

 [R. v. A.S.D., \[2017\] B.C.J. No. 2757](#)

British Columbia and Yukon Judgments

British Columbia Supreme Court

Vancouver, British Columbia

T.A. Schultes J.

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Registry: Vancouver

**[2017] B.C.J. No. 2757** | 2017 BCSC 2487

Between Regina, and A.S.D., G.C.A.R., and L.Z.

(791 paras.)

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**Reasons for Judgment****T.A. SCHULTES J.****I. INTRODUCTION**

**1** In the early morning hours of May 17, 2015, 19-year-old Luka Gordic died as a result of being stabbed during an attack on him by a group of young men in the outdoor walkway of a shopping area in Whistler. A.S.D. ("A.D.") and G.C.A.R. ("G.R.<sup>1</sup>") are charged with manslaughter in relation to that incident, and L.Z. is charged with second-degree murder.

**2** May 17 was the Sunday of the Victoria Day long weekend. Mr. Gordic, the accused, and most of the non-police witnesses were current or former students of Burnaby high schools, and were in Whistler for the long weekend to party.

**3** The theory of the Crown is that the accused were part of a group that was enlisted to find and attack Mr. Gordic by Arvin Golic, who was angry with Mr. Gordic for remarks that he had made on May 16 about Mr. Golic's treatment of a former girlfriend.

**4** The evidence against A.D. and G.R. is circumstantial. The main elements are Mr. Gordic's DNA, which the Crown contends all came from his blood, being found on their footwear when they were arrested a short time after the attack, and G.R.'s DNA being found on a knife that was left at the scene.

**5** They deny participating in the attack, which they say was committed by other members of the large group that was in the area with them. They challenge the reliability of some of the forensic evidence that implicates them and offer innocent explanations for how it could have been placed in these potentially incriminating locations.

6 L.Z. was also arrested shortly afterwards, in the company of A.D. In addition to Mr. Gordic's blood on his clothing and on a knife in his pocket, there is evidence from witnesses that purports to identify him as a member of the attacking group and to link an item of his clothing that he was wearing when he was arrested to a person who was seen stabbing Mr. Gordic during the attack.

7 L.Z. concedes that the physical evidence is capable of showing that he stabbed Mr. Gordic, but says that he has no memory of any involvement in this incident because of his level of intoxication, which he contends deprived him of the necessary intent for murder. He also raises the question of whether the actions that can be attributed specifically to him demonstrate that intent, in light of the potential infliction of some of the stab wounds by another attacker and the failure of the police to pursue an avenue of investigation that could have revealed the use of another knife.

8 The attack on Mr. Gordic was observed by a group of young people with whom he had been socializing briefly in the walkway before the arrival of his attackers. In addition, there is a security video from La Cantina, a restaurant that is adjacent to his pre-attack position. That video captured him and his group, the arrival of the attackers who pursued him, his eventual return to that area after being stabbed, and his collapse from his injuries. An issue in the trial is whether any of the accused can be identified in the video and, if so, which figure each of them corresponds to. In their evidence, A.D. and G.R. identified themselves as figures in the video whose actions are inconsistent with having taken any role in the attack.

9 All three accused are under the jurisdiction of the *Youth Criminal Justice Act*, [S.C. 2002, c. 1](#) because they were 17 years old at the time they are alleged to have committed these offences. They have elected to have their trial in this Court. For criminal liability purposes, Mr. Golic was already considered an adult and he has been tried separately. To avoid any unconscious adoption of the evidence or findings in that case, I have deliberately not read the reasons for judgment resulting from it.

10 This case has been extremely thoroughly and capably presented and argued. I have obviously considered all of the evidence and submissions, but in an effort to produce a comprehensible judgment of a reasonable length, despite the extensive nature of both, I have attempted to focus on matters that are essential to the determination of the issues.

## II. CROWN EVIDENCE

### a. Overview of the Physical Setting

11 The relevant actions in this case took place in and around two sections of the Whistler town area that are described in the local map that was entered as an exhibit as Village North and Village Centre. (Village Centre was also sometimes referred to in the evidence as the "original" village.) These sections are adjacent to each other, divided by Village Gate Boulevard. As its name implies, Village North is located to the north. Both sections of the village contain stores, restaurants, and places to stay.

12 The attack on Mr. Gordic happened in a pedestrian walkway that is part of a shopping area in Village North called Marketplace, which consists of buildings, containing various businesses, that partly surrounding a roughly rectangular parking lot. This walkway leads south from the parking lot, between two buildings that form part of the perimeter of the rectangle, and comes out on Main Street.

13 Two important reference points in the walkway are a KFC restaurant on the west side near the entrance to it, which many of the witnesses used to orient their location before the attack, and the La

Cantina Restaurant on the opposite side of the entrance, from which, as I have said, the security video that depicts the beginning of the attack was taken.

**14** Besides Marketplace, the walkway, and Main Street, the other feature of Village North that figures prominently in the narrative is the Olympic Plaza, which is southeast of Marketplace. It contains a large sculpture of the Olympic Rings. Many of the witnesses described the area simply as "Olympic Rings" or "O-Rings".

**15** The significance of Village Gate Boulevard, which divides Village North and Village Centre, is that is the street along which all of the accused were arrested at some point shortly after the attack.

**16** The significance of Village Centre, south of Village Gate Boulevard, is that it contains businesses around which one of the Crown witnesses claims to have seen Mr. Golic, L.Z., and A.D., along with a group of unidentified males, looking for Mr. Gordic shortly before the attack.

**17** It is common ground that the accused, Mr. Golic, and others were staying for the long weekend in a rented unit of the Montebello Townhouses, which are to the north of Village North.

#### **b. Origins of the Dispute and Mr. Golic's Reaction**

**18** The Crown led evidence in this trial of Mr. Golic's animosity towards Mr. Gordic in the time leading up to the attack, both its origins and the way in which Mr. Golic subsequently expressed it, to show the nature of the plan to locate and assault Mr. Gordic that the Crown contends the accused were recruited into and ultimately participated in.

**19** The original dispute arose from an encounter between Mr. Gordic and a young man named Ramin on the afternoon of the 16th. Mr. Gordic and some of his friends were walking to a restaurant when they saw Ramin and a companion near the TD Bank in Marketplace. Jason Medina said that they knew Ramin and his companion, "Omid", to be friends of Arvin Golic.

**20** The details of the ensuing conversation that were given by the various Crown witnesses differ somewhat, but they all involved Mr. Gordic in some way asking Ramin to pass on to Mr. Golic that he should stop harassing Mr. Golic's former girlfriend, Devon Luksic.

**21** According to Mr. Medina, Mr. Gordic had previously learned that Mr. Golic had been seen yelling and swearing at Ms. Luksic in public.

**22** Most of the witnesses had Ramin agreeing in some manner to pass that request on. One can infer that it was passed on, because when Mr. Gordic and his friends arrived at the restaurant Mr. Medina began to receive calls on his phone from Mr. Golic, demanding to speak to Mr. Gordic.

**23** There is a lack of precision about the time of their restaurant attendance and the calls. Mr. Medina's phone records said that the first of these calls was at around 1:00 p.m.

**24** After talking to Ramin, Mr. Golic's understanding was that Mr. Gordic wanted to fight him. Mr. Medina unsuccessfully attempted to correct that misunderstanding. After several more calls from Mr. Golic to the same effect, Mr. Gordic overheard what was going on and asked to have the phone. He then spoke to Mr. Golic. Both Mr. Medina and Sangerth Suresh-Absalom, another friend who was eating with them, said that Mr. Golic was shouting so loudly on the phone that they could hear him.

**25** Several further calls between them then followed. The tenor of Mr. Gordic's end of the conversation, as overheard by Mr. Medina and Mr. Suresh--Absalom, as well as Stefan Puseljic, another friend, was that he was attempting to calm Mr. Golic down. A fourth companion, Deepak Parmar, only recalled him telling Mr. Golic to stop harassing Ms. Luksic.

**26** Mr. Medina and Mr. Suresh-Absalom recalled Mr. Gordic ultimately agreeing to meet Mr. Golic at the Olympic Rings. According to Mr. Medina, Mr. Gordic said he was only going to talk, whereas Mr. Suresh-Absalom maintained that Mr. Gordic had agreed to a fight using fists but no weapons. The distinction is not ultimately an important one.

**27** What is clear is that after finishing his meal Mr. Gordic, along numerous other friends who were also staying at Whistler and whom he and another companion at the restaurant had contacted, went to the Olympic Rings in anticipation of meeting with Mr. Golic and, I infer, whoever might accompany him.

**28** It is also clear that while the Gordic group, which consisted of about 10 people, was at the Olympic Rings, Mr. Golic did not actually appear, although some of the Crown witnesses described various numbers young men who may have been associated to him coming by. The common thread of those observations was Mr. Gordic communicating with these attendees that he did not want any trouble with Mr. Golic, although L.Z.'s counsel drew from Mr. Medina in cross-examination that Mr. Gordic had characterized Mr. Golic's refusal to attend in insulting terms when speaking to them. Steven Potter, another friend of Mr. Gordic's, tried to reach Mr. Golic and L.Z., whom he knew, by phone while the group was waiting, presumably in an attempt to smooth things over, but had no success. The Gordic group left after about 20 minutes.

**29** It appears that Mr. Golic may eventually have gone to the Rings, because after Mr. Gordic arrived at the place he was staying, he began to receive more phone calls from Mr. Golic on Mr. Medina's phone. Mr. Medina said he initially attempted to field the calls and explain that they were not there to fight, but Mr. Gordic then took over. He put the calls on speaker, so his other friends who were present were able to hear Mr. Golic. Mr. Golic would call back repeatedly after they hung up on him. They answered about every second call, according to Mr. Medina. Mr. Golic was yelling and accusing them of cowardice for failing to show up at the Rings. After some initial attempts to emphasize that they were all in Whistler for a good time rather than for fighting, Mr. Gordic pointed out in forceful and profane terms that he was much bigger than Mr. Golic and would prevail in any fight between them. Mr. Golic then insulted Mr. Gordic's family, to which Mr. Gordic responded with further insults of his own. Eventually Mr. Medina turned off his phone.

**30** The other Crown witnesses present (except for Mr. Parmar who, mistakenly it appears on all of the other evidence, believed that the dispute was resolved by these calls) described Mr. Gordic emphasizing to Mr. Golic that things should be left as they were and everyone should have a good weekend, to which Mr. Golic continued to respond in an angry and threatening manner.

**31** The significance of all of this to the Crown's efforts to link the accused's subsequent actions to Mr. Golic's motive, is that it seems clear that Mr. Golic remained unappeased after these conversations.

**32** There was additional evidence of these state of mind on Mr. Golic's part. Niloufar Daliri, a friend of Devon Luksic's, who was spending the May long weekend with her back in the Lower Mainland, was aware of ongoing concerns about harassment of Ms. Luksic and threats towards her by Mr. Golic following the end of their relationship. On the Saturday afternoon, Mr. Golic made some phone calls to

Ms. Luksic that contained references to Luka Gordic. Ms. Daliri had not spoken with Ms. Luksic about Mr. Gordic before, as he was not part of their social group.

**33** Although the calls to Ms. Luksic were not on speaker, Ms. Daliri was still able to hear their content, because she and Ms. Luksic were alone in a room together. Mr. Golic referred to some people kicking at his door and asked if Mr. Gordic was involved. He also said he had been confronted by a bunch of people, which had initiated the conflict he was describing. He asked "which one of the . . . guys is it? Is it Luka?" and gave other names as well. He made threats to harm these people, as well as Ms. Luksic. Ms. Daliri described this as the kind of thing he was always saying. When asked specifically what Mr. Golic said in relation to Mr. Gordic, she said, "He's like 'I'm gonna fucking stab him,' or 'I'm gonna kill him . . .'" She and Ms. Luksic did not take these comments seriously, because he said similar things in relation to Ms. Luksic so frequently.

### **c. Efforts to Locate Mr. Gordic**

**34** In an attempt to further demonstrate Mr. Golic's intentions, there was also evidence, the credibility and reliability of which was vigorously challenged by the defence, that he and his group later went looking for Mr. Gordic during the period leading up to the assault.

**35** Christian Guzman-Koenigbaur was another friend of Mr. Gordic's. He was staying for the weekend in a hotel in Village Centre and he had arrived in the early afternoon of Friday the 15th. Although it precedes the dispute that is said to provide the motive for the attack, it is relevant to the way Mr. Guzman-Koenigbaur's evidence unfolds and the attacks on his credibility that he claimed to have seen Mr. Golic, A.D., and L.Z. together on Friday afternoon, as part of a group of 13 to 15 people who were crossing the bridge over Village Gate Boulevard, near a restaurant called the Mongolie Grill in Village Centre. He knew Mr. Golic from having attended the same high school and he knew A.D. and L.Z. through mutual friends. He did not speak to any of them at that point. His observation of L.Z. was that he seemed angry.

**36** He testified that on Saturday night, around 10:00 or 11:00, he encountered Mr. Gordic in the parking lot of Marketplace. Mr. Guzman-Koenigbaur was with his girlfriend and Mr. Gordic was with Mandeep Randhawa and Farez Maleky, whom Mr. Guzman-Koenigbaur also knew, as well as another person. Mr. Guzman-Koenigbaur and his girlfriend were heading towards the Olympic Rings, which is just southeast of Marketplace, to meet a friend. Mr. Gordic was "heading towards the outside of the village". They spoke for about 20 minutes. Mr. Guzman-Koenigbaur and his girlfriend then stopped near the playground in the Olympic Rings to wait for his friend.

**37** At that point, a group of about 13 or 14 people came by, including Mr. Golic, A.D., and L.Z. He believed that they had recognized his voice when he called out to his friend, causing them to come over to him.

**38** Mr. Golic asked him two or three times where Mr. Gordic was. He declined to provide that information or say when he had last seen him. By this point, it was "probably" 20 to 30 minutes since he and Mr. Gordic had last been together.

**39** Mr. Golic and his group then headed towards the "original village" - that is, towards Village Centre. He remained at the Olympic Rings for about 20 to 30 minutes before he and his companions, now including his friend and her boyfriend, headed in the same direction, towards his hotel.

**40** He saw that group again by the Mongolie Grill, which is at the northernmost end of Village Centre. He had no interaction with any of them at this time. In cross-examination by A.D.'s counsel, he elaborated

they were on his left-hand side and he just walked through the group without stopping to talk. He was adamant that the group consisted of the same members he had seen at the Olympic Rings and that none of them had "discarded," (by which it seems clear he meant "departed,") in the meantime.

**41** In cross-examination by L.Z.'s counsel, Mr. Guzman-Koenigbaur denied the suggestion that during the lunch break, when Crown counsel had come into the room where he was waiting to be called as a witness, they had talked about his evidence with him. Crown counsel made a subsequent admission of fact that during that time they had asked him if he was sure that it was Mr. Gordic the Golic group was looking for on Friday night, as there is evidence that Mr. Gordic was not in Whistler until Saturday. The admission goes on to say that Mr. Guzman-Koenigbaur did not provide an answer to this question.

**42** In further cross-examination, he agreed that he would have seen the Golic group at the Mongolie Grill an hour after he had left Mr. Gordic, since he had seen them at the Rings 30 minutes after leaving and had stayed there 20 to 30 minutes before heading to the original village. He disagreed, however, that there would have been an additional 10 minutes required for him to walk to the area of Mongolie Grill where he saw them. He then agreed that he could not be sure about the time.

**43** He had greater difficulty when it was pointed out to him that in his statement to the police he had described telling Mr. Gordic on Saturday that L.Z. and Mr. Golic had been looking for him on the Friday night, which is of course before the dispute with Mr. Golic had arisen. He explained that he meant that he told someone other than Mr. Gordic, but had used the wrong name when speaking to the police. He then said he had tried to tell Mr. Gordic on Saturday evening, before he met the Golic group at the Olympic Rings, but that Mr. Gordic had brushed him off.

**44** When a further portion of his statement was put to him in which he said he had told Mr. Gordic on Friday night that they were looking for him, he initially explained that he had told Mr. Gordic that he had seen them then, but did not yet realize that they were actually looking for him. However, when that portion of his statement was put to him again, he agreed that it was true that he had told him on Friday that they were looking for him.

**45** The next portion of the statement that was put to him involved him agreeing with the interviewing police officer that the Golic group had been looking for Mr. Gordic on Friday *and* Saturday. He first said that this portion of his statement was not true and they were just looking for him on Friday. However, after L.Z.'s counsel confirmed with him that he was attempting to be truthful with the police and that his memory was better at the time of the statement, he agreed that his "best memory" was that they had been looking on both nights.

**46** Then, after maintaining that Mr. Gordic had brushed off his attempts to tell him about it on Saturday night, he agreed once again with the suggestion that it had been Friday.

**47** The other encounter with a group looking for Mr. Gordic on Saturday evening that is relied on by the Crown involves three other friends of Mr. Gordic's: Dejon Janjic, Nicholas Popovic, and Tanasija Stojanovic. The common thread of their evidence is that this encounter occurred in or near a break between two buildings that form part of the southern perimeter of Marketplace.

**48** They had joined Mr. Gordic for dinner earlier in the evening.

**49** Mr. Stojanovic said he and his friends were heading in the direction of the Rings, while the group they encountered were coming from that area and heading towards Marketplace. It was dark outside and he thought it was about 9:00 p.m. A member of this group, which consisted of eight to 12 people, asked them

if they knew where Mr. Gordic and Mr. Medina were. He could not recall which member of the group asked this. Mr. Janjic pointed in the direction of the IGA, which is on the north side of Marketplace, in the direction from which they had come. Mr. Stojanovic said he did not know, but Mr. Popovic, whom he described as "a bit drunk," asked, "What the fuck is it to you?" Mr. Golic, whom he recognized from having seen him previously, and L.Z., whose identity he later confirmed through a photograph on Facebook after learning his name, came back and confronted them in response to this comment. One of the two, whom Mr. Stojanovic believed was L.Z., asked "What the fuck did you say?" In view of the difference in numbers between the two groups, Mr. Stojanovic tried to smooth things over by referring to Mr. Popovic's level of intoxication, suggesting that he did not know what he was saying. L.Z. said something along the lines of "okay" and the Golic group continued on its way.

**50** Mr. Popovic did not recall himself being quite that impaired. He said he had four to six beers by that point and was "tipsy." His description was that at the point they met this group, they were accompanied by another friend and some girls. The location was near a concert stage, which he was pretty sure was in Village North. It was "probably 10:30, 11:00." He put the size of the group they encountered as 12 to 13. Mr. Golic, whom he knew, and "some East Indian guy" whom he described as tall and skinny, two to three inches taller than Mr. Popovic's height of five foot 10 - came up and asked where Mr. Gordic was. He knows L.Z. and did not notice him in the group - he was mainly looking at Mr. Golic coming towards him. He was mad about the earlier threats to Mr. Gordic and so he told them to "fuck off". He said Mr. Golic came towards him but Mr. Stojanovic interceded, and told Mr. Golic to leave him alone.

**51** In cross-examination, Mr. Popovic was confronted with passages in his statement to the police in which he said, "[he] was so drunk the whole time in Whistler" and that he was so drunk that he could not remember if he had met some "Italian girls" before or after the confrontation with Mr. Golic. He responded that he was drinking for a long period "and it got from tipsy to drunk," but that he was "not super-drunk the whole time."

**52** Mr. Janjic went to high school with Mr. Golic and knew A.D. from attending parties. He had run into his friends, Mr. Popovic and Mr. Stojanovic, after deciding not to accompany some other friends to a house party. He said that they ran into a group of guys and he identified the same location for this encounter as Mr. Stojanovic did. He put the time as "9:30 - 10:00." He was "pretty confident" that it was A.D. who asked them where Mr. Gordic and Mr. Medina were. His group responded that they did not know. After some further conversation involving different members of each group speaking to each other, they separated. Besides A.D., he initially testified he thought that he "might recall" Mr. Golic being there.

**53** He had testified in direct examination that he had slipped and hit his head earlier on Saturday, requiring stitches to close a wound, although he was not diagnosed with a concussion. In cross-examination, he confirmed his statement to the police that Friday and Saturday were "a bit of a blur", I infer because of this injury.

**54** He agreed that he had described the group to the police as consisting of A.D., whom he knew from seeing twice at parties over "the last couple of years" and "some younger guys". There was nothing threatening in what the group was saying or doing.

**55** He emphasized that describing the group as consisting of younger guys did not exclude Mr. Golic, who was younger than him. He did not count the number and, after initially estimating that there were eight of them, offered estimates as low as five and was prepared to accept the possibility of 15.

**56** He also agreed that he had not mentioned Mr. Golic being present when he gave his statement. In contrast to his answer in direct examination, he now felt "pretty confident" that Mr. Golic was there.

Towards the end of his cross-examination, he said he was 100% sure. He agreed that his memory was better at the time of his statement, but said "it's not like I completely forgot about everything." He said he had spoken to Mr. Popovic and Mr. Stojanovic after court on the day that they testified and after he had begun to give his evidence, but explained that he had only asked one of them how their testimony had gone and received the answer that it was "tough." After it was suggested that his memory got better after talking to Crown counsel, he said, "Yes, going into detail, that would help."

#### **d. The Attack Scene Video**

**57** The La Cantina Restaurant has a window that faces the part of the walkway where the attack on Mr. Gordic began. A security camera was recording within the restaurant at the time of the attack and there is an admission of fact that the resulting video footage accurately depicts the images of the scene.

**58** Because of the way the camera was positioned, the main view of the original raw footage is of the restaurant interior, with the view out the window that is relevant to this case occupying only a small portion of the upper right of the screen. Tarek Grymaloski of the RCMP's Forensic Video Unit created a version of the video that zooms in on the window area, so that the portion of the walkway outside is the main thing shown. This does not change the content of that zoomed-in view.

**59** In addition, after reviewing the video frame by frame, he attached colour-coded markers to the images of Mr. Gordic and of the first five members of the attacking group who entered the scene, to assist in tracking their various actions. He did not attempt to track any of them on their return to the scene after the attack. The only person whose movements he continued to track returning to view is Mr. Gordic.

**60** Mr. Grymaloski conceded that it is possible that the markers attached to each attacker may have gotten switched to different individuals at a certain point in the video, where the figures converge in the frame before separating again. However, given the positions that were ultimately taken on the significance of the video, the potential lack of complete accuracy in tracking some of those individuals did not end up being a significant factor.

**61** Like many security systems, the camera uses infrared light to permit scenes to be viewed that were in darkness. Mr. Grymaloski explained this makes the scene recorded appear to be in black and white. It can also have a distorting effect on the lightness or darkness of objects that are depicted. For example, depending on the material it is made of and how the infrared light reflects from it, a black object could appear white. In addition, objects that are closer to the infrared light sources may have an overexposed appearance. He agreed with the proposition on cross-examination that, as a result, the video cannot assist in identifying the actual colours of objects we see in it. This has implications for its ability to confirm some of the clothing that the witnesses described being worn by specific attackers.

**62** The enhanced video contains only the relevant portion of the seized footage, from 12:31:45 to 12:32:56 on morning of the 17th. It preserves the time code from the original video, so that the times of the various relevant actions can be tracked.

**63** The video provides a view of an area of the walkway that contains two stone pillars on the opposite side of the restaurant, which support the covered portion of the walkway, and a large stone planter closer to the middle of the walkway, where some of Mr. Gordic's friends were sitting when the attack began.

**64** The only relevant feature of this area that cannot be seen on the video is a series of evenly-spaced rectangular concrete pillars, perhaps four feet in height, which run along the walkway from an area parallel to KFC to an area parallel to a teahouse farther down the alley towards Main Street. These pillars

are closer to the La Cantina side of the walkway than the centre of it, which may be why the camera does not capture them.

**65** There is no issue that from 12:31:45 to 12:32:02 the video shows Mr. Gordic, his friends Mandeep Randhawa, Adam Bifano and Farez Maleky, as well as three young women he knew - Justine Brummitt, Sawyer Jensen and Dhillon Kirkpatrick-Dionne - and Ms. Kirkpatrick-Dionne's boyfriend, Dane Salt, socializing in the area. Towards the end of this period, Mr. Gordic is standing almost exactly between the two pillars, close to the covered part of the walkway, appearing to be talking on a cell phone.

**66** At approximately 12:32:02, Participant 1, who on the Crown's theory is L.Z., enters the frame on the right, coming from the direction of Marketplace, and walks briskly towards Mr. Gordic, who immediately starts to back up towards the left and drops a bag on the ground. There is no issue that this was a bag of Doritos chips that was later found by the police during their examination of the scene later in that area.

**67** Participants 2, 3, and 4 emerge from the right about a second afterwards. Participant 2, who on the Crown theory is Mr. Golic, catches up to and passes Participant 1 in pursuit of Mr. Gordic, who continues to back up until he leaves the frame to the left. Just before Participant 2 catches up to Participant 1, Participant 1 turns so that his body is facing the camera instead of in profile, and one can see what appears to be his right arm crooked in a semicircle, with his hand at his waist.

**68** By this point, Participant 5 has also come from the right and is slightly behind the rest of this group. Participant 2 continues to pursue Mr. Gordic out of the frame to the left and then the convergence spoken of by Mr. Grymaloski occurs, in which Participants 1, 3, 4, and 5 are very close to each other. Attackers 1, 4 and 5 then proceed rapidly off screen to the left. Participant 3 remains with his hands at his side, walks forward, hesitates, then proceeds off screen to the left at a slower pace than the attackers who preceded him. A sixth person, who G.R. says was him, appears from the right and walks up behind Participant 3 in the same direction, hesitating approximately when Participant 3 does.

**69** At about the same time, a young man in a baseball cap, who had been part of Mr. Gordic's group, appears to escort a young woman from out of this group and off screen to the right in the direction of IGA. She is walking backwards and appears still to be looking in the direction where Mr. Gordic went. There is no issue that this was Mr. Salt and Ms. Kirkpatrick-Dionne.

**70** Meanwhile, two additional participants, 7 and 8, run quickly across the screen, in the foreground near the restaurant window, in the direction where Mr. Gordic went. At about the same time that they pass out of view, Participant 3 walks off screen to the left after them, followed by Participant 6.

**71** Participant 9, who has a distinctive wide-legged stride, appears from the right and walks across and out of the frame to the left, appearing to turn briefly towards one of Mr. Gordic's companions in the process.

**72** Thus it appears that nine potential participants in the attack on Mr. Gordic crossed in front of the camera and went in his direction. The last one went out of sight in that direction at 12:32:18.

**73** Participant 10, who A.D. says was him, never actually proceeds off screen to the left to the area where Mr. Gordic went. That person emerges from the right and stands in the same area as Mr. Gordic's companions, watching whatever is happening off screen in the area that Mr. Gordic and his pursuers had gone, before turning and joining the first of those who appear to be fleeing from that area, back from left to right across the screen towards Marketplace.

**74** I will describe Mr. Gordic's movements in more detail before describing the figures who are apparently fleeing back in the direction they came, but for now I will note that a figure that appears to be him reappears at 12:32:25 in the covered walkway in the background area of the image, moving quickly from left to right.

**75** At 12:32:24, just before Mr. Gordic reappears, a figure comes from off screen to the left and walks to the right and off screen in the direction of Marketplace. It is worth noting that he appears to have a slender object in his right hand, held pointing downwards. Another participant follows him off screen at 12:32:27, and jogs from the left and off screen to the right, followed by someone who goes at an extremely fast run. Thus the last participant who fled in the direction of Marketplace, as opposed to south towards Main Street, as one can infer the remainder must have done, left the screen at 12:32:35.

**76** The figure who turns out to be Mr. Gordic continues right in the walkway past both pillars and off screen to the right. After being out of sight for a few seconds, he reappears in the foreground, near the La Cantina window, now moving from right to left across the screen. He ends up standing in the middle of the walkway, just to the left of the two visible pillars. He begins to sway unsteadily, and then staggers backward a few steps, before stepping forward. His knees appear to buckle and he falls forward to the left, below the area the camera captures.

**77** If one assumes that the actual attack was encompassed by the period between Participant 2's disappearance off screen in apparent pursuit and the point just before Mr. Gordic's reappearance in the walkway, it would have taken about 17 seconds. If one assumes that the three returnees were part of the group that followed him off to the left, as they appear to be, then three of the nine potential participants returned the way they had come, as opposed to leaving south in the direction of Main Street.

**78** The correspondence between the appearance of the participants in the video and the clothing and characteristics of the accused and Mr. Golic were explored in detail with the eyewitnesses and in submissions, as I will discuss. But just as an overview of the participants at this point, the first participant appears to be wearing some type of vest, with what shows as a darker band across the back shoulder area. However, the tone of his sleeves is difficult to identify because of the quality of the image. Number 2's top appears to have a lighter body and dark sleeves. Number 6 is wearing what appears to be a dark hooded jacket, and Number 10 is wearing what seems to be a darker, bulkier, jacket; looser-fitting, at least at the bottom.

#### **e. Witnesses to the Attack**

##### *i) Overview*

**79** The actual witnesses to the attack, as I have said, were Mr. Gordic's friends Mandeep Randhawa, Adam Bifano, and Farez Maleky, as well as Justine Brummitt, Sawyer Jensen, Dhillon Kirkpatrick-Dionne, and Mr. Salt.

**80** Jasmine Harms-Kroeher and Taryn Harms, sisters who were staying in a hotel overlooking the walkway on Main Street, gave evidence of parts of the incident that they saw and heard from that position.

**81** There is no issue that just before the attack, Mr. Gordic and his friends bought food from the 7-Eleven on Main Street and then ran into the young women and Mr. Salt on the walkway. They were in the course of visiting when the attack started.

*ii) Mandeep Randhawa*

**82** Mr. Randhawa believed that the attack took place at about 12:30 a.m. He said they had been talking for 30 - 45 seconds when he saw "a bunch of guys" coming from the parking lot area of Marketplace, on the other side of KFC, and running after Mr. Gordic. He described this as "just a swarm of them, just ambushing him." Mr. Gordic had been farther into the walkway, so the attackers went past Mr. Randhawa to pursue him.

**83** He heard the first of the attackers say, "You thought you wouldn't see me up here", when this person was five or six feet away from Mr. Gordic. Mr. Gordic moved backwards three or four feet and put up his fists to protect himself, but "there were too many guys and they were just... circling him." One by one, more guys were coming in, moving "pretty fast." Ultimately he said "about eight to 10 guys" physically attacked Mr. Gordic. They were in a circle, punching him, but Mr. Randhawa could not say how many of them were actually throwing punches, nor did he see any stabbing taking place. The attack lasted 10 to 15 seconds. He heard someone say, "I juked him," which he understands to be a slang expression for stabbing, from movies and video games. He thought the same person said this as had made the initial comment at the start of the attack. This person was dressed in black, wearing a zip hoodie and a white T-shirt. He was about Mr. Randhawa's age (19 at the time he testified), with a stocky build and short black hair. From looking at the back of his neck "you could tell he was a white guy." Mr. Randhawa did not see his face.

**84** He also could not say anything about the complexions, and therefore the ethnicities, of the other attackers. They were wearing black and it was dark, he said. He remembered one of them wearing a black Crooks and Castles (a popular brand of clothing) T-shirt, but this was not the person who said, "I juked him."

**85** He knew Mr. Golic, L.Z., and A.D. at that time, and said that he did not see any of them there.

**86** The group then "dispersed into different directions." Three or four ran in his direction. The one who made the comments ran in the opposite direction, south towards Main Street.

**87** Mr. Gordic said, "look at me," and Mr. Randhawa saw blood "kind of leaking out of his body." Mr. Gordic walked around in a circle and then fell to the ground. Mr. Randhawa said Mr. Gordic had taken off his shirt shortly after the attack, and he did not have it on when he fell. They rolled him onto his side and started putting pressure on his wounds.

**88** A police officer arrived between one and two minutes after the attack ended. Mr. Randhawa did not see any other knives present, but he was present when Mr. Maleky pointed one out to a female police officer.

*iii) Justine Brummitt*

**89** Ms. Brummitt described six to 10 attackers, approaching Mr. Gordic from the IGA, that is the Marketplace side. She described them hitting him with their arms, "like punches I guess," although she did not see the punches actually land. Her impression was of "multiple people that tried to hit each other." She did not recall if the group had actually formed a circle around Mr. Gordic. Although she was facing in the direction of the attack, she said, "I wasn't, like, looking at it." It lasted a few minutes and then everyone scattered fast in different directions. She was not aware that Mr. Gordic was injured until she saw him taking his shirt off.

**90** She recognized L.Z. as one of the attackers. They had dated each other on and off previously, although they were not in a relationship at this time. As he walked by her, she tried to pull him in to give him a hug. He stopped for a few seconds and then brushed or shrugged her off and kept going. She did not "watch" and so was unable to say whether L.Z. tried to punch Mr. Gordic in the fight or did anything else in relation to him. She also did not see what direction he went in after the attack, although as far as she saw he did not come in her direction (back towards Marketplace). She could not recall what he was wearing.

**91** When she was shown the video in her testimony, she believed that the first member of the attacking group, the one who appeared to crook his right arm to the side before being overtaken by the other members, was L.Z. The period of delay in his progress shown in the video was when she was trying to hug him.

**92** She agreed with the suggestion on cross-examination that she and Ms. Kirkpatrick-Dionne and Ms. Jensen "drank a good deal all weekend long" and it would be fair to say that she herself was "drunk most of the weekend." In addition, throughout the evening she had taken approximately four capsules of MDMA, which is also popularly known as "Molly". Her description of the effect of this drug is that one becomes "more unobservant". She agreed that it produces a sensation of "being there but not really there," and that "you kind of become oblivious to what's happening" and concentrate more on feelings and sensations. She thought this would be one of the reasons why she could not recall how many attackers passed L.Z. after she tried to hug him.

**93** Moving forward slightly for context, in his examination of the toxicologist, Mr. Jeffery, who was called on behalf of L.Z., G.R.'s counsel brought out that this drug is a minor stimulant and hallucinogenic. Mr. Jeffery testified that when a person takes the drug, "What you perceive may not be real. You see sounds, you hear colours, hallucinating, and as a stimulant you can dance all night long." Its effects last six to eight hours, sometimes 10.

*iv) Dhillon Kirkpatrick-Dionne*

**94** Ms. Kirkpatrick-Dionne also gave evidence of her substance use that evening. In her case she drank alcohol, had two capsules of MDMA (one at 9:30 and one between 11:00 and 11:30 p.m.), and also some cocaine between midnight and 12:30 a.m., the time of the attack. She described her condition as a result as, "Alright, a little bit euphoric, little bit uplifted, nothing incoherent or anything like that."

**95** She and her boyfriend, Mr. Salt, as well as Ms. Brummitt and Ms. Jensen, were on their way to meet a friend at Marketplace when they ran into Mr. Gordic and his friends. She and Mr. Salt basically stepped back to let her friends talk to them.

**96** Out of the corner of her eye she saw L.Z. coming and turned to Ms. Brummitt to let her know. L.Z. was with Mr. Golic and there were a few others behind them. She said that he was moving pretty quickly and "it definitely looked like he was on a mission." He was wearing a pleated vest with grey on the top and then brown. She had seen him briefly in the street on Friday night and he had been wearing that particular vest, so she recognized it. She thought Mr. Golic was probably moving at about the same speed as L.Z.

**97** As they approached Mr. Gordic, L.Z. said, "There you are, you little bitch." Mr. Gordic was crouching down as though ready for a fight, and Mr. Golic and L.Z. "kept charging for him". At that point, Mr. Salt grabbed her and pulled her in the direction that L.Z. and Mr. Golic had come from. She and Mr. Salt

ended up in front of the IGA, which is to the right of the KFC at the entrance to the walkway as one leaves Marketplace, and remained there.

**98** She was shown the video and identified herself and her other companions before and at the time of the attack, to the point that Mr. Salt dragged her away. She was also shown a portion of the video between 12:32:30 and 12:32:32 in which a figure exits the walkway towards the Marketplace (the second of the returning figures I have described). She could not be 100% sure, but "want[ed] to say" that it was L.Z., as she put it, because of the texture of the coat.

**99** In cross-examination, it was brought to her attention that her first statement to the police a few hours after the attack had involved her saying that the matter did not seem too serious, that it seemed that they were joking before they started to brawl "a little bit," and that it looked like play fighting. This was in contrast to her testimony that it seemed to her like the first two attackers were on a mission. She clarified that it was thinking back on the incident that had led her to make the more recent comments.

**100** She also agreed that before giving evidence in the trial, she had not said, in any of her three statements to the police, that L.Z. was the person who had said, "There you are, you little bitch."

**101** After being shown the video, she agreed that she was wrong when she told the police that L.Z. had approached Mr. Gordic first. He had come up to their group first, but she did not actually see who eventually approached Mr. Gordic. Nor had she seen him go in and physically push Mr. Gordic away from everybody, as she had described to the police. She sought to explain that portion of her statement by saying that Mr. Gordic had pushed back, so to speak, as L.Z. approached, rather than that L.Z. had physically pushed him. After having that portion of the video played to her, she agreed that the male with the light shirt and dark sleeves had gone in Mr. Gordic's direction ahead of the person she identified as L.Z. She then agreed that the video was the best depiction of what had actually gone on.

**102** She clarified that the last thing she saw of the attack before Mr. Salt pulled her away was that L.Z. and Mr. Golic "kind of charged" towards Mr. Gordic.

**103** She did not accept the suggestion that the seventh male in the sequence of attackers approaching Mr. Gordic was L.Z. The coat that person was wearing did not resemble his, which had been "like a pleated vest." In contrast that seventh male was wearing what she described as a "varsity coat".

**104** Although she had told the police that one of the members of the attacking group had turned around with L.Z. and Mr. Golic before leaving the area, she explained that she had not actually seen them turn around and was "just generalizing."

**105** She agreed that in her third statement, during which she was shown the video by the police, she had identified a person in a black hoodie who leaves in the direction of Marketplace at 12:32:26 (the first of the returning figures I have described) as being L.Z. However, because that person is all in black, she no longer thinks that was him. She agreed that she had also told the police that L.Z. was all in black, but she remembered the vest she had seen him in the night before and that it "kind of clicked [I infer, that he had been wearing the vest] the next day." Watching the video in her police interview "solidified" this view, she said.]

v) *Dane Salt*

**106** Mr. Salt's substance consumption that evening had consisted of half a mickey of vodka and "a few"

beers, which he later clarified had been three, since 9:30 or 10:00 p.m., as well as some cocaine around midnight. The effect, as he described it, was of being "on very high alert" and, in terms of his level of intoxication, "feeling good".

**107** After the girls stopped to talk to Mr. Gordic, whom he had not met previously, he saw a group of eight to 12 people walking towards them from the direction of the liquor store in Marketplace. This group started into a speed walk when they were still 30 to 40 feet away. They broke into a run and he heard a voice say, "There you are, you little bitch" in an angry tone, fairly loudly, directed at Mr. Gordic. He then saw a male flash something made out of silver metal at his waistband. By this, he meant the person lifted up his shirt or sweater with a bent right arm to show something to the right of his right pocket, along the beltline. He knew that this object was "something not good", but could not tell any more specifically what it was.

**108** He was shown the video and he identified 12:32:06, when the first figure to approach Mr. Gordic appears to turn sideways, as I have previously described in my summary, so that he is facing the camera directly, and crook his right arm in the area of his waist, as the point at which this male flashed something.

**109** Mr. Gordic stepped back and motioned like he was ready to fight. At that point, Mr. Salt pulled Ms. Kirkpatrick-Dionne out of the way and they ended up in the area of the shopping carts. He called the store Save-On Foods, but it is obvious on all the evidence that he was referring to the IGA.

