
CANADA / JUDGMENT

R. v. Papalia

2012 BCSC 245

COURT

Supreme Court of British Columbia

DECIDED

20 February 2012

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2012 BCSC 245 R. v. Papalia

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Papalia,

2012 BCSC 245

Date: 20120220

Docket: 25682

Registry: Vancouver

Regina

v.

Tyson Manrico Papalia

Before: The Honourable Madam Justice Bruce

Reasons for Judgment

Counsel for the Crown:

G.C. Banning

Counsel for the Accused:

S.R. Chamberlain, Q.C.

Place and Date of Trial:

Vancouver, B.C.

January 11-13 and 16-18, 2012

Place and Date of Judgment:

Vancouver, B.C.

February 20, 2012

INTRODUCTION

- [1] The accused is charged with aggravated assault contrary to s. 268(2) of the Criminal Code, R.S.C. 1985, c. C-46 and assault with a weapon, to wit, a steering wheel locking device, contrary to s. 267(a) of the Code. These charges arise out of an altercation between the accused and the complainant, Raymond Truong, which occurred at 10:35 p.m. on October 8, 2009, at the intersection of Commercial Drive and East Hastings Street, in Vancouver, B.C.
- [2] The accused admits that he was involved in an altercation with Mr. Truong, but maintains he is not guilty of the offences charged because he acted in self-defence. The accused also argues the Crown has failed to prove beyond a reasonable doubt that Mr. Truong sustained serious head injuries during the altercation.
- [3] The Crown called three eyewitnesses to the altercation and, while Mr. Truong testified, he had no memory of the events. The accused testified and called Yvette Mihalec who also witnessed the altercation. The Crown also called several police witnesses, Baun Adlington, who is a friend of Mr. Truong, and Robert Clark, who discovered Mr. Truong parked in the lane behind his apartment in a distressed state approximately five hours after the altercation.
- [4] It is my intention to summarize the evidence led by the Crown and the defence. I will then outline the admissions made by Crown and defence. Next I will summarize the arguments presented at trial and discuss the law applicable to the case. Lastly, I will provide reasons for my conclusions.

SUMMARY OF THE EVIDENCE

A. Crown Witnesses

- [5] Kalyn Bentham was driving eastbound on Hastings Street at about 10:30 p.m. on the night of October 8, 2009 when he stopped at a traffic light at Commercial Drive while in the curb lane on Hastings Street. On his left side Mr. Bentham saw two males beside two vehicles and one male was hitting the other with a metallic object. At this point he was about 20 to 25 feet away from the two males. He described the vehicles as a late model white Toyota and a late 1990s periwinkle Volkswagen Golf. The Toyota was facing south on Commercial Drive and was parked near the curb. The Golf was parked ahead of the Toyota facing south on Commercial Drive, but at an angle facing the curb. Mr. Bentham testified that the Toyota would have to reverse to get around the Golf given its angled position. The altercation occurred on the sidewalk of Commercial Drive near the white Toyota.

- [6] As he watched, Mr. Bentham saw one male repeatedly strike the other male with the metallic object while the other man was on his back on the ground holding his hands and arms crossed over his head in a protective fashion and his legs were straight out and bent at the knee. He was not kicking or trying to get up while Mr. Bentham observed the altercation. There was nothing in the hands of the male on the ground. The standing male was described as slightly crouched while reaching forward towards the other male and either straddling the male or standing with one leg between his legs. At first Mr. Bentham thought the metallic object was a bar-like object but when he came closer he recognized it as one-half of a steering wheel locking mechanism.
- [7] As soon as Mr. Bentham saw the two males involved in this altercation he moved his vehicle into a parked position on Commercial Drive four to five feet behind the white Toyota and called 911. It was at this time that he observed the male standing over the other male and striking him with the steering wheel locking device. While he cannot be certain of the precise number of blows, Mr. Bentham estimated there was between seven and twelve in rapid succession. These blows struck the male on the ground in his head area. While he could not see if all of the blows hit the male's head, Mr. Bentham testified that the blows hit some part of his body, including his hands which were up to protect his face. Mr. Bentham described the blows as with the right hand and lifted above the head over the shoulder and down onto the other male.
- [8] After Mr. Bentham parked behind the Toyota, the standing male stopped striking the other male and retreated to the Golf on the passenger side. The Golf left the scene quickly and drove south on Commercial Drive. The whole event was estimated to last about 30 seconds.
- [9] Mr. Bentham identified the standing male as the accused. He described the accused as white, five feet seven inches to five feet eleven inches tall, with a powerful build and athletic. While his view of the altercation was partly obstructed by a chain link fence when he was parked on Hastings Street, Mr. Bentham testified that his view was not obstructed when he turned and parked on Commercial Drive behind the Toyota.
- [10] When the Golf drove away, Mr. Bentham decided to follow it in order to provide the police with a licence plate number of the vehicle. He reversed his pickup truck and followed the Golf. Although the route taken by the Golf involved six or seven quick turns along residential streets, Mr. Bentham was able to catch up to it twice to obtain the licence plate number. The Golf was travelling at a fast pace for residential streets with cars parked on both sides and Mr. Bentham had difficulty keeping up with the Golf. He stopped pursuing the Golf in the 2000 block of William. During the pursuit of the Golf, Mr. Bentham was talking to the 911 operator. He returned to the scene of the altercation about two minutes after he left in pursuit of the Golf. He parked in the same place behind the Toyota. The male victim was still on the ground and there was a crowd of people around him. The victim got up and walked in front of Mr. Bentham's pickup and got into the passenger side of the Toyota. The victim was described by Mr. Bentham as an Asian male, about five feet ten inches to six feet tall, black hair, and wearing a hoodie. He had a slim build. There was blood on his sweater, face and

arms. The victim was holding his face with his hands and his nose appeared bent.

- [11] The crowd around the male told him to stay down and that the ambulance had been called. The victim ignored what they said to him. He got into the driver's seat and drove off. A bus came to the stop ahead of the Toyota and he drove left around the bus over the centre median and headed south on Commercial Drive. Mr. Bentham took down his licence plate number and gave it to the 911 operator. Mr. Bentham believed that the male was behaving strangely when he drove away against the advice of the crowd.
- [12] Mr. Bentham observed one-half of a steering wheel lock device on the sidewalk near the location of the altercation. He also noted blood on the sidewalk in this location. He identified the lock device as Exhibit 2.
- [13] In cross-examination, Mr. Bentham acknowledged that he did not see the males get out of their vehicles and that he did not see the beginning of their altercation. He also acknowledged that for a very brief period when he was driving around to park on Commercial Drive, he was also focused on the call to the 911 operator and was not fully attentive to the altercation. Lastly, he acknowledged that due to the lighting at the time, he could be mistaken about whether the Asian male had something in his hand during the altercation.
- [14] Craig Michael testified that he was walking from Powell Street at between 10:00 p.m. and 11:00 p.m. on the night of October 8, 2009 and when he reached Franklin Street at Commercial Drive he saw two vehicles parked near the bus stop on the west side of Commercial Drive just past Hastings Street. The vehicles were parked parallel to each other, one ahead of the other. The white car was closest to Mr. Michael and the blue car was parked two or three feet ahead of the white car. On noting these vehicles, Mr. Michael crossed diagonally to the east side of Commercial Drive about 20 feet from the intersection of Commercial Drive and Hastings Street. From this vantage point, Mr. Michael saw two people get out of their respective vehicles from the drivers' side at the same time and the male exiting the white vehicle had a stick in his hand. The blue car male, identified by Mr. Michael as the accused, moved to the rear bumper of the white car, and the white car male, identified as an Asian male, tried to strike the accused with the object in his hand. In cross-examination, Mr. Michael agreed that the blue car was parked far enough ahead of the white car to permit it to leave without backing up. He also agreed that it is possible the fight started when the men were between the two vehicles. If this was the case, Mr. Michael agreed his view of the fight could have been obstructed.
- [15] Mr. Michael described the stick-like object in the Asian male's hand as three to four feet in length. He testified that the accused blocked the Asian's attempts to strike him with the object twice by raising his arms up in front of his face. Then the accused pushed the Asian male to the ground and punched him a couple of times. The Asian male landed on his back at the rear of the white vehicle. The Asian male tried to cover his face with his hands to protect it from the punches thrown by the accused. The accused then picked up the stick-

like object and struck the Asian male with it a couple of times while the Asian male was on the ground on his back. The Asian male tried to cover his head with his hands and kicked out at the accused. The accused towered over the Asian male. The Asian male tried to get away while on the ground and ended up on the sidewalk between the two vehicles. Mr. Michael testified that he saw the accused strike the Asian male two or three times with the stick-like object while the Asian male was lying on the sidewalk. The accused lifted his arm and held it back at head level and then swung at the Asian male. The blows landed on the Asian male's head and he went into a foetal position and laid there. The Asian male did not move when he was struck by the stick-like object. The Asian male was moaning and crossed his hands over his face to protect his head. It appeared to Mr. Michael that the accused was enraged.

- [16] After striking the Asian male while he laid on the ground, Mr. Michael saw the accused walk to the blue car and drive off. He got into the driver's seat and drove off at a normal speed. Mr. Michael did not see anyone else in the blue car. While the accused appeared to "tower" over the Asian male, Mr. Michael did not see him straddling the Asian male's body.
- [17] Mr. Michael saw the stick-like object left on the road where the altercation took place. He observed the Asian male on the ground mumbling something and moaning. He helped the Asian male get up and Mr. Michael noted that the Asian male was bleeding profusely and was incoherent. The blood was coming from his head and his face. There was a gash on his face near his nose. The Asian male had no shoes on and Mr. Michael saw a pair of slip-on sandals nearby. The Asian male appeared to be confused and was unsteady on his feet. People around him were telling the Asian male to stay put because an ambulance was on its way; however, he paid no attention to them. He looked for his sandals and threw them into his vehicle from the passenger side and walked around to the driver's side and got into the vehicle. He then drove off down Commercial Drive. In cross-examination, Mr. Michael clarified that he did not see the Asian male walk around to the driver's side of the vehicle; he slid over to the driver's side from the front passenger seat. He also testified that the Asian male hit the curb as he left and drove over the median on Commercial Drive.
- [18] When the Asian male drove off, Mr. Michael observed an identification card at the left rear of where the white car was parked. The identification belonged to the accused. He also noted the steering wheel device on the sidewalk at the rear of where the white car was parked and identified it as Exhibit 2. He did not recall seeing the other part of the locking device marked as Exhibit 3. Because Mr. Michael estimated the locking device was about three feet long when he observed it during the altercation, he agreed it was possible that both halves of the device were used and that they broke apart during the altercation. Mr. Michael testified that he did not see a pickup truck pull in behind the white car until he was on the scene attempting to help the Asian male get up off the ground.
- [19] Robert Reynolds was driving south on Hastings Street with his girlfriend between 10:30 p.m. and 11:00 p.m. on the night of October 8, 2009. When they arrived at the intersection of Hastings Street and Commercial Drive, he was in the far right lane preparing to turn right

onto Commercial Drive when his girlfriend exclaimed, "Oh my God". Mr. Reynolds looked to his left and saw a white car parked four or five feet behind a blue car. The blue car had turned the corner onto Commercial Drive and stopped abruptly on an angle towards the curb. I note, however, that in cross-examination, Mr. Reynolds testified that he did not see the two vehicles stop. The passenger door of the blue car opened and a male exited at the same time as the driver's door of the white car opened and a male exited. They headed towards each other quickly as if with a purpose. Both their respective car doors remained open. Mr. Reynolds noticed that the male who exited the blue car was carrying something in his hand but could not identify it. He was also unsure whether this person had the object when he left the blue car. The white car driver was identified as a taller Asian male wearing a hooded sweatshirt and the blue car male was identified as the accused.

