Court of Queen's Bench of Alberta

Citation: R v Jensen, 2020 ABQB 237

Date: 20200408
Docket: 170781553Q1
Registry: Edmonton

Between:

Her Majesty the Queen

- and -

Justin Lyle Jensen

Accused

Reasons for Judgment
of the
Honourable Mr. Justice B.R. Burrows

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[1] Austin MacDougall, a member of the RCMP stationed in Edson, Alberta, died in a tragic accident on July 5, 2017. Cst. MacDougall was off duty at the time of his death. An avid cyclist, he was riding his racing bicycle on the shoulder of Highway 16 just west of the town limits of Edson at about 8:50 p.m. that evening, when a Dodge pickup truck drove onto the shoulder and collided with him and his bicycle. Cst. MacDougall was thrown into the ditch. He died immediately.

[2] Dustin Lyle Jensen has admitted that he was the driver and sole occupant of the vehicle, a 2014 Dodge Ram pickup truck, which struck Cst. MacDougall, causing his death. Mr. Jensen was charged on a three-count indictment.

[3] The Crown did not proceed with the first count on the indictment – Impaired Driving causing death (*CC* s. 255(3)).

[4] In Count 2 of the indictment, Mr. Jensen is charged with refusing to comply with a demand to provide a sample of his breath at a time when he knew or ought to have known that his operation of a motor vehicle caused an accident that resulted in the death of another person.

This is the offence created by *Criminal Code* 255(3.2) which was in force on July 5, 2017. That section has since been repealed and replaced by *Criminal Code* s 320.21.

[5] Mr. Jensen is also charged, in Count 3 of the indictment, with dangerous driving causing death contrary to *Criminal Code* s 249(4) which was also in force on July 5, 2017 but which has since been repealed. The equivalent offence is now found in *Criminal Code* s 320.13(3).

[6] The evidence at this trial consisted of the testimony of a number of Crown witnesses including two civilians, (Clinton and Carol Ann Reid who were in the "Reid Vehicle"), two police officers (RCMP Csts. Alexander Ayres and Mark Facendi) and one expert witness (an accident reconstructionist, Cpl. Kenneth Alexander), a number of exhibits, including three Agreed Statements of Facts, and the testimony of one defence expert witness (Terry Lolacher, an accident reconstructionist). In addition, there were a number of "Aids" which are not evidence. Most of them were transcripts of recordings which are in evidence.

[7] Most of the evidence was presented in the context of a *voir dire*. My decision in the *voir dire* is at 2020 ABQB 5. Some of the evidence presented in the *voir dire* is not evidence in the trial. I make no reference to that evidence in this decision.

Count 1 – Impaired Driving causing death

[8] As noted, the Crown withdrew this charge before Mr. Jensen was arraigned at the commencement of the trial.

Count 2 – Failing to comply with a demand to provide a sample of breath at a time when Mr. Jensen knew that his operation of a motor vehicle had resulted in the death of another person.

The Evidence

[9] The evidence relevant to the charge of refusing to provide a breath sample was set out in my *voir dire* decision paragraphs [6] to [31]. I will set it out again here as paragraphs [10] to [35] of this decision. At paragraph [23] of the *voir dire* decision I referred to a transcript of a recording which is in evidence and note that it was included as an Appendix to the *voir dire* decision. As I mention in paragraph [27] below, the same transcript is included as an Appendix to these reasons.

[10] The collision that resulted in Cst. MacDougall's death occurred at about 8:50 p.m. on Wednesday, July 5, 2017, on the westbound portion of Highway 2, about 4 km. west of Edson, Alberta.

[11] Immediately before the collision, the Reid vehicle was in the right-hand westbound lane. Mr. Jensen, driving a Dodge pickup, passed the Reid vehicle in the left-hand westbound lane and then moved into the right-hand lane ahead of the Reid vehicle. Very shortly after arriving in the right-hand lane, Mr. Jensen's vehicle swerved to the right onto the shoulder where Cst. MacDougall was riding his bicycle. Mr. Jensen's vehicle hit Cst. MacDougall and his bicycle. Cst. MacDougall was thrown into the ditch.

[12] Mr. Reid stopped his vehicle on the shoulder to the west of the collision point. Mr. Jensen continued further west. He then stopped his vehicle and backed up to a point just west of

Mr. Reid's vehicle and stopped there. Both Mr. Jensen and Mr. Reid went on foot to Cst. MacDougall's body in the ditch. Mr. Jensen realized that Cst. MacDougall was dead. He went back to his vehicle and retrieved his cell phone and cigarettes and sat in the ditch near his vehicle. He was very emotionally upset.

[13] Cst. Ayres and Cst. Facendi were both on duty and at the Edson RCMP detachment when the dispatch call regarding the collision was received at 8:55 p.m. They each immediately drove, in separate police vehicles, to the collision scene. They received some details of the dispatch information after they left the detachment – that the call was in relation to a collision between a truck and a cyclist and that the truck driver might be impaired.

[14] Cst. Ayres and Cst. Facendi arrived at the collision scene shortly after 9:00 p.m. They immediately went to the body lying in the ditch. They discovered that the deceased was their friend and colleague, and in Cst. Facendi's case, room-mate, Cst. MacDougall.

[15] Cst. Ayres stayed with Cst. MacDougall's body. Cst. Facendi drove his police vehicle further west to where Mr. Jensen's Dodge pickup was parked. Cst. Facendi parked his cruiser in front of – that is, to the west of – Mr. Jensen's vehicle in a position that would prevent Mr. Jensen's vehicle from being moved. He noticed that the grill and hood of the Dodge pickup were damaged on the passenger side.

[16] Cst. Facendi approached Mr. Jensen who was in the ditch about 25 feet from the pavement. Mr. Jensen was on his knees. His head was hung down. Cst. Facendi asked Mr. Jensen if he was OK. Mr. Jensen nodded in reply. Mr. Jensen appeared to Cst. Facendi to be in a dazed state which Cst. Facendi considered consistent with the reaction one would expect from a driver who had just hit someone and caused their death.

[17] Cst. Facendi was aware at that point that it had been suggested that alcohol might be involved. He engaged Mr. Jensen in "just a little kind of quick conversation trying to ascertain from like, you know, where his mind was, you know, if I did believe he was impaired at the time. . . . " (Facendi testimony, October 9, 2019 transcript, page 20, line 30). He did not ask Mr. Jensen if he had had anything to drink.

[18] Cst. Facendi asked Mr. Jensen for his driver's license, and registration and insurance documents. Mr. Jensen said they were in the vehicle. Cst. Facendi and Mr. Jensen went to the vehicle and Mr. Jensen looked for the registration and insurance documents. Cst. Facendi and Mr. Jensen continued their conversation. Mr. Jensen said he was on his way to work. He had his work clothes on.

[19] After a few minutes, Cst. Ayres joined Cst. Facendi and Mr. Jensen as they were looking for the vehicle's documents. When the documents were located, Cst. Facendi took them to his police vehicle, laid the documents on the hood, and took photographs of them.

[20] At some point, after both Cst. Ayres and Cst. Facendi had been with, and in close proximity to, Mr. Jensen at his vehicle for a few minutes, Cst. Ayres asked Cst. Facendi, using code words, whether Cst. Facendi thought Mr. Jensen had been drinking. Cst. Facendi answered that he did not. [Cst. Facendi testified that Cst. Ayres asked him, "Do you think he is impaired?" to which he responded "No, not right now." (Oct 9 transcript, page 26, line 18).]

[21] Cst. Ayres left Cst. Facendi with Mr. Jensen. Cpl. McPhail had arrived at the scene and was talking to Mr. and Mrs. Reid near their vehicle. Cst. Ayres went to Cpl. McPhail and reported that neither he nor Cst. Facendi had detected alcohol on Mr. Jensen's breath. Cst. Ayres

asked Cpl. McPhail to go to Mr. Jensen and also make an assessment as to whether he had been drinking. Cpl. McPhail declined Cst. Ayres' request and told Cst. Ayres to return to Mr. Jensen.

[22] About this time, EMS arrived. Cst. Ayres was present while EMS spoke to Mr. Jensen. He noticed nothing unusual about the manner in which Mr. Jensen spoke to EMS. Mr. Jensen declined EMS assistance.

[23] When EMS left, Mr. Jensen lit a cigarette. He crouched near, or sat against, the side of his vehicle as he smoked. Cst Ayres crouched in front of him – a bit west of him – and engaged Mr. Jensen in conversation.

[24] Cst. Ayres testified that he had two purposes in this conversation. He was trying to be compassionate with Mr. Jensen because he realized that Mr. Jensen was going through a hard time given that he had just caused a death. He was also trying to detect whether there was an odour of alcohol on Mr. Jensen's breath. Referring to the latter, he testified, "It was in the back of my mind to pay attention to that, yes." As time went on it seemed more and more to Cst. Ayres ". . . like alcohol was not a factor." Compassion became his dominant purpose.

[25] Mr. Jensen started talking about his personal life – about problems he was having with an ex-girlfriend. The conversation went on for several minutes. Cst. Ayres testified that during the conversation he thought he smelled an odour of alcohol, but he was upwind from (west of) Mr. Jensen and was not sure where the odour had come from.

[26] Cst. Ayres asked Cst. Facendi for the remote microphone from Cst. Facendi's cruiser's video recorder and Cst. Facendi brought it to him. Cst. Ayres moved so that he was downwind from Mr. Jensen – slightly to the east of Mr. Jensen.

[27] From that point on, the conversation between Cst. Ayres and Mr. Jensen was recorded. The recording is in evidence and a transcript was provided as an "Aid". I include the recorded part of the conversation as an Appendix to these reasons.

[28] At the end of the conversation, Cst. Ayres said:

> You know what I'm, I'm actually going to stop you I, I'm pretty sure I got a whiff of alcohol off of your breath, ah so I'm going to make a demand for a sample of your breath, okay, so I'll have you take the smoke out, you can't smoke.

[29] Cst. Ayres testified that he looked at his watch when he detected the odour of alcohol on Mr. Jensen's breath. It was 21:25.

[30] He asked Mr. Jensen to go with him to his police vehicle which was parked some distance to the east. Cst. Ayres and Mr. Jensen walked to Cst. Ayres' police vehicle. When they arrived at the police vehicle, Cst. Ayres asked Mr. Jensen to get in the back of the vehicle and he did. The back seat was a secure space – separated from the front seat by a plexiglass "silent patrolman", bars on the side windows and doors unable to be opened from inside the vehicle.

[31] Cst. Ayres believed he had an Approved Screening Device (ASD) with which to take a breath sample, in his police car. His normal practice was to put an ASD in the car at the start of his shift. However, he discovered that he had neglected to do so at the start of his shift that day. Neither had he thought to take an ASD with him when he left the detachment to respond to the call to attend at the collision scene.

[32] He asked the other officers at the scene whether they had an ASD. None of them had one. Cst. Facendi went back to the detachment office to retrieve one. That took between 10 and 15 minutes.

[33] While Cst. Facendi was fetching an ASD from the detachment, Cst. Ayres read the formal demand for a breach sample to Mr. Jensen. The conversation was video recorded. The camera shot shows only Mr. Jensen. Throughout the conversation it is obvious that Mr. Jensen is very emotionally upset and fighting to maintain control of his emotions. A transcript of the conversation has been provided:

Ayres:	Okay Justin I'm going to read you the demand, can you hear me okay?
Jensen:	(nods affirmative)
Ayres:	In accordance with the provisions of the Criminal Code I demand that you provide forthwith a sample of your breath suitable for analysis on approved screening device, you'll be charged under the provisions under the Criminal Code if you do not comply, do you understand?
Jensen:	Yep. What happens if I don't blow?
Ayres:	Ah, it would be refusal which is a criminal code offence.
Jensen:	And?
Ayres:	Ah, you'd be charged, with that.
Jensen:	I don't know what to do bud.
Ayres:	Sorry?
Jensen:	I don't know what to do. I want to talk to a lawyer.
Ayres:	Sorry?
Jensen:	I want to talk to a lawyer.
Ayres:	Ah, you don't have a right to a lawyer ah before an ASD demand.
	Momentary interruption by transmissions and other conversation
Jensen:	(making whimpering/breathing noises)
Ayres:	Are you just pulling shit out of your pocket?
Jensen:	Huh?
Ayres:	Okay, you can't have any gum.