**110** At that point, he took a look back over his shoulder and saw a person, who had his back to him, stick a knife into the left side of Mr. Gordic's body, under the armpit.

**111** The stabber was wearing blue True Religion brand jeans, which have white stitching along the sides and back pockets, and had a white hood. Mr. Salt described him as 17 to 18 years old, not white, five feet nine or 10 inches tall, 160 pounds, "not humungous". When Crown counsel asked if he was able to say whether this was the same person who had said, "There you are, you little bitch," at the start of the attack, he replied that it was "safe to say" that it was.

**112** Only one or two people were around Mr. Gordic when he was stabbed, Mr. Salt said, and he did not see any other blows being struck.

**113** According to him, Mr. Gordic screamed at the top of his lungs, tore off his shirt, and then fell to his knees and collapsed.

**114** People were running around yelling, "Get out of here. Buddy just got poked."

**115** Mr. Salt then ran into the parking lot to find a police officer.

**116** In cross-examination, he confirmed that he had told the police initially that the stabber was white and "was a smaller and skinnier guy." He had described the person's upper clothing as a white sweater. He elaborated in his evidence that, "I just saw white. It happened so quickly". He also told the officer that the person had "maybe" worn a white hat.

**117** He was taken to the passage in his statement where he had said that he could not be sure that the person who made the initial comment towards Mr. Gordic was the same one who had stabbed him, since there were a couple of what he called "jump-ins" to the fight, and it was not just two people going at it. He confirmed that this concession in his statement was accurate.

**118** He did not believe that there had been any more stab wounds after the one he saw under the armpit. He agreed with the suggestion that it was logical that if Mr. Gordic had received more than one stab wound and he was not stabbed while he was on the ground, then those other wounds must have occurred before the one he saw.

**119** After being shown a portion of the video, he agreed that it was either the first member of the attacking group who came into the frame or the one who passed him going towards Mr. Gordic who yelled the initial comment.

**120** When he was re-shown the portion of the video in which Mr. Gordic collapsed, he agreed that it did not appear as though his shirt was off. He said that Mr. Gordic had definitely tried to get the shirt off, but maybe someone running away had taken a white shirt off and he had confused the two.

*vi) Adam Bifano*

**121** Mr. Bifano described himself as being "pretty intoxicated" at the time of the attack, as a result of consuming a 26-ounce bottle of vodka and "a bunch of beers." His high state of intoxication was confirmed by Cst. Gauthier, who dealt with him after the attack.

**122** His description of the attack was "a crew of people [which he defined as seven or more] came in and swarmed Luka." They had come from the Marketplace area. He first saw them when they passed him. He heard one of them say, "You didn't think you'd see me here."

**123** As to the actual assault, he saw "a punch back and forth and that was it," which he elaborated on as, "maybe I think two punches," as well as a jerking motion of a hand. Mr. Gordic was on the receiving end. In cross-examination, he agreed with the suggestion that the jerking motion was right at the very beginning of the attack.

**124** He initially said that the attackers ran off towards the 7-Eleven, which would be towards Main Street, but then said he did not know and that he thought they ran in different directions. The entire incident, from the time the attackers passed him to them running away, was 15 seconds.

**125** He did not recognize any members of this group. All he could say was that they wore dark clothing -- mostly black, hoodies and that some of the ethnicity of some of them was "brown".

**126** After it was over, he saw Mr. Gordic bleeding from the stomach area.

*vii) Sawyer Jensen*

**127** Ms. Jensen described her condition as "kind of intoxicated" and said that "they", by which I took to mean the group she had been to the party with before meeting Mr. Gordic, had all been drinking pretty heavily. They had been together one or two minutes when a group of "maybe 10 guys" ran up behind her to Mr. Gordic and started fighting, and then ran away. She had been sitting on a ledge before it happened and was about five feet away. She saw these people throwing punches and moving around. There was more than one blow, but she could not say how many of them threw punches. She did not see any weapons. Mostly their backs were to her. Mr. Gordic was trying to defend himself, but was not able to do so very well because he was "pretty outnumbered".

**128** The only one she recognized was Mr. Golic, who just happened to turn his face towards her. She has known him since she was in Grade 8 and they went to the same high school for about two years. She knew him to be "pretty good" friends with L.Z.

**129** He was on Mr. Gordic's left and was throwing punches at him. She became aware of his presence a couple of seconds into the fight. In cross-examination, she said that he was hitting Mr. Gordic the most. She knew that he frequently dressed in white and it was possible he was dressed that way at this point.

**130** She said the attack was really quick, lasting "maybe" 30 seconds. The attackers all ran away in the opposite direction from where they had come. She originally thought they were all friends and it was play fighting, but when she saw blood on Mr. Gordic, she realized it was serious and that a weapon must have been used.

*viii) Farez Maleky*

**131** By agreement amongst counsel, Mr. Maleky was called in L.Z.'s case, with the proviso that L.Z.'s counsel was allowed to cross-examine him, rather than having to lead his direct evidence in the usual way. Despite his location in the sequence of the trial, his relevant evidence relates in large part to the attack, so it is best described in that context.

**132** He gave five statements to the police during the course of the investigation, and the differences in content among them, numerous of which were brought out in his examination, were at the root of the Crown's decision not to call him in their case.

**133** In his initial cross-examination, L.Z.'s counsel sought to have Mr. Maleky adopt previous statements about the incident that he was alleged to have made to other witnesses or given to the police. These statements, if adopted by him, would have tended to confirm facts favourable to the theory of L.Z.'s defence, by pointing to the involvement of other suspects in stabbing, or identifying L.Z. as having had a particular role. Although it would not normally be beneficial to recount propositions that Mr. Maleky did not ultimately accept, his credibility and whether any of his evidence can safely be relied on are important issues in the trial, and his responses are relevant to those issues.

**134** Mr. Maleky said he did not recall if he had told Steven Potter that Ramin, who may be the person who was mentioned previously in connection with the conversation with Mr. Gordic about Devon Luksic, had boasted about having killed Mr. Gordic, although he agreed that he did tell Mr. Potter that he had seen the attack. He did not recall actually seeing Ramin at the scene of the attack and answered "not that I know of" when asked if he saw Ramin punch Mr. Gordic. If he did tell Mr. Potter those things, he may have "misinterpreted some information" or lied in order to give Mr. Potter an answer. In fact, he had only heard that Ramin was there, he said.

**135** He denied telling Jason Medina that he had seen Mr. Golic stab Mr. Gordic twice in the stomach, or that he himself had actually seen that happen. He also did not tell Mr. Medina that he had observed, nor did he actually observe, L.Z. stabbing him in the upper arm. Later in the cross-examination, he denied telling Mr. Medina "exactly who was there and who did what in the attack." When asked why he would lie to Mr. Medina about things like that, Mr. Maleky said that if he was passing on names that he received from a friend, and that information was not correct, then "technically" he would be the one who was lying when he passed it on further.

**136** In his first statement to the police after the attack, he had said one attacker came in first and said,

"You wanna fucking go?" to Mr. Gordic, after which four to six people were beating him up. Then one person started swinging with a knife and said, "Yo, I juke'd him." He explained that he had not actually seen a knife being used, but since there was one at the scene afterwards he "put two and two together." He did hear the "I juke'd him" comment and see four to six males attacking.

**137** He told the police in that statement he did not recognize any of the attackers - he said that was because he was frightened and did not want to be involved. But when he went home and "analyzed it through my sober thoughts, I did come up with who I saw," and in a later statement, the fifth one, he said he recognized L.Z. there.

**138** He agreed that he told the police that he "saw a couple of Middle Eastern kids and a white kid, in heat score clothing - Crooks and Castles - all dressed in black, hoods on."

**139** He did not know Mr. Golic at the time, but he agreed with L.Z.'s counsel that when he "think[s] back in sober thought," Mr. Golic and the "white kid" he described to the police were the same person. He was not sure, however, that this was the person who first attacked Mr. Gordic or whom he had said in his statement he had seen with a knife.

**140** He agreed that he had told the police that the person who made the "I juke'd him" comment had been a "little brown guy" with a "faux hawk" (which is a hairstyle similar to a Mohawk except the sides are not as fully shaved) who was skinny, five eight to five nine inches tall, and wearing a black hoodie with the hood up, and black pants. The hoodie or the pants, from what he "somewhat remembered", was Crooks and Castles brand. He explained that his use of the term "little" was not meant to describe short stature, but used in a disparaging sense, as one would say "little punk" for example. He was guessing that the knife on the ground was this person's, although it was drawn to his attention that at one point he had actually told the police this kid had dropped the knife after he hit Mr. Gordic.

**141** At the time of his statement, he was also "pretty confident" that two of the assailants had knives, and that he had seen one of them with a baton, although he stressed that the latter observation was made when he was intoxicated and still in shock about what had happened.

**142** He explained that his reference in the statement to having seen members of this group "yesterday" had to do with the potential fight with members of the Golic group earlier on in the day on Saturday. He clarified that his reference to them looking "exactly the same" at that time referred only to their clothing style.

**143** L.Z.'s counsel also referred to Mr. Maleky's comment at the RCMP detachment, when, after seeing A.D. in the garage, in reference to "the guys that were there," that "it wasn't them," that is, part of the group that was involved in the attack.

**144** In reference to A.D. specifically, he had said "110%" he was not in the attacking group. In her cross-examination, A.D.'s counsel had him confirm his further comment to the police of, "What's he doing here? He wasn't part of this at all."

**145** Mr. Maleky explained that he actually had said this because he did not think this was the sort of thing A.D. would do, and because he thought that he would have recognized him right away if he had been there, since he knew him. He told Crown counsel that "he had never seemed like a violent type, so it just put a surprise into me." Information he subsequently received from others, after saying this, caused him to change his point of view about A.D.

**146** In cross-examination by G.R.'s counsel, he explained that although he was referring to two people in his comments about "the guys who were there," his "main referral" was to A.D.

**147** In response to questions from G.R.'s counsel about his descriptions of the attackers, he said he had presumed that the attackers were Middle Eastern and said it was difficult to determine whether a person was of that descent or from somewhere else. He confirmed that his recollection was that the knife at the scene, which he says he pointed out to Cst. Gauthier, had a black handle with a white flowery design on it, and that it was half-closed - more open than closed.

**148** Crown counsel then succeeded in eliciting a more linear narrative of the attack from him, which drew on his various statements to the police.

**149** He described Mr. Golic's repeated angry calls on Jason Medina's phone in the restaurant that afternoon, threatening Mr. Gordic, as I have described. He was at the table and heard those calls on speakerphone. This was similar to the description of the events from other witnesses that I have already recounted. As other witnesses also described, he went to the Olympic Rings with Mr. Gordic and his "Serbian friends". Mr. Golic did not show up, although Mr. Maleky was pretty sure that "a couple of people" who had some connection to him passed by and spoke to "a couple of our friends."

**150** Later that evening, he was drinking beer with Mr. Bifano, Mr. Randhawa, and Mr. Gordic in Mr. Bifano's hotel room, before they made their way to the 7-Eleven and then to the walkway. He knew the girls they met there, but not Mr. Salt.

**151** He described his state of sobriety at the time he saw the attack as "fairly intoxicated, but not to the point of puking or falling asleep, passing out." He was only 15 at the time and not an experienced drinker.

**152** The attackers came from the direction of Marketplace, he said. When the first people came running, he thought it was just a fist fight, but then a big swarm of people came and attacked Mr. Gordic.

**153** That first person was running with his fist up, and one to two seconds later the others joined in. He did not see him actually punching Mr. Gordic. He described the person looking neither white nor dark, but "tanned white". In his view, Mr. Golic was "too white" to fit that description.

**154** He estimated that there were five to eight of the attackers and they formed "fairly close to a full circle" around Mr. Gordic.

**155** Of the group, nobody stood back watching - everyone who came in attacked Mr. Gordic, who was fairly centred and trying to throw people off him. Mr. Maleky confirmed the suggestion that Mr. Gordic was, in effect, surrounded and could not really move.

**156** When his statement to the police that Mr. Gordic was getting "punched, elbowed, kneed and kicked" was put to him by Crown counsel, he agreed that was what it looked like. When kicks were specifically put to him, he said he was "pretty sure" he saw them.

**157** He did not see a knife in anyone's hand. He told the police he saw people reaching into their waists and "start pulling shit out" because that is what he thought he saw. He also saw what he thought was a baton in someone's waistband.

**158** His initial position at this stage was that the kid with the faux hawk was the person who yelled, "I

juked him," and that it was "very loud." However, when Crown counsel then attempted to have him confirm that this person was not L.Z., he said it was. He also said he was 95% sure L.Z. was the first person to attack Mr. Gordic.

**159** When a portion of his police statement in which he had said the person with the faux hawk and L.Z. were *not* the same person was put to him by the Crown, he agreed with it and apologized, saying, "I guess I'm just thinking of someone else." All he saw L.Z. do, he explained, was initially run towards Mr. Gordic with his fist raised.

**160** He agreed that he was 95% sure that L.Z. was the first one to attack Mr. Gordic and after being shown the attack scene video by the police he had taken what he remembered and transposed it onto the video. He accepted the suggestion by Crown counsel that this was true of all of his recollections of the attack in relation to what is depicted in the video.

**161** When the video was played for him in court, he identified himself. At the point that the attack started, he was positioned to the left of the post containing the planter. He confirmed that he was 90% sure that the person in the two-tone vest, coming in first, was L.Z. He said that this person reaching into his waistband in the video was what he meant when he described people reaching into their waistbands.

**162** When Participant 3<sup>2</sup> came in (denoted by a purple arrow in the Grymaloski version of the video) he could not say for sure if he was the person to that participant's immediate right.

**163** While he said he might have "just swung [his] head" by the tenth person to enter from the left (whom A.D. later identified as himself in his evidence) he did not look closely at him and did not know who it was.

**164** Either L.Z. or the person with the faux hawk made the "I juked him" comment. The faux hawk guy was the first to run away from the scene after the attack was over and from what he could recall, that person was not L.Z.

**165** He said he was "most likely sure" that the knife that he saw was still on the ground after Mr. Gordic had been taken to the hospital, as opposed to having been seized earlier while Mr. Gordic was still being treated at the scene.

**166** In addition to being intoxicated, he said he found it difficult to focus on these events because he was trying to focus on the girls (which I took to mean on their safety), the first attacker and the attacking group, and also to watch out for himself. As a result, he agreed he would not necessarily have seen everyone who was there. He did not think he would have recognized A.D. there unless he was looking at him face to face.

**167** He agreed that at the time of his first two statements, on the morning of the incident, he was hysterical, overwrought, and emotionally excited.

**168** He did not tell the police that L.Z. was at the scene until his fifth statement, as I have mentioned. He explained that he was nervous, but finally built up the courage to identify him. He said that until that point, he was protecting himself, not L.Z. He also had to be sure about who he saw -- he did not want to "throw a possible name in there" and end up being incorrect.

**169** Sometime after the attack, he spoke to A.D.'s younger brother about it and gained some further information. When he later spoke to Jason Medina and Steven Potter, he said he did not distinguish

between what he had been told and what he had seen himself. This was also true about what he had heard from "a friend of a friend" about Ramin supposedly bragging that he had killed Mr. Gordic.

**170** In further cross-examination, L.Z.'s counsel had Mr. Maleky confirm that "every last one" of the attackers ran towards Marketplace afterwards. But he later qualified this by saying that he was certain based on what he saw, but that he has since heard from other people that not everyone ran in that direction.

**171** He also agreed that although L.Z. was the first person shown running in the direction of Mr. Gordic in the video, the second participant to enter the frame (marked by a blue arrow) was actually the first person to approach Mr. Gordic. He agreed the video shows L.Z. is actually the third or fourth person to approach Mr. Gordic. He explained that he had described L.Z. to the police as the first person to attack because the video he was shown at the time did not have the benefit of the coloured arrows to mark individual participants.

**172** He also agreed that, contrary to his description in one of his statements, only one of these two attackers had their hoods up. He maintained that the guy with the faux hawk had his hood up, but when he was asked how he could tell the hairstyle, he offered the explanation that, "He might have taken the hood up after and everything happened so fast, right?"

**173** He was unable to answer clearly whether he was saying that the first person seen running from the scene after the attack was the faux hawk guy based on the video alone, or whether he was just "putting two and two together" and attributing that role to the person depicted in the video.

**174** In her additional cross-examination, A.D.'s counsel had Mr. Maleky confirm that he did not see A.D. as one of the attackers. But he subsequently qualified that concession by noting that he only "saw" (by which I took him to mean "recognized"), one face at the scene.

**175** Finally, G.R.'s counsel had him confirm that the person shown in the video who is alleged to be G.R. was walking, although Mr. Maleky pointed out that this person was still joining the group of people who were running at Mr. Gordic. When he was shown Participant 3 standing still for a moment, he said he had no reason to disagree that the attack was already underway, but added that that did not mean that the person standing behind Participant 3 (Participant 6) who is supposed to be G.R. could not have joined it while it was still going on. He accepted that he does not know what Participant 3 or the person behind him actually did in terms of the attack.

**176** He also accepted the suggestion that due to the impediments to his observation that I have described, as well as the darkness and the speed of the events, it is impossible for him to say what the first three attackers actually did.

*ix) Jasmine Harms-Kroeher and Taryn Harms*

**177** As I indicated, they are adult sisters who were spending a girls' weekend in Whistler with their mother. They stayed at the Summit Lodge on Main Street. Their room, which had a small deck, looked down at the south end of the walkway that I have been describing, where that walkway connects with Main Street.

**178** Ms. Harms-Kroeher testified that shortly after midnight she opened the door to the deck to let some fresh air into the room. From outside, she heard a voice saying, "I knew I'd find you, you little bitch" or

something along those lines. Her sister, who was still inside the room at that point, heard the same statement, which she described as being said in an angry voice.

**179** Ms. Harms-Kroecker was curious, so she went out onto the deck, where she saw a group of 10 or 15 people, "or maybe even a little bit less," outside. All of a sudden a fight broke out, which consisted of people punching each other. There were two main combatants, but others were getting involved. A tree at her end of the walkway blocked some of her view, and people were moving back and forth out of her view behind it. She could hear punching and also talking. She agreed in cross-examination that it was hard to say whether some of the group were bystanders or friends (of the actual participants, I took her to mean), or whether some people were trying to intervene to stop the fighting. It lasted 15 to 30 seconds, and then a voice said, "Whoa, chill, chill." Her sister heard that as well. The group then disbanded and she saw people run in different directions.

**180** One was a male in a black sweater, who put up his hood and ran towards the Summit Lodge and then to his right, which would be roughly west along Main Street. This person was not Caucasian, because she noted a darker skin tone, and he had brown or black hair.

**181** Two taller people ran up the pathway towards the Village, which I took to mean back in the direction of Marketplace. One was Caucasian and the other had a shaved head. One of them took off and then threw down a white shirt. They might have been wearing shorts. During cross-examination by A.D.'s counsel, she seemed to accept that both were Caucasian, both took off their shirts and, despite the previous evidence that one had a shaved head, both had brown hair. L.Z.'s counsel, in his examination, clarified her recollection that only one of them had dropped his shirt.

**182** Ms. Harms-Kroecker also noticed a pair of legs coming out from behind the area that was blocked by the tree, which signified to her that someone was on the ground. She saw a person on the phone trying to get help afterwards, and then someone being taken away by ambulance.

#### **f. Mr. Gordic's Bleeding after the Attack**

**183** As I will discuss, an aspect of G.R.'s defence is the possibility that he could have gotten blood on his shoes by simply passing through the area of the attack, without having participated in it. In support of that possibility, his counsel explored in cross-examination of the scene witnesses the extent to which blood dripped or was projected from Mr. Gordic's body as he moved around after being stabbed.

**184** Although he said that it occurred in the course of giving first aid to Mr. Gordic, Mr. Randhawa agreed that the profuse bleeding resulted in blood being sprayed on to his clothing, leaving it heavily covered in blood, and on his shoes. He said the same thing happened to Mr. Bifano. Mr. Randhawa also agreed with the suggestion by G.R.'s counsel that after the attack Mr. Gordic was "walking in a circular fashion and at that time... he was bleeding profusely and spraying blood from his body," and "wherever he had walked, there was blood trails and pools of blood..." Mr. Bifano agreed to essentially the same suggestions about these post-stabbing movements and conditions. Ms. Brummitt accepted the term "gushing" in relation to the post-attack bleeding and, after initially expressing some confusion about the further suggestion that this meant the blood was spraying from his body, replied, "Sure, yes," to it. Mr. Salt also accepted the "spraying" suggestion, including that it was "to a distance" and "on the ground." In addition, he agreed that blood was coming from Mr. Gordic's mouth. Ms. Jensen agreed with the term "dripping" and that pools of blood and blood trails were created, as well as that Mr. Randhawa and Ms. Brummitt had "blood-splat" on them due to the bleeding. Mr. Maleky said there was only blood where Mr. Gordic stepped -- "you had to be pretty close" -- and it was not splattered everywhere. The only

reason he was bloody was that he was "hands on" in rendering assistance after Mr. Gordic fell.

#### **g. Immediate Police Attendance**

**185** There is an admission that members of the RCMP were dispatched to attend the scene of an attack in the walkway at about 12:34 a.m.

**186** Three RCMP officers, Cpl. Williams, Cst. Baker and Cst. Sayyah, happened to be on foot patrol in the Marketplace parking lot at the time that the attack ended and saw two groups of young males apparently fleeing the walkway area. Cst. Sayyah had heard what he described as a loud commotion just before that.

**187** One group of about five people ran to the stairs that lead from Marketplace to the Village Stroll, heading in the direction of the Olympic Rings. The other group of up to 10 people (Cpl. Williams thought more like five or six) ran in front of the IGA and west towards Northlands Boulevard. This was noted by Cpl. Williams at 12:36 a.m. He and Cst. Sayyah pursued this second group on foot, while Cst. Baker went to the KFC area to see what was going on.

**188** In his evidence, Cst. Sayyah placed both groups very close to the place where the walkway joins the Marketplace parking lot when he first saw them.

**189** The group that fled towards Northlands split up at various stages and three members of it were caught and arrested by Cpl. Williams and Cst. Sayyah at 12:40 a.m. There was nothing directly implicating them in the assault, the occurrence of which had been communicated to the officers from the scene by then, so they were released. The only further relevant aspect for this case was that one of the arrestees identified himself as Kabir Biriya, who, as I will discuss, was described by two of the accused in their evidence as being part of the large group that was in the area of the attack.

**190** Cst. Baker was approached by a male in the parking lot who said that someone had been shot or stabbed and needed assistance, so he began to run towards the walkway area. He found Mr. Gordic face down in the walkway, shirtless, with significant blood in the area. There was a male beside Mr. Gordic who handed Cst. Baker a towel.

**191** By reference to photos that contained the numbered markers that were later placed at the scene by members of the Forensic Identification Section, Cst. Baker was able to point out the place where he found Mr. Gordic. It is an area of apparently significant blood deposit just south of the planter on which some of his friends had been sitting. His feet were towards the Marketplace and his head was towards Main Street. (This corresponds to the position he is seen falling into in the video.) Cst. Baker put him in the recovery position and applied pressure to a stab wound in his left upper chest area.

**192** Cpl. Ross arrived, followed in succession by other officers. Once the scene was determined to be safe for them to enter, paramedics were allowed in to assist Mr. Gordic and take him to the hospital. Cpl. Ross delegated officers to set up police tape and maintain the security of the scene. Pending the arrival of the Forensic Identification Section, he and Cst. Chan set up makeshift shelters using tarps to protect the scene against the impending rain.

**193** Cst. Baker and Ben Manley, one of the paramedics who assisted Mr. Gordic, were asked by G.R.'s counsel about blood at the scene. Cst. Baker said it was very dark and all he could see was a large amount of blood underneath Mr. Gordic and a few pools as he approached his feet. Mr. Manley agreed that Mr.

Gordic was covered in blood and that the immediate vicinity had blood staining.

#### **h. The Knife found at the Scene**

**194** While Mr. Gordic was still on his stomach, Cst. Baker noticed a knife on the ground near his left shoulder. He described it as reddish in colour, four inches long. In direct examination, he said it was open and described the blade as silver, but in cross-examination he clarified that he believed it was in the open position, but did not recall 100%, nor could he recall the colour of the blade. He did not have any notes on this point from which to refresh his memory.

**195** He said that after Cpl. Ross arrived, he pointed the knife out to him. Looking at photos of the area where he assisted Mr. Gordic, he said that the knife would have been in a spot that was now covered up by a bloody shirt and towels that were left after Mr. Gordic was taken away. This material was next to the marker where he said Mr. Gordic's head had been.

**196** Cpl. Ross said he arrived at 12:40 a.m., bringing medical supplies. He noticed the knife on Mr. Gordic's right side, about two feet, or arm's length, away from Mr. Gordic. He said that he noticed it himself, rather than Cst. Baker pointing it out. His notation of the location on a photo of the scene was a few feet farther down the walkway towards Main Street, and closer to the line of concrete pillars running along the walkway, than the shirt and towels that Cst. Baker had said were covering the spot where the knife had been.

**197** He could not recall if he noticed it when he and Cst. Baker were assisting Mr. Gordic or when the paramedics arrived and took over. His description was of an opened folding knife with a two-and-half-inch-long blade. It had a black handle, with a pinky purplish colour on the rear of the handle, away from the hilt.

**198** He had concerns about the fact that it seemed likely to rain, I take it in terms of the integrity of this exhibit, so he put on fresh gloves (he had put on an earlier set to assist with Mr. Gordic), obtained a plastic exhibit bag, and seized the knife. He did not photograph it in this location before seizing it. His view, when pressed on the issue in cross-examination, is that while he could always testify about the knife's location, it would be impossible to replicate evidence that is lost due to the weather.

**199** He was also aware that the best practice when dealing with exhibits from which DNA evidence may be sought is to place them in paper bags, but he only had plastic. He was concerned that the open blade might cut the bag, leading to contamination of the exhibit, so he closed the knife before placing it inside. He confirmed in cross-examination that he always picks up knives by the handle and that he is familiar with the mechanism that causes knives of this kind to close.

**200** Cst. Gauthier was another of the early police attendees and he saw the knife before Cpl. Ross seized it, he said from a distance of about six to eight feet away. He was unable to identify its specific location on the scene photos, only feeling comfortable situating it somewhere within the walkway, between the KFC and just beyond the last of the concrete pillars, in the direction of Main Street. He did not recall if the knife was open or not.

**201** After seizing the knife, Cpl. Ross locked it in his police car and later gave it to Cst. Wirth at the Whistler RCMP detachment. After holding onto it briefly, she turned it over to Cst. Polspoel, who placed it in a secure temporary exhibit locker. Later that morning, at the direction of the Integrated Homicide Investigation Team ("IHIT"), Cst. Polspoel retrieved the knife and transferred it from the plastic bag to a clean paper bag, without touching it in the process. She then labelled and sealed the paper bag. G.R.'s

counsel raised the issues that Cst. Polspoel did not have notes of having worn gloves for the process she engaged in to transfer the knife, although she testified that she had worn them, and that she and Cst. Wirth gave evidence of slightly differing times at which Cst. Wirth had passed the knife on, with Cst. Wirth having no notes of the time that she testified to, a difference of about three minutes from Cst. Polspoel, although she thought she had recorded the time in a police task action report and said she had no reason to disagree with Cst. Polspoel's time.

### **i. The 7-Eleven Video**

**202** There was a further admission of fact that video surveillance was in place at the Market Pavilion on Main Street, overlooking the 7-Eleven store that was then in operation (the evidence was that it is no longer there), and that this video captured images between 12:37:32 a.m. and 12:38:17 a.m., which its footage accurately depicts. This is a period shortly after the attack on Mr. Gordic.

**203** According to the Google map placed in evidence, the 7-Eleven was west about 50 metres along Main Street from the place that the walkway joins that street. The camera appears to be positioned above the store, looking down on the pedestrian area in front of it. If, as the map indicates, the store was on the north side of Main Street facing south, then the left side of the frame would be east and the right side would be west.

**204** Between 12:37:36 and 12:37:46, the video footage, which in this case is in colour, shows three figures moving from the top left corner of the screen to the bottom right corner and then out of the frame. They appear to be young men. All are running at what could be described as a jog and they proceed one by one. The camera is much closer to them than the La Cantina camera was to the attendees and the detail is quite good, especially on the mp4 video format provided as Exhibit 25(a), although the faces remain blurred.

**205** The first person to run across the screen appears to be wearing a vest or sleeveless jacket with a wide dark horizontal portion across the front and back shoulders. The fabric below this dark area is a lighter greyish colour. Underneath the vest, which is unbuttoned and trailing out behind him slightly as he runs, is a long-sleeved T-shirt with a dark body and white sleeves and a white hood. The pants and shoes are dark, and he has dark hair that appears to be mainly on the top of his head.

**206** The second person is wearing what looks like a light grey jacket with black sleeves, unzipped or unbuttoned, with a light purple shirt underneath -- quite a distinctive shade. The pants look like blue jeans and the shoes look like light brown shoes. In contrast to the first runner, the second person's dark hair also appears to cover the sides of his head above his ears. He is running just a few feet behind the first person.

**207** Further behind the first two, appearing from the left only after they have gone off screen, is the third person, who is running with his hands in the pockets of his dark-coloured hooded jacket. He is wearing dark pants and bright white runners. The hairstyle looks similar to the second person's, but not as long.

**208** The other notable feature of this video is that the third person appears to turn to his left as he exits the screen so the bottom of his legs and his feet are still visible along the right edge of the screen. Just ahead of him, a left leg appears and seems to lift upwards, as though the person is stepping over a barrier. The third person's left leg then performs the same action.

### **j. Arrests of the Accused**

#### ***i) L.Z. and A.D.***

**209** Because of the large number of visitors for the holiday weekend, the Whistler RCMP had additional officers on duty on foot and bicycle patrol.

**210** Sgt. Mulhall and Cst. Miller were on foot patrol in Village Centre when they began to receive radio broadcasts in relation to the incident near the KFC, each with progressively more information. Cst. Miller described a broadcast by Cst. Baker of a possible stabbing at 12:35. They walked in the direction of Village North to see if they could assist.

**211** As they approached Village Gate Boulevard, they saw two males walking west on its north sidewalk. These males turned out to be A.D. and L.Z.

**212** Cst. Miller did not see anyone else at that point, but Sgt. Mulhall described a third male, dressed in dark clothing, whom the Crown alleges was G.R., following close behind the first two. Sgt. Mulhall was in his regular RCMP uniform and so was recognizable as a police officer. He said that this third male glanced in his direction and then veered to the right. There did not appear to have been any communication between this person and the first two and those two did not change their route.

**213** In response to a question from me and a follow-up question from G.R.'s counsel, Sgt. Mulhall clarified that this person had moved to the right at approximately the point where the path splits in two, with one path running behind the bus stop and the other in front, and he could not say where this person went from there. He did not think the person had taken another path that runs north from that point, perpendicular to Village Gate Boulevard.

**214** He and Cst. Miller decided to approach the first two. When they were five to 10 feet away, he asked them where they were coming from. At the time of or shortly after asking this question, he noted blood on L.Z.'s hands and the front right of his hoodie. Cst. Miller said that he also noticed the blood and told Sgt. Mulhall about it. These observations, coupled with the location being a possible route from the Marketplace area and the actions of the third person, caused Sgt. Mulhall to decide to arrest L.Z., which he did shortly after 12:40. He guided L.Z. to the ground and handcuffed him behind his back.

**215** As he was about to carry out a search, L.Z. informed him he had a knife in his pocket. After removing a smartphone from L.Z.'s right front pants pocket, he lifted that pocket open, shone his flashlight in, and saw red staining that he thought was blood and a silver folding knife. Because L.Z. was already handcuffed and safety concerns were addressed, he left the knife in there to preserve its integrity.

**216** In his direct evidence, Sgt. Mulhall described L.Z. as calm, quite cooperative, and pleasant to deal with. He did not appear to be drunk or high. In cross-examination, he agreed that L.Z. had been matter of fact and very calm when telling him about the knife in his pocket, and that his whole demeanour was "a little bit strange" in terms of how much he was speaking in that kind of situation. When his counsel suggested this talkativeness reflected a lack of inhibition, Sgt. Mulhall suggested that it was "maybe a mix of bravado" as well. Rather oddly, L.Z. also spelled his surname incorrectly when he provided it.

**217** Cst. Miller had arrested A.D. at about the same time. Sgt. Mulhall said that they were about five feet apart when they carried out these arrests. Because they were relatively close to the detachment, they decided to walk the suspects there rather than waiting for a police car to transport them. Cst. Miller described some difficulties in trying to arrange that transportation before the decision was made to walk. Sgt. Mulhall walked in front with L.Z. There was about 10 feet between them and Cst. Miller with A.D. They arrived shortly after 1:00 a.m.

**218** Around the time that he searched L.Z., Sgt. Mulhall had broadcast to other officers that a third person had split off and was heading in the direction of Highway 99 west. In cross-examination, he agreed that he was proceeding on the assumption that this male was connected to the first two and that had changed his route after seeing the officers. He also agreed that the sidewalk itself split into two at that point, with the one path going in front of and the other behind the bus stop, as I have said. What stood out for him, however, was the person's change of direction.

**219** When it was pointed out to him that transcripts of the typed synopses by police radio operators during that period do not reflect any broadcasts by him of this third person, he responded that they are not a transcript of all the radio calls that are actually made by officers.

*ii) G.R.*

**220** Leaving aside for the moment the question of whether this third person seen by Sgt. Mulhall was G.R., and what the significance of those movements was, he was in fact arrested shortly afterwards, farther west along Village Gate Boulevard.

**221** Csts. Bastians and Hadlow were on foot patrol when they received the broadcasts about the stabbing incident. After the broadcast in relation to a third person still being at large, they headed down Village Gate Boulevard, west in the direction of Highway 99. They saw G.R. walking in that direction on the north side of Village Gate Boulevard and began to approach him. He matched the description that had been broadcast and Cst. Bastians said it was unusual to see a person walking alone in that area at that time of night. He was walking slowly and turning his head from left to right.

**222** At the same time, Csts. Banville and Shook were on bike patrol in this area. As they rode west on Village Gate Boulevard, G.R. hailed them by calling out and waving his arm. He was west of the intersection of Village Gate Boulevard and Northlands. When these officers approached him, he asked them where Montebello was (as I mentioned earlier, this was the name of the townhouses where the accused and Mr. Golic were staying). Cst. Banville agreed in cross-examination that G.R. did not appear anxious and was not out of breath. They had not even seen him until he hailed them.

**223** When he shone the flashlight on one of G.R.'s white runners, Cst. Shook noticed two drops of blood on it. When the foot patrol officers arrived, he told them what he had seen.

**224** Cst. Bastians said that he detained G.R., handcuffed him and, after hearing Cst. Shook, asked G.R. why he had blood on him. Cst. Bastians also saw the blood himself, on the toe area of the right runner.

**225** As a result, he arrested G.R. This was at about 12:53 a.m. They called for a police car to transport him to the detachment.

**226** Cst. Bastians rejected the suggestion on cross-examination that the moisture from condensation on the ground at that time of night, which he said had made the shoes look glossy, could also have made dried blood on them look like it was fresh. Dried blood has a brownish colour, while fresh blood is bright red, he responded.

**227** Cst. Shook removed these runners by pulling on the heels. He said he tried not to touch the blood. He was wearing cycling gloves that covered his entire hands as he did so.

**228** Cst. Chan arrived in a police car. Cst. Bastians turned the custody of G.R. over to him. In cross-examination, he said that he also noticed the apparent presence of blood on the shoes when they were on the street.

**229** After Cst. Hadlow photographed the shoes on the ground, Cst. Bastians picked them up. He pinched them together with his right hand in the area of their lace holes and supported them with his left hand underneath. He had been wearing a pair of lined winter search gloves when initially dealing with G.R., but had removed the right one to retrieve G.R.'s cell phone from his pocket during the post-arrest search. He did not put that right glove back on to carry the shoes. He said he knew the glove was still on his left hand, because he did not feel any wetness from the shoes.

**230** In his cross-examination, G.R.'s counsel mistakenly put to him that he had said he was "probably" wearing a glove on the left hand because he did not feel the wetness. Counsel suggested that he was making an assumption and could not be sure. Cst. Bastians disagreed and said he was making a statement based on his recollection. However, after it was put to him that he had no notes with respect to any glove wearing or removal and that these details had come to him as he was giving evidence, he agreed that he was making an assumption that might or might not be correct. Similarly, he agreed that he may have been the one who moved the shoes to the point on the sidewalk where Cst. Hadlow photographed them and that, in keeping with his previous testimony, he may or may not have been wearing gloves for that.

**231** He also advised in cross-examination that he did not recall how he had carried G.R.'s phone in relation to the shoes. It was either in his hand or in one of the shoes. He did not accept that there could have been contamination of the shoes by contact with the phone, because he did not rub the phone against the toe area. He also did not observe any blood on the phone. He accepted, however, that the phone and the shoes could inadvertently have come into contact with each other in the process of transporting them.

**232** He then walked back to the detachment with the shoes. He was adamant that he did not let go of the shoes in order to open the door to the detachment, which he entered after Sgt. Mulhall and L.Z. were already inside. He said that Cst. Hadlow could have opened it. When pressed, he said that he did not see how he could have opened the door with his hands occupied with the shoes and the security fob in his pocket. He had no memory of doing so. As to the possibility of taking his right hand off the shoes, he said that he remembered the shoes being in his grip the entire time, because of the heat of G.R.'s feet on his fingers. When it was put to him that he still felt this warmth 10 minutes after seizing the shoes, he said that he had not given a time frame for that assertion. He had not made a note of this recollection but "always knew that".

**233** For his part, Cst. Hadlow was not sure who transported the shoes, and in relation to Cst. Bastians' entry to the detachment, he said he "would have used his key fob," which Cst. Bastians usually kept in his notebook, so that he can enter without using his hands.

**234** Cst. Chan put G.R. in the back seat of the police car, with his handcuffs on behind his back, and drove him to the detachment. Later, when he looked in the back seat area, he saw remnants of fresh blood in the area of the back seat, where G.R.'s hands would have been. Cst. Bastians took swabs of this substance, but they do not appear to have been analyzed.

**235** This evidence is related to later observations of an injury to G.R.'s left index finger, which none of the officers involved at the arrest scene noticed.

#### **k. Seizure and Handling of Exhibits**

*i) L.Z.*

**236** Sgt. Mulhall brought L.Z. into the detachment at 1:01 a.m. The seizure of his clothes and the knife and the taking of swabs from his hands and face were carried out by Cst. Bastians and photographed by Cst. Hadlow. This process began in the cellblock hallway and continued in an interview room off of it.

**237** The process was for Cst. Bastians to seize an item, have Cst. Hadlow photograph it, and then place it in an exhibit bag, adding the relevant notations to the bag. While he had no recollection of any of L.Z.'s clothing coming into contact with his own clothing, he agreed that it was impossible to say that it had not occurred. He pointed out that he could not account for every second.

**238** He said that after each seizure he threw away the latex gloves that he had used and put on a fresh pair. In cross-examination, he demonstrated his practice of removing each set of gloves by taking the right one off with the left, then using a portion of the right one held in his right hand to remove the left, thus ensuring that his bare hand was never in contact with the portion of glove that had touched the exhibits. He said it is the only way that he ever removes latex gloves.

