

IN THE COURT OF APPEAL OF MANITOBA

Coram: Chief Justice Marianne Rivoalen
Mr. Justice Marc M. Monnin
Madam Justice Diana M. Cameron

BETWEEN:

<i>HIS MAJESTY THE KING</i>)	<i>M. T. Gould and</i>
)	<i>Z. B. Kinahan</i>
<i>Respondent</i>)	<i>for the Appellant</i>
)	
)	<i>R. Lagimodière</i>
<i>- and -</i>)	<i>for the Respondent</i>
)	
)	<i>Appeal heard:</i>
<i>CODY DON SAUNDERS</i>)	<i>November 22, 2024</i>
)	
<i>(Accused) Appellant</i>)	<i>Judgment delivered:</i>
)	<i>May 13, 2025</i>

CAMERON JA

Introduction

[1] The accused was convicted of second degree murder after trial by a judge and jury. He appeals his conviction, maintaining that he should have been convicted of manslaughter. At trial, his main defence was that he lacked the required intent to commit murder due to alcohol and drug consumption. He called expert evidence in this regard. He also testified that, while he choked the deceased, his recall of the incident was that he did not intend to kill her.

[2] On appeal, the accused asserts that the trial judge provided an inadequate *W(D)* instruction (see *R v W(D)*, [1991] 1 SCR 742, 1991 CanLII 93 (SCC) [*W(D)*]). He also argues that the trial judge failed to instruct the jury on the defences of provocation and accident. Finally, he maintains that the trial judge erred in refusing to admit expert evidence regarding recovered memories.

[3] Applying the functional approach, I am of the view that the jury was adequately instructed based on the principles enunciated in *W(D)*. The trial judge was not required to instruct the jury regarding provocation or accident, as those defences lacked an air of reality. Furthermore, I am not persuaded that the trial judge erred in refusing to admit expert evidence regarding recovered memories. Therefore, I would dismiss the appeal.

Facts

[4] The deceased was a sex trade worker. She and the accused were not known to each other prior to the incident.

[5] On the night of the incident, the deceased was with her friend (the friend). She told the friend that she had a customer coming over and that she was going to make \$500. That customer was the accused.

[6] After arranging for the transaction with the deceased, the accused was picked up by taxi at a strip club. Prior to going to the deceased's house, he stopped at a convenience store to purchase cigarettes and condoms. The taxi dropped him off at the deceased's house at 12:23 a.m.

[7] Upon arriving at the deceased's house, the accused had a brief word with the friend. The friend then left. The friend and the deceased had plans to meet after the deceased was finished with the accused, which the deceased estimated to be around 2 a.m. The deceased and the friend had been texting throughout the night. The last text the friend received from the deceased indicated that the accused wanted more time and that she would have to go to his place in the morning to collect extra money that he would owe her.

[8] The following morning, the accused made two 911 calls from his cellphone. In the first call at 5 a.m., he stated that he was in a domestic dispute.

[9] When police responded at 7:57 a.m., there was no answer at the door. Shortly after they left the deceased's house, the accused called 911 again and stated that he needed police assistance.

[10] When police arrived, they found the deceased on the floor. They loudly announced their presence. The accused was in the bathroom. He had no shirt on and had blood on him. He faced the officers, pointed a large kitchen knife at them and took steps toward them. The police shot and tasered him.

[11] The accused was taken to the hospital. Aside from a gunshot wound, he had several self-inflicted injuries. Those injuries included lacerations to his left arm and the right side of his neck, as well as a stab wound to his stomach.

[12] Despite there being blood found throughout the house, the forensic identification officer responsible for the scene testified that the deceased did

not have any bloodletting injuries. The pathologist testified that the deceased died of strangulation and that while there was evidence that a ligature had been applied to her neck, it was his opinion that there was also “some other form of neck compression or strangulation”, such as a hand or an arm wrapped around the neck. The accused’s DNA was found on the deceased’s neck and fingernail clippings.

[13] The accused testified at the trial. He stated that on the evening in question, he had consumed significant amounts of alcohol at a friend’s house. He then went to a strip club where he drank some more and purchased and consumed cocaine. He located the deceased’s website and contacted her.

[14] After he had met the deceased and paid for her services, he said that she had purchased some crack cocaine. The two then engaged in sexual acts and consumed drugs. The accused admitted that he was having trouble performing sexually and that he and the deceased agreed that this was likely due to his drug use. He also testified that he was experiencing auditory problems and visual hallucinations to the extent that he was hearing conversations and seeing people that were not there. He said that was a common occurrence when he used cocaine.

[15] The next thing the accused recalled was choking the deceased. He testified that he choked her for a few seconds and let go when she stopped moving. He denied that he had any intent to kill her.

[16] After realizing he had killed the deceased, the accused tried to commit suicide. He cut his wrists, arm and neck with a knife. He recalled the police coming into the house and said that he was hoping to evoke a reaction from them such that they would discharge their firearms and kill him.

[17] After he was arrested, the accused was taken to the hospital. In direct examination, he testified that he told the psychiatrist at the hospital that there was “some sort of disagreement between [him and the deceased], some accusations of theft, that there was a fight.” He thereafter testified that what he told the psychiatrist was not true and that he only lied because the psychiatrist was pressuring him to come up with a reason as to why things happened.

[18] The accused denied that he and the deceased had an argument or a confrontation. He said that he did not intend to kill the deceased and described her as “a nice, kind lady.”

[19] In cross-examination, the accused agreed that he told the medical personnel at the hospital that “once [he] did cocaine with [the deceased, he] started to feel anxious, edgy and a bit . . . agitated.” He also agreed that he told them that the deceased became paranoid and accused him of stealing from her, tried to take his cocaine from him, and told him to leave, and that this led to a physical fight. He also agreed that he told the medical personnel that he was angry and that he described himself as a “spinning top.”

[20] For ease of reference, I will refer to the statements the accused made to the psychiatrist and the medical personnel as the inconsistent statements.

[21] The accused also called a forensic psychologist, Dr. David Hill (Dr. Hill). Dr. Hill testified that, in his opinion, the accused was “experiencing symptoms of psychosis at the time the offences occurred, [which was] likely due to . . . cocaine use” and that at the time of the incident, he could not foresee that his actions “were going to cause [the deceased’s] death.”

