
CANADA / JUDGMENT

R. v. A.D.,

2010 BCSC 1780

COURT

Supreme Court of British Columbia

DECIDED

9 December 2010

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2010 BCSC 1780 R. v. A.D.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. A.D.,

2010 BCSC 1780

Date: 20101209

Docket: X073697

Registry: New Westminster

Regina

v.

A.D. and B.G.

Before: The Honourable Madam Justice Stromberg-Stein

Reasons for Judgment

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Place and Date of Trial:

New Westminster, B.C.

September 13-16, 20-24, 2010

Place and Date of Judgment:

New Westminster, B.C.

December 9, 2010

INTRODUCTION

- [1] The evening of Thursday, May 28, 2009, was like a typical Friday night for a group of teens associated with Lord Tweedsmuir Secondary School, because school was cancelled Friday for a professional development day. The teens exchanged text messages early in the day and arranged to meet to drink and socialize at one of their usual hangouts, the Cloverdale Amphitheatre at 176th Street and 64th Avenue in Surrey, and across the street in the WestWinds Community Church parking lot. B.G. and A.D., who were good friends, were part of the Tweedsmuir group, along with Cody Shaer, Taylor Nichols, Nick Storness-Bliss, and Joe Andor. An older group, consisting of youths in their late teens to early 20s, including Matthew Skura and Ryan Opdendries, happened to meet at the Amphitheatre as well. A chance encounter between members of the two groups led to a confrontation, when Joe Andor overheard Matthew Skura yelling at his girlfriend, Shavaun Pellatt, and commented that was no way to treat a girl. Matthew Skura and Ryan Opdendries were both intoxicated and took offence at Joe Andor's comments. Words were exchanged and Ryan Opdendries pushed Joe Andor. Joe Andor crossed the street to the church to join the Tweedsmuir group, yelling the older group had "beef". A few minutes later the older group, in response to a telephone call from one of their friends to come to the church, crossed the street. There was a confrontation in the church parking lot between a number of teens, including Joe Andor, with Ryan Opdendries.
- [2] There is no question that B.G. punched Ryan Opdendries one time, rendering him unconscious and knocking him to the ground, and then punched Matthew Skura one time, knocking him to the ground where someone stomped on his head. The Crown alleges it was A.D. who stomped on Matthew Skura's head. Matthew Skura died from his injuries. The forensic pathologist was unable to say which blow caused his death.
- [3] B.G. and A.D. are charged with manslaughter in the death of Matthew Skura. B.G. is also charged with assault causing bodily harm of Ryan Opdendries.

Issues

- [4] The issue with respect to A.D. is whether the Crown has proved beyond a reasonable doubt that he stomped on Matthew Skura's head. If he did, the issue is whether he is a party to the assault by B.G. on Matthew Skura. If he is not a party, the issue is whether the Crown has proved beyond a reasonable doubt the stomp caused, or is a significant contributing factor, in the death of Matthew Skura.
- [5] The first issue with respect to B.G. is whether the Crown has proved beyond a reasonable doubt that the punches to Ryan Opendries and Matthew Skura were assaults and not consensual fights. If they were assaults, the next issue is whether he is a party to the actions of the person who stomped Matthew Skura's head; or whether the punch caused, or is a significant contributing factor to, the death of Matthew Skura. The final issue is whether the Crown has proved beyond a reasonable doubt that B.G. was not acting in self defence.

Fundamental Principles

- [6] There are fundamental principles that govern every criminal trial and guide any decision.
- [7] The first fundamental principle is the presumption of innocence. That means that both B.G. and A.D. are presumed to be innocent, unless and until the Crown proves their guilt beyond a reasonable doubt. The presumption of innocence lasts throughout the trial and only ceases to apply if, at the end of the case and on the whole of the evidence, the Crown has proved beyond a reasonable doubt that the accused person is guilty of the crimes charged. B.G. and A.D. do not have to present evidence or prove anything in this case. In particular, they do not have to prove that they are innocent of the crimes charged. From start to finish, it is the Crown which must prove the guilt of B.G. and A.D. beyond a reasonable doubt.
- [8] The second fundamental principle is the requirement for proof beyond a reasonable doubt, which is an essential part of the presumption of innocence. A reasonable doubt is a doubt based on reason and common sense that arises at the end of a case based on the evidence or lack of evidence. It is not enough to believe that B.G. and A.D. are probably or likely guilty. That is not proof beyond a reasonable doubt. After assessing all of the evidence, I must be sure that B.G. and A.D. committed the offences charged. Otherwise, I must find them not guilty.
- [9] In making my decision, I have considered carefully all the evidence presented during the trial, to determine how much or little of the testimony of any witness I will believe or rely on. I may believe some, none or all of the evidence given by a witness. Some factors I have kept in mind include whether the witness seemed honest; whether there was any reason why the witness would not be telling the truth; whether the witness appeared to have an interest in the outcome of the case, or any reason to give evidence more favourable to one side than to the other. Other factors I have considered include the ability and opportunity of the witness to make accurate and complete observations about the events; the circumstances in which the observation was made; the sobriety of the witness; the ability of

the witness to remember events, and whether the witness was relating personal observations or reconstructing evidence based on what others might have said. Of importance is the reasonableness and consistency of the witness' account, having regard to what the witness may have said on an earlier occasion and to what other witnesses have said about the same events. Any explanation for any inconsistencies assists in considering whether the inconsistency is the result of a deliberate lie or an honest mistake. Some inconsistencies are not as important as others.

- [10] Reasonable doubt applies to the credibility of witnesses. The credibility and reliability of the witnesses are key factors in determining the issues at trial and must be tested in light of all of the evidence, since there are numerous inconsistencies, internally and externally, in relation to the evidence of other witnesses. Some inconsistencies are minor; others are significant. The number of inconsistencies raises concerns about the reliability of some of the witnesses' evidence. Care and caution must be exercised in assessing the evidence of the key witnesses, who are young persons, not skilled in giving evidence, and who clearly have differing abilities, values and life experiences. These witnesses have provided varying accounts of two traumatic events which occurred unexpectedly in 8 to 15 seconds, in a dark, shadowed parking lot and crowded chaos.

Assessment of Evidence

- [11] I will refer to some of the inconsistencies in the evidence of some of the key witnesses. My review is by no means intended to be exhaustive. Suffice it to say, I have carefully considered all the inconsistencies in the evidence.

Cody Shaer

- [12] I have considered and concluded that a Vetrovic warning is unnecessary for Cody Shaer as he is neither an accomplice nor an unsavory witness. Cody Shaer was 17 years old at the time of the incident. Although he had consumed no intoxicants, his memory has been affected not only by the passage of time but because the events were, as he variously described, scary, traumatic, upsetting, and stressful. He talked to people after the incident, and read a couple of newspaper articles but said he was not influenced by them. However, he talked about "mixed loyalties" and not wanting to go along with any "cooked up plans," in connection with an alleged conspiracy to blame Curtis Huseon for the stomping of Matthew Skura. This still bothers him and still emotionally affects him. He placed a message on Matthew Skura's Facebook page saying, "I intend to do everything I can to aid the RCMP in their investigation."
- [13] There are a number of discrepancies in Mr. Shaer's evidence, some less significant than others. Significantly, his evidence relating to where he was standing when he made his observations is confusing and inconsistent. At trial he said he was two to three feet from Ryan and B.G. when they got into their confrontation. In his police statement he said B.G. was at the front and he was at the back. Mr. Shaer explained this referred to the point where

B.G. re-entered the group and not when B.G. was talking to Ryan. However, in his police statement he said he did not see a lot of the confrontation with Ryan because he was three metres back on the curb. At the preliminary hearing he said he did not see B.G. enter the group and only saw him when B.G. punched Ryan. He said he wasn't really paying attention before the punch was thrown. He did not provide the names of the "group of 5" who went forward to meet Joe Andor until the Crown interview prior to the preliminary hearing. In his police statement he said B.G. was not a part of the group that went to meet Joe Andor but stayed back to talk to Curtis. He explained this referred to B.G. returning to the main group. At the preliminary hearing he testified he did not see Curtis following the original argument with B.G. until after it was all over. In his police statement he said "they were cheering and jumping around like idiots." In evidence at the preliminary hearing and at trial he described "high-fiving" and "chest-bumping" and said they all did it at least once, but it's possible some did not. Cody Shaer's evidence is inconsistent whether Matthew Skura's bag contained ice or glass or coolers. At trial he was adamant it was ice, contrary to his police statement where he said it was ice or glass or whatever. No other witness saw ice. Generally, Cody Shaer is a very certain witness whose memory seems to be getting better over time, despite his recollection being at odds with the recollections of other witnesses.

