Citation: R v Hall, 2018 MBCA 122 Date: 20181119
Docket: AR16-30-08641

IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Barbara M. Hamilton
Madam Justice Diana M. Cameron
Mr. Justice Christopher J. Mainella

B E T W E E N :

	M. D. Glazer *and*
	A. J. Steigerwald
	for the Appellant
HER MAJESTY THE QUEEN	
Respondent	***N. M. Cutler***
	for the Respondent
- and -	
DEVIN KINGSLEY HALL	*Appeal heard:*
	January 15, 2018
(Accused) Appellant	
	Judgment delivered:
	November 19, 2018

NOTICE OF RESTRICTION ON PUBLICATION: An order prohibiting disclosure of a witness's identity has been made in this proceeding pursuant to section 486.31(1) of the *Criminal Code* and shall continue.

On appeal from 2016 MBQB 120

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MAINELLA JA

Introduction

[1] Early in the morning of September 27, 2012, the quiet charm of an all-night diner was disrupted by gunfire. While eating with friends, Jeffrey Lau was fatally shot and G. N. was seriously wounded. The masked shooter fled the scene by vehicle. Soon after the shooting, the police found his abandoned semi-automatic pistol (the gun); black fleece gloves (the gloves); and mask, a white tank top (the shirt), near the diner. Deoxyribonucleic acid (DNA) on the items ultimately led police, several months later, to the accused via the National DNA Data Bank.

[2] On June 28, 2016, after a three-week trial in the Court of Queen's Bench at Winnipeg, before a judge and jury, the accused was convicted of first degree murder and attempting to cause bodily harm.

[3] The key dispute at the trial was the identity of the shooter. The case

against the accused was entirely circumstantial and relied on DNA evidence; a description of the shooter and his getaway vehicle from a surveillance video and eyewitnesses; and business records associating the accused with a rental vehicle fitting the description of the getaway vehicle.

[4] There are 12 grounds of appeal. Many are repetitive or of no merit. Three grounds are arguable and challenge the admission of hearsay evidence from a deceased eyewitness, the adequacy of the jury instructions on the DNA evidence and the reasonableness of the verdicts.

[5] For the following reasons I would dismiss the appeal.

Summary of Evidence

[6] The diner is located at the intersection of Pembina Highway and Stafford Street. It has windows that look onto both roads.

[7] After a night of socializing, Lau, G. N., Justin Latinecz, Jordan Fries, Khuong Nguyen and James Robert McGir went to the diner to eat. They sat at a table near the windows facing Stafford Street.

Eyewitness Evidence

[8] At just before 3:02 a.m., the diner's video surveillance recorded a male wearing a grey hoodie and blue jeans enter the Pembina Highway side of the diner. It is not disputed that the shooter's face was covered with the shirt to the bridge of his nose, he was wearing the gloves and he was holding the gun. In under nine seconds, he fired 12 shots. Lau was struck at least four times; G. N. twice. The shooter then fled the diner.

[9] The jury heard eyewitness evidence about the shooter from Tina Schultz, the waitress, and Latinecz. Latinecz was murdered a year after the shooting. His eyewitness evidence was presented to the jury through three statements he gave to police being admitted at the trial.

[10] The shooter was between 5'8" and 6' tall with a slim to average build. Latinecz said his skin colour was "lighter . . . olive, white, tanned" and not "a visible minority, a black person." The accused was 5'11" tall and weighed 159 pounds when arrested on February 21, 2013. More will be said about his skin colour later in my reasons.

[11] The shooter fired seven shots outside the diner as he ran towards Stafford Street and then got into the passenger side of a vehicle that departed northbound. In Latinecz's first statement, approximately 10 minutes after the shooting, he described the getaway vehicle as a "grey/blue Lincoln Zephyr or MKX." In his second statement, approximately nine hours later, he described the getaway vehicle as "decent", not "cheap." He called it a "Lincoln" but said he was not sure where that came from. He said it was a newer silver/grey car with four doors, tinted windows and blue high-intensity discharge (HID) headlights. In his third statement, approximately 16 hours after the shooting, he described the vehicle as a newer four-door silver or grey car with tinted windows and blue HID headlights.

Forensic Evidence

The Gun, Gloves and Shirt

[12] At 3:16 a.m., police located the gun on the street on the east side of Stafford Street, 310 metres north of the diner. At 3:53 a.m., police found the

gloves and the shirt a further 208 meters north from the gun on the street on the east side of Stafford Street. The serial number on the gun had been filed off. No fingerprints were found on it. The gloves had gunshot residue (GSR) on them.

The DNA Evidence

[13] DNA is a molecule in the cells of living organisms that stores genetic information. STR (short tandem repeats) analysis identifies, measures and expresses in numerical values repeating sequences of DNA that vary between individuals at specific locations, or *loci*, in the chromosomes in the nucleus of cells. Through STR analysis, a DNA profile of the combined genotypes at the *loci* tested in an evidentiary sample can be developed and compared to the known DNA profile of a suspect. STR analysis is a highly discriminating procedure, even for minute quantities of DNA containing a mixture of the DNA of more than one person (referred to as a mixed profile).

[14] DNA profiles can be used as circumstantial evidence of identity. If the DNA profiles in the known and evidential samples are the same at a sufficient number of the *loci* examined, that is considered to be a "match". A match means the samples do truly match or they match by coincidence. The statistical significance of the match is calculated using the genetic characteristics of the relevant population database. The random match probability (RMP) is the probability of a randomly selected person from the relevant population, unrelated to the suspect, having the same DNA profile as found in the evidential sample. The RMP illustrates for the fact finder the rarity of the DNA profile in the evidential sample to address the possibility of a coincidental match.

[15] The minimum testing threshold for STR analysis used by the lab in this case was 0.25 nanograms of DNA. The STR analysis kits used were Profiler Plus, which examines nine *loci*, plus gender, and, at the request of the accused, some of the evidential samples were retested using Identifiler Plus, a more sensitive device which examines 15 *loci*, plus gender.

[16] The jury heard two experts to assist them in interpreting the DNA evidence. The Crown called Michelle Mascioli, a forensic scientist at the RCMP lab in Ottawa. The accused called Dr. William Watson, a forensic scientist with an American police department. In his evidence, he confirmed that he did not have any concerns as to how Ms. Mascioli conducted the STR analysis, the results generated or her interpretations of them.

[17] There was no issue as to the integrity of the evidence or the possibility of investigator or laboratory contamination once police seized the gun, gloves and shirt, except that the gloves were tested for the presence of GSR before the STR analysis. Both experts agreed that it was possible some of the DNA may have been removed by the GSR testing.

[18] Ms. Mascioli examined 21 DNA samples on the gloves and shirt. Two areas of the shirt had insufficient DNA to test. The quality of the DNA on one area of the shirt, six areas of the right glove and five areas of the left glove was not adequate except for her to say that the accused could not be excluded as a contributor. She concluded that there was a match between the DNA profile of the accused and the DNA found in the other seven samples.

[19] All seven samples were also partial profiles meaning it could not be said that the accused's known DNA profile was the same as every *locus* examined in the evidential sample. According to Ms. Mascioli, it is not

uncommon for evidential samples to be missing some genetic markers, thereby increasing the chance that the sample came from someone other than the suspect. That said, the argument that this may be a case of a false positive (different DNA profiles wrongly determined to be matching) was not seriously advanced. To the contrary, Dr. Watson testified it was "likely" that the accused's DNA was on the gloves and shirt. He came to that conclusion based on the STR analyses Ms. Mascioli conducted on the seven samples, which were as follows.

[20] Area AG of the right glove (the palm side of the index finger) contained 8.85 nanograms of DNA. It could not be determined if this was on the inside or outside of the glove. The DNA of more than three individuals was identified in this sample. The profile of the major component on this sample matched the known sample of the accused on nine of 15 *loci* using the Identifiler Plus kit. The RMP for the match was one in 8.8 trillion.

[21] Area AF of the left glove (the back of the hand below the fingers) contained 5.4 nanograms of DNA. It could not be determined if this was on the inside or outside of the glove. The DNA of more than three individuals was identified in this sample. The profile of the major component on this sample matched the known sample of the accused on nine of 15 *loci* using the Identifiler Plus kit. The RMP for the match was one in 1.5 trillion.

[22] Area AD of the shirt (the lower back left of the shirt) contained 0.72 nanograms of DNA. The DNA of two individuals was identified in this sample. The profile of the major component on this sample matched the known sample of the accused on eight of nine *loci* using the Profiler Plus kit. The RMP for the match was one in 940 billion. This area of the shirt also

fluoresced when tested under fluorescent light for the presence of semen, saliva or sweat.

[23] Area AE of the shirt (centre front panel of the shirt about 10 inches from the neck) contained 1.35 nanograms of DNA. The DNA of at least three individuals was identified in this sample. The profile of the major component on this sample matched the known sample of the accused on seven of nine *loci* using the Profiler Plus kit. The RMP for the match was one in 120 billion.

[24] Area AF of the shirt (centre back panel of the shirt) contained 1.25 nanograms of DNA. The DNA of at least three individuals was identified in this sample. The profile of the major component on this sample matched the known sample of the accused on six of nine *loci* using the Profiler Plus kit. The RMP for the match was one in 3.8 billion.

[25] Area AG of the shirt (centre front panel of the shirt) contained 1.19 nanograms of DNA. The DNA of at least three individuals was identified in this sample. The profile of the major component on this sample matched the known sample of the accused on five of nine *loci* using the Profiler Plus kit. The RMP for the match was one in 60 million.

[26] Area AH of the shirt (centre back panel of the shirt) contained 1.8 nanograms of DNA. The DNA of two individuals was identified in this sample. The profile of the major component on this sample matched the known sample of the accused on 12 of 15 *loci* using the Identifiler Plus kit. The RMP for the match was one in 4.2 quadrillion.

[27] Because the RCMP lab was not told the race of the accused or asked to use a different population database, the default Canadian Caucasian

database was used for calculating the RMP of the seven matches. Ms. Mascioli testified that, if the accused was black, the RMPs would have been "different" but still "rare" using the Canadian Black database.

[28] No DNA was found on the gun or shell casings.

[29] Nobody, other than the possibility of the accused, could be identified as a contributor to the DNA on the gloves and shirt. Neither DNA expert provided an opinion as to how or when the accused's DNA might have been deposited on the gloves or shirt. Ms. Mascioli testified that there is "no timestamp" for DNA.

Human Hairs on the Gloves and Shirt

[30] Human hairs were on the left glove and the shirt. They were not suitable for STR analysis. Testing of the hair shafts for mitochondrial DNA was not requested. According to Dr. Watson, unlike nuclear DNA, mitochondrial DNA analysis cannot identify a specific individual; all maternally related persons share the same mitochondrial DNA profile. He opined that mitochondrial DNA testing could have been done to determine whether the accused could be excluded as being the source of these hairs.

Business Records Evidence

[31] On August 30, 2012, a 2012 Lincoln MKZ was rented at the Winnipeg Airport. The vehicle was sterling grey in colour, had lightly tinted windows and HID headlights that produced white light. A 2012 Lincoln MKZ is a four-door sedan. The Lincoln MKZ used to be called the Lincoln Zephyr until the 2011 production year. The Lincoln MKX, which is a crossover, is a

similar-looking vehicle to the Lincoln MKZ.

[32] According to the business practices of the car rental company, the renter and any authorised driver must be present at the time of rental, produce proper identification and sign the rental contract.

