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Docket: CR 24-01-40304
(Winnipeg Centre)
Indexed as: R. v. Dalebozik
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COURT OF KING'S BENCH OF MANITOBA

B E T W E E N:

| | |
|------------------------|----------------------------|
| HIS MAJESTY THE KING |) <u>Krista D. Berkis</u> |
| |) <u>James Wood</u> |
| |) for the Crown |
| - and - |) |
| |) |
| |) <u>Steven W. Brennan</u> |
| CURTIS ROSS DALEBOZIK, |) <u>Evan M. Chrusch</u> |
| |) for the accused |
| | accused.) |
| |) |
| |) Judgment Delivered: |
| |) February 5, 2026 |

BOND J.

BACKGROUND

[1] In the early evening of January 24, 2024, a physical altercation occurred between Kyriakos Vogiatzakis ("Mr. Vogiatzakis") and Curtis Dalebozik ("Mr. Dalebozik") outside a restaurant located on Portage Avenue, in Winnipeg, Manitoba. Mr. Vogiatzakis was the owner of the restaurant. Mr. Dalebozik lived next door. During the incident, Mr. Vogiatzakis suffered cardiac arrest, and despite resuscitation efforts, he died.

[2] Mr. Dalebozik is charged with manslaughter. The Crown alleges that Mr. Dalebozik committed the unlawful act of assault and thereby caused the death of Mr. Vogiatzakis.

Mr. Dalebozik is also charged with uttering threats to Shanise Powell ("Ms. Powell"), an employee of the restaurant, when she confronted him about what had happened.

[3] Mr. Dalebozik says that the Crown has failed to prove the charges beyond a reasonable doubt. He argued that even if his actions may have contributed to Mr. Vogiatzakis' death, he acted in self-defence and therefore is not guilty of manslaughter. With respect to the charge of uttering threats, he argued that the language of the alleged threats is equivocal, and further argued that they were uttered in an effort to avoid any further violence. He argued that the court should apply the doctrine of self-defence by analogy, and find him not guilty.

[4] The only evidence regarding how the altercation unfolded is from surveillance video. Because the video evidence is central to the determination of this case, I will begin with a description of the video evidence. I will refer to the remainder of the evidence as I address each of the issues to be decided.

[5] The issues to be decided are:

1. Has the Crown proved that Mr. Dalebozik caused Mr. Vogiatzakis' death?
2. Has the Crown proved that Mr. Dalebozik caused Mr. Vogiatzakis' death by an unlawful act?
3. Has the Crown proved that the unlawful act was dangerous in the circumstances?
4. Has the Crown proved that Mr. Dalebozik did not act in self-defence?
5. Has the Crown proved that Mr. Dalebozik uttered a threat to cause death or bodily harm to Ms. Powell?

THE SURVEILLANCE VIDEO

[6] The surveillance video recording (the “video”) was obtained from security cameras mounted on the restaurant building. It shows a confrontation between Mr. Dalebozik and Mr. Vogiatzakis outside the restaurant, in the parking lot, and on the adjacent sidewalk. The incident occurred between 5:27 p.m. and 5:32 p.m. on January 24, 2024. It is not disputed that the timestamps on the video are one hour fast; I will refer to the timestamps as they were recorded on the video.

[7] Initially, Mr. Dalebozik is seen on the video walking in the parking lot of the restaurant. He is wearing a hooded jacket or sweater, with the hood up. Mr. Vogiatzakis drives up into the parking lot in his vehicle. He stops his vehicle, gets out of the driver’s side door and appears to confront Mr. Dalebozik (6:27:30). The two men are facing each other. Mr. Vogiatzakis gestures, pointing towards Portage Avenue, and then pointing his index finger at Mr. Dalebozik. At one point, both men appear to have their right fists clenched, as they face each other.

[8] After approximately fifteen seconds, Mr. Dalebozik walks quickly away towards Portage Avenue (6:27:45). Mr. Dalebozik stops beside a sign located close to the sidewalk (6:27:50). Mr. Vogiatzakis appears to go towards the entrance of the restaurant. As he does so, Mr. Dalebozik turns, walks, and then jogs several steps towards the entrance of the restaurant and Mr. Vogiatzakis. Mr. Vogiatzakis turns away from the entrance door and moves quickly towards Mr. Dalebozik. Mr. Vogiatzakis has his hands raised. Mr. Dalebozik raises his right hand, but backs away. Mr. Vogiatzakis advances towards

Mr. Dalebozik and pushes him. The view is obscured for a couple of seconds as Mr. Dalebozik backs away from Mr. Vogiatzakis and they go behind a pillar (6:28:00).

[9] When it is possible to see them again on the video, Mr. Vogiatzakis is holding on to Mr. Dalebozik with his left hand. Mr. Dalebozik is backing away, across the entrance of the parking lot towards the sidewalk. The men appear to be pulling and pushing each other, as Mr. Dalebozik moves backwards and Mr. Vogiatzakis continues to hold on to Mr. Dalebozik. Mr. Dalebozik is seen on the video punching Mr. Vogiatzakis at least once, and perhaps twice (6:28:15).

[10] Mr. Vogiatzakis continues to hold on to Mr. Dalebozik and they continue to grapple and throw punches at each other. Mr. Vogiatzakis appears to be holding on to Mr. Dalebozik's hoodie or hair or both, pulling it forward so that Mr. Dalebozik is bent forward at the waist with his head down, and the hood pulled over his head. Mr. Vogiatzakis throws at least three uppercut punches, apparently at Mr. Dalebozik's head, while holding his hoodie or hair. Mr. Dalebozik throws two punches at Mr. Vogiatzakis' head (6:28:47). The men both appear to be struggling to maintain their balance on the snowy sidewalk. Mr. Vogiatzakis continues to hold Mr. Dalebozik by his hoodie or hair. Mr. Vogiatzakis throws eight more uppercut punches at Mr. Dalebozik, who remains bent forward with his head down. (It is unclear whether or where the punches land, however, photos taken upon Mr. Dalebozik's arrest show some bruising to his face.)

