SUPREME COURT OF YUKON

Citation: *R. v. Sheepway*, 2018 YKSC 4

Date: 20180130
S.C. No. 16-01511
Registry: Whitehorse

BETWEEN:

HER MAJESTY THE QUEEN

AND

DARRYL STEVEN SHEEPWAY

Publication of information that could disclose the identity of the complainant or witness has been prohibited by court order pursuant to s. 486.5 of the *Criminal Code*.

Before Mr. Justice L.F. Gower

Appearances:

Jennifer Grandy and Leo Lane	Counsel for the Crown
Lynn MacDiarmid and Vincent Larochelle	Counsel for the Defence

REASONS FOR JUDGMENT

INTRODUCTION

[1] GOWER J. (Oral): Darryl Steven Sheepway is charged with the first-degree murder of Christopher Brisson in Whitehorse on August 28, 2015. Mr. Sheepway admits killing Mr. Brisson, but maintains that he did not have the specific intent to commit murder, because he was in an abnormal mental state as a result of his dependency on crack cocaine. Rather, Mr. Sheepway has submitted that he is guilty of manslaughter. Mr. Brisson was one of Mr. Sheepway's principal suppliers of crack. Mr. Sheepway

admits shooting Mr. Brisson in the back with a 12-gauge shotgun, using a one-ounce slug-type shot shell, apparently of the kind used against bears in the wilderness. Mr. Sheepway recalls firing three shots. He testified that the first two shots were essentially accidental in the course of a struggle and did not strike Mr. Brisson, and that the third shot was the fatal one. However, one of his two defence co-counsel, Mr. Larochelle, raised for the first time in closing argument the theory that the second shot might also have been the fatal one, arguing that this leaves the court uncertain as to whether the second or the third shot was the one which killed Mr. Brisson.

[2] The two principal issues in this trial are: (a) whether the murder was planned and deliberate, as this is required for first-degree murder under s. 231(2) of the *Criminal Code*, R.S.C., 1985, c. C-46 *(*the *"Code")*; and (b) whether Mr. Sheepway had the specific intent to either cause Mr. Brisson's death or to cause him bodily harm that he knew was likely to cause death, as required under s. 229(a) of the *Code*. In the alternative, if I am not satisfied beyond a reasonable doubt that Mr. Sheepway had the specific intent required under s. 229(a), then I must also consider whether he did anything for an unlawful object that he knew was likely to cause death, as is required under s. 229(c) of the *Code*.

[3] Mr. Sheepway has elected to be tried by judge alone, which the Crown has consented to pursuant to s. 473 of the *Code*. He has also made several admissions expediting the trial, which I will come to in due course.

[4] Apart from the issue of planning and deliberation, the foremost issue in this trial has been whether Mr. Sheepway was suffering from an abnormal mental state arising from his dependency on crack cocaine at the material time. The accused asserts that he

was either intoxicated by crack cocaine at the time of the shooting, or was suffering from extreme cravings and withdrawal, after having binged on crack for the three previous weeks, approximately. Dr. Shabehram Lohrasbe testified about Mr. Sheepway's mental state as an expert witness for the defence. Dr. Philip Klassen also testified in this area as an expert witness for the Crown. It is acknowledged that Mr. Sheepway was also dependent on marijuana at the time of the killing, but the experts agreed that this did not play a significant role in the offence.

ANALYSIS

1. Did Mr. Sheepway have the specific intent to commit murder?

a) The Law

[5] For the sake of convenience, because most of the evidence pertains to this issue, I am going to deal with it first and then go on to deal with the issue of planning and premeditation, if necessary.

[6] Mr. Sheepway can be convicted of murder under s. 229(a) of the *Code* if the Crown proves beyond a reasonable doubt that he either intended to kill Mr. Brisson (subsection (i)) or that he intended to cause bodily harm to Mr. Brisson with the foresight that the likely consequence would be death and was reckless about whether death ensued or not (subsection (ii)). This is referred to as the specific intent to commit murder.

[7] Intoxication by a drug or evidence of a mental condition that falls short of a mental disorder may raise a reasonable doubt as to whether an accused possessed the specific intent to commit murder.

[8] In *R. v. Robinson*, 2010 BCSC 368 ("*Robinson*"), Justice Joyce was considering a case where the Crown relied upon s. 229 (a)(ii) of the *Code*, which deals with the intention to cause bodily harm while having the foresight that the likely consequence would be death. Nevertheless, the Court's comments are pertinent to both ss. 229(a)(ii) and 229(a). *Robinson* was referred to with approval by the British Columbia Court of Appeal in *R. v. Damin*, 2012 BCCA 504, at para. 47. In *Robinson*, Justice Joyce stated:

> [104] In this case the Crown relies on the definition of murder as set out in s. 229(a)(ii) of the *Criminal Code*, which reads as follows:
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> 229. Culpable homicide is murder
>
> (a) where the person who causes the death of a human being
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> ...
>
> (ii) means to cause him bodily harm that he knows is likely to cause his death, and is reckless whether death ensues or not;
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> …
>
> 107 Of course, the Crown has the burden to prove the requisite intent under s. 229(a)(ii) beyond a reasonable doubt. Because we cannot look into the mind of the accused and there is often little direct evidence of an accused's mental state, intent must generally be proven based upon inferences to be drawn from established facts. This is where use may be made of the common sense inference that a sane and sober person intends the natural consequences of his acts. But there may be circumstances that cast doubt on whether one can safely rely on the common sense inference. Such circumstances include intoxication, whether by alcohol or drugs. In addition, evidence of a mental condition that falls short of a mental disorder that renders the accused not criminally responsible, may raise a reasonable doubt as to whether the accused had the necessary specific intent. If such circumstances, either alone or in combination, raise a

> reasonable doubt that the accused had the subjective intent to cause bodily harm or that he had the subjective knowledge that the bodily harm he inflicted was of such a nature that it was likely to result in death, then the accused is entitled to the benefit of that doubt and cannot be convicted of murder.
>
> 108 Furthermore, the ultimate question is not simply whether the accused had the capacity to form the specific intent, but whether because of intoxication or any other relevant circumstances he did not in fact possess that intent at the time he committed the homicide. …
>
> …
>
> 110 Where there is evidence of a mental condition relevant to intent, this evidence must be considered along with all the other evidence in determining whether the accused had the intent requisite for murder. Such consideration does not create the notion of diminished responsibility, which does not exist in our law. Rather it simply recognizes that if the accused was suffering from some sort of mental condition at the time of the offence, that mental condition is a circumstance that might affect whether or not he formed the necessary specific intent (see *R. v. Bailey* (1996), 111 C.C.C. (3d) 122 (B.C.C.A.)).
>
> 111 Evidence of intoxication, whether by alcohol, drugs or both, and evidence of a mental condition or state is to be considered with respect to the question whether the accused intended to cause bodily harm as well as the question whether he had the subjective foresight or knowledge that the bodily harm was likely to cause death and was reckless whether death ensued or not, that is the accused's ability to measure and foresee the likely consequences of his actions. … (my emphasis)

[9] *R. v. Harding*, 2008 BCSC 265, considered the issue of recklessness arising in s. 229(a)(ii), as well as the common sense inference referred to in *Robinson*:

> 120 … The mental element for culpable homicide under s. 229(a)(ii) has three components:
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> (a) intention (“means to cause him bodily harm”);

> (b) knowledge and foresight ("that he knows is likely to cause his death"); and
>
> (c) recklessness ("and is reckless whether death ensues or not").
>
> …
>
> 121 This mental element requires proof that the accused had the subjective intent to cause bodily harm, the subjective knowledge and foresight that the bodily harm was of such a nature that it was likely to cause death, and was reckless whether death ensued or not. A person is reckless when he knows the risk of death and nevertheless persists and takes the chance …
>
> 122 The legal inference that a person intends the natural consequences of his actions is relevant to proof of intention. When the accused raises issues that call this into question, the Crown must prove beyond a reasonable doubt that the accused actually foresaw the natural consequences of his act, i.e. the death of the victim …
>
> 123 The adequacy of proof is a question of fact, based upon the whole of the evidence relevant to the issue of intent. (my emphasis) (citations omitted)

[10] Thus, the common sense inference can be rebutted either by evidence of intoxication or by evidence of a mental condition relevant to intent.

[11] The extent of intoxication and, I would hold, the extent to which an accused is suffering from an abnormal mental state, sufficient to advance a successful defence to a specific intent offence may vary, depending upon the type of offence involved. Generally speaking, the more grievous the circumstances, the more advanced the degree of intoxication or the more severe the abnormal mental state must be for an accused to avail himself of the defence. This was addressed by the Supreme Court in *R. v. Daley* , 2007 SCC 53 ("*Daley*"):

> 42 It is important to recognize that the extent of intoxication required to advance a successful intoxication defence of this type may vary, depending on the type of offence involved. This was recognized by this Court in *Robinson*, at para. 52, in regards to some types of homicides:
>
> > [I]n cases where the only question is whether the accused intended to kill the victim (s. 229(*a*)(i) of the *Code*), while the accused is entitled to rely on any evidence of intoxication to argue that he or she lacked the requisite intent and is entitled to receive such an instruction from the trial judge (assuming of course that there is an "air of reality" to the defence), it is my opinion that intoxication short of incapacity will in most cases rarely raise a reasonable doubt in the minds of jurors. For example, in a case where an accused points a shotgun within a few inches of someone's head and pulls the trigger, it is difficult to conceive of a successful intoxication defence unless the jury is satisfied that the accused was so drunk that he or she was not capable of forming an intent to kill.
>
> Although I would hesitate to use the language of capacity to form intent, for fear that this may detract from the ultimate issue (namely, actual intent), the point of this passage, it seems to me, is that, for certain types of homicides, where death is the obvious consequence of the accused's act, an accused might have to establish a **particularly advanced degree of intoxication** to successfully avail himself or herself of an intoxication defence of this type. (my emphasis)

b) The Undisputed Facts

[12] In the case at bar, Mr. Sheepway, presently age 39, began to use marijuana in his early teens and soon developed a daily habit. Cannabis use remained central to Mr. Sheepway's daily life throughout his adulthood. His drive to get high daily was powerful and difficult to resist.

