

CANADA / JUDGMENT

R. v. Thebaud

2024 BCSC 2533

COURT

Supreme Court of British Columbia

DECIDED

19 December 2024

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2024 BCSC 2533 R. v. Thebaud

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Thebaud,

2024 BCSC 2533

Date: 20241219

Docket: 35659-2

Registry: Cranbrook

Rex

v.

Jonathan Ricardo Thebaud

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Before: The Honourable Justice Whately

Oral Reasons for Judgment

Counsel for the Crown:

S. Miller

Counsel for the Accused:

B.N. Belcher

Place and Date of Trial:

Cranbrook, B.C.

December 4-6, 2024

Place and Date of Judgment:

Cranbrook, B.C.

December 19, 2024

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- [1] THE COURT (by videoconference): Jonathan Ricardo Thebaud, the accused, is charged with the aggravated assault of Bradley Bettke, contrary to s. 268(2) of the Criminal Code, R.S.C. 1985, c. C-46. The charge relates to an incident that took place on or about August 16, 2021, on the side of the road in Kimberley, British Columbia.

- [2] This is an oral ruling and I will, if a transcript is ordered, edit for clarity, organization, typographical errors, and I will add in more fulsome cites to caselaw that I will not read out loud today in the interests of time.
- [3] While the accused did not lead evidence and Mr. Bettke was not able to identify Mr. Thebaud, under all the circumstances, including a voluntary admission by Mr. Thebaud to his partner who was a witness, and later to police, and the other evidence presented at trial, there is little dispute that in the early evening of August 16, 2021, the accused struck Mr. Bettke on the side of the road beside Mr. Bettke's parked vehicle.
- [4] There is also no dispute that, as a result of the blow, Mr. Bettke suffered injuries, including a broken nose, a cheekbone or orbital bone fracture, lacerations requiring stitches and, for a time, damaged vision in his right eye.
- [5] Ultimately, the primary issue before me is whether Mr. Thebaud acted in self-defence.

Overview

- [6] The trial commenced on December 3, 2024, and completed in three days. The Crown called four witnesses:
- Mr. Bettke, the victim;
 - a lay witness who did not witness the altercation, but who arrived at the scene moments later and saw Mr. Bettke injured on the side of the road;
 - the investigating RCMP officer, Const. Scott Payne; and
 - Brandi-Lee Gruninger, Mr. Thebaud's partner.
- [7] As mentioned, Mr. Thebaud did not testify and called no witnesses in his defence. While this is somewhat unusual where self defence is claimed, I draw no inference from this. Mr. Thebaud has no obligation to tender evidence or to testify. The Crown must prove its case beyond a reasonable doubt.
- [8] I will not recount each witness's evidence in detail, but will focus on those aspects of their testimony that are relevant to the issues before me. I note that the facts and chronology of the events are, for the most part, not in dispute. There are differences in perception of certain events leading up to the altercation. Where the facts are not in conflict, the below description of the evidence may be considered my factual findings unless I say otherwise.
- [9] I also recount certain inner thoughts, and perceptions of the events as described by the two primary witnesses, Mr. Bettke and Ms. Gruninger. As I have found both to be credible, I accept that those perceptions were honestly held, even where I have found the facts to be different from a witness's perception of them.

The Altercation

- [10] Mr. Bettke is 66 years old and is a retired transportation and dispatch worker. He drove 18-wheelers for 15 years for Sunrise Transport in Cranbrook, then went into the office to work with dispatch. He had a Class 1 licence. When he drove, he travelled all across Western Canada, the North, and to the US. Mr. Bettke held a special licence at the time of the events in question and considered himself an experienced driver. Mr. Bettke resides with his wife in Kimberley, B.C., and he has lived in that community since 2000.
- [11] Every Monday at 5:30 p.m. during the summer months, Mr. Bettke and a group of friends play golf at a course in Marysville, a small community that is either part of or immediately adjacent to Kimberley. Mr. Bettke called it their "nine and dine", meaning that they played nine holes of golf and then had dinner and drinks.
- [12] On the day in question, the golf began between 5:30 and 5:45 p.m., and ended around 8:00 p.m. Mr. Bettke recalls having beer with dinner. He did not drink any other alcohol that day and stated that one beer would have had no impact on him and did not have an impact on him that day. Specifically, he said it did not impact his ability to drive, or to recall or perceive events.
- [13] After dinner, Mr. Bettke got into his truck, a red 2015 F-150. He began the six-kilometre drive home to his house. He said the speed limit on that road is 50 kilometres per hour, and he was probably driving around 55 kilometres per hour. It was still light out, but the sun was lower and it was approaching dusk. The weather was clear and the roads were dry.
- [14] Mr. Bettke first noticed a black Mercedes SUV approaching him from behind on Wallinger Avenue. He said it approached quickly and appeared to be going faster than he was. He said he first noticed it when it was far away, but when he looked back again, the SUV was almost upon him. He described the SUV as accelerating towards him, then backing off after coming within a car length.
- [15] Mr. Bettke said that the SUV then tried to pass him in a reckless manner. He said the car lurched to the left and tried to correct itself after almost losing control. As I will discuss later, this particular fact, or at least Mr. Bettke's interpretation of it, is in dispute.
- [16] Mr. Bettke said, and Const. Payne later confirmed, that in this stretch of road there are two lanes of traffic going either direction, with solid double lines and no passing lanes.
- [17] The SUV ultimately succeeded in passing Mr. Bettke's truck and carried on ahead. Mr. Bettke could see that there were two people in the car when it passed him, seated in the front seats. He saw a blonde-haired woman in the passenger side. He did not get a good look at the driver.
- [18] Mr. Bettke estimated the SUV would have been going approximately 70 to 80 kilometres an hour when it passed him. Mr. Bettke stated that he thought the SUV was driving dangerously and so he wanted to get the licence plate number to provide to police.