[11] The video shows that approximately one minute after the physical altercation began both men fall to the ground (6:29:06). It is unclear what causes them to fall. The view is somewhat obscured because the men are behind the sign at this point. It is clear,

however, that Mr. Vogiatzakis maintains his hold on Mr. Dalebozik, and as Mr. Dalebozik falls, Mr. Vogiatzakis is pulled down with him.

[12] Mr. Vogiatzakis is on his hands or elbows and knees on the ground. Mr. Dalebozik is on his knees, leaning over Mr. Vogiatzakis. It is difficult to discern, but it appears that Mr. Vogiatzakis is no longer holding on to Mr. Dalebozik. Mr. Dalebozik's head is now bare, indicating that the hoodie has been pulled off over his head. (Later in the video, Mr. Dalebozik can be seen pulling his hoodie out from under Mr. Vogiatzakis, while it appears that one sleeve remains around his wrist or forearm.)

[13] Both men are moving, with Mr. Dalebozik above Mr. Vogiatzakis. Mr. Dalebozik pushes Mr. Vogiatzakis down onto the front of his body. Mr. Vogiatzakis pushes himself back up to his hands or elbows and knees (6:29:50). Mr. Dalebozik remains on his knees beside Mr. Vogiatzakis, leaning over him. He begins to strike Mr. Vogiatzakis with his right knee, in the left side of his torso (6:30:05). The blows appear forceful, striking Mr. Vogiatzakis' torso eight times. (This is consistent with the location of the rib fractures noted by Dr. Robert Johnston, the pathologist who conducted the autopsy on Mr. Vogiatzakis.) Mr. Dalebozik then reaches over Mr. Vogiatzakis, with his arm around the upper part of his body. It is not clear if it is around Mr. Vogiatzakis' neck, head or shoulder. Mr. Vogiatzakis remains on his knees, as Mr. Dalebozik continues to lean on him, at one point bracing himself with his legs extended to the side.

[14] Mr. Vogiatzakis then goes down flat onto his front on the ground, with Mr. Dalebozik leaning on him, and apparently pushing him down (6:30:43). Mr. Vogiatzakis' legs are moving and at one point he appears to attempt to push himself up with his right hand, raising his upper body off the ground, but then goes back down.

Mr. Dalebozik is leaning his upper body on top of Mr. Vogiatzakis' upper back throughout.

Less than one minute later (6:31:30) Mr. Vogiatzakis stops moving.

[15] Mr. Dalebozik then gets up, pulling what appears to be his hoodie from under Mr. Vogiatzakis. He then delivers three kicks to Mr. Vogiatzakis' head. He steps away a few feet and then returns, kicking Mr. Vogiatzakis twice on the left side of his torso (6:32:12).

[16] About 20 seconds later, Ms. Powell runs out of the restaurant and speaks to Mr. Dalebozik. (I will summarize her evidence below.) Mr. Dalebozik walks away.

[17] The entire physical altercation lasted for approximately four minutes.

ISSUE 1: HAS THE CROWN PROVED THAT MR. DALEBOZIK CAUSED MR. VOGIATZAKIS' DEATH?

[18] To prove Mr. Dalebozik guilty of manslaughter, the Crown must prove that he caused Mr. Vogiatzakis' death. This causation requirement means that the Crown must prove that Mr. Dalebozik's conduct contributed significantly to Mr. Vogiatzakis' death. It is not necessary for Mr. Dalebozik's conduct to be the only or main cause of his death. Further, it does not matter if more timely medical treatment might have saved his life. It also does not matter if Mr. Dalebozik's conduct only accelerated his death from some existing disease or condition. (See ***R. v. Nette***, 2001 SCC 78 CanLII, [2001] 3 S.C.R. 488, at pp. 534-535; ***Smithers v. R.***, 1977 CanLII 7 (SCC), [1978] 1 S.C.R. 506, at pp. 519-521.)

[19] Dr. Robert Johnston, the pathologist who conducted the autopsy on Mr. Vogiatzakis, was qualified to give expert opinion evidence regarding the cause and mechanism of injury and death. He testified that the cause of Mr. Vogiatzakis' death was

the combined effect of blunt force trauma, asphyxiation (insufficient oxygen in the body) and the physiological stress of the altercation. Dr. Johnston's opinion was based on his findings at autopsy along with his review of the video.

[20] The indicia of blunt force trauma observed by Dr. Johnston included subdural hematoma (bleeding under the dura that covers the brain) and three broken ribs on the left side. The broken ribs resulted in bleeding, which indicates that they were caused before Mr. Vogiatzakis' death. The asphyxia was the result of Mr. Vogiatzakis' reduced and compromised breathing caused by compression of his chest (and perhaps compression of his neck), along with the broken ribs that would have tended to collapse the rib cage and cause significant pain, making it hard to breathe. Dr. Johnston explained that the reduced capacity to breathe would cause not only a lack of oxygen but also a buildup of carbon dioxide in the body resulting in increased acidity that can lead to cardiac arrest. The physiological stress of the altercation would include elevated blood pressure, increased heart rate, and the body's increased demand for oxygen, all putting increased stress on the heart muscle.

