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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,	)	Counsel:
	)	
	)	MICHAEL DESAUTELS
- and -	)	DANIEL ANGUS
	)	for the Crown
	)	
SAMUEL ZANEN MONEYAS and	)	NO ONE APPEARING
STORM ALEXANDER MOAR,	)	for the accused, MONEYAS
accused.	)	
	)	TARA WALKER
	)	ANDREW McKELVEY-GUNSON
	)	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.

[2] The charges against the co-accused Samuel Zanen Moneyas ("Moneyas") have been resolved, but the details are not on the record in this trial, and Moneyas did not testify.

ISSUES

[3] The issues at trial were:

a) Did Moar cause the Deceased's death?

b) If so, was the death unlawful, or:

i) did Moar cause the Deceased's death accidentally? or

ii) was Moar acting in self-defence?

c) If the death was unlawful, did Moar have intent for murder? and

d) If so, was Moar provoked?

BACKGROUND

[4] The shooting occurred at 411 Nairn Avenue, in Winnipeg ("411 Nairn"), at which Shane Pruden ("Shane"), Bradley Keith Morton ("Morton") and Cory Gardiner ("Gardiner") were residing at the material time. Shane's daughter, Mariah Pruden ("Mariah"), and her mother, Vickie Whitford ("Whitford"), were residing two doors down at 419 Nairn Avenue, in Winnipeg ("419 Nairn"). Mariah and Moneyas were dating and saw each other on the evening of December 31, 2018, at 419 Nairn. The Deceased was a friend of Shane's and was visiting 411 Nairn.

[5] Shane was the only trial witness who observed the events that preceded the Deceased's death. Morton gave a video statement to police on January 1, 2019 reflecting

his observations of the events, which I admitted into evidence at trial pursuant to the principled exception to the hearsay rule. My reasons for doing so are found at ***R. v. Moar***, 2021 MBQB 8.

GENERAL ANALYSIS AND THE LAW

[6] In argument, the defence did not deny that Moar was involved in an altercation with the Deceased at 411 Nairn, together with Moneyas. There is substantial evidence which supports these conclusions, including:

a) Moar and Moneyas were in a taxicab together at approximately 12:00 a.m. on January 1, 2019. Their identities are obvious from a review of the taxicab surveillance video, which reflects Moar's forehead and hand tattoos, and Moneyas' facial scar;

b) a picture[1] of Moar and Moneyas was posted to Moar's Facebook page at 3:28 a.m. on January 1, 2019, in which:

   i) Moar is wearing a pair of white pants with zippers and lines on both pant legs; and

   ii) Moneyas is wearing a black hoodie and brown pants;

c) Shane testified that at 5:30 a.m. or 5:40 a.m. on January 1, 2019 he arrived home and found Moneyas in the kitchen with another male who had a tattoo over his right eyebrow, which Moar has;

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[1] There is no evidence of when this picture was taken, but given the evidence set out below that both Moar and Moneyas were wearing the same clothing in the later morning of January 1, 2019, I have inferred that it was taken in the early morning hours, shortly before it was posted.

d) Mariah testified that on the morning of January 1, 2019:

   i) Moneyas and another male attended at 419 Nairn in an upset and agitated state;

   ii) Moneyas was wearing a black hoodie (which was her hoodie) and brown pants[2];

   iii) the male with Moneyas was wearing white pants with zippers and lines on the knees; and

   iv) Moneyas was bleeding from the nose and had a blackeye;

e) both Mariah and Whitford identified Moar as the male with Moneyas;

f) police later found at 419 Nairn a pair of white pants with zippers and lines on both pant legs (the "White Pants")

g) Moar's DNA was found on the interior front left knee area of the White Pants;

h) the Deceased's blood was found on the exterior of the White Pants, both at the front right knee and the back left lower leg; and

i) Moar made comments in a series of recorded telephone calls and in-person visits after his arrest, admitted into evidence by consent (the "Jail Calls"), in which he made specific reference to a physical altercation on January 1, 2019 between him and "Adam".

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[2] The hoodie and pants were recovered by police near 419 Nairn and entered into evidence at trial.

[7] The evidence is clear, therefore, and I am satisfied, that Moar and Moneyas engaged in a physical altercation with the Deceased at 411 Nairn.

[8] The real issue in this case is whether I am satisfied beyond a reasonable doubt on the whole of the evidence that Moar shot the Deceased, and if so, in what circumstances. The Crown's case is based upon circumstantial evidence.

[9] In ***R. v. Villaroman***, 2016 SCC 33 (CanLII), the court stated:

> [26] …There is a special concern inherent in the inferential reasoning from circumstantial evidence. The concern is that the jury may unconsciously "fill in the blanks" or bridge gaps in the evidence to support the inference that the Crown invites it to draw. …
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> [30] …Telling the jury that an inference of guilt drawn from circumstantial evidence should be the only reasonable inference that such evidence permits will often be a succinct and accurate way of helping the jury to guard against the risk of "filling in the blanks" by too quickly overlooking reasonable alternative inferences. … The inferences that may be drawn from [an] observation must be considered in light of all of the evidence and the absence of evidence, assessed logically, and in light of human experience and common sense.
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> [35] … In assessing circumstantial evidence, inferences consistent with innocence do not have to arise from proven facts: *R. v. Khela*, 2009 SCC 4, [2009] 1 S.C.R. 104, at para. 58; see also *R. v. Defaveri*, 2014 BCCA 370, 361 B.C.A.C. 301, at para. 10; *R. v. Bui*, 2014 ONCA 614, 14 C.R. (7th) 149, at para. 28. Requiring proven facts to support explanations other than guilt wrongly puts an obligation on an accused to prove facts and is contrary to the rule that whether there is a reasonable doubt is assessed by considering all of the evidence. The issue with respect to circumstantial evidence is the range of reasonable inferences that can be drawn from it. If there are reasonable inferences other than guilt, the Crown's evidence does not meet the standard of proof beyond a reasonable doubt
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> [37] When assessing circumstantial evidence, the trier of fact should consider "other plausible theor[ies]" and "other reasonable possibilities" which are inconsistent with guilt … [and which] must be based on logic and experience applied to the evidence or the absence of evidence, not on speculation.
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> [55] … Where the Crown's case depends on circumstantial evidence, the question becomes whether the trier of fact, acting judicially, could reasonably be

> satisfied that the accused's guilt was the only reasonable conclusion available on the totality of the evidence.

[10] In other words, I must consider the range of reasonable inferences that can be drawn from the circumstantial evidence before me. If there are reasonable inferences other than guilt, the Crown's case does not meet the standard of proof beyond a reasonable doubt.

[11] One of the forms of circumstantial evidence that the Crown relies upon is after-the-fact evidence, which includes conduct and words by Moar after the altercation at 411 Nairn, and from which it argued inferences of guilt can be drawn. Leading cases on the use of after-the-fact evidence reflect the following guiding principles.

[12] In ***R. v. White***, 1998 CanLII 789 (SCC), [1998] 2 S.C.R. 72, the court stated:

> 19 Under certain circumstances, the conduct of an accused after a crime has been committed may provide circumstantial evidence of the accused's culpability for that crime. ... As Weiler J.A. noted in R. v. Peavoy (1997), 1997 CanLII 3028 (ON CA), 117 C.C.C. (3d) 226 (Ont. C.A.), at p. 238:
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> > Evidence of after-the-fact conduct is commonly admitted to show that an accused person has acted in a manner which, based on human experience and logic, is consistent with the conduct of a guilty person and inconsistent with the conduct of an innocent person.
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> 21 Evidence of post-offence conduct is not fundamentally different from other kinds of circumstantial evidence. In some cases it may be highly incriminating, while in others it might play only a minor corroborative role. Like any piece of circumstantial evidence, an act of flight or concealment may be subject to competing interpretations and must be weighed by the jury, in light of all the evidence, to determine whether it is consistent with guilt and inconsistent with any other rational conclusion.
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> 43 … Post-offence conduct, like any evidence, takes on its full significance and probative value only in the context of the other evidence in the case. Evaluated in a piecemeal fashion, the evidence of post-offence conduct may not allow a jury to conclude beyond a reasonable doubt what the motivation of the accused was for his or her actions. However, in conjunction with all the other evidence in the

case, it may indeed assist the jury in determining whether a reasonable doubt exists with respect to guilt or innocence.

