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R. v. McGrath, 2024 ONSC 2348

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CITATION: R. v. Michael McGrath / Michael Alexander 2024 ONSC 2348
COURT FILE NO.: CR-23-70000433
DATE: 20240422

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
HIS MAJESTY THE KING	)	*Lisana Nithiananthan*, for the Crown
	)	
– and –	)	
	)	
MICHAEL MCGRATH / MICHAEL ALEXANDER	)	*Michael Alexander*, for himself
Defendant	)	*Paula Rochman*, *amicus curiae*
	)	
	)	
	)	**HEARD: April 8-12, 16-17, 2024**

REASONS FOR DECISION - TRIAL

BOUCHER J.

Overview/Executive Summary

[1] This is an overview or executive summary of the court's reasons for decision. This summary is provided for ease of reference and comprehension. The detailed version of the reasons is released in writing and follows this summary.

[2] The accused was tried on four counts before a judge alone: aggravated assault s.268(1), assault with a weapon 267(a), possession of a weapon s.88, and attempted murder, s.239. There was one alleged victim for all offences. All offences are alleged to have happened March 18, 2022.

[3] The accused was found guilty of aggravated assault. He was acquitted of three charges: assault with a weapon, possession of a weapon s.88, and of attempted murder.

[4] The aggravated assault charge was proven beyond a reasonable doubt through a combination of direct witness testimony and circumstantial evidence, including observations of the scene and evidence found at the scene, evidence about the victim's injuries from medical records and the evidence of witnesses who observed or interacted with the victim, and evidence of the accused's presence at or near the scene and his physical appearance on arrest.

[5] The assault with a weapon charge was not proven beyond a reasonable doubt. Proof of this charge depends on the definition of "weapon" in the *Criminal Code*, which in this case required that the item be used, or was intended for use, to injure the victim. There was insufficient evidence that the accused person injured, or intended to injure, the victim with the frying pan, specifically.

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The accused applied force to the victim in three ways: with his hands, with his feet and with a frying pan. The evidence was not specific about which applications of force did or could have caused the injuries in question, and more force and repetition was described for the other modalities. There was insufficient evidence to connect the victim's injuries to the frying pan for proof of this charge. Not every case would require specific evidence linking the injury to the weapon. However, there was doubt here because the evidence was too general about both the injuries and the accused's intentions. The accused was acquitted of the s.88 charge for the same reasons.

[6] The attempted murder charge was not proven beyond a reasonable doubt. There was a reasonable doubt based on insufficiency of evidence of intention for murder. The area of attack was mainly the victim's face. There was no clear evidence that the victim's murder would have been a virtual certainty from the accused's application of force. The nature of the medical interventions did not clearly indicate that death would have ensued otherwise. There was a reasonable doubt that the accused's utterances after the incident showed an intention for murder at the time of the incident, because of the whole context in which the utterances were made, and the ambiguity arising from that context.

[7] The accused's *Charter* claims were dismissed because they were not substantiated by the evidence at trial or did not meet the legal standard to establish a breach or to obtain *Charter* relief.

Charges and the trial process

[8] The accused re-elected to have a trial by judge alone before me on the first day of trial. He pleaded not guilty to four counts: aggravated assault s.268(1), assault with a weapon, s.267(a), possession of a weapon for the purpose of committing an indictable offence, s.88(1), and attempted murder, s.239(1). The Crown withdrew the remaining counts on the indictment, counts 5 and 6. The trial proceeded, with evidence and submissions, from April 8-12 and on April 16, 2024. The matter then adjourned to April 22, 2024, for decision.

[9] As the trial started, I ordered the accused's eyeglasses returned under s490(9) because they were no longer required as exhibits by the police.

The accused person's name and identity

[10] I note that the indictment lists the accused person's name as Michael Thomas McGrath. The accused person identifies as Michael Alexander, a name he says he has used for thirty years. The court therefore refers to him in this decision as Mr. Alexander. Mr. Alexander however acknowledges that Michael McGrath and Michael Alexander are the same person. He also led evidence, through the cross-examinations, demonstrating that the various witnesses recognized him and had observed him and dealt him on the night of the incident.

Self-representation

[11] Mr. Alexander represented himself at trial. He had been given ample opportunity throughout the case management process to retain counsel for trial. Mr. Alexander did not raise any issue with self-representation until the very end, during his closing submissions, as one of the points in his list of issues. The raising of the issue was unduly late, and without a proper basis. He

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proceeded through all aspects of the trial independently, and never requesting the assistance the counsel. The issue seemed to be raised in a checklist, rather than as an actual issue impacting the trial.

[12] At all times, Mr. Alexander understood the trial process, that I was the trial judge and decision-maker, the roles of the Crown and police, and his role as the accused person, not obligated to give evidence. He fulfilled his role of challenging and testing the evidence that was in issue for him, and he had the opportunity to present evidence as he chose according to the governing legal framework. He conducted all the cross-examinations himself and touched on relevant issues and other issues important to him. He made strategic decisions throughout the trial.

[13] Earlier in the case management process, *amicus curiae* was appointed for the court. That appointment was made by another judge. The role of the *amicus* was to assist the trial judge as needed. The *amicus* at times explained some of the process and legal issues to Mr. Alexander, which the court did as well. She also conducted cross-examinations of the issues to clarify and flush out issues apparent in the evidence and made submissions to the court about legal considerations at all the stages. The *amicus* did not fulfill the role of defence counsel and did not replace the role that a defence counsel would perform. In this case, Mr. Alexander was able to conduct his own defence, so more enhanced *amicus* role was not necessary.

[14] Occasionally, Mr. Alexander referred to the *amicus* as being foisted upon him, or as somehow interfering in his defence, although more often he acknowledged understanding that the *amicus* was the friend of the court, there to assist the court, and the court reminded him always of the limited function of the *amicus*, which he accepted as accurate.

The Counts on the Indictment

[15] Mr. Alexander was tried on 4 counts. The allegations relate to an incident that occurred March 18, 2022, at a multi-tenant, or rooming, house in Toronto.

[16] My analysis will start with Count 1, aggravated assault, and then will move to each subsequent count in the indictment.

Count 1 - Aggravated Assault

[17] To prove count 1, the Crown must prove beyond a reasonable the following four elements of aggravated assault.

1. that Mr. Alexander applied force to Raymond Ozarko on March 18, 2022, in Toronto;
2. that Mr. Alexander intentionally applied the force;
3. that Raymond Ozarko did not consent to that force, and that Mr. Alexander knew that Raymond Ozarko did not consent to the force applied; and
4. that the force wounded, maimed, disfigured or endangered the life of Raymond Ozarko.

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Element 1: Did Mr. Alexander apply force to *Raymond Ozarko on March 18, 2022, in Toronto?*

[18] The evidence proves the first element beyond a reasonable doubt, that Mr. Alexander applied force to Raymond Ozarko on March 18, 2022, in Toronto.

