

CANADA / JUDGMENT

## R. v. McCrae

2025 BCSC 1372

### COURT

Supreme Court of British Columbia

### DECIDED

28 July 2025

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2025 BCSC 1372 R. v. McCrae

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. McCrae,

2025 BCSC 1372

Date: 20250728

Docket: 97183-2

Registry: Kelowna

Rex

v.

Richard Brant McCrae

Before: The Honourable Justice Wilson

Reasons for Judgment

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Place and Date of Trial:

Kelowna, B.C.

September 16 - 19, 23, 24, 2024

May 1, 2, 5 - 8, 2025

Place and Date of Judgment:

Kelowna, B.C.

July 28, 2025

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## Overview

- [1] The underlying facts in this case are not in dispute. On March 26, 2022, Cst. Jason Tymofichuk responded to a call to the police for assistance with removing a tent-like structure in the Ellis Place Supportive Housing facility parking lot at 1055 Ellis St., Kelowna, B.C. ("Ellis Place"). He attended the scene alone. He was aware that he would be dealing with Mr. Richard McCrae, a resident of Ellis Place. He was also aware that Mr. McCrae was a larger man.
- [2] There was a brief cordial conversation between the two, wherein Mr. McCrae said that the tent was empty. Constable Tymofichuk took a few steps towards the tent to check when Mr. McCrae surprised Cst. Tymofichuk by kicking him in the stomach and stabbing him in the eye with a knife. A struggle for Cst. Tymofichuk's firearm ensued until a bystander distracted Mr. McCrae, allowing Cst. Tymofichuk to regain his feet. Mr. McCrae then began slashing his own throat with his knife before eventually being subdued by other police officers arriving at the scene.
- [3] The events, which took place behind Ellis Place in the area of the parking lot, were all captured on video by a security camera at Ellis Place.

- [4] Mr. McCrae is charged with a number of offences arising out of the events, those being: attempted murder; aggravated assault; disarming a police officer; possession of a weapon for a dangerous purpose; and obstructing a police officer.
- [5] The primary issue in the case is whether Mr. McCrae should be found not criminally responsible by reason of mental disorder ("NCRMD").
- [6] For the reasons that follow, I conclude that the Crown has proven beyond a reasonable doubt the actus reus of the offences, Mr. McCrae can be held criminally responsible for his actions, and the Crown has proven beyond a reasonable doubt Mr. McCrae had the requisite mens rea for aggravated assault, disarming a police officer, and obstructing a police officer. I find Mr. McCrae not guilty of attempted murder and possession of a weapon for a dangerous purpose.

## Facts

- [7] The events leading up to and including the alleged offences are as follows.

## Police call for trespassing

- [8] The Crown called two witnesses who were working at Ellis Place on March 26, 2022, at the time of these events: Ms. Sepideh Jalili and Ms. Susan Racicot.
- [9] As Ms. Racicot arrived early for her shift at Ellis Place, she saw a structure being built on the side of the bike shed. She decided to go into Ellis Place to get some help from the earlier shift to have it removed.
- [10] Ms. Jalili had previously been instructed that if someone were camping on the property, they should be told to leave and if they did not leave, they would be trespassing and staff could call the police. On this occasion, there was a female who was camping. Ms. Jalili and Ms. Racicot went outside to ask the person setting up the tent to leave. She refused to do so. They then saw Richard McCrae outside near the tent structure. Richard McCrae was one of the residents at Ellis Place.
- [11] Ms. Jalili described the interaction with Mr. McCrae as him being upset that the female was being asked to leave. He stepped forward and "roared" from a distance, more of a vocal sound than a word. It was clear to her that there was nothing she could do to persuade the female to leave the property and she did not feel safe given Mr. McCrae's reaction.
- [12] Ms. Racicot's description of the interaction is that Mr. McCrae approached from the northeast just as they were asking for the structure to be taken down. Mr. McCrae got elevated, said that they were all going to lose their jobs, that he owned the property, and that the Canadian Mental Health Society will be sued. He let out a loud roar and clenched his fists as he did so. He said they were all going to be fired and they should leave him alone. He appeared to Ms. Racicot to be protective of the tent structure.

- [13] Ms. Jalili and Ms. Racicot went back inside, and Ms. Jalili called the police on the nonemergency number.
- [14] Ms. Racicot answered the phone when the police officer called to say that he had arrived. She also saw him arrive on camera. She asked him to come around the back, and he drove his car into the back alley. She observed the attack on the building's video camera.

### Cst. Tymofichuk's Arrival

- [15] Constable Tymofichuk was the police officer who responded to the call from Ms. Jalili for police assistance. He is currently 36 years old and at the time of the incident was a general duty police officer. He is 5'7" and weighs 160 pounds. He was working the Saturday night shift from 7:00 PM to 7:00 AM and described the call from staff at Ellis Place to be a fairly routine call on an average evening. He arrived at approximately 11:50 PM and parked at the front of the building. He had been given Mr. McCrae's name as the male who was refusing to take the tent down and his search of his database revealed Mr. McCrae to be a large man, 6'2" and 250 pounds.
- [16] Constable Tymofichuk drove around the back of Ellis Place and pulled in behind the building. He saw a grey tarp and belongings which he assumed was the subject tent. He saw a large male with a beard, and a puffy vest and assumed, correctly, that it was Mr. McCrae. He engaged Mr. McCrae in conversation in a polite casual tone. Constable Tymofichuk does not recall that he said he was a police officer or that he gave Mr. McCrae his name, but says it was obvious from how he was dressed.
- [17] Constable Tymofichuk's plan was to give Mr. McCrae sufficient time to remove the tent. Constable Tymofichuk asked if there was anyone inside the tent because he had previously been told that there was a female there, and he asked if he could check to see if she was okay. Mr. McCrae's demeanour was polite, respectful and cordial. Mr. McCrae said that the female had left, but Cst. Tymofichuk said that he wanted to double check. Mr. McCrae's response was that he was receptive to him doing so. Constable Tymofichuk could not observe any overt risks and stepped towards the tent.

### The Attack

- [18] Mr. McCrae kicked Cst. Tymofichuk in the stomach and delivered a hard blow to the right side of his face, knocking him to the ground. He was lying on his back. He observed a knife in Mr. McCrae's hand and realized that he had been stabbed in the eye socket. Mr. McCrae continued to swing the knife in the direction of Cst. Tymofichuk's face and made contact. Constable Tymofichuk did his best to block the knife and he engaged his emergency police radio button. Constable Tymofichuk noticed his right eye was clouding over and as he was lying on his back, Mr. McCrae came down on top of him. After a second strike hit his face, Cst. Tymofichuk drew his pistol and fired a shot while on his back. Mr. McCrae jumped to the side and grabbed for the pistol.

- [19] Constable Tymofichuk was holding his pistol in his right hand. Mr. McCrae grabbed Cst. Tymofichuk's right hand with both hands. Constable Tymofichuk could not shoot again because he was unable to move his hand in Mr. McCrae's grasp. He started to scream, "help me, somebody help me". The struggle continued and Cst. Tymofichuk tried to use his left hand to deliver strikes but every time he let go with his left hand, he felt Mr. McCrae was starting to overpower him in grabbing the pistol. He wrapped his legs around Mr. McCrae and the hands with the pistol and Mr. McCrae lifted him off the ground. They rolled on the ground as they struggled for control of the pistol.
- [20] At some point, Mr. McCrae said "Please, please give me your gun" to Cst. Tymofichuk and asked Cst. Tymofichuk on multiple occasions to shoot him. Constable Tymofichuk disagreed that during the tussle Mr. McCrae wanted the gun because he wanted to shoot himself. Constable Tymofichuk says that Mr. McCrae forced the barrel so that it was pointing at him and he believed that Mr. McCrae's intention was to shoot him.
- [21] Mr. S.L. was a resident of Ellis Place. As S.L. was preparing to leave the building with his friend, he could hear the altercation. S.L. recognized Mr. McCrae, whom he had known for close to a year. S.L. saw a police officer and Mr. McCrae wrestling for control of the officer's gun. He described Mr. McCrae trying to turn the gun onto the officer but failing to do so.
- [22] S.L. knew the officer was in trouble, and he went to try to get Mr. McCrae's attention. S.L. had dealt with people who are schizophrenic before, and tried to get Mr. McCrae to look at him so that he would stop. He got within about a foot-and-a-half away, and called "Richard, let him go!" multiple times, which caused Mr. McCrae to pause, and gave Cst. Tymofichuk sufficient time to get back on his feet and keep his pistol.
- [23] But for S.L.'s brave and timely intervention, it is very likely that things could have been a lot worse, both for Cst. Tymofichuk and for Mr. McCrae.

### Arrival of other officers

- [24] Constable Tymofichuk retreated in the direction of his vehicle, creating a distance of five or six feet between him and Mr. McCrae. At this point Cst. Tymofichuk was becoming increasingly aware of the fact that he had suffered a significant injury to his right eye. He held his gun and pointed it at Mr. McCrae, ready to shoot if he closed the gap. At this point, Mr. McCrae had the knife pointed at his own neck. Constable Tymofichuk shouted at him to drop the knife and he grabbed his Taser with his left hand. He tried to use the Taser to get Mr. McCrae to drop the knife but it proved ineffective. Mr. McCrae flinched and started to walk away.

