Citation: R v Comber, 2026 MBCA 27
Date: 20260330

IN THE COURT OF APPEAL OF MANITOBA

Coram: Mr. Justice Christopher J. Mainella
Madam Justice Janice L. leMaistre
Madam Justice Anne M. E. Turner

***B E T W E E N**:*

	)	***M. D. Glazer** and*
	)	***C. L. Mahoney***
HIS MAJESTY THE KING	)	*for the Appellant*
	)	
Respondent	)	***C. R. Savage** and*
	)	***B. M. P. Moen***
- and -	)	*for the Respondent*
	)	
WILLIAM RYERSON THOMAS COMBER	)	*Appeal heard:*
	)	***October 22, 2025***
(Accused) Appellant	)	
	)	*Judgment delivered:*
	)	***March 30, 2026***
	)	

NOTICE OF RESTRICTION ON PUBLICATION: An order has been made in accordance with section 486.5(1) of the *Criminal Code*, RSC 1985, c C-46, directing that any information that could identify a victim or witness in this proceeding shall not be published, broadcast or transmitted in any way.

MAINELLA JA

Introduction

[1] This murder appeal focuses on the gatekeeping role of a trial judge during the cross-examination of witnesses and the reasonableness of the jury's verdict considering the principles set out in *R v Villaroman*, 2016 SCC 33 [*Villaroman*].

[2] On the evening of November 17, 2018, Hailey Dugay (the victim), age twenty, was struck in the lower back by a .30-calibre bullet while she sat in the rear passenger seat of a pickup truck travelling down Kuz Road, a gravel road in the Interlake area of Manitoba. Tragically, she died from the gunshot.

[3] The police originally charged Jesse Paluk (Paluk) with second degree murder as several witnesses saw him shooting a rifle on Kuz Road at the time the vehicle transporting the victim was shot at. However, subsequent ballistics testing confirmed the rifle Paluk possessed and discharged on Kuz Road did not fire the fatal shot.

[4] Paluk pleaded guilty to discharging a firearm with recklessness for his conduct on Kuz Road and assault with a weapon in relation to a fight earlier in the evening at the Fraserwood Bar in Fraserwood, Manitoba (the bar). Paluk became a cooperating Crown witness against the accused, identifying him as being another shooter on Kuz Road.

[5] On August 6, 2019, the accused was charged with second degree murder in relation to firing the fatal shot from the side of Kuz Road.

[6] On December 15, 2022, after a three-week trial by a court composed of a judge and jury, the accused was convicted of second degree murder. The accused now appeals and seeks a new trial.

[7] As the accused states in his factum, the jury had to be satisfied beyond a reasonable doubt of two key facts in dispute in the trial: whether he "fired the fatal shot" and, "if so, whether he did so with murderous intent."

[8] Unfortunately, while the issues were clearly delineated for the jury, the same cannot be said about the appeal. This Court was faced with the phenomenon that is all too common for appellate judges and was succinctly described long ago by Pearce LJ in *Rondel v Worsley*, [1967] UKHL 5 at 20 [*Rondel*], as follows:

> [M]any hours are spent each year . . . in listening to wholly unbalanced attempts to re-open, without justification, a case which a party has lost and which, by brooding over it, he can no longer see in an objective light. Disgruntled by a decision, he reflects on various side issues (often quite irrelevant or at least not matters of decisive importance) of which he now considers that the judge failed to take any account or any sufficient account.

[9] A significant challenge in this appeal is that this Court, instead of counsel, has been tasked with decanting the issues to separate importance from triviality. The accused's twelve grounds of appeal are "a shotgun approach to appellate advocacy" (*R v Henderson (WE)*, 2012 MBCA 93 at para 51 [*Henderson*]). The accused invited this Court to retry every decision that the trial judge made against him during the trial. This is a fundamental misunderstanding of the role of an appellate court.

[10] As has been said many times, an appellant must focus and be realistic; an appeal is not a retrial. Trials are never perfect; however, every perceived error that occurs during a trial does not necessarily call the result into question. The message of cases like *Rondel* and *Henderson* is a timeless one; an appellant must prioritize their submissions and focus on the truly controversial feature(s) of a trial. In most appeals, there are only a few issues that qualify as a matter of "real substance" for an appellate court (*Henderson* at para 51).

[11] It is unnecessary for me to address each of the grounds of appeal (many of which duplicate or overlap one another) save in brief.

[12] Several of the grounds simply have insufficient merit for discussion, mindful of the deferential standard of review that often applies to a trial judge's management of a trial. For example, the trial judge's decision to not conduct broad inquiries into the jury because one juror, at the commencement of the trial, came forward and was excused because he said his daughter was an acquaintance of the victim who worked with her was a reasonable exercise of discretion by the trial judge (see *R v Regan*, 2002 SCC 12 at para 117). The same can be said for the trial judge's dismissal of the motion for a directed verdict (see *R v Monteleone*, 1987 CanLII 16 at para 8 (SCC)); the refusal to allow the accused to tender irrelevant evidence (all the firearms seized from Paluk's residence); and how the trial judge instructed the jury to ignore prejudicial evidence relating to the accused that came out during Paluk's testimony.

[13] As well, it is quite clear from reading the transcript that counsel for the accused conducted this case exclusively as one of a whodunit. No submissions were made to the jury by defence counsel as to how they should consider the issue of intent if they concluded the accused fired the fatal shot. Only the Crown and the trial judge discussed that topic before the jury. I say this not to be critical but to highlight that defence counsel made obvious tactical choices as to how the trial judge should instruct the jury on the verdicts of murder versus manslaughter (see *R v Wahabi*, 2024 MBCA 70 at paras 161-65). Many of the "complaints" raised on the appeal with the adequacy of the trial judge's jury instructions on the issue of the accused's intent stand in stark contrast to the position of counsel for the accused at trial. While this does not

mean that the trial judge could instruct the jury improperly without consequence, it does signal to this Court the true significance of alleged errors as to the adequacy of the instructions to the jury.

[14] The two issues that need to be canvassed in detail relate to the trial judge's interventions during defence counsel's cross-examination of witnesses and the reasonableness of the jury's second degree murder verdict.

[15] Given my conclusion that the record here could only support a conviction for manslaughter, as opposed to second degree murder, it is unnecessary to comment on the ground of appeal that relates to the adequacy of the trial judge's answer to a question from the jury on murderous intent during their deliberations.

[16] For the following reasons, I would dismiss the appeal but substitute the verdict of manslaughter because the verdict of second degree murder was unreasonable.

Background

Events Prior to the Shootings on Kuz Road

[17] On the afternoon of November 17, 2018, Paluk received a text message from the accused, suggesting that the two get together and go deer hunting. Later that evening, they met with Taylor Goodfellow (Goodfellow) and Joseph Denoyer (Denoyer) at the bar. The four men socialized and then left in Paluk's vehicle to go deer hunting in the countryside.

[18] There were two firearms in Paluk's vehicle; both fired .30-calibre bullets.

[19] Paluk had his bolt-action .300 Remington rifle (the bolt-action Remington rifle). It had a scope on it and was camouflage in colour. It could fire up to four .300 Remington Ultra Magnum Calibre cartridges (Magnum cartridges) without being reloaded—three in the magazine and a fourth manually loaded into the chamber before inserting the magazine.

[20] The accused had his semi-automatic .300 Winchester rifle (the Winchester rifle). It was open-sighted and brown in colour. According to Paluk, the Winchester rifle's sight was defective. Paluk was familiar with the Winchester rifle and testified that it fired a smaller cartridge than the bolt-action Remington rifle.

[21] After deer hunting, the four men returned to the bar. Later in the evening, at around 11:00 p.m., Paluk got into a fight at the bar with Paluk's ex-girlfriend's boyfriend. The fight resulted in the bar being closed.

[22] After the fight, Paluk and the accused left the bar in Paluk's vehicle. Goodfellow travelled with them in his own vehicle. Denoyer was picked up by a friend and was not a witness to subsequent events.

The Shootings on Kuz Road

[23] The two vehicles driven by Paluk and Goodfellow travelled east from Fraserwood on Highway 231 towards Gimli. After travelling half a mile, Paluk turned south off the highway onto Kuz Road as he had to urinate. He parked on the west side of Kuz Road.

[24] Goodfellow parked his vehicle on the opposite side of the road about thirty to forty yards away. The rural area was dark as it was nighttime and there were no street lights.

[25] As Paluk was urinating, he observed three sets of vehicle headlights coming towards him. He thought he was going to "get jumped" because of the fight in the bar.

[26] Paluk went back to his vehicle and alerted the accused. He said, "you got my back." The accused replied, "yeah, yeah, yeah." Goodfellow said that Paluk told them to be ready to back him up.

[27] Paluk grabbed the loaded bolt-action Remington rifle and stood in the middle of Kuz Road. Paluk said that the accused grabbed and loaded the Winchester rifle.

[28] Paluk began firing into the air as the three vehicles passed him.

[29] The occupants of the three vehicles driving towards Paluk had been at the bar earlier in the evening, as had the accused and Goodfellow, but none of them were involved in Paluk's fight; they were at the wrong place at the wrong time.

[30] Unseen by the occupants of the three vehicles and Goodfellow, but according to Paluk, the accused was at the side of Kuz Road firing the Winchester rifle in the direction of the three travelling vehicles.

