

Court of Queen's Bench of Alberta

Citation: **R v Lugela, 2019 ABQB 128**

Date: 20190311
Docket: 161121298Q1
Registry: Calgary

Between:

Her Majesty the Queen

Crown

- and -

Nelson Tony Lugela

Accused

**Reasons for Judgment
of the
Honourable Mr. Justice K.D. Yamauchi**

I. Introduction

- [1] The Crown has charged the Accused Nelson Tony Lugela with the following:
That he, on or about the 25th day of September, 2016, at or near Calgary, Alberta,
did unlawfully cause the death of Mylan Hicks, thereby committing second
degree murder, contrary to section 235(1) of the *Criminal Code of Canada*
- [2] This Court received evidence over seven days. Counsel then provided this Court with
written argument, and oral argument thereafter. These are the reasons for this Court's decision in
this matter.

II. Evidence

- [3] All locations to which this Court refers are located in Calgary, Alberta.
- A. Calgary Stampeders' Players**
- [4] On September 24, 2016, the Calgary Stampeders defeated the Winnipeg Blue Bombers.
This was a big game for the Stampeders, so a number of players decided to celebrate their
victory by going to the Marquee Beer Market ("Marquee"), which is a drinking establishment on

Macleod Trail. Somewhere between 15 and 25 of the players went to the Marquee. The Marquee was busy that evening. There was a large crowd. It was well-lit, and, as one witness testified, he could "see everyone's faces and eyes."

[5] One of the players, a kicker named Rene Paredes, went to the bar to get a drink. A man standing behind Mr. Paredes felt that Mr. Paredes bumped him and knocked his drink over. An argument ensued, so a number of the Stampeders' players went to the bar to make sure everything was okay. Mr. Paredes was with his wife, and he "looked uncomfortable." The individual who felt Mr. Parades had bumped him was a smaller man of Asian or Hispanic descent. He was between five-feet six inches and five-feet eight inches tall and was wearing a white hat ("Person 1").

[6] There were two other individuals involved in this initial altercation, who appeared to be Person 1's friends. The witnesses variously described one of the individuals as being tall, somewhere between six-feet one inch and six-feet three inches ("Person 2"). Person 2 was a black person and was wearing a red "bubble vest," which this Court interprets as being like a down-filled vest.

[7] The other individual was wearing a white polo shirt ("Person 3"). One of the Stampeders' players, Derek Dennis, testified that Person 3 was wearing a "dad hat," which is like a low-peaked baseball cap, worn backwards. The "dad hat" had an adjustable strap in the back (which was facing frontwards). Person 3 was also a black person, but his skin colour was darker than that of Person 2. He was somewhere between five-feet eight inches and five-feet nine inches tall. Another Stampeders' player, Jamal Nixon, testified that Person 3's polo shirt had "a little colouring on the collar."

[8] Person 1 is Darwin Concepcion, Person 2 is Dhia-al-Hage Mohammed, and Person 3 is Mr. Lugela.

[9] Mr. Dennis attended the scene at which the initial altercation took place, with the intention of easing the tension between the parties. Although Mr. Dennis had had a few drinks before he went to the Marquee that night, he did not drink while he was at the Marquee. Mr. Mohammed came up and challenged the players. Mr. Lugela came around the bar aggressively, but said little. The Stampeders' players explained that they had just won a big game, and that they were not interested in pursuing this matter any further.

[10] There was a second incident involving Mr. Concepcion, Mr. Lugela, and Mr. Mohammed. This time, it involved Kahlil Carter, one of the Stampeders' coaches. Coach Carter had gone to the bar to order drinks for a few of his players. Behind him, he heard someone say "hurry up, nigga." Coach Carter turned around and saw Mr. Lugela standing behind him. Another Stampeders' player, Shaquille Richardson said "don't talk to my coach like that." Mr. Mohammed grabbed Mr. Lugela to calm him down. To ease the tension, Coach Carter, purchased a drink for the three individuals. In return, Mr. Lugela bought a round of drinks for a number of people, including Coach Carter. During this exchange, Jerome Messam, another Stampeders' player, took a hat from one of the individuals and put it on. He eventually returned the hat to that person.

[11] Although it appeared that the situations had diffused, Mr. Mohammed continued to stare at the Stampeders' players, with his arms crossed in "a very aggressive manner," and was "texting" on his cellular telephone. This made Mr. Dennis nervous and suggested to his

teammates that they should leave. However, other players wanted to stay. As a result, Mr. Dennis stayed to make sure nothing went wrong.

[12] Mr. Messam noticed that Mr. Lugela was pacing in an agitated manner. As Mr. Messam described, Mr. Lugela "looked like he wanted trouble." As well, Coach Carter noticed that throughout the night, Mr. Lugela was bumping into people around him, as though he was "under the influence of something." Two other Stampeders' players, Kamar Jorden and Mr. Nixon, also noticed that Mr. Lugela was "going through the club, bumping people," and not apologizing. He was also "passing through" the group of Stampeders' players standing by the dance floor.

[13] Another Stampeders' player, Bakari Grant, was sitting near the back of the Marquee, as he did not want to be among the crowd near the front of the Marquee. Mr. Grant had sustained an injury, and was wearing a knee brace. Mr. Grant consumed a couple of drinks that night. Mylan Hicks, another Stampeders' player, came to the back of the Marquee, as well. Both players stayed there until the Marquee began to close. Mr. Messam testified that Mr. Hicks had nothing to do with what was happening in the front of the Marquee, and that he was "not involved with these guys."

[14] Mr. Dennis spoke to one of the Marquee's bouncers after the initial altercation. He suggested to the bouncer that the three individuals who were involved in the initial altercation be removed from the Marquee as they appeared to be getting hostile. The bouncer checked with the three individuals and told Mr. Dennis that, "everything was okay." Mr. Dennis saw the three individuals consume "quite a few drinks," but none of them seemed to be "sloppy drunk." They did, however, appear to be belligerent. Mr. Messam described those individuals in the same way.

[15] Mr. Jorden left the Marquee towards closing time. He picked up his vehicle and drove towards the front of the Marquee to pick up his friend. He saw Mr. Concepcion and Mr. Lugela in a sport utility vehicle. They were looking around. The sport utility vehicle was parked right in front of the Marquee. Mr. Lugela was in the passenger seat. Mr. Concepcion was in the driver's seat. Mr. Jorden picked up his friend and they left.

[16] After the Marquee closed, people in the club started to exit the premises. Mr. Dennis went to retrieve his vehicle, which he had parked behind the Marquee. He was going to drive his vehicle around to the front to pick up some of his teammates so they could go and get something to eat. There were many people standing outside the club as he was leaving. He hugged Mr. Hicks and asked him how he was doing. Mr. Hicks said he was fine.

[17] As they left the Marquee, Mr. Hicks, Mr. Grant, Mr. Nixon and two other Stampeders' players, DeVaris Daniels and Roy Finch, were standing in front of the Marquee "having a good time" and laughing. They were trying to figure out what they were going to do next. Mr. Mohammed came up to them and asked what they are laughing about. Mr. Grant said that they were just having a good time. Mr. Mohammed kept pressing them, as it appeared he wanted to get into a fight. A "pushing match" ensued. Mr. Lugela came up to try to pull Mr. Mohammed away, but then also became involved in the altercation. Mr. Nixon pushed Mr. Grant back and spun him around. Mr. Lugela was "in [Mr. Hicks'] face" and then threw a glass in the direction of Mr. Hicks. Mr. Daniels, Mr. Grant, and Mr. Nixon saw Mr. Lugela take a few steps to the left and pull a handgun out. Mr. Nixon testified that he was only about two feet away from Mr. Lugela. Mr. Lugela then fired one shot to the ground towards the front door of the Marquee. Mr. Daniels saw Mr. Hicks walking away from the situation, but Mr. Lugela was walking towards Mr. Hicks. Mr. Grant ducked and ran towards the parking lot, where he heard three shots. Mr.

Nixon also ran away, but he heard three or four gunshots. Mr. Daniels also heard more shots. Mr. Hicks then began running, but looked back at Mr. Lugela. Someone then yelled, "Mylan got shot, Mylan got shot." Another Stampeders' player, Roy Finch, yelled, "they shot him, they shot him."

[18] Mr. Messam left the Marquee just before it closed. He went near the back of the club to urinate. As he was standing there, he heard "pow, pow, pow." He did not think they were gunshots; "not in Calgary." He saw someone go down to the ground. He started walking back and he heard Mr. Dennis yell, "he shot him, he shot Mylan, the nigga in the white polo, stop that car." Mr. Messam grabbed Mr. Hicks and turned him over. He saw a bullet hole and took Mr. Hicks' hand and said "fight man, we're here for you." Mr. Messam thought Mr. Hicks would be okay, "because he is strong." After the ambulance took Mr. Hicks away, this is the last time Mr. Messam saw Mr. Hicks.

[19] After picking up his car, Mr. Dennis stopped his vehicle just north of the Marquee, and heard an altercation in front of the building, in which a glass bottle was broken. He "saw the tussling," so he started to get out of his vehicle. He could not make out who was in the tussle, but as he was getting out of his vehicle, he heard a gunshot. People dispersed. Mr. Hicks was running towards Mr. Dennis's vehicle trying to escape and he was shot. Mr. Dennis then saw Mr. Hicks being shot a second time after which, he collapsed on to the concrete. Mr. Dennis did not see the first shot being fired. However, he did see the other two shots being fired. Mr. Dennis identified the shooter as Mr. Lugela, who was dressed in a "white polo shirt" and had the "dad hat" on. Mr. Mohammed then grabbed Mr. Lugela and told him to get into the car, which was a BMW X5 or X6. Mr. Dennis described the BMW as white or silver. Mr. Concepcion was driving. They "took off."

[20] Mr. Dennis described the gun as a silver 9 mm handgun with a black handle. Although he is not a person who uses firearms, Mr. Dennis is familiar with them. He described exactly where Mr. Hicks and Mr. Lugela were located when Mr. Hicks was hit with the second shot. Mr. Dennis described the area as being quite light, and there was nothing obstructing his view of Mr. Hicks and Mr. Lugela.

[21] Mr. Nixon testified that he thought he had seen the shooter jump into a grey Porsche sport utility vehicle, which exited from the parking lot on to Macleod Trail.

[22] The BMW immediately sped off towards Macleod Trail and headed north. Mr. Dennis chased after the vehicle trying to get its license plate number, as did Mr. Grant. Neither was able to obtain a license plate number. Mr. Dennis ran back to see how Mr. Hicks was doing. In the meantime, another player had grabbed Mr. Hicks and flipped him over. That player was holding him and unzipped his coat. Mr. Dennis, saw a bullet hole in Mr. Hicks' chest area, and Mr. Hicks was gasping for air. Mr. Dennis told Mr. Hicks to "hold on" and he was praying that Mr. Hicks would hold on until the ambulance arrived. Mr. Nixon testified that he lay with Mr. Hicks until the paramedics arrived.

[23] The police arrived and Mr. Dennis frantically told the police to chase after the culprits. After about five or 10 minutes, a police officer put Mr. Daniels and Mr. Dennis into the back of the police vehicle to transport them to Westwinds, which is the Calgary Police Service headquarters, to make a statement. They started to make their way to Westwinds by heading north on Macleod Trail, which was the same direction that the BMW had travelled. Mr. Dennis was in the back of the police vehicle, and he saw the three individuals walking down Macleod

Trail, although they had taken off some of the clothing that they were wearing while at the Marquee. Mr. Lugela had on the white polo shirt, but no "dad hat." Mr. Mohammed had on a white shirt, but no red bubble vest. Mr. Concepcion had on a white shirt, but no hat. Mr. Dennis pointed these individuals out to the police officer. Mr. Daniels recognized only the person in the red pants, because of the colour of the pants. He could not recognize the other two. The police officer immediately made a U-turn on Macleod Trail at which time the three individuals crossed Macleod Trail to the front of the Holiday Inn which is on Macleod Trail. Mr. Dennis then saw the police apprehend the three individuals.

[24] The police officer took Mr. Dennis to Westwinds to view a photo lineup. Mr. Dennis selected from the photo lineup two individuals, being the person who he believed was the shooter (Mr. Lugela), as well as the individual who was standing by the bar with his arms crossed staring at the group of players (Mr. Mohammed). He was certain when he picked out the photograph of the shooter (Mr. Lugela).

[25] Coach Carter also viewed a photo line-up. He selected Mr. Lugela as the person who told him to "hurry up, nigga." Coach Carter, who is an African-American, specifically recognized Mr. Lugela because of his "eyes and his lips." Mr. Lugela, according to Coach Carter, had fuller lips and dark eyes, and described his skin colour as "more African than African American." His level of certainty was 95%. Mr. Lugela's photograph "stood out" to him.

[26] Mr. Daniels went home after the police took his statement. He then returned a few hours later to view a photo line-up. He had not seen Mr. Mohammed and Mr. Lugela for any length of time, and he testified that he was not certain what they looked like. He did choose 2 individuals from the photo line-up, but he was not certain of his choices.

[27] Mr. Grant and Mr. Nixon dock-identified Mr. Lugela as the shooter in the white polo shirt. Mr. Messam also dock-identified Mr. Lugela as the person who was wearing the white polo shirt. Mr. Messam testified that he viewed Mr. Lugela's Instagram account two days after the shooting, and he had seen his picture in the newspaper. He had shared the Instagram picture with Mr. Dennis, but this happened after Mr. Dennis had identified Mr. Lugela in the photo line-up. Mr. Nixon testified that he had never seen a photograph of Mr. Lugela.

[28] The Crown made an application pursuant to *Criminal Code* s 715 to allow testimony taken at a preliminary inquiry to be used in the trial proper. Mr. Lugela's counsel did not object to this application. However, this Court asked the Crown's counsel to confirm the evidence of the criteria outlined in *Criminal Code* s 715, to allow this Court to make a proper ruling. The Crown's counsel advised this Court that a witness had provided his evidence at the preliminary inquiry, that he was out of Canada, and that he would not return to Canada to provide testimony in the trial proper. That was the criteria outlined in *Criminal Code* s 715, so this Court allowed that witness's evidence of the preliminary inquiry to be used in the trial proper. This Court is alive to the fact that Mr. Lugela's counsel was not able to cross-examine that witness in the trial proper. As he quite correctly points out, that factor goes to the weight of the evidence, but not to its admissibility.

[29] The *Criminal Code* s 715 evidence is the testimony of Mr. Finch, who was at the Marquee on the night in question. Mr. Finch arrived at the Marquee at approximately 11:30 p.m. on September 24, 2016. When asked whether he observed anything in the Marquee during his time there, he responded by saying that he observed "the person who shot my teammate was just causing a ruckus." He described the "ruckus" as bumping into his teammates and that his

teammates were trying to calm this person down. Mr. Finch was some distance away from these goings-on, so he just observed them. Mr. Finch attributed this "bumping" to the person's intoxication. Mr. Finch saw Mr. Messam go up to the person and speak to him. After Mr. Messam spoke with that person, "things calmed down." As part of Mr. Messam's confronting that person, Mr. Messam took that person's hat off. Mr. Finch described the person as "alone at the time."

