IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Barbara M. Hamilton
Mr. Justice Christopher J. Mainella
Madam Justice Janice L. leMaistre

B E T W E E N :

HER MAJESTY THE QUEEN	)	***L. C. Robinson***
	)	*for the Appellant*
	)	
Respondent	)	***P. A. Cooper***
	)	*for the Respondent*
- and -	)	
	)	*Appeal heard:*
KENNETH GREEN	)	***February 15, 2019***
	)	
	)	*Judgment delivered:*
(Accused) Appellant	)	***May 7, 2019***

HAMILTON JA

[1] The accused appeals his conviction, by a judge and jury, for second degree murder.

[2] Ryan Sinclair (the deceased) died soon after being stabbed in the neck. His body was found near a trailer court in the Town of Powerview-Pine Falls, Manitoba. The accused and the deceased were among a group of people who went to the trailer court after a night of partying that involved alcohol and cocaine.

[3] The accused's primary position at trial was that another person in the group, Charles Epp (Epp), stabbed the deceased. Epp denied this. Because Epp was an unsavoury witness, the trial judge provided a *Vetrovec*

warning in her instructions to the jury (see *Vetrovec v The Queen*, [1982] 1 SCR 811).

[4] The issues for the jury were whether the Crown had proved beyond a reasonable doubt that the accused was the person who stabbed the deceased, and, if so, whether the Crown had proved beyond a reasonable doubt the specific intent required for second degree murder, given evidence of the accused's intoxication.

[5] The evidence of who stabbed the deceased is circumstantial. Epp, and two other witnesses, testified as to what occurred during the hours they were together with the accused and the deceased. They described the deceased being chased by the accused and Epp minutes before the deceased's death. A surveillance video from a residence at the trailer court captured most of the chase, but not all of the events leading up to it. No one saw the stabbing.

[6] The accused argues that the jury's verdict is unreasonable with respect to both identity and specific intent. He also argues that the trial judge erred in her instructions to the jury by failing to give limiting instructions with respect to certain evidence, including evidence that touched upon the accused's background and association with Epp.

[7] The accused has not persuaded me that appellate intervention is warranted and I would dismiss the appeal.

Background

[8] Shortly after 6 a.m. on October 26, 2014, the deceased was stabbed in the neck and arm with a knife. He died from blood loss from the neck

wound. His body was found in the driveway of 57 Art Avenue, which is adjacent to the trailer court.

[9] Epp and the accused were with the deceased in the hours leading up to his death, as were Dwayne Guimond (Guimond), Heather Bunn-Daniels (Daniels) and Jade Bercier-Sinclair (Sinclair). Except for Daniels, who testified that she drank only one beer, they drank alcohol and used drugs during this time period. Later in my reasons, I review the evidence about their intoxication when I address the accused's ground of appeal that the jury's conclusion, that the accused had the specific intent for second degree murder, is unreasonable.

[10] The accused had been staying with Epp in trailer #10 (trailer #10) in the trailer court. During the evening of October 25, 2014, the accused, Epp and Guimond were together at trailer #10. Guimond and Epp's girlfriend were cutting up deer meat. Later that night, the accused, Epp and Guimond went to the bar and around 3 a.m. on October 26th, after the bar closed, they went to Daniels's residence. The deceased was there. The group, now including the deceased, then left Daniels's residence around 4 a.m. in Sinclair's van to go to her apartment.

[11] The accused and Guimond got into an altercation at Sinclair's apartment. Epp then punched Guimond in the face twice, causing two large gashes under his eyes and his eyes to swell shut.

[12] Around 6 a.m., a number of people left Sinclair's apartment in her van to go to trailer #10. Sinclair drove. Epp, the accused, the deceased, Daniels and Guimond were passengers.

[13] Sinclair parked the van beside a red truck in front of trailer #10. Epp left the van and went into trailer #10. While waiting for Epp to return, the accused left the van, as did the deceased. Eventually, the accused and Epp chased after the deceased. Epp, Sinclair and Daniels testified as to what happened at this critical time. I review their evidence later in my reasons when I address the accused's ground of appeal that the jury's conclusion, that the accused stabbed the deceased, is unreasonable.

