COURT OF APPEAL FOR THE YUKON TERRITORY

Citation: ***R. v. Daunt***,
2007YKCA14

Date: 20071120
Docket: YU541

Between:

Regina

Respondent

George Kieran Daunt

Appellant

Before: The Honourable Chief Justice Finch
The Honourable Madam Justice Huddart
The Honourable Mr. Justice Low

R.S. Fowler — Counsel for the Appellant

M.W. Cozens — Counsel for the Respondent

Place and Date of Hearing: Whitehorse, Yukon
2 June 2007

Place and Date of Judgment: Vancouver, British Columbia
20 November 2007

Written Reasons by:
The Honourable Mr. Justice Low

Concurred in by:
The Honourable Chief Justice Finch
The Honourable Madam Justice Huddart

Reasons for Judgment of the Honourable Mr. Justice Low:

[1] Near Dawson City, Yukon Territory on 28 August 2003 the appellant shot and killed Robert Truswell. He claimed that he acted in self-defence and that, in any event, he lacked the necessary intent to commit murder. A jury in Whitehorse convicted him of second degree murder.

[2] The trial judge left the defence of provocation with the jury but that possible route to a manslaughter verdict is not at issue on appeal.

[3] The appellant seeks a new trial. He raises three grounds of appeal: (1) that there was impropriety and unfairness in the closing address of Crown counsel to the jury which prejudiced his right to make full answer and defence; (2) that the trial judge erred when instructing the jury on the mental state required for murder; and (3) the post-trial discovery of fresh evidence.

Crown counsel's jury address

[4] To properly discuss the first issue it is necessary to review the following: the evidence as to the circumstances of the shooting; the evidence about the threat presented by Mr. Truswell generally to the community in which he lived and to the appellant in particular; the submissions made by Crown counsel in his closing address to the jury; and the response of the trial judge to those submissions.

[5] The appellant and Truswell lived a short distance from each other in a rural mining area. Between their places of residence was a mining claim named Gold Hill. Both men arrived at the Gold Hill claim during daylight hours on 28 August 2003,

each by motor vehicle. The appellant had a small trailer on the property in which he stored mining equipment. Each man had a right to be on the property. Neither was a trespasser.

[6] There was no eyewitness to the shooting. What transpired between the two men could be determined only from the evidence of the appellant, to the extent it was not disbelieved by the trier of fact, and from forensic evidence.

[7] The appellant testified that he went to the claim site around 4:00 p.m. to get some pry bars. He parked in front of his trailer and unloaded items from his truck. He went down a slope to his sluice run to look for the pry bars and was there when Truswell drove in. Photographs show the site to be a large, open piece of ground with a gravel surface.

[8] The appellant testified that Truswell stopped his Blazer beside a fuel tank. The Blazer was up the slope from the sluice area, and Truswell looked down at the appellant from a height of about eight feet. The appellant said that he waved the other man away and said "Go. Go away. This is trouble brewing." For reasons that I will develop presently, he said that he was afraid of Truswell.

[9] There is no dispute as to the paths of the vehicles in and out of the area. It is clear from tire impressions left at the scene that Truswell started driving west toward the appellant's sluice box located about 150 feet away from the fuel tank, near the appellant's truck and tool trailer. The appellant testified that he moved to his truck intending to leave. The appellant's truck was parked perpendicular to his trailer facing north with the engine off. Truswell got to the vicinity of the sluice box in the

Blazer before the appellant got to his truck. The appellant went to the passenger's door of his truck (which he had left open) to be in a position to reach his rifle about five feet away. He was positioned between the truck and the trailer. There was about eight to ten feet of space between the appellant and the trailer.

[10] The appellant said that Truswell's face was taut and he appeared to be extremely angry. The driver's side of the Blazer was parked close to the open tailgate of the appellant's truck and faced toward the back left corner of the trailer. Truswell was sitting in the driver's position. All the appellant could see was Truswell's shoulders. He could not see his arms. The windows of the Blazer were rolled down. The appellant was not able to provide a useful estimate as to how far the vehicles were apart.

