

CANADA / JUDGMENT

R. v. Klein

2020 BCSC 333

COURT

Supreme Court of British Columbia

DECIDED

6 March 2020

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2020 BCSC 333 R. v. Klein

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Klein,

2020 BCSC 333

Date: 20200306

Docket: 66296

Registry: Chilliwack

Regina

v.

Gabriel Brandon Klein

Restriction on Publication: the initials "E.I." are used in these reasons because of a restriction on publication under s. 486.4(2.1) of the Criminal Code

Before: The Honourable Associate Chief Justice H. Holmes

Reasons for Judgment

Counsel for the Crown:

D.T.R. Loucks

R. Macgowan

Counsel for the Accused:

J.M. Peters

M. Vis-Dunbar

Place and Dates of Trial:

New Westminster, B.C.

October 7-9, 15-18, 21-24, 31,

November 1, December 9, 16-18, 2019

Place and Date of Judgment:

New Westminster, B.C.

March 6, 2020

INTRODUCTION

- [1] On November 1, 2016, Letisha Reimer and E.I., who were 13 and 14 years old at the time, were sitting together in the large rotunda area of the Abbotsford Senior Secondary School. They had been excused from their classroom, and were working, chatting, and looking at pictures on a mobile phone. With no warning at all, a young man came up from behind E.I. and stabbed her four times with a large knife. When E.I. managed to run away, the man turned to Ms. Reimer and stabbed her a total of 14 times, including while she lay or crouched on the ground. School staff rushed to the scene and stopped the attack, but tragically Ms. Reimer died within minutes while school staff did their best to save her, as well as to encourage and reassure her.
- [2] Gabriel Klein, who was 21 years of age at the time, acknowledges that he was the man who stabbed Ms. Reimer and E.I., and that he did so volitionally (such that the actus reus of each offence is admitted) and without any possible justification or excuse. He acknowledges that Ms. Reimer died as a result of the attack, and that E.I. was very seriously wounded, with long-lasting effects.
- [3] Mr. Klein agrees that he is guilty of the aggravated assault of E.I. (as charged in count two).
- [4] On the charge of second degree murder of Ms. Reimer (charged in count one), Mr. Klein acknowledges that he is guilty of the included offence of manslaughter, but says that the Crown has not proven beyond a reasonable doubt that he had the "specific intent" that the offence of murder requires. He points to evidence that he was intoxicated, and evidence that he was subject to mental disturbance or mental illness falling short of mental disorder as described in s. 16 of the Criminal Code.

THE ISSUE

- [5] Before the trial, and during the Crown's case in the trial, the defence indicated that Mr. Klein would be relying on s. 16 of the Criminal Code for a conclusion that he is not guilty of the offences on account of mental disorder. The defence position changed after the close of the Crown's case in the trial, and Mr. Klein no longer seeks such a conclusion. Nor does the Crown invoke s. 16.
- [6] The issue for determination, given the parties' final positions and the evidence, is whether the Crown has proven beyond a reasonable doubt that Mr. Klein had the specific intent required for second degree murder, according to s. 229 of the Criminal Code. In this case, the Crown relies on s. 229(a), which requires that the person mean to kill, or, alternatively, mean to cause bodily harm that they know is likely to cause death while being reckless whether death ensues or not:

229 Culpable homicide is murder

- (a) where the person who causes the death of a human being
- (i) means to cause his death, or
- (ii) means to cause him bodily harm that he knows is likely to cause his death, and is reckless whether death ensues or not;

- [7] The Crown says that there can be no doubt that Mr. Klein either meant to kill Ms. Reimer, or meant to cause her bodily harm that he knew was likely to cause her death and was reckless whether that result would follow or not.
- [8] The defence says that the evidence of mental disturbance and intoxication on Mr. Klein's part must, separately or in combination, leave a reasonable doubt that he intended to kill, or that he subjectively knew that the bodily harm he was inflicting was likely to result in Ms. Reimer's death.
- [9] The Crown and the defence each ask the Court to draw inferences from the evidence to support their respective positions about Mr. Klein's specific intent, or lack of it. A large body of evidence in the trial gives a view of Mr. Klein's actions in the days immediately before the offences, and his conduct during the offences and afterwards when he was in custody. For context, I will begin with a summary of this evidence before I later discuss the inferences that, I conclude, should be drawn from the evidence as a whole.
- [10] The summary I will give below represents the facts as I find them to be. Where I recite a witness's evidence without comment, I accept that evidence unless I say differently, except as follows. Where the evidence relates to statements made by Mr. Klein, I accept the evidence about what he said; however, only later in these reasons will I discuss whether I accept that the various things he said were true.

MR. KLEIN'S CONDUCT BEFORE, DURING, AND AFTER THE EVENTS

- [11] The narrative disclosed by the evidence begins 48 hours before the offences, on October 30, 2016 at 2:00 p.m.

Afternoon of October 30, 2016 - At the Huntingdon Border Crossing

- [12] At that time, US border patrol officers delivered Mr. Klein to Krysten Montague, a Canada Border Services Officer who was working at the Huntingdon Canada-USA border crossing.
- [13] When Ms. Montague then interviewed Mr. Klein over the course of the next 15-20 minutes, he told her that he had accidentally crossed into the USA while he was lost in an area with no border markings. Mr. Klein said that he was homeless, without money or identification, and had been looking for work. When Ms. Montague offered to contact some local shelters or missions for him, he declined and said he would walk to a Tim Horton's and ask for money there.
- [14] Ms. Montague testified that Mr. Klein seemed lucid and matter of fact, and did not seem nervous or uncomfortable. There was no indication that he was intoxicated or under the influence of drugs.

Evening of October 30 - At the Abbotsford Regional Hospital

- [15] The next witness to see Mr. Klein was Kylee Evanuk, who was an emergency room ambassador at the Abbotsford Regional Hospital, working as a member of the hospital's security team. She saw Mr. Klein a few hours later, beginning at about 5:00 p.m., in the hospital emergency room, and had dealings with him there on and off during the next two hours.
- [16] By this time, Mr. Klein's demeanour was somewhat different, although, like Ms. Montague, Ms. Evanuk saw no sign of alcohol or drugs. When Ms. Evanuk first saw Mr. Klein, he was lying face down on a knapsack on a bench in the emergency room, and appeared to be in pain and distress. When at that point she inquired about his welfare and offered to help, he shrugged her off and did not engage. Later, after Mr. Klein got up and walked toward the entrance and Ms. Evanuk inquired again, he told her that he was really sick, not feeling well at all, had no money, needed to get in contact with his mother, and was trying to return to Alberta. He was hunched over, holding his abdominal region, sounded pained, and did not follow normal social cues - his eyes were scrunched and closed, and he did not make eye contact. Ms. Evanuk tried to continue the conversation but stopped because her inquiries and offers of solutions and support seemed to aggravate Mr. Klein's behaviour and to confuse and agitate him. He kept repeating that he needed to get help and to get better, and then he returned to the face down position on his knapsack.
- [17] Ms. Evanuk persisted, and offered to help Mr. Klein telephone his mother. That offer he accepted, and he gave the number and Ms. Evanuk dialled it; however, the call was not answered. Nor were the calls answered later when several times Ms. Evanuk tried again.

- [18] Ms. Evanuk was concerned enough about Mr. Klein to speak with nursing staff about him while he continued to wait for attention. She was assured that he had been triaged, she need not worry, and he was not suicidal.
- [19] The narrative of observations and dealings with Mr. Klein then picked up with the evidence of Faye Reglin, a social worker employed by the hospital. She spoke to Mr. Klein in his examining room at the request of an emergency room physician who, by that time, had cleared him for discharge. Mr. Klein was calm, communicated politely with good eye contact, and had no apparent pain or distress. Ms. Reglin saw no signs that Mr. Klein was under the influence of alcohol or drugs.
- [20] Ms. Reglin testified that Mr. Klein told her that his money and identification had been stolen, the \$200 in income assistance he had received that Wednesday had run out, and he had nowhere to stay that night. He wanted to return to his family in Edmonton, and asked Ms. Reglin if she could give him a bus pass, which she could not. However, she located a bed for him at the Lookout Shelter in Abbotsford, and authorized taxi service to get him there, and gave him a bag lunch. She also suggested that he contact his family for support, and he said that he would do so the next day.
- [21] The Lookout Shelter's records indicate that Mr. Klein did stay there that night.

Morning of October 31 - At the Lookout Shelter in Abbotsford

- [22] The next witness to have dealings with Mr. Klein was Hilary Cave, a resource worker at the Lookout Shelter in Abbotsford. She first dealt with him the next day, October 31, when she completed the intake process for him around midday.
- [23] When Ms. Cave asked Mr. Klein about alcohol and drug use, he said that he had drunk a little bit that morning, but to Ms. Cave he seemed sober. He said he had been robbed of his money, and that he had not been able to contact his mother. Ms. Cave made notes of "anxiety", and that Mr. Klein "feels depressed about his situation". On the intake form, she requested service for "mental health" (among other forms of assistance). Mr. Klein was talkative during these dealings. As I said, Ms. Cave saw no signs of intoxication; however, she found him to be "a bit off".
- [24] Since Mr. Klein wanted a bus ticket back to Alberta, and to use a computer to check his email and try to reach his parents, Ms. Cave gave him a map and directions to the public library and to another location where computers were available. The public library is physically linked with the school where the events took place, with open access between them at the time.

Afternoon of October 31 - Outside the Public Library

- [25] The narrative in the evidence then breaks until a couple of hours later, when K.P., a grade 7 student at the time at Abbotsford Senior Secondary School, had a brief encounter with Mr. Klein outside the public library at about 3:25 p.m. K.P., who did not know Mr. Klein, was leaving through the library's exterior doors when he stopped her to chat. A surveillance video recording of the encounter (without audio) shows the encounter as initiated by Mr. Klein, short, and apparently friendly.
- [26] K.P. testified that Mr. Klein asked her questions about whether she lived in Abbotsford, where she came from, whether she was a student at the school, and about her age. She found the conversation "weird" because Mr. Klein seemed to be asking about private matters, despite the fact that she was trying to leave. Like all the witnesses who had dealt with Mr. Klein to this point, K.P. saw no sign of alcohol or drug consumption.
- [27] K.P. was the last witness to see or deal with Mr. Klein on October 31.

Morning of November 1 - Back at the Lookout Shelter

- [28] The next witnesses in the chronology were people who dealt with Mr. Klein the following morning, the day of the offences, back at the Lookout Shelter.
- [29] The first witness to deal with Mr. Klein that day was Larry Koch, an employee assistance worker with the BC Ministry of Social Development and Social Innovation (as it was at that time), who was working on an outreach basis that day at the Lookout Shelter. He dealt with Mr. Klein for about 15 minutes, starting at about 9:45 a.m.
- [30] Mr. Koch described Mr. Klein as very needy from the outset, with a "high level of engagement". Mr. Klein wanted to go to Edmonton, and then north from Edmonton to where his mother was. He told Mr. Koch that he had no identification because he had been robbed at knifepoint a few days earlier. He also asked for help in getting hold of his mother.
- [31] During their meeting, Mr. Klein responded angrily and in an agitated manner to what he evidently saw as obstacles Mr. Koch was putting in his path. For example, Mr. Koch told Mr. Klein that quite a lot of documentation was necessary before the Ministry could provide funds for travel ("repatriation"), and it would take some time. Also, Mr. Koch asked Mr. Klein whether travelling to Edmonton would actually help his situation, and refused to lend Mr. Klein his own telephone. Mr. Koch testified that Mr. Klein responded by pacing around the office in a high energy fashion, and with conversation that was "all over the map", with apparently scattered thinking, becoming vague whenever Mr. Koch asked for details. Mr. Koch interpreted this as drug-seeking behaviour.