[14] Several hours after the chase, the police found the deceased's body at 57 Art Avenue, which was a few dozen metres from where Sinclair had parked the van in front of trailer #10. Police marked a trail of the deceased's blood from the location of the deceased's body to around trailers #10 and #11. The police placed numbered placards along the blood trail. Placard #16 was near the location where Sinclair's van had been parked. The police seized a hunting knife with a one-inch blade from trailer #10. They did not seize a knife block from the kitchen counter that contained assorted knives. The knife used in the stabbing was never found.

The Video

[15] The police obtained a video from a motion-activated camera of a residence in the trailer court (the video). It captured some of the events after the van arrived at 6:09 a.m. It shows the van arriving, Sinclair parking beside the red truck and Epp running into trailer #10. It does not show any events that occurred just outside the van, but captures the chase at 6:19 a.m. The video does not show the accused making any contact with the deceased during the chase and shows the accused getting no closer than a few feet from the deceased. It shows Epp turning around during the chase and the accused

pursuing the deceased in the same direction between two trailers before they are out of view for less than a minute, after which the accused returns into view by himself.

[16] The video shows the accused had a shiny object in his hand during the chase. The accused acknowledged that this was a knife. His position at trial was that this knife was too large for the type of neck wound suffered by the deceased.

The Pathologist's Evidence

[17] The pathologist, Dr. John Younes (Dr. Younes), testified that the neck wound was 11 centimetres deep (approximately 4.5 inches) and 1.4 centimetres wide (approximately .5 inches) at the surface of the skin and that the wound could have been made by a knife with a blade no wider than 1.4 centimetres. He could not rule out that a narrower blade could have caused the neck wound. He testified that potential elastic recoil of the deceased's skin could account for no more than a few millimetres of disparity between the "length" of the wound and the width of the weapon that inflicted it.

[18] He also testified that, "Blood loss would have been brisk and heavy" and the deceased would have died within five to 15 minutes after being stabbed in the neck. He opined that the deceased would have only been able to take a few steps before a trail of blood would have become apparent given the nature and location of the neck wound, and the relative absorbency of any clothing close to the neck.

Witnesses at the Trial

[19] The Crown called Dr. Younes; Constable Yasin, one of the investigating officers; Daniels; Epp; and Sinclair. The Crown entered the video into evidence with the accused's agreement. The accused did not testify and presented no evidence.

Theory of the Crown and the Accused at the Trial

[20] The Crown's theory was that: after Epp left the van to go into trailer #10, the accused and the deceased fought outside the van, after which the accused ran to, or into, trailer #10; at trailer #10, the accused either retrieved or was given a knife and then returned to the van and waited beside it; when the deceased left the van, the accused stabbed him in the neck; the deceased fled following the placard path towards Art Avenue and the accused and Epp chased him; and the neck wound began to bleed by the time the deceased reached placard #16.

[21] The accused's theory was that: Epp stabbed the deceased; although the accused is seen running with a knife (which may have been handed to him by Epp after the deceased, and then Epp, had exited the van), the blade of that knife was too wide to have caused the two stab wounds that the deceased received; he was never close enough to the deceased where he could have stabbed him; and it was probable that Epp stabbed the deceased with another knife when they were both seated in the van and Epp turned in his seat towards the deceased. The accused's alternate theory was that if the jury concluded he stabbed the deceased, he was too intoxicated, as a result of his consumption of alcohol and drugs, to form the intent to cause death, or to cause bodily harm that he knew was likely to cause death.

Ground of Appeal—Jury Instructions

[22] The accused submits that the trial judge's instructions were inadequate because she did not give the jury limiting instructions with respect to: 1) evidence about his bad character; and 2) certain hearsay and opinion evidence. The accused asserts that these alleged errors cumulatively, and/or individually, are errors in law that warrant appellate intervention and a new trial.

[23] I disagree.

