

CANADA / JUDGMENT

R. v. Wu

2020 BCCA 128

COURT

British Columbia Court of Appeal

DECIDED

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2020 BCCA 128 R. v. Wu

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Wu,

2020 BCCA 128

Date: 20200508

Docket: CA45019

Between:

Regina

Respondent

And

Jian Hu (James) Wu

Appellant

Restriction on publication: A publication ban has been imposed under section 486.5 restricting the publication, broadcasting or transmission in any way of evidence that could identify the victim's child. This publication ban applies indefinitely unless otherwise ordered.

Publication bans have been imposed under section 486.5(7) restricting the publication, broadcasting or transmission in any way of the appellant's evidence relating to his ex-wife or of the Admissions of Fact marked as exhibit 33 in the court below relating to Cst. Den Haan. These publication bans apply indefinitely unless otherwise ordered.

Before:

The Honourable Mr. Justice Harris

The Honourable Mr. Justice Butler

The Honourable Madam Justice DeWitt-Van Oosten

On appeal from: An order of the Supreme Court of British Columbia,
dated November 7, 2017 (R. v. Wu, Vancouver Docket 26845).

Counsel for the Appellant:

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Place and Date of Hearing:

Vancouver, British Columbia

December 4, 2019

Place and Date of Judgment:

Vancouver, British Columbia

May 8, 2020

Written Reasons by:

The Honourable Mr. Justice Butler

Concurred in by:

The Honourable Mr. Justice Harris

The Honourable Madam Justice DeWitt-Van Oosten

Summary:

A jury found the appellant guilty of second degree murder of his wife. He attacked her with a knife, inflicting more than 250 wounds. At trial, he admitted the actus reus for the offence of murder but submitted that the evidence of intent, including the expert evidence of two doctors who opined that the appellant was likely in an abnormal dissociative mental state at the time of the killing, went no further than manslaughter. On appeal the appellant argues the trial judge erred by failing to explain how his dissociative mental state should factor into the jury's assessment of intent, causation and foreseeability. He also says the jury charge on provocation and manslaughter contributed to the erroneous charge on intent. In addition, he applies to introduce as fresh evidence the opinion evidence of a bloodstain pattern analysis expert, arguing

that the Crown's expert evidence was unreliable and unfairly undermined the defences left with the jury. Held: Application and appeal dismissed. The appellant is unable to meet the due diligence criterion for fresh evidence, nor could the proposed evidence, when taken with the other evidence at trial, be expected to have affected the result. The charge to the jury on intent, both for second degree murder and manslaughter, enabled the jury to decide the case in accordance with the law having regard to the salient evidence. The instructions were legally correct and the decision tree was logical and clearly explained. The jury could not have been confused or misled in considering the defences raised on the evidence and the question of whether the Crown had proved that he had the requisite intent for second degree murder.

Table of Contents

Background

[5] - [9]

Trial

[10] - [21]

Jury Charge Conferences and Jury Charge

[22] - [35]

Issues on Appeal

[36] - [37]

Fresh Evidence Application

[38] - [63]

Analysis

[40] - [63]

Due Diligence

[43] - [56]

Could the Evidence Have Affected the Result?

[57] - [63]

Charge to the Jury

[64] - [99]

Standard of Review

[64] - [67]

Appellant's Arguments

[68] - [68]

Analysis

[69] - [99]

The Manslaughter Charge Was Confusing and Caused the Jury to Focus on Objective Fault

[79] - [85]

No Link between Expert Evidence of Mental State and Intent

[86] - [91]

Structure of the Charge Was Confusing and Did Not Default to Manslaughter

[92] - [99]

Disposition

[100]

Reasons for Judgment of the Honourable Mr. Justice Butler:

- [1] On May 4, 2014, Jian Hu (James) Wu killed his 36-year-old wife, Jin (Jenna) Cheng, in a prolonged attack that began in their apartment and continued in a hallway outside of their apartment. The victim suffered at least 250 knife wounds at the hands of the appellant and bled to death because of injuries to her carotid artery and jugular vein. Following a 32-day trial before a judge and jury, the appellant was convicted of second degree murder. This was the second trial of the murder charge. A mistrial was declared after the first trial in November 2016 when the jury was unable to deliver a verdict. The issue at the second trial was intent. The appellant admitted the actus reus for the offence of murder, but argued that the evidence of intent went no further than manslaughter. In finding the appellant guilty of second degree murder, the jury must have rejected, or otherwise not been left with a reasonable doubt, by the expert evidence of two doctors who opined that the appellant was likely in an abnormal dissociative mental state at the time of the killing and was unable to form the specific intent for murder.
- [2] The appellant contends on appeal that the trial judge erred in law by failing to explain in the charge to the jury how the appellant's dissociative mental state factored into the jury's assessment of intent, causation and foreseeability. He also says the way the jury was charged on provocation and manslaughter contributed to the erroneous charge on intent.

- [3] Additionally, the appellant applies to introduce as fresh evidence the affidavit and bloodstain pattern analysis ("BPA") report of Joseph Slemko. The appellant seeks to introduce this evidence contending that parts of the evidence of Dr. Diane Cockle, the Crown's BPA expert, were unreliable. I understand this contention to be in support of an argument that her evidence unfairly undermined the defences left with the jury and led to a miscarriage of justice.
- [4] For the reasons that follow, I would dismiss the application to adduce fresh evidence and dismiss the appeal.

Background

- [5] The appellant and Ms. Cheng had been married for two years before Ms. Cheng was killed. It was an unhappy marriage. It was the second marriage for Ms. Cheng. Her seven-year-old daughter from the prior marriage lived with the couple. By the time of the offence, the appellant and Ms. Cheng had become estranged and their relationship was marked by a high degree of acrimony. The appellant believed he had been treated unfairly by Ms. Cheng.
- [6] On the morning of her death, Ms. Cheng excluded the appellant from a family outing with her daughter. At lunchtime, after they had returned to the apartment, the appellant became angry when Ms. Cheng also excluded him from lunch. An argument ensued and both were upset and angry. At one point Ms. Cheng waved a knife in front of the appellant's face. He testified that she called him a "bastard" and said, "I am going to fight you to the death." The appellant testified that he was frightened and pushed Ms. Cheng out of the kitchen. He remembered the beginning of a struggle but said that he went "totally blank" so that he did not recall using the knife to attack Ms. Cheng. The next thing he remembered was sitting in the apartment hallway near Ms. Cheng's body and a police officer was talking to him.
- [7] The evidence established that Ms. Cheng received multiple knife wounds in the attack that took place in the couple's condominium and in the hallway outside of their suite. Ms. Cheng's daughter was present when the attack began but she ran out of the suite part way through the assault. At para. 8 of the reasons for sentence, *R. v. Wu*, 2017 BCSC 2271, the trial judge summarized her factual findings about what happened during the attack, providing a helpful explanatory context for the issues raised on the appeal:
- (i) The pair argued and Mr. Wu approached Ms. Cheng, armed with a cleaver-type knife used for chopping vegetables;
 - (j) Ms. Cheng was unarmed and seated at her dining room table at the time that Mr. Wu commenced his attack on her;
 - (k) The offence occurred in Ms. Cheng's and Mr. Wu's home commencing in their condominium suite and continuing in the hallway. The expert evidence of Dr. Cockle at trial established that there were 11 key findings regarding blood-letting events;