[13] There was also evidence that Mr. Sheepway exhibited other addictive behaviours involving coffee, sugar, junk food, television shows and pornography.

[14] His marijuana use became an issue in his only two serious romantic relationships. The first was with a woman named A., whom Mr. Sheepway met in his early 20s, and which lasted until approximately 2010, when he met his present (now estranged) wife, Katherine Scheck. Both women eventually became intolerant of Mr. Sheepway's marijuana usage and required him to stop. He did so initially in 2009, but was only able to remain clean from marijuana for about 10 months. After that, he continued using marijuana surreptitiously and admits that he "became good at lying" about it. After marrying Ms. Scheck in 2012, she also got to the point where she demanded that Mr. Sheepway stop using marijuana. He promised her that he would, but continued to use and lie about it. He even used dog urine to pass urine tests administered by Ms. Scheck and began attending Narcotics Anonymous ("NA") meetings at her request, where he received "recovery" chips while he was still using the substance. He admitted in this context that he "lied all over the place" and used marijuana while convincing people that he was remaining clean.

[15] In approximately early 2015, Mr. Sheepway met a co-worker, C.B., who was also attending NA and suffering from frequent relapses with marijuana and crack cocaine. This eventually led to Mr. Sheepway's first use of crack cocaine around the end of May or early part of June 2015. He testified that he instantly fell in love with the feeling of euphoria and thought that the crack had given him the greatest feeling he had ever had in his life. Within a couple of days, he began dreaming of crack cocaine. For the next few weeks, he and C.B. would get together about once a week and smoke crack. He would contribute financially, but C.B. made all the purchases of the substance.

[16] Mr. Sheepway disclosed to Dr. Lohrasbe that between mid-June and late July 2015, he was using cannabis daily and crack cocaine once or twice a week, "a couple of grams at a time". There is evidence that a "$50 bag" contains just under half-a-gram of crack.

[17] On July 31, 2015, Mr. Sheepway's second child, a son F., was born. Mr. Sheepway arranged to take some vacation time following the birth, which occurred by way of caesarean section. His principal duties at the couple's rural home, about 40 kilometres south of Whitehorse, were to assist Ms. Scheck in her recovery from the caesarean, as well as being mainly responsible for their daughter, A., who was 2½ years old at the time. This involved taking A. back-and-forth to Whitehorse to a babysitter, cooking and cleaning at home, and also being principally responsible for the couple's 15 sled dogs on their rural property.

[18] On August 7, 2015, Mr. Sheepway obtained the telephone number of Mr. Brisson, and thereafter was able to contact him directly in order to make crack purchases. With more time on his hands at home on vacation, Mr. Sheepway's crack cocaine use increased to a daily habit. He testified that he started off purchasing quantities of $50 to $100 per day, but that by the end of August his habit was costing him between $300 and $500 a day. He began to binge use the substance, meaning that after the initial high, as soon as he would start to feel like he was coming down, he would smoke more crack in order to maintain the high. His days were spent fighting off, or indulging in, cravings for more cocaine. The significant financial cost of supporting this habit led to Mr. Sheepway surreptitiously, and repeatedly, using Ms. Scheck's credit

card in order to make cash withdrawals. He also stole some money from tenants living in the upstairs of the family home.

[19] The facts thus far are not contentious.

[20] However, this trial was an unusual one in the sense that much of the evidence relevant to the questions of planning and deliberation and the specific intent for murder came from the accused himself. In evidence are multiple statements made by the accused, as well as an audio-video recording of a re-enactment which Mr. Sheepway performed with the RCMP on October 4, 2016. Many of the facts asserted by the accused are not capable of corroboration or independent verification.

[21] Crown counsel has urged the Court to be cautious in accepting Mr. Sheepway's evidence where it is not corroborated. For the defence, Ms. MacDiarmid, submits that it is "improper and unfair" for the Crown to suggest that I should only rely upon the evidence of the accused where it is capable of independent corroboration. The defence position is that Mr. Sheepway's cooperation with the police investigation should weigh in his favour, in terms of his credibility. Additionally, Ms. MacDiarmid notes that the Crown's case itself is built, at least in part, on statements Mr. Sheepway gave to the police during their investigation. Further, Ms. MacDiarmid seemed to suggest that I am almost compelled to believe the accused's version of the shooting, because if I do not then there is insufficient evidence to establish how the confrontation with the deceased actually occurred.

[22] I disagree with Ms. MacDiarmid on this. It is within the discretion of the Crown to rely upon whatever evidence it chooses to try to prove its case beyond a reasonable doubt. The Crown's reliance on some aspects of Mr. Sheepway's evidence does not

mean that it must accept everything he has said as credible. As well, regardless, I must conduct my own credibility assessment of his evidence.

[23] The following facts are based upon those set out in the Agreed Statement of Facts filed October 19, 2017, as well as the testimony of witnesses at the trial.

[24] As stated, Mr. Sheepway started financing his drug purchases by taking out cash advances on Ms. Scheck's credit card. She noticed some unusual transactions and confronted Mr. Sheepway about them on August 28, 2015. She took away his cell phone, his bank cards and his identification.

[25] On August 28, 2015, around 2:30 p.m., Mr. Sheepway used his home land telephone line to call Mr. Brisson for drugs. The two arranged to meet at the Mountain Ridge Motel, where Mr. Brisson was living.

[26] That afternoon, Christopher Brisson's father, Rock Brisson, went to the Mountain Ridge Motel. Rock Brisson paid his son $2,340 in cash for work he and another employee had done. Mr. Sheepway arrived during the meeting. Rock Brisson and Mr. Sheepway did not know each other.

[27] After Rock Brisson left, Mr. Sheepway asked Christopher Brisson to 'front' him some crack because he did not have any money. This is the first time he had asked Mr. Brisson for drugs on credit. Mr. Brisson gave Mr. Sheepway $50 worth of crack and they parted ways.

[28] Mr. Sheepway parked nearby and smoked some of the crack. He then drove north on the Alaska Highway to the McLean Lake Road. A surveillance camera at a nearby business captured a section of the Alaska Highway near the McLean Lake Road

entrance. Video footage shows Rock Brisson's vehicle passing by at 3:22 p.m. Mr. Sheepway's vehicle is seen going northbound at 3:25 p.m.

[29] Mr. Sheepway drove down the McLean Lake Road to the gravel pit, where he parked and used the remainder of the crack cocaine. He had a loaded shotgun with him in the truck.

[30] Mr. Sheepway left the gravel pit and started heading home. His vehicle was captured on the surveillance video camera at 3:30 p.m., heading south.

[31] On his way home, Mr. Sheepway decided he needed more drugs and turned around. He went back to the Mountain Ridge Motel, but Mr. Brisson was gone. Mr. Sheepway used the phone in the motel office to call Mr. Brisson's mobile phone at 3:46 p.m. During that call he told Mr. Brisson he now had money to pay him back and buy more cocaine. Mr. Sheepway and Mr. Brisson agreed to meet each other at a pull out on the McLean Lake Road, which was a meeting place that they had used before for the purchase of drugs.

[32] At 3:48 p.m., Mr. Sheepway's truck was seen on the surveillance video travelling north and slowing down to make a left turn onto the McLean Lake Road.

[33] Mr. Sheepway was first to arrive at the meeting point. He backed his truck up to a yellow gate, at the entrance of the gravel pit, and parked facing towards the McLean Lake Road.

[34] Mr. Brisson arrived within a minute or so. He pulled up facing the opposite direction, towards the yellow gate, so that the drivers' side windows of the two pickup trucks were adjacent and within arm's reach.

[35] The two men remained in their vehicles. Mr. Sheepway had the loaded shotgun on his lap, covered with a jacket. He said he wanted $250 worth of crack. When Mr. Brisson looked down to get the drugs out of his pocket, Mr. Sheepway raised the gun and told him to hand over whatever he had.

[36] At some point in the course of the subsequent minutes, Mr. Sheepway admits he shot and killed Mr. Brisson, but the precise details are under dispute, and I will return to them shortly.

[37] Mr. Brisson's truck, which had been driven forward from its initial parked position, reversed, and Mr. Sheepway lost sight of it as it backed quickly out of the pullout and across the McLean Lake Road. The truck ultimately crashed into the bush of the opposite side of the road, facing into the bush and away from the road.

[38] An autopsy later confirmed that Christopher Brisson had been shot with a shotgun. The shotgun slug entered the rear of his left shoulder and lodged in the right side of his jaw. The cause of death was catastrophic blood loss caused by the shotgun slug.

[39] Mr. Sheepway approached the scene of the accident. Mr. Brisson was lying dead on the ground about 10 feet away from his truck.

[40] Mr. Sheepway took Mr. Brisson's cocaine, which was in his pocket. He also took the cash that Rock Brisson had given his son earlier that day.

[41] Mr. Sheepway started driving home. His vehicle passed the surveillance camera at approximately 4 p.m. He stopped a couple of times on the drive home to do some of the drugs he had just taken from Mr. Brisson.

[42] Once Mr. Sheepway got home, he called Ms. Scheck, changed his clothes and then drove back to the scene of the shooting. His truck was captured on the surveillance video camera at 4:59 p.m.

[43] Mr. Sheepway went to the pullout by the yellow gate and picked up some spent shotgun shells. He found another five baggies of crack cocaine lying on the ground. He then approached Mr. Brisson's body for a second time.

[44] Mr. Sheepway loaded Mr. Brisson's body onto the bed of his truck and drove south on the Alaska Highway to the Miles Canyon Road. He passed the surveillance video camera at 5:05 p.m.

[45] Mr. Sheepway drove down the Miles Canyon Road towards the [pedestrian] suspension bridge across the Yukon River. He backed his truck up to a steep slope just above the Miles Canyon parking lot. He pushed the body out of the back of the truck and it rolled down the hill, coming to rest against some trees.

[46] Mr. Sheepway went to a self-service carwash at the intersection of Robert Service Way and the Alaska Highway. He sprayed the blood out of the back of his truck. He smoked some more of Mr. Brisson's crack. He then drove to the Canada Games Centre and discarded the shotgun shell casings in a garbage bin in the parking lot. He went inside the building and phoned Ms. Scheck. She said she was at her friend's house in the Whitehorse subdivision of Copper Ridge, so Mr. Sheepway drove there. After speaking with Ms. Scheck for a while, Mr. Sheepway took their daughter, A, and drove home.

