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COURT OF QUEEN'S BENCH OF MANITOBA

B E T W E E N:

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)	
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- and -)	<u>DANIEL ANGUS</u>
)	for the Crown
)	
SAMUEL ZANEN MONEYAS and)	<u>NO ONE APPEARING</u>
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accused.)	
)	<u>TARA WALKER</u>
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)	for the accused, MOAR
)	
)	JUDGMENT DELIVERED:
)	JANUARY 14, 2021

GRAMMOND J.

INTRODUCTION

[1] The accused Storm Alexander Moar ("Moar") is charged with second degree murder in the death of Adam Travis Martin (the "Deceased"), who died on the morning of January 1, 2019 from a shotgun wound to his chest. These reasons relate to a *voir dire* heard within the trial.

[2] The Crown sought to admit into evidence as against Moar two video statements of Bradley Keith Morton ("Morton"), pursuant to the principled exception to the hearsay rule. Police were unable to locate Morton to serve a subpoena upon him, and he did not testify at trial.

[3] On October 21, 2020, I advised the parties that Morton's video statement given on January 1, 2019 (the "First Statement"), in which Morton described events surrounding the shooting, would be admitted into evidence, but his video statement given on January 3, 2019 (the "Second Statement"), in which he identified Moar in a photo line-up would not be admitted, with reasons to follow. These are those reasons.

[4] Both statements are presumptively inadmissible. The principled exception to the hearsay rule requires that to admit the statements, the Crown must prove both necessity and threshold reliability on a balance of probabilities. The defence conceded, and I accept, that necessity was established, so the only issue to be decided was threshold reliability.

THRESHOLD RELIABILITY

[5] The concept of threshold reliability was most recently considered by the Supreme Court of Canada in ***R. v. Bradshaw***, 2017 SCC 35, where the court stated:

[26] To determine whether a hearsay statement is admissible, the trial judge assesses the statement's *threshold* reliability. Threshold reliability is established when the hearsay "is sufficiently reliable to overcome the dangers arising from the difficulty of testing it" (*Khelawon*, at para. 49). These dangers arise notably due to the absence of contemporaneous cross-examination of the hearsay declarant before the trier of fact (*Khelawon*, at paras. 35 and 48). In assessing threshold reliability, the trial judge must identify the specific hearsay dangers presented by the statement and consider any means of overcoming them (*Khelawon*, at paras. 4 and 49; *R. v. Hawkins*, 1996 CanLII 154 (SCC), [1996] 3 S.C.R. 1043, at para. 75). The dangers relate to the difficulties of assessing the declarant's perception,

memory, narration, or sincerity, and should be defined with precision to permit a realistic evaluation of whether they have been overcome.

[27] The hearsay dangers can be overcome and threshold reliability can be established by showing that (1) there are adequate substitutes for testing truth and accuracy (procedural reliability) or (2) there are sufficient circumstantial or evidentiary guarantees that the statement is inherently trustworthy (substantive reliability) (*Khelawon*, at paras. 61-63; *Youvarajah*, at para. 30).

[emphasis added]

...

[40] ... in assessing threshold reliability, the trial judge's preoccupation is whether in-court, contemporaneous cross-examination of the hearsay declarant would add anything to the trial process (*Khelawon*, at para. 49 ...). At the threshold stage, the trial judge must decide on the *availability* of competing explanations (substantive reliability) and whether the trier of fact will be in a position to choose between them by means of adequate substitutes for contemporaneous cross-examination (procedural reliability). For this reason, where procedural reliability is concerned with whether there is a satisfactory basis to rationally *evaluate* the statement, substantive reliability is concerned with whether the circumstances, and any corroborative evidence, provide a rational basis to *reject* alternative explanations for the statement, other than the declarant's truthfulness or accuracy.

[6] In *R. v. Johnston*, 2018 MBCA 8, at para. 91 the court characterized the principled exception to the hearsay rule as a "logical, functional approach looking for *indicia* of reliability external to the statement itself as well as within the statement". In addition, the court stated:

[92] With respect to reliability, if a statement is made where there are sufficient circumstantial guarantees of trustworthiness that substantially negate the possibility that the declarant was being untruthful or mistaken, that hearsay evidence will generally be determined to be reliable on a threshold basis and will then be admissible for consideration in the trial. This is subject to the judge's discretion to exclude the evidence if its prejudicial effect outweighs its probative value.