- [32] Mr. Koch testified that Mr. Klein told him that he had "a diagnosis", but would not say what it was. Mr. Klein also said that he had not been able to get his medication (which he did not identify) in British Columbia, because he had no identification. Mr. Koch agreed that Mr. Klein's behaviour appeared consistent with being off a regular medication.
- [33] Mr. Koch testified that at one point Mr. Klein remarked in an aggressive manner that he would "just go do crime". He would "do B & Es". He "would rather be in jail than be stuck in Abbotsford". Mr. Koch interpreted this as a "screw you" response, lashing out at the perceived obstacles to the funds that Mr. Klein needed for drugs, Mr. Koch believed. However, Mr. Koch saw no sign that Mr. Klein was intoxicated by alcohol or drugs at the time.
- [34] After Mr. Koch had given Mr. Klein the information he felt he should have, Mr. Klein left the room and Mr. Koch did not see him again. Kimberly Willis, a case planner at the Lookout Shelter who had arranged for Mr. Klein to see Mr. Koch, also testified that Mr. Klein was clearly not happy after the meeting with Mr. Koch.
- [35] Andrea Desjarlais, program coordinator, was in her office with Ms. Cave, who had done the intake process I described earlier, and with Ms. Willis, who saw Mr. Klein after his meeting with Mr. Koch, when Mr. Klein went into the office a bit later in the morning of November 1 and asked to telephone his mother. When Ms. Desjarlais declined, saying that his mother would not speak to him and had asked that he email her instead, Mr. Klein responded with anger and verbal aggression, Ms. Desjarlais testified. Mr. Klein was also angry that Ms. Desjarlais could not immediately give him money to return to Alberta; staff were working to get him a bus ticket, but the process could take a couple of days.
- [36] The Lookout Shelter witnesses testified that Mr. Klein left Ms. Desjarlais' office in anger, went to the locker area where shelter guests kept their belongings, and banged loudly on the lockers. He then moved on to the washroom, and loud banging was heard from there too, as though he was kicking a door. Then, after he emerged from the washroom, he returned to the locker area, removed his belongings and packed them into his backpack, and left the shelter with them. Ms. Desjarlais thought this was at approximately 11:00 a.m. Other evidence, which I will outline later, suggests that it must have been slightly earlier.
- [37] Ms. Desjarlais testified that Mr. Klein's conduct and demeanour changed suddenly from being angry and aggressive in her office to being calm and with a flat affect, during the two to three minutes when he was packing up his belongings in the locker area. While he was packing to leave, he had a blank, emotionless look on his face, and did not respond to her questions. To Ms. Desjarlais, he did not seem fully alert or aware, and she was concerned that he may be suffering from a psychosis. She viewed some of his behaviour as characteristic of schizophrenia, although she emphasized that she is not a medical expert. Ms. Desjarlais saw no sign of alcohol or drug consumption on Mr. Klein's part.

- [38] Kimberly Willis was the staff person who, along with Ms. Cave, was in Ms. Desjarlais' office when Mr. Klein asked to telephone his mother. When Mr. Klein had made a similar request the day before, on October 31, Ms. Willis had called his mother but found the message system full. She did manage to put Mr. Klein in telephone contact that day with a man at the number Mr. Klein indicated was his father's.
- [39] Ms. Willis described Mr. Klein's reaction the following day, November 1, when Ms. Desjarlais declined his request to telephone his mother. He appeared angry and frustrated, and his body language was agitated and tight. Ms. Willis was one of the Lookout staff members who watched Mr. Klein as he went into the washroom and heard him slam a door, and she described his conduct as aggressive enough to cause some other Lookout clients to react in surprise and concern. Ms. Willis testified that, while Mr. Klein then removed things from his locker, he slammed and shook the locker. As he walked through the shelter to leave, he did so in an angry and aggressive manner, moving his hands and arms in strong, tight, and intense motions.

Around 11:00 a.m. on November 1 - Theft at the BC Liquor Store

- [40] I said earlier that Ms. Desjarlais thought that it was about 11:00 a.m. when Mr. Klein left the Lookout Shelter with his belongings but that other evidence suggested it was slightly earlier. The other evidence is a video recording from surveillance cameras at the BC Liquor Store on Sumas Way in Abbotsford that shows Mr. Klein entering the store at about 10:48 a.m. The surveillance video and the evidence of Lisa McLatchey, who was working at the liquor store, were entered into evidence through the Agreed Statement of Facts No. 1 (exhibit 1).
- [41] Ms. McLatchey was behind the cash register near the front entrance when Mr. Klein entered. He approached her and asked if the store sold "151", a type of high proof rum. When she said she did not know and would have to ask her supervisor, Mr. Klein walked away from her, and "did a loop" around some of the aisles. Ms. McLatchey suspected that he may have stolen something, and alerted her manager.
- [42] The surveillance video shows that Mr. Klein did, indeed, steal at least one item. After speaking with Ms. McLatchey, Mr. Klein went quickly to an area in the store away from her, crouched down while looking quickly around, put one or more items into his backpack, and then stood up and left. He was in the store for no more than about 45 seconds, and, from the video recording, his actions appeared purposeful and precise. The reasonable inference is that Mr. Klein was stealing the two bottles of white rum later found in his backpack.
- [43] Video surveillance footage from the Abbotsford Police Department's Community Policing Office shows Mr. Klein walking eastbound on Marshall Road at 11:25 a.m. and crossing Abbotsford Way.

Around 12:15 p.m. on November 1 - Theft of Knife from Cabela's Outdoors Store

- [44] At approximately 12:15 p.m., Mr. Klein stole a knife from Cabela's hunting, fishing, and outdoor gear store on McCallum Road in Abbotsford. The knife was almost certainly the knife he used in the attack at the school, a "Buck" brand hunting knife with an approximately six inch blade.
- [45] Lucia Borgford (whose evidence was admitted through the Agreed Statements of Facts No. 1) was working at the customer service register at Cabela's. When Mr. Klein entered the store, he asked her for directions to the knives, and then walked in the direction she indicated.
- [46] Crystal Andresen, another Cabela's employee, assisted Mr. Klein when he arrived in the hunting section where she worked. He asked where the knives were, and she led him to the area, showed him the aisles in which they were located, and, since he needed no more help, walked away. She described her dealings with Mr. Klein as a normal interaction with a customer. There was nothing unusual about him, and no indication of alcohol or drugs.
- [47] The surveillance video from Cabela's shows that, after Ms. Andresen left him, Mr. Klein looked at several items on different shelves in the area Ms. Andresen had taken him to, and picked up and briefly examined at least two knives in their packaging. He appeared to settle on one of them, and left the store quickly with it in his hand. His actions appear easy and comfortable, as well as purposeful, throughout the few minutes he was in the store.

Along the Route Between Cabela's and the School

- [48] Mr. Klein was next noticed by several witnesses along his walking route from the general area of Cabela's to the school. These witnesses, unassociated with Mr. Klein or each other, each noticed him because he appeared odd or in distress.
- [49] Audrey Faber was walking from her home to the University of the Fraser Valley at about 1:30 p.m. when her attention was drawn to Mr. Klein because he seemed quite agitated as he walked along. He was walking in an unusual manner, leaning forward as though on the balls of his feet, and he seemed very tense. He was clenching his hands sometimes alternately and sometimes together. Once in a while he made quite a loud noise, guttural in its sound, almost a roar. When Mr. Klein turned onto McCallum Road so that Ms. Faber was walking behind him, she held back because "something seemed off". She saw no sign of intoxication on Mr. Klein's part.
- [50] When Ms. Faber came across Ron Chard, a retired police officer, who was positioning a speed monitoring trailer (for the City of Abbotsford) near the intersection of McCallum Road and Marshall Road, she asked him whether she should call 911 about Mr. Klein, and, with his affirmative response, she did. Her 911 call began at 1:35 p.m. and ended at 1:39 p.m., after she made some additional observations I will describe shortly.

- [51] Mr. Chard had himself noticed Mr. Klein shortly before Ms. Faber came along. Mr. Chard was kneeling to unhook his trailer when from behind he heard loud vocalizations, with grunts, groans, and squeaks, some of them high-pitched. Mr. Chard took these sounds as signs of distress. When Mr. Klein walked past, Mr. Chard had the impression that he was talking to himself, although no words were identifiable; he appeared to be in his own world. Mr. Chard noticed nothing unusual about Mr. Klein's manner of walking, which was brisk, and he saw no stumbling or other signs of intoxication.
- [52] Mr. Chard estimated that he made these observations between 11:30 a.m. and 12 noon; he had estimated 11:45 a.m. in his report but indicated that the time might not be exact. Given the time of Ms. Faber's 911 call which, there is no dispute, was between 1:35 and 1:39 p.m., it is clear that Mr. Chard must have made his observations later than he remembers or noted.
- [53] Mr. Chard knew that Ms. Faber had phoned 911, but he was nonetheless sufficiently concerned about Mr. Klein to try to find him. After finishing the process of safely positioning the trailer and unhooking it, Mr. Chard drove around some of the nearby streets, but he did not see Mr. Klein.
- [54] I said I would return to some further observations Ms. Faber made. After she spoke to Mr. Chard, she saw Mr. Klein pass a gas station at McCallum Road and Cornwall Avenue, and then cross McCallum Road uneventfully, continuing to walk in a way that Ms. Faber interpreted as agitated, with clenched hands, making roaring sounds sporadically. However, then he unsafely crossed Rainbow Avenue, causing a vehicle to brake to avoid him.
- [55] Ms. Faber lost sight of Mr. Klein after he walked through the parking lot for the Nugent Medical Building, which is accessed from Rainbow Avenue.
- [56] The third witness to notice unusual behaviour on Mr. Klein's part as he walked toward the school was Sidney Skantz. Mr. Skantz had driven his brother to a medical appointment, and was waiting in his parked car in the medical building parking lot. He had a full view of the parking lot, and saw Mr. Klein walk across it in front of his car, in the direction of the school. But before he saw Mr. Klein, he heard him coming.
- [57] Mr. Skantz had difficulty describing the sounds Mr. Klein was making, and tentatively described them as unreal, sort of human but weird, not screaming but low rumbling, blood-curdling, shocking, hideous, and quite loud. Mr. Skantz agreed that, once Mr. Klein was in view, he made no eye contact as he passed in front of the vehicle, did not appear to be speaking to anyone in particular, and seemed to be in his own world. Mr. Klein was striding along with no apparent difficulty, and did not appear to be intoxicated by alcohol.

Before the Attack - In the Public Library

- [58] Evidence from a surveillance camera at the public library shows Mr. Klein entering the library at 2:00 p.m. He entered through the same door through which he had entered and left the day before, and where he had chatted briefly with K.P.

- [59] The last witness to see Mr. Klein before the attack was Monique Comeau, adult daughter of the school's principal, who was using a computer in the public library adjoining the school's rotunda. Ms. Comeau's evidence was admitted by way of the Agreed Statement of Facts No. 1, and indicated that Mr. Klein walked in front of her desk, and made brief eye contact with her as he did so. Ms. Comeau estimated that this was about ten or fifteen minutes before she heard sounds of screaming from the school indicating the attack. In fact, the interval must have been five minutes at the most, because it is agreed that numerous 911 calls about the attack were made at 2:06 p.m.
- [60] I turn now to the horrific and profoundly sad events at the school.

