

CANADA / JUDGMENT

R. v. Baptiste

2025 BCCA 208

COURT

British Columbia Court of Appeal

DECIDED

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2025 BCCA 208 R. v. Baptiste

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Baptiste,

2025 BCCA 208

Date: 20250620

Docket: CA48626

Between:

Rex

Respondent

And

Derek Ryan Baptiste

Appellant

Before:

The Honourable Madam Justice DeWitt-Van Oosten

The Honourable Justice Riley

The Honourable Justice MacNaughton

On appeal from: An order of the Supreme Court of British Columbia, dated

February 27, 2019 (conviction) (R. v. Baptiste, 2019 BCSC 497,

Vernon Docket 52615).

Counsel for the Appellant:

J.L. Dawkins

Counsel for the Respondent:

M.J. Sheardown

Place and Date of Hearing:

Vancouver, British Columbia

May 28, 2025

Place and Date of Judgment:

Vancouver, British Columbia

June 20, 2025

Written Reasons by:

The Honourable Justice MacNaughton

Concurred in by:

The Honourable Madam Justice DeWitt-Van Oosten

The Honourable Justice Riley

Summary:

The appellant was convicted of one count of pointing a firearm at another person under s. 87 of the Criminal Code and one count of recklessly discharging a firearm under s. 244.2(1), both relating to the same incident. During an altercation with his intimate partner, the appellant pointed the gun at her, before moving it slightly upwards and firing. He argues on appeal that his conviction on the lesser offence (pointing a firearm) should be stayed based on the Kienapple principle.

HELD: Appeal from the firearm convictions dismissed; appeal from uttering threats conviction allowed. While the offences share a factual nexus, they lack the required legal nexus for the Kienapple principle to apply. The lesser offence in this case has an additional element which is not part of the offence of recklessly discharging a firearm under s. 244.2(1): it requires the presence of another person. This additional element reflects the fact that the offences are targeted at different harms. Whereas s. 244.2(1) addresses the risk of actual bodily harm created by discharging a gun reckless to the presence of others, s. 87 is focused on preventing guns from being used to strike fear and intimidate, regardless of whether the risk of actual bodily harm is present. However, the appellant's conviction for uttering threats is quashed, as the Crown raised on appeal that the basis for this conviction in the trial judge's reasons was not that argued by the Crown at trial. The Crown concedes that this conviction should be quashed.

Reasons for Judgment of the Honourable Justice MacNaughton:

Introduction

- [1] Derek Baptiste, the appellant, was charged with eleven offences under the Criminal Code, R.S.C., 1985, c. C-46 [Code] including assaults, firearms offences, threatening, and the two counts which give rise to this appeal, discharging a firearm and pointing a firearm.
- [2] Mr. Baptiste was tried at a six-day trial in January and February 2019. At the commencement of the trial, the Crown entered a stay of proceedings on four of the offences and proceeded on the remaining seven.
- [3] On February 27, 2019, in oral reasons cited at *R. v. Baptiste*, 2019 BCSC 497, the trial judge convicted Mr. Baptiste of five of the seven counts including firearms offences, assault, and threatening his intimate partner, Joanne Jack.
- [4] On appeal, the two most relevant convictions arise from an incident on January 6, 2018, in which Mr. Baptiste: (i) pointed a firearm (an SKS rifle) at Ms. Jack while the two of them were in a bedroom at his father's residence, and (ii) discharged that firearm, by firing a shot just over Ms. Jack's head, leaving a hole in the wall behind her.
- [5] The primary issue on appeal is whether, in respect of these two firearms offences which are clearly factually linked, the trial judge erred in failing to apply the rule against multiple convictions as stated in *R. v. Kienapple*, [1975] 1 S.C.R. 729, 1974 CanLII 14.