Jensen: No, I'm not.

Ayres: Okay, I just want to make sure.

Jensen: It's just bugging me in my back pocket, but . . .

Ayres: Okay, that's fine.

Jensen: I need you guys to call my boss to be honest with ya, some, something happens at the plant and it goes down he's going to keep calling my cell phone and know what's going to happen, so, at this point I almost need to let me boss know that if something happens he's gotta go to work.

Ayres: What's your boss' number?

Jensen: Um, fuck, it's an Edson cell, * * * * I know is the last four but I'm not sure of the first three, [*name of boss*], but I really need you guys to contact him I guess and . . .

Ayres: I need his phone number in order to, right?

Jensen: I need my phone.

Ayres: Is your cell phone in your vehicle?

Jensen: I think so.

Ayres: Do you know?

Jensen: I had it, well I was talking ah, I ah, was talking on it after so I don't know if I put it in the there or if it's laying in the ditch or what, but. . .

Ayres: Okay, you didn't see it when you were looking for your documents though ah?

Jensen: No but I know I was talking to it, in the time that . . .

Ayres: So it's probably in the ditch. Is, is your ringer on?

Jensen: I think so. My number is ***-****

Ayres: ***

Jensen: ****, ****

Ayres: ****, kay

Jensen: I just, yep

Ayres: Kay, kay we'll take care of that in a sec.

[34] A few minutes passed after this conversation concluded and before the ASD arrived. When it arrived, Cst. Ayres advised Mr. Jensen that he had the ASD:

Ayres: Okay, Justin, alright so I have your Alco Sensor F-S-D, it's a pre-screen device in the criminal code.

Jensen: I don't know what to do, bud.

Ayres: Okay, well so I have a brand-new mouth piece here, alright, you can still see it's sealed, I'm going to attach it and then you're going to take a deep breath and you're going to exhaust your breath until I tell you to stop, kay?

Jensen: I don't think I'm gonna.

Ayres: Kay.

Jensen: Like.

Ayres: Okay, take a nice deep breath.

Jensen: I don't think I can do it. I don't know what to do.

Ayres: You're not going to do it. Jason (*sic*), you're not going to do it, kay cause it's telling you to blow right now right, so I need you to take a nice deep breath, put your mouth on the mouth piece make a tight seal and exhaust your breath until I tell you to stop, kay, if you don't do it, it is a criminal offence, kay, potentially we'd be looking at ah, refusing a breath sample um, where a death has occurred, kay?

Jensen: Um hum.

Ayres: It's a criminal offence, there are penalties to refusing a breath sample, okay.

Jensen: That's fine, I . . .

Ayres: You're not going to provide a breath sample.

Jensen: No.

Ayres: No you're not?

Jensen: Nope.

Ayres: Okay. Okay, then I'm arresting you for refusing a breath sample where a death has occurred.

Jensen: Kay.

Ayres: Do you understand?

Jensen: Yes.

[35] Cst. Ayres then advised Mr. Jensen of his right to counsel and asked Mr. Jensen if he wanted to call a lawyer. Mr. Jensen replied that he wanted to call a lawyer. Whether and when Mr. Jensen was actually permitted to call a lawyer is not in evidence. Cst. Ayres then advised Mr. Jensen of his right to silence and Mr. Jensen confirmed that he understood what he had been told. Cst. Ayres left the vehicle. Another officer completed the arrest procedures.

[36] A further fact relevant to the refusing to provide a sample charge is that Mr. Jensen has admitted, in an Agreed Statement of Facts: (Trial Ex 13, para 5)

> . . . that he consumed two ounces of hard alcohol mixed with water and a separate glass of alcoholic beer at the Original Joe's licensed restaurant in Edson, Alberta, the evening of July 5, 2017. After consuming the drinks he paid the tab shortly after 6:50 pm that evening.

Elements of the Offence

[37] In order for Mr. Jensen to be found guilty of refusing to provide a breath sample where operation of a motor vehicle has caused an accident resulting in the death of another person, (*CC* s. 255(3.2)), the Crown must prove each of the following elements beyond a reasonable doubt:

1. that Cst. Ayres had reasonable grounds to suspect that Mr. Jensen had, within the preceding three hours, operated a motor vehicle,
2. that Cst. Ayres had reasonable grounds to suspect that Mr. Jensen had alcohol in his body,
3. that Cst. Ayres demanded that Mr. Jensen provide forthwith a sample of breath for analysis in an approved screening device,
4. that at the time Cst. Ayres made the demand, Mr. Jensen knew or ought to have known that his operation of a motor vehicle caused an accident that resulted in the death of another person, and
5. that Mr. Jensen, without reasonable excuse, failed or refused to comply with Cst. Ayers demand that he provide a breath sample.

[38] The focus is on the first three elements. Mr. Jensen submits that they have not been proved beyond a reasonable doubt.

Did Cst. Ayres have reasonable grounds to suspect Mr. Jensen had within the preceding three hours, operated a motor vehicle?

[39] As to the first element, although Mr. Jensen admits that he was in fact the driver of the vehicle that hit Cst. MacDougall, he submits that Cst. Ayers did not have reasonable grounds to suspect he was the driver before he made the breath sample demand.

[40] Mr. Jensen notes that when Cst. Ayers and Cst. Facendi arrived at the accident scene, Cst. Ayers stayed with Cst. McDougall's body and Cst. Facendi went to "the driver". Cst. Facendi drove to the Dodge pickup and parked west of it. He got out of his police vehicle and went to Mr. Jensen who was sitting in the ditch. He secured from Mr. Jensen the information that Mr. Jensen was obliged to provide by virtue of the *Traffic Safety Act*. That information is not part of the trial evidence. About 5 minutes later Cst. Ayers came to where Cst. Facendi and Mr. Jensen were at the Dodge pickup and participated in assisting Mr. Jensen to find the documents that Cst. Facendi had asked him to produce.

[41] Mr. Jensen submits that Cst. Facendi learned that Mr. Jensen was the driver from the information Mr. Jensen was obliged to provide to him under the *Traffic Safety Act* and that Cst. Facendi told Cst. Ayers that Mr. Jensen was the driver. Cst. Ayers' understanding that Mr. Jensen was the driver was therefore founded on information that Mr. Jensen was obliged to provide for *Traffic Safety Act* purposes and cannot be used for the purpose of satisfying this element of the offence charged.

[42] In fact, Cst. Facendi did not testify that he asked Mr. Jensen if he was the driver or that Mr. Jensen told him that he was. Cst. Facendi testified that when he first approached Mr. Jensen who was sitting or crouching in the ditch near the Dodge pick up, he asked Mr. Jensen, "Are you okay?" And neither Cst. Facendi nor Cst. Ayres testified that Cst. Facendi told Cst. Ayers that Mr. Jensen had told Cst. Facendi that he was the driver. It appears that both Cst. Facendi and Cst. Ayers derived the understanding that Mr. Jensen was the driver from other features of the circumstances – not from Mr. Jensen's saying he was.

[43] That Mr. Jensen was the driver of the Dodge was an eminently reasonable conclusion. There were three civilians and two motor vehicles at the scene of the accident. For the entire period before Cst. Ayers demanded a breath sample from Mr. Jensen, Mr. and Mrs. Reid were inside or in the vicinity of the truck with the U-Haul trailer attached to it and Mr. Jensen was in the vicinity of the Dodge pickup. Mr. Jensen's behaviour – his emotional state – was consistent with that of someone who has just hit and caused another person's death.

[44] It was also clear from the time of the emergency dispatch which Cst. Ayres knew was in response to a 911 call, that the accident had happened just before 9:00 p.m. It was clear therefore that Mr. Jensen had been driving well within the previous three hours.

[45] In my view, these circumstances, of which Cst. Ayres was aware before he demanded the breath sample of Mr. Jensen, were sufficient to justify Cst. Ayres' suspicion that Mr. Jensen had been the driver of the vehicle that hit Cst. MacDougall and that he had been driving within the three hours which preceded the demand for a breath sample. That suspicion was entirely reasonable. I find that the first element of the offence has been proved beyond a reasonable doubt and proceed to the second element.

Did Cst. Ayres have reasonable grounds to suspect that Mr. Jensen had alcohol in his body?

[46] As noted above, after several minutes of conversation between Mr. Jensen and Cst. Ayres while they were sitting or crouching in the ditch near the Dodge pickup, Cst. Ayres thought he smelled the odour of alcohol on Mr. Jensen's breath. Cst. Ayres testified that when he first thought he detected the odour of alcohol, he was up wind or west of Mr. Jensen. He asked Cst. Facendi for the microphone from the recording system in Cst. Facendi's nearby police car and recorded the conversation from that point on. He moved to the other side of Mr. Jensen, the east side, downwind from Mr. Jensen. After several minutes of further conversation (the transcript is the appendix to this decision), he said to Mr. Jensen, "I'm pretty sure I got a whiff of alcohol on your breath", and told him he would be making a demand for a sample of breath.

[47] Cst. Ayres testified at trial that he was certain that he had detected the odour of alcohol on Mr. Jensen's breath when he said that. Here is Cst. Ayres' testimony on examination-in-chief on this point: (Transcript, October 7, page 125, lines 6 to 41)

Q. . . . What, if any, further observations of consumption of alcohol did you make.

A. At 9:25 PM is when I smelled liquor off of Mr. Jensen's breath.

Q. How did you know it was coming from his breath?

A. Because I was lot – I was close to him. There was maybe room for a person to stand between us, and he was speaking at the time, and I smelt it.

Q. And where was he located at that time?

A. He was crouched on the passenger side of his vehicle facing towards the ditch.

Q And where were you exactly?

A. Just off to his left, but in his immediate vicinity.

Q. And how were –

A. Or pardon me, just off to his right.

Q. And where was your face in relation to his face when you made this observation?

A. Relatively close, within – within an arm's reach.

Q. Where is Facendi at that time?

A. I actually don't know.

Q. You said that with your first observation of the smell of alcohol you were reasonably – I don't want to misspeak – but reasonably sure, you used reasonably?

A. Yeah.

Q. How sure were you the second time you smelled liquor?

A. I had no doubt in my mind.

Q. And what about where it was coming from?

A. That it was coming from Mr. Jensen's breath, the smell.

Q. So I want to clarify; you had no doubt in your mind that what you smelled was alcohol. And in relation to where it was coming from, how certain are you that it was his mouth?

A. Certain, again no doubt.

[48] The question is whether Cst. Ayres' clear evidence that he smelled the odour of alcohol on Mr. Jensen's breath is reliable.

[49] Cst. Ayres is an officer of the law. He appeared to me to be trying to be careful in his testimony. I am satisfied that at the time testified he truly believed he detected the odour of alcohol when he said so to Mr. Jensen at the side of the highway more than two years ago. The question is whether in all of the circumstances I can rely on his evidence in that regard. If I can, there can be no doubt that Cst. Ayres had reasonable grounds to suspect that Mr. Jensen had alcohol in his body. But if I cannot, this element of the offence will not have been established beyond a reasonable doubt.

[50] The Crown submits that there is external evidence which corroborates Cst. Ayres' evidence that he detected the odour of alcohol on Mr. Jensen's breath. Mr. Jensen has admitted that he consumed two ounces of hard liquor and a beer earlier that evening.