Mr. Ennis's evidence: testimony witnessing the application of force

[19] The Crown called one direct witness to the conduct in question, Mr. Ennis. Mr. Ennis testified that he saw Mr. Alexander punch and kick Raymond, the guy from 106. Mr. Ennis was a tenant at the house in downtown Toronto along with Mr. Alexander, Raymond Ozarko, and 30 other tenants. They had lived together for some time. Mr. Ennis was a long-term resident of the home. Mr. Alexander had lived there for a few months, Mr. Ozarko for a few years. All tenants shared the kitchen. Both Mr. Ennis and Raymond were responsible for locking and unlocking the kitchen, and both had keys to the kitchen.

[20] Mr. Ennis describing sitting in his room, watching the hockey game with the TV loud, then hearing banging and thumping that caused him to open the door and look out into the hallway. He saw Mr. Alexander punching Raymond in the head and face. He said he tried to intervene, asking Mr. Alexander to stop. He said that Mr. Alexander told him that Raymond had locked the kitchen early. He could see that Raymond was in distress, trying to lean forward, but that he was unable to defend himself. Raymond told him he had given Mr. Alexander the key.

[21] Mr. Ennis testified that Mr. Alexander then went to his room and got a frying a pan, and that he began hitting Raymond in the head with it. Mr. Ennis said he recognized it as a frying pan, that he was a chef by trade, that it had a handle and that it was not a deep pan. Mr. Ennis told him to stop. Mr. Alexander then gestured at him with pan, saying "you're next". Mr. Ennis then went back to his room and called 911, reporting the incident. He said that he told 911 he could not help Raymond, and that he would need to use his baseball bat to try to restrain Mr. Alexander. He said he went back to the hallway and saw Mr. Alexander kicking Raymond in the head multiple times. He described Raymond's head as bouncing on the wall. He said he gave a statement to police that night explaining what happened.

[22] Initially, Mr. Ennis said there were 5 to 6 punches. Later, he clarified several times that he recalled 2 punches before he called 911. He also described the number of kicks as about 30, but he was not certain.

[23] Mr. Ennis denied the suggestion that he brought a cooking pot to the hallway and denied that he was concerned about a pot being left on the stove. Mr. Ennis denied bringing the baseball bat to the hallway. He agreed that he was a golfer, but that he had no golf clubs in his room, and that he brought no golf clubs or baseball bat into the hallway. He added that the police went to his room when they interviewed him that day, and that they would have been able to see anything like that. Later, he agreed that the police had just gone to his door for the interview. A video of the police interview with Mr. Ennis shows that the police did not enter his room, and that they stayed and that Mr. Ennis stood at the door opening during the interview.

[24] Given all that evidence, it is fair to say that Mr. Ennis has some issues with his reliability on certain points in the evidence, particularly regarding the accuracy of number of punches and kicks, and about whether or not the police entered his room to inspect it. The court will assess Mr.

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Ennis's evidence against the whole evidentiary picture before relying on it, as the court should do with respect to the assessment of any witness, being mindful of course of the potential frailties of human memory particularly in traumatic experiences.

Supporting evidence that Mr. Alexander applied the force

[25] There are several pieces of circumstantial evidence relevant to proving that Mr. Alexander applied force to Mr. Ozarko, that I will outline below. I will also outline my reasoning about the other issues raised at trial as they relate to the evidentiary proof in this case.

Mr. Ozarko was found near Mr. Alexander's room

[26] Mr. Ozarko was found, bloody, slumped and nearly motionless, very close to Mr. Alexander's room, 101. Mr. Alexander was found in room 101, and Mr. Ennis said that Mr. Alexander lived in that room. Mr. Ozarko was found slightly closer to room 100, but just there is not a great distance between 100 and 101. Mr. Ozarko was closer to rooms 100 and 101 than any other rooms in that hallway. The greatest concentration of spilled blood was pooled in the area near rooms 100 and 101 and was splattered on the wall up to approximately waist level.

Mr. Alexander had blood on his body and clothing

[27] The circumstantial evidence strongly indicates that Mr. Alexander had blood on him when they found him in room 101.

[28] The police all described Mr. Alexander as being covered in blood. The arresting police officers on scene described, and their body worn cameras show, the scene and Mr. Alexander covered in blood.

[29] The forensic identification officer described unit 101, Mr. Alexander's apartment, as covered in blood when she photographed it the next morning. In the overnight period, no one had gone into the unit, it was security surveilled all night. All those photos are evidence in the trial.

[30] Forensic identification officer Wu photographed Mr. Alexander and seized his clothing shortly after the arrest. Officer Wu described him as being covered in blood. The photographs taken by Officer Wu show Mr. Alexander's hands and feet and covered in a red substance that Wu described as blood. The photographs of his shirt and pants are covered in fresh-looking red stains, and he is depicted wearing those same clothing items in the body worn camera videos. Even though the red substances visible on Mr. Alexander's shirt and pants, and in his apartment, were not tested, the only reasonable inference from the combination of the observations and the presence of Mr. Ozarko nearby his room is that the substance is blood.

The blood on Mr. Alexander belonged to Mr. Ozarko

[31] The circumstantial evidence also sufficiently demonstrates that the blood on Mr. Alexander belonged to Mr. Ozarko.

[32] First, I as mentioned, there is ample evidence that Mr. Ozarko was bleeding. A red substance is seen all over the face of Mr. Ozarko in the body worn camera videos. A large pool of

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the red substance is around Mr. Ozarko in the wallway, as seen in the videos and in the photographs. All the video evidence is shown as being captured on March 18, 2022, just after 10 pm. The paramedic described Mr. Ozarko as bleeding, and that a significant amount of blood was present at the scene. The medical records filed show that Mr. Ozarko had significant injuries and bleeding, with treatments starting just after 10 pm on March 18, 2022.

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[33] Second, Mr. Alexander was in the hallway near Mr. Ozarko's blood. Officer Lichtenberger saw Mr. Alexander in the hallway, in the area of the blood, just as they were trying to enter it after 10pm that night, holding a frying a pan, and then walking down the hall. The FIS officer described finding a frying pan in Mr. Alexander's unit, and that it was covered in blood. The photographs of the seized frying pan show it to be covered in blood, particularly the electronic copies that have clearer coloration. Mr. Ennis saw Mr. Alexander using a frying pan, as well as his hands and his foot, to hit Mr. Ozarko in the head in the hallway area.

[34] I note as well that Mr. Alexander made several statements from counsel table saying that he only lightly rapped Mr. Ozarko with his knuckles, and that the frying pan used was a different pan, a lighter one. The court could properly use those particular statements as confirmation that Mr. Alexander had contact with Mr. Ozarko on the night in question, as an admission against interest. Mr. Alexander made several inconsistent assertions from counsel table on this topic as well, including denials that he did anything to Mr. Ozarko, that someone else did this to Mr. Ozarko. Mr. Alexander's admissions of force are not, however, necessary to establish this element of the office.

DNA evidence

[35] The DNA evidence also supports the inference that Mr. Alexander had Mr. Ozarko's blood on him. The expert witness gave evidence that the CFS received a swab from police, described as a swab from Mr. Alexander's hand. The CFS analyzed the swab to determine if they could find any DNA profiles. The CFS determined that there was a mixture, that is, two profiles on the swab. The CFS said that Raymond Ozarko could not be excluded as a contributor to the profile, at a rate of probability of more than 1 trillion times more likely to have come from Raymond Ozarko that any other person unrelated to Raymond Ozarko.

