

COURT OF KING'S BENCH OF MANITOBA

B E T W E E N:

HIS MAJESTY THE KING,)	<u>Renée Lagimodière</u>
)	<u>Danielle Simard</u>
- and -)	for the Crown
)	
JOSH BENOIT,)	<u>Jeremy Kostiuk</u>
accused.)	<u>Stefania Whidden</u>
)	for the accused
)	
)	Judgment Delivered:
)	May 5, 2026

GRAMMOND J.

INTRODUCTION

[1] The accused is charged with first degree murder in the death of Mackaylah Gerard-Roussin (the "Deceased") on August 27, 2022. These are my reasons for decision relative to the judge alone trial that took place in February 2026.

BACKGROUND

[2] The accused and the Deceased had known each other for many years and became reacquainted in the summer of 2022, when they were 20 years of age. The evidence reflects that they had been spending time together for a period of weeks before the murder.

[3] At all material times, the accused was the registered owner of a grey Mazda3 (the "Vehicle") and was residing at his mother's residence in Steinbach, Manitoba (the "House"). The Deceased was residing in Winnipeg, Manitoba. On August 25, 2022 between 10:30 p.m. and 11:00 p.m., the Deceased left her home and was not seen or heard from again.

[4] On August 27, 2022, police arrested the accused at the side of the highway near La Broquerie, Manitoba, at which time he set the Vehicle on fire, with the use of an accelerant. Police later recovered fabric from the Vehicle bearing the Deceased's DNA.

[5] On August 28, 2022, police and forensic anthropologist Dr. Emily Holland excavated a clandestine grave in rural Manitoba (the "Grave"), in which the Deceased's body was found wrapped in a tarp and placed in a plastic container¹ with a lid. The container also contained a wooden spoon with a sharpened handle (the "Spoon"), and the Deceased's blood was found on three locations on the Spoon.

[6] At trial, the Crown sought to enter into evidence a number of electronic documents and after a contested *voir dire* I admitted those documents into evidence, with written reasons. The electronic documents included:

- a) data collected from the accused's phone after his arrest (the "Phone") including:
 - i. log details of audio calls between the Phone and the Deceased's cousin;
 - ii. log details of instant or native messages;
 - iii. log details of Snapchat messages;
 - iv. log details of the Phone being reset, set up, powered on, and powered off;and

- v. four "trip" videos prepared by police by plotting out location data found on the Phone;
- b) fourteen still images obtained from traffic cameras in Winnipeg; and
- c) video surveillance obtained from the following sources:
 - i. the Canadian Tire store in Steinbach, Manitoba;
 - ii. the La Broquerie bar;
 - iii. the Deceased's residence in Winnipeg, Manitoba; and
 - iv. the Domo gas station in Woodridge, Manitoba.

POSITION OF THE PARTIES

The Crown

[7] The Crown submitted that I should be satisfied beyond a reasonable doubt that the accused killed the Deceased, that he meant to cause her death, and that he planned and deliberated the murder. The Crown also argued that these are the only reasonable conclusions that I can reach when I consider all of the circumstantial evidence before me. In addition, the Crown contended that the post-offence conduct in this case supports the accused's consciousness of guilt and an inference that he acted unlawfully.

The Defence

[8] The defence submitted that the Crown has failed to establish beyond a reasonable doubt that the accused killed the Deceased or that the murder was planned and deliberate. The defence argued that to convict on the strength of circumstantial evidence, all reasonable possibilities consistent with an alternative explanation must be

¹ At trial, this item was also referred to as a bin or a tote bin.

negated. Here, there are available, alternative reasonable inferences and some of the accused's behaviour was illogical, which must not be ignored.

THE LAW AND ANALYSIS

[9] The law is clear that to convict the accused of first degree murder, the Crown must prove beyond a reasonable doubt that the accused committed an unlawful act which caused the Deceased's death, that the accused had the intent required for murder, and that the murder was both planned and deliberate.

[10] The Crown's case against the accused is based upon circumstantial evidence, and accordingly, to convict the accused I must be satisfied beyond a reasonable doubt that his guilt is the only rational (or reasonable) inference that can be drawn from the totality of the evidence (see ***R. v. Griffin***, 2009 SCC 28, at paragraph 33). If there are reasonable inferences other than guilt, the Crown's case does not meet the standard of proof beyond a reasonable doubt.

[11] The leading case on circumstantial evidence is ***R. v. Villaroman***, 2016 SCC 33, where the court stated:

[26] ... There is a special concern inherent in the inferential reasoning from circumstantial evidence. The concern is that the jury may unconsciously "fill in the blanks" or bridge gaps in the evidence to support the inference that the Crown invites it to draw. . .

. . .

[30] ... Telling the jury that an inference of guilt drawn from circumstantial evidence should be the only reasonable inference that such evidence permits will often be a succinct and accurate way of helping the jury to guard against the risk of "filling in the blanks" by too quickly overlooking reasonable alternative inferences. . . The inferences that may be drawn from [an] observation must be considered in light of all of the evidence and the absence of evidence, assessed logically, and in light of human experience and common sense.

. . .

