

CANADA / JUDGMENT

R. v. Crossley

2025 BCCA 224

COURT

British Columbia Court of Appeal

DECIDED

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2025 BCCA 224 R. v. Crossley

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Crossley,

2025 BCCA 224

Date: 20250627

Docket: CA49823

Between:

Rex

Respondent

And

Ryan Ross Crossley

Appellant

Before:

The Honourable Mr. Justice Abrioux

The Honourable Madam Justice DeWitt-Van Oosten

The Honourable Justice Riley

On appeal from: An order of the Supreme Court of British Columbia, dated
September 23, 2023 (conviction) (R. v. Crossley, New Westminster Docket 83803).

Counsel for the Appellant:

S. Wright

Counsel for the Respondent:

E. Purtzki

Place and Date of Hearing:

Vancouver, British Columbia

May 5, 2025

Place and Date of Judgment:

Vancouver, British Columbia

June 27, 2025

Written Reasons by:

The Honourable Madam Justice DeWitt-Van Oosten

Concurred in by:

The Honourable Mr. Justice Abrioux

The Honourable Justice Riley

Summary:

A jury found the appellant guilty of second degree murder. There were two main issues at trial: (1) whether the appellant stabbed the victim and caused his death; and (2) if so, whether he intended to kill the victim or meant to cause him bodily harm that he knew was likely to cause the victim's death and was reckless as to whether death ensued. There was evidence the appellant consumed illicit drugs before the stabbing and was exhibiting signs of impairment. As such, the jury was instructed to consider the defence of intoxication. On appeal, the appellant alleged error in those instructions. HELD: The appeal is allowed and a new trial ordered. The judge correctly instructed the jury on the defence of intoxication in his main charge. If successful, that defence would have resulted in a verdict of manslaughter. However, after these instructions, the jury asked a question specific to the defence and the answer provided by the judge was confusing and incorrect at law. Among other things, the answer left the jury with too high of a threshold for assessing the defence. Shortly thereafter, the jury returned a verdict of guilty on the charge of second degree murder. In the circumstances of this case, the erroneous instructions require a new trial. The jury was not properly equipped to decide the case according to the law and the evidence.

Reasons for Judgment of the Honourable Madam Justice DeWitt-Van Oosten:

Introduction

- [1] In September 2023, a jury found the appellant, Ryan Ross Crossley, guilty of second degree murder in the tragic stabbing death of Robert Powshuk. The offence occurred in November 2021.
- [2] The appellant challenges the guilty verdict on different bases, including alleged errors in the instructions to the jury.
- [3] I have concluded the judge erred when explaining the defence of intoxication to the jury. He told the jurors that in deciding whether evidence of intoxication raised a reasonable doubt on the specific intent for murder, they had to consider whether the appellant's "level of intoxication impacted [his] mind to such an extent that it caused him to lose control of his thoughts and actions". This is legally incorrect. The judge's error was not harmless and necessitates a new trial. On the whole, the jury was not properly equipped to decide the case according to the law and the evidence: *R. v. Abdullahi*, 2023 SCC 19 at paras. 35-37.

Background

Factual context

- [4] On the day of the offence, Mr. Powshuk was interacting with the appellant and the appellant's brother, Curtis Crossley, on a street in New Westminster. There was evidence all three men were consuming illicit drugs. An argument broke out, possibly over a perception or belief by the appellant that Mr. Powshuk wrongfully took something from him after rooting through his belongings. The argument turned physical. As a result of the altercation, Mr. Powshuk sustained six stab wounds. Two of the stab wounds were to Mr. Powshuk's chest. The remaining stab wounds were to his right abdomen, mid-back, lower back, and right buttock. He died from these injuries.
- [5] Much of the incident involving the three men was captured on surveillance video, including the argument, the start of the physical altercation, stabbing motions by the appellant into Mr. Powshuk's lower right side, and the aftermath. There was a 40-second gap in the video during which additional stab wounds may have been inflicted. The video showed that Mr. Powshuk was kicked by both the appellant and his brother. Bear spray was also used against him. After the stabbing, Mr. Powshuk was able to walk away. He entered a nearby coffee shop and asked for help. He received medical assistance; unfortunately, that assistance was unable to prevent his death.

- [6] The surveillance video showed both the appellant and his brother in possession of knives. According to a pathologist who performed an autopsy on Mr. Powshuk, either knife could have caused the stab wounds. The knives were eventually located by the police. One of them was found near the appellant and contained his DNA on the handle and Mr. Powshuk's DNA on the blade. The second knife was thrown into a river by Curtis Crossley. It was retrieved; however, it did not offer DNA evidence.

Murder charges and the brother's guilty plea

- [7] Following the incident, the appellant and his brother were both charged with second degree murder. Before trial, Curtis Crossley pleaded guilty to the lesser and included offence of manslaughter. This plea was entered based on what is commonly referred to as "party liability". The Crown accepted that the appellant's brother was involved in the physical altercation with Mr. Powshuk but did not stab him. According to agreed-upon facts read into court at the time of the plea, Curtis Crossley's involvement was limited to kicking Mr. Powshuk and using bear spray against him.