- [20] Mr. Reynolds testified that the Asian male walked quickly to the front of the white car to confront the accused who was coming at him. They both raised their hands and when they were face to face the Asian male backed off quickly to the rear of his vehicle. At this point Mr. Reynolds noticed that the accused now had an object in his hand that looked like a pipe and the Asian male had nothing in his hands. In cross-examination, Mr. Reynolds agreed it was possible that the Asian male had the object and the other male grabbed it from him. As the Asian male moved back towards the rear of the white car, the accused hit him with the pipe on the ribs or arms and the Asian male swung back with his fists. Mr. Reynolds described the pipe as round and shiny and about three to four feet long.
- [21] When the Asian male had backed up to the rear of the white vehicle, he lost his balance and fell to the ground on his back on the roadway near the driver's side of the vehicle. Mr. Reynolds testified that the Asian male remained on the ground and while in this position he tried to kick the accused who continued to strike him with the pipe. The Asian male also had his arms crossed over his face and head. The accused was standing at the Asian male's feet and he tried to avoid being kicked. The pipe made contact with the Asian male's legs and sides as they tried to keep their distance from each other. Mr. Reynolds testified that the accused held the pipe in his right hand and raised it above his head with a one arm motion and swung towards the Asian male. At the preliminary inquiry, Mr. Reynolds was unsure of whether the pipe was held in the accused's right or left hand. Mr. Reynolds saw three to four blows at this point in the altercation. After receiving these blows, Mr. Reynolds noted that the Asian male stopped trying to kick the accused and dropped his arms to his sides.
- [22] When the Asian male stopped fighting back, Mr. Reynolds says the accused dragged him by the sweatshirt onto the sidewalk where the X is marked on the diagram marked Exhibit 9, which is located near the driveway indentation on the west sidewalk of Commercial Drive. This is the location where blood was observed. In this location, Mr. Reynolds assumed the Asian male was lying on his side because he was no longer on his back. The Asian male was not moving when the accused delivered one or two blows. The accused then dropped the pipe and got back into the blue car on the passenger side and the blue car immediately drove south on Commercial Drive. At no time did Mr. Reynolds see the Asian male being hit

on the head. However, while on the telephone with the 911 operator, Mr. Reynolds observed injuries to the Asian male's head or what he perceived to be blood in his hair. He also agreed in cross-examination that the process of "dragging" the Asian to the sidewalk did not seem purposeful or deliberate on the part of the accused.

- [23] Mr. Reynolds testified that there was nothing that obstructed his view of the altercation except that he had to look through the chain link fence that surrounded the vacant lot next to the west side of Commercial Drive where the incident occurred. Mr. Reynolds also testified that while he made these observations he was in the process of making a very slow right turn onto Commercial Drive. The further west he drove, the less he could see of the incident.
- [24] After the accused left in the blue car, Mr. Reynolds drove around the block and parked on the east side of Commercial Drive adjacent to the scene of the altercation. From this perspective he observed the Asian male sitting on the curb with his head in his hands. His head was between his knees. Mr. Reynolds observed blood on his sweatshirt and what he thought was blood in the Asian male's hair. Mr. Reynolds watched the Asian male in this position for five or ten minutes while he talked to the 911 operator. He left before the police arrived because he did not want to end up testifying in court. It was the next day that Mr. Reynolds provided a written statement to the police. During this statement Mr. Reynolds mistakenly referred to Commercial Drive as Woodlands. He also was unsure whether the intersection had a stop sign or was a traffic controlled intersection.
- [25] While Mr. Reynolds testified he had a pattern of speech in which he often prefaced his statement with "I guess", he denied that this phrase meant he did not know the answer or was unsure.
- [26] Robert Clark resides in the 1900 block of East First Avenue in Vancouver. At about 3:30 a.m. on the morning of October 9, 2009, he awoke to the sound of loud music coming from a vehicle parked in the lane behind his apartment. Mr. Clark went out to find out what was going on and noted that the vehicle was running and its headlights were on and shining brightly. There was so much condensation on the windows of the vehicle that Mr. Clark could not see inside. He yelled "hey" and tapped on the hood to get someone's attention, but there was no response. When he called out again and tapped the hood harder, Mr. Clark noted movement in the passenger front seat. He called 911. It is not disputed that the vehicle was the white Toyota operated by Mr. Truong and that Mr. Truong was inside the vehicle in the passenger seat.
- [27] Cst. Powell was dispatched to the 1900 block of East First Avenue in response to Mr. Clark's 911 call. He and Cst. McCluskie arrived at 4:07 a.m. On arrival, the constable observed Mr. Truong's vehicle parked in the lane. It was running and the music was playing loudly. There was condensation covering the windows. No one could be seen in the driver's seat but Cst. Powell saw someone hunched over in the front passenger seat with his head down towards his lap. There was a fair amount of blood on his sweatshirt in the chest area. The doors were

locked and when the constable knocked on the window and yelled police there was no response. This male person appeared to be shaking and his hands were clenched and held out in front of him. When there was no response to their commotion, Cst. McCluskie broke the driver's window with his baton and opened both doors. When Cst. Powell opened the passenger door, he saw that the male was bleeding from his nose and mouth and there was still no response to the constable's words or his touch on the male's shoulder. The male's nose was indented as if facial bones were broken. EHS arrived very soon after they were called and they took Mr. Truong to Vancouver Hospital in the ambulance.

- [28] When Cst. Powell opened the passenger door of the Toyota, he observed a pair of sandals in the foot well of the driver's seat and there was blood inside the driver's side door frame. There was blood on the driver's seat and more blood on the passenger seat. There was also a cellular telephone. A bag with hockey gear was in the rear hatch. The constable also noted that Mr. Truong had bare feet and was wearing shorts.
- [29] Cst. Powell followed the ambulance to the hospital and when he arrived he used the cellular telephone found in the Toyota to call Mr. Truong's parents. Their telephone number was identified as a "contact" in the cellular telephone's directory.
- [30] Cst. McCluskie testified that when they arrived in the lane, he noted that the white Toyota had its four way flashers on and the windows were so fogged up that he had to put his face to a window to see inside the vehicle. From his observations, the Asian male in the passenger seat was in a considerable amount of distress. He was shaking and held his hands over his face and did not respond to their calls and raps on the window. His hands were covered with blood. When there was no response to their entreaties, the constable smashed the driver's window and unlocked the doors. Even when the constable kneeled into the vehicle and called Mr. Truong's name, there was no response. His nose was broken and bleeding profusely. His eyes were very bloodshot.
- [31] The constable described the Toyota as very messy. There were three full bottles of beer and an empty one. There was a pool of blood in the passenger door jam. The driver's seat was reclined but the passenger seat was upright. In the passenger foot well there was the female half of a steering wheel lock. Cst. McCluskie travelled in the ambulance with Mr. Truong and at this time he noted that his nose appeared to be pushed in and flattened. Mr. Truong's face was concave shaped.
- [32] Baun Adlington is a friend of Mr. Truong's. In 2009, they played hockey together and have been friends since high school. He and Mr. Truong were scheduled to play hockey at the Britannia Community Centre on the night of October 8, 2009. This centre is located at Commercial Drive and Venables. Their ice time was at 11:15 p.m. but they usually arrived at the centre at about 10:15 p.m. to ensure they did not lose the ice time. At about 9:00 p.m. the night of October 8, 2009, Mr. Adlington telephoned Mr. Truong and arranged to meet him at the ice rink at 10:00 p.m. or 10:15 p.m. Mr. Adlington did not notice anything out of the ordinary during his conversation with Mr. Truong. Mr. Adlington arrived at the rink at about

10:15 p.m. Mr. Truong never showed at all that night and Mr. Adlington thought he had been "ditched". Mr. Adlington called Mr. Truong after the hockey game but there was no response.

- [33] Mr. Adlington described Mr. Truong's driving as not very talented. While he was not unusually aggressive, Mr. Truong was not as aware of his surroundings as he should be. He did not leave enough distance when following a vehicle and he cut in too close when changing lanes.
- [34] Mr. Adlington testified that the facial injuries on Mr. Truong noted in Exhibit 1, tab C, were not there before the altercation. He also testified that since the altercation Mr. Truong has changed; he is less coherent and he stutters. Mr. Adlington believes that Mr. Truong's cognitive abilities have suffered a little as a result of his injuries.
- [35] Mr. Truong testified that he has no recollection of the altercation or the events that preceded this incident. He has long term memory but has lost the ability to retain memories in the short term. He recalled playing hockey with Mr. Adlington at the Britannia ice rink and that he owned a white Toyota in October 2009. Mr. Truong also owned a steering wheel locking device that had two pieces which locked together around the wheel. When he was not using the locking device, Mr. Truong kept both pieces together in the passenger foot well. If necessary, he would use this device as protection. Mr. Truong identified Exhibits 2 and 3 as his locking device.
- [36] While Mr. Truong recalled that he normally played hockey at around 10:00 p.m. or 11:00 p.m., he did not recall making a specific plan to play hockey on the evening of October 8, 2009. He recalled leaving the house that night to go play hockey and waking up on the passenger side of his Toyota with blood all over him. Mr. Truong testified that he was only briefly conscious at that time and then passed out again until after the surgery.
- [37] In October 2009, Mr. Truong was living with his parents in North Burnaby. He did not have friends in the area of First Avenue and Victoria in Vancouver. Nothing connected him to this area. Mr. Truong does not know the accused and did not recognize him.
- [38] Mr. Truong spent two weeks in hospital and five months in rehabilitation at GF Strong Rehabilitation Centre. He is no longer able to drive and has a less stressful job with a laundry service. He has seizures.
- [39] In cross-examination, Mr. Truong testified that he was once "kicked out" of high school for fighting with a group of youths. He also agreed that up to 2009, he had been suspended twice for drinking and driving and in December 2005 he was charged with impaired driving. However, he also testified that between 2003 and October 2006, he had his licence suspended five times because of drinking and driving. There is nothing on his driving record after October 2006.
- [40] Detective Aitken searched the white Toyota in the police garage on October 13, 2009. He found the vehicle in good shape and did not observe any damage to it. His observations were essentially the same as those of Cst. Powell and Cst. McCluskie. The detective also went to

the hospital on October 13th to see Mr. Truong. Although Mr. Truong was conscious, the detective found him to be confused and unable to communicate. When he returned to the hospital on October 15th, the detective found Mr. Truong more alert but he could only communicate by shaking his head for no and yes.

