

IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Diana M. Cameron
Mr. Justice Christopher J. Mainella
Madam Justice Anne M. E. Turner

BETWEEN:

<i>HIS MAJESTY THE KING</i>	)	<i>S. B. Simmonds, K.C. and</i>
	)	<i>J. DeFehr</i>
	)	<i>for the Appellant</i>
<i>Respondent</i>	)	
	)	<i>D. Sahulka</i>
<i>- and -</i>	)	<i>for the Respondent</i>
	)	
<i>DAVID ALLAN MORRISSEAU</i>	)	<i>Appeal heard:</i>
	)	<i>February 25, 2026</i>
<i>(Accused) Appellant</i>	)	
	)	<i>Judgment delivered:</i>
	)	<i>June 30, 2026</i>

On appeal from *R v Morrisseau*, 2025 MBKB 20 [*Morrisseau*]

CAMERON JA

Introduction and Issues

[1] The accused appeals his conviction for the second degree murder of Franklin Tobacco (the victim) following a trial before a judge of the Court of King’s Bench. He also seeks leave to appeal and, if granted, appeals the sentence imposed of life imprisonment without parole eligibility for twelve years.

[2] The accused advances three grounds of appeal regarding his conviction. He argues that the trial judge erred by (1) failing to consider viable defences, (2) misapprehending the evidence concerning his intoxication defence, and (3) improperly applying the principles set out in *R v W(D)*, [1991] 1 SCR 742, 1991 CanLII 93 (SCC) [*W(D)*].

[3] Regarding sentence, the accused submits that the sentence is unfit given his personal circumstances.

[4] For the reasons that follow, I would dismiss the conviction appeal. While I would grant leave to appeal sentence, I would dismiss the sentence appeal.

Trial Evidence

Civilian Evidence

[5] Because the grounds of appeal primarily concern the trial judge's interpretation of the evidence, findings of fact and application of the law to those findings, a detailed review of the evidence is necessary.

[6] The offence occurred after a night of partying at a house in Winnipeg where the accused lived with his brother, Lawrence Morrisseau (Lawrence) (the residence). Lawrence's girlfriend, Megan Houle (Houle), and her roommate, Cassandra Neepin (Neepin), lived on the same street (Houle's residence). The accused and Lawrence's parents also resided on the same street (the parents' residence).

[7] Lawrence, Houle and Neepin testified at the trial. They agreed that the party began when Lawrence, Houle and Neepin arrived at the residence

the evening of April 7, 2022 (April 7). At the time, the accused was sleeping on a mattress in the living room. The victim and another male, Desmond Ferland (Ferland), were also present. At approximately 10:25 p.m., Lawrence and Ferland took a taxi to a hotel, where they purchased alcohol and then returned to the residence.

[8] At the party, people were consuming alcohol and smoking marihuana. Beers were consumed using a method described in the evidence as “[s]hotgunning” (*Morrisseau* at para 7), wherein a hole was punctured in beer cans, using a machete, to drink them quickly.

[9] The trial judge accepted Lawrence’s testimony that he saw the accused consuming methamphetamine (meth) during the party. As well, he accepted Lawrence’s assertion that the accused was looking out the window, presumably at nothing.

[10] At 1:55 a.m. the following morning (April 8), Lawrence, Houle, Neepin and Ferland left the residence to continue partying at Houle’s residence, leaving only the accused and the victim behind. It was an undisputed fact at the trial that the victim was alive at that time.

[11] Prior to arriving at Houle’s residence, Lawrence and Houle took a taxi to a beer vendor to buy more alcohol. After viewing the video evidence of Lawrence in the beer vendor, the trial judge described him to be extremely intoxicated (see *Morrisseau* at para 13).

[12] The party resumed at Houle’s residence, where Lawrence kept drinking. An argument occurred causing Lawrence to leave.

[13] Lawrence testified that he returned to the residence, where a physical altercation occurred between the accused and the victim at the top of the stairs to the second floor. He said that he pulled the two of them apart. He did not observe any weapons. He further testified that the victim was bleeding from a cut to his forehead that Lawrence and the accused attempted to mend with glue. Lawrence testified that he then went to the parents' residence to sleep.

[14] The trial judge rejected all of Lawrence's evidence about what happened after he left Houle's residence, including having attended the residence and what he said had occurred there, citing his extreme intoxication at the time he was at the beer vendor and his continued drinking thereafter.

[15] Nonetheless, the trial judge inferred that Lawrence had attended the residence after leaving Houle's residence and before arriving at the parents' residence, based on the presence of blood on the cuffs of the pants he had been wearing that night.

[16] The trial judge accepted that text messages and phone calls were exchanged between the accused and Lawrence on the afternoon of April 8. In particular, the accused placed two calls to Lawrence at approximately 1:32 p.m. and 1:39 p.m. (the afternoon calls) during which the accused stated to Lawrence, "I guess I killed [the victim]" (*Morrisseau* at para 20).