Cody Allan

- [14] Cody Allan drank four Palm Bay coolers, but felt he wasn't influenced by the alcohol very much and was still able to focus. He was very shaken up and was going through a lot of stress when Matthew and Ryan were knocked down. It was upsetting and it still is, and he has tried to put it out of his mind. Mr. Allan talked to a number of people before he gave his police statements. It wasn't until he was at the hospital the next day that he started to remember Matthew was stomped while he was on the ground. His evidence at trial that he saw someone punch Matthew conflicts with his police statements that he didn't see who hit Matthew, he just saw Matthew fall. There are no specifics in Mr. Allan's first police statement recounting the events when Matthew Skura got hit.
- [15] Mr. Allan said, "I believe" and "I guess," many times in his statements. He testified he is basically trying to remember everything as best he can. He "reconstructed" his memory using his statements but agreed his statements are not safe to rely on. Reading over the statements has allowed him to retrace everything in his head, from start to finish, picturing it once more. He is fairly confident he reconstructed things properly. He now remembers seeing the punch to Matthew despite what it says in the statements. Certain events are getting clearer as time goes on. There are a lot of things in the statement that Mr. Allan knows don't add up. One major inconsistency in his evidence is that it was not B.G. who punched Matthew Skura. The first time that he mentioned the cheering of the small group was at trial, or possibly in the Crown interview several days before testifying. He did not mention this in his police statements because he did not think it was relevant. Mr. Allan could not identify anyone in a photo pack line up. He was in McDonald's with the black kid, who he said was the stomper, for about five minutes, in a well lit place, but wasn't paying

much attention to him at the McDonald's. He remembers him from the bright red shirt he was wearing.

Justin Marshall

- [16] Justin Marshall smoked a joint but said he was not impaired. The whole scene was chaotic and traumatic; people were rushing to help Ryan after he got knocked down. Mr. Marshall's evidence originally included statements he had given to the police, despite having no personal knowledge, although he openly admitted this on the stand. Justin Marshall said B.G. was not in the group that went to meet Joe Andor. He could not identify the black male from the photo pack line up. He could not say the person doing the stomping was wearing a red shirt or jersey. He does not remember any of the colours or clothes from that night. At the preliminary hearing he testified that if the person who performed the stomp had been wearing a red shirt, it would have stood out in his mind. He testified at trial the stomper was not wearing a red jersey. He agreed it is possible there could have been more than one kick and that Matthew's head landed close to where Curtis was standing. His line of sight to the kick was somewhat obstructed by what was happening.

Curtis Huseon

- [17] Curtis Huseon was 15 years old and intoxicated, having consumed one half to two thirds of a 26 ounce bottle of whiskey. He suffers memory lapses and blackouts from drinking so much alcohol. He had little recollection of anything. He admits people tell him he has done things he has no memory of doing. He was upset about rumours he had kicked Matthew but he did nothing about it. He denied re-enacting a kick and bragging about kicking someone in the head; he could not say why he would have done that. He denied stepping on or kicking anyone. He remembered an argument with B.G. but not what it was about. He remembered a big commotion in the middle of the parking lot and was not sure if he was pushed or just fell to the ground. He did not see anyone get punched or stomped. He could not recall seeing A.D. at the church that night. He was checked by police at the school yard after the incident and provided a false name to avoid getting into trouble.

Bradley Sanders

- [18] Mr. Sanders was unable to say who said what when he observed three males on the street outside his house talking about a kick. He could not say whether any of the three were taking responsibility for the kick or just re-enacting what they saw earlier at the church. He could not recognize any of the males. He knew B.G. and he was acquainted with A.D. but it was too dark to say if they were there.

Shavaun Pellatt

- [19] Shavaun Pellatt was intoxicated. She did not recall Matthew calling her names and said he would not do that. She did not recall that Ryan pushed Joe Andor. Heated words were exchanged and she ended the argument by apologizing for Ryan's behavior.

Marilyn Mortensen

- [20] Marilyn Mortensen was a drunk 16-year-old who had consumed 12 ounces of vodka. The upsetting events happened some time ago. Her recollection of what she did before the incident is somewhat inconsistent with her police statement. Her evidence is somewhat inconsistent in describing the stomp by A.D. to Matthew's head. She could not recall what A.D. was wearing as nothing stood out from the crowd. She could not say if there were other black males present. Her evidence is inconsistent about whether A.D. was at the school yard after the incident.

Ryan Opdendries

- [21] Ryan Opdendries, now 22 years old, was drunk on the night in question, and has little recollection of the incident in which he suffered a concussion. He denied his typical behavior is to get into fights, to get cocky and to mouth off when he gets drunk, so that Matthew has to clean up his mess. He had no idea why he would have shoved a 15-year-old and yelled and swore. The fact he is charged with public mischief for making a false claim to police impacts his credibility.

The Events of May 28, 2009

- [22] Despite the concerns with respect to the credibility and reliability of the witnesses and their recollections, there is sufficient commonality in their evidence to provide a snapshot of what occurred between the two groups on the fateful night.
- [23] B.G. and his friend Curtis Huseon got into a verbal argument that Nick Storness-Bliss seemed to egg on, encouraging it to escalate; and encouraging the two to go at it, to fight, and not hold anything back. B.G. was very agitated, upset, tense, frustrated, and his fists were clenched. At one point Cody Shaer feared there would be a confrontation between them. The argument went on for 10 to 15 minutes before Brooklyn Letourneau stepped in and got mad at B.G. Even after the argument died down B.G. was still upset and his body language had not changed. He was not as friendly or outgoing towards his friends as he normally was, and he was very short with people.
- [24] There was an initial altercation at the Amphitheatre grounds between Joe Andor, Matthew Skura and Ryan Opdendries where Mr. Opdendries pushed Mr. Andor. Mr. Andor crossed the street to join his friends at the church, yelling 'these guys have beef.' A group of hostile teens joined Mr. Andor, keen to fight the older group. Mr. Shaer identified the group of teens as being led by B.G. and Nicholas Storness-Bliss, followed by himself, A.D. and Taylor

Nichols. The teens and the older group exchanged words of anger. However, upon arrival at the church parking lot, most of the older group dispersed as it became apparent that members knew others in the opposing group. It appeared as if tensions might ease.

