Court of King's Bench of Alberta

Citation: R v Underwood, 2022 ABKB 709

Date: 20221024
Docket: 200629988Q3
Registry: Edmonton

Between:

His Majesty the King

Crown

- and -

Buddy Ray Underwood and Tyra Muskego

Defendants

Decision
of the
Honourable Justice Robert A. Graesser

NOTE: The results of this decision were announced in open court on October 21, 2022. Counsel and the Defendants were given draft copies of this decision, and it was briefly summarized. I advised that I was reserving the right to make minor edits and formatting changes before publication, but nothing of substance would be changed. I have done so, and confirm that nothing of substance has been changed from what was provided on October 21, 2022.

Introduction

[1] Buddy Ray Underwood and Tyra Muskego are jointly charged that they, on or about the 7th day of April 2019, at or near Hinton, Alberta:

1. Did unlawfully cause the death of Nature Duperron, thereby committing first-degree murder, contrary to section 235(1) of the *Criminal Code of Canada*;

2. Did unlawfully kidnap Nature Duperron with intent to cause him to be confined or imprisoned against his will, contrary to section 279(1.1) (B) of the *Criminal Code of Canada*; and

3. Did steal property from Nature Duperron and at the time thereof did use violence (or threats of violence) to Nature Duperron, contrary to section 344(1)(B) of the *Criminal Code of Canada*.

[2] This decision follows a roughly three-week trial. The Crown alleges that the murder was first degree murder, either because Mr. Underwood and Ms. Muskego were parties to the planned and deliberate killing of Ms. Duperron under section 231(2) of the *Criminal Code* or because they are guilty of constructive murder under section 231(5) of the *Criminal Code*.

[3] The Defendants were charged jointly with Grayson Eashappie and Kala Bajusz. Mr. Eashappie and Ms. Bajusz resolved their charges on the first day of the trial. Those proceedings have been dealt with by Mr. Justice Little. During this trial, Mr. Eashappie is referred to by witnesses as "Grayson" or by "Rex". He apparently used both names.

[4] The key witness against the Defendants was Bret Desjarlais. Mr. Desjarlais is Mr. Underwood's cousin and was involved as the driver of the white truck used in connection with the robbery, kidnapping, forcible confinement, and transporting the group to and from the spot where Ms. Duperron was left to die.

[5] The Crown alleges that Ms. Duperron was robbed by Ms. Muskego and Ms. Bajusz after being driven around Central Edmonton in Bret Desjarlais' truck, accompanied by Mr. Underwood and Mr. Eashappie. Ms. Duperron was beaten up and her purse was stolen. Initially, she was let go. When Ms. Muskego and Ms. Bajusz found that there was not much in the purse, they instructed Mr. Desjarlais to drive around so they could find Ms. Duperron again.

[6] Ms. Duperron was spotted, and Ms. Muskego and Ms. Bajusz ran after her, eventually finding her in the cash machine kiosk of the Servus Credit Union at 11311 Kingsway Avenue in Edmonton. They dragged Ms. Duperron back to Mr. Desjarlais' truck, where Ms. Duperron was shoved onto the floor of the truck with Ms. Muskego, Ms. Bajusz and Mr. Eashappie sitting on the bench seat above her with their feet resting on her. Ms. Duperron was hit and kicked, and Ms. Bajusz searched her while Ms. Muskego held her down. Nothing of value was found.

[7] The group began driving around Edmonton until Mr. Underwood made a "call" that Ms. Bajusz knew too much, and they had to get rid of her. Mr. Desjarlais was directed to head west out of Edmonton. They stopped at Kim's No 1 Convenience Store near Beach Corner for gas. As they drove by Alberta Beach, Ms. Bajusz suggested that they dump Ms. Duperron in the lake. That was ruled out as not being practical.

[8] The group continued west on Highway 16. They stopped at Darwell where Mr. Desjarlais bought some alcohol for them to consume. Sometime between Darwell and Edson Mr. Eashappie injected Ms. Duperron with fentanyl. There were at least two more injections of fentanyl before the group reached Hinton.

[9] It is alleged by the Crown that Ms. Duperron was killed by overdoses of fentanyl administered to her by Mr. Eashappie and Mr. Underwood and that she died sometime after being handcuffed, knocked to the ground, and left to die in the bush just off Highway 40 near Hinton.

[10] Both Defendants pled not guilty and argue that the Crown has not proven their guilty beyond a reasonable doubt on any of the charges or included charges they face.

[11] Following the completion of the Crown's case, Mr. Underwood moved for a directed verdict of not guilty on all charges and included charges. Ms. Muskego moved for a directed verdict of not guilty on first degree murder. In an oral decision given on October 1, 2022, I dismissed those applications.

[12] Neither Defendant elected to call any evidence. Argument was given on October 6 and 7, and I reserved my decision to October 21.

Evidence

[13] Some of the evidence is not contested. There is video surveillance footage from the McDonalds Restaurant at 8132 112 Avenue, Edmonton, the Servus Credit Union on Kingsway Avenue in Edmonton, Kim's No 1 Convenience Store near Beach Corner heading westbound on Highway 16, a liquor store in Darwell, Fas Gas in Edson, the McDonalds Restaurant on Carmichael Lane in Hinton, and Tim Hortons in Edson. Times are not in dispute. There are cell phone records from Mr. Underwood's cell phone and from Mr. Desjarlais' cell phone, as well as pings from both cell phones off cell towers in various locations confirming that the cell phones were near those towers at various times on April 7, 2019. Those times and locations accord with Mr. Desjarlais' account of what occurred that day in relation to Ms. Duperron.

[14] During the RCMP investigation, Mr. Desjarlais acted as an RCMP agent and participated in recorded conversations with Ms. Muskego, Mr. Underwood, and Mr. Underwood's girlfriend Cassandra Cann. Conversations between Mr. Underwood and Ms. Cann were also recorded.

[15] Mr. Desjarlais' bank records are in evidence, and there have been various agreements on other relevant facts.

[16] There was no issue over the cause of Ms. Duperron's death and the evidence of the medical examiner and chief toxicologist were essentially accepted without any controversy.

[17] The controversial evidence is mainly that of Mr. Desjarlais. His credibility and reliability are very much in issue. Additionally, Jessica Desjarlais, another Crown witness, gave evidence that contradicted or at least was inconsistent with Mr. Desjarlais testimony.

[18] I will only deal with the evidence in any detail where it is contested.

Narrative – Bret Desjarlais

[19] Since the key witness was Bret Desjarlais, I will begin with his narrative. Mr. Desjarlais was raised in Evansburg. He completed school and became a welder. At the time in question, he was 25 years old. He was working in Edmonton but still living in Evansburg and commuting back and forth. Mr. Desjarlais had long-standing drug issues and described himself as a user of meth amphetamine, cocaine, and heroin. He supplemented his income by selling drugs. No criminal record was put in evidence.

[20] On April 6, 2019, he was working in Edmonton. He had an eighth of an ounce of heroin that he wanted to sell. He thought his cousin Buddy Underwood might be able to help him. Mr. Desjarlais and Mr. Underwood had grown up together and went to school together as children. They had drifted apart but had reconnected earlier in 2019. They were friendly but not particularly close. There was no history of any antagonism between them.

[21] Mr. Desjarlais arranged to meet Mr. Underwood at an address in central Edmonton Mr. Underwood had given him. Mr. Underwood told him he couldn't help with the heroin sale but invited him into the residence to party. There were several other people in the residence. Mr. Desjarlais recalls smoking some meth. He was introduced to some of the people there, including Grayson Eashappie, Kala Bajusz, and Tyra Muskego. He had not met these people before.

[22] According to Mr. Desjarlais, they partied all night. Between 6 or 7 am on April 7, the partiers were hungry and placed their food orders with Mr. Desjarlais.

[23] At some stage, Mr. Eashappie got a telephone call from Ms. Duperron. According to Mr. Eashappie, she needed someone to drive her around as she did some drug deals. She was prepared to pay for this. Mr. Desjarlais needed money, and he agreed to do this. He had not met Ms. Duperron before. Mr. Desjarlais left to get some food, picking up Ms. Duperron on the way. Mr. Desjarlais testified that she seemed sober. They then drove to McDonalds on 112 Avenue and got some food. The stop at McDonalds is confirmed by video footage from the restaurant at 6:51 am. It shows a white truck in the drive through. Mr. Desjarlais confirmed that he was the driver (recognizable by a tattoo on his arm). Mr. Desjarlais' bank records show a purchase of $50.42 from McDonalds at 6:50 am on April 7.

[24] The three of them, Mr. Desjarlais, Mr. Eashappie and Ms. Duperron, then drove back to the house and distributed the food to the group there.

[25] Ms. Duperron had talked about the deliveries she wanted to make, so after dropping off the food, Mr. Desjarlais drove Ms. Duperron to see a person he believed to be her aunt. The aunt, Margaret Houle, had apparently asked Ms. Duperron to get her some drugs.

[26] At the aunt's residence, Ms. Duperron gave her the drugs. They had a brief exchange and left to return to the house where the others were. Mr. Desjarlais' account of these events was confirmed by Ms. Duperron's aunt in her testimony. Ms. Houle testified that the exchange with Ms. Duperron was at 8 am on April 7. While Ms. Duperron was talking to her aunt, Mr. Desjarlais had a telephone conversation with Mr. Underwood, who seemed upset that he was with Ms. Duperron.

[27] Ms. Duperron needed to do some more deliveries. They returned to the house. Mr. Underwood, Mr. Eashappie and someone described as "Little Dan" got into the truck and they drove to a drop site for Ms. Duperron. At the site, Ms. Duperron and Mr. Underwood went into the house. After that visit, the group began to look for the third delivery or drop site. Ms. Duperron was not able to find the site. During the trip, all but Ms. Duperron were smoking meth from a pipe. Eventually, they drove back to the house.

[28] Little Dan and Mr. Eashappie went into the house. Shortly after that, Mr. Eashappie returned to the truck with Ms. Bajusz and Ms. Muskego. Ms. Bajusz and Ms. Muskego told Mr. Desjarlais they needed a ride to a friend's house.

[29] They drove for a few minutes. Mr. Desjarlais was told to pull into an alley as the friend apparently used the back door of the residence. At this point, Mr. Desjarlais received a text message from Mr. Underwood. He was surprised to get a message as Mr. Underwood was sitting beside him. The others were in the back seat. The message warned Mr. Desjarlais that Ms. Duperron was going to be robbed. He understood that Ms. Bajusz and Ms. Muskego intended to rob her.

[30] Mr. Desjarlais testified “I was kind of shocked. I wasn’t expecting it.” He did not recall the exact wording of the text message, just “what was all going to happen”. He related that Mr. Underwood said “I’m sorry, cuz, and I love you, cuz”. The message ended “Sorry, I love you”.

[31] Mr. Eashappie then got out of the truck. Ms. Bajusz and Ms. Muskego dragged Ms. Duperron out of the truck. Mr. Desjarlais said that Ms. Bajusz got out, Mr. Eashappie was standing by the truck, and Ms. Muskego was “kicking at (Ms. Duperron’s) hands and head to get her out the door”. Mr. Underwood remained in the truck. He then saw Ms. Duperron on the ground, with Ms. Bajusz’s and Ms. Muskego’s elbows and fists going up. After this, Mr. Eashappie, Ms. Bajusz and Ms. Muskego got back in the truck, leaving Ms. Duperron on the ground. They had Ms. Duperron’s purse with them.

[32] Ms. Bajusz and Ms. Muskego searched Ms. Duperron’s purse and were disappointed with the take. Mr. Desjarlais recalls Ms. Muskego telling him to turn around to go back and find Ms. Duperron. He recalls driving around and Ms. Muskego getting excited when she saw Ms. Duperron. Ms. Muskego jumped out of the truck to chase after Ms. Duperron, even though the truck had not fully stopped. Once the truck stopped, Ms. Bajusz got out and followed Ms. Muskego. Mr. Desjarlais said that he drove around a bank and stopped. Ms. Bajusz then got out of the truck. Ms. Bajusz and Ms. Muskego ran towards the bank where they had spotted Ms. Duperron. He then saw them walking Ms. Duperron back to the truck.

[33] Video surveillance footage from the Servus Credit Union on Kingsway Avenue shows Ms. Duperron entering the bank machine kiosk. Shortly after that, Ms. Muskego can be seen entering the kiosk followed by Ms. Bajusz. The two women can then be seen escorting Ms. Duperron out of the kiosk. Mr. Desjarlais identified the three women when shown the surveillance video during his testimony. The timing of the video surveillance confirms Mr. Desjarlais’ chronology and narrative.

[34] Mr. Desjarlais testified that Ms. Bajusz and Ms. Muskego “had their arms kind of wrapped around” Ms. Duperron guiding her back to the truck. They got in the truck and Mr. Desjarlais started driving around. According to Mr. Desjarlais, Mr. Eashappie was in the rear passenger seat behind Mr. Underwood, Ms. Bajusz was in the middle and Ms. Muskego was behind Mr. Desjarlais. Ms. Duperron was sitting between Ms. Muskego and Ms. Bajusz.

[35] Mr. Desjarlais testified that Ms. Bajusz and Ms. Muskego started searching Ms. Duperron for more drugs. He said that Ms. Bajusz was doing the searching while Ms. Muskego held Ms. Duperron’s legs down. Mr. Eashappie searched Ms. Duperron’s purse or another bag, and Mr. Desjarlais said he saw Ms. Bajusz hit Ms. Duperron a few times.

[36] The group drove around for some time and ended up travelling west on Stony Plain Road in Edmonton. They continued westbound. At this point, Mr. Desjarlais says that Mr. Underwood made a “call”. He said that “she knew too much, and we had to get rid of her”. At the time Mr. Underwood spoke, there was music playing in the truck, but it was turned down. Mr. Desjarlais said that when he heard the words Mr. Underwood spoke, he was “kind of stunned, like, kind of confused, kind of what he meant.”

[37] He said he was then threatened by Mr. Underwood with words like “you’re either with us or you’re not type deal”.

[38] Mr. Desjarlais testified that he couldn't remember whose idea it was to leave Edmonton, but Mr. Underwood directed him a little bit. They ended up going west on Stony Plain Road in Edmonton.

[39] Mr. Desjarlais was familiar with the highway heading west. They went through Spruce Grove and then through Stony Plain and he thinks they consumed some more meth along the way. They stopped at Kim's No 1 convenience story for gas shortly before the Alberta Beach turnoff. Mr. Underwood paid for the gas in the store. Mr. Desjarlais was told not go into the store.

[40] By this time, Ms. Duperron was laying in the back seat on the floor, where she stayed for the entire trip to Hinton that followed. She had been handcuffed, using handcuffs found in her purse. Mr. Desjarlais was asked where everyone was putting their feet, and he replied, "on top of her". Mr. Desjarlais said that everyone in the back seat had pushed and shoved Ms. Duperron to the floor.

[41] At some point in the early stage of the drive west, Mr. Eashappie injected Ms. Duperron with what Mr. Desjarlais believed to be fentanyl. The injection was into either her leg or her butt.

[42] Mr. Desjarlais testified that when Mr. Underwood went into the store to pay for the gas at Kim's No 1, Ms. Duperron was on the floor of the back seat. Ms. Muskego was behind him, Ms. Bajusz was in the middle and Mr. Eashappie was in the rear seat behind Mr. Underwood had been sitting. All three in the back seat had their feet on Ms. Duperron.

[43] They continued west, and as they got near the Alberta Beach turnoff, Ms. Bajusz suggested that they dump Ms. Duperron in the lake. That was discussed by the group as not being a good idea.

[44] Around this time, Ms. Bajusz handed Mr. Eashappie something Mr. Desjarlais thought (based on his drug experience) was fentanyl. A syringe was loaded, and Mr. Eashappie injected Ms. Duperron with the drug. Ms. Duperron was injected in similar fashion on at least one other occasion before the group got to Edson.

[45] Mr. Desjarlais was asked about seeing any assaults on Ms. Duperron. He responded that "I witnessed her getting kicked. I witnessed needles getting shove in her. Hit. The hitting was Kala and Tyra. The needles was Grayson."

[46] After the first injection, Ms. Duperron was in and out of sleep for the rest of the journey.

[47] They continued west, stopping next at Darwell to purchase some liquor. The group provided Mr. Desjarlais with cash so he could make some purchases. Mr. Desjarlais got out of the truck and went into the store. He thinks he bought vodka and some coolers. Everyone else stayed in the truck. Records from the Darwell liquor store confirm that at 10:47 am on April 7, there was a cash sale of vodka and coolers.

[48] After the Darwell stop, they continued to Edson, where they stopped at the Fas Gas station for gas. Between Darwell and Edson, Mr. Desjarlais believes that Mr. Eashappie injected Ms. Duperron with fentanyl again. Mr. Desjarlais fueled up and paid for the fuel. Mr. Underwood went into the store to use the bathroom.

[49] Fas Gas records show that a $50 cash purchase for gas was made at 13:05 on April 7. These events are also confirmed by the video surveillance from the Fas Gas station in Edson.

That video shows Mr. Desjarlais getting out of the driver's seat of a white truck. It also shows Mr. Underwood getting out of the truck. Mr. Underwood was identified by Mr. Desjarlais when shown the video during his testimony.

[50] Mr. Desjarlais said that he remained in the driver's seat with Mr. Underwood in the passenger seat to Edson. On the trip from Edson to Hinton, he said that "Buddy and I switched drivers' seats a couple of times".