[33] The Lincoln was rented by Matthew Lavergne and the other authorised driver was the accused. The contract had the accused's purported signature and driver's licence information. The contract was until September 3, 2012. Lavergne did not return the vehicle until September 29, 2012. He paid for the car rental, including the late-return charges. Given his physical features, Lavergne could not have been the shooter.

[34] The address associated to the accused on the car rental contract is approximately two kilometres to the east of the diner.

Issue One—Admissibility of Hearsay Evidence

Background

[35] Latinecz's first statement was given to Constable Graeme Beattie in the back of his police vehicle outside the diner from 3:11 a.m. to 3:17 a.m. The second statement was given to Sergeant Douglas Bailey at a police station from 12:40 p.m. to 4:50 p.m. Non-verbatim notes of the two statements were taken. The third statement was video recorded at the police station under solemn affirmation from 7:12 p.m. to 7:42 p.m. The accused concedes that, if the first statement is admissible, then, for reasons of fairness and context, so, too, are the other statements. Because of this tactical concession, it is not necessary to decide whether the other two statements are admissible despite

being hearsay.

[36] The judge found that Latinecz's statement to Cst. Beattie was made "voluntarily" for assisting the police (at para 17(i)). He rejected the argument that Latinecz was intoxicated or high, relying on Cst. Beattie's observations. He determined that the statement met the requirements of the spontaneous (or excited) utterance exception to the hearsay rule because, when given, Latinecz's "mind and thoughts were still dominated by the shooting and its aftermath" such that the possibility of concoction or distortion could be "disregarded" (at para 20). The judge was satisfied that Latinecz had no motive to provide false information about the shooting and the getaway vehicle as he was not a suspect. The judge weighed the fact that the statement was elicited by questions from Cst. Beattie that he described as professional, straightforward and open-ended. The judge commented, "The questions and answers were short and clear" (at para 17(f)).

[37] The judge also considered the statement in terms of the principled approach and said "there is other supporting evidence that gives credence to the indicia of reliability and belies concoction concerns" (at para 24).

[38] Finally, the judge was "satisfied that the probative value of [the statement] exceeds prejudicial concerns" (at para 25).

[39] The accused makes several arguments regarding the judge's admissibility ruling which can be summarised as follows:

Traditional Exception Arguments

- the statement was not contemporaneous to the shooting because

of the "intervening event" of Latinecz calming down after Cst. Beattie physically removed him from the diner in handcuffs;

- the statement was not spontaneous because it arose from questions;

- the possibility of concoction or distortion could not be disregarded because Latinecz was a drug dealer who lied to Sgt. Bailey about Lau being a drug dealer until he learned Lau was dead;

- there was real risk of error because of Latinecz's intoxication and the non-verbatim recording of what was said;

Principled Exception Arguments

- there was a lack of corroboration for Latinecz's eyewitness evidence in light of *R v Bradshaw*, 2017 SCC 35;

- there was a truthfulness concern because of Latinecz's capacity to lie;

- there were accuracy concerns as to mistaken identification of the getaway vehicle because of several frailties of Latinecz's evidence and the possibility of innocent collusion; and

Residual Discretion Argument

- the judge improperly exercised his residual discretion in refusing to exclude Latinecz's hearsay evidence as it had no probative value and great prejudicial effect because of the lack of cross-

examination.

Discussion and Conclusion

Standard of Review—Hearsay Rulings

[40] Hearsay decisions, if informed by the correct principles of law and reasonably supported by the evidence, are entitled to deference on appeal (see *Reg v Andrews (Donald)*, [1987] 1 AC 281 at 302 (HL (Eng)); *R v Blackman*, 2008 SCC 37 at para 36; *R v Youvarajah*, 2013 SCC 41 at para 31; and *R v Head*, 2014 MBCA 59 at para 24, leave to appeal to SCC refused, 36036 (29 January, 2015)).

Spontaneous (or Excited) Utterance Exception to the Hearsay Rule

[41] A spontaneous (or excited) utterance is one of the categories of *res gestae* recognised to be a traditional exception to the hearsay rule (see *Head* at para 25; and S Casey Hill, David M Tanovich & Louis P Strezos, *McWilliams' Canadian Criminal Evidence*, 5th ed (Toronto: Thomson Reuters, 2013) (loose-leaf updated 2018, release 3), pt III, ch 7 at para 7:120.10 (online: WLNext Can (date accessed 14 November 2018)). A spontaneous utterance resulting from a startling event is admissible if the circumstances in which it was made exclude the possibility of concoction or distortion and there are no special features of the case that give rise to a real possibility of error (see *Ratten v The Queen* (1971), [1972] AC 378 at 388-91 (PC (Eng)); *Andrews* at pp 300-301; and *Head* at para 31). The circumstances of the making of the statement provide the circumstantial guarantee of trustworthiness to alleviate any hearsay danger (see James H Chadbourn, ed, *Wigmore on Evidence: Evidence in Trials at Common Law* (Boston: Little,

Brown and Company, 1976) vol 6 at para 1747; Sidney N Lederman, Alan W Bryant & Michelle K Fuerst, *Sopinka, Lederman & Bryant: The Law of Evidence in Canada*, 5th ed (Toronto: LexisNexis, 2018) at paras 6.364-6.365; *R v Khan*, [1990] 2 SCR 531 at 540; *R v Starr*, 2000 SCC 40 at para 212; and *R v Khelawon*, 2006 SCC 57 at paras 62-64).

[42] Consideration of this traditional exception is not a mechanical process. Rather, a functional analysis of the surrounding circumstances of the statement should be undertaken (see *R v Dakin*, 1995 CarswellOnt 4827 at para 20 (CA); and *Head* at para 31).

[43] Sitting near two people when they are unexpectedly shot is obviously a dramatic and highly unusual event. The judge found that, because of the shooting, Latinecz's emotions and anger "overflowed" (at para 2) to the point that he 'lost control' (at para 17(b)) and began to trash the diner, requiring Cst. Beattie to use force to remove him. According to Cst. Beattie, after Latinecz left the diner and was handcuffed, he was "quite agitated and very upset" but more in control.

[44] In my view, the evidence reasonably supports the judge's finding that Latinecz made a statement because of the "pressure or emotional intensity" of witnessing the shooting (*Khan* at p 540). Although Latinecz was calmer, there was sufficient evidence that his mind was still dominated by the event such that his statement was an "instinctive reaction" to the shooting without an "opportunity for reasoned reflection" such that the possibility of concoction or distortion could be disregarded (*Andrews* at p 301).

[45] The accused's submission that Latinecz being handcuffed by Cst. Beattie was an "intervening event" from witnessing the shooting

hearkens back to the outdated view that the utterance must be part of the event and not occur subsequently (see *Reg v Bedingfield* (1879), 14 Cox CC 341 at 342 (Crown Court (Eng))). It was noted in *Ratten* that the proximity between the startling event and the statement must be one of "approximate but not exact contemporaneity" (at p 391; see also *Regina v Clark* (1983), 7 CCC (3d) 46 (Ont CA), leave to appeal to SCC refused, [1983] SCCA No 253; *Andrews;* and *Head*).

[46] There is no accepted cut-off period of how long is too long between the startling event and the statement; each case depends on its own circumstances (see *Wigmore*, vol 6, at para 1750, pp 203, 221; and Kenneth S Broun et al, eds, *McCormick on Evidence: Practitioner Treatise* Series, 7th ed (Thomson Reuters, 2013) vol 2 at para 272, p 370). Time periods in prior decisions are not precedential. As the judge here adroitly put it, "There is no point . . . when the ticking clock trips a wire and makes the [statement] inadmissible" (at para 19). All that can be said is that, generally, as the time between the startling event and the statement increases, so does the likelihood that the normal thought process of the declarant is regained (see *McCormick* at para 272, p 369; and Hodge M Malek et al, eds, *Phipson on Evidence*, 19th ed (London, UK: Sweet & Maxwell, 2018) at para 31-18, p 1088).

[47] In his decision, the judge properly took into consideration that Cst. Beattie elicited the statement from Latinecz which is one factor to weigh on the question of whether the possibility of concoction or distortion can be disregarded (see *Andrews* at p 301). The judge found Cst. Beattie's questions were asked "professionally" and were not "demanding or hostile" (at para 23). Constable Beattie did not ask "leading questions" (at para 23) (see

R v Nicholas (2004), 182 CCC (3d) 393 at para 91 (Ont CA), leave to appeal to SCC refused, 2004 CarswellOnt 4003), or questions otherwise designed to derive a particular answer from Latinecz (see *R v Aguilar* (1992), 77 CCC (3d) 462 at 471 (Ont CA); and *R v Marleau*, 1994 CarswellOnt 3365 at para 4 (CA)).

[48] The record reasonably supports that the manner of elicitation of the statement does not undermine its spontaneity. It was the middle of the night and two people had been shot. As a first responder to a major incident, Cst. Beattie did not have a reason, the luxury of time or any background information to embark on a lengthy interrogation of Latinecz. He asked a few straightforward questions about the shooter and what happened and immediately relayed the information to other officers.

[49] I have also not been persuaded that the judge erred because, over nine hours after the shooting, Latinecz was deceitful to police. When Sgt. Bailey spoke to Latinecz, he asked some questions as to the background of the people at the diner. Latinecz admitted he and others were casual drug users. When he was asked if anyone "dealt drugs," Latinecz lied and said no. When Sgt. Bailey told him later that Lau was dead, Latinecz became emotional and told Sgt. Bailey that Lau was a high-level cocaine dealer.

[50] Unlike when speaking to Cst. Beattie, when Latinecz was speaking to Sgt. Bailey, he had the capacity for reflective thought; nine hours had passed since the shooting. While Latinecz may have had a self-serving reason to lie to protect a friend from scrutiny by the police, there was no self-serving reason, 10 minutes after the shooting, to concoct or distort his description of what happened. Latinecz was not a suspect; he was an innocent bystander

(see *Regina v Schwartz and Schwartz* (1978), 40 CCC (2d) 161 at 166-67 (NSSC (AD)); and *Andrews* at p 301). There is also no evidence he knew the accused or had some reason to say something to the police to disadvantage the accused. The judge's finding that Latinecz had a sincere desire to assist the police catch the shooter was reasonably open to him on the record.

[51] At the hearing of the appeal, counsel for the accused advised that his principal concerns with the statement related to its spontaneity and accuracy as opposed to sincerity. As the argument unfolded, counsel adjusted his position and repeatedly asked this Court to have doubts about the trustworthiness of Latinecz, not just because he later lied to Sgt. Bailey but also because he was, according to counsel, a "drug dealer."

[52] There was absolutely no evidence on the *voir dire* that Latinecz was a drug dealer. The only background information before the judge was that, at the time of the three statements, Latinecz was 21 years old, had no criminal record and was employed by the City of Winnipeg. During arguments on the *voir dire*, counsel for the accused advised that he was not going to argue that Latinecz was a person of "unsavoury character." In his reasons, the judge overlooked this concession and proceeded as if the accused was arguing Latinecz was "unsavoury" (at para 14). Given there is no evidence to support the allegation, nothing turns on the judge's mischaracterisation of the arguments; if anything, it was to the accused's advantage.