- [19] Mr. Bettke proceeded to follow the SUV in an effort to get the licence plate. He believed there was an opaque or shaded grey cover on the SUV's licence plate that made it hard to see the numbers, but he could see that it was an Alberta plate. Under cross, Mr. Bettke acknowledged that he felt angry that someone passed him on a double solid line.
- [20] Mr. Bettke continued to pursue the SUV, even travelling past his own house in doing so, for a period of approximately three to four minutes or eight blocks. Mr. Bettke lost sight of the SUV a couple of times, but assumed correctly that it would head towards the ski hill where many tourists stayed. He caught up with the SUV on Gerry Sorensen Way.
- [21] Mr. Bettke saw that the SUV was stopped on the side of the road and pulled up around one and a half to two car lengths behind it. Mr. Bettke said his intention in stopping behind the SUV was to record the licence plate.
- [22] Mr. Bettke put his vehicle into park and stepped out. He said that as he came around his driver side door, he saw a younger Black gentleman in front of him, but a ways away. He estimated that the younger man was about five to six feet away, near the front of his vehicle. He did not see where the young man had come from.
- [23] The next thing Mr. Bettke knew, he had been struck, he believed just once. At the time, he did not know who struck him, or with what. He lost consciousness. Mr. Bettke was straightforward and honest in stating that he could not identify the man he saw as the accused, Mr. Thebaud. Nor could he confirm that the person he saw five to six feet away at the front of his vehicle was in fact the person who struck him.
- [24] Mr. Bettke stated that, at first, he did not even think he was struck by a fist and that he thought he had been struck by an object. The blow came out of nowhere. There were no words exchanged and no gestures. Mr. Bettke said he did not engage physically with anyone and did not swing in advance of being struck. He said he did not attempt to strike the approaching gentleman.
- [25] Under cross, Mr. Bettke was pressed on his intentions with respect to, first, his decision to pursue the black SUV and, second, his decision to get out of the vehicle. Mr. Bettke denied being angry. He admitted to being "perturbed". He denied having any fear of, or issues with people of colour. He acknowledged that he could have just gone home and called the police, and in fact went right past his house in his pursuit of the SUV. He said that he felt that he needed the licence plate to give to the police. He acknowledged that he could have called 9-1-1 from his car, but he also said that his phone was in his golf bag.
- [26] Mr. Bettke admitted that he had a pen and paper in his console, but he did not have either in his hand when he got out of the vehicle. He denied that he pursued the SUV with any intention other than getting the licence plate. Mr. Bettke denied that he wanted to confront the driver, and he denied that he instigated a fight by taking the first swing at the person who hit him, but he missed. He repeated that he never saw the person who hit him.

- [27] After he had been struck, Mr. Bettke next remembers crawling on the road. A woman appeared, helped him to the side of the road and held a t-shirt or towel to his face. He did not know the woman. He said that his first clear memory is sitting on the shoulder of the road on some rocks, about eight to 10 feet from his truck. Mr. Bettke knew he was bleeding because of the towel or shirt being held to his face, and said he could feel pain in his ribs and right side.
- [28] Mr. Bettke said he saw the Black gentleman he had seen earlier talk with another individual and then walk away. He also said that at some point later, he saw the SUV come back, and once again saw the driver speak to someone at the scene, and then drive away again.
- [29] Mr. Bettke said that an ambulance came approximately 15 to 20 minutes later and took him to the East Kootenay Regional Hospital in Cranbrook. He was treated in emergency for approximately one and a half to two hours before being released. Mr. Bettke recalled being cleaned and stitched up. He received approximately 13-14 stitches across his face and eyebrow. He did not recall being prescribed any pain medication, although his medical records indicate he was either prescribed or dispensed Tylenol 3s.
- [30] Mr. Bettke missed a week of work following the incident. He suffered from bruising in the following days, and he had to attend an ENT specialist to monitor the fracture of his eye-socket bone. He still experiences some issues with sinus pain and pain in his right cheek. The stitches were removed after a month and the wound healed well. He has no scarring. He has no gaps in his memory before or after the incident.
- [31] Besides Mr. Bettke, there was one other witness called at the trial who witnessed the events leading up to and including the incident: Brandi-Lee Gruninger, who was called by the Crown.
- [32] Ms. Gruninger is a psychologist registered with the College of Alberta Psychologists. She has been a psychologist since 2005 and registered since 2011. She owns and oversees two practices, as well as providing therapy to her own patients. She also supervises new therapists, both in her own practice and outside her practice. At the time of the events at issue, Ms. Gruninger was Mr. Thebaud's common law partner and was a passenger in the black Mercedes SUV on the day in question. Ms. Gruninger and Mr. Thebaud no longer reside together, but they remain romantic partners.
- [33] On the day in question, Mr. Thebaud, Ms. Gruninger, and her two teenage children, then 13 and 16, were visiting her parents who live in Cranbrook. They were driving back to their hotel in Kimberley after a family dinner.
- [34] Ms. Gruninger confirmed that she, her children, and Mr. Thebaud were travelling in a Mercedes SUV with Alberta licence plates and a storage rack on top. The licence has a clear cover, no coloured shade or shield over it. Mr. Thebaud typically drove when they travelled in the car together and he was driving that night.