- (l) The victim's only child, her daughter who was age 7 at the time, was present in their suite at the time of the commencement of Mr. Wu's attack of Ms. Cheng. ;
- (m) In the course of the attack in their suite, Mr. Wu struck Ms. Cheng repeatedly while she was standing as well as when she was on or close to the ground;
- (n) The force used by Mr. Wu on Ms. Cheng in the suite was substantial as indicated by the damage to the laminate flooring in the area where the attack commenced;
- (o) Although Ms. Cheng was safe in the suite after Mr. Wu departed, Ms. Cheng left the suite and went into the hall unarmed. She approached Mr. Wu from behind and put her arms around him. The reason for Ms. Cheng's actions in leaving the suite and holding Mr. Wu is not proven;
- (p) Those actions of Ms. Cheng were observed by a neighbour, Mr. Li, who had opened the door to his suite in response to knocking by Ms. Cheng's daughter. He took her daughter into his suite and from there she called 9-1-1;
- (q) The attack of Mr. Wu on Ms. Cheng continued outside of their suite in several locations in the hallway that were identified and described by Dr. Cockle, the expert witness who testified regarding blood splatter patterns;
- (r) Two of the findings were with regard to the events at the end of the hall near apartment 701 where Ms. Cheng came to her final resting place: (1) Multiple hand transfer stains, swipe patterns with associated cessations cast off patterns located at a height of 151 cm from the floor were consistent with Ms. Cheng's hands repeatedly coming into contact with the door of apartment 701 with force; and; (2) The impact pattern and transfer stains with flow were consistent with Ms. Cheng receiving a minimum of one blow while in a seated or kneeling position against the door of apartment 701;
- (s) The attack upon Ms. Cheng was extremely violent, with regard to both the prolonged duration of the attack and the number of injuries inflicted;
- ...
- (u) Mr. Wu repeatedly targeted an extremely vulnerable part of the deceased: her head and neck. Ms. Cheng suffered at least 250 stab and chop type wounds with her injuries most densely distributed over the left rear aspect of her neck, elsewhere over her head and neck, both of her hands, the distal left forearm/ wrist region and over her forearms;
- (v) The two injuries which were the likely cause of her death were the cutting of Ms. Cheng's jugular vein, and the near-total cutting of her carotid artery;
- (w) Substantial force was used by Mr. Wu in his attack which resulted in scoring and gauging of Ms. Cheng's skull and damage to the cutting edge of the knife;
- (x) There were numerous opportunities for Mr. Wu to stop his attack;

- (y) Ms. Cheng knocked on a neighbour's suite near her final resting place. The occupants of that suite 701, heard, through their closed door, her say in Mandarin words to the effect of "save me".
- [8] The police arrived six-and-a-half minutes after the 9-1-1 call. The first officer on the scene observed the appellant lying on the floor next to the body of Ms. Cheng with the knife next to her head. The officer called out and the appellant sat up in a cross-legged position. Another officer gave the appellant instructions to move down the hallway, which the appellant did, crawling on his hands and knees. One of the officers had a responsive conversation with the appellant in which he gave his name, said that he was not hurt and that he was the person that "did this".
- [9] There was a considerable amount of blood in the suite and in the hallway. The appellant was covered in blood but had only a small cut on his right pinkie finger that required one stitch and a couple of superficial cuts on the back of that hand. He also had an injury to his upper left arm that appeared to be a bite mark.

Trial

- [10] The Crown's evidence included the BPA evidence of Dr. Cockle. Dr. Cockle prepared a PowerPoint presentation on BPA evidence and a BPA report of the appellant's condominium and in the hallway where Ms. Cheng died. Dr. Cockle also testified at the first trial and her report and PowerPoint were submitted in evidence at that trial.
- [11] Dr. Cockle began by explaining what BPA is, the science behind it and some of the types of bloodstain patterns to which she would refer in her testimony about the crime scene. Dr. Cockle described a series of bloodletting events that began in the appellant's dining room and continued out into the hallway. She documented a variety of bloodstain patterns including spatter stains, impact patterns, drip trail patterns, projected patterns, cast off patterns, transfer stains and hand impressions. She opined that some injuries sustained by Ms. Cheng involved a "high level of force" and at one point that Ms. Cheng received "multiple blows to her head".
- [12] Defence counsel did not object to Dr. Cockle's qualification or to the admissibility of her report and opinion evidence at either trial. Defence counsel cross-examined Dr. Cockle but did not seriously challenge her opinion, including the parts of her evidence to which the appellant now objects.
- [13] During the defence opening statement, counsel told the jury that he would call the appellant to testify:

And that's why we want to call him. And what we're saying at the end of the day is we're not talking about a murder, we're talking about manslaughter, a serious offence, but it's a different state of mind. In fact, manslaughter doesn't require a state of mind other than consciousness. And that's really what we're dealing with here, and that's what he was operating under, and that's why, in my submission, at the end of the day -- I'll show you the evidence -- he's not able to even remember the relevant time.

[Emphasis added.]

[14] Following the opening statement, Crown counsel asked the judge to provide a mid-trial instruction to provide a correction for the comments of defence counsel concerning "consciousness" as the state of mind for manslaughter. The judge gave a brief ruling dismissing the Crown's application that she provide a mid-trial instruction. She was of the view the statements by counsel in his opening about the law relating to murder and manslaughter and the position of the defence were accurate up to the comment that, "manslaughter doesn't require a state of mind other than consciousness". As the jury was fully aware that the judge would provide instructions on the law in her final charge to the jury, she did not want to provide a mid-trial instruction that would draw unnecessary attention to an issue that was still developing and about which the evidence was incomplete. She stated:

My ruling therefore is that the issue can be clarified and emphasized in final instructions, and that I will not make a curative instruction to the jury at this time with regard to the defence Opening. However we will in clear terms revisit the use of the word consciousness at the close of the evidence, certainly amongst counsel and the precharge conference, and in my written instructions to ensure that there is no confusion left with the jury arising from the defence opening submissions with the use of the word "consciousness".

[15] The appellant testified that after a morning of conflict between him and Ms. Cheng, he confronted Ms. Cheng for bullying him. A struggle ensued between the appellant and Ms. Cheng and the appellant felt scared and angry. He testified that Ms. Cheng threatened to "fight [him] to death." He said that Ms. Cheng was yelling at him. He then went "totally blank" and the next thing he remembers is the voices of the police officers in the hallway.

[16] Dr. Shabehram Lohrasbe, a forensic psychiatrist, and Dr. Robert Ley, a forensic psychologist, presented evidence about the appellant's state of mind at the time of the offence.

[17] Dr. Lohrasbe interviewed the appellant on two occasions and prepared a report on the appellant's mental state at the time of the events. He opined that when the appellant attacked Ms. Cheng, he may have experienced dissociation, a mental defence against overwhelming emotions. His report contained the following conclusion:

It is likely that Mr. Wu experienced an abnormal mental state, reasonably characterized at least in part, as a dissociative episode at the time he killed his wife, based on the cumulative consideration of his history, clinical findings and personality testing, put together with what is known in general about patients who have had dissociative episodes in both criminal and non-criminal settings, and the literature on dissociation.

However, he also said that he could not place the appellant at any particular point on the continuum of impairment with any degree of certainty.

- [18] On cross-examination, Dr. Lohrasbe agreed that he could not rule out the possibility that the appellant killed his wife with full awareness and control. He also agreed that "no particular diagnosis equates with any particular legal finding, whether it's to do with the intention or voluntariness or insanity." Indeed, he agreed that the term, "abnormal mental state" is not defined or included as a specific diagnosis in the Diagnostic and Statistical Manual of Mental Disorders and that there is a debate in the psychiatric community about what dissociative amnesia actually means. He also agreed with counsel's suggestion that the appellant's statement to the police officer that, "I did it" suggested some awareness and memory of the situation.
- [19] Dr. Ley testified that the appellant "was experiencing an abnormal mental state and in that state his conscious awareness was relatively lacking in regard to his actions. He was not thinking logically. His cognitive and psychological abilities were impaired, such that in my view he was not thinking rationally, planfully [sic], logically. In my opinion, he was not thinking that he wanted to kill his wife." Dr. Ley also stated that the appellant was very fearful of Ms. Cheng because he viewed her as being "stronger, more physically fit, more forceful, angrier and that once their altercation started he was fearful that she would overwhelm and kill him." He was of the view that the altercation triggered a "psychophysiological state that is often referred to as a fight-or-flight response". According to Dr. Ley, the appellant had avoided conflict and fighting throughout his life but perceived himself to be in a situation where "the fight is on, and it's fierce, and that he would be, in my view, fighting for his life and reacting very instinctively or even instinctually to what he perceived as a life-threatening situation". Dr. Lohrasbe did not agree with this opinion. On cross-examination, he testified that the "fight, flight or freeze" concept is not recognized in psychiatric literature.
- [20] On cross-examination, Dr. Ley agreed that in a prolonged altercation, the longer the event goes on, the more a person starts to use more complex, rational, logical or sophisticated thinking or cognition. He also agreed that if one person attacks another person in a state of anger they do so with the intention to harm the other person. Further, he agreed that classifying someone as being in an abnormal mental state does not say anything about that person's intent at the time of an event.

