
CANADA / JUDGMENT

R. v. Taylor

2009 BCSC 1525

COURT

Supreme Court of British Columbia

DECIDED

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2009 BCSC 1525 R. v. Taylor

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Taylor,

2009 BCSC 1525

Date: 20091106

Docket: 59272-4

Registry: Nanaimo

Regina

v.

Robert Anthony Taylor

Before: The Honourable Mr. Justice Macaulay

Reasons for Judgment

Counsel for the Crown:

C.D. Hagen and F. Dubensky

Counsel for the Accused:

S. Taylor and S. Littlely

Place and Date of Trial:

Nanaimo, B.C.

October 19-23 and 26 & 27, 2009

Place and Date of Judgment:

Nanaimo, B.C.

November 6, 2009

- [1] The accused, Robert Anthony Taylor, is charged with second degree murder arising out of the death of his common law spouse, Jessica Collette James, at their home on Kuper Island on April 5, 2005. To secure a conviction for second degree murder, the Crown must prove beyond a reasonable doubt the essential elements of the offence of murder. This includes proving that Mr. Taylor, at the time and place as charged, committed an unlawful act that caused the death of Jessica James. In addition, the Crown must prove beyond a reasonable doubt that the accused either meant to cause the death or meant to cause bodily harm that he knew was likely to cause death and was reckless about whether or not it caused death as set out in s. 229(a) of the Criminal Code.
- [2] Much of the Crown's case is not at issue. The central issue at trial is whether Mr. Taylor had one of the requisite intents for murder. He contends that he caused his wife's death by accident and, accordingly, that the Crown has failed to prove intention.
- [3] When he was arraigned, Mr. Taylor sought to plead guilty to manslaughter but the Crown did not consent as required by the Criminal Code. The accused conceded during his evidence at trial that he discharged a high-powered rifle at close range causing the death of his spouse as set out in the indictment. As to the legal effect of such an accident, the accused also conceded that he carelessly handled the rifle. Section 86(1) of the Criminal Code makes it an offence to handle a firearm in a careless manner or without reasonable precaution for the safety of other persons. Accordingly, if the Crown fails to prove beyond a reasonable doubt that the accused intended to cause death in either of the ways set out in s. 229(a), thereby disproving the defence of accident, the accused must be found not guilty of second degree murder but guilty of manslaughter.
- [4] As will be apparent from my review of the evidence, Mr. Taylor's alcohol consumption and level of impairment provides context for the events that unfolded leading up to the death of his spouse. Counsel for Mr. Taylor only advanced a defence of accident. That is understandable but, if I find that the shooting was not accidental, it will still be necessary for me to determine if the accused had the requisite intent for murder. In considering whether Mr. Taylor intended the natural and probable consequence of deliberately discharging the high-powered rifle in the circumstances, I must take into account the evidence respecting the accused's level of intoxication. This is necessary, in spite of counsel's decision not to specifically argue a defence of intoxication.
- [5] In that event, the primary issue will become whether the Crown has proven beyond a reasonable doubt that Mr. Taylor, in spite of his level of intoxication, intended either to cause his wife's death or to cause her bodily harm that he knew was likely to cause her death and was reckless whether death ensued or not. This is because intoxication can impair a

person's foresight of the consequences of his act sufficient to raise a reasonable doubt about the requisite mens rea. While it may be difficult to imagine how one could intentionally pull the trigger of a high-powered rifle aimed at the head of the victim from very close range without intending to cause death, the extent of any intoxication founded on the evidence must be taken into account in determining whether the Crown has proven intention.

- [6] This analytical process is usually described as linking the common sense inference that a sane and sober person intends the natural and probable consequences of his actions with the effects of intoxication on the accused's subjective foresight. If the Crown does not successfully disprove the effects of intoxication, thus leaving a reasonable doubt, Mr. Taylor must be acquitted of murder and only convicted of manslaughter.
- [7] The onus remains on the Crown throughout all aspects of the trial to prove the requisite intention for murder beyond a reasonable doubt. To succeed, it must disprove both accident and intoxication.
- [8] Before turning to the evidence, I want to comment on two other matters. First, because the accused testified, if I believe him, I must acquit him of murder and convict him only of manslaughter. Even if I do not believe him, I must consider whether his evidence raises a reasonable doubt on its own or in the context of all of the evidence. This again is a result of the onus to prove intention beyond a reasonable doubt remaining on the Crown.
- [9] Second, with the express agreement of the defence, I admitted into evidence, under the principled exception to the hearsay rule, the statement of a child who did not testify. D. is the daughter of Jessica James and Mr. Taylor. She was six years old at the time and witnessed some aspects of the events. In an unsworn videotaped statement given the day after the shooting, D. described her observations of the events but has refused to speak about the matter further since that time.
- [10] D.'s statement materially differs from the account that Mr. Taylor gave in sworn testimony. D. did not testify at trial and, accordingly, her account has never been tested by cross-examination. In considering the reliability of the child's account, I take into consideration her age and, more importantly, her apparent mental development, understanding and ability to communicate. This requires recognizing that young children may not be as aware of peripheral matters.
- [11] Given the age of the child and the unsworn nature of her statement, I consider it important to look for other evidence that tends to confirm or detract from her statement. I also take into account that the defence never had any opportunity to test the child's credibility or reliability by cross-examination.
- [12] I next set out the evidence, largely uncontroversial, that is necessary for an understanding of the issues. I will then turn to the more contentious evidence and set out my findings of fact.