- [35] Mr. Thebaud, Ms. Gruninger and the children went to a Mexican restaurant in Cranbrook with Ms. Gruninger's extended family. Mr. Thebaud and Ms. Gruninger each had one drink. She had a margarita which was large and acidic and she did not finish it. She recalled Mr. Thebaud had something different, perhaps a pina colada. She commented that Mr. Thebaud rarely drank, and when he did it was a single cocktail with dinner. She could not recall whether he finished his drink before they left.
- [36] Ms. Gruninger said that they were driving back to the hotel through an area she thought was called Marystown, but is actually called Marysville, which is part of Kimberley. They were driving on a stretch of road with businesses on either side. She recalled that they came upon a red pickup that was driving very slowly. She estimated it was going 30 kilometres an hour in a 40- or 50-kilometre-an-hour zone.
- [37] Ms. Gruninger said that Mr. Thebaud became impatient with the slow driver and tried to go around the pickup. When Mr. Thebaud pulled alongside the truck in an attempt to pass, the truck swerved to the side and almost ran them off the road. She recalled that the truck was almost completely in the left lane as it swerved.
- [38] She recalled Mr. Thebaud saying, "Oh, this guy." Ms. Gruninger recalled that she said to Mr. Thebaud, "Well, maybe he was trying to turn?" However, Ms. Gruninger said that it became obvious very quickly that the driver of the red truck did not swerve inadvertently in an attempt to turn, but was actively trying to block them from passing.
- [39] Ms. Gruninger said that she could not recall if the red truck ultimately let them pass or, due to the road widening or some other circumstance, there was suddenly room to pass. Ultimately, they got past the red truck and continued on their way back to their hotel.
- [40] When asked whether it was suitable to pass when they made the attempt to pass the red truck, Ms. Gruninger said, "Well, no, it was not." She remembered that she said to Mr. Thebaud, "You are not allowed to pass here." Ms. Gruninger candidly said that while the driver of the red truck was going excessively slow, Mr. Thebaud could have been more patient, and she felt annoyed at the time at his impatience.
- [41] Ms. Gruninger said that after they passed the red truck, they continued along to their hotel, but that Mr. Thebaud was driving strangely. She described him repeatedly looking in the mirrors behind him and said he seemed agitated. Mr. Thebaud would speed up and look in the mirrors, then slow down and look in the mirrors. She recalled feeling both annoyed and confused and she asked him what he was doing. Ms. Gruninger said she was also starting to feel carsick.
- [42] Ms. Gruninger could not see or did not recall looking back to see what was behind them. She said that the kids were seated in the SUV behind her and there was a lot of camping and activity gear, so while the view was not obstructed, it was not completely clear. She could not judge exactly how much time had passed since passing the red truck, but estimated that a few minutes had passed when Mr. Thebaud stopped on the side of the road.

- [43] Ms. Gruninger asked why they were stopping, but Mr. Thebaud was already getting out of the car. She looked back and said to her kids, "Oh my God, it's the red truck." She testified that in that moment, she realized two things: first, that the red truck had followed them and, second, this was why Mr. Thebaud had been acting strangely.
- [44] Ms. Gruninger saw a man open the door of the truck, and said that she could see the top part of him come out very quickly. Even though she could just see the top half of him, she was firm that he was in rapid motion. She could not see Mr. Thebaud. She said to her children, "Oh my gosh, I think this guy wants to fight."
- [45] Ms. Gruninger recalled that her daughter asked, "Should I call 9-1-1?" Ms. Gruninger said, "Wait, I can't see what's happening." Then, Mr. Thebaud was back at their SUV. Ms. Gruninger said she looked back but she could not see the man at the red truck anymore.
- [46] Ms. Gruninger estimated that only 20 to 30 seconds had passed between when Mr. Thebaud left the SUV and when he came back. She did not see any interaction between the driver of the red truck and Mr. Thebaud. She did not hear anything. She confirmed that it was still light out when they were stopped on the road.
- [47] Mr. Thebaud jumped back in the car and they started back towards the hotel. Ms. Gruninger asked Mr. Thebaud what happened. He did not respond directly to that question, other than to say, "I have to get you guys back to the hotel." They were very close to their hotel, which Ms. Gruninger did not realize at the time. Mr. Thebaud dropped Ms. Gruninger and the children off and then drove away again. After about 20 minutes, he returned.
- [48] At the time, Ms. Gruninger did not know why Mr. Thebaud left, but thought he may have told her at some point that he went back to check on the driver of the red truck. When he returned, Ms. Gruninger was irritated because her children were upset, and because Mr. Thebaud had not explained to her what was happening. She admitted that when Mr. Thebaud came back, she "came at him", which I take to mean that she was angry, and was looking to Mr. Thebaud for an explanation for his behaviour.
- [49] Ms. Gruninger recalled that Mr. Thebaud was agitated. In response to her questions, he said: "That guy was following us. I had to make sure he didn't follow us to our hotel room." Ms. Gruninger asked if they fought - meaning Mr. Thebaud and the driver of the red truck - and Mr. Thebaud said something along the lines of, "I was not the instigator I made contact and he went down."
- [50] Mr. Thebaud also told her that he thought the man driving the red truck had been drinking and driving. He said he went back and there were a lot of people around and said that they had called the police and ambulance. Ms. Gruninger and Mr. Thebaud then talked to the children, who were upset by the events. Mr. Thebaud had no injuries that she noticed. Ms. Gruninger recalled that the police came to their room about an hour later, when it was getting dark.

- [51] Ms. Gruninger admitted to having conflicting emotions about the events. She was annoyed and frustrated with Mr. Thebaud at the time. She said that, on reflection, she believed that Mr. Thebaud was trying to protect her and the children. She described trying to see it from his perspective, that they were in a strange place being followed by someone. She did not think he appeared fearful, but she described his manner as "vigilant". She said that afterward, he behaved like he was coming down from a fight or flight response.
- [52] Two other witnesses testified, a passerby named Jason McCulloch, who was vacationing in the area with his family and some friends, and Const. Scott Payne, one of the investigating officers who arrived at the scene and who subsequently located and arrested Mr. Thebaud.
- [53] Mr. McCulloch described driving back to his hotel in a vehicle with his family. They were following friends who were in another car. They came upon an older gentleman leaning by a truck, and initially thought he was getting sick. As they passed, they noticed blood. They pulled to the side of the road to help, and saw other people at the scene.
- [54] Mr. McCulloch recalled seeing a young woman he thought was a nurse or a nursing student attending to the injured gentleman. Mr. McCulloch stood back and did not interact with him, but he noted that the man was bleeding quite a bit from the nose and face, and appeared incoherent or dazed.
- [55] Mr. McCulloch recalled that while he was standing observing the injured man being tended to, a young man pulled up in a Mercedes SUV. He described the vehicle as a M-class Mercedes, black with an extra rack on top, in good condition. The driver got out and walked towards Mr. McCulloch. Mr. McCulloch initially thought he might be a doctor. He expected the man to ask what had happened, but instead the man asked if Mr. McCulloch had seen a wallet. Mr. McCulloch described the man as between 28 to 55, Black, well-dressed, in good shape, with no grey hair. Their interaction lasted approximately 30 seconds.
- [56] Mr. McCulloch subsequently heard that the injured man had pointed out the person Mr. McCulloch was talking to as the man who had punched him. On the way back to the hotel, one of the other travellers in their group mentioned that she had seen the black Mercedes SUV in the parking lot of the same hotel they were staying at. Mr. McCulloch and his friends drove around the hotel parking lot, found the Mercedes SUV, and contacted police.
- [57] Const. Scott Payne arrived on the scene of the incident while Mr. Bettke was being treated by ambulance paramedics. He confirmed that the location was on Gerry Sorensen Way, not far from the Trickle Creek golf course, on the road that leads to the ski hill. It was still light out, but verging on dusk when he arrived. He spoke to some of the witnesses, including Mr. McCulloch.