Issues

- [22] The accused raises four grounds of appeal. They are:
- I. the trial judge failed to provide an adequate *W(D)* instruction regarding the accused's evidence, as well as the inconsistent statements;
 - II. the trial judge erred by failing to instruct the jury on the (partial) defence of provocation;
 - III. the trial judge erred by failing to instruct the jury on the defence of accident; and
 - IV. the trial judge erred in not allowing the accused to call expert evidence on issues relating to memory.

The Functional Approach to Jury Instructions

[23] Prior to embarking on an examination of the grounds raised, it is helpful to summarize the functional approach to appellate review of jury instructions.

[24] In *R v Abdullahi*, 2023 SCC 19, Rowe J, writing for the majority (not dissented to on this point), summarized the principles regarding the functional approach. Briefly, the accused is entitled to a properly, not perfectly, instructed jury (see *ibid* at para 35). The charge must be read in the context of the record, including the issues at play and the submissions of counsel (see *ibid* at paras 36-37). It is the substance of the charge that matters. A single ambiguous or problematic statement is not necessarily an error in law

where the charge, as a whole, provided the jury with an accurate understanding of the relevant legal issue (see *ibid* at paras 41-42).

[25] Justice Rowe explained a properly equipped jury as being “one that is both (a) accurately and (b) sufficiently instructed. This requires the appellate court to have regard both to what *was* said and what was *not* said in the judge’s instructions” (*ibid* at para 37) [emphasis in original].

[26] With these principles in mind, I now turn to a review of the grounds of appeal.

I. The Trial Judge Failed to Provide an Adequate *W(D)* Instruction Regarding the Accused’s Evidence, as Well as the Inconsistent Statements

[27] It is undisputed that the only issue was whether the accused had the required intent to commit murder. In providing the *W(D)* instruction to the jury, the trial judge stated:

In this case, we heard evidence from [the accused]. You assess his evidence in the same way, and in accordance with the same principles, that you assess the testimony of any other witness. As with any other witness, you may believe some, none, or all of [the accused’s] testimony. If you believe [the accused’s] evidence that he did not have the intent, as I will define intent for you in a few moments, to kill [the deceased], then you must find him not guilty of second-degree murder.

Even if you do not believe [the accused’s] evidence that he did not have the intent, as I will define for you, if it leaves you with a reasonable doubt about an essential element of the offence, you must find him not guilty of second-degree murder. Even if [the accused’s] evidence does not leave you with a reasonable doubt about the guilt, you may convict him only if the rest of the

evidence you do accept proves his guilt beyond a reasonable doubt.

Positions of the Parties

[28] The accused acknowledges that, as long as the concepts of reasonable doubt and the evaluation of conflicting testimony explained in *W(D)* are properly conveyed, the trial judge need not use any particular language in instructing the jury (see *R v BD*, 2011 ONCA 51 at para 103 [*BD*]; *R v JHS*, 2008 SCC 30 at paras 8-9) [*JHS*]). However, his position is that all of the evidence called at a trial that is capable of being exculpatory must be the subject of a *W(D)* instruction. In this case, neither the expert evidence of Dr. Hill nor the inconsistent statements were mentioned in the *W(D)* instruction.

[29] Related to the above, the accused maintains that the lack of instruction regarding Dr. Hill's evidence was compounded by the fact that the *W(D)* instruction failed to tell the jury that even if it acquitted him of second degree murder, it still had the option of finding him guilty of manslaughter. He asserts that this failure would have misled the jury into thinking that it could only convict or acquit him of murder. In my view, this is not a compounding issue but, rather, a separate alleged breach of the *W(D)* instruction and will be dealt with as such in these reasons.

[30] The Crown submits that the jury charge contained a detailed description of Dr. Hill's testimony along with a specific instruction regarding his expert evidence. Thus, it asserts that the *W(D)* instruction was sufficient.

[31] Regarding the inconsistent statements, the Crown notes that the trial Crown (not the same as on appeal) suggested that a *W(D)* instruction be given as part of the standard instruction regarding inconsistent statements of an accused. However, trial counsel (not the same as on appeal) opposed any such instruction.

The Law Regarding the W(D) Instruction

[32] In determining what must be included in a *W(D)* instruction, it is helpful to consider the nature of the issue dealt with in *W(D)* and the jurisprudence that has since developed. *W(D)* arose in the context of a sexual assault trial where the central issue was the credibility of the complainant and the accused. The trial judge in that case originally charged the jury in accordance with the standard reasonable doubt instruction applicable at that time. However, at the request of the Crown, he recharged the jury, telling them that, in essence, the core issue was whether they believed the complainant or the accused (see *ibid* at 750, 752).

[33] In *W(D)* at 758, Cory J, writing for the majority, articulated the three-prong test as:

First, if you believe the evidence of the accused, obviously you must acquit.

Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.

Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

[34] In *JHS*, Binnie J added a fourth consideration, which requires the trier of fact to consider *all of the evidence* in determining whether a reasonable doubt exists (see para 12).

[35] Subsequent case law has established that the exact wording of *W(D)* need not be slavishly followed. The Court need not employ any particular language as long as it conveys the message that the burden to prove every essential element of the offence beyond a reasonable doubt never shifts from the Crown (see *JHS* at para 13).

Reformulation of the W(D) Instruction in Ryon and Achuil

[36] In *R v Ryon*, 2019 ABCA 36 [*Ryon*], Martin JA noted that concerns had been raised regarding the *W(D)* instruction when given without contextualization or elaboration.

[37] In addition to other concerns, the first of the concerns raised by Martin JA involved the evidence to which the *W(D)* instruction applies (see *Ryon* at paras 24-26). Citing jurisprudence from Ontario and Alberta, Martin JA stated that the statement in the first prong was too narrow in that it only refers to the “evidence of the accused” (*ibid* at para 28). Rather, the first prong “is to apply to all exculpatory evidence that the Crown must negate beyond a reasonable doubt, whether found in the Crown or the defence case” (*ibid* at para 29).

[38] At the same time, Martin JA noted that the *W(D)* instruction on the first prong was too broad. He was of the view that it does not apply to evidence that is inculpatory or neutral, as acceptance of such evidence from an accused would not lead to an acquittal (see *ibid* at para 30).