- [13] Kuper Island is a First Nations Reserve located just off the inside coast of Vancouver Island. Movement on and off the island is typically by ferry or other watercraft. Most of the residents are members of the Penelakut Band and related by blood or marriage. Jessica James was age 34 when she died. She was a member of the band and had many relatives on the island, including her eldest sister, Sharon Cross, sometimes called "Shuggie".
- [14] Sharon Cross lived near the ferry terminal on the west side of the island, sometimes referred to as the "ferry side". Jessica James and the accused lived on the east side of the island, often referred to as the "other side", in a house owned by her cousin, Erik James. Mr. Taylor is originally from Ontario and is not related to the extended community on the island. My references to relatives below signify a blood or marriage relationship to Jessica James only.
- [15] Mr. Taylor and Jessica James had two children, A., a boy age 12 at the time of the events, and D., then age 6, described above. The accused, Jessica James, their children and Erik James all lived in the house at the material time.
- [16] The Erik James house is one of several located on Clam Bay. In general terms, the Erik James house is two stories facing approximately north towards the water with the road running alongside the rear of the house. The house is rectangular in shape with a single floor of living space, including three bedrooms, as well as a basement below the main living area. Because the property slopes down to the water, the main floor is at road level. A ramp runs from the roadside along the west outside wall and allows access to the house through sliding glass doors into the living room. The living room is in the northwest portion of the house.
- [17] The bedroom occupied by D. and A. is adjacent to the living room on the roadside. A hallway runs from the living room to the kitchen and bathroom at the east end of the house. On leaving the living room, the first bedroom is on the north side. Mr. Taylor and Jessica James used that bedroom.
- [18] The third bedroom is where Jessica James died. The doorway is off the hallway to the right as one continues walking towards the kitchen. Erik James occupied that bedroom.
- [19] The Erik James bedroom is about 3 x 6 meters. The doorway is close to the northeast corner of the room. The bed lies parallel and adjacent to the west wall. Normally, Erik James kept a television on a stand at the foot of his bed. He also stored three rifles standing barrel up in the corner of the room near the foot of the bed. The most powerful firearm was a .308 rifle that Mr. James used for hunting deer. He stored the gun unloaded. Live ammunition for the weapon, along with cleaning equipment, was in a plastic case mounted on the wall between the head of the bed and the door.
- [20] Nadine James, another relative, lived very close by with other people, including her son, Chris Edwards, her daughter, and her daughter's boyfriend, Harlan Sylvester.
- [21] Amanda James, then age 18, lived a short distance up the road from the Erik James house. From Amanda James's house it was possible to see the roadside end of the ramp noted above.

- [22] At the time of the events, Riley Joe, then age 37, lived with his mother in her home located a few minutes' walk from the Erik James residence.
- [23] Clam Bay to the ferry side of Kuper Island is a short drive by car. A hydro line is located about two kilometers from Clam Bay. It is possible to reach the north end of the island along the line or by walking along the beach from Clam Bay. A person on foot could travel either route to the north end in less than an hour.
- [24] Thetis Island is located immediately north and, in part, to the west of Kuper Island. The two islands are separated by a small channel, known as the "Cut", which can be forded on foot at low tide. Once on Thetis Island, two marinas are within easy walking distance. One of them is the Thetis Island Marina and Pub. Peter Jennings was the manager of the pub. His home is immediately uphill from the pub and marina. Donovan Saul was a close neighbour and also Jennings' friend.
- [25] The Kuper Island ferry also connects to Thetis Island and to Vancouver Island at Chemainus. Both D. and her brother went to school on Vancouver Island. This necessitated daily ferry trips. Jessica James worked at a health clinic near Chemainus and also used the ferry daily to go back and forth to work. On school days, the children typically returned to Kuper Island after school.
- [26] On the day she died, Jessica James worked. She caught a ferry home in the late afternoon.
- [27] The evidence respecting the injuries that caused the death of Jessica James and the scene in the Erik James house after she died is important but largely unchallenged.
- [28] At the time of her death, Jessica James was a tiny woman, 4'11" and less than 100 pounds. She died as a result of a major gunshot wound to the head. According to the pathologist, the weapon was likely a high-powered rifle with the muzzle possibly at very close range. The entry point was on her forehead, just above eyebrow level and slightly right of the midline of her face. Her face and skull were severely damaged. Much of the latter was fragmented. Literally, the shot blew out her brain. Death would have been pretty much instantaneous. In the immediate aftermath, significant blood, brain and other tissue, skull fragments and scalp remnants were projected forcefully through the air. In addition, there was massive bleeding from her wounds.
- [29] Due to the extensive damage, the pathologist could not determine a clear exit wound but the damage pattern was consistent with a front to back trajectory for the bullet. He was unable to determine the extent to which the actual trajectory deviated horizontally or vertically as it passed through the brain and skull. In cross-examination, he stated it was unlikely that the bullet was deflected as a result of contact with tissue or bone due to its velocity.