[30] Mr. Finch left the Marquee approximately 20 to 25 minutes before the Marquee's last call. He was standing with Mr. Daniels, Mr. Grant, and Mr. Hicks. Four individuals approached them and they "wanted conflict." One of the individuals pushed Mr. Hicks in the chest. Then people started screaming "gun, oh my God." Mr. Finch then saw the shooter "pull the gun" out of his waist area. Mr. Finch started to run away. Mr. Hicks ran in the opposite direction. Mr. Daniels also ran in the same direction that Mr. Finch was running. Mr. Finch saw the shooter go towards Mr. Hicks and Mr. Hicks was trying to run away. Mr. Hicks' pants were falling down, so he could not get away. Mr. Finch saw the shooter point the gun towards Mr. Hicks and shoot three times. By this time, Mr. Finch was about 100 yards away. The shooter was not the same person who pushed Mr. Hicks. The shooter was holding the gun in his right hand. Mr. Finch saw the gunman shoot one shot. He then heard the next two shots. The gunman was pointing the gun directly at Mr. Hicks, while Mr. Hicks' back was turned. Mr. Hicks was, however, looking back to see what was going on. The shooter was approximately seven to 10 yards away from Mr. Hicks.

[31] Mr. Finch described the shooter as being black, about five-feet nine inches tall, and weighing between 150 and 160 pounds. He had on jeans and a dark shirt, and was wearing an ordinary ball cap. Mr. Finch had seen this individual inside the Marquee. He was the individual with whom Mr. Messam was talking. Mr. Finch dock-identified Mr. Lugela as the shooter. Mr. Finch said he was confident in his identification.

[32] After the shooting ended, Mr. Finch started to return to the place he had left. As he was walking back, he saw Mr. Daniels, and said, "DaVaris, like I think... I think they got him" and Mr. Daniels said, "no, no." As they got closer, they noticed a body lying there. They identified the body as being that of Mr. Hicks. Mr. Hicks was lying on his face and he was not moving.

B. Other Lay Witnesses

[33] A number of non-player civilians provided evidence to this Court. The first such witness was Hilary Jeavons who attended the Marquee on the night in question. She arrived somewhere between 12:00 midnight and 12:15 a.m. along with her former roommate. She recognized some of the current and former Stampeders' players, as she has a child with one of them.

[34] She was standing with her roommate at the bar in front of the dance floor. An individual in a white t-shirt and white hat bumped her out of the way. He did not apologize. She described this individual as being black with bigger lips and bloodshot eyes. His complexion was dark; like an individual of African descent. This individual was with another individual who was also wearing a white shirt. The other individual was not wearing a hat. Ms. Jeavons thought that other individual might have been of Asian descent. Ms. Jeavons described the individual of Asian descent as not being as "loud or pushy" as the individual who had bumped into her. He was more like a follower. As a result, he did not stand out to her so she did not pay much attention to him. Ms. Jeavons did not believe the person of Asian descent was black, and he was shorter than the individual who had run into her.

[35] Ms. Jeavons' roommate was speaking with Mr. Paredes. The individual who bumped into her moved over to where her roommate and Mr. Paredes were talking. A verbal altercation erupted, which resulted in a number of the Stampeders' players moving towards the altercation. At that time, another individual entered the altercation. He was about six-feet one inch to six-feet two inches tall. Ms. Jeavons described him as a black person and he was wearing red pants and a red top. This individual was taller than the individual who had bumped into her. She described third man as being more like a "protector or enforcer." In other words, he was there to protect the other two individuals. At first, Ms. Jeavons was not sure whether the third individual was with the other two. She then she saw one of the Stampeders' players put his arm around the third individual to calm him down. The third individual flung the Stampeders' player's arm off of him. It was at that point that Ms. Jeavons knew that the third individual was with the other two. Ms. Jeavons noted that Mr. Messam was wearing the white hat that the first individual had been wearing. She told Mr. Messam to return the hat. She did not see what became of the hat.

[36] The altercation went on for about five minutes until the bouncers took the individual with the white hat who had originally bumped into her and the individual who appeared to be of Asian descent away from the group. Ms. Jeavons thought that the group had been kicked out of the Marquee, but they returned. The individual who had bumped into her came back and strutted around in a "cocky manner" because he had not been kicked out of the Marquee. The three individuals returned to the bar about every 20 minutes.

[37] Another altercation occurred. The individual with the white hat and the white shirt started arguing with Mr. Dennis. The three individuals surrounded Ms. Jeavons and told her to get out of the way. The individual with the white hat and the white shirt had bumped into her several times. She stepped away until they left the area.

[38] Ms. Jeavons left the Marquee at around 2:30 a.m., at closing time. She had offered one of her friends, Joe, another Stampeders' player a ride home. She was walking towards her car and she heard some arguing coming from the parking lot in front and to the side of the Marquee. When she turned around to look at the individuals who were arguing they stopped arguing and looked at her. These were the same three individuals who were in the Marquee, one of whom had bumped into her. She could not hear what they were arguing about, but they were loud. She went to her car and was talking to Joe, as they waited for her roommate. Joe heard a gunshot. Ms. Jeavons did not hear the first gunshot, but she heard two others. Her roommate ran to her vehicle and said someone's been shot, so she drove away as she was scared.

[39] Eventually, she saw a photograph of the individual who the police had arrested in relation to the shooting. It was at that point, that she knew that she was right, but she did not want to be right as to who the shooter was. He was the individual who had bumped into her multiple times at the Marquee. It was Mr. Lugela.

[40] Ms. Jeavons was asked to attend a photo lineup in an attempt to identify the individual in the red tracksuit. The police did not feel that it would be appropriate for her to identify the shooter because she had already seen his photograph. She could not identify the individual in the red tracksuit. And she struggled during the photo lineup. She explained the cause of her uncertainty was because she did not focus her attention on him because he was not the one who had bumped into her. She focused more on the individual who had been bumping into her. Despite this, she was certain who the shooter was. She did not waiver during cross-examination.

[41] Jamie Guy arrived at the Marquee somewhere between 10:30 p.m. and 11:00 p.m. While in the bar, she did not notice anything unusual. That night, she had consumed about seven drinks. She remained at the Marquee until it closed. She and a friend went outside and saw Mr. Messam. They started speaking with him. They were standing along the north side of the building. From there, she could hear an altercation in the front of the building. She heard a gunshot, and saw the shooter coming around the corner of the building. He shot again. Ms. Guy and her friend ran around to the back of the building. Mr. Messam was not with them.

[42] Ms. Guy described the shooter as being a black male, approximately 6 feet tall and weighing 200 pounds. He was wearing a white t-shirt and blue jeans. He was not bald and he had spiky hair. She described the gun as black, similar to what the police carry. She noticed that there was something red on the shooter's upper body. It was not a red shirt and he was not wearing a vest. She just noticed something red on his upper body. She saw the shooter fire the second shot. Ms. Guy could not see to what or whom the shooter was firing. He was simply shooting straight ahead.

[43] Ms. Guy and her friend stayed at the back of the building for about 10 minutes. They came back and stood by Mr. Hicks who was then on the ground. People were taking off his clothes to see where he was shot.

[44] Carlos Abel Tejada Colindres was at the Marquee with two of his friends on the morning of September 25, 2016. They arrived at around 1:00 a.m. It was a busy night. He saw a few of the Stampeders' football players, who were identified by his friends. Mr. Tejada Colindres left the Marquee when it closed. After he exited the building, he spoke with a couple of women, one of whom was his friend, Ms. Guy. Mr. Tejada Colindres then heard something that sounded like a firecracker. He turned around and saw an individual pointing and shooting a gun at the victim. The shooter was approximately 12 feet away from the victim. Mr. Tejada Colindres saw the shooter take one shot, but he heard two. The shooter held the gun in his right hand and his arm was fully extended as he was shooting. The gun was black in color and resembled a "Glock." Mr. Tejada Colindres testified that the shooter tried to take another shot, but "it slid back." The shooter was not wearing a hat. Mr. Tejada Colindres was about 6 feet away from the shooter.

[45] Mr. Tejada Colindres' described the shooter as being well over six-feet tall, perhaps six-feet four inches, and weighing well over 200 pounds. Mr. Tejada Colindres is five-feet seven inches tall. The shooter had no facial hair, but was an Afro-American with black skin. In describing the range of skin color, Mr. Tejada Colindres described the shooter as having "darker skin." He had short hair, like a buzz cut, and was wearing a long-sleeved white crewneck sweater and a chain which was around 20 inches long. He was wearing dark jeans and his shoes were white with a green logo, which he described as Gucci shoes.

[46] Mr. Tejada Colindres saw the victim run away. The victim's pants were lower down and he tripped on his pants as he was running. After the shooting, Mr. Tejada Colindres ran towards the victim to see if he was bleeding. By this time, the shooter was gone. Mr. Tejada Colindres testified that he held the victim in his arms, but he did not perform any first aid. When emergency medical services arrived, they checked on the victim, unbuttoned his shirt to see if he was bleeding, and put foil around the victim's body to keep him warm.

[47] Mr. Tejada Colindres also participated in a photo lineup. He identified two photos as resembling the shooter. One of them was Mr. Lugela.

[48] Kim Aull is a resident in the Parkhill area of Calgary Alberta. In the early morning hours of September 25, 2016, there were three people who sounded like they had passed through her backyard and the left side of her house. They ended up on her street. It was 2:40 a.m., as she had checked her clock when she heard them. She opened her window because she had heard the individuals having a heated discussion. She went to the front window to have a look. Her dogs were still barking and the individuals were still speaking loudly. She could hear them even though she had shut her window, and her dogs were still barking.

[49] She described the individuals as being three black men with light-colored clothing. One of the individuals was taller than the other two. He was wearing a light coloured hoodie or sweatshirt. Another individual was wearing white pants which were drooping low, with a belt around his hips. The final individual was also wearing white clothing. The individuals then walked towards a back alley near Ms. Aull's place, went up the back alley, came back out, and then they left. She does not know the direction to which they left.

[50] Mr. Lugela called one witness, Shelley Marie Stevenson. Ms. Stevenson was working as a bartender at the Marquee on the night of September 24, 2016, and the morning of September 25, 2016. While she is working, Ms. Stevenson does not consume alcohol.

[51] The Marquee was busy that night. Ms. Stevenson was working at the "back bar" near the doors of the Marquee in which Mr. Lugela, Mr. Concepcion and Mr. Mohammed entered and exited. Ms. Stevenson remembered that there was an argument near her bar, where someone was pushing someone else. Although it did not result in a fight, the Marquee's manager came to talk to the people involved in the argument and asked them to "calm down and relax." Ms. Stevenson could not tell how many individuals were involved in the argument, but she said that there were five or six of them.

[52] One group that was involved in the argument parked themselves by her bar and ordered drinks from her. Those individuals were rude and, generally, not very nice to her. She described two of the individuals in that group. One was wearing a white collared t-shirt. He was black and between five-feet eight inches tall to five-feet 10 inches tall, and was wearing a shorter chain around his neck. The other individual was wearing a red vest and was fairly tall, somewhere between six-feet and six-feet two inches tall. He was also black and had longer hair or was wearing a hat. The individuals with whom these two were arguing were also black. She does not remember whether the Marquee's manager took anyone out of the building, as she could not see.

[53] As the night was ending, and all of the patrons were leaving the Marquee, Ms. Stevenson went outside to have a cigarette before cashing out. She was standing directly in front of the door in which Mr. Concepcion, Mr. Lugela, and Mr. Mohammed had entered and exited. Someone approached her and was teasing her in a humorous way. This individual asked her for her phone number and she was passing this individual her phone. As she was doing this, the individual pushed her backwards towards the door. The reason for pushing her was that a group next to her was beginning to scuffle and they were approaching her. The individual pushed her against the door to get her out of the way. All of the scuffling men were black. There were three or four of them. Two of the men who were rude to her were not part of the group who were scuffling.

[54] During the scuffle, Ms. Stevenson heard glass break, which concerned her as she was wearing flip-flops at the time. She started to walk towards the south end of the building, away from the scuffle. As she was walking towards the south end of the building, she heard a male voice say, "where's the gun, do you have the gun?" At that point, she turned around and saw a

man holding a gun. The gun was pointing towards the ground and the man was facing north. The gun was in his right hand. She saw him bring it up and shoot it four times. She did not know at what he was shooting. She described the gun as being a dark gray handgun. She ran towards the door on the south side of the building, away from the shooting. Everyone was screaming. She banged on the door and someone let her in.

[55] She described the man holding the gun as the individual wearing the red vest. He was the taller of the two individuals. The shooter fired the four shots in rapid succession. The man with the white shirt was standing beside the individual with the red vest. He was not wearing a hat. He just had a short haircut. She cannot attribute the words spoken to either of those two men, although she did not think there were other people with them.

[56] She saw these two men again near the Holiday Inn while she was being taken by the police to provide a statement. She saw the individual with the red vest. The police vehicle in which she was sitting stopped for a short period. They then went to the police station where she gave a statement to the police. She did a photo lineup while at the police station.

[57] During cross-examination, although she testified that she was fairly close to the shooter, she described her location as being some distance away from him. In the photo lineup, she did pick an individual from that lineup, which was the individual in the polo shirt. He was standing beside the individual with the red vest at the time of the shooting.

[58] Ms. Stevenson provided a number of statements to the police. Several times in her statements, she emphasized that she "did not get a good look" at the shooter. She was scared and was anxious while she was looking at the shooter and while she was providing her statement to the police. Throughout her statements to the police, she was consistent that she was having trouble remembering what she saw. She said that she did not get a good look at the shooter at least two more times while providing her statement, and she could not describe the colour of the gun.

[59] In her statements, and while testifying before this Court, she said that she had not slept for 24 hours and was "not all there." She was exhausted and did not trust herself. She was traumatized and scared because she had never seen anyone shoot a gun before. She cannot remember between the individual in the red vest and the individual in the white shirt who had the gun, and she testified before this Court that she was "having trouble remembering what happened, even up to today's date."

C. Marquee Employees

[60] Paul Power is currently a partner of the Marquee. In September of 2016, he was not a partner, but he was the Marquee's operations manager. Mr. Power described the Marquee's operations during the period in question. In particular, he testified that the Marquee stopped serving alcohol at 2:00 a.m., and turned off the music and lights somewhere between 2:15 a.m. and 2:30 a.m.

[61] During the night in question, there were approximately 900 patrons in the Marquee. The reason he was able to advise this Court of the number of patrons was because of a computer system at the entrance of the Marquee which scans the identification of each person entering the Marquee. It also takes a webcam photograph of each patron as they enter the Marquee. Thus, there are 2 photographs of each individual in the system; one from their identification, and one from the webcam.