[47] On August 29, 2015, Rock Brisson attended the Whitehorse RCMP Detachment and reported his son missing. He had been trying to reach Christopher Brisson since the previous day.

[48] Later that afternoon, a passerby saw Mr. Brisson's truck in the bush beside the McLean Lake Road, and reported it to the police. Investigators found the rear window and passenger's side window had been smashed out. There was blood on the ground near the truck. A small bag of cocaine was found near the edge of the road. The truck was towed to the Whitehorse RCMP detachment, but it was not suspected as being involved in the alleged murder of Mr. Brisson at that time.

[49] On September 1, 2015, a mushroom picker spotted Mr. Brisson's body. As stated, it had come to rest against some trees on the slope above Miles Canyon. Investigators saw tire tread marks leading to the edge of the slope. The width of the tracks was later found to be consistent with Mr. Sheepway's vehicle. Mr. Brisson's DNA was eventually found in Mr. Sheepway's truck on the driver's side floor mat.

[50] Mr. Sheepway continued to use crack in the days following August 28, 2015. His wife helped him get into the detox centre in Whitehorse on August 30, 2015.

[51] In late October 2015, Mr. Sheepway went to Ontario and entered a residential treatment program for drugs. While in Ontario, he committed several armed robberies between November 9 and 25, 2015. He was not apprehended at that time. He returned to the Yukon in March 2016.

[52] The RCMP interviewed Mr. Sheepway on April 7, 2016. He said he had bought cocaine off Mr. Brisson many times. He admitted to phoning Mr. Brisson for drugs on

August 28, 2015, but said Mr. Brisson was too busy to meet and they never saw each other again.

[53] On May 28, 2016, Ms. Scheck told the RCMP that Mr. Sheepway was on the phone from Prince George, British Columbia, threatening to commit suicide. She said he also admitted he had killed Christopher Brisson. An officer went to speak with Ms. Scheck, and while he was at the house, Mr. Sheepway phoned again. The officer heard Mr. Sheepway on the speakerphone admitting to killing Mr. Brisson. Prince George RCMP quickly found Mr. Sheepway and arrested him under the *Mental Health Act* of British Columbia.

[54] On May 30, 2016, Mr. Sheepway was discharged from hospital in Prince George and arrested on charges of theft and fraud committed in Whitehorse between April 15 and May 25, 2016. He was returned to the Yukon and ultimately pleaded guilty to these charges.

[55] At the end of May 2016, the RCMP seized ammunition and two firearms belonging to Mr. Sheepway. One of these was a 12-gauge Remington pump action shotgun. Firearms experts determined that this firearm was designed to fire shotgun slugs consistent with the one retrieved from Mr. Brisson's body and consistent with some of the ammunition seized. There was also a separator from a shotgun shell found at the scene on the McLean Lake Road. This was also consistent with the firearm and the ammunition seized.

[56] The RCMP interviewed Mr. Sheepway at the Whitehorse Correctional Centre ("WCC") on June 25, 2016. He denied killing Mr. Brisson and again claimed that he had called Mr. Brisson on August 28, 2015, but that Mr. Brisson was not available.

[57] In July 2016, Mr. Sheepway met with Ms. Scheck at WCC and gave her a detailed description about shooting Mr. Brisson.

[58] On August 19, 2016, Mr. Sheepway was released from WCC and arrested for murder. He gave statements to the RCMP on August 19 and 20, 2016, during which he admitted killing Mr. Brisson.

[59] On October 4, 2016, Mr. Sheepway accompanied RCMP officers to participate in a video recorded re-enactment of the events of August 28, 2015. They attended the McLean Lake Road and Miles Canyon Road areas where Mr. Sheepway described in detail the killing of Mr. Brisson.

c) Mr. Sheepway's Version of Events

[60] In his trial testimony, Mr. Sheepway maintained that he had been smoking crack cocaine on more or less a daily basis from August 7, 2015, when he obtained Mr. Brisson's telephone number. He says that he was up most of the night on August 27, 2015 smoking crack cocaine. During the morning of August 28, 2015, Mr. Sheepway continued to smoke crack while he cleaned one of the guest cabins on his rural property. Ms. Scheck confronted him about cash advances on her credit card, which she was unaware of. Mr. Sheepway said that he anticipated this confrontation and gave Ms. Scheck a rehearsed response that he had heard of credit card scams in Whitehorse where people were getting a hold of other people's credit card numbers to access their accounts. In any event, he said that Ms. Scheck left their home to go into Whitehorse with their infant son around midday, taking his cell phone with her. The cell phone holder also contained his credit card, his debit card and his driver's license. Mr. Sheepway said that he started coming down from his crack high and had no further

drugs. He also had no access to money because his wife had taken his bank cards. He said that he began to feel suicidal and thought about getting more drugs to gain the courage to commit suicide. Mr. Sheepway decided to drive into town in his pickup truck to go to Mr. Brisson's motel to see if Mr. Brisson would give him some crack on credit. He said he took his 12-gauge shotgun with him, which was loaded with four shells, because he planned to shoot himself once he got high.

[61] On arriving at Mr. Brisson's motel room, Mr. Sheepway asked him for a few hundred dollars' worth of cocaine, but Mr. Brisson only gave him $50 worth, which was slightly less than half-a-gram. Mr. Sheepway returned to his truck and quickly smoked that amount, but realized on his way home that he was not high enough, and did not yet have sufficient courage to commit suicide. He decided that he wanted more drugs and so he turned around to go back to Mr. Brisson's motel. When he realized that Mr. Brisson was not there, he used the motel office phone to call him on his cell phone. Mr. Sheepway told Mr. Brisson that he had enough money to pay him what he owed, as well as to purchase more drugs. He arranged to have Mr. Brisson meet him at the pullout on the McLean Lake Road, where they had met before. His plan was to use the shotgun to rob Mr. Brisson for the drugs that he had in his possession.

[62] Mr. Sheepway said that he arrived at the pullout and backed in so that the rear of his truck was towards the yellow metal gate going into the gravel pit. He said that Mr. Brisson arrived a minute or so later, parking beside him with his nose towards the gate.

[63] Mr. Sheepway said that he asked Mr. Brisson for $250 worth of cocaine.

[64] In the re-enactment on October 4, 2016, the following exchange occurred between Mr. Sheepway and the RCMP:

> A We talked a little bit. He said, how much do you want? And I told him I wanted another two hundred and fifty dollars worth.
> Q And what did he say to that?
> A He said, oh. And he started to, get it out of his pocket, I guess, 'cause he was looking down. I was just sitting there. That's when my heart really started racing 'cause I knew like, I didn't know what I was gonna do.
>
> …
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> A He just, I said, I might as well, I just thought to myself, I might as well just try.
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> …
>
> A I really don't know, I was so high on drugs. Like, I just wanted more drugs, that's all I wanted, I wanted more drugs.
>
> …
>
> Q What else was going through your mind at that time? I know you said your heart was racing …
> A Can I go through with this? Like I was thinking, should I just leave? Should I just say, oh sorry, and, and leave?
> Q Mm-hm.
> A Or not. And, I don't know. I thought I had come this far, I don't, I just, I just wanted more drugs.

[65] As Mr. Brisson was looking down to search for the baggies, Mr. Sheepway raised the shotgun, pointed it at Mr. Brisson and told him to give him everything he had.

[66] Mr. Sheepway said that Mr. Brisson then grabbed the shotgun and the two struggled over the weapon, while Mr. Sheepway maintained his finger on the trigger and his other hand on the pump slide action. He said that two shots were fired during the course of the struggle. The first blew out the passenger side window and the second he

recalled blowing out the rear passenger window. Then Mr. Sheepway said he regained control of the shotgun while Mr. Brisson put his truck in gear and drove forward a few feet towards the gate. He could see Mr. Brisson bending forward and slightly to the right through the tinted rear window of his pickup truck. Mr. Sheepway said that the tailgate of Mr. Brisson's truck was just behind the back side of his driver's side window. Mr. Sheepway then stood up in his driver's seat, leaned out the driver's side window of his pickup, twisted around and fired a third shot towards the rear of Mr. Brisson's truck.

[67] In his trial testimony, Mr. Sheepway said repeatedly that he did not really know what he was thinking at the time that he pulled the trigger, other than he thought Mr. Brisson was about to leave with the drugs.

[68] However, in the re-enactment on October 4, 2016, the following exchange occurred between Mr. Sheepway and the RCMP:

> Q You talked about going backwards, the third one you leaned out, he was, he was uh, pulled a - , pulled ahead, you leaned out, you purposefully shot. The second one you said it chambered and shot without in-, you intending to, to do so, is that correct?
> A Yes.
> Q And then the first one you chambered and, and intended to shoot?
> A No. The first two I didn't intend to shoot.
> Q Okay.
> A The bullets were chambered and the trigger was pulled just 'cause I was hanging on to the trigger.

[69] At that point, he says that Mr. Brisson put his truck in reverse, revved the engine and backed up very quickly across the McLean Lake Road and out of sight from Mr. Sheepway.

[70] Mr. Sheepway then drove forward and noticed Mr. Brisson's truck the bush. He got out and went over to the truck, opened the driver's door and shut off the engine. He

noticed Mr. Brisson on the ground nearby. He testified that Mr. Brisson appeared to be dead and he kicked his foot to make certain. He then searched Mr. Brisson's body and took some baggies of crack, as well as the cash Mr. Brisson had received from his father. He next drove home at a high rate of speed. At one point, he said that he almost lost control of his truck going around a corner, when it went up onto two wheels. He also stopped a couple of times on the way home to smoke some of the crack cocaine.

[71] When he got home, Mr. Sheepway changed his clothes and called his wife to arrange a meeting with her in Whitehorse. He also decided at that point that he should return to the scene of the shooting to pick up the empty shotgun shells and to do something with Mr. Brisson's body.

[72] When he got to the scene, Mr. Sheepway said that he picked up three shotgun shells. He also picked up Mr. Brisson's body and put him in the back of his (Mr. Sheepway's) pickup truck. He said that he had planned to dump Mr. Brisson's body in the Yukon River, but when he got on the Alaska Highway there was a lot of traffic and he was concerned that someone might see the body in the back of his pickup. Accordingly, he decided to turn down towards Miles Canyon. When he got there, Mr. Sheepway said tourists were present, so he decided to back up to a slope immediately above the parking lot, where he pushed Mr. Brisson's body out of the back of his pickup truck, causing it to roll down a hill.

