

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:)
)
HER MAJESTY THE QUEEN) Peter Scrutton and Linda Shin, for the
) Crown
– and –)
)
MICHAEL THERIAULT and CHRISTIAN) Michael Lacy and Deepa Negandhi, for
THERIAULT) Michael Theriault
)
Defendants) Alan D. Gold and Laura Metcalfe, for
) Christian Theriault
)
)
)
) **HEARD:** October 29, 31, November 1, 4, 5,
) 6, 7, 8, 12, 2019, and January 29, 2020

2020 ONSC 3317 (CanLII)

REASONS FOR JUDGMENT

DI LUCA J.:

- [1] In the early morning hours of December 28, 2016, Dafonte Miller suffered a horrific eye injury following an altercation with the defendants, Michael and Christian Theriault. The injury resulted in the loss of his eye as well as associated physical and emotional trauma. Michael Theriault is a police constable with the Toronto Police Service, though at the time of the altercation he was off-duty. Christian Theriault is Michael Theriault’s younger brother. Michael and Christian Theriault are white. Dafonte Miller is a young black man.
- [2] According to Mr. Miller, he and two friends, Antonio Jack and Bradley Goode, were simply walking down the sidewalk when they were approached and questioned by Michael and Christian Theriault. They were asked where they lived and what they were doing in the neighbourhood. Mr. Miller and his friends ran and were chased. Michael and Christian eventually caught Mr. Miller in between two houses and beat him viciously, Michael using a metal pipe and Christian using his hands and feet. Mr. Miller managed to get to the front door of the Silverthorn residence where he was calling for help. He was then struck in the eye with the metal pipe, causing the injury.
- [3] Michael and Christian Theriault advance a very different version of events. According to them, they were in the garage at their parents’ home at 18 Erickson Drive when they

heard a commotion inside one of the vehicles parked on the driveway. They opened the garage door and saw two males inside one of their vehicles. The males ran in different directions. Michael and Christian chased one male, later identified as Mr. Miller. They wanted to arrest him and hold him for police. The chase ended in between two houses at 113 and 115 Erickson Drive, some distance down the street. While in between the houses, Mr. Miller produced a metal pipe and began swinging it, hitting Christian in the head and elsewhere. A violent struggle ensued, and Mr. Miller was eventually subdued. During the course of the struggle, Michael punched Mr. Miller in the face many times, with one of those punches presumably causing his eye injury. He denies ever hitting Mr. Miller with the metal pipe, though acknowledges that he brandished it towards the end of the encounter. The defendants argue that they used reasonable force in an attempt to arrest Mr. Miller and acted in self-defence when he produced the metal pipe and began using it as a weapon.

- [4] Mr. Miller was arrested at the scene and later charged with a number of offences, including theft under \$5,000 and assault with a weapon x2. Those charges were ultimately withdrawn by the Crown.
- [5] Several months after the incident, the Special Investigations Unit (“SIU”) completed its investigation. Michael and Christian Theriault were jointly charged with aggravated assault. They were also each separately charged with attempting to obstruct justice by lying to members of the Durham Regional Police Service.
- [6] The trial in this matter took place over three weeks in October and November of 2019. I then received detailed and helpful written submissions, followed by concise closing arguments on January 29, 2020. These Reasons were originally scheduled to be delivered on April 9, 2020. However, as a result of the COVID-19 pandemic, the delivery of these Reasons was delayed. Scheduling teleconferences were held on May 26, 2020 and June 2, 2020 to canvass options for completing the matter, and all parties agreed that it made practical sense to webcast the proceedings with the virtual presence of the defendants. Notice was provided to the media and other interested parties. I understand that the Victim Witness Assistance Program undertook efforts to advise Mr. Miller and his friends and family about the process and how they could observe the proceedings.
- [7] In what follows, I will review the fundamental legal principles that govern my assessment of the evidence. I will next review the evidence heard at trial and I will make factual and legal findings in relation to each count in the indictment. I will conclude by providing verdicts in relation to each defendant.
- [8] At the outset, I wish to express my gratitude to all counsel, including the students-at-law, for their high degree of skill, meticulous preparation and professionalism. The manner in which this difficult case was conducted stands as a credit to the profession.
- [9] I also want to note one very important feature of my function as a trial judge. This case has attracted significant public and media interest. This interest is welcome as the openness of the court process is one of its core defining principles. It is also welcome

because public and media interest fosters legitimate debate, criticism and change, all of which are essential features of a functioning modern democracy.

- [10] However, and to be clear, my task is not to be swayed or influenced by the attention given to this case. My task is not to deliver the verdict that is most clamoured for. Trials are based on evidence and not public opinion.
- [11] My task is also not to conduct a public inquiry into matters involving race and policing. In stating this, I want to make one thing very clear. I am *not* saying that race has nothing to do with this case. Indeed, I am mindful of the need to carefully consider the racialized context within which this case arises. Beyond that, I also acknowledge that this case, and others like it, raise significant issues involving race and policing that should be further examined. To give but one example taken from the evidence in this case, one could well ask how this matter might have unfolded if the first responders arrived at a call late one winter evening and observed a black man dressed in socks with no shoes, claiming to be a police officer, asking for handcuffs while kneeling on top of a significantly injured white man.
- [12] While this is a question that merits examination, my instant task is more focussed. As a trial judge in a criminal case, I must decide whether the Crown has proven the offences charged beyond a reasonable doubt based on the evidence that was presented in court.

Fundamental Legal Principles

- [13] The defendants are presumed innocent. The presumption of innocence is of fundamental importance in the criminal justice system as it serves to place the burden of proof squarely on the Crown, and also serves to protect against wrongful conviction.
- [14] The presumption of innocence stays with the defendants throughout the trial and is only displaced if I am satisfied that the Crown has proven the charges beyond a reasonable doubt. The Crown has the sole obligation or burden of proving each charge against each defendant individually. Neither defendant has an obligation to prove anything or even to testify.
- [15] The concept of proof beyond a reasonable doubt is also of fundamental importance in the criminal justice system. Proof beyond a reasonable doubt is a very high legal standard. A reasonable doubt is not an imaginary or frivolous doubt. It is not a doubt based upon sympathy or prejudice. Rather, it is a doubt based on reason and common sense. It is logically derived from the evidence or absence of evidence.
- [16] While likely or even probable guilt is not enough, proof to a level of absolute certainty is not required as that standard is impossibly high. That said, while absolute certainty is an impossibly high standard, proof beyond a reasonable doubt falls much closer to absolute certainty than to proof on a balance of probabilities.
- [17] Ultimately, in order to convict a defendant of an offence, I must be *sure* that the defendant has committed the offence. If I am not sure, I must acquit.

Assessing Credibility and Reliability

- [18] There is no magic formula that applies in determining whether a witness is telling the truth. Instead, the witness' evidence is considered using a common-sense approach that is not tainted by myth, stereotype or assumption. There are many factors that may be relevant in determining credibility. Some of the key factors include: whether the witness' evidence is internally consistent, whether it is externally consistent with evidence from other witnesses or exhibits, whether the witness has a bias or motive to give evidence that is more favourable to one side or the other, whether inconsistencies in the evidence are about important or minor matters, what explanations are given for any inconsistencies, and whether the inconsistencies suggest that the witness is lying.
- [19] I am also mindful that there is a distinction between credibility and reliability. Credibility relates to the honesty of the witness' testimony. Reliability relates to the accuracy of the witness' testimony which engages a consideration of the witness' ability to accurately observe, recall and recount an event; see *R. v. H.C.*, 2009 ONCA 56, at para. 41. At times, a witness may credibly recount an observation or occurrence. However, that evidence may lack reliability for a number of reasons, including the conditions under which the witness made the observation as well as the impact of information received by the witness after an event. A witness whose evidence about some factual matter is not credible cannot be relied on to establish that fact. However, the converse is not automatically true as credibility is not a proxy for reliability. A credible witness may, nonetheless, give unreliable evidence; see *R. v. Morrissey* (1995), 22 O.R. (3d) 514 (C.A.), at p. 526.
- [20] In this case, the Crown's central witness is Mr. Miller. The Crown's case is also based on the evidence of a number of other witnesses, including James Silverthorn and Mr. Jack.
- [21] Michael Theriault testified in his defence. The defence also relies on exculpatory statements made by both Michael and Christian Theriault and tendered by the Crown.
- [22] Arriving at a verdict in this case requires that I determine issues of credibility and reliability. In other words, I have to decide whether the witnesses told the truth and if so, whether their evidence can be relied upon as accurate.
- [23] However, and to be clear, this case is not simply a credibility contest between Mr. Miller and the defendants. The issue is not whose evidence I prefer. Rather, the issue is whether the Crown has proven the case against each defendant, on each charge, beyond a reasonable doubt. In making this determination I can accept some, none or all of any witness' evidence. I may find that even though I prefer the evidence of Mr. Miller on some points over the evidence of or supporting one or both defendants, I am left with a reasonable doubt about the guilt of one or both defendants. As well, after careful consideration of all the evidence, I may not know who to believe, in which case, I am also left with reasonable doubt.

- [24] The methodology for assessing the evidence in cases where credibility is a key issue was set out by the Supreme Court of Canada many years ago in *R. v. W.(D.)*, [1991] 1 S.C.R. 742, as follows:

First, if you believe the evidence of the accused, obviously you must acquit.

Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.

Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

- [25] The *W.(D.)* methodology is not a rigid or formalistic rule that requires rote incantation. Rather, it is an analytical framework that serves to emphasize the burden of proof and the presumption of innocence by ensuring that criminal cases are not reduced to credibility contests; see *R. v. J.H.S.*, 2008 SCC 30 and *R. v. C.L.Y.*, 2008 SCC 2.
- [26] In applying the *W.(D.)* methodology, I am mindful of the following additional guidance that has been provided by the caselaw. First, the *W.(D.)* methodology applies not only to instances where the defence calls exculpatory evidence, but also to exculpatory evidence that is found within the Crown's case, for example, where the Crown tenders a statement by a defendant which is in part or in whole exculpatory; see *R. v. B.D.*, 2011 ONCA 51, at para. 105.
- [27] Second, in considering the first two steps of the *W.(D.)* analysis, the evidence of the defendant must be considered in the context of the evidence as a whole, including the complainant's evidence. In other words, the assessment is not simply whether the defendant's evidence standing alone and without context is believed or leaves a reasonable doubt; see *R. v. Carriere* (2001), 159 C.C.C. (3d) 51 (Ont.C.A.) at para. 51, *R. v. Hull*, 2006 CanLII 26572 (ONCA), and *R. v. J.J.R.D.* (2006), 215 C.C.C. (3d) 252 (Ont.C.A.).
- [28] Third, the second step of the *W.(D.)* analysis is important. It emphasizes the point that credibility assessments in a criminal case are not dichotomous. In other words, there is a third alternative between complete acceptance and complete rejection of a defendant's evidence; see *R. v. Edwards*, 2012 ONSC 3373 at para. 20 and *R. v. J.M.*, 2018 ONSC 344 at paras. 9-20.
- [29] Lastly, where the defence advanced contains an objective component, as is the case with self-defence or use of reasonable force in the commission of a lawful arrest, the *W.(D.)* analysis must be modified accordingly. The defendant's evidence will, in such instances, only result in an acquittal where that evidence establishes or leaves the trier of fact with a reasonable doubt about the objective component of the defence; see *R. v. Ryon*, 2019 ABCA 36 at para. 31 and *R. v. Reid*, (2003) 65 O.R. (3d) 723 (Ont.C.A.) at para. 72.

- [30] Applying the *W.(D.)* methodology to the charge of aggravated assault, on which the defendants raise the defence of self-defence (*Criminal Code*, s. 34) and also rely on their legal authority to use reasonable force while making an arrest (*Criminal Code*, s. 25), I must approach the evidence before me as follows. In his testimony before the court and in his original statement to police, Michael Theriault indicated that he used reasonable force during the course of a lawful arrest and acted in self-defence when Mr. Miller used the metal pipe against him and his brother. If I believe his testimony and/or his statement and that evidence amounts, as a matter of law, to self-defence and/or reasonable force during the course of a lawful arrest, then I must acquit him. If I do not believe his testimony and/or his statement but that evidence leaves me with a reasonable doubt about his guilt, I must acquit him. Lastly, even if I completely reject all of the exculpatory portions of his testimony and statement I must, nonetheless, assess whether on the basis of the rest of the Crown's case I am satisfied beyond a reasonable doubt that Michael committed an aggravated assault on Mr. Miller.
- [31] In relation to Christian Theriault, while he did not testify at trial I do have Michael Theriault's evidence as well as Christian's statements to police which support his position. Again, if I believe the evidence in favour of Christian and on that basis accept that he acted in self-defence and/or used reasonable force in the course of a lawful arrest, I must acquit him. Even if I do not accept the evidence that favours his defence in this regard, I must acquit him if, based on the evidence, I am left with a reasonable doubt about his guilt. Lastly, even if I am not left with a reasonable doubt about his guilt based on the evidence that favours him, I can only find him guilty if based on the rest of the Crown's case I am satisfied of his guilt beyond a reasonable doubt.
- [32] In relation to the individual charges of attempting to obstruct justice by giving a false statement to the Durham Regional Police, if I find Michael and/or Christian Theriault not guilty of aggravated assault, I will also find them/him not guilty of attempting to obstruct justice. Even if I am satisfied beyond a reasonable doubt that Michael and/or Christian committed aggravated assault or a lesser and included offence, I must nonetheless go on to assess whether the Crown has proven beyond a reasonable doubt that the statements given to police were not only false, but given with the intent to obstruct justice. This assessment must be undertaken in accordance with the principles of *R. v. W.D.* as discussed.

The Events of December 28, 2016

(i) Dafonte Miller

- [33] At the time of trial, Mr. Miller was 22 years old. On the night of the incident he was 19 years old. He was living in an apartment complex in Whitby with his parents and siblings. He had no criminal record. He was employed on a part-time basis with an environmental services company and he would also occasionally assist a neighbour who worked as an electrician.

- [34] Mr. Miller was friends with Mr. Jack, whom he knew as “AJ”. They had been friends for a few years and had met through Mr. Jack’s older brother. They would hang out and play video games, often two to three times a week. Mr. Miller also knew Mr. Goode as an acquaintance, though they were not close and would not hang out together unless in the company of others.
- [35] According to Mr. Miller, on the evening of December 27, 2016, Mr. Jack came over to his house around 8:30 p.m. They played video games for a while and Mr. Jack left before midnight. Later that evening, Mr. Miller received a telephone call from Mr. Jack who was with Mr. Goode. They indicated that three girls wanted to meet up with them. Mr. Miller agreed to join them and took a shower to ready himself. Mr. Jack and Mr. Goode arrived at Mr. Miller’s home and the three of them set out on foot, leaving shortly after 1:00 a.m.
- [36] Initially, they walked to Noble Selby’s home which was approximately 10 minutes away. Once at Mr. Selby’s home, they smoked some marijuana that Mr. Miller provided. They were on the porch at Mr. Selby’s home, though Mr. Miller and Mr. Selby stepped into the home for a period of time. Mr. Jack may also have entered the home briefly. At some point, Mr. Goode received a phone call from one of the girls who indicated they were not yet ready. Mr. Miller believed the girl that Mr. Goode was speaking with was named “Nicky” or “Vicky”, though he never spoke directly to her.
- [37] Mr. Miller denied that he went to Mr. Selby’s home to buy marijuana and indicated that he had some on him that night. Mr. Miller also denied the suggestion that there was no late night trip to Mr. Selby’s house, and that this trip was concocted to provide an explanation for what Mr. Miller and his friends were actually doing that night.
- [38] According to Mr. Miller, once he and his friends departed Mr. Selby’s home they continued walking, ostensibly to meet up with the girls. Mr. Goode was leading the way as he knew where the girls lived. Mr. Miller was playing “beats” on his phone and they were rapping back and forth. They walked for approximately 20 to 25 minutes. Mr. Miller did not know the area where they were walking.
- [39] As the three of them were walking past a home, Mr. Miller observed two white males standing outside an open and lit garage. One of the males had shorter hair and one had longer hair. Mr. Miller later learned that these two individuals were Michael and Christian Theriault.
- [40] As Mr. Miller’s group approached, the male with the longer hair, Christian Theriault, asked whether they lived in the area. Mr. Jack replied “no” and pointed in the general direction where they lived. Michael Theriault then asked what they were doing in the neighbourhood. Based on the tone of Michael’s voice, Mr. Miller felt like he and his friends were being questioned. In response to the questioning, Mr. Jack started laughing, as did Mr. Miller and Mr. Goode. Michael replied that he was a “cop” and could ask whatever he wanted.