Preliminary Issue

- [6] On the day before this appeal was to be heard, the Crown wrote to the Court asking that a preliminary issue be drawn to the Division's attention.
- [7] In preparing for the appeal, the Crown concluded that Mr. Baptiste's conviction on Count 9 of the indictment, a charge of uttering threats against Ms. Jack contrary to s. 264.1(1) of the Code, reflected an error of law.
- [8] The Crown conceded that Mr. Baptiste was found guilty of this count on the basis of conduct and a theory of liability not advanced by the Crown, and did not have fair opportunity to respond.
- [9] Accordingly, the Crown consented to an amended notice of appeal challenging Count 9, a quashing of that conviction, and an order for a new trial specific to the charge of uttering threats. The appellant supports the Crown's position on Count 9 and asks that the conviction be quashed.

The Background to the Offences in Issue

- [10] Briefly, and based on the trial judge's findings, the circumstances giving rise to Mr. Baptiste's convictions for the two offences in issue (Count 1-discharging a firearm and, Count 2-pointing a firearm collectively the "Firearm Offences") were as follows.
- [11] Mr. Baptiste was in an intimate relationship with Ms. Jack. On January 6, 2018, they were both living at Mr. Baptiste's father's residence in Vernon B.C. and they were drinking alcohol and arguing.
- [12] In the early afternoon, Mr. Baptiste, accompanied by Ms. Jack, took his father's car to Vernon to buy beer. They argued during the trip and their argument continued after they returned to the residence and entered the bedroom they shared.
- [13] The argument became physical. Mr. Baptiste admitted that he purchased an SKS rifle and took it into the bedroom. Ms. Jack was lying on the bed.
- [14] Mr. Baptiste and Ms. Jack gave significantly different evidence about what happened in the bedroom and the circumstances surrounding the Firearm Offences. The case turned primarily on the credibility and reliability of Mr. Baptiste's and Ms. Jack's evidence, both of whom had criminal backgrounds.
- [15] The trial judge treated Ms. Jack as a Vetrovec witness. She accepted Ms. Jack's evidence only where it was supported by confirmatory evidence sufficient to give her faith in the credibility of Ms. Jack's testimony. When assessing the evidence relating to the Firearm Offences, the trial judge accepted Ms. Jack's testimony, rejected Mr. Baptiste's, and convicted Mr. Baptiste.
- [16] In particular, the trial judge accepted that, at one point, while Mr. Baptiste and Ms. Jack were arguing, he left the bedroom. He returned, still angry, and chased her around the bed. He left a second time, and when he returned, he was carrying the SKS rifle which he then pointed at Ms. Jack.
- [17] In her testimony regarding the pointing of the firearm, Ms. Jack described how Mr. Baptiste ran back into the bedroom holding the rifle up and pointing it at her. She said that, from where she was lying, she could look down the barrel of the rifle at him. He was holding it with the butt high against his shoulder, aiming it at her. Mr. Baptiste had her "in the crosshairs". She believed that he was going to shoot her. She told Mr. Baptiste that she would make it easier for him by looking away when he shot her and she turned and looked out the window. She believed she was about to take her last breath. When she looked back at Mr. Baptiste, he pulled the trigger and discharged it but he pulled the rifle up, above her head, as he did so.
- [18] The discharge of the rifle made an extremely loud sound, causing Ms. Jack's ears to ring. Mr. Baptiste then pulled up the rifle, removed the clip, and ran out the door. Mr. Baptiste's father heard the rifle discharge in the bedroom.

- [19] The bullet from the rifle caused a hole in the bedroom wall several feet above the head of the bed, and to the right of the centre of the bed. The police traced the path of the bullet into, and through, a closet behind the wall, and out of the residence.
- [20] Mr. Baptiste later returned to the residence. Early on January 7, 2018, Mr. Baptiste left the residence in his father's vehicle which his father then reported as stolen.
- [21] The Vernon RCMP arrested Mr. Baptiste in the early morning hours of January 8, 2018. On arrest, he had the SKS rifle with him.