[51] After Edson, the group continued west on Highway 16. Ms. Duperron was still on the floor of the back seat with everyone's feet on top of her. Mr. Eashappie injected Ms. Duperron again on the trip between Edson and Hinton. They arrived at Hinton and stopped at the RBC cash machine. Ms. Bajusz had arranged for an E-Transfer to be sent to Mr. Desjarlais, and he stopped to withdraw some cash. He believes it was $150.

[52] As part of the agreed statements of fact, it is admitted that Ahmid Alin sent $150 to Mr. Desjarlais 1:38 pm on April 7 and that Mr. Desjarlais removed $150 from his account at 2:01 pm that day. That stop is confirmed by video surveillance from the RBC in Hinton, showing Mr. Desjarlais walking into the vestibule. Mr. Desjarlais recognized himself getting out of the passenger side of the truck and believes that Mr. Underwood was operating the truck at that time.

[53] After the group left Hinton, they turned north on Highway 40 towards Grande Cache. Ms. Duperron was still in and out of sleep. There was some talk about what road or where to go. After 10 to 20 minutes, Mr. Desjarlais testified that Mr. Underwood got angry and told him to "turn in here". Mr. Desjarlais turned left into a clearing on the north-west side of the highway. From there, they drove up a "quad" trail until they could go no further because of the muddy conditions. That was about a hundred yards.

[54] Mr. Desjarlais then stopped. He testified that everyone, but Ms. Duperron got out of the truck. She was still sleeping. Mr. Desjarlais was given a syringe loaded with what he believed to be more fentanyl. He believes that Ms. Bajusz gave him the syringe. He was told to inject Ms. Duperron with it. He was told the purpose of that was to overdose her. Mr. Desjarlais said that rather than inject Ms. Duperron he broke the needle off in Ms. Duperron's sweater or hoodie. He said the needle didn't make contact with her skin. He did not think that Ms. Duperron was still handcuffed at that time.

[55] Mr. Desjarlais believes that Ms. Duperron then woke up. He did not remember how she got out of the truck.

[56] No further reference was made to Ms. Muskego at this point. It appears that if she had ever left the truck, she returned to it before anything else happened. The evidence at trial did not implicate Ms. Muskego with anything that was done to Ms. Duperron at this site.

[57] Mr. Desjarlais testified that Ms. Bajusz then gave Mr. Underwood and Mr. Eashappie more fentanyl, which they handed it to Ms. Duperron, ordering her to eat it. She did so. According to Mr. Desjarlais, Ms. Duperron was not handcuffed at the time she was ordered to eat the fentanyl. He said he could see her hands as she was given the fentanyl and ate it.

[58] Mr. Underwood then retrieved a shotgun from his duffel bag which had been put in the truck bed early that morning. Mr. Desjarlais was aware Mr. Underwood's bag had been put there but was not aware of the gun. Mr. Desjarlais described the shotgun and said that it was covered by duct tape. Mr. Desjarlais loaded the gun and handed it to Mr. Eashappie. Mr. Eashappie pulled the trigger, but nothing happened. The barrel was pointed at Ms. Duperron's head. Mr.

Eashappie gave the gun back to Mr. Underwood, who pulled some of the duct tape off the gun, released the safety catch and then gave it back to Mr. Eashappie. He pulled the trigger again, but again the gun did not go off.

[59] Mr. Desjarlais testified that he then told Mr. Eashappie to hit Ms. Duperron with the gun, saying "she's suffered enough". Mr. Eashappie swung the gun at Ms. Duperron's head, striking her on the left side of her head. That caused Ms. Duperron to fall down. According to Mr. Desjarlais she began to nod off.

[60] Someone suggested they leave. Mr. Eashappie objected, saying that he wanted to see Ms. Duperron suffer. Shortly after that, however, Mr. Eashappie announced that she "was on her way out" and the group left. Before they did, Ms. Bajusz put an ID card in one of Ms. Duperron's pockets.

[61] According to Mr. Desjarlais, Ms. Duperron was propped up against a tree, alive but not awake. He didn't recall her being handcuffed when they left. He said that he had not seen the state of her hands while she was sitting up against the tree, and "just thought they were beside her."

[62] When asked again about seating configuration, Mr. Desjarlais couldn't remember who was driving when they got to the McDonalds in Hinton. He said that he and Mr. Underwood had switched seats a few times, referencing a stop after Darwell. He couldn't remember where the switch had taken place, saying "I think it was on the side of the road" and he thought Mr. Underwood had driven for close to an hour.

[63] The group headed back to Hinton where they stopped at the McDonalds on Carmichael Avenue for food. Mr. Desjarlais believes that both he and Mr. Eashappie went into the restaurant. The video surveillance from McDonalds shows Mr. Underwood and Mr. Eashappie in the restaurant between 3:13 and 3:33 pm. Mr. Underwood can be seen wearing a red shirt and Mr. Eashappie a checkered shirt. Mr. Desjarlais thinks he paid by debit. Mr. Desjarlais identified Mr. Underwood and Mr. Eashappie when shown the video during his testimony. He also saw himself in the video clip.

[64] Next, they visited with Mr. Underwood's aunt Judith Desjarlais and her daughter Jessica. After greeting them outside her trailer, Ms. Desjarlais, Mr. Underwood, Mr. Eashappie, Ms. Bajusz and Ms. Muskego joined Jessica Desjarlais in her father's trailer, which was also located on the site. They were not joined by Judith Desjarlais. Judith testified that Jessica was involved in drugs at the time.

[65] Mr. Desjarlais says that he went into the father's small trailer with the group. Meth was being passed around. Mr. Desjarlais declined to use any. He said that Mr. Underwood gave him a bag of dope. Mr. Desjarlais then left the trailer, put the dope in one of his duffel bags, and changed his shirt.

[66] After about half an hour at Desjarlais property, everyone got back in the truck and drove to Edmonton. Before leaving Hinton, Mr. Desjarlais says they stopped at a Safeway or Walmart and then a gas station. The stop at Safeway or Walmart was to get things for Ms. Bajusz as she'd been bitten by something at some stage. The stop at the Tempo was for fuel and cigarettes. Mr. Desjarlais paid for the fuel and cigarettes and Mr. Underwood then got out of the truck and pumped some more gas.

[67] Between Hinton and Edson, Mr. Desjarlais recalled getting a phone call from the RCMP asking if he was part of a gas and dash from the Tempo station in Hinton. He said that at first, he was confused because he had paid for the gas he pumped. After initially denying involvement but being confronted with having been identified on store video footage, he said "that was me, I was there". He told the officer that he would email the money to the Tempo, which he did at 5:32 pm on April 7 according to his bank records.

[68] In Edson, the group stopped in a Sobeys store parking lot, which was near a Tim Hortons. Mr. Underwood and Mr. Eashappie went into the Tim Hortons. Video footage from the Tim Hortons in Edson shows Mr. Eashappie and Mr. Underwood in the restaurant. Ms. Muskego can be seen walking into the restaurant. Other video footage shows Ms. Muskego getting out of a white truck. The identifications of Mr. Underwood, Mr. Eashappie and Ms. Muskego were made by Mr. Desjarlais when shown the video during his testimony. The Tim Hortons video clips from Edson were the photos used by RCMP in their news release asking for assistance with identifying the men shown. The Tim Hortons video clips indicate that it was approximately 6:30 pm on April 7.

[69] When they left the parking lot, Mr. Desjarlais blew a red light. Everyone was angry at him, and he had a "little freak-out". Shortly after leaving Edson, Ms. Duperron's cell phone and the gun were thrown out of the truck onto the right-hand side of the road in the bush. That was after Mr. Desjarlais had apparently missed a turn resulting in everyone else been angry at him about that.

[70] After that Mr. Underwood was driving. Mr. Desjarlais was on his phone, and he felt that everyone was getting more upset with him. His phone got taken from him, and Ms. Muskego searched it. He described a bizarre episode with a knife he found in the back seat. He put the knife on the console and said "if I wanted to hurt you, I would have. I'm no threat".

[71] The group had consumed the meth Mr. Underwood gave to Mr. Desjarlais on the way. They stopped at Angel's house. She was a friend of Mr. Underwood's. Mr. Desjarlais estimated the time was around 6:30 pm.

[72] He felt that Mr. Underwood had turned somewhat hostile towards him. After he left Angel's house, he received a text from Mr. Underwood telling him to delete all of his texts, which he did.

[73] Once Mr. Desjarlais returned home, he began using a lot of narcotics and called in sick for work. He didn't sleep that night, and then went back to work on the Tuesday. He testified that he was using a lot of cocaine and meth. At work, he caused an accident within a few days of going back and knew that he was going to have to take a drug test because of the accident. He confided in his boss and told him he would fail the drug test. Mr. Desjarlais says he told his boss about going to Jasper and witnessing a murder.

[74] He was fired and was aware that his boss had called the police. That led to him being interviewed by RCMP. Following losing his job and talking to the RCMP, Mr. Desjarlais says he was using drugs heavily, and overdosed. He was taken to hospital in Mayerthorpe and phoned one of his good friends explaining what had happened. He believes that friend called the police as well.

[75] Mr. Desjarlais testified that he was intoxicated by drugs during his interviews with Cst. Borkent and his initial interviews with Sgt. Bradfield. He got off drugs towards the end of April.

[76] None of the RCMP officers who had interviewed Mr. Desjarlais during that period felt that he was intoxicated when interviewed.

[77] In cross-examination he candidly admitted that drug intoxication affected his memory and his judgment and that from April 7 until the end of April he had been using drugs heavily and was trying to forget what had happened on April 7.

[78] Mr. Desjarlais was initially interviewed by Constable Borkent on April 20, 2019. The initial interview at Mr. Desjarlais' residence was interrupted when friends arrived, so it was postponed. The interview continued at the Hinton RCMP detachment. Mr. Desjarlais starts by saying "I just want to do the right thing" and shortly after says "I didn't do anything; I was just scared I would go to jail just because I drove the vehicle."

[79] RCMP Major Crimes then became involved. On April 23, Mr. Desjarlais was picked up by police at his home in Evansburg and driven to the Hinton detachment. Mr. Desjarlais knew he could be charged. He spoke at length to Sergeant Bradfield and Corporal Harnish. Mr. Desjarlais said that he told the two RCMP officers the whole story and then took them to where Ms. Duperron's body was. They found the body in the location identified by Mr. Desjarlais and eventually brought Mr. Desjarlais back to Edson. Ms. Duperron could be seen to be handcuffed when her body was viewed.

[80] Mr. Desjarlais was again interviewed April 24. On April 24 he signed a Waiver of Informer Privilege. There were further interviews with the RCMP after that date. On April 7, Mr. Desjarlais was granted immunity from prosecution for any offences arising from the death of Ms. Duperron. The immunity agreement is in evidence.

[81] There was then a discussion about Mr. Desjarlais "going undercover" to help RCMP with their ongoing investigation. He was paid some $2000 per month for about 8 months, had some free meals and hotel rooms, and received some assistance for a truck or insurance payment. His services were essentially to make contact with Mr. Underwood, Mr. Eashappie, Ms. Bajusz and Ms. Muskego.

[82] In the context of Mr. Desjarlais' undercover work, I heard a number of intercepted or recorded conversations. All of the intercepted communications were orchestrated by Mr. Desjarlais' RCMP handlers.

[83] Initially, Mr. Desjarlais met with Mr. Underwood at the Edmonton Remand Centre on October 28, 2019. It was a video visit and was recorded. Mr. Underwood was aware that the conversation was being recorded. The pretext of that visit was for Mr. Desjarlais to put some money in Mr. Underwood's canteen account. The timing was shortly after news releases had shown Mr. Underwood's and Mr. Eashappie's images from some of the video surveillance footage from April 7.

[84] Mr. Desjarlais said that he wanted to talk to him about a news release. Mr. Underwood tells him to speak to Cassandra Cann. Mr. Underwood tells Mr. Desjarlais that he heard that Mr. Desjarlais had been arrested. Mr. Desjarlais tells him that he was arrested for speeding and gun possession. Nothing of significance is said during that conversation.

[85] Next, Mr. Desjarlais met with Ms. Muskego on the pretext of wanting to help her get some baby things for the baby she was expecting. The meeting on November 4, 2019, was shortly after RCMP had announced that Ms. Duperron's body had been found near Hinton. They

had also posted pictures of Mr. Underwood and Mr. Eashappie taken from the Tim Horton's surveillance video in Hinton on April 7.

[86] The objective for the meeting was to have Ms. Muskego implicate herself and to provide contact information for Ms. Bajusz and Mr. Eashappie. Mr. Desjarlais was under the impression it was Mr. Underwood's baby, and he wanted to help his cousin. The meeting took place in a Walmart in Lloydminster and the sound quality is very poor because of the location of the microphone and background noise. For this meeting, Mr. Desjarlais was accompanied by Undercover Agent "Jon". UC Jon played the role of Mr. Desjarlais' friend and employer who had some knowledge about what had happened to Ms. Duperron.

[87] Much of the conversation is unintelligible. Ms. Muskego is obviously cautious in discussing the events of April 7. They begin to discuss the recent new items, and Ms. Muskego said "I didn't tell anybody. I don't talk about it to anybody".

[88] UC Jon talks about "loose ends" and says, "maybe you guys are who fucking greased that chick at that time". Mr. Desjarlais says "yeah", and UC Jon testified that Ms. Muskego nodded.

[89] They talked about stopping at Tim Hortons and Ms. Muskego told him it was because she had to use the bathroom. They talked about everyone getting mad at Mr. Desjarlais when he took a wrong turn in Edson, to which Ms. Muskego said, "yeah and that wasn't funny".

[90] Sometime after that, UC Jon and Ms. Muskego have a conversation in Mr. Desjarlais' absence. UC Jon was expressing concerns about Mr. Desjarlais and him being implicated by others. She tells him that she hasn't told anyone about what happened. Ms. Muskego said that all Mr. Desjarlais was the just the driver.

[91] As for her role, she confirmed that they got Ms. Duperron out of the vehicle, she was not dead when they arrived at the site because she could hear Ms. Duperron. She was not sure whether Ms. Duperron was dead when they left her as she said, "I really didn't get outta the truck". She said "I don't know the boys took her out. I stay in the truck. I didn't look." She later said all she'd done at the site was crawl over the back seat of the truck into the front seat.

[92] When asked if she was scared, she said, "I was but I couldn't be" and when asked to explain that she said "'cause I was already deep in it". She said that all she had done was grab Ms. Duperron's phone.

[93] She confirmed that the people involved were herself, Buddy, Rex (Mr. Eashappie), Kala and Bret and said, "it was just us". She also confirmed that she, Kala, Rex, and Ms. Duperron were in the back seat of the truck.

[94] On November 2, a number of calls between Mr. Underwood and Cassandra Cann, Mr. Underwood's girlfriend at the time, were recorded. Mr. Underwood was at the Edmonton Remand Centre.

[95] It is obvious from these calls that they are discussing the RCMP having released photos of Mr. Underwood and Mr. Eashappie from the Hinton Tim Horton's video surveillance on April 7. The caption of the new release says "We're releasing some new photos of people we want to talk to regarding Nature Duperron's murder. Do you know these men? Help me solve this one?" (Exhibit 21)

[96] Ms. Cann says “it’s only a matter of time ‘cause it took me two seconds. It’s only a matter of time before people are fucking trying to get cash for tips. Mr. Underwood asks “Why is it that easy to identify?” and Ms. Cann replies “Yep”.

[97] Ms. Cann tells him “Bret just messaged me and said, I don’t know if you see the news but we need to meet.” Mr. Underwood tells her “just tell him to just chill”.

[98] Ms. Cann phones Mr. Underwood again some hours later and tells him that Mr. Desjarlais wants to meet with her. Mr. Underwood says “just tell him be like fucking keep quiet and just, if need be, call a lawyer right.”

[99] Ms. Cann next phones Mr. Underwood at about 8:00 pm. She had just met Mr. Desjarlais and tells Mr. Underwood he has “two people who definitely know everything”. She says she told Mr. Desjarlais to “shut the fuck up. And you just don’t say nothing and if you don’t give them nothing, they got nothing.”

[100] She attempts to reassure Mr. Underwood that “none of you are mentioning, including yourself, are even hot right now…you’re panicking for nothing.”
Mr. Desjarlais called Mr. Underwood again on December 19, 2019. He talks about being interviewed and asked for a DNA sample. He goes on and asks, “Like is there anything that we left behind from when we, well when we killed Nature, or what?” and tells Mr. Underwood he’s “getting sketched out”.

[101] Mr. Underwood says “whoa, whoa, whoa, whoa. What are you talking about?” and goes on to say “You don’t ever say anything like that ever. Okay?” He tells Mr. Desjarlais to get a lawyer and “don’t ever fuckin’ bring up anything about anything”.

[102] On December 19, 2019, a further conversation between Mr. Underwood and Ms. Cann was recorded. In this conversation, Mr. Underwood tells Ms. Cann that his cousin “kind of said something he shouldn’t have”. Ms. Cann asks, “One to ten, how bad?” to which Mr. Underwood replies “about a twenty”.

[103] He goes on to tell her that the RCMP interviewed his cousin and asked him for his DNA. “and then he said something and tried to ask me something and I’m like, whoa, whoa, whoa, like I don’t know what the fuck”.

[104] It is clear this conversation references Mr. Desjarlais saying to him “when we killed Nature”.