[21] Under cross-examination, Dr. Johnston was firm in his opinion that Mr. Vogiatzakis' death was the result of a combination of these causes. He was not prepared to speculate whether one of the causes alone, such as the physiological stress of the altercation, would have been sufficient to cause his death. He was also not prepared to say whether, had one of the causes been absent, death would still have occurred. It was his evidence that all of these causes were present, and it was the combined effect that caused Mr. Vogiatzakis' death.

[22] I am satisfied beyond a reasonable doubt that Mr. Dalebozik's actions contributed significantly to Mr. Vogiatzakis' death. Mr. Dalebozik punched Mr. Vogiatzakis in the head, and kneed him multiple times in the chest, causing the blunt force injuries observed by Dr. Johnston, including the broken ribs. He also can be observed in the video leaning his weight on Mr. Vogiatzakis' upper back, which, as Dr. Johnston testified, would cause compression of the chest, and reduced capacity to breathe.

[23] I find beyond a reasonable doubt that Mr. Dalebozik caused Mr. Vogiatzakis' death.

ISSUE 2: HAS THE CROWN PROVED THAT MR. DALEBOZIK CAUSED MR. VOGIATZAKIS' DEATH BY AN UNLAWFUL ACT?

[24] The unlawful act alleged in this case is assault. The Crown must prove beyond a reasonable doubt:

- a) That Mr. Dalebozik intentionally applied force to Mr. Vogiatzakis;
- b) That Mr. Vogiatzakis did not consent to the force that Mr. Dalebozik applied;
and
- c) That Mr. Dalebozik knew that Mr. Vogiatzakis did not consent to the force that Mr. Dalebozik applied.

[25] Mr. Dalebozik clearly intentionally applied force to Mr. Vogiatzakis, as described above. This is not disputed.

[26] Counsel for both Crown and defence took the position that the absence of consent was not a live issue in this case. The Crown argued that Mr. Dalebozik was the aggressor throughout the altercation and that there was no basis to find that Mr. Vogiatzakis consented to any application of force at any time. The defence took the position that any consent on the part of Mr. Vogiatzakis that may have been present during the incident

was vitiated by the fact that Mr. Vogiatzakis died. Mr. Dalebozik sought to rely on self-defence, not consent, to argue that his assaultive conduct was lawful.

[27] I agree with both counsel that the absence of consent is proved in this case, but for different reasons. One inference that could be drawn from the video is that the altercation began as a “consent fight” with both parties consenting to the exchange of blows. There is no direct evidence of an express agreement to fight, but it may be inferred from their conduct observed on the video that the men were engaged in an argument and that both were ready to fight. However, it would not be reasonable to infer that Mr. Vogiatzakis consented to the knee strikes, compression of his chest and kicks that are observed in the video. Even if Mr. Vogiatzakis consented to an exchange of blows, as may be inferred from his actions at the beginning of the altercation, any such consent was exceeded by Mr. Dalebozik’s assaultive conduct after Mr. Vogiatzakis was on the ground. (See ***R. v. Toth***, 2024 BCCA 139, at paras. 77-79, leave to appeal denied 2024 CanLII 96613 (SCC); ***R. v. Zsombor***, 2023 BCCA 37, at para. 33.)

[28] I am satisfied that Mr. Vogiatzakis did not consent to the application of force by Mr. Dalebozik and I am satisfied that Mr. Dalebozik had the requisite knowledge that he did not consent. Again, even if it could be inferred that the altercation began as a “consent fight” any assertion that Mr. Dalebozik believed that Mr. Vogiatzakis was consenting to the force he applied when he was prone is not plausible.

[29] As a result, I find that Mr. Dalebozik caused Mr. Vogiatzakis’ death by an unlawful assault.

ISSUE 3: HAS THE CROWN PROVED THAT THE UNLAWFUL ACT WAS DANGEROUS IN THE CIRCUMSTANCES?

[30] To prove manslaughter, the Crown must prove the requisite mental element of the offence. Specifically, I must be satisfied beyond a reasonable doubt that a reasonable person, in the same circumstances as Mr. Dalebozik, would realize that his unlawful acts would likely put another person at risk of bodily harm. In this context, "bodily harm" means any hurt or injury that interferes with another person's health or comfort in something more than a brief or minor way. The Crown does not have to prove that a reasonable person would realize that the unlawful act would likely cause the precise bodily harm that Mr. Vogiatzakis suffered or that it would likely cause his death. The issue is whether a reasonable person in the same circumstances would realize that their unlawful act would likely put Mr. Vogiatzakis at risk of bodily harm.

[31] I find that it would be obvious to any reasonable person that restraining Mr. Vogiatzakis, repeatedly and forcefully striking him in the ribs with the knee, and kicking him while he is prone, as depicted in the video, would put him at risk of bodily harm as defined. The significant level of force used is observable in the video. I am satisfied beyond a reasonable doubt that a reasonable person would realize that inflicting these kinds of blows would risk causing bodily harm, and so the unlawful assault committed by Mr. Dalebozik was dangerous in the circumstances.

ISSUE 4: HAS THE CROWN PROVED THAT MR. DALEBOZIK DID NOT ACT IN SELF-DEFENCE?

[32] Mr. Dalebozik claims to have been acting in self-defence when he assaulted Mr. Vogiatzakis. The Crown did not take issue with the defence having an air of reality

in this case. I agree that the defence does have an air of reality and so the Crown must prove beyond a reasonable doubt that Mr. Dalebozik was not acting in self-defence when he assaulted Mr. Vogiatzakis. (See ***R. v. Cinous***, 2002 SCC 29 (CanLII), [2002] 2 S.C.R 3, at paras. 49 and 53.)

