the *Criminal Code.* Because of the conclusion I have reached on the next ground of appeal, I would not do so.

**Answers to jury questions**

[91] A second category of error alleged on appeal arises from the judge's answers to questions posed by the jury.

[92] The jury posed two questions after the final instructions. These questions, set out earlier, suggested that the jurors did not fully grasp the meaning of planning and deliberation, and more importantly, they were having difficulty applying the concepts of planning and deliberation to the evidence. The jury asked the judge to provide examples of how planning and deliberation might work in practice. The appellant says the judge failed to answer the questions clearly, correctly, and comprehensively, and that this too constitutes reversible error.

***Standard of review***

[93] The standard of review governing this type of an error was recently affirmed in *R. v. Crossley*, 2025 BCCA 224:

> [28] To obtain a new trial based on an error in jury instructions, an appellant must persuade this Court that the instructions did not properly equip the jurors to decide the case according to the law and the evidence. In assessing whether that burden has been met, we are obliged to consider the impugned parts of the instructions in the context of the trial as a whole. Moreover, jury instructions are not measured against a standard of perfection. Consequently, one ambiguous or problematic statement will not warrant appellate interference if the charge as a whole properly equipped the jury to decide the case: *Abdullahi* at paras. 35–37, 41–42; *R. v. P.A.*, 2024 BCCA 93 at paras. 20–23.
>
> …
>
> [30] … It is well-established that a response to a question from the jury must be answered "clearly, correctly and comprehensively", even where the original instruction was free of error: *R. v. S. (W.D.)*, [1994] 3 S.C.R. 521 at 530, 1994 CanLII 76. However, once again, in assessing the impact of an impugned answer, what was said by the judge must be considered in the context of the trial as a whole.
>
> [Emphasis added.]

[94] The questions and the judge's responses are set out at paras. 49–50 above. The jury's questions were answered after defence counsel received an opportunity for input. He was content with the proposed wording, as well as the examples.

[95] Taking a different position on appeal, the appellant now says the answers to both questions were highly problematic. He raises several concerns.

[96] First, he says the jury's questions were confusing and the judge should have sought clarification. Second, in responding to the questions, the judge should have highlighted the material evidence (something not done in the final instructions), emphasizing those aspects of the record that could raise a reasonable doubt on planning and deliberation. In particular, the appellant says the judge should have highlighted Mr. Bernier's testimony that the appellant said he had gone out to the bush to shoot guns with Mr. Cormack and at some point, "just looked over at him and fucking shot him". From the appellant's perspective, this testimony supported a finding (or at least raised a reasonable doubt) that the shooting occurred suddenly, was impulsive, and was not planned and deliberate.

[97] The appellant's third concern is focused on the correctness of the answers.

[98] He says the answers were "unclear, incorrect and misleading". The response to the question about "weighing the consequences" would have left the jury with the erroneous impression that to prove "planning", it was enough for the Crown to show that the appellant was generally aware his actions might attract criminal consequences. The appellant says the response to the question about "deliberate" failed to make clear the need for proof that the appellant took time to weigh the advantages and disadvantages of his actions. The example of asking someone to exit the bar and then "immediately" punching them once outside did not include any reference to thinking about the advantages and disadvantages of the proposed action (punching) and deciding to follow through before the punch was thrown. The appellant says those details were necessary. Otherwise, the scenario posited by the judge risked the jury equating an impulsive, spur of the moment action once outside the bar with a deliberated act. In the context of this case, it would mean the jury could find a "deliberated" shooting:

> … even if [it] found that the appellant's intention, when walking up the road, was to teach [Mr. Cormack] a lesson of some sort, and the decision to shoot

> or kill [Mr. Cormack] was otherwise made "immediately" once they got to where they were going.
>
> [Appellant's Factum at para. 87, emphasis added.]

[99] In responding to this ground of appeal, the Crown accepts in its factum that the "rationale for requiring proof of planning and deliberation for first degree murder is to exclude murders committed on the spur of the moment" (emphasis added, footnote omitted). It says the judge's answers to the jury's questions kept this distinction clear and in the context of the entire record, the jury could not have been misled.

***Analysis***

[100] I consider the way the judge answered the jury's questions to be problematic and, importantly, to have exacerbated the prejudice that flowed from his failure to relate the evidence to planning and deliberation in his final instructions. The combined effect rules out the availability of the *curative proviso* as it cannot reasonably be described as harmless or negligible.