[11] The appellant told the jury that Truswell accused him and Jerry Bryde of stealing Truswell's father's will from Truswell's house and of always being "against" him. The appellant's evidence continued:

> Q How long was he making accusations towards you?
>
> A I'd say a couple of minutes.
>
> Q Did he accuse you of doing anything else?
>
> A Oh, yeah, he went to – he started – he went "You've always robbed from me." "You've taken peanut butter." "You've taken my food." "You've taken my tools." "You've taken my jewellery equipment." "You've taken, for some reason, lay flat hoses", a big deal with him and he kept on.
>
> Q What about Mr. Truswell, whereabouts in his vehicle was he?
>
> A He was sitting in the driver's side. All I could see was his shoulder. He was staring at me like that. He was firm, but his arms weren't moving. I thought he had a gun in his arms.

Q What did you think he was going to do?

A I thought he was going to shoot me right there and then.

Q What were you thinking of doing yourself?

A I couldn't do anything at that moment. I was – Fear starts consuming you, it starts overwhelming you, it starts – you just can't do a thing. You start shaking.

Q Is that what was happening to you?

A Well, yeah, I was just being consumed, consumed.

Q What was going through your mind when you felt consumed?

A This is it. I'm a dead man. My life is over. This is how it ends.

Q Did Mr. Truswell's anger let up at any point?

A No, he actually seemed to feed off my fear and he actually got angrier. He got more intense and then the accusations got more serious, "You're a gold thief, you always have been." "You've stolen everything off your parents." "You're a gold thief." "You stole off of Topaz." "You're not going to steal gold here any more, and by the way, this plant isn't yours any more." That was pretty serious.

Q When you say it's "pretty serious"; what do you mean?

A That means that I figured, okay, at that point, he's going to kill me now.

Q What did you do?

A I felt I had to get out of there. I felt I had the chance. I grabbed my gun. I said, "Robert, things don't work that way. I would like you to leave now" and I fired a warning shot at him.

Q Did you aim the gun?

A No, I just pointed it.

Q In what direction?

A Towards his vehicle.

Q Do you remember what happened next?

A The next thing I remember is there's a vehicle coming at me, trying to run me over.

Q Where were you standing?

A I'm standing between the trailer and my truck again.

Q How did you feel when you saw this truck driving at you?

A I thought I'd won a little reprieve and then all of a sudden now I'm going to get run over.

Q What did you do next?

A I fired a couple more shots at him and watched him go down the hill.

Q And you say you watched him go down the hill, which hill are you referring to?

A The steep hill going down [past] my shack.

Q Now as best as you're able, tell the members of the jury how quickly those events involving the shots and Mr. Truswell driving at you occurred?

A Three seconds.

[12] The appellant's counsel asked him why he didn't get into his truck and he replied that it wasn't running and "If I turn my back on him and he has a gun, I'm dead."

[13] Truswell did not have a gun in his vehicle.

[14] R.C.M.P. Constable James Giczi, an expert qualified to identify footwear and tire impressions, plotted the tire tread marks left at the scene on a diagram to demonstrate the movements of the two vehicles over the course of events. The appellant testified that he fired the first shot in the direction of Truswell's vehicle while it was stationary. Afterwards, Truswell proceeded to back up. The tire marks

show that Truswell drove the Blazer in reverse in a southwest direction and then accelerated forward, driving between the appellant's truck and the tool trailer. According to the appellant, the Blazer went right past him.

[15] The Blazer turned almost 180 degrees across an open area of land to an exit road. After negotiating an elbow curve in the road, the vehicle left the road and came to rest against a gravel mound. The appellant said he saw what he thought was a plume of steam erupting where the vehicle had stopped.

[16] Police investigators found three spent 7 mm Mauser FC brass cartridges at the scene. Forensic tests established that all three cartridges had been ejected from the appellant's rifle. The diagram of the tire impressions serves to determine where the vehicles had been in relation to the locations of the shell casings. One spent casing was found near the rear passenger side tire of the appellant's truck in the position at which the appellant had parked it. Another casing was found a short distance away. It was lying beside tread marks made by the tires on the driver's side of Truswell's vehicle. A third spent shell casing was found somewhat further away, by tread marks of the Blazer at the point to which it had backed up.

[17] The passenger side vent window of Mr. Truswell's vehicle was perforated by a projectile that entered from the driver's side and travelled toward the passenger side. A trail of glass fragments was found in a triangular fanning pattern beside marks made by the passenger side tires of Truswell's vehicle. These tire marks were located some distance across the open area on the route Truswell drove the Blazer after making the near 180 degree turn and heading toward the exit road.