- [41] Mr. Miller then started to leave but sensed that he was being chased. He glanced backwards and “felt like” he was being grabbed so he started running. He could not identify who tried to grab him. Initially, Mr. Miller was running in the same direction as Mr. Jack and Mr. Goode, but eventually he was on his own being pursued by Michael and Christian Theriault. He heard them say “we almost have them”.
- [42] Mr. Miller did not see anything in either Michael or Christian Theriault’s hands when he looked back.
- [43] Eventually, Mr. Miller slowed down and was grabbed by his pursuers. He then “changed direction” and ended up in between two houses. While between the houses, Mr. Miller was grabbed by Christian Theriault who placed him in a headlock. Mr. Miller was facing down and was “pretty much” on the ground. He started feeling hits on his back and “a little bit” on his head. He managed to get out of the headlock and that is when he first saw the metal pipe. The initial headlock and struggle occurred in the area of the flowerbed of the Forde residence.
- [44] Mr. Miller next remembered that he was on the ground facing the fence and was being hit repeatedly with the metal pipe by Michael Theriault. Christian Theriault was also hitting him with his hands and feet, though Mr. Miller could not see him very well.
- [45] As he was being hit with the pipe, Mr. Miller struggled to his feet and made his way to the front door of the Silverthorn residence. He recalled that he was still receiving blows with the pipe even when he was on the porch of the Silverthorn residence. He attempted to block some of the blows using his arms. He did not otherwise fight back.
- [46] According to Mr. Miller, once he made it to the front door he started knocking. He then turned towards Michael Theriault who was holding the metal pipe. He said “you are going to kill me” and he was then hit in the eye with the pipe. He noticed the blood pouring from the wound and saw blood on the ground. When he realized that no help was coming from inside the house, he walked over to the driveway. Michael continued to hit him in the head with the pipe. Mr. Miller made it to a car that was parked on the driveway. During this portion of the incident, Christian Theriault was on the sidewalk, some distance away.
- [47] Mr. Miller ended up on the ground, with his back against the car parked in the driveway. He took out his cell phone and called 911. Michael Theriault was telling him to put the phone down and he eventually grabbed Mr. Miller’s phone. Michael was still holding the metal pipe at this point and he was also holding Mr. Miller down on the ground. Mr. Miller could not breathe and asked to be turned over.
- [48] Mr. Miller agreed that on the 911 call Michael Theriault says, “you’re under arrest” and Mr. Miller responds, “I know”. However, Mr. Miller maintained that his response was not an acknowledgement that he knew he was under arrest. He also maintained that Michael can only be heard saying “you are under arrest” once, and not twice, on the audio

- recording. According to Mr. Miller, the first time he heard anyone tell him he was under arrest was after his eye injury and after he called 911.
- [49] Michael Theriault remained on top of Mr. Miller until uniformed Durham police officers arrived, at which time he was handcuffed and formally arrested. Mr. Miller was then placed against the hood of the car and his pockets were emptied. He had some loose change, a small quantity of marijuana and some other items in his pocket.
- [50] Mr. Miller denied ever using the pipe to assault either Michael or Christian Theriault. He indicated that the only person he saw wield the pipe was Michael. He indicated that he tried to defend himself but was not able to. He denied that he was “car hopping” or breaking into cars with Mr. Jack and Mr. Goode that evening. He indicated that he only found out about the allegations of “car hopping” through either media reports or his criminal charges which include one count of theft under \$5,000.
- [51] Mr. Miller was shown photographs of various items found at the scene. He identified his blood-stained cell phone. He also identified a BIC lighter, his house keys and the key to a Mazda 3, an uninsured vehicle he had recently purchased. He denied that the car key was for a vehicle that belonged to Mr. Jack.
- [52] Mr. Miller initially could not recall wearing the black knit gloves found at the scene. In cross-examination, he specifically denied owning the gloves and indicated that they were too small for his hands based on their size as depicted in the photographs. He agreed that the gloves were located close to the car that was parked on the driveway where he was eventually arrested. He indicated that it was not cold enough that evening to be wearing gloves, and denied that he was wearing gloves that evening in order to avoid leaving fingerprints behind while stealing from cars.
- [53] When shown a photograph of the sunglasses found at scene near the BIC lighter, he initially indicated that they could be his and that they looked like his mom’s sunglasses. However, when shown a photograph of the sunglasses displayed along with other items found at the scene, he indicated that the sunglasses were not his mom’s and that he did not recognize them. In cross-examination, he indicated that he was not wearing sunglasses when he went out that night and that he did not recognize the sunglasses found at the scene.
- [54] Lastly, when shown a photograph of the flashlight found at the scene, Mr. Miller initially indicated that it was not his and he could not say what the object was. When it was suggested to him that it was a manual charging flashlight, Mr. Miller explained that if it was in his sweater it “could belong” to his brother. He agreed that at the preliminary inquiry he had identified the flashlight as being his. However, he specifically denied using the flashlight that night.
- [55] Mr. Miller was also asked about the change found in his pockets and on the ground at the scene. He explained that he went to a convenience store prior to going to Mr. Selby’s residence. He recalled buying a number of specific items totalling \$12 to \$13. He further

recalled paying with a \$20 bill and receiving the change in coins. When asked about the \$5 bill found in his pocket, he indicated that the \$5 bill was “change” from buying marijuana. When shown a photograph of other change found at the scene, Mr. Miller added that he also had that additional change in his possession that evening. He denied that the change was stolen from cars.

- [56] Photographs of the injuries were taken at the scene by police (Exhibit 2, Tab 2) and at the hospital by Mr. Miller’s mother (Exhibit 2, Tab 5). The “hoodie” sweater worn by Mr. Miller on the night of the incident was also photographed. The photographs reveal significant blood stains along the sleeves, cuffs and lower front portion of the sweater (Exhibits 22(a-c)).
- [57] When asked to describe his injuries, Mr. Miller explained that his left eye was “burst, like split four ways”. He explained that he had damage to the structural bones around his face including his forehead, cheeks and jaw, his wrist was broken, and he had related physical problems including a very sore back and bruises. He lost vision in his left eye and also had difficulty seeing out of his right eye. He was advised by doctors that there was a risk of further vision loss due to the build up of pressure.
- [58] Mr. Miller had initial surgery done at the Bowmanville Hospital immediately following the incident. He was then discharged to recover at home. In the weeks following the incident, Mr. Miller suffered pain everywhere. He could not stand for long periods of time, he was sensitive to light and vomiting a lot. At night when he slept, his eye would bleed out and Mr. Miller’s mother would help him clean it. His hand was numb, and he had many bruises. This general state of pain lasted for “a couple of months”.
- [59] Mr. Miller later went to have his wrist x-rayed and he learned that it was fractured. He was also advised that his blood circulation had been cut off when the handcuffs were placed on too tight and that he had suffered nerve damage as a result.
- [60] Follow up surgery was done in March or April of 2017 at Sunnybrook Health Sciences Centre. During this surgery, Mr. Miller’s damaged eyeball was removed and he was later fitted for a prosthesis.
- [61] When asked about his current health, Mr. Miller explained that the injuries have mainly healed. However, he noted that his right eye gets fatigued and hurts at times and he needs to use eyes drops in his left eye. He explained that further surgery will be required on his eye, though it is not currently viewed as urgent. He explained that he currently feels stronger and like he now “is in a good place”. That said, he is more careful about his surroundings and is reluctant to go outside and be around people.
- [62] In cross-examination, Mr. Miller was asked about certain photographs of his injuries that were released to the media by his counsel. He agreed that one photograph shows a scar on his back, though he agreed that the scar was unrelated to the incident. He denied any knowledge that his counsel released this photograph on his behalf. He was also challenged on the fact that two photographs of his back taken some five months apart

appear essentially identical, despite Mr. Miller's claim that the first photograph taken shortly after the incident shows "swelling".

- [63] He was also asked about a complaint that had been filed in his name with the Office of the Independent Police Review Director ("OIPRD"). He acknowledged that the complaint included a certification of truth and further acknowledged that the complaint included information that came from Mr. Jack. However, he denied knowing what Mr. Jack's version of events was, and further denied having spoken to Mr. Jack about the details of the events.
- [64] Mr. Miller was asked about his knowledge of Mr. Goode's version of events. He denied knowing that Mr. Goode testified at trial. Mr. Miller was asked about an application that had been filed by his counsel at the preliminary inquiry. The application sought an adjournment of the preliminary inquiry so that Mr. Miller could be "properly" prepared to testify by the Crown. Mr. Miller denied knowledge of this application and further denied knowing that the application was related to the nature of Mr. Goode's testimony at the preliminary inquiry.
- [65] Mr. Miller was also asked about the fact that his civil counsel had disclosed to Crown counsel that Mr. Miller had heard that Mr. Goode was connected with the defendants' younger brother. Mr. Miller explained that when he heard this rumour, he concluded that this was the explanation for why Mr. Goode had not come to see him after the incident. Mr. Miller maintained that he asked Mr. Jack to help him locate Mr. Goode, which Mr. Jack denied.
- [66] Lastly, Mr. Miller was cross-examined about an incident where he was alleged to have made a threatening gesture towards the owner/manager of a restaurant. This incident first came to light when it was brought to the Crown's attention by Mr. Miller's civil counsel, who indicated that Mr. Miller had been visited by the Durham Police in relation to the incident but denied having done anything. In cross-examination, Mr. Miller initially denied ever having made a threatening gesture. He was then confronted with a surveillance video taken from the restaurant where the incident happened. The video clearly shows Mr. Miller making a gun-like gesture with his fingers towards the owner/manager. Having watched the video, Mr. Miller explained that he now recalled that he was walking with a friend and having a discussion about a shooting involving some children, and that the gesture was made in the context of that discussion.

(ii) Dafonte Miller's Friend, Antonio Jack

- [67] Mr. Jack was a classmate and friend of Mr. Miller's. He lived in the same area as Mr. Miller and they would see each other every day to hang out, play basketball or play video games. He also knew Mr. Goode but was not as close with him. He would not see Mr. Goode as regularly as Mr. Miller.

- [68] On December 27, 2016, Mr. Jack went to Mr. Miller's house to hang out. While he was walking there, he ran into Mr. Goode near the No Frills grocery store. It was sometime in the afternoon.
- [69] Once at Mr. Miller's house, they played a videogame known as "2K". They also smoked marijuana and ate pizza. That night, they decided to go to visit another friend, Mr. Selby, to get more marijuana as they had run out. The walk from Mr. Miller's house to Mr. Selby's house was approximately 25 to 30 minutes. Once there, they hung out with Mr. Selby and smoked some marijuana. However, Mr. Selby did not have any marijuana to sell so he gave Mr. Miller the contact for another person who might have some for sale. Mr. Miller, Mr. Goode and Mr. Jack, left Mr. Selby's house after about an hour and they used Google maps to find the route to the location of the contact provided by Mr. Selby.
- [70] According to Mr. Jack, he was following behind Mr. Miller and Mr. Goode who were listening to some "beats" on a phone and rapping. Mr. Jack was also on his phone talking to his girlfriend. He was a distance of approximately two houses behind Mr. Miller and Mr. Goode. As the three of them were walking, two guys came out of a garage and approached Mr. Miller and Mr. Goode. Mr. Jack heard what sounded like an argument in a loud pitched voice. He asked Mr. Miller if he was okay and Mr. Miller replied "yes." Mr. Jack denied being present alongside Mr. Miller and Mr. Goode when this interaction occurred. He denied hearing the questions asked by the persons who came out of the garage. He denied laughing during this interaction.
- [71] Mr. Jack then saw two or three white males run out of the garage towards them. Mr. Jack recalled that one male ran after Mr. Goode and two males ran after Mr. Miller. One of the white males who started chasing Mr. Miller had something in his hand that looked like a silver pole. Mr. Jack also ran.
- [72] Approximately 15 to 20 minutes later he saw Mr. Goode at a traffic light and caught up to him. He and Mr. Goode then walked to Mr. Miller's house to retrieve a telephone charger they left behind in the garage. While on the way, they tried calling Mr. Miller's phone. Once at Mr. Miller's home, they ran into Mr. Miller's mother who happened to be taking out the garbage at approximately 3:30 a.m. According to Mr. Jack, Mr. Miller's mother asked where Mr. Miller was and Mr. Jack indicated that he did not know. He made no mention of seeing a guy with a silver pole chasing Mr. Miller.
- [73] Ms. Leisa Lewis, Mr. Miller's mother, denied having any discussion with Mr. Jack in the early morning hours of December 28, 2016. She did not see and was not aware that Mr. Miller had any friends over earlier that evening, though she would not have known if someone came over after she went to bed. The first she heard about the incident involving her son was when she received a call from the Bowmanville Hospital in the early morning hours of December 28, 2016.
- [74] According to Mr. Jack he next heard from Mr. Miller two or three days later, and that is when he first learned that Mr. Miller had suffered an eye injury and had been charged in the incident. Mr. Jack was initially reluctant to give a statement to police as he was

violating the terms of a bail order that evening. However, a few months later, he met with Mr. Miller's lawyer and provided a statement.

- [75] In cross-examination, Mr. Jack was confronted with a number of inconsistencies in his version of events. He agreed that he initially told Mr. Miller's lawyer that when Mr. Miller was chased, he and Mr. Goode just stood there and tried calling Mr. Miller's cell phone. He also agreed that he later told the SIU investigator that both Mr. Miller and Mr. Goode ran, though he did not run. He agreed that he told Mr. Miller's lawyer that after Mr. Miller ran off, he called his own mother who came to pick him up and he told her what had happened. Lastly, he agreed that at the preliminary inquiry he testified that he had not seen a weapon in the hands of the male who pursued Mr. Miller, and he acknowledged that prior to testifying at trial he was visited by an SIU investigator who asked him whether he recalled telling the SIU that he had initially seen the male with a pipe in his hands when the confrontation occurred. While Mr. Jack could not recall the specifics of this conversation, he agreed that he lied at the preliminary inquiry and now recalled seeing the weapon in the male's hands. He could not provide a reason for why he might have proffered this lie at the preliminary inquiry.
- [76] Mr. Jack was asked about the timing of his version of events. He agreed that he, Mr. Miller and Mr. Goode were at Mr. Selby's house for approximately 20 minutes, and that the latest time for this to happen would have been at 10:00 p.m. He was confronted with the fact that the distance between Mr. Selby's home and the Theriault home was less than a 20 minute walk. When asked to explain why, on his version of events, it took them approximately four hours to cover this distance, Mr. Jack replied that his timing was off. He denied that this time was actually spent stealing items out of cars.
- [77] Mr. Jack was asked whether he owned a car at the time. He indicated that he had just bought a car but was not driving it as it had no plates. He indicated that he gave the key to the car to Mr. Miller, but when asked why he would give Mr. Miller a key for a car that had no licence plates, Mr. Jack indicated that Mr. Miller was "probably" just holding it for him.
- [78] Mr. Jack was also asked about discussions he may have had with Mr. Miller about the incident. He maintained that he and Mr. Miller did not discuss matters in detail. Mr. Miller told him that he was hit in the eye with a pole and lost his eye as a result. He indicated one of the people in the garage was a police officer. Mr. Miller mentioned that he had been accused of stealing car keys from a car.
- [79] Mr. Jack agreed that Mr. Miller asked him to get in touch with his lawyer. He initially did not contact the lawyer, though he eventually spoke with her. He could not recall the details of how he eventually came into contact with the lawyer. Mr. Jack also agreed that he did not contact Mr. Goode to see if he could assist, though he denied that this was because he was concerned that Mr. Goode would not "stick to the story".

[80] Mr. Jack denied that he was lying at trial. In particular, he denied that he and Mr. Miller were “car hopping” on the evening of the incident. He further denied that he was lying to protect and/or support Mr. Miller.

[81] At the time of trial, Mr. Jack was in custody serving a sentence of 2 years less 1 day for firearms offences. His criminal record was admitted as Exhibit 19.