[51] In my view, the corroboration which that fact provides is significantly limited. There is no evidence as to the period of time over which Mr. Jensen consumed the alcohol that he admits he consumed. All that is in evidence is that he finished consuming it and paid for it just over two hours before the accident and about two and half hours before Cst. Ayres, according to his evidence, detected the odour of alcohol on Mr. Jensen's breath. Neither is there any expert evidence before me as to whether there would still be an odour of alcohol on the breath of a person who had consumed that amount of alcohol at least two and a half hours later. That is not a point upon which I am able to take judicial notice.

[52] I have determined that Cst. Ayres' evidence that he detected the odour of alcohol on Mr. Jensen's breath is not sufficiently reliable to prove the second element of the offence beyond a reasonable doubt. My reasons for that conclusion are:

a. Cst. Facendi, who, in his pre-RCMP occupation as a bouncer and as a Remand Centre guard, had significant experience with people who had consumed alcohol, and who was

with Mr. Jensen for several minutes, both in the general vicinity of the Dodge pickup and in the partially enclosed space of the Dodge pickup while they looked for the documents he had requested from Mr. Jensen, did not detect the odour of alcohol on Mr. Jensen's breath at any point.

b. EMS personnel attended to Mr. Jensen at the scene of the accident presumably to determine whether or not he was in need of medical attention. The evidence suggests there was more than one EMS person who attended to him. I infer that they were in close proximity to Mr. Jensen when they did so. This was before Cst. Ayres, according to his evidence, detected the odour of alcohol on Mr. Jensen's breath. The EMS personnel did not testify. There is no evidence that they detected the odour of alcohol on Mr. Jensen's breath.

c. Before he spoke to Cpl. McPhail, Cst. Ayres was with Mr. Jensen or near him in the partially enclosed space of the Dodge pickup for a short time. He was with Mr. Jensen when the EMS personnel dealt with him. He was specifically trying to ascertain whether there was an odour of alcohol on Mr. Jensen's breath. Yet, he did not detect any such odour, and told Cpl. McPhail that neither he nor Cst. Facendi had detected such an odour before Cpl. McPhail instructed him to return to Mr. Jensen.

   I note that Cst. Ayres testified, in cross-examination, that when he went to Cpl. McPhail and suggested that Cpl. McPhail go to Mr. Jensen and determine whether there was an odour of alcohol on Mr. Jensen's breath, "I hadn't satisfied myself yet whether alcohol was not a factor." (Transcript, October 8, page 68, line 25)

d. Cst. Ayres' conversation with Mr. Jensen went on for several minutes before he first thought he might have detected an odour of alcohol. And it went on for several further minutes (the recorded part of the conversation) after he changed physical position and before he said he was "pretty sure" he got a whiff of alcohol. He did not describe the intensity of the "whiff" he got in his testimony, but the fact that it took as long as it did to get the two whiffs he perceived – one the origin of which he was not certain, and one which he was "pretty sure" was from Mr. Jensen's breath – is consistent with it being an odour of low intensity – more easily a mistake than would be the case for a "strong odour of alcohol".

e. Mr. Jensen was smoking when Cst. Ayres detected the odour of alcohol on his breath the second time. Cst. Ayres' testimony on this point, which came in cross-examination, was as follows: (Transcript, October 8, page 97, line 22)

Q. Okay. And this [the second whiff] is a whiff that you get while he is smoking?

A. No, he had finished his cigarette.

Q. Okay. You would agree with me that doesn't make sense that you could have smelled it if he was still smoking where all you could smell was the cigarette, it had to be after he was finished?

A. It is possible to smell liquor off of someone's breath while they're

smoking, but it's incredibly difficult.

Q. Okay.

A. But that second time I smelled the liquor and that when I smelled it off of Mr. Jensen's breath it was when he finished his cigarette.

Q. Okay. So he wasn't smoking, but he was – but he was talking out loud.

A. Yes

Q. Okay. And I would invite you – I suggest to you that in your notes at page 4 on the fourth line down from the top your notes say, "He was still smoking when I got the second whiff at 21:25".

A. Yes, I believe he was just finishing his cigarette.

I note that the transcript of the conversation between Cst. Ayres and Mr. Jensen which is set out in the appendix to this decision, indicates that Mr. Jensen had a cigarette in his mouth when Cst. Ayres "got a whiff of alcohol off of your breath". After telling Mr. Jensen that he was going to make a demand for a sample of breath, Cst. Ayres said, "So I'll have you take the smoke out."

The odour of alcohol Cst. Ayres testified he perceived was detected in circumstances in which, by his own assessment, detection of the odour of alcohol on someone's breath is "incredibly difficult."

f. As noted, Cst. Ayres testified that he had been confident that he had detected the odour of alcohol on Mr. Jensen's breath when he told Mr. Jensen he had done so. He was also confident in his trial testimony that Mr. Jensen was not smoking at the time he detected the odour of alcohol. It appears he was in error on the second point. It is a concern that Cst. Ayres' confidence in respect of one significant detail appears not to have been justified.

g. Cst. Ayres, understandably, was experiencing significant emotional impact throughout the investigation at the scene of the accident given that the accident had resulted in the death of his colleague, Cst. MacDougall. He testified, in examination-in-chief, that he had asked Cpl. McPhail to go to Mr. Jensen and make his own assessment of whether there was an odour of alcohol on Mr. Jensen's breath because, "I was a bit overwhelmed right then, and it also just gave me a chance to kind of separate myself from the situation right then and clear my head . . . I was still in shock. I wasn't upset at that time. It was just – it was – it was all still becoming very real." (Transcript, October 7, page 122, line 32).

In cross-examination he testified as follows on this point: (Transcript, October 8, page 80, line 26).

Q: So you were asking him [Cpl MacPhail] his permission to be relieved from that investigation and go and do something else?

A: No.

Q. Oh, I'm sorry.

A. I wasn't asking for permission. I wanted him to go make his own assessment.

Q. Okay. So did you want him to come with you to accompany you back for further investigation or did you want to take on some other tasks such as interviewing witnesses?

A. No, I didn't want – I was overwhelmed at that point --

Q. Right.

A. -- and to be honest, I didn't want any part of the investigation.

Q. Okay. So you wanted to be released from your portion of the investigation, yes?

A. I didn't ask that.

Q. No?

A. But I – going to speak to Corporal McPhail gave me some time to just collect my thoughts and it was – I – in my head, I – I would have rather have to not dealt with that investigation, period, but . . .

Q. No, I totally understand that. I understand that. But was – so what – and I'm just suggesting to you because you totally didn't want to be involved in that part of the investigation, but that's one of the things you asked Corporal McPhail is if you could be released from that part of the investigation. Maybe not released to some other duty, but released from that part of the investigation, yes?

A. No.

Q. Okay. So you weren't – you weren't asking him to not have to go back and conduct more investigations, you were perfectly content and willing to go back and do that yourself?

A. I was hoping he would so I wouldn't have to.

Q. Okay. So you weren't asking him to release you, you were hoping that he was going to do it?

A. Yes.

. . .

Q. Okay. And I would assume that you would have confidence in your own abilities to do an impaired driving investigation because you've done 50 of them before, correct?

A. Besides the point that there is a personal connection to this one, yes.

This raises a concern as to the reliability of Cst. Ayres' evidence that he detected an odour of alcohol – a concern that his perception might have been induced or affected by a combination of influences including:

- his emotional state,
- a subconscious, personal and intense desire to know whether alcohol was a causal factor in his colleague's death, and
- a subconscious understanding that Cpl. McPhail's instruction that he return to Mr. Jensen when he reported that he had not detected the odour of alcohol was an instruction to detect an odour of alcohol.

Cst. Ayres was not asked, either in examination-in-chief or in cross-examination, whether he believed it was possible that his detection of an odour of alcohol was influenced by any of these things. However, the last exchange quoted above, where Cst. Ayers said, "Besides the point that there is a personal connection to this one, yes" is significant. As I understood him, Cst. Ayers himself recognized that a qualification of his usual confidence in his ability to do an impaired driving investigation was appropriate.

h. Cpl. McPhail did not testify.

i. Mr. Jensen was in the back of Cst. Ayres' police car for a significant time while Cst. Ayres was in the front and was conversing with and dealing with Mr. Jensen. Though the back seat was separated from the front by a plexiglass barrier, there was an opening in the middle, several inches wide and the height of the barrier. It is visible in the video. Cst. Ayres did not testify that in that significant time, when they were together in an enclosed space, he ever again detected alcohol on Mr. Jensen's breath. Indeed, he did not testify that he detected alcohol on Mr. Jensen's breath on any occasion other than the one time in the ditch when, as discussed above, Mr. Jensen was smoking.

[53] In my view, for the reasons set out above, it is not possible for me to be sure that I can rely on Cst. Ayres' evidence that he detected the odour of alcohol on Mr. Jensen's breath. In order to conclude that the second element of offence has been proved beyond a reasonable doubt, I must be sure. I am not.

[54] I find that the second element of the offence has not been proved beyond a reasonable doubt.

Conclusion on Count 2

[55] Given this conclusion, it is not necessary for me to deal with the remaining three elements of the office.

[56] I find Mr. Jensen not guilty of failing to comply with a demand to provide a sample of his breath at a time when he knew or ought to have known that his operation of a motor vehicle caused an accident that resulted in the death of another person – Count 2 of the indictment.

Count 3 – Dangerous driving causing death

The Evidence

[57] The evidence of particular relevance to the dangerous driving causing death charge includes that of Mr. and Ms. Reid, two Agreed Statements of Facts, some of the evidence of Cst. Ayres and Cst. Facendi, and the expert evidence of an accident reconstructionist called by the Crown, Cpl. Anderson, and an accident reconstructionist called by the defence, Mr. Lolacher.

Clinton Reid

[58] Mr. Reid testified that he and his wife departed Edson on route to Hinton at about 8:30 p.m. on July 5, 2017 in their pickup truck. He was pulling a 12-foot U-Haul trailer. It was a perfect summer day – about 80 degrees and clear. Traffic was light. The highway was dry.

[59] The highway consisted of two lanes each direction separated by a grass median ditch. There was a paved shoulder on the right of the right (outside) lane and on the left of the left (inside lane). There was a painted line between the travel lanes and a white painted line, the fog line, between the outside lane and the right paved shoulder. There were rumble strips between the outside travel lane generally, but there were some stretches where there were no rumble strips. The speed limit was 110 kph.

[60] There was a long gradual downward hill going west at the relevant part of the highway. It ended with a dip at the bottom before an upward hill. Mr. Reid was on the downward hill. He testified that he might have been going just above the speed limit.

[61] Mr. Reid did not see Mr. Jensen's vehicle in his rear-view mirror. He first saw the Jensen vehicle when it passed him in the left (inside) lane. In examination-in-chief, he estimated the speed at which the Jensen vehicle passed him at 80 mph or about 130 kph. In cross-examination he acknowledged that in a statement to police he had estimated that Mr. Jensen's speed was five to ten kph over the speed limit – which would be 115 to 120 kph.

[62] Mr. Reid described how the Jensen vehicle passed him as follows: (Transcript October 7, page 22, line 5.)

> . . . I noticed him right away because he – he pulled over in front of me right away, and there was really no reason. He was maybe five, six car lengths in front of me. And then I said to my wife, Look at that guy. And about then he – he pulled over; and then he did another abrupt movement, a swerve onto the shoulder at which point I saw him hit something; but I wasn't sure what it was. I – I saw parts flying like maybe bike parts or broken lights.

> And then I thought I might have seen a body, but it was hard to – to see what – on the shoulder because the sun was coming through the trees there. So it made it kind of difficult. It was just . . . about sunset.

[63] Mr. Reid testified that the Jensen vehicle was three quarters across the fog line when the impact occurred. Mr. Reid saw no indication of braking from the Jensen vehicle before the impact.

[64] Mr. Reid testified that he had not seen the bicycle travelling on the shoulder.