Standard of Review—The Functional Approach

[24] A jury charge is reviewed on appeal on a functional basis. This calls for the charge to be reviewed as a whole in the context of the entirety of the trial. The standard is not perfection. The accused is entitled to a properly instructed jury, not a perfectly instructed jury (see *R v Jacquard*, [1997] 1 SCR 314; *R v Daley*, 2007 SCC 53; and *R v Kociuk (RJ)*, 2011 MBCA 85, aff'd 2012 SCC 15).

[25] As explained by Mainella JA in *R v Hall*, 2018 MBCA 122 (at para 143):

> Jury instructions are reviewed on a standard of adequacy, not perfection. The question for the reviewing court is whether, taking a functional approach to the instructions looked at in their entirety and in the context of the trial (i.e., the evidence, the live issues, the positions of the parties and the submissions of counsel), the overall effect of the charge was that the jury was properly and fairly instructed (see *R v Jacquard*, [1997] 1 SCR 314 at paras 32, 62; and *R v Araya*, 2015 SCC 11 at para 39).

[26] The accused acknowledges that defence counsel (not counsel on appeal) did not seek the limiting instructions he now asserts should have been given, although she requested other revisions to the draft charge during the pre-charge discussions with the trial judge. As will be explained, the absence of objection to a jury charge can be an important consideration for the functional review of a jury charge.

Issue—Bad Character Evidence

[27] The Crown and defence counsel agreed with the trial judge that Epp's evidence called for a strong *Vetrovec* warning. The jury heard evidence about Epp's prior violent and criminal behaviour. This was important evidence for the accused's third-party defence that Epp was the stabber. The trial judge's instructions included the following direction:

> You have heard evidence with respect to Mr. Epp's disposition and prior violent conduct. If you accept that evidence, along with the rest of the evidence that you do accept, you are entitled, but do not have to, draw an inference that Mr. Epp committed the offence with which [the accused] is charged.

[28] The jury also heard evidence that Epp and the accused were long-time friends and that the accused was staying with Epp for a few days in trailer #10.

[29] The accused did not testify and his criminal record was not before the jury. However, he points to the following evidence (the impugned bad character evidence), introduced largely as part of the narrative, that he says was bad character evidence about his violent disposition:

- Daniels testified that several men in the group, including the accused, were talking about their time in jail and gangs; the accused was in a fight at Sinclair's apartment; she disarmed the accused of a beer bottle when he was attempting to go after Guimond; and she took a bottle away from the accused as he stepped out of the van to fight the deceased.

- Sinclair testified that she witnessed an altercation between Guimond and the accused during which she saw Guimond on top of the accused punching him.

- Epp testified that he intervened in a scuffle between Guimond and the accused.

[30] The accused argues that the lack of instruction as to what use could be made of the impugned bad character evidence is of particular concern because of the specific instructions given by the trial judge with respect to Epp. He says that the trial judge instructed the jury how to use the impugned bad character evidence with respect to Epp, particularly in light of the third-party suspect defence, but she did not provide any instruction with respect to how not to use the impugned bad character evidence. In other words, he says that the jury should have been instructed not to engage in propensity reasoning and infer that the accused was the sort of person who is likely to have committed the offence in question (see *R v B(FF)*, [1993] 1 SCR 697). He says that it was crucial that the jury receive instructions not to use the impugned bad character evidence to fill in gaps in this case, which was based on circumstantial evidence.

[31] The accused relies on *R v Bomberry*, 2010 ONCA 542, in which the Court stated that (at para 37):

> An appeal court must look at the whole of the record and determine the impact of the trial judge's omission on the fairness of the trial. In the end, the trial judge's duty to charge the jury properly and to ensure that the jury reaches a fair verdict – that is, a verdict not based on improper considerations – is not vitiated by the failure of defence counsel to object at trial.