...

[98] *Bradshaw* reaffirmed many of the basic principles of law surrounding hearsay as set out in *Khelawon*. It is, however, narrower in focus than *Khelawon*. *Bradshaw* is focused on the role of corroborative evidence in evaluating threshold reliability.

[7] In addition, in ***R v. Hall***, 2018 MBCA 122, the court stated:

[59] Factors underlying the spontaneous (or excited) utterance exception to the hearsay rule, such as spontaneity, reasonable contemporaneity to the event described, the declarant's motive and the real possibility of error, are also factors to determine whether hearsay is reliable under the principled approach (see *Sopinka* at para 6.126).

PROCEDURAL RELIABILITY

[8] Pursuant to ***Bradshaw***.

[28] *Procedural* reliability is established when "there are adequate substitutes for testing the evidence", given that the declarant has not "stated[d] the evidence in court, under oath, and under the scrutiny of contemporaneous cross-examination" (*Khelawon*, at para. 63). These substitutes must provide a satisfactory basis for the trier of fact to rationally evaluate the truth and accuracy of the hearsay statement... Substitutes for traditional safeguards include a video recording of the statement, the presence of an oath, and a warning about the consequences of lying... However, some form of cross-examination of the declarant ... is usually required.

[9] In this case, both video statements reflect that police administered to Morton an affirmation to tell the truth, and explained to him the dangers of giving a false statement, which he indicated he understood. The defence had no opportunity, however, to cross-examine Morton on either of the statements.

[10] The defence questioned whether Morton appreciated the solemn circumstances in which he made the statements, because he had previously made comments to the 911 operator and police that were incomplete and partially untrue. For ease of reference, I will refer to these comments, discussed in more detail below, as the "Inconsistent Statements".

[11] In addition, the defence argued that while in the First Statement Morton "seemed interested" in swearing on the Bible, police did not offer it to him, so he may not have

taken the affirmation seriously. The defence submitted, therefore, that the procedural substitutes in this case do not provide a satisfactory basis to rationally evaluate both the truth and accuracy of the statements.

[12] I have concluded that the First Statement was video recorded in a straightforward manner, with no indication by Morton that he wanted to swear an oath on the Bible. The police officer who administered the affirmation to Morton questioned whether a Bible would be used, and Morton did not respond. I recognize that early on in the First Statement Morton asked police to retrieve a cross from his belongings, and they did so, but that request neither equates to the expression of a desire to swear on the Bible, nor derogates from Morton's affirmation to tell the truth. Similarly, I am not concerned that the Inconsistent Statements tainted the procedural reliability of the First Statement for the reasons expressed in paragraphs 25 to 28 below.

[13] Having said that, I am concerned about the lack of any opportunity to cross-examine Morton on the First Statement, wherein he describes events that are material to the issues before me. For that reason, the established *indicia* of procedural reliability are not sufficient to justify admission of the First Statement.

[14] I have considered the procedural reliability of the Second Statement independently from that of the First Statement. Most of Morton's person is blocked from the camera's view during a significant portion of the Second Statement, and the presentation of the photo line-up, which was the purpose of taking the statement, is blocked completely. Accordingly, it would be difficult to determine exactly what took place in the presentation of the photo line-up to Morton, which is an issue in this case, and to assess fully his

behaviour and demeanour during the statement. Given these issues and the lack of any opportunity to cross-examine, I am not satisfied that there are sufficient *indicia* of procedural reliability to justify admission of the Second Statement.

SUBSTANTIVE RELIABILITY

[15] The court in *Bradshaw* stated:

[30] A hearsay statement is also admissible if *substantive* reliability is established, that is, if the statement is inherently trustworthy (*Youvarajah*, at para. 30; *R. v. Smith*, 1992 CanLII 79 (SCC), [1992] 2 S.C.R. 915, at p. 929). To determine whether the statement is inherently trustworthy, the trial judge can consider the circumstances in which it was made and evidence (if any) that corroborates or conflicts with the statement (*Khelawon*, at paras. 4, 62 and 94-100; *R. v. Blackman*, 2008 SCC 37, [2008] 2 S.C.R. 298, at para. 55).