[105] On January 28, 2020, a further conversation between Ms. Cann and Mr. Underwood is recorded. Mr. Underwood has just been served with a search warrant for his residence. He tells her he needs to get hold of Kala because they told him they were going back to Kala’s place. Ms. Cann tells him not to reach out to Kala because that is what they want him to do.

[106] Mr. Desjarlais was extensively cross-examined by Mr. Jordon for Mr. Underwood and by Mr. Moreau for Ms. Muskego.

[107] The cross-examinations were wide ranging, but focused on a number of areas:

- Mr. Desjarlais’ history of illegal drug use and drug dealing;
- Mr. Desjarlais’ level of intoxication on April 7;
- Mr. Desjarlais’ lack of sleep between April 6 and April 8;

- Mr. Desjarlais' heavy drug use after April 7 wanting to try to forget about what happened;
- Mr. Desjarlais' level of intoxication while being interviewed by RCMP in April 2019;
- Mr. Desjarlais' dishonesty in initially lying to RCMP about his involvement in the Tempo gas and dash;
- Mr. Desjarlais initially minimizing his involvement to RCMP and not disclosing that he had suggested that Mr. Eashappie hit Ms. Duperron with the gun or that he had broken a needle in Ms. Duperron's hoodie;
- Mr. Desjarlais' self-admitted memory problems;
- Incentives to lie to RCMP, including getting his side of the story to them first, wanting immunity from prosecution, and getting paid to work undercover with them;
- Contradictions between trial testimony and earlier statements or testimony; and
- Inconsistencies between his testimony and other testimony or evidence, including:
    - His lack of precision about what was said by Mr. Underwood about the "call";
    - Instructions allegedly given to him by Mr. Underwood about the drive to Hinton;
    - Whether Mr. Underwood had driven the truck on the way up to Hinton;
    - Whether he actually saw Ms. Muskego assault Ms. Duperron;
    - Whether he saw Mr. Underwood load the gun;
    - Whether he saw Ms. Muskego get out of the truck after they left Highway 40;
    - Whether he ever saw Mr. Underwood hand fentanyl to Ms. Duperron; and
    - How the handcuffs could have been found on Ms. Duperron's body when he testified, she did not have them on when they left her off Highway 40.

[108] Mr. Jordan for Mr. Underwood argues that Mr. Desjarlais was so tainted as a witness and his testimony was so unreliable that none of it should be accepted.

[109] Mr. Moreau for Ms. Muskego was less focused on Mr. Desjarlais' credibility, but he emphasized unreliability and argues that Mr. Desjarlais' testimony was so unreliable that none of it should be accepted.

Other evidence

[110] There was nothing of any significance in contest over any of the RCMP officers' testimony. Most importantly, their evidence was entirely confirmatory of Mr. Desjarlais' testimony about him making voluntary disclosures to the RCMP about his involvement in what happened to Ms. Duperron on April 7, 2019.

[111] While Mr. Desjarlais did not go directly to the police, when he made a limited disclosure about witnessing a killing to his boss a few days after April 7, he was not surprised when police contacted him and wanted to speak to him about his disclosure.

[112] The initial interview was not as well handled as it might have been, but it offered no inducements to Mr. Desjarlais. Mr. Desjarlais spoke freely to RCMP about his involvement and extensive cross-examination only pointed out that Mr. Desjarlais had initially withheld him having told Mr. Eashappie to hit Ms. Duperron with the gun to end her suffering, after Mr.

Eashappie had injected her with fentanyl on many occasions, made her eat fentanyl and tried to shoot her twice in his effort to get rid of her.

[113] Mr. Desjarlais was interviewed by major crimes in a more controlled environment that with Cst. Borkent, and he was then *Chartered* and cautioned. Mr. Desjarlais knew that he was at risk of being charged but says he was concerned then about doing the right thing and was not focused on what might happen to him.

[114] Mr. Desjarlais then led the RCMP to Ms. Duperron's body. He provided a chronology of events and locations, leading RCMP to recover video surveillance footage, store records, bank records, cell phone records and cell tower records.

[115] Only after RCMP completed their interview process did the subject of immunity from prosecution arise. Mr. Desjarlais had legal advice over that and was also aware that the immunity agreement might be negated if he testified at trial differently than in accordance with the information provided in his various statements.

[116] Any suggestion of going undercover, or being paid for assisting ongoing investigations, came up long after Mr. Desjarlais had voluntarily implicated himself in what the Crown characterizes as a first-degree murder. He had done so knowing that he might be charged as a result of his involvement in Ms. Duperron's death.

[117] Following extensive cross-examination, it is clear that Mr. Desjarlais' testimony at trial was substantially the same as the information given to RCMP in his numerous statements. That fact was acknowledged in the Agreed Statement of Facts entered as Exhibit 18.

[118] The medical examiner, Dr. Balachandra, testified that in his opinion, Ms. Duperron died from a drug overdose. Her system contained toxic levels of both fentanyl and methamphetamine. He observed injection sites on her body. He observed bruising on her body and noted a bruise on the left side of Ms. Duperron's head. That was consistent with being struck with a blunt object, like a shotgun barrel.

[119] Dr. Balachandra saw no evidence that anything else such as these other injuries or exposure contributed to her death. He deferred to the chief toxicologist in drug toxicity issues.

[120] Dr. Chatterton, Alberta's chief toxicologist, testified as to the levels of methamphetamine and fentanyl found in Ms. Duperron's system. Both were at a potentially toxic or fatal level. He could not rule out that one or the other may have caused Ms. Duperron's death but thought it likely that both contributed to her death. He thought it unlikely that the fentanyl found in Ms. Duperron's stomach were contributors to her death.

Jessica Desjarlais

[121] Both Defendants raise Jessica Desjarlais' testimony as important independent evidence that cannot be reconciled with Mr. Desjarlais' account. According to Ms. Desjarlais' testimony on cross-examination, she met Nature Duperron when the group arrived at her mother's trailer property in Hinton. After Mr. Underwood greeted his aunt, the group joined Jessica Desjarlais in her father's small trailer, which was located on the same property as the aunt's trailer.

[122] According to Ms. Desjarlais, "some of us" consumed some drugs in the trailer. She recognized her cousin Mr. Underwood but did not know any of the other visitors. She thought that one of the men stayed in the truck. Ms. Desjarlais testified that the two women appeared unharmed. They were friendly towards each other and accompanied each other to the bathroom.

[123] Ms. Desjarlais said that one of the women introduced herself as “Nature”. Sometime later, when the RCMP were investigating Ms. Duperron’s killing, Ms. Desjarlais and Jessica were interviewed by RCMP. Jessica was shown a Facebook posting with a photograph of Nature Duperron. Jessica said that the person in the Facebook photo was the person who introduced herself at “Nature” to her in April 2019 when Mr. Underwood and the group arrived at her mother’s property in Hinton.

[124] Ms. Desjarlais’ testimony did not include any information about the time of day when these things happened. Her mother Judith was vague on times.

[125] Jessica confirmed this narrative and her identification of the Facebook photo on cross-examination.

[126] She recalled having seen the RCMP media release at some time before she was interviewed by police and recalls that Nature’s name was included with the photograph in the release.

[127] I will deal with Ms. Desjarlais’ testimony in my analysis.

Case law

[128] For the purposes of argument, I was given a number of cases. For the Crown:

R v Vetrovec, 1982 CarswellBC 663 (SCC);
R v Kehler, 2004 SCC 11;
R v Thatcher, 1987 CarswellSask 338 (SCC);
R v Wood, 1989 CarswellOnt 804 (ONCA);
R v H(LI), 2003 MBCA 97;
R v Picton, 2010 SCC 32;
R v Briscoe, 2010 SCC 13;
R v Beardy, 2016 MBCA 68;
R v Cowan, 2021 SCC 45;
R v Ouellette, 2022 ABCA 40;
R v Hernandez (Vu), 2012 SCC 40;
R v Bird, 2009 ABCA 45;
R v Bird, 2009 SCC 60;
R v Nygaard, 1989 CarswellAlta 152 (SCC);
R v Harbottle, 1993 CarswellOnt 121 (SCC);
R v Sundman, 2022 SCC 31;
R v Nette, 2001 SCC 78; and
R v Maybin, 2012 SCC 24.

For Mr. Underwood:

R v Scher, 2021 ABQB 803 (referencing ***Vetrovec***); and
R v Lawrence, 2020 ABCA 268;

For Ms. Muskego:

R v Martineau, 1990 CanLII 80 (SCC);

USA v Shepherd, 1976 CanLII 8 (SCC);
R v Harbottle, 1993 CanLII 71 (SCC);
R v Nette, 2001 SCC 78;
Dunlop and Sylvester v The Queen, 1979 CanLII 20 (SCC);
R v Ouellette, 2022 ABCA 40;
R v Cowan, 2021 SCC 45;
R v Briscoe, 2010 SCC 13;
R v Creighton, [1993] 3 SCR 3;
R v Javanmardi, 2019 SCC 54, and
Vetrovec v The Queen, 1982 CanLII 20 (SCC).

Analysis

[129] The Crown argues strenuously that it has made out its case for first degree murder against both Mr. Underwood and Ms. Muskego on either theory: that this was a planned and deliberate killing under section 231(2) as well as constructive first-degree murder under section 231(5).

[130] Section 231(2) provides:

> **(2)** Murder is first degree murder when it is planned and deliberate.

[131] Section 231(5) provides:

> **(5)** Irrespective of whether a murder is planned and deliberate on the part of any person, murder is first degree murder in respect of a person when the death is caused by that person while committing or attempting to commit an offence under one of the following sections:
>
> > **(a)** section 76 (hijacking an aircraft);
> >
> > **(b)** section 271 (sexual assault);
> >
> > **(c)** section 272 (sexual assault with a weapon, threats to a third party or causing bodily harm);
> >
> > **(d)** section 273 (aggravated sexual assault);
> >
> > **(e)** section 279 (kidnapping and forcible confinement); or
> >
> > **(f)** section 279.1 (hostage taking).

[132] It is also clear that the only direct evidence that puts Mr. Underwood and Ms. Muskego with Ms. Duperron on April 7, 2019, is the testimony of Bret Desjarlais, but for the video surveillance at the Servus Credit Union cash machine kiosk that morning. The video surveillance clearly shows Ms. Duperron who is recognizable from the photographs of her in Exhibit 1, the RCMP Photo Booklet.

[133] Mr. Underwood and Mr. Eashappie are recognizable from the various video surveillance clips in evidence and particularly Exhibit 21. It is only Mr. Desjarlais' evidence that says a robbery took place, and following that puts Ms. Duperron, Mr. Underwood, Mr. Eashappie, Ms. Bajusz and Ms. Muskego in his truck driving to Hinton. While it is clear that Ms. Duperron had methamphetamine and fentanyl in her system and that was the cause of her death, only Mr. Desjarlais' testimony has Ms. Bajusz supplying the fentanyl, Mr. Eashappie injecting it into Ms.

Duperron, and then Mr. Eashappie and Mr. Underwood forcing Ms. Duperron to ingest more fentanyl.

[134] There is only Mr. Desjarlais' testimony that Mr. Underwood made a "call" that Ms. Duperron knew too much and that they had to get rid of her.

[135] And there is only Mr. Desjarlais' evidence as to who did what to whom at the site off Highway 40 where Ms. Duperron's body was found.

[136] Without his evidence, there is really nothing to prove that anyone other than him committed any crimes. And he has been granted immunity from prosecution for these charges.

[137] Mr. Jordan and Mr. Moreau rightly describe Mr. Desjarlais as a "Vetrovec" witness. He was at the time of these events a self-described drug user and drug dealer. On the day in question, he was attempting to sell some heroin he had in his possession. In his own testimony, he admitted to driving the group to Hinton after he understood Mr. Underwood to say that they needed to kill Ms. Duperron. While his role was mainly limited to that of being the driver, he facilitated the process by purchasing gas for his truck, and eventually by putting a syringe in her hoodie. Even though he says he broke off the needle, that act could be seen as involvement in Ms. Duperron's death. Further, he did tell Mr. Eashappie to hit Ms. Duperron with the gun, which Mr. Eashappie did. That caused Ms. Duperron to fall down, and the evidence indicates that she eventually died where she fell.

[138] All participants have referred me to ***Vetrovec v The Queen***. In ***R v Khela***, the Supreme Court restated the principles in that case at paras 11 and 12:

> [11] The central purpose of a *Vetrovec* warning is to alert the jury to the danger of relying on the unsupported evidence of unsavoury witnesses and to explain the reasons for special scrutiny of their testimony. In appropriate cases, the trial judge should also draw the attention of the jurors to evidence capable of confirming or supporting the material parts of the otherwise untrustworthy evidence.
>
> [12] Since the decision of this Court in *Vetrovec*, the very real dangers of relying in criminal prosecutions on the unsupported evidence of unsavoury witnesses, particularly "jailhouse informers", has been highlighted more than once by commissions of inquiry into wrongful convictions (see, for example, *The Commission on Proceedings Involving Guy Paul Morin: Report* (1998) and *The Inquiry Regarding Thomas Sophonow* (200l)). The danger of a miscarriage of justice is to be borne in mind in crafting and in evaluating the adequacy of a caution.
>
> [13] The crafting of a caution appropriate to the circumstances of the case is best left to the judge who has conducted the trial. No particular set of words is mandatory…

[139] In ***Khela***, the majority (6-1) approved the Ontario Court of Appeal's "principled framework" at paras 37-38:

> [37] In *Sauv—*, at para. 82, the Ontario Court of Appeal set out a principled framework that will assist trial judges in constructing *Vetrovec* warnings appropriate to the circumstances of each case. That proposed framework, which I

> adopt and amplify here, is composed of four main foundation elements: (1) drawing the attention of the jury to the testimonial evidence requiring special scrutiny; (2) explaining *why* this evidence is subject to special scrutiny; (3) cautioning the jury that it is dangerous to convict on unconfirmed evidence of this sort, though the jury is entitled to do so if satisfied that the evidence is true; and (4) that the jury, in determining the veracity of the suspect evidence, should look for evidence from another source tending to show that the untrustworthy witness is telling the truth as to the guilt of the accused (*R. v. Kehler*, 2004 SCC 11, [2004] 1 S.C.R. 328, at paras. 17-19).
>
> [38] While this summary should not be applied in a rigid and formulaic fashion, it accurately captures the elements that should guide trial judges in crafting their instructions on potentially untrustworthy witnesses. The fourth component, of particular interest on this appeal, provides guidance on the kind of evidence that is capable of confirming the suspect testimony of an impugned witness.

[140] It is clear that I must charge myself as I would a jury, recognizing the dangers of convicting on the basis of uncorroborated evidence from an unsavory witness.

[141] In doing so, it is also clear that the trier of fact is entitled to accept all, some, or none of any particular witnesses' testimony. (***R v Mathieu***, (2009) 90 CCC (3d) 415 (QCCA), aff'd [1995] 4 SCR 46.)

[142] Where testimony comes from a ***Vetrovec*** witness, it is especially important to look for supporting evidence from sources other than the potentially untrustworthy witness.

[143] I am also familiar with the distinction between credibility and reliability when assessing a witnesses' testimony as discussed in cases such as ***R v HC***, 2009 ONCA 56.

[144] ***R v Villaroman*** confirms that inferences of guilt from circumstantial evidence may only be drawn if that inference is the "only reasonable inference that such evidence permits" (at para 30).

[145] In Alberta, the Court of Appeal confirmed a number of "non-exclusive characteristics" of witnesses who require special scrutiny in ***R v Lawrence*** at para 26:

1. Did the witness have any motive to lie or mislead the court?
2. Did the witness receive benefits for cooperation such that there is a risk he is lying to the court?
3. Did the witness have a long criminal history?
4. Did the witness have a history of lying to or manipulating the police?
5. Was the witness an accomplice with knowledge of the circumstances such that it would be easy to falsely implicate the accused?
6. Did the witness have access to disclosure or other information that may explain his evidence or how it was given?
7. Did the witness minimize his own wrongdoing?
8. Did the witness exhibit selective memory?
9. Did important evidence emerge only after the witness exhausted his memory or after prodding by police?
10. Did new information emerge for the first time at trial despite many previous statements?

11. Was the witness evasive?
12. Was the witness testimony inconsistent with external evidence, particularly objective evidence that has been accepted?
13. Did the witness provide prior inconsistent statements?
14. Was the witness internally consistent: did the witness evidence change in testifying?
15. Upon the application of common sense, is the witness evidence impossible, improbable, or unlikely?

[146] These characteristics are the focus of the defense arguments concerning Mr. Desjarlais. The Crown focuses on what they describe as the 37 points where Mr. Desjarlais' testimony has been confirmed or corroborated by other evidence.

[147] My starting point for my analysis of Mr. Desjarlais' testimony is the areas where he his testimony has been inconsistent or is contradicted by other evidence. There are really only 2 areas where Mr. Desjarlais' testimony is at odds with other evidence.

Handcuffs

[148] Mr. Desjarlais' testimony was clear on the subject. He did not believe Ms. Duperron was handcuffed when he was directed to inject her with fentanyl. He testified he was in the front seat and Ms. Duperron was in the back seat. He reached over the seat and put the syringe in Ms. Duperron's armpit area. He broke off the needle rather than inject her. He was also clear that Ms. Duperron was not handcuffed when she was directed to ingest fentanyl by Mr. Eashappie and Mr. Underwood. His memory is that her hands were out in front of her and not handcuffed.