Based upon a forensic analysis, there was an admission of fact that the glass fragments found beside the tire marks in the open area matched the glass from the vent windows. The evidence of the locations of the shell casings and the location of the vent window glass support Crown's argument that the appellant fired the third shot as the Blazer was being driven away from the scene and that to do so he must have moved some distance from behind his own truck.

[18] The evidence supports the Crown's challenge to the appellant's evidence that he fired all three shots in quick succession while remaining in one spot beside his truck.

[19] An autopsy revealed that two bullets struck Truswell's body. One bullet went through the left elbow and entered the left side of the chest. After passing through the left lung it came to rest in the back of the neck. The second bullet entered and fractured the left shoulder. Without penetrating the body cavity it exited through the back of the shoulder. The pathologist testified that death was caused by loss of blood and would have occurred within ten minutes. It was not possible to determine which of the two shots was fired first.

[20] After the shooting, the appellant went to the residence of his friends Chuck and Camelia Sigurdson ten to twelve miles from Gold Hill. He told Camelia Sigurdson that he thought he had shot Robert Truswell. She telephoned the police. Later the police found the appellant's rifle at the Sigurdson property.

[21] A civilian member of the R.C.M.P., Kenneth McConaghy, testified as an expert in tool mark identification and firearm examination. He attended the autopsy

and he test fired the appellant's rifle. His purpose was to attempt to determine the distance from which the two shots that struck Truswell were fired. Based upon a comparison between residue on the skin of the deceased man where the bullet penetrated his elbow and the results of test firing, this witness gave the opinion that when that shot was fired the muzzle of the rifle was only two to four feet from the point of entry of the bullet. He was unable to determine the same distance with respect to the shot through the left shoulder. It was in excess of two feet and could have been fired from some distance away.

[22] The opinions of this witness were not challenged in cross examination and there was no other evidence on the subject of the distance between the muzzle of the rifle and the entry wounds.

[23] There was a large body of evidence given by several witnesses that Mr. Truswell had a history of violent behaviour toward other members of the community. Most notably, in 1982, he was convicted in the Yukon of assault causing bodily harm for hitting another man on the head with a piece of lumber. This incident earned Truswell the nickname "Two-by-Four Bob." Camelia Sigurdson testified that in 1986, he tried to run her car off the road. Her son, Andy Sigurdaon, gave evidence that in 1997 or 1998 Truswell shot at him when Sigurdson was riding his motorcycle. James Archibald testified that Truswell purposefully damaged his trailer by running into it with a caterpillar. In addition, R.C.M.P. Corporal Gaudet gave evidence that he had obtained Truswell's New Zealand criminal record through Interpol, which showed that Truswell had been convicted in 2001 of uttering threats against his sisters who were resident there. Witnesses at trial described several other incidents

of Truswell's harassing behaviour and threats of violence, substantiating his reputation in the community as a volatile individual.

[24] Over the many years they were acquainted, the relationship between the appellant and Truswell ranged from companionable to antagonistic. The two men met in 1978 while working as miners and got to know each other very well. According to the appellant, they often helped each other with their respective mining operations. He described Truswell as having a split personality. There was a decent, helpful side, but also an angry, unpredictable side. When Truswell was angry the appellant said he would avoid him or would change the topic of conversation. On some occasions, when Truswell's anger was directed towards another person, the appellant was able to calm him down. The appellant testified that he was well aware of Truswell's past violent behaviour.

[25] Relations between the appellant and Mr. Truswell deteriorated. The appellant testified that in June 2003, Truswell spread rumours about certain mining contracts the appellant held on Gold Hill with a company called Topaz Consolidated. When the appellant confronted him, Truswell called him a thief and accused him of stealing personal items from him, which made the appellant angry. A heated argument ensued between the two men, ending with the appellant's departure.

[26] Wayne Hawkes testified that about one week before the offence date, Truswell threatened to shoot the appellant because the appellant was trying to run Truswell off his claim. Hawkes saw the appellant later that day and relayed Truswell's threat to shoot him, saying he'd better watch his back.

[27] James Archibald testified that about the same time, on 22 August 2003, the appellant approached him in a bar in Dawson City and asked Archibald to kill Truswell for him. When Archibald told him "don't talk foolish," the appellant said "then I will have to do it myself. I'll have to kill Robert myself."

[28] As will be seen, the prosecution did not make too much of Archibald's evidence. It did not contend that the appellant had formed an intent to shoot or to kill Truswell before the encounter on 28 August 2003, or that he took his rifle with him on that day so that he could shoot Truswell if he did encounter him. But Archibald's evidence as to what the appellant said to him did go to the Crown theory that the appellant bore animosity toward Truswell that was the underlying cause of the fatal shooting.