After 2:00 p.m. - The Events at the School

- [61] Numerous witnesses saw all or some of the attack from different vantage points. Some witnesses - especially those who could not clearly see Ms. Reimer or E.I. - interpreted the attack as a fight, perhaps even staged for a film class. Some recognized it as an attack, but did not realize that Mr. Klein had a knife until late in the sequence of events. But on the evidence as a whole it is clear that the attack started quickly and without warning, and did not stop until staff members rushed in and yelled at Mr. Klein, at which point Mr. Klein became compliant and subdued. While he was attacking, Mr. Klein looked "really mean" to E.I., and "very angry" to D.T., a student who was in the rotunda and saw the attack.
- [62] As I said earlier, Mr. Klein began by stabbing E.I., and when she managed to run away, turned to stabbing Letisha Reimer, and continued doing so until staff members stopped him. A short video recording (six seconds in duration) taken by a student who thought he was seeing a fall or a fight, shows the end of the attack on Ms. Reimer as staff members begin to arrive. Mr. Klein can be seen stabbing Ms. Reimer as she crouched on the ground, using quick and large downward movements to do so, then immediately backing away with his hand held high.
- [63] Ken Lachelt, fine arts teacher, was the first or one of the first staff members to arrive. He described Mr. Klein's motions in the attack on Ms. Reimer as very fast jabbing motions, some of them reaching behind her body as she lay struggling on the ground. Mr. Klein stood over her in almost a football player's stance, arching down, his legs spread apart. Mr. Lachelt could not see Mr. Klein's face at that point, but his overall demeanour was very physical and very aggressive. While Mr. Klein was stabbing Ms. Reimer, he appeared to be using a lot of force, "pushing as hard as he could".
- [64] Mr. Lachelt testified that after he yelled and Mr. Klein stood up, holding up the knife, he looked directly at Mr. Lachelt. Mr. Lachelt yelled at him to put the knife down, and he tossed it onto the ground. At that point, Mr. Klein showed no fear or anger that Mr. Lachelt could detect, but just seemed like someone who had been in a confrontation. Shortly afterwards, when Mr. Lachelt approached Mr. Klein, and walked him backwards, away from Ms. Reimer, Mr. Lachelt saw a moderate amount of fear in his face.

- [65] Rob Comeau, the school principal, and Bruce Cuthbertson, the vice-principal, had also arrived quickly. They intervened while Mr. Lachelt attended to Ms. Reimer. When Mr. Comeau commanded Mr. Klein first to sit in a chair, and then get on his knees and eventually the ground, Mr. Klein complied without hesitation or delay, except that he struggled briefly when he was held face down on the ground, before he seemed to give up.
- [66] According to Mr. Comeau, after the attacks Mr. Klein had a blank expression on his face. According to Mr. Cuthbertson, Mr. Klein was strangely calm, showing no emotion despite the violent attack shortly before.
- [67] To the extent that Mr. Comeau's and Mr. Cuthbertson's descriptions of Mr. Klein may differ from Mr. Lachelt's, the difference in my view reflects the witnesses' different focuses and times of arrival at the scene. In particular, Mr. Lachelt was the first witness to deal face to face with Mr. Klein, and he dealt with him before, as well as after, Mr. Klein transitioned from aggression to submission.

Dealings with the Police at the School After the Attacks

- [68] Numerous police officers arrived within a few minutes, and took over. While each police witness described Mr. Klein in slightly different terms, common themes were that Mr. Klein did not speak at all, either at the scene or later at the police cell block; that he sometimes walked or moved under his own steam, but seemed lethargic and was at times almost a dead weight; and that, though his eyes were open, he did not seem fully aware of his situation.
- [69] Inspector Burrows, who was probably the first police officer to arrive, found Mr. Klein lethargic, lifeless, staring straight ahead with his eyes open as though in a trance. Cst. Young arrested Mr. Klein at the scene, and, with Cst. Turner, walked him out of the school to a bench. At the scene of the attack, they had to pick up Mr. Klein from the floor by his arms because he was limp, although he did not appear to be in physical distress, but he then walked without apparent difficulty. Outside, he seemed very slow in his actions, and did not seem to register what was happening. Cst. Turner testified that Mr. Klein had a "sort of stupefied look on his face" with a "sort of smirk", and Cst. Turner wondered if he was high.
- [70] Apart from the stupefied look and the smirk that Cst. Turner described, the police officers who dealt with Mr. Klein noticed no sign that Mr. Klein was affected by alcohol or drugs while they dealt with him at the scene.
- [71] Cst. Bader was with or near Mr. Klein from the time police officers took control of him from Mr. Comeau and Mr. Cuthbertson. She testified that although he did not speak and he appeared "catatonic", he walked on his own, breathed normally, and did not seem to be in any physical distress. However, his behaviour then changed.

In the Police Vehicle

- [72] During the trip in the police vehicle from the school to the police cell block, Mr. Klein's breathing became more laboured, and he began to bang his head lightly on the partition in front of him, and to stick out his tongue. When the police vehicle arrived in a bay in the cell block, Mr. Klein was seen to be drooling. Cst. Bader called for an ambulance on a low priority basis.

At the Abbotsford Cell Block

- [73] Mr. Klein's behaviour then changed again in several ways, and Cst. Bader upgraded the request for an ambulance. A surveillance video recording of Mr. Klein being taken from the police vehicle into the cell block shows him walking under his own power but stumbling a bit, with a dopey overall demeanour, his head bouncing around, sometimes tilted far back with his chin in the air, then dropping suddenly forward.
- [74] Another surveillance video of Mr. Klein then being photographed inside the cell block shows him almost swaying during the process, and stumbling as he was taken to the fingerprint counter afterwards. There, he slumped over the counter, breathing heavily. He seemed to retch, and he spat out a small amount of fluid, before he then started to bang his head hard on the counter. This was at about 2:40 p.m.
- [75] Cst. Bader was in close proximity to Mr. Klein as this happened, and she noticed a smell of liquor on his breath. She had not noticed any indication of alcohol consumption or intoxication on Mr. Klein's part in her earlier dealings with him even though she had been near or with him since police officers took control of him at the school.
- [76] When an ambulance arrived and paramedics began to assess Mr. Klein, he was moved to a stretcher. Another surveillance video shows that at that point he began to thrash about and to shake intensely, while breathing heavily and making grunting sounds, lifting and dropping his head rapidly, and clenching and releasing his toes. Detective Alldritt testified that Mr. Klein appeared to be biting his own arms, but without leaving any lasting impressions or teeth marks.
- [77] Mr. Klein was put in an ambulance at about 3:15 p.m., and was taken to the Abbotsford Regional Hospital. Cst. Bader testified that in the ambulance Mr. Klein had another episode of similar flailing behaviour, but this was less violent than the episode in the cell block.
- [78] Some of the police officers who saw Mr. Klein's thrashing or flailing and shaking behaviour thought that he might be having a seizure. However, the medical witnesses who were later asked either to view the video recordings showing this behaviour, or to comment on the behaviour as described, all testified that the behaviour was not characteristic of seizure. For example, Dr. David Melnychuk, whose evidence I will address in more detail later, viewed the video recording of Mr. Klein's shaking and thrashing episode in the Abbotsford cell block, and testified that much volitional movement can be seen, such as rolling over. He

testified that many of Mr. Klein's unusual movements (such as the flailing movements of his arms and legs, his attempts to bite his arms, and his pelvic thrusting) are not typical of seizure, and at least one of the features of Mr. Klein's episode is highly atypical of seizure.

At Abbotsford Regional Hospital - Evening of November 1 and Morning of November 2

- [79] Cst. Bader testified that Mr. Klein began to scream loudly after he was placed in an emergency room bed and assessed by medical staff. He also wriggled and pulled away when staff inserted a catheter, and he was placed in hospital restraints on the bed. Det. Alldritt described Mr. Klein as screaming and roaring at this stage, though not constantly.
- [80] After Mr. Klein was later moved to a private room, he calmed down, according to Cst. Turner. His breathing was no longer rapid or laboured, and he no longer screamed or thrashed around to the point of needing to be restrained or held down. However, he did bite down on his teeth from time to time, and he reacted with groans when hospital staff touched him. He continued not to speak or to engage with anyone.
- [81] Cst. Bader testified that through the late afternoon and early evening, Mr. Klein lay with his eyes closed much of the time, but on occasion opened them and stared at the ceiling. He sat up at one point and looked behind him at an intravenous bag. At around that time, he began to clench or clang his teeth in a "loud and awful" way, and he repeated that behaviour several times.
- [82] Dr. Melnychuk, emergency and trauma physician at the hospital, examined Mr. Klein in the emergency room because of the unusual behaviour and presentation others had seen, including the head-striking, apparent breathing difficulties, and a possibly decreased level of consciousness. Dr. Melnychuk found no evidence of brain injury or any other physical injury to explain the behaviour, or any of the stereotypical signs of seizure. Rather, Dr. Melnychuk found many indications that Mr. Klein was aware of his body and acted volitionally, such as when he moved his arm on request, fixated his eyes on a particular object, or tilted his head to spit. In addition, and as Det. Alldritt also observed, each time Dr. Melnychuk raised Mr. Klein's hand to arm's length above his face before releasing it, the hand dropped in what appeared to be a controlled fashion. Dr. Melnychuk agreed, however, that a neurological examination is heavily dependent on the cooperation of the subject, which Mr. Klein, who continued not to speak, was not giving.
- [83] The one abnormal finding was an elevated lactate reading. Dr. Melnychuk indicated numerous possible causes. They included seizure, but also alcohol or drug use, a period of heavy breathing, or other causes of bodily duress.

- [84] In Dr. Melnychuk's opinion, the alcohol reading (which was 55 mg% when Mr. Klein's blood was taken at 4:06 p.m.) did not account for the stupor in Mr. Klein's presentation. The toxicology indicating cannabis use was hard to interpret, and Dr. Melnychuk could say no more than that it indicated Mr. Klein had used cannabis some time within the previous seven days. Other expert witnesses also testified about the degree of intoxication by alcohol or cannabis, based on the analysis of Mr. Klein's blood, as I will discuss later.
- [85] Dr. Melnychuk was satisfied that Mr. Klein had no life-threatening illness or injury that, if untreated, would cause harm. However, he was unable to find a clear or cogent explanation for Mr. Klein's presentation and behaviour, or his seemingly decreased level of consciousness. To Dr. Melnychuk's mind, the leading diagnosis was that Mr. Klein's activities were behavioural and volitional with no medical cause, and he suspected malingering (or feigning); however, he thought it possible that Mr. Klein had a mental illness preventing him from safely managing himself. He certified Mr. Klein under the BC Mental Health Act, on the basis of his "opinion that this person has a disorder of the mind that requires treatment", so that Mr. Klein would be held for 48 hours and evaluated by both a neurologist and a psychiatrist.
- [86] Nurse Diana Flores and the several Corrections or police officers who kept watch over Mr. Klein testified about his behaviour during the evening and night of November 1 and the morning of November 2. Mr. Klein continued not to speak to anyone, and he rarely made eye contact, except very briefly. Occasionally he reacted to sound or to stimulation, sometimes by swearing loudly, sometimes by investigating the source of the sound, and sometimes by screaming and thrashing in his bed, such as when doctors tried to talk to him or to test his physical responses.
- [87] Dr. Ryan Punambolam, neurologist at the hospital, examined Mr. Klein in the emergency room some time before 7:30 p.m. on November 1, and again at around 12:30 p.m. on November 2. He too concluded that Mr. Klein was not suffering from a decreased level of consciousness, organic brain dysfunction, or seizure activity, and he concluded that there was no medical reason for Mr. Klein to remain in hospital. In his view, Mr. Klein's presentation and behaviours could be due to psychological factors or, alternatively, malingering. He also noted that psychological stress, whether from depression or psychosis, can lead to a mimicking of seizure behaviour.
- [88] Asked to consider Mr. Klein's behaviour in the hospital on November 1 and 2 in light of a later diagnosis of schizophrenia and psychiatric hospitalization for three years, Dr. Punambolam agreed that the behaviour was consistent with such a psychiatric disorder. The Crown stresses that Dr. Punambolam's evidence went no further than that the behaviour was possibly the result of psychosis, but I note that although Ms. Vis-Dunbar included the word "possibly" in one of her questions on this point, Dr. Punambolam's answer, as I interpreted it, responded to the main focus of the question, which was that the behaviour was consistent with psychiatric disorder, and expressed Dr. Punambolam's unqualified agreement that it was consistent.

- [89] Dr. Punambolam concluded that Mr. Klein should be evaluated by a psychiatrist. However, such an evaluation would require an interview, and Mr. Klein continued to be unresponsive at that time.
- [90] Dr. Punambolam testified that Mr. Klein's blood-alcohol level (which, as I said, was 55 mg% when his blood was taken at 4:06 p.m.) was moderate and indicated that he would have been intoxicated at the time of the reading. However, he agreed that Mr. Klein's presentation was disproportionate to the level of intoxication.