[32] I agree that the failure of defence counsel to object at trial cannot vitiate the failure of a trial judge to charge the jury properly and ensure that the jury reaches a fair verdict. However, defence counsel's failure to object must be considered in the context of the required functional review of the jury instructions. As stated by Doherty JA in *R v Austin* (2006), 214 CCC (3d) 38 (Ont CA), "counsel's approval of the jury instruction and to a lesser extent his or her failure to object, will be a significant consideration on appeal . . .. Counsel's position at trial will become all the more significant on appeal if it appears that the position reflects a calculated tactical decision" (at para 14).

[33] The witnesses described a night involving the consumption of alcohol and drugs and violent confrontations involving a number of people. As acknowledged by the accused, the impugned bad character evidence was part of the narrative, or volunteered by witnesses in their testimony, with respect to how the night unfolded leading up to the stabbing of the deceased. Most of the impugned bad character evidence related to the accused's behaviour shortly before the stabbing. This evidence was relevant for assessing the accused's actions, as well as his state of mind for the issue of intent. The Crown made no submission that relied on the impugned bad character evidence for any improper purpose.

[34] More importantly, in my view, the fact that defence counsel did not seek an instruction about the impugned bad character evidence is significant and is best viewed through the lens of trial strategy. I think it is telling that the accused is not arguing ineffective representation at trial with respect to the failure of defence counsel to seek the instruction now at issue. As is well known, such arguments are difficult to make given the latitude given to counsel for matters of trial strategy (see *R v Le (TD)*, 2011 MBCA 83).

[35] Defence counsel reviewed the draft charge carefully, providing comment and seeking changes. I think it is fair to conclude that had she wanted an instruction about the impugned bad character evidence, she would have asked for one. However, this would have highlighted that evidence when the defence strategy was to point the finger at Epp as the person who committed the murder.

[36] When I look at the whole of the record, I do not see an omission by the trial judge, let alone one that had an impact on the fairness of the trial.

Hearsay/Opinion Evidence

[37] The accused also asserts that the trial judge erred in law because the jury instructions were inadequate with respect to certain hearsay and opinion evidence.

[38] First, the accused takes issue with how the trial judge instructed the jury with respect to what could be seen in the video because both Sinclair and Cst. Yasin testified that it depicted the accused holding a knife in his hand. He asserts that the trial judge should have specifically instructed the jury that it was for them to decide whether or not a knife could be seen.

[39] Sinclair viewed the video when testifying. In conjunction with her evidence that she saw the accused with a knife in his hand, she pointed out when viewing the video that a knife could be seen in the accused's right hand. Constable Yasin testified that when he viewed the video during the investigation, he could see the accused running with something in his hand that "appeared to be like a knife."

[40] The trial judge instructed the jury as follows with respect to the video:

> It is for you to determine how much you will rely on this video recording in reaching your decision. You make that decision by watching the video recording. . . .
>
> In your review of the video recording, consider its clarity and quality or lack of it. What can you see? How well can you see it? Can you see the full picture? Or only part of it? Take into account how long or how briefly the persons, [the accused], Mr. Epp and [the deceased] appear on the video and under what circumstances. Is the appearance of those individuals on the video similar to or different from what you know about the appearance and movements of them at that time from other evidence given at trial?

[41] The jury would have understood that it was for them to decide what the video showed and what weight to place on it. In any event, the accused's position at trial did not take issue with how the witnesses' identified him in the video or even whether he was carrying a knife. What was at issue was whether the size of the knife carried by the accused was consistent with Dr. Younes's evidence.

[42] Second, the accused asserts that the trial judge failed to instruct the jury adequately with respect to Cst. Yasin's evidence about information he

had gathered during the investigation, including statements of individuals not called to testify. While I agree that this hearsay evidence was not probative, it was harmless. Understandably, defence counsel did not object during the trial to this hearsay evidence nor did she seek a special instruction about this evidence.

[43] A question does arise in regard to Cst. Yasin's statement during his evidence that, "It was later found . . . [by the] serious crimes and major crime unit that does in depth investigation . . . that [the accused] . . . had stabbed [the deceased]." The record shows that this statement was given after Cst. Yasin misunderstood a question from Crown counsel. A clarifying question was immediately put to Cst. Yasin, which he answered. Defence counsel did not object.