- [41] Because the police were unable to piece together what occurred between the time Mr. Truong left the scene of the altercation and when he was located in the lane at 1900 East First Avenue, Det. Aitken did a Computer Aided Dispatch (CAD) search for any 911 call during these hours identifying a fight or altercation in which it would have been possible for Mr. Truong to suffer additional injuries. The search included all of the Vancouver area from the business district to Boundary Road (District 2). This search revealed only a few calls for "fights" and "assault in progress" and "assault with a weapon". None of these calls were consistent with either Mr. Truong's description or his injuries. The detective concluded that none of the calls could be related to Mr. Truong.
- [42] In cross-examination, Det. Aitken agreed that in five hours Mr. Truong could have driven out to Abbotsford and back again. Further, efforts to locate where Mr. Truong's cellular telephone was during this period of five hours (10:30 p.m. to 3:30 a.m.) were unsuccessful. He also agreed that in many cases people do not report fights to the police. Det. Aitken explained that while the locking device marked Exhibit 3 was tested for fingerprints, it was not analyzed for DNA because it was found in the vehicle and presumably not used in the fight. The male portion of the locking device, marked as Exhibit 2, was not analyzed for DNA because continuity of this object was lost at the scene.
- [43] Detective Pyper is a forensic specialist and he analyzed the data on the cellular telephone found in Mr. Truong's vehicle. The record of calls on the telephone indicates that on October 8, 2009, at 9:39 p.m., Mr. Adlington called Mr. Truong; at 9:42 p.m., Mr. Truong called Ivan and at 10:14 p.m., Mr. Truong called Billy Vu. These are all contacts whose numbers are recorded in the telephone. At 10:40 p.m. and 10:41 p.m. there is a missed call from Billy Vu and at 10:53 p.m. there is a missed call from Mr. Adlington. At 2:11 a.m. on October 9, 2009, the telephone records a missed call to Paul's restaurant which is also recorded as a contact in the telephone. To reach a contact, one need only dial the first letter of the name. There is no duration to this call and no message was left. There are no more calls after 2:11 a.m.
- [44] The text messages sent and received are also recorded on the cellular telephone belonging to Mr. Truong. There is a text message received at 10:46 p.m. on October 8th that is noted as "read". To read a text one simply selects "messages" and then selects a particular message to read. At 2:25 a.m. on October 9th, the cellular telephone records a multi-media message was created with zero bytes. The user started to create a message by entering the telephone number without text or attachments. It was never sent. Again, to enter the telephone number one merely presses the first letter of the contact. At 2:24 a.m. on October 9th, the cellular telephone records receiving an email that was not read.

- [45] Cst. Bal was an officer in training in October 2009. He and Sgt. Spicer were dispatched to a fight at 10:32 p.m. on October 8, 2009, at the 400 block of Commercial Drive. At the scene he observed blood on the sidewalk and was given a photograph identification card by Sgt. Spicer that bore the name and address of the accused. The officers left the scene and drove to the address noted on the card, which was in the 1100 block of Renfrew Street in Vancouver. They first approached the residence from the lane. When they drove into the lane, Cst. Bal observed a small blue Volkswagen coming towards them in the lane. The Volkswagen stopped quite suddenly with its hood being forced downward. The Volkswagen's driver backed up and permitted the officers to pass in their marked police vehicle. As they passed the Volkswagen, Cst. Bal noted the driver was female and was wearing a royal blue jacket. There was a male passenger in the front seat. Neither of the occupants attempted to get the attention of the officers. They looked straight ahead and did not make eye contact. Immediately thereafter the officers attended to the front door of the residence and were advised that the accused resided in the basement suite.
- [46] Cst. Bal could not identify the accused but it was his evidence that a young male matching the accused's description opened the basement door when they knocked and a young female was also present at the door. The male was cool headed; he was neither surprised nor upset to see the police. Cst. Bal noted the accused had a scrape on his left forearm. Cst. Bal spoke to Yvette Mihalec, who was the accused's girlfriend. She appeared very similar to the driver of the Volkswagen that the officer had seen moments earlier. She was wearing a royal blue jacket.

B. Defence Witnesses

- [47] Yvette Mihalec is currently the accused's girlfriend. In October 2009, she was 19 years old and had been dating the accused for two years. Between 10:00 p.m. and 10:30 p.m. on October 8, 2009, Ms. Mihalec picked up the accused from a restaurant at SFU where he had been working part time. Neither of them had been drinking that night. It was their plan to go for pizza at Brothers Pizza on Commercial Drive. While stopped at a red light on Hastings Street and Renfrew, an Asian male in a white Toyota pulled up beside them in the next lane. In cross-examination, Ms. Mihalec agreed that although Renfrew is 12 blocks from Commercial Drive, at the preliminary inquiry she testified that the white Toyota pulled up beside them a couple of streets away from Commercial Drive. Ms. Mihalec explained that she was not familiar with this area of Vancouver; however, she had been dating the accused for two years in October 2009 and he resided on Renfrew.
- [48] When he stopped, the Asian male looked over at them and the accused nodded to acknowledge him. While Ms. Mihalec testified that the accused and the Asian male made eye contact, she explained that this is what the accused later told her had occurred. When the light turned green, the Asian male made a gun shaped gesture with his hand and pointed it towards the accused. While he made this gesture, the Asian male mouthed what Ms. Mihalec believed to be, "I'm going to shoot you." He had nothing but a normal facial

expression. While at the preliminary inquiry, Ms. Mihalec testified the Asian male moved his hand up and down to simulate bullets coming out. She testified at trial that he did not move his hand when making the gun gesture. Thereafter the Asian male sped forward, changing into their lane and cutting them off. She estimated that he was travelling between 60 to 70 kph and, as a result, got quite a bit ahead of them.

- [49] While she believed this conduct to be very strange, according to Ms. Mihalec's evidence, the only comment the accused made about the gun gesture was, "did you see that?" Her only response was, "yea". Neither Ms. Mihalec nor the accused responded to this gesture verbally or by their conduct. Further, nothing that they had done would have prompted such a gesture. Ms. Mihalec testified that she did not think much about the Asian male's actions.
- [50] Ms. Mihalec continued driving on Hastings Street until she arrived at Commercial Drive. As she was waiting to turn left onto Commercial Drive, Ms. Mihalec observed the Asian male make the same left turn and stop on Commercial Drive a short distance from the intersection. When he came to a stop, the Asian male made a wave gesture with his hand out of the driver's window that she interpreted as a signal to them to pull over. Without discussing anything beforehand, the accused told Ms. Mihalec to pull over to see what the Asian male had to say. She did what the accused said without saying anything in response. Even though Ms. Mihalec acknowledged that what this stranger had done meant that he was potentially dangerous, she could not explain why they pulled over. She was merely obeying the accused's directions.
- [51] Ms. Mihalec testified that she parked about ten feet ahead of the white Toyota with her hood slightly angled into the curb. She pulled over suddenly and the rear end of her vehicle stuck out into the roadway a little.
- [52] As soon as she stopped the vehicle, the accused exited the passenger side simultaneously with the Asian male's exit from the driver's side of his Toyota. Just as he left the vehicle, the Asian male reached into the vehicle with the driver's door open and when he came around the door Ms. Mihalec saw that he had a steering wheel locking device in his hand. Ms. Mihalec testified that the accused walked towards the Asian male and they met at the rear of her vehicle a few feet from the hood of the white Toyota. The Asian male struck the accused with the steering wheel lock and the accused blocked the weapon with his forearms and covered his head. The accused punched the Asian male and Ms. Mihalec yelled to the accused to get back into the car. He either ignored her or did not hear her calling because the accused continued to fight with the Asian male. Ms. Mihalec kept her vehicle running and even inched forward. The passenger door also remained open during the fight.
- [53] Ms. Mihalec testified that she saw both the accused and the Asian male fall to the ground behind her vehicle after the accused punched the Asian male. Thereafter she turned her head and stopped watching because she was afraid. A very short time thereafter, the accused returned to the car and they drove home. Ms. Mihalec was not acquainted with Mr. Truong and neither she nor the accused had done anything to provoke him. Ms. Mihalec

testified that the accused's mood when he returned to the car was normal; he was a little shook up. They did not discuss what had occurred. Ms. Mihalec asked the accused if he was hurt and in response the accused said he had a scrape on his arm. In cross-examination, Ms. Mihalec agreed that she believed the Asian male's unprovoked attack on the accused was very strange and that this person was dangerous. However, neither she nor the accused called 911 to report the incident. Both of them had cellular telephones with them that night. Further, although Ms. Mihalec agreed she made six or seven turns on residential streets, at the accused's direction, when heading towards his home on Renfrew, she denied being conscious of anyone following them in a pickup truck. She also acknowledged being afraid of the Asian male, but was not concerned that he may have followed them in his white Toyota. She denied speeding through the residential streets. While the accused gave her directions, he talked with a normal voice and said nothing about what had occurred.