[39] In the result, Martin JA indicated that it would be advisable for trial judges to begin the *W(D)* instruction by explaining to jurors the evidence to which the instruction applies. He stated that juries need to understand (*Ryon* at para 49):

- i. that the instruction applies only to exculpatory evidence, that is, to evidence that either negates an element of the offence or establishes a defence (other than a reverse onus defence);
- ii. that it applies to exculpatory evidence whether presented by the Crown or the accused.

[40] Justice Martin then proposed a reformulated four-prong *W(D)* instruction. The new instruction in its entirety has not been raised in this appeal and, therefore, need not be commented on. However, of import in the present case, Martin JA suggested that the first prong explain the Crown's obligation to prove guilt beyond a reasonable doubt. He suggested that the second prong of the reformulated instruction state that "if the jury believes the accused's evidence denying guilt (or any other exculpatory evidence to that effect), or if they are not confident they can accept the Crown's version of events, they must acquit. (Subject to defences with additional elements such as an objective component discussed at para 31)" (*ibid* at para 51(ii)).

[41] Justice Martin was cognizant that the actual instruction provided to a jury would need to be contextual and responsive to the evidence. He stated, "the trial judge will need to decide whether juries should be left to identify for themselves the actual evidence to which the instruction applies. If there is risk of misunderstanding it would be better to refer to all of the relevant evidence" (*ibid* at para 50).

[42] Immediately following *Ryon*, in *R v Achuil*, 2019 ABCA 299 [*Achuil*], Martin JA agreed that his proposed instruction that if the jury was “not confident they can accept the Crown’s version of events’ is not a recognized legal standard and that it would be an error to tell the jury they should acquit on that basis” (at para 18). He reformulated that part of the instruction to state (*ibid*):

In that context, if the accused’s evidence denying complicity or guilt (or any other exculpatory evidence to that effect) is believed, or even if not believed still leaves the jury with a reasonable doubt that it may be true, then the jury is required to acquit. (Again subject to defences with additional elements such as an objective component)[.]

Appellate Consideration of Ryon

[43] The Alberta Court of Appeal continues to follow Martin JA’s reformulated *W(D)* instruction (see e.g. *R v Bean*, 2024 ABCA 339 at paras 44-50; *R v Chan*, 2024 ABCA 207 at paras 78-80; *R v Ammar*, 2024 ABCA 19 at para 9; *R v Sidhu*, 2023 ABCA 184 at para 39; *R v Gauthier*, 2022 ABCA 121 at para 28 [*Gauthier*]).

[44] On the other hand, notwithstanding its comments in *Ryon* and *Achuil*, the Court has recognized that *W(D)* is the leading precedent from the Supreme Court of Canada on the appropriate instruction for the legal principle that the legal burden rests on the Crown to prove every element of the offence beyond a reasonable doubt (see *R v Randall*, 2020 ABCA 52 at para 61). The Court has also reiterated the Supreme Court’s reasoning from *JHS*, that neither the instruction provided in *W(D)* nor as restated in *Ryon* and *Achuil* is a “magical incantation” (*Gauthier* at para 31, citing *JHS* at para 11).

[45] In *R v BJ*, 2023 BCCA 166 [*BJ*], the British Columbia Court of Appeal commented on *Ryon* stating, “*Ryon* confirms that it is necessary for the trier of fact to consider all of the ‘exculpatory’ evidence before them” (at para 69). Nonetheless, it noted that neither *Ryon* nor the cases that have followed it cast doubt on *W(D)*. In support of its position, the Court cited its decision in *R v Demirovic*, 2021 BCCA 429, wherein it suggested that the reformulation in *Ryon* has not changed the message in *W(D)* (see *BJ* at para 72).

[46] In *R v LK*, 2020 ONCA 262 at para 18, the Ontario Court of Appeal commented on *Ryon*’s reformulation of the *W(D)* instruction, noting that it clarified the objective of the second prong of the instruction by ensuring that “jurors understand that even if they cannot determine whether exculpatory evidence should be believed or rejected, the evidence may still raise a reasonable doubt and, if so, they must acquit” (at para 19). On the other hand, that Court has not expressly adopted or rejected the reformulated instruction.

[47] In *R v Pépin*, 2022 CMAC 4 [*Pépin*], the Court Martial Appeal Court considered the appellant’s argument that the trial judge should have instructed the court martial panel to use a *W(D)* approach when analyzing two out-of-court statements made by the accused that were, in part, exculpatory. Justice Scanlan, writing for the Court, stated that, while such an instruction may have been preferable, the failure to provide it did not justify setting aside the verdict (see *ibid* at paras 45-46).

[48] I pause to note that the Court in *Pépin* also relied on the fact that trial counsel urged the trial judge not to include such an instruction in its determination that the *W(D)* ground of appeal be dismissed.

[49] In *R v McKay*, 2024 SKCA 72 [*McKay*], the Court considered the applicability of *Ryon* in the context of a judge-alone trial. In that case, the accused was charged with murder for having killed his wife after consuming drugs and alcohol. He called an expert witness who testified that, due to his resulting alcohol and drug amnesia, he would not have appreciated the consequences of his behaviour and, therefore, lacked the necessary intent for murder.

[50] In considering the trial judge's failure to apply *Ryon*, the Court stated that it was not necessary to adopt the restatement of *W(D)* proposed in *Ryon*. It held that the underlying principle in *W(D)* is whether the accused's evidence when considered in the context of the evidence as a whole, raises a reasonable doubt. Quoting *R v KJ*, 2021 ONCA 570 at para 19, the Court emphasized that the principles in *W(D)* and other cases require the evidence of each witness to be considered in light of the totality of the evidence (see *McKay* at para 31). Nevertheless, the Court held that the trial judge erred when he stated that he could not rely on the expert's evidence *at all* because he rejected the accused's evidence.

[51] Although not relying on *Ryon*, in *R v Herntier*, 2020 MBCA 95, Beard JA cited *BD* at para 114; *R v Haroun*, 1997 CanLII 382 at paras 13-16 (SCC); and *R v Grant (ME)*, 2013 MBCA 95 at paras 31-33, in support of her statement that the *W(D)* instruction "can apply to other defence evidence and even to exculpatory evidence that forms part of the Crown's case where that evidence conflicts with other evidence on a vital issue" (at para 307).