- [30] The bullet was recovered from an interior wall stud at a point just above a pillow at the head of the bed in the northwest corner of Erik James's bedroom. Very little can be inferred from the final resting point of the bullet. The actual position of the deceased and the angle of the firearm at the time of discharge necessarily determined the point of impact with the wall, assuming, as is likely here, that the bullet was not deflected along the way.
- [31] Jessica James's other injuries, apparent on examination at the autopsy, were minor and consisted of bruising to the right buttock, right knee and left shin. Of significance, there were no signs of typical defensive wounds associated with a struggle.
- [32] At the time of her death, Jessica James had a blood alcohol level of 179 mg% or about twice the legal driving limit. As the level of alcohol in her urine and vitreous fluids was less than that in her blood, it is likely that she consumed alcohol shortly before death and that her system was still absorbing alcohol at the time of death.
- [33] The .308 rifle in the Erik James bedroom was in good working condition and well maintained. It had a built-in clip capable of holding five rounds but could also be loaded with a single bullet. Loading the weapon required using the bolt action to open the breech, placing a bullet inside the breech, closing the bolt and locking it by folding part of the bolt over the side. The bolt action must be completed before the rifle can be fired. The safety was located at the rear of the bolt and was usually operated by thumb when holding the weapon in a firing position. I am satisfied on the evidence of Erik James and the firearm expert that the weapon operated normally. The police found a spent cartridge in the breech when they first examined the rifle.
- [34] Testing demonstrated that the rifle had a normal trigger pressure of three pounds twelve ounces. Mr. Taylor had previous experience using the particular weapon and was familiar with its operation. He also knew where Erik James stored the rifles, as well as the ammunition for the .308.
- [35] Mr. Taylor owned a twelve gauge shotgun, which he kept in the bedroom that he shared with Jessica James. According to him, the shells for the shotgun were not stored in any particular place. The police found Mr. Taylor's shotgun on the ground outside one of two broken living room windows. They also found two unspent twelve gauge shotgun shells on the deck outside the sliding glass doors, an additional unspent shell on the ground below the deck, and an empty shell box inside the house on the floor near the bathroom.
- [36] The police also found a coffee table outside the house below the second broken window. That article was normally inside the living room.
- [37] When the first person arrived at the house after the shooting, the sliding glass doors were open. Apart from Jessica James's body, no one else was there.

- [38] The living room was in a complete state of disarray. Furniture was pushed out of position and a love seat was overturned. Many items, including four empty beer cans and an empty 40 ounce Gibson's Finest whiskey bottle, were scattered on the floor. Three of the beer cans were Lucky and one was Kokanee.
- [39] There were also items scattered on the hallway floor including an overturned dresser drawer from inside the bedroom that Jessica James and the accused used.
- [40] Returning to the inside of the Erik James bedroom, human biological material, including brain and skull fragments, extended all the way to the edge of the hallway outside the doorway into the bedroom. The .308 rifle was found lying on the floor immediately inside the doorway. The television, to which I earlier referred, was lying face down on the bottom of the bed in a position consistent with being pushed off the stand as someone reached behind it to get at the rifles in the corner.
- [41] The deceased lay on the floor on her right side near the bed, partially in a fetal position. Her feet were towards the head of the bed and her head near the foot. There were two significant areas of pooled blood: one under the right side of her head and shoulder, the other not far from her feet closer to the north wall between two laundry hampers. Present on the floor area near the body, on the laundry hampers and their contents, on top of the bed, and on the pillow at the head of the bed, were significant amounts of blood, bone and human biological material. Human hair was on the wall near the point where the bullet entered, and there was a large section of scalp and hair at the foot of the bed along with skull and other fragments. Blood and human biological material were present on the walls and ceiling in the area closest to the bed. Some blood was apparent on the north wall as far as the doorway towards the east end.
- [42] During the course of the events, the plastic container for bullets and gun cleaning equipment broke off the wall. This likely happened after the shooting as the area of wall behind the case remained largely blood free. There was an additional live round for the .308 near the head of the bed along with some of the gun cleaning paraphernalia.
- [43] Ordinarily, expert examination of a shooting scene reveals much to assist the court in inferring fact. The existence of such evidence can sometimes help in determining the relative positions of the shooter and the victim at the time. The absence of such evidence may contribute to a reasonable doubt about the accuracy of the Crown's theory that the shooting was intentional. Two blood splatter experts testified, one each for the Crown and defence. Both offered limited opinions in part because they did not have any opportunity to attend at the scene to direct the taking of photographs and measurements.
- [44] Unfortunately, it appears that the expert who attended the scene failed to take all necessary steps to assist in determining the relative positions of the shooter and the victim. Indeed, at the end, both experts agreed that, by reviewing the presence of blood shown in the photos and on exhibits, including on the back of the hoodie worn by the accused, they could not discount the possibility that the shooting took place as he described. On the other hand,

neither went so far as to say that the available evidence supported the accused's description. I will return to my conclusions about the weight of their respective opinions in more detail later after I set out the evidence respecting the actual events.