- [54] Ms. Mihalec denied that she stopped in the alley for a police vehicle. While they may have passed a police vehicle, she does not recall this occurring. She also denied that the Asian male engaged in some poor driving that led to the confrontation. She denied attempting to block the white Toyota by the manner in which she pulled into the parking space at an angle. Lastly, she acknowledged discussing what occurred with the accused subsequent to the events.
- [55] The accused testified that in October 2009 he was 21 years old and working as a longshoreman. He is five feet, ten inches tall and at the time weighed about 210 pounds. He also worked part time at a restaurant. The accused testified that Ms. Mihalec picked him up from work on the night of October 8th and they headed towards Brothers Pizza on Commercial Drive. While stopped at a light on Hastings and Renfrew, a white sedan pulled up beside them and the Asian male driver looked over at him without any expression on his face. The accused nodded and then began to converse with Ms. Mihalec. When he looked back at the Asian male, he was still looking over at them without any expression on his face. The Asian male made a gun gesture with his hand and mouthed words that the accused assumed said, "I'm going to shoot you." When the light turned green, the Asian male quickly drove in front of them. There was no emotion in his facial expression; there was no smile as if he had made a joke. The accused did not recognize the Asian male.
- [56] While the accused felt this was very strange behaviour, he did not discuss it with Ms. Mihalec except to say, "did you see that?" The accused testified that there was nothing "bad" about the Asian male's driving and he drove off on Hastings Street without speeding. Although he was a little interested in what the Asian male had done, he did not react to it or think about it. The accused believed the white Toyota remained ahead of them on Hastings but only by one-half of a block. There was no further interaction between the accused and the Asian male until they both reached Commercial Drive.
- [57] When the accused and Ms. Mihalec arrived at Hastings and Commercial Drive and waited to turn left, the Asian male was ahead of them in the left turn lane to head south on Commercial Drive. The Asian male made the turn and then parked on the west side of

Commercial Drive about a car length from the intersection. As they turned left, the accused saw the Asian male gesture out of the driver's window for them to pull over. The accused instructed Ms. Mihalec to pull over so that he could see what the Asian male wanted. She pulled into the curb suddenly and parked on a slight angle about ten feet from the white Toyota. Although the accused agreed that before pulling over they drove parallel to the Asian male's vehicle and could have asked through the window what he wanted, he felt there was no time to do this because they were driving. The accused also testified that he pulled over because he was doing what the Asian male told him. His intention was to get out and see if this man knew him. The accused testified that he was not concerned about the gun gesture because he believed the Asian male was joking. He agreed, however, that there was no humour in his facial expression or his manner.

- [58] The accused testified that he sat in the car for awhile before getting out and the Asian male was similarly stationary. During this time the accused did not talk with Ms. Mihalec. As the accused opened his passenger door, he saw the Asian male exit his vehicle. In cross-examination, the accused testified that he got out because the Asian male got out of his vehicle. The accused testified that he had no weapon of any kind. After leaving his vehicle, the accused saw the Asian male reach into the vehicle and bring out a steering wheel locking device that he identified as Exhibit 2. The accused testified that he continued toward the Asian male because he was curious as to whether the Asian male thought he knew him. He had no intention to cause harm to the Asian male. The Asian male continued to walk towards the accused carrying the locking device. When he was close, the Asian male swung the locking device at the accused's head and the accused blocked the strike with his forearm. In response, the accused punched the Asian male, aimed for his head and was successful in connecting with a couple of hard blows. They both fell to the ground and began to wrestle. The accused testified that he stumbled over the Asian male as he went down with the locking device still in his hand. When they fell to the ground, the accused testified they were located on the sidewalk on the recessed driveway area marked with an X on Exhibit 9.
- [59] In cross-examination, the accused agreed that he was still on the passenger side of his vehicle when he saw the locking device in the Asian male's hand. Further, the passenger door was still open. The accused testified that he did not turn and get back into the car because he was afraid of being struck from behind; however, he did not attempt to back up into the car while watching the Asian male and was unsure why he did not do this. He believed there was insufficient time to get back into the car given the speed at which the Asian male was approaching him. In his mind was a notion that he had to defend himself. The accused testified that the Asian male said nothing and gave no explanation for his aggressive behaviour.
- [60] The accused testified that when the Asian male fell, the locking device was knocked out of his hand and on getting up the accused retrieved the device. The Asian male also stood up when he did. The accused testified that he backed up and did not swing the locking device to keep the Asian male away from him. Nor did he raise it as a signal that he was ready to

attack. The Asian male came at the accused with his fists raised and then he swung his fists at the accused but was not close enough to connect. Even as he approached in this manner, the accused testified that he did not raise the locking device in a threatening gesture. In response, the accused dodged out of his way. When the Asian male got too close, the accused struck him with the locking device. The accused acknowledged that he aimed for the Asian male's head and believed that he connected somewhere on his head. They again both fell to the ground and wrestled around. The accused was unable to describe how he tripped. The accused punched the Asian male a couple of times, pushed him away, and then got up and left because he felt that he was not at risk anymore. In cross-examination, the accused testified that the Asian male continued to engage him in the fight at this point even after he got up for the second time and was heading towards his car. The accused turned away from the Asian male to return to his car and was not concerned that he would be attacked from behind. This was so even though the accused did not know where the locking device had landed.

- [61] The accused testified that he did not initiate this fight and only struck the Asian male to protect himself. He denied the version of the events given by all of the Crown's independent witnesses where these conflicted with his version of the altercation.
- [62] The accused testified that he could not recall whether the Asian male was bleeding or not after being struck with the locking device or at any other time. Further, he could not recall precisely how he let go of the locking device or where it landed. The accused did not notice whether the Asian male's nose was bashed in or whether he had a gash on his cheek after the fight. He did not recall seeing any type of injury to Mr. Truong's head or body.
- [63] The accused agreed that he directed Ms. Mihalec to make six or seven turns on residential streets to make their way back to his home on Renfrew. He testified that the side streets are his regular route because the traffic on the main roads makes the trip home longer. He also testified that the excessive number of turns on the residential streets was due to the roads being blocked which forced a left turn. The accused was not aware of Mr. Bentham's pickup truck following him through the residential neighbourhoods. Despite the fact that he was shaken up by the altercation and believed Mr. Truong was not injured, the accused was not concerned that he would follow them to his home. The accused did not recall seeing a police vehicle in the alley behind his home on the night of the altercation. If he had seen a police vehicle, the accused may have reported the assault, but he is not sure what he would have done at this point in time.
- [64] The police attended the accused's residence on the night of the altercation and the accused spoke to them about the incident. At this time the accused was aware that his recollection of the events was important and that he may have to testify in court. He was arrested on October 22, 2009.

C. Medical Evidence

[65] Dr. David Koo is a specialist in Physical Medicine & Rehabilitation. He was qualified to provide the court with expert opinion evidence concerning the diagnosis, assessment and treatment of acquired brain injuries, the symptoms of brain injury, the impact of brain injuries on cognitive functions and memory. He was also qualified to provide the court with expert opinion evidence as to the injuries suffered by Mr. Truong, his symptoms, treatment and prognosis for recovery.

[66] Dr. Koo treated Mr. Truong at the GF Strong Rehabilitation Centre. In addition to his oral evidence, Dr. Koo's report dated November 17, 2009, was entered as an exhibit in the trial. This report indicates that Mr. Truong was admitted to hospital and diagnosed with a left frontal lobe epidural hemorrhage and a brain herniation due to a skull fracture, a left sided temporal bone and zygomatic arch fracture and right sided maxillary sinus and nasal bone fractures. He was given an immediate craniotomy to evacuate the hemorrhage and decompress the brain herniation. He also had a soft tissue injury that consisted of a laceration over the right zygoma which appeared to be punctate. Dr. Koo reviewed the nurses' notes from the hospital and these revealed no injuries to Mr. Truong's legs and torso. Dr. Koo testified that the nurses usually do a complete visual inspection for injuries when the patient is admitted to the hospital. However, he agreed in cross-examination that clothing can protect the skin from lacerations and bruising during an altercation.

[67] At page 6 of his report, Dr. Koo explained how Mr. Truong's brain injury likely progressed in the hours after the altercation and until he was located by the police:

His initial intracranial injuries were likely a concussion, at the time when witnesses were attending to his immediate state following the altercation. This is based on the assumption that there was no immediate loss of consciousness at that time, but that he appeared confused and disoriented, stating words to the effect, "I have to go. I have to leave". It was during this time that he was able to leave the altercation scene despite the wishes of the witnesses, stumbled to his car, sat in the passenger seat and then moved over to the driver seat and drove away.

Subsequent to his concussion however, there was a secondary brain insult, which was the result of an epidural hemorrhage. Epidural hemorrhages are usually related to arterial lacerations within the skull, from a skull fracture (such as his left temporal bone fracture). Bleeding occurs within the space between the skull and underlying brain. Over the ensuing interval of several hours unattended, the volume of intracerebral blood accumulated sufficiently to cause increased intracranial pressure, reducing blood supply to the brain as well as producing direct physical compression and subsequent herniation of the brain with compression of brain tissue laterally and downwards towards the brainstem. It was a result of this secondary brain insult from his epidural hemorrhage, that he was found with a deeply comatose state (Glasgow Coma Scale of 3/15), and a fixed dilated pupil when he arrived to the emergency room.

- [68] Dr. Koo testified that a lucid interval with only minor symptoms of concussion is consistent with Mr. Truong's brain injury. As the blood pooled in the brain, the pressure on the brain increased over time to the point where he became comatose. In that interval of several hours, Mr. Truong could perform confused but seemingly normal functions such as driving, talking on the telephone and turning on the radio. Dr. Koo testified that in the period of time before the blood has pooled in the brain sufficiently to render the victim comatose, he or she can be on "auto pilot" and subsequently have no memory of the events. In this case, Dr. Koo regarded all of Mr. Truong's actions at the scene to be consistent with a brain concussion, a slow pooling of blood in the brain from the skull fracture, and ultimately a comatose state after several hours. However, Dr. Koo could not rule out an intervening event and agreed in cross-examination that the skull fracture could have been caused by a fall to the concrete subsequent to the altercation.
- [69] While the emergency craniotomy relieved the brain herniation, a post-operative CT scan revealed that Mr. Truong had suffered strokes due to a lack of blood supply to his brain and there was some residual brain swelling. Thus after the operation, Mr. Truong continued to suffer permanent injuries from the skull fracture. He was moderately unsteady on the left side and very impaired cognitively; he was distractible, had short term memory impairment, impulsivity, and disinhibition. Mr. Truong had right sided vocal cord impairment due to the epidural hemorrhage in his brain. The facial fractures were managed non-surgically and would heal over time. The craniotomy scar over his scalp will be permanent. Residual swelling over his left temple and face was expected to resolve with time and the punctate wound on the left side was expected to leave a small scar. Dr. Koo believed that the balance difficulties Mr. Truong suffered from, as well as his vocal cord dysfunction, would also resolve over the next six to nine months.
- [70] Dr. Koo was not optimistic about Mr. Truong's full recovery from the cognitive impairments he suffered due to the brain injury. In November 2009, Mr. Truong exhibited severe and significant frontal lobe dysfunction, which includes dysfunction with regard to executive functions, impaired memory, personality characteristics, and self-awareness. Dr. Koo believed that Mr. Truong would improve slowly over the following one to two years; however, it was likely that he would have some degree of ongoing cognitive and behavioural dysfunction even after his recovery reached a plateau.
- [71] In regard to the cause of the injuries to Mr. Truong's face and skull, Dr. Koo says at page 8 of his report:

In my opinion, it is difficult to ascertain the mechanism of injury as it relates to his nasal and facial bone fractures. These bones are more delicate, and potentially could have been fractured with a direct impact to the face either through a closed fist or alternatively with an implement such as the "club".