[52] While pre-dating *Ryon*, in *R v Van*, 2009 SCC 22, the Court considered the accused's argument that the *W(D)* instruction was insufficient

because it only referred to “Mr. Van’s evidence” (at para 22) and did not include other evidence called by the defence. Justice LeBel, writing for the majority (not dissented to on this point), held that such a deficiency did not amount to a reversible error (*ibid*). Rather, a review of the charge as a whole led to the conclusion the jury would not have been misled, as any such deficiency in the *W(D)* instruction was compensated for by the rest of the charge, wherein the trial judge clearly conveyed that “the Crown always bears the burden of proof and that if the jury had any reasonable doubt based on the evidence as a whole, they must acquit” (*ibid* at para 23).

[53] In conclusion, the authorities agree that the principles underlying the *W(D)* instruction apply to all exculpatory evidence. However, the overriding factor is not necessarily whether a formal *W(D)* instruction is given regarding such evidence. Rather, as stated in *BD* at para 114:

Where, on a vital issue, there are credibility findings to be made between conflicting evidence called by the defence or arising out of evidence favourable to the defence in the Crown’s case, the trial judge must relate the concept of reasonable doubt to those credibility findings. The trial judge must do so in a way that makes it clear to the jurors that it is not necessary for them to believe the defence evidence on that vital issue; rather, it is sufficient if – viewed in the context of all of the evidence – the conflicting evidence leaves them in a state of reasonable doubt as to the accused’s guilt: *Challice*. In that event, they must acquit.

Dr. Hill’s Evidence

[54] As earlier indicated, the accused argues that the trial judge erred by failing to instruct the jury regarding Dr. Hill’s evidence in the *W(D)* portion of his charge. As I have explained, while such an instruction may be preferable, failure to provide one may not amount to reversible error where

the alleged deficiency is compensated for in the rest of the charge. The issue here is whether the jury was clearly instructed on the issue of reasonable doubt in relation to the evidence of Dr. Hill.

[55] In this case, the trial judge instructed the jury as to reasonable doubt. He told the jury that if, after considering all of the evidence or lack of evidence, it was not sure that the accused committed the offence, then it must find the accused not guilty. The trial judge also told the jury that it was free to accept all, none or some of each witness' evidence. Throughout his instructions, he repeatedly told the jury that it must find the accused not guilty if it had a reasonable doubt as to his intent to kill the deceased.

[56] The trial judge reviewed Dr. Hill's evidence in his instruction regarding expert evidence. He reiterated Dr. Hill's opinion that at the time of the deceased's death, the accused "was experiencing cocaine-induced psychosis and that at the relevant time, he did not foresee his actions would cause the death of [the deceased]." He reinforced Dr. Hill's expertise as a forensic psychiatrist. Next, he reminded the jury that it may give as much or as little weight to the testimony as it deserved.

[57] In discussing the defence of intoxication, the trial judge stated:

As a result of consuming drugs or alcohol, a person may not have the required intent. However, the mere fact a person's mind is affected by drugs or alcohol, so that they lose inhibitions or act in a way in which they would not have done had they been sober, is no excuse if the required intent is proved. In this case, *you must decide whether the evidence of intoxication, along with all the other evidence, leaves you with a reasonable doubt about whether [the accused] had the intent required for second-degree murder at the time of strangling [the deceased]. [The accused] is not required to prove he lacked the required intent. The Crown must*

prove or -- beyond a reasonable doubt [the accused] had the intent required for second-degree murder despite evidence of his consumption of drugs and alcohol.

[emphasis added]

[58] The trial judge then reminded the jury to consider all of the evidence, including how much drugs and alcohol the accused consumed, when he consumed them and their effect on his intent and knowledge of the consequence of his actions at the time of strangling the deceased, and not at some time before or after the incident.

[59] In discussing the post-offence conduct of the accused, the trial judge warned the jury about inferring guilt from such conduct. He told the jury that before it could consider such evidence, it had to reject the accused's defence that his after-the-fact-conduct was "symptomatic of drug and alcohol induced psychosis". He again warned the jury that the accused need not prove anything and that the Crown must prove guilt beyond a reasonable doubt and that the onus never shifts.

[60] When reviewing the evidence that the jury may want to consider regarding the issue of intent, the trial judge gave a detailed description of Dr. Hill's evidence. He reinforced Dr. Hill's testimony that the discrepancies between what the accused told Dr. Hill and the accused's trial evidence did not change Dr. Hill's opinion.

[61] Finally, regarding intent, the trial judge stated that even if the jury determined that the defence of intoxication did not apply in deciding whether the accused had the required state of mind to make the unlawful killing murder, it still had to consider if the accused had the intent required for that

offence. He provided a rolled-up instruction telling the jury that, even if it found the defence of intoxication was not made out, the jury must consider it along with “any other evidence that might suggest [the accused] acted instinctively, in the sudden excitement of the moment, without thinking about the consequences of what he did, and without either state of mind necessary to make the unlawful killing murder.”

[62] In *R v Wesley*, 2025 ONCA 51 at para 31, the Court explained:

A rolled-up instruction is intended to ensure that all evidence relating to whether the Crown has proven the requisite mental state for murder is considered cumulatively, even if a specific defence, justification or excuse to which particular evidence also relates, e.g., intoxication, provocation, is rejected or not available. This is because “[s]ometimes, the whole exceeds the sum of its parts”: *R. v. Cudjoe*, 2009 ONCA 543, 251 O.A.C. 163, at paras. 104 and 107; *R. v. Phillips*, 2017 ONCA 752, 355 C.C.C. (3d) 141, at paras. 154-55.

[63] While I have included only a few examples, the trial judge repeatedly advised the jury to consider all of the evidence and emphasized that the Crown always has the burden to prove the necessary intent for murder beyond a reasonable doubt.

[64] In conclusion, the trial judge extensively instructed the jury regarding the evidence of Dr. Hill, including how it would apply to the defence of intoxication and repeated the caution that the burden always remains on the Crown to prove guilt beyond a reasonable doubt. While the *W(D)* instruction could have stated that even if the jury did not accept the evidence of the accused *and/or Dr. Hill*, the jury still had to consider whether that evidence raised a reasonable doubt. However, when viewed through the

functional lens, the overall charge provided by the trial judge was sufficient to convey the purpose of *W(D)* as it related to the exculpatory evidence, including that of Dr. Hill. In my view, the trial judge made no reversible error in this regard.