[13] In ***R. v. Calnen***, 2019 SCC 6 (CanLII), the court stated:

> [106] After-the-fact conduct encompasses what the accused both said and did after the offence charged in the indictment was allegedly committed. It covers a large range of possible circumstances, and its content and contours are confined only by the limits of human experience. After-the-fact conduct may also arise in respect of all types of criminal offences and in different legal settings … It is this potential breadth, variety, and mix of considerations that lies at the heart of the much repeated observation that the proper legal treatment of after-the-fact conduct is highly context and fact specific.
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> [112] In order to draw inferences, the decision maker relies on logic, common sense, and experience. As with all circumstantial evidence, a range of inferences may be drawn from after-the-fact conduct evidence. The inferences that may be drawn "must be reasonable according to the measuring stick of human experience" and will depend on the nature of the conduct, what is sought to be inferred from the conduct, the parties' positions, and the totality of the evidence: *R. v. Smith*, 2016 ONCA 25, 333 C.C.C. (3d) 534, at para. 77. That there may be a range of potential inferences does not render the after-the-fact conduct null: see *R. v. Allen*, 2009 ABCA 341, 324 D.L.R. (4th) 580, at para. 68. In most cases, it will be for the jury or judge to determine which inferences they accept and the weight they ascribe to them. "It is for the trier of fact to choose among reasonable inferences available from the evidence of after-the-fact conduct": *Smith*, at para. 78.
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> [116] … Conduct that is "after-the-fact", and therefore removed in time from the events giving rise to the charge, carries with it a temporal element that may make it more difficult to draw an appropriate inference. This evidence may also appear more probative than it is, it may be inaccurate, and it may encourage speculation. After-the-fact conduct evidence may thus give rise to imprecise reasoning and may encourage decision makers to jump to questionable conclusions.
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> [117] To meet the general concern that such evidence may be highly ambiguous and susceptible to jury error, the jury must be told to take into account alternative explanations for the accused's behaviour. In this way, jurors are instructed to avoid a mistaken leap from such evidence to a conclusion of guilt when the conduct may be motivated by and attributable to panic, embarrassment, fear of a false accusation, or some other innocent explanation: see *White (1998)*, at para. 22; *White (2011)*, at paras. 23-25; *R. v. Arcangioli*, 1994 CanLII 107 (SCC), [1994] 1 S.C.R. 129, at p. 143.
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> [119] Contrary to certain suggestions made in the courts below, there is no legal impediment to using after-the-fact conduct evidence in determining the accused's intent. The jurisprudence of this Court is clear: after-the-fact conduct evidence

> may be relevant to the issue of intent and may be used to distinguish between different levels of culpability (see *White (1998)*, at para. 32; *White (2011)*, at para. 42; *Rodgerson*, at para. 20). Specifically, this Court has said that "[w]hether or not a given instance of post-offence conduct has probative value with respect to the accused's level of culpability depends entirely on the specific nature of the conduct, its relationship to the record as a whole, and the issues raised at trial": *White (2011)*, at para. 42. There is therefore "no *per se* rule declaring post-offence conduct irrelevant to the perpetrator's state of mind": *R. v. Jackson*, 2016 ONCA 736, 33 C.R. (7th) 130, at para. 20, per Doherty J.A. As there are also no automatic labels which make certain kinds of after-the-fact conduct always or never relevant to a particular issue, "we must consider all the circumstances of a case to determine whether the post-offence conduct is probative and, if so, what use the jury may properly make of it": see *R. v. Angelis*, 2013 ONCA 70, 296 C.C.C. (3d) 143, at para. 55.
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> [145] Whether an inference is available is measured against what is reasonable and rational according to logic, human experience, and common sense. It is this combination which informs the determination of whether the impugned evidence makes the proposition more or less likely. This is an evaluative assessment, which is not defeated simply by listing alternative explanations. As long as the evidence is more capable of supporting the inference sought than the alternative inferences, then it is up to the fact finder, after considering all explanations, to determine what, if any, inference is accepted, and the weight, if any, to be provided to a piece of circumstantial evidence.

[14] With these authorities in mind, and before considering the after-the-fact conduct in this case, I caution myself that I must be careful with this evidence, and not leap to a finding or imputation of guilt where the conduct in question could be subject to various interpretations.

[15] Before addressing each of the issues in this matter, I will comment in some detail upon Shane's evidence and upon Morton's police statement.

[16] Shane testified that when he arrived at home he found the Deceased in the kitchen with Moneyas, Morton and a white male now known to be Moar.[3] The mood was positive. After about ten minutes, the mood changed due to a conversation between Moneyas and the Deceased about money that Moneyas owed to the Deceased. Shane testified that Moar became involved in the conversation, and pulled a shotgun (the "Firearm") out of his jacket. The defence did not contest, and I accept, that the fatal shot was fired from the Firearm, on which the Deceased's blood was found.

[17] Shane said to Moar either "You can't have that in my house" or "why do you got that in my house", and "give me that", after which Moar "pumped it" and pointed the Firearm at Shane. Moneyas told Moar not to do that, and Shane said "you give me that damn gun and get it out of my house and you can get out". The Deceased then appeared to get angry, and said to Moneyas "Why did you bring this fuckin' idiot here for? Why would you let him bring a gun into Shane's house? Who is this fuckin' clown anyways?". In response, Moar got angry and said "Fuck this, I'm going to fuckin' do everybody", while holding the gun.

[18] Shane testified that the Deceased hit Moneyas, who hit the wall, slid down to the floor and did not get up right away. The Deceased then grabbed Moar by the legs, picked

[3] Neither Shane nor Morton knew Moar previously, and they did not refer to him by name in their evidence. Given that Moar's presence at the scene is not an issue, however, and for ease of reference, I will refer to both Moar and Moneyas by name for the balance of these reasons.

him up "MMA style", and took him out the back door onto the pavement, where Moar ended up on his back. The Deceased hit Moar repeatedly with his forearm.[4]

[19] Shane testified that he went out and joined the fight, together with Moneyas and Morton. Everything was happening quickly and the backyard was dark. The Firearm went off right by Shane's ear and everyone dove for cover. Shane testified that Moar had the Firearm when it went off, and that he was on the ground with the Deceased on top of him. Shane testified that he grabbed the Deceased and told him to let Moar and Moneyas go, as they were making their way to the front yard. The Deceased slapped Shane's hand, said "fuck that, no", and chased Moar and Moneyas towards the front yard, kicking at them from behind. Shane testified that 30 seconds later he heard shots.

[20] Shane said that he went into the house because he was worried about being shot. Someone told him "Bull's[5] down" so he went to the front yard, where the Deceased was lying. The Deceased said he was cold so Shane got him a blanket and wrapped it around him, trying to keep his "good lung up", because he was gurgling on his own blood.

[21] When giving evidence, Shane sometimes had difficulty staying on track and answering the questions asked of him. He rambled periodically and he spoke out of turn repeatedly, especially about the Deceased. I do not believe that Shane was trying to evade questions, but rather that he struggled to focus, as was apparent when he had

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[4] This evidence is consistent with the testimony of pathologist Dr. Charles Littman, who testified that on autopsy the Deceased's hands were not injured.

[5] The evidence reflected that the Deceased's nickname was "Bull", because, according to Shane, he was a big, strong man full of testosterone.

difficulty finding certain pages in the transcript of his police statement. I note also that Shane appeared to be unwell physically, in terms of his gait and posture, and he said at one point that he was having chest pains, although he agreed to continue testifying.

[22] Shane commented on his past drug addiction, but stated that at the material time, he had consumed only one-half of a can of beer, and no other alcohol or drugs. The defence noted Shane's evidence that at the material time he was subject to urinalysis testing as part of his parole obligations, and did not contest Shane's sobriety, despite Whitford's testimony that she was present when Shane was "doctored" with methamphetamine on the evening of December 31, 2018. Having considered all of the evidence before me, I accept that Shane's ability to observe events at the material time was not impaired due to alcohol or drugs.