- [58] Const. Payne eventually spoke to Mr. Bettke at the scene. He observed that Mr. Bettke was not "all that with it", but took a brief statement from him. Mr. Bettke was in some pain and had injuries to his face. Const. Payne noted no indicia of alcohol impairment. He noted blood on the ground next to the driver side door of the pickup. There was no blood anywhere else except on Mr. Bettke.
- [59] Const. Payne and his partner obtained the description of the Mercedes SUV and the driver, and later received information that the car was at Trickle Creek Lodge. They found the SUV and ran the licence plate, which came back as being registered to Brandi-Lee Gruninger.
- [60] Const. Payne and his partner attended the unit where Ms. Gruninger, Mr. Thebaud and the children were staying. Const. Payne cautioned Mr. Thebaud that he was under investigation. Mr. Thebaud initially did not want to speak to police. Based on the information they had, Const. Payne arrested Mr. Thebaud for assault.
- [61] Const. Payne provided Charter warnings to Mr. Thebaud. Mr. Thebaud indicated that he did not want to speak to a lawyer, and asked Const. Payne if he wanted his side of the story. Mr. Thebaud gave an audio statement, which Const. Payne later discovered did not record. Const. Payne recalled Mr. Thebaud as being calm and cooperative. He did not appear impaired. It was approximately 9:55 p.m. in the evening at the time of the arrest.
- [62] Const. Payne took photos of the Mercedes SUV. He described the licence plate as having a clear cover, not shaded. He said that glare from the clear cover could possibly cause difficulty in seeing the numbers. One of his photos of the rear of the vehicle clearly showed the licence plate of the Mercedes. In another photo, the licence plate is obscured by glare. Const. Payne said that this was caused by the flash of his camera, however.

Credibility

- [63] When I review the credibility of the witnesses, I consider the leading case on assessing a witness's credibility: *Bradshaw v. Stenner*, 2010 BCSC 1398, *aff'd* 2012 BCCA 296, leave to appeal to SCC refused.
- [64] In *Bradshaw*, Justice Dillon summarized the law respecting assessing a witness's credibility:
- [186] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 1919 CanLII 11 (SCC), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis*, [1926] 31 O.W.N. 202 (Ont.H.C.); *Faryna*

v. Chorny, 1951 CanLII 252 (BC CA), [1952] 2 D.L.R. 354 (B.C.C.A.) [Farnya]; R. v. S.(R.D.), 1997 CanLII 324 (SCC), [1997] 3 S.C.R. 484 at para.128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (Farnya at para. 356).

- [187] It has been suggested that a methodology to adopt is to first consider the testimony of a witness on a 'stand alone' basis, followed by an analysis of whether the witness' story is inherently believable. Then, if the witness testimony has survived relatively intact, the testimony should be evaluated based upon the consistency with other witnesses and with documentary evidence. The testimony of non-party, disinterested witnesses may provide a reliable yardstick for comparison. Finally, the court should determine which version of events is the most consistent with the "preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions" (Overseas Investments (1986) Ltd. v. Cornwall Developments Ltd. (1993), 1993 CanLII 7140 (AB KB), 12 Alta. L.R. (3d) 298 at para. 13 (Alta. Q.B.)). I have found this approach useful.
- [65] I considered all of the factors listed in Bradshaw with respect to assessing the credibility of the witnesses in this case. Generally speaking, however, I do not consider credibility to be a material issue in this trial.
- [66] I will not address the testimony of Const. Payne or Mr. McCulloch under this category. Both testified carefully and to the best of their ability about the events they were involved in or witnessed. Both admitted where their memories were lacking or where they did not know the answer to a question. Their evidence does not conflict with the record or other events in any significant way, and I accept their evidence is credible and reliable as far as their evidence goes.
- [67] The material witnesses are, of course, Mr. Bettke and Ms. Gruninger. For the most part, their testimony did not conflict, except with respect to their descriptions of, and perceptions of the interaction on the road when Mr. Thebaud attempted to pass Mr. Bettke. I accept that both tried their best to recount the events as accurately as possible from their perspective. It is possible that they could each have very different perspectives of the exact same event, with neither intentionally lying about what was happening.
- [68] That said, on balance I accept Ms. Gruninger's description of the events over Mr. Bettke's on the narrow points where they conflict.
- [69] Ms. Gruninger was an impressive witness. Despite the difficult position she was put in, she strove to testify honestly and to the best of her ability. She was thoughtful and articulate, and balanced in her testimony. She was candid about her recollections from the incident and admitted when she could not see something or could not recall a detail.