The Inconsistent Statements

Background

[65] As earlier indicated, the inconsistent statements made by the accused basically allege that the deceased had initiated a physical altercation with him and that he was a “spinning top” during the time of the incident. Arguably, these statements could have supported an alternate means for the jury to find a lack of intent to commit murder. However, the draft charge provided by the trial judge to counsel did not include the instruction that out-of-court statements by an accused may still be considered as evidence even if not adopted as true by the accused in their testimony. Consequently, no *W(D)* instruction was provided in that regard.

[66] Section 11.11 of the Canadian Judicial Council’s (CJC) National Committee on Jury Instructions, “Model Jury Instructions: Final Instructions” (last visited 12 May 2025), online (pdf): <nji-inm.ca> (the CJC Instructions) provides a model instruction regarding inconsistent statements of an accused. It states:

11.11 PRIOR INCONSISTENT STATEMENTS OF ACCUSED WITNESS

...

- [1] If you find that (*NOAW*) said one thing in the witness box and something different about the same subject on an earlier occasion, this may be a factor in assessing his/her credibility.

- [2] It is for you to determine what effect any differences will have on your overall assessment of *(NOAW)*'s credibility. They may have a huge effect, or no effect, or somewhere in between. Not every difference is important. Consider the extent and nature of any difference. Was it on a central point or something peripheral? Consider any explanation *(NOAW)* gave.
- [3] Unlike statements by other witnesses, however, you may also consider *(NOAW)*'s earlier statement(s) as evidence of what happened, whether or not *(NOAW)* testified that what s/he said earlier was true. It is for you to say how much or little of what *(NOAW)* said earlier you will believe or rely on.
- ...
- [4] As I have said to you earlier, you must find *(NOAW)* not guilty if you believe his/her statement(s) that s/he did not commit the offence charged.
- [5] Even if you do not believe *(NOAW)*, you must find him/her not guilty if a statement leaves you with a reasonable doubt about his/her guilt (or about an essential element of the offence charged (or an offence)).
- [6] Even if *(NOAW)*'s statement(s) does not raise a reasonable doubt about his/her guilt (or about an essential element of the offence charged (or an offence)), you still must acquit if after considering all the evidence you are not satisfied beyond a reasonable doubt of his/her guilt.

[underlining added; footnote omitted]

[67] When discussing the *W(D)* instruction in the draft jury charge provided by the trial judge, the Crown referred to the above instruction and suggested that a further *W(D)* instruction be given regarding the inconsistent statements.

[68] Trial counsel objected to the inclusion of such an instruction. He was of the view that the standard instruction that was provided earlier in the

charge regarding the assessment of evidence as found in section 9.4 of the CJC Instructions was appropriate. For ease of reference, section 9.4 is reproduced in the appendix at the end of these reasons.

[69] Presumably referring to the Crown's theory that the accused was not credible based on his differing versions of the incident, trial counsel stated that the instruction, as suggested, was "singularly unfair" and "[u]nnecessarily confusing". He said, "This is not a place to appoint and re-append and insert and emphasize the Crown's theory."

[70] The Crown responded, stating that it was of the view that what it was suggesting was to the benefit of the accused.

[71] After stating that he wished that the ability of the jury to find that inconsistent statements of an accused could be found to be evidence of what happened "wasn't the law", trial counsel told the judge that it would be "okay" if it was included in the *initial W(D)* instruction, but not as part of a separate instruction regarding inconsistent statements of an accused. Trial counsel felt that to repeat the *W(D)* instruction as indicated in the CJC Instructions would be unnecessarily confusing.

[72] In his final charge to the jury, the trial judge did not provide any specific instruction regarding inconsistent statements of an accused. Rather, as initially requested by trial counsel, the jury was left with the following instruction consistent with section 9.4 of the CJC Instructions regarding the assessment of evidence in general:

Do any inconsistencies in the witness's evidence make the main points of the testimony more or less believable and reliable? Is the inconsistency about something important, or about a minor detail?

Does it seem like an honest mistake? Is it a deliberate lie? Is the inconsistency because the witness said something different, or because he or she failed to mention something? Is there any explanation for it? Does it make sense?

Discussion and Decision

[73] I start by noting that, in addition to the CJC Instructions, David Watt, *Watt's Manual of Criminal Jury Instructions* (Toronto: Thomson Reuters, 2023) provides a standard instruction regarding the use that can be made of out-of-court statements made by an accused. It states that some judges *might consider* giving a *W(D)* instruction when discussing such evidence. Nonetheless, it cautions that rarely will a prior statement be purely exculpatory and that recent jurisprudence cautions against repetition of the classic *W(D)* formula (see *ibid* at 353).

[74] In *R v Flores*, 2011 ONCA 155, Watt JA explained that instructions regarding out-of-court statements of an accused must make it clear that they are “evidence of the truth of what is said and evidence both for and against their maker [and that a] trial judge should say or imply nothing that leaves the impression with jurors that they should apply a different level of scrutiny to the exculpatory portions of anything said by an accused than they apply to the inculpatory parts” (at para 116). A trial judge should also point out that the “statements may be used as prior inconsistent statements to impeach the credibility of the accused as a witness and to challenge the reliability of his or her testimony” (*ibid* at para 117).

[75] As earlier stated, the trial judge acceded to the preference of trial counsel that the jury not be given an instruction regarding inconsistent statements made by an accused.

[76] In the recent decision of *R v Wahabi*, 2024 MBCA 70, this Court summarized the law regarding the role of counsel in relation to jury charges. Briefly, trial counsel's approval of a jury charge or, to a lesser extent, a failure to object, becomes more significant where it appears to have been based on a tactical decision or trial strategy. On the other hand, the position taken by trial counsel is not determinative, especially where a legal error exists. The ultimate responsibility to properly instruct the jury is with the trial judge (see *ibid* at paras 161-66).

[77] In my view, the position taken by trial counsel in this case was a tactical decision, made to advance the case of the accused and minimize the effect of the inconsistent statements.

