

COURT OF KING'S BENCH OF MANITOBA

B E T W E E N:

HIS MAJESTY THE KING,)	
)	<u>Chantal Boutin</u>
)	<u>Georgia Couturier</u>
- and -)	for the Crown
)	
JAMIE RANDY FELIX)	<u>Theodore L. Mariash</u>
)	<u>Jason Malloy</u>
)	for the accused.
)	
)	<u>Judgment Delivered Orally:</u>
)	December 2, 2025

RESTRICTION ON PUBLICATION: Pursuant to s. 684(1) of the *Criminal Code*, no information regarding any portion of this decision shall be published in any document or broadcast or transmitted in any way until a jury has heard the evidence and retires to consider its verdict. **This publication ban expired on March 5, 2026.**

HUBERDEAU J.

VOIR DIRE RULING

A. OVERVIEW

[1] At approximately 3:55 a.m. on November 26, 2023, what sounded like nine consecutive gun shots were captured on video surveillance obtained from a grocery store located across the street from 143 Langside Street.

[2] Shortly thereafter, Lisa McKenzie ("McKenzie") attended to the back door of 2-143 Langside Street ("2-143") where she heard the voice of her friend, Shawn Marko ("Marko") asking for help. Once inside, she came upon a bloody scene where she

believed five people had been stabbed, one of whom was Marko. McKenzie ran from the residence and called 911.

[3] Upon arrival, Winnipeg Police Service (“WPS”) determined that the incident was in fact a mass shooting of five individuals, four of which had been shot in the head, three of which were deceased, while the fourth struggled to breathe. The fifth individual, Marko, who had been shot in the stomach, was still alive and told officers on two separate occasions that he had been shot by “Jamie Houle” (the “November 26 Hearsay Comments”).

[4] Marko was then transported to the Health Science Centre (“HSC”) and remained there until his passing on June 1, 2025.

[5] On January 8, 2024, Marko provided police a video recorded statement while at the HSC where he told police the shooter’s name was “Jason” while later indicating that he meant to say “Jamie” (the “January 8 Hearsay Statement”).

[6] As a result of the shootings Jamie Randy Felix (“Felix”) was charged with five counts of second degree murder.

[7] Given Marko’s passing, the Crown now applies to have the November 26 Hearsay Comments admitted in Felix’s trial.

B. THE ISSUES

[8] The issues include the following:

1. Are Marko’s November 26 Hearsay Comments admissible under the traditional hearsay exception of *res gestae* utterance and/or dying declarations?
2. Is this a “rare case” where a separate principled approach analysis is required?
3. Should the court exercise its residual discretion to exclude the hearsay evidence?

C. WITNESSES, EXHIBITS AND AGREEMENTS

[9] The Crown called Detective Sargent Stephen McIntyre ("McIntyre"), Constables Adam Herrick ("Herrick"), Chad Swenarchuk ("Swenarchuk"), Scott Blanco ("Blanco"), McKenzie, and filed three exhibits.

[10] Defence called Detective Sargeant Brent Simpson ("Simpson") and filed the January 8 Hearsay Statement, the lineup form, and the photo pack as exhibits. None of the defence's exhibits were being tendered for their truth and none of the defence's evidence is to apply to the trial.

[11] The parties agreed that Marko's date of birth was November 25, 1968, and that he died on June 1, 2025.

D. EVIDENTIARY BACKGROUND

[12] At 3:55:33 a.m. on November 26, 2023, video camera footage obtained from 164 Langside Street captured the sound of what was believed to be nine consecutive gun shots.

[13] At approximately 4 a.m. McKenzie and her friend, Candace Ballantyne ("Ballantyne") left Ballantyne's residence (which is approximately two buildings away) and attended 2-143 to visit her friends, Crystal and Stephanie Beardy ("Crystal" and "Stephanie"). The residence located at 2-143 is a known drug house, which McKenzie attended frequently.