The appellant's trial

- [8] After his brother's guilty plea, a new charging document was filed by the Crown against the appellant, and he proceeded to trial as the sole accused. He did not testify.
- [9] On the Crown's evidence, there were two main issues for the jury.
- [10] First, the jury had to determine whether the Crown proved that the appellant committed one or more unlawful acts that caused Mr. Powshuk's death. The video showed stabbing motions by the appellant and a knife found near him contained Mr. Powshuk's DNA on the blade. However, the defence argued that the 40-second gap in the video left open the possibility that Curtis Crossley also stabbed Mr. Powshuk and that those stab wounds were the ones that caused his death. The jury was not told of the fact that Curtis Crossley pleaded guilty to manslaughter or the agreed-upon basis for that plea.
- [11] If the jury concluded that the appellant stabbed Mr. Powshuk and caused his death, the second main issue to decide was whether the Crown proved that the appellant had the specific intent for murder at the time of the stabbing. There were two ways the Crown could do this. It could prove beyond a reasonable doubt that the appellant intended to kill Mr. Powshuk when he stabbed him. Alternatively, the Crown could prove beyond a reasonable doubt that the appellant meant to cause Mr. Powshuk bodily harm when he stabbed him, knew the bodily harm was likely to cause his death, and was reckless as to whether death ensued: s. 229(a)(i)-(ii), Criminal Code, R.S.C. 1985, C-46. In deciding the issue of intent, the jury was entitled to infer as a matter of common sense that a sane and sober person usually knows the predictable consequences of their actions and means to bring them about: *R. v. Walle*, 2012 SCC 41 at paras. 3, 64; *R. v. Weng*, 2022 BCCA 332 at para. 67.

[12] Evidence of intoxication was relevant to the issue of intent. Murder is a specific intent offence, requiring proof of "heightened thought and reasoning processes": *R. v. Tatton*, 2015 SCC 33 at paras. 42-43; *R. v. Brown*, 2022 SCC 18 at para. 43. If the jury found the appellant committed unlawful acts that caused Mr. Powshuk's death but had a reasonable doubt on the specific intent for murder due to intoxication, this would function as a partial defence to murder, and the proper verdict would be for the lesser and included offence of manslaughter.

[13] In his closing submissions to the jury, defence counsel drew the jurors' attention to evidence of the appellant's intoxication. He said:

- it was apparent from the surveillance video that at the time of the physical altercation with Mr. Powshuk, the appellant was "seriously impaired by drugs";
- there were a number of video clips showing behaviour consistent with intoxication. For example, before the altercation: (a) the appellant is seen laying on the ground for a considerable period, "sort of passed out"; (b) he "stagger[s] across" a street and almost gets hit by a car; (c) at another point on the video, he "wander[s] back into the street" and someone pulls him back on to the sidewalk; (d) he is seen to be "swaying"; (e) he is seen to be "staggering"; and (f) the three men were using drugs; and,
- police officers testified that when they located the appellant approximately eight and one half hours after the incident, he was "on the nod" (an expression sometimes used to describe moving in and out of consciousness or drowsiness after drug use).

[14] Defence counsel told the jurors that the evidence of intoxication should raise a reasonable doubt about whether the appellant intended to kill Mr. Powshuk at the time of the stabbing. He also said this evidence should raise a reasonable doubt on the Crown's alternative route to a murder verdict, namely, whether the appellant knew that stabbing Mr. Powshuk was likely to cause his death and was reckless as to whether death ensued:

So, when considering the totality of the evidence and deciding if the Crown has proven beyond a reasonable doubt that [the appellant] had the intention to commit murder, consider his state of impairment. It's a factor in -- in what's going on here, to say the least.

I've talked to you already about some of his actions and what do you take from that. Consider that, alongside with the evidence of his intoxication. Ask yourselves was he in a state to be thinking clearly, to be appreciating the likely result of his conduct?

And the -- the issue of intoxication, it's about foreseeability of consequences or the likely consequences. It's not a question whether someone can engage in purposeful conduct. You don't need to be completely unaware of what you're doing for this to be a factor. The issue is about the foreseeability, and that's why I talked - I asked that question, was he thinking clearly? Was he in a state to be appreciating the likely result of his conduct?

So we have those -- what we see on the video, the jab -- the stabs and some kicks. We don't know who did what from there, of course, but whatever you decide, if you can get to a point of somehow being satisfied that he stabbed further, he did so while in an advanced state of impairment through drugs, and the idea that he was in a state to be forming the necessary intent for murder, in my submission to you, is deeply flawed. He was mad at Mr. Powshuk, lashed out.

As you heard the Crown theory, he wanted his stuff back. Nothing more, nothing less, and as the Crown has said, that was his purpose. He was not in a state to be thinking clearly beyond that and foresee consequences of his actions. At a minimum, there's a doubt on that, and I -- and you can never lose sight of sort of what -- of where the burden of proof lies on that. And so that common-sense inference that I spoke of just a while ago, that has no application to this case.

So, if you find that [the appellant] was upset with Mr. Powshuk, attacked him, and was a significant contributing cause of the death, meaning to cause him some form of harm but did not intend to kill or think it likely that Mr. Powshuk would die, then manslaughter is the correct verdict.

[Emphasis added.]

[15] Crown counsel also addressed the issue of intoxication in his closing submissions:

no one has told us that they were taking drugs, but I think it's a fair inference and I'm not going to say otherwise, that early on [the appellant] and Mr. Powshuk appeared to be taking some illicit substances. And we also see him stagger at a few times And we know that when he was arrested eight and a half hours after the offence he did have illicit drugs on him

If you find that [the appellant] was so intoxicated he could not form the intent for murder or have a reasonable doubt that he had the intent for murder because of the drugs in the system at the time, this does not result in a not guilty finding. It reduce[s] murder to manslaughter.