- [70] Ms. Gruninger's evidence was clear and detailed on the passing incident, describing how she initially thought that Mr. Bettke was attempting to turn, thinking that was why he swerved. Ms. Gruninger's measured and balanced depiction of poor decisions by both drivers makes logical sense to me, given the ensuing events. I believe the interaction transpired as Ms. Gruninger described, and caused Mr. Bettke to be intent on pursuing Mr. Thebaud, and Mr. Thebaud to behave with heightened vigilance.
- [71] I find that Mr. Thebaud became impatient, believing that Mr. Bettke was going too slow. I find that he made this impatience known by quickly coming up on Mr. Bettke from behind. I find that Mr. Thebaud attempted to pass Mr. Bettke and I find that Mr. Bettke attempted to stop Mr. Thebaud from passing by swerving into the left lane.
- [72] I also consider the fact that Mr. Bettke chose to pursue Mr. Thebaud for several minutes, persisting when losing sight of him, even passing his own house in the process. I note that upon finding the SUV on the side of the road, Mr. Bettke pulled up behind and emerged quickly from his vehicle, without a pen and paper to jot down a licence plate, even though they were right in his console.
- [73] I am not convinced that Mr. Bettke undertook this pursuit simply to get Mr. Thebaud's licence, although that may have been part of it. Put simply, I believe Mr. Bettke was angry about Mr. Thebaud's driving, given that he passed him on a double line in what he perceived to be an unsafe manner. Beyond the pursuit through town and an associated thought about getting a licence plate number, I find that Mr. Bettke most likely did not have a fully-developed "plan" in mind in terms of confronting the driver of the SUV.
- [74] Aside from those differences, I accept Mr. Bettke's evidence in most other respects, just as I accept Ms. Gruninger's. Mr. Bettke was candid and honest when he said he could not identify Mr. Thebaud in circumstances where many might make mental leaps or assumptions allowing them to make a positive identification, even without a clear memory. In sum, I do not believe Mr. Bettke was intentionally dishonest when he testified, but the added context and detail provided by Ms. Gruninger provides a logical framework for what happened later.

Law - Aggravated Assault

- [75] Given the facts of this case, the limited credibility findings described above are largely relevant only with respect to the analysis of Mr. Thebaud's defence of self-defence, and not to whether the assault of Mr. Bettke happened or did not happen.
- [76] The defence does not contest identity, nor Mr. Bettke's injuries. Even if that were not the case, the evidence before me allows me to find that Mr. Thebaud is the person charged and the person involved in the incident with Mr. Bettke in Kimberley, B.C., on the date in question. Defence did not argue that Mr. Thebaud did not strike Mr. Bettke, nor do they take issue with the injuries described by Mr. Bettke in his testimony and in the medical records.

[77] Mr. Bettke did not identify Mr. Thebaud, but the evidence of Const. Payne, Brandi-Lee Gruninger, the statements by Mr. Thebaud, statements Mr. Thebaud voluntarily made to Ms. Gruninger and to the police all establish beyond a reasonable doubt that Mr. Thebaud struck Mr. Bettke at least once, and that the blow or blows from Mr. Thebaud caused Mr. Bettke's injuries.

[78] Section 268(1) of the Criminal Code states that:

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

[79] The Crown contends that the circumstances of Mr. Bettke's injuries, including the breaking of Mr. Bettke's orbital bone accompanied by the temporary inability to fight back, satisfies the definition of "maiming", and that the laceration requiring stitches satisfies the definition of "wound". He cites R. v. McPhee, 2015 ONSC 3001 (appeal 2018 ONCA 1016) and R. v. Pootlass, 2019 BCCA 96 for these propositions. The defence did not counter this and I do not need to go into greater detail on this point, nor recount the historical, legal, and plain meanings of those words, which can be found in those cases.

[80] I find that Mr. Bettke's injuries satisfy the requirements of s. 268(1) of the Criminal Code, and therefore I will not go on to review the lesser and included offence of assault causing bodily harm, which was proposed as an alternative by the Crown.

Law - Self Defence

[81] Ultimately, the primary issue I must determine is whether self-defence is available to Mr. Thebaud in the circumstances of this case.

[82] Section 34 of the Code governs the defence of self-defence:

Defence -- use or threat of force

34 (1) A person is not guilty of an offence if

- (a) they believe on reasonable grounds that force is being used against them or another person or that a threat of force is being made against them or another person;
- (b) the act that constitutes the offence is committed for the purpose of defending or protecting themselves or the other person from that use or threat of force; and
- (c) the act committed is reasonable in the circumstances.

Factors

(2) In determining whether the act committed is reasonable in the circumstances, the court shall consider the relevant circumstances of the person, the other parties and the act, including, but not limited to, the following factors:

- (a) the nature of the force or threat;

- (b) the extent to which the use of force was imminent and whether there were other means available to respond to the potential use of force;
- (c) the person's role in the incident;
- (d) whether any party to the incident used or threatened to use a weapon;
- (e) the size, age, gender and physical capabilities of the parties to the incident;
- (f) the nature, duration and history of any relationship between the parties to the incident, including any prior use or threat of force and the nature of that force or threat;
- (f.1) any history of interaction or communication between the parties to the incident;
- (g) the nature and proportionality of the person's response to the use or threat of force; and
- (h) whether the act committed was in response to a use or threat of force that the person knew was lawful.

[83] Self-defence may not be considered unless an air of reality exists on all elements of the defence: *R. v. Cinous*, 2002 SCC 29 at para. 47.

[84] In *R. v. Tremblay*, 2019 BCSC 410 at paras. 172-174, Justice DeWitt-Van Oosten described the onus on the Crown and the legal principles that apply to self-defence:

[172] The Crown bears the burden of disproving the defence of self-defence. To meet this burden, it need only prove beyond a reasonable doubt that one of the three elements of the defence does not apply. All three of the s. 34(1) criteria must be present for the defence to be available: *R. v. Randhawa*, 2019 BCCA 15 (B.C. C.A.) at para. 34. [Internal references omitted.]

[173] In deciding whether the Crown has met its burden, the Court must consider the whole of the evidence: *R. v. Fontaine*, at para. 12. Throughout the course of the analysis, I must also remain mindful of the fact that the accused is presumed innocent unless and until the Crown meets its burden of proof.

[174] The law does not require that an accused retreat before acting in self-defence: *R. v. Sandhu*, 2018 BCPC 122 (B.C. Prov. Ct.) at para. 11, although a failure to do so may be relevant to the ss. 34(1) and (2) analysis. It is also well-established that a person who is under attack, and defending themselves, cannot be expected to weigh, to a nicety, the exact measure of the defensive action required: *R. v. Sandhu* at para. 13, citing *Palmer v. R.* (1971), 55 Cr. App. R. 223 (Jamaica P.C.) at p. 242. See also *R. v. Kandola*.