[33] The statutory foundation for self-defence is found in s. 34(1) of the ***Criminal Code*** (the “***Code***”):

Defence — use or threat of force

34 (1) A person is not guilty of an offence if

(a) they believe on reasonable grounds that force is being used against them or another person or that a threat of force is being made against them or another person;

(b) the act that constitutes the offence is committed for the purpose of defending or protecting themselves or the other person from that use or threat of force; and

(c) the act committed is reasonable in the circumstances.

Défense — emploi ou menace d'emploi de la force

34 (1) N'est pas coupable d'une infraction la personne qui, à la fois:

a) croit, pour des motifs raisonnables, que la force est employée contre elle ou une autre personne ou qu'on menace de l'employer contre elle ou une autre personne;

b) commet l'acte constituant l'infraction dans le but de se défendre ou de se protéger — ou de défendre ou de protéger une autre personne — contre l'emploi ou la menace d'emploi de la force;

c) agit de façon raisonnable dans les circonstances.

[34] A useful framework for analysis can be found in the model jury charge on self-defence created by the Canadian Judicial Council (“CJC”) (***R. v. King***, 2023 MBCA 37, at para. 44). I have also found reference to David Watt’s Model Jury Instructions to be helpful (David Watt, *Watt’s Manual of Criminal Jury Instructions*, (Toronto: Thomas Reuters Canada, 2024)).

[35] Applying the CJC model jury instructions to this case, I must find Mr. Dalebozik not guilty, if all of the following three conditions were present:

- a) Mr. Dalebozik believed that force was being used against him and Mr. Dalebozik's belief was based on reasonable grounds (this condition is described as the "catalyst" in ***R. v. Khill***, 2021 SCC 37, at paras. 37 and 51);
- b) Mr. Dalebozik committed the assault on Mr. Vogiatzakis for the purpose of defending or protecting himself from the use of force (this condition is described as the "motive" in ***Khill***, at paras. 37 and 51); and
- c) Mr. Dalebozik's act was reasonable in the circumstances (this condition is described as the "response" in ***Khill***, at paras. 37 and 51).

[36] To decide whether the Crown has proved beyond a reasonable doubt that Mr. Dalebozik did not act in self-defence, I must consider three questions:

1. Has the Crown proved beyond a reasonable doubt that Mr. Dalebozik did not believe that force was being used against him or that Mr. Dalebozik's belief was not based on reasonable grounds?
2. Has the Crown proved beyond a reasonable doubt that Mr. Dalebozik did not commit the assaultive acts for the purpose of defending or protecting himself from the use or the threat of force?
3. Has the Crown proved beyond a reasonable doubt that Mr. Dalebozik's act was not reasonable in the circumstances?

1. Has the Crown proved beyond a reasonable doubt that Mr. Dalebozik did not believe that force was being used against him, or that Mr. Dalebozik's belief was not based on reasonable grounds?

[37] This is the catalyst element. The focus here is on Mr. Dalebozik's subjective belief that force was being used against him based on his perception of the circumstances, and whether his perception was objectively reasonable. In determining whether Mr. Dalebozik's belief was reasonable, I must consider whether an ordinary person who shares Mr. Dalebozik's attributes, experiences and circumstances would have held the same belief (***Khill***, at paras. 53-57; ***King*** at para. 23).

[38] I must consider Mr. Dalebozik's perception of events and circumstances that led him to act as he did. The question is not whether force was actually being used, or its use threatened against him, but rather whether he reasonably believed in the circumstances that force was being used or threatened against him. He may be mistaken in his belief about the use or threatened use of force as long as his mistake was reasonable in the circumstances as he knew or believed them to be (***Khill***, at para. 57).

[39] In this case, I must consider carefully what inferences about Mr. Dalebozik's state of mind I may draw from the evidence, in particular the video. In doing so, it is important to recall that the Crown bears the onus to prove the absence of the reasonable belief, and that Mr. Dalebozik is not required to prove otherwise.

[40] That Mr. Vogiatzakis used force against Mr. Dalebozik is objectively observable on the video. At the beginning of the physical altercation, Mr. Vogiatzakis holds Mr. Dalebozik's hoodie or hair with his left hand, pulling Mr. Dalebozik's head down, and punching him with his right hand.

[41] The question of whether Mr. Vogiatzakis is continuing to apply force, or continuing to threaten force, after the two men are down on the ground is less obvious. Again, the question to be determined is not whether Mr. Vogiatzakis did in fact pose a threat but whether Mr. Dalebozik reasonably believed that he posed such a threat. Having just received multiple closed fist blows from Mr. Vogiatzakis, it is reasonable to infer that Mr. Dalebozik believed that if Mr. Vogiatzakis were to get up from his prone position he would continue to punch or otherwise apply force to him.

[42] Would a reasonable person in the circumstances of Mr. Dalebozik have a similar belief that force was being used or threatened against them? A reasonable person is sane and sober, not exceptionally excitable, aggressive or fearful. A reasonable person also shares the same characteristics, experiences and circumstances as Mr. Dalebozik to the extent that they may shed light on Mr. Dalebozik's belief at the time.

[43] There is little evidence before me about Mr. Dalebozik's characteristics, experiences and circumstances that would have any bearing on this issue. From the video it appears that Mr. Dalebozik is able bodied and taller than Mr. Vogiatzakis; there is no evidence to indicate any disability or any particular vulnerability.

[44] Ms. Powell, the restaurant employee who confronted Mr. Dalebozik after the altercation, testified that she was familiar with him. She was aware that he lived in the building adjacent to the restaurant, and she would see him occasionally "loitering" outside the restaurant, approaching customers asking for change, or looking for and picking up cigarette butts in the parking lot. She testified that she did not know him and so could not comment on his character.