[65] Specifically, as to the effect of the setting sun on visibility, Mr. Reid testified: (Transcript, October 7, page 23, line 25)

> . . . it was easy enough to see on the highway. It was just more of the sun in the trees and the shadows on the shoulder, difficult to see what was on the right-hand side of the road. But yeah, no, it was a clear day; and it's not like I had the sun straight in my eyes.

In cross-examination he said the sun was at about 2:00 if the direction in which he was driving was 12:00, and that it was just over the trees. (Transcript, October 7, page 33, line 27)

[66] Mr. Reid stopped his vehicle. The Jensen vehicle stopped about 150 meters further west and then backed up. Mr. Reid testified that he was concerned, as the Jensen vehicle backed up, because it seemed to be zigzagging. He was concerned it might not stop – but it did about 50 feet west of where Mr. Reid was stopped.

[67] Mr. Reid got out of his vehicle and started to walk back toward where the collision had happened which was, he estimated, 200 meters to the east of where he had stopped. Mr. Jensen passed him on foot going east. Mr. Reid could see bicycle parts. He said, "I think you hit somebody" or "You might have killed somebody" to Mr. Jensen as he passed. Mr. Jensen kept going.

[68] Mr. Jensen was at Cst. MacDougall's body when Mr. Reid got to it. It was clear that Cst. MacDougall was dead. Mr. Jensen was very upset and ran back to his vehicle. Mr. Reid ran back to his vehicle and asked Ms. Reid to call 911. He could see Mr. Jensen, upset, and in the ditch near the Jensen vehicle.

[69] Mr. Reid recalled that after the police arrived and had been questioning Mr. Jensen, Mr. Reid called out to Mr. Jensen, "It's all right, buddy, it could have happened to anybody." because he felt badly for Mr. Jensen.

Carol Ann Reid

[70] Mr. Reid's wife, Carol Ann Reid, testified that she was in the front passenger seat of the Reid vehicle at the relevant time. Here is her examination-in-chief description of what she saw: (Transcript October 7, page 68, line 28)

> We were driving along. My husband had it on cruise control, 110. We were going down the highway. We passed a red van. And shortly after that, a blue truck passed us erratically. I noticed that he was – and I am like to myself, I thought I am going to keep an eye on this guy. And then I looked down; and my husband turned – said to me, "He just hit somebody."

> Prior to his saying that, when I looked up, he had swerved – after he passed us, he had swerved into our lane and then that's when we saw the debris.

[71] In cross-examination Ms. Reid testified that after the Jensen vehicle (the blue truck) passed the Reid vehicle in the left lane, while it was still in the left lane, she looked down for her lighter, which was on her lap, picked it up and lit a cigarette. In cross-examination Ms. Reid was clearly nervous, frustrated and unable to recall exactly what she saw by way of movement of Mr. Jensen's vehicle after she saw it pass the Reid vehicle on the left. Her evidence was inconsistent as to the details of what she had actually seen.

Second Agreed Statements of Facts

[72] The second Agreed Statement of Facts marked as a Crown exhibit (Exhibit 13) in this trial states the agreement of the Crown and Mr. Jensen regarding some of Mr. Jensen's actions in the hours and minutes before the collision.

[73] In particular, the Crown and Mr. Jensen agree that at 6:50 p.m. July 5, 2017, Mr. Jensen sent a text message to a former girlfriend, Ms. Lyon:

> Quick brew at oj's just tabbing up

With regard to this text the Crown and Mr. Jensen agree that the Ms. Lyon interpreted the message to mean that he was paying his tab at a restaurant in Edson, Alberta.

[74] The Crown and Mr. Jensen further agree that at 8:47 p.m. July 5, 2017 another former girlfriend, Ms. Bareman, received a voicemail on her cellular phone from him. A recording of the voice mail message is in evidence by agreement. Mr. Jensen admits that Ms. Bareman interpreted the sound in the voice mail to be the sound of Mr. Jensen's truck tires driving over rumble strips on the shoulder of the highway. To be clear, Mr. Jensen does not agree or disagree that Ms. Bareman's interpretation of the sound on the voicemail is accurate. He agrees no more than that it is Ms. Bareman's lay opinion that the sound is of Mr. Jensen's truck driving over rumble strips.

[75] I have listened to the recording several times. I cannot discern a sound which I interpret as the sound of a vehicle driving on rumble strips. I can discern what I interpret to be the sound of a vehicle driving on the highway. I am not satisfied that Ms. Bareman's lay opinion on the point is accurate. I am satisfied that at 8:47 Mr. Jensen, apparently while driving, left a short voicemail message for Ms. Bareman. There was no evidence as to whether or not it was possible for Mr. Jensen to make that call "hands free".

[76] The Crown and Mr. Jensen further agree that Mr. Jensen and Ms. Bareman exchanged text messages following the voice mail message. Here is the exchange:

Jensen:

8:48 – 👍👍

8:49 – Called ya back

8:49 – Your busy. Allkgoood. Cheers love ya

8:55 – Omg

8:55 – I just hit someone

Bareman: 9:00 – What do you mean called you back? I didn't call

9:01 – For real? You hit a pedestrian or a car? Just got out if so yes

9:01 – of sobeys*

[77] The Crown and Mr. Jensen further agree that:

> At approximately 9:00 pm, minutes after the collision occurred, Bareman contacted the Accused via telephone. He advised that he had been in a collision. The conversation was brief and near the end of the conversation, the Accused advised that he was "fucked". Bareman next asked if he had been drinking, referring to alcohol, and he hung up the phone.

[78] Finally, as previously referenced, the Crown and Mr. Jensen agree:

> . . . that [Mr. Jensen] consumed two ounces of hard alcohol mixed with water and a separate glass of alcoholic beer at the Original Joe's licensed restaurant in Edson, Alberta the evening of July 5, 2017. After consuming the drinks he paid the tab shortly after 6:50 pm that evening.

Evidence of Cst. Ayres

[79] Cst. Ayres testified that when he first went to Mr. Jensen's vehicle to join Mr. Jensen and Cst. Facendi as they looked for the documents Cst. Facendi had requested from Mr. Jensen, there was a Dairy Queen Blizzard treat in the cup holder between the front seats and a partially eaten hamburger. Cst. Ayres testified that he believed that he saw the hamburger on the front passenger seat. His memory of the hamburger when he was testifying seemed to be more as to its odour than its location.

[80] Cst. Ayres evidence also includes the VICS video recording of his trip from the RCMP Detachment in Edson to the collision scene. The video records the view of the driver – out the windshield.

VICS video recording from Cst. Facendi's Police Car

[81] As Cst. Facendi traveled from the Edson RCMP detachment to the scene of the collision having been dispatched immediately following Ms. Reid's call to 911, a video recording system which is part of the standard equipment on a police car recorded the scene ahead of his route of travel. The video is significantly clearer than the video recorded in Cst. Ayres' police car.

[82] The video shows features of the scene of the collision in particular that it appears to have been just at the bottom of the gradual downhill grade, at the point of the "dip" where the gradual uphill grade begins; that there is a stand of trees to the north of the highway; the position of the sun; and the shadows cast by the trees onto the highway.

Crown Expert Evidence of Cpl. Ken Alexander – Accident Reconstructionist

[83] Cpl. Ken Alexander, an RCMP Accident Reconstructionist, attended at the scene within hours of the collision. He observed, recorded and photographed all the relevant information available from an inspection of the scene of the collision including:

- the particulars of the highway's travel and shoulder lanes (their width and the markings separating them);
- the exact locations of the parts of the damaged bicycle;
- the exact location of the deceased;
- gouges and marks on the road which were relevant to the location of the bicycle at the moment of impact;
- the exact location of Mr. Jensen's vehicle, the distance it had travelled after the collision (determined by tire marks off the right edge of the road) and the distance it had been backed up to the position where it was located when Cpl. Anderson observed it;
- the absence of any tire marks from a vehicle at or before the point of impact which were relevant to whether or not there had been any pre-impact braking by the Jensen vehicle;
- the damage to the front of Mr. Jensen's vehicle which was relevant to the point of the impact between that vehicle and the bicycle.

[84] Cpl. Alexander's written report is in evidence. In it he states these conclusions:

a. The cyclist was travelling westbound on the north shoulder of the westbound lanes of Highway 16 when struck from behind. The cyclist was a minimum of 0.9 meters [90 centimeters] north of the fog line when impact occurred.

b. The Dodge Ram 3500 was traveling westbound on Highway 16 with the right side tires on the north shoulder when the front right corner of the vehicle struck the cyclist from behind. The right side tires were approximately 1.2 meters [120 centimeters] north of the fog line at impact.

c. Excessive speed was not a factor in this collision.

d. There was no evidence of any roadway or mechanical defects that may have contributed to the collision.

e. There was no evidence of any view obstruction or environmental condition that may have contributed to the collision.

f. There was no evidence of any evasive action either by steering or braking by the driver of the Dodge Ram to avoid the collision. There was no evidence of any immediate action taken by the driver to react after the collision. The vehicle traveled 233 meters post-impact before coming to a controlled stop. This driving pattern before and after the impact is consistent with driver inattention, fatigue or alcohol induced.

[85] In his testimony Cpl. Alexander noted that, although generally there were "rumble strips" at the left edge of the righthand (outside) shoulder, for a section of the highway beginning 73 meters east of the point of impact and continuing 103 meters west from the starting point, the surface of the highway had been repaired with an asphalt overlay that covered up the rumble strips. There were no rumble strips for a distance of 73 meters to the east of the point of impact.

[86] In his written report Cpl. Alexander described the damage to the Jensen vehicle caused by the collision as follows:

> The Dodge Ram displayed major contact damage to the front right corner bumper, light assembly, fender, hood and side view mirror. The damage measured approximately 36 centimeters in width from the outer right side of the vehicle inboard. The right fender was pushed rearward into the front door and there was significant contact to the lower right "A" pillar. The outer bumper cover was split vertically near the contact point and dislodged from the mounting clips.

[87] Cpl. Anderson returned to the scene of the collision the day after the collision at about the same time as the time of the collision the day before, to observe the position of the setting sun and determine what effect it might have had on visibility at the time of the collision. He testified that as he stood on the highway, he observed the sun to be 20 to 30 degrees to the northwest of the direction of travel, west, on the highway, and "probably twice, three times the length of the trees, above the trees" (which I understood to be the stand of trees on the north side of the highway at the site of the collision). In cross-examination he estimated that the sun had been 30 degrees above the horizon. He determined that, in that position, the sun would not affect a westbound driver's vision. He testified:

- "It wasn't a factor. It wasn't blinding" (Transcript November 25, Page 34, line 13), and
- "My opinion is that the sun had no role in the – the collision. It appeared to me by visually seeing, it was not in the line of sight, did not obscure the vision." (Transcript November 25, page 37, line 6)

[88] Cpl. Anderson's report did not mention that there were many cracks in the windshield of the Jensen vehicle. The multiple cracks in the windshield, including four which travel the entire width, or almost the entire width, of the windshield from driver's side to passenger side, are seen in police photographs not included in Cpl. Anderson's report. At least two of the photos showing significant windshield crack damage, and significant dirt on the windshield were taken by Cpl. Anderson.

[89] In cross-examination Cpl. Anderson agreed that the condition of the windshield could possibly be significant to the effect of the setting sun on the driver's vision: (Transcript, November 25, page 69, line 3)

> Q. . . . even if they're [cracks in the windshield] off to the side and the sun gets refracted, that has the potential to shine the sun in the driver's eyes; does it not?
>
> A. Perhaps. It's a possibility yes.

[90] Cpl. Anderson did not identify the windshield cracks as damage caused by the collision in his report, in his evidence in chief, or on cross-examination. In re-examination he testified that the cracks in the windshield could have resulted from the collision: (Transcript, November 25, page 79, line 18)

> Q. Do you have any information as to the time in which those cracks would have been created on the windshield?
>
> A. No.

Q. And in your experience in this field, with an object being struck like the cyclist was struck, would that have any impact on the windshield?

