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(Winnipeg Centre)
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COURT OF QUEEN'S BENCH OF MANITOBA

B E T W E E N:

HER MAJESTY THE QUEEN,	)	**Appearances:**
	)	
	)	Christian A. Vanderhooft and
- and -	)	Joel N. Myskiw
	)	for the Crown
	)	
AARON MICHAEL DUCHARME,	)	Bruce F. Bonney and
	)	Kaitlynn A. Porath
accused.	)	for the accused
	)	
	)	JUDGMENT DELIVERED:
	)	December 16, 2020

McCARTHY J.

INTRODUCTION

[1] Aaron Michael Ducharme ("the accused") stands charged with first degree murder with respect to the April 22, 2019 killing of another inmate, Adrian Fillion ("Fillion"). He is also charged with accessory after the fact to the murder of Fillion.

[2] Mr. Fillion was murdered at Stony Mountain Institute ("Stony"), in the Province of Manitoba. At the time of this trial, two other inmates, Peter Fisher ("Fisher") and Kevin Edwards ("Edwards"), had pled guilty to first degree murder in their roles in planning and carrying out this homicide.

BACKGROUND

[3] On April 22, 2019, Fillion was stabbed 52 times in his cell at Stony. He died as a result of those injuries. It is the Crown's position that Fisher and Edwards inflicted the stab wounds, but that the accused aided in the planning and carrying out of the murder. The Crown alleges that without the involvement of the accused, the murder could not have occurred as it did. In the alternative, the Crown argues that the accused was an accessory after the fact to the murder by disposing of the murder weapon.

[4] On April 22, 2019, there were 24 inmates on "I" range in the maximum security unit at Stony. The accused, Fisher, Edwards and Fillion were among those 24 inmates. Mr. Fillion had only arrived on "I" range from another institution approximately two weeks before his death. "I" range houses those inmates sentenced to life in prison and other inmates are placed there for their protection for various reasons.

[5] The evidence in support of the Crown's case was primarily video surveillance from Stony. The Crown also called three witnesses, Lindsay Scott, a Certified Forensic Identification Assistant and civilian member of the Royal Canadian Mounted Police ("RCMP"), Tanner Faulkner, a Correctional Officer with The Correctional Service of Canada ("CSC"), and Miles Day, a Security Intelligence Officer with CSC. The accused testified in his own defence. No other evidence was called by the Defence.

[6] The parties also filed an Agreed Statement of Facts. The Crown filed a USB flash drive containing scene diagrams of "I" range at Stony, an RCMP photobook and diagrams, "I" range surveillance video from 12 noon to 8:25 p.m. on April 22, 2019 ("the video"), and the autopsy report of Dr. David Taylor.

[7] The autopsy report states that Fillion's cause of death was multiple stab wounds.

[8] Based on all of the evidence on April 22, 2019, at approximately 8:23 p.m., inmates Fisher and Edwards entered Fillion's cell and stabbed him repeatedly. They then returned down the stairs to the lower range and each proceeded to shower. The accused was in the common area when they entered Fillion's cell and did not participate directly in the stabbing. The accused went to the shower after and retrieved the knife used in the stabbing from Fisher, and threw it in the garbage.

[9] The Crown alleges that upon review of the video, it is apparent that the accused knew about and participated in the plan to kill Fillion, and that he assisted by luring Fillion into his cell prior to the stabbing, and by disposing of the weapon after the stabbing.

[10] There is no audio or video surveillance in the cells and none of the cameras record into the cells themselves.

[11] The video surveillance was able to show the upper tier of the range from both ends, and the lower tier from the far end toward the common area. The

common area could be seen from two angles, with a blind spot when individuals were along the grated wall nearest to the centralized control area.

[12] It was the evidence of Mr. Day that the video recording of the lower tier recorded from the common area down the hall had been inadvertently deleted after the incident and was not available for trial. Therefore, there was no way to see behind individuals as they walked down the lower tier away from the common area. This became important when the footage relating to the Crown evidence about a purported weapon was reviewed.

[13] The video covers the eight hours up to and including the stabbing. It can be paused or slowed to fractions of a second, but the quality of the images, when paused or zoomed in closer, is not very clear. As well, the fixed angle of the cameras is above the subjects it is recording, at times making it difficult to be sure what direction an individual is looking, or who the individual is speaking or gesturing to. It is impossible to ascertain what is being said, although people can be seen speaking, acting or reacting.

[14] The evidence in this case, if that has not been obvious to this point, is purely circumstantial.

[15] I will review the evidence in more detail during the evidence portion of my decision.

THE LAW

(a) First Degree Murder

[16] The accused is charged with committing first degree murder.

[17] A person commits murder if he causes the death of another by means of an unlawful act with the intention of killing or of causing bodily harm which he knows is likely to cause death, and is reckless as to whether death ensues.

[18] Subsection 231(2) of the ***Criminal Code*** ("the ***Code***") reads:

> Murder is first degree murder when it is planned and deliberate.