[44] The accused says that Cst. Yasin's statement was prejudicial and should not have been permitted, as it was investigative hearsay and opinion evidence (see *R v Van*, 2009 SCC 22). I agree with the Crown that Cst. Yasin's statement was regrettable, but the accused has not persuaded me that the lack of a special instruction about Cst. Yasin's statement rises to the level of an error of law.

[45] As already stated, the accused is not entitled to a perfect trial. With the benefit of hindsight, Cst. Yasin's statement could have been challenged by defence counsel or questioned by the trial judge. However, in my view, the context of the trial did not require the trial judge to include a limiting instruction. The trial judge instructed the jury that it was for them to determine the facts. She instructed them to use their common sense. In my view, common sense would tell them that Cst. Yasin's statement simply

reflected the conclusion of the investigating officers that the accused should be charged, as he was, and that it was for the jury to decide if the Crown had proved his guilt beyond a reasonable doubt.

[46] Furthermore, defence counsel did not seek a special instruction in this regard, again no doubt, so as not to bring attention to this evidence. As stated in *R v Tymchyshyn (C) et al*, 2016 MBCA 73, "To draw attention to . . . hearsay statements of other persons . . . could have had the effect of further emphasizing [the issue] for the jury" (at para 90).

Conclusion

[47] The trial judge fairly and properly instructed the jury. Her instructions were careful and detailed and reflected input from defence counsel. In light of the evidence, the live issues, the positions of the parties and the submissions of counsel, the jury instructions were more than adequate to ensure a fair trial.

Ground of Appeal—Reasonableness of the Verdict

[48] The accused asserts that the jury's verdict is unreasonable for two alternate reasons. First, he says that the finding by the jury that he stabbed the deceased is unreasonable. Second, if that finding is not unreasonable, he says that the finding by the jury that he had the necessary intent for second degree murder is unreasonable.

Standard of Review

[49] The test for unreasonable verdict is well known: whether the verdict, based on the whole of the evidence, is one that a properly instructed

jury, acting judicially, could reasonably have rendered (see *R v Yebes*, [1987] 2 SCR 168 at 186).

[50] The reasonableness of the verdict is not a question of whether this Court would have convicted the accused, but whether the evidence, viewed through the lens of judicial experience, was reasonably capable of supporting a finding of guilt. This Court must ask itself "whether the jury's verdict is supportable on *any* reasonable view of the evidence and whether proper judicial fact-finding applied to the evidence *precludes* the conclusion reached by the jury" (*R v WH*, 2013 SCC 22 at para 2; see also at paras 26-28).

[51] Because this is a circumstantial case, this Court must assess the reasonableness of the jury's use of inferential reasoning. The question is "whether the trier of fact, acting judicially, could reasonably be satisfied that the accused's guilt was the only reasonable conclusion available on the totality of the evidence" (*R v Villaroman*, 2016 SCC 33 at para 55). In *Hall*, Mainella JA explained the approach (at para 166):

> Deference plays an important part in evaluating the inferential reasoning of the jury. The reviewing court does not draw its own inferences; rather, it considers whether the inferences drawn by the jury were "reasonably open" to it in light of the standard of proof (*Villaroman* at para 67). Drawing the line between inferences that are speculative and those which give rise to a reasonable doubt is the responsibility of the jury alone (see *Villaroman* at para 71).

Identity of the Stabber

[52] The jury had to decide whether Epp stabbed the deceased, or whether, his actions and presence raised a reasonable doubt as to whether the accused stabbed the deceased. Because no one saw the accused stab the

deceased, the jury had to consider the circumstantial evidence leading up to the death. The evidence of Epp, Sinclair and Daniels as to what occurred at the trailer court was critical.

[53] For the most part, their evidence was consistent with respect to the events of the night. However, Sinclair and Daniels's evidence differed in two major respects from Epp's evidence. Sinclair and Daniels testified that after Epp went into trailer #10, he returned and got into the van wearing a Manitoba Warriors vest. They also testified that when he re-entered the van, he had words with the deceased. Epp denied that he wore a Manitoba Warriors vest, re-entered the van and had words with the deceased.