[149] Yet when her body was found on April 23, she was clearly handcuffed, with her hands behind her.

[150] Could Mr. Desjarlais be mistaken about her being handcuffed? Possibly, although it would be impossible for her to feed herself fentanyl as he described if she was handcuffed. Could someone have removed the handcuffs at some time before they arrived at the site off Highway 40, and then put them back on after she had been knocked down? That is possible, and more likely.

[151] Mr. Desjarlais testified in redirect that he only had an impression that Ms. Duperron's hands were beside her. There was no questioning as to whether there was any opportunity to put the handcuffs back on before they drove off.

[152] Ultimately, this is a mystery that is not explained in the evidence and cannot be reconciled. It is a detail although it essentially has no bearing on any of the issues in this case such as intent, planning and deliberation, and acts that caused or contributed to Ms. Duperron's death.

[153] It is troubling, but it does not impact on either Mr. Desjarlais' credibility or reliability.

Jessica Desjarlais

[154] Ms. Desjarlais' testimony cannot be reconciled with Mr. Desjarlais' narrative. Her identification of Ms. Duperron as being one of the two women who arrived at her mother's trailer with Mr. Underwood was clear. She was certain of her identification. The circumstances surrounding this were that she was herself involved with drugs and at the time she was consuming drugs. She is Mr. Underwood's cousin. She had never met any of Ms. Duperron, Ms.

Bajusz or Ms. Muskego before. Two women came into her father's trailer. They seemed to be getting along. No injuries were visible. They went to the bathroom. They were there for an hour or less and left.

[155] Much doubt has been raised generally about the accuracy of identification evidence. I view it as being in a similar category to testimony from dubious witnesses, in that it may be dangerous to accept uncorroborated identification evidence. It certainly may be accepted, but brief interactions with strangers do not provide a lot of confidence that they may be accurately identified months later from a photograph. This was not as if Ms. Duperron's photo was selected out of a photo lineup.

[156] Ms. Desjarlais estimated she was with the group for as much as an hour.

[157] It defies credibility that Ms. Duperron would have been unharmed and friendly to either Ms. Muskego or Ms. Bajusz after having been robbed and abducted a minimum of 5 hours earlier, hit and kicked, handcuffed, and pushed to the floor of the back seat of the truck.

[158] As far as fitting into the chronology, if Ms. Desjarlais' identification was correct, the parties would have had to go to Judith's property sometime after 2 pm when Mr. Desjarlais is captured by the RBC video footage in Hinton. The next video capture is of Mr. Underwood and Mr. Eashappie at 3:13 at McDonalds. Judith Desjarlais says Mr. Underwood, and the group were with her for about 20 minutes. Jessica Desjarlais says the group were with her in her father's trailer for about an hour. Excluding the time to get to and from the RBC to the trailer park, there is not enough time between sightings for the visit to have taken place then.

[159] Even if the visit had taken place then, the group left McDonalds sometime after 3:30. They would have had to go from there to the site where Ms. Duperron was left, deal with Ms. Duperron there, and then get to Tim Hortons in Edson by 6:30. That would not have left enough time to cause the physical injuries to Ms. Duperron, overdose her with fentanyl and wait until she was nodding off, when one also factors in the shopping at Walmart to get Ms. Bajusz something for her bites and get gas at Tempo.

[160] I simply do not believe Ms. Desjarlais and I conclude that she was at a minimum mistaken about her identification. If the woman she identified as Nature introduced herself as such, it was because the woman lied to her.

Credibility issues

[161] It is best to deal with the ***Vallee*** characteristics as adopted in ***Lawrence***. I will deal with 1-4 together:

1. **Did the witness have any motive to lie or mislead the court?**
2. **Did the witness receive benefits for cooperation such that there is a risk he is lying to the court?**
3. **Did the witness have a long criminal history?**
4. **Did the witness have a history of lying to or manipulating the police?**

[162] The key consideration here is that the RCMP found Mr. Desjarlais because of his voluntary statements to his boss. Those statements were made within a week or so of April 7. It is clear from Mr. Desjarlais' testimony that he was wracked with guilt following Ms. Duperron's death. He tried to erase his memories with heavy drug use. Like Lady MacBeth, those memories

could not be washed away. While intoxicated, he went to work and caused an accident. That resulted in the loss of his job and further descent into drugs.

[163] The first interview with police was initiated by Cpl Borkent. It occurred less than 2 weeks from Ms. Duperron's death. Mr. Desjarlais was not Chartered and cautioned but spoke freely. The interview with Cpl Borkent continued the next day, April 21, and Mr. Desjarlais provided nearly full details of the events of April 7.

[164] According to Mr. Desjarlais, he had been advised by a friend to go to the police and tell them the truth. There was some sense that it would be better to get his version of events to the police before anyone else did, for fear that they would implicate him beyond what his role had actually been.

[165] I am satisfied that Mr. Desjarlais' motive for speaking freely to the police was as he described it: to do the right thing. He knew he had been involved in criminal activities and could be charged himself. But in all of his statements to police, he made no inquiries as to what might happen to him. He concentrated on answering their questions.

[166] The evidence, and the agreement made in these proceedings, is that no inducements were made to Mr. Desjarlais to make the statements he made. He did so knowing he did not have to make any statements and that any statements could be used against him. He waived informant privilege.

[167] In his earlier statements, he did not volunteer that he had broken the needle in Ms. Duperron's jacket, nor did he volunteer that he had told Mr. Eashappie to hit Ms. Duperron with the gun. When pressed by Sgt. Bradfield, however, he made both those admissions at a time when his jeopardy was full.

[168] The argument that the Immunity Agreement provides a motive to lie is interesting. What the Immunity Agreement says is that:

> 3.2.1 no statements made by Bret Desjarlais during the one or more interviews held by virtue of this Agreement will be used in evidence against Bret Desjarlais in any criminal proceedings…except in the case of:
>
> > (a) Bret Desjarlais subsequently giving, in any trial, hearing or proceeding (including any in which he is an accused) evidence that is materially different from that given by him under this agreement, or
> >
> > (b) Bret Desjarlais being charged as a result of anything said or done by him during the course of the aforementioned interviews, with one or more offences of committing perjury, giving contradictory evidence, fabricating evidence, obstructing a peace officer, obstructing justice, or committing public mischief by false statements.

That in essence is a representation or warranty that Mr. Desjarlais has told them the truth. And that is how Mr. Desjarlais answered the question about knowing he could be charged if he gave different evidence at trial:

[169] Transcript Day 4 page 24:

Q …when you were asked that you had to stick to the same story that you had already told, you would agree with me that you understood that to be what you had told police in your interviews with them regarding this investigation"

A Yeah.

Q And you understood that, if you did so, you would not be prosecuted for your role in Ms. Duperron's death?

A Yeah.

Q And really, that's why you're here today testifying?

A I'm testifying because it's really the right thing to do, right?

Q It has nothing to do with the indemnity agreement?

A What's that?

Q It doesn't have anything to do with the immunity agreement?

A No. I'd testify even if I didn't have it.

Transcript Day 4 pages 99-100:

Q And in order to hang on to that (immunity, payment as police agent), you know that your job is to tell a certain story.

A Tell the truth.

Q Well the truth as you remember it.

A Yes

Q With your memory that we've already agreed is unreliable.

A Yes

[170] I accept those answers as sincere. Crown and Defence have full knowledge of everything said by Mr. Desjarlais to the RCMP between April 20 and June 7 when the Immunity Agreement was made. With that knowledge, and the evidence that actually came out at trial, they have agreed by way of Exhibit 18 made on September 20 that "the version of events Desjarlais provided in this narrative (the warned and cautioned statement given on April 23, 2019) is largely consistent with the narrative he testified to at trial.".

[171] I will deal separately with some of the inconsistencies Mr. Desjarlais was cross-examined on.

[172] There is no doubt that Mr. Desjarlais received benefits from RCMP for acting as a police agent in attempting to get incriminating statements from Ms. Muskego and Mr. Underwood. All of that occurred after his statements had been given to RCMP. I do not see that this after the fact work compromised Mr. Desjarlais's credibility or reliability as a Crown witness.

[173] As for his criminal history, Mr. Desjarlais admitted to use of illegal drugs and selling illegal drugs for a number of years before April 7, 2019. He did so freely and made no attempt to offer any excuses for his involvement. He has no criminal record that was put in evidence. The events of April 7 occurred in the course of illegal drug use by all involved and was precipitated by Mr. Desjarlais wanting to sell some heroin as he needed money. However, Mr. Desjarlais has

no history of any crimes of dishonesty or any offences against the administration of justice. Because of his involvement in criminal activities, his evidence must be viewed cautiously, but his admitted history does not of itself cause me to reject his testimony.

[174] As for a history of lying to the police, Mr. Jordan notes that Mr. Desjarlais initially denied involvement in Ms. Duperron's murder, and that he initially denied involvement in the Tempo gas and dash. He also initially said it was others who broke the syringe needle in Ms. Duperron's jacket.

[175] It can certainly be argued that when confronted by some potentially incriminating things, Mr. Desjarlais' reaction was to minimize his involvement. He was, however, always quick to provide fulsome details. His statement to Cst. Borkent that he "didn't do anything" is substantially correct but for his breaking the needle in Ms. Duperron's jacket (which had nothing to do with her death and caused her no harm) and telling Mr. Eashappie to hit her with the gun (which was motivated by pity for Ms. Duperron). It was Mr. Underwood who did the "gas and dash". Mr. Desjarlais paid for the gas he pumped. It is not surprising that he initially denied involvement as reaction to a telephone call out of the blue when he was not the one who had failed to pay

[176] In any event, these three examples do not demonstrate someone who has a history of lying and do nothing to weaken Mr. Desjarlais' credibility in my mind.

5. Was the witness an accomplice with knowledge of the circumstances such that it would be easy to falsely implicate the accused?

[177] There is no question that this factor applies here. Mr. Desjarlais was a participant in the events of April 7 and but for a few occasions when he was out of the truck for purchases, he was witness to all of the conversations and events leading to and following Ms. Duperron's death.

6. Did the witness have access to disclosure or other information that may explain his evidence or how it was given?

[178] There is no information that Mr. Desjarlais had access to anything other than his own statements. He was not shown the video surveillance footage until a week or so before the commencement of the trial such that his statements to RCMP and even his testimony at the preliminary inquiry would not have influenced his evidence. Indeed, it was Mr. Desjarlais who led RCMP to all of the video footage and store records, so his memories were not created by the things the RCMP obtained. This factor is of no bearing here.

7. Did the witness minimize his own wrongdoing?

[179] This has been canvassed above. Mr. Desjarlais in early discussions with RCMP minimized some aspects of his role, but while still fully in jeopardy of being charged, completed the record by adding his role in breaking the needle and telling Mr. Eashappie to hit Ms. Duperron with the gun. Nothing came out in evidence at trial that implicated Mr. Desjarlais beyond what he had said himself. Indeed, in the conversation between UC Jon and Ms. Muskego, she confirmed that Mr. Desjarlais' only role was as the driver.

[180] This factor does not apply here.

8. Did the witness exhibit selective memory?

[181] In his testimony at trial, my observation and conclusion is that Mr. Desjarlais did his best to answer all questions as truthfully and honestly as he could. He was cautious and asked for clarifications when he needed them. He was not argumentative at all. He was if anything quick to agree with Defence counsel when an inconsistency was pointed out. He did not seem defensive and was never evasive.

[182] Mr. Desjarlais made no attempt to hide behind "I don't remember" or use memory issues as an excuse to avoid answering difficult or unpleasant questions.

[183] Additionally, I did not see any attempts by Mr. Desjarlais to exaggerate things.

[184] I characterize Mr. Desjarlais as a good, responsive witness.

9. Did important evidence emerge only after the witness exhausted his memory or after prodding by police?

[185] Nothing is in evidence to this effect. Ultimately, but for Mr. Desjarlais' cooperation, Ms. Duperron's body may never have been found as she had been left to die in a somewhat remote, wooded area. Her body was left fully exposed to the elements. But for Mr. Desjarlais' cooperation, RCMP would never have been led to any of the video surveillance footage or cell phone information or business records tying the accused and Mr. Eashappie and Ms. Bajusz to Ms. Duperron's murder.

10. Did new information emerge for the first time at trial despite many previous statements?

[186] No.

11. Was the witness evasive?

[187] No.

12. Was the witness testimony inconsistent with external evidence, particularly objective evidence that has been accepted?

[188] Almost entirely, but for the handcuff issue (which has been dealt with above) and the evidence of Jessica Desjarlais (which I have rejected).

13. Did the witness provide prior inconsistent statements?

14. Was the witness internally consistent: did the witness evidence change in testifying?

[189] All counsel and the parties have agreed that Mr. Desjarlais' testimony was substantially consistent with previous statements. I will deal with inconsistencies below.

15. Upon the application of common sense, is the witness evidence impossible, improbable, or unlikely?

[190] Subject to my comments above about the handcuffs and my discussion below about inconsistencies, my overall conclusion is, no.

Specific inconsistencies

[191] Where the evidence of one witness is so determinative of most of the issues in a serious criminal trial, it is important that no stone be left unturned in analyzing their evidence. Much of cross-examination focused on inconsistencies. I will deal firstly with Mr. Jordan's issues.

Duffel Bag

[192] Mr. Jordan referenced Mr. Desjarlais testifying on the preliminary inquiry that he did not know when Mr. Underwood's duffel bag was put into the back of the truck. At trial he said it was in the morning. My view on this is that this inconsistency demonstrates an honest witness. When asked the question out of the blue about something of little consequence at the time it happened, an understandable answer is "I don't know". Later, if given time to think about it, the only time the duffel bag could have been placed in the truck bed was in the morning as they left the house to start driving Ms. Duperron around. That was the first time Mr. Underwood got in the truck, and they did not go back to the house again.

[193] As for whose decision it was to turn around after the first robbery, on a careful review I do not see any clear inconsistency.

The Call

[194] The "call" is one of the key issues in this trial. Mr. Desjarlais was entirely consistent throughout that Mr. Underwood made the "call". Mr. Desjarlais never wavered from his understanding that the call was "she knew too much, and we need to get rid of her". He was consistent that he was not certain of the exact words. Much was made that when the subject first came up, Mr. Desjarlais said:

> A …there was a call that was made that she made too much -or not made- that she knew too much. And we had to get rid of her."
>
> Q Okay. Who made that call?
>
> A Buddy.
>
> Q Okay. And—now, you said he made a call, she knew too much, we had to get rid of her. Are those the specific words he used, or is it something to that effect?
>
> A Something to those effects.
>
> (Day 1 page 41)

[195] In cross-examination on Day 4 at page 16 he said:

> Q …it might have been Kala who made the statement.
>
> A I don't know.
>
> Q Yeah. You don't know who made the comment, correct?
> A No. Like I –like I said before, like, the music was turned down, and there's conversation with Buddy and everybody, right?
> Q Somebody said it, but we don't know who said it.
>
> A I'm pretty sure it was Buddy that did say it.

Q But there's some doubt in your mind if it was Buddy, if it was Rex, if it was Kala?

A No. It was Buddy.

[196] And at pages 66-67, Mr. Desjarlais confirmed that he was not sure exactly what words were used, that he remembered something along the lines of "knows too much", but in terms of anything else, any other words that were used, he couldn't recall.

[197] He was not entirely sure who said that but thought "maybe probably" it was Buddy. He agreed he was not 100 percent sure.

[198] From carefully looking at these exchanges, I do not see any inconsistency, apart perhaps from the degree of certainty. My conclusion is this was much ado about nothing.

Driving out of the city

[199] As for the drive out of the city, any inconsistencies result from taking the answers out of the context of the questions asked. The first time the subject came up, Mr. Desjarlais was asked what happened after the "call" had been made. Mr. Desjarlais responded, "we left Edmonton". He was asked whose idea that was, and he responded, "I can't remember." He said that he got directed a little bit by Mr. Underwood. When asked "where did he direct you to go", Mr. Desjarlais responded "we ended up on Stony Plain Road", going west.

[200] The second time the matter came up Mr. Jordan asked him "whose decision is it to drive west of the city?". That question followed questions about Mr. Underwood having texted him to warn him of the robbery. Mr. Desjarlais' answer was "I can't remember whose decision it was."

[201] Then Mr. Desjarlais was asked about driving by Mr. Moreau. He had been asking about the second robbery and Kala and Tyra "mocking" Ms. Duperron in the car as they drove around Edmonton. He was then asked, "at some point there's a decision made to head out of town, right?". Mr. Desjarlais responds, yeah. He then says, "that was Buddy's decision."

Q so did he tell you what the destination was"

A No.

Q Or did he just say go west?

A I can't remember exactly how we ended up going west.

Q Okay. Did he say something like let's get out of the city?

A Probably.

…

Q But you don't remember what he said.

A No.

Q Okay. In any event, you get yourself on Stony Plain Road heading west, and you go west, right?

A Yes.

(Day 4, page 63)

[202] Certainly, the first time asked the question Mr. Desjarlais did not recall whose idea it was to leave Edmonton. His answer to Mr. Moreau was different; he identified Mr. Underwood as the person. I suppose it is an inconsistency when someone says, "I don't remember" and then 3 days later provides Mr. Underwood's name. Not remembering something one day and remembering something later, especially after going over the details of a single day for over 3 days by that point, may not be surprising. It might be different if Mr. Desjarlais had been certain about one person driving and 3 days later gave another name.