[14] Once there, McKenzie made her way to the back door where she heard Marko say, "Open it. Open it!" Forcing the door open, McKenzie saw a male, who she knew as "Mel" (later identified as Leseri Lesikel), on the ground partially blocking the door. She also observed an unknown male, later identified as Dylan Lavalley, Crystal, and Stephanie all of whom appeared to be deceased. She then saw Marko, who was bleeding from his stomach. Marko yelled out to her, "We're going to die, Lisa! We're going to die!"

[15] Given she had not heard the sound of gunshots she believed all of the individuals had been stabbed. Fearing for her safety, McKenzie left the residence and called 911 at 4:04 a.m.

[16] WPS officers were dispatched between 4:05 and 4:06 a.m. and Herrick and Swenarchuk arrived on scene at 4:08 a.m. Having entered through the rear door, they

found two males and two females with gunshot wounds to their head and Marko, who was holding his chest, yelling for help. Swenarchuk described the scene as one of the most violent, bloody, and chaotic he had experienced in his 15 years of policing.

[17] The officers described the two males as laying motionless in the darkened room nearest to the rear door, while the two females and Marko were in the adjacent room which was lit. Each room had a clear sightline into the other.

[18] When Herrick asked Marko where he had been stabbed, he yelled that he had been shot and that he would not be answering any other questions. Herrick and Swenarchuk then cleared the residence after which Swenarchuk tended to Marko while Herrick triaged the other victims. Herrick noted that Stephanie was still breathing, despite brain matter coming from her head wound.

[19] Blanco and Lewis then arrived on the scene at 4:10 a.m.

[20] Swenarchuk and Blanco tended to Marko, which included placing two chest seals to his right upper chest and right upper back. Blanco described Marko yelling out for help and telling him he was struggling to breath. Swenarchuk described believing that they may lose Marko given the extent of his injuries.

[21] At approximately 4:12 a.m. Swenarchuk asked Marko his name, to which he did not answer. He then asked Marko, "Who did this to you?" to which Marko responded "Jamie Houle". Marko was unable to answer any further questions.

[22] Blanco was then directed by paramedics to assist in transporting Marko to the ambulance as he needed immediate medical attention. Once in the ambulance Marko, who was agitated and struggling to breath, provided Blanco with his name and that his birthday was the day prior. When Blanco asked who did this to him, Marko told him, "Jamie Houle".

[23] Throughout their interactions with Marko, neither Herrick, Swenarchuk, nor Blanco recalled seeing any signs of impairment. Swenarchuk described Marko's speech as being both precise and direct, while Blanco indicated that no drugs were found in Marko's personal belongings.

[24] Upon arriving at the HSC, Marko was taken directly into the resuscitation room and then into surgery and remained at the HSC until his death on June 1, 2025.

[25] On January 8, 2024, WPS attended the HSC and obtained the January 8 Hearsay Statement at which time Marko told police, among other things, that the shooter's name was "Jason", while also selecting Felix's photo from the photo pack.

[26] Following the statement, Simpson informed Marko that they had arrested Felix. Marko responded by telling Simpson, "I told you that was his name". When Simpson advised Marko that he identified the shooter as Jason, Marko replied that he meant to say "Jamie".

E. THE GENERAL FRAMEWORK FOR THE ADMISSION OF HEARSAY EVIDENCE

[27] Generally, hearsay evidence is presumptively inadmissible unless it falls under an exception to the hearsay rule. The onus is on the party tendering the evidence to show it meets the requirements of a traditional exception (*R. v. MacKinnon*, 2022 ONCA 811, at para 62(i)).

[28] Evidence that falls under the traditional exception to the hearsay rule (i.e. *res gestae* utterance and dying declarations) is presumptively admissible given these exceptions incorporate an inherent reliability component (*MacKinnon*, at para 62(ii)).

[29] In some "rare cases", evidence falling within an existing traditional exception may be excluded because of the existence of "special features" such that the hearsay statement does not meet the requirements of the principled approach in the particular circumstances of the case. Such "rare cases" will be unusual and the onus rests on the party resisting the admission and the threshold is high (*Ibid.* at paras 51 and 62(ii)(a); *R. v. Nurse*, 2019 ONCA 260, at para 61).