[73] Mr. Sheepway then drove to a nearby carwash, where he sprayed the blood from Mr. Brisson's body out of the back of his pickup. He stopped a couple of times en route to use more crack.

[74] Mr. Sheepway next drove to the Canada Games Centre, where he expected to meet Ms. Scheck and their infant son. When he discovered that Ms. Scheck was not there, he went into the building to use the telephone to contact her. He also went into the washroom to wash some blood off his pants. On leaving the Canada Games Centre, Mr. Sheepway said that he disposed of the three shotgun shells in a garbage can in the parking lot.

[75] Mr. Sheepway said that he then went to the home of a friend of his wife's in the Copper Ridge subdivision, where he retrieved his daughter, A., and drove her home. Once there, he made supper for A. and put her to bed. He said that he continued to use crack at home until shortly before he expected Ms. Scheck to return, because he wanted to be coherent upon her arrival.

d) Mr. Sheepway's Credibility

[76] It is clear from the evidence at trial that Mr. Sheepway has lied in the past in order to conceal this offence and to hide his escalating drug use.

[77] Mr. Sheepway admits he lied to the RCMP in his statement on April 7, 2016 when he told them that the last time he called Mr. Brisson, Mr. Brisson said he was busy and could not see him for a few hours and so he called somebody else. Similarly, he lied when he said that he never met with Mr. Brisson on August 28, 2015. Further, he lied when he told the RCMP that he found out about Mr. Brisson's death by reading about it in the newspaper.

[78] Mr. Sheepway admits that he again lied to the RCMP in his statement on June 25, 2016, when he told them that he had called Mr. Brisson on August 28, 2015, but Mr. Brisson said he was busy and would call him back. Mr. Sheepway lied when he said

that the last time he spoke to Mr. Brisson was during a 30-second phone call. He also lied on that occasion when he told the police that he did not kill anybody.

[79] Mr. Sheepway admits he was also not truthful with the RCMP at the beginning of his statements to them on August 19 and 20, 2016. He lied when he initially said that he only took drugs from Mr. Brisson's body, when in fact he had taken both drugs and cash. He also lied when he said that he did not physically touch Mr. Brisson's body, until he picked him up to move him. In fact, Mr. Sheepway had kicked Mr. Brisson's foot when he first discovered him near his truck in order to ensure that he was dead.

[80] In addition to what he said in early statements to the police, Mr. Sheepway admits to a history of deceiving people in his everyday life about his drug use. For example, Mr. Sheepway lied to his former romantic partner, A., about his marijuana use over the course of about two years.

[81] Mr. Sheepway similarly denied his marijuana use to Ms. Scheck for several years. He deceptively used dog urine to pass urine tests to satisfy Ms. Scheck that he was not using marijuana. He also deceived his NA group into believing that he was remaining clean and was receiving recovery chips despite still using narcotics.

[82] Mr. Sheepway admitted to Dr. Lohrasbe that he became good at lying in the course of his relationships, that he pushed his drug use underground, and that he "lied all over the place".

[83] There are other examples of this in the context of the events of August 28, 2015.

[84] On that day, Mr. Sheepway lied initially to Ms. Scheck when he denied using her credit card to obtain cash advances.

[85] In this trial, Mr. Sheepway further admitted that he lied to Mr. Brisson, when he was getting the “front”, that he was on his way into town to get some money. At that time, he knew that he was not able to get any money because his wife had all his bank cards and his identification.

[86] Mr. Sheepway also lied to Mr. Brisson, after consuming the $50 bag of crack cocaine, when he called Mr. Brisson and told him that he had the money to pay him for the front and also to purchase more crack.

[87] On May 28, 2016, Mr. Sheepway lied to Ms. Scheck during his telephone call from Prince George, when he told her that he had pawned the shotgun for drugs.

[88] More significantly, Ms. Scheck testified in this trial, and I accept her testimony, that even though Mr. Sheepway has confessed the killing to her, he has given her different versions of the event over time.

[89] Mr. Sheepway has admitted in this trial, in relation to his truthfulness, “Yes, I was lying to everybody”. In discussing his various statements to the police, Mr. Sheepway admitted that they were at varying levels of truthfulness as he saw fit at the time.

[90] It is also uncontested that Mr. Sheepway has committed several offences of dishonesty, including thefts from his tenants and his family, as well as the Whitehorse charges of theft and fraud committed between April 15 and May 25, 2016, to which he has pleaded guilty.

e) Mr. Sheepway’s Reliability

[91] Mr. Sheepway’s testified that his ability to remember events has been affected by his drug use. However, he claims that his memory has been improved as a result of reviewing Crown disclosure and hearing witnesses testify in this trial. That calls into

question the accuracy and reliability of his initial memories. At one point during his cross-examination Mr. Sheepway stated that every time he talks of his story, he generates new memories. Some specific examples raise questions about the reliability of Mr. Sheepway's memories.

[92] I have already mentioned his testimony that he shot out the rear window of Mr. Brisson's crew cab truck during the second shot while they were struggling over the rifle. We know, of course, that Mr. Brisson was not driving a crew cab pickup and that there was no rear passenger window in the two-door cab. At one point, I believe that Mr. Sheepway also said that his third shot went into the metal underneath the rear window of Mr. Brisson's truck. However, we know from the photographs and the ballistics evidence that that did not occur either.

[93] There is also Mr. Sheepway's admission that he does not recall very much at all of the evening of August 27, 2015 when he and his wife were celebrating their wedding anniversary. Specifically, he did not recall that their 2½ year-old daughter was not present in their home that night.

[94] In addition, Mr. Sheepway told both Dr. Lohrasbe and Dr. Klassen that he admitted the thefts from Ms. Scheck's credit card and his crack cocaine use before she left their home to go into Whitehorse in the early afternoon of August 28, 2015. This is also consistent with what he told the RCMP during the re-enactment on October 4, 2016. As I understood him, Mr. Sheepway testified at trial that this confession did not take place until Ms. Scheck returned to their home later that evening after the homicide, although it is clear that a confrontation occurred about money before Ms. Scheck left the home.

[95] Mr. Sheepway also conceded on cross-examination that in order for him to have fired three times and to have left three expended shotgun shells at the scene of the shooting, he would have had to have cocked his gun a total of four times. More particularly, he said that he would not have left the third empty shell in the shotgun and that he usually ejects the last shell after firing it. Yet, despite his concession that he obviously did so, Mr Sheepway had no memory at all of the ejecting the third shell.

[96] Finally, Mr. Sheepway testified that he still had crack cocaine to consume at his home after Ms. Scheck left to go to Whitehorse with their infant son on August 28th . However, he admitted that this evidence is inconsistent with a statement that he gave to the RCMP on June 25, 2016, when he claimed that the drugs were all gone in the morning. Further, his trial evidence that he still had drugs to consume after 12 o'clock noon is inconsistent with the evidence of Ms. Scheck, which I accept, which was that it was shortly after noon that she began to seriously suspect Mr. Sheepway of having stolen money off her credit card. She stated that she and Mr. Sheepway went "back and forth" on this topic for a couple of hours, until she had to leave to go to Whitehorse at about 2:30 p.m. Given this evidence, it seems improbable in the extreme that Mr. Sheepway would have been out of her sight long enough to be able to smoke crack. We also know from the agreed statement of facts that Mr. Sheepway made his initial call to Mr. Brisson on the afternoon of August 28, 2015 at about 2:30 p.m. By that time, Mr. Sheepway has admitted that he was coming down and was out of drugs, which was the whole reason for the call. Therefore, I do not accept Mr. Sheepway's revived memory that he continued to use crack after lunch time on August 28th, and I find that

he certainly did not use after Ms. Scheck left their home at 2:30 p.m., because this was exactly the time that he placed the call to Mr. Brisson.

f) C.B.'s Evidence

[97] C.B. is a 32-year-old woman who has lived in Whitehorse for about seven years. She is a single parent with a five-year-old daughter. She is attending Yukon College full time and was on the Dean's List last year.

[98] C.B. has been in recovery from addictions for about five years. I understand she has an acknowledged addiction to marijuana and cocaine. She has been totally clean for over 18 months.

[99] C.B. met Mr. Sheepway while the two of them worked together. She introduced him to Narcotics Anonymous.

[100] C.B. testified that one day she and Mr. Sheepway ended up smoking crack cocaine together and that after that they would get together to do so a couple of times a week. She said that on those occasions they would smoke one or two grams and each would contribute financially to the purchase of the crack.

[101] C.B. knew Chris Brisson, because he used to be a next-door neighbour of her ex-partner.

[102] C.B. testified that she had a conversation with Mr. Sheepway in which he told her about Mr. Brisson's death. She was not sure exactly when the conversation occurred, but said that there was no snow on the ground and that she was aware that Mr. Sheepway had just returned to the Yukon from Ontario for addiction treatment. The conversation occurred at her home and the two of them had been using crack cocaine. She said that the conversation took place at about 11 p.m. C.B. sensed that something

was “off” with Mr. Sheepway and she encouraged him to open up a bit. She described Mr. Sheepway as being “pretty hesitant”. Then she testified that Mr. Sheepway said two times that he had killed his drug dealer. When she asked him what he meant, he said that he had killed Chris Brisson. She described Mr. Sheepway as being “very hesitant about it”. She said that she did not really know what to say and felt that the conversation was awkward. However, she did ask him “Was it an accident?” and that Mr. Sheepway replied “No, I shot him”. She also clearly remembered that Mr. Sheepway had said that he covered a shotgun on his lap in his vehicle and that he shot him. However, she said that he did not go into too much detail more than that. She also recalled him saying “I always knew I would tell you” and that nobody else knew. He did not say that he shot Mr. Brisson for drugs and money, but he did say that afterwards he took his drugs and his money, which was about $2,000. C.B. said she had not heard any of this information before this conversation.

[103] Eventually, C.B. reported this conversation to her counsellor at Alcohol and Drug Services, and subsequently also to the police.

