
CANADA / JUDGMENT

R. v. Fraser

2021 BCCA 432

COURT

British Columbia Court of Appeal

DECIDED

16 November 2021

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2021 BCCA 432 R. v. Fraser

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Fraser,

2021 BCCA 432

Date: 20211116

Docket: CA46342

Between:

Regina

Respondent

And

Stephen George Fraser

Appellant

Before:

The Honourable Mr. Justice Frankel

The Honourable Mr. Justice Fitch

The Honourable Madam Justice DeWitt-Van Oosten

On appeal from: An order of the Supreme Court of British Columbia, dated December 13, 2018 (R. v. Fraser, Kamloops Docket 103101-2).

Counsel for the Appellant

(via videoconference):

S.R. Wright

Counsel for the Respondent

(via videoconference):

S.E. Elliott

Place and Date of Hearing:

Vancouver, British Columbia

June 16, 2021

Place and Date of Judgment:

Vancouver, British Columbia

November 16, 2021

Written Reasons by:

The Honourable Mr. Justice Frankel

Concurred in by:

The Honourable Mr. Justice Fitch

The Honourable Madam Justice DeWitt-Van Oosten

Summary:

The appellant appeals his conviction for murder on the basis that his right to a fair trial was prejudiced by Crown counsel: (1) cross-examining him on whether he had constructed his evidence to fit the disclosure he had been given; and (2) inaccurately summarizing the forensic evidence in her jury address. Held: Appeal dismissed. The door to cross-examining the appellant on whether he had constructed his evidence to fit the Crown's forensic evidence had been opened by the fact that his testimony in regard to how events unfolded was inconsistent with how he had described those events in a statement to the police. There was nothing improper in Crown counsel's jury address.

Reasons for Judgment of the Honourable Mr. Justice Frankel:

Introduction

- [1] Stephen George Fraser appeals his conviction on a charge of second degree murder following a trial in the Supreme Court of British Columbia before Justice Marchand (then of that Court) and a jury. In his evidence, Mr. Fraser admitted he stabbed the victim, Cody Foster, multiple times in Mr. Foster's trailer. He said he acted in self-defence after Mr. Foster told him a gang had ordered Mr. Foster to kill him.

- [2] It was not disputed that Mr. Fraser came out of Mr. Foster's trailer at 9:30 p.m., calling for help. The police were called and Mr. Fraser was arrested. While being transported to the detachment Mr. Fraser said Mr. Foster had chased after him with a knife. When a police officer interviewed Mr. Fraser two days later, he acknowledged stabbing Mr. Foster. He said the altercation lasted no more than two minutes and that he ran out of the trailer as soon as Mr. Foster was too weak to stop him. However, Mr. Fraser described events differently in his direct examination at trial. He testified the altercation occurred at approximately 5:20 p.m. and that he passed out for four hours before leaving the trailer. Crown counsel cross-examined Mr. Fraser on this inconsistency. During that cross-examination, Mr. Fraser agreed he had read the various forensic reports that were part of the Crown's disclosure. In addressing the jury, Crown counsel submitted Mr. Fraser had tailored his evidence to fit the Crown's forensic evidence.
- [3] In challenging his conviction, Mr. Fraser submits his right to a fair trial was prejudiced by Crown counsel: (1) cross-examining him on whether he had constructed his evidence to fit the disclosure he had been given; and (2) inaccurately summarizing the forensic evidence in her jury address.
- [4] For the reasons that follow, I would dismiss this appeal.

Factual Background

The Crown's Case

- [5] Mr. Fraser and Mr. Foster were co-workers and friends. There was no history of animosity or violence between them. At the time of Mr. Foster's death, he was nearly 27 years old; Mr. Fraser was 56 years old. The altercation that resulted in Mr. Foster's death occurred on Saturday, February 11, 2017, in Mr. Foster's trailer at a trailer park in Kamloops, British Columbia.
- [6] At approximately 3:00 p.m. on February 11, 2017, Mr. Foster purchased a bottle of Smirnoff Double Black Vodka from a liquor store in Kamloops. The manager of the store, who spoke with Mr. Foster, testified he did not appear intoxicated. At approximately 4:30 p.m., Mr. Foster met with the trailer park's manager to pay outstanding hydro costs. The manager testified Mr. Foster was "quite alert" and that she did not smell alcohol on him.
- [7] At approximately 9:30 p.m. Mr. Fraser left Mr. Foster's trailer. He was dishevelled and covered in blood. He banged on the side of a nearby trailer. The occupants of that trailer who came outside testified Mr. Fraser said various things such as: "I need an ambulance, I've been stabbed, I need an ambulance, call the police"; "I'm hurt, I been [sic] stabbed, my buddy's hurt"; "Help, I need help, somebody tried to stab me, he has a knife"; "Somebody's been stabbed, call the cops". One of the occupants called 9-1-1. Two occupants followed Mr. Fraser to Mr. Foster's trailer, where they found Mr. Foster dead, lying on a collapsed kitchen table at the north end of the trailer.

- [8] Another person who entered the trailer shortly after had experience working as an auxiliary RCMP member and a paramedic and realized the trailer was a crime scene. He testified he told the person with him that they had to leave and they did so carefully. After leaving, he closed the door and did not allow anyone to enter the trailer while waiting for the police to arrive.
- [9] Mr. Fraser was restrained to await the arrival of the police. While being restrained Mr. Fraser muttered something like, "They're gonna kill me, he's gonna kill me, soldiers, soldiers, Independent Soldiers, they're gonna kill me." A police officer testified the Independent Soldiers are a known criminal gang.
- [10] The police arrived at approximately 9:50 p.m. After the police checked Mr. Foster's trailer, Mr. Fraser was arrested for murder. Before transporting Mr. Fraser to the detachment, an officer examined Mr. Fraser's chest and back for injuries but did not notice any.
- [11] During cross-examination of the officer who transported Mr. Fraser to the detachment, one of Mr. Fraser's counsel (neither of whom are counsel on this appeal) referred to the fact that the conversation in the police vehicle had been recorded and a transcript of it provided to the defence. The officer stated Mr. Fraser seemed paranoid but did not appear impaired by alcohol or drugs. Using the transcript, and without objection from Crown counsel, Mr. Fraser's counsel elicited that Mr. Fraser said he was concerned the Independent Soldiers would kill both him and the officer. Mr. Fraser also said, "He was going to kill me and my rats and he's chasing after me with a knife." Mr. Fraser had pet rats that were found in a pet carrier in Mr. Foster's trailer.
- [12] The officer who examined Mr. Fraser at the detachment observed apparent blood staining on the palms and backs of Mr. Fraser's hand, but no injuries. There was an abrasion below Mr. Fraser's right eye, blood staining around his mouth, a scratch below his left ear, and a scratch on his abdomen just below his chest.
- [13] The forensic pathologist who conducted the autopsy on Mr. Foster's body testified that:
- There were 28 injuries to Mr. Foster's head and neck, 17 of which were caused by a sharp-edged object such as a knife.
 - Mr. Foster died from blood loss caused by a stab wound on the right side of his neck behind the ear that injured his carotid artery; death would have occurred within minutes.
 - A stab wound on the right side of Mr. Foster's neck indicated that a knife had been moved or rotated when it was inserted.
 - There were five stab wounds on the left side of the neck behind the ear; one wound had a fragment from a knife blade protruding from it; an x-ray of the neck revealed two more fragments; a fourth fragment was found in the hoodie Mr. Foster was wearing.