- [45] On the morning of April 5, 2005, Erik James and the accused took the ferry to Chemainus and borrowed a car on the Vancouver Island side. According to Mr. James, they drove around for awhile. Mr. Taylor cashed a cheque for about \$150 and bought a bottle of Gibson's Finest whiskey. Mr. James thought it was a 40 ounce bottle.
- [46] The two men returned home on the 11:40 a.m. ferry. While on the ferry, Mr. Taylor poured out half of a large Coke bottle and replaced it with about 13 ounces of whiskey. Erik James did not drink any of the whiskey, but the accused started drinking on the ferry and, according to Mr. James, was "buzzed" by the time Mr. James left home at about 12:10 p.m. to go to work.
- [47] According to Riley Joe, the accused came to his house at about noon that day bringing with him hard liquor and beer. He testified that they each had a large glass of alcohol with Coke added. After twenty minutes or so, according to him, the two men walked to the Erik James house where they continued to drink and finished the bottle of liquor within a couple of hours. They also drank beer after the other liquor was gone. According to Mr. Joe, the two of them matched drinks until D. arrived home and then Jessica James. Mr. Joe testified that the accused got "pretty drunk". To this extent, Mr. Joe's evidence was believable and not inconsistent with any other evidence.
- [48] I cannot say the same about the balance of his evidence. It was apparent that he was not telling the truth about what happened while he was still at the Erik James house. This is evident not only from the statement of D. and the evidence of the accused but also from the evidence of Amanda James and Harlan Sylvester which I set out below.
- [49] According to Amanda James, she was in her home when she heard a noise like a gunshot and screaming from the direction of the Erik James house. She observed D., who was not wearing shoes, run off the ramp while screaming. The accused followed the child, picked her up and took her back up the ramp. A short time later, D. reappeared wearing shoes and came to Amanda's house. The child told Amanda that her daddy shot her mummy. While D. was at her house, Amanda could hear noise from the other house, including the sound of breaking glass. Around that time, she also observed Mr. Joe staggering up the street. Based on that evidence, as well as the evidence of the accused and the statement of D. to the effect that Mr. Joe was in the house at the material time, I reject Mr. Joe's further evidence. Mr. Joe has a potential brain injury from a car accident and it is possible that has affected his memory.

- [50] Amanda made arrangements to obtain a ride to the ferry side and took D. with her. They picked up D.'s brother at a friend's house where he was playing and she then dropped off both children at the home of their aunt, Sharon Cross. D. repeated her verbal statement to her aunt, but Mrs. Cross was reluctant to believe her and questioned her for a short time. I will refer to that evidence later in detail.
- [51] Harlan Sylvester is the only other witness who observed events at the house and elsewhere before Jessica James's death. According to him, he first encountered the accused at Mr. Joe's house when he went there to visit. He observed the accused and Mr. Joe drinking Gibson's Finest whiskey mixed with pop. He did not stay long and left before the other two men did.
- [52] Around 3:00 p.m., Mr. Sylvester went to the Erik James house and stayed about an hour. He sat with Mr. Taylor and Mr. Joe listening to music and playing a video game. They also smoked a joint of marihuana. He testified that all three were high. He did not drink but the other two continued to drink. He observed that Mr. Taylor was talking loudly.
- [53] At around 4:00 p.m., Jessica James and D. arrived home. Mr. Sylvester remained at the house for another 15 minutes or so after their arrival. The other two men continued drinking during that time but he did not. He testified that he could not recall Ms. James drinking.
- [54] In cross-examination, Mr. Sylvester agreed that the accused was clearly drunk: a 5 out of 10 assuming that 10 is falling down drunk. He had seen Mr. Taylor "more drunk" on other occasions.
- [55] Of significance, Mr. Sylvester did not see a rifle while he was at the house nor was the living room disrupted in any way or any windows broken. Sometime after returning to his home, Mr. Sylvester heard a sound like a gunshot but was not sure what it was. He looked out the window towards the Erik James house and saw something being thrown out the window and heard the sound of breaking glass.
- [56] Mr. Sylvester observed D. run outside followed by the accused who picked her up and returned to the house. He observed more things being thrown out a window and also observed D. leave the house a second time. He did not see where she went. He observed Mr. Joe leave the house about the same time. This evidence is consistent with that of Amanda James and further demonstrates that Mr. Joe was likely present in the house at the time Jessica James died.
- [57] Apart from Mr. Sylvester's estimates of the times of events and other peripheral matters, which may have been affected by his use of marihuana, I accept his evidence.
- [58] At about 6:00 p.m., Nadine James received a telephone call from Sharon Cross who told her that D. had said her dad shot her mom. Mrs. Cross persuaded Nadine James to take her son, Chris Edwards, to check to see if Jessica James needed help. They went to the house and observed the scene that I have already described. They did not touch or move anything except the door into the Erik James bedroom. It was readily apparent that Jessica James was dead. Both observed a strong smell of alcohol in the living room area in spite of the broken

windows and open door.