[17] During these conversations, the accused requested money from Lawrence. The accused travelled by taxi to the parents' residence, where Lawrence provided him with funds. Lawrence testified that the accused looked like he was under the influence of alcohol and drugs.

[18] The trial judge found that Lawrence was upset and contacted Houle, who arrived at the parents' residence. Lawrence and Houle walked past the residence and observed blood on the door. They left cigarettes for the accused in the mailbox and proceeded to Houle's residence, where Lawrence later spoke to the accused, who said he was going to kill himself.

[19] Houle then contacted the accused's parents, who attended at her residence. The accused and Lawrence's mother (Mrs. Spence) spoke with the accused, who again indicated an intention to kill himself. The accused's parents decided to attend the residence, and Mrs. Spence advised the accused of this by text message. The accused responded that he would be outside on the steps. Mrs. Spence said that when they arrived at the residence, the accused was sitting on the steps with a machete in his hands, and he had a two-litre bottle of alcohol. She stated that the accused refused to allow her to enter the residence and that he threatened to kill her if she did so. Mrs. Spence contacted the police by calling 911. She testified that she observed the accused throw away the machete when police arrived.

Police and Forensic Evidence

[20] Although several police officers testified, I will refer only to the evidence of two of the officers who initially attended the residence in response to Mrs. Spence's 911 call. Constable Andrew Fyfe (Cst. Fyfe) was the first to encounter the accused. He testified that, upon arriving at 6:22 p.m. on April 8, he observed the accused sitting on the front steps. He said the accused appeared to be intoxicated and was drinking from a two-litre bottle of alcohol.

[21] Based on the information available to him, Cst. Fyfe drew his gun and issued commands to the accused. He described the accused as passive-

aggressive, noting that he would not respond to questions or comply with directions. Sometime after backup officers arrived at 6:24 p.m., the accused complied with police directions and Cst. Fyfe, together with another officer, effected the arrest.

[22] During an initial search of the residence, Cst. Fyfe observed significant amounts of blood on the main floor but did not locate a body. The victim's body was located by Constable Gilbert Sawatsky (Cst. Sawatsky) during a second search.

[23] Cst. Sawatsky arrived at the scene at 6:23 p.m. and located two machetes near the front of the residence, which he seized. During a subsequent search, he discovered the victim's body in the basement of the residence, concealed beneath an empty television box and two blankets. The victim was deceased and was no longer bleeding from what Cst. Sawatsky described as significant injuries. There was no blood in the surrounding area.

[24] Blood was otherwise located throughout the residence, with some areas of bloodstaining showing indications of cleanup. What appeared to be a significant amount of blood was located on a couch in the living room.

[25] Dr. Miller, a forensic pathologist, provided expert evidence arising from her autopsy of the victim. She testified that the cause of death was exsanguination due to multiple sharp force injuries. She said that the victim suffered thirty-three sharp force injuries, noting that some may have resulted from the same blow. The victim also sustained blunt force injuries, including bruises, abrasions and lacerations.

[26] Of significance, there were six incised wounds to the head, two of which nicked the skull, indicating the application of substantial force. Dr. Miller testified that these injuries would have substantially and collectively contributed to the victim's death. She further observed that the injuries were located on the scalp beneath the hair, making them challenging to see.

[27] Additional sharp force injuries, some significant, were observed on the victim's neck, cheek, lip, hands, wrist and forearm.

[28] Dr. Miller said that a machete could have caused the sharp force injuries. She also opined that, given that the cause of death was exsanguination, if there was not a significant amount of blood found around the body, she would expect that the body had been moved or the area cleaned.

[29] The DNA evidence indicated that:

- The handle of one of the machetes seized confirmed the presence of blood with a mixed profile of the accused and the victim.
- The handle of the other machete seized had the victim's blood near the cutting edge towards the point end and on the point. The handle of the machete had a mixed DNA profile of the victim and the accused, with the accused being the major contributor.
- The victim's blood was on the upper front right leg and inside front leg of the jeans worn by and seized from the accused at the time of his arrest.

- The victim's blood was found in various locations of the main floor inside the residence and on a fence post in the rear yard of the residence.

Evidence Related to the Intoxication Defence

[30] The civilian evidence primarily relied on by the accused in support of his intoxication defence was provided by Lawrence and Mrs. Spence.

[31] During cross-examination, Lawrence testified that on the evening of April 7, the accused consumed alcohol and had been smoking a substance that Lawrence believed to be meth. He further stated that the accused looked out of the window, apparently at no one, behaviour Lawrence considered consistent with prior episodes of drug-induced paranoia.

[32] Lawrence agreed that when he spoke to the accused on the phone during the afternoon calls on April 8, the accused told him that he could not recall what had occurred the night before, blaming his lack of memory on his use of meth.

[33] In addition, Lawrence testified that the accused had a long history of drug abuse, including meth, crack cocaine, Xanax and other illicit substances. He said that the accused sometimes displayed episodes of paranoia, hallucinations and failure to recognize those around him when under the influence of these drugs.

