

CANADA / JUDGMENT

R. v. Kueth

2025 BCSC 447

COURT

Supreme Court of British Columbia

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2025 BCSC 447 R. v. Kueth

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Kueth,

2025 BCSC 447

Date: 20250312

Docket: X085654

Registry: New Westminster

Rex

v.

Jaal Routh Kueth

Before: The Honourable Justice Layton

Oral Reasons for Judgment

Counsel for the Crown:

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J.W. Laporte

Counsel for the Accused:

G. Orris, KC

R. Young

Place and Date of Trial:

New Westminster, B.C.

February 18-20, 2025

Place and Date of Judgment:

New Westminster, B.C.

March 12, 2025

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- [1] Jaal Routh Kueth is charged with aggravated assault committed against Mark Datinguino on February 6, 2023 at Surrey, British Columbia, contrary to s. 268(2) of the Criminal Code, R.S.C. 1985, c. C-46.
- [2] Mr. Datinguino was the key Crown witness at trial, and testified that Mr. Kueth attacked him with a knife at his apartment.
- [3] Two police officers testified about events related to Mr. Kueth's arrest an hour or so after the incident described by Mr. Datinguino, but little turns on their evidence, given that Mr. Kueth's identity as the man at Mr. Datinguino's apartment is not in dispute.
- [4] A third officer, Cst. Wildsmith, testified regarding his observations and photographs he took at the apartment soon after Mr. Datinguino called 911. Much of Cst. Wildsmith's evidence is similarly peripheral to the issue of guilt.
- [5] The Crown case also included admissions of fact in which the parties agreed on the authenticity of photographic and CCTV evidence, as well as the degree to which date stamps on the CCTV footage were accurate. The photographs and CCTV footage were extensively canvassed with Mr. Datinguino during his testimony.
- [6] Mr. Kueth did not call any defence evidence.
- [7] The outcome of this trial thus rests largely, if not entirely, on whether Mr. Datinguino's testimony proves beyond a reasonable doubt that Mr. Kueth attacked and wounded him with a knife.

- [8] Before addressing this issue, I will set out some of the legal principles guiding my analysis. I will then apply those principles in examining Mr. Datinguinoo's testimony, during which I will assess his credibility and reliability.

Legal Principles

- [9] The legal principles applicable to determining whether Mr. Kueth is guilty of the charged offence are relatively straightforward, and I do not understand them to be disputed by the parties. They can therefore be set out in summary fashion.
- [10] An accused is presumed innocent of the charged offence unless and until the Crown proves each element of that offence beyond a reasonable doubt. The high standard of proof beyond a reasonable doubt is explained in many cases, including *R. v. Lifchus*, 1997 CanLII 319 (SCC) at paras. 13, 22-39. The burden of proving every element of the offence on this standard never shifts from the Crown. See *R. v. J.H.S.*, 2008 SCC 30 at para. 13.
- [11] In this case, Mr. Kueth is charged with aggravated assault, which is defined in s. 268(1) of the Criminal Code. Section 268(1) states that:

Every one commits an aggravated assault who wounds, maims, disfigures or endangers the life of the complainant.

- [12] To obtain a conviction for aggravated assault, the Crown must prove each of the following five elements beyond a reasonable doubt:
- a) the accused intentionally applied force to the complainant;
 - b) the complainant did not consent to that force being applied;
 - c) the accused knew the complainant did not consent;
 - d) the force applied wounded, maimed or disfigured the complainant, or endangered the complainant's life; and
 - e) in the circumstances, a reasonable person would realize that the force applied would put the complainant at risk of suffering some kind of bodily harm, although not necessarily serious bodily harm or the precise kind of harm the complainant suffered.

See *R. v. Parker*, 2023 BCSC 2392 at para. 49; *R. v. Fontaine*, 2011 BCCA 140 at para. 25.