[29] Andy Sigurdson testified that on or about 26 August 2003, he and the appellant visited the Heather Claim, a mile up Big Skookum Gulch, which the two men intended to mine. The appellant brought his hunting rifle. On the way they passed Truswell on the road. The appellant dipped his head down inside the vehicle so Truswell could not see him. He testified that he did this because Truswell had threatened to kill him and he was scared. Andy Sigurdson testified that the appellant told him he had taken the hunting rifle for protection, which was necessary because Truswell had threatened to kill him.

[30] The appellant and Truswell also came into contact over the years with respect to some business dealings involving the appellant's father, Ivan Daunt, who is a medical doctor in Saskatchewan. He also maintains interests in some placer claims

up Skookum Gulch. He purchased the claims after a visit to the Klondike in 1973 and spends each summer working on them. The appellant moved to the Yukon in the mid-1970s and began mining in the same area as his father under leases from a man named Art Fry. Father and son worked together from time to time over the years. Ivan Daunt bought machinery and shared it with the appellant, who would keep up repairs. By 2002-2003, they shared a crawler caterpillar, a JCB backhoe wheel loader and a 966B front-end loader. They also shared water rights courtesy of a Y-shaped pipeline that pumped water from Bonanza Creek up to a holding pond built by the appellant at the bottom of Skookum, and then diverted the water to their respective operations.

[31] Ivan Daunt testified that around 1999 he acquired ownership of the Art Fry leases under which the appellant had been working for the past 20 years. He said that he made the acquisition for strategic reasons. The land in question sat between his existing claims and he wanted to gain control of the entire property. He said he did not inform the appellant in advance of his plan to purchase the leases but his aim was not to displace him and he allowed him to continue working the claims. The appellant said that the purchase caused serious friction between them due to Ivan Daunt's new position of power over him.

[32] The appellant testified that Truswell informed him, in the fall of 2002, that he told Ivan Daunt how to evict the appellant from his property. Around the same time, the appellant and Ivan Daunt had a serious rift and relations between them were poor. Father and son agreed to stay away from each other at the claims. Therefore, upon his return to the Yukon in the spring of 2003, Ivan Daunt and the appellant did

not work together at all. Instead, when he needed help in mid-July reconstructing his pipelines, Ivan Daunt hired Truswell. He testified that they worked together for one month.

[33] Despite their agreement, the appellant visited Ivan Daunt's claim a few times that summer when Truswell was working there. Ivan Daunt said that during one visit the appellant announced that he was missing items from his sluice box. Truswell replied that he was also missing personal items, including his father's medals, implying that the appellant might have taken them. The appellant stated that he was aware Truswell had threatened to kill him. Ivan Daunt said that Truswell denied making the threat. During another visit, Ivan Daunt said that the appellant told him he did not want Truswell on his claims.

[34] Ivan Daunt testified that he had no business arrangement with Truswell apart from the purchase of some equipment from Truswell and the assistance Truswell lent him on a casual employment basis.

[35] Ivan Daunt left the Yukon around 20 August 2003. The appellant testified that he heard rumours a few days later that Ivan Daunt had left Truswell the 966B loader originally promised to him and he was suspicious of their business arrangements. A few days later he learned that the rumours were false.

[36] Defence counsel addressed the jury first. He emphasized Truswell's history of volatile behaviour. He argued that the appellant had every reason to fear him and to reasonably believe that Truswell was going to shoot him. He could not reach his vehicle to escape and was trapped. He acted instinctively and in the heat of the

moment generated by fear, and could not be faulted for not being able to accurately account for where he was when he fired the three shots. Counsel argued that the appellant's business dispute with Truswell was only an annoyance, not a motive to kill. He argued that the appellant was under threat from Truswell before the day of the shooting. In addition, he submitted that the appellant reasonably saw Truswell's demeanour and words to be threatening just before the shooting. He had good reason to believe in all the circumstances that Truswell was going to kill him by shooting him or by running him down with his vehicle. He did all he could do to preserve his own life.