[34] Mrs. Spence similarly testified to the accused's history of drug use and his behaviour when using drugs. She said that on April 7 she had spoken

to him about entering a program to address his addiction and that the accused had agreed.

[35] In addition to the evidence of the Crown witnesses, the accused called Dr. Cetaruk who was qualified by the trial judge as an expert in toxicology and “the assessment diagnosis and treatment, and adverse effects of Xanax, meth, crack cocaine, powder cocaine, alcohol, gabapentin, and marihuana”.

[36] In forming his opinion, Dr. Cetaruk reviewed the police reports, witness statements and summaries prepared by defence counsel of the testimony from the witnesses at the preliminary inquiry and trial. Dr. Cetaruk also reviewed the accused’s medical and treatment records, including a 2019 Health Sciences Centre Emergency visit, 2019 Seven Oaks General Hospital records, 2019 Winnipeg Fire Paramedic Service records, as well as 2020 admission and case management records from Main Street Project.

[37] Dr. Cetaruk testified regarding the effects of the use of meth, crack cocaine and other drugs, as well as their interaction with alcohol use. He explained that alcohol has a disinhibiting effect, which may be amplified by the presence of stimulants.

[38] He testified that chronic meth use “can be associated with chronic neuro-psychiatric symptoms” and elaborated that there is “well-described phenomena on where these delusions, paranoia, those kind of symptoms, can persist even beyond the use of the drug acutely when the drug is used chronically.”

[39] Based on his review of the evidence, Dr. Cetaruk concluded that the accused was extremely intoxicated at the time of the victim's death and that this level of intoxication "would have likely impaired many of his cognitive functions...including his ability to judge the consequences of or have appropriate insight into his actions."

[40] On cross-examination, Dr. Cetaruk acknowledged the limitations in the foundation of his opinion. He had not interviewed Lawrence, had no information from the accused, relied on evidentiary summaries and did not have access to the complete autopsy report.

[41] Dr. Cetaruk further agreed that claims of blackout in such contexts may be advanced for secondary gain. In addressing the validity of a blackout claim, he stated:

So there's not, as I mentioned before and we talked about it, there's not a definitive test to prove whether it did or didn't happen. You have to look at the totality of the data, meaning this case, this offence and then all of the literature, not just this paper. So I think it's a fair point to make and I'm glad you brought it up because you know this is -- this is something that again, this is -- look at the journal, it's psychiatry and law. *So this is the interfacing between medicine or toxicology, psychiatry and law. So it's not, it's not a clean-cut decision either way* and I would expect you guys to look at this carefully and I would hope you would. I'm *just giving you the information of -- is toxicology* before you that I -- I hope will be helpful making your decision.

[emphasis added]

Decision of the Trial Judge

[42] After reviewing the applicable law, including the elements of murder and the requisite state of mind, the trial judge categorically addressed the issues.

[43] First, he concluded that the accused caused the victim's death. He found that, apart from Lawrence's earlier presence in the residence—evidenced by the blood located on his pant cuffs—the evidence established that only the accused and the victim were present in the residence between 1:55 a.m. (when Lawrence, Houle, Neepin and Ferland departed) and approximately 6:30 p.m. (when police arrived) on April 8. He rejected the theory that Lawrence, despite being angry with Houle and Ferland, was involved in the victim's death. Furthermore, he said that the accused's suggestion that an unknown third party entered the residence was speculative (see *Morrisseau* at para 59).

[44] In reaching these conclusions, the trial judge relied on the fact that only the accused's and the victim's DNA profiles were found on the machete handles (see *ibid* at para 61). He further noted that Lawrence unequivocally denied any involvement in the victim's death.

[45] Applying *R v Villaroman*, 2016 SCC 33, the trial judge concluded that the only reasonable inference to be drawn from the evidence was that the accused had administered several blows to the victim's head with a machete, causing his death.

[46] In assessing the accused's state of mind, the trial judge considered both the number and severity of the blows, which he found were inflicted with

the seized machetes. He determined the injuries were significant, noting Dr. Miller's description of them as severe blunt force trauma.

[47] The trial judge also considered the accused's frequent alcohol and drug use but rejected Lawrence's evidence as sufficient to establish that the accused had blacked out. He reviewed the evidence of Dr. Cetaruk, stating that Dr. Cetaruk did not eliminate the possibility of a blackout from a combination of alcohol and drugs but noted such a circumstance was "rare" (*Morrisseau* at para 77). He questioned Dr. Cetaruk's reliability given that he had identified the accused's use of a certain drug where there was no evidence supporting its presence. He concluded that the accused was not blacked out at the time he killed the victim. Rather, he found the nature of the injuries suffered by the victim, as well as the amount of blood strewn around the main floor, walls and furnishings, was indicative of a determined attack.

[48] Given that the victim died from exsanguination, the trial judge found that he was killed while on the couch on the main floor, where heavy blood staining was found. He further found that the accused subsequently moved the body to the basement and attempted to conceal it.