[53] The last objection of the accused to the ruling on the spontaneous (or excited) utterance exception relates to whether there was any special feature of the case that gives rise to the real possibility of error in the statement (see *Regina v Slugoski* (1985), 17 CCC (3d) 212 at 228 (BCCA); and *Andrews*

at p 301). This issue raises the judge's gatekeeper function. His task was not to decide whether Latinecz was correct in what he saw—that was for the jury. Rather, he had to be satisfied there was nothing of substance beyond generic concerns about the weakness of the evidence (see Colin Tapper, *Cross on Evidence*, 7th ed (London, UK: Butterworths, 1990) ch XVIII at 663).

[54] This was not a situation of gross intoxication as the accused argued (see *Andrews* at p 301). There was no evidence Latinecz had taken drugs. The evidence as to his alcohol consumption was cursory. While Cst. Beattie thought Latinecz likely should not have been driving given he admitted to drinking that night, his speech was not slurred, his breath did not smell of liquor and he had the ability to perform CPR on Lau. It was open on the record for the judge to conclude that Latinecz's degree of intoxication was not of such concern that his eyewitness evidence should not have been presented to the jury at all for it to assess on the question of the shooter's identity.

[55] The accused has also not established that the judge erred by not having a concern over the lack of verbatim recording of the statement. This objection relates to the accuracy and completeness of Cst. Beattie noting what Latinecz said as opposed to the suggestion that Cst. Beattie somehow, and for no reason suggested to him on cross-examination, improperly induced a particular answer. Constable Beattie's diligence was a question of weight, not admissibility (see *R v Learning*, 2010 ONSC 3816 at paras 54-64).

[56] The judge found Cst. Beattie's narration of the statement to be sufficiently reliable. His finding was supported by the evidence: the conversation was short, uncomplicated and Cst. Beattie made notes of it as it was occurring which he compiled into a more detailed report prepared three

hours later. I see no error in the judge leaving for the jury to decide what Latinecz said about the shooting and whether what he said was true (see *Ratten* at p 389).

[57] I have not been persuaded that the judge erred in coming to the conclusion that the statement of Latinecz to Cst. Beattie met the requirements of the spontaneous (or excited) utterance exception to the hearsay rule. It is therefore necessary to consider his challenge to the admissibility of the statement under the principled approach to the hearsay rule.

The Principled Approach to the Hearsay Rule

Onus

[58] While hearsay evidence is presumptively inadmissible, if the evidence meets the criteria of a traditional exception to the hearsay rule, it is presumptively admissible because the traditional exceptions "incorporate an inherent reliability component" (*Starr* at para 212; see also *Khan* at p 540).

[59] Factors underlying the spontaneous (or excited) utterance exception to the hearsay rule, such as spontaneity, reasonable contemporaneity to the event described, the declarant's motive and the real possibility of error, are also factors to determine whether hearsay is reliable under the principled approach (see *Sopinka* at para 6.126).

[60] The accused has not asked that the spontaneous (or excited) utterance exception be re-evaluated to ensure that it complies with the principled approach (see *Starr* at para 192). Because the statement met the requirements of a traditional exception to the hearsay rule, that determination

is "conclusive" (*Khelawon* at para 60) for the purposes of its admissibility in terms of the principled approach unless the accused established that this was one of the "rare cases" (*Starr* at para 214) where the principles of necessity and reliability were not satisfied (see *R v Mapara*, 2005 SCC 23 at paras 15, 30, 37).

Relationship between Necessity and Reliability

[61] The relationship between necessity and reliability was described in the following way in *Fawley et al v Moslenko*, 2017 MBCA 47 (at para 99):

> The questions of necessity and reliability are not separate thresholds; rather, they "work in tandem" (*R v Baldree*, 2013 SCC 35 at para 72). The circumstances of the given case will determine where a particular strength or weakness in one of the characteristics is accommodated by the opposite quality of the other characteristic.

Necessity

[62] The necessity qualities of the statement favour its admissibility. It was reasonably necessary to admit the statement for the truth of its contents because Latinecz's untimely death made his evidence unavailable and, if not admitted despite being hearsay, the evidence would be lost (see *R v Smith*, [1992] 2 SCR 915 at 934; *R v Hawkins*, [1996] 3 SCR 1043 at paras 71-72; and *Khelawon* at para 49).

Reliability

[63] Under the principled approach, questions of admissibility focus on threshold reliability as opposed to the ultimate reliability of the statement which is for the trier of fact to decide. The requirement of reliability is about

ensuring the integrity of the trial process. The trial judge must decide whether the given circumstances "sufficiently overcome" the inability to test the hearsay evidence in the regular way (*Khelawon* at paras 49, 61).

[64] It is not contentious that there were no adequate substitutes for contemporaneous cross-examination at trial to test the statement's truth and accuracy, i.e., "procedural reliability" (*Bradshaw* at paras 27-28; see also *Khelawon* at para 63). The statement was not under oath, it was given without explanation of the criminal consequences of lying under oath, it was not video-recorded and Latinecz was never cross-examined on it. The reliability of the statement rests entirely on whether it was inherently trustworthy because there is "no real concern about whether the statement is true or not because of the circumstances in which it came about" (*Khelawon* at para 62), i.e., "substantive reliability" (*Bradshaw* at paras 27, 30-31).

[65] Where, as is the case here, procedural reliability plays no role under the principled approach, the trial judge "must inquire into those factors tending to show that the statement is true or not" (*Khelawon* at para 92). The standard for a statement being substantively reliable to overcome the hearsay danger(s) is high but not to the point of absolute certainty. Again, returning to the functional approach, the trial judge must be satisfied that testing the evidence by contemporaneous cross-examination is unnecessary because, given the features of the case, it can be said that the evidence is trustworthy and accurate (see *Bradshaw* at para 31).

[66] In assessing the inherent trustworthiness of a statement, regard should be had to the testimonial attributes of the declarant, the circumstances of the making of the statement, and whether there is corroborating or

conflicting evidence (see David M Paciocco & Lee Stuesser, *Essentials of Canadian Law: The Law of Evidence*, 7th ed (Toronto: Irwin Law, 2015) at 136; and *Sopinka* at para 6.120).

The Bradshaw Rules—Corroboration of Hearsay Evidence

[67] The approach of the majority in *Bradshaw* resurrects the idea discussed in *Starr*, and later overruled in *Khelawon*, that there are what can be described as "rules" as to when extrinsic evidence led on a *voir dire* can be corroborative of a hearsay statement for determining its admissibility. Moldaver J, in his dissent in *Bradshaw*, critiques this approach of creating a 'threshold test within the threshold test' (at para 120).

[68] The *Bradshaw* rules as to corroborative evidence are more complex to apply than the single rule in *Starr* which prohibited altogether considering extrinsic evidence as corroborative of the hearsay evidence for the purpose of determining admissibility (see *Starr* at para 217). The *Bradshaw* rules focus on the relevancy, sufficiency and reliability of the proposed corroborative evidence. According to the majority in *Bradshaw*, the purpose of these three rules is to preserve the distinction between the trial judge deciding threshold reliability and the trier of fact deciding ultimate reliability (at para 42).

[69] As Newbury JA explained in *R v Poony*, 2018 BCCA 356, the effect of *Bradshaw* is to create a "high bar" (at para 27) before evidence can be considered to be corroborative of hearsay in the analysis of threshold reliability. The *Bradshaw* rules for when corroborative evidence may be relied on in determining the admissibility of hearsay evidence may be summarised as follows.

[70] First is the relevance rule. Normally, evidence can be said to be corroborative of other evidence if it makes it more probable that the fact asserted is true (see *R v B (G)*, [1990] 2 SCR 3 at 20-26). The approach under *Bradshaw* is more restrictive. To be corroborative, the evidence is only relevant, for the purposes of corroboration, if it goes to the issue of the truthfulness or accuracy of the material aspects of the hearsay statement (see para 45). The material aspects of the statement are those relied on by the moving party for the truth of their contents (see para 4).

[71] Second is the sufficiency rule. The judge must identify alternative, even speculative, explanations for the truth or accuracy of the statement and weigh the evidence against those alternative explanations. If the evidence is equally consistent with the alternative explanation, it cannot be relied upon (see para 48).

[72] Third is the reliability rule. The evidence must be trustworthy itself before it can be relied upon (see para 50).

[73] If all three criteria are satisfied, the function such evidence plays is whether, in conjunction with any other corroborative evidence and the circumstances of the case (including contradictory evidence), the specific hearsay danger(s) raised by the statement are overcome and the only likely explanation, on balance, is the declarant's truthfulness about, or the accuracy of, the material aspects of the statement (see paras 4, 47, 49, 56).

[74] This exercise is a cumulative assessment. As Karakatsanis J explained, "substantive reliability is concerned with whether the circumstances, and any corroborative evidence, provide a rational basis to *reject* alternative explanations for the statement, other than the declarant's

truthfulness or accuracy" (at para 40; see also para 48; *R v Thyagarajah*, 2017 ONCA 825 at para 11; *R v Johnston*, 2018 MBCA 8 at paras 115-16; *R v Larue*, 2018 YKCA 9 at para 93; and *R v Klimitz*, 2018 ONCA 553 at para 8).

[75] Karakatsanis J summarised the framework for a trial judge to determine whether corroborative evidence is of assistance in the substantive reliability inquiry as follows (at para 57):

> 1. identify the material aspects of the hearsay statement that are tendered for their truth;
>
> 2. identify the specific hearsay dangers raised by those aspects of the statement in the particular circumstances of the case;
>
> 3. based on the circumstances and these dangers, consider alternative, even speculative, explanations for the statement; and
>
> 4. determine whether, given the circumstances of the case, the corroborative evidence led at the *voir dire* rules out these alternative explanations such that the only remaining likely explanation for the statement is the declarant's truthfulness about, or the accuracy of, the material aspects of the statement.

[76] It was evident from the parties' submissions at the hearing of the appeal that *Bradshaw* is an important development in the law of hearsay. Professor Hamish Stewart has observed that "the stringent standards set in *Bradshaw* threaten to undermine the original purpose of the principled approach to hearsay: to provide a flexible and context-sensitive pathway for the admission of hearsay where the traditional exceptions were inapplicable" (Hamish Stewart, "The Future of the Principled Approach to Hearsay" (2018) 23 Can Crim L Rev 183 at 193).

[77] Given some of the arguments advanced on this appeal, in my view, it is important not to stray too far afield from exactly what *Bradshaw* decided. The only point *Bradshaw* decides is clearly identified by Karakatsanis J as being, "When can a trial judge rely on corroborative evidence to conclude that the threshold reliability of a hearsay statement is established?" (at para 3). *Khelawon* remains the leading decision on determining threshold reliability (see *Johnston* at para 98; *Larue* at para 98; and *Brousseau c R*, 2018 QCCA 1140 at paras 21-22).

[78] Practically, the relevance of *Bradshaw* in a given case will depend primarily on how the moving party seeks to establish threshold reliability of the evidence in question; particularly if there is attempted reliance on corroborative evidence. If corroborative evidence of the statement is important to establishing threshold reliability, so, too, will be the *Bradshaw* rules regarding corroboration. If, however, the case is like this one, where corroborative evidence plays little, if any, role on the question of threshold reliability, *Bradshaw* will be of less significance.