[104] In cross-examination, C.B. described Mr. Sheepway as “a heavy user” of drugs, probably a nine or a 10 on a scale of 10. She was not questioned at all about the conversation where Mr. Sheepway denied that the shooting of Mr. Brisson was an accident.

g) The Ballistics Evidence

[105] On September 8, 2015, RCMP forensic firearms expert, Joseph Prendergast, came to Whitehorse to conduct a projectile (bullet) path analysis on Mr. Brisson’s recovered truck. Mr. Prendergast described the truck as a Chevrolet Silverado two-door

half-ton pickup. The accused testified that it was a short box pickup and that the bed of the box would have been about six feet long. This evidence was unchallenged by the Crown.

[106] Mr. Prendergast determined that damage to the truck revealed two projectile paths. He referred to these as path A and path B, but could not say which bullet was fired before the other.

[107] With respect to path A, one perforating projectile hole was seen in the driver's side headrest, low on the headrest and slightly right of centre. Mr. Prendergast opined that the direction of travel of that projectile was from the back of the truck to the front, at a downward angle of approximately five degrees. The horizontal angle was approximately 15 degrees to the left of perpendicular from the entry hole in the rear of the driver's side headrest towards the driver's side rear quarter (i.e. roughly the back corner of the truck box near the tailgate on the driver's side). Mr. Prendergast found no corresponding interior cab damage associated with that projectile path, and therefore concluded that this slug was likely the one that ended up in Mr. Brisson's body.

[108] With respect to path B, one perforating projectile hole was observed in the right edge of the driver's sun visor (as viewed from the rear in the up position). An additional corresponding perforating projectile hole was seen in the windshield, slightly left of centre and near the interior roofline. Mr. Prendergast opined that the direction of travel of that projectile was from back to front, with a vertical angle that was approximately horizontal or flat. The path is high through the cab just below the headliner (roof liner). He said that the horizontal angle formed was approximately 20 degrees to the left of perpendicular from the probable entry point through the shattered rear window of the

pickup towards the driver's side rear quarter. Corresponding projectile fragment damage was observed on and in the headliner and on the mirror side of the rear-view mirror adjacent to this path.

[109] In his testimony, Mr. Prendergast acknowledged that his opinion on the angles of the trajectories was very rough and could vary by plus or minus five degrees.

[110] Mr. Prendergast also testified that he cut open the driver's side headrest and found two holes in the front side of the foam. The larger of the two appeared to him to be the hole which the slug passed through, from back to front. The smaller of the two holes appeared to him to be the result of a deviation beginning with the entry hole on the rear of the headrest. On the front surface of the headrest there appeared to be a dimple or an outcropping of the vinyl immediately above this smaller hole. However, when Mr. Prendergast cut open the headrest to have a closer look, he could find no corresponding projectile or other material to account for the dimple. He found this "odd", and speculated at one point that the dimple could have been caused by powdered glass travelling through the headrest after the slug struck the rear window of the truck. However, at the end of the day, he conceded that he did not have a solid explanation for this dimple. Nevertheless, this anomaly did not cause him to change his opinion on the two trajectory paths.

[111] Defence co-counsel, Mr. Larochelle, cross-examined Mr. Prendergast about his testing for lead residue in and on the driver's side headrest. Mr. Prendergast testified that he found some lead residue on the rear exterior surface as well as some on the front interior surface, both of which supported his opinion that the path of travel was from back to front. In the course of this cross-examination, there was at one point some

confusion with a few of the related photographs and one of the blotting papers used by Mr. Prendergast to detect lead. He had labelled this “Head Rest Front”, and during the cross-examination defence counsel suggested that this meant he had tested for lead on the front exterior surface of the headrest and not the interior surface. However, Mr. Prendergast subsequently clarified that the blotting paper was used to test for lead residue on the interior front facing foam surface, which was further clarified by Exhibit 10.

[112] I mention this because Mr. Larochelle, argued in closing submissions that lead residue detected on the front surface of the driver’s side headrest was consistent with a defence theory that the second shot fired during the struggle may have been the one that killed Mr. Brisson. However, I am satisfied beyond a reasonable doubt that Mr. Prendergast’s clarified testimony confirms that he found lead residue on the inside front surface of the headrest and not the exterior front surface.

[113] As I mentioned earlier, Mr. Sheepway is adamant that he only fired three shots. He has told the police in earlier statements and testified in this trial that the first two shots were essentially accidental, in that they occurred during the course of the struggle with Mr. Brisson over the firearm. According to Mr. Sheepway, when he pointed the gun at Mr. Brisson and told him to give him everything he had (i.e. all the drugs in his possession), Mr. Brisson reacted by grabbing the barrel of the shotgun with one or two hands and grappling with Mr. Sheepway. Mr. Sheepway maintains that the first two shots occurred in the course of this struggle and that the chambering of the shells on each occasion was not intentional, but due to the fact that he had one hand on the

trigger and one hand on the pump slide action when the shotgun was being pulled back and forth.

[114] Mr. Sheepway also testified that he heard or saw glass being blown out on the passenger side of Mr. Brisson's truck during each of these shots. Specifically for the second shot, he recalled that Mr. Brisson was driving a crew cab style pickup truck and that he saw the rear passenger side window being blown out.

[115] The physical evidence only corroborates that the first shot blew out the passenger side window of Mr. Brisson's truck. Mr. Prendergast was not able to say much about this shot because there was no corresponding projectile damage to examine, as the passenger window had been completely blown away. But the fact that the window was blown out corroborates Mr. Sheepway's testimony about the first shot. Logically then, the bullet would not have struck Mr. Brisson, but must have passed by him within the cab and shattered the passenger side window.

[116] There is no particular corroboration for Mr. Sheepway's evidence that there was a struggle for the shotgun. Indeed, in his re-enactment of October 4, 2016, he told the RCMP that during the fight for the gun "… I managed to chamber a bullet and the gun went off … we kept fighting for the gun and I chambered another bullet in the struggle …". While this language suggests to me a certain degree of intentionality, I am prepared to give Mr. Sheepway the benefit of the doubt on this point. I conclude that if he truly intended to shoot Mr. Brisson with the first shot, he could easily have done so. Therefore, the fact that he shot past Mr. Brisson and hit the passenger side window does leave me with a reasonable doubt about whether the first shot could have been accidental.

[117] There is also no corroboration for Mr. Sheepway's testimony about the second shot. Indeed there is contradictory evidence that Mr. Brisson's pickup truck was a short box Chevrolet Silverado, with a standard two-door cab, and no passenger side window behind the bench seat. In my view, his testimony about shooting out a back passenger window calls into question the reliability of Mr. Sheepway's evidence. I will have more to say about Mr. Sheepway's reliability and credibility later. For now, I note that Mr. Sheepway has nothing to prove in this trial and that all he need do is reasonable doubt on the principal issues. However, in this somewhat unusual situation, where a number of varying accounts have come from the accused, I feel I must be very cautious in accepting as plausible what Mr. Sheepway has said about the nature of the confrontation with Mr. Brisson, especially where certain alleged facts are uncorroborated or apparently inconsistent with uncontentious facts.

[118] All this leaves me uncertain as to whether there was a second shot fired during the struggle at all, because there is no other evidence besides Mr. Sheepway's say-so that it occurred.

[119] I can be certain that there were at least three shots: one that blew out the passenger side window of Mr. Brisson's truck; one that passed through the driver's side headrest; and one that passed through the driver's side sun visor and the front windshield, although the third shot was not necessarily after the shot that went through the headrest and into Mr. Brisson.

[120] Mr. Sheepway's co-counsel, Mr. Larochelle, argued in final submissions that the Crown had not proven that the hole in the windshield was caused by a bullet slug, and suggested rather that it might have been caused by a rock, the trunk of a small tree, or

a branch of a larger tree which either punctured the front windshield and then went into the visor, or the other way around from back to front.

[121] Mr. Sheepway clarified through his co-counsel, Ms. MacDiarmid, that Mr. Larochelle was in error here in suggesting that the puncture might have happened from front to back and that the defence position was that that the object that perforated the visor and the front windshield could only have had a trajectory from the back of the vehicle to the front.

[122] Despite this clarification by Ms. MacDiarmid, I think I should briefly address Mr. Larochelle's argument. It was based in large part on the fact that there was significant damage to Mr. Brisson's pickup truck after it was recovered off the edge of the McLean Lake Road. The photographs in evidence show significant body damage to the driver's side, as well as to the hood and the roof. Also, there was significant damage to the rear bumper, as it was partially pulled away from the frame, and the protruding ends of the exhaust pipes appear also to have been bent downward towards the passenger side of the truck.

[123] There was some evidence that there was an accident reconstruction examination done in relation to Mr. Brisson's truck, but that the results were inconclusive. Nevertheless, it is an agreed fact that, after the shots were fired, Mr. Brisson backed quickly out of the pullout and across the McLean Lake Road and ultimately crashed into the bush on the opposite side of the road. Further, we know the truck ended up with its nose facing into the bush and away from the McLean Lake Road. Therefore, it seems reasonable to infer from these facts and the body damage that the rear of the truck could well have impacted the ground after leaving the road surface in such a way as to

cause the truck to spin around 180 degrees and perhaps roll, if not fully, at least partially onto the driver's side and the roof, before coming back to rest on its wheels. There are also photographs of corresponding damage to willow shrubs, bushes and other vegetative material in the bush to support this inference.

[124] It is within the context of this inferred type of accident, that Mr. Mr. Larochelle theorized a rock or a branch or tree trunk of some kind might have perforated the cab at some point causing the damage to the visor and the front windshield. Mr. Larochelle further argued that this would account for the leaf or tree debris found on the dashboard between the console and the windshield, as well as other similar apparently vegetative type debris on the driver's seat and elsewhere in the cab.

[125] I reject this theory and agree with the Crown that it is fanciful. I do so for the following reasons.

[126] Firstly, although I do not have a note of the exact measurements of the hole in the windshield, I acknowledge that it is oval or even slightly rectangular in shape, and according to one of the photographs in which a scale is placed nearby, it appears to be an opening of about two centimetres by three centimetres. Logically, this would mean that whatever perforated the glass would have had no greater width. Whether or not the trunk of a slender tree or the branch of a larger tree of approximately that same diameter would have the physical capacity to perforate the windshield was not put to Mr. Prendergast or any other expert witness. In the absence of any evidence confirming that vegetation could puncture a windshield in this manner, I am uncertain what to make of the premise of Mr. Larochelle's submission.