- [13] A "wound" within the meaning of s. 268(1) is a break in the continuity of the whole skin that constitutes serious bodily harm, which in turn is any hurt or injury that interferes in a substantial way with the complainant's integrity, health or well-being. See *R. v. Pootlass*, 2019 BCCA 96 at paras. 85-113.
- [14] *R. v. Rektor*, 2025 BCSC 77 at para. 106 endorses the following list of non-exhaustive factors that may be useful to a trier of fact in assessing a witness's credibility and reliability:

- a) The witness's ability to observe the events, record them in memory, recall and describe them accurately.
- b) The external consistency of the evidence. Is the testimony consistent with other, independent evidence which is accepted?
- c) The internal consistency of the evidence. Does the witness's evidence change during direct examination and cross-examination?
- d) The existence of prior inconsistent statements or previous occasions in which the witness has been untruthful.
- e) The "sense" of the evidence. When weighed with common sense, does it seem impossible or unlikely? Or does it "make sense"?
- f) Motives to lie or mislead the court, namely bias, prejudice, or advantage.
- g) The attitude and demeanour of the witness. Are they evasive or forthcoming, belligerent, co-operative, defensive, or neutral? In assessing demeanour, [a judge] must consider all possible explanations for the witness's attitude, and be sensitive to individual and cultural factors, which may affect demeanour. Because of the danger of misinterpreting demeanour, it is unwise to rely on this factor alone.

Mr. Datinguino's Evidence

- [15] My review of Mr. Datinguino's evidence, including my assessment of his credibility and reliability, is divided into three parts.
- [16] First, I will comment on Mr. Datinguino's presentation as a witness and his manner of expressing himself. Although presented at the start of this section of my reasons, these comments are based on my assessment of all of his evidence, including its contents, viewed together with the other trial evidence.
- [17] Second, I will review Mr. Datinguino's evidence in chief.
- [18] Finally, I will review Mr. Datinguino's evidence in cross-examination, with a focus on those aspects of his evidence that Mr. Kueth says materially detract from Mr. Datinguino's credibility and/or reliability.

Presentation as a Witness and Manner of Expressing Himself

- [19] Mr. Datinguino was not an articulate witness, and sometimes had trouble expressing himself. He might search for a word, without ever finding it, or use an incorrect word, such as "bond" instead of "bound".

- [20] Mr. Datinguino also occasionally employed odd turns of phrase, such as his comment that, when first speaking to Mr. Kueth at the Skytrain station, he felt like Mr. Kueth was "induced of illegal substances", or his reference to Mr. Kueth when depicted on CCTV footage as the man "in red", even though Mr. Kueth was wearing black in the footage, presumably because Mr. Kueth had on a red top in court.
- [21] Mr. Datinguino sometimes used unusual syntax in answering questions. One example is when he described COVID-19 measures taken at the North Fraser Pretrial Centre ("NFPTC"). At times, he referred to things seemingly out of context, for instance when asking himself whether he was on probation in the course of answering a question about what happened after he and Mr. Kueth first went up to his apartment.
- [22] These idiosyncrasies on occasion made it difficult to understand Mr. Datinguino's meaning, but where material to the events in dispute that meaning was usually if not always clarified through follow-up questioning by counsel or the court.
- [23] Part of Mr. Datinguino's challenges in these regards may stem from the fact that English appears not to be his first language. I say this because he spoke with an accent, although not a particularly heavy one.
- [24] A few times, Mr. Datinguino laughed when describing matters that were not funny on any objective view of the events. In my opinion, this was the result of nervousness. Mr. Datinguino more overtly demonstrated and expressed this nervousness when, at a point not far into examination-in-chief, he was unable to respond to Crown's question about what happened next, explaining that he had not had coffee that morning and was nervous.
- [25] To the extent that Mr. Datinguino had difficulty answering questions or expressing himself clearly, I attribute this to the deficiencies mentioned above, as well as the passage of time, as opposed to evasiveness. Overall, Mr. Datinguino very much struck me guileless and simple, sometimes almost child-like, as opposed to cunning or calculated.