(iii) Dafonte Miller’s Acquaintance, Bradley Goode

[82] Mr. Goode was an acquaintance of Mr. Miller, having met him through Mr. Jack. At the time of the incident, Mr. Goode did not really know Mr. Miller very well. While Mr. Goode was friends with Mr. Jack, he also did not know him very well and they only hung out “a couple of times”.

[83] On December 27, 2016, Mr. Goode met up with Mr. Miller and Mr. Jack as he was walking to the store near his mother’s house. Mr. Goode was not sure what time they met up, but indicated that it was after sundown. Mr. Miller and Mr. Jack indicated that they were going to steal valuables from cars and invited him to join them. The request came from Mr. Miller, though Mr. Goode could not recall the exact words that were spoken. Mr. Goode agreed to join them and they proceeded to walk through a cornfield towards a new subdivision. They did not go to Mr. Selby’s house.

[84] Once in the new subdivision, they walked around trying doors on various cars to see if they had been left unlocked. Mr. Goode entered three or four cars and believed that Mr. Miller and Mr. Jack also entered a few cars. Mr. Goode estimated that between the three of them, they entered between 10 to 15 cars that evening.

[85] At a certain point, Mr. Goode was no longer interested in entering cars and he fell back from Mr. Miller and Mr. Jack. They were walking ahead of him and they entered a truck parked on a driveway in front of a house. Mr. Goode “believed” he saw a garage door open. He then saw Mr. Miller and Mr. Jack exit the truck, shut the doors and start running. Mr. Goode saw two guys giving chase. He did not see either of these persons holding a metal pipe. Mr. Jack ran towards Mr. Goode and Mr. Miller ran the other way. Mr. Goode also started to run and he was soon surpassed by Mr. Jack.

[86] Approximately one block away, Mr. Goode heard Mr. Jack call out his name. Mr. Jack was hiding in a back yard. He came out and they called a cab to return to the area of their residence. At this time, there were police “everywhere”.

[87] A few days after the incident, Mr. Goode spoke with Mr. Jack and was told that Mr. Miller’s eye had been “messed up”. Mr. Goode had no further conversations with either Mr. Jack or Mr. Miller.

[88] In cross-examination, Mr. Goode confirmed that he had never been approached by either Mr. Miller or someone on Mr. Miller’s behalf following the incident. He was never asked to give a statement to Mr. Miller’s lawyers. While he initially was not interested in giving a statement, he eventually agreed to meet with the SIU and “tell the truth”.

(iv) Noble Selby

- [89] Mr. Selby was a friend of Mr. Miller. They met in Grade 9 and would see each other on a weekly basis to hang out and play video games.
- [90] According to Mr. Selby, he met up with Mr. Miller at a Chinese food restaurant shortly after Mr. Miller had been injured. They had a brief discussion, but Mr. Miller did not tell Mr. Selby how his eye had been injured. Mr. Selby denied that Mr. Miller asked him to support his version of events.
- [91] Prior to the meeting at the Chinese food restaurant, the last time Mr. Selby saw Mr. Miller was possibly a “couple days” before the eye injury occurred, though he was not certain on the timing. It was outside his house in the front yard, and it was not dark outside. Mr. Miller was there alone. They had a brief conversation about some girls that lived down the street and Mr. Miller left soon thereafter. Mr. Selby identified one of the girls as “Becka” and indicated that Mr. Miller knew where she lived. Mr. Selby did not recognize the names “Antonio Jack”, “AJ” or “Bradley Goode”. He denied knowing them and denied ever having sold marijuana to them.

(v) James Silverthorn – 113 Erickson Drive

- [92] Mr. Silverthorn is the owner of the home located at 113 Erickson Drive. He is a District Chief of Fire Prevention with the Toronto Fire Department where he has been employed for approximately 30 years. While he has resided on Erickson Drive for 27 years, he does not know the Theriault family who live nearby. He also does not know Mr. Miller.
- [93] On December 27, 2016, Mr. Silverthorn went to bed between 10:00 and 11:00 p.m. as he was scheduled to work the next day. He was awakened during the night by the sound of voices screaming and yelling. Given the volume, he initially thought someone was inside his home, but soon realized that the noise was coming from the west side of the house. He went into his upstairs bathroom and peered out the bathroom window. From this vantage point he could see the wall of the neighbour’s house, and he was able to see two individuals with their backs to him swinging their arms and throwing punches at a third individual who was up against the neighbour’s wall, near a fireplace “jut out” and raised flowerbed. Mr. Silverthorn marked a photograph, Exhibit 7, showing the approximate location of the individuals he observed throwing the punches.
- [94] The punches appeared hard and were being delivered rapidly with “just the time needed to pull the arm back”. The punches were landing on the recipient’s torso area, and not the face. Mr. Silverthorn could not see what the recipient of the punches was doing, though it did not appear that he was responding violently or aggressively. Mr. Silverthorn was concerned that the recipient was being beaten by two people and was concerned that the recipient could get injured or killed.
- [95] Mr. Silverthorn agreed that it was dimly lit but maintained that he could clearly see three individuals. He denied that he could only see shadows, though agreed that he used this language in a previous statement. He further agreed that he could not see the skin colour

of the persons involved at this point. The bathroom window has shutters that can be opened but Mr. Silverthorn did not open them. Instead, he peered through the opening of the shutters by putting his face up against the slats.

- [96] After a short period of time in the bathroom, Mr. Silverthorn went downstairs to the main floor of his house. He was standing in the foyer to his living room. He could hear a mixture of screaming and yelling and was concerned that there were many people outside, perhaps a gang. He then instructed his wife to call 911.
- [97] While in the foyer area of his home, Mr. Silverthorn observed one male come between the houses and head towards the street. He also saw a black male at his front door. The male was banging very hard on the door and screaming “Call 911”. Mr. Silverthorn recalls hearing “Call 911” several times. It was the first phrase he was able to discern during the screaming and yelling.
- [98] According to Mr. Silverthorn, the black male was banging so hard that Mr. Silverthorn was concerned that the front doors would open and the people outside would enter his home. Both he and his son, who was standing nearby, picked up ceramic statues to use as makeshift weapons in case the front doors gave way.
- [99] At a certain point, the black male moved away from the door. Mr. Silverthorn went back upstairs and took the phone from his wife who was on the line with 911. He walked over to the centre window of the upstairs floor, which looks out over the front doors and entrance walkway of the home. From this vantage point, Mr. Silverthorn could see his wife’s SUV parked on the driveway. He observed an individual down on the ground between the SUV and the snow bank on his front yard. He also observed another male standing nearby holding what appeared to be a silver or white metal pipe in his hand. The pipe appeared to be approximately four feet long.
- [100] According to Mr. Silverthorn, when the individual on the ground would try to get up, the individual holding the pipe would “stab” it downwards to keep the individual on the ground. Mr. Silverthorn described the action of the individual with the pipe as a “rapid push down”.
- [101] Mr. Silverthorn also observed a third individual who he described as smaller than the individual holding the pipe. This smaller individual was initially near the larger individual, but then moved down towards the street where he was pacing back and forth while on a cell phone. After refreshing his memory from the 911 call, Mr. Silverthorn recalled that the smaller individual was wearing shorts, which was unusual given the time of year. Mr. Silverthorn also explained that when he said on the 911 call that one guy was “bent over the car”, he meant to describe his observation of the individual who was on “all fours” on the driveway. He further explained that when he told the 911 operator that it looked like the person was going to be struck “again”, it was a reference to an earlier strike with the pipe that he had observed but had not verbalized.

- [102] Following the 911 call and the arrival of the Emergency Medical Service (“EMS”) and police, Mr. Silverthorn went outside and spoke with a female police officer. Since the incident occurred on his property, he felt it was appropriate to introduce himself as the property owner. He also wanted to get an incident number for insurance purposes as the front door had been damaged. He had a discussion with a female police officer and told her about his observations. In cross-examination, he denied telling this officer that it was the white male with the black toque who was saying “Call 911” and not the black male at the door.
- [103] In the morning, Mr. Silverthorn went back outside his residence to look around. He observed damage to his front doors. In particular, he noted that the frame around the glass window was cracked and the window had gouges in the glass. He also noted that the door handle screw had been pulled loose. The door was not damaged prior to the incident.
- [104] The front door as it looked on December 28, 2016, can be seen in photographs 73, 78, 81 of Exhibit 2, Tab 2. The damage to the door can be seen in photograph 82 of Exhibit 2, Tab 2. It can be better seen in photograph 954015 of Exhibit 18, which is a series of photographs obtained from Mr. Miller’s counsel.
- [105] While looking outside, Mr. Silverthorn observed blood in several locations including the hood of his wife’s SUV, around the front door area and along the stone walkway in front of his house. He also observed an area of disturbed bricks around the flowerbed of his neighbour’s house near the fireplace “jut out”. The bricks were not disturbed prior to the incident.
- [106] When shown the metal pipe, Mr. Silverthorn indicated that it did not look like something associated with his or his neighbour’s property. That said, when shown photographs of other items stored by the side of his neighbour’s house, he agreed that he had not looked at the side of the house during the winter and did not know what was stored back there at the time.
- [107] In April of 2017, Mr. Silverthorn was contacted by Mr. Miller’s counsel who asked for his permission to attend at the property to take photographs in support of a civil action that was contemplated. When these photographs were being taken, Mr. Silverthorn observed what he believed to be additional blood stains on the side wall of his house and eaves downspout (Exhibit 18, photographs 94937 and 94952).
- [108] At some point after the preliminary inquiry, members of the SIU also attended at Mr. Silverthorn’s house to take photographs. Some of the photographs they took were from the bathroom window where he made his initial observations. Those photographs were taken during the day, with the shutters opened and the lights on. No photographs were taken from the upstairs hallway looking out to the front of the house. No photographs were taken at night so as to replicate the conditions under which Mr. Silverthorn made his observations.

- [109] In cross-examination, Mr. Silverthorn's recollection was challenged on the basis that he had reconstructed some of his observations based on knowledge later obtained from other sources. He maintained that he had a clear recollection of two individuals punching a third individual at the side of the house. He also maintained that he had a clear recollection of seeing one individual holding and using the metal pipe. His observations of the use of the pipe were contemporaneous with the 911 call and he was essentially narrating what he was watching during the call.
- [110] Mr. Silverthorn was challenged on whether the narration provided during the 911 call was the most accurate version of events. He explained that it was not entirely accurate, as he was upset when making the call and now realized that he had not completely expressed what he was seeing. He agreed that his current recollection was inconsistent with what he said on the 911 call. In particular, he agreed that he did not mention a person using the pipe in an aggressive stabbing fashion. He explained that when he said in the 911 call that it looks like the person with the pipe is going to "strike him again", he actually meant "stab down" with the pipe. He agreed that he initially said that there were "two guys fighting", but explained that what he observed was two guys fighting a third guy. He agreed that he described an individual in shorts crouching as he appeared to be possibly hurt. He explained that in the heat of the moment, he described his observations as best as he could. He was holding back emotions and ultimately used language that did not best describe what he was observing.

The *Voir Dire* on James Silverthorn's Prior Consistent Statement

- [111] During Mr. Silverthorn's evidence, the Crown elicited a prior consistent statement that Mr. Silverthorn gave to Cst. Gendron at the scene. The statement was to the effect that "just because someone breaks into a car doesn't mean you can try to kill them". Mr. Silverthorn agreed that this statement was essentially an opinion based on his observations of the incident, and the information he received from the 911 operator that the incident appeared to be related to a theft from a motor vehicle.
- [112] The Crown argues that the fact that this spontaneous comment was made to a uniformed police officer in the immediate aftermath of the incident is probative of Mr. Silverthorn's credibility and reliability, particularly the accuracy of his memory of the event. The Crown also notes that this statement was made months before Mr. Silverthorn learned of the extent of Mr. Miller's injuries.
- [113] In my view, there is no probative value to the statement. The statement amounts to an expression of a lay opinion coupled with a value judgment. Mr. Silverthorn is essentially telling the police officer, perhaps in colloquial terms, that based on his observations it appeared as though the defendants were trying to "kill" Mr. Miller. He is further expressing his view that just because Mr. Miller was breaking into cars, the defendants were not justified in using the degree of force he observed.
- [114] At trial, Mr. Silverthorn provided direct evidence about his observations of the incident, including the degree of force used. He was, quite properly, not asked to opine on whether

the force used was justified. Nor was he, again quite properly, asked to opine on what the defendants' intent was based on what he observed.

- [115] Leaving aside the opinion and value judgment expressed in the utterance, the fact that the utterance was made shortly after the observations, at best, supports the inference that Mr. Silverthorn observed a violent interaction between the defendants and Mr. Miller. However, there has been no allegation of recent fabrication and the statement has no role to play in neutralizing such a challenge to Mr. Silverthorn's evidence. The utterance also does not provide required context or narrative to Mr. Silverthorn's evidence. In short, this is not an instance where the statement fits within one of the permissible exceptions for the admissibility of a prior consistent statement, nor is it a scenario where the statement should be admitted on a principled basis; see *R. v. Khan*, 2017 ONCA 114. I decline to rely on it.

(vi) Michael Hastie and David Silverthorn

- [116] Michael Hastie lives with his parents across the street from the Silverthorn residence. On December 28, 2016 at approximately 2:30 a.m., he was awoken by loud sounds outside. He looked outside his window and saw a person "propped up" on the hood of a car "looking weak", with two other individuals "on guard" looking like they were keeping the person in place. He heard someone say "Call 911" on more than one occasion. He also heard someone say "Stop" or "Stay there. Don't go anywhere". Mr. Hastie placed a call to 911 and was advised that a number of calls had already been made.
- [117] Mr. Hastie could see that one of the individuals was holding what appeared to be a metal cylinder or pipe. Mr. Hastie agreed that he did not have a clear sight line from his vantage point. He was groggy from having been asleep and it was also dim outside which made it hard to see. However, he indicated that he did not observe the metal pipe being used to strike or prod anyone. It was just being held. His observations lasted for approximately 15 minutes, though this was just an estimate.
- [118] Mr. Hastie also agreed that prior to speaking with the SIU, he had two or three discussions with James Silverthorn about what had happened. During one of these discussions, Mr. Silverthorn mentioned that the incident involved some form of "car hopping", and that an "off duty police officer" who lived near them had taken matters into his own hands. Mr. Hastie also eventually learned that an individual involved in the incident had suffered a significant eye injury and he discussed this with Mr. Silverthorn. On this issue Mr. Silverthorn agreed that he had some discussion with Mr. Hastie, though he denied discussing specific details of his observations. He denied telling Mr. Hastie that the incident involved "vigilante justice". He denied that there was some sort of meeting between neighbours where the incident was discussed.
- [119] David Silverthorn, Mr. Silverthorn's son, indicated that he was awoken by loud sounds at the side of his home, though he did not make any observations at that location. He next heard loud knocks on the front door to the home. The door was "shaking," and he could

hear “let me in, let me in”. David was concerned that the person might be a burglar and he initially did not believe that the person was actually in need of assistance.

[120] David went to his bedroom and made further observations from that vantage point. He saw one person hunched over his mother’s vehicle which was parked in the driveway. He saw two other persons. One was doing nothing and the other was holding a pipe. He told his father Jim that he could see a person holding a pipe. He did not see the person with the pipe do anything with it other than hold it. His father told him he could see two people, but David pointed out that there were three.

(vii) Michael Theriault’s Account

i. Statement to Police

[121] Once Mr. Miller was arrested and turned over for medical attention, Michael Theriault was approached by Cst. Sean McQuoid of the Durham Regional Police Service. Christian Theriault was also present. Cst. McQuoid asked what happened and Michael indicated that he and his brother were in their garage having a cigarette when they heard noises outside. They went to investigate and saw two persons inside their vehicle. They chased after one of the persons, who eventually ran in between 113 and 115 Erickson Drive. Michael indicated that the person attempted to scale the fence in between the houses and he body checked him against the fence. The person then produced a pipe which he swung at both of them. Michael indicated that he tried calling 911 during the struggle but lost his phone. He also indicated that he eventually managed to get the pipe off the person. The male went to the door of the house. Michael thought he had a “second breath” and was going to run again so he put him to the ground.

[122] This initial statement was not taken verbatim and was not initially recorded in Cst. McQuoid’s memo book, though it was included in a later supplementary report. Once Cst. McQuoid was finished with Michael Theriault he next spoke with Christian Theriault. While Michael and Christian were in the same general area when speaking with Cst. McQuoid, they were spoken to individually. Cst. McQuoid explained that he moved the individual he was speaking to aside so as to keep the discussions independent.