[37] The focus of the Crown's closing submissions was that the shooting could not have occurred as claimed by the appellant in his testimony. The appellant's story that he fired his rifle all three times from beside the passenger side of his truck did not accord with the several locations of the ejected shell casings on the ground and the location of broken glass from the Blazer's vent window. The paths of the two bullets into and through the body of the deceased man as he sat in his vehicle did not jibe with the claim of the appellant that he fired only to warn Truswell off. The Crown contended, by inference at least, that the appellant fired the fatal shot from point-blank range and that he must have had one or the other of the two possible intents in murder. Finally, the Crown asserted that the appellant shot Truswell with murderous intent out of anger over their business dispute, not out of fear of the man he had known for many years and whose dark moods he had been able to deal with in the past.

[38] It is to be inferred from the jury verdict that the jurors concluded that the appellant shot Truswell out of anger, or that the force he used in defending himself was excessive or unnecessary, and that he had one or the other of the two possible intents in murder. There was considerable support in the evidence as a whole for the conclusion that there was no need for the appellant to fire his rifle and that when he did so, with respect to the fatal shot at least, he had the necessary intent.

[39] The appellant contends that, in his closing address to the jury, Crown counsel misstated the evidence and invited the jury to draw inferences unsupported by the evidence. It is said that the matters complained of related to the critical issue of the appellant's state of mind both when he fired the fatal shot and during the time leading up to that event. The appellant says that as a consequence, he was denied a fair trial and that the only appropriate remedy is a new trial.

[40] The first passage from Crown counsel's address that the appellant points to reads:

> . . . We have the suspicion that it was probably him that shot at Andy Sigurdson. And when you look at that, you've got a very young fellow who has a tire blow up and thinks he was shot at, but he's not even too sure, if you look at his evidence carefully, who did the shooting. Maybe it was Robert Truswell, maybe it was somebody else, and maybe two things happened together; the sound of the shot and somebody's tire blowing up on the motorcycle. We don't know what happened. It isn't the kind of evidence that can tell us very much about Robert Truswell other than the reputation he got out of it.

[41] At worst this was mild scepticism by counsel that was not consistent with the evidence the Crown led from Andy Sigurdson. It was set right by the trial judge who, after hearing submissions from counsel, said this:

> . . . One suggestion made by Mr. McWhinnie was that there was a suspicion that Andrew Sigurdson was shot at on his motorcycle by Robert Truswell and the clarification is that this should be corrected to say that there is direct evidence from Andrew Sigurdson that Robert Truswell shot at him while he was on his motorcycle.

[42] The appellant concedes that if this was the only complaint to be made with respect to the address of Crown counsel, this ground of appeal would not be arguable.

[43] The appellant expresses concern about the following reference to the evidence of Wayne Hawkes:

> Take a look at the sequence of events. Wayne Hawkes says that about a week, perhaps 10 days, prior to the actual shooting, he hears this threat supposedly – or this threat from Robert Truswell directed against Kieran Daunt and he takes the time to tell him about it.

[44] The contention here is that because there was no dispute about the fact of the threat toward the appellant by Truswell when he was talking to Hawkes, the use of the word "supposedly" in this passage improperly undermined the defence. I do not agree with that submission. It is clear from the passage, and I am sure the jurors saw it to be so, that counsel misspoke and immediately corrected himself. The point counsel was making was that on more than one occasion the conduct of the appellant in his comings and goings was inconsistent with his assertion that he was in great fear of Truswell at the time of the shooting. In my opinion, this was proper advocacy having regard to the whole of the evidence.

[45] The next passage to which the appellant objects makes the point to which I have just referred. It reads:

> We didn't hear any evidence from Kieran Daunt, or very little evidence, about his state of mind during those other events when he was up doing the stripping or when he was up there doing the GPS. A man who is in mortal fear of his life, from what was said a week before, goes to a place which he acknowledges was probably 250 yards from his nemesis' dwelling house. Do you accept that? I would suggest to you he was completely implausible. He also tells you he's frightened unto death, as it were; frightened he's about to die.
>
> Do you remember his description about how he got his truck back? In Andy Sigurdson's car he said he didn't want Truswell to know he was up there, so when they see him standing on the road near his own driveway, that is, near Daunt's driveway, he scrunches down in the car so that he can't be seen.
>
> The next day he gets on a bicycle and rides 10 miles down that same road past, it would appear, the place where he had seen Truswell the day before, makes no mention to you about having the gun with him, completely exposed, completely unprotected and never asked anybody for help. A man who's afraid that he's about to be killed or that he's at risk of being killed by his neighbour, Mr. Truswell; does that strike you as plausible? These things don't fit together.
>
> They do fit together if you accept, as appears to be the evidence, that Mr. Truswell's father – or Mr. Truswell and Kieran's father are forming a business relationship, that Kieran's at risk of losing everything he's worked for and that that has become know to him. And then, as my friend raised the question quite fairly, the things that happened with Andy Sigurdson may have a more sinister turn. Was he putting it all on? Letting Andy think that he was paranoid, when in fact he wasn't? He had been up there a couple of times before, it appears, and after.

