

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

His Majesty the King

– and –

Paul Nelson

Helen How, for the Crown

Chris Avery, for the Defendant

HEARD: February 20-23, 26, 27, 2024

REASONS FOR JUDGMENT

NISHIKAWA J.

Overview

[1] On the evening of August 2, 2018, the defendant, Paul Nelson, and the complainant, Pierre Shortliffe, were separately having drinks at a bar on Bloor Street West. Sometime after 11:00 p.m., they had a physical altercation on the street near the intersection of Jane Street. Mr. Nelson stabbed Mr. Shortliffe four times resulting in serious, life-threatening injuries.

[2] Mr. Nelson is charged with attempted murder, aggravated assault, and assault with a weapon. The defence disputes that the Crown has established the elements of the offence of attempted murder beyond a reasonable doubt. The defence concedes that the Crown has demonstrated the elements of the offences of aggravated assault and assault with a weapon. However, the defence’s position is that Mr. Nelson acted in self-defence.

[3] The Crown’s theory is as follows. Mr. Nelson was angry with Mr. Shortliffe about a perceived racist comment made at the bar. Mr. Nelson waited, with a knife in hand, for Mr. Shortliffe to leave the bar. The Crown suggests that Mr. Nelson said something to Mr. Shortliffe as he was leaving the bar, causing Mr. Shortliffe to engage in a physical fight with him. Mr. Nelson then stabbed Mr. Shortliffe four times near his heart and lungs with an intent to kill him. The

Crown's position is that Mr. Nelson must have had the knife ready when Mr. Shortliffe passed him because he would not otherwise have been able to stab him so quickly and devastatingly. The Crown submits that there is no air of reality to the claim of self-defence, and that Mr. Nelson used excessive force against Mr. Shortliffe.

[4] The defence's position is that it was Mr. Shortliffe who ambushed Mr. Nelson as Mr. Nelson left the bar. Before Mr. Nelson could resist, Mr. Shortliffe took him to the ground and punched him repeatedly in the head. After approximately eight blows, Mr. Nelson retrieved a pocketknife from his bag and began to stab Mr. Shortliffe to stop the beating and to get away.

Issues

[5] The issues raised in the case are as follows:

- (a) Has the Crown demonstrated beyond a reasonable doubt that Mr. Nelson intended to kill Mr. Shortliffe?
- (b) Has the Crown demonstrated beyond a reasonable doubt that Mr. Nelson did not act in self-defence?

Analysis

The Applicable Principles

[6] Mr. Nelson is presumed innocent. The Crown bears the burden of proving the elements of the offences charged beyond a reasonable doubt, which is a high standard. It is not sufficient to prove that the defendant is probably guilty. However, the Crown is not required to prove its case to the point of absolute certainty, which would be impossibly high.

[7] If I find that the defence has shown an air of reality with respect to self-defence, then the onus is on the Crown to demonstrate beyond a reasonable doubt that at least one of the elements of self-defence could not be established.

[8] Before proceeding with an examination of the evidence, it is useful to set out the principles that are applied by the court in weighing the evidence. In assessing the evidence, because Mr. Nelson testified in his defence, this court must follow the approach set out by the Supreme Court of Canada in *R. v. W.(D.)*, [1991] 1 S.C.R. 742. The *W.(D.)* analysis, as applicable to this case, would be articulated as follows:

- (i) If the court believes Mr. Nelson's evidence, he must be acquitted;
- (ii) If the court does not believe Mr. Nelson's evidence, but it leaves the court with a reasonable doubt, he must be acquitted; and

- (iii) Even if Mr. Nelson's evidence does not leave me with a reasonable doubt, the court may only find the defendant guilty if the court is persuaded that the Crown proves the charges beyond a reasonable doubt.

[9] In applying the *W.(D.)* analysis, Mr. Nelson's evidence is not to be considered in isolation, but in the context of the evidence as a whole. In this case, the defence acknowledged that even if I believed Mr. Nelson's evidence, because of his memory gaps, this would be insufficient to acquit.

Uncontested Facts

[10] On the night of August 2, 2018, Mr. Nelson went to a bar, the Station, on Bloor Street West near Jane Street. He was sitting inside at the bar.

[11] Mr. Shortliffe was also at the Station on August 2, 2018. He had gone there with a friend, Julia MacDowall. They were sitting at a table on the patio outside the bar. They ordered a number of drinks and some food.

[12] Sometime after 11:00 p.m., Mr. Shortliffe and Ms. MacDowall decided to leave the Station. Mr. Shortliffe had a cigarette while he waited for Ms. MacDowall, who went to the washroom inside the Station.

[13] At some point during the evening, employees of the Station cut Mr. Nelson off from further alcohol. Mr. Nelson did not dispute being cut off and paid his bill. After speaking to some other regular patrons, he left the bar.

[14] A physical altercation between Mr. Nelson and Mr. Shortliffe took place on the south side of Bloor Street West near the intersection of Jane Street. The altercation was captured by a video surveillance camera at a restaurant at 2422 Bloor Street West, to the east and north of the location of the fight. It is undisputed that Paul Nelson and Pierre Shortliffe are the two men seen in the video. The camera was approximately 70 metres from where the fight took place. The recording that is in evidence is in fact a cellphone video of the video as it was being played on a monitor at the restaurant. It was agreed between the parties that the video was so fuzzy that it was zoomed in to capture the incident.

[15] After the altercation, Mr. Shortliffe walked back to the Station patio. Eyewitnesses saw that he was bleeding in the chest area. Someone called 911 and Ms. MacDowall used her clothing as compresses to stop the bleeding. Once the paramedics arrived, Mr. Shortliffe was taken to a hospital.

[16] At the hospital, Mr. Shortliffe was placed in a medically-induced coma for two days. Mr. Shortliffe suffered multiple injuries. He had been stabbed in the chest area three times and in the back once. One wound nicked his heart. The stab wound to his back punctured his lung. He had 72 stitches to close a wound from his neck to his chest. Mr. Shortliffe also had injuries to his fingers, including a severed tendon, which required surgery to repair. He does not have full movement of his finger. He was in hospital for approximately six weeks. Mr. Shortliffe was on pain medication and blood thinners while in the hospital.

[17] Later that night, Officer Kim Truong of the Toronto Police Service and her partner located Mr. Nelson in an alleyway off Durie Street, not far from the Station bar. Mr. Nelson complied with police directions. He had blood on his face and behind his left ear. His shirt was blood-stained. The police called paramedics who cleared Mr. Nelson medically. He was then taken to the police station. At the station, Mr. Nelson's injuries were photographed. They included abrasions to his elbows, and some bruises and scratch marks on his chest.

[18] Early the next morning, Officer Todd Hall located a knife in a planter on the patio of a Timothy's coffee shop on Bloor Street West and Armadale Avenue, approximately 80-100 metres from Bryden's pub, which was next door to the Station.

[19] Mr. Nelson admitted that the knife belonged to him. The knife is a folding pocketknife with a four-inch handle. The blade, which is three and a quarter inches long, was partially serrated. The knife is not a prohibited weapon.

[20] A blood sample taken from the knife matched the DNA sample provided by Mr. Shortliffe. A DNA sample of blood swabbed from behind Mr. Nelson's ear was also found to match that of Mr. Shortliffe.

The Evidence

[21] In weighing the evidence, I must assess the credibility and reliability of the witnesses' evidence. This involves considering the internal consistency of each witness's testimony and its consistency in the context of the evidence as a whole.