[62] On September 24, 2016, there were a number of Stampeders attending the Marquee. Mr. Power recognized some of them. He was advised that there was an incident near the bar, so he approached the situation and noted that there were three individuals on one side and a number of Stampeders' players on the other. Of the three individuals, Mr. Power noted that two of the individuals were black and one of the individuals appeared to be of Asian descent. He did not know any of them. Mr. Power went over to determine what was taking place and where it was headed. He spoke with the participants and tried to separate the groups. He did not eject any of them. He asked the person who appeared to be of Asian descent to accompany him outside where he had a discussion with that person. After this discussion, he told that person to remain outside while he went to speak with his two friends. Mr. Power allowed that person to re-enter the Marquee and join his friends.

[63] Mr. Power became aware that there was a shooting in the parking lot after the Marquee had closed. At the time of the shooting, he was upstairs in his office. He immediately went outside and approached a crowd that had gathered. Mr. Dennis was yelling that the "guy in the white polo" had "shot his boy." Mr. Dennis was loud, agitated and emotional.

[64] Mr. Power began searching through the computer database to locate who might have been involved in the shooting incident. He identified the three individuals with whom he had spoken earlier, and printed out the information that he collected from the database, as well as the webcam photographs.

[65] The individuals involved were Mr. Concepcion, Mr. Mohammed and "Akieg Bol." The information that Mr. Power printed out for the benefit of this Court, were made exhibits. This information included a photograph taken from the identification presented by the patron, the webcam photograph of the individual that was taken at the time they were entering the Marquee, the individual's age, and the number of times that the individual had attended the Marquee.

[66] Also shown to this Court was a closed-circuit television recording of the entrance to the Marquee. It showed individuals entering and exiting the Marquee. During the entry process, security personnel would do pat-down searches of the patrons to determine whether the patrons were in possession of any weapons or drugs. Later in the recording, it showed the patrons leaving the Marquee at closing time. Included in that recording are the three individuals with whom the Stampeders' players had been involved in the earlier altercation. The recording showed them entering and exiting the Marquee.

[67] During cross-examination, Mr. Power confirmed that the computer database was not a failsafe system. For example, an individual could provide false identification. During his review of the database, Mr. Power only went through the male patrons and not female ones.

[68] On the evening in question, Aaron Ostlund was a doorman at the Marquee. His role was to ensure that everything was running smoothly inside, in the sense that he would ensure that there were "no ruckuses or fighting." After last call, Mr. Ostlund and other security personnel would circulate among the patrons and tell them to finish their drinks and exit the building.

[69] After 2:00 a.m., Mr. Ostlund was standing inside of the entranceway doors to make sure nothing untoward was going on outside the Marquee. He saw a "big ruckus" outside of the building, in which a large group of people were "shoving each other." He also saw that there was a silver BMW sport utility vehicle by the curb in front of the Marquee's entrance doors.

[70] An individual got out of the passenger side of the BMW sport utility vehicle with a handgun in his hand. That person ran past him. Mr. Ostlund described the individual as being black; on the darker shade of an Afro-American individual. The individual was wearing a plain white shirt, blue jeans and, what Mr. Ostlund described as a "du-ray" hat, which this Court understands to be a scarf-like headwear wrapped around the wearer's head. Mr. Ostlund testified that the individual was pointing the handgun towards the ground near his upper thigh area. The handgun was silver with a black handle, and was the type of handgun a person loads from the bottom.

[71] Mr. Ostlund immediately yelled "gun, gun, gun," and for someone to call the police. He closed the door behind him and heard three or four gunshots. He then saw the individual in the white shirt run in front of him towards the passenger side of the sport utility vehicle. As the individual ran past him, they made eye contact with each other and the individual made a "half-assed gesture" by pointing the gun towards the door area where Mr. Ostlund was standing just as he was getting into the sport utility vehicle. There was a black individual driving the sport utility vehicle. The sport utility vehicle left the scene by driving north on Macleod Trail.

[72] Mr. Ostlund did not see the actual shooting. He did see people scattering when the shots were being fired. When further questioned, he testified that another person was also in the sport utility vehicle. This individual had an "olive complexion," but was not black. He stayed in the vehicle the whole time. The driver was black. As Mr. Ostlund was viewing all of this, the area was well lit.

D. Police Officers

[73] In September of 2016, Csts. John Burdyny and David Dalton were members of the CPS Gang Suppression Team. As part of their roles on this team, they attended, and did a walk-through of, the Marquee between 11:40 p.m. on September 24, 2016, and 12:10 a.m. on September 25, 2016. They were looking for individuals who might be involved in organized crime.

[74] As they were leaving the Marquee's parking lot, they noticed a grey BMW X6 coming towards them. The BMW X6 was trying to get around vehicles. Cst. Dalton, who was driving, spoke with BMW X6's driver because the parking lot was full. He told the driver to "be careful." Cst. Burdyny described the driver as a mixed-race individual, possibly Hispanic. Cst. Dalton described the driver as being a Hispanic male with chubby cheeks and wearing a white hat and white shirt. The individual was in his early 20s. Both officers also saw a black male in the passenger seat. Cst. Burdyny saw two males in the backseat. Cst. Dalton said he could not see anyone in the back seat, as the rear windows were tinted. The conversation between Cst. Dalton and the driver was short; about 10 to 15 seconds.

[75] Constable Burdyny wrote down the license plate number of the BMW X6. He later learned that this license plate number was incorrect because it described a Chevrolet Avalanche, and not a BMW X6. Because they had other places to go, Csts. Burdyny and Dalton did not stop to investigate this matter.

[76] After Csts. Burdyny and Dalton heard that there was a firearm incident at the Marquee, Cst. Burdyny did a "reverse query" on the license plate number. Cst. Burdyny explained this process as his entering part of the license plate number into the computer. The searches that came back were numerous, but he eventually found a BMW X6 bearing a similar license plate

number. He knew that this was the type of vehicle for which he was looking. Csts. Burdyny and Dalton eventually found the BMW X6 in the Parkhill area of Calgary. Cst. Dalton checked the wheel well of the BMW X6 to see if it had been recently running. The wheel well was warm, so, to him, the BMW X6 had been recently driven.

[77] Without entering the BMW X6 or touching it, Csts. Burdyny and Dalton noted that there was a backpack on the backseat of the driver's side, as well as a red puffy vest on the back passenger side seat. Cst. Burdyny also noticed a bottle on the ground under the driver's side of the vehicle.

[78] Csts. Burdyny and Dalton stayed with the BMW X6 after they discovered it. They contacted a flat-bed tow truck to transport the BMW X6 to a CPS secure identification facility. Eventually, they followed the tow truck with the BMW X6 on its flatbed to the CPS secure identification facility. The tow truck driver dropped the BMW X6 off in an identification bay and the officers sealed it so it could be processed at a later date. No one touched or went into the BMW X6 while it was under their watch.

[79] When the Crown's counsel showed Cst. Burdyny a number of photographs, Cst. Burdyny identified the backpack and the red coat that were in the backseat, as well as the bottle that was on the ground under the driver's side of the BMW X6.

[80] After the shooting, other members of the CPS Gang Suppression Team went to look at photographs of the suspects from the Marquee's computer system. They circulated photographs of the suspects. Csts. Burdyny and Dalton identified Mr. Concepcion as the driver of the BMW X6.

[81] In September of 2016, Cst. Chad Rausch was on CPS foot/beat patrol. His partner was Cst. Miles Weatherall. They responded to a call to attend at the Marquee. When they arrived, there were already a number of police vehicles in attendance with their emergency lights on. They received a brief description of what had happened and noticed that there were people milling about yelling and crying. Some of the individuals were identified as Stampeders' players. Cst. Rausch did not know the Stampeders' players. He was advised that there were two witnesses who needed to be transported to Westwinds. These witnesses were Mr. Daniels and Mr. Dennis.

[82] Mr. Daniels and Mr. Dennis entered Cst. Rausch's police van. They left the Marquee's parking lot just after 3 a.m. and went north on Macleod Trail. Mr. Dennis and Mr. Daniels were in the back seat of the police van. They were distraught, saying things such as, "Mylan had nothing to do with this," and "Mylan would not hurt anyone."

[83] Mr. Dennis then yelled, "that's the shooter!" Mr. Dennis was seated behind Cst. Rausch in the back seat behind the driver. Mr. Dennis pointed to three males on the west side of Macleod Trail around 40th Avenue SW. Constable Rausch did a U-turn at 39th Avenue SW, so his police vehicle was now facing south on Macleod Trail. The three individuals crossed Macleod Trail from the west side to the east side. Mr. Dennis identified the individual with the white shirt and black jeans as the shooter, the individual with the red pants as the "instigator," and the other individual as the person who started altercations with the Stampeders' players by bumping into Mr. Paredes.

[84] Cst. Rausch was initially watching the three individuals in his rear view mirror. Once he did the U-turn, he watched the individuals out of his front windshield. He saw the individuals cross Macleod Trail. They started walking north. Almost instantly, marked police vehicles were

there and arrested them. Cst. Rausch was parked by a 7-Eleven store and clearly could view other police officers arresting the three individuals. Once officers had taken the three individuals into custody, Cst. Rausch took Mr. Dennis and Mr. Daniels to Westwinds. During this entire time, Cst. Rausch was communicating with other police officers concerning Mr. Dennis's identification of the three individuals, and the movements of the three individuals.

[85] In the early morning hours of September 25, 2016, Cst. Kyle Murphy was in a patrol unit with his partner, Cst. Michael George. Cst. Murphy was driving. They received a "suspicious person" complaint concerning individuals in someone's backyard. They started circulating in the area near Stanley Place SW in Calgary. They did not find anyone.

[86] After circulating in that area, they headed south on Macleod Trail. They received a radio report from Csts. Rausch and Weatherall that a witness they were transporting had identified the three males involved in the Marquee shooting. Csts. Murphy and George were travelling south on Macleod Trail near the Holiday Inn at the time they received the radio report. They did a U-turn at 43rd Avenue SW and were heading north on Macleod Trail. They saw three males crossing Macleod Trail from the west side to the east side. The three males crossed Macleod Trail just north of 42nd Avenue SW, and they matched the description that the officers had received over the radio. Cst. Murphy stopped his police vehicle behind the three males and "challenged them." He said, "Calgary police. Stop where you are and put your hands in the air." The three individuals cooperated and Csts. Murphy and George took them into custody.

[87] Cst. Murphy's police vehicle had a dash-cam. This Court viewed the digital video recording that was taken from the time when Cst. Murphy did the U-turn on 43rd Avenue SW to the point where Csts. Murphy and George stopped the three males. Cst. Murphy described the three males in the recording, and what was going on. He described Mr. Concepcion as sitting at the side of the road dressed in white pants and a grey sweater. Mr. Lugela was dressed in a white shirt and dark pants, and Mr. Mohammed was dressed in red pants.

[88] Cst. George walked Mr. Lugela back to their police vehicle, and searched Mr. Lugela for officer safety before placing him in the back of the vehicle. Among other things that Constable George seized from Mr. Lugela, was a driver's license with the name of "Akieb Bol" on it. Cst. George read Mr. Lugela his *"Charter rights"* concerning his right to counsel, as well as the "standard police caution" concerning what he might say to the police officers. Mr. Lugela told Cst. George that he understood his *Charter* rights and the police caution.

[89] When Cst. George questioned Mr. Lugela about the driver's license of "Akieb Bol," and the fact that it did not have Mr. Lugela's picture on it, Mr. Lugela said that he was supposed to give Mr. Bol his driver's license. Cst. George asked Mr. Lugela for his name and Mr. Lugela identified himself, and his date of birth, which was August 26, 1997. Cst. George then undertook a number of computer searches of Mr. Lugela. Cst. George then advised Mr. Lugela that he was detaining him for attempted murder and for his outstanding warrants.

[90] While Cst. George was dealing with Mr. Lugela, Cst. Murphy was dealing with Mr. Concepcion. Cst. Murphy seized two cellular telephones, a roll of cash, and a carabiner with keys.

[91] Csts. George and Murphy transported Mr. Lugela to Westwinds. They departed the Holiday Inn at 3:32 a.m., and arrived at Westwinds at 3:55 a.m. While transporting him to Westwinds, Mr. Lugela fell asleep. When they arrived at Westwinds, the officers received more

information, and were advised that Mr. Lugela "arrestable." As a result, Cst. George "re-Chartered and cautioned" Mr. Lugela. Mr. Lugela said he did not want to speak to a lawyer. However, when Cst. George read him the formal waiver of his right to contact counsel, Mr. Lugela said that he did want to call a lawyer. Cst. George, however, was not the police officer who provided Mr. Lugela with his right contact counsel. Mr. Lugela was placed in a holding cell.

[92] Cst. George could not provide this Court with an opinion on the state of Mr. Lugela's sobriety, but he did not note any smell of alcohol coming from his police vehicle or other signs of Mr. Lugela's lack of sobriety.

[93] On their arrival at Westwinds, Cst. George seized from Mr. Lugela a black Armani hat, a belt, money and jewelry consisting of a watch, earrings, chain, and a ring. Cst. George placed all of these items in a secure locker. Mr. Lugela was wearing the black Armani hat and the belt at the time of his arrest. The hat and belt were shown to this Court.

[94] Csts. Murphy and George dock-identified Mr. Lugela.

[95] Staff Sgt. Sean Gregson was the primary investigator of the homicide involving Mr. Hicks. At the time, he was a detective in the CPS Homicide Unit. Among his other roles, he seized dash-cam videos that were taken by two taxicabs. He played the taxicab dash-cam videos in court.

[96] The dash-cam videos show the chaos that was occurring at the time the shots were being fired. They recorded the sound of the gunshots. This Court will discuss these dash-cam videos in more detail later in these reasons.

[97] In September of 2016, Sgt. Raymond Kelly was with the CPS Cybercrime Support Team. That team conducts network investigations. Det. Gregson, as he then was, directed Sgt. Kelly to examine Mr. Lugela's online profiles. As a result, Sgt. Kelly reviewed social media platforms such as Facebook, WhatsApp, and Pinterest.

[98] Facebook is a social media platform that allows individuals to speak with each other, and to share pictures, videos, and text messages. Each individual using Facebook must login. In the first instance, the individual must provide a first name, last name, date of birth, email address, and cellular telephone number. Facebook, however, does not verify names. In fact, individuals can use fictitious names.

[99] Det. Gregson provided Sgt. Kelly with Mr. Lugela's name and possible fictitious names. He also provided Sgt. Kelly with Mr. Lugela's date of birth. A user can privatize information. However, the information that Sgt. Kelly gleaned from the various social media platforms he examined were in the public realm, such that he did not need anyone's permission to access that information.