[123] Later that morning, at approximately 3:34 a.m., Cst. McQuoid was tasked to take a statement from Michael Theriault. The statement was taken while he and Michael were seated in a police vehicle. The statement was typed into a police computer in the vehicle.

[124] In this statement, Michael Theriault explains that he and his brother Christian were in the garage having a cigarette when they heard what sounded like someone going through their truck. They opened the garage door and Michael rolled under the door with his brother following him. Upon exiting the garage, Michael saw the male he later arrested, Mr. Miller, leaving the driver’s seat of the vehicle. In his peripheral vision, he saw another male exit the passenger’s side of the vehicle.

[125] They pursued Mr. Miller as he ran eastbound on Erickson Drive, and eventually followed him in between the houses at 113 and 115 Erickson Drive where they observed him

attempt to climb the fence. According to Michael Theriault, he then “ran into him”. Michael described what happened next as follows:

At this time the male pulled out a pole, umm he immediately started to swing at me and hit me an unknown amount of times. I feared for my life and attempted to steal the pole, the weapon from the male as he was hitting me. During the struggle my brother intervened to assist. Another struggle ensued. And in the midst of the struggle I attempted to call 911. All three of us were fighting and I did not know if the male had another weapon on him possibly a knife and due to the close encounter I lost my phone and feared for my brother’s life.

- [126] Michael Theriault explained how the male proceeded to the front door of 113 Erickson Drive where he rang the door bell and “slammed on the door”. Michael indicated that he yelled out “Call 911” several times. The male then walked away from the front door and placed his hands on the hood of the car that was parked on the driveway. Michael told him several times to get down on the ground and when he did not, Michael grabbed him and put him to the ground, placing a knee on him.
- [127] Michael Theriault advised Cst. McQuoid that he did not identify himself as a police officer as he “did not have a chance to”. He indicated that he and his brother were fighting for their lives. Michael did not see where the metal pipe came from, though he indicated “[l]ooking after it appears he took the pole from the gas line at 113”.
- [128] Cst. McQuoid noted no odour of alcohol when speaking with Michael Theriault either outside at the scene or later when taking the statement inside the police vehicle. According to Cst. McQuoid, Michael appeared shaken up and expressed concern about his brother’s well being.

ii. Evidence at Trial

- [129] At the time of the incident Michael Theriault was 24 years of age. His brother, Christian, was 21. Michael was employed as a police constable with the Toronto Police Service. He became a police officer in 2014. Prior to becoming a police officer, he worked in parking enforcement for two years.
- [130] The home at 18 Erickson Drive is his parents’ home. He grew up at the residence, though in December of 2016 he was living elsewhere. His brother, Christian, and a younger brother, Mitchell, lived at the residence with the parents and a grandmother.
- [131] On December 27, 2016, an uncle was visiting from Saskatchewan and the family had gathered at the family residence for dinner and socializing. At a certain point in the evening, Michael and Christian Theriault and their uncle were playing video games in the basement. Michael and Christian were smokers, and they would smoke in the garage which was attached to the house through a laundry room door. Michael recalled having two glasses of wine with dinner and no further alcohol after dinner. He agreed that

Christian was drinking that night, though he did not see how much. In his view, Christian was not drunk.

- [132] In the early morning hours, Michael and Christian Theriault went to the garage to smoke. They were not drinking in the garage. Michael was wearing jeans, a shirt and socks without shoes. Christian was wearing shorts, a sweater, running shoes and a toque. Neither was wearing a winter jacket. The main garage door was closed.
- [133] While smoking in the garage, Michael and Christian Theriault heard the sounds of a truck door closing. On hearing the noise, Michael concluded that someone was in one of their trucks on the driveway and was either stealing things or perhaps trying to hotwire the truck.
- [134] Michael told Christian to activate the electric garage door opener and as the door was slowly opening, Michael rolled out under the door onto the driveway. He wanted to get under the door as quickly as possible in order to confront whomever was in the truck by surprise. He agreed that when he did so, he did not know if the person or persons in the truck had weapons, were high on drugs or struggling with mental health issues. He indicated that he “just made a decision” and was not thinking about the risks. When pressed on this issue, Michael repeatedly asserted that he did not know what was happening on the other side of the door. He denied thinking about the need to have a weapon, and specifically denied taking the metal pipe from his garage for this purpose. He also denied that rolling out under the garage door was a tactical move, suggesting that he only did it to get out quickly.
- [135] As he stood up on the driveway, he saw two males exiting the vehicle, one from each side. The males started to run. One of the males ran north and one ran east. Michael Theriault pursued the male who exited the driver’s side of the vehicle. This male ran east.
- [136] According to Michael Theriault, his intention was to apprehend this male and then await the arrival of Durham Police. He denied that his intent was to catch and teach the male “a lesson”.
- [137] Michael Theriault agreed that the pursuit covered a distance of approximately 130 metres. He was hesitant to indicate how long the pursuit lasted, but agreed that an Olympic sprinter would cover 100 metres in approximately 10 seconds and that therefore, this pursuit was longer. At no time while pursuing the male, who was later identified as Mr. Miller, did Michael identify himself as a police officer or call out words of arrest. While Christian recalled hearing Michael say “stop, stop, stop”, Michael had no recollection of doing so.
- [138] Michael Theriault agreed that it would have been helpful to identify himself as a police officer and to call out words of arrest in accordance with his training, but maintained that the incident unfolded rapidly and he simply did not have the opportunity. When pressed on this issue, Michael agreed that he had sufficient time to identify himself as a police officer but it just was not on his mind. When asked whether he did not identify himself as

a police officer because he was acting in a civilian capacity, Michael indicated that he was not thinking about the distinction between acting in a civilian capacity versus acting in a police capacity. He further denied thinking that his training did not apply as he was acting in a civilian capacity. He agreed that had he identified himself, Mr. Miller might have stopped and submitted to an arrest. That said, he denied the suggestion that the real reason why he never identified himself as a police officer was because his true intention was not to effect an arrest but instead to administer “street justice”.

- [139] According to Michael Theriault, Mr. Miller was running at full speed. It appeared that he was fleeing and did not want to be caught. In cross-examination, Michael agreed that despite the fact that it was dark, he never lost sight of Mr. Miller while chasing him. He did not see Mr. Miller holding the pipe while running and saw no signs of a weapon. Lastly, he agreed that during this part of the incident, neither he nor his brother were in danger. Their concern was simply to apprehend Mr. Miller. When asked why he did not call 911 at this point, Michael explained that he wanted to apprehend Mr. Miller before he escaped.
- [140] The chase progressed to the homes located at 113 and 115 Erickson Drive. Once there, Mr. Miller ran in between the two homes and tried to climb the fence that demarcates the back yard. Michael Theriault was in close pursuit and as Mr. Miller attempted to climb the fence, he “body checked” him. Michael did not try to grab Mr. Miller. He said nothing to him at this time. He denied that the reason he body checked Mr. Miller instead of grabbing him was because he was holding the pipe and therefore could not use his hands to grab him.
- [141] Right after he body checked Mr. Miller, Michael Theriault “started getting hit by something”. It felt like a weapon and not fists. Michael backed up and saw something in Mr. Miller’s hand. Michael did not see where the weapon came from. He did not see Mr. Miller retrieve it from anywhere, nor did he see it in Mr. Miller’s hands when Mr. Miller attempted to scale the fence.
- [142] At this point, Michael Theriault called out to Christian Theriault and said “he’s got a bat”, and Christian entered the fray and was struck on the side of the head by Mr. Miller. Christian appeared dazed or semi-conscious after the strike to the head and he stepped back from Mr. Miller. Michael said nothing to Mr. Miller at this time. In particular, he did not identify himself as a police officer, nor did he advise Mr. Miller that he was under arrest.
- [143] Michael Theriault “closed the gap” between himself and Mr. Miller and attempted to disarm him. He did this in accordance with his police training which suggested that doing so would make it more difficult for an assailant to swing a weapon. He indicated that he feared for his life at this point and he reacted accordingly. There was no time for decision making.
- [144] Michael Theriault tried to “rip” the pipe from Mr. Miller’s hands. He also punched him wherever he could. His punches landed on Mr. Miller’s body and face. He was punching

Mr. Miller as hard as he could as he feared for his life. He punched Mr. Miller in the face in order to distract him so he could disarm him. Michael was not successful in disarming Mr. Miller and he called out for his brother to assist. This portion of the incident happened in between the homes but closer to the Silverthorn residence.

- [145] As Michael Theriault yelled at Christian to “get in here”, Christian Theriault ran towards Mr. Miller and placed him in a headlock. Michael, Christian and Mr. Miller, ended up on the flowerbed of Mr. Forde’s residence. With reference to the photograph depicting the disturbed bricks in the flowerbed (photograph 0086 in Exhibit 2, Tab 2), Michael explained that Christian was on his back and Mr. Miller was punching him. Michael managed to get the pipe away from Mr. Miller and threw it on the snow-covered lawn in between the houses. Michael continued to punch Mr. Miller everywhere he could.
- [146] Eventually, Mr. Miller stopped fighting and Michael Theriault pulled out his cell phone indicating that he was going to call 911. As he said that, Mr. Miller started punching Christian Theriault again. Michael threw his phone and re-engaged with Mr. Miller. Eventually, Mr. Miller stopped fighting again and Christian let him go. Michael ran to get to the pipe in order to keep Mr. Miller from getting it. According to Michael, after Mr. Miller left the area of the flowerbed no further punches were thrown by either him or Christian.
- [147] Michael Theriault next observed Mr. Miller moving towards the front door of the Silverthorn residence. Mr. Miller was not doing anything against either Michael or Christian Theriault at this point. He was walking away from them. Michael was yelling at Mr. Miller to get down and saw him banging on the door. Michael could not recall whether Mr. Miller was saying anything, though he recalled that he was yelling “Call 911” to whomever was inside the residence. He heard someone inside the residence say something like “they are on their way”. Michael did not tell the people inside the house that he was a police officer.
- [148] While Mr. Miller was at the door to the Silverthorn residence, Michael Theriault was holding the pipe with both hands. The pipe was raised up at shoulder height. This was done in accordance with his police training regarding the use of a regular or expandable baton. According to Michael, he did not know what Mr. Miller would do next. If Mr. Miller decided to attack, his plan was to use the pipe like a baton to strike his body. Michael denied striking Mr. Miller with the pipe, and denied causing the scratch on the glass of the front door of the Silverthorn residence.
- [149] According to Michael Theriault, after Mr. Miller was at the front door for a period of time, Mr. Miller walked on his own accord towards the driveway and placed his hands on the hood of the vehicle that was parked there. This was not done in response to a command or direction. As Mr. Miller put his hands on the hood of the vehicle, Michael was yelling at him to get down and told him he was under arrest. Michael was still brandishing the pipe at this time.

- [150] According to Michael Theriault, he then grabbed Mr. Miller and put him to the ground. He threw the pipe to the side as he no longer needed it. He held Mr. Miller down by placing one leg on his back. At this point, Christian Theriault was down the driveway calling 911 on his phone.
- [151] Mr. Miller managed to get his phone out and also placed a call to 911. Michael Theriault confirmed the contents of that call, including the fact that he can be heard telling Mr. Miller that he is under arrest twice on the call. When addressing the 911 operator, Michael makes no mention of the fact that Mr. Miller wielded the pipe against him and Christian Theriault. Michael also makes no mention in either the 911 call or in his statement to police that he ever brandished the metal pipe.
- [152] Once Durham Police arrived on scene, Michael Theriault was provided handcuffs. He was still holding Mr. Miller on the ground. He placed the handcuffs on Mr. Miller and lifted him to his feet. Another officer then took custody of Mr. Miller.
- [153] Michael Theriault explained that his intention initially was to apprehend Mr. Miller. However, when Mr. Miller produced the metal pipe, “all hell broke loose” and Michael was afraid for his and his brother’s life. It was a very traumatic incident and even after the pipe was taken from Mr. Miller, Michael was concerned that Mr. Miller might have other weapons including an edge weapon that might be concealed on his person.
- [154] Michael Theriault indicated that apart from general soreness, he suffered no injuries.
- [155] When shown a photograph of a pair of sunglasses found at the scene, Michael Theriault identified them as belonging to his brother, Christian Theriault.
- [156] In cross-examination, Michael Theriault agreed that at the time of the incident, he had received police training on use of force and on proper arrest procedure. He agreed that he was a primary response officer and had conducted dozens of arrests by that point in his career. He agreed that he had been taught about the importance of communicating with an arrestee, and that such communication could have a positive effect on how an arrestee responds to the arrest. He agreed that communication was important from an officer safety perspective as it could promote a de-escalation of an incident.

(viii) Christian Theriault’s Statements

- [157] When at the scene of the incident, Christian Theriault initially spoke with Cst. McQuoid. He told Cst. McQuoid that he had been hit on the right side of the head and on the right hand with a metal pipe. Cst. McQuoid observed what appeared to be a fresh scratch on Christian’s hand. He then put on gloves and checked Christian for injuries by running his hands over Christian’s head and neck. Cst. McQuoid agreed he had no medical training and was essentially looking for blood or signs of an open wound.
- [158] Christian Theriault later gave two formal statements to police. The first statement was given to Cst. Justine Gendron on December 28, 2016 while seated in her police vehicle at the scene of the incident.

[159] In the first statement, Christian Theriault indicates that he and his brother were having a smoke in the garage when they heard rattling and the sound of a truck door closing on their driveway. They opened the garage door and Christian saw two males run north and one run east. His brother pursued the male who ran east, and Christian followed. When they arrived at 113 Erickson Drive, the male being pursued ran in between the homes and tried to jump the fence.

[160] Christian Theriault offered the following description of what happened next:

...once he realized we caught up to him he started swinging a steel pipe at both my brother and myself, so we tried to defend ourselves and stop him, he continued to swing the pipe at us and hit me repeatedly with the pipe all over and was hitting my brother, eventually we were able to stop him from hitting us, my brother held him on a car, and was yelling for someone to call 911 and I was already on the phone with them at this point.

[161] When asked if he saw where the pipe came from, Christian Theriault replied “I’m assuming out of his pants, its really dark between the houses and he just turned and hit me with it, I didn’t even see it coming”. Christian further indicated that he had been hit in the head with the pipe and was sore. While not reflected in his initial statement, Christian admitted to Cst. Gendron that he had been drinking. Cst. Gendron testified that she could smell alcohol in the car when she was taking the statement, though she had no concerns about the effects of alcohol on Christian.

[162] The second statement was given on video to Cst. Craig Willis on January 9, 2017. In this statement, Christian Theriault provided a more detailed account of the incident. He explained that as the garage door opened, Michael Theriault rolled underneath it and he followed. They observed two males inside their parents’ pickup truck which was parked on the driveway. They decided to pursue the male who ran east to try to arrest him for breaking into their car.

[163] According to Christian Theriault, Michael Theriault was yelling “stop, stop” as they tried to grab the male and then call the police. The male then ran between two houses followed by Michael. Christian was behind them and, as he was running in, he heard Michael say “he has a bat”. It was dark in between the houses and it took a moment for Christian’s eyes to adjust. He could hear the sound of things being hit, including his brother. At this point, Christian felt that his brother’s life was in danger. As he ran in, he was struck on the right side of his head with the metal pipe. He feared for his life and was dazed. He tried to get close to the male in an effort to disarm him but was hit on the elbow, hand and leg. Michael was also getting hit. According to Christian “he was violently hitting us with this pipe and his fists”.

[164] Michael Theriault managed to get the pipe off him and threw it to the side, and the male started hitting them with his fists. They struggled to restrain him. Christian Theriault was punching him in the head to get him to stop. At a certain point, the male got away from

Christian and went to Michael who managed to restrain the male on the ground using his knee. At that point, Michael pulled out his cell phone and indicated that he was calling 911. The male then rolled out causing Michael to drop his phone. The male then started “jogging” away and Michael grabbed him and took him to the ground again. At this point, Christian called 911 using his phone and told the dispatcher what had happened.