- [25] At the church, Matthew Skura appeared to be in a friendly mood. Mr. Shaer described exchanging jokes about their worry that there was going to be a fight between the two groups and that it was a bit of a relief for both of them. Matthew was fairly happy, laid back, relaxed and friendly. Matthew was intoxicated, slurring his words a bit, and his balance was somewhat affected.
- [26] When the tension level de-escalated, B.G. left the parking lot and was not part of the continuing verbal confrontation between Joe Andor and Ryan Opdendries. Mr. Andor and some members of his group surrounded Ryan Opdendries. Ryan Opdendries tried to laugh things off and offered to shake hands but was rebuffed. Someone in the teen group told him, "We're not giving you props" and someone pushed his hand away. Mr. Marshall believed it was either Curtis Huseon or the black male. In the course of this argument, an already aggravated B.G. returned to the fray, demanding, "Where's the beef? Where's the beef?" He engaged Ryan in a verbal confrontation and threw a very wide hook type of a punch, which hit Ryan in the head, rendering him unconscious on his feet. Matthew Skura verbally reacted to what had just happened to Ryan. Either Mr. Skura grabbed B.G. by the shoulders and pulled him back, there was a struggle, a pushing match, and the bag went flying; or the teen group turned on Mr. Skura and he swung his bag to keep them away. In any event, there was a brief standoff and it appeared as if it was all over.
- [27] B.G. then took a couple of steps to Mr. Skura's right and struck him with a wide hook type punch to the head, sending him to the ground. Once he hit the ground, it appeared he started to raise his head and his neck up off the cement. A black male from the teen group stepped from the curb, forcefully stomped Mr. Skura's head into the cement, and kept walking. B.G. approached Cody Allan wanting to fight, but Mr. Allan told him to get lost so he could go and help his fallen friends. There was cheering when Ryan Opdendries was knocked out. Following the stomp, there was more cheering and celebrating by the same group, which included B.G. and A.D.

Identification of A.D.

- [28] The first issue is whether the Crown has proved beyond a reasonable doubt that A.D. was the black male who stomped on Matthew Skura's head while he was lying on the ground. The case against A.D. depends entirely on whether I am satisfied beyond a reasonable doubt that the eyewitnesses correctly identified A.D. as the person who stomped on Matthew Skura. The frailties of identification evidence when relying on eyewitness testimony are well known and readily apparent in this case, where there are as many different versions of the events that unfolded as there are eyewitnesses who were called to testify. Mistakes can be made by eyewitnesses. An eyewitness can be a very convincing witness and honestly believe that the accused person is the one who committed the offence. However, there is little

connection between the confidence of the witness and the accuracy of the identification. A number of witnesses can be honestly mistaken about identification. Caution must be exercised in considering eyewitness evidence because human experience proves that observation and memory are often unreliable when it comes to the identification of people.

- [29] Several factors relate specifically to the identification evidence relating to A.D.
- [30] The witnesses made their observations in less than ideal circumstances. The lighting was poor, consisting of pot lights at the front of the church under the overhang. The nearest street light was 80 to 100 feet from the church and parking lot where the incidents occurred. The parking lot was cast in dark shadows. The entire incident happened suddenly and unexpectedly and was over very quickly. It was less than one minute, and as little as 8 to 10 seconds, from the punch to Ryan Opendries to the stomp to Matthew Skura's head.
- [31] The witnesses' vantage points and attention varied, and evidence of their vantage points has been inconsistent. Some were quite close and claimed to have had an unobstructed view; some were inconsistent on whether they were close and whether their view was clear and unobstructed.
- [32] There were 20 to 25 young persons milling about, socializing, drinking and partying, and numerous distractions associated with that scene, which quickly changed to panic, chaos and hysteria as the traumatic events unfolded. Afterward, there was much talk and many rumours amongst those present and others who had not been present. The versions provided by the key witnesses, in police statements, at the preliminary hearing if they testified, and at trial, have varied and are internally and externally inconsistent.
- [33] Sixteen-year-old Marilyn Mortensen was intoxicated. She agreed her testimony was unreliable as she was drunk. She did not want to testify at trial. Ms. Mortensen testified that when Matthew Skura fell to the cement and landed on his back, unconscious and snoring, A.D. came from the grassy area at the front of the church, stepped off the curb into the parking lot walking fast, and stomped his foot one time on Matthew Skura's head. In her statement, one time Ms. Mortensen described a stomp on Matthew Skura's head; the second reference was that it was not really a stomp; another reference was to a glancing blow to Matthew Skura's face. She denied that a better term was that A.D. stepped on Matthew Skura's face. She could not recall what A.D. was wearing; nothing stood out from the crowd. Ms. Mortensen thought A.D. was at the school yard after the incident. However, she did not mention this in her police statement and agreed that if he had been there she would have mentioned it in her statement. B.G. and Curtis Huseon were checked by the police at the school, but there is no evidence A.D. was checked by the police.
- [34] Cody Shaer was the only witness who had consumed no intoxicants. However, there are numerous discrepancies between his evidence at trial, his evidence at the preliminary hearing, and his police statements. The most significant discrepancy involves his position in relation to the incidents and thus his ability to observe the events. Mr. Shaer said A.D. was wearing a red shirt with a dark pattern. He testified A.D. stepped off the curb of the grassy

island, into the parking lot, and stomped on Matthew Skura's head. He described a backward stomp or donkey kick to Mr. Skura's head; the other witnesses described variously a downward stomp or a glancing blow. Mr. Shaer said the kick, within a second or so of Matthew Skura's head hitting the ground, was not anything close to a soccer kick; it was a more spontaneous or impulsive act as A.D. stepped over Matthew Skura and stepped backward.

- [35] Mr. Shaer did not mention the kick to the first officer on scene, Constable Maharaj, but he did mention it in his first police statement the next day. Constable Maharaj did not take a formal statement from any of the witnesses. He was the single police officer dispatched to the call. The officer was intent on scene control and not on interviewing witnesses.
- [36] Cody Shaer and Marilyn Mortensen are recognition witnesses, who knew A.D.
- [37] Cody Allen and Justin Marshall did not know A.D. but testified a tall black male stomped on Matthew Skura. The witnesses agreed it is possible there were other black males at the church. There is no evidence there were other black males present amongst the group of friends who had assembled at the church.
- [38] Like Cody Shaer, Cody Allan did not tell Constable Maharaj, or anyone else, that Matthew Skura was kicked until his statement the next day. He did not think the kick was relevant. He testified that a lot of things in his statement were unreliable and it was not safe to rely on his police statement, as he was reconstructing what must have happened. Mr. Allan had four vodka coolers but denied being too intoxicated to give a statement, as testified to by Constable Maharaj.
- [39] Mr. Allan saw a kid emerge from the crowd and stomp in a straight downward motion on the left side of Matthew Skura's head, one time only, with a fair amount of force. Mr. Allan did not believe the kid who emerged from the crowd was part of the group that surrounded Matthew and Ryan. He had seen the stomper in McDonald's earlier that same night: it was the same African American kid with the red shirt. There was only one person with a shirt like that at the church that night. He saw him at McDonald's for about five minutes, in a well-lit place, but Mr. Allan did not pay much attention to him. Mr. Allan remembered him from the bright red shirt he was wearing and remembered he received a phone call about a fight at the church and ran out. Mr. Allan could not identify anyone in a photo pack line up and did not attempt to identify anyone in court. The black male at McDonald's was not identified as being A.D.
- [40] Justin Marshall had smoked a joint but denied being impaired. He was not part of either group but had tagged along with Joe Andor. At first Justin Marshall testified he had a clear view of a tall skinny black kid with curly hair coming from under the overhang and half kicking, half stomping on Matthew's face with force immediately after Matthew Skura hit the ground, before continuing on walking. The stomp was hard, with an outward movement, and not right down. Later in evidence, Mr. Marshall agreed he was not able to see the kick or stomp very clearly, because when Matthew Skura fell his vision was

somewhat obstructed; there was not a lot of light, it was fairly dark and shadowy; and it was upsetting.