[35] ... In assessing circumstantial evidence, inferences consistent with innocence do not have to arise from proven facts [citations omitted]. Requiring

proven facts to support explanations other than guilt wrongly puts an obligation on an accused to prove facts and is contrary to the rule that whether there is a reasonable doubt is assessed by considering all of the evidence. The issue with respect to circumstantial evidence is the range of reasonable inferences that can be drawn from it. If there are reasonable inferences other than guilt, the Crown's evidence does not meet the standard of proof beyond a reasonable doubt.

[36] ... [A] reasonable doubt, or theory alternative to guilt, is not rendered "speculative" by the mere fact that it arises from a lack of evidence. . . . A certain gap in the evidence may result in inferences other than guilt. But those inferences must be reasonable given the evidence and the absence of evidence, assessed logically, and in light of human experience and common sense.

[37] When assessing circumstantial evidence, the trier of fact should consider "other plausible theor[ies]" and "other reasonable possibilities" which are inconsistent with guilt [citations omitted]. . . . [T]he Crown thus may need to negative these *reasonable* possibilities, but certainly does not need to "negative every possible conjecture, no matter how irrational or fanciful, which might be consistent with the innocence of the accused" [citations omitted]. "Other plausible theories" or "other reasonable possibilities" must be based on logic and experience applied to the evidence or the absence of evidence, not on speculation.

[38] Of course, the line between a "plausible theory" and "speculation" is not always easy to draw. But the basic question is whether the circumstantial evidence, viewed logically and in light of human experience, is reasonably capable of supporting an inference other than that the accused is guilty.

. . .

[55] ... Where the Crown's case depends on circumstantial evidence, the question becomes whether the trier of fact, acting judicially, could reasonably be satisfied that the accused's guilt was the only reasonable conclusion available on the totality of the evidence.

[emphasis in original]

[12] In ***R. v. Ponace***, 2019 MBCA 99, the court stated:

[37] ... [T]he accused did not testify. Therefore, the jury did not have an innocent explanation from her regarding the evidence that linked her to the arson and the murder and there was no evidentiary foundation which could have precluded the impugned inferences from being drawn [citations omitted].

. . .

[39] While I agree that the jury could have reached a different conclusion, circumstantial evidence does not have to totally exclude other conceivable inferences and the verdict is not unreasonable simply because those alternatives did not raise a doubt in the jury's mind (see ***Villaroman*** at para 56, quoting ***R v Dipnarine***, 2014 ABCA 328 at para 22; see also ***Calnen*** at para 145).

[13] One of the forms of circumstantial evidence upon which the Crown relies is the accused's post-offence conduct (or after-the-fact conduct), from which it argued that inferences of guilt can be drawn. Leading cases on the use of this type of evidence reflect the following guiding principles.

[14] In **R. v. White**, [1998] 2 S.C.R. 72, the court stated:

[19] Under certain circumstances, the conduct of an accused after a crime has been committed may provide circumstantial evidence of the accused's culpability for that crime. For example, an inference of guilt may be drawn from the fact that the accused fled from the scene of the crime . . . Such an inference may also arise from acts of concealment . . . As Weiler J.A. noted in **R. v. Peavoy** (1997), 117 C.C.C. (3d) 226 (Ont. C.A.), at p. 238:

Evidence of after-the-fact conduct is commonly admitted to show that an accused person has acted in a manner which, based on human experience and logic, is consistent with the conduct of a guilty person and inconsistent with the conduct of an innocent person.

. . .

[21] Evidence of post-offence conduct is not fundamentally different from other kinds of circumstantial evidence. In some cases it may be highly incriminating, while in others it might play only a minor corroborative role. Like any piece of circumstantial evidence, an act of flight or concealment may be subject to competing interpretations and must be weighed by the jury, in light of all the evidence, to determine whether it is consistent with guilt and inconsistent with any other rational conclusion.

. . .

[43] ... Post-offence conduct, like any evidence, takes on its full significance and probative value only in the context of the other evidence in the case. Evaluated in a piecemeal fashion, the evidence of post-offence conduct may not allow a jury to conclude beyond a reasonable doubt what the motivation of the accused was for his or her actions. However, in conjunction with all the other evidence in the case, it may indeed assist the jury in determining whether a reasonable doubt exists with respect to guilt or innocence.

[15] In **R. v. Calnen**, 2019 SCC 6, the court stated:

[106] After-the-fact conduct encompasses what the accused both said and did after the offence charged in the indictment was allegedly committed. It covers a large range of possible circumstances, and its content and contours are confined only by the limits of human experience. After-the-fact conduct may also arise in respect of all types of criminal offences and in different legal settings . . . It is this potential breadth, variety, and mix of considerations that lies at the heart of the

much repeated observation that the proper legal treatment of after-the-fact conduct is highly context and fact specific.

...

[112] In order to draw inferences, the decision maker relies on logic, common sense, and experience. As with all circumstantial evidence, a range of inferences may be drawn from after-the-fact conduct evidence. The inferences that may be drawn “must be reasonable according to the measuring stick of human experience” and will depend on the nature of the conduct, what is sought to be inferred from the conduct, the parties’ positions, and the totality of the evidence: **R. v. Smith**, 2016 ONCA 25, 333 C.C.C. (3d) 534, at para. 77. That there may be a range of potential inferences does not render the after-the-fact conduct null: see **R. v. Allen**, 2009 ABCA 341, 324 D.L.R. (4th) 580, at para. 68. In most cases, it will be for the jury or judge to determine which inferences they accept and the weight they ascribe to them. “It is for the trier of fact to choose among reasonable inferences available from the evidence of after-the-fact conduct”: **Smith**, at para. 78.