Evidence in Chief

- [26] At the time of trial, Mr. Datinguino was 38 years old, unemployed and living in a shelter. But at the time of the alleged offence, he lived with four other people in a one-bedroom apartment on the seventh floor of a high-rise condominium building in Surrey, about a 10-minute walk from the Surrey Central Skytrain station.
- [27] Mr. Datinguino had lived at this location for only a month or so. He and another Filipino man, Gerardo Osorio, had "bedrooms" in the apartment's living area, with drapes or curtains that provided privacy if closed. Mr. Datinguino's bedroom was a step or two away from the apartment's galley kitchen.

- [28] Mr. Datinguino testified that on the morning of February 6, 2023, he woke up at about 5:30 a.m., and decided to walk to the SkyTrain station to ask someone for a cigarette. I accept that Mr. Datinguino had insufficient money to buy a pack of cigarettes. He had at most a few coins that he hoped to exchange for a cigarette if he found a smoker willing to make the trade.
- [29] On his way out of the building, Mr. Datinguino saw a man in the lobby, who he described as African-Canadian and between 20 and 30 years old.
- [30] Mr. Datinguino testified that he recognized this man because they were both inmates at NFPTC during the COVID-19 pandemic. However, he said he did not at that point know the man's name, and they had never spoken during their time together in custody. Mr. Datinguino in effect explained that COVID-19 measures at NFPTC had restricted contact between inmates during this period. Mr. Datinguino further testified that, at this point, he was unsure whether the man lived in the building.
- [31] As there is no dispute that this man was Mr. Kueth, I will refer to him by this name going forward.
- [32] Mr. Datinguino testified that he approached Mr. Kueth in the lobby and asked whether Mr. Kueth lived there and also whether he had a smoke. Mr. Kueth did not have a smoke, so Mr. Datinguino says he walked by himself to the Skytrain station, where he asked numerous commuters for a cigarette, but without any success.
- [33] Mr. Datinguino testified that he then turned around and saw Mr. Kueth approaching from a couple of steps away. He says Mr. Kueth had numerous "scratch and win" lottery tickets. Later in chief, Mr. Datinguino described a conversation where Mr. Kueth said the tickets were in the groin or crotch area of his pants, and Mr. Datinguino mentioned that Mr. Kueth did not have a bag with him.
- [34] Mr. Datinguino testified that, after some conversation at the Skytrain station, he and Mr. Kueth walked back to Mr. Datinguino's building and went up to his apartment. CCTV footage from 6:25 a.m. shows the two men entering the building lobby, and then walking into an elevator. Mr. Kueth is wearing dark pants, a black T-shirt and running shoes. Although it was early February, he is not wearing a sweater or coat.
- [35] Mr. Datinguino testified that, once inside the apartment, he and Mr. Kueth scratched lottery tickets, and won about \$40. Mr. Datinguino suggested they buy smokes, so the two men walked to a convenience store located under the SkyTrain station. They scratched more of Mr. Kueth's tickets at a BC Lotto table in the store, and bought pop and cigarettes, before returning to Mr. Datinguino's apartment.