- [21] Both doctors relied heavily on what the appellant said to them. Crown counsel cross-examined the experts on their assumptions, which were, of necessity, based on what they were told by the appellant. Defence counsel asked the jury to accept the appellant's evidence at trial and to find that the doctors based their opinions on assumptions that accorded with the appellant's evidence. Crown counsel's strategy at trial was, in part, to challenge the factual foundation for the doctors' opinions. Counsel attempted to establish that there were important discrepancies between the appellant's account to the doctors, his evidence in court and the other evidence tendered at the trial.

Jury Charge Conferences and Jury Charge

- [22] As noted, this was the second trial of the murder charge. The first trial also proceeded with a judge and jury, and a transcript of the jury charge from the first trial was available to the parties and the court. It was marked as an exhibit for identification. Counsel for both the Crown and the appellant were counsel at the first trial. They referred to the jury charge used at the first trial in making submissions on the charge for this trial. The judge prepared a number of drafts of her charge and solicited comments from counsel at a number of charge conferences.
- [23] The first charge conference took place on October 26, 2017. The judge asked whether the charge should include a summary of the evidence of Drs. Lohrasbe and Ley, observing that the former provided a great deal of evidence. The Crown was of the view that the judge should not give a summary, noting that at the first trial, counsel had agreed that should not be done. The rationale was that the judge's summary had the potential to influence the jurors' opinion of the expert evidence. Defence counsel expressed the same view but indicated that he had not made a final decision on whether such a summary should be part of the charge and would let the court know if his view changed. Defence counsel's position on that issue did not change.
- [24] Crown counsel submitted that the jury should be charged on the defence of provocation but thought it likely that defence counsel would make no submissions on that defence, consistent with the position he had taken at the first trial. Defence counsel agreed that the judge should charge the jury on provocation even though that defence "takes away from" the principal position advanced by the appellant. Ultimately, defence counsel did not make any submissions to the jury about provocation in his final address.
- [25] The third charge conference started on October 31, 2017, and continued the next day. By that time, the judge had provided drafts of the proposed charge to counsel who had given lists of their proposed changes to the judge. Counsel made numerous suggestions about proposed wording. Defence counsel again stated that he was not "going to be going to the jury on provocation", but made submissions on changes to the draft charge on provocation.

- [26] The fourth charge conference began on the afternoon of November 1 and continued the next day. The judge proposed that her charge regarding the state of mind for manslaughter would include the statement: "the state of mind for manslaughter is more than consciousness". This was intended as a "clarification with regard to the consciousness comment in defence counsel's opening". Defence counsel did not object to that clarification.
- [27] On November 2, the charge conference took a large part of the day. At the end of the conference, the judge advised counsel that they would have the final draft early the next morning. At 10:00 a.m. on November 3, counsel's closing addresses to the jury began. A final jury charge conference followed and counsel made submissions based on the third draft of the charge. The judge made final amendments to the draft and began charging the jury at 7:00 p.m. that evening. When the judge concluded her charge to the jury the following morning, counsel for the Crown and the defence indicated to the court that they were content with the charge and that no corrections or additions were needed.
- [28] The judge's charge was based on and consistent with the model jury instructions (Gerry Ferguson et al., eds., *Canadian Criminal Jury Instructions*, 4th ed. (Vancouver: The Continuing Legal Education Society of British Columbia, 2005) ("CRIMJI"); *Watt's Manual of Jury Instructions* 2nd ed. (Toronto: Carswell, 2015) ("Watt"); and *Model Jury Instructions*, online: National Judicial Institute <<http://www.nji-inm.ca>>.). The structure of the jury charge followed the CRIMJI structure.
- [29] The judge began her charge on second degree murder by setting out the essential elements of that offence. Given the position taken by the defence, the majority of the charge focused on the fifth element: whether the Crown had proved the specific intent for murder beyond a reasonable doubt. She instructed the jury on the common sense inference that a sane and sober person intends the natural and probable consequences of his or her voluntary actions. She referred to the evidence of Drs. Lohrasbe and Ley but, as discussed with counsel, she did not summarize their evidence. However, she gave standard jury instructions on how to approach expert evidence and that it was up to the jury to decide how much weight to give to the experts' opinions, and to decide whether the assumptions made by the experts were supported by the evidence. Both counsel provided their views and summary of the key points of the experts' evidence in their closing addresses.
- [30] The charge included the following:

If you decide that Jenna Cheng's death would be a natural consequence of Mr. Wu's actions, you may be entitled to conclude that Mr. Wu intended to kill Jenna Cheng by those actions. However you are not required to draw this conclusion. Before relying on this inference that a person normally intends the natural and probable consequences of his or her voluntary actions you must consider all the circumstances in this case, including evidence of what the accused said and did in deciding whether such an inference should be relied upon in this case.

In this case, you've heard evidence from Dr. Lohrasbe that Mr. Wu was suffering from an abnormal mental state coupled with a dissociative episode at the time of the events. You've also heard the evidence of Dr. Ley in this regard. If you believe, or it leaves you with a reasonable doubt, that an abnormal state affected Mr. Wu's ability to foresee the natural and probable consequences of his actions, then you must not rely upon this inference when you decide whether Mr. Wu had the necessary intention.

However, you are not required to draw that inference about Mr. Wu. Indeed you must not do so if on the whole of the evidence, including the evidence of Drs. Ley and Lohrasbe, you have a reasonable doubt whether Mr. Wu had one of the intents required for murder.

[31] The judge provided a summary of the evidence of the appellant including that he became fearful when Ms. Cheng said she would fight him to the death while holding a knife up to his face. The judge indicated that the appellant said he had no memory of what happened after the initial confrontation until he remembers sitting on the floor in the hallway and hearing the police officers' English voices. After summarizing the appellant's evidence, the charge included the following:

You have also heard the opinion evidence of Dr. Ley, a psychologist called by the defence, and Dr. Lohrasbe, a psychiatrist called by the defence. These doctors gave evidence about how traumatic events may affect the cognitive functioning of an individual who experiences them. You should consider this evidence together with the other evidence in deciding whether the Crown has proved beyond a reasonable doubt that Mr. Wu had the required intent to commit second-degree murder. I want to remind you, however, that Mr. Wu does not have to prove anything and you do not have to agree with the opinions of Dr. Ley and Dr. Lohrasbe to conclude that the Crown has not proven that Mr. Wu had the necessary intent. It is sufficient that you have a reasonable doubt arising from any evidence or lack of evidence, including the medical evidence that you have heard.

[32] The judge then turned to the defence of provocation. She began that instruction by stating:

If you are satisfied that the Crown has proven all of the essential elements of second degree murder, you must then consider whether the Crown has proven beyond a reasonable doubt that the partial defence of provocation does not apply in this case. The killing that would otherwise be murder is reduced to manslaughter if the person who committed it did so in the heat of passion caused by sudden provocation.

[33] After charging the jury on provocation, the judge began her charge on manslaughter. The judge explained that the Crown must prove specific intent for the offence of murder, but that specific intent is not required for manslaughter. Her charge about the criminal fault required for manslaughter included her comment on defence counsel's opening statement:

The criminal fault in manslaughter is the commission of the unlawful act which is objectively dangerous in the sense that a reasonable person in the same circumstances as the accused (as described below) would recognize that the unlawful act would subject another person to the risk of bodily harm which is neither trivial nor transitory. This mental state required for manslaughter is more complex than the description provided in the defence's opening statement when he said that only consciousness was required.