[31] While the standard for substantive reliability is high, guarantee “as the word is used in the phrase ‘circumstantial guarantee of trustworthiness’, does not require that reliability be established with absolute certainty” (*Smith*, at p. 930). Rather, the trial judge must be satisfied that the statement is “so reliable that contemporaneous cross-examination of the declarant would add little if anything to the process” (*Khelawon*, at para. 49). The level of certainty required has been articulated in different ways throughout this Court’s jurisprudence. Substantive reliability is established when the statement “is made under circumstances which substantially negate the possibility that the declarant was untruthful or mistaken” (*Smith*, at p. 933); “under such circumstances that even a sceptical caution would look upon it as trustworthy” (*Khelawon*, at para. 62, citing Wigmore, at p. 154); when the statement is so reliable that it is “unlikely to change under cross-examination” (*Khelawon*, at para. 107; *Smith*, at p. 937); when “there is no real concern about whether the statement is true or not because of the circumstances in which it came about” (*Khelawon*, at para. 62); when the only likely explanation is that the statement is true (*U. (F.J.)*, at para. 40).

...

[57] ... to determine whether corroborative evidence is of assistance in the substantive reliability inquiry, a trial judge should

1. identify the material aspects of the hearsay statement that are tendered for their truth;
2. identify the specific hearsay dangers raised by those aspects of the statement in the particular circumstances of the case;
3. based on the circumstances and these dangers, consider alternative, even speculative, explanations for the statement; and

4. determine whether, given the circumstances of the case, the corroborative evidence led at the *voir dire* rules out these alternative explanations such that the only remaining likely explanation for the statement is the declarant's truthfulness about, or the accuracy of, the material aspects of the statement.

[16] The court in **Hall** stated:

[69] ... the effect of *Bradshaw* is to create a "high bar" (at para 27) before evidence can be considered to be corroborative of hearsay in the analysis of threshold reliability. The *Bradshaw* rules for when corroborative evidence may be relied on in determining the admissibility of hearsay evidence may be summarised as follows.

[70] First is the relevance rule. Normally, evidence can be said to be corroborative of other evidence if it makes it more probable that the fact asserted is true (see *R v B (G)*, 1990 CanLII 113 (SCC), [1990] 2 SCR 3 at 20-26). The approach under *Bradshaw* is more restrictive. To be corroborative, the evidence is only relevant, for the purposes of corroboration, if it goes to the issue of the truthfulness or accuracy of the material aspects of the hearsay statement (see para 45). The material aspects of the statement are those relied on by the moving party for the truth of their contents (see para 4).

[71] Second is the sufficiency rule. The judge must identify alternative, even speculative, explanations for the truth or accuracy of the statement and weigh the evidence against those alternative explanations. If the evidence is equally consistent with the alternative explanation, it cannot be relied upon (see para 48).

[72] Third is the reliability rule. The evidence must be trustworthy itself before it can be relied upon (see para 50).

[73] If all three criteria are satisfied, the function such evidence plays is whether, in conjunction with any other corroborative evidence and the circumstances of the case (including contradictory evidence), the specific hearsay danger(s) raised by the statement are overcome and the only likely explanation, on balance, is the declarant's truthfulness about, or the accuracy of, the material aspects of the statement (see paras 4, 47, 49, 56).

[74] This exercise is a cumulative assessment. As Karakatsanis J explained, "substantive reliability is concerned with whether the circumstances, and any corroborative evidence, provide a rational basis to *reject* alternative explanations for the statement, other than the declarant's truthfulness or accuracy" (at para 40; see also para 48; *R v Thyagarajah*, 2017 ONCA 825 at para 11; *R v Johnston*, 2018 MBCA 8 at paras 115-16; *R v Larue*, 2018 YKCA 9 at para 93; and *R v Klimitz*, 2018 ONCA 553 at para 8).

...

[82] The mere fact that not all of the statement was corroborated by other evidence ... is not fatal to whether the statement could be found to be substantively reliable. Since Professor Wigmore's principled approach was endorsed by the Supreme Court of Canada, it has always been the law that reliability can arise from the circumstances under which a statement is made (see *Smith* at p 933).

...