His left temporal fracture, however, occurred through his cranium (skull), which is a substantially thicker piece of bone. In my opinion and experience, it is less likely that his skull fracture occurred as a result of punching, and was more likely related to direct head trauma received from being struck by a metal rod. Additionally, his right zygomatic soft tissue laceration appears to be punctate as it is healing. This suggests that the underlying fracture of his right maxilla, was likely incurred through direct impact with a focused source, that would have penetrated the skin in a fairly concise manner, creating such a hole.

- [72] Dr. Koo testified that a skull fracture is usually caused when the head is on a hard surface, such as concrete, and is therefore immobile. When struck with an object using great force and magnitude, the skull fractures because there is no movement to absorb the impact. When the person is standing it is more difficult to fracture the skull, even with a blow from a metal object at great force, because the skull movement with the blow softens the impact. He also testified that the punctate wound could be caused by a fist punch if the attacker wore a ring or some other kind of sharp object. Dr. Koo testified that given the nature and location of the three facial and skull fractures, they were likely caused by multiple blows to the area. In particular, at least two blows and more likely three blows. He agreed in cross-examination that given the proximity of the punctate wound to the zygomatic bone fracture, it could be that whatever caused the punctate wound also caused the bone fracture. He also agreed that a blow from the steering wheel lock device is not the likely cause of the punctate wound because of its blunt edges.
- [73] It was Dr. Koo's opinion that Mr. Truong's lack of memory of the events is a classic symptom of traumatic brain injury. While there may be some patchy retrieval of memories over time, the result is often a mixture of what others have told the patient and what the patient has been able to reconstruct on their own. Given the severity of Mr. Truong's brain injury, Dr. Koo believed that it is unlikely he will ever recover his memory of the events leading to the altercation.

SUMMARY OF ADMISSIONS

- [74] The defence admits continuity of the exhibits filed in this trial. In addition, and pursuant to s. 655 of the Code, the accused made the following admissions:
1. That he is the person who was involved in the altercation with Mr. Truong near the intersection of Hastings Street and Commercial Drive in Vancouver at approximately 10:35 p.m. on October 8, 2009.
 2. On October 8, 2009 at 10:35 p.m., Cst. Clark was dispatched to the 400 block of Commercial Drive to investigate a "road rage" call. He arrived at 10:40 p.m. and observed a dark coloured pickup truck on the west side of Commercial Drive with his four way hazard lights flashing. Four males were present, including Mr. Bentham, Mr. Michael, and two unknown males. There was no suspect or injured party present. Cst. Clark observed blood on the west sidewalk and close to the blood the constable located a Ports Canada ID tag that bore the

name of the accused and his photograph. This identification was seized and given to Cst. Spicer. Cst. Clark observed on the west side of the street, about five feet from the blood, a portion of a chrome steering wheel lock device but he did not move it or seize it.

3. On October 9, 2009 at 4:13 a.m., Cst. Gilles attended as a cover unit to the north lane of 1969 East First Avenue while a white Toyota, licence plate number 618 BVN was present at the scene. He took custody of the Toyota and searched it. Inside the passenger foot well of the Toyota he located a BlackBerry and seized it. The BlackBerry was not locked and from it he obtained a contact number for Mr. Truong's parents. Cst. Gilles observed half of a steering wheel lock device inside the passenger foot well of the Toyota. It was left in place for IDENT. This half of the device is shown in Exhibit 1, tab A-20. It is marked as Exhibit 3. The Toyota was towed to the Vancouver Police garage at 7:48 a.m. on October 9, 2009. There was no alteration to the Toyota or its contents until it was searched by Detective Aitken on October 13, 2009.
4. On October 9, 2009 at 7:00 a.m., Cst. Tsok attended the north lane of 1969 East First Avenue, Vancouver and took the photographs that are marked as Exhibit 1, tab A. Immediately after taking these photographs, Cst. Tsok attended the scene of the altercation and at 7:30 a.m. he took the photographs marked Exhibit 1, tab B.
5. On October 9, 2009 at 1:44 p.m., Cst. Christensen attended the west sidewalk of the 400 block of Commercial Drive and observed no steering wheel lock device on the sidewalk. It was observed in the vacant lot on the west side of the sidewalk behind a fence. Cst. Christensen took the photographs of the scene marked Exhibit 1, tab D. He seized the steering wheel lock that became Exhibit 2.
6. On October 15, 2009, Cst. Wood attended Vancouver Hospital and took photographs of Mr. Truong which are marked Exhibit 1, tab C.

ARGUMENT

- [75] The defence says there is at least a reasonable doubt as to the accused's guilt based on his evidence, as corroborated by Ms. Mihalec. Further, the defence argues the evidence of the Crown suffers from the frailties associated with eyewitness testimony. None of the three main witnesses have consistent versions of the events and none of them had an unobstructed view of the altercation. Moreover, it cannot be said that any of the witnesses saw the entire altercation. In these circumstances, the defence says the Crown has failed to prove the charges beyond a reasonable doubt.
- [76] The defence argues that this is a case of self-defence against an unprovoked attack by Mr. Truong. Each of the self-defence provisions of the Code, including ss. 34(1), 34(2), and 37, argues the defence, apply to the accused's circumstances. Section 34(1) applies based on the accused's evidence, which is corroborated by Ms. Mihalec's testimony, that he had no intention to cause harm to Mr. Truong and was attacked without provocation when he stopped to see what Mr. Truong wanted. Further, the defence argues that the force used by

the accused was not intended to cause death or grievous bodily harm and was no more than necessary to permit him to defend himself against the attack by a steering wheel lock device. In this regard, the defence says the accused immediately left the scene when he realized that Mr. Truong was no longer fighting back.

- [77] If the court is satisfied beyond a reasonable doubt that the accused intended to cause death or grievous bodily harm, and did cause such harm to Mr. Truong, the defence says that s. 34(2) applies to the accused's circumstances. The defence says that the accused was unlawfully assaulted by Mr. Truong; that Mr. Truong welded a lethal weapon against him; and that the accused repelled the assault with force in response to a reasonably held belief that he was in danger of death or grievous bodily harm and could not otherwise preserve himself from death or grievous bodily harm. Even if the court concludes that Mr. Truong did not pose a danger to the accused, the defence says the accused remains entitled to the benefit of s. 34(2) if he acted under a mistake of fact in regard to the danger presented by Mr. Truong. Moreover, the defence argues that there is no requirement to use proportionate force under s. 34(2) of the Code.
- [78] On any interpretation of the accused's intent, the defence says s. 37 of the Code is applicable. The accused was assaulted by Mr. Truong and the assault was not provoked. The accused used no more force than necessary to repel the assault.
- [79] Lastly, the defence argues that retreat is not a condition precedent to invoking self-defence; the failure to retreat is only one factor to consider when determining whether the force used to repel the assault was reasonable.
- [80] In support of its submissions, the defence relies upon *R. v. Baxter*, [1975] O.J. No. 1053 (C.A.); *R. v. Cameron* (1995), 22 O.R. (3d) 65 (C.A.); *R. v. Grandin*, 2001 BCCA 340; *R. v. Kandola* (1993), 80 C.C.C. (3d) 481 (B.C.C.A.); *R. v. McIntosh*, [1995] 1 S.C.R. 686; *R. v. Nelson* (1992), 8 O.R. (3d) 364 (C.A.); *R. v. Pawliuk*, 2001 BCCA 13; and *Gil McKinnon, Q.C. and Keith Hamilton, "Simplifying Self-Defence"*, Vol. 55 Part 5, September 1997, *The Advocate* 701. In regard to the duty to retreat, the defence relies upon *R. v. Nieto*, 2007 MBCA 82; *R. v. Rode*, 2004 BCCA 393; and *R. v. Abdalla*, 2006 BCCA 210.
- [81] The defence maintains that even if the court rejects the accused's reliance on the self-defence provisions of the Code, the Crown has failed to prove beyond a reasonable doubt that the traumatic brain injury suffered by Mr. Truong occurred during the altercation. In addition, there is evidence to suggest the punctate wound was caused by some unrelated intervening event. The medical evidence also establishes that two and possibly three blows could have caused all of the facial and head injuries. This evidence, says the defence, supports the accused's use of reasonable force to defend himself against the attack.
- [82] The Crown argues the evidence called by the defence is so lacking in credibility that it cannot raise a reasonable doubt as to the accused's guilt. The story told by the accused and Ms. Mihalec is fanciful at best and does not accord with ordinary experience and common sense. On the other hand, the Crown argues that its independent witnesses, coupled with

the expert medical evidence, establishes beyond a reasonable doubt that the accused initiated an attack on Mr. Truong who tried unsuccessfully to defend himself. Almost immediately the accused secured possession of the locking device and proceeded to beat Mr. Truong well beyond what was necessary to protect the accused from further harm.

- [83] The Crown argues that none of the self-defence provisions of the Code apply to the case at hand because the accused was not assaulted. He consented to the fight and an assault does not occur where there is consent: s. 265(a) of the Code. Section 34(1) is also inapplicable because the accused intended to cause death or grievous bodily harm by aiming the locking device at Mr. Truong's head. Sections 34(1), 34(2) and 37 are additionally inapplicable because the accused continued to beat Mr. Truong when he no longer posed a threat to him. Moreover, the accused's failure to retreat when he had the opportunity is also evidence that he intended to cause more injury than was reasonably necessary to protect himself.