Accused's Corroboration Argument

[79] The accused's first argument about the substantive reliability of the statement follows from my comments about the limits of *Bradshaw*. He submits, purportedly relying on *Bradshaw*, that the statement cannot be said to be substantively reliable because there was no corroborative evidence of Latinecz's identification of the make and model of the getaway vehicle. He says, without corroboration of every material aspect of the statement, it could not be admissible regardless of the circumstances under which the statement was made or that other material parts of the statement were corroborated by

evidence on the *voir dire*. I disagree: "the absence of confirmatory evidence is not a reason, by itself, for there necessarily to be a concern about threshold reliability" (*G (JD) v G (SL)*, 2017 MBCA 117 at para 59).

[80] The accused's submission that corroborative evidence is a prerequisite to the admissibility of hearsay evidence does not reflect the governing approach to assessing the substantive reliability and, in particular, the need for flexibility that is at the core of the principled approach to the hearsay rule.

[81] A statement is inherently trustworthy when it can be said that the hearsay danger has been substantially negated. How that is achieved can vary depending on the particular circumstances. All relevant factors are to be considered, including, where appropriate, the presence of confirming or contradicting evidence (see *Khelawon* at para 4; and *Bradshaw* at paras 30, 47).

[82] The mere fact that not all of the statement was corroborated by other evidence and, in particular, the description of the make and model of the getaway vehicle, is not fatal to whether the statement could be found to be substantively reliable. Since Professor Wigmore's principled approach was endorsed by the Supreme Court of Canada, it has always been the law that reliability can arise from the circumstances under which a statement is made (see *Smith* at p 933).

[83] The decisions in *Smith* (see p 935); and *R v Blackman*, 2008 SCC 37 (see para 43), are examples where the circumstances of the making of a statement without any corroboration of the material aspects of the statement were sufficient to overcome the hearsay danger(s).

[84] The other difficulty with the accused's submission is it would cast doubt on aspects of *Starr*, *Mapara*, *Khelawon* and other decisions of the Supreme Court of Canada which confirm that evidence falling under a traditional exception to the hearsay rule automatically satisfies the principled approach to the hearsay rule save in the rare case. *Bradshaw* did not address, let alone overrule, that principle.

[85] Accordingly, the accused's submission that substantive reliability requires the existence of corroborative evidence on all material aspects of the hearsay statement must be rejected. The submission hearkens back to a formalistic approach to hearsay based on fixed criteria that the principled approach is designed to remedy. As Lamer CJC commented in *R v U (FJ)*, [1995] 3 SCR 764 (at para 35), "both necessity and reliability must be interpreted flexibly, taking account of the circumstances of the case and ensuring that our new approach to hearsay does not itself become a rigid pigeon-holing analysis". See also *Hawkins* at p 1081; and *Khelawon* at para 45.

Accused's Truthfulness Concern Argument

[86] The truthfulness concern the accused raises with Latinecz's description of the shooter's getaway vehicle and its manner of flight from the diner is based on the theory that, for reasons unknown, he may have tried to frame the accused. He says, because Latinecz had the capacity to lie, and did so nine hours after the shooting when covering up that Lau was a drug dealer, he may have manipulated his description of the getaway vehicle, ten minutes after the shooting, in some way so as to implicate the accused.

[87] The starting point is that the judge determined that the possibility of

concoction or distortion by Latinecz could be disregarded because the statement was spontaneous to a recent startling event.

[88] Also pertinent is Latinecz's motive to give the statement. The presence or absence of a motive to lie is a factor to consider on the threshold reliability inquiry (see *Blackman* at para 42; and *Bradshaw* at para 67). The importance of this factor will vary depending on the circumstances of the case (see *Blackman* at para 42).

[89] The scenario suggested by the accused is not plausible. There was no evidence on the *voir dire* that there was any relationship between Latinecz and the accused or that the two men even knew each other. In the three statements Latinecz made about the shooting, he does not identify the shooter by name; he gives only a description based on the disguise the shooter was wearing. Despite the opportunity to implicate the accused, he did not, even after having the benefit of many hours to think about the shooting before speaking to Sgt. Bailey. It would, however, be neglectful to not explore Latinecz's motive deeper because it is undisputed he did lie to the police many hours after the shooting, therefore showing he had the capacity for deceit (see *Smith* at p 936). In examining his motive, the context is important.

[90] The circumstances suggest no incentive for Latinecz to fabricate or distort his eyewitness evidence (see *Bradshaw* at para 67). As stated previously, it cannot, given the record, be said that he was an unsavoury person making his word dubious to start with (see *Bradshaw* at paras 68-70). While lying to the police is evidence of a capacity for deceit, the reason for the lie appears self-evident (to protect a friend from getting into trouble with the law). Latinecz made it clear to Sgt. Bailey before giving the video-

recorded statement that he did not wish to discuss the criminal backgrounds of his friends. Counsel for the accused calls this evidence of Latinecz being manipulative.

[91] The judge's finding that the first statement was spontaneous and given soon after the shooting for the purpose of sincerely assisting the police dispels any concerns that Latinecz's eyewitness evidence is untrustworthy. The record as to the circumstances of the statement was extensive and supported the judge's conclusion that Latinecz had "no obvious motive to make up what he said" (at para 21). It is not the function of this Court to re-weigh evidence.

[92] Moreover, the facts here are quite different than in *R v Czibulka* (2004), 189 CCC (3d) 199 (Ont CA), leave to appeal to SCC refused, 2005 CarswellOnt 2041, which the accused relies on and, in my view, actually supports the admissibility of the evidence.

[93] In *Czibulka*, there was little in the way of evidence as to the circumstances surrounding the making of the statement because it was a letter sent in the mail three months before the declarant's death (see para 35); the opposite is the case here. Also, in *Czibulka*, the Court distinguishes the situation there from where the circumstances surrounding the making of a statement negate a motive to lie, as in the case of the spontaneous (or excited) utterance exception to the hearsay rule or a case like *Khan* (see paras 35, 40), which is the situation here. Finally, in *Czibulka*, the Court notes that the nature of the relationship between the declarant and her relative in California was not so special that she would not lie to him about her relationship with the accused (who was the declarant's husband) (see paras 9-10, 39, 47). The

situation here, of course, is quite different. The statement is not about the accused; it is about an unknown masked shooter.

[94] In my view, this is a case of proved absence of motive to fabricate in relation to the eyewitness evidence given in the statement. There are no trustworthiness concerns about the statement that would affect its presumptive admissibility given it meets the criteria of a traditional hearsay exception.

Accused's Accuracy Concern Arguments

[95] The accused argues that there are two accuracy concerns with Latinecz's description of the shooter's getaway vehicle and its manner of flight from the diner: mistaken identification and innocent collusion.

[96] The mistaken identification submission—the colour of the vehicle was different and it was not a Lincoln Zephyr or MKX—is based on several frailties the accused raises with Latinecz's evidence (intoxication, lack of verbatim recording of the statement, inconsistent account of events, conflicting evidence from other eyewitnesses and his ability to observe the events).

[97] The innocent collusion submission is that Cst. Beattie arrived at the diner at 3:07 a.m. Therefore, five minutes elapsed between the shooting and his arrival. The accused says it is possible that, in that time, Latinecz had spoken to others at his table in the diner and learned from them the details of the getaway vehicle and its manner of flight, which he passed along to Cst. Beattie, therefore making his statement double hearsay.

[98] In making both of these arguments, the accused revisits several

issues previously addressed in the discussion of the traditional exception to the hearsay rule. The judge's findings as to the statement being voluntary, Latinecz's degree of intoxication and the accuracy of Cst. Beattie's recording of the statement apply equally to examining the statement in terms of substantive reliability under the principled approach.

[99] The accused's concern as to the accuracy of Cst. Beattie's narration of Latinecz's statement is not a consideration because Cst. Beattie was available for cross-examination at the trial. The only relevance of inaccurate narration would be to the residual discretion to exclude evidence where its potential probative value is not exceeded by the potential prejudicial effect of that evidence (see *Blackman* at para 51).

[100] The next misidentification submission relates to contradictory evidence. The accused says Latinecz gave inconsistent descriptions of the getaway vehicle in the three statements and his evidence was in conflict with other eyewitnesses.

[101] While the judge relied on the substantive reliability coming from the statement of Latinecz to Cst. Beattie being a spontaneous (or excited) utterance, he did comment, as I mentioned earlier, that "other supporting evidence" gave "credence to the indicia of reliability and belie[d] concoction concerns" (at para 24). In his reasons, the judge did not review the conflicting and potentially corroborative evidence in great detail other than to briefly summarise some of the other evidence on the *voir dire*. He remarked that, in his view, the evidence from other witnesses was "remarkably consistent" with Latinecz's description of what happened except for there being really no other evidence supporting or contradicting him that the getaway vehicle was a

"Lincoln" (at para 24).

[102] Because the judge's decision pre-dates *Bradshaw*, how he dealt with corroborative evidence did not follow that decision. In my view, his reasons, read as a whole and in light of the submissions of counsel and the record, are adequate for appellate review. As I will explain, some of the evidence before him could not be corroborative under *Bradshaw*. However, because he accepted that the statement fell under a traditional exception to the hearsay rule, corroborative evidence was not important to establishing threshold reliability. The only relevance was whether the corroborative evidence, together with the contradictory evidence, gave reason to exclude the presumptively admissible evidence because of the principled exception to the hearsay rule (see *Starr* at para 214; and *Khelawon* at para 60).

[103] As this part of the accused's submission on accuracy touches on corroborative evidence, consideration must be given to the rules discussed in *Bradshaw*.

[104] The material aspects of the Latinecz's statement to Cst. Beattie relied on by the Crown for the truth of their contents were Latinecz's descriptions of the shooter, the shooting, and the shooter's getaway vehicle and its manner of flight from the diner. As previously mentioned, the hearsay danger is accuracy and the plausible alternative is that he was mistaken; particularly as to the colour, make and model of the getaway vehicle.

[105] The record on the *voir dire* consists of the statements of Latinecz; testimony from Cst. Beattie and Sgt. Bailey; and, by agreement, the preliminary inquiry transcripts of Schultz, G. N. and Cst. Shawn Lowry (who located the gun, gloves and shirt) and the transcripts of the video-recorded

police statements made under oath or solemn affirmation of two members of Lau's party (Fries and Nguyen) and three customers in the diner (Levi Toews, Douglas Harkness and Roger Burden).

[106] In my view, based on *Bradshaw*, the evidence that was corroborative of the three material aspects of the statement was:

- the surveillance video depicting the shooter and the shooting;
- Toews's statement describing the shooter, the shooting and the getaway vehicle;
- Schultz's testimony describing the shooter and the shooting; and
- Constable Lowry's testimony describing the items seized on the getaway vehicle's escape route.

[107] The evidence from G. N., Nguyen and Fries cannot be considered as corroborative of Latinecz's statement to Cst. Beattie because it cannot be said that evidence was both relevant and reliable. It is unnecessary to weigh the sufficiency of the evidence of the three against any alternative explanation for the material aspects of the statement. While the evidence of the three does not meet the requirements of *Bradshaw* to be considered corroborative, it is sufficiently clear from the judge's reasons, when read in the context of the record, that he did not rely on any of the evidence of G. N., Nguyen or Fries as corroboration of the statement.

[108] The statement of Harkness that the shooter got into a "silverish or grey . . . mid sized car" was relevant to material aspects of the statement but, as I will explain, it cannot be said to be reliable. Accordingly, it is also

unnecessary to weigh the sufficiency of his evidence against the alternative explanation for the getaway vehicle Latinecz described to Cst. Beattie.