[49] In applying *W(D)*, the trial judge said that he did not accept Dr. Cetaruk's opinion that the accused lacked the requisite intent to commit murder nor did it raise a reasonable doubt. In concluding that the Crown had proven guilt beyond a reasonable doubt, the trial judge found that Lawrence's evidence regarding the accused's drug use and behaviour on the day in question did not support the finding that the accused lacked the requisite intent for the offence of murder. Rather, he concluded that such intent was evidenced by the deliberate nature of the attack, as evidenced by the sheer

number of blows, as well as the accused's conduct in moving and covering the victim's body in an attempt to prevent its discovery.

The Conviction Appeal

Third Party Suspect and Self-Defence

[50] In my view, this ground can be dealt with summarily. Although a failure to consider a defence that has an air of reality would constitute an error in law, the trial judge expressly considered and rejected the accused's argument that Lawrence, or another unidentified individual, caused the victim's injuries. The issue, therefore, is whether the verdict is unreasonable.

[51] The test for an unreasonable verdict involves the determination of whether it is one that a properly instructed judge or jury could have reasonably rendered (see *R v RP*, 2012 SCC 22 at para 9). In judge-alone trials, a verdict may also be unreasonable where the trial judge has drawn an inference or made a finding of fact that "is plainly contradicted by the evidence relied on by the trial judge in support of that inference or finding" or "is shown to be incompatible with evidence that has not otherwise been contradicted or rejected by the trial judge" (*ibid*).

[52] The accused asserts that the trial judge erred in finding that the evidence supported that he had the exclusive opportunity to have killed the victim. He points out that Lawrence had been to the residence after having left Houle's residence. Thus, he submits that this was a case of likelihood of having perpetrated the crime as opposed to exclusive opportunity.

[53] In my view, it is unnecessary to determine the issue of exclusivity. Regardless of whether the case was one of exclusive opportunity or one of likelihood, the trial judge's conclusion that it was the accused who inflicted the victim's injuries rested on the presence of both the accused's and the victim's DNA on the machetes that he found were used to inflict those injuries. No one else's DNA was found on the machetes. The trial judge noted that the accused was in possession of the machetes when his parents arrived on April 8. He found that the accused's pants were covered in the victim's blood, whereas Lawrence's pants showed only cuff staining consistent with walking through the bloodied scene. The trial judge also accepted Lawrence's denial of any involvement in the victim's death.

[54] In rejecting the possibility that an unknown third party attended the residence and killed the victim, the trial judge acknowledged the accused's submission that police did not obtain DNA samples from every bloodstain. Nonetheless, he inferred that, had another individual been responsible, their DNA would likely have been present at the scene.

[55] While it is not necessarily true that, if someone else was responsible for the murder, their DNA would have been at the crime scene, the overall conclusion reached by the trial judge—rejecting the accused's position that another party, including Lawrence, was responsible for the murder—was reasonably supported by the evidence, and I would not disturb it.

[56] In addition, the accused argues that the trial judge failed to consider that the accused acted in self-defence. This argument is based on Lawrence's evidence that, when he was at the residence, the accused and the victim became engaged in an altercation that he had to break up.

[57] Self-defence was not advanced at trial. In any event, the trial judge rejected Lawrence's account of events following his departure from Houle's residence and prior to his arrival at the parents' residence, finding that Lawrence was extremely intoxicated at the relevant time. This conclusion was grounded in the trial judge's review of video evidence of Lawrence at the beer vendor at approximately 2:00 a.m., as well as evidence that he continued drinking thereafter. A trial judge is entitled to accept all, part, or none of a witness' evidence. I am not satisfied that the trial judge committed a palpable and overriding error in this assessment (see *R v Kruk*, 2024 SCC 7 at para 82).

Misapprehension of Evidence

The Law

[58] The accused contends that the trial judge misapprehended the evidence in concluding that he possessed the intent to commit murder, as defined in section 229(a) of the *Criminal Code*, RSC 1985, c C-46 [the *Code*], which states:

Murder

229 Culpable homicide is murder

(a) where the person who causes the death of a human being

(i) means to cause his death, or

(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 :

(i) ou bien a l'intention de causer sa mort,

(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[.]

[59] In *R v Whiteway (BDT) et al*, 2015 MBCA 24 at paras 31-32, Mainella JA summarized the standard of review where a misapprehension of evidence is alleged:

The standard of review for a misapprehension of evidence by a trial judge was articulated by the Supreme Court of Canada in *R. v. Lohrer*, 2004 SCC 80, [2004] 3 S.C.R. 732, as follows (at para. 2)

.... The misapprehension of the evidence must go to the substance rather than to the detail. It must be material rather than peripheral to the reasoning of the trial judge. Once those hurdles are surmounted, there is the further hurdle (the test is expressed as conjunctive rather than disjunctive) that the errors thus identified must play an essential part not just in the narrative of the judgment but “in the reasoning process resulting in a conviction”.