The Video Recording

[22] As noted above, the altercation between Mr. Nelson and Mr. Shortliffe was captured on video. The video was taken at a distance and is of very poor quality. The quality of the video recording does not improve when it is slowed down because the image becomes even more distorted.

[23] On the video, the heavier individual, Mr. Nelson, is seen walking. He turns slightly and is tripped, then spun and taken to the ground by the slimmer individual, who is Mr. Shortliffe. They fall to the ground together. Mr. Shortliffe then gets on top of Mr. Nelson and punches him in the head in a rapid and relentless manner. Over the course of 10 seconds, 14 blows are seen. Mr. Nelson appears to be struggling underneath Mr. Shortliffe. He is holding up a black item, which is his bag, as if to shield himself. After 8 to 10 punches, Mr. Nelson's arm can be seen moving up and down. The defence submits that this is when Mr. Nelson stabbed Mr. Shortliffe.

[24] Mr. Shortliffe gets up first. He stomps his foot on something and then drags Mr. Nelson by the arm toward the curb. Mr. Shortliffe then walks away, westward, but looks unsteady on his feet. Mr. Nelson gets up. He has his bag in his hands. He bends down to pick something up, which is likely his hat. He then walks away slowly in the opposite direction of Mr. Shortliffe.

Julia MacDowall

[25] At the time of the incident, Ms. MacDowall was a friend of Mr. Shortliffe's. He was a regular at a bar where Ms. MacDowall worked. It was Ms. MacDowall's idea to go to the Station bar that night because they had live music and cheap drinks. Ms. MacDowall testified that Mr. Shortliffe drove them both to the bar. They were there for approximately two to three hours that night. They sat at a table on the patio, drank beer and ate some food.

[26] Ms. MacDowall testified that on one occasion, when she went into the bar to use the washroom, a man who was sitting at the bar blocked her way and told her that she and her "boyfriend" or her "man" were not welcome at his bar. Ms. MacDowall responded that Mr. Shortliffe was not her "man." An employee of the bar, Dilara, then told the man to back off and calm down. She got him to sit back down on the bar stool. Ms. MacDowall did not recall seeing the man before that interaction. The individual she described was dressed as Mr. Nelson was dressed that night, in a Blue Jays' baseball cap and plaid shirt. Ms. MacDowall testified that when she returned to the table and told Mr. Shortliffe that a guy at the bar tried to stop her from going to the bathroom, Mr. Shortliffe told her the same guy bothered him when he went for a smoke.¹

[27] Ms. MacDowall and Mr. Shortliffe were going to leave when Ms. MacDowall again went into the Station to use the washroom. Mr. Shortliffe went to have a cigarette. Ms. MacDowall testified that she saw Mr. Shortliffe walk in the direction of the Pizza Pizza, which was east of the Station. Ms. MacDowall testified that she had taken Mr. Shortliffe's car keys from him and was going to call an Uber.

[28] Ms. MacDowall returned from the washroom to find Mr. Shortliffe slouched in a chair on the patio. He was slurring his words and bleeding. Ms. MacDowall opened Mr. Shortliffe's shirt to see where the blood was coming from and observed three stab wounds in the upper chest area near Mr. Shortliffe's heart. Ms. MacDowall took off her clothes to use as a compress. Ms. MacDowall tried to keep Mr. Shortliffe calm and conscious while waiting for the ambulance to arrive.

[29] Ms. MacDowall did not see the altercation between Mr. Shortliffe and Mr. Nelson. She did not see Mr. Shortliffe get stabbed. When she was shown the video of the altercation, she testified that she did not recognize the individual punching the other man as Mr. Shortliffe. She testified that it would be "extremely out of character" for Mr. Shortliffe, whom she described as a "savvy French man."

[30] Ms. MacDowall was a credible witness. She was candid and answered questions in a forthright manner. She did not overstate her evidence and acknowledged when she did not know or recall something. At one point, Ms. MacDowall corrected her earlier testimony and stated that

¹ This is a hearsay statement and was not admitted for the truth of its contents and I do not rely on it for the truth of its contents.

she may have exaggerated at first. This was in relation to the amount of blood she initially saw on Mr. Shortliffe's shirt, which she at first described as a "tiny dot" that grew to cover the whole side of his shirt. Ms. MacDowall conceded that there was more blood initially than a tiny dot. She admitted that both she and Mr. Shortliffe had a lot to drink that night. Ms. MacDowall testified that while she spoke to Mr. Shortliffe in the past, they were no longer in touch because it was difficult not to discuss the incident with Mr. Nelson. While Ms. MacDowall tried to portray Mr. Shortliffe in a positive light, in my view, she was sincere when she testified that she did not recognize Mr. Shortliffe on the video. Despite having seen Mr. Shortliffe drunk in the past, she had not previously seen him behave in an aggressive manner.

Scott Penfold

[31] Scott Penfold was a bartender at the Station. By August 2018, he had worked there for approximately one year and knew Mr. Nelson, who came into the bar approximately three times a week. Mr. Penfold testified that he spoke to Mr. Nelson often and that they had a "cordial" relationship, but that Mr. Nelson would sometimes get "aggravated" by other people's behaviour. Mr. Penfold testified that Mr. Nelson could be "abrasive" when someone rubbed him the wrong way but that he had never seen him behave in a physically aggressive manner.

[32] Mr. Penfold testified that on the night of August 2, 2018, Mr. Nelson told him that another man at the Station had made a comment to him, about whether someone like him was allowed to drink alcohol. Mr. Nelson pointed in the direction of the person who made the comment, who Mr. Penfold recalled was a tall slim man who was sitting on the patio with a woman with brown hair.

[33] Mr. Penfold testified that as the night went on, Mr. Nelson seemed to get more "frustrated" about the interaction. Mr. Penfold spoke to Dilara, the waitress, and they decided that Mr. Nelson should not be served any further alcohol to avoid adding "more gas on the fire." Another Station employee who was at the bar but not working that night, Walter, had been sitting next to Mr. Nelson. Walter also suggested to Mr. Penfold that Mr. Nelson be cut off. Mr. Penfold testified that when he gave Mr. Nelson the bill, he paid without any issue and that they both laughed about the comment that the other man had made. Mr. Penfold estimated that in the past year, he had cut off Mr. Nelson approximately five times.

[34] Later on, Mr. Penfold was having a cigarette break outside behind the bar when another employee told him that someone had been stabbed. He ran through the bar to the patio and saw Mr. Shortliffe bleeding and Ms. MacDowall attending to him. Mr. Penfold testified that he recognized Mr. Shortliffe as the man whom Mr. Nelson had pointed out earlier.

[35] I find Mr. Penfold's testimony to be both credible and reliable. Although he knew Mr. Nelson as a regular at the bar, there was no evidence to suggest that they remain friends or are in touch. He was not involved in the incident between Mr. Nelson and Mr. Shortliffe. Mr. Penfold answered the questions about Mr. Nelson's behaviour that night and in the past in a candid manner. He remembered details like the type of bag Mr. Nelson carried. Mr. Penfold corrected his testimony when presented contradictory evidence. For example, he first estimated that he cut Mr. Nelson off between 9:00 and 10:00 p.m., but when presented with evidence of the timing of the

911 call, he corrected himself to say that it was likely closer to 11:00 or 11:15 that he cut Mr. Nelson off.

Pierre Shortliffe

[36] Mr. Shortliffe testified that he and Ms. MacDowall went to the Station at approximately 9 p.m. on August 2, 2018. They were sitting at a table on the patio.