[36] The CFS evidence was that the other profile was an unknown person. The CFS did not have a known sample of Mr. Alexander's DNA. The CFS had a known sample from Mr. Ozarko, however, one taken by the police from Mr. Ozarko's mouth. The CFS expert also described that the CFS confirmed that blood was detected on the hand swab taken from Mr. Alexander on arrest.

[37] Both the swab from Mr. Alexander's hand after his arrest in 2022, and the buccal swab from Raymond Ozarko, were submitted to the CFS February 10, 2023. The officer in charge said she submitted the swabs to CFS on that date, picking up the samples from storage locations. There was no issue raised about the continuity of the swabs. The CFS expert was not the original scientist who completed the DNA analysis, but she had been one of the original reviewers of the work and she re-reviewed the work and said she agreed with the process followed, and that she would have done the analysis the same way. The expert testified that the delay in testing would not have impacted the results of the analysis; there was no issue, for example, that the samples had degraded

over time. If the sample had degraded, it could have made it more difficult to generate a DNA profile, but it would not create a false positive.

[38] The DNA evidence was not ideally presented. There appear to be some weaknesses with the evidence, including that the expert did not do the analysis herself and that some of the police submission-related evidence was a bit unclear. However, the prime issue raised by Mr. Alexander, that the swabs were submitted a year after the offence, is not an area of concern for the evidence in this case. The evidence was clear that short of the samples degrading and making testing not possible to generate a profile, the lab could still do a reliable DNA analysis for items seized in the past.

[39] Despite some of the challenges with the DNA evidence, I accept the CFS conclusion as presented, based on the strong circumstantial evidence from the case that supports the conclusions stated in the report, as I have just outlined.

911 call and police videos

[40] The 911 call is also circumstantial evidence that supports Mr. Ennis's evidence. The Crown played the 911 call in court, showing the emergency call made by Mr. Ennis was received after 10 pm on October 18, 2022, calling for assistance to the address in question. Mr. Ennis is seen letting the police in the backdoor on video, which is consistent with his evidence that he did so when they knocked, and he is the person calling asking for assistance.

Alternate suspects/ Ennis as an alleged suspect

[41] From time to time in the trial, Mr. Alexander made various assertions of a person or persons that attended the hallway on the night of the incident. Mr. Alexander elected, intentionally, not to give evidence at trial. The assertions were not under oath or affirmation, and the exculpatory assertions were not established through the cross-examinations and did not raise any reasonable doubts.

[42] When Mr. Ennis was testifying, Mr. Alexander asked a question that might have been interpreted as suggesting that Mr. Ennis applied force to Raymond Ozarko. However, Mr. Ennis denied doing so, denying the suggestion that he brought the cooking pot to the hallway, and that he was concerned about the kitchen key and a pot left cooking in the kitchen. Mr. Ennis also had no blood on him, according to his evidence, and the depiction of him on the video at Exhibits 17 and 18, the body worn camera video of Officer Lichtenberger.

[43] There was no evidence from any other witness that would support the suggestion that another person or persons was responsible for the force applied to Mr. Ozarko.

[44] When the police attended mere minutes after 10 pm they found no other people present. They also searched the whole fenced in back area of the building, and it is depicted on video that no one was there. The videos from the building show the other residents in their own parts of the home, not out in the hallway with Mr. Ozarko. The circumstantial evidence strongly supports that Mr. Ozarko's blood was on Mr. Alexander, and there was direct evidence of him applying the force to Mr. Ozarko. Mr. Ennis testified that he heard nothing in terms of disruption or yelling in the hallway before he went out and witnessed the application of force by Mr. Alexander, and that the

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walls were thin enough that he would have heard. Indeed, the sounds from Mr. Alexander's application of force caused Mr. Ennis to go out into the hallway.

[45] There is no air of reality to the suggestion that another person or persons applied the force to Mr. Ozarko, other than Mr. Alexander.

Mr. Ennis's credibility

[46] The court recognizes there are some challenges to Mr. Ennis's credibility.

[47] While Mr. Ennis's evidence about the number of blows was not precise and slightly inconsistent, the surrounding evidence supports his evidence that multiple blows were delivered. The paramedic observed several injuries to Mr. Ozarko's face and a significant amount of blood, as well as swollen and injured eyes. The medical records, documented as belonging to Raymond Ozarko, show multiple areas of injuries to the face and eyes, from his admission to the hospital on March 18, 2022, through to March 19, 2022. The police officers who attended testified, and the body worn camera videos show, that a person identified as Mr. Ozarko was seated in the hallway of the rooming house.

[48] The number of blows would be an understandable item to be unsure about, since Mr. Ennis was not the person being assaulted, the incident would have been traumatic for him, and the main thrust of his evidence was that numerous blows were laid upon Mr. Ozarko, not precision as to the number of blows. I do not consider the variation in description of the number of blows as a significant detractor from Mr. Ennis's evidence.

[49] A more significant issue in the evidence was Mr. Ennis's overstatement about the extent of police following up with him after the incident. The video shows that the police did not enter or inspect his room, as Mr. Ennis suggested in cross-examination. In examination by the *amicus,* Mr. Ennis clarified that the police were only at the threshold of his door and that they could see in, which is more consistent with video evidence than the suggestion that they entered. Mr. Ennis may well have taken offence to the suggestion that he used a golf club or baseball bat to harm Mr. Ozarko, and then overstated the extent to which the police did any verifications.

[50] Although Mr. Ennis overstated the amount of police verification, this issue does not present a wider concern for the overall reliability of his evidence. Several important aspects of Mr. Ennis's evidence were supported by the circumstantial evidence.

[51] To summarize, Mr. Ennis's description that multiple blows were inflicted is supported by the amount of blood in the hallway, the injuries seen on Mr. Ozarko in the videos, the medical records documenting the extent and number of the injuries. Mr. Ennis's description that Mr. Alexander used a frying pan to hit Mr. Ozarko is supported by Officer Lichtenberger witnessing Mr. Alexander holding a frying pan close to the time, and the police seized a frying pan covered in blood from unit 101, the unit where Mr. Alexander was found, and close to the area the police found Mr. Ozarko. Mr. Ennis's description that the incident started because of an issue about the locking of the kitchen was not disputed and was indeed confirmed by Mr. Alexander's questions. The 911 call supports Mr. Ennis's assertion that he was seeking help, not the aggressor or assaulter. Mr. Alexander's hands, feet, clothing and glasses, and his room, were covered in blood, all of

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which was documented in photographs and videos, and supports Mr. Ennis's description that he also used his hand, foot to hit Mr. Ozarko.

After the fact Conduct

[52] The Crown relied on some of Mr. Alexander's after the fact conduct as proof of the elements of the offence. Specifically, the Crown points to Mr. Alexander going to his room, then holding out his hands as if seeking the police to cuff him as evidence of guilt. The Crown also points to the fact that he asked officers if the charge was attempted murder as evidence of guilt.