After Discharge from Abbotsford Regional Hospital - November 2 to November 4

- [91] Mr. Klein was discharged from the hospital shortly after 12:30 p.m. on November 2. As police officers transferred him from the hospital to the Abbotsford courthouse cell block, his body was limp and he had to be lifted out of a wheelchair and into the police vehicle. In the vehicle, he once again banged his head for a short while. On arrival at the Abbotsford courthouse cell block, officers had to lift him out of the vehicle and carry him inside, where he began yelling and screaming in the same way as at the hospital. He did not make an appearance before a justice.
- [92] Mr. Klein was then transferred to the Surrey Pre-Trial Centre, where, over the next day or two, he was kept on his own, sometimes in a padded room wearing a protective wrap device because he continued to hit his head against the wall. When interacting with Corrections staff there, he often remained limp and unresponsive, a dead weight when he had to be moved, his breathing sometimes laboured, although there were numerous signs that he was conscious. He did not eat, drink, or talk during this period, and was considered a suicide risk.
- [93] On November 4, an examination of a head injury Mr. Klein had sustained the previous day revealed a soft and spongy swelling in the frontal lobe region. Mr. Klein was still not eating or speaking to Corrections staff, and was considered at risk of self-harming behaviour. Medical staff at the pre-trial centre referred him to hospital "for further investigation and/or certification".

At Surrey Memorial Hospital - Before the Administration of Lorazepam

- [94] Mr. Klein was taken to the Surrey Memorial Hospital at about 3:00 p.m. on November 4. At first, he continued not to speak, and appeared agitated, sometimes yelping, spitting, thrashing around, or rocking back and forth, while held on a stretcher by restraints. He screamed at the top of his lungs while he was being cleaned up after one of the occasions when he was incontinent of feces while in or on a bed. A hospital record made shortly after his admission noted "extreme agitation".
- [95] Dr. Samantha Saffy, the on-call psychiatrist at the hospital, gave an order for an oral dose of lorazepam, an anti-anxiety medication. She testified that high anxiety is one of the two main causes of mutism. Mr. Klein refused to open his mouth to take the oral dose, even when told

that the medication would be given by injection if he did not. Dr. Saffy then ordered lorazepam by injection, which was administered at about 8:30 p.m. Mr. Klein groaned but settled shortly afterwards, remaining non-responsive and staring blankly at a wall, and refusing offers of water or other fluids.

After the Administration of Lorazepam

- [96] Mr. Klein's demeanour then changed markedly within about two hours of the lorazepam dose. He asked Nurse Flores about the medication she had administered, and said that it had really helped him. His conversation was normal, although his affect was at this point still flat or blank.
- [97] Mr. Klein told Nurse Flores that he was really hungry because he had not eaten in four days. She gave him food and drink, and he consumed it all. In response to her question, he said that it had been on purpose that he had not eaten for four days. He refused Nurse Flores' offers to help him use a urinal or bedpan either then or later, but he nonetheless was incontinent of feces in the early morning hours. Mr. Klein also asked if his face was in the news, and expressed concern that people would want to kill him.
- [98] Mr. Klein became quite talkative with the Corrections officers who were with him at the time. He told them that the officers previously with him were "assholes", not very nice. He reported being assaulted and insulted, and said he was bruised all over, and had been unable to breathe as a result of assaults by the officers. He said that he had been behaving in the way he had because he had been treated so poorly.
- [99] Mr. Klein also brought up the topic of the events at the school. He told the officers that he had attacked two girls, killing one and injuring the other. Mr. Klein said he remembered parts of the attack, including stabbing the girl who died, hitting her organs and hitting her spine, and one of the girls knocking the knife out of his hand, causing him to back off as the school principal arrived. Mr. Klein said that he had been in a sort of delusional state, hearing a voice say "kill, kill, kill", and, until the knife was knocked from his hand, did not know why he was doing what he was doing. He said he felt badly for the other, injured girl, and many times he said that he would like to donate blood or organs to help her. What happened was his fault, and he didn't know why he did it. He felt so guilty about what happened that he wanted to kill himself. He was also worried about how he was being portrayed in the media. He felt that everyone would think he was high on drugs, and he wanted to be tested; he had smoked a bit of weed, and thought that it might have been laced with methamphetamine.
- [100] Mr. Klein also asked when he would get to see a psychiatrist.

Assessment by Dr. Samantha Saffy - November 4, at approx. 11 p.m.

- [101] When Mr. Klein saw Dr. Saffy shortly after 11:00 p.m., he was still restrained but was alert, polite, and cooperative. At the outset, he asked Dr. Saffy whether their conversation would be recorded for his medical records. He also volunteered that his lawyer would be using the "NCR defence", and that he had been seeking mental health assistance in the week before the attack.
- [102] Also in support of his concern about mental illness, Mr. Klein told Dr. Saffy that he had been having shaking episodes. These he described as typically out of the blue, unrelated to anything in particular, and they did not cause him to lose consciousness. He told Dr. Saffy that he had had one such episode earlier in the evening when Corrections officers pushed too hard on his feet.
- [103] As to the events at the school, Mr. Klein told Dr. Saffy that earlier in the day he stole some alcohol but not enough to make him very intoxicated, and he then stole a knife. He initially thought he might use the knife to attack or threaten a police officer so that they would shoot him, and he could claim "suicide by cop". He was unsure what he did exactly before arriving at the school, but his initial plan was to go there to use the computer. Once he was there, he saw the two girls but to him they appeared to be monsters or strange creatures. At that point, he got up and walked toward them, the knife hidden, and stabbed the first girl and then, when she slumped over, the second. When the second girl hit the knife out of his hand, he was surprised and realized that these were not monsters but girls. He allowed himself to be tackled by the headmaster of the school, and he complied with the police from then on.
- [104] When Dr. Saffy asked for clarification about seeing the girls as monsters or creatures, Mr. Klein said that one of them looked like a grey owl, and the other like a shape-shifting witch. When Dr. Saffy asked for clarification about some other details, Mr. Klein said that a voice in his head said, "kill, kill, kill"; however, at another point he said that he had not heard voices at all, but had seen monsters instead of people. Dr. Saffy flagged these inconsistencies in Mr. Klein's account, as well as that he was unable to give any clear or consistent answer about whether he had had auditory hallucinations before (as further discussed below), and noted that when asked for details he tended to change the subject.
- [105] Dr. Saffy noted that, in an example of a delusional belief that had caused him to seek medical assistance, Mr. Klein told her that he had gone to the Abbotsford Regional Hospital because he believed he had chicken feces on his hands. Dr. Saffy found that report inconsistent with hospital records that showed Mr. Klein complaining of (among other things) painful hands from handling chickens. The defence submits that Dr. Saffy agreed, in cross-examination, that her impression of discrepancies in Mr. Klein's reporting of his condition would have been different had she known that he had also spoken of chicken feces on his hands, as the hospital records show he in fact did. However, as I assessed Dr. Saffy's evidence, she was careful to confine that agreement to the particular perceived discrepancy under discussion (chicken scratches vs. chicken feces). Dr. Saffy did not withdraw from her broader opinion that what Mr. Klein told her included numerous

discrepancies or inconsistencies.

- [106] Dr. Saffy testified that Mr. Klein asked to see his urine toxicology results, and suggested that his marihuana may have been laced with some sort of methamphetamine, causing psychosis. However, when Dr. Saffy rejected his request for anti-psychotic medication, saying that if his behaviour was in fact drug-induced he should let the drugs clear from his system, Mr. Klein responded that it was not drugs that caused him to attack; rather, he was not high or intoxicated at the time, and had been hearing voices long before he used drugs and also when he was not using drugs.
- [107] Dr. Saffy found Mr. Klein to speak clearly and fluently in the interview, with organized thoughts. She could not elicit any evidence of delusional thinking or paranoia, or that Mr. Klein was responding to internal stimulæ or internal thought processes. Overall, her impression was that there was no evidence of psychosis at the time of the assessment, and she was concerned about possible malingering, or intentionally producing or exaggerating symptoms.
- [108] Dr. Saffy gave several reasons for her concern about malingering, in addition to the inconsistencies previously noted. The shaking episodes, as Mr. Klein described them, referring to them as evidence of mental illness, did not fit with any psychological or neurological condition. For example, they involved no warning signs, or loss of bladder control, or confused state afterwards, and Mr. Klein was conscious throughout. Nor did the visual phenomena, as Mr. Klein described them, particularly since hallucinations about monsters are usually associated with paranoia and a perceived need to protect oneself, whereas Mr. Klein reported walking toward the monsters to attack them. In addition, psychosis is usually fairly enduring. Dr. Saffy was also struck by Mr. Klein's tendency to evade direct answers.
- [109] Dr. Saffy recognized that her assessment was cross-sectional only, based on Mr. Klein's presentation on a single day; she would defer to an opinion based on a longitudinal assessment.
- [110] Asked whether she might have been seeing in Mr. Klein a prodrome for schizophrenia (which she explained as being a stage often preceding schizophrenia in which one sees social changes, usually social withdrawal, and sometimes psychotic-like symptoms, but no full-blown psychosis), Dr. Saffy could not say. She herself saw nothing in Mr. Klein's presentation or history that indicated a diagnosis of schizophrenia; however, Mr. Klein was at an age when psychotic illnesses often present.

After the Assessment by Dr. Saffy - Overnight November 4-5

- [111] After his interview with Dr. Saffy, which ended at around 11:45 p.m., Mr. Klein watched television with apparent interest, and asked about changing the channel. Nurse Flores testified that when she checked him at 2:15 a.m., he had a smile on his face, which was quite different from his previous affect.

Assessment by Dr. Satnam Kunar - Morning of November 5

- [112] Dr. Satnam Kunar, who is also a staff psychiatrist at the Surrey Memorial Hospital, assessed Mr. Klein at about 9:30 a.m. on November 5.
- [113] When Dr. Kunar's assessment began, Mr. Klein was lying under a blanket and initially was not very conversant. However, he became more so as the interview progressed.
- [114] Mr. Klein said that he had not slept well, and he was not happy about being in the hospital. He complained of pain from being manhandled by the Corrections officers. He also said that he had been banging his head, and had pain in his wrist and his jaw. He had not eaten for three or four days (until the day before) because he was hoping to starve himself to death.
- [115] Mr. Klein told Dr. Kunar that he was banging his head in the pre-trial centre to get rid of the voices. The voices had started a few months earlier, in the summer of 2016, and he had heard them as recently as the day before, when a voice said, "Lucy, Lucy" to him. At a different point in the interview, Mr. Klein said that the day before voices had told him to kill himself in his cell, and had given instructions about how to do so. Mr. Klein reported that at other times voices would tell him to do certain things, such as to steal or to assault people or "fuck someone up". On one occasion, a voice told him to hurt himself and he therefore stepped in front of a car. Mr. Klein also spoke of a voice saying "kill, kill" at the school in Abbotsford. Asked where the voices came from, at one point he said the back of his head, and at another he said, "not from outside very often".
- [116] Asked more about the events at the school, Mr. Klein said that the two girls were walking past him and he thought they were monsters. When he heard the voice saying "kill, kill", he used the knife that he had inside his sweater to assault one of the girls, and, when she fell, the other girl, until he was subdued. He also said that the second girl managed to push the knife out of his hand, and at that point he realized what he had done and sat down. Mr. Klein told Dr. Kunar that he was sorry about what he had done, and was afraid that he would spend many years in prison.
- [117] As to substance use before the events, Mr. Klein told Dr. Kunar that he had used marihuana the day before, given to him in the shelter, and on the day of the incident in the school had drunk three to four shots of white rum. He suspected that the marihuana may have been laced with crystal methamphetamine and might have been a causative factor in his assault on the two girls. Mr. Klein said that he had used crystal methamphetamine once before, and

it at that time caused him to hallucinate and to see shadows following him, and people to be appearing to change shape. Mr. Klein also said that even the day before the incident, he thought people on the street were mutating, but ignored this because it was Halloween and they could be in costume as demons or monsters.