[37] At some point, Mr. Shortliffe went into the restaurant to use the washroom. On his way out, he ordered two beers from the bartender and carried them outside. Mr. Shortliffe testified that at that point, a waitress said something like, “I hope this guy is not bothering you.” Mr. Shortliffe recalled that Ms. MacDowall told him that a guy at the bar physically prevented her from going to the washroom and told her not to bring her boyfriend to the bar. Ms. MacDowall pointed out the individual who spoke to her. Mr. Shortliffe testified that she pointed to one of four or five people at the bar. The person was wearing a hat.

[38] Mr. Shortliffe testified that he had no interaction with Mr. Nelson. Mr. Shortliffe denied making any comment to Mr. Nelson, whether racist or otherwise.

[39] Mr. Shortliffe testified at trial that after he and Ms. MacDowall decided to leave, he was standing on the sidewalk in front of the Station patio smoking a cigarette while waiting for her to use the washroom. Mr. Shortliffe testified that it was then that Mr. Nelson came out of the bar and stabbed him. Mr. Shortliffe testified that Mr. Nelson had a knife in his hand and put it in the centre of Mr. Shortliffe’s chest. Mr. Nelson said two words to him, which he does not recall. Mr. Nelson then took the knife out and stabbed him again. Mr. Shortliffe recalled trying to catch the blade as it went through his chest again. He recalls trying to hold it while Mr. Nelson kept pushing harder and harder. Mr. Shortliffe testified that Mr. Nelson’s face was very close to him, and his expression was very angry. Mr. Nelson then stabbed him again in the left shoulder area. Mr. Shortliffe testified that when he fell to his knees, Mr. Nelson stabbed him again on the left side of his back. Mr. Shortliffe testified that this took place “immediately in front of the Station.”

[40] Mr. Shortliffe testified that after he fell to his knees, he looked up and saw the person walking away eastbound on Bloor Street. He got up and chased Mr. Nelson on Bloor Street a little past the Pizza Pizza. Mr. Shortliffe testified that he was “outraged” that the person who stabbed him was disappearing into the darkness. Mr. Shortliffe testified that they got into a fight there on the street, where the physical altercation is captured on video. He testified that he noticed that the fight had spilled into the street. After punching Mr. Nelson, he dragged him on the ground to remove him from the path of vehicles turning onto Bloor Street. Mr. Shortliffe admitted that he is the individual seen walking away on the video recording.

[41] Mr. Shortliffe testified that he then went back to the patio at the Station. Mr. Shortliffe testified that he felt “fine” and wanted to go. Ms. MacDowall came out of the bar and began to attend to his wounds.

[42] On cross-examination, defence counsel put to Mr. Shortliffe that he had an alcohol addiction, which he denied. Mr. Shortliffe admitted that while recovering in the hospital, he spoke

to a psychotherapist about his drinking because he was distraught at the pain he had put his family through. He testified that he realized that he needed to stay away from bars, because “bad things happen.” Mr. Shortliffe acknowledged that he drank a significant amount of beer multiple times a week.

[43] Mr. Shortliffe was also asked whether he recalled telling the psychotherapist at the hospital that he drank to overcome the trauma of an incident that took place during his childhood. Mr. Shortliffe did not recall having told the psychotherapist but admitted that while he was a child in France, he had experienced a traumatic incident at the hands of a man who was of Algerian origin. Mr. Shortliffe objected to the use of his discussion with the psychotherapist, which he had understood to be confidential. This was an extremely sensitive and private subject matter that was understandably difficult for Mr. Shortliffe. Defence counsel approached this area of questioning with great caution and asked no more questions than necessary. I do not wish to cause Mr. Shortliffe further distress. However, I refer to this evidence because it is relevant to the factual findings that I make further in these reasons.

Credibility and Reliability

[44] Prior to the trial, Mr. Shortliffe had provided a statement to the police in August 2018, an interview with the CBC shortly thereafter and testimony at the preliminary inquiry in March 2020. It was only at trial that Mr. Shortliffe testified, for the first time, that he had been stabbed before the physical fight. On the previous occasions, Mr. Shortliffe had said that the physical fight took place before the stabbing.

[45] Mr. Shortliffe admitted that his account of the incident between Mr. Nelson and himself has changed, between his initial police statement, the subsequent CBC interview, his testimony at the preliminary inquiry and his testimony at trial. However, he disputes that each version varies significantly from the other.

[46] On cross-examination, Mr. Shortliffe admitted that in his police statement, he described a brief physical altercation with a young, Middle Eastern man with an accent, who was wearing a black track suit and was sitting on a bench outside the bicycle shop, a few doors east of the Station. The young man called him over toward the bench and punched him for no reason. Mr. Shortliffe described punching the man a couple of times and finding the man odd because he was smiling. Mr. Shortliffe admitted that he told police that he did not remember the stabbing but was likely stabbed by that man. When cross-examined about this account, Mr. Shortliffe stated that when he gave the statement to police, he had just come out of a coma, was on pain medication, and was confused and trying to piece together what had happened. Mr. Shortliffe admitted that he did not know whether what he told the police happened or not.

[47] Mr. Shortliffe was also cross-examined about the account that he gave a CBC reporter approximately one week after his police statement. At that time, he told the reporter that when he was leaving the Station, a stranger approached him, yelled something, brandished a weapon and then stabbed him.

[48] Mr. Shortliffe further admitted that at the preliminary inquiry, he testified that a Middle Eastern man in his 20s with a thick accent and full beard called him over toward a bench and then punched him. Mr. Shortliffe then threw the person to the ground and punched him one or two times. Mr. Shortliffe testified then that he was certain that he was not injured after the physical altercation and that he was stabbed by a different individual when he returned to the Station patio.

[49] It was at the preliminary inquiry that Mr. Shortliffe viewed the video recording for the first time. At trial, Mr. Shortliffe testified that when he first saw the video, he did not recognize it, and he did not remember that he got into a fight with Mr. Nelson. Mr. Shortliffe testified that he can no longer say whether the other person, the young Middle Eastern man in the track suit, existed or not. At trial, Mr. Shortliffe speculated that there were two fights, one with Mr. Nelson and one with the other individual.

[50] It is clear from Mr. Shortliffe's testimony that he continues to try to make sense of what happened that night. Mr. Shortliffe described trying to piece together what happened to him with each new detail that he learns. Mr. Shortliffe explained that his memories were "unlocked" over time and that his memory "evolved" as he received additional information.

[51] For a number of reasons, I find Mr. Shortliffe's evidence entirely unreliable. Not only has Mr. Shortliffe's version of the incident changed significantly over time, on each occasion and despite the significant differences, Mr. Shortliffe expresses absolute certainty about his recollection of the incident. On cross-examination, Mr. Shortliffe admitted that had the trial been held at any of those previous occasions, immediately after his police statement, after the CBC interview, or after the preliminary inquiry, he would have testified to the account he gave at the time and he would have been certain that it was true.

[52] The one consistent thread among Mr. Shortliffe's various accounts is that he was stabbed on the sidewalk in front of the Station patio. However, it is not possible that the incident occurred as Mr. Shortliffe describes it. Mr. Shortliffe's evidence is completely inconsistent with the evidence of the eyewitnesses. Chantal Forde, Amber Trollope and Stephanie Weese were all seated on the patio at Bryden's pub next door to the Station. None of them saw an individual get stabbed near the patio area. None of them saw Mr. Shortliffe chase Mr. Nelson from the patio to the intersection of Bloor Street West and Jane Street. None of them testified to seeing Mr. Shortliffe bleeding while the altercation was going on. They all saw an altercation or incident between two men at the intersection by the Pizza Pizza. They all saw an individual, Mr. Shortliffe, return to the Station patio with blood appearing in the chest area of his shirt.