[109] Harkness, together with Burden, were paying their bills when the shooter came into the diner behind them. Harkness did not see the shooting. He said the shooter left the diner immediately and he lost sight of him as he ran towards Stafford Street. Harkness then spent two to five minutes inside the diner as he was shaken up (which Burden confirms). When Harkness left the diner, he says it was then that he saw the shooter get into the vehicle parked on Stafford Street. Like Burden, the first time he gave a statement as to his eyewitness evidence was four days after the shooting as both men fled the diner in fear before the police arrived.

[110] The obvious inaccuracy is that it is not disputed that the shooter immediately left the diner by vehicle and did not linger around outside for a few minutes waiting for a ride after shooting two people. If evidence is plainly wrong, it cannot be relied upon as corroboration on the substantive reliability analysis (see *Bradshaw* at para 50). However, in light of the reliability of Toews's evidence as to the description of the getaway vehicle, any reliance by the judge on the evidence of Harkness is inconsequential.

[111] I am satisfied that Toews's evidence meets the *Bradshaw* requirements of relevance, sufficiency and reliability to be considered corroborative of Latinecz's statement to Cst. Beattie. At the time of the shooting, Toews was enjoying a cup of coffee at a location near the diner's entrance. From his vantage point, like Latinecz, he was able to witness the shooting and the shooter's getaway. He voluntarily gave a statement to police about nine hours after the shooting. His description of the shooter and

shooting was largely consistent with Latinecz's except as to the shooter's height. Like Schultz, he said the shooter was a few inches shorter than Latinecz's description. In terms of the shooter's escape, Toews said that, although it was dark outside, he observed the shooter depart the diner and immediately get into the passenger side of a "greyish car" which sped away north on Stafford Street. He observed only one vehicle moving near the diner. His ability to observe the getaway vehicle was farther away from the windows facing Stafford Street than where Latinecz was.

[112] Burden's evidence was contradictory, not corroborative. There are no special rules arising from *Bradshaw* as to when contradictory evidence can be considered. The rule is still the same as *Khelawon*—that it must be considered—which is what the judge did. The judge referred to Burden's evidence when he said, "For completeness I note another witness said he saw a black van" (at para 24).

[113] The obvious reason the judge did not have a concern about the contradictory effect of Burden's statement on the probative value of Toews's evidence as to whether the getaway vehicle might not have been a "greyish car" is because Burden's statement was unreliable on its face. According to Harkness, Burden was a frail person. Like Harkness, he did not observe the shooting as his back was turned to the shooter and he did not give his statement to police soon after the event. According to his statement, Burden was a reluctant witness; he had to be prompted in answering questions to previous comments he gave to police before the formal interview. His eyewitness evidence was also uncertain; he said he saw someone run to a vehicle after the shooting. He described the vehicle as "a black van, or a car, whatever it was, I don't know." He then said all he could say was that it was

"black".

[114] The judge's use of Burden's evidence was entirely consistent with *Khelawon* and *Bradshaw*. It was open to him to not rely on it in favour of the descriptions of the getaway vehicle provided by both Toews and Latinecz. The low probative value of Burden's evidence is illustrated by the fact that, despite him apparently contradicting Latinecz's description of the getaway vehicle, he was never produced as a witness at the trial or his evidence otherwise put before the jury for it to consider on the ultimate reliability of Latinecz's eyewitness evidence.

[115] It is unnecessary to deal with the Crown's argument that no true inconsistency exists in relation to the description of the getaway vehicle by Latinecz in the three statements. Not every contradiction will be material to the admissibility of the evidence; it will depend on the context, taking into account the relevant hearsay danger(s) of the evidence proposed and the factor(s) raised to overcome the danger(s) (see *Khelawon* at para 93; and *Fawley* at paras 117-18). It was well within the discretion of the judge to consider the type of contradictions counsel raised here to be questions of ultimate reliability as opposed to threshold reliability (see *R v Thomas (RJ)*, 2009 MBCA 85 at paras 40-42).

[116] When the corroborative evidence that could be considered pursuant to *Bradshaw* is taken as a whole, there are indicia of reliability as to the accuracy of what Latinecz said as opposed to reason to question the presumptive admissibility of his statement because it fell within a traditional exception to the hearsay rule. Latinecz was largely corroborated by the surveillance video; by Schultz and Toews on two of three material aspects of

the hearsay statement except for minor discrepancies which are clearly matters of ultimate reliability; and he was corroborated in part by Toews and the location of the abandoned evidence on the other material aspect of the hearsay relating to the shooter's getaway vehicle (grey car) and its manner of flight from the diner (north on Stafford Street).

[117] The accused's next accuracy submission relates to Latinecz's ability to observe the getaway vehicle. There is little merit to this argument. While it was dark outside, this observation took place at a short distance. The shooter ran to a car parked on the street right outside the diner, near the intersection of two major roads in an urban area. According to the evidence, the diner was illuminated (both inside and outside). There is no evidence of inclement weather such that normal nighttime visibility would be affected.

[118] It is not an uncommon experience for people to look outside a restaurant window to the adjacent street and observe a parked car. What is uncommon is this occurred in relation to a fleeing assassin. This was a significant event to Latinecz at the time he witnessed it as opposed to a passing glance in a moment of mundanity. Latinecz's reaction to Cst. Beattie is telling as to his ability to observe what he saw despite the conditions and his capacity. The judge found that, without hesitation, Latinecz provided "relatively straightforward information" (at para 21) in a "coherent and understandable" fashion (at para 17(h)), reasonably contemporaneous to the event.

[119] There was no evidence that came out of the *voir dire* that raises a genuine concern either as to there being a difficulty that would have impacted Latinecz's opportunity or capacity to make the observation or the conditions under which he made it (see *Smith* at p 935). While it is not uncommon for

cross-examination to expose errors in identification evidence, what is missing here is any evidentiary basis to say that cross-examination could have made any difference given the specificity of what Latinecz said the getaway vehicle was (unlike Burden) and where it went soon after the event happened. The judge was alive to the accused's submission and rejected it, along with other concerns raised about Latinecz's ability to make the observation. In my view, it was open to him to do so. The generic frailties of Latinecz's eyewitness evidence were an issue of ultimate reliability.

[120] There is also no reason to disturb the judge's finding that Latinecz alone was the source of the eyewitness evidence. The circumstances provide a sufficient guarantee against the possibility of outside influence or collusion (see *U (FJ)* at paras 43-45).

[121] Nguyen, Fries, Toews and Schultz provided direct evidence on the *voir dire*, ruling out the possibility that Latinecz's statement was the product of outside influence or collusion. Both Toews and Fries said that, after the shooting, the people in the group were screaming for help. The interviewing officer asked Toews about what they were saying and if anyone might have mentioned who the shooter was. Toews said, "No. They were worried about their guys that got shot." Both Schultz and Fries also said that nobody in the group was talking about the shooter after he left the diner. In his statement, Nguyen said, after the shooting, the group did not talk about what had happened before the police arrived. He said everyone was in "shock".

Conclusion on Threshold Reliability of the Statement

[122] The accused has not demonstrated that this is a rare case where there is reason to question, based on the principled approach, the presumptive

admissibility of the statement because it met the criteria of the spontaneous (or excited) utterances exception to the hearsay rule. The necessity qualities of this case favour the admissibility of the statement. In terms of threshold reliability, I see no serious or real concerns about reliability based on the circumstances under which the statement was made that are not adequately addressed by the spontaneous (or excited) utterances exception to the hearsay rule (see *Mapara* at para 30). There is no trustworthiness concern as Latinecz had no motive to lie about the statement, there is some corroborative evidence as to the accuracy of the statement to further buttress its inherent reliability given it meets the requirements of a traditional exception, and there is no reason to have concern the statement was the product of innocent collusion with other eyewitnesses at the diner. I also see no reversible error by the judge as to how he dealt with the principled exception to the hearsay rule in relation to the statement given he did not have the benefit of *Bradshaw* when making his admissibility ruling. In my view, *Bradshaw* has little relevance to the facts here.

Residual Discretion to Exclude Hearsay Evidence

[123] A trial judge has a residual discretion to exclude otherwise admissible hearsay evidence to ensure trial fairness when its prejudicial effect is out of proportion to its probative value (see *Smith* at p 937; *Khelawon* at paras 3, 49; *Bradshaw* at para 24; and *Sopinka* at paras 6.174-6.176).

[124] The starting point is that normally a trial is fair if the evidence before a properly instructed fact finder is relevant and admissible. As Charron J explained in *Khelawon*, there is a broad "spectrum of interests encompassed in trial fairness" in relation to hearsay evidence (at para 49). There is the

interest of society to get to the truth. There is the interest of all in preserving the integrity of the trial process. Finally, there are the constitutional rights of an accused to a fair trial.

[125] Determining whether the probative value of evidence outweighs its prejudicial effect requires a 'cost benefit analysis' (*R v Hart*, 2014 SCC 52 at para 94).

[126] The assessment of the probative value of evidence is a preliminary test of its relevance as opposed to a final arbitration of its persuasive power (see *Wigmore*, vol 1A, at para 28, p 976). Probative value is more than just the evidence having logical relevance; it is also about the prospective materiality of the evidence. The legal concept of relevance ensures that the ultimate factual inquiry is "reasonable, practical and fair" (*Phipson* at para 7-06, p 201). Defining legal relevance requires the trial judge to assess "the degree to which the evidence would prove the fact in issue for which it was tendered" (*R v Pascoe* (1997), 113 CCC (3d) 126 at 143 (Ont CA)), as well as any "defects" in the evidence in terms of credibility or reliability (*Hart* at para 95). In carrying out this analysis, the trial judge must weigh the evidence to a limited degree but without encroaching on the domain of the fact finder as to whether the evidence should be believed and relied upon. The overriding question is whether the evidence is 'worthy' of being heard by the fact finder (*Hart* at para 98; see also *Wigmore*, vol 1A, at para 29, p 978).

[127] Prejudicial effect is assessed by identifying the dangers of the evidence and considering how real those dangers are to the fairness of the trial (see *Hart* at para 106). Prejudice, however, does not refer to the mere fact that the evidence supports the moving party's case to the prejudice of the

respondent (see *R v Tran*, 2001 NSCA 2 at para 28; *R v Fattah*, 2007 ABCA 400 at para 23; and *R v Korski (CT)*, 2009 MBCA 37 at para 66).

[128] Some of the dangers otherwise admissible evidence may cause to the fairness of a trial are undue arousal of the jury's emotions, distraction, unnecessary delay or repetition, unfair surprise to a party and usurpation of the role of the jury (see *R v Clarke* (1998), 129 CCC (3d) 1 at paras 34-45 (Ont CA); and *R v Candir*, 2009 ONCA 915 at paras 59-61, leave to appeal to SCC refused, 34622 (26 April 2012)).

[129] In the specific case of hearsay evidence being admitted, trial fairness can also be undermined because of investigative misconduct in obtaining the evidence or manifestly deficient narration of it (see *R v Humaid* (2006), 208 CCC (3d) 43 at para 57 (Ont CA), leave to appeal to SCC refused, 31501 (9 November 2006); and *R v Devine*, 2008 SCC 36 at para 30).

[130] The accused's argument that the judge improperly exercised his residual discretion because the evidence had little probative value and great prejudice is unpersuasive.