- [165] In terms of where the metal pipe came from, Christian Theriault indicated “I really don’t know where he got this pole from...whether it was tucked in his pants or at the side of the house or wherever”. Christian denied that the pipe came from his parents’ house.
- [166] In his second statement, Christian Theriault indicated that he suffered a concussion as a result of being hit with the pipe. He also indicated that he had bruises on his hand, a “darker eye”, and his elbow was swollen. He indicated that he used his hand defensively and that his thumb was very sore. He went to a doctor for medical treatment. His hand was x-rayed and he was advised that he should take Tylenol and stay at home with the lights off to rest.

(ix) The 911 Calls

- [167] There were three calls placed to 911 at the time of the incident. The first call came from Christian Theriault at 2:48:14 a.m., the second call came from the Silverthorn residence at 2:48:33 a.m. and the third call came from Mr. Miller at 2:52:21 a.m. Audio recordings and transcripts of these calls were included in the Agreed Statement of Facts filed as Exhibit 1.

Call #1 – Christian Theriault

- [168] In the first call, Christian Theriault tells the 911 dispatcher that he and his brother, whom he identifies as an “off duty cop”, found “guys” trying to break into their cars and they caught one of them. He tells the dispatcher that the person they caught is being restrained on the ground and is need of an ambulance. The dispatcher asks about the injury and Christian replies “[inaudible] He was fighting. He’s fighting us back we were trying”. He further states “...we’re all – all fucking bloody right now”. He tells the dispatcher that the person is bleeding from his face.
- [169] On this call, Christian Theriault can be heard speaking to Mr. Miller, indicating “I’m on 911 you fucking, you fucking in our cars and shit, eh? You picked the wrong cars”.

Call #2 – The Silverthorn Residence

- [170] The second call to 911 comes from the Silverthorn residence. The call is initially placed by Mrs. Silverthorn, though she quickly turns the call over to her husband, James Silverthorn. Mr. Silverthorn advises that there is someone banging on the front door, yelling “Call 911”. Mr. Silverthorn indicates that he is concerned that the person is trying to get into his home. He indicates that there are “two guys” on the front lawn and that he was woken up by “two guys fighting between the houses”.

- [171] Mr. Silverthorn describes his observations and indicates that he sees one male in shorts “bent over” right in front of the driveway. He then advises that he sees “one guy” bent over his wife’s car and another guy holding a “stick” that is approximately four feet long. He then states “Jesus, I think he’s gonna strike the guy again”.
- [172] The 911 dispatcher advises Mr. Silverthorn that “one guy was trying to break into the other guy’s car there” and that “he was trying to restrain him”. Mr. Silverthorn replies, “They’re holding the guy down...I assume the guy that broke into the car is the guy that’s on the ground”.

Call #3 – Dafonte Miller

- [173] At the outset of Mr. Miller’s 911 call, Michael Theriault is heard saying “You’re under arrest” and “Back the fuck up”. Moments later, Michael again states “Dude you’re under arrest”. And Mr. Miller replies “I know”.
- [174] Mr. Miller then speaks with the 911 dispatcher who asks “Where do you need police?” Mr. Miller replies “Down the street [inaudible]”. After this exchange, both Mr. Miller and Michael Theriault speak with the 911 dispatcher. Mr. Miller can be heard saying “You’ve got the wrong guy” and he also asks Michael to turn him over and turn him the other way.

(x) The Scene Evidence

- [175] The initial interaction between the parties occurred outside the Theriault residence, which is located at 18 Erickson Drive. The final interaction between the parties occurred in between the homes at 113 and 115 Erickson Drive. Aerial photographs, maps and scale drawings, were filed as Exhibit 2, Tab 1. The distance between 18 Erickson Drive and 113/115 Erickson Drive is approximately 140 metres.
- [176] Diagrams of the scene in between 113 and 115 Erickson Drive were filed as Exhibit 2, Tab 1, Exhibit 4 and Exhibit 5. The diagrams were prepared and later marked by Cst. Jennifer Bowler, who was one of the first officers on scene and later acted as the Scenes of Crime Officer (“SOCO officer”). Cst. Bowler took the photographs found at Exhibit 2, Tab 2. The photographs were taken in the order that she walked the area depicted. Her purpose was to document any evidence in the area, including the presence of blood.
- [177] In submissions, the Crown prepared a visual aid combining Exhibit 4 with markings depicting where blood was observed at the scene. The visual aid also contains a legend correlating markings placed on Exhibit 4 with the evidence of Cst. Bowler. The visual aid is appended to these Reasons as Appendix “A”. While it is not evidence, I am satisfied that it usefully and accurately reflects the scene evidence in an easy to view format.
- [178] The first officer on scene, Cst. Bowler, testified that she received a call to attend the scene at approximately 2:50 a.m. Her partner at that time was Cst. Barbara Zabdyr. She understood that the call related to the apprehension of a person believed to have been

breaking into cars. She also understood that an off duty Toronto police officer was on scene.

- [179] Cst. Bowler arrived on scene at 2:55 a.m., and first observed two males on the ground in between the snow-covered front yard and the driveway. A black male was on the bottom on his stomach and a white male was on top holding the black male's hands behind his back. When the black male was brought up to his feet, Cst. Bowler noted what appeared to be a significant injury to his eye. She called for EMS to attend and noted that other officers arrived on scene as well. Cst. Bowler next saw the black male positioned against a Hyundai Tucson that was parked in the driveway at 113 Erickson Drive.
- [180] Cst. Zabdyr approached the scene and observed a white male with a beard restraining a young black male on the ground. She had been advised that this male was a police officer, and she handed her handcuffs over to him so he could handcuff the young black male. According to Cst. Zabdyr, once the black male was brought to his feet he was leaned over the hood of the nearby car and was searched by Michael Theriault. Once the ambulance arrived, Cst. Zabdyr walked the young black male over to get medical attention.
- [181] At approximately 2:56 a.m., Cst. Justine Gendron and Cst. Sean McQuoid arrived on scene. According to Cst. McQuoid, he approached the location where Michael Theriault was holding Mr. Miller. He noticed that Mr. Miller had "a small cut underneath his left eye" that was bleeding.¹ He observed that certain items, including a quantity of change, a \$5 bill, a small baggie of marijuana, as well as blood and yellowish fluid were on the hood of the nearby car. He seized the small baggie of marijuana.
- [182] Soon thereafter, Cst. Bowler began photographing the scene, taking photographs of her observations as she progressed. She noted blood and "tissue"² on the hood of the car, as well as pocket change and gum. She noted a knit glove on the ground near the vehicle and near where she initially observed the two males, and also observed some blood staining in the snow at this location. To the side of the Hyundai Tucson, Cst. Bowler observed the metal pipe (Exhibit 3) and a cell phone later identified as belonging to Mr. Miller. She then proceeded up the walkway towards the front door of 113 Erickson Drive, following drops of blood that she observed. A second black glove was found at the top of the driveway where it meets the walkway to the home.
- [183] The black knit gloves were tested at the Centre of Forensic Sciences. A blood-stained portion of the right hand glove was DNA tested and the results showed the blood was Mr.

¹ While not ultimately relevant to any of the issues that I must decide, Cst. McQuoid's description of the injury on Mr. Miller as a "small cut underneath the eye" is an understatement that begs disbelief. In fact, it strongly suggests a failure to objectively and honestly recount this observation. By contrast, Cst. Bowler, the Scenes of Crime Officer who photographed Mr. Miller in the ambulance moments later, described how she felt "queasy" when she observed the injury; see photograph 0061 in Exhibit 2, Tab 2.

² While Cst. Bowler described the yellowish substance on the hood of the car as "tissue", it appears to have been either vomit or mucous.

Miller's.³ Testing of other portions of the gloves showed the presence of DNA from at least three contributors, but the major DNA profile was Mr. Miller's.⁴

- [184] Cst. Bowler next observed blood on the walkway up to the front door and also noted blood drops at the base of the door and on the glass window of the door. She then followed the blood drops to the bench placed to the right of the front doorway. There was some additional blood visible in the snow just beyond the bench. James Silverthorn testified that when he later inspected the side of his home leading towards the backyard, he observed blood on the wall and on the eavestrough downspout. The location of these blood stains is depicted in photographs tendered as part of Exhibit 18 (photographs 094937 and 094952).
- [185] Cst. Bowler proceeded into the area in between 113 and 115 Erickson Drive and made further observations. In particular, she observed a cell phone, later identified as belonging to Michael Theriault, on the ground roughly in between the two homes. She further observed a pair of sunglasses and a BIC lighter near the rear fence area of the Silverthorn residence. She also observed a silver flashlight near the rear fence area of the Forde residence and some loose change.
- [186] A retaining wall demarcating a flowerbed was observed alongside the wall of the Forde residence. Some stones or bricks from the retaining wall were disturbed or dislodged. Cst. Bowler located Mr. Miller's house keys and a key fob for a Mazda motor vehicle at this location.
- [187] Cst. Bowler located no visible blood in between the houses or on the objects found in between the houses.
- [188] Cst. Bowler took photographs of Christian Theriault. In these photographs, found in Exhibit 2, Tab 2, photographs 0103-0107, Christian is wearing a hoodie sweater, blue shorts and running shoes. There is no blood visible on any of his clothing. Apart from a scratch to the topside of his hand between the wrist and the thumb, there are no other visible injuries.
- [189] No photographs of Michael Theriault were taken at the scene as he indicated that he had no injuries.

(xi) The Metal Pipe

- [190] Exhibit 3 is a hollow aluminum pipe approximately four feet long, with a slight bend in it. The parties agree that this is the pipe that was involved in the altercation between the parties on December 28, 2016. The provenance of the metal pipe is the subject of significant dispute between the parties.

³ The chances of a random match of the DNA profile was 1 in 440 quadrillion.

⁴ The chances of a random match of the DNA profile on these samples was between 1 in 150 quadrillion and 1 in 440 quadrillion. These DNA samples were not blood based samples, see Exhibit 41.

- [191] The pipe was examined at the Centre of Forensic Sciences and blood was found on one end of the pipe. The blood was tested for DNA comparison purposes and Mr. Miller could not be excluded as the contributor. The random match probability of someone else being the contributor was 1 in 440 quadrillion.
- [192] According to Exhibit 42, the metal pipe was examined by Mr. Lucic, the manager of Metal Supermarkets. Mr. Lucic believed that the pipe had been exposed to the outdoors and appeared to have been pounded into the ground. He noted that one end appeared to have been beaten and the other end appeared to have earth inside it.
- [193] George Forde is the owner of the residence located at 115 Erickson Drive. He indicated that he stored “sticks” that he used to hold up plants in the corner by the fence between the houses. A photograph taken by Cst. Bowler on December 28, 2016, shows the corner which contains only a trellis and some tomato cages. Photographs taken in May and June 2017 by the SIU also depict the same corner and show a trellis and some ornamental reindeer.
- [194] Mr. Forde was also asked about the air conditioning rough-in that is at the side of his house and is depicted in several photographs, including photograph 094823 of Exhibit 18. He described the rough-in as a “wire with black tape”. He described how this rough-in was “soft” and could be moved out of the way when cutting the grass. When shown photograph 094823, he identified a rake handle that can be seen lying on the flowerbed next to the wall of the house. He agreed that this was the type of thing he would use to hold up his plants.
- [195] At trial, Mr. Forde was shown the metal pipe filed as Exhibit 3. He testified that he did not recognize the pipe and did not know where the pipe came from. In cross-examination, Mr. Forde was shown photographs of the side of his yard depicting a rake handle, and he indicated that he was not surprised to see that type of item there as that was the type of item he used to hold up plants. While there is some confusion in the unfolding of this evidence, I am satisfied that when Mr. Forde was answering these questions, he was referring to the wood rake handle and not Exhibit 3.
- [196] In cross-examination, Mr. Forde acknowledged that he spoke with a police officer and was asked about a length of galvanized metal pipe, though he could not recall what he said to the police officer. Cst. McQuoid testified that he described the pipe seized at the scene to Mr. Forde, and Mr. Forde agreed that it was the type of thing that he might have used to secure his plants.
- [197] On November 5, 2019, a student from Mr. Gold’s office attended at Mr. Forde’s residence. Mr. Forde advised the student that he often uses broken yard tools to hold up his plants. The student asked if she could see where Mr. Forde keeps pole-like items for use in gardening and she was directed to the side yard. A series of photographs filed as part of Exhibit 43 illustrate the types of poles stored in the side yard. The pole-like items include a yellow handle attached to what appears to be a broken rake, a wooden handle with a broken metal end, and a solid metal bar.

(xii) The Expert Medical Evidence

[198] There is no issue that Mr. Miller suffered significant injuries on December 28, 2016. Indeed, it is an agreed fact that the injury to Mr. Miller's eye satisfies the "wounds, maims disfigures" element of aggravated assault under s. 268(1) of the *Criminal Code*.

[199] A forensic pathologist, Dr. Michael Pickup, provided expert evidence on the extent and causation of the injuries on Mr. Miller. In his opinion, Mr. Miller suffered the following injuries:

- a. A left globe (eyeball) rupture with retinal herniation that resulted in a permanently blind left eye. This injury resulted in two surgeries and ultimately the use of a prosthetic eye;
- b. A left orbital floor (the bone where the eyeball sits) fracture, also known as a "blow out" fracture. This injury also resulted in a prosthesis being placed where the floor of the eye orbit was fractured;
- c. A left nasal fracture;
- d. Two small lacerations above the left eye;
- e. One 0.5 cm laceration on the forehead above the right upper eyelid. This injury was sutured and could have been caused by blunt force trauma;
- f. A right wrist fracture; and,
- g. A left lower eyelid injury. This injury was essentially related to the main injury to the eye, which resulted in the build up of scar tissue and ultimately required surgical correction.

[200] In relation to the injuries described in a, b, c and g above, Dr. Pickup opined that they were caused by blunt force trauma, likely a punch or punches. In particular, Dr. Pickup opined that given the close proximity of the injuries, they were probably caused by at least one punch with significant or considerable force. The force would have been significant enough to cause the eyeball to rupture from the inside out, like a water balloon.

[201] While Dr. Pickup testified that it was possible that these injuries were caused by a strike with a metal pipe, this was not his favoured method of causation. In his view, if a metal pipe had been used to poke the eye, he would have expected to see more eyelid injuries. As well, a poke with the metal pipe would not explain the fractured nose. Similarly, he opined that if the pipe had been used to strike across Mr. Miller's face, he would have expected to see a fracture to the side of the orbital bone, which was not present. Lastly, even if the pipe had struck Mr. Miller's eye from the side but not across the bridge of the nose, the fracture of the nose would not be accounted for. Ultimately, Dr. Pickup opined

that it was highly unlikely that a strike across the face with the pipe caused the injury to the eye. He opined that it was unlikely that a strike with the end of the pipe on the eye area caused the injury unless some other blunt force caused the fracture to the nose. Lastly, he opined that a poke to the eye with the metal pipe was less likely than a punch to be the cause of the injury as he would have expected more damage to the eyelids.

- [202] In terms of bleeding, Dr. Pickup testified that the nasal fracture would have bled profusely and immediately. The eye injury would also have bled but not as profusely as the nose injury. When shown a picture of Mr. Miller's face taken at the scene, Dr. Pickup opined that the blood observed in the photographs was consistent with the injuries suffered by Mr. Miller. When shown the photograph of the hood of the car where Mr. Miller was ultimately arrested, Dr. Pickup noted the presence of blood and another yellowish substance which he believed could be either vomit or mucous.
- [203] In relation to the fractured wrist, Dr. Pickup opined that the most common mechanism of sustaining this type of injury is through "forced dorsiflexion", or the forceful bending of the wrist such as what might occur when someone falls backwards and tries to break their fall using their hand. Dr. Pickup indicated that this type of injury could possibly also have been caused by a strike with a metal pipe or punch while the arm was held in a defensive pose. On this issue, Dr. Pickup testified that a punch was less likely to have caused the fracture and that a pipe was more likely. That said, he testified that if this injury had been caused by a pipe strike or punch, he would have expected swelling or redness to the area which was not noted in the medical records. He also agreed that the injury could have been caused when Mr. Miller was fighting over the pipe with someone else. Lastly, he agreed that given the timing of the reporting of the wrist injury, it could have been caused after the fact.
- [204] During his testimony, Dr. Pickup was asked whether Mr. Miller might also have suffered a concussion. He opined that a concussion could result from blunt force trauma caused by a strike to the head with a metal pipe. He indicated that symptoms of a concussion could include vomiting, opening of the eyes only on verbal stimulation, dizziness and headaches. Based on Mr. Miller's reporting and the medical records, Dr. Pickup opined that Mr. Miller's injuries were consistent with a concussion.
- [205] While in hospital, Mr. Miller was photographed by his mother. One photograph of his back shows apparent swelling to his left side. An x-ray and medical follow up on February 9, 2017, noted a loss of "lordosis" or natural curvature of the spine. This, according to Dr. Pickup, is associated with a person's tendency to hunch forward while experiencing back pain. Dr. Pickup also explained that bruises resulting from a strike with an object like a metal pipe would resemble "tram tracks". He did not see evidence of any such injuries in the photographs or medical records for Mr. Miller.