[31] The victim was in the second vehicle of the procession—a black 2000 GMC Sierra pickup truck that was operated by Brandon Harasymko (Harasymko) (Harasymko's vehicle).

[32] Harasymko slowed his vehicle down as he approached Paluk and then accelerated, causing the vehicle to "fishtail" on the gravel road (i.e., the back of the vehicle swerved erratically).

[33] One of the occupants of Harasymko's vehicle was Colton Murray (Murray). He was familiar with firearms. He was in the front passenger seat of the vehicle, directly in front of the victim. He heard four or five shots as Harasymko's vehicle accelerated. He testified that the victim was struck by the third shot. He described two of the shots he heard as being "much louder than the others."

[34] One bullet hit the driver's side tail light of Harasymko's vehicle just above the rear bumper. It travelled through and damaged the vehicle's superstructure just above the wheel well of the rear driver's side back tire. It was never recovered by the police.

[35] The fatal bullet struck near the middle of the tailgate of Harasymko's vehicle. It then passed through the relatively empty truck bed of the vehicle and struck the vehicle's rear cab wall. The bullet continued travelling through the rear passenger seat before striking the victim in her back.

[36] The distance between where the accused was located on the side of Kuz Road while firing the Winchester rifle and Harasymko's vehicle was about fifty to one hundred yards.

The Police Investigation

[37] Paluk, the accused and Goodfellow fled the area of Kuz Road after the shootings. They drove east to the accused's residence in Gimli. The

accused took the Winchester rifle with him into his residence. The three men walked away from the accused's residence and hid because the police were looking for them. The police located and arrested them.

[38] The police recovered the loaded bolt-action Remington rifle and twenty-two spent and unspent Magnum cartridges from Paluk's vehicle.

[39] The Winchester rifle was not located by police.

[40] Police found five spent Magnum cartridge casings in the middle of Kuz Road. Forensic analysis confirmed they had been fired by the bolt-action Remington rifle and matched the type of ammunition found in Paluk's vehicle.

[41] About ten feet away from the Magnum cartridges, in the grass of the ditch on the west side of Kuz Road, police located three spent SAVFC .300 cartridge casings (SAVFC cartridges), another type of .30-calibre bullet.

[42] A Magnum cartridge is larger (about seven centimetres long) than a SAVFC cartridge (about five centimetres long).

[43] Forensic analysis confirmed that the three SAVFC cartridges found adjacent to Kuz Road had not been fired by the bolt-action Remington rifle. However, the make of the firearm that discharged the three SAVFC cartridges could not be established conclusively by police.

[44] The .30-calibre bullet that killed the victim was recovered from her body. Forensic analysis confirmed that the fatal shot was not fired by the bolt-action Remington rifle. However, the make of the firearm that fired the fatal shot could not be established conclusively by police.

[45] Police obtained and executed a search warrant on Paluk's residence near Komarno. Nine firearms were seized. One of these firearms was a brown semi-automatic Remington 7400 30-06 rifle with a black scope (the semi-automatic Remington rifle). This firearm could fire a .30-calibre bullet.

[46] Police seized a wide range of ammunition from Paluk's residence. None matched the three SAVFC cartridges found adjacent to Kuz Road.

The Trial

[47] The Crown alleged that the accused fired the fatal shot from the side of Kuz Road with murderous intent based on section 229(a)(ii) of the *Criminal Code*, RSC 1985, c C-46 [the *Code*].

[48] The cornerstone of the accused's defence was the assertion that Paluk was attempting to frame the accused. In order to address the undisputed ballistics evidence that the bolt-action Remington rifle did not fire the fatal shot or the three SAVFC cartridges, the accused advanced the theory during the trial that Paluk possessed and wielded two firearms at the same time while the three vehicles proceeded past him and he was standing in the middle of Kuz Road.

[49] In addition to certain agreed facts and exhibits, fifteen witnesses testified before the jury.

[50] Denoyer testified as to events prior to the shootings on Kuz Road.

[51] Paluk, Goodfellow and eight witnesses who were in the three vehicles gave evidence as to what occurred on the evening in question, including the shootings on Kuz Road.

[52] One police officer testified to items found during the investigation and another police officer provided expert evidence on firearms.

[53] Another witness (A.Z.) was called by the accused, as well as a private investigator who provided some background on A.Z.

[54] A.Z. has a lengthy criminal record for property crimes, weapons and prostitution offences. He testified that he met the accused while they were in jail together in Manitoba and were cellmates. He knew of Paluk through some friends that were in jail in Saskatchewan with Paluk. A.Z. admitted that, in addition to being a "pimp", he was a cocaine trafficker and that he supplied Paluk with cocaine on a few occasions in December 2021.

[55] A.Z. claimed that they met in the parking lot of a Winnipeg hotel to negotiate a large cocaine deal. During the negotiation of this cocaine deal, Paluk told A.Z. he could be trusted with the drugs being supplied to him on credit because he had "beat" a murder charge by dumping the gun "just in time." A.Z. testified he said no to the offer. Instead, A.Z. sold Paluk a smaller amount of cocaine for cash upfront. A.Z. said he got "spooked" by Paluk and had no further contact with him because he did not want to deal with "somebody like that" despite the fact that dealing with unsavory people was something A.Z. was used to because of his criminal lifestyle.

[56] A.Z. admitted that, when he went back to jail and met the accused, the two of them discussed the details of the accused's case. A.Z. said he realized that Paluk was trying to frame the accused and agreed to testify for the accused. At the time he testified, A.Z. was awaiting sentencing for drug offences.

[57] The accused did not testify at his trial.

Discussion

Issue One: The Trial Judge's Interventions During Defence Counsel's Cross-Examination of Witnesses

[58] The accused's main complaint as to the unfairness of his trial is that the trial judge improperly intervened during defence counsel's cross-examination of witnesses. He submits that the trial judge curtailed cross-examination without objection by the Crown. He alleges he was deprived of a fair trial by these interventions and their manner. He says the trial judge's conduct of the trial "cr[ies] out for appellate relief."

[59] The issues raised by the accused require discussion of the evidentiary gatekeeping role of a trial judge. I will begin with some brief comments on the applicable general principles.

The Gatekeeping Role of a Trial Judge: Intervening During the Examination of a Witness

[60] In our adversarial system of justice, a trial judge acts as an independent and impartial decision-maker in a contest between opposing parties conducted according to law. Impartiality is "a fundamental qualification of a judge and a core attribute of the judiciary" (Canadian Judicial Council, "Ethical Principles for Judges" (last visited 20 March 2026) at 5.A.1, online (PDF): <cjc-ccm.ca>).

[61] In *Brouillard Also Known As Chatel v The Queen*, 1985 CanLII 56 SCC [*Brouillard*], the Supreme Court of Canada explained that judicial

impartiality is more than the absence of bias and prejudgment; it also includes the appearance of impartiality. The Court cited, with approval, the timeless comments in *The King v Sussex Justices; Ex parte McCarthy*, [1924] 1 KB 256 at 259, that "justice should not only be done, but should manifestly and undoubtedly be seen to be done" (*Brouillard* at para 13). As Lamer J put it, "although the judge may and must intervene for justice to be done, he must nonetheless do so in such a way that justice *is seen to be done*. It is all a question of manner" (*ibid* at para 25) [emphasis in original].

[62] Judicial impartiality requires the trial judge to remain above the fray and allow the parties to present their case as they see fit (see *R v Samaniego*, 2022 SCC 9 at para 22 [*Samaniego*]). However, remaining above the fray is not a direction for a trial judge to be a passive "sphinx judge" in the absence of an objection (*Brouillard* at para 17; see also *R v Lynxleg*, 2002 MBCA 101 at paras 18-19 [*Lynxleg*]).

[63] A challenging aspect of the maintenance of judicial impartiality is the responsibility of a trial judge to be the trial's evidentiary gatekeeper. This role tasks them with determining not only the admissibility of evidence at the trial but also managing the trial in an "effective, efficient and fair" manner (*R v Colling*, 2017 ABCA 286 at para 31, aff'd 2018 SCC 23; see also *R v Haevischer*, 2023 SCC 11 at para 102 [*Haevischer*]; *Samaniego* at paras 25-26).

[64] The modern understanding of the evidentiary "gatekeeper function" (*R v J-LJ*, 2000 SCC 51 at para 1 [*J-LJ*]) of trial judges can be traced back to the area of the admissibility of expert opinion evidence. However, since *J-LJ*, the gatekeeping responsibility of a trial judge has been recognized to apply to

the admissibility of any form of evidence, including the cross-examination of witnesses (see *Haevischer* at para 102; *Samaniego* at para 22).

[65] The evidentiary gatekeeping role of a trial judge engages the fundamental values of ensuring a fair trial and preserving the integrity of the fact-finding process (see *R v Grant*, 2015 SCC 9 at para 44; *R v Youvarajah*, 2013 SCC 41 at para 25). Striking the correct balance in relation to these objectives while staying above the fray is a demanding task for trial judges and requires a thorough knowledge of the law, patience and a sensitivity to the dynamics of a trial—particularly one before a jury (see *Samaniego* at para 1).