DISCUSSION

- [84] The accused is charged with two offences: (1) aggravated assault contrary to s. 268(2); and (2) assault with a weapon, to wit, a steering wheel locking device contrary to s. 267(a) of the Code. Section 268 defines aggravated assault as "wounds, maims, disfigures or endangers the life of the complainant". The mens rea for aggravated assault is the mens rea for assault plus objective foresight of the risk of bodily harm. Section 267(a) of the Code provides that a person is guilty of assault with a weapon if they have committed an assault and coincidentally, "carried, used or threatened to use a weapon or an imitation thereof". It is not an essential element of the offence that the assailant cause bodily harm to the complainant.
- [85] The accused has testified thus bringing into play the well established principles of *R. v. W. (D.)*, [1991] 1 S.C.R. 742. First, if I believe the accused's evidence I must acquit. Second, if I do not believe the accused's evidence, but it leaves me with a reasonable doubt as to his guilt, I must acquit. Lastly, even if the accused's evidence does not leave me with a reasonable doubt, I must go on to determine whether the Crown has established guilt beyond a reasonable doubt based on the whole of the evidence.
- [86] The accused's evidence also requires the court to address the defence of self-defence as defined by ss. 34(1), 34(2) and 37 of the Code, which provide as follows:
34. (1) Every one who is unlawfully assaulted without having provoked the assault is justified in repelling force by force if the force he uses is not intended to cause death or grievous bodily harm and is no more than is necessary to enable him to defend himself.
 - (2) Every one who is unlawfully assaulted and who causes death or grievous bodily harm in repelling the assault is justified if
 - (a) he causes it under reasonable apprehension of death or grievous bodily harm from the violence with which the assault was originally made or with which the assailant pursues his purposes; and

- (b) he believes, on reasonable grounds, that he cannot otherwise preserve himself from death or grievous bodily harm.
37. (1) Every one is justified in using force to defend himself or any one under his protection from assault, if he uses no more force than is necessary to prevent the assault or a repetition of it.
- (2) Nothing in this section shall be deemed to justify the wilful infliction of any hurt or mischief that is excessive, having regard to the nature of the assault that the force used was intended to prevent.
- [87] The defence of self-defence is codified and thus the parameters of the defence must be based on a proper construction of the statutory provisions. As the Court of Appeal says in *Kandola* at para. 22:

As has already been noted, a successful defence of self-defence provides a justification for what would otherwise be an unlawful act of assault. Under s. 34(1), and indeed under all of the self-defence provisions in the Criminal Code, the force applied in self-defence is justified if the requirements of the statute are met.

- [88] When applying ss. 34(1) and 34(2), it is important to bear in mind that the limits of justifiable self-defence are not determined by the objective standard of what a reasonable man would consider necessary to defend himself or would do in the circumstances. It is the accused's subjective belief that he was in imminent danger of death or grievous bodily harm (s. 34(2)) or that he used the force necessary to defend himself (s. 34(1)) that is relevant. The accused's subjective belief, however, must be based on objectively reasonable grounds. Analysis of the reasonableness of the belief may include a consideration of what a reasonable person in the accused's circumstances might do or believe. As Martin J.A. says in *Baxter* at para. 35:

The accused's subjective belief that he was in imminent danger of death or grievous bodily harm and that his action was necessary in self-defence was, however, required to be based on reasonable grounds. In deciding whether the accused's belief was based upon reasonable grounds the jury would of necessity draw comparisons with what a reasonable person in the accused's situation might believe with respect to the extent and the imminence of the danger by which he was threatened, and the force necessary to defend himself against the apprehended danger.

- [89] Further, the doctrine of mistake of fact is equally applicable to s. 34(1) and s. 34(2). An accused's belief that he is in imminent danger from an attack may be reasonable, although mistaken. An accused may reasonably but mistakenly believe he is being assaulted. Thus the court does not ask was the accused unlawfully assaulted, but instead, asks whether the accused reasonably believed that he was being unlawfully assaulted.

[90] Unlike s. 34(2), both s. 34(1) and s. 37 incorporate a proportionality test in regard to the force used to repel the assault. When deciding whether the force used by the accused was more than necessary to defend himself against an attack, the court must bear in mind that a person in these circumstances cannot be expected to "weigh to a nicety" the exact measure of necessary defensive action: Baxter at para. 45. Similar statements can be found in such authorities as Kandola, where Wood J.A. says at para. 28:

It would be inconsistent with this principle to expect a person, who is under attack of sufficient magnitude to warrant resort to potentially deadly force, even though no deadly force is present, to stop and reflect upon the risk of deadly consequences which might result from taking such defensive action.

[91] Retreat is also not a condition precedent to a successful plea of self-defence under s. 34(2). It is only a factor to consider when analyzing the reasonableness of the accused's belief that the use of force was the only means available to preserve him from death or grievous bodily harm: Nieto at para. 29.

[92] While many judges at all levels of court have commented on the difficulty of applying s. 34(1) and s. 37 of the Code due to their apparent overlap, suffice to say that s. 37 applies to a broader range of circumstances than s. 34(1). Section 37 applies even when the accused has provoked the assault and there is no element of intent with regard to the amount of force used. Thus s. 37 applies even if the accused intends to cause death or grievous bodily harm: Grandin at paras. 36-39.

[93] Further, the application of both s. 34(1) and s. 37 focuses on the amount of force used by the accused rather than on the consequences of his use of force: Grandin at para. 44. Recklessness as to the consequences of the application of force or risk of consequences does not deprive an accused of the benefit of either provision. It is only recklessness as to the measure of force necessary in the circumstances that could deprive an accused of the defence because it can lead to a finding of excessive force: Kandola at para. 25.

[94] Lastly, s. 37 and s. 34(2) are available when the accused is the initial aggressor and it cannot be said that the assault being repelled was unprovoked: McIntosh at paras. 42, 44 and 45.

[95] I am going to divide the defence evidence into two parts; first, the evidence of the events immediately before and after the altercation; and second, the evidence of the altercation.

[96] Turning to the events before and after the altercation, I find the defence version of the events is highly improbable and quite inconsistent with common sense and experience. It is neither reasonable nor rational that the accused and his girlfriend would risk an encounter with a stranger who has clearly exhibited aggressive and potentially violent behaviour towards them merely to "find out what he wanted" or "to see if he thought he knew them". Coupled with the fact that it is highly unlikely that a stranger would single out their vehicle for this aggressive attack without the slightest provocation on their part, I find the circumstances leading to the accused's decision to stop and meet Mr. Truong are irrational

and entirely lacking in credibility.

- [97] In addition, the accused's failure to immediately retreat to his vehicle upon seeing Mr. Truong coming towards him with a metal object in his hand is completely irrational if his purpose was merely to "see what he wanted". The failure to immediately retreat when he had the opportunity is far more consistent with the existence of a dispute with Mr. Truong or some animosity towards him. No one with a peaceful purpose would continue to pursue an encounter when the other party has brought a weapon.
- [98] Further, the accused's and Ms. Mihalec's description of the events that led to their stop on Commercial Drive at the request of this potentially very dangerous stranger underlines the fanciful nature of their evidence. Given the obvious danger associated with Mr. Truong's gun gesture and his mouthing of the words, "I am going to shoot you", one would expect the accused and Ms. Mihalec to have discussed what could possibly have led this man to react so aggressively towards them and to a discussion of whether it would be advisable to first stop at his request and then get out of the vehicle to meet with him. Yet, there is barely any conversation between the accused and Ms. Mihalec. The fact that they thought little about the gun gesture is also inconsistent with the accused's subsequent desire to meet up with Mr. Truong simply out of curiosity. It is also incredulous that the accused did not direct Ms. Mihalec to stop her vehicle beside Mr. Truong's vehicle to have this meeting at a safe distance from the strangely behaving and potentially dangerous stranger.
- [99] Lastly, I find that the accused's behaviour after the altercation is inconsistent with his innocent explanation for the encounter with Mr. Truong. It is unreasonable to believe that a person in the accused's position, having just been assaulted with a metal rod without any provocation, would not immediately call the police. Further, it is entirely unreasonable to believe that the accused's girlfriend would not suggest they call the police while on route home or when they reached the accused's residence. The accused was injured in the altercation and he was the innocent party according to his evidence. It is also highly unlikely that the circuitous route they took back to the accused's residence was simply the accused's regular routine. It is far more likely that the accused directed Ms. Mihalec to take this route through residential streets in order to lose Mr. Bentham who had followed them from the scene of the altercation. Moreover, the fact that they were not concerned about whether someone was following them is quite inconsistent with their stated fear of Mr. Truong and the accused's innocent role in the altercation.
- [100] There is no dispute that the accused directed Ms. Mihalec to pull over and park ahead of Mr. Truong's vehicle. There is also no dispute that the accused left Ms. Mihalec's vehicle and proceeded towards Mr. Truong with the intention of having some form of contact with him. Lastly, there is no dispute that the accused and Mr. Truong were strangers. Based on the defence evidence as to the aggressive behaviour of Mr. Truong prior to the stop on Commercial Drive, I find the only conceivable purpose behind their meeting in these circumstances was to engage in a consensual fight. There is no other plausible reason behind the accused's decision to stop and meet up with Mr. Truong.