[53] Moreover, had Mr. Nelson stabbed Mr. Shortliffe outside the Station patio, he would not have been able to then chase Mr. Nelson to the intersection of Bloor Street West and Jane Street, tackle him and then punch him 14 times. Given the nature and location of the stab wounds, it is unlikely that Mr. Shortliffe would have been physically able to perform those acts. He would have been bleeding profusely. Ms. MacDowall, Ms. Trollope, Ms. Forde and Ms. Weese describe seeing Mr. Shortliffe when he returned to the Station patio. He was bleeding, pale, and in a state of shock. Had the stabbing taken place before the physical altercation, it is likely that Mr. Shortliffe would

have been bleeding, pale and in shock at that time. He would not have been in a condition that would enable him to fight Mr. Nelson as he did.

[54] It is also implausible that after being stabbed, Mr. Shortliffe, who was unarmed, would go after a person he knew to be armed. In addition, if the stabbing took place before the physical altercation, it is likely that Mr. Nelson would have used the knife sooner and before allowing Mr. Shortliffe to punch him in the head repeatedly.

[55] In my view, Mr. Shortliffe's memory is also impaired because of his level of intoxication that night. He was found to have a blood alcohol content of 209 milligrams, which is more than two and a half times over the legal limit of 80 milligrams. Mr. Shortliffe nonetheless testified that he was "fine" that night and planned to drive home. Mr. Shortliffe denied that he was intoxicated and did not recall that Ms. MacDowall had taken his car keys.

[56] More significantly, the stabbing was an extremely traumatic event for Mr. Shortliffe. It took place over five years ago. It is not surprising that Mr. Shortliffe's memory of the incident has changed over time. While Mr. Shortliffe described his memories as being "unlocked" with each new fact, it is difficult to know the difference between the unlocking of a memory and the brain filling in a gap.

[57] Since viewing the video for the first time at the preliminary inquiry, Mr. Shortliffe appears to have grappled with his own violent acts as recorded on the video. On cross-examination, Mr. Shortliffe asked, "How do you explain that I come running up the sidewalk and jump on Paul Nelson, a person I've never met in my life before for no reason apparently unprovoked and suplex him on the sidewalk and throw 14 punches into his head. I'm clearly very upset with this person about something." His account at trial, that the stabbing took place before he attacked Mr. Nelson, would provide an explanation for his anger.

[58] On cross-examination, Mr. Shortliffe testified that Crown counsel and the officer-in-charge (OIC), Candy Graham, told him before the preliminary inquiry that there was a video recording of the fight and that if that was when he was stabbed, Mr. Nelson would claim self-defence. It was agreed between the Crown and defence, through an agreed statement of facts, that neither Crown counsel nor the OIC ever advised Mr. Shortliffe what Mr. Nelson's defence would be but only what possible defences could be anticipated. I mention this as a demonstration of the extent to which Mr. Shortliffe was prepared to improvise his evidence. This also explains to some extent Mr. Shortliffe's more recent version of the incident, that the stabbing took place before the physical altercation, which would negate Mr. Nelson's claim of self-defence.

[59] The Crown conceded that Mr. Shortliffe was a "problematic witness" and that he was prone to "confabulation." The Crown submitted that it could not urge one version over another based on Mr. Shortliffe's testimony alone. Nonetheless, the Crown argued in closing that the version Mr. Shortliffe testified to at trial accords with the evidence. As explained further in these reasons, I cannot agree.

[60] In my view, Mr. Shortliffe did not intend to mislead the court or to give false testimony. His attempts to make sense of what happened to him that night are genuine. However, Mr.

Shortliffe's tendency to give answers when he in fact does not know the answer, his reluctance to admit that he does not know, and his professed certainty in his testimony cannot help but affect my assessment of his credibility. Mr. Shortliffe's filling in the blanks to come to grips with what happened that night, while understandable, does not constitute evidence of the facts.

[61] For the foregoing reasons, unless corroborated by other evidence, Mr. Shortliffe's testimony is too problematic to be accepted as evidence of what took place between him and Mr. Nelson on August 2, 2018.

The Eyewitnesses

[62] The Crown called three eyewitnesses. None had any interest in the proceeding or any motive to fabricate evidence. Although there were some minor inconsistencies with the video recording, they were not material. Their testimony was largely consistent with each other. I find all three witnesses both credible and reliable.

Chantal Forde

[63] At approximately 10:30 p.m. on August 2, 2018, Ms. Forde was on the patio of Bryden's pub with her husband. At the time, Bryden's pub was on the east side of the Station where Mr. Shortliffe and Ms. MacDowall were having drinks. Approximately 30 minutes after arriving, Ms. Forde observed two men fighting in the street, in the intersection. Ms. Forde testified that she saw the "slighter" man on top of the heavier man punching him several times. She did not see the heavier man punch the other man. Ms. Forde turned to tell her husband to call 911 because she was concerned about the man who was being hit. However, when she turned back, the fight was over. The heavier man got up, put his bag over his shoulder and began to walk east. The other man walked back toward the Station. As he got closer, she saw blood coming through his shirt on the left side.

Stephanie Weese

[64] On the night of August 2, 2018, Ms. Weese was on the patio of Bryden's pub with her friend, Amber Trollope. Ms. Weese was facing the street and Ms. Trollope was facing the restaurant. At some point, Ms. Weese saw two men on the ground and assumed there had been an accident. Ms. Weese did not see the altercation or stabbing. She saw the heavier man who was wearing a plaid shirt and shorts get up and put his hat back on and put his bag over his body. He walked away slowly. Ms. Weese noticed that he had blood on his face. The slimmer male also got up and started walking toward the patio. It was then that Ms. Weese noticed blood coming out from his chest area onto his shirt.

[65] Before the altercation, Ms. Weese had seen Mr. Shortliffe in the area in front of the Pizza Pizza. Ms. Weese testified that patrons of both bars were congregating in front of the Pizza Pizza to smoke.

Amber Trollope

[66] On the night of August 2, 2018, Ms. Trollope was on the patio of Bryden's pub with her friend, Stephanie Weese. Ms. Trollope's attention was drawn to the altercation between two men by something Ms. Weese said. Ms. Trollope saw the two men in the midst of falling. However, she did not recall seeing any punching. Ms. Trollope testified that after the two men got back up, the larger man walked away at a normal pace. The smaller man had blood on the left upper chest portion of his shirt. Ms. Trollope saw the spot growing and realized that he had been injured. Ms. Trollope testified that he looked dazed and shocked.

[67] Ms. Trollope had noticed Mr. Shortliffe and Ms. MacDowall on the Station patio earlier in the evening. She testified that they seemed to be having a good time. Ms. Trollope did not recall noticing Mr. Nelson at any point. She testified that she did not observe any conflict or disagreement on the patio or in front of the Pizza Pizza.

The Police Witnesses

[68] The evidence of the police witnesses was largely uncontroversial. As noted in the undisputed facts, Officer Kim Truong located and arrested Mr. Nelson and brought him to the station. Officer Truong took the photographs of Mr. Nelson showing his injuries and of his clothing. Officer Truong took a sample of the blood that was located behind Mr. Nelson's ear. She later provided this to Detective Constable Robert Jitta for testing.