[46] The Crown did not put to the appellant in cross examination that he was putting on a show of fear for the benefit of Andy Sigurdson. It was excessive rhetoric to say that the appellant was perhaps letting Sigurdson believe he was paranoid (fearful) when he was not. But, the essential point being made was that the appellant's conduct at other times was inconsistent with him being in a state of fear of Truswell during the days immediately prior to the day of the shooting. This is clear from the last sentence in the passage: "He had been up there [meaning the

Gold Hill claim close to Truswell's residence] a couple of times before, it appears and after". This goes directly to the Crown's reasonable contention before the jury that the appellant shot the victim out of anger rather than fear.

[47] In his jury address, Crown counsel commented on the evidence of Archibald as follows:

> Now, Mr. Archibald has all kinds of reasons to have no love for Robert Truswell. He's the same fellow whose trailer got run into with a CAT at the hands of Robert Truswell, did some property damage. And although Kieran Daunt described Robert Truswell's intent to go out and mow down the trailer, what he did do was about $800 worth of damage. Some stuff that Mr. Archibald was able to fix himself with some cobble-together scraps and fix up the trailer. He said that probably because it was on wheels, he really couldn't get a bite on it to do any serious damage to it.

[48] The appellant objects to the comments that followed:

> A couple of things come from that. One, does Robert Truswell, as you've come to know him in this trial, sound like the kind of guy that would, intending to kill somebody, threaten and then confront him face to face? I would suggest most of the witnesses who talked about him would describe him as sneaky. Remember Wanda Burndt-Schmidt's description of him skulking in the bushes, popping out of the shaker plant, just always being out of the corner of your eye, just showing up? He sounds more sneaky and deceitful. He doesn't sound like the kind of guy who would threaten somebody and then get in his face.
>
> Kieran Daunt, perhaps, is different. His – the description of him at the Jenkins' place suggests that when he was angry he confronted Truswell. Truswell doesn't sound to have been that kind of a fellow. Those are things to think about.
>
> He didn't go and confront Mr. Archibald. He went and bashed up his trailer over a tree or something stupid like that. He acted badly, he acted stupidly, but he wasn't physical with Archibald or anybody else. Kieran Daunt knew all about that.

[49] The Crown agrees that part of this passage was an overstatement. It was contrary to the evidence about the incident that earned Truswell his nickname and the incident described by Andy Sigurdson. However, I have no doubt that the jury saw this as a weak submission to be confined to the description of the Archibald incident, in which Truswell did some property damage in anger and did not seek to injure any person, and another incident involving Jenkins and the appellant in which it was said that the appellant was the aggressor in an argument and that Truswell was passive. When charging the jury on self-defence and on intent, the trial judge carefully referred to the evidence as to those incidents in which Truswell was violent. It is not conceivable that the jury, from the Crown submission above, would have seen Truswell as a man who was never violent and who had no propensity for violence.

[50] The appellant testified that he knew that Truswell had guns and that knowledge fuelled his fear that Truswell had a gun as he sat in his Blazer with his arms not visible to the appellant. In response to a submission to the jury by defence counsel that the appellant, unlike the police later, did not have the opportunity to search Truswell's vehicle for a weapon, Crown counsel said to the jury: "There's absolutely no evidence that he [the appellant] had any reason to believe that Robert Truswell had a weapon in the truck [i.e., the Blazer] that day at all."

[51] The appellant says that this comment was unfair because it amounted to a suggestion that the appellant did not know that Truswell had guns, in contradiction of considerable evidence to the contrary, including unchallenged evidence given by the appellant. I disagree. The Crown's point was an obvious one and was part of a

larger submission. The specific point was that the appellant did not see Truswell with a weapon. The broader point was that Truswell did not say that he had a weapon, he did not attack the appellant before the appellant fired the first shot, and he did not threaten to do the appellant any physical harm during the verbal confrontation.