A. It could have, yes. It puts stress on windshield, and it could crack it.

Q. Okay.

A. There is significant damage to that front fender and jamming it back into the wheel and into the A pillar, which puts stress on the windshield, yeah.

[91] Cpl. Anderson also agreed in cross-examination that "Christmas Tree" air fresheners which were hanging from the rear-view mirror, and the dirt on the windshield, which were also not mentioned in his report or examination in chief, could interfere with the driver's vision.

[92] In cross-examination Cpl. Anderson was asked about his opinion that the absence of evidence of braking and the distance travelled after the collision before stopping was consistent with "driver inattention, fatigue or "alcohol induced". He testified that the opinion was based on what he had seen in 2000 collision investigations. He agreed that he was not saying that any of these three conditions – inattention, fatigue or alcohol impairment – was present in this case, just that the lack of evidence of immediate reaction and the distance of travel after the collision were consistent, in his experience, with the presence of these conditions.

Third Agreed Statement of Facts

[93] In the third Agreed Statement of Facts, which was received in evidence as a Defence exhibit (Exhibit 19), the Crown and Mr. Jensen agree:

- That at the time of the collision, Austin McDougall, the cyclist, was wearing a medium grey shirt, black cycling shorts, and bright orange shoes, and
- That prior to the point of impact between Mr. Jensen's truck and the bicycle, Mr. Jensen did not see Austin McDougall on his bicycle.

Defence Expert Evidence of Terry Lolacher – Forensic Reconstructionist

[94] The only defence witness was Mr. Terry Lolacher, a forensic reconstructionist. who reviewed all of the available evidence including the recorded video and audio evidence, the evidence gathered by Cpl. Alexander and the evidence of Mr. and Ms. Reid. Mr. Lolacher gathered information concerning the position of the sun at the relevant time, and performed a "preliminary impact analysis".

[95] Here is a summary of the essential points Mr. Lolacher made in his evidence.

Speed

[96] Mr. Lolacher agreed with Cpl. Alexander's conclusion that excessive speed was not a factor in the collision.

Abruptness of Lane Change

[97] Mr. Lolacher testified concerning "abrupt" lane changes as follows: (Transcript February 10, page 24, line 29)

Q. . . . In the second paragraph, you make reference to Mr. Reid's testimony about the Dodge vehicle making an abrupt change and then almost immediately swerved on to the north shoulder of the highway?

A. Yes, sir.

Q. And then you give us some estimates about time. Can you explain those, please?

A. Yes. A typical lane change requires approximately two seconds, and that's based on years of testing, practical testing that some I've observed, some I've read in different publications. So the time is approximately two seconds. The lane change – the angle that a vehicle actually changes from one lane to the other tends to be around the five degrees. It's a very shallow steering action.

Q. So is that a gradual change or an abrupt change that you're telling us about.

A. An abrupt change could be as high as 10 [degrees]. Much more than that, people tend to get uncomfortable. The suspension starts loading on one side or the other.

Environmental Conditions Affecting Visibility

[98] Mr. Lolacher did not agree with Cpl. Alexander's conclusion that there was no evidence of any environmental condition that may have contributed to the collision. In his opinion the sun and the shadows it cast on the highway could have affected the visibility of a cyclist to a driver approaching from the east.

[99] In that connection, Mr. Lolacher examined data published by the U.S. Naval Observatory as to the position of the sun at the relevant time on July 5, 2017 at the longitude and latitude of the collision site. In his report he wrote:

> Industry accepted published data [United States Naval Observatory] reported that at between 8:50 and 8:55 PM, July 5, 2017, at the accident site, that the sun was positioned between approximately 25 and 26° north of west (direction of travel for both the Ram 1500 and the cyclist), with the altitude of the sun reported to be 9.0° above the horizon.

[100] In cross-examination, Mr. Lolacher acknowledged that the resource he consulted for this information did not take into account the effects of slopes in the topography at various GPS locations.

[101] Mr. Lolacher noted that the lower the angle of the position of the sun, the more directly the sun would impact on a driver's vision.

[102] Mr. Lolacher noted Mr. Reid's evidence confirmed that it was difficult to see the cyclist on the shoulder. He noted that Mr. Reid testified that prior to Mr. Jensen moving into the right-

hand lane, there was no vehicle in front of him, and that at that point he did not see the cyclist on the shoulder even though he had a clear and unobstructed view of the roadway.

[103] Mr. Lolacher also noted that in his trial testimony Mr. Reid testified that the sun was "not a factor." It appears that Mr. Lolacher understood Mr. Reid's testimony to mean that Mr. Reid did not think that the sun affected his ability to see the cyclist and compared that testimony to Mr. Reid's police statement which is not in evidence but had been examined by Mr. Lolacher.

[104] I must deal with an evidentiary objection that was raised at this point in Mr. Lolacher's testimony (Transcript February 10, page 21, line 15). The Crown objected to Mr. Lolacher's reference to the police statement – that because it is not in evidence, "zero weight should be put on" it. Because the objection appeared to be as to the weight to be attached to evidence, I deferred dealing with it at the time the Crown raised it.

[105] In my view, Mr. Lolacher's reference to Mr. Reid's police statement on the point is insignificant to the weight to be attached to Mr. Lolacher's evidence because Mr. Reid in fact testified at trial that the sun in the trees and the shadows it cast on the road made it difficult to see what was on the shoulder. (See paragraph [65] above.) Mr. Lolacher's understanding of Mr. Reid's evidence described above (paragraph [103] above) was incorrect.

[106] I return to my summary of Mr. Lolacher's evidence.

[107] Also, in relation to the effects of the setting sun on visibility, Mr. Lolacher referenced the "VICS" video recording made by equipment in Cpl. Facendi's police car as it approached the scene of the collision, as previously described. He noted that ". . . there were significant shadows. The sun was just above the tree level casting shadows from the trees around the northwest quadrant of the impact area and there was a significant shadow across highway 16 westbound in the immediate area of the accident." (Transcript February 10, page 23, line 1) He opined that "if somebody is wearing dark clothing and not directly in the line of sight of a driver, it would be difficult or more difficult to see that person. . .". (Transcript February 10, page 23, line 30)

[108] The video was played during Mr. Lolacher's cross-examination. Mr. Lolacher agreed that in the video the parts of the bicycle that remained on the highway were in a shadow, but the shadow did not extend significantly to the east. He agreed that this indicated that at the point of impact the bicycle had only just entered an area of shadow and had been on a sunlit, non-shadowed, part of the shoulder immediately prior to the collision.

[109] Mr. Lolacher testified in examination in chief that as the collision occurred just where the westbound uphill slope began at the "dip" where the downhill slope ended, the cyclist would not have been silhouetted against the sky. The background would have been the roadway, the ditch, and the grassy area north of the highway – all of which was in shadow. In cross-examination, Mr. Lolacher confirmed that this would be the case even if the cyclist was not yet in the shadowed portion of the shoulder.

[110] He agreed in cross-examination that the effects of the shadow would have made it difficult but not impossible for a driver to see the cyclist.

[111] Mr. Lolacher testified that the four lateral cracks across the windshield could have acted as reflectors to the sunlight, affecting the driver's vision. He also observed that the dirt on the windshield and the air fresheners hanging from the rear-view mirror would also interfere with the driver's vision. Further he testified that the cellophane wrapping on the air fresheners could

reflect sunlight which could contribute to effect of the setting sun if the angle of hanging happened to be "right" though he could not say the amount of such an effect.

Time Required for Swerve onto Shoulder,
Distance Travelled on Shoulder,
Rumble Strips

[112] Mr. Lolacher testified that given the time required for an abrupt lane change, two seconds, and the fact that at the time of the collision approximately half of the Jensen vehicle was on the shoulder, it would have taken as little as one second for the Jensen vehicle to cross the shoulder line and collide with the bicycle. Given the range of speed for the Jensen vehicle (minimum as per Cpl Anderson's evidence, 108 mph; maximum as per Mr. Reid's evidence, 130 mph), the Jensen vehicle would have travelled between 30 and 36 meters in that one second.

[113] Mr. Lolacher observed that at that minimum travel distance, the Jensen vehicle would have crossed onto the shoulder well inside the area of the highway where there were no rumble strips.

Possible Causes of the Swerve onto the Shoulder

[114] Mr. Lolacher agreed with Cpl. Anderson's opinion that "inattention, fatigue or alcohol" are possible causes of a vehicle straying from the travel lane onto the shoulder. In his view, however, inattention and fatigue are more consistent with a gradual crossing onto the shoulder than the abrupt crossing observed by Mr. Reid in this case. As to alcohol, he testified that it could cause a driver to abruptly swerve onto the shoulder, "but only if the driver has consumed enough alcohol to impair his abilities".

[115] Mr. Lolacher was of the view that there was another possible explanation for the sudden swerve on the shoulder which Mr. Reid saw in this case. He suggested that something might have fallen from the dash: a cell phone, a cup, a hamburger – and the driver's startled reaction might be to reach for the item with his right hand. His eyes would follow his right hand. His left hand, on the steering wheel would tend to turn the steering wheel in that direction. It would be a momentary distraction or momentary inattention to forward driving. In Mr. Lolacher's opinion this is a possible explanation for the sudden swerve onto the shoulder in this case. In cross-examination Mr. Lolacher explained that he distinguished between the momentary inattention that would result from reaching with one hand to retrieve an item which had fallen from the dash, and continual inattention.

[116] Mr. Lolacher also disagreed with Cpl. Anderson's opinion as to the significance of Mr. Jensen's vehicle having travelled 233 meters from the point of collision to the point where it stopped. In Cpl. Anderson's opinion this indicated "inattention, fatigue or alcohol". In Mr. Lolacher's opinion it was consistent with Mr. Jensen having just passed the Reid vehicle and its U-Haul trailer, having realized that he had hit something and bringing his vehicle to a controlled stop while reducing the possibility of being struck from behind.

Dangerous Driving Causing Death – The Law

[117] It is absolutely vital to distinguish the crime of dangerous driving causing death from the civil wrong, the tort, of negligent driving. In ***R v Beatty*** 2008 SCC 5, Charon J. writing for the majority of the Supreme Court of Canada, observed: (paras 34 -35)

> If every departure from the civil norm is to be criminalized, regardless of the degree, we risk casting the net too widely and branding as criminals persons who are in reality not morally blameworthy. Such an approach risks violating the principle of fundamental justice that the morally innocent not be deprived of liberty.
>
> In a civil setting, it does not matter how far the driver fell short of the standard of reasonable care required by law. The extent of the driver's liability depends not on the degree of negligence, but on the amount of damage done. Also, the mental state (or lack thereof) of the tortfeasor is immaterial, except in respect of punitive damages. In a criminal setting, the driver's mental state does matter because the punishment of an innocent person is contrary to the fundamental principles of criminal justice. The degree of negligence is the determinative question because criminal fault must be based on conduct that merits punishment.

[118] As with all crimes, dangerous driving causing death involves first, prohibited conduct (the *actus reus* of the offence) and second, the required mental element or the required level of moral fault (the *mens rea).* In ***Beatty*** the Supreme Court explained how the concept of *mens rea* works in an offence where driving has caused danger or injury, given that, generally, neither would have been caused intentionally. In ***R v Roy*** 2012 SCC 26, Cromwell writing for the Court, summarized the law as articulated in ***Beatty*** as follows: (at para. 28)

> The *actus reus* of the offence is driving in a manner dangerous to the public, having regard to all the circumstances, including the nature, condition and use of the place at which the motor vehicle was being operated and the amount of traffic that at the time was or might reasonably have been expected to be at that place (s. 249(1)(a) of the *Criminal Code).* The *mens rea* is that the degree of care exercised by the accused was a *marked* departure from the standard of care that a reasonable person would observe in the accused's circumstances *(Beatty,* at para. 43). The care exhibited by the accused is assessed against the standard of care expected of a reasonably prudent driver in the circumstances. The offence will only be made out if the care exhibited by the accused constitutes a *marked* departure from that norm. While the distinction between a mere departure from the standard of care, which would justify civil liability, and a *marked* departure justifying criminal punishment is a matter of degree, the lack of care must be serious enough to merit punishment.