[23] I have concluded that Shane's evidence on the key points was given in a reasonably straightforward manner. He was fair in his evidence, and I accept that he tried his best to give evidence accurately and honestly. For example, when describing how Moar pulled the Firearm from his jacket, Shane volunteered that he could not say which hand Moar used, because he was not sure if Moar is right or left handed. In addition, Shane admitted that he antagonized Moar by repeating his stutter just before the physical altercation, when Moar threatened to "do everybody". Shane also admitted that he was not wearing his glasses at the time of the incident, and that without them his vision is like looking through a swimming pool; that he is "blind as a bat". Shane stated that he could not pick anyone out of a photo line-up in this matter, and he was clear at trial that he could not identify Moar as the person involved. I am also satisfied

that Shane did not attempt to tailor his evidence, because some of it was helpful to Moar, such as his statement that the Deceased chased Moar and Moneyas from the backyard to the front yard.

[24] The defence submitted that generally, Shane's evidence should be given more weight than Morton's because Shane provided details that make sense, whereas Morton's recounting of events is basic, generic, and lacks corroboration.

[25] I will now consider Morton's evidence as set out in his videotaped statement. The Crown submitted, and I agree, that Morton's evidence should be viewed with care and caution, since he was a drug user residing at a "flop house". Accordingly, I will look for corroboration of Morton's evidence. Having said that, police detained Morton within approximately five minutes of being dispatched to the scene, and he had no opportunity to collude with anyone relative to the contents of his statement, which lends to it a general trustworthiness.

[26] Morton said that he woke up around 5:00 a.m. when he heard someone entering 411 Nairn. He went into the kitchen and found the Deceased sitting at the kitchen table, Shane sitting on the bathtub[6], and Moar and Moneyas looking for knives to put hot knives on the stove.[7]

[27] Morton stated that the Deceased and Moneyas had a "stand off", chest to chest and that Moneyas was yelling. They said offensive things to each other and the Deceased

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[6] The evidence reflects that the bathroom door opens off of the kitchen near the kitchen table, and Morton's evidence is corroborated by Shane who said he was cleaning the bathroom at the time.
[7] Shane also said that Moar and Moneyas were hotknifing, and police found knives at the scene.

became "defensive or offensive". Moar was "motioning" the Firearm, then pointed it down, started to load it with red shells,[8] and locked the kitchen door.

[28] Morton did not reference the threat recounted by Shane, that Moar would "do" everyone in the house. Conversely, and as pointed out by the defence, Shane did not testify that Moar locked the kitchen door. Having said that, no one asked Shane about that detail at trial.

[29] Morton stated that the Deceased pushed Moneyas, after which Moar unlocked and opened the kitchen door. The Deceased then punched Moneyas, and hit Moar in the chest, forcing both the Deceased and Moar out of the porch and into the backyard, landing in front of the fire pit. In doing so, the Firearm went off.

[30] Once outside, Morton, who was standing in or near the porch, saw the Deceased's arms going up, hitting Moar. He thought that the Deceased "overcame" Moar and knocked him out. Moneyas, who Morton thought was knocked out also, left the kitchen and went outside. Morton called to the Deceased to "come in". The Firearm was loose, and they were scrambling for it. Morton stepped back into the kitchen, and may have called to the Deceased one more time before he ran around to the front of the house, followed by Moar and Moneyas. Within 30 seconds, Morton heard another "bang", so he looked out the front window and saw the Deceased lying on the ground.

[31] Morton described Moar as Caucasian, 5'7" or 5'8" in height, with a husky build, with tattoos on both hands, and a tattoo almost like a cloud formation on the "full part

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[8] Morton said that he saw two shotgun shells in the magazine.

of his neck". Those details are mostly accurate. Morton also said that Moar was wearing red and white, as well as blue jean shorts.

[32] I will now consider Morton's level of sobriety at the material time. The defence suggested that I infer that Morton was impaired because he said:

a) the night before these events he "smoked" with the Deceased, who had large amounts of methamphetamine in his system;

b) the night before these events he drank with the Deceased, whose blood alcohol level was .239; and

c) "what was said [on the 911 call, which Morton placed] is not clearly known to myself because just woke up and you have an event like that, you kind of lose track of what the hell goes on".

[33] I am not prepared to infer that Morton was impaired, because the evidence reflects that while the Deceased came and went from 411 Nairn the night before these events, Morton said that he stayed home, working on a TV or cell phones.[9] There is no evidence that Morton and the Deceased were together continuously or that their respective consumption of drugs and/or alcohol was similar. In addition, Morton's comment about losing track of what happened is not unusual in the circumstances, and is not necessarily indicative of impairment. In any case where unexpected events happen quickly, it can be difficult to observe and recount every detail accurately.

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[9] The scene photographs show what look like dismantled cell phones on a table in the living room.

[34] Gardiner told police that he saw Morton smoking methamphetamine around midnight, but at trial he stated that he saw Morton holding drugs and that he had no idea what time it was. Gardiner's evidence on this point supports that Morton was a drug user, which I accept, but adds very little to my assessment of Morton's sobriety at the time of the material events in this case.

[35] For all of these reasons, I will rely upon my own observations of Morton in the video statement, and those of police after they detained Morton. At all times Morton appeared to be coherent, alert, deliberate, articulate, and engaged.

[36] The defence also argued that Morton may not have been able to see events clearly if he was not wearing his glasses.

[37] I have considered Morton's detailed description of the Firearm, as a sawed-off shotgun, "silver-ish" in colour, and approximately two feet in length with a walnut stock. The defence noted that Morton failed to mention that the butt of the Firearm was covered in bright red tape, even though he said he was focused on the Firearm, and initially saw it sticking out of Moar's waistband. I accept that this omission represents a frailty in Morton's description of the Firearm, but I also note that when Moar was pointing the Firearm into the kitchen, the butt would have been nearest to his person with the barrel towards the room, which would have made the tape more difficult to see. In addition, both Morton and Mariah said that Moar was wearing red, which may have caused the tape to blend in with his clothing.

[38] The defence also submitted that the forearm, not the stock, of the Firearm was wood, such that Morton's description was inaccurate. While his use of the word "stock"

may have been incorrect, the Firearm clearly has a large brown wood component, making the substance of his observation accurate in my view.

[39] In fact, Morton's description of the Firearm was detailed and generally consistent with the characteristics of the Firearm in evidence. The Crown called an expert, James Elliott[10] ("Elliott"), who testified that the Firearm is 675 mm long, which is just over two feet. I accept that Morton's fairly specific observations of the Firearm are consistent with his comment that he could not provide much detail of what was said prior to the physical altercation, because he was focused on the Firearm.

[40] I have also noted Morton's statement that he saw Moar load red shotgun shells into the Firearm, and I accept this evidence, on the basis that police recovered several 3-inch red shells in the attic of 419 Nairn together with the Firearm.

[41] Given the detailed observations reflected in Morton's statement, including with respect to the Firearm, Moar's tattoos, and the Deceased's hat which Morton observed in the front yard on his way to the police cruiser, I am satisfied that Morton was wearing his glasses at the material time.

[42] There is a detail in Morton's statement, however, that is obviously inaccurate, namely that Moar was wearing knee length blue jean shorts at the material time. As I have stated, the evidence is clear that Moar was wearing the White Pants, and moreover these events occurred in the middle of winter in Winnipeg when it was very cold, as

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[10] With the consent of the defence, Elliott was qualified as an expert in the identification, classification and functionality of firearms and ammunition and in their mechanical assessment.

stated by the police at trial. Morton himself expressed the oddity of someone wearing shorts in these circumstances. Similarly, Morton's description of Moneyas' clothing at the material time was inaccurate. These aspects of his statement represent additional frailties in Morton's evidence.