[66] Judicial interventions on counsel's questioning of a witness is a particularly delicate aspect of a trial judge's evidentiary gatekeeping role. While the right to cross-examine "without significant and unwarranted constraint is an essential component of the right to make a full answer and defence" (*R v Lyttle*, 2004 SCC 5 at para 41), this right has limits, such as those arising from the basic principle that evidence must be relevant to be admissible and the requirements of various legal exclusionary rules (see *R v Osolin*, [1993] 4 SCR 595 at 665-66, 1993 CanLII 54 (SCC) [*Osolin*]).

[67] Made clear in *Osolin* is the principle that there is no right to cross-examine in a manner that runs afoul of an exclusionary rule created by Parliament in the *Code* or the *Canada Evidence Act*, RSC 1985, c C-5 (the *Act*) or by the common law. Intervention by a trial judge to restrict cross-examination that offends the law is entirely appropriate if done in a respectful and judicial manner. It should be remembered that the trial judge's role as the

evidentiary gatekeeper makes them "ultimately responsible for enforcing compliance with evidentiary rules" (*R v Kinamore*, 2025 SCC 19 at para 44).

[68] Trial judges also have the discretion to limit cross-examination where it is unduly repetitive, rambling, argumentative, misleading or irrelevant (see *Samaniego* at para 22). In addition, trial judges have the discretion "to ask questions of witnesses to clear up ambiguities or to bring out relevant matters which have been omitted" (*Lynxleg* at para 18; see also *R v Giovannini*, 2018 NLCA 19 at para 15).

[69] The evidentiary gatekeeping role of a trial judge in relation to intervening during the examination of witnesses was summarized this way in *Lynxleg* as "a judge may and sometimes must intervene in the examination of witnesses" (at para 18).

[70] Indeed, the failure of a trial judge to intervene when the law requires it can be a reversible error (see *R v Barton*, 2019 SCC 33 at para 9; *R v Ball*, 2019 BCCA 32 at para 96).

[71] For an appellate court, two questions are of significance in the review of a specific intervention by a trial judge during the examination of a witness.

[72] First, was the trial judge's intervention in the examination of a witness done for a "valid purpose" (either because of a legal requirement or based on a reasonable exercise of a trial judge's trial management power) (*R v Monias*, 2016 MBCA 111 at para 6 [*Monias*])?

[73] Second, consistent with the comments in *Brouillard*, even when an intervention by a trial judge is for a valid purpose, was the manner of the intervention judicious (i.e., civil)?

[74] The importance of civility in the administration of justice cannot be overstated. Civility is essential to the proper functioning of the rule of law. As Wagner CJC has remarked, incivility, by either counsel or the judiciary, "weaken[s] the justice system, its integrity, and ultimately the confidence of those we serve" (Chief Justice Richard Wagner, "Civility and Collegiality" (Opening statement delivered at the Cambridge Lectures 2019, 4 July 2019) [unpublished] online: <scc-csc.gc.ca/about-apropos/judges-juges/list-liste/richard-wagner/sd-2019-07-04/>). As he put it, judges and lawyers must be more conscious to be civil and collegial with one another, "*especially* when we disagree with each other" (*ibid*) [emphasis in original]. For the judiciary, civility promotes "greater efficiency in the decision-making process, a properly judicial frame of mind, and a good example being set for the other actors in the legal system" (*ibid*).

[75] The skill of voicing a different view without being uncivil—what has been described as "disagreeing without being disagreeable" (British Columbia Civil Trial Handbook, 3rd ed (The Continuing Legal Education Society of British Columbia, 2011), ch 15 at 385—is more art than science. That said, a trial judge must be alive to the reality that, while they are tasked to firmly and efficiently control the trial process, "the power and prestige of their position" (*Monias* at para 9) has consequences for the perception of justice if their language or demeanor is uncivil.

[76] The jurisprudence provides some helpful commentary for trial judges as to how an intervention with a witness can be done judiciously:

i. The language used during an intervention is important. "[E]xpressions of annoyance, impatience and sarcasm" should be avoided (*Chippewas of Mnjikaning First Nation v Chiefs of Ontario*, 2010 ONCA 47 at para 240 [*Chippewas*]). Ideally, the trial judge's intervention will be based on clear and courteous language, even if the situation necessitates a firm response. One way to think about the proper use of language is judicial critique of a submission is expected and sometimes requires bluntness; however, judicial critique of the submitter is problematic.

ii. The trial judge should be mindful of the timing of an intervention. While some interventions cannot be delayed, if a trial judge has questions for a witness, it is "best to leave the questions to a point during the evidence where counsel has completed a particular area or to the end of the witness's evidence" (*ibid* at para 239).

iii. Correcting or rebuking counsel should be done cautiously, particularly before a jury. A trial judge should take care not to undermine counsel's function or strategy; however, the intervention may be entirely appropriate to ensure compliance with the law, accurate fact-finding and trial fairness to all parties, including a witness (see *R v Gager*, 2020 ONCA 274 at para 152 [*Gager*]).

[77] In addition to being judicious, any intervention of a trial judge should not compromise their neutrality or result in an unfair trial (see *Lynxleg* at para 19). In *R v Valley* (1986), 26 CCC (3d) 207 at 231-32, 1986 CanLII

4609 (ONCA) [*Valley*], the Ontario Court of Appeal highlighted four such situations where a trial judge's intervention may be particularly problematic: (1) conveying the impression the judge is siding with the prosecution and disbelieves the accused or the defence witnesses through questioning, (2) intervening in a manner that makes it impossible for counsel to present the defence and properly test the evidence, (3) intervening in a manner that prevents the accused from telling his or her story in his or her own way, and (4) actively obstructing counsel in his or her work (cited with approval in *R v Van Wissen*, 2018 MBCA 110 at para 141 [*Van Wissen*]).

[78] For an appellate court reviewing the interventions of a trial judge during the examination of witnesses, the standard of review depends on the nature of the complaint raised.

[79] The standard of review for an alleged evidentiary error is correctness (see *Samaniego* at para 25).

[80] Aside from pure questions as to the admissibility of a piece of evidence, a trial judge's trial management decisions are an exercise of discretion. Accordingly, an appellate court must show deference to such decisions absent an error in principle or an unreasonable exercise of discretion (see *ibid* at para 26).

[81] Finally, where the complaint is that the cumulative effect of the trial judge's interventions produced an unfair trial, the applicable standard of review is the reasonable observer test based on a consideration of the record as a whole (see *Van Wissen* at para 140; *R v Churchill*, 2016 NLCA 29 at paras 14-17; *R v Schmaltz*, 2015 ABCA 4 at paras 23-24 [*Schmaltz*]; *Valley* at 232).

Analysis

[82] At the outset of my analysis of the trial judge's interventions during defence counsel's cross-examination of witnesses, it is important to address three submissions that underlie much of the accused's argument. As I will explain, in my respectful view, each is based on a misunderstanding of the law.

[83] First, the accused says that none of the interventions by the trial judge were justified because they were not triggered by an objection by the Crown. The record is quite clear that defence counsel and the trial judge had a different understanding of a trial judge's gatekeeping function. For example, at one point the trial judge said his judicial gatekeeping role required him to "determine what is appropriate questioning, whether the Crown sits during the entire time or not."

[84] In my view, the trial judge's understanding of his gatekeeping role was correct. The mere fact that a party does not object to a question or the tendering of evidence does not relieve a trial judge from their gatekeeping duty. Whether the trial judge struck an appropriate balance in the case is a matter I will discuss in greater detail later, but the reality that his perception of the cross-examination of a witness was improper, without objection by the Crown, is not determinative as to whether the trial judge improperly abandoned his duty to be impartial and entered the fray (see *R v Sipes*, 2012 BCSC 765 at paras 13-15).

[85] Next, during the trial, and again in this Court, counsel for the accused repeatedly raised this Court's decision in *R v Wallick* (1990), 69 Man R (2d) 310, 1990 CanLII 11128 (MBCA) [*Wallick*], to challenge the trial

judge's interventions during cross-examination. Some care needs to be taken with the continued use of *Wallick* as a precedent.

[86] When *Wallick* was quoted to the trial judge, he said he had "no problem" with the idea that, in a criminal case, the accused has great latitude in the right of cross-examination so long as they do not "abuse that right" (*ibid* at para 2).

[87] A core principle in *Wallick* remains true today, that one focus for a trial judge before intervening is whether an accused is abusing the right of cross-examination in some way—for example, asking questions that are irrelevant or in breach of some exclusionary rule. To that I would add, even when an accused abuses their right of cross-examination, the manner of a trial judge's intervention must be done in a respectful and judicial manner.

[88] However, *Wallick* is difficult to reconcile with subsequent cases from this Court, such as *Lynxleg*, and from the Supreme Court, such as *Samaniego*, that recognize that, as part of their trial management role as the evidentiary gatekeeper, trial judges have discretion to curtail cross-examination in appropriate cases. This understanding of a trial judge's role is hardly controversial. It is difficult to fathom that a new trial must be ordered simply because a trial judge reasonably curtailed cross-examination that was unduly repetitive, rambling, argumentative, misleading or irrelevant, or the trial judge asked a question to clarify an uncertainty in a witness' testimony.

[89] Indeed, the statement in *Wallick* that a conviction must always be quashed when cross-examination has been curtailed without a valid purpose (see para 2) has been supplanted by the more nuanced analysis set out in

Samaniego as to the effect of the curative proviso in such cases (see paras 65-78).