A misapprehension of evidence may refer to a mistake as to the substance of evidence, a failure to consider evidence relevant to a material issue or a failure to give proper effect to evidence (*R. v. Morrissey (R.J.)* (1995) 80 O.A.C. 161 at para. 83; and *R. v. Sinclair*, 2011 SCC 40 at para. 13, [2011] 3 S.C.R. 3). A misapprehension of the evidence is not to be confused with a different interpretation of the evidence than the one adopted by the trial judge (*R. v. Lee*, 2010 SCC 52 at para. 4, [2010] 3 S.C.R. 99). It is insufficient that the judge may have misapprehended the evidence; the error must be readily obvious (*Sinclair* at para. 53).

[60] The three legally relevant degrees of intoxication are set out in *R v Daley*, 2007 SCC 53 at paras 41-43. They are:

- (1) “mild” intoxication (*ibid* at para 41), where there is alcohol-induced relaxation of both inhibitions and socially accepted

behaviour. This type of intoxication has never been accepted as an excuse in determining whether the accused possessed the requisite *mens rea*;

- (2) “advanced” intoxication (*ibid*), where there is intoxication to the point that the accused lacks specific intent such that the impairment of an accused’s foresight of the consequences of their act is sufficient to raise a reasonable doubt regarding the requisite *mens rea*. This degree of intoxication is the one that triers of fact most often grapple with in murder trials. The extent of intoxication required to successfully raise this type of intoxication defence depends on the type of offence involved, but where death is an obvious consequence of an accused’s actions, they might have to “establish a particularly advanced degree of intoxication” (*ibid* at para 42) to successfully make out the defence; and
- (3) “extreme” intoxication (*ibid* at para 43) akin to automatism, which negates voluntariness and such a defence is extremely rare.

[61] At the hearing of the appeal, the accused confirmed that he relied on the second or “advanced” (*ibid* at para 41) state of intoxication in support of his defence that he did not have the requisite intent for murder.

Defining “Blackout” in Relation to Dr. Cetaruk’s Evidence

[62] I begin by noting a degree of confusion in the term “blackout” as it has been used by the accused and, to some extent, mirrored by the trial judge.

In oral argument before this Court and the trial judge, the accused used that term to describe intoxication-based amnesia *as equating to* a lack of specific intent or the inability to foresee the consequences of one's act due to intoxication.

[63] In my view, the confusion stems in part from Dr. Cetaruk's testimony. During direct examination, he explained that alcohol can impair cognitive functions, including decision making, judgment and risk assessment. Based on his understanding of the accused's level of intoxication at the relevant time, these functions would have been impaired. He further explained:

So if those cognitive functions are impaired, then that includes the ability to judge the outcome of your actions or the potential having insight into the results of those actions. And we see that a lot of times when we seen people making bad decisions. Unfortunately, in this circumstance, it was a catastrophic situation.

So essentially, he fits the case definition or -- or description of who I would expect to have a blackout and his actions here would fit into what has been described as the types of cognitive impairments that we expect with alcohol intoxication.

[emphasis added]

[64] It should be emphasized that the term "blackout" is not necessarily synonymous with the accused's inability to foresee the consequences of his actions, as was clarified by Crown counsel during cross-examination in the following exchange:

[Crown counsel] Now by blackout, we meant that a person does not remember what happened after?

[Dr. Cetaruk] Yeah, typically, again, it's -- it's generally considered as amnesia of the timeframe while intoxicated.

[Crown Counsel] Okay. And you'll agree that just because somebody can't remember something happened, doesn't mean that in the moment they were doing an action that they intended to do the action or they were acting without foresight?

[Dr. Cetaruk] I don't think you can use the -- the occurrence of the blackout as a basis to say they -- they didn't have blackout foresight or they didn't have decision-making capabilities just purely because of the blackout in the -- in the timeframe. But unfortunately, we don't really have real time data on that. There's very few controlled setting on blackouts, but I think I made reference to one in my report. Because there are some very interesting studies that were done with people that were intentionally given alcohol in a controlled environment sufficient to become very intoxicated. They were people that were known to have blackouts, and they did have blackouts during this timeframe as ascertained after they were sober and -- and the study subjects were interviewed and then were like, I don't remember this, I don't remember that.

So the occurrence of the blackout I don't think is the foundation to say they -- they didn't have decision-making capabilities at the time. However, that said, blackouts typically occur when a significant amount of alcohol intoxication [is] going on. And if you have a significant amount of intoxication, it's invariable that you're going to have impaired cognitive functions such as decision-making, risk-taking and insight.

[65] Not only has the term "blackout" been referred to in a confusing manner, but as I next explain, the weight to be assigned to Dr. Cetaruk's opinion that the accused suffered a blackout evidencing a significant cognitive impairment at the time of the incident is compromised.

[66] In *R v Abbey*, 1982 CanLII 25 at 46 (SCC) [*Abbey*], the Supreme Court of Canada emphasized:

While it is not questioned that medical experts are entitled to take into consideration all possible information in forming their

opinions, this in *no way removes from the party tendering such evidence the obligation of establishing, through properly admissible evidence, the factual basis on which such opinions are based*. Before any weight can be given to an expert's opinion, the facts upon which the opinion is based must be found to exist.