[19] As stated by the Supreme Court of Canada in ***Harbottle v. Queen*** (1993), 1993 CanLII 71 (SCC), 84 C.C.C. (3d) 1 (S.C.C.) at p. 11, the purpose of classifying some forms of murder as first degree:

> …to impose the longest possible term of imprisonment without eligibility for parole upon those who commit the most grievous murders. It is concerned with contract killers; with those who murder police officers and correctional officers; those who murder after planning and deliberation, and with those who murder while committing crimes of combination.
>
> To be planned and deliberate means:
>
> "Planned" is to be assigned … its natural meaning of a calculated scheme or design which has been carefully thought out, and the nature and consequences of which have been considered and weighed. But that does not mean, of course, to say that the plan need be a complicated one. It may be a very simple one, and the simpler it is perhaps the easier it is to formulate. …
>
> "Deliberate" … 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. (*R. v. Widdifield* – The *Widdifield* instruction was approved by the Supreme Court of Canada in *Nygaard and Schimmens v. The Queen* (1989), 1989 CanLII 6 (SCC), 51 C.C.C. (3d) 417 at p. 432 (S.C.C.)).

[20] While the accused is charged with the commission of first degree murder, he may be convicted of a lesser or included offence where the Crown has failed to prove the more serious offence.

[21] To prove murder, the Crown must prove beyond a reasonable doubt:

(1) that the principal committed an unlawful act;

(2) that the unlawful act caused the death of Adrian Fillion; and

(3) that the principal either meant to cause the death, or meant to cause bodily harm that he knew was likely to cause death and was reckless about whether or not it caused death.

[22] In the event the Crown has been able to prove each of the three elements beyond a reasonable doubt, it will have proven second degree murder. In order to prove first degree murder has occurred, the Crown must also prove that the murder was planned and deliberate.

[23] An included offence is that of manslaughter. A person commits manslaughter if he or she causes the death of another person by means of an unlawful act, without any one of the two kinds of intention required to prove murder. The criminal fault in manslaughter is the commission of the unlawful act which is objectively dangerous, in the sense that a reasonable person in the same circumstances as the principal would recognize that the unlawful act would subject another person to the risk of bodily harm, which is neither trivial nor transitory.

(b) Parties to Offences (s. 21)

[24] Subsection 21(1) of the ***Code*** reads in part:

> Every one is a party to an offence who
>
> …
>
> (b) does or omits to do anything for the purpose of aiding any person to commit it; or
>
> (c) abets any person in committing it.

[25] It is not enough that a person be simply there when a crime is committed by someone else. Aiding involves an inquiry as to:

(1) whether the accused in fact aided the principal; and

(2) whether the actions were done for the purpose of aiding the principal.

[26] The *actus reus* for aiding is doing something that assists the principal in committing the offence. It can be any act before or during the offence that somehow assists or further facilitates the offence.

[27] The *mens rea* for aiding is that it must be for the "purpose" of assisting the principal. This requires that the accused intended to help the principal and had knowledge that the principal intended to commit the offence.

[28] An abettor is one who:

(1) actually encourages the principal with words or acts; and

(2) intended to do so.

[29] It is necessary that an accused must have contributed, actually participated in, or assisted someone, in the murder. Further, there must be evidence that the accused intended his acts or words to encourage the principal, and not merely that they had that effect. The accused must also have knowledge of the general nature of the offence that the principal intends to commit.

[30] In ***R. v. Briscoe***, 2010 SCC 13, [2010] 1 S.C.R. 411 ("***Briscoe***"), the Supreme Court of Canada quotes Doherty J.A. in ***R. v. Maciel***, 2007 ONCA 196, 219 C.C.C. (3d) 516 (Ont. C.A.) (at paras. 88-89) at para. 17:

> … a person who is alleged to have aided in a murder must be shown to have known that the perpetrator had the intent required for murder under s. 229(a): *R. v. Kirkness*, (1990), 60 C.C.C. (3d) 97 (S.C.C.) at 127.
>
> The same analysis applies where it is alleged that the accused aided a perpetrator in the commission of a first degree murder that was planned and deliberate. The accused is liable as an aider only if the accused did something to assist the perpetrator in the planned and deliberate murder and if, when the aider rendered the assistance, he did so for the purpose of aiding the perpetrator in the commission of the planned and deliberate murder. Before the aider could be said to have a requisite purpose, the Crown must prove that the aider knew the murder was planned and deliberate.

[31] In ***R. v. Hibbert***, [1995] 2 S.C.R. 973 ("***Hibbert***"), Cory J. in ***R. v. Kirkness***, [1990] 3 S.C.R. 74, stated (at p. 88) at para. 37:

> …the person aiding or abetting the crime [of murder] must intend that death ensue or intend that he or the perpetrator cause bodily harm of a kind likely to result in death and be reckless whether death ensues or not.

[32] The accused is also charged with accessory after the fact to murder. If the Crown has not proven that the accused is guilty of murder, they allege that by disposing of the murder weapon, he is guilty of being an accessory after the fact.

[33] Section 23 of the ***Code*** reads:

> 23.(1) An accessory after the fact to an offence is one who, knowing that a person has been a party to the office, receives, comforts or assists that person for the purpose of enabling that person to escape.

[34] The accused, with respect to the charge of accessory after the fact, relies upon the common law defence of duress (which applies to offences as a party), and is similar to a common law defence of necessity (***Hibbert***, para. 51).