[115] ... Not every contradiction will be material to the admissibility of the evidence; it will depend on the context, taking into account the relevant hearsay danger(s) of the evidence proposed and the factor(s) raised to overcome the danger(s) (see *Khelawon* at para 93; and *Fawley* at paras 117-18). It was well within the discretion of the judge to consider the type of contradictions counsel raised here to be questions of ultimate reliability as opposed to threshold reliability (see *R v Thomas (RJ)*, 2009 MBCA 85 at paras 40-42).

[17] The First Statement was made in the following circumstances:

- a) at 6:05 a.m. on January 1, 2019, police were dispatched to 411 Nairn Avenue in Winnipeg ("411 Nairn"), where Morton was residing, following a 911 call that he placed regarding the shooting;
- b) at 6:08 a.m. police arrived at 411 Nairn, and at 6:10 a.m. they entered the house, finding Morton in the kitchen, alone, at which time he was handcuffed and detained by Officer Langhan;
- c) at approximately 7:30 a.m., Officer Langhan took Morton to the police cruiser, at which time Morton was arrested for murder;
- d) in the interim, Morton remained in the kitchen with Officer Langhan and did not speak with any other residents of 411 Nairn, including Mr. Shane Pruden ("Shane"), nor could Morton hear what, if anything, they told police;
- e) at 7:47 a.m., Officer Langhan took Morton to the police station where it was quickly determined that he was a witness, and not a suspect, in this matter;
- f) thereafter, Morton and Officer Langhan engaged in general conversation on a variety of topics in an interview room;

- g) at 12:46 p.m., Morton was turned over to Detective Parry, who told to Morton that he was no longer under arrest and was free to go; and
- h) at 6:30 p.m. the video recording of the First Statement commenced.

[18] The circumstances in which the Second Statement was made include the following:

- a) on January 3, 2019, police attended at 411 Nairn and advised Morton that they wished to present to him a photo line-up; and
- b) after waiting for Morton to complete some personal matters, police took him to the station where the Second Statement was recorded.

[19] I will now comment upon the available corroborative evidence, in the context of the four-step test set out in ***Bradshaw*** at paragraph 57.

[20] The material aspects of the First Statement tendered for their truth are:

- a) the particulars of an altercation involving the Deceased and two males in the kitchen and backyard of 411 Nairn;
- b) a description of a firearm involved in the altercation;
- c) the aftermath of the altercation in the front yard of 411 Nairn; and
- d) a description of the two males involved.

[21] I agree with the defence that the contents of the First Statement describing events that occurred prior to the arrival of the two males at 411 Nairn are ancillary to the issues before me and are not material aspects of the First Statement for the purposes of the *voir dire*.

[22] The only material aspect of the Second Statement tendered for its truth is Morton's identification of Moar from a photo line-up.

[23] The defence did not identify truth as a hearsay danger in this case, but nevertheless I will address the Inconsistent Statements, admitted on the *voir dire* through police witnesses, not for the truth of their contents, but to establish that they were made.

The details are:

- a) Morton told the 911 operator that he was sleeping, and awoken by either two bangs or someone telling him to call 911;
- b) Morton told Officer Langan that he was asleep when he heard two gun shots. He looked outside and saw a male lying on the ground, so he called police; and
- c) Morton told Detective Parry that he woke up to the sound of a bang, spoke to Shane, and that they heard another bang which prompted them to look out the front room window. Morton saw a guy going east, away from the scene, and saw the Deceased lying outside, so he called 911.

[24] Conversely, in the First Statement, Morton said that he witnessed events that preceded the shooting. Having reviewed the First Statement, it is clear, and the defence accepts, that Morton lied about being asleep just prior to the shooting, and initially omitted many material facts. As such, the Inconsistent Statements could be reflective of a capacity for deceit, or at the very least for omitting important information.

[25] Having said that, Detective Parry testified, and I accept, that when he advised Morton of his belief that Morton was omitting details, (based upon what Shane told police) Morton said "I knew it was going to come out; I just didn't want to be the first to say anything". In other words, when challenged on the Inconsistent Statements, Morton

changed his position quickly. Detective Parry then conducted a second pre-interview of Morton, and subsequently obtained the First Statement.