- [118] As he had earlier to Dr. Saffy, Mr. Klein also mentioned to Dr. Kunar his thoughts of attacking a police officer for "suicide by cop". He also spoke of his visit to the Abbotsford Regional Hospital a couple of days before the incident, and said that he felt his concerns had been minimized there.
- [119] Dr. Kunar did not believe that Mr. Klein was suffering from an acute psychotic illness on November 5. Mr. Klein's thoughts appeared logical and organized. The symptoms Mr. Klein described, particularly relating to voices, were vague and inconsistent, and were more consistent with pseudo-hallucinations than with delusions. Dr. Kunar testified that pseudo-hallucinations can be associated with mood disorders such as depression, and they exist within the realm of reality; delusions, by contrast, proceed from a fixed false belief and indicate mental disorder.
- [120] Mr. Klein also told Dr. Kunar that he had seen a psychologist for two months in Red Deer, Alberta for what Mr. Klein described as anxiety, and had been diagnosed with general anxiety disorder. On the basis of what Mr. Klein told him, the problem did not sound to Dr. Kunar like generalized anxiety disorder.
- [121] Dr. Kunar could not make a definitive diagnosis, but he concluded that Mr. Klein could be discharged.
- [122] Like Dr. Saffy, Dr. Kunar agreed that he could comment only on what he saw on the day of his assessment, and that he would defer to a diagnosis based on a longitudinal study.
- [123] Dr. Kunar agreed that schizophrenia often has its onset in young men between their mid- to late teens and their early twenties, and is commonly preceded by a prodromal period before the onset of active symptoms of the disorder. During the prodromal period, patients may experience social withdrawal, lack of emotion, and lack of self care. These prodromal symptoms may vary, with periods during which they are acute, and other periods during which they are somewhat better. In this sense, the onset of the prodrome may be uneven, although generally the overall pattern is a deteriorating one.

After Discharge from Surrey Memorial Hospital on November 5

- [124] Mr. Klein was discharged at about noon, and taken back to the Surrey Pre-Trial Centre. Once again, his body became a dead weight as he was dressed and taken by wheelchair to the vehicle, where he was lifted and placed inside. Back at the pre-trial centre, he reverted to the demeanour and behaviour before his departure, uncooperative and non-responsive (except when he appeared to speak to a lawyer who visited him on November 15), refusing to eat for lengthy periods, sometimes throwing his food in his toilet, and sometimes self-

harming.

- [125] For a scheduled appearance in the Abbotsford Provincial Court on November 7, the Court was at first told that Mr. Klein refused to come out of his cell. After some discussion, Mr. Klein was taken to the video room connected to the courtroom, but he did not respond to questions from the Court.
- [126] For a further appearance in Surrey Provincial Court on November 9, Mr. Klein had to be transported by wheelchair. He did not respond to duty counsel, or to the Court.
- [127] A change was seen on or about November 20, when Mr. Klein began to cooperate with staff in the pre-trial centre, and November 21, when he dressed on his own in preparation for an appearance in this Court in Chilliwack, and followed directions as he moved around the pre-trial building. Duty counsel spoke to Mr. Klein before the court appearance and advised the Court that he had been able to "establish some level of communication" with him. Mr. Klein also responded appropriately on that occasion to questions and comments from the Court.

Mr. Klein's Telephone Calls to his Mother

- [128] In telephone calls from the Surrey Pre-Trial Centre to his mother on December 6, 8, and 21, 2016, Mr. Klein made various statements potentially bearing on his state of mind during the events at the school, including these:

- what I did was horrible. I don't understand why I did it. I have to tell you that, I had encephalitis, like the swelling of the brain? Read about it, mom. It's uh, I had a virus, a bacteria attacked my brain. And uh, my brain was swelling at the time.
- Encephalitis. So, swelling of the brain. It was causing me to do things and think things that weren't, right. Weren't - . . . natural?
- I told the doctor that I have, a (INDECIPHERABLE) to my brain, I think my brain is swelling. My spine may be swelling as well. I may have meningitis, I may have encephalitis. I told the nurse that I wanted to kill myself. I told so many people, 'cause my thoughts were, eh, drastically changing from wanting to kill myself wanting to hurt others, wanting to steal, wanting to do this and that, this and that. I had no long term planning. That's a part of encephalitis, that people can't say that I was planning this out, because encephalitis affects long term planning.
- They're trying to reach out to me, he held me. I still see things that aren't there. And it's scary.
- that's the problem with having brain damage, mom. That's the problem, I'm having, what encephalitis did to me 'cause, like, when I, I had chicken feces? 'Cause I, I um, I went to a farm and the farmer had me check out, uh, clean out a coop? . . . And I got, my hands were cut up. From a thorn bush. And I had, I got chicken feces, all over my hands. And that made the encephalitis worse.
- I never did mean to kill these people

· I didn't go to that school for the [sole] purpose of killing somebody. I went to that school for the public library that's connected to that school.

Post-Events Diagnosis of Schizophrenia

[129] Some months after the events, Mr. Klein was diagnosed as having schizophrenia. This is agreed, and the diagnosis is not challenged. The defence highlights in particular the following references in clinical records of the Forensic Psychiatric Services Commission:

· On January 27, 2017, by Dr. Widajewicz: "Mr. Klein claimed that from time to time he was hearing two different female voices, mostly coming from inside his head, telling him what to do. He claimed that the attack on two teenage girls happened because of these voices but declined to elaborate [referring to advice from his lawyer]."

· On March 15, 2017, by Dr. Lacroix: "Mr. Klein's current working diagnosis is that of Schizophrenia. He remains acutely psychotic with persistent delusional beliefs as described above. Although details of his alleged offences have not been discussed, it is possible that his psychotic symptoms are associated with extreme violence. He requires continued treatment under the Mental Health Act in a designated facility to prevent deterioration of his mental state and for the protection of others. He has no insight and requires this treatment to be provided on an involuntary basis."

· In psychiatric clinical notes of Dr. Emlene Murphy between May 17 and July 5, 2017: "diagnosis of schizophrenia", "delusional thought patterns", "hallucinations". On May 17, 2017, Mr. Klein reported: "I killed a person and feel really guilty about that."

· In an August 2, 2017 a medical certificate of Dr. Emlene Murphy: "Diagnosis of schizophrenia . . . auditory hall[ucinations] . . . bizarre ideation. . . . He states he just had a dream of stabbing 'a bunch of people'. States he has already stabbed 2 people."

[130] Before I outline the parties' positions in more detail than I did before and the applicable law, and then apply the law to the facts as I find them, I will summarize the main evidence about intoxication or impairment by alcohol or drugs.

EVIDENCE OF INTOXICATION BY ALCOHOL OR DRUGS

[131] Samples of Mr. Klein's blood were taken on November 1, 2016 at 4:06 p.m. at the Abbotsford Regional Hospital.

Alcohol

[132] As I said, Mr. Klein's blood had an alcohol concentration of 55 mg% as of that time.

[133] There is no dispute that Mr. Klein had consumed no alcohol in the two hours between approximately 2:00 p.m., when the attack took place, and 4:06 p.m., when the samples were collected.

- [134] The other main piece of objective circumstantial evidence about alcohol consumption is that, as I have mentioned, two bottles of white rum were found in Mr. Klein's backpack at the school, one of them unopened, and the other open and missing 2.9 fluid ounces of rum. The reasonable inference is that Mr. Klein drank the missing 2.9 fluid ounces of rum (and other alcohol as well, as I will discuss) between the theft from the liquor store at about 11:00 a.m. and the events at the school at 2:00 p.m.
- [135] Micheal Rosland, toxicologist, whose academic degree is in pharmacology, testified as an expert in toxicology, and was asked to give his opinion about hypothetical situations reflecting the drinking pattern I have outlined. He assumed a male drinker of Mr. Klein's approximate weight, and a rate of elimination of alcohol from the body of between 10 and 20 mg% per hour, which, he testified, is the range generally accepted by the forensic community. (Mr. Rosland selected from within that range according to the particular extrapolation he was asked to perform.) Also, his extrapolations relate to the consumption of 40% volume by volume liquor, which, he testified, is the alcohol concentration of most spirits.
- [136] Mr. Rosland testified that the blood alcohol concentration of 55 mg% at 4:06 p.m. is not consistent with the consumption of only 3 ounces of spirits at or shortly before 2:00 p.m. A person who consumed that amount at approximately that time would have a blood alcohol concentration of only 35 mg% two hours later.
- [137] To achieve the higher concentration of 55 mg% at 4:06 p.m., the person would have needed to drink between at least 4.0 and 5.1 ounces of spirits (and perhaps 1.5 to 2 times as much in an actual drinking situation) at or before 2:00 p.m. The amount of spirits required would be yet higher if the drinking was significantly earlier than at 2:00 p.m.
- [138] Assuming, also, no consumption of alcohol between 1:30 p.m. and 2:00 p.m. (because alcohol consumed within that period would not have been absorbed into the body by 2:00 p.m.), Mr. Rosland testified that between 76 and 96 mg% (depending on the person's elimination rate) would be the highest possible blood alcohol concentration at 2:00 p.m. consistent with a concentration of 55 mg% at 4:06 p.m.
- [139] Mr. Rosland testified that an average social drinker with a blood alcohol concentration of between 76 and 96 mg% would be considered impaired, but toward the lower end of the spectrum of impairment. One would expect poor attention and judgement, increased risk-taking and self-confidence, and longer reaction times, but no observable physical signs. At the higher end of that range, one might see issues with fine motor control and coordination.
- [140] Asked in cross-examination about a person's blood alcohol concentration at 2:00 p.m. after their consumption of 4.75 ounces of spirits between 12:25 p.m. and 12:55 p.m., Mr. Rosland indicated that it would be 73 mg%. Mr. Rosland agreed with the defence suggestion that the 4.75 ounces of spirits so consumed could consist in total of 3 ounces from a bottle plus the entirety of a small 50 ml. (or 1.75 fluid ounce) sample attached to the bottle. There is no

evidence that any such sample came with either of the bottles of rum in Mr. Klein's backpack, but this portion of Mr. Rosland's evidence allows for a plausible inference - if not the only one - that such was the case.

Drugs

- [141] Analysis of the blood drawn at 4:06 p.m. also indicated previous consumption of cannabis, although without indicating when the consumption took place.
- [142] Mr. Rosland testified that the findings of 1 ng of THC and 97 ng of carboxy THC in Mr. Klein's blood likely suggest that he was a frequent user of cannabis, and do not of themselves indicate whether or not he was under the effects of cannabis at the time.
- [143] If a person with the blood alcohol concentration described earlier had recently consumed a joint or two of marihuana as well, the cannabis would increase the level of impairment, Mr. Rosland testified, but would not change the symptoms and effects previously described as resulting from alcohol impairment.
- [144] I turn now to the positions of the parties.

THE POSITIONS OF THE PARTIES

The Crown's Position

- [145] The Crown submits that the evidence amply establishes that Mr. Klein had the "specific intent", or the subjective mental state, required for second degree murder. The Crown relies on the common sense inference that a person usually intends the ordinary consequences of their acts, and submits that the Court can safely infer that when Mr. Klein stabbed Ms. Reimer 14 times, he intended either to cause her death or to cause bodily harm that he knew was likely to cause that result. The Crown submits that little but speculation supports the defence submission that the common sense inference cannot apply because of Mr. Klein's intoxication or his mental disturbance, taken separately or together.
- [146] As to intoxication, the Crown says that this partial defence has no air of reality on the evidence. Witnesses who dealt with Mr. Klein around the time of the events described no signs of intoxication or impairment, except that Cst. Turner noted a stupefied look and a smirk, and Cst. Bader smelled liquor on Mr. Klein's breath when she was close to him at the cell block counter. And although the blood analysis revealed cannabis use, there was no indication in the evidence that it was recent or that Mr. Klein was subject to the effects of cannabis at the time of the attack.
- [147] The Crown submits that since intoxication has no air of reality, on the evidence, it cannot contribute to a cumulative or "rolled up" basis for rebutting the common sense inference or otherwise negating specific intent.