[emphasis added]

[67] While Dr. Cetaruk's qualifications were certainly sufficient for him to give evidence as to what constitutes a blackout, the value of his opinion regarding the accused's level of intoxication and state of mind is limited, as it was based on summaries of the evidence called at the trial that defence counsel determined to be relevant. The record demonstrates that Dr. Cetaruk was only provided with summaries of the testimony of Lawrence and Mrs. Spence and not that of the other witnesses who testified, including that of Dr. Miller regarding the significant injuries suffered by the victim. Dr. Cetaruk also agreed that he had not been provided with the full autopsy report of the victim.

Discussion

[68] The accused submits that the trial judge misapprehended the evidence of Dr. Cetaruk when he stated (*Morrisseau* at para 77):

There is some evidence before me that [the accused] was a frequent user of alcohol and drugs, as noted herein. He previously experienced episodes where he blacked out as a result of his use of alcohol and drugs, resulting in his admission to hospitals and/or treatment facilities. Although Lawrence testified, prior to his leaving [the residence], [the accused] stared out the kitchen window. *However, there is no evidence [the accused] blacked out at that time*. I reject, staring out the window can only infer [the accused] had blacked out at that time. I accept Dr. Cetaruk's opinion that form of black out is from alcohol, and not drug use identified by Lawrence on

[April 8]. *Although Dr. Cetaruk did not eliminate the possibility of a black out from alcohol and drugs, he suggests those incidents are rare.*

[emphasis added]

[69] The accused argues that the trial judge erred when he stated that Dr. Cetaruk stated that blackouts occurring from drug usage were rare. In fact, Dr. Cetaruk testified that while blackouts “would be more well described with alcohol”, it is not uncommon for people who are in a “hallucination phase, a delusional phase, a rage phase, overstimulated phase with [meth] to not recall events once they’re sober.”

[70] In my view, read in the context of the reasons as a whole, the distinction between “rare” and “uncommon” is immaterial. The trial judge simply misspoke, likely reflecting the terminology used by the Crown in its closing submissions. In this regard, it is important to recall that reasons are not to be “finely parse[d] . . . in a search for error” (*R v GF*, 2021 SCC 20 at para 69 [*GF*]).

[71] The accused also submits that the trial judge failed to consider evidence that, when approached by police at approximately 6:30 p.m. on April 8, he was non-responsive and was speaking to himself while being transported to the police station.

[72] Similarly, he argues that the trial judge did not address Mrs. Spence’s evidence regarding his demeanor at approximately the same time on April 8, nor Lawrence’s evidence that he was looking blankly out the window during the evening of April 7.

[73] Read as a whole, the trial judge considered all the evidence relating to the accused's intoxication, including his history of substance use and his condition before and after the incident. The trial judge did not, however, assign the weight to this evidence or draw the inferences urged by the accused regarding his level of intoxication at the time he inflicted the fatal injuries on the victim. Consistent with *Abbey*, the trial judge was entitled to place little weight on Dr. Cetaruk's opinion, considering the circumstances under which it was given.

[74] Rather, the trial judge based his conclusion on the severity and number of blows inflicted, finding that they reflected a determined, deliberate attack inconsistent with a blackout (see *Morrisseau* at paras 80, 93). As this Court stated in *R v Cassan (ER)*, 2012 MBCA 46, "it was entirely proper for the judge to focus on the evidence of that conduct" (at para 67), as it constituted the important factual context in which the deceased's death occurred. In that case, the fact that the trial judge was "strongly, and probably decisively, influenced on the question of intent by the conduct of the appellant in stabbing [the deceased] 22 times" (*ibid* at para 68) did not constitute an error.

Application of the W(D) Instruction

The *W(D)* Instruction and Standard of Review

[75] The three-prong test as articulated in *W(D)* is well-known. If the jury (1) believes the evidence of the accused, they must acquit; (2) even if the evidence is not believed, the jury must consider whether it raises a reasonable doubt; and (3) even if not left with a reasonable doubt by the accused's

evidence, based on the evidence it accepts, the jury must be convinced beyond a reasonable doubt of the guilt of the accused (see *ibid* at 758).

[76] The application of the test in *W(D)* is a question of law reviewable on the standard of correctness. However, findings of credibility are entitled to a high standard of deference on review (see *R v Monaghan*, 2013 MBCA 87 at para 5 [*Monaghan*]).

Positions of the Parties

[77] The accused argues that the trial judge erred in his *W(D)* analysis by failing to consider the comments made by the accused to Lawrence during the afternoon calls.

[78] During direct examination, when asked what the accused said during the afternoon calls, Lawrence testified: “[He] [t]old me that he -- I guess he killed [the victim].” When the Crown asked Lawrence if anything further was said, Lawrence indicated that the accused also asked for money. The Crown then asked four additional times whether the accused provided any further details. Each time Lawrence responded in the negative. The Crown concluded by confirming that the accused’s comments were limited to saying that he killed the victim and that he asked for money.