**239** The same process of changing gloves between the exhibits was described by Cst. Hadlow in his evidence.

**240** The relevant items of L.Z.'s clothing potentially linking him to the clothes described by the witnesses or captured in the videos were: a puffy North Face brand vest, light grey on the bottom three-quarters of its length and a dark grey or black portion on its shoulders and collar; an off-white or light grey zippered hoodie, a black Crooks and Castles T-shirt; black Rock Revival brand jeans, which have lighter stitching around the pockets; and black runners.

**241** In addition to the red staining on the front of L.Z.'s hoodie that Cst. Miller and Sgt. Mulhall had seen, Cst. Hadlow documented similar staining or spots on the right cuff and forearm and left arm of his hoodie, the right pocket and waist area of his jeans, his belt, the front and back of his undershorts, his hands and his right cheek and jawline.

**242** Cst. Bastians took swabs by wetting a piece of surgical gauze and rubbing it on what was believed to be blood from the skin. He took samples in this way from both of L.Z.'s hands and his cheek.

**243** The knife was removed from his right-hand pocket, where it had first been located at the time of the arrest. Sgt. Mulhall was still present with Cst. Bastians and Cst. Hadlow at that point, and made the notations on the exhibit bag in which the knife was kept. The knife was also swabbed.

**244** When A.D.'s counsel pointed out to Cst. Bastians in cross-examination that, while testifying, he had handled the knife and the bag and box in which it was contained using a single pair of gloves, thereby raising a concern about the transfer of DNA between them, he responded that the DNA had already been identified on that exhibit and he was not seizing it any longer. When it was suggested that this reflected a cavalier attitude, in light of the fact that Mr. Golic's trial was then pending, he said he was considering the knife only as evidence against L.Z. In response to the observation that the IHIT members who handled exhibits during their testimony had used multiple pairs of gloves, he noted, somewhat defensively, that the Whistler detachment had many junior officers and was not necessarily set up to handle investigations of this kind.

**245** Although it was put in by the Crown initially and mainly to rebut L.Z.'s evidence of intoxication, the video recording of the interview room where the seizures from him took place, which has no sound

accompanying it, appears to show the same process that Cst. Bastians described, including his changing of gloves in between seizing each item and putting the items in the appropriate bags, (with the exception of his use of a single pair of gloves at the outset to seize personal items such as L.Z.'s belt, neck chain and wallet).

**246** According to Cst. Bastians, the Whistler detachment exhibit locker was not big enough to accommodate the number of exhibits that were being seized in this investigation without raising the danger of cross-contamination. As a result, the fingerprinting room was initially used to store all of these seized exhibits, with Cst. Hadlow standing by to preserve continuity.

**247** The issue of L.Z.'s sobriety and mental state was also pursued by his counsel in relation to his behaviour during the search process. Sgt. Mulhall was not prepared to accept that the photos of L.Z. taken at the detachment, in which his eyes were entirely or partly closed, reflected a state of sleepiness. He said that he was engaged in conversation with L.Z. during that period. When it was put to him that L.Z. looked "docile" in the photos, Sgt. Mulhall described him as deflated but engaged, in the sense that he would jump into the conversation with questions and "tidbits," even in relation to things that were not directed to him. Sgt. Mulhall believed L.Z. was "very much paying attention." He did agree that L.Z. had mumbled his response after being provided with his *Charter* rights a second time at the detachment.

**248** More significantly, and consistent with his evidence about L.Z.'s talkativeness at the arrest scene, he testified that in view of some of the things L.Z. was saying at the detachment, he felt it appropriate to remind him that he was not required to say anything.

**249** Cst. Bastians agreed with the observations in the report he had written that L.Z. was overly friendly, burst out laughing at times, and seemed oddly concerned with the medical status of the victim. In addition, he accepted that some of the photographs during this period show L.Z. with a vacant stare and drooping eyes, and that overall his mood appeared to swing somewhat.

**250** Cst. Hadlow agreed with the suggestions that L.Z. had been making jokes during their dealings at the detachment and that overall his behaviour seemed a bit odd in the circumstances.

**251** When Cst. Wirth provided L.Z. with his right to counsel at the detachment, he was able to carry out that process satisfactorily, as well as contact with his mother, but it is noteworthy that during that process he once again misspelled his surname, but in a different way than he had misspelled it to Sgt. Mulhall at the time of the arrest.

*ii) A.D.*

**252** Cst. Miller brought A.D. into the prisoner bay of the detachment at 1:02 a.m., where he remained until 2:30 a.m. Cst. Miller's understanding of the reason for that waiting period was that the two others who had also been arrested were "ahead" of his prisoner, I infer in terms of being dealt with by the investigators.

**253** Cst. Miller noticed what he believed were drops of blood on A.D.'s left boot at 1:37 a.m., some time after their arrival at the prisoner bay.

**254** At 2:31 a.m., he took A.D. into the cellblock and at 2:53 he seized the boots. The process that he described for seizing them was that he put on a pair of latex gloves, removed the left boot, and placed it into a fresh brown paper bag. Cst. Polspoel was with him and she sealed the bag and made notations on it.

He then put on fresh latex gloves and seized the right boot, repeating the process with another fresh paper bag, which was once again sealed and labelled by Cst. Polspoel. She then put the boots in the exhibit locker.

**255** In cross-examination, A.D.'s counsel pursued several possibilities for the contamination of the boots due to police handling.

**256** To demonstrate the potential for it, she pointed out that the process Cst. Miller had followed in court to open the sealed exhibit bags containing the boots so he could identify them involved him using the same pair of gloves to handle scissors, the exhibit bag, and the boots, creating a risk of transfer. He acknowledged that concern.

**257** Later in her cross-examination, she linked this kind of risk to the photos of Cst. Miller handling the boots at the time they were seized. A BlackBerry phone is visible in those photos and she suggested that it would not be good to have touched the phone in the course of handling the exhibits, I infer because DNA from a previous exhibit could have been left on the phone and then transferred to the new exhibit when the officer touched the phone again with a new set of gloves. He agreed that there was always the potential for contamination by such an action and he would try to avoid it. When pressed further, he said he *would* avoid it.

**258** He did not agree with the suggestion that A.D. and L.Z. had been placed close to each other on the ground after they were arrested. He said he was cognizant of not putting them too close, because of the safety risk that he and Sgt. Mulhall could trip over each other if one of the suspects reacted adversely while they were on the ground. However, he agreed that he had not looked at the sidewalk pavement to see if there was blood there, and that nothing was placed underneath the suspects before they were put on the ground.

**259** Later that morning, after A.D. had completed his conversations with counsel and a parent, Cst. Miller seized his clothes before he was put in a cell. The relevant items in terms of potentially linking him to the clothes in the videos were: a camouflage pattern vest in what appears to be differing shades of brown; a black hooded sweatshirt; a purple T-shirt; and blue jeans. The footwear that was previously seized from him, as I have described, were beige Timberland brand boots.

*iii) G.R.*

**260** Once Cst. Chan brought G.R. to the detachment, he kept him seated on the floor of the cell bay and remained with him. He said that L.Z. was in a separate closed room at this point. Shortly after 2:00 a.m., with Cst. Polspoel and another officer present, he began to seize G.R.'s clothes. Like the other officers involved in seizing exhibits from the accused, Cst. Chan described using a clean pair of gloves to seize each item, and to sealing each exhibit in a container after it had been photographed. After these exhibits had been seized, he placed them in temporary Exhibit Locker 33, which is secure.

**261** G.R.'s relevant outer clothes were a black Under Armour brand hoodie with a grey hood; blue jeans; and a white or light-coloured baseball shirt with grey sleeves. He was also wearing a gold watch that had some red staining on it, the potential relevance of which was apparently not pursued.

**262** When his jeans were being seized, G.R. made a comment to Cst. Chan, which the Crown fairly agreed could be elicited by the defence as a spontaneous utterance at the point that the state of his clothing first arose. G.R. said there was blood in his left pocket because he had cut his finger and had been rubbing it on the pocket.

**263** Cst. Wirth took a photo of an apparent injury to G.R.'s index finger. It is not an ideal photo, being quite dark, but it appears to show dried or congealed blood on the fingernail, the cuticle, and an area of about an inch below them on the finger itself. There is also an area of darker blood on the cuticle, from which the blood may have emanated, but also a darker horizontal mark on the finger that could be a cut. It is impossible to say with any certainty based on the photograph. Cst. Wirth described it as "a nick on index finger - fresh blood." Cst. Chan's description was that the blood "looked to have been fresh," and while it was not a severe injury, it was "more than a paper cut."

*iv) G.R.'s Shoes*

**264** When Cst. Bastians arrived at the detachment with G.R.'s shoes, he was asked by Sgt. Mulhall immediately to help with the seizure of exhibits from L.Z. He testified that ideally he would first have secured the shoes in the locker, but because he was needed by Sgt. Mulhall and the situation at the detachment was somewhat chaotic, he decided to put the shoes and G.R.'s cell phone on the floor beside an administrative staff desk in the general duty area of the detachment office. The phone was either on the floor beside the shoes or still inside one of them. The area of the office that he put them on was not in a main walkway and the shoes were placed "closer to under the desk," with the soles resting on the carpet. This office area is under 24-hour video surveillance, although the desk itself is not covered by the cameras, and access to the building is only possible by the use of authorized electronic key fobs. He did not recall there being a lot of officers in that area at that time of night. He was not able to review the surveillance video to determine whether anyone had touched the shoes, because it had been seized by IHIT.

**265** He then began seizing the exhibits from L.Z., as I have previously described, at 1:19 a.m. At 2:26, he returned to the shoes. He did not have gloves on. He had removed the last latex gloves that he had been wearing in relation to the seizure from L.Z. The shoes were in the same place that he had left them and the apparent bloodstains on them appeared the same as when he had first noticed them. He picked them up by pinching the lace areas together once again, as he had at the arrest scene, although he could not remember if he put his left hand underneath the soles again. He took them to the fingerprint room, which was still being used to store all the exhibits at that point. There he placed each shoe in a separate exhibit bag and labelled the bags. He could not recall whether he had put gloves on after that, but could not see why he would not have put them on to make the shoes exhibits.

**266** In cross-examination, he added that it would be "uncharacteristic" of him to deal with the processing without gloves, and that there were fresh boxes of gloves in that room, but he could not say if he had used them or not. L.Z.'s seized articles were on the far end of the fingerprint room from where he dealt with G.R.'s shoes.

**267** He resisted the suggestion from G.R.'s counsel that he had violated police protocols in failing to immediately make the shoes an exhibit. He responded that the order in which he dealt with the shoes was correct, but because he was required to assist Sgt. Mulhall, there was about an hour before they were put in bags. He did not report this occurrence to his supervisor, because he did not perceive that he had done anything wrong, although he conceded that it was not ideal and could have been managed differently. Again, in relation to the contrast with IHIT, he conceded that IHIT might have better practices because of the number of cases of this kind they deal with, and may have had other ideas about how to preserve the shoes in the interim. He had dealt with major investigations in his previous posting in Salmon Arm, but had not previously worked "major events" like this one in Whistler, in which there was a chaotic situation

in the cellblock and he had to respond rapidly to provide assistance

### **I. Scene Examination**

**268** After he had finished seizing G.R.'s clothing, Cst. Chan went to the scene of the attack and took photos which captured the multiple bloodstains around the walkway, some of which still appeared to be in a semi-liquid state. This included apparent blood spots on the concrete pillar nearest to the bloody shirt and towels. He was not trained as an identification officer, but I took his assignment to be an effort by the local investigators to preserve the appearance of that scene as soon as possible after the attack.

**269** A more rigorous documentation of the scene was carried out later that morning by Cpl. Lu and Cst. Otto, who are forensic identification officers. Their process involved Cst. Otto placing numbered markers next to each relevant object or apparent bloodstain, and Cpl. Lu then photographing it and its marker together for ease of reference.

**270** Leaving aside for the moment the expert evidence about what the stains signify, the things observed by the identification officers correspond to many of Mr. Gordic's movements as they were observed by his companions and captured in the video, from the point that the attackers appeared in the walkway to his collapse. The first marker was placed by a bag of Doritos chips next to the pillar that Mr. Gordic was standing by when the video shows him reacting to the approach of the attackers and dropping a bag on the ground.

**271** Although the succeeding markers are in reverse numerical order from what seems to have been the actual sequence of events, looking at them in descending order, from 14, which marks blood droplets in the covered portion of the walkway, to 2, which marks the bloodied material in the area of Mr. Gordic's collapse, they essentially track his movements as they were captured in the video.

**272** The numbered deposits of blood progress along the covered walkway in the direction of Marketplace, come out into the uncovered portion of the planter where some of Mr. Gordic's companions had been sitting, and cut rather sharply to the area between the planter and the shorter concrete pillars, where he is seen swaying in the video before collapsing.

### **m. Disposition of Exhibits**

**273** Later that morning, Cst. Bastians transferred all of the exhibits to the community policing office, which is adjacent to the cellblock. The goal was to have a place to store them that could be secured. However, the lock malfunctioned, so he secured the door by placing a large exhibit sticker over the door. Cst. Hadlow broke the seal and entered shortly after that to adjust some of the police exhibit numbers, which had been applied incorrectly.

**274** Cst. Dulude, who became the IHIT exhibits officer, took custody of these exhibits on the 18th. The process he described, similar to the anti-contamination measures described by the officers who seized the exhibits originally, was to put on a fresh pair of gloves before examining each exhibit, after which it would be returned to its exhibit bag and the bag resealed.

**275** In cross-examination, A.D.'s counsel drew Cst. Dulude's attention to examples of what she suggested were deficiencies in his handling of exhibits, as shown in the photos of the process. Mr. Gordic's shirt, which contains tears that are consistent with the locations of his stab wounds, was placed on a table with the exhibit bag touching one of its sleeves, which he conceded was less than ideal. However, when the possibility of other officers touching the outside of the bag and transferring DNA from the shirt to other

objects was put to him, he clarified he was the only officer who touched the bag, I infer during this particular examination process. Similarly, he agreed that placing G.R.'s shoes on the floor, with the heels touching the exhibit bag, was not ideal.

**276** He submitted what have been described in the admissions of fact as the "DNA exhibits" to the RCMP Forensic Lab for analysis. These were: the knife from the scene; the knife from L.Z.; L.Z.'s vest and white hoodie; A.D.'s boots; G.R.'s right runner; a blood sample from Mr. Gordic's autopsy; and one taken from G.R. pursuant to a DNA warrant. The knife from the scene was submitted in June and the others were submitted at the end of July. As I will describe, before Cst. Dulude submitted the July exhibits, Sgt. Dubyk, the bloodstain pattern analyst, had requested and reviewed the footwear and the clothing and had made recommendations about what should be examined for the presence of DNA.

**277** Before the DNA analysis was carried out on them, Cst. Dulude submitted the knives for fingerprint analysis to Cst. Otto. No useful fingerprints were found on either one. Cst. Otto testified that these knife surfaces were not very suitable for obtaining fingerprints and expectations of finding any on them were low to begin with. While a brand new knife might offer a fairly good chance of such fingerprints, the age of an item and the amount it has been handled will reduce that likelihood, because of fine scratches that develop, as well as the accumulation of sweat and skin oils. (Sgt. Dubyk, who was also an experienced identification officer before becoming a bloodstain pattern analyst, described the same kinds of impediments to usable prints arising from repeated handling of a knife in his cross-examination.) Cst. Otto explained that knives could still be swabbed for DNA afterwards, however, the fingerprint testing process will reduce the concentration of any blood or DNA on them. For that reason, he took DNA swabs before that process, although they do not appear to have been submitted for analysis. He described the various steps that he took to avoid contamination of these knives during his dealings with them, such as examining them separately, using a clean paper examination surface, and making multiple glove changes.

**278** He described both knives opening with a gravity-assist mechanism, meaning that if the holder presses their thumb on the button on the handle while moving the knife forward in a sweeping motion, the blade will open more rapidly.

## **n. DNA**

### ***i) Overview***

**279** There are admissions of fact specifically dealing with the DNA evidence. They describe the forwarding of the relevant exhibits to the RCMP's National Forensic Laboratory, the manner in which they were dealt with there, the initial examination of them by a search technologist, the subsequent identification of DNA profiles on parts of them by an analyst, and the interpretations made and the conclusions reached concerning those profiles by a reporting scientist. Dealing with issues of continuity, there is a general admission that throughout these processes the exhibits were dealt with according to the lab's "established guidelines, protocols, and policies."

**280** In addition, the Crown called as witnesses Lyngrace Gandham, the search technologist, and Natalia Biernat, the reporting scientist, to elaborate on their involvement.

### ***ii) Initial Screening***

**281** Ms. Gandham performed screening tests for the presence of blood on the exhibits and also removed and submitted samples from them that were sent on to be analyzed for the presence of DNA.

**282** The first blood screening test she carries out is a presumptive one using a product called Hemastix. When it is applied to a portion of the stain in question, it will turn green within 10 seconds if an enzyme that is found in blood and other substances, such as rust or plant material, is present. The limitation of Hemastix is that it also reacts to things other than blood, which can lead to false positives. That is why it is only a presumptive test.

**283** Hemochromogen, the second test she uses, is more discriminating. It involves removing a small portion of the stain, putting it on a microscope slide, and applying a reagent to it. If blood is present, then crystals will form and that can be seen with a microscope. Ms. Gandham explained that a substance that is blood can have a negative hemochromogen test for several reasons, such as that there was not enough blood on the stain to begin with, that it has been diluted too much, the stain has absorbed too much into the material of the object, or because of certain environmental conditions, such as rain or other moisture.

**284** She examined the knife that was recovered from the scene and performed the Hemastix test on five areas of orange staining. All results were negative. In cross-examination, G.R.'s counsel had her confirm that, in fact, she was unable to identify any kind of biological material on the knife. She then sampled three areas of the knife: a fingerprint-like impression on the blade (likely the residue of Cst. Otto's testing); the rest of the blade; and the handle, and then transferred them to the analytical unit for testing.

**285** The left boot that had been taken from A.D. had multiple areas of brownish staining. She tested two areas that had been designated by Sgt. Dubyk. Both were on the left side of the boot, one in the heel area, almost at the back of the boot, and the other on the toe area, slightly to the left of centre, a short distance from the front. The Hemastix tests were both positive, but the hemochromogen tests were both negative. This means that the substances were either not blood, or were blood that was not sufficiently concentrated to create the necessary reaction. Because these boots were leather and that is one of the substances that can trigger a false positive from Hemastix, Ms. Gandham performed a Hemastix test on the boot on an unstained portion. The negative result indicated to her that the composition of the boot had not played a role in the results.

**286** She agreed with the suggestion by A.D.'s counsel that she had obtained a negative result on the hemochromogen test to confirm the presence of blood, despite it initially appearing to her that there was enough material present for the test. I took counsel's point to be that this would weigh against an insufficient concentration of blood being the cause of the negative hemochromogen outcome, and tend to favour it being a different substance than blood.

**287** Sgt. Dubyk had designated one area for testing on the right boot -- on the front left side, a short distance above the sole. Ms. Gandham's testing had the same outcome as for the left boot: Hemastix positive and hemochromogen negative.

**288** She took samples from the designated areas of each boot and forwarded them for analysis in the same way.

**289** The right white runner taken from G.R. had four areas of brown blood-like staining that had been identified by Sgt. Dubyk. They were on the middle of the right side near the sole, the middle of the right side just to the right of the laces, the front right just above the laces, and the middle of the toe. She was directed to sample the one in the middle to the right of the laces. She proceeded directly to the hemochromogen test without doing the presumptive test first, because of the blood-like appearance of the stain. That test was positive for blood. A sample of that stain was taken and forwarded for analysis. In cross-examination, G.R.'s counsel reinforced the point that the effect of this selective testing is that it is

not possible to say what the substance is on the other three spots, of course other than by drawing the inference based on the positive test on a similar-appearing stain.

**290** Three areas of reddish blood-like staining had been identified for testing on the knife seized from L.Z.: the blade; the spring between the handle and the blade; and the handle. Once again, the appearance of the stain suggested that there was sufficient concentration of blood for her to go straight to hemochromogen testing, which was positive in all three spots. Samples from each spot were also taken and sent on for analysis.

**291** Two spots were identified by Sgt. Dubyk for testing on L.Z.'s vest: one in the upper right chest area just to the right of the zipper and the other in the middle of the right chest, farther to the right of the zipper than the first one. Both areas tested positive with Hemastix, but when the higher stain tested negative with hemochromogen, Ms. Gandham looked at the lower one and, noting it was much lighter than the one that had already tested negative, concluded it was not concentrated enough to test it.

**292** Finally, two areas were tested on L.Z.'s hoodie pursuant to Sgt. Dubyk's request: the upper right arm and the right pocket of the hoodie. Because their appearance was so blood-like, it was not necessary for her to conduct the presumptive test first. Both areas tested positive for blood with the hemochromogen test. As in the previous cases, samples from each of these designated areas of these articles of L.Z.'s clothing were sent for analysis.

### *iii) Interpretation and Conclusions*

**293** As part of her evidence as an expert, Ms. Biernat gave an overview of the basic science that underlines the ability to make DNA identifications. Because that science is not in issue in the trial, I will describe it only in the amount of detail needed to provide context for the matters that were actually disputed.

**294** The ability of DNA analysis to identify bodily substances of specific individuals is based on the patterns of genetic characteristics that are found at certain specific locations among the 23 pairs of chromosomes that are in each cell of the human body. Unlike the vast majority of DNA, which is identical among all humans, each individual person has unique variability in those locations, which can be used to match or exclude bodily substances as having come from that person. Fifteen such locations are routinely analyzed, plus the chromosomes that determine gender (which I infer simply correspond or not to the gender of the donor of the known sample).

**295** The result of this analysis of a sample of a bodily substance in each location is expressed as pairs of numbers, representing the pattern of genetic characteristics on each of the pairs of chromosomes in that location. These 15 sets of numbers, plus the configuration of the gender chromosome, create the DNA profile of that bodily substance, which can then be compared to the profile that has been generated from another substance. A difference in the numbers at any of the locations between the two profiles means that they did not come from the same person, and the sample that was sought to be matched to that person is excluded from further consideration.

**296** A complicating factor arises when there turn out to be genetic characteristics from one or more additional people at these locations. This is known as a mixed profile and it requires the reporting scientist to interpret the results and determine whether there is a sufficient amount of separation between the amounts of the largest amount of material at that location and the other amounts, for the larger amount to be considered the "major profile" at all locations. If it can, then that profile is considered the major profile

of the sample as a whole. The major profile can then in turn be compared to the profile from another bodily substance in the same way as for profiles from a single source.

**297** There can also be partial profiles, where there is not sufficient information at each of the 15 locations to identify a major profile for it. However, if the reporting scientist is able to identify a major profile in at least eight locations, it is considered the major profile of that sample, and a match can still be made to another sample, comparing those locations where the major profile has been identified.

**298** There is a crucial distinction in the process of comparing DNA profiles that must be kept in mind. A difference between the genetic information at a location in one sample and that location in the sample being compared means that the samples do not match, and they are excluded as having come from the same person. However, as I will discuss in the context of the thorough cross-examination conducted by G.R.'s counsel, the absence of some information, or the inability to identify a major profile at one or more locations of a partial profile, does not exclude it from being a potential match to the profile from the other substance. As Ms. Biernat explained, it is not that the genetic information in those areas is different, it is simply that she is unable to tell what the major profile is, from among that information.

**299** The strength of a match of DNA profiles is expressed in terms of the probability that an unrelated person in the general population would have the same profile. This is known as the random match probability. That figure is arrived at by multiplying the probabilities of an unrelated match of the genetic characteristics at each location by each other.

**300** The DNA admissions, as well as Ms. Biernat's reports and testimony, set out her findings with respect to the submitted exhibits:

- \* The profiles of the samples taken by Ms. Gandham from the heel area of A.D.'s left boot and the toe area of the right boot matched the known sample from Mr. Gordic. The random match probability is one in 2.3 quintillion.
- \* The profile of the sample taken by Ms. Gandham from the toe area of A.D.'s left boot is of mixed origin consistent with having originated from two individuals, but the major component of the partial profile matched the known sample from Mr. Gordic. The random match probability is one in two quadrillion.
- \* Based on the outcome of Ms. Gandham's screening test (positive Hemastix, negative hemochromogen), the forensic conclusion for these areas of the boots was that "blood may be present, however it was not identified in [these] particular area[s]." As Ms. Gandham had also described, this could mean that there was no blood present, or that there was not enough material present to test positive.
- \* The profile of the sample taken by Ms. Gandham from the middle of G.R.'s right shoe to the right of the laces (described in the admissions as the "outstep side of the shoe, close to the shoe laces"), matched the known sample from Mr. Gordic, with a random match probability of one in 2.3 quintillion. The positive hemochromogen test meant that blood was confirmed in this area of the shoe.
- \* The profile of the sample taken by Ms. Gandham from the blade of the knife found at the scene is of mixed origin, consistent with having originated from at least three individuals. The major component of this partial profile matched the known sample from G.R. The random match probability is one in 53 trillion. In light of the outcome of Ms. Gandham's screening tests, Ms. Biernat confirmed that blood was not found to be present on the knife.

Ms. Gandham's sample from it, from which the partial profile was developed, was looking for other biological material that could contain DNA.

- \* The profiles of the samples taken by Ms. Gandham from the right pocket area of L.Z.'s vest and from the right sleeve and right front pocket of his hoodie are of mixed origin, having originated with one individual plus a trace component. The profile of the sample from the right upper area of the vest is of mixed origin, consistent with having originated from two individuals. The main components of all of these profiles matched the known sample from Mr. Gordic. Blood was identified on the two tested areas of the hoodie by the hemochromogen test. The positive Hemastix tests, followed by a negative hemochromogen test in one area and a decision not to perform the test on the other, means that blood could not be confirmed on the two tested areas of the vest.
- \* The profiles of the samples taken by Ms. Gandham from the blade, the spring between the blade, and the handle of L.Z.'s knife matched the known sample from Mr. Gordic. The random match probability is one in 2.3 quintillion. The positive hemochromogen tests meant that blood was present in these areas.

**301** The main focus of the cross-examination of Ms. Biernat, which was carried out most extensively by G.R.'s counsel, was on the possibility that secondary DNA transfer had occurred in this case. This is the process by which a person's DNA can end up at some other location than where they originally deposited it, through contact between the original deposit surface and a subsequent one. Ms. Biernat agreed with the suggestion that research and discussion about this issue in her profession is "becoming more prevalent".

**302** Dealing generally with the transfer of DNA between two surfaces, she said that a wet stain will transfer DNA more readily than a dry one. Other factors that can affect the likelihood of a transfer are the porousness and texture of the surfaces involved, as well as the amount of pressure or friction between them. It is more likely that DNA will transfer between objects if there is friction or rubbing between them than if they are just lightly touching. The amount of DNA involved is also a factor affecting the likelihood of transfer. In contrast to the transfer of DNA in liquid form, which can be predicted, she said that there is more "ambiguity" with respect to transfer between two people by touch.

**303** It is possible, she agreed, that touching an object will transfer a person's DNA to it. She also agreed that this is "not uncommon". But she emphasized that the likelihood of such a transfer is not absolute. It does not mean that every time a person touches an object there will be a transfer of DNA or, if one occurs, that the person will be a major component on the object.

**304** Responding to a hypothetical situation from A.D.'s counsel, in which a person came into physical contact with a variety of people, objects, and surfaces in the course of a working day, she explained that while it would be possible for the person to pick up the DNA of others from those forms of contact, the majority of the DNA on that person would still be their own.

**305** Skin cells are a biological material that can be transferred in this manner, she agreed. Although they are technically non-living material at that point, because they have left the body, they still generally have the properties of living cells, which permits them to provide DNA profiles. After conducting some additional review at the request of A.D.'s counsel, she was able to confirm counsel's suggestion that a person can shed 400,000 skin cells in a day. Depending on personal habits and the presence of certain health conditions, two people may shed their skin cells at quite different rates (and therefore, I infer, be more likely to pass on their skin cells through the process of touch).

**306** The RCMP's National Forensic Laboratory, of which she is a part, does not have a test to identify

skin cells as the specific material that makes up the DNA that is found on an object, as it does for blood and semen. In this case, no specific biological material was found on the blade of the knife found at the scene, so it was classified as being "unknown cellular material." In general terms, it could be any biological material from a human being, although Ms. Biernat ruled out hair, because in that case the technologist would have sampled the hair root and submitted it. Urine and feces were put forward as alternatives, but she said they are generally not good sources of biological material.

**307** When G.R.'s counsel suggested a scenario in which a person shakes hands with another person and then touches a knife, Ms. Biernat says the literature tells us there is a possibility that the person who never touched the knife, and only shook hands with the person who did, could end up with their DNA on it. Factors that will influence whether that occurs are the length of the handshake, the amount of pressure and friction between the surfaces involved, the type of biological material (liquid versus skin cells), and how many other objects the person handled between the handshake and touching the knife. Sweat enables DNA to transfer more easily, she said. The more transfers there are, the less material is transferred each time.

**308** She stressed that it is an entirely different question whether the person who did not touch the knife could end up as the major DNA profile on it. Where the biological material is skin cells, she considered a scenario in which the person who had never touched the knife became the only contributor to the profile. She considered this scenario unlikely. In contrast, if blood or other biological fluids were involved, then it would be probable for the contributor of them to be the only profile.

**309** She confirmed two other attributes of DNA that are important for the defence theories in this case: (1) there is no way to tell when DNA was placed on an object; and (2) if it is preserved from sunlight, exposure to the environment, and extremes of temperature, DNA can remain on the object for a very significant period of time.

**310** With respect to the knife found at the scene, she also agreed that she could not determine in what order the DNA profiles that were found on the blade, which represented characteristics from at least three individuals, had been placed there. She did not consider it accurate to express the results as indicating that at least three individuals handled the knife, only that the profiles of at least three were present.

**311** More broadly, she said that it is not possible to determine the sequence in which multiple DNA profiles have been deposited. Responding to a question from A.D.'s counsel relating to contamination by police handling, she confirmed that it is not possible to determine, when she is dealing with a series of profiles on an object, whether they were left on it by different individuals or by the handling of it by one person who had more than one DNA profile on their hands.

**312** Responding to the scenario that potentially applies to A.D.'s circumstances, she agreed with the suggestion that DNA can be transferred by a person grabbing onto a pair of shoes, whether while wearing gloves or with bare hands.

**313** Dealing specifically with G.R.'s circumstances, she agreed there was a possibility that he had come into contact with the knife at an earlier stage and someone else handled it after that, or that his DNA ended up on it through his contact with some other person or object.

**314** But she pointed out that almost all transfer situations are "possible" -- how likely a transfer actually is depends on the facts, which I took to mean the specific facts of the case in question.

**315** G.R.'s counsel cross-examined Ms. Biernat skilfully on three journal articles that have examined the

possibility of secondary transfer in greater detail. She acknowledged sufficient familiarity with the journals in question to allow passages from the articles to be put to her.

**316** The first was by G.E. Meakin, E.V. Butcher and R.A.H. van Oorschot, "The deposition and persistence of indirectly-transferred DNA on regularly-used knives" (December 2015) *Forensic Science International: Genetics Supplement Series* 5, e498. The experimental design there was for volunteers to handle a knife for one minute, twice a day, for two consecutive days. Over the next three days, these volunteers shook hands with a person for 10 seconds and then, without touching anything else, stabbed their knife into foam for one minute. In three of the four pairings of knife user and hand shaker, genetic profiles of both of them were found on the knives within one hour. The ratio was 10:1 in favour of the knife user.

**317** Ms. Biernat commented that she did not find it surprising that some of the hand shakers' genetic material would be found on the knife, but she pointed out the proportion of it compared to the amount of the knife users' was a lot smaller. She also observed that the researchers had not detected a full profile of the hand shakers, "just a small portion, a small genetic characteristic." This material could, in fact, be from the hand shaker, but it could be from somewhere else. The researchers had also used thresholds for detecting such characteristics that were lower than the very conservative ones used by the Forensic Laboratory. In her opinion, it was therefore a "very strong statement" to conclude that the genetic characteristic corresponds to the hand shaker. However, she once again had no difficulty accepting the general propositions from the study that secondary transfer can occur and that the presence of the material can persist for a long period of time.

**318** The second article on which she was cross-examined was by M. Goray, R.J. Mitchell and R.A.H. van Oorschot, "Investigation of secondary DNA transfer of skin cells under controlled test conditions" (May 2010) *Volume 12, Legal Medicine*, 117. Again, Ms. Biernat did not dispute its overall methodology or conclusions. She agreed with its findings that the variables affecting the transfer of DNA by means of skin cells include the nature of the surface on which it was deposited (non-porous surfaces increasing the likelihood of transfers of the initial deposit, but porous secondary surfaces facilitating transfers more readily), and the manner of contact between that surface and the one in relation to which a transfer potentially occurs. To those relevant variables, she would have added the personal habits of a person from or to a transfer takes place and the number of intervening transfers between the original deposit and the collection of the DNA.

**319** With respect to the influence of the freshness of the deposit of material, the article concluded that, unlike biological fluids such as saliva and blood, the freshness of skin cells on a surface generally does not affect the likelihood of transfer. As to the types of contact, friction was the one that significantly increased the rate of transfer. Ms. Biernat explained that friction actually increases both the amount of the surface area that is in contact between the two items and the amount of time that they are in contact. In her view however, most of the DNA transfer in handshaking would occur through pressure rather than friction.

**320** Finally, Ms. Biernat was asked about the article by C.M. Cale, B.S. Madison, E. Earll, K.E. Latham, and G.L. Bush, "Could Secondary DNA Transfer Falsely Place Someone at the Scene of a Crime?" (January 2016) *Volume 61, Issue 1, Journal of Forensic Sciences*, 196. In experiments constructed by the authors, two subjects wore latex gloves for one and half hours, shook hands for two minutes, and then each handled a clean knife of their own for two minutes, after which the knives were swabbed. What was significant for G.R.'s position was, first, that secondary DNA transfer (that is, DNA from the person who did not handle the knife), was found in 85% of the samples, and in five of the 20 samples in which DNA

was identified, the person who did not handle the knife previously provided the major profile or the only profile.

**321** Ms. Biernat expressed a number of concerns about this article. She questioned how realistic this type of transfer would be in day-to-day occurrence -- that is, the use of gloves prior to the handshake. There was also one subject in the study who was found to be the predominant source of the DNA that was recovered (in other words, the person was a good shedder of skin cells) which would skew the data. And, significantly, major profiles were identified in only six locations, which is less conservative than the RCMP approach of requiring eight. Without seeing the raw data of the researchers or knowing what their thresholds for identifying major profiles would be, she could not say if that number represented a majority of the sites that had been examined. As she put it, "[T]o say that in five instances the secondary contributor was a major who had never come in contact with the knife, I think is over-exaggerating [sic] the results."

**322** In addition, Ms. Biernat was shown a critique of that study that was published in the Journal of Forensic Science (September 2016) Volume 61, Issue 5. She agreed with its general statement that secondary DNA transfer should not be regarded as an event that may occur only under optimal experimental conditions. More broadly, she agreed that DNA should never be treated as the sole form of evidence and that it was part of her role as an expert to explain clearly the limitations in the evidence or the methodology. As a factor potentially limiting the weight to be attributed to that study, she also agreed with the author of the critique that the conditions of the study had been geared towards generating DNA transfer.

**323** After being referred to a report by Dean Hildebrand, a DNA expert acting for the defence and with whom she was familiar, Ms. Biernat said that while she would expect the person who was the primary handler of an object to be the major contributor, a scenario in which a person who had not handled it ultimately provided the major profile was possible. She later elaborated this would take place "in a very small amount of cases... less than five per cent."

**324** G.R.'s counsel also explored some of the technical aspects of Ms. Biernat's interpretation and conclusions. He referred her to the documents that she generated during her analysis and interpretation of the profiles from G.R.'s known sample and the blade of the knife from the scene. He pointed out that some of the numbers that indicate genetic characteristics at certain locations in the profile from the known sample are absent from the document showing the profile from the knife, and suggested that this means the profiles do not match.

**325** In keeping with her general explanation of the results for partial profiles from mixed samples that I summarized previously, Ms. Biernat reiterated that a partial profile means that there is information at fewer than the full 15 locations. So, at three locations in the profile from the knife, she could identify the number or pattern of only one of the two characteristics at those locations, which she indicated by adding a plus sign to those numbers. She stressed that that number represents the major profile at that location, but due to several possible factors, such as the number of contributors, the weakness of the information or an imbalance of genetic characteristics, she will only provide the genetic characteristic that she is certain about, in order to be conservative. She also stressed that having partial information at a location is different from one of the characteristics at that location differing from the same characteristic at that location in the known sample, which would mean the profiles do not match.

**326** At one location, she did not include either number corresponding to the profile from the known sample. She explained that this does not mean that the profiles do not match either. She was unable to identify a major contributor, likely because the number of contributors prevented her from determining

which one was contributing more. Her ability to identify a major contributor was controlled by the lab's guidelines. It is important that she remains conservative in her interpretations, she said, which I took her to mean by adhering to guidelines about the level of information that needs to be present before identifying a characteristic.

**327** In essence, she said, there needs to be a certain amount of difference between what she thinks the major profile is at a location and what other genetic characteristics at that location are exhibiting. Usually the person who is contributing most of the DNA will do so at all locations. It is rare for a major contributor at one location to be a minor at another. In those "back and forth" situations, reporting officers cannot say anything about the profile and no meaningful comparison can be made.

**328** G.R.'s counsel pursued this issue further, putting another lab document to her that showed the contributions of different genetic characteristics at each location on the knife blade sample, expressed in percentages. She explained that it was not just the relative contributions of each characteristic at a location that mattered. Pursuant to the Laboratory's guidelines, it is the degree of separation between other characteristics and the largest contributor that determines whether she is permitted to call the largest one the "major" one at that location.

**329** While the interpretation between two reporting scientists can vary, she said that the overall interpretation of whether there is a major or a minor component, and the number of contributors to it, will always remain the same. This is because their training program is standardized, as is their validation program. In general, the thresholds and guidelines used by the RCMP, "tend to be more conservative."

**330** She rejected the suggestion that comparing the random match probability for profiles on two different exhibits will show the relative likelihood of finding that person's DNA on each exhibit. Random match probability statistics simply cannot be used in that manner.

**331** When asked why only a limited number of stains had been examined, Ms. Biernat explained that in this case there had been a significant amount of consultation with the bloodstain pattern analyst, Sgt. Dubyk, as to what was relevant. The lab is guided by whatever the "forensic questions" are in a particular circumstance. Here the question would be whether the identified stains are blood and whether the DNA profile can be obtained from them. If the identity of the wearer of the shoes had been significant, for example, then steps could have been taken to try to determine that forensically.

#### **o. Bloodstain Pattern Analysis**

**332** Sgt. Dubyk examined A.D.'s boots, G.R.'s runners, and L.Z.'s vest and hoodie before they were sent to the forensic lab for DNA analysis. He conducted his own Hemastix tests on them for the presumptive presence of blood, which led him to exclude G.R.'s left runner from further consideration after the test on it was negative. He flagged certain stains on the items for DNA analysis, which were the ones that Ms. Gandham later conducted her screening tests on, as I have described, and sampled for DNA analysis.

**333** Pursuant to his expertise in bloodstain pattern analysis, Sgt. Dubyk gave evidence about the type of stains that can be seen on these items and, very generally, the manner in which those stains would have been deposited. His final opinions are closely linked to the outcome of the DNA analysis, because he incorporated into those opinions the Forensic Lab's identification of Mr. Gordic's DNA profile in the material comprising some of the stains.