[100] He located an individual on Facebook who had Mr. Lugela's first name and date of birth. However, the individual's last name was different from Mr. Lugela's last name. The username that the person used for Facebook was "Nelson_wani.31". Sgt. Kelly located photographs which the user would have inputted. Sgt. Kelly obtained a profile picture which was that of Mr. Lugela. On September 21, 2016, the profile picture was changed. Sgt. Kelly then looked at a number of photographs that were in the public realm, which had Mr. Lugela in them.

[101] Sgt. Kelly also checked Instagram, which is another social media platform. The username in this instance was "@Nelson_Wani". The main difference between Facebook and Instagram is

that, on Instagram, most profiles are made on a cellular telephone. Individuals use their cellular telephones to take photographs which they upload immediately on to Instagram. Again, Sgt. Kelly looked at Mr. Lugela's Instagram public network and found photographs of him. In one photograph, there was a cup containing a fluid, a black male's hand, and a handgun at the base of the screen. The next photograph showed the bottom half of the same individual, as the flooring was exactly the same as in the previous picture. The final photograph was the upper half of the same individual, who was Mr. Lugela, showing his face, in which he had the same belt buckle as in the previous photograph.

[102] Sgt. Kelly obtained this information from Facebook on September 25, 2016, and the information from Instagram on September 27, 2016.

[103] Det. Kenneth Carriere was asked to assist in this case by reviewing and obtaining video recordings from businesses surrounding the Marquee. While completing his tasks, he moved from the area around the Marquee to the location where the BMW X6 was abandoned. The BMW X6 was found near Stanley Road SW and Stanley Place SW. Det. Carriere drew a line from where the BMW X6 was found, to the Holiday Inn on Macleod Trail. He noted "drag marks" on the pavement near Stanley Place SW where he thought the BMW X6 might have been towed. He took a route along Stanley Drive to 42nd Avenue SW towards the Holiday Inn. He noted that there was an A&W Restaurant on the corner of 42nd Avenue SW and Macleod Trail.

[104] From that point, he turned down an alley going southbound looking for anything of interest. He saw three cellular telephones discarded in a grassy area. He advised CPS crime scene identification of those cellular telephones. Those cellular telephones contained nothing of any evidentiary value. He continued walking southbound in that alley and made his way up to a different alley above the first alley. As he was walking down that alley, he saw footprints and was looking in the garbage bins and recycling bins along that alley. He was looking for clothes, weapons or cellular telephones. In one recycling bin he saw a box and moved it with one finger. He heard a clunk, looked inside, and said to his partner, "gun." He took photographs of the recycling bin with his Blackberry. He did not touch the gun, but he advised CPS crime scene identification of his discovery. CPS crime scene identification had just arrived looking for the cellular telephones that he had earlier reported. Det. Carriere did not see CPS crime scene identification seize the gun from the blue recycling bin.

[105] Det. Carriere's photographs were made exhibits in these proceedings. His photographs showed the alley, the blue recycling bin, the box, and the item in the box that had ribbing and was gunmetal gray, which ultimately turned out to be a handgun. He also identified a residence located at 4 Stanley Place SW, behind which the blue recycling bin was located.

[106] In September of 2016, Sgt. John Medlicott was in the general investigations unit of CPS. He was, at that time, a detective in that unit. His primary role in the investigation of the shooting at the Marquee was to interview Mr. Concepcion. The interview started at 12:20 p.m. on September 25, 2016, and ended at around 8:00 p.m. At first, Mr. Concepcion said he knew nothing about a firearm that was used at the Marquee. Mr. Concepcion's level of cooperation changed when he realized that he was more likely a witness than a suspect. At one point during the interview, Sgt. Medlicott suggested that they take a drive to search the area and locate the firearm. Mr. Concepcion agreed to do this. Sgt. Medlicott testified that, up to this point in his interview of Mr. Concepcion, the officer had no knowledge of where the gun was located.

[107] Sgt. Medlicott and another officer drove Mr. Concepcion to the Marquee. The interaction among the officers and Mr. Concepcion was audio-video recorded. The audio-visual recording was played in open court.

[108] From their arrival at the Marquee, it was clear to this Court that Mr. Concepcion was directing the officers on where they were to drive. They drove from the Marquee north on Macleod Trail where Mr. Concepcion turned left on Stanley Drive SW. They continued to drive up Stanley Drive SW to Stanley Place SW, where Mr. Concepcion identified where he parked the BMW X6. He then directed the officers to a number of alleys. In one alley, they exited the police vehicle and walked to where Mr. Concepcion identified a rickety set of stairs that he said they took to arrive at the alley in which they were situated.

[109] They returned to the police vehicle and drove up yet another alley. In this alley, they exited the police vehicle and Mr. Concepcion pointed out the recycling bin where the handgun should be located. This was a blue recycling bin behind 4 Stanley Place SW. By this time, the handgun had already been recovered by crime scene identification. However, Mr. Concepcion was certain of the blue recycling bin in which the handgun would be located. This was the blue recycling bin in which Det. Carriere found the handgun. Mr. Concepcion then directed the officers to the route he, Mr. Lugela, and Mr. Mohammed had taken from the alley to the Holiday Inn on Macleod Trail.

[110] Cst. Lori St. Onge was with the CPS Forensic Crime Scene Unit. She was tasked with being the primary crime scene investigator of this murder. Sgt. Couture was the secondary investigator and acted as the photographer. Cst. St. Onge described the photographs that Cst. Couture took of the scene and the various exhibits that she had seized.

[111] Among other things, Cst. St. Onge was tasked with obtaining samples of gunshot residue ("GSR"). In particular, she took and recorded GSR samples from each of Mr. Lugela, Mr. Mohammed, and Mr. Concepcion in a systematic fashion, which she described in detail to this Court. Her methodology involved taking swabs of the back of each hand, the thumb webbing, and the lower arm of each individual, as well as dabbing each side of their faces. For each individual, she used a fresh set of surgical gloves and she was dressed in a "bunny suit." Each individual was separated from the others from the time of their detention to the time that Cst. St. Onge examined them for GSR. She advised this Court that she did make an error in the labeling the GSR samples that she took from the three individuals in the sense that she had mixed up left and right. However, she soon discovered this error and corrected it.

[112] Cst. St. Onge identified photographs of all items that CPS officers had seized from the three individuals. Of particular interest to this Court was Cst. St. Onge's seizure of the impugned handgun. The handgun had been discarded in a box in the alley behind a home on 4 Stanley Place SW. The box was placed in a blue recycling bin. Cst. St. Onge took a progressive series of photographs of the alley, the recycling bin, the box in the recycling bin, and the handgun inside of the box. Each series of photographs provided closer detail of the item that was being photographed. She described the handgun in great detail to this Court and showed this Court close-up photographs of it. As well, at the crime scene, she photographed and seized a number of rounds of ammunition, both live and expended, and identified for this Court the exact location of each round of ammunition. She eventually sent the handgun to the laboratory for forensic testing as well as for DNA and fingerprints. She also took photographs of red stains she located in the parking lot outside the Marquee, and identified where she found those stains.

[113] Cst. St. Onge also attended Mr. Hicks' autopsy. She seized four items that the medical examiner removed from Mr. Hicks' body, and described from where those items were removed. Cst. St. Onge also executed a search warrant on the BMW X6. She described photographs of the BMW X6, along with the contents of the vehicle.

E. Experts

1. Dr. Claude Dalpé

[114] Following a review of his qualifications, and without objection from Mr. Lugela, this Court qualified Dr. Claude Dalpé as an expert in forensic examination and the identification of GSR.

[115] Dr. Dalpé explained the nature of GSR. GSR is expelled from any opening in a gun once the gun is fired. GSR dissipates in all directions, as far as four metres from the discharge, depending on atmospheric conditions such as wind, rain, and temperature. It is not visible to the naked eye. It will remain in the air between 10 to 15 seconds or less, again, depending on the atmospheric conditions. Eventually, it settles on the ground.

[116] A forensic crime scene investigator will remove GSR from a surface using a dabber. In the case of a person, the forensic crime scene investigator will apply the dabber to the individual's hands and face. The reason a forensic crime scene investigator uses the dabber on an individual's face is that, at times, a suspect will wear gloves while shooting the firearm so GSR will not collect on the hands, but it might collect on the face.

[117] The forensic crime scene investigator will then seal the dabber and send it to the laboratory. A forensic technician will open the dabber and conduct their examination of the material found on the dabber, using an electron microscope with energy dispersive x-ray spectroscopy. GSR shows specific chemical compounds, usually a combination of two or more of lead, barium, and antimony. Other residue, such as that emanating from vehicle airbags, will contain other elements. Those three elements, however, are unique to GSR.

[118] GSR can appear on a person in one of three primary ways. First, the person might be the individual who fired the weapon. Second, the person might be in close proximity to a discharged firearm, such as within four metres. Finally, there might be a secondary transfer, such as when a shooter shakes hands with another, that other person might end up with GSR on their hand.

[119] Dr. Dalpé's report indicates that the forensic crime scene investigator sent dabbers to the laboratory from samples taken from the face and hands of each of Mr. Concepcion, Mr. Mohammed, and Mr. Lugela. Dr. Dalpé reports that there was no GSR found on either of Mr. Concepcion's hands or on his face. A single GSR particle was found on the left side of Mr. Mohammed's face.

[120] The forensic crime scene investigator took samples from each of Mr. Lugela's hands, as well as from each side of his face, six hours and 45 minutes after the alleged event. Mr. Lugela's left hand indicated four characteristic GSR particles. Dr. Dalpé testified that this is not coincidental and four characteristic GSR particles is high, given the time between the alleged event and the taking of the samples from Mr. Lugela's body. In particular, Dr. Dalpé reported that 80% of GSR disappears from the body within the first two hours after the event. There was no GSR on Mr. Lugela's other hand.

[121] Dr. Dalpé concluded that Mr. Lugela fired a firearm, was in close proximity to a firearm, or handled a firearm. Dr. Dalpé cannot say which of these alternatives is correct.

[122] If GSR is not found in a sample, Dr. Dalpé's report provides the following as to why GSR is not found:

- the individual did not discharge a firearm
- the individual was not in proximity to a firearm being discharged
- GSR was lost or removed by routine daily activity or washing/wiping of the skin
- a mask and/or gloves were worn, preventing deposition of GSR particles on the skin
- the ammunition discharged did not produce particles characteristic of conventional GSR, such as lead-free or non-toxic ammunition, and some 0.22 calibre rimfire ammunition
- sampling was not effective, which may result from sampling dirty surfaces
- no GSR was present on the specific areas sampled

[123] Dr. Dalpé also asked this Court to note that one particle of GSR results in a positive report, such as in the case of Mr. Mohammed. If 10 particles appear, it remains of the same value. In other words, the individual on whom the GSR particles are found was either in close range to the discharge of the firearm, that person discharged the firearm, or there was a secondary transfer of the GSR to that person. The number of GSR particles will decrease over time.

2. Kathryn McCaw

[124] After hearing her qualifications, and with no objection from Mr. Lugela's counsel, this Court qualified Kathryn McCaw as an expert in scientific examination, comparison, and evaluation of recorded media, including video evidence. Of particular interest to this Court is Ms. McCaw's creation of a multisource timeline. With a multisource timeline, Ms. McCaw takes audio-visual video recordings and splices segments together chronologically. As well, she takes something unknown in a video recording and looks for its unique characteristics. She then compares the unknown with a known, such as comparing the unknown clothing a person is wearing in a video recording to seized evidence.

[125] In the case at bar, Ms. McCaw took audio-visual recordings from four different sources, *viz*, the entrance of the Marquee, the audio-visual dash-cam recordings from the Checker taxicab, the audio-visual dash-cam recordings from the Delta taxicab, and the in-car police dash-cam video recordings. With respect to the Marquee videos, she spliced the segments showing Mr. Concepcion, Mr. Lugela, and Mr. Mohammed entering and exiting the Marquee. As well, she spliced the taxicab dash-cam videos together to form a timeline. In particular, she spliced the taxicab dash-cam video recordings together using the sounds of the gunshots, where the audio was consistent.

[126] To identify the persons of interest, she compared and contrasted their clothing with known clothing items, such as photographs of the evidence that Cst. St. Onge seized, photographs that were taken of Mr. Concepcion, Mr. Lugela, and Mr. Mohammed, and actual items that Cst. St. Onge seized.

[127] In the case at bar, Ms. McCaw compared what she saw in the digital video recordings with the seized items of clothing that each of Mr. Concepcion, Mr. Lugela, and Mr. Mohammed was wearing. She reviewed all of the video recordings, and isolated images that showed the three individuals.

[128] The multisource timeline video that Ms. McCaw created allows the viewer to see the video recording frame by frame, and to zoom into particular parts of the frame. In her multisource timeline video, Ms. McCaw pointed out for this Court each of Mr. Concepcion, Mr. Lugela, and Mr. Mohammed, and located where each of them was located and what they were doing at particular times during her multisource timeline video. Importantly, each of Mr. Lugela and Mr. Mohammed was wearing very distinctive clothing.

[129] In the Marquee video recording, Ms. McCaw noted that Mr. Lugela was wearing a white short-sleeved golf-type shirt, dark pants, a light ball cap, and dark footwear. His shirt was untucked and it had accents around the collar. She also noted reflective items on his earlobe and wrist, as well as reflective items on his shoes.

[130] Mr. Mohammed was wearing red pants, a red vest, and a white long-sleeved shirt with characters that go up the arm of his shirt.

[131] In images that Ms. McCaw took from one of the in-car police dash-cam videos that shows the arrest of the individuals, Ms. McCaw points out the clothing that each of Mr. Lugela, Mr. Concepcion, and Mr. Mohammed is wearing. With respect to Mr. Lugela, she identifies a dark ball cap, dark pants, dark footwear and a white shirt. The brim of his hat is pointing backwards and there is a reflective accent on the hat. His shirt is a white short-sleeved golf-type shirt, which is untucked and the buttons are done up. He is wearing a long chain on the front of his shirt. His shoes are high tops with accents. She compared what Mr. Lugela was wearing in these images to the individual clothing items that Cst. St. Onge seized. She also compared this series of images with the photograph of Mr. Lugela taken while he was at Westwinds.

[132] In all these images, Mr. Lugela is wearing a shirt of the same color and style, and with the same accents. In particular, Ms. McCaw pointed out for this Court the contrasting dark lines around the base of the collar and the four dark buttons. Those four dark buttons appear in the Marquee video recording of his entering and exiting the Marquee, his arrest, the police in-car dash-cam video, and the photographs taken of him at Westwinds.

[133] Ms. McCaw also noted the jewelry that Mr. Lugela was wearing in the various images. She noted the reflective item on his left ear, the thick chain around his neck, and a reflective item on his left wrist. The photographs that she viewed did not provide sufficient detail for her to compare these items with the items that Cst. St. Onge seized and photographed. However, the fact that these items exist are of interest to this Court. Seized from Mr. Lugela were two earrings, a thick chest chain, and a Michael Kors wristwatch.