[35] There are preconditions for the defence of necessity:

(1) there must be an urgent situation of clear and imminent peril;

(2) compliance with the law must be demonstrably impossible;

(3) that there be proportionality between the danger facing the accused and the harm caused by his unlawful acts.

(***Hibbert***, para. 53)

[36] In ***Hibbert***, the Supreme Court of Canada defines the test to be applied with respect to the defence of duress to be a modified objective standard. The court is to determine whether there is a reasonable legal alternative to disobeying the law, but this assessment must be viewed in light of the particular actor's capabilities and abilities.

[37] In ***Hibbert***, as stated by the court at para. 60:

> ….I am of the view that while the question of whether a "safe avenue of escape" was open to an accused who pleads duress should be assessed on an objective basis, the appropriate objective standard to be employed is one that takes into account the particular circumstances and human frailties of the accused.

[38] Also at para. 61:

…..

> ….In my view, in determining whether an accused person was operating under such constrained options, his or her perceptions of the surrounding facts can be highly relevant to the determination of whether his or her conduct was reasonable under the circumstances, and thus whether his or her conduct is properly excusable.

[39] The accused in this case testified. Therefore, the analysis outlined in the Supreme Court of Canada in ***W.D.*** applies.

[40] Finally, the Crown's evidence in this case is purely circumstantial. According to the Supreme Court of Canada in ***R. v. Villaroman***, 2016 SCC 33, [2016] 1 S.C.R. 1000, the following principles are important to the assessment of circumstantial evidence:

> ….In assessing circumstantial evidence, inferences consistent with innocence do not have to arise from proven facts…
>
> ….If there are reasonable inferences other than guilt, the Crown's evidence does not meet the standard of proof beyond a reasonable doubt. (para. 35)
>
> … the basic question is whether the circumstantial evidence, viewed logically and in light of human experience, is reasonably capable of supporting an inference other than that the accused is guilty. (para. 36)
>
> …to justify a conviction, the circumstantial evidence, assessed in light of human experience, should be such that it excludes any other reasonable alternative…. (para. 41)

And finally,

> ….alternative inferences must be reasonable, not just possible". (para. 42)

THE EVIDENCE

[41] Correctional Officer Tanner Faulkner testified that he was on a break eating in the control bubble on April 22, 2019 when they received an emergency call from Fillion's cell. He was the first Correctional Officer to arrive at Fillion's cell at approximately 8:30 p.m. He described Fillion as unconscious when he arrived at the cell, and stated that he had received numerous stab puncture wounds. Mr. Fillion was transported to the hospital and died there.

[42] Mr. Faulkner testified that when he arrived at the cell, Fillion was laying on the bed on his side, was wearing only pants, with his shirt off, and appeared to be unconscious. There was not a lot of blood, although there was some blood on the floor. Mr. Fillion was at times conscious and said, "I don't know why they did this", but he did not give any names.

[43] By way of general information, Mr. Faulkner and Mr. Day testified that each inmate has his own cell and that the cell doors automatically open approximately every half hour, for five minutes and then close again. An inmate can go out of, or stay in his cell when the door opens, knowing that it will shut again. The opening and closing of the doors is run manually from the control room, so there is no exact schedule of when they open and close.

[44] Certain ranges go out for exercise in the evenings, and there is a canteen where inmates can buy food on Thursday nights. Otherwise they are in "I" range.

[45] Mr. Faulkner and Mr. Day confirmed that some canteen items can be used as currency between inmates, and some items, such as Nicorette gum, are often

traded, as smoking is banned. Also, drugs in Stony are a significant problem and are smuggled into the institution in various ways.

[46] Mr. Faulkner testified that each new inmate is given $30 for the canteen, and a bag with two cups and a set of cutlery. The cutlery is orange plastic and some inmates take them back to their cell. An orange plastic knife from Stony was filed as an exhibit during the testimony of the accused.

[47] With respect to showers, there are two showers on each tier. The showerheads are at the back of the shower stalls and there are plastic shower curtains in the shower for privacy, but no plexiglass or doors on the showers.

[48] They also confirmed that inmates regularly pace up and down the halls to pass time and for exercise, and that it was common for two, three or four to be pacing at any time.

[49] Each cell has a panic button and if the button is pushed, the doors will be closed manually from the control room.

[50] Mr. Day testified that "I" range at Stony is part of unit 6, being the maximum security unit. It is used to house the most serious offenders and those that required protective custody.

[51] Mr. Day testified that sound travels pretty well as the range is made of cement and steel. If someone is yelling from the first floor shower, you would likely be able to hear it in the common area and on the second floor, and if someone was screaming inside their cell, you could hear it from the common area.

[52] Mr. Day testified that there are rules with respect to inmate and staff contact. He confirmed that when the staff are on the range, the inmates are required to move away from certain areas and where staff are. When there is an emergency, the primary concern is the victim so in this case they directed all of the inmates to the lower tier.

[53] According to Mr. Day, there is a process involved for moving a prisoner off a range. It is a management decision and such a request could be granted if the inmates concerns were validated.

[54] Lindsay Scott testified that she and her partner, Constable Benjamin Alec, prepared the scene video and made the scene diagrams, and that Constable Byford removed the murder weapon from the trash can in the common area.