[79] Conversely, in cross-examination, Lawrence agreed with defence counsel’s suggestions that during the same conversations:

- the accused asked Lawrence what had happened;
- Lawrence told the accused about the fight between the accused and the victim;

- the accused stated that the victim was dead;
- the accused said that he did not remember being involved in a fight with the victim;
- the accused stated that he had done so much meth that he had no memory of the events;
- the accused said that if he hurt the victim, he didn't mean to;
- the accused asked whether Lawrence had killed the victim; and
- the accused said that, if he killed the victim, the accused wanted to die.

[80] The accused contends that the trial judge erred by failing to consider these statements in applying the first and second prongs of the *W(D)* analysis. He argues that the statements demonstrate that he was in a state of blackout when the killing occurred and therefore lacked the necessary intent for murder.

[81] The Crown submits that the accused's position is, in substance, a challenge to the sufficiency of the trial judge's reasons. It maintains that when the record is considered as a whole—including the evidence adduced at trial and the parties' submissions—it is apparent that the trial judge did not accept Lawrence's testimony in this regard. The Crown further notes that the Crown attorney at the trial (not the same as on appeal) expressly argued that Lawrence's evidence during cross-examination lacked credibility on this point.

Analysis

[82] The principles underlying the *W(D)* instruction apply to all exculpatory evidence, regardless of whether it is elicited by the Crown or as otherwise called by the defence (see *R v Saunders*, 2025 MBCA 44 at paras 32-53, for an examination of the development of the law in this regard).

[83] Even where evidence has been found to be not credible at the first stage of the *W(D)* analysis, it may still leave a reasonable doubt as to guilt at the second stage (see *R v Demetroff*, 2025 ABCA 373 at para 23; *R v Roche-Garcia*, 2024 BCCA 298 at para 130).

[84] On the other hand, where the trial judge rejects the testimony of an accused or a witness on their behalf, it can also lead to the conclusion that the evidence failed to raise a reasonable doubt (see *Monaghan* at para 9). The governing principle is that the trial judge must be aware of the Crown's obligation to prove the case beyond a reasonable doubt. In my view, this reasoning should apply equally to exculpatory evidence adduced by the Crown or elicited from Crown witnesses by the accused.

[85] Reasons of the trial judge are to be reviewed on a functional basis. This entails a consideration of the entire record. As stated in *R v JJB*, 2013 ONCA 268 at para 21:

Further, reasons for judgment cannot be assessed standing alone: "reasons for judgment must be examined in the context of the entire proceeding, especially the nature of the evidence heard and the arguments advanced": *R. v. J.J.R.D.* (2006), 215 C.C.C. (3d) 252, at para. 32 (Ont. C.A.). See also *R. v. R.E.M.*, 2008 SCC 51, [2008] 3 S.C.R. 3.

[86] In *R v Sanhueza*, 2020 BCCA 279 at para 47, DeWitt-Van Oosten JA explained that the functional approach to the review of reasons in the context of an alleged *W(D)* error is an individualized assessment:

I appreciate that the “functional approach” to analyzing reasons for judgment allows for a finding that *W.(D.)* principles have been respected, even where those reasons are sparse and the judge neither references *W.(D.)*, nor explains in any detail why exculpatory evidence does not raise a reasonable doubt: *Vuradin* at paras. 12–13; *R.E.M.* at para. 66; *Dick* at paras. 23–25. I also appreciate that in some circumstances, an out-of-court denial by the accused, limited in detail and untested through cross-examination, may attract considerably less weight than testimony. *This is an individualized assessment, necessarily informed by the evidential foundation of each case.*

[emphasis added]

[87] In this case, a functional analysis demonstrates that the trial judge accepted the Crown’s submission that the evidence elicited from Lawrence in cross-examination concerning the accused’s asserted lack of memory or intent to harm the victim was not credible.

[88] In closing argument, the Crown addressed Lawrence’s evidence, stating:

At this point, I’m going to go over what I think the Court should accept of [Lawrence’s] evidence. His evidence changed from direct to cross-examination. So, I suggest the Court look at what is corroborated in his testimony and compare his direct with his cross.

He is clearly trying his best to help his brother. I think the clearest example of this is the phone call the next day. On direct exam, when asked an open-ended question, he said that [the accused] killed [the victim]. And on cross-examination, this changed to [the accused] didn’t know who killed [the victim]

and asked him if he had killed [the victim]. Those are -- that's a change.

And this -- this is where we get the evidence of the blackout. The entirety of the evidence of blackout that we have is from [Lawrence] that came out during cross-examination when he was agreeing to suggestions put to him by defence counsel.

The Crown submits that the Court should accept what you heard in direct testimony about the nature of this call. Do not even consider what came out in the cross-examination. Do not even consider the evidence of blackout. We do not need to speak about Dr. Cetaruk because there's no foundation for Dr. Cetaruk.

[89] The trial judge's acceptance of the Crown's argument is reflected in his fact-finding process. The trial judge stated that the evidence that *he did accept* regarding the afternoon calls was that (1) the accused stated that he guessed he killed the victim, and (2) the accused asked for money—evidence given by Lawrence in direct examination. The omission of any reference to Lawrence's cross-examination evidence suggests that the trial judge did not accept that portion of the testimony.