[134] Cst. St. Onge also seized a dark coloured baseball-type hat from Mr. Lugela. On the arrest images, Mr. Lugela was wearing a dark-coloured baseball-type hat backwards, so that the peak was located towards the back of his head. The front of Mr. Lugela's head shows a reflective object. That part of the hat that Cst. St. Onge seized had a shiny reflective adjustment buckle in the back of the hat. In the taxicab dash-cam videos, the individual who is running from the scene is wearing a dark hat worn forward that has a reflective material on the front of the hat, consistent with the front of the hat that Cst. St. Onge seized.

[135] Mr. Lugela was wearing black footwear which Cst. St. Onge seized. The laces on that footwear were also black. The images taken from video of the Marquee entrance, show a person who appears to be Mr. Lugela wearing dark footwear with *light* colored laces. Ms. McCaw took the shoes that Cst. St. Onge seized from Mr. Lugela with the black shoelaces back to the Marquee and had a video recording taken of those shoes using the same recording system. In an image taken from that video recording, the shoes that Cst. St. Onge seized from Mr. Lugela have laces that appear to be light in color when photographed using that system. Ms. McCaw explained this phenomenon to this Court. The fabric that makes up the shoelaces is a synthetic material that fluoresces when seen through an infrared camera. They appear to be light in color, rather than their actual dark colour. As well, images from the Marquee video recording appear to show Mr. Lugela wearing a light-colored hat. Ms. McCaw explained that the hat is also made of synthetic material that appears light when using an infrared camera. Therefore, the hat that Mr. Lugela was wearing when he entered the Marquee was not actually light in color.

[136] Ms. McCaw was asked to extract frames from the Checker taxicab and the Delta taxicab dash-cam videos to determine whether there is an object in the right hand of a male that appears to be Mr. Lugela. Ms. McCaw extracted a number of frames, many of which, because of the contrast between the individual's hand and the background, cannot determine whether he was carrying something in his right hand. When his hand is contrasted against a lighter background, a number of the images that Ms. McCaw produced for this Court appear to show an item in his right hand. Of course, Ms. McCaw could not definitively tell this Court whether the item in the right hand of the individual was a handgun. It appears, however, to this Court to have the trappings of a handgun.

[137] The images from the taxicabs' dash-cam recordings did not appear to show the individual who was wearing clothing similar to that Mr. Lugela was wearing to be wearing a neck chain. Ms. McCaw explained this as being attributable to the fact that the taxicab dash-cam videos were of low quality or, quite simply, that the individual was not wearing a chain at that time. The Crown did direct this Court to an image taken from one of the taxicab dash-cam videos which appears to show a neck chain around that individual's neck.

[138] During cross-examination, Mr. Lugela's counsel drew Ms. McCaw's attention to an individual in the background during the seconds immediately after the alleged shooting. It appears that he is simply standing and watching. This Court is unclear why this was of any interest to anyone, as this individual was neither the shooter nor the victim. He was simply watching.

[139] As well, Mr. Lugela's counsel pointed to something that Mr. Mohammed might have been carrying in his right hand. When looking through a series of photographs leading up to that image, however, it appears, and Ms. McCaw was definitive, that the item was simply a reflection of a headlight, rather than anything that Mr. Mohammed might have been carrying.

[140] It should be emphasized that Ms. McCaw's role was not to identify any particular individual, or any particular item. She was simply conducting a comparison of known and unknown items taken from photographs and evidence.

3. Darryl Barr

[141] After reviewing his qualifications, and with no objection from Mr. Lugela's counsel, this Court qualified Darryl Barr as an expert in firearms and tool mark identification. Among other

things, Mr. Barr had a number of articles published in peer-review journals dealing with firearms and tool mark identification.

[142] Mr. Barr described tool mark identification as determining whether a tool mark was produced by a particular tool. A firearm is a specialized tool, so tool mark identification, as it relates to firearms, is concerned with whether a bullet, cartridge case, or other ammunition component was fired by a particular firearm.

[143] Imperfections and irregularities in the firearm will result in unique characteristics that are transferred to different parts of the ammunition fired from the firearm. This allows experts to establish a link between the firearm and ammunition.

[144] In the case at bar, Mr. Barr examined the firearm that Cst. St. Onge seized, along with the cartridge cases, bullets, and bullet fragments that she seized. To undertake his task, Mr. Barr personally had to test fire the firearm to determine the unique characteristics that would be shown in ammunition fired from that firearm. He would then compare the test-fired ammunition to the seized items.

[145] With respect to the spent cartridges that Cst. St. Onge seized, Mr. Barr was very confident that these spent cartridges were fired from the firearm that Cst. St. Onge seized. As for the bullets and bullet fragments, he could not dismiss or confirm that these bullets were fired from that firearm. The reason is that some of the bullet fragments were not suitable for comparison because of, for example, their size. In other words they could not be identified or eliminated as items that were fired from that firearm. As well, certain of the markings on those items were obscured because of corrosion from body fluids. He also concluded that the firearm that was used in this instance is a "restricted firearm" within the meaning of *Criminal Code* s 84(1).

F. Darwin Concepcion

[146] In September of 2016, Mr. Concepcion was 18 years old. He has no criminal record. Mr. Concepcion and Mr. Lugela knew each other when they were in junior high school. They reconnected sometime in July of 2016, and partied together a few times. They had gone to the Marquee on at least one occasion. Mr. Concepcion dock-identified Mr. Lugela.

[147] At around 6:00 p.m. or 7:00 p.m. on September 24, 2016, Mr. Concepcion received a telephone call from Mr. Lugela. Mr. Lugela told Mr. Concepcion that he had a flat tire, and asked Mr. Concepcion to pick him up. At that time, Mr. Concepcion was driving a BMW SUV. Mr. Concepcion had not been drinking.

[148] Mr. Concepcion picked Mr. Lugela up at a gas station in northwest Calgary. Mr. Lugela's friend "D Mo" was with Mr. Lugela. "D Mo" is Mr. Mohammed. Henceforth in these reasons, this Court will refer to "D Mo" as Mr. Mohammed, although Mr. Concepcion referred to Mr. Mohammed as "D Mo" throughout his testimony.

[149] Mr. Concepcion had met Mr. Mohammed before, as he was one of Mr. Lugela's friends. In other words, Mr. Mohammed was a "friend of a friend." Mr. Concepcion was shown a picture of Mr. Mohammed. Mr. Concepcion identified him. He described Mr. Mohammed as a tall black man. When Mr. Concepcion picked up Mr. Lugela and Mr. Mohammed, Mr. Mohammed was wearing red pants, and a red jacket with no sleeves (a vest). Mr. Concepcion saw no weapon on either Mr. Lugela or Mr. Mohammed.

[150] After Mr. Concepcion picked up Mr. Lugela and Mr. Mohammed, they went downtown and drove up and down 10th Avenue SW. They did not stop at any of the clubs, as they had planned on going to the Marquee. Near the end of 10th Avenue there was "an event," but they did not attend the event. They were just "killing time."

[151] They ended up going to the Marquee at between 9:00 p.m. and 10:00 p.m. They did not go in when they first arrived because the line-up was too long. As they were leaving the parking lot, they encountered two police officers. Because he was driving too fast, one of the officers told Mr. Concepcion to "take it easy." Mr. Concepcion apologized to the officer.

[152] Mr. Concepcion, Mr. Lugela, and Mr. Mohammed left the Marquee's parking and went down Macleod Trail to a liquor store, which was about three minutes away. They bought a 750 ml bottle of Cîroc vodka and a bottle of wine. They drove back to the Marquee, where Mr. Concepcion parked along the north side of the Marquee. They started "taking shots" out of the bottles. Among the three of them, they drank about one-half of the bottle of vodka and the wine. By this time, Mr. Concepcion was "tipsy" and he testified that each of them drank about the same amount. Mr. Concepcion is 5-feet 6 inches tall and weighed 175 pounds at that time.

[153] They exited the BMW SUV and waited in the Marquee's line-up for about five minutes. The process to get into the Marquee was to go through the doors, pay the admission, and get searched. He was shown a digital video of the Marquee entranceway and identified himself, Mr. Mohammed, and Mr. Lugela as they entered.

[154] Once they got into the Marquee, they continued drinking shots. Mr. Concepcion testified that he got bumped as he was standing at the bar. He started swearing at the individual who bumped him, and that individual and others started swearing back at him. He did not know the man who bumped him, who Mr. Concepcion described as a "tall black guy with a hat on." Mr. Lugela and Mr. Mohammed, who were standing next to Mr. Concepcion, joined Mr. Concepcion in the swearing match. On the other side were about seven or eight individuals. Mr. Concepcion described the individuals with whom they were arguing as "definitely taller guys," but he did not know any of them. At one point, someone took Mr. Concepcion's hat, laughed at him, and put it back on his head.

[155] The altercation went on for about a minute and got more serious, although there was no pushing and no punches were thrown. Because of the volume of the music and the number of people in the Marquee, Mr. Concepcion could not hear what the others were saying. He just knew what he was saying, and he was focussed on the individual who had bumped him.

[156] Eventually, the bouncers came and separated them. The Marquee's manager kicked Mr. Concepcion out of the Marquee, who Mr. Concepcion described as a "tall white guy." When the manager asked Mr. Concepcion why they got into the argument, Mr. Concepcion told the manager "how would you feel if someone took your hat off and disrespected you?"

[157] The manager returned and let Mr. Concepcion back into the Marquee. Once Mr. Concepcion returned, "everything was cool." There were no more problems. He did not see the individuals with whom they had had the original altercation. During the evening, Mr. Concepcion testified that every 10 or 15 minutes he would "do shots at the bar." He, Mr. Lugela, and Mr. Mohammed stayed in the Marquee until closing time.

[158] At closing time, Mr. Concepcion, Mr. Mohammed, and Mr. Lugela left the premises. The Crown showed Mr. Concepcion a digital video recording of the Marquee's entranceway and he

identified the three of them leaving the premises. The three of them went to the north side of the Marquee where Mr. Concepcion had parked his BMW SUV. They got into the vehicle and he drove it around to the front of the Marquee. Mr. Concepcion was "pretty drunk at this point." Once he parked the vehicle, he opened the windows and started "blasting music." He got out of the vehicle and was standing in front of it. He was speaking with a girl that he knew. He thought that Mr. Mohammed and Mr. Lugela were behind him, as they were not in front of him. He thought that Mr. Lugela was about four metres away from him.

[159] As Mr. Concepcion was standing and talking, he heard a bang in his left ear. He actually thought someone was shooting *at him*. Everyone started running and his ears were ringing. Mr. Concepcion heard two or three gunshots. He turned around and saw Mr. Lugela about four metres away from him. He did not notice anything in Mr. Lugela's hand. Mr. Lugela was approaching him quickly and saying, "we gotta go." Mr. Concepcion jumped in his vehicle. Mr. Lugela came around and jumped into the front passenger side of the vehicle, and Mr. Mohammed got into the back seat. Mr. Concepcion had not seen Mr. Mohammed until he jumped into the vehicle. Mr. Concepcion did not notice anything in Mr. Lugela's hands at that time. Although Mr. Concepcion was challenged as to who said "we gotta go" or "let's go," he confirmed before this Court that it was Mr. Lugela who said it.

[160] Mr. Concepcion backed out of the parking stall and drove through the parking lot to Macleod Trail northbound. He was driving quickly. He took the first left turn off of Macleod Trail and went up a hill. Nothing was said in the vehicle at the time, as the music "was blasting." They ended up in a roundabout and he parallel parked his vehicle. It was a residential area.

[161] As he was parking the vehicle, for the first time, he saw a handgun in Mr. Lugela's hand. Mr. Lugela was still seated in the passenger seat. Mr. Concepcion described the gun as a handgun which was chrome with a wooden handle. Mr. Lugela said, "I took two shots. I don't think he's going to make it." It was then that Mr. Concepcion became aware of the situation and he was "amazed" at what had happened. He said nothing to Mr. Lugela. He had not seen the gun before, and did not know there was a weapon inside his vehicle.

[162] Mr. Lugela's counsel challenged Mr. Concepcion's testimony that Mr. Lugela said, "I took two shots." Mr. Concepcion did not say this to the officer who was interviewing him while he was giving his *KGB* statement, nor during the preliminary inquiry. Mr. Concepcion thought he had told the officer. In fact, on September 25, 2016, Mr. Concepcion told Sgt. Medlicott that Mr. Lugela said, "I shot two." Mr. Concepcion's exact wording during that interview was as follows:

I was like, "Well, why'd you shoot him?" That's exactly the first question I asked [Mr. Lugela]. And then he was like – ah, he's was like, "Man, I ..." – I think he said "I shot two. Ah, I don't think he's going to make it," bro.

This was the wording taken from the transcript of his initial interview with Sgt. Medlicott on September 25, 2016. Before this Court, Mr. Concepcion testified that "that was the truth." Mr. Lugela's counsel did not challenge Mr. Concepcion at all on Mr. Lugela's comment, "I don't think he's going to make it."

[163] Mr. Concepcion, Mr. Lugela, and Mr. Mohammed exited Mr. Concepcion's vehicle because "the police were looking for the vehicle." They walked through someone's yard, went to a back alley, and "just walked." Mr. Concepcion did not know why they were walking. There

was no discussion. Mr. Mohammed was shocked, as well. Mr. Concepcion saw Mr. Lugela throw the gun into a recycling bin. Mr. Concepcion did not remember Mr. Mohammed handling the gun. Mr. Concepcion was behind Mr. Lugela when Mr. Lugela threw the gun into the recycling bin. Nobody said anything. They just continued walking.

[164] Mr. Lugela's counsel challenged Mr. Concepcion on exactly who placed the handgun in the recycling bin. In the *KGB* statement that Mr. Concepcion provided on September 28, 2016, he recalled that the handgun was placed in the recycling bin, but he did not know whether it was Mr. Mohammed or Mr. Lugela who placed it in the bin. During the preliminary inquiry, he testified that he could not remember which of the two put the handgun into the recycling bin. It was not him. In his earlier statement, which he gave to Sgt. Medlicott on September 25, 2016, the day of the shooting, he told the officer no fewer than three times that it was Mr. Lugela who placed the handgun in the recycling bin. In his last comment, he said, "Nelson disposed of the gun, not [D-Mo]."

[165] During their walk, the three of them eventually got back on to Macleod Trail, and walked past an A&W. They arrived at a Holiday Inn on Macleod Trail. Mr. Concepcion called a friend to come and pick him up. Mr. Concepcion, Mr. Lugela, and Mr. Mohammed were arrested right in front of the Holiday Inn. When the police arrived, Mr. Concepcion put his hands up, and the police placed each of the three individuals into separate police vehicles.