[30] The "rare cases" exception cannot include weaknesses that go to the ultimate reliability of the evidence or reliability concerns that are inherent in the traditional exception (*MacKinnon*, at para 62(ii)(a)).

i) *Res gestae* Utterance

[31] *Res gestae* utterance is one of the traditional exceptions to the general rule that hearsay evidence is inadmissible. Subject to the "special features" or "rare cases" exceptions, a *res gestae* utterance will be admissible if it is:

1. spontaneous and contemporaneous; and

2. made under the pressure of a dramatic event which results in the declarant's faculty becoming overcome and dominated by the event,

thereby minimizing the danger of fabrication, distortion or concoction (***Mackinnon***, at paras 40, 41, and 43; ***R. v. Hall***, 2018 MBCA 122, at para 41; ***R. v. Head***, 2014 MBCA 59, at para 29; and ***R. v. Johnston***, 2018 MBCA 8, at para 122).

[32] Exact contemporaneity is neither required, nor is it to be assessed simply by a mechanical reference to time but rather in the context of all the circumstances such that the event would still be dominating the mind of the declarant at the time the utterance is made (***Mackinnon***, at para 42; ***R. v. Dakin***, 1995 CanLII 1106 (ON CA), at para 20; and ***Hall***, at para 46).

[33] A *res gestae* utterance made in response to questions asked by a first responder does not exclude its admission and is only one factor to be considered (***R. v. M. Hall***, 2011 ONSC 5628, at paras 18 and 19; ***Hall***, at para 48).

[34] Animus or motive to contrive does not impact the admission of a spontaneous utterance so long as the judge is satisfied that the mind of the declarant was so caught up in the event, they did not have time to contrive (***R. v. Carty***, 2017 ONCA 770, at paras 9 and 10).

[35] In the context of the spontaneous utterance exception, "rare cases" may include gross intoxication, highly impaired vision, and exceptionally difficult viewing conditions and "special features" are "circumstances of particular difficulty" beyond the ordinary limitations of human recollection (***Mackinnon***, at paras 45-46).

[36] Finally, any reliability concerns relating to the truthfulness is inherently captured and addressed in the requirements of this traditional hearsay exception and cannot form the basis for exclusion under the "rare cases" exception (***Mackinnon***, at paras 47-49).

ii) Dying Declaration

[37] For a dying declaration to be admissible, four key conditions must be met: 1) the declarant had a settled, hopeless expectation of almost death; 2) the statement was about the circumstances of the death; 3) the statement would have been admissible if the declarant had been able to testify; and 4) the offence involved the homicide of the declarant (***Nurse***, at para 72).

[38] Given that dying declarations can be very powerful, strict adherence to these prerequisites is required (*Nurse*, at para 73).

[39] In determining whether the deceased had a “settled, hopeless expectation of death,” the court must consider what the declarant said, what others said in his presence, the declarant’s physical condition, and the time between the injuries that gave rise to death and the statement (David Watt, *Watt’s Manual of Criminal Evidence* (Toronto: Thomson Reuters, 2025) at section 4:5).

[40] Another important point for the court to consider is the timing of the statements, given in most cases dying statements often occur moments before the declarant’s death (*MacKinnon*, at para 73).

[41] Similar to *res gestae* utterances, only in “rare cases” should evidence that would otherwise be admissible under a dying declaration be excluded.

F. POSITION OF THE PARTIES ON THE ISSUES

[42] The Crown submitted that the November 26 Hearsay Comments are admissible under both the *res gestae* utterance and dying declaration exceptions.

[43] It further submitted that this is not a “rare case” where the evidence should be excluded or that the principled approach to the admissibility of hearsay is required. On this point the Crown noted that there was nothing in the November 26 Hearsay Comments or his subsequent January 8 Hearsay Statement that impacted Marko’s perception, narration, or memory of what occurred on November 26.

[44] The Crown further argued that the court should not exercise its residual discretion to exclude the evidence, as the probative value of the November 26 Hearsay Comments outweigh any potential prejudice, particularly given that the identity of the shooter remains an unresolved issue at trial.