- [25] By this time, Cst. Tymofichuk could see nothing from his right eye and he also saw that his uniform was covered in blood. Mr. McCrae then started to slash his own neck with his knife. Constable Tymofichuk saw Mr. McCrae holding the knife to his own neck with his left hand and hitting his left hand with his right, thrusting the knife in the direction of his neck. At this point, other police officers started to arrive.
- [26] Constable Backman was a general duty officer and responded to the alert from Cst. Tymofichuk's radio. He was the second officer to arrive. Upon arrival he saw Cst. Tymofichuk with his firearm pointed at Mr. McCrae.
- [27] Constable Backman went to arrest Mr. McCrae and yelled at him to drop the knife and to stop. When he yelled at Mr. McCrae, he made direct eye contact and it appeared that Mr. McCrae was pausing to think as he looked back. Mr. McCrae did not stop and continued to walk into the alley. The back of the Ellis Place facility is well lit and the lighting was therefore much worse in the alley, making it difficult to see.
- [28] Although Cst. Backman also had his gun unholstered, he got his Taser out and tried to stop Mr. McCrae by aiming his Taser between the shoulder blades. The Taser was ineffective. He put his Taser back in the holster and pointed his pistol with two hands. He directed another officer, Cst. Semlitch, to try his Taser. Another officer had also unsuccessfully tried a Taser.
- [29] When Cst. Semlitch tried his Taser the second time, it was effective. Mr. McCrae fell down to his left and Cst. Backman went to arrest him. The Taser is only good for about five seconds, and as he ran over, Mr. McCrae had his palm on the ground and was going to get up. Constable Backman struck him in the face with his foot. This stunned him and he fell back. He endeavoured to take control over Mr. McCrae with his hands. He had his hand on his neck and realized that Mr. McCrae was bleeding profusely. Mr. McCrae continued to fight back and Cst. Backman pointed his pistol directly against Mr. McCrae's temple and told him to stop fighting or he would shoot him. Mr. McCrae rotated his body and looked directly at the firearm. Eventually Mr. McCrae was handcuffed.
- [30] Once Cst. Backman saw that handcuffs had been attached, he went over to Cst. Tymofichuk who was wavering in his stance. He got him seated and removed Cst. Tymofichuk's Kevlar vest.

## Aftermath

- [31] Constable Tymofichuk and Mr. McCrae were each taken to the Kelowna General Hospital ("KGH").
- [32] The emergency room doctor at KGH, Dr. James Reid, was qualified as an expert emergency room doctor at trial. He was working alongside Dr. Lee Graham and a resident, Dr. Kohler. There was also an ophthalmologist on call, Dr. Robert Semeniuk, who was qualified as an expert ophthalmologist at trial and gave Dr. Reid advice to perform a lateral canthotomy.

- [33] A CT scan showed that Cst. Tymofichuk had what is referred to as a 'blowout fracture of the orbital bone'. The eye socket is essentially a cone-shaped bony structure and, in this case, some of those bones were fractured, either by blunt force or penetration by the knife. When pressure builds up behind the eye, it can cause a loss of blood flow which can then leave permanent damage including loss of sight from the eye.
- [34] Dr. Semeniuk received a call from Dr. Reid. They discussed the case and Dr. Semeniuk drove to Kelowna from Penticton in the middle of the night to assist. During the time that Cst. Tymofichuk was in the emergency room and Dr. Semeniuk was driving there, doctors noted that the vision in his eye was deteriorating and the pressure behind the eye increasing. There was a telephone call about a possible deterioration in Cst. Tymofichuk's condition and Dr. Reid and Dr. Semeniuk discussed that Dr. Reid would proceed with a lateral canthotomy.
- [35] Dr. Reid performed the lateral canthotomy to relieve increasing pressure behind Cst. Tymofichuk's eye. A canthotomy involves the cutting of a ligament that allows the eye fall forward, thus reducing the pressure.
- [36] When Dr. Semeniuk arrived at KGH, Cst. Tymofichuk had a serious laceration to his right eyebrow and to his right eyelid, and a large hematoma on his right lower eyelid so it was difficult to examine. He was able to pry open, very gently, Cst. Tymofichuk's eye and conduct a decent examination on the eye globe. The pressure reading was good and he was able to read letters on the wall. All in all, he considers that Cst. Tymofichuk was extremely fortunate that the eyeball seemed to be fine despite what had happened around it.
- [37] It was Dr. Semeniuk's opinion that the orbital fracture was more likely to have been caused by a hard kick or punch, as opposed to a puncture wound.
- [38] The superficial laceration to Cst. Tymofichuk's neck caused no serious injury, but if it had been two or three centimetres deeper it could have been life-threatening. The knife wound above the eye similarly could have been disastrous because the eye socket goes to the brain and the risks are therefore obvious.
- [39] Constable Tymofichuk has residual nerve damage to the side of his face and his head. It goes down the right side of his lip and his mouth and he has a scar on his forehead. He has limited mobility in his right eyebrow. He finds that if he goes underwater he cannot seal his right eye and keep it watertight. He has no feeling on the right side of his face. He could not open his eye for approximately two months, but fortunately he has been left with no permanent vision impairment.
- [40] It is readily apparent that although Cst. Tymofichuk has largely physically recovered from what happened, he could have been killed. In terms of other consequences, he has PTSD, depression and anxiety and has undergone multiple treatments and therapies.

### Witness' previous perception of Mr. McCrae

- [41] Ms. Jalili confirmed that she knew Mr. McCrae because he was a resident at Ellis Place, and that he was very easy to deal with. She describes him as a gentle giant, always kind and respectful to the staff.
- [42] Ms. Racicot was familiar with Mr. McCrae. He would come down for coffee and often would be talking to someone that she understood was the voices in his head. It sounded like he was annoyed by the voices, was fighting them off, and did not want them. He was not talking to the voices as a friend. He was always polite to her, often zipping by to go out on his skateboard. There were complaints about Mr. McCrae being more verbal and elevated when he was in his room.
- [43] S.L. had known Mr. McCrae from living in Ellis Place. He knew him in passing, and had a few conversations with him. When Mr. McCrae was getting the proper treatment, S.L. described him as a pretty decent guy and not disrespectful. S.L. had friends in the past who have been either schizophrenic or in drug-induced psychosis and he knows how to get them to respond. He is not sure whether what he did made Mr. McCrae click back into reality, but his actions changed the course of where things were going.
- [44] During cross-examination, Cst. Tymofichuk confirmed that he did not know Mr. McCrae before this event. His understanding is that schizophrenics can hear voices and as an observer, one cannot always tell. Mr. McCrae appeared quite normal to Cst. Tymofichuk during his brief interaction with him before he stepped toward the tent structure.

### Richard McCrae's evidence

- [45] The accused testified in his own defence. Richard McCrae was born on January 28, 1983. He grew up in Gravenhurst, Ontario. His family upbringing and childhood was standard. He had issues in school, including behavioural problems. Although he had reported mental health issues throughout his life, his schizophrenia had become much worse into his thirties. He is now 42 years old.
- [46] He has been transient for most of his life. For the past five years or so, he talks to himself and it is worse when he is alone. Since he has been in prison, he has taken a lot of medications, both injections and pills. Now that he is clean and sober from street drugs, the voices remain but he is able to respond to them more rationally. His reactions are therefore more in control but the voices themselves cannot be controlled.
- [47] Mr. McCrae left Ontario in approximately 2020. He wanted housing in a place that was warm and he hitchhiked across the country over the course of four or five days. He ended up homeless and ultimately in the shelter at Ellis Place. He described the facility as "okay", but it was what he referred to as a "wet house" that pursued a harm reduction model and he has since determined that he would have been better off in a different facility.

- [48] The first time Mr. McCrae was diagnosed with schizophrenia was when he was in his thirties, and the diagnosis was in a psychiatric hospital associated with a jail in Ontario. He has had symptoms since he was young - mumbling, indecision, mental breakdowns, lots of transient behaviour that resulted in him dropping out of school, and a vivid imagination that would run away with itself. His parents are both deceased, his father only one month before trial.
- [49] Mr. McCrae has both auditory and visual hallucinations. At times when he is talking, he hears different people's voices. He would hear things like, "kill God", "kill yourself". The auditory hallucinations were on and off through his twenties but got worse when in his thirties. The visual hallucinations did not start until he was in his thirties. An example of a visual hallucination is stepping off a bus and into a cartoon. The voices he hears can be angels, demons, celebrities, or spirits. The demonic voices try to trick and confuse him. He has punched himself in the head to try to get them out. The more emotional he is, the more he gets possessed.
- [50] Throughout his life he has done carvings. Photographs of a couple of his carvings were put into evidence. His carving involves the use of a carving knife, and he will often just pick up a stick and start carving it. He has a carving knife which he has in his pocket all the time. He could not recall if he had done any carving that day but he had the knife in his pocket because he always took it everywhere he went. This is the same knife he used to stab Cst. Tymofichuk.
- [51] On the day in question, Mr. McCrae was helping a woman who was homeless. She had some carts in the back alley. He was worried for her. At some point in the evening when it was dark outside, staff from Ellis Place came outside and said that the carts had to be moved. The staff went back inside because he had scared them. The woman had moved into the location by the parking area at approximately 10:30 or 11:00 PM but she had been around earlier in the day. He described himself as walking around out of his mind, having an episode, and that the voices were very potent and weird all of that day. He recalled pacing back and forth.
- [52] Mr. McCrae agreed that he used crystal methamphetamine during the day. He described having a one-centimetre square of crystal meth that he used throughout the day, and that it would have been when it was dark out when he last used it that evening.
- [53] He recalls a police officer driving up in an SUV. The police officer asked about the carts. He recalls little, saying that the voices took over and he had no control. Mr. McCrae's first recollection is rolling on the ground with the police officer. He described no recollection of fighting with the police officer and said he was in and out of delirium. When he realized his circumstances, he tried to kill himself with the carving knife against his throat and asked the police officer to shoot him. He walked back towards the garbage container and cut his own neck because he was overwhelmed with guilt and terror. He remembers being put in an ambulance and being in and out of consciousness. He felt the Taser but it had little impact

on him. He remembers being on the ground and getting handcuffed before he was put in the ambulance.