[53] I do not accept the specified after the fact conduct as indicative of any guilt inference. There are multiple alternate inferences available from that evidence. First, his room was mere steps from the scene. It is a normal inference that someone can go to their home, at any point. Going home is not indicative of guilt. It is equally consistent with innocence.

[54] Second, holding out his hands in this context is equally consistent with merely being cooperative. Multiple police officers entered, at least one with a firearm visible on video, in a setting with obvious signs of trauma circumstances given the amount of blood in Mr. Alexander's home. Mr. Alexander made utterances on video indicating that he feared the police, asking them if they were going to hurt him. He made various assertions about 51 Division, both in the in-car camera, and from counsel table, about his beliefs regarding various alleged bad acts or violent acts done by the division. In that whole context, it is an equally reasonable inference that he was merely being cooperative with the armed officers attending at his room.

[55] I do not rely on the after the fact conduct for any of my conclusions regarding proof of the charges.

Conclusion: Element 1

[56] The overall circumstantial evidence overwhelmingly supports the conclusion that Mr. Alexander had Mr. Ozarko's blood on him, on March 18, 2022, in Toronto, with nothing to dispute that conclusion. I do not need to rely on the DNA evidence in this case to determine that Mr. Ozarko's blood was on Mr. Alexander that night, nor do I need to rely on Mr. Alexander's admissions or after the fact conduct for my conclusion. Mr. Ennis's credibility issues are more than adequately addressed by the circumstantial evidence that supports his direct evidence that he witnessed Mr. Alexander applying force to Mr. Ozarko with his hands, feet and a frying pan.

[57] The only reasonable conclusion from all the circumstantial evidence, combined with the direct evidence from Mr. Ennis, is that Mr. Alexander applied force to Mr. Ozarko on March 18, 2022.

Element 2: Did Mr. Alexander intentionally apply the force to Mr. Ozarko?

[58] For the second, the court decides whether Mr. Alexander applied force intentionally. This means intentional conduct, as opposed to accidental conduct.

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[59] There was no suggestion of accidental conduct in this case. Mr. Ennis's evidence described the intentional application of force, rather than some kind of mishap or bad accident that could have caused the injuries.

[60] Mr. Ennis testified that Mr. Alexander was aiming where he was applying the force, that is, he was not randomly punching or kicking, and that Mr. Alexander did this multiple times. The medical records show that the injuries to Mr. Ozarko affected the facial, eye, head area, all of which supports Mr. Ennis's contention that the blows were aimed at any area. Mr. Ennis also described Mr. Alexander as smiling while he was inflicting the blows, denoting that Mr. Alexander was conscious of his actions. The smiling description is consistent with Mr. Alexander's calm demeanour depicted on the body warn cameras and the facial expressions captured in the photos.

[61] I conclude beyond a reasonable doubt that Mr. Alexander *intentionally* applied the force to Mr. Ozarko.

Element 3: Did Raymond Ozarko consent to that force, and did Mr. Alexander know that Raymond Ozarko did not consent?

[62] Consent is to be assessed from Mr. Ozarko's perspective. That is, did Mr. Ozarko agree in his mind to Mr. Alexander applying the force to him.

[63] There is no suggestion that Mr. Ozarko consented to the application of force.

[64] Mr. Ozarko had so many injuries that he was largely non-responsive to the first responders, apart from saying he could not see and breathing on his own. The first responders are shown lifting him out of the hallway on a stretcher, into an ambulance.

[65] There was no evidence of a consent fight, or that Mr. Ozarko was the aggressor in some way. The only evidence was that he had locked the kitchen, early. Even if there was some application of force by Mr. Ozarko, the extent of the force that followed from Mr. Alexander would not have been the subject of any legally valid consent. In any event, there is no evidence that Mr. Ozarko consented. The evidence equally shows that Mr. Alexander knew that Mr. Ozarko was not consenting. Mr. Ennis testified that Mr. Ozarko was not fighting back or reacting in any meaningful way to the force applied by Mr. Alexander and that Mr. Alexander continued to assault him regardless; Mr. Ozarko was found in a similarly non-responsive, barely moving position by the first responders moments later.

[66] Mr. Alexander's assertion from counsel table that Mr. Ozarko tried to assault him with a key is not evidence and is contradicted by other assertions by Mr. Alexander that third parties assaulted Mr. Ozarko. There is no suggestion of a mistake by Mr. Alexander about the existence of consent on the evidence.

[67] I conclude that Mr. Ozarko was not engaged in a consent fight, at least not for the most significant part of this incident. Mr. Alexander's awareness of the lack of consent is established based on the common-sense inference available from the circumstances, that a person engaging in a non-consensual fight would be aware that the other person is not consenting.

[68] This element is proven beyond a reasonable doubt.

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Element 4: Did the force wound, maim, disfigure or endanger the life of Raymond Ozarko?

[69] The Crown does not have to prove all those different named modes of commission to establish this element. Any one of those types of harm is sufficient to prove the element.

[70] Wound means to injure someone in a way that breaks, cuts, pierces, or tears the skin or some part of the person's body. It must be more than something trifling, fleeting or minor, such as a scratch.

[71] There is ample evidence of wounding in this case. Mr. Ozarko's medical records show that he was significantly injured, with multiple, deep, facial lacerations on both sides, as well as bruising, and problems with his vision, and fractures of the bones in his facial/eye/nose areas. He was found to have an intracranial hemorrhage, or brain bleed, still showing a week after the incident. His injuries required extensive surgery. He spent a prolonged period in the intensive care unit due to the extent of his injuries. After discharge one month later, he was transferred to an acquired brain injury unit. None of those injuries could be described as trifling, fleeting or minor. Indeed, all those injuries are quite serious because they were deep and even into the muscle.

[72] Maiming means to cripple, mutilate or disable someone. This element was not clearly highlighted in the evidence. It is unclear whether or not Mr. Ozarko permanently or even non-transiently lost his vision. There is an indication in the medical records that Mr. Ozarko could not see in one eye at some point in his hospital care, and that for some period he could not close his eye properly, though that may have been addressed. Maiming is not proved.

[73] To disfigure means to deform or deface. This mode of the offence is more clearly established. The medical records show extensive facial and orbital injuries. The medical records describe that he was unable to close his right eye, and that he needed medical intervention to make that more comfortable. He also had the lasting impact of a facial droop one month later. Those injuries constitute deforming or defacing in this context because the eye components were not functioning normally and the face was not presenting normally. The video evidence also shows that Mr. Ozarko's face was significantly impacted with injuries, such that some first responders could not discern his ethnicity or gender, although this was also due to him being covered in a lot of blood. The records also show that a superficial hemorrhage, meaning bleeding close to the surface of the skin, was still on his face at the time of discharge weeks later. The overall evidence clearly established defacing or deforming.

[74] To "endanger the life" of someone is to put him in a condition that could cause him to die. The evidence on this issue primarily comes from the paramedic and the medical records. The Crown's main theory on this issue seems to be that Mr. Ozarko's life was endangered from the application of force, as proven by the significant amount of blood lost, and the emergency services provided to Mr. Ozarko.