[166] While he was in the back seat of the police vehicle, the police asked Mr. Concepcion what he was driving and where he was coming from. He told them that he was driving a Mercedes-Benz and coming from the Commonwealth (which is a nightclub). He told the police that the three of them were not near the Marquee, and said they were going to stay at the Holiday Inn. Mr. Concepcion admitted to this Court that none of this was true. When the Crown's counsel asked him why he had lied to the police, he said he did not want "to be part of the situation."

[167] The police took Mr. Concepcion to the police station and he gave a statement to Sgt. Medlicott. At first, he lied to Sgt. Medlicott. Eventually, he told Sgt. Medlicott exactly what had happened. When asked why he did not tell the truth the first time, Mr. Concepcion said he was still drunk and did not know what to say. As well, he did not want anything to do with the situation, particularly because someone had been shot. He did not know why someone had to die and he was scared. He eventually told the truth because he found out who was killed. Mr. Concepcion testified that Mr. Hicks "lost his life over nothing."

[168] When the Crown's counsel showed Mr. Concepcion a dash-cam video taken from one of the taxicabs, he identified his BMW X6 as being parked in front of the Marquee. As two individuals were approaching his BMW X6, he identified the man in the white shirt as being Mr. Lugela, and the person with the red vest and pants as being Mr. Mohammed. He testified that he was probably standing in front of the BMW X6 at that time.

[169] Mr. Concepcion was then shown the two videos taken from the dash-cams of the police vehicles. He identified himself, as well as Mr. Lugela, and Mr. Mohammed. Finally, the Crown's counsel showed Mr. Concepcion the social media photographs that Sgt. Kelly had printed from Facebook and Instagram. Mr. Concepcion had never seen these photographs before. Mr. Concepcion identified Mr. Lugela in each and every photograph.

[170] Following Sgt. Medlicott's interview of Mr. Concepcion, they went for a drive so that Mr. Concepcion could point out where the handgun was deposited. They walked through an alley and

arrived at a recycling bin where Mr. Concepcion showed Sgt. Medlicott where he could find the handgun. This is where Cst. Carriere found the handgun. Mr. Concepcion had never touched the handgun.

III. Discussion

A. Charge and *Criminal Code*

[171] The Crown charged Mr. Lugela with second degree murder contrary to *Criminal Code* s 235, which reads as follows:

235 (1) Every one who commits first degree murder or second degree murder is guilty of an indictable offence and shall be sentenced to imprisonment for life.

(2) For the purposes of Part XXIII, the sentence of imprisonment for life prescribed by this section is a minimum punishment.

[172] As can be seen, *Criminal Code* s 235 describes the sentence that a court can impose on a person if it finds them to be guilty of first or second degree murder. Other sections in the *Criminal Code* will assist this Court in determining the issues before it. *Criminal Code* ss 222, 229 and 231 provide as follows:

222 (1) A person commits homicide when, directly or indirectly, by any means, he causes the death of a human being.

(2) Homicide is culpable or not culpable.

(3) Homicide that is not culpable is not an offence.

(4) Culpable homicide is murder or manslaughter or infanticide.

(5) A person commits culpable homicide when he causes the death of a human being,

(a) by means of an unlawful act;

...

229 Culpable homicide is murder

(a) where the person who causes the death of a human being

(i) means to cause his death, or

(ii) means to cause him bodily harm that he knows is likely to cause his death, and is reckless whether death ensues or not;

(b) where a person, meaning to cause death to a human being or meaning to cause him bodily harm that he knows is likely to cause his death, and being reckless whether death ensues or not, by accident or mistake causes death to another human being, notwithstanding that he does not mean to cause death or bodily harm to that human being; or

(c) where a person, for an unlawful object, does anything that he knows or ought to know is likely to cause death, and thereby causes death to a human being, notwithstanding that he desires to effect his object without causing death or bodily harm to any human being.

231 (1) Murder is first degree murder or second degree murder.

(2) Murder is first degree murder when it is planned and deliberate.

...

(7) All murder that is not first degree murder is second degree murder.

[173] Mr. Lugela raises an issue of his alleged intoxication. Which this Court will discuss later in these reasons. For now, it is worthwhile to provide the following *Criminal Code* sections, as they relate to manslaughter:

236 Culpable homicide that is not murder ... is manslaughter.

236 Every person who commits manslaughter is guilty of an indictable offence and liable

(a) where a firearm is used in the commission of the offence, to imprisonment for life and to a minimum punishment of imprisonment for a term of four years,

B. The Offence and Issues

[174] For this Court to convict Mr. Lugela of the second degree murder of Mr. Hicks, the Crown must prove, and this Court must find, the following beyond a reasonable doubt:

- (a) that Mr. Lugela is the person who actually committed the offence of second degree murder.
- (b) that the second degree murder occurred at the time and place set out in the indictment.
- (c) that Mr. Lugela committed an unlawful act.
- (d) that the unlawful act caused Mr. Hicks' death.
- (e) that Mr. Lugela had the state of mind required for murder, in the sense that he meant to cause Mr. Hick's death, or meant to cause bodily harm to Mr. Hicks that Mr. Lugela knew was likely to cause Mr. Hicks' death and was reckless about whether or not it caused Mr. Hicks' death.

[175] The issue before this Court involves the identity of the person who pulled the trigger that killed Mr. Hicks. Said differently, if this Court is satisfied beyond a reasonable doubt that it was Mr. Lugela who pulled the trigger, Mr. Lugela concedes items (b) through (d).

[176] If this Court finds that it was Mr. Lugela who pulled the trigger that killed Mr. Hicks, it must then move on to consider item (e), as Mr. Lugela argues, in the alternative, that he could not have had the state of mind that is required for murder. For an unlawful killing to be murder, the Crown must prove, and this Court must find, beyond a reasonable doubt that Mr. Lugela either meant to kill Mr. Hicks, or meant to cause Mr. Hicks bodily harm that Mr. Lugela knew

was likely to kill Mr. Hicks, and was reckless whether Mr. Hicks died or not. The Crown need not prove both. One is enough. If Mr. Lugela did not mean to do either, he committed manslaughter.

[177] The twist in the case at bar is that Mr. Lugela argues that he was too drunk to have an intent. One of the effects of intoxication is that it may interfere with a person's ability to foresee or intend the natural consequences of his actions. If this Court believes, or has a reasonable doubt, that intoxication affected Mr. Lugela's ability to foresee the natural and probable consequences of his actions, then this Court cannot rely on the common sense inference that a sane and sober person intends the natural and probable consequences of his actions when it decides whether Mr. Lugela had the intent to cause Mr. Hicks' death or to cause bodily harm to Mr. Hicks that Mr. Lugela knew was likely to cause Mr. Hicks' death and was reckless about whether or not it caused Mr. Hicks' death. In that case, it must find Mr. Lugela guilty of manslaughter, and not second degree murder.

C. Motive

[178] The existence of motive may represent circumstantial evidence that supports inferences consistent with identity and intent. Conversely, the absence of a motive might represent circumstantial evidence that supports the inference that an accused was unlikely to have committed an offence: *R v Lewis*, [1979] 2 SCR 821.

[179] The parties provide arguments supporting or refuting a motive. Arguably, the initial altercation among the parties had resolved itself, so Mr. Lugela would have had no motive to shoot Mr. Hicks. It is equally arguable that the initial altercation had not completely resolved itself, and that Mr. Lugela continued to seethe as a result. It is possible that a further altercation occurred after the parties left the Marquee, when the "tussle" occurred. It is also possible that Mr. Lugela, or whoever was the shooter, was simply looking for trouble, and wanted to shoot someone. There is some evidence to support any of these hypotheses. This Court finds, however, that it need not answer the question whether there was a motive for the shooting. It is the other evidence on which this Court must rely, and to which it now turns.

D. Identity

[180] Identity is the crucial issue before this Court. An important place to start this discussion is by providing the following words that Belzil JA, for the court, said in *R v Atfield*, 1983 ABCA 44, 25 Alta LR (2d) 97, 42 AR 294 at paras 3 and 6:

The authorities have long recognized that the danger of mistaken visual identification lies in the fact that the identification comes from witnesses who are honest and convinced, absolutely sure of their identification and getting surer with time, but nonetheless mistaken. Because they are honest and convinced, they are convincing, and have been responsible for many cases of miscarriages of justice through mistaken identity. The accuracy of this type of evidence cannot be determined by the usual tests of credibility of witnesses, but must be tested by a close scrutiny of other evidence. In cases where the criminal act is not contested and the identity of the accused as the perpetrator the only issue, identification is determinative of guilt or innocence; its accuracy becomes the focal issue at trial and must itself be put on trial, so to speak. As is said in *Turnbull, supra*, the jury (or the judge sitting alone) must be satisfied of both the honesty of the witness

and the correctness of the identification. Honesty is determined by the jury (or judge sitting alone) by observing and hearing the witness, but correctness of identification must be found from evidence of circumstances in which it has been made or in other supporting evidence. If the accuracy of the identification is left in doubt because the circumstances surrounding the identification are unfavourable, or supporting evidence is lacking or weak, honesty of the witnesses will not suffice to raise the case to the requisite standard of proof, and a conviction so founded is unsatisfactory and unsafe and will be set aside.

...

It goes without saying that correctness of identification must be decided by examining the whole of the evidence left on the scales at the end of the case and not by selectively picking and accepting those items of evidence which support correctness while disregarding contradictory evidence not specifically rejected for cause which might leave correctness in doubt.

[Emphasis added].

See also **R v Saddleback**, 2013 ABCA 250 at para 38.

[181] In **R v Burke**, [1996] 1 SCR 474 at para 52, Sopinka J said the following for the court:

The cases are replete with warnings about the casual acceptance of identification evidence even when such identification is made by direct visual confrontation of the accused. By reason of the many instances in which identification has proved erroneous, the trier of fact must be cognizant of "the inherent frailties of identification evidence arising from the psychological fact of the unreliability of human observation and recollection" ...

See also **R v Goran**, 2008 ONCA 195 at para 19.

[182] Simply because more than one witness might identify a person as being the person who committed the crime does not make the identification less frail: **R v FA** (2004), 183 CCC (3d) 518 at para 39 (Ont CA). Identification is not a situation in which a trier of fact can be more comfortable as the number of witnesses who identify the perpetrator grows. The trier of fact still requires proof beyond a reasonable doubt.

[183] But how does the trier of fact reach that level of comfort? As Belzil JA said in **Atfield**, "[t]he accuracy of this type of evidence cannot be determined by the usual tests of credibility of witnesses, but must be tested by a close scrutiny of other evidence." See also **R v Hibbert**, 2002 SCC 39 at para 52, [2002] 2 SCR 445. What is that other evidence? One of the more important is whether the witness knows the perpetrator. Mr. Lugela provides this Court with a number of non-exhaustive factors, which this Court accepts, as follows:

- Length of opportunity to observe, i.e. "lengthy or fleeting?": **R v Carpenter**, 1998 CarswellOnt 1651, [1998] OJ No 1819 at para 1
- Whether the sighting by the witness was in circumstances of stress: **R v Nikolovski**, [1996] 3 SCR 1197 at 1209-10
- Distance of observation: **R v Fengstad** (1994), 27 CR (4th) 383 at para 46
- Impediments to observation: **Fengstad** at para 50

- Time elapsed between original observation and the subsequent identification to the police: *ibid*
- Light conditions
- Eyesight of the witness
- Whether the accused person has any special distinguishing features, either physical or in speech or dress: *Fengstad* at para 46.

[184] Although many of the witnesses in the case at bar positively identified Mr. Lugela as the shooter through in-dock identification, the Crown acknowledges that in-dock identification is of limited value to this Court. Although this Court might refer to the in-dock identification, it will place limited weight on it.

[185] In *R v Jack* (2013), 100 CR (6th) 164 at para 16, 294 CCC (3d) 163, Epstein JA, for the court, said the following:

As well, the jury must be instructed to carefully scrutinize the witnesses' description of the assailant. Was it generic and vague, or was it a detailed description that includes reference to distinctive features of the suspect? ... In some cases, a failure to mention distinctive characteristics of a suspect is sufficiently important, especially where there is no other inculpatory evidence, to reduce the case from one of identification effectively to one of no identification.

[Citations excluded].

[186] It is also important that an eyewitness's description that contains dissimilarities to the accused could be either valueless or exculpatory, depending on the nature of those dissimilarities: *R v Richards* (2004), 186 CCC (3d) 333 at para 30, 70 OR (3d) 737 (CA).

[187] This Court must be alive to the fact that there might be some "tainting" in the identification process. It will address this concern as it proceeds through its analysis. Robertson CJO explained the notion of "tainting" in the context of photographs in *R v Goldhar* (1941), 76 CCC 270 at 271 (Ont CA), where he said the following:

... while no doubt it is often necessary to assist the police in their search that photographs should be exhibited to someone who may be able to pick out a photograph of the person to be sought for, there is always the risk that thereafter the person who has seen the photograph will have stamped upon his memory the face he has seen in the photograph, rather than the face he saw on the occasion of the crime. The usefulness of such person as a witness may thereafter be seriously impaired ... It is important that trial Judges, as well as the police, should have this in mind.

[188] A more contemporary concern with "tainting" might arise through a witness's use of social media. Much like in-dock identification, seeing Mr. Lugela's photograph on social media might have tainted some of the witnesses when they identified Mr. Lugela in-dock. However, it does not taint their identification of him immediately after the shooting before they saw his photograph on social media. Mr. Messam did not say that he looked at the social media photographs of Mr. Lugela before he, or any of his teammates, attended for the photo line-ups.

The fact that Mr. Messam might have circulated Mr. Lugela's photograph after the fact is of no concern to this Court. There was no tainting of the evidence.

[189] A further argument that Mr. Lugela raises is that "the vast majority of Stampeder players" heard Mr. Dennis say "the nigga in the white polo" shot Mr. Hicks. In fact, it was only Mr. Messam who testified that Mr. Dennis was screaming and stated that it was "the nigga in the white polo" who shot Mr. Hicks. Similarly, Mr. Power testified that Mr. Dennis "was yelling that the guy in the white polo shot my boy." None of the other Stampeders' players testified that they heard this. There was no confirmation bias or other tainting of the evidence of other witnesses.

[190] An interesting issue that need not arise in the case at bar is a concern over "cross-racial identification," to which the court in *Richards* at para 32 referred. This was described by Finlayson J.A. in *R v McIntosh* (1997), 117 CCC (3d) 385 at para 21, 35 OR (3d) 97, as the perception that members of one race tend to think that members of another race "all look alike." In the case at bar, many of the eyewitnesses were of the same race as Mr. Lugela, *viz*, black males.

[191] Many of the witnesses were shown a photo line-up. Mr. Lugela concedes that the photo line-up process was fair. There are other issues that arise in the photo line-up, which this Court will address when it discusses it.

[192] From the foregoing, it is clear that this Court must exercise caution when relying on the identification of Mr. Lugela as the shooter in the case at bar. It will first discuss the eyewitness identification, and then the evidence that might corroborate, or refute, the eyewitness identification.