[45] Finally, the Crown submitted that the prejudice occasioned by being unable to cross-examine Marko on the November 26 Hearsay Comments can be mitigated through cross-examination of its other witnesses, submissions of counsel, and properly crafted jury instructions (*Hall*, at para 131).

[46] Defence counsel submitted that the November 26 Hearsay Comments are not admissible as they do not fall within the two separate traditional hearsay exceptions given the following:

1. McKenzie's evidence was neither credible nor reliable given her level of impairment at the time of the incident and her animus towards Felix;
2. Marko's comments to Swenarchuk and Blanco were not spontaneous, in that he had ample time to concoct his answer; and
3. Marko's comments cannot be treated as a dying declaration given he made multiple separate declarations, and the police response as a whole reflects that they did not consider his condition to be life-threatening.

[47] Defence further submitted that if the court does accept that the November 26 Hearsay Comments fall within one or both of the traditional hearsay exceptions, they should be excluded given the special and rare features present in this case. This includes questions relating to Marko's level of impairment and the contradictory information Marko provided in his January 8 Hearsay Statement, which included, but was not limited to identifying his shooter as "Jason".

[48] Finally, in the event the court does not find this to be a "rare case", defence further submitted that the court should use its residual discretion to exclude the November 26 Hearsay Comments given its prejudicial effect far outweighs its probative value, which cross-examination of other Crown witnesses would be insufficient to remedy.

G. ASSESSMENT OF THE CREDIBILITY AND RELIABILITY OF THE CROWN WITNESSES

i) Police

[49] I found the evidence of McIntyre, Herrick, Swenarchuk, and Blanco to be both internally and externally consistent. Their testimony aligned on key points such as timelines and observations, and they corroborated one another in significant respects regarding the events of November 26, 2023. Importantly, their evidence was further supported by video surveillance, which confirmed the manner, direction, and timing of their arrival at the scene.

ii) McKenzie

[50] Although McKenzie admitted to consuming 12 alcoholic beverages and one gram of cocaine around the time of the incident, I found her testimony to be, on the whole, credible and reliable.

[51] On the issue of consumption, she spoke openly and honestly to being a daily user of cocaine during November 2023 and given this, had built a tolerance to its effects. I also found her description of the events leading up to the incident and the incident itself to be both clear and concise, especially when one considers nearly two years has passed since the incident.

[52] Also important to note was when her evidence could be corroborated, it was. On this point I note she described gaining entry to 2-143 through the backdoor, which is consistent with what many of the officers testified to. She also noted having to push the door inwards and their being resistance given a body was obstructing the doorway. Once again this was consistent with what many of the officers testified to (see Herrick's evidence during the Crown's re-direct and Swenarchuk's evidence). I also found McKenzie's general description of the chaos, blood, and bodies inside 2-143 to be, for the most part, consistent with what the police testified to, other than only recalling seeing one body in the first room, while the police described there being two.

[53] Regarding whether McKenzie's testimony should be discounted due to animus toward Felix, the only visible indication was her comment, "Fuck you Felix", made as she left the courtroom. While this behavior was both inappropriate and unacceptable, it occurred after she had completed her testimony and was no longer under oath. Considering this, along with the corroboration noted earlier, I am not persuaded that her animus toward Felix materially affected the reliability of her testimony.

H. APPLICATION OF THE FACTS TO THE LAW OF *RES GESTAE* UTTERANCE

[54] Having applied the facts to the law I am satisfied that the November 26 Hearsay Comments where Marko names "Jamie Houle" as his shooter meet the strict requirements for admission under the traditional hearsay exception of *res gestae* utterance. I make such a finding given a functional and contextual analysis of all of the evidence, which includes:

1. audio evidence of what appears to be the sound of multiple gunshots coming from the immediate vicinity of 2-143 approximately five minutes prior to McKenzie attending 2-143;
2. Marko's utterances as to the identity of the shooter were made at a time when he was crying out for help, struggling to breath and speak, while he laid beside two other people who had been shot in the head, while also having an unobstructed sightline into the adjoining room where two others laid lifeless;
3. there was no evidence to suggest that Marko did not see the shooter, given the room he was located in was lit and none of the witnesses described there being any obvious sightline obstructions between the rooms where the victims' bodies were located;
4. the roughly 30-minute interval between the assumed gunshots and Marko's two statements to police did not alter the intensity of his pain or the circumstances of the traumatic event, making it unlikely that his account was influenced by reflection, distortion, or fabrication;
5. although the manner in which Marko's utterances were elicited by police is a relevant factor for consideration, I am satisfied that it does not undermine the spontaneity of his utterances in that the evidence shows that Marko's mind remained dominated by the event throughout. I say this given the traumatic event he had just undergone minutes prior, the nature of his injuries, the officers describing Marko repeatedly crying out for help, that he appeared distressed and agitated, and had difficulty breathing; and
6. despite being located in a known drug house there was no direct evidence that Marko was impaired in a way that would undermine his reliability. This included:
 - a. Marko knowing the person who first arrived to be his friend, McKenzie;
 - b. he knew the gravity and jeopardy he faced given he instructed her to open the door and then proceeded to tell her that he and the others inside were all going to die;

- c. police did not note any indicia of impairment; Marko having disclosed to police his birthday while also correcting them as to the cause of his injuries; and finally
- d. no drugs were found in his personal belongings when they were turned over to police by hospital staff.

I. APPLICATION OF THE FACTS TO THE LAW OF DYING DECLARATIONS

[55] Having applied the facts to the law I am satisfied that Marko's utterances of naming "Jamie Houle" as his shooter also meet the strict requirements for admission under the traditional hearsay exception of dying declarations.

[56] In considering whether Marko had a settled, hopeless expectation of death I point to the following evidence:

1. McKenzie attended the residence and heard Marko repeatedly yell for her to open the door. Once inside he then told McKenzie, "We're going to die, Lisa! We're going to die!" These comments, which speak to Marko's mindset at the time, were made by Marko only minutes after the sound of multiple gunshots are captured on the neighbouring video surveillance footage and as he lay mere feet away or within the sightline of four bodies, three of which were bleeding and lifeless, while the fourth, although alive, had brain matter coming from her head wound;
2. Marko would have seen and/or heard Blanco advise paramedics that he needed immediate medical attention, while also seeing the chaotic movements of both police and paramedics who were assisting him and the others;
3. Marko would have observed and experienced the same violent, bloody, and chaotic environment as described by Swenarchuk; and
4. Marko's injuries were both severe and painful which included a gun shot wound to the chest, which required police to place two chest seals while he struggled to breathe, speak, and repeatedly called out for help.

[57] Given the totality of these circumstances, I am satisfied that Marko had a settled, hopeless expectation of death.

[58] In considering the three remaining factors, I am also satisfied that the evidence clearly shows that the November 26 Hearsay Comments were about the circumstances of his death. I say this given the comments were in direct response to Swenarchuk and Blanco asking him who had done this to him. I am further satisfied that but for his death at the HSC, Marko would have been able to testify as to the identity of his shooter at trial.

[59] I also reject defence counsel's argument that Marko's multiple declarations to police are indicative that he was in no real danger of dying and therefore are not dying declarations. I say this given in *M. Hall*, the court found multiple declarations admissible under the dying declaration exception.

[60] I also reject defence counsel's argument that police officer's actions, or inactions, were indicative that Marko was not in actual danger of death. I say this given the belief or perception of others, such as police, is not one of the four pre-conditions set out in *Nurse* in determining whether a dying declaration is admissible.

J. IS THIS A "RARE CASE" WHERE A SEPARATE PRINCIPLED APPROACH ANALYSIS IS REQUIRED?

[61] Having applied the facts to the law, I am not satisfied that Felix has met the high threshold of establishing any "special feature" that would raise concerns about Marko's perception, narration, or memory, thereby making this a "rare case".¹

[62] On this point I am satisfied that the evidence and the circumstances surrounding the November 26 Hearsay Comments negate the possibility that he was mistaken, misquoted, or that he misrepresented what had just occurred. I say this given the following:

1. despite the incident having occurred in a known drug house, there was no direct evidence that Marko was in any way impaired by alcohol or drugs;

¹ Neither sincerity and/or truthfulness are factors for consideration given they are inherently addressed in both the *res gestae* utterance and dying declaration exceptions.