Epp's Evidence

[54] Epp testified that he did not stab the deceased and he did not have any weapons at any time that night.

[55] As for the events at the trailer court, Epp testified that:

- when the van pulled up to trailer #10, he got out by himself and went into the trailer for maybe "like 10, 20 minutes";
- the accused knocked at the trailer door and he went outside, where there was fighting; he immediately hit Guimond once and went to the van. When he opened the rear passenger sliding door, the deceased "runs"; and
- he chased the deceased for about five to 10 steps and then turned around when Sinclair urged him to stop.

[56] In cross-examination, Epp testified that when Guimond and his girlfriend were cutting up deer meat, Guimond used a knife with a long skinny blade and his girlfriend used a "buck knife" with a wider blade.

Sinclair's Evidence

[57] As for the events at the trailer court, Sinclair testified that:

- while everyone but Epp was still in the van after arriving at trailer #10, the accused tried to goad the deceased into a fight and, as a result, the accused and the deceased got out of the van;

- she stayed in the van and saw the accused swing once at the deceased and miss, and the deceased then punched the accused, who fell to the ground;

- after the punch, the accused got up and ran towards trailer #10 and the deceased returned to the van, uninjured and sat in the middle-row passenger seat, directly behind the front passenger seat;

- soon after the fight between the accused and the deceased, Epp returned to the van, sat in the front passenger seat and confronted the deceased about the fight. Epp turned in his seat to face the deceased and attempted to punch him. She did not see Epp with a weapon. The accused had returned to the van and remained directly outside the rear passenger sliding door, some two or three feet from where the deceased was seated;

- when confronted by Epp, the deceased immediately left the van out of the rear passenger sliding door. The accused started to chase the

deceased, and then Epp joined the chase. The accused was closest to the deceased during the chase;

- she left the van, followed the chase and stopped Epp; and

- she recalled seeing the accused with a knife, but did not remember when she first saw it or where it came from. She described the knife as being approximately five to six inches in length and "about" one inch in width. She agreed she told the police it was like "maybe a machete" and that at the preliminary hearing, she had testified that the knife could have been as long as eight and one-half inches. She maintained that the width of the blade was at most one inch.

Daniels's Evidence

[58] As for the events at the trailer court, Daniels testified that:

- a while after Epp went into trailer #10, the deceased "jumped out" of the van after the accused and "kept trying to fight with him . . . [e]gging him on";

- the deceased called out the accused "[b]ecause he wanted to fight." She recalled hearing them "kind of fighting", but she could not see it;

- the deceased got back into the van in the middle row behind the front passenger seat and the accused went to trailer #10. The deceased was not injured;

- about 10 minutes later, Epp returned to the van to the front passenger seat. Epp confronted the deceased and "leaned over his seat [towards the deceased] and then [the deceased] took off [out of the van]". When Epp leaned over to confront the deceased, he made punching motions, but he did not hit the deceased;

- the accused returned to the van when Epp did and stood beside the van, not far from the passenger door;

- when the deceased left the van, he started running towards the red truck and then in between the trailers;

- the accused and Epp chased the deceased, and the accused was closest to the deceased and Epp was behind the accused;

- Epp stopped running after the deceased and came back, and then the accused came back; and

- she could not see if the accused was holding anything while he was chasing the deceased and he did not have anything in his hand when he returned from between the trailers.

Analysis

[59] When instructing the jury about the difference between direct and circumstantial evidence, the trial judge stated that, "In order to find [the accused] guilty on the basis of circumstantial evidence, you must be satisfied beyond a reasonable doubt that his guilt is the only rational conclusion or inference that can be drawn from the whole of the evidence."

[60] The evidence, underscored by the trial judge's instructions, made it clear that Epp was a violent person. The trial judge cautioned the jury about Epp's evidence and instructed them how to consider it in the context of the third-party defence asserted by the accused (see *Vetrovec*). She told the jury to approach his evidence with "the greatest care and caution", and that it was dangerous to rely on his evidence without some evidence independent of Epp that confirms his evidence and that "tend[s] to show that Mr. Epp is telling the truth."

