

Court of Queen’s Bench of Alberta

Citation: R v Dubroy-Clement, 2021 ABQB 418

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Docket: 170570618Q1
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Registry: Peace River

Between:

Her Majesty the Queen

- and -

Kyle Dubroy-Clement

Accused

**Reasons for Decision
of the
Honourable Mr. Justice E.J. Simpson**

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Introduction

[1] This trial involved a four-count Indictment in relation to the May 16, 2017 killing of Lawrence Butt (“Butt”) (aka Lawrence Villeneuve). Blake Murphy (“Murphy”) shot Butt from close quarters in the upper torso with a sawed-off shotgun while in a small RV trailer (the “RV Trailer”) occupied by Butt and the accused Kyle Dubroy-Clement (“the accused” or “Dubroy-Clement”) near Peace River, Alberta. Murphy entered a guilty plea to a charge of second-degree murder.

[2] At the commencement of this trial, the accused entered a guilty plea to a charge of assisting Murphy for the purpose of enabling him to escape knowing that Murphy had murdered Butt and to a charge of break and enter of the dwelling house of Butt’s mother, Marianne Villeneuve, from which he stole money.

[3] This trial dealt with the charges of robbery with a firearm, contrary to s 344(1)(a.1) of the *Criminal Code*, RSC 1985, c C-46 and manslaughter with a firearm, contrary to s 236(a).

[4] The Crown alleges Dubroy-Clement participated as a party either by aiding or abetting Murphy to rob Butt. He is therefore guilty of the charge of robbery with a firearm.

[5] The Crown further alleges that the accused formed a common intention to rob Butt; however, during the robbery Murphy murdered him. Dubroy-Clement, the Crown alleges, could reasonably have foreseen the risk of non-trivial and non-transitory bodily harm being caused to Butt during the course of the robbery. He is therefore guilty of manslaughter.

Issues

[6] The following issues were before me for determination:

1. Was the accused a party to the robbery of Butt on account of his aiding or abetting Murphy?
2. Alternatively, did the accused and Murphy form an agreement or common intention to rob Butt and to help each other to rob him?
3. If the accused formed an agreement with Murphy to rob Butt, could the accused have reasonably foreseen the risk of bodily harm to Butt which was neither trivial nor transitory?

Decision

[7] Based upon the evidence, I conclude the following:

- (a) The accused aided Murphy in robbing Butt. Violence was used against Butt and he was fatally wounded either immediately prior to or following the theft from Butt. I am not satisfied that the accused was aware that Murphy was in possession of a firearm prior to Murphy removing the shotgun from a bag and shooting Butt. I therefore find Dubroy-Clement guilty of robbery under s 343(b) of the *Criminal Code*, by virtue of s 21(1)(b), and not of armed robbery under s 343(d).

- (b) The accused did not form an agreement or common intention with Murphy to rob Butt and therefore he is not guilty of manslaughter by virtue of s 21(2) of the *Criminal Code*.

[8] Given the wording of the Indictment, the issue of whether or not a firearm was used in the commission of the robbery is relevant to the applicable sentence and is not an essential element of the offence of robbery.

Facts

[9] The Crown and the Defence entered an Agreed Statement of Facts (“ASF”) in this proceeding. What follows is an edited version of the ASF:

INTRODUCTION

2. In the early morning hours of Tuesday, May 16, 2017 an individual by the name of Blake Murphy (“Murphy”) shot and killed Lawrence Butt (“Butt”; “the Deceased”) at the Pine Ridge Campground just outside of Peace River, Alberta. Murphy plead guilty to second degree murder for his role in the death.

3. Murphy, who was at the time of the murder residing in Grande Prairie, arrived in town some hours before in the company of Paige Burkinshaw (“Burkinshaw”).

4. At the time of his death, Butt (also known as Lawrence Villeneuve) was involved in the drug trade in Peace River. He was actively trafficking and appeared to be quite successful. He was 20 years old and known by the nickname “the Kid.”

5. Murphy was at the time associated with individuals involved in the drug trade in the Grande Prairie area.

THE DECEASED BEFORE THE MURDER

6. Butt was living with his mother Marianne Villeneuve (“Ms. Villeneuve”) at the beginning of May, 2017, at a residence located on 99th Street in Peace River, Alberta.

7. Butt and his mother decided Butt would move out. Ms. Villeneuve was planning on relocating, and she wanted her son to be more independent. Butt was concerned for his mother’s safety as the residence had been broken into before by people looking for him. Butt was looking for a trailer to stay at so he could keep his dog, called Girl, with him.

8. On Monday, May 15, 2017, Butt came home with a male friend unknown to Ms. Villeneuve and said his friend had lent him a camper.

9. Butt purchased a little car from his mother - a green Pontiac Wave - paying \$2,000.00 in \$20 bills. He loaded his belongings into the car intending that his friend would drive it as he did not have a driver’s licence.

10. He asked Ms. Villeneuve not to stay at the house for fear something would happen, but she disregarded this request.

11. Butt had a quantity of cash - \$10,000.00 in \$20 bills - in a black bag and asked Ms. Villeneuve to hide it for him. She offered to hide it in her truck, but Butt declined, saying he would use his usual hiding spot.

12. Ms. Villeneuve observed Butt in his bedroom, kneeling down in his closet. It appeared he removed a board and put something into the space. Normally Butt did not share this kind of information with his mother.

[No Paragraph 13 in the ASF]

Pine Ridge Campground

14. On the same day that he left his mother's residence, a truck belonging to Lucas Lundstrom ("Lundstrom") pulled a recreational vehicle trailer into a camping spot at Pine Ridge Campgrounds (the "RV Trailer"), placing it next to the already present trailer belonging to the Accused around noon. This was in accordance with an agreement the Accused had reached with the campsite manager, Mark Senger, to share one campsite and save money.

15. During the evening, Butt arrived at the newly-arrived RV Trailer and examined it with the Accused. He later returned close to 12:00 am with the newly purchased Pontiac Wave.

16. By about 3:30 am, Murphy and Burkinshaw had arrived at the campground in a white Kia Rio.

17. Murphy, Burkinshaw and the Accused were all in the RV Trailer visiting with Butt.

18. Murphy had brought a shotgun in a bag. At some point Murphy pulled out the shotgun from the bag and shot Butt in the torso.

19. All three left the scene of the shooting in the Kia Rio.

20. At some point Murphy instructed the Accused to dispose of the RV Trailer.

DISPOSAL OF THE RV TRAILER

21. The Accused enlisted the aid of Lundstrom in getting rid of the RV Trailer.

22. Lundstrom was charged and pled guilty to being an accessory after the fact to murder for his role in assisting with the disposal of the RV Trailer.

23. As part of Lundstrom's involvement, the RV Trailer was taken from the Pine Ridge Campground and deposited on Township Road 810, sometimes referred to as Reno Road.

The Trailer is Found

24. On May 16, 2017, a call came in through the Alberta wildfire reporting line ("310-FIRE") regarding a fire on Reno Road towards Kimiwan Tower.

25. Brett Casey ("Casey"), then employed in the Peace River area Wildfire Management Branch responded. He communicated with the dispatch centre for

firefighters in Northern Sunrise County. This led to Julien Bergeron (“Bergeron”), the deputy fire chief, being dispatched in a command vehicle to the scene.

26. Casey was first on scene, but waited for Bergeron to arrive. It appeared to Casey that the fire was in its final stages and involved a trailer.

27. Bergeron describes arriving on the scene around 5:30 pm. He too believed the fire was dying, having been burning for some time. The camper was smouldering and some grass had lit on fire, but due to high humidity in the vegetation had extinguished itself.

28. Chief Bergeron and Casey assessed the scene and agreed that the fire would not reignite and no suppression activity was needed. Bergeron used a thermal imaging camera to check for high temperatures and did not see any. There was some smoke, but no flames seen. Based on his observations that only metal remained and the plastic was all consumed, he estimated the fire had been burning for at least 3 hours.

29. A photograph of the scene was taken by Casey shortly after his arrival.

30. Bergeron contacted Cpl David Browne of the Peace River RCMP and advised him about the fire. At that time there was no indication of the significance of the trailer, and Cpl Browne assumed it was a property matter, tasking Cst Hoggins to investigate and see if the remains of the trailer could be towed and the owner identified.

31. A tow company was contacted to remove the trailer, but they could not locate it in the dark.

BREAK AND ENTER AT VILLENEUVE RESIDENCE

32. The next day, Wednesday, May 17, 2017, Ms. Villeneuve was on Facebook and discovered Butt’s dog Girl was at the SPCA. When she spoke to the SPCA she learned Girl had been found on Reno Road close to a burnt trailer.

33. She had spent the previous night at her sister’s place. She left to pick up the dog and do errands, and then planned to go looking for her son.

34. After picking up Girl, Ms. Villeneuve decided to drop the dog off at her own house as she anticipated she could be looking for her son for a while.

35. Arriving at home around noon, she realized her residence had been broken into through the kitchen window.

36. She went to the hiding place where she believed her son had stashed the bag of money and observed the board covering the spot was out of place. She felt inside the compartment and discovered it was empty.

37. She reported the break-in to police and told the police her son’s dog had been found on Reno Road close to a burnt trailer.

POLICE BEGIN TO REALIZE THE SIGNIFICANCE OF THE RV TRAILER

38. Having received the above information about Reno Road and realizing the potential connection, Cpl Browne requested forensic investigators attend the

location of the burned trailer with regular members to see if they could locate human remains.

39. Sgt Vogel and Cst Bauer, forensic investigators, attended at the trailer's location at about 5:28 pm.
40. The trailer appeared to be a recreational vehicle style of trailer ("RV") approximately 16 feet in length. The tires were gone along with almost everything except the metal structure, primarily the bed or platform portion of the RV.
41. Human remains were found in the driver side rear corner of the trailer with the shoulders arranged towards the driver side rear and the feet towards the RV centre front.
42. These were the remains of the Deceased, although he could not be identified visually; skin and tissue had been largely burned away.
43. The Major Crimes Investigative Team of the RCMP was contacted by the investigators on scene and containment set up to hold the location until the area could be processed and the remains of the Deceased removed to be sent to the Medical Examiner for autopsy.

THE SCENE OF THE BREAK AND ENTER IS EXAMINED

44. Cst Bauer and Sgt Vogel proceeded to examine Ms. Villeneuve's residence for evidence regarding the break and enter.
45. They observed the hiding spot, which Cst Bauer referred to as a board removed from a built-in shoe rack in the closet to access a hidden space.
46. They found other potential hiding places where panels could be removed to provide access to hidden spaces.
47. Cst Bauer observed that it appeared the residence had been searched for hidden locations or items. The toilet tank was partially removed and cedar planks in the unfinished basement had been pried away from the wall partially.
48. Using contrasting powder, Cst Bauer attempted to obtain fingerprint impressions.
49. He was able to secure several impressions from the kitchen window point of entry. He located a set on the white metal frame of a window pane brought by the initial investigator (before the connection to these events were realized). Of these, he later conducted a comparison and determined one to be a match for the Accused's right thumb. This was designated during his investigation as the "R2" impression.
50. According to Cst Power, who secured the window, the side that this print was located on would have put it on the exterior of the residence.
51. On his own attendance at the scene, Cst Bauer obtained another impression on the frame of one pane still in place. Based on the anatomical positioning of the impressions, Cst Bauer determined the prints were consistent with someone grabbing the edge of the window from inside the residence. One of

these prints, designated by him as “RS”, was later identified as being the right index finger of the Accused.

MURPHY AND BURKINSHAW ON THE ROAD

52. Some time after the murder, Burkinshaw and Murphy left the Peace River area and headed towards Edmonton in the Kia Rio.

53. They checked into a hotel in the Edmonton area at around 12:30 pm on May 16, 2017: the Yellowhead Inn.

54. They went to the West Edmonton Mall and spent a few hours there, making a number of small purchases.

55. On May 18, 2017, they checked out of their hotel.

56. On May 19, 2017, the Kia Rio fled from a police check-stop.

57. On May 20, 2017, the Kia Rio was located by police responding to a complaint that a vehicle had been dumped on private property in the Mayerthorpe area.