...

[116] ... Conduct that is “after-the-fact”, and therefore removed in time from the events giving rise to the charge, carries with it a temporal element that may make it more difficult to draw an appropriate inference. This evidence may also appear more probative than it is, it may be inaccurate, and it may encourage speculation. After-the-fact conduct evidence may thus give rise to imprecise reasoning and may encourage decision makers to jump to questionable conclusions.

[117] To meet the general concern that such evidence may be highly ambiguous and susceptible to jury error, the jury must be told to take into account alternative explanations for the accused’s behaviour. In this way, jurors are instructed to avoid a mistaken leap from such evidence to a conclusion of guilt when the conduct may be motivated by and attributable to panic, embarrassment, fear of a false accusation, or some other innocent explanation: see **White (1998)**, at para. 22; **White (2011)**, at paras. 23-25; **R. v. Arcangioli**, [1994] 1 S.C.R. 129, at p. 143.

...

[145] Whether an inference is available is measured against what is reasonable and rational according to logic, human experience, and common sense. It is this combination which informs the determination of whether the impugned evidence makes the proposition more or less likely. This is an evaluative assessment, which is not defeated simply by listing alternative explanations. As long as the evidence is more capable of supporting the inference sought than the alternative inferences, then it is up to the fact finder, after considering all explanations, to determine what, if any, inference is accepted, and the weight, if any, to be provided to a piece of circumstantial evidence.

Did the accused cause the death of the Deceased unlawfully?

[16] The parties agreed that the Deceased left her Winnipeg residence between 10:30 p.m. and 11:00 p.m. on August 25, 2022. The Deceased was seen on video

surveillance waiting for the elevator in her apartment building, walking through the front lobby, and waiting at the front doors before exiting the building. In addition, she saw and spoke with her sister as she was leaving. At the time, the Deceased was wearing black pants, a black hoodie, and black and white running shoes with pink on the sole, which could be seen as she was walking. She was carrying a phone.

[17] As referenced above, the Phone was seized from the accused after his arrest and was later analyzed by police. On the basis of the testimony of Constable Cowell that the Phone contained various accounts and documents that belonged to the accused, I accept that the Phone was used by the accused prior to his arrest and in addition, I accept that that the log details referenced at paragraphs 6(a)(ii) and 6(a)(iii) above reflect messages exchanged as between the accused and the Deceased. The identities of the participants in those conversations were not challenged at trial, and in one of the Snapchat messages, the accused referred to the Deceased by name.

[18] I have considered the movements of the Deceased after she left her residence, and I have concluded that the only reasonable inference that can be drawn from the evidence is that she left with the accused in the Vehicle because:

- a) at 9:42 p.m. the accused asked the Deceased in a Snapchat message, "Wanna hang out" to which she agreed;
- b) at 9:52 p.m. the accused messaged the Deceased "I'll come get you" to which she agreed, after he stated "I'm already by your house";
- c) the accused then verified the Deceased's address, and between 10:12 p.m. and 10:23 p.m. he messaged "I'm here", "Same spot as last time", "Come to the same spot", "Where I parked", "Look left", and "See the lights";

- d) multiple traffic camera still images reflect a vehicle that looked very similar to the Vehicle at various locations in the area of the Deceased's residence from 9:43 p.m. until after 10:30 p.m. that night; and
- e) the Deceased's DNA was found on fabric found in the Vehicle.

[19] After picking up the Deceased, the accused attended at his father's residence near the intersection of Arlington Street and Logan Avenue in Winnipeg. The still images from his father's surveillance camera reflect that the accused was there from 11:36 p.m. to 11:57 p.m. The traffic camera still images from the area show the presence of a vehicle that looked very similar to the Vehicle at 12:13 a.m. and 12:15 a.m. on August 26, 2022. I agree with the defence that there is no direct evidence that the Deceased was in the Vehicle when the accused attended at his father's residence.

[20] Having said that, the Deceased's cousin testified that she and the Deceased shared location services on their phones, and that the last location she observed for the Deceased that night was on the Perimeter Highway at Fermor Avenue. I note that this location is consistent with the path of travel from the accused's father's neighbourhood in Winnipeg to Steinbach, and with a traffic camera still image from the intersection of Fermor Avenue and Lagimodiere Boulevard, that reflects a vehicle that looked very similar to the Vehicle at 12:30 a.m. on August 26, 2022.

[21] I agree with the parties that there is no evidence of when or where the Deceased passed away². Her cousin testified that the observation of the Deceased's

² The pathologist, Dr. Duke, could not speak to the time of death, although she testified that the Deceased had some Tardieu spots which could reflect the early stages of decomposition.

location as referenced above was the last location observation that she was able to make, and that from the morning of August 26, 2022 forward, no location information was available. Nevertheless, the Deceased's cousin made repeated efforts to reach her through multiple methods but received no response. I note that after the accused's arrest, police found a burned and "completely destroyed" phone in the Vehicle that could not be analyzed because of its condition. The defence agreed it was unusual for the Deceased to not respond to her family, and I have inferred that the Deceased did not respond to her cousin on August 26, 2022 because she was unable to do so.