[127] However, even if I can accept the premise as possible, Mr. Prendergast detected lead residue on both the sun visor, the rear-view mirror and, very faintly, on the interior of the windshield around the hole. These facts are consistent not just with a lead slug bullet as the object causing the hole, but also with a trajectory from back to front through the cab.

[128] As well, Mr. Prendergast detected two secondary impact points on the interior of the front windshield just below and slightly to the right of the main hole. He described these as being "cratered" on the inside surface of the windshield, but without any corresponding damage to the outside surface. As I recall, he theorized that this could have been bullet fragments which broke away from the main part of the slug, and again indicates back to front direction of travel.

[129] Lastly, and perhaps most importantly, Mr. Prendergast detected plastic fragments embedded in the headliner immediately above the rear-view mirror, which were consistent with the plastic of which the sun visor was constructed. As I recall, Mr. Prendergast also opined that this was consistent with a bullet slug passing through the sun visor, creating a "channel" through the visor, to use his word, and causing portions to break up and travel forward with the bullet, eventually embedding in the headliner.

[130] Taken as a whole, the evidence satisfies me beyond a reasonable doubt that the object that punctured Mr. Brisson's visor and windshield was a bullet that was travelling from the rear of the vehicle to the front.

h) The Bloodstain Pattern Analysis

[131] Sgt. Alison Cameron performed a bloodstain pattern analysis on the interior of Mr. Brisson's pickup truck. She detected spatter stains on the headliner (roof liner) the passenger side headrest, the passenger side coat hook, and the interior overhead light. She opined that the stains were consistent with being created by an external force (such as the shotgun slug) applied to a source of blood (i.e., Mr. Brisson) in or near the driver's seat, causing the blood drops to be dispersed through the air and onto these locations within the cab. She further detected drip bloodstains on the base of the middle seat (on the vertical vinyl edge of the middle seat between that seat and the driver's seat). She opined that these were consistent with being created by blood drops that were formed due to gravity, while the blood source (again, Mr. Brisson) was above the driver's and the middle seat.

[132] Defence co-counsel, Mr. Larochelle, cross-examined Sgt. Cameron rather extensively on issues relating to the directionality of the blood spatter and the potential impact of the movement of Mr. Brisson's truck on the drip bloodstains. As I understood him, the point of this cross-examination was to try and place Mr. Brisson further to the rear of the vehicle and closer to the driver's side door, presumably to fit better with the defence theory that it was the second of the first two accidental shots (according to Mr. Sheepway's evidence) which killed Mr. Brisson. This cross-examination did not significantly impact in any adverse manner the essential conclusions of Sgt. Cameron just stated above. Rather, Sgt. Cameron's evidence generally tends to support Mr. Sheepway's own evidence that when he fired the shots into the rear of Mr. Brisson's truck, Mr. Brisson was in the process of leaning forward in the cab and slightly to the

right while shifting the gear lever on the right-hand side of the steering column into reverse.

i) The Pathology Evidence

[133] Dr. Matthew Orde performed an autopsy on Mr. Brisson on September 4, 2015. He determined that the cause of death was the result of a shotgun slug wound to Mr. Brisson's left upper back and neck, followed by catastrophic blood loss, likely within minutes of the slug entry. He stated that the wound track passed upwards from back to front and slightly to the right, with the slug projectile lodging within the tissue adjacent to the right angle of the jaw on the right side. He did not measure the length of the wound path, but estimated it would have been approximately 30 to 50 centimetres. Shotgun wadding was also recovered from that area within an inch or so of the slug. Dr. Orde opined that the presence of shotgun wadding within the wound track suggested that the weapon would have been discharged "at a fairly close range", but that no other features pointing to a specific range of fire were seen.

[134] Dr. Orde detected the presence of cocaine in Mr. Brisson's urine, but not in his blood. He stated that this simply indicated prior use of cocaine, but was not indicative of any particular amount of use or recent use. Dr. Klassen testified that metabolites of cocaine can be detected in urine for two-to-four days after cocaine use, but that they do not have any psychoactive effects at that time. In other words, the presence of cocaine in Mr. Brisson's urine did not mean that he was under the influence of cocaine at the time of the homicide

[135] Dr. Orde also noted that the slug destroyed a nerve bundle on the left side of Mr. Brisson's body referred to as the brachial plexus, which could have paralyzed Mr. Brisson's left arm after the impact from the slug.

[136] Dr. Orde detected no black/grey material suggestive of firearm discharge residue around the margins of the shotgun slug entrance wound. I infer from this that he was talking about what is commonly known as "powder burns" from gunpowder.

[137] Dr. Orde also noticed a number of pieces of bloodstained foamy debris within Mr. Brisson's clothing, and between his clothing and his skin, which were visually consistent with the foam in the driver's side headrest.

[138] The flattened shotgun shell slug was subsequently examined by the firearms expert, Mr. Prendergast, and determined to be approximately one ounce in weight, consistent with Winchester shotgun shells. Similarly, the two pieces of circular shotgun shell wadding retrieved from Mr. Brisson's jaw were also the same diameter and thickness of the spacer wadding immediately adjacent to the shotgun shell slug in Winchester 12-gauge ammunition. Two irregularly shaped pieces of wadding material were also located in the wound.

[139] Dr. Orde opined that once a projectile enters the body, it generally travels in a straight line, unless deflected by collision with bone material. In this case, he noted that the slug entered the rear of Mr. Brisson's back just to the right of his left scapula and was not significantly deflected by any bone material. Therefore, he opined that in order to account for the wound track that he observed, Mr. Brisson would have had to have been leaning forward with his head rotated slightly to the left at the time of impact. This

is more or less consistent with Mr. Sheepway's description of how Mr. Brisson was positioned at the time of the shot referred to as projectile A.

[140] In cross-examination, Dr. Orde could not exclude the possibility that some of the red bruise marks around the entrance wound could have been caused by fragmented shotgun wadding. I understood the purpose of this questioning to support the defence theory that the muzzle of the shotgun would have been less than two metres from Mr. Brisson's back when the fatal shot was discharged. Again, this presumably was put forward in support of the further theory that it was the second accidental (according to Mr. Sheepway) shot that might have caused Mr. Brisson's death. However, Dr. Orde was quite insistent that the red bruising around the entrance wound may also been caused by Mr. Brisson being ejected from his truck during the accident, or being rolled down the hillside after being pushed out of the back of Mr. Sheepway's truck. He testified that he could not be confident that the bruising was caused by shotgun wadding without more information as to the nature of the ammunition used in this particular case. He also did not specifically agree that the presence of that bruising indicated a muzzle distance of less than two metres, although he did opine that the discharge was "at a fairly close range".

j) Conclusion on the Three Shots

[141] I conclude from the foregoing that there were at least three shots fired by Mr. Sheepway. I have a reasonable doubt about whether the first shot which shot out the passenger side window of Mr. Brisson's truck was intentional or accidental. However, I find that Mr. Sheepway fired at least two additional shots into the back of

Mr. Brisson's pickup, as exemplified by projectile paths A and B. I am also satisfied beyond a reasonable doubt that it was projectile path A that caused Mr. Brisson's death.

k) Dr. Lohrasbe's Evidence

[142] Following a *voir dire*, I allowed Dr. Lohrasbe to testify as an expert witness on behalf of Mr. Sheepway. He was qualified as a forensic psychiatrist testifying on the formation of intent and the impacts of intoxication and dependence on crack cocaine, as well as the causes and consequences of abnormal mental states.

[143] Dr. Lohrasbe interviewed Mr. Sheepway at WCC on August 6, 2017, for approximately four hours. He reviewed the bulk of the Crown disclosure available at that time and also had a telephone interview with Ms. Scheck on August 17, 2017.

Dr. Lohrasbe submitted a 16-page written report, which I admitted as part of the evidence in this trial. He also testified. In summary, his opinion is that Mr. Sheepway was in an abnormal mental state at the time of the homicide as a result of his cocaine use and dependency.

[144] Dr. Lohrasbe diagnosed Mr. Sheepway as being subject to Cannabis Dependence and Cocaine Dependence. One of the assumptions of his opinion is that Mr. Sheepway consumed "significant amounts of cocaine", and to a lesser extent cannabis, in the days and hours leading up to the homicide. He referred to Mr. Sheepway's consumption of cocaine as "binge" using.

[145] Dr. Lohrasbe said that cocaine is a strong central nervous system stimulant, producing a feeling of euphoria immediately after consumption. Particularly, when smoked as crack cocaine, the "high" has onset within a few minutes. Dr. Lohrasbe compared the effects of cocaine with that of alcohol, stating: that alertness or simple

awareness is enhanced by cocaine, whereas it is dampened by alcohol; perceptions are sharpened by cocaine, whereas they are blunted by alcohol; energy is stimulated by cocaine, whereas it is depleted by alcohol; and psychomotor coordination is initially enhanced by cocaine, whereas it is steadily impaired by alcohol.

[146] Dr. Lohrasbe described "bingeing" as an attempt to prolong the pleasurable effects of cocaine, with multiple doses being repeatedly taken within a relatively short period of time, while still high from the last dose.

[147] When coming down, Dr. Lohrasbe said the user experiences the opposite effects of the high, such as dysphoria rather than euphoria, depression rather than a sense of confidence and well-being, as well as agitation, nervousness and restlessness associated with an increase in the craving for more cocaine. He testified that the franticness of wanting to stay high arises from the fact that the crash takes the user well below normal. Dr. Lohrasbe testified that people get high very quickly on crack cocaine, but then they also crash very quickly.

[148] Further, because of the jagged natures of the highs and lows, there is a general kind of irritability as well as hyper-reactivity. This means that users respond very impulsively and very quickly to incoming stimuli when they are coming down from cocaine. At the same time they are often hyper-focused on getting more drugs, and in that sense their awareness is essentially hijacked by the craving.