[101] In my view, the judge's response to the jury's questions was prejudicial for at least two reasons. First, I agree with the appellant that the example used to support the meaning of "deliberate" allowed for the possibility of an "immediate" (and thereby impulsive) punch to be equated with a deliberated act. Second, and more critically in the context of this case, the jury's questions revealed that it was having trouble understanding and applying the legal concepts of planning and deliberation to the evidence. That struggle may well have arisen from the fact that the final instructions did not assist the jury in understanding what evidence was germane to planning and deliberation and what it had to look for in deciding whether the Crown met its burden of proof on those elements of the offence, as opposed to the element of intent. Rather than use the jurors' questions as an opportunity to bring them back to the evidence and explain how they should assess proof of planning and deliberation in that context, the judge directed them to hypothetical factual scenarios.

[102] Specific to the first of these issues, the Crown had to prove beyond a reasonable doubt that Mr. Cormack's killing was a deliberated act, not steps taken before then. In the example of deliberation provided to the jury, the judge did not make it clear that inflicting physical force on the victim in the parking lot was the action that was considered, thought out, and weighed by the perpetrator while still in the bar, as opposed to getting the victim outside for the purpose of confrontation. For ease of reference, I will repeat the example here:

> Suppose someone insults you in a bar and you react immediately, impulsively by punching him. Compare that to a situation where someone insults you in a bar and your response is to challenge him to come outside the park – into the parking lot where then you immediately punch him.
>
> The first example would not be a deliberate act. It was impulsive. The second example was a deliberate act. You have taken some time to consider your action. It was not impulsive.
>
> [Emphasis added.]

[103] The appellant says this example did not rule out the reasonable possibility that the punch in the parking lot was delivered suddenly and without forethought. Had the judge said: "your response is to challenge him to meet you in the parking lot so you can punch him out once you are both there, and that's what happens", the same concern might not arise. The example would have included advance consideration of an unlawful act. Instead, the example chosen by the judge left the door open to the concept of deliberation attaching solely to the "response [of challenging the victim] to come outside … into the parking lot", and the unlawful act of punching occurring impulsively and on the spur of the moment once there.

[104] This is, of course, precisely the type of scenario for which the appellant says there was an air of reality in this case. He says that on the evidence adduced by the Crown, a properly instructed jury could have had a reasonable doubt on whether the killing of Mr. Cormack was impulsive. Even if the jury accepted that the appellant planned on delivering "consequences" to Mr. Cormack for stealing and selling a gun, there was evidence from which the jury could have a reasonable doubt about whether the decision to shoot Mr. Cormack in the head after walking down the trail arose suddenly, was not thought out in advance, and was an action for which the

appellant had not weighed the advantages and disadvantages. Some witnesses testified that the group drove to the remote area, used as an informal shooting range, to smoke and shoot guns. One of the versions of the killing that Mr. Bernier said was provided by the appellant allowed for an impulsive shooting. Again, the jury may not have viewed the evidence this way given everything else before it, but that was a determination for the jury to make with proper instruction. Respectfully, the example of deliberation provided by the judge did not accomplish that goal.

[105] More importantly, in my view, rather than have the jury work its way through planning and deliberation with reference to two hypothetical factual scenarios that were unconnected to the case, the judge should have directed the jury's attention to the evidence the Crown relied upon to prove planning and deliberation and relate that evidence to the legal tests the jury was bound to apply. This is what the jury required to properly decide the issue. It had to understand what evidence was germane to these elements of the offence, how that evidence was said to support planning and deliberation, and what evidentiary frailties or competing interpretations the jury should consider in deciding whether and to what extent it did.

[106] The problematic nature of the example provided by the judge and the choice to direct the jury's attention to hypotheticals rather than the evidence only served to exacerbate the prejudice that already existed from the failure to relate the evidence to planning and deliberation in the final instructions. I appreciate that in answering the questions the way he did, the judge was attempting to be responsive to the jury's request for examples. However, the questions were posed in respect of a critical issue, and unfortunately, the jury was not adequately equipped with the tools it required to fairly decide this aspect of the case.