[55] Ms. Scott then photographed the murder weapon when it was placed on the freezer beside the trash can by Constable Byford. She described the weapon as a shank and confirmed on cross-examination that shanks are very common in Stony and that her investigations often include a shank. The photograph of the shank retrieved from the garbage can was filed as an exhibit.

[56] The accused testified in his own defence. He denied any prior knowledge of the plan to kill Fillion and denied having or seeing the shank prior to the stabbing.

[57] According to the accused, he figured out that something was going on when he heard a squeak on the floor and then noises coming from Fillion's cell.

[58] He testified that just prior to the stabbing, he had not been attempting to lure Fillion back into his cell to assist Fisher and Edwards with their plan. Instead, he testified that he got Fillion's attention so that they could go back to his cell to complete a drug hand off that had been arranged earlier that day.

[59] The accused acknowledged that one of his roles in prison was dealing drugs.

[60] With respect to picking up and disposing of the murder weapon, the accused testified that he did so, but that doing so was not pre-arranged. The accused stated that he went upstairs to get Nicorette gum from one of the inmates, and when he was coming back down the stairs, he saw Fisher look at him from the shower and yell at him to bring him sandals. When he did so, he saw Fisher with the shank in the shower and Fisher said, "take this or I'll fucking kill you".

[61] When the accused bent over to throw the sandals under the shower door to Fisher, Fisher threw the knife out from under the door and the accused immediately picked it up and put it in his pocket. The accused then started toward his cell, but realized he couldn't take the shank there so he took it to the garbage can in the common area. The accused hid it under some trash and walked away.

[62] The accused testified that he did not approach the correctional officers or any staff, or tell anyone in authority what he had done. His reason, he said, was that he was afraid of Edwards and Fisher and did not believe that there was any way to tell the authorities or "snitch", without putting his life in danger.

[63] On cross-examination, the accused conceded that he had previously obtained a transfer out of a unit, but argued that it did not happen immediately,

and it required him to slip someone a note to make the request, so no one would know.

[64] The accused testified that he was afraid for his life and picked up and disposed of the shank only because he felt in that moment he had no option.

[65] By way of background, the accused testified that he grew up in Thunder Bay and had become involved in criminal activity as a youth. He has a criminal record for robbery and property-related offences.

[66] The accused also described himself as having a bad addiction to opiates, which he said partly led to his crimes. He is also prescribed medications for Attention Deficit Hyperactivity Disorder, depression and perhaps, Obsessive Compulsive Disorder. He described the process for receiving medications in prison as lining up in front of other inmates, and having your name and prescription stated prior to receiving the medication. Once Edwards and Fisher knew that he was taking certain drugs, they bullied and muscled him into giving them his medication. The accused said this happened daily except with one nurse who made sure he rinsed, which forced him to swallow his medication.

[67] The accused said that he learned that giving up his medication and obtaining other drugs for inmates was a good way to keep himself safe and on the good side of other inmates.

[68] The accused testified that he was afraid of Edwards and Fisher, and stated that he knew that they were gang members and that Fisher was a lifer. He stated

that they each belonged to different factions of the Bloods gang and that gang members had a code of protecting each other.

[69] The accused also testified that he was afraid of Edwards after being incarcerated with him previously on "J" range. He stated that there had been a rivalry between Thunder Bay inmates and Winnipeg inmates, and he was from Thunder Bay and Edwards from Winnipeg. He testified that he saw Edwards stab three people in June 2018. He also stated that he had previously been beaten up in prison, including by Fisher shortly after he arrived in "I" range.

[70] The accused described himself as having been afraid of Edwards and Fisher and compliant with them and other inmates on "I" range as a way of protecting himself. He was routinely bullied and degraded by other inmates. He testified that Edwards and Fisher nicknamed him "Douchebag", and insisted that everyone on the range call him that. He said that they often engaged in horseplay, except it wasn't actually horseplay, because they would hit him. The accused said he tried not to complain because that made it worse.

[71] The accused testified that he had previously been in medium security, but was moved to "I" range because he was getting beaten up. He understood "I" range to be the last stop at Stony. It was the place where they put those that needed protection as there was nowhere else to go.

[72] The accused admitted on cross-examination that he had previously acquired weapons for protection. However, this did not work as they were taken from him. Fisher had taken the one that he acquired shortly after coming onto "I" range.

Therefore his approach had become to obtain drugs and do chores, cooking, laundry and cleaning for other inmates to make himself valuable and therefore, safe.

[73] The accused denied any involvement or affiliations with gangs. He denied that he was ever involved in gang-related handshakes or other gang activities, but said that gang members engaged in those activities in Stony. He testified that Edwards, Fisher and one other inmate ran the range. Mr. Day confirmed that this may have been true and that one of them had the nickname "Big Man". He also confirmed that the accused was not a gang member.

The Crown's Position

[74] The Crown submitted that evidence contained on the video supported a finding that the accused both aided and abetted in the commission of the murder of Fillion. They argued that the accused was the lynchpin in a coordinated plan, and without his part, the crime could not have taken place.