But I say to you, when you look at all of the evidence, you should not have any difficulty in finding that [the appellant] knew what he was doing, and that he was not so impaired or intoxicated by the drugs that he could not have formed the intent for murder. Nor should any evidence of drug use raise any reasonable doubt in your mind.

you should have no doubt that any drug use[d] by [the appellant] at the time prevented him from having the intent for murder we've gone over his purposeful actions prior to the stabbing, during the stabbing, and after the stabbing, it shows that he knew what he was doing, and meant to do it.

[Emphasis added.]

Jury instructions

[16] In his final instructions to the jury, the judge summarized the defence theory of the case, saying this:

There [was] video evidence that [the appellant] had been using drugs all night and was intoxicated at the time of the offence. He [was] seen on video throughout the night smoking drugs and appearing to be "on the nod". There [was] video of him moving headfirst into a wall and importantly, just prior to the altercation, he [was] staggering down the middle of the street and almost [got] hit by a car. The commonsense inference that a sane and sober person intends the consequences of their actions doesn't apply here. [The appellant] was not in a state to be thinking clearly - to foresee the potential consequences of his actions

[17] In light of that theory and based on the evidence before the jury, the judge instructed the jurors on the defence of intoxication. He made it clear that if the jury had a reasonable doubt on the specific intent for murder because of intoxication, it must acquit on the charged offence and find the appellant guilty of manslaughter. The judge told the jury that a "person can become intoxicated by taking drugs" and there was evidence the appellant "consumed drugs prior to" the stabbing. The jury was told that this evidence had to be considered in deciding whether the Crown proved the intent for murder. If the appellant was "so intoxicated that he did not have the necessary intent to commit the offence", he would have a defence to murder. The judge explained that this is because intoxication "can interfere with a person's ability to foresee or measure the natural consequences of [their] actions". The judge correctly explained that the appellant did not have to prove the defence of intoxication. Instead, the Crown was required to prove beyond a reasonable doubt that the defence did not apply.

[18] The judge told the jury that in deciding whether the Crown met this burden, it had to consider "all the evidence" surrounding the appellant's "level of intoxication resulting from drug use and its effect on his intent and knowledge at the time of the act". If the jury was left with:

a reasonable doubt as to whether [the appellant's] consumption of drugs resulted in a level of intoxication which prevented him from forming the necessary intent, along with the other facts that shed light on [the appellant's] intent, then [the jury] must find [the appellant] not guilty of second degree murder, but guilty of manslaughter

[Emphasis added.]

[19] After these instructions, the judge reviewed the evidence of intoxication for the jury, including video evidence showing that the appellant was "having difficulty maintaining his balance at various times", "passing out on the ground", and when arrested approximately eight and one half hours after the offence, the appellant "appeared [to] have recently used drugs" and was "at times passing out and falling asleep" while detained at the police station.

Question from the jury

[20] After the final instructions were delivered, the jury began its deliberations. However, it returned to the courtroom with a question, specific to the defence of intoxication:

We have confusion over the application of intoxication in regards to intent. Can you define the level of intoxication in regards to an accused['s] understanding of the consequences of his/her actions. Can you provide examples?

[Emphasis added.]

[21] The judge, Crown counsel, and defence counsel all agreed that the jury was asking the judge to identify the level (or degree) of intoxication necessary to raise a reasonable doubt on the intent required for murder. The jury's use of the phrase "level of intoxication" presumably arose out of the judge's final instructions, which used this same language.

[22] The judge received submissions from counsel on how best to answer the question. He then provided the jury with additional instructions:

THE COURT: Members of the jury, good evening. Thank you for your question, which I have reviewed and I have reviewed it with Crown and defence counsel.

I'm just going to start by saying that this is one of those questions where I will remind you of my earlier instructions in their entirety, in particular the instructions with respect to intent and the two methods available to you to find that the Crown has proven that Mr. Crossley, that Ryan Crossley had the necessary intent at the relevant time, right?

And, as well, the written instructions where I set out some guidance for you with respect to the defence of intoxication and how you apply it. Now, obviously you have reviewed those, I expect you have, and then you have a question and that's a fair question.

I'm also going to remind you of this, which is, as members of the jury, this is an example of a situation where you will, naturally, have to apply human experience and your common sense. Determining intent is something that demands that, because of course we cannot look inside the mind of an individual. You have to look at the circumstances and, in looking at those circumstances, all of the circumstances, you need to apply your common sense, right?

Now, your question is -- I'm just going to read it back to you and then tell you how I intend to approach an answer, right?

We have confusion over the application of intoxication in regards to intent. Can you define the level of intoxication in regards to an accused understanding of the consequences of his or her actions. Can you provide examples.

Now, I interpret this question to be focusing on whether or not a level of intoxication can be defined at law in regards to an accused's understanding of the consequences of his or her actions, and then you ask for examples to be provided, and I'm taking that to be levels of intoxication, all right?

So let me provide the following comments. I've already made reference to the instructions that I've already provided. First general comment, and this is with respect to determining Ryan Crossley's state of mind at the relevant time. You must be satisfied beyond a reasonable doubt that Ryan Crossley was not aware of what he was doing -- pardon me, I'll start again. All right, with respect to state of mind -- all right. Please, I'll start again.