[69] Officer Todd Hall discovered the pocketknife that Mr. Nelson discarded in a planter on the patio of a Timothy's coffee shop. He testified to the type of knife it was and how it opens.

[70] Officer Jitta is the Forensic Identification Services officer who took photographs at the scene of the stabbing. Officer Jitta also photographed the pocketknife where Officer Hall had located it. He sent the knife to the Centre of Forensic Science for testing.

Paul Nelson

[71] Mr. Nelson was the sole witness for the defence. He testified that he and his spouse, Natasha, were regulars at the Station and were known to employees of the bar. They went there approximately two to three times per week.

[72] In August 2018, Mr. Nelson was employed at Humber Valley hospital preparing operating rooms for surgery. He had an additional position with a medical devices company.

[73] Mr. Nelson testified that he carried a knife with him because he would use it to open packaging that the medical supplies came in. Mr. Nelson explained that while there were box cutters at work, they would frequently go missing and not be available when needed. He used the knife approximately three to four times a day opening packages. When he was at work, he had the knife clipped to his scrubs or in a pocket. When he was not at work he put it in his bag so that it would not get lost.

[74] On August 2, 2018, he worked until 3 p.m. and then went home. After having dinner with Natasha, Mr. Nelson went to the Station alone. He sat at the bar beside Walter, a Station employee who was not working that night.

[75] Mr. Nelson testified that at some point, a male and a female whom he did not know made a comment to him about “my kind” drinking. He did not know what they meant by his “kind” but he believed the comment to be racist. Mr. Nelson testified that “it was just unfortunate, that it sounded more of like an Islamic comment or something.” It is unclear what words were said that Mr. Nelson interpreted as racist or Islamophobic. Mr. Nelson testified that he was upset by the comment, which he found very offensive. He recalled saying something like, “if you don’t like the way I look, you can fuck off.” At the time, nothing further took place between Mr. Nelson and the two individuals.

[76] Mr. Nelson testified that Walter told him to calm down. Mr. Nelson was presented with his bill and told that he would not be served any more alcohol. Mr. Nelson testified, as Mr. Penfold had, that while he was paying the bill, they talked about the comment that was made and laughed it off. Mr. Nelson had a total of about five pints of beer that night.

[77] Mr. Nelson did not recall making a comment to Ms. MacDowall or Mr. Shortliffe about their not being welcome at his bar.

[78] After paying his bill, Mr. Nelson greeted some of the other regular patrons and left the Station. He was walking east toward the subway station when he felt a punch on the right side of his head. He was then thrown “violently” to the ground, landing on his elbow. Mr. Nelson testified that he remembered punches and then it stopped. Mr. Nelson testified that he felt excruciating pain in the back of his head and on his left elbow where he landed. Mr. Nelson testified that he did not recall anyone saying anything to him and did not see anyone coming. Mr. Nelson denied that he was waiting for Mr. Shortliffe to leave the bar.

[79] When asked what he remembered about the fight, Mr. Nelson testified that he could not remember much, just being on the pavement and fearing for his life. He felt “disoriented, shocked and scared.” Mr. Nelson does not recall taking the knife out of his bag or stabbing Mr. Shortliffe. Even after being shown the video, Mr. Nelson testified that he did not recall that happening. When his attention was drawn to a pumping movement of his arm, Mr. Nelson testified that he did not recall doing that.

[80] After Mr. Shortliffe got off Mr. Nelson, he testified that he felt disoriented, with a burning sensation in his elbow and pain in the back of his head. Mr. Nelson testified that his head felt like he had a concussion. Mr. Nelson testified that he did not recall what happened other than that a police car came, he was handcuffed and there was a paramedic crew. Mr. Nelson testified that he does not recall discarding the knife in a planter next to a Timothy’s coffee shop. He does not recall calling 911, which he did before his arrest.

[81] In the recording of the 911 call, Mr. Nelson tells the 911 operator that he was just “attacked by an idiot at Jane and Bloor... outside of a bar called Bryden’s.” He said he was walking there to see if the person was still there. Mr. Nelson stated that he thought it was race-related

because the person talked about “my kind” not being at the bar. Mr. Nelson said that he “fought back.” When the 911 operator asked if could describe the person, Mr. Nelson responded that he did not know what the person looked like. Mr. Nelson said that he had to go because he thought he was bleeding. When the 911 operator told him that there were a lot of police at Bloor and Jane, Mr. Nelson hung up. He did not go back to Bloor and Jane. At trial, Mr. Nelson admitted that it was his voice on the recording, but he did not recall having made the call.

[82] Contrary to the defence’s submission, I find that Mr. Nelson sounds coherent on the recording of the 911 call. While he expresses confusion about what just happened, he speaks clearly and is not audibly agitated. At the same time, Mr. Nelson did not go home as planned and was found by police in an alleyway a short distance from the Station, which supports that he was disoriented.

Credibility and Reliability

[83] In my view, Mr. Nelson’s inability to recall substantial portions of the night of August 2, 2018, raises questions about the reliability of his evidence. His memory about the incident is poor. At the same time, he has admitted the facts that he does not remember, including stabbing Mr. Shortliffe, disposing of the knife, and making the 911 call.

[84] The defence submits that it would have been more beneficial to Mr. Nelson’s claim of self-defence to testify to key aspects of the fight and when he stabbed Mr. Shortliffe. He could have testified as to why he stabbed Mr. Shortliffe. He could have explained how he managed to retrieve and open his knife. Because of the gaps in his memory, he was unable to do so. The defence submits that Mr. Nelson’s lack of memory is genuine and that this enhances his credibility; he does not have a memory of convenience.

[85] Conversely, the gaps in Mr. Nelson’s memory could be seen as detracting from his credibility. He has avoided specifically testifying to stabbing Mr. Shortliffe. He could not be effectively cross-examined on what he was thinking at the time or his subsequent actions. He has admitted facts that would otherwise be incontrovertible, given the video, the DNA on the knife and the 911 recording.

[86] It is possible that Mr. Nelson has no recollection of what happened between the beating and the police locating him. He had just been attacked and hit in the head multiple times. However, his lack of memory between being hit by Mr. Shortliffe and being arrested makes it more challenging to assess his credibility. He simply has no account of his own actions that can be assessed against other evidence. Mr. Nelson was candid about the amount he drank that night and about being upset by the comment that was made to him. His testimony, as limited as it was, was not significantly undermined on cross-examination.

[87] While I acknowledge that Mr. Nelson could have but did not testify about the stabbing in a manner favourable to his claim of self-defence, in the circumstances of this case, I do not view this as enhancing his credibility. Nonetheless, I find certain aspects of Mr. Nelson’s testimony, such as how he felt, credible. In respect of what transpired, however, given the significant gaps in

Mr. Nelson's memory, I accept Mr. Nelson's evidence only where it is corroborated by the video recording and other witnesses.

Factual Findings

[88] After careful consideration of the totality of the evidence, I find as follows.