- [54] While living in Ellis Place, he had injections and sheets of pills. However, he was not taking the oral pills because he kept forgetting and therefore he was only taking advantage of the monthly injections.
- [55] If Mr. McCrae is by himself, he will talk nonstop. He hears other people's voices. He is the one doing the talking, but sometimes the voice sounds like a woman's voice, sometime it's a demonic voice. He calls them demonic voices because of how they sound and what they say and they ask him to do things like body snatching. On occasion during his testimony, his speech slowed and he mumbled. He said the voices had taken over before he was able to regain control.
- [56] He agreed that he had a short conversation with the police officer who was polite. The police officer walked towards the cart and it went blurry from there.
- [57] Mr. McCrae says the fact of moving a couple of carts doesn't justify what happened but "I basically blacked out". He agrees that the police officer gave him time to move the tent. The police officer said that he wanted to check the tent and Mr. McCrae then got nervous. That is when he blacked out. He agreed that he had told the police officer that the woman was not in the tent and that he was nervous because he knew she was there.
- [58] The voices in his head are louder when he is stressed or if he is emotional.
- [59] He is able to calm down when he hears the voices, although it does not make the voices go away. At the time of the events, he cannot recall falling to the ground or striking at the officer. When asked whether he remembered taking the knife out, he said no. When the police officer stepped towards the tent, Mr. McCrae agreed he was looking towards the tent. He could not remember falling to the ground but remembered regaining control of himself and then walking away. He agreed that he got control of himself when S.L. yelled at him. This got him out of the possession he was in and he regained control. This was at the time when he realized what had happened. That was when he cut his own throat and told the police officer to just shoot him. He did not notice the injuries to the police officer at the time S.L. yelled at him.
- [60] Mr. McCrae attempted to slit his own throat because he was appalled and horrified at what he had done. He had tried to take his own life in the past and he thought the situation warranted it.
- [61] He knew that he had hurt the police officer and the altercation was enough to overwhelm him. He knew he was injured although not specifically how he was injured.
- [62] He remembers bits and pieces from when he was in the hospital. He does not remember receiving a needle in the thigh. Later in the day, he remembers that he was wheeled to the psychiatric ward. He recalls talking to a doctor in a brown suit.

- [63] Mr. McCrae says he did not remember an evaluation nor a casual interview with a doctor. He does not recall giving the doctor a background of his illness. He also does not remember telling the doctor that he was playing with the knife and went for the police officer's gun. He does not recall explaining he used the knife for self defence. He does not remember saying it was his worst day ever. He remembers the brown suited doctor vaguely but does not recall any of the conversation.
- [64] When he hears the voices that say "kill God" and "kill himself", he knows that it is not right. He cannot stop the voices but he tries to take control. He tries to control the voices because he knows they are wrong and he knows the voices are not supposed to be there. They are not there all the time and he knows that those voices are not okay.

### The charges

- [65] Mr. McCrae is charged with:

Count 1: attempted murder of Cst. Jason Tymofichuk, by stabbing him with a knife, contrary to Section 279(1)(b) of the Criminal Code.

Count 2: aggravated assault of Cst. Jason Tymofichuk, contrary to Section 270.02 of the Criminal Code.

Count 3: disarming Cst. Jason Tymofichuk without consent by taking or attempting to take a weapon (an RCMP issued firearm), that was in the possession of the peace officer when that peace officer was engaged in the execution of his duty, contrary to Section 270.1 of the Criminal Code.

Count 4: possessing a dangerous weapon, a knife, for a purpose dangerous to the public peace or for the purpose of committing an offence, contrary to Section 88(1) of the Criminal Code; and

Count 5: resisting or wilfully obstructing Cst. Jason Tymofichuk, a peace officer in the execution of his duty, contrary to Section 129(a) of the Criminal Code.

### The law re: NCRMD

- [66] Section 16 of the Criminal Code, R.S.C. 1985, c. C-46, provides that a person is not criminally responsible for an act committed while suffering from a mental disorder that made them either incapable of appreciating the nature and quality of the act or incapable of knowing that it was wrong.
- [67] The presumption in s. 16 is that the person did not suffer from a mental disorder that exempts them from criminal responsibility: s. 16(2). In *R. v. Dobson*, 2015 ONSC 2865, aff'd 2018 ONCA 589, the Ontario Superior Court of Justice discussed the presumption and its effect on criminal responsibility:

- [64] Section 16(2) of the Criminal Code enacts a presumption of criminal responsibility. Everyone is presumed not to suffer from a mental disorder so as to be exempt from criminal responsibility. The presumption is not that persons do not suffer from a mental disorder simpliciter but, rather, that they do not suffer from a mental disorder of sufficient magnitude or gravity that they are exempt from criminal responsibility on that account. Stated positively, the presumption is that everyone is criminally responsible for their conduct.
- [65] Section 16(2) goes beyond a mere statement of the presumption. The subsection makes it clear that the presumption it creates is rebuttable. And it states the standard of proof to be met in rebuttal: the balance of probabilities. Section 16(3) assigns the burden of proof to the party who seeks to rebut the presumption section 16 creates.
- [66] Section 16(1) defines the scope of the exemption from criminal responsibility provided by mental disorder. The exemption has two components: the first is a condition, mental disorder. The second is an incapacity associated with that condition. On its own, a mental disorder does not exempt anyone from criminal responsibility. A mental disorder only exempts from criminal responsibility if it renders a person incapable of appreciating the nature and quality of an act or omission, or incapable of knowing that the act or omission was wrong.
- [68] The burden of proving the accused suffered from a mental disorder so as to be exempt from criminal responsibility rests with the party that raises the issue: s. 16(3). Here, the defence raised the issue that Mr. McCrae was suffering from a mental disorder as to exempt him from criminal responsibility, and therefore this is one of the rare circumstances where the burden falls on the accused to prove that he should be exempted from criminal responsibility on a balance of probabilities.
- [69] In *R. v. Chaulk*, [1990] 3 S.C.R. 1303 at 1323-1324, 1990 CanLII 34, the Court set out that when the defence raises the issue of NCRMD, they must prove on a balance of probabilities that:
- a) the accused was suffering from a mental disorder at the time of the offence;
  - b) the mental disorder rendered the accused incapable of appreciating the nature and quality of the act or omission. This is the first branch of the analysis. If the defence is able to prove this on a balance of probabilities, then it negates the mens rea with respect to either the circumstances or consequences of the act; and
  - c) the mental disorder rendered the accused incapable of appreciating the act or omission was wrong. This is the second branch of the analysis which arises when the accused is incapable of distinguishing between right and wrong.
- [70] In this context, the concept of "knowing it was wrong" was addressed by the Supreme Court of Canada in *Chaulk* and *R v. Oommen*, [1994] 2 S.C.R. 507 as going beyond legally wrong and includes morally wrong.

[71] The Supreme Court of Canada in *R. v. Ratti*, [1991] 1 S.C.R. 68 at para. 20, stressed that the accused will still be convicted if he knew that what he was doing was morally wrong:

In accordance with our decision in *Chaulk*, the trier of fact must be directed to consider whether the appellant was rendered incapable, by reason of disease of the mind or "natural imbecility", to know that his act was morally wrong in the circumstances. It is not sufficient to decide that the appellant's act was a result of his delusion. Even if the act was motivated by the delusion, the appellant will be convicted if he was capable of knowing, in spite of such delusion, that the act in the particular circumstances would have been morally condemned by reasonable members of society.

[Emphasis in original]

[72] An important difference between the two branches of the test is that the former negates the mens rea of the offence and therefore must be raised as part of the trial because a finding of guilt necessarily implies that the mens rea has been proven.

[73] By contrast, the second branch of the test serves as an excuse for criminal responsibility for the conduct, and as such can be raised even after a finding of guilt.

## The trial

[74] The trial took place over two distinct blocks of time. The Crown's case was presented over six days in September 2024. As the Crown was approaching the completion of its case, the defence indicated an intention to pursue the defence that Mr. McCrae was NCRMD pursuant to s. 16 of the Criminal Code. This was not a surprise, based both on information provided by defence counsel and the manner in which they cross-examined the Crown's witnesses.

[75] After discussing the matter with counsel, they agreed that if the accused wished to argue either or both branches of the NCRMD test under s. 16(1), evidence regarding Mr. McCrae's mental disorder would need to form a part of the trial. Although Mr. McCrae had been assessed by a forensic psychiatrist, Dr. Johann Brink, his report was not finalized by the time the Crown closed its case, and as a result, there was a break in the trial.

[76] When the trial resumed, the defence called both the accused, Mr. McCrae, and Dr. Brink to testify.

[77] The Crown then called one rebuttal witness, Dr. Kevin Duncan, who was not called as an expert witness but rather gave evidence regarding statements made by Mr. McCrae at KGH approximately 12 hours after the incident.

## Analytical approach

[78] As such, the approach to be taken in this situation where the accused raised issue of whether he is NCRMD before there has been a finding of guilt is as follows:

a) has the Crown proven beyond a reasonable doubt the actus reus;

- b) if yes, has the accused proven on a balance of probabilities that he was NCRMD;
- c) if no, can the Crown prove beyond a reasonable doubt the required mens rea, taking into account the evidence of the accused's mental state, even if it does not give rise to a NCRMD defence: *R. v. Klein*, 2021 BCSC 742 at para. 58.

[79] As the accused testified on his own behalf, I must be mindful of the principles set out by the Supreme Court of Canada in *R. v. W.(D.)*, [1991] 1 S.C.R. 742:

[28] Ideally, appropriate instructions on the issue of credibility should be given, not only during the main charge, but on any recharge. A trial judge might well instruct the jury on the question of credibility along these lines:

First, if you believe the evidence of the accused, obviously you must acquit.

Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.

Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

[80] *W.(D.)* is a helpful road map, but is not a "magic incantation" and its purpose is to focus the trier of fact on considering whether, based on the totality of the evidence, they are left with a reasonable doubt as to the accused person's guilt: *R. v. Demirovic*, 2021 BCCA 429.