**334** His report and opinions with respect to the actual presence of blood are confined to those stains on

which DNA analysis is performed, but I am of course asked to draw the inference that the other stains on the tested articles are also blood.

**335** Like the science underlying DNA identification, the basic principles that permit the analysis of bloodstain patterns are not in issue in this case, although certain variations on the application of those principles were raised in cross-examination.

**336** The premise is that blood is consistent in how it behaves in various situations and its movement follows the laws of physics, mathematics, and biology. This permits an analyst to work backwards from the presence of a bloodstain in a location and to make observations about the type of physical action that likely placed it there. As Sgt. Dubyk elaborated in his evidence, the amount of information available to him in a given situation governs how specific he is able to be about the mechanism by which blood was deposited.

**337** Bloodstains are grouped generally by their causes into gravity (the flow of blood on a surface due to gravity or the movement of the surface); spatter (blood dispersed through the air due to external force being applied to liquid blood); and transfer (something contaminated with blood touching another surface). This case is concerned mainly with spatter and transfer stains, although other possibilities were raised.

**338** On A.D.'s left boot, Sgt. Dubyk described the mark on the heel that was dealt with by Ms. Gandham as a 3 cm by 1.5 cm transfer stain. He could not tell whether this stain was due to just one contact, so he described it as "multiple transfer stains" in his report.

**339** He described the second stain that was sampled for DNA on the toe area as another transfer stain, this time 1 cm by 1 cm.

**340** He applied the Hemastix test to both locations and received positive results.

**341** On the right boot, the stain on the front left of it, which he described as being on the instep of the toe, was a transfer stain .5 cm by .5 cm. It also tested positive in his Hemastix test.

**342** In his opinion, the transfer stains on both boots were consistent with a person or object contaminated with blood coming into contact with the boot.

**343** On G.R.'s right runner there were four stains: three "altered spatter stains" and a transfer stain. An altered stain is one that has characteristics indicating that some physical change has occurred to it, either by an object wiping through it or by dilution from water or another liquid.

**344** The altered spatter stains were the ones in the middle of the right side near the sole, the middle of the right side just to the right of the laces and on the front right just above the laces. Their size was 1 mm or less. He tested the spot just to the right of the laces with Hemastix and that was the one that was highlighted for DNA testing.

**345** On the toe area, he described a 5 cm by 4 cm transfer stain. It tested positive for Hemastix, but was not flagged for DNA testing.

**346** His opinion on the spatter stain that was tested was that it was consistent with being created by an external force being applied to blood, causing blood to be dispersed through the air, landing on the shoe, and being altered by possible contact or dilution. He was unable to say anything about the force that had

been involved in creating the spatter stains, nor whether all three stains had been created by the same "modality". Experiments conducted by his unit have indicated that smaller bloodstains, by which I took him to mean smaller amounts of blood, do not travel that far because they do not have enough mass.

**347** He found that L.Z.'s vest contained multiple spatter and transfer stains. He counted a minimum of 11 spatter stains, with a size of less than 1 mm. The first area of them was on the upper right side of the vest, near the zipper. He also identified individual spatter stains on the top left and bottom right of the vest, both quite near the zipper.

**348** He expressed the opinion that the spatter stains in the top right area were created by an external force being applied to blood, causing the blood to be dispersed through the air and onto the vest, "while the vest was in close proximity to the blood source".

**349** There were multiple areas of transfer staining on the front of the vest, as well as one on the back, near the bottom. Some of these stains appeared to have been altered. On the right front, there were transfer stains in the top right near the shoulder, two separate areas in the middle near the zipper, and on the very bottom below the pattern stain. The higher of the two middle areas was sampled by Ms. Gandham.

**350** In relation to the tested transfer stain in the right middle, he expressed the opinion that it was consistent with the vest coming into contact with a person or object that was contaminated with blood.

**351** Finally, his examination of the hoodie revealed numerous spatter and transfer stains. Hundreds of such stains, once again with a size of 1 mm or less, were on the right and left sleeves. There were also a few spatter stains on the back sides of each sleeve, which he incorporated into his description of the front. On the right side, they were in an area 23 to 38 cm from the cuff, and on the left, 27 to 38 cm from there. In the middle of the right sleeve, on the outside edge, there was swipe pattern, showing a movement in two directions. A swipe is created when there is movement between the surface contaminated with blood and the recipient surface. An area of spatter in the upper right arm was selected for DNA examination and was sampled, as I indicated. He offered the same opinion about its creation as he had in relation to the sampled spatter on the vest.

**352** There were also multiple transfer stains on the front and back of the hoodie. They were in the lower right arm; slightly higher on the left arm but still below the elbow; large areas on the pockets on each side of the zipper; separate smaller areas on the bottom right and mid-left sides; the upper middle and bottom of the right arm; and two small areas on the back of the hood.

**353** Sgt. Dubyk was not able to give an opinion about the amount of force that would be required to generate any of the spatter stains in this case. Generally speaking, the greater amount of force that is applied to the blood source, the smaller the spatter stains will be.

**354** As I have described when dealing with the DNA evidence, all of the stains flagged by Sgt. Dubyk were ultimately identified to contain the DNA profile of Mr. Gordic, except the stain on the toe on the left boot, which was a mixed profile to which he was the major contributor.

**355** In cross-examination by A.D.'s counsel, she questioned why Sgt. Dubyk would simply import the findings from the DNA analysis into his final report, particularly in light of the fact that the hemochromogen tests conducted on the area of A.D.'s boots that he had flagged for testing did not confirm the presence of blood. He said he drew a distinction between the inability to confirm the presence of blood, which is described as "blood not confirmed" in the Forensic Laboratory's reports, which means that it may or may not be present, versus a negative test, which means the substance is not blood.

**356** G.R.'s counsel engaged in a further detailed cross-examination of Sgt. Dubyk, which he anchored in principles drawn from what were acknowledged to be leading texts in this field.

**357** With respect to the limitations of his analysis, Sgt. Dubyk confirmed that he had not attempted to calculate the angle at which the spatter stains had struck G.R.'s runner. In light of the limited number of stains, the curved surface involved, and the fact that a shoe is a movable item, it would be difficult to calculate an accurate angle. Similarly, it would not be possible to draw lines of convergence from the stain back to a point of origin, as can sometimes be done for a stain on a fixed surface. One cannot tell what position the shoe was in when the spatter landed on it. In addition, he said that he could not provide a distance between the shoe and the blood source when the stains were created. Nor could he have used a measurement of the distances between the three stains to determine if the blood source was parallel or perpendicular to them.

**358** In general, he agreed that the limited number of spatter stains made it difficult to establish a mechanism by which they were placed there. On that point, he confirmed a passage from S.H. James, P.E. Kish, T.P. Sutton, *Principles of Bloodstain Pattern Analysis*, (CRC Press, 2005) asserting that "a single or few bloodstains do not lend themselves to useful valid analysis." (at page 3). As he put it, "it's limited what I can read from the stains, yes."

**359** Another limitation put to him was the Hemastix testing and subsequent analysis of only one of the spatter stains. He explained that in order to avoid overwhelming the Laboratory, only certain stains are selected. While the two spatter stains looked like blood to him, he acknowledged that "it could be something else", and cannot say they are blood without confirmation.

**360** The core of the cross-examination on behalf of G.R. dealt with alternative explanations for the spatter stains on his runner, in particular the mechanism of "satellite" staining, which occurs when blood drips onto existing blood on the ground, causing blood to splash up from the existing blood. If the height that it falls from is sufficient, satellite staining can also occur just from blood falling onto the ground and splashing out from the place that it hits. He agreed with the authors of *Principles of Bloodstain Pattern Analysis* that it has not always been appreciated in the past that satellite staining can produce stains in the same size range as medium- and high-velocity impact stains (although the term "velocity" has more recently been replaced by "energy").

**361** In this case, he did not have enough information to say whether the spatter on G.R.'s shoes had occurred through the satellite mechanism, as opposed to impact spatter from force being applied to the original blood source, or expiratory spatter, which occurs when blood is projected from the nose, mouth, or an open wound to the airway or lungs.

**362** He applied the general label of "spatter" in his opinion, therefore, rather than trying to be more specific. He confirmed that the shape and size of these stains falls within the description of satellite spatter provided in the text. He also agreed with the authors' assertion that the vertical nature of the shoe surface and the fact that the shoe has been moved away from the blood source creates difficulty in establishing whether a pattern is actually satellite staining.

**363** He was only given a selection of photos from the scene, so his observations about the blood that was present there "could only be very general." He disagreed with the suggestion that attending the attack scene could have assisted him in his analysis. The stains on the exhibits are simply recorded "for what they are" and analyzed on that basis. However, he agreed that satellite stains can be examined with a microscope, which obviously he was unable to do.

**364** He accepted the suggestions in *Principles of Bloodstain Analysis* that satellite staining on shoes and pant cuffs can be misinterpreted as impact spatter arising from the act of violence in question. This staining can occur when the recipient is in close proximity to blood dripping on a horizontal surface. As a result, the examiner must evaluate so-called "scene facts" - in particular, whether there are blood deposits conducive to the production of satellite staining, to determine if it could be the cause of the stains in question.

**365** In support of that possibility, G.R.'s counsel had Sgt. Dubyk confirm the stain on the runner that was sampled for DNA analysis was only 3 or 4 cm above the ground.

**366** Sgt. Dubyk's description of the blood at the scene was: hundreds of drip stains, some altered by dilution; drip patterns; splash patterns; and transfer stains. In particular, he noticed a significant amount of blood between Markers 2 and 3, and he accepted counsel's description that there was "blood all over the place".

**367** In his view, the blood at the scene was consistent from having fallen from a source due to gravity and the movement of that source between Marker 14 and Marker 2 (which is Mr. Gordic's approximate path after the attack, as described in the video). Assuming the blood-letting source travelled that path, he confirmed that the wearer of the runner could have been anywhere on the outer circumference of that circle (I infer, when the spatter was placed on the runner). On this point, Sgt. Dubyk accepted a passage from J.M. Taupin, C. Cwiklik, *Scientific Protocols for Forensic Examination of Clothing*, (CRC Press, 2010) that said that satellite stains can result from an injured person who ambulates while bleeding.

**368** In response to the suggestion that the stains on the runners were more likely to be satellite spatter, he said that "it could possibly be satellite spatter", but he had no way to confirm it.

**369** He also agreed that these stains could be the result of Mr. Gordic spitting out blood as he was moving along the path that has been identified, through the expiratory mechanism. The authors of the *Principles of Bloodstain Analysis* had observed that in many instances this kind of spatter overlaps the size range of impact spatter from various violent events.

**370** While these stains do not resemble the distinctive linear patterns of cast-off stains, which occur when blood is released from an object due to the object's motion, he accepted the possibility that a cast-off stain could fall into existing blood and thereby create a satellite spatter.

**371** Along these same lines, he confirmed that he had written in his follow-up communications with Crown counsel that the presence or absence of blood on a person does not provide evidence that they were or were not involved in a blood-letting event, and that a person can be contaminated by indirect contact with blood. He has also been involved in experiments that show the opposite is also true - that just because a person has little or no blood on them does not mean that they were not involved in the blood-letting. In essence he agreed with the proposition put to him from T. Bevel., R.M. Gardner, *Bloodstain Pattern Analysis with an Introduction to Crime Scene Reconstruction*, 3d ed. (CRC Press, 2008), that the dynamic nature of these processes means that there are "countless ways in which two components may interact". What he can say about these stains at the end of the day is that they are the product of a force applied to liquid blood.

**372** He was not prepared to agree with an opinion in the report by the defence bloodstain expert, Joe Slemko, that there was substantial evidence of satellite spatter accompanying the drip bloodstains created by Mr. Gordic. In order to do a proper analysis, he would need the close-up photos in order to offer his

own opinion. He did agree that satellite bloodstains created by dripping blood will be deposited on surfaces and objects in proximity to where the drips are created.

**373** While he accepted that the greater the height from which blood falls, the more spatter it will create, he could not say how far spatter could travel if it fell from the height of a person of Mr. Gordic's size. It depends on variables such as the volume of blood and the type of surface it strikes. He also cannot be specific about the relationship between the size of spatter drops that are deposited and the proximity of the recipient to the blood source. It is governed by the amount of force that is applied. In general, satellite drops tend to be smaller. He acknowledged that in a diagram contained in *Principles of Bloodstain Pattern Analysis*, blood drops from the creation of satellite spatter were shown as being smaller the farther they were away from the source.

**374** The cross-examination by L.Z.'s counsel was focused mainly on clarifying some of the mechanisms for depositing blood that have been described, as they potentially applied to Mr. Gordic's movements.

**375** L.Z.'s counsel secured Sgt. Dubyk's agreement that the force involved in transfer of blood could potentially be a centrifugal one, in which the blood source is moving around an axis. For example, if a knife hit a large calibre vein and the body turned on its axis, blood could be sprayed as a result. Even though the person is bleeding, it is the centrifugal force that is actually removing the blood from their body.

**376** However, this must be distinguished from the projection of blood, which Sgt. Dubyk said typically comes from an artery or vein, through which the heart is pumping blood out of the body. Rather than being a spray, he said that in a projection situation, the blood typically comes out in a stream and as it moves from the body, "it starts to pull apart into larger drops". The presence of little spots, such as the spatter on the sleeves of the hoodie, is not consistent with the severing of a large-calibre vein or artery and is not part of any projection pattern than he has seen. While specific distances cannot be established, smaller stains usually occur in close proximity to the blood source. In contrast, with projection "there is a lot of pressure, a lot of volume coming out in an arch formation, and large stains."

**377** He initially stated that misting, which I took to be the discharge of blood from a source in the form of a mist, is only seen when high energy is applied to the source, like from a shotgun blast. He said he did not see how misting could result from the amount of force applied by a knife. When presented with the scenario in which a knife being placed into a large calibre vein and pressure building up around the wound, followed by spurting when it was removed, he said "it could be possible. It would just depend on the amount of pressure that's there at the time." It was not entirely clear from his answer whether he was acknowledging the possibility of the blood spurting, which corresponded to the analogy suggested by counsel of built-up blood being released from underneath an injured thumbnail by a hot paper clip, or of misting actually resulting from the removal of the knife.

**378** In re-examination, Crown counsel confirmed with Sgt. Dubyk that in order to receive satellite spatter, a person would have to have been in proximity to Mr. Gordic bleeding as his blood was hitting the pavement. In other words, the predicate for receiving the staining around the circumference of Mr. Gordic's path would be blood dripping at the place where the recipient was. By "proximity" to the bleeding, Sgt. Dubyk meant one to two metres away. In that position, the person could receive satellite staining from the blood drips, or from a splash pattern if they were there when a large volume of blood hits the ground. If the person was not in that approximate location, they could get the stains by someone else stepping in the blood and projecting it in that manner.

**379** The number of blood drips around Marker 14, where the blood trail starts, could possibly have

resulted in satellite staining, he said. The same was true with the blood around Marker 9, the point where Mr. Gordic emerged from under the covered portion of the walkway and began to complete the circle where he fell, as well as at other markers between there and the major blood deposit at his resting position at Marker 2.

**380** Sgt. Dubyk said that one would need to know the exact position of a shoe in order to determine definitively whether the deposits on it were satellite staining. That would not have been possible in this case, even with a scene examination by him, because G.R.'s runners were seized separately.

**381** Similarly, the recipient would have had to be in proximity to Mr. Gordic while he was expiring blood, if that mechanism was the source of the stains on the runner.

**382** Finally, Sgt. Dubyk clarified that blood that is removed by centrifugal force is called a spatter stain that makes up a cast-off pattern.

#### **p. Pathology**

**383** Dr. Orde performed the autopsy on Mr. Gordic on May 19. Besides a sharp force injury to Mr. Gordic's chest wall, which he ultimately determined was likely caused by doctors inserting a chest tube during resuscitation efforts, he described three stab wounds.

**384** The most serious wound, which he identified as the cause of death, was to the low left front of the chest wall. It penetrated deeply, in the range of 6 to 10 cm, causing an injury to one of the major chambers of the heart, with bleeding into the left chest cavity and pericardial sac surrounding the heart.

**385** He could not be certain of the precise trajectory of the wound, because the body was in a different position during the autopsy than when the wound was inflicted and the injuries to the skin, and the chest wall were somewhat offset from each other as a result. What he could say was that the wound passed from front to back, and "possibly passed somewhat upwards, and ... from left to right" - that is, towards the middle of the body.

**386** He elaborated that if the wound had occurred "out in the community", without immediate medical assistance, it would not have been survivable.

**387** The second wound was a relatively shallow one to the mid-left front part of the chest, just below the nipple. Again, allowing for the effect of the body's position being different at the autopsy, this wound also had an "apparent directionality" of upwards and towards the middle of the body. There was nothing to suggest that the path of the knife stopped because it came up against something hard, like the structures of the chest cavity.

**388** The third wound was to the inner aspect of the left underarm, just adjacent to the armpit, which caused injuries to the underlying muscle and to a large calibre vein. It was about 3 cm deep. Looking at photos of Mr. Gordic's shirt during cross-examination by L.Z.'s counsel, Dr. Orde agreed that the tear appears to correspond more to the rear of the shirt, even if it was hanging on a person, although an argument that the stab occurred from the rear was not ultimately advanced.

**389** This wound was also serious, because of the severing of the large calibre vein and the resulting potential for significant blood loss, and could have proved independently fatal, but Dr. Orde said that if it and the serious chest wound occurred around the same time, then the chest wound was potentially the more serious injury.

**390** During cross-examination by L.Z.'s counsel, he drew an even greater distinction between the relative seriousness of these wounds, which he considered in the context of the immediate consequences of the chest wound. He said, "If we assume that that those injuries were sustained at or around the same time, then I think that the effects of the injury to the armpit region were fairly insignificant in relation to the injury to the heart."

**391** The direction of this wound was dependent upon the position of the arm at the time it was inflicted, but if the arm was at the side, then it would have been somewhat upwards and slightly towards the front.

**392** While the shape of the incision of the most serious wound raised the possibility that it was made by a weapon with one cutting edge and one blunt one, Dr. Orde emphasized there was no certainty on that point. Skin is elastic and can stretch around the knife. There may also be relative movement between the knife and the body.

**393** Similarly, he was unable to say whether these wounds were caused by the same knife or in what sequence they had been inflicted.

**394** Although the general rule is that one cannot make an inference about the nature of a weapon by looking at the injuries, in this case the serious chest wound passed through cartilage, so he retained part of the chest wall to permit tool mark comparison, if the investigators decided to have it carried out. A straight edge knife would not have left any specific marks, but he said, "Maybe if something like serrated marks were seen, that would be of importance."

**395** He also noticed "scattered occasional relatively minor surface injuries, to the face, the left elbow, and the knees." The facial injuries included grazes to the left eyebrow and right side of the nose. A fist could have caused these, he confirmed, as could contact with the ground or a hard surface, or being struck with an object. There was bruising just below the right eye (containing a shallow abrasion), to the inner right and left cheek areas, and to the edge of the upper lip and the inner aspect of that lip. The lip injuries were from blunt force he said, such as from a blow, falling or resuscitation efforts. There was also an abrasion within an area of bruising on the chin, and bruising to the left side of the scalp overlying the temple area.

**396** The focus of cross-examination by G.R.'s counsel was on the potential for blood to have been projected from Mr. Gordic's body after he received the stab wounds.

**397** Dr. Orde said that the distance that blood would be dispersed from a wound after a stabbing depended on a whole host of variables, such as what structure was damaged, the depth of that structure, whether the body was moving, the ability of the blood to coagulate, the position of the body, the presence of overlying clothing, and the effects of gravity. He was skeptical when it was suggested to him that humans have been known to disperse blood as far as 30 feet in the right circumstances, and requested the opportunity to view the literature that counsel was relying on to support such a suggestion, although he was not ultimately provided with it.

**398** He said that blood from Mr. Gordic's heart "need not have been expelled with any significant degree of force". If this injury were sustained with the person standing motionless, the wound would gush, "but not necessarily with any degree of force". (In re-examination, he defined the term "gush" as implying a large amount of fluid coming out, but not "forcibly". In that situation, the blood would come forth reasonably quickly, but not with "huge velocity".)

**399** There is not "huge" blood pressure on the right side of the heart, and so the position and movement

of Mr. Gordic's body and his clothing (which can obstruct blood flow), are more likely to have played a greater role. In re-examination, he elaborated that in this case escaping blood would have had to come through the holes in Mr. Gordic's shirt, or else it would have simply been absorbed into the shirt. Other relevant variables he cited were the position of the chest wall, and whether the heart was contracted when the injury was received. As a result, on the essential question of whether blood "would have been expelled far", Dr. Orde's short answer was he did not know.

**400** He characterized follow-up suggestions by G.R.'s counsel about factors that influence the distance that blood can squirt as falling more within the area of fluid dynamics, which is outside of his area of expertise. After it was confirmed that he would be responding only to suggestions to the extent that his own expertise permitted, he agreed that it was reasonable to suggest that the blood pressure involved, the size of the vessel that had been cut, and the size of the wound would determine the distance that blood could be sprayed.

**401** In response to the suggestion that blood could have spilled on people in close proximity to the path travelled by Mr. Gordic after receiving the injuries, as shown by the scene markers, Dr. Orde spoke again in terms of factors that could influence this possibility. It is likely that the heart wound would have gushed internally, although he did not know what the shape of the wound was at the time that it was inflicted, compared to how it was at the time of the autopsy. From there, the sac around the heart, the chest wall, the skin, and the clothing could all have modified the potential for blood to leave the body. Blood could also have gushed from the cut to the large-calibre vein under the arm.

**402** Ultimately, he considered Mr. Gordic's movements to be the most important factor in terms of spilling blood. If he had been standing still, the blood would have gushed towards his feet, released through the wounds with "maybe some gush a short distance from him." But once movement is superimposed on top of that, Dr. Orde would need to know the precise movements, when they commenced, and the timing of the three wounds.

**403** When the attack scene video was played to him, he was unable to draw much useful information from it, other than the person identified to him as Mr. Gordic seemed to be moving around.

**404** On the possibility of bleeding from the wound under the arm to the surface area during the period that Mr. Gordic was out of view to the left side of the screen, Dr. Orde agreed that that wound was deep and would have started bleeding immediately. The amount of blood would have depended on the position of the arm; if it was outstretched, it is likely that the wound would bleed more rapidly. But the presence of clothing and the fact that the arm could have been down for part of the time would also have an effect. That blood, since it was under venous pressure, would most likely have oozed out, albeit fairly rapidly.

**405** He agreed that Mr. Gordic would have been bleeding copiously and the blood would "gravitate" (by which I took him to mean accumulate), as it dropped downwards. But he did not think it would have spurting out, as previously suggested.

**406** He also did not believe Mr. Gordic would have been expelling blood from his mouth due to the serious chest wound. There was no injury to his lungs and no significant large-volume bleeding in the lungs or the airways, just a small amount of blood in the area of the trachea. The bleeding to the tissues of the larynx and pharynx was likely due to tubes being inserted during resuscitation. If witnesses saw blood in his mouth during or after the attack, he thought it could have been the result of the injury to his inner lip, which could have bled quite profusely, or of his facial injuries. During re-examination, he elaborated that the bleeding from the mouth would have resulted in a pattern of passive blood drops. Coughing or

sneezing could have resulted in an expectoration pattern, which would be governed by the size of the drops and the amount of force expelling them.

**407** He was also asked to look at the photos of the apparent injury to G.R.'s left index finger. While he noted some bloodstaining and some partly dried mucous, he was unable to discern any actual injury, and said he would defer to someone who had observed it "in real life". He did note a small injury next to the nail bed on the middle finger, and what he described as "petechial tears" on all of the fingers at the base of the nails. When he was asked if the photos suggested a person was engaged in "skin-picking", his response was, "Yes, very much so."

#### **q. Tool Mark Examination**

**408** As Dr. Orde described, a portion of Mr. Gordic's rib cage that contained a puncture associated to the serious chest wound was retained following the autopsy. The intention of the investigators was to submit it for tool mark analysis to see if the mark on it could be matched to the knife that was found on L.Z. The police had received some information indicating that another person had also stabbed Mr. Gordic. Cst. Dulude requested tool mark analysis, but was initially told by a lab official that it would not be done until after the biological testing had been completed. However, he did not re-submit the knife for the tool mark process after DNA results were provided.

**409** In cross-examination by L.Z.'s counsel, Cst. Dulude eventually accepted the suggestion that the investigators did not re-submit the knife because they now had evidence of Mr. Gordic's blood on it, and he agreed that in this situation, where more than one knife may have been involved and Mr. Gordic had received three stab wounds, determining which knife had been used would have been useful information. He also agreed that it is "possible" that tool mark analysis could have confirmed this knife as "the instrument that caused the death". When it was put to him that for all he knew this knife had only inflicted the non-fatal wound to Mr. Gordic's arm, he once again said that was possible.

**410** An admission of fact attached a further explanation from the lab official with whom Cst. Dulude had discussed this issue. Normally, successfully identifying the victim's DNA profile on a weapon provides the "necessary forensic link" and forensic tool mark analysis is not done unless there are other "reasons/rationale."

**411** The official then in turn provided comments from a representative of the section that does these tool mark comparisons, who explained that if the marks on the bone or cartilage were of good quality, they would be able to positively identify a knife as having caused them. However, he said, "The vast majority of time with these types of analysis, we get inconclusive results."

### **III. DEFENCE EVIDENCE**

#### **a. A.D.**

**412** He described his relationships with Mr. Golic, L.Z., and G.R. as being fairly casual in nature. He had met Mr. Golic the previous year at a gym, and their contact consisted of playing basketball at a park near A.D.'s house, hanging out with friends there, and other socializing of that kind. He described their contact as "not super consistently, here and there". He met L.Z. through Mr. Golic, and had known him for three or four months before the incident. He said that L.Z. "did not leave his house that much." His contact with G.R. before the May long weekend was even more limited. Like L.Z., he had met him through Mr. Golic, and they had "possibly" played basketball once or twice. He did not know Mr. Gordic personally, but knew who he was.

**413** His arrangements at Whistler for the long weekend did not originally involve Mr. Golic or G.R. He had been involved in renting the townhouse with friends from his high school. Mr. Golic overheard them discussing it while playing basketball and wanted to come. After some discussion, he and his friends agreed, to help defray the cost. L.Z. came in at the last minute with Mr. Golic, and they did not want to say no. He was not sure how G.R. became part of the group.

**414** A.D.'s evidence was his drive up to Whistler, which he did with Mr. Golic, L.Z., and G.R., came about after there was a problem with his original ride plans. His father was then going to drive him instead, but when there turned out to be space in the vehicle driven by Mr. Golic's mother, he took advantage of it.

**415** He said he got really drunk on Friday night, wandered around the Village, came home to the townhouse and "crashed".

**416** On Saturday, he woke up at around 11:00 in the morning. He was really hung over and, after having breakfast, he began drinking with the others who were staying at the townhouse, up to 15 of them. Some of them were out on the balcony and the "overflow" was inside. He drank seven or eight shots of Bacardi mixed with orange juice. He drank quickly, consuming the shots within about an hour between noon and 2:00 p.m.

**417** At the time he was drinking with everyone on the deck, he saw a folding pocket knife with a pinkish handle. It was closed. People were "looking at the knife, being curious, passing it around." He might have touched it himself, but was not 100% sure.

**418** After that he felt sick, so he lay down for a while.

**419** After that, his friend David asked him if he wanted to go to the Village. At that point, most of the high school friends with whom he was staying were at a house a few doors down, socializing with other friends, so he ended up going to the Village with David, Mr. Golic, L.Z., and G.R. They were there for about an hour. They walked around, got pizza, and took pictures.

**420** As they were making their way back, Mr. Golic got on his cell phone and began to walk ahead of them. He was angry and yelling, but they could not "hear what he was saying", which I took to mean that they could not make out the specific contents. When they got back to the townhouse, Mr. Golic, who was still on his phone, continued walking past it. A.D., G.R., and David went into the townhouse, retrieved some beer, and then went to a nearby house where his school friends were. They drank beer, listened to music, and partied there. They did not know what happened to L.Z. during this period.

**421** After having a few beers with his friends, A.D. described himself as drunk, but not as drunk as he had been in the morning (or early afternoon, perhaps). He, G.R., and David went back to their townhouse, where he smoked a joint and took a nap.

**422** When he got up, Mr. Golic was back. He no longer appeared angry, and was laughing and joking as he had been before. Everyone was sitting on the couch, eating chips, and listening to music. L.Z., G.R., and David were taking turns playing chess. A.D. retrieved a bottle of liquor from the bedroom and began drinking. He initially said that "we" were drinking at a much slower pace because "we" wanted to enjoy the drink, but when his counsel focused him on his own consumption, he said that he was drinking more slowly, but that he did not know what the others were doing.

**423** Around this time, he started communicating on Facebook with Riel Antes-Schaefer, a female friend of his who was also staying at Whistler. He invited her over and agreed that she could bring a friend. She asked how many people were there and he told her five, which he believed had consisted of himself, David, Mr. Golic, L.Z., and G.R., in that area of the townhouse. Mr. Golic did not like Ms. Antes-Schaefer and did not want her to come over. L.Z., on the other hand, "wanted the girls". David and G.R. were not even paying attention.

**424** By reference to the extract of Facebook and text messages that was prepared by an RCMP analyst, it appeared that Ms. Antes-Schaefer and her friend arrived at 9:59 p.m. After a short period in the hot tub with these young women and L.Z., A.D. and Ms. Antes-Schaefer's friend left and went to a bedroom, leaving L.Z. and Ms. Antes-Schaefer in the hot tub. He said that L.Z. was interested in Ms. Antes-Schaefer, so he was keeping her friend occupied.

**425** Eventually the young women were going to take a cab back to the place they were staying. A.D. and L.Z. said they would meet up with them later. Ms. Antes-Schaefer wanted them to come in the cab right then, but A.D. said he wanted to change his clothes, freshen up, and "get ready". In addition, he, David, and L.Z. wanted to find somewhere to buy cigarettes. As a result, Ms. Antes-Schaefer and her friend eventually left without him.

**426** A.D. described himself as drunk but not "super-drunk" by this point. He was not 100% sure about L.Z.'s condition, but said he had a low tolerance for alcohol and had been drinking with them. Later, in cross-examination by L.Z.'s counsel, he agreed that he did not really have a basis to make such an assertion about L.Z.'s degree of tolerance.

**427** When Mr. Golic found out they were going to get cigarettes, he said he would come with them. A.D. did not see any point to this, but did not object. He, David, and L.Z. waited for Mr. Golic outside, and after a couple of minutes, L.Z. went back in.

**428** After 10 minutes, A.D. said that a "big group ... started leaving their house". It included girls from his school. He said, "And then a big group of people, all guys, come". He did not know anyone in that group, in fact there was "a bunch" he did not know. They all started walking towards the Village - slowly, because it was such a big group. There were smaller groups of people within this overall large group, all heading in the same direction.

**429** He was through the middle of the group, "more towards the back". David was beside him and around him were people he knew: "Kabir", "Amanveer", and "Ajit". During this time, he was texting Ms. Antes-Schaefer and also figuring out where to buy cigarettes. In pursuit of that goal, he ran into an older friend along the way and asked him where they could be bought in that area. He referred to something about needing identification for the purchase because of his age, but that particular point was not pursued. The friend told him about the 7-Eleven, so he started walking in that direction, still texting Ms. Antes-Schaefer as he went. The texts between them are in evidence, and they confirm ongoing communications about when he would be arriving and how he would be getting there.

**430** A.D. knows Dejon Janjic, but said that he did not meet him that day. He also knows Christian Guzman-Koenigbaur and thought that the group did run into him. He did not talk to Mr. Guzman-Koenigbaur and if he was anywhere near him when Mr. Guzman Koenigbaur was talking to his friends, it would have been five to 10 feet away. He did not hear any conversation between them. A.D. did not initially specify the point at which this encounter may have happened.

**431** He said that he was pretty close to the 7-Eleven when people in the group started moving away and he heard yelling. He looked up and people were already running away from him, so he started running to catch up. In relation to the 7-Eleven, he thought the people were "around the corner" when they started to run. He then agreed with his counsel's clarifying suggestion that they turned the corner. He elaborated that these members of his group started speed-walking away from him and he tried catching up.

**432** He got to where a fight was happening, with a group of guys in a circle around an individual. He did not know who this individual was at first, but then he saw Mr. Gordic's face and knew it was him. There were people involved "who I didn't know who they were... bigger guys, East Indian or Middle Eastern." There were four or five of them. He did not see any knife being used, but saw people making "body movements", which he took to be throwing punches. He heard someone say the words "joked him", and then people started running in all different directions. He did not know "for sure" who had said that.

**433** When he was trying to catch up, he said he saw people standing there, I take it in the vicinity of the fight. He now believes this to be the group containing Justine Brummitt and the others who were with Mr. Gordic. Although he said he knew Ms. Brummitt, Sawyer Jensen, Mandeep Randhawa, and Adam Bifano, I did not understand him to be saying that he recognized them at that time, only that he now knows it must have been them, based on all the evidence.

**434** Some people started running back the way they came and he turned and followed. He saw Mr. Golic running away in a different direction. Everyone was running, so he tried to get out of there. He saw L.Z. ahead of him, running with a knife in his hand. He caught up with him, got ahead of him, and then they were running beside each other. Then they stopped to catch their breath. When that happened, he saw that there was blood on the knife and on L.Z.'s clothes. L.Z. then put the knife in his pocket and they started walking.

**435** He was asked to comment on L.Z.'s demeanour during this period, and his description included that L.Z. "seemed right out of it... It's like his reactions and everything were different... he seemed frightened, definitely not happy, kind of panicking... looking around shifting back and forth... seemed like he was going to have an anxiety attack."

**436** He said that police officers came up to them and asked to see their hands. When L.Z. took his hand out of his pocket, it was covered in blood, and the officer told them to get on the ground. He said the officer laid them right beside each other, very close. He was not sure how long they lay there. The officers were talking about how to transfer them. There were some other pedestrians in the area and L.Z. was asking them not to leave because he did not want the police to beat them. The police then got them to their feet. It was pretty dark, so he could not see if there was any blood on the pavement.

**437** A.D. described his return to the detachment on foot, and the time he spent sitting in the garage under the observation of an officer, until he was taken to one room to be photographed and another to have his clothes and boots seized. In addition to confirming the police description of the clothes he had been wearing, he described his slim build at that time: 155 pounds and five feet 11 and a half inches, and the hairstyle that he wore: shaved on the sides and spiked on the top.

**438** He emphasized that over the course of this weekend, he had never heard Mr. Golic asking about Mr. Gordic's whereabouts or talking about fighting or hurting him.

**439** He was asked by his counsel if he had any idea how the bodily substance identified on his boots got

there. He offered that he had been running alongside L.Z. and was laid along the ground close beside him, while L.Z. was covered in blood.

**440** When his counsel played the scene video to him again, he identified himself as the person I have described in my summary as the tenth participant, who enters the screen from the right side, and approaches the approximate area of Mr. Gordic's companions before turning and running back off screen to the left, behind the first person who appears to run from the attack scene in that direction. He said the person he identified had hair that was the same length as his had been, and he recognized the posture, the skinnier legs, and the slimmer build. This person also seemed to be wearing the same type of sleeveless vest he had worn.

**441** In cross-examination, G.R.'s counsel had A.D. elaborate on some of the physical contact among the occupants of the townhouse and between the occupants and their visitors, as well as their dealings with the pink knife there, which A.D. identified from the photos as the same knife that was found at the scene. This was elicited in support of the theory that the presence of G.R.'s DNA on the knife may have been due to secondary transfer, rather than personal handling.

**442** A.D. agreed there were more people staying in the house than it was set up to accommodate. In addition, there were even more people coming and leaving on both Friday and Saturday nights than were actually staying there. Whenever new people came in, there was handshaking and similar gestures between them, as well as grasping of each other's arms. There had also been play fighting or wrestling on the lawn among the occupants.

**443** He could not be sure, but he gave a range of between five and 15 people who would have come into contact with the knife. When it was suggested to him that they held it by the handle or by the blade, he said that they could have. He later agreed that it had been handled by "a few people" in the open and the shut positions. It was possible that he touched it himself.

**444** With respect to G.R.'s relationship with the other participants, he agreed that G.R. did not know Mr. Golic well, and when it was suggested the same was true of L.Z., he said, "I would think so, yes."

**445** As to the attack itself, he could not identify who was hitting Mr. Gordic because they all wore dark clothing. He did not see G.R. there, nor did he see him running. At the point that he and L.Z. were stopped by the police, he had no idea where G.R. was or that he was close behind him.

**446** He could not see blood dripping from L.Z.'s knife because of the darkness - only that there was blood on it.

**447** In cross-examination by L.Z.'s counsel, A.D. said that he saw L.Z. take Xanax on Saturday night when they were all on the couch, but he could not tell the amount.

**448** He elaborated on L.Z.'s apparent mental condition at the time of their arrest, by adding, "You could tell he wasn't in his right state of mind," and that he was disoriented.

**449** In cross-examination by Crown counsel, A.D. distanced himself somewhat from Mr. Golic, L.Z., and G.R. He placed his relationship with Mr. Golic on the continuum between not knowing him all that well and being a good or best friend. He would not have classified L.Z. as a good friend and considered G.R. even lower on the scale.

**450** He clarified that he could not recall how many people actually opened the knife when they were all

drinking on the deck, as opposed to just having some sort of contact with it. He emphasized that picking it up is obviously just one step of a process of actually opening it. Despite it being an object of such interest, he maintained that at no point did anyone ever ask whose knife it was. It was unusual to have a knife like this on the table, he agreed, but he did not see anything suspicious about it. He was not concerned about a knife lying around - he was there to have a good time.

**451** Dealing with the subject of Mr. Golic being on the phone when they were walking back from the Village, A.D. said Mr. Golic started to walk away as soon as he got on the phone, and that they were aware he wanted privacy. Mr. Golic started yelling when they got close to the townhouse, causing a passerby to remark that it must have something to do with a girl.

**452** He agreed that he had told Ms. Antes-Schaefer inside the townhouse that he and L.Z. would be accompanying her and her friend right away to their place, even though he had no intention of doing so. He wanted to see them later, but did not tell her that because she would get mad at him. When Crown counsel challenged his contention that freshening up, changing his clothes, and having a shower would be a particularly time-consuming process, justifying not accompanying the young women at that point, he referred to the additional difficulties posed by performing those tasks while he was drunk. As to his other justification, the need to buy cigarettes, he said he never thought of asking Ms. Antes-Schaefer if there was any way to do that near her place. For all he knew, it was her first time in Whistler as well, he said. In contrast, he knew there would be a place that sold them in the Village.

**453** He said that he first noticed there were a lot of people in the house when he came out of the bedroom with Ms. Antes-Schaefer's friend. When he was asked why he did not mention that in his direct evidence, he said he did not think it was relevant. This group consisted of people who were staying there, plus friends they had brought. He thought the number was 15 to 20. It consisted of the majority of the occupants of the townhouse, girls from his school, and bunch of people, "I had no idea who they were."

**454** With respect to the circumstances of their departure, A.D. initially said he was outside, and then Mr. Golic went back inside, telling him he was going to get ready or "get a jacket or something", before joining them to walk to the Village. He then clarified that Mr. Golic had been with them "in front of the door", before going to get his jacket. He later explained he did not remember exactly what Mr. Golic had said, but assumed he had to grab a jacket or something, because he took a while. L.Z. never told them why he went back inside after waiting with them for two minutes. It was 10 minutes later when the big group came out.