[203] I conclude that while an inconsistency has been shown, it is of no effect and does not adversely affect either Mr. Desjarlais' credibility or his reliability.

Mr. Underwood Driving to Hinton

[204] Mr. Desjarlais was consistent that at some stage on the trip from Edmonton to Hinton he and Mr. Underwood switched seats and Mr. Underwood drove for as much as an hour. I agree that it is unclear from Mr. Desjarlais' testimony when that happened; whether it was before Edson or between Edson and Hinton.

[205] The question cited by Mr. Jordan from Day 2 page 10 was:

> Q Between Darwell and Edson, did the seating configuration stay the same in your vehicle?
> A Everything was the same.
>
> Q Throughout the entire trip to Hinton?
>
> A Buddy and I switched driver's seats a couple of times.

[206] On Day 2 page 12, Mr. Desjarlais said seating configuration between Edson and Hinton was still the same.

[207] On another occasion Mr. Desjarlais said he thought Mr. Underwood did some of the driving between Edson and Hinton. He couldn't remember where they had switched places. And on another occasion his evidence might suggest that the switch took place between Darwell and Edson. We do know from video footage that Mr. Desjarlais was driving when they arrived at the Fas Gas store in Edson.

[208] There is some vagueness about this, other than that Mr. Desjarlais was not challenged about his testimony that he and Mr. Underwood had switched driver's seats.

Loading the gun

[209] It is clear that Mr. Desjarlais initially said he saw Mr. Underwood load the shotgun. During cross-examination he agreed that he was not sure who loaded it. That is an inconsistency.

Feeding/telling Ms. Duperron to eat fentanyl

[210] Mr. Desjarlais' evidence on this issue changed. He initially testified that both Mr. Underwood and Mr. Eashappie told Ms. Duperron to eat the fentanyl Ms. Bajusz had given them. On cross-examination, Mr. Desjarlais agreed that he was not sure which one had done so.

Reliability

[211] On Ms. Muskego's behalf, Mr. Moreau adopted Mr. Jordan's concerns about the inconsistencies in Mr. Desjarlais' testimony. He added concerns about Mr. Desjarlais' overall reliability.

[212] It was clear from Mr. Desjarlais' evidence that from the time he arrived at the house in the early evening of April 6 until after Ms. Duperron was killed, Mr. Desjarlais had consumed a significant amount of methamphetamine. He had also had at least one cooler. He self-described as having been as high or intoxicated as he had ever been.

[213] He acknowledged that the passage of time, being over 3 years from Ms. Duperron's death, has adversely affected his memory of the events.

[214] He clearly acknowledged that his drug use before, during, and after April 7, 2019, has impacted on his ability to perceive and understand events and to remember events.

[215] He also said that in the weeks following April 7, until approximately May 4, he tried his hardest to forget what had happened that day.

[216] Mr. Desjarlais also agreed on cross-examination that his memory of events was not reliable absent independent confirmation. That was a skillfully obtained and somewhat dramatic admission, but it needs to be put in context.

[217] At page 100 on Day 4, he was asked:

> Q I'm going to suggest to you that the evidence that you're giving us in this trial today is less what you actually remember and more what you've read in your own prior transcripts. Isn't that true?
>
> A No. Because when I've –when I read the transcripts, some of them drawed memories some of them didn't.
>
> Q Sure.
>
> A Right?
>
> Q Sure.
>
> A So what I remember, yes, is the truth, and what I messed up, yes is a mistake.
>
> Q Okay. So, what you're giving us is the best of your memory; is that fair?
>
> A Yes.
>
> Q And which we've agreed is unreliable.
>
> A Yes.
>
> Q And which we've found is wrong in certain parts.
>
> A Yes.
>
> Q Okay. And it's also fair to say you don't know which parts are wrong, do you?
>
> A No.
>
> Q Okay. You would have no way of knowing, would you?
> A No.

[218] It is important to see what led to this exchange. The previous questions had related to the immunity agreement and him being an "integral part of this crime", to which Mr. Desjarlais agreed. They discussed what Mr. Desjarlais had been paid to act as a police agent, and Mr. Moreau asked him "you did really well out of this, didn't you? Mr. Desjarlais agreed.

[219] The questioning continued:

Q And in order to hang onto that, you know that your job is to tell a certain story.

A Tell the truth.

Q Well, the truth as you remember it.

A Yes.

Q with your memory that we've already agreed is unreliable.

A Yes.

[220] Mr. Desjarlais was then asked about his review of his previous statements and the preliminary inquiry transcript, and was asked:

Q And you told us that you worked on that almost every day for a long period of time, right?

A No, I only had—I only had it in my possession for about a week.

Q Okay. You read some every day?

A every day. I try to, but family life, work life.

[221] At page 104, Mr. Moreau asked:

Q When you were giving your statements to the police, did the police show you from time-to-time surveillance of video like we've seen in this trial?
A I remember a line-up of pictures. I think you showed me some pictures.

Q Right. And did that help to refresh your memory when you saw those pictures?

A Yea. And there's – pretty sure I seen a video, a couple videos before.

Q And those are videos of places like Tim Hortons or McDonalds or Fas Gas?

A Tim Hortons.

Q Tim Hortons?

A Yeah.

Q Okay. And that helped to confirm your memory about those events; is that fair to say?
A Yes.

Q Okay. I'm going to suggest to you that, where we've got an independent source of evidence, like a video, we can be sure that those things happened, right? We can be sure you went into the Tim Hortons because we can see it on the video. You agree with that, right?
A Tim Hortons. You mean, like, McDonald's? The video of me.

Q Sure.

A Yeah.

> Q Okay. And I'm going to also suggest to you that, where we don't have video or something independent like that but all we have is your memory, then we really can't be sure. Do you agree?
>
> A Yeah.

[222] At the outset, I do not see that a few general questions on cross-examination about the witnesses' reliability necessarily destroys the evidentiary value of the witnesses' testimony. Ultimately credibility and reliability are issues for the trier of fact and not a witnesses' self-assessment.

[223] Mr. Desjarlais' answers about refreshing his memory are exactly what using prior statements is for. Prior statements can be used for refreshing memory, or they can be used as a substitute where the witness has no memory of something they said earlier and where looking at the earlier statement does not refresh the memory.

[224] What Mr. Desjarlais said about seeing something and having more come back to him is a common-sense approach and commonly seen with witnesses at trial, especially when trying to recall events of some years earlier.

[225] Mr. Desjarlais clearly did not agree with the suggestion that he remembered less than were in the statements and transcripts.

[226] General questions about the quality of someone's memory are to some extent unhelpful unless they disclose medical conditions such as dementia or Alzheimer's disease. Acknowledging a poor memory does not negate the veracity of what has actually been remembered.

[227] I heard no expert evidence about the effects of methamphetamine or other drugs on memory, whether it be short term or long term. I cannot take judicial notice of any effects of drugs, or for that matter sleep deprivation. Mr. Desjarlais' belief that he was as high or intoxicated as he had ever been may well be his subjective belief. But it can to some extent be contrasted with the objective evidence in this case.

[228] Despite being up all night and consuming significant quantities of methamphetamine, Mr. Desjarlais was able to drive without incident to McDonalds, order food, pay for it and take it back to the house. He then drove Ms. Duperron to her aunts without incident. He gassed up at Kim's No 1. He drove back roads to Darwell where he purchased liquor. He then drove to Fas Gas where he can be seen filling up. From there, he can be seen at the RBC Kiosk in Hinton getting cash. To get the cash, he had to accept an email transfer from Ms. Bajusz's friend.

[229] There was nothing unusual or remarkable about his appearance or demeanor throughout these events. He was certainly not "falling down drunk" or in a fugue-like state or acting in some bizarre manner.

[230] When he was interviewed by Cst. Borkent and then Sgt. Bradfield, Mr. Desjarlais testified that he was intoxicated by drugs. These police officers observed nothing in his demeanor that suggested to them that he was intoxicated or not acting clearly. He can be seen and heard in video recordings at this time and there was nothing that could be observed in those recordings that suggested he was intoxicated by anything, or not acting clearly.

Independent verification of Mr. Desjarlais' testimony

[231] As noted in ***Khela***, an important step in assessing the evidence of a potentially untrustworthy witness is to look for independent verification of the witnesses' testimony. Mr. Desjarlais himself recognized that independent verification was an important consideration.

[232] There is no requirement that independent verification be of any particular aspect of the witnesses' testimony. That is clear from ***R v Kehler***:

> 12. The appellant concedes, at para. 11 of his factum, that "confirmatory evidence", in the sense that concerns us here, "need not directly implicate the accused or confirm the Crown witness' evidence in every respect". In his submission, however, "the evidence should . . . be capable of restoring the trier's faith in the relevant aspects of the witness' account" (emphasis added).
>
> 13. As a matter both of law and of logic, we agree with that submission.
>
> 14. The appellant argues that the only relevant aspect of Mr. Greenwood's evidence relates to the implication of the appellant in the Red Deer robbery. He contends that the legal test, applied contextually, therefore required confirmatory evidence implicating the appellant. Nothing less, he says, could rationally restore the trier's faith in the relevant aspects of Mr. Greenwood's account.
>
> 15. The appellant wrongly equates "relevant" with "disputed". Mr.Greenwood's detailed account of the robbery, though undisputed, was no less "relevant" to the offences charged than his implication of the appellant in their commission. And while confirmatory evidence should be capable of restoring the trier's faith in relevant aspects of the witness's account, it hardly follows that the confirmatory evidence must, as a matter of law, implicate the accused where the only disputed issue at trial is whether the accused was a participant in the crimes alleged.
>
> 16. As the appellant himself concedes, it is clear from *Vetrovec*, *supra*, that independent evidence, to be considered confirmatory, does not have to implicate the accused. There is no separate rule in this regard for cases where the only evidence of the accused's participation in the offence is that of a tainted witness.

[233] The Crown provided a detailed list of what they considered to be independent verification of Mr. Desjarlais' testimony. I will deal with what I consider the important ones.

Recorded conversation with Ms. Muskego

[234] The discussion between Ms. Muskego and UC Jon is very helpful. UC Jon's purpose was mainly to get incriminating evidence on Ms. Muskego, Ms. Bajusz and Mr. Underwood, but it was also to verify what Mr. Desjarlais had told police.

[235] Ms. Muskego said nothing in that meeting that contradicted Mr. Desjarlais' narrative. She confirmed who was involved. She confirmed Mr. Desjarlais' role as limited to being the driver. She confirmed the seating arrangement in the truck. She confirmed the stop at Tim Horton's in Edson.

[236] She also confirmed to some extent her involvement in the events on April 7. According to UC Jon, when asked if they were involved in Ms. Duperron's death, Ms. Muskego nodded.

She also told him she had no right to be scared as "I was already deep into it." There can be no doubt about what they were talking about: Ms. Duperron's death.

[237] She also confirmed Mr. Desjarlais' testimony that Ms. Duperron was alive when they arrived at the site off Highway 40. Apart from having Ms. Muskego out of the truck when they first arrived (Ms. Muskego said she stayed in the truck) Mr. Desjarlais' testimony was that Ms. Muskego had nothing to do with anything that happened at the site to Ms. Duperron. That was Ms. Muskego's statement to UC Jon.

[238] Ms. Muskego talked about Mr. Desjarlais taking a wrong turn in Edson and everyone being angry with him. That coincided with Mr. Desjarlais' testimony.

Chronology and Timing

[239] The chronology and timing of events as provided by Mr. Desjarlais has been independently verified by video surveillance and third-party records.

[240] Beginning with the trip to McDonalds on 112 Avenue to being at Tim Hortons in Edson, the information he gave to RCMP about the journey was accurate:

McDonalds in Edmonton:	6:50 am
Drug drop off at aunt's	8:00 am
Servus Credit Union kiosk	9:33 am
Darwell liquor store	10:49 am
Fas Gas in Edson	1:05 pm
RBC Cash Machine Hinton	2:01 pm
McDonalds in Hinton:	3:13 pm-3:33 pm
Tim Hortons in Edson:	6:25 pm

[241] He said he had purchased vodka and coolers in Darwell. That was confirmed by their sales records.

[242] He described Ms. Bajusz arranging funds to be E-Transferred to him by her friend. That occurred, and he obtained the cash when and where he said he had.

[243] Ms. Duperron's aunt Margaret Houle confirmed in her testimony that Ms. Duperron arrived in a white truck at 8:00 am on April 7.

Cell phone and cell tower evidence

[244] The records RCMP were able to obtain because of Mr. Desjarlais' statements confirm that various communications between Mr. Desjarlais and Mr. Underwood took place when he said they did and, in the timeframe, he testified to. Cell tower records confirm that cell phone activity occurred in the areas Mr. Desjarlais said they were in and in the timeframe, he testified to.

On site

[245] Mr. Desjarlais told police that Ms. Duperron had been handcuffed. Despite the inconsistency between his memory of how Ms. Duperron had been left at the site, she was

handcuffed. I recognize that this one puzzle is something contradicts Mr. Desjarlais' evidence to some extent. But that is the only piece of independent or outside evidence that is not confirmatory of Mr. Desjarlais' testimony.

[246] Mr. Desjarlais said Ms. Bajusz had put an ID card in one of Ms. Duperron's pockets. An ID card belonging to someone other than Ms. Duperron was found in a jacket pocket.

[247] And Mr. Desjarlais accurately and easily took RCMP to the site where Ms. Duperron's body was found.

Medical examiner

[248] Dr. Balachandra's evidence was consistent with Mr. Desjarlais' account of what happened to Ms. Duperron. Dr Balachandra noted damage to Ms. Duperron's wrists from being handcuffed. Mr. Desjarlais testified that Ms. Duperron had been handcuffed at some point along the journey to Hinton.

[249] Dr. Balachandra noted a bruise he thought was caused by a blunt object on the left side of Ms. Duperron's head. Mr. Desjarlais testified that she had been hit there with the shotgun, swung by Mr. Eashappie.

[250] Dr. Balachandra observed needle marks on various places on Ms. Duperron. Mr. Desjarlais had testified that Ms. Duperron had been injected by Mr. Easchappie multiple times.

[251] Other minor injuries were noted, consistent with Mr. Desjarlais' account of Ms. Duperron being hit and kicked.

Toxicologist

[252] Dr. Chatterton testified that Ms. Duperron had toxic levels of fentanyl in her blood. Mr. Desjarlais testified that he believed Ms. Duperron was being injected with fentanyl.

[253] Dr. Chatterton testified that Ms. Duperron had some fentanyl in her stomach contents which may have been a result of ingestion, although he was not certain of that. Mr. Desjarlais testified that Ms. Duperron had been forced to eat some fentanyl.

[254] I note here that Dr. Chatterton also testified as to the presence of toxic levels of methamphetamine in Ms. Duperron's blood. There was no evidence from Mr. Desjarlais that Ms. Duperron had used any methamphetamine on April 7. When he first met her sometime before 7 am, he thought she was sober. She did not consume any methamphetamine when they were back at the house and did not consume any during the time from the robberies until she was abandoned near Hinton.

[255] I view the methamphetamine in Ms. Duperron's system as a red herring. There was no evidence as to when and where she consumed the methamphetamine or how or when it got into her system. There was no evidence as to Ms. Duperron's use of methamphetamine or how any particular quantities might affect her.

[256] While the presence of methamphetamine may have been a contributing factor to her death it was not something in the nature of an intervening act as contemplated in ***R v Maybin***.

Jessica and Judith Desjarlais

[257] These witnesses confirm elements of Mr. Desjarlais' evidence as to the group stopping at Mr. Underwood's aunt's trailer and Mr. Desjarlais essentially staying in his truck and not participating in the partying inside the father's trailer.

[258] I have already described my rejection of Jessica Desjarlais' testimony about Nature Duperron being at her residence that afternoon.

Conclusions on credibility and reliability

[259] Mr. Desjarlais went along with the robbery and kidnapping of Ms. Duperron. When told by his cousin that they were about to rob Ms. Duperron, Mr. Desjarlais could simply have told everyone to get out of his truck and driven away. After they robbed her, he could have refused to turn around and go after Ms. Duperron. Again, he could have ordered everyone out of his truck, or simply driven it somewhere neutral and parked it.

[260] When the "call" was made, he could have done the same thing, rather than drive around and eventually drive out to Hinton. He testified that he was threatened by Mr. Underwood and did not want to find out what Mr. Underwood might do if he did not do what he was told. The threat was vague, although there was no character evidence put forward regarding Mr. Underwood and whether threats from him might be serious.

[261] In any event, Mr. Desjarlais didn't have to get back in the truck after filling it up at Kim's No 1 Convenience Store. He didn't have to buy liquor in Darwell and again didn't have to get back in the truck. He had plenty of opportunities to abandon the venture. But he didn't. He carried on. And he will have to live with that. Some of those decisions were moral failures, and not breaches of the criminal law.

[262] Other conduct might be considered criminal in nature, but as was eloquently stated in ***Dunlop and Sylvester*** as quoted by Mr. Moreau:

> …in order to render a person an accomplice and a principal in felony, he must be aiding and abetting at the fact, or ready to afford assistance if necessary, and therefore if A happeneth to be present at a murder, for instance, and taketh no part in it, nor endeavoureth to prevent it, nor apprehendeth the murderer, nor levyeth hue and cry after him, this strange behaviour of his, though highly criminal will not of itself render him either principal or accessory.

