

ONTARIO COURT OF JUSTICE

B E T W E E N :

HER MAJESTY THE QUEEN

— AND —

DANIEL MONTSION

**Before Justice R. Kelly
Reasons for Judgment released on October 20, 2020**

**Philip Perlmutter and Roger Shallow.....counsel for the Crown
Michael Edelson and Solomon Friedman.....counsel for Daniel Montsion**

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Kelly J.:

OVERVIEW

[1] On July 24, 2016, Constables Daniel Montsion and David Weir arrested Abdirahman Abdi in front of an apartment building in Ottawa's Hintonburg community. Soon after they had him on the ground and in handcuffs, Mr. Abdi went into cardiac arrest. He was pronounced dead the next day.

[2] Constable Montsion was tried over 72 days on charges of manslaughter, aggravated assault, and assault with a weapon based on his role in the interaction.

[3] Stripped to its essence, the Crown's position is this:

- Constable Montsion committed an unlawful act: he assaulted Mr. Abdi by punching him multiple times in the face and head while wearing hard-knuckled gloves. The force he used was excessive and unjustified and carried a foreseeable risk of bodily harm. The gloves were a weapon;
- Constable Montsion's conduct was criminally negligent: he breached his legal duty to keep Mr. Abdi safe by assaulting him without justification. His conduct showed a wanton or reckless disregard for Mr. Abdi's life or safety and was a marked and substantial departure from the standard of a reasonable police officer in his circumstances;
- One or more of Constable Montsion's punches caused injuries to Mr. Abdi; most significantly, fractures and a laceration to his nose;
- Constable Montsion's unjustified assault was a significant contributing cause of the cardiac arrest that led to Mr. Abdi's death.

[4] It is the defence's position that Constable Montsion is not guilty of any offence. Defence counsel do not dispute that he struck Mr. Abdi a couple of times in the head or face when Mr. Abdi was on the ground. Their main contentions are:

- Constable Montsion's conduct was neither unlawful nor criminally negligent. The force he used was legally justified under s. 25(1) of the *Criminal Code*;
- Constable Montsion did not fracture Mr. Abdi's nose. Those fractures were caused by his face hitting the bricks when Constable Weir took him to the ground and/or during the struggle after the takedown when the officers were trying to handcuff him;

- Constable Montsion did not cause Mr. Abdi's death. The medical evidence showed that Mr. Abdi may have reached the point where cardiac arrest was inevitable even before Constable Montsion arrived at the scene. In any event, Mr. Abdi may have died because he was in a state of Excited Delirium.

[5] The parties' positions frame three main issues.

[6] Issue One is whether the Crown has proved that Constable Montsion's conduct was unlawful or criminally negligent. In addressing this issue, I must make findings about the force he used and the information that was available to him when he used the force. I must then decide whether he was legally justified in using the force and whether his overall conduct showed a wanton or reckless disregard for Mr. Abdi's life or safety and was a marked and substantial departure from the standard of the reasonable police officer in the circumstances.

[7] Issue Two is whether the Crown has proved that Constable Montsion's acts caused the fractures and laceration to Mr. Abdi's nose. To decide this issue, I must examine a large body of evidence relevant to the potential causes of the nasal injuries.

[8] Issue Three is whether the Crown has proved that Constable Montsion's acts caused Mr. Abdi's death. This issue requires that I analyze all the evidence, both medical and non-medical, and decide whether his conduct was a significant contributing cause of the fatal cardiac arrest.

[9] For the reasons that follow, I am left with a reasonable doubt on Issue One and find Constable Montsion not guilty of the charges. I will also address Issues Two and Three even though it is not strictly necessary to decide them.

[10] I will divide my reasons into four parts. To begin, I will state some foundational principles about the presumption of innocence and the burden of proof in a criminal trial, and I will link the burden of proof to the offences charged and the positions of the parties.

[11] Next, I will outline the evidence about what happened on July 24, 2016, drawing for the most part on the testimony of the civilian witnesses and Constable Weir. I will also introduce the video evidence that became a focal point of the trial and set out some of the evidence about police training on the use of force.

[12] After that, I will turn to my analysis of the three issues, referring to additional evidence as is necessary.

[13] I will end with a summary of my conclusions.

BURDEN OF PROOF

[14] The Crown has the burden to prove Constable Montsion's guilt beyond a reasonable doubt. Constable Montsion is presumed innocent and has no burden to prove anything.

[15] Proof that he is probably guilty is not enough. The standard of proof beyond a reasonable doubt falls much closer to absolute certainty than to proof on a balance of probabilities.¹ It applies not to individual items of evidence but to the final determination of guilt or innocence based on the essential elements of the offences charged.²

[16] The Crown's burden of proof never shifts. If, after considering the evidence as a whole, I am left with a reasonable doubt on any essential element of any alleged offence, or about any justification or defence for which there is an air of reality, I must find Constable Montsion not guilty of that offence. I must consider the charges separately.

[17] On the manslaughter charge, the Crown pursues two routes to liability: unlawful act manslaughter and manslaughter by criminal negligence.

[18] The Crown must prove three elements beyond a reasonable doubt. The first is a conduct element. For unlawful act manslaughter, the Crown must prove that Constable Montsion did an unlawful act. For manslaughter by criminal negligence, the Crown must prove that Constable Montsion did something or omitted to do something he had a duty to do.³

[19] The second is a causation element. The Crown must prove that Constable Montsion's unlawful act or criminally negligent conduct caused Mr. Abdi's death.⁴

[20] The third is a fault element. For unlawful act manslaughter, the Crown must prove that Constable Montsion's unlawful act carried an objectively foreseeable risk of bodily harm that was neither trivial nor transitory.⁵ For manslaughter by criminal negligence, the Crown must prove that his conduct showed a wanton or reckless

¹*R. v. Lifchus* (1997), 118 C.C.C. (3d) 1 at paras. 14, 27, 30-39 (S.C.C.), *R. v. Starr* (2000), 147 C.C.C. (3d) 449 at para. 242 (S.C.C.)

²*R. v. White*, [1998] S.C.J. No. 57 at paras. 39-41, *R. v. Morin*, [1988] 2 S.C.R. 345

³*R. v. Javanmardi*, 2019 SCC 54 at paras. 18-30

⁴*Javanmardi* at paras. 19, 25, *R. v. Maybin*, 2012 SCC 24 at paras. 1, 15-28, *R. v. Romano*, 2017 ONCA 837 at paras. 26-30

⁵*Javanmardi* at paras. 31, 37-39, *R. v. Creighton*, [1993] 3 S.C.R. 3 at paras. 78, 138-47

disregard for Mr. Abdi's life or safety — in other words, that it was a marked and substantial departure from the standard of the reasonable police officer in his circumstances.⁶

[21] For aggravated assault, the Crown must prove that Constable Montsion assaulted Mr. Abdi and wounded, maimed, or disfigured him. The fault element is, in addition to the basic intention to apply force, objective foreseeability of non-trivial bodily harm.⁷

[22] On the assault with a weapon count, the Crown must prove that Constable Montsion assaulted Mr. Abdi and that he used a weapon⁸ in committing the assault.⁹

[23] The allegation of unjustified assault is a thread running through each count. It is at the root of the assault-based charges and at the heart of the alleged conduct grounding the manslaughter charge. It is the Crown's position that Constable Montsion assaulted Mr. Abdi without legal justification when he punched him in the face and head while wearing hard-knuckled gloves. It is the Crown's burden to prove this beyond a reasonable doubt.

EVENTS OF JULY 24, 2016

[24] I will outline the events in two sections. I will begin by setting out the narrative through the testimony of the civilian witnesses and Constable Weir. After that, I will introduce the video evidence.

THE NARRATIVE

[25] The narrative begins around 9:30 on the morning of July 24, 2016. It ends several minutes later.

[26] It was a sunny, warm Sunday in Hintonburg. People were starting their day.

⁶*Javanmardi* at paras. 20-23

⁷*R. v. DeSousa*, [1992] S.C.J. No. 73 at paras. 24-28, *R. v. Godin*, [1994] 2 S.C.R. 484 at para. 1, *R. v. Walia*, 2018 ONCA 197 at para. 8

⁸Under s. 2 of the *Criminal Code*, "weapon" means "any thing used, designed to be used or intended for use (a) in causing death or injury to any person, or (b) for the purpose of threatening or intimidating any person [...]"

⁹*Walia* at paras. 9-11

[27] Caolan Cullum was arriving for work at the Hintonburg Community Centre, a stone's throw from the Bridgehead coffee shop at Fairmont Avenue and Wellington Street West.

[28] Michael Rowe, a retired record store owner, was at the Bridgehead with his wife and sister-in-law for morning coffee.

[29] Darren Courtney, a psychiatrist from Toronto, was in town visiting his sister and brother-in-law. They were in the area of the Bridgehead looking for a place to have breakfast.

[30] S.L.¹⁰ and her friend were in a car on their way for a spa day in Gatineau.

[31] Matthew Rousselle, an advanced care paramedic, had the day off. He and his family were heading out for a road trip. He stopped to pick up a coffee at the Bridgehead.

[32] Wendy Dunford and Ross McGhie were out for a run.

[33] Sarah Clements was home, relaxing on the couch and texting with a friend.

[34] Testimony from these eight people would help paint the picture of what happened that morning.

[35] A couple of blocks east of the Bridgehead, just past the point where Wellington is interrupted by a pedestrian-only area, stands 55 Hilda Street, where Mr. Abdi lived with his family.¹¹

[36] Mr. Abdi was 38 years old. Originally from Somalia, he had been in Canada for a few years. English was not his first language.

[37] Mr. Abdi had mental health difficulties. His medical history was significant for psychotic illness. He was not taking his prescribed medication at the time of his death. No drugs or alcohol were found in his system.

¹⁰The identity of two witnesses, S.L. and A.S., is protected by a publication ban ordered under s. 486.5 of the *Criminal Code*.

¹¹Exhibit 87 is a photograph that gives a bird's-eye view of the area.

[38] Two witnesses who lived at 55 Hilda knew Mr. Abdi from the building. Nimao Ali described him as quiet and socially disengaged. He was peaceful around her and her children. She assumed he had a mental illness but was unaware of a diagnosis and reluctant to speculate.

[39] A.S., who was 16 at the time, found Mr. Abdi to be quiet and introverted. It was obvious to him that he was slow compared to someone who was not mentally ill.

[40] The apartment building at 55 Hilda had an alcove-type entrance a couple of steps below sidewalk level.¹² A Closed-Circuit Television (CCTV) camera in the lobby captured part of the entrance area outside. As I will explain later, digital video evidence from this camera (which came to be known as “Camera 7”) was admitted in two formats. For convenience, I will refer to these as the “PSF video” and the “MP4 video.”

[41] The narrative divides into three parts: (1) the Bridgehead; (2) the route to 55 Hilda; and (3) the entrance at 55 Hilda.

[42] Constable Montsion did not witness anything that happened before he arrived at 55 Hilda. His knowledge or belief about these events is a matter of inference from evidence of police communications that I will review later.

[43] The evidence of Mr. Abdi’s physical exertion and stress before Constable Montsion’s actions at 55 Hilda will be relevant to the issue of cause of death. Testimony about Mr. Abdi’s physical strength will be part of the overall evidentiary picture on the use of force issue.

The Bridgehead

[44] The first part of the narrative emerges chronologically from the evidence of five witnesses: Caolan Cullum, S.L., Michael Rowe, Matthew Rousselle, and Darren Courtney.

Caolan Cullum

[45] Caolan Cullum worked at the Hintonburg Community Centre, just down the street from the Bridgehead at Fairmont and Wellington.

¹²Videos taken by the Special Investigations Unit show the entrance to 55 Hilda and the area surrounding it (Exhibit 8, Folder 2 – SIU Scene Videos).

[46] He arrived around 9:30 to open the facility. A man (Mr. Abdi) approached him near the front door. He was very close to Mr. Cullum, about two feet away, in Mr. Cullum's personal space. His mouth was agape and he had kind of a blank stare with eyes that were quite intense. He was silent. He appeared shiny and may have been perspiring.

[47] Mr. Cullum entered the building and walked down the hall. Mr. Abdi followed him, still staring. When Mr. Cullum asked him what he could do for him, Mr. Abdi gestured to the Community Police Depot, which was closed for the weekend. He began speaking incomprehensibly. Mr. Cullum was only able to pick out a few words here and there, like "government", "corruption", and "sexuality." Mr. Abdi also mentioned Paris and Germany.

[48] At one point, Mr. Abdi told Mr. Cullum to "Stand with your brothers," which Mr. Cullum took to mean brothers of Arabic background. When he responded that he was not Middle Eastern, Mr. Abdi said, "I have eyes. Don't lie to me."

[49] Mr. Cullum went to the office to get keys from the back room. When he unlocked the office door, Mr. Abdi was behind him, still staring.

[50] When Mr. Cullum came out of the back room, he saw that Mr. Abdi had entered the office and was standing about four feet inside the door. He was looking a bit lost. Mr. Cullum told him it was not appropriate for him to be in the office and that he had to leave.

[51] Mr. Abdi again started speaking incomprehensibly. The only thing Mr. Cullum could understand was his repeated requests to shake hands. Mr. Abdi held out his hand about four times, saying, "Shake. Shake." He seemed to become frustrated that Mr. Cullum was not understanding him, but his handshake gestures seemed like a peace offering.

[52] After a few minutes, Mr. Abdi left the building on his own.

[53] During the interaction, Mr. Cullum was not afraid for his safety. Mr. Abdi did not appear violent, aggressive, or threatening. It did seem like he was having trouble thinking clearly and was not fully in touch with reality, but Mr. Cullum did not sense a tinge of paranoia.

[54] Video evidence shows Mr. Abdi in the community centre between 9:29 and 9:34 a.m. The parties agreed the times on the video reasonably approximate the times of the events.

S.L.

[55] Around 9:30 a.m., S.L. and her friend were heading out for a spa day in Gatineau.

[56] S.L. was driving. It was sunny and warm, but not hot enough for air conditioning. Their windows were down.

[57] While they were waiting for a red light at Wellington and Fairmont, S.L. saw a man (Mr. Abdi) crossing the street towards the Bridgehead. When she made eye contact with him, he made a beeline for the driver's side of her car, fixing her eyes with an intense stare, an uncomfortable gaze.

[58] Arriving at the car, Mr. Abdi reached in through the window to shake S.L.'s hand, which was on the steering wheel. He kept asking her name, which she refused to give him, saying, "You don't need to know my name."

[59] Mr. Abdi's eyes were a bit bloodshot and intense but not "super focusing", almost like he wasn't "there."

[60] To be polite, S.L. shook Mr. Abdi's hand. When she tried to pull her hand back, he tightened his grip and continued to ask her name. She told him to let go and not touch her.

[61] Mr. Abdi told S.L. two or three times that he wanted or needed to touch her. He said, "I just need to touch you," and then he reached in, grabbed her breast, and forcefully squeezed it two to four times.

[62] Mr. Abdi felt incredibly strong. He was able to grab S.L.'s breast with one hand while still holding her hand on the steering wheel with the other. He only released his grip when S.L. drove away in a panic, removing him from the side of the car.

[63] The incident affected S.L. in significant ways right up to the time of trial.

Michael Rowe

[64] Around 9:30 a.m., Michael Rowe was at the Bridgehead with his wife and sister-in-law for their morning coffee. He was in line near the counter when a woman approached him and said she had just been sexually assaulted. She was shaking and seemed traumatized.

[65] While Mr. Rowe was struggling to digest this information, he heard a commotion. Voices grew louder. The atmosphere became electrified. Then his wife stood up and said, “Oh my God. That man has just jumped that lady.”

[66] Mr. Rowe went over to a group of tables where he saw one man on either side of a third man (Mr. Abi), who appeared to be on top of someone he had pinned to a bench seat. The two men were imploring him to get off, saying, “The police are coming. Get off. Get off.”

[67] Mr. Abdi was bent over at a 45-degree angle with his head near one of the bench seats. His arms and torso were around the person who was pinned underneath him. The person was not moving or making a sound.

[68] Concerned for the person’s well-being, Mr. Rowe intervened. He grabbed Mr. Abdi by the right bicep, which was around the person underneath him on the bench. Mr. Abdi was bulky with a big neck and shoulders.¹³ Mr. Rowe realized he was only holding about a third of his bicep. He tried to pull Mr. Abdi’s arm away two or three times, but Mr. Abdi didn’t move an inch. He was very strong – “a rock.”

[69] With his left hand still on Mr. Abdi’s bicep, Mr. Rowe hooked his right arm around Mr. Abdi’s neck, with his elbow joint near his throat. He pulled as hard as he could, trying to use his body weight as leverage. He couldn’t budge Mr. Abdi’s arm at first, but after a couple of seconds Mr. Abdi popped off the person on the bench and both he and Mr. Rowe fell backwards to the floor. Mr. Abdi went in one direction. His head hit a leather-covered chair and bounced three to five inches. He landed in a sitting position. Mr. Rowe fell in the other direction.

[70] The two men got up and looked at each other. Mr. Abdi was not agitated, nor did he seem dazed after hitting his head. His eyes were large and wide open. His demeanour was blank and largely emotionless. He was unnaturally relaxed.

[71] Mr. Rowe moved towards Mr. Abdi with a view to channeling him to the door several feet away. Mr. Abdi backed up slowly. The look on his face was mostly blank and expressionless. He glared at Mr. Rowe. He was neither angry nor violent, but Mr. Rowe found him slightly unpredictable. There was more of a smirk than a smile on his face, which Mr. Rowe found slightly ominous or threatening. He didn’t look normal. Mr. Rowe suspected mental health issues.

¹³Mr. Abdi was five foot nine and 238 pounds.

[72] Mr. Rowe told Mr. Abdi he had to leave and that the police were coming. Mr. Abdi moved to the entrance doors, hesitated, and then backed out the door. Mr. Rowe stayed inside.

[73] Mr. Abdi stared into the coffee shop. He and Mr. Rowe looked at each other for about 30 seconds until Mr. Rowe told him to “go in peace.” Mr. Abdi put his hand out in a gesture that looked like a handshake: it was almost conciliatory, as if he was trying to make peace. At the same time, his head made a quick forward motion and then he smiled and said, “Fuck you.”

[74] Mr. Abdi walked east on Wellington. He bumped into an older person with a dog, almost knocking the person over. A few seconds later, Mr. Rowe heard someone say, “Oh my God. He’s grabbed that lady.” He looked out and saw that Mr. Abdi had grabbed a woman near the bike racks out front.

[75] Mr. Rowe went outside. A woman was at the bike racks with a child in the seat at the back of her bike. She had one hand on her bike; Mr. Abdi was holding her other hand. It seemed like he was trying hard to pull her away from her bike and make her release her grip.

[76] Mr. Rowe once again intervened. He took two firm steps and with both hands pushed Mr. Abdi in the chest, sending him back a couple of feet into the horizontal bar of the bike racks. He then felt someone’s hands on his shoulders. The man, who turned out to be off-duty paramedic Matthew Rousselle, calmly told him, “We’ve got this. We’ll take it from here,” and suggested he go back in the coffee shop. Mr. Rowe complied.

[77] Mr. Rowe had seen Mr. Abdi around the neighbourhood a few times. He had an unusual way of walking. He was heavy on his feet. He would lunge or lurch. He would sometimes stop and stare and then jerk forward in a feinting move – reminiscent of a boxer – and then continue walking. This was the type of move he made at the door to the Bridgehead after being ushered out. Mr. Rowe didn’t see the move as aggressive; it was as if Mr. Abdi used it to get a reaction.

[78] During the incident, Mr. Rowe found Mr. Abdi to be confused and slightly blank. He was menacing when he smirked or smiled but not the whole time. He described Mr. Abdi as a little bit unpredictable. He recalled the “unpredictable blankness of his stare.” He seemed less predictable when he was outside the coffee shop. This made Mr. Rowe more concerned about his behaviour.

Matthew Roussele

[79] Matthew Roussele is an advanced care paramedic. He was not working that Sunday. He was going on a road trip with his family and stopped for coffee at the Bridgehead. He parked across the street.

[80] As he walked up to the entrance on Wellington, Mr. Roussele saw two Bridgehead employees speaking with a man (Mr. Abdi) sternly but without raised voices. One of them told Mr. Abdi a couple of times that they had locked the building and that he couldn't go back inside and needed to leave. Mr. Abdi was calm.

[81] Mr. Roussele entered the Bridgehead from the Fairmont side. As he approached the counter, he noticed a couple of people were crying, one woman in particular. A few people were consoling her.

[82] About 30 seconds later, people started screaming. Someone said, "He's grabbed another woman," and a group of eight to ten men went outside through the Wellington door.

[83] Mr. Roussele went outside. Three or four of the men had corralled Mr. Abdi into the bike racks and were starting to push him. He wasn't pushing back.

[84] Mr. Abdi was sweating profusely, more than anyone else and "more than he probably should have been." His face and forehead were very sweaty. It was a nice morning but Mr. Roussele himself wasn't feeling the humidity.

[85] Mr. Abdi was breathing heavily, deeply, and rapidly – hyperventilating. Mr. Roussele was concerned at the rate of his breathing. He appeared to be in some kind of distress. He had been calm earlier but was now more agitated.

[86] It looked like the situation was getting heated. A couple of the men were "kind of landing some punches" on Mr. Abdi. The punches landed "more kind of [in the upper] chest, maybe one or two head area, none really in the face." One or two of the blows may have been to his arms.

[87] There was a flurry of activity. The crowd was confronting and confining Mr. Abdi. Arms were flying. Mr. Roussele agreed someone may have pushed Mr. Abdi into the bike rack.

[88] Mr. Rousselle was concerned for Mr. Abdi's safety. People were getting very aggressive with him and he wasn't fighting back. One of the men in particular was getting pretty physical, so Mr. Rousselle pulled him off Mr. Abdi, took him inside the Bridgehead, and sat him down with his wife.¹⁴ The other men backed off and dispersed.

[89] Mr. Rousselle recalled seeing Mr. Abdi try to shake hands with people. He believed this was after the altercation near the bike racks had broken up. He last saw Mr. Abdi walking east on Wellington. There were people with him, but they were not pursuing him.

[90] Mr. Rousselle got his coffee and went back to his car. About a minute later, he saw a police car pull up in front of the Bridgehead. He soon saw more police cars.

[91] Mr. Rousselle recognized Mr. Abdi that morning. He had seen him at the Bridgehead a couple of weeks earlier. Mr. Rousselle was waiting in line and saw Mr. Abdi staring at the employee behind the counter. He wasn't speaking but he did make audible sounds like grunting or snorting. The employee tried different ways to communicate with him, but he just stared. Mr. Abdi was not aggressive but did not seem normal. He was not sweating. His breathing was normal and without distress. He eventually backed away from the counter and stared at other people in the coffee shop.

Darren Courtney

[92] Darren Courtney is a psychiatrist. He was on Wellington with his sister and brother-in-law looking for a place to have breakfast.

[93] Dr. Courtney's attention was drawn to a commotion at the entrance to the Bridgehead. He saw three men. Mr. Abdi was facing the door and was half-in-half-out the door. He had his fist raised, as if ready to punch someone. One of the other men also had his fist up – a symbol of aggression. The third man was trying to defuse the situation. Voices were loud. The message to Mr. Abdi was, "Get out of the coffee shop."

[94] After several seconds, things calmed down. It seemed to be over. Mr. Abdi was milling around the coffee shop.

[95] A couple of minutes later, Dr. Courtney saw Mr. Abdi in close contact with a woman at the bike racks. He had his arms wrapped around her and made at least three

¹⁴The man was obviously Michael Rowe.

thrusting motions. The woman yelled, “Don’t touch me,” and then “Don’t touch *her*,” referring to a child. Eventually, Mr. Abdi walked away.

[96] At 9:39 a.m., Dr. Courtney called 911. He felt the police should be involved because of the ongoing situation of instability and unpredictability he was witnessing. During the call, he described Mr. Abdi as agitated and aggressive. He told the dispatcher he was assaulting and groping people. He cautioned a passerby not to have their child go by Mr. Abdi because he was unstable.

[97] Dr. Courtney spoke with Mr. Abdi while he was on the phone with the 911 dispatcher. Their conversation was recorded but much of it is indecipherable. It is possible Mr. Abdi said something about voices and people not liking him or killing him. He may also have said he was upset with someone. But none of this can be discerned with certainty. Much of the recording is inaudible. Mr. Abdi was some distance from the phone and speaks with an accent. Crucial context is lost.

[98] From Dr. Courtney’s perspective, Mr. Abdi seemed pretty relaxed. He was smiling as he described some struggles at the coffee shop. He walked in a relaxed way and his breathing seemed normal. He was a bit disheveled and his eyes had a yellowish tinge. Dr. Courtney did not notice him sweating.

[99] Dr. Courtney described Mr. Abdi as responsive during their conversation. He caught snippets of what he was saying but there was a lot he didn’t understand. He was unsure if this was because Mr. Abdi wasn’t making sense or because he was struggling with English. The audio record of the 911 call supports his account.

[100] During their interaction, Mr. Abdi kept shaking Dr. Courtney’s hand. This did not make Dr. Courtney feel nervous and he participated in the handshakes.

[101] While Dr. Courtney was speaking with Mr. Abdi, a police officer (Constable Weir) arrived and approached Mr. Abdi from behind. When he noticed the officer, who was about three feet away, Mr. Abdi said, “I have to go,” and started walking down the street. Dr. Courtney encouraged him to stay and held him lightly by the wrist to delay him so the officer could intervene.

[102] The police officer told Mr. Abdi to put his hands on a store window. With a glance at the officer, he complied.

[103] The officer took out his handcuffs and directed Mr. Abdi to put one hand behind his back. At this point, Mr. Abdi stopped complying and started walking east on Wellington. He was in a relaxed and dismissive state: nonchalant and grinning.

[104] In response to Mr. Abdi's noncompliance, the officer reached his hand out and said, "Alright," as if to say, "This is what we're doing now," meaning physical restraint was now required. He kicked Mr. Abdi in the back of the knee, causing him to fall backwards in the tight space between the curb and a parked car. Mr. Abdi landed on his buttocks and then his back. Dr. Courtney saw no contact between his head and the ground. He did not seem injured from the fall.

[105] Mr. Abdi got up quickly and ran north across Wellington with the officer chasing him. At one point, when the officer was about 10 feet away, he picked up a circular garbage can lid and appeared to be contemplating either throwing it or using it to defend himself. But he put it down and ran down the street towards Hilda.

[106] Dr. Courtney went into a diner for breakfast. Within a minute, he heard the first siren.

[107] According to Dr. Courtney, Mr. Abdi showed signs of disinhibition and poor judgment during their interaction. He appeared mentally ill.

The Route to 55 Hilda

[108] This part of the narrative draws on the testimony of Constable Weir and three civilian scene witnesses: Wendy Dunford, Ross McGhie, and Sarah Clements.

Constable Weir

[109] Constable Weir had been with the Ottawa Police Service for 14 years. He is six feet tall and weighed 195 to 200 pounds.

[110] He started his shift at 6:00 a.m. He recalled the day as sunny, hot, and muggy.

[111] At 9:37 a.m., Constable Weir responded to a call for a physical altercation at the Bridgehead. Arriving about six minutes later, he spoke with an employee in the crowd of people out front and learned of allegations of assault and sexual assault.

[112] Armed with grounds to arrest, the officer approached Mr. Abdi who was speaking with a man who was on his phone. The man was Dr. Courtney, who was nearing the end of his 911 call.

[113] Mr. Abdi and the man were shaking hands. Mr. Abdi was in the man's personal space and the man looked uncomfortable. It looked to Constable Weir like two people who were experiencing a conversation differently.

[114] Constable Weir made eye contact with Mr. Abdi as he approached. Mr. Abdi turned and started to walk away, but the other man said, "[W]ait a second. They need to talk to you. Stay here," and Mr. Abdi moved towards a store window.

[115] Constable Weir described Mr. Abdi's eyes as "super bloodshot" and bleary. There was a buildup of saliva in the corners of his mouth. He was glistening with sweat; his whole body was wet. The officer's initial observations led him to question Mr. Abdi's mental health.