Sentence

- [22] Mr. Baptiste was sentenced for the five counts on which he was convicted. The reasons for sentence were delivered orally on December 18, 2019, cited at *R. v. Baptiste*, 2019 BCSC 2339. All sentences were to run concurrently.
- [23] As it relates to the Firearm Offences, Mr. Baptiste was sentenced to four years and six months imprisonment on the most serious offence, Count 1-discharging a firearm, and to 18 months on Count 2-pointing a firearm. The parties did not make submissions regarding the Kienapple principle and the judge did not rule on its applicability.
- [24] With credit for presentence custody, the overall sentence amounted to three years and 28 days imprisonment, plus various ancillary orders. Mr. Baptiste has completed his sentence.
- [25] On October 19, 2022, Mr. Baptiste filed a notice of appeal and notice of application for extension of time to appeal. On January 13, 2023, he filed a notice of application for appointment of counsel. The applications were heard on April 10, 2024. Both were granted but only on the limited issue of whether the Kienapple principle applied to his convictions on Counts 1 and 2.

The Appeal

- [26] As explained, the appeal proceeded with respect to two of the counts on which Mr. Baptiste was convicted after trial. In particular, Mr. Baptiste was convicted on Count 1 of intentionally discharging a firearm contrary to s. 244.2(1) of the Code which provides:

Discharging firearm - recklessness

244.2 (1) Every person commits an offence

- (a) who intentionally discharges a firearm into or at a place, knowing that or being reckless as to whether another person is present in the place; or
- (b) who intentionally discharges a firearm while being reckless as to the life or safety of another person.

- [27] Mr. Baptiste was also convicted on Count 2 of pointing a firearm contrary to s. 87(1) of the Code which provides:

Pointing a firearm

87 (1) Every person commits an offence who, without lawful excuse, points a firearm at another person, whether the firearm is loaded or unloaded.

- [28] Mr. Baptiste submits that with respect to these two counts, the judge erred in not conditionally staying his conviction under s. 87(1) of the Code on the basis of the Kienapple principle.
- [29] There is no dispute between the parties, and I agree, that, if Kienapple applies, Count 2 is the less serious of the offences and Mr. Baptiste's conviction on that count should be conditionally stayed. When Mr. Baptiste was convicted, Count 1 carried a mandatory minimum sentence of four years and a maximum sentence of 14 years (the mandatory minimum sentence was declared unconstitutional in *R. v. Hills*, 2023 SCC 2 [Hills] and has since been repealed). In contrast, there was no minimum sentence for Count 2 and the maximum sentence was five years.

Kienapple Principle

- [30] Kienapple sets out the legal principle precluding multiple convictions for offences involving the same "delict" (criminal act or criminal wrong). It provides that when an accused is found guilty of multiple offences with the same or substantially the same elements, the accused should be convicted of only the most serious of the offences, subject to Parliament's clearly expressed intention to provide for multiple convictions: *R. v. Prince*, [1986] 2 S.C.R. 480 at 489, 491, and 500, 1986 CanLII 40. If Kienapple applies, the conviction for the less serious offence should be conditionally stayed.
- [31] Whether Kienapple applies is case-specific and contextually informed: *R. v. Mohsenipour*, 2023 BCCA 6 at para. 283. *Prince* establishes the analytical framework to be applied in deciding whether a conviction should be conditionally stayed. The framework involves determining first if there is a factual nexus between the offences at issue, and if so, whether there is also an adequate legal nexus between them.

Factual Nexus

- [32] The answer to whether there is a factual nexus between the offences at issue is generally determined by considering whether the same act grounds each of the charges: *Prince* at p. 492. In some cases the factual nexus will be obvious. However, it is not always easy to determine when one act ends and another begins. In cases involving a continuing offence in which the offending behaviour occurred over a period of time, determining whether a factual nexus exists may require consideration of factors such as: the remoteness or proximity in time and place between offences; the presence or absence of relevant intervening events; and whether the acts underlying the offences were related to each other by a common objective: *Prince* at p. 492-493.