[263] Mr. Desjarlais is not on trial. I do not have to decide if any of his conduct crossed the line from immoral to criminal. I do have to decide whether I will accept some, all, or none of his evidence.

[264] Mr. Desjarlais was not a perfect witness and there were some inconsistencies in his testimony and some instances where his trial evidence differed from prior statements. It would be a rare witness who testified flawlessly, and that in itself might raise concerns.

[265] I have rejected any attack on Mr. Desjarlais' credibility on account of him giving statements to the police and ultimately benefitting from an Immunity Agreement. I have also rejected any attack based on his becoming a police agent and receiving compensation for those activities.

[266] Mr. Desjarlais' statements were incriminating and were given by him when he was in jeopardy of being charged in connection with Ms. Duperron's death and him knowing of his jeopardy.

[267] He testified consistently with what he had told police. In my finding, that is because of what he said on cross examination: he was testifying as to the truth. If he told the truth to the RCMP, he told the same truth at trial.

[268] There is no apparent animus between Mr. Desjarlais and any of Mr. Underwood, Ms. Muskego, Mr. Eashappie or Ms. Bajusz. Mr. Desjarlais' name calling of Mr. Underwood was more in jest than in anger.

[269] Mr. Desjarlais' testimony on key points, essentially the first robbery of Ms. Duperron, the second robbery of her, the "call", Ms. Duperron being injected with toxic levels of fentanyl by Mr. Easchappie; the fentanyl being supplied by Ms. Bajusz, and Ms. Duperron being left to die in the bush off Highway 40, is uncontradicted.

[270] Many aspects of his testimony were corroborated by independent evidence. Importantly, apart from Ms. Duperron not being handcuffed when he last saw her, there is no independent evidence which I have accepted that contradicts any aspect of his testimony. The only evidence I rejected was that of Ms. Desjarlais' incredible testimony about meeting Nature Duperron at her father's trailer in Hinton in the afternoon of April 7.

[271] As discussed above, Mr. Desjarlais appeared to be trying hard to answer questions completely and honestly. He played no games on cross-examination. He made reasonable concessions as to memory issues. He did not try to minimize his culpability.

[272] While Mr. Desjarlais agreed with cross-examining counsel that his memory was poor, that he had tried to forget about the events of April 7, and that he was highly intoxicated during those events and for at least three or four weeks after, his memory has been very good as to the details he testified to. Memory failings, such as remembering exact words from conversations 3 ½ years ago, are understandable (especially when the Court requires a court reporter to read back exactly what a witness said an hour earlier).

[273] Despite his drug using and drug dealing past, and his role in Ms. Duperron's death, I have no hesitation in accepting his evidence.

[274] To the extent it may matter, I certainly prefer Mr. Desjarlais' testimony as to what happened to Ms. Duperron over Ms. Desjarlais' account that she saw her alive and well when the group visited her and her mother in Hinton after the time Mr. Desjarlais testified the group had left Ms. Duperron to die in the bush outside Hinton.

The Charges

Robbery

[275] The evidence clearly proves beyond a reasonable doubt that Ms. Muskego and Ms. Bajusz robbed Ms. Duperron. I accept Mr. Desjarlais' testimony that when ostensibly driving Ms. Bajusz and Ms. Muskego to a friend's sometime after 9 am on April 7 that they robbed Ms. Duperron of her purse. I accept Mr. Desjarlais' testimony that he received a text message from Mr. Underwood warning him that the robbery was going to take place.

[276] I also find beyond a reasonable doubt that Ms. Muskego and Ms. Bajusz robbed or attempted to rob Ms. Duperron a second time when they chased after her, located her in the Servus Credit Union bank machine kiosk, and forcibly escorted her back to the truck. There, they assaulted her, searched her, and with Mr. Eashappie forced her onto the floor of the back seat of the truck. I accept Mr. Desjarlais' identification of the three women in the Servus Credit Union kiosk.

[277] I find beyond a reasonable doubt that Mr. Underwood was a party to these robberies. He aided Ms. Muskego and Ms. Bajusz by notifying or warning Mr. Desjarlais as to what was about to happen as well as by directing Mr. Desjarlais where to park near the Credit Union.

[278] Mr. Underwood acknowledged his role and active participation in the robberies when he later threatened Mr. Desjarlais and telling him "You're either with us or against us". Those statements should be seen as abetting Ms. Muskego and Ms. Bajusz. Mr. Underwood was clearly part of the "us".

[279] Mr. Underwood and Ms. Muskego are accordingly guilty of robbery under s 235 of the *Criminal Code*.

Forcible confinement and kidnapping

[280] The evidence clearly proves beyond a reasonable doubt that Ms. Duperron was forcibly confined and kidnapped by Ms. Muskego, Ms. Bajusz, and Mr. Eashappie.

[281] I am satisfied beyond a reasonable doubt that Ms. Duperron was taken by Ms. Muskego and Ms. Bajusz against her will from the Servus Credit Union and forced into Mr. Desjarlais' truck. Force was used against her. She was forcibly confined in Mr. Desajarlais' truck for a number of hours until she was pulled from the truck at the site near Hinton. At no time did she consent to being confined or to any force being used against her.

[282] These conclusions are based partly on the video footage from the Servus Credit Union and Mr. Desjarlais' identification of the three women seen there.

[283] Additionally, when brought back to the truck and forced into it, Ms. Duperron was held against her will and thus forcibly confined in the truck. Her ability to escape was prevented by her being forced onto the floor of the truck, and by Ms. Muskego's, Ms. Bajusz's and Mr. Eashappie's feet on top of her, as well as by Ms. Muskego and Mr. Eashappie being between Ms. Duperron and the doors to the back seat. An additional factor in this is that Ms. Duperron was handcuffed sometime after the "call" had been made and remained that way at least until they arrived at the site near Hinton.

[284] Mr. Moreau argues that Mr. Desjarlais' testimony as to him actually seeing Ms. Muskego's feet on top of Ms. Duperron.

[285] He notes that the evidence on this point is found in 4 places:

> Day 1 page 44:
>
> Q And with her down on the floor in the back, where was everyone putting their feet?
>
> A On top of her.
>
> Q Does that include all three people in the back?

A Yes.

Day 1 page 49 (When Mr. Underwood went into Kim's No 1 to pay for the gas):

Q And when Buddy went in to pay for the gas, was – where were Tyra, Kala, and Rex?

A Tyra was sitting behind me still. Kala was in the middle. And Rex was behind the passenger seat.

Q Were you able to see their feet at all?

A Whose feet?

Q Tyra, Kala, and Rex?

A I seen Kala's feet because she was sitting in the middle.

Q Okay. And where were her feet placed?

A On top of her body.

Q On top of Natures' body?

A Yes.

Day 2 page 12-13 (after Fas Gas in Edson):

Q During that hour between Edson and Hinton, what was the seating configuration in your truck?
A Still the same.

Q And does that include Nature being in that same position?
A Yes.

Q Were you able to see what was going on in the back seat between those two points?

A Between there she slept most of the way. So everyone was just kind of sitting there, really.

Q Okay. And when you say "everyone", who are you including?

A Tyra, Kala and – and Grayson.

Q And you say they're just kind of sitting there. Can you see how their bodies are positioned at all?

A Just sitting straight forward, their feet on top of Nature.

Q And how are you looking at this in the back seat?

A Over my shoulder and through the rear-view mirror.

Day 4 page 71:

Q Now during this road trip down the highway to Darwell and then going on to Hinton, you've told us that for most of that time Nature was laying down on the floor across the back seat, is that correct?

A Yes

Q Okay. And you told us that you saw Nature getting kicked and punched during that time. Is that right?
A Yes

Q Was that happening continuously the whole time?

A Like, you mean, hitting her, like, the whole time? Not the whole time.

Q Okay. Well you've also said that for almost all of that time she was asleep, passed out, right?
A Yeah.

Q Nobody was hitting her when she was passed out, right?

A No. It is was the time that she was awake.

Q Okay. And she was certainly getting kicked and punched by Kala; is that true?

A Yeah.

Q And I would suggest you can't say whether or not Tyra was doing that too.

A No. She was behind my seat. It's hard to see.

Q Right. You couldn't see.

A Yeah.

[286] There is nothing in this evidence where Mr. Desjarlais resiled from his testimony that Ms. Muskego's feet were on Ms. Duperron during the drive to Hinton.

[287] Mr. Moreau appears to be arguing that since Mr. Desjarlais acknowledged that he couldn't see Ms. Muskego hitting Ms. Duperron when she was in the truck, he must have been unable to see where Ms. Muskego's feet were. But he didn't ask about the feet.

[288] In this regard a common-sense inference is appropriate so support Mr. Desjarlais' testimony. He was not always driving. He was in and out of the truck from time to time between Edmonton and Hinton. And where else would Ms. Muskego's feet be in a tight back seat with Ms. Duperron on the floor for 5 hours? A photo of the back seat of the truck is included in Exhibit 1.

[289] I accept Mr. Desjarlais' testimony and find as a matter of fact that Ms. Muskego's feet were on top of Ms. Duperron for at least some of the journey from the Servus Credit Union to Hinton.

[290] Mr. Underwood is also guilty of this offence as a party by reason of his directing Mr. Desjarlais where to park when Ms. Muskego and Ms. Bajusz chased after Ms. Duperron. That was clearly aiding them with their plans to continue their robbery of Ms. Duperron. He abetted them by his threat to Mr. Desjarlais and acknowledged his participation in the forcible confinement with his statement to Mr. Desjarlais "you're either with us or against us."

[291] The forcible confinement and kidnapping continued unabated from the time Ms. Duperron was taken from the Servus Credit Union kiosk until the group abandoned her and left her to die in the bush north-west of Hinton off Highway 40.

[292] I accept Mr. Desjarlais' testimony that Mr. Underwood did some of the driving between Edmonton and Hinton, after Ms. Duperron had been taken from the Servus kiosk and before she

was left in the bush near Hinton. He paid for some of the gas. He gave at least some directions to Mr. Desjarlais as to where to drive.

[293] Most importantly, he gave directions to Mr. Desjarlais as to where to turn off Highway 40 into a remote, secluded area in the bush.

[294] He had as well made the "call": Ms. Duperron knew too much, and they needed to get rid of her.

[295] Mr. Underwood and Ms. Muskego are accordingly guilty of kidnapping and forcible confinement under s 279 of the *Criminal Code*.

Murder

Constructive Murder

[296] I will deal firstly with constructive murder and section 231(5) of the *Criminal Code*. I am satisfied that Ms. Muskego and Mr. Underwood were both parties to the kidnapping and forcible confinement of Ms. Duperron.

[297] Section 231(5) creates an exception to the requirement for first degree murder to be planned and deliberate as set out in section 235(2).

[298] S 231(5) provides that murder is first degree murder in respect of a person when the death is caused by that person while committing or attempting to commit an offence under s 279.

[299] The key cases in this area are ***R v Harbottle*** and ***R v Nette***. Those cases, and the cases that have followed them, make it clear that a death in the course of a kidnapping or forcible confinement does not automatically render all parties to the kidnapping or forcible confinement of the victim guilty of first-degree murder. Some participation in the death itself is required.

[300] For the purposes of s 231(5) (formerly 214(5)) ***Harbottle*** implemented the "Substantial Cause Test" at page 325:

> Accordingly, I suggest a restrictive test of substantial cause should be applied under s. 214(5). That test will take into account the consequences of a conviction, the present wording of the section, its history and its aim to protect society from the most heinous murderers.
>
> The consequences of a conviction for first degree murder and the wording of the section are such that the test of causation for s. 214(5) must be a strict one. In my view, an accused may only be convicted under the subsection if the Crown establishes that the accused has committed an act or series of acts which are of such a nature that they must be regarded as a substantial and integral cause of the death. A case which considered and applied a substantial cause test from Australia is *R. v. Hallett*, [1969] S.A.S.R. 141 (S.C. *in banco*). In that case, the victim was left beaten and unconscious by the sea and was drowned by the incoming tide. The court formulated the following test of causation, at p. 149, which I find apposite:
>
> > The question to be asked is whether an act or series of acts (in exceptional cases an omission or series of omissions) consciously performed by the accused is or are so connected with the event that it or they must be regarded as having a sufficiently substantial causal effect which subsisted up to the happening of the

> event, without being spent or without being in the eyes of the law sufficiently interrupted by some other act or event.

The substantial causation test requires that the accused play a very active role -- usually a physical role -- in the killing. Under s. 214(5), the actions of the accused must form an essential, substantial, and integral part of the killing of the victim. Obviously, this requirement is much higher than that described in *Smithers v. The Queen*, 1977 CanLII 7 (SCC), [1978] 1 S.C.R. 506, which dealt with the offence of manslaughter. There it was held at p. 519 that sufficient causation existed where the actions of the accused were "a contributing cause of death, outside the *de minimis* range". That case demonstrates the distinctions in the degree of causation required for the different homicide offences.

The majority of the Court of Appeal below expressed the view that the acts of the accused must physically result in death. In most cases, to cause physically the death of the victim will undoubtedly be required to obtain a conviction under s. 214(5). However, while the intervening act of another will often mean that the accused is no longer the substantial cause of the death under s. 214(5), there will be instances where an accused could well be the substantial cause of the death without physically causing it. For example, if one accused with intent to kill locked the victim in a cupboard while the other set fire to that cupboard, then the accused who confined the victim might be found to have caused the death of the victim pursuant to the provisions of s. 214(5). Similarly, an accused who fought off rescuers in order to allow his accomplice to complete the strangulation of the victim might also be found to have been a substantial cause of the death.

Therefore, an accused may be found guilty of first-degree murder pursuant to s. 214(5) if the Crown has established beyond a reasonable doubt that:

> (1) the accused was guilty of the underlying crime of domination or of attempting to commit that crime;
> (2) the accused was guilty of the murder of the victim;
> (3) the accused participated in the murder in such a manner that he was a substantial cause of the death of the victim;
> (4) there was no intervening act of another which resulted in the accused no longer being substantially connected to the death of the victim; and
> (5) the crimes of domination and murder were part of the same transaction; that is to say, the death was caused while committing the offence of domination as part of the same series of events.

[301] ***Nette*** notes at para 65:

> 65. It is clear from a reading of *Harbottle* that the “substantial cause” test expresses the increased degree of moral culpability, as evidenced by the accused person’s degree of participation in the killing, that is required before an accused can be found guilty under s. 231(5) of the *Criminal Code* of first degree murder. The increased degree of participation in the killing, coupled with a finding that the accused had the requisite *mens rea* for murder, justifies a verdict of guilty under s. 231(5) of the *Code*.

[302] It further comments on ***Harbottle*** at para 73:

> 73. In light of *Harbottle*, where the jury must be instructed on first degree murder under s. 231(5) of the *Code* in addition to manslaughter or second degree murder, the terminology of "substantial cause" should be used to describe the applicable standard for first degree murder so that the jury understands that something different is being conveyed by the instructions concerning s. 231(5) of the *Code* with respect to the requisite degree of participation of the accused in the offence. In such cases, it would make sense to instruct the jury that the acts of the accused have to have made a "significant" contribution to the victim's death to trigger culpability for the homicide while, to be guilty of first-degree murder under s. 231(5), the accused's actions must have been an essential, substantial, and integral part of the killing of the victim.

[303] ***Nette*** gets into the issue of causation. It notes at para 75:

> The appellant submits that the present appeal is a case involving multiple causation in which the trier of fact must decide whether the acts of the accused were a "beyond de minimis" contribution that triggers criminal liability. The respondent and intervenor do not take issue with the appellant's characterization of this appeal as a case involving multiple causes.

[304] In dealing specifically with causation issues, the Court stated at paras 69-71:

> 69. In describing the *Smithers* standard of causation, Lambert J.A. concluded that the phrase "a contributing cause that is not trivial or insignificant" reflected the applicable standard without the need to resort to the use of the Latin expression "beyond *de minimis*". He further found that a cause that is "not insignificant" can be expressed positively as a cause that is "significant" and that it would therefore be correct to describe the *Smithers* standard as a "significant contributing cause" (para. 29).
>
> 70. There is a semantic debate as to whether "not insignificant" expresses a degree of causation lower than "significant". This illustrates the difficulty in attempting to articulate nuances in this particular legal standard that are essentially meaningless. I agree with Lambert J.A. that even if it were desirable to formulate a causation test for second degree murder that is higher than the *Smithers* standard for manslaughter but less strict than the *Harbottle* standard for first degree murder under s. 231(5), which I conclude it is not, it would be difficult to formulate such a test in a meaningful way and even more difficult for a jury to grasp the subtle nuances and apply three different standards of causation.
>
> 71. The causation standard expressed in *Smithers* is still valid and applicable to all forms of homicide. In addition, in the case of first-degree murder under s. 231(5) of the *Code*, *Harbottle* requires additional instructions, to which I will return. The only potential shortcoming with the *Smithers* test is not in its substance, but in its articulation. Even though it causes little difficulty for lawyers and judges, the use of Latin expressions and the formulation of the test in the negative are not particularly useful means of conveying an abstract idea to a jury. In order to explain the standard as clearly as possible to the jury, it may be preferable to phrase the standard of causation in positive terms using a phrase such as "significant contributing cause" rather than using expressions phrased in the

> negative such as “not a trivial cause” or “not insignificant”. Latin terms such as “*de minimis*” are rarely helpful.