- Eleven injuries were probably lacerations due to blunt force; Mr. Foster suffered a broken nose, a fractured orbital bone, and a fractured jaw; multiple blows would have been required to cause such injuries; these injuries could have been caused by a glass bottle; it would be unusual for a fist to have caused these injuries and it was more likely that they were caused by a hard object.
- There were no defensive wounds on Mr. Foster's left hand and only a scratch or superficial cut on his right hand.
- There were no physical indicia of alcoholism or alcohol abuse.

[14] Mr. Fraser admitted (in writing) that:

- DNA analysis determined that the blood found in clippings taken from Mr. Foster's fingernails was Mr. Foster's.
- At the time of his death, Mr. Foster had a blood alcohol concentration of .278 (i.e., nearly three and a half times the legal limit for operating a motor vehicle); this level is generally associated with very heavy intoxication; a very heavily intoxicated person will have a great deal of difficulty standing or even walking without support and will experience significant motor and mental dysfunction and, therefore, will not display purposeful, goal oriented, and coordinated physical action.
- Heavy drinkers may have a significant degree of tolerance to the effects of alcohol.
- Mr. Foster had THC (i.e., the main psychoactive component of marihuana) in his body and that marihuana combined with alcohol can increase the state of intoxication relative to the ingestion of either one alone.

[15] A knife handle with a small piece of blade attached located in the trailer, blade fragments located in the trailer, and the blade fragments located during Mr. Foster's autopsy were examined and found to be part of one knife.

[16] An expert on bloodstain pattern analysis who examined Mr. Foster's trailer opined that:

- Mr. Foster received blows in two areas of the trailer; he received a minimum of two blows while near or around the north end of the trailer while on or near the floor, and a minimum of one blow while lying on the collapsed kitchen table.
- An object with a straight edge and contaminated with blood--such as a knife--had come into contact with the table after blood had already been deposited on that object.
- It was likely that the assailant was standing at the north end of the trailer facing toward the entrance at the south end and was swinging an object contaminated with blood causing the castoff pattern on the ceiling and west wall.
- Blood transfer patterns were consistent with someone contaminated with blood other than Mr. Foster moving around the trailer after the bloodletting event had occurred.

- A towel found in the trailer had been used to wipe blood off Mr. Foster's face.
 - Saturation and transfer stains on Mr. Foster's sock indicated that at some point he was upright and either walking or standing when he came into contact with blood on the floor of the trailer; footwear transfer patterns were consistent with someone other than Mr. Foster moving around the trailer after the bloodletting event had occurred.
 - Eyeglasses on a bench next to Mr. Foster's body had transfer stains consistent with fingers contaminated with blood coming into contact with the lens as well as drip/gravity and spatter stains showing the glasses had been in proximity to a force-related event.
 - Transfer stains on a box found at the north end of the trailer (near the towel and glasses) indicated that it had been moved both during and after the bloodletting event.
 - Transfer stains on Mr. Fraser's jacket--which was wedged between Mr. Foster's body and the bench--were consistent with it having come into contact with a source of blood.
 - Mr. Foster's jeans indicated he had come into contact with a source of blood, potentially while kneeling in that source.
 - The spatter stains on Mr. Fraser's pet carrier--located close to Mr. Foster's body in the passage leading into the area in which the body was found--indicated it had been in proximity to multiple force-related events and had come into contact with someone's hand or fingers contaminated with blood.
- [17] The police located an empty Smirnoff Double Black Vodka bottle on the surface of the snow in the bed of a white pick-up truck registered to Mr. Fraser's father parked outside Mr. Foster's trailer; Mr. Fraser's left-hand palm print was found on that bottle, embedded in blood. Mr. Foster's blood was found on the bottle's neck and mouthpiece.
- [18] A voir dire was held during the Crown's case to determine the admissibility of statements Mr. Fraser made to police officers at the detachment. The Crown did not intend to lead these as part of its case, but wished to have them available for use in cross-examination should Mr. Fraser testify. The trial judge ruled the statements admissible.

Mr. Fraser's Case

- [19] A work colleague of Mr. Fraser and Mr. Foster testified the three of them socialized, including drinking and smoking marihuana. He described them as good workers. Another work colleague testified he was not aware of either of Mr. Foster or Mr. Fraser having being disciplined at work. One of these witnesses said that on the afternoon of Friday, February 10, 2017, he saw Mr. Foster at a bank; Mr. Foster appeared to be texting and looked angry.

Mr. Fraser's Evidence In-Chief

- [20] Mr. Fraser was the last defence witness. He began his testimony by describing how he and Mr. Foster had become friends through work.

[21] Mr. Fraser said that on February 11, 2017, he was living at his father's home. He was working on a pet carrier for his rats when Mr. Foster arrived at 3:19 p.m. looking for money to pay his hydro costs and for a ride home. Mr. Fraser borrowed money from his father to give to Mr. Foster and then drove Mr. Foster home using his father's pick-up truck. He brought the pet carrier with his rats inside the trailer. Mr. Foster handed him a bottle of vodka and said it was for him. Mr. Foster went to pay his hydro costs and Mr. Fraser made himself a drink. Mr. Foster had a beer when he returned to the trailer and the two of them smoked a joint together.

[22] Mr. Foster removed the cushions and plywood from the bench in the dining area of the trailer where Mr. Fraser normally sat and placed the pet carrier inside the well. As a result, Mr. Fraser sat on the nearby couch.

[23] Mr. Fraser described what happened next as follows:

- When he got up at about 5:10 p.m. to pour himself another drink, Mr. Foster asked him to crack his back, which Mr. Fraser did; when he went back to pouring his drink, Mr. Foster said, "Just so you know, I really don't want to kill ya. But I got no choice."
- He put his drink down and turned to face Mr. Foster. Mr. Foster came forward and hugged him, saying, "Don't feel bad, my brother from another mother. It's not personal, it's just business."
- He was shocked and, without realizing it, went into "bear encounter mode".
- Mr. Foster said he was with the Independent Soldiers, it was not personal, and that he was just following orders.
- At this point, he felt he was Mr. Foster's prisoner and that it would be useless to try to fight Mr. Foster who was younger and stronger; as Mr. Foster was hugging him, he looked around for something he could use to distract or hit Mr. Foster and spotted a knife in the kitchen dishrack.
- When Mr. Foster started to let go of him, he picked the knife up and stabbed Mr. Foster once in the neck; Mr. Foster grabbed Mr. Fraser's hand causing the blade of the knife to break in Mr. Foster's neck; Mr. Foster reached for the broken knife blade in his neck. In this regard, Mr. Fraser testified:

I thought the -- I thought the knife must have broken off right at the handle, but when I saw the evidence photos of the small broken piece with the rivet hole partially in it that was on -- in his hoodie I guess, I realized that that section probably hadn't broken off yet. So when I pushed his hand out of the way it must have embedded in his neck beside -- beside where the first wound was, but at the time I didn't know that. I just wanted to block him from pulling out that knife.

And so then he had pushed my hand away again and that time I had noticed a -- a fine -- a fine spray hitting my face, I'm not sure where, but it was in the upper part of my face and it kind of made a motion across my face. I think it must have hit my right side of my glasses, my -- my right side of my face and my glasses. Then he started reaching for the knife blade again, so I pushed -- pushed his hand away again, still holding onto that handle. The -- I thought it had no blade in it, but looking at the evidence it must have had -- must have had a piece of blade still left on it.

[Emphasis added.]