[89] At some point during the evening of August 2, 2018, Mr. Shortliffe made a comment to Mr. Nelson about his "kind" drinking alcohol. Mr. Penfold testified that Mr. Nelson was upset by this comment and that he identified Mr. Shortliffe, who was sitting on the patio, as the person who made the comment to him. It is not clear what made Mr. Nelson believe the comment to be Islamophobic because he does not remember the content of the comment. However, I find that Mr. Shortliffe made a comment with a racial element, and that it stemmed from Mr. Shortliffe's perception that Mr. Nelson was Middle Eastern. Mr. Shortliffe admitted that in his police statement and his testimony at the preliminary inquiry that he had an altercation with a young, Middle Eastern man with a beard. As the defence noted, Mr. Nelson is olive-skinned, dark-haired and had a full beard at the time. Mr. Nelson self-identifies as a member of the Cree First Nation. It is plausible that Mr. Shortliffe mistook him as being of Middle Eastern origin. As noted above, Mr. Shortliffe admitted that he experienced a traumatic incident during his childhood, which was perpetrated by an Algerian man. I note this to observe that the comment that Mr. Nelson perceived as Islamophobic was thus not entirely random or without context.

[90] I further find that although he is not of Middle Eastern origin, Mr. Nelson took great offence to the comment.

[91] After that comment was made, Mr. Nelson said something to Ms. MacDowall when she passed the bar on her way to the washroom, which she then reported to Mr. Shortliffe. My finding is based on Ms. MacDowall's testimony, which I accept. Although Mr. Nelson testified that he does not recall making any comment to Mr. Shortliffe or Ms. MacDowall, he admitted that after the comment was made, he said something like "if you don't like the way I look, you can fuck off." This had to have taken place inside the bar, because Mr. Nelson was never seated on the patio. In addition, Mr. Penfold testified that Mr. Nelson was cut off because of his behaviour as opposed to his alcohol consumption that night. Moreover, unless there was some further interaction, the subsequent altercation between Mr. Nelson and Mr. Shortliffe simply makes no sense. As a result, I find that Mr. Nelson said something to Ms. MacDowall about leaving or not being welcome at his bar.

[92] I accept Mr. Nelson's testimony that he was leaving the bar when Mr. Shortliffe punched him in the head and took him down to the ground. On the video, Mr. Nelson is seen facing forward as he walks east. Something causes him to look back. Mr. Shortliffe then comes from behind him before taking Mr. Nelson down. The fight took place in front of the Pizza Pizza on the south side of Bloor Street West near the intersection of Jane Street. The location of the fight matches Mr. Shortliffe's recollection of an altercation near the Brown's bicycle shop, which had a bench in front of it. The Pizza Pizza was just west of the bicycle shop.

[93] Mr. Nelson's testimony about how Mr. Shortliffe attacked him is consistent with the video, which shows Mr. Shortliffe expertly grabbed Mr. Nelson, spun him and forced him to the ground. The two men actually fell together. Mr. Shortliffe then quickly got on top of Mr. Nelson and delivered 14 punches to Mr. Nelson's head in rapid-fire fashion. At first, in the video, Mr. Nelson appeared to be using his bag to try to shield himself from the blows. He struggled underneath Mr. Shortliffe. On the video, after approximately eight to ten punches, Mr. Nelson can be seen moving his arm in a pumping motion. I find that this is when he stabbed Mr. Shortliffe. Mr. Shortliffe then got up and stomped on something. I infer from the evidence that he stomped on Mr. Nelson's hand, which was holding the knife. He then dragged Mr. Nelson a few feet on the street.

[94] Mr. Shortliffe then walked away. Mr. Nelson also walked away after retrieving his hat from the street. Ms. Forde and Ms. Trollope testified that Mr. Nelson walked normally in that he did not appear to be injured. Ms. Weese described Mr. Nelson as walking away slowly. In the video, Mr. Nelson did not stagger or limp. He did not appear to be in a hurry. Given that Mr. Nelson had no recollection of getting up and leaving, he did not testify as to what he was thinking at the time.

[95] The stabbing could not have taken place in front of the Station patio as Mr. Shortliffe testified. DC Robert Jitta from Forensic Identification Services marked a single trail of blood drops from in front of the Pizza Pizza back to the patio of the Station bar. Had Mr. Shortliffe been stabbed in front of the Station patio, there would have been two trails of blood: one from when he chased after Mr. Nelson to the intersection and another from when he returned to the Station patio.

[96] I reject the Crown's theory of the case. Mr. Shortliffe did not recall Mr. Nelson saying something to him to get his attention as he left the Station. Mr. Nelson was not waiting for Mr. Shortliffe with his knife out. If Mr. Nelson had the knife in his hand, Mr. Shortliffe could not have overcome Mr. Nelson so easily. In addition, Mr. Nelson would have used the knife much sooner. It is illogical that Mr. Nelson would have allowed Mr. Shortliffe to punch him in the head at least eight times before resorting to using the knife.

[97] While Mr. Nelson had been cut off at the bar, he had 4-5 pints of beer and was not so intoxicated that he would not have been able to get his knife out from his bag and open it while being hit by Mr. Shortliffe. The knife, while not a switchblade, could be opened with one hand. Mr. Nelson was accustomed to using the knife, which he used multiple times per day.

Has the Crown demonstrated beyond a reasonable doubt that Mr. Nelson intended to kill Mr. Shortliffe?

[98] In order to find Mr. Nelson guilty of attempted murder under s. 239(1) of the *Criminal Code*, I must find that the Crown has proven beyond a reasonable doubt that he intended to kill Mr. Shortliffe. The *mens rea* for attempted murder is a specific intention to kill; recklessness or carelessness with respect to the consequences of one's actions is not sufficient for a finding of guilt on a charge of attempted murder: *R. v. Ancio*, [1984] 1 S.C.R. 225.

[99] In this case, the Crown concedes that the intention to kill would have to be inferred from the facts because there is no evidence of an exchange of words. The Crown submits that the circumstances support an inference that Mr. Nelson intended to kill Mr. Shortliffe because he stabbed Mr. Shortliffe four times with precision and force, near the heart and lungs. The Crown submits that injury to those vital organs could have resulted in death, and that Mr. Nelson knew this.

[100] As noted above, however, the evidence does not support the version of the incident advanced by the Crown.

[101] In this case, I find that the Crown has failed to demonstrate beyond a reasonable doubt that Mr. Nelson intended to kill Mr. Shortliffe. Mr. Nelson had been punched repeatedly in the head when he stabbed Mr. Shortliffe. Mr. Nelson was also visibly struggling under Mr. Shortliffe. The assault was ongoing. Mr. Nelson testified that he wanted to get away. Given the seriousness of Mr. Shortliffe's injuries, I find that Mr. Nelson stabbed him with considerable force. However, in the circumstances, it would have been difficult for him to stab Mr. Shortliffe with precision, or to aim at a particular organ. Because Mr. Shortliffe was above Mr. Nelson, who had the knife in his right hand, stabbing upward would necessarily hit Mr. Shortliffe on the left side of his chest area. While Mr. Nelson may have been reckless or careless as to where he was stabbing Mr. Shortliffe and the physical consequences, that is not sufficient to demonstrate that he intended to kill Mr. Shortliffe.

[102] Accordingly, the Crown has failed to demonstrate beyond a reasonable doubt the offence of attempted murder.

Has the Crown demonstrated beyond a reasonable doubt that Mr. Nelson committed aggravated assault against Mr. Shortliffe?

Has the Crown demonstrated beyond a reasonable doubt that Mr. Nelson assaulted Mr. Shortliffe with a weapon?

[103] As noted above, the defence concedes that the evidence establishes the offences of aggravated assault and assault with a weapon.

Has the Crown demonstrated beyond a reasonable doubt that Mr. Nelson did not act in self-defence?

The Applicable Principles

[104] Section 34 of the *Criminal Code* sets out the pre-conditions for self-defence:

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.