- [41] Mr. Marshall had seen the same black guy in the crowd a couple of times earlier in the evening. Mr. Marshall believed he was involved in the initial confrontation with Joe Andor and Curtis Huseon in the parking lot, but he was not 100% sure. He did not see any other black persons at the church but it was possible there were others. The black male was a little taller than his own height of 5'10-11"; in fact, A.D. was 6'2". Various in his statements he referred to the "colored" guy, the "dark-skinned" guy; the "black" guy; and said he was between black and brown, but not dark black, not like a person from Africa. It was the police interviewer who suggested the male was black. Part of the issue was that Mr. Marshall did not know the politically correct description for a black person.
- [42] Mr. Marshall did not recall the color of the black male's shirt. He could not say if he was wearing a red jersey. At the preliminary hearing he testified the black person was wearing a basketball jersey but he was unable to say what color; however, he agreed if it was red that would stand out; and the person kicking or stomping was not wearing a red jersey. He did not remember colours of clothes from that night. However, eventually he agreed the stomper was not wearing a red jersey. He could not identify anyone in a photo pack line up and did not attempt to identify anyone in court.
- [43] Mr. Marshall saw B.G. and the black male by the back of the church shortly after he left the church with Joe Andor. There were five to seven in the group and it was possible Curtis Huseon was one of them. He heard yelling and thought it was B.G. saying how he'd "fucked up", he was "going to jail", and he "thought he'd killed him"; but in cross-examination Mr. Marshall said he assumed it was B.G. yelling but he had never had a conversation with B.G.
- [44] Bradley Sanders, described an incident involving three males to the 911 operator as it was unfolding outside his house. He said one male was wearing a red t-shirt, was taller than the others, was either Indo-Canadian or African American and was about 145-150 pounds. This male said nothing of interest or nothing at all. A male wearing a Kobe Bryant basketball shirt with the number 8, which Curtis Huseon agrees was him, was describing, demonstrating and bragging about how he had soccer kicked a kid in the face. Mr. Sanders was unable to say who said what and could not say whether any of the three were taking responsibility for the kick or just re-enacting what they saw earlier at the church. He knew B.G. and he was acquainted with A.D. but it was too dark to recognize anyone.
- [45] Curtis Huseon could not recall seeing A.D. at the church that night. Mr. Huseon had no recollection of doing what Mr. Sanders attributed to him and denied even knowing anyone had been kicked. He was pretty drunk, having consumed one half to two thirds of a 26 ounce bottle of whiskey. This quantity of alcohol causes him to have blackouts and memory lapses. He recalled a big commotion and he was pushed or knocked to the ground. His glasses flew off. He was a little upset when he got up. Two kids were lying on the ground but he did not see them punched or kicked. When asked why he would brag about kicking a guy in the

head if he was not responsible for the kick, he maintained he knows what he did that night; he would clearly know if he had kicked or soccer kicked a guy in the head; and he denied he was responsible for kicking Matthew Skura. Mr. Huseon was checked by the police at the school yard and gave a false name to avoid trouble with his parents.

- [46] The reliability of the evidence of all the identification witnesses, and particularly the two witnesses who knew A.D., Cody Shaer and Marilyn Mortensen, is a key factor for consideration on the issue of the identification of the person who stomped Matthew Skura. Both identify A.D., a tall skinny black male, as the person who stomped Matthew Skura. Cody Allan provided a description of a tall, lanky black male. Justin Marshall described a black male just under six feet.
- [47] Cody Shaer testified A.D. was wearing a red shirt which had a dark pattern. Cody Allan said the black male was wearing a bright red shirt. Cody Allan claimed he saw the same male in the same red shirt for five minutes earlier in the evening but he could not identify him. He said there was only one person with a red shirt like that on the night in question. Marilyn Mortensen and Justin Marshall could not describe the clothing worn by the black male or anyone else that night. Marilyn Mortensen said nothing stood out from the crowd; Justin Marshall suggested a red shirt would have stood out and the kicker was not wearing a red shirt. None of the witnesses saw any other black males present but acknowledged it was possible. The witnesses did not see Curtis Huseon, or anyone matching his description (a short overweight white kid with glasses), kick or stomp Matthew Skura. Justin Marshall agreed maybe there was more than one kick, and Marilyn Mortensen said Curtis Huseon was in the area of Matthew's head. Cody Allan and Justin Marshall failed to identify anyone in a photo pack line up. Cody Allan and Cody Shaer failed to report seeing a kick until they provided police statements the next day.
- [48] Although there are many weaknesses in the Crown evidence as it relates to the issue of the identification of the person who stomped Matthew Skura, there are significant similarities in the evidence. All four identification witnesses describe, within seconds of Matthew Skura landing on his back on the ground, a tall, thin black male stepping off the curb and stomping one time on Matthew Skura's head. Cody Shaer and Marilyn Mortensen recognized A.D. as this black male. Both knew A.D. for about four years, since Grade 8. At one point, they attended the same school. They socialized with him outside school. Cody Shaer communicated with him on Facebook. Marilyn Mortensen had been at the same party as A.D. this particular night. Had other black males been present they would have been part of one of the groups of friends.
- [49] Despite the inconsistencies in the evidence, I am satisfied beyond a reasonable doubt that A.D. was the black male who stomped on Matthew Skura's head.

Parties

Are B.G. and A.D. parties to the assault on Matthew Skura?

- [50] The party provisions are set out in s. 21 of the Criminal Code of Canada, R.S. 1985, c. C-46. There is more than one way for the Crown to prove B.G.'s and A.D.'s guilt. A person commits an offence if he, alone or along with somebody else or others, personally does everything necessary to constitute the offence. A person also commits an offence if he does anything for the purpose of helping another person to commit the offence. Anyone who actively encourages somebody else to commit an offence is as guilty of the offence as the person who actually commits it. A person may also commit an offence by being involved with another in a joint criminal enterprise. If any one of the group commits an offence in carrying out their original enterprise, any other member of the group who knew or should have known that the offence would likely be committed by a group member carrying out their original design, is guilty of the offence the other person actually commits.
- [51] The defence agrees the relevant law on parties is set out correctly in the Crown submissions. I do not intend to review that law but would adopt the Crown submissions as the correct statement of the law.
- [52] It is the position of the defence that A.D. had little or no role in the altercation between B.G. and Mr. Opendries, and A.D. had no involvement in the confrontation with Mr. Skura until after B.G. landed his one punch and began to walk away. The defence submits the two blows to Mr. Skura are close in time but are consecutive events. The defence argues if B.G. had been inclined to jointly assault Mr. Skura, he could easily have continued to punch or even kick Mr. Skura while he was on the ground but he did nothing of the kind. The defence argues there is little or no evidence that B.G. and A.D. were co-perpetrators in a joint assault and certainly not beyond reasonable doubt. As there is little or no evidence to suggest that B.G. expected A.D. to step in, the defence submits it is impossible for the Crown to successfully argue B.G. intended his one punch of Mr. Skura to aid or abet A.D.
- [53] It is the position of the Crown that B.G., together with A.D. and others, participated in a chain of events that were all interconnected and seamless from the time the altercation began until they left the scene.
- [54] B.G. and A.D. had been good friends for a number of years. They were part of the Tweedsmuir group of teens who would hang out together. Other persons who socialized with them were Taylor Nichols and Nick Storness-Bliss and, less frequently, Joe Andor. This particular evening, the Tweedsmuir group arranged to meet at the Amphitheatre. Many had consumed alcohol, but there is no evidence B.G. and A.D. were drinking or were intoxicated. The Tweedsmuir group migrated across 176th Street to the parking lot of the WestWinds Community Church where Curtis Huseon was waiting. B.G. became embroiled in a heated argument with him, becoming more and more agitated to the point where it looked like a fight would break out. A.D. was not part of this argument but was part of the Tweedsmuir group at the church.