You must be satisfied that Ryan Crossley was aware of what he was doing and understood the effect of his actions. That's the first general comment.

Next, with respect to reasonable doubt regarding whether the level of his intoxication impacted his state of mind -- sometimes it's better to write things out. Excuse me.

Let me just put it this way. You must consider whether the level of intoxication impacted Ryan Crossley's mind to such an extent that it caused him to lose control of his thoughts and actions. The second general comment. I'm going to make some further comments, and hopefully this will help you with your range -- I'll just describe it as your range of intoxication concerns.

Now, intoxication as a defence to murder will arise where there is evidence of advanced intoxication. In the case of the second method of finding intent -- you'll recall that there are two methods -- in a charge of second degree murder, the focus is on whether the accused knew that the bodily harm he inflicted was likely to cause the victim's death. The degree of intoxication required to advance a successful intoxication defence may vary depending on the manner in which death was caused. For certain types of homicides, where death is the obvious consequence of the unlawful act, you will have to be satisfied as to whether a particularly advanced degree of intoxication existed. That's the answer.

So I've talked about the importance of your applying your common sense. This is an example. There is no legal definition in that respect, right? There is no test which can be applied in that respect. You have to consider the circumstances.

So I repeat, in this question, you will have to answer whether death by stabbing of Robert Powshuk is an obvious consequence of the unlawful act of the stabbing that you find occurred in this case. Right? So I mentioned "stabbing" twice, because that is the conduct that is the unlawful act you'll need to consider in this case.

Now, as well, evidence that an accused engaged in purposive conduct immediately before and after causing the death of the victim is relevant in determining whether the Crown has proved beyond a reasonable doubt that the accused caused the death with the intent for murder.

Final general comment, you'll have to consider whether Ryan Crossley at the relevant time, displayed indicia of impairment by drugs of the kind that might reasonably be considered to impair his ability to foresee the consequences of his actions.

So those are my further instructions. Now, again, I'm not going to provide you with examples, either of other types of unlawful conduct. You'll have to focus on the unlawful conduct at issue in this case, and again, I'm not able to provide you with a legal definition with respect to degree of intoxication other than what I've already provided.

Now, that doesn't mean you are prevented from coming back and asking further questions. Hopefully I haven't confused you any more, but you are certainly welcome to do so, so please do. Thank you for your question. We'll see you again

[Emphasis added.]

[23] After receiving these instructions, the jury resumed its deliberations. Defence counsel expressed concern about the judge having told the jury it must ask itself "whether the level of intoxication impacted [the appellant's] mind to such an extent that it caused him to lose control of his thoughts and actions". Defence counsel said that because of this wording, the jury may have been left with the erroneous impression that it had to find the appellant was intoxicated "to the point of automatism" before it could have a reasonable doubt on the intent required for murder. The judge disagreed and declined to have the jury return for a further, corrective instruction.

[24] Approximately 40 minutes after receiving the additional instructions, the jury returned a verdict of guilty for second degree murder.

Issues on Appeal

[25] The appellant's factum advances three grounds of appeal. He says the judge erred by:

- a) rejecting the appellant's request to admit evidence of the fact that his brother pleaded guilty to manslaughter;
- b) misstating the legal test for the intent required for murder by telling the jury on one occasion that it was sufficient if the appellant "should [as opposed to would] have known" stabbing Mr. Powshuk was likely to result in his death; and,
- c) misdirecting the jurors on the defence of intoxication when answering their question about the "level of intoxication" required to raise a reasonable doubt on intent.

[26] I do not consider it necessary to address the first and second of these alleged errors. I am satisfied the third error has been made out and standing alone, this error necessitates a new trial. Accordingly, nothing said in these reasons should be taken as commenting, one way or another, on the merits of the first two grounds of appeal.

Standard of Review

[27] The third of the alleged errors is focused on the judge's answer to the jury's question about intoxication. This answer supplemented the final charge, formed part of the judge's overall instructions, and was the last thing the jurors heard about the defence of intoxication.

- [28] To obtain a new trial based on an error in jury instructions, an appellant must persuade this Court that the instructions did not properly equip the jurors to decide the case according to the law and the evidence. In assessing whether that burden has been met, we are obliged to consider the impugned parts of the instructions in the context of the trial as a whole. Moreover, jury instructions are not measured against a standard of perfection. Consequently, one ambiguous or problematic statement will not warrant appellate interference if the charge as a whole properly equipped the jury to decide the case: Abdullahi at paras. 35-37, 41-42; R. v. P.A., 2024 BCCA 93 at paras. 20-23.

Discussion

- [29] On appeal, the Crown does not suggest that the defence of intoxication had no air of reality in this case. It accepts the judge was obliged to leave the defence with the jury and, consequently, it was important to ensure that in assessing the defence, the jury was correctly and sufficiently instructed.
- [30] The parties agree that the instruction on intoxication in the final charge was legally correct. It is only the response to the jury's question that is said to be problematic. It is well-established that a response to a question from the jury must be answered "clearly, correctly and comprehensively", even where the original instruction was free of error: R. v. S. (W.D.), [1994] 3 S.C.R. 521 at 530, 1994 CanLII 76. However, once again, in assessing the impact of an impugned answer, what was said by the judge must be considered in the context of the trial as a whole.