[Emphasis added.]

[34] In discussing the third element for manslaughter, whether the appellant committed an unlawful act that was dangerous, she observed that the jury should have no difficulty in determining that the appellant committed the unlawful act of cutting Ms. Cheng. She noted that the second part of that element required the jury to decide whether the unlawful act was "objectively dangerous in the sense that a reasonable person in the same circumstances as Mr. Wu would recognize that the unlawful act would subject another person to the risk of bodily harm that is neither trivial nor transitory." The judge explained the concept of a reasonable person, and indicated that if the Crown failed to prove that element the appellant was to be found not guilty of manslaughter:

The words "reasonable person" do not include the personal characteristics of the accused person. In other words, we are not concerned with the state of mind of Mr. Wu. We are concerned with the state of mind of a hypothetical reasonable person in the circumstances of Mr. Wu, and we are not concerned about an intention to cause death or even an intention to cause bodily harm that was likely to kill Ms. Cheng. We are simply concerned with whether a reasonable person in all of the circumstances would have appreciated that bodily harm that is neither trivial nor transitory was the foreseeable consequence of cutting Ms. Cheng.

I doubt that you will be overly taxed in answering this question. It is difficult to imagine that a reasonable person would not have appreciated that bodily harm that is neither trivial nor transitory was the foreseeable consequence of cutting Jenna Cheng, but that is a matter for you. If, however, you are not satisfied beyond a reasonable doubt that a reasonable person in all the circumstances would have appreciated that bodily harm that is neither trivial nor transitory was the foreseeable consequence of the dangerous act that was being undertaken, then you must find Mr. Wu not guilty of manslaughter.

[35] The judge then summarized the positions of the Crown and the defence using summaries provided by counsel. The summary of the defence position included:

Mr. Wu is in an abnormal state of mind at the relevant time in this matter. That abnormal state of mind is occasioned by aroused emotions quickly moving from anger into a state of extreme fear, terror and panic. He is faced with a critical life or death situation. He believes he is forced to fight for his life. In these circumstances, that part of his brain responsible for logical thinking and goal-directed behaviour is very greatly impaired. He is, as Dr. Ley and Dr. Lohrasbe say, not forming an intent to kill or cause bodily harm knowing that death is likely. That part of his brain required to form that kind of intent is not functioning. He is reacting in an automatic and

instinctive state to save himself. His conscious mind is disengaged. He is not forming the intent to kill or cause bodily harm appreciating the consequences of what is happening around him.

The focus of the defence at trial is to show that the requisite intent the Crown must establish has not been proven. The defence evidence and the Crown evidence come together so that based on a totality of the evidence Mr. Wu has not formed the requisite intent for murder and is guilty of, at most, manslaughter.

Issues on Appeal

[36] The appellant's factum advanced two grounds of appeal alleging errors in the jury charge. At the hearing, the appellant did not pursue his second ground of appeal which alleged that the judge erred in failing to distinguish between two events that comprised the attack on Ms. Cheng. In the factum, the appellant argued that the first event took place in the apartment, to which the defence of provocation applied, and the second took place in the hallway, to which the defence of self-defence should have applied. However, at the hearing, counsel took the position that neither provocation, nor self-defence, should have been left with the jury. Instead, the appellant argues that the structure of the charge was confusing because it left the jury with no route to manslaughter other than by finding that the Crown had failed to disprove provocation. As counsel suggested, I will deal with that argument as part of the primary ground of appeal:

The trial judge erred in law by not adequately explaining to the jury how the appellant's dissociative mental state factored into an assessment of intent, causation and foreseeability.

[37] The appellant also applies to introduce the report of Mr. Slemko as fresh evidence pursuant to s. 683 of the Criminal Code, R.S.C. 1985, c. C-46. He says in substance that the fresh evidence reveals reliability concerns about the evidence of Dr. Cockle and had those concerns been exposed at trial, the defences left with the jury would have carried greater strength.

Fresh Evidence Application

[38] The appellant seeks to adduce the affidavit of Mr. Slemko attaching his report criticizing the BPA evidence tendered at trial by Dr. Cockle. The appellant says that Dr. Cockle's opinion evidence created a mistaken impression that the appellant was the aggressor in the apartment, when this could not properly be inferred from that evidence. The appellant argues that Mr. Slemko's evidence, if admitted, would demonstrate that Dr. Cockle's comments about the force with which some of the bloodstains were created and her characterization of some of the patterns were prejudicial and not scientifically reliable. In his factum, the appellant argued that Dr. Cockle's overstated opinion evidence was sufficiently egregious to result in a miscarriage of justice. However, at the hearing of the appeal, the appellant submitted this argument is not a stand-alone ground of appeal; rather, the fresh evidence supports his arguments about the errors in the jury charge on intent.

[39] For the reasons that follow, I would dismiss the application to adduce Mr. Slemko's evidence.

Analysis

[40] Pursuant to s. 683(1) of the Code, this Court is authorized to receive evidence where it is in the interests of justice to do so. Fresh evidence is evidence that existed at the time of trial but, for various reasons, could not be put before the court. New evidence is evidence that only became available subsequent to the trial: *Jens v. Jens*, 2008 BCCA 392 at paras. 27-29. While Mr. Slemko's affidavit and report did not exist at the time of trial, the appellant seeks to adduce the evidence as fresh evidence.

[41] The criteria for admitting fresh evidence are articulated in *Palmer v. The Queen*, [1980] 1 S.C.R. 759 at 775:

- (1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases: see *McMartin v. The Queen* [[1964] S.C.R. 484].
- (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.
- (3) The evidence must be credible in the sense that it is reasonably capable of belief, and
- (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

[42] The first and fourth criteria are of particular concern for this application. I am of the view that the appellant has failed to satisfy the due diligence requirement and that failure is significant in these circumstances. Further, the proposed evidence could not reasonably be expected to have affected the result.

Due Diligence

[43] There is no question that Mr. Slemko's report and affidavit could have been available with due diligence at the time of trial. Indeed, as I will explain, the decision not to seek the evidence of a BPA expert to contradict or challenge Dr. Cockle's evidence was a tactical decision made by trial counsel.

[44] In *R. v. Smith* (2001), 161 C.C.C. (3d) 1 (Ont. C.A.), leave to appeal ref'd [2002] S.C.C.A. No. 156, the accused argued the trial judge erred by failing to grant an adjournment to permit the accused to obtain a second concurring expert report on Shaken Baby Syndrome. In dismissing the application to adduce the fresh evidence on appeal, Justice Simmons, at para. 71, summarized principles applicable to the admission of fresh opinion evidence including:

· Absent incompetence, tactical decisions not to present evidence, or not to pursue remedies for obtaining evidence at trial must generally preclude satisfaction of the first Palmer criterion. The interest of justice in finality of the criminal process requires that such decisions weigh

significantly against subsequent admission of the same evidence. Nevertheless, where a decision was made not to pursue a remedy for obtaining evidence at trial, "assessment of the totality of circumstances" may involve consideration of both the realistic likelihood of obtaining the evidence at trial and the strength of the proposed evidence.

· Where proposed fresh evidence consists of "a concurring expert opinion", it may be excluded either because of an absence of due diligence or because the interest of justice in finality of criminal proceedings forecloses its admissibility. Ultimately what is required is an assessment of whether "the concurring opinion" raises new considerations with sufficient potential to impact the verdict such that the interests of justice require its admission.

[Emphasis added.]