- [101] Turning to the defence evidence of the altercation, I find the accused's version of the events, as corroborated by Ms. Mihalec, is also incredible in a number of respects. I am satisfied that it was Mr. Truong who struck the first blows with the locking device and that the accused did not have a weapon in his hand when he first approached Mr. Truong. Mr. Michael testified that the first blows were struck by Mr. Truong wielding the steering wheel locking device as a weapon. Mr. Bentham first saw the accused with the weapon; however, it is apparent that he came on the scene after the altercation began. Mr. Reynolds could not say with any certainty that the accused had anything in his hands when he left Ms. Mihalec's vehicle. No other possible weapon was found at or near the scene of the altercation. The steering wheel locking device belonged to Mr. Truong and the female half of this device was found in Mr. Truong's vehicle several hours after the altercation. Mr. Truong testified that he used this device for protection.
- [102] It is the defence evidence concerning the fight after this point that I find lacks credibility for several reasons. The accused's description of the altercation defies common sense. It is highly unlikely that Mr. Truong would attack the accused with only his fists raised after he fell to the ground and came up to realize that the accused had the locking device. The accused's evidence in this regard is particularly improbable when one considers that, according to the accused's testimony, the hardest blows were administered prior to their first fall to the ground. It is also incredible that the accused, as he testified, would keep the weapon at his side and try to dodge Mr. Truong's punches without any attempt to use the locking device to ward off Mr. Truong's attack at this juncture in the altercation. The accused had already been injured by Mr. Truong's first attack at the outset of the fight and thus knew Mr. Truong intended to cause him bodily harm. Further, it is not credible that the accused would fail to notice the blood pouring out of Mr. Truong's face during the altercation, or the apparent injuries to his face, as witnessed by all of the independent witnesses. While the accused said that he had no recollection of where he actually struck Mr. Truong with the locking device, he acknowledged that he aimed for Mr. Truong's head. Given the two combatants were at close range during the fight, it is likely that the accused would have known if he had hit the target. Indeed, the blood flowing from Mr. Truong's face would have made it clear to the accused that he had made contact with some part of Mr. Truong's head.
- [103] The accused's testimony concerning the fight is also inconsistent with the evidence of the three independent witnesses. None of the witnesses saw the accused fall to the ground at any time. According to their evidence, the accused remained upright and in control of Mr. Truong almost from the beginning of the altercation. Further, both Mr. Reynolds and Mr. Michael testified that the accused secured the weapon soon after Mr. Truong struck him with it. Lastly, while the accused testified that he walked away from the fight as soon as Mr. Truong was no longer a threat to him, and after administering a single blow with the weapon, all of the independent witnesses testified that Mr. Truong never got up off the ground and, after a brief period, gave up any kind of defensive action with his legs. Despite this lack of defensive action on the part of Mr. Truong, all three witnesses testified that the

accused continued to strike Mr. Truong multiple times with the locking device even after Mr. Truong lay motionless on the ground. The independent witnesses described Mr. Truong lying on the ground in a foetal position.

- [104] While Ms. Mihalec's evidence, in part, corroborates the accused's testimony that he fell to the ground, I find her evidence concerning the altercation to be lacking in credibility. Her view of the altercation, whether it occurred behind her vehicle or Mr. Truong's vehicle, was obstructed. Further, Ms. Mihalec turned her head away from the fight almost immediately after it began out of fear of what might occur. Lastly, her version of these events is suspect due to my complete rejection of her evidence concerning the circumstances leading to their stop on Commercial Drive. The same caution must apply to my assessment of the accused's evidence.
- [105] Accordingly, I conclude that the defence version of the events is not credible and does not leave me with a reasonable doubt as to the circumstances behind the impetus for the encounter or the altercation. Thus I must go on to ask whether the defence evidence raises a reasonable doubt in regard to self-defence.
- [106] The Crown maintains the self-defence provisions of the Code are not applicable because, having agreed to engage in a fight, there was consent to the physical contact, which negates the actus reus of assault. However, as described above, I am satisfied the accused did not have a weapon in his hands when he first approached Mr. Truong with the intention of engaging in a consensual fight. It was only Mr. Truong who brought a weapon to the fight.
- [107] In these circumstances, I am satisfied that the accused did not consent to participate in a fight with a weapon. In my view, the presence and use of the weapon by Mr. Truong negates consent in the circumstances. Moreover, in law a person cannot consent to bodily harm, which was the result of Mr. Truong's decision to strike the accused with the locking device and was clearly his intention given the nature of the weapon he chose and the testimony of the independent witnesses as to how he administered the blows. Mr. Truong also testified that it was his practice to use the locking device for protection should the need arise. This admission supports an inference that he intended to use the weapon to cause harm to the accused.
- [108] Thus the court must start with the premise that Mr. Truong assaulted the accused with a weapon and the accused used force to protect himself from physical harm. The question is whether the self-defence provisions of the Code provide a defence to the force used by the accused to repel the attack by Mr. Truong.
- [109] Section 34(1) requires evidence that raises a reasonable doubt that the accused was assaulted without provocation; repelled the assault without an intention to cause death or grievous bodily harm; and used no more force than necessary to defend himself. The accused admitted that he swung the locking device at Mr. Truong at close range aiming for his head. Applying the principle that a person intends the natural consequences of his acts, I am satisfied beyond a reasonable doubt that the accused intended to cause grievous bodily

harm when he aimed for Mr. Truong's head. The locking device is made of metal and was wielded by the accused forcefully in an over arm motion and down towards Mr. Truong's head. The accused knew the power and force of this weapon because Mr. Truong had struck his forearm with it at the commencement of the fight. In these circumstances, I must necessarily conclude that the accused had the intention to cause grievous bodily harm with the weapon. In addition, I find the defence evidence fails to raise a reasonable doubt that the accused used no more force than was necessary to defend himself. As outlined above, I have found the accused's evidence that he walked away from the fight as soon as Mr. Truong was no longer a danger to him to be incredible. I neither believe this evidence nor find it raises a reasonable doubt for the reasons described above.

[110] Where the accused is unlawfully assaulted and he causes death or grievous bodily harm in repelling the assault, s. 34(2) of the Code provides a defence where the accused raises a reasonable doubt that:

- (a) he caused the harm under a reasonable apprehension of death or grievous bodily harm from the violence of the initial assault or the subsequent application of force in pursuit of these purposes; and
- (b) he believes, on reasonable grounds, that he cannot otherwise preserve himself from death or grievous bodily harm.

[111] If I had accepted the accused's version of the altercation or found his evidence raised a reasonable doubt, and assuming I concluded he had caused Mr. Truong grievous bodily harm, it would be clear that s. 34(2) provided a complete defence to the charges against him. Based on the accused's version of the course of the altercation, he and Mr. Truong were engaged in an evenly balanced physical conflict in which neither of the combatants gained the upper hand until the final blow struck by the accused. Given the nature of the weapon used by Mr. Truong to strike the first blow in the fight, it would be reasonable for the accused to believe that he was in danger of grievous bodily harm or death. Further, it would be equally reasonable for him to believe that he could only protect himself by fighting back with equal force.

[112] However, it is the accused's evidence about the events during the altercation subsequent to the initial strike by Mr. Truong that I find not believable and incapable of raising a reasonable doubt with regard to the application of s. 34(2). I do not accept the accused's evidence that the two combatants were equally engaged in the fight or that the accused walked away from the fight as soon as Mr. Truong was no longer a threat to him. In my view, where an accused continues to inflict grievous bodily harm after it is apparent the other party is no longer able or willing to fight back, there can be no belief, on reasonable grounds, that the accused must continue to inflict grievous bodily harm in order to preserve himself from such harm.

- [113] The defence argues that s. 34(2) does not require the force used by the accused to be proportionate to the risk of harm. I do not take issue with this proposition. However, in my view, s. 34(2) requires the accused to have a belief that he must use force sufficient to cause grievous bodily harm at the time he inflicts the harm. Absent this belief at the time of administering the force, there are no reasonable grounds to believe the risk of harm is sufficient to warrant the force. Thus where an accused continues to beat a complainant with a weapon when there is no risk of retaliation or continued attack, the requirements of s. 34(2) are not satisfied. On the facts of this case, I am not satisfied that the accused's evidence raises a reasonable doubt in regard to reasonable grounds for his belief that at the time he struck Mr. Truong, he could not otherwise protect himself from death or grievous bodily harm. Nor does the accused's evidence raise a reasonable doubt that he believed, on reasonable grounds, that when administering this force he was in apprehension of death or grievous bodily harm.
- [114] Section 37 of the Code provides a defence to the charges if the accused raises a reasonable doubt that he used no more force than was necessary to prevent an assault or the repetition of it. Where the force used is excessive, having regard to the nature of the assault and the force used to prevent it, the defence is not available to an accused. Because I am not left with a reasonable doubt in regard to the accused's version of the events, I find that s. 37 is also not available to him as a defence. In this regard, I do not accept that the force used by the accused to repel the assault by Mr. Truong was no more than necessary in the circumstances. As described above, I am not left with a reasonable doubt concerning the accused's testimony that he walked away from the fight as soon as Mr. Truong was no longer a risk to him.
- [115] Having found that the accused's evidence fails to leave me with a reasonable doubt as to self-defence, I must decide whether, on the whole of the evidence, the Crown has proven the offences charged beyond a reasonable doubt. There are clearly differences in the evidence provided by the three independent witnesses about the altercation. Each witness viewed the altercation from different perspectives and distances from the scene. Further, while Mr. Michael and Mr. Reynolds saw the altercation from the beginning, Mr. Bentham arrived after the two combatants had exited their vehicles and had begun to exchange blows. In my view, the presence of minor differences in the witnesses' evidence is to be expected because every person experiences an event somewhat differently. What one witness recalls as significant may not have struck another as important. Further, a truthful witness can make a mistake about what he or she has seen. Nevertheless, in this case I find there is sufficient consistency in the witnesses' overall observations to provide the court with a cogent and reliable account of the altercation.
- [116] Based on the evidence of the three independent witnesses, I am satisfied beyond a reasonable doubt that Ms. Mihalec parked on an angle ahead of Mr. Truong's vehicle, which was parked at the curb in the 400 block of Commercial Drive. Mr. Truong exited his vehicle from the driver's side at the same time as the accused left his vehicle from the passenger

side. Mr. Truong came towards the accused with the locking device in his hand and they met between the two vehicles. Mr. Truong struck the accused with the locking device and his blows were blocked by the accused's forearm. The accused either pushed Mr. Truong to the ground or he stumbled and fell. By this time Mr. Truong had backed up to a location near the rear bumper of the Toyota. Once Mr. Truong was on the ground, the accused secured the locking device and proceeded to strike Mr. Truong on various parts of his body, including his head, torso and legs. Mr. Truong did not get up after he first fell to the ground.

[117] Mr. Truong was either dragged by the accused or he attempted to crawl away from him and the fight moved a few feet away to the sidewalk adjacent to the Toyota or slightly ahead of it. At this point, Mr. Truong was no longer putting up any resistance and took no defensive action. He lay in a foetal position with his hands attempting to protect his head. The accused continued to strike Mr. Truong with the locking device at least twice while Mr. Truong lay on the sidewalk in this state. After administering these last blows, the accused quickly re-entered Ms. Mihalec's vehicle through the passenger door and they drove away. Mr. Truong attempted to get up and people at the scene helped him to a standing position. His face was covered with blood and his nose appeared to be bent and his face was misshapen. There was a gash on his cheek.