[26] I recognize that there can be many reasons why witnesses try to avoid involvement in police investigations, particularly where acts of violence are involved. I also note that Morton expressed reluctance in the First Statement when police asked him to review two photo line-ups. Morton balked at the request, stating both "I didn't consent to a photo line-up", and that police were putting him in the "hot seat" or the "hot plate". Although he ultimately reviewed the line-ups, his expressions of reluctance to do so support the inference that he made the Inconsistent Statements to avoid involvement in the police investigation.

[27] It is important to note that the circumstances of this case do not suggest an incentive for Morton to fabricate or distort the contents of the statements, such as deflecting liability away from himself, because he had already been identified as a witness, not a suspect. In addition, there was no animus between Morton and the two males, because he did not know them previously. Although Morton knew the Deceased, his statement reflects that they had met only two to four times before, and there is no indication that they had a close friendship.

[28] Given all of these factors, in my view the reason for the Inconsistent Statements is self-evident, namely to avoid involvement in the police investigation. Accordingly, as acknowledged by the defence, the specific hearsay danger relative to the statements is accuracy, including whether Morton misperceived or misremembered the facts, or imparted the facts to police in an unintentionally misleading manner.

[29] I must now consider any alternative or speculative explanations for both the First Statement and the Second Statement, which I have identified as follows:

- a) Morton was mistaken as to who and what he saw and heard;
- b) Morton's ability to observe people and events was impaired by drugs or alcohol; and
- c) Morton's ability to observe people and events was impeded because he was not wearing his glasses.

[30] Additional alternative and speculative explanations for the Second Statement are:

- a) Morton's identification of Moar was influenced by Shane or someone else with whom he had discussions between January 1 and 3, 2019; and
- b) Morton's identification of Moar was influenced by police.

[31] The First Statement reflects that:

- a) Morton woke up in the early morning of January 1, 2019 when he heard someone entering 411 Nairn. He went into the kitchen and found the Deceased, Shane and two young males: one who was Caucasian, approximately 5'7" or 5'8" in height with tattoos on his hands and neck, and the other who was Native;
- b) an altercation occurred among the Deceased and the two males, including:
 - i) the Deceased and the Native male were chest to chest when the Deceased punched the Native male;
 - ii) the Caucasian male "motioned" with a "silver-ish" sawed-off shotgun, approximately two feet in length with a walnut stock;

- iii) the Deceased then forced the Caucasian male out of the porch and into the backyard, and in doing so the shotgun discharged;
 - iv) a physical fight occurred, there was a scramble over the loose shotgun, and the Caucasian male recovered it; and
 - v) all three males left the backyard ran to the front yard of 411 Nairn; and
- c) Morton looked out the front window and saw:
- i) the Deceased lying in the front yard; and
 - ii) the Caucasian male with the shotgun run away, towards 419 Nairn Avenue ("419 Nairn").

[32] The evidence led at the *voir dire* that corroborates the First Statement includes the following:

- a) Shane testified that two young males¹ attended at 411 Nairn in the early morning of January 1, 2019;
- b) Shane described an altercation among the Deceased and the two males that started in the kitchen of 411 Nairn, including that:
 - i) the "other boy" brandished a "chopped down" shotgun with a pump action, in the presence of Shane and Morton;
 - ii) Moneyas stepped in front of the Deceased, who punched Moneyas, causing him to hit the wall and fall to the floor;

¹ Shane knew Samuel Zanen Moneyas ("Moneyas"), who is Indigenous, prior to this incident and identified him by name. Shane referred to the second male as the "other boy". Morton did not identify either of the males by name.

- iii) the Deceased then forced the "other boy" out the back door, through the porch and into the backyard where a physical fight occurred;
 - iv) the shotgun discharged in the backyard;
 - v) the shotgun was loose, was fought over, and was recovered by the "other boy";
 - vi) the Deceased and the two males left the backyard and ran to the front yard of 411 Nairn;
- c) police found a spent shotgun shell in the backyard of 411 Nairn;
 - d) police found blood in the backyard of 411 Nairn, and on the sidewalk connecting the backyard and front yard, where the Deceased was found with a shotgun wound;
 - e) Cory Gardiner ("Gardiner"), who was sleeping upstairs at 411 Nairn, testified that he saw two people in the front yard where the Deceased lay, who ran away from 411 Nairn, towards 419 Nairn;
 - f) Mariah Pruden ("Mariah") and Vickie Whitford ("Whitford"), who resided at 419 Nairn, testified that on the morning of January 1, 2019, Moneyas had facial injuries that he did not have the evening before;
 - g) police found a shotgun (the "Firearm") similar to that described by Morton in the attic of 419 Nairn, on which the Deceased's blood was found;
 - h) Moar is Caucasian, 5'5" in height, with tattoos on his hands and neck; and
 - i) Moar made the following comments in recorded telephone calls or in-person visits after his arrest, admitted into evidence by consent (the "Jail Calls"):