[105] In *R. v. Khill*, 2021 SCC 37, 409 C.C.C. (3d) 141, the Supreme Court of Canada confirmed the three elements of a successful self-defence claim: (1) the “catalyst”: the accused person must reasonably believe that force is being used against him or another person; (2) the “motive”: the accused person’s subjective purpose for responding to the threat must be to protect himself or another; and (3) the “response”: the accused’s act must be reasonable in the circumstances: *Khill*, at para. 37.

[106] The Crown takes the position that there is no air of reality to self-defence. The air of reality test is not an onerous one to meet: *R.v. Barrett*, 2022 ONCA 355, 162 O.R. (3d) 425, at para. 61. A defence has an air of reality if a properly instructed jury acting reasonably could acquit the defendant based on the defence: *R. v. Cinous*, 2002 SCC 29, 162 C.C.C. (3d) 129, at para. 2. In other words, is there evidence upon which a properly instructed jury acting reasonably could be left with a reasonable doubt about whether Mr. Nelson acted in self-defence? In my view, the answer is yes. Based on the evidence, Mr. Shortliffe was repeatedly punching Mr. Nelson in the head, while holding him to the ground. The speed and force with which Mr. Shortliffe was hitting Mr. Nelson created a risk to his life and safety.

[107] The Crown bears the burden of disproving self-defence beyond a reasonable doubt. To satisfy its burden, the Crown is required to disprove only one of the three elements in s. 34(1): *Khill*, at para. 185.

Did Mr. Nelson have reasonable grounds to believe that force was being used or threatened against him by Mr. Shortliffe?

[108] While the Crown suggests that the physical altercation between Mr. Nelson and Mr. Shortliffe was consensual, the video recording shows Mr. Shortliffe unexpectedly taking hold of Mr. Nelson and swiftly taking him down to the ground. Aside from the brief interaction in the bar, there was no lead up immediately before the altercation: no exchange of words, verbal argument, pushing, or shoving. Mr. Shortliffe pinned Mr. Nelson down and then began to hit him with rapid, repeated punches. Mr. Shortliffe delivered 14 blows to Mr. Nelson’s head within 10 seconds. Mr. Nelson is seen moving and struggling but does not appear to be able to get out from under Mr. Shortliffe.

[109] Mr. Nelson testified that when they fell to the ground, he felt a sharp pain in his elbow. He then experienced excruciating pain in his head and feared for his life. Two eyewitnesses, Ms. Forde and Ms. Trollope, were concerned for Mr. Nelson’s safety. They both testified that he was being beaten by the other individual. Ms. Forde testified that she turned to tell her husband to call 911 but when she turned back, the fight was over. They both testified that they were surprised to see Mr. Nelson stand up and walk away.

[110] In my view, Mr. Nelson had reasonable grounds to believe that force was being used against him by Mr. Shortliffe. As a result, the Crown has not demonstrated this element beyond a reasonable doubt.

Did Mr. Nelson stab Mr. Shortliffe for the purpose of protecting himself from the use or threat of force by Mr. Shortliffe?

[111] As noted above, this element is subjective. Mr. Nelson does not remember taking out the knife and stabbing Mr. Shortliffe. As a result, he could not testify that he stabbed Mr. Shortliffe to protect himself. However, this does not mean that the Crown, who bears the burden, has disproven this element.

[112] From Mr. Nelson's perspective, he was leaving the Station when he was suddenly punched in the side of his head and then within seconds taken to the ground in expert fashion. It was a surprise attack with no lead up. What followed can only be described as a brutal beating. The video evidence is shocking in the relentlessness of the blows Mr. Shortliffe delivered to Mr. Nelson's head. The video shows Mr. Nelson holding and manipulating his bag, at first likely in attempt to shield his head and then to retrieve the knife. Mr. Nelson stabbed Mr. Shortliffe while he was pinned to the ground and after Mr. Shortliffe punched him in the head approximately eight to ten times. Even then, despite being stabbed, Mr. Shortliffe continued to hit Mr. Nelson a further four to six times.

[113] The Crown's theory, that Mr. Nelson was so upset at Mr. Shortliffe for the comment he made earlier that he attacked him out of anger, is not supported by the evidence. The Crown has thus failed to prove beyond a reasonable doubt that Mr. Nelson did not stab Mr. Shortliffe for the purpose of protecting himself from the use or threat of force by Mr. Shortliffe.

Was Mr. Nelson's use of force reasonable in the circumstances?

[114] Section 34(2) of the *Criminal Code* sets out a non-exhaustive list of factors to consider in assessing the reasonableness of the accused's act:

- (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 accused's role in the incident;
- (d) whether any of the people involved used or threatened to use a weapon;
- (e) the size, age, gender and physical capabilities of those involved in the incident;
- (f) the nature, duration and history of any relationship among the people involved in 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 among the people involved in the incident;
- (g) the nature and proportionality of the accused's response to the use or threat of force; and
- (h) whether the accused's act was in response to a use or threat of force that he knew was lawful.

[115] Each factor informs “the overall reasonableness of the accused's actions in the circumstances”: *Khill*, at para. 42. No one factor is dispositive; rather, the consideration of the factors is a “global, holistic exercise”: *Khill*, at para. 69.

[116] Based on my consideration of the relevant factors, as detailed below, I find that Mr. Nelson's response in the circumstances was not unreasonable.

The nature of the force or threat

[117] I have found that Mr. Nelson was being brutally beaten by Mr. Shortliffe. Mr. Shortliffe punched Mr. Nelson in the head multiple times in a relentless and rapid manner. The head is a vulnerable part of the body, injury to which could lead to serious consequences. The nature of the force or threat was unexpected and significant.

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

[118] I am mindful that in assessing this factor, it is necessary to consider the speed with which the situation unfolded, and that Mr. Nelson had little time to consider his options. People in stressful and dangerous situations do not have time for subtle reflection: *R. v. Cunha*, 2016 ONCA 491, 337 C.C.C. (3d) 7, at para. 7.

[119] The Crown submits that Mr. Nelson, who was approximately the same height but 50 pounds heavier than Mr. Shortliffe, could have thrown him off to get away. On the video, Mr. Nelson is seen struggling but does not appear able to get Mr. Shortliffe off him. The eyewitnesses described Mr. Shortliffe muscular and having the upper hand. It is relevant that from Mr. Nelson's perspective, the attack was unexpected, speedy and continuous. I accept Mr. Nelson's testimony that he felt disoriented but that he wanted to get away. That would be an expected reaction to such an attack.

[120] The use of force was imminent. De-escalation was not an option. Mr. Nelson was shielding his head but unable to strike back. Mr. Shortliffe was overpowering him. In my view, the reasonably available options to Mr. Nelson were limited. While I have significant concerns about Mr. Nelson introducing a knife into a physical fight, he did not do so immediately. He sustained at least eight blows before using the knife.

The person's role in the incident

[121] The phrase “person’s role in the incident” is to be interpreted broadly, consistent with Parliament’s intent: *Khill*, at para. 74. “[T]he person’s role in the incident’ refers to the person’s conduct — such as actions, omissions and exercises of judgment — during the course of the incident, from beginning to end, that is relevant to whether the ultimate act was reasonable in the circumstances”: *Khill*, at para.74. The “phrase ‘role in the incident’ encompasses not only provocative or unlawful conduct but also hotheadedness, the reckless escalation of risk, and a failure to reasonably reassess the situation as it unfolds”: *Khill*, at para. 84.