[43] I have also considered the general manner in which Morton gave the police statement. He asked police to get a cross from his belongings, and while he did not explain this request, the only reasonable inference to make is that he drew some meaning from having it in his possession. In addition, at one point during his statement, Morton asked police for a break because "it's all going through my head". He appeared to be collecting his thoughts in a solemn manner. In addition, although Morton initially balked at the request that he review photo line-ups, when he did so he stated "if I make the wrong selection, man, then we're hooped". In my view, this statement reflects the care with which Morton spoke to police. In addition, when giving his statement, Morton gestured as to how Moar brandished the Firearm. I accept that in doing so, he was recreating the events in his mind as he spoke to police.

[44] For all of these reasons, I have concluded that throughout his statement Morton tried to recount his observations carefully, and to give police an accurate description of the events that he witnessed.

[45] I have also considered a series of comments that Morton made before giving his video statement, including in the 911 call, in which he said he was asleep and awoken by bangs or gunshots. These inconsistent statements do not concern me, because once confronted, Morton immediately recanted them and cooperated with police. In my view,

he made the inconsistent statements because he was trying, initially, to avoid involvement in the police investigation.

[46] I have concluded, therefore, that Morton did his best to speak truthfully and accurately in his statement. In addition, he appeared to speak independently, without influence, and pushed back to police when he wished to do so.

DID MOAR CAUSE THE DECEASED'S DEATH?

[47] I will now consider whether Moar caused the Deceased's death. In other words, did he fire the shot that killed the Deceased?

[48] It is clear, based upon Shane's testimony and Morton's statement, that there was a verbal argument in the kitchen of 411 Nairn, at which time Moar brandished the Firearm. A physical altercation ensued, and moved to the backyard where the Firearm was discharged. I have also noted one of the Jail Calls in which Moar stated "A fuckin' fight broke out quick and all of a sudden I'm getting punches in the back of the head… I tried to hit him. I tried to throw a punch in his face and he speared me".

[49] I will now consider whether, as the defence submitted, the fatal shot was inflicted in the backyard.

[50] Elliott classified the Firearm as a 12 gauge pump action shotgun with a magazine that will hold four shotgun shells, of 2 ¾ inches or 3 inches in length. Police found a 3-inch green, spent shotgun shell in the backyard, which Elliott said could not be included or excluded as having been fired from the Firearm, because the tool marks were insufficient for that purpose. In addition, Elliott stated that there is no test that can determine when the shell was fired.

[51] I am satisfied, however, that the spent shell was fired when the physical altercation was ongoing in the backyard because:

a) both Shane and Morton said that the Firearm discharged in the backyard during the physical altercation;

b) the shell was found beside the fire pit, which is where:

i. Shane and Morton said the fight occurred; and

ii. police found blood on the snow, close to the shell; and

c) the shell looked clean, and was found on top of the snow, which in my view indicates that it was discarded not long before it was found.

[52] To be clear, according to Elliott, to eject a spent shell the pump action on the forearm of the Firearm must be slid backward, and then forward to re-cock the hammer and insert a new shell from the magazine into the chamber. In other words, after the Firearm discharged in the backyard, the spent shell could have been ejected only if the pump action was engaged. If that was not done, the spent shell would have remained in the magazine of the Firearm. I have inferred, therefore, that the pump action of the Firearm was engaged in the backyard.

[53] I will add that police found several live shotgun shells situated randomly in the living room of 411 Nairn, and observed what appeared to be damage by a shotgun blast in the main floor bedroom. Police could not determine when the damage occurred, and there is no indication that either the shells or the damage are linked to this matter in any way. There is no allegation either that any part of the altercation occurred in the living

room or bedroom, or that Moar or Moneyas entered those rooms. Accordingly, this evidence is irrelevant.

[54] There is no evidence that the Firearm was discharged intentionally in the backyard, and Shane stated candidly that it "probably" discharged accidentally. I have concluded that this question is irrelevant to the charge before me, however, because the shot in the backyard did not cause the Deceased's death. For the reasons that follow, I have concluded that a second shot, the fatal shot, was fired in the front yard of 411 Nairn.

[55] First, Dr. Charles Littman, pathologist ("Dr. Littman")[11], testified that the exclusive cause of death was a single gunshot wound on the left side of the Deceased's body measuring approximately 4.5 cm x 4 cm, which caused severe damage to the Deceased's left lung. In other words, there was a large hole in the side of the Deceased's chest. Dr. Littman testified that "lots" of blood would have come out of this wound, as long as the Deceased's heart was still pumping, and that blood would have accumulated in the Deceased's chest cavity. He also stated that the amount of blood at the scene would depend on gravity, and that the amount of blood where a body is found will depend upon the position of the body relative to the wound. For example, where a body with a wound on the left side is positioned on its right side, there would be less blood at the scene because more blood would remain within the body.

[56] Dr. Littman testified, and I accept, that the Deceased may not have died right after infliction of the gunshot wound, and that he could have walked a distance of 15 - 20 feet

[11] Neither Dr. Littman's qualifications nor the substance of his evidence was challenged by the defence.

or more. The distance from the backyard to the front yard of 411 Nairn is approximately 35 feet, and I accept that the Deceased could have travelled that distance after infliction of the fatal shot. Dr. Littman also stated that the Deceased's ability to function after such a devastating injury could have been enhanced by the methamphetamine and adrenaline in his system after the physical altercation, which I accept.

[57] The problem with the argument that the fatal shot was inflicted in the backyard, however, is that if the Deceased continued the physical fight or ran to the front yard after the infliction of the fatal shot, blood would have been coming out of the wound in his side while he did so. The Crown did not call a blood pattern expert at trial, but it is obvious, based upon Dr. Littman's evidence, and as a matter of common sense, that a significant amount of blood would have come out of the Deceased's wound and the corresponding holes in his clothing, if he had remained upright. In other words, if the Deceased was shot in the backyard, where did the blood go?

[58] I acknowledge the defence argument that the Deceased was wearing four layers of clothing on his torso, which would have absorbed some of the blood. Having said that, very little blood was found either in the backyard of 411 Nairn or on the sidewalk connecting the backyard and the front yard. Similarly, there was only a small amount of blood found on the White Pants,[12] which in my view would not have been the case if the Deceased and Moar continued to fight after the Deceased was shot.

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[12] At trial the White Pants were at times described as "drenched" in blood, but I disagree with that characterization. Rather, there are some small blood stains on the pants.

[59] Moreover, there is no evidence of whose blood was found in the backyard or on the sidewalk, and since the Deceased, Moar and Moneyas were all involved in the physical altercation, it could have belonged to any of them.

[60] Police found the Deceased in the front yard lying on his back, approximately nine feet from the front steps of the house, with his head towards Nairn Avenue and his feet towards the house. There was a lot of blood in the snow around the Deceased's body, as shown in the scene photographs, and on his clothing. The police officer who accompanied the Deceased to hospital testified that during the 12 minute ambulance ride, the Deceased's blood was "pouring down the steps" of the ambulance floor. Accordingly, I am satisfied that the Deceased's gunshot wound bled heavily.

[61] Second, and as I have referenced already, Shane testified that he heard multiple shots. Specifically, he testified that there was one shot fired in the backyard, followed by one or more in the front yard. On cross-examination, Shane was challenged on the basis that he told police he heard one shot, but he clarified twice that his comments to police were made with reference to the events in the backyard, or "during the altercation outside the back door". Accordingly, I am satisfied that Shane's evidence was consistent on this point.

[62] The defence also challenged Shane on the basis that he told police he did not know what happened to the Deceased, and asked them whether the Deceased was shot out front. At trial, Shane testified that he did not remember making these comments, and that it was possible the Deceased "took that hit" in the backyard. These statements are, in my view, a further reflection of the fair manner in which Shane gave evidence,

and they confirm that he did not see what happened in the front yard. That fact does not detract, however, from his evidence that he heard multiple shots.

[63] I am also mindful of the fact that Shane was in close proximity to both the Deceased and the Firearm when it was discharged in the backyard, and that thereafter he continued to interact with the Deceased, by trying to dissuade him from engaging further with Moar and Moneyas. Despite Shane's candour, it is very unlikely, in my view, that he did not notice a large shotgun wound in the Deceased's chest during their interactions, see blood, or hear any reaction from the Deceased to being shot, particularly given that one of his lungs was damaged severely. Accordingly, Shane's evidence supports the conclusion that the Deceased was shot in the front yard.