[78] The accused was unshaken in his testimony that he lied to the psychiatrist and medical personnel when he described the deceased's behaviour and asserted that it led to a confrontation. Rather, he said that the deceased was a nice, kind lady and "[v]ery understanding." He testified that she shared the drugs that she had purchased with him and that she tried to assist him when he had trouble maintaining an erection. Part of his defence was that he was *not angry* at her and had *no motive* to kill her.

[79] The theory of the Crown was that the accused became angry at the deceased because he could not perform sexually and that was why he committed the offence. In its closing argument, the Crown referred to inconsistent statements as one of the lies that the accused had concocted to

deflect blame from himself. That is, the Crown referred to the inconsistent statements to impugn the credibility of the accused.

[80] Nonetheless, the Crown only relied on the inconsistent statements as one of a number of inconsistencies between the accused's testimony and statements that he had made to the psychiatrist and medical personnel and those that he had made to Dr. Hill, including (i) whether or not he shared the deceased's crack cocaine prior to or after killing her, (ii) whether or not he was sober at the time of the incident, and (iii) the amount of cocaine he had been using in the three months leading up to the incident.

[81] Considered in the context of the trial, the inconsistent statements contradicted the exculpatory evidence that the accused was urging the jury to accept. Thus, consistent with the defence theory, the accused never relied on the potentially exculpatory nature of them.

[82] On appeal, the accused urges this Court to unravel the defence presented to the jury and impose a different one, seemingly involving an element of provocation—a partial defence, which trial counsel pointedly resisted being put to the jury when the issue was discussed during the proceedings.

[83] In my view, the facts of this case and the testimony of the accused, combined with the position taken by trial counsel, weigh against the conclusion that the charge was deficient as alleged. Viewed through the functional lens, I am not convinced that the trial judge made a reversible error in this aspect of his charge to the jury (see *R v Calnen*, 2019 SCC 6 at para 43).

Failure to Instruct on Manslaughter in the W(D) Instruction

[84] As earlier indicated, I will now deal with the argument that the *W(D)* instruction was deficient in that it failed to advise the jury that it could convict the accused of the included offence of manslaughter. I disagree with the argument of the accused that the failure to include such an instruction caused the jury confusion. A review of the closing submissions of the parties and the trial judge's instructions makes it clear that the jury would not have misunderstood that a conviction for murder or an acquittal were the only possible verdicts that it could reach.

[85] The accused did not deny that he killed the deceased. The entire defence rested on the accused's assertion that he did not intend to murder her and that his state of intoxication was such that it rendered him incapable of forming the required intent for murder. Trial counsel was adamant that this was the only issue the defence wanted the jury to focus on. In his closing submissions to the jury, trial counsel stated that the question came down to whether the accused was guilty of murder or manslaughter. He repeated this assertion throughout his submissions and asked the jury to find the accused not guilty of murder, but guilty of manslaughter.

[86] Similarly, the Crown's submissions focussed on evidence that supported its contention that the accused possessed the necessary intent to commit murder.

[87] Finally, the trial judge's instructions focussed on the alternative findings of murder or manslaughter. He concluded his instructions regarding the issue of guilt by telling the jury that if they found the accused not guilty of murder, they must find him guilty of manslaughter.

[88] The case of *R v Feng*, 2014 BCCA 71, relied on by the accused, is distinguishable. In that case, the Court held that, in instructing the jury regarding murder, the trial judge focussed too much on the issue of excessive force as it related to self-defence as opposed to the intent requirement for murder, as opposed to manslaughter. The accused testified that he blacked out when he stabbed the deceased. Conversely, in the present case, whether the accused had the required intent for murder was essentially the only issue for the jury.

[89] Thus, I am not persuaded that the *W(D)* instruction provided to the jury was insufficient in the manner alleged by the accused.

II. The Trial Judge Erred by Failing to Instruct the Jury on the (Partial) Defence of Provocation

III. The Trial Judge Erred by Failing to Instruct the Jury on the Defence of Accident

[90] In my view, each of these grounds can be dismissed summarily on the basis that they lacked an air of reality. That is, there was no evidentiary foundation established for either of the defences based on the totality of the evidence (see *R v Cinous*, 2002 SCC 29 at paras 50-65).

[91] Aside from the accused's denial of the truthfulness of the inconsistent statements, which he now says ground the alleged error of failing to instruct regarding provocation, trial counsel was asked whether provocation was at issue, and he made it clear that it was not.

[92] Even assuming the inconsistent statements were found to constitute a true account of what had happened, they are insufficient to demonstrate an air of reality to the partial defence of provocation as it is defined in sections 232(1)–232(2) of the *Criminal Code*, RSC 1985, c C-46.

[93] The inconsistent statements do not evidence that the two-fold objective element of provocation was met in that there was no evidence of a wrongful act or insult that was sufficient to deprive an ordinary person of the power of self-control (see *R v Cairney*, 2013 SCC 55 at paras 32-41). Nor is there evidence regarding the two-fold subjective element that the accused acted in response to the provocation and that he acted on the sudden before there was time for his passion to cool (see *ibid* at para 34).

[94] Regarding accident, the accused relies on his testimony that his only recall is that he did not know why he choked the deceased, but that he was doing it as if he was fighting with her and that he stopped after a few seconds when she stopped moving.

[95] The meaning of accident in the criminal law context was recently discussed in *R v Barton*, 2019 SCC 33 [*Barton*]. The term accident can be used to signal that the act itself was involuntary, thereby negating the *actus reus* of the offence or that the accused did not have the requisite *mens rea*. As it relates to the *mens rea* for murder, that means that accident may apply to the subjective intention to bring about the intended consequence (see *ibid* at paras 187-88).

[96] In *Barton*, the Court reinforced that when considering the defence of accident, the relevance does not lie in whether the accused is claiming an

accident but, rather, if the claim evidences the absence of one of the elements of the offence charged (see para 194).

[97] In my view, the facts relied on by the accused in the present case cannot support his assertion that the *actus reus* of the offence was involuntary, thereby constituting an accident. In this regard, *R v Mathisen*, 2008 ONCA 747, relied on by the accused, is distinguishable. In that case, there was an air of reality to the accused's assertion that he did not intend to commit the act that led to the death of his wife. That is, while he meant to hold his wife down, he did not mean to subject her to the risk of harm of death when he accidentally kneeled on her chest, as opposed to holding her arms down.