(xiii) The Injuries Sustained by Christian Theriault

- [206] In cross-examination, Dr. Pickup was asked about medical records pertaining to Christian Theriault. These medical records reveal that Christian was observed to have tenderness

over the posterior elbow with an intact range of motion. He also had swelling at the base of his right thumb and tenderness of the thumb muscle on the palm side. Lastly, he had a large bruise on the upper outside of the right thigh.

- [207] Dr. Pickup agreed that the swelling and tenderness to the thumb was possibly caused by being hit with a pipe. He further agreed that this was possibly a defensive type wound. In re-examination, he indicated that this injury could also possibly be caused by a punch, though he noted that punching injuries tend to be on the knuckles and top of the hand. He agreed that swelling to the base of the thumb could have been caused if the thumb was “jammed”.
- [208] Dr. Pickup was also asked about the scratch on Christian Theriault’s hand, as depicted in photograph 107 of Exhibit 2, Tab 2. He could not rule out the possibility that the scratch was caused by contact with the rough edge of the metal pipe, though it was not his favoured explanation given the absence of bruising.
- [209] In terms of the bruise to the leg, Dr. Pickup opined that significant blunt force would be required to cause a large bruise. He agreed that a strike with the pipe could have caused it. He did not believe that this was a defensive type wound.
- [210] The doctor who saw Christian Theriault on December 29, 2016, diagnosed a concussion based on the reported symptoms and suggested that fractures be ruled out with x-rays. Dr. Pickup agreed that a concussion could be caused by blunt force impact with an object such as a metal pipe and that, with some variability, it would require a considerable amount of force. Dr. Pickup also indicated that there is no medical imaging process available to diagnose the presence of a concussion. The diagnosis is usually based on the historical information reported to the doctor by the patient and potentially others who witnessed the events or made observations.

(xiv) The Evidence of Retired Deputy Police Chief Michael Federico

- [211] As part of its case, the Crown called Michael Federico, retired Deputy Chief of Police for the Toronto Police Service, as a subject matter expert in relation to police training on arrest and use of force during an arrest. While the defence did not dispute the fact that Mr. Federico was a qualified expert in this field, the defence argued that his evidence was not necessary in order to fairly determine the issues in this case. That said, the defence did agree to admit various arrest and use of force policies in use with the Toronto Police Service at the time of Michael Theriault’s interaction with Mr. Miller. Those policies were entered as Exhibits 35, 36 and 37.
- [212] At the close of the Crown’s case and after hearing submissions, I indicated that I was not satisfied that the expert evidence of Mr. Federico was sufficiently relevant and necessary in order to assist me in assessing the issues in this case. I indicated that I would provide further reasons. These are those reasons.
- [213] By way of brief summary, Mr. Federico testified that the police policies regarding arrest and use of force are aimed at ensuring that arrests are undertaken in a manner that is both

lawful and safe. Safety relates to both officer safety and safety of the arrestee. The policies are intended to reflect the current state of the law on arrest powers and use of force.

- [214] Mr. Federico explained that proper arrest procedure generally requires that police officers identify themselves to an arrestee and state their intentions in a loud clear voice. The purpose of identification and a statement of intention is to secure quick compliance with an arrest, without escalation.
- [215] Mr. Federico also explained that arrest scenarios are dynamic and unfold very quickly. Arresting officers are required to use good judgment at all times and are required to constantly assess and re-assess the situation they are in. Whenever force is used, it must be necessary and proportionate. An arresting officer must act within the limits of the law.
- [216] Mr. Federico also discussed differences between on duty and off duty police functions. He noted that when an officer is off duty, he or she would not be expected to have use of force equipment at hand. He further indicated that while an off duty police officer could act and make an arrest, the officer would need to consider whether it would be better to simply call for on duty police officers to conduct the arrest. Again, the officer would be required to apply good judgment in view of his or her training.
- [217] In cross-examination, Mr. Federico agreed that the police policies do not specifically apply to scenarios where police officers undertake an arrest while off duty. He agreed that an off duty police officer could act under the powers of arrest that apply to ordinary citizens. That said, he indicated that even when acting under civilian powers of arrest, it would be prudent for a police officer to follow police policy. Lastly, he agreed that aspects of the policy, for example conducting a Canadian Police Information Centre (“CPIC”) query, could not be conducted by an officer who was off duty and that as such, the policy was not specifically geared towards the conduct of off duty police officers.
- [218] In terms of the admissibility of this type of expert evidence, there is no issue that in certain cases expert evidence relating a police officer’s training is relevant to the live issues and may assist a trier of fact in deciding the case; see *R. v. Khill*, 2020 ONCA 151 at para. 98 and *R. v. Forcillo*, 2018 ONCA 402.
- [219] In this case, the Crown argues that the expert evidence of Mr. Federico is relevant to assessing Michael Theriault’s intent in pursuing Mr. Miller. In other words, the Crown argues that Michael’s failure to follow police procedure during the purported arrest of Mr. Miller is circumstantial evidence supporting a finding that Michael’s intent was actually not to arrest Mr. Miller, but rather to chase him down and administer “street justice”. The Crown also argues that the evidence is relevant to the reasonableness components of the self-defence and use of force during an arrest provisions of the *Criminal Code*. Lastly, the Crown argues that the evidence will assist in determining the provenance of the metal pipe, as in view of the police training, Michael is more likely to have taken the metal pipe with him from his garage as a potential use of force weapon as he would not have had access to his usual use of force equipment.

- [220] The defence argues that the expert evidence is not necessary to assist the court with determining the live issues in this case. The defence notes that the applicable police policies are in evidence and provide the court with the necessary background information on the arrest and use of force policies that would have been known to Michael Theriault, a trained police officer, at the time of the alleged offence. Further, the defence notes there is no suggestion that Michael was justified in using the metal pipe against Mr. Miller should that be the court's finding. Instead, the core issue to be determined is the credibility of the parties and, in particular, whether Mr. Miller was injured in a violent attempt to avoid a lawful arrest.
- [221] In assessing the relevance of this evidence, I note that the evidence of Mr. Federico in this case does not extend significantly beyond a recitation of the basic parameters of the police policies that have been tendered into evidence on consent. To the extent that some of his evidence extends beyond describing the police policies into explaining the rationale for elements of the policies, I find that his evidence essentially accords with common sense. To give one example, Mr. Federico indicated that the policy requiring a police officer to identify him or herself and inform the person he or she is dealing with that they are under arrest, is intended to create a scenario where compliance with a lawful arrest is encouraged thus avoiding or limiting the risk of physical escalation. In my view, this is a common sense proposition and not one that needs to be established by expert evidence. It is also a proposition that is supported inferentially by the caselaw, see for example *R. v. Whitfield*, [1970] 1 C.C.C. 129 (S.C.C.), *R. v. Latimer* (1997), 112 C.C.C. (3d) 193 (S.C.C.) at para. 24 and in the context of entry into a home see *Eccles v. Bourque*, [1975] 2 S.C.R. 739 at p. 746.
- [222] In short, when I assess the live issues in this case in view of the fact that the relevant police policies are in evidence, I see no need for the additional expert evidence of Mr. Federico. His evidence is essentially an amplified version of the police policies. Mr. Federico did not opine on a hypothetical that is related to the case and could offer no expert opinion on legal issues relating to the scope of ss. 25 and 34 of the *Criminal Code*. As such, I found his evidence to be inadmissible.
- [223] I add the following postscript. After my bottom-line ruling was given, Michael Theriault was called as a defence witness and he was cross-examined and re-examined on his training on police arrest procedures and use of force. In his evidence, he relates his subjective knowledge and understanding of the policies that have been tendered into evidence. When I consider his subjective evidence in context with the objective standards reflected in the police policies, I am further convinced that the expert testimony of Mr. Federico was not required in this specific case.

Legal Framework

- [224] I start this portion of my reasons by reviewing the elements of the offences charged against each defendant.

- [225] In order for there to be a conviction for the offence of aggravated assault, the Crown must prove beyond a reasonable doubt that the defendant, either as a principal or as a party, applied non-consensual force to Mr. Miller, and further that the non-consensual force caused an injury that “wounds, maims, disfigures or endangers the life of the complainant”. The Crown does not need to prove that the injury was intentionally inflicted. An objective foreseeability or risk of bodily harm is all that is required; see *R. v. Godin*, [1994] 2 S.C.R. 484. In this case, it is admitted that the injury suffered by Mr. Miller satisfies the “wounds, maims, disfigures” element of aggravated assault under s. 268(1) of the *Criminal Code*. There is also no suggestion that the Crown has not established an objective foreseeability or risk of bodily harm as a result of the alleged assaultive conduct.
- [226] The element of causation requires that the assault be a substantial contributing cause to the injury; see *R. v. Nette*, [2001] 3 S.C.R. 488. In this regard, the Crown must establish beyond a reasonable doubt that the injury was caused by an unlawful assault, and not as a result of conduct falling within lawful self-defence or reasonable use of force in the course of a lawful arrest.
- [227] Section 34 of the *Criminal Code* sets out the defence of self-defence. Where there exists an air of reality to self-defence, the Crown must disprove self-defence beyond a reasonable doubt.
- [228] The self-defence provisions have a blend of objective and subjective components that were recently reviewed by Doherty J.A. in *R. v. Khill*; and see also *R. v. Phillips*, 2017 ONCA 752 at para. 80, and *R. v. Mohamad*, 2018 ONCA 966 at paras. 213-214. The provisions are comprised of three components that can be succinctly summarized as follows:
- a. The Trigger - The defendant must reasonably perceive an application or threat of force against himself or another person. On this issue, the evidence has both a subjective and objective component; the defendant must subjectively perceive the application or threat of force, but that perception must be based on reasonable grounds, in other words it must be objectively justified. The objective justification is not purely objective, rather it incorporates relevant subjective features of the accused’s personal characteristics and experiences, including training as a police officer; *Khill*, at paras. 48-51.
 - b. The Motive - The defendant must respond with a defensive purpose. In other words, what the defendant does must be in response to the perceived threat or application of force. It must not be to seek vengeance, impose punishment or vindicate honour. This component is assessed subjectively. This is an important inquiry because absent a defensive purpose, the rationale for the defence disappears; *Khill* at para. 54 and *R. v. Atkinson*, 2013 MBQB 264.

- c. The Response - The defendant's actions must be reasonable in the circumstances, determined in accordance with the factors set out in s. 34(2) of the *Criminal Code*. This portion of the assessment is objective, but it too requires consideration of the relevant personal circumstances and experiences of the person and, as such, it maintains a subjective component. Proportionality of a defendant's response is a factor to consider. However, the defendant's response is not held to a standard of perfection viewed with the benefit of hindsight; *R. v. Baxter* (1975), 27 C.C.C. (2d) 96 (Ont.C.A.), and *R. v. Cunha*, 2016 ONCA 491 at paras. 28 and 47. In assessing the reasonableness of the response, the court must be careful to not simply reason backwards from the nature of an injury and conclude that a response was unreasonable solely because it resulted in significant injuries; see *R. v. Omand*, [2005] O.J. No. 5006 (Ont. S.C.J.) at paras. 25-27.⁵

- [229] Section 25 of the *Criminal Code* provides that everyone who is authorized by law to effect an arrest, either as a private citizen or as a police officer, is, if acting on reasonable grounds, justified in undertaking the lawful arrest using as much force as is reasonably required in the circumstances. This section provides a defence for the use of force during a lawful arrest. Again, where an air of reality to the defence exists, the Crown must disprove the applicability of the defence beyond a reasonable doubt.
- [230] Sections 494 and 495 of the *Criminal Code* authorize citizens and peace officers, respectively, to arrest persons found committing indictable offences. An off duty police officer remains a peace officer. However, an off duty police officer is not restricted to the arrest powers available under s. 495 of the *Criminal Code* and can conduct a "citizen's arrest" under s. 494 of the *Code*; see *R. v. Reddy*, 2007 BCPC 384 and *R. v. Scharf*, 2003 SKPC 181, aff'd 2005 SKQB 287.
- [231] An arrest consists of "the actual seizure or touching of a person's body with a view to his detention. The mere pronouncing of words of arrest is not an arrest, unless the person sought to be arrested submits to the process and goes with the officer"; see *R. v. Whitfield*, [1970] S.C.R. 46, at para. 3. Conversely, an arrest can be effected with physical force alone even if no words are spoken; see *R. v. Latimer*, [1997] 1 S.C.R. 217 at para. 24 and *R. v. Asante-Mensah*, 2003 SCC 8 at para. 43.
- [232] Where an arrest requires the use of force, the person conducting the arrest must use only the amount of force that is reasonably required in the circumstances. While proportionality of the response is not specifically mentioned in s. 25 of the *Criminal Code*, proportionality is a factor to be considered in assessing whether the force used was reasonable in the circumstances; see *R. v. Nasogaluak*, 2010 SCC 6 at paras. 32, 34-35 and *R. v. Szczerbaniwicz*, 2010 SCC 15 at paras. 20-21.

⁵ Many of these cases were decided under the former self-defence provisions of the *Criminal Code*, though the principles contained therein continue to apply under the current provisions.

- [233] Assessing whether the degree of force used to conduct an arrest is justified is not an exercise of exactitude. The court should not hold a person conducting an arrest to a standard of perfection. A person conducting an arrest is often placed in a dangerous, fast-paced situation where it may be difficult, if not impossible, to measure the degree of force required with precision; see *R. v. Robinson*, 2019 ONSC 4696 at para. 106, *R. v. Amofa*, 2011 ONCA 368 at paras. 19, 24-25, *Chartier v. Greaves*, [2001] O.J. No. 634 (Ont.S.C.J.), and *Day v. Woodburn*, [2019] ABQB 356.
- [234] In terms of the offence of attempt to obstruct justice, s. 139(2) of the *Criminal Code* makes it an offence for a person to wilfully attempt in any manner to obstruct, pervert or defeat the course of justice. The attempt must be wilful and it must result in at least a risk that, without any further action, an injustice will result; see *R. v. Yarlasky*, [2005] O.J. No. 606 (Ont.C.A.). It is not required that the attempt be successful or even possible; see *R. v. Hansen*, 2016 ONSC 548, aff'd 2018 ONCA 46 and *R. v. David* (2009), 68 C.R. (6th) 139 (Ont.S.C.J.) at paras. 24-26. The “course of justice” includes the investigative stage of the process; see *R. v. Wijesinha*, [1995] 3 S.C.R. 422 at paras. 27-34 and *R. v. Spezzano* (1977), 34 C.C.C. (2d) 87 (Ont.C.A.). A knowingly false statement given to police during the course of an investigation can amount to attempt to obstruct justice. The falsity of the statement can be based on a material omission.
- [235] However, in the absence of a duty to provide information, mere omission standing alone is generally not sufficient to make out the offence of obstruct justice. The statement as a whole must be assessed in context. If, by virtue of a material omission, the statement made to an investigator is false in the sense that it has the tendency to obstruct, defeat or corrupt the ends of justice, the *actus reus* of the offence has been established. If the statement, including the omission, was given with the requisite intent to obstruct, defeat or corrupt the ends of justice, the offence is complete; see *R. v. Hoggarth* (1956), 25 C.R. 174 (B.C.C.A) and *R. v. Beaudry*, 2007 SCC 5 at para. 52.