58. Cst Donnelly of Edson RCMP Forensic Identification Section (“FIS”) examined the vehicle. He located receipts matching up to purchases made by Murphy and Burkinshaw at West Edmonton Mall. A fingerprint impression was taken of the exterior of the driver’s door that he later matched to Murphy and he swabbed the steering wheel for DNA as well.

59. A match came back to Murphy.

60. Sneakers located in the vehicle were tested for DNA and came back with the DNA of the Deceased as well as that of Murphy.

61. Other items were located in the vehicle matching that seen in pictures of Murphy, including a hat and a baseball bat.

62. On the backseat of the vehicle a Samsung phone (referred to by investigators as “Exhibit 609” or the “Samsung phone”) was seized by investigators.

SEIZURE OF THE IPHONE - EXHIBIT 006

63. On May 18, 201[7] a phone was seized from the vehicle of Madison Brent, the girlfriend of the Accused, by Cst Pope and S/Sgt McChoshen.

64. This item is referred to during the investigation as Item or Exhibit “006” or the “iPhone”.

THE PHONE DATA ANALYSIS

65. Both phones referred to were submitted to Edmonton Technological Crime Unit (“ETCU”) for analysis.

66. Civilian Member (“CM”) Geoff Rempel (“Rempel”) conducted the initial analysis of each phone’s contents, providing an extraction of some data or

information and a report to the investigators. Due to the presence of pass codes, Rempel advised further work would have to be done.

67. From the RCMP lab in Ottawa, CM Frank Maloney assisted in this regard, providing further extraction and passing along the results of his use of software tools to retrieve data on the phone.

68. This information was ultimately consolidated and built into a coherent data picture by an analyst, CM Symonds.

THE AUTOPSY

69. The Deceased's body was transported to Edmonton where an autopsy was conducted by Dr. Bannach and a report prepared on August 1, 2017.

70. The Autopsy confirmed that the Deceased had died as a result of a shotgun blast to the torso, with pellets perforating the heart and lungs of the Deceased.

71. The Examiner's opinion was that the absence of soot in the lining of the trachea or mainstream bronchi meant that the Deceased died prior to the fire occurring.

STATEMENTS OF THE ACCUSED

73. The Accused was interviewed at different points of time during the investigation.

74. On May 18, 2017, he was interviewed by police including by Sgt Mike Kendell. This was a non-custodial witness-style interview.

75. A transcript of that statement became evidence in the trial as an attachment to the ASF. A USB flash drive with the audio/video of that statement also became an exhibit in the trial.

76. About five days later, on Tuesday, May 23, 2017, the investigators (again, mainly Sgt Kendell) took two warned statements from the Accused, the first around 10:30 am and the second around 6:00 pm.

77. Both warned statement transcripts and the audio/video recordings of each on the flash drive became exhibits in the trial.

79. Finally, almost a year later, the Accused was interviewed again, this time under *Charter* caution as well as the police warning. The first statement was taken on April 19, 2018 in St. Albert around 5:10 pm. The next day they continued on, and police recorded a second statement on April 20, 2018, beginning at about 8:40 am.

80. Both transcripts and the audio/video recordings of each saved on the flash drive became exhibits in the trial.

Brief Statements on the Law and Position of the Parties

Reasonable Doubt

[10] The reasonable doubt standard is a single objective, exacting standard of proof. It is not the same as proof of probability, and is not like subjective standards of care that we apply in important everyday situations. It is not proof to an absolute certainty. It is not proof beyond any

doubt nor is it imaginary or frivolous doubt. It is based on reason and common sense and not on sympathy or prejudice: *R v Lifchus*, [1997] 3 SCR 320, (1997) 9 CR (5th) 1 at para 36.

[11] Proof beyond a reasonable doubt falls much closer to absolute certainty than proof on a balance of probabilities: *R v Starr*, 2000 SCC 40 at para 236.

R v W(D)

[12] Whenever exculpatory evidence is entered on behalf of the accused, the principles enunciated by the Supreme Court of Canada in *R v W(D)*, [1991] 1 SCR 742 [*W(D)*] must be taken into account: *R v Ryon*, 2019 ABCA 36 at para 30 [*Ryon*]; *R v Gray*, 2012 ABCA 51 at paras 42-43. The Court of Appeal in *Ryon*, at para 51, provided further guidance with respect to the application of the *W(D)* principles:

[51] Then the charge should impart the following information:

(i) The burden of proof is on the Crown to establish the accused's guilt beyond a reasonable doubt and that burden remains on the Crown so that the accused person is never required to prove his innocence, or disprove any of the evidence led by the Crown. (Subject to the caveat that this does not apply to defences, such as that found in s 16 of the *Criminal Code*, where the onus rests with the proponent of the defence.)

(ii) In that context, if the jury believes the accused's evidence denying guilt (or any other exculpatory evidence to that effect), or if they are not confident they can accept the Crown's version of events, they must acquit. (Subject to defences with additional elements such as an objective component discussed at para 31).

(iii) While the jury should attempt to resolve conflicting evidence bearing on the guilt or innocence of the accused, a trial is not a credibility contest requiring them to decide that one of the conflicting versions is true. If, after careful consideration of all the evidence, the jury is unable to decide whom to believe, they must acquit.

(iv) Even if the jury completely rejects the accused's evidence (or where applicable, other exculpatory evidence), they may not simply assume the Crown's version of events must be true. Rather, they must carefully assess the evidence they do believe and decide whether that evidence persuades them beyond a reasonable doubt that the accused is guilty. Mere rejection of the accused's evidence (or where applicable, other exculpatory evidence) cannot be taken as proof of the accused's guilt.

Party Liability

[13] The Crown alleges the accused was a party to the robbery and murder of Butt by virtue of subsection 21(1) and (2) of the *Criminal Code*. These subsections read as follows:

Parties to offence

21 (1) Every one is a party to an offence who

(a) actually commits it;

(b) does or omits to do anything for the purpose of aiding any person to commit it; or

(c) abets any person in committing it.

Common intention

(2) Where two or more persons form an intention in common to carry out an unlawful purpose and to assist each other therein and any one of them, in carrying out the common purpose, commits an offence, each of them who knew or ought to have known that the commission of the offence would be a probable consequence of carrying out the common purpose is a party to that offence.

[14] As pointed out by the Supreme Court of Canada in *R v Briscoe*, 2010 SCC 13 [*Briscoe*], at para 13, “Canadian criminal law does not distinguish between the principal offender and parties to an offence in determining criminal liability.” Section 21(1) of the *Criminal Code* makes principal offenders, aiders, and abettors equally liable for the commission of an offence.

[15] Subsection 21(2) extends liability to a person when another person commits an offence beyond the one which the parties had originally planned to assist one another with committing. The offence to which s 21(2) extends liability is not the original “unlawful purpose” to which the subsection refers; it is a different crime, one that a participant in the original “unlawful purpose” commits in carrying out the original purpose: *R v Simon*, 2010 ONCA 754 at para 42, leave to appeal to SCC refused, [2010] SCCA No 459; *R v Phillips*, 2017 ONCA 752 at para 221.

[16] The Crown submits the accused aided or abetted Murphy in the robbery of Butt. Upon finding the accused a party to the robbery, the Crown argues the Court should also find the accused responsible for the death of Butt pursuant to the imposition of broad liability under s 21(2) of the *Criminal Code*. The Crown submits the accused planned and helped carry out the robbery in which a firearm was used, but Murphy committed a different offence, murder, which the accused knew or ought to have known would be a probable consequence of carrying out the robbery. Alternatively, the Crown argues the accused is liable under s 21(2) for the commission of the more serious offence robbery with a firearm.

[17] The Crown argues that Dubroy-Clement knew or ought to have known that a probable consequence of carrying out the robbery was the carrying out of a dangerous act which a reasonable person would recognize as creating a risk of bodily harm to Butt which was neither trivial nor transitory

[18] The Defence argues that the evidence does not prove beyond a reasonable doubt that the accused was a party to the robbery. If the accused was a party to the robbery, he did not know of nor could he have foreseen the killing of Butt.

Post-Offence Conduct Evidence

[19] The Supreme Court of Canada in *R v Calnen*, 2019 SCC 6 [*Calnen*] recently explained at para 106 that post-offence conduct, otherwise known as “after-the-fact conduct” encompasses: “what the accused both said and did after the offence charged in the indictment was allegedly committed.” Because of the large range of possible conduct that can follow the commission of an offence, “the proper legal treatment of after-the-fact conduct is highly context and fact specific”: *Calnen* at para 106; *R v Downey*, 2021 ABCA 142 at para 64 [*Downey*].

[20] Post-offence conduct evidence is a form of circumstantial evidence. It allows a fact finder to draw particular inferences based on a person’s words or actions: *Calnen* at para 111. It can be

used in determining the accused's intent as well as to distinguish between different levels of culpability: *Calnen* at para 119.

[21] In *R v White*, [1998] 2 SCR 72, 1998 CanLII 789 at paras 19 and 21, the Supreme Court described post-offence conduct evidence as follows:

19 Under certain circumstances, the conduct of an accused after a crime has been committed may provide circumstantial evidence of the accused's culpability for that crime. For example, an inference of guilt may be drawn from the fact that the accused fled from the scene of the crime or the jurisdiction in which it was committed, attempted to resist arrest, or failed to appear at trial. Such an inference may also arise from acts of concealment, for instance where the accused has lied, assumed a false name, changed his or her appearance, or attempted to hide or dispose of incriminating evidence. As Weiler J.A. noted in *R. v. Peavoy* (1997), 1997 CanLII 3028 (ON CA), 117 C.C.C. (3d) 226 (Ont. C.A.), at p. 238:

Evidence of after-the-fact conduct is commonly admitted to show that an accused person has acted in a manner which, based on human experience and logic, is consistent with the conduct of a guilty person and inconsistent with the conduct of an innocent person.

...

21 Evidence of post-offence conduct is not fundamentally different from other kinds of circumstantial evidence. In some cases it may be highly incriminating, while in others it might play only a minor corroborative role. Like any piece of circumstantial evidence, an act of flight or concealment may be subject to competing interpretations and must be weighed by the jury, in light of all the evidence, to determine whether it is consistent with guilt and inconsistent with any other rational conclusion.

[22] The Supreme Court explained whether a court can consider evidence of post-offence conduct will depend on the facts of each case, instructing at para 26:

... The question that should be asked at the outset is: What does the Crown seek to prove by means of the evidence? ... The evidence of post-offence conduct may still be used by the jury for other purposes where appropriate, for example to connect the accused to the scene of the crime or to a piece of physical evidence, or to undermine the credibility of the accused generally.

[23] In *R v White*, 2011 SCC 13, the Supreme Court reiterated at para 17 that post-offence conduct by an accused person, such as flight, destruction of evidence, or fabrication of lies, "can, under certain circumstances, provide circumstantial evidence of their culpability for that crime." The Court confirmed at para 19 that "[a]fter-the-fact conduct may in fact be put to a wide variety of uses and its utility is not confined to supporting an inference that the accused had a 'guilty mind.' The Supreme Court cautioned against jumping "too quickly from evidence of post-offence conduct to an inference of guilt" (*White* (1998) at para. 57) without giving proper consideration to alternate explanations for the conduct in question" (para 23). See also: *Calnen* at para 117; *Downey* at paras 58 and 60.

[24] It is for the trier of fact to determine which inferences it will draw from the post-offence conduct evidence: *Downey* at para 67. In doing so, the trial judge should define the issue, purpose, and use for which such evidence is tendered and articulate the reasonable and rational inferences which might be drawn from it: *Calnen* at para 113.