**455** When Crown counsel asked him why he needed to wait outside for Mr. Golic, he said he did not see a problem with it and there was no difference from waiting inside. He was not concerned about waiting that length of time for Mr. Golic to come back because he was drunk. He confirmed that Mr. Golic had not said why he wanted to come with them, or that this large group would be coming too. He did not know why this large group joined him. Similar to his description of the group inside, half the group were his good friends from school and the others were people whom he did not know. He accepted the proposition that it was some members of this group who attacked Mr. Gordic. However, he did not know that any of them were looking for Mr. Gordic and he was not part of any such search. He also had no idea who brought the pink knife to the scene.

**456** He denied that the gap between the young women leaving the townhouse to get a cab and his communication to her that he and L.Z. would join them later was the point that Mr. Golic told him about the plan to find and attack Mr. Gordic.

**457** Crown counsel spent some time with A.D. reviewing his description of events, in light of the

Facebook communications and texts with Ms. Antes-Schaefer from the time that she and her friend left the townhouse to just before the attack. After initially agreeing that his communication to her at 11:42 was probably while he was walking to the Village, A.D. noted that the records showing "SMS" for his communications to her from 12:07 onwards were relevant to identifying his location. He explained that he was using Facebook in the house because it had Wi-Fi, and then using text messaging, indicated by the SMS sign, once he left (I infer so as not to use mobile data with his phone or because he did not have a data plan). This information indicated to him that his first message from outside of the house, showing as SMS, was at 12:07 a.m. Since his previous message at 11:42 was a Facebook message, he accepted the resulting proposition that he left the house between 11:42 and 12:07.

**458** It had taken him only 10 minutes to walk back from the Village to his townhouse earlier in that day with his small group of friends, but with this number of people it took longer to walk there. Other than walking along the main road to the area just before Village North, he had no idea where he and this group went after that. He attributed his lack of knowledge to intoxication and the fact that it was his first time in Whistler. In particular, he did not know whether he was at the Mongolie Grill, as described by Mr. Guzman-Koenigbaur, and in fact did not know if the group ran into him or not - it was only a "possibility". He agreed that the route of the group described in the evidence of Mr. Guzman-Koenigbaur and Mr. Janjic and his friends would not make a lot of sense if his only purposes were to go and get cigarettes and see Ms. Antes-Schaefer.

**459** He had been in the Village for "maybe" 10 minutes before he was told about the 7-Eleven as a place to buy cigarettes. He was not sure, but thought the 7-Eleven was "maybe" a few hundred metres away when he was told about it. He did not know if he was in the Marketplace parking lot at that point. Although he then headed towards the 7-Eleven, the members of the group who were walking in front of him appeared to be headed in the same direction, so he simply continued following them. He agreed that the 7-Eleven was close to the area of the attack.

**460** His last communication to Ms. Antes-Schaefer was at 12:24 a.m., shortly before the attack. There was a reply from her shortly afterwards, which he could also have looked at, he said.

**461** He was unable to recall if he was actually texting her when he heard the yelling leading up to the attack. He said it was a small detail and he could not remember it after two years.

**462** He estimated that the closest he got to the attack was maybe 10 feet away. He could not say for certain where in the walkway Mr. Gordic was, even when he was getting attacked - he was not stationary. There were five to six people actually hitting him. He did not recognize those people and was not 100% sure if they had emerged from the townhouse with Mr. Golic or had joined somewhere else. His explanation for not recognizing anyone involved in the attack was that there was a lot going on at once and it was hard to focus. He stressed he only saw it for a few seconds.

**463** He understands that "joked" means stabbed and said it was most likely L.Z.'s voice that he heard say it, but he could not be 100% sure. The only people he recognized were Mr. Golic running away from the scene, L.Z. running away with the knife, and Mr. Gordic being attacked. He did not see G.R. running and did not know where he was during the attack. G.R., L.Z., and Mr. Golic may have been part of the attacking group, but he did not see them.

**464** When he saw Mr. Golic, he was closer to Mr. Gordic than he was, but still "a distance away". He said he did not know what direction Mr. Golic ran in, but he did not come towards them. He did not agree there was only one other direction for him to have gone (given the configuration of the walkway). People

were running all over the place, he said. He described them as "splitting apart", before eventually running in one direction or the other.

**465** A.D. said there was "no certain reason" that he followed L.Z. Everything was happening fast and he just ended up doing it. He did not have time to think everything through. He subsequently accepted the suggestion that he was panicked.

**466** He agreed that in order for him to have followed L.Z., L.Z. must have run by him, coming from his left, passing him to his right from the area of the attack. G.R. was not part of their group - that is, of him and L.Z., running away - and he would have noticed if G.R. was running behind them. He then said G.R. could have been behind them and he did not notice him.

**467** He clarified that the sequence of events after running away was that he caught up to L.Z., passed him, then slowed down, and then L.Z. caught up and they stopped. He said he was running for a couple of minutes before he slowed down, but was not 100% sure. He did not see the knife when L.Z. first ran past him at the scene, but rather when he was running towards him. He was not sure, but he thought it was in L.Z.'s right hand. L.Z. seemed to be swinging his arm back and forth. He saw it close up when they all stopped. He remembered L.Z. putting it in his pocket, but did not recall him closing it. He assumed he must have.

**468** When he was asked how he could see blood on the knife but not whether it was dripping, he said he was not paying attention to the drip and if it fell to the ground, it would be hard to tell, I infer because of the darkness. He explained, "But if the knife's closer to my eyes, I'm going to see blood on [it]." When he was asked why it did not occur to him to get away from L.Z., given that he was holding a bloody knife and had just been involved in an attack on Mr. Gordic, he said it did not hit him right away and the only thing in his head was to get back to the house.

**469** Despite maintaining that L.Z. appeared "out of it" at the arrest scene, he accepted the suggestion that his comments to the passerby about not leaving so he would not be assaulted by the police sounded pretty lucid. He clarified that he was put on the ground side by side with L.Z. after the arrest.

**470** He expressed his position in relation to the person he identified in the video as, "I believe that is me." He confirmed that the first person who flees from the scene off to the right of the video would have to have been L.Z. on his version of events. He resisted the suggestion that this person does not appear to resemble the first of the attackers in the video, who is wearing the distinctive vest that has been attributed to L.Z. He said that the vest appeared to be one shade to him and that he found it hard to tell if it had the light/dark scheme that Crown counsel suggested. He also found it hard to tell whether the person who he said he ran past him is the person who Crown suggested is L.Z. at the start of the attack - Participant 1. A.D. pointed out that Participant 4 in the attack scene video has something sticking out from his body that appears to be a knife. In re-examination, he identified the object in the hand of the person who ran past him away from the attack (and whom he said he turned and followed) as looking like a knife, as I have described in my summary of the video.

**471** He also clarified in re-examination that there is sometimes a gap between receiving his text messages and looking at them, and that he cannot identify anyone involved in the attack because it was very hard to see faces, not because he saw faces that he did not recognize.

#### **b. G.R.**

**472** G.R. testified that he was aware about a month in advance that the Whistler trip was happening, but

he did not confirm his attendance until shortly before. The plan was for him to have a ride with Amanveer Gosal, but that car ended up being full. Mr. Gosal told him he would figure something out, after which he got a text from Mr. Golic saying there was space in his car. G.R.'s family home is in Vancouver and they picked him up there.

**473** Like A.D., G.R. took some time to describe his relatively casual friendships with Mr. Golic and his co-accused. He and Mr. Golic were not best friends, but he knew him. He did not talk to him often, but would see him at events and social gatherings. He described the relationship as being that they "knew who each other were". He had seen A.D. a few times and knew he was a good friend of Mr. Gosal's. They also had lots of other mutual friends. The trip to Whistler was the first time he had met L.Z.

**474** G.R. was in a relationship with Judith Gomez. She wanted to accompany him on the trip, but he expressed a preference for going with friends, which upset her. She was somewhat insecure about the possibility that he would talk to other girls, and his need to keep in touch with her over the weekend formed an ongoing part of his activities.

**475** He emphasized the close quarters of their accommodation at Whistler, given that 11 to 14 others were staying there. There were three bedrooms and two washrooms for that entire group.

**476** His activities on Friday night involved consuming marijuana, beer, and what I understood to be "drinks" of hard liquor, and then heading to the Village to socialize. A large group, including people who were not staying there, then came back to their place to party.

**477** He got up on Saturday at around 10:00 a.m. and believed he was the first person up. The place was very messy and he decided to clean up a bit. In the course of this, he saw a knife on the floor of the deck. It had a light pink handle and he identified it from the photos in evidence as the knife found at the scene. When he saw it, it was closed. At that point in his testimony, he said that he only touched the knife once and "didn't really touch it later."

**478** After they made breakfast, the occupants drank shots of alcohol and smoked marijuana on the deck. This was at around noon. He said that as they were passing around the joint, they were also looking at the knife. Some guys were opening and closing it and just looking at the colour of it, which I infer was considered unusual. Ultimately, it was passed around to quite a few people. He might have touched it again at this point, he was not sure, but he did not hold it or put it in his pocket. Later in his evidence, he added, "Maybe when I touched it my hand came in contact with the blade." He certainly did not bring the knife to the crime scene, he stressed.

**479** After that, he joined Mr. Golic, G.R., L.Z., Mr. Gosal, Kabir Biriya, and the same friend "David" who was described in A.D.'s evidence in walking to the Village, getting pizza, and wandering around taking Snapchat pictures.

**480** It was during this outing he said he suffered the injury to his left index finger that was noted and photographed by the arresting officer. He noticed a piece of skin sticking out and peeled it too much. A little bit of blood started coming out, which he cleaned up with a tissue. Skin picking, as his counsel called it, is a habit for him. It bothers him when he sees skin sticking out on the top of his nail, and many times he has peeled it back too much and caused bleeding, to the point that his girlfriend has told him to get a manicure.

**481** As they walked back to the house, he had his left hand in his pants pocket. He noticed a bloodstain

on the pants, which were white, so he changed them. Because he was arrested later and did not return to the house to get his belongings, he does not know whatever became of those pants.

**482** He identified the substance just above the nail in the post-arrest photo of that finger as looking like dried blood. He attributed the blood shown in the post-arrest photos of his left pants pocket to a process of it rubbing off of his finger when he put his hands in and took them out of his pockets, which he sometimes does, especially when it is cold.

**483** He said that he had recently (in relation to the time that he testified) recalled that on the way back from the Village Mr. Golic was talking on his cell phone. He overheard him say the words "baby, baby" which made him think he was talking to a girlfriend.

**484** After getting back to the house at around 2:00 to 2:30, he went to a house a few doors down, as A.D. has already described, where he had drinks and beer. Mr. Golic and L.Z. did not come over. At around 5:00, he went back to his house to lie down, because he had "smoked a lot of weed" and was tired.

**485** When he got up again, there was McDonald's food in the house and he ate some. In cross-examination, he agreed with L.Z.'s counsel that it was possible the McDonald's food was actually brought in the morning. He played video games with a couple of the occupants and listened to music. He said "some more weed was being rolled" and "there was also a few beers out". He called his girlfriend to see what she was up to, but he did not recall whether she picked up the phone or not.

**486** At one point, he pulled out the chessboard that was there and L.Z. challenged him to a game. He drank a couple glasses of Hennessy and Coke, and L.Z. had some Hennessy as well. He described himself as "a little buzzed" by that point and said that L.Z. seemed pretty intoxicated.

**487** In cross-examination, L.Z.'s counsel sought to explore this consumption in more detail, bringing out that G.R. remembered L.Z. drinking something else in addition to Hennessy, that it was possible he was also drinking beer during that period, and had been drinking shots throughout the day.

**488** G.R. had not noticed that Mr. Golic was there when he first got up, but said, in reference to later in the evening, that Mr. Golic was pretty happy and was joking around. He clarified in cross-examination that he noticed him when he was playing chess, around 9:00 to 10:00 p.m.

**489** He recalled the arrival of Ms. Antes-Schaefer and her friend, both of whom he did not know. He brought them some drinks after A.D. and L.Z. sat down next to them. The four of them "kind of disappeared" and G.R. did not know where they went.

**490** More people began to arrive at the house, including some girls. He was mingling and hanging out.

**491** At about 11:00, he used the washroom and ended up accepting a capsule of Molly from one of the girls he came upon in there. After they left, he used the washroom, which he says he spends a lot of time in when he has been drinking, and found out in communications with his girlfriend that she had taken a Xanax. He was upset, because that was not her usual kind of behaviour, and said he would talk to her later.

**492** When he got out of the washroom, he found out that the occupants of the house were going to another party. He thinks Kabir and Amanveer told him. Some of them had already left the house and he just followed the group. It included people who were not staying at their house and were just tagging along. The game plan, as far as he was concerned, was to go to the party and have fun.

**493** He described the configuration of this group as a lot of guys at the front. He noticed A.D. and David in the middle. He was a little behind them, with Amanveer, Kabir, and another friend, "Jaspreet". More people from the house were ahead of him. Overall he described himself as "kind of in the back" of the group.

**494** The circumstances leading up to the attack that he described were that he was trying to call his girlfriend but she was not picking up. He tried logging onto some of her social media accounts to see what she was up to. He then ran into a friend from high school and spent a short time talking to him. The group did not stop for him, however, and after this conversation he had to search for them. Then he saw Amanveer, who is a "pretty big guy", pretty far away.

**495** He started jogging towards Amanveer, caught up to him, and "kind of walked past him". He then pulled out his phone again. His "best guess" was that he was trying to contact his girlfriend again. He was on a walkway at this point, and on his phone. He thought he remembered a KFC. He looked up and saw something going on. Kabir was in front of him and appeared to be watching. He did not know what it was, but it appeared to be a cluster of guys pushing and shoving. He did not know who was getting beaten up and it looked like they were just pushing each other.

**496** His initial description of his flight from the scene was that he immediately saw people running away, and "then I departed from the scene, like as fast as I can - not as fast as I can, but pretty fast." He later elaborated that Kabir ran past the incident and "I kind of followed him."

**497** He said that he did not get a look at what was going on in this altercation. Out of his peripheral vision, he saw one guy in the cluster with his head tilted and his arm in the air. He did not know who the person was at the time, but accepted in cross-examination that this was likely Mr. Gordic. He also did not know if the person had blood on his arm because he did not get a good look. Most importantly, he stressed that he thought this was just a cluster of guys being aggressive and not that Mr. Gordic was being attacked or a knife being used.

**498** He ran past them, jogged for a bit, and then slowed down. He said that he took off "kind of just on instinct", and he did not want to get involved. He later elaborated by raising the concern that staying and watching would have been equivalent to taking part in the attack.

**499** He had not been in the walkway for longer than 10 seconds. In essence, the fight had begun when he arrived, and he left before it ended. The closest he ever got to Mr. Gordic was six to eight feet when he was running past him. He later said "six maybe ten feet... it definitely wasn't arm's length."

**500** The manner in which he described Kabir's movements initially, before he followed him, bears quotation:

And then Kabir he was like to the left of me, but he ran -- he ran straight, but he came into view when he ran, he was like on my right and he ran. So I can't really explain it but he ran straight. And we're kind of going at a diagonal from my left to my right but still going forward ahead of me. And I immediately ran behind him.

**501** G.R.'s counsel reviewed the scene video with him, both on the regular courtroom computer screens and then the large display screen that counsel arranged for that purpose, which was helpful.

**502** He identified himself appearing in the video at 12:32:12. He described himself appearing behind the

person I have described as Participant 3, who was marked by a purple arrow in the version of the video prepared by Mr. Grymaloski, and who, after progressing quickly towards Mr. Gordic in the group, stopped, walked forward a few steps, stopped again, then seemed to lean backwards slightly for a moment, before walking again. The person G.R. says is him - Participant 6 - walks into the frame from the right at a steady pace, slows down in the area of Mr. Gordic's friends, continues forward, hesitates or slows slightly when Participant 3 hesitates, walks forward a few steps, almost comes to a stop, and then walks off the screen to the left. This person is in the frame for a total of six seconds.

**503** G.R. described himself as looking down because the phone was in his hand, and said he did not look up until that person almost leaves the frame. He remembered looking up and seeing what was happening with respect to the fight after the point that the person he said was him has gone out of the frame to the left in the video. He identified the black hoodie that he was wearing that night, which a friend had loaned to him because he was cold, on this figure and suggested that on a higher resolution screen it could be seen that he was wearing white shoes and holding a phone in his right hand and looking down at it. He said it also appeared that the figure had his left hand in his pocket, as G.R. had previously described himself doing.

**504** When he reviewed it on the larger screen, he said he believed that Participant 3, denoted by the purple arrow, was Kabir. He was also able to identify his white shoes and the outline of the hood of his jacket.

**505** He added the other friends he had been walking with, Amanveer, Ajit, and Jaspreet, were a few feet behind him, outside of the frame of the video to the right, when he entered.

**506** Although he initially followed Kabir in leaving the walkway, after running away he ended up alone. He saw two guys ahead of him, kind of jogging, who looked like A.D. and L.Z. He tried catching up with them. He "kind of got pretty close to them, not that close". He remembered an intersection. He yelled "Yo" and "Slow down, where are you guys going?" but they completely ignored him, although he said he did not know if they heard him. He decided to find his own way home. The difficulty was that he did not know where he was. He had only been to Whistler once before when he was much younger, and did not know the streets.

**507** In particular, he stressed that he was not the person Sgt. Mulhall had seen moving to the right behind A.D. and L.Z. to take the fork in the sidewalk behind the bus stop on Village Gate Boulevard. The closest he got to A.D. and L.Z., he said, was when they had either crossed or were in the process of crossing an intersection and he had called to them without success. He said he then turned around and walked in the other direction.

**508** He called his girlfriend, because he had been wanting to call her before. He does not remember if she picked up. He called various friends for assistance and only one picked up. This person was staying at Whistler. There was a lot of static on the line and all he could make out was the friend was at Montebello and that was where he should go. He tried the GPS function on his phone but could not get a connection.

**509** He then saw two police officers and waved them down, as I have previously described in my summary of the police evidence. He asked if they could help him get to Montebello. He believed that they had begun pointing him in a direction when the two other officers arrived from his left and told him he had blood on his shoe. He was going to explain what he had just seen, I infer back at the walkway, when one of the officers told him something along the lines of "don't say anything."

**510** He emphasized that he did not previously know Mr. Gordic, had not been part of any discussions

about him earlier in the day, and was not part of a group that was looking for him. His best guess about how he got blood on his shoe is that it occurred when he was running past the fight.

**511** In support of the key defence theory of the possibility of secondary transfer of his DNA to the scene knife, he discussed potential opportunities for it to have occurred during the day, along similar lines as his counsel had posed to A.D. He remembered meeting a lot of people during the day and introducing himself. His habit, if he does not know someone, is just to shake their hand, but if they have mutual friends, he will bring them in for a little hug in addition to the handshake, and will sometimes do a fist pound as well. Those who were staying in the house were messing around with each other physically a lot, challenging each other to see who was stronger. In particular, he recalled arm wrestling with Amanveer after Amanveer had teased him for calling his girlfriend. Quite a few people played video games, taking turns with the two controllers. And after they ran out of paper cups, the glasses that belonged to the house were used for consumption of alcohol. He just rinsed them out with water and re-used them. No one actually washed dishes.

**512** In cross-examination by Crown counsel, G.R. agreed that he and Mr. Golic were "more than acquaintances", but not to the extent that he would go to his house or they would hang out together.

**513** He does not know Mr. Guzman-Koenigbaur, Mr. Medina, or the friends of Mr. Gordic who claimed to have encountered a group looking for him, and he did not recall any of the interactions with them that were described in their evidence.

**514** Both Mr. Golic and L.Z. seemed to be in a good mood when they were in the Village. He confirmed that during the telephone conversation as they were walking back from the Village, Mr. Golic expressed himself in a "very pleasant, fond kind of tone" to whoever he was on the phone with. There was no hint of anger on his part and G.R. did not hear him yelling at all during that walk, nor did he remember staying outside to continue yelling on the phone when they reached the house. Similarly, he heard no threatening calls or efforts to gather a group for any confrontation at the Olympic Rings.

**515** Potentially significant for the Crown's theory that the blood on his left index finger resulted from an abortive attempt to use the scene knife during the attack, G.R. confirmed that he is left-handed.

**516** He agreed that if Amanveer and David had contact with the knife when it was being passed around on the deck, that would have happened before he arm-wrestled with them.

**517** He did not see David in the attacking group and he knows Amanveer was not part of it, because he passed him before he came upon it.

**518** When it was put to him that his first evidence about the knife from the scene was that he had only touched it once at the townhouse, he responded that he meant he had only touched it once when he was cleaning the balcony. Crown counsel also pursued his later comment in his direct examination that his DNA could have been on the blade because when he handled it, his hand came into contact with the blade. In response he said he might have opened the knife. When this proposition was re-stated to him, he said, "I don't know." When Crown counsel noted that he had not said that he had opened the knife in his direct evidence, he responded that one cannot really touch the blade without the knife being opened, that he had not been asked that specific question, and it could have been passed to him in an open position.

**519** He confirmed that he had never asked whose knife it was and no one claimed it as theirs.

**520** When everyone was talking about going on to the next party, which G.R. heard about while he was

in the kitchen of the house, Mr. Golic, L.Z., and A.D. were not present. He was pretty sure they were not part of the conversation concerning this party.

**521** When the large group from the house left for the party, he did not see Mr. Golic walking in the area where he was. He thought he did see him "more ahead of us." He did not see L.Z. at all, but thought he was probably part of the group, and that he would have had to leave the house with everyone else, rather than joining later.

**522** However, he was not prepared to agree that some of the people who left the house must have been the ones who attacked Mr. Gordic. He said it was possible the attackers were not members of that group, but he did not know.

**523** As to the group's movements before the attack, he had no idea if they had wandered around the Village first or headed straight to the walkway, because he did not know Whistler. After being shown the map of the general area, he said he was not 100% sure, but would probably say they went around the Village a bit. He did not remember the group asking about Mr. Gordic's whereabouts. He did not recall any of the interactions with the Stojanovic group that they described, although he agreed he would have been part of the group they encountered, if that is what they saw.

**524** He could not say how long he was talking to his school friend along the way, and he did not know if he was in a parking lot at that point, although he could have been.

**525** He had no idea an incident was about to occur, and when he caught up with Amanveer, he did not hear anything in particular. Specifically, he did not hear the phrase, "There you are, you little bitch," as some witnesses have described. He thought that he was probably nearby, trying to catch up at that point. Nor did he see any members of his group speed walk and then run to the scene.

**526** Crown counsel pursued this issue further, and G.R. said that Amanveer and the group were still walking when he caught up to them. He walked past them, closer to where the incident was going on. When asked why he walked past them, he said that when he reached them, he slowed down from a jog to a walk. When the term was explained to him, he agreed that this occurred because of his "inertia", which meant that he was carried forward by his jogging speed until he acted on it to decrease it.

**527** He walked a little bit, pulled out his phone, and then realized an incident was going on. He does not know exactly how close he was to the scene of the incident when he realized what it was, maybe a couple of metres.

**528** He agreed that he was not part of the attacking group and was therefore shocked when it happened. Crown counsel then pointed out that he had described it only as bunch of guys being aggressive, and at the most he could say there was some kind of incident. Until the person had the arm in the air, he said he did not see anything related to an attack.

**529** He defined a cluster as "a certain number of people really close - not a circle but really close".

**530** In short, he said that after being engaged or distracted by his phone, he looked up, saw the incident, and immediately ran. In the process, he recognized no one except Kabir.

**531** When Crown counsel played the attack video to him, he was not sure the person I have described as Participant 2, who was marked with a blue arrow, was Mr. Golic.

**532** At 32:10 of the video, when the person he says was him caught up to Participant 3, G.R. said this was around when he remembered pulling out his phone. It was something he remembered doing, rather than what he could see on the screen. At 32:12, he said his head appears to be looking down and something is poking out, like his hand, though he said this was definitely not a knife. He said he was actually slowing down at this point. He was still unaware of any attack in front of him because he was in his own world he said, I infer in the sense of still being focused on his phone. Even though the video shows two people running past him in the direction of the attack, he did not look up to see where they were running until a second or two after.

**533** At 32:14, despite agreeing with the suggestion that he "had a line on" the attack taking place in front of him, by which I took to mean a direct view, he did not hear or see anything. He knew that he had his phone in his hand, and was pretty sure that he had his left hand in his pocket. He agreed that the person he says is him exits the frame at 32:16, still walking. He said that when he left the frame is probably when he started running. He agreed that he had said in his direct evidence that that was also when he looked up and saw what was happening. This was after being depicted on the screen for six or seven seconds.

**534** On the issue of why he decided to run, he could not say what caused his instinct to kick in. He was "pretty buzzed", which he further described as "really high" and "scared in a way". When Crown counsel suggested that he had remembered numerous details despite being in that condition, he said he could not remember "exactly everything", just the "most part".

**535** Crown counsel also focused on his claim to have seen the person who had his head down and his arm up through his peripheral vision when running by. When he was asked if he was saying he could not look at what was going on beside him, he said he saw Kabir once he was going straight and ran in that same direction. When asked why he did not look over at the point this person had his arm in the air, he said it was "just what he picked up".

**536** People were running all over the place, he said, but when Crown counsel pointed out that he had described running past the attack before it was over, and that he had witnessed Kabir running away, he agreed that Kabir was not these "people".

**537** He sought to clarify the description of Kabir's movements that he had given in his direct examination. Kabir was in front of him but to the left, then ran in a direction to the right. He agreed with Crown counsel's suggestion that he was contending that Kabir was blocking his view "for a second".

**538** However, after running back past the attack he was not following Kabir. He went in the direction that Kabir was going, but then went in a different direction. He did not remember why they separated.

**539** When he was shown the 7-Eleven video of the three young men running across the screen, he agreed that the third person depicted could be him. He had no idea who the first and second people are. He did not run from the scene with A.D. and L.Z. It was later that he was pursuing them.

**540** On the issue of his attempts to link up with A.D. and L.Z., he said they were jogging across the road, and when he called out to them, they seemed to be walking. While he agreed that he could have just jogged slightly faster to close the gap, he said he was "high", is not really that athletic, and was getting a bit light-headed. He agreed with the suggestion that he could not run any faster or yell any louder to them than he had done. He also did not notice any other person walking behind them.

**541** When it was put to him that the easiest way to get home would have been to catch up with them, he

said he did not even know where they were going. When he was asked why he tried to catch them in the first place, he said he saw them, recognized them, and then made the realization about their unknown destination.

**542** He was reluctant to agree that A.D. and L.Z. must have been part of the group that was at the scene of the attack, even though he did not actually see them there. When the alternative was put to him - that they came all the way to the scene with him but then left before the attack happened - he said that he did not know.

**543** His description of the routes that he and his co-accused followed in the area of Village Gate Boulevard was that they were running south towards that street, but then turned east, towards Blackcomb Way, rather than west towards Highway 99, which is the direction in which the arresting officers observed L.Z. and A.D. walking. When that police evidence was put to G.R., he said that was not what he remembered. He said after they walked away east, he turned and went west towards Highway 99, which is in keeping with his eventual arrest location.

**544** He agreed that phoning his girlfriend, which was the next thing he did after A.D. and L.Z. departed without him, would not have resulted in his obtaining the address of the townhouse.

**545** Although he initially maintained that he was arrested because of the blood on his shoe, he ultimately conceded that he did not know whether it was that or because he matched the description of someone fleeing from the scene. What he was sure of was that the officer told him there was blood on his shoe. He was not aware of the blood until then, but maintained that he would probably have flagged down the officer even if he had been aware of it, since he was still lost.

**546** When he was asked to account for the transfer stain on his shoe, which Crown counsel suggested could not be explained even if his version of events were believed, he initially said that he did not know what the stain was. Crown counsel then reviewed the bloodstain evidence with him, and his response with respect to the origins of the transfer stain was, "I honestly don't know."

**547** When asked how what he claimed was an injury to his finger caused by peeling the skin could still be bleeding eight to ten hours later, he said moving his hand in and out of his pocket "kind of bothered the wound" and the blood started coming out again. When he was handcuffed in the police car, the fabric of the seat might have bothered it a little more, resulting in bloodstaining on the seat. He also expanded a bit on the mechanism of this kind of injury, indicating that sometimes if it is a big piece of skin, he just rips the skin off and blood keeps coming out. If he had told Cst. Chan that he had cut it earlier, that did not mean that he cut it opening the knife at the scene.

*i) Judith Gomez*

**548** She is G.R.'s girlfriend, as I have mentioned, and had known him for about three and a half years by the time she testified. She described the countless number of electronic communications that they engaged in together - including phone calls, texts, and various social media applications.

**549** She confirmed the basis of the dispute they were having on that weekend was G.R.'s decision to go to Whistler with his friends, although her recollection was it arose because they had plans to hang out together and he wanted to go party instead, not that she wanted to accompany him to Whistler. She said that they were continuously discussing this issue, and she decided to get back at him on the evening of May 16 by going out partying herself. He was constantly calling and messaging her, inquiring where she

was, who she was with, and what she was doing. Later in her evidence she said she was also messaging him constantly. In cross-examination, she said she no longer has any of these messages in her possession.

**550** Her destination was the Cloverdale Rodeo, and she was there from 9:00 p.m. to midnight or thereabouts. She said she occasionally drinks alcohol but contrary to G.R.'s evidence that she had taken a Xanax that night, which caused him concern, her position is she does not consume illegal drugs.

**551** The other important aspect of her evidence, in terms of potential support for the defence, is that she confirmed G.R.'s habit of picking the skin around his nails, during which he sometimes makes himself bleed, as he described in this case. She regards this habit as "gross" and, as he testified, she has urged him to get a manicure, although he has not yet followed her advice or ceased the habit.

**552** She was shown the photo of his left hand that was referred to by others in the evidence. She said there was lots of blood around the index finger nail, and it looked like he had been picking his skin on other nails of that hand too, specifically on the middle and ring fingers. She could see scabs on these other nails. She agreed in cross-examination that what was on the index finger looked like a healing cut, but maintained that she had seen him inflict a cut of that nature by pulling on the cuticles. She agreed that the scars that she had pointed out on the other fingers were much smaller.

**553** She said that she had not met Mr. Golic, and had only met A.D. and L.Z. at court. Before the May long weekend, she had never heard any of their names mentioned, and she knows all of G.R.'s friends well.

### **c. L.Z.**

**554** Because it is relevant to the defence of intoxication, particularly the question of his tolerance and what physical symptoms he might display at given levels, he gave evidence about his history of alcohol and drug use.

**555** Up to the point of this incident, he drank alcohol every day, four days a week to the point of drunkenness, and just "to get a buzz" on the other days. It would take about six shots of alcohol to get him drunk. That pattern of consumption had been in place for about the past seven or eight months before May 17, ever since he had stopped attending school.

**556** At times he was able to mask the fact that he was intoxicated. He referred to situations in which his mother was unable to detect his condition, despite his heavy consumption on that night. However, he was not always successful in concealing it.

**557** He smoked marihuana every day but, more pertinent to this incident, he was also addicted to the prescription drug Xanax. He began taking it when he was 14 to control anxiety, I gather through a prescription, but later began to abuse it. By May of 2015, he was taking two bars (each bar of Xanax can be broken into four individual doses) per day. In cross-examination, he explained that by that point he was buying it on the street.

**558** A consequence of taking this drug was that he developed an ulcer, which caused him to vomit regularly. He also had withdrawal symptoms if he stopped taking it.

**559** The effect of consuming Xanax with alcohol was that he would "get drunker way quicker". Another relevant effect was that after he "cross[ed] a line", which he was not able to anticipate, he would black out and lose all memory of his subsequent activities until, I infer, waking up the next day. Another version of

this effect was that he would sometimes lose gaps of time, parts of days - later remembering only "bits and pieces".

**560** L.Z. went up to Whistler on Friday with A.D., G.R., and Mr. Golic. They were driven up by Mr. Golic's mother. He brought alcohol with him to Whistler, consisting of three bottles of vodka, one of rum, and one of Crown Royal whisky. He also brought two cases of 12 beers each - one Corona and one Heineken.

**561** He did not know the specific location of the townhouse that he stayed at in Whistler, only that he paid \$200 to Mr. Golic to stay there. When he arrived on Friday, there were six other people already staying there, whom he did not know.

**562** As a result of his alcohol and Xanax consumption following his arrival at Whistler, L.Z. did not have an extensive memory of his activities on Friday evening. After drinking vodka shots and taking a bar of Xanax, he remembered walking through the Village and seeing a McDonald's there. His next memory was being on the townhouse balcony at sunrise, "smoking a joint to go pass out".

**563** While this is all helpful background of his consumption history, of course the consumption affecting his mental state at the time of the attack on Mr. Gordic is the critical focus.

**564** He said that when he woke up Saturday morning, no one else was up yet, so he went to the balcony to smoke another joint, to calm himself down. His memory of waking up at dawn was clarified to be a separate, earlier incident. He was hung over and also wanted to take Xanax, which he does not usually do on an empty stomach. He asked A.D., who had woken up while he was still smoking the joint, to go to McDonald's with him. At McDonald's, he ate breakfast and took a half-bar of Xanax, before walking home. To situate this activity within some kind of timeframe, he said that McDonald's stopped serving breakfast at 11:00 a.m. He brought back breakfasts for G.R. and Mr. Golic as well.

**565** When he got back to the townhouse, which he confirmed in cross-examination was still in the morning, Mr. Golic was now up and wanted to drink shots as a hangover cure. L.Z. had two shots of vodka and a beer. After a further period of time, which he was not able to quantify, hanging around the townhouse, he had another shot, another beer, and another half-bar of Xanax. He described the shots as "full ones" in "little shot glasses".

**566** At some point, which he again could not specify, he needed cigarettes, so he went to the Village, once again accompanied by A.D. according to his recollection. He took an additional beer with him and drank it on the way. During this trip, he met Jason Medina, and had a conversation with him about Mr. Medina possibly staying with them (which Mr. Medina also mentioned in his evidence). According to L.Z., he told Mr. Medina he would have to check with his roommates first, rather than saying that Mr. Golic did not like Mr. Medina, as Mr. Medina had testified. In cross-examination, he elaborated that he, Mr. Medina and Mr. Golic had grown up together, so there was no reason why he would have said that. He also denied having exchanged phone numbers with Mr. Medina, as Mr. Medina recalled, since he had had the same phone number for three years as of that day, by which I infer he meant that Mr. Medina would already have had it.

**567** When he returned to the townhouse, he spent time in the living room. He used his PlayStation, which he had brought from home, and also played chess with G.R. While they were doing that, he drank at least a quarter bottle of Captain Morgan himself, but it could have been more. G.R. was drinking rum too and L.Z. was pouring the shots. He remembered having more shots than G.R. In cross-examination, he said he did not remember anyone else sharing from the bottle besides them.

**568** During this period, he said he also drank at least four beers and smoked marihuana. As in the case of the rum, it is possible he had more beer than that. He remembered a "cluster" of beer bottles beside him on the table and there could not have been fewer than four.

**569** He said he had a half-bar of Xanax when he got back to the townhouse. He remembered the second half-bar being under his cigarette pack when he was playing chess with G.R. and then taking it at some point. He later clarified in cross-examination that he took it while playing chess.

**570** When Riel Antes-Schaefer and her friend came over, L.Z. grabbed the unopened bottle of Crown Royal in order to impress the girls, because it was bigger, fuller, and more expensive than the by-then half-finished bottle of rum. He said that, "Riel was not drunk so I went and got her alcohol." He next remembered being in the hot tub of the townhouse with her, but not how he got in or out of it.

**571** His next memory is of being woken up by a police officer at the Whistler detachment, who told him that either his mother or his lawyer was wanting to see him.

**572** Although he made it clear in his evidence that these are his only memories of the day, he also expressly confirmed that he has no memory of Arvin Golic engaging in any dispute with Mr. Gordic, or of him being angry or yelling on the phone. He also did not recall any of the other encounters with friends of Mr. Gordic in and around the Village that were described in the evidence.

**573** During cross-examination, he also confirmed he did not recall any knives being out on the balcony, as described by the other accused in their evidence.

**574** More significantly, when asked by his counsel if he had stabbed Mr. Gordic, he said that he did not remember. When asked why he thought that was, he said, "I think I was just extremely intoxicated at the time."

**575** In cross-examination, Crown counsel challenged the extent and duration of the pre-existing alcohol and drug abuse that L.Z. claimed. He also sought to demonstrate the contrast between L.Z.'s fairly full descriptions of his alcohol and drug consumption on the day of the incident and the gaps in his memory concerning many of the other events on that day.

**576** On the issue of his pre-existing addiction, Crown counsel suggested it was unlikely that L.Z. would have been able to afford the amount of alcohol he claimed to have been consuming, nor the \$20 a day he said his Xanax habit cost, when he was not employed. He explained his parents gave him money and that, among his friends, he was not the only one who bought alcohol or Xanax, so he could sometimes get those substances from them. When he was asked why his mother would give him \$20 to buy Xanax, he said, "I lied a lot."

**577** With respect to his tolerance for alcohol, he was unable to explain the precise mechanism by which he was able to appear not to be drunk to his mother, other than just that he knew he could "get away with it".

**578** Before this incident, he would have blackouts about twice per week. He confirmed that on this weekend, he experienced both complete blackouts and gaps in his memory. He maintained that having no memory from being out in the Village on Friday night to being on the balcony at dawn was a gap, rather than a blackout, as Crown counsel suggested, because the extended period with no memory "was the gap".

When it was put to him that as he described it there was really no distinction between the two types of memory loss, he conceded "There's little distinction."

**579** Later in the cross-examination, he confirmed that he regards the gap between being in the hot tub to being woken up by the police officer as a blackout. He explained that he started to have gaps that morning, around when he took the first Xanax at McDonald's. He agreed that the gaps increased in number and length as the day wore on and he took more drugs and alcohol. However, he then added that he did not recall walking to McDonald's, so there was a gap even before taking that Xanax.

**580** When he was asked why, after drinking and taking drugs pretty much every day for eight months, he would remember all these details about his consumption on that day, he said it was a big case and he had to remember his consumption. He gave this information to his lawyer, who wrote it down. That was "maybe the first week through [his] case", which I took to mean the first week after this incident. In re-examination, he clarified that he gave the information "one or two weeks after it happened".

**581** He conceded the obvious point that at the actual time of the consumption, he had no idea that these details were going to become important.

**582** Crown counsel also raised the contrast between the details of the consumption that L.Z. provided and his inability to recall basic matters such as whether it was afternoon by the time he returned to the townhouse from buying cigarettes. His explanation was that "intoxication was a big part of my life."

**583** Overall he agreed with the proposition that he was confident about the amount of drugs and alcohol that he had, just not when he had them. He later modified this to exclude the period in which he had been drinking with G.R., which he said he did not have a clear memory of.

**584** Despite his initial testimony that he had gone to McDonald's and later on to get cigarettes with A.D., he then agreed with A.D.'s counsel on cross-examination that he might actually have gone in both instances with another friend named David, who appears to be the same David who was spoken of in the other accused's evidence. A.D.'s counsel went to the further lengths of reviewing security footage from the McDonald's at the relevant time in the morning with him, during which he confirmed that A.D. is nowhere to be seen, although a person who resembles Ramin was there.