[61] The trial judge provided examples of evidence that the jury could find to support, or confirm, Epp's evidence. She referred to the evidence of Daniels and Sinclair with respect to the events of October 26th and the video. She also pointed out that Epp's evidence deviated from their evidence with respect to him wearing a Manitoba Warriors vest and whether he returned to the front passenger seat of the van before the chase and made punching motions toward the deceased after turning in his seat.

[62] The accused argues that no properly instructed jury should reasonably have found that the Crown had proven beyond a reasonable doubt that it was the accused, rather than Epp, that inflicted the fatal wound to the deceased.

[63] Furthermore, he says that the verdict is inconsistent with the evidence that the weapon was too large to have caused the fatal neck wound and with the blood trail evidence, when considered in conjunction with Dr. Younes's evidence that the deceased would only be able to take a few steps, at most, after being stabbed in the neck before a trail of blood would have become apparent. He argues that this evidence supports only one

inference that the wound was inflicted when the deceased was either in the van, or just outside of it, and not later.

[64] I agree that the only inference from the blood trail evidence, when considered in conjunction with Dr. Younes's evidence, is that the deceased was stabbed either in the van, or just outside of it, just before the chase. Because the verdict demonstrates that the jury accepted Epp's evidence that he did not stab the deceased, the only reasonable inference available to the jury was that the deceased was stabbed outside of the van by the accused when the deceased jumped out of the van.

[65] The jury was entitled to accept Epp's evidence that he did not stab the deceased. Sinclair and Daniels both testified that Epp did not have a weapon and he did not injure the deceased when he confronted him in the van. Importantly, Sinclair and Daniels both testified that they saw the accused outside the van just before the deceased left the van to get away from Epp.

[66] I do not accept the accused's argument that it was a fact that the accused brandished a knife that was too large to have caused the fatal neck wound. The size of the knife was a live issue at trial and it was for the jury to decide whether the accused used a knife that was too large to inflict the neck wound.

[67] Furthermore, the jury did not have any innocent explanation from the accused to consider regarding the evidence that associated him to the stabbing. The fact that the accused did not testify is a relevant consideration when assessing the reasonableness of the verdict. As stated in *Hall* (at paras 201-2):

> Where a conviction is dependent on circumstantial evidence in assessing the reasonableness of the verdict, a reviewing court may take into consideration the failure of the accused to testify (see *Corbett v The Queen*, [1975] 2 SCR 275 at 280-81; and *R v Oddleifson (JN)*, 2010 MBCA 44 at paras 25-27, leave to appeal to SCC refused, 33756 (28 October 2010)). The accused's silence is not a piece of evidence that can support the reasonableness of the verdict; rather, it is "indicative of the absence of an exculpatory explanation" (*R v Noble*, [1997] 1 SCR 874 at para 103; see also *Oddleifson* at paras 25-27).
>
> The failure of the accused to testify can be taken by this Court to mean that there is no innocent explanation regarding the evidence that associates him to the shooting.

[68] To conclude, the jury could accept all, some or none of the evidence of each witness. Their verdict demonstrates that they accepted Epp's denial and Sinclair and Daniels's evidence that Epp did not injure the deceased in the van and that the accused was outside the van by the rear passenger sliding door when the deceased got out of the van, which gave him the opportunity to stab the deceased. The jury's conclusion was based on findings of fact and reasonable inferences open to them. Taking into account the factual matrix of the case viewed through the lens of judicial experience, the jury was entitled to conclude that the only reasonable conclusion was that the accused inflicted the fatal wound.

Intent

[69] The accused argues that the jury's conclusion that the Crown had proved beyond a reasonable doubt that the accused had the specific intent to commit second degree murder is unreasonable, given the evidence of alcohol and drug use.

[70] The starting point for addressing the issue of a defence of intoxication is the degree to which the consumption of intoxicants affected an accused's ability to reason, not merely whether he or she was intoxicated to some degree (see *R v Robinson*, [1996] 1 SCR 683).