[131] The beginning point for the probative value of the evidence is the fact that the issue of identity may be established by circumstantial evidence (see *Wigmore*, vol 2, at para 411, p 386). The probative value of Latinecz's eyewitness evidence must be assessed in light of what reasonable and logical inference could be drawn from his evidence when viewed, not in isolation as the accused argues, but in the context of the entirety of the circumstantial evidence relevant to whether the accused was the shooter (see *R v Morrissey* (1995), 97 CCC (3d) 193 at 209 (Ont CA)).

[132] An association of the accused to a vehicle fitting the description of the getaway vehicle is evidence of the accused having a connection to one of the tools the shooter used to carry out the shooting. The judge was aware the Crown was going to attempt to buttress the strength of the inference that could be drawn from Latinecz's eyewitness evidence through other evidence, such as business records of the car rental, as well as evidence from a Ford dealership employee as to the attributes of different models of Lincolns. When all of this is taken together, it cannot be said that Latinecz's eyewitness evidence is trifling or that it would be speculation to draw an inference from it when considered in light of the other evidence related to the shooting.

[133] In terms of defects of the eyewitness evidence, there are of course frailties and inconsistencies with it but the exercise of the discretion to exclude otherwise admissible hearsay evidence is not the time to repeat the debate answered by the judge's finding on threshold reliability. There must be something more that a proper jury instruction cannot address so as to make the trial unfair if the evidence was admitted (see *R v P*, 2008 NSCA 95 at para 68). I see no reason to interfere with the judge's exercise of discretion that Latinecz's eyewitness evidence was worthy for the jury to consider. In the context of the entire factual matrix, it had the capacity to help demonstrate that the accused was the shooter.

[134] In terms of the prejudicial effect of the evidence, the judge proceeded on the basis that the only danger in this case was the inability to test the evidence by cross-examination which is always present with hearsay evidence from a deceased declarant. In his view, features of the trial would mitigate that prejudice, such as his ability to highlight to the jury the weaknesses of Latinecz's eyewitness evidence as to his condition, perception,

memory, ability to observe and credibility, through the hearsay evidence itself and other witnesses. The jury would also have the submissions from counsel and an instruction from him on "the frailties of observations in stressful situations" (at para 25). Taken together, these features of the case, in his view, would "sufficiently offset" (at para 25) the prejudice of not being able to test Latinecz's evidence by way of cross-examination.

[135] The exercise of any discretion involves choice. Weighing the probative value of evidence against its prejudicial effect is not an "exact science" (*Hart* at para 109). Deciding whether to admit Latinecz's evidence was not an easy decision as the stakes were high for both the Crown and the accused. Each piece of evidence potentially linking the accused to the shooting was important and hotly contested.

[136] Judges can reasonably disagree on the same set of facts as to whether the residual discretion to exclude otherwise admissible hearsay evidence should be exercised or not. Appeals of such decisions are not about the result the trial judge ended up with, but whether he or she reasonably applied the correct principles in getting there. Where that is done, appellate deference will be shown because the trial judge has the advantage of understanding the nuances of a trial up close and the likely impact of otherwise admissible evidence on the jury in light of all of the aspects of the trial.

[137] In my view, it was the judge's call to make as to whether the fairness of the trial would be undermined if he admitted the hearsay evidence from Latinecz and, in doing so, he applied the correct legal principles. I see no basis for this Court to interfere with his decision to refuse to exercise his residual discretion to exclude relevant and otherwise admissible evidence.

[138] In conclusion, the judge did not err in admitting into evidence at the accused's trial Latinecz's statement to Cst. Beattie.

Issue Two—Adequacy of the Jury Instructions on the DNA Evidence

Background

[139] The jury heard comprehensive closing submissions as to the issue of the identity of the shooter, including the relevant DNA evidence. After the submissions, the judge commented that, given counsel's thorough review of the DNA evidence, he did not think it wise to be too repetitive in his summation of that evidence. He said he wanted to focus the jury on the "main task" of deciding whether it had been proven beyond a reasonable doubt that the accused was the shooter.

[140] The judge provided counsel with four drafts of his instructions for input and held two lengthy pre-charge conferences. He accepted some of the accused's concerns about the instructions on the DNA evidence but he was not prepared to accept every recommendation because, in his view, they either did not reflect the evidence or would have resulted in an unbalanced charge. A review of the transcript satisfies me that the judge was acutely aware of the subtleties of the DNA evidence and the jockeying attempts of each side.

[141] The judge's jury instructions were succinct and efficient. It took him 90 minutes to instruct the jury. His charge covers 43 pages of the transcript. He also provided the jury with a written copy of his instructions. This was not a situation where, after a long trial, the judge said a few words about the law and then made no comment at all on the facts, leaving the jury to simply rely on their memory (see *Azoulay v The Queen*, [1952] 2 SCR 495

at 499).

[142] While the accused makes a barrage of arguments about alleged deficiencies of the jury instructions as to the DNA evidence, only two warrant discussion. He says that the judge failed to fairly and adequately review the evidence as to the limitations of mixed DNA profiles, particularly as explained by Dr. Watson, and also neglected to identify the evidence that supported his defence of innocent DNA transfer.

Discussion and Conclusion

Standard of Review—Jury Instructions

[143] Jury instructions are reviewed on a standard of adequacy, not perfection. The question for the reviewing court is whether, taking a functional approach to the instructions looked at in their entirety and in the context of the trial (i.e., the evidence, the live issues, the positions of the parties and the submissions of counsel), the overall effect of the charge was that the jury was properly and fairly instructed (see *R v Jacquard*, [1997] 1 SCR 314 at paras 32, 62; and *R v Araya*, 2015 SCC 11 at para 39).

Jury Instructions—The Law

[144] Jury instructions must be "comprehensive and comprehensible" (*R v Rodgerson*, 2015 SCC 38 at para 50). The instructions should be in "plain, understandable language" as to the relevant law, the real issues, the positions of the parties and the material evidence for the jury to consider in resolving those issues (*R v Jack* (1993), 90 CCC (3d) 353 at 362 (Man CA), aff'd [1994] 2 SCR 310; see also *Azoulay* at p 497; *R v Cooper*, [1993] 1 SCR

146 at 163; and *R v Daley*, 2007 SCC 53 at para 29). Trial judges are to be afforded "considerable latitude" as to how best they should review and relate the evidence (*R v PJB*, 2012 ONCA 730 at para 46; see also *R v Hay*, 2013 SCC 61 at paras 47-48; and *Araya* at para 39).

[145] In respect of a DNA case, the jury should be advised in the usual way about the use and limits of expert evidence; instructed not to be overwhelmed by the aura of scientific infallibility associated with scientific evidence; and told to use their common sense in their assessment of all of the evidence on the DNA issue and determine if it is reliable and valid as a piece of circumstantial evidence (see The Hon Mr Justice David Watt, *Watt's Manual of Criminal Evidence 2018* (Toronto: Thomson Reuters, 2018) at para 29.08, p 501; and *R v Terceira* (1998), 123 CCC (3d) 1 (Ont CA), aff'd [1999] 3 SCR 866).

Adequacy of the Judge's Jury Instructions—DNA Evidence

[146] Based on my reading of the jury instructions, I am satisfied that the judge addressed all of the essential elements of a charge involving DNA evidence as discussed in *Terceira* and more.

[147] He properly reviewed Ms. Mascioli's unchallenged interpretation of the DNA evidence. His review of the statistical elements of her evidence avoided the "prosecutor's fallacy" of confusing the RMP with the probability that the accused was not the source of the evidential sample (*McDaniel v Brown*, 558 US 120 at 128 (2010)). The RMP is not the probability of the accused's guilt or innocence (see *R v Doheny and Adams* (1996), [1997] 1 Cr App R 369 at 372-73 (CA (Eng)); *Terceira* at para 58; and *McDaniel* at p 128). He properly instructed the jury that the limited use of the RMP was

to give them an understanding of the "degree of rarity" of the DNA profile in the evidential samples.

[148] He also told the jury that STR analysis "does not conclusively establish the identity of the shooter." He stated, "DNA evidence is just one piece of circumstantial evidence introduced by the Crown as part of its case. It does not prove [the accused's] guilt. . . . [I]ts significance will depend upon other evidence you heard in this trial." Finally, he summarised the accused's position on the DNA evidence this way:

> Notably, even if you find the DNA on the shirt and gloves is [the accused's] that alone cannot identify him as the shooter because other people also left DNA on those items and there is no way, or evidence, to tell how or when or where the DNA got there or whether as primary or secondary or other transfer means. So its location on the articles is not telling. Don't be wowed by the DNA, they say.

[149] In my view, the accused's two arguments about the deficiency of the jury instructions on DNA are unpersuasive.

[150] Defence counsel's interpretation of Dr. Watson's evidence at the first pre-charge conference that, "if it's a mixed profile, you can't convict. It's as simple as that", was not reflective of the expert's testimony. Dr. Watson testified as follows on what STR analysis and the RMP could establish: "So I would say it's impossible to tell just from that evidence alone who was involved in the shooting" (emphasis added).

[151] In summarising Ms. Mascioli's evidence, the judge told the jury the same thing as what Dr. Watson said: "DNA testing cannot determine when or how DNA was deposited on the garment, or the order in which it was

deposited, or, for example, who wore what, when or for how long".

[152] Like any piece of circumstantial evidence, the probative value of DNA evidence depends on assessment of the totality of the factual matrix in the case (see *R v Morin*, [1988] 2 SCR 345 at 359-62; and *Terceira* at paras 47, 54). One of the difficulties with the accused's position in this case is the repetition of the erroneous view that the probative value of DNA evidence should be considered in a vacuum. Dr. Watson was candid in his evidence. He said he did know the overall context of the DNA evidence and was not giving an opinion on the ultimate issue.

[153] On the question of DNA transfer, the jury heard evidence from both experts that was not contentious. Each explained that it is possible when a person has contact with an object or another person that none of his or her DNA is transferred. The judge reminded the jury in his instructions that "it is possible to handle a garment and not leave DNA."

[154] Both experts also told the jury that it is also possible that, when a person has contact with an object or another person, his or her DNA is transferred directly (a primary transfer). Thereafter, it is possible that the contributor's DNA can be indirectly transferred through intermediaries. A secondary transfer occurs when there is an indirect transfer through one intermediary. A tertiary transfer occurs when there is an indirect transfer through two intermediaries. There are a number of variables that affect the likelihood of DNA transfer, such as the material contacted, the length and manner of contact, shedding characteristics, and the presence or absence of moisture.

[155] The judge properly summarised the accused's position that this may

have been a case of innocent transfer because there were mixed profiles of DNA on the gloves and shirt and DNA transfer is always a possibility. Beyond that, there was no expert evidence as to the likelihood of the manner of DNA transfer on the facts here, an opinion whose admissibility is an open question, at least in Canada (see *R v Reed & Anor*, [2009] EWCA Crim 2698 (BAILII) at paras 118-27; *United States v Brooks*, 727 F (3d) 1291 at 1296-97 (10th Cir 2013); *Fitzgerald v The Queen*, [2014] HCA 28 at paras 22, 36; and *R v Awer*, 2017 SCC 2 at para 2).

[156] When a party relies on expert evidence, the facts on which an opinion is based must be proven by admissible evidence (see *R v Abbey*, [1982] 2 SCR 24 at 45; and *R v Lavallee*, [1990] 1 SCR 852 at 896). An expert's opinion that lacks any factual basis has no evidentiary value (see *Lavallee* at p 896; and *R v Boucher*, 2005 SCC 72 at para 54). In his evidence, Dr. Watson gave some simple examples of how DNA transfer can occur, such as touching an item at a store or through a secondary transfer. The difficulty here, as noted in *Lavallee*, was that there was no "admissible evidence to establish the foundation for the expert's opinion" (at p 896) in relation to the accused.