Legal Nexus

- [33] If a trial judge is satisfied of a factual nexus, they must then consider whether there is also an "adequate legal nexus" between the relevant offences. This is because an accused's single act "can involve two or more delicts against society which bear little or no connection": Prince at p. 494-495.
- [34] There will only be an adequate legal nexus between offences if there is "no additional and distinguishing element" that requires proof to make out the count sought to be stayed: Prince at p. 498-499.
- [35] When offences are both factually and legally connected, but distinguishable because they are of "unequal gravity", it may be appropriate to conditionally stay the lesser offence if that offence does not include "additional and distinct" elements from the more serious offence: Prince at p. 499.
- [36] Prince also set out a process for determining whether the elements of an offence are additional and distinct. At p. 499-502, the Supreme Court set out three ways of making this determination:
- a) an element of one offence may simply be a particularization of an element that forms the foundation for another offence;
 - b) multiple offences may reflect the fact that there is more than one method to prove a single delict; or,
 - c) Parliament may have deemed a particular element of an offence to be satisfied by proof of another "because of social policy or inherent difficulties of proof". Elements of an offence that "serve only as an evidentiary proxy for another element cannot be regarded as distinct or additional elements for the purposes of the rule against multiple convictions".
- [37] In *R. v. Heaney*, 2013 BCCA 177 at para. 26, this Court reiterated and clarified three factors that, subject to Parliament's clear intention to the contrary, will generally "defeat a claim that different offences have the legal nexus to warrant the application of Kienapple". They are: (a) where the offences are designed to protect different societal interests; (b) where the offences involve violence against different victims; and (c) where the offences proscribe different consequences: at para. 26.

Arguments on Appeal

Standard of Review

- [38] The failure to apply Kienapple, when properly engaged, amounts to an error of law that is reviewable on a correctness standard: *R. v. Mohsenipour*, at para. 281; *R. v. Donovan*, 2025 BCCA 30, at para. 161.

Mr. Baptiste's Arguments

[39] Mr. Baptiste contends that the Kienapple principle precluded his conviction on both Counts 1 and 2 on the indictment such that the trial judge erred in failing to apply the Kienapple principle and conditionally stay Count 2. He submits that there is a sufficient factual and legal nexus between the two offences.

Factual Nexus

[40] Applying the factors identified in *Prince*, Mr. Baptiste submits, that the offences share a sufficient factual nexus because the pointing and discharge of the firearm happened at essentially the same time, in the same place, and involved the same victim.

[41] These facts were accepted by the trial judge. Mr. Baptiste was found to have been pointing the firearm at Ms. Jack in the bedroom and, at the same time as pulling the trigger, lifting the firearm slightly above her head. Ms. Jack testified that Mr. Baptiste did not move while pointing or aiming the rifle at her and discharging it.

[42] As a result, Mr. Baptiste says that there were no relevant intervening events between these two offences; the rifle remained pointed at Ms. Jack until immediately before it was discharged.

[43] Finally, Mr. Baptiste submits that both pointing and discharging the rifle involved dangerous and improper use of a firearm and threatened violence against an intimate partner. Mr. Baptiste's actions had a common objective of frightening or intimidating Ms. Jack.

[44] Mr. Baptiste also refers to the structure and organization of the trial judge's reasons for judgment as further evidence of the trial judge's acceptance that the two offences were part of one continuing act. In that regard, Mr. Baptiste points to the manner in which the trial judge analyzed the various counts and the fact that she engaged in a substantive analysis of Count 1, then imported her factual findings into her less substantive analysis of Count 2. Mr. Baptiste also points to the trial judge's linked references to Mr. Baptiste's pointing and firing the rifle and to the fact that he was given concurrent sentences for both offences.

Legal Nexus

[45] Mr. Baptiste submits that in determining the sufficiency of a legal nexus, this Court must consider whether the two offences describe different ways of committing the same criminal wrong and that the factors for consideration are whether: the offences are designed to protect different societal interests; concern violence against different victims; and proscribe different consequences.