[90] However, what is the most contentious part of *Wallick* as a relevant precedent is the result the Court reached based on the facts. In today's landscape, the facts of *Wallick* would point to a duty on a trial judge to curtail cross-examination as opposed to the conclusion in *Wallick* that it was an error to do so.

[91] *Wallick* was a case where a trial judge intervened in the cross-examination of a complainant in a sexual assault allegation when defence counsel's cross-examination was based on myths and stereotypes. In short, it was being suggested that the complainant was not credible because she failed to meet some idealized standard of conduct before and after intercourse, which is improper cross-examination that should be curtailed by a trial judge immediately and in the clearest terms (see *R v CAM*, 2017 MBCA 70 at paras 51-52).

[92] I expect the result in *Wallick* today would be quite different; it is appropriate for defence counsel's cross-examination of a witness to be curtailed when it is based on forbidden reasoning. That is the view this Court has endorsed in cases such as *Lynxleg* and *Van Wissen*.

[93] The final general legal assertion the accused makes is the suggestion that the Supreme Court has "made it clear that a trial judge should only intervene in defence led cross-examination when the prejudice substantially outweighs the value of the evidence". Interestingly, while *Samaniego* is cited for this proposition in the accused's factum, no passage of that decision was identified as standing for it.

[94] It is instructive to return to basic principles to address the position of the accused. At common law, a trial judge has a residual discretion to exclude relevant and otherwise admissible evidence when its prejudicial effect exceeds its probative value in the case of evidence tendered by the Crown. In the case of relevant and otherwise admissible evidence tendered by the defence, this residual discretion is narrower and is restricted to situations where the prejudicial effect of admitting the evidence "substantially" outweighs its probative value" (*R v Seaboyer; R v Gayme*, [1991] 2 SCR 577 at 610-11, 1991 CanLII 76 (SCC)).

[95] In both scenarios, trial judges have the residual discretion to exclude relevant evidence that does not run afoul of an exclusionary rule based on a cost/benefit analysis. This power is not, as the accused is claiming here, a power to admit evidence that is either irrelevant or otherwise excluded by an exclusionary rule. As was explained in *R v Pearce (ML)*, 2014 MBCA 70, the justification for the common law residual discretion to exclude evidence that is both relevant and otherwise admissible is to ensure the "integrity" (at para 61) of the fact-finding process when evidence is of "questionable value" (*ibid*; see also *R v Collins*, 2001 CanLII 24124 at para 19 (ONCA)).

[96] When the record in this case is carefully reviewed, there was no instance where the trial judge exercised his common law residual discretion to prevent the admission of relevant and otherwise admissible evidence sought to be tendered by the accused. The trial judge's interventions were restricted to situations where the accused was attempting to admit irrelevant evidence or evidence that ran afoul of a statutory or common law rule or some other valid purpose.

[97] Before turning to the question of whether the cumulative effect of the trial judge's interventions produced an unfair trial, three specific complaints raised by the accused require discussion.

i. Allegation of Paluk Accessing Child Pornography

[98] Paluk was a *Vetrovec* witness (see *Vetrovec v The Queen*, 1982 CanLII 20 (SCC) [*Vetrovec*]). Not surprisingly, defence counsel conducted a comprehensive assault on Paluk's character during cross-examination.

[99] The police investigation established that, in the days prior to the shootings on Kuz Road, Paluk's mobile phone was used to access pornography, including internet websites relating to "teen" and "chubby teen" pornography.

[100] Paluk readily admitted in his testimony that he accessed this pornography for his personal sexual gratification.

[101] Defence counsel repeatedly suggested to Paluk that Paluk was viewing "child" pornography. Paluk consistently denied the allegation, testifying that none of the images he accessed were of individuals under the age of eighteen.

[102] The trial judge gave defence counsel a wide licence to challenge Paluk's evidence. When the jury and Paluk were out of the courtroom during a recess, the trial judge asked where defence counsel was going with this line of questioning because Paluk had admitted looking at pornography but claimed it was not child pornography. Defence counsel told the trial judge he would "prove" the allegation and that he should not be "handcuffed."

[103] The trial judge asked: “Have I handcuffed you?” Defence counsel said no but advised he wanted the opportunity to continue the child pornography allegation further.

[104] When the trial resumed, defence counsel continued to repeatedly ask Paluk about his pornography accessing habits; Paluk continued to freely admit he accessed pornography related to adults. After several similar answers by Paluk, the trial judge asked defence counsel to “move on.”

[105] Defence counsel asked for permission to put a specific example of child pornography to Paluk. The trial judge said that would be appropriate. Defence counsel then referred Paluk to the police report of data extracted from his mobile phone, which identified twenty-one times on November 16, 2018 that the phone was used to access websites relating to teen and chubby teen pornography. Paluk admitted he did that.

[106] Defence counsel repeatedly suggested to Paluk that he was looking at child pornography. Paluk denied the claim each time. After several similar answers from Paluk, the trial judge intervened and said to defence counsel: “You have his evidence.” The trial judge asked defence counsel: “Do you have anything to contradict that with?” Defence counsel said “[y]es”, stating there were “text messages.” The trial judge then instructed defence counsel to proceed.

[107] Defence counsel made no reference to any text messages when cross-examination was recommenced. Again, he simply referred to the police report. After several allegations of accessing child pornography were denied, the trial judge intervened and said that, unless defence counsel had some proof of Paluk accessing child pornography, the questioning had become repetitive.

Defence counsel advised he had no images to show Paluk; all he had was the police report. The trial judge then stated: “then you have his answer.”

[108] When cross-examination recommenced, defence counsel continued to ask Paluk questions about accessing pornography. Paluk said repeatedly he did access pornography, but none of it involved individuals under the age of eighteen. Eventually the trial judge intervened again and said to defence counsel that he “asked the question” and “got an answer”, and it was time to move on. Defence counsel continued to ask a few more questions about the subject of pornography and then finally moved onto a new area.

[109] It is difficult to see any error in the trial judge’s approach; if anything, he was too indulgent with defence counsel. This area of inquiry could have been shut down far earlier than when the trial judge intervened.

[110] Paluk’s accessing pornography prior to the shootings on Kuz Road was a collateral fact (see *R v Krause*, 1986 CanLII 39 at para 17 (SCC)). The collateral facts rule is designed to ensure the integrity of the trial process (see *R v Peters*, 2023 MBCA 96 at para 20). Absent a recognized exception to the collateral facts rule, which was not suggested in this case, Paluk’s evidence that the pornography he accessed on the days leading up to the shootings on Kuz Road involved individuals age eighteen or older was final (see *ibid*; see also *R v OCFG (No 1)*, 2025 MBCA 27 at para 228).

[111] Defence counsel’s submission to the trial judge that he was entitled to prove his allegation by repeating the same question was contrary to the collateral facts rule. Moreover, defence counsel’s cross-examination was entirely repetitive. In my view, the trial judge provided defence counsel with ample opportunity to challenge Paluk’s character given his pornography

habits. Also, there was nothing disrespectful or injudicious with the trial judge's approach.

ii. Paluk's Criminal Record

[112] Defence counsel cross-examined Paluk on his criminal record and, in particular, what offence he accepted responsibility for in relation to the shootings on Kuz Road.

[113] Unfortunately, in his questioning, defence counsel misdescribed the offence Paluk pleaded guilty to. He said it was "[i]ntentional discharge of a firearm while being reckless on -- with respect to [Harasymko's vehicle]." Paluk pleaded guilty to an offence contrary to section 244.2(1) of the *Code*, not section 244(1). Paluk did not accept responsibility for discharging a firearm "at a person" (see the *Code*, s 244(1)), which was the premise of defence counsel's cross-examination.

[114] Matters were not assisted by the fact that defence counsel relied on the statement of offences the police had set out in a search warrant for Paluk's home as opposed to the Court's records of Paluk's conviction, which is the usual course for examination of a witness as to a previous conviction under section 12 of the *Act*.

[115] The trial judge intervened and asked some basic questions of Paluk and counsel to clarify what offence Paluk pleaded guilty to. He said he wanted an accurate statement of Paluk's conviction put to him, as Paluk was confused by defence counsel's suggestion but did not deny pleading guilty to an offence relating to discharging a firearm on Kuz Road.

[116] I see no difficulty with the trial judge's intervention or his manner. Section 12 of the *Act* requires basic accuracy. This is especially the case as Paluk freely admitted he had broken the law for his conduct; there should have been no mystery as to what offence Paluk pleaded guilty to. When defence counsel later retrieved the court document, he realized he had been mistaken and apologized for having "misspoke." I see no difficulty with the trial judge's intervention or his manner; defence counsel misdescribed the nature of Paluk's prior conviction, and the trial judge intervened merely to ensure accuracy and fairness to the witness.

iii. Requiring the Full Context of a Prior Statement to Be Put to a Witness

[117] A similar issue arose during defence counsel's cross-examination of Paluk, Goodfellow and Denoyer. With each witness, defence counsel paraphrased prior statements of the witness to police and then attempted to suggest their trial testimony was different as allowed for by section 10 of the *Act*.