[148] As to mental disturbance, the Crown submits that, even if Mr. Klein suffered from a mental illness or disturbance at the time, nothing in the evidence associated that condition with an inability to foresee the ordinary consequences of his actions. Moreover, much of the evidence about Mr. Klein's behaviour before the events indicated that he acted in a goal-directed and purposeful manner, albeit sometimes in frustration or anger. The Crown submits that similarly Mr. Klein's behaviour in the hours and days after the events was volitional and deliberate, although also, for much of it, feigned in an apparent effort to support a defence of NCRMD.

Mr. Klein's Position

[149] As I said at the outset, the defence submits that the Court should find Mr. Klein guilty of the included offence of manslaughter in relation to Ms. Reimer. The defence submits that the evidence leaves a reasonable doubt that Mr. Klein's state of mind included the subjective foresight of death that is required for second degree murder.

[150] The defence submits that, separately or in combination, Mr. Klein's mental disturbances and his intoxication must prevent the application of the common sense inference, which applies only to the actions of "sane and sober" individuals.

[151] As I noted earlier, the defence acknowledges that the evidence does not link Mr. Klein's schizophrenia, diagnosed months later, with his conduct at the school, and for that reason does not seek a finding that Mr. Klein was not criminally responsible on account of mental disorder.

[152] However, the defence points to evidence of unusual and distressing demeanour and behaviour, before and in association with the events, suggestive of mental disturbance on Mr. Klein's part, including, in particular, that he told various doctors in the days and months after the events that he experienced hallucinations or delusions, including at the time of the attack. The defence submits that the evidence allows for a conclusion that at the time of the events Mr. Klein may have been in the prodromal period leading to the onset of schizophrenia.

[153] As to intoxication, the defence submits that Mr. Klein's blood alcohol content of between 73 or 76 and 96 mg% at the time of the attack must have affected his control of his mental faculties.

[154] The defence submits that the common sense inference cannot properly apply, and that without that inference the Crown cannot meet its burden of proving that Mr. Klein meant to cause death or to cause bodily harm that he knew was likely to cause that result.

THE APPLICABLE LAW

- [155] As mentioned earlier, for a finding of second degree murder the Crown must prove beyond a reasonable doubt that when the accused person caused the death of the victim they either: (i) meant to kill the victim; or (ii) meant to cause the victim bodily harm knowing that the bodily harm was likely to cause the victim's death, and was also reckless whether death would follow or not.
- [156] These two alternatives describe the necessary "specific intent" for the offence. The state of mind to which they refer is sometimes also described as "subjective foresight".
- [157] Second degree murder has other essential elements as well, but those are not in issue in this case.
- [158] As has been noted many times in the case authorities, direct evidence of an accused person's state of mind is often unavailable. Usually, the Crown must rely on circumstantial evidence relating to the context in which the death took place, and on the reasonable inferences arising from that circumstantial evidence. In recognition of this, courts often apply a "common sense inference" that "a person usually knows what the predictable consequences of his or her actions are, and means to bring them about": *R. v. Walle*, 2012 SCC 41 at para. 64, referring to the Canadian Judicial Council's Model Jury Instructions. By spelling out this proposition about a person's intent, the common sense inference aims to provide a marker to help the trier of fact, in the appropriate circumstances, with a concept that otherwise may seem "rather amorphous" (*Walle* at para. 63).
- [159] But care must be taken in relying on the common sense inference. The inference should not displace the requirement to consider all the evidence relating to intent, particularly evidence that points away from intent. Moldaver J. for the Court in *Walle* gave the following caution:
- [63] A proper instruction also sounds a cautionary note. The jurors are admonished that the inference is permissive, not presumptive, and that before acting on it, they must carefully consider the evidence that points away from it. That is important. Left to its own devices, a jury might too readily turn to common sense for an answer, especially in cases like the present one, where common sense might suggest that anyone who fires a gun into a person's chest at close range would surely be aware of the consequences.
- [160] The common sense inference was traditionally described as applying to the "sane and sober" accused person, and was therefore sometimes said not to apply if there were signs of mental disturbance or intoxication. However, the Supreme Court of Canada has recently emphasized in *R. v. Daley*, 2007 SCC 53 and *Walle* (see below) that there are no bright dividing lines concerning the use of the inference, and that the overarching question is whether, on the whole of the evidence, the trier of fact believes or has a reasonable doubt that the accused did not have the requisite intent. The Court in *Walle* explained this as follows, and also referred to the approach of the trial judge in that case as illustrating how

the general principles may properly be applied (at paras. 66-8):

- [66] After the jurors have been alerted to the pertinent evidence, they should be told that if, after considering the whole of the evidence, they believe or have a reasonable doubt that the accused did not have one or the other of the requisite intents for murder at the time the offence was committed, then they must acquit the accused of murder and return a verdict of manslaughter.
- [67] If, however, there is no evidence that could realistically impact on whether the accused had the requisite mental state at the time of the offence, or if the pertinent evidence does not leave the jury in a state of reasonable doubt about the accused's intent, then the jury may properly resort to the common sense inference in deciding whether intent has been proved.
- [68] In the instant case, there was no jury. Instead, as discussed above, the trial judge considered the pertinent evidence of alcohol consumption and found that it did not leave him in a state of reasonable doubt as to whether the appellant knew that death would likely result if he shot the deceased in the chest at close range. Only then did the trial judge apply the common sense inference in finding that the appellant had the necessary intent for murder.
- [161] As Madam Justice Huddart said in *R. v. Courterille*, 2001 BCCA 17 at para. 32, leave to appeal ref'd [2001] 1 S.C.R. ix, the common sense inference "does not die with the first drink". It may be applied in light of good sense and common experience that the effect of alcohol on thought processes is a continuum:
- [32] I agree with Crown counsel's sensible comments in his factum.
- [The common sense inference] does not die with the first drink. The collective common sense and knowledge of life possessed by twelve jurors is of fundamental importance to the unique value of juries. As Lord Denning observed, "The presumption of intention is not a proposition of law but a proposition of ordinary good sense." It is equally good sense and common experience that the effect of alcohol on thought processes is a continuum. It is a misnomer to refer to the inference as that of a "sane and sober" person. The common sense inference may be perfectly valid at lower levels of intoxication. The more intoxicated a person becomes, the greater the likelihood that drink will result first in uninhibited conduct, and ultimately in unintended conduct. It is proper to remind the jury that they may use their common sense with respect to this, even if intoxication is advanced, provided the reminder includes the admonition that the inference is permissive and subject to a consideration of the evidence of intoxication. Such a direction may be "boilerplate" to lawyers and judges, but it is helpful to jurors who deserve to be assisted not only with what the evidence is, but also with how they may deal with it.
- [162] In this case, Mr. Klein does not rely on intoxication alone as the basis for displacing the common sense inference and negating specific intent. As I explained earlier, he also relies on the "rolled up" or cumulative effect of intoxication combined with mental disturbance (short of mental disorder under s. 16 of the Criminal Code).

- [163] (I pause to note that the rolled up or cumulative effect "defence" is often referred to as such for convenience, and I will do so at times in these reasons. However, it actually refers to the failure of the Crown to prove a necessary element of the mens rea for the offence.)
- [164] To briefly explain the role of the rolled up or cumulative effect defence, I can do no better than to quote Madam Justice Ker's summary in *R. v. Scott*, 2019 BCSC 313 at paras. 530-2:
- [530] The position advanced by the defence in this case is often referred to as the "cumulative effect" defence. It largely had its genesis in the decisions of the Ontario Court of Appeal in *R. v. Clow* (1985), 44 C.R. (3d) 228, *R. v. Nealy* (1986), 30 C.C.C. (3d) 460, and *R. v. Desveaux* (1986), 51 C.R. (3d) 173. These three cases are authority for the proposition that where the evidence establishes elements of defences such as intoxication, provocation, and/or self-defence, the trier of fact should be instructed to consider and take into account all the surrounding circumstances in determining whether the accused had the requisite intent for murder. *Clow*, *Nealy* and *Desveaux* were cited with approval by Chief Justice Lamer writing for the majority of the Supreme Court of Canada in *R. v. Robinson*, [1996] 1 S.C.R. 683 at para. 59. In the context of jury trials, instructions to the jury on this issue are frequently referred to as the "rolled-up charge".
- [531] Prior to the decision in *Robinson*, our Court of Appeal declined to order that a rolled-up charge was necessary in the case of *R. v. Stewart* (1995), 41 C.R. (4th) 102. Post-*Robinson*, the jurisprudence in this province started to move towards recognition of the rolled-up charge where the circumstances warrant it: *R. v. Williams*, 2001 BCCA 648 at paras. 31-33; *R. v. Kent*, 2005 BCCA 238 at paras. 22-34. In *R. v. Neumann*, 2009 BCCA 296, Mr. Justice Low, writing for the Court, held:
- [28] Once it is established that the accused caused the death of the victim by means of an unlawful act, provocation can arise at two stages of the analysis that must be undertaken by the jury to determine if the accused is guilty of murder or of manslaughter - manslaughter if he lacked intent or if, under s. 232 of the Code, he was provoked. Evidence of provocative acts might form part of the body of evidence to be considered on the question of whether the accused had either of the two possible intents in murder. At this stage of the analysis, s. 232 does not come into play. Provoking conduct by the victim of any kind is to be considered on the question of intent. In many cases, intoxication will be a factor to weigh on this issue. It is sometimes useful for the trial judge to give a "rolled-up" instruction that brings to the analysis by the jury consideration of all aspects of the evidence that have a bearing on the issue of intent, including intoxication and provocation: see *R. v. Clow* (1985), 44 C.R. (3d) 228 (Ont. C.A.); *R. v. Robinson*, [1996] 1 S.C.R. 683, 105 C.C.C. (3d) 97; and *R. v. Kent*, 2005 BCCA 238, 196 C.C.C. (3d) 528.
- [532] Mr. Justice Low went on to analyze the charge to the jury in *Neumann* and concluded it satisfied the requirements of the rolled-up charge.

- [165] The applicable authorities clearly allow mental disturbance short of s. 16 mental disorder to play a part in a rolled up or cumulative effect defence, or to function alone as the basis for reasonable doubt about specific intent. Joyce J. articulated this proposition in *R. v. Robinson*, 2010 BCSC 368 at para. 107, in an oft-quoted passage that the Court of Appeal endorsed in *R. v. Damin*, 2012 BCCA 504 at para. 47 and *R. v. O.V.*, 2015 BCCA 449 at para. 55:
- [107] Because we cannot look into the mind of the accused and there is often little direct evidence of an accused's mental state, intent must generally be proven based upon inferences to be drawn from established facts. This is where use may be made of the common sense inference that a sane and sober person intends the natural consequences of his acts. But there may be circumstances that cast doubt on whether one can safely rely on the common sense inference. Such circumstances include intoxication, whether by alcohol or drugs. In addition, evidence of a mental condition that falls short of a mental disorder that renders the accused not criminally responsible, may raise a reasonable doubt as to whether the accused had the necessary specific intent. If such circumstances, either alone or in combination, raise a reasonable doubt that the accused had the subjective intent to cause bodily harm or that he had the subjective knowledge that the bodily harm he inflicted was of such a nature that it was likely to result in death, then the accused is entitled to the benefit of that doubt and cannot be convicted of murder.
- [166] With these principles in mind, I turn to the question of whether the Crown has proven beyond a reasonable doubt that Mr. Klein had the necessary specific intent for second degree murder.

ANALYSIS

Introduction

- [167] Mr. Klein's diagnosis of schizophrenia some months after the events is unchallenged, as I mentioned. However, and as the defence concedes, nothing in the evidence links that diagnosis, or the condition underlying it, with Mr. Klein's conduct in attacking Ms. Reimer and E.I.
- [168] The defence submits that the evidence as a whole indicates mental disturbances short of mental disorder (as defined in s. 16 of the Code) that, alone or together with the evidence of intoxication, must leave reasonable doubt that Mr. Klein subjectively foresaw the fatal consequence (or its likely risk) when he stabbed Ms. Reimer, and must prevent the application of the common sense inference.
- [169] I will begin by addressing the circumstantial evidence relating to Mr. Klein's mental state in the 48 hours before the attack.