- [36] Mr. Datinguino explained that, once back at his apartment, he wanted to party, so he asked if Mr. Kueth had any illegal substances. Mr. Kueth had a bowl pipe and a little bit of methamphetamine. Mr. Datinguino sat on the corner of his bed and had two or three tokes from the pipe. This was not Mr. Datinguino's first experience using methamphetamine, and he freely admitted to having had a substance abuse problem at that time.
- [37] Mr. Datinguino testified that after smoking the methamphetamine he and Mr. Kueth did not talk for about half an hour. During this period, he was intoxicated and sat on the corner of his bed looking at his cell phone. He was not really paying attention to Mr. Kueth, but said Mr. Kueth also seemed high and was going back-and-forth around the kitchen.
- [38] Mr. Datinguino testified that he then felt a knife "going through my neck", but "softly". It was not a strong strike but rather "touched" his neck, and he was lucky. He leaned back on his bed through "basic instinct", and kicked Mr. Kueth while lying down, as his instinct was to get out of "that violence".
- [39] Later in chief, Mr. Datinguino said the first thing he saw was the handle of the knife, which was in Mr. Kueth's hand, and a striking motion to his neck. Mr. Datinguino said the attack was not preceded by any conversation or disagreement.
- [40] Mr. Datinguino testified that, once he was lying on his bed, Mr. Kueth struck again towards his face. Mr. Datinguino grabbed the knife on the sharp part in his left hand. Mr. Datinguino mentioned in passing that he realized that if he let go of the knife his hand would bleed all over the place.
- [41] Mr. Datinguino testified that he took the knife into his right hand, although he never "gestured" the knife "on" Mr. Kueth because he thought this could be a charge against him. Mr. Kueth was now moving towards the entrance door to the apartment. Mr. Datinguino explained that he was "luring" Mr. Kueth in that direction, although he commented that this might be the wrong word, as it was quite "strong".
- [42] Mr. Datinguino testified that Mr. Kueth asked for his shoes, but Mr. Datinguino told him, "get out of here you, blah, blah, blah, blah, blah, blah". Mr. Kueth was a few steps outside of the door, which Mr. Datinguino shut because his left hand was lacerated and he could feel it bleeding. He looked through the "small glass" in the door and saw Mr. Kueth run to the "emergency stairs".
- [43] In passing, Mr. Datinguino mentioned giving Mr. Kueth a bag before "the violence", and said that Mr. Kueth left behind not only his shoes but also what was left of the \$40 cash and the scratch tickets. A photograph taken by police shows a bag on the kitchen counter, which Mr. Datinguino identified as the one he gave Mr. Kueth.

- [44] Mr. Datinguino further testified that, because it was cold outside and Mr. Kueth was wearing only a T-shirt, he had given Mr. Kueth a grey sweatshirt. Mr. Kueth can be seen wearing this sweatshirt on CCTV footage showing him going down the emergency exit stairs in his sock feet at 7:58 a.m. CCTV footage from the lobby shows Mr. Kueth exiting the building at about 8:03 a.m.
- [45] Mr. Datinguino testified that the knife used by Mr. Kueth was from the kitchen, and had a black plastic handle. He said the handle broke off during the incident, and he put the blade, which he was left holding in his hand, in the sink. As for the separated plastic handle, Mr. Datinguino testified that he never saw it again, and described it as having disappeared.
- [46] Mr. Datinguino said that, after Mr. Kueth had left the apartment, he "bond" his hand with a T-shirt to stop it from bleeding. He exited the apartment to make sure his neighbours were okay, and went to the elevator, at which point blood was squirting and gushing. He went downstairs "to see", but went up back upstairs right away because he saw a cleaning lady and it might be "hectic" for the janitor because blood was all over the place.
- [47] CCTV footage from the elevator shows Mr. Datinguino entering at the 7th floor and exiting at the lobby at 8:25 a.m., about 20 minutes after Mr. Kueth left the building, and then making the return trip at 8:26 a.m. Mr. Datinguino's left hand is bound with a cloth, and by the time he leaves the elevator at the end of the return trip many drops of blood are visible on the floor.
- [48] Mr. Datinguino called 911 to report the incident a few minutes after returning to the apartment. The approximate time can be calculated by reference to Cst. Wildsmith's evidence that dispatch asked him to attend Mr. Datinguino's apartment at 8:29 a.m.
- [49] Mr. Datinguino identified several photographs as having been taken by police of him or his apartment on the day of the incident. One photograph shows two injuries on his index finger.
- [50] The first injury is a fairly deep cut, perhaps a couple of centimetres long, running almost horizontally just below the knuckle, and spread open several millimetres in the middle.
- [51] The second injury is more of a curved cut, of approximately the same length if not slightly longer, but likely shallower, on the side of the same finger but facing the thumb and closer to the webbing.
- [52] A photograph of Mr. Datinguino's neck shows what appear to be two or three reddish, linear scrapes, as opposed to cuts, each about a centimetre in length. He testified that these marks were the result of the knife touching his neck during the incident.