[22] The Deceased's cousin also testified that the accused called her at 2:10 a.m. on August 26, 2022, and that she missed the call. She messaged the accused later that day and made repeated efforts to call and message him later that night. At 10:46 p.m. on August 26, 2022, the accused sent two messages to the Deceased's cousin that read: "Yeah" and "Wbu?" (which means "What about you?"). The Deceased's cousin testified that she was very worried about the Deceased and at 11:07 p.m. she messaged the accused "I'm literally about to call the cops".

[23] The evidence reflects that when the Deceased's cousin sent that message, the Phone was situated³ at an address in Lockport, Manitoba, where the police believe the accused's sister resided. Within a few minutes of the message being sent, the Phone, and I have inferred, the accused, returned to Steinbach, Manitoba, and the House for a brief period of time before travelling to the La Broquerie bar.

³ The location services for the Phone reflect that it arrived at that location at 1:30 p.m.

[24] The video surveillance from the La Broquerie bar reflects that at approximately 1:27 a.m.⁴ on August 27, 2022, a vehicle arrived in the parking lot that was similar to the Vehicle. An individual, who could have been the accused, exited that vehicle and appeared to speak to someone in another car in the parking lot, while gesturing toward the area of the front tire. Within a few minutes, both vehicles left the parking lot. The vehicle that appeared to be similar to the Vehicle left the scene at a slow rate of speed, and police suggested that one of the tires on the Vehicle appeared to be low. I have reviewed the surveillance footage and concluded that I am not able to discern anything about the tire pressure from that footage.

[25] Having said that, the accused's father testified that he received a telephone call from the accused after midnight, advising that he had a flat tire and asking his father to pick him up. The accused's father declined because was at home with a young child. Thereafter, the Phone and, I have inferred, the accused returned to the House which is approximately nine kilometres away from the La Broquerie bar, at a very slow pace.

[26] In the later morning of August 27, 2022, the accused's father attended at the House and changed a flat tire on the Vehicle, which was parked in the garage. Thereafter, he opened the back hatch of the Vehicle and observed a tarp covering a bin. He picked up the tarp and saw a hand. At 1:33 p.m. he called 911, of which the accused was aware. While the accused's father was speaking with the 911 operator, the accused left the House and drove away in the Vehicle. The Phone was turned off at 1:45 p.m. such that the accused's movements thereafter were not tracked through the Phone.

⁴ Police testified as to this time frame based upon their observations of the surveillance footage at the bar. The footage itself does not reflect a date or time.

[27] Shortly after the 911 call was placed, police attended at the House and took steps to locate the Vehicle and the accused. Later that afternoon police located the accused driving the Vehicle on the highway near the La Broquerie bar, after which he was arrested at the roadside at 3:56 p.m. Neither the bin nor human remains were in the Vehicle at that time.

[28] Within seconds after the accused exited the Vehicle at the roadside, flames and smoke were seen in the interior of the Vehicle. The expert fire investigator, who testified at trial, opined that the fire was started intentionally on the passenger side front footwell, with the use of an accelerant. The expert retrieved pieces of fabric from the rear footwells of the Vehicle that appeared to be remnants of clothing, including a garment consistent with a black hoodie that had a drawstring hole and what appeared to be a pair of black pants. I note that these details, and in particular the hoodie, are consistent with the clothing that the Deceased was wearing when she left her home on the night of August 25, 2022, and that as referenced above, her DNA was found on one piece of fabric.

[29] As referenced above, on August 28, 2022, the Deceased's body was found in the Grave, wrapped in a tarp in a plastic container with a lid. At trial, a considerable amount of evidence was presented with respect to the Grave itself, which is summarized as follows.

[30] On August 25, 2022, Mr. Dylan Kantimer, who testified at trial, was advised by his partner that there was a vehicle parked on their road, near the intersection of Highway 210 and Provincial Road 58E in rural Manitoba (the "Intersection"), which is

south of La Broquerie, Manitoba. Mr. Kantimer attended at the Intersection at approximately 7:30 p.m. and observed the Vehicle⁵. He also saw a male with his shirt pulled up over his face. He asked the male what he was doing and the male stated that he was digging a hole.

[31] Less than an hour later, Mr. Kantimer returned to the Intersection with his father-in-law Mr. Bruce Ascoli, who also testified at trial. The male was in the hole when they arrived, and they asked him what he was doing. He again stated that he was digging a hole. Messrs. Kantimer and Ascoli observed a tape measure on the ground near the hole, and Mr. Kantimer observed a blue lid from a plastic container. They asked the male for his name and where he was from, and he stated that he was Kyle from Lockport.

[32] Thereafter, Mr. Kantimer called police to report his observations, and an officer attended at the Intersection to observe and photograph the hole. By that time, the male had left the scene but there was a blue plastic lid in the hole.