[81] Of course, this analysis does not apply to the defence of NCRMD where the onus rests with Mr. McCrae to prove the defence on the balance of probabilities.

### Actus reus

[82] The actus reus for the various charged offences is not disputed. The defence concedes that Mr. McCrae recognized Cst. Tymofichuk as a police officer, which is relevant to Counts 2, 3 and 5. Mr. McCrae also concedes that by pulling his knife and stabbing Cst. Tymofichuk, he would have had the objective foresight that bodily harm would result, which is an element of the aggravated assault charge. There is also no dispute that Mr. McCrae possessed the carving knife (as defined in s. 4(3) of the Criminal Code) and that the carving knife was a weapon (as defined in s. 2 of the Criminal Code). I accept that the act of stabbing Cst. Tymofichuk with the knife could have resulted in death.

[83] I also accept that Cst. Tymofichuk was acting within the scope of his duties as a police officer when he took steps towards the tent-like structure adjacent to the parking area whereupon he was kicked, punched, and stabbed by Mr. McCrae. The staff at Ellis Place had called police to assist in the removal of the tent and Cst. Tymofichuk was dispatched in response to the call. I conclude it was reasonable and formed a part of his duties as a police officer to ensure that there were either no occupants of the tent structure or that any occupants were safe. This point is not disputed by Mr. McCrae.

- [84] Finally, I accept the evidence of the witnesses, Cst. Tymofichuk, S.L., and the evidence from the video surveillance that Mr. McCrae attempted to take Cst. Tymofichuk's RCMP-issued firearm when Cst. Tymofichuk was in the execution of his duty, which is sufficient for the actus reus requirement of Count 3.
- [85] In summary, I find that the actus reus of each of the offences has been proven beyond a reasonable doubt, which is not disputed by counsel for Mr. McCrae.

## NCRMD

- [86] I will now address whether Mr. McCrae has established that he cannot be held criminally responsible for an act committed while suffering from a mental disorder that made him either incapable of appreciating the nature and quality of the act or incapable of knowing that it was wrong. This begins with an overview of the evidence introduced by the parties on this point.

## Dr. Johann Brink

- [87] Dr. Brink was qualified as an expert in forensic psychiatry including the assessment of diagnostic needs and the clinical treatment for people with mental disorders and more specifically disorders for schizophrenia and NCRMD.

## Schizophrenia as a mental disorder

- [88] Dr. Brink described schizophrenia as a major psychotic illness. It is not a single disease and can take various forms of varying severity. Overall, it is an illness that impacts a person's functional level and is characterized by a gradual progressive decline in function, disorganized thinking, formal thought disorder including irrationality, off-the-point responses to straightforward questions, and thought blocking, where people simply stop talking mid sentence. People with schizophrenia can have delusions. These include paranoid delusions, which are irrational fears for their personal safety, grandiose delusions which involve exaggerated and clearly untrue beliefs with regard to their abilities or assets or belongings; romantic delusions where they believe that someone is in love with them; and religious delusions in which they may believe they were sent to earth to complete a task, such as killing the antichrist. The delusions can involve hearing voices, smelling things, and seeing things that are not there, all coupled with no insight into those matters.
- [89] The illness itself leads to cognitive impairment - cognitive abilities are duller, and they are less astute and acute in their thinking. It is also characterized by affective disturbances, such as a loss of the normal range of emotional reactivity. It can result in inappropriate emotions, gradual decline in function, disturbance of logic, abnormal psychotic beliefs, and conceptual disturbances.

- [90] Schizophrenia can be a paranoid hallucinatory disease in which hearing voices along with a lack of insight is common.
- [91] Most schizophrenics will respond to medications and improve. About one-third will be able to come off those medications or take them only intermittently, another third will remain on their medications indefinitely and will generally function fairly well in the community with periodic relapses, and another third are so unwell that they must live in settings such as hospitals as they require a lot of treatment and supervision.
- [92] The vast majority of those with schizophrenia know what they are doing and can understand what they are doing is wrong. They will often accept court findings. Dr. Brink gave the example of a homeless person with schizophrenia who is convicted of shoplifting will understand what they did was wrong, but explain that they did so because they were hungry.
- [93] However, a person in the throes of an acute psychosis may be so disturbed or disorganized by delusional beliefs that they do not necessarily appreciate what they are doing or understand the nature and quality of their actions. For example, a person who has strong delusions that they are on a divine mission to kill the antichrist, may simply recognize the antichrist from the voices that they are hearing and will then attack a complete stranger on the street. They know that they are stabbing someone but believe that they are doing God's will and it was their mission in life based on a divine intention. Therefore, they do not believe that what they were doing was wrong.
- [94] When people with schizophrenia act in this way, it is an acute stage of schizophrenia. It is a combination of delusional beliefs that become so intense that they believe they are commanded to act in a certain way, forcing the person to become agitated, disoriented and to lose contact with reality and to act on those psychotic impulses.
- [95] Schizophrenia is a fluctuating illness. A person may be able to control their behaviour 90% of the time and function reasonably well, but then can relapse, especially if they are not on treatment or if they lose contact with their caregivers in the community.
- [96] A person acting in an agitated and elevated state may not lay down the memories of what they are doing. They are aware of what they are doing at the time but cannot retrieve those memories later. They often will have glimpses of various aspects of what happened but are unable to recall the entire event. This is true not only of people with schizophrenia but can also arise in people with severe emotional dysregulation who may also kill out of rage and have only a partial memory of what occurred. Under either scenario, the person can have a complete lack of memory as to what happened. The task or challenge for the assessor is to see if what they did is out of character. It does not mean these people are not criminally responsible, however.

- [97] An additional challenge is if the person is acting on psychotic beliefs and following voices, they will not necessarily remember hearing the voices either. A person may say that the voices told them to do something and they tried to make those voices go away but the voices got more demanding and eventually the person did what the voices said. They will remember being agitated or angry with the voices. The challenge is to tease out the role of psychosis as distinct from typical angry behaviour.

### Impact of drugs on Schizophrenia

- [98] Drugs and, in particular, methamphetamine, which is what Mr. McCrae was using, further complicate the assessment. Methamphetamine is a stimulant, both cognitively and behaviourally. People can use it to work long shifts, study, or use it just as a "pick me up". Schizophrenics like to use crystal methamphetamine because it counters the antipsychotic medication they might be receiving. The antipsychotic medication blocks dopamine and as a result, the "colour" goes out of the world and they miss that. Smoking also has the same effect as crystal methamphetamine and as a result, many schizophrenics smoke cigarettes. Methamphetamine does not take away the delusions but it makes the world appear a brighter place.
- [99] A challenge in these sorts of assessments is determining whether schizophrenia or the drugs caused the psychosis. As such, reviewing historical records to determine whether a reduction or elimination in drug use reduces symptoms tends to support the idea that the psychosis was caused by the drug. By contrast, if the psychosis were present prior to drug use or continue unabated after drugs have been discontinued, this would be more likely to support the suggestion that it was the schizophrenia that caused the psychosis. Historically, psychiatrists used to believe that this determination could be made after only three weeks of ceasing the drug use but now a longer period is required. It can be three to six months before symptoms abate.

### Dr. Brink's summary of Mr. McCrae's psychiatric history

- [100] Dr. Brink summarized in his report Mr. McCrae's psychiatric history. Mr. McCrae started hearing voices around 15 years of age, and those voices have become more frequent and intense over time. The voices eventually started to command him to do things, such as to harm or kill himself.
- [101] By the time Mr. McCrae was in his thirties, he had both auditory and visual hallucinations. He has attempted suicide on five previous occasions. He was admitted to a hospital in Ottawa and was transferred to the Brockville Mental Health Centre where he was diagnosed with schizophrenia approximately 10 years ago.
- [102] Mr. McCrae has a history of aggression including assaulting a friend with a knife. On that occasion, he was assessed and found fit to stand trial. He was subsequently convicted in 2016 of aggravated assault in Bracebridge, Ontario arising out of this incident.

[103] Dr. Brink's opinion is that Mr. McCrae's condition has continued to deteriorate, which is not unusual in those with schizophrenia.

### **Dr. Brink's assessment of Mr. McCrae for the matters in issue**

[104] Dr. Brink described Mr. McCrae having very vague recollections or descriptions of the events. He denied being angry but felt that he was possessed by demons who had taken over. He does not understand what it was that caused him to act as he did. He remembered punching and hitting, but not "roaring". Mr. McCrae's recollections are set out in paras. 67 to 71 of Dr. Brink's report:

67. Mr. McCrae says that on that day and night, "I was talking+++, I was messed out of my mind, I tried to help some girls outside Ellis Place, it was late at night. I tried to help a homeless woman with a shopping cart, I recognised her from the street. The woman put the cart in the back parking lot." Mr. McCrae says that he was out in the parking lot to try to "chill", the staff came out and told him to move the cart but the woman did not want him to move the cart, and that the staff subsequently called the police. He says that the police "talked and lied" to the owner of the cart and that when the officer walked to the cart, "I was told later that I roared and kicked and stabbed."
68. He went on to say that: "Bad voices, the demons, possessed me, I kicked, and then I realised it was a police officer, I saw a gun pointed at me, I told him to shoot me. I took the knife and cut my throat. It is a wooden carving knife. I was tazed a lot."
69. Mr. McCrae went to say again that he felt that he was "possessed" by demons. He denied that he was feeling angry at the time, but rather that he was possessed. When I asked what he meant by that statement, he replied that it was "because of fear, paranoia, vulnerable to bad voices and demons. If I become emotional the demons take over, they take control of me, but I typically punch myself." He said that he does not understand what that night caused him to act a[s] he is alleged to have done.
70. When asked to describe in detail what he remembered about the events at issue, Mr. McCrae, he said that he was perplexed about what caused him to act violently towards a police officer, as he typically gets on well with the police. He stated that his memory of the events was "foggy" but he remembered that he asked the officer "to pull the trigger" and that he tried to get the barrel to point to his heart and then to his head, but that "the cop pulled it away."
71. Mr. McCrae described the officer as "a quiet, chill police officer" and that "there was no reason to attack him except demon possession." He went on to say that he usually has amnesia or a "foggy" memory for these kinds of events but that he "kind of remembered what happened" when he was shown the video of the attack. He claims to have no memory of the reported "roar" but does remember making "a funny face" at the time.