[305] Most recently, the Supreme Court considered constructive first-degree murder in ***R v Sundman***. The accused and others had unlawfully confined the victim, who escaped and ran. The victim was fatally shot by another person after he had been shot and wounded by the accused. The cause of death was the shot fired by the other person. The Supreme Court found that the accused had participated in the killing by shooting and wounding the victim, which prevented the victim from escaping from the other attacker.

[306] Under this section, I must determine if Mr. Underwood and Ms. Muskego did something that was more than a trivial or insignificant cause of Ms. Duperron’s death.

[307] The Medical Examiner concluded that Ms. Duperron died of fentanyl and methamphetamine toxicity. The injuries on her face, head and limbs were insufficient to cause death. He was of the view that the fentanyl in Ms. Duperron’s blood was there as a result of injection rather than ingestion. He thought it very likely that Ms. Duperron died of fentanyl and methamphetamine toxicity although hypothermia as a contributing factor could not be ruled out.

[308] Dr. Chatterton, the chief toxicologist was uncertain whether the fentanyl found in Ms. Duperron’s stomach contents resulted from ingestion, injection, or both. He was of the opinion that the level of fentanyl in Ms. Duperron’s blood did not likely result from oral ingestion alone.

[309] Nothing in the evidence links either Mr. Underwood or Ms. Muskego to the methamphetamine found in Ms. Duperron’s system following her death. Nothing links Ms. Muskego to the fentanyl found in Ms. Duperron’s system. The fentanyl was supplied by Ms. Bajusz and injected into Ms. Duperron by Mr. Eashappie. No one assisted Mr. Easchappie with the injection process.

[310] Mr. Desjarlais’ testimony as to Mr. Underwood forcing Ms. Duperron to eat some fentanyl was undermined by cross-examination and I cannot and do not conclude beyond a reasonable doubt that he did so. Even if I had so concluded, Dr. Chatterton’s testimony was that it was not certain that there had been any ingestion of fentanyl. Evidence of any causal connection between ingested fentanyl and Ms. Duperron’s death is not made out beyond a reasonable doubt.

[311] None of the physical injuries were found to have contributed to Ms. Duperron’s death, and any contribution to Ms. Duperron’s death by exposure or having been left in the elements was only something that could not be ruled out. There was no evidence that could be accepted beyond a reasonable doubt that being abandoned in the bush was a causal or contributing factor to Ms. Duperron’s death.

[312] As a result of these findings, I am not satisfied that the Crown has met the burden of proving that some act on the part of either Mr. Underwood or Ms. Muskego was a significant contributor to Ms. Duperron’s death, or a “significant contributing cause” using the words in ***Nette***.

[313] Accordingly, neither accused can be found guilty of constructive first-degree murder under section 231(5).

Planned and Deliberate Murder

[314] The alternate path to first degree murder is for the Crown to prove that these Defendants or either of them caused Ms. Duperron's planned and deliberate murder.

[315] The evidence does not implicate either as the principal actor. That was Mr. Eashappie's role. However, party liability is dealt with in section 21(1) of the *Criminal Code*. That section provides:

> **21 (1)** Everyone 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.
>
> **(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.

[316] The Crown cites a number of cases which set out the basic principles on aiding and abetting.

[317] ***R v Wood*** holds at paras 60-62 that when accused persons act in concert, pursuant to a common motive, it is immaterial who the principal is, and who is the aider or abettor.

[318] ***R v H (LI)*** holds at paras 20-22:

> 20. Where several persons participate and assist each other in an assault which is intended to cause death or which they know will likely cause death, and the death of the victim is achieved, then each participant may be considered a joint principal offender to the murder under s. 21(1)(a). This is so no matter which member of the group actually delivered the killing blow and even when it is not known which person struck the killing blow.
>
> 21. If those persons do not have the specific intent to murder, then they may only be liable for manslaughter. A person may be guilty of manslaughter under s. 21(1)(a) where he participates with others in an assault which leads to death if the person knew the assault was likely to cause some harm short of death or in circumstances where a reasonable person would have foreseen the risk of bodily harm of a non-trivial or non-transitory nature.
>
> 22. Therefore, where there is evidence that more than one person acted in concert in the commission of a homicide, it will be open to a jury to convict all such persons as principals, even though it is unknown which of them actually struck the fatal blow.

[319] A case with some similarity to the facts in this case is ***R v Briscoe*** which deals with aiding and abetting. That case deals with the necessary *mens rea*, *actus reus*, and knowledge to establish aiding and abetting. At paras 14-17 the Supreme Court stated:

> [14] The *actus reus* of aiding or abetting is doing (or, in some circumstances, omitting to do) something that assists or encourages the perpetrator to commit the offence. While it is common to speak of aiding and abetting together, the two concepts are distinct, and liability can flow from either one. Broadly speaking, "[t]o aid under s. 21(1)(*b*) means to assist or help the actor. . .. To abet within the meaning of s. 21(1)(*c*) includes encouraging, instigating, promoting or procuring the crime to be committed": *R. v. Greyeyes*, 1997 CanLII 313 (SCC), [1997] 2 S.C.R. 825, at para. 26. The *actus reus* is not at issue in this appeal. As noted earlier, the Crown argued at trial that Mr.Briscoe was both an aider and an abettor. The trial judge's finding that Mr.Briscoe performed the four acts of assistance described above is not disputed.
>
> [15] Of course, doing or omitting to do something that resulted in assisting another in committing a crime is not sufficient to attract criminal liability. As the Court of Appeal for Ontario wrote in *R. v. F. W. Woolworth Co.* (1974), 1974 CanLII 707 (ON CA), 3 O.R. (2d) 629, "one does not render himself liable by renting or loaning a car for some legitimate business or recreational activity merely because the person to whom it is loaned or rented chooses in the course of his use to transport some stolen goods, or by renting a house for residential purposes to a tenant who surreptitiously uses it to store drugs" (p. 640). The aider or abettor must also have the requisite mental state or *mens rea*. Specifically, in the words of s. 21(1)(*b*), the person must have rendered the assistance *for the purpose* of aiding the principal offender to commit the crime.
>
> [16] The *mens rea* requirement reflected in the word "purpose" under s. 21(1)(*b*) has two components: intent and knowledge. For the intent component, it was settled in *R. v. Hibbert*, 1995 CanLII 110 (SCC), [1995] 2 S.C.R. 973, that "purpose" in s. 21(1)(*b*) should be understood as essentially synonymous with "intention". The Crown must prove that the accused intended to assist the principal in the commission of the offence. The Court emphasized that "purpose" should not be interpreted as incorporating the notion of "desire" into the fault requirement for party liability…
>
> [17] As for knowledge, in order to have the intention to assist in the commission of an offence, the aider must know that the perpetrator intends to commit the crime, although he or she need not know precisely how it will be committed. That sufficient knowledge is a prerequisite for intention is simply a matter of common sense.

[320] That case is perhaps best known for its treatment of wilful blindness.

[321] ***R v Beardy*** from the Manitoba Court of Appeal holds that presence at the scene of the crime may be a form of aiding or abetting, although that the circumstances must be carefully analyzed as ***Dunlop and Sylvester*** from the Supreme Court of Canada is clear that being a passive bystander to a crime does not create criminal liability.

[322] A very recent Alberta Court of Appeal decision is ***R v Ouellette*** discusses ***Dunlop and Sylvester*** and confirms that "something more" than mere presence at the scene or passive acquiescence is necessary to establish criminal liability. The Court sets out the applicable principles at paras 133 – 138:

> [133] Although the liability of principal offenders and parties is the same, the essential elements of aiding and abetting are different, with parties having a distinct *actus reus* and *mens rea*: *Regina v Briscoe*, 2010 SCC 13 at para 13. The *actus reus* for abetting has been defined as "encouraging, instigating, promoting or procuring the crime to be committed": *R v Greyeyes*, [1997] 2 SCR 825, 1997 CanLII 313 at para 26. Or put another way, "doing something or omitting to do something that encourages the principal to commit the offence": *R v Cowan*, 2021 SCC 45 at para 32.
>
> [134] The *mens rea* of abetting requires both intent and knowledge: *Cowan* at para 32. Intent requires that the abettor intended to assist the principal in committing the offence; however, it does not require the abettor to actually desire that the offence be committed: *Briscoe* at para 16. As for knowledge, the abettor must subjectively know that the principal intends to commit the offence but is not required to know the precise details of how the offence will be committed: *Briscoe* at para 17. Wilful blindness will also suffice to meet the *mens rea* requirement in the absence of actual knowledge: *Briscoe* at para 25.
>
> [135] It has been consistently held that mere presence at the scene of an offence, or passive acquiescence to the commission of an offence, is insufficient to establish liability under s. 21: *Dunlop and Sylvester v The Queen*, 1979 CanLII 20 (SCC), [1979] 2 SCR 881 at 891, 99 DLR (3d) 301. There must be something more in order for liability to be established. In his text, V. Gordon Rose, *Parties to the Offence*, (Toronto: Carswell, 1982) suggests at page 23 that this "something more" must be something showing the party's desire to associate themselves with the principal's acts.
>
> [136] This "something more" is also explained by the fact that conduct constituting aiding or abetting is "coloured by the mental state accompanying the act", meaning the conduct must have been for the purpose of aiding or abetting: *R v Dooley*, 2009 ONCA 910 at para 118, leave to appeal to SCC refused 2010 CanLII 56575 (SCC).
>
> [137] There does not need to be a causal connection between the conduct of aiding or abetting and the commission of an offence, so long as the conduct in some way "furthers, facilitates, promotes, assists or encourages" the principal or is "conduct that 'has the effect' of aiding or abetting": *Dooley* at paras 121, 123. As such, there must be some factual nexus between the conduct and the offence, but it does not need to be causative. For example, if an individual were to shout words of encouragement from such a distance that the principal could not hear them, they would not be guilty of abetting the principal: *Dooley* at para 120.
>
> [138] In sum, any act, gesture, or words spoken before or during an offence, which have the effect of encouraging the principal will constitute the *actus reus* of

> abetting. This conduct will establish criminal liability where it is accompanied by the requisite *mens rea* of intent and knowledge: *Cowan* at para 32.

[323] The Court noted at para 148:

> [148] The general principle, if any, that may be gleaned from the above cases is that there is no threshold for what types of words might constitute abetting; it is the *context and circumstances* of the discussion that is most important. As such, the analysis will be highly fact specific.

[324] ***R v Bird*** is a companion case to ***R v Briscoe***.

[325] In that case, Ms. Bird and the principal offender had approached the victim and lured her to a golf course under the false pretense that they were going to a party. Along with 3 others (including Mr. Briscoe) they took the victim to a golf course where the victim was sexually assaulted and killed. Before completion of the sexual assault, Ms. Bird left the golf course fairway and returned to the car. The trial judge found that the murder was planned and deliberate and was done in the course of an unlawful confinement. She was convicted of manslaughter at trial. The Court of Appeal dismissed the appeal. The Supreme Court, however, set aside the manslaughter conviction and substituted a conviction for first degree murder. The case turned on the law relating to abandonment.

[326] The Court of Appeal noted that there was evidence on record capable of supporting the defence of abandonment by the accused.

[327] More recently in ***R v Cowan***, the Supreme Court considered the essential elements of aiding and abetting and stated at para 32:

> [32] The essential elements of abetting are well established. The *actus reus* of abetting is doing something or omitting to do something that encourages the principal to commit the offence (*Briscoe*, at paras. 14-15). As for the *mens rea*, it has two components: intent and knowledge (para. 16). The abettor must have intended to abet the principal in the commission of the offence and known that the principal intended to commit the offence (paras. 16-17).

[328] Mr. Jordan cited ***Johnson v The Queen*** as to what constitutes "planned and deliberate". There, the Nova Scotia Court of Appeal held at para 67:

> [67] To attract liability for first degree murder, the trier of fact must be satisfied beyond a reasonable doubt that the murder was both planned and deliberate. The suggested wording to explain these requirements to a jury are found in *Watt's*, *supra*, p. 691:
>
> > A *planned* murder is one that it is committed as a result of a scheme or plan that has been previously formulated or designed. It is the implementation of that scheme or design. A murder committed on a sudden impulse and without prior consideration, even with an intention to kill is *not* a planned murder.
> >
> > "Deliberate" is *not* a word that we often use when speaking to other people. It means "considered, not impulsive", "carefully thought out, not hasty or rash", "slow in deciding", "cautious".

> A deliberate act is one that the actor has taken time to weigh the advantages and disadvantages of. The deliberation must take place *before* the act of murder (*briefly describe*) starts. A murder committed on a sudden impulse and without prior consideration, even with an intention to kill is *not* a deliberate murder.

[329] In ***R v Almarales***, the Ontario Court of Appeal sets out a series of "governing principles" relating to secondary participation in first degree murder. At paras 68 – 72, the Court stated:

> [68] A person may be found guilty of first-degree murder as a secondary participant in a planned and deliberate murder. Nothing in s. 231(2), which classifies planned and deliberate murder as first-degree murder, eliminates, or restricts the secondary participation provisions of ss. 21(1)(b) and 21(1)(c).
>
> [69] A person may be found guilty of first-degree murder as an aider of planned and deliberate murder if that person:
>
> - Did (or, in the case of a legal duty, failed to do) something that helped the (or, a) principal to commit a planned and deliberate murder [the conduct requirement]; and
> - Provided the assistance with the intention of helping the (or, a) principal to commit a planned and deliberate murder [the fault requirement].
>
> [70] The fault requirement, as in all cases of secondary participation by aiding, consists of two elements: an *intention* to help the principal and *knowledge* of the principal's intention. *Maciel* at para. 87. An aider must *know* that the principal intends to commit a planned and deliberate murder and *intend* to help the principal to commit a planned and deliberate murder. The aider may acquire his or her knowledge that the murder is planned and deliberate through actual participation in the planning and deliberation, or by some other means. The means of acquiring knowledge are as irrelevant to culpability as proof of knowledge is essential to it. *Maciel* at para. 89.
>
> [71] A person may be found guilty of first-degree murder as an abettor of a planned and deliberate murder if that person:
>
> - Said or did something that encouraged the (or, a) principal to commit a planned and deliberate murder [the conduct requirement]; and
> - Offered the encouragement, by words or conduct, with the intention of encouraging the (or, a) principal to commit a planned and deliberate murder [the fault requirement].
>
> [72] As in the case of secondary participation by aiding, abetting requires proof of the abettor's *intention* to encourage the principal and of the abettor's *knowledge* of the principal's intention. An abettor must *know* that the principal intends to commit a planned and deliberate murder and *intend* to encourage the principal to commit a planned and deliberate murder.

[330] Mr. Jordan characterized Mr. Underwood's "call" as an utterance and argued that it should not have been admitted into evidence because of the uncertainty as to what was being talked about and the prejudice to Mr. Underwood of it being admitted exceeded its probative value.

[331] He cited ***The Queen v Hunter*** in that regard.

[332] I frankly do not think ***Hunter*** has any relevance to the case at bar. There, the Court was dealing with an overheard statement, "I killed David". That had been overheard by a police officer who was walking past the accused while he was on the phone. The police officer had no context within which to definitively characterize the utterance as an admission of guilt. The issue in that case was the admissibility of the utterance.

[333] Mr. Jordan describes the "call" as an utterance. Mr. Desjarlais' evidence was that the "call" was part of a conversation in the truck. It was not "overheard" by anyone as the statement was, in Mr. Desjarlais' view, directed at everyone in the truck who was a participant in the robbery, kidnapping and forcible confinement of Ms. Duperron. Here, the issue is not as to context, it is as to whether Ms. Muskego and the others in the truck heard and understood Mr. Underwood's statement. I conclude the evidence on the "call" is admissible and should not be excluded.

[334] ***R v CP*** deals with inferences and the absence in that case of any evidence on aiding and abetting. It turns on its own facts and not the law. It is not helpful here.

[335] ***R v Wallen*** involves the adequacy of the trial judge's charge regarding the effect of intoxication on planning and deliberation. The Supreme Court considered whether the charge had adequately directed the jury to consider intoxication with respect to planning and deliberation separately from intoxication with respect to intent.

[336] The Court noted that there are no hard and fast rules on this issue.

[337] I agree to some extent with Mr. Jordan's concerns here. Wallen goes into some detail as to what might be said to a jury where there is evidence of intoxication. Common sense tells us what Mr. Desjarlais testified to: drug intoxication, like alcohol intoxication, may affect judgment and memory. Drunkenness and intoxication by alcohol are routinely found to take away the *mens rea* in cases requiring intent. Here, while there was clear evidence of intoxication by reason of the use of methamphetamine, there was no expert evidence as to the potential for intoxication by that drug to diminish criminal responsibility by taking away *mens rea*.

[338] The effects of alcohol and drug use are matters of fact or expert opinion, and not something that a trier of fact can take judicial notice of. What this group did was clearly not rational, but I do not think the law permits me to arbitrarily reduce criminal responsibility absent a clear evidentiary foundation to do so.

[339] With reference to Mr. Desjarlais' testimony and arguments as to his unreliability, Mr. Jordan cited ***R v Bereznicki***. There the Alberta Court of Appeal noted at para 24:

[340] Unreliable evidence has little probative value. It is illogical to suggest that unreliable evidence from one count can be used to bolster unreliable evidence on another count.

[341] I of course agree with that comment, but here, I have not found Mr. Desjarlais' testimony as a whole to be unreliable.

Analysis

[342] A finding of planning and deliberation hinges to a large degree on the "call". Clearly Mr. Desjarlais heard Mr. Underwood say that Ms. Duperron "knew too much" and understood him to also say words to the effect that "we need to get rid of her".