- [55] Cody Shaer described how he, along with four others, including B.G. and A.D., went forward to meet Joe Andor who was yelling the older group had "beef." B.G. and/or Nicholas Storness-Bliss said, "Okay, let's go" and led the way, followed by Mr. Shaer, A.D. and Mr. Nichols. Joe Andor told them the group across the street was looking to fight. The group intention was to fight if necessary, as evidenced by the reaction from all five: "Okay, let's go fight." Mr. Shaer backed out but B.G. and A.D. did not. There was yelling and words of anger exchanged between the older group and the group of teenage males who had come out to meet Joe Andor. The teen group approached the older group in a hostile manner and it appeared a fight might occur. This tense atmosphere was defused when members of the groups seemed to recognize each other. As things seemed to cool down a bit and tensions dissolved somewhat, B.G. joined others by the church.
- [56] However, a verbal confrontation continued between Ryan Opdendries and Joe Andor. Ryan was surrounded by a group of teens. The evidence is inconsistent as to who formed part of this group of teens and whether it included Curtis Huseon and/or A.D. Ryan Opdendries was laughing at one point and Joe Andor and his group told him, in the words of Justin Marshall, "This isn't funny. Like this is -- this is serious. Like, what do you find funny about this?" They talked a little bit more but when Ryan went to shake Joe Andor's hand he said, "Like I'm not going to shake your hand. Like why would I shake your hand?" One of Joe Andor's friends pushed Ryan's hand away. Tensions were again simmering down when an aggravated B.G. came from the church, barging into the fray and yelling in an aggressive manner, "Where's the beef? Where's the beef?"
- [57] B.G. briefly engaged Ryan Opdendries in a verbal argument and then threw a wide hook type punch which hit Ryan in the head and knocked him unconscious to the ground. Ryan Opdendries did not move. There was a very large verbal reaction, both negative and positive, from the two groups. Matthew Skura yelled at the group of teens words to the effect, "What the hell. What are you doing?" There is inconsistent evidence about what happened next. Either the group of teens came towards him, or he grabbed B.G. by the shoulders and pulled him away from Ryan. In any event, there was a brief struggle or pushing match between Matthew Skura and B.G., at which point Matthew Skura's bag of drinks was swung or flung or went flying. There was a brief standoff between Matthew Skura and B.G., and then it seemed as if things were over. B.G. took a couple of steps to Mr. Skura's right and struck him in the head with a wide hook type punch. Mr. Skura stumbled back a couple of feet and fell backwards onto the cement. Once he hit the ground, he slightly raised his head, neck, and possibly his shoulders. These movements, though visible, could have been involuntary. Almost immediately, A.D. stepped off the curb from the grassy area, stomped on Matthew Skura's head, and continued walking. B.G. next tried to engage Cody Allan, intent on continuing the fight, but was rebuffed. B.G. and A.D. were part of the group of teens that started "cheering and jumping around like idiots," "high-fiving" and "chest-bumping." B.G. and A.D. were part of the group Justin Marshall saw at the back of the church following the incident.

- [58] The entire sequence of events happened in 8 to 15 seconds. The time between the punch and the stomp to Matthew Skura was seconds.
- [59] These events occurred within a hostile environment in which Joe Andor and his supporting friends had already indicated their willingness to become involved in a fight. When Ryan Opdendries offered to shake hands, he was rebuffed. In that charged environment B.G. barged in demanding to know, "Where's the beef?" He punched Ryan Opdendries, rendering him instantly unconscious. There is evidence of cheering. When Matthew Skura came to the aid of Ryan Opdendries yelling "what are you doing," B.G. struck him in the head with a hook punch similar to the blow rendered to Ryan Opdendries. It is a reasonable inference B.G. would know that if Matthew Skura was not knocked out by his blow, but attempted to get back up, another member of his group would likely further assault Mr. Skura.
- [60] As held by Blair J.A. in *R. v. Mariani*, 2007 ONCA 329, at para. 56, "one way in which ... intent could be established - as the trial judge said - was by the pusher 'knocking the victim to the ground while knowing that he [was] likely to then be assaulted.'" B.G. did not have to know who in particular would commit the assault and he did not have to know Matthew Skura would be stomped. He simply had to have subjective foresight that Matthew Skura was likely to be assaulted in some fashion.
- [61] Pursuant to s. 21 of the Criminal Code, the culpability of each accused may be founded on his actions alone or as a party to the actions of others. I agree with the Crown that B.G., together with A.D. and others, participated in a chain of interconnected, seamless and related events from the time the altercation began until they left the scene.
- [62] B.G. and A.D. participated in assaults which caused the death of Matthew Skura. Each rendered one blow and the medical evidence cannot establish which blow caused the death. However, this does not matter. It is unnecessary to decide who struck the fatal blow. It is not necessary that the acts be simultaneous or the blows be identical. They participated together in the assault which caused the death and, in so doing, assisted each other. The assaults formed one continuous sequence of events, one single ongoing transaction. They were jointly involved; they acted in concert. Both assisted the other and are parties, either as principals or as aiders and abettors.
- [63] The circumstances of this case are very different from those in *R. v. Maybin*, 2008 BCSC 1277; 2010 BCCA 527, where the trial judge found there was no evidence the Maybin brothers and the bouncer acted in concert or assisted or encouraged the other's actions.

Unlawful Act Manslaughter

- [64] Manslaughter is causing the death of another person, unintentionally, by committing an unlawful act which is objectively dangerous in that a reasonable person, in all the circumstances, would have known or foreseen that the commission of the unlawful act would give rise to the risk of bodily harm that was not trivial or transitory. Foreseeability of the risk of death is not required. The mental state for manslaughter is objective. The mental

fault for manslaughter flows from a failure to direct the mind to the risk which a reasonable person would have appreciated had he proceeded reasonably, rather than from what was actually in the accused person's mind.

[65] To prove the offence of manslaughter, the Crown must prove beyond a reasonable doubt B.G. and A.D. committed the offence on the date and in the place described in the Indictment. There is no dispute that B.G. punched Ryan Opendries and Matthew Skura on the date and at the place as described in the Indictment. I have concluded that A.D. stomped on Matthew Skura's head. In addition, the Crown must prove each of the following essential elements of manslaughter beyond a reasonable doubt:

1. that B.G. and A.D. committed an unlawful act;
2. that B.G.'s and A.D.'s unlawful act was dangerous; and
3. that B.G.'s and A.D.'s unlawful act caused Matthew Skura's death.

1. Did B.G. and A.D. commit an unlawful act?

[66] It is a crime to cause the death of another person by an unlawful act. The unlawful act alleged in this case is the assault of Matthew Skura. The Crown must prove beyond a reasonable doubt that B.G. and A.D. committed the unlawful act of assault.

[67] An assault is the intentional application of force by one person to another person, without the consent of that other person, with knowledge the other person is not consenting. To prove the unlawful act of assault, the Crown must prove each of the following essential elements of the offence beyond a reasonable doubt:

1. that B.G. and A.D. applied force to Matthew Skura;
2. that B.G. and A.D. intentionally applied the force;
3. that Matthew Skura did not consent to the force that B.G. and A.D. applied;
4. that B.G. and A.D. knew that Matthew Skura did not consent to the force that he applied; and
5. that B.G. and A.D. caused bodily harm to Matthew Skura.

[68] There is no issue that B.G. punched Matthew Skura, which is an intentional application of force. I have concluded that A.D. stomped Matthew Skura, which is an intentional application of force.