[118] In each of these examples, the trial judge expressed the concern that the witnesses were confused by the suggestion as to what each witness had told police, or that defence counsel was parsing a prior statement and was not putting to the witness the full context of what they had previously told the police. The trial judge's intervention was understandable; on several occasions, counsel for the accused asked complex compound questions or quoted lengthy portions of a police statement that made it difficult to decipher what was being inquired about.

[119] In the case of both Paluk and Denoyer, defence counsel accused the trial judge, outside the presence of the jury, of improperly interfering with cross-examination. The trial judge disagreed and commented that he thought it necessary, in each instance, to require the witnesses to be provided with their prior statements to ensure fairness to them and clarity in the evidence.

[120] As Conrad JA commented in *R v DJR*, 2014 ABCA 263: "Cross-examination on a prior statement should be fair and clear, and all parties should understand the exact portion of the previous statement that was being put to the appellant as cross-examination" (at para 73). As part of their gatekeeping role, a trial judge has the discretion to require the cross-examining party to put portions of the statement to the witness to ensure fairness (see S Casey Hill, David M Tanovich & Louis P Strezos, "McWilliams' Canadian Criminal Evidence", 5th ed (December 2025) at s 21:190, online: (WL) Thomson Reuters Canada; Sidney N Lederman, Michelle K Fuerst & Hamish C. Stewart, *The Law of Evidence in Canada*, 6th ed (Toronto: LexisNexis, 2022) at para 16.194).

[121] I have considered the interventions of the trial judge where he exercised his discretion to require that Paluk, Goodfellow and Denoyer be provided with copies of their prior statements to ensure fairness. In each case, I have not been persuaded that the trial judge erred in principle or unreasonably exercised his discretion. There was an evidentiary foundation for each of the trial judge's exercises of discretion. Also, in each of these interventions, the trial judge was measured and judicial in his manner of intervention.

iv. Cumulative Effect Analysis

[122] In addition to the interventions by the trial judge, I have discussed some other features of this trial that are relevant to a cumulative effect analysis as to whether the trial judge's interventions gave rise to an unfair trial.

[123] The first is the "play[ing] cute" incident.

[124] Before the jury was recalled after a lunch break during the cross-examination of Paluk, defence counsel complained to the trial judge that he was constantly interrupting him. In response to that admittedly opaque accusation, the trial judge became angry and asked defence counsel for specifics. He said: "put the facts on the table. Don't suggest things".

[125] Regrettably, both the trial judge and defence counsel then became uncivil with each other. Defence counsel refused to answer the trial judge's question and identify what interventions were improper; the trial judge responded by saying defence counsel was "play[ing] cute."

[126] Thankfully, matters quickly de-escalated and a more respectful discussion followed. The trial judge said he had been "very careful" as to when to intervene during defence counsel's questioning of witnesses. Defence counsel said that was true but he asked the trial judge to be more docile. The trial judge stated: "I have your point. I don't agree with it."

[127] Fortunately, this incident was outside the presence of the jury, which renders its impact less significant (see *Van Wissen* at para 144; *Tymkin v Ewatski et al*, 2014 MBCA 4 at para 44 [*Tymkin*]).

[128] The next noteworthy feature of the trial is the accused's claim that the trial judge applied a double standard by not requiring the Crown during its direct examination of Goodfellow to show the witness his multiple prior statements. The accused says this was contrary to the approach the trial judge took with defence counsel.

[129] The trial judge heard the accused's objection outside the presence of the jury. He accepted the position of the Crown that it was not relying on the *Act* to impeach its own witness; rather, it was simply refreshing Goodfellow's memory on one of his statements. Crown counsel said that, if what he was doing was in any way misleading, defence counsel would have the opportunity to correct matters in cross-examination.

[130] I see no error in principle in the trial judge's approach, let alone this incident being evidence of the trial judge applying a double standard against the accused. Throughout this incident, the trial judge's approach was entirely judicial.

[131] The accused also highlights that there were instances during the trial where the trial judge refused to excuse the jury when defence counsel wished to make a legal submission, dealt with objections raised by defence counsel summarily in the jury's presence, or refused to allow the accused to tender irrelevant evidence in the form of all of the firearms seized from Paluk's residence that did not fire .30-calibre ammunition.

[132] It is important to remember that a trial judge "should control, direct, and administer the trial in an effective and efficient way" (*Samaniego* at para 125). I have reviewed each of the examples of alleged unfairness cited by the accused in his written and oral submissions. It is sufficient to say that

it is contrary to their role for a trial judge to permit irrelevant evidence to litter the record. Also, a trial judge has the discretion to decline to hear a frivolous motion as part of their trial management powers (see *ibid*). While the trial judge was firm at times in his manner, he was judicious in each of the examples cited by the accused.

[133] A final important feature of the record is that, right after Paluk finished his evidence, the trial judge gave a mid-trial instruction to the jury that sometimes "heated exchanges" occur during a trial between counsel or the judge and counsel. He said this was not unusual and that they should not see anything as a sign of "animosity". He advised that he wanted them to be clear that their "focus should only be on the evidence [they] hear in relation to the charge."

[134] What would the informed observer conclude about the fairness of the trial based on the trial judge's interventions when the record is considered as a whole?

[135] The inquiry as to the "perception of unfairness is fact specific and relative to the circumstances of the particular trial within which they are observed" (*Lynxleg* at para 23). As was said in *Tymkin*, "the impugned behaviour must be considered in the context of the entire case by considering the quality and quantity of the interventions or comments and their effect on a party's presentation of their case" (at para 43).

[136] There is a divergence in the jurisprudence on the reasonable observer test in relation to whether the interventions by a trial judge rendered a trial unfair. In *R v Hamilton*, 2011 ONCA 399 [*Hamilton*], the Ontario Court of Appeal advised that there is a strong presumption that a trial judge has not

unduly intervened in a trial (see para 29). In contrast, in *Schmaltz*, a majority of the Alberta Court of Appeal stated that, unlike a claim of reasonable apprehension of bias, there is no reason to presume that a trial judge has not unduly intervened in a trial when applying the reasonable observer test (see para 24).

[137] This Court has historically favoured the Ontario approach (see *R v AAFP*, 2025 MBCA 92 at para 18). However, this is not a case that turns on whether a presumption that the trial judge did not unduly intervene was rebutted. As I will explain, the record here simply does not objectively establish that the trial judge's interventions resulted in an unfair trial.

[138] I would begin with the observation in *Van Wissen* that the role of a trial judge in a criminal trial—particularly a homicide case involving the tragic death of a young person—is "very demanding" (at para 137; see also *Monias* at para 7).

[139] As I explained, the reasonable observer is aware that a trial judge is not obligated to sit passively and silently during a trial until summoned by the parties to resolve a dispute. The trial judge correctly understood his evidentiary gatekeeping role.

[140] Next, consistent with *Wallick* and *Tymkin*, the trial judge intervened to prevent abuses of the right of cross-examination by defence counsel. In the examples cited in relation to defence counsel's cross-examination of Paluk, Goodfellow and Denoyer, the trial judge's interventions were for a valid purpose (either as required by the law of evidence or a reasonable exercise of discretion to ensure accurate fact-finding and/or trial fairness). In none of these interventions was his manner of intervention injudicious. The accused's

claim that the trial judge applied a double standard by making interventions against the defence but allowing the Crown to conduct its case as it saw fit is not persuasive.

[141] The trial judge's mid-trial instruction properly explained to the jury that they should take nothing from any debate between counsel or counsel and the trial judge as to the questioning of witnesses.

[142] While a trial judge should refrain from imparting a sense of impatience or discourtesy, even when that occurs throughout a trial, it may not be enough to render the trial unfair (see *Tymkin* at para 43). While courtesy is to be expected during a criminal trial, appellate courts do not hold counsel or trial judges to a standard of perfection (see *Gager* at para 153) if trial fairness has not been compromised based on an assessment of the overall context.

[143] As I said previously, both defence counsel and the trial judge should have handled the playing cute incident differently, but, to each of their credit, matters did not escalate.

[144] This was not a trial where the trial judge engaged in a constant pattern of incivility. In fact, several times during the trial, both defence counsel and the trial judge complimented each other for the skill and courtesy each displayed during the conduct of a difficult and emotional murder trial. The playing cute incident was an isolated episode of incivility (see *Hamilton* at para 30; *Chippewas* at para 243) that, importantly, was outside the presence of the jury and was quickly de-escalated by cooler heads prevailing.

[145] The playing cute incident is not an event of sufficient magnitude—either standing alone or considering the record as a whole—that renders the trial unfair.

[146] The miscellaneous complaints raised by the accused as to how the trial judge conducted the trial fall far short of the type of trial unfairness discussed in *Valley*.

[147] In summary, this was a fair trial. None of the trial judge's interventions during the examination of witnesses or his manner of intervention were inappropriate. He addressed improper cross-examination by defence counsel or reasonably exercised his discretion to ensure accurate fact-finding and trial fairness. The one incident of incivility was isolated and the jury was not privy to it. Moreover, the trial judge made sure to instruct the jury to not be influenced by debate between counsel or counsel and the Court as to the rules of evidence. The accused's argument that the trial judge unreasonably curtailed or rushed defence counsel's ability to make submissions or tender evidence is also not persuasive.

[148] In my view, a reasonable person reviewing the whole of the proceedings in this case would not conclude that the proceedings were unfair because of the interventions by the trial judge, including his manner of interventions.