[45] In *R. v. Falkner*, 2008 BCCA 277, the accused had not called a BPA expert at trial but on appeal, applied to adduce as fresh evidence blood spatter analysis by Mr. Slemko. Justice Hall, writing for the Court, dismissed the application, stating at para. 17:

A tactical decision against tendering evidence at trial will usually militate against an appeal court exercising its jurisdiction to allow the evidence to be admitted on appeal: see *R. v. Smith* (2001), 154 O.A.C. 51, 161 C.C.C. (3d) 1, and *R. v. G.D.B.*, [2000] 1 S.C.R. 520, 2000 SCC 22. It could quite reasonably have been viewed as detrimental to the defence advanced by the appellant at trial (a form of alibi defence or perhaps better described as "non-involvement in anything related to a homicide") for the defence to put in issue questions as to the degree of guilt of the appellant by adducing evidence from an expert to contest the conclusions expressed by S./Sgt. Mellis. The election was made to leave this aside to seek to advance with full vigour the defence of the appellant in which he denied any complicity or culpability in the homicide. In my opinion, such a considered tactical decision at trial should usually be a bar to an application to adduce new evidence on appeal.

[Emphasis added.]

[46] Justice Hall acknowledged that the interests of justice are always paramount but found that the proposed evidence "does not in my view rise to the level of significantly undermining the evidence adduced from [the Crown] expert at trial": at para. 25. Finding that there was no due diligence exercised by defence counsel, he held that "the proposed evidence here is not of sufficient cogency to warrant the damage to the integrity of trial finality that is a core value of the justice system": at para. 26.

[47] In addition to *Smith* and *Falkner*, other appeal courts have made similar observations about attempts to tender fresh evidence on appeal where the due diligence criterion is not met: see *R. v. Walle*, 2012 SCC 41 at paras. 82-83; *R. v. Forcillo*, 2018 ONCA 402, leave to appeal ref'd [2018] S.C.C.A. No. 258 at para. 109.

[48] The appellant did not call BPA evidence at either his first or second trial. The appellant now says that issues concerning expert evidence such as bloodstain analysis are evolving, difficult and complex. In support of this argument, he refers to *R. v. Jenkins*, [2004] EWCA

Crim 2047, that he calls a bellwether case and in which Mr. Slemko testified, and Terry Laber et al., "Reliability Assessment of Current Methods in Bloodstain Pattern Analysis" (2014) National Institute of Justice Final Report No. 247180. However, as the respondent argues, Canadian courts have considered BPA evidence for more than two decades and the appellant does not explain how any issue arising in this case has a connection with Jenkins or the report. Further, the Jenkins decision and the report were available to defence counsel well before trial.

[49] The application to adduce fresh evidence must be considered in the context of the proceedings as a whole. This was a retrial after a mistrial was declared due to a hung jury. The Crown called Dr. Cockle at the first trial to give the same BPA evidence that was tendered at the second trial. Counsel agreed to be bound by the qualification ruling from the first trial and agreed to address Dr. Cockle's evidence in the same manner as it had been addressed at the first trial.

[50] Not only did the appellant not seriously challenge Dr. Cockle's evidence at trial, the defence relied on her evidence to support its theory of the case. In his closing address to the jury, defence counsel introduced his discussion of Dr. Cockle's evidence by observing that it did not contradict any other evidence:

MR. ORRIS: Dr. Cockle says that the struggle, she refers to it as a blood letting because she's basing it on the blood analysis, begins in the apartment and that, of course, is certainly what we get from the other evidence; Mr. Wu, [his daughter]. So, let's -- I'll just deal with Cockle's evidence because I don't think it conflicts with any other.

[51] Defence counsel then described to the jury the sequence of events said to support its theory of the case, basing those circumstances in large part on the evidence of Dr. Cockle. Indeed, in the summary of the defence position that was included in the charge to the jury, defence counsel stated:

The blood splatter evidence, the evidence of Dr. Orde, the evidence of Shao Li, and the state of Mr. Wu when found by the police proves that Mr. Wu's abnormal mental state instinctively acting to preserve his life continued in the hallway until the police arrived.

[Emphasis added.]

[52] Having tried the case before and considered it again, experienced defence counsel decided to accept the BPA evidence presented by the Crown and to use it to support the argument on intent, suggesting that it was probative of the appellant's abnormal dissociative mental state. The defence decision not to present its own expert to amplify, explain or contradict Dr. Cockle's evidence was strategic and tactical. As the respondent argues, the appellant is now attempting to revisit trial tactics.

- [53] In addition, Mr. Slemko was well-known to defence counsel at the time of trial. Defence counsel had acted for the defence at trial and on appeal in *Falkner*. On appeal in *Falkner*, as in this case, counsel sought to adduce a report of Mr. Slemko as fresh evidence, having elected not to call a BPA expert at trial. That application was dismissed. Given his previous involvement with Mr. Slemko, long before the present trial, defence counsel must have been aware of Mr. Slemko's experience in BPA analysis and of any issues relating to such evidence.
- [54] The due diligence criterion is applied less strictly in criminal cases because a strict application could lead to a miscarriage of justice: *R. v. G.D.B.*, 2000 SCC 22 at para. 19. Referring to *R. v. Aulakh*, 2012 BCCA 340, and *R. v. Dunbar, Pollard, Leiding and Krant*, 2003 BCCA 667, leave to appeal ref'd [2004] S.C.C.A. No. 217, the appellant argues that the due diligence factor has less relevance here because the fresh evidence is adduced to prevent a miscarriage of justice, implying that the issue touches on the integrity of the trial process. I would reject the appellant's suggestion that this application raises any issue about the integrity of the trial process. *Aulakh* and *Dunbar* were concerned with applications to adduce fresh evidence where the issue on appeal was ineffective assistance of counsel. No such argument is advanced here, and there is no other way in which the appellant's application raises an issue about the integrity of the trial process.
- [55] An additional shortcoming of the appellant's application is that he does not explain failing to adduce expert BPA evidence at trial. Further, he gives no reason for not objecting to those parts of Dr. Cockle's evidence that he now says were unreliable and may have misled the jury in considering the appellant's defences, especially provocation.
- [56] It is clear that the decision not to call BPA evidence was a considered decision of defence counsel; it was a tactic used to find some support for the proposition that the appellant stabbed Ms. Cheng while in a dissociative state. I agree with the view expressed in *Falkner*. In these circumstances, where a strategic choice was made not to pursue a possible avenue of expert evidence, this Court should generally be reluctant to exercise its jurisdiction to permit the introduction of fresh evidence on appeal. Nevertheless, it is still necessary to consider the cogency of the proposed evidence. When I do that, I am persuaded that it is not in the interests of justice to grant the appellant's application.

Could the Evidence Have Affected the Result?

- [57] Dr. Cockle testified about the bloodstains found both in the apartment and in the hallway where Ms. Cheng died. Mr. Slemko's report only challenges Dr. Cockle's findings regarding the bloodstains in the apartment. Unlike Dr. Cockle, Mr. Slemko did not attend the scene and acknowledges that there are "limitations inherent to bloodstain pattern analysis conducted from the review of photographs without personal attendance at the scene". His critique can be summarized as follows:

- He disagrees with Dr. Cockle's opinion that cuts to the wooden floor ("defects to the floor") could be sequenced to "the bloodletting event", as they may have existed prior to the bloodletting;
- He disagrees with Dr. Cockle's opinion that certain bloodstain patterns were indicative of a "high level of force", or that it was possible to conclude that the deceased came in contact with the apartment door "with force". He suggests that Dr. Cockle could not have arrived at those opinions based on the BPA and that the comments were inflammatory;
- He disagrees with Dr. Cockle's conclusions that the bloodstain patterns were consistent with a knife striking the wall or door in two locations;
- He disagrees with Dr. Cockle's view that bloodstain patterns on closet doors were consistent with someone (Ms. Cheng) who was walking or running and says that the pattern would also be consistent with an individual swinging a blood contaminated object; and
- He disagrees with Dr. Cockle's identification of the location "where the event started", suggesting that it is not possible to determine the location where wounds were inflicted based on BPA evidence.