- a) Consent to Fight: Matthew Skura

- [69] B.G. and A.D. contend that Matthew Skura consented to fight. The issue is whether Matthew Skura consented to fight and, if not, whether B.G. and A.D. knew that Matthew Skura did not consent to fight. To decide whether Matthew Skura consented to fight, all the circumstances surrounding the incident must be considered, including words or gestures of Matthew Skura and indications of his state of mind at the time. Consent requires Matthew Skura's voluntary agreement to let the physical contact occur.
- [70] It is the position of B.G. and A.D. the Crown has not proven beyond a reasonable doubt Matthew Skura did not consent to the application of force by B.G. and A.D.
- [71] It is the Crown's position there is insufficient evidence to support the contention that Matthew Skura engaged in a consensual fight with B.G. and there is no evidence he engaged in a consensual fight with A.D. It is the Crown's further submission, if the Court finds that Matthew Skura did agree to enter a consensual fight, B.G. and A.D. are barred from relying on this as a defence to a charge of manslaughter based on the principle set out in *R. v. Jobidon*, [1991] 2 S.C.R. 714, particularly at paras. 120 - 121: "that the common law has developed a strong resistance to recognizing the validity of consent to intentional applications of force in fist fights and brawls is merely one instance of the criminal law's concern that Canadian citizens treat each other humanely and with respect."
- [72] Cody Allen described Matthew Skura as being upset that Shavaun Pellatt, his girlfriend, had left and had not told him where she was going. As they were arguing, Joe Andor yelled to Matthew Skura that was no way to talk to a girl. Mr. Skura was not too pleased about the comment and he and Ryan Opdendries walked over to talk to Joe. Mr. Skura was not in a pleasant mood. Mr. Allan did not hear any of the conversation; he believed Ryan Opdendries and Joe Andor exchanged a push.
- [73] Ms. Pellatt, who was very intoxicated, denied Matthew Skura would call her names. Ms. Pellatt said nothing physical happened but there was a verbal altercation where heated words were exchanged between Ryan and two strangers. Ms. Pellatt tried to end the confrontation by apologizing.
- [74] Justin Marshall described how he and Joe Andor ran into the two males, Matthew Skura and Ryan Opdendries. One male was swearing at Shavaun Pellatt for going the wrong way. Joe Andor said he should not talk to girls that way and if it was his sister she wouldn't take it well. There was a verbal dispute and one of the two guys pushed Joe. Joe did not fall down and there was no physical response from Joe.
- [75] Cody Shaer testified that after the older group crossed 176th Street, he met Matt. He spoke to Matt for a couple of minutes, exchanging jokes about their worry there was going to be a fight between the two groups and it was a bit of a relief for both of them that there would be no fight. Matt seemed fairly happy; he was laid back, relaxed, and friendly. Immediately after Ryan Opdendries was punched, Matt appeared to come to Mr. Opdendries' aid by grabbing B.G. by the shoulders and forcefully pulling him out of the immediate area. B.G. twisted out of Matt's grasp, the two faced off against one another, and had a bit of a shoving/

pulling match. The plastic bag Matt had been carrying went flying into the air and ice flew throughout the parking lot. Mr. Shaer agreed it was possible Matt swung the bag at B.G. The two slowly circled back and faced off in a way.

- [76] Their hands dropped and it did not appear as if there was going to be any more of a physical confrontation or issue between them. They were not "hands up, ready to fight;" it was not as if they were going to face off and fight. At that point, B.G. took a few steps to Matt's right as if to walk away or to walk past Matt. Matt turned his head to watch B.G., but did not turn his body. Once he got close enough, B.G. threw another wide hook-type punch, which hit Matt in the head. Matt did not see it coming. Normally, when you are engaged in a fight with someone, you are facing off or squared off. It was a "blindside" punch because rather than squaring off, Matt was not really expecting it. Matt stumbled back a couple feet and fell backwards onto his back and hit his head on the pavement. Mr. Shaer testified he did not witness any overt offensive actions on the part of Mr. Skura towards B.G. In fact, after the initial pushing and shoving between them, it appeared as if each was going to let it go.
- [77] Cody Allan testified that upon their group entering the church parking lot, three or four males from the larger group of kids in front of the church approached them in a hostile manner. The 'tank top guy' (Joe Andor) confronted Ryan Opdendries. Once Ryan had been knocked down, Matthew yelled something out at them. The group then went over towards Matthew. Matthew saw them coming and as they were walking up to him, he swung his plastic bag with his drinks in it, in a general sweeping motion, to either keep the kids away or to hit them. The bag did not make contact with anybody, as he was hit before it would have. As he was swinging, another kid came up from his left side and struck him on the left side of the face. He fell down onto his right side. Cody Allan guessed that with Matthew swinging his bag and being hit he was caught off balance.
- [78] Marilyn Mortensen had been standing in the parking lot when she noticed it was becoming 'rowdy.' She looked over and saw that someone had pushed Curtis Huseon. B.G. punched a guy and he fell to the ground. Mr. Skura, who had been in a group of people, perhaps five feet away, jogged forward five feet and swung at B.G. but missed, as B.G. had stepped back and ducked. B.G. punched Mr. Skura, knocking him to the ground. In cross-examination, she agreed she did not see the initial interaction between Mr. Skura and B.G., as she had turned her back. When she looked back, her view was of Mr. Skura's back and B.G. was facing her. It was at this point that she saw Mr. Skura swing a fist at B.G. She did not see anything in Mr. Skura's hand.
- [79] Justin Marshall testified the shorter guy (Ryan Opdendries) was arguing with Joe Andor and his friends. At one point Ryan was laughing and offered to shake hands. His hand was pushed away by someone other than Joe. Things appeared to be "simmering down" when B.G. came from around the side of the church and approached the group saying, "Where's the beef? Where's the beef?" He appeared to be aggravated. It seemed to Mr. Marshall he was being "defensive of Joe." B.G. threw a punch and Ryan dropped to the ground. The taller guy (Matthew Skura) appeared to notice what had happened to his friend and yelled a challenge,

something to the effect of "What the hell" or "What are you doing," and was in the process of making his way over towards B.G. There was some confusion and some people were moving to the shorter guy who was motionless. Mr. Marshall was distracted and glancing around, and did not see all of the interaction between B.G. and Mr. Skura. He saw B.G. move to meet Mr. Skura. They both had their fists up. He saw B.G. deliver a hook punch which connected with Matthew Skura's head. He did not see Mr. Skura swing a bag. He did not believe that Mr. Skura had anything in his hands but he was "not very" sure.

[80] I agree with the Crown there is simply no evidence to support the contention that Matthew Skura consented to fight B.G. The only reasonable inference to be drawn from the evidence is that Mr. Skura reacted to seeing his friend, Ryan Opendries, struck to the ground and went to his aid. This is not a case where the combatants agree to "take it outside" and enter into a consensual fight with the expectation of suffering some degree of injury. To the contrary, the evidence establishes an aggravated B.G., itching for a fight, took advantage of Mr. Skura dropping his guard and "blindsided" him with a knockout punch to the head.

[81] There is no question that Mr. Skura did not consent to being stomped by A.D.

[82] I am satisfied beyond a reasonable doubt Matthew Skura did not consent to fight B.G. and A.D.

b) Knowledge of Lack of Consent

[83] The Crown must prove beyond a reasonable doubt that B.G. and A.D. were aware that Matthew Skura did not consent to the physical contact in question. To prove that B.G. and A.D. were aware of Matthew Skura's lack of consent, the Crown must prove any one of the following:

1. that B.G. and A.D. actually knew that Matthew Skura did not consent;
2. that B.G. and A.D. knew there was a risk that Matthew Skura did not consent and proceeded in the face of that risk;
3. that B.G. and A.D. were aware of indications that Matthew Skura did not consent, but deliberately chose to ignore them because they did not want to know the truth.

[84] Any one of these would be sufficient to establish B.G. and A.D.'s awareness of Matthew Skura's lack of consent.