[118] Applying the law regarding self-defence to the facts as I have found them to be proven beyond a reasonable doubt, I am satisfied neither ss. 34(1), 34(2) or 37 apply. Section 34(1) does not apply because I am satisfied beyond a reasonable doubt that the accused used more force than necessary to defend himself. The accused gained the upper hand in the fight as soon as Mr. Truong fell to the ground and no longer had the use of a weapon. Thereafter the accused used both his fists and the weapon to strike Mr. Truong while he was on the ground and unable to take any retaliatory measures that may have caused a risk of harm to the accused. In addition, even when Mr. Truong was obviously incapacitated from the blows struck by the accused using the locking device, the accused continued to assault him as he lay motionless on the sidewalk. While it is clear one cannot expect a person who is in the midst of a physical confrontation to weigh with a nicety the force administered in self-defence, I find that the accused went well beyond what was necessary to subdue Mr. Truong. He could have left the scene immediately after Mr. Truong fell to the ground and was no longer in possession of a weapon. It is apparent that the accused gained the upper hand in the fight soon after it began and he would have been acutely aware of this situation.

[119] Based on my view of the facts, the Crown has established beyond a reasonable doubt that s. 34(2) is also not available to the accused as a defence to the charges. Once Mr. Truong fell to the ground and was no longer in possession of a weapon, the accused could not have been acting under a reasonable apprehension of death or grievous bodily harm when he continued to strike Mr. Truong with the locking device. Nor could he have had a belief, based on reasonable grounds, that he could not otherwise preserve himself from death or grievous bodily harm at the time he administered these blows.

- [120] Lastly, on my view of the facts, the Crown has proven beyond a reasonable doubt that the accused used excessive force within the meaning of s. 37 of the Code. While the initial assault with the weapon could be justified in response to Mr. Truong's assault with the locking device, the force became excessive having regard to the amount used and the nature of the initial attack, once Mr. Truong fell to the ground and no longer had the weapon. Thereafter it was excessive to continue striking Mr. Truong with the locking device even after he was obviously incapacitated.
- [121] Turning to the elements of the offences charged, I am satisfied beyond a reasonable doubt that the accused assaulted Mr. Truong with a weapon; to wit, a steering wheel locking device contrary to s. 267(a) of the Code. The evidence establishes that the accused intentionally applied force to Mr. Truong without his consent and used the locking device as a weapon to carry out this intention. I thus convict him of the offence in Count 2 of the Indictment.
- [122] The accused is also charged with aggravated assault contrary to s. 268(2) of the Code. While I am satisfied beyond a reasonable doubt that the accused assaulted Mr. Truong with objective foresight of the risk of bodily harm, whether the harm inflicted can be characterized as "wounding, maiming, disfiguring or endangering" Mr. Truong's life is in doubt. There is cogent evidence that immediately after the altercation Mr. Truong had a gash on his cheek and his nose was obviously broken in light of the observations of the independent witnesses. These injuries are established beyond a reasonable doubt by the consistent evidence of the three independent witnesses.
- [123] However, there is a gap of several hours between the assault and the police interception of Mr. Truong in the early morning hours of October 9, 2009. The skull fracture and consequential traumatic brain injury as well as the zygomatic arch fracture on the left side of his face were not immediately apparent to the witnesses at the scene. Dr. Koo provided cogent evidence of the progress of the brain injury suffered by Mr. Truong that explains why he was able to drive away from the altercation and appear to be conscious of his actions. Nevertheless, I am left with a reasonable doubt about the origins of the traumatic brain injury for several reasons.
- [124] Dr. Koo agreed in cross-examination that while the skull fracture and consequent traumatic brain injury were consistent with Mr. Truong's appearance and behaviour immediately after the assault, he also testified that the skull fracture could have occurred subsequent to the assault in the intervening period before he was found by the police. Mr. Truong was disoriented and unsteady on his feet immediately after the assault. He drove away from the scene and was not found for about five hours. It is reasonably possible that sometime during this period Mr. Truong could have fallen to the ground and fractured his skull on a concrete surface. The medical evidence of the skull fracture is not inconsistent with this mechanism of injury. The fact that Mr. Truong was disoriented and unsteady on his feet after the assault renders it more plausible that he may have injured himself subsequent to the fight by simply falling on a sidewalk or road surface.

- [125] Further, none of the independent witnesses could precisely identify where on Mr. Truong's head the accused's blows with the locking device made contact. Mr. Reynolds testified that he only saw the accused strike Mr. Truong's torso and legs.
- [126] Det. Aitken's computer search within the CAD system could identify no reported fight or dispute that could have caused additional injuries to Mr. Truong in the intervening period between the altercation with the accused and when Mr. Truong was located. Det. Aitken's search included a very large area spanning the length and breadth of Vancouver. However, not every fight or dispute comes to the attention of the police; Mr. Truong may not have been in any condition to report another altercation if he was the victim of an attack. In addition, there is no evidence to suggest that Mr. Truong remained in Vancouver during the five hour interval. Lastly, Det. Aitken's evidence does not rule out an accidental injury caused by Mr. Truong falling to the ground while in a disoriented state.
- [127] While it is probable that Mr. Truong suffered the skull fracture during the altercation with the accused, the evidence does not establish this injury was inflicted beyond a reasonable doubt for the reasons described above. I am also left with a reasonable doubt as to the cause of the punctate wound to Mr. Truong's face and the zygomatic arch fracture for the same reasons. I note that there was nothing found at the scene that could have caused the punctate wound and Dr. Koo agreed that the locking device had a blunt end and was not therefore the likely cause of that wound. While there may have been a gash to the left side of Mr. Truong's face that was visible immediately after the fight, its punctate feature could easily have occurred subsequent to these events due to a fall or another altercation. In my view, Dr. Koo's evidence is not inconsistent with this scenario.
- [128] The question is whether the broken nose and the gash on his cheek, which I have found were caused by the accused's assault, constitute aggravated assault or the included offence of assault causing bodily harm. It is well established that assault causing bodily harm is an included offence in the offence of aggravated assault. See, *R. v. Soluk*, 2001 BCCA 519.
- [129] The Criminal Code defines assault (s. 265) and then creates three categories, simple assault (s. 266), intermediate assault (s. 267) and aggravated assault (s. 268). The maximum penalty for simple assault is five years' imprisonment, for intermediate assault it is 10 years and for aggravated assault it is 14 years. The category of simple assault covers all assaults that do not fall into one of the higher categories. An intermediate assault is defined as one committed by a person who, in committing it, carries, uses or threatens to use a weapon or causes bodily harm while an aggravated assault is defined as one which wounds, maims, disfigures or endangers the life of the complainant.
- [130] These graduated categories thus progress from the least serious to the most serious. The least serious category covers those assaults with the least risk of harm to the victim. No weapon is involved and no bodily harm is caused. The intermediate category involves either a more serious manner of carrying out the offence (i.e. involving a weapon) or bodily harm falling short of wounding, maiming or disfiguring the victim. Finally, we have the

most serious category in which the victim is wounded, maimed, disfigured or his or her life endangered.

- [131] Section 268(1) of the Code narrowly defines aggravated assault by reference to proof of specific consequences to the victim. Turning to the specific consequences that render an assault aggravated, I am not satisfied that Mr. Truong's broken nose can be regarded as "maiming or disfiguring". Mr. Truong's broken nose healed without surgical intervention and there is no evidence of any residual disfigurement. To "maim" means to inflict an injury that deprives a person of the use of a limb or renders the victim less able to defend themselves. A broken nose cannot be regarded as maiming by this definition. The nasal fractures cannot be characterized as a wound, which involves a breakage of the skin in a way that causes more than minor bodily harm. Minor bodily harm was held to be insufficient to constitute "wounding, maiming or disfiguring" in *R v. Innes and Brothie* (1972), 7 C.C.C. (2d) 544 (B.C.C.A.). In *R v. Burger*, 2000 BCSC 655, the victim, the accused's wife, suffered from a bloody nose after the assault. Boyle J. noted that "wounding" required the breaking of skin. He was of the opinion that breaking the nasal mucosa was not enough to constitute aggravated assault.
- [132] While the punctate wound may leave a scar, there is no evidence that the gash on Mr. Truong's face would have left him with a permanent mark absent the punctate feature. Nor could it be characterized as a wound as opposed to a scrape or an abrasion. In my view, this was a relatively minor injury even if one includes consideration of its punctate feature.
- [133] The final category of aggravating circumstances is "endangering life". While it may be that to strike someone with a metal locking device while aiming for the head creates a risk that the victim's life will be endangered, it is the consequences of the assault that must endanger Mr. Truong's life. As Twaddle J.A. says in *R. v. De Freitas* (1999), 134 Man.R. (2d) 78 (C.A.) at paras. 11 and 12:
- [11] What strikes me about the offence of aggravated assault is that it is defined not by reference to the manner in which it is carried out, but rather in reference to a consequence. No matter how the offence is carried out, it becomes one of aggravated assault if the victim is wounded, maimed or disfigured. This strongly suggests that, in adding endangerment to life, Parliament intended the phrase to refer to a consequence of an assault rather than a risk which arose from it.
- [12] The use of a weapon in an assault will almost always create a risk of the victim being wounded, maimed or disfigured or his or her life endangered. Yet the legislation does not place an assault with a weapon in the category of aggravated assault. For this to happen, the risk must become reality. The victim must actually be wounded, maimed or disfigured or his or her life endangered. "Endangers the life of the complainant" is thus, in my view, intended to be as much a consequence of the assault as "wounds, maims or disfigures."

- [134] Accordingly, I find that the injuries suffered by Mr. Truong that have been proven beyond a reasonable doubt do not bring the accused's actions within the definition of aggravated assault.
- [135] On the other hand, s. 2 of the Criminal Code defines "bodily harm" as "any hurt or injury to a person that interferes with the health or comfort of the person and that is more than merely transient or trifling in nature". The injuries inflicted by the accused clearly constitute bodily harm within the parameters of this definition. A fracture of the nasal bones is more than a mere transient or trifling injury.
- [136] I thus convict the accused of the included offence of assault causing bodily harm.
- [137] There is considerable authority for the proposition that the accused cannot be convicted of both assault causing bodily harm and assault with a weapon if they arise out of the same set of circumstances pursuant to the principles in *R. v. Kienapple*, [1975] 1 S.C.R. 729. See, for example, *R. v. Arnill*, [1999] O.J. No. 332 (C.A.); *R. v. Basilio* (2003), 175 C.C.C. (3d) 440 (Ont. C.A.); and *R. v. Briscoe* (1992), 17 B.C.A.C. 302. In these circumstances, a conditional stay is entered on one of the counts.
- [138] However, the parties have not yet had an opportunity to argue this point. I thus will permit argument on the Kienapple issue at a time convenient to the Crown and defence, but prior to sentencing.

"Bruce J."

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