[75] The paramedic testified that Mr. Ozarko had significant blood loss, and that he needed to call for advanced paramedic care to administer him a bolus of fluids to prevent cardiac arrest from blood loss. He was brought to the trauma bay of the emergency department because the paramedics were unsuccessful in stopping Mr. Ozarko's blood loss with the tools they had at hand for first aid, and that Mr. Ozarko required surgery to stop the blood loss.

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[76] After admission to the hospital, the records show that Mr. Ozarko was kept in an intensive care unit for some period while he was at the hospital, and he was being fed through a tube for a number of weeks. He was provided extensive pain medications and antibiotics to guard against infection. He did not receive surgery until some weeks into his stay.

[77] The medical records are not written in a way that clearly indicate whether Mr. Ozarko was at an increased risk of death from his injuries during his stay at the hospital. The pre-admission evidence is that the paramedic thought he was at risk of cardiac arrest from blood loss without their immediate interventions. The paramedic was not challenged on this evidence. Based on the description of the situation of blood loss, the need for external infusion of fluids to guard against the risk of death, the admission to the trauma part of the hospital, and the extended stay in the hospital monitoring Mr. Ozarko's vitals and feeding him with external aids, I conclude that his life was endangered. I further conclude that Mr. Alexander significantly contributed to Mr. Ozarko's situation by inflicting those specific injuries on him just prior to Mr. Ozarko's interaction with the paramedics, and because the only reasonable conclusion in the circumstances is that the injuries were a significant contribution to Mr. Ozarko's medical situation and risk to life.

[78] As I noted earlier, the Crown does not have to prove all possible modalities specified for the application of force to be considered an aggravated assault. Proof of one modality is sufficient. Here, all the listed modalities were proven beyond a reasonable doubt but proof any one of them would have been sufficient.

Conclusion Count 1) Aggravated assault

[79] Aggravated assault, count 1, is proven beyond a reasonable doubt. I am satisfied beyond a reasonable doubt of all elements of the offence.

Count 2 - Assault with a weapon

[80] In Count 2, Mr. Alexander is charged with assaulting Raymond Ozarko with a weapon on March 18, 2022, in Toronto.

[81] The evidence of date, place and identity is the same as for Count 1. I am satisfied of those issues beyond a reasonable doubt, for this Count and every Count. Elements 1, 2 and 3 are the same for Count 1 and Count 2, so I am satisfied of proof of those elements. Only element 4 is different for the offence of assault with a weapon.

[82] Element 4 of Count 2, assault with a weapon, requires the Crown to prove beyond a reasonable doubt that Mr. Alexander used a "weapon" to assault Mr. Ozarko. The alleged weapon is the frying pan filed in evidence at Exhibit 8.

[83] Mr. Alexander argued that the item in question is not a "weapon". He submitted that weapons could include a variety of objects, starting with the most serious, firearms, then knives, and then other objects. He argued that the object in question, the alleged frying pan was too light to be considered a weapon, that it could not harm anyone.

[84] Mr. Alexander's argument accords with the legal framework I must apply to consider whether this element is proven.

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[85] The Criminal Code at s.2 defines a "weapon" as anything used, designed to be used, or intended by a person to be used to injure, kill, threaten, or intimidate another person. The definition is broad, but certain key elements must be met before the item in question could be considered as a "weapon" according to the Criminal Code definition?

[86] The evidence of Mr. Alexander's use of the frying pan is as I described in count 1. Mr. Ennis saw Mr. Alexander go to his room, grab a frying pan, and that he used the frying pan to hit Raymond's head with the side of the frying pan multiple times. Mr. Ennis said he yelled for Mr. Alexander to stop, and that Mr. Alexander then came at him with the frying pan. Mr. Alexander is, however charged only in relation to Mr. Ozarko, not with respect to Mr. Ennis.

[87] Mr. Alexander also suggested that Exhibit 8 was not the same item as was involved in the incident. He suggested that the item should have been something lighter, more crinkled and rolled up.

[88] The court disagreed with that argument. There is significant circumstantial evidence that supports the argument that Exhibit 8 is the item used in the assault.

[89] Mr. Ennis said that he was about 80% sure that Exhibit 8 was the frying pan in question, but he was not certain, and there is no video of the assault itself. Mr. Ennis described the pan as 8 to 10 inches by 12, that it was green on the side and black on the bottom. Therefore, the court must assess the other circumstantial evidence.

[90] The supporting circumstantial evidence is that Exhibit 8 includes the fact that Exhibit 8 was found in Mr. Alexander's apartment the morning after the incident. Officer Collins found Exhibit 8 on a high table or chest immediately beside a chair, and she described it as covered in blood. Officer Arsenault's body worn camera shows Mr. Alexander seated in that same chair, immediately within arm's reach of the high tabletop. On the tabletop, a frying pan is visible. I recognize that pan in the video as Exhibit 8: both the frying pan on video and the exhibit appear to be a shallow pan with a handle, and both the pan and the exhibit have the same, distinctive appearance of being crinkled up or folded-in on one side, and the pan was seized by the FIS officer from the same location that I saw on video.

[91] The evidence that Exhibit 8 was used in the assault includes Officer Lichtenberger's evidence. He saw Mr. Alexander holding a frying pan as the police were trying to gain entry to the building. The police then obtained a search warrant to look for the frying pan. When Officer Collins searched Mr. Alexander's room, she did not find any other frying pan. It is also a reasonable inference that tenants of the rooming house kept their personal items like their own pots and pans in their own room. It is further a reasonable inference that Mr. Alexander would have gone back to his own room after being in the hallway since that was his home.

[92] The frying pan photographs show that it was covered in blood, and the FIS officer described it as covered in blood. The exhibit is covered in what appears to be dried blood. Refer to my findings in Count 1. The fact that the pan was not tested does not cause me to doubt that the pan was covered in blood in the relevant timeframe of the incident, in Mr. Alexander's apartment, because of the ample circumstantial evidence that the substance was blood.

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[93] Mr. Alexander also pointed to the weight of the item as a relevant consideration, effectively suggesting that it could not have caused injuries. I examined Exhibit 8. I agree that is not a heavy frying pan, rather it is a lighter, non-stick pan. The weight of the object is not the only relevant factor, however.

[94] For the item to be a "weapon", Mr. Alexander needs to have either used it or intended to use it to injure Mr. Ozarko, according to the s.2 definition. Mr. Ozarko had extensive injuries, as I detailed in Count 1. Those injuries potentially could have been caused either by punching, or the pan, or the kicking, or from a combination of all those applications of force. Mr. Alexander suggested that he may have only lightly rapped Mr. Ozarko with the item. The medical records do not permit the court to draw an inference about whether the frying pan caused injury to Mr. Ozarko. The witness evidence was not specific as to whether the frying pan caused injury, because it seemed that Mr. Ozarko was already injured at the point of its application, and the number or force of blows was unclear. The frying pan had blood on it, but Mr. Ozarko may have already been bleeding from existing injuries. The evidence was clearer about the amount of force from the other modalities. For example, Mr. Ennis estimated 30 kicks to the face or head. Multiple punches to the face or head preceded the frying pan being used.