[75] The Crown argued that the following evidence supports this finding beyond a reasonable doubt:

(1) the accused was nearby when Edwards placed a change of clothes near the shower at approximately 5:16 p.m.;

(2) Edwards, Fisher and the accused walk back and forth on the lower range from 5:19 p.m. to 5:30 p.m.;

(3) there is a handshake and an embrace in the common area between some inmates at 5:32 p.m.;

(4) at 5:33 p.m., Edwards and the accused are walking together and an item is passed from another inmate to either Edwards or the accused;

(5) 5:36 p.m. to 5:40 p.m., Edwards, Fisher and the accused are walking around together and appear to be friendly;

(6) 5:38 p.m., Fisher places clothes at the shower;

(7) 7:53 p.m., the accused moves items at the shower;

(8) 7:55 p.m., Edwards tries on the accused's sandals and the sandals are left in the common area;

(9) 8:22 p.m., the accused appears to be looking up toward Fillion's cell. The cell doors open, and Fisher and Edwards ascend the stairs to the second floor. Mr. Fillion leaves his cell when the door opens and heads down the stairs, but the accused catches his attention and the accused and Fillion go back up to his cell;

(10) the accused leaves Fillion's cell after a brief drug hand off. Edwards and Fisher are waiting, and go into Fillion's cell and the stabbing occurs;

(11) the accused looks up from the common area in the direction of Fillion's cell while the stabbing is occurring;

(12) the accused goes back upstairs while Fisher and Edwards are still in Fillion's cell, and walks by glancing in the cell;

(13) when Edwards and Fisher leave the cell, the accused goes back up and looks in the cell. He does not show any visible reaction to what he sees;

(14) the accused runs downstairs, picks up his sandals in the common area and takes them to the shower. He throws them under the door to Fisher and at the same time, picks up a weapon that has been thrown out under the door;

(15) he takes the weapon to the common area and hides it in the garbage can.

[76] From the above series of events, the Crown argued that it was clear that the accused participated in the planning, execution and clean-up of Fillion's murder. They stated that the evidence proved that he knew about the plan to murder Fillion, that he possessed the murder weapon before the killing, or at the very least, that he knew Edwards possessed the weapon, and that the accused's role of ensuring that Fillion was in his cell was pre-arranged. They also argued that having his sandals in the common area and providing them to Fisher in exchange for the murder weapon was pre-arranged. They argued that a careful review of the video would lead to no other reasonable conclusion, and that they had proven their case beyond a reasonable doubt.

[77] The Crown submitted that in the event that the court was not satisfied beyond a reasonable doubt that the accused knew of the intention to kill Fillion, they had proved that he knew of the plan to violently attack him and had assisted

in carrying out that plan, and was therefore guilty of second degree murder. They argued that wilful blindness can substitute for knowledge.

[78] With respect to the charge of accessory after the fact, the Crown argued that in the event that the court did not find that the accused knew about or was wilfully blind to the plan, and intended to assist Fisher and Edwards, he must be convicted of disposing of the weapon after the fact, and thereby guilty of being an accessory after the fact to murder.

[79] With respect to the defence of duress, the Crown argues that the evidence that the accused was afraid of Edwards and Fisher should not be believed. They point to the demeanor of the accused on the video as being friendly with them and argue that even if he was afraid, he has not proven that he had no safe avenue of escape. In fact, they argue that he had previously requested and obtained a move, so he knew how to get out of the situation.

[80] The Crown argued that the court would have to be satisfied that the accused had no means of escape in order to acquit him on the basis of that defence. They argue that he could have gone to the correctional officers immediately upon becoming aware of the stabbing, or even after picking up the weapon. That he did not do so was a choice and as such, he is guilty of being an accessory after the fact.

[81] The Crown argued that pursuant to the Manitoba Court of Appeal in ***R. v. McDonald***, 2020 MBCA 92, at para. 10, the trial judge is required to evaluate the evidence as a whole rather than in a piecemeal fashion.

The Defence's Position

[82] The Defence argued that the testimony of the accused was believable and ought to be believed, both with respect to the fact that he had no prior knowledge of the plan to harm or kill Fillion, and with respect to the defence of duress. They argued that his evidence was unshaken and largely unchallenged. They also pointed out several inconsistencies between the evidence that the Crown says demonstrates the accused's guilt and the other evidence on the video. This other evidence from the video will be reviewed in more detail in the analysis section of my decision.

[83] The Defence argued that if I believe the testimony of the accused, I must acquit. They also argued that, even if I did not believe the accused, or his evidence did not raise a reasonable doubt, the Crown's theory is pure speculation. They argued that the Crown was asking the court to make findings from actions by the accused, such as glances over his shoulder and walking and talking with other inmates that could have any number of explanations and interpretations, and are simply not sufficient evidence upon which to ground guilt beyond a reasonable doubt.

[84] The Defence argued that guilt as a party to murder required that I find that he knew of the plan and intended to assist in the plan, and that neither element had been proven.