- i) he was in a fight "on the 1st";
- ii) he was "getting punches"; and
- iii) "it was some fucking big ass white guy named Adam";

(collectively the "Corroborative Evidence").

[33] The court in **Hall** made it clear that the effect of **Bradshaw** is to create a "high bar" before evidence can be considered to be corroborative of hearsay in the analysis of threshold reliability. In particular, corroborative evidence must be relevant, sufficient and reliable to be considered on the *voir dire*.

[34] I have concluded that the Corroborative Evidence is relevant for the purposes of my analysis on the *voir dire*, because each piece of evidence goes to the accuracy of one or more of the material aspects of the First Statement.

[35] Similarly, I have concluded that the Corroborative Evidence is reliable because it is trustworthy. The defence did not identify or establish a basis on which to challenge the Corroborative Evidence, including the witness testimony.

[36] I am also satisfied that the Corroborative Evidence is sufficient, when weighed against the alternative and speculative explanations for the First Statement listed in paragraph 29 above, to determine whether the evidence is equally consistent with the alternative explanations or whether the only remaining likely explanation for the statements is the accuracy of their material aspects. This is so because there are multiple items of Corroborative Evidence that are detailed and specific in nature.

[37] I have not considered as corroborative evidence Whitford's testimony that she found a spent shotgun shell in the bathroom at 419 Nairn a few hours after police left,

because there is no evidence of how or when that shell was left in the bathroom, and, since it was never turned over to police, no other information about it is available. Accordingly, Whitford's evidence on that point is neither relevant, sufficient nor reliable for the purposes of the *voir dire*.

[38] I must also consider any evidence that conflicts with the First Statement, which includes:

- a) Morton said that the Caucasian male was wearing blue jean shorts at the material time, but there is other evidence, including forensic analysis, that he was wearing white pants; and
- b) Morton said that the two males chased the Deceased to the front yard from the backyard, whereas Shane testified that the Deceased chased the two males.

[39] Counsel identified several other points of evidence as conflicting with the First Statement, but for the reasons that follow I disagree that a conflict exists:

- a) the Crown submitted that Morton said that Shane was not involved in the physical altercation, while Shane testified that he was involved. Having reviewed the First Statement very carefully, I have concluded that Morton did not make this comment in the First Statement;
- b) the Crown submitted that while Morton stated that he heard two shots, Shane testified that he heard only one shot. Again, having reviewed the evidence very carefully, Shane testified at trial that he heard multiple shots. Shane's evidence on this point was challenged on cross-examination, on the

basis that he told police he heard one shot, but Shane clarified that this statement related only to the altercation in the backyard;

- c) the defence argued that while Morton said that the Caucasian male at one point locked the kitchen door, Shane did not corroborate this detail. The fact is that Shane gave no evidence about the door, so although Morton's statements on this point are not corroborated, there is no conflict in the evidence; and
- d) the defence submitted that while Morton said he saw one person run from 411 Nairn towards 419 Nairn, Gardiner said he saw two people do so. I do not agree that this difference represents a conflict in the evidence, because neither Morton nor Gardiner stated unequivocally that either one or two people ran from 411 Nairn. Rather, each of them relayed his own observations, which does not mean that either one of them is incorrect. Morton made his observations from the living room window, while Gardiner observed events from the upper floor, so the timing and position of their respective observations may simply have differed.

[40] Having identified the circumstances in which the First Statement was given, the Corroborative Evidence and the conflicting evidence, I will now consider, with regard to each of those factors, whether the hearsay dangers in this case are overcome.