Evidence

[25] In addition to the Agreed Statement of Facts, to which four statements made by the accused were attached as exhibits, a friend of his Lucas Lundstrom (“Lundstrom”), the accused’s girlfriend Madison Brent, as well as Marianne Villeneuve, the mother of the victim, testified.

[26] The girlfriend of Murphy, at the time, Page Burkinshaw (“Burkinshaw”), testified as to her travels with Murphy to Peace River on two occasions, as well as to circumstances surrounding the killing of Butt.

[27] An RCMP officer, as well as two civilian RCMP members, gave evidence with respect to data extracted from cell phones seized in relation to the investigation pertaining to the killing of Butt. As a result of the evidence of the RCMP members, a timeline table setting out the content of the text messages became an exhibit in the proceeding for the purpose only of proving the fact that the words were communicated, not for the truth of their contents.

Vetrovec Witnesses

[28] The Defence has argued against giving any weight to the evidence of Lundstrom and Burkinshaw because of their “*Vetrovec* witness” status.

[29] Our Court of Appeal in *R v Lawrence*, 2020 ABCA 268 [*Lawrence*], at para 25, summarizes the law with respect to a *Vetrovec* witness:

A *Vetrovec* witness is one with a “disreputable and untrustworthy background” (*Vetrovec*, 821) including “an accomplice, or a disreputable witness of demonstrated moral lack” (823, 824, 832).

[30] In para 26, the Court set out a non-exhaustive list of characteristics of a witness who may draw special scrutiny. Those, and any other factors that may apply, I will deal with in assessing the evidence of these two witnesses.

The Witness - Lucas Lundstrom

[31] Lundstrom, now 34 years of age, testified that at the time of the murder of Butt he had lived in Peace River for 9 years. He knew the accused, Dubroy-Clement, through Butt. He consumed illegal drugs with both.

[32] In May of 2017, he had finished his employment as a portable wood chip operator prior to spring breakup. Off work, he began partying by consuming illegal drugs including marijuana, methamphetamine, cocaine, and a number of prescription drugs.

[33] The accused had utilized Lundstrom as a driver to assist him in delivering his illegal products. The two also travelled together in rural areas stealing items from farms including light bars, tools, and firearms. They took these items to Grande Prairie to sell.

[34] Lundstrom testified as to the details of how he received a call from the accused in or about mid-May asking him to help him dispose of the RV Trailer. Lundstrom learned later it contained Butt’s body.

[35] Lundstrom eventually entered a guilty plea to a charge of acting as an accessory after the fact to murder.

[36] With the exception of one piece of evidence, nothing in his evidence implicated the accused in the alleged robbery and murder of Butt beyond what the accused himself told the police. Lundstrom faced no cross-examination with respect to that one piece of evidence, a text message from Dubroy-Clement.

[37] Lundstrom testified that sometime in May 2017 he received a text message from Dubroy-Clement regarding Butt. The accused told him that Butt had a large clientele and he wanted to push Butt out so the accused could have a bigger drug operation.

[38] Lundstrom faced only brief cross-examination; mostly with respect to the receipt of money and drugs from Butt and the accused and his uncertain memory due to his extensive drug use in mid-May 2017.

[39] Based upon my review of all the evidence and Lundstrom's circumstances, I see no motive for Lundstrom to lie nor a benefit received so as to entice him to lie to the Court. He does have a criminal history of committing thefts with Dubroy-Clement and he entered a guilty plea as an accessory to the murder of Butt. He forthrightly admitted his own involvement in these criminal offences.

[40] If he has any knowledge of the circumstance regarding the murder of Butt, he did not use it to implicate the accused. He did not appear evasive or selective with respect to his memory. Nothing in his evidence either in chief or cross-examination showed any inconsistency. His evidence generally aligned with the evidence of Burkinshaw and with many of the statements made by the accused to the police.

[41] Considering all of the evidence, the personal circumstances of Lundstrom and the *Vetrovec* factors, I do not find any reason to discredit the evidence of Lundstrom.

[42] Therefore, while aware of the conduct of Lundstrom in assisting in the drug trade as a driver, stealing items with Dubroy-Clement for profit and his involvement in disposing of the RV Trailer, after scrutinizing his evidence, his conduct does not give me concern about his credibility.

[43] I now turn to the evidence of the text message communication Lundstrom says he had with Dubroy-Clement in May 2017 wherein the accused told him he wanted Butt pushed out of the drug trade in Peace River.

[44] This evidence came in without anyone raising a concern with respect to the possibility of it being hearsay evidence, i.e. an out of court statement offered for the truth of its contents without an opportunity to have the maker tested by way of cross-examination.

[45] The Crown in submissions asked me to rely upon this evidence for the truth of its contents. In response to my inquiry, Crown counsel advised he considered it an admission against interest.

[46] The Defence argued the text message had no use beyond the fact that the accused allegedly stated the words. He cautioned I should be careful because the details about the text came from a *Vetrovec* witness.

[47] I note Lundstrom received the text message from Dubroy-Clement sometime during the month of May. The Crown did not lead evidence to authenticate this text message as it did with

the timeline table of texts prepared from the extraction of data from the cellphones of Dubroy-Clement and Murphy. No such text message appears in the accused's text messages during the timeline table period which runs from May 10, 2017 to May 19, 2017. None of the text messages in the timeline table show Lundstrom as a sender or a recipient.

[48] However, Lundstrom and the accused were well acquainted with one another. They, I infer from the evidence, likely communicated regularly with one another by text.

[49] On balance, I find that Lundstrom received the text message from the accused in which he expressed his wish to push Butt out of the drug trade in Peace River so that he could grow a bigger drug operation. I infer that the text message was sent by Dubroy-Clement before the murder of Butt, because it would make no sense for Dubroy-Clement to tell Lundstrom this information after the murder as it would appear to be an admission that he had Butt killed in order that he could push Butt out of the Peace River drug trade.

[50] Although some academic debate exists as to whether an admission against interest is hearsay at all, the Supreme Court in *R v Couture*, [2007] 2 SCR 517, accepted it as such. Under either view, an admission against interest, if material and relevant, is admissible because "what a party has previously stated can be admitted against the party in whose mouth it does not lie to complain of the unreliability of his or her own statements": *R v Evans*, [1993] 3 SCR 653 at para 28.

[51] I accept the accused Dubroy-Clement made the statement about wanting to push Butt out of the Peace River drug trade in a text message to Lundstrom. It constitutes material and relevant evidence in that it provides a motive for the accused to deal with Butt in a manner which would diminish his success in that drug trade. The evidence is admissible for the truth of its contents.

The Witness – Paige Burkinshaw

[52] This witness, as did Lundstrom, provided very little evidence that implicated the accused Dubroy-Clement in the robbery and murder of Butt. Her evidence implicated herself far more than the accused.

[53] During her testimony, Burkinshaw said she knew Murphy planned to rob Butt. She agreed to accompany Murphy from Grande Prairie to Peace River, including driving the car at various times. She drove the car away from the scene after Murphy killed Butt. She drove Murphy back near the RV Trailer after the get-a-way when he found nothing in the first bag taken from the RV Trailer. She waited to meet Murphy at the Co-op cardlock, until he returned with money he found by searching the RV Trailer. Thereafter, she accompanied him on a trip to Edmonton.

[54] She gained her release from remand in May 2018 by giving a sworn statement to the police with respect to the incident.

[55] Burkinshaw's evidence should be considered carefully before relying upon it as she is a *Vetrovec* witness. The Defence also alleges her evidence is suspect as to reliability because of her addiction to drugs, in particular her use of drugs in those early morning hours of May 16, 2017 with the others in the RV Trailer.

[56] She testified she did not provide any information to Dubroy-Clement with respect to a possible robbery. The evidence she gave which could implicate the accused includes his procrastinating while the two of them walked from the bathroom area of the campground to the RV Trailer, the text she received from Murphy asking the accused to hurry back so that he could

distract the dog and her observation that the accused hurried back to the RV Trailer after she relayed the contents of the text to him. At some point, after she went into the RV Trailer, after returning from the bathroom, Murphy had a shotgun.

[57] Burkinshaw said the accused went through the bag stolen from the RV Trailer, in the Kia Rio, after Murphy went through it and she was pretty sure that Dubroy-Clement threw the bag out of the window of the car.

[58] Assessing her evidence against the *Vetrovec* factors from **Lawrence**, they do not give rise to a concern regarding Burkinshaw's credibility. With respect to a motive to lie, no one put one to her during her examination. Nor on the evidence can I discern any such motive. No cross-examination occurred on her sworn statement. No inconsistency stands out with respect to her evidence. Of course, she could have lied in the original statement and repeated it in this trial. However, if she did, I was not able to discern the lie(s).

[59] If her intention was to lie to implicate Dubroy-Clement, she did a very poor job of it because she, for the most part, did not implicate him. She remained steadfast in her evidence that she told him nothing about Murphy's plan to rob Butt.

[60] Burkinshaw has a criminal record she described as a DUI, which I infer is the criminal offence of operating a motor vehicle with a blood alcohol content over 80 or operating a motor vehicle while impaired by alcohol or drugs. She also has a conviction for possession of drugs. She has no history of dishonest involvement with the police. She did not minimize her own involvement with Murphy before and after the murder of Butt.

[61] She did not exhibit a selective memory, for example remembering incriminating things with respect to the accused and nothing with respect to herself. Neither her manner on the stand nor her evidence showed evasiveness.

[62] If she had any intention to seriously implicate the accused in the robbery of Butt, she only had to say she discussed it with him or heard him discussing it with Murphy while the three of them drove about the town of Peace River collecting money before the murder. She did not.

[63] Accordingly, the *Vetrovec* factors do not undermine Burkinshaw's credibility.

[64] With respect to her reliability, she admitted that she is a drug addict, she used drugs that night and has tried to repress her memories of the incident.

[65] Notwithstanding potential problems with her memory, I find her evidence reliable regarding the events surrounding the murder of Butt. She had a memory of going to Peace River with Murphy from Grande Prairie. She has a clear memory of being in the RV Trailer with the other three men, which fits with the evidence from one of the statements of Dubroy-Clement and the ASF.

[66] She has a memory of going to the campground bathroom with Dubroy-Clement. Before the entry of the timeline table containing the precise words of the text, she had a memory of receiving a text message from Murphy, during their walk back to the RV Trailer, about the possibility of the dog attacking Murphy. That text message became evidence in this proceeding before the timeline table.

[67] She recalls hearing the sound of the shotgun blast which startled her, such that she dropped the car keys while she stood by the Kia Rio outside of the RV Trailer. To her, that noise and the dropping of the car keys in surprise were unusual, memorable events and I accept both happened.

[68] Burkinshaw recalls the hiding of the firearm by a sign on the highway which matches the evidence of Dubroy-Clement in a statement. She remembers letting Murphy out of the vehicle to go back to the RV Trailer to try and find money after he could not find any in the bag taken from the Trailer. She remembers thereafter going to the Co-op cardlock to meet Murphy. The text message from Murphy's phone to her at 5:41 a.m. confirmed her evidence of his request to have her meet him at that location.

[69] Overall, with respect to the events surrounding the visit of Burkinshaw and Murphy to the RV Trailer, the events while there and thereafter, I find her memory reliable.

[70] Therefore, I find her evidence overall, unless otherwise noted, credible and reliable.

[71] As a result of those findings, I accept her evidence and find as a fact that the accused Dubroy-Clement did behave in a manner she considered sketchy or nervous while the two of them walked back to the RV Trailer after her visit to the campground bathroom. I believe her evidence when she says that after receiving the text message from Murphy about distracting Butt's dog, and passing on the contents to Dubroy-Clement, he walked ahead of her quickly to the RV Trailer. I also accept that he ran out of the RV Trailer, in her words "barrelled out" of the Trailer, with Murphy and jumped into the Kia Rio after the shooting. Furthermore, I accept Murphy went through the bag taken from the RV Trailer. Then he gave it to Dubroy-Clement who also searched the bag.