[33] I have concluded that the only reasonable inference that can be drawn on the evidence before me is that it was the accused who dug the Grave on August 25, 2022, on the basis that:

- a) Mr. Kantimer noted the license plate of the Vehicle while the hole was being dug;
- b) on August 23, 2022, the accused purchased a plastic container with a blue lid, which is described in further detail below;

⁵ Mr. Kantimer testified that he noted the licence plate number of the vehicle that he observed, and police confirmed that it matched that of the Vehicle.

- c) the blue lid was left at the Grave after it was dug; and
- d) the accused's father did not testify that he saw a lid when he looked in the Vehicle, only that he saw a bin, which is consistent with the lid having been left behind at the Grave prior to the Deceased being buried.

[34] On August 27, 2022, Mr. Ron Bolin, who also lived in the area of the Grave, stopped his vehicle near the Intersection at approximately 2:30 p.m. to take a phone call. He observed a sport utility vehicle with the hatch open and a male nearby, bent down and "throwing sand".

[35] After the accused's arrest, police determined that there could be a connection between the hole near the Intersection and the human remains that the accused's father observed in the Vehicle. The defence did not ask that I draw any inference other than that the accused buried the Deceased's body in the Grave, and I have concluded that there is no other reasonable inference that can be drawn on the evidence before me. I have inferred, therefore, that on August 27, 2022 after his father called 911, the accused left the House with the remains in the Vehicle, and he buried the Deceased's body (wrapped in a tarp and in a plastic container) in the Grave. I note that:

- a) at approximately 2:20 p.m.⁶, a vehicle that appeared to be similar to the Vehicle was captured on video surveillance passing the Woodridge Domo, which is on Highway 210 *en route* to the Grave from Steinbach;

⁶ One of the police witnesses testified that he checked the accuracy of the surveillance timestamp with a Domo employee, and calculated that the relevant footage was recorded at approximately 2:20 p.m. I am satisfied that his evidence is both credible and reliable.

- b) the tarp in which the Deceased's body was wrapped and the plastic container and lid in which it was found were very similar to the items which the accused purchased on August 23, 2022, as referenced below;
- c) Mr. Bolin observed someone "throwing sand" at the Intersection at approximately 2:30 p.m., which was after the accused left the House and before police re-attended at the Grave at approximately 4:40 p.m.; and
- d) the evidence before me, including photographs, reflect that the terrain at the Grave is sandy, and the accused had sand on his shoes when he was arrested at 3:56 p.m.

[36] The defence submitted that there is a gap in the narrative spanning from the night of August 25, 2022 to the afternoon of August 27, 2022, including the details of the murder itself. More specifically, there is no evidence of whether the accused was alone or with someone other than the Deceased on August 26, 2025. On August 27, 2025 after the accused's arrest, an unidentified person sent a message to the Phone, seemingly to warn the accused that police were looking for him. As such, while the Crown may have established that the accused had the opportunity to commit the murder, the defence contended that it has not proven beyond a reasonable doubt that he did so.

[37] The defence acknowledged that burying the Deceased's body and setting the Vehicle on fire reflected a desire to avoid being brought justice for some reason, but that this post-offence conduct demonstrated other possibilities than the accused killed the Deceased. In other words, the accused could have been connected to the

Deceased's murder without having committed it, and he could have been attempting to avoid conviction for another offence. More specifically, the accused could have been an accessory after the fact and acted to protect the guilty party from detection or capture, or he could have acted to avoid his own detection for unlawful interference with human remains and obstruction of justice.

[38] I have considered all of circumstantial evidence in this case, including the post-offence conduct, and I note that I must be careful with this evidence and not leap to a finding or imputation of guilt where the conduct in question could be subject to various interpretations. Having said that, given my conclusions that the accused buried the Deceased's body and set the Vehicle on fire, it is open to me conclude that these steps constituted post-offence conduct that arose from the fact that the accused was aware that he caused the Deceased's death.

[39] On the basis of all of the circumstantial evidence before me, I have concluded that the only reasonable inference that can be drawn is that the accused inflicted the fatal injuries upon the Deceased. In particular:

- a) the accused dug the Grave on August 25, 2022;
- b) on the same date, the accused picked up the Deceased from her home in the Vehicle, and she was never again seen alive;
- c) the running shoes that the Deceased was wearing when she left home on August 25, 2022 were found in the plastic container with her remains;
- d) the accused, in the main, ignored the efforts of the Deceased's cousin to communicate with him, despite her repeated efforts to contact him and her

evidence that he appeared to be active on the application through which she was trying to reach him;

- e) when the Deceased's cousin advised the accused on the night of August 26, 2022 that she intended to call the police, he immediately left Lockport, Manitoba and returned to the Steinbach area;
- f) the Deceased's remains were in the Vehicle when the accused's father attended at the House on August 27, 2022;
- g) the accused fled the House after his father called 911, and turned off the Phone, which I have inferred was done to prevent the accused's whereabouts from being tracked;
- h) the accused then travelled to the Grave immediately and buried the Deceased's body;
- i) just prior to his arrest, the accused set the Vehicle on fire using an accelerant, in my view because he wanted to destroy evidence including the Deceased's clothing and phone;
- j) the Deceased's DNA was found on fabric found in the Vehicle, and I have inferred that the fabric was what remained of her hoodie and pants, noting that the only piece of clothing found on her remains was a bra; and
- k) a variety of tools that may have been used as weapons were found in the Vehicle, including a hammer, a shovel, and the remnants of a baseball bat similar to that which the accused purchased on August 23, 2022 as referenced below.