[95] Not every assault with a weapon charge requires specific evidence linking the weapon to the injuries. However, in this case because of the possibility of other applications of force having caused the injuries, it is not possible to prove this element beyond a reasonable doubt. Regarding Mr. Alexander's intentions, it is clear he intended to apply force to Mr. Ozarko, but the information was not sufficiently specific to permit an inference of intention to "injure" with the object in question. The frying pan use would be an aggravating factor on sentence for the offences but is not a "weapon" as defined by the Criminal Code, in this situation.

[96] Element 4 of Count 2, that Mr. Alexander used a weapon to assault Mr. Ozarko, is not proven beyond a reasonable doubt.

Count 3 - Possession of a weapon for the purpose of committing an offence

[97] Count 3 has two elements, 1) conduct, possession of a weapon, and 2) intention, related to the accused's purpose in possessing the weapon. The conduct element is not proven beyond a reasonable doubt for the reasons given for Count 2.

[98] In any event, even if the conduct element were proven, the conduct and intention components depend entirely on the same evidence. This count would have stayed pursuant to the rule against multiple convictions.

Count 4 - Attempted Murder

[99] Mr. Alexander is charged in Count 4 with attempting to murder Mr. Ozarko on March 18, 2022, in Toronto, contrary to s.239 of the Criminal Code.

[100] To prove this offence, the Crown must prove both 1) conduct and 2) intent. The Crown must prove beyond a reasonable doubt that Mr. Alexander engaged in conduct, and that in doing so he meant to kill Raymond Ozarko.

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[101] The conduct for Count 4 is the aggravated assault in Count 1, which I concluded was proven beyond a reasonable doubt. What remains is to consider whether the evidence is sufficient to prove that Mr. Alexander meant to kill Raymond Ozarko.

Did Mr. Alexander mean to kill Mr. Ozarko?

[102] To determine whether Mr. Alexander meant to kill Mr. Ozarko, I must consider all the evidence, including the nature of the harm inflicted, and anything said or done in the circumstances. I may also take into account, as a matter of common sense, that a person usually knows what the predictable consequences of their actions, and means to bring about those consequences. I must not, however, draw any such common sense inference, if, on the whole of the evidence, including any evidence of disordered thinking, I have have a reasonable doubt about Mr. Alexander's intention for murder.

Mr. Alexander's utterances – evidence of intention?

[103] The Crown relies on Mr. Alexander's comments, made after the incident, as evidence of his intention to cause Mr. Ozarko's death. The comments were made while he was being arrested in his room, at the gate of the yard, and in the police car. Mr. Alexander conceded voluntariness partway through the admissibility arguments, although he does not agree that the comments show that he had an intention for murder. Mr. Alexander also acknowledged waiving or letting go of a possible s.10(b) argument.

[104] The Court agreed with his concession on voluntariness, because the evidence would have proven that he had an operating mind and that there were no *quid pro quo* offers from the police. He understood that he was speaking to police officers, he had been cautioned, and he waived his rights orally at the time, and to try to speak to the officers about the incident.

[105] Mr. Alexander's potential s.10(b) argument would not likely have succeeded. Mr. Alexander told the police either that he waived his rights, that he did not want to call anyone, or that he did not have the name of a lawyer. His mention of a counsel's name was in the middle of a long discourse on various topics that the police would not have understood at the time. In any event, the police called duty counsel for him after he was paraded, he never made any kind of formal statement, and the police never elicited any statement from him.

[106] In terms of the evidentiary value of Mr. Alexander's comments, I set out my analysis separately for the three groupings of comments, since the comments need to be understood in their particular context.

Comments made in Mr. Alexander's room

[107] Mr. Alexander was placed under arrest by several officers in his room. His arrest was recorded on body warn cameras. Several officers were speaking at the same time, discussing with each other practicalities of cuffing him and arresting him. Officer Adam told Mr. Alexander "Right now you're under arrest". Mr. Alexander replied, "That's fine" and asked if he could put on shoes. Officer McGuire told him, "You're under arrest for aggravated assault". Mr. Alexander asked, "you said attempt murder?", and the officer explained that it was "potentially attempted murder, definitely aggravated assault, potentially attempted murder".

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[108] For comments in Mr. Alexander's room, I note that it is possible that he may have simply misheard the charge indicated by the officers, because multiple people were speaking. He might also have been guessing at the potential charge based on the overall evidence at the scene. He might also have been communicating his belief about the appropriate charge because he had attempted to kill Mr. Ozarko. He does not provide an overall narrative at this point to go with his comment, so it is difficult to know what he meant just from that comment. These comments could be assessed with the other circumstantial evidence.

Comments at the gate

[109] The next comments were made at the gate going out to the street, while waiting for the firefighters to open it. Mr. Alexander said something like "you're dead, just like that", but right in a string of comments he was making about being stuck with the police at the back gate, and about the prospect of standing there all night, so the comment might well have been linked to the possibility of dying from standing around all night.

[110] He then repeated something that sounded like "feliz navidad" several times, and then "I hope he's ok" and other comments that I could not make out from the video recording. He was cautioned, and then he said the word "orbital", but in a string of other inaudible comments. I note that later in the evening, he spoke about spaceships as well, so it is unclear if he was referring to an eye or a spaceship when he said orbital.

[111] Mr. Alexander then clearly said, "and I would have had dinner tonight. But he decided he had the key from the guy down the hallway". Mr. Alexander continued speaking, but a police officer told him to stop talking, that he was on camera.

[112] Mr. Alexander's position is that he was trying to make an exculpatory statement at that point, but that the police would not take the statement from him. This is a possible reasonable inference, evidenced by his comment to the police at the gate, "are you going to ask me a few questions now", after he had given them some information about the incident, and the direction by police to stop talking. It is difficult for the court to attribute a specific meaning to the comments at the gate, other than he was starting to explain the encounter, since only a few clips were discernable in a long string of other comments. There is nothing to draw from the comments, however, about Mr. Alexander's intentions for murder.

Comments at the booking hall

[113] At the booking hall, when he was being paraded before Sergeant Hammond, the Sergeant told Mr. Alexander what he was seeing before him, that he did not see any injuries, but that he saw blood on Mr. Alexander's feet. Mr. Alexander replied, "Oh no, I'm, I'm going to say that he didn't struggle much", and then the officer cut him off, explaining he was just trying to figure out if he was injured. Again, the meaning of this exchange is ambiguous because it was not a full discussion. Mr. Alexander was replying to the officer's questions about injuries on himself.

[114] One possible interpretation is that he was communicating that Mr. Ozarko did not injure him. Another possibility is that he was trying to explain away blood that was on his feet by indicating that he did not struggle with Mr. Ozarko. The comment may also be an acknowledgement of struggling with Mr. Ozarko.

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[115] Given the number of competing inferences, the comment about the lack of struggle does not provide much information about the difference in intention between aggravated assault and attempted murder.

Comments in the police car, enroute to the station

[116] The Crown also relies on comments that were made in the scout car, while being transported to the station. The ride to the station and then waiting for admission through the sally port took over 30 minutes. In that time, Mr. Alexander spoke essentially non-stop the whole time, to himself. The police did not ask him questions in that period. He independently carried on a narrative that covered many, many topics in quick succession from one to the next.

