

## **COURT OF KING'S BENCH OF MANITOBA**

### **B E T W E E N:**

HIS MAJESTY THE KING	)	
	)	<u>Michael Himmelman</u>
	)	<u>Melody Hanslip</u>
- and -	)	for the Crown
	)	
	)	<u>Steven Brennan</u>
	)	<u>Jordan Smith</u>
JON PRESTON HASTINGS,	)	for the accused
	)	
accused.	)	<u>Judgment Delivered:</u>
	)	November 25, 2024

### **TOEWS J.**

#### **INTRODUCTION**

[1] The accused, Jon Preston Hastings, is charged with three counts arising out of certain events that took place at his residence in Wasagamack, Manitoba on May 9, 2022. The charges include one count of the first degree murder of Darius Harper (the deceased), an aggravated assault on Stacey Beardy and a third count of the unlawful confinement of Ms. Beardy.

[2] In his arguments on behalf of the accused, counsel agreed that the Crown had led sufficient evidence at the trial of this matter to prove beyond a reasonable doubt the

essential elements of the count of aggravated assault and the count of forceable confinement in respect of Ms. Beardy. However, in respect of the count of first degree murder of the deceased, while counsel for the accused agreed that the Crown has proven the *actus reus* of the offence in that the accused committed an unlawful act resulting in the death of the deceased, he submits the Crown has failed to prove the accused had the requisite mental intent for first or second degree murder.

[3] Accordingly, the issue that this court is required to determine is whether the Crown has proven the requisite *mens rea* in respect of first degree murder, or in the alternative, second degree murder. If the Crown has failed to prove the requisite intent for either first or second degree murder, the accused, by virtue of the admissions of counsel on behalf of the accused, is guilty of the lesser offence of manslaughter.

[4] The accused did not call any *viva voce* evidence, but also relies on the evidence provided by the Crown witnesses in advancing his case.

### **THE FACTS**

[5] The facts, for the most part, are largely uncontested. The direct substantive evidence in respect of the death of the deceased is found in the testimony of Ms. Beardy who was in a relationship with the accused. The accused, for reasons that are not clear, believed that Ms. Beardy had been unfaithful to him and that the deceased was the other party in the relationship with Ms. Beardy.

[6] On May 8, 2022, Mother's Day, Ms. Beardy testified she went to the accused's home, a very basic single room cabin or "shack" as it has been characterized in the evidence. This cabin is on the same property with a larger house where the accused's

uncle, Elvis, resides. Ms. Beardy had been driven to the accused's residence by her older brother Patrick and although she had been dropped off there when she met the accused on the driveway, she was anticipating that Patrick would return to pick her up in approximately half an hour. When Patrick failed to return, Ms. Beardy went inside the accused's residence because it was cold outside. She sat down on the only bed and covered herself with a blanket because of the cold.

[7] Inside the cabin the accused was playing music and often looked out of the two windows of the cabin. When she asked him if "he was watching out for somebody" he replied no. Ms. Beardy remained on the bed and fell asleep several times. She testified that the accused kept on looking out of the windows. She testified that she thought he might be high on something because of the way he acted. She testified that "he would ... look paranoid". During this time, he had turned off all of the lights in the cabin.

[8] While together in the cabin, he asked her what she had been doing over the course of Mother's Day. She told him that she had attended a family supper and visited her mother's gravesite. In response, the accused kept on repeating that she had been with someone else and although she denied it, she testified the accused "got himself mad" because he thought she was not telling the truth.

[9] Ms. Beardy stated that at this time the accused slapped her face with the flat edge of a filleting knife "a few times" and kept on asking who it was that she had been with. The assault by the accused with the filleting knife on Ms. Beardy progressed to the point where she said he sliced her and poked her with the knife on her arm. He then proceeded to take a small axe and hit her with it on her arms and legs. He continued the assault

with the axe even though she asked him to stop. The assault had left her bleeding from the face, her arms and her legs.

[10] At one point she was told by the accused to sit on the floor of the cabin, telling her to wrap up her arms and wrists with some tape that was in the cabin. When she told him that she was unable to do that, he took the tape from her and taped her wrists, her arms and her mouth. Later, when she wanted to tell him something, he took a knife and cut the tape covering her mouth.

[11] Even though the accused eventually removed the tape that bound her, Ms. Beardy testified that although she wanted to leave, she was unable to do so because he had also locked the door and the windows. She testified that while she was inside the cabin, she saw the accused with a large axe, the small axe already mentioned, and several small kitchen knives. She said he placed one of the axes and the kitchen knives on a garbage bag on the floor beside the bed and told her he was going to use them.

[12] At this point, Ms. Beardy and the accused were sitting on the floor beside the axe and the knives that had been laid out on the floor. He handed her a pillowcase and told her to wash the blood from her wounds. He cut up the pillowcase to use as a dressing for her injuries. He also gave her two pills from a bubble pack which he told her to take and which he placed in her mouth. He may also have taken a pill. She was unaware of what type of pills they were. She was given these pills sometime between 1:00 a.m. and 3:00 a.m. on May 9, 2022.