[72] With respect to her evidence that Murphy had a shotgun when she returned to the RV Trailer from the bathroom, I cannot find as a fact she saw him with the shotgun in the RV Trailer. Her testimony does not provide that detail. She knew he had a shotgun in the car, although, I cannot find as a fact when she first knew about it. Dubroy-Clement said Murphy had it in a small Swiss Army bag.

[73] From her evidence, I can only conclude that when Burkinshaw re-entered the RV Trailer, after returning from the bathroom, she knew Murphy had a shotgun with him. I cannot find as a fact that she actually saw the shotgun in the RV Trailer.

[74] With respect to who threw the bag out the window of the Kia Rio, I cannot find as a fact that the accused carried out that action. The evidence of Burkinshaw waivered on that point, although she eventually concluded she "was pretty sure" "Kyle" threw it out. Based on her testimony, I am not prepared to make a finding of fact that Dubroy-Clement threw the bag out of the window of the Kia Rio. That detail is in any event of little significance in regard to whether Dubroy-Clement was a party to the robbery and murder of Butt.

Evidence of the Accused and Application of *W(D)*

[75] As part of its case, the Crown entered a number of statements the accused made to the police, which were attached to the ASF. Therein, the accused, although admitting to burning the RV Trailer and breaking, entering, and stealing from the house of Marianne Villeneuve, flatly denied any involvement in planning or otherwise assisting with the robbery of Butt.

[76] The accused did not testify during the trial. Nevertheless, because his statements contained exculpatory evidence, the *W(D)* principles apply.

Knowledge, Actions, and Times

[77] I have organized the accused's evidence according to a timeline of when he acquired knowledge and took actions before and after the murder of Butt.

[78] In this discussion of the accused's evidence, I have incorporated the relevant text messages or telephone calls made by or to Dubroy-Clement and/or Murphy contained in the timeline table entered by the Crown, covering the period May 10, 2017 to May 17, 2017. I have also incorporated some of Burkinshaw's evidence for chronological cohesion purposes.

[79] Following a *voir dire*, I found that Madison Brent retrieved a cell phone belonging to the accused from her car which she turned over to the police. As well, I ruled a cell phone found in the Kia Rio motor vehicle belonged to Murphy. Thereafter, I authenticated the text messages contained in the timeline table. In addition, after weighing their relevance, the prejudicial effect of the text messages against their probative value, I ruled the text messages admissible to establish that the communications contained therein were made, regardless of their truth or falsity. See: *R v Shivak*, 2020 ABQB 642 at para 25.

[80] The authors of *The Law of Evidence in Canada*, 5th ed (Toronto: LexisNexis Canada Inc, 2018) explain at para 6.29:

... if the out-of-court statement, merely because it was made, is relevant to an issue apart from its truth, it is being tendered for a non-hearsay purpose and is admissible for that limited purpose.

[81] The Crown sought to rely upon the text messages only for the fact they were made notwithstanding the fact that some of the text messages sent by Dubroy-Clement himself might provide inculpatory evidence of his knowledge of and involvement with the robbery of Butt, which would otherwise constitute admissible hearsay against him: *R v Cabrera*, 2019 ABCA 184 at para 223 (in dissent); *R v Taylor*, 2013 ONCA 656 at para 26.

[82] The text messages are therefore admissible to prove that a text message was sent, by whom and to whom it was sent, when it was sent, and that the words communicated in the message were made: *R v Monroe*, 2016 NSCA 16 at paras 12 and 16; *R v Seruhungo*, 2015 ABCA 189 at para 73, rev'd by 2018 SCC 2, with the majority relying upon the dissent of O'Ferral JA. They are not admissible for the truth of their contents.

[83] Text messages are documents containing out-of-court statements. Under the documents in possession rule, documents that are or have been in the possession of a party are generally admissible against that party as original circumstantial evidence to show the party's knowledge of their contents, his or her connection with or complicity in, the matter to which they relate, or his or her state of mind with reference thereto: *Canadian Natural Resources Limited v Wood Group Mustang (Canada) Inc (IMV Projects Inc)*, 2018 ABCA 305 at paras 19-21; *R v Bridgman*, 2017 ONCA 940 at paras 70, 72, and 77; *R v Black*, 2014 BCCA 192 at para 29 [*Black*]; *R v Turlon* (1989), 49 CCC (3d) 186, 70 CR (3d) 376 (Ont CA) at para 11.

[84] In *Bridgman*, the Ontario Court of Appeal explained at para 77:

... By way of example only, text messages may constitute original circumstantial evidence connecting the accused to a location, transactions, or people, or demonstrating knowledge, state of mind and so on...

[85] Whether their content is true or not, I have considered the text messages sent to and from Dubroy-Clement's cell phone to the extent that they provide circumstantial evidence of the accused's knowledge of and state of mind regarding their contents and that they enable me to draw an inference with respect to the accused's connection to or involvement in the robbery of Butt. See: *Black* at paras 38, 39 and 41.

[86] The text messages sent to and from Murphy's cell phone to someone other than the accused, whether their content is true or not, provide narrative or context with respect to the sequence of events that transpired prior to and following the robbery and killing of Butt. See: *R v Tsega*, 2016 ONSC 3772 at paras 5 and 8 (reversed on other grounds, 2019 ONCA 111, leave to appeal to the SCC denied). I have accepted the text message sent to Burkinshaw while she returned from the campsite washroom for the truth of its contents.

May 10, 2017

DUBROY-CLEMENT's phone sends a SMS message to 780-402-9372 (Person 1) "And im getting that. Vest tonight".	2017/05/10 12:59 AM
DUBROY-CLEMENT's phone sends 2 SMS messages to 780-625-4031 (Person 5) TCU - D-C & Merged SMS 1168 & DOC00453(298); 2018- "We got the bulletproof best" & "vest".	2017/05/10 3:36 AM

DUBROY-CLEMENT's phone has SMS conversation with 780-219-9321 (BUTT)... BUTT: "Where's my gun" D-C: "Put away!! Its safe" BUTT: "Ok", "Wen can we meet I'm in nampq", "Nampa" D-C: "Late im out of town atm" BUTT:"K well I want my money and my gun and I don't Wana camp together if you and Luke are going to be teaming up and I'm my own team", "400 and the gun because this is ridiculous" D-C: "Wtf u talking about kid what is rediculous ive told u all he isis a fucking driver" BUTT: "He's your driver not mine" D-C: "Ya i payed him to drive me what wrong whit that its lisenced and 100% legit"	2017/05/10 8:20 PM
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May 11, 2017

DUBROY-CLEMENT's phone receives a SMS message from 780-625-6539 (Person 4) "Bro Lawrence just text he coming here".	2017/05/10 9:29 PM
DUBROY-CLEMENT's phone receives a SMS message from 780-625-6539 (Person 4) "Better not give him the gun back.. Lol".	2017/05/10 9:30 PM

[87] The timeline table shows the first text message between Murphy and Dubroy-Clement took place on May 11, 2017 at 11:48 a.m.

MURPHY's phone sends 3 SMS messages to 780-617-4306 (DUBROY-CLEMENT) "Kyle calk me", "Its blake", and "Need to talk to you asap".	2017/05/11 11:48 AM
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[88] In the following text message exchange, Butt demands that Dubroy-Clement bring him his toy, which from the evidence means his gun. He makes the first request at 2:36 pm and at 4:00 pm sends two demanding messages as follows:

DUBROY-CLEMENT's phone receives a SMS message from 780-219-9321 (BUTT) "Cam u bring me my toy plz".	2017/05/11 2:36 PM
DUBROY-CLEMENT's phone receive s 2 SMS messages from 780-219-9321 (BUTT) "I want my gun" & "I want my fucking gun".	2017/05/11 4:00 PM
DUBROY-CLEMENT's phone sends a SMS message to 780-219 -9321 (BUTT) "Im fucking comming. Calm ure fucking attitude kid im whit customers that whant work done on there house".	2017/05/11 4:04 PM

[89] From these text messages, Debroy-Clement had information as to the possibility that Butt was not in possession of a gun that he could use for protection purposes.

[90] That same afternoon, Murphy sent a text message to Burkinshaw advising her that he was going to head out to Peace River:

MURPHY's phone SMS messages 587-297-9141 (BURKINSHAW) "Alright have a good sleep im go head out to peace river".	2017/05/11 2:56 PM
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May 12, 2017

MURPHY' s phone SMS messages 780-617 -4306 (DUBROY-CLEMENT) "I. Not gunna leave till the morning" and "Im get paige to put so.e cover up over my tattoo s that are noticeable".	2017/05/12 12:29 AM
MURPHY's phone SMS messages 780-617-4306 (DUBROY-CLEMENT) "Call me".	2017/05/12 12:34 AM
DUBROY-CLEMENT's phone calls 780-882-2565 (MURPHY). It last s 1 minute and 27seconds.	2017/05/12 12:38 AM
MURPHY's phone SMS messages 780-617-4306 (DUBROY-CLEMENT) "K im leaving in half hour whats the location so.i can gps it".	2017/05/12 7:01 AM
MURPHY's phone sends a SMS message to 780-617-4306 (DUBROY-CLEMENT) "Call me asap when you wake up i aint leaving till i can put the cordinates in the gps".	2017/05/12 9:24 AM

MURPHY's phone SMS messages 780-617-4306 (DUBROY-CLEMENT) "Call me fuker" and "How hard is it to send me the fukin adress to you".	2017/05/12 1:15 PM & 1:19 PM
DUBROY-CLEMENT's phone calls 780-882-2565 (MURPHY.) It lasts 1 minute and 10 seconds.	2017/05/12 1:16 PM
MURPHY's phone receives a SMS message from 780-617-4306 (DUBROY-CLEMENT) "Kids house is 10219 99 street peace river alberta".	2017/05/12 1:38 PM
MURPHY's phone receives an MMS message from 780-617-4306 (DUBROY-CLEMENT) that contains DUBROY-CLEMENT's location (56.166871,-117.137979). This location is Hilltop Campground.	2017/05/12 1:39 PM
MURPHY's phone SMS messages 780-617-4306 (DUBROY-CLEMENT) "I cant accept picture downliadd".	2017/05/12 1:40 PM
MURPHY's phone receives a SMS message from 780-617-4306 (DUBROY-CLEMENT) " 261195 Valley View Road Northwest".	2017/05/12 1:41 PM

[91] Murphy and Burkinshaw did travel to Peace River on May 12, 2017. However, a flat tire on their vehicle interrupted their trip. Lundstrom went to assist them. Eventually, the two made it to Peace River, but without interacting with Butt.

May 13, 2017

[92] On May 13, 2017, Dubroy-Clement received a text message from another person who voiced concern that Dubroy-Clement might "go to (sic) savage on him," and asked Dubroy-Clement not to let that happen. In Dubroy-Clement's mind the reference to "the kid" and "him" must have meant Butt.

DUBROY-CLEMENT's phone receives a SMS message from 780-625-5361 (Person 10) "U don't want me out there to come back with the kid? To be honest I don't want to be involved in this 1 job. Plz don't go to savage on him, I know that he will cooperate with you".	2017/05/13 12:17 PM
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[93] In an exchange of text messages with Dubroy-Clement, Murphy indicated that he needed a vehicle that he could use to "get away from the cops with".