[117] Mr. Alexander talked about his theory regarding 51 Division and his belief about their connection to events in World War II, his theory regarding child murders and the murder or murders of women, the "butcher of China", talking about various well-know people, or purported well-known people, and referencing them into the narrative. He seemed to be role playing in various conversations between third parties, including a potential lawyer and a rabbi. It is unclear whether he is speaking in his own voice or putting on the voice of another party in some of these discussions. He role played being the Queen, announcing that he was the Queen, ordering for his handcuffs to be removed, speaking in a British accent, explaining that no key and that he was stuck.

[118] From this discussion, the Crown isolates several individual comments and are isolated as evidencing intention.

[119] At the beginning of the time in the car, Mr. Alexander said "I hit him like 20 times, something unclear then "punched him", "noogies to his head". I note that he then improvised a conversation between a lawyer and client, talking about bail and the criminal process. The Crown then isolated comments 6 minutes later, where Mr. Alexander said "how is he, he's dead" then said other things I could not discern, then said he was tired. He next said something like "your fucking hands, skillet inside your hands, blood, sorry about that", "he's not allowed to go to jail, peace, love, marriage, ever thought about America, he's not allowed in jail, Morgan Forbes, deal with the commissioner, he would not have done it the door was not locked, he is shut in, an invalid, Mark Styles, Mr. Lobster, you are financing him, hahahaha, distant relative, pay the right people. He then said he was feeling hot, that he was not hungry yet because of adrenaline. The police then re-cautioned him.

[120] Later, several other comments were isolated by the Crown. Mr. Alexander said "I would leave him for dead. I would leave him dead too." Those comments were immediately followed by other comments including something like "far more precipitous individual" and then other things that were not clear. He was then more clearly speaking in a third-party voice or to a third party, saying that "this is serious" something about science, then thanked a rabbi, indicating a certain lawyer was a good choice, and about how much it meant to the rabbi. He then started talking about the Russians, about Officer Arsenault, then about a murder charge related to a child being stabbed in the eye by the police, and a reference to going to a room in the spaceship, decompression chamber, then referred to the prospect of having a noodle dinner, before pulling into the police parking lot. He then swore and referred to Lucifer, and New York City, amongst other things.

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Analysis of car comments

[121] The scout car comments are clear that Mr. Alexander was referring to someone being left for dead, maybe by him, that he was making voices of people asking how someone was to which he replied, “he’s dead”. He had death on his mind, but not necessarily related to this incident: he referred to death a number of times while in the car, about a variety of contexts, like the alleged murders of third parties by the police and other people. All the comments are sandwiched in with other statements about Lucifer, the Queen, various fictional and non-fictional characters. It is never clear when he was speaking as himself, and when he is play acting another character’s voice, because of the ease and speed with which he changed topics.

[122] Mr. Alexander’s comments are troubling and likely indicate something about his understanding that he seriously injured Mr. Ozarko. It is difficult to discern with certainty who and what he was talking about or who he was speaking as, at various other points in time, because of the extent of topics and voices and the speed of switching between them. Mr. Alexander was possibly having a stress reaction to the traumatic scene and to his own actions, and inventing narratives to go along with it to explain the conduct, since some of the references accord with the circumstantial evidence.

[123] Mr. Alexander fairly points out the evidence that he had obviously been through a traumatic circumstance, that he was overheating, that he was tired, that he was indicating he was hungry, that he thought the officers were pumping exhaust into the car, that he speaks in a continuous fashion about various topics in other contexts as well like the courtroom, and those factors should weigh into the court’s considerations of the reliability and meaning of the utterances from the scout car.

[124] Taking into account all those considerations and the whole of the context, it is difficult for the court to infer backwards from the various utterances in the car, the gate, and the apartment, to draw an inference about what his intention would have been at the time of the aggravated assault. Mr. Alexander’s comments clearly associate him to the offence, in that he admitted hitting Mr. Ozarko multiple times and said things like leaving someone for dead in the context of having a bail discussion, although he never directly admitted having an intention for murder or any plan to murder him. The wider circumstantial evidence, including overall nature and context of the comments in the scout car causes the court to have a reasonable doubt about his state of mind at the time of the aggravated assault.

[125] Mr. Alexander also made several statements from counsel table suggesting that Mr. Ozarko was currently dead, and that he died and came back to life, and that he killed because he was licenced to kill, but that he did not kill. I cannot infer anything from those statements about Mr. Alexander’s intentions two years ago. There was never a clear or reliable statement from Mr. Alexander from which the court would be confident drawing an inference of intention to murder.

The whole of the circumstantial evidence

[126] For a charge of attempted murder, the court should look to the other circumstantial evidence to determine whether there is sufficient evidence from which to draw reasonable inferences about the required intent for attempted murder. See for example *R. v. Payne* 2013 ONSC 4605 at para. 26.

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[127] There was no evidence of self-defence, no evidence of defensive wounds on Mr. Alexander, or any narrative put forward or tested in evidence that he was defending himself. Mr. Alexander made utterances including a reference to hitting him 20 times, but that must be looked at alongside the witness description and the medical presented, because the number of blows alone would not indicate whether death was virtually certain to occur.

[128] The evidence about Mr. Alexander's room is not relevant to assessing intention, for example, the items that were on the floor or tables, other than the frying pan.

[129] The modalities that Mr. Alexander used to apply the force must be considered as well. The modalities of force application were fists, feet and a frying pan. His feet were barefoot, not clad in heavy boots or shoes. The frying pan was on the lighter end of the weight spectrum, not a heavy cast iron object. This was not, as Mr. Alexander pointed out, a shooting, or a stabbing, or the use of another object that might on its own be more telling of the person's intention: such items could more clearly indicate an intention to murder. With the modalities applied used here, the court must also carefully assess the medical evidence.

[130] The medical evidence documents that the nature of the assault was localized to the face. There is not a clear indication of a risk to life from impact to vital organs, like major arteries, or the skull, or major organs. The evidence about the bleeding in the brain was not explained in terms of its level of risk to life. Many people sustain concussions and strokes without being at risk of imminent death, for example. Similarly, broken face bones and eye trauma do not necessarily indicate an imminent risk of death. The extent of the injuries may not in themselves have indicated to Mr. Alexander that Mr. Ozarko was virtually certain to have died from them, without intervention, since the medical evidence itself does not clearly state that conclusion.

[131] The presentation of the injuries and the way they were inflicted are some evidence relevant to whether there was an intention to kill Mr. Ozarko. The nature of the harm inflicted by Mr. Alexander was a serious aggravated assault on the head and facial area of Mr. Ozarko. As I explained in Element 4 of Count 1, Mr. Ozarko had significant blood loss from multiple, deep injuries, then remained in hospital and required a feeding tube to sustain him over several weeks after the harm. This evidence in itself would not be enough from which to draw a common-sense inference. The evidence only established a *risk* of death, not that death would have been a virtual certainty from the injuries.

[132] The Crown must prove either that Mr. Alexander's direct purpose in inflicting the harm was to bring about Mr. Ozarko's death or that he understood that death was a virtual certainty from his actions: see *R. v. Boone* 2019 ONCA 642 at *para. 81*.