[45] Ms. Powell had worked at the restaurant for seven to eight months before the incident, and knew Mr. Vogiatzakis as the owner. She testified that Mr. Vogiatzakis was very protective of his restaurant and was sometimes “hotheaded”. However, there is no evidence that Mr. Dalebozik was aware of these traits. Mr. Vogiatzakis’ manner as he drove onto the parking lot, quickly stopped and got out of his vehicle, and confronted Mr. Dalebozik suggests that he objected to Mr. Dalebozik’s presence in the parking lot. But there is no evidence of a history or any prior encounters between Mr. Dalebozik and Mr. Vogiatzakis that would inform their interaction that night.

[46] Having considered all of the circumstances, I find that a reasonable person in Mr. Dalebozik’s circumstances – having just been restrained and punched repeatedly by Mr. Vogiatzakis – would believe that Mr. Vogiatzakis would return to punching, or otherwise applying force to him, were he to get up from his prone position. I find that the Crown has not proved that Mr. Dalebozik did not reasonably believe that force was being used or threatened by Mr. Vogiatzakis.

2. Has the Crown proved beyond a reasonable doubt that Mr. Dalebozik did not commit the assaultive acts for the purpose of defending or protecting himself from the use or the threat of force?

[47] This is the motive element. This inquiry relates solely to Mr. Dalebozik’s subjective state of mind, and does not include an objective component. Mr. Dalebozik’s purpose in acting as he did must be defensive, not vengeful. Mr. Dalebozik’s action must not have been undertaken for the purpose of vigilantism, vengeance, or some other personal motivation (***Khill***, at para. 59; ***King***, at paras. 24 and 27.)

[48] An accused’s purpose may evolve as the incident unfolds, and may be mixed or layered. That an accused acted with anger or frustration does not preclude reliance

on self-defence so long as he acted for a defensive purpose along with any other purpose. (See ***Khill***, at para. 61; ***R. v. Jeremschuk***, 2024 ABCA 268, at paras. 26-31; ***R. v. Zsombor***, 2023 BCCA 37, at para. 29; and ***R. v. Knott***, 2014 MBQB 72.)

[49] The only evidence of Mr. Dalebozik's state of mind, other than what may be inferred from the video, is his comment to Ms. Powell after the fact. In response to Ms. Powell's question: "What did you do?" Mr. Dalebozik said: "He pulled my fucking hair, so I laid him down". In my view, this answer, considered in the context of the remainder of the evidence, is equally consistent with an expression of fear as it is of anger. It is not inconsistent with Mr. Dalebozik subjectively having a defensive purpose.

[50] Because of the absence of any other evidence of Mr. Dalebozik's mental state at the time, his purpose must be inferred from the video evidence. I have no evidence of what is being said by either Mr. Vogiatzakis or Mr. Dalebozik during the altercation. Again, I note that it is for the Crown to prove beyond a reasonable doubt that Mr. Dalebozik's purpose in acting as he did was not defensive. Any doubt that arises from the evidence, or the absence of evidence, must be resolved in Mr. Dalebozik's favour.

[51] Turning to the video evidence, I find that, contrary to the position of the Crown, the evidence does not show Mr. Dalebozik to be the aggressor throughout the incident. At the beginning of the altercation, it was Mr. Vogiatzakis who confronted Mr. Dalebozik. Mr. Dalebozik did approach Mr. Vogiatzakis again after they had disengaged, but it was Mr. Vogiatzakis who first pushed Mr. Dalebozik, and then grabbed him by the hoodie or hair. As Mr. Vogiatzakis continued to restrain him, Mr. Dalebozik backed away. Mr. Dalebozik was held by Mr. Vogiatzakis such that he could not remove himself, and then was subjected to multiple blows.

[52] After the two men were on the ground, Mr. Dalebozik's actions included holding Mr. Vogiatzakis down when he was on his hands and knees, stopping him from getting up. Mr. Vogiatzakis was on his hands and knees when Mr. Dalebozik struck him in the side of the torso with his knee. Once Mr. Vogiatzakis stopped moving, Mr. Dalebozik removed himself from Mr. Vogiatzakis and stood up. He then kicked Mr. Vogiatzakis three times, walked away a few steps and then returned, and kicked/stomped him again twice. Viewing the video, one available inference is that Mr. Vogiatzakis no longer posed a threat to Mr. Dalebozik at that point, and so the knee strikes and the kicks were not necessary for Mr. Dalebozik to defend himself and were driven by anger.

[53] However, the test under s. 34(1)(b) of the **Code** is solely subjective and does not engage any assessment of objective reasonableness. This means that I must avoid conflating the assessment of this element of the self-defence analysis with that to be conducted under s. 34(1)(c) of the **Code**. Mr. Dalebozik's role in the incident and the reasonableness of his response to the threat posed by Mr. Vogiatzakis must be weighed under s. 34(1)(c) applying a modified objective test of "reasonable in the circumstances" (**King**, at paras. 27-28).

[54] To satisfy s. 34(1)(b), the Crown must prove that Mr. Dalebozik did not act as he did for the purpose of defending himself. One inference available on the evidence is that Mr. Dalebozik's purpose in striking Mr. Vogiatzakis with his knee and kicking him was to ensure that Mr. Vogiatzakis would not return to assaulting him. After considering the absence of any direct evidence of Mr. Dalebozik's purpose, Mr. Dalebozik's equivocal statement to Ms. Powell, and the inferences available from the video evidence, I find that

the Crown has not proved beyond a reasonable doubt that Mr. Dalebozik did not act as he did for the purpose of defending or protecting himself.