***In the result, the curative proviso is not available***

[107] As noted, the Crown asks that we treat any errors found in the case as harmless or negligible and apply the *curative proviso.* As explained in *R. v. Samaniego*, 2022 SCC 9:

> [65] The curative proviso set out in s. 686(1)(b)(iii) of the *Criminal Code* allows a court of appeal to dismiss an appeal from conviction where "no substantial wrong or miscarriage of justice has occurred". The Crown may rely on the curative proviso where the error is harmless or trivial or where the evidence is so overwhelming that a conviction was inevitable (*R. v. Sekhon*, 2014 SCC 15, [2014] 1 S.C.R. 272, at para. 53) …
>
> [Emphasis added.]

An error is harmless or trivial when there is no reasonable possibility the verdict would have been different had it not been made: *Samaniego* at para. 65, citing *R. v. R.V.*, 2019 SCC 41 at para. 85; *R. v. Khan*, 2001 SCC 86 at para. 28.

[108] I cannot say with confidence this test has been met. As emphasized, planning and deliberation is what distinguished first degree murder from second degree murder. It was a live issue at trial. In deciding whether the Crown proved a planned and deliberate murder, it was critical the jury be adequately equipped to assess and weigh the evidence germane to those elements of the charged offence. That did not occur, even after the jury posed questions that revealed it was struggling with its understanding and application of the concepts. The evidence relied upon by the Crown in support of planning and deliberation was capable of competing inferences. That evidence, its frailties, and the potential for competing interpretations, had to be identified for the jury so that it could assess the evidence and decide whether planning and deliberation had been proved beyond a reasonable doubt. The errors found here impacted an integral part of the adjudicative process.

[109] In responding to the appeal, the Crown has stressed the fact that defence counsel did not take issue with the judge's instructions on planning and deliberation or ask that the judge relate the evidence to those elements. He was also content with the answers provided to the jury's questions, including the examples. The Crown says this fact speaks volumes about the prejudice that flowed from the judge's errors—real or apparent. A failure to object is relevant to the assessment of a charge's overall accuracy and the seriousness of alleged non-direction or misdirection: *Jacquard* at paras. 35–38; *Daley* at para. 58.

[110] I agree with the Crown that many of the submissions made on appeal are substantively different from the ones made by the defence at trial. There has been a change in position, including on the adequacy of the judge's answers. However, the responsibility for adequate instructions lies with the trial judge, not the lawyers: *R. v. Khill*, 2021 SCC 37 at para. 144. Consequently, a failure to object, although informative, is not determinative. As noted in *R. v. Barton*, 2019 SCC 33 at para. 48, a failure to object "does not waive the public interest in a verdict untainted by materially deficient jury instructions". In my view, given the nature of the errors in this case and their centrality, the failure to object carries minimal significance. Consequently, I am satisfied the *curative proviso* is not available.

[111] Given this conclusion, it is not necessary to assess the merits of the other errors of law alleged specific to the final instructions.

**Improperly admitted evidence**

[112] The same can be said about the third category of errors alleged by the appellant, which challenge the judge's decision to admit evidence of discreditable conduct; the hearsay statement from Cyril Golar; and a "plethora" of other evidence that the appellant says was placed before the jury without a *voir dire* to assess its admissibility.

[113] Given the conclusions reached above, it is not necessary to assess the merits of these claims. An order for a new trial has been shown to be warranted on another basis.

**Reasonable apprehension of bias**

[114] Finally, there is the allegation of juror bias. Again, it is not strictly necessary to address this ground of appeal. However, I consider it appropriate to do so for the purpose of reiterating that if this type of an allegation is raised on appeal, it cannot be grounded in bald assertions. A supportive foundation is required, as well as substantive analysis with reference to the applicable legal principles.

[115] After jury selection, it came to light that one of the jurors involved in the case worked in a government office of approximately 24 people with the spouse of the main police investigator. According to the record, the investigator had never met or spoken with this juror.

[116] Defence counsel informed the judge of the situation out of an "abundance of caution". He was asked if he was raising it as an "issue" in the trial (in other words, whether he wished to advance an argument that the relationship impaired trial fairness). Defence counsel responded: "[I] don't know that I'm raising an issue. I'm raising the fact that I know it". He said he wanted to alert the judge to the situation, place the relevant information on the record, and then leave it to the judge to decide what should happen next. The judge told defence counsel that from his perspective, a work connection between a juror and the spouse of one of the investigators was a "long way from any potential bias". Defence counsel agreed and that was the end of it. There does not appear to have been any further inquiry. The juror remained on the jury, eventually becoming the foreperson.