[41] Reliability can arise from the circumstances under which a statement is made, and the circumstances in which the First Statement was made support the trustworthiness of its contents. As set out above, police arrived at the scene quickly, and after placing the

911 call, Morton was unattended for only five minutes, approximately. Shane testified as to his own actions during that timeframe, including that he was standing outside 419 Nairn when police arrived. On that basis, and given the police evidence, I accept that Morton had no real opportunity to collude with Shane or to speak with and be influenced by anyone else at the scene before giving the First Statement. Rather, Morton relayed his personal observations only 12 ½ hours after the shooting, when the events were fresh in his mind, which is significant.

[42] In addition, I note that in the First Statement:

- a) Morton appeared to speak voluntarily and independently, without influence or leading questions posed by police. In particular:
 - i) for approximately 27 minutes of the First Statement, Morton spoke about the events of January 1, 2019, in essence, uninterrupted;
 - ii) Detective Parry testified, and I accept, that he sought to obtain a “pure version” of Morton’s observations, and that in doing so he did not influence Morton in any way; and
 - iii) Morton balked when he wanted to do so, such as when he was asked to review two photo line-ups; and
- b) Morton appeared to speak carefully, cautiously, and with concern about the accuracy of what he said. For example, at one point he asked police for a break because “it’s all going through my head”. In the context of the photo line-up, he stated “I don’t want to make the wrong selection”.

[43] I am satisfied, therefore, that the First Statement was made in circumstances which substantially negate the likelihood that Morton was mistaken, such that even a skeptical caution would look upon it as trustworthy.

[44] As pointed out by the defence, police did not ask Morton for the details of his alcohol or drug consumption the evening before. Morton said that he had consumed some alcohol that evening, had "passed out", and had "smoked" with the Deceased. There is no evidence of how much alcohol he consumed, whether he meant that he "passed out" from impairment or some other cause, such as fatigue, or what, if any, drugs he smoked. Similarly, police did not ask Morton how he was functioning or feeling at the time of the material events, including whether he was tired or fully awake.

[45] Having said that, Officer Langhan testified that when he found Morton in the kitchen of 411 Nairn at 6:10 a.m., he appeared to be very awake and astute, such that Officer Langhan had no concerns about Morton being intoxicated or high. Morton advised Officer Langhan that he had last injected methamphetamine at 5:00 p.m. or 6:00 p.m. the previous evening, or 12 to 13 hours before their conversation. This evidence was not tendered for the truth of its contents, but I accept that Morton made the statement.

[46] Detective Parry testified that Morton spoke in a clear, concise and deliberate manner prior to and during the First Statement, such that he had no concerns about Morton's sobriety.

[47] I accept that Morton was a drug user. Having said that, at all times during the First Statement he appeared to be coherent, alert, deliberate, articulate, and engaged.

In other words, he did not appear to be either under the influence of any substance or experiencing withdrawal.

[48] In addition, it is clear that Morton was able to observe details at the time of the material events. For example, he gave a specific description of the Firearm, and he said that on his way to the police car he saw a hat lying near where the Deceased was found, confirmed in the scene photographs, which he had given to the Deceased.

[49] I have also noted Morton's comment that when he saw police attend at 411 Nairn, he stayed inside and waited for them, because he "didn't want to get shot". In other words, he had the insight that police might have seen him as a threat.

[50] Given that police observed Morton continuously from 6:10 a.m. through to after 8:00 p.m. on January 1, 2019, and based upon my own observations of Morton in the First Statement, I have concluded that impairment by drugs or alcohol at the material time is not a genuine concern on the *voir dire*.

[51] As argued by the defence, police did not ask Morton in the First Statement whether he was wearing his glasses when he observed the material events. Having said that, Morton stated candidly that he "can't even open a cell phone without glasses". Assuming that to be true, it seems unlikely that he would have been able to observe anything, such as the details of the Firearm, the nature of the tattoos on the white male's neck as described in the First Statement, or the hat on the ground if he was not wearing his glasses at the material time. I have concluded, therefore, that Morton's inability to see is not a genuine concern on the *voir dire*.

[52] I have also concluded that the Corroborative Evidence, considered as a whole, is more consistent with the accuracy of the material aspects of the First Statement than with any of the alternative explanations, namely that Morton was mistaken, impaired, or unable to see what occurred. Accordingly, the Corroborative Evidence supports the reliability of the accuracy of the First Statement.