[85] One of the leading authorities regarding self-defence under s. 34 is *R. v. Khill*, 2021 SCC 37. In *Khill*, The Supreme Court of Canada clarified the approach to the amended self-defence regime and emphasized that the contours of self-defence "are tied to our notions of culpability, moral blameworthiness, and acceptable human behaviour," and therefore "demands a broader social perspective." *Khill*, para. 2.

- [86] At para. 51 of Khill, Justice Martin describes the inquiries under s. 34 in the following conceptual way: (1) the catalyst, (2) the motive, and (3) the response.
- [87] Under the "catalyst", the court considers whether the accused believed, on reasonable grounds, that force was being used against him or another person.
- [88] Under the "motive", the court considers the accused's personal purpose in committing the act that constitutes the offence. Justice Martin explains the inquiry required under this element as follows:
- [59] Section 34(1)(b) requires that the act be undertaken by the accused to defend or protect themselves or others from the use or threat of force. This is a subjective inquiry which goes to the root of self-defence. If there is no defensive or protective purpose, the rationale for the defence disappears (see *Brunelle v. R.*, 2021 QCCA 783, at paras. 30-33; *R. v. Craig*, 2011 ONCA 142, 269 C.C.C. (3d) 61, at para. 35; *Paciocco* (2008), at p. 29). The motive provision thus ensures that the actions of the accused are not undertaken for the purpose of vigilantism, vengeance or some other personal motivation.
- [60] The range of reasonable responses will be different depending on whether the accused's purpose is to defend property, effect an arrest, or defend themselves or another from the use of force.
- [61] An accused's purpose for acting may evolve as an incident progresses or escalates. . Clarity of purpose is not meant to categorize the accused's conduct in discrete silos, but instead appreciate the full context of a confrontation, how it evolved and the accused's role, if any, in bringing that evolution about
- [89] Under the "response" element, the court considers the accused's response and whether it was reasonable in the circumstances. Parliament provides an express structure within s. 34(2) for determining whether an act of self-defence was reasonable in the circumstances: Khill, paras. 62-64.
- [90] The components of this third, "response" element of self-defence include:
- a) an examination of the accused's response to the threat of force and a requirement that "the act committed [be] reasonable in the circumstances": Khill, at para. 62;
 - b) the reasonableness inquiry operates to ensure conformity with "community norms of conduct": Khill, at para. 62;
 - c) grounding the law of self-defence in "the conduct expected of a reasonable person in the circumstances" achieves an appropriate balance between respecting the security of the person acting and security of the person acted upon: Khill, at para. 62;
 - d) "reasonableness" under s. 34(1)(c) is the new legislative scheme's orientation towards "broad and flexible language" making the law of self-defence "more comprehensible and accessible" to the public: Khill, at para. 63.

- [91] The structure provided by s. 34(2) to decide whether an act of self-defence was reasonable in the circumstances is explained by Justice Martin as follows:
- [64] Through s. 34(2), Parliament has also expressly structured how a decision maker ought to determine whether an act of self-defence was reasonable in the circumstances. As the language of the provision dictates, the starting point is that reasonableness will be measured according to "the relevant circumstances of the person, the other parties and the act". This standard both casts a wide net of inquiry covering how the act happened and what role each person played and modifies the objective standard to take into account certain characteristics of the accused -- including size, age, gender, and physical capabilities (s. 34(2)(e)). Also added into the equation are certain experiences of the accused, including the relationship and history of violence between the parties (s. 34(2)(f) and (f.1)).
- [65] Nevertheless, the trier of fact should not be invited to simply slip into the mind of the accused. The focus must remain on what a reasonable person would have done in comparable circumstances and not what a particular accused thought at the time. For example, even if Mr. Khill's military training qualifies as a relevant personal characteristic, it does not convert the reasonableness determination into a personal standard built only for him, much less a lower standard than would otherwise be expected of a reasonable person in his shoes. The law of self-defence cannot offer different rules of engagement for what happens at the homes of those with military experience or allow "training" to replace discernment and judgment. Section 34(1)(c) asks whether the "act committed is reasonable in the circumstances". It does not ask whether Mr. Khill's military training makes his act reasonable nor whether it was reasonable for this accused to have committed the act. The question is: what would a reasonable person with similar military training do in those civilian circumstances?
- [66] As observed by Doherty J.A. at para. 58 of his reasons, the "relevant circumstances of the accused" in s. 34(2) can also include any mistaken beliefs reasonably held by the accused. If the court determines that the accused believed wrongly, but on reasonable grounds, that force was being used or threatened against them under s. 34(1)(a), that finding is relevant to the reasonableness inquiry under s. 34(1)(c). However, while s. 34(1)(a) and (b) address the belief and the subjective purpose of the accused, the reasonableness inquiry under s. 34(1)(c) is primarily concerned with the reasonableness of the accused's actions, not their mental state.
- [67] Courts must therefore avoid treating the assessment of the reasonableness of the act under s. 34(1)(c) as equivalent to reasonable belief under s. 34(1)(a). Beyond honest but reasonable mistakes, judges must remind juries that the objective assessment of s. 34(1)(c) should not reflect the perspective of the accused, but rather the perspective of a reasonable person with some of the accused's qualities and experiences. As simply put by the then-Parliamentary Secretary to the Minister of Justice at second reading, "If a person seeks to be excused for the commission of what would otherwise be a criminal offence, the law expects the person to behave reasonably, including in the person's assessment of threats to himself or herself,

or others" (House of Commons Debates, vol. 146, No. 58, at p. 3834 (emphasis added) (Robert Goguen)).