[117] Although the appellant did not pursue a bias claim at trial, he does so now on appeal. However, his factum contains no substantive argument in support of appellate intervention on that basis. He has not applied to adduce fresh evidence relevant to the point. He has not alleged ineffective assistance by his trial lawyer for not pursuing the issue. Instead, he simply asserts that this was an "uncomfortable state of affairs, and the appearance of bias is readily apparent".

[118] The general principles that govern a reasonable apprehension of bias are well-established and canvassed at length in *R. v. Mehl*, 2021 BCCA 264 at paras. 268–281. Maintaining public confidence in the administration of justice requires jury impartiality—both real and apparent: at para. 268, citing *R. v. Dowholis*, 2016 ONCA 801 at para. 21. However, establishing a reasonable apprehension of bias attracts a "stringent test": at para. 270.

[119] The party that raises the issue bears the burden of showing "a real likelihood or probability of bias": at para. 271, citing *Yukon Francophone School Board,*

*Education Area #23 v. Yukon (Attorney General)*, 2015 SCC 25 at paras. 20–21. Whether that burden has been met is contextually assessed against the "background of the whole of the proceeding": at para. 276. In the jury context, factors for consideration will include:

> [274] … the oath the juror took to "well and truly try" the case "according to the evidence"; the instructions the juror received, including to decide the case impartially, without sympathy for or prejudice against anyone; and the strong presumption that jurors adhere to their oaths and follow instructions given to them by the presiding judge, rebuttable only upon cogent evidence to the contrary: *R. v. Teskey*, 2007 SCC 25 at para. 21; *R. v. Spence*, 2005 SCC 71 at paras. 21–23; *R. v. Corbett*, 1998 CanLII 80 (SCC), [1988] 1 S.C.R. 670 at 692–693; *R. v. Durant*, 2019 ONCA 74 at paras. 146–151; *R. v. Wolfe,* 2005 BCCA 307 at para. 32, leave ref'd [2005] S.C.C.A. No. 342.
>
> [Emphasis added.]

[120] In this case, the judge properly told the jurors they must base their decision on the evidence and "only on that evidence". They were also told they must "make [their] decision on a rational and fair consideration of all the evidence and not on passion or sympathy or prejudice against the Accused". They were reminded of their duty to "assess the evidence impartially".

[121] The "strong presumption that jurors adhere to their oaths and follow instructions" (*Mehl* at para. 274) means that a claim of reasonable apprehension of bias "must be substantial and supported by cogent evidence": *Mehl* at para. 279, emphasis added. The appellant laid no such foundation at trial; he has alleged juror bias for the first time on appeal; and he has made no effort to support that claim through "cogent evidence" in the form of a fresh evidence application or otherwise.

[122] I agree with the Crown that this ground of appeal is without merit.

## Disposition

[123] The shooting of Mr. Cormack occurred in June 2017, more than eight years ago. The appellant was tried and convicted in 2019. His notice of appeal from conviction was filed within the prescribed period. Unfortunately, it has taken considerable time for the appeal to be advanced and heard. At one point, it was dismissed as abandoned: 2023 YKCA 3. It was then reinstated in the interests

of justice: 2024 YKCA 16. Reinstatement was granted because the delay was attributable, at least in part, to long standing mental health issues. There were viable grounds of appeal, and importantly, the Crown did not oppose reinstatement.

[124] I recognize that ordering a new trial more than eight years after the fact is far from ideal and, understandably, may adversely impact the lives of many, including the family of the deceased and the individuals who participated in the trial. However, the appellant was constitutionally entitled to a fair trial and I have found reversible error that cannot be salvaged by the *curative proviso.* The appellant's criminal culpability for the tragic death of Mr. Cormack must be adjudicated fairly.

[125] Accordingly, I would allow the appeal, set aside the conviction for first degree murder, and order a new trial.

"The Honourable Madam Justice DeWitt-Van Oosten"

I AGREE:

"The Honourable Mr. Justice Grauer"

I AGREE:

"The Honourable Justice Donegan"