[116] Constable Weir told Mr. Abdi to put his hands against the glass. He complied. The officer pulled his handcuffs from his belt and told him to put his hands behind his back. Mr. Abdi started to obey, but then his left hand stopped. Fearing he was going to run, Constable Weir said, "Don't," and tried to take hold of his hands, but Mr. Abdi spun out of his grip and started to run. The officer kicked the back of his knee to knock him off balance, but it didn't work.

[117] Mr. Abdi ran east down the south sidewalk on Wellington. He hadn't covered much distance before Constable Weir caught up with him and pushed him with one hand between the shoulder blades, causing him to fall between a parked car and a garbage bin. As far as the officer could tell, he didn't hit his head. He didn't hear any clunks or thumps, nor did he see any blood.

[118] Mr. Abdi jumped up, took a few steps westbound, and then u-turned and continued running east, still on the south sidewalk. As Constable Weir followed him, Mr. Abdi cut across Wellington to the north sidewalk. He didn't wait or check over his shoulder for cars, although traffic was light.

[119] Constable Weir recalled saying over his police radio that he was running after the suspect. He was trying to keep everyone informed. He needed help.

[120] Mr. Abdi seemed to be running as hard as he could, but Constable Weir was able to keep up with him, in part because Mr. Abdi would slow down at times and try and knock things over or pick things up. At one point, he grabbed a metal garbage can and tried to tip it over, but he couldn't because it was bolted to a post.

[121] When Mr. Abdi reached the north side of the street, Constable Weir caught up with him. Mr. Abdi took hold of a metal sign post that was fixed in cement. He started

rocking it back and forth with all his might, as if he was trying to pull it out of the ground. Constable Weir took out his pepper spray and went to spray him, but nothing came out. The spray jammed. Mr. Abdi's eyes bugged out as he looked at the officer, and then he started running again.

[122] Constable Weir continued the chase. He tested his pepper spray and discovered it had become unjammed and was working.

[123] After entering the pedestrian walkway at Wellington and Somerset, Mr. Abdi stopped running, bent over, and tried to pick up a four-foot construction sign by its wooden base. As he struggled with the sign, Constable Weir pepper sprayed him twice in the eyes. There was no response. Mr. Abdi didn't even blink.

[124] Constable Weir had used pepper spray about six times before, but he had never seen it have zero effect. This was an alarm bell. It meant to him that he was dealing with someone who was really strong and feeling no pain. He took out his baton and opened it.

[125] Mr. Abdi let go of the sign and picked up a 30-pound rubber pad commonly used to weigh down construction equipment. He held it up near his head on an angle. Constable Weir was seven to ten feet away. He was afraid Mr. Abdi was going to hit him with the pad, so he backed up another five feet.

[126] Mr. Abdi started clumsily running with the pad over his head. When he reached a curb, he was forced to step up and lost his balance. Constable Weir gave him two strikes with his ASP as hard as he could, targeting the nerve bundle at the back of the thigh. He kept telling him to "Get down."

[127] The ASP blows had no effect on Mr. Abdi. He did not get down and he did not drop the construction pad. Constable Weir couldn't believe he was still standing.

[128] Mr. Abdi moved at a fast but unsteady pace towards the entrance to 55 Hilda. He exchanged words with a woman but then became top-heavy and lost his balance. He dropped the rubber pad and stumbled into the alcove-style entrance.

[129] Constable Weir agreed his foot pursuit of Mr. Abdi covered a bit more than 300 meters. At the end of it, he was out of gas.

Wendy Dunford

[130] Wendy Dunford and her husband, Ross McGhie, lived in the area. They had just finished a morning run. They had walked south along Hilda and were crossing Wellington when Ms. Dunford saw Constable Weir and Mr. Abdi walking east on the south side of Wellington.

[131] Mr. Abdi was ahead of the officer. He was carrying a flat construction pad over his head. Constable Weir was trying to detain him, saying things like “Stop” and “Don’t move,” but Mr. Abdi kept plodding away with the pad almost resting on his head. He was evasive but not aggressive toward the officer. His movement seemed a little uncoordinated.

[132] Constable Weir had his baton out. He tried a number of times to make contact with Mr. Abdi with the baton, and in response Mr. Abdi would bring the construction pad down like a shield. Ms. Dunford was unsure if the officer connected with the baton.

[133] When the two men were nearing the intersection of Wellington and Hilda, Constable Weir made another lunge at Mr. Abdi and Mr. Abdi ran across the street towards 55 Hilda. There was a change in his speed but he was not sprinting; he still had a shambling gait.

[134] Near the northeast corner of Wellington and Hilda, Constable Weir shoved Mr. Abdi quite hard from behind. Mr. Abdi dropped the construction pad and stumbled into the entrance area at 55 Hilda with a lot of forward momentum. Ms. Dunford thought there was a woman was coming out of the building at the time.

Ross McGhie

[135] Ross McGhie recalled that he and Ms. Dunford were approaching the northwest corner of Wellington and Hilda when he first saw Constable Weir and Mr. Abdi walking eastbound on the south side of Wellington. The officer was keeping up with Mr. Abdi although they were a couple of metres apart.

[136] Mr. Abdi was holding a piece of construction equipment over his head. He did not seem to be struggling under its weight. Constable Weir’s demeanour was defensive. He was trying to get Mr. Abdi to stop and speak to him, but Mr. Abdi was not responding. He did not seem to be in distress. He was smiling, almost as if he was playing a game with the officer.

[137] At one point, Constable Weir adopted a defensive posture, putting one of his arms forward with a fist. It was as if he was preparing to be charged or for some kind of physical altercation.

[138] According to Mr. McGhie, he and his wife moved south across Wellington around the same time as Constable Weir and Mr. Abdi crossed in the opposite direction. Mr. Abdi was still holding the construction pad at about a 45-degree angle near his head and shoulders.

[139] Close to the northwest corner of Wellington and Hilda, Constable Weir made a grab for Mr. Abdi's shoulder, at which point Mr. Abdi projected the construction pad towards the officer. It was not Mr. McGhie's impression that he deliberately threw it at him; rather, Mr. Abdi released the pad and sort of pushed it in the officer's direction, as if he was trying to create an obstruction as he ran.

[140] Mr. Abdi sprinted to the entrance to 55 Hilda. When he reached the door, Constable Weir was right on top of him.

Sarah Clements

[141] Sarah Clements lived in a second-floor apartment at the northwest corner of Wellington and Hilda. Her living room window looked onto Wellington, while from her kitchen window she had a downward view of the entrance to 55 Hilda.

[142] Ms. Clements was on her living room couch texting with a friend when she heard yelling outside. She looked out the window and saw Constable Weir chasing Mr. Abdi on Wellington just before Hilda. They were moving at relatively fast pace, like a fast jog. Mr. Abdi was holding a flat construction weight over his head with both hands. The officer told him twice to put it down, but he wasn't complying.

[143] Ms. Clements texted her friend about what she was seeing. According to a printout of her texts, she sent her first message at 9:46:45 a.m.

[144] When the two men were out of Ms. Clements' line of sight, she heard Constable Weir say over his radio that he was at Hilda Street.

The Entrance at 55 Hilda

[145] The narrative continues through the testimony of Sarah Clements, Wendy Dunford, Ross McGhie, and Constable Weir. The CCTV video from Camera 7, which I will review later, is also critical.

Sarah Clements

[146] When she lost sight of the two men on Wellington, Ms. Clements got off the couch and went to her kitchen window. She heard a car pull up on Armstrong, the first street north of Wellington. It sounded like a fast engine and quick braking. She did not hear sirens.

[147] From her kitchen window, Ms. Clements saw that two police officers had Mr. Abdi against a wall in the entry area at 55 Hilda. One officer had “DART” on his uniform. She did not recall seeing any police cars.

[148] One of the officers was hitting Mr. Abdi in the legs with a baton while the other was punching him in the face. Mr. Abdi was pretty much standing in place; he wasn’t attacking back.

[149] Ms. Clements saw more than one closed fist punch to Mr. Abdi’s face, but she didn’t know how many there were. One of the punches struck him in the left side of the face, but her memory wasn’t clear on where any other punch or punches to the face landed.

[150] Ms. Clements saw Mr. Abdi lean forward and then she looked away to text her friend. When she looked back, Mr. Abdi was face-down on the ground in handcuffs.

Wendy Dunford

[151] Ms. Dunford recalled that she was with her husband about 40 meters away when she saw Mr. Abdi stumble into the entrance at 55 Hilda with Constable Weir right behind.

[152] Ms. Dunford described her location with reference to photographs. She was more certain of the view she had of the scene than she was of the precise spot where she was standing. She said her view was similar to the perspective in one of the photographs, although she was further back.¹⁵ She could not see the entry doors at 55 Hilda.

[153] Once the two men were in the entrance area, Ms. Dunford heard Constable Weir say things like “Stop” and “Get down on the ground.” Mr. Abdi was not complying. The officer hit him in the arms and legs a few times with his baton.

¹⁵Exhibit 3, page 8

[154] A police car pulled up. An officer (Constable Montsion) got out quickly and went straight over to where Constable Weir and Mr. Abdi were “somewhat grappling.” He immediately started punching Mr. Abdi. Ms. Dunford described seeing between five and ten punches. It looked to her like there were a lot of punches to his face and upper body. The blows were at the height of the head.

[155] According to Ms. Dunford, Mr. Abdi was non-compliant and trying to get away, but she did not see him offer any physical resistance or make any aggressive move towards either police officer.

[156] At the time of the blows, Ms. Dunford heard somebody yelling “Help” and “Why are you doing this?” but she was not sure whether it was Mr. Abdi or not.

[157] Ms. Dunford next saw Mr. Abdi lying on the ground on his front. She could not see clearly because the alcove area was a few steps below street level and the officers were sometimes blocking her view. Mr. Abdi was in handcuffs. She was unsure if he had been in handcuffs earlier, at the time of the punches, or whether the officers had been trying to handcuff him at that time.

[158] Ms. Dunford agreed she may have caught only glimpses of action as the three men moved around during the dynamic encounter, although her recollection was of not seeing glimpses. She did not dispute the suggestion that she may not have seen every event and that she had subconsciously filled in gaps to create a coherent whole. When presented with video evidence, she accepted that her estimate of five to ten punches could be mistaken. She maintained a recollection, however, of seeing several punches to the head.

Ross McGhie

[159] Mr. McGhie estimated that he saw the events at 55 Hilda from 40 to 50 yards away. His memory of his precise locations at various times differed from his wife’s.

[160] For example, Mr. McGhie recalled that when he saw the blows he described, he was on the sidewalk on the south side of Wellington. Although he couldn’t give an exact distance, he said he was perhaps about 15 to 20 feet west of the southwest corner of Wellington and Hilda.¹⁶ He had a clear and unobstructed view of the entry doors at 55 Hilda.

[161] According to Mr. McGhie, once the two men were in the entrance area, Constable Weir yelled at Mr. Abdi two or three times to get down. At the same time, he

¹⁶Exhibits 159, 160, 161, 163

was using his baton on Mr. Abdi's legs, arms, and back. Mr. McGhie believed there were four or five solid blows to the legs with a command to get down after each one. He saw no kicks or knee strikes. Mr. Abdi reacted to the baton blows by flinching in pain, but he did not try and block the blows or make any physical gestures towards the officer. He did not go to the ground.

[162] After the baton strikes, Constable Weir tried to grapple with Mr. Abdi in front of the entry doors. He grabbed Mr. Abdi around the neck and shoulders. In response, Mr. Abdi reached up to the officer's arms and shoulders in an attempt to resist or unlock the grapple.

[163] It was at this point that Constable Montsion arrived. He left his vehicle, ran across the street, and immediately administered five or six closed-fist blows to Mr. Abdi's face, neck, and head. Mr. McGhie saw the blows from the back. They came from the shoulder and Mr. McGhie had the impression they were very heavy and delivered with a fair degree of force. Mr. Abdi was unable to avoid the blows because his arms were still locked in a grapple with Constable Weir.

[164] While making these observations, Mr. McGhie was moving in a southeasterly direction. During this time, he heard someone screaming, "Help. Police." The voice sounded panicked. Although it was difficult to hear, Mr. McGhie formed the belief that it was Mr. Abdi's voice.

[165] Several seconds later, Mr. McGhie saw Mr. Abdi on the ground. It looked like his hands were restrained behind his back. Both officers appeared to be holding him down. Mr. Abdi wasn't moving. Mr. McGhie's view of the entry area was less clear at this point. He couldn't see the doors.

[166] In cross-examination, Mr. McGhie acknowledged that he had been mistaken on some points. After watching the video, he agreed, for example, that

- Constable Weir delivered the baton strikes as Constable Montsion was arriving and not *before* he arrived;
- Mr. Abdi's arms were not secured in a "grapple" with Constable Weir when Constable Montsion delivered his blows; rather, his arms were free;
- the outer door to 55 Hilda was not locked when Mr. Abdi ran into it.

[167] These are not the only examples. By the end of his testimony, Mr. McGhie acknowledged it was possible his view of the scene was not as clear and unobstructed

as he had initially thought. He felt some of the impressions he had formed about the conduct of the officers had been corrected.

Constable Weir

[168] Constable Weir was right behind Mr. Abdi when he stumbled into the entranceway at 55 Hilda. He was aware that if Mr. Abdi went into the building and the door closed behind him, he would escape arrest.

[169] Mr. Abdi banged into the window. When he turned around, Constable Weir kned him in the midsection as hard as he could, using the forward momentum he had from running. He felt this blow “should floor pretty near anybody,” but Mr. Abdi had no reaction to it.

[170] Constable Weir and Mr. Abdi were a few feet apart, eye-to-eye and circling each other. It was as if they took a “mini break” – a moment where bodies weren’t moving. The officer was looking for an opportunity when, in his peripheral vision, he saw a police car arrive.

[171] Constable Montsion approached. He delivered three quick punches with both hands to the area of Mr. Abdi’s head and shoulders. They were hooking blows, not jabs or haymakers from behind the shoulder.

[172] Mr. Abdi had no reaction to the blows; they didn’t seem to faze him. But Constable Weir saw his nose bleeding. It was bleeding a lot.

[173] The officers were on either side of Mr. Abdi. Constable Weir anchored Mr. Abdi’s upper body with his own body and used his weight and all his strength to take him to the ground. They went down in tandem. Mr. Abdi went forward onto his stomach. Constable Weir was beside him.

[174] In his evidence in-chief, Constable Weir first described the takedown this way:

His nose started to bleed, and we each got on one side of him. And, like, I’m, I’m like I’m gesturing with my arms as in where. I’m on one side, Dan is on the other, and we’re trying to grab hold of Abdi with our arms. I still have my asp in my right hand. The story of my life, something in my right hand, and I can’t grip. I have, I don’t have great [purchase], but we manage to eventually, using our weight, bring him to the ground. And we, as in Abdi and I, both went down forwards. I went down, he went down.

Q. All right.

A. I don't know what happened to Dan.

Q. You don't know what?

A. I'm not sure where Dan was at that point.

Q. All right.

A. But we got him to the ground.

[175] According to Constable Weir, the takedown was "pretty textbook." It was not a fast fall or a hard hit. They went down fairly smoothly; they kind of "slunk" to the ground. It was not "a tree falling in the woods situation." Neither man hit his face. There were no audible smacks or unusual sounds.

[176] When shown the MP4 video, Constable Weir said the takedown was "how I see it in my head when I replay it over in my head." He did not recall Mr. Abdi falling as quickly as shown in the PSF video.

[177] In cross-examination, after watching the video, Constable Weir accepted the following suggestions:

- he was holding Mr. Abdi's shirt near the right shoulder but was not using all of his own weight to bring him to the ground; and
- Constable Montsion was not touching Mr. Abdi at the time of the takedown.

[178] After the takedown, Constable Weir got up fast and put his knee on Mr. Abdi's back. He took hold of his right arm and tried to bring it behind his back, but Mr. Abdi was too strong. At one point, the officer was hauling for all he was worth with both hands; he feared he would break Mr. Abdi's arm. But it wouldn't budge; it was as stiff as an oar. His one arm was, Constable Weir felt, "stronger than my entire body at this point."

[179] Constable Weir commented on the importance of controlling Mr. Abdi's hands:

I still have to be cognizant of weapons. We haven't searched him yet. Maybe he's got something in his belt. I don't know. These are the things they train you for. But as long as I can control his hands, he's not going to access that. That's why it was so imperative to get him into

handcuffs. Once he, once we did that, we had complete control over him.

[180] During the struggle on the ground, Constable Montsion delivered a couple of strikes to the area of Mr. Abdi's head. Constable Weir did not know if these were open-handed or closed-fist strikes. At time of the blows, Mr. Abdi's head moved from left to right and blood splashed on Constable Weir's left arm.

[181] According to Constable Weir, the blows by Constable Montsion were the key to getting Mr. Abdi's arms behind his back and handcuffed. He explained:

I don't know how it was delivered. I just know that it effectively allowed us to get him in handcuffs because the distraction was enough that his strength faltered for just enough time, and I could get his arm behind his back.

[182] When asked why he himself did not punch Mr. Abdi, Constable Weir explained that he had previously injured three knuckles in his right hand when delivering punches while on duty. He avoids punching because it hurts his hand and he can't make a proper fist. He later testified:

... [I]f I could have stood, stood toe to toe, I would have. I would have punched as many times as I had to, but that's how I, I can't fight that way. My right hand is noneffective. But if I could have used it, I would have used it.

[183] After the handcuffs were secured, Mr. Abdi was making noises with his mouth: breathing and groaning. His body was still rigid when Constable Weir brought him gauze. It was when the paramedics arrived that he felt all the power leave his body. Mr. Abdi went limp in his hands.

THE VIDEO FROM 55 HILDA

[184] This trial was scheduled for 12 weeks beginning February 4, 2019. The CCTV video from 55 Hilda was the centerpiece of the Crown's case.

[185] On the afternoon of February 3, 2019, the Crown came into possession of a video in a different format than the one it had disclosed two years earlier. There were noticeable differences between the two versions of the video.

[186] The Crown immediately disclosed the new video. This spawned months' worth of unforeseen work that included terabytes of additional disclosure, extensive

consultation with experts over many weeks, and applications for a stay of proceedings and exclusion of evidence.

[187] The applications involved days of evidence about digital video from expert witnesses called by both parties: Ed Segeren for the Crown and Grant Fredericks for the defence¹⁷. The parties agreed the evidence of these witnesses would apply at trial.

[188] By July 5, 2019, all issues had been addressed and the following video evidence was admitted on consent:¹⁸

- **PSF Files** – These files contain the events captured by Camera 7 and recorded by the Digital Video Recorder (DVR) at 55 Hilda. They were received by the Special Investigations Unit (SIU) on a USB key on July 24, 2016. They can only be played through the DVR’s proprietary video player;
- **MP4 Exports** – These are files generated through the export feature of the DVR’s proprietary player. Once exported, an MP4 file can be played using commonly available computer video players like VLC and QuickTime.

What the Video Shows

[189] I will examine the video in detail when I analyze the issues. For now, I will set out the main events in overview form.

[190] The critical action covers just over a minute. There are five main parts.

[191] First, Mr. Abdi and Constable Weir arrive in the entrance area. Both are running. As Mr. Abdi reaches the door, the officer knees him in the midsection. At this time, Constable Montsion’s cruiser pulls up in front of the building. Constable Weir hits Mr. Abdi with his ASP and appears to direct him to go to the ground. He delivers a second ASP strike as Constable Montsion approaches the entrance area.

[192] Second, Constable Weir kicks Mr. Abdi as Constable Montsion steps down into the alcove. He then delivers a third blow with his ASP. Constable Montsion engages

¹⁷The saga of the video evidence is summarized at paras. 3 to 23 of my ruling on the *voir dire* into the admissibility of the Crown’s proposed expert witness. As mentioned at paras. 10 and 89 of that ruling, the defence voiced its belief on the second day of trial that the newly disclosed video had been “materially altered and doctored to change the perception of the events in the interaction between Mr. Abdi and Constables Weir and Montsion.” This serious allegation was never substantiated by any evidence. It should not have been made.

¹⁸Exhibit 167 – Defence position on ongoing common law *voir dire* re: video evidence, July 5, 2019

with Mr. Abdi. Constable Weir kicks Mr. Abdi a second time. It is in this time period that Constable Montsion allegedly delivers blows that, in the Crown's submission, ground his criminal liability. I will refer to these as the "*standing blows*."

[193] Third, Mr. Abdi goes to the ground, ending up on his stomach.

[194] Fourth, the officers work to get Mr. Abdi's hands behind his back so they can handcuff him. Constable Montsion strikes Mr. Abdi three times in the back of the thigh. Several seconds later, he allegedly delivers three blows to Mr. Abdi's face or head that, in the Crown's submission, make him criminally liable. I will refer to these as the "*blows on the ground*."

[195] Fifth, about 20 seconds after the blows on the ground, the officers secure Mr. Abdi in handcuffs.

Expert Evidence About the Video

[196] The Crown's submissions make no mention of its expert witness, Mr. Segeren. This is not surprising since this witness' evidence receded into the background after disposition of the stay application and the agreement leading to the admission of the PSF and MP4 videos.

[197] Defence counsel rely on the evidence of their expert, Mr. Fredericks, in support of their contention that the video should be approached with caution¹⁹. In their written submissions, counsel seized on some of the more important considerations underlying Mr. Fredericks' concerns about the reliability of the video evidence.²⁰

[198] Crown counsel cross-examined Mr. Fredericks but made no submissions directly challenging his opinions.²¹ Again, this may not be surprising. By the end of the trial, once both parties had a sophisticated understanding of the video files, a number of technical issues about the video were no longer the subject of serious dispute.

[199] With this context in mind, I will limit myself to a brief review some of the key points in Mr. Fredericks' report and testimony.

¹⁹Defence Final Submissions, para. 76

²⁰Defence Final Submissions, paras. 91 to 110

²¹The Crown maintains its position that the video footage is "substantially accurate" (Crown Reply Submissions, para. 71).

Mr. Fredericks' Evidence

[200] Mr. Fredericks was qualified to give expert opinion evidence on forensic video analysis.

[201] A forensic video analyst seeks to determine whether a video is “fit for the purpose”; in other words, whether it can answer the question being asked. A video may be fit for one purpose but not another. For example, a video may be fit to show that an object moved from one point to another or that a person made a striking motion, but it may not be fit to allow a reliable determination of the speed of the movement or the force of the motion.

[202] In Mr. Fredericks' opinion, the video from 55 Hilda is not fit for the purpose of determining

- whether Mr. Abdi went to the ground slowly or quickly;
- whether Mr. Abdi's face did or did not hit the ground during the takedown;
- the force of any blows delivered by Constable Montsion;
- the presence or absence of staining on the ground at various times;
- fine details at some points in time, such as the shape of a person's fingers or whether there is something in a person's hand; or
- the precise passage of time between events.

[203] Mr. Fredericks identified limitations in the DVR system that created the video files. These exist in both the PSF and MP4 files because an MP4 export is a perfect “bit-for-bit” copy of the PSF. Their digital properties are identical.

[204] I will set out the main limitations identified by Mr. Fredericks and relied on by the defence.

Refresh Rate

[205] Mr. Fredericks explained that a relatively low “refresh rate” or frame rate of a video file can prevent a viewer from perceiving certain fast-moving events, such as the muzzle flash of a firearm. In simple terms, the event happens too quickly for the system to capture it.

[206] Mr. Fredericks illustrated this point with a demonstrative aid that shows a basketball falling to the ground. The event was captured with two cameras: one recording at 30 frames-per-second (FPS), the other at 480 FPS. The exercise shows that the video with the lower refresh rate is not fit for the purpose of determining precisely when the ball hits the ground. Based on the 30 FPS video, a viewer will mistakenly believe the ball is still falling at a time when – as the 480 FPS video reveals – it has already bounced on the ground and begun rising.

[207] By extension, Mr. Fredericks explained, video with a relatively low refresh rate would not be fit for the purpose of determining if or when a person's head hit the ground during a fall. While we know a free-falling ball will hit the ground, the head of a falling person is different: it may or may not touch the ground. It is possible for a head to strike the ground and come back up so quickly that – like a muzzle flash or the dropping ball in the demonstration – a 30 FPS video system will fail to sample or capture the event.

[208] It is mainly for this reason that Mr. Fredericks concluded the video from 55 Hilda is not fit for the purpose of determining whether or not Mr. Abdi's head hit the ground during the takedown.

Oversaturation and Motion Blur

[209] Oversaturation occurs when an excess in light energy causes white pixels to bloom and then bleed into darker pixels that make up an object; for example, a hand or an officer's baton. This, in turn, causes the darker object to lose its shape and size or even disappear from view.

[210] Motion blur is the result of poor resolution. It can happen when one object (e.g., a swinging baton or hand) is moving quickly relative to others. The fast-moving object can become blurry and lose its shape.

[211] According to Mr. Fredericks, oversaturation and motion blur help explain why this video is not a reliable representation of whether or not there is staining on the bricks at certain moments in time.

Compression Technology

[212] Like most CCTV systems, the DVR at 55 Hilda used compression technology. This allows a system to conserve storage space and function economically. But there are tradeoffs. For example, image resolution is reduced.

[213] In addition, with compression technology, a certain amount of data making up a particular video image will often be repeated or borrowed from another image, as

opposed to all of the data being updated afresh each time an image is created. In Mr. Fredericks' view, this "redundancy" among images is one of the reasons for caution when assessing the reliability of the video, especially its ability to depict accurately subtle changes in movement.

Variable Image Refresh Rate

[214] The DVR at 55 Hilda had 16 cameras. It was set to record at 30 FPS. The cameras operated by motion activation. For example, when Camera 7 detected motion that reached a preset sensitivity threshold, it would "wake up" and capture the events, and the DVR would record them.

[215] According to Mr. Fredericks, motion activation can result in "under-sampling." In other words, motion that falls under the preset sensitivity threshold will not be sampled and will be lost.

[216] In addition, a multi-camera system²² that relies on motion activation cannot sample images from different cameras at precisely the same millisecond. As a result, the system will capture action from a particular camera *not* at a constant rate of 30 FPS but at a variable frame rate, also known as a "variable image refresh rate."²³

[217] A variable image refresh rate means that the elapsed time between images is not constant; it varies.²⁴ For example, in a video with 75,000 images, the time between Image 1 and Image 2 may be 40 milliseconds; the time between Image 2 and Image 3 may be 20 milliseconds; the time between Image 3 and Image 4 may be 10 milliseconds; and so on.

[218] According to Mr. Fredericks, a DVR that operates by motion activation will always capture action at a variable image refresh rate. Moreover, his examination of the metadata of the digital files confirmed that the video footage from Camera 7 was captured at such a rate.²⁵

[219] Mr. Fredericks explained that no video player can accurately play back variable image refresh rate video. The proprietary player for the DVR in this case will try and

²²A system with multiple cameras is called a "multiplexed" system.

²³For Mr. Fredericks, the terms "frame rate", "refresh rate", and "sample rate" can be used interchangeably.

²⁴The elapsed time between images is sometimes called the "packet duration time."

²⁵The variable image refresh rate of the Camera 7 video is seen in the entries at Column K of Exhibit 143(G) – Spreadsheet re Probe Analysis of 49-minute MP4 Export. This column (headed "pkt_duration_time") shows the packet duration time for each image. The times are not constant; they vary. Reference may also be made to the seventh column ("pkt_d_time") of the table at Appendix III of the Crown Written Submissions (Exhibit FFF).

play the images at the variable rate at which they were captured, but the results can be misleading. In what is often called an “accordion-type” playback, action will speed up or slow down unnaturally. It is common to see what look like sudden bursts of accelerated motion. These can create the illusion of increased speed which the viewer can misinterpret as increased force.

[220] Players like VLC and QuickTime are incapable of replicating the variable rate at which the images were recorded. Instead, they play the video back at a different rate, usually an average framerate. As Mr. Mr. Fredericks explained, they “more or less average out the playback speed.” Tools like these can also drop images or, in some cases, display an image twice. As Mr. Fredericks put it, a player like QuickTime is not perfect, but it is “the best tool we have, apart from the forensic tools that I use.”²⁶

[221] In short, variable image refresh rate video can never be played back at a rate that replicates the actual motion of the events or the refresh rate at which the events were captured by the DVR. It cannot be corrected and displayed through a computer player as an accurate real time video sequence.

[222] The variable nature of the refresh rate is the principal reason why, in Mr. Fredericks’ opinion, the video from 55 Hilda is not fit for the purpose of assessing speed, force, and motion. To reduce the risk of the viewer being misled on these issues, he recommended using QuickTime as a still image playback device; in other words, going frame-by-frame instead of “playing it back as a video.”