- [53] Other police photographs show blood on the inside of the apartment door near the lock and door handle, droplets of blood on the drywall, substantial amounts of blood on the kitchen floor, and what appear to be blood transfer stains on a curtain between the kitchen and Mr. Datinguino's bedroom. Mr. Datinguino identified Mr. Kueth's shoes on the floor in the photograph depicting blood on the drywall. These appear to be the same shoes Mr. Kueth can be seen wearing in CCTV footage from earlier in the day.
- [54] Mr. Datinguino was shown police photographs taken in his kitchen, and identified the blade of the knife he had placed in the sink. The blade does not have a handle.
- [55] After closing submissions were completed, and the case was adjourned to await my decision, I reviewed at a much-reduced speed the CCTV footage showing Mr. Kueth in the landing of the emergency stairwell and then descending that stairwell on his way out of the building. I then sent a memo to counsel asking for written submissions regarding whether Mr. Kueth appeared to be holding something in his right hand, and if so whether the footage impacted any disputed trial issue.
- [56] Having considered the parties' ensuing written submissions, and reviewed the CCTV footage again, I find that Mr. Kueth is holding a dark object in his clenched right hand. One end of the object protrudes from the pinky-finger side of his hand. The object's shape and Mr. Kueth's manner of holding it are consistent with the object being the black handle of a kitchen knife with a blade the size of that seen in the kitchen sink.
- [57] Given the object's appearance, I reject the defence submission that it must be Mr. Kueth's meth pipe, and conclude the object is more likely than not the handle that broke off the knife blade police later found in the kitchen sink. Though not necessary to this conclusion, it is nonetheless further supported by Mr. Datinguino's evidence that the men smoked methamphetamine in the pipe half an hour or so prior to Mr. Kueth exiting the apartment.

Evidence in Cross-examination and Defence Challenge to Credibility/Reliability

- [58] I will not review in detail all of Mr. Datinguino's cross-examination. Rather, I will focus on those parts of the cross-examination relied on by the defence to argue that Mr. Datinguino's evidence is insufficiently credible and reliable to prove guilt beyond a reasonable doubt.
- [59] In challenging Mr. Datinguino's credibility, the defence points to his conviction under s. 403 of the Criminal Code for personation, which he explained involved using a fake identification card. Mr. Datinguino also admitted that, when speaking to Mr. Kueth in his apartment, he suggested they make money from crime, although he added that they were high and did nothing to follow-up on the suggestion.
- [60] I agree with the defence that these factors weigh against finding Mr. Datinguino to be a credible witness, and I have taken them into account in considering whether the Crown has met its burden of proof.