3. Has the Crown proved beyond a reasonable doubt that Mr. Dalebozik's act was not reasonable in the circumstances?

[55] This is the response element. Its purpose is to ensure that the law governing self-defence conforms to the standard of conduct we expect of our fellow citizens. Since the defence is grounded in the conduct expected of a reasonable person with the characteristics and experiences of Mr. Dalebozik in the same circumstances, a proper balance is achieved between respecting the security of the person who acted, Mr. Dalebozik, and that of the person acted upon, Mr. Vogiatzakis (***Khill***, at para. 62).

[56] The issue here is the reasonableness of Mr. Dalebozik's conduct. The question is what an ordinary person would have done in Mr. Dalebozik's position. The focus is not on what Mr. Dalebozik thought at the time, but rather on the reasonableness of what Mr. Dalebozik did in the circumstances as he knew or honestly believed them to be (***Khill***, at paras. 63-66).

[57] Whether Mr. Dalebozik's conduct was reasonable is assessed according to the relevant circumstances of the parties – Mr. Dalebozik and Mr. Vogiatzakis – as well as of the conduct itself. This includes how the conduct developed and happened and the role each of the parties played in it.

[58] Factors to be considered in making this assessment are set out in s. 34(2) of the ***Code***, which reads as follows:

Factors

(2) In determining whether the act committed is reasonable in the circumstances, the court shall consider the relevant circumstances of the person, the other parties and the act, including, but not limited to, the following factors:

- (a) the nature of the force or threat;
- (b) the extent to which the use of force was imminent and whether there were other means available to respond to the potential use of force;
- (c) the person's role in the incident;
- (d) whether any party to the incident used or threatened to use a weapon;
- (e) the size, age, gender and physical capabilities of the parties to the incident;
- (f) the nature, duration and history of any relationship between the parties to the incident, including any prior use or threat of force and the nature of that force or threat;
- (f.1) any history of interaction or communication between the parties to the incident;
- (g) the nature and proportionality of the person's response to the use or threat of force; and

Facteurs

(2) Pour décider si la personne a agi de façon raisonnable dans les circonstances, le tribunal tient compte des faits pertinents dans la situation personnelle de la personne et celle des autres parties, de même que des faits pertinents de l'acte, ce qui comprend notamment les facteurs suivants :

- a) la nature de la force ou de la menace;
- b) la mesure dans laquelle l'emploi de la force était imminent et l'existence d'autres moyens pour parer à son emploi éventuel;
- c) le rôle joué par la personne lors de l'incident;
- d) la question de savoir si les parties en cause ont utilisé ou menacé d'utiliser une arme;
- e) la taille, l'âge, le sexe et les capacités physiques des parties en cause;
- f) la nature, la durée et l'historique des rapports entre les parties en cause, notamment tout emploi ou toute menace d'emploi de la force avant l'incident, ainsi que la nature de cette force ou de cette menace;
 - f.1) l'historique des interactions ou communications entre les parties en cause;
- g) la nature et la proportionnalité de la réaction de la personne à l'emploi ou à la menace d'emploi de la force;

(h) whether the act committed was in response to a use or threat of force that the person knew was lawful.

h) la question de savoir si la personne a agi en réaction à un emploi ou à une menace d'emploi de la force qu'elle savait légitime.

Consideration of these factors is mandatory (***Khill***, at para. 127; and ***King***, at para. 26).

[59] Some of the identified factors have no application in this case: neither party used nor threatened to use a weapon (s. 34(2)(d)); there was no evidence of any prior relationship between the parties (s. 34(2)(f)); there was no evidence of any prior interaction or communication between them (s. 34(2)(f.1)); and there is no basis upon which to find that Mr. Vogiatzakis' use of force against Mr. Dalebozik was lawful (s. 34(2)(h)).

[60] I will address the relevant factors in turn, although out of order.

Section 34(2)(e): The size, age, gender and physical capabilities of each of the persons involved in the incident

[61] From the evidence, I would conclude that the men were similar in physical capabilities although Mr. Dalebozik is taller and younger. Neither appeared to suffer any disability. Dr. Johnston testified to certain medical conditions identified during the autopsy of Mr. Vogiatzakis but there is no indication that any would have negatively affected his physical capabilities. Mr. Vogiatzakis was capable of holding Mr. Dalebozik, and throwing multiple punches. Neither man appeared to be uniquely positioned to overpower the other.

Section 34(2)(c): Mr. Dalebozik's role in the incident

[62] When considering his role in the incident, I must consider not only the "final confrontation" but Mr. Dalebozik's "conduct – such as actions, omissions and exercises of judgment – during the course of the incident, from beginning to end, that is relevant to

whether the ultimate act was reasonable in the circumstances" (*Khill*, at paras. 74 and 82; *King*, at paras. 46-47). I must consider the extent to which Mr. Dalebozik contributed to the circumstances that led to the physical altercation wherein he felt compelled to respond with force (*Khill*, at paras. 86-87).

[63] Prior to the physical altercation, Mr. Vogiatzakis confronted Mr. Dalebozik in the parking lot of his restaurant. There is no evidence of what was said.

[64] After Mr. Vogiatzakis confronted him, Mr. Dalebozik moved away, and Mr. Vogiatzakis moved towards the entrance of the restaurant. However, Mr. Dalebozik did not leave the area, but lingered briefly and then moved back towards Mr. Vogiatzakis. Mr. Dalebozik had the opportunity to remove himself, and avoid any further contact with Mr. Vogiatzakis. Instead, he re-engaged with him, and Mr. Vogiatzakis responded by pushing him, and then grabbing on to him. The physical altercation escalated from there.