[119] Cromwell J. further discussed the *actus reus* element: (para. 34)

> In considering whether the *actus reus* has been established, the question is whether the driving, viewed objectively, was dangerous to the public in all of the circumstances. The focus of this inquiry must be on the risks created by the accused's manner of driving, <u>not the consequences, such as an accident in which he or she was involved.</u> (emphasis added) As Charron J. put it, at para. 46 of *Beatty,* "The court must not leap to its conclusion about the manner of driving based on the consequence. <u>There must be a meaningful inquiry into the manner of driving.</u>" (emphasis added [in *Roy*]). A manner of driving can rightly be qualified as dangerous when it endangers the public. It is the risk of damage or injury created by the driving that is relevant, not the consequences of a subsequent

> accident. In conducting the inquiry into the manner of driving, it must be borne in mind that driving is an inherently dangerous activity, but one that is both legal and of social value (*Beatty*, at paras. 31 and 34). Accidents caused by these inherent risks materializing should generally not result in criminal convictions.

[120] Cromwell J. also further discussed the *mens rea* element in ***Roy***: (para. 36)

> The focus of the *mens rea* analysis is on whether the dangerous manner of driving was the result of a marked departure from the standard of care which a reasonable person would have exercised in the same circumstances (*Beatty*, at para. 48). It is helpful to approach the issue by asking two questions. The first is whether, in light of all the relevant evidence, a reasonable person would have foreseen the risk and taken steps to avoid it if possible. If so, the second question is whether the accused's failure to foresee the risk and take steps to avoid it, if possible, was a *marked departure* from the standard of care expected of a reasonable person in the accused's circumstances.
>
> Simple carelessness, to which even the most prudent driver may occasionally succumb, is generally not criminal. As noted earlier, Charron J., for the majority in *Beatty*, put it this way: "If every departure from the civil norm is to be criminalized, regardless of the degree, we risk casting the net too widely and branding as criminals persons who are in reality not morally blameworthy" (para. 34). The Chief Justice expressed a similar view: "Even good drivers are occasionally subject to momentary lapses of attention. These may, depending on the circumstances, give rise to civil liability, or to a conviction for careless driving. But they generally will not rise to the level of a marked departure required for a conviction for dangerous driving" (para. 71).

[121] As to the determination of whether a "marked departure" has been proved, Cromwell J. said: (para. 40)

> The underlying premise for finding fault based on objectively dangerous conduct that constitutes a marked departure from the norm is that a reasonable person in the position of the accused would have been aware of the risk posed by the manner of driving and would not have undertaken the activity: *Beatty*, at para. 27.
>
> In other words, the question is whether the manner of driving which is a marked departure from the norm in all of the circumstances, supports the inference that the driving was the result of a marked departure from the standard of care that a reasonable person in the same circumstances would have exhibited.
>
> Driving which, objectively viewed, is simply dangerous, will not on its own support the inference that the accused departed markedly from the standard of care of a reasonable person in the circumstances (Charron J., at para. 49; see also McLachlin C.J., at para. 66, and Fish J., at para. 88). In other words, proof of the *actus reus* of the offence, without more, does not support a reasonable inference that the required fault element was present. Only driving that constitutes a marked departure from the norm may reasonably support that inference.

[122] Very recently, in ***R v Chung*** 2020 SCC 8, the Supreme Court held that a trial judge had erred in the application of these principles when he determined that excessive speeding on its

own could not constitute a marked departure from the standard of care that a reasonable person would exhibit in the same circumstances because it was only momentary excessive speeding. Martin J. writing for the majority of the Court observed: (para. 21 and 22)

> . . . A brief period of rapidly changing lanes and accelerating towards an intersection is not comparable to momentary mistakes that may be made by any reasonable driver, like the mistimed turn onto a highway in *Roy*¸ the momentary loss of awareness in *R v. Beatty* . . . or the sudden loss of control in *Willock* [*R v. Willock (C.)* (2006) O.A.C. 82].
>
> Although this Court in *Roy* and *Beatty* determined that momentary lapses in attention and judgment would usually not raise criminal liability, this was because momentary lapses often result from the "automatic and reflexive nature of driving" (*Beatty*, at para. 34) or "[s]imple carelessness, to which even the most prudent drivers may occasionally succumb" (*Roy*, at para. 37). These are examples of conduct that, when assessed in totality against the reasonable person standard only represent a mere departure from the norm. Momentary conduct is not assessed differently from other dangerous conduct. Conduct that occurs over a brief period of time that creates foreseeable and immediate risks of serious consequences can still be a marked departure from the norm (*Beatty*, at para. 48).

[123] In ***Chung*** Martin J. also held that the trial judge had erred by failing to determine whether a reasonable person in the accused's position would have foreseen the risk of driving as he did and taken actions to avoid it. She observed:

> At some point in the *mens rea* analysis, the trial judge must work with the facts as found and consider whether, in the totality of the circumstances, a reasonable person would have foreseen the risk and then taken the same actions as the accused.

[124] It might be helpful for me to briefly set out the facts and result of the three Supreme Court of Canada cases referred to in the last several paragraphs:

1. ***Beatty*** (2008): The accused's pick-up truck, for no apparent reason, suddenly crossed the solid centre line, collided with an oncoming vehicle killing all three occupants of that vehicle. Witnesses driving behind the accused observed that he was driving in a proper manner prior to the collision. There was no mechanical malfunction of the accused's vehicle. Intoxicants were not a factor. The accused testified that he was not sure what had happened but that he must have lost consciousness or fallen asleep.

   All nine judges of the SCC held that the offence was not made out. Five judges, the majority, held that the *actus reus* was proved but that the *mens rea* was not. Three judges held that the *actus reus* was not proved. One judge disagreed with the other judges' analysis of the *actus reus* and *mens rea* but agreed that Mr. Beatty's driving did not amount to a marked departure from the norm. The accused was acquitted.

2. ***Roy*** (2012): The accused was turning from a snowy back road onto a highway. Visibility was limited due to fog. The accused stopped before turning and then drove onto the highway into the path of a tractor-trailer. The accused's passenger was killed in the resulting collision.

The seven judges of the SCC who heard the appeal acquitted the accused. Writing for the court, Cromwell J. said: (para 55)

> In my view, the appellant's decision to pull onto the highway is consistent with simple misjudgment of speed and distance in difficult conditions and poor visibility. The record here discloses a single and momentary error in judgment with tragic consequences. It does not support a reasonable inference that the appellant displayed a marked departure from the standard of care of a reasonable person in the same circumstances so as to justify conviction for the serious criminal offence of dangerous driving causing death.

3. ***Chung*** (2020): The accused was driving on an arterial road in Vancouver approaching its intersection with another arterial road. He was not inattentive, nor engaged in any dangerous conduct prior to entering the city block before the intersection. The accused moved into the curbside lane, passed at least one vehicle on the right side, and accelerated to three times the speed limit before entering the intersection. There was a vehicle ahead of the accused turning right onto the cross street. As it did so, another vehicle which had been traveling in the direction opposite to that of the accused, commenced a left turn into the arterial cross street in front of the accused's vehicle. The accused started braking, narrowly missed the vehicle that turned right and collided with the vehicle that was turning left at a speed of more than twice the speed limit. The driver of the left turning vehicle was killed.

   Four of the five judges of the SCC who heard the appeal agreed with the BCCA that the trial judge had made an error of law in finding that the accused lacked the requisite *mens rea* for dangerous driving causing death. The fifth and dissenting judge, Karakatsanis J., held that the trial judge's decision to acquit was not tainted by legal error. In the result the SCC agreed with the BCCA that the accused should be convicted.

[125] I note that Counsel in this case were aware at the time of argument that ***Chung*** had been argued in the Supreme Court. Its basic facts were mentioned in argument. The SCC decision was issued after the argument in this case. I have not invited Counsel to provide further submissions relating to ***Chung*** because in my view it discusses the law set out in ***Beatty*** and ***Roy*** but does not alter or significantly elaborate on it. Indeed, though the law of dangerous driving causing death is discussed in the decision, the issue before the court in ***Chung*** was whether or not the appeal was in relation to a question of law. The SCC provided summary of the decision states, "The sole issue in this appeal is whether the trial judge made an error of law, which would allow the Crown to appeal [Chung's] acquittal under s. 676(1)(a) of the *Criminal Code*."

Theory of the Crown

[126] Mr. Schmidt, Crown Counsel, submitted that there are eight elements relating to Mr. Jensen's conduct and driving which, considered together, render his swerving onto the shoulder more than a momentary lapse of judgment or momentary inattention. As I understood the Crown's submissions, the analysis of these eight elements constitutes the required "meaningful inquiry" into Mr. Jensen's manner of driving.

[127] In each instance I have assessed the strength of the contribution to the Crown's theory which each point makes.

1. Alcohol consumption although not to the point of impairment:

[128] In the Agreed Statement of Facts, Mr. Jensen acknowledged that he consumed two ounces of hard alcohol mixed with water and a separate glass of alcoholic beer at an Edson restaurant sometime before he paid the tab at 6:50 p.m. which was two hours before the collision. (See para. [78] above).

[129] The Crown cites ***R v. Settle*** 2010 BCCA 426 where Smith and Bennett J.J.A. wrote: (para 55)

> The *Beatty* restatement of the *Hundal* test, has, in our view, opened the door to including, in a consideration of the *mens rea* of the offence of dangerous driving, evidence of an accused's state of mind, including evidence of the voluntary consumption of alcohol prior to driving. That evidence, when considered with evidence of driving conduct, may demonstrate a "pattern" of conduct that shows a disregard for the safety of others using the highway, which in its totality may be sufficient to establish a marked departure from the standard of a reasonably prudent driver.

[130] In ***Settle*** the accused after a day of "quading" and drinking beer, drove on a windy and hilly B.C. road with two passengers, one of whom testified that the accused was "fairly drunk", was driving too fast, and was cutting corners in the oncoming lane. At a particularly sharp curve in the road, the accused lost control of his vehicle which rolled over, seriously injuring all three of its occupants. The accused was convicted of dangerous driving causing bodily injury.

[131] The Crown also cites ***R v. McLennan*** 2016 ONCA 732 where MacFarland J. A. said: (para. 23)

> The fact that a person voluntarily consumes some alcohol, albeit short of the point of impairment, is a factor – and only that – that can be considered in determining whether the necessary *mens rea* has been made out. It is an indication of a mindset, in my view, of a willingness to assume a degree of risk – a risk that the amount they have consumed will not rise to the level where it impairs their ability to operate a motor vehicle. ...

(para. 25)

> When dealing with a dangerous driving charge, it is not inappropriate in considering whether a driver's conduct is a marked departure from that of a reasonable driver in similar circumstances, to consider whether or not that person has consumed alcohol and if so to what degree before operating the motor vehicle – as I have said it goes to mindset and a willingness to assume risk.

[132] In ***McLennan*** the evidence was that the accused had consumed 4 beers and a shot of tequila in a four-hour period that ended about 15 minutes before he lost control of his vehicle. His son who was a passenger in his vehicle was killed in the ensuing crash. A Crown toxicologist testified that, based on the analysis of blood samples and intoxilyzer readings taken after the accident, the accused would have been impaired at the time of the accident. A Defence expert did not agree with the Crown's toxicologist. A jury had acquitted the accused of impaired

driving causing death, so, the Court of Appeal, concluded, it must have accepted the Defence expert's opinion. The jury found the accused guilty of dangerous driving causing death.