[223] In Mr. Fredericks’ view, the video from 55 Hilda would be fit for the purpose of determining generally what happened over 20 minutes, but it cannot replicate motion over 20 *milliseconds* or the time covered by one, two, or three video images.

On-Screen Time Stamps and Running Time

[224] On-screen time stamps are an “approximation” and should never be relied on to measure speed, force, or motion with variable image refresh rate video. The time is displayed to the second, not the millisecond, and is only meant to show roughly what the time is.

[225] Mr. Fredericks accepted that if one were to watch 10 seconds of video, it would probably represent close to 10 seconds, but he resisted going further than that. This video is not accurate, he maintained, down to fractions of seconds or “for the purpose of observing motion from image to image.”

²⁶According to Mr. Fredericks, the quality of the video can also be affected by limitations in the computer equipment used to display it.

[226] The running time counter in QuickTime is also just an estimate. Mr. Fredericks recommended using the frame number feature instead because it is more accurate.

A Note About the MP4 Files

[227] By the end of the trial, the PSF video had faded into the background and the parties worked with MP4 exports. Two of these were made trial exhibits. The Crown introduced an MP4 export created by a member of the SIU during the investigation,²⁷ while the MP4 export filed by the defence was produced by Mr. Fredericks.²⁸

[228] The action depicted in the two MP4 exports begins at slightly different times, but the files have the same digital properties where the images overlap.

[229] In these reasons, I will use the MP4 export generated by Mr. Fredericks. All time and frame references are from the QuickTime player.

POLICE TRAINING ON THE USE OF FORCE

[230] I will begin by reviewing some of the main ideas in the testimony of the Crown's use of force expert, saving other points for later sections of my reasons. After that, I will set out the evidence about police training on punching.

Michael Federico

[231] Retired Deputy Chief Federico served for 45 years with the Toronto Police Service. His evidence focused on the training police officers receive on the use of force.²⁹

[232] Every new recruit undergoes basic training at the Ontario Police College. Each officer completes a course on the use of force that includes training on five matters mandated by regulation: (1) legal requirements; (2) exercise of judgment; (3) safety; (4) theories relating to the use of force; and (5) practical proficiency. After basic training, the officer must undergo use of force training at least once every 12 months.³⁰ The method of delivery of this training may vary among police services depending on their needs and resources.

²⁷This is Exhibit 181. It became known as the "Kavcic export" after the SIU member who created it.

²⁸This was marked as Exhibit 143C.

²⁹Mr. Federico was qualified to give expert evidence in (a) the legal requirements and parameters for use of force; (b) use of force theory; (c) exercising judgment; (d) officer and suspect safety; (e) practical proficiency and exigencies; (f) suspects/subjects in distress; (g) suspect/subject de-escalation; and (h) use of weapons.

³⁰Exhibit 7, tab 8A – *Regulation 926* under the *Police Services Act*, ss. 14.2(1), 14.3 (0.1)(1), 14.4(1)

[233] Police officers have a duty to protect life and prevent death or serious bodily injury. This responsibility extends to all people, including offenders and suspects. Police duties also include apprehending criminals, preventing crime, and obeying the law. Protecting life is the highest priority. These duties are introduced during basic training and reinforced throughout an officer's career.³¹

[234] Police officers receive instruction on ss. 25 and 26 of the *Criminal Code* and the fundamental concepts of necessity, reasonableness, and proportionality. They are taught that the force they use must be necessary and reasonably justified: there has to be a reason for it and the reason has to be objectively observed. Mr. Federico explained:

That means police officers are taught that means a reasonable police officer, a reasonable person standing in their stead would see the grounds that the officer is seeing.

[235] Police officers are taught that every situation is unique and dynamic. They are cautioned not to jump to conclusions or rely solely on assumptions. Their obligation is to assess the situation based on their observations and to think about their options. The assessment must be continuous, allowing officers to adjust their response as the situation changes. Officer training seeks to develop critical thinkers and analytical responders, avoiding an automatic, unthinking approach where officers rush in headlong, oblivious to risks to the police or the subject.

[236] Mr. Federico elaborated on these ideas when explaining Ontario's Use of Force Model.³² He described the model as a "visualization of a thought process" or a decision-making tool. It is not a policy or procedure, nor is it a legal justification for police use of force. It is a mental tool to help officers make decisions that are reasonable and justifiable. The model gives officers the opportunity to make an assessment and choose a course of action based on that assessment, as opposed to responding in an unthinking and strictly emotional way to a situation.

[237] By its spherical design, the model illustrates the dynamic nature of each situation and helps officers understand the need for continuous assessment and the importance of adapting and responding as the situation develops. The model aims to show that the use of force does not proceed in a linear or incremental fashion and that officers must be prepared to move in any direction on the sphere as the situation requires. At the centre of the model, circling around the "Situation", with arrows representing perpetual motion, is the framework "Assess-Plan-Act."

³¹See also s. 42 of the *Police Services Act*

³²Exhibit 41 – Toronto Police Service Policy & Procedures Manual, Procedure 15-01 – Appendix A, Provincial Use of Force Model; see also Exhibit 7, tab 9 – De-escalation Job Aid PowerPoint, page 27

[238] Mr. Federico explained that officers are trained to be “situationally aware” and to rely on a suite of observations or compilation of cues in order to make informed decisions about using force. He touched on some of the factors that can bear on an officer’s assessment, including the following:

- *Number of officers at the scene* – The presence of multiple officers may allow for a coordinated approach and the assignment of tasks. It may open opportunities for communication with the suspect with a view to calming things down. Each officer, however, is responsible to make his or her own assessment and decisions, adapting as situation requires;
- *Containment* – This means the person is secure against harming anybody, secure from being harmed, and secure against flight. Containment gives the officer more time and may provide an opportunity to defuse or de-escalate the situation;
- *Behaviour of the subject* – This can include noncompliance, passive resistance, active resistance, and assaultive conduct (both active assaults and threats to assault);³³
- *Nature of any threat* – Officers are instructed that a potential threat, by itself, does not necessarily justify a use of force. In contrast, officers may use force to respond to an imminent threat, *i.e.*, where the person is engaged or about to engage in the threatening activity;
- *Whether the subject is armed* – The mere presence of a weapon, just like the mere utterance of a threat or a single gesture by the subject, is a factor to consider but is not, in and of itself, a justification for the use of force;
- *Distance between the officer and the subject* – Distance equals time, and time gives the officer more options including, for example, speaking to the subject or calling for backup;
- *Conduct of the subject before the officer’s arrival on scene* – Assuming the officer is aware of it, this information can help the officer prepare for the encounter. An officer may approach a person who has been violent or threatening differently than he or she would someone who has caused property damage. While a subject’s previous behaviour may be an indication of what the officer might encounter, it is not determinative; the officer must still assess the situation when he or she arrives at the scene.

[239] Mr. Federico spoke about de-escalation. This, he explained, is series of vocal communications aimed at calming things down with a view to reaching a mutually

³³Mr. Federico testified that it is the subject’s *behaviour* that justifies the police response, not the mental state underlying the behaviour.

satisfactory resolution of the event and minimizing the need for force. Suggested phrases include, “I’m here to help you”; “Don’t be afraid”; “No one’s going to hurt you.”

[240] There is no legal requirement to de-escalate, nor is there any script or fail-safe technique that will achieve de-escalation. Sometimes, Mr. Federico acknowledged, there is no opportunity to de-escalate.

[241] While de-escalation does not appear as a label on the Use of Force Model, it is an interpretation placed on the model and forms part of police training.³⁴ There is an expectation that officers will engage in de-escalation techniques at any stage of an encounter; however, as Mr. Federico put it, “Good faith application is what we’re expecting for police officers rather than some ideal state.”

[242] Mr. Federico recognized that police training cannot always simulate real life situations. Officers are often required to make very quick judgment calls in the heat of the action – split second decisions on the fly and under stress. Training cannot cover the specifics of every incident, but it can give officers techniques and tools to help prepare them for virtually every incident.

[243] Officer training is reality-based and conveys the importance of good faith decisions about the use of force. Mr. Federico explained:

So, it’s always understood to be good faith efforts to do so. And of course, the officer is the one who will be expected to explain and justify their action. But we also don’t want police officers during the training to be so apprehensive about the restrictions around use of force that they’re, you know, hesitant or unable to actually carry out their duty because they’re fearful of retributions or, you know, completely confused or bewildered, so it’s reality-based training.

[244] Mr. Federico agreed there is no single reasonable response to every case. Officers are taught that different officers in a similar situation may make different decisions about use of force options. In a training exercise, for example, one officer might take the subject down while another might choose to step back. This can be based in part on individual perception.³⁵

³⁴Exhibit 7, tab 9 – PowerPoints: Communication and De-escalation Training 2014 and De-escalation Job Aid; see also Exhibit 49 – Ontario Police College Basic Constable Training Defensive Tactics Course Training Standard, page 2

³⁵Some of the commentary on the Use of Force Model also touches on this point: see Exhibit 41 – Toronto Police Service Policy & Procedures Manual, Procedure 15-01 – Appendix A: Provincial Use of Force Model, page 5 (under the heading “Perception and Tactical Considerations”).

[245] During cross-examination, Mr. Federico spoke about handcuffing a noncompliant or resistant suspect. His testimony included the following:

Q. In your estimation, what is the level of force that's permissible in order to achieve appropriate handcuffing of an individual who is refusing or resisting?

A. Well, again, training would say it's going to depend. In order to get the handcuffs on it's going to require the officer to take certain physical actions. If the officer's met with resistance, the officer would be, again, justified if the grounds exist, in using greater force to accomplish it. There's no limit in terms of the considerations the officer goes through, and the ultimate goal, of course, that the officer is attempting to achieve, is – is the purpose the officer intends, which is get the person in handcuffs and make the arrest. So the officer must prevail. There's no question that the officer's going to take action. Does nobody any good if the officer is overpowered or physically prevented in accomplishing the task when it's reasonable to do so.

Training on Punching

[246] The Toronto Police Service policy on the Use of Force Model discusses five use of force options. Under the sub-heading "Physical Control", the policy describes control techniques that do not involve the use of a weapon:

Soft techniques are control oriented and have a lower probability of causing injury. They may include restraining techniques, joint locks and non-resistant handcuffing. *Hard* techniques are intended to stop a subject's behaviour or to allow application of a control technique and have a higher probability of causing injury. They may include empty hand strikes such as punches and kicks.³⁶

[247] Mr. Federico elaborated on the concept of hard physical engagement:

... So as opposed to soft, a hard would be the application of strikes or blows and that would be, if the hands are being used, that could include open or closed fists, for example, or it could be kicks or jabs. So it's a strike or a blow. And it's designed to distract by impacting the individual. There is some pain, typically, involved. It's designed to distract the person so that the officer can accomplish the goal, get the person's hand behind them and in the handcuffs, but it's without weapons. So it's still using the officer's body. And there are techniques

³⁶Exhibit 41 – Toronto Police Service Policy & Procedure Manual, Procedure 15-01, Appendix B: Provincial Use of Force Model, page 7 [Emphasis in original]

taught to police officers that go along with the instruction that hard application of force is permitted under the appropriate circumstances.³⁷

[248] The Ontario Police College teaches punching techniques during basic training. The Defensive Tactics Study Guide includes the following:³⁸

Punching

Punching can be an effective technique to establish control; however, there are several safety issues that must be considered before punches are used. The bones of the hand are small and relatively fragile. Hard impact with solid structures such as the skull, jaw, and teeth can quickly lead to severe hand injuries that may impede an officer's ability to effectively defend themselves. Punching may break the skin over the knuckles and exposes the officer to blood-borne pathogens such as hepatitis and HIV. As an alternative, the palm heel strike may be used.

Support Hand Palm Heel Strike

As the name implies, it is delivered with the bottom portion of the palm. The effectiveness of the strike is dependent upon speed. Do not telegraph the strike by winding up or pulling the hand back. All motion should be forward. The effectiveness of the strike relies on forward weight transfer. The target area is typically the face and upper torso. This tactic may be used to stop a subject's forward momentum create a distraction or displace balance.

Weapon Hand Punch

Weapon hand punches are delivered with significant hip rotation for power. The hips rotate as the strike is delivered.³⁹

Punching is an extremely prevalent method of delivering empty hand strikes. Most people have seen a fistfight at some time in their lives. Care must be taken when delivering punches to prevent injuries to the hand. As a police officer, you may need to use your hands for follow up techniques, use of force options, and many police functions. The overall body mechanics for punching in the context of use are the same as a palm heel strike; the difference lies with the striking surface of the hand. With punches, the fingers and thumb should be rolled into a fist and the contact area should be the front face of the first two knuckles of each hand. The index and middle finger metacarpals should be in line with the radius and ulna bones in the forearm and the thumb should be

³⁷Evidence of M. Federico, March 19, 2019, page 4 [Emphasis added]

³⁸Exhibit 42 – Ontario Police College Basic Constable Training Program Defensive Tactics Study Guide 2018, pages 33, 35, 38 [Emphasis added]

³⁹These two sentences appear in bold type opposite a demonstrative photograph.

wrapped around the index and middle fingers. Making a correct fist will reduce, but not eliminate, the possibility of injury.

[249] According to Mr. Federico, police officers in Ontario are taught these punching techniques.

[250] In 2016, the Ottawa Police Service offered a course on “Open and Closed Fist Strikes” in its Defensive Tactics Studio. According to the lesson plan, the learning objective was to teach students “to strike a subject effectively using either a closed fist or palm heel strike” so that the student “can effectively gain time and distance due to the distraction strikes.” The content of the lesson includes the following:⁴⁰

Lecture:

Purpose of striking to distract and to gain time and distance from the Subject. Once time and distance has been gained the officer shall choose an effective U of F Option. All power from a strike is generated from the hips. We will be looking at the Jab Cross Method.

Lecture/Demo:

CLOSED FIST STRIKE – With a closed fist using the index and middle finger top knuckles will be the striking area. To deliver the distraction strike, the Support hand delivers a quick sharp jab into the face. The fist will rotate so the knuckles will be parallel to the ground. This may be followed up by a cross with the dominant hand. The strike will get its power from the hips. Once strikes have been made move back, gain time and distance, access a use of force option.

[251] Mr. Federico testified that officers are cautioned not to deliberately strike vulnerable parts of the body, such as the head, neck, throat, or groin. He explained:

Blows to the head, even with a fist or an open hand, could cause serious – unintentionally could cause serious damage. So the officers are instructed, to the extent that they can where it's, you know, reasonable, to avoid striking those areas and instead strike the arms and the legs which can be used as weapons against the officer in turn.⁴¹

[252] Mr. Federico agreed, however, that distraction blows to the face can be justified in certain circumstances. With reference to the Ottawa Police Service's 2016 lesson

⁴⁰Exhibit 43 – 2016 DT Studio Lesson Plan, Open and Closed Fist Strikes. The lesson plan is dated December 18, 2015. The “learner level” for the course is described as “U of F Requal[ification]” [Emphasis added]

⁴¹Evidence of M. Federico, March 19, 2019, page 5

plan on open-handed and closed-fist punching strikes, he commented, “I’m not sure I’ve seen the reference to the jabs to the face commonly, but I have seen it in the past.”

ANALYSIS OF THE ISSUES

[253] I will address the issues in the order set out in the overview.

ISSUE ONE – WAS CONSTABLE MONTSION’S CONDUCT UNLAWFUL OR CRIMIINALLY NEGLIGENT?

[254] This issue, framed in broad terms, touches all three charges. It turns on whether the Crown has proved beyond a reasonable doubt that Constable Montsion assaulted Mr. Abdi without legal justification. If the Crown succeeds on this issue, it will have proven an unlawful act for the manslaughter count and the foundational element of each assault-based charge. If I am left with a reasonable doubt on this issue, Constable Montsion is entitled to an acquittal on all counts.

[255] In saying this, I do not lose sight of the fact that the Crown’s position on manslaughter by criminal negligence requires an assessment of Constable Montsion’s overall conduct during the arrest. Nevertheless, the issue of whether he committed an unjustified assault is pivotal to the determination of whether the Crown can prove manslaughter by this route.

[256] I will begin by summarizing the evidence about Constable Montsion’s employment with the Ottawa Police Service, including evidence about the gloves he was wearing at the time of the incident.

[257] I will next examine the evidence about the force Constable Montsion used on Mr. Abdi and the information available to him at the time he used the force.

[258] After that, I will set out the law governing a police officer’s use of force and then turn to my analysis of the issue.

CONSTABLE MONTSION

[259] Constable Montsion was hired by the Ottawa Police Service in August 2008. He took basic training at the Ontario Police College shortly after joining the force. Over the years, he received annual use of force training. In 2009, he took a half-day course on

defensive tactics. His most recent Use of Force Block Training was on March 23, 2016.⁴²

[260] On July 24, 2016, Constable Montsion was in uniform and carrying handcuffs, pepper spray, an expandable baton, and a firearm. As a member of the Direct Action Response Team, the letters “DART” appeared on the back of his vest. He had a police radio on his left shoulder.

[261] Constable Montsion was driving a marked police vehicle. GPS evidence showed part of his route to 55 Hilda and his cruiser’s speed at various points.

[262] Much time was spent on the gloves Constable Montsion was wearing at the time of the incident. They were entered as an exhibit⁴³ and appear in photographs⁴⁴. I have examined them.

[263] The gloves are black and made by Oakley. The knuckles are raised and rounded and hard to the touch, leading to the inference that the area is reinforced in some way. The knuckle area is covered by a piece of leather-type material. The surface is smooth and free of protrusions or jagged edges.

[264] There is no admissible evidence about the composition of the gloves – specifically, the material used to harden the knuckles . The gloves are not noticeably weighted; in other words, when holding the gloves, one does not feel them being weighed down by the knuckles.

[265] By the end of the trial, the only reasonable inference from the evidence was that the gloves were acquired and issued to Constable Montsion at the direction of his supervisor with the DART unit.⁴⁵ The Crown accepts this.

[266] On the evidence as a whole, I find that Constable Montsion was wearing gloves with hard and smooth knuckles that had been issued to him by the supervisor of his unit as part of his equipment.

⁴²Exhibit 7, tab 7 – Employee Profile

⁴³Exhibit 9

⁴⁴Exhibit 8, Folder 8 – Exhibit Photo Book, pages 22 to 25; Exhibit 2 – Crown Photograph Book, tab 8A

⁴⁵Exhibits 170, 173, 180

EYEWITNESS ACCOUNTS OF THE FORCE USED BY CONSTABLE MONTSION

[267] The eyewitness evidence of the force used by Constable Montsion comes from the civilian scene witnesses (Ms. Dunford, Mr. McGhie, and Ms. Clements) and Constable Weir.

[268] Earlier, I outlined the testimony of these witnesses. I will not repeat that here. I will instead recapture the core of their observations on the force issue and then explain my assessment of their evidence.

[269] As I turn to the evidence of these witnesses, I remind myself of the importance of evaluating the testimony of each person not in isolation but in light of the evidence as a whole, including the accounts of other witnesses and the video.

Civilian Witnesses

[270] Wendy Dunford described between five and ten punches to Mr. Abdi's face and upper body. The blows were at the height of the head.

[271] Ross McGhie recounted five or six heavy closed-fist blows to the face, neck, and head that looked like they were delivered with a fair degree of force.

[272] Sarah Clements recalled the officer punching Mr. Abdi in the face more than once, but she didn't know many times.

[273] Ms. Dunford, Mr. McGhie, and Ms. Clements were honest witnesses who did their best to give a truthful and accurate account of what they saw. They were thoughtful and balanced and free of bias. Their evidence raised no credibility concerns.⁴⁶

[274] The three witnesses were consistent with each other at the core of their accounts: each saw more than one punch to the area of the face or head. Their evidence also finds some support in the video, which I will review in detail in a later section.

⁴⁶Ms. Dunford's admission in cross-examination that she had not answered truthfully about having watched part of the CCTV video in an online media article does not affect my view of her credibility. She made a mistake, as human beings do. When her mistake was revealed, her powerful reaction was that of an honest, decent person: she was gripped with anguish and remorse. This was a dramatic moment in the trial, to be sure, but it does not cause me to doubt Ms. Dunford's credibility. In fact, her painful acknowledgement that she had not told the whole truth speaks to her honesty. A person bent on misleading could easily have said she had forgotten about seeing part of the video, instead of making the admission and publicly exposing her error.

[275] Not surprisingly, there are reliability issues with their evidence. The events they described were unexpected, fast-paced, and shocking to all three people, who, until their attention was drawn, were enjoying a relaxing Sunday morning.

[276] None of them had a close-up view. Each was some distance away, Ms. Dunford and Mr. McGhie as much as 30 to 40 metres from the alcove.⁴⁷ Ms. Clements was looking down on an angle from her second-floor kitchen window across the street, and she caught only a brief moment of the action between arriving at the window and turning away to text her friend.

[277] The scene was dynamic. The events unfolded rapidly. Three men were moving around the recessed area below street level. Arms were swinging; legs were flying; baton blows were struck. Each witness had, at most, a period of seconds to observe the events they would describe in court three years later. It is unrealistic to expect anything approaching perfection in an eyewitness's description of events like these. It is only natural a person will miss something or make a mistake.

[278] Mistakes were made. Mr. Abdi and Constable Weir were not "locked in a grapple" when Constable Montsion delivered the standing blows. As Mr. McGhie acknowledged without hesitation, he was mistaken on this point.

[279] Ms. Dunford's estimate of five to ten punches cannot be correct when it is considered in light of the video. She was mistaken.

[280] Human memories are imperfect. Ms. Clements acknowledged that her memory failed her on some points, including about which of the two officers punched Mr. Abdi or how many punches to the face there were and where each of them landed.

[281] The witnesses formed impressions about what they saw. They were shocked. Mr. McGhie was disgusted. He and his wife were of the opinion that Constable Montsion's force was excessive, and they discussed their views. Ms. Clements' reaction was similar. She was upset by what she saw.

[282] It is normal for witnesses to form impressions and opinions about events they observe, especially events that affect them emotionally. They cannot be criticized for this. A trial judge must take care, however, to sift through impressions and opinion and make findings based on admissible evidence, namely, the witness' recollection of what they saw and heard. A witness' opinion about the propriety of the force used by Constable Montsion can help me understand their account of what they observed and

⁴⁷Exhibit 168 – Google Maps Satellite Photos. There was some discrepancy between Ms. Dunford and Mr. McGhie about exactly where they were standing at the time of the blows they described.

evaluate the reliability of their testimony. Those opinions are not relevant, however, to my determination of whether the Crown has proven that the force he used was excessive.

[283] Ms. Dunford and Mr. McGhie discussed some of what they had seen with each other and perhaps with others at the scene. They consumed media reports about the case until they learned of the court order prohibiting it.⁴⁸ None of this is surprising or sinister. They are married. They are intelligent. The events were shocking and upsetting to them. The case had a high profile in the community. It is natural that it would be a topic of discussion and interest to them. None of this affects my assessment of the testimony of Ms. Dunford and Mr. McGhie when I consider it in light of the evidence as a whole. I am satisfied each of them communicated his or her own recollection of the events, untainted by discussion with others or media consumption.

Constable Weir

[284] Constable Weir recalled three fast hook-style blows to the area of Mr. Abdi's head and shoulders while he was standing and a couple of strikes to his head when he was on the ground. He said he saw Mr. Abdi's nose bleeding after the standing blows. The officer's evidence about the blows finds support in the video and is consistent in a general way with the testimony of the civilian eyewitnesses.

[285] There are, however, reliability concerns with Constable Weir's evidence. He acknowledged that he was mistaken on a number of issues, some of which are significant.⁴⁹ For example, he had no memory (even after seeing the video) of kicking Mr. Abdi twice or hitting him with his ASP three times in the alcove, or of Constable Montsion delivering three blows to his thigh. These are not peripheral details; they are prominent events in the interaction. While these gaps in Constable Weir's perception or memory may be understandable given the traumatic nature of the call and the passage of time, I must take them into account in evaluating the reliability his evidence.

[286] The Crown questioned the credibility of some aspects of Constable Weir's account, such as his description of the fear he felt when dealing with Mr. Abdi and Mr. Abdi's physical strength. Crown counsel characterized his testimony on these issues as exaggerated or embellished and referred to other testimony as understated.

[287] I am unable to accept this submission. Constable Weir had many opportunities to shade his evidence in favour of the defence but did not. On important issues, his

⁴⁸Unfortunately, they were not notified of the media component of the order excluding witnesses order until well into the trial.

⁴⁹The defence has set out an exhaustive list of issues on which Constable Weir was mistaken: Final Submissions, paras. 431 to 442; Defence Submissions (PowerPoint), slides 30 to 34. In my assessment, some of these issues (e.g., what Mr. Abdi was wearing or whether there was a bicycle rack in front of the Bridgehead) are of less significance than others.

testimony was straightforward and balanced. This was not a witness who simply gave the defence what it wanted. To give one example, Constable Weir did not back down from his memory of seeing Mr. Abdi's nose bleeding after the standing blows, even during cross-examination on his contemporaneous notes. I recall his resistance to Mr. Edelson's suggestion that his memory would have been better on the day of the incident than a few months later.

[288] Constable Weir's testimony also finds support in other evidence. His testimony about the blows, for example, is generally consistent with the eyewitness accounts and the video. As for Mr. Abdi's physical strength, Constable Weir was not alone in commenting on this issue. Both Michael Rowe and S.L. remarked on how strong Mr. Abdi was. Moreover, as I will explain below, a close examination of the video lends credence to Constable Weir's description of his struggle to get Mr. Abdi's arm behind his back even after the blows on the ground. The video amply supports his description of Mr. Abdi's strength.

[289] While some of Constable Weir's evidence was framed in vivid terms, I do not find he was exaggerating. There are reliability issues with his account, but my assessment of his evidence is unaffected by credibility concerns.

THE INFORMATION AVAILABLE TO CONSTABLE MONTSION BEFORE HE ARRIVED AT 55 HILDA

[290] This information can be gleaned from the following evidentiary sources:⁵⁰

- Detailed Call Summary;⁵¹
- Radio Communications;⁵²
- Mobile Data Terminal (MDT) Records;⁵³
- Call Path Record;⁵⁴

⁵⁰This evidence is helpfully gathered in a table at Appendix II of the Crown Written Submissions (see also paras. 46 to 50 of those submissions). The times in the various sources are not synchronized. The Crown's table reflects its effort to harmonize them visually.

⁵¹Detailed Call Summary, Exhibit 7, tab 5

⁵²Radio Communications (audio files), Exhibit 8, Folder 6

⁵³Mobile Data Terminal (MDT) Records, Exhibit 7, tab 3. The MDT is the cruiser's on-board computer. The MDT records for Constable Montsion's cruiser appear after the second green divider sheet in the exhibit binder. There is no evidence that he had access to MDT information beyond what appears in his own MDT records. I also bear in mind Constable Weir's evidence that information about the call would be updated on the MDT and he would glance at it as he was driving.

⁵⁴Call Path Record, Exhibit 156. This document was introduced through Constable Weir during cross-examination without objection or any evidence to explain the source(s) of the entries in the document. Defence counsel's introductory reference to the document as "radio communications" is not evidence (Evidence of D. Weir, Transcript, June 25, 2019, pages 119 to 120). Some of the information in the record appears to come from the MDTs.

- GPS evidence.⁵⁵

[291] I will summarize the essential evidence from these sources, focusing on the radio communications and pausing from time to time explain my assessment of the evidence.