[58] The appellant's primary position at trial was that he was in an abnormal dissociative mental state. Trial counsel for the defence may well have been of the view that the characterization of blood stains as indicating a "high level of force" provided some support to this argument. On appeal, the appellant now argues that Dr. Cockle's evidence was problematic because parts of it were unreliable and "painted a different story than was told by the appellant before his dissociative state commenced, and showed him to perhaps be the aggressor inside the apartment, when he could equally have been either defending himself or attempting to flee." He suggests that Dr. Cockle's evidence unfairly undermined the jury's consideration of the defence of provocation because some of the inferences drawn by Dr. Cockle suggested that rather than reacting to a wrongful act or insult committed by Ms. Cheng, the appellant was the initiator throughout.

[59] If Mr. Slemko's evidence had been presented at trial, the totality of the evidence about how the sequence of events transpired would not be different in any material way. The blood stains in the apartment and the hallway belonged to Ms. Cheng. She was cut at least 250 times by a knife wielded by the appellant. The evidence of Mr. Wu, Ms. Cheng's daughter and a neighbour supported that sequence of events. The appellant has never disputed the deceased's movements through the apartment and the fact that there were a number of bloodletting events in the apartment occurring when she was standing and near the floor.

[60] The appellant does not point to any error in the charge about the rules governing expert opinion evidence. The jury was properly instructed that they were not bound by Dr. Cockle's opinion. Further, the appellant now concedes that the fresh evidence application is not sufficient to be a stand alone ground of appeal.

- [61] In summary, the proposed evidence of Mr. Slemko is not fresh in any relevant sense, as that term was used in *R. v. Phillion*, 2009 ONCA 202 at para. 233. It is a new report about evidence that was canvassed in detail at trial (and at the first trial of this matter) and does not offer anything appreciably new or different, other than some relatively minor criticism of the Crown's expert. I fail to see how the proposed evidence could reasonably, when taken with the other evidence at trial, be expected to have affected the result.
- [62] This is a case in which defence counsel made a considered, tactical decision not to challenge the BPA evidence of Dr. Cockle at trial. I agree with the approach suggested by Justice Doherty in *R. v. Maciel*, 2007 ONCA 196 at para. 50 (cited with approval in *Falkner*):

If the evidence could have been led at trial, but for tactical reasons it was not, some added degree of cogency is necessary before the admission of the evidence on appeal can be said to be in the interests of justice. Otherwise, the due diligence consideration would become irrelevant.

- [63] The appellant has not been able to demonstrate any cogency, let alone the added degree necessary in these circumstances. It is not in the interests of justice to admit the evidence of Mr. Slemko. I would dismiss the application.

Charge to the Jury

Standard of Review

- [64] Jury charges are intended to provide a jury with the tools required to reach a verdict in accordance with the law: *R. v. Baker*, 2019 BCCA 199 at para. 32. In *R. v. Ball*, 2019 BCCA 32, at para. 50, Justice Dickson aptly summarized the requirements for an adequate charge:

The purpose of jury instructions is to educate and guide the jury in reaching a true verdict according to the evidence. Consequently, jury instructions are adequate when they enable the jury to understand the live issues, the relevant law and the salient evidence to be considered in resolving the issues. In other words, jury instructions are adequate when they are legally correct, comprehensive and comprehensible: *R. v. Rodgerson*, 2015 SCC 38 at paras. 30, 50, 54; *R. v. Pearce*, 2014 MBCA 70 at paras. 111-112.

- [65] Justice Moldaver, for the majority, in *R. v. Calnen*, 2019 SCC 6, explained that "[a]n appellate court undertakes a functional approach in reviewing a jury charge, asking whether the charge as a whole enabled the trier of fact to decide the case according to the law and the evidence": at para. 8. Justice Moldaver also referred to Justice Bastarache's expression of the "cardinal rule" from *R. v. Daley*, 2007 SCC 53 at para. 30:

The cardinal rule is that it is the general sense which the words used must have conveyed, in all probability, to the mind of the jury that matters, and not whether a particular formula was recited by the judge. The particular words used, or the sequence followed, is a matter within the discretion of the trial judge and will depend on the particular circumstances of the case.

[66] When assessing the adequacy of a charge, an appellate court must look at the charge in the context of the trial as a whole, including the addresses of counsel to the jury. Further, counsel are expected to assist the trial judge in constructing an adequate charge so that a failure to object is a factor to take into account on appellate review: Daley at para. 58:

Finally, it should be recalled that the charge to the jury takes place not in isolation, but in the context of the trial as a whole. Appellate review of the trial judge's charge will encompass the addresses of counsel as they may fill gaps left in the charge: see Der, at p. 14-26. Furthermore, it is expected of counsel that they will assist the trial judge and identify what in their opinion is problematic with the judge's instructions to the jury. While not decisive, failure of counsel to object is a factor in appellate review. The failure to register a complaint about the aspect of the charge that later becomes the ground for the appeal may be indicative of the seriousness of the alleged violation. See Jacquard, at para. 38: "In my opinion, defence counsel's failure to object to the charge says something about both the overall accuracy of the jury instructions and the seriousness of the alleged misdirection."

[67] In short, the test is whether the jury was properly, not perfectly, instructed and whether the jury was properly equipped to decide the case: Calnen at para. 9.

Appellant's Arguments

[68] The appellant says the fundamental problem with the jury charge was that it did not adequately provide the jury with a route to find the appellant guilty of manslaughter rather than second degree murder. He identifies three problems with the charge. First, the appellant argues that the manslaughter charge was confusing as it instructed the jury not to consider the appellant's state of mind when deciding if the Crown had proved the intent for manslaughter. He says that this would lead the jury to conclude he was guilty of murder. Second, he says the charge did not adequately link the expert evidence about the appellant's dissociative state with his mental state at the time of the offence. He says the charge failed to link that evidence with the common sense inference and the proper assessment of the element of intent. Third, the appellant argues the judge failed to explain to the jury that if it found that the intent for murder was not proved, it should default to a verdict of manslaughter. In this regard, he says that the structure of the charge was confusing because the jury would have understood that the only route to a manslaughter verdict was through provocation.

Analysis

[69] I will first explain why I am of the view that the jury charge, when viewed in the context of the trial and counsel's addresses to the jury, adequately equipped the jury to decide the case. I will then address the particular arguments advanced by the appellant.

- [70] The appellant fairly concedes that the judge's instructions on the law dealing with second degree murder, provocation and manslaughter, considered individually, are not objectionable. However, he argues that the jury charge as a whole did not adequately equip the jury to deal with the particular circumstances of the offence, the evidence of the appellant's mental state and the defence position that the Crown could not prove the specific intent required for murder. I cannot accept the appellant's submissions. In my view, the jury could not have been confused about the main issue it had to decide: whether the appellant should be found guilty of second degree murder or manslaughter. The judge's charge combined with the way the Crown and defence counsel presented their cases ably equipped the jury to determine whether the Crown had proved that the appellant had the intent required for second degree murder. The key issues were highlighted by defence counsel's opening and closing addresses to the jury and were fully explained in the jury charge.
- [71] As noted in Daley, the charge must be assessed in the context of the whole of the trial. Here, the submissions of counsel and the judge's charge to the jury clearly directed the jury to the principal questions. In his opening, defence counsel made it abundantly clear that the issue was whether the Crown had proven the specific intent for murder or whether the appellant was guilty of manslaughter:

I want to start off by saying that the issue in this case at the end of the day -- the Crown mentioned it briefly in their opening -- but the issue at the end of the day is what was in Mr. Wu's mind at the time that he had the confrontation with his wife in the apartment; secondly, in the hallway.

When we talk about the crime of murder -- and the case here for the Crown is the murder of Mr. Wu's wife -- the Crown has to prove that there was a specific intent to kill, on other words, an active mind thinking along those lines. There is the secondary intent that is an active mind thinking about causing bodily harm that the mind was likely to cause death, and careless and reckless about whether the death ensued. Those are different intents, but they're basically the same when you think about it.

But before we get there, you need to know about Mr. Wu, because he's never denied that he's responsible for the death of his wife. That's never an issue. The issue here is whether it's manslaughter, which is an unintentional causing of death, or whether it's murder, which is an intentional causing of death. That's really what it comes down to.