[46] Referring to *R. v. Andrew*, 57 C.C.C. (3d) 301, 1990 CanLII 11057 (B.C.C.A), citing to *Prince*, Mr. Baptiste relies on the four clear "keys" for when the Kienapple principle will apply:

- 1) Where the offences are of unequal gravity, Kienapple may bar a conviction for a lesser offence, notwithstanding that there are additional elements in the greater offence for which a conviction has been registered, provided that there are no distinct additional elements in the lesser offence. (Prince p. 499)
 - 2) Where an element of one offence is a particularization of essentially the same element in the other offence. (Prince p. 500)
 - 3) Where there is more than one method, embodied in more than one offence, to prove a single delict. (Prince p. 501)
 - 4) Where Parliament has deemed a particular element to be satisfied on proof of another element. (Prince p. 501)
- [47] Mr. Baptiste submits that pointing and discharging a firearm are both ways of using a firearm, and in this case, were both ways of threatening Ms. Jack and causing her to fear for her safety. Further, the trial judge's finding that Mr. Baptiste pointed the firearm at Ms. Jack and discharged it almost immediately thereafter, necessarily meets the element of the offence required in Count 1, that Mr. Baptiste discharged a firearm knowing that another person was present.
- [48] Mr. Baptiste submits that, viewing the Firearm Offences in the context of the facts in this case, the apparently distinguishing element in Count 1, should be regarded merely as a particularization of the apparently distinguishing element in Count 2.
- [49] In sum, Mr. Baptiste submits that on the particular facts of this case, the offences of pointing and discharging the rifle did not promote different societal interests, involved the same victim, and do not proscribe different consequences, thereby establishing a sufficient legal nexus.

Crown's Arguments

- [50] The Crown contends that although the offences of discharging and pointing a firearm were committed in very close temporal proximity to each other, and at the same location (the bedroom of the residence), and involved the same victim, there is an insufficient factual and legal nexus between them to engage the Kienapple principle.
- [51] In particular, the Crown submits there was a lack of sufficient factual nexus because Mr. Baptiste discharged the firearm while pointing it away from Ms. Jack, not at her. The Crown submits that the intervening act, Mr. Baptiste's redirection of the firearm before discharging it grounded the Firearm Offences in two separate and distinct acts -- the pointing and then the discharge of the rifle.
- [52] Most significantly, the Crown submits that the requisite legal nexus is absent because the s. 87 offence has a distinct additional element, that is not present in the s. 244.2 offence -- the requirement of the pointing of the firearm at a person, in this case Ms. Jack.

- [53] The Crown submits that the pointing of the firearm at Ms. Jack was a distinct criminal wrong, complete before Mr. Baptiste discharged the firearm, and not captured by the elements of s. 244.2 of the Code. As a result, the Crown submits that in order for Mr. Baptiste to properly account to society for his criminal wrongdoing, Count 2 should not be stayed but remain as a conviction on his criminal record.

Analysis

- [54] On the basis of the trial judge's factual findings as to the events surrounding the pointing and discharging of the rifle, there is a sufficient factual nexus connecting the Firearm Offences.
- [55] On the judge's findings, Mr. Baptiste's pointing of the rifle and discharging it were proximate in time and location, involved the same victim, and were committed for the same purpose of frightening and intimidating Ms. Jack. The criminal acts were, in effect, seamless. Mr. Baptiste did not move to a different part of the bedroom between pointing the rifle and discharging it. He stayed in one place. The only relevant intervening event was the slight shift in the angle of the rifle from where it was pointed at Ms. Jack to where it was discharged, slightly above her head and into the wall.
- [56] The act of directing the firearm away from Ms. Jack was not a significant intervening act sufficient to factually disconnect the two offences.
- [57] This case is not factually similar to *R. v. Fogah-Pierre*, 2024 ONSC 386, a case involving convictions for pointing a firearm and reckless discharge of a firearm. There, the court ruled that *Kienapple* did not apply because the two offences were factually distinct. The offender initially pointed his handgun at a man who had recently attacked him, causing him to flee. The offender took a number of steps towards the fleeing man, while pointing the handgun, past two women on the sidewalk, one of whom cowered away from the offender. He then got down on one knee, steadied himself and shot at the man. The act of pointing and the act of discharging were distinct acts, separated by the intervening act of intimidating the women on the sidewalk.
- [58] However, I reach a different conclusion with respect to the legal nexus between the offences of pointing and discharging a firearm. As Justice Doherty explained in *R. v. Kinnear*, 198 C.C.C. (3d) 232, 2005 CanLII 21092 (Ont. C.A.) the legal nexus inquiry is not directed at "finding common elements between offences, but at determining whether there are different elements in the offences which sufficiently distinguish them so as to foreclose the application of the *Kienapple* rule": at para. 34.