[13] Ms. Beardy testified that she would fall asleep from time to time, but she was aware the accused went outside, on one occasion for a cigarette, locking the door from

the outside. On another occasion the accused woke her up when he came back inside, advising her that two band constables had been by, asking if she was there. The accused stated he told them she had been picked up the night before and was no longer there.

[14] Ms. Beardy testified that the accused continued to ask her the identity of the other person that she was seeing. Although she denied there was anyone else, the accused asserted that she and the deceased, Darius Harper, were in fact seeing each other and that he was going to try to get the deceased to his place. She stated that the accused said he would go outside and connect his phone with the WIFI across the road. She stated the accused told her that he had messaged the deceased on his phone to have him come over. She stated that the accused showed her the message that he had sent to get the deceased to come over. She testified that the message she saw from the accused to the deceased stated in words to the effect that "he needed him to come help him with something quick, fast."

[15] She said that after he said he sent the message to the deceased, the accused stated they would wait for the deceased to come over. Ms. Beardy testified the accused told her the deceased "was going to get it and he was probably going to get it worser ... than what he did to me".

[16] At about 4:00 p.m., the accused told her the deceased was coming down the road and the accused went outside and shouted, calling the deceased over. Looking out of a window, she saw the accused and the deceased were already walking towards the cabin. She stated she knew what was going to happen next and so she went to go sit on the bed and covered herself with the blanket.

[17] After the two men entered, Ms. Beardy stated she heard the door closing. She stated she was looking through the blanket and at that point, the deceased said, "what's happening?" or "what's going on?" She said the deceased looked at her and "that's when he got hit with the big axe ... on the head". She said she looked away, but said she heard the accused hitting and kicking the deceased. When she looked at the deceased again, he was on the floor and one of his ears was "cut right open".

[18] At that point, the accused told the deceased to move to the wall next to the bed where he continued to kick and hit him with a knife and the axe. The beating at the wall next to the bed went on for about 20 minutes. When she looked at the deceased again, he was all bloody and lying on the floor. When she asked the accused to give the deceased something to drink, the accused threw water in his face.

[19] The accused then told Ms. Beardy he was going to let the deceased "bleed out", stating "nobody was going to touch or bother what's mine." Shortly after those comments were made the accused stated with reference to the deceased, "look, he is already gone", and then started laughing. At that point the deceased was no longer moving.

[20] When Ms. Beardy indicated she needed to use the washroom, the accused told her to use a pail in one corner of the room for that purpose. Meanwhile, the accused brought in a long roll of plastic or "poly" from the outside and unrolled it on the floor. The accused wanted her assistance to help him move the body of the deceased and put it on the poly, but she would not help him. He then rolled the body up in the poly himself and pushed it up against the wall.

[21] She testified that at this point the accused started getting “paranoid”, looking out of the window and “getting worried that the cops might come there again, looking for me.” The accused then told her he wanted her to go home to show her face there, but that she was to come straight back. She agreed, assuring him that she was going to come back. At that point, she left and while walking along the road towards the main street of the community, a truck driven by her father came by and she got in. In total, Ms. Beardy spent about 18 hours inside the accused’s residence on May 8 and 9, 2022.

[22] Mr. Cornish, the registered nurse who attended to Ms. Beardy’s injuries after she was brought to the medical centre by two support persons for treatment at approximately 9:00 p.m. on the evening of May 9th, testified she was alert and not intoxicated. Her pupils were not dilated, and she answered questions appropriately. He noted Ms. Beardy had suffered various puncture wounds, lacerations and bruises. In respect of puncture wounds on her right arm and her right elbow, he used four stitches on each wound, in respect of two separate lacerations to her right leg he used four stitches on one and five on the other, and he used five stitches in respect of a laceration to her face.

[23] For the purposes of these reasons, a few additional comments in respect of the evidence of Ms. Beardy are relevant to the charges on the indictment and specifically to the issue of intent.

[24] Ms. Beardy testified that the accused had shown her his message to the deceased on his cellphone and although it was light outside when she was shown the message in the cabin, she did not know what time it was.

[25] Also, Ms. Beardy was unable to say whether the deceased had a cellphone with him. In respect of the cellphone that was seized by the police and filed as an exhibit, Ms. Beardy advised that she was unable to recognize or identify it. Nor was any message of the kind she said she saw, on the phone. The phone is a black LG cellphone with a shattered or cracked face. It was the only cellphone seized during the police investigation.

[26] Furthermore, when asked in cross-examination by defence counsel, what she thought the accused meant when the accused said the deceased was going to do something "worse" than she had received, I allowed the question over the objection of Crown counsel even though there is clearly an element of speculation in that answer. I allowed the question based on the circumstances here as the answer could be relevant, and significant considering the entire factual matrix here. In any event, her answer was that she thought the accused meant he would "maybe hit ... be hit" with reference to the deceased.

[27] In view of the admissions in this matter, it is sufficient to only briefly note that the nature and extent of the injuries suffered by the deceased are set out in the autopsy report and provided in the testimony of the forensic pathologist. The deceased suffered both blunt force injuries and stab wounds. These injuries were inflicted upon him before death and a combination of these injuries led to his death. The forensic evidence suggests some unconsciousness before death and it was the forensic pathologist's opinion that given the nature of the injuries, it would have taken the deceased anywhere between 56 minutes and four hours to die as a result of the injuries.