[71] Epp, Sinclair and Daniels testified about the consumption of alcohol and drugs during the hours of partying as they moved from the bar to the homes of Daniels and Sinclair and, ultimately, to trailer #10 so that Epp could get more cocaine.

[72] Daniels testified that Epp was "pretty drunk" and "pretty loud", and that the accused's level of intoxication was similar to Epp's. She testified that she did not drink that night except for one beer.

[73] Epp testified that Guimond and the accused were at the bar drinking "Shots. Beer. Everything" and estimated that his level of intoxication was a "five out of 10", where 10 on the scale was passing out. He testified that at Daniels's house, they were drinking beers and using "[l]ots" of cocaine and pills like "[o]xys, like percs", and they continued drinking and using more cocaine and percocets at Sinclair's apartment.

[74] In cross-examination, Epp described the accused as "absolutely juiced", "[o]ut of it", "[s]taggering" and "talking loud", and by the time they were at trailer #10, the accused was "close to a 10" out of 10.

[75] Sinclair had not met the accused before that night. She testified that she had been consuming intoxicants, as had almost everyone, including the accused. In cross-examination, she described the accused as "quite

intoxicated", "staggering and stumbling" and was an "eight-and-a-half" out of 10.

[76] The trial judge correctly instructed the jury that they had to be satisfied beyond a reasonable doubt that the accused "meant to kill [the deceased], or meant to cause [the deceased] bodily harm that [the accused] *knew* was likely to kill [the deceased], and was reckless whether [the deceased] died or not." The verdict of second degree murder, and not manslaughter, demonstrates that the jury was so satisfied.

[77] The evidence of alcohol and drug consumption, by the accused, and others, had to be assessed in the context of all of the evidence. As instructed by the trial judge, to determine the accused's state of mind, the jury had to consider what the accused did or did not do; how he did or did not do it; and what he said or did not say.

[78] While a verdict of manslaughter would not have been surprising, I agree with the Crown that there is evidence that supports the jury's conclusion with respect to intent. It was open to the jury to conclude that the accused had run away after his first confrontation with the deceased, only to return from trailer #10 with a knife and then wait for the deceased to exit the van. As well, the video shows the accused running after the deceased with a knife and navigating around various objects in his way.

[79] It was not necessary for the jury to find that the accused intentionally stabbed the deceased in the neck to kill him. It was open to the jury to convict the accused of second degree murder if they were satisfied beyond a reasonable doubt that the accused intended to cause the deceased bodily harm

by stabbing him; that the accused knew that it was likely to kill the deceased and he was reckless whether the deceased died or not.

[80] The evidence, and common sense, supports the reasonable inference that the accused intended to cause the deceased bodily harm; that the accused knew stabbing the deceased was likely to kill him and he was reckless whether the deceased died or not.

[81] Furthermore, the jury was, as is this Court now, entitled to consider the absence of evidence from the accused as to how the alcohol and drugs he consumed affected him. While others testified as to the general consumption of intoxicants and their opinions as to the level of intoxication of the accused, there was no specific evidence that the accused could not foresee the dire consequences of stabbing the deceased.

[82] The trial judge properly instructed the jury regarding the level and significance of the accused's intoxication. The following comments of Cronk JA in *R v Sinobert*, 2015 ONCA 691 are applicable here (at para 114):

> It is for the jury to assess, as a matter of fact, whether an accused was so intoxicated as to be relieved of liability for a particular offence. The jury in this case was equipped to make that determination with respect to the appellant. That the appellant was very drunk at the time of the crime does not render the jury's murder verdict unreasonable.

Conclusion

[83] The trial judge properly instructed the jury. The jury's conclusions that the accused stabbed the deceased and that he had the specific intent for second degree murder were based on findings of fact and reasonable

inferences available to the jury on the evidence. I see no basis for appellate intervention.

[84] I would dismiss the appeal.

Hamilton JA

I agree: Mainella JA

I agree: leMaistre JA