**585** Crown counsel pointed out that L.Z. had originally said he went with A.D. to get cigarettes because A.D. was the only other person staying at the townhouse who smoked. L.Z. said this did not indicate that he must have been with A.D. with on that occasion, "because I don't remember," he said. When the same proposition was put to him again, he said, "That's why I remember it was A.[D.]," and, "In my memory, yes it was A.[D.]"

**586** He maintained that the only interaction he could remember with Mr. Golic that day was to bring him a McDonald's breakfast and agreed with Crown counsel's suggestion that "there is nothing whatsoever that distinguishes [Mr.] Golic in your memory that day or evening". Although he knew Mr. Gordic from high school, he had no relationship with him and no animosity towards him, and was unaware of any grievance between him and Mr. Golic.

**587** He was aware that he was arrested with a knife in his pocket. He said that he did not know where the knife came from. It was not his and he did not know how to operate it.

**588** When the scene video was played to him, he maintained that he could not identify himself in it, despite what was suggested to be his distinctive vest on the first participant who appears, as I have

described.

*i) Riel Antes-Schaefer*

**589** Ms. Antes-Schaefer testified as part of L.Z.'s case. As we had previously heard, she was staying at Whistler that weekend and was friends with A.D. and L.Z. from attending school together.

**590** As A.D. described, they had been texting and then decided to meet up. Before meeting with him, she had two beers, which she was able to remember because she had set up the game of beer pong with her friends during which she drank them. She was referred to the Facebook messages that I have previously described and identified herself as the person having the ongoing communications with A.D.

**591** She and her friend Amanda went to the place where A.D. and L.Z. were staying. The messages to A.D. have her advising "here" at 9:59 p.m., to which he replied he was coming out.

**592** When she and her friend came in, A.D., L.Z., Mr. Golic, a young man named David, and another person whom she did not know, who may well have been G.R., were there.

**593** Ms. Antes-Schaefer had what she described as a "fairly decent-sized shot" of Crown Royal. Everyone else was drinking, including L.Z. When she arrived, he seemed normal to her, "a little bit like he had been drinking", but not drunk.

**594** After about 20 minutes, she and her friend, A.D., and L.Z. went into the hot tub. She did not drink while she was in there but said L.Z. did, although she could not recall what he was having. She described him as getting progressively more drunk.

**595** They were all in the hot tub for 15 to 20 minutes, after which, she and L.Z. went to a bedroom where they spent "maybe another 15 minutes" there. She described him as "really drunk... His coordination was off and it seemed like... his actions weren't as fast as he was thinking." This bedroom was in the downstairs area of the residence. When she left, she could hear a lot of people upstairs. She did not go up there.

**596** She then suggested that A.D. and L.Z. come over to the house where she was staying and they agreed. She and her friend waited outside for a taxi, and ended up taking a friend who was in distress and his girlfriend back in the taxi with them. Before she left, L.Z. was on the balcony talking to her, and he "screamed down" his cell phone number so she could write it on her hand. She tried to text that number later but nothing happened. However, she remained in contact with A.D. in that manner, as I have already described. Her understanding from their subsequent exchanges was that he and L.Z. were going to be coming over.

**597** She also explained some of the contents of her statement to the police about this case, which she gave in September 2015 at her house. She said that in the statement she had incorrectly described herself as being "really drunk" at the time. She said that her mother was there at the time of the interview, and she preferred her mother to think that she had been drunk when she made these unwise decisions, rather than to think that she was a "stupid teenager". The presence of the police also made her nervous. She did not mention all of the details of what happened between her and L.Z., which I take it to mean their intimate activity in the bedroom, because the police did not ask her about it and she did not think it was relevant.

**598** In cross-examination, she clarified that her mother was not in her immediate presence when she

spoke to the police, but was in the house "around the corner". She elaborated that her actual condition after having had the shot of Crown Royal was "a little tipsy" at most.

**599** She also did not mention her observations of L.Z.'s declining sobriety in the statement, because she was not asked about them. It was not drawn to her attention that these details might be relevant until recently, when his lawyer asked her about it. Nevertheless, she said she was "confident that's how it was". In re-examination, L.Z.'s counsel had her confirm that he had not suggested anything to her about L.Z.'s sobriety when he spoke to her, and that in fact he had looked surprised when she told him what she remembered about it.

**600** She agreed that she had written "WTF" (a well-known abbreviation of a profane expression of incredulity) to A.D. when he texted her at 12:21 that they were walking to her house, because it was a long way to walk.

## *ii) Toxicology*

**601** Wayne Jeffery, an experienced toxicologist called on behalf of L.Z., prepared a report on the likely effects of L.Z.'s consumption of ethyl alcohol (which I will refer to simply as alcohol) and drugs during the day leading up to the attack on Mr. Gordic. As it was for the other experts in this case, his report was admitted as proof of its contents and then Mr. Jeffery elaborated on it in his oral testimony.

**602** His opinion was based on transcripts of L.Z. and Ms. Antes-Schaefer's evidence, as well as on L.Z.'s weight at the time of the incident and his medical records from the youth detention centre, which describe the medication that he was prescribed while he was in custody there. The range of blood-alcohol levels that were contained in his report had to be revised in his oral testimony, because he had originally been given an inaccurately low weight for L.Z.

**603** L.Z.'s likely blood-alcohol level at the time of the incident was calculated by Mr. Jeffery according to three scenarios, which varied depending on the amount of hard liquor that had actually been consumed, in addition to the beer. Mr. Jeffery ultimately concluded that the first scenario, involving the consumption of nine ounces of hard liquor along with seven bottles or cans of beer, between 10:30 a.m. and 7:00 p.m., best fit with the evidence. If L.Z. had consumed the amount of alcohol assumed in the second or third scenarios with the Xanax he reported, he would have been "right out of it", according to Mr. Jeffery, which does not suit the descriptions of his actions.

**604** Based on this first scenario, L.Z. would have had a blood-alcohol level in the range of 57 to 197 mg of alcohol in 100 ml of blood. The assumptions that Mr. Jeffery was required to make about the alcohol consumed were that a shot is one ounce of 40% alcohol and a bottle of beer is 12 ounces of 5% alcohol. The required physical assumption is that L.Z. is part of the 95% of the population who eliminate 10 to 20 mg of alcohol from their bodies every hour.

**605** The low end of this predicted range would lead to a state of impairment, which arises in blood alcohol levels of 30 to 100 mg. In that state, the effects of alcohol, which are described as minor by Mr. Jeffery, are mainly on mental processes. At the middle and higher ends of the range, the person would be in a state of intoxication. According to the report, that arises at blood alcohol levels from 100 to 250 mg, although in his oral testimony he said it began at 150 mg (nothing ultimately turned on the discrepancy). In that state, physical effects such as slurred speech and balance difficulties start to appear, as well as more serious mental ones like confusion and memory loss.

**606** Mr. Jeffery explained that defined categories called "stages of alcohol influence" for so-called normal social drinkers have been developed to describe these progressive effects of consumption in more detail. He included them in his report. The effects of alcohol differ for each person, so there will be some overlap in these stages. The range that he has provided for L.Z.'s likely blood-alcohol levels encompasses the stages of euphoria at its low end, excitement in the middle, and confusion at the high end. These stages describe the same progressive deterioration of coordination and motor control on the physical side and progressive loss of inhibition, judgment, and emotional regulation on the mental side as are captured more generally by the movement from impairment through intoxication that he previously described.

**607** The other factor affecting the physical symptoms of alcohol consumption that a person exhibits is their tolerance. As the body becomes used to alcohol, it becomes possible for the person to govern their behaviour so as to mask physical symptoms like slurring speech and balance problems. A rush of adrenaline can also assist in masking physical signs of impairment for the brief five to 10-minute period that it endures, he said, but the impairment of the person's mental processes continues despite it.

**608** Normally it takes a long time for an adult to become an experienced drinker and develop this level of tolerance, but Mr. Jeffery explained that because the brain is not fully developed until age 25, those who become addicted early in life can also develop into experienced drinkers, despite their youth. In his opinion, a person who became drunk four times a week, as L.Z. described, and was able to tolerate the amount he said he drank on the day of the incident, is an experienced drinker in terms of their tolerance.

**609** He also gave evidence on the likely effects of Xanax, which is the brand name of the drug alprazolam. It belongs to the benzodiazepine family. It is usually prescribed for anxiety, but it is widely available as a street drug as well. The maximum dose prescribed by doctors is 3 mg a day. A bar of Xanax contains 2 mg, so L.Z.'s reported consumption of two bars on that day works out to 4 mg.

**610** Like alcohol, Xanax is a central nervous system depressant. Mr. Jeffery said "it's identically the same effects as...alcohol". Taking it in conjunction with alcohol will have an additive effect, increasing the symptoms of impairment or intoxication beyond what they would be from alcohol alone.

**611** Drowsiness is the most common adverse effect, but it can produce a range of others, such as difficulties with coordination, disorientation, and mental confusion.

**612** Of particular significance to L.Z.'s evidence, another of its effects is anterograde amnesia, in which events that occur after the taking of the drug cannot be recalled. Xanax affects the ability to actually form memories, so the person may remember things incorrectly or not at all. This effect is dose-dependent, so that the higher the consumption, the greater the chance of memory problems. Alcohol impairs memory in a different way, by stopping the person from concentrating, I take it therefore preventing them from attending to the details that they would otherwise remember. Excessive alcohol consumption can lead to alcohol blackouts, in which the person cannot remember some or any of what occurs.

**613** According to Mr. Jeffery, consuming Xanax and alcohol together would definitely result in memory problems. Depending on the amount of each substance involved, the person may be able remember some of what occurred, a limited amount, or none at all.

**614** It was also possible for gaps in memory to occur, depending on when the alcohol and drugs were taken. If something out of the ordinary happens, the person may be able to remember parts of that, by which I took him to mean the events before and after this unusual occurrence would remain as gaps in memory. He stressed the complexity of the operation of memory in this area.

**615** Despite its status as a depressant, Xanax can also have what are called paradoxical effects, such as excitement and aggression, for short periods.

**616** Just like alcohol, people can develop tolerance for the effects of Xanax. In view of the maximum prescribed dose, someone who is consuming 4 mg a day has become tolerant to the use of the drug. Use for more than three weeks will typically result in addiction.

**617** When he was asked to consider the drugs that L.Z. was prescribed in the youth custody centre, he confirmed they can be used to treat ulcers, which can be caused by excessive Xanax consumption, as well as the common stomach problems that can result from withdrawing from addiction to Xanax.

**618** Some of the physical signs and behaviour that L.Z. was said to have demonstrated after his arrest were put to Mr. Jeffery. He said that droopy eyelids and "being slow" are consistent with use of a central nervous system depressant; confusion and a blank stare are consistent with alcohol intoxication; and talkativeness may result from the decrease in inhibitions caused by both alcohol and Xanax. Mood swings can also result from the amounts of alcohol and Xanax that were consumed and may be prompted by the situation.

**619** Although it was written to describe the potential effects of the broader range of blood-alcohol levels contained in his original written opinion, which had a much higher maximum, in his oral testimony, Mr. Jeffery adopted a description from his report of the likely effects of L.Z. within the range of his revised opinion as including a decrease in his inhibitions; logical reasoning; exercise of judgment; and ability to understand situations, and an increase in his inclination to act unpredictably and misconceive surrounding events. In addition, memory would be "distorted or compromised".

**620** He said that the combined effects of the alcohol and Xanax would be impairment and possibly intoxication at the lower end of the blood-alcohol range and intoxication at the higher end. Depending on his degree of tolerance to those substances, L.Z. "may or may not" have been showing any outward signs of his condition. The more significant physical problems would occur at the higher levels.

**621** In cross-examination, Mr. Jeffery accepted Crown counsel's suggestions about the difficulties of using information that has been provided by impaired or intoxicated people. For example, one cannot necessarily rely on the information of a person who is being subjected to breathalyzer tests. And he confirmed that during experiments in which subjects consumed alcohol, they were later notoriously inaccurate about the amounts they drank, even though they knew in advance that the experiment was about consumption. He agreed that the unreliability would be increased if the person was not involved in an experiment and had no reason to keep track of the amounts. In this case, he agreed he was largely relying on L.Z.'s self-reporting about consumption and its effects and he agreed that L.Z.'s evidence was extremely vague about parts of that consumption.

**622** Mr. Jeffery's opinion about the hard liquor consumed had been expressed in terms of shots. The drinking of this liquor later in the day had been described as a quarter of a bottle of Captain Morgan, but he agreed there was no evidence of the bottle's size and therefore the number of one-ounce shots that a quarter of it would provide. He accepted the number would depend on whether it was a mickey, which is 13 ounces, a 26-ounce bottle, or a so-called 40-pounder, which is 40 ounces.

**623** Similarly, while his opinion reflected precise times of Xanax consumption, he agreed that L.Z.'s evidence did not provide such precision. Perhaps more significantly, the report proceeded on the basis that L.Z. had taken three bars, or six mg of Xanax, rather than the four that his evidence described. Mr. Jeffery

said he was not able to determine from the transcript the precise amounts that were taken, which Crown counsel suggested was a total of two bars. After reviewing the transcript, he expressed the view that in direct examination, L.Z. had expressed consuming five mg and had given the same answer on cross-examination, although Crown counsel had summarized it as two mg.

**624** He confirmed that he had not done any testing to determine L.Z.'s specific tolerance, or whether he fit within the normal range of absorption and elimination.

**625** He accepted the general proposition that, all other things being equal, the physical and mental effects increase together with the amount of alcohol consumed, with greater effects at the top of the range. In a normal person, physical and mental deterioration go together. In this case, he agreed he was suggesting a range for L.Z. that goes from moderate impairment to mid-range intoxication.

**626** Particular effects that Crown counsel confirmed with him were the likelihood of acting more spontaneously and reacting to stimulus without thinking, and a significant impairment of the ability to plan ahead.

**627** While he stood by his position in direct examination that a young person can become tolerant of alcohol more quickly because of the ongoing development of the brain, such a situation would be rare, he said. And he agreed with Crown counsel that it would be "pretty unusual" for a person to drink for eight months and then display virtually no symptoms at a high blood-alcohol level. One would only know the truth by actually testing the person.

**628** He clarified that tolerance means the mind learning to control physical signs of impairment. There is no way for the mind to control the effect of alcohol on the brain itself. Nevertheless, he agreed someone can "snap out of it" and in that sense control their mental processes for a brief period.

**629** Since an "adverse high dose" of Xanax, which I took to be one well above the maximum prescribed level, can lead to drowsiness, dizziness, muscle weakness, and an inability to coordinate muscle movements, Mr. Jeffery accepted Crown counsel's proposition that a person who walks for a number of miles with no discernible difficulty is either highly tolerant to Xanax, or has not taken the amounts they claim to have taken. He would expect to see at least some of those signs at the "large dose" of four to six mg. For example, unless the person was "really addicted", he would expect them to have slow, deliberate, slurred speech.

**630** He agreed that deciding to run away after doing something wrong requires orientation to one's surroundings, and sufficient motor control to run without falling over.

**631** Mr. Jeffery clarified that in this context, the term "paradoxical reactions" means "unexpected". He said, "Just rarely - it happens. We don't know how or when or why it's going to happen." Again he agreed that the only way to find out would be to test the person.

**632** He agreed that the medications prescribed to L.Z. are useful for stomach upsets generally, not just ulcers, and taking them is not in itself an indication of an ulcer.

**633** Mr. Jeffery said he dealt with the difficulty in the evidence arising from the quarter bottle of Captain Morgan by just going with the original scenarios he was given of nine, 13, or 16 ounces of hard liquor.

**634** Reviewing the signs of impairment and intoxication that were put to him in direct examination, he agreed he would have to have more detail to say anything meaningful about them and that he had been

speaking in very general hypothetical terms. Vacant stares and droopy eyes could have alternatives causes, he accepted, and he did not know what mood swings and conduct inconsistent with the situation were intended to mean in this context.

**635** Crown counsel suggested that when a person shows limited signs in comparison to their supposed consumption of alcohol and drugs, the possibilities are that they are an experienced drinker, alcohol and drugs do not affect them as much as other people, they are mistaken about the amount they consumed, or they are lying about it. Mr. Jeffery could not see any other alternatives.

**636** Crown counsel pursued this relationship between the amount of alcohol and Xanax reported by L.Z., and the types of signs that a normal unhabituated person would display at that level. Mr. Jeffery agreed those would include difficulties with motor skills, such as picking things up and putting them down. Such a person would comply with verbal demands slowly and would not be able to comply with a request, for example, to stand on one leg.

**637** As a means of illustrating the contrast between what might be expected at L.Z.'s stated consumption and his actual presentation, Crown counsel played Mr. Jeffery the video recording of L.Z. being searched and having his clothes seized at the Whistler detachment, which I have already referred to on the issue of exhibit integrity.

**638** While he agreed that during the first portion, L.Z. appeared alert, responsive, and engaged with the officers, he noticed that he was very relaxed in the chair and his head bobbed forward four or five times. He might have been answering questions or he might have been "on the nod" or going to sleep. Other than those observations, Mr. Jeffery said L.Z. appeared normal. He also agreed that he appeared engaged at a later stage of the video, in which he appears to shift his attention back and forth between the two officers who are dealing with him.

**639** Further on in the video, Mr. Jeffery noted a slight sway as L.Z. stood up, but did not see anything that was consistent with gross intoxication. The same was true to his reactions to the officers removing an object (which we know from other evidence is the knife), from his pocket. When L.Z.'s hands were being swabbed, Mr. Jeffery said he appeared "almost normal". When he was being photographed he also managed to comply with a request to tilt his head without falling over. He had some jerky movements and put his feet apart when his belt was being removed, but Mr. Jeffery described this as "nothing untoward, nothing that stands out".

**640** Two other examples of physical coordination shown in the video were noteworthy. The first was L.Z.'s ability to place his water cup on the table without looking, which Mr. Jeffery agreed shows a fairly high level of concentration and said shows he is interacting normally with his environment. In the second one, he was able to undress himself and give his clothes to the officer without demonstrating any physical signs of intoxication.

**641** In re-examination, he explained that the mental and physical conditions of a person under the influence do not have to deteriorate "at the same level" (by which I took him to mean at the same rate) and that tolerance can play a role in the different rates of deterioration.

**642** With respect to developing tolerance with eight months of drinking, Mr. Jeffery expressed it as "unusual, but not unheard of".

**643** He clarified that his opinions about the effect of alcohol on the behaviour of people at the levels that he attributed to L.Z. do not just relate to spontaneous actions, but all aspects of their behaviour.

**644** With respect to the issue of self-reporting, he agreed with the suggestion that independent reports can enhance the reliability of a reported consumption pattern, and that reports of consumption at earlier stages of consumption would not necessarily be subject to the concerns that arise at a later stage, when the person's blood-alcohol levels are high.

**645** As to the vagueness of some of the times of consumption reported by L.Z., Mr. Jeffery stressed that for the purposes of his calculations what matters is the total amount consumed over the total time period. The specific time of the drinks does not really matter for his calculation.

**646** Finally, he confirmed that the overall timeframe that he had used in his calculation was between L.Z.'s return from McDonald's, which there was evidence happened sometime after 10:00 a.m., and the arrival of Ms. Antes-Schaefer and her friend at around 10:00 p.m.

#### **IV. POSITIONS**

**647** The final submissions in this case took place over multiple days and were admirably thorough, well presented, and helpful. I have obviously considered them in their complete form, but in order to keep my summary of them to a reasonable length, I have focused on what I took to be counsel's essential arguments on the issues.

##### **a. A.D.**

**648** A.D.'s counsel's submissions included the following points:

- \* The evidence does not support a finding that Mr. Golic had any plan to harm Mr. Gordic. The background to the incident was mutual provocation between them earlier in the day, aggravated by youthful bravado and the consumption of substances, and the attack itself is more accurately characterized as resulting from someone overreacting when Mr. Gordic was spotted in the walkway, with others jumping into the fray in the heat of the moment. Earlier inquiries about Mr. Gordic's whereabouts, even if they occurred, do not mean there was a plan to attack him.
- \* This mutuality of the conflict is shown by the gathering of Mr. Gordic's friends at the Olympic Rings in anticipation of a confrontation with Mr. Golic, which their conduct suggests they expected would involve themselves and allies of Mr. Golic. There is no evidence A.D. or the other residents of the townhouse were aware of this conflict, and counsel places emphasis on the lack of clarity in the evidence about whether anyone connected with Mr. Golic even showed up.
- \* More generally, there is no evidence that anyone except Mr. Golic had animosity towards Mr. Gordic. The group staying at the townhouse were not a pre-existing friend group or gang, and he held no particular sway over them.
- \* While A.D.'s counsel concedes the Crown does not have to prove a motive, she points out that the complete lack of connection between A.D. and whatever animosity may have existed raises a significant question about why he would involve himself in an attack on Mr. Gordic.
- \* A.D. denied any knowledge of the animosity between Mr. Golic and Mr. Gordic. He and Mr. Golic were not close friends, and even if he had heard something about the dispute, it

is questionable whether what counsel calls the "rantings of a jealous boyfriend who is known to make idle threats" should have given rise to any foreseeability of harm to Mr. Gordic on his part. At most, what might have been anticipated was a consensual fist fight between them, which would also not raise any objective risk of non-trivial harm. There was no reason to expect the use of a knife.

- \* In fact, counsel says, there is significant exculpatory evidence concerning A.D.'s presence at the scene. The text messages with Ms. Antes-Schaefer show that he was communicating with her about meeting up shortly. He testified that he was trying to find a place to buy cigarettes and, after speaking to a friend, lagged behind the group. This is confirmed by his late appearance in the scene video, which also shows him holding back and never crossing into the area off-screen where the attack was happening.
- \* His self-identification is confirmed by the similarity in colouring, hairstyle, clothing, and stature between him and the figure who engaged in these actions. Further, Ms. Kirkpatrick-Dionne identified L.Z. as the person A.D. says he followed away from the scene, and he is also shown following L.Z. in the 7-Eleven video.
- \* Even if he is not the person he identifies in the video, there is a complete absence of evidence linking him with the attack, including from witnesses who knew him and presumably could have identified him if he had participated, and the evidence is clear that there were more group members than actual attackers. Mere presence or association with the attackers is not sufficient for a conviction of any others present. Liability as a party requires an act of assistance or encouragement done with the intent of assisting or encouraging the principal offender.
- \* There is only circumstantial evidence of A.D.'s actual participation in the attack, consisting only of his inquiry about Mr. Gordic's whereabouts, his presence within a group that contained his attackers shortly before it began, and three small areas on his boots containing Mr. Gordic's DNA, consistent with a transfer stain from a third party or object. Before a conviction can result from evidence of this kind, the accused's guilt must be the only reasonable inference from it. Counsel emphasizes that it is also vital to maintain the distinction between inference and speculation, with the latter being the impermissible drawing of conclusions without any factual basis for doing so, which would be the result in this case.
- \* With respect to the first circumstantial element, counsel argues that Dejon Janjic must be lying or mistaken that A.D. asked about Mr. Gordic's whereabouts. This assertion is based on Mr. Janjic's vague original statement to the police, given five months after the event, in which he attributed the question about Mr. Gordic to "A.[D.] and some of his friends"; his admission that he remembered more details after speaking with Crown counsel in his pre-trial interview; his head injury earlier on the Saturday; the increase in his level of certainty in his evidence that Mr. Golic was part of the group that contained A.D., which occurred during a break of several days in the proceedings, and after his conversations with Mr. Popovic and Mr. Stojanovic; the wide variation in the estimates of the size of the group he was prepared to accept, as low as five to as high as 15; the unlikelihood of A.D., whom Mr. Janjic knew only from attending parties, would approach him with an inquiry of this kind; and the contradiction provided by Ms. Antes-Schaefer's evidence and the records of his Facebook communications, which show he would not have even left the townhouse until after 11:42 p.m.
- \* Mr. Guzman-Koenigbaur's identification of A.D. should be considered similarly suspect, based on his claim to have told Mr. Gordic on Friday night about the group that was

looking for him, when Mr. Gordic was not in Whistler yet; his explanation for this inconsistency that he had misspoken and was talking about someone else; his agreement that the number of people in the later group "could be more, could be less" than the earlier one; his lack of forthrightness about what matters he had discussed with Crown counsel on the morning of his court appearance; his evident efforts to tailor his evidence to assist the Crown case; and, like Mr. Janjic's evidence, his contradiction by the more reliable evidence of A.D.'s location at that time provided by Ms. Antes-Schaefer and the phone records. A.D.'s counsel submits that Mr. Guzman-Koenigbaur probably did see him after 12:00 in the group around the Mongolie Grill in Village Centre, but has mistakenly put him as a member of the earlier group as well.

- \* With respect to the critical piece of circumstantial evidence - DNA on A.D.'s boots, it was not confirmed as blood through the hemochromogen test, leaving open the possibility that the DNA was in an area of plant-like material resembling blood which tested presumptively positive with Hemastix. If it is blood, it is important to keep in mind that transfer stains can be transmitted by a chain of people or objects, not just from an original source to a direct recipient. Further, if the transfer of this DNA had resulted from close proximity to Mr. Gordic during the attack, one would expect to see droplets of blood from his bleeding as well.
- \* Although the circumstances under which the DNA was placed on the boots cannot be pinpointed, several possibilities clearly emerge. L.Z. was covered in blood and was holding a bloody knife. At one point, A.D. ran past him and they ended up walking side by side. As A.D.'s counsel put it, "in such close proximity, it is reasonable that the DNA could have been transferred from person to person, from person to bottom of shoe, from bottom of shoe to side or top of shoe or from bottom of shoe to where A.D. was put on the ground at the time of arrest."
- \* There is also the possibility of transfer at the arrest scene, where both A.D. and L.Z. were placed on the ground in the dark "nearby each other." His counsel observes that it would not have been impossible to see a small amount of blood on the ground dropping from L.Z. or coming from the bottom of his shoes. Again, to use counsel's specific description of the possible mechanism, "the location on the side of the boot is consistent with someone folding their boots under themselves or rolling on the side of one's calves in effort to get up off the ground. In coming up off the ground, it would not have been difficult to transfer from one boot to the other, to the side, or to the top of the boot." They were on the ground for 10 minutes, which counsel submits was "certainly enough time to change their sitting position on the cold concrete."
- \* The evidence from the police was that there was moisture on the ground, and Ms. Biernat testified that DNA can persist and transfer more easily when moisture is present.
- \* Finally, there is the possibility of accidental contamination from the actions of the police, including their handling of the exhibits. These actions included walking A.D. to the detachment behind L.Z., possibly causing him to step in spots where L.Z. dropped DNA; having him sit on the floor of the loading bay for close to an hour before the stains were even spotted on his boots; and not removing the boots until after he had taken his picture in the same spot where the co-accused had been earlier. The boots were not actually seized until two hours after the stabbing, leading to an argument, I infer, that this created a long time within which to come in contact with Mr. Gordic's DNA from other sources of direct contact.

- \* A.D.'s counsel characterized the officers handling these exhibits as novices, and Cst. Bastians opening the exhibit in court in a manner that shows could have led to its contamination if its further analysis had been required, shows that their claim to have used gloves during the process should be viewed very skeptically. Another example that should raise a concern is of Cst. Dulude's photos showing exhibits on top of exhibit bags or being placed on the same underlying piece of kraft paper. These could lead to DNA on the outside of the bag being transferred to an exhibit, even if clean gloves have been put on. Similarly, touching a camera, phone, notebook, or pen between handling of exhibits, which appears to have happened here, could transfer DNA even if the gloves are changed.
- \* In short, counsel submits that A.D.'s evidence that he was part of a large group in the area of the attack, but had no prior knowledge of the motive for it and took no part in it, is supported by cell phone records and video evidence, and should be believed or at least raise a reasonable doubt as to his guilt. Even if that is not the result, on the whole of the evidence, other reasonable inferences arise with respect to the circumstantial evidence of his participation, and a reasonable doubt should therefore arise.

#### **b. G.R.**

**649** G.R.'s counsel initially prepared submissions that included potential liability pursuant to s. 21(2) of the *Criminal Code* (common unlawful design), but as Crown explicitly disavowed that subsection as a route to conviction, I will not summarize that portion of them.

- \* In the defence submission, there has been a complete failure of proof of G.R.'s liability as either a co-principal or an aider and abettor, because of the absence of reliable evidence actually identifying him as being involved in the attack.
- \* G.R.'s counsel canvassed helpful authorities that guide the assessment of credibility of a witness's evidence, with the factors particularly relevant to our case including the evidence's internal consistency, its consistency with reliable external evidence, changes in it over time, the witness's interest in the outcome, and their motive to lie. Counsel also emphasized a point that is well-known, but still worthy of repetition - in a situation where there is a conflict in the evidence, all that is needed for there to be an acquittal is for the accused's evidence, viewed in the context of the evidence as a whole, to raise a reasonable doubt.
- \* On the facts, counsel submits in overview, the Crown failed to identify G.R. either as a person who jointly committed or acted as a party to the attack. No witnesses identify him as participating or fleeing from the scene. The DNA evidence on the shoe and the knife should be given no weight, due to possible cross-contamination and improper handling. The inculpatory inferences available from the cut on his finger have been satisfactorily explained by G.R., and whether the knife was open or closed and whether Sgt. Mulhall saw him divert his path to avoid the police are disputed issues that should not be resolved against him.
- \* In his summaries of the witness evidence, G.R.'s counsel highlighted, for its advocacy value, the complete absence throughout the litany of witnesses of an identification of or reference to G.R. in any of the important events preceding the attack. This included his absence from: the evidence of activities in the Village on Friday night, other than his agreement that the group went there to socialize; the conversation with Ramin that seems to have ignited these events; the calls to the restaurant by Mr. Golic; the subsequent non-event at the Olympic Rings; the follow-up calls by Mr. Golic and the group looking for

Luka Gordic around the Village, and so on. His counsel also takes the position that he is not the person whom Riel Antes-Schaefer said was present but she did not know when she and her friend arrived at the townhouse, besides Mr. Golic, A.D., L.Z., and David. This tends to undermine the theory of association among Mr. Golic and all of the accused in the time before the attack.

- \* Supplementing the absence of any witness observations implicating him was G.R.'s own evidence of his lack of awareness or involvement in any dispute between Mr. Golic and Mr. Gordic, or of any threats or hostile action by Mr. Golic. To the extent that the group that he says he joined on the way to a party is implicated in any efforts to search for Mr. Gordic, his focus on communication with his girlfriend that night, which she confirmed in her testimony, and his resulting distraction from the group's efforts, explains the situation completely.
- \* When reviewing the witness evidence of the attack itself, aside from noting the absence of any identification of G.R., counsel emphasized, as A.D.'s counsel had, that witnesses identified a meaningful disparity between the number of actual attackers and the larger group in the area. Some of the witnesses also undermined the assumption that all members of the group who passed into the area of the assault necessarily took part in it. This links with one of G.R.'s important final submissions, which is that it is not clear that there was actually any large group assault or swarming to which the DNA on his shoe could link him.
- \* Of the witnesses he reviewed, the most helpful evidence included Ms. Jensen describing three to five attackers out of a group of 10.
- \* Ms. Harms-Kroeker had seen 10 to 15 people, "or maybe a little less", and then suddenly a fight breaking out. Significantly, from the defence point of view, she did not see any clump or circle of attackers and said it was difficult to tell who were bystanders or friends.
- \* Aside from its importance as direct evidence of L.Z. inflicting a stab wound, the significant part of Mr. Salt's evidence from G.R.'s perspective is he said there was only one or two people around Mr. Gordic at that point, which counsel submits makes them the attackers and leaves the remaining members of the group as mere bystanders with no criminal liability.
- \* Some of those who reported larger numbers of attackers are said to have meaningful weaknesses in their evidence.
- \* Farez Maleky agreed several times there were four to six attackers, before expanding it to five to eight in response to questioning by the Crown. G.R.'s counsel says that his evidence is inaccurate and unreliable in many other respects, due to such factors as his age, intoxication, lighting conditions, and his efforts to focus on multiple tasks.
- \* Mandeep Randhawa said that eight to 10 people were actually physically attacking Mr. Gordic, but the defence argues he was not confident about this, and his inability to refer to how many were punching Mr. Gordic indicates that he was speculating.
- \* In his evidence, A.D. said he did not see G.R. at the attack scene, and his description of the attackers (four or five bigger guys, Middle Eastern or East Indian), does not link specifically to him in any meaningful way. While A.D. said that five to six people were hitting Mr. Gordic, the submission is that, given his position as he identified it in the video and his concession there was "a lot happening at once", he might be wrong about those numbers.

- \* Dealing with the significance of his alleged flight from the scene, G.R.'s counsel submits that it is not of much probative value, given the evidence that almost everyone scattered from the scene immediately including, it appears, members of the original group who were present but not involved in the attack. This is supported by the significant number of young males fleeing from the walkway area who were seen by nearby police officers. G.R.'s calm demeanour when dealing with the officers from whom he proactively sought directions and those who arrested him, and more importantly his counterintuitive act of seeking the police out, tend to further undermine any inculpatory inference from leaving the scene.
- \* Sgt. Mulhall's observations must be moderated by the fact that his fellow officer, Cst. Miller, who was in just as good a position to make observations, simply did not see anyone following A.D. and L.Z. Counsel submits that if there was a third person and it was G.R., which is not at all clear on the evidence, it is just as likely that he took the fork in the path routinely, without having seen the police despite looking in that direction and without any intention to evade them.
- \* Counsel submits that the evidence surrounding the identification and seizure of the knife at the scene is also filled with uncertainty and marred by the failure of the police to adhere to proper investigative practices. As well, in terms of its usefulness as a basis to infer G.R.'s active participation in the assault, there is also not a basis to find that it was open when it was seized.
- \* Cst. Baker initially testified that the blade was silver, but could not recall 100% that it was open. The location where he saw it is different from what Cpl. Ross and Cst. Gauthier described, and there could have been a loss of continuity over the knife, I infer because Cst. Baker was also occupied with other matters in the interim. Cst. Gauthier could not say if it was open or closed when he first saw it, and the subsequent seizure is problematic because Cpl. Ross claimed the blade was open, but made no notes, then used a plastic bag rather than the approved paper one, because the former was all he had, and closed the knife himself. There was also a concern, given the likelihood that he had blood on him from the previous pair of gloves he had worn and the fact that he did not know if he had gotten any on his clothing, that he is not a person who should have handled the exhibits, even wearing clean gloves.
- \* There were also some omissions in note taking during the subsequent handling of the knife at the detachment, including Cst. Wirth and Cst. Polspoel, who failed to note she was wearing gloves.
- \* I am also asked to consider the possibility that the knife became contaminated after Cst. Wirth met with G.R. earlier, presumably coming into physical contact with him, and later transferred the knife to Cst. Polspoel.
- \* Taken as a whole, the police failed to follow best practices for the collection of trace evidence, as described in the case of *R. v. Hart*, [2002 BCSC 498](#), such as the failure to use an appropriate container for the knife and an insufficient degree of separation among the accused following their arrest and transport.
- \* The other significant possibility, which was affirmed through cross-examination of Ms. Biernat, is that the substance that yielded the DNA which the defence submits is not blood and could be a variety of bodily substances emanating from G.R., could have been placed there by secondary transfer, in view of the evidence from both him and A.D. of widespread handling of the knife through activities in which he participated, such as hand shaking and

arm wrestling or, I take it, innocent transfer if he did touch the blade himself when the knife was being shown around.

- \* In addition, it is unlikely that G.R. opened the knife at the scene, because no fingerprints were identified.
- \* As to the actual probative value of the knife, assuming that the issues of its integrity can be overcome, Ms. Biernat's evidence about three individuals having contributed genetic material to the blade area of the knife raises a plausible alternative that one of the other two contributors played the role of bringing it.
- \* Turning to the blood on G.R.'s shoe, counsel reviewed the extensive evidence of the presence of large amounts of blood at the scene, including Dr. Orde's concession about the possibility of blood from an exposed artery spraying quite high, before turning to Sgt. Dubyk's evidence and the question of what can be made of the bloodstain pattern. Among the key points were:
  - (a) Sgt. Dubyk saying that the person wearing the right Nike shoe could have been anywhere on the outside perimeter of the path made by the bloodstains;
  - (b) The unlikelihood that a person in that perimeter would get no stains at all on the left shoe, and relatively few on the right one;
  - (c) The fact that Sgt. Dubyk could not calculate the angle at which the stains were deposited or the distances from the blood source;
  - (d) His agreement with the authors of the learned texts that bloodstains should not be over-interpreted; and that there are special warnings against drawing too much from stains on shoes, because of their curved and irregular surfaces;
  - (e) His agreement that a few bloodstains "do not tell much of a story" and he is limited as to what he can read from them;
  - (f) Blood can contaminate an individual through indirect contact, that is - through contact with something other than the original blood source, like an item that has become saturated with blood;
  - (g) A compelling possibility here is satellite spatter, which is usually caused when blood drips into an existing pool, although can also result from blood simply hitting the ground;
  - (h) The spatter stains on the right shoe have a shape, size and uniformity that is consistent with satellite spatter
  - (i) Sgt. Dubyk did not have enough information to go beyond the general classification of spatter to be able to identify these stains as satellite spatter;
  - (j) A cast-off mechanism like blood being flung from a knife can create satellite spatter if it hits existing blood on the ground; and
  - (k) Overall, not much weight can be given to the bloodstain pattern evidence due to its inherent limitations.
- \* A number of errors were also made by the police in seizing and preserving the shoes, counsel argued. Cst. Bastians seized both shoes while holding G.R.'s phone, then put them on the floor near a staff member's desk in a secured area of the detachment where they were left unattended for an hour and 24 minutes. He never reviewed the surveillance video

of the area to be able to rule out interference with the shoes, and there would be no way for him to tell from looking at them afterwards if any contamination had occurred.

- \* There is also an excellent possibility of cross-contamination of the shoes caused by Cst. Bastians' involvement in seizing L.Z.'s clothing and the knife, which were contaminated with the victim's blood, and then going back and handling the shoes with his bare hands. He used the same pen throughout the seizure of these items, which could have received the DNA from one item and then allowed it to be passed on to others, despite a clean pair of gloves being put on between them. He could not say for sure that the clothing he seized never came into contact with his own clothes. Cross-contamination could also have occurred when he took off the last pair of gloves, presumably transferring what was on them to his bare hands.
- \* Finally in this category, it is argued that Cst. Bastians demonstrated a careless attitude when he gave his evidence, in terms of safeguarding against contamination. This included the habit he testified to of not putting gloves on because he does not want to project the image of the "big bad police officer" when meeting people in the Village. He rebuffed any concerns about his in-court handling of L.Z.'s knife on the basis that it had already been analyzed, and agreed that he had not been thinking about the possibility of DNA transfer through skin cells. He contrasted the experience level that he and other officers brought to investigations at Whistler to the experience of IHIT officers who seize exhibits in homicide cases. And he was unapologetic for leaving the shoes unsecured to assist Sgt. Mulhall because general chaos prevailed in the detachment.
- \* A critical best practice that was also ignored here, and also quoted in the *Hart* decision, was that articles should be seized from different suspects by different officers. With so much of Mr. Gordic's blood on the items seized from L.Z., we simply cannot rule out the possibility that some of it ended up on G.R.'s shoes inadvertently.
- \* G.R.'s counsel emphasizes that even taken at its highest, the evidence can only show that he was somewhere near the scene, which G.R. himself described, passing six to 10 feet from it at the point that Mr. Gordic was apparently getting stabbed under the arm. Sgt. Dubyk testified that spatter stains can be deposited as far as two metres and, in addition, counsel submits that the transfer stain is not of much value because we do not know from contact with what surface it came.
- \* Dealing with the implications of the cut to G.R.'s finger, his counsel points out that while Cst. Chan described it as a fresh cut, not severe but more than a paper cut, Dr. Orde could not see any injury at all, and agreed that it looked like skin picking, which is exactly what G.R. described and what Ms. Gomez confirmed as an ongoing habit. The added feature that makes the Crown theory that it was a cut sustained while using the knife even less plausible is that G.R. is left-handed. This was not explained further, but I take the argument to be that the dominant hand that would customarily hold the knife is not likely the one to be cut when opening it, given the nature of the opening mechanism here.
- \* I understand the submissions in relation to the scene video to be that G.R. was able to attribute specific physical actions to the person he identified as himself in it, such as looking down and holding an object that is consistent with a phone and walking into the area of the attack in a way that does not appear to be particularly cognizant of his surroundings. He also identified the hoodie he was wearing and on a larger screen he was able to identify his white shoes. I took the point from this that there is a credible basis on which to make a finding that he is that person, which tends to support his account of only transiting along the periphery of the assault, along his way out of the alley behind Kabir.