· He was facing south; Mr. Foster was facing north; Mr. Foster pushed him backwards towards the north end of the trailer; he lost his balance, went "airborne", and hit his head against something; Mr. Foster climbed on top of him; he was lying on his back on top of the table; Mr. Foster was trying to get the knife blade out of his neck and he was blocking Mr. Foster from doing so; the table gave way and they rolled off of it. He described what happened next as follows:

So now all of a sudden I'm directly on top of him. In fact, because I still had my hand up beside -- beside the first wound, when we stopped rolling over I had to put my hand up to brace to keep from spinning right over onto the couch and I ended up pushing my hand, I guess, on the upper part of his face, probably right near his eye, and that's when the -- the knife handle that I was holding just -- it felt like it exploded. It just -- the two halves separated and I guess maybe the stub of blade that was there pushing up against his eye caused the handle to -- to break apart.

· To try to escape, he punched Mr. Foster, who was beneath him; he hit Mr. Foster in the face as hard as he could about four times; he spun around and took off towards the door (at the south end of the trailer); after moving about four feet he came to a stop; Mr. Foster was now holding on to him with both hands; Mr. Foster fell against the broken table holding him tight with both hands.

· The struggle continued; he pushed Mr. Foster back as much as he could and hit Mr. Foster in the face as hard as he could, probably half a dozen times, but that had no effect.

· To get Mr. Foster to let go he hit Mr. Foster in the neck a couple of times; when that did not work, he hit Mr. Foster in the arm half a dozen times, but that also had no effect.

· He looked for something else with which to hit Mr. Foster; he was leaning over the pet carrier and could feel something in his pocket pressing up against the carrier; he realized he had a small folding fishing knife in his pocket--one that he generally never carried--and managed to get a hand on it. He described what happened next as follows:

So I got my hands on the knife and the next thing I remember I was having a dream about swinging this knife with my left hand at him while he was trying to grab it out of my hand with his right arm, and I thought that's a weird dream because I can't do anything left-handed. And then I realized, oh, I shouldn't be having a dream like this and then I -- I woke up and I -- first thing I looked at my hand and there was no knife in it, and he was still holding my shirt with his right -- no, his left hand, and his mouth was still wide open and his eyes were still wide open and I thought, okay, I must have just blacked out for a second, and I pushed on him again and suddenly

his left hand came loose, so I just spun around and -- and I just went straight for the door, out the door.

I have -- I don't remember grabbing the vodka bottle, but I must have, because it's in the back of my dad's truck and I sort of have a déjà vu moment of taking a swig out of it, which is something I would never do, but I guess it'd be like splashing cold water on your face, kind of a shock to wake you up. So I got outside in my socks and my t-shirt, and I don't remember the next few minutes much. I remember thinking I had to get out of there.

Oh. Oh, I -- when I woke up from my dream I -- I pushed Foster away, and I believe I felt a fresh shot of adrenalin and I was in a pretty big hurry to get out of there. My jacket was actually hanging right beside Foster's bed, so it would have been very easy to grab it on the way by, but like I said I was -- I was in a real big hurry. I wasn't sure how long I blacked out for, but I know when I got up to make my drink it was about 5:10. And I cracked Foster's back before he told me his bad news, so I imagine the time I blacked out was roughly 5:20, give or take five minutes. When I ran past my jacket I wasn't looking at the time, but apparently when I was out yelling for the cops it was roughly 9:30, so apparently I had actually blacked out for about four hours.

[Emphasis added.]

- He was surprised to see his jacket lying on Mr. Foster's body in the photographs taken by the police because he had left it hanging on a nail inside the trailer.

- In regard to the eyeglasses near Mr. Foster's body, he testified:

I noticed my glasses were laying there beside the subwoofer in the photos and I guess when he slapped me onto the table, when we hit that subwoofer we would have come to a complete stop. So his head would have hit me probably right in the bottom of my glasses, giving me that cut on my -- on my face. I had a very similar injury playing hockey once, where I decided that I should wear contacts playing hockey, but definitely that was a very similar injury to the one that I received that night from stopping on that subwoofer, and my glasses landed just about straight below there.

[Emphasis added.]

- After leaving Mr. Foster's trailer he started yelling for help; he told the people who came out of another trailer:

There's been a stabbing and there's a guy down there that's gonna kill me. Somebody's gotta call the cops and maybe get an ambulance, too, because, you know, I know I stabbed him once.

Mr. Fraser's Cross-Examination

[24] Crown counsel challenged Mr. Fraser's version of events.

- [25] In response to questions, Mr. Fraser said that when he stabbed Mr. Foster in the neck his intention was "[t]o hit the door running." He did not run for the door when the knife blade broke off in Mr. Foster's neck because Mr. Foster was standing right in front of him and he would have had to push Mr. Foster out of the way or go around him. He disagreed with the suggestion that stabbing someone in the neck would likely kill them. He said that if he thought he had to kill Mr. Foster, then he would have stabbed him in the larynx or ear.
- [26] Mr. Fraser agreed the fight was "dynamic", didn't last long, and that, in his mind, he was fighting for his life.
- [27] Mr. Fraser agreed he had spoken with Corporal (now Sergeant) Mark Goodall of the Royal Canadian Mounted Police on February 13, 2017, and that he had told the officer the truth "to the best of [his] knowledge". Crown counsel then read out a portion of that conversation:

So Corporal Goodall says [as read in]:

Obviously, and I think you -- no one could appreciate, it's kind of a complicated scene there. So do you remember --

Answer, and this is you:

Uh, uh, I -- actually, I don't understand. To me it's pretty straightforward.

Goodall: Yeah.

Fraser: Evidence is like, uh, couldn't been more than a 30 to 60 second -- it was probably just -- okay, I mean time's kinda hard to call at that point. I don't see how it could have lasted more than two minutes, honest to God.

Goodall: Really?

Fraser: Honest.

Goodall: Okay.

Fraser: I don't see how it could have, but I mean whatever.

Goodall: Well, I guess they're just being thorough and stuff like that, but I haven't been out there. I'm hoping to get out there, so I can have a look myself, but you gotta figure the whole --

Fraser: Yeah.

Goodall: -- altercation two minutes max?

Fraser: Tops.

Goodall: Tops?

Fraser: Yeah. It went, like, from here to the bed. That's it. No -- no thumpin' around, just boom, boom, done.

[Emphasis added.]

[28] Mr. Fraser initially rejected, but then accepted, Crown counsel's suggestion that the description of the altercation he gave to Sergeant Goodall was different from what he had testified to during his direct examination:

Q So, Mr. Fraser, you described the altercation as, "just boom, boom, done." Would you agree with me that it's very different than the version you're giving here in court today?

A I believe the incident lasted about two minutes, just about what I said.

Q So you agree that the timeframe is the same, correct?

A Yes.

Q But the description of the altercation is quite different.

A It covered a very small area, which is accurate. I just didn't remember where.

Q Pardon me?

A I did not remember where it took place.

Q Okay. But again I put to you, sir, that the description of the actual altercation itself, so not the location, not the timeframe, but the altercation itself is quite different, isn't it, sir?

A No.

Q No.

A No.

Q So --

A It was about two minutes and it occurred at a very small area.

Q Okay, but what you've told us about the fight with Cody, the wrestling, the him trying to pry the knife out, the detail, the moving from place to place, the pet carrier, all those things is [sic] quite a bit different than telling Corporal Goodall it was [as read in]:

No -- no thumpin' around, just boom, boom, done.

Would you agree with me?

A It is different.