[28] In respect of the injuries suffered by both the deceased and Ms. Beardy, it is my opinion that there is nothing inconsistent between the testimony of Ms. Beardy in which she set out how the accused assaulted her or the deceased and the medical evidence provided by the forensic pathologist in the course of her testimony in respect of the deceased or the observations and medical treatment provided by Mr. Cornish, the nurse in respect of the injuries suffered by Ms. Beardy.

[29] I would note that when the accused was placed under arrest by the RCMP and cautioned in the early morning hours of May 10th (1:06 a.m.), there was no indication of impairment. The testimony of the police officer making the arrest was that the accused needed no help to walk, and he appeared sober. He indicated he understood the charge and caution and advised the police of his choice of legal counsel.

[30] To the extent necessary, I will refer to any other evidence led in this case during my analysis and decision in this matter.

### **THE LAW**

[31] Considering the admissions made by the defence in this matter and the evidence itself, it is clear all essential elements of the counts of aggravated assault and forcible confinement of Ms. Beardy have been made out. In respect of the count alleging first degree murder of the deceased by the accused, the parties disagree as to whether the Crown has established the requisite intent for first or second degree murder. Defence counsel takes the position that the Crown has not proven the intent required for first or second degree murder and that only a count of manslaughter has been made out against the accused.

[32] The relevant sections of the ***Criminal Code*** read as follows:

**Classification of murder**

231(1) Murder is first degree murder or second degree murder.

**Planned and deliberate murder**

(2) Murder is first degree murder when it is planned and deliberate.

. . . . .

**Second degree murder**

(7) All murder that is not first degree murder is second degree murder.

[33] In ***R. v. Skibicki***, 2024 MBKB 113 (QL), Joyal C.J. set out the essential elements of first degree murder as follows:

**56** To convict the accused of first degree murder as charged, the Crown must establish beyond a reasonable doubt the essential elements for first degree murder. Set out below are the elements that the Crown must establish either in connection to its theory that the killings were planned and deliberate and/or its theory that the accused committed constructive first degree murder because he caused the death while committing the offence of sexual assault and/or unlawful confinement.

**57** Respecting the Crown's theory that the accused committed murder in the first degree because it was planned and deliberate, the Crown must establish the following:

1. that the accused caused the deceased's death;
2. that the accused caused the deceased's death unlawfully;
3. that the accused had the state of mind required for murder;
4. that the accused's murder of the deceased was both planned and deliberate.

**58** Unless I am satisfied beyond a reasonable doubt that the Crown has proved all these essential elements, I must find the accused not guilty of first degree murder based on the Crown's theory that the killings were planned and deliberate.

[34] In ***Skibicki***, Joyal C.J. further noted in respect of the state of mind required for murder:

**334** To prove that the accused had the intent required for murder, the Crown must prove beyond a reasonable doubt one of two things, either:

1. that the accused meant to cause the victim's death; or
2. that the accused meant to cause the victim bodily harm that he knew was likely to cause the victim's death and was reckless whether the death ensued or not.

**335** In other words, I must decide whether the Crown has proved beyond a reasonable doubt that the accused meant to kill the identified victim in each count, or that the accused meant to cause the identified victim in each count, bodily harm that he knew was so dangerous and serious, that he knew it was likely to kill the victim and proceeded despite his knowledge of that risk.

**336** If the Crown has not established beyond a reasonable doubt on any given count that the accused did have either intent for murder, then the accused has committed manslaughter in respect of that count.

**337** The Crown does not have to prove both of the above. Nor do I have to agree on the same intent with respect to all counts in the indictment so long as one or the other intents has been proved beyond a reasonable doubt when I consider each count.

**338** To determine whether the Crown has proved that the accused had one of the intents required for murder, I must consider all of the evidence, including the nature of the harm inflicted and anything said or done in the circumstances. I may take into account, as a matter of common sense, that a person usually knows what the predictable consequences of his or her actions are and means to bring them about. That said however, I am not required to draw that inference about the accused. Indeed, I must not do so if, on the whole of the evidence, including evidence of drug consumption (or any evidence of mental incapacity or disorder that in this case has fallen short of the s. 16 *Criminal Code* threshold), I have a reasonable doubt about whether the accused had one of the intents required for murder.

[35] In respect of the intent necessary to prove first degree murder, Joyal C.J., held as follows:

**379** To prove planned and deliberate first degree murder, the Crown must prove beyond a reasonable doubt not only that the accused had the intent required for murder, but also that the murder was both planned and deliberate. "Planning and deliberation" are not the same as "intention". For example, a murder committed intentionally, but on a sudden impulse or without prior consideration, is not planned and deliberate.

**380** It is the murder itself that must be both planned and deliberate, not something else that the accused did or committed, like for example, an underlying offence such as sexual assault or unlawful confinement.

**381** The words “planned” and “deliberate” do not mean the same thing.

**382** “Planned” means a calculated scheme or design that has been carefully thought out, the nature and consequences of which have been considered and weighed.

**383** The plan does not have to be complicated. It may be very simple. In addressing this question, I must consider the time it took to develop the plan, not how much or little time it took between developing it and carrying it out. I must remember that one person may prepare and plan and carry it out immediately, while another person may prepare a plan and wait a while, even quite a while, to carry it out.