9:37 a.m. – The Call Begins

[292] At 9:37:11, the dispatcher radios: *Looking for units to attend 1024 Wellington West, it's the Bridgehead in 2300 zone for a minor 10-11 [disturbance] between customers. Males are pushing each other.*

[293] At 9:37:35, Constable Weir responds by giving his call sign: ... *2306 Echo.*

[294] At 9:37:50, Another officer, Constable Oger, answers the call, saying: *Oger 2407 Delta.*

[295] At 9:39:43, the dispatcher puts Constable Weir on the call, saying: *2306 Echo for 1024 Wellington at the Bridgehead. The 10-11 has escalated.*

[296] At 9:40:08 and 9:40:16, the dispatcher transmits: *Alright, so it seems the uh male has been thrown out but he's still attacking people on the street ... Just throw him out and lock the doors. Described as a black male, medium build and tall, approximately 40 years old.*

[297] At 9:40:28, the dispatcher broadcasts: *Possible MHA issues. And he's just assaulted a female.*

[298] At 9:40:47, Constable Montsion (whose call sign is 2305D) identifies himself over the radio and asks, *Where's Echo?* to which the dispatcher immediately responds: *At the Bridgehead, 1024 Wellington, 2300 zone.*

[299] At 9:40:57 and 9:41:07, Constable Montsion radios: *10-4. I'll start heading ... Yeah, I'm going to head that way, but I'm switching vehicles. Please log me off and I'll log back on for it.*

[300] It is a reasonable inference that Constable Montsion heard the radio communications after Constable Weir's initial response to the dispatcher (at 9:37:35);

⁵⁵GPS Evidence, Exhibit 8, Folder 6

otherwise, it would not make sense for him to ask, “*Where’s Echo?* mere seconds after the dispatcher said the man had “*just assaulted a female.*”

[301] I find that by about 9:41 a.m., the following information was available to Constable Montsion:

- There was a 10-11 (disturbance) at the Bridgehead that had escalated;
- A man with possible MHA issues (physical description given) had been thrown out and was still attacking people on the street and had just assaulted a female;
- 2306 Echo was on the call and was at the Bridgehead at 1024 Wellington.

9:41 a.m. – Additional Information is Transmitted

[302] At 9:41:56, the dispatcher broadcasts: ... *We’re getting multiple calls for this. Apparently, the male has um bloodshot eyes.*

[303] At 9:42:04, the dispatcher says: *Grabbing women’s breasts.*

[304] At 9:42:09, Constable Weir reports: ... *2306 Echo. I’m on scene. He seems to have calmed down but he’s just speaking [inaudible] the 911 operator.*

[305] It is possible Constable Montsion heard these transmissions over a cruiser radio or perhaps through his portable shoulder radio. At 9:41:07, however, he had said he was switching vehicles and asked to be logged off.⁵⁶ He must have been away from a cruiser for some period of time. I heard no evidence about police practices with portable radios – whether, for example, they are on all the time and whether they always pick up the same information as cruiser radios. There are no responses from Constable Montsion over the radio to support an inference that he heard these particular transmissions. Having said this, I appreciate he had told the dispatcher he was heading to Bridgehead, so one might think he would keep track of the radio communications to stay up-to-date on the call.

[306] On the record as a whole, I am concerned it would be speculative to find that Constable Montsion heard the radio transmissions from 9:41:56 to 9:42:09 about “*getting multiple calls ... bloodshot eyes ... grabbing women’s breasts ...*” or Constable Weir’s broadcasts that he was “*on scene*” and the man “*seems to have calmed down.*” I

⁵⁶According to the MDT records, Constable Montsion logged off the MDT system at 9:43 and logged back on at 9:46.

cannot find this was part of the bank of information available to him when he arrived at 55 Hilda.

9:43 a.m. – The Foot Chase

[307] At 9:43:34, Constable Weir radios: *This guy is running east on Somerset. We're cutting in behind the [inaudible].*

[308] At 9:43:48, the dispatcher broadcasts: *10-3 on special for 2306 Echo in foot pursuit.*⁵⁷

[309] The entry in Constable Montsion's MDT printout at 9:46 (the time he was dispatched⁵⁸) includes the following "... 10-3 called by disp for foot pursuit ... 2306E running ..."

[310] Constable Weir testified that the audio record of his transmission at 9:43:34 picked up the sound of his microphone rubbing against his uniform while he was running and trying to speak over the radio. He agreed this noise is well known to Ottawa Police Service officers as an indicator that an officer is running in pursuit.

[311] Constable Weir also explained the significance of a 10-3 code. It means "Nobody talk. Keep the line open," so that that the officer can use the line when necessary to seek assistance or give directions. It is a high priority code that grabs attention and is typically used when an officer needs help and may be involved in a dangerous situation. According to Constable Weir, when the 10-3 was called,⁵⁹ other officers would have been able to hear his dialogue with the dispatcher without having to turn to the radio channel because they had been working with that particular channel all day.

9:44 to 9:46 a.m. – Arrival at 55 Hilda

[312] At 9:44:44,⁶⁰ Constable Montsion's cruiser first appears on the GPS map travelling westbound on Highway 417.

⁵⁷MDT Records, Exhibit 7, tab 3, Green Sheet 2, page 2

⁵⁸The Detailed Call Summary has 9:46:06 as the time Constable Montsion was dispatched to 1024 Wellington.

⁵⁹9:43:48 (radio time); 9:45:22 (Detailed Call Summary time). Constable Weir also referred to the 10-3 code as a "silent on air" direction.

⁶⁰GPS time.

[313] At 9:44:50, Constable Weir radios: *Wellington and Hilda. He's tossing stuff and I sprayed him; so far no result.* During this transmission, the officer is breathing heavily but he is not yelling and his voice is controlled in its tone.

[314] At 9:45:05, Constable Weir broadcasts: *At Wellington and Hilda. He's walking right in front of 55 Hilda.*

[315] At 9:45:08, the GPS map shows Constable Montsion's cruiser on Highway 417 at a speed of 123 km/hr. About a minute later, he is on Wellington travelling at speeds of 89 to 102 km/hr.

[316] At 9:45:14 Constable Oger radios: *10-4 I'm just at booth and Somerset.*

[317] At 9:46:36, the GPS map has Constable Montsion's cruiser arriving at 55 Hilda.

[318] Constable Montsion's arrival at 55 Hilda, as opposed to the Bridgehead, has significance. It leads to the inference that he heard Constable Weir say the suspect was "walking right in front of 55 Hilda," a transmission that came mere seconds after his report that the male was "tossing stuff" and had been "sprayed" with "so far, no result."

[319] On all the evidence, I find that the following information became available to Constable Montsion during this time period:

- a police officer (2306E) was running in pursuit of the fleeing suspect;
- a 10-3 code had been called;
- the man was "tossing stuff" and had been pepper sprayed with "so far, no result";
- the man was walking right in front of 55 Hilda;
- another officer was on his way and was not far from the scene.⁶¹

Summary

[320] To summarize, I find that in the few minutes before he arrived at 55 Hilda, the following information became available to Constable Montsion.⁶²

⁶¹According to the GPS evidence, Constable Oger arrived at 55 Hilda at 9:47:37.

⁶²The Crown does not seriously dispute that Constable Montsion was aware of this information: see Crown Written Closing Submissions at paras. 47 and 49 to 50 and Crown Reply Submissions at para. 52.

- a man had been involved in a disturbance at the Bridgehead;
- the disturbance had escalated;
- the man had been thrown out and was *“still attacking people on the street”*;
- the man had *“possible MHA issues”* and *“just assaulted a female”*;
- 2306 Echo had taken the call and gone to the Bridgehead;
- 2306 Echo had become engaged in a foot pursuit. He was running after the man;
- a 10-3 had been called for foot the pursuit;
- when 2306 Echo was at Wellington and Hilda, he had said, *“He’s tossing stuff and I sprayed him; so far no result”*;
- the man was *“walking right in front of 55 Hilda”*;
- another officer was on his way and was at Booth and Somerset.

[321] I observe that, according to the GPS evidence, Constable Montsion did not take his time driving to the scene. After getting off the highway, he was doing between 89 and 102 km/hr. on Wellington.

THE VIDEO AT 55 HILDA

[322] In this section, I will review the video in detail and explain my assessment of what it shows and some of the findings it supports about Constable Montsion’s actions and the information available to him after his arrival at 55 Hilda. But before doing that, I will explain how I have approached the video given the extensive evidence about its reliability.

Approach to the Video

[323] This incident happened in real life. A video is not real life; it is a digital representation of real life. In any trial, video evidence will only be as good as the system that created it and the equipment on which the recording is displayed. It will never be a perfect representation of the events.

[324] The video from 55 Hilda has limitations. I accept Mr. Fredericks’ explanations about oversaturation and motion blur; refresh rate (both a relatively low refresh rate and a variable image refresh rate); redundancy in images as a result of compression; and

the time and frame counters on the QuickTime player.⁶³ I have kept these issues in mind when reviewing the video.

[325] Based on Mr. Fredericks' evidence, as well as my own assessment of certain features that are apparent to me after countless viewings, I have used caution when examining fine points in the video at precise moments in time, *i.e.*, over milliseconds or a few frames of video. I am in general agreement with the defence's position urging caution when using the video to assess issues like speed, force, timing, elapsed time, impacts or contacts, and the apparent disappearance (or appearance) of staining or blotches on the ground.⁶⁴

[326] I keep in mind, however, that this video is being used to *observe* and *assess* events, not as a foundation for *calculating* speed or force or *measuring* time or distance. Moreover, the video is not the only evidence of what happened at 55 Hilda or of the speed, force, and motion of events. It is only one piece of evidence (albeit an important one) to be weighed in light of the evidence as a whole including, but not limited to, the testimony of the civilian scene witnesses and Constable Weir.

[327] The video has value. It is entitled to substantial weight. Even the defence accepts that it is an accurate and reliable representation of the sequence of events, the relative positioning of the people involved, and the general timing of the events. Defence counsel rely heavily on the video in their submissions.

[328] As the next section of my reasons reveals, a frame-by-frame examination of the video is inevitable given the issues in this case. But I must not lose sight of the importance of playing the video and observing the flow of the action, while still keeping Mr. Fredericks' admonitions in mind. Again, this incident happened in real life, without the opportunity to freeze-frame, go backwards and forwards, and reflect on specific moments in time. It is only by playing the video that continuity of action can be maintained and individual movements assessed in context. I must guard against the risk of losing the forest for the trees: becoming so immersed in an examination of individual images that I forget the events happened in real time over about one minute.

[329] Finally, a number of witnesses were asked about what they saw on the video. As counsel and I stressed many times during the trial, a witness' opinion about what the video shows is not relevant. It is my assessment that governs.

⁶³As I read Mr. Fredericks' testimony, the issue of redundancy in images is not a driving feature of his analysis of this video. The defence places virtually no reliance on this concept in their written submissions.

⁶⁴The defence position on this issue is summarized at para. 76 of their Final Submissions.

Review and Assessment of the Video

[330] I will break the video into six parts: Constable Montsion's arrival; the standing blows; the takedown; the blows on the ground; handcuffing; and after handcuffing.

Part One: Constable Montsion's Arrival

[331] The front wheel of Constable Montsion's cruiser is first seen at Frame 369 (14 seconds), right at the time Constable Weir is kneeling Mr. Abdi in the midsection at the entry door. The cruiser comes to a stop at Frame 403 (15 seconds), just as Constable Weir begins to raise his ASP for the *first ASP strike*.

[332] It is impossible to say whether Constable Montsion saw the knee strike and the first baton blow. I can infer, however, that as a trained police officer, he was making observations as he rolled up to the scene, and he must have immediately become aware of what was obvious: a fellow officer was actively engaged with the man from the radio call. The scene was dynamic; the action was ongoing. While this inference finds support in Mr. Federico's testimony that officers are trained to be "situationally aware" and to make observations on their way to a scene, it is largely rooted in common sense.

[333] Constable Montsion gets out of his cruiser and moves along the driver's side and around the back before taking a few steps and then entering the alcove to join the fray.⁶⁵ His foot is first visible at Frame 548 (21 seconds), right after Constable Weir's *second ASP strike* to the back of Mr. Abdi's upper thigh.⁶⁶ In response to this blow, Mr. Abdi makes a quick movement with his left arm, almost as if he is swatting the ASP away; he then turns his head and begins to move his body to his left as he looks in Constable Montsion's direction.

[334] As Constable Montsion is approaching (a few steps before he enters the alcove), and right before the second ASP strike, Constable Weir is shouting at Mr. Abdi. Both Wendy Dunford and Ross McGhie recalled him yelling at Mr. Abdi to get on the ground. Mr. Abdi was not complying. Constable Montsion must have heard this shouting. He was right there.

[335] Less than two seconds elapse between Constable Weir's second ASP strike and the appearance of Constable Montsion's foot on the screen. As I assess the video, this ASP strike occurred while Constable Montsion was walking towards the alcove. He was facing Constable Weir and Mr. Abdi; he must have had eyes on the action he was about to step into. Again, this is common sense.

⁶⁵Even though Constable Montsion cannot be seen getting out of his vehicle and walking around it, these inferences are irresistible on a common-sense assessment of the video.

⁶⁶Frame 516, 19 seconds

[336] Whether or not Constable Montsion saw and processed the second ASP strike and Mr. Abdi's physical reaction (or lack of reaction) to it, there can be no doubt he knew he was about to step into the middle of a dynamic interaction. Against the backdrop of the information he had gathered on the way to 55 Hilda, he was now approaching a fellow officer who had his ASP drawn and was shouting commands at a non-compliant suspect who was turning towards Constable Montsion.

[337] I recall the evidence of Mr. Federico and Constable Weir that a trained police officer would know that the minimum requirement justifying the use of the ASP is assaultive behaviour by the subject.⁶⁷ According to Mr. Federico, an officer arriving on scene and seeing a fellow officer with his ASP drawn would safely conclude, based on training, that the subject had committed an assaultive offence against either the officer or a third party. This, Mr. Federico continued, would give the second officer an important cue that the incident was one of some seriousness.⁶⁸

Part Two: The Standing Blows

[338] Around Frame 590 (22 seconds), there are a number of things happening at once. Mr. Abdi is in the midst of turning his body to the left in the direction of Constable Montsion. At the same time, Constable Weir is beginning his wind-up to deliver his *first kick* to Mr. Abdi's right hip area. As the kick makes contact (Frame 605, 23 seconds), Constable Montsion is dropping down off the low wall into the entrance area.

[339] By Frame 615 (23 seconds), Constable Weir has completed the kick, to which Mr. Abdi responds by leaning his body to the right and making contact with Constable Weir's thigh with his right hand. Constable Weir then launches immediately into his *third ASP strike* (Frames 615 to 627; 23 to 24 seconds), which appears to connect near Mr. Abdi's upper right thigh.

[340] It is impossible to say for certain whether Constable Montsion saw and processed each of these acts – the kick and the ASP strike – and if he did see them, how they registered in his mind. It would demand too much of the evidentiary record to find that he saw each specific act and to draw inferences about exactly how he factored them into his assessment of the situation. Findings like these would be speculative.

[341] I can infer, however, that as he arrived on scene and stepped into the action in the alcove, Constable Montsion knew the interaction was dynamic and physical: his fellow officer had his ASP drawn was engaging with the suspect with commands and blows. This was obvious.

⁶⁷Exhibit 48 – 2016 Use of Force Requalification – Baton, page 3

⁶⁸Evidence of M. Federico, March 21, 2019, pages 1 to 3; Evidence of D. Weir, June 26, 2019, page 13

[342] At Frame 618 (24 Seconds), Constable Weir has almost completed his windup for his third ASP strike. Mr. Abdi, having turned his body and taken one-and-a-half steps in Constable Montsion's direction, is now facing Constable Montsion; the right side of his body faces Constable Weir. Mr. Abdi's arm has just connected with Constable Weir's leg in response to the officer's kick.

[343] At Frame 620 (24 seconds), Constable Weir's arm begins its descent to deliver the third ASP strike. Mr. Abdi's right arm starts to move up towards Constable Montsion, who is now in the alcove facing the two men. Constable Montsion's arms are blocked from view so it is impossible to say what he is doing with them.

[344] Simultaneously, as Constable Weir delivers his third ASP blow, Mr. Abdi's arm moves in an upward trajectory towards Constable Montsion's upper body. His arm is initially bent at the elbow; it then extends towards Constable Montsion in a gesture resembling a reaching motion. The movement of his shoulder is noticeable. When the forward movement ends, Mr. Abdi's arm appears to be at the height of Constable Montsion's upper body. All of this happens over about nine frames of video (ending at Frame 629; 24 seconds) in less than one second, according to the QuickTime counter.

[345] Immediately after Mr. Abdi's arm movement, Constable Montsion takes a step back with his right foot; he then steps forward with his left foot and begins his windup for the first of the standing blows (Frames 630 to 646; 24 seconds).

[346] There is no question that Mr. Abdi's arm moves out and up towards Constable Montsion's upper body from Frames 620 to 629 (24 seconds); there is also no doubt that Constable Montsion stepped back with his right foot immediately after the arm movement. I am unable to make a finding, however, that Mr. Abdi's arm movement was an assault (or attempted assault) on Constable Montsion. The movement of his arm may have been a reflexive reaction to the kick by Constable Weir or to an action by Constable Montsion, or it could have been a deliberate attempt to apply force to Constable Montsion. I cannot say one way or the other without speculating.

[347] More to the point – and without ignoring Constable Montsion's quick step backwards immediately after Mr. Abdi's arm movement – I cannot infer that he formed a belief that the arm movement was an assault. Everything happens with lightning speed and the video has its limitations. The evidentiary record cannot, in my assessment, support an inference about how Constable Montsion perceived this single arm movement if in fact he saw and processed it. The record does support a finding, however, that Constable Montsion knew at this time that he and his fellow officer were now engaged in a physical struggle with the suspect. The video makes this clear.

[348] Pausing here, it is worth noting that about 10 seconds have elapsed since Constable Montsion's cruiser arrived. I recall Mr. Federico's testimony that a police officer may have to make split-second decisions under stress – judgment calls on the fly – and that sometimes the officer “can't complete the entire panoply of considerations” before he or she acts.

[349] By Frame 632 (24 seconds), Mr. Abdi's arm is moving down and away from Constable Montsion and back towards himself. At Frame 648 (25 seconds), Constable Montsion begins his windup with his left hand for the first blow in a one-two combination, which covers, roughly, Frames 648 to 673 (25 to 26 seconds). During these blows, Constable Weir is slightly off to the side. The time between Mr. Abdi's reaching motion towards Constable Montsion's upper body and Constable Montsion's first blow is less than one second and covers about 20 to 25 frames of video.

[350] Around Frame 652 (25 seconds), Mr. Abdi's hand moves towards Constable Montsion at about chest height, just as Constable Montsion delivers the first of the two blows. Mr. Abdi's hand appears to be open, but I cannot be sure given the video's limitations; nor can I say whether or not his hand connects with Constable Montsion's body at this time.

[351] Beginning around Frame 673, and simultaneously with the completion of Constable Montsion's second (right-handed) strike, Mr. Abdi's right arm extends out and to the right, and he appears to be bent over with his head hanging down. I caution myself here. Everything is happening very fast. The video's perspective may not give an entirely accurate picture of, for example, the direction Mr. Abdi's arm moved or how that movement would have been perceived by the officers if in fact they perceived it. I observe that the video's perspective is that of the camera looking out from the lobby.

[352] Around Frame 685 (26 seconds), Mr. Abdi's hand appears to move upwards, possibly towards his own head. At the same time, Constable Weir begins his *second kick* which appears to land around mid-body height at the back of Mr. Abdi (Frame 705, 27 seconds). At this moment, Constable Montsion is bent forward to some degree.

[353] It is worth pointing out that Constable Weir delivers this second kick immediately after Constable Montsion's first two blows. This brings to mind Constable Weir's evidence that from his perspective, he and Constable Montsion were coordinating their actions even though they were not speaking. Mr. Federico, for his part, testified that training encourages a coordinated team approach.

[354] At Frame 715 (27 seconds), as Constable Weir's leg comes down from the kick, Constable Montsion steps slightly forward and delivers three uppercut-style blows. While I am satisfied the first two of these blows landed in Mr. Abdi's mid to upper body

area, I cannot make a finding, after my closest examination of the video, that the third one connected.

[355] Based on my assessment of the video in light of the evidence as a whole, including the testimony of Constable Weir and the scene witnesses, I make the following findings about the standing blows:

- Constable Montsion delivered two closed-fist hooking blows to the area of Mr. Abdi's head, at least one of which landed in that area;
- Constable Montsion delivered three uppercut blows, two of which connected with Mr. Abdi in the mid or upper body area.

Part Three: The Takedown

[356] Around Frame 748 (29 seconds), just as Constable Montsion completes his third uppercut arm movement, Mr. Abdi's body starts moving towards the ground. The takedown is beginning.

[357] At this point, Mr. Abdi's arm seems to be extended towards Constable Montsion's crotch area, but this is impossible to say with certainty; nor could I find that this was an intentional movement as opposed to an involuntary gesture as he went to the ground.

[358] During the takedown, it is Constable Weir who is touching and has control of Mr. Abdi's body. Constable Montsion straightens his body, takes a half step back with his left foot, and then rotates his body counter-clockwise to focus on what is happening on the ground.

[359] Mr. Abdi goes down with his head turned to the left such that the right side of his head is facing the ground. Despite innumerable viewings of the video, I cannot find that the right side of Mr. Abdi's face did or did not hit the ground during the takedown. Even to my untrained eye, the video at the critical moment has obvious limitations. Put simply, the picture is blurry. The movements of Mr. Abdi's head are so fast and so subtle that I cannot make a finding, based on the video alone, that his face hit the ground or did not hit the ground. Mr. Fredericks' teachings about refresh rate and motion blur only add to the need for caution in this area.

[360] The video itself cannot safely support a finding one way or the other about whether the right side of Mr. Abdi's face hit the ground during the takedown. I can only say it does not obviously show his face hitting the ground. I will review the other evidence on this issue during my analysis of Issue Two – whether the Crown has proved beyond a reasonable doubt that Constable Montsion's acts caused Mr. Abdi's nasal injuries.

Part Four: The Blows on the Ground

[361] By Frame 778 (30 seconds), Mr. Abdi is on the ground. His right arm is under his body, presumably from the momentum of the takedown.

[362] At this point, roughly 15 seconds have passed since Constable Montsion's cruiser arrived. It will be about another 44 seconds until Mr. Abdi is in handcuffs.

[363] Once Mr. Abdi is on the ground, Constable Weir immediately puts his right knee on Mr. Abdi's upper back near the area of his shoulder (Frames 780 to 795; 30 seconds). Beginning around Frame 795, Constable Montsion begins to crouch down on Mr. Abdi's left side.

[364] Around Frame 840 (32 seconds⁶⁹), Constable Weir, with his right knee still pinning Mr. Abdi's shoulder, begins the first of four or five attempts to close his ASP by hitting it against the ground. His last attempt ends around Frame 975 (37 seconds).

[365] During this period of roughly four or five seconds (32 to 37 seconds), there are other things happening. For example:

- Constable Montsion is using both his hands to try and control Mr. Abdi's left side – specifically, his left arm (Frames 845 to 871; 32 to 33 seconds). At Frame 850 (32 seconds), he appears to be holding onto Mr. Abdi's arm although this is difficult to say for sure;
- Beginning at Frame 890 (34 seconds), Mr. Abdi frees his right hand from under his body and slides it up above his shoulder towards his head. This coincides with Constable Weir's third attempt to close his ASP. Around this time (Frames 924 to 960; 35 to 37 seconds), Mr. Abdi's head, neck and perhaps his upper chest are off the ground.

[366] Frame 985 (38 seconds) captures the start of Constable Montsion's three right-handed blows to the back of Mr. Abdi's left upper thigh. At almost the exact same time, Constable Weir hops up and jumps onto Mr. Abdi's outstretched right arm, landing with both knees around the shoulder area.

[367] I pause here to make five points.

⁶⁹Parenthetically, the portion of the video around Frames 835 to 840 (32 seconds) is a good example of what Mr. Fredericks would describe as oversaturation. Constable Montsion's uniform and body are largely blotted out by light. It is impossible to make out details of his actions. The most one could say is that he appears to be making movements at the left side of Mr. Abdi's body.

[368] First, in my assessment, this part of the video supports Constable Weir's testimony that Mr. Abdi was actively resisting the two officers and was not under control after the takedown until he was in handcuffs. It lends credence to Constable Weir's description of Mr. Abdi's physical strength, which both of these relatively large trained officers were dealing with.

[369] Second – and again, consistent with Constable Weir's account – the video shows two officers continuing to work together, one on each on side of Mr. Abdi, coordinating their actions in pursuit of a common goal.

[370] Third, Constable Weir's act of jumping on Mr. Abdi's upper arm area with both knees was itself a significant use of force, as were his knee strike, kicks, and ASP blows.

[371] Fourth, Constable Montsion does not immediately begin striking Mr. Abdi as soon as he is on the ground (at 30 seconds). Instead, he works for roughly seven seconds to try and gain control of Mr. Abdi's left arm. It is about eight seconds after the takedown that he administers three thigh strikes that have no effect. About 14 seconds after that (or 22 seconds post-takedown), he delivers the first of the impugned blows to the area of Mr. Abdi's head.

[372] Fifth, it is of some significance that Constable Montsion delivers distraction blows to Mr. Abdi's thigh before striking him in the head area while he is on the ground. This sheds light on his purpose. It tends to undermine the suggestion that he was letting loose in the unthinking, automatic way which, on Mr. Federico's evidence, officer training seeks to avoid. It supports an inference that Constable Montsion was using force to try and distract Mr. Abdi in order to get him in handcuffs. It is consistent, moreover, with an officer calibrating his use of force: selecting one option (struggling with the left arm) and then moving to another more intrusive option (thigh strikes) and then another (blows to the head area) when the previous options proved ineffective. It is consistent, in other words, with an officer making an ongoing assessment and exercising judgment about the use of force in the heat of the moment.

[373] Returning to the video, at Frames 985 to 1029 (38 to 39 seconds), Constable Montsion strikes Mr. Abdi in the back of the thigh three times in rapid succession, while Constable Weir is kneeling on his right shoulder area. Almost immediately (Frames 1043 to 1065; 40 to 41 seconds), Mr. Abdi's lower body slides across the ground from left to right towards Constable Weir. I cannot say what caused this – whether Mr. Abdi moved on his own or whether he was moved by one or both officers.

[374] In any event, right at this moment (Frames 1050 to 1095; 40 to 42 seconds), and in apparent response to the body slide, Constable Weir makes a slight jump up from a crouching position, does a quick split-step, and then appears to lead with his left side in

placing weight on the upper part of Mr. Abdi's body, although it is impossible to see exactly where he lands because the door is in the way. At the same time (Frames 1050 to 1065; 40 to 41 seconds), Constable Montsion's right arm, which had been working at Mr. Abdi's left side (blocked from view by Constable Weir's body) makes a quick grabbing motion, as if he had lost his grip and was trying to regain it.

[375] I observe that the officers are still working together, struggling to control Mr. Abdi's arms even after Constable Montsion's distraction blows to the thigh. Their purpose is clear: get Mr. Abdi in handcuffs. I recall Constable Weir's description of how they worked in tandem:

We weren't sitting down writing on a game plan but he came; he assisted me; we fought him down to the ground together and then we fought him in the handcuffs together.

[376] As of about Frame 1095 (42 seconds), Constable Weir has his left knee on Mr. Abdi's back and is bracing himself with his outstretched right leg. Constable Montsion is working with both hands at Mr. Abdi's left side, although the view of his hands is blocked by Constable Weir's body.

[377] Beginning at about Frame 1140 (44 seconds), Constable Montsion's right hand moves for his handcuffs, which are attached to his uniform in the area of his vest. He fiddles for a moment but by Frame 1245 (48 seconds), he has the cuffs in his hand and starts to bring them down towards Mr. Abdi.

[378] While Constable Montsion is retrieving and readying the handcuffs, Constable Weir has his left knee on Mr. Abdi's back while his right leg is out to the side. Although Constable Weir's right hand is blocked for a time by the door frame, it becomes clear he is using it to hold the lower part of Mr. Abdi's right arm on the ground. From about Frames 1195 to 1215 (46 to 47 seconds), part of Mr. Abdi's right arm is visible as Constable Weir brings his own left hand down onto the area of Mr. Abdi's bicep in an apparent effort to control his arm. This is right around the time the handcuffs can first be seen in Constable Montsion's hand.

[379] Beginning at about Frame 1250 (48 seconds), just as Constable Montsion starts to bring the handcuffs down towards Mr. Abdi's body, Mr. Abdi's head, neck, and part of his chest are off the ground. Constable Weir is holding Mr. Abdi's right arm near the wrist (while still holding his ASP in his right hand), and with his left arm he appears to be pushing Mr. Abdi's head and upper body towards the ground. But Mr. Abdi's head does not stay down; it rises right back up off the ground (Frames 1295 to 1355; 50 to 52 seconds).