MURPHY's phone receives a SMS message from 780-617-4306 (DUBROY-CLEMENT) "U still comming".	2017/05/13 2:31 PM
MURPHY's phone sends 2 SMS messages to 780-617-4306 (DUBROY-CLEMENT) "Yes just trying to fid a truck to borrow" and "Probablly bring j with me". His phone receives the response "Just take tjs he dont need it".	2017/05/13 2:33 PM

MURPHY's phone SMS messages 780-617-4306 (DUBROY-CLEMENT) "Nope his is a break down risk i need something i can get away from the cops with".	2017/05/13 2:38 PM
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May 14 and 15, 2017

MURPHY's phone receives 2 SMS messages from 780-617-4306 (DUBROY-CLEMENT) "Call me" and "Call".	2017/05/14 9:35 PM & 9:45 PM
DUBROY-CLEMENT's phone calls 780-882-2565 (MURPHY). It lasts 8 minutes and 40 seconds.	2017/05/14 10:23 PM
DUBROY-CLEMENT's phone sends a SMS message to 780 -617-4502 (Person 12) "Rv park why u comming her im whit the kid".	2017/05/15 2:54 AM
DUBROY-CLEMENT's phone receives a SMS message from 780-617-4502 (Person 12) "Lawrence?" His phone messages back "Ya".	2017/05/15 2:55 AM

[94] During the late evening of May 15, 2017, Dubroy-Clement helped Butt move out of his mother's house and into an RV Trailer at a campsite just outside of Peace River. The RV Trailer was parked by Lundstrom on the same lot that Dubroy-Clement occupied. The following message was sent by Butt to Dubroy-Clement at 8:48 p.m.

DUBROY-CLEMENT's phone receives a SMS message from 780-219-9321 (BUTT) "I'll bethere soon".	2017/05/15 8:48 PM
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[95] Later that night, the following text message exchange took place between Murphy and Dubroy-Clement.

MURPHY's phone SMS messages 780-617-4306 (DUBROY-CLEMENT) "Im leaving town now".	2017/05/15 11:40 PM
MURPHY's phone SMS messages 780-518-5010 (Person 2) "Whatever im on my way" and "To peCe".	2017/05/15 11:57 PM
MURPHY's phone receives a SMS message from 780-617-4306 (DUBROY-CLEMENT) "Ok kid is here whit dog and cash. toy is at his buddys place".	2017/05/15 11:58 PM
MURPHY's phone SMS messages 780-617-4306 (DUBROY-CLEMENT) "where are you". His phone replies "Im at camper whit kid".	2017/05/15 11:59 PM

May 16, 2017

MURPHY's phone SMS messages 780-617 -4306 (DUBROY-CLEMENT) "How do i get to the camper once i get to peace" and "Whos all at the camper".	2017/05/16 12:00 AM & 12:01AM
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MURPHY's phone receives 3 SMS messages from 780-617-4306 (DUBROY-CLEMENT) "So u comming here or going for toy what u thinking", "Just me kid and dog u comming. Y fairview", and "By*".	2017/05/16 12:02 AM & 12:03 AM
MURPHY's phone sends 3 SMS messages to 780-617-4306 (DUBROY-CLEMENT) "Yea", "But i literally just left ", and "Grande prairie".	2017/05/16 12:03 AM
MURPHY's phone SMS messages 780-617 -4306 (DUBROY-CLEMENT) "What kinda dog".	2017/05/16 12:18 AM
MURPHY's phone receives a SMS message from 780-518-5010 (Person 2) "fucking sick of bullshit ". His phone replies "Me too im getting something tonight kyle has him at the trailer he dont have a toy on him just the dog" and "the kids got cash".	2017/05/16 12:19 AM to 12:21 AM
MURPHY's phone receives a SMS message from 780-617-4306 (DUBROY-CLEMENT) "Lab female".	2017/05/16 12:21 AM
MURPHY's phone receives a SMS message from 780-518-5010 (Person 2) "Wheres the toy does he have food too". His phone replies "I dunno" and "The toy is at his buddies place".	2017/05/16 12:22 AM to 12:23 AM
MURPHY's phone SMS messages 780-617-4306 (DUBROY-CLEMENT) "How do i get to the camp ground once i get to peace river".	2017/05/16 12:24 AM
DUBROY-CLEMENT's phone receives a SMS message from 780-625-6539 (Person 4) "There gone for the night".	2017/05/16 12:56 AM
MURPHY's phone receives a SMS message from 780-617-4306 (DUBROY-CLEMENT) "Go straight threw across bridge up the hill stay straight until u see junk yard then turn left then first left".	2017/05/16 1:03 AM
DUBROY-CLEMENT's phone receives a call from 780-882-2565 (MURPHY). The call lasts 11 minutes and 39 seconds.	2017/05/16 1:42 AM
MURPHY's phone SMS messages 780 -617-4306 (DUBROY-CLEMENT) "5872979141" (BURKINSHAW's number) and "Send location".	2017/05/16 1:54 AM
MURPHY's phone receives a SMS message from 780-617-4306 (DUBROY-CLEMENT) "Dont do nothing tonight he knows ure comming heard u on phone".	2017/05/16 2:00 AM
DUBROY-CLEMENT's phone sends a SMS message to 780-625-6539 (Person 4) "Buddy came down to get paper".	2017/05/16 2:09 AM

MURPHY's phone receives a SMS message from 780-617-4306 (DUBROY-CLEMENT) "If u where to came back in like a hpur buddys kinda tripping things merphy and bryce know where wre are and they have rolled on him before".	2017/05/16 2:13 AM
MURPHY's phone receives a SMS message from 780-617-4306(DUBROY- CLEMENT) "He convinced there coming for him". His phone replies "Yeaa eh i could buddy buddy him".	2017/05/16 2:14 AM

[96] In the early morning hours of May 16, 2017, Murphy and Burkinshaw met Dubroy-Clement at his trailer located at the campsite near Peace River.

[97] Thereafter, Murphy, Burkinshaw, and Dubroy-Clement drove into Peace River where Dubroy-Clement collected money owing to him for a drug deal. While there, Dubroy-Clement received text messages from Butt with respect to the operation of a motor vehicle. Dubroy-Clement replied making reference to the safety of Butt.

DUBROY-CLEMENT's phone receives 2 SMS message from 780-219-9321 (BUTT) "How do you put the car In reverse" & "???".	2017/05/16 2:42 AM
DUBROY-CLEMENT's phone sends a SMS message to 780-219-9321 (BUTT) "Like i showed u lift the thing on shifter pull left as hard as possible then up".	2017/05/16 2:44 AM
DUBROY-CLEMENT's phone receives 2 SMS messages from 780-219-9321 (BUTT) "Should I go" & "Should I try to teach myself right now?". DUBROY-CLEMENT's phone replies with 2 SMS messages "I wouldnt have left u if i did t think u where safe" & "Plus u got girl".	2017/05/16 2:46 AM
DUBROY-CLEMENT's phone receives a SMS message from 780-219-9321 (BUTT) "Let's tell bryce and murphy bear nuckle brawl at fas gas nampa 3:30am".	2017/05/16 2:55 AM
DUBROY-CLEMENT's phone receives a SMS message from 780-219-9321 (BUTT) "Hurry back bro".	2017/05/16 3:11 AM

[98] After the trip to Peace River to collect money, Dubroy-Clement, Murphy, and Burkinshaw went to the RV Trailer, where they met Butt. Murphy at some point while in the RV Trailer had a bag which contained a shotgun.

MURPHY's phone SMS messages 587-297-9141 (BURKINSHAW) "Go to the washroom in 20 minutes".	2017/05/16 4:04 AM
MURPHY's phone SMS messages 587-297-9141 (BURKINSHAW) "Fuck it go". Her phone replies "Kk one sec".	2017/05/16 4:07 AM

[99] From one of the statements of Dubroy-Clement and the evidence of Burkinshaw, I accept that the two went to the washroom facility at the campground. On route back to the RV Trailer, Burkinshaw received the following text message from Murphy.

MURPHY's phone SMS messages 587-297-9141 (BURKINSHAW) "Tje dogs going to attack me if i do it tell kyle to come bak in" and "So he can distract the dog."	2017/05/16 4:20 AM
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[100] After Burkinshaw told Dubroy-Clement about the text message, he walked ahead of Burkinshaw and went into the RV Trailer.

[101] Burkinshaw then entered the RV Trailer. For a brief period of time, Dubroy-Clement, Murphy, Butt, and Burkinshaw remained in the Trailer together.

[102] Sometime after 4:22 AM, Burkinshaw left the trailer to go to the car. Thereafter, Murphy fired the shotgun killing Butt. Burkinshaw testified she heard the gunshot and dropped the keys to the car. Dubroy-Clement and Murphy then ran out of the RV Trailer with Murphy holding a bag stolen from the Trailer.

[103] All three entered the Kia Rio car. Burkinshaw drove the car away with Murphy as the front seat passenger and Dubroy-Clement as a rear seat passenger.

[104] As Burkinshaw drove away, according to her evidence, Murphy searched the bag for drugs and money, finding nothing. Murphy then handed the bag to Dubroy-Clement who also searched it finding nothing.

[105] Burkinshaw stopped the car by a highway sign east of the campground location where, from the evidence I conclude, one of the two men hid the shotgun near the sign. Dubroy-Clement knew the location because he returned later to retrieve the gun, evidence I accept from his statement.

[106] Burkinshaw drove the car back near the campsite where Murphy exited. Murphy returned to the RV Trailer.

[107] Between 5:12 a.m. and 5:41 a.m. the following text messages were exchanged:

MURPHY's phone receives a SMS message from 780-617-4306 (DUBROY-CLEMENT) "Yo".	2017/05/16 5:12 AM
MURPHY's phone receives a SMS message from 780-617-4306 (DUBROY-CLEMENT) "U good".	2017/05/16 5:38 AM
MURPHY's phone sends 2 SMS messages to 587-297-9141 (BURKINSHAW) "Im at the co op card lock" and "Hurry". Her phone replies "K coming" and "U hera or see anything".	2017/05/16 5:41 AM to 5:44 AM

[108] Thereafter, Murphy met Burkinshaw and Dubroy-Clement at the Co-op cardlock on the east hill out of Peace River. Burkinshaw drove the Kia Rio to downtown Peace River where Dubroy-Clement exited the vehicle.

[109] During the day of May 16, 2017, Dubroy-Clement, Bonnie Casselton, and Lundstrom removed the RV Trailer from the campsite to a location on the Reno Road, south and east of the campsite. Dubroy-Clement burned the Trailer with the body of Butt inside it.

May 17, 2017

[110] On the morning of May 17, 2017, Dubroy-Clement sent the following message to Murphy:

MURPHY's phone receives a SMS message from 780-617-4306 (DUBROY- CLEMENT) "Yo might have more paper theres 8-IOk somewhere i think its in moms house im almost in house il let u know what i find".	2017/05/17 6:37 AM
DUBROY-CLEMENT's phone sends a SMS message to 780-625-6539 (Person 4) "They should be almost here and even if i gotta fuckin smash window im doing it".	2017/05/17 6:44 AM

[111] That same morning, Dubroy-Clement broke into the house of Marianne Villeneuve and took money hidden by Butt.

[112] The following day, May 18, 2017, Dubroy-Clement gave a statement to the police denying any involvement holding out that Butt disappeared while he went downtown with “John” to collect money. He told the police he burnt himself while pouring gas on a hotdog fire at the campgrounds.

[113] On May 23, 2018, Dubroy-Clement gave a statement to the police acknowledging that he burnt the RV Trailer and broke into the home of Marianne Villeneuve, from which he stole \$9,000 more or less on the morning of May 17, 2017.

Analysis of the Offences

Robbery or Impulsive Killing Followed by a Theft

[114] The Defence in submissions argued that Murphy did not rob Butt. Rather, Murphy impulsively killed Butt, then went about stealing property from the RV Trailer.

[115] Respectfully, I disagree with this submission; the evidence suggests otherwise. I find Murphy robbed Butt, and that in doing so used a firearm.

[116] Proof of robbery requires proof that Murphy:

- a) stole something from Butt (commission of a theft); and
- b) used one of the four methods specified in section 343 to carry out the stealing.

See: *R v Newell*, 2007 NLCA 9 at para 21 [*Newell*]

[117] Generally speaking, the additional feature which turns theft into robbery is the presence of violence or a threat of violence: *Newell* at para 21.