Issue Two: Reasonableness of the Jury's Verdict

Introduction

[149] The standard of appellate review of the jury's murder verdict under section 686(1)(a)(i) of the *Code* is whether the verdict is one that a properly instructed trier of fact, acting judicially, could reasonably have rendered. In performing this analysis, a reviewing court must consider and, to some extent, re-weigh the evidence and its effect through the lens of judicial experience but with appropriate deference to the trier of fact's fact-finding (see *R v Hall*, 2018 MBCA 122 at paras 164, 166 [*Hall*]).

[150] In *Villaroman*, Cromwell J stated: "Where the Crown's case depends on circumstantial evidence, the question becomes 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 *Hall* at para 165). This analysis tasks the appellate court with focusing on whether the inferences drawn by the trier of fact, having regard to the standard of proof, are reasonably open to it (see *Villaroman* at para 67).

[151] Post-*Villaroman*, some controversy has arisen as to the parameters of the comments in *Villaroman* when the inferential reasoning based on circumstantial evidence is directed to proof of *mens rea* as opposed to the *actus reus* (see *R v Cook*, 2023 SKCA 117 at para 79; *R v Dingwall*, 2021 SCC 35; *R v Delorme*, 2021 ABCA 424 at paras 62-72 [*Delorme*]).

[152] Historically, the view of this Court has been that *Villaroman* is a case of universal application such that the principles discussed therein are not

limited to cases where the inferential reasoning, based on circumstantial evidence, is directed to proof of the *actus reus* only (see e.g. *R v KB*, 2025 MBCA 73; *R v Monro*, 2025 MBCA 64; *R v Assi*, 2023 MBCA 2; *R v Bradburn et al*, 2022 MBCA 98; *R v Beardy*, 2022 MBCA 90; *R v Contois*, 2020 MBCA 89; *R v Giesbrecht*, 2019 MBCA 35; *R v Ewert*, 2019 MBCA 29; *R v Houle*, 2016 MBCA 121). I would note that the parties in this case accepted that *Villaroman* applied to the question of the accused's murderous intent; I agree with that view.

[153] A final introductory comment is that it is common ground that the death of the victim was a culpable homicide—either murder or manslaughter—because her death was caused by the unlawful act of the discharge of a firearm at an occupied vehicle on Kuz Road (see the *Code*, s 222(5)(a)).

[154] The accused says any verdict of culpable homicide against him was unreasonable. I will begin with the accused's claim that it was unreasonable for the jury to conclude he was the one who fired the fatal shot, thus making him guilty of some form of culpable homicide.

The Firing of the Fatal Shot

[155] The case for the Crown as to the firing of the fatal shot rested on both direct and circumstantial evidence. There are several relevant contextual facts for consideration of the jury's finding that the accused fired the fatal shot, thus making him guilty of a culpable homicide.

[156] The fatal shooting on Kuz Road was in an isolated rural location. The shooter had to be either the accused, Paluk or Goodfellow. There was no

evidence that Goodfellow ever possessed a firearm on Kuz Road and the accused did not suggest at the trial that he fired the fatal shot. That left the jury to consider whether the Crown had proven beyond a reasonable doubt that the accused was the fatal shooter.

[157] It is not disputed that Paluk possessed and fired the bolt-action Remington rifle on Kuz Road. That firearm was recovered from his vehicle by police shortly after the fatal shooting. However, it was not the firearm that fired the fatal shot or the three SAVFC cartridges based on the uncontroverted ballistics evidence.

[158] Despite Paluk testifying he fired only two shots on Kuz Road, the physical evidence confirmed that, in fact, he fired five shots from the bolt-action Remington rifle. The five Magnum cartridges seized on Kuz Road established that Paluk fired the bolt-action Remington rifle, reloaded it and continued to fire it.

[159] The Magnum cartridges and SAVFC cartridges were found in two distinct locations. Eyewitnesses put Paluk on Kuz Road where the Magnum cartridges were, not in the ditch where the SAVFC cartridges were found.

[160] According to Murray's evidence, at the time Harasymko's vehicle was accelerating away from where Paluk, Goodfellow and the accused were located, there were two different gunshot sounds, thereby corroborating Paluk's narrative that two firearms were being shot: one by him and one by the accused at roughly the same time.

[161] The victim died from being shot with a .30-calibre bullet. No firearm capable of firing that calibre of ammunition, other than the bolt-action

Remington rifle fired on Kuz Road, was recovered by police and subjected to ballistics testing to see if it fired the fatal shot.

[162] Paluk testified that he asked the accused to back him up when the three vehicles were approaching him on Kuz Road. The accused agreed. The accused then loaded the Winchester rifle and fired it from the side of the road. The accused took the Winchester rifle with him after the shooting and took it into his residence before the police arrived.

[163] The accused does not challenge the adequacy of the trial judge's *Vetrovec* instruction in relation to Paluk. The mere fact that Paluk was a disreputable witness does not mean that a properly instructed jury could not act judicially by accepting Paluk's evidence: that the accused fired the Winchester rifle from the side of Kuz Road (see *R v Ponce*, 2012 MBCA 87 at para 48). The discovery of the three SAVFC cartridges in the ditch away from where Paluk was observed to be by the various eyewitnesses and where the five Magnum cartridges were found is entirely consistent with there being two shooters on Kuz Road, not one.

[164] It is entirely understandable why the jury rejected the defence theory that Paluk was gunslinging: possessing and discharging two firearms at the same time on Kuz Road.

[165] The evidence of A.Z.—that Paluk was a fellow drug dealer and confessed to him of getting away with a murder—was sensational but entirely uncorroborated. A.Z. was a classic jailhouse informant, a type of witness notoriously unreliable without some corroboration. Moreover, Paluk's "confession" to A.Z. was vague in its particulars and was made under conditions that cast doubt on its accuracy, as apparently Paluk made the

comment to gain A.Z.'s trust and obtain a large amount of drugs on credit. It was open to the jury, and not surprising, that they put no reliance on A.Z.'s evidence.

[166] The theory of the defence as to Paluk possessing and wielding two firearms at the same time is also difficult to reconcile with the uncontested evidence. According to the theory, Paluk held and fired two firearms in the few seconds the three vehicles passed by him and, during that fleeting period, he also had time to reload and re-fire the bolt-action Remington rifle. If this difficult feat had been accomplished in the open on the middle of Kuz Road, there likely would have been witnesses to it and other facts would be consistent with that narrative. However, no witness saw Paluk possessing and wielding two firearms, and the other facts of the case do not support that theory.

[167] In terms of the eyewitness evidence, with one exception, the occupants of the vehicles in the three-vehicle procession saw Paluk with one rifle in his hands that he fired towards the sky. Some of the witnesses described the rifle in a manner consistent with it being the bolt-action Remington rifle. No witness described Paluk possessing a firearm resembling the Winchester rifle. Only one witness, Shawn Stefishen (Stefishen), the driver of the last vehicle in the three-vehicle procession, saw another detail. He said, as they approached Paluk, he thought he saw that Paluk had a pipe in his hands that he placed down and then picked up a hunting rifle. However, even Stefishen's account does not assist the accused because he did not say Paluk handled two objects at the same time. He said Paluk put the first object down and then picked up one rifle.

[168] According to Goodfellow's version of events, there were only two firearms in Paluk's vehicle. When Paluk alerted Goodfellow and the accused to the approaching vehicles, Paluk grabbed the bolt-action Remington rifle with a camouflage pattern. He discharged that firearm multiple times towards the sky. Goodfellow did not see Paluk possess and wield two firearms on Kuz Road. Goodfellow was not paying attention to what happened to the Winchester rifle or what the accused was doing on Kuz Road.

[169] In closing submissions and on the appeal, it was suggested the victim was shot by Paluk's semi-automatic Remington rifle that can fire an unknown form of .30-calibre bullet.

[170] Interestingly, while the semi-automatic Remington rifle was seized by the police from Paluk's residence, it was never subject to ballistics testing in relation to the bullet recovered from the victim's body or the Magnum and SAVFC cartridges. At the hearing of the appeal, the panel asked counsel for the accused if ballistics testing of the semi-automatic Remington rifle was ever requested as part of the disclosure process or pursuant to section 605 of the *Code*. The panel was advised it was not.

[171] The panel asked counsel for the accused if the appeal should be adjourned and ballistics testing of the semi-automatic Remington rifle be ordered pursuant to section 683 of the *Code*, as the thrust of counsel's position was the danger of a wrongful conviction due to an inadequate police investigation by their failure to forensically examine and test the semi-automatic Remington rifle. After a recess, the panel was advised by counsel for the accused that the accused wished to proceed with his appeal without further evidence as to ballistics testing of the semi-automatic Remington rifle.

[172] The insurmountable problem with the theory that Paluk's second firearm was the semi-automatic Remington rifle is the geography of Manitoba and the time of Paluk's arrest. After the shootings on Kuz Road, it is not disputed that Paluk, the accused and Goodfellow fled to the east towards Gimli where they were arrested near the accused's residence. The semi-automatic Remington rifle was recovered from Paluk's residence near Komarno, which is due south of where the shootings occurred on Kuz Road. How the semi-automatic Remington rifle travelled from Kuz Road to Komarno in the brief time before Paluk and the others were arrested far to the northeast is an important question the accused's speculative theory that Paluk had two firearms does not address.