[Emphasis added.]

[29] Cross-examination continued; the bolded question below is where Mr. Fraser submits it became improper:

Q Thank you. Excuse me. I'm just going to read you another passage, Mr. Fraser. This is picking up right from where we left off [as read in]:

Goodall: Okay. Well, that helps put it into clarity, too, right.

Fraser: Uh, so --

Goodall Yeah.

Fraser: -- anything that's more than this far away isn't part of it.

Goodall: Okay. Okay. Well, that helps, too, right?

Fraser: It's --

Goodall: 'Cause, I mean, they don't know --

Fraser -- like, uh, you -- you guy --

Goodall: -- where --

Fraser: -- you're say -- you're telling me it's complicated. Uh, I used to go in that thing every day. I don't see how complicated could be. I mean -- I mean, I don't know. You were saying about all the blood and the only blood I saw was the blood in his eyes, 'cause I never took my head -- my face off his eyes for one second, 'cause as soon as he was weak enough for me to get outta there I was fuckin' gone. And that's what I did, I fuckin' booked and I started making a lotta noise.

Do you recall being asked those questions and giving those answers, Mr. Fraser?

A Yes, I do.

Q And you'd agree with me that again that's quite different than the version you're giving here in court today, correct?

A I don't think I ever did take my -- my eyes off his face.

Q Well, Mr. Fraser, there's no four hour gap in this version, is there?

A I didn't know about the four hour gap.

Q You didn't know about it till you read the Crown disclosure, did you?

A That's correct.

Q And you'd agree with me that you've changed your story to fit with the forensic evidence and the evidence that you've been given from the police?

A I couldn't remember where it happened, so I believe that it ended up on the bed, but obviously that's impossible.

Q Well -- and you've considered that there's a number of parts of your story that didn't match up with the extrinsic evidence and you've changed your story to match those, correct?

A No. No, I re -- I remembered how it started and I remembered how it ended, but I didn't remember anything in between. It took me about six months to figure it out.

Q Well, sir, six months and you read over all the witness statements, correct?

A There was no witnesses. I was the only witness.

Q Well, you read the witness statements that had -- sorry, maybe I should rephrase. You read the pathologist's report?

A Mm-hmm.

Q You read the forensic identification specialist report?

A Yes.

Q Yes. You read the blood spatter analyst's report?

A Yes, I did.

Q Right. You read the knife reconstruction report. You've already referred to that in your testimony today.

A Mm-hmm.

Q Right. And all those things helped inform your story that you've told the jury here today.

A All those things brought clarity to what actually took place.

[Emphasis added.]

[30] Mr. Fraser said when he woke up Mr. Foster was holding on to him. He believes Mr. Foster held on to him for four hours and died during that time. When he woke up he pushed Mr. Foster away and ran out of the trailer. He believes that after he left the trailer someone placed his jacket on Mr. Foster and wiped Mr. Foster's face with a towel.

[31] Mr. Fraser has no memory of taking the vodka bottle out of the trailer but believes he must have done so after he woke up. He acknowledged that he told the police he thought one of the persons who restrained him had stolen it from the trailer.

[32] Mr. Fraser agreed "a lot of [his] memories are based off seeing photographs of the crime scene", that "looking at the police file has helped solidify [his] memories", and that some of his memories were "sort of piec[ed] together in hindsight".

[33] Mr. Fraser said the vodka bottle was not in the vicinity of the struggle and denied hitting Mr. Foster with it. In the course of Mr. Fraser being asked about the kitchen table breaking, the following exchange occurred:

Q And we're now still in the phase where your memories are vague, correct?

A I -- that was very vague. Absolutely.

Q And fair to say this is also a memory that you're sort of piecing together in hindsight?

A Absolutely.

[34] After Mr. Fraser agreed with the suggestion that he started hitting Mr. Foster in the face after the knife blade broke off in Mr. Foster's neck, the following exchange took place:

Q Okay. And I suggest to you, sir, that the reason why you're saying that now is because you have heard the pathologist's evidence, you've seen his report, and this would explain the injuries to Cody's eye.

A I believe the pathologist was incorrect.

Q Okay. So you disagree with Dr. Stephen that a fist could not have made these injuries.

A I had no other -- access to no other --

Q Pardon? I'm sorry, I didn't catch the end.

A -- I -- I had access to no other item.

Q Okay. You mean in your immediate vicinity?

A Yes.

Q But, sir, before today you've never told anybody about punching Cody with your fist, correct?

A Not true, no.

Q Okay. You never told the police about punching Cody with your fists?

A I don't believe so, no.

[Emphasis added.]

[35] When asked if Mr. Foster was drunk that night, Mr. Fraser responded he "[d]id not appear so." Mr. Fraser further stated that the vodka bottle was not empty the last time he remembers seeing it.

Pre-Charge Conferences

[36] Following completion of the evidence the trial judge and counsel engaged in discussions with respect to the jury charge. The judge provided counsel with a draft charge. Later, he provided them with a revised draft. Mr. Fraser's counsel requested the jury be instructed on self-defence and provocation. The Crown opposed those instructions. The judge ruled in Mr. Fraser's favour.

Counsel's Jury Addresses

Mr. Fraser's Counsel

[37] Mr. Fraser's counsel acknowledged that Mr. Fraser killed Mr. Foster. He focussed his submissions on the Crown's burden to prove the specific intent for murder. He submitted there were significant gaps in the Crown's case and invited the jury to consider ten points:

- The persons at the trailer park who responded to Mr. Fraser's calls had been drinking that night, were traumatized, and could not say what happened inside Mr. Foster's trailer.
- No witnesses were called from the trailers adjacent to Mr. Foster's who would have been in the best position to hear the struggle.
- There was no evidence in regard to how Mr. Foster got to Mr. Fraser's father's house.
- There was no evidence as to why Mr. Foster went to Mr. Fraser's father's house.
- The previous day Mr. Foster had been seen texting and looking angry.
- The police did not investigate a pizza box visible in photographs of the interior of the trailer that may have provided some evidence as to the time of Mr. Foster's death.
- The police had not done a complete inventory of the trailer; had they done so they might have found the fishing knife Mr. Fraser referred to in his evidence or a receipt for the pizza.
- There was no reason for Mr. Fraser to have put his coat, which contained his wallet and keys, beside Mr. Foster.
- There was no reason for Mr. Fraser to wipe Mr. Foster's face.
- The Crown had failed to establish a motive.

[38] Mr. Fraser's counsel asked the jury to accept that events had unfolded as testified to by Mr. Fraser, as Mr. Fraser had not been "shaken" by Crown counsel's rigorous cross-examination. In that regard, he stated:

Now am I saying that Mr. Fraser was a perfect witness? No, I am not. And we would not expect his evidence to be perfect. He is human. He is not an actor. His evidence was consistent with someone who has gone through a very traumatic event. He admitted to my friend that some of his memories are vague. He even admitted that he has had to piece some of it together after the fact, and is that such a novel concept?

In cross-examination, Mr. Fraser admitted that some of his memories surrounding the event are vague and that it took him months even, to regain some of the pieces and put them together. Ask yourself, is that consistent with someone who has emerged from a dreamlike state? By Mr. Fraser's account, he grabbed the knife and stabbed Mr. Foster in the neck only seconds after those comments were made. You should ask yourself -- ask yourselves, is that acting on the sudden before allowing time for your passions to cool?