[118] *Martin’s Annual Criminal Code, 2018, Judicial Edition*, provides the following helpful synopsis with respect to robbery:

Every person who steals and uses violence or threats of violence to another person or property in order to overcome resistance to the stealing or to extort whatever is stolen, commits the form of robbery set out in para (a). Everyone who steals from

any person and during the course of the stealing, or immediately before or after, wounds, beats or uses any personal violence to that person commits the form of robbery set out in para (b). A person who assaults another person with the intent to steal from him commits the offence of robbery described in para (c). Finally, everyone who steals from any person while armed with an offensive weapon or an imitation thereof, commits the offence of robbery described in para (d). It is to be noted that paras (a), (b) and (d) require proof of the act of stealing as one of the elements of the offence. Para (c) requires proof only of an intent to steal as an essential element. (p 711)

[119] For Murphy to be found guilty of robbing Butt under s 343(b) of the *Criminal Code*, for example, violence must have been inflicted upon Butt at a time immediately proximate to the time of the theft, whether immediately preceding or following the theft: *R v Lieberman*, [1970] 5 CCC 300 at para 32 (WL), 1970 CanLII 393 (Ont CA); *Newell* at 25; *R v Crabe* (1993), 79 CCC (3d) 323 at para 11 (WL), 1993 CanLII 14715 (BCCA). There is no requirement that the violence must exactly accompany the theft.

[120] Here I am satisfied that Murphy stole Butt's bag from the RV Trailer as he believed it contained money and drugs. He had no colour of right to the bag and he had no intention of returning it to Butt. I accept Burkinshaw's evidence that Murphy had the bag and searched it for money and drugs in the Kia Rio.

[121] Murphy used violence against Butt at a time immediately proximate to the time of the theft of his bag. He shot him dead with a shotgun.

[122] I infer from the evidence that Murphy used violence to prevent Butt from resisting, to allow him to steal Butt's bag and later the money he found after returning to the RV Trailer. He returned to the scene because he found no money or drugs in Butt's bag. The later taking of the money from the RV Trailer was a continuation of the theft for which he had used violence.

[123] This was not an impulsive killing and later a theft of property from the RV Trailer. Burkinshaw testified, and I accept her evidence, that she knew from her discussions with Murphy that he intended to rob Butt.

[124] I find that Murphy did rob Butt and killed him while in the process of robbing him. It does not matter whether the shooting occurred immediately prior to or following the theft for Murphy to be found guilty of robbery under s 343(b) of the *Criminal Code*. The use of violence must have been proximate in time with the theft. I am satisfied that it was.

Dubroy-Clement as a Party

[125] I am satisfied that Murphy robbed Butt. The next question to determine is whether the Crown has proven beyond a reasonable doubt that Dubroy-Clement was a party to the robbery of Butt, in particular with a firearm.

[126] In *R v Saunders*, [1990] 1 SCR 1020 at 1023, the Supreme Court of Canada advised: "It is a fundamental principle of criminal law that the offence, as particularized in the charge, must be proved." In this case, count 2 on the Indictment reads:

ON OR ABOUT THE 16TH DAY OF MAY, 2017, AT OR NEAR PEACE RIVER, ALBERTA, [KYLE DUBROY-CLEMENT] DID USE A FIREARM, IN ROBBING LAWRENCE BUTT, CONTRARY TO SECTION 344(1)(A.1) OF THE CRIMINAL CODE OF CANADA.

[127] The wording of the Indictment alleges that Dubroy-Clement used a firearm “in robbing Lawrence Butt.” The reference to the robbery of Butt in the charge must be read together with the words of the enactment that describes the offence, namely, s 343 of the *Criminal Code*. The Indictment does not specify any one of the particular modes of robbery described in ss 343(a) to (d). See: **R v AD**, 2003 BCCA 106 at para 29 [**AD**]. Of importance, the accused was not charged with armed robbery under s 343(d). Therefore, it is open to this Court to find the accused guilty of robbery under any of the subsections of s 343.

[128] The words “did use a firearm” in the Indictment and “where a firearm is used” in s 344(1)(a.1) of the *Criminal Code* are relevant to the question of sentence only. The use of a firearm is not an essential element of the offence of robbery. Rather, it is an essential component of the applicable sentencing ranges set out in s 344(1). As a firearm was used in the robbery committed by Murphy, the reference to s 344(1)(a.1) of the *Criminal Code* put the accused on notice that he faces a minimum sentence of 4 years’ imprisonment if found guilty of robbing Butt: **AD** at paras 30-31; **R v Watson**, 2008 ONCA 614 at para 24 [**Watson**]; **R v Manley**, 2011 ONCA 128 at paras 60-61; **R v Cudmore**, 2020 ABCA 389 at para 6.

[129] The Crown does not argue the evidence makes out proof beyond a reasonable doubt that the accused committed the robbery; rather, the Crown submits he aided or abetted Murphy to rob Butt. Further, the Crown submits the accused knew and intended that Murphy use a firearm in the robbery and aided him in so doing.

[130] In the alternative, the Crown alleges the accused and Murphy made an agreement to rob Butt. Murphy went further and committed a different offence, robbery with a firearm. The Crown contends Dubroy-Clement should have foreseen Murphy would probably use a firearm in carrying out their original agreement.

Aiding

[131] The *actus reus* of aiding is doing something, or in some circumstances, omitting to do something, that assists or supports a principal offender to commit the offence. Broadly speaking, “[t]o aid under s. 21(1)(b) means to assist or help the actor”: **Briscoe** at para 14 and **R v McKay**, 2012 ABCA 310 at para 13 [**McKay**].

[132] There is no need for the trial judge to decide the precise nature of an accused’s participation in order to find the accused was a party to the offence: **R v Thatcher**, [1987] 1 SCR 652. That said, mere presence at the scene of the commission of the offence is not sufficient. It can, however, be evidence of aiding if accompanied by other factors, such as prior knowledge of the principal offender’s intention to commit the offence: **R v Dunlop**, [1979] 2 SCR 881 at 891, 1979 CanLII 20 [**Dunlop**].

[133] Moreover, doing or omitting to do something that resulted in assisting another in committing an offence is not sufficient to attract criminal liability. The aider must also have the requisite mental state or *mens rea*. The person must have provided the assistance for the purpose of aiding a principal offender to commit the offence: **Briscoe** at para 15; **R v Cowan**, 2020 SKCA 77 at para 28 [**Cowan**].

[134] The law requires proof beyond a reasonable doubt of both intent and knowledge to render the accused liable as an aider. The Crown must prove that the accused intended to assist a principal offender in the commission of the offence and further that the accused knew a principal offender intended to commit the offence, although he or she does not need to know precisely

how the offence will be committed: *Briscoe* at paras 16 and 17; *Cowan* at paras 26-28. Further, the aider need not share the intent of the principal to commit the offence: *Briscoe* at para 18.

[135] As the accused was charged under s 344(1)(a.1) of the *Criminal Code*, it is not necessary that I find that he knew Murphy was armed with a firearm (s 343(d)) or that he intended to use the firearm during the commission of the offence in order to find the accused guilty of aiding Murphy in committing the robbery under s 21(1)(b).

[136] At the first step of *W(D)*, I do not believe Dubroy-Clement's exculpatory statement to the police that he did nothing to plan the robbery of Butt or otherwise assist in the robbery.

[137] Dubroy-Clement consistently lied to the police during his first statement of May 18, 2017.

[138] Dubroy-Clement misled the police when he was asked how Murphy knew Butt was there at the RV Trailer when he answered "he didn't." "I never even mentioned anything." "Nothing." This is not true, in light of the text messages of May 15, 2017 sent at 11:58 pm and 11:59 pm in which Dubroy-Clement tells Murphy that the kid, that is Butt, is here with him, with cash, and without a firearm. Dubroy-Clement could have provided false information in the text but he did mention Butt at a particular location.

[139] Moreover, when he did admit his responsibility for the burning of the RV Trailer and the break-in at Marianne Villeneuve's house, he repeatedly misled the police and did not fully disclose until pressed by the police or until it became obvious to him that the police already had information that he was withholding from them. The following details provide some of the misleading information that he gave to the police. He gave a vague answer then acknowledged that Murphy had tattoos on his hands. He misled the police about the third person, Burkinshaw, being at the RV Trailer at the time of the shooting until pressed by the police with respect to the security video indicating a third person was present. He left out the fact that while in the car with Murphy and Burkinshaw, after leaving the scene of the robbery, he looked through the bag which I have found as a fact he did, based on the evidence of Burkinshaw. He then told the police that nothing of significance happened on Wednesday, before he went on to admit that he broke into the house of Marianne Villeneuve.

[140] Due to his extensive lying, his efforts to mislead the police, and weighing his denial against all of the evidence, I do not believe his denial with respect to having played no part in the robbery of Butt.

[141] The second step of the *W(D)* analysis requires a detailed review of the evidence. It requires examining the accused's exculpatory statement(s) internally against his own evidence and externally against the other evidence in the trial.

[142] This means a blending in this case somewhat of steps two and three in the *W(D)* analysis. Upon my assessment of the evidence, I reject the accused's denial that he had prior knowledge of and assisted with the robbery. Instead, I am satisfied beyond a reasonable doubt, based upon the totality of the evidence, that Dubroy-Clement assisted Murphy in the robbery of Butt.

[143] My decision relies in part upon what Dubroy-Clement knew, what he did with that knowledge, and the relevant times he had the knowledge and acted on it.

[144] The position taken for the defence of Dubroy-Clement rests with his statement to the police that Murphy came to Peace River on May 15 – 16, 2017 to bring drugs to and collect money from himself, not Butt.

[145] I reject that explanation. On the evidence it makes no sense. If Murphy only made the trip to supply drugs to and collect money from Dubroy-Clement, which did happen, then Butt should have played no part in the event. Butt, however, features prominently in the text messages regarding both the May 12, 2017 and the May 15, 2017 Grand Prairie to Peace River trips.

[146] Furthermore, if Dubroy-Clement thought Murphy planned to come to Peace River only to bring him drugs and to collect money from him, it made no sense for Murphy to cover his tattoos in order to protect his identity. The two were known to each other.

[147] Dubroy-Clement knew as early as the evening of May 10 and the afternoon of May 11, 2017, that Butt had demanded the return of his firearm from Dubroy-Clement. Thereafter, Dubroy-Clement could, although Butt might have lied, assume that Butt may have no firearm with which to arm and protect himself.

[148] The accused in his May 23, 2017 statement to the police acknowledged he knew that Butt had money and knew where he kept it, at his mother's home. He knew of these two matters because, as he said to the police, "he was my kid" and "the kid always kept me aware of that kind of stuff."

[149] Sometime in May, 2017, which I have concluded must have occurred before the killing of Butt, Dubroy-Clement told Lundstrom he wanted to push Butt out of the Peace River drug trade. From those words, which I have admitted for the truth of their contents, I do not infer, and no other evidence supports, that he then went about planning the robbery of Butt. However, from the words I conclude he wanted something done by himself or on his behalf that would reduce Butt's trade in Peace River and increase his own trade in the sale of illegal drugs.

[150] With respect to both the May 12 and May 15, 2017 trips, the accused had information from the text messages that Murphy planned to come to Peace River. He expected Murphy to make the trip.

[151] Dubroy-Clement also knew that Murphy had told him he planned to cover his tattoos. Burkinshaw, in her evidence, confirmed that she did cover Murphy's tattoos. I accept her evidence on that point. Whether or not Dubroy-Clement could rely on that information, he knew that Murphy had told him he would take steps to conceal his identity.

[152] Concealing identity in the circumstances, on balance, can only relate to avoiding the detection of a perpetrator of a criminal act. As Murphy and Dubroy-Clement already knew one another, the logical inference is that Murphy wanted to conceal his identity from Butt.

[153] After the murder, Murphy took no action against Dubroy-Clement. Murphy had a witness to a gratuitous killing. Doing nothing about it, as against Dubroy-Clement, indicates his confidence in Dubroy-Clement as someone he could trust.