[173] Finally, while it was the accused's right to remain silent during the trial, on an appeal, his failure to testify can be used to assess a claim of an unreasonable verdict. As Chartier JA explained in *R v Oddleifson (JN)*, 2010 MBCA 44, "the absence of an innocent explanation, can be considered at the appellate level as a factor in assessing the reasonableness of the guilty verdict" (at para 27; see also *R v George-Nurse*, 2019 SCC 12 at para 2).

[174] I agree with the Crown that it was entirely open to the jury to reach a verdict of some form of culpable homicide based on the accused firing the fatal shot when the direct and circumstantial evidence is viewed cumulatively. The mere existence of evidence which, if accepted, may give rise to a reasonable doubt does not make a verdict unreasonable. I have little difficulty on this record coming to the conclusion that a properly instructed jury, acting judicially, could reasonably have rendered a verdict based on the conclusion that the accused committed culpable homicide when he caused the victim's

death by the unlawful act of discharging a firearm at an occupied vehicle on Kuz Road.

Murderous Intent

[175] Once the jury was satisfied beyond a reasonable doubt that the accused fired the fatal shot, the crucial question that arose was proof of the accused's murderous intent: "what [he] subjectively knew and intended" at the time he discharged the firearm at Harasymko's vehicle (*R v Wakefield*, 2019 SCC 26 at para 2).

[176] At trial, the Crown took the position that proof of the accused's murderous intent turned on the application of section 229(a)(ii) of the *Code*, not section 229(a)(i). Section 229(a)(ii) provides as follow:

Murder **229** Culpable homicide is murder **(a)** where the person who causes the death of a human being **(ii)** means to cause him bodily harm that he knows is likely to cause his death, and is reckless whether death ensues or not[.]	**Meurtre** **229** L'homicide coupable est un meurtre dans l'un ou l'autre des cas suivants : **a)** la personne qui cause la mort d'un être humain : **(ii)** ou bien a l'intention de lui causer des lésions corporelles qu'elle sait être de nature à causer sa mort, et qu'il lui est indifférent que la mort s'ensuive ou non[.]

[177] Section 229(a)(ii) "modestly expands the 'pure' definition of murder set out in s. 229(a)(i)" (*R v Watkins*, 2003 CanLII 3874 at para 58 (ONCA) [*Watkins*]).

[178] Murderous intent within the meaning of section 229(a)(ii) requires proof of (1) subjective intention to cause bodily harm, and (2) subjective knowledge that the bodily harm is of such a nature that it is likely to result in death (see *R v Cooper*, [1993] 1 SCR 146 at 155, 1993 CanLII 147 (SCC) [*Cooper*]). If both requirements are established, the statutory reference to "reckless" in section 229(a)(ii) becomes "an afterthought" (*Cooper* at 154) because, by "necessity", someone with that state of mind is reckless whether death ensues or not (*ibid* at 155).

[179] As was explained in *Watkins*: "The distinction between meaning to kill [section 229(a)(i)] and causing bodily harm knowing that that harm is likely to cause death [section 229(a)(ii)] is a slim one" (at para 63; see also *R v Vaillancourt*, 1987 CanLII 2 at para 11 (SCC) [*Vaillancourt*]). While section 229(a)(ii) is a residue of a much greater historic doctrine of constructive intention for murder, the provision is not designed to water down the fault requirement for murder from subjective intent to mere recklessness (see *Regina v Simpson (No 2)* (1981), 58 CCC (2d) 122 at 144, 1981 CanLII 3284 (ONCA); Don Stuart, *Canadian Criminal Law: A Treatise*, 7th ed (Toronto: Carswell, 2014) at 535; Kent Roach, *Criminal Law*, 7th ed (Toronto: Irwin Law, 2018) at 432).

[180] Section 229(a)(ii) addresses the situation "where it is unclear whether the accused *meant* to kill the victim, but where there is evidence to establish that there was an intention to cause serious bodily harm that was likely to result in death" (Morris Manning & Peter Sankoff, *Criminal Law*, 4th ed (Markham: LexisNexis, 2009) at 741) [emphasis in the original].

[181] In this case, to convict the accused of second degree murder, the Crown had to establish beyond a reasonable doubt that he intended to cause bodily harm to the victim by the act of discharging a firearm at Harasymko's vehicle and that, while doing so, he subjectively foresaw that death was a likely consequence of that act (see *Vaillancourt* at para 11).

[182] The theory of the Crown in its closing submission to the jury was that the accused, given that he was a hunter, "knew what it meant to pull the trigger of a gun." The Crown alleged that, once Paluk asked for backup, the accused aimed at Harasymko's vehicle with the Winchester rifle at "the only thing he could see; the taillights" and fired three shots. The Crown alleged that that act—firing three shots with a rifle at the tail lights of an occupied vehicle driving erratically from about fifty to one hundred yards—satisfied the requirements of section 229(a)(ii) of the *Code*.

[183] There was no direct evidence as to the accused's state of mind; this aspect of the Crown's case was entirely circumstantial. To establish the requirements of section 229(a)(ii), the Crown relied on the common sense inference as to the accused's state of mind that was described by Cory J in *R v Seymour*, 1996 CanLII 201 at para 19 (SCC), as follows :

> [I]n determining the accused's state of mind at the time the offence was committed, jurors may draw the inference that sane and sober persons intend the natural and probable consequences of their actions. Common sense dictates that people are usually able to foresee the consequences of their actions. Therefore, if a person acts in a manner which is likely to produce a certain result it generally will be reasonable to infer that the person foresaw the probable consequences of the act. In other words, if a person acted so as to produce certain predictable consequences, it may be inferred that the person intended those consequences.

[184] As was explained in *R v Walle*, 2012 SCC 41 [*Walle*], the common sense inference is a useful "marker [for the trier of fact] against which to measure the rather amorphous concept of intent" (at para 63). The inference that a sane and sober person intends the natural and probable consequences of their actions is a "*permissive* inference, not a presumptive one" (see *R v Hodgson*, 2024 SCC 25 at para 67 [*Hodgson*]) [emphasis in original]. Before relying on this analytical tool, the trier of fact must carefully consider the evidence that points away from the inference (see *ibid* at paras 67-68; *Walle* at para 63).

[185] The following is made clear in *Walle* at para 67:

> [If] there is no evidence that could realistically impact on whether the accused had the requisite mental state at the time of the offence, or if the pertinent evidence does not leave the jury in a state of reasonable doubt about the accused's intent, then the jury may properly resort to the common sense inference in deciding whether intent has been proved.

[186] Based on my review of the transcript, there was little in the way of "evidence that could [have] realistically [borne] on the accused's mental state" (*Walle* at para 65) at the time of the shootings on Kuz Road. The one exception is that, in his jury instruction, the trial judge did caution the jury to consider what little evidence there was as to the accused's intoxication, as he had been at the bar socializing prior to the shootings on Kuz Road. This was necessary on the trial judge's part, but the evidence here is far removed from the type of advanced intoxication evidence that would realistically impact whether the accused had the requisite mental state at the time of the offence (see *R v Daley*, 2007 SCC 53 at para 42).

[187] In terms of the reasonableness of the verdict of second degree murder, what are the natural and probable consequences of discharging a firearm at an occupied vehicle that is moving?

[188] In *R v Bains*, 1985 CarswellOnt 1590 at para 27 (ONCA) [*Bains*], Cory JA stated:

> All firearms are designed to kill. A handgun is a particularly insidious and lethal weapon. It is easy to carry and conceal, yet at close range, it is every bit as deadly as a .50 calibre machine gun. It follows that when, at close range, a handgun is pointed at a vital portion of the body of the victim and fired, then in the absence of any explanation the only rational inference that can be drawn is that the gun was fired with the intention of killing the victim. No other reasonable conclusion can be reached: a deadly weapon was used in the very manner for which it was designed – to cause death. It is appropriate to conclude that in these circumstances the gun was fired in order that it might fulfil its design function and kill. An element of surprise arises only if death does not occur.

[189] In addition to *Walle*, a number of appellate authorities have highlighted that, in the absence of evidence to the contrary, the act of pointing and discharging a firearm at a vital portion of a victim's body can be a sufficient evidentiary foundation for the trier of fact to employ the common sense inference to decide subjective intent (see *R v Singharath*, 2023 SKCA 6 at paras 27-29; *R v Weng*, 2022 BCCA 332 at para 70; *Delorme* at para 39; *R v McArthur*, 2013 SKCA 139 at para 10; *R v Arrieta*, 2012 BCCA 402 at para 12; *Bains* at para 47).

[190] While I would endorse this line of authority, the one caution I would take with reading the jurisprudence in this area is that many of the cases involve handguns, shotguns or rifles that were fired at a vital portion of a victim's body at a short distance.

[191] It is important to not forget the comment in *Bains* that "[a]ll firearms are designed to kill" (at para 27). Rifles are intended to kill at long distances. The composition of such firearms is tailored to meet that objective. Some individuals, such as hunters, shooting hobbyists, or those with law enforcement or military training, are adept at marksmanship at long distances with rifles. All of this to say that a rifle shot at a long distance can be just as dangerous as a firearm shot at a short distance.