**384** “Deliberate” means “considered, not impulsive”, “slow in deciding”.

[36] In this case, the accused is relying on the defence of advanced intoxication to negate the intent required for murder. The defence of advanced intoxication was addressed by the court in *R. v. King*, 2023 MBCA 37 (QL), where Pfuetzner J.A. held:

**66** In law there are three degrees of intoxication: mild, advanced and extreme. The defence of advanced intoxication must be grounded on more than conclusory evidence that an accused attended a social gathering where alcohol and drugs were consumed and they partook. Evidence of mild intoxication is insufficient to give an air of reality to the defence of advanced intoxication (see *R v Daley*, 2007 SCC 53 at para 44) ...

[37] In addition to advanced intoxication, the accused has also argued that based on the “rolled-up instruction”, the Crown has failed to prove the intent for murder beyond a reasonable doubt. This defence was considered in *Skibicki*, by Joyal C.J., who held:

**372** In this case I must decide whether the evidence of drug consumption along with all of the other evidence, leaves me with a reasonable doubt whether the accused had the intent required for murder at the time of the act. I remain mindful that the accused is not required to prove that he lacked the required intent. The Crown must prove beyond a reasonable doubt that the accused had the intent required for murder despite evidence of his drug consumption.

**373** I have considered all of the evidence, including the stated evidence of the accused’s drug consumption. I have also considered any evidence coming from the accused or elsewhere that might inform my analysis as to the effect of that

drug consumption on the accused's intent and/or his knowledge of the consequences of his actions.

**374** In addition to the accused's police statement, I have considered his messages, writings, and/or assertions to the psychiatrists wherein he discusses what he described as the voices he heard and the delusions he had. Even if I did not believe the accused as it relates to those assertions that he made to the psychiatrists, I must still examine those assertions and indeed, any and all of the other out of court messages, writings, or letters that the accused made, to determine whether they leave me with a reasonable doubt about whether the accused had the requisite state of mind for murder at the time of the four killings stipulated in each of the four counts in the indictment. Even if none of the accused's statements, messages, writings and/or assertions do not raise a reasonable doubt, I must still on a consideration of all of the evidence, satisfy myself that the Crown has proved beyond a reasonable doubt that the accused had the requisite state of mind (intent) for murder.

*The Rolled-Up Instruction*

**375** As it relates to the accused's state of mind and the requisite intent for murder, given the numerous times the accused mentioned in his police statement that he was "triggered" and given the implied suggestion that that triggering involved anger, I must keep in mind one additional instruction when I consider all of the evidence. In that regard, I would be remiss if, based on all of the evidence that I have reviewed, I did not instruct myself pursuant to what has become known as the "rolled-up instruction", which flows from a series of cases including **R. v. Nealy** (1986), 30 C.C.C. (3d) 460 (Ont. C.A.); **R. v. Settee** (1990), 55 C.C.C. (3d) 431 (Sask. C.A.); **R. v. Robinson** (1996), 105 C.C.C. (3d) 97 (S.C.C.). In connection to that instruction, even if I am satisfied beyond a reasonable doubt that when the accused caused the victims' deaths he was not in a mental state (caused by the consumption of drugs or otherwise) so as to negate the requisite state of mind, I must nonetheless consider any evidence of what might be the accused's combined anger, fear, drug high, and possible instinctive reaction. I must consider any such evidence, not just by itself, but altogether, along with any other evidence that might suggest that the accused acted instinctively, in the sudden excitement of the moment, without thinking about the consequences of what he did so as to negate the requisite state of mind and intent for murder.

**376** Any such evidence does not necessarily mean that the accused did not have either mental state necessary to make the unlawful killing of the deceased's murder. The fact that the accused may have consumed drugs, been angry, afraid, and excited is not necessarily inconsistent with the state of mind required to make an unlawful killing murder. As a matter of fact, evidence of some of these states or conditions may actually give rise to one or other states of mind required to make an unlawful killing murder.

**377** Take for example anger, even intense anger. Feeling angry at someone or about something, may cause a person to have one of the states of mind necessary

for murder. As a result, the accused's anger on its own is not enough to negate what may still be the presence of the requisite state of mind for murder. On the other hand, when considered along with the other evidence that might be present, evidence of anger may raise a reasonable doubt as to whether, when an accused unlawfully killed a victim, that accused had either intent required for murder.

**378** I have thus considered the effect of all of the evidence, the sum total of it, along with any other evidence that seems or tends to show the accused's state of mind as it relates to the issue of whether the Crown has proved beyond a reasonable doubt the state of mind or intent required for murder. Having considered all of that evidence and having considered the cumulative effect of that evidence in the context of the "rolled-up instruction", I am not left with a reasonable doubt.

### **POSITION OF THE CROWN**

[38] The Crown submits the accused is guilty of first degree murder noting that the accused has admitted that he caused the death, and that the death was unlawful. It states that the accused had the requisite state of mind for murder and that the murder was planned and deliberate.