[122] The Crown takes the position that Mr. Nelson used excessive force because he “brought a knife to a fist fight.” The Crown submits that Mr. Nelson could have fought back without resort to stabbing Mr. Shortliffe.

[123] Mr. Nelson had the knife with him while out at his regular bar. Mr. Nelson testified that he always had his knife with him because he uses it at work to open boxes of surgical equipment. On August 2, 2018, Mr. Nelson went home after work before going to the Station. Mr. Nelson brought his bag with him to the Station. He explained that he kept the knife in his bag so that he would always have it at work.

[124] I have found that Mr. Shortliffe made a comment that Mr. Nelson perceived as racist and that this upset him significantly. I have also found that Mr. Nelson must have said something to Ms. MacDowall about not being welcome at his bar. While neither man recalls making a comment to the other, the fight that ensued is otherwise inexplicable. As it is, both men’s reactions to the comment that the other made was disproportionate and unreasonable. This was undoubtedly impacted by the amount of alcohol they had both consumed.

[125] Despite being upset by the comment made by Mr. Shortliffe, however, Mr. Nelson accepted that he would not be served more alcohol and paid his bill. He was leaving the bar when he was unexpectedly taken to the ground by Mr. Shortliffe. There was no opportunity to de-escalate. Mr. Shortliffe did not say anything to Mr. Nelson to which he could have responded verbally.

[126] Where a defendant had not prior interaction with the victim and was subjected to an unprovoked assault, the absence of the defendant’s role in the confrontation may militate strongly in favour of the defendant: *Khill*, at para. 101 (citations omitted).

[127] I have rejected the Crown’s theory that Mr. Nelson was waiting for Mr. Shortliffe with his knife ready and that he said something to get Mr. Shortliffe’s attention. I further reject that the physical fight that followed was consensual. While he was belligerent earlier in the evening, when he was leaving the bar, Mr. Nelson was not looking for a fight. The video recording shows a very unequal fight. In terms of Mr. Nelson’s role in the incident, I find that he did not initiate the physical altercation. He did, however, escalate the risk when he took his knife out and used it.

Whether any of the people involved used or threatened to use a weapon

[128] Mr. Shortliffe was not armed. Mr. Nelson was armed with a knife and used it to stab Mr. Shortliffe.

The size, age, gender and physical capabilities of those involved in the incident

[129] Both men are approximately six feet tall. Mr. Nelson weighed 210 pounds at the time, which is 50 pounds more than Mr. Shortliffe, who weighed 160 pounds.

[130] While the two men are only one year apart in age, all of the eyewitnesses perceived Mr. Nelson as approximately 10 years older than Mr. Shortliffe. All of the eyewitnesses described the contrast between the physical appearance of the two men in similar terms: Mr. Nelson was heavier or “chubbier”, while Mr. Shortliffe was slim and “muscular.”

[131] The manner in which Mr. Shortliffe was able to take Mr. Nelson to the ground before Mr. Nelson, despite his size, could resist suggests that Mr. Shortliffe has greater physical capabilities, at least in terms of physical fighting. Mr. Shortliffe spun and brought Mr. Nelson down with ease, or as defence counsel characterized it in a “UFC move.” However, Mr. Shortliffe was not cross-examined about any martial arts or other training and there is no evidence that he has such training.

The nature, duration and history of any relationship among the people involved in the incident

[132] Other than the brief interaction at the Station, there is no evidence of any history of a relationship between Mr. Nelson and Mr. Shortliffe. The absence of a relationship could increase the perceived risk of a threat to a reasonable person, especially considering the unanticipated nature of the physical violence.

Any history of interaction or communication among the people involved in the incident

[133] Based on Mr. Nelson’s testimony, he and Mr. Shortliffe had a brief interaction which included a reference to whether individuals of Mr. Nelson’s “kind” could drink. Mr. Nelson understood the comment to be Islamophobic and found it offensive. Mr. Nelson then said something to Ms. MacDowall and tried to prevent her from going to the bathroom, which she reported to Mr. Shortliffe.

The nature and proportionality of the person’s response to the use or threat of force

[134] I have described both the physical fight and stabbing earlier in these reasons. As noted above, the Crown submits that Mr. Nelson’s use of force was excessive because he introduced a knife to a consensual, physical altercation.

[135] As stated above, the physical attack on Mr. Nelson was not a consensual fight. Nonetheless, Mr. Nelson escalated the level of risk of grievous injury when he took out his knife. Mr. Nelson stabbed Mr. Shortliffe with force four times. Mr. Shortliffe continued to punch Mr. Nelson while he was being stabbed. He did not recall how many times he hit Mr. Nelson. When it

was put to him that he stopped hitting Mr. Nelson because he had been stabbed, he testified that he stopped because it was “enough.” Mr. Shortliffe also testified to feeling “fine” when he returned to the Station patio. On a strict proportionality analysis, I would be inclined to find that Mr. Nelson’s response was disproportionate to the use of force by Mr. Shortliffe. However, because Mr. Shortliffe continued to hit Mr. Nelson and seemed unaware of his injuries, I cannot find that Mr. Nelson’s use of force was excessive. In the circumstances, it is not possible to find, for example, that Mr. Shortliffe would have stopped hitting Mr. Nelson if Mr. Nelson had simply threatened him with the knife or stabbed him once.

Whether the person’s act was in response to a use or threat of force that he knew was lawful

[136] In the circumstances, this factor does not apply.

Overall Assessment of Reasonableness

[137] The third element of self-defence is an overall consideration of the reasonableness of Mr. Nelson’s act in the circumstances. The Supreme Court held in *Khill*, at para. 2, that “self-defence demands a broader societal perspective. Consequently, one of the important conditions limiting the availability of self-defence is that the act committed must be reasonable in the circumstances.” As further articulated by the Court in *Khill*, at para. 62, “the reasonableness inquiry under s. 34(1)(c) operates to ensure that the law of self-defence conforms to community norms of conduct.”

[138] Section 34(2) states that in assessing reasonableness “the court shall consider the relevant circumstances of the person, the other parties and the act”. The “circumstances” are not simply those that existed between Mr. Nelson and Mr. Shortliffe but include the non-exhaustive list of factors in s. 34(2) and other relevant factors such as the location of the incident, the time of the incident, and the other parties who were present: *R. v. Owusu*, 2022 ONCJ 667, at para. 72.

[139] I have difficulty finding that Mr. Nelson’s conduct, of stabbing Mr. Shortliffe with force resulting in life-threatening injuries during a physical fight, accords with community norms of conduct. At the same time, the community would not expect Mr. Nelson not to respond to an unprovoked attack or to continue to subject himself to a relentless physical beating. Moreover, Mr. Nelson had little opportunity to consider his options. He had to try to get away. Based on the factors considered above, and the totality of the circumstances, in my view, the Crown has failed to demonstrate beyond a reasonable doubt that Mr. Nelson’s conduct was unreasonable in the circumstances.

[140] For the foregoing reasons, the Crown has failed to prove beyond a reasonable doubt that self-defence does not apply.

Conclusion

[141] For all the foregoing reasons, I find the defendant, Paul Nelson, not guilty of attempted murder, aggravated assault and assault with a weapon.

Released: March 27, 2024

CITATION: R. v. Nelson, 2024 ONSC 1815
COURT FILE NO.: CR-20-10000223
DATE: 20240327

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Her Majesty the Queen

– and –

Paul Nelson

REASONS FOR JUDGMENT

Nishikawa J.

Released: March 27, 2024