- \* Counsel noted that G.R. acknowledged that the third person in the 7-Eleven video may have been him, but took the position on it that it does not contradict his account of the events surrounding the assault itself, nor is it evidence of any specific intent or actions on his part.
- \* In recounting the evidence of association with the other accused and Mr. Golic, counsel acknowledged evidence of a pre-existing friendship between Mr. Golic and L.Z. and some bonding between A.D. and L.Z. over the women whom they invited over to the townhouse and wished to socialize with later. G.R.'s connections with them were not as close, including only having met L.Z. that weekend, and his recitation of activities throughout the day does not show any focus on Mr. Golic or his co-accused, other than as part of an overall socializing among the much larger group that went on throughout the day. This included the chess matches with L.Z., which were brought to an end by the arrival of the young women and L.Z.'s shift of attention to them.
- \* This lack of particular connection with those with whom he is alleged to have acted in concert is even more relevant to G.R.'s presence within the large group that eventually made its way to the walkway. He was not walking with any of the co-accused or Mr. Golic in the time leading up to the attack, nor was he aware of any inquiries that they might have been making about Mr. Gordic. His encounter with a classmate actually removed him from the group in the critical few minutes when members of it came upon Mr. Gordic. Coming back full circle to his earlier point that not a single witness identified G.R. as part of any of the group's or Mr. Golic's activities over the course of the weekend, counsel submits that there is no basis to reject his account of peripheral and non-culpable involvement - mere presence, in essence - and a very brief, transitory presence at that. This account, the defence submits, had no significant improbabilities, gaps, or inconsistencies, and should be found to be credible and reliable. His inability to explain the DNA transfer on his shoe is of no significance, it is argued, because its presence arises from suspect handling and contamination issues rather than from any action on his part.

### **c. L.Z.**

**650** L.Z.'s counsel framed his cogent submissions with authorities that have emphasized the great care with which courts must scrutinize the credibility and reliability of eyewitness evidence, having regard to such critical factors as the opportunity to observe; the conditions of observation, the degree of intoxication of the witness; their partiality towards one of the parties; any lack of truthfulness by the witness and the context within which it was demonstrated; the particular vulnerabilities of cross-racial identification; and the passage of time since the incident.

**651** These factors are said to apply directly to the evidence of the young eyewitnesses in this case and should inform my analysis of it on the critical issues.

**652** Summarizing counsel's essential points:

- \* L.Z.'s counsel candidly acknowledged that the physical evidence is capable of supporting an inference that L.Z. stabbed Mr. Gordic at some point in the sequence of the attack. The important questions, however, are with what accompanying intent he did that and what wound or wounds did he inflict.
- \* Counsel challenged what he understood to be the Crown's theory of L.Z.'s liability, which is that he was part of a joint venture with Mr. Golic to assault Mr. Gordic with a weapon,

which he ultimately acted on when inflicting the stab wounds. He submitted that the pillars on which it rests are unreliable.

- \* The submission on that point was that Ms. Daliri's description of Mr. Golic's threats did not contain a reference to killing, only stabbing, which is a subtle but important distinction when considering the specific levels of intent required for second-degree murder, and so it is relevant that even the evidence of the origins of Mr. Golic's plan may not contain an actual expression of that intent.
- \* While normally an error by witnesses about the time that an event occurs is not fatal to the reliability of their evidence if other matters make it reliable, the shortcomings in the evidence of Mr. Stojanovic, Mr. Janjic, and Mr. Popovic, coupled with reliable evidence of where L.Z. actually was during their observations, in the form of the evidence with respect to Ms. Antes-Schaefer and her friend, suggest that something quite different than what they describe actually occurred.
- \* Mr. Stojanovic's purported identification of L.Z. in court after being unable to say who asked about Mr. Gordic in his discussions with the police and the way in which his evidence conflicts with Mr. Janjic's evidence on the location of the confrontation and the role played by A.D.; Mr. Janjic's change in his evidence after speaking to other witnesses during a break, and the inconsistency with other evidence concerning his presence and participation when the issue with Mr. Golic and Mr. Gordic arose earlier in the day; and Mr. Popovic's failure to notice L.Z. in the group despite knowing him and his recollection that he was confronted by a big East Indian, all suggest that these meetings may have taken place, not just at a different time, but with other members of the group from the townhouse or friends of Ramin, while L.Z. was pursuing the relationship with Ms. Antes-Schaefer that the evidence discloses.
- \* In counsel's submission, nothing that Mr. Guzman-Koenigbaur says can be believed, since he committed the most damaging act in relation to his credibility possible - lying under oath about his conversation with Crown counsel before he testified on a vital issue. Proceeding from that flawed mindset, he then tailored his evidence to reflect the concerns that the Crown expressed. The level of concern is such that I should be wary even of accepting the concession by A.D.'s counsel that Mr. Guzman-Koenigbaur likely saw the group around the Mongolie Grill near midnight.
- \* To the extent that the evidence of the witnesses to the attack can support the joint attack theory, L.Z.'s counsel submits that it depends on proof that words spoken at the attack were from L.Z. rather than from Mr. Golic, and that there is direct evidence of him stabbing Mr. Gordic. Neither of those propositions can be accepted on a careful review of the witness's evidence.
- \* Ms. Kirkpatrick-Dionne had consumed substantial amounts of a drug that was capable of interfering with her perception of reality in the hours leading up to the attack and, more importantly, she failed to attribute the statement, "There you are, you little bitch," to L.Z. in any of her three statements to the police, before purporting to recall it in her evidence. She agreed after seeing the video that she was wrong when she told the police that L.Z. approached Mr. Gordic first, and further, that she did not see who did it and her memory is "not so good". She was then willing to link the strength of that memory to the assertion about L.Z. making the initial statement.
- \* The reliability of Dane Salt's evidence is also said to be significantly compromised. In addition to his degree of intoxication, there were meaningful variations between his police statement and his testimony on such matters as the ethnicity of the person, the type of

upper garment the person was wearing, and his level of certainty about whether this person was the same one who had said, "There you are, you little bitch" - being unable to say whether it was the person wearing the top with the black sleeves in the attack video or the person who is said to be L.Z., before then claiming he had been referring only to the person with black sleeves. He is also the only witness to see a knife at any point and his descriptions of Mr. Gordic spurting blood at a distance, tearing off his shirt "like the Hulk" (as Mr. Salt testified at one point), and falling immediately to his knees after being stabbed are contrary to the other reliable evidence, including the video.

- \* While Mr. Bifano could not attribute the statement he heard from one of the attackers towards Mr. Gordic - "You didn't think you'd see me here," - to any specific person, counsel submits that, in the overall context, this was likely said by Mr. Golic.
- \* Mr. Randhawa thought the person who first approached Mr. Gordic and said, "You didn't think you'd see me here," was the same one who said, "I juked him." His description of the first attacker was a stocky white male dressed all in black. He knew L.Z. and did not see him there.
- \* Ms. Brummitt, who had been in a relationship with L.Z., grabbed onto him to give him a hug, and he stopped for a few seconds before following the other pursuers, as the video confirmed. In the course of the attack by the group of males, she did not see L.Z., nor did she see any weapons used.
- \* Failing proof of these crucial aspects of L.Z.'s role, his counsel says I am left with Mr. Golic's expressed intention to stab Mr. Gordic and only speculation beyond that.
- \* The more reasonable inference, on the actual evidence, is that his involvement arose as a result of a spontaneous decision, even if I find he was flashing the knife, which would only have been seconds before it was used. The point is that he did not approach the group with a knife in his hands ready to be used. This has implications for the strength of the inferences about his intent when he did stab Mr. Gordic at least once.
- \* L.Z.'s counsel then helpfully provided what he said were the four routes to an acquittal on second degree murder.
- \* First, in light of L.Z.'s testimony and Mr. Jeffery's expert evidence, and particularly the independent evidence supporting his Xanax addiction, his opportunity to have become a seasoned drinker and user of Xanax despite his age, the ability of such individuals to conceal the expected physical symptoms while still experiencing the kinds of mental effects the arresting officers observed, and the gross intoxication that his predicted blood-alcohol level coupled with the ingestion of Xanax, would have produced, the common sense inference that he intended the natural consequences of stabbing Mr. Gordic has certainly been rebutted.
- \* Second, there is the so-called rolled-up instruction, in which evidence of intoxication that may not support it as a stand-alone defence is considered, together with all of the other evidence bearing on his intent, to determine if the necessary level of intent has been proven beyond a reasonable doubt. Considered in that light as well, a reasonable doubt about the necessary intent should emerge.
- \* A third pathway is a reasonable doubt that L.Z. inflicted the fatal wound with one of the necessary intents or, if he did not inflict that wound, that he intended to assist the person who did inflict it to cause death or to cause bodily harm that he knew was likely to cause death and was reckless whether death ensued (the alternative level of intent for murder). The important factual questions, given that I can be satisfied that he inflicted a stab wound

are: where did he stab him and was he the only stabber? The evidence of Ms. Harms-Kroecker of two males punching each other, followed by others joining in, has potential relevance to this inquiry. Despite having received information to the effect that Mr. Golic was in possession of a knife and had stabbed Mr. Gordic, and despite agreeing that it would be good to determine whether all of the wounds were caused by the same tool, Cst. Dulude did not resubmit the rib portion for tool mark analysis. I must ask myself, this submission goes, if it would be safe to draw an inference of guilt beyond a reasonable doubt when there is an important lack of evidence, which can of course form the basis of a reasonable alternative inference, described in the essential authority of *R. v. Villaroman*, [2016 SCC 33](#).

- \* The final pathway to an acquittal on second degree murder, if I find L.Z. inflicted the fatal wound, is a doubt that, amid the turbulent circumstances of the attack, L.Z. may have intended to stab Mr. Gordic somewhere other than the heart, or that Mr. Gordic shifted his position in the melee in a way that led L.Z.'s blow to land in that location. Counsel was at pains to stress that this argument in no way implicates Mr. Gordic in his own demise. It is simply an aspect of the struggle in which, on all the evidence, Mr. Gordic was engaged.

#### d. Crown Counsel

**653** Crown counsel were placed in the position of having to reply to three separate sets of submissions and, as a result, their submissions were necessarily somewhat lengthier. They bear the brunt of the greatest amount of compression in my summary, but I will just repeat my original comment that I have considered all of the evidence and submissions that have been made.

**654** The Crown's guiding principle in its submission is the necessity of examining each individual piece of evidence in this case in light of the evidence as whole. The evidence is highly contextual, and isolating one portion and analyzing it as though it had no relationship to the whole will produce erroneous results. The same is true of the assessment of the credibility of the accused's evidence, which must be carried out in light of all the evidence, not in isolation.

**655** The other essential guiding principle, as expressed in *Villaroman*, is that other alternative inferences inconsistent with guilt must be reasonable, not just possible.

**656** The Crown's essential points included the following:

- \* While it is highly relevant to demonstrating the intent with which the accused approached their encounter with Mr. Gordic to show that there was a preplanned assault, it is not an essential element of the offence. Nor does the intention to participate in a group assault need to arise before the participation itself.
- \* Regardless of the depth of their friendship, all three accused were connected through Mr. Golic and adopted the unquestionable motive he had to harm Mr. Gordic for challenging his treatment of his ex-girlfriend. All of the subsequent actions of the day are best understood in that light.
- \* The recruitment of the co-participants in the assault occurred just before the large group spilled out of the townhouse on the way to the Village. This is when the large group upstairs, described by Ms. Antes-Schaefer, materializes.
- \* All the accused implausibly feign obliviousness to Mr. Golic's obvious anger throughout the day, and absence during, or unawareness of his efforts to gather the group.

- \* Mr. Guzman-Koenigbaur's difficulties, properly viewed, stem mostly from a lack of intelligence, rather than any intent to mislead the court, and despite them his evidence can safely be relied on. The same goes for the Stojanovic group, who I should conclude are incorrect only in their evidence of timing, not in their identification of the people who they say approached them.
- \* Despite their shortcomings the scene witnesses are essentially reliable and can safely be relied on, on the core points.
- \* These witnesses and the video show that L.Z. was the person who flashed the knife and was the one to first advance on Mr. Gordic before being passed by others. The scene witnesses can also be relied on for the finding that he uttered the initial menacing comments, and at the end of the attack indicated that he had "juke" Mr. Gordic.
- \* The armpit wound was accurately witnessed by Dane Salt as being inflicted by L.Z. Its timing as the last wound makes it more likely that L.Z. also inflicted the first two, given the unlikelihood that he would flash the knife and then wait until the end of the encounter to use it.
- \* The flight of the accused is relevant post-offence conduct and offers a further inference of participation in the assault.
- \* Despite searching examination by the defence, no possibility of contamination of the DNA exhibits has emerged that is realistically linked in any way to the actual conduct of the police when dealing with the accused and the exhibits.
- \* Similarly, the alternative scenarios for the placement of blood on A.D. and G.R.'s footwear and the transfer of DNA to their footwear or the scene knife, through any process other than their presence and participation in the assault, found no connection to the actual evidence.
- \* A careful examination of the evidence of all three accused, applying the well-known *W.(D.)* principle (*R. v. W.(D.)*, [1991] 1 S.C.R. 742), should lead to the rejection of all of it as unworthy of belief. The common thread through all of their evidence is an attempt to work backwards, from the obvious implications of the evidence against them to create implausible alternative scenarios to explain what, at the end of the day, is unexplainable, except by their active participation in the attack.
- \* No realistic mechanism was proposed by A.D. in his evidence for the deposit of Mr. Gordic's DNA by means of transfer stains on his boots. He cannot be the person he claims to be in the video, who took no part in the assault, because the person he links to himself fleeing with as L.Z. is demonstrably not L.Z.
- \* G.R.'s evidence seeks to provide an explanation for the blood on his shoe that does not implicate him in the assault, but his resulting account of how he came upon the attack and then decided to run through it on the periphery is completely implausible.
- \* L.Z.'s intoxication defence depends completely on his account of his consumption, which is unrealistic and should not raise a doubt. It contains significant details about those substances and their amounts, but little about other important details of the day. His contact with the police, including an objective video record, also rebuts any suggestion of the gross degree of intoxication he claims.
- \* Further, a review of all the evidence shows that he is undoubtedly the sole stabber, and that has major implications for the inferences that can be drawn about the level of intent that accompanied the particular wounds that he inflicted.

## V. DISCUSSION

### a. Overview

**657** The theory of the Crown is that A.D. and G.R. participated in a group assault on Mr. Gordic, in relation to which there was an objective foreseeability of non-trivial bodily harm. His death as a result of that assault renders them potentially liable for manslaughter. The core evidence in support of that finding is Mr. Gordic's DNA being identified on their footwear and, in the case of G.R., his DNA being found on a knife that was left at the attack scene and a fresh cut on his finger at the time of the arrest. To this, the Crown seeks to add the evidence that they participated in efforts to find Mr. Gordic before the assault, thus attaching them to Mr. Golic's motive to harm him, and the inferences available from the post-offence conduct of their flight from the scene, along with L.Z.

**658** The theory of the Crown in relation to L.Z. is that he is most likely the only person who stabbed Mr. Gordic. There is no reliable evidence of another stabber, although a finding that there were other stabbers does not affect his liability for second degree murder, because he had the necessary intent and the minimum one stab wound that he unquestionably inflicted was part of a joint attack and meets the standard for causation in terms of its contribution to Mr. Gordic's death. The main significance of his being the only stabber in the Crown's theory, I infer, is that the inference of intent that is available from the pattern of all the wounds that were inflicted is much stronger.

**659** Like the other accused, the core evidence against him is the DNA of Mr. Gordic, in this case in the form of blood on a knife in his pocket and on his clothing when he was arrested. In addition to the efforts to locate Mr. Gordic beforehand and flight from the scene that apply to the co-accused, there is also evidence from witnesses at the attack scene who witness him carrying out certain actions, including, in the case of one witness, inflicting the stab wound under Mr. Gordic's arm.

### b. Legal Principles

**660** Fortunately, this case was argued with a focus on the relevant facts, and proceeded generally on the basis of a common understanding of the applicable law, which can readily be summarized.

**661** A conviction for manslaughter requires the commission of an unlawful act, accompanied by the objective foreseeability of bodily harm that is neither trivial nor transitory. Foreseeability of the risk of death is not required: *R. v. Creighton*, [\[1993\] 3 S.C.R. 3](#).

**662** A conviction for second degree murder requires that the accused commit an unlawful act and cause the death of a person with one of the intents provided in s. 229(a) of the *Criminal Code*: that they meant to cause death or they meant to cause bodily harm that they knew was likely to cause death and were reckless whether death ensues or not.

**663** The requirement of causation is the same for manslaughter or murder. In order for an accused person to be guilty of homicide, it is necessary that their actions be a "significant contributing cause" of the death: *R. v. Nette*, [\[2001\] 3 S.C.R. 488](#), at para. 71.

**664** When more than one person participates in an offence, they may do so as co-principals, even if each of them has not committed every act that makes up the *actus reus* of the offence. Although they may well have agreed in advance to commit the offence, what is required is their common participation, as opposed

to common purpose. Where co-perpetrators engage in a deadly assault, the Crown need not prove which of the attackers struck the fatal blow or blows: *R. v. Ball*, [2011 BCCA 11](#), at paras. 23-25 and 28.

**665** In the context of liability for manslaughter, participants in a group assault may be liable even if one of the other participants caused the death of the victim by the use of a weapon without their prior knowledge. All that is required for a conviction for manslaughter was the objective foreseeability of non-trivial bodily harm, as I have described: *R. v. Miazga*, [2014 BCCA 312](#), leave to appeal ref'd [\[2014\] S.C.C.A. No. 439](#) at para. 15.

**666** This case was mainly argued on the footing that if there is liability for the accused, it is likely as co-principals, rather than as parties, including L.Z.'s liability for second degree murder if there was another stabber. However, if participants in a group assault are not co-principals, liability for aiding or abetting manslaughter or murder can arise where the accused knows of the intentions of the principal, (including in the case of second degree murder one of the intents required by s. 229(a)), and performs an act of assistance or encouragement in the unlawful act for the purpose of assisting or encouraging it: *R. v. Briscoe*, [\[2010\] 1 S.C.R. 411](#) at paras. 14-18.

**667** One of the ways in which an accused can raise a reasonable doubt about the specific intent required for second degree murder is by means of the defence of intoxication. The applicable principles were helpfully summarized in the recent British Columbia Court of Appeal case of *R. v. Florence*, [2014 BCCA 288](#), which I will quote from:

[20] As the trial judge correctly said, the leading case on intoxication as it applies to the specific intent for murder is *R. v. Daley*, [\[2007\] 3 S.C.R. 523](#) . . . In *Daley*, the Court set out the three legally relevant levels of intoxication. On the one end, there is "mild" intoxication which cannot negate specific intent, and on the other end, there is extreme intoxication, where the accused is so intoxicated that he or she is incapable of forming specific intent. Extreme intoxication is akin to automatism.

[21] The middle category of "advanced" intoxication is relevant here. This occurs "where there is intoxication to the point where the accused lacks specific intent, to the extent of an impairment of the accused's foresight of the consequences of his or her act sufficient to raise a reasonable doubt about the requisite *mens rea*": *Daley* at para. 41. In other words, the intoxication defence recognizes that alcohol may impair both one's ability to act with intention or foresee the consequences of one's actions. Evidence that an accused had been consuming alcohol may prevent the Crown from relying on the common sense inference that a sane and sober person intends the probable consequences of his . . . actions.

[22] However, the extent of intoxication required to negate specific intent may vary, depending on the type of offence involved. As stated in *Daley* at para. 42, "for certain types of homicides, where death is the obvious consequence of the accused's act, an accused might have to establish a particularly advanced degree of intoxication to successfully avail himself or herself of an intoxication defence of this type."

**668** Even if the intoxication defence is unsuccessful, it is still necessary to go on to consider the cumulative effect of all of the evidence, including evidence with respect to alcohol consumption or drug consumption, on the question of whether the Crown has met its burden of proving the accused's specific intent required for murder beyond a reasonable doubt.

**669** Virtually the entire case against A.D. and G.R. and a significant portion of the case against L.Z. depends on circumstantial evidence. Before a conviction can result from circumstantial evidence, the guilt

of the accused must be the only reasonable inference. Reasonable alternative inferences from guilt may arise from the evidence or from the absence of evidence. As the Court put it in *Villaroman*:

[36] . . . A certain gap in the evidence may result in inferences other than guilt. But those inferences must be reasonable given the evidence and the absence of evidence, assessed logically, and in light of human experience and common sense.

[37] When assessing circumstantial evidence, the trier of fact should consider "other plausible theor[ies]" and "other reasonable possibilities" which are inconsistent with guilt . . . I agree with the appellant that the Crown thus may need to negative these *reasonable* possibilities, but certainly does not need to "negative every possible conjecture, no matter how irrational or fanciful, which might be consistent with the innocence of the accused . . . "Other plausible theories" or "other reasonable possibilities" must be based on logic and experience applied to the evidence or the absence of evidence, not on speculation.

[Emphasis in original.]

**670** It is critical, when engaging in this analysis to distinguish inference from speculation. Inferences have a factual basis from which to conclude that further logically-related facts existed. "An inference which does not flow logically and reasonably from established facts cannot be made and is condemned as conjecture and speculation": *R. v. Morrissey* ([1995](#)) *97 C.C.C. (3d)* 193 at 209 (Ont. C.A.).

**671** In general, the trier of fact must consider the evidence as a whole and not subject individual pieces of evidence to the criminal standard: that is *R. v. Morin*, [[1988](#)] *2 S.C.R.* 345.

**672** Eyewitness evidence is also a key feature of this case. Of course, a standard of uniform and perfect observation and recollection cannot be expected from witnesses to sudden and traumatic events. Some errors and inconsistencies are understandable, even among truthful and largely reliable witnesses. But it is still essential to approach eyewitness evidence in a cautious manner, aware of its potential frailties, and to assess its credibility and reliability in light of all the relevant circumstances surrounding the witness's ability to observe and recall the events truthfully and accurately. These are well-known principles and the decision of *R. v. Alexander*, [2012 ONSC 7117](#), provided on behalf of L.Z., provides a helpful example of their application.

**673** In the present case, some of the relevant factors particularly important with respect to these witnesses' evidence, as suggested in L.Z.'s submissions, are their opportunity to observe, the conditions of their observations, their inconsistency with past descriptions of the events, the degree of intoxication of the witnesses, their partiality towards the accused or the victim, any lack of truthfulness they have shown and the context within which it was demonstrated. The particular vulnerabilities of cross-racial identification are also a legitimate concern, as can be the passage of time since the incident.

**674** Post-offence conduct, which is frequently described as after-the-fact conduct in the Ontario authorities, also potentially arises in this case. A helpful reference is the case of *R. v. Peavoy* ([1997](#)), *117 C.C.C. (3d)* 226 (Ont. C.A.):

26 Evidence of after-the-fact conduct is commonly admitted to show that an accused person has acted in a manner which, based on human experience and logic, is consistent with the conduct of a guilty person and inconsistent with the conduct of an innocent person. The after-the-fact conduct is said to indicate an awareness on the part of the accused person that he or she has acted unlawfully and without a valid defence for the conduct in question. It can only be used by the trier of fact in this manner if any innocent explanation for the conduct is rejected. That explanation may be

expressly stated in the evidence, such as when the accused testifies, or it may arise from the trier of fact's appreciation of human nature and how people react to unusual and stressful situations. It is for the trier of fact to determine what inference, if any, should be drawn from the evidence.

27 Often, after-the-fact conduct may be relevant to the issue of the identity of the person who committed the crime . . . Where, for example, a person denies being the person who engaged in an assault on another person, but was seen fleeing from the scene of the crime by someone who knew him, the trier of fact may (not must) conclude that flight from the scene was more consistent with a person who had committed a culpable act. The evidence is, therefore, relevant to the question of the identity of the person who committed the assault. On the other hand, where the accused admits being the person engaged in a fight, after-the-fact conduct will add nothing to the issue of identity and has no relevance in that regard.

. . .

30 . . . although after-the-fact conduct cannot be used to determine the level of culpability with respect to included offences, it may, nevertheless, be of assistance in determining whether the accused committed an unlawful act. In other words, after-the-fact conduct cannot be used to determine whether the accused committed manslaughter or murder but, depending on the circumstances, it may be of some assistance in determining whether he committed a culpable homicide.

31 The conduct of an accused person after the event . . . may also, depending on the circumstances of the case, have some evidentiary value in rebutting defences put forward by an accused which are based on an alleged absence of the required culpable mental state [including intoxication] . . . In these cases, the after- the-fact conduct is potentially relevant because it is circumstantial evidence with respect to the accused's state of mind. In other words the conduct is not consistent with the actions of a person who had the state of mind now alleged at trial. If the accused's explanation of the after-the-fact conduct is rejected by the jury, it is evidence from which an inference may be drawn that the accused person did have the requisite cognitive mental state, or level of mental awareness, to commit the crime alleged.

### **c. The Accused's Evidence**

**675** As I did for all of the youthful witnesses in this case, when assessing the accused's testimony I have kept in mind the level of sophistication that accompanies their age and the stressful circumstances under which they were testifying.

**676** The doctrine of reasonable doubt with respect to credibility certainly applies to the evidence of all the accused in this case.

**677** The evidence of both A.D. and G.R. provides a mechanism, at least arguably, for the innocent transfer of DNA to their footwear. In any event, belief in or a reasonable doubt based on their evidence that they did not take part in the assault would result in an unresolvable conflict with the forensic evidence. So if I believe their evidence or have a reasonable doubt based on it, they should be acquitted. Even if I am not left in one of those states of belief I must consider all of the evidence and determine whether the Crown has proven their guilt for manslaughter beyond a reasonable doubt.

**678** L.Z.'s evidence of alcohol and drug consumption and tolerance to those substances provided the foundation for Mr. Jeffery's opinion that he was grossly intoxicated at the time of the offence, so if I believe or have a reasonable doubt based on his evidence, he would be acquitted of second degree murder, leaving the availability of the included offence of manslaughter, based on the effect of intoxication on his

intent. Even if I am not left in one of those states of belief I must consider all of the evidence, including with respect to intoxication, to determine whether the Crown has proven the necessary intent of second degree murder beyond a reasonable doubt.

*i) A.D.*

**679** The evidence of Riel Antes-Schaefer and L.Z., as well as the Facebook and text messages, offer some meaningful support for portions of A.D.'s evidence. In fact, the Crown did not ultimately contest the timing suggested by those messages, the fact the texts were sent from outside the townhouse, or that his ultimate goal might still have been for him and L.Z. to eventually join Ms. Antes-Schaefer at her place. The timing of her departure means whatever recruitment Mr. Golic undertook would have happened after the young women were outside the townhouse, and the time he actually departed created quite a narrow window within which the group could walk to the Village and look around for Mr. Gordic before the attack. It also means that whatever he thought the group was going to be doing, he does not appear to have expected it to interfere with his plans for later.

**680** All of that acknowledged, I find there are problems with his evidence.

**681** He was certainly not with Mr. Golic throughout the day, but he did spend significant periods in his company, and I find it hard to accept that he could remain oblivious to the dispute that was clearly consuming Mr. Golic's attention, in light of all of his communications with the Gordic group (except for the call on the way back to the Village that he heard, but did not link to Mr. Gordic) or that Mr. Golic would then be back to laughing and joking in the evening, as he had been before the call. This was admittedly a large group at the townhouse, but he knew Mr. Golic reasonably well and I cannot accept that he heard absolutely nothing of what was going on throughout the day.

**682** His account of his interactions with Ms. Antes-Schaefer in connection with joining her later did not make much sense. Stringing her along with no intention of accompanying her at that point, so that she would not get mad at him while he was engaged in the not especially time-consuming process of freshening up did not seem plausible, and his explanation that things like finding his clothes would take much longer because he was drunk struck me as an attempt simply to explain away that implausibility. It was also not clear why getting cigarettes, his other necessary task, needed to be done separately from going with her.

**683** I agree with Crown counsel's suggestion in cross-examination that the account of how Mr. Golic and then the large group ended up joining him outside sounded like an effort to distance himself from any plans regarding an assault that may have been made inside the townhouse. He initially said Mr. Golic needed to get "a jacket or something", but then said he just assumed that. A.D. also could not say why L.Z. went back inside after a couple of minutes.

**684** After 10 minutes, following the exit of a "big group" from the house that included girls from his school, "then the big group of people, all guys, come" he said and they all began to walk to the Village. There were no inquiries by him about what any of their plans were, despite there being "a bunch" he did not know, or seemingly any effort to relate it to Mr. Golic's request to accompany them. He never seems to have asked the basic questions of where they were going and what they were doing. Even if he did not know Whistler, I would expect him, in light of the detail of the rest of his evidence, to be able to say at least whether the route to where he was supposed to be buying cigarettes was a direct one or not.

**685** It was a possibility that he ran into Mr. Guzman-Koenigbaur, he conceded, although he did not deal

with him directly, and he agreed that a route that included that encounter (along with the one with the Stojanovic group, which he did not recall), would not make much sense in terms of a route to buy cigarettes. I appreciate his evidence that he was drunk at that point, but that had not inhibited him from making any of the arrangements that he had previously described, going out to look for cigarettes or continuing to update Ms. Antes-Schaefer about the progress of the visit. His claim to have been texting her during the walk to the Village is certainly true, but his last outgoing text is at 12:24, well before the attack.

**686** It seems oddly coincidental that the portion of the group ahead of him just happened to be heading in the same direction as the location where he was told by the friend he could buy cigarettes, and it was unclear why he would feel the need to speed walk to catch up to them, given his ultimate destination was not necessarily the same as theirs.

**687** He said he believed he was the person he identified on the video, which, as Crown counsel submitted, is perhaps a lesser degree of certainty than one might expect, given the certainty with which he described his movements during that period. Perhaps most importantly, I agree with the submission that he cannot be that person, because in his evidence the person he claimed passed him by after the attack carrying a knife is certainly not L.Z.

**688** Leaving aside the disputes about what L.Z. actually did, it seems clear on all the reliable evidence in this case that L.Z. was the first member of the attacking group to cross into view from the left of the screen, Participant 1. Even allowing for the difference in shading caused by the special lighting, the person A.D. follows or says he follows is not wearing the highly distinctive two-tone vest that can be attributed to L.Z. Rather, this person, who seems to be wearing a dark hoodie, appears in fact to be one of the last three attackers who arrived at the scene, as Crown counsel submitted. I agree, though, that this person could well be holding a knife, based on the video.

**689** More primarily, given that he did not recognize anyone carrying out the attack (although he saw Mr. Golic "a distance away"), it is not clear why he needed to flee, and he had no coherent explanation for it. He accepted that he was panicked, but on his evidence, he had come upon an attack being carried out by people he did not know or did not recognize, and he did not describe any sense of personal danger to himself arising from it.

**690** It is also not clear why he would have to run such a distance from the scene if he had just happened upon an unexpected assault in which he had had no involvement. No need to avoid the police existed on his account of his behaviour, and a brief distance away from what was going on seems likely to have ensured his safety. I also did not find it believable that, having had no involvement in the attack or hostile intent towards anyone himself, he would stick with L.Z. from then on, despite seeing him carry a bloody knife away from the assault, and, just because matters had not "hit him yet" and he just wanted to get home.

**691** As a result, I do not believe A.D.'s evidence and it does not leave me with a reasonable doubt.

*ii) G.R.*

**692** Like A.D.'s evidence, I found G.R.'s claim not to have been aware of any anger or hostility by Mr. Golic towards Mr. Gordic, despite being in each other's presence for parts of the day, to be unlikely. As I acknowledged in relation to A.D., there was a large group at the townhouse, and his relationship with Mr. Golic was a less developed one than the other accused's, but they were on friendly enough terms for him

to have had a ride up with Mr. Golic's mother and they were in a smaller group together for the trip to the Village during the day.

**693** On that note, it seemed unlikely that his recent memory that he would happen to recall Mr. Golic speaking the innocuous words, "baby, baby," in a very pleasant fond kind of tone, if Mr. Golic's emotional state was of no consequence throughout the day, as he claimed. As in the case of A.D., I think it is much more likely that anyone in Mr. Golic's presence, for even portions of the day after the dispute with Mr. Gordic arose, would have observed the anger, or at least some of it, that he communicated so clearly to the Gordic group.

**694** As Crown counsel pointed out, his testimony concerning his dealings with the pink knife evolved considerably during the course of his evidence. He initially said he picked it up when he was cleaning on the deck and "didn't really touch it later". In cross-examination, he claimed he meant he had only touched it once while cleaning, which seems an odd distinction to draw. Later, when it was being passed around, he might have touched it again, he was not sure, but subsequently added, "Maybe when I touched it my hand came in contact with the blade."

**695** When Crown counsel pursued him on the last statement, he said that DNA could have gotten on the knife when his hand came in contact with the blade, he said he might have opened the knife, but said "I don't know" when Crown counsel restated it to him. He then said one cannot really touch the blade without opening it, and it could have been passed to him in an open position. He said he had not mentioned that previously because he had not been asked, despite it seeming to be of vital importance to his defence. These exchanges, in my view, demonstrate a fluidity in his evidence on a very important point that I would not expect from a natural, truthful account. In addition, given the unique nature of this object and the interest that it provoked supposedly among the occupants of the townhouse, it is not believable that no one would ever have claimed ownership of it during the handling process.

**696** An incongruous note relating to the reasons for the group from the townhouse heading to the Village was the appeal to him of a further party, with the presence of additional women, when he said he was deeply concerned about his girlfriend's behaviour, including her drug use. That same girlfriend denied in her evidence that she takes drugs, which tends to undermine that basis of his concern.

**697** In my estimation, however, the primary difficulties with his evidence centre on the sequence of events leading up to and following the attack. His explanation of why, when he rushed to catch up with Amanveer and the others, he ended up walking past them made no sense - slowing down from a jog to a walk, and then agreeing with Crown counsel that he was effectively carried forward by the physical principle of inertia of his existing movement.

**698** I agree with Crown counsel's submission that G.R. seemed to regard or describe his attention to his phone as a kind of sealing off of his powers of observation generally, causing him to ignore an attack that would have been developing directly in front of him. If he were the person he identifies himself to be in the video, that would have required him to remain inattentive for the six or seven seconds that that person is on screen, which included two additional attackers running past him. I also think it defies belief that he would happen to have looked up from the phone, noticed the attack, and "probably started running" just as he was out of view of the camera, as he claimed. At that point, he would have been very close to the site of the attack, with no credible basis for only beginning to notice it then. Even when played on a larger screen and higher resolution, I could not see any of the activities he claimed the figure who was him engaged in, except a possible hint of lighter coloured footwear as the person goes out of sight.

**699** Despite this only being a group of guys being aggressive with each other, pushing and shoving, he

departed "not as fast as I can but pretty fast," following Kabir, whom he confirmed was Participant 3 marked by the purple arrow, when he ran by the incident. His description of Kabir's movements was convoluted, as I have described, and he was forced to concede, after asserting that "people" were running away, that it was just Kabir.

**700** Of course, a person who provided that somewhat distinctive name was followed by some of the officers from the Marketplace and eventually arrested away from the scene, and, as Crown counsel points out, that is at least a piece of original circumstantial evidence that G.R. did not follow Kabir in the direction he claimed, north towards Main Street. He said the third person on the 7-Eleven video could be him, and in light of the strong similarity of the clothing of the first two (especially L.Z.'s two-tone vest and A.D.'s purple shirt), offers further circumstantial contradiction to his claim not to have been anywhere near them until later in his flight from the scene.

**701** I also found it difficult to understand why he would engage only his peripheral vision on the part of the encounter with these aggressive males in which one of them has his arm in the air and his head down. It would have been an extremely short time after he claimed to have looked up and saw the event and started running.

**702** A particularly odd part of his evidence was his exchange with Crown counsel about why, when A.D. and L.Z. had begun walking after crossing the intersection, he could not have jogged a bit faster or yelled a bit louder to get their attention. It is difficult to understand why he would not make those efforts, on the basis that he was high, not that athletic, and feeling light headed, after having followed them all the way to Village Gate Boulevard. His explanation for following them in the first place, then realized he did not know where they were going, was not convincing. In light of the uncontested evidence of the arrest location of the other two, I think he is simply wrong that they headed east on Village Gate Boulevard, which may have been an effort to resist the conclusion that he is the third man seen by Sgt. Mulhall following fairly closely behind A.D. and L.Z. as they headed west towards Highway 99.

**703** He may well have the habit of picking the skin on his cuticles - Dr. Orde saw indications of that and there is support in his girlfriend's evidence. But it seems highly unlikely from the point of view of common sense that the excessive amount of picking he described could be "bothered", as he described it, by coming into contact with the fabric of his pocket and the back seat of the police car, into shedding the amount of blood that was left in those two places. Nor is a cut, as he described it to Cst. Chan, an accurate description of what he claims to have done to his finger, or of what Cst. Chan and Cst. Wirth observed.

**704** As a result, I also do not believe G.R.'s evidence and am not left in any state of reasonable doubt by it.

*iii) L.Z.*

**705** L.Z.'s evidence is of a different nature than the other two accused. He did not seek to refute any of the allegations about his conduct in relation to the offence, only to explain that his alcohol and drug consumption left him with no memory from just before it occurred until a point during his time in custody.

**706** It is not inherently implausible that he could have developed the addictions he described in that time period and the manner in which he financed it - money cadged from his parents or by sharing by friends - certainly could be true. There is also some circumstantial support for his claim to have developed an ulcer from the Xanax use in the form of the medical records from his time in custody, although those medications can be used to treat other conditions and ulcers can have other causes.

**707** There are, however, two main areas of concern.

**708** The first is that the gaps in his memory overall seem highly selective and his available memories of the day, somewhat too conveniently in my view, tend to include recitations of his alcohol and drug consumption in preference of other idiosyncratic details of a day of that nature that one might expect him to have noted. In other words, although he agreed that he started to have gaps in the morning and that they increased in number and length as the day wore on, as he took more drugs and alcohol, he still seemed to surface from these long enough to note, at least in approximate terms, the alcohol and Xanax he was consuming. He was also unable to define a gap in a way that distinguished it meaningfully from a blackout, enhancing my sense that the former can be selectively defined. I appreciate that he confided these claimed amounts to his counsel within a short time of being charged, or at least I infer that they are the same, and to the extent that Crown counsel might suggest a more recent concoction of them, that information could rebut it, but self-serving evidence does not lose that character for having been in existence from an early stage. I also keep in mind that it is possible, as Mr. Jeffery described, for a person ingesting significant amounts of substances to have an accurate recall in some situations, but my point is that L.Z.'s ability to recall the pattern largely in preference to a recall of other surrounding facts is what is not believable.