- [105] Dr. Brink acknowledged that he necessarily accepted what he was told by Mr. McCrae as being true as to his recollections and lack of memory. Dr. Brink agreed that it is possible that Mr. McCrae was malingering his symptoms, but felt that it was unlikely. He did not administer a specific test for malingering, but explained that his interview will tend to reveal inconsistencies such that a formal standalone test is not necessary in his experience. Rather, Dr. Brink looks for signs such as bizarre explanations for simple matters. People who are malingering often speak clearly and logically and describe the most bizarre events. They are also often able to give detail to the level of absurdity. In his view, Mr. McCrae is not a sophisticated man, not psychologically minded, and he believed that Mr. McCrae was telling him what he believed to be true. Dr. Brink said, "I remind myself that his description of his experiences is consistent over at least a decade."
- [106] Dr. Brink drew a distinction between this event and the one from 2016 when he stabbed his friend. The incident with his friend occurred when he and his friend had both been drinking to the point of intoxication at a bar. The friend went home early and ended up leaving the gate unlocked and Mr. McCrae's dog escaped. Mr. McCrae became very angry. He used a knife because his friend was bigger than him and he knew he would not win a physical fight. In that case, it was anger as opposed to a psychotic episode that caused the behaviour. The doctor in that case, concluded that the behaviour was substance-induced and the NCRMD defence did not apply.
- [107] Dr. Brink agrees that methamphetamine use on top of schizophrenia can intensify symptoms. If a person is schizophrenic and: (1) not taking all of their prescription medications; and (2) using methamphetamine, there can be an increased risk of violence, increased impulsivity, and an impairment of judgement.
- [108] However, based on the information available, it was Dr. Brink's opinion that the quantities used by Mr. McCrae were too small to be significant or relevant in this case. He described Mr. McCrae as having a 'slight buzz', which confirms usage but not in an amount to be causative of the psychosis of that night. Dr. Brink pointed out that even though he is no longer using illicit drugs because he is in jail, the auditory hallucinations continue.
- [109] Dr. Brink's opinions with regard to Mr. McCrae are set out in paras. 71(v) and (vi) of his report as follows:
- v. Capacity to appreciate the nature and quality of their actions
  - i. Mr. McCrae only has a vague memory of the alleged offences; he is able to recall only some aspects, and some only after having seen the video of the offenses. He remembers taking out his knife but not the stabbing itself. He has some memory of fighting with the officer and of asking the officer to shoot him, and of trying to force the barrel to his heart and face.
  - ii. He is unable to comprehend why he attacked the officer, a person he liked and described in positive terms. Mr. McCrae admits that he had smoked crystal methamphetamine that day but says that he was not intoxicated, and only "had a buzz on."

iii. He describes the voices a being particularly loud and insisting that he kill the officer and kill himself and God.

iv. Her [sic] describes his mental state at the time as being "possessed by demons" who wanted him to do harm to himself and to others. He had tried meditation and emotional relaxation techniques to avoid becoming emotionally aroused, as that typically triggered in him a sense that he was being possessed by demons and with him acting in a manner for which he lacked memory.

v. It is my opinion that Mr. McCrae was able to appreciate the nature and quality of some of his actions, such as taking the knife from his pocket, but that the mental disorder was of such severity that it had deprived him of the capacity to appreciate the nature and quality of the stabbing itself, not of stabbing the officer.

vi. Capacity to know the wrongfulness of their actions

It is my opinion that Mr. McCrae's psychosis at the time was of such severity that it deprived him at the time of knowing that his actions were legally or morally wrong. It seems that his illness was so severe at the time that he was unable to appreciate what he was doing when he stabbed the officer, that he [had] no memory of the stabbing and thus was unable at the time, on account of mental disorder, of knowing the wrongfulness of his actions.

[110] It is Dr. Brink's opinion that Mr. McCrae meets the s. 16 criteria for a finding of NCRMD.

### Rebuttal witness - Dr. Kevin Duncan

[111] The Crown called Dr. Duncan as a rebuttal witness. He was not qualified as an expert, but rather was called to testify as to what Mr. McCrae said to him at KGH. He testified after Dr. Brink's evidence was completed.

[112] Dr. Duncan is completing his fifth year of residency as an emergency physician. At the time of his interaction with Mr. McCrae, he was a second-year resident doing a four-week rotation in the psychiatry department.

[113] On the day that Dr. Duncan first met with Mr. McCrae, the staff physician who served as his supervisor was Dr. Ryan Ishkanian. Although the tasks he was given would vary, he was routinely tasked with conducting intake interviews. He would conduct the interview and document it, and then talk to the staff physician. He would then discuss his interactions with that staff physician and then complete his formal chart note.

[114] Dr. Duncan took a history from Mr. McCrae, who told Dr. Duncan that he was told to leave a place. Mr. McCrae said:

- a) he had a knife in his hand and "was playing with it";
- b) a police officer showed up and spoke to him;

- c) the police officer saw the knife and went for his gun;
- d) he immediately knew there was going to be an altercation and described using his knife defensively; and
- e) he was then taken down by police.

[115] Mr. McCrae also told Mr. Duncan he was using methamphetamine that day but denied using any other substances. He made references to chronic auditory hallucinations and referred to "psychotic possession" and "Chinese government shit". He expressed suicidal ideations, but denied an attempt of suicide by police. Mr. McCrae then went on to say, "Yesterday was the worst day ever".

[116] Dr. Duncan was asked about medications given to Mr. McCrae. He understood that Mr. McCrae may have been given ketamine. Ketamine is a sedative and may have the effect of impairing recollection and memory, but Dr. Duncan did not know the dosage of ketamine given to Mr. McCrae, nor when it might have been administered.

### Positions of the parties

[117] The accused argues that at the moment of the stabbing, he was in an acute state of psychosis, was overwhelmed by the voices, and lost contact with reality such that he had no free will. He argues he lacked the executive functioning necessary to distinguish right from wrong in the moment and had no reason to stab the officer. He relies on Dr. Brink's opinion that on account of his mental disorder, he did not appreciate what he was doing and was incapable of knowing the wrongfulness of his actions.

[118] The Crown acknowledges the accused suffered from a mental disorder at the time of the offence, but says that Mr. McCrae was not suffering from psychosis on a level that deprived him of knowing what he was doing and from knowing that his actions were wrong. The Crown says the evidence proves beyond a reasonable doubt that Mr. McCrae had the requisite intent and that the defence has failed to establish the defence of NCRMD on a balance of probabilities.

### Discussion

[119] I have difficulty accepting Dr. Brink's opinion for two main reasons:

- a) Dr. Brink did not know of the version of events Mr. McCrae told Dr. Duncan following the attack; and
- b) Dr. Brink's original opinion assumed that Mr. McCrae knew and liked Cst. Tymofichuk.

[120] When these issues were put to Dr. Brink, he gave conflicting answers as to how they might change his opinion and minimized their significance.

[121] I will address the implications of each of these issues on Dr. Brink's opinion in turn.

### Mr. McCrae's alternative version and memory of the events

- [122] One of the foundations for Dr. Brink's conclusion that Mr. McCrae lacked the capacity to appreciate the nature and quality of his actions is that Mr. McCrae has no memory of the events. Dr. Brink said that if we accept that Mr. McCrae has no memory of the actual stabbing, then the illness would have been so severe that it deprived him of the capacity to understand the nature of the actions or that they were wrong, either legally or morally. He described that Mr. McCrae had an almost dreamlike recall, with only bits and pieces of the events in his memory.
- [123] The evidence of Mr. McCrae having no recollection of attacking Cst. Tymofichuk is contradicted to some degree by Mr. McCrae's assertion of a recollection of events to Dr. Duncan within 12 hours of the event. Contrary to what he told Dr. Brink in his September 2024 interview, Mr. McCrae told Dr. Duncan that he had been told to leave a place. He said he had a knife in his hand and "I was playing with it". A police officer then showed up and spoke to him. Mr. McCrae said that the police officer saw the knife and went for his gun. Mr. McCrae said that he immediately knew there was going to be an altercation and described using his knife defensively. He told Dr. Duncan that he was then taken down by police. I note that Mr. McCrae did not say anything to Dr. Duncan or Dr. Brink about protecting a woman in the tent by attacking a police officer.
- [124] It is readily apparent from the security video from Ellis Place that what Mr. McCrae told Dr. Duncan is not true. However, the significance of what Mr. McCrae told Dr. Duncan is not the truthfulness of his statement but rather that Mr. McCrae was providing a version of events that he may have considered to be exculpatory, which tends to undermine the suggestion that he was psychotic to the point of not having the capacity to distinguish right from wrong. In other words, Mr. McCrae's comments to Dr. Duncan tend to suggest that he knew what had happened and was contemplating a potential defence. It is noteworthy that he made no mention to Dr. Duncan about a loss in memory of the incident.
- [125] While I accept that it could be possible that Mr. McCrae no longer had any recollection of the stabbing as of the time of his interview with Dr. Brink in September 2024, some two-and-a-half years later, his comments to Dr. Duncan at KGH suggest that he was aware of what had happened at the time, even though what he told Dr. Duncan was clearly untrue.
- [126] The defence argues that what Mr. McCrae said to Dr. Duncan is nonsensical, and that his comments or explanations as to what had happened are simply an attempt in his mind to explain events for which he has no recollection. Therefore, the defence argues, Mr. McCrae's comments to Dr. Duncan support the defence position that he had no recollection of events. However, I have no evidence to support this possible inference, whether from Dr. Brink or from anyone else. It is unfortunate that Dr. Brink had not reviewed the KGH records in the preparation of his report, even though those documents were available.