[65] Did Mr. Dalebozik reignite the verbal confrontation after it was over? Was it reasonable for him to do so? With no evidence of the contents of their verbal exchange, it is difficult to assess. Certainly Mr. Dalebozik had the opportunity to remove himself, and chose not to do so.

[66] Mr. Vogiatzakis was the first to make physical contact by pushing Mr. Dalebozik. Mr. Dalebozik was the first to throw a punch, but only after he had been pushed, and when Mr. Vogiatzakis had him by the hoodie or hair. Mr. Vogiatzakis continued to restrain Mr. Dalebozik, and to punch him. At that point, Mr. Dalebozik was not in a position to extricate himself.

Section 34(2)(a): The nature of the force or threat

[67] The force used by Mr. Vogiatzakis included pushing Mr. Dalebozik, holding him by the hoodie or hair and punching him repeatedly. As noted, no weapon was used or brandished. The men appeared to be fairly evenly matched in terms of capacity to fight. Although Mr. Vogiatzakis' punches left Mr. Dalebozik with bruises, there is no indication that Mr. Vogiatzakis was in a position to easily overpower Mr. Dalebozik, nor that Mr. Dalebozik was particularly vulnerable.

[68] Mr. Vogiatzakis inflicted no further blows on Mr. Dalebozik after the two men fell to the ground. For the most part, Mr. Vogiatzakis maintained his position on his hands or elbows and knees, and did appear on the video as if he were attempting to get up. However, he did not strike or kick Mr. Dalebozik. The physical force used by Mr. Vogiatzakis, that might have been continued had he been able to stand, was likely to have been limited to grappling and punching.

Section 34(2)(b): The extent to which the use of force was imminent and whether there were other means available to Mr. Dalebozik to respond to the potential use of force

[69] Mr. Vogiatzakis' use of force was ongoing and imminent, up to a point. Initially, Mr. Vogiatzakis pushed and then held on to Mr. Dalebozik as he backed away. He continued to hold on to Mr. Dalebozik and punched him repeatedly. Could Mr. Dalebozik have disengaged? There is no indication that Mr. Vogiatzakis would have desisted. Mr. Vogiatzakis was still holding on to Mr. Dalebozik when they fell to the ground, and let go or lost his grip after they fell. Could Mr. Dalebozik have removed himself from the fight at that point? Perhaps. But he is not required to weigh his options to a nicety to avail himself of self-defence. Moreover, he is entitled to make a reasonable mistake

about the nature and extent of force necessary to defend himself. (See *R. v. Tanner*, 2024 MBCA 87, at paras. 15-17.) Nevertheless, the possibility that Mr. Dalebozik had the opportunity to disengage and retreat is a factor to be considered in the overall reasonableness of his response.

Section 34(2)(g): The nature and proportionality of Mr. Dalebozik's response to Mr. Vogiatzakis' use or threat of force.

[70] It is consideration of this factor that most significantly impacts my assessment of the overall reasonableness of Mr. Dalebozik's assaultive acts.

[71] Mr. Dalebozik's response appears to be proportionate to the force used by Mr. Vogiatzakis initially. While the two men were still on their feet, they exchanged blows, with Mr. Dalebozik punching Mr. Vogiatzakis as Mr. Vogiatzakis held on to him. However, in my view, the proportionality of Mr. Dalebozik's assaults on Mr. Vogiatzakis after they are on the ground must also be considered.

[72] I must take a holistic approach to my assessment of the reasonableness of Mr. Dalebozik's actions, and avoid compartmentalization. In explaining the scope of the factor prescribed in s. 34(2)(c) ("the role of the accused in the incident"), Martin J. in ***Khill*** states:

[83] Consistent with the new approach to self-defence under s. 34, judges and juries are no longer expected to engage in a step by step analysis of events, artificially compartmentalizing the actions and intentions of each party at discrete stages, in order to apply the appropriate framework to the facts (see, e.g., *R. v. Paice*, 2005 SCC 22, [2005] 1 S.C.R. 339, at paras. 17-20). For example, where both parties are engaged in aggressive and confrontational behaviour, s. 34(2)(c) does not demand a zero-sum finding of instigation, provocation, cause or consent (paras. 21-22). Parliament has now selected a single overarching standard to weigh the moral blameworthiness of the accused's act in context: reasonableness. This reflects the complexity of human interaction and allows triers of fact to appropriately contextualize the actions of all parties involved, rather than artificially fragmenting the facts.

[73] This holistic approach does not mean, however, that the assessment of the reasonableness of Mr. Dalebozik's actions does not take into account the threat of force as it exists at a particular time. What may have been a reasonable and lawful application of force by Mr. Dalebozik initially, may become unreasonable and unlawful once the threat is eliminated or diminished. (See *R. v. Bilodeau*, 2024 ABCA 149, at paras. 59-61.)

[74] In my view, a reasonable person in Mr. Dalebozik's circumstances would have recognized that the threat of force posed by Mr. Vogiatzakis had been significantly reduced once he was on the ground. Despite this diminished threat, Mr. Dalebozik used his weight to push Mr. Vogiatzakis down onto his front on the sidewalk, compressing his chest. He struck Mr. Vogiatzakis eight times in his torso with his knee, and the blows were forceful. After Mr. Vogiatzakis became unresponsive, Mr. Dalebozik continued his assault, kicking him three times in the head, and twice in the torso.