[192] The common sense inference resulting from pointing and discharging a firearm is not limited to instances where the firearm is discharged at close range; that reasoning ignores the inherent dangerousness of firearms at long distances (see *Regina v Turner*, [1967] 1 CCC 1 at 7-8, 1966 CanLII 546 (BCCA), aff'd [1967] 1 CCC 1 at 33 (SCC)).

[193] In their weighing of the common sense inference, the trier of fact needs to consider the whole of the firearms evidence, which will include:

1) the nature and lethality of the firearm;

2) the condition of the firearm;

3) the range of the shot given the firearm used;

4) how the firearm was aimed;

5) the skill of the shooter given their firearms experience;

6) the number of shots taken; and

7) any motive for the shooting.

[194] I have no difficulty with the position of the Crown that the discharging of the Winchester rifle, a firearm used for hunting and capable of firing .30-calibre ammunition, on three occasions at an occupied vehicle at a distance of about fifty to one hundred yards by a person familiar with firearms, *could* give rise to the application of the common sense inference to establish murderous intent for the purposes of section 229(a)(ii) of the *Code* even though the accused had no motive for the shooting other than, as Paluk requested, to back him up. The difficulty here is that section 229(a)(ii) required proof beyond a reasonable doubt that the accused discharged the Winchester rifle with the intention of causing bodily harm and not for another purpose based on the evidence or its absence (see *Villaroman* at para 55).

[195] Before discussing my analysis, it is important to highlight what is and what is not permissible in appellate review of the reasonableness of a jury's verdict in a case such as this that depends on circumstantial evidence to distinguish which form of culpable homicide the accused is guilty of.

[196] The role of this Court is not to act as a "13th juror" (*R v WH*, 2013 SCC 22 at para 27 [*WH*]). The inference(s) to be drawn on the evidence or its absence is not a matter for this Court; that is the providence of the jury alone. As well, appropriate appellate deference requires this Court to not second guess the jury's inferential reasoning as to what separates reasonable doubt from speculation (see *Hall* at para 166; *Villaroman* at paras 55-56).

[197] As was explained in *WH*: "Trial by jury must not become trial by appellate court on the written record" (at para 34). A jury has "considerable leeway" (*R v Biniaris*, 2000 SCC 15 at para 24 [*Biniaris*]) in their fact-finding and in their ultimate assessment of whether the Crown has proven the case

beyond a reasonable doubt. The important but limited role of this Court is to see whether there is evidence in the record to support the verdict and, if so, does the jury's verdict conflict with the bulk of judicial experience (see *WH* at para 28). That role is captured by Hamilton JA's comments in *R v Green*, 2019 MBCA 53, where she stated that the Court of Appeal must ask itself "whether the jury's verdict is supportable on *any* reasonable view of the evidence and whether proper judicial fact-finding applied to the evidence *precludes* the conclusion reached by the jury" (at para 50) [emphasis in the original].

[198] As was explained in *Biniaris*: "The determination of the intent or foresight of a person at the time of his participation in a homicide is often a difficult question of fact" (at para 51). The jury in this case was obviously troubled by the question of the accused's intent. During their deliberations, they asked a question: "Does intentionally aiming/pointing a firearm and discharging at a vehicle with passengers confirm intention to commit murder?"

[199] The lens of judicial experience informs me that the problem with the reasonableness of the jury's verdict, in terms of second degree murder as opposed to manslaughter, is that the act of discharging a firearm with an intention to cause mischief in relation to property is not automatically synonymous with also having an intention to cause bodily harm to a person in close proximity to the mischief being caused (see e.g. *R v Russell*, 2023 BCSC 1123 at paras 132-33). It is important to repeat that section 229(a)(ii) is "limited to cases where the accused intended to cause bodily harm to the victim" (*Vaillancourt* at para 11; see also *Hodgson* at paras 48-51).

[200] There are two aspects of the evidence that cause me to conclude that the jury's fact-finding on murderous intent was sufficiently "flawed" (*Biniaris* at para 39) to produce an unreasonable result: a verdict of second degree murder as opposed to manslaughter (see *ibid*).

[201] First, unlike cases such as *Walle*, there is no evidence that the accused pointed and fired the Winchester rifle at a vital part of the body of any of the occupants of Harasymko's vehicle. In fact, that was not the theory of the Crown in the closing address to the jury, which was that the accused was shooting at the dark vehicle's tail lights as that was all he could likely see in the unlit rural location from about fifty to one hundred yards.

[202] What happened to one of the three shots the accused fired from the Winchester rifle is unknown. However, the location in which the other two shots struck Harasymko's vehicle gives rise to the inference that the accused was not discharging the firearm at the occupants in the cab of the vehicle to cause bodily harm; he was shooting at the vehicle's tail lights, as the Crown contended, to scare them away as part of the plan to back up Paluk.

[203] At the hearing of the appeal, the parties both conceded that, had the Winchester rifle been pointed and fired at the windows of Harasymko's vehicle, that act—intentionally shooting a rifle discharging a .30-calibre bullet at a vital portion of the body of a victim—would dispel any concerns about a trier of fact relying on section 229(a)(ii) to satisfy the proof of the *mens rea* of murder. I agree that would be unambiguous evidence of an intent to cause bodily harm that would be subjectively foreseeable that death was a result (see *Walle*).

[204] My other concern is that, while the accused's behaviour is highly blameworthy and resulted in a tragic death of a young person, the conditions under which the Winchester rifle was fired reasonably gave rise to the inference of an errant bullet based on a state of mind of recklessness, as opposed to a requirement of section 229(a)(ii)—an intention to cause bodily harm to the victim.

[205] Several aspects of the evidence are important. The shooting conditions at the time were not optimal; it was dark. The fishtailing of Harasymko's vehicle on a gravel road made aiming at it in a precise manner challenging. While the accused was familiar with firearms, the distance between him and Harasymko's vehicle was not great for a rifle (about fifty to one hundred yards); the sight on the Winchester rifle was defective according to Paluk, an experienced hunter. While the result of the accused's incautious decision was tragic, it cannot be said with the requisite certainty on these facts that his intention was for an occupant of the vehicle to be shot, as opposed to the vehicle's tail light.

[206] In my view, the combined effect of the circumstantial evidence gives rise to the conclusion that the application of the common sense inference on these facts would not allow a properly instructed jury acting judicially to conclude that murderous intent, within the meaning of section 229(a)(ii), had been established beyond a reasonable doubt. The circumstances here, in terms of murder, amount to a reasonable inference other than guilt given the evidence and the absence of evidence, assessed logically, and in light of human experience and common sense (see *Villaroman* at paras 36, 55). In my judgment, the verdict of second degree murder was unreasonable within the meaning of section 686(1)(a)(i) of the *Code*.

[207] In terms of a remedy, while the accused was not properly convicted of second degree murder, I believe that no properly instructed jury acting reasonably could have reached a conclusion more favourable to him on this record other than that he was guilty of the lesser included offence of manslaughter (see the *Code*, ss 686(1), 686(3); *R v Turner*, 2023 MBCA 40 at para 55).

Disposition

[208] In the result, I would dismiss the accused's appeal and substitute a verdict of manslaughter for that of second degree murder.

[209] I am satisfied that the factual record is such that this Court can impose the manslaughter sentence that is warranted by law. Accordingly, I direct the registry, after consulting with counsel, to set a half-day manslaughter sentencing hearing before this panel as soon as conveniently possible and no later than June 1, 2026.

[210] As part of the sentencing process, I would direct that the parties file all relevant background and impact materials being relied on for the sentencing in the form of a supplemental appeal book and their written submissions as to a fit manslaughter sentence, not to exceed fifteen pages, by the date set by the registry in advance of the scheduled sentencing hearing.

[211] One final comment.

[212] As was explained in *Schrof v Schrof*, 2025 MBCA 49 at para 42 [*Schrof*], appellate counsel have the duty to provide the Court with a complete,

but succinct, appellate record. This is necessary for the proper administration of justice.

[213] In many cases, filings in accordance with the rules of this Court will meet counsel's duty but that may not be the case in a complex appeal where there is a voluminous record and/or numerous legal authorities being relied upon.

[214] Since February 5, 2024, the right of a party to file a condensed book on an appeal has been recognized (see Manitoba Court of Appeal, "Consolidated Practice Direction" (5 February 2024) at s 2c(xiv), online (pdf): <manitobacourts.mb.ca/site/assets/files/1139/consolidated_practice_direction_amended_-_january_13_2026.pdf>). The liberal use, in conformity with the Consolidated Practice Direction, of a properly prepared condensed book in complex appeals is not only strongly encouraged, it is, in a complex appeal, part of the duty of counsel to properly focus the appeal (see *Schrof* at para 43).

[215] This is a complex appeal. The accused was convicted of a serious offence involving the tragic death of a young person who was in the wrong place at the wrong time. The factual record exceeds 2,000 pages of material and counsel referred to another 2,000 pages of legal authorities. It was a surprise to the panel that no condensed books were filed by either party.

[216] Going forward, counsel appearing in this Court on complex appeals such as this should be mindful of the purpose of condensed books and the expectation of this Court that they will be properly prepared by counsel in

accordance with the procedure set out in the Consolidated Practice Direction based on their anticipated oral submissions.

Mainella JA

I agree: leMaistre JA

I agree: Turner JA