[64] Third, Morton said in his statement that after the Firearm discharged in the backyard, he "almost knew" that the Deceased was not hit. When asked "Can you see if anyone is bleeding at this point?", Morton answered "No". When asked, relative to the scramble over the Firearm, "Could you see at this point if Bull was injured?", Morton answered "No, I don't – I believe not". Morton said that after the Deceased, Moar and Moneyas ran to the front yard he heard "another gunshot go off", which prompted him to go to the front window and look out, where he saw the Deceased "lying on the ground with the gentleman that had the gun". In other words, Morton did not observe the infliction of the fatal shot in the backyard.

[65] Fourth, there were multiple shells in the magazine of the Firearm, because, as I have already accepted, Morton saw Moar load the Firearm in the kitchen. Morton also said that in the backyard Moar "was checking to see if it was loaded". Although there is

no evidence of exactly what Morton observed Moar to do in this regard, as I have already found, when the pump action was engaged in the backyard, and the green, spent shell ejected, a new shell would have been racked into the chamber of the Firearm, making it ready to fire.

[66] I have considered the range of reasonable inferences that can be drawn from the circumstantial evidence before me and I have concluded that the only scenario that fits with the physical evidence, and the eyewitness evidence of Shane and Morton, is that the fatal shot was inflicted in the front yard of 411 Nairn.

[67] I will add that I have also considered the evidence of Gardiner, and in particular the defence argument that since he was sleeping upstairs at 411 Nairn, facing the front yard, any shot in the front yard would have been fired right below his windows (one of which was missing and filled with a pillow), and should have awoken him. This argument is logical, but Gardiner testified specifically that he heard yelling but no gun shots, so his evidence does not assist me in determining whether one or two shots was fired. Although Gardiner did not remember much of what he told police, I accept the basic points of his evidence as given at trial. Having said that, I suspect that in all likelihood, Gardiner was awoken by the gunshots, without realizing or remembering that he heard them.

[68] Mariah's evidence also supports the finding that two shots were fired. She testified that after Moar and Moneyas arrived at 419 Nairn they talked about their fight with the Deceased in her presence. On direct examination, Mariah testified that Moar said jokingly, "It didn't go off the first time … but it went off the second time" (the "Comments") while laughing, and demonstrating how he held the gun: with one hand in

front of the other, his elbows at shoulder height, and knees bent (the "Stance"). On cross-examination, defence counsel reminded Mariah that she told police Moneyas made the Comments and exhibited the Stance, and she agreed that it could have been either Moar or Moneyas who did so. Either way, Mariah's evidence was clear that all three of them were present, and neither Moar nor Moneyas expressed any disagreement. I accept Mariah's evidence on this point.

[69] In general, I found Mariah to be both a credible and reliable witness. She testified that she was pregnant and was not drinking or on drugs at the material time, which was unchallenged. In addition, she presented as an articulate and thoughtful witness, who gave her evidence reasonably and assertively. The defence argued that Mariah attempted to protect Moneyas when giving her evidence, but I found her perspective to be one of sympathy moreso than protection. For example, Mariah testified that she and Moneyas had an argument the evening before these events, and she told him not to come back to her residence. Having said that, when he arrived with Moar she let them in because Moneyas was physically injured. In addition, as the morning progressed Mariah did not want Moar to see that Moneyas was crying, so she wiped his tears away.

[70] I will add that Mariah was recalled at trial to speak to a narrow issue that arose in Whitford's evidence. When Mariah left 419 Nairn, she wore the black hoodie and brown pants previously worn by Moneyas and left behind, as a means of removing those clothes from 419 Nairn. A discrepancy arose as between Mariah and Whitford over why Mariah did so, but in my view that issue is immaterial. It is not surprising to me that both Mariah and Whitford would have wanted those clothes out of their residence. Mariah admitted

that what she did was wrong, and Whitford, who initially disposed of the clothes in a back alley, later led police to them.

[71] Whitford also presented as a generally credible witness who speaks her mind. Her answers were direct and forthcoming, and when she could not remember details she said so. Whitford said candidly that at the material time she was a methamphetamine user, and was experiencing withdrawal symptoms. On that basis, and given Mariah's sobriety, where their evidence conflicts, I prefer Mariah's evidence.

[72] I will now consider whether Moar was in possession of the Firearm in the front yard of 411 Nairn when the fatal shot was fired, on the basis of the circumstantial evidence before me.

[73] Shane testified on direct examination that Moar was in possession of the Firearm in the kitchen, during the fight in the backyard, and during the chase to the front yard, and that no one else had it at any time. On cross-examination, Shane agreed that it was dark in the backyard, there was a tangle of people, and without his glasses he could not say for sure who had the gun at that point.

[74] Morton said in his statement that after the scramble over the Firearm in the backyard, Moar "received" it. Morton also stated that when Moar and Moneyas ran into the front yard, Moar held the gun in his hand. In addition, Morton said both that he saw the Deceased on the ground "with the gentleman that had the gun", and that the "Caucasian" had "got the gun again".

[75] I have also considered the Jail Calls, and in particular Moar's comments to a female, who seemed to be his friend, in the early morning hours of January 5, 2019 that:

a) "[the Deceased] got his whole belly blown out";

b) "I'm just an accessory to it. Just kidding, no";

c) "Yeah I'm a killer, buddy. I fuckin' kill things, yo";

d) "They don't call me a shooter for no reason, yo. My name ain't in the street for nothing"; and

e) I'm not a killer, yo, okay?"

[76] In a conversation with a different female on January 7, 2019, Moar was asked if he "really did it", with reference to the shooting, and answered "No".

[77] I am mindful of the fact that when considering the Jail Calls, which are a form of after-the-fact conduct, I must be careful not to jump to a mistaken conclusion that Moar was the shooter, when his comments may be motivated by and attributable to an innocent explanation. Having said that, I also recognize that admissions and inculpatory statements do not necessarily present the same risk of error as more ambiguous after-the-fact conduct (***White (1998)***, para. 42).

[78] I have considered Moar's comments on this issue as a whole and in context, recognizing that he was speaking to people that he knows. I have also considered other possible meanings or motives for his comments that he was the shooter, but I am unable to find any innocent explanation. It is not unusual for a person to deny having done something of which they are accused, especially a violent act such as a fatal shooting. It is very unusual, however, for someone to admit to inflicting a fatal gunshot wound that he did not inflict, particularly in a casual conversation with a friend. I agree with the

Crown that the overall tone of Moar's admissions was an exhibition of bravado, and that he was bragging, in essence, about shooting the Deceased.

[79] Accordingly, I have concluded that Moar's comments taken as a whole, together with Shane's evidence and Morton's statement, support the findings that Moar was present when the fatal shot was inflicted, and that he was the shooter.

[80] In conclusion, the circumstantial evidence before me, viewed logically and in light of human experience and common sense, is not reasonably capable of supporting any inference other than that Moar was the shooter.

DID MOAR CAUSE THE DECEASED'S DEATH UNLAWFULLY?

Accident

[81] The issue is whether the Crown has proven beyond a reasonable doubt that Moar did not fire the fatal shot accidentally.

[82] The defence submissions on this issue were supported mainly by the theory that the fatal shot was inflicted during the fight in the backyard. Having concluded that the fatal shot was inflicted shortly thereafter, in the front yard, I have considered the defence submissions in that context.

[83] In ***R v. Barton***, 2019 SCC 33 (CanLII), the court stated:

> [186] …the term "accident" is used to signal one or both of the following: (1) that the act in question was involuntary (i.e., non-volitional), thereby negating the *actus reus* of the offence; or (2) that the accused did not have the requisite *mens rea* [citations omitted].
>
> …
>
> [189] Where the offence charged requires proof of subjective intent to bring about a particular consequence, the claim that the accused did not intend to bring about that consequence, making it a mere "accident", is legally relevant, as it could negate the *mens rea* required for a conviction.