[39] The Crown argues that there is no factual basis for the defence of advanced intoxication and it has no air of reality. While the Crown admits that there was drug paraphernalia in the form of a crack pipe seized from the residence of the accused, there is no evidence that he consumed any drugs or alcohol that resulted in his impairment. There is no evidence of any change in the motor skills of the accused and that the various actions of the accused, including getting a cigarette from his uncle's house, which is on the same property adjacent to his own residence, cooking a meal, or locking the door from the outside when he left his residence with Ms. Beardy inside, and his conversation with Ms. Beardy over the course of hours, provide any basis for this defence.

[40] The Crown stated that there is no mention of the accused drinking alcohol or taking drugs during the 18 hours Ms. Beardy was with him. The only evidence of the consumption of any pills are the pills from a bubble pack which he forced Ms. Beardy to take and which Ms. Beardy indicated may have contributed to her being tired or sleepy. There is no evidence as to the exact nature of these pills and although he may also have taken one, there is no evidence of advanced intoxication.

[41] The Crown argued that the way the accused restrained Ms. Beardy with tape and the multiple wounds he inflicted on Ms. Beardy over a period of time also demonstrated that there is no air of reality to this defence. The way he injured the deceased also demonstrates that he was not in a state of advanced intoxication. He clearly recognized that the injuries he inflicted upon the deceased were going to kill him, stating to Ms. Beardy as the deceased lay dying, he would simply allow the deceased to "bleed out". He then wrapped the body in poly that he brought into his residence from outside and subsequently proceeded to wash and dry his clothes and Ms. Beardy's clothing at his uncle's house next door.

[42] Similarly, the Crown argued that there is no air of reality to a defence based on the "rolled-up instruction". There is no evidence of advanced intoxication, but rather the evidence demonstrated that he was motivated to assault Ms. Beardy and kill the deceased based on his belief that Ms. Beardy was unfaithful to him by being involved in a relationship with the deceased.

[43] The Crown also submitted the evidence demonstrated not only that the accused meant to kill the deceased and therefore has the intent required for murder, but that the

evidence disclosed that the murder was planned and deliberate and therefore the accused is guilty of first degree murder. In this respect, the Crown relied on the evidence of Ms. Beardy which it submitted demonstrated planning and deliberation and included the accused's efforts to get the deceased to come to the cabin. Ms. Beardy testified that the accused told her that he would go up to the road to access the WIFI to send a message to the deceased on his cellphone, and that he had asked the deceased to come and help him. The accused left the cabin and after he came back inside the cabin, Ms. Beardy said the accused showed her the message he said he had sent to the deceased "to come over." She said the message he showed her on his cell phone was to the effect that: "I need you to come help me something quick, fast or something like that. She said he also stated to her that the deceased was probably going to get it "worse" than she did.

[44] It was evident to Ms. Beardy, the Crown submits, what was going to happen to the deceased since she covered herself with the blanket on the bed when the accused saw the deceased on the road through the window. At that time, he "went outside and he shouted and yelled for Darius". As a result, the deceased came "walking towards the house" and came inside where she was on the bed under the blanket. The deceased was only able to ask "what's happening or what's going on" before he was struck in the head by the accused with the big axe. That was followed by the accused kicking and hitting the deceased, until he told the deceased to move against the wall near the bed where the assault continued with the accused kicking and hitting the deceased with one of the axes and stabbing him with a knife over a period of approximately 20 minutes. After throwing a glass of water in the deceased's face when Ms. Beardy handed him the water



to give to the deceased to drink, the accused told Ms. Beardy that "he was going to let him bleed out". Shortly after stating "nobody was going to touch or bother what is mine", the accused stated "look, he is already gone then he started laughing."

[45] After he had rolled up the body in poly and pushed him against the wall, Ms. Beardy testified that in her opinion, he "started getting paranoid" and "was looking out the window and getting worried that the cops might come there again, looking for [her]". As a result of this concern, the accused told her to go "show your face at home at least and then he wants me to come back."

[46] The Crown submitted that the plan does not need to be complicated and that the evidence demonstrates not only the intention to murder, but that it was also planned and deliberate.

### **THE POSITION OF THE ACCUSED**

[47] Counsel for the accused submitted that the evidence here does raise a reasonable doubt on the basis of extreme intoxication or on the basis of the "rolled-up instruction", so that the Crown has not proven the intent or planning and deliberation for the accused to be convicted of second or first degree murder. Counsel submitted that the accused was high and that he was in some form of paranoia. He submitted that this is evidenced by the pills in the bubble pack (one of which he took and two of which were given to Ms. Beardy) and the crack pipe.

[48] Counsel submitted that in respect of Ms. Beardy's testimony about a message purportedly sent by the accused to the deceased asking him to "come help with something, quick", that there is no evidence that the message was actually sent, nor

could she identify the phone seized by the police as being the one which she claimed to having seen the message. Counsel stated that the deceased walked by the accused's cabin regularly. However, Ms. Beardy denied that the deceased came by randomly or that he arrived at the cabin by chance when defence counsel suggested that to her in cross-examination. She testified that she did not remember saying that to the nurse when she was getting medical attention.