- [68] Parliament provides further structure and guidance because the fact finder "shall" consider all factors set out in paragraphs (a) to (h) of s. 34(2) that are relevant in the circumstances of the case.
- [69] The "act committed" is the act that constitutes the criminal charge -- in this case, the shooting. Given s. 34(1)(c), the question is not the reasonableness of each factor individually, but the relevance of each factor to the ultimate question of the reasonableness of the act. There is thus no requirement for the Crown to show that a "person's role in the incident" was itself unreasonable before it may be considered as a factor under s. 34(1)(c). As long as "the person's role in the incident" is probative as to whether the act underlying the charge was reasonable or unreasonable it may be placed before the trier of fact. Once a factor meets the appropriate legal and factual standards, it is for the trier of fact to assess and weigh the factors and determine whether or not the act was reasonable. This is a global, holistic exercise. No single factor is necessarily determinative of the outcome.
- [70] As previously explained, Parliament's choice of a global assessment of the reasonableness of the accused's otherwise unlawful actions represents the most significant modification to the law of self-defence. While new to the law of self-defence, this is not the first time Parliament has asked judges and juries to assess the reasonableness of an accused's conduct or used a multifactorial legal test. The clear and common methodology which applies in such instances also operates under s. 34(2). The parties can be expected to make submissions about the legal interpretation of the factors, which apply, the evidence that may support or refute them and the weight to be assigned to each applicable factor. Indeed, whether a certain factor needs to be considered at all or the weight to be given to it will often be contested in final argument and/or when counsel makes submissions concerning what should be left to the jury.

[92] With these legal principles in mind, I turn to my analysis

Analysis - Self Defence

Catalyst - force or threat of force

- [93] I must determine whether Mr. Thebaud believed, on reasonable grounds, that force was being used against him or another person.
- [94] Where there is an air of reality to self-defence, the Crown must disprove self-defence beyond a reasonable doubt. The defence states that an honest but mistaken belief can still be reasonable and that I must consider whether a reasonable person in the accused's circumstances would have acted in a similar fashion.

- [95] The circumstances I am urged to consider are that Mr. Thebaud was travelling with his family, including his partner and her children, in a rural area that was largely unfamiliar to them. He came across a driver in a pickup driving excessively slow, and attempts to pass, only to be almost run off the road.
- [96] Regardless of whether this was an illegal pass or an otherwise poor driving decision on the part of Mr. Thebaud, he could not have expected that the driver of the passed vehicle would pursue him through town, which reasonably would cause any person concern and surprise. The defence asks me to consider additional social context, in that Mr. Thebaud is a younger Black male, and given events of recent years, including the heightened tensions and events surrounding the death of George Floyd in 2020, his belief that he was danger of force being used against him or his family could be reasonable.
- [97] Counsel for Mr. Thebaud pointed me to R. v. Goodfellow, 2022 ONCJ 576 which cites R. v. Theriault, 2020 ONSC 3317, two Ontario cases that discuss the lived realities of racialized people in our society and how the evidence, and ultimately an assessment of the accused's state of mind must be sensitive to this.
- [98] I note that in the Goodfellow case there was a more overt current of racism at issue, clearly evidenced in the verbal exchanges between the two individuals. Here there were no words or gestures or anything being communicated between Mr. Bettke and Mr. Thebaud to suggest that racism was a factor on top of what, on the surface, appears to be a wordless mutual disagreement about driving habits. In other words: road rage.
- [99] I accept and take into account that Mr. Thebaud's lived experience certainly must have informed how he felt internally about the situation. I also note that this is necessarily an assumption, and an inference that defence is asking me to make without specific evidence as to Mr. Thebaud's own lived experience, or evidence as to how he felt at any point during the series of events, aside from the reflections of Ms. Gruninger.
- [100] Ms. Gruninger testified that while she initially questioned whether Mr. Bettke's pickup swerved into them on the road by mistake, she almost immediately believed it was intentional. Mr. Bettke admitted that he pursued the black SUV for several minutes. He said that even when he lost sight of it, he continued to pursue it because he knew where it was likely going, and caught up more than once before pulling up behind and stopping.
- [101] Ms. Gruninger noticed Mr. Thebaud looking behind him, driving strangely, and noticed that he seemed agitated, or in a vigilant state. She also testified that she saw Mr. Bettke emerge from his vehicle very quickly, and that her initial thought upon realizing he had followed them, was that he "wanted to fight". I accept her evidence in this regard, and from Ms. Gruninger's evidence, I am able to draw inferences about Mr. Thebaud's reaction to being followed by Mr. Bettke.

[102] Defence submits, and I agree, that the Crown has not disproved beyond a reasonable doubt that under all the circumstances, Mr. Thebaud did not believe that force would be used against him or his family.

Motive - whether the act was defensive

[103] At this stage of the self-defence analysis, the Crown is required to prove that the accused did not commit the act that constitutes the offence for the purpose of defending himself.

[104] Crown states that the evidence shows that there was one punch immediately at the side of Mr. Bettke's pickup. Upon leaving his vehicle, Mr. Bettke described seeing a man several feet away. I have found that this man was Mr. Thebaud. Then all of a sudden, Mr. Bettke was hit. Mr. Bettke cannot connect Mr. Thebaud with the blow. I accept that this means the blow happened quickly and without verbal or other warning by Mr. Thebaud, and without or comment or action by Mr. Bettke.

[105] Mr. Thebaud may have stated to Ms. Gruninger that he did not instigate the fight. However, given the location of the blood on the ground immediately beside Mr. Bettke's drivers side door, the fact that Ms. Gruninger estimated that Mr. Thebaud was only gone from their car for approximately 20 or 30 seconds, I accept Mr. Bettke's evidence on this point.

[106] I am left to consider whether the Crown has proven beyond a reasonable doubt that Mr. Thebaud was not acting for a defensive purpose.

[107] Given I have found that Mr. Bettke swerved in an effort to prevent Mr. Thebaud from passing, then pursued Mr. Thebaud and his family through the streets of Kimberley, I cannot ignore the familial and social context in which Mr. Thebaud existed at the moment he decided to leave his vehicle and approach Mr. Bettke. He had his partner and her children in the vehicle, and Ms. Gruninger's evidence was that Mr. Thebaud did not want Mr. Bettke to follow them all the way to the hotel.