[52] The duty of Crown counsel in addressing a jury is clearly stated in the cases and is well understood. ***R. v. Rose***, [1998] 3 S.C.R. 262 dealt with ***Charter*** issues that arose with respect to the order of jury addresses in a criminal case. The majority described the duty of Crown counsel in addressing the jury as follows:

> [107] Moreover, the Crown's ability to take the defence by surprise is severely curtailed by the restrictions placed on the scope of the Crown's closing address to the jury. In presenting closing submissions to the jury, Crown counsel must be accurate and dispassionate. Counsel should not advert to any unproven facts and cannot put before the jury as facts to be considered for conviction assertions in relation to which there is no evidence or which come from counsel's personal observations or experiences. As noted by Lamer C.J. writing for the majority in *R. v. P. (M.B.)*, [1994] 1 S.C.R. 555, at p. 580, "[o]nce the defence starts to 'meet the case', thus revealing its own case, the Crown should, except in the narrowest of circumstances be 'locked into' the case which, upon closing, it has said the defence must answer. The Crown must not be allowed in any way to change that case". Although the comments of Lamer C.J. in *P. (M.B.)* were addressed to the issue of the ability of the Crown to re-open its case, they are also applicable to the content of the Crown jury address. Crown counsel is duty bound during its jury address to remain true to the evidence, and must limit his or her means of persuasion to facts found in the evidence presented to the jury: see, e.g., *Pisani v. The Queen*, [1971] S.C.R. 738; *R. v. Munroe* (1995), 96 C.C.C. (3d) 431 (Ont. C.A.), aff'd [1995] 4 S.C.R. 53; *R. v. Neverson* (1991), 69 C.C.C. (3d) 80 (Que. C.A.), aff'd [1992] 1 S.C.R. 1014; and *R. v. Charest* (1990), 57 C.C.C. (3d) 312 (Que. C.A.). As is discussed in more detail below, the discretion of the trial judge to deal with those situations in which Crown counsel's address oversteps the bounds of propriety is a sufficient safeguard against any potential unfairness to the accused.
>
> [Emphasis in original.]

[53] The appellant relies on ***Pisani v. The Queen***, [1971] S.C.R. 738, 1 C.C.C. (2d) 477, in which the court found that excesses by Crown counsel at trial in speaking to the jury deprived the accused of his right to a fair trial because what counsel said to the jury "bore so directly on the central issue in the case" (at 741).

[54] The appellant also relies on ***R. v. Peavoy*** (1997), 117 C.C.C. (3d) 226, 34 O.R. (3d) 620 (Ont. C.A.). In that case, Crown counsel invited the jury to speculate on matters not in evidence, misstated the evidence and developed a theory about the position of the appellant when he stabbed the deceased on which the Crown had not led evidence from the pathologist who had testified that the stab wound was consistent with the evidence of the accused as to positioning. In addition, Crown counsel made inappropriate comments about fabrication of a defence of self-defence by the accused after the defence had received disclosure of its evidence from the Crown without having put that assertion to the accused in cross examination. At para. 15, Weiler J.A. said the following:

> ¶ 15 When one considers the Crown's address in its entirety, the tone and style was not a fair and dispassionate presentation of the Crown's case according to the standard set in *Boucher v. The Queen*, [1955] S.C.R. 16 at 21, 110 C.C.C. 263, and recently confirmed in *R. v. Michaud* (1996), 107 C.C.C. (3d) 193 (S.C.C.):
>
> [Translation] The position of Crown counsel is not that of counsel in a civil matter. His functions are quasi-judicial. He must not so much try to obtain a conviction as assist the judge and jury so that justice will be fully done. Moderation and impartiality must always characterize his conduct in court. He will have honestly carried out his duty and will be beyond reproach if, putting aside any appeal to the passions, in a dignified manner appropriate to his role, he presents the evidence to the jury without going beyond what is revealed.

[55] In my opinion, the transgressions of Crown counsel in the present case were minor and innocuous. They did not go to the core of the defence. The most significant one, as I have indicated, was adequately addressed by the trial judge. Read in its entirety, the Crown's address to the jury was balanced and it properly joined issue with respect to intent and self-defence. It was not colourful or aggressive. Indeed, counsel often used rather passive and unassertive language. He frequently merely called matters argued by the defence into question rather than strongly articulating and urging findings of fact contrary to the position of the defence. The closing address of defence counsel to the jury, on the other hand, was much more forceful and assertive.