General Credibility and Reliability Findings

- [236] I turn next to general credibility and reliability findings. Here, I will review my overall findings in relation to the key witnesses who testified in this case. I provide this overview for ease of reference and for context. In the portions of my judgment that follow this overview, I will provide specific factual findings with further detailed credibility and reliability assessments.
- [237] I remind myself that the Crown bears the sole onus of proof and that while individual facts may be established on a balance of probabilities, I can only convict if I am satisfied that the Crown has proven each and every essential element of the offences charged against each defendant beyond a reasonable doubt.
- [238] I also remind myself that I can accept some, none or all of a witness' testimony. I can draw reasonable inferences from the evidence but must guard against speculation. I must apply the same degree of scrutiny to the Crown and defence evidence. I must assess the

evidence that favours the defence in accordance with *R. v. W.(D.)*, and I must not treat this case simply as a credibility contest.

- [239] I will start with the defendant, Michael Theriault. I have carefully considered his evidence in context with the whole of the evidence at trial, including the scene evidence and the evidence of the independent witnesses. There are aspects of Michael's evidence that I accept as I will detail momentarily. That said, there are significant aspects of his evidence that I do not accept. I reject his assertion that his initial intention was to arrest Mr. Miller. I am troubled by his description of how Mr. Miller first produced the metal pipe. I also have significant concerns about his description of what happened in between the Silverthorn and Forde residences. Lastly, I do not accept his evidence about what happened at the front door of the Silverthorn residence. His evidence is contradicted by the physical evidence at the scene and the evidence of other witnesses.
- [240] In terms of Christian Theriault, while he did not testify, the Crown tendered several statements which are exculpatory and, as such, I must determine whether the statements are credible. I conclude that there are portions of the statements that I accept. However, as with Michael Theriault, there are portions of the statements that I do not accept. For instance, I reject the suggestion initially advanced by Christian that the pipe possibly came from Mr. Miller's pants. There is simply no way that Mr. Miller could have been running with a four foot long segment of pipe down his pants. I find this suggestion, even though it was delivered as a "possibility," was an obvious attempt to paint a less than favourable picture of Mr. Miller. It may also have been an attempt by Christian to distance himself and his brother from the pipe. I am also troubled by the comment Christian can be heard saying to Mr. Miller while he is on the call with 911. The comment "You picked the wrong cars" which is shouted towards Mr. Miller, who at this point is being held on the ground by Michael, undermines the self-defence narrative that is advanced in the later statements. It also suggests a belief that a degree of deserved retribution had been administered.
- [241] Ultimately, while there are aspects of Michael and Christian Theriault's evidence that I accept, there are significant aspects of their evidence that leave me concerned about their overall credibility. Below I will detail the areas where I have specific credibility concerns. I do so mindful of the legal analysis mandated by *R. v. W.(D.)*. In particular, I remind myself that even if I do not accept Michael and/or Christian's evidence and/or any of the other evidence that supports the defence position, I must nonetheless assess whether I am left with reasonable doubt by that evidence.
- [242] I turn next to the Crown's main witnesses.
- [243] Mr. Miller presents with significant credibility problems. He has proffered a version of events that is false in certain material aspects. I find that he has attempted to maintain that false narrative despite the evidence to the contrary. That said, and as I will set out shortly, there are also aspects of his evidence that I accept as credible when viewed in the context of the evidence as a whole.

- [244] The law recognizes that it is dangerous to convict a defendant based solely on the unconfirmed word of a person who has demonstrated a willingness to lie under oath; see *R. v. Vetrovec*, [1982] 1 S.C.R. 811 and *R. v. Khela*, 2009 SCC 4 at para. 2. The law also recognizes that in some cases, a witness who has decided to perjure him or herself runs the real risk that his or her credibility will be entirely destroyed; see *R. v. Ahulwalia*, [2000] O.J. No. 4544 (C.A.) at para. 60.
- [245] As a result, I must approach Mr. Miller's evidence with great caution. In assessing his credibility, I must consider whether his evidence on key points is confirmed by other independent evidence. To be confirmatory, the evidence must confirm relevant or important parts of Mr. Miller's evidence such that the court's faith in his evidence is restored. However, the confirmatory evidence does not need to specifically implicate the defendants in the commission of an offence. Lastly, there is no requirement in law that Mr. Miller's evidence be confirmed in order for me to accept it. The rule is simply that I must exercise great caution before doing so.
- [246] In assessing Mr. Miller's credibility, I am also mindful that I must assess his evidence in a fair context and with a sensitivity to the realities that racialized individuals face in society. In this regard, when I assess Mr. Miller's initial denial of criminal involvement with the Theriault vehicle, I must keep in mind that as a young black man, Mr. Miller may well have had many reasons for denying any wrongdoing including a distrust of law enforcement. This is understandable especially in view of his injuries and the fact that he was initially arrested and later charged with a number of criminal offences relating to the incident.
- [247] As well, while I must consider the fact that Mr. Miller was committing a crime of dishonesty at the outset of this incident, the context is important. To be blunt, Mr. Miller is not the first nor will he be the last young man caught stealing pocket change and sundries from unlocked vehicles. As such, I am mindful that the fact that Mr. Miller was caught stealing from the Theriault vehicle does not automatically render his evidence less credible. Mr. Miller engaged in an act of petty theft which, while invasive of property rights, can hardly be described as an offence that is significantly telling in terms of his character or credibility generally.
- [248] Mr. Jack is also a witness with significant credibility problems. He came to court intent on offering a version of events geared towards supporting Mr. Miller regardless of the truth. However, despite a surface level of support, his evidence actually contradicted Mr. Miller's evidence in key regards. In colloquial terms, Mr. Jack could not keep his story straight. I reject most, if not all of Mr. Jack's evidence.
- [249] Conversely, I find that Mr. Goode came to court and told the truth about what he, Mr. Miller and Mr. Jack, were doing on the night of the incident. His evidence was presented in a straightforward and credible fashion. He admitted his own unlawful conduct in a fair and frank manner. I find him to be a credible witness.

[250] James Silverthorn was also an honest witness. He gave a compelling and dispassionate account of what he observed on the night in question. His evidence was tested vigorously, and he remained objective and offered logical explanations for certain discrepancies in his evidence. I am not troubled by the suggestion that he discussed his observations with Michael Hastie, and I accept that they may have had some limited discussion as might be expected when neighbours commonly observe a traumatic event. That said, I am aware that Mr. Silverthorn's evidence poses potential reliability concerns. It is clear that Mr. Silverthorn made his observations in less than ideal conditions when emotions were running high. Nonetheless, I remain impressed with and generally accept his evidence as credible and reliable, subject to some comments which I will address shortly.

Detailed Factual Findings

(i) The Interaction in Front of the Theriault Residence

[251] On Mr. Miller's version of events, he and his friends were walking down a street late at night doing nothing out of the ordinary, when they were stopped and questioned by the defendants who wanted to know why they were in the neighbourhood and what they were doing.

[252] The defendants have mounted a formidable challenge to this version of events. They argue that Mr. Miller and his friends were out "car hopping", in other words stealing from unlocked cars. They argue that Mr. Miller has perjured himself on this issue and, further, that this perjury casts a pall on his overall credibility.

[253] Having considered all of the evidence, I am satisfied that Mr. Miller, Mr. Jack and Mr. Goode, were "car hopping" at the time of the incident. I am further satisfied that Mr. Miller and Mr. Jack had opened the unlocked doors to the vehicle on the driveway at the Theriault residence and were essentially caught by Michael and Christian Theriault in the act of stealing items from the vehicle. I reach this conclusion for the following reasons:

a. I reject Mr. Miller's evidence of what he was doing that night and in particular, his denial of involvement in "car hopping". His evidence was internally inconsistent. He was evasive and he refused to admit obvious inconsistencies in his evidence. I note the following as a few of many examples:

i. Mr. Miller's evidence about the timing of the visits to his home by Mr. Jack and Mr. Goode evolved following the preliminary inquiry. At trial, he indicated that Mr. Jack was initially at his home, then left and later returned with Mr. Goode. At the preliminary inquiry, he testified that both Mr. Jack and Mr. Goode were at his house until they left to go visit the girls. Mr. Miller was questioned on this inconsistency, and on the fact that his mother testified at the preliminary inquiry

and indicated that she did not see any of Mr. Miller's friends over that night. Mr. Miller denied that he was aware that his mother had testified at the preliminary inquiry that she had not seen any of his friends over that night. Moreover, he refused to acknowledge the inconsistency between his evidence at trial and at the preliminary inquiry, indicating that at the preliminary inquiry the question asked related only to his presence at the house and not specifically to Mr. Jack and Mr. Goode as well. I agree with the defence that this change in evidence appears to be geared towards tailoring his evidence to address the evidence given by his mother.

- ii. Mr. Miller's evidence about who entered Mr. Selby's home also evolved following the preliminary inquiry. Initially his evidence was that he, Mr. Jack and Mr. Goode, entered the home. However, Mr. Selby's evidence at the preliminary inquiry contradicted Mr. Miller on this issue. At trial, Mr. Miller moderated his evidence and indicated that he went inside the Selby residence, Mr. Jack was inside briefly, and Mr. Good never went inside. I agree with the defence that this change in the evidence appears geared towards "softening" the inconsistency created by Mr. Selby's evidence.
- iii. At trial, Mr. Miller indicated that he provided the names of his friends, "AJ and Bradley", when asked by police at the scene. Assuming he and his friends were doing nothing wrong, it would make perfect sense for Mr. Miller to name his friends. However, at the preliminary inquiry, Mr. Miller indicated that he told officers that he was with two people but did not provide their names. Mr. Miller refused to acknowledge that his evidence on this issue was inconsistent. He was also contradicted on this evidence by the police officer on scene, who testified that Mr. Miller did not provide the names of his friends at the scene. I agree with the defence that Mr. Miller was reluctant to name his friends because they had been engaged in illegal activity at the time of the incident.
- iv. At trial, Mr. Miller admitted to smoking marijuana on the evening of the incident and particularly at Mr. Selby's residence. However, in a statement to the SIU and in his evidence at the preliminary inquiry, Mr.

Miller denied smoking marijuana and denied going to Mr. Selby's house to buy marijuana. At the preliminary inquiry, Mr. Miller's denial of using marijuana at Mr. Selby's residence was included in a written list of assertions titled "Things Always Remembered" that was presented to Mr. Miller. He confirmed that he was 100% certain of the assertions listed in the document. At trial, the document, which was entered as Exhibit 25, was put to Mr. Miller. When confronted with the inconsistency about marijuana usage, Mr. Miller indicated that his evidence at the preliminary inquiry "Sounds different, but, actually, like, it's just the way I said it was different".

- v. At trial, Mr. Miller testified that he "assumed" Michael Theriault had been drinking and smoking because he smelled alcohol and cigarettes on him, though he did not actually see him drinking and smoking. In a statement to the SIU, Mr. Miller indicated that he saw both Michael and Christian Theriault drinking and smoking in the garage. When confronted with this inconsistency, Mr. Miller was reluctant to admit it and instead tried to offer possible explanations for why his evidence was, in fact, consistent on this issue.
- b. Mr. Miller's denial of any involvement in car hopping is also contradicted by the physical evidence at the scene and his attempt to explain that physical evidence, for instance:
- i. Mr. Miller was reluctant to admit that the flashlight found at the scene was his. When shown a photograph depicting the flashlight, Mr. Miller initially indicated that he did not know what the item was. He later indicated that "if" the item had been in his sweater pocket, it "could" belong to his brother. This evidence was obviously contrived to distance himself from the flashlight. Moreover, at the preliminary inquiry, Mr. Miller testified that the flashlight was his, though he claimed to not remember having it on him at the time of the incident. When confronted with the preliminary inquiry evidence, Mr. Miller again denied that his evidence was inconsistent.
 - ii. Mr. Miller refused to accept that the gloves at the scene were his, indicating they were too small. He maintained this position even when confronted with the DNA

evidence suggesting that his bodily fluids were found inside the gloves. The testing revealed the presence of both blood and non-blood bodily fluid DNA on and in the gloves. The obvious inference is that Mr. Miller wore the gloves. His denial is telling. The incident happened on a winter evening. There would be a perfectly valid reason for any person out that night to have a pair of gloves. However, Mr. Miller was insistent that the gloves were not his despite the DNA evidence. I find that Mr. Miller's denial is an attempt on his part to distance himself from the suggestion that the gloves were being worn to avoid leaving fingerprints behind while stealing from cars.

- iii. Mr. Miller's evidence regarding the sunglasses at the scene is troubling. His initial evidence was the sunglasses might be his and they "actually" looked like his mother's sunglasses. When shown a further photograph of the sunglasses, he denied any knowledge of the sunglasses. It is clear that Mr. Miller decided to distance himself from the sunglasses. Moreover, I accept Michael Theriault's evidence that the glasses belong to Christian Theriault and I am satisfied that Mr. Miller had them in his possession, having taken them from the truck.
 - iv. Mr. Miller's evidence regarding the coins found at the scene is also troubling. When shown a photograph of some of the coins found at the scene, Mr. Miller spontaneously offered a detailed recollection of what he had purchased at a store earlier that evening which resulted in the amount of change shown in the photograph. However, Mr. Miller was then shown further photographs of additional coins and money found on him. He accounted for this additional money by suggesting that it too was change from other purchases that he made earlier on the evening of the incident. This evidence was obviously contrived in a transparent attempt to account for the fact that Mr. Miller was in possession of pocket change which he knew he was alleged to have stolen from parked cars.
- c. It is clear to me that Mr. Miller and Mr. Jack have attempted to proffer a false version of events that avoids any mention of car hopping. However, their respective versions of events are inconsistent on material issues:

- i. According to Mr. Jack, he and Mr. Goode went to Mr. Miller's house and stayed there until 8:00 or 9:00 p.m., when they went to Mr. Selby's house to buy marijuana as they had run out. Mr. Selby did not have marijuana to sell and he gave them a contact for someone who would sell them marijuana. Mr. Miller then used a map application on his phone to lead the way, and as they were walking towards the contact they ran into the defendants. According to Mr. Miller, it was only Mr. Jack who initially came to his house and then left, returning much later with Mr. Goode. They then went to Mr. Selby's house while waiting for some girls to get ready to meet them. Mr. Miller denied buying marijuana from Mr. Selby, indicating that he had his own marijuana. Mr. Miller also denied using a map application on his phone as he did not have a data plan.
- ii. Their evidence about the visit to Mr. Selby's home is not only inconsistent, it is also contradicted by Mr. Selby himself. According to Mr. Selby, the last time he saw Mr. Miller prior to the injury was when Mr. Miller came to his house alone during the day. He makes no mention of either Mr. Jack or Mr. Goode being present for this visit. Mr. Selby's evidence is supported by Mr. Goode, who denied that the three of them visited Mr. Selby on the night in question. I find that there was no rendezvous at Mr. Selby's house on the night of the incident. The visit was concocted to provide an explanation for what Mr. Miller, Mr. Jack and Mr. Goode, were doing that evening.
- iii. According to Mr. Jack, when they were walking down the street towards the Theriault residence, he was walking behind Mr. Miller and Mr. Goode. He was not standing alongside them when they were approached by the defendants. He did not hear what was said and denied laughing as they were being questioned by defendants. According to Mr. Miller, Mr. Jack was present for this interaction and when Christian Theriault asked if they lived in the area, it was Mr. Jack who responded "no" and pointed to where they lived. Mr. Miller also indicated that Mr. Jack laughed when being questioned by the defendants.
- iv. Lastly, I am troubled by the evidence in relation to the Mazda car key found at the scene. Mr. Miller indicated

that the key was for a car he owned. The car had been recently purchased and was uninsured. Conversely, Mr. Jack indicated that he was the owner of a Mazda 3 that had been recently purchased and that he had given a key to Mr. Miller “to hold onto”. I find that this is another instance where Mr. Jack and Mr. Miller have attempted to contrive a version of events but have not managed to keep their stories straight.