[108] I can find no other reason for Mr. Thebaud's conduct, other than a defensive one. Up until the moment he left his car, Mr. Thebaud was not pursuing Mr. Bettke, nor engaging with him. They did not know each other. Mr. Thebaud and his family were being followed through an unfamiliar town, after what he and Ms. Gruninger perceived as an attempt to run them off the road.

[109] I conclude the Crown has not proven beyond a reasonable doubt that the accused's acts during the incident were not committed for a defensive purpose.

Response - Reasonableness of the Acts

[110] The last component of this defence is where I struggle, Mr. Thebaud.

[111] I must start with the principle that "reasonableness will be measured according to the relevant circumstances of the person, the other parties, and the act."

- [112] This standard requires me to cast a "wide net of inquiry" that examines how the act happened and the role each person played. It "modifies the objective standard to take into account the characteristics of the accused" along with certain experiences of the accused. Importantly, the focus remains on what a reasonable person would have done in comparable circumstances, and not what a particular accused thought at the time. Khill, at paras. 64-65. Of course, in this case, I do not know what Mr. Thebaud thought at the time.
- [113] The factors in paras. (a) to (h) of s. 34(2) of the Criminal Code (listed above at para. 82 must be considered, but they are not exhaustive. The question is not the reasonableness of each factor, but the relevance of each to the ultimate question of the reasonableness of the act. The trier of fact must assess and weigh the factors and determine whether or not the act was reasonable as a whole. This is a global, holistic exercise and no single factor is determinative. Khill, at para. 69.

Nature of the Force or Threat

- [114] With respect to the nature or the force of the threat, I have little to go on. Mr. Bettke followed Mr. Thebaud in a vehicle after Mr. Thebaud undertook an illegal pass. They exchanged no words or other communication. They did not know each other or even see each other clearly. Ms. Gruninger testified that Mr. Thebaud appeared agitated, and he seemed "vigilant."
- [115] I do not know if Mr. Thebaud was afraid.

Imminence of Force or Threat of Force, Other Ways to Respond

- [116] With respect to whether the force was imminent and whether there was other ways to respond, I cannot find that force was imminent. While I do not necessarily accept that Mr. Bettke simply intended to record a licence plate in undertaking his pursuit and then getting out of his vehicle, it does not directly follow that he intended to physically attack or hurt Mr. Thebaud and his family.
- [117] In terms of other ways to respond, it is my view that there were any number of alternative options available to Mr. Thebaud. One possible response, of course, would be to stay in his car. Another would be to initiate a conversation, even a heated one, with Mr. Bettke. Mr. Thebaud could have called 9-1-1 or asked Ms. Gruninger to call 9-1-1. Mr. Thebaud made one extreme and violent choice. I simply cannot find it was the most reasonable one under the circumstances.

The Role of the Accused

- [118] In terms of Mr. Thebaud's role in the incident, he was, if not an equal participant in the brief driving squabble leading up to the physical altercation, certainly a contributor to it. While driving, Mr. Thebaud's behaviour was impatient and foolhardy. Mr. Bettke's driving choices were also aggressive and problematic. However, Mr. Thebaud both started and

finished the actual physical fight, catching Mr. Bettke as he was emerging from his car. At this point, Mr. Thebaud's shared responsibility for the incident moves from equal participant, to primary aggressor.

Size, Age and Physical Capabilities

[119] With respect to the size, age, and physical capabilities of the parties, Mr. Thebaud and Mr. Bettke were of similar size and weights. However, Mr. Thebaud is significantly younger than Mr. Bettke, and can be described as muscular, well-built, and fit. Mr. Bettke is a good-sized man, but by all accounts, including his own, he is older and less physically fit than Mr. Thebaud.

Nature of the Relationship, or History of Communication between the Parties

[120] With respect to the nature of the relationship or the communication between the parties, there was none. Mr. Bettke and Mr. Thebaud were not only complete strangers, but they exchanged no communication with each other before, during, or after the driving interaction, or during the physical altercation on the side of the road. One could say that the only form of communication between them was their mutually aggressive driving.

Nature and Proportionality of the Response

[121] The factor related to the nature and proportionality of the accused's response is the most difficult to assess and weigh.

[122] Mr. Bettke's injuries were serious, but arguably not catastrophic. The law recognizes some level of tolerance to "the objective measurement of proportionate force" in cases of genuine self-defence: *R. v. Kandola* (1993), 80 C.C.C. (3d) 481, 1993 CanLII 774 (B.C.C.A.) at para. 27.

[123] This is not a case in which there were repeated blows. The Crown states there is no evidence to suggest it was one blow or multiple blows, but I find there is no evidence of more than one blow, including the testimony of Mr. Bettke.

[124] Of course, this one blow came out of the blue for Mr. Bettke - he did not see it coming. He thought Mr. Thebaud was still several feet away and was not prepared to respond. Mr. Bettke did not have the opportunity to fight back or to protect himself. Mr. Bettke did not approach the SUV or verbalize any threats; he did not have a chance to.

[125] Mr. Bettke's dogged pursuit of Mr. Thebaud's vehicle was troubling. I accept the defence's submissions about the social context in which Mr. Thebaud lives, and I accept that these factors may well have heightened his sense of vigilance and apprehension. However, as I have found, Mr. Thebaud had many other avenues open to him in terms of possible responses or choices to make that evening.

[126] The saying "the best defence is a good offence" may be accurate in hockey, but in all the circumstances before me, and considering the factors of s. 34(2), I cannot find that Mr. Thebaud's decision to approach Mr. Bettke's truck and strike him was a proportional or reasonable response to a threat that had not yet clearly materialized.

Conclusion

[127] After considering all of the evidence and applying the holistic approach described in Khill, I find that one of the three criteria provided in s. 34(1) of the Code is not available to the accused, that being: (c) the act committed is reasonable in the circumstances.

[128] As a result, I find that the Crown proved beyond a reasonable doubt that Mr. Thebaud is guilty of Count 1 of the indictment.

"J. Whately J."

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