[149] Dr. Lohrasbe's opinion is based on the assumption that Mr. Sheepway's version of events is generally accurate. He reported that Mr. Sheepway told him he has never thought of the homicide as anything but an accident, albeit a lethal one in the course of a robbery. He opined that because of the large amounts of cocaine that he assumed

Mr. Sheepway had consumed in the days and hours before the homicide, it was "reasonable to hypothesize" that he was in an abnormal mental state and that his higher mental functions, including insight, perspective taking, judgment and awareness of consequences were likely impaired. Further, Dr. Lohrasbe opined that Mr. Sheepway would have been in a hyper-reactive state at the time of the confrontation with Mr. Brisson during the struggle with the gun, and that his capacity for making quick "rational" decisions, much less for reflective thought, was almost surely very impaired. He testified that Mr. Sheepway did not expect Mr. Brisson to react in that way, and that it is possible that he did not comprehend the implications of firing the weapon repeatedly and did not grasp the consequences of doing so. Rather, his focus was simply on obtaining more drugs.

[150] According to Dr. Lohrasbe, when he asked Mr. Sheepway what he was thinking when he fired the shot now referred to as projectile A, he stated:

> I didn't want the drugs to go away. I wanted him to stop. I wanted the drugs. Even now I can't believe he fought back. I didn't expect to meet any resistance. I was not thinking. I just wanted the drugs. All I wanted was more drugs. The desire for more drugs was so great.

[151] In cross-examination by the Crown, Dr. Lohrasbe conceded that he did not have any information as to how much crack cocaine Mr. Sheepway had actually consumed on the morning of the homicide. He acknowledged that Mr. Sheepway had told him he had used some crack while cleaning one of the guest cabins on his rural property, but that he had finished it by the time his wife confronted him, which we know from Ms. Scheck's evidence was approximately noon on August 28, 2015. Therefore, when asked to assume that the homicide occurred about 3:30 in the afternoon, Dr. Lohrasbe

agreed that after Mr. Sheepway consumed the small amount he obtained from Mr. Brisson before the homicide, slightly less than half-a-gram, he would not have described Mr. Sheepway as “intoxicated on cocaine” at the time of the homicide.

[152] Dr. Lohrasbe also conceded that there is no evidence about how much cocaine Mr. Sheepway consumed in the day or two leading up to the homicide. Further, without knowing the amounts of cocaine, or the purity of the cocaine, in that period before the shooting, he could not be certain about the anticipated effects of the cocaine.

[153] Further, Dr. Lohrasbe agreed that if there was evidence that Mr. Sheepway was engaging in the mental functions Dr. Lohrasbe described in his opinion, such as attention, perception and insight, “within the bounds of normality”, then this would affect his opinion.

[154] Crown counsel then proceeded to ask Dr. Lohrasbe about a number of examples where Mr. Sheepway was seemingly exhibiting rational, fairly ordered and goal-directed linear thinking at a time shortly before the shooting. Because the point is important, I am going to quote from a few lines of the transcript. Crown counsel began by having just referred to the fact that Mr. Brisson had fronted Mr. Sheepway the half-gram of crack without requiring any money, which Mr. Sheepway then consumed very quickly. The exchange continued as follows:

> Q And at that point, he said that he started thinking about how he might get more drugs.
>
> And he talked about a thought process that he went through where he said he considered going to the bank, but his wife had his bank card and his ID, and he knew that if he told the bank teller that he had lost his debit card they would ask for photo ID before letting him make a withdrawal. And so this is approximately 30 minutes before the killing.
>
> A Okay.

Q And so I suggest to you that that is fairly compelling evidence of linear thinking at a time close to the predicate offence, as you say. And so what he's got here is he's got a goal. His goal is - his goal is to get drugs -
A Yes.
Q - because of the cravings.

And in the thought process that he described in court, there's six steps.

He realized he needs to get cash to buy the drugs. He has to go to the bank to get cash. He has to use a debit card at the bank. If he tells the bank that he lost his debit card, then they'll ask him for photo ID. And if he doesn't have photo ID, then they're not going to give him any cash. And then, of course, if he doesn't have the cash, then he won't be able to obtain the drugs.

And so that is fairly ordered, goal-directed thinking that he's engaging in close in time to the offence.
A Yes.

…

Q And that thought process - the way the evidence came out at trial is that that thought process happened right after he'd smoked the small amount of drugs that Mr. Brisson had fronted him.
A Yes.

…

Q And nothing about that thought process seems to be irrational or abnormal.
A Agreed.
Q And that thought process engages many of those higher mental functions that you've - that you defined earlier today.
A Oh, yeah. I mean when he's focused, he's very focused on getting those drugs. So yeah, for those limited purposes, his higher functions were completely sort of in gear.

[155] Crown counsel also had Dr. Lohrasbe concede that the plan to rob Mr. Brisson for drugs and the manner in which the accused intended to carry it out showed

rationality and goal-directed linear thinking. Dr. Lohrasbe also agreed that Mr. Sheepway's return to the scene to retrieve the shotgun shells and to dispose of Mr. Brisson's body was rational in the sense of having a goal to avoid criminal sanctions. Finally, Dr. Lohrasbe agreed that Mr. Sheepway meeting up with his wife in the Copper Ridge subdivision, installing a car seat in his truck for their 2½-year-old daughter, driving his daughter home, giving her supper and putting her to bed was a further example of linear, goal-directed behaviour. Moreover, Dr. Lohrasbe acknowledged that all of the post-offence conduct by Mr. Sheepway was performed when he had consumed significantly more crack cocaine than he had at the moment right before the homicide.

l) Dr. Klassen's Evidence

[156] Following a *voir dire*, I allowed Dr. Klassen to testify as an expert rebuttal witness for the Crown. I qualified him as a forensic psychiatrist with expertise in the formation of intent, the impacts of intoxication and dependence on cocaine, and the causes and consequences of abnormal mental states.

[157] Dr. Klassen interviewed Mr. Sheepway at WCC for five hours on November 3, 2017. He also reviewed the bulk of the Crown disclosure available at that time, but was unable to speak with Ms. Scheck or C.B. because of a lack of time prior to the trial. He was asked by the Crown for an opinion as to whether Mr. Sheepway was suffering from a mental state disturbance, and the nature of that disturbance, at the time of the homicide.

[158] Dr. Klassen diagnosed Mr. Sheepway as having a substance use disorder with respect to both cannabis and cocaine. He agreed with Dr. Lohrasbe that, on a

secondary basis, Mr. Sheepway also suffered from depression, anxiety and an adjustment disorder. However, his opinion about Mr. Sheepway's mental state at the material time was that Mr. Sheepway was not suffering from a type of abnormal psychological state requiring an expert psychiatric opinion. He acknowledged that Mr. Sheepway was in significant distress at the time of the homicide, particularly because of a number of psychosocial factors which had culminated in a crisis for him just before the homicide. For example, he referred to the facts that: Mr. Sheepway and his family were residing in cramped living quarters, with tenants upstairs; he and his wife were under financial pressures; Ms. Scheck had prohibited him from using marijuana; Ms. Scheck had just given birth to their second child; Ms. Scheck had just confronted Mr. Sheepway about stealing money from her; Mr. Sheepway was attempting to cope with all of these pressures while continuing to consume cannabis and cocaine and maintaining a façade of normality; and, according to Mr. Sheepway, he had just confessed to Ms. Scheck about his use of crack cocaine, and was feeling suicidal as a result. Nevertheless, Dr. Klassen was of the opinion that Mr. Sheepway was not suffering from any abnormal psychotic, psychiatric or psychological phenomena such as hallucinations or delusions, which would have had a bearing on his capacity to form the requisite intent to commit murder. Further, he opined that Mr. Sheepway's conduct, as self-reported by him, did not suggest any non-linear thinking or disorganized behaviour which would require an expert psychiatric opinion to interpret as having any bearing on the formation of such intent.

[159] Dr. Klassen testified that Mr. Sheepway indicated that he has been successful in functioning under the influence of cannabis (for many years) and cocaine (for the few

months before the homicide) and had an ability to manage the direct intoxicating effects of those substances. In particular, he managed his life roles satisfactorily when he was under those intoxicating effects. For example, he was able to continue to: work at his employment; drive back and forth from Whitehorse; ride his mountain bike; look after his 15 sled dogs; look after his 2½ year-old daughter; and cook and clean at home, while Ms. Scheck was convalescing from her caesarean.

[160] Dr. Klassen generally agreed with Dr. Lohrasbe about the effects of cocaine. When it is smoked as crack, he said the high can come on within approximately one minute. It is a stimulant which produces euphoria, self-confidence, relief from lethargy and fatigue, and a sense of energy and alertness. Users then often begin to experience the withdrawal process after about 20-to-45 minutes. Like Dr. Lohrasbe, Dr. Klassen said that when users crash, they experience a dysphoric, unhappy sensation.

[161] Mr. Sheepway admitted to Dr. Klassen, and generally in cross-examination, that he was "pretty proficient" with his 12-gauge shotgun.

[162] When Dr. Klassen asked Mr. Sheepway why he pulled the trigger to fire what is now referred to as projectile A into the rear of Mr. Brisson's vehicle, he responded "we were fighting" and he "panicked".

[163] Dr. Klassen agreed with Dr. Lohrasbe that Mr. Sheepway's cannabis use was not an important direct contributor to the events of that day.

[164] He also agreed that Mr. Sheepway would have been "minimally under the effects" of cocaine just prior to using the $50 baggie of crack between 2:30 and 3 p.m. and that because 2-to-2½ hours had passed since his previous crack use, a good deal of the effect of that previous crack would have been gone. Dr. Klassen acknowledged

that Mr. Sheepway would have been craving cocaine at the time of the homicide, but that he would not then have been experiencing the direct pharmacologic effects of cocaine.

[165] Dr. Klassen testified that in many respects he and Dr. Lohrasbe agree on the effects of cocaine. However, he said the difference in his approach from that of Dr. Lohrasbe is that he had asked Mr. Sheepway to tell him about his thinking at the material time, rather than hypothesizing or speculating on what was going on with that thinking. Dr. Klassen testified that Mr. Sheepway described the events around the homicide in a way which was not strongly imbued with the acute effects of cocaine intoxication. He said that at no time did Mr. Sheepway inform him that he felt really "screwed up" due to the effects of cocaine, but rather what he did say was that he really needed more cocaine. In other words, Dr. Klassen opined that Mr. Sheepway himself did not raise the issue of cognitive interference based on cocaine intoxication, other than the craving, which he acknowledged could be strong. Dr. Klassen felt that he had a "cogent narrative" from Mr. Sheepway about what his performance was like while under the influence of cocaine, doing such things as parenting, cooking and the various tasks that he performed before and after the homicide. Therefore, the need for a psychiatrist to offer a conceptual opinion on what might have happened with Mr. Sheepway's thinking due to the influence of cocaine is greatly diminished.