[85] On the charge of accessory after the fact, the Defence argued that the evidence supported a finding that the accused was bullied by Edwards and Fisher,

and afraid of them. They argued that his medication was taken from him, he was called degrading names and he stayed safe by being the range gopher and chore-boy. They argued that Edwards and Fisher were gang members who ran the range, and that the accused had been bullied and intimidated, and had no options but to follow suit and play along, or get beat up and mistreated. They argued that the physical and emotional circumstances of life on "I" range were such that the accused effectively had no choice but to pick up the shank when ordered to do so and threatened by Fisher. These were the inmates who had just attacked Fillion and could hurt him as well. They argued that the Crown's position that he could have just gone to the correctional officers and asked for help and protection was a naive and unreasonable option in the circumstances of the harsh environment of the prison.

[86] The Defence submitted that this is a clear case of the accused acting out of necessity and duress, and as such, I must acquit on the charge of accessory after the fact.

Analysis

[87] The Crown is asking me in this case to find the facts to be as outlined above, and then connect the dots between those facts to find that there is no reasonable inference to be drawn, other than the guilt of the accused beyond a reasonable doubt. This case, however, is not entirely similar to ***Briscoe*** and ***R v. Beardy***, 2016 MBCA 68, relied upon by the Crown in argument. In those cases, the accused was actively involved in the events prior to death, and there was evidence from

other participants, the credibility of which could be assessed and weighed by the trier of fact as to the accused's knowledge and involvement. There was no such evidence in this case.

[88] The evidence the Crown put forward in this case was comprised entirely of a silent video of the activities of the accused and the other inmates on "I" range for the eight hours leading up to and throughout the events of April 22, 2019. There were no other witnesses who were present prior to or at the time of the stabbing.

[89] Edwards and Fisher have pled guilty to planning and executing the stabbing that caused Fillion's death. The issue is whether I am satisfied beyond a reasonable doubt that the accused knew about that plan and intended to assist in carrying it out.

[90] The Crown has drawn my attention, as outlined above, to several images and actions of the accused and others. They are asking me to reach the conclusion that the only reasonable inference to be drawn is that the accused knew about or was wilfully blind to the plan by Fisher and Edwards to kill Fillion, and that he intended to assist Fisher and Edwards in committing that crime.

[91] The Defence, as outlined above, argues that the evidence is equally, if not more, consistent with the accused's evidence that he did not know about the plan in advance and in picking up and disposing of the weapon, was reacting to a threat made toward him. The Defence argued that he was effectively acting involuntarily and under duress.

[92] I outlined above the evidence on the video that the Crown argues leads to no other inference than the guilt of the accused.

[93] The accused testified that he did not have knowledge of the plan and did not intend to assist. Even if I do not believe the accused, I must consider whether his evidence raises a reasonable doubt. Even if the accused's evidence does not raise a reasonable doubt, I must also consider whether the evidence of the Crown satisfies me beyond a reasonable doubt that the elements of the offence have been proven, and that the evidence is not reasonably capable of supporting an inference other than the guilt of the accused.

[94] The fact that the video does not have any audio makes being certain of most of what is going on very challenging. The following are the observations I have made from watching the video and the evidence of the accused, which are not necessarily consistent with the Crown's theory of the case or in some cases support the evidence of the accused.

[95] With respect to the evidence that the accused was around when Edwards placed his clothes at the shower, the accused testified that the inmates mark their place in line for the showers by putting their clothes there in advance. Other inmates, including the accused, appeared to do the same. Also, Edwards placed his clothes, before the accused was alleged to be walking and talking with Fisher and Edwards to hatch the plan.

[96] Edwards, Fisher and the accused walked back and forth on the lower range for several minutes. However, throughout the eight hours of video, various

inmates walk together at various times. This evidence demonstrates an opportunity to discuss a plan, but is not proof that they in fact discussed a plan.

[97] There is a handshake and an embrace in the common area, which is argued to solidify the plan. However, the accused is not nearby and does not participate in this handshake or embrace. The accused testified that the gang members have special ways of interacting that he is not included in. There are also other times during the video coverage in which such interactions between other inmates are observed.

[98] The Crown contends that Edwards and the accused are seen walking together and an item is passed from another inmate, Justin Cross ("Cross"), to either Edwards or the accused. This is alleged to be the passing of the murder weapon, which is barely visible behind Cross's back. The object appears to me to be clearly orange in colour. In my view, it is considerably more similar to the orange cutlery which Mr. Faulkner confirmed is issued to inmates at Stony than to the photo of the shank retrieved from the garbage. The image was captured just after dinner as Cross was walking toward the cells, and Mr. Faulkner testified that the inmates often keep their cutlery in their cell. The camera angle from behind is unavailable which makes the Crown's assertion that it is the murder weapon, impossible to establish. Similarly, the accused is outside of the camera angle when the Crown asserts the weapon is passed to him, so no such hand off can be seen. The accused testified that he did not see or handle a weapon that day.

[99] At 7:55 p.m., Edwards tries on the accused's sandals and the sandals are left in the common area. This occurs after the accused showers and comes to the common area in his shower sandals. He dries off his feet, changes his shoes and then leaves his shower sandals in the common area, initially just on the floor and then later, near his seat at the table. The accused testified that he was doing laundry and left them by his chair. He also said that he didn't know if his cell was open. I make a few observations in regard to this evidence. I note that another inmate earlier does the same thing changing out of his wet sandals in the common area, although he eventually leaves his sandals in the range outside a cell. There was no evidence from the Crown that this is not what the accused usually did with his sandals, and the evidence is that the majority of the time cell doors are closed. After the accused takes them off, several people kick and look at the sandals, and Edwards jokingly tries them on. They are the only orange sandals seen in the video as the accused testified that they came from another institution. Finally, after the assault, the sandals are worn by Fisher, not Edwards.