[40] To be clear, I have considered all of the evidence logically and in light of human experience and common sense, and I have concluded that there is no alternative, reasonable inference available to me other than that the accused killed the Deceased. Any other scenario is purely speculative.

[41] Although the accused had no obligation to prove facts, to present any evidence, or to testify at trial, the reality is that there is no innocent explanation before me regarding any of the evidence that linked the accused to the murder, and there is no evidentiary foundation that would preclude me from drawing the inference that the accused killed the Deceased.

[42] I will add that I have considered the fact that the evidence does not reflect a discernable motive or *animus* as between the accused and the Deceased, but none is required at law. At best, as the defence argued, the absence of a motive is a piece of circumstantial evidence that makes it less likely that the accused committed the murder, but in my view, given the rest of the evidence before me, the absence of a motive is of no moment.

[43] In conclusion, I have found that the accused caused the death of the Deceased and that he did so unlawfully.

Intention

[44] Murder is a specific intent offence, and s. 229 of the ***Criminal Code of Canada***, R.S.C., 1985, c. C-46, provides that murder is made out where the person who causes the death of another either meant to cause the death or meant to cause

bodily harm that he knew was likely to cause death and was reckless as to whether death ensued.

[45] In this case, the nature and extent of the injuries inflicted upon the Deceased are of particular relevance to the question of intent. More specifically, pathologist Dr. Linnea Duke testified that the cause of death was stab wounds to the neck, which caused significant blood loss and would have resulted in death within minutes without medical care. In particular, the Deceased's left jugular vein was punctured twice, and her right jugular vein was punctured once, with what Dr. Duke opined was done with a sharp blade such as a knife.

[46] Dr. Duke also testified that the Deceased suffered the following additional injuries:

- a) significant blunt force injuries to the right side of the face and head, including a swollen and hemorrhaged right eye, temple, and scalp, which could have incapacitated her;
- b) puncture wounds to the left side of the face that could have been caused by the Spoon or by a hammer;
- c) ligature marks to the front of the neck and an abrasion to the back of the neck, which indicates that an object was pulled around the neck from behind, with pressure across front of the neck; and
- d) various bruises on the shoulders, arms, and legs.

[47] I have no direct evidence of the accused's mental state at the time of the murder, but his father testified that in the months before the murder, the accused's

mental health was deteriorating, in that he was paranoid, was not thinking normally a lot of the time, and that he was confused. For example, the accused believed that co-workers were speaking about him in coded language, that people were listening in on his phone, and that the electrical switches in the House were bugged. On one occasion he told his father that he did not know how to travel back to Steinbach from Winnipeg, which did not make sense. In addition, when they were working together, the accused would "space out". I note also that in a message to the Deceased in late July 2022, the accused stated "Phones tapped".

[48] The Crown submitted that the evidence of the accused's state of mind is limited, particularly in the context of all of the other evidence before the court, and does not suggest that he was unable to form the requisite intent for murder. The Crown did not argue that the accused's post-offence conduct was relevant to the issue of intent or that I should infer intent from that conduct.

[49] The defence agreed that the injuries inflicted upon the Deceased "minimally" support the intention to inflict lethal harm, and that the evidence before the court of the accused's deteriorating mental state does not necessarily negate the possibility that he could form the necessary intent for murder.

[50] I note that the evidence of the accused's father regarding his mental health was not challenged, and although I accept the veracity of his testimony, I have concluded that his evidence does not have significant probative value because it does not inform the question of the accused's intent at the time of the murder. More specifically, there is no evidence before me of what impact, if any, the accused's apparent mental health

deterioration in the months leading up to the murder may have had upon his mental state when he killed the Deceased, including his awareness of the consequences of the injuries inflicted upon her, and particularly the impact of stabbing her in the neck.

[51] In *R. v. Walle*, 2012 SCC 41 at paragraph 53 and *R. v. V.(O.)*, 2015 BCCA 449 at paragraph 56, the court commented upon the common sense inference that a person usually knows the predictable consequences of their conduct and means to bring those consequences about. In this case, there is no evidence that the accused was not aware of the consequences of his actions, due to intoxication or mental disorder, such that the common sense inference ought not to apply to him.

[52] I have considered the nature and extent of the harm inflicted upon the Deceased, and in particular the fact that she may have been incapacitated by significant blunt force trauma, that her death was caused by sharp force injuries to her neck, and that multiple weapons were used to injure her. I am prepared to infer that in inflicting those injuries upon her, the accused knew the predicative consequences of his conduct and meant to bring those consequences about. In other words, I am satisfied that the nature and extent of the injuries reflected an intention to kill and that when the accused inflicted the fatal wounds upon the Deceased, he either meant to kill her, or meant to cause her bodily harm that he knew was likely to cause her death but was reckless as to whether death ensued.