[75] Although the entire physical altercation was over in four minutes, Mr. Dalebozik had the upper hand for the last half of that time. During the last two minutes, Mr. Dalebozik held Mr. Vogiatzakis down, violently struck him, and kicked him when he was no longer offering any resistance or response. I find that these actions were beyond what was necessary to address any remaining threat of ongoing violence from Mr. Vogiatzakis. I recognize that Mr. Dalebozik was not required to precisely calculate his response, and was not required to reflect on the risk of deadly consequences, in the circumstances (*Tanner*, at para. 16). However, the force used by Mr. Dalebozik was much greater than required.

CONCLUSION ON SELF-DEFENCE

[76] I find that it was not Mr. Dalebozik who initiated the physical altercation, but rather it was Mr. Vogiatzakis, who pushed Mr. Dalebozik, and grabbed and held on to him. There was an exchange of blows, while Mr. Vogiatzakis held on to Mr. Dalebozik. After the two men fell to the ground, it was not unreasonable for Mr. Dalebozik to apprehend that Mr. Vogiatzakis would continue to apply physical force, if he were to regain his feet. However, the threat of force diminished as Mr. Dalebozik held Mr. Vogiatzakis down, and continued to assault him. Mr. Dalebozik's application of force became disproportionate to the diminished threat posed by Mr. Vogiatzakis, and therefore was not reasonable.

[77] Having considered all of the relevant circumstances, including the factors enumerated in s. 34(2) of the **Code** that are relevant on the facts of this case, I find that Mr. Dalebozik's assaultive acts were not reasonable in the circumstances. As a result, I am satisfied beyond a reasonable doubt that Mr. Dalebozik did not act in self-defence when he repeatedly struck Mr. Vogiatzakis with his knee, compressed his chest, and kicked him.

CONCLUSION ON MANSLAUGHTER

[78] I conclude that Mr. Dalebozik caused the death of Mr. Vogiatzakis by an unlawful act. I find Mr. Dalebozik guilty of manslaughter.

ISSUE 5: HAS THE CROWN PROVED THAT MR. DALEBOZIK UTTERED A THREAT TO CAUSE DEATH OR BODILY HARM TO Ms. POWELL?

[79] To prove that Mr. Dalebozik committed the offence of uttering a threat to Ms. Powell to cause death or bodily harm to her, the Crown must prove each of the following essential elements beyond a reasonable doubt:

- a) That Mr. Dalebozik made a threat;
- b) That the threat was to cause death or bodily harm to Ms. Powell; and
- c) That Mr. Dalebozik made the threat knowingly.

[80] Ms. Powell testified that a customer told her that there was an altercation in the parking lot, and she went outside. She saw Mr. Dalebozik standing over someone lying on the ground. She confronted him, and asked: "What's going on? What happened?" Mr. Dalebozik said: "He pulled my fucking hair, so I laid him down." Ms. Powell said: "What did you do? You could have killed someone." Mr. Dalebozik said: "Shut the fuck up. I know where you work. I'll lay you down too." She testified that he then ran away. Ms. Powell was adamant that she recalled the words Mr. Dalebozik said to her.

[81] I accept Ms. Powell's testimony regarding her interaction with Mr. Dalebozik. Her testimony was credible and reliable. The defence did not argue otherwise.

[82] The issue is what meaning a reasonable person would give to the words used, in the circumstances in which the words were spoken. Would a reasonable person, fully aware of the circumstances in which the words were uttered, have perceived them as a threat of death or bodily harm?

[83] Ms. Powell understood Mr. Dalebozik's words as a threat to do the same to her as he had just done to Mr. Vogiatzakis. That is, she interpreted them as a threat to hurt her physically. She testified that she saw what he was capable of, and his threat made her anxious and fearful.

[84] In my view, a reasonable person would similarly interpret Mr. Dalebozik's words as a threat to cause bodily harm, at least, if not death. In his interaction with Ms. Powell, Mr. Dalebozik referred to Mr. Vogiatzakis and acknowledged he had "laid him down". He

then said: "I know where you work" and "I will lay you down too". In the context, the only reasonable interpretation is that Mr. Dalebozik was threatening to do to Ms. Powell what he had done to Mr. Vogiatzakis. Again, in context, his reference to knowing where she worked could only be interpreted as a threat to return to harm her.

[85] I am also satisfied that Mr. Dalebozik made the threat knowingly. There is no evidence that Mr. Dalebozik suffered from a mental disorder, or was intoxicated, such as would raise a reasonable doubt about whether he knowingly uttered the threat. Ms. Powell testified that the accused appeared to be "scattered, angry, not all there". She testified that his eyes were bloodshot and she agreed with the suggestion in cross-examination that he "looked messed up". This evidence is not sufficient to unsettle the common sense inference that a person usually knows the predictable consequences of their conduct and means to bring them about.

[86] I am satisfied that Mr. Dalebozik meant to intimidate Ms. Powell and meant his threat to be taken seriously by her. He said the words in response to her questioning him about what had happened and her accusation that he may have killed someone. He told her to "shut the fuck up" and followed up with the threat.

[87] With respect, there is no merit to the defence argument that Mr. Dalebozik uttered the threatening words in an effort to avoid any further violence and should be acquitted based on the application of the doctrine of self-defence by analogy. Counsel for Mr. Dalebozik acknowledged that this was a novel argument for which he had been unable to find any precedent. In my view, even if such a defence were available in law, it could not be applicable on the facts in this case. There is no basis in the evidence to infer that Mr. Dalebozik perceived Ms. Powell as a threat.

CONCLUSION – UTTERING THREATS

[88] I am satisfied beyond a reasonable doubt that Mr. Dalebozik knowingly uttered a threat to cause bodily harm to Ms. Powell. I find Mr. Dalebozik guilty of uttering a threat to kill or cause bodily harm to Ms. Powell.

J.