Defence of intoxication - legal principles

- [31] In R. v. Daley, 2007 SCC 53, the Supreme Court of Canada explained that a person who is not "so intoxicated as to lack [any] capacity" to form intent, may nonetheless raise a reasonable doubt on the Crown's proof of a specific intent by arguing that intoxication impacted their ability to exercise that capacity: at para. 40, emphasis added.
- [32] Daley made it clear that with a specific intent offence (including murder), the defence of intoxication will not succeed on evidence of "mild" intoxication: at para. 41. This is because "mild" intoxication will generally cause a person's "inhibitions and socially acceptable behaviour" to be relaxed but will not negate specific intent: at para. 41. Instead, a successful intoxication defence requires evidence of "advanced" intoxication: Daley at para. 41.
- [33] What does that mean? Daley did not specify the kind of evidence necessary to meet this threshold or identify specific indicia of impairment that must be present for the defence to succeed. Instead, the focus of the "advanced" intoxication inquiry is the overall impact of intoxication on the accused's state of mind at the time of the offence, as borne out by the entirety of the evidence. In the murder context, evidence of "advanced" intoxication is evidence that reasonably supports a finding that intoxication impaired the accused's "foresight of the consequences of [their] act sufficient to raise a reasonable doubt about the

requisite mens rea": Daley at para. 41. In other words, it is evidence that reasonably raises a doubt as to whether the accused intended to kill the victim or meant to cause the victim bodily harm that the accused knew was likely to cause their death and was reckless as to whether death ensued.

- [34] As a practical matter, whether the evidence of intoxication in a particular case will be sufficient to raise a reasonable doubt on the intent for murder will vary with the circumstances: Daley at para. 42, citing *R. v. Robinson*, [1996] 1 S.C.R. 683 at para. 52, 1996 CanLII 233. See also *R. v. Sundman*, 2021 BCCA 53 at para. 103, aff'd 2022 SCC 31; *R. v. Arjun*, 2015 BCCA 273 at para. 5, leave to appeal ref'd [2015] S.C.C.A. No. 324; *R. v. Florence*, 2014 BCCA 288 at para. 22. This is an individualized inquiry.
- [35] For example, in a case where the accused is alleged to have killed someone by pointing a loaded shotgun directly at their head and pulling the trigger, the evidence of intoxication will likely "have to establish a particularly advanced degree of intoxication" before it will be sufficient to raise a reasonable doubt on the intent for murder because death will have been such an obviously foreseeable consequence of the unlawful act: Daley at para. 42, emphasis added. In a different case, where the natural and probable consequences of the unlawful act that causes death may not be as clear, "advanced" intoxication of a lesser degree may suffice to raise a reasonable doubt. It is generally the case that the "more severe the injuries and the more force required to inflict them, the stronger the inference will be that the accused [including an intoxicated accused] intended to kill the victim or cause the victim bodily harm knowing it was likely to cause death": *R. v. So*, 2024 BCCA 101 at para. 91, citing *R. v. Rodgeron*, 2015 SCC 38 at paras. 20, 55.
- [36] Deciding whether evidence of intoxication reasonably supports the defence is determined case-by-case. What is critical in the murder context is that whatever the evidence might consist of, it must be sufficient to raise a reasonable doubt as to whether intoxication by drugs or alcohol impaired the accused's foresight of the consequences of their actions: Daley at para. 41. As aptly articulated by this Court in *R. v. Ruff*, 2019 BCCA 412, the evidence must be sufficient to "reduce" the accused's "appreciation of the consequences of [their] actions, at the time of the act": at para. 21.
- [37] In making this assessment, the trier of fact may consider: the nature of the act(s) that caused death; the manner in which those acts were committed; the quantity of alcohol or drugs consumed before the offence; whether the accused was displaying impairment at the time of the offence and to what extent; evidence of purposive behaviour before, during, and after the offence; and any expert evidence that may be adduced specific to intoxication, including its likely effect on the accused's ability to appreciate the consequences of their actions: Sundman at para. 108. This is not a closed list. There may be other types of evidence relevant to the assessment. Again, as explained in *R. v. Matchatis*, 2020 ABCA 435, "[d]etermining whether an accused's level of intoxication rises to the level of impairing an accused's foresight of the consequences of their acts is a highly factual and contextual exercise": at paras. 26-27. The trier of fact:

[32] must weigh and consider all of the evidence of intoxication in a contextual manner to determine whether the accused's intoxication crossed the line from mere loss of inhibition, impaired judgment and increased bravado to the point where they are left with a reasonable doubt as to whether the intoxication was severe enough that its effect might have impaired the accused's foresight of the consequences of their actions.

[Matchatis, emphasis added.]

See also R. v. Rogers, 2024 NSCA 100 at paras. 56-57.

Defence of intoxication - application to the case

[38] In his final instructions, the judge correctly told the jury that intoxication from drugs was a defence to murder if the appellant was "so intoxicated that he did not have the necessary intent to commit the offence". He correctly stated that intoxication can "interfere with a person's ability to foresee or measure the natural consequences of [their] actions". As required, the judge linked the evidence of intoxication to the common-sense inference, told the jury this was a permissive inference, and explained that the jury must not draw the inference if, on the whole of the evidence, including evidence of intoxication, it had a reasonable doubt as to whether the appellant had "one of the intents required for murder".