- [127] Dr. Duncan's anticipated evidence was put to Dr. Brink on cross-examination as hypothetical scenarios. I found that Dr. Brink was argumentative when responding to these hypotheticals.
- [128] Dr. Brink was asked whether it would concern him that Mr. McCrae was referring to what amounts to self defence immediately following the event, only to provide a different version to Dr. Brink after viewing the security video.
- [129] Dr. Brink said he did not know what Mr. McCrae told the other doctor, if it even was a 'half decent' psychiatric interview, how Mr. McCrae was behaving, and that he did not have anywhere near enough information to provide an opinion. However, the potential significance of Dr. Duncan's evidence was not whether or not he conducted an appropriate psychiatric interview for the purpose of providing a psychiatric opinion, but rather the content of what Mr. McCrae said. In other words, it would not have mattered whether Mr. McCrae had provided his explanation of what had happened to a doctor, hospital porter, or to a stranger on the street.
- [130] Dr. Brink acknowledged that he did not have the KGH records when preparing his report, and that the omission may have made a difference. He was not certain that it would affect the accuracy of his report, but it would have been more complete with those records.
- [131] Dr. Brink grounded his opinion that Mr. McCrae was in a psychotic state, such that he had no ability to know that what he was doing was wrong, on Mr. McCrae telling him that he had no memory of the event. He explained that people in a psychotic state may not lay down memory which can explain why they have no recall. As such, I find difficult to accept that Mr. McCrae's relaying of a version of events to Dr. Duncan within 12 hours would not be significant, even if that version were subsequently proven to be incorrect.

### **Mr. McCrae did not know Cst. Tymofichuk**

- [132] There was also a discrepancy regarding Dr. Brink's assumption on the issue of whether Mr. McCrae knew and liked Cst. Tymofichuk. The presence of Mr. McCrae's positive view of Cst. Tymofichuk was important to Dr. Brink's opinion because if there was no reason for Mr. McCrae to attack Cst. Tymofichuk, it suggests that the attack was as a result of acute psychosis, as opposed to criminal behaviour.
- [133] During his evidence, both on direct and during cross-examination, Dr. Brink made several references to Mr. McCrae's familiarity with the police officer, saying that he knew the officer, liked the officer and respected the officer, and that he knew him from the street.
- [134] Specific references to Dr. Brink's evidence regarding Mr. McCrae's familiarity with Cst. Tymofichuk are as follows:
- a) Direct Examination May 2, 2025:

- i. 2:13:30 - "Knew the police officer as a quiet and chill police officer " when describing circumstances of incident;
  - ii. 2:30:00 - "This was a person that he liked and he described the officer in positive terms" when speaking about facts supporting opinion given on NCRMD;
  - iii. 2:38:53 - "Because he liked the man, he respected the officer, he had had several interactions with him before." Q: How do schizophrenic patients in these situations where they get this demonic possession, how do they describe the sense of losing the agency or the free will at that moment? Are there typical explanations of how they say they feel?;
- b) Cross Examination May 5, 2025:
- i. 10:34:49 "He didn't understand why he acted like that and he went on to say he knew the officer, he liked the officer, he didn't understand his actions. Q: He also says that he didn't understand that night what caused him to act as he is alleged to have done?;
  - ii. 11:05:40 - "This was an officer that he recognized, and he liked, and that he described as a kind and caring man. And yet the voices compelled him to act in a homicidal as well as suicidal manner ". Q: Is there any one factor [from factors at pg. 13, bullet V. of his report] that makes the mental disorder in this case so severe?;
  - iii. 11:37:17 - "The cop is a quiet, chill, police officer, there was no reason to attack him except demon possession". Q: Dr. Brink was quoting what Mr. McCrae told him after reviewing his notes regarding if Mr. McCrae told Dr. Brink the demons told Mr. McCrae to kill the police officer; and
  - iv. 12:12:42 - "Why would there be an altercation if he knows the police officer as a kind man and he liked the officer?". Q: Would his opinion change based on the hypothetical evidence of Dr. Duncan.
- [135] Notwithstanding Dr. Brink's evidence, however, Cst. Tymofichuk had previously testified that he had had no prior interactions with Mr. McCrae. Mr. McCrae had also testified prior to Dr. Brink, and he made no reference to ever having previously met Cst. Tymofichuk either.
- [136] After the parties' examinations of Dr. Brink had concluded, I pointed out to counsel that although Dr. Brink had made those numerous references, there was no evidence before the Court that the two had ever met, and it was not clear to me how important that assumption had been in the formulation of Dr. Brink's opinion.
- [137] After discussing the matter with counsel in the absence of the witness, I asked Dr. Brink with the agreement of counsel, "Did Mr. McCrae tell you that he knew the officer from before this incident?" Dr. Brink responded, "Yes, he told me that". Dr. Brink was then asked to review his notes to see if there was such an entry. He referred to three lines on page 7 and then went on to say, "He told me he knew him, he had frequent contact with him on the street".

[138] I discussed with counsel that I would ask one further question of Dr. Brink, following which counsel could ask any questions arising from mine.

[139] My follow up question was, "If you were told that Mr. McCrae and the police officer were unknown to one another before this incident, would this change your opinion?" Dr. Brink's answer was, "Not necessarily". He said if there was animus between the two, his opinion would change. He said he was told by Mr. McCrae that he considered the officer to be a 'chill' officer, and his assumption was there was some personal interaction. If the correct information was that there was no contact whatsoever and he had not met him, it would be important to know if he had seen the officer interact with street people in the community, and if he considered him to be a kind, chill officer. If that was Mr. McCrae's impression, then his opinion would not change.

[140] Ms. Turko (defence counsel) then asked if Mr. Brink's assessment would still be the same if there was no evidence of animosity at the time of the incident and no animosity to be drawn from the scenario. His answer was, "It was my understanding that there had not been any animosity between them so my opinion would not change, it would remain the same."

[141] Ms. Ogi-Harris (Crown counsel) asked to clarify if it was correct that Dr. Brink's evidence was that if Cst. Tymofichuk and Mr. McCrae had no contact whatsoever, then Dr. Brink's opinion would change. Dr. Brink said:

No, that wasn't what I said. I said that if there was evidence that there had not been any contact between the two of them, then my opinion would still remain the same. Because he told me for whatever reason that there was no animosity between them.

[142] Dr. Brink's answers to the questions posed by counsel were not exactly the same as his initial response to my question. When answering my question, he said it would be important to know if Mr. McCrae had seen the officer interact with street people in the community. As such, in his response to the Court's question, Dr. Brink appeared to suggest that Mr. McCrae's opinion of the police officer, presumably a positive opinion of a kind, chill officer, would need to have been derived from some prior event, even if it had not been an interaction between the two directly. However, in his response to the follow-up questions from counsel, he said his opinion would not change because there was no evidence of animus. This answer would suggest that any prior knowledge on the part of Mr. McCrae of the police officer was irrelevant to his opinion, absent evidence of animus, which would seem strange given the number of times Dr. Brink felt it necessary in both his written report and his oral evidence to refer to Mr. McCrae's positive impression of the police officer based on his understanding of their prior interactions.

## Protecting the woman in the tent

- [143] Due to the issues with Dr. Brink's evidence, I find the evidence is much more likely to support a conclusion that Mr. McCrae had a motive to protect the woman in the tent behind Ellis Place rather than being in a state of acute psychosis wherein he was unable to appreciate the nature and wrongfulness of his actions.
- [144] Dr. Brink was also asked during his evidence, "When you were forming your opinion did you consider that Mr. McCrae had any other motive to attack the officer?" he replied saying "I wondered if there was animus between the two of them and he denied it repeatedly."
- [145] Dr. Brink was asked about Mr. McCrae's use of the knife in Dr. Duncan's anticipated evidence. He said that if Mr. McCrae had a knife and was playing with it, and then the police officer spoke with him and pulled his gun, which was followed by an altercation, he is not certain how protecting the woman would come into it. Dr. Brink acknowledged that the fact pattern expressed to Dr. Duncan contrasted to some extent with what Mr. McCrae told him. When challenged, Dr. Brink's response was that the hypothetical was not tested in court and it may not be what the doctor heard, so it does not help him at all. Dr. Brink said he would have explored in much greater detail with Mr. McCrae during his interview about that version of events. He referred to the provocation of the officer pulling the gun, the protection of the woman from being moved, and said that there were a lot of things he would have explored. Dr. Brink said the "Chinese government shit" comment suggests delusional thinking on the part of Mr. McCrae.
- [146] Dr. Brink was asked if the element of wanting to protect someone, namely a woman in the tent, would change his opinion. Dr. Brink agreed that if Mr. McCrae were brandishing the knife because he did not want the police officer to move the woman in the tent, it would be a different scenario.
- [147] I agree with Dr. Brink that the addition of this fact would make this a different scenario and find that it leads to a different conclusion regarding Mr. McCrae's capacity at the time of the stabbing.
- [148] I find that Mr. McCrae wanted to protect the woman in the tent and to prevent the tent from being moved, something that was obviously imminent given Cst. Tymofichuk's arrival and their brief conversation just before the attack.
- [149] Earlier in the evening, the staff from Ellis Place also told Mr. McCrae that the tent would have to be moved. Mr. McCrae did not comply, but rather "roared" at staff which frightened them, and told them they would be fired. They went back inside and called the police to assist.
- [150] When Cst. Tymofichuk responded to that call for assistance, he dealt with Mr. McCrae in a polite and respectful manner, but he also made it clear that the tent structure would need to be moved. When Cst. Tymofichuk asked Mr. McCrae if there was anyone in the tent, Mr. McCrae said there was not. However, Cst. Tymofichuk was not willing to accept Mr.