[100] At 8:22 p.m., the accused appears to be looking up towards Fillion's cell. Fillion leaves his cell when the door opens and heads down the stairs, but the accused catches his attention and the accused and Fillion go back up to his cell. The accused testified that he was watching and waiting for the cell doors to open so he could go up and give Fillion the drugs he had requested. I note from review of the video that Fillion and the accused had discussions at approximately 5:28 p.m. and 6:32 p.m. in the common area. The accused testified that Fillion

had asked him for drugs that day. Further, just prior to looking upstairs, the accused handed something to or exchanged items with another unidentified inmate on the lower range and near the dryer. For over two hours prior to that time, the accused had been busy with food preparation and laundry in the common area.

[101] The cell doors open and Fisher and Edwards ascend the stairs to the second floor. The accused leaves Fillion's cell after a quick drug hand off. Edwards and Fisher are waiting and go into Fillion's cell and the stabbing occurs. Despite all being in the common area and the area of Fillion's cell, there were no discussions or signals of any kind between Edwards, Fisher and the accused to suggest that this was an orchestrated plan.

[102] The accused looks up from the common area, in the direction of Fillion's cell while the stabbing is occurring. The accused testified that they could hear sounds coming from the cell. A number of inmates, besides the accused, are looking up.

[103] The accused goes back upstairs while Fisher and Edwards are still in Fillion's cell, and walks by glancing in the cell. Several inmates, in addition to the accused, do this both before and after him. There is nothing in the accused's actions that suggests any different extent of prior knowledge than the other inmates.

[104] When Edwards and Fisher leave the cell, the accused goes back up and looks in the cell. He does not show any visible reaction to what he sees. Again,

this applies to several of the inmates. The accused and others walk by and glance into the cell.

[105] The accused runs downstairs, picks up his sandals in the common area and takes them to the shower. He throws them under the door to Fisher and at the same time, picks up a weapon that has been thrown out under the door. When viewing the video of the first floor range at the same time two other inmates quickly grab sandals which are in the hall outside of the cells. One takes a pair to the shower that Edwards was in, and the other turns back when he sees the accused come from the common area with his. It is clear that something is said from the shower, given the quick and simultaneous response from three inmates. There is no suggestion that the other inmates who also ran with sandals were in on the plan.

[106] The evidence is that there are no doors on the shower so the accused would likely have been able to see into the shower from the stairs. However, there is no camera angle that allows us to see this.

[107] The accused takes the weapon to the common area and hides it in the garbage can. However, initially upon picking up the weapon, the accused puts it in his pocket and starts walking toward his cell. He then appears to change his mind, and turns and goes to the common area garbage. One would expect that if the plan was pre-arranged for him to pick up the shank and dispose of it, that he would have headed straight to the garbage.

[108] I am mindful of the fact that I must assess the evidence as a whole and not in a piecemeal fashion. While the video surveillance as a whole raises suspicions or questions as to whether the accused knew of the plan to kill or injure Fillion, there are several portions of the evidence that do not prove the accused's knowledge, or also support his evidence he did not know. Suspicion is not sufficient to prove guilt in a criminal case, and particularly, in a murder case. I must be satisfied beyond a reasonable doubt of the guilt of the accused. That means that there must be no reasonable inference that I can draw from all of the evidence, or lack of evidence, which is consistent with the accused's innocence.

[109] While I am not able to accept all of the accused's evidence, I did find him generally to be a forthright witness. He did not try to deny his criminal past, prior possession of weapons or that he is a drug dealer in the institution. He conveyed the practical reality of his existence in the institution and in most cases, seemed genuine. Most importantly though, his testimony was largely consistent with what I observed in the video.

[110] It was clear that the accused catered to the needs of other inmates much of the day. He was preparing and serving food for hours around dinner time and doing laundry for the other inmates that he describes as running the range. The interaction between him and Fisher and Edwards was primarily initiated by them. Edwards in particular, was seen throughout the video to be engaging in horseplay and hugging or putting his arm around various individuals, not just the accused. Edwards and others were seen interacting with other inmates more than with the

accused, including engaging in hugs and special handshakes. The accused was not seen to engage in special handshakes. Fisher and Edwards also sat together and the accused sat at another table. It was also notable that Fisher and Edwards did not seem to do chores. Their behaviour on the range was quite different from the accused's in that regard.

[111] Mr. Day confirmed Edwards and Fisher had gang affiliations, which the accused did not. He also testified that a person who was labelled a "snitch" in the institution could be in danger and needed to be placed in protective custody.

[112] I accept the accused's evidence as to the role he played on "I" range and that it was done to keep himself safe and in the good graces of Edwards, Fisher and others. It was the evidence of Mr. Day that the accused had been placed on "I" range as a protective placement and that "I" range was the only such option at Stony.