[154] In relation to both trips, Dubroy-Clement provided directions to Murphy as to the whereabouts or at least possible whereabouts of Butt.

[155] On the first trip on May 12, 2017, which fell apart because of the flat tire, he sent a text providing an address to "kids" house on 99 Street. Marianne Villeneuve confirmed she lived on 99 Street.

[156] On the May 15, 2017 trip, Dubroy-Clement gave directions as to how Murphy could find the campground where Butt was staying. Whether or not he provided truthful directions, he could provide such information to Murphy because Dubroy-Clement helped Butt set up the RV Trailer

on the same lot which Dubroy-Clement occupied at the campsite. Eventually Murphy did arrive at the campground where he met Dubroy-Clement.

[157] On May 13, 2017, in a text message, Person 10 told Dubroy-Clement that s/he did not want to be involved in this job. The person went further, pleading “please don’t go to [sic] savage on him. I know he will cooperate with you.” Whether the contents of the text message are true or not, Dubroy-Clement knew someone had told him about a job that was planned involving “the kid.” The person was telling Dubroy-Clement not to use too much violence when he used the words “to” [sic] “savage”. This person at least was placing in the mind of Dubroy-Clement that s/he expected Dubroy-Clement to use violence against Butt during “the job.”

[158] The day after the May 12, 2017 trip fell apart, Dubroy-Clement followed up with a text message to Murphy saying: “U still coming.” Murphy replied telling Dubroy-Clement that he needed to borrow a truck. Dubroy-Clement informs him of one that Murphy rejects as likely to break down, whereas Murphy needs something that he “can get away from the cops with.”

[159] At that moment Dubroy-Clement was aware that Murphy had told him that Murphy needed a vehicle in which he could get away from the police. He made no inquiry as to why Murphy would need a truck to get away from the cops.

[160] Dubroy-Clement was also aware that Murphy’s involvement in the drug trade included collecting money. He knew, I infer from his own involvement in that trade, that collecting money can involve violence. Thus, in these circumstances, in the mind of Dubroy-Clement, Murphy must have wanted to flee after committing a criminal act.

[161] At 11:40 p.m. on May 15, 2017, Dubroy-Clement received a message from Murphy advising that Murphy was just leaving town. In Dubroy-Clement’s mind Murphy was coming to Peace River.

[162] At 11:58 p.m., eighteen minutes later, Dubroy-Clement tells Murphy that Butt is here with his dog and cash and has no firearm, the firearm is at his buddy’s place. Murphy appears to subjectively accept this information as one minute later he passes it on to Person 2.

[163] At 12:02 a.m., Dubroy-Clement again inquires which way Murphy will travel and then again confirms that it is just himself, Butt, and a dog together.

[164] At 1:42 a.m. on the morning of May 16, 2017, Dubroy-Clement and Murphy spoke on the phone for 11 minutes and 39 seconds. Then at 2:00 a.m. Dubroy-Clement sent a message to Murphy “Dont do nothing tonight he knows ure coming heard u on phone.” At that point it is obvious that Dubroy-Clement is expecting Murphy to do something to Butt. Dubroy-Clement has now told Murphy, that he, which can only refer to Butt, knows of the impending visit by someone.

[165] I infer from this text message that Dubroy-Clement must have known something was going to happen between Murphy and Butt.

[166] Although Dubroy-Clement has told Murphy of the suspicions of Butt and has told him not to do anything tonight, he does not withdraw or otherwise act to prevent whatever might occur between Murphy and Butt. Instead in the next two texts Dubroy-Clement sends to Murphy he suggests that Murphy come back in an hour because “buddys,” which I take to be Butt, “kind of tripping things.” Dubroy-Clement goes on to explain that two other individuals have “rolled on him before,” which I take to mean used force or threats with respect to Butt. Dubroy-Clement

then suggests that he could “buddy buddy him.” Although Dubroy-Clement could have tried to mislead Murphy with false information, Dubroy-Clement’s later texts show otherwise.

[167] While collecting money in Peace River with Murphy and Burkinshaw, Dubroy-Clement exchanged text messages (between 2:42 a.m. to 2:46 a.m.) with Butt which suggest he was trying to “buddy buddy him.” Dubroy-Clement ensured Butt he would not have left him if he did not think he was safe and reminded him that he has the dog.

[168] He also provided Butt with some information as to how to drive the car, which I infer to be the vehicle Butt had just purchased from his mother.

[169] Somewhat earlier at 2:09 am, Dubroy-Clement sent a message to an individual identified as Person 4, “buddy came down to get paper.” I understand this to mean that someone had come to Peace River to collect money.

[170] In all of the circumstances from the evidence, “buddy” could only mean Murphy. Murphy, on the evidence of Burkinshaw and Dubroy-Clement’s statement, did collect money from Dubroy-Clement as part of his trip to Peace River. However, thereafter, Murphy, accompanied by Burkinshaw and Dubroy-Clement, met with Butt at the RV Trailer. The text message therefore could also refer to Murphy coming to Peace River to take money from Butt.

[171] From the surrounding evidence Dubroy-Clement knew Murphy wanted to connect with Butt. An inference from that evidence can therefore be drawn that the only reason for that meeting could be that Murphy wanted to take money, and possibly drugs, from Butt.

[172] After driving around Peace River collecting money, Murphy, Burkinshaw, and Dubroy-Clement returned to the campsite and joined Butt at the RV Trailer. At some point thereafter, Burkinshaw needed to go to the bathroom. Murphy subsequently sent text messages instructing Burkinshaw to go. This meant she had to go to an outside facility. Dubroy-Clement explained in a statement that he went with her because the door required a code and it could prove difficult to manipulate. Notwithstanding my findings with respect to the credibility of the accused at the first step of the *R v W(D)* analysis, I accept this as a reasonable explanation as to why he accompanied Burkinshaw to the outside washroom facility.

[173] The two went and as they walked back, Burkinshaw received a text message from Murphy. The text message told her that Murphy was concerned that the dog was “going to attack me if i do it.” He went on further to say “tell kyle to come bak in.” He then stated “So he can distract the dog.”

[174] On the evidence of Burkinshaw, which I accept, Dubroy-Clement did hurry ahead as requested. Burkinshaw followed and eventually went into the RV Trailer, which now contained all four of the individuals.

[175] The only reasonable inference is that Dubroy-Clement hurried back to the RV Trailer because, in his mind, he intended to help Murphy to “do it” by distracting the dog. I further infer that the words “do it” referred to an act of violence against Butt which might cause the dog to attack anyone harming Butt.

[176] At the moment that Murphy shot Butt, Dubroy-Clement must have known, as would any reasonable person, that Butt could not survive the shotgun blast to his upper body. Dubroy-Clement knew that Murphy had just murdered someone that Dubroy-Clement later told the police he considered family.

Post Offence Conduct of Dubroy-Clement

[177] Dubroy-Clement's post-offence conduct provides circumstantial evidence of his culpability for the robbery of Butt. It pertains to the issue of whether he aided or helped Murphy in robbing Butt.

[178] The purpose of considering the evidence is to weigh whether it makes his alleged aiding of Murphy to rob Butt more or less likely.

[179] I have used the evidence of his post-offence conduct to draw inferences as to what must have been in his mind and his knowledge before and after the robbery and killing of Butt. I have also used it to determine his intentions in regard to assisting or helping Murphy in committing the robbery against Butt and therefore to determine whether the Crown has established the requisite *mens rea*.

[180] After the shooting of Butt, Dubroy-Clement "barrelled out" of the RV Trailer leaving the scene of the killing apparently with no concern for the welfare of his "friend."

[181] He thereafter fled the scene with the killer in the car brought by the killer.

[182] In the car, the accused went through the stolen bag after Murphy searched it.

[183] Dubroy-Clement, in a statement, said that Murphy threatened him with the shotgun by holding it in his face in the car. I reject that any such thing happened.

[184] Burkinshaw did not testify to that happening, but I put no weight on the absence of that evidence from her. In the trial she went through the events mostly in chronological order, but as unusual as that event might be, she could have overlooked it. Moreover, no one directed her attention to the handling of the shotgun between Murphy and Dubroy-Clement in the vehicle. Accordingly, the fact that Burkinshaw did not say it happened does not undermine what Dubroy-Clement says did happen.

[185] What undermines and causes me to reject the alleged shotgun threat comes from Dubroy-Clement's own statement. From the evidence of Dubroy-Clement and Burkinshaw, Murphy occupied the front passenger seat and Dubroy-Clement occupied the rear passenger seat after they initially fled the scene of the killing. In his statement, Dubroy-Clement said that after the threat Murphy placed the shotgun behind the driver's seat. This would mean that not long after threatening Dubroy-Clement with the firearm, Murphy essentially handed the gun over to him by placing it beside him in the backseat. I do not believe that someone would hand a shotgun to a person that they had just threatened to shoot with it.

[186] Dubroy-Clement went through the bag taken by Murphy from Butt. If he had the least twinge of conscience or any horror regarding the gratuitous violence used against Butt, it did not stop him from searching the stolen property.

[187] The use which I make of all of this conduct is to conclude as a matter of common sense and logic it supports a reasonable inference that the accused expected Murphy to rob Butt because he immediately left after the event and helped look for the drugs and money they expected to find in the stolen bag.

[188] Thereafter, the accused stayed with the vehicle while Murphy went back to the RV Trailer to search it. This conduct again supports an inference that the accused expected Murphy to rob Butt because he remained with Murphy until Murphy finished looking for the money or drugs he wanted to take from Butt.

[189] Early on Wednesday morning May 17, 2017, Dubroy-Clement sent a text message to Murphy stating he thinks there is more money in the house of Butt's mother. He also sent a text message to Person 4 saying he will smash the window if necessary to get it. The accused later broke into Marianne Villeneuve's house and stole the money hidden by Butt.

[190] The break and enter and text messages suggest the accused knew Murphy wanted to take money from Butt and he continued by committing another crime to help him obtain that money.

[191] Dubroy-Clement provided a garbled explanation to the police in one of his statements about two individuals higher in the drug trade feuding over money and one of them turning to Butt to recover it. He also explained that any debt of Butt would become his debt. The better explanation and the inference which I make is that the break, enter and theft Wednesday morning amounted to a continuation of the taking of money from Butt.

[192] Logically, if Dubroy-Clement had not expected Murphy to rob Butt or had no intention of helping Murphy with the robbery of Butt, he would not have continued to associate with the man who had killed his friend. He would have found a reason to withdraw from the situation, rather than continue to be involved in it. He would not have waited while Murphy went back to search the Trailer. He would not have gone to the house of Ms. Villeneuve to break in and steal money after telling Murphy he thought he would find money there.

[193] Upon a consideration of the evidence of Dubroy-Clement's post-offence conduct, the only reasonable inference I can draw is that Dubroy-Clement knew Murphy intended to rob Butt and intended to help him.

[194] I am satisfied beyond a reasonable doubt that Dubroy-Clement assisted Murphy and he intended to assist Murphy with the robbery of Butt. To summarize, he provided advice with respect to the location of the victim, directions to that location, information as to Butt lacking a firearm and to him having cash. He hurried in response to the request of Murphy that he come back to the RV Trailer to distract Butt's dog. He remained with Murphy after the shooting of Butt and helped him search the bag in the car. He remained in the car while Murphy went back to the RV Trailer to look for more money. Then he stole more money on his own on Wednesday morning at the home of Butt's mother.

[195] The only reasonable inference which I can make is that he knew he was assisting and intended to assist Murphy with the robbery of Butt. Therefore, Dubroy-Clement aided Murphy to rob Butt and is guilty as a party to the robbery. Given Butt was fatally wounded during the robbery, and that the wounding was proximate in time to the robbery, I find the accused guilty of robbery under s 343(b) of the *Criminal Code*.

Armed Robbery

[196] I am not satisfied beyond a reasonable doubt that the accused is guilty of armed robbery under s 343(d) of the *Criminal Code* because of the lack of proof that Dubroy-Clement knew that Murphy was armed with a firearm until he removed it from the bag and shot Butt.