- [61] An aspect of Mr. Datinguino's evidence on which he was challenged in cross-examination concerns his description of meeting Mr. Kueth as in effect a coincidental or chance encounter. The defence suggests this description is implausible, and therefore undermines Mr. Datinguino's credibility.
- [62] I do not agree. There is nothing inherently implausible about the meeting being coincidental. The defence has pointed to no evidence suggesting the meeting was planned. Moreover, if the meeting were planned, one might have expected the men to meet in the lobby and then go immediately to Mr. Datinguino's apartment. Instead, Mr. Datinguino went to the Skytrain station to ask commuters for a cigarette, after which the two men returned to Mr. Datinguino's apartment.
- [63] The defence further argues that Mr. Datinguino's evidence that he was at times nervous, suspicious, concerned or afraid of Mr. Kueth calls into question his credibility. To be clear, Mr. Datinguino never suggested that Mr. Kueth presented in a threatening way, apart from during the knife attack, but rather in essence testified that he felt some worry on seeing Mr. Kueth.
- [64] This testimony also does not detract from Mr. Datinguino's credibility. It is reasonable to suppose Mr. Datinguino may have felt worry on unexpectedly seeing a person he had previously encountered only in jail in the lobby of his building. Nor do I find this worry to be inconsistent with Mr. Datinguino continuing to interact with Mr. Kueth, given Mr. Datinguino's testimony to the effect that, while he harboured some suspicion towards Mr. Kueth, he also felt a pull to take advantage of an opportunity to use drugs, despite simultaneously wanting to quit.
- [65] The defence points to a number of prior inconsistent statements made by Mr. Datinguino, including to police and in his preliminary inquiry testimony. I will not canvass all of the asserted inconsistencies, but they include the following four examples.
- [66] First, in chief Mr. Datinguino said he first asked if Mr. Kueth had any illegal substances when they were back at his apartment. But in his initial police statement, he recounted asking if Mr. Kueth had crystal meth when they were first at the Skytrain station. When confronted with this inconsistency, Mr. Datinguino was initially unsure which version was correct, and mentioned that when making the statement to police he was in shock and was nervous because he did not usually speak to the police. Mr. Datinguino then testified that he recalled asking whether Mr. Kueth had illegal substances as they approached his apartment building on their first trip back from the Skytrain station.
- [67] Second, in cross-examination defence counsel put to Mr. Datinguino that using methamphetamine negatively impacted his memory. Mr. Datinguino said he did not know if this was the case. He was then taken to his preliminary inquiry testimony, where he agreed with defence counsel that methamphetamine affects memory, and when asked whether it impacted his memory on this day, so that he did not recall things clearly, he said it may or may not have done so, he was not too sure. Mr. Datinguino admitted giving this

evidence at the preliminary inquiry, and although expressing himself awkwardly in effect admitted he was being truthful.

- [68] Third, Mr. Datinguino initially denied knowing people who committed frauds with scratch tickets, but was then shown his February 10, 2023 statement to police, where he said he used to be friends with some Filipino guys who "do frauds and all that with scratch tickets". Mr. Datinguino then explained that these guys did credit card fraud, not frauds with scratch and win tickets, although his answers during this line of questioning were somewhat confusing, because he also seemed to say that these guys probably or may have done scams with lottery tickets.
- [69] Fourth, in chief and initially in cross-examination Mr. Datinguino said he did not go into the hallway after Mr. Kueth, or at most only went a few feet into the hallway, and did not back Mr. Kueth down the hallway to the elevator while holding the knife blade. But in his February 6 and 10, 2023 police statements, Mr. Datinguino essentially stated that he used the knife to back Mr. Kueth down the hallway to the elevator, at which point Mr. Kueth left via the emergency stairs. In cross-examination, Mr. Datinguino eventually agreed that this is what happened.
- [70] These sorts of inconsistencies demonstrate that Mr. Datinguino's memory about some of the details regarding the events was fallible, in my view due to a combination of the passage of time and the dynamic and shocking nature of the attack he described. But they do not cause me to question Mr. Datinguino's credibility or reliability regarding his core assertion that Mr. Kueth attacked him with a knife. While I would have come to this conclusion regardless, the reliability of this core assertion is corroborated by the CCTV footage showing Mr. Kueth holding what is more likely than not the black handle of the knife whose blade police later found in the kitchen sink.
- [71] Another argument made by the defence in attacking Mr. Datinguino's credibility is that his comments, whether in police statements or trial testimony, about backing Mr. Kueth out of the apartment and/or down the hallway with a knife, and about trying to "aggressive myself" or "toughen up myself", and make Mr. Kueth disappear, indicate that Mr. Datinguino was the aggressor, and not vice versa.
- [72] In the same vein, the defence asserts that Mr. Datinguino was desperate for money, and had given Mr. Kueth the bag in the hope he would place his valuables inside, at which point Mr. Datinguino could steal the bag. While in closing submissions the defence did not outline a specific theory as to how, on this scenario, Mr. Datinguino would have injured his hand, in cross-examination it was suggested that at some point he used the knife to stab something, and his hand ran down the blade and was cut.
- [73] The defence further claimed that the fact the knife handle was never found suggests Mr. Datinguino disposed of it because he knew that, if tested by police, the handle would not yield forensic evidence to support his version of events.