[380] As the video makes clear, the struggle is continuing. I recall Constable Weir's evidence about how he had both his hands on Mr. Abdi's arm in an effort to control it: rowing it like an oar, hauling for all he was worth, but getting nowhere because Mr. Abdi was so strong. The video supports his account.

[381] It is at this point (Frames 1355 to 1365; 52 seconds) that Constable Montsion delivers a quick jab with his right hand. I am satisfied this blow landed but Mr. Abdi's head is blocked by the doorframe so I cannot say for certain where it landed, only that it was directed to the area of his head and the uppermost part of his body. I am also unable, after my closest examination of the video, to make a finding that Constable Montsion had the handcuffs in his right hand at the time.

[382] Immediately after this blow, Constable Montsion delivers two hooking strikes in quick succession with his left hand (Frames 1376 to 1410; 53 to 54 seconds). Having assessed the video in light of all of the evidence,⁷⁰ I find that these two blows landed on the left side Mr. Abdi's head or face even though the door frame makes it impossible to see exactly where they connected. At the time of the strikes, Mr. Abdi's head appears to be tilted to the right with the left side of his face exposed, and his head moves from left to right in response to the blows.

[383] Despite my most careful examination of the video, I cannot make a finding about whether Constable Montsion's hand was open or closed at the time of these blows. While I appreciate there are some frames that appear to depict a closed fist, other frames are less clear (compare, for example, Frame 1381 with Frame 1383 (53 seconds) or Frame 1402 with Frames 1403 and 1404 (54 seconds). Oversaturation and motion blur contribute to the difficulty of perceiving these fast-moving events.

[384] A finding that Constable Montsion's hand was closed in a fist cannot safely be made given the quality of the video and the caution required in assessing its reliability. Constable Weir could not say whether his hand was open or closed during these strikes, and no other witness testified about blows while Mr. Abdi was on the ground. I cannot assume his hand was closed, especially when there is evidence before me that officers receive training on the open-handed "palm heel strike."

[385] At the time of the three blows on the ground, Constable Weir has his left knee on the area of Mr. Abdi's back. His right hand is holding Mr. Abdi's wrist. Between the first and second of Constable Montsion's hooking strikes (Frames 1390 to 1404; 53 to 54 seconds), Mr. Abdi's right hand starts to slide down and his elbow moves in towards his body.

⁷⁰This includes the evidence of Constable Weir, the forensic pathologist (Dr. Milroy), and the bloodstain pattern analyst (Mr. Laturnus).

Part Five: Handcuffing

[386] Immediately after the second of Constable Montsion's hooking blows, Mr. Abdi's right arm moves further down towards his waist (Frames 1410 to 1445; 54 to 55 seconds). His elbow and most of his arm are off the ground; his arm is bent at roughly a 90-degree angle.

[387] Beginning around Frame 1445 (55 seconds), Constable Weir puts his left hand on Mr. Abdi's elbow while still holding his wrist with his right hand, and he starts to lift Mr. Abdi's elbow and bend his arm to bring it around his back (Frames 1445 to 1490; 55 to 57 seconds). He begins to make some progress in gaining control of Mr. Abdi's arm, but Mr. Abdi is still struggling.

[388] This part of the video brings to mind Constable Weir's evidence that it was Constable Montsion's blows on the ground that caused Mr. Abdi to falter for just enough time to allow Constable Weir to get control of his arm. According to the QuickTime counter, it takes him about five seconds after the blows to get Mr. Abdi's right hand behind his back.

[389] In the meantime, Constable Montsion is still on Mr. Abdi's left side. At about Frames 1445 to 1453 (55 to 56 seconds), he brings his own right arm back from the area of Mr. Abdi's head towards his own body. His right hand appears to be empty although this is difficult to say with certainty. Less than one second after this, around Frame 1453 (56 seconds), the handcuffs can be seen in Constable Montsion's hands.

[390] Both officers continue to struggle with Mr. Abdi's arms. Constable Weir still has his left knee on Mr. Abdi's back. By about Frame 1600 (1:02) – about six or seven seconds after the blows on the ground and Constable Weir's attempt to push Mr. Abdi's elbow forward – the officers seem to have had some success: both of Mr. Abdi's arms are behind his back and the handcuffs are visible in Constable Montsion's hand.

[391] But Mr. Abdi is still not in handcuffs. This will take several more seconds.

[392] Around Frame 1645 (1:03), as the two officers work to try and control Mr. Abdi's arms (which are now behind his back), Mr. Abdi brings both of his feet back towards his buttocks in a backwards kicking motion. It is unclear if he strikes anyone, including himself. Over the next six seconds or so (around Frames 1645 to 1805; 1:03 to 1:09), he makes three more reverse kicking motions, using one leg at a time. Again, I cannot say if he hits anyone with these movements.

[393] By around 1:14, Mr. Abdi is in handcuffs.

Part Six: After Handcuffing

[394] The events after handcuffing can be summarized briefly:

- At Frame 2100 (1:21), Constable Weir closes his ASP by banging it twice on the ground;
- At Frame 2455 (1:35), another officer (Constable Oger) arrives and enters the alcove;⁷¹
- At Frame 3855 (2:29), Constable Montsion kneels down to check Mr. Abdi's head area. He gives three light taps with his hand to his head or upper body area as if he is trying and get a response;
- At Frame 4270 (2:45), Constable Montsion leans down to check Mr. Abdi's head area. He then stands up and immediately puts Mr. Abdi in the recovery position (Frames 4295 to 5025; 2:50 to 3:14);
- From about Frames 5230 to 5490 (3:22 to 3:32⁷²), Constable Montsion checks Mr. Abdi's head area again;
- Around 3:36, Constable Montsion appears to speak into his portable radio;
- Around Frame 6745 (4:21), Constable Weir approaches carrying gauze.

Summary

[395] I end this section by summarizing my assessment of the evidence of

- the information available to Constable Montsion before and after he arrived at 55 Hilda; and
- Constable Montsion's acts during the interaction in the alcove.

Before arriving on scene

[396] In the few minutes before Constable Montsion arrived at the scene, the following information became available to him:

⁷¹The GPS evidence has Constable Oger arriving at 9:47:37.

⁷²I note that during this time period, QuickTime's frame counter jumps from Frame 5343 to Frame 5454, and the time counter goes directly from 27 seconds to 31 seconds. This illustrates Mr. Fredericks' point that neither feature of the player is a perfect measure.

- Another officer was engaged with a man with possible mental health issues who had been thrown out of the Bridgehead as a result of a disturbance that had escalated;
- Once outside the coffee shop, the man had been attacking people on the street, including assaulting a female;
- The officer had become involved in a foot pursuit; he had run after the man and had used pepper spray on him with no result;
- A 10-3 code had been called;
- The officer and the man were walking in front of 55 Hilda;
- The officer needed assistance.

Arriving on scene

[397] As Constable Montsion pulled up to 55 Hilda in his cruiser, his fellow officer was engaged in the front entrance area with the man described in the call.

[398] As Constable Montsion got out of his car and approached the alcove, his fellow officer had his ASP drawn and was shouting commands.

[399] Regardless of whether Constable Montsion saw and processed Constable Weir's knee strike or his first two ASP blows, he could only have known was stepping into the middle of a dynamic confrontation in which the other officer, with his ASP drawn, was engaging in a physical way with the suspect.

[400] At the same time, Constable Montsion must also have been aware that the suspect was not actively assaulting his fellow officer, nor was he holding a weapon in his hand. In saying this, however, Constable Weir's evidence about weapons comes to mind, but only by way of context and not as evidence of what was in Constable Montsion's mind:⁷³

I have to be cognizant of weapons. We haven't searched him yet ... These are the things they train you for ... But as long as I can control his hands, he's not going to access that. That's why it was so imperative to get him into handcuffs ...

⁷³Evidence of D. Weir, June 20, 2019, pages 65 to 66; Evidence of M. Federico, March 19, 2019, page 92

The Standing Blows

[401] Immediately after he stepped into the alcove, and regardless of whether he saw and processed each of Constable Weir's two kicks and the third ASP strike, Constable Montsion could only have known the other officer was engaging the suspect with blows. He was right there. He knew his fellow officer had his ASP drawn and that the interaction was physical. The video supports these inferences.

[402] It is in these circumstances that – immediately after Mr. Abdi's right arm moved out and up towards constable Montsion who took a quick step back – Constable Montsion began delivering the standing blows: a one-two combination of closed-fist hooking strikes to the area of the head, at least one of which landed, followed by three uppercut blows to the mid or upper body area, two of which connected. I make these findings based on the video seen in light of all of the evidence, including the testimony of the civilian scene witnesses and Constable Weir.

[403] During the standing blows, Constable Weir was still fully engaged. Right after the one-two combination of hooks, he kicked Mr. Abdi a second time in the mid-body area. After the uppercut strikes, he took Mr. Abdi to the ground.

[404] When Mr. Abdi went to the ground, the struggle was not over. Another 44 seconds would elapse before he was in handcuffs.

The Blows on the Ground

[405] The actions of the two officers on the ground show they were still making a coordinated effort to bring Mr. Abdi under control. Constable Weir was on his right, with a knee on his back. Constable Montsion was on his left, struggling with his arm. Mr. Abdi's head and chest were off the ground and his upper body was moving against the force of the two officers.

[406] A few seconds into the struggle on the ground, Mr. Abdi's right hand slipped out from under his body and moved up towards his head. Constable Weir jumped on his shoulder area with both knees, a move that was itself a significant use of force. At the same time, Constable Montsion, who had been struggling with Mr. Abdi's left arm for about seven seconds, delivered three strikes with his hand to the back of Mr. Abdi's thigh. These, I find, were distraction blows designed to achieve compliance.⁷⁴ Constable Montsion administered these strikes for the purpose of subduing Mr. Abdi; they were part of his joint effort with Constable Weir to get him in handcuffs.⁷⁵

⁷⁴Evidence of M. Federico, March 19, 2019, pages 114 to 115

⁷⁵The Crown does not allege that the thigh strikes were unlawful.

[407] The strikes to the thigh did not bring an end to the struggle. Mr. Abdi's body slid abruptly towards Constable Weir who hopped back in a split-step before putting his weight back on Mr. Abdi with his left knee. Using both of his hands, Constable Weir worked to bring Mr. Abdi's right arm under control.

[408] I accept Constable Weir's evidence about Mr. Abdi's physical strength. The video supports his account of how he was fighting to move Mr. Abdi's arm and bend it around his back for handcuffing. A careful review of this part of the video shows that his description of hauling for all he was worth against Mr. Abdi's oar-stiff arm was not an exaggeration. Constable Weir was not the only one dealing with this strength; Constable Montsion was working with Mr. Abdi's left side as he readied the handcuffs.

[409] It is at this point, about 12 or 13 seconds after the blows to Mr. Abdi's thigh (and 22 seconds after takedown), that Constable Montsion delivered a right-handed jab to the area of his head followed by two left-handed hooking strikes that landed in the area of his head and face.

[410] It is about seven seconds after these blows that the officers managed to get Mr. Abdi's arms behind his back. Another 13 seconds or so elapsed until Mr. Abdi was secure in handcuffs. During this time, the officers were still struggling to maintain control of his upper body while he kicked his legs back towards them.

[411] Appreciating that this issue does not involve an ends-justify-the-means analysis, the video supports Constable Weir's perspective that the blows on the ground were key in getting Mr. Abdi's hands behind his back and in handcuffs: they caused his strength to falter long enough for the officers to begin to have some success in their effort to secure his arms.

LEGAL JUSTIFICATION OF POLICE USE OF FORCE

[412] There is often an imbalance of power between a police officer and a citizen. Police officers are not above the law and do not have unlimited power to inflict harm on people in the execution of their duties. In *Nasogaluak*, the Supreme Court of Canada explained:⁷⁶

While, at times, the police may have to resort to force in order to complete an arrest or prevent an offender from escaping police custody, the allowable degree of force to be used remains constrained by the principles of proportionality, necessity and reasonableness. Courts must guard against illegitimate use of power by the police against members of our society, given its grave consequences.

⁷⁶*R. v. Nasogaluak*, 2010 SCC 6 at para. 32, *Castro v. Monteiro*, [2012] O.J. No. 5865 at para. 45 (S.C.J.)

[413] The legal justification of a police officer's use of force is rooted in s. 25 of the *Criminal Code*. Sections 25(1) and (3) read:

25(1) Every one who is required or authorized by law to do anything in the administration or enforcement of the law ... as a peace officer ... is, if he acts on reasonable grounds, justified in doing what he is required or authorized to do and in using as much force as is necessary for that purpose.

(3) Subject to subsections (4) and (5), a person is not justified for the purposes of subsection (1) in using force that is intended or is likely to cause death or grievous bodily harm unless the person believes on reasonable grounds that it is necessary for the self-preservation of the person or the preservation of any one under that person's protection from death or grievous bodily harm.

[414] Section 26 provides:

26 Every one who is authorized by law to use force is criminally responsible for any excess thereof according to the nature and quality of the act that constitutes the excess.

[415] Under s. 25(1) of the *Code*, a police officer is justified in using force to effect a lawful arrest, provided he or she acts on reasonable grounds and only uses as much force as is necessary in the circumstances. Section 25(3) prohibits a police officer from using a greater degree of force – *i.e.*, force intended or likely to cause death or grievous bodily harm – unless the officer believes on reasonable grounds that this force is necessary to protect himself or herself, or another person under his or her protection, from death or grievous bodily harm. The use of force under s. 25(3) is judged on a subjective-objective basis.⁷⁷

[416] Grievous bodily harm means a “significant hurt or injury that interferes with a person’s wellbeing in a very serious or very severe way”; it is not limited to injury or harm that is permanent or life-threatening.⁷⁸ In contrast, bodily harm means “any hurt or injury to a person that interferes with the health or comfort of the person and that is more than merely transient or trifling in nature.”⁷⁹ Wounding, for purposes of aggravated assault, means injuring someone in a way that breaks, cuts, pierces, or tears the skin or some part of the body in a way that is more than trifling, fleeting, or minor.⁸⁰

⁷⁷*Nasogaluak* at para. 34, *R. v. Khill*, 2020 ONCA 51 at para. 97

⁷⁸*R. v. Paice*, 2005 SCC 22 at para. 41, *R. v. Oppenheimer*, [2011] O.J. No. 3918 at para. 43 (S.C.J.), *R. v. Bottrell* (1981), 60 C.C.C. (2d) 211 at para. 18 (B.C.C.A.)

⁷⁹*Criminal Code*, s. 2

⁸⁰*Watt's Manual of Criminal Jury Instructions*, 2nd ed. (Toronto: Thomson Reuters Canada Limited, 2015) at page 819, *R. v. Littlelent*, 1985 ABCA 22 at para. 2-4

[417] Section 25(1) has three branches. First, the police officer must be authorized or required by law to act.⁸¹ Second, the officer must act on reasonable grounds in performing the action. Third, the officer must only use as much force as is necessary.⁸²

[418] Under s. 25(1)'s third branch, the officer's use of force is evaluated on a modified objective standard. The court determines whether the force used was reasonable in light of the circumstances faced by the officer. Police officers will be exempt from liability if they use "no more force than is necessary having regard to their reasonably held assessment of the circumstances and the dangers in which they find themselves."⁸³

[419] Judicial review of a forcible arrest requires an assessment of the reasonableness of the use of force in the totality of the circumstances. The perspective is that of a reasonable officer with training and field experience in circumstances similar to those faced by the subject officer.⁸⁴ The court may consider factors such as

- the urgency of the situation;
- the nature and imminence of a threat to the police, the public, or the suspect;
- whether the suspect was acting in a hostile manner towards the police, resisting arrest or failing to comply with the arrest procedure;
- the relative sizes and weights of the officer(s) and the suspect;
- the time to react;
- information available to the officer, including information about a history of conduct that might represent a threat to police;
- information that remained unknown to the police (e.g., whether or not the suspect had a weapon);
- training and experience of the officer.⁸⁵

⁸¹*Fleming v. Ontario*, 2019 SCC 45 at paras. 115-118

⁸²*Crompton v. Walton*, [2005] A.J. No. 178 at para. 6 (C.A.), *Chartier v. Greaves*, [2001] O.J. No. 634 at para. 54 (S.C.J.)

⁸³*Crompton v. Walton* at paras. 42-44 (C.A.), *R. v. Dobbs*, [2016] O.J. No. 7213 at para. 34 (S.C.J.), *R. v. DaCosta*, [2015] O.J. No. 1235 at para. 105 (S.C.J.), *Bottrell* at para. 16, *Puricelli v. Toronto Police Services Board*, [2014] O.J. No. 5638 at para. 40 (S.C.J.), *Khill* at para. 97

⁸⁴*DaCosta* at paras. 97-98, 105, *Bottrell* at paras. 16, 18, *Crompton v. Walton* at para. 42, *R. v. Asante-Mensah*, [2003] 2 S.C.R. 3 at para. 74, *Nasogaluak* at para. 35, *R. v. McKenzie*, 2013 SCC 50 at para. 83, *R. v. Mulligan*, [2000] O.J. No. 59 at para. 41 (C.A.)

⁸⁵*R. v. Walcott*, [2008] O.J. No. 1050 at para. 24 (S.C.J.), *R. v. Rice*, [2015] O.J. No. 3397 at paras. 6-7 (C.A.), *Mulligan* at para. 41, *DaCosta* at para. 105, *R. v. MacKay*, 2012 ONCA at para. 28, *Khill* at para. 98

[420] Police officers are under a duty to act and must often react in difficult and exigent circumstances, exercising judgment and discretion with little time for reflection. Recognizing this, the law affords officers some latitude in the choices they make in using force. They cannot be expected to measure the force they use with exactitude, and their conduct will not be measured against a standard of perfection. A reviewing court must not be too quick to second guess police decisions about force based on an over-reliance on reflective hindsight. It is one thing to have the time to reconstruct and examine an arrest over several days at trial; it is another thing to be a police officer in the heat of the moment with little time to dissect the significance of events and reflect calmly on the actions to be undertaken.⁸⁶

[421] Writing in the context of a “hard entry” during execution of a search warrant, the Supreme Court of Canada cautioned against a “Monday morning quarterback” approach when reviewing a forcible police response:

[The police] cannot be expected to measure in advance with nuanced precision the amount of force the situation will require: *R. v. Asante-Mensah*, 2003 SCC 38, [2003] 2 S.C.R. 3, at para. 73, *Crompton*, at para. 45. It is often said of security measures that, if something happens, the measures were inadequate but that if nothing happens, they were excessive. These sorts of after-the-fact assessments are unfair when applied to situations like this where the officers must exercise discretion and judgment in difficult and fluid circumstances.⁸⁷

[422] The authority to use force entails a degree of discretion in a police officer and, in a particular case, a permissible range of response that may be accepted as reasonable. Where the police act within a reasonable range of force response, they will not be denied the protection of s. 25(1) of the *Code* if they fail to use the least amount of force that would achieve the desired result. Moreover, some allowance is made for an officer misjudging the degree of force in the exigency of the moment. The police are entitled to be wrong, but they must act reasonably. A description of what the officer might have done differently may run afoul the discretionary allowance for police action.⁸⁸

REASONABLE GROUNDS

[423] Section 25(1) of the *Code* can justify a police officer’s use of force where he or she “acts on reasonable grounds.”

⁸⁶*Asante-Mensah* at para. 73, *DaCosta* at paras. 98-99, 125, *Mulligan* at para. 41, *Puricelli* at para. 40, *Bottrell* at para. 16, *Chartier v. Greaves*, [2001] O.J. No. 634 at para. 64 (S.C.J.), *Castro v. Monteiro* at para. 45

⁸⁷*R. v. Cornell*, 2010 SCC 31 at para. 24; see also *R. v. Golub* (1997), 117 C.C.C. (3d) 193 at paras. 44-45 (Ont. C.A.)

⁸⁸*DaCosta* at para. 103, *Crompton v. Walton* at para. 45, *Castro v. Monteiro* at para. 38, *Chartier v. Greaves* at para. 64, *Puricelli* at para. 40, *R. v. MacKay*, 2012 ONCA at para. 28

[424] The reasonable grounds concept is well-known in criminal law. Trial judges work with it routinely, most often in reviewing the validity of arrests and search warrants. It has both a subjective and objective component.⁸⁹

[425] In the s. 25(1) context, the subjective branch looks to whether the officer believed he or she was required or authorized by law to act in the administration or enforcement of the law.

[426] Where s. 25(3) applies, the officer must subjectively believe that the force used was necessary for his or her self-preservation or the preservation of anyone under his or her protection from death or grievous bodily harm.

[427] The officer need not articulate his or her belief in testimony; instead, it may be inferred from his or her conduct and/or the unfolding events.⁹⁰ But evidence of the requisite belief must be found somewhere in the trial record.⁹¹

[428] The objective component of the reasonable grounds assessment examines whether the officer's belief was supported by objective facts. The existence of reasonable grounds must be based on facts known by or available to the officer when he or she formed the belief.⁹² The question is not whether the belief turned out to be correct, but whether it was reasonable at the time.⁹³ In the context of s. 25 of the *Code*, the court will examine the officer's belief through the lens of a reasonable person standing in the officer's shoes.⁹⁴

[429] In *Khill*, the Ontario Court of Appeal (writing in the context of self-defence) commented on the reasonable grounds requirement in justification defences:

The requirement in s. 34(1)(a) that the belief be based on "reasonable grounds" imports an objective assessment of the accused's belief. Reasonableness is ultimately a matter of judgment. A reasonableness assessment allows the trier of fact to reflect community values and normative expectations in the assignment of criminal responsibility. To brand a belief as unreasonable in the context of a self-defence claim is to declare the accused's act criminally blameworthy.⁹⁵

⁸⁹*R. v. Storrey*, [1990] 1 S.C.R. 241 at 250-51

⁹⁰*R. v. Nesbeth*, [2008] O.J. No. 3086 at para. 20 (C.A.), *R. v. Marzoff*, [2015] M.J. No. 22 at paras. 22, 31-32 (Q.B.)

⁹¹*R. v. Craig*, [2011] O.J. No. 893 at para. 42 (C.A.)

⁹²*R. v. Oduneye*, [1995] A.J. No. 632 at para. 20 (C.A.)

⁹³*R. v. Musurichan*, [1990] A.J. No. 418 at para. 10 (C.A.)

⁹⁴*R. v. Censoni*, [2001] O.J. No. 5189 at para. 35 (S.C.J.), *Storrey* at 250-51, *MacKenzie* at paras. 62-63

⁹⁵*Khill* at para. 46 [Citations omitted]

AIR OF REALITY

[430] Before the trier of fact can consider a justification under s. 25 or self-defence under s. 34, there must be an air of reality. In other words, the trial judge (acting as trier of law) must be satisfied there is evidence on which a properly instructed trier of fact, acting reasonably, could acquit based on the justification or defence. The trial judge will consider the totality of the evidence and assume any evidence relied on by the accused is true. Where a defence or justification has more than one element, there must be evidence that lends an air of reality to each element.⁹⁶

[431] There is no legal requirement that the accused testify in order to give an air of reality to a justification under s. 25 or self-defence under s. 34.⁹⁷ Where there is direct evidence of an element of a justification or defence, whether from the accused or another source, the trial judge must find there is an air of reality to that element.⁹⁸ Where there is no direct evidence, the judge will engage in a limited weighing of the evidence to determine whether the element can reasonably be inferred. This limited weighing is only for the purpose of deciding whether there is evidence on which a trier of fact could reasonably conclude that the element has not been disproved beyond a reasonable doubt.⁹⁹

ANALYSIS OF ISSUE ONE

[432] I will begin by identifying the justification that is available on the evidence and then consider whether the Crown has disproved the justification beyond a reasonable doubt.

The Available Legal Justification

[433] On the whole of the evidence, I conclude that s. 25(1) of the *Criminal Code* is legally available as a justification for Constable Montsion's use of force.

[434] There is an air of reality to the s. 25(1) justification. I am satisfied that when the evidence is considered in its totality, a properly instructed trier of fact, acting reasonably, could be left with a reasonable doubt on the issues of whether Constable Montsion

- believed on reasonable grounds that he was required by law to act in the administration or enforcement of the law – specifically, to help Constable Weir with the arrest of Mr. Abdi;

⁹⁶*R. v. Cinous*, [2002] 2 S.C.R. 3 at paras. 82, 93, *Craig* at para. 32

⁹⁷*Craig* at para. 40, *Cinous* at para. 53

⁹⁸*R. v. Paul*, 2020 ONCA 259 at para. 28, *Cinous* at para. 88.

⁹⁹*Paul* at para. 29, *R. v. Pappas*, 2013 SCC 56 at paras. 21-22

- acted for the purpose of assisting his fellow officer with the arrest; and
- used as much force as was necessary for that purpose, having regard to the principles of necessity, reasonableness, and proportionality.

[435] I do not agree with the Crown’s position that s. 25(3) of the *Criminal Code* applies here. I cannot find that when Constable Montsion delivered the impugned blows, he “intended” to cause Mr. Abdi “death or grievous bodily harm”¹⁰⁰ or that the force he used was “likely”¹⁰¹ to cause either of these results.

[436] I have found that Constable Montsion punched Mr. Abdi more than once in the face or head while wearing gloves that have hard knuckles. The gloves were issued by his supervisor with the DART unit. There is no evidence of their composition. They are not weighted. Dr. Milroy observed that a blow with these gloves would cause more damage than an uncovered fist. Based on my own examination of the gloves, I agree with this common-sense appraisal.

[437] While I accept that more than one blow to the face or head while wearing these gloves would carry a risk of some degree of non-trivial bodily harm, I cannot find on this evidentiary record that the force Constable Montsion used was “likely” to cause “grievous” bodily harm or that he “intended” to cause this degree of bodily harm. It is important to emphasize that the focus here is on the force used, not on the consequences of the force, although the consequences are relevant.¹⁰²

[438] A suggestion of self-defence lurked behind some of the defence’s submissions. In my assessment, a trier of fact, properly instructed on the elements in s. 34 of the *Criminal Code*, could not acquit based on self-defence on the evidence in this case.¹⁰³

[439] The issue is whether the Crown has disproved the s. 25(1) justification beyond a reasonable doubt.

¹⁰⁰*Paice* at para. 41, *Oppenheimer* at para. 43, *Bottrell* at para. 18

¹⁰¹The word “likely” connotes probability.

¹⁰²As I will discuss later, if the Crown’s theory on the cause of the facial injuries is accepted, the main physical consequences of the blows were fractures to Mr. Abdi’s nose and a 2.5-cm laceration that was closed with stitches. It was Dr. Milroy’s evidence that, in the absence of an underlying heart condition, he would expect Mr. Abdi to have recovered fully from all his physical injuries without significant deleterious effects. I also observe that despite the two blows on the ground that landed on the left side of Mr. Abdi’s head or face, Dr. Milroy testified that there were no injuries to the left side of his face.

¹⁰³*Criminal Code*, s. 34(1)(a) and (b), *Khill* at paras. 38-63

Section 25(1) and Constable Montsion's Use of Force

[440] Based on all of the information available to Constable Montsion both before and after his arrival at 55 Hilda, I have no difficulty concluding that he was “required or authorized by law” to act in the enforcement of the law and that he acted on reasonable grounds within the meaning of s. 25(1) of the *Code*. There is a strong inference that he reasonably believed a police officer was attempting to arrest the man referred to in recent radio calls. He was entitled to believe his fellow officer was acting lawfully in seeking to apprehend the suspect and in using force for that purpose. He had a duty to help his colleague complete the arrest.

[441] As I will explain, I also find that Constable Montsion acted throughout the interaction for the purpose of assisting in the arrest and not out of malice or a desire to punish or harm Mr. Abdi. The pivotal issue is whether he used more force than was necessary for that purpose.

[442] The Crown accepts that Constable Montsion was justified in using some degree of force. For example, the Crown does not question the lawfulness of his laying hands on Mr. Abdi at various points during the interaction or even his three blows to the back of Mr. Abdi's thigh after the takedown. Nor is the Crown critical of any of the force used by Constable Weir, either on Wellington Street (e.g., kick, push, ASP strikes, pepper spray) or at 55 Hilda (e.g., knee strike, kicks, ASP strikes, jumping on his upper body with both knees).