Before the Attack

- [170] From the summary of the facts I gave near the start of these reasons, it is evident that during the 48 hours before the attack, Mr. Klein appeared normal and capable at certain points, and anxious and troubled at others.
- [171] Mr. Klein appeared normal to Ms. Montague, the Canada Border Services Officer, and calm to Ms. Reglin, the last staff member to deal with Mr. Klein at the Abbotsford Regional Hospital. The next day, after Ms. Cave (at the Lookout Shelter) suggested that he use a computer at the public library, he accepted her directions and a map and he went there. When he came across K.P. at the library, he chatted to her in a friendly and engaging fashion, if somewhat more intrusive in his questions than she considered customary in the circumstances.
- [172] Mr. Klein engaged in some goal-oriented behaviour the next day, not long before the attack, when he committed the two separate thefts, each purposive and efficient. The thefts also amounted to the carrying out of Mr. Klein's angry observation to Mr. Koch earlier that morning that, in face of the Ministry's refusal to give him funds immediately, he might as well "do crime".
- [173] But there were also indications that Mr. Klein was distressed. As I have noted, he seemed confused and agitated to Ms. Evanuk, the emergency room ambassador at the Abbotsford Regional Hospital. A triage assessment form completed in connection with Mr. Klein's hospital visit gives some support to Ms. Evanuk's impression. Among Mr. Klein's complaints were that, "[patient] states he is having difficulty planning things" (along with complaints of spine swelling and intermittent back pain, that he felt unwell and had been vomiting, and that he was worried about infection from chicken feces on his scratched hands). There was no elaboration in the evidence of "difficulty planning things", but one reasonable inference - though not the only one - is that Mr. Klein meant that he had trouble with focus or foresight, a matter potentially relevant to his mental state in general at the time.
- [174] In the intake process at the Lookout Shelter on October 31, Ms. Cave was sufficiently concerned about Mr. Klein to request mental health assistance for him. And on November 1, when Mr. Klein reacted with disproportionate anger and stormed out of the shelter, witnesses noted unusual features of his demeanour, such as that he did not seem fully alert or aware.
- [175] Mr. Klein's behaviour as he walked toward the school in the half hour or so before the attack was highly unusual, remarkable to three unrelated witnesses, and sufficiently troubling that two of them took action to follow up. Ms. Faber was concerned that Mr. Klein may have a mental health issue, and she had concerns for his safety and that of others. Mr. Chard agreed that he too would have called the police, had he located Mr. Klein when he tried to find him shortly afterwards, because he thought someone should intervene.

[176] All of these unusual features of Mr. Klein's demeanour and behaviour merit consideration in the analysis of his mental state at the time of the attack.

Mr. Klein's Non-Verbal Sounds and Physical Conduct After the Attack

[177] Next, I will address the evidence of Mr. Klein's condition after the attack, insofar as it may bear on his mental state during the attack.

[178] There is no medical evidence to indicate that Mr. Klein's unusual sounds and acts in the hours and days after the attack reflected a neurological condition or problem, such as seizure. Rather, there is considerable medical evidence (outlined earlier) indicating that they did not (Dr. Melnychuk, Dr. Punambolam, and Dr. Saffy).

[179] Nor did any medical evidence indicate that Mr. Klein's sounds and behaviour were the product of psychosis.

[180] It is true that, as I mentioned earlier, Dr. Punambolam, the neurologist who saw Mr. Klein on November 1 and 2 at the Abbotsford Regional Hospital when Mr. Klein was still non-verbal, agreed that the behaviour he saw then was consistent with psychosis. However, that recognition was not a diagnosis, as is evident from the fact that Dr. Punambolam referred Mr. Klein for a psychiatric evaluation, to take place when he became willing or able to participate in an interview. As I outlined earlier, when such evaluations were conducted by Dr. Saffy and Dr. Kunar a few days later, each of them concluded that Mr. Klein was not suffering from psychosis.

[181] That Mr. Klein's non-verbal sounds and behaviour were not caused by a neurological condition or a psychiatric disorder does not necessarily mean that they were deliberately feigned, as the Crown submits they were. There are other reasonable possibilities, such as that Mr. Klein withdrew from the world because he could not cope with the enormity of what he had done at the school, or was overcome by fear of what he would face in the future. Dr. Punambolam testified that psychological stress, whether from depression or psychosis or some other cause, can lead to a mimicking of seizure behaviour. Some of the statements Mr. Klein made in the coming days to Corrections officers guarding him at the Surrey Memorial Hospital made clear that he was very concerned about what would happen to him in the pre-trial centre, and about how he was viewed and would be dealt with by members of the public.

[182] Some of Mr. Klein's unusual conduct after the attack was, as I find, deliberate. Mr. Klein effectively acknowledged this in statements he made to the Corrections officers with whom he was friendly in the Surrey Memorial Hospital (he had behaved as he had earlier because the previous officers were "assholes"), and in later telephone conversations with his mother in December 2016 during which he said the following:

[December 8]:

kinda just like I was not talking, I was kinda being a douchebag and making them carry me, put me in a wheelchair and stuff like that

[December 21, referring to his life in the pre-trial centre]:

the staff . . . weren't giving my canteen so I was like kicking the door in, and they like, they removed me, but I didn't like resist them, I just went limp, like I usually do.

[183] That some of Mr. Klein's unusual behaviour after the attack was thus deliberate, does not mean that all of it was. Nor does the unusual behaviour necessarily indicate that Mr. Klein was dishonestly trying to lay the groundwork for a spurious defence relating to his mental status, as the Crown submits he was. For example, the conduct may have been consistent with a developing recognition of the horror of what he had done, whether or not he had fully understood or intended it at the time.

[184] In my view, the evidence of Mr. Klein's demeanour and physical conduct after the attack is unhelpful in the analysis of his mental state at the time of the events. That evidence does not raise a reasonable doubt about his ability to foresee the consequences of his actions at the time of the attack, but also it does not necessarily indicate that Mr. Klein was trying to manufacture a spurious defence.

Mr. Klein's Statements About the Attack

[185] With this in mind, I turn now to consider the various statements Mr. Klein made about the attack. These he made to Corrections officers with whom he chatted cheerfully at the Surrey Memorial Hospital after he had been administered lorazepam; to the psychiatrists (Dr. Saffy and Dr. Kunar) he saw there afterwards; to his mother in the December 2016 telephone calls from the pre-trial centre; and to psychiatrists of the Forensic Psychiatric Services Commission in the months after the events.

[186] There are abundant references to hallucinations and delusions in the Forensic Psychiatric Services Commission records leading to Mr. Klein's diagnosis of schizophrenia in June 2017, or possibly earlier. However, these are of relatively little assistance because they relate to Mr. Klein's condition substantially after the events. Also, they lead to and, one assumes, support the eventual diagnosis of a mental disorder, which, it is agreed, the evidence does not link in any way with Mr. Klein's mental state at the time of the events.

[187] The Crown submits that the earlier post-event statements should be given little weight because they were made after the events, and are obviously self-serving in an effort to manufacture and support a false defence.

- [188] I exercise considerable caution in my approach to evaluating the statements to Drs. Saffy and Kunar. This is because the focus of their examinations was on Mr. Klein's condition and mental state at the time they each saw him, not on whether he was mentally disturbed at the time of the events (although the statements about the events and the manner in which Mr. Klein made them indirectly informed the psychiatrists' examinations and opinions about his presenting condition).
- [189] As I have noted, Drs. Saffy and Kunar both found inconsistencies in Mr. Klein's statements, notably about the hallucinations and delusions he said he had experienced, that contributed to their conclusions that Mr. Klein was not suffering from a psychotic disorder or (Dr. Saffy) from a neurological condition at the time of the examination. Their views of his accounts of delusions or hallucinations related to their medical opinions about Mr. Klein's presenting condition, and are properly available for the Court's use as such. They are not views on which the Court can rely directly in the course of assessing the credibility of Mr. Klein's statements (about delusions or hallucinations), which is a matter for the Court, not the psychiatrists.
- [190] Nonetheless, an assessment of the credibility of Mr. Klein's statements about delusions or hallucinations requires a consideration of the context in which he made those statements. This consideration is somewhat of a delicate task, because the evidence about that context is given entirely by the psychiatrists who conducted the examinations, and their interest was diagnostic, not investigative. Unlike, for example, statements to police officers in the course of an investigative interview, the statements to the psychiatrists were not video- or audio-recorded, and there is no transcript of the complete exchange. Instead, the evidence consists of the brief reports of the psychiatrists, together with their oral testimony in the trial, typically recounting the examination or interview in general or overview terms, with some illustrative details.
- [191] I take these considerations into account in evaluating the statements Mr. Klein made to Drs. Saffy and Kunar.
- [192] The Crown submits that Mr. Klein's clear interest, during his examination by Dr. Saffy, in developing a mental status defence indicates that he was seeking to advance a spurious defence. But in my view, his statements and inquiries about such a defence, of themselves, are equally consistent with Mr. Klein not fully understanding the reasons for his own conduct and being concerned to gain and to document expert assistance to explain it.
- [193] Similarly, standing alone, Mr. Klein's statement that the marihuana he had smoked the day before may have been laced with methamphetamine is also open to competing inferences. I note also that at least once Mr. Klein asked to be tested for drugs, seemingly to determine whether they may have played a part in the attack, or to prove that they did. There is no evidence to suggest that Mr. Klein was aware at that point that the analysis of his blood indicated no drug use other than cannabis.

- [194] More significant, in my view, is that Mr. Klein's various statements about the hallucinations or delusions he experienced were inconsistent with each other, and with other evidence.
- [195] For example, when Mr. Klein first spoke of the attack, which was to the Corrections officers guarding him before he saw Dr. Saffy, his reference to delusion was general only. He said he heard a voice say "kill, kill", and that he had been in some sort of delusional state, but he did not refer to seeing the girls as monsters, witches, or some other form of creature. Those more specific descriptions came only in the later accounts to Drs. Saffy and Kunar. Also, while Mr. Klein told the Corrections officers that he remembered only parts of the attack and was unsure why he did what he did, he said nothing to them to suggest that he was unaware when he was attacking them that the victims were girls.
- [196] Speaking to Dr. Saffy, Mr. Klein said that a voice in his head had told him to kill, but at another point he told her that he had not heard voices at all, but had seen monsters instead of people.
- [197] To Dr. Kunar, Mr. Klein said that he saw, variously, witches, monsters, and possibly demons (terms Dr. Kunar considered somewhat inconsistent with each other, although he agreed that he did not ask Mr. Klein whether these were different things to Mr. Klein). But Mr. Klein at no time mentioned a grey owl to Dr. Kunar, even though that creature figured significantly in the events as he related them to Dr. Saffy.
- [198] The explanation Mr. Klein gave to Dr. Kunar for having stolen the knife shortly before the attack is inconsistent with other, objective evidence. Mr. Klein told Dr. Kunar that he stole the knife because a voice told him to take it when he was in a shop to buy something else. This statement does not accord with the evidence of Lucia Borgford that Mr. Klein asked her for directions to the knives after he entered Cabela's, when that evidence is coupled with the surveillance video footage that shows Mr. Klein walking directly to address Ms. Borgford at her position immediately inside the entrance door.
- [199] Mr. Klein told Dr. Kunar that he told the social worker at the Abbotsford General Hospital that he was hearing a voice in his head. However, the evidence, including the hospital records of that visit, includes no reference to any such report to Ms. Reglin or anyone else. As I noted earlier, the triage assessment form lists several complaints, including one ("difficulty planning things") that, if it did relate to Mr. Klein's mental state, would have been a natural springboard for reporting such a disturbance.
- [200] Mr. Klein suggested to Dr. Saffy that his marihuana may have been laced with methamphetamine, causing psychosis; however, he later told Dr. Saffy that he was not high or intoxicated, and it was not drugs that caused the attack (after Dr. Saffy refused him anti-psychotic medication), and he said that drug use did not explain the voices he had been hearing because sometimes he heard voices when he had not used drugs.