[49] Counsel stated that what happened here was neither planned nor deliberate, but that it was a spontaneous occurrence. As Ms. Beardy testified, the accused "seen Darius walking on the road" and said "look, he said, look, Darius, there he is, there's Darius." At that point Ms. Beardy testified, "... he went quickly and opened the door and like – like went to the road ... not walk all the way to the road but he shouted for him ... [a]nd I looked outside the window and they were already walking towards the house." (See transcript, Vol. 5, p. T59, lines 7-13)

[50] Defence counsel argued that there was no intention to kill, but rather as Ms. Beardy stated, she thought that when the accused stated he would get it "worse" than she got it, the deceased was simply going to "be hit" by the accused.

### **ANALYSIS AND DECISION**

[51] Prior to setting out my conclusions in respect of the evidence in this case, I think it is important to state that despite the incredibly difficult a situation the main witness for the Crown, Ms. Beardy, found herself in when being assaulted and unlawfully confined by the accused, she nevertheless provided evidence to the court that in my opinion is truthful and reliable. Although she was soft spoken and often difficult to hear, in the

result, she provided the court with her honest recollection of the events that transpired leading up to, during and after the killing of the deceased by the accused. This includes the time before the killing of the deceased when she herself was the direct victim of the accused's violence. While the circumstances under which she was being held and the nature of the violence that she personally suffered and witnessed while being held by the accused in his cabin were undoubtedly very difficult for her mentally and physically, her recollection of what was said and done during that time was not in my opinion successfully challenged or put into question to any substantive degree.

[52] It is only natural that it would be extremely difficult to recall in detail the precise nature and order of the events that took place over the course of these 18 hours when she was being held. Nevertheless, she testified in a manner that even where her evidence was not always corroborated by other evidence, I consider the testimony safe to rely upon. That said, I note that her evidence was often corroborated in various ways, including in the form of medical evidence related to her injuries, the seizures made by the police from the accused's cabin which are set out in the photographs taken by the police and filed as exhibits, or specific examples like the damage done to her clothing when she was being assaulted by the accused. Indeed, in advancing the accused's position, counsel for the accused cited Ms. Beady's testimony and urged me to rely upon it when advancing his argument that the accused did not have the requisite intent to commit murder while assaulting and ultimately killing the deceased. As noted earlier, counsel for the accused has not challenged her evidence in respect of the offences in

which she is the victim or for that matter, the actual assault by the accused that comprises the *actus reus* in relation to the killing of the deceased.

[53] After a review of all the evidence before the court, I have concluded that beyond a reasonable doubt the accused meant to cause the deceased's death. In my opinion there is no evidence here that raises a reasonable doubt in respect of whether the accused had the requisite state of mind for murder.

[54] Specifically, there is no air of reality to the defence of advanced intoxication here. There is an absence of the necessary factual foundation to support that defence in relation to the actions of the accused.

[55] In ***R. v. Daley***, 2007 SCC 53 (QL), Bastarache J. explained the development of the defence of voluntary intoxication and concluded, at para. 40:

Thus, on the current state of the law, for a murder charge, the defence of intoxication will only be available to negate specific intent so as to reduce the charge to manslaughter.

[56] In his judgment, Bastarache J. described the three legally relevant degrees of intoxication as mild intoxication, advanced intoxication and extreme intoxication akin to automatism. He stated that advanced intoxication "... occurs where there is intoxication to the point where the accused lacks specific intent, to the extent of an impairment of the accused's foresight of the consequences of his or her act sufficient to raise a reasonable doubt about the requisite *mens rea* ... ." (at para. 41). Bastarache J. explained when the trial judge must instruct a jury on intoxication:

**44** It is apparent that where there is evidence of a mild degree of intoxication, since this has never been held to be a defence, the trial judge is not required to

give any instruction on intoxication; there would be no air of reality to the defence. The threshold for instructing juries on intoxication was set out in *Robinson* at para. 48: “(B)efore a trial judge is required by law to charge the jury on intoxication, he or she must be satisfied that the effect of the intoxication was such that its effect might have impaired the accused’s foresight of consequences sufficiently to raise a reasonable doubt” (emphasis deleted). This is the threshold for instructing juries on advanced drunkenness.

[57] Evidence of a mild degree of intoxication has never been held to be a defence, and therefore in the case of evidence of mild intoxication only, a trial judge is not required to give any instruction to a jury on intoxication since there would be no air of reality to the defence. As stated in *R. v. Ponace*, 2019 MBCA 99, the threshold for instructing juries on intoxication is set out in *R. v. Robinson*, [1996] 1 S.C.R. 683 (S.C.C.) (QL):

**48** ... (B)efore a trial judge is required by law to charge the jury on intoxication, he or she must be satisfied that the effect of the intoxication was such that its effect might have impaired the accused’s foresight of consequences sufficiently to raise a reasonable doubt. ...

[58] Even if I were to accept the position in this case that there is an air of reality to this defence (which I do not accept), in considering the evidence here as the trier of fact, I find that the evidence does not satisfy me that intoxication by alcohol or drugs, if any, was such that its effect might have impaired the accused’s foresight of consequences sufficiently to raise a reasonable doubt in respect of his intent to murder the deceased.

[59] While there is some evidence of the presence of drug paraphernalia in the accused’s cabin, there is no evidence of intoxication by drugs or alcohol. To the extent that Ms. Beardy described him as acting paranoid or otherwise strangely, I find that his actions were motivated by his belief that Ms. Beardy was involved in a relationship with the deceased and that he would not tolerate such a relationship. I find his intent to kill

the deceased was not impacted by drugs or alcohol so as to negate the intent required for a finding of murder. For example, his so-called paranoia, a word used by Ms. Beardy, is explained by her at one point in her evidence as being prompted by his fear the police would come back to his cabin looking for Ms. Beardy after he had killed the deceased.