[443] The Crown's concerns target Constable Montsion's blows to Mr. Abdi's face and head with the gloves he was wearing, both when Mr. Abdi was standing and when he was on the ground. It is this use of force that the Crown contends was unjustified.

[444] In reflecting on the Crown's position, I must consider all of the evidence about police training on punches as a use of force option. Officers are taught that punching can be an effective means of establishing control. They receive training on punching techniques, some of which identifies the typical target area as the face and upper torso. Teaching covers both the “palm heel strike” and the “weapon hand” or closed-fist punch. In 2016, the Ottawa Police Service offered a defensive tactics lesson on how to deliver effectively a quick and sharp closed-fist distraction strike to the face.

[445] Mr. Federico spoke of open-handed or closed-fist blows as examples of “hard” force techniques¹⁰⁴:

So it's a strike or a blow. And it's designed to distract by impacting the individual. There is some pain, typically, involved. It's designed to

¹⁰⁴Exhibit 41 – Toronto Police Service Policy & Procedure Manual, Procedure 15-01 – Appendix A: Provincial Use of Force Model, page 7

distract the person so that the officer can accomplish the goal, get the person's hand behind them and in the handcuffs, but it's without weapons. So it's still using the officer's body. And there are techniques taught to police officers that go along with the instruction that hard application of force is permitted under the appropriate circumstances.

[446] While Mr. Federico said that officers are cautioned to avoid striking the face and other vulnerable parts of the body, he acknowledged that blows to the face can be justified in some circumstances.

[447] All of this evidence bears on the issue of whether, by inflicting the blows to Mr. Abdi's head and face in the circumstances facing him, Constable Montsion acted contrary to police training and outside the range of reasonable force response by a police officer.

[448] The Crown contends that when Constable Montsion arrived at 55 Hilda, he saw a non-compliant but non-violent and unarmed suspect and – without making any assessment of the situation or an informed judgment about the degree of force that was necessary – entered the fray like a “hockey enforcer” and immediately started punching Mr. Abdi in the face while wearing gloves with hard knuckles.¹⁰⁵ His unthinking, automatic approach continued, in the Crown's submission, when Mr. Abdi was on the ground.

[449] In advancing this position, the Crown draws on a theme that pervaded Mr. Federico's evidence, namely, the importance of police officers engaging in a continuing assessment of the situation and making informed decisions about the force they use. This, Mr. Federico explained, is embodied in the Use of Force Model's mantra, “Assess-Plan-Act.”

[450] The Crown emphasized that when Constable Montsion arrived on scene, Mr. Abdi was not acting violently. He was not actively assaulting Constable Weir, nor was he holding a weapon. Instead, he was standing in the middle of the alcove after Constable Weir's two ASP strikes as Constable Montsion got out of his car and walked up to the scene.

[451] In considering this submission, I must look at the evidence as a whole.

[452] To begin, I cannot ignore the information available to Constable Montsion before he arrived at 55 Hilda. As he pulled up in front of the building, he reasonably believed

¹⁰⁵Crown's Written Submissions, para. 132. The expression “hockey enforcer” originated in Ross McGhie's SIU statement.

he was arriving at a scene where an officer needed immediate assistance. The evidence is capable of supporting inferences that he had learned

- the suspect had been thrown out of a coffee shop after an altercation that had escalated and had then been attacking people on the street, including assaulting a female;
- he had been chased and was tossing stuff;
- he had been pepper sprayed with no result;
- dispatch had called a 10-3 code to clear the channel for the pursuing officer.

[453] Next, there is the information available to Constable Montsion when he arrived at the scene and entered the alcove. Constable Weir had his ASP drawn and was shouting commands, which the suspect was ignoring. He was engaging physically with the suspect, kneeing him in the midsection and hitting him with his ASP. Regardless of whether or how each of these specific uses of force registered in Constable Montsion's mind, there can be no doubt that as he approached the action, he was aware of the obvious: a dynamic arrest event was underway. He knew a fellow officer, with his ASP drawn, was engaging physically with the suspect. The video supports these inferences.

[454] I appreciate that Constable Montsion arrived at 55 Hilda as the second officer on scene and that he had information that backup was on the way. But Mr. Abdi was not contained. Constable Weir did not have control over him. Mr. Abdi was near the middle of the alcove-style entry area, steps away from the street where he could have run in either direction. He was also no more than a few feet from the entry door, and neither officer could have known if it was locked or not. I do not see containment as a significant factor here.

[455] As Constable Montsion drew closer to the scene, Mr. Abdi turned and stepped towards him. When Constable Montsion dropped into the alcove, Constable Weir kicked Mr. Abdi and hit him with his ASP. Mr. Abdi's arm moved up and out towards Constable Montsion who took a step back and to the right. Again, regardless of whether and how Constable Montsion processed each of these acts, he could only have known he was right in the middle of a physical interaction. The video makes this clear.

[456] Constable Montsion's actions at this moment permit an inference that he made an assessment and responded to the circumstances that were quickly developing and the behaviour he was observing as he arrived at 55 Hilda and joined the interaction (and this, again, must be seen against the backdrop of the information that had become available to him as he had travelled to the scene). His delivery of the standing blows, almost simultaneously with a kick and ASP strike by Constable Weir and Mr. Abdi's

moving arms, allows for an inference that he had made a split-second assessment of the situation and chose these blows as a force option to assist his fellow officer in gaining control of the suspect. These are inferences I cannot ignore, and they work against the portrayal of Constable Montsion as a hockey enforcer who arrived on scene and immediately started flailing away without thinking.

[457] I must not lose sight of the speed at which the events were moving. At trial, we spent many weeks dissecting eyewitness and video evidence moment-by-moment, frame-by-frame. But this event happened in real life. It was over in less than a minute. There was no opportunity to pause, rewind, debate, and start again.

[458] Roughly 10 seconds elapsed between Constable Montsion's arrival and his first use of force. The time that passed between his stepping into the alcove and the first standing blow was about two seconds. During this time, Mr. Abdi had turned and was stepping towards him; Constable Weir delivered a kick and a blow with his ASP; Mr. Abdi's arms were moving; his right arm moved up towards Constable Montsion. Everything was happening at once. This was a dynamic interaction requiring quick decisions on the fly.

[459] It is possible another officer would have responded differently in the moment and selected a different use of force option, avoiding blows to the head or face. But recognizing that police duties often require officers to react in exigent circumstances with little time for reflection, the law gives them some latitude in the choices they make in using force. They are not required to measure their force with exactitude. Perfection is not the standard. A reviewing court must avoid an undue reliance on hindsight that obscures the realities of the situation faced by the officer. A trial judge must not be too quick to criminalize a use of force based solely on the fact that the officer might have acted differently.

[460] When I step back and consider the evidence as a whole – including all of the evidence about police training and the situation Constable Montsion encountered when he arrived at 55 Hilda, seen against the backdrop of the information available to him before he arrived on scene – I cannot conclude, beyond a reasonable doubt, that his use of the standing blows fell outside the range of reasonable police force response in the totality of the circumstances.

[461] I move to the blows on the ground.

[462] At the time of these blows, Mr. Abdi was physically resisting – struggling with some success against two relatively large police officers who were working together to try and control him. By this point, the interaction in the alcove had been underway for about 38 seconds – 29 seconds since Constable Montsion had entered the fray. It had

involved a knee strike to the abdomen, three blows with an ASP, two kicks, and blows to the head and upper body areas. And still, Mr. Abdi continued to resist.

[463] Once Mr. Abdi was on the ground, Constable Montsion struggled for about seven seconds to get control of his left arm before administering any blows. He opted initially for strikes to the back of the thigh, attempting no doubt to achieve compliance through distraction. And then other 12 seconds went by before he delivered the first of the impugned strikes to the head area. During this time, Mr. Abdi was still struggling. The officers were unable to control his arms and bring his hands behind his back.

[464] The evidence allows for the inference that Constable Montsion's purpose in administering the impugned blows on the ground was to distract Mr. Abdi so the officers could get his arms behind his back for handcuffing. Support for this inference comes from the fact that he delivered these blows several seconds after the thigh strikes – a standard distraction technique that the Crown does not criticize – which proved ineffective in subduing Mr. Abdi.

[465] Not only does the delivery of the impugned blows on the ground several seconds after the thigh strikes (and the earlier failed attempts to control Mr. Abdi's left arm) shed light on Constable Montsion's purpose, it is consistent with an officer making decisions about the use of force: moving from one unsuccessful option to another when the first had no effect. This militates against the suggestion that he was simply unloading on the suspect without any assessment or restraint.

[466] The question is whether, in seeking to distract Mr. Abdi in an effort to gain control of his arms so he could be handcuffed, Constable Montsion chose a use of force option that exceeded the range of reasonableness.

[467] The blows are jarring. This part of the video is not easy viewing. But as Mr. Federico explained, police officers are taught that justification of use of force choices rests on good faith decision-making based on reasonable grounds, not "what it's going to look like."

[468] As with the standing blows, it is possible another officer would have made different choice in the heat of the moment. But this alone does not disprove the s. 25(1) justification. When I consider the totality of the circumstances based on the entirety of the evidence before me, I cannot conclude, beyond a reasonable doubt, that the blows on the ground fell outside the range of reasonable police use of force.

[469] I have considered the Crown's submissions about de-escalation. As the evidence makes clear, however, Constable Montsion walked right into the middle of a

dynamic physical interaction that continued unabated until Mr. Abdi was in handcuffs. It is difficult to see a realistic opportunity for collaborative dialogue.

[470] I observe, moreover, that Constable Weir was not trying to de-escalate when Constable Montsion arrived. Instead, he was seizing opportunities to engage and use force. For example, as Constable Montsion stepped into the alcove, Constable Weir delivered a hard kick followed immediately by a third blow with his ASP.

[471] The time that elapsed between Constable Weir's first two ASP strikes (during which he was pointing at the ground and shouting commands as Constable Montsion approached) is barely three seconds; it ends when Mr. Abdi looks and then moves in Constable Montsion's direction, just as Constable Weir goes into a kick followed by the third ASP strike. There was no appreciable break in the action that would have made de-escalation a viable option.

[472] Nothing changed when Mr. Abdi was on the ground. He continued to struggle against the force of the two officers, who were doing what they could to get his hands behind his back. There was no realistic opportunity to attempt de-escalation techniques at this point.

[473] Similarly, there was no realistic opportunity for Constable Montsion to consult with Constable Weir when he arrived on scene. There was no time to seek a briefing and formulate a plan. These were dynamic circumstances that demanded immediate action. Constable Weir touched on this in re-examination:

Well, if you have the luxury of time you'll discuss the call ...When [Constable Montsion] rolled up in front of there I was still fighting with this guy who was actively resisting every effort I made to arrest him. That would be an open book for me if I rolled up on scene in my cruiser and I'm in Dan's shoes I know what I would do and it wouldn't be let's stop and talk about this. It would be get in there and help ... There was no opportunity to [say anything]. I was in the middle of asp striking Mr. Abdi when Dan showed up.

[474] Moreover, as I said earlier, review of the video in conjunction with Constable Weir's testimony reveals that even though the two officers were not speaking, they were coordinating their actions. From the moment Constable Montsion joined the interaction, each officer took one side of Mr. Abdi and they worked together to try and subdue him and get him into custody. Constable Weir saw it this way:

I don't remember saying anything while we were down trying to get his arms behind [his back] because it was pretty clear what we were trying to do and we were working together to get it done.

[475] The coordinated nature of the officers' actions is apparent during the entire interaction and is consistent with the evidence about police training. This is part of the overall picture of Constable Montsion's force response.

CONCLUSION ON ISSUE ONE

[476] I have looked at all of the circumstances based on the evidence as a whole. I have not ignored the Crown's submissions emphasizing that when Constable Montsion arrived as the second officer on scene, Mr. Abdi was not holding a weapon and was not actively assaulting Constable Weir; nor was he striking the officers when he was on the ground, although he was struggling hard for some time and with some success against the force of two trained police officers.

[477] This is a close call. In the end, my assessment of the evidence as a whole under the governing principles of law leaves me in a state of reasonable doubt about whether the standing blows and the blows on the ground exceeded the bounds of reasonable police force response in the totality of the circumstances.

[478] I conclude that the Crown has failed to meet its burden to prove beyond a reasonable doubt that the force Constable Montsion used was not justified under section 25(1) of the *Criminal Code*, having regard to the principles of necessity, reasonableness, and proportionality.

[479] Equally, having considered Constable Montsion's overall conduct during the interaction, including the Crown's submissions about his failure to consider de-escalation, I am left with a reasonable doubt about whether his conduct showed a wanton or reckless disregard for Mr. Abdi's life or safety and whether it was a marked and substantial departure from the standard of the reasonable police officer in his circumstances.

[480] It follows from these conclusions that the Crown has not discharged its onus of proving beyond a reasonable doubt an unlawful act or criminally negligent conduct for manslaughter or an unjustified assault to ground liability on the other two charges.

[481] In these circumstances, I need not decide whether the Crown has proved beyond a reasonable doubt that the gloves worn by Constable Montsion meet the definition of "weapon" in s. 2 of the *Criminal Code*.

[482] As I said at the outset, it is not strictly necessary for me to decide Issues Two and Three. For completeness, however, and given the careful attention the parties gave to these issues, I will address them.

ISSUE TWO – DID CONSTABLE MONTSION CAUSE MR. ABDI’S NASAL INJURIES?

[483] The Crown bears the burden to prove beyond a reasonable doubt that Constable Montsion’s blows caused Mr. Abdi’s nasal injuries. If, after considering the evidence as a whole, I am left with a reasonable doubt on this issue, the Crown will have failed to establish the wounding element of aggravated assault and will lose the foundation for its submission that Constable Montsion’s acts caused Mr. Abdi’s death.

[484] My analysis of this issue draws on four main sources of evidence:

- Dr. Milroy, the forensic pathologist;
- Mr. Latus, the bloodstain pattern analyst;
- Constable Weir; and
- the video.

[485] As always, I keep in mind the importance of considering each witness’ evidence in light of the evidence as a whole, including the testimony of the eyewitnesses. Even though Ms. Dunford, Mr. McGhie, and Ms. Clements did not see the takedown, their accounts of the blows they saw have relevance on this issue.

EVIDENCE OF DR. MILROY

[486] I will outline Dr. Milroy’s findings and opinions that are germane to this issue and review other aspects of his evidence when I address the third issue about the cause of death.

[487] During his post-mortem examination, Dr. Milroy found injuries to Mr. Abdi’s face and head, and he commented on the neuropathologist’s findings about the brain.¹⁰⁶

The Face

[488] A CT scan revealed comminuted fracturing of the nasal bones. The term “comminuted” means there were multiple breaks. The bone was in several pieces.

[489] The fractures were in the “big bony part of the nose”, right up “over to the top”; more than just to the bridge. The breaks were on both sides of the nose.

¹⁰⁶Dr. Milroy also found bruising and abrasions on Mr. Abdi’s torso and limbs, but these injuries are of lesser relevance on this issue.

[490] There was bruising of the adjacent skin and subcutaneous tissue around the nose. A laceration ran down the junction of the nose and cheek on the right side of the face. The laceration was 2.5 centimetres long and there were two inferior splits in the skin. It had been closed with sutures.¹⁰⁷

[491] The nasal septum was deviated to the left. One explanation for this could be that force had been moving from right to left. The caveat, Dr. Milroy added, was that he had no evidence about whether or not the deviated septum was a preexisting condition.

[492] There was a horizontal abrasion along the chin line on the right side of the face.

[493] The upper lip was extensively bruised and swollen. There was an abrasion on the mucosal surface of both the right upper lip and the midline of the lower lip.

[494] Aside from a split on the inside of the lip, there were no injuries to the left side of the face.

[495] Dr. Milroy explained that the nasal bone is the most commonly fractured bone in the face. Typically, a blow to the bridge of the nose will break the bridge. The nasal fractures here were more extensive than he had often seen from blows with an uncovered fist.

[496] There were no fractures to the jaw, cheek, or the part of the skull that encases the brain. Nor was there any injury to the forehead.

[497] According to Dr. Milroy, the principal source of blood was the laceration to the nose. Although the mouth would bleed reasonably quickly, it would not bleed as extensively as the nose.

[498] Dr. Milroy testified he would expect immediate blood flow from the nasal injuries. He later agreed that, assuming a two-blow scenario where the first blow created a blood source, a fraction of a second between the two blows would not be enough time to allow for the formation of a sufficient blood source to cause the spatter seen on the door. In re-examination, he said he would expect it would take a few (“Five, ten”) seconds for a sufficient blood source to form in this scenario.

¹⁰⁷Exhibit 130 – Post-mortem Report, page 10, item 3 under the subheading “Head and Neck”; Exhibit 131, Diagram of Injuries, page 1; Exhibit 132 – Autopsy Photographs (*partially sealed exhibit*), pages 2 to 4, 12 to 13

[499] In his Post-mortem Report, Dr. Milroy said this about the injuries to Mr. Abdi's nose, lips, and cheek:

The evidence indicates this occurred from the blows to Mr. Abdi's face. The gloves worn by Officer #2 would have caused more damage in punching than an uncovered fist.¹⁰⁸

[500] At trial, Dr. Milroy explained that the nasal fracture he observed was more extensive than he would expect from an uncovered fist, and he again mentioned that the gloves had a hard covering on the knuckles. He thought that if there were multiple blows to the face, the laceration to the nose would be from one blow while the fractures could be from more than one blow.

[501] Dr. Milroy could not exclude the possibility that the facial injuries were caused *not* by blows but by a fall to the ground. In considering this issue, he explained, one would have to look at the force of any fall as well as the surface on which the person landed and, of course, whether the face hit the ground.

[502] In this case, the complexity of the nasal fracture might favour the idea of a fall on the theory that a forceful fall would produce a more complex fracture. Dr. Milroy recognized, however, that similar reasoning could be used to support the blow theory: a punch with a hard object would deliver more force than a blow with a bare hand.

[503] As for the laceration, Dr. Milroy agreed it was reasonably possible the nasal bone could fracture and then push through the skin, causing the skin to split. He also accepted it was possible for a person to fall and hit their nose and jaw line at the same time without hitting their forehead, producing the nasal injuries and abrasion he saw on the right side of Mr. Abdi's face.

[504] According to Dr. Milroy, what tells against the fall theory, although not definitively, is the absence of injuries to bony prominences of the facial structure. Dr. Milroy explained that if a head falls against an abrading surface with enough force to break the nose, one will characteristically see abrasions to bony areas that impact the ground, such as the forehead and the bridge and tip of the nose. Similarly, if a person falls and hits their jaw line, one might expect to see other injury to the prominence of the cheek. These injuries were not present here, although the fractures themselves were in the "big bony part of the nose."

[505] As for the laceration on Mr. Abdi's right upper lip, Dr. Milroy said it was typical of a punch to the mouth. While it could be produced by a fall, one would again have to consider the absence of other injuries to the surface of the face.

¹⁰⁸Exhibit 130, Post-mortem Report, page 19, item (b)

[506] Dr. Milroy made clear that, ultimately, the pattern of injury on the face from a fall will depend on exactly how the person falls as well as the nature of the surface with which the face comes into contact.

[507] Dr. Milroy summarized his opinion on this issue in these words:

So, having considered it all, I certainly think that a punch could cause it. I think it is probably less likely it's the fall but I don't – I can't exclude it and I think that I've given the court factors which I think should be considered in whether the injury was from a fall or a punch.

[508] Dr. Milroy's cross-examination on this issue ended with the following exchange:

Q. And, if that person falls from almost six feet tall and comes down and makes a hard fall into pavement, you wouldn't be surprised to see [the nose] break?

A. No. Especially, I mean, and I think it's fair to say for what I have seen, and obviously His Honour can consider this, the visualizations I've seen, and I am of course being cautious here, there seem to be an element of propulsion as well. And, so he may have been going down a bit quicker than even a normal fall of, without, without aid.

Q. Okay.

A. But he ...

Q. Is an entirely reasonable scenario?

A. Yes. I said I ... absolutely can't exclude that scenario.

The Head and the Brain

[509] There was a large area of sub-scalp bruising on the left side of the head involving the frontal, temporal, and posterior parietal scalp.¹⁰⁹ The underlying skull was intact. The existence of this bruising, standing alone, would not allow Dr. Milroy to say whether it was caused by a punch as opposed to the head striking an object during a fall, or whether it was the result of both a fall and a punch. He could only say there had been impact with the head.¹¹⁰

¹⁰⁹The bruised area measured 17 by 11 centimetres.

¹¹⁰Dr. Milroy sounded a note of caution about the bruising in this area (and others) because an anti-clotting drug given to Mr. Abdi at the hospital may have made bruising appear more extensive than it had originally appeared.

[510] Dr. Milroy explained the concept of “*contrecoup*”, where impact to one side of the head causes movement in the brain that produces sub-scalp bruising on the opposite side. He agreed that contusions on the left side of the brain could be consistent with a fall where the person lands on the right side of their face.¹¹¹

[511] The neuropathologist’s findings included hypoxic brain damage¹¹², mild diffuse axonal injury, and changes consistent with a very subtle contusion in the left inferior temporal lobe.¹¹³

[512] According to Dr. Milroy, the hypoxic brain damage was secondary to the cardiac arrest with resuscitation and the period of survival.

[513] Mild axonal injury means that some of the nerve fibers in the brain appear damaged. This is a microscopic change that occurs more commonly with falls than punches, because falls tend to generate larger forces. According to Dr. Milroy, axonal injury can be the result of hypoxic brain damage itself or a traumatic impact from an external source. It can be difficult to differentiate between the two and both may play a role. Mr. Abdi also had a very subtle bruise on the brain. Dr. Milroy testified:

So, overall the relevance of that was he may have had – it’s possible in the events somewhere on that day, and that could be anywhere from before – even before the coffee shop – just from a pathology point of view, he may have sustained a very mild head injury as well as ultimately he got the hypoxic brain damage from the cardiac arrest. But those do not – they would not account for his death. At most, I suspect, he could have had a mild degree of concussion, but in the context of his – he may have had nothing – and in the context of his apparent psychotic illness, it may not have been noticeable.¹¹⁴

[514] In Dr. Milroy’s opinion, the changes in Mr. Abdi’s brain, including the subtle contusion, can be accounted for by hypoxic brain damage together with a fall or falls to the ground. Given the findings in the brain, it was his view that the blows to the head “did not contribute significantly to the microscopic brain damage seen.”¹¹⁵

[515] As for the sub-scalp bruising to the left frontal, temporal, and parietal scalp, Dr. Milroy wrote:

¹¹¹During this exchange, Mr. Edelson and Dr. Milroy discussed the “classic example” of the “one-punch manslaughter case” where the person is punched and falls backwards “like a tin soldier” and hits their head causing injury to the brain: Evidence of C. Milroy, June 6, 2019, pages 57 to 59.

¹¹²The damage is called Hypoxic Ischemic Encephalopathy. It means the brain was starved of oxygen.

¹¹³Exhibit 7, tab 15 – Forensic Neuropathology Report, October 13, 2016, page 1 (“Final Pathological Diagnosis”)

¹¹⁴Evidence of C. Milroy, June 4, 2019, pages 73 to 74; June 6, 2019, pages 54 to 56 [Emphasis added]

¹¹⁵Exhibit 130 – Post-mortem Report, page 18, item 10; page 19, item 16(a)

This could have occurred with the blows seen to be delivered to the head. However, the blows may not have landed to this part of the head. Secondly the bruising is more extensive than is normally seen with punches, even taking into account the disordered coagulation. Thirdly there are other parts of the incident that could have caused bruising to this area including the struggle in the coffee shop¹¹⁶ and the subsequent falls.

EVIDENCE OF PATRICK LATURNUS

[516] Mr. Laturus is an expert in bloodstain pattern analysis. He reviewed photographs and gave evidence about the location of the blood source and the cause of bloodstain patterns.¹¹⁷

[517] Mr. Laturus opined that a blood source (a bleeding person) was in a prone position on the bricks in the area near the drain in the entrance to 55 Hilda. He saw no evidence that the person was bleeding while standing. In particular, there was no blood in the ramp area leading into the alcove.¹¹⁸

[518] Mr. Laturus agreed that if a person who is standing takes a blow to the face that causes the nose to bleed, one would expect blood to drop from the nose onto the person's shirt and shoes¹¹⁹ and, if the person is bent over at the waist, to hit the ground.¹²⁰

[519] Mr. Laturus identified an impact pattern¹²¹ on the lower part of the entry door and on the bricks between the drain and the door.¹²² This pattern, he concluded, was the result of at least one blow to an existing blood source – in other words, a person who was already bleeding. In his view, the person was fairly close to the ground, near the drain, and face down, although the head could have been raised.

[520] Mr. Laturus could not offer an opinion about how the blood source was created; more particularly, whether it was caused by an injury from the person landing on the

¹¹⁶Recall Mr. Rowe's evidence (summarized at para. 69, above) about Mr. Abdi's head bouncing off the chair in the Bridgehead when he fell backwards after Mr. Rowe pulled him away from the person he had pinned against the bench seat.

¹¹⁷See, generally, the photographs in Exhibit 3, pages 15 to 105 and Exhibit 7, tab 1A – Report of P. Laturus, pages 2 to 5.

¹¹⁸See, for example, Exhibit 3, photograph 20. There was also no blood on Mr. Abdi's shoes or on Constable Montsion's boots, but there was blood on Constable Weir's boots.

¹¹⁹Mr. Laturus suggested that if the person had a large stomach, the blood could hit the stomach on the way down before it reached their shoes.

¹²⁰Evidence of P. Laturus, April 3, 2019, pages 25 to 29

¹²¹An impact pattern is a bloodstain pattern resulting from an object striking liquid blood.

¹²²See, for example, Exhibit 60 – Photographs 8773, 8773 ("Edited"), 8787, 8702 ("Edited"), 8705 ("Edited"), 8641.

ground or from an impact after the person landed on the ground uninjured. In either case, the impact pattern on the door would be the same.

[521] According to Mr. Laturus, in the absence of a preexisting injury generating blood, two blows would be required to cause an impact pattern: one to create the blood source, the other to spatter the blood and produce the pattern. Where there is more than one blow to an already bleeding source that does not move between the blows, the blood stains forming an impact pattern will overlap and be indistinguishable from one another. For this reason, it was impossible for Mr. Laturus to say how many blows caused the impact pattern on the door; he could only conclude it was the result of a minimum of one blow.

[522] In cross-examination, Mr. Laturus discussed a hypothetical that I have paraphrased this way:

- Person A (an existing blood source) is on the ground in a prone position;
- Person B is on Person A's left;
- Person B hooks his left arm and hits Person A on the right side of the face.

[523] In this scenario, Mr. Laturus explained, blood could spatter in both directions: back towards Person B and also away from Person B (and towards the door on the facts of our case). He also agreed that if Person A had a cut on the right side of his face and Person B struck the left side of Person A's face, the blood could go in the direction of the force (again, towards the door).

EVIDENCE OF CONSTABLE WEIR

[524] Earlier, I set out Constable Weir's testimony about the standing blows and the takedown. I will not repeat that evidence here. The core of his account of these events can be recaptured in these points:

- He saw three quick hooking punches to the area of Mr. Abdi's head and shoulders while Mr. Abdi was standing. Right after these blows, his nose was bleeding;
- Constable Weir used his body weight and all his strength to take Mr. Abdi to the ground. He and Mr. Abdi went down fairly smoothly together; they kind of "slunk" to the ground. Mr. Abdi went forward onto his stomach. His face did not hit the ground.

[525] As I have already mentioned, there are reliability concerns with Constable Weir's evidence. He was mistaken on some points and had no recollection on others. He acknowledged that he "missed some things." He agreed that the speed of the takedown may be something he did not remember accurately.

[526] Constable Weir had no memory – even after watching the video – of kicking Mr. Abdi or hitting him with his ASP in the alcove, or of Constable Montsion striking the back of his thigh. These are significant events. While I do not criticize Constable Weir for these failures of memory or perception, I must keep them in mind when weighing his testimony in light of the evidence as a whole. They raise the possibility that other aspects of his evidence about the events at 55 Hilda – specifically, his recollection of seeing Mr. Abdi's nose bleeding after the standing blows – may not be accurate.

[527] I must also consider the cross-examination on two set of notes that Constable Weir made on the day of the incident before finishing his shift. First, in his Investigative Action Report (IAR),¹²³ he recorded that after the arrest, "the male was breathing and spitting blood onto the pavement."¹²⁴ The IAR contains no mention of an injury to the nose.