[193] It is important to note at the outset that none of the witnesses, save for Mr. Concepcion, knew Mr. Lugela before the night in question. Many of the witnesses, however, interacted with Mr. Lugela, Mr. Concepcion, and Mr. Mohammed in the Marquee before the shooting took place. Those witnesses, therefore, had previously seen those individuals. Because of their previous interactions with them, they were able, in varying degrees, to identify specific characteristics unique to those individuals, along with their clothing.

[194] This Court notes that there are varying differences in the witnesses' description of the shooter. There are, however, some consistencies, which are as follows:

- Darker skinned: Mr. Dennis ("dark-skinned of African descent"), Mr. Grant, Coach Carter ("more African than African-American"), Mr. Daniels, Mr. Jorden ("really dark skinned"), Ms. Jeavons ("seemed more African descent than ... a lighter Jamaican type"), Mr. Tejada-Colindres, Mr. Finch, Mr. Nixon, Mr. Ostlund
- White polo shirt: Mr. Dennis, Mr. Messam, Mr. Grant, Mr. Jorden
- Five feet eight inches to five feet ten inches: Mr. Dennis, Coach Carter, Mr. Grant, Mr. Daniels, Mr. Jorden, Mr. Finch, Mr. Nixon
- Bigger lips: Coach Carter, Ms. Jeavons
- Hat: Mr. Dennis ("dad hat worn backwards"), Mr. Finch ("baseball cap"), Mr. Nixon ("baseball cap")

[195] Mr. Lugela is darker skinned. Coach Carter, who is African-American, described the differences in complexion when he said, "in America, we have all colour shades of our blackness, and I know some African brothers, and they are darker than I am": Transcript of Proceedings, December 3, 2018, p 69, ll 23-24). It was in this context that he described Mr. Lugela as "more African than African-American."

[196] It is important for this Court to point out certain differences in the descriptions of the shooter. Ms. Guy described the shooter as being "approximately six feet" tall, and Mr. Tejada-Colindres described the shooter as being somewhere between six-feet and six-feet four inches tall. Neither of those individuals is particularly tall. The witnesses who described the shooter's height as being between five-feet eight inches to five-feet ten inches are football players who are taller than the majority of the population.

[197] Mr. Messam described the hat that Mr. Lugela was wearing as being a hat without a brim, and Mr. Ostlund described the shooter's hat as being a "du-ray" type of hat, which is more like a scarf tied in the back. Ms. Guy described the shooter as having a full head of hair. Mr. Tejada-Colindres described the shooter as having "short hair, like a buzz," which was similar to the description that Ms. Stevenson provides.

[198] Ms. Guy was also specific in her description of the shooter's shirt. She said there was red on his shirt, but "there wasn't that much red," when responding to the question whether the red might be a vest. The photograph of Mr. Lugela's shirt showed that it had red trim on the collar.

[199] It is also noteworthy that many of the witnesses describe certain attributes of Mr. Concepcion and Mr. Mohammed, such as stature and clothing. As well, none of the witnesses describe the shooter as having Mr. Mohammed's attributes, except Ms. Stevenson, whose evidence will be discussed later in these reasons.

[200] As can be seen from the foregoing, it would be foolish for this Court to determine the identity of the shooter solely on eyewitness identification. Although there are consistencies in many aspects of the shooter, there are some inconsistencies. Thus, as Belzil JA said in *Atfield*, "correctness of identification must be found ... in other supporting evidence," to which this Court now turns.

[201] The Marquee entrance videos show Mr. Lugela, Mr. Concepcion, and Mr. Mohammed entering and exiting the Marquee. Mr. Concepcion identified each of them for this Court, which showed, among other things, that Mr. Lugela was wearing a white polo-type shirt, dark pants, and a hat. Mr. Mohammed was wearing a bubble vest. Mr. Concepcion also identified Mr. Lugela in the Delta taxicab dash-cam video recording as the individual in the white shirt and dark pants seconds after the shooting.

[202] Where did the shooting occur? Mr. Nixon testified that a first shot was fired to the ground near the door of the Marquee. Two further shots were fired. Cst. St. Onge seized a cartridge case and an unfired round on the northwest sidewalk. She seized a second cartridge directly north of the first, on the asphalt of the parking lot. Mr. Barr testified that he was very confident that the spent cartridges were fired from the firearm that Cst. St. Onge seized from the recycling bin that Det. Carriere had discovered. This was the same recycling bin that Mr. Concepcion identified as the one in which he testified that Mr. Lugela disposed of the firearm he was carrying in his right hand. The cartridges were in the exact location where a number of witnesses testified that the shooter was located as Mr. Hicks was trying to flee. In fact, Cst. St. Onge observed red staining

consistent with blood in the parking lot northwest of the Marquee, consistent with the location where witnesses say Mr. Hicks fell. Cst. Coutu took photographs of the red staining.

[203] Ms. Guy and Mr. Tejada-Colindres also testified that they saw the shooting from their vantage point on the north side of the Marquee. Had the shooter not been on the north side of the building, they would not have seen him shooting, as they were speaking to each other on the north side of building. The building would have obstructed their view.

[204] Mr. Lugela argues that the "medical evidence confirms that the victim was shot twice in the front." That is not what the medical evidence says. It says that one gunshot wound "is on the lower left chest 58 cm below the top of the head and 9 cm left of midline." This is consistent with Mr. Hicks fleeing the shooter and looking left over his shoulder as the bullet enters his chest. The second gunshot wound "is on the left posterolateral abdomen at 72 cm below the top of the head and 15 cm left of midline," which is even farther left than the first gunshot wound. Again, this is consistent with Mr. Hicks continuing to flee the shooter and looking back over his left shoulder. In fact, given the path of the bullet, as described in the autopsy report, it appears that Mr. Hicks was either on the ground or falling when the second bullet hit. This does not contradict the evidence of either Mr. Dennis or Mr. Finch. In fact, it is consistent with their evidence.

[205] Ms. McCaw provided this Court with the multisource timeline video, which, among other things, shows still frames from the Delta taxicab dash-cam video recording and the Checker taxicab dash-cam video recording while the gunshots are heard, and shortly thereafter. The importance of these videos are that they show Mr. Mohammed walking along the sidewalk on the west side of the building as the second shot is being fired. He cannot be the shooter, as he is not in the location where the shooting took place.

[206] The multisource timeline video then shows Mr. Mohammed approaching the person in the white shirt. This could explain why Mr. Mohammed has a particle of GSR on his face. He is in close proximity to where the gun was shot, which resulted in a "cloud" of GSR. This also might explain why Mr. Lugela has GSR on his left hand; he was close to discharged firearm, although there is evidence that is more convincing than the GSR on Mr. Lugela's left hand.

[207] The person in the white shirt runs back to the location where the BMW SUV is located. The person in the red vest (Mr. Mohammed) follows close behind the person in the white shirt. The person in the red vest is gesturing the person in the white shirt towards him in a manner which appears to be consistent with Mr. Dennis's evidence that the person in the red vest grabbed the shooter and said "let's go." This can be seen in the Checker taxicab dash-cam video recording and the Delta taxicab dash-cam video recording.

[208] Two further questions emerge from this portion of the taxicab dash-cam video recordings. Is the person in the white shirt carrying something in his right hand? If the answer to that question is affirmative, what is it? When one looks at the still frames of the videos, it is clear that the individual in the white shirt is carrying something in his right hand. This is particularly evident in the still frames where his right hand is contrasted against his white shirt. As well, the shape of the item in his right hand is consistent with the shape of a handgun.

[209] The next question is whether the person in the white shirt is Mr. Lugela. Ms. McCaw's video analysis shows that this individual is wearing what appears to be the same clothes as those that Mr. Lugela is wearing in the Marquee video recording (which Mr. Concepcion has

identified), the taxicab dash-cam video recordings (which Mr. Concepcion has also identified), and the police in-car videos of after they arrest Mr. Lugela, *viz*, the following:

- a white collared shirt
- dark pants/jeans
- wristwatch on the left wrist
- dark shoes with luminescent laces and a silver buckle
- a black hat with a strap that Mr. Dennis referred to as a "dad hat," with reflective markings and worn backwards

[210] Mr. Lugela points out that Ms. McCaw's video does not show a visible chain around the neck of the person in the white shirt. However, Ms. McCaw explained that this could be because of the lower quality of the taxicab dash-cam videos, or, quite simply, the fact that the person with the white shirt was not wearing the chain at that particular time.

[211] Finally, Mr. Concepcion identified the person in the white shirt as Mr. Lugela. Mr. Concepcion's evidence in this regard was not challenged during his cross-examination. As well, Mr. Concepcion knows Mr. Lugela, and dock-identified him.

[212] One of the Instagram photos that was entered as an exhibit in these proceedings shows a handgun that appears to be identical to the handgun which was forensically proven to have been used in Mr. Hicks' shooting. As one walks through the photographs, they eventually point towards Mr. Lugela as the person who possesses that handgun. Immediately following the photograph that shows the handgun, is another photograph that shows the waist, the legs of an individual, and a distinctive belt buckle in the shape of an "H" standing on a floor that appears to have the same pattern as the floor seen in the photograph of the handgun. The final photograph in the series shows Mr. Lugela wearing the same belt with the distinctive "H" shaped buckle. That belt buckle, in turn, appears to be the same as that worn by Mr. Lugela at the time of his arrest. That belt was made an exhibit in these proceedings.

[213] A handgun, which looks identical to the handgun used in Mr. Hick's shooting, appears to have been possessed by Mr. Lugela. This provides further evidence that Mr. Lugela was likely the shooter.

[214] All of this takes us back to evidence that certain witnesses provided to this Court. Even though there would be a danger in establishing the identity of the perpetrator of a crime on the evidence of an eyewitness, or even a number of eyewitnesses, a witness's evidence might reach such a level of reliability that a court can rely on it. In the case at bar, Mr. Dennis provided this Court with that type of compelling evidence. His evidence is detailed, and corroborated by other eyewitnesses (including Mr. Concepcion). Most importantly, his evidence is corroborated by the photographic, video, and expert evidence. Mr. Dennis was one of only three witnesses who observed the altercations with his teammates in the Marquee, as well as the shooting itself, and provided detailed descriptions of the three individuals he observed in the altercations, and of the shooting.

[215] His descriptions of each individual in terms of their apparent ethnicity, complexion, approximate heights, and how they were dressed were near-matches to Mr. Concepcion, Mr. Mohammed and Mr. Lugela. Mr. Dennis also correctly noted that when he saw the three of them

walking down Macleod Trail, Mr. Mohammed was no longer wearing a red vest, and Mr. Concepcion was no longer wearing a hat.

[216] Mr. Dennis also provided detailed descriptions of the handgun that the shooter used, and the vehicle in which the three individuals fled. These descriptions matched, respectively, the 9 mm gun that Cst. St. Onge recovered from the recycling bin, and Mr. Concepcion's BMW X6 found near the intersection of Stanley Place SW and Stanley Road SW, although Mr. Dennis testified during the trial before this Court that the BMW X6 was white, whereas he testified during the preliminary inquiry that the BMW X6 was silver.

[217] Immediately before the shooting, Mr. Dennis was positioned in the driver's seat of his red Charger immediately to the north of the Marquee, where the shooting happened. He testified that Mr. Hicks was running in his direction when he was shot by the gunman. Mr. Dennis's positioning is corroborated by other eyewitness testimony, as well as the location of the recovered shell casings and the location of where Mr. Hicks fell in the parking lot. Thus, Mr. Dennis was uniquely well-positioned to witness the shooting.

[218] Mr. Dennis's testimony that the gunman was the individual wearing a white shirt is corroborated by the evidence of several eyewitnesses, including Mr. Grant (white polo shirt), Mr. Daniels (white shirt, believes it was short sleeved), Mr. Ostlund (plain white short sleeved t-shirt), Ms. Guy (white t-shirt with something red on the upper portion), and Mr. Tejada-Colindres (white long-sleeved crew neck). Notably, none of these witnesses describe the gunman as wearing a red vest or red pants. With the exception of Ms. Guy, it was never suggested to these witnesses in cross-examination that the gunman had on a red vest or red pants. Significantly, when it was put to Ms. Guy that the red that she saw on the gunman's upper body could have been a vest, she specifically said that it was not, because "there was not that much red."

[219] Mr. Dennis's testimony that the shooter was the individual in the white polo shirt is further supported by his spontaneous utterances made mere moments after the shooting. Mr. Messam testified that Mr. Dennis was screaming and stated that it was "the nigga in the white polo" who shot Mr. Hicks. Similarly, Mr. Power testified that Mr. Dennis "was yelling that the guy in the white polo shot my boy." Both statements were made immediately after Mr. Dennis witnessed the shooting, when he was in an excited and agitated emotional state. This Court finds that this falls within the *res gestae* exception to the hearsay rule, as such statements are admissible for the truth of their contents, and serve to capture and preserve Mr. Dennis's observations as to who the shooter was immediately after the shooting occurred, as opposed to statements to police some time later. These statements are the "best evidence" of what occurred.

[220] As mentioned earlier, Mr. Dennis identified Mr. Lugela as the shooter while Cst. Rausch was driving Mr. Dennis and Mr. Daniels to Westwinds just over 40 minutes after the shooting had occurred. This Court finds that Mr. Dennis's exclamation "that's the shooter" is also admissible as *res gestae*. While Mr. Dennis did not make this statement immediately after the shooting, this Court finds that it was nonetheless a spontaneous utterance to the unexpected occurrence of Mr. Dennis seeing Mr. Lugela again so close to the location of the shooting. It is the spontaneity of the utterance itself in conditions of stress or pressure that gives such statements their reliability.

[221] Although this Court need not rely on it, Mr. Dennis's tentative selection of Mr. Lugela's photograph in the photo line-up is further evidence of Mr. Dennis's identification of Mr. Lugela

as the shooter. While he did select another photo as well, when pressed on cross examination, Mr. Dennis stated with respect to Mr. Lugela's photo "I can tell you that is him."

[222] The video evidence that Ms. McCaw presented to this Court corroborates Mr. Dennis's evidence that the shooter was the individual in the white polo shirt. The video evidence shows a person in a white shirt holding what appears to be a gun seconds after the shooting. As well, Mr. Concepcion's evidence that Mr. Lugela had a handgun in his possession in his vehicle minutes after the shooting, corroborates Mr. Dennis's testimony.

[223] Mr. Concepcion's evidence is important because, among other things, he knows Mr. Lugela, and was with Mr. Lugela almost the entire night. He had no difficulty identifying the three of them from the Marquee video recording. His evidence in this regard was not challenged. Mr. Concepcion testified in a direct, straightforward manner, and his evidence contained no indication of bias or partisanship. While Mr. Lugela attempted to question the reliability of Mr. Concepcion's recollection on some matters, Mr. Lugela did not significantly challenge Mr. Concepcion's overall credibility during cross-examination.