[84] In ***R. v. White***, 2011 SCC 13 (CanLII), the court stated:

> [67] As a matter of logic and human experience, one would expect an ordinary person to present some physical manifestation, such as hesitation, at a gun in their hand accidentally discharging into someone's chest, thereby killing them. It was open to the jury to infer that a failure to react in this way was incongruous with the theory, advanced by the defence, that the gun went off by accident as the two men struggled with each other. To use the language of *Arcangioli* and *White (1998)*, lack of hesitation was not "equally consistent with" or "equally explained by" accidentally as opposed to intentionally shooting the victim. It is less consistent with accident.

[85] The defence pointed to Elliott's testimony that the Firearm discharged when he performed one of eight shock discharge tests. In particular, the Firearm discharged when it was dropped onto a rubber mat from two feet above, oriented vertically, with the barrel pointed down. Elliott testified that he could not comment on whether the Firearm would have discharged if it was dropped from a height of less than two feet, or if the barrel was pushed into an object at the time of the test.

[86] The defence argued that the Firearm could have discharged accidentally, as it did in the shock discharge test, if it was dropped onto hard packed snow and ice. Elliott did not comment upon this possibility, and there is no evidence that the Firearm was dropped in the front yard, causing it to discharge, or that it discharged accidentally in other conditions not tested by Elliott. I accept, however, that the snow and ice on the front sidewalk at 411 Nairn, where the Victim was found, was hard packed, because police had to use a scalpel to extract blood evidence from the snow.

[87] The defence also pointed to the trigger pull weight of the Firearm, which Elliott testified is lighter than most other 12 gauge pump action shotguns. There is no evidence

that this characteristic of the Firearm was a factor in its discharge when the fatal wound was inflicted.

[88] I have also considered Dr. Littman's evidence regarding a series of non-fatal injuries suffered by the Deceased, caused by blunt force trauma, which Dr. Littman opined occurred around or immediately after the time of the gunshot wound[13] including:

a) a 4 cm laceration on the left side of his forehead;

b) a broken nose;

c) two lacerations (1.4 cm and 1.1 cm) on his nose; and

d) an abrasion on his nose.

[89] Dr. Littman testified on cross-examination that the lacerations could have resulted from the Deceased falling into something, including a firepit, concrete steps or ice-packed snow, but in my view it is equally possible that they were inflicted upon the Deceased by Moar and/or Moneyas. In fact, in one of the Jail Calls Moar said "in the statement, yo, [Moneyas] was showing them how I hit the guy in the face with a gun". This evidence is not before me for the truth of its contents, because Moar was repeating something apparently said by Moneyas, but the implication of Moar's comment, in the absence of a denial, is that he hit the Deceased in the face with a gun. If this happened, Moar was in control of the Firearm at the time, which does not support an accidental discharge.

[90] I have also considered the Comments and the Stance, which are incongruous with the argument that the shooting was accidental.

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[13] The basis for this opinion is that there was no swelling or bruising around these injuries.

[91] In addition, I have considered the Jail Calls, in which Moar does not say or even imply that the shooting was accidental. In addition, he expressed concern, repeatedly, in many of the calls, about Moneyas "ratting" him out, or telling on him. The Crown submitted, and I agree, that Moar seemed to be fixated on this issue. If the shooting was accidental, it is difficult to understand why Moar was concerned about what Moneyas told police.

[92] I have considered all of the circumstantial evidence before me, including the absence of evidence, and I have considered the range of reasonable inferences that I can draw. I have concluded that there is no basis for the argument that the *actus reus* of the offence has been negated because of an accident. Similarly, there is no basis on which to conclude that the fatal shot was fired unintentionally, such that *mens rea* is negated. To be clear, I make no finding at this stage regarding whether Moar had the requisite intention for murder. I will consider that question separately, if necessary.

Self-Defence

[93] The ***Criminal Code***, R.S.C., 1985, c. C-46, section 34(1) provides:

> Defence — use or threat of force
>
> 34 (1) A person is not guilty of an offence if
>
> (a) they believe on reasonable grounds that force is being used against them or another person or that a threat of force is being made against them or another person;
>
> (b) the act that constitutes the offence is committed for the purpose of defending or protecting themselves or the other person from that use or threat of force; and
>
> (c) the act committed is reasonable in the circumstances.

> Factors
>
> (2) In determining whether the act committed is reasonable in the circumstances, the court shall consider the relevant circumstances of the person, the other parties and the act, including, but not limited to, the following factors:
>
> (a) the nature of the force or threat;
>
> (b) the extent to which the use of force was imminent and whether there were other means available to respond to the potential use of force;
>
> (c) the person's role in the incident;
>
> (d) whether any party to the incident used or threatened to use a weapon;
>
> (e) the size, age, gender and physical capabilities of the parties to the incident; [and]
>
> …
>
> (g) the nature and proportionality of the person's response to the use or threat of force.

[94] The issue is whether the Crown has proven beyond a reasonable doubt that Moar was not acting in self-defence when he shot the Deceased. In other words, the Crown must disprove at least one of the three elements of the defence of self-defence beyond a reasonable doubt.

[95] The Crown argued that there is no air of reality to this defence in this case, and for the reasons that follow, I reject that suggestion.

Reasonable Belief

[96] Section 34(1)(a) of the ***Code*** requires me to consider Moar's beliefs at the material time, and since Moar did not testify at trial, as is his right, the only evidence of his beliefs are as set out in one of the Jail Calls, as follows:

> STORM MOAR: A fuckin' fight broke out quick and all of a sudden I'm getting punches in the back of the head, and then he got hit with a slug in the belly. Like

> what more can I do? Like I'm not going to get punches, like what do you think this is out here?
>
> FEMALE: Well, you could have fought him. You could have fought back.
>
> STORM MOAR: No. Buddy, that guy was like 6'2", like fuck.
>
> FEMALE: Holy. Okay. That's makes sense though like.
>
> STORM MOAR: I tried to – I tried to hit him. I tried to throw a punch in his face and he speared me, yo.

[97] It is clear on the basis of this exchange and the findings I have already made that for the purposes of s. 34(1)(a), Moar believed, reasonably, that the Deceased used force against him and Moneyas.

Purpose

[98] I will now consider, pursuant to s. 34(1)(b), whether Moar fired the fatal shot for the purpose of defending himself or protecting Moneyas from the Deceased.

[99] On the basis of Moar's comments in the Jail Calls, and the evidence of Shane and Morton as to how the physical fight started, I accept that the Deceased likely surprised Moar in the kitchen by punching Moneyas, and then tackling Moar. I also accept that Moar had to act quickly to defend himself in the backyard.

[100] I have considered Shane's evidence that the Deceased was a "powerhouse", and that he could not think of a single man who could beat the Deceased in a fight. I am not prepared to attach much weight to this evidence, however, because Shane also stated that the Deceased was not known for fighting, and he had never seen him fight before.

[101] Shane speculated that Moar probably never had such a "good licking" as he did from the Deceased, and that he could see the fight being very scary for Moar, making

him fear for his "bloody life". Since Shane was the only eyewitness to the fight who testified at trial, I will assume that this assessment is accurate, at least at the beginning of the fight.

[102] I note, however, that neither Mariah nor Whitford noticed any injuries on Moar when he attended at 419 Nairn immediately after the shooting. As such, either the Deceased did not injure Moar or his injuries were not visible.

[103] I am mindful, however, of the following key facts that became apparent as the fight progressed, and that are relevant to whether the fatal shot was fired to defend Moar and/or Moneyas:

a) once Moneyas left the kitchen and joined Moar in the backyard, there was a two-on-one fight against the Deceased;

b) both Shane and Morton repeatedly encouraged the Deceased to disengage. In other words, they tried to de-escalate the fight, and although they were the Deceased's friends, there is no evidence that either of them engaged with or physically threatened Moar or Moneyas;

c) the Deceased was unarmed; and

d) as I have already found, Moar recovered the Firearm in the backyard.