- [59] It is apparent that Mr. Taylor left the house shortly after the events described above. On his own evidence, he left without changing his bloody clothes, ran along the beach until he reached the Cut, waded across in very cold, chest deep water and then ran to the Thetis Island Marina and Pub. By that point, it was after 7:00 p.m., as Mr. Jennings had closed the pub and gone to his house.
- [60] According to Mr. Jennings, he observed a person run towards the marina, go by the pub and then to his house. On answering the door, he encountered Mr. Taylor. The accused was distraught and wet. He immediately stated that he had killed his wife and repeated it a moment later. Mr. Jennings took him to the pub so that he could call 911. At that point, he was concerned that Mr. Taylor may have been in a boating accident with his wife.
- [61] At the pub, the accused told Mr. Jennings that he had shot his wife. He continued to be very distraught and was also hypothermic or very close to it. According to Mr. Jennings, the accused told him that he loaded his gun, that he shot his wife, and that he tried to put her head back together. Mr. Jennings later agreed in cross-examination that the accused frequently referred to an accident. He understood that a kid and someone else was in the house at the time. According to Mr. Jennings, who has considerable experience dealing with people who drink, the accused did not appear under the influence of alcohol but possibly drugs.
- [62] Donovan Saul called the pub to pass on the news that he was hearing about the events and came to the pub shortly thereafter. He also spent a significant period of time with the accused before the police arrived. In Mr. Saul's view, the accused was not drunk. He did not smell any alcohol on Mr. Taylor's breath; Mr. Taylor did not slur his speech or stagger when he walked. Mr. Saul corroborated Mr. Jennings' evidence as to Mr. Taylor's statements.
- [63] I accept the evidence of both Mr. Jennings and Mr. Saul. Both were alert and observant. Their evidence as to the lack of visible signs of impairment is also consistent with the evidence of the police respecting the eventual arrest at the pub.
- [64] Evidence of flight may be circumstantial evidence of a guilty mind, but I take into account that an accidental shooting might explain flight in the present circumstances. Mr. Taylor knew that his wife was dead and that he was on a small island where most of the inhabitants were related to her. It is possible that he would flee, even if he did not intend to kill her or cause her death as set out in s. 229(a).
- [65] The additional evidence respecting Mr. Taylor's intention, or lack thereof, at the time he shot his wife is as follows: the oral and videotaped statements of D.; Mr. Taylor's own videotaped statement to the police; Mr. Taylor's evidence at trial, the interpretive evidence of the two blood splatter experts; and finally, the additional evidence of the toxicologist. For convenience, I will review this evidence in the order set out immediately above.

- [66] When D. went to Sharon Cross's house after the shooting, she was crying and frightened but told her aunt: "My dad shot my mom." Mrs. Cross kept asking the child if she was sure and D. repeated the statement several times. D. stayed at the Cross home that night. Mrs. Cross observed that D. had a smudge line on her right pant leg that looked like blood. Mr. Cross later burned the pants so there is no forensic evidence to confirm or disprove his wife's opinion.
- [67] Mrs. Cross knew D. well and described her as a very smart little girl. D.'s grandmother also testified and described her as very intelligent. Those opinions were consistent with the child's behaviour during the videotaped statement taken the day after the events. In spite of her age and the circumstances, D. was articulate, responsive and reasonably comfortable talking to the police officer who conducted the interview. The child did not demonstrate any apparent difficulty in recalling the events at that time.
- [68] Corporal Young was dressed in casual clothing when she conducted the interview. She is an experienced officer trained in child interview techniques, familiar with and followed the Step-Wise approach developed by Dr. Yuille, a psychologist with special expertise in interviewing children about traumatic events.
- [69] Dr. Yuille's report was admitted into evidence by consent. After reviewing the videotape and transcript, Dr. Yuille opined that the interview was well conducted and that D. provided a full account of her memory.
- [70] I reached similar conclusions as a result of my own observations. The interviewer used open-ended questions and only sought further detail after D. provided her initial account.
- [71] As I stated earlier, I take into account that some of D.'s description of the events reflects her child view of the world which necessarily differs from that of an adult's. For example, D. believed the rifle was already loaded because she had previously seen her cousin load it to shoot a bird. With adult experience, she would understand that a rifle might have to be reloaded before it can be used again. Also, I note that at the beginning D. demonstrated that she understood the difference between telling a lie and telling the truth by responding to an obvious example even though she could not explain the difference using her vocabulary. Instead, she nodded her head appropriately when asked if she knew what it is to tell the truth.
- [72] After the exchange about telling the truth, the following exchange occurred:

Officer: Now, do you know why you're talking to me today? No? I'm talking to you today because something happened last night didn't it. Do you think you can tell me what happened, 'cause I wasn't there.

D: After school my Mom went home

Officer: Okay, so after school your mom went home, and I need you to take that out of your mouth okay 'cause I can hardly hear you, so after school your Mom went home, and what happened?

D: Then I, then I caught the, then I seen my Dad, he was drinking then he pushed her down.

Officer: Okay, and then what happened?

D: He shoot her.

Officer: He shoot her. Were you there? Is that a yes or a no 'cause I can't, I, I can't see you

D: Yes.

Officer: It's a yes?

D: Yeah.

The officer went on to ask D. about surrounding events. The child's responses were internally consistent and externally consistent with other evidence to which I have already referred. In particular, she described running out of the house after the shooting and her father coming out, picking her up and taking her back inside. She stated that she then put on her shoes and ran to Amanda's. She also described her father and Mr. Joe drinking. She saw her mother have a beer.

[73] According to the child, her father shot her mother in the Erik James bedroom. She said her father pushed her mother down because they were fighting about her mother leaving the house to go and stay at Gramma's house in Nanaimo. D.'s grandmother lived in Nanaimo at the time.

[74] Later in the interview, D. stated that her father pushed her mother down in the hallway and then pulled her into the bedroom before shooting her. According to D., her mother said "don't". D. never saw her father fire the shot because she was in her parents' room by that point. According to D., Mr. Joe was standing in the hallway before the shooting also saying "don't".