Crown Counsel

[39] Crown counsel began her address by asking the jury to find that events had unfolded as described by Mr. Fraser in his statement to the police, i.e., "boom, boom, done." She urged the jury to reject Mr. Fraser's evidence in its entirety on the basis that it was "completely unbelievable" and "[t]o put it less politely, he lied to you."

[40] Crown counsel said there were five aspects of the evidence that refuted Mr. Fraser's testimony:

- Mr. Foster's blood alcohol concentration (.278): Mr. Foster appeared to be sober at 4:30 p.m.; he could not have become so heavily intoxicated 40 minutes later; he was not in a condition to defend himself from a sober man with a knife.
- Mr. Foster's injuries: The number and severity of the injuries inflicted on a person who was drunk indicated Mr. Fraser intended to kill Mr. Foster; the pathologist testified it was highly unlikely that the blunt force trauma injuries were caused by a fist.
- The number of pieces into which the knife had broken.
- The lack of defensive wounds on either Mr. Foster or Mr. Fraser.
- The vodka bottle found outside the trailer.

[41] Crown counsel referred to Mr. Fraser's explanation for Mr. Foster's numerous injuries as "creative", "inconsistent with previous versions of [his] own story", and "inconsistent with common sense." Her position was that Mr. Fraser had tailored his evidence to fit the disclosure he had been given. For example, near the end of her remarks, Crown counsel stated:

Mr. Fraser's story is inconsistent with common sense. He was evasive and argumentative under cross-examination. You must consider his evidence, as a whole, and give it as much weight as you can, but I suggest the more you look at it, the more it disintegrates. His alternating memory lapses and recalls are convenient. His lies are clumsy. He admits to tailoring his evidence to match the police report on multiple occasions. He says he told the police the truth, then tells a different version to you on the stand.

Jury Charge

[42] The trial judge provided the jury with a written version of his charge.

[43] Under the heading "Jurors' Memory and Opinion of the Evidence Prevails", the jurors were instructed to rely on their own memory of the evidence, if that memory was different from that of the judge or counsel. Under the heading "Presumption of Innocence and Proof Beyond a Reasonable Doubt", the judge explained that the onus was on the Crown to prove that the defences of self-defence and provocation could not succeed (those defences were dealt with in detail later in the charge). Under the heading "Jury to Assess Credibility and Weight", jurors were told they must decide what evidence to believe and also how much weight or importance to give to the testimony of each witness.

[44] Under the heading "Prior Inconsistent Statement", the jurors were instructed with respect to what use they could make of Mr. Fraser's statements to Sergeant Goodall:

- [58] In the course of Mr. Fraser's cross-examination, his prior statement to Sgt. Goodall was presented to him by [Crown counsel] for the purpose of showing that he said something different to Sgt. Goodall than he said in his direct examination. Mr. Fraser admitted having made certain statements to Sgt. Goodall. It is for you to decide whether those statements were inconsistent with the evidence he gave during his direct examination.
- [59] Bear in mind that a statement and evidence given at trial can be inconsistent in a material way not only because of differences between them, but also because important details in Mr. Fraser's trial evidence were omitted from Mr. Fraser's statement. You may take any such omissions into account when determining if the prior statement and the evidence given at trial are inconsistent, and when deciding whether or not you believe Mr. Fraser.
- [60] But remember, a person who is charged with an offence has a right to silence. You cannot use Mr. Fraser's failure to provide all of the details in his statement as evidence indicative of guilt.
- [61] Mr. Fraser's prior statement can also be used by you as evidence concerning the issue of his innocence or guilt. The law considers the prior statement of an accused to be a past admission. You can look at the whole of Mr. Fraser's past statements and decide what parts may incriminate him and what parts may show that he is not guilty.
- [45] In a section near the end of the charge headed "Summary of the Positions of the Crown and the Defence", the judge began his discussion of the "Crown's Position" as follows:
- [164] The Crown says the totality of the evidence proves beyond a reasonable doubt that Mr. Fraser murdered Cody Foster on February 11, 2017.
- [165] [Crown counsel] highlighted five key pieces of evidence for you to consider: Mr. Foster's blood alcohol concentration, the number of injuries inflicted on him, the number of pieces the knife broke into, the lack of defensive injuries on Mr. Fraser and Mr. Foster, and the vodka bottle found in Mr. Fraser's vehicle.
- [166] The Crown argues that when these key points are reviewed in conjunction with Mr. Fraser's evidence, the only logical conclusion is that Mr. Fraser is guilty of second degree murder.
- [167] The Crown compared the objective evidence submitted in the Crown's case to the evidence given by Mr. Fraser. [Crown counsel] asked you to find that Mr. Fraser was lying and that his version was inconsistent with the Crown evidence and with common sense.

The judge then discussed the five pieces of evidence on which the Crown relied in more detail. During that discussion he stated the Crown's position was that:

- Mr. Fraser had been "untruthful" about how the injuries had been inflicted on Mr. Foster.
- Mr. Fraser's evidence with respect to the knife breaking was "inconsistent" with the physical evidence and the evidence of the Crown's forensic expert.

- The lack of defensive wounds was indicative of Mr. Fraser "lying" about the nature of the incident.
 - Mr. Fraser "lied and then changed his story" about how the vodka bottle came to be in the back of the truck.
- [46] The judge began his discussion of "Mr. Fraser's Position" by stating Mr. Fraser asserted that he had acted in self-defence in response to a lethal threat made by Mr. Foster and that he took pre-emptive action to weaken, not kill, Mr. Foster. The judge briefly summarized Mr. Fraser's description of how events unfolded. He referred to Mr. Fraser's position that the final blows were struck with a small fishing knife which, by reasons of the incompetence of the police, was never located. The judge mentioned Mr. Fraser's position that the police had not conducted a thorough investigation.
- [47] The judge referred to Mr. Fraser's position that his actions after the altercation were consistent with innocence rather than guilt and that he did not wipe Mr. Foster's face with a towel, put his jacket beside Mr. Foster, or fold up his glasses. The judge also referred to Mr. Fraser's evidence that he put the vodka bottle in the back of the truck without any thought.
- [48] The judge then discussed Mr. Fraser's position that if self-defence failed, then the jury should find that he lost the power of self-control as a result of Mr. Foster's threat to kill him.

Post-Charge Proceedings

- [49] Neither Mr. Fraser's counsel nor Crown counsel had any objections concerning the charge. The jury commenced its deliberations just before 11 a.m. It returned with a guilty verdict just before noon on the following day.

Grounds of Appeal

- [50] In his factum, Mr. Fraser sets out his grounds of appeal as follows:
1. Crown counsel turned Mr. Fraser's constitutional rights into a trap;
 2. Crown counsel inaccurately summarized the forensic evidence in closing submissions.

Analysis

Cross-Examination on Disclosure

- [51] Mr. Fraser submits that because, as set out in *R. v. Stinchcombe*, [1991] 3 S.C.R. 326, an accused has a constitutional right to receive disclosure from the Crown, it was improper for Crown counsel to cross-examine him on his having reviewed that disclosure and to argue that he had used it to tailor his evidence. He relies on the following statement by Justice Doherty in *R. v. White* (1999), 132 C.C.C. (3d) 373 at para. 20 (Ont. C.A.), which this Court cited with approval in *R. v. Kokotailo*, 2008 BCCA 168 at para. 50, 232 C.C.C. (3d) 279, and *R. v. Jerace*, 2020 BCCA 326 at para. 9:

As a matter of common sense, there may be considerable force to the suggestion that a person who gets full advance notice of the other side's evidence and testifies last is in a position to tailor his or her evidence to fit the disclosure. That inference, no matter how logical, cannot be drawn without turning fundamental constitutional rights into a trap for accused persons. Where any such suggestion seeps into the cross-examination of an accused, it must be eradicated by the trial judge.