[104] In other words, when the Deceased, Moar and Moneyas went to the front yard, the Deceased was alone and unarmed, in the midst of a physical conflict with two people, one of whom had a loaded shotgun. I have concluded, therefore, that by that time Moar and Moneyas had gained the upper hand in the fight.

[105] The Deceased, however, was very impaired by drug and alcohol use. Dr. Littman testified that the use of methamphetamine can result in increased energy, feelings of intense euphoria, increased abilities, hallucinations or delusions, aggression, and compromised decision-making ability. In addition, when a user consumes alcohol also, as the Deceased did, each substance can enhance the effects of the other, so all of the effects of the methamphetamine can be intensified. I will assume that the Deceased was experiencing these effects when he advanced upon Moar and Moneyas in the kitchen.

[106] A hotly contested issue at trial was who chased who from the backyard to the front yard. Based upon the facts as I have found them, it would have been illogical for the Deceased to chase after Moar and Moneyas, if they ran from him, but Shane testified that this happened. Given the Deceased's level of impairment, I will assume that he took this irrational step, and pursued Moar and Moneyas from the backyard to the front yard, where he overtook either or both of them, forcing them to defend themselves. On that basis, I am satisfied for the purposes of s. 34(1)(b) that Moar inflicted the fatal shot for the purpose of defending himself or protecting Moneyas from the use of force by the Deceased.

Reasonableness

[107] I will now consider whether the infliction of the fatal shot was reasonable, pursuant to s. 34(1)(c) of the ***Code***, with regard to the relevant factors set out in s. 34(2).

[108] Since the Deceased was unarmed, the nature of the force that he could use against Moar and Moneyas was the infliction of blows or other contact using his body. The

Deceased was very impaired, almost 6' tall, and he weighed 187 pounds, whereas Moar is only 5'5" and weighed 174 pounds. Moneyas was 5'7" and weighed 140 pounds.

[109] I will assume that, having chased Moar and Moneyas to the front yard, a further attack upon them by the Deceased was imminent. Having said that, they were in a good position to defend themselves because they were two as against one, and Moar was armed. I have concluded, therefore, that Moar and Moneyas could have continued to fight the Deceased physically, they could have returned to the backyard and asked Shane and/or Morton to assist them or to call the police, or they could have attempted, again, to flee the scene.

[110] The nature of Moar's response to the Deceased's use of force was as serious as it could be, namely a shotgun blast to the chest. In assessing the proportionality of the fatal shot, it is important to note Dr. Littman's opinion that the shot was fired at "close range", from a distance of between three and six feet from the Deceased. Dr. Littman drew this conclusion for two reasons. The first was that the Deceased's wound was one large hole with no satellite wounds around it. Satellite wounds are small holes that can be caused by a shotgun blast, as the individual shot pellets spread out before impacting the target. When the target is close to the shotgun, most of the pellets will stay together and act as one projectile, as seen here.

[111] The second reason for Dr. Littman's conclusion was the location of the shotgun shell wadding, which separates the gunpowder from the pellet projectiles within a shotgun shell, and leaves the barrel on the discharge of a round. The wadding drops to

the ground sooner than the projectiles, but in this case, it was found in the Deceased's body, which reflects that the shot was fired at close range.

[112] Dr. Littman also testified, based upon the spread of shotgun pellets within the Deceased's chest and back, that the shot was fired from the front of his body to the back, at a slightly downwards angle. This evidence was not contested.

[113] On the basis of Dr. Littman's evidence, I have concluded that:

a) the Deceased and Moar were close to each other when the shot was fired;

b) the Deceased and Moar were facing each other when the shot was fired;

c) the Deceased's chest was lower than the barrel of the Firearm when the shot was fired; and

d) since the Deceased was seven inches taller than Moar, he could not have been standing upright when Moar shot him. He was either on the ground or crouching in some way.

[114] In addition, based on the location of the wound, the Deceased's left arm was not at his side when he was shot. Rather, his arm was raised in some fashion, and Dr. Littman agreed that he could have been punching with that arm. It is also possible, in my view, that the Deceased raised his arm in a defensive motion.

[115] In ***R. v. Johnston***, 2018 MBCA 8 (CanLII), the court considered a situation where, as here, the complainant struck the accused first, and the accused raised the defence of self-defence. At para. 126 the court stated "the force used [by the accused] in response must be objectively reasonable in the circumstances". The court upheld the trial judge's finding that:

> [127] … [W]hat might have subjectively began as a viable contention of self-defence on the accused's part transitioned objectively into a course of conduct that constituted assault cause bodily harm. His actions in response to being struck were not reasonable or proportionate in the circumstances.

[116] I have already concluded that in the Jail Calls, Moar was fixated on what Moneyas told police, which defies the argument that the shooting was reasonable.

[117] I recognize that Moar cannot be expected to have known exactly how to deal with the situation in which he found himself, and that what was reasonable in the circumstances may include several alternatives. Having considered all of the evidence before me, however, I have determined that prior to the infliction of the fatal shot Moar had other options available to him, having gained the upper hand over the Deceased, who was outnumbered, unarmed and no longer standing upright.

[118] I am satisfied, therefore, that the Crown has proven beyond a reasonable doubt that the force used by Moar in self-defence, namely shooting the Deceased in the chest, was neither reasonable nor proportionate in the circumstances, pursuant to s. 34(1)(c) of the ***Code***. Accordingly, the defence of self-defence must fail.

DID MOAR HAVE THE REQUISITE INTENT FOR MURDER?

[119] To establish intent for murder, the Crown must prove beyond a reasonable doubt that Moar either meant to kill the Deceased, or meant to cause the Deceased bodily harm that Moar knew was likely to kill the Deceased, and was reckless whether the Deceased died or not.

[120] As is often the case, there is no direct evidence of Moar's intention when he fired the shot. Accordingly, the circumstantial evidence must be examined to determine what, if any, inferences can be drawn as to his intention.

[121] I have already concluded that the pump action of the Firearm was engaged in the backyard. Since Moar was the only person observed to be in possession of the Firearm throughout these events, I have inferred that he engaged the pump action. The only reasonable inference to draw from him doing so is that he was preparing the Firearm to be discharged a second time.

[122] The Crown pointed to Moar's after-the-fact conduct, and contended that Moar shot the Deceased out of pride, after being insulted, embarrassed and physically attacked by the Deceased.

[123] I have already cited the relevant law on after-the-fact conduct, but I will add that at paras. 123 and 124 of ***Calnen***, the court said that where two or more offences are under consideration, after some baseline culpability has already been established (here, murder and manslaughter), I can conclude that after-the-fact conduct is more consistent with one offence than the other.

[124] In addition, the defence pointed to ***R. v. Lumberjack***, 2017 SKCA 106, at para. 43 as authority for the proposition that after-the-fact conduct has no probative value on the issue of intent for murder, because it is equally consistent with both murder and manslaughter. In my view, the court in ***Calnen*** made it clear that this question depends upon the nature of the conduct, its relationship to the record as a whole and the issues

raised at trial. Accordingly, I will consider the after-the-fact conduct in this case in the context of Moar's intent, as follows.

Flight from 411 Nairn

[125] Morton said that he saw "the guy take off with the shotgun, no accomplice behind him", eastbound on Nairn Avenue. Gardiner testified at trial that when he woke he heard a male yell "Let's fucking go" in an excited and panicked voice. Gardiner looked out the window, and saw two people running from the front yard of 411 Nairn, eastbound, towards 419 Nairn.

[126] I am satisfied that Moar and Moneyas fled to 419 Nairn where they yelled and banged on the door to Mariah's suite until she let them in. In my view, however, their doing so, on its own, has no probative value relative to Moar's intent when he shot the Deceased. This is so because the shooting of the Deceased was a significant event that happened quickly, at a "flop house", and Moar may have panicked. He would have been aware that Shane and Morton were still at the scene, and after shooting the Deceased he may have feared some form of retribution, so he ran.