[56] The address of Crown counsel here was less objectionable than the address under attack in ***R. v. Sodhi*** (2003), 179 C.C.C. (3d) 60, 66 O.R. (3d) 641 (Ont. C.A.) where, in dismissing the assertion on appeal that the Crown's address made the trial unfair, Doherty J.A., for the court, said at para. 89: "Just as perfection is not required in a jury charge, so too, in my view, it is not required in a closing address." I think that observation has application in the present case. The appellant's complaints about the address of Crown counsel, when considered in the context of the evidence as a whole and the live issues in the case, come to naught.

[57] I am not persuaded that the address of Crown counsel deprived the appellant of a fair trial and I would not give effect to the first ground of appeal.

Instruction on intent

[58] On the element of intent in murder the trial judge instructed the jury as follows:

> [159] We are now returning to the third element of second degree murder, assuming that you have found that Kieran Daunt caused Robert Truswell's death unlawfully and that Kieran Daunt was not acting is self-defence.
>
> [160] The crime of murder requires proof of a particular state of mind. For an unlawful killing to be murder, Crown counsel must prove that Kieran Daunt meant *either* to kill Robert Truswell *or* meant to cause Robert Truswell bodily harm that Kieran Daunt *knew* was likely to kill Robert Truswell, and was reckless whether Robert Truswell died or not. The Crown does *not* have to prove *both*. One is enough. All of you do *not* have to agree on the same state of mind, as long as everyone is sure that one of the required states of mind has been proven beyond a reasonable doubt.
>
> [161] If Kieran Daunt did *not* mean to do either, Kieran Daunt committed manslaughter.
>
> [162] To determine Kieran Daunt's state of mind, what he meant to do, you should consider all the evidence. You should consider:
>
> - *what* he *did* or did not do;
> - *how* he *did* or did not do it; and
> - *what* he *said* or did not say.
>
> [163] You should look at Kieran Daunt's words and conduct before, at the time and after the unlawful act that caused Robert Truswell's death. All these things, and the circumstances in which they happened, may shed light on Kieran Daunt's state of mind at the time. They may help you decide what he meant or didn't mean to do. In considering all the evidence, use your good common sense.
>
> [Emphasis in original.

[59] The appellant contends that this charge is inadequate because:

(1) there was no instruction that one or the other of the two intents in murder had to be contemporaneous with the act of shooting;

(2) there was no instruction that the appellant had to subjectively foresee a likelihood of death on the second intent in murder; and

(3) the instruction provided the jury with no definition of "reckless" as that word is used in s. 229 of the ***Criminal Code***.

[60] Because of the circumstances in this particular case I would not give effect to any of these submissions. The appellant shot Truswell at least once from very close range. He claimed that he did not intend to hit him. That factual issue was before the jury in the clearest of terms in both the addresses of counsel and the judge's charge.

[61] The jury obviously concluded that the appellant did intend to shoot the victim, that is, that he did not fire the rifle to warn Truswell off as he claimed in his evidence. Once the jurors reached that conclusion, a finding of one or the other of the two intents in murder was inevitable.

[62] The instruction on intent tracked the wording of s. 229 of the ***Criminal Code*** and, in the circumstances of this case, little elaboration was required.

Fresh evidence

[63] About a week after conclusion of the trial, the owner of a mining claim previously owned by Truswell found a 30-30 rifle and some tins of ammunition in an old culvert on the claim. The appellant seeks a new trial on the basis that this physical evidence lends weight to the appellant's evidence that he knew that Truswell owned such a weapon. It would counter the Crown's submission to the jury

that the appellant had no reason to believe that Truswell had a weapon in his truck on the day he died.

[64] This argument is linked to the assertion of impropriety in the Crown's submission and I have already dealt with that issue. There was evidence that Truswell was no stranger to guns and that he had used one to shoot at Andy Sigurdson as described above. In my opinion, if there had been evidence before the jury of the discovery of this particular rifle it would have done nothing to bolster the appellant's assertion that he thought that Truswell had a rifle with him on the day in question. The evidence could not reasonably be expected to have affected the verdict: ***R. v. Palmer***, [1980] 1 S.C.R. 759, 50 C.C.C. (2d) 193.

[65] I would dismiss the appeal.

R. J. Low J.A.

The Honourable Mr. Justice Low

I agree:

Finch CJBC

The Honourable Chief Justice Finch

I agree:

Huddart J.A.

The Honourable Madam Justice Huddart