[157] There was no evidence before the jury as to innocent or incidental contact between the accused and the gloves and/or shirt historically (see *R v Robinson*, 2003 BCCA 353 at para 91 (*Robinson 2003*)). Nor could an inference be drawn because of an obvious innocent association between the accused and the location where the items were found, such as a home or workplace (see *Terceira* at para 54). The origin of the gloves and the shirt was unknown. They were found in a public place, abandoned soon after a shooting at a location remote to the known address of the accused. That is the

factual matrix of this case.

[158] I see no difficulty with how the judge summarised the evidence that supported the defence of innocent transfer as there was no evidence beyond the general expert opinion on how DNA transfer can occur. The situation here can be contrasted to *Fitzgerald*.

[159] In *Fitzgerald,* the case against the appellant was based solely on a match of his DNA profile and that of the major contributor in a mixed-profile DNA sample on a musical instrument, likely used by one of the victims during a home invasion in self-defence. On the day of the home invasion, the appellant shook hands twice with one of the known assailants and later a witness saw that individual inside the home where the attack occurred in close proximity to the musical instrument. While it was unlikely these facts could have resulted in a secondary DNA transfer according to the expert evidence at the trial, the Australian High Court overturned the conviction because it concluded there was a sufficient evidentiary basis to make the defence of innocent DNA transfer a reasonable inference as opposed to speculation (see *Robinson 2003* at para 91).

[160] Given the rarity of the DNA profiles in the seven samples found on the gloves and shirt, the issue of whether the accused's DNA was on the shooter's clothing was of secondary concern in this case. In his charge, the judge referred to an innocent primary or secondary transfer as the defence of the accused if the jury concluded his DNA was on the clothing. That was sufficient, in my view, to fairly remind the jury of what evidence to consider in their deliberations on the defence of innocent transfer, taking into account the extensive closing submissions on the experts' evidence by both counsel

(see *Jacquard* at para 14; and *Daley* at para 57).

[161] Juries are intelligent. Counsel for the accused stated in his closing submission that DNA transfer is a "very simple" concept. A trial judge is not required to exhaustively review the evidence, particularly where counsel "do a good job in reviewing the evidence", so long as the judge's review is fair, which is the case here (*Jack* at p 361; see also *Daley* at para 76). That is even more the case where there is absolutely no evidence, such as there was in the cases of *Fitzgerald, Robinson 2003* and *Terceira*, to explain how the accused's DNA may have innocently ended up at the crime scene other than general science.

[162] Perfection is not asked of trial judges. Their duty to decant and simplify the case is just as much about avoiding "over-charging" as it is "under-charging" (*Rodgerson* at para 50; see also *R v Royz*, 2009 SCC 13 at para 2). In my view, taking a functional approach to the jury instructions looked at in their entirety and in the context of the trial, the overall effect of the charge was that the jury was properly and fairly instructed on the DNA evidence. In conclusion, I would not accede to this ground of appeal.

Issue Three—Reasonableness of the Verdicts

Background

[163] The accused's arguments on the reasonableness of the verdicts centre on the probative value of the DNA evidence. He says that evidence was "meaningless" because the mixed DNA profiles on the shirt and gloves make it possible someone else could have been the shooter. He also argues an innocent DNA transfer of the accused's DNA to the gloves and the shirt

was an alternative reasonable inference to guilt. Finally, he submits that Latinecz's eyewitness evidence was too unreliable, in part, for the jury to rely on and that the getaway vehicle evidence was too remote to the shooting and him.

Discussion and Conclusion

Standard of Review—Unreasonable Verdict in a Circumstantial Case

[164] The standard of review of the reasonableness of a jury's verdict under section 686(1)(a)(i) of the *Criminal Code* is 'whether the verdict is one that a properly instructed jury acting judicially, could reasonably have rendered' (*R v Yebes*, [1987] 2 SCR 168 at 185). To apply this standard, the reviewing court considers and, to some extent, re-weighs the evidence and its effect through the lens of judicial experience with due regard to the jury's assessment of the evidence because, in our system of justice, the responsibility for fact finding lies with juries who enjoy the advantage of hearing the evidence firsthand and assigning weight to it through their collective wisdom (see *Yebes* at p 186; *R v Biniaris*, 2000 SCC 15 at paras 36-40; and *R v WH*, 2013 SCC 22 at paras 26-29).

[165] Where a verdict depends on circumstantial evidence, the reviewing court must assess the reasonableness of the jury's use of inferential reasoning. Cromwell J explained in *R v Villaroman*, 2016 SCC 33, that can be done by determining "whether the trier of fact, acting judicially, could reasonably be satisfied that the accused's guilt was the only reasonable conclusion available on the totality of the evidence" (at para 55). See also *R v Robinson*, 2017 BCCA 6 at para 38, aff'd 2017 SCC 52 (*Robinson 2017*); and *R v Youssef*,

2018 SCC 49.

[166] Deference plays an important part in evaluating the inferential reasoning of the jury. The reviewing court does not draw its own inferences; rather, it considers whether the inferences drawn by the jury were "reasonably open" to it in light of the standard of proof (*Villaroman* at para 67). Drawing the line between inferences that are speculative and those which give rise to a reasonable doubt is the responsibility of the jury alone (see *Villaroman* at para 71).

The Reasonableness of the Verdicts

[167] As with the case of fingerprints, a circumstantial case depending on DNA evidence can be a sufficient basis to ground a conviction, depending on the qualities of the DNA evidence and its relation to all of the other evidence in the case (see *R v Lepage*, [1995] 1 SCR 654 at 668-69; *R v Adams*, [1996] 2 Cr App R 467 at 469-70 (CA (Eng)); *R v O'Brien*, 2011 SCC 29; *R v Grant (ME)*, 2013 MBCA 95 at paras 14-19, aff'd on other grounds 2015 SCC 9; *R v Tsekiri*, [2017] EWCA Crim 40 (BAILII) at para 21; and *Youssef*).

[168] The risk present with any type of circumstantial evidence is "the danger of jumping to unwarranted conclusions" (*Villaroman* at para 27). Here, the judge instructed the jury on how to properly analyse the circumstantial evidence in light of the presumption of innocence and to take care with their inferential reasoning when he told them that they had to "be satisfied beyond a reasonable doubt that the only rational inference that can be drawn from the whole of the circumstantial evidence is that [the accused] committed the offences for which he is charged, otherwise you must find him not guilty."

[169] In some circumstantial DNA cases, often crimes with a sexual component, it is clear that DNA has been directly deposited during the commission of the crime. That fact, together with a very high match probability between the known DNA profile of an accused and the evidential sample, is sufficient to raise a case for the accused to answer or risk conviction (see *R v Kociuk (RJ)*, 2011 MBCA 85 at paras 54-58, aff'd 2012 SCC 15; *R v FNC*, [2015] EWCA Crim 1732 (BAILII) at para 27; and *Tsekiri* at para 14).

[170] The situation here is different; the DNA evidence was found on readily moveable articles located at or near the scene of the crime. When the Crown relies principally on DNA evidence found on a readily moveable article as proof of identity, the trier of fact must be satisfied that there is a link between the article and the crime and that the accused handled the object while committing the crime, and not innocently before or after (see *R v Mars* (2006), 205 CCC (3d) 376 at para 19 (Ont CA); *People v Arevalo*, 225 Cal App (4th) 612 at 618-20 (2014); and *R v Grayston*, 2016 ONCA 784 at para 14).

[171] There is no issue in this case that there is a sufficient link between the gloves and shirt and the shooting. The unchallenged expert evidence and the rarity of the DNA profiles in the seven evidential samples, as expressed by the various RMPs, allowed for the jury to reasonably conclude (with other evidence, such as the surveillance video and the GSR evidence) that the accused's DNA was on the shirt and gloves that the shooter used and that were subsequently abandoned near the diner. Counsel for the accused does not challenge the reasonableness of that inference.

[172] The more difficult question is whether the jury could come to the

conclusion that the only reasonable inference was that the accused handled the gloves and shirt while committing the crime, and not innocently before or after. The point was well made by Binnie J in his dissent in *O'Brien* that "an inferential leap must still be made from a finding that the respondent once came into contact with the mask to a finding that he actually donned the mask to commit the robbery" (at para 31). The question of the manner and timing of the DNA being deposited is important because a false association of an accused's DNA to a crime can lead to false deductive logic and the potential of a miscarriage of justice.

[173] The important feature of this case is that the DNA on the gloves and the shirt came from more than one person, unlike the case in *O'Brien* where an abandoned mask used in a convenience store robbery had a single DNA profile. For the jury to properly draw an inference that the DNA evidence associated the accused to the shooting, the circumstantial evidence had to reasonably rule out the alternative of another DNA contributor being the shooter (see *R v Johnson*, 2010 ABCA 230 at para 20).

[174] The accused went so far as to argue that it is impossible for a properly instructed jury to ever convict when there is a mixed DNA profile because one cannot tell which of the contributors may have perpetrated the crime. This logic is faulty. It is another iteration of the argument that DNA evidence should be looked at in isolation as opposed to weighing its probative value in light of the overall factual matrix of a given case.

[175] Not every contributor of DNA to a mixed DNA sample necessarily has an equal opportunity to be the perpetrator. The accused's argument overlooks that the cumulative effect of circumstantial evidence is that it can

narrow the range of inferences to a single reasonable inference consistent only with the guilt of an accused. As Lord Simon explained in *Reg v Kilbourne*, [1973] AC 729 (HL (Eng)) (at p 758): "Circumstantial evidence is evidence of facts from which, taken with all the other evidence, a reasonable inference is a fact directly in issue. It works by cumulatively, in geometrical progression, eliminating other possibilities."

[176] An example of Lord Simon's comments is *Villaroman*. In reviewing the reasonableness of the possession of child pornography conviction, Cromwell J looked at the pieces of circumstantial evidence relating to control and use of the computer to decide whether that evidence, "when considered in light of human experience and the evidence as a whole and the absence of evidence, excluded all reasonable inferences other than guilt" (at para 69).

[177] The starting point here is the surveillance video and the evidence of Schultz and Latinecz. The shooter was a male of a certain height and body mass. That circumstantial evidence does not eliminate the accused from the potential pool of suspects; it includes him.

[178] The surveillance video further establishes that the shooter had physical contact with both gloves and the shirt during the shooting. According to the expert evidence, a primary DNA transfer from the shooter to the gloves and the shirt could have occurred during the shooting. The shirt was worn over the shooter's mouth raising the possibility of aerosol transfer of saliva; area AD of the shirt fluoresced for the presence of a bodily fluid. The friction caused by pulling the gun's trigger 19 times would be conducive to a DNA transfer if the jury found that the DNA at area AG of the right glove was more

likely on the inside of the glove than the outside, taking into account probabilities and the totality of the evidence.

[179] The jury was not required to make an inference of a primary DNA transfer by the shooter to the clothing based on the expert evidence they heard, but it was open to them to do so because their role was to assign weight to the evidence. The possibility of the shooter making a primary DNA transfer during the crime does not eliminate the accused from the potential pool of suspects; it includes him as his DNA likely was on the three pieces of clothing the shooter wore.