[166] Dr. Klassen also acknowledged that hyper-reactivity is a potential effect of cocaine consumption, and he agreed with Dr. Lohrasbe's testimony in that regard.

[167] Dr. Klassen also agreed that in relation to the way most people live their lives most of the time, Mr. Sheepway was in an abnormal mental state at the time of the

homicide. Indeed, he acknowledged that Mr. Sheepway was likely in the most dire psychological and social circumstances of his life at that time. However, Dr. Klassen said that parsing out the extent to which cocaine was responsible and the extent to which his psychological and psychosocial distress was responsible for the homicide, was "at the very least, challenging". Further, he stated that the mental state which Mr. Sheepway was in is very typical of people before committing a personal injury offence. He referred to the direct interpersonal conflict between Mr. Sheepway and Ms. Scheck, the difficult psychosocial circumstances which I referred to above, and some degree of intoxication.

[168] In short, Dr. Klassen opined that, when focusing on Mr. Sheepway's behaviour, there is no evidence that he was dysfunctional while having the experience of cannabis or cocaine intoxication or craving. Rather, he was able to keep his mind working while under the influence of those drugs, although on this occasion there was "super-added" to that influence a very high level of stress.

[169] When asked about the significance of Mr. Brisson grabbing the shotgun, Dr. Klassen acknowledged that it would have raised Mr. Sheepway's level of anxiety, but beyond that he focused on the various things that Mr. Sheepway said: he was frightened at the prospect of doing a robbery; he wondered if Mr. Brisson had a gun of his own or was getting away; he was concerned that his truck might be rammed by Mr. Brisson; he was concerned whether Mr. Brisson would be coming after him; he panicked; and he wanted to get more drugs. With all of this information, Dr. Klassen opined that there was no reason to hypothesize about what was going on in Mr. Sheepway's mind at the time of the shooting.

m) Conclusion on whether Mr. Sheepway had the specific intent to commit murder

[170] Because Mr. Sheepway testified in his own defence, I must consider whether his evidence raises a reasonable doubt in the context of the law as set out in *R. v. W.(D.)*, [1991] 1 S.C.R. 742. In particular, I am required to acquit an accused in any of the following circumstances:

1) if I believe his evidence;
2) even if I do not believe his evidence, if I still have a reasonable doubt as to his guilt after considering his evidence in the context of the evidence as a whole;
3) if, on the basis of all the evidence, I am not convinced beyond a reasonable doubt of the guilt of the accused.

[171] Also, because intention is a state of mind and cannot be seen, evidence of intent is generally determined from inferences that are based on proven facts found in the evidence. Inferences cannot logically be drawn from mere speculation or conjecture: *R. v. Bakker*, 2003 BCSC 741, at para. 89.

[172] In this case, I do not believe the accused when he said that he was “not thinking” or “did not know” what he was thinking at the time of the shot now referred to as projectile A.

[173] Nor does the accused’s evidence, in the context of the evidence as a whole, raise a reasonable doubt in my mind as to whether he had the specific intent to commit murder in the sense required by s. 229(a)(ii), i.e. an intent to cause foreseeably lethal bodily harm and being reckless as to whether death ensued.

[174] The evidence of intoxication by crack cocaine is minimal at best. Both Drs. Klassen and Lohrasbe testified to that effect. We do not know how much cocaine

Mr. Sheepway consumed on the morning of August 28, 2015, but we do know that his crack cocaine use had gone from a habit costing him between $50 and $100 per day, i.e. half-a-gram to a gram per day, up to between $300 and $500 per day towards the end of August, i.e. three to five grams per day. We also know that Mr. Sheepway stopped smoking drugs sometime in the morning before noon. I make that finding because Ms. Scheck said she confronted him about stealing from her credit card at around noon that day, and then the two of them went back and forth for the next 2½ hours approximately discussing the issue, until Ms. Scheck had to leave for Whitehorse at 2:30 p.m. It is inconceivable to me that Mr. Sheepway was able to continue to smoke crack after noon that day given the circumstances. Further, we have evidence from Dr. Klassen that a crack user usually starts to come down from their high about 20 to 45 minutes after the initial euphoria. In addition, we have Mr. Sheepway's own evidence that he was "coming down" when he went to meet Mr. Brisson to ask him to front him some drugs. The amount he received, slightly less than half-a-gram, would have been much below what he himself said that he was normally consuming on a daily basis at that time. As well, we also have Mr. Sheepway's own evidence that, although he likely experienced some euphoria from that small amount of the drug, it was not enough to give him the courage to go ahead with his plan to commit suicide and he quickly decided that he needed more drugs.

[175] There is also nothing in Mr. Sheepway's behaviour or self-described thought process immediately before the shootings to indicate that he was impaired by an abnormal mental state.

[176] On the contrary, Mr. Sheepway exhibited numerous examples of rational, linear and goal-directed behaviour both immediately before and after the shootings. I can properly take those behaviours into account in considering what effects the crack cocaine likely had on Mr. Sheepway at the time of the shootings: *R. v. Dickson*, 2006 BCCA 490, at para. 67.

[177] Importantly, the fatal shooting of Mr. Brisson was no accident. Mr. Sheepway admitted this himself in his conversation with C.B. after his return from addiction treatment in Ontario in March 2016. In my view, this was a very significant admission against his interest and C.B. was not cross-examined on the point at all. Nor was Mr. Sheepway asked for clarification on the issue, notwithstanding the central importance of the so-called "accident" during his interview with Dr. Lohrasbe.

[178] Equally important was Mr. Sheepway's admission to the RCMP during the re-enactment on October 4, 2016 when he agreed with the suggestion that, after Mr. Brisson pulled ahead in his vehicle, Mr. Sheepway had leaned out of his driver's side window and "purposefully" shot at the rear of Mr. Brisson's truck. Furthermore, when asked again about the first two shots, Mr. Sheepway replied "The first two I did not intend to shoot.", implying to me that he <u>did</u> intend the shot into the back of the vehicle, now referred to as projectile A, which killed Mr. Brisson.

[179] Lastly on this point, I am satisfied beyond a reasonable doubt that Mr. Sheepway fired not one but two shots at the rear of Mr. Brisson's truck. In each case he would have had to have cocked and loaded his 12-gauge shotgun in order to do so. He admitted to Dr. Lohrasbe that he did not want the drugs to go away, he wanted

Mr. Brisson to stop, and he wanted the drugs. He also admitted at the trial that everything that he told Dr. Lohrasbe was true.

[180] In the result, I do not find that the evidence of Mr. Sheepway's crack cocaine consumption or the evidence of his craving for the drug leaves me in a state of reasonable doubt as to whether he knew that death would likely result if he shot towards Mr. Brisson through the back of his pickup cab at a relatively close range of approximately six feet or two metres. In those circumstances, I am persuaded that it is appropriate to rely upon the common sense inference that a sane and non-intoxicated person intends the natural consequences of their acts. In my view, the natural consequence of Mr. Sheepway firing two 12-gauge slugs into the back of Mr. Brisson's truck, on the driver's side, with Mr. Brisson seated in the driver's seat, and especially given Mr. Sheepway's proficiency with the weapon, was that Mr. Sheepway meant to cause Mr. Brisson bodily harm that he knew was likely to cause his death and was reckless whether death ensued or not.

[181] I also bear in mind here the implied instruction from the Supreme Court in *Daley*, cited above, that, in a case where the accused points a shotgun at a relatively close distance of six feet or about two meters, is proficient with the shotgun, and where death is the obvious consequence of the accused's act, then the accused might have to establish a particularly advanced degree of intoxication, or I would add abnormal mental state, to successfully avail him or herself of a defence of this type.

[182] Given that I am satisfied beyond a reasonable doubt that the Crown has proven murder in the second degree pursuant to s. 229 (a)(ii) of the *Criminal Code*, there is no

need for me to consider the alternative of whether he might have also been guilty of second degree murder under s. 229(c) of the *Code*.

2. Was the murder planned and deliberate?

a) The Law

[183] Planning and deliberation are independent elements of the offence of first-degree murder. Both must be proven beyond a reasonable doubt. Planning refers to a calculated scheme or design carefully thought out and arranged beforehand. Deliberate means considered and not impulsive, rash or hasty. A person commits a deliberate murder when he or she thinks about the consequences and contemplates the advantages and disadvantages of committing the offence: *R. v. Fraser*, 2016 BCCA 89, at para. 77; and *R. v. Jacquard*, [1997] 1 S.C.R. 314, at para. 26. Planning and deliberation can be brief: *Fraser*, at para. 79. An abnormal mental state or disorder that is insufficient to negative the specific intent for murder may nevertheless be sufficient to negative the elements of planning and deliberation. This is because one can intend to kill and yet be impulsive, rather than considered, in doing so. It requires less mental capacity simply to intend than it does to plan and deliberate: *Jacquard*, at para. 27. In other words, a finding that the accused had the intent required for murder despite evidence of intoxication, or some other abnormal mental state, is not determinative of whether the same evidence leads to a reasonable doubt on the issues of planning and deliberation: *R. v. Brown*, 2015 ONCA 782, at paras. 16 and 18.

b) Analysis

[184] All of the above facts apply to this issue as well.

[185] I am not satisfied beyond a reasonable doubt that Mr. Sheepway carefully thought out a plan beforehand to kill or cause foreseeably fatal bodily harm to Mr. Brisson. Nor am I satisfied beyond a reasonable doubt that Mr. Sheepway thought about the consequences of his actions or contemplated the advantages and disadvantages of committing the offence of murder. Further, the abnormal mental state that he was in, even to the extent acknowledged by Dr. Klassen, while insufficient to negative the specific intent for murder, in my view is sufficient to negative the elements of planning and deliberation.

[186] Accordingly, I find the accused not guilty of first-degree murder.

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GOWER J.