2. there is no evidence that he did not see his shooter, given he was located in a lit room with an unobstructed sightline between the rooms where all of the victims were located;
3. McKenzie testified that Marko and Felix were known to each other, having been seen together on at least five occasions, and also noted that Felix had a brother with the last name Houle;
4. the questions asked by police as to the identity of the shooter were direct and Marko's answers, which were recorded by police, were short, clear, repeated, and made less than 30 minutes from the time nine consecutive gun shots are captured by surveillance; and
5. Marko was aware of his surroundings at the time of the November 26 Hearsay Comments given he provided police (i.e. Blanco) his name and that his birthday was the day prior, both of which were later confirmed by police.

[63] I am also satisfied that the January 8 Hearsay Statement does not amount to a "special feature" or "rare case" that would raise concerns about Marko's perception, narration, or memory. I say this despite Marko initially identifying his shooter as "Jason" in the January 8 Hearsay Statement. Notably, in the same statement, Marko identified Felix as his shooter when shown a photo lineup. Later, when informed by officer Simpson that Felix had been arrested, Marko responded, "I told you that was his name." When Simpson pointed out that Marko had initially said "Jason", Marko clarified that he had meant to say "Jamie".

[64] Furthermore, many aspects of what Marko said in his January 8 Hearsay Statement is supported by what many of the Crown witnesses testified to including that his shooter had a brother who was a member of the B-side gang (see McKenzie's testimony), he gained access to 2-143 through the back door (see McKenzie's and most of the police officers' testimony), and there being multiple other victims in 2-143 (see McKenzie's and most of the police officers' testimony).

[65] Furthermore, despite Marko having confirmed using reading glasses in his January 8 Hearsay Statement, he also indicated not needing them to see.

[66] Finally, although there were some discrepancies in the January 8 Hearsay Statement, including having identified a person named Gerry as one of the victims, which is not supported by any of the Crown's witnesses, I am not satisfied, given the January

8 Hearsay Statement was made 16 days after the shooting, the fact he had undergone multiple surgeries, that this along with the other points I have previously noted amounts to “special features” that would raise concerns about Marko’s perception, narration, or memory, thereby making this a “rare case”.

K. SHOULD THE COURT EXERCISE ITS RESIDUAL DISCRETION TO EXCLUDE THE HEARSAY EVIDENCE?

[67] As noted in *Hall*, at para 126, the overriding question as it relates to this issue is whether the evidence, namely the November 26 Hearsay Comments, is worthy of being heard by the trier of fact.

[68] Given the identity of the shooter remains a live issue, and given Marko’s passing, I find the November 26 Hearsay Comments to be highly probative evidence for the jury to consider in determining the guilt or innocence of Felix as it relates to his second degree murder charges.

[69] On its face I find that this evidence will not lead to unnecessary delay, be an unfair surprise on Felix (in that the Crown has provided ample notice), or cause undue arousal or distraction to the jury. I also find that this evidence was not the result of investigative misconduct, or a manifestly deficient narration of it (*Hall*, at paras 128 and 129).

[70] Given the November 26 Hearsay Comments are but one of potentially several other pieces of evidence that the jury will consider, I am satisfied that the prejudicial effects of not being able to cross-examine Marko can be mitigated through cross-examination of other Crown witnesses, thorough submissions of counsel, and carefully and properly crafted jury instructions cautioning jurors about the “frailties of observations made in stressful circumstances” (*Hall*, at para 134).

[71] It is for these reasons that I forego to exercise my discretion in excluding the November 26 Hearsay Comments.

[72] The November 26 Hearsay Comments are admissible at Felix’s trial under the traditional exception to the hearsay rule of *res gestae* utterance and dying declaration.