[98] Regarding *mens rea*, the accused relies on *R v Roe*, 2009 BCCA 193 [Roe]. In *Roe*, the accused had a knife in his hand while engaged in a physical altercation with the victim. The accused testified that he never intended to stab the victim and that it must have happened during the physical altercation or when he pushed the victim away. The Court held that the trial judge erred in failing to consider whether accident could have negated the required *mens rea* for murder.

[99] In my view, *Roe* is distinguishable. In the present case, the accused admitted that he intentionally strangled the deceased until she stopped moving. There is no evidence that he accidentally choked her while trying to commit some other act—to surmise otherwise is speculative. This is especially so in light of the medical evidence that the deceased would have to have her oxygen cut off to her brain for four minutes to incur the brain damage that she did.

[100] Based on the above, I am not persuaded that an evidentiary basis sufficient to ground an air of reality to the defence of accident was raised.

IV. The Trial Judge Erred in Not Allowing the Accused to Call Expert Evidence on Issues Relating to Memory.

Positions of the Parties at Trial

[101] After the Crown had closed its case, but prior to the accused testifying, the accused moved for the admission of expert evidence in the form of testimony of Dr. Randall Jamieson (Dr. Jamieson) regarding issues related to memory.

[102] Initially, trial counsel sought to ask the following two questions:

- If a person were to have a memory lapse due to drugs and alcohol and then recover memories of an incident, are those memories more likely to be reliable?
- Could the recovered memories be affected by things the person heard about the incident?

[103] While the Crown agreed to Dr. Jamieson's expertise with respect to memory for the purposes of the *voir dire*, it contested the necessity and reliability of the proposed evidence.

[104] The accused argued that the evidence was relevant as it was outside of a normal person's experience to have memory loss due to the consumption of cocaine. He further argued that the evidence was necessary to provide the

jury with the tools necessary to evaluate his testimony. When asked to explain the theory of the defence in this regard, trial counsel responded:

[TRIAL COUNSEL]: We anticipate that [the accused] was part of [the killing]. Say, initially, he didn't remember some of this, but it started to come back to him. He will take responsibility for causing [the deceased's] death, and the issue will be one of intent.

Because of the way he recovered his memory, some of what he recalls doesn't sit exactly side by side perfectly with some of the other details, and these are not exculpatory details he's bringing in. They're just things that are a bit different. And we'd like Dr. Jamieson's --

THE COURT: Sorry. Help me out. Some of what he recalls?

[TRIAL COUNSEL]: May be a little bit at odds with other evidence that we have about the case. And these aren't exculpatory things. These aren't particularly inculpatory things, but they're of a order of -- he remembers, for example, a red car when the car was actually blue. That kind of thing. A little bit more dramatic than that, but it's that kind of thing. And we wouldn't want this to sort of -- these sort of differences to necessarily affect his credibility.

We think the trier of fact would benefit from knowing that a person's memory could be affected in these circumstances, and it would [not] go necessarily to their honesty if they got some details wrong.

[105] When questioned further, trial counsel clarified that he anticipated that the accused's testimony "might be at odds with other evidence that is actually uncontested, that's accepted."

[106] In support of its opposition to the admission of the evidence, the Crown argued that a jury instruction would be sufficient to address any concerns regarding the reliability of the accused, if he chose to testify. It noted

that drug and alcohol consumption was a common feature in the testimony of witnesses.

[107] The Crown further argued that there was no evidence of what constituted a recovered memory in this case, the accused not having yet testified.

[108] After hearing the Crown's argument, the accused submitted that the first question be reformulated to state, "if a person were to have a memory lapse and then recover memories of an incident, are those memories likely to be reliable?" The accused withdrew the second question.

Decision of the Trial Judge

[109] The trial judge noted that the parties were in agreement with the substance of the applicable case law and that *R v Mohan*, [1994] 2 SCR 9, 1994 CanLII 80 (SCC) [*Mohan*], is the leading case regarding the admission of expert evidence. He distinguished *R v SKM*, 2021 ABCA 246 [*SKM*], relied on by the accused, as that case involved a historical sexual assault where the defence was built on the unreliability of memories recovered years after the event. He noted that the expert evidence in that case explained how false memories develop and come to be believed over time. He stated that the defence in this case had "not expressed their purpose . . . with comparable or similar clarity."

[110] The trial judge considered the submission that the expert evidence was required to address how returning or lapsed memories might influence a jury. Nonetheless, he held the expert evidence inadmissible on the basis that 1) it was "not a matter where ordinary people are unlikely to form a correct

judgment about it if otherwise unassisted by persons with special knowledge”; 2) when balancing all interests, he had “concern the expert evidence could place too much focus on the evidence; and 3) he could address the concerns raised by the defence, as he normally would address the jury regarding the assessment of reliability and credibility.

[111] In summary, although his decision appears to be primarily concerned with the necessity criterion, the trial judge found the evidence to be both unnecessary and irrelevant, as defined in *Mohan*.

Positions of the Parties on Appeal

[112] On appeal, the accused argues that the ruling of the trial judge left a void with respect to how to deal with his testimony, resulting in trial counsel not addressing in detail the matters relating to his memory.

[113] He submits that the jury was not provided with the tools to assess the inconsistent statements in light of the version of the incident that he testified to that he said he only recalled a day or two after the incident. He says the jury could not determine whether this was a credibility or reliability issue or a complex, psychological issue.

[114] In support of this argument, the accused relies on *R v Pearce*, 2012 MBQB 22 [*Pearce 2012*], rev'd on other grounds 2014 MBCA 70 [*Pearce 2014*], wherein expert testimony regarding the phenomenon of repressed memory was permitted where the accused alleged that he had made a false statement when he admitted to police that he had committed a murder.

[115] The accused also relies on *SKM* in his assertion that evidence of repressed or other memory issues has been permitted in historic sexual assault cases.

[116] Finally, the accused underscores the liberal approach to be applied to the admission of defence-led evidence (see *Pearce 2012* at para 51).

[117] The Crown argues that expert evidence is presumptively inadmissible and that consideration of its admission involves a determination of the factual matrix. It notes that the accused did not renew his motion to call Dr. Jamieson after he testified. It submits that there is no evidence to substantiate that there were recovered or false memories that would require evidence outside the jury's ability to assess the reliability and credibility of the accused's evidence.