[39] Consistent with Daley, the judge made it clear that evidence of "mild" intoxication is not sufficient to support the defence:

the mere fact that a person's mind is affected by drugs so that they may -- so that they lose inhibitions or act in a way in which they would not have done had they been sober is no excuse if the required intent is proved. A drunken intent is still intent.

[40] The judge then said that if the jury had a reasonable doubt as to whether the appellant's "consumption of drugs resulted in a level of intoxication which prevented him from forming the necessary intent", it must find him not guilty of murder and guilty of manslaughter (emphasis added). Although the judge did not use the language of "advanced" intoxication here, this final instruction substantially conformed with Daley. The appellant accepts that such is the case. The jury was correctly told to acquit the appellant of second degree murder if the evidence of intoxication raised a reasonable doubt as to whether he intended to kill Mr. Powshuk when he stabbed him, or meant to cause Mr. Powshuk bodily harm that he knew was likely to cause his death and was reckless as to whether death ensued. Importantly, the judge also told the jury that the Crown bore the burden of disproving the defence.

[41] However, the appellant says the judge's answer to the jury's question changed these instructions in a fundamental and highly prejudicial way. The appellant submits that the answer introduced a new question for the jury to ask in assessing the availability of the defence, namely, whether the evidence of intoxication was such that it "caused [the appellant] to lose control of his thoughts and actions" (emphasis added). The appellant says

this instruction goes well beyond what was meant by "advanced" intoxication in Daley. It set a threshold for the defence that would have left the jury with the erroneous impression that evidence of intoxication can only raise a reasonable doubt on the specific intent for murder if it reveals a state of mind and conduct equivalent to automatism.

- [42] In Daley, the Supreme Court of Canada recognized there will be cases (albeit rare) in which evidence of impairment by drugs or alcohol supports a finding of "extreme" intoxication akin to automatism. This condition, if found to exist, will negate the voluntariness of someone's actions, and at common law, provides a "complete defence to criminal responsibility": at paras. 41-43. The appellant did not advance a defence of "extreme" intoxication and did not argue that the jury could infer his conduct was involuntary. The appellant says the judge wrongly incorporated the "extreme" intoxication threshold into his answer to the jury's question, and by so doing, left the jurors with too high of a threshold to apply in deciding whether they had a reasonable doubt on intent.
- [43] The Crown says the judge's answer was responsive and correct in law. The jury asked what "level of intoxication" is necessary to raise a reasonable doubt on the specific intent for murder. To answer that question, the judge had to explain that "advanced" intoxication is required, and importantly, what that means. No specific definition or language is mandated by Daley; rather, the judge's obligation was to make clear that the intoxication had to reach a level from which the jury could reasonably have a doubt about whether the appellant could foresee the consequences of his actions. The Crown says the judge did precisely that and contrary to the appellant's submission, he did not impose too high of a standard for a successful intoxication defence.
- [44] According to the Crown's factum, the judge's description of a level or degree of intoxication that "caused [the appellant] to lose control of his thoughts and actions" was "simply another way of expressing, in plain language, the degree of advanced intoxication required to make out the defence". Furthermore, the Crown argues that this articulation was approved by this Court in *R. v. Pi*, 2023 BCCA 105. As such, the judge can hardly be faulted for using it. Finally, the Crown submits that if the judge did err, it was harmless given his earlier instructions and this Court should apply the curative proviso under s. 686(1)(b)(iii) of the Criminal Code.
- [45] The appellant has persuaded me that the judge's answer to the jury's question was incorrect at law and, importantly, substantially prejudicial. Overall, the answer is confusing. There are parts of it that are inconsistent with the instructions provided in the final charge. Most critically, I agree with the appellant that the answer introduced an improper threshold for the jury's consideration of the defence of intoxication.
- [46] The judge began the substantive portion of his answer with some "general comments" about the jury's task in "determining [the appellant's] state of mind at the relevant time". He told the jury it had to be satisfied beyond a reasonable doubt that the appellant "was not aware of what he was doing". This is incorrect. It is the opposite of what the Crown was required to prove.