[133] To reiterate, while the evidence established that Mr. Ozarko's life was endangered, the evidence did not clearly indicate that death would have been a virtual certainty from the injuries if left untreated, or that Mr. Alexander understood that was the outcome to expect, or that he in other words had a clear purpose to murder him when he was assaulting him. I am not satisfied beyond a reasonable doubt that he had the intention required to murder Mr. Ozarko.

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Mr. Alexander's abuse of process allegations

[134] During the trial, Mr. Alexander made various allegations from counsel table and through his cross-examinations of the witnesses, relating to his theory that the police abused their powers in doing a shoddy investigation, substituting or losing evidence, failing to test evidence or to test it in a timely manner, substituting or obscuring police officer identities.

[135] First, I note that Mr. Alexander did not file any formal or informal *Charter* applications. However, I am nonetheless considering his arguments as raised.

[136] In terms of the quality of the investigation, it is difficult for the court to evaluate that from the evidence at trial. The court is also informed of the evidence chosen to be led by the parties, so the picture is narrowed to the matters in issue.

[137] In terms of the DNA, as I outlined earlier, it could have been better. Obviously, it would be preferable to have had the original scientist assessor. However, the subsequent review by another expert did not impact the ultimate conclusion put forward. The evidence was that the late submission of the swabs did not impact the test results. In any event, there is no indication that any further or better work on the DNA would have excluded Mr. Alexander as a suspect, for example. It is more likely that further work would have inculpated him, since it is probable that his DNA would have been found in the swab taken from his hand, as a matter of logic. There is no indication that the late testing had any impact on the trial process.

[138] The allegation that the police seized the wrong frying pan was not substantiated. There was no direct evidence from Mr. Alexander, and the police said they found no other frying pan. Moreover, the pan they found was covered in blood, and was in his room.

[139] The allegation that there were two different officers named Arsenault was not substantiated. Officer Arsenault and other police officers were extensively questioned on this topic. They denied any habit, practice or culture of switching names, velcros, badges, identifications, or uniform parts. The body worn camera videos and the booking hall videos establish that Officer Arsenault was only one individual that night. All other people on the videos are accounted for in terms of identity. There was no specific evidence about what this other person was alleged to have done, in any event. This allegation was not established.

[140] The suggestion that Officer Arsenault was not present for the photographs taken of Mr. Alexander's feet is similarly not established. Officer Wu took the photographs and supports Officer Arsenault's observations of Mr. Alexander's feet. There is no indication of more than one parade having happened at the station. The evidence documented that there was an initial search on arrival to have Mr. Alexander take off his bloody clothing, then a parade before Sergeant Hammond as depicted on video, then lodging into an interview room to await FIS photographs, then the FIS entered the room with Officer Arsenault and took the photographs. All activities were documented on video or by photograph, except for when Mr. Alexander stripped on arrival at the station, presumably for privacy reasons. There is no substantiation of the theory that there were multiple parades at the station other than as I have described.

[141] The allegation that there was a black and white video that was omitted from evidence was not established. All witnesses asked about this topic denied that any black and white videos existed,

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explaining that all the videos were in colour, that they did not make black and white videos. There was no evidence filed about the existence of a black and white video. It is very likely that Mr. Alexander thought that some of the body worn camera footage was in black and white. Parts of the BWC videos from the back yard of the rooming house seem like they are in black and white, because there is limited light and the officers are just shining flashlights around, something that Mr. Alexander referenced when he spoke of this alleged black and white video. The issue of the black and white video is not established.

[142] The suggestion that the videos were spliced together or not a true representation of the events is not substantiated. The videos were mostly filed in their entirety, and they run continuously from start to finish, in a logical sequence with the events occurring on screen, concurrent with the timing articulated by the witnesses and the 911 call.

[143] Mr. Alexander pointed out the recordings of officers wearing and fussing with blue gloves as showing a problem in the videos. In Officer Zacheva's body worn camera video, she is seen struggling to put on her gloves, the gloves appeared on and off her hands at different points around the entry to the building.

[144] I have watched the body worn camera videos several times. It is evident, in watching the video slowly and repeatedly, that Officer Zacheva had difficulty putting on the gloves, as she explained in her evidence. It is clearly her own hands in all the video frames from her body worn camera. The gloves were just at various stages of being pulled on or off or adjusted to be fitted on her properly in the first few minutes of filming. This was a distracting feature of the video for Mr. Alexander, but effectively, nothing turns on it. There is no suggestion that Officer Zacheva contaminated the scene and it took her, in the end, mere seconds to properly don them, in an emergency rushed situation. The allegation that there was anything improper about the video evidence is not established. Similarly, the suggestion that videos did not depict the front door glass being broken was not substantiated. The videos are somewhat unclear regarding the door from some angles, because of the lighting. However, from other angles, it is apparent that the glass was broken. Indeed, one of the videos shows the glass being broken. One officer explained that the glass was plexiglass, which explains that it was more bent, and partially breached rather than shattered.

[145] The allegation that an officer sprayed blood on Mr. Alexander was not substantiated. The Crown filed video evidence of the police actions relating to this investigation. The scene and the people were video recorded immediately after the 911 call was received. There was insufficient time or opportunity for anyone to have interfered with the scene such that Mr. Alexander could have been sprayed with blood. The initial videos of Mr. Alexander in his room show that he has blood on him. He was recorded being securely kept in a police car before being brought to the station. All of his custody time prior to his clothing being seized was recorded, except for the clothing change time. There is no air of reality from any documented evidence that Mr. Alexander's clothes or body were sprayed with blood, because no contrary evidence was heard verifying that claim. Even if such a claim had been made, the circumstantial evidence showing its unlikelihood or effective impossibility would have defeated that claim.

[146] Mr. Alexander also claimed he was mistreated during the arrest, that he was overheating, not fed, that his glasses were taken so that he could not see. Mr. Alexander indeed mentioned food,

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although he said that he was not hungry because of adrenaline, and alternately that he was looking forward to eating pork noodles. The evidence of hunger is ambiguous, and there was no evidence about whether or not he was fed that night. In terms of overheating, this may have been the case, but the police were not trying to make him uncomfortable and were not trying to take a statement from him. They purposely did not question him, and they cautioned him not to speak. He never asked for any cooling of the car, and earlier had asked the police for a jacket.

[147] In terms of the glasses, Mr. Alexander acknowledged they were covered in blood and that he was picking off blood from the glasses in court, as the glasses were returned to him from the evidence box so that he could see during the trial. It made sense in the context that the police seized the glasses, although they should have perhaps returned them sooner after photographing or swabbing them. This conduct does not rise to the level of an abuse, however. He also showed that his handcuffs were tight on his wrist. That is an unfortunate reality related to the size of his wrists and mid-section, but the police tried their best to address this at the time by putting on multiple sets of handcuffs to make them bigger. He did not raise the tightness of the cuffs with the officers during the interaction, in a clear way, although he suggested removing them.

Conclusion - all Counts

[148] Mr. Alexander is found guilty beyond a reasonable doubt of Count 1 aggravated assault. He is found not guilty of Count 2 assault with a weapon, Count 3 possession of weapon under s.88, and Count 4 attempted murder.

Boucher J.

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