Discussion and Decision

[118] The standard of review regarding the admission of expert evidence was explained by Mainella JA in *Pearce 2014* at para 74, where he stated:

Appellate deference will be afforded to determinations as to the admissibility of expert opinion evidence. The balancing of its potential probative value, reliability, significance to the trial, necessity and its potential prejudicial effect to the trial process, if admitted, in the context of the particular case “does not involve the application of bright line rules, but instead requires an exercise of judicial discretion” (*Abbey* at para. 79). Therefore, absent an error in law, a misapprehension of evidence, a failure to consider relevant evidence or abdication by the trial judge of his or her gatekeeper function, an appellate court should decline to interfere with a trial judge's admissibility decision (*K. (A.)* at para. 93; *D.D.* at paras. 12-13, 70; *J.-L.J.* at para. 61; and *R. v. Woodard (J.)*, 2009 MBCA 42 at para. 14, 240 Man.R. (2d) 24).

[119] In *Mohan*, the Court emphasized that expert opinion evidence is presumptively inadmissible. The party seeking to introduce such evidence must establish on a balance of probabilities that the evidence is (a) relevant, (b) necessary in assisting the trier of fact, (c) that there is an absence of an exclusionary rule, and (d) that of a properly qualified expert (see *ibid* at 20). Also see *Pearce 2014* at paras 66-74 for an explanation of the law regarding the admission of expert evidence.

[120] I am of the view that the accused has not demonstrated reviewable error. The accused is simply rearguing the position he advanced at trial. That position did not address what the expert was expected to say regarding recovered memories; there was no definition of a recovered memory or evidence that one existed in this case. In my view, the trial judge was asked to determine the matter in a vacuum. I am not convinced that he erred in determining that, based on the submissions before him, the evidence was not necessary or relevant.

[121] In my view, *Pearce 2012* and *SKM* relied on by the accused are distinguishable. In *Pearce 2012*, the accused initially denied having a memory of the incident to police. After the police suggested to him that he had repressed his memory regarding the incident, he made what he alleged was a false confession. The expert evidence was that the “theory that a person can repress a memory of a traumatic incident and later recall it is highly contentious [and that there] is no validity to the theory of recovered memory” (*ibid* at para 49).

[122] Similarly, in *SKM*, the complainant testified to having recovered memories of a historical sexual assault. In that case, the crux of the defence

concerned the reliability of the complainant's recovered memories. False memory was a critical issue. The Alberta Court of Appeal held that the trial judge erred in not permitting expert evidence on "how human memory works and false memories may be formed, even in the case of traumatic events, [agreeing that it] is an area 'which is likely to be outside the ordinary experience and knowledge of the trier of fact'" (*ibid* at para 89).

[123] In this case, there is no identifiable argument as to how the expert evidence would apply to the accused's alleged recovered memory or of its relevance and necessity.

[124] Further, I am unconvinced that the accused has demonstrated that the trial judge erred when he found that the standard jury instructions regarding credibility and reliability, including the effects of the use of drugs and alcohol, were insufficient.

Decision

[125] Based on all the above, I am not convinced that the issues raised by the accused demonstrate reviewable error by the trial judge. In the result, I would dismiss the appeal.

Cameron JA

I agree: _____
Rivoalen CJM

I agree: _____
Monnin JA

APPENDIX

Section 9.4 of Canadian Judicial Council's National Committee on Jury Instructions, "Model Jury Instructions: Final Instructions" (last visited 12 May 2025), online (pdf): <nji-inm.ca>, provides as follows:

9.4 ASSESSMENT OF EVIDENCE

...

- [1] To make your decision, you should consider carefully, and with an open mind, all the evidence presented during the trial. It will be up to you to decide how much or little of the testimony of any witness you will believe or rely on. You may believe some, none or all of the evidence given by a witness.
- [2] When you go to the jury room to consider the case, use your collective common sense to decide whether the witnesses know what they are talking about and whether they are telling the truth. There is no magic formula for deciding how much or how little to believe of a witness's testimony or how much to rely on it in deciding this case. But here are a few questions you might keep in mind during your discussions.
- [3] Did the witness seem honest? Is there any reason why the witness would not be telling the truth?
- [4] Does the witness have any reason to give evidence that is more favourable to one side than to the other?
- [5] Was the witness in a position to make accurate and complete observations about the event? Did s/he have a good opportunity to do so? What were the circumstances in which the observation was made? What was the condition of the witness? Was the event itself unusual or routine?
- [6] Did the witness seem to have a good memory? Does the witness have any reason to remember the things about which s/he testified? Did any inability or difficulty that the witness had in remembering events seem genuine, or did it seem made up as an excuse to avoid answering questions?

- [7] Did the witness seem to be reporting to you what he or she saw or heard, or simply putting together an account based on information obtained from other sources, rather than personal observation?
- [8] Did the witness's testimony seem reasonable and consistent? Is it similar to or different from what other witnesses said about the same events? Did the witness say or do something different on an earlier occasion?
- [9] Do any inconsistencies in the witness's evidence make the main points of the testimony more or less believable and reliable? Is the inconsistency about something important, or a minor detail? Does it seem like an honest mistake? Is it a deliberate lie? Is the inconsistency because the witness said something different, or because s/he failed to mention something? Is there any explanation for it? Does the explanation make sense?
- [10] What was the witness's manner when he or she testified? Do not jump to conclusions, however, based entirely on how a witness has testified. Looks can be deceiving. Giving evidence in a trial is not a common experience for many witnesses. People react and appear differently. Witnesses come from different backgrounds. They have different abilities, values and life experiences. There are simply too many variables to make the manner in which a witness testifies the only or most important factor in your decision.
- [11] These are only some of the factors that you might keep in mind when you go to your jury room to make your decision. These factors might help you decide how much or little of a witness's evidence you will believe or rely on. You may consider other factors as well.
- [12] In making your decision, do not consider only the testimony of the witnesses. Take into account, as well, any exhibits that have been filed and decide how much or little you will rely on them to help you decide this case. I will be telling (or, have already told) you about how you use admissions in making your decision.

[footnotes omitted]