- [47] After making this comment, the judge recognized it may be problematic and appropriately, he attempted to rectify the instruction. He told the jury it must be satisfied the appellant "was aware of what he was doing and understood the effect of his actions". This is also an incorrect articulation of the Crown's burden. As the judge had properly explained in his final charge, much more was required to prove the intent for murder. The Crown bore the onus of proving beyond a reasonable doubt that the appellant had the specific intent for murder, namely: that he either intended to kill Mr. Powshuk or meant to cause him bodily harm that he knew was likely to cause his death and was reckless as to whether death ensued.
- [48] The judge then turned to reasonable doubt arising from intoxication. As noted, he told the jury it "must" consider whether the "level of intoxication impacted" the appellant's mind "to such an extent that it caused him to lose control of his thoughts and actions". There is no such requirement at law. Daley does not impose this evidentiary threshold or define "advanced" intoxication in this way. I agree with the appellant that the language used here is more closely aligned with the defence of "extreme" intoxication than one of "advanced" intoxication. In *Brown*, the Supreme Court of Canada described "extreme" intoxication as the "highest form of intoxication" that "results in a person losing voluntary control of their actions": at para. 45, emphasis added. "Absent a willed movement of the body, the Crown cannot prove the actus reus [of an offence] beyond a reasonable doubt : at para. 47, internal reference omitted. In addition, "[w]here an accused has no conscious awareness of their movements, they necessarily cannot intend their involuntary acts": *Brown* at para. 48, emphasis added.
- [49] The judge next told the jury that the defence of intoxication will arise where there is evidence of "advanced" intoxication. This is correct. He also told the jurors that the "degree of intoxication required to advance a successful intoxication defence may vary depending on the manner in which death was caused". This too is correct. However, the judge went on to say that for "certain types of homicides, where death is the obvious consequence of the unlawful act, [the jury would] have to be satisfied as to whether a particularly advanced degree of intoxication existed" (emphasis added). In my view, this is not correct.
- [50] The case law on the defence of intoxication recognizes that as a practical matter, the defence is unlikely to succeed without evidence of a particularly advanced degree of intoxication where death was the obviously foreseeable consequence of the unlawful act. However, this does not mean a jury must be instructed that before it can have a reasonable doubt on intent in those cases, it must be satisfied of (or find) a "particularly advanced degree of intoxication". The "advanced" intoxication threshold from Daley remains the legal standard. With this statement, the judge mistakenly transformed an observation that has been made about the kind of evidence likely required to achieve a reasonable doubt in some cases, into a legal threshold.
- [51] The judge next told the jury there is no "legal definition" of the level of intoxication required to successfully advance the defence (which is correct), and no specific "test which can be applied in that respect" (also correct). However, these statements contradict the earlier

comment about the need for the jury to ask whether the appellant "lost control" of his "thoughts and actions". That instruction does suggest a specific threshold. The judge then said the jury would have to decide whether "death by stabbing [was] an obvious consequence of the unlawful act that [it found] occurred in this case". However, he did not go on to explain what inference the jury might draw from that finding, and critically, how any such inference might be impacted by evidence of "advanced" intoxication.

- [52] The judge finished his answer by identifying various factors the jury should consider in deciding whether the evidence of intoxication raised a reasonable doubt, including evidence of "purposive conduct immediately before and after" the unlawful act, and whether the appellant "displayed indicia of impairment by drugs of the kind that might reasonably be considered to impair his ability to foresee the consequences of his actions". He then said he was not going provide the jury with examples of "advanced" intoxication, or a "legal definition with respect to degree of intoxication other than that [which he had] already provided" (emphasis added). The only definition provided, of course, was the one referred to earlier, namely, "losing control" of "thoughts and actions". As such, the incorrect and more stringent threshold for the defence was brought back into focus.
- [53] In my view, the supplemental instructions to the jury, in their cumulative effect, were confusing and importantly, did not correctly answer the question posed. Respectfully, the instructions ran the realistic risk of the jurors leaving the courtroom with the erroneous understanding that to have a reasonable doubt on the specific intent for murder based on intoxication, they had to find (be "satisfied") that the appellant was displaying a "particularly advanced degree of intoxication" at the time of the stabbing, namely, one that "caused" him to "lose control" of his "thoughts and actions".
- [54] The Crown says this wording was approved of in *Pi*. I disagree.
- [55] Mr. *Pi* was found guilty of second degree murder after a trial by judge alone. He stabbed the victim four times. Mr. *Pi* argued that his "heavy and chronic use of methamphetamine prevented him from forming the specific intent to commit murder": at para. 2. There was also evidence from a defence expert who testified that Mr. *Pi* was experiencing a "substance-induced psychotic disorder" at the time of the offence, with "psychotic symptoms, such as paranoia": at para. 35. It was Mr. *Pi*'s position that the expert evidence supported a finding he may have foreseen the harm that would flow from stabbing someone, but not the "fatal outcome": at para. 57. In other words, he would have understood the nature and quality of his actions, but did not intend to kill the victim: at para. 60.
- [56] The trial judge rejected this argument. He concluded that when Mr. *Pi* inflicted the fatal stab wounds, he "knew that if he stabbed someone in the torso he ran the risk of causing an injury that would kill them": at para. 41. The trial judge accepted that Mr. *Pi* was a regular user of drugs and his substance abuse "caused significant disruption in his life": at para. 42. However, it did not:

[cause] him to lose control of his thoughts and actions. The judge therefore did not accept that, at the relevant time, Mr. Pi was in a drug-induced mental state that was either an active psychosis or significant intoxication so as to raise a doubt that he was aware of his actions and their consequences.

[At para. 42, citing paras. 173, 178 of the trial judgment, emphasis added.]

[57] On appeal, Mr. Pi argued the trial judge erred in law by failing to consider the impact of his drug use on his mental state. This Court disagreed. It was apparent from his reasons that the trial judge "alluded to the expert evidence [relevant to drug use] and provided reasons for his ultimate conclusion": It "was for the judge to weigh [that] evidence and to give effect to it in consideration of the evidence as a whole": at para. 92.

[58] In my view, Pi is distinguishable from this case in two significant ways.

[59] First, unlike the situation before us, Mr. Pi relied upon two distinct bases to raise a reasonable doubt on the specific intent for murder: (1) intoxication; and (2) a stimulant-induced "active psychosis" (indicative of a mental disorder), that manifested itself in the form of paranoid thoughts, caused Mr. Pi to panic, and "led" to the unlawful act(s) that underlay the offence: at paras. 42, 79. This Court's reference to "los[ing] control" of his "thoughts and actions" occurred in that context and in response to the specific bases on which Mr. Pi said the judge should have had a reasonable doubt on the issue of intent.