And what we're saying at the end of the day is we're not talking about a murder, we're talking about manslaughter, a serious offence, but it's a different state of mind.

- [72] In charging the jury on the offence of second degree murder, the defence of provocation and the included offence of manslaughter, the judge followed the structure in CRIMJI. She first charged the jury on the elements of second degree murder. In doing so, the charge highlighted the question of intent and the appellant's contention that the Crown failed to establish he had the required intent. Consistent with counsel's submissions, she did not summarize the evidence of the doctors relied upon by the defence. However, she referred to

the general substance of the doctors' evidence and clearly told the jury that the evidence, even if they did not accept it, could raise a reasonable doubt as to whether the appellant had the requisite intent for second degree murder.

[73] In concluding the charge on second degree murder, after summarizing the elements that the Crown must prove, she instructed the jury as follows:

You must return a verdict of not guilty on the offence of second degree murder if the Crown has not proven each of these elements beyond a reasonable doubt. You would then go on to consider the included offence of manslaughter discussed below.

[Emphasis added.]

[74] The judge then turned to provocation and provided her instruction on the elements and onus of proof for that defence. She then transitioned to the charge on manslaughter with the following instructions:

If you have found that the Crown has proven beyond a reasonable doubt all of the elements of second-degree murder and the partial defence of provocation fails, you would return a verdict of guilty of murder as charged. If you all agree that the answer to all four of these questions is no, then the conditions for provocation are present and you must acquit Mr. Wu of murder, but find him guilty of manslaughter and return that verdict.

The next topic is the included offence of manslaughter

If you find that the Crown has not proven beyond a reasonable doubt all of the elements of second-degree murder, then you next consider the included offence of manslaughter. In other words, if you're satisfied that Mr. Wu committed an unlawful act that caused Ms. Cheng's death, but are not satisfied that the Crown has proven beyond a reasonable doubt that Mr. Wu intended to cause Ms. Cheng's death or intended to cause her bodily harm that he knew was likely to cause her death and was reckless whether death would ensue, you must go on to consider the included offence of manslaughter.

[Emphasis added.]

[75] In dealing with the third element of manslaughter, which was described as the "objective fault component", the judge stated:

I doubt that you will be overly taxed in answering this question. It is difficult to imagine that a reasonable person would not have appreciated that bodily harm that is neither trivial nor transitory was the foreseeable consequence of cutting Jenna Cheng. But that is a matter for you. If however you are not satisfied beyond a reasonable doubt that a reasonable person in all the circumstances would have appreciated that bodily harm that is neither trivial or transitory was the foreseeable consequence of the dangerous act that was being undertaken, then you must find Mr. Wu not guilty of manslaughter.

[Emphasis added.]

- [76] Contrary to the appellant's submissions, the charge to the jury did precisely what it was supposed to do. It allowed the jury to understand the live issues, informed them of the relevant law and directed them to the salient evidence to consider in order to resolve the issues. Further, the structure of the jury charge provided the jury with an avenue to a verdict of second degree murder and two avenues to a verdict of manslaughter. The charge was actually broader in scope than sought by the appellant as it also included a path to a possible verdict of not guilty of either murder or manslaughter.
- [77] The jury could not have been confused by the choice between second degree murder and manslaughter. The charge presented them with a decision tree to follow: a) if the Crown proved the elements of second degree murder, they must return a verdict of second degree murder; b) unless the Crown failed to disprove the conditions for provocation, in which case, it must return a verdict of manslaughter; and c) if the Crown disproved one of the conditions for provocation, the jury had to return a verdict of guilty of second degree murder. The jury was directed to consider the included offence of manslaughter only if it decided that the Crown had failed to prove the requisite intent for murder. The instruction on manslaughter gave the jury the path to finding that the accused was not guilty of that offence, but the judge doubted the jury would have difficulty with that question, and would likely return a verdict of manslaughter should they get to that final issue.
- [78] The instructions were legally correct and the decision tree was logical and clearly explained. In my view, the jury could not have been confused or misled in considering the defences raised on the evidence and the question of whether the Crown had proved that he had the requisite intent for second degree murder. Nevertheless, I will consider the specific arguments advanced by the appellant.

The Manslaughter Charge Was Confusing and Caused the Jury to Focus on Objective Fault

- [79] The appellant's somewhat academic argument on this alleged error starts from the premise that manslaughter can be committed in diverse ways that can be divided between "voluntary" and "involuntary" manslaughter. He points to *R. v. Prince*, 2007 MBCA 15 at para. 36, which references the following statement in Tremeeear's *Criminal Code* (Toronto: Carswell, 2007):

Manslaughter is either "voluntary" or "involuntary". In voluntary manslaughter, the mental element of murder is proven, but a reasonable doubt about some defined mitigating circumstance, for example provocation under s. 232, reduces what otherwise would be murder to manslaughter. Involuntary manslaughter includes any culpable homicide that lacks the mental element of murder. It may be committed, in any way described in s. 222(5).

[80] The appellant develops his argument suggesting that there is little judicial commentary on the meaning of the term "involuntary" as it relates to manslaughter. He suggests that the term creates confusion because "the actus reus for all criminal offences, including manslaughter, is a voluntary act." There is no doubt that the stabbing of Ms. Cheng was a voluntary act, but by focusing on that act, the jury charge misled the jury because they would have been distracted from considering the appellant's state of mind when he committed that act. The appellant argues:

The appellant submits that the use of the term involuntary, as referenced by the trial judge in this case, (which appears to have arisen without any in-depth analysis of the ramifications of the term over the past six-plus decades in Canadian law) deflected the trial judge, and ultimately the jury, from focusing on the fault element of the act itself (the stabbing), and not delving into the intent element in relation to the stabbing. What arose in the circumstances of this case was essentially an objective assessment of intent arising from the many stab wounds.

[81] There is little merit to this argument. There is no basis for the suggestion that the use of the term involuntary somehow misled the jury. The judge did not use the term "involuntary" in the jury charge. The jury was never provided with an instruction about voluntary versus involuntary manslaughter. The judge used the term in her mid-trial ruling, at para. 3, where she noted that in Watt, "involuntary manslaughter is 'an unlawful killing that lacks the mental element required to make it murder'". The appellant does not explain how that single reference from the mid-trial ruling could have led the judge and, importantly the jury, astray.

[82] The charge to the jury provided correct instructions on intent for both second degree murder and manslaughter. Of necessity, those instructions were different. In the murder instruction, the jury was told that if they accepted or were left with a reasonable doubt about the evidence that the appellant was in a dissociative state such that he could not have formed the requisite intent, they must return a verdict of not guilty to the second degree murder charge.

[83] In the manslaughter charge, the jury was instructed that the appellant had committed an unlawful act and that he did not dispute that. The judge instructed the jury that "you should be satisfied beyond a reasonable doubt that Mr. Wu committed an unlawful act. However, that is for you to decide." It was not necessary for the judge to instruct the jury on the mens rea for the underlying unlawful act, because the defence never took the position that his act was not unlawful or involuntary. The primary issue for the jury to determine on manslaughter was foreseeability--whether a reasonable person in all the circumstances would have appreciated that bodily harm that is neither trivial nor transitory was the foreseeable consequence of the appellant's dangerous act. In other words, it was in the context of the charge on foreseeability that the judge instructed the jury to use an objective assessment.

[84] The charge was consistent with the test for the mens rea of unlawful act manslaughter as set out in *R. v. Creighton*, [1993] 3 S.C.R. 3 at 64-66. Justice McLachlin (as she then was) noted that it is settled law that for offences such as manslaughter, actual intention or knowledge is not a factor to be considered. Rather, the question is whether the accused appreciated the risk to which an objective test is applied. That test does not require consideration of experiential, educational or psychological defences, mental disabilities or personal factors falling short of incapacity. Justice McLachlin summarized the correct approach at 65-66:

To summarize, the fundamental premises upon which our criminal law rests mandate that personal characteristics not directly relevant to an element of the offence serve as excuses only at the point where they establish incapacity, whether the incapacity be the ability to appreciate the nature and quality of one's conduct in the context of intentional crimes, or the incapacity to appreciate the risk involved in one's conduct in the context of crimes of manslaughter or penal negligence. The principle that we eschew conviction of the morally innocent requires no more.