[90] In his *W(D)* analysis, the trial judge emphasized that Dr. Cetaruk's opinion was based only on the facts provided to him. He rejected that previous incidents of the accused's behaviour while consuming drugs were sufficient to determine the accused's intent on this occasion.

[91] Echoing the argument of the Crown, he stated that there was “no evidence” (*Morrisseau* at para 88) to support that the accused was “ever on the verge of being blacked out on April 7 or 8” (*ibid*) in his analysis of the first prong of *W(D)*. This was consistent with his earlier review of the evidence, wherein he stated that there was “no evidence that [the accused was]

blacked out” (*Morrisseau* at para 77) when he stared out the window on the evening of April 7, as described by Lawrence. In his view, the nature and extent of the victim’s injuries and the accused’s efforts to conceal the body, were inconsistent with the level of intoxication described by Dr. Cetaruk.

[92] In summary, there was evidence that the victim died a savage death when he was alone with the accused. DNA evidence confirmed that the accused handled the murder weapon. While there is no debate that the accused was intoxicated at the time of the killing, his degree of intoxication was open to interpretation and was a live issue at the trial. While the accused did not testify, the trial judge had the benefit of multiple sources of evidence, both direct and circumstantial, as to the accused’s state of mind. In my view, as is the case with the defence of third party suspect, in his reasons, the trial judge provided an identifiable path, grounded in the record, as to why he rejected the defence of advanced intoxication. I am not persuaded that the trial judge reached his decision by an illogical or irrational reasoning process; nor am I persuaded that his verdict was unreasonable within the meaning of section 686(1)(a)(i) of the *Code*.

[93] Similarly, in the trial judge’s analysis of the second prong of *W(D)*, he stated that he did not accept the facts relied on by Dr. Cetaruk when he formed his opinion and that his evidence did not raise a reasonable doubt. He found that while the accused was intoxicated, there was no evidence to support that his level of intoxication was so severe as to negate intent (see *Morrisseau* at para 91).

[94] In concluding that the Crown had proven guilt beyond a reasonable doubt, the trial judge reiterated that the evidence of the accused looking out

the window, and his use of meth and crack cocaine on the night of the incident, were insufficient to establish that the accused lacked the requisite intent for murder. Rather, intent was inferred from the number of blows inflicted and the subsequent efforts to conceal the body.

[95] Trial judges are presumed to know and apply well-established criminal law principles that they work with on a regular basis (see *GF* at para 74). As stated in *GF*: “Where ambiguities in a trial judge’s reasons are open to multiple interpretations, those that are consistent with the presumption of correct application must be preferred over those that suggest error” (at para 79). In my view, the foregoing review demonstrates that he considered all the evidence, including the exculpatory evidence that he accepted, in his *W(D)* analysis. He remained focussed on the fundamental requirement that the Crown prove guilt beyond a reasonable doubt.

[96] Thus, I would dismiss the accused’s conviction appeal.

The Sentence Appeal

[97] As earlier mentioned, the trial judge sentenced the accused to life imprisonment without parole eligibility for twelve years.

[98] In limited written and oral submissions, the accused contended that the sentence imposed was unfit, given his lack of criminal record, as well as his status as an Indigenous person affected by the history of colonialization and residential schools, as recognized under section 718(e) of the *Code*.

[99] In imposing sentence, the trial judge considered the accused’s circumstances under section 718(e) of the *Code*, including the impact of

residential schools on his family and his parents' struggles with alcohol during his upbringing. The trial judge also noted that the accused had no prior criminal record and that the pre-sentence report indicated the offence was out of character, according to those interviewed.

[100] On the other hand, the trial judge characterized the murder as brutal and unexplained. He found an element of callousness associated with it. He characterized the use of machetes as vicious and treated the accused's attempt to conceal the body—albeit unsophisticated—as an aggravating factor. While he noted that there was some evidence of intoxication, he found that it did not mitigate the brutality of the offence.

[101] The trial judge also considered the case law provided, the victim impact testimony and the fact that the victim was Indigenous.

[102] Absent an error of law or an error in principle that has an impact on the sentence, an appellate court may not vary the sentence unless it is demonstrably unfit (see *R v Lacasse*, 2015 SCC 64 at para 11). In my view, the accused's core argument is with the weight that the trial judge placed on his mitigating factors. An appellate court must not intervene in a sentence simply on the basis that it would have weighed the relevant factors differently (*ibid* at para 49).

[103] Thus, I am not persuaded that the accused has demonstrated that the sentence is demonstrably unfit nor that the trial judge committed an error in principle, and I would not interfere with the sentence imposed.

Conclusion and Decision

[104] In the result, I would dismiss the accused's conviction appeal. I would grant leave to appeal sentence and dismiss his sentence appeal.

Cameron JA

I agree: _____
Mainella JA

I agree: _____
Turner JA