[53] In addition, as stated in *Hall*, the fact that not every aspect of the First Statement is corroborated is not fatal to whether it can be found to be substantively reliable. The altercation in this case seems to have unfolded quickly, and no witness is expected to see, hear and recall every detail or aspect of an event.

[54] Similarly, I have concluded that the two items of conflicting evidence that I identified should not preclude the First Statement from being admitted, because both items relate to details that should be considered in the context of the ultimate reliability of Morton's evidence, and weighed against the other evidence called at trial. For example, just because Shane's evidence as to the chase to the front yard was different than Morton's does not necessarily mean that Morton's observation was inaccurate.

[55] I have found that when considered as a whole and in the circumstances of the case, including the conflicting evidence, the Corroborative Evidence shows, on balance, that the only likely explanation for the material aspects of the First Statement is accuracy, including as to perception, memory and narration. Said another way, there is a rational basis upon which to reject the alternative explanations for the First Statement, and the only likely explanation is that the First Statement is accurate. I am also satisfied that the material aspects of the First Statement would not likely change on cross-examination. As

such, the hearsay dangers of the First Statement are overcome and its substantive reliability is established.

[56] I have also considered my residual discretion to exclude the First Statement, on the basis that its prejudicial effect outweighs its probative value. As stated in *Halt*:

[126] ... Probative value is more than just the evidence having logical relevance; it is also about the prospective materiality of the evidence. ...

[127] Prejudicial effect is assessed by identifying the dangers of the evidence and considering how real those dangers are to the fairness of the trial.

[57] The First Statement reflects an eyewitness account of a series of events that surrounded the Deceased's death, and it is significant, particularly in light of the other evidence before the court. I recognize the frailties of eyewitness evidence, but those should be considered in the context of ultimate reliability, not substantive reliability. I am not concerned about the prejudicial effect of the First Statement because of the nature and extent of the Corroborative Evidence. Accordingly, I will not exercise my discretion to exclude the First Statement.

[58] I will now comment upon the Second Statement. As I have stated, the circumstances in which the Second Statement was taken differ from that of the First Statement. In particular, the Second Statement was taken on January 3, 2019, after Morton had an opportunity to speak to others about the physical appearance of the two males before identifying Moar in the photo line-up. Moreover, in the Second Statement, Morton raised aspects of the description of the white male that he did not mention in the First Statement, including a forehead tattoo and an eyebrow piercing. It is possible that

Morton recalled these details on his own, after reflecting on events, but is equally possible that he heard them from someone else.

[59] There is no evidence that Morton had conversations with anyone, but at the time, he was residing with Shane at 411 Nairn, two doors down from 419 Nairn where Mariah and Whitford lived. In my view, and speaking generally, individuals who live together or know one another are likely to discuss an incident such as this one in its aftermath.

[60] I have also considered the alternative explanation that Morton was influenced by police in the Second Statement. Certainly, in the portions of the Second Statement during which Morton can be seen fully, he appeared coherent, alert, and co-operative.

[61] Having said that, in the latter part of the statement a police officer engaged Morton in a conversation about Morton's selection from the line-up in which the officer testified that he "attempted to clarify" Morton's selection. Another reasonable interpretation of the conversation is that the officer encouraged Morton to make a specific selection from the line-up, namely Moar. In addition, for a brief time, Moar's photo was visible to Morton together with one other photo, which enabled Morton to compare those two photos. The police evidence on the *voir dire* reflected, and it is well-established law, that the comparison of line-up photos should be avoided.

[62] For all of these reasons, I have concerns about the inherent trustworthiness of Morton's identification of Moar in the photo line-up, despite the significant corroborative evidence putting Moar at the scene. I am not satisfied that the alternative and speculative explanations for Morton's identification of Moar have been excluded, and I have concluded that accuracy is not the only likely explanation for Morton's identification of

Moar. Accordingly, hearsay dangers persist with respect to the Second Statement, and its substantive reliability has not been established.

CONCLUSION

[63] The Crown has established the threshold reliability of the First Statement, which was admitted into evidence in this trial. Threshold reliability was not established with respect to the Second Statement, and it was not admitted.

_____ J.