[53] I appreciate that police did not find a knife or similar weapon either in the Vehicle or at the accused's residence that may have been used to inflict the fatal wounds, but I am not concerned about the absence thereof, because significant efforts

were undertaken by the accused to conceal his involvement in the murder, which could have included disposal of the murder weapon.

[54] I have concluded that the only reasonable inference that can be drawn on the basis of the evidence before me is that the accused had the requisite intent for murder at the time that he injured the Deceased, and I am satisfied beyond a reasonable doubt that he had that intent. There is no alternative, reasonable inference to be drawn from the evidence before me.

Planning and deliberation

[55] Having determined that the accused killed the Deceased and that he had the requisite intent for murder, I have considered whether his actions were planned and deliberate, in the context of all of the evidence before me.

[56] In ***R. v. Jacquard***, [1997] 1 S.C.R. 314, the court stated:

[27] It is true that some factor, such as a mental disorder, that is insufficient to negative the charge that the accused intended to kill, may nevertheless be sufficient to negative the elements of planning and deliberation. This is because one can intend to kill and yet be impulsive rather than considered in doing so. It requires less mental capacity simply to intend than it does to plan and deliberate.

[57] In ***R. v. Whiteway (B.D.T.) et al.***, 2015 MBCA 24, the court stated:

[10] Planning and deliberation are different requirements that must each be proven beyond a reasonable doubt (***R. v. Aalders***, [1993] 2 S.C.R. 482 at 502). Failing that, a murder is properly classified as second degree murder (s. 231(7) of the ***Code***).

[11] A “planned” murder is one resulting from a calculated scheme or design previously devised. While the plan to murder may be a simple one, it must have existed before the murder was committed. A “deliberate” murder is one that is carefully considered and thought out. A murder where a person thinks about the consequences beforehand is deliberate; a murder that is hasty, rash or impulsive is not (see ***R. v. Jacquard***, [1997] 1 S.C.R. 314 at para. 26; and ***R. v. Nygaard***, [1989] 2 S.C.R. 1074 at 1084).

[12] There are no special rules as to proof of planning or deliberation. Either requirement may be established by way of an inference drawn on circumstantial

evidence, if the jury is satisfied beyond a reasonable doubt that the guilt of the accused is the only reasonable inference that can be drawn on the proven facts (*R. v. Cooper*, [1978] 1 S.C.R. 860 at 880-81; and *R. v. Griffin*, 2009 SCC 28 at para. 33, [2009] 2 S.C.R. 42).

[58] In *R. v. Tremble*, 2017 ONCA 671, the court stated:

[76] To establish planning and deliberation based on circumstantial evidence, the jury must be directed to consider all the circumstances that inform the question of the accused's mental state. Such circumstances will seldom, if ever, be wholly consistent with only one conclusion as to an accused's mental state. As Spence J. stated in *R. v. Mitchell*, [1964] S.C.R. 471, at pp. 478-479:

. . . The jury is now concerned with the mental processes of a person who has committed a crime. In relation to that crime it has to consider his actions, his conduct, his statements, and his capacity and ability to plan and deliberate. It must consider the whole of the evidence in relation to the issue of planning and deliberation. In nearly every case some of this evidence may indicate planning and deliberation and some may indicate the contrary. . .

[59] The Crown submitted that the accused implemented his plan to murder the Deceased on August 23, 2022 when he turned off the Phone and went to Canadian Tire in Steinbach, Manitoba to purchase a variety of items for which he paid in cash.

[60] The defence submitted that the Crown has failed to prove planning and deliberation beyond a reasonable doubt, and noted that even where a plan exists, a murder can be committed impulsively. In addition, although there is some evidence of planning in this case, the actions taken by the accused were inconsistent with the reasonable execution of the plan alleged by the Crown. When those factors are considered together with the accused's failing mental health, there is a reasonable doubt as to the element of planning.

[61] The evidence of planning advanced at trial includes the following.

[62] First, on August 23, 2022 at 4:52 p.m. the accused attended at the Canadian Tire in Steinbach, Manitoba and purchased a black plastic container with a blue lid, a

tarp, a baseball bat, four rolls of duct tape, and three bags of concrete mix. The defence did not ask me to infer that someone other than the accused made these purchases, and I am satisfied that he did so for a variety of reasons, including that he was seen at the store on good quality video surveillance, the police found bags of concrete at the House identical to those purchased at Canadian Tire, and police found a "Scarface" t-shirt at the House that appeared to be very similar to that which he was wearing at the store.

[63] I agree with the submissions of the defence that, in theory, most of the items purchased by the accused could have been used in construction, and I recognize that the accused worked in the roofing and construction industries before the murder. Having said that, I have concluded that at the very least the accused intended to bury the Deceased in a tarp, because her remains were found in a tarp, and that he intended to bury her in the plastic container, because as referenced below, the evidence before me reflects that the Grave was custom-made to accommodate that container. The intended purpose of the other items that he purchased, including the concrete, the duct tape, and the baseball bat are unclear, but in my view none of those items are inconsistent with a plan to carry out a murder.

[64] Second, and as referenced above, the accused dug the Grave on August 25, 2022.