- [59] The sufficiency of the legal nexus between offences depends on interpreting the statutory provisions creating the offences and the application of the statutory provisions to the circumstances of a case. As Doherty J.A. put it at para. 39 of Kinnear, the crucial distinction for the purpose of the Kienapple principle "is between different wrongs and the same wrong committed in different ways".
- [60] I conclude that the pointing of the firearm, and its discharge, were two distinct delicts or criminal acts or, as put by Doherty J.A. "different wrongs".
- [61] I start with considering the essential elements of both offences.

Essential Elements under s. 244.2

- [62] Section 244.2 is contained in Part VIII of the Code, "Offences Against the Person and Reputation", under the sub-heading "Bodily Harm and Acts and Omissions Causing Danger to the Person". At the time of the offence, s. 244.2(1) of the Code provided:

Discharging firearm - recklessness

244.2 (1) Every person commits an offence

- (a) who intentionally discharges a firearm into or at a place, knowing that or being reckless as to whether another person is present in the place; or
- (b) who intentionally discharges a firearm while being reckless as to the life or safety of another person.

- [63] The essential elements of the offence under s. 244.2(1)(a) were described by Justice Martin writing for the majority in Hills:

- [8] The actus reus of s. 244.2(1)(a) requires that an offender discharge a firearm into or at a "place" (as defined by s. 244.2(2)). The mens rea for this offence contains two main components. First, the offender must intentionally discharge the firearm into or at a place. Second, in intentionally discharging the firearm into or at a place, the offender must know a person is present in the place or be reckless as to whether a person is present there (*Vézina v. R.*, 2018 QCCA 739, at para. 27). The actus reus does not require a person to be at the "place" where the firearm is discharged, only that the firearm be discharged into or at a place (para. 46). Thus, there is no requirement for a person to even be present when the firearm is discharged.

- [64] The following essential elements of s. 244.2(1)(b) were summarized by the Manitoba Court of Appeal, in *R. v. Barca*, 2022 MBCA 80 at para. 103:

- (i) the accused discharged a firearm;
- (ii) the accused intended to discharge the firearm; and
- (iii) in doing so, the accused was reckless as to the life or safety of another person.

[65] The trial judge found that Mr. Baptiste was guilty under both s. 224.2(1)(a) and (b): at para. 187.

Essential Elements under s. 87

[66] Section 87 is contained in Part III of the Code, "Firearms and other Weapons" under the sub-heading "Use Offences". At the time of the offence, s. 87 provided:

Pointing a firearm

87 (1) Every person commits an offence who, without lawful excuse, points a firearm at another person, whether the firearm is loaded or unloaded.

[67] The essential elements of s. 87 of the Code were described in *R. v. Price*, 2021 NLSC 6 as follows:

[57] (i) the accused pointed a firearm; (ii) the accused pointed the firearm at another person; and (iii) the accused had no lawful excuse for pointing the firearm.

[58] To point a firearm means to direct or aim it, intentionally, not accidentally, absent-mindedly, or simply by chance. Pointing involves a choice, an intentional act of directing the weapon towards a person or object as a target. The firearm does not have to be loaded.