[113] I accept the accused's evidence that he had previously seen people stabbed by Edwards and that he had been assaulted by other inmates, including Fisher.

[114] I accept that he went up to Fillion's cell on that day to sell him drugs. Fillion's reaction when the accused signalled to him is consistent with that evidence. He did not seem confused, or surprised, and turned immediately and went back to his cell. What I can't be certain of is whether it was also intended to further Edward's and Fisher's plan to kill him, or whether it simply created the opportunity for them to carry out their plan. Where the evidence is consistent with an inference that favours the accused, I should give him the benefit of the doubt.

[115] The evidence that I do not accept is the accused's explanation for why he went up to the upper tier during and immediately after the stabbing. However, the inference the Crown has asked me to accept on that point is also troubling. The Crown argued he was ensuring that the stabbing had been done. That suggestion does not make sense to me if he was in fact in on the plan. If his job was to make sure that Fillion was in his cell and then dispose of the weapon, it would seem more reasonable to me that he would have waited in the common area near his sandals and stayed as far away from the assault as possible. In my view, the most likely scenario is pure morbid curiosity as the inmates were all looking up and clearly hearing something, and then one by one going up and walking by to look in the cell. Several other inmates went up immediately ahead of the accused and immediately after. The Crown argues that the accused did not react noticeably to whatever he saw going on in Fillion's cell, but sadly, nor did any of the inmates except one who stood and watched the attack and seemed visibly upset.

[116] While I did not believe the accused on every point of his testimony, I find that his testimony raises a reasonable doubt as to his prior knowledge of the attack on Fillion.

[117] I find that the Crown has failed to prove beyond a reasonable doubt that the accused had any prior knowledge of a plan, or was wilfully blind to a plan, by Fisher and Edwards to kill or harm Fillion. As such, the Crown has failed to prove beyond a reasonable doubt that the accused is guilty as a party to murder.

[118] With respect to the charge of accessory after the fact to murder, it is clear from the video and the testimony of the accused that he disposed of the weapon on the request of Fisher. He knew it was a weapon, and by then, there could be no question in his mind that it had been used in a violent offence. Regardless of what he saw or didn't see in the cell, I have no doubt that the accused, and in fact all of the inmates in "I" range, had heard violent sounds coming from Fillion's cell and knew Fisher and Edwards had been in there assaulting him. The elements of accessory after the fact are therefore, proven.

[119] However, the accused argues that he did so out of necessity. It is his position that his fear for his safety, his personal circumstances, and his circumstances as an inmate rendered him incapable of having a way out of the situation.

[120] The requirements for the defence of duress are:

> (1) there must be an urgent situation of clear and imminent peril;
>
> (2) compliance with the law must be demonstrably impossible;
>
> (3) that there be proportionality between the danger facing the accused and the harm caused by his unlawful acts.
>
> (***Hibbert***, para. 53)

[121] I find that these preconditions to the defence of duress have been met in this case.

[122] I accept the evidence that the accused was afraid of and intimidated by Fisher and Edwards. I accept that he was bullied in his day-to-day circumstances on "I" range, that he had previously witnessed Edwards stab three people and knew that Fisher was serving life for manslaughter. He was also, at the time of picking up and disposing of the knife, aware that Edwards and Fisher had likely just harmed Fillion. These circumstances in my view, rendered his choice to pick up the shank when ordered to do so effectively involuntary in the normative sense. While I am not certain whether he was verbally threatened with a stabbing or simply ordered to take the weapon, I find that a reasonable person in those circumstances would have felt that they had no true choice. The attack that had just been carried out in Fillion's cell took just minutes and at the time, the inmates were all on the lower range and were going into emergency lockdown. I accept that the accused did not perceive himself to have any safe option. I find that a reasonable person, in his circumstances, would have reached the same conclusion.

[123] The onus remains with the Crown to satisfy the court beyond a reasonable doubt that the accused had options and was not excused for acting out of necessity.

[124] I find that the Crown has not met that onus. The accused is therefore not guilty of being an accessory after the fact to murder.

Conclusion

[125] This murder was a cold, calculated and senseless murder of extreme violence in the institution that Fillion and several other inmates called home while

serving their sentence. Mr. Fillion lost his life and his family is left to mourn his loss and look for answers.

[126] While the Crown has a theory that the accused knew that the crime was going to occur, and was involved in its planning and implementation, it must prove that theory beyond a reasonable doubt in order for an accused person to be convicted of those very serious allegations. Based upon the evidence that was presented in this case, and the evidence of the accused, I am not satisfied beyond a reasonable doubt of his involvement.

[127] There is some circumstantial evidence that supports the Crown's theory of what happened, but there is also evidence that supports the accused's position that he was not involved, other than to pick up and dispose of the knife after the fact.

> As stated by the Supreme Court of Canada in the Villaroman case…to justify a conviction, the circumstantial evidence, assessed in light of human experience, should be such that it excludes any other reasonable alternative…. (para. 41)

[128] I do not find, beyond a reasonable doubt, that the evidence presented excludes any other reasonable alternative, and therefore I must acquit. I also do not find that the evidence satisfied me beyond a reasonable doubt that the accused had any safe and viable alternative to disposing of the weapon and therefore, I must also acquit of that charge.

McCarthy J.