[180] The next point is about coincidence. According to Ms. Mascioli, the quality of the DNA samples on the gloves and shirt allowed her to develop a DNA profile of only one person from the 19 evidential samples where there was a sufficient quantity of extractible DNA for STR analysis. Counsel for the accused argues it was possible that someone else, in addition to the accused, may have had contact with all three pieces of clothing the shooter wore. If that was the case, the probability of the coincidence that the shooter's DNA was not identifiable despite having recent contact with all three pieces of clothing before abandonment (including pulling a trigger 19 times), but the accused's DNA was, was a fact for the jury to weigh to determine its likelihood. So, too, was the coincidence that the GSR testing may have removed the DNA of the shooter from the gloves but not that of the accused. As Cory J remarked in *R v Arp*, [1998] 3 SCR 339, "It is the unlikelihood of coincidence that gives the evidence its probative force" (at para 64).

[181] The jury heard reasons why a DNA profile may not be identifiable, such as degradation of the biological material or no transfer occurred in the

first place, but, as is the case with any possibility, it fell to the jury, not the experts, to find the facts. The fact that the DNA profile of only one contributor could be properly identified on any of the 19 DNA samples found on the gloves and shirt that were testable was a relevant consideration (see *R v Ibrahim*, 2014 ONCA 157 at para 49; and *Tsekiri* at para 19).

[182] Another narrowing piece of circumstantial evidence is the shooter's skin colour. Curiously, while the accused says Latinecz's eyewitness evidence is unreliable generally, on this point, he argues Latinecz's evidence is reliable. This is the controversy I referred to earlier of the accused's skin colour.

[183] Throughout the trial, counsel for the accused said the accused was black. Obviously, if the jury accepted that submission, that piece of evidence would exclude the accused as the suspected shooter and diminish the probative value of the DNA to associate him to the shooting if they accepted Latinecz's evidence. The Crown took the opposite view, that Latinecz's description accurately depicted the accused's skin colour. The judge made the following observation outside the presence of the jury:

> [Y]ou've used the phrase black in description of [the accused]. I guess that's a very generic sort of way to describe someone of that race or ethnicity, but to be clear and for the record obviously there are different degrees of skin tone and colour, and [the accused], as he sits here now, presumably as he was many years ago, is not what you would necessarily call a dark black individual and, if anything, he's on the very light side, mulatto or olive-skinned in that particular way.

[184] The jury had several weeks during the course of the trial to look at the accused's skin colour for themselves and decide collectively whether

Latinecz's description of the shooter eliminated the accused as a suspect or included him. I see no reason why the jury could not use Latinecz's description of the shooter's skin colour as a further narrowing circumstance of the pool of suspects if they agreed with him.

[185] There are many enigmas about this case. The accused abandoned a defence of third-party suspect during the middle of the trial. How the shooter knew that the group was going to be at the diner is unknown as it was a place they did not frequent. The shooter's accomplice, who drove the getaway vehicle, is unknown. There is no evidence of a pre-existing relationship between the accused and Lau or G. N. (see *R v Griffin*, 2009 SCC 28 at para 61). This also is not a situation of proved absence of motive (see *Lewis v The Queen*, [1979] 2 SCR 821 at 835-36). The judge captured the essence of the case when he told the jury in his instructions, "In the end, the lack of evidence of a motive is just one of many things for you to consider as you determine whether you have a reasonable doubt."

[186] Finally, there is the getaway vehicle. The frailties of Latinecz's eyewitness evidence, discussed in detail previously, were raised for the jury's attention throughout the course of the trial. The eyewitness evidence, although fleeting, is simply of a type of vehicle at the scene of the crime as opposed to an identification that a particular vehicle was known to be the accused's. The ultimate relevance of Latinecz's evidence only comes through when considering it in conjunction with the business records evidence which is less contentious.

[187] The judge told the jury in his instructions to take "special care" with the evidence of Latinecz. He instructed them to take into consideration

Latinecz's capacity (as he had been drinking and this was a stressful event), his deceit to Sgt. Bailey, the circumstances of his observation, the lack of cross-examination of his evidence, the inconsistencies in his descriptions and the corroborating evidence. He warned them to be "cautious" overall when determining how much or little to rely on Latinecz's evidence because it "may be less reliable than other evidence" in the case. A review of the transcript of the pre-charge conferences on the drafts of the jury charge highlights that the language the judge ultimately used about the frailties of Latinecz's evidence was adapted and crafted with significant input of counsel for the accused. The instructions about Latinecz's evidence fairly and properly made clear to the jury the relevant dangers.

[188] Latinecz described the getaway vehicle with a degree of specificity. There was some corroborative evidence as to the accuracy of his observations relating to the shooting based on the shell casings and bullet holes found at the diner, the surveillance video, Schultz's testimony and the location of the abandoned items in the direction Latinecz said the getaway vehicle fled. Cst. Beattie recorded the key aspects of the description of the vehicle only 10 minutes after the observation was made. Given the circumstances, I see no reason why a properly instructed jury could not rely on Latinecz's eyewitness evidence, despite its frailties, if they so chose (see *Hay* at para 40).

[189] It was also open to the jury to accept the business practices of the car rental company as evidence that the accused was aware and participated in the car rental as the contract tendered as evidence suggests on its face (see *R v Shams*, 2017 MBCA 116 at para 5). The reasonableness of that inference is supported by the fact the contract had his unique personal information.

[190] The fact that the accused had some association to a Lincoln matching the description of the getaway vehicle on the day in question is a piece of circumstantial evidence narrowing the inferences that could be drawn from the evidence as a whole. There are, of course, some discrepancies between Latinecz's description of the getaway vehicle and the one rented by Lavergne but those were for the jury to weigh as to their significance.

[191] The accused's further argument that the contract had expired because of the date on it is also not persuasive. The car rental company was quite content for Lavergne to keep the vehicle past the return date on the same terms so long as he paid for it (which he did). There is no evidence to suggest that the accused contacted the rental company before the shooting and severed his ties to the rental of the Lincoln.

[192] There may have been several olive-skinned males of a certain height and body type that have some linkage to a Lincoln sedan in Winnipeg on the day in question, but the size of that audience becomes rather unique, in my view, if one adds in the final and important feature of that male also possibly transferring DNA to three pieces of clothing used in a shooting. As my colleague, Cameron JA, remarked in *R v Dritsas (K)*, 2014 MBCA 85 (at para 6): "As we have said on numerous occasions, 'evidence must be taken as a whole and its cumulative effect is to be considered when making the assessment on the reasonableness of any inferences to be drawn' (*R. v. Eckstein (S.M.)*, 2012 MBCA 96 at para. 22, 288 Man.R. (2d) 26)." See also *Sopinka* at para 2.91.

[193] Before a final evaluation of the reasonableness of the DNA evidence associating the accused to the shooting, the accused's argument about the

possibility of an innocent DNA transfer must be considered.

[194] DNA transfer can occur in three ways: innocently before the crime, during the commission of the crime, or innocently after the crime (see Peter Gill, *Misleading DNA Evidence: Reasons for Miscarriages of Justice* (London, UK: Elsevier, 2014) at 3).

[195] The factual matrix rules out the reasonability of an innocent transfer after the shooting. The gloves and shirt were found soon after at a location with no association to the accused and at a time of day where a transfer of DNA was unlikely before police found the clothing. There is also no evidence to suggest that, as a result of investigative or laboratory error, the DNA of the accused contaminated the gloves and the shirt through a secondary transfer once the clothing came into the authorities' control.

[196] The difficulty with the alternative of an innocent transfer before the shooting is that it appears to be speculative; particularly as the innocent transfer defence requires the deposit of the accused's DNA not on one piece of clothing, but on three. Alternative inferences can arise from the evidence or its absence but an inference must be more than possible; it must be reasonable. The Crown is not required to negate mere conjecture (see *Villaroman* at paras 36-37).

[197] In *R v Doan*, 2013 BCCA 123, an innocent DNA transfer defence was raised by way of the argument that the victims' DNA made its way onto duct tape not because the victims were bound with it, but because of an innocent transfer in the garbage or by police error in handling the exhibits. The trial judge rejected the reasonableness of that inference. The Court of Appeal concluded that the trial judge made no error in concluding that the

possibility of an accidental transfer was too speculative despite, as here, the trial judge hearing expert evidence on the science of DNA transfer as a general phenomenon (see also *R v Abdelhamid (WA)*, 2015 MBCA 35 at paras 31-32 (where the theory was rejected that the DNA transfer occurred not because of sexual assault, but because of a secondary transfer from a routine medical examination of the victim)).

[198] The situation here is even more speculative than *Doan*, *Fitzgerald* or *Abdelhamid*. The origin of the gloves and shirt before the shooting is unknown. As previously mentioned, there is no historic connection of the accused to the clothing or obvious innocent association of the accused to the place where the clothing was found.

[199] Unlike in *Doan*, *Fitzgerald* or *Abdelhamid*, there are simply no facts (either from the evidence or its absence) to anchor a defence of innocent DNA transfer before the shooting other than the general science. As was the case in *Doan* and *Abdelhamid*, it was open to the jury to reject the general science of DNA transfer as a reasonable inference explaining how the accused's DNA may have gotten on the gloves and shirt before the shooting. I would repeat that the probative value of expert evidence is only as good as the facts in the case supporting it (see *Abbey*, *Lavallee* and *Boucher*).

[200] In summary, it was the prerogative of the jury to draw the line between speculative and reasonable inferences. The role of this Court is not to decide if an alternative way of looking at the case is reasonable enough to raise a doubt, but only to decide if the jury could reasonably have come to the decision they did (see *Villaroman* at paras 55-56; and *Youssef*).

[201] My final comment relates to the fact that the accused did not testify.

Where a conviction is dependent on circumstantial evidence in assessing the reasonableness of the verdict, a reviewing court may take into consideration the failure of the accused to testify (see *Corbett v The Queen*, [1975] 2 SCR 275 at 280-81; and *R v Oddleifson (JN)*, 2010 MBCA 44 at paras 25-27, leave to appeal to SCC refused, 33756 (28 October 2010)). The accused's silence is not a piece of evidence that can support the reasonableness of the verdict; rather, it is "indicative of the absence of an exculpatory explanation" (*R v Noble*, [1997] 1 SCR 874 at para 103; see also *Oddleifson* at paras 25-27).

[202] The failure of the accused to testify can be taken by this Court to mean that there is no innocent explanation regarding the evidence that associates him to the shooting.

[203] A case of some similarity to the situation here is *R v Wills*, 2014 ONCA 178, aff'd 2014 SCC 73. In *Wills*, the DNA of the accused was found in mixed DNA samples located on two bandanas worn during a home invasion robbery and subsequently abandoned at or near the crime scene. Police also seized a baton from the accused's house two months after the robbery that resembled the weapon used in the home invasion. While a majority of the Court of Appeal called the case a "close call" (at para 44), it was satisfied that the verdict was reasonable when the totality of the evidence was considered taking into account that, despite a case to answer, the accused did not testify. A majority of the Supreme Court of Canada upheld that decision.

[204] In conclusion, I reject the accused's submission that the verdicts are unreasonable. Taking into account the factual matrix of the case viewed through the lens of judicial experience, the jury was entitled to conclude that

the only reasonable conclusion was that the accused was the shooter. I am satisfied that the verdicts were ones that a properly instructed jury, acting judicially, could reasonably have rendered.

Disposition

[205] In the result, I would dismiss the appeal.

Mainella JA

I agree: Hamilton JA

I agree: Cameron JA