[Emphasis added.]

[85] In short, the judge's instruction correctly followed the law regarding foreseeability for manslaughter.

No Link between Expert Evidence of Mental State and Intent

[86] The appellant argues that the jury was given no instruction about what they could or could not consider in determining the concept of intent. He says that instead of being given such an instruction, the jury was merely told that the concept of "consciousness" was "more complex" than what defence counsel had stated in his opening.

[87] In making this argument, the appellant refers to the decision of this Court in *R. v. Reeves*, 2017 BCCA 97, and the decision in *R. v. B.E.*, 2019 BCSC 1442.

[88] The appellant submits that the judge here made an error similar to the error made in *Reeves*, where this Court allowed the appeal from a conviction for second degree murder and substituted a conviction for manslaughter. The trial judge refused to leave evidence with the jury about the accused's mental state as it was not supported by expert evidence. In allowing the appeal, Justice Donald stated at paras. 18-19:

The real issue in the trial was whether this was murder or manslaughter. The appellant's telephone statement was to the effect that he lost control, "snapped" because of the torture he was enduring, and he did not want to harm the victim. What was on his mind shortly after was clearly relevant to intent and had a direct bearing on the crucial question of intent.

Speaking in the context of the common sense inference, Moldaver J., in giving judgment for the Court in *R. v. Walle*, 2012 SCC 41, [2012] 2 S.C.R. 438, wrote:

- [65] In the end, what is critical is that the jury be made to understand, in clear terms, that in assessing the specific intent required for murder, it should consider the whole of the evidence that could realistically bear on the accused's mental state at the time of the alleged offence. The trial judge should alert the jury to the pertinent evidence. How detailed that recitation should be will generally be a matter for the trial judge, in the exercise of his or her discretion.
- [89] The judge here made no such error. The appellant's argument conflates the instruction the judge gave regarding the intent required for manslaughter with the instruction she gave for the jury's consideration of the murder charge. In her charge on the element of intention required for second degree murder, the judge clearly followed the guidance from Walle. She instructed the jury to consider the whole of the evidence that could realistically bear on the appellant's mental state including the evidence of Drs. Lohrasbe and Ley. The jury was directed to the doctors' evidence that Mr. Wu was suffering from an abnormal mental state coupled with a dissociative episode at the time of the offence. The jury was told more than once that if they believed this evidence, or if it left them with a reasonable doubt, that they could not rely on the common sense inference.
- [90] The appellant also says that the charge to the jury failed to follow the approach taken in B.E. In that case, Justice Williams considered the young offender's statement to the police that described his unusual state of mind at the time that he stabbed his foster parents multiple times resulting in their death. The judge found the offender guilty of manslaughter rather than second degree murder. In doing so, he indicated that the evidence led him to doubt that, at the time of the attack, the offender was sane and sober. As a result, he found that he could not apply the common sense inference, concluding at para. 81:

Notwithstanding that the accused was not in a state of non-mental disorder automatism (and is accordingly presumed to have been acting voluntarily) and has led no medical evidence to establish a mental disorder (as contemplated by s. 16 of the Criminal Code), evidence of the accused's mental condition at the time of the offence remains relevant to determining whether the common sense inference can be applied, and, ultimately, if the fault element required for murder has been proven beyond a reasonable doubt: Robinson at para. 110-111; Spence at para. 45-49; R. v. Bakker, 2003 BCSC 741 at 99-100.

- [91] I cannot accept that the charge failed to direct the jury to consider the appellant's mental condition when deciding whether to apply the common sense inference. Indeed, she instructed them not to apply that inference if they accepted the evidence of Drs. Lohrasbe and Ley, or if their evidence, or a consideration of all of the evidence, left them with a reasonable doubt. In other words, the instruction followed the approach described in Walle, Reeves and B.E.

Structure of the Charge Was Confusing and Did Not Default to Manslaughter

- [92] One of the unifying themes of the appellant's submissions is that the structure of the charge confused the jury in a way that would have had the effect of directing them to default to a conviction for murder rather than manslaughter.
- [93] I would not accept the appellant's proposition. First, the jury was properly instructed on the mens rea for manslaughter. They were told that in deciding whether the appellant was guilty of manslaughter, they had to consider whether a reasonable person, "in the circumstances of Mr. Wu", would have foreseen that the unlawful act would cause bodily harm that was neither trivial nor transitory. The mens rea analysis was appropriately individualized as required by law.
- [94] In advancing this argument, the appellant says the judge should have followed the Watt model charge. The structure of that charge is different from the CRIMJI structure followed by the judge. In Watt, the charge on intent for second degree murder (including the common sense inference and a summary of the relevant evidence) is followed by the instructions at 658:

If you are not satisfied beyond a reasonable doubt that [the accused] had either state of mind required to make his/her unlawful killing of [the deceased's] murder, you must find [the accused] not guilty of second-degree murder, but guilty of manslaughter.

If you are satisfied beyond a reasonable doubt that [the accused] had either state of mind to make his/her unlawful killing of [the deceased's] murder, you must find [the accused] guilty of second degree murder as charged (or, go on to the next question).

- [95] I would not accede to this argument. A trial judge is afforded flexibility in crafting a jury charge: Baker at para. 34. The sequence of a jury charge is a matter for discretion of the trial judge: Daley at para. 30. The structure of the charge will be adequate if it gives the jury the necessary tools to properly decide the issues before them: R. v. Feng, 2014 BCCA 71 at para. 56. Here, I am of the view that the structure of the charge did not mislead the jury in any way.
- [96] Further, counsel did not object to the structure of the charge during the charge conferences. Where counsel engaged in lengthy charge conferences with the judge and had the benefit of a prior charge of the same count, the failure to object to the structure supports the adequacy of the charge.
- [97] The other way the appellant says the charge was structured improperly was that it would have led the jury to believe that the only way to reach a verdict of manslaughter was through provocation. In my view, there is no merit to this submission. The charge on provocation was, as the appellant concedes, in accordance with the law. After two trials, counsel agreed that the jury should be charged on provocation because there was sufficient evidence to raise that partial defence. The fact that counsel did not actively pursue that defence by making any submissions on provocation, was a strategic choice. Counsel was, not

unreasonably, of the view that the appellant's case on provocation was not strong. As a result, counsel did not want submissions to be made that would detract from the appellant's primary defence; that the Crown could not prove the requisite intent for second degree murder. The sequence of the charge did not detract from that strategic decision.

- [98] In addition, there can be no suggestion that the only path to manslaughter was through provocation. The jury instructions directed the jury to consider provocation only if they were satisfied that the Crown had proven all of the elements of second degree murder. Further, they were instructed to consider the manslaughter instruction only if they concluded that the Crown had failed to prove that the appellant had one of the two requisite intents for second degree murder. In other words, the instructions provided two routes to manslaughter. In my view, there is no possibility the jury was confused by the inclusion of the provocation charge or its placement in the structure of the charge.
- [99] Most importantly, at the end of the day, the question is whether the charge properly educated the jury so that they could understand the important issues, the relevant law and salient evidence so that they could render a true verdict. In my view the charge clearly and logically led the jury through a decision tree that allowed them to reach the possible verdicts available on the evidence and law: second degree murder; manslaughter (by way of provocation); manslaughter (by way of failure to prove specific intent); or not guilty.

Disposition

- [100] I would dismiss the appellant's application to adduce the fresh BPA evidence and would dismiss the appeal.

"The Honourable Mr. Justice Butler"

I AGREE:

"The Honourable Mr. Justice Harris"

I AGREE:

"The Honourable Madam Justice DeWitt-Van Oosten"

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