[85] Having regard to the same evidence I have just reviewed on lack of consent to fight, I am satisfied beyond a reasonable doubt that B.G. and A.D. knew Matthew Skura did not consent to fight, or knew there was a risk and proceeded in the face of that risk, or deliberately choose to ignore the risk.

c) Bar Due to Bodily Harm

- [86] When a person consents to physical contact, that consent covers only a certain amount of force. It does not cover force that goes beyond what he consented to. The law allows consent to a certain amount of physical pain or discomfort, but not to bodily harm. Consent will be vitiated where an accused person intends to cause bodily harm. If B.G. and A.D. intentionally caused bodily harm to Matthew Skura, it does not matter whether Matthew Skura consented. To intentionally cause bodily harm means to significantly contribute to an injury to Matthew Skura, and to do it on purpose. In view of my finding that there was no consent to fight, I do not have to consider this issue. However, I would have no difficulty concluding bodily harm to Matthew Skura was both caused and intended by B.G. and A.D.: *R. v. Paice*, 2005 SCC 22 ; *R. v. Jobidon* [1991] 2 S.C.R. 714.
2. Was B.G.'s and A.D.'s unlawful act dangerous?
- [87] The Crown must prove beyond a reasonable doubt that B.G.'s and A.D.'s unlawful act was dangerous; that is, that a reasonable person in the same circumstances would have realized he was exposing someone else to a risk of bodily harm, meaning to any hurt or injury. This is a purely objective test. In deciding what a reasonable person would have realized, the individual characteristics or experiences of B.G. and A.D. are not taken into account.
- [88] It is the position of the defence that B.G. landed one punch against a much taller, heavier, older man who was coming at B.G. in a fairly dark parking lot, swinging a bag containing full cans of liquid. In this situation, the defence submits the court will have a reasonable doubt as to whether the risk of serious bodily harm is reasonably foreseeable. Cody Shaer and Marilyn Mortensen described B.G. as about 5'8" to 10". Dr. Straathof said Matthew Skura's height was 6'6" and estimated his weight to be 180-185 pounds. Cody Allan said Mr. Skura was 22 years old. It is in this context the defence says that the Court must examine whether or not the Crown has proven beyond a reasonable doubt that bodily harm was reasonably foreseeable.
- [89] "Bodily harm" is any hurt or injury that interferes with a person's health, comfort or psychological well-being. The harm must be something that is more than brief, fleeting or minor in nature. It must result from or be due to the physical contact that B.G. and A.D. had with Matthew Skura. The question is whether B.G.'s and A.D.'s conduct contributed significantly to the bodily harm done to Matthew Skura. The Crown does not have to prove B.G. and A.D. meant to cause bodily harm of the nature they did to Matthew Skura by the force that they applied.
- [90] The defence argues other young people at the scene testified that in their experience the result from one punch would be relatively insignificant. The defence relies on the evidence of Cody Shaer that Matthew put his arms out to try to break his fall and raised his head and neck off the ground before the stomp. In a one-punch teenage fight, Mr. Shaer would expect a fat lip, bleeding nose, or a knock down; a lucky punch to the right spot could knock someone out; and the punch on Matthew was less forceful than the punch to Ryan. Cody Allan assumed Matthew was blindsided because of the ease with which he was knocked

down. He was surprised to see Ryan and Matthew knocked out. He had seen a few fights before, and a punch usually results in a black eye, cut lip, or bleeding nose. These were lucky punches. Ryan Opdendries had been in four or five fights and would expect a black eye or a bloody nose as the result.

- [91] No one expected the results here. The position of the defence is that one's intentions are often inferred from their actions in a particular circumstance. Here, the defence says, it is a reasonable inference that B.G. intended just what others of his peer group expected. B.G. punched Mr. Skura only once and then walked away when he fell. A.D. stomped only once on Mr. Skura's head.
- [92] It is admitted that Matthew Skura's blood alcohol content was .137 percent and ethanol alcohol content was .194 percent. Cody Allan said Matthew was intoxicated. He was slurring his words a bit and had a slight stumble: Matthew's balance was a little bit affected from alcohol; "his balance wasn't great." Cody Shaer said Matthew smelled of alcohol but he was not overly intoxicated, not slurring, and his balance was not off. Ryan Opdendries testified Matthew was drinking to the point he was at five or six out of 10 on a scale of drunkenness.
- [93] I agree with the Crown there is no question that B.G. intended to cause non-trivial bodily harm to Matthew Skura. The blow was described by everyone as being of significant force sufficient to knock a man of Mr. Skura's size to the ground. Only moments before, using a similar blow, B.G. had rendered Ryan Opdendries unconscious on his feet. B.G. would have known that Ryan Opdendries fell to the ground making no attempt to break his fall and his head hit the concrete with force. This is not the situation where an accused person only executes one punch with no idea as to what the consequences will be. Having rendered Ryan Opdendries instantly unconscious on his feet, B.G. struck Matthew Skura with an almost identical punch with essentially the same effect. Matthew Skura fell hard to the concrete. B.G.'s punch left Matthew Skura a defenceless young man, vulnerable to someone like A.D. stomping on his head and smacking it into the concrete. Both B.G. and A.D. either intended serious bodily harm or were wilfully blind as to serious harm being the outcome.
- [94] I am satisfied beyond a reasonable doubt that B.G. and A.D. intentionally applied force to Matthew Skura, intending to cause non-trivial bodily harm and did cause bodily harm. I am satisfied beyond a reasonable doubt that B.G.'s and A.D.'s unlawful acts were dangerous. A reasonable person in the same circumstances would have realized that they were exposing Matthew Skura to a risk of bodily harm in this highly charged, alcohol and testosterone fuelled scene, surrounded by their friends.
3. Did B.G.'s and A.D.'s unlawful act cause Matthew Skura's death?
- [95] The Crown must prove beyond a reasonable doubt that B.G.'s and A.D.'s conduct contributed significantly to Matthew Skura's death. A person's conduct may contribute significantly to another person's death even though that conduct is not the sole or main cause of death. All the evidence concerning the cause of death must be considered, including the expert evidence of Dr. Straathof, in determining whether the Crown has proved that B.G.'s and

A.D.'s conduct contributed significantly to Matthew Skura's death. There must not be anything that somebody else does later, or some other subsequent event, that results in B.G.'s and A.D.'s conduct no longer being a contributing cause of Matthew Skura's death.

- [96] Dr. Straathof observed three injuries to Matthew Skura's head: an abrasion to the upper right forehead; a soft tissue injury to the upper right cheek; and a fracture to the left temporal bone. Dr. Straathof considered the first two injuries relatively minor and said it is doubtful that either would have been a contributing cause of death. The abrasion to the forehead is the type of injury most likely caused by a fall where there has been a scraping of the surface of the skin against another surface.
- [97] The cheek injury was only visible in the course of Dr. Straathof's internal examination at the autopsy. Dr. Straathof considered whether a significant punch to the face could be responsible for this minor injury but explained that given the location of this injury he would have expected to see bruising such as a black eye, and there was no bruising present. Because Matthew Skura was kept alive for 24 hours on life support, the bruising action would have continued. The only reasonable inference is that B.G.'s punch or A.D.'s kick did not cause either the abrasion on the forehead or the soft tissue injury to the upper right cheek.
- [98] Dr. Straathof attributed the cause of death to the fracture and associated injuries to the left temporal bone. The left temporal bone is thinner than other areas of the head and easier to fracture. In Dr. Straathof's opinion, the injury to the left temporal side of the head could be the product of two blows, one superimposed on the other. The left side injury could well have been caused by a kick or stomp to the head; it was less likely to have been caused by a punch alone. In cross-examination, Dr. Straathof said he had dealt with fewer than five cases where death had resulted from a single punch to the head. However, there does not have to be a fracture of the skull for there to be injury to the brain. He agreed that a significant punch to the left temporal side of the head could cause bleeding to the brain even though it was not the blow which caused the fracture; and risk of death increases with each blow that causes additional injury because of increased swelling to the brain.
- [99] There is evidence that each blow was delivered with force sufficient to cause injury. There is evidence to conclude that each blow would have had some contributing effect to the swelling of the brain, thereby adding to the risk of death. Dr. Straathof testified that even the mildest form of concussion would be considered an injury to the brain.
- [100] Given Dr. Straathof's evidence regarding the two minor injuries, the most likely scenario is that both the punch and the kick were delivered to the left side of the head. He found no injuries corresponding to any kind of a significant blow to the right side of the head and he ruled out the damage to the left side of the head having been caused by a fall.
- [101] The defence argued the facts at bar are similar to *R. v. Maybin*, 2008 BCSC 1277, (which now has been overturned by the Court of Appeal: 2010 BCCA 527) and that in the absence of being able to determine who administered the fatal blow, the only way B.G. or A.D. can be

found guilty is to find beyond a reasonable doubt that they are each party to the offence committed by the other person. I have concluded that B.G. and A.D. are parties. Maybin does not apply. It is not necessary to determine who administered the fatal blow to cause the death of Matthew Skura, as both B.G. and A.D., in punching and stomping Mr. Skura, on a factual and legal basis, significantly contributed to the cause to the death of Mr. Skura.