[528] Second, while his Duty Book Notes (DBN) contain a reference to "Subject male bleeding from nose," this entry comes *after* a note about Mr. Abdi being handcuffed. Constable Weir agreed officers are taught to make DBNs sequentially to mirror how the events unfolded.

[529] During his SIU interview 137 days after incident, Constable Weir spoke about seeing Mr. Abdi's nose bleeding after the standing blows.¹²⁵ I stress that these portions of his SIU statement were admitted for the limited purpose of ensuring that the evidentiary record did not leave the erroneous impression that the first time the officer mentioned seeing Mr. Abdi's nose bleeding after the standing blows was at trial. That is the only way these excerpts are relevant to my assessment of his testimony. His out-of-court assertions to the SIU are prior consistent statements. They are not admissible for their truth or to enhance the quality of his evidence through impermissible reasoning based on corroborative consistency.¹²⁶

¹²³The first time Constable Weir had been shown his IAR in the three years since the incident was during cross-examination.

¹²⁴Constable Weir agreed, based on the Call Path Record (Exhibit 156), that it was quite possible he transmitted over the radio that Mr. Abdi was "bleeding from mouth", and he testified that Mr. Abdi was in fact bleeding from the mouth after he was handcuffed.

¹²⁵Exhibit WW – Excerpts (with redactions) from Constable Weir's SIU Statement, December 16, 2016

¹²⁶*R. v. D.K.*, 2020 ONCA 79 at paras. 34-37, *R. v. J.H.*, 2020 ONCA 165 at paras. 117-121, *R. v. G.J.S.*, 2020 ONCA 317 at paras. 41-48

THE VIDEO

[530] As I said during my review and assessment of the video, I cannot make a finding, based on the video alone, about whether or not Mr. Abdi's face hit the ground during the takedown. I can only say the video does not obviously show his face striking the ground. But this observation adds nothing of value given Mr. Fredericks' evidence that video with a relatively low refresh rate may fail to capture certain fast-moving events, such as a falling person's head striking the ground.

[531] This does not mean the video plays no role in the analysis. It remains a piece of evidence to be weighed in light of the evidence as a whole, keeping in mind the caution required in assessing its reliability.

ANALYSIS OF ISSUE TWO

[532] I begin with a proposition that is not controversial: when Constable Montsion delivered the first of the blows on the ground, Mr. Abdi's nose was already bleeding.¹²⁷ I say this for four main reasons.

[533] First, the laceration was, on Dr. Milroy's evidence, the principal source of blood.

[534] Second, Constable Weir was unchallenged in his testimony that at the time of the blows on the ground, blood splashed on his arm.

[535] Third, Mr. Larnus identified an impact pattern on the bricks and the door. This must be seen in light of the direction of the two hooking blows on the ground (left-handed strikes to the left side of Mr. Abdi's face) and the movement of Mr. Abdi's head from left to right.

[536] Fourth, based on Dr. Milroy's evidence, it would take a few seconds ("Five, ten") for a sufficient blood source to form in order to produce the impact pattern on the door. A fraction of a second between blows would not be enough time. According to the QuickTime counter on the video, two seconds (*at most*) elapsed between the first and third of the blows on the ground.¹²⁸

[537] On all of the evidence, I have no difficulty finding that the laceration to Mr. Abdi's nose happened before the blows on the ground.

¹²⁷Frame 1356, 52 seconds

¹²⁸In saying this, I reiterate that the QuickTime counter is only an "approximation."

[538] This takes me to an examination of three periods of time when the laceration may have occurred:

- i. during the takedown;
- ii. during the struggle on the ground after the takedown but before the blows on the ground;
- iii. while Mr. Abdi was standing.

[539] I must emphasize that my task is not to determine which of these possibilities has been established. That approach risks shifting the burden of proof. The issue I must decide is whether, on the whole of the evidence, the Crown has met its onus of proving beyond a reasonable doubt that Constable Montsion's acts caused the nasal injuries.

The Takedown

[540] On Constable Weir's evidence, he and Mr. Abdi slunk to the ground in a fairly smooth fashion. It was not a "tree falling in the woods" situation. There were no audible smacks; nothing out of the ordinary. Neither man hit his face.

[541] Constable Weir agreed, however, that his memory of the speed of the takedown may not be accurate. His testimony was also proved to be mistaken on a number of issues, some of which are significant. This raises reliability concerns that I cannot ignore.

[542] Speaking generally, the MP4 video supports Constable Weir's description of the takedown, but I cannot make much of this given the video's limitations and the need for caution in assessing its reliability.

[543] The video shows the right side of Mr. Abdi's face moving towards the ground, and I have looked at this in light of the evidence that his nasal septum was deviated to the left, which is consistent with force having been applied from right to left. There is no evidence about whether or not Mr. Abdi had a preexisting deviated septum.

[544] I must consider Dr. Milroy's evidence that while the nasal injuries could have been caused by one or more punches with hard-knuckled gloves, he could not exclude the possibility that they were the result of a fall, although he felt this was probably less likely, particularly given the absence of abrading injuries to bony parts of the facial structure such as the forehead, eyebrows, and tip of the nose. The fractures themselves, however, were to the "big bony part of the nose."

[545] I have reflected on Dr. Milroy's opinion that the changes in Mr. Abdi's brain can be accounted for by hypoxic brain damage together with a fall or falls to the ground, and that the blows to the head did not contribute significantly to the "microscopic brain damage seen" (*i.e.*, diffuse axonal injury).

[546] I note that Dr. Milroy referred to the head injury Mr. Abdi may have sustained as "very mild" and to the bruise on his brain as "very subtle." He also recognized the need for caution when interpreting hypoxic brain damage because, he explained, it can be difficult to determine if a lack of oxygen to the brain is the result of "truly traumatic damage as opposed to just the lack of oxygen ..."¹²⁹ The mild nature of the head and brain injuries is one factor I have kept in mind when considering whether the fractures to Mr. Abdi's nose were caused by his face hitting the ground.

The Struggle on the Ground After the Takedown

[547] Constable Weir was not asked if he saw Mr. Abdi's face hit the ground during the struggle after the takedown and before Constable Montsion delivered the blows on the ground. Counsel also never suggested to Constable Weir that he struck Mr. Abdi in the face with his ASP when he was trying to close it by banging it on the bricks.¹³⁰ No other witness testified about this period of time.

[548] The video, once again, has its limitations. Based on my innumerable viewings, there is no point in time during the struggle when Mr. Abdi's face clearly touches the ground with any force, and there are many points when his head is clearly *off* the ground. But there are also times when his head is blocked from view, either partially¹³¹ or completely.¹³² The most I can say, based on the video, is that there are moments when it is possible his face came into contact with the ground. I cannot go any further without speculating.

While Mr. Abdi Was Standing

[549] Based on the eyewitness testimony¹³³ and video evidence, seen in light of the evidence as a whole, I have found that while Mr. Abdi was standing in the alcove, Constable Montsion delivered two sets of closed-fist blows in rapid succession: first, two strikes to the area of the head (the one-two combination); and second, three uppercut-style blows to the upper body area. I could not say whether any of the uppercuts struck Mr. Abdi's face or whether the third uppercut connected.

¹²⁹Evidence of C. Milroy, June 5, 2019, pages 13 to 14

¹³⁰The defence alluded to this as a possibility at para. 450 of their Final Submissions.

¹³¹See, for example, Frames 790 to 795 (30 seconds).

¹³²See, generally, Frames 900 to 1235 (34 to 47 seconds).

¹³³Constable Weir, Ms. Dunford, Mr. McGhie, and Ms. Clements.

[550] I have found that at least one of the blows in the one-two combination struck Mr. Abdi's face. It is common ground that Constable Montsion was wearing gloves with hard knuckles at the time. In saying this, however, I recall Dr. Milroy's evidence that there were no injuries to the left side of Mr. Abdi's face, and I consider this evidence in light of the two hooking blows on the ground that connected with the left side of his face. The absence of injury to the left side of the face from these blows has some bearing on whether the standing blows caused the nasal injuries.

[551] Constable Weir testified that he saw Mr. Abdi's nose bleeding right after the hooking punches.¹³⁴ It was bleeding a lot. He said the hooks bloodied his nose.

[552] Constable Weir's account of the events has some markers of reliability. His narrative flowed naturally and logically and was rich with details that gave it coherence from the perspective of common sense and human experience. In particular, his evidence about the interaction in the alcove – the standing blows; the takedown; the struggle on the ground; the blows on the ground; and the handcuffing – was vivid, detailed, and precise.

[553] Constable Weir's also evidence finds support in the testimony of other witnesses. For example, his account of his initial approach to Mr. Abdi and the beginning of the foot pursuit along Wellington is consistent with Dr. Courtney's evidence. His narration of the run to 55 Hilda leading to the arrival of Constable Montsion and the delivery of the standing blows accords with the testimony of the three civilian scene witnesses. Of course, each of these witnesses is inconsistent on some points with one or more of the others, but this is to be expected. Perfect congruence is not the standard.

[554] Constable Weir's testimony also gains force when it is seen in light of the video. As I have already discussed, a close examination of the video (even recognizing its limitations) lends support to his account of the five stages of the interaction in the alcove: the standing blows; the takedown; the struggle on the ground; the blows on the ground; and the handcuffing.

[555] At the same time, Constable Weir was shown to be mistaken on significant issues, including issues about his own use of force (kicks, ASP blows) and that of Constable Montsion (thigh strikes). This raises concern about the accuracy of his perception and memory of the fast-moving events at 55 Hilda.

[556] There is, moreover, inconsistency between Constable Weir's trial testimony and his two sets of same-day notes. Neither contemporaneous record contains a statement that Mr. Abdi's nose was bleeding before he was on the ground. On the other hand,

¹³⁴He described three hooks in quick succession.

neither contains a positive assertion that his nose was *not* bleeding while he was standing. There is ambiguity in both records.

[557] I take into account that Constable Weir made his IAR and DBN within hours of what he described as the most difficult call in his policing career. He was tired, stressed (although to a lesser degree by that time), and nervous at the prospect of being named a subject officer in the SIU investigation. Neither record was based on a witness interview with follow-up questions, although I do not ignore police duties and training about note-taking.

[558] In assessing Constable Weir's evidence that Mr. Abdi's nose was "bleeding a lot" right after the standing blows, I must take into account Mr. Laturus' undisputed evidence that there was no blood evidence to suggest that Mr. Abdi was bleeding while standing. In particular, there were no drops of blood in the ramp area where the standing blows occurred, nor was there any blood on Mr. Abdi's shoes.¹³⁵ I look at this in light of the common-sense proposition that if blood is flowing from a person's nose while they are standing (or bent over at about a 90-degree angle, as Mr. Abdi was at one point¹³⁶), gravity will pull the blood towards their shirt, shoes, and the ground. When I consider this together with Dr. Milroy's evidence that he would expect immediate blood flow from the nasal injuries, the absence of even a single drop of blood in the ramp area becomes significant.

[559] I have not ignored Dr. Milroy's evidence that it can take a few seconds for a blood source to form after a first punch to a degree that would be sufficient to cause the impact pattern seen on the entry door. I observe that, according to the QuickTime counter (for what it's worth), three to four seconds elapse between Constable Montsion's first standing blow and the beginning of the takedown. Mr. Abdi bends over immediately after the one-two combination of hooking blows and remains bent over for roughly one second. In my assessment, this aspect of Dr. Milroy's evidence, which focuses on the *quantity* of blood flow that would be *sufficient* to cause the impact pattern on the door does not dilute the effect of his testimony that he would expect immediate blood flow from the nasal injuries.

CONCLUSION ON ISSUE TWO

[560] I am not satisfied beyond a reasonable doubt that Constable Montsion's blows caused Mr. Abdi's nasal injuries. While there is much to say in favour of Constable Weir's account of the events at 55 Hilda, there are reliability issues with his evidence that cannot be overlooked. I must also consider the following:

¹³⁵The cell phone video of Nimao Ali (Exhibit 35 – IMG_0633.MOV) shows blood on Mr. Abdi's shirt when the officers were moving him after the incident; however, he had been lying facedown for some time in the area of the alcove where there was the greatest concentration of blood, so this evidence does not assist on the issue of whether there was blood on his shirt while he was standing.

¹³⁶Mr. Abdi bends over immediately after the one-two combination of hooking blows and remains bent over for roughly one second (Frames 672 to 695; 26 seconds).

- The video shows Mr. Abdi going to the ground with his head turned to the left so that the right side of his face is facing the bricks;
- The laceration to Mr. Abdi's nose and the abrasion to his chin were on the right side of his face;
- Mr. Abdi's nasal septum was deviated to the left, which is consistent with force going from right to left;
- There were no injuries to the left side of Mr. Abdi's face;
- There was no blood in the ramp area of the alcove or on Mr. Abdi's shoes, and this must be seen in light of Dr. Milroy's evidence that he would expect immediate blood flow from the nasal injuries;
- Dr. Milroy allowed for the possibility that the nasal injuries were caused by a fall as opposed to blows. Although he thought a fall was probably a less likely source of the injuries, he "absolutely [couldn't] exclude that scenario."

[561] My assessment of the evidence as a whole leaves me in a state that bears some similarity to Dr. Milroy's view. I think it is likely that one or more of Constable Montsion's blows caused Mr. Abdi's nasal injuries, but I cannot safely make this finding on the criminal standard. My closest examination of the evidence leaves me with a reasonable doubt on this issue.

[562] I will now address Issue Three – cause of death – on the assumption that the Crown had proved beyond a reasonable doubt that Constable Montsion's acts caused Mr. Abdi's nasal injuries.

ISSUE THREE – DID CONSTABLE MONTSION CAUSE MR. ABDI'S DEATH?

[563] The Crown has the burden to prove beyond a reasonable doubt that Constable Montsion's acts caused Mr. Abdi's death. This translates, on the facts of this case, into an onus to prove that at least one of the blows to Mr. Abdi's face or head was a significant contributing cause of the fatal cardiac arrest.

[564] I will begin with a review of the evidence, focusing on the evidence of Dr. Milroy. I will next set out the law on causation and then turn to my analysis.

COMPLETING THE CHRONOLOGY

[565] Before returning to Dr. Milroy's evidence, a brief time line will complete the chronology of the events that ended, tragically, with Mr. Abdi's death:

- At about 9:48 a.m., Constable Weir notified dispatch that Mr. Abdi was in custody;
- At about 9:50, Constable Montsion asked over the radio for an upgrade in the priority of the call, saying that Mr. Abdi had lost consciousness;¹³⁷
- At 9:56 a.m., an ambulance arrived. One minute later, after checking for a pulse, paramedic Alexander Bain found Mr. Abdi to be in cardiac arrest with vital signs absent (VSA).¹³⁸ About a minute after that, Constable Montsion began chest compressions at Mr. Bain's direction.¹³⁹
- Over the next 25 minutes or so, paramedics administered emergency treatment and rushed Mr. Abdi to the hospital;
- Shortly before 11:00 a.m., after an estimated "downtime" of about 60 minutes, hospital personnel were able to reestablish a pulse; however, Mr. Abdi had sustained irreversible hypoxic brain damage;
- On July 25, 2016, at 3:17 p.m., brain death was confirmed.

DR. MILROY'S EVIDENCE

[566] Dr. Milroy's evidence about the cause of death comes from three main sources:

- 1) his Post-mortem Report of November 21, 2016;¹⁴⁰
- 2) an audiotaped interview with counsel for the SIU on January 17, 2017;¹⁴¹
- 3) his trial testimony over three days in June 2019.

¹³⁷Constable Montsion appears to speak into his radio at 3:36 on the video.

¹³⁸Mr. Bain's arrival is seen at 10:40 on the video.

¹³⁹This is seen at 12:22 on the video.

¹⁴⁰Exhibit 130 – Post-mortem Report

¹⁴¹Exhibit 135 – Audio Interview; Exhibit UU – Transcript of Audio Interview. The interview was introduced during Dr. Milroy's cross-examination. Dr. Milroy adopted his answers as part of his evidence. Crown counsel raised no objection to the interview's admissibility and, in fact, relied on some of it in their submissions.

Framing the Cause of Death

[567] Dr. Milroy defined the “cause of death” as a statement by a medical practitioner of the disease and/or injury that brings about death. It is a factual pronouncement used by the state for statistical purposes. The “mechanism of death” is the physiological process that brings about death. For example, where a person is stabbed in the heart, the cause of death is the stab wound, while the mechanism is blood loss.

[568] A forensic pathologist’s statement of opinion about cause of death follows a two-part structure. The first part contains the immediate cause of death followed by a logical chain that resulted in the disease or injury. The second part lists contributing factors that are not directly related to the main cause of death.

[569] At the end of his Post-mortem Report, Dr. Milroy framed his opinion about the cause of Mr. Abdi’s death in this way:

- 1(a) Hypoxic brain damage
- 1(b) Cardio-respiratory arrest
- 1(c) Coronary artery atheroma
- 2 Struggle, physical exertion and facial injuries.

[570] Dr. Milroy explained that Mr. Abdi died because he sustained hypoxic brain damage; in other words, his brain was starved of oxygen. This happened because he went into cardiac arrest: his heart stopped. The reason for the cardiac arrest was that he had severe coronary artery atheroma. This, in lay terms, means a hardening and furring of the coronary arteries which are the main suppliers of blood to the heart.

Coronary Artery Atheroma and Physical Stress

[571] Post-mortem examination of Mr. Abdi’s heart revealed major cardiac disease. He had 80% stenosis (or narrowing) in two main arteries: the left anterior descending (LAD) coronary artery and the right coronary artery.¹⁴² This, Dr. Milroy explained, is sufficient to cause sudden and unexpected death. In fact, coronary artery disease is the most common cause of sudden death in Western society.

[572] The LAD is one of three major arteries. It is known as the “widow maker.” According to Dr. Milroy:

¹⁴²There was also 40% stenosis in the left main coronary artery and 20% stenosis in the left circumflex coronary artery, but these findings were not significant.

... [T]he blockage of 80 percent in any one of the three major arteries is sufficient to cause a lack of blood supply to a major area of the heart. It feeds the anterior part of the left ventricle, and a lack of blood supply for that will trigger an abnormal rhythm. Or it could, be, it could be that they have what we call a myocardial infarction but a lot of people who get, have this actually simply die before they get to the hospital.¹⁴³

[573] With an 80% blockage in two major arteries, Mr. Abdi was at risk of having a fatal heart attack at any time. As Dr. Milroy put it, he could have been found dead in bed one morning.

[574] In Dr. Milroy's opinion, none of the injuries to Mr. Abdi's body, face, head, or brain "caused or directly contributed to death."¹⁴⁴ In other words, in the absence of the underlying heart condition, Dr. Milroy would not expect these injuries to have produced any significant deleterious effects. While the head injury may have resulted in a mild concussion requiring a brief stay in hospital, Dr. Milroy would expect a person with a healthy heart to have recovered fully from these injuries.¹⁴⁵ It is in the context of Mr. Abdi's heart disease that the injuries become relevant.

[575] There are, Dr. Milroy explained, factors that increase the risk of cardiac arrest in a person with underlying heart disease. One of these is physical stress. This may be induced by exertion (e.g., running, struggle, restraint) or noxious stimuli, such as pepper spray or blows that cause pain. Emotional stress is also a recognized factor. This may be the result of positive emotion (e.g., excitement) or negative emotion (e.g., fear).

[576] Physical and emotional stress are associated with an increase in the release of catecholamines, as well as lactic acidosis and changes in potassium levels. Catecholamines are chemicals in the body (e.g., adrenaline, noradrenaline) that help with the "flight or fight" response. Invoking the well-known idea of an adrenaline rush, Dr. Milroy testified that releasing catecholamines "allows us to run a bit quicker or to fight a bit stronger for a while." A blow that fractures the nasal bones is painful and will result in the release of catecholamines.

[577] A person with a healthy heart can compensate for a catecholamine surge by slowing down and resting. Where, however, the blood supply to the heart is compromised (as in Mr. Abdi's case), there is an increased risk of abnormal heart rhythm leading to cardiac arrest. Once a person goes into ventricular fibrillation (an abnormal rhythm where the heart quivers¹⁴⁶), they will lose consciousness within five to

¹⁴³Evidence of C. Milroy, June 6, 2019, pages 46 to 48

¹⁴⁴Exhibit 130 – Post-mortem Report, page 19, para. 17

¹⁴⁵It was also Dr. Milroy's view that the brain injury would not be expected to lead to the cardiac arrest.

¹⁴⁶According to Dr. Milroy, ventricular fibrillation "essentially is cardiac arrest": Exhibit UU – Transcript of Audio Interview, page 11

ten seconds.¹⁴⁷ The chances of surviving an out of hospital cardiac arrest are less than ten percent.

[578] Acidosis means there is too much acid in the blood. It is a common metabolic state in people who have physically exerted themselves. Dr. Milroy explained:

... [Y]ou have too much acid in your blood and that affects your – that’s your metabolism affected and that can bring about other changes in your biochemistry and actually it’s believed to be one of the factors in sudden death in people who may have been exerting themselves or been involved in a struggle, or both.

[579] According to Dr. Milroy, the risk of cardiac arrest increases during physical exertion and in the period shortly after, sometimes called the “period of peril.”¹⁴⁸ This has been related to the release of catecholamines, as well as lactic acidosis and changes in potassium levels. He testified:

You can get an accumulation such that you don’t die at the height of all of these events. So, if you think that one of these events would push the catecholamines to its highest level, that is not necessarily when the people die ... [M]arathon runners often die after they finish the marathon. And that’s actually the peak of when you’ve got probably got your highest rates of catecholamines and acidosis. And that affects other biochemistry as well. So, the accumulation of these things can go on for several minutes after the end of the struggle, the exertion, after any injuries are inflicted and it’s actually – it’s quite a common description in people dying after restraint that they [have] “gone quiet” and then they die.¹⁴⁹

[580] It is not entirely accurate to think of catecholamines as accruing to a breaking point where cardiac arrest occurs. In his audio interview, Dr. Milroy explained:

It’s almost not so much I think that the actual concentrations will go up, because they may go up or down, but there’s gonna be a point when the heart is going to become vulnerable in the presence of an underlying disorder. So, it’s – it may not be that it’s – it’s not so much that there is a, sort of, steady increase in catecholamines until there’s gonna be a point where you have a cardiac arrhythmia ... but it’s probably more that, you know, a combination of using up – of the heart becoming more vulnerable through the whole process of both catecholamine release, becoming acidotic and having changes in your

¹⁴⁷Dr. Milroy testified that Mr. Abdi was not in cardiac arrest when he was moving.

¹⁴⁸According to Dr. Milroy, the period of peril can last up to ten minutes after the exertion has ceased, although he thought the most dangerous time is in the early period.

¹⁴⁹Evidence of C. Milroy, June 5, 2019, pages 37 to 38; pages 40 to 42

electrolytes, so in potassium particularly, in the struggle. So, yes, there is a point at which you are going to be at your most vulnerable. And the irony is – or it may appear, it may not be at the height of the struggle, it may actually be slightly later when you have what is known as the period of peril.¹⁵⁰

[581] In examination in-chief, Dr. Milroy summarized this same idea and connected it to this case:

... [T]he effects of the catecholamines can be accumulative, the effects of the exertion, struggle, injuries can be, in some respects, accumulative and that it can all actually affect the person after they have, if you like, the height of all of those, the exertion [and] the struggle have ceased. And, in my – it is that – it is those factors that caused Mr. Abdi to die when he did because they were exerting their effects upon a heart with a compromised blood supply because of the coronary artery atheroma.¹⁵¹

[582] In his Post-mortem Report, Dr. Milroy opined that the medical cause of the cardiac arrest that led to Mr. Abdi's death was the underlying coronary artery atheroma, while the mechanisms that brought about the cardiac arrest were the struggles and physical exertion along with the physiological effects of the facial injuries. He continued: "But for the physical exertion, struggle and facial injuries Mr. Abdi would not have sustained the cardiac arrest when he did."¹⁵²

[583] Dr. Milroy framed the main post-mortem finding as "significant coronary artery atheroma in the setting of physical exertion and restraint with evidence of blows/impacts to the head and torso and the upper and lower limbs." He gave the cause of death as "hypoxic brain damage as a consequence of the cardio-respiratory arrest due to the underlying coronary artery atheroma with struggle, physical exertion and facial injuries as contributing factors."¹⁵³

[584] During examination in-chief, Dr. Milroy gave his "bottom line" about the cause of death:

So, really the bottom line of this is the principal reason Mr. Abdi died when he did was he had significant underlying coronary artery atheroma that put him at risk of a heart attack, frankly, at any time, but in this case we know that there were factors that would lead to an increase in these catecholamines and they were struggle, physical exertion and facial

¹⁵⁰Exhibit UU – Transcript of Audio Interview, pages 6 to 7 [Emphasis added]

¹⁵¹Evidence of C. Milroy, June 5, 2019, pages 38 to 39

¹⁵²Exhibit 130 – Post-mortem Report, page 21, paras. 27 to 28

¹⁵³Exhibit 130 – Post-mortem Report, page 18 (para.14), page 21 (para. 30), page 22 (para. 41)

injuries which is why I put them in as contributing factors, but they don't cause coronary artery atheroma, which is why they're in part – not [in] part one.¹⁵⁴

[585] While people in restraint settings often die after they have “gone quiet”, it is the events that precede the “going quiet” that precipitate their death. In Mr. Abdi's case, it was Dr. Milroy's view that “... the maximal stress event on him and the lactic acidosis and probably changes in other chemicals was taking place in the 10-minute period before he stopped moving.”¹⁵⁵

[586] The “contributing factors” that would have raised Mr. Abdi's catecholamines were “essentially, all the events that preceded the cardiac arrest.” This included the struggle in the coffee shop, the physical exertion after the coffee shop, and the pepper spray (although Dr. Milroy was not clear on whether the spray landed or if it had any effect¹⁵⁶). He continued:

That's all part of the struggle and physical exertion that has already happened. Then there is an additional struggle, physical exertion, and sustaining of facial injuries. All of those were contributing factors, but as I have already said, can I tease [them out] separately, I can't. And from a medical point of view, it has to be said that people can die without all of those factors being present, but some of them being present.¹⁵⁷

[587] As Dr. Milroy suggested in this answer, it is not possible from a pathology point of view to isolate a particular “contributing factor” and say that its presence was necessary for Mr. Abdi to have gone into cardiac arrest and died. Using the facial injuries as an example, he testified:

... [I]s it possible that he was going to die before the facial injuries were inflicted, I think the answer you have to say it's possible that there was a sufficiency in the struggle and the exertion up to that point because we know that the biochemical changes can continue for a period after.

[...]

So that's why I say, there may be a sufficiency in the physical exertion, there may be a sufficiency in the physical exertion and the struggle, but there can also be a sufficiency in the, if you like, in someone sustaining injuries, facial injuries, which would be, you know, more extensive than you can see in these sorts of confrontations. From a pathology point of

¹⁵⁴Evidence of C. Milroy, June 4, 2019, page 60

¹⁵⁵Evidence of C. Milroy, June 5, 2019, pages 41 to 42

¹⁵⁶Dr. Milroy testified, however, that even if there was no apparent response, one would still expect the pepper spray to be a noxious stimulus.

¹⁵⁷Evidence of C. Milroy, June 5, 2019, pages 35 to 36

view I can't separate them out, but I acknowledge that other situations you don't require them...¹⁵⁸

[588] Dr. Milroy made the same point during his audio interview. Counsel for the SIU referred him to the part of his report where he had said, "But for the physical exertion, struggle and facial injuries Mr. Abdi would not have sustained the cardiac arrest when he did." Counsel asked whether it was possible to isolate these "individual catecholamine stimulating physical events." Dr. Milroy answered:

Can I say that he would not have sustained the cardiac arrest just from running away up to the point – let us assume that all that happened was he had the struggle in the café, he ran away, he was pepper sprayed and before he was confronted by the police outside 55 Hilda, would that of itself potentially have been sufficient for him to go into cardiac arrest? The answer is yes, it was.

[...]

Then if you say, well, if we say that – and I'm segmenting this deliberately, could I say it then must logically follow, well it – the confrontation when he was upright, the running and the confrontation when he was upright, could that have been sufficient for him to go into cardiac arrest, the answer is yes. Then if you want the next stage, it logically follows when he's taken to the ground and he's struggling and he's hit on the back of the thigh but he's not been hit in the head area at that stage, when he's on the ground, would he still have been at risk of going into cardiac arrest, the answer is yes.