[75] Counsel for the accused contends that Mrs. Cross, by asking questions the night before the police interview, may have inadvertently contaminated the child's statement. I do not agree. Mrs. Cross had no details about what transpired inside the house other than the statements D. made. At the time of her videotaped statement, D. was not repeating information that came from Mrs. Cross or anyone associated with the investigation, including Corporal Young.

[76] I accept the need for caution in accepting the unsworn statement of a six year old witness to such a tragic and traumatic event. Nonetheless, the statement is compelling and supported in many important respects by other evidence. I also take into account that the child described watching a violent video game during the course of the afternoon that included, according to Mr. Taylor's evidence, a man shooting a woman after pushing her down.

[77] In his videotaped statement to a police officer, after consulting with counsel who advised him not to make any statement, Mr. Taylor maintained throughout that he had very little memory of the events but that the shooting was accidental. He recalled that he had been drinking whiskey with Riley Joe but could not remember how much, although he stated he was drunk when he was at the Riley Joe house.

[78] Upon being challenged as to how he knew it was an accident if he could not remember anything, he responded to the effect that he did remember certain parts. Near the beginning of the interview, the accused stated that his back was turned to his wife at the time of the shot:

RT: I remember my back was turned to it. So I'd, I just turned around and it was already done. Like I didn't even fuckin' see it.

Officer: Your back was turned to

RT: Yeah. I wasn't even facin' her.

Officer: Ummhmm

RT: Had my back turned and Turned around and that's I wasn't chasin' her. So I fuck (indecipherable), it was an accident. I didn't even see it. Didn't see anything till it was fuckin' already done.

Officer: Where was the gun?

RT: Ah, I don't know. In there, I guess, you know.

Officer: Were you holding it?

RT: Don't remember.

Officer: What room did it happen in?

RT: I don't know. No, I can't, (indecipherable) little things, that all I can see.

Elsewhere in the statement, Mr. Taylor denied intending to kill or hurt his wife.

[79] According to Mr. Taylor's statement, he had no idea what he was doing with the rifle but again described holding it with his back towards his wife. When pressed for details, Mr. Taylor acknowledged that the gun was Erik's and demonstrated that he held the gun diagonally in front of himself with the barrel pointed up in the area of his left shoulder and his right hand holding the stock much lower. He admitted his finger was on the trigger. He said, in apparent reference to his wife, that she "[w]ent and grabbed the gun. And then it just went off and I fuckin' heard a scream and I turned around and fuck. It's the hardest thing I ever seen in my life." He was not able to explain why he was holding the gun. Later, Mr. Taylor again demonstrated how he held the rifle and stated he was standing at the time, that the gun was pointing behind him and that it went off.

- [80] The accused denied any preceding argument, admitted buying liquor earlier in the day, admitted familiarity with firearms and admitted ransacking the house afterwards. According to Mr. Taylor, he was searching for shotgun shells for his shotgun so that he could kill himself although he eventually abandoned that plan.
- [81] Mr. Taylor's description of an accidental shooting in his statement was selective and incomplete in important respects. He explained during his evidence at trial that he really did not want to talk to the police officer but he showed little reluctance at the time. At trial, Mr. Taylor professed to a fairly complete and continuous memory of the sequence of events and provided many important details that he earlier professed he was unable to remember. If he told the truth to the police, he was untruthful at trial. Of course, I must consider the opposite as well, that Mr. Taylor deliberately held back the truth when he spoke to the police, even when it might assist him, but was truthful at trial.
- [82] Mr. Taylor is now age 34 and, as set out earlier, from Ontario. He and Jessica James had a good relationship although he admitted there was some friction arising out of his drinking and drug use. Following a separation, he had moved back in with his family at the Erik James house.
- [83] In chief, the accused testified that, on the morning of April 5, 2005, he went to Chemainus with Erik James where he bought a 40 ounce bottle of Gibson's Finest whiskey and an 8 pack of Lucky beer. He also bought and dropped off lunch for his daughter at her school and then caught the 10:00 a.m. ferry back to Kuper Island. While on the ferry, he filled half of a 750 milliliter bottle of Coke with whiskey and started drinking it. He walked across the island after the ferry docked and went to Riley Joe's house where they drank whiskey and some beer and smoked marihuana. After an hour, the two men went to the Erik James house where they continued to drink, smoked more marihuana and listened to music. He described Harlan Sylvester arriving and smoking marihuana with them as well. Mr. Taylor testified in chief that he and Mr. Joe continued drinking until all the booze was gone. He was drunk but in a good mood when his wife arrived home.
- [84] According to Mr. Taylor, his wife brought home some beer as well. She seemed as if she had already been drinking and they also shared some of her beer. He described her mood as feisty and talkative. At some point, his wife looked in the fridge and noticed that he had not bought food as he was supposed to, but he told her to forget it and that he would buy food the next day. That appeared to satisfy her but she brought it up again a half hour later and said she was going to go to Nanaimo to spend time with her mother. Mr. Taylor thought that was all right and that he would just go to the Riley Joe house and continue drinking.
- [85] Jessica James then told the accused that he always made sure that he had enough food for the dog but not for the kids. He told her if she felt that way, he would shoot the dog. He started down the hall towards the Erik James bedroom to get the .308 that he knew was there. As he went down the hall, his wife told him to smarten up and tugged on his arm. According to Mr. Taylor, D. was in her parents' bedroom at that point.