Other conduct at 419 Nairn

[127] Whitford testified that at 419 Nairn, Moneyas handled the Firearm in the presence of Moar and Mariah, and asked Mariah to hide it. Mariah contradicted Whitford's evidence, testifying that she did not see the Firearm while Moar and Moneyas were at the residence. Mariah also testified that while she did not see anyone take the Firearm up into the attic, she saw Moneyas fall out of the attic hatch in the ceiling, which Whitford confirmed.

[128] In the Jail Calls, Moar complained about the manner in which Moneyas hid the Firearm, after speaking with police. Moar said on January 6, 2019: "they said that he didn't even hide that thing. They found it in plain sight."

[129] In addition, after Moar left 419 Nairn, Whitford found the White Pants in a laundry basket with some of her clothing, which means that Moar must have taken them off and left them behind.

[130] I am satisfied that Moar left behind both the Firearm and the White Pants at 419 Nairn, and I have inferred that he did so as a means of distancing himself from the shooting. These are the only reasonable inferences to draw from these facts.

Fleeing 419 Nairn

[131] Both Mariah and Whitford testified that while Moar remained at 419 Nairn he repeatedly looked out of the various windows of their second storey apartment. It was apparent, and they were all aware, that police had surrounded 411 Nairn. Accordingly, if Moar had fled 411 Nairn because of panic or fear of retribution, he could have revealed himself to police safely, but he did not do so.

[132] Mariah testified that she was present in the main floor bathroom at the rear of 419 Nairn when Moar jumped out of the window and ran away through the yard, and the neighbour's yard, away from 411 Nairn. Officer Gaudet testified that he saw foot holes in the undisturbed snow of neighbouring yards, and that the snow had been disturbed on top of fences, which he traced to the rear window of 419 Nairn.

[133] In other words, to evade police, Moar jumped out of a window and ran away, as far east as 431 Nairn according to the testimony of a neighbour. Ironically, police were

surveilling the backyard of 419 Nairn at the material time, but did not have a sightline to the rear window from which Moar jumped, and his escape went unnoticed.

[134] Moar confirmed that he evaded police in this manner when he said in the Jail Calls "At that house, I was like "We're surrounded. Nowhere to go." Then all of a sudden I jump out the window and run away".

[135] The only reasonable inference to be drawn from Moar's flight from 419 Nairn is that he was trying to evade police and distance himself from the shooting.

Jail Calls

[136] I have already referenced several excerpts of the Jail Calls to which Moar was a party, including the following comment made four days after the shooting:

> A fuckin' fight broke out quick and all of a sudden I'm getting punches in the back of the head, and then he got hit with a slug in the belly. Like what more can I do? Like I'm not going to get punches, like what do you think this is out here?
>
> [emphasis added]

[137] The only reasonable interpretation of these comments is that Moar was so bothered, and his pride so damaged by the physical altercation, that the shooting was a deliberate act that he felt was justified.

Facebook postings

[138] The following posts were made to Moar's Facebook account on January 1 and 2, 2019:

a) a link to a Global News article headlined "Winnipeg police at scene of 'serious incident' in Elmwood" with the comment "Crazy I wonder what happened lmfao"; and

b) a link to a CBC article with a picture of 411 Nairn, headlined "Man shot dead as new year starts with a homicide in Winnipeg" with the comments:

i) "Wtf there's already a body damn that's Brazy"; and

ii) "Wtf aye lol"

c) "Man down it's a murda scene … bring the yellow tape";

d) "Yu ain't a shoota yu bluffing lmfao"; and

e) "Call that day blood sport …".

(collectively the "Posts")

[139] Although I have no direct evidence that Moar made the Posts himself, I have inferred that he did so, because in the Jail Calls:

a) he repeatedly asked about media attention in this case, so the news articles were clearly important to him;

b) he asked a friend to remove the Posts from his Facebook account, stating:

i) "I'm going to trust you to go on my Facebook";

ii) "I need to see what people are saying and shit. And you need to delete pictures and stuff for me off there, man";

iii) "I need those things deleted"; and

iv) "Can you please go on my Facebook for me?"; and

c) at no time did he say that someone else made the Posts to his account.

[140] In other words, Moar made the Posts and within a few days tried to distance himself from doing so.

[141] I have taken into account alternative, innocent explanations for every aspect of Moar's after-the-fact conduct set out above, and I have concluded that, when taken together, it is more consistent with murder than manslaughter, because it supports the inference that he meant to cause the Deceased bodily harm (a shotgun blast to the chest at close range). Even if in doing so Moar did not intend to kill the Deceased, he would know that the gunshot wound was likely to kill the Deceased, and was reckless whether the Deceased died or not. Accordingly, I am satisfied that Moar had the requisite intent for murder.

WAS MOAR PROVOKED?

[142] Section 232 of the ***Code*** provides:

> Murder reduced to manslaughter
>
> 232 (1) Culpable homicide that otherwise would be murder may be reduced to manslaughter if the person who committed it did so in the heat of passion caused by sudden provocation.
>
> What is provocation
>
> (2) Conduct of the victim that would constitute an indictable offence under this Act that is punishable by five or more years of imprisonment and that is of such a nature as to be sufficient to deprive an ordinary person of the power of self-control is provocation for the purposes of this section, if the accused acted on it on the sudden and before there was time for their passion to cool.
>
> Questions of fact
>
> (3) For the purposes of this section, the questions
>
> > (a) whether the conduct of the victim amounted to provocation under subsection (2), and
> >
> > (b) whether the accused was deprived of the power of self-control by the provocation that he alleges he received,

> are questions of fact, but no one shall be deemed to have given provocation to another by doing anything that he had a legal right to do, or by doing anything that the accused incited him to do in order to provide the accused with an excuse for causing death or bodily harm to any human being.

[143] In ***R. v. Krasny***, 2014 MBQB 237 (CanLII), the court stated:

> [59] In order to determine whether the defence of provocation applies to the circumstances of any case, two tests must be considered. The first is an objective test and considers the effect of the alleged provocation, that is to say the wrongful acts and/or insults, upon an ordinary person.
>
> [60] The second test, which is only considered where an evidentiary basis for the objective test has been established, is subjective. It considers whether the accused actually acted upon the provocation, "on the sudden," and before there was any time for his or her passion to cool. The act of suddenness must characterize not only the alleged provocation but also an accused's person's response to it.

[144] Moar is not required to prove the defence of provocation, but rather the Crown must prove beyond a reasonable doubt that Moar was not acting under provocation when he murdered the Deceased.

[145] The defence submitted, and I agree, that the Deceased engaged in an indictable offence, namely the assault cause bodily harm of Moneyas. I am also satisfied that the Deceased assaulted Moar, and though it is unclear whether Moar suffered injuries, I will assume that this assault also constituted an indictable offence.

[146] I recognize that the Deceased also insulted Moar, by calling him names, that he was older and bigger than Moar, and that he and Moar did not know each other prior to these events.

[147] I have considered, however, an ordinary person of the same age and gender as Moar, who experienced the same series of acts and insults. I have no evidence of any of Moar's personal characteristics that would constitute relevant considerations, as was the

case in ***Krasny***, where the accused was disabled. Rather, in this case, the Deceased was highly intoxicated by alcohol and methamphetamine and launched a physical attack against Moar, who had the Firearm, and was in the company of several other men. In my view, these circumstances would not cause an ordinary person to lose the power of self-control.

[148] Given this finding, I need not go further, but I have considered whether Moar acted "on the sudden" and before there was time for his passion to cool. I accept that the events in this case escalated and unfolded quickly, and that it was a dangerous situation for everyone involved, but the fact remains that Moar and Moneyas had gained several advantages in the physical fight, and could have disengaged with the Deceased, as I have found already.

[149] I will add that pursuant to the ***Code***, provocation does not apply where the accused incited the acts of the victim. In this case, the Deceased's insults and physical attack arose after Moar brandished the Firearm, and, according to Shane, threatened to "do" everyone in the house. In these circumstances, Moar incited the Deceased's attack, who was likely attempting to protect his friends from Moar and the Firearm.

[150] For all of these reasons, I am satisfied that the Crown has proven that Moar was not provoked when he murdered the Deceased.

CONCLUSION

[151] I find Moar guilty of second degree murder.

_____ J.