[60] While his behaviour may have been motivated by an erroneous belief in respect of the nature of the relationship between Ms. Beardy and the deceased, it does not demonstrate that his actions or his beliefs were the result of or influenced by intoxication by drugs or alcohol. The evidence does not satisfy me that he was intoxicated by alcohol or drugs such that the effect of either or both might have impaired the accused's foresight of consequences sufficiently to raise a reasonable doubt.

[61] The facts are that sometime after laying out an axe and various knives on a garbage bag on the floor of his cabin, the accused went outside part of the way to the road to call the deceased inside when he saw him coming down the road. Almost immediately after the deceased entered the cabin and asked "what's happening or what's going on" he was struck in the head with the "big axe" without a word of explanation by the accused. The vicious assault by the accused on the deceased with the axe, a knife and his feet continued for a prolonged period and only stopped briefly at which time the accused told the deceased to place himself up against or near the wall next to the bed where the accused then continued the assault on the deceased for at least another 20 minutes. His comments to Ms. Beardy during the assault and before the deceased expired, that "he was going to let him bleed out" and that "nobody was going to touch or bother what is mine", support the Crown's position that he meant to kill the deceased,

and his actions demonstrate he followed through with that expressed intention. The only apparent surprise to the accused was not that the deceased died, but that perhaps the deceased died sooner than he expected, stating to Ms. Beardy "look, he is already gone", before he started laughing.

[62] In respect of the "rolled-up instruction", as stated in *Skibicki*, by Joyal C.J.:

**375** ... In connection to that instruction, even if I am satisfied beyond a reasonable doubt that when the accused caused the victims' deaths he was not in a mental state (caused by the consumption of drugs or otherwise) so as to negate the requisite state of mind, I must nonetheless consider any evidence of what might be the accused's combined anger, fear, drug high, and possible instinctive reaction. I must consider any such evidence, not just by itself, but altogether, along with any other evidence that might suggest that the accused acted instinctively, in the sudden excitement of the moment, without thinking about the consequences of what he did so as to negate the requisite state of mind and intent for murder.

[63] In respect of this defence, I have considered the evidence as a whole, including any evidence of the accused's combined anger, fear, drug high, and possible instinctive reaction, as well as any other evidence that might suggest that the accused acted instinctively, in the sudden excitement of the moment, without thinking about the consequences of what he did so as to negate the requisite state of mind and intent for murder. In doing so, I have come to the conclusion that the evidence, in whole or in part, does not suggest that the accused was impaired by alcohol or drugs or that together with the consumption of some alcohol or drugs that he acted instinctively, in the sudden excitement of the moment, without thinking about the consequences of what he did so as to negate the requisite state of mind and intent for murder. I find he meant to kill the deceased, and he did so.

[64] The final issue that I must address is having found that the accused acted unlawfully in killing the deceased and that he meant to kill the deceased, whether in doing so he committed first degree murder. As reproduced earlier in these reasons, in *Skibicki*, Joyal C.J. noted:

**379** To prove planned and deliberate first degree murder, the Crown must prove beyond a reasonable doubt not only that the accused had the intent required for murder, but also that the murder was both planned and deliberate. "Planning and deliberation" are not the same as "intention". For example, a murder committed intentionally, but on a sudden impulse or without prior consideration, is not planned and deliberate.

**380** It is the murder itself that must be both planned and deliberate, not something else that the accused did or committed, like for example, an underlying offence such as sexual assault or unlawful confinement.

**381** The words "planned" and "deliberate" do not mean the same thing.

**382** "Planned" means a calculated scheme or design that has been carefully thought out, the nature and consequences of which have been considered and weighed.

**383** The plan does not have to be complicated. It may be very simple. In addressing this question, I must consider the time it took to develop the plan, not how much or little time it took between developing it and carrying it out. I must remember that one person may prepare and plan and carry it out immediately, while another person may prepare a plan and wait a while, even quite a while, to carry it out.

**384** "Deliberate" means "considered, not impulsive", "slow in deciding".

[65] In concluding that the murder of the deceased was planned and deliberate, I have considered all of the evidence, including:

- what the accused did or did not do;
- how the accused did or did not do it;
- what the accused said or did not say;
- the accused's condition;



- the accused's state of mind, including any evidence of how that may have been affected by his consumption of drugs, or by his mental state;
- the effect of any real or imagined provoking words or conduct from the victim on the accused's state of mind; and
- any evidence of similar act or after-the-fact conduct from which I can properly draw permissible inferences.

[66] If I am not satisfied beyond a reasonable doubt that the murder of the deceased was planned and deliberate, I must find the accused in relation to that count, not guilty of first degree murder, but guilty of second degree murder.