**709** Make no mistake, he could well have had a lot to drink and combined it with Xanax. The Crown does not claim otherwise. Ms. Antes-Schaefer described an increase in his apparent intoxication level in their time together in an apparently credible fashion, although I note he was able to carry out a sexual encounter of some sort with her nonetheless and to think to pass on his phone number to her as she was waiting to leave.

**710** What I find is most telling, however, is that his post-arrest dealings with the police do not demonstrate a mental state that is consistent with gross intoxication.

**711** Sgt. Mulhall, an experienced police officer, said he did not appear drunk or high and suggested that his talkativeness, which he did find strange, might reflect bravado, as well as a lack of inhibition. Back at the detachment, he described him as deflated but engaged, and that he was very much paying attention, and that he would jump in with tidbits that related to matters that were not directed to him. He also contested whether the photos of L.Z. taken there reflect sleepiness on his part. He did, however, acknowledge that L.Z. had a level of talkativeness that required a reminder that he was not required to say anything, and that he mumbled his response when given his *Charter* rights again.

**712** Cst. Bastians noted over-friendliness, bursting out laughing, and an odd concern with the condition of the victim. He said that overall L.Z.'s mood appeared to swing, and agreed that some of the photos taken of him show a vacant stare and drooping eyes. Cst. Hadlow agreed that L.Z. was making jokes and that overall his behaviour was a bit odd.

**713** He spelled his name incorrectly twice during his dealings with these officers, a different incorrect spelling each time. On the other hand, he was able to effectively exercise his right to counsel and communicate subsequently with his mother and a lawyer with no difficulty.

**714** Overall, these observations show an amount of disinhibition and decline in emotional regulation which is consistent with a degree of intoxication, as described by Mr. Jeffery in the various stages that he uses to assess this progress. There were none of the physical symptoms associated with greater degrees of intoxication and, even if L.Z. is that rare youthful drinker and user of Xanax, no indication of more severe cognitive symptoms, other than the variable emotion.

**715** In this regard, the exhibit seizure video is highly informative. While there is no sound, L.Z.'s demeanour and apparent level of focus throughout his dealings with the officers indicates a high level of focus and engagement on the officers in their dealings with him. Even if he is capable of masking the physical manifestations of gross intoxication, his presentation in terms of his interaction with his surroundings, that is the mental element he demonstrates by his behaviour, does not resemble that of a severely intoxicated person.

**716** Accordingly, I do not believe his evidence about his state of intoxication, in particular, that he has no memory of the events from his time in the hot tub with the young women and A.D. to the time he says he awoke at the detachment, and his reported alcohol and Xanax consumption, nor do they leave me with a reasonable doubt.

**717** The rejection of the accused's evidence is of course not positive evidence of anything. It simply requires me to proceed to the stage of determining whether the Crown, on all of the evidence, has met its burden of proof beyond a reasonable doubt.

#### **d. Evidence of Looking for Mr. Gordic**

**718** The potential importance of this evidence is that it is capable of linking the accused to Mr. Golic's motive and the steps he was taking to carry it into action - searching around the village area with a group of friends in the hope of finding and confronting Mr. Gordic. To the extent that the accused can be shown to have knowingly joined in that process, it is circumstantial evidence rendering it more likely that they were active participants in the attack that ensued.

**719** The evidence does not apply directly to G.R., who was not identified as one of the members of the group that engaged in this action. Its connection to him is only through his acknowledgement that he accompanied the group into the village from the townhouse. That has probative value only if I find that all members of the group must inevitably have been aware of and actively participating in its purpose.

**720** Mr. Guzman-Koenigbaur's evidence, if I accept it, is capable of supporting the idea of an active search for Mr. Gordic across two different areas of Whistler - near the Olympic Rings in Village North and some period later near a restaurant in Village Centre. It also identifies A.D. and L.Z. as participating in that process. There are, of course, serious issues with his evidence, in the form of his claim not to have spoken to Crown counsel about it before court on the day that he testified, and the effect of his previous statements to the police about when the Golic group was first looking for Mr. Gordic.

**721** The assessment of credibility always depends on the specific circumstances. Despite the conventional wisdom that may have accumulated, there is no one thing that a witness can do that always destroys their credibility in every circumstance. As we tell juries, a lie under oath is the most damaging thing a witness can possibly do and that they can consider when assessing credibility. But the specific circumstances still matter - a witness who shades the truth on a peripheral but embarrassing matter, but who otherwise gives compelling evidence, could well be rehabilitated, whereas a cynical disregard for the truth on a material matter may well be fatal.

**722** Mr. Guzman-Koenigbaur's denial of what he discussed with Crown counsel was an unsophisticated lie, one that was inevitably going to be exposed as a result of the ethical obligations of Crown counsel. Nevertheless, it was on a core aspect of his evidence and showed a situational willingness to be dishonest, despite his obligations as a witness. As such, it must be treated as a serious blow to his credibility.

**723** Similarly, contradiction by previous statements may be more or less damaging depending on several factors, the most important being the nature and seriousness of the contradiction and how the witness explains it. Here, the contradiction is quite meaningful - he previously told the police that he encountered the group looking for Mr. Gordic on Friday, before Mr. Gordic was there and before the dispute that gave rise to the attack had even occurred. He then made a mess of his attempts to explain those statements, including confusing responses on when he had attempted to tell Mr. Gordic about it and on what night or nights it had actually occurred. I agree that he came across as an unsophisticated witness, but this contradiction is pretty fundamental, and when it is considered in light of the false denial of the Crown interview, I think it prevents me from accepting the details of his evidence.

**724** The other witnesses who are capable of giving this kind of evidence are the members of the Stojanovic group. The issues raised with their evidence are firstly that the time that they encountered the group simply cannot be correct in the face of the seemingly reliable chronology provided by the Facebook messages and texts between A.D. and Ms. Antes-Schaefer, especially the earliest time that the group could have left the townhouse. They also identify different people asking about Mr. Gordic's whereabouts. Mr. Stojanovic's identification of L.Z. is based on a subsequent viewing of a Facebook photo after learning his name, Mr. Popovic, who knew him, did not see him, although he was concentrating on Mr. Golic, and Mr. Janjic did not know him. Mr. Janjic's certainty that Mr. Golic was there increased in cross-examination, after a break in the evidence in which he had spoken to these other witnesses, and he was the only one to identify A.D.

**725** I understand the submission of L.Z.'s counsel that this is not the usual case of whether witnesses got the time wrong. The error in their timing here leaves open the possibility that some other configuration of the townhouse group, or Ramin and his friends, were looking for Mr. Gordic at the same time period, before the present accused were even out in the Village. But looking at the evidence of these three witnesses as a whole, including the inconsistencies between them and their own explanations for their statements, I find it overall to be credible and entitled to weight, except for their errors about the time, which I think are likely attributable to intoxication in Mr. Popovic's case and in the case of the others of having no particular reason to note the time until after learning of what had happened to Mr. Gordic.

**726** Mr. Janjic knew A.D. and gave a plausible explanation that seeing him with some younger guys, as he told the police, included Mr. Golic, who was younger than them. His conversation with the other witnesses consisted of asking them how things went in court and being told it was tough. No discussion about the substance of their evidence has been demonstrated. Even if I put less weight on his identification of Mr. Golic because he went from not mentioning him being there to 100% sure by the end of the cross-examination, the other two witnesses, who know Mr. Golic, also put him there. His head injury was not linked in any meaningful way to his testimony, and I frankly do not understand the negative implications of a person being able to recount more detailed testimony after pretrial interviews with Crown counsel. His identification of the person who asked about Mr. Gordic's whereabouts as A.D. is not inconsistent with Mr. Stojanovic, who did not remember who asked, and somewhat consistent with Mr. Popovic, at least in terms of the ethnicity and slenderness of frame of the questioner.

**727** The variation of their estimates in the size of the group was not that meaningful, because we know from the video and the police evidence that a large group ended up at the walkway.

**728** Therefore, I find this encounter occurred and that it involved the presence of A.D. as the questioner, and of Mr. Golic. In view of his unquestionable presence with Mr. Golic during the attack afterwards, I think it is likely that L.Z. was also present, but given the fact that the person who knew him did not see him and Mr. Stojanovic relied on what is in effect a single photo identification after the fact, I do not feel

comfortable making that finding based on this evidence.

#### **e. Attack Witnesses and the Video**

**729** With respect to the attack witnesses in the video, two critical questions have to be asked when looking at this evidence: (1) whether it is capable of showing that the group assault took place on Mr. Gordic, of the kind that anyone who got his blood or other biological material on their footwear would inevitably have participated in; and (2) what specific actions during the attack can be attributed to L.Z., as they might reflect on his intent.

**730** The video offers reliable evidence of some important baseline factors, like the onset of the attack; the initial movements of Mr. Gordic and the other attackers, and that a total of nine possible attackers left the view of the camera in the direction of the fray; that three, who appear to be the last three who joined, returned in the direction from which they had come; and that the approximate duration of the attack of 17 seconds, based on the amount of time between Mr. Gordic's disappearance and his return to the view of the camera. These are useful tools for assessing the reliability of the witnesses' observations, although of course it cannot assist with the events that took place off screen, or anything said by the participants.

**731** The video's ability to provide evidence of identification is only circumstantial, based on its linkage with testimony of the scene witnesses describing certain people and certain distinctive clothing that can be seen in it.

**732** With respect to the scene witnesses, Mandeep Randhawa gave a coherent description of his observations, which I do not find marred by any major impediments or past inconsistencies. His estimates of the number of participants and the duration of the assault are accurate in relation to the video, as is his description of the manner and directions in which the attackers dispersed afterwards. The statement he attributes to the first of the attackers, "You thought you wouldn't see me up here," resonates with Mr. Golic's grievance in terms of failed attempts to have an earlier confrontation. But he attributes the "I juked him" statement to a stocky white guy, and although he knows Mr. Golic, L.Z., and A.D., he said he did not see them there. There was less variety in the clothing of the various participants that he described than the video suggests. Of potential significance when assessing the evidence of Dane Salt, he said that Mr. Gordic took off his shirt shortly after the attack and did not have it on him when he fell.

**733** It appeared to me that Adam Bifano's evidence was narrowed in its scope by the degree of his impairment, in the sense that his observations were not as detailed as some other witnesses, but what he could observe and recall did seem to me to be reliable. He described a crew of seven or more people swarming Mr. Gordic, during which he was able to see maybe two punches and a jerking movement of the hands towards the beginning. The attack was preceded by the same initial comment that Mr. Randhawa described. His description of dark clothing and hoodies and the ethnicity of some of the participants as "brown", however, are quite generic.

**734** Although the Crown submitted that Farez Maleky ultimately provided some unexpected pieces of reliable evidence, when viewed in light of the support offered by other witnesses, I found that his credibility was so significantly impaired that it would be unsafe to give his testimony any weight. Aside from the impediments to observation that he disclosed himself, he showed an alarming malleability in giving his version of the events. The most serious example of this tendency was on the question of whether L.Z. and the person with the faux hawk were the same person or not, in reference particularly to the "I juked him" comment. This was aggravated by the late point in the sequence of his numerous police statements that he brought L.Z. into the narrative. Perhaps he was never sure to begin with, and that would have been fine, but these sudden major shifts of position under questioning raise real concerns. His other

major tendency was to describe details or make strong assertions of fact, only to reveal later that he was only inferring them to exist. Significant examples included his reference to someone swinging a knife when he actually did not see one being used, or that the faux hawk person had dropped the knife that he later pointed out to the police.

**735** In the same vein, he told police at the detachment that A.D. was not at the scene, when the reality is he did not think A.D. was the type of person to be involved and thought that he would have recognized him if he had been there. In addition, he was evasive about the previous statements implicating other uncharged people in the attack that L.Z.'s counsel put to him, parsing out unrealistically the definition of whether or not he was lying if he had said those things, rather than demonstrating any candour or straightforwardness. For greater certainty in terms of the liability of A.D. and G.R., I cannot put any weight on his claims to have seen kicks during the assault, which he was only able to say he was "pretty sure" he saw, in any event.

**736** Sawyer Jensen described herself as pretty intoxicated, which must be taken into account, but like Mr. Bifano, within the confines of what she could see, there did not seem to be notable irregularities. She has "maybe 10 guys" carrying out the assault, with Mr. Gordic being unable to defend himself because of being pretty outnumbered. Her description of the people throwing punches and moving around seems like a realistic observation, given the likely fluidity of an attack of this kind. A notable detail was the presence of Mr. Golic, whom she has known since Grade 8, to Mr. Gordic's left, throwing punches that hit Mr. Gordic "the most".

**737** Justine Brummitt's ingestion of alcohol and MDMA on this evening must be an important factor in the assessment of the reliability of her evidence, especially in view of some of the hallucinatory properties described by Mr. Jeffery. I thought her own concessions about it making one feel "more unobservant" and so on had an idiosyncratic quality and reflected a good awareness of the actual extent of her impairment, and in general I thought she was quite restrained in what she claimed to have seen. So although she saw six to 10 attackers appearing to punch Mr. Gordic and was facing in that direction, she did not look at the attack, which I took to mean she did not do so extensively, given her basic description of it. Her estimate of the duration may well be a function of her impairment, however, since it is much too long, in light of all the other evidence.

**738** Given her relationship with L.Z., I find her identification of him as one of the attackers reliable and her description of detaining him slightly and trying to hug him resembled what is seen in the video, as he is passed by several other participants. Her identification of him as Participant 1, who appears to turn towards the camera in the video and crook his arm towards his waist as he is passed by others, is confirmed by the distinctive vest that person is wearing and L.Z.'s clothing on arrest. She did not claim to be able to describe his actions after that, because she did not "watch", which was in keeping with her general claim not to have observed the fight. She was also not aware of Mr. Gordic's injuries until later, and she also saw him taking his shirt off.

**739** Dhillon Kirkpatrick-Dionne's evidence requires a more cautious approach, because in addition to the substance issue, which she said left her only a little bit euphoric and uplifted, her previous statements revealed some meaningful inconsistencies with her current testimony. I find her identification of L.Z. as being present among the initial attackers with Mr. Golic reliable, given her previous familiarity with him. Her comment that L.Z. looked like he was "on a mission" must be treated with caution though, given her initial police statement about the event first looking like play fighting, and her coming to that more serious view on subsequent reflection may have something to do with her knowledge of the tragic consequences. But, given there is no issue from the video or the forensic evidence that L.Z. joined the attack, or the manner in which he approached, this is a fairly innocuous discrepancy. However, she had his clothing

wrong in her initial police statements, the vest then "clicked" in her mind based on having seen him wear it the night before and the video solidified her view, and she misidentified him as one of the attackers who fled towards Marketplace when the investigators showed her the video.

**740** When she testified, she also "wanted to say" that another of those who exited towards Marketplace at 12:30:30 is L.Z., when on the other reliable evidence, he certainly is not. When she was proven wrong in the video that L.Z. attacked first, as opposed to being the first one into the walkway, she fenced with counsel a bit about whether his movements effectively pushed Mr. Gordic back, rather than physically pushing him as she seems to have told the police, instead of just conceding that the video shows that others passed him on the way to Mr. Gordic. For these reasons, and also because she did not mention it in any statements before testifying, I do not think that I can give much weight to her evidence that L.Z. said, "There you are, you little bitch" to Mr. Gordic as he approached.

**741** Dane Salt was "feeling good" as a result of his drug and alcohol intake, which of course must be weighed. I found his description of the initial approach of the attackers, someone saying "There you are, you little bitch," the flashing by one of them of something "not good" at the waistband to be a plausible sequence of events, and his description of the item being flashed by the person whom the other evidence indicates is L.Z. is of course confirmed by the video. There were other idiosyncratic details that sounded to me like a recollection of accurate events, such as Mr. Gordic stepping back and motioning as if he was ready to fight, and people around yelling, "Get out of here, Buddy just got poked" afterwards. The one area where he over extended himself was in his response in his direct evidence that it was "safe to say" that the person who said, "There you are, you little bitch," was the same person as the stabber he saw, before agreeing, after being shown his statement to the police, that he could not be sure; and eventually confirming, after a portion of the video was shown, that it was said by either the first attacker or the person who passed him.

**742** The centrepiece of his evidence, from both the Crown's perspective and L.Z.'s, was his description of Mr. Gordic being stabbed under the arm. There is no question that some of the surrounding details are clearly incorrect, on the other apparently reliable evidence. Mr. Gordic did not immediately fall to his knees and collapse and, while it does seem that his shirt was removed at some point (two other scene witnesses also recalled that and Cst. Baker described Mr. Gordic as shirtless when he arrived), it was at some later point than the initial sequence that Mr. Salt described. No one else was able to see a knife being used and no one else has a single assailant remaining with one or two onlookers. His police statement had this person wearing a white sweater, as opposed to just having a white hood, and "a small and skinnier guy" in his police statement as opposed to "not humongous" in his evidence, is also somewhat of a difference.

**743** But I agree with the Crown that the description of a stab under the underarm is a very unique and compelling detail, one that would not otherwise have been evident and one that does not strike me as the sort of thing that would be mistaken for any other kind of physical interaction, or fabricated to portray someone in a bad light (as opposed to some more exaggeratedly life-threatening type of manoeuvre). Added to this observation, the pattern on the stabber's jeans, even if L.Z.'s actual jeans were of a different brand than he described, stands out from the more generic clothing descriptions and provides another quite striking detail. I am satisfied these specific observations are reliable, despite the other issues, and that they can be considered along with the other evidence on the question of the number of stabbers and the sequence of the infliction of the wounds.

**744** The evidence of Jasmine Harms-Kroeher is generally consistent with the onset of the attack as described by the witnesses closest to the scene, including her recollection of the comment. "I knew I'd find you, you little bitch," which is very close to what was described by Ms. Kirkpatrick-Dionne and Mr. Salt.

Her description of the number of participants and the duration of the fight are within the parameters set by the video. I do not consider her seeing two main combatants with others getting involved to be inconsistent with the account of a group assault offered by the witnesses closer to the event, since Mr. Gordic would presumably have had at least one face-on assailant as part of the initial stage of the group attack. Her view was partially blocked by a tree and some people moved in and out of view, so she did not see all of the action. I would, however, decline to draw an inference from her evidence that it was difficult to tell whether part of the group were bystanders or friends, that any of those who crossed out of view of the camera thereby did not necessarily join the attack. We simply do not know who was included in her field of view, and the only other witness who claimed to see a portion of the attack taking place with only a few people nearby was Mr. Salt, whose evidence I would not accept on that point.

#### **f. Innocent Transfer of DNA**

**745** A.D.'s evidence, which I have rejected, would not have offered an innocent means for Mr. Gordic's DNA to get on his boots from his presence at the scene, because he claimed not to have approached the actual attack.

**746** G.R.'s version, which I also rejected, hinted at a possible mechanism in the form of the victim with his head down and his arm in the air, which might be seen as coinciding with the stab to Mr. Gordic's armpit, with the possibility of projecting blood some distance towards him. While that method of contamination has been deprived of its factual underpinning by my rejection of his evidence, it is also worth noting that Dr. Orde's evidence was blood from that particular wound, being under venous pressure, would likely have oozed out, although fairly rapidly, and that the clothing and the subsequent position of the arm would have had an effect on the amount of blood. Perhaps more significantly, this possibility does not account for the transfer stain.

**747** The possibility of at-scene contamination that does not depend on G.R.'s version being true is satellite spatter from moving through a blood trail that included pooled blood. G.R.'s counsel did a good job of having Sgt. DUBYK elaborate on the availability of this mechanism in various situations, but I conclude that the Crown has conclusively eliminated this possibility on the facts. The path of Mr. Gordic's blood trail tracks his progress from Marker 14 in the covered portion of the walkway, in the clockwise, roughly circular pattern, to the place he fell. The three attackers who run north towards the Marketplace once he appears in view of the camera are on the opposite side of the walkway, and no one is seen moving in the area of his blood trail. I am satisfied that the other six attackers ran south towards Main Street, and would have had no opportunity to move through or near his blood trail. If they got blood on them from the scene, I conclude they would have to have been present at and very near to the initial bloodletting.

**748** A.D.'s counsel has advanced the possibility of blood transfer from L.Z.'s knife or clothing as he passed L.Z. and ran alongside of him. I agree with Crown counsel that it is an overstatement, in view of the actual results of the examination of his clothing, to describe L.Z. as covered in blood at this stage, as A.D.'s counsel did, and even if the knife or his clothing dripped any blood during flight from the scene, it must be kept in mind that these are transfer stains on A.D.'s boots and no plausible mechanism by which drops of blood could be applied in such a way as to produce that type of stain en route has been suggested.

**749** As to post-arrest contamination of the boots by contact with L.Z., Cst. Miller testified they were five feet apart when they were arrested and that he was cognizant of not putting them too close together, so that the officers would not trip over them if they reacted. Neither he nor Sgt. Mulhall was cross-examined on the suggestion that their position after arrest would have allowed them any physical contact with each other. More to the point, since these are transfer stains, it is difficult to envision, as Crown counsel pointed

out, why L.Z. would deliberately or even inadvertently apply a part of his body that was contaminated with blood to these separate spots on both of A.D.'s boots, or vice versa.

**750** Given the distance between them at the time of arrest, A.D. being put on the ground on top of blood that had dripped from L.Z. also seems far-fetched. If he was ever actually in proximity to L.Z.'s blood drops, the additional combination of physical circumstances, which struck me as somewhat contorted, that would have been needed to have his boots have contact in exactly these locations with bloodstained portions of the sidewalk, is a remote possibility. His counsel's suggestion of that means is a credit to her resourcefulness, but on the evidence it seems completely speculative.

**751** I think the same analysis applies to the possibility of transfer arising from walking behind L.Z. or standing in a similar area within the detachment.

**752** I should also say that an argument on A.D.'s part that the substances on his boots are not blood is not tenable, in view of the defence theory that the boots were contaminated by L.Z.'s knife or clothing, since there were positive hemochromogen tests on both the blade and the hoodie. If that is not sufficient to resolve the issue, it also seems extremely unlikely that some other DNA-bearing substance originating from Mr. Gordic would have been applied to the exact sampled location where a material so closely resembling blood, just like the stains that were not sampled, also happened to have been applied.

**753** In overview, G.R.'s concerns about the contamination of the clothes post arrest, which I will discuss in further detail, must be moderated substantially by the fact that the shoes were photographed at the scene right after their removal, and clearly bear the same blood-like markings as were subsequently described and analyzed. Like the possibility that the stains on A.D.'s boots are not blood, this would require subsequent contamination to have been applied to a sampled area that already existed and could be readily seen as blood, before any possibility of contamination arose.

**754** Dealing with matters back at the detachment, other than the possibility of A.D. having stood in the same place or followed L.Z., which I have addressed as extremely unlikely to have produced contamination, I took the main possibilities of contamination to be as between L.Z. and G.R., since they were the only ones to have common police officer, Cst. Bastians, handling their exhibits.

**755** A.D.'s counsel did a good job of cross-examining Cst. Miller and Cst. Bastians. She caught both handling court exhibits in a way that would have raised the risks of contamination during an investigative seizure, and she was able to produce an excessively defensive reaction from Cst. Bastians about the experience level of the Whistler officers and their ability to deal with a case of this seriousness. But Cst. Miller ultimately said he would avoid touching his phone in between handling the exhibits; he seized the boots first and described changing gloves between each boot, and for contamination by means of the phone to have occurred he would have had to have touched the spots on either boot that were ultimately sampled for DNA, which I find highly unlikely.

**756** There was no reason to disbelieve Cst. Bastians' evidence that he took care while carrying the shoes from the scene not to touch the areas of apparent blood, or that he ever allowed G.R.'s cell phone to contact those areas. He was rather defensive in cross-examination by G.R.'s counsel about how he gained entry to the detachment while holding shoes, and seemed to have over extended himself with the time in his memory of still feeling the warmth of the shoes in his hand in an effort to bring greater certainty to his assertion that he had not contaminated them. His improvised solution with respect to G.R.'s shoes once he reached the detachment is open to criticism, even in a situation where he was being ordered by a superior officer to assist, but it strains credulity, as Crown has submitted, to imagine another officer coming along, touching the area of the bloodstains while contaminated with DNA, and then replacing the shoes exactly

where they were left. I am not left in any state of concern about the integrity of the shoes based on this aspect of their handling.

**757** G.R.'s counsel is absolutely correct that best practices would not have the same officer then seize L.Z.'s clothing before dealing with the shoes again. But the video shows a correct use of gloves during the process, and the less significant items that were seized at the outset with a common pair of gloves were not a part of the evidence. Whatever effect using the same pen and camera during that process might have had, it would have ended with the discarding of the last pair of gloves from those seizures. Even if something got on Cst. Bastians' clothes, which he candidly conceded he might not have seen, it is difficult to see how anything could have ended up on one of the sampled spots on the shoes when he was taking care, which I accept, to carry them in a way that prevented contact with the spots.

**758** The other aspect of exhibit handling that was raised was Cst. Dulude's allowing Mr. Gordic's shirt and G.R.'s shoes to touch their respective exhibit bags when they were being photographed. He candidly acknowledged that this is not an ideal approach. Aside from that acknowledgment however, I find the separation between processing of exhibits that he described, including handling them and bagging them separately, and the lack of any suggestion that the portions that touched the bags were areas containing DNA that could have been transferred or that the bags containing exhibits were allowed to touch each other, mean that no weight to the possibility of contamination by this means.

**759** Turning to the seizure of the scene knife, I agree with Crown counsel that G.R.'s counsel has over-emphasized the significance and consequence of a failure of a police officer to take notes. It is unquestionably an important duty of police to take notes of relevant details of an investigation. Failure to take a note of something significant may lead to evidence about it being questioned if it emerges for the first time at trial. But how severely any given failure to take notes should be judged depends on the particular circumstances, including any circumstances that might cause the police officer to remember something reliably despite it.

**760** Here, Cpl. Ross's reason for remembering the state of the knife when he seized it was inextricably bound up with a key feature of the seizure - that he was using a plastic bag instead of the preferred paper one. In his evidence, the closing of the knife was connected to the concern that it would cut the bag. I think this sufficiently distinguishes this particular transaction to accept that memory as reliable. Cst. Baker's inability to say for certain the condition of the knife is likely accounted for with his preoccupation with Mr. Gordic's condition and his other initial duties at the scene. In any event he simply was unable to confirm his initial recollection - he did not say the knife was not open. Neither that nor Cst. Gauthier's uncertainty is a contradiction of Cpl. Ross's memory - it is just the absence of definitive confirmation. I also do not see any undermining of the weight of this evidence based on the difference in the recollections of the officers about where the knife was when it was located, since there is no difference among those potential areas in the strength of the inference that finding it at the scene potentially supports.

**761** The consequences of using plastic instead of paper in this situation was not clearly explained in the evidence, but I am not being facetious when I say that they are highly unlikely to include creating DNA that would not otherwise be present in the stored object.

**762** I also could find no uncertainty in the evidence of the subsequent disposition of the knife. Cst. Polspoel was clear about her process of decanting it into a paper bag without touching it. Ideally she would have noted she was wearing gloves during this process, but no concern emerges as a result of that omission, that contrary to her recollection, she ever actually touched the knife. The three-minute discrepancy between when Cst. Wirth said she handed it over and Cst. Polspoel's time likewise does not cast any doubt on whether it happened as they described, and Cst. Wirth's absence of a note seems

innocuous - she believed that the time she gave it to Cst. Polspoel was recorded in a police task action report and said she had no reason to disagree with Cst. Polspoel's time. It is entirely speculative to suggest that an aspect of Cst. Wirth's dealings with G.R. somehow made its way into the knife in this process, since she only handled it when it was inside the sealed plastic bag used by Cpl. Ross.

**763** As I have said, G.R.'s counsel effectively cross-examined Ms. Biernat on the possibility of secondary DNA transfer relating to the knife, with particular reference to the recent literature and Mr. Hildebrand's report. Like the careful scientist she clearly is, she acknowledged that in a minority of cases, which she defined as less than 5%, a person who had not handled an object directly could end up as the major profile. But she was adamant that in the remaining significant majority of cases, a major profile would be the result of direct contact. I found her reservations about the methodology and conclusions of the articles she was shown to be well-observed and fair, and they tended to diminish the effectiveness of those articles as challenges to her own conclusions, which were clear and persuasive. However, even without the factual underpinnings of the possibility of secondary transfer from innocent handling earlier in the day, or secondary transfer through handshaking or other contact with an unknown eventual user, which were based on A.D. and G.R.'s evidence, I will still weigh the less than 5% possibility that G.R.'s DNA could have become the major profile without him handling it directly when I come to determine the strength of the overall inferences to be drawn from the presence of the knife at the scene.

#### **g. Post-Offence Conduct**

**764** It is clear from the police evidence that all members of the group, even those who remained closer to Marketplace and out of view of the camera, scattered and fled when the assault ended. The best example is the group followed by Cst. Sayyah and Cpl. Williams, which ended up near some condos to the north and was found to contain *a* Kabir Biriana, if not *the* Kabir Biriana. This is not determinative of the strength to be attached to the accused's flight, but it is an example of the caution that should be applied before drawing inferences from it.

**765** I am satisfied, based on the strong circumstantial correspondence between their clothing, including the distinctive items worn by L.Z. and A.D., that they are the three runners shown in the 7-Eleven video and that they were together from that point until Village Gate Boulevard. I am also satisfied as a result that G.R. is the person whom Sgt. Mulhall saw walking just behind L.Z. and A.D. near the bus stop prior to the arrest. But given Sgt. Mulhall's admirably candid inability to rule out G.R.'s veering to the right in the area where the path splits into two, I am not prepared to attach weight to that particular move as an additional piece of relevant post-offence conduct specifically on his part.

**766** Obviously, flight from the scene in itself, even if it is valid post-offence conduct, is not relevant to L.Z.'s situation with respect to the difference between murder and manslaughter, and he has effectively conceded his involvement in the culpable act of stabbing to which it could also have been relevant.

**767** As to the evidence of flight as it applies to A.D. and G.R., tending to show their involvement in a culpable act, I conclude that running this distance in the opposite direction from where they lived distinguishes them from the flight of uninvolved group members and is entitled to some weight as circumstantial evidence of their culpable involvement. I was initially attracted to the idea, as G.R.'s counsel submitted, that the flight of the group members who did not actually commit the assault showed that the inference from flight in that context would not be a helpful one. But I have concluded that reasoning is not persuasive. The flight of those other group members is open to the reasonable interpretation that the purpose for which they had assembled and looked through the Village had been carried out by a portion of them by the attack on Mr. Gordic, and that they left suddenly to avoid being implicated in that plan.

**768** In the situation of G.R. and A.D., who claim to have known about no such purpose and to have stumbled on that attack inadvertently, their flight is a relevant piece of circumstantial evidence that they did in fact have a sense of their own potential culpability in what was going on, which has relevance to rebut those protestations of obliviousness.

**769** For L.Z., it shows only that at a time when he claimed a gross degree of intoxication, with the level of mental impairment and confusion that goes with it, he demonstrated a relatively purposeful choice of evasive action, which tends to contradict his claims as to his severely-impaired mental state.

**770** So while far from decisive or heavily weighted, these inferences are still entitled to some weight in the analysis.

#### **h. Other Inferences Regarding A.D. and G.R.**

**771** I have found no other possible way for Mr. Gordic's blood to have ended up on their footwear than from close proximity to Mr. Gordic while he was bleeding at the attack. I accept the evidence of the witnesses who described this as a group assault involving all of the attackers who entered that area, coming together closely around Mr. Gordic, attacking him before dispersing in two directions.

**772** I am satisfied that the transfer stains on A.D.'s boots indicate that he brought his feet into contact with Mr. Gordic's body or clothing while they had blood on them, most likely by kicking him. I find that the transfer stains on G.R.'s shoe reflects the same origin and physical action, and the drip stains reflect close proximity to Mr. Gordic while he was bleeding during the group assault.

**773** I also find that A.D. was actively involved in the search for Mr. Gordic by more than just his presence in the group, by questioning the Stojanovic group about his location. This is further evidence capable of attaching him to the group's purpose of attacking Mr. Gordic when they found him, and tends to suggest that he was physically part of that effort when Mr. Gordic was found.

**774** In the absence of any credible evidence of a basis for secondary transfer of G.R.'s DNA as the major profile on the blade of the knife, I conclude that it was placed there by direct transfer from his hand. If, aside from the evidence of passing the knife around in the context of frequent hand-to-hand contact by the townhouse occupants that I have rejected, there is still some residual possibility of secondary transfer, I would reject it as the mechanism here in light of the great unlikelihood of it then forming the major profile, as explained by Ms. Biernat. Its presence on the blade of a knife that I find was left open at the scene of the group attack is a further piece of evidence tending to confirm both his presence at the attack and his performance of some operation of the knife consistent with its overall intent. I stress that Crown did not argue and I would not find that the knife was used to actually stab Mr. Gordic.

**775** His unexplained (in light of my rejection of the skin picking cause), and still bleeding cut, which indicates a recent interaction with an object sharper than the edge of piece of paper, according to Cst. Chan, is a further small piece of evidence capable of showing some manual interaction with the knife blade in the recent past and deserves to be weighed on that basis. (I should say that the alternate explanation of some interaction with his handcuffs in the back of the police car, which was proposed by his counsel as a matter of judicial notice in his final reply submissions, did not strike me as realistic.)

#### **i. Intoxication**

**776** My rejection of L.Z.'s evidence of his consumption pattern and professed failure to remember many

of the events surrounding the attack and the preceding day deprives Mr. Jeffery of the factual foundation for his opinion that L.Z. would have likely been grossly intoxicated at the time of the offence. I note that, in any event, the range that he provided, based on the significant consumption pattern proposed by the defence, still included a level that, at least until the Xanax was added, included only impairment or the early stages of intoxication. While, as I have said, I am satisfied that he did likely consume alcohol and possibly Xanax, on all of the evidence, in particular the remaining degree of focus and lucidity that he displayed in his post-arrest dealings with the police (despite notable evidence of some disinhibition and loss of emotional regulation), I am not left with any reasonable doubt that the inference that he understood the consequences of his actions due to intoxication has been displaced and that defence cannot succeed.

#### **j. Stab Wounds and Intent for Murder**

**777** Of course, it is still for the Crown to prove specific intent required for murder beyond a reasonable doubt and so the evidence of alcohol and drug consumption falling short of supporting an intoxication defence must be considered with all the other evidence relevant to intent to determine if the standard has been met.

**778** Before any inferences of intent can be drawn from the circumstances around L.Z.'s involvement, findings of fact are required. As I have said, he does not dispute that the physical evidence showed that he stabbed Mr. Gordic. Based on my finding that Mr. Salt saw a person wearing jeans with a pattern that is consistent with the ones that L.Z. was wearing, albeit a different brand, with the same type of stitching, I am prepared to find that whatever else he may have done, he inflicted the armpit wound.

**779** There is no admissible evidence of any other stabbers. It is not suggested, as I have said, that the knife found at the scene was ever used and the fleeting outline of something that might be a knife in the hand of one of those fleeing towards Marketplace is not supported by any suggestion of use. What Cst. Dulude learned to put him on notice that tool mark analysis of Mr. Gordic's rib might be appropriate is, of course, admissible only to show the state of investigative awareness in which he failed to act.

**780** I am sympathetic to the concerns the defence has raised, but I do not think the failure to analyze the rib in itself gives rise to a reasonable alternative inference that there was another knife used. We do not know what the outcome would have been, and I am not aware of any authority holding that the failure of the police to take steps to rule out the participation of another suspect can support the positive inference that there was such participation. The potential of a reasonable inference that there was a second stabber must rise or fall on the current state of the evidence. Perhaps a negligent or blinkered investigation, which I must emphasize I have not found here, could give rise to a *Charter* remedy of some kind, or the defence could be allowed access to the exhibit to conduct its own analysis, and perhaps given an adjournment for that purpose, but those questions are not before me.

**781** While the absence of evidence of another stabber would in itself permit me to find that L.Z. was in fact the only one, the Crown has gone further and identified other bases to support such a conclusion. Those I find helpful are:

- \* The relatively close proximity of the wounds and their location on the same side of the body, tending to render it unlikely that different stabbers inflicted them;
- \* The nature of the attack as a group assault or swarming in which all the attackers gathered closely around Mr. Gordic and assaulted him, as I have found. In the course of a maximum of 17 seconds, it would have been particularly difficult for more than one stabber to get

into the necessary position relative to the first one to inflict the other wounds in this area and side of the body.

- \* The significant amount of blood spatter and transfer stains on L.Z.'s right side, suggesting his close proximity and physical contact with Mr. Gordic's left side and the resulting blood during the stabbing, which seems unlikely to have resulted from the armpit stab alone.

**782** While these additional considerations fortify the conclusion that inevitably results from the absence of other admissible evidence, I would have, on the basis of that absence alone, concluded L.Z. was the sole stabber.

**783** I find the evidence too unclear to find that he said, "There you are, you little bitch," and that, "You didn't think you'd see me here," one or both of which could well have been said by Mr. Golic. I am satisfied that he did say, "I juked him," however.

**784** On all the evidence, I conclude that when L.Z. inflicted these wounds, he was causing bodily harm that he knew was likely to cause death and was reckless whether death ensued or not. His consumption of substances may well have made him less inhibited about acting on whatever impulse motivated this action, and he need not have held this intention for long at all before acting on it, but I am satisfied beyond a reasonable doubt that this was indeed his present intent when he acted.

**785** In considering all of this evidence, I have satisfied myself that the fourth alternative route to an acquittal on second degree murder, that he struck these more vital areas in the course of the melee in which Mr. Gordic changes his position to evade harm, without intending to bestow the blows there, is not plausible.

**786** Having found that L.Z. was the sole stabber, I do not think it is a reasonable possibility that he could have continued to stab in this part of the body without having developed the intention to strike there, with the level of bodily harm and the likelihood of death ensuing that such blows would inevitably have entailed.

## **VI. CONCLUSIONS**

**787** I am satisfied beyond a reasonable doubt the guilt of each of the accused on the offence for which he is being tried is the only reasonable inference to be drawn from the evidence.

**788** In the case of A.D. and G.R., all of the evidence leads me to conclude that the only reasonable inference is that they participated in a joint assault on Mr. Gordic from which the possibility of non-trivial bodily harm was objectively foreseeable.

**789** The only reasonable inference available on all of the evidence with respect to L.Z. is that he caused Mr. Gordic's death with the intent described in s. 229(a)(ii) of the *Criminal Code*.

**790** Accordingly, I find A.D. and G.R. guilty of manslaughter, and L.Z. guilty of second degree murder.

**791** This matter will be adjourned to Wednesday, October 11, at 2:00 p.m. to fix dates for sentencing.

T.A. SCHULTES J.

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- 1** G.C.A.R. is actually known by his second middle name, and was referred to by that name in much of the evidence, but since that name begins with the letter A I have used his actual first name when representing him by initials, to make it easier for the reader to distinguish him from A.D.
- 2** Referred to by Crown counsel in this questioning as "Number 5", because although he is the third person to enter the screen from the right, as I have described in my summary of the video, he is the fifth person to exit to the left in the direction of the attack.

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