In *White*, a sexual assault conviction appeal, cross-examination on telephone records that had been disclosed was found proper because Mr. White referred to those records during his direct examination to assist in placing times and dates on certain meetings he said he had with the complainant: at para. 22.

- [52] Mr. Fraser's position is that this Court's judgment in *Kokotailo* stands for the proposition that before the Crown will be entitled to cross-examine an accused in regard to disclosure, the accused must first have affirmatively relied on that disclosure in aid of their defence when testifying. He further submits he did not make such use of disclosure.
- [53] In *Kokotailo*, a murder conviction appeal, Mr. Kokotailo raised the fact that he had reviewed the disclosure during his direct examination in an attempt to explain his inability to remember details of the circumstances surrounding the killing. At the outset of cross-examination, Mr. Kokotailo confirmed he had reviewed the disclosure in detail. In his closing address to the jury, Crown counsel submitted Mr. Kokotailo had "tailor[ed] his own testimony to fit as closely as possible with each and every aspect of the Crown's case." In dismissing a ground of appeal based on Crown counsel's conduct, Justice K. Smith stated:
- [58] In the case at bar, since the appellant himself raised the Crown disclosure in aid of his defence, the approach taken by Crown counsel in cross-examination and in submissions was legitimate.
- [54] Mr. Fraser also cites *R. v. Cavan* (1999), 139 C.C.C. (3d) 449 (Ont. C.A.), leave to appeal ref'd [2000] 1 S.C.R. viii, [2000] 1 S.C.R. xix (sub nom. *Scott*), a drug-trafficking conviction appeal. In that case, it was held that Mr. Cavan was properly cross-examined on "will-say" statements that he, not Crown counsel, had referred to during cross-examination to buttress his explanation: at paras. 23, 45. A "will-say" statement summarizes the anticipated evidence of a witness: *Stinchcombe* at 344.
- [55] Mr. Fraser says that prior to being asked the question "You didn't know about [the four-hour gap] till you read the Crown disclosure, did you?", he had not made any mention, let alone affirmative use, of disclosure. He says the references during his direct examination to his memory having been assisted by "evidence photos" and "evidence" were with respect to exhibits in the Crown's case. In response, the Crown says those references bring this case within the ratios of *Kokotailo* and *Cavan* because Mr. Fraser used his knowledge of the Crown's case to buttress his explanation for having a detailed recollection of certain events.

- [56] I do not agree with the Crown that what occurred in this case is comparable to what occurred in Kokotailo and Cavan. In both of those cases, the accused, in direct examination, referred to disclosure they had reviewed prior to trial to explain their ability or inability to recall events: Kokotailo at para. 53; Cavan at para. 23. Mr. Fraser's oblique references to "evidence photos" and "evidence" are not such that it can be said he affirmatively used disclosure to aid his defence. However, I do not read the authorities Mr. Fraser relies on as supporting his proposition that an accused's affirmative use of disclosure is the only key that can open the door to cross-examination. Those cases are but examples of where, on specific facts, the door was found to have been opened. As Doherty J.A. stated in White, "Sometimes, it will be necessary for the Crown to establish that an accused received disclosure as a step in a legitimate line of cross-examination": at para. 22. In other words, the propriety of any given cross-examination must be considered on a case-by-case basis and will depend on the circumstances: Kokotailo at para. 56; R. v. E. (F.E.), 2011 ONCA 783 at para. 71, 108 O.R. (3d) 337; Cavan at para. 41. This issue has been considered a number of times in cases in which alibi was raised as a defence.
- [57] In R. v. Simon (2001), 154 C.C.C. (3d) 562 (Que. C.A.), a murder conviction appeal, Mr. Simon advanced an alibi in his direct examination. Crown counsel cross-examined Mr. Simon with respect to his knowledge of the evidence against him. In addressing the jury, Crown counsel acknowledged the right of an accused to disclosure but argued that Mr. Simon had fabricated his testimony to fit with that disclosure. The Court held that the cross-examination was proper: at para. 41.
- [58] In R. v. Marshall (2005), 200 C.C.C. (3d) 179 (Ont. C.A.), a murder conviction appeal, the Crown's theory was that Mr. Marshall had driven the victim from Montreal to Toronto before stabbing him and disposing of his body. The Crown used Mr. Marshall's cellular telephone records to track his movements from Montreal to Toronto. In his opening address to the jury, defence counsel advanced, for the first time, the version of events that Mr. Marshall and the victim had travelled separately to Toronto. This version had not been put to several Crown witnesses. In direct examination, Mr. Marshall used the telephone records in an attempt to establish he was still in Montreal after the victim had left for Toronto. This conflicted with statements Mr. Marshall had made to the police. Without objection from defence counsel, Crown counsel cross-examined Mr. Marshall in an effort to establish he had used the records to tailor his testimony. The Court held that the cross-examination was proper: at paras. 74-75.
- [59] In E. (F.E.), a sexual assault conviction appeal, defence counsel had provided the Crown with two alibi notices. The first indicated Mr. E. was out of Canada on the date of the alleged offence. The second indicated he was in the city where the offence was alleged to have occurred on that date but was making deliveries at the relevant time. Without objection from defence counsel, Mr. E. was cross-examined briefly about his review of disclosure before the first alibi notice was given. Justice Watt held that "[t]he prosecutor was entitled to show through cross-examination that the alibi notices were given after [Mr. E.] was made

aware of the complainant's allegations, including when and where she said that the assault occurred": at para. 76. Justice Watt also said this:

- [71] Whether cross-examination of an accused about his or her receipt of and familiarity with prosecutorial disclosure is permissible or improper depends on the circumstances of each case: *R. v. Thain*, [2009] O.J. No. 1022, 2009 ONCA 223, 243 C.C.C. (3d) 230, at para. 24. One instance in which it may be appropriate for a prosecutor to refer in cross-examination to an accused's receipt of disclosure is to undermine a defence of alibi, thereby to contend that the accused has tailored his or her evidence to fit the Crown's disclosure: [*R. v. Thain*, 2009 ONCA 223], at para. 24; *R. v. Khan* (1998), 126 C.C.C. (3d) 523 (B.C. C.A.), at para. 50; *R. v. Marshall* (2005), 77 O.R. (3d) 81 (C.A.), at paras. 74-75; and *R. v. Simon* (2001), 154 C.C.C. (3d) 562 (Que. C.A.), at pp. 573-574.
- [60] This brings me to this Court's judgment in *R. v. Khan* (1998), 126 C.C.C. (3d) 523 (B.C.C.A.), a murder conviction appeal. In that case, the Crown's theory was that the killing took place between 12:00 p.m. and 3:00 p.m.; its case was purely circumstantial. There was independent evidence with respect to Mr. Khan's whereabouts up until noon. In his direct examination, Mr. Khan advanced an alibi for which no notice had been given. On appeal, he took issue with the following statement made during Crown counsel's jury address:

Now, every accused person is entitled to full disclosure of the particulars of the case against him by the Crown. And I am certainly not criticizing, that's the way our system has to work, for every accused to fairly defend himself. But what that does allow is an unscrupulous accused to take what he knows you are going to hear, to take what he knows you are going to believe and then weave into that fabric a series of lies to try to make up a story that holds some water before you. It's much, much easier to do that than to try to make up a story from scratch.