- [74] I do not accept that these aspects of Mr. Datinguino's testimony detract from his credibility or reliability regarding the material parts of his evidence. He was firm in his testimony that Mr. Kueth attacked him, not the reverse. Responding to an attack by attempting to get Mr. Kueth out of the apartment, using the knife blade to assist, is not inconsistent with being the victim of an unprovoked attack.
- [75] I also find that Mr. Datinguino's decision to give the bag to Mr. Kueth resulted from the same kindness that motivated his decision to give Mr. Kueth a sweater. And while Mr. Datinguino admitted to having no money, and to thinking about how to obtain money as he sat with his phone on his bed, in the circumstances his impecunious state does not lead me to believe he might have fabricated the attack to cover up a plan to rob or steal from Mr. Kueth.
- [76] My conclusions in this regard are supported by the CCTV footage showing Mr. Kueth holding what is likely the handle of the knife, which corroborates Mr. Datinguino's evidence about who stabbed whom. Even were this object not the knife handle, a proposition I have rejected, I am extremely sceptical that Mr. Datinguino would have had the presence of mind to hide or dispose of the handle to prevent police from finding incriminating DNA or fingerprint evidence.
- [77] I also find it improbable that, if the scenario floated by the defence or something like it had occurred, Mr. Datinguino would have reported a fabricated crime to the police to head off the possibility of Mr. Kueth calling the police first.
- [78] In short, given the evidence before me, the type of scenario put to Mr. Datinguino by defence counsel is speculative, and in any event does not leave me with a reasonable doubt.
- [79] The defence further suggests that Mr. Datinguino provided much more detail regarding events in his cross-examination, which indicates that his version of events is false. I disagree. It is true that Mr. Datinguino's evidence in cross-examination was more detailed, but this is primarily if not entirely because defence counsel was able to ask multiple leading questions and cross-examine him using prior statements.
- [80] The defence also points to aspects of Mr. Datinguino's evidence that it says appear to make no sense. While I agree that Mr. Datinguino's description of what he did or was thinking sometimes seemed unusual, these aspects of his evidence do not cause me to question the credibility or reliability of his claim to have been stabbed by Mr. Kueth.
- [81] I will provide a few examples to illustrate why I have come to this conclusion.