McCrae's answer at face value, and told him that he needed to check it for himself. I conclude that when Mr. McCrae realized that Cst. Tymofichuk was about to find out that what he had told the officer was untrue, he responded quickly and violently, resulting in his kicking, punching and ultimately stabbing of Cst. Tymofichuk.

- [151] Although Dr. Brink's evidence was that Mr. McCrae told him that he had no recollection of the assault or of having roared at the Ellis Place staff, he has recollections of events both before and after, and provided an alternative explanation of the events of the evening to Dr. Duncan only 12 hours later.
- [152] Dr. Brink's opinion that Mr. McCrae's state of psychosis rendered him incapable of appreciating the nature and quality of the act, or incapable of knowing that his acts were wrong is undermined because he:
- a) did not have the record of Dr. Duncan's interview before him, which is an important piece of the story that he admitted may have made a difference in his opinion. Among other things, this undermines the inferences Dr. Brink drew from Mr. McCrae's statement to him that had no memory of the stabbing; and
  - b) relied on the incorrect assumption that Mr. McCrae knew and liked Cst. Tymofichuk in support of his belief that there was no reason for Mr. McCrae to attack Cst. Tymofichuk.

## Conclusion on NCRMD

- [153] I find that it is more likely than not that Mr. McCrae's motive for his attack of Cst. Tymofichuk was that Cst. Tymofichuk was about to discover the woman in the tent who Mr. McCrae had been trying to help or protect, however misguided that motivation might have been with the benefit of hindsight.
- [154] The fact that Mr. McCrae had a motive is not necessarily determinative. For instance, it is possible that Mr. McCrae could have wanted to protect the woman and still have gone into a state of acute psychosis at the moment of the attack that rendered him not criminally responsible. However, as I have discussed above, the theory that Mr. McCrae entered into a state of acute psychosis coinciding with a loss in memory is significantly undermined by his comments to Dr. Duncan shortly after the attack. Mr. McCrae's version of events, while untrue, establish that he understood the facts or the events that had taken place sufficiently to draw on them to create a potential defence or explanation for his actions.
- [155] I find that Mr. McCrae's actions were not the result of an acute psychosis that rendered him unable to appreciate the nature of his actions, or that his actions were wrong. It follows that although Mr. McCrae was clearly suffering from a mental disorder, I find he has not established on a balance of probabilities that the mental disorder rendered him either incapable of appreciating the nature and quality of the act, or incapable of knowing that his acts were wrong. His NCRMD defence therefore must fail.

## Mens Rea

[156] I will now turn to the question of whether the Crown has proven the mens rea for each of the charged offences. In doing so, I have considered all of the evidence, including the evidence of mental disturbance that was insufficient to support an NCRMD verdict.

### Count 1 - Attempted murder of Cst. Tymofichuk

[157] Under the Criminal Code, a person commits homicide when they directly or indirectly cause the death of a human being: s. 222(1). Culpable homicide is murder where the person who causes the death of a human being means to cause their death: ss. 222(4) and 229(a)(i). Pursuant to s. 239 of the Criminal Code, every person who attempts by any means to commit murder is guilty of an indictable offence. Section 24 of the Criminal Code states:

24. (1) Every one who, having an intent to commit an offence, does or omits to do anything for the purpose of carrying out his intention is guilty of an attempt to commit the offence whether or not it was possible under the circumstances to commit the offence.
- (2) The question whether an act or omission by a person who has an intent to commit an offence is or is not mere preparation to commit the offence, and too remote to constitute an attempt to commit the offence, is a question of law

[158] The mens rea requirement for attempted murder is a specific attempt to kill: *The Queen v. Ancio*, [1984] 1 S.C.R. 225 at 249. Mere recklessness, even where the accused means to cause the other person bodily harm that they know is likely to cause death, is not sufficient to constitute the requisite intention for attempted murder: *Ancio* at 251.

[159] I have already concluded that Mr. McCrae's motivation for the attack on Cst. Tymofichuk was his wish to help and protect the woman in the tent. From a review of the video, Mr. McCrae's reaction and his assault of Cst. Tymofichuk was when it became obvious that Cst. Tymofichuk was going to find the woman in the tent that Mr. McCrae was determined to protect.

[160] Mr. McCrae's actions with the knife are the only aspect of the interaction to consider on the attempted murder charge because the Indictment refers only to the knife. In other words, the wrestling for control of the gun, and more significantly, Mr. McCrae's attempts to point the gun towards Cst. Tymofichuk while they were both on the ground, do not form part of the Indictment.

[161] There is no doubt that Mr. McCrae's actions could have resulted in the death of Cst. Tymofichuk, which is evident from the significant wound inflicted by Mr. McCrae to Cst. Tymofichuk's eye, and further supported by the medical evidence of Dr. Reid and Dr. Semeniuk.

- [162] However, attempted murder is a specific intent offence and Mr. McCrae can only be convicted of that offence if the Crown has proven beyond a reasonable doubt that he had the specific intent to kill Cst. Tymofichuk with the knife.
- [163] The B.C. Court of Appeal in *R. v. Weng*, 2022 BCCA 332 at para. 82, adopted the explanation of the mens rea of attempted murder by Justice Doherty in *R. v. Boone*, 2019 ONCA 652:
- [82] . . . the offence of attempted murder "requires proof beyond a reasonable doubt that the accused intended to kill, coupled with conduct by the accused done for the purpose of carrying out that intention" which is more than merely preparatory: at para. 49. That being so, he stated, "[t]he intention to inflict harm, even significant harm, combined with recklessness as to the consequence of inflicting that harm, does not suffice to establish the mens rea for attempted murder": at para. 51. He stated further that a specific intent to kill is established where the killer's purpose is to kill another or the killer believes "with virtual certainty" that death will result from a course of action: at paras. 52-53.
- [164] Applying the law to the facts of the case, Justice Dickson for the Court in *Weng* found that the trial judge failed to grapple with the question of whether the accused specifically intended to kill one of the victims, or merely intended to cause him bodily harm that he knew was likely to cause his death, being reckless as to whether death would ensue. This caused the trial judge to err, as the common-sense inference that people intend the natural and probable consequences of their actions may ground a murder charge, but is insufficient to ground the mens rea for attempted murder.
- [165] In my view, the evidence in this case does not go as far as establishing that Mr. McCrae had a specific intent to kill Cst. Tymofichuk as distinct from engaging in conduct that may have had that consequence. Although Mr. McCrae's sudden and unprovoked attack on Cst. Tymofichuk with the knife could have, and was reckless to, causing his death, I am not convinced beyond a reasonable doubt that Mr. McCrae specifically intended to kill Cst. Tymofichuk. Although a common-sense inference that stabbing someone with a knife will cause them to die can be drawn from the facts in certain scenarios, even were this the case here, this inference is insufficient to establish that Mr. McCrae had a specific intention to kill Cst. Tymofichuk.

## Count 2 - Aggravated assault of a police officer

- [166] The mens rea requirement for assault is the intentional application of force without consent of the victim. Non-consensual contact will constitute an assault unless some defence applies. The aggravated element focuses on the consequences, which are that the victim was wounded, maimed or disfigured, or that their life was in danger. The permanent loss of function of some part of the victim's body is not required in order to meet the definition of maiming: *R. v. McPhee*, 2018 ONCA 1016 at paras. 28 to 42.

[167] The Supreme Court of Canada in *R. v. Godin*, [1994] 2 SCR 484, summarized the mens rea requirement for aggravated assault as follows:

The mens rea required is objective foresight of bodily harm. It is not necessary that there be an intent to wound or maim or disfigure. The section pertains to an assault that has consequences of wounding, maiming or disfiguring.

[168] Bodily harm is defined in s. 2 of the Criminal Code as, "any hurt or injury to a person that interferes with the health or comfort of that person that is more than merely transient or trifling in nature."

[169] The question in this case is therefore whether it was objectively foreseeable that stabbing Cst. Tymofichuk in the head would create a risk of bodily harm that was neither trivial nor transitory.

[170] The defence concedes that Mr. McCrae recognized Cst. Tymofichuk as a police officer and that by pulling out his knife, would have had the objective foresight of bodily harm to prove the aggravated assault of Cst. Tymofichuk if the defence failed to establish the defence of NCRMD. The act of stabbing a person near the eye, a vulnerable area of the body, after kicking and knocking them to the ground, clearly carries an objectively foreseeable risk of bodily harm. It would be foreseeable that such an attack on Cst. Tymofichuk would wound, maim, or disfigure the officer.

[171] I find that the Crown has proven beyond a reasonable doubt that Mr. McCrae's actions constitute an aggravated assault of Cst. Tymofichuk.

### Count 3 - Disarming a police officer

[172] Section 270.1(1) of the Criminal Code defines the offence of disarming a police officer as follows:

Every one commits an offence who, without the consent of a peace officer, takes or attempts to take a weapon that is in the possession of a peace officer when the peace officer is engaged in the execution of his or her duty.

[173] The offence is a general intent offence. As noted above, the defence concedes that Mr. McCrae recognized Cst. Tymofichuk as a police officer.

[174] The evidence of Cst. Tymofichuk and S.L. is that Mr. McCrae was trying to take Cst. Tymofichuk's sidearm from him by force, which is consistent with the surveillance video. Mr. McCrae attempted to do so when Cst. Tymofichuk was in the execution of his duty as a police officer and Cst. Tymofichuk did not consent to this action.

[175] Proof of intention is generally inferred from the commission of the acts themselves on the basis that people are assumed to intend the consequences of their actions: *R. v. Seymour*, [1996] 2 S.C.R. 252 at para. 19. Based on my findings earlier in the decision, Mr. McCrae can be presumed to intend the natural consequences of his actions. He therefore intended to disarm Cst. Tymofichuk.