[133] In the case at bar, Mr. Jensen's alcohol consumption ended a full two hours before the collision. The evidence does not address the duration of the period over which his alcohol consumption occurred. Neither is there any expert evidence addressing what effect the consumption of the amount of alcohol he consumed might have had on his ability to drive two hours after his consumption of alcohol ended.

[134] In my view, there is no basis in the evidence for a finding that the alcohol Mr. Jensen consumed two hours earlier played any part in the cause of the collision.

[135] Driving after drinking alcohol is not illegal so long as the driver's ability to drive is not impaired by the alcohol. If there is no such impairment, it is not unsafe. Indeed, it is a common behaviour.

[136] Further, in my view, that Mr. Jensen drove two hours after consuming the quantity of alcohol he consumed, does not justify any inference as to his mindset or his willingness to assume risk. So far as the evidence goes, not driving for two hours after finishing consuming two ounces of hard alcohol and one beer might represent a responsible attitude and an appropriate mindset. There is, in my view, no basis in the evidence, to conclude otherwise.

2. Distraction by Texting

[137] The Crown submits that the evidence supports the conclusion that very shortly before the collision Mr. Jensen was texting on his cell phone – that his attention was not fully on his driving. The Crown refers to the photograph of the display on Mr. Jensen's cell phone text messaging application the contents of which is set out at paragraph [76] above.

[138] That evidence establishes that Mr. Jensen was texting at 8:49 p.m. There is no evidence as to the exact time of the collision. From the photograph of the text messages and other evidence, I find that the collision had occurred by 8:55 p.m. but the evidence permits no greater precision. There was, therefore, a maximum of about six minutes between Mr. Jensen's last text and the collision.

[139] As previously noted, the evidence does support the inference that when Mr. Jensen left a voice mail for Ms. Bareman at 8:47 p.m. he was driving (para. [75] above). It is a reasonable inference, therefore, that when he wrote and sent the text messages referenced in para. [76] above at 8:48 and 8:49 p.m., he was driving.

[140] The evidence does not however permit the inference that Mr. Jensen's abrupt move from the left passing lane into the right lane after passing the Reid vehicle or his swerve onto the shoulder were related to his texting. Indeed, it appears reasonable to conclude that several (four or five) minutes passed between the last text at 8:49 and the collision. I reject the Crown's submission to the contrary.

[141] I agree, however, that the fact he was texting while driving establishes that at least a few minutes prior to the collision he was engaged in distracting conduct which is inherently dangerous and a driving offence (*Traffic Safety Act* s. 115.1) In my view, this is relevant to the required "meaningful inquiry" into Mr. Jensen's manner of driving.

3. Distraction by Eating

[142] As noted, a partially eaten and odoriferous hamburger was in Mr. Jensen's vehicle, probably on the front seat, after the collision. (See para.[79] above.) The Crown invites the inference that Mr. Jensen's driving conduct immediately before the collision includes distraction by eating.

[143] Again, the evidence does not justify the inference that Mr. Jensen was eating the hamburger when his vehicle swerved onto the shoulder. The evidence does not permit any conclusion as to when between the time he bought the hamburger and the collision he had eaten the portion of it which had been eaten.

[144] Again, however, I agree that given that the hamburger was partially eaten and near to the driver's position in the vehicle, it can reasonably be inferred that Mr. Jensen was eating at some point when he was driving. This too is relevant to an assessment of Mr. Jensen's manner of driving.

[145] Eating while driving is not specifically identified in the *Traffic Safety Act* as a form of distracted driving. Whether or not a particular instance of eating while driving would be a driving offence would depend on whether or not it distracted the driver from the operation of the vehicle (*Traffic Safety Act*, s. 115.4(1). Whether a particular instance of eating while driving added to the inherent danger of driving, would, I expect, depend on the same analysis – did it distract the driver from the operation of the vehicle. I take judicial notice that eating while driving is an extremely common behaviour in which even careful and safe drivers engage.

[146] In my view, it is not appropriate in these circumstances to infer that Mr. Jensen's eating while driving contributes anything significant to an assessment of his manner of driving at the time of, or in the period leading up to, the collision.

4. Cracked and Dirty Windshield

[147] The Crown referenced Mr. Lolacher's evidence that the severely cracked and dirty windshield on Mr. Jensen's vehicle could have intensified the glare from the setting sun and obscured Mr. Jensen's vision. (See para. [111] above.) The Crown submitted that it is relevant in the assessment of Mr. Jensen's driving that he drove when his windshield was in such a condition.

[148] The cracks in the windshield are clearly visible in photographs taken after the collision. For much of their evidence Cpl. Anderson and Mr. Lolacher appear to have assumed that the cracks existed before the collision – that they were not caused by the collision. But Cpl. Anderson in re-direct examination testified that this might not be the case – that it is possible that the cracks were caused by the collision. (See para. [90] above.) Given that evidence, I am not prepared to find that the cracks existed before the collision.

[149] As to the dirt on the windshield, in my view, it is not possible to assess the extent of the "dirtiness" from the photographs in evidence. They do show dirt on the window. However, I cannot conclude that it was to a degree which was significantly unusual for the windshield of a vehicle driving on Alberta roads in July.

[150] I note that Cpl. Anderson, who saw the Jensen vehicle and took at least some of the photographs which show its windshield, did not mention dirt on the Jensen vehicle windshield in

his written report. Indeed, he concluded that there was no "view obstruction" that might have contributed to the collision.

[151] I also note that the videos taken by the onboard cameras of both Officers Ayres' and Facendi's police cars as they traveled from the RCMP detachment in Edson to the scene of the collision show that the windshields of both vehicles were significantly dirty with what appears to be dust and "bug smear".

[152] While the dirt on Mr. Jensen's windshield may be significant to the effect of the sun on his vision, in my view it says very little if anything about his manner of driving that he drove with a windshield in that condition in Alberta in July.

5. Cellophane Wrapped Air Fresheners Hanging from Mirror

[153] The Crown submits that it is significant to Mr. Jensen's manner of driving that he had cellophane wrapped air fresheners hanging from the rear-view mirror of his vehicle.

[154] As in the case of the dirt on the windshield it is necessary to distinguish between the question of whether or not the presence of the air fresheners conceivably contributed to the cause of the collision and what their presence says about Mr. Jensen's manner of driving.

[155] The Crown points out that to drive with anything obscuring the driver's vision is a driving offence (*Traffic Safety Act* s. 115(1)(j)). The Crown submits that it is relevant to an assessment of Mr. Jensen's manner of driving that he drove while in violation of that provision.

[156] I note that it is not uncommon for drivers to have items, very often parking passes and very often shiny objects, hanging from their rear-view mirrors even though the item obscures their vision to some extent. In most contexts the extent of the obscuring is marginal. It does not follow from the fact that something is hanging from the rear-view mirror that the driving offence just cited has been committed. In my view, driving with cellophane wrapped air freshener hanging from his mirror has very limited negative impact in the assessment of Mr. Jensen's manner of driving. It says nothing about his mind-set while driving.

6. Mr. Jensen's Speed

[157] The Crown submitted that on an assessment of all of the evidence, the conclusion should be that Mr. Jensen was "moderately speeding".

[158] The particular evidence to which the Crown referred was:

- Mr. Reid's estimate that Mr. Jensen was going 130 kph, which he "softened" in cross-examination to a speed greater than his which, he testified, was 110 kph.
- Ms. Reid's evidence to the same effect.
- Cpl. Alexander's and Mr. Lolacher's concurring expert evidence that calculating from the distance the deceased was thrown, and the "throw speed", Mr. Jensen's speed was roughly 109 kph.

[159] Some of the evidence cited is to the effect that Mr. Jensen was driving at just above the speed limit. Some of it is to the effect that he was driving slightly less than the speed limit. In my view, there is no basis for a confident conclusion that he was speeding, even moderately, or marginally. The Crown's expert testified that speed was not a factor in the causation of the

collision. In my view, the conclusion that Mr. Jensen's manner of driving included speeding is not available on the evidence.

7. Mr. Jensen's Lane Change After Passing the Reid Vehicle

[160] The Crown submits that Mr. Jensen made an unsafe lane change from the left lane to the right lane after he passed the Reid vehicle. Mr. Schmidt submitted that the evidence supported the conclusion that Mr. Jensen executed the lane change "without giving enough distance" between his vehicle and the Reid vehicle.

[161] Mr. Schmidt referenced only the evidence of Ms. Reid in his submission on this point. As noted at para. [71] above, Ms. Reid's evidence in cross-examination indicated that she did not actually see the Jensen vehicle move from the left lane into the right lane – she was looking down at the time.

[162] Mr. Reid's description of Mr. Jensen's lane change is quoted in para. [62] above. One of the features of the lane change as Mr. Reid described it was that Mr. Jensen was "five or six car lengths" ahead of the Reid vehicle when he moved, albeit abruptly, into the right lane.

[163] As I interpret the Crown's submission, it is that Mr. Jensen's lane change had two features that made it unsafe and therefore significant in an assessment of his manner of driving: (1) that it was abrupt and (2) that it was executed when the Jensen vehicle was too close to the Reid vehicle.

[164] In my view, the second feature is not established in the evidence. No evidence was offered and no authority or provision of the *Traffic Safety Act* or *Regulations* was cited supporting the conclusion that to change lanes when five or six car lengths ahead of another car, even on a highway where the speed limit is 110 kph, is unsafe.

[165] As to the abruptness of the lane change, Mr. Lolacher's evidence was that the range of directness of a lane change is from five degrees (gradual) to ten degrees (abrupt). (See para. [97] above.) There was no evidence adduced, or authority or provision of the *Traffic Safety Act* or *Regulations* cited, for the proposition that a lane change at the abrupt end of the range is unsafe. There is no basis for a conclusion that the abruptness of the lane change impacts negatively in the assessment of Mr. Jensen's manner of driving.

8. Swerving onto the Shoulder

[166] Finally, the Crown submits that Mr. Jensen swerving from the travel lane onto the shoulder itself contributes to the conclusion that Mr. Jensen's manner of driving was wanting – indeed, in the Crown's submission, that it was criminal.

[167] There is no evidence as to the cause of the swerve. Both expert witnesses testified as to possible causes. Cpl. Anderson testified that the cause could be "inattention, fatigue, or alcohol induced" and referenced the distance it took Mr. Jensen to bring his vehicle to a stop after the collision as supporting the conclusion that one of these causes was in play. Mr. Lolacher observed that inattention and fatigue are not consistent with the abrupt swerve Mr. Reid witnessed. In his view, the stopping distance was consistent with Mr. Jensen bringing his vehicle to a stop in an appropriate manner given the traffic behind him.

[168] As previously concluded, the evidence does not show that Mr. Jensen's admitted alcohol consumption has significance.

[169] Mr. Lolacher opined that another possible cause of the sudden swerve is Mr. Jensen reacting to something falling from the dash or seat of his vehicle – a momentary attention lapse.

[170] In my view, the evidence is more consistent with Mr. Lolacher's opinion than Cpl. Anderson's. In my view, the swerve represents a momentary attention lapse. And as noted in the quotation from ***Roy*** above (para. [120] above) Chief Justice McLachlin in ***Beatty*** (at para. 71) observed "Even good drivers are occasionally subject to momentary lapses of attention."

[171] In my view, that Mr. Jensen's vehicle swerved onto the shoulder does not contribute significantly to the conclusion that his manner of driving was dangerous to the point where criminal sanction is justified.

Conclusion as to the Crown's Theory

[172] In my view, the eight elements which Crown submitted justify the conclusion that Mr. Jensen's manner of driving was dangerous and a marked departure from that of a reasonable person do not produce that conclusion.

[173] In the preceding discussion I have found that only one of the elements says anything significant about the manner of Mr. Jensen's driving – the texting. I have concluded that the other seven "driving behaviours" to which the Crown pointed were either not proven or were not significant in the assessment of Mr. Jensen's driving. In my view, most of the Crown's theory is not supported by the evidence.