[343] Mr. Desjarlais' evidence was that the music in the truck was on but was turned down.

[344] Did that comment constitute the necessary "planning and deliberation" to find that Ms. Duperron's killing was first degree murder.

[345] I see some difficulties with that position. Firstly, it requires an inference that "get rid of her" could only mean "kill her". Secondly, it requires a finding that everyone else in the truck heard those words and understood them.

[346] Mr. Desjarlais, not surprisingly, was unable to relate any particular conversation that followed Mr. Underwood's statement. He did say he himself was confused, but I disagree with Moreau's argument that his confusion related to understanding what Mr. Underwood meant. In my view, Mr. Desjarlais' "confusion" was in my view shock and surprise as the "call" seemed to come out of nowhere. Mr. Desjarlais was always clear in his evidence as to what he understood Mr. Underwood to be saying.

[347] There is, as both Mr. Moreau and Mr. Jordan point out, no evidence that anyone in the back seat heard those words or understood them.

[348] Mr. Desjarlais was clear and unshaken that Mr. Underwood threatened him with words to the effect "you're either with us or against us." Again, there is no evidence that anyone else heard that.

[349] Some time later Ms. Bajusz suggested they dump Ms. Duperron in Alberta Beach. That was ruled out. After that, Mr. Desjarlais did not refer to any other discussions about Ms. Duperron being killed until they reached the site off Highway 60.

[350] Mr. Desjarlais was initially an outsider to the planned robbery of Ms. Duperron. Mr. Underwood knew of it and warned Mr. Desjarlais. Ms. Bajusz and Ms. Muskego obviously knew about that. There were times when Mr. Desjarlais was out of the truck and not privy to discussions amongst the others. He went into the liquor store at Darwell. He went into the Fas Gas in Edson. He went into the RBC kiosk in Hinton. So, he does not know what the others were doing or talking about when he was away from the truck.

[351] From the whole of Mr. Desjarlais' evidence, there did not seem to be a plan, at least one he was aware of. He believed the plan was to kill Ms. Duperron, but he did not know where or when that might happen. The idea of an overdose was first mentioned by him when he related his being ordered to inject Ms. Duperron himself with fentanyl shortly after they arrived at the site near Hinton.

[352] As I mentioned during argument on the directed verdict applications, we don't really know if the "call" was really one to kill Ms. Duperron, or rather was intended to scare her into leading them to her anticipated cache of drugs and money. According to Mr. Desjarlais, Ms. Bajusz and Ms. Muskego continued to "mock" Ms. Duperron as they drove.

[353] Undoubtedly Ms. Duperron would be frightened by the circumstances, although Mr. Desjarlais only spoke of her pleading for her life at the Hinton site, and not before.

[354] I am left in some doubt that the "call" as described by Mr. Desjarlais was one that could be characterized as evidence of a planned and deliberate murder. There was really no plan and no discussion as to how, when or where Ms. Duperron would be killed. That is obvious from the discussion about dumping Ms. Duperron in Alberta Beach.

[355] It should have been obvious to everyone that harm was being done to Ms. Duperron when Mr. Eashappie began injecting her with fentanyl between Darwell and Edson. Ms. Bajusz supplied the fentanyl. From that point on, Ms. Duperron was mainly asleep on the floor of the back seat of the truck. When she awoke, Mr. Eashappie gave her more fentanyl, again supplied by Ms. Bajusz.

[356] Yet at that stage it is not obvious that there was any kind of plan that Ms. Duperron was to be killed. What appears to be the situation is a group of drug-intoxicated people driving around with no destination in mind. I see no certainty in any of this.

[357] That changed when Mr. Underwood directed the turn onto Highway 40. Mr. Desjarlais testified that after 10 to 20 minutes of driving on that Highway, he appeared to get angry and then directed Mr. Desjarlais to turn into the clearing and up the quad road. I am satisfied that was a turning point. Aimlessness turned into purpose.

[358] At that point, at least Mr. Underwood had made a decision to end the journey. It is obvious that from that point, everything done was aimed at killing Ms. Duperron in a remote location. Mr. Desjarlais was directed to inject Ms. Duperron with more fentanyl to overdose her. He thwarted that process by breaking the needle in Ms. Duperron's clothing rather than inject her. Ms. Duperron woke up. She was forced to eat more fentanyl, supplied by Ms. Bajusz. That seemed to have no effect. Mr. Underwood then retrieved his shotgun from the truck. It doesn't matter who loaded it because it never fired. Mr. Eashappie tried to shoot Ms. Duperron. The gun didn't go off, so he handed it back to Mr. Underwood who removed some duct tape and released the safety. Mr. Eashappie tried to shoot Ms. Duperron. The gun still didn't go off, so he swung the gun at Ms. Duperron's temple, hitting her and knocking her down. She never got up. Waiting for her to "nod off", the group then departed leaving her to die in the exact location where she was found some 2 weeks later.

Mr. Underwood

[359] This was clearly a deliberate killing, but not planned in the context of section 231(2). Mr. Eashappie was the principal actor. I am satisfied beyond a reasonable doubt that Mr. Underwood was a party to the deliberate killing by virtue of section 21. He both aided and abetted Mr. Eashappie.

[360] I do not take much from the recorded conversations with Mr. Underwood. It is clear that he and Mr. Desjarlais are talking about the death of Ms. Duperron. It is also clear that the conversations with Ms. Cann focus on the death of Ms. Duperron. No other inferences from these conversations are possible.

[361] That said, Mr. Underwood does not say anything expressly inculpatory. He knows all of his calls are recorded so is obviously being very careful in his choice of words. The tenor of the discussions are consistent with a guilty mind, but there are no admissions as to any particular act. Importantly, there was nothing exculpatory in any of the recorded conversations apart from a few obvious planted lines about not knowing what Mr. Desjarlais was talking about.

[362] It is very clear from the evidence that Mr. Underwood was calling the shots. He had made the original call. He then made the final call to turn off into the bush where Ms. Duperron was to be killed.

[363] Amongst at least Mr. Underwood, Mr. Eashappie and Ms. Bajusz, there was a common intention to kill Ms. Duperron and to assist each other in doing so.

[364] Each of them knew or ought to have known that the Ms. Duperron's death would be a probable consequence of carrying out their common purpose.

[365] Mr. Underwood avoided doing any of the dirty work himself. He got Mr. Eashappie to do that for him. But he clearly aided Mr. Eashappie by being at least being beside him when Ms. Duperron was fed the fentanyl. He was not an idle bystander but was an intimidating force assisting Mr. Eashappie and preventing Ms. Duperron from going anywhere if she could. He then came up with the plan to shoot Ms. Duperron and provided his gun and ammunition. As I said, it doesn't matter who loaded it. The gun didn't work so he tried to fix it and handed it back to Mr. Eashappie. It was ultimately used to assault Ms. Duperron. She was knocked down with it and never got up. Satisfied that the purpose had been accomplished, they walked away.

[366] Abetting is made out by Mr. Underwood's role as the director of the events.

[367] I am satisfied beyond a reasonable doubt that Mr. Underwood is guilty of the second-degree murder of Nature Duperron and find him guilty of that less but included offence.

Ms. Muskego

[368] It is clear from the evidence that Ms. Muskego was fully involved as a principal actor in the robberies, kidnapping and forcible confinement of Ms. Duperron. That role did not change until the group got to the site near Hinton and got out of the truck. However, there is no evidence that Ms. Muskego was involved in any way with the injections of fentanyl to Ms. Duperron. There is no evidence that Ms. Muskego was involved in any way with anything done to Ms. Duperron after they arrived at the site near Hinton. Indeed, I am not satisfied beyond a reasonable doubt that she got out of the truck at the site. If she was in the truck the whole time, she would have seen Mr. Desjarlais break the needle in Ms. Duperron's clothing, as that was done while Ms. Duperron was still in the truck. If she was initially out of the vehicle as Mr. Desjarlais believes, she might not have even seen that.

[369] Her statement to UC Jon was to the effect that she didn't get out of the truck because she didn't want to see what was going to happen. Her statement that she had no right to be scared because she was into it too deeply is evidence of a guilty mind.

[370] Mr. Moreau did not argue abandonment and that was appropriate having regard to the wilful blindness analysis in ***Briscoe***.

[371] It is impossible to know what was in Ms. Muskego's mind at any time after Mr. Underwood made the "call". It is highly likely that she was aware of it and had a similar understanding to Mr. Desjarlais. That would also mean that she heard the threat to Mr. Desjarlais.

[372] In one scenario, she was part of the common plan to get rid of Ms. Duperron, and she performed her role: making sure Ms. Duperron stayed on the floor of the truck and did not get out the door Ms. Muskego was sitting beside.

[373] In another scenario, Ms. Muskego was trapped, having started a process that had gotten out of control and was leading to the likelihood of serious bodily harm or death to Ms. Duperron. She, like Mr. Desjarlais, was intimidated by Mr. Underwood and did not know how to extricate herself from this situation.

[374] There is no clear evidence that she did anything to Ms. Duperron other than rest her feet on top of her. There is no evidence of anything said by Ms. Muskego that could give any clue as to her state of mind or even understanding of what was going on.

[375] Whatever the situation, it would have been abundantly clear to her when Mr. Underwood directed Mr. Desjarlais to turn off Highway 40 and drive into a secluded area that something was going to happen. Either something was going to be done to Ms. Duperron, or perhaps she was just going to be left in her heavily drugged and handcuffed state.

[376] Where does this lead to by way of criminal responsibility for Ms. Duperron's death?

[377] Mr. Moreau referenced ***R v Creighton*** in his argument. That case defines unlawful act manslaughter.

[378] Homicide is defined in section 222(1):

> A person commits homicide when, directly or indirectly, by any means, he causes the death of a human being.

[379] Subsection 4 states:

> Culpable homicide is murder or manslaughter or infanticide.

[380] Subsection 5 says:

> **(5)** A person commits culpable homicide when he causes the death of a human being,
>
> **(a)** by means of an unlawful act;
>
> **(b)** by criminal negligence;
>
> **(c)** by causing that human being, by threats or fear of violence or by deception, to do anything that causes his death; or
>
> **(d)** by wilfully frightening that human being, in the case of a child or sick person.

[381] The Supreme Court discusses this at pages 42 – 44 (in [1993] 3 SCR 3):

> Manslaughter is a crime of venerable lineage. It covers a wide variety of circumstances. Two requirements are constant: (1) conduct causing the death of another person; and (2) fault short of intention to kill. That fault may consist either in committing another unlawful act which causes the death, or in criminal negligence…
>
> The structure of the offence of manslaughter depends on a predicate offence of an unlawful act or criminal negligence, coupled with a homicide. It is now settled that the fact that an offence depends upon a predicate offence does not render it unconstitutional, provided that the predicate offence involves a dangerous act, is not an offence of absolute liability, and is not unconstitutional…

> The cases establish that in addition to the *actus reus* and *mens rea* associated with the underlying act, all that is required to support a manslaughter conviction is reasonable foreseeability of the risk of bodily harm. While s. 222(5)(*a*) does not expressly require foreseeable bodily harm, it has been so interpreted: see *R. v. DeSousa*, *supra*. The unlawful act must be objectively dangerous, that is likely to injure another person. The law of unlawful act manslaughter has not, however, gone so far as to require foreseeability of death. The same is true for manslaughter predicated on criminal negligence; while criminal negligence, *infra*, requires a marked departure from the standards of a reasonable person in all the circumstances, it does not require foreseeability of death…
>
> This Court in *R. v. DeSousa*, *supra*, confirmed that a conviction for manslaughter requires that the risk of bodily harm have been foreseeable. After referring to the statement in *Larkin*, *supra*, that a "dangerous act" is required, Sopinka J. stated that English authority has consistently held that the underlying unlawful act required for manslaughter requires "proof that the unlawful act was 'likely to injure another person' or in other words put the bodily integrity of others at risk" (p. 959). Moreover, the harm must be more than trivial or transitory. The test set out by Sopinka J. (at p. 961) for the unlawful act required by s. 269 of the *Criminal Code* is equally applicable to manslaughter:
>
> . . . the test is one of objective foresight of bodily harm for all underlying offences. The act must be both unlawful, as described above, and one that is likely to subject another person to danger of harm or injury. This bodily harm must be more than merely trivial or transitory in nature and will in most cases involve an act of violence done deliberately to another person. In interpreting what constitutes an objectively dangerous act, the courts should strive to avoid attaching penal sanctions to mere inadvertence. The contention that no dangerousness requirement is required if the unlawful act is criminal should be rejected. [Emphasis in original.]
>
> So, the test for the *mens rea* of unlawful act manslaughter in Canada, as in the United Kingdom, is (in addition to the *mens rea* of the underlying offence) objective foreseeability of the risk of bodily harm, which is neither trivial nor transitory, in the context of a dangerous act. Foreseeability of the risk of death is not required. The question is whether this test violates the principles of fundamental justice under s. 7 of the *Charter*.

[382] The Supreme Court defined the *actus reus* for unlawful act manslaughter in ***R v Javanmardi*** at paras 25-31:

> [25] The *actus reus* of unlawful act manslaughter under s. 222(5)(a) requires the Crown to prove that the accused committed an unlawful act and that the unlawful act caused death… The underlying unlawful act is described as the "predicate" offence…
>
> [26] There has been some uncertainty around whether the Crown must prove that the predicate offence was "objectively dangerous" … In my view, the "objective dangerousness" requirement adds nothing to the analysis that is not captured within the fault element of unlawful act manslaughter — objective

> foreseeability of the risk of bodily harm that is neither trivial nor transitory (*Creighton*, at pp. 44-45). An unlawful act, accompanied by objective foreseeability of the risk of bodily harm that is neither trivial nor transitory, is an objectively dangerous act.
>
> [27] Support for this position is found in *DeSousa*, which has been cited as the definitive statement of the fault element of unlawful act manslaughter (*Creighton*, at pp. 44-45). In *DeSousa*, Sopinka J. considered the meaning of "unlawful act" for the purposes of the offence of unlawfully causing bodily harm, concluding that the unlawful act must be objectively dangerous in the sense that there is objective foreseeability of bodily harm…
>
> [28] Subsequent cases and academic writing confirm that there is no independent *actus reus* requirement of objective dangerousness. As Patrick Healy observed, this Court in *Creighton* agreed that the element of dangerousness connotes an element of fault ("The *Creighton* Quartet: Enigma Variations in a Lower Key" (1993), 23 C.R. (4th) 265, at pp. 271-73). Others too have suggested that "dangerousness can be seen as entirely subsumed within the concept of foreseeability of harm, and should be discarded as unnecessarily complicated" …
>
> [29] There is little benefit, in my view, to inviting judges or juries to first consider the objective "dangerousness" of the accused's actions in a vacuum, and then duplicate that exercise with the benefit of context when they reach the fault element of the offence. Model jury instructions already avoid this repetition, which introduces unnecessary complexity into the offence of unlawful act manslaughter, increasing the risk of confusion and legal error …
>
> [30] As a result, the *actus reus* of unlawful act manslaughter is satisfied by proof beyond a reasonable doubt that the accused committed an unlawful act that caused death. There is no independent requirement of objective dangerousness.
>
> [31] The fault element of unlawful act manslaughter is, as noted, objective foreseeability of the risk of bodily harm that is neither trivial nor transitory, coupled with the fault element for the predicate offence (*Creighton*, at pp. 42-43; *DeSousa*, at pp. 961-62) …

[383] In Ms. Muskego's case, the predicate offence is forcible confinement and kidnapping. Some violence was used in Ms. Duperron's abduction from the Servus Credit Union kiosk. Some violence was used in forcing her into the truck. Some violence was used forcing her to the floor of the truck and keeping her there. Ms. Duperron was kept in that state for hours. Forcible confinement and kidnapping are ongoing offences, so the offence continued until Ms. Duperron was abandoned at the site near Hinton.

[384] The continuing offence of kidnapping or forcible confinement as described above clearly carried a foreseeable risk or a likelihood of serious injury to Ms. Duperron. It can I think be said that virtually all kidnappings and forcible confinements are objectively dangerous. The foreseeable risks to Ms. Duperron grew as the journey carried on. Whether Ms. Muskego did anything to harm Ms. Duperron is irrelevant. As a principal actor in the forcible confinement and kidnapping, she started the process and participated in it until the confinement ended. She herself

may have had no ongoing intention to harm Ms. Duperron and may have been wilfully blind to the consequences, but the risk of serious injury that was neither trivial nor transitory to Ms. Duperron was obvious.

[385] As a result, I am satisfied beyond a reasonable doubt that Ms. Muskego committed unlawful act manslaughter by her role in Ms. Duperron's death and find her guilty of that lesser but included offence.

[386] I am grateful to all counsel for their cooperation throughout this difficult matter. Crown and Defence worked effectively and efficiently to place all necessary evidence before me. I am also grateful for their able submissions on the law. All parties have been well served by the efforts of their lawyers.

Heard on the 12th day of September, 2022 to the 7th day of October, 2022.
Delivered in Court on October 21, 2022.

Dated at the City of Edmonton, Alberta this 24th day of October, 2022.

Robert A. Graesser
J.C.K.B.A.

Appearances:

Lawrence Van Dyke & Marissa Tordoff
Alberta Justice
for the Crown

Mark Jordan
for the Defendant Buddy Ray Underwood

Paul Moreau
for the Defendant Tyra Muskego