- [86] Mr. Taylor entered the Erik James bedroom, removed a shell from the container on the wall and then picked up the rifle from its position in the corner of the room. He held the weapon in both hands and loaded it. He described holding the rifle in the same position, as in his statement, with his finger on the trigger as he was ready to leave the room. Again, according to the accused, his wife was behind him telling him to smarten up and not to shoot the dog. From behind him, she pulled up and back on the barrel of the rifle causing it to discharge. He turned to see her lying on the floor and dropped the rifle. He heard D. scream and saw the child and Mr. Joe at the doorway. He knelt down beside his wife and tried to help her but it was obvious that she was dead.
- [87] Mr. Taylor testified that the rifle discharged accidentally. He never intended to kill his wife although he accepted responsibility for her death because of his careless use of the firearm.
- [88] In cross-examination, Mr. Taylor admitted that he was about 5'10" or 5'11" and weighed 170 pounds at the time. He denied fabricating his evidence about the dog but admitted that he told the police some things that he knew were untrue. Some of the accused's answers changed when he was pressured seemingly to put himself in a more favourable light. He denied intending to shoot the dog and stated that he would only shoot at it. He stated that he chose the .308 because his wife had seen him shoot dogs on the reserve with it but that he never intended to actually do so.
- [89] The accused repeatedly denied that he was angry; he stated that he was only frustrated that they were arguing about the dog because his wife had brought up that example on previous occasions.
- [90] Mr. Taylor denied any physical contact with his wife in the bedroom while he removed the bullet from the container, selected the rifle and loaded it. He denied releasing the safety and stated that it was already off. According to him, Jessica James made no effort to intervene in any of these events. It was only when Mr. Taylor turned to leave that his wife pulled the barrel of the rifle towards herself from behind him. He denied that he put the barrel to her forehead and intentionally shot her.
- [91] According to the Crown's blood splatter expert, Staff Sergeant Ellis, the two large blood stains on the floor were pooled blood. He identified two possibilities. As a result of the shooting, Jessica James may have first bled near the laundry baskets and then moved to her final resting position closer to the foot of the bed. Alternatively, she fell near the laundry baskets and was then moved by someone to her resting position. Some of the blood stains on the floor were consistent with projected arterial blood but he was unable to say if there would have been arterial damage associated with a massive head wound.
- [92] The expert examined the accused's clothing, including the hoodie to which I have referred. Blood stains of indeterminate type were on the front right side but more predominant on the back lower right side. There were also stains on the upper arms. He could not determine whether the stains were the result of transfer, splatter or projection due to the nature of the material. In cross-examination, he testified that the stains on the hoodie were inconclusive

and that it would be speculative to conclude from the stains on the back of the garment that the shooter had his back turned towards the blood source.

- [93] The defence expert, Mr. Slemko, testified that he had particular expertise in analyzing blood stain patterns on fabric and that it is more probable, in his opinion, that the stains on the back of the hoodie were splatter. He also agreed that his ability to provide an opinion was hampered by his inability to conduct other tests including microscopic analysis. Nonetheless, he opined that a forceful event caused blood to splatter on the rear of the hoodie. This supports the possibility that the accused's back was turned at the time of the event.
- [94] It was apparent that Mr. Slemko also relied significantly on the fact that the stains had survived immersion in cold water and subsequent handling. In his view, this reinforced his conclusion that the blood was forcefully driven into the garment. I observe that if that is true, the same reasoning should apply to the other stains on the garment, including those on the front. I also observe that the defence expert was never asked to examine the other stains on the garment and, accordingly, he offered no opinion on whether they were the same or different than those on the back.
- [95] Cross-examination revealed other weaknesses in the defence expert's opinion. He agreed that, as significant biological material flew throughout the room, blood splatters would have been cast off. He also agreed that the analysis of blood stains on fabric is an emerging area of expertise but did not seek to have his work peer reviewed as is usually done. The Crown expert, on the other hand, had his work peer reviewed. Finally, although Mr. Slemko maintained that the evidence was not inconsistent with the accused's account, he agreed that he could not assist in ascertaining what actually happened.
- [96] In all the circumstances, there are too many limitations present to give any significant weight to Mr. Slemko's opinion respecting the specific type of blood stains on the back of the hoodie that Mr. Taylor wore at the time of the shooting. On the whole of the evidence, they are more likely the result of splatter or transfer as Mr. Taylor tried to help his wife.
- [97] I also find Mr. Taylor's description of the rifle discharging accidentally while his back was to his wife highly improbable. Leaving aside the obvious question as to why she would grab the barrel of a weapon and pull it towards herself after watching the accused chamber a live round, their respective sizes when standing, coupled with the manner in which Mr. Taylor described holding the rifle, would have resulted in considerable pressure on the trigger while the barrel was still moving up and over his shoulder. I do not accept that the barrel would have reached a downward arc over Mr. Taylor's shoulder before accidentally discharging. In all likelihood, the rifle would have discharged into the ceiling or somewhere well above Jessica James, rather than striking her.
- [98] I do not believe Mr. Taylor's account of accident. I am satisfied beyond a reasonable doubt that he intentionally discharged the firearm. It was not accidental.