[...]

In other words, can I say but for the blows to the face he would not have died, the answer is, no, I cannot say that. There is sufficient physiological stress in all the events up to that point to account for his death. You do not have to add in the facial to say that death must – it would have required the facial injuries for him to have died.¹⁵⁹

[589] Later in the audio interview, SIU counsel asked what role, if any, the addition of a further catecholamine release would play if the person was already "at this hypothetical level of sufficient catecholamines that would have resulted in cardiac arrest." Dr. Milroy explained:

Well ... this is more logic than it is ... physiology. If you've reached a point where you're going to have a cardiac arrest, additional blows

¹⁵⁸Evidence of C. Milroy, June 5, 2019, pages 39 to 40

¹⁵⁹Exhibit UU – Transcript of Audio Interview, pages 8 to 10 [Emphasis added]

aren't gonna make any difference. Is it possible that you haven't quite reached it and the blows just add a bit more? Yes, it is. That's why I've put them in the cause of death. But equally I – I recognize that there is a causation issue in the sense that what parts of those were necessary as opposed to which parts were potential contributors.¹⁶⁰

[590] During cross-examination, Dr. Milroy agreed there were many factors at play with respect to the rise of catecholamines, and that Mr. Abdi may have died at any time without police intervention. The catecholamines could have started in the Bridgehead and been building when Mr. Abdi was outside, and it is possible he had reached the “point of no return” before Constable Montsion arrived at the scene. Dr. Milroy testified:

The effects of the catecholamines and the other, and the exertions, the point [I] was making, could have occurred before we see the police officers, and I use the plural deliberately, before we see the police officers in the video at 55 Hilda.¹⁶¹

[591] In reexamination, Dr. Milroy elaborated on the idea of the “point of no return”:

Well, I mean the point is that the point of no return is – are really possibilities. And, that's why I have to say it's possible that there was a sufficiency of, uh, his stress effects upon his heart and then the build-up of the lactic acidosis. That could, I mean we know that can occur just from physical exercise. It doesn't require a struggle. Nor does it require injuries. But, the fact that there are all of these elements means that it's not possible to, with any certainty, to include or exclude them. So, from a medical point of view it is, I think, it is correct to say these are the stresses that were present but equally I have to accept that you don't have to have them all present for there to be a sufficiency to bring about death ... In other words, I can't say with certainty that they did and I can't say with certainty that they didn't contribute.¹⁶²

[592] Crown counsel then asked Dr. Milroy to elaborate on his use of the word “potentially” in one of his answers from his audio interview (quoted at para. 588, above).¹⁶³ Dr. Milroy testified:

Because, I cannot be certain that the simple exertion was enough that in the running away, but it could be. It's one of the possibilities. And, I'm repeating this but I can't separate out the factors from a pathology point of view with certainty. But, I do know that in, in, other situations

¹⁶⁰Exhibit UU – Transcript of Audio Interview, pages 12 to 13 [Emphasis added]

¹⁶¹Evidence of C. Milroy, June 6, 2019, pages 92 to 94

¹⁶²Evidence of C. Milroy, June 6, 2019, pages 95 to 96 [Emphasis added]

¹⁶³See, also, Dr. Milroy's use of the word “potential contributors” in the passage quoted at para. 589, above.

not all of the elements that are present in this case are required for someone with this degree of heart disease to go into cardiac arrest.¹⁶⁴

[593] Mr. Shallow also asked Dr. Milroy whether, assuming Mr. Abdi had reached the “point of no return”, the injuries could have accelerated his death. This led to the following exchange:

A. ... so if I’ve understood that question, we have a point of no return but there is going to – but if you like he would have died after 10 minutes but the excess may have pushed that to 5 minutes, as an example?

Q. Sure. Yes.

A. I suppose that’s possible. Yes. Although, I mean, I think that the point is that, yeah, the more physical and emotional and all the stresses, then it’s likely it would have been, it’s probably likely it would have been earlier. Although this is somewhat speculative.

Q. Okay. And, we don’t want you to speculate.

A. No.¹⁶⁵

Psychotic Illness and Excited Delirium

[594] In his Post-mortem Report, Dr. Milroy noted that people with a psychotic illness “may be more vulnerable to sudden death during restraint.”¹⁶⁶ This, he explained at trial, is probably attributable to the fact that some antipsychotic drugs can alter the cardiac rhythm cycle which can produce an abnormal heart rhythm.

[595] During cross-examination, Mr. Edelson raised the subject of Excited Delirium. Dr. Milroy had not addressed this issue in his report, nor was it discussed in his audio interview or his examination in-chief.

[596] When the topic was first introduced, Dr. Milroy testified that Excited Delirium is “a highly controversial area both for the entity and for how it, it’s being dealt with and how our knowledge of it has progressed over the last 30 odd years.” The controversy, he later explained, lies in its “definitions” as well as in the fact that some medical organizations do not specifically recognize it. However, both the National Association of

¹⁶⁴Evidence of C. Milroy, June 6, 2019, pages 96 to 97

¹⁶⁵Evidence of C. Milroy, June 6, 2019, page 95

¹⁶⁶Exhibit 130 – Post-mortem Report, page 20 (para. 22)

Medical Examiners (NAME) and the American Association of Emergency Room Physicians recognize it.¹⁶⁷ Dr. Milroy testified:

And, the reason why I think we recognize it and the emergency room physicians recognize it is because we're the people that come into contact with the entity.

[597] Dr. Milroy is satisfied Excited Delirium exists as a medical disorder that requires sedation and supportive treatment. Although it has not been "a hundred percent defined", there are, he explained, certain criteria:

So, there's a number of criteria and it's said, I think there are ten listed, I can't remember off the top of my head, but they said if you've got six then we would classify that as excited delirium.¹⁶⁸

[598] On Dr. Milroy's evidence, the criteria include:

- having a psychotic illness;
- inappropriate dress;
- running into traffic;
- looking at shiny objects in mirrors;
- running into glass;
- superhuman strength;
- unresponsiveness to commands;
- not reacting to pepper spray;
- sweating and feeling hot to touch.

[599] Dr. Milroy agreed that people with Excited Delirium are at risk of death in police custody situations. The exact figures, however, are not known: some people die; some don't.

[600] Dr. Milroy's final answer during cross-examination included the following:

¹⁶⁷NAME is the North American forensic pathology association. Dr. Milroy has served on NAME's board and edited its official journal.

¹⁶⁸Evidence of C. Milroy, June 6, 2019, page 66

... [I]f His Honour were to accept that this person was in excited delirium then there would be, it would be, it would have to be stated there was a possibility he was going to die once he reaches a state that we would consider excited delirium. Although, um, and obviously the more physical activity that you have the greater the risk to you. But, as I've said it – and that's a factor I think it's unlikely from my descriptions of what I've heard that he was, he had reached that point¹⁶⁹ before the bridgehead. I think it was probably, the likelihood, it was after. But, I certainly acknowledge, and I think I always have done, it could be before you see the police officers at 55 Hilda.¹⁷⁰

[601] In reexamination, Dr. Milroy testified that for people “who are behaving like Mr. Abdi was”, there is a risk of sudden death. Regardless of the label one attaches – “Excited Delirium”, “psychotic illness”, “substance abuse” – what is relevant is that “these people are at risk of sudden death.”

[602] Dr. Milroy added that a death is typically ascribed to Excited Delirium when there is no finding of a specific cause of death at autopsy. In this case, he explained,

We clearly have a specific cause of death at autopsy which is another reason why people may not formerly [*sic*, formally?] classify this as an excited delirium death even though he may have exhibited some of the features of excited delirium.¹⁷¹

CAUSATION IN HOMICIDE CASES

[603] Section 222(1) of the *Criminal Code* says that a “person commits homicide when, directly or indirectly, by any means, he causes the death of a human being.”¹⁷²

[604] A single standard of causation applies to all homicide cases. The Crown must prove beyond a reasonable doubt that the accused's acts were a significant contributing cause of death.¹⁷³

[605] Causation has two components: factual causation and legal causation. Juries are not asked, however, to determine these issues separately. Instead, guided by a single instruction that seeks to convey the requisite degree of factual and legal

¹⁶⁹By “that point”, Dr. Milroy was referring to the “point of no return.”

¹⁷⁰Evidence of C. Milroy, June 6, 2019, pages 93 to 94

¹⁷¹Evidence of C. Milroy, June 6, 2019, pages 104 to 105

¹⁷²Under s. 222(5)(a) and (b) of the *Code*, a person commits “culpable homicide” when he or she causes the death of a human being by means of an unlawful act or by criminal negligence.

¹⁷³*R. v. Maybin*, 2012 SCC 24 at paras. 1, 5, 28, *R. v. Nette* (2001), 158 C.C.C. (3d) 486 at paras. 71-72, 88 (S.C.C.)

causation, the jury decides whether the accused's actions significantly contributed to the victim's death.¹⁷⁴

[606] Factual causation is concerned with how the victim came to die in a medical, mechanical, or physical sense and with the contribution of the accused to that result. The inquiry is inclusive in scope. A “but for” analysis of the chain of events culminating in the victim's death usually answers the factual causation question. If the victim would not have died when he or she did but for the act of the accused, that act is a factual cause of death.¹⁷⁵

[607] Legal or “imputable” causation is about who among those who have factually caused a death should be held legally responsible for the death. It is a narrowing concept that seeks to funnel a wider range of factual causes into those that are sufficiently connected to the harm to warrant responsibility in the eyes of the criminal law. Legal causation is not a mechanical or mathematical exercise; it is based on concepts of personal responsibility and involves normative and moral judgments.¹⁷⁶ As the Ontario Court of Appeal explained in *Romano*:

The legal causation inquiry recognizes that there are cases where the factual causation test is facially met, but where the accused should not be held criminally responsible because circumstances affect the level of moral fault or blameworthiness of the accused, making it inappropriate to treat his contribution to the consequence as “significant.”¹⁷⁷

[608] There may be several contributing causes of death. To prove factual causation, the Crown need not establish that the accused's acts were the only cause or even the direct, immediate, predominant, or most significant cause. What is required is proof that the accused's acts were a “significant contributing cause”, which is another way of saying they were at least a contributing cause outside the *de minimus* range. The Latin term means that the contribution cannot be minimal.¹⁷⁸

[609] In *McDonald*, the Ontario Court of Appeal explained that

¹⁷⁴*Nette* at para. 46, *R. v. Talbot*, 2007 ONCA 81 at para. 81, *R. v. McDonald*, 2017 ONCA 568 at para. 139

¹⁷⁵*Maybin* at paras. 15, 21, *Nette* at para. 44, *Talbot* at para 79, *R. v. J.S.R.*, 2008 ONCA 544 at para. 17, *McDonald* at para. 138, *Pocock*, 2015 ONCA 212 at para. 14, *R. v. Romano*, [2017] O.J. No. 5703 at paras. 26-28 (C.A.)

¹⁷⁶*Maybin* at para. 16, *Nette* at paras. 45, 83, *J.S.R.* at paras. 17, 33, *R. v. Kippax*, 2011 ONCA 766 at para. 26, *Talbot* at para. 80

¹⁷⁷*Romano* at para. 29

¹⁷⁸*Maybin* at paras. 1, 5, 14, 20, *Nette* at paras. 71-72, 88, *Kippax* at para. 24, *J.S.R.* at para. 14, *McDonald* at paras. 139, 152, *R. v. Manasseri*, 2016 ONCA 703 at para. 189, *R. v. Malkowski*, 2015 ONCA 887 at para. 14, *Romano* at para. 27, *R. v. Smithers*, [1978] 1 S.C.R. 506 at 519, 522, *R. v. Worrall*, [2004] O.J. No. 3463 at para. 215 (S.C.J.)

... merely because other factors, conditions or circumstances may have contributed to the death of a deceased, they are not always legally significant in establishing the guilt of a person charged with some crime of culpable homicide. It is only significant, and exculpatory, if independent factors, occurring before or after an accused's conduct, legally sever the link that ties the accused to the prohibited result. To prove guilt, what must be established, and nothing more, is that the accused's conduct was a significant contributing cause of the death of the deceased. Not the only cause. Or even the most probable cause. But a significant contributing cause.¹⁷⁹

[610] Causation does not ask whether the victim would have died in any event. As the Ontario Court of Appeal put it in *Bottineau*:

Everyone will die. Causation asks whether the conduct of the accused was a significant factor contributing to the victim's death at the time and for the reason the victim in fact died. If the accused's conduct shortens the victim's life by a minute, the accused has caused the victim's death for the purposes of the law of homicide.¹⁸⁰

[611] A significant contributing cause can be something that exacerbates an existing fatal or potentially fatal condition, thereby accelerating death.¹⁸¹ The "thin-skulled" rule, which requires that the wrongdoer take their victim as they find them, applies in homicide prosecutions. Once the Crown has proved that the accused's acts were a significant contributing cause, it is immaterial that death was in part caused by an unforeseeable preexisting physical sensibility.¹⁸²

[612] Although not required, expert opinion evidence is admissible in proof of factual causation in a prosecution for homicide. The work of the expert is purely diagnostic. We do not require medical witnesses to distinguish between causes or conditions, or to rank causes based on their relative significance or contribution to death.¹⁸³ It is also important not to confuse medical diagnosis with legal causation, nor should legal causation be equated with medical certainty.¹⁸⁴ As the Supreme Court of Canada wrote in *Nette*:

The difficulty in establishing a single, conclusive medical cause of death does not lead to the legal conclusion that there were multiple operative causes of death. In a homicide trial, the question is not what or who

¹⁷⁹*McDonald* at para. 152

¹⁸⁰*R. v. Bottineau*, 2011 ONCA 194 at para. 67

¹⁸¹*Talbot* at para. 81, *McDonald* at paras. 140, 153, *R. v. Hong*, 2019 ONCA 170 at paras. 23, 29

¹⁸²*McDonald* at paras. 139, 153, *Smithers* at 519-22, *R. v. Shanks*, [1996] O.J. No. 4386 (C.A.)

¹⁸³*Manasseri* at paras. 186, 192-93, *Smithers* at 518, *R. v. Biddersingh*, 2020 ONCA 241 at para. 69

¹⁸⁴*Manasseri* at para. 194, *R. v. Fiorino*, 2008 ONCA 568 at paras. 46, 49, *McDonald* at para. 154, *R. v. Dhillon*, [2019] O.J. No. 1019 at para. 11 (C.A.), *R. v. Cribbin*, [1994] S.C.J. 477 at para. 36

caused the death of the victim but rather did the accused cause the victim's death. The fact that other persons or factors may have contributed to the result may or may not be legally significant in the trial of the one accused charged with the offence.¹⁸⁵

[613] Expert evidence is neither dispositive nor essential. The trier of fact can rest a finding of factual causation on any evidence that reasonably supports the conclusion. As with any issue in a criminal trial, the trier of fact in a homicide case must use common sense and consider all the evidence, both expert and non-expert, in deciding whether the Crown has proved that the accused's acts were a significant contributing cause of death.¹⁸⁶ As with any witness, the trier of fact need not defer to expert testimony and is free to accept or reject any part of it. The issue of causation is "for the jury and not the experts."¹⁸⁷

ANALYSIS OF ISSUE THREE

[614] It is the Crown's burden to prove beyond a reasonable doubt that Constable Montsion's acts were a significant contributing cause of the fatal cardiac arrest.

[615] In his Post-mortem Report, Dr. Milroy wrote: "But for the physical exertion, struggle and facial injuries, Mr. Abdi would not have died when he did."¹⁸⁸

[616] This statement cannot, however, be seen in isolation. In his audio interview and at trial, Dr. Milroy explained that it is possible Mr. Abdi had reached the point of return and was going to die before the facial injuries. The exertion and stress from the events preceding Constable Montsion's blows may have been sufficient to cause the fatal cardiac arrest. Once again:

In his audio statement:

In other words, can I say that but for the blows to the face he would not have died, the answer is, no, I cannot say that. There is sufficient physiological stress in all the events up to that point to account for his death. You do not have to add in the facial injuries to say that death must – it would have required the facial injuries for him to have died.¹⁸⁹

[...]

¹⁸⁵*Nette* at para. 77, *Maybin* at para. 21

¹⁸⁶*Manasseri* at para. 193, *Pocock* at paras. 15-16, 18-19, *McDonald* at paras. 140, 154, *Hong* at para. 28, *Shanks* at para. 10, *Talbot* at para. 83, *Smithers* at 515, *R. v. Knight*, [2002] A.J. No. 1022 at paras. 24-26 (C.A.)

¹⁸⁷*Smithers* at 518, *Hong* at para. 23, *Biddersingh* at paras. 66, 69

¹⁸⁸Exhibit 130, Post-mortem Report, page 21, para. 28

¹⁸⁹Exhibit UU – Transcript of Audio Interview, page 10 [Emphasis added]

If you've reached a point where you're going to have a cardiac arrest, additional blows aren't gonna make any difference. Is it possible that you haven't quite reached it and the blows just add a bit more? Yes, it is. That's why I've put them in the cause of death.¹⁹⁰

In reexamination at trial:

But, the fact that there are all of these elements means that it's not possible to, with any certainty, to include or exclude them. So from a medical point of view it is, I think, it is correct to say these are the stresses that were present but equally I have to accept that you don't have to have them all present for there to be a sufficiency to bring about death ... In other words, I can't say with certainty that they did and I can't say with certainty that they didn't contribute.¹⁹¹

[617] On Dr. Milroy's evidence, the nasal fractures could have contributed to Mr. Abdi's death; however, he could not "tease out" this or any of the potential contributing factors and say, from a pathology point of view, that it was necessary for Mr. Abdi to have died.

[618] In short, it was Dr. Milroy's opinion that, from a medical perspective, the nasal fractures may have been a factor that contributed to the fatal cardiac arrest, but he could not be certain.

[619] The Crown's position comes down to this:¹⁹²

- It was Dr. Milroy's medical opinion that the nasal injuries could have contributed to the fatal cardiac arrest;
- The medical evidence does not stand alone. It must be combined with the non-medical evidence, including the evidence about the nature and number of the blows delivered by Constable Montsion; Mr. Abdi's demeanour and conduct before the blows; and the proximity in time between the blows and Mr. Abdi's going into cardiac arrest;
- Assessment of all of the evidence – both medical and non-medical – leads to the conclusion that the nasal injuries were a significant contributing cause of death beyond a reasonable doubt.

[620] I am not able to accept this submission.

¹⁹⁰Exhibit UU – Transcript of Audio Interview, pages 12 to 13 [Emphasis added]

¹⁹¹Evidence of C. Milroy, June 6, 2019, page 96

¹⁹²Crown Written Submissions, paras. 126-27, 129; see also *McDonald* at paras. 27, 155, *Pocock* at paras. 11-12, 16-18

[621] The interaction in the alcove was part of a series of events spanning several minutes. Recalling the broad timeline:

- The initial dispatch for the disturbance at the Bridgehead was at 9:37 a.m.;
- The foot chase with Constable Weir began at about 9:43 a.m.;
- Constable Montsion arrived on scene at about 9:46 a.m.;
- Constable Weir radioed that they had “one in custody” at 9:48 a.m.

[622] There is substantial evidence showing that for several minutes before Constable Montsion delivered the first of the impugned blows, Mr. Abdi was involved in considerable exertion and stress. For example:

- In the street, after making a beeline to S.L.’s car, he grabbed and forcefully squeezed her breast while holding her hand against the steering wheel;
- In the Bridgehead, Mr. Abdi was using his body to pin a person to the bench while two men implored him to get off;
- Michael Rowe grabbed Mr. Abdi by the bicep and then by the neck¹⁹³ and pulled him off the person on the bench, causing Mr. Abdi to pop off and fall to the floor with his head bouncing three or four inches off a chair on the way down;¹⁹⁴
- Once outside, Mr. Abdi was thrusting against a woman at the bike racks and trying to pull her away from her bicycle. When Mr. Rowe intervened, he took two firm steps and pushed Mr. Abdi by the chest into the bike racks;¹⁹⁵
- On the evidence of off-duty paramedic Matthew Rousselle, the men who had Mr. Abdi corralled at the bike racks were getting pretty physical with him. A couple were “kind of landing some punches on him.”¹⁹⁶ Mr. Abdi was sweating profusely and hyperventilating. Mr. Rousselle sensed he

¹⁹³According to Dr. Milroy, Mr. Rowe’s description of his armlock hold would account for bruising to muscles in the area of Mr. Abdi’s chest and neck.

¹⁹⁴In his Post-mortem Report, Dr. Milroy said the sub-scalp bruising of the left frontal, temporal, and parietal scalp could have been caused during the struggle in the coffee shop.

¹⁹⁵Dr. Milroy testified that subcutaneous bruising on Mr. Abdi’s chest could be consistent with the push described by Mr. Rowe, bearing in mind the effect of the anticoagulant Mr. Abdi received at the hospital.

¹⁹⁶When asked where the punches landed, Mr. Rousselle testified, “More kind of chest, maybe one or two head area, none really in the face.” With gestures, he described the “[u]pper chest between like the pectoral area” and also said there may have been “a couple on the arms”: Evidence of M. Rousselle, September 11, 2019, pages 18 to 19

was in some kind of distress; he was concerned about the rate of his breathing;¹⁹⁷

- The pursuit by Constable Weir along Wellington covered a couple of hundred metres. For some of this time, Mr. Abdi was running;
- During the foot chase, Mr. Abdi picked up a garbage can lid, struggled to pull a sign out of the cement, and then tried to lift a construction sign by its base. For part of his run, he was carrying an awkwardly-shaped 30-pound construction weight over his head and lowering it from time to time towards the officer. The weather was warm. When Constable Weir first approached Mr. Abdi, he saw that his whole body was wet with sweat;
- Before arriving at 55 Hilda, Constable Weir used significant force on Mr. Abdi. He kicked the back of his knee; he pushed him from behind, causing Mr. Abdi to fall to the ground between the curb and a parked car; he pepper sprayed him twice in the eyes; and he struck him twice in the back of the thigh with his ASP;
- Once at 55 Hilda, Constable Weir continued to use force. He kned Mr. Abdi in the mid-section as hard as he could, struck him three times with his ASP, and kicked him once in the upper thigh/hip area.

[623] Dr. Milroy's evidence supports the view that the effects of all these events – *i.e.*, catecholamine release, lactic acidosis, changes in potassium levels – were underway as Constable Montsion pulled up in front of 55 Hilda, and it is possible Mr. Abdi had reached the point where the fatal cardiac arrest was going to happen before the first of the impugned blows. This is significant.

[624] I have considered the issue of timing. It is impossible to pinpoint the precise moment when Mr. Abdi went into cardiac arrest, but it is safe to say it happened within minutes of Constable Montsion's arrival on scene at 9:46 a.m.¹⁹⁸ We know that at 9:57 a.m., paramedics found Mr. Abdi in cardiac arrest and VSA. There is also the evidence of Constable Montsion's radio transmission at 9:50 a.m. in which he requested a bump-up in the call's priority, saying that Mr. Abdi had lost consciousness.

¹⁹⁷I do not ignore Constable Weir's radio transmission at 9:42 in which he said the man "seems to have calmed down" or Mr. Abdi's demeanour during his recorded conversation with Dr. Courtney.

¹⁹⁸In his Post-mortem Report, Dr. Milroy seemed to link this event to when Mr. Abdi stopped moving. As I assess the video, the last visible movement in his body is at about 2:07, which (according to the QuickTime counter) is roughly 73 seconds after the last of the blows on the ground. I am highly cautious, however, in making this assessment given the limitations of the video and the subtleties of movement in a human body. I also recall Constable Weir's unchallenged evidence that Mr. Abdi was still rigid when he brought him gauze, and that it was not until the paramedics arrived that he felt his body lose power and go limp.

[625] In reflecting on the issue of timing, however, I cannot overlook the fact that Constable Montsion's acts were part of a series of events that spanned several minutes. I come back to Dr. Milroy's evidence: all of the other stress events, separate and apart from the impugned blows, were exerting their effects in the minutes before Constable Montsion's arrival, and it is possible Mr. Abdi had reached his most vulnerable state, where cardiac arrest was going to happen, before the blows were delivered.

[626] I have considered the nature of Constable Montsion's blows. These were blows with a hand covered by gloves with hard knuckles. The standing blows were delivered with a closed fist. As a matter of common sense and human experience, a punch with a hard-knuckled glove would cause more pain than a blow with a bare hand. I have assumed for this discussion that at least one of the standing blows caused comminuted nasal fractures and a laceration. The blows on the ground were also significant, although I am unable to find they were delivered with a closed fist, and I observe again that there were no injuries to the left side of Mr. Abdi's face. In any event, the blows and the injuries, seen as a whole, would have caused pain and a release of catecholamines.

[627] I have looked at Mr. Abdi's conduct before and after Constable Montsion's blows. It is true he went into cardiac arrest within minutes of the blows, and that before Constable Montsion's arrival at 55 Hilda, Mr. Abdi had been walking, talking, running, and engaging in various physical acts. At the same time, however, this is not a case where there was a dramatic physical change immediately following the alleged unlawful acts¹⁹⁹. Rather, after both sets of blows, Mr. Abdi continued to struggle, with some degree of success, against two relatively large police officers, even when they had him face down on the ground. And once again, I cannot lose sight of Dr. Milroy's evidence that the other stress events, independent of Constable Montsion's acts, had been exerting their effects for several minutes and had possibly pushed Mr. Abdi to the point of no return before Constable Montsion's blows.

[628] When I step back and consider the evidence as whole, I am left with a reasonable doubt about whether Constable Montsion's acts were a significant contributing cause of the cardiac arrest that led to Mr. Abdi's death. I accept that they may have been, but I am unable to reach this conclusion on the criminal standard.

[629] I am also not satisfied beyond a reasonable doubt that Constable Montsion's acts were a significant contributing cause on the theory that they accelerated Mr. Abdi's death. When addressing a hypothetical about acceleration in reexamination, Dr. Milroy was equivocal²⁰⁰:

I suppose that's possible. Yes. Although, I mean, I think that the point is that, yeah, the more physical and emotional and all the stresses, then

¹⁹⁹Compare, for example, *Smithers, Pocock, and Hong*.

²⁰⁰See para. 590, above.

it's likely it would have been, it's probably likely it [the cardiac arrest] would have been earlier. Although this is somewhat speculative²⁰¹.

[630] In his audio interview, Dr. Milroy said:²⁰²

If you've reached a point where you're going to have a cardiac arrest, additional blows aren't gonna make any difference. Is it possible that you haven't quite reached it and the blows just add a bit more? Yes, it is. That's why I've put them in the cause of death.

[631] In my view, these passages, seen in the light of the evidence as a whole, cannot sustain a finding of causation beyond a reasonable doubt based on a theory of acceleration of death.

CONCLUSION ON ISSUE THREE

[632] After considering the medical and non-medical evidence as a whole, I am left in a state of reasonable doubt about whether Constable Montsion's acts caused Mr. Abdi's death.

[633] I need not address Excited Delirium or psychotic illness as potential causes of death. I will only say that I have concerns that the evidentiary record on these issues may invite speculation.

CONCLUSION

[634] The events of July 24, 2016, ending with Mr. Abdi's tragic death, have touched so many people in the Hintonburg community and beyond.

[635] The trial of Constable Montsion was long and difficult. My task throughout was to listen and reflect, with an open mind, on all of the evidence and the submissions of counsel. My only duty was to decide dispassionately, based on the admissible evidence and the applicable law, whether the Crown met its burden of proving Constable Montsion's guilt on each charge beyond a reasonable doubt.

[636] In the end, I am left with a reasonable doubt on each of the three main issues framed at the outset. I am not satisfied the Crown has proved on the criminal standard an unlawful act or criminally negligent conduct for the manslaughter count or an

²⁰¹Evidence of C. Milroy, June 6, 2019, page 95

²⁰²Crown counsel rely on this passage at para. 130 of their Written Closing Submissions under the heading "Acceleration."

unjustified assault on the other counts. I am also left with a reasonable doubt about whether Constable Montsion's acts caused Mr. Abdi's nasal injuries and, even if they did, whether those acts caused his death.

[637] I find Constable Montsion not guilty of all charges.

Signed

Justice R. Kelly