[60] Second, and more critically, Pi was a judge-alone trial and in resolving the appeal, this Court was not asked to consider the appropriate wording when explaining "advanced" intoxication to a jury. Instead, the focus was on whether the judge adequately considered the evidence on the issue of intent. In that specific context, the Court's reference to Mr. Pi's drug use not having caused him to "lose control of his thoughts and actions" cannot be viewed as having endorsed specific wording or a particular threshold for use in jury instructions when intoxication is raised in response to murder: at para. 42.

[61] Standing alone, the judge's statement about a "particularly advanced degree of intoxication" may not have been enough to justify appellate intervention in this case. However, the combination of that statement with the reference to losing control of "thoughts and actions" ultimately left the jury with too high of a threshold for the defence.

[62] What should the judge have said in answer to the jury's question? As noted, there is no mandatory wording that addresses this situation. Judges have considerable latitude in crafting and tailoring their answers, unique to the case before them and with the assistance of counsel.

[63] However, it is my view that the Model Jury Instructions prepared on behalf of the Canadian Judicial Council offer helpful guidance on how best to have shaped the answer. In particular, see ss. D(6) and E(4), Canadian Judicial Council, Model Jury Instruction, Online: National Judicial Institute <<https://www.nji-inm.ca>> (June 11, 2025). I have also found David Watt, K.C. and Jill Makepeace, Watt's Manual of Criminal Jury Instructions, 2024. (Toronto:

Thomson Reuters Canada Limited) instructive. In answer to the question, the judge should have:

- reminded the jury that it could only find the appellant guilty of second degree murder if the Crown proved the intent for murder beyond a reasonable doubt;
- confirmed that evidence of the appellant's drug consumption was relevant to deciding whether that burden had been met;
- reiterated that the mere fact a person's mind is affected by drugs, such that they lose their inhibitions or act in a way they would not have acted if sober, is no excuse if the Crown proves the intent for murder;
- explained that a reasonable doubt on the intent for murder arising from the appellant's drug consumption required evidence of "advanced" intoxication. The level or degree of intoxication must have been sufficient to negate an intention to kill or impair the appellant's foresight of the consequences of his conduct at the time of the unlawful act(s) that caused death. In other words, it must have been sufficient to impair the appellant's foresight that the bodily harm he meant to cause to Mr. Powshuk was likely to cause his death;
- explained that in deciding this issue, the jury was obliged to consider all of the evidence adduced at trial, including: (a) evidence about what the appellant did at the time of the stabbing, how he did it, and what, if anything, he may have said; and (b) evidence about what the appellant consumed before the stabbing, how much he consumed, when he consumed it, and importantly, the effect of that consumption on his intent and foresight of the consequences of his actions at the time of the stabbing, not at some earlier or later time;
- reminded the jury that as a matter of common sense, if a person acts in a way that has predictable consequences, they usually know what those consequences are and either intend or mean to bring them about or know that the consequences will probably occur. However, this is not an inference the jury was obliged to draw. Indeed, the jury was not to draw this inference if, after considering all of the evidence, including the evidence of intoxication, it had a reasonable doubt about the appellant's state of mind at the time of the stabbing; and finally,
- reminded the jury that the appellant was not required to prove that he lacked the intent for murder. Instead, the Crown bore the burden of proving beyond a reasonable doubt that despite the evidence of drug consumption, the appellant intended to kill Mr. Powshuk or meant to cause him bodily harm that he knew was likely to cause his death and was reckless as to whether death ensued.

[64] In responding to the appeal, the Crown emphasizes that the judge's answer to the jury's question cannot be considered in isolation. In his final instructions, he correctly charged the jury on the defence of intoxication. When responding to the question, the judge reminded the jurors of his prior instructions and they were given a written copy of those instructions for purposes of their deliberations.

- [65] I appreciate that in deciding whether a jury has been properly equipped to decide the case according to the law and the evidence, impugned instructions are considered in the context of the trial as a whole. I also appreciate that judges are not held to a standard of perfection. However, this is a case in which confusing and legally problematic instructions on a material issue were provided to the jurors in response to a specific question, and it was the last thing they heard before deciding the availability of the defence.
- [66] The Crown also emphasizes that defence counsel only raised concerns about the language of "losing control" after the answer was provided to the jury, not beforehand. That may be so, but as soon as the answer was delivered, defence counsel expressed concern. There was time for the judge to bring the jury back in and provide a corrective instruction. He declined to do so. In these circumstances, I do not consider the timing of the defence objection to make a difference in the appellate analysis.

Disposition

- [67] I have concluded the judge committed reversible error in his answer to the jury's question about the defence of intoxication. Furthermore, in the circumstances of this case, that error was not harmless. The defence of intoxication formed an integral part of the appellant's response to the prosecution for second degree murder and trial fairness required that the defence be given meaningful consideration with reference to the proper legal framework. That did not happen, and the curative proviso is not available.
- [68] I would quash the conviction, set aside the jury's verdict, and order a new trial.

"The Honourable Madam Justice DeWitt-Van Oosten"

I AGREE:

"The Honourable Mr. Justice Abrioux"

I AGREE:

"The Honourable Justice Riley"

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