- [99] I also do not find Mr. Taylor credible on his description of the crucial events. His conduct, immediately before and at the time of the shooting, was more consistent with him being angry at his wife which he denied. I accept the statement of D. that her parents argued and that her mother told the accused that she was going to Nanaimo. It is clear that Jessica James intended to separate from Mr. Taylor and I conclude, in spite of Mr. Taylor's denial, that his wife's statement of intention made him angry.
- [100] Did Mr. Taylor intend to kill? He was certainly drunk. Assuming that Mr. Taylor consumed 20 ounces of whiskey and three cans of beer between 11:00 a.m. and 4:00 p.m., the toxicologist estimated that Mr. Taylor's theoretical blood alcohol level at 5:00 p.m. was between 314 mg% and 374 mg%. In reality, alcohol is not absorbed 100%; according to the toxicologist, a more realistic absorption rate is 70%. This results in revised estimates of 220 mg% to 261 mg%.
- [101] Assuming Mr. Taylor was only a social drinker, and there was little evidence on this point, an individual with a blood alcohol level in the range of 220 mg% to 261 mg% would demonstrate symptoms consistent with heavy to severe intoxication. Such physical symptoms include falling down, stumbling and staggering. The cognitive symptoms include confusion, disorientation, inability to communicate effectively, loss of goal-oriented behaviour, and an inability to plan or execute. On considering all of the evidence, including that of the accused, I find no evidence of any such symptoms.
- [102] I also observe that the theoretical blood alcohol level assumes a constant elimination rate of 10 mg% to 20 mg% over six hours, although the actual pattern of drinking was likely heavier during the earlier period of the day. Mr. Taylor first drank alone on the ferry from a large Coke bottle half filled with whiskey. Mr. Taylor told Erik James that he expected to finish the whiskey by 2:00 p.m. When Mr. James left the house at 12:10 p.m., the accused was already "buzzed". Mr. Joe described drinking whiskey at his house with Mr. Taylor from a large glass with Coke added to it. It is likely that the accused drank a significant amount of whiskey before he even went to the Riley Joe house and that his pace of consumption slowed thereafter. This casts doubt on the reliability of the theoretical calculations.
- [103] No witness described Mr. Taylor staggering or stumbling, let alone falling down drunk. Instead, he appeared able to normally manage all physical tasks, including walking and running. Further, he did not appear to have any difficulty communicating with the various persons who encountered him, including Riley Joe and Harlan Sylvester before the shooting, and Peter Jennings and Donovan Saul within two or so hours afterwards.
- [104] In spite of Mr. Taylor's drinking and his use of marihuana, he engaged in deliberate conduct. I find that, in the course of an argument with his wife, Mr. Taylor decided to go to Erik James's bedroom and get the .308 rifle; he entered the room for that purpose over his wife's objections; took a live round from the container on the wall; reached around the television and selected the particular rifle from a stack of three firearms in the corner; manipulated the bolt action to open the breech; loaded the rifle; either released the safety

or noticed that it was already off; and finally, deliberately fired the weapon from very close range at his wife's head.

- [105] After the initial shock, Mr. Taylor was aware that his daughter ran outside; he went outside and brought her back in, either helped her put on her shoes or watched her put them on, and then permitted her to leave the house. He then ransacked the house, considered suicide but abandoned the plan, and decided to leave the island. He ran along the beach towards the Cut, crossed in chest deep water to Thetis Island, and then made his way to his destination, the Thetis Island Marina and Pub. On finding that the pub was closed, he went to the manager's home and essentially turned himself in. In my view, Mr. Taylor's conduct indicated an awareness of what he was doing throughout.
- [106] The question, as I stated at the beginning of my reasons, is whether Mr. Taylor intended to cause his wife's death or to cause her bodily harm that he knew or ought to have known was likely to cause death and was reckless whether death ensued or not. It has been said, and subsequently widely approved by other courts, that "[a] drunken intent is nevertheless an intent": *R. v. Sheehan and Moore*, 60 Cr. App. R., 308 at 312; [1975] 2 All E.R. 960 (C.A.); *R. v. Robinson*, [1996] 1 S.C.R. 683, at para. 35 and following.
- [107] The key for any trier of fact, as set out by the Supreme Court of Canada in *R. v. Daley*, 2007 SCC 53, [2007] 3 S.C.R. 523, is to ensure that the consumption of alcohol is taken into account in determining whether the Crown has proven intention. I would err if I simply applied the common sense inference that a sane and sober person intended the probable consequence of his act without taking into account the effect that drunkenness may have on the accused's foresight.
- [108] In a case such as this, in which death was such an obvious consequence of Mr. Taylor's act, it would take a very advanced state of intoxication to support an inference that he did not intend to kill (see *Daley*, at para. 42). The evidence does not support such an inference in this case. On the whole of the evidence, including evidence that Mr. Taylor was drunk at the time, I am satisfied beyond a reasonable doubt that he intended to cause the death of Jessica James when he fired the high-powered rifle at her head from very close range.
- [109] I find Mr. Taylor guilty of second degree murder as charged.

"M.D. Macaulay, J."

The Honourable Mr. Justice Macaulay

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