[65] I have concluded that the only reasonable inference available to me is that these steps reflected a calculated scheme on the part of the accused that he devised before he picked up the Deceased on August 25, 2022. In other words, the accused thought

about what he was going to do before he did it. I am also satisfied that the accused took some time to develop the plan, at least from August 23 to August 25, 2022, before he carried out the murder, and that no alternative reasonable inference is available.

[66] I appreciate that some of what the accused did or did not do appears to be illogical, but that does not negate my conclusion that he planned the murder. For example, it is unclear how the accused spent his time on August 26, 2022, and why he did not bury the Deceased's remains that day. Having said that, when he left Lockport that night after 11:00 p.m., prompted by the threat of the Deceased's cousin to call police, he could have been on his way to the Grave with the intention of burying the Deceased, but failed to arrive because of the flat tire. Regardless, the Crown is not required to establish that every aspect of the accused's plan was carried out in an objectively logical manner.

[67] The Crown submitted that the murder was deliberate because the accused asked the Deceased what time she finished work, he turned the Phone on and off at different times before the murder, and he dug the Grave with precision.

[68] The defence argued that because of the gap in the evidence, including when the Deceased was killed, the Crown has not proven the circumstances surrounding her death, such that the murder can be said to be deliberate.

[69] The evidence of deliberation advanced at trial includes the following.

[70] First, the accused turned the Phone on and off multiple times such that it could not be tracked, including during his attendance at Canadian Tire on August 23, 2022, and during the time frame within which he dug the Grave on August 25, 2022. I reject

the defence submission that the accused turned the Phone off on those occasions simply because the battery was low.

[71] Second, when the accused attended at Canadian Tire, he wore gloves and sunglasses throughout his visit, and he paid for the items in cash, despite the fact that he paid with traceable, electronic means for other purchases that week.

[72] Third, the accused dug the Grave at a location that was some distance from Steinbach, and to which he had no apparent connection. He took steps to hide his appearance and identity from Mr. Kantimer and Mr. Ascoli when he did so.

[73] Fourth, the accused had a tape measure at the scene of the Grave, and he dug it in a very specific manner. Dr. Holland testified that the walls of the Grave were square, vertical, and consistent from top to base, such that it was dug in a careful and precise manner, which is not what she would typically expect in a clandestine grave. She opined that it would have taken time to dig the Grave in that manner, and that it did not appear to have been dug hastily. She also stated that the Grave looked almost like it was purposely built to fit the container in which the Deceased's body was found.

[74] Dr. Holland noted that the container was wedged into the Grave very tightly and could not be removed from the Grave without destroying one of the walls of the Grave. She opined that the lid of the container could have been used as a template or that a tape measure could have been used to size the hole.

[75] Fifth, on August 25, 2022 at 2:21 p.m., the accused asked the Deceased in a message what time she got off of work. As referenced above, he later drove to the area of her home and asked her if she wanted to see him.

[76] In my view, none of these steps were taken hastily, rashly, or impulsively. Rather, on the basis of the foregoing, I am satisfied that the accused took time to consider and weigh the advantages and disadvantages of the murder before he killed the Deceased, and that his course of conduct shows that he contemplated the consequences of his action, as referenced in ***R. v. Scott and Jack***, 2022 MBQB 164 at paragraph 87. In addition, whether all of his efforts were successful does not detract from his deliberation, because it is clear that he thought about his choices. Having taken into account the whole of the evidence, viewed logically and in light of human experience and common sense, I have concluded that the only reasonable inference available to me is his actions were deliberate.

[77] I will add that I have considered the evidence of the accused's mental state in the context of the evidence of the planning and deliberation of the murder. I note again that there is no evidence of intoxication, and I have concluded that any mental health issues that he was experiencing were insufficient to negate or to impact his ability to plan and deliberate in the context of the murder.

[78] The defence submitted that as the evidence reflects, when the accused dug the Grave, he preserved the sod from the surface carefully, and the parties agreed that he appeared to do so because he intended to replace it after the Grave was filled in. He did not, in fact, replace the sod after he buried the Deceased's remains and filled in the Grave, and instead Dr. Holland's team did so.

[79] I reject the defence submission that the accused's failure to replace the sod was reflective of a decaying mental state in which he did not remember that he kept the

sod, such that the evidence of planning and deliberation is undermined. This is so particularly given that the accused buried the Deceased after he fled the House when his father called 911. These circumstances were not part of his plan, and he may have felt the need to rush. In my view, the fact that he did not replace the sod does not detract from the care and deliberation that he exhibited when he dug the Grave or from my finding that the murder was planned and deliberate.

[80] I will add that even after his father called 911, the accused turned off the Phone before attending at the Grave to bury the Deceased's body, just as he did two days earlier when he dug the Grave. In other words, it appears that he continued to think about consequences at that time, despite the fact that police had been called to the House.

[81] On the strength of the circumstantial evidence before me, and having considered the range of reasonable inferences that can be drawn from that evidence, I have inferred that the murder was planned and deliberate, and that no alternative, reasonable inferences are available.

CONCLUSION

[82] On the basis of all of the foregoing, a finding of guilt is the only reasonable conclusion that can be drawn from the evidence. The accused is convicted of first degree murder.

Original signed by Justice Grammond

Grammond J.