[67] It is clear from the evidence that it was the accused's suspicion that Ms. Beardy was having a relationship with the deceased which motivated him to act in the manner he did. His suspicion of Ms. Beardy's involvement with the deceased does not appear to be grounded in fact. When she denied any other relationship, he thought she was not telling the truth and got angry with her, slapping her face and arms a number of times with the flat side of a filleting knife. The slapping progressed to "slicing and poking" her face and arm with the knife. He also hit her arms and legs a number of times with what she referred to as the "small axe" before eventually taping her arms, wrists and mouth to prevent her from moving or speaking for a time.

[68] Ms. Beardy testified that she did not know "how he got [the deceased's] name out of [my] mouth". She stated that she kept on telling him "nobody", and it appears the name of the deceased was only provided to the accused during the course of the assault

on her and her confinement when he insisted over and over again that she tell him who she was having a relationship with.

[69] When she provided the accused with the name of the deceased, he told her that he was going to try to get the deceased over to his place. She said he was going to try to do this by trying to hook up with the WIFI across the street and "inbox him through Facebook". She stated in her testimony that the accused messaged the deceased to come over, telling her after he had done so and showed her the message he had sent the deceased.

[70] At that point, the accused said they would "just wait" for the deceased to come over and that the deceased was "going to get it" and that he was probably going to get it "worse" than what he did to her.

[71] Although it appears that no such message was recovered from the only cellphone seized by the RCMP in the course of the investigation, I have no difficulty in accepting the testimony of Ms. Beady that she saw a message of the nature she testified to on a phone held by the accused, with a message asking the deceased "to come help him with something quick, fast". Her testimony and the way she related the events that occurred during the time in the cabin with the accused have been measured and careful. She has been even tempered and, in my opinion, careful not to exaggerate the brutal actions of the accused and has related any comments made by the accused fairly and honestly despite the abuse she suffered at his hands. I find she is not a witness who made up or embellished what occurred here.

[72] It may well be the case that the message was seen by Ms. Beardy on the phone's screen but that it was never sent over the phone by the accused to the deceased. As noted by counsel for the accused in argument, the deceased apparently used that road regularly and perhaps he was using the road at that time not for the specific purpose of attending at the accused's cabin, but simply by coincidence.

[73] In my opinion, whether the deceased was summoned by a message on his phone from the accused or whether he was simply walking by when called by the accused from the road and into the cabin, the importance of the message is not whether it was sent or not. Its importance is that the text of the message together with the conversation the accused had with Ms. Beardy when he showed it to her on a phone screen, provides insight into the intention of the accused with respect to the deceased.

[74] The importance of the words set out in the message which Ms. Beardy claims to have seen on the accused's phone, is that the accused clearly wanted to lure the deceased to the cabin, where he intended to deal with him "worse" than he treated Ms. Beardy. It is evidence of deliberation and planning on the part of the accused, even if the message was not received by the deceased. Along with the conversation between the accused and Ms. Beardy when she was shown the phone screen, the text of the message shows that the attack on the deceased commencing with the blow to his head with the large axe almost immediately upon the deceased being called into, and entering the cabin was the product of deliberation and planning well in advance of the attack itself. It demonstrates that the attack was not impulsive but a considered step. While the plan was not sophisticated by any means, it was a plan that was calculated to bring the

deceased to the cabin where the only reasonable inference on the evidence is that the accused intended to kill him.

[75] The laying out of the small axe and the knives on the floor of the cabin on top of a garbage bag; his stated intention to Ms. Beardy that he planned to use them; his comments that the deceased would probably receive it "worse" than Ms. Beardy; and the use of the large axe on the deceased's head almost as soon as he entered the cabin without any response to the deceased's inquiry of what was going on, supports the Crown's position that the killing was planned and deliberate. Not only was the deceased struck with the axe almost immediately upon entry into the cabin, but the assault also continued without any pause by use of a knife and by kicking the deceased. During the assault that killed the deceased, the accused's comment that "nobody was going to touch or bother what is mine", supports the Crown's position that the accused's suspicion of the deceased in relation to Ms. Beardy was the motivating factor in the killing of the deceased.

[76] The common sense and indeed, only reasonable inference here, based on all the evidence, is that the accused intended to kill the deceased and the preparatory steps he took, and his statements to Ms. Beardy before the deceased entered the cabin, demonstrate the deliberation and planning taken to bring about his intention to kill the deceased.

[77] The accused's statement to Ms. Beardy before the deceased died that he was going to let the deceased "bleed out" must be used very cautiously in respect of whether the accused had any intention to kill at the time of the killing itself or that the killing was

planned and deliberate. However, I would simply note that the accused was not surprised that his unprovoked, prolonged and vicious assault on the deceased resulted in the death of the accused. As noted by the comment of the accused when the deceased appeared to be dead, if there was any surprise, it was not that he died, but that he was “already gone”, in other words, sooner than expected.

[78] The Crown maintains the burden throughout the trial to prove every element of the crime of first degree murder, including the requisite intent for murder and that the murder was planned and deliberate. The burden of proof never shifts to the accused. However, in my opinion, there are no other reasonable alternative interpretations on the evidence that raise a reasonable doubt in respect of any essential element of the count of first degree murder. In this context, I refer to and I am guided by the directions of the court in ***R. v. Villaroman***, 2016 SCC 33.

[79] Based on all the evidence, I find that the murder of the deceased by the accused was planned and deliberate and that the accused is guilty of first degree murder.

\_\_\_\_\_. J.