[176] I conclude the Crown has proven beyond a reasonable doubt that Mr. McCrae attempted to take Cst. Tymofichuk's firearm while he was engaged in the execution of his duty.

#### **Count 4 - Possession of a weapon for a dangerous purpose**

[177] The charge of possession of a weapon for a dangerous purpose relates to Mr. McCrae's possession of the carving knife that he used to stab Cst. Tymofichuk. Section 88(1) of the Criminal Code defines the offence as follows:

88 (1) Every person commits an offence who carries or possesses a weapon, an imitation of a weapon, a prohibited device or any ammunition or prohibited ammunition for a purpose dangerous to the public peace or for the purpose of committing an offence.

[178] The essential elements are as follows:

- a) the accused carried or possessed a weapon as defined in s. 4(3) of the Criminal Code;
- b) the weapon must meet the definition of "weapon" in s. 2 of the Criminal Code; and
- c) the person possessed the weapon:
  - i. "for a purpose dangerous to the public peace"; or
  - ii. by possessing a weapon "for the purpose of committing an offense".

[179] Section 88 creates two separate offences: (i) possession of a weapon "for a purpose dangerous to the public peace" and (ii) possession of a weapon "for the purpose of committing an offence": *Kerr* at para. 22.

[180] Although the language of Count 4 refers to both branches of s. 88(1), the Crown does not rely upon the second branch and the issue in the present case is whether the Crown has proven beyond a reasonable doubt that the accused possessed the knife for a purpose dangerous to the public peace.

[181] Possession of a weapon for a dangerous purpose is a specific intent offence. The leading case on possession of a weapon for a purpose dangerous to the public peace is *R. v. Kerr*, 2004 SCC 4. In *Kerr*, the accused was a prison inmate who received death threats from the victim, a fellow inmate. The accused concealed weapons in his pants, and when the victim attacked him with a knife, an altercation ensued and the accused killed the victim with a stab to the head. In allowing the appeal in *Kerr*, the Supreme Court of Canada divided on what it means to be in possession of a weapon for a purpose dangerous to the public peace.

- [182] A majority of the Court found that determining whether a purpose is "dangerous to the public peace" requires a two-part assessment, often referred to as a subjective-objective test (Justice Bastarache, with Justice Major concurring, wrote the primary judgment on this point at para. 25, while Justice Fish, with Justice Deschamps concurring, took a similar approach at para. 118). The trier of fact must first determine the accused person's purpose, which is a subjective determination, following which there is a determination of whether the purpose was dangerous to the public peace, which is objective.
- [183] Regarding the subjective determination, the court must consider all the circumstances in the case, "including the nature of the weapon, the circumstances under which the accused had it in his possession, his own explanation for that possession, and the use to which he actually put it, if that sheds light on what his purpose was in originally having it": *R. v. M.D.*, 2008 BCCA 538 at para. 16.
- [184] Finally, a person's intention for the purposes of s. 88(1) of the Criminal Code does not necessarily always remain constant and may change to a dangerous intention, even if the item was originally taken into the accused's possession for a purpose that was not dangerous: *Kerr* at para. 24. For there to be a conviction, there must be a point where the elements of possession and a dangerous purpose coexist: *Kerr* at para. 24.
- [185] The Crown argues that Mr. McCrae's purpose changed when the carving knife that he originally possessed for a purpose that was not dangerous to the public peace was subsequently rendered dangerous when Mr. McCrae removed it from his pocket and stabbed Cst. Tymofichuk.
- [186] The accused argues the principle from *Kerr* that a person's purpose may change while they possess a weapon is not applicable in this case because it involved a different set of circumstances. *Kerr* does notably differ from this case in that the accused in *Kerr* was carrying the weapons at the time of the altercation for the purpose of defending himself from the threat of another prison inmate. Accordingly, the Court's reasons in *Kerr* were not tailored to specifically address the issue of when lawful possession may change to unlawful possession for a purpose dangerous to the public peace. That said, the Court's comments relating to this issue (specifically at para. 24) and the subjective-objective test, remain binding.
- [187] The accused refers to the case of *R. v. Flack* (1968), [1969] 1 C.C.C. 55, (cited in *Kerr*), as being more factually similar to this case and for the proposition that an unpremeditated use of a weapon out of sudden anger or annoyance for the forbidden purpose is not enough to covert lawful possession into an unlawful one within the meaning of s. 88: *Flack* at 56.

- [188] In Flack, the accused possessed a knife for shucking oysters and went to use the knife to cut a deer carcass from his automobile. Before he could do so, he ended up waving the knife around in anger and annoyance and in doing so threatened the complainant. Flack involves similar facts to this case, to the extent that the knife was not designed as a weapon and was possessed by the accused for legitimate or legal purposes, before it was suddenly used for an improper purpose.
- [189] There is no doubt in this case that the accused possessed a weapon. However, I accept that Mr. McCrae's carving knife was ordinarily used for wooden carvings. Mr. McCrae's evidence, which was not disputed, is that carving is an activity that he enjoys and is something he spends significant time doing. I also accept the carving knife was routinely in his pocket and not because he had an intention to use it as a weapon.
- [190] The Crown argues I should infer that he had the knife in his pocket for the purposes of using it to scare off anyone who was intent on interfering with the tent. I reject this submission as it is nothing more than conjecture, nor was that proposition ever put to Mr. McCrae on cross-examination.
- [191] The question is whether removing the carving knife from his pocket before stabbing the officer changed the character of possession of the knife to possession for a dangerous purpose within the ambit of s. 88.
- [192] Justice Campbell provided a helpful summary of the law relating to this issue in *R. v. Andrade*, 2024 ONSC 655:

15 Given that subjective possessory purposes can change over time, the Crown need not establish that the accused's possession of the imitation firearm was always for a purpose dangerous to the public peace. Rather, the Crown is obliged to establish only that the accused's possession of the imitation weapon became, at some point, for a subjective purpose that was dangerous to the public peace. It is important to appreciate, however, that where an accused actually uses a weapon in a manner that is objectively dangerous to the public peace, this does not establish that the weapon was subjectively possessed by the accused for that purpose. Such use of the weapon is but one factor to be considered in assessing the subjective purpose of the accused in his or her preceding possession of the weapon. Moreover, the interval between the formation of an accused's subjective possessory purpose dangerous to the public peace, and his or her actual use of the weapon in a manner dangerous to the public peace, may be short, but it must be significant enough to permit the accused to clearly formulate the unlawful possessory purpose dangerous to the public peace. In this regard it is important to recall that the unpremeditated use of a weapon that spontaneously arises from sudden anger or annoyance may not be sufficient to establish the existence of a preceding subjective purpose dangerous to the public peace. See: *R. v. Kerr*, at para. 37; *R. v. Chomenko* (1974), 18 C.C.C. (2d) 353 (Ont.C.A.); *R. v. Proverbs* (1983), 9 C.C.C. (3d) 249 (Ont.C.A.) at p. 251; *R. v. Flack*, [1969] 1 C.C.C. 55 (B.C.C.A.) at p. 56; *R. v. Chalifoux* (1973), 14 C.C.C. (2d) 526 (B.C.C.A.) at p. 530; *R. v. Chiplick* (1960), 128 C.C.C. 45 (Ont.C.A.) at pp. 45-46; *R. v. Calder*, at pp. 548-552, 554-555.

[193] In this case, the evidence establishes Mr. McCrae possessed the knife for the purpose of carving and only used it as a weapon in the sudden altercation with Cst. Tymofichuk. Although he actually used the knife in a manner that is objectively dangerous to the public peace, he did not subjectively possess the knife for that purpose.

[194] Simply put, in all the circumstances the "dangerous purpose" was not formed before the actual use of the carving knife by Mr. McCrae as a weapon, which is necessary to substantiate a conviction under s. 88: R. v. Proverbs, 9 C.C.C. (3d) 249 at 251 and 259 (Ont. C.A.); Flack at 56.

[195] I conclude that the Crown has not proven beyond a reasonable doubt that the accused possessed the knife for a purpose dangerous to the public peace.

#### Count 5 - Wilfully obstructing a peace officer

[196] Section 129(a) of the Criminal Code defines the offence as follows:

129 Every one who

(a) resists or wilfully obstructs a public officer or peace officer in the execution of his duty or any person lawfully acting in aid of such an officer,

[197] The essential elements of the offence are:

- a) the accused knew the individual was a police officer;
- b) the accused knew that the police officer was in the execution of his duty; and
- c) the accused had either the intention to obstruct the officer or foresaw with substantial certainty that doing the act in question would obstruct the peace officer.

[198] As set out above, Mr. McCrae knew Cst. Tymofichuk was a police officer and knew that he was in the execution of his duty as a police officer.

[199] Proof of intention is generally inferred from the commission of the acts themselves on the basis that people are assumed to intend the consequences of their actions.

[200] By kicking, punching, stabbing Cst. Tymofichuk and wrestling for his firearm, it can be inferred Mr. McCrae had the intention to obstruct Cst. Tymofichuk from the lawful execution of his duty, which involved checking the tent to see if a woman remained inside. I conclude that the Crown has proven beyond a reasonable doubt that Mr. McCrae obstructed Cst. Tymofichuk in the course of his duties.

#### Conclusion

[201] I find that Mr. McCrae has failed to prove the defence of NCRMD on the balance probabilities.

[202] I find that the Crown has proven Mr. McCrae guilty of Count 2 (aggravated assault), Count 3 (attempting to disarm a police officer), and Count 5 (willfully obstructing a police officer) beyond a reasonable doubt.

[203] Counts 1 (attempted murder) and 4 (possession of a weapon for a dangerous purpose) are dismissed.

"Wilson J."

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