Self Defence

- [102] It is the position of the defence that should the court find that B.G.'s involvement with Mr. Skura was not a consent fight and all the elements of manslaughter are made out, B.G.'s punch to Mr. Skura was in self defence.
- [103] The defence submits the court should have at least a reasonable doubt that Matthew Skura was coming towards B.G. in an aggressive fashion based on the evidence he was yelling insulting language at his girlfriend and he got into an altercation with Joe Andor who took exception to his behavior. Further, as his group approached the church, they traded aggressive remarks with the group of teens. After Ryan Opdendries was knocked down, Matthew Skura yelled and started towards B.G., grabbed him from behind and pulled him back. He swung or flung his bag in B.G.'s direction and may have swung a punch at B.G. Dr. Straathof found no injuries on Matthew's hands or knuckles. B.G. responded with only one punch and then walked away. Matthew Skura was five years older, 40 pounds heavier and eight inches taller than B.G. The defence argues that at minimum this would qualify as self defence under s. 37(1), although sections 34 and 35 may also apply.
- [104] The punch to Ryan Opdendries occurred in a hostile environment in which Joe Andor and his supporting friends had already indicated their willingness to become involved in a fight. Ryan Opdendries offered to shake hands but was rebuffed. B.G., who was already worked up from his argument with Curtis Huseon, charged into the fray, demanding, "Where's the beef?" and almost immediately he punched Ryan Opdendries, rendering him instantly unconscious. Matthew Skura reacted to what had just happened to his friend by yelling words to the effect of, "What are you doing?" B.G. struck him in the head with a similar punch to the one that had just rendered Ryan Opdendries unconscious on his feet. When Matthew Skura fell, A.D. stomped on his head. B.G. approached Mr. Allan, intent on continuing on his assaultive spree but Mr. Allan told him to get lost so he could help his fallen friends.
- [105] The law of self defence is governed by ss. 34 to 37 of the Criminal Code. These sections attempt to define specific situations which allow for the defence. They distinguish between several situations: the accused is unlawfully assaulted; the accused is the initial aggressor; the accused acts in protection of others; the accused intends to cause death or grievous bodily harm; and the accused has no such intention. In each scenario, the essential inquiry turns on the accused's apprehension of harm and his perception of the degree of force required to defend himself against that perceived harm. The Crown's argument carefully details the requisite elements of each self defence section and provides the relevant law,

which defence counsel accept as the proper statement of the law. I accept the Crown's submission on the law.

- [106] I agree with the Crown that, no matter which version of the facts is accepted, and without evidence of the accused's perception of the threat he faced, a punch to the head of Matthew Skura, strong enough to instantly knock him to the ground, within seconds of landing a punch to the head of Ryan Opendries that instantly knocked him unconscious, was not proportionate to either being pulled away from Ryan Opendries or having had a bag swung or flung in his direction. I am satisfied beyond a reasonable doubt the punch to Matthew Skura was not in self defence.

Consent Fight: Ryan Opendries

- [107] As I have stated above with respect to Matthew Skura, a person's consent to physical contact covers only a certain amount of force. It does not cover force that goes beyond what he consented to. The law does not allow consent to bodily harm. Consent will be vitiated where an accused person intends to cause bodily harm. I agree with the Crown that the defence of consent fight has been disproved by the Crown.
- [108] Cody Shaer described a verbal confrontation between Ryan Opendries and B.G.; the confrontation lasted 30 seconds. He could tell by the body language it was a confrontation or argument; there may have been pushing back and forth but he cannot say for certain as he could not see past Ryan. He concluded an immense amount of force was used because Ryan was out cold. He also agreed when someone is drunk they're likely easier to knock out. Justin Marshall said at the amphitheatre it was likely Ryan who pushed Joe Andor and at the church Ryan was arguing with Joe and some of Joe's buddies. He saw Ryan falling and B.G.'s arm extended. Cody Allan said Ryan was involved in a mutual push at the amphitheatre with Joe; Ryan was drunk enough that his balance was affected; he thinks he saw Ryan push one of the three guys around him, but he was not sure. Marilyn Mortensen said she saw Matt's friend push Curt and Curt stumble back, then B.G. punched "this guy" and he fell to the ground. She did not see "this guy" try to push B.G. before B.G. punched him. Ryan Opendries does not remember the incident, or the prior one at the amphitheatre, as he was drunk, having had 10 to 12 beers plus a shot in about two and a half hours, and due to the effects of the concussion he suffered.
- [109] There is simply no evidence to support the contention that Ryan Opendries consented to fight B.G.

Knowledge of Lack of Consent

- [110] I am satisfied B.G. knew Ryan Opendries did not consent to fight, or knew there was a risk and proceeded in the face of that risk, or deliberately choose to ignore the risk.

Was Bodily Harm Caused to Ryan Opendries?

- [111] Ryan Opdendries was punched in the head and knocked unconscious, causing him to fall to the concrete. When he awoke he "wasn't all there;" he was "kinda' groggy and out of it." His head was sore, throbbing with pain, and he was bleeding from the area of his eye and the back of his head. The following morning he was "still a little dazed from being hit."
- [112] The evidence of Ryan Opdendries was that he did not receive treatment for his injuries. However the symptoms associated to a concussion as related by Dr. Straathof are very similar to the symptoms experienced by Mr. Opdendries. Dr. Straathof testified that even the mildest form of concussion would be considered an injury to the brain. The symptoms associated to a concussion would include loss or semi-loss of consciousness, disorientation and loss of memory.
- [113] The photographs of Mr. Opdendries' injuries, taken by the police on May 29, 2009, show he had blood in the white portion of his right eye and a vertical cut below his eyebrow that resulted in a permanent scar. He also bled from an injury at the back left of his head. His head was still bleeding at the time of the photos. The "bump" on the back of his head remained for about a week and he suffered headaches for two to three days. Mr. Opdendries also suffered permanent memory loss as to much of the evening of May 28, 2009.
- [114] These injuries constitute bodily harm, as they caused Mr. Opdendries discomfort that was more than transient and trifling.

Bar Due to Bodily Harm

- [115] If B.G. intentionally caused bodily harm to Ryan Opdendries, it does not matter whether Ryan Opdendries consented. To intentionally cause bodily harm means he significantly contributed to an injury to Ryan Opdendries, and did it on purpose. In view of my finding there was no consent fight, I do not have to consider this issue. In any event, I am satisfied B.G. intentionally caused bodily harm to Ryan Opdendries. He significantly contributed to an injury to Ryan Opdendries, and did it on purpose.

Self Defence

- [116] What I have said about self defence with respect to Matthew Skura applies equally to Ryan Opdendries. I am satisfied beyond a reasonable doubt that B.G.'s punch to Ryan Opdendries was not in self defence.

Conclusion

- [117] I am satisfied beyond a reasonable doubt that B.G. is guilty of the manslaughter death of Matthew Skura and of assault causing bodily harm to Ryan Opdendries. I am satisfied beyond a reasonable doubt A.D. is guilty of manslaughter in the death of Matthew Skura.

"Stromberg-Stein J."

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