In support of his argument, Mr. Khan relied on *R. v. Peavoy* (1997), 117 C.C.C. (3d) 226 (Ont. C.A.), in which a conviction for murder was set aside because Crown counsel had suggested to the jury that Mr. Peavoy had concocted his evidence after receiving disclosure. The possibility of concoction had not been raised during Mr. Peavoy's cross-examination.

- [61] In dismissing Mr. Khan's appeal, Justice Esson said this:

- [50] There are a number of significant distinctions between that case and this. Peavoy raised no alibi defence, whereas Mr. Khan, by his evidence regarding his whereabouts and movements on the day of the killing, did raise such a defence. It was therefore open to the Crown to rely, as a factor in assessing the credibility of that defence, upon the failure of the accused to disclose the defence before giving evidence. That matter was explored in cross-examination of Mr. Khan. There was other evidence of non-disclosure of the alibi. Throughout the cross-examination of Mr. Khan, it was made clear that the Crown's position was that he had concocted his version of events from mid-day on December 10 to the time of his arrest 30 hours later. Indeed, it was the pursuit of that position which led Crown counsel to cross-examine the accused on his failure to tell his story to the police when he was arrested.

- [51] The language of Crown counsel in the impugned passage was essentially factual, pointing out that, because of the structure of the system, an accused has the opportunity to concoct a false story which will fit into the case presented by the Crown. Clearly it was open to Crown counsel, as he did, to go through the evidence of the accused to demonstrate how, in his submission, that evidence with all its inherent improbabilities was designed to meet the evidence of the Crown witnesses.
- [52] It would be desirable for the Crown to avoid any reference to the constitutional right of disclosure which might be taken as an implication that the existence of the right is somehow unfair to the Crown. But I cannot find that the relatively fleeting and factual reference in this case could have jeopardized the right of the accused to a trial according to law. Crown counsel was entitled, as he did, to press the point that the evidence of the accused was a concoction. Whether the concocting was done in light of pre-trial disclosure, or after the preliminary hearing, or after hearing the Crown evidence at trial, was a matter of little moment.

[Emphasis added.]

In other words, this Court held it is proper for Crown counsel to confront an accused on the basis that they had concocted an alibi to fit within the disclosure they have received without their first having affirmatively relied on that disclosure in aid of their defence.

- [62] I return now to the case at bar. Of critical importance in determining whether the door to cross-examining Mr. Fraser had been opened is that the description of events he gave in the witness box is inconsistent with what he told Sergeant Goodall. In his statement to Sergeant Goodall, Mr. Fraser described the altercation as "no thumpin', just boom, boom, done" and said he ran out of the trailer as soon as Mr. Foster was weak enough for him to do so, implying that Mr. Foster was alive at that time. When Crown counsel raised with Mr. Fraser the fact that he had said nothing to Sergeant Goodall about a four-hour gap, Mr. Fraser responded, "I didn't know about the four hour gap." At this point the cross-examination concerning access to disclosure began with the following exchange:

Q You didn't know about [the four-hour gap] till you read the Crown disclosure, did you?

A That's correct.

A few questions later, Mr. Fraser said it took him about six months to figure out what happened.

- [63] In light of Mr. Fraser's prior inconsistent statement, Crown counsel was entitled to question him with respect to when, why, and how his description of what occurred changed. It was both logical and reasonable for counsel to delve into whether disclosure had a bearing on that change. At no time during her cross-examination or jury address did Crown counsel suggest that Mr. Fraser's testimony should be disbelieved simply because he had received disclosure. Rather, she asked the jury to find that what he said in the witness box had been concocted to fit the disclosure. Indeed, it would have been improper for counsel to have argued to the jury that Mr. Fraser had concocted his testimony if she had not raised that

subject with him: Peavoy at paras. 13-14.

- [64] In short, I am of the view that counsel engaged in a legitimate line of cross-examination. I note, parenthetically, that Mr. Fraser's statement to the officer who transported him to the detachment that Mr. Foster chased after him with a knife is also inconsistent with his testimony.
- [65] There are two additional matters addressed in Mr. Fraser's submissions which, although not advanced by him as grounds of appeal, merit comment. The first relates to the suggestion in White, that "[t]he prudent course whenever Crown counsel wish to cross-examine on matters relating to disclosure is to vet the proposed line of questioning with the trial judge in the absence of the jury": at para. 23. While this statement was referred to in passing in Kokotailo at para. 52, there is no indication in that judgment that the cross-examination that elicited Mr. Kokotailo had reviewed disclosure in detail had been vetted. It is noteworthy that Mr. Fraser's trial counsel did not object to the cross-examination.
- [66] The second matter arises from Marshall, where, as set out in para. 72 of that judgment, after the trial judge in that case had vetted and approved of Crown counsel's proposed line of cross-examination he twice gave the jury the following mid-trial instruction:

It is necessary to keep in mind that every accused has a right against self-incrimination as well as a right to disclosure of the Crown's case before the trial begins. You must not draw any adverse inference from the accused having availed himself of those Constitutional rights. However, the fact remains that an accused may fabricate evidence after hearing witnesses in court, after seeing exhibits and after receiving disclosure in order to tailor his evidence in accordance with the witnesses, the exhibits or the disclosure. The fact also remains that an accused may not fabricate his evidence in accordance with the testimony of Crown witnesses, exhibits or disclosure and may well be telling the truth. It will be up to you to make that determination, keeping in mind that every accused has a Constitutional right to hear Crown witnesses and have disclosure before testifying.

In charging the jury, the judge in Marshall reiterated that "the reality is that an accused who has remained silent on a particular matter may indeed fabricate his evidence and tailor it after the fact to fit the Crown's case."

- [67] I agree with Mr. Fraser that it was open to the trial judge to give the jury an instruction similar to the one in Marshall. However, had the judge done so, he would have drawn the jury's attention to something not mentioned in his charge, namely, that disclosure can be used to fabricate evidence. In addition, the judge might have chosen to give examples of how that could have occurred. It may be that Mr. Fraser's trial counsel elected not to seek a Marshall-type instruction to avoid the potential for misuse of disclosure being highlighted for the jury.

Crown Counsel's Jury Address

[68] Mr. Fraser submits Crown counsel misstated the forensic evidence and that the cumulative effect of those misstatements prejudiced his right to a fair trial. I will deal with each of the points he raises in turn. However, I will state at the outset that I find no merit in them. It should be noted that Mr. Fraser's trial counsel did not raise these points with the trial judge in the discussions that took place immediately after counsel addressed the jury. It should also be noted that the judge instructed the jurors to rely on their memory of the evidence and that the only statements of counsel that could be treated as evidence were those made by Crown counsel in reading aloud the written admission filed as exhibits.

Mr. Foster's Blood Alcohol Content

[69] In her closing address, Crown counsel said this:

So, first, the victim's blood alcohol content. Cody's blood alcohol content was 278 milligrams percent when Stephen Fraser killed him. That is just shy of three-and-a-half times the legal limit. The toxicologist and Dr. Stephen described people at that BAC as heavily intoxicated. They suffer from significant impact to their mental and physical abilities and will have great difficulty in walking or even standing without support. In fact, they would be drifting in and out of consciousness, and they would not be displaying purposeful, goal-oriented, and coordinated physical actions, but you probably don't need an expert to tell you that. You know what an extremely drunk person looks like; stumbling, slurring their words, falling over, slumped, maybe even peeing their pants. Remember, there were multiple beer cans at the scene, along with the empty vodka bottle. Cody also had THC or marihuana in his system, which combined with alcohol increases the state of intoxication. THC can affect muscle strength, balance, and ability to perform complex tasks. [The manager of the liquor store] saw Cody around 3 p.m. and says he appeared sober. [The manager of the trailer park] saw Cody around 4:30 p.m. and said he appeared sober. Cody's BAC was 278 when he was stabbed to death. His body was found at 9:30 p.m. Before he was killed, Cody went from being apparently sober to being heavily intoxicated in a short span of time. By the time of his death, he wasn't in any condition to defend himself against an attack by a sober man, much less a sober man with a knife. He did not pose a danger to the accused.