[224] Importantly, as with Mr. Dennis's testimony, Mr. Concepcion's testimony was corroborated or confirmed by other evidence, including the Marquee video recording and the taxicab dash-cam video recordings, the location of where he parked his vehicle after the shooting, and the location of the handgun in the blue recycling bin. There was also corroboration of less significant details, such as his encounter with Cst. Dalton earlier in the evening in the Marquee parking lot, and his brief removal from the Marquee by Mr. Power after the altercations inside.

[225] As mentioned earlier, Mr. Concepcion identified Mr. Lugela as the white-shirted individual running towards the Delta taxicab in the Delta taxicab dash-cam video recording seconds after the shooting. As with his other evidence, Mr. Concepcion's evidence in that regard was not challenged on cross-examination.

[226] As he was parking his BMW X6 in the Parkhill area about five minutes after the shooting, he saw, for the first time, that Mr. Lugela had a chrome-coloured gun in his hand. This evidence did not appear to be seriously challenged in cross-examination.

[227] He also testified that Mr. Lugela said something like "I hit two shots. I don't think he's going to make it": Transcript of Proceedings, December 6, 2018 (afternoon), p 52 line 1. Mr. Lugela challenged the "I hit two shots" statement, pointing out that Mr. Concepcion did not say this when he was providing his "*KGB* statement" to the CPS, nor in his evidence at the preliminary inquiry. Mr. Concepcion, during re-direct, testified that he did say that in his initial police interview with Det. Medlicott just hours after the incident itself: Transcript of Proceedings, December 7, 2018 (morning), p 59, l 18 to p 61 l 4. Inasmuch as the events were still fresh in his memory at that time, this Court accepts Mr. Concepcion's statement that Mr. Lugela said to him, "I shot two."

[228] Who put the handgun in the recycling bin? Mr. Concepcion stated in his "*KGB* statement" and at the preliminary inquiry that he was unsure whether it was Mr. Lugela or Mr. Mohammed who put the handgun into the recycling bin. However, during re-direct, on his memory being refreshed as to what he said in his initial police interview with Det. Medlicott just hours after the incident itself, Mr. Concepcion was able to say that he believed it was in fact Mr. Lugela who disposed of the handgun, rather than Mr. Mohammed: Transcript of Proceedings,

December 7, 2018 (morning), p 61 1 8 to p 66 1 7. Furthermore, inasmuch as Mr. Concepcion testified that he saw the handgun in Mr. Lugela's hands as he was parking the BMW X6 moments after the shooting was not significantly challenged, whether it was Mr. Lugela or Mr. Mohammed who deposited the handgun in the recycling bin is of little import. What is important is that Mr. Concepcion led Det. Medlicott to the exact recycling bin where Det. Carriere discovered the handgun.

[229] Nine witness saw the shooting itself or the person holding the gun. Ms. Stevenson is the only witness who identifies the shooter as the individual in the red vest. Ms. Stevenson testified that she was in the area under the "Marquee" sign, as was the shooter, when the shooting began: Transcript of Proceedings, December 11, 2018 (morning), p 26, 1 26. This is inconsistent with the description that the other witnesses provided, who describe the shooting as starting near the north doors, and continuing towards the northwest side of the building. The shell casings that Cst. St. Onge seized confirms that the shooting took place at the north end of the building. Further, Ms. Stevenson's testified that she heard four shots fired in rapid succession: Transcript of Proceedings, December 11, 2018 (morning), p 20 ll 3-7). This evidence is not consistent with the known evidence where only two shots are heard on the taxicab dash-cam video recordings. There is a distinct pause between the two shots, and Cst. St. Onge recovered only two shell casings from the scene.

[230] Ms. Stevenson stated that she was quite close to the shooter. However, she also said that she was running away and looking over her shoulder as the shooting occurred: Transcript of Proceedings, p 26, ll 14-20. As mentioned, the shooting progressed from the doors near the northwest corner of the building to the north side of the building, which was away from the direction that Ms. Stevenson was running. In comparison to other witnesses, such as Mr. Dennis, she was not in a position well-situated to observe the shooting.

[231] During cross-examination, Ms. Stevenson agreed that she did not really get a good look at the shooter. The following excerpt is instructive in terms of Ms. Stevenson's uncertainty in her evidence:

Q: And this is the last passage from the transcripts I'm going to ask you about, Shelley. Page 128 -- or -- pardon me -- 127, line 5, I asked you: (as read)

What did the guy holding the gun look like?

[And you answered] As far as I remember, I think it's the guy that was wearing the red vest -- or wearing the red. The guy that was -- had either the red vest or the red pants on, but I can't remember exactly who had the gun.

You're nodding. Is that because that's -- that's what you said at the preliminary hearing?

A That is what I said, yeah.

Q And you were under oath at that time?

A Yeah.

Q And at that time of the preliminary hearing, your evidence was, "I can't remember exactly who had the gun"?

A Yeah.

Q So you've told the Court that there was a person in a red vest –

A Yeah.

Q -- and the person in the Polo shirt with the chain –

A Yeah.

Q And you can't remember exactly who had the gun?

A Yeah.

Q So is it fair to say from the very first interview with the police all the way up to the preliminary hearing to today's date that you're having trouble remembering exactly what happened?

A Yes.

Transcript of Proceedings, December 11, 2018 (morning), p 35, l 34 to p 36, l 28.

[232] Ms. Stevenson admitted that she initially told the CPS that she thought the shooter was wearing a hat: Transcript of Proceedings, December 11, 2018 (morning), p 31, ll 1-21. Mr. Lugela was wearing a hat that night, and Mr. Mohammed was not. She also testified that the person in the red vest and the person in the white-collared shirt with a chain, whom she tentatively identified as Mr. Lugela in a photo line-up, were within close proximity to each other at the time of the shooting: Transcript of Proceedings, December 11, 2018 (morning), p 28, ll 30-34. It is likely that Ms. Stevenson confused Mr. Lugela (the shooter), with Mr. Mohammed, who was the person next to him, although this Court need not find this as a fact.

[233] Ms. Stevenson also testified that she witnessed Mr. Mohammed being arrested in front of the Holiday Inn shortly after she witnessed the shooting: Transcript of Proceedings, December 11, 2018 (morning), p 23, ll 1-21, p 37, l 19 to p 38, l 26. This event likely taints Ms. Stevenson's evidence identifying Mr. Mohammed as the shooter, although this Court need not find this tainting.

[234] What Ms. Stevenson witnessed is contrary to the taxicab dash-cam video recordings, which conclusively show that the man in the red vest (Mr. Mohammed), was not in the area where the shooting occurred. The taxicab dash-cam video recording also does not show Mr. Mohammed as having a gun, or anything resembling a gun, in his hand.

[235] Mr. Lugela argues that this Court should accept Ms. Stevenson's evidence over the evidence of the other witnesses inasmuch as Ms. Stevenson was not drinking that night, but the others were. There is nothing in the evidence which suggests that the other witnesses were impaired by alcohol. In fact, the evidence specifically suggests that they were not.

[236] What the witnesses saw was an extraordinary event. This Court has weighed the evidence of each witness, and has satisfied itself of the veracity of that evidence using the evidence itself, and other objective evidence, such as the various videos, and other exhibits.

[237] For the foregoing reasons, this Court does not accept Ms. Stevenson's evidence.

[238] In conclusion, looking at the totality of the evidence, and, in particular, Mr. Concepcion's evidence, Mr. Dennis's evidence, and the videos, expert and social media evidence, this Court is satisfied beyond a reasonable doubt that Mr. Lugela was the person who shot Mr. Hicks to death.

E. Mr. Lugela's State of Mind

[239] For this Court to find Mr. Lugela guilty of second degree murder, the Crown must prove, beyond a reasonable doubt, that Mr. Lugela had the state of mind required for murder. The Crown can do this in one of two ways, *viz.*, that Mr. Lugela meant to cause Mr. Hick's death, or that he meant to cause bodily harm to Mr. Hicks that Mr. Lugela knew was likely to cause Mr. Hicks' death and that he was reckless about whether or not it would cause Mr. Hicks' death.

[240] In the case at bar, Mr. Lugela argues that he did not possess such state of mind, as he was in a state of "advanced" intoxication, such that he could not have had the specific intent to commit murder. In *R v Daley*, 2007 SCC 53 at para 41, [2007] 3 SCR 523, Bastarache J, for the majority, described "advanced" intoxication as follows:

This occurs where there is intoxication to the point where the accused lacks specific intent, to the extent of an impairment of the accused's foresight of the consequences of his or her act sufficient to raise a reasonable doubt about the requisite *mens rea*.

Daley at para 41.

[241] If Mr. Lugela lacked such specific intent, this Court could convict him of the included offence of manslaughter, which requires the Crown to prove that he had only a general intent: *Daley* at para 40.

[242] For Mr. Lugela to show that he was in a state of "advanced" intoxication, he must meet a high standard of proof. Bastarache J said the following in *Daley*:

... [W]here death is the obvious consequence of the accused's act, an accused might have to establish a particularly advanced degree of intoxication to successfully avail himself or herself of an intoxication defence of this type.

Daley at para 42.

[243] Mr. Concepcion testified that before entering the Marquee, he, Mr. Lugela, and Mr. Mohammed had consumed over half of a bottle of vodka, along with wine. Mr. Concepcion also testified that the three of them consumed shots of hard liquor, "every 10-15 minutes," for a total of 4-5 rounds. Coach Carter observed Mr. Lugela "stumbling and staggering," and Mr. Finch testified that Mr. Lugela was bumping into people, from which Mr. Finch inferred that Mr. Lugela was intoxicated.

[244] Other witnesses, however, did not draw those same conclusions. When asked about the level of Mr. Lugela's sobriety, Ms. Jeavons said the following:

I felt that maybe he had been drinking because he kept bumping me out of the way. His eyes were bloodshot. But I wouldn't say he was any more drunk than anybody else. Like, he wasn't falling over, he wasn't staggering, or he wasn't, you know, walking kind of like he was drunk. But, I mean, I saw him go to the bar at least three times.

Transcript of Proceedings, December 5, 2018 (morning), p 16, ll 1-5.

[245] Mr. Dennis testified that Mr. Lugela "wasn't sloppy drunk, but it was more of just a belligerent, like, he's just - was just being ignorant": Transcript of Proceedings, December 3, 2018 (morning), p 25 lines 1-2. Similarly, referring to Mr. Lugela, Mr. Concepcion, and Mr.

Mohammed, Mr. Messam said, "there was nothing to me would indicate that they didn't know what was going on or that they weren't in their right state of mind": Transcript of Proceedings, December 3, 2018 (afternoon), p 49 1 30 to p 50 1 1.

[246] After Mr. Concepcion parked the BMW X6 near Stanley Place, Mr. Lugela said, "I hit two shots. I don't think he's going to make it": Transcript of Proceedings, December 6, 2018 (afternoon), p 51, 1 41 to p 52, 1 1. Mr. Lugela was clearly aware of the consequences of his shooting Mr. Hicks, *viz*, that Mr. Hicks would likely die of his injuries.

[247] In addition to the testimony of various witnesses, this Court has the benefit of objective evidence. The Delta taxicab dash-cam video recording captures the moments immediately after the shooting. Mr. Lugela does not stumble, trip, or display any other signs of advanced intoxication.

[248] As well, this Court has the benefit of the dash-cam videos taken by the CPS vehicles. At the time of his arrest near the Holiday Inn, Mr. Lugela shows no signs of "advanced" intoxication. He is not wavering as he stands with his hands cuffed. He does not stumble as he is walked to the police vehicle in handcuffs. He maneuvers himself into the vehicle without any apparent difficulty. He provides, and spells, his name. He provides his birthdate, address, and telephone number. When asked whether he understands his *Charter* and caution rights, he says, "yes." He tells Cst. George he wishes to contact a lawyer. These are not signs of someone who is in a state of "advanced" intoxication.

[249] Mr. Lugela also argues that when one reviews the in-car video during his arrest, it shows "some slurring of speech," followed by him falling asleep in the police vehicle on the way to Westwinds. This Court sees no evidence of such slurring, and the fact that Mr. Lugela fell asleep on the way to Westwinds at 3:00 in the morning suggests that he was tired. These items of evidence do not suggest an "advanced" level of intoxication.

[250] Most importantly, Mr. Lugela was sober enough to shoot not one, but two bullets into the body of Mr. Hicks, *from a distance*. In *R v Robinson*, [1996] 1 SCR 683 at para 52, 105 CCC (3d) 97, 46 CR (4th) 1, Lamer CJC said the following, for the majority:

... [I]ntoxication short of incapacity will in most cases rarely raise a reasonable doubt in the minds of jurors. For example, in a case where an accused points a shotgun within a few inches from someone's head and pulls the trigger, it is difficult to conceive of a successful intoxication defence unless the jury is satisfied that the accused was so drunk that he or she was not capable of forming an intent to kill.

[251] Arguably, it is even more difficult to conceive of a successful intoxication defence when the shooter points a handgun at a person from several feet away, pulls the trigger, and successfully embeds 2 bullets into the body of his victim.

[252] The evidence before this Court does not support the defence of "advanced" intoxication. There is simply no air of reality to that defence. At most, Mr. Lugela suffered from "mild" intoxication, which Bastarache J described as follows in *Daley*:

This is where there is alcohol-induced relaxation of both inhibitions and socially acceptable behaviour. This has never been accepted as a factor or excuse in determining whether the accused possessed the requisite *mens rea*.

Daley at para 41.

[253] As a result of the foregoing, this Court finds beyond a reasonable doubt that Mr. Lugela had the state of mind to commit murder.

IV. Conclusion

[254] As a result of the foregoing, this Court finds the following beyond a reasonable doubt:

- (a) that Mr. Lugela is the person who actually committed the offence of second degree murder;
- (b) that the second degree murder occurred at the time and place set out in the indictment, namely on September 25, 2016;
- (c) that Mr. Lugela committed an unlawful act, namely shooting a handgun;
- (d) that the unlawful act caused Mr. Hicks' death; and
- (e) that Mr. Lugela had the state of mind required for murder, in the sense that he meant to cause Mr. Hick's death, or meant to cause bodily harm to Mr. Hicks that Mr. Lugela knew was likely to cause Mr. Hicks' death and was reckless about whether or not it caused Mr. Hicks' death.

[255] As a result of the foregoing, this Court finds Nelson Tony Lugela guilty of the second degree murder of Mylan Hicks.

Heard on the 3rd day of December, 2018 to the 11th day of December, 2018.

Dated at the City of Calgary, Alberta this 11th day of March, 2019.

**K.D. Yamauchi
J.C.Q.B.A.**

Appearances:

Gordon E. Haight & Tom Spark
General Prosecutions, Alberta Justice
for the Crown

Alain Hepner, Q.C.
for the Accused