[197] To prove aiding in an armed robbery requires proof the accused knew the principle carried a weapon. The Ontario Court of Appeal explained in *Watson* at paras 40-44:

[40] Although I agree that the trial judge's instructions and recharge could have been clearer, I am satisfied that they were adequate to ensure that the jury would not convict unless they were satisfied that the appellants participated in a theft at a time when they knew Smith had a gun. I say that for three main reasons.

[41] First, I consider that it would have been obvious to the jury, based on the aiding and abetting instructions, that they could only convict on count 1 if they were satisfied that Watson participated in the robbery at a time when he knew Smith had a gun.

[42] In instructing the jury on aiding and abetting, both in his charge and in his recharge, the trial judge stated repeatedly that actual assistance (or actual encouragement by acts or conduct) is necessary, that aiding (and abetting) relates to a specific offence, and that the aider (or abettor) must intend to help (or encourage) the other person commit the offence.

[43] Given the instruction that actual assistance (or encouragement) is necessary and that mere presence is not enough, the jury would necessarily have understood that in order to be guilty of count 1, they had to find that a particular appellant actually did something (such as pick up garbage bags) to assist (or encourage) commission of the offence.

[44] Further, in my view, the repeated instruction that aiding (and abetting) must relate to a specific offence is significant. In the face of the instructions that aiding (and abetting) relate to a specific offence, and that the aider (or abettor) must intend to help or encourage the other person to commit the offence, it would have been obvious to the jury that in order to intend to assist (or encourage) an armed robbery, the particular appellant had to know the person they intended to assist was armed.

[198] In *R v Kennedy*, 2016 ONCA 879, the Ontario Court of Appeal advised at paras 24-26:

24 The trial judge's instructions on party liability were not correct. On the evidence, only one of the intruders had a weapon, and it was not unequivocal who that was. Nowhere in the instruction does the trial judge instruct the jury that to find the non-gun-wielding intruder guilty of the offences as charged, it must find that he knew the other intruder had the imitation firearm: *R. v. Koroma*, 2012 ONSC 4397 (Ont. S.C.J.), at paras. 88-90; *R. v. Chang*, [2007] O.J. No. 5787 (Ont. S.C.J.), at paras. 44-46, *aff'd* 2009 ONCA 564 (Ont. C.A.), at para. 4.

25 The importance of instructing the jury on this knowledge element was addressed by this court in *R. v. Watson*, 2008 ONCA 614, 240 O.A.C. 370 (Ont. C.A.). In *Watson*, the appellants accompanied a friend to a clothing store just after he had purchased garbage bags and gloves. The friend was carrying a loaded firearm. The three robbed the store, but the appellants claimed they were not aware the friend had a firearm until he pulled it out in the course of the robbery. On appeal, the appellants argued that the jury charge was flawed: the jury was not told that it could only find the accused guilty of armed robbery if satisfied that the accused had participated in the theft knowing that the friend had a firearm. In dismissing the appeal, this court held, at para. 40, that while the trial judge's instructions could have been clearer, taken as a whole they were "adequate to ensure that the jury would not convict unless they were satisfied that the appellants participated in a theft at a time when they knew [the friend] had a gun". The instructions on aiding and abetting and the summary of the parties' positions also made it clear that to convict either accused for offences involving a firearm

carried by a third person, that accused had to have known the third person had a firearm during the course of the robbery.

26 In this case, the jury would not have been aware that it had to be satisfied that each accused either carried the firearm or knew the other was in possession of a firearm. It is apparent from the question posed by the jury that it was unclear what would be required to find the non-gun-wielding intruder guilty of an offence involving a firearm. The re-charge, unfortunately, did not clarify this point.

[199] Most recently, in *R v Abdulle*, 2020 ONCA 106, the Ontario Court of Appeal noted at para 43:

43 Finally, as the Crown points out, the decision in *Kennedy* is unhelpful to the appellants. The appellants in that case were jointly charged with three offences: stealing while armed with an imitation handgun; assault with an imitation handgun; and using an imitation handgun while committing an indictable offence. It was in that context that this court held that the instruction on party liability was incorrect and that, in order to find the non-gun-wielding intruder guilty of the offences charged, it had to be proven that he knew the other intruder had an imitation firearm.

[200] From the evidence of Dubroy-Clement and my findings regarding Burkinshaw's observations, I cannot reject the evidence of the accused that he did not see the shotgun until Murphy took it out just before shooting Butt. The accused maintains that explanation throughout his statements entered as part of the ASF.

[201] If Burkinshaw did not see it in the RV Trailer before she went out to the Kia Rio and heard the shot, no other evidence points to Dubroy-Clement seeing it until just before the shooting. Nor is there any evidence that she told Dubroy-Clement anything about the shotgun so as to fix him with knowledge that Murphy had it or any firearm in his possession.

[202] Accordingly, the evidence does not make out that Dubroy-Clement saw or knew Murphy was armed with the shotgun or any firearm until Murphy took it out of the bag and shot Butt.

[203] Therefore, although having found Dubroy-Clement aided Murphy to Rob Butt, Dubroy-Clement is not guilty of robbery while armed with an offensive weapon under s 343(d) of the *Criminal Code*.

Abetting

[204] Proof of abetting requires proof beyond a reasonable doubt of conduct and a state of mind on behalf of the accused to encourage, instigate, promote, or procure the commission of an offence by another person: *Briscoe* at para 14 and *McKay* at para 13. Abetting requires actual encouragement by words or conduct or both.

[205] Mere presence when the offence was committed by someone else, as with aiding, does not found liability: *Dunlop* at 891. The *mens rea* requires that the abettor have knowledge of the offence and the intent to encourage the other person to commit the offence: *Briscoe* at paras 16-17; *R v Nyuon*, 2014 ABCA 130 at para 11. It is not enough that what the abettor says or does has the effect of encouraging the other person to commit the offence; intention is required.

[206] Having found that the accused aided Murphy in committing the robbery of Butt, it is not necessary that I consider whether he also abetted Murphy in committing the offence.

[207] Nevertheless, on my consideration of the evidence, it would not support a finding that Dubroy-Clement encouraged, instigated, promoted, or procured the commission of the offence of robbery by Murphy.

[208] Although the evidence from the text of Dubroy-Clement to Lundstrom from which I have concluded he wanted something done either by himself or on his behalf does give me some suspicion of what he may have discussed with Murphy, it falls short of proving abetting.

Common Intention

Robbery with a Firearm

[209] In this case, the Crown submits if it has not proven that the accused aided or abetted Murphy in committing robbery with a firearm, then under s 21(2) of the *Criminal Code*, the evidence proves beyond a reasonable doubt that Dubroy-Clement is guilty of robbery with a firearm.

[210] Subsection 21(2) renders an individual liable for having joined in a criminal venture which results in another person in the venture committing a different offence while pursuing the original goal.

[211] The three elements the Crown must prove are as follows:

- a) Agreement or common intention;
- b) Offence different than the one agreed to by the parties committed while carrying out the agreement; and
- c) Knowledge, generally whether the accused knew or ought to have known the offence committed by a principle was a probable consequence arising from their unlawful agreement.

[212] The Crown argued a common plan to rob turned into a robbery with a firearm.

[213] There is no separate offence known as robbery with a firearm. Stealing from any person while armed with an offensive weapon is one of the modes in which the offence of robbery can be committed (s 343(d)). As well, a firearm could be used to threaten the victim (s 343(a)) or could have wounded the victim (s 343(b)). These are all forms of the same offence, being robbery.

[214] As the Crown did not particularize the mode of robbery used in the Indictment, the Crown's argument would have had to be that the parties formed the common intention to carry out a theft, which converted into a robbery because of the use of violence against Butt. This was not argued by the Crown.

[215] This leaves only a common intention to rob which became a murder.

Manslaughter

[216] The required *mens rea* or state of mind for the offence of manslaughter is objective foreseeability of the risk of bodily harm that is neither trivial nor transitory, in the context of a dangerous act. There is no requirement of foresight of death: *R v Creighton*, [1993] 3 SCR 3 at 42-45; *R v Jackson*, [1991] 68 CCC (3d) 385 at 417-8 (Ont CA), aff'd [1993] 4 SCR 573.

[217] The Crown alleges the accused is liable for manslaughter under s 21(2) of the *Criminal Code*, even if he did not participate in the killing of Butt, because he formed an intention in common with Murphy to carry out a robbery and that, in the course of the robbery, Murphy

committed a different offence, murder. The Crown argues that Dubroy-Clement knew or ought to have known that a probable consequence of carrying out the robbery was the carrying out of a dangerous act which a reasonable person would recognize as creating a risk of bodily harm to Butt which was neither trivial nor transitory. See: **R v Jackson**, [1993] 4 SCR 573 at paras 20, 33 and 47 [**Jackson**].

[218] For the Crown to prove the guilt of the accused under s 21(2), the Crown must prove three elements beyond a reasonable doubt:

- a) Agreement to rob Butt;
- b) An offence committed by Murphy other than robbery, in this case murder, while carrying out the agreement to rob Butt;
- c) Knowledge proven in one of two ways:
 - i. proving Dubroy-Clement knew or foresaw that murder was a probable consequence of carrying out their agreement to rob Butt: **Jackson** at para 33; or
 - ii. proving Dubroy-Clement “having formed an intention to carry out an unlawful purpose and to assist [Murphy], knew or ought to have known that a probable consequence of carrying out the common purpose was the carrying out by [Murphy] of a dangerous act which a reasonable person could recognize as creating a risk of bodily harm which is neither trivial nor transitory.” See: **Jackson** at para 47.

[219] Dubroy-Clement was charged with having committed manslaughter contrary to s 236(a) of the *Criminal Code*. As with the robbery charge, the reference to “using a firearm” in count 1 of the Indictment is relevant to the question of sentence only and is not an element of the offence of manslaughter. The offence of manslaughter is described in s 234 of the *Criminal Code*. Section 236 sets out the punishment for the offence.

[220] To prove agreement requires proof beyond a reasonable doubt “that the accused and the other participant(s) agree to carry out a common unlawful purpose and to help each other do so”: **R v Cadeddu**, 2013 ONCA 729 at para 58.

[221] This element differs somewhat from aiding which requires only assisting with knowledge and intent. Section 21(2) requires an agreement to carry out a common purpose and to help each other carry out that agreement.

[222] From the evidence reviewed in this decision, I am not convinced beyond a reasonable doubt of an agreement between the two men to rob Butt.

[223] Instructing juries, we often use the words “if you are sure.” In this case, I am sure Dubroy-Clement aided Murphy, but I am not sure the two ever made an agreement to rob Butt. If they did, it is not apparent in the text messages exchanged between them. Burkinshaw, who knew about Murphy’s plan to rob Butt, says she did not tell Dubroy-Clement about it. Nor does she mention any knowledge of an agreement between Dubroy-Clement and Murphy to rob Butt.

[224] If the two men made any such agreement, the evidence of it almost certainly lies in their telephone conversations or person to person conversations. As to evidence of those two types of communications, I have nothing.

[225] The circumstances give rise to much suspicion, but not to proof beyond a reasonable doubt.

[226] Therefore, at the second step of **W(D)**, I cannot reject the accused's evidence in his statement when he told the police he did not participate in a "plan" to rob Butt.

[227] Accordingly, lacking proof of an agreement to rob Butt, no finding of guilt can follow for the murder committed while carrying out the robbery.

Summary

[228] For the reasons provided, I find the accused Dubroy-Clement guilty of robbery and not guilty of manslaughter. The words in the indictment "while using a firearm" have put the offender on notice that he faces a possible minimum sentence.

Heard on the 8 to 12th day of March, 2021.

Dated at the Town of Peace River, Alberta this 28th day of May, 2021.

E.J. Simpson
J.C.Q.B.A.

Appearances:

Mark Mastel
for the Crown

Robert Wachowich
for the Accused