[174] As to the texting, I have found that the evidence does not support the conclusion that Mr. Jensen was texting at the time of either the lane change or the swerve onto the shoulder. Though the texting is relevant to the assessment of Mr. Jensen's manner of driving, it does not, on its own justify the characterization of the manner of his driving prior to the collision as either objectively dangerous or a marked departure from the standard of care expected of a reasonable person.

The* Actus Reus - *Was Mr. Jensen's Swerve onto the Shoulder Objectively Dangerous?

[175] Focusing on the manner of driving which actually caused the collision, the swerve into the shoulder, I consider whether or not Mr. Jensen's driving was, in all the circumstances, objectively dangerous.

[176] I am not convinced beyond a reasonable doubt that it was.

[177] I take note particularly that Mr. Jensen's swerve onto the shoulder was of very short duration. Mr. Lolacher testified that the time required for the portion of Mr. Jensen's vehicle which crossed into the shoulder lane to do so and collide with Cst. MacDougall's on his bicycle, was as little as one second. Nothing in the testimony of Mr. Reid was inconsistent with that.

[178] There were no rumble strips at that point at the left edge of the shoulder. Up until a short distance east of the collision scene there had been rumble strips. An undoubtedly effective physical warning to drivers that they are crossing onto the shoulder was not provided at the point where Mr. Jensen crossed into the shoulder.

[179] For there to be something into which a vehicle could collide on the shoulder of a rural highway is relatively rare. For the vast majority of the time, for a driver to momentarily swerve onto the shoulder is not dangerous. It is rare that such a swerve will create any significant risk to anyone. The *Criminal Code* section defining the offence of dangerous driving expressly

provides that one of the circumstances to be considered is "the amount of traffic that at the time is or might reasonably be expected at [the place at which the motor vehicle is being operated]" (s. 249(10(a)). The amount of traffic that might reasonable be expected on the shoulder of Highway 16 west of Edson at any time is almost none.

[180] To the extent, however, that the assessment of the objective dangerousness of Mr. Jensen's crossing onto the shoulder must take into account that there was in fact a person riding a bicycle on the shoulder, the effect of the sun and the shadows it cast on the visibility of Cst. MacDougall and his bicycle on the shoulder, is relevant. The evidence supports the conclusion that neither Mr. Reid, before Mr. Jensen was in front of him, nor Mr. Jensen, after he passed Mr. Reid, saw Cst. MacDougall on the shoulder. "All the circumstances" include the fact that Cst. MacDougall was difficult to see, and in fact, was not seen by either driver.

[181] The risk which was manifest in the collision was, in my view, as much the result of the interference of the setting sun and the shadows it cast on the visibility of Cst. MacDougall and the absence of rumble strips on the short section of the highway where the collision occurred, as it was the result of whatever caused Mr. Jensen's momentary inattention and swerve onto the shoulder.

[182] I repeat the point made in the Supreme Court of Canada authorities cited above: the consequence of the accused's driving (in this case the collision and tragic death of Cst. MacDougall) is not the focus of the *actus reus* inquiry. The focus is the accused's manner of driving.

[183] I am not convinced that Mr. Jensen's manner of driving was objectively dangerous. I am not satisfied beyond a reasonable doubt that the *actus reus* of dangerous driving has been proved.

The* Mens Rea – *Was Mr. Jensen's driving a marked departure from that of a reasonable person?

[184] I am not convinced that a reasonable person would have foreseen the risk that crossing onto the shoulder actually created in this case. The sun and the shadows it cast made it difficult to see Cst. MacDougall on his bicycle. Mr. Reid did not see him when there was nothing ahead of him in his lane. Mr. Jensen did not see him either.

[185] The sun did not however interfere with the visibility of the road ahead.

[186] In my view, a reasonable driver would have continued to drive, as Mr. Jensen and Mr. Reid continued to drive, notwithstanding that the sun and shadows affected the visibility of what might be on the shoulder at the place where Cst. MacDougall was cycling. There is no basis for concluding that a reasonable person would have seen that Cst. MacDougall was on the shoulder and taken special care to avoid the risk of collision by not inadvertently swerving onto the shoulder.

[187] In my view, it has not been proved beyond a reasonable doubt that this tragic collision resulted from a marked departure by Mr. Jensen from the standard of care expected of a reasonable person.

Conclusion on Count 3

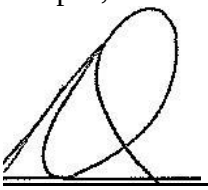
[188] I conclude that Count 3 of the indictment has not been proven beyond a reasonable doubt. I find Mr. Jensen not guilty of Count 3.

Conclusion

[189] To review, Count 1 of the indictment was withdrawn by the Crown. I have found Mr. Jensen not guilty of Counts 2 and 3. I direct that acquittals be entered on the record in respect of those counts.

Heard on October 7, 8, 9 and 10, 2019 in Hinton, Alberta and November 25, 2019 and February 10 and 12, 2020, in Edmonton, Alberta.

Dated at the City of Edmonton, Alberta this 8th day of April, 2020.



B.R. Burrows
J.C.Q.B.A.

Appearances:

John Schmidt and Dallas Sopko
for the Crown

Timothy E. Foster, Q.C.
for the Accused

Appendix

Conversation between Cst. Ayres and Mr. Jensen at the side of the highway after Cst. Ayres first detected an odour of alcohol. The conversation is in progress when the recording begins:

Jensen	He, he was stalking me and ah fucking followed me around and this shit. . . It's been a shitty week. Okay?
Ayres	I need you to step over here, okay?
Jensen	It's been a shitty bro (unintelligible)
Ayres	Kay' Where abouts is your house, back that way?
Jensen	Well, like . . .
Ayres	Are you, are you in between with fighting with your girlfriend?
Jensen	I'm in between man, I rent a house my family went on vacation home in Campbell River.
Ayres	Yep
Jensen	So I'm kinda living there but I work in Edson, I stay in camp and kinda back and forth, my girlfriend's a dentist, or ex girlf (*sic*), or fuck whatever she is.
Ayres	Okay
Jensen	Ex girlfriend lives in Cold Lake, then I works out of Peer Lake so I'm in between there and . . .
Ayres	Yep
Jensen	We just kinda went through a break up and she's been kinda fucking sayin' she's stalking me and following me and all this shit.
Ayres	Okay
Jensen	And I was kinda, my mind was definitely elsewhere I'm not you know . . . I've never had, I'm almost to the point basically where I was going to come in this week and get a no contact going.
Ayres	Oh, okay
Jensen	I don't know.
Ayres	Was there any like violence, or just . . .
Jensen	No, no, not at all like

Ayres Okay

Jensen We never, never violent [fought], just verbally or just . . .

Ayres Kay

Jensen I've never been mind fucked like this, like that way, I've never in my life felt so, different, so weird.

Ayres Yeah, okay.

Jensen So I don't know, maybe mind's took off, off the path, but I don't know.

Ayres What time were you supposed to be at work?

Jensen Well I'm on call right now.

Ayres Oh you're just on call, okay.

Jensen Well no, I work, I stay at the plant but I work.

Ayres Do you live there?

Jensen Yeah

Ayres Oh, okay, oh I didn't realize.

Jensen Yeah twenty-four seven.

Ayres Okay

Jensen Unless something goes down I go up there.

Ayres Gotcha.

Jensen That's why it pays. That's kinda what my boss expects me to be

Ayres Yep.

Jensen It's a, it's a whole fucking truck full of groceries, I was heading back to work.

Ayres Um hum

Jensen I don't know where the fuck he came from.

Ayres Okay, well obviously right, we'll need a statement from you . . .

Jensen (unintelligible)

Ayres At some point, not right now but . . .

Jensen Yeah

Ayres At some point.

Jensen I understand, it's just over the top.

Ayres Um hum, have you lived in, in Yellowhead County all your life, or?

Jensen No.

Ayres No, where are you originally from?

Jensen Taber.

Ayres Okay, when did you move to the area?

Jensen Ah, two thousand eight.

Ayres Ah, okay.

Jensen But I lived in Hinton, worked in camp, got laid off.

Ayres Right.

Jensen And came back.

Ayres Okay.

Jensen Different company.

Ayres Gotcha, and sorry which company did you say it was again?

Jensen Peyto, peyto, peyto, peyto

Ayres Which plant is that?

Jensen Swanson, south Swanson.

Ayres Oh, okay.

Jensen Just yeah, South Swanson Road and kilometer ninety.

Ayres Okay, I don't know if I've been down there, is that like down towards Robb or, is that up north?

Jensen (unintelligible)

Ayres Oh okay, oh yeah yeah yeah.

Jensen Yeah Swanson Road or ah Bikerdike, Bikerdike goes south and . . .

Ayres Oh okay.

Jensen Swanson goes north. So I'm like nine k up the Swanson road.

Ayres Okay

Jensen I used to just work at a plant there.

Ayres Um hum. How long have you been a plant operator?

Jensen Nine years, ten years, it's all I've kinda ever done.

Ayres Okay.

Jensen I hate it but . . .

Ayres Yep

Jensen It's the only work there is.

Ayres Right.

Jensen It's all I've ever done.

Ayres How long have been with you, your ex girlfriend?

Jensen For about a year.

Ayres Oh okay, she lived in Cold Lake the entire time?

Jensen Um Um (negative sound), no no I worked here, up in Campbell River.

Ayres Oh okay.

Jensen I just grew up with her. I met her, and we grew up in Taber.

Ayres Yeah.

Jensen And then, yeah, we just kinda. . . I broke up with my girlfriend on the island and she ended up randomly texting me. She just broke up with hers and we ended up hooking up and . . .

Ayres Um hum

Jensen Yeah, it was all good for a while and then yeah shit just went south and . . .

Ayres Okay. Hum

Jensen She saying she's following me around and shit.

Ayres (laughs) From Cold Lake?

Jensen No, Vancouver Island.

Ayres Oh.

Jensen She called me at like, my last days off, she's like oh it was fun following you. What do you mean? Like I followed you around for your whole days off.

Ayres Yep

Jensen Okay, like weird but . . .

Ayres Um hum

Jensen So I got that block two days off. She said she's been following me around.

Ayres Gotcha

Jensen And then actually the RCMP showed up at my house on Sunday. Yeah it was either a Saturday or Sunday cause she was trying to call me and I said leave me alone – like I'm going to Gold River on my bike. I got a Harley.

Ayres: Um hum

Jensen I'm going to Gold River on my bike. Fuckin leave me alone. Shut my phone off. There's no service there anyway. Leave me alone.

Ayres Um hum

Jensen Well then she phones the RCMP worried that I was going to kill myself or I was going to whatever.

Ayres Um hum

Jensen So she phones you guys to say hey, go check on him or whatever. I think he – something's happened to him, because I didn't call her back right away.

Ayres Um hum

Jensen Well no. I was in the middle of nowhere for three four hours with no service.

Ayres Right.

Jensen So when I got home on my bike, I had RCMP waiting at my house.

Ayres OK

Jensen Like what are you guys doing?

Ayres Um hum

Jensen Oh well your girlfriend said you were gonna hurt yourself. Like what are you guys talking about? Like fuck I went for a ride on my bike. Like yeah I don't know. I've never, I've never met anyone like it.

Ayres Hum

Jensen She keeps saying she's following me around and stalking me, like that's wild. My mind's been elsewhere.

Ayres Um hum

Jensen But, I just thought I'd throw that, I mean that's on file so I thought I would tell you that story

Ayres Yeah

Jensen Sorry, I'm just

Ayres You know what I'm, I'm actually going to stop you. I, I'm pretty sure I got a whiff of alcohol off of your breath. Ah so I'm going to make a demand for a sample of your breath. Okay? So I'll have you take the smoke out. You can't smoke.

Jensen Okay

Ayres Um, so we are going to go back to my police vehicle here okay. We are going to my vehicle. We're going to my vehicle.