[68] To make out the offence of pointing a firearm, it is sufficient that the firearm be pointed in a general way towards the complainant: *R. v. Baptiste*, 2020 ONSC 6823, at para. 187; *R. v. Phillips*, 2009 CanLII 2922 (O.N.S.C.), at para. 73.

Comparing the Essential Elements of the Two Offences

[69] There are clearly different elements in the Firearm Offences in issue here:

(i) Section 244.2 requires the intentional discharge of a firearm; s. 87 does not require a discharge, whether intentional or unintentional;

(ii) Section 244.2(a) requires that the discharge occur at a place, as defined in s. 244.2(2); s. 87 does not contain a location requirement;

(iii) Section 244.2 requires the firearm to be loaded as an unloaded firearm will not discharge; s. 87 does not require the firearm to be loaded;

(iv) Section 244.2 does not require the firearm to be pointed at a person and, in fact, does not even require a person to be present when the firearm is discharged as recklessness as to whether a person is present is sufficient: *Hills* at paras. 8, 156-157, and 159; s. 87 requires the firearm to be pointed at another person.

- [70] The s. 87 offence can be made out even when the firearm poses no danger to the person it is pointed at: *R. v. Morrison* (1991), 66 C.C.C. (3d) 257 at 259; 1991 CanLII 995 (B.C.C.A.). In contrast, as explained in *Hills* at para. 5, the spectrum of conduct captured by an offence under s. 244.2 ranges from acts that "present little danger to the public to those that pose a grave risk". As a result, some actual risk of harm is inherent in the s. 244.2 offence.
- [71] In sum, the offence of pointing a firearm can be committed without discharging it. In fact, in this case, the elements of the offence of pointing a firearm were complete before the discharge occurred. The offence of discharging a firearm can be committed without pointing it and, in fact, without anyone being nearby.

Harms Addressed by the Offences

- [72] In addition to the different elements required for conviction of the offences of pointing a firearm and discharging it, I conclude that the two offences address distinct societal harms.
- [73] The harm addressed by the offence of pointing a firearm under s. 87 is reducing the use of a firearm (loaded or not) to strike fear in and intimidate others. The harm addressed by the offence of discharging a firearm is reducing the public risk of actual bodily harm through criminalizing the use of a firearm in a way that creates or enhances this risk.
- [74] In the circumstances of this case, both forms of harm arose. The elements of the s. 87 offence were complete once Mr. Baptiste pointed the firearm at Ms. Jack. The act of pointing the firearm at Ms. Jack grounded the conviction on Count 2, and the different act of discharging the firearm (while not pointing the firearm directly at Ms. Jack) grounded the conviction on Count 1.
- [75] Due to their close physical proximity -- Ms. Jack was lying on the bed and Mr. Baptiste was at the foot of it -- and the fact that Ms. Jack described looking down the barrel of the rifle and being in its crosshairs as it was pointed at her -- it is clear that Mr. Baptiste must have pointed the rifle away from Ms. Jack before he pulled the trigger. Had he not done so, he would have shot her.
- [76] Ms. Jack said that Mr. Baptiste lifted the SKS rifle as he discharged it and the bullet missed her. This was confirmed by the investigating officers who traced the path of the bullet to a hole above the bed, through a closet, and out through a wall of the residence.

Conclusion

- [77] For the foregoing reasons, I conclude that the Kienapple principle does not apply to Counts 1 and 2 of the indictment and would dismiss Mr. Baptiste's challenge to those convictions. His convictions for both Firearm Offences should remain on his criminal record to accurately reflect his criminal wrongdoing.

[78] As set out, and based on the Crown's concession, which I consider well-founded on the record, I would allow the appeal from conviction solely for the purpose of quashing Mr. Baptiste's conviction for uttering threats on Count 9 and order a new trial on that count. The remainder of the convictions and the two acquittals remain intact.

"The Honourable Justice MacNaughton"

I AGREE:

"The Honourable Madam Justice DeWitt-Van Oosten"

I AGREE:

"The Honourable Justice Riley"

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