- [82] Mr. Datinguino said he wrote Mr. Kueth a \$40 cheque as payment for the methamphetamine, which Mr. Kueth left in the bag by the kitchen sink. I agree that Mr. Datinguino's testimony that he later checked his bank account to see whether the cheque had been cashed is nonsensical. But I do not attribute this logical flaw to a lack of credibility. Rather, it is more indicative of the challenges I described in the first section of my reasons regarding Mr. Datinguino's testimony.
- [83] I also agree with the defence that Mr. Datinguino's professed worry about being charged if he pointed the knife at Mr. Kueth is hard to fathom. Again, however, I attribute Mr. Datinguino's evidence on this point to his simple and unsophisticated nature, as opposed to viewing it as an indication of mendacity. Indeed, I find it improbable that a perjurious witness would profess such a worry, whether to help support false evidence or as a slipup revealing their falsehoods.
- [84] The defence also submits that it made no sense for Mr. Datinguino to have waited over 20 minutes after Mr. Kueth left the building to call the police, or to have gone down to the lobby during this period instead of remaining in the safety of his locked apartment.
- [85] However, I accept Mr. Datinguino's explanation for the delay in calling the police. He had just suffered a serious injury and was bleeding fairly heavily, as indicated by the blood on the kitchen floor. It was not unreasonable for him to take some time to try to staunch the blood. He also testified to being in shock by reason of the attack, which I accept as true.
- [86] Nor is Mr. Datinguino's evidence about considering what to say to the police troubling. After all, he had been smoking methamphetamine with Mr. Kueth, and had a criminal history. His concern about the police thinking he had committed an assault was misplaced, but is consistent with his lack of sophistication.
- [87] And while remaining in his apartment was undoubtedly safer than travelling to the lobby, Mr. Datinguino waited until over 20 minutes after Mr. Kueth had left to make the trip, and being in shock may have impacted his decision-making.
- [88] A further defence example of purportedly nonsensical evidence from Mr. Datinguino centres on his testimony that his roommate Mr. Osorio was in a nearby bed when the attack happened, separated only by a curtain, but he did not cry out or yell.
- [89] While many or even most people may have yelled if in the same position, I do not accept that the victim of such an attack would invariably do so. It is plausible that Mr. Datinguino was simply focussed on fending off the attack and getting Mr. Kueth out of the apartment.
- [90] I also reject the defence contention that the absence of blood on Mr. Datinguino's bed, as indicated in the photographic evidence and Cst. Wildsmith's testimony, undermines his claim to have been stabbed at this location. As described, the attack happened very quickly, and it is reasonable to conclude Mr. Datinguino got off the bed before blood began to gush from his finger. Furthermore, and as already noted, in chief Mr. Datinguino in effect testified that he initially kept hold of the knife blade in his left hand to prevent his hand

from bleeding. Doing so would likely have delayed any loss of blood until he got off the bed.

- [91] The defence also cross-examined Mr. Datinguino to suggest the two cuts on his left index finger were inconsistent with having grabbed the knife blade as he described, and were instead consistent with him having pushed the knife hard into something so that his hand slid down the blade and the handle broke off. Defence counsel also suggested to Mr. Datinguino that the attack as described would have caused more serious injuries to his hand.
- [92] Absent expert medical evidence, however, I am unable to accept these defence arguments. Rather, in my view the appearance of the cuts is equally consistent with both the Crown and defence theories.
- [93] For a similar reason, I also reject the defence argument, made only in closing submissions, that the marks on Mr. Datinguino's neck are inconsistent with his description of the attack. In coming to this conclusion, I have not drawn an adverse inference based on the defence failure to put this assertion to Mr. Datinguino in cross-examination.

Conclusion

- [94] For the reasons provided above, I accept as credible and reliable Mr. Datinguino's testimony that Mr. Kueth attacked him with a knife on February 6, 2023, and conclude that the Crown has proven beyond a reasonable doubt that Mr. Kueth intentionally stabbed Mr. Datinguino without the latter's consent.
- [95] I also conclude beyond a reasonable doubt that the deeper of the two cuts to Mr. Datinguino's index finger is a "wound" within the meaning of s. 268(1) of the Criminal Code, because it is a break in the continuity of the whole skin that interfered in a substantial way with his integrity, health or well-being, and thus constitutes serious bodily harm.
- [96] In addition, I find on the criminal standard that a reasonable person in Mr. Kueth's place would have realized that lunging at another person with a knife in the manner described by Mr. Datinguino would put that other person at risk of suffering some kind of bodily harm.
- [97] Accordingly, I conclude that the Crown has met its onus of proving that Mr. Kueth committed aggravated assault on Mr. Datinguino.
- [98] Mr. Kueth, please stand up.
- [99] For the reasons I have stated, I find you guilty of the offence of aggravated assault charged in count 1 of the Indictment.

"D. Layton J."

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