[Emphasis added.]

Mr. Fraser's complaint is directed at the underlined portion. He says it overstates the evidence because "[n]o witness or admission ever said as much."

[70] There is nothing improper in what Crown counsel said. She did no more than ask the jury to draw a common-sense inference from the evidence she had just accurately summarized: *R. v. Trochym*, 2007 SCC 6 at para. 79, [2007] 1 S.C.R. 239; *R. v. Hawkins*, 2011 NSCA 6 at para. 127, 265 C.C.C. (3d) 472, leave to appeal ref'd [2011] 2 S.C.R. vii.

Mr. Foster's Injuries

[71] In her closing address, Crown counsel said this:

The second point I raise is the number of injuries inflicted on the victim. Cody suffered at least 32 injuries, according to Dr. Stephen [the forensic pathologist] -- 17 stab wounds, 11 lacerations, a broken jaw, a broken eye socket, a broken nose, a broken skull. You heard Dr. Stephen describe and explain the injuries. He told you that it was highly unlikely the blunt force trauma was caused by fists; in particular, because the external force to the eye socket was so significant as to cause a blowout fracture that caused an internal skull fracture.

The only explanation for why the accused inflicted at least 32 injuries, and these aren't small cuts or scrapes or bruises we are talking about, to a drunk man, is that the accused intended to kill him. One stab wound to the neck points in that direction, a fractured skull in that direction, too; but 32 separate blows with two or more weapons, makes the point beyond any doubt. Stephen Fraser meant to kill Cody Foster.

Mr. Fraser goes on to explain the numerous lacerations to Cody's eye, nose, and cheek area, by describing punching him with his fists. This story is inconsistent with the evidence of the expert, Dr. Stephen; inconsistent with previous versions of Mr. Fraser's own story; and inconsistent with common sense.

[Emphasis added.]

Mr. Fraser's complaint is directed at the underlined portions. He says they overstate the pathologist's evidence because the pathologist never said it was "highly unlikely" for the blunt force trauma injuries Mr. Foster sustained to have been inflicted by a fist.

[72] In direct examination, the pathologist stated that the blunt force trauma injuries could have been caused by a bottle. With respect to whether those injuries could have been caused by a fist, the following took place during cross-examination:

Q Now you have also given evidence about some blunt force injuries to the deceased's face, right?

A Yes.

Q And you would agree that it's fair to say that it's possible that the injuries occurred from punching, but that you thought it was more likely that a harder object was used because of the lacerations you observed?

A Yes. I believe in the preliminary I was asked whether this could -- these injuries could be caused by a fist, and I think it's less likely that a fist caused them because there is -- there is so much boney injury, and I think it suggests that the object that struck those areas was hard.

Q Now are you able to point to any particular object as being something that you suspect as being involved?

A No. There is nothing from the -- the morphology of those injuries that says -- or suggests what the type of blunt force object was used.

Q And the injuries could be from -- the blunt force injuries could be from, I suppose, a knife handle?

A I would think a knife handle would result in smaller lacerations. We noted a couple of the injuries over his eye were in excess of five centimetres, and so that -- I think that would -- that would be a very large knife handle to inflict those.

Q Now, I believe -- I believe, you said previously that it could have been a boot?

A Something like a steel-toed boot could cause injury -- lacerations like that.

Q And could these lacerations have occurred from a fall or hitting some fixed object?

A It's unlikely that one fall would result in injuries spread from the nose to the jaw to the left orbit. I would say that's unlikely.

Q But it is possible.

A In -- in my line of work, I seldom say something is impossible, but I would probably put the probability as highly improbable.

Q But you would agree that it's possible that the blunt force injuries could have resulted from multiple punch -- punches?

A Well, I think -- I think a fist causing those lacerations would be -- would be unusual. I think it's more likely that a hard object was used to inflict those lacerations. So while I cannot categorically exclude a fist, I would say, again, that it's less probable than a hard object.

[Emphasis added.]

[73] It is not possible to read the pathologist's evidence as other than expressing the opinion that the likelihood of the blunt force trauma injuries having been caused by a fist was very low. Although the pathologist did not use the words "highly unlikely", I consider Crown's counsel's use of them to be a fair characterization of the tenor of his evidence as a whole.

DNA Evidence

[74] In her closing address, Crown counsel said this:

The fourth area of interest is the lack of defensive wounds on the victim or the accused. You heard Dr. Stephen testify about what defensive wounds are, how they are received, and what they generally look like. You have the autopsy report and photographs, and you heard evidence from Dr. Stephen regarding the lack of defensive wounds on Cody's hands and forearms. You saw photos in her evidence, from Corporal Penner, regarding the lack of defensive wounds or injuries in general on the accused. Ask yourselves, what do the lack of defensive wounds mean to this case?

Moving back to the lack of defensive wounds on the victim or the accused. Mr. Fraser describes a significant fight. He describes Cody hitting his arm, Cody throwing him around, bashing his head and back into a wall, but there's no visible injuries on Mr. Fraser.

Throughout his direct examination and cross-examination, my friend is correct, Mr. Fraser is adamant that he could not escape at any time during the altercation he described, and that every assault upon Cody was necessary to preserve his own life, and, yet there is [sic] no significant or relevant injuries to be found on Mr. Fraser.

Consider this. He told you that on several occasions Cody was trying to pull the knife piece out that was protruding from Cody's neck. So Cody was trying to pull this piece of broken knife out of his own neck. You saw that sharp knife piece in the autopsy photos. You saw it in court. You will have an opportunity to observe it up close in the jury room, and yet Cody had no cuts on his hands. According to Dr. Stephen, there was one very superficial scratch on Cody's right hand. Is that consistent with someone trying to pull a piece of knife blade from their neck while wrestling with another adult male who is still holding a knife hilt with a piece of blade in it? Consider this. The only DNA under Cody's fingernail, the only blood found there was his own. He didn't scratch Mr. Fraser. He didn't fight back.

[Emphasis added.]

[75] Mr. Fraser's complaint is that there was no foundation for the underlined words because there was no evidence with respect to the likelihood his DNA would be transferred to Mr. Foster during the altercation he described.

[76] The words Mr. Fraser impugns have to be read in context. The point being advanced by Crown counsel was that neither Mr. Fraser nor Mr. Foster had defensive wounds and that the absence of such wounds was inconsistent with Mr. Fraser's description of the altercation. Although there was evidence that Mr. Fraser had a scratch mark below his left ear and another on his abdomen, he did not testify those were caused by Mr. Foster. In the context of the evidence as a whole, Crown counsel's remarks were factually accurate and fair comment.

Disposition

[77] I would dismiss this appeal.

"The Honourable Mr. Justice Frankel"

I AGREE:

"The Honourable Mr. Justice Fitch"

I AGREE:

"The Honourable Madam Justice DeWitt-Van Oosten"

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