- [201] It is also noteworthy, in my view, that Drs. Saffy and Kunar each found Mr. Klein to be evasive, as well as inconsistent, when they asked for detail about his hallucinations or delusions.
- [202] Dr. Saffy and Dr. Kunar each found Mr. Klein's thought processes to be logical and organized when they saw him. Nothing in the evidence suggests that the inconsistencies they identified or those to which I have referred are themselves attributable to mental disturbance.
- [203] I find that Mr. Klein's statements to the Corrections officers and to Dr. Saffy and Dr. Kunar about his mental state at the time of the attack can have extremely little weight.

The Prodromal Period Before Full Onset of Schizophrenia

- [204] Drs. Saffy and Kunar did not diagnose schizophrenia after their relatively short examinations of Mr. Klein, but each testified that they would defer to a diagnosis based on a longitudinal examination based on a substantial period of experience. As I said earlier, the defence does not suggest that the actual diagnosis of schizophrenia many months later has any link in the evidence to the events at the school. The defence suggests, instead, that the evidence allows for the conclusion that Mr. Klein was experiencing a prodrome for schizophrenia at the time of the attack.
- [205] The simple difficulty with the defence position in this area is that even if Mr. Klein was experiencing a prodrome for schizophrenia - and there is no medical evidence that he was - nothing in the evidence relates prodromal features or symptoms to the affected person's ability to foresee the consequences of their actions.

Intoxication by Alcohol or Drugs

- [206] On Mr. Rosland's unchallenged evidence, which I accept, Mr. Klein's blood alcohol content at the time of the events was at most between 76 and 96 mg%. He would have been intoxicated, but on the evidence he was not severely so. Mr. Klein himself told people that he had had a few shots but was not intoxicated, and none of the witnesses who saw him on November 1, 2016 noticed any sign of intoxication, except the few and minor indications I noted earlier.
- [207] Nothing in the evidence indicates that Mr. Klein's intoxication by alcohol, as discussed earlier, had any effect on his ability to foresee the consequences of his actions. Far more likely, based on the evidence of Mr. Rosland viewed in light of the fact that almost no sign of intoxication was seen, is that the intoxication had a disinhibiting effect on Mr. Klein's conduct, and a negative effect on his judgement.
- [208] That the analysis of Mr. Klein's blood showed signs of previous cannabis consumption does not change this conclusion. On the evidence, even if the consumption was recent, the additional effects would have been minimal.

[209] There is no suggestion that Mr. Klein's intoxication was of itself sufficient to negate the required specific intent for second degree murder. As to its effect with other factors in a "rolled up" or cumulative basis for negating that intent, I find that Mr. Klein's intoxication can play only a limited role.

Later Statements to Mr. Klein's Mother and to Psychiatrists

[210] The evidence of Mr. Klein's statements to his mother in telephone calls in December 2016, and to psychiatrists at the Forensic Psychiatric Services Commission during the following year, include many that on their face raise concerns about his mental state. For example, in some of the telephone calls to his mother (samples quoted earlier) Mr. Klein appeared preoccupied by the concern that encephalitis (with swelling of his brain and spine) was affecting his physical and mental well-being in various ways, including by interfering with his long-term planning. There is some consistency to his concerns, as the triage assessment form for his October 30 visit to the Abbotsford Regional Hospital shows that he complained about "spine swelling" and "difficulty planning things" at that time as well, two days before the events at the school.

[211] It was a significant time later, more than a month after the events, that Mr. Klein made the statements to his mother. As some of the statements themselves indicate, and some documentary records from the pre-trial centre confirm, he was in extremely stressful circumstances, having been the subject of threats, anti-social conduct, and worse in the pre-trial centre.

[212] I will discuss the effect of these statements later.

Motive

[213] The defence submits that, in considering Mr. Klein's state of mind, the Court should take into account that the attack was entirely without motive. Ms. Reimer and E.I. were strangers to Mr. Klein. He had no known association with the school.

[214] Although the Crown is not required to prove a motive for an offence, an absence of motive may bear upon whether an accused formed the specific intent that second degree murder requires. Dickson J., as he then was, observed in *Lewis v. The Queen*, [1979] 2 S.C.R. 821 at 835, that "proved absence of motive is always an important fact in favour of the accused and ordinarily worthy of a note in a charge to the jury".

[215] Mr. Klein's lack of motive to harm, specifically, Ms. Reimer or E.I. must be considered in light of his statement that he might as well "do crime"; and, after the attack, that he had been considering "suicide by cop". While those statements do not indicate that he was motivated to attack students at the school in the way he did, they could be taken as expressing an intention to further his own interests through criminal action at the expense of others.

[216] Nonetheless, I take into account that Mr. Klein had no reason at all to harm Ms. Reimer or E.I., and that his conduct at the school was incomprehensible.

Did Mr. Klein Subjectively Foresee the Consequence?

[231] I return to the question of whether the evidence establishes beyond a reasonable doubt that Mr. Klein either meant to kill Ms. Reimer, or meant to cause her bodily harm that he knew was likely to cause death and was reckless whether death resulted or not.

[232] This was not a situation like that in *R. v. F.M.*, 2008 BCCA 111, where the trial judge declined to apply the common sense inference to the actions of two young accused persons (ages 13 and 15) who beat two elderly men in separate attacks with a baseball bat or bats and their fists, and left them. Mr. Justice Smith for the Court of Appeal found the trial judge entitled to conclude, as he did, that "[t]he lack of life experience and the relative inability to foresee serious consequences accompanying an act are hallmarks of youth" (quoted at para. 16), and he added that "[j]ust as it is common knowledge that intoxication can affect the ability of persons to foresee the consequences of their actions, it is common knowledge that lack of life experience affects the level of maturity and can affect the ability of youths to foresee the consequences of their actions" (para. 24). However, not only were the accused persons in *F.M.* younger than Mr. Klein, but also, the deaths were less obviously connected to their actions: in each case, the death was not until a considerable time after the attack (in one case, about a month), and the death followed after medical complications (a stroke following surgery in one case, and a heart attack in the other).

[233] The situation here was much more similar to that in *R. v. O.V.*, 2015 BCCA 449 and in *R. v. G.C.Z.*, 2015 BCSC 1952.

[234] In *O.V.*, the accused stabbed his estranged spouse in front of their children. He had a mental health history, and was found to have been suffering from a delusional disorder at the time of the attack, but his defence of NCRMD did not succeed. Upholding the conviction for murder, MacKenzie J.A. for the Court of Appeal noted that there was no evidence that the accused's mental disorder "would have had a negative effect on [his] awareness of the consequences of stabbing his wife 15 times in vital areas", and that the extent of the injuries and the force used to inflict them provided strong circumstantial evidence that the consequences were intended (paras. 58-60).

[235] In *G.C.Z.*, a case where similarly the NCRMD defence was rejected, Mr. Justice Verhoeven put the specific intent issue very clearly as follows, finding a lack of evidence that the accused's psychotic disorder affected her ability to form the necessary intent to kill or to appreciate the consequences of her actions:

[40] In the case of any ordinary person, the nature of the attack in this case would leave no room for doubt whatsoever that as a matter of common sense, the accused intended the natural and probable consequences of her actions. This is the "common sense inference" referred to by Joyce J. in *Robinson*, quoted previously. In fact, in the circumstances of this case, the

lethal intention of the assailant could hardly be more emphatically demonstrated. This is not, for example, a case of one or two injuries of such a nature and brought about in such a way that any ordinary person could possibly be surprised by the consequences.

- [41] The issue, then, is essentially whether the accused's mental disorder affected her mental state at the material time, such that there is a reasonable doubt about whether she intended to kill the victim or, alternatively, whether she intended to cause bodily harm that she knew was likely to cause the victim's death and was reckless as to whether death ensued or not.
- [42] In my view, the answer to that question must be no.
- [43] The argument that the accused's mental condition may have affected her ability to form the intention to kill the victim or to appreciate the consequences of her actions is speculative at best.
- [236] As in *O.V.* and *G.C.Z.*, in my view, there is no evidence in this case that any mental disturbance that Mr. Klein may have been experiencing at the time of the attack affected his ability to foresee the ordinary consequences of his actions.
- [237] Mr. Klein's unusual behaviour during the 48 hours before the attack is of concern, and I have taken it into account. However, even if it reflects a mental disturbance on Mr. Klein's part, there is nothing in the evidence to suggest that the mental disturbance may have affected Mr. Klein's ability to foresee the consequences of his conduct.
- [238] I have considered whether, specifically, Mr. Klein's preoccupation with encephalitis and brain and spine swelling may have reflected a mental disturbance or mental illness that may be linked to his mental state (as it relates to specific intent) by way of Mr. Klein's own references to difficulty with planning (in his assertions to that effect to his mother, and through the complaint of difficulty with planning noted on the triage assessment form).
- [239] However, I conclude that these references, viewed in the light of the evidence as a whole, do not raise a reasonable doubt about Mr. Klein's mental state in relation to the consequences of his attack. Abundant other evidence indicated that Mr. Klein acted with purpose and foresight in the lead-up to the events at the school.
- [240] Nor does any other evidence, either alone or in combination with other aspects of the evidence as a whole, raise a reasonable doubt on that point.
- [241] As I have outlined, in the hours before the attack Mr. Klein spoke angrily of "doing crime" to get what he wanted. He adroitly stole bottles of rum from the liquor store, and then the knife that he used in the attack, each time asking the store clerks where the items could be found and going directly to them. When he walked into the rotunda where Ms. Reimer and E.I. were sitting, he had the knife out of its packaging and under his clothing. He moved quickly to attack E.I., and when she escaped, turned immediately to Ms. Reimer, and kept on stabbing her, a total of 14 times, until a number of staff members arrived to intervene.

- [242] There is no specific evidence about the degree of force Mr. Klein used in the attack, but the only reasonable inference is that it was considerable. Even those witnesses who did not realize that Mr. Klein had a knife described him as "striking" or "hitting", words which suggest reasonably large arm movements or at least a moderate degree of force. Mr. Lachelt saw Mr. Klein "pushing as hard as he could". The cellphone video recording of the last few seconds of the attack depicts a forceful stabbing motion.
- [243] Moreover, Mr. Klein stabbed Ms. Reimer in parts of her body that would obviously put her at a likely risk of death.
- [244] As I have discussed, Mr. Klein's unusual conduct and demeanour after the events at the school do not much assist him. As I noted, some of his unusual behaviour was deliberate. And again, even if some or all of the conduct indicated a mental disturbance, nothing in the evidence indicates that the disturbance affected Mr. Klein's foresight of the consequences of his actions.
- [245] Mr. Klein was intoxicated at the time of the attack. However, I find that his intoxication was not severe, and it did not materially interfere with his ability to foresee the results of his actions at the time of the attack.
- [246] The evidence as a whole does not give rise to a reasonable doubt that when Mr. Klein stabbed Ms. Reimer 14 times, he meant to cause her bodily harm that he knew was likely to cause her death, and was reckless whether death ensued or not. I am satisfied, on the evidence, that the common sense inference may properly apply.
- [247] It is unnecessary to address whether Mr. Klein meant to cause Ms. Reimer's death within the meaning of s. 229(a)(i).
- [248] The Crown has proven beyond a reasonable doubt that Mr. Klein had the specific intent for second degree murder described in s. 229(a)(ii).

AGGRAVATED ASSAULT OF E.I.

- [249] The mental element for the offence of aggravated assault requires the "general intent" to apply force intentionally with objective foresight of the risk of bodily harm. Objective foresight is measured according to what a reasonable person in the position of the accused person would have foreseen.
- [250] Specific intent or subjective foresight of the consequences (here, wounding) is not required for the offence of aggravated assault.
- [251] Mr. Klein acknowledges that he committed the offence of aggravated assault of E.I., as I have noted. I find that he did.

CONCLUSION

[252] Mr. Klein, I find you guilty of the second degree murder of Letisha Reimer, as charged in count one.

[253] I also find you guilty of the aggravated assault of E.I., as charged in count two.

"The Honourable Associate Chief Justice H. Holmes"

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