- d. I accept the evidence of Mr. Goode that he, Mr. Miller and Mr. Jack, spent the evening entering unlocked cars and stealing items. I also accept his evidence that he saw Mr. Miller and Mr. Jack enter the pickup truck on the driveway of the Theriault residence while he was standing some distance behind them. Mr. Goode’s evidence on this issue is essentially an admission against interest. He has no apparent motivation to falsely incriminate himself in the car hopping activity he engaged in that evening. His evidence on the issue of timing is consistent with the objective evidence relating to the timing of the incident. His evidence is also supported by Mr. Selby who suggests that there was no rendezvous at his house that evening, either for the purpose of purchasing marijuana or as a stop on the way to meet some girls.
- e. I accept Mr. Selby’s evidence that the last time he saw Mr. Miller before the injury was when Mr. Miller came by his house, alone, during the day. Mr. Selby and Mr. Miller were friends. Mr. Selby visited with Mr. Miller following the incident. According to Mr. Miller, his visit to Mr. Selby’s house was for a perfectly innocent purpose. If the attendance at Mr. Selby’s residence had happened as Mr. Miller said it did, Mr. Selby would have no reason to lie about it.
- f. I accept the evidence of Michael and Christian Theriault that they were in the garage with the door closed when they heard noise outside, suggesting that someone was in one of the vehicles. I accept that this is the reason why the garage door was opened, and I accept that when they exited the garage they saw two individuals exiting the truck on their driveway. Those two individuals were Mr. Miller and Mr. Jack. The photographs of the interior of the truck show an open centre console, supporting the fact that the theft from the vehicle was interrupted. I accept that the sunglasses found at the scene came from the truck.
- g. Lastly, I am satisfied that some of the change at the scene likely came from other thefts committed that evening. I also accept that Mr. Miller was using the flashlight and gloves during the commission of these thefts.

(ii) The Provenance of the Metal Pipe

- [254] The Crown forcefully argues that the metal pipe came from the garage at the Theriault residence. The Crown posits that as a trained police officer, Michael Theriault would not simply have “rolled out” under the opening garage door to confront whomever was in the vehicle on the driveway without some form of weapon or defensive device. He was confronting a person or persons who posed an unknown, though potentially serious threat. He was using an element of surprise by rolling under the garage door as it opened. He did not have access to his usual use of force equipment. In this context, the Crown argues it makes perfect sense that Michael would have armed himself with something typically stored in a garage and readily accessible, like a metal pipe.
- [255] The Crown further argues that Michael Theriault’s evidence provides implicit support for a finding that he was initially armed with the metal pipe when he body checked Mr. Miller. In this regard, the Crown argues that the reason why Michael body checked Mr. Miller instead of simply grabbing him is because he was holding the metal pipe in his hands.
- [256] Lastly, the Crown argues that Michael and Christian Theriault’s failure to mention the fact that Michael held the pipe, at least for part of the incident, is a concoction by omission that is contradicted by the independent evidence of the witness at the scene. The Crown argues that in view of the independent evidence, the omission is an intentional fabrication and can be used as positive evidence of the fact that Michael initially possessed the metal pipe during the altercation.
- [257] The provenance of the metal pipe is a central issue in this case. There is no issue that Michael Theriault was in possession of the pipe towards the end of the encounter. The evidence on this issue is clear. Michael admits that when Mr. Miller went to the front door of the Silverthorn residence, he retrieved the pipe and held it in both hands at shoulder height, ready for use against Mr. Miller. Apart from Mr. Miller, Mr. Hastie, David Silverthorn and James Silverthorn also place the pipe in Michael’s hands during this portion of the incident.
- [258] However, the evidence about the provenance of the pipe at the initial stages of the incident is less than clear:
- a. Michael Theriault denies taking the pipe from the garage and maintains that it was produced by Mr. Miller immediately after the body check on the fence.
 - b. Christian Theriault initially tells police he “assumes” Mr. Miller pulled the pipe from his pants. In his later statement, he tells police he is not sure whether the pipe was “tucked” in Mr. Miller’s pants or if it came from the side of the house. It does not appear that he actually saw Mr. Miller produce the pipe. Instead, he heard his brother say “he’s got a bat”, and then ran in to help.

- c. It is virtually impossible for Mr. Miller to have had a four foot long pipe secreted down his pants as he walked the neighbourhood and later ran away from the defendants. There is no other evidence suggesting that Mr. Miller had the pipe in his possession prior to entering in between the homes at 113 and 115 Erickson Drive. Neither Mr. Goode nor Mr. Jack saw him with a pipe. Mr. Miller denies having the pipe in his possession. Michael Theriault agreed that he never lost sight of Mr. Miller while chasing him, and he further agreed that he never saw the pipe in his hands.
- d. Mr. Miller did not see a pipe in anyone's hands when he was being chased by Michael and Christian Theriault.
- e. Mr. Jack claims at trial to have seen a metal pipe in the hands of the person chasing Mr. Miller. However, at the preliminary inquiry he could not recall seeing a pipe. When challenged on this development in his evidence, he could offer no explanation as to why he would have lied about this topic at the preliminary inquiry.
- f. Mr. Forde did not recognize the pipe as an item he used to prop up plants in his garden, though he agreed that it was similar to items he used for that purpose. Mr. Forde presented as an elderly witness who was honestly trying to assist the court as best as he could. However, he also was less than clear in his evidence and at times appeared confused. The photographs of his yard in between the homes show various pole-like items that could be used to prop up plants.
- g. The pipe was examined by the manager of a metal supply store. He noted that one end of the pipe had dirt in it, and the other end appeared beaten as if the pipe had been beaten into the ground. The pipe also appeared weathered. This evidence suggests that the pipe could have been used to support a plant in a garden. That said, the evidence does not specifically link the pipe to Mr. Forde's house, it merely permits a possible connection. The pipe could have been used for the purpose of propping plants wherever it came from.

[259] When I consider this evidence as a whole, I am left with a number of possible options: (1) Mr. Miller had the pipe with him initially, either down his pants or perhaps in his hands; (2) the pipe came from the garage at Theriault residence with either Michael or Christian Theriault taking it as they left the garage to confront the persons in the vehicle; (3) the pipe was located in between the Silverthorn and Forde residences and was grabbed by either Mr. Miller or one of the defendants at some point during the altercation.

[260] The first option is easy to dispose of. There is no basis in the evidence to conclude that Mr. Miller had the pipe with him initially while outside the Theriault residence.

- [261] In terms of the second option, I agree with the Crown that it would make logical sense for either Michael or Christian Theriault to grab the metal pipe as they were leaving the garage. They were confronting an unknown individual or individuals who were potentially committing an offence and could potentially pose a safety risk. I also agree with the Crown that one possible reason why Michael body checked Mr. Miller instead of grabbing him was because he was holding the pipe in his hands. On the basis of this evidence and the inferences that follow, I am prepared to find that it is a reasonable possibility that the pipe came from the Theriault garage.
- [262] In reaching this conclusion, I am not placing any weight on the failure of Michael and Christian Theriault to mention in their initial statements to police the fact that Michael later possessed and brandished the pipe. Even assuming for the sake of argument that the omission was an intentional and independently proven fabrication, it would only be circumstantial evidence supporting an inference that Michael possessed and perhaps wielded the pipe at some point during the altercation. Michael agrees that he took possession of the pipe in the late stages of the altercation, although he denies striking Mr. Miller with it. In these circumstances, the omission is not circumstantial evidence supporting an inference that Michael brought the pipe from his garage at the outset. In other words, the omission is perhaps telling in terms of the use of the pipe during the altercation, but it does not assist in determining whether the pipe came from the Theriault garage or was picked up by Michael or Christian at the scene.
- [263] I am also not prepared to make a finding that Michael and Christian Theriault colluded prior to making their statements. I agree that there is no mention of Mr. Miller using the pipe during the 911 calls involving Michael and Christian. I also agree that Michael and Christian were potentially together for periods of time before they gave their police statement, and were within earshot of each other when they gave their initial verbal recitations to Cst. McQuoid.⁶ While these circumstances raise the possibility that they colluded, they offer no proof of collusion. I am also not prepared to draw a conclusion of collusion based on the similarity of the statements. As the defence notes, the degree of similarity is equally consistent with two persons accurately conveying their observations of an event that had just happened.
- [264] Turning to the third option, I am troubled by Michael Theriault's evidence as to how the pipe was produced by Mr. Miller. In short, I do not accept it. According to Michael, he chased Mr. Miller from his house to the Silverthorn/Forde residences. He was following him closely and never lost sight of him. He did not see Mr. Miller arm himself with the pipe while initially running into the space between the homes. However, according to Michael, once he body checked Mr. Miller against the fence in between the homes, Mr. Miller instantaneously produced the pipe and began swinging it. As discussed below,

⁶ After finishing his shift, Cst. McQuoid drove to the defendants' home to advise them of the possibility that the SIU might become involved in the matter and that further statements might be requested. He did not speak with either Michael or Christian Theriault at this time. Ostensibly this was an act of "professional courtesy." Again, while not ultimately relevant to the findings I am making, I am troubled by the optics and purpose of this "professional courtesy."

considering all of the evidence, it seems quite unlikely that as Mr. Miller was body checked off the fence, he simply landed right where the metal pipe just happened to be.

[265] I am also troubled by Michael Theriault's assertion in his statement to police that when "looking after" the incident, it appeared to him that the pipe could have come from the "gas line at 113", which I find is a reference to the air conditioning rough-in near the flower-bed and disturbed bricks. In his evidence, Michael denied that after the incident he went back to look at the area of the air conditioning rough-in. When challenged on this evidence, he indicated that he had "no idea" what gas line he was talking about. The denial is telling. If Michael's evidence that the pipe was produced by Mr. Miller right after the body check on the fence was true, the pipe could not have come from the "gas line" at the side of the house. Mr. Miller would have run past the air conditioning rough-in on his way to the fence while being chased, and it is highly unlikely that in doing so he would have managed to spot and grab the pipe without Michael noticing it.

[266] In my view, a more likely scenario is that the metal pipe was introduced into the altercation at some point during the altercation, perhaps as the parties were running into the area between the homes or perhaps after the body check against the fence. In this regard, I accept that the pipe was possibly located at the side of the Forde residence, perhaps stored against the wall near the fireplace "jut out" and flowerbed. Mr. Forde's evidence, while credible, is neither clear nor ultimately reliable enough to support a finding that the pipe had no connection with his residence. James Silverthorn's evidence adds little to this issue, and I find he ultimately could not say whether or not the pipe came from the side of the Forde residence. When combined with the evidence suggesting that the pipe had been banged into the ground, I find that the pipe was possibly one of the pole-like objects that Mr. Forde used in his garden and stored at the side of his house. I cannot conclude, as the Crown argues, that the pipe did not come from the side of the Forde residence and therefore must have come from the defendants' residence. However, to be clear, even if the pipe came from the side of the Forde residence, it could have been first wielded by any one of the three individuals present.

(iii) The Events In Between the Silverthorn and Forde Homes

[267] The Crown argues that this is essentially a case of street justice. Michael and Christian Theriault caught Mr. Miller inside their vehicle, and they chased him intending not to arrest him but to catch and beat him. They were successful. However, they went too far and Mr. Miller was badly injured. It was only once it became clear that Mr. Miller was attempting to call 911 on his phone and that neighbours had been alerted to the incident, that Michael decided to arrest Mr. Miller.

[268] The defence position is that Mr. Miller was caught in the commission of an indictable offence and that the defendants, at all times, wanted to arrest him and hold him for the arrival of Durham Police.

[269] At the time of the incident, Michael Theriault was a trained police officer. While he did not have years of experience, he was not a rookie. He agreed that arrests of individuals

suspected of committing crimes were the “bread and butter” of his work. He was also well acquainted with his training and understood police procedure for effecting an arrest, including the reasons why following police procedure could de-escalate an arrest and result in an uneventful submission by an arrestee.

- [270] When Michael Theriault left his garage, he was not dressed for the weather. He was not even wearing shoes. It was winter and there was snow on the ground. Michael chased Mr. Miller for a long distance, perhaps as far as 140 metres. On all versions of events, at no time during this lengthy foot chase did he identify himself as a police officer. At no time did he utter words of arrest or detention. The failure to identify himself as a police officer and utter words of arrest continued during the physical interaction in between the houses, and then at the front door of the Silverthorn residence. It only ended when Mr. Miller moved towards the parked car on the driveway of the Theriault residence. According to Michael, he told Mr. Miller he was under arrest when Mr. Miller was on the car. According to Mr. Miller, this occurred when he called 911 once he was on the ground next to the vehicle parked on the Silverthorn driveway.
- [271] When questioned on this issue, Michael Theriault explained that everything unfolded quickly and that he just did not have time to identify himself as a police officer and utter words of arrest. He added that in hindsight he should have identified himself as a police officer and should have uttered words of arrest.
- [272] I am unable to accept this evidence. This is not simply a momentary delay in the midst of a rapidly unfolding and dynamic situation. This is a prolonged and sustained failure to abide by police training that is rooted in common sense.
- [273] To be blunt, I would have expected the first thing out of Michael Theriault’s mouth as he was chasing Mr. Miller while wearing only socks would have been “Stop...you are under arrest...I’m a police officer”, or words to that effect. The fact that nothing was said during the chase is telling, especially in view of the distance covered. Equally, if not more telling, is that fact that nothing is said to Mr. Miller when he is body checked against the fence, or thereafter as the incident escalates into a violent struggle with Mr. Miller purportedly swinging the metal pipe.
- [274] Even once the violent struggle initially tapers off and Michael Theriault takes out his phone, ostensibly to call 911, he does not identify himself as a police officer or utter words of arrest. I accept that by this stage in the incident, matters had escalated to the point where Michael had at least turned his mind to getting police assistance, and it is telling that he still does not identify himself or utter words of arrest.
- [275] Even after the struggle subsides again and Mr. Miller moves towards the front door of the Silverthorn residence, Michael Theriault still does not identify himself as a police officer or utter words of arrest. Instead, he retrieves the metal pipe and brandishes it. He does not look for his phone to make another attempt at calling 911. He does not instruct Christian Theriault to call 911.

- [276] It is inconceivable that a trained police officer intent on effecting an arrest would have failed to utter a word by this stage in an encounter. Lastly, it is telling that it is only when Mr. Miller is on the phone with 911 that Michael Theriault finally identifies himself as a police officer.
- [277] On the whole, I am satisfied that Michael Theriault's initial intent was not to conduct an arrest. It was likely to capture Mr. Miller and assault him.
- [278] In terms of Christian Theriault, when he is on the call with 911, he can be clearly heard yelling at Mr. Miller who by this point is being held on the ground by Michael Theriault. He states: "I'm on 911 you fucking, you fucking in our cars and shit, eh? You picked the wrong cars". This comment is telling. It suggests that, at least in Christian's mind, retribution had been served.
- [279] In terms of Mr. Miller's state of mind at the time of the chase, I find that he ran from the scene because he had been caught inside the Theriault vehicle. I find that as he ran, he knew he was being pursued by persons who were trying to catch him. However, in the absence of any words of arrest or words identifying a police presence, I cannot conclude that Mr. Miller would have known that his pursuers were attempting to lawfully arrest him. At best, he would have known that his pursuers wanted to catch him, perhaps to arrest or detain him for police, perhaps to harm him, or perhaps both.
- [280] Against this backdrop, I turn next to events that transpired in between the homes.
- [281] I accept Michael Theriault's evidence that he body checked Mr. Miller against the fence as Mr. Miller was attempting to scale the fence in an effort to escape. I reject Mr. Miller's version of events in this regard.
- [282] I find that after the body check against the fence, a violent struggle ensued near the area of the fence. The dispersal of items such as the sunglasses, the silver flashlight and the BIC lighter (depicted as Items #2, 3, and 4 in Appendix "A"), suggests that the initial struggle was localized around this area. I find that as the violent struggle continued, it progressed over to the fireplace "jut out" and flowerbed alongside the Forde residence.
- [283] In terms of the metal pipe, I find that it could have been introduced into the struggle at some point after the body check when the parties moved over to the flowerbed. Given the credibility issues with Mr. Miller, I am unable to accept that he never had the pipe in his hands. Ultimately, it remains a reasonable possibility that he wielded the pipe at some point during this initial encounter.
- [284] On this basis, I cannot entirely reject Michael Theriault's evidence that Mr. Miller wielded the pipe and further, that Michael called Christian to join in the fight at that point. I also cannot reject the possibility that Christian was hit in the head with the pipe and suffered a concussion as a result.
- [285] I find that what followed the initial struggle following the body check was a further struggle at the side of the Forde residence near the fireplace "jut-out" and flowerbed. I

accept that by this stage Christian Theriault had joined the melee and was holding Mr. Miller in a headlock for at least some period of time. I accept Michael Theriault's evidence that he was hitting Mr. Miller as hard and as fast as he could at this time.

- [286] While I cannot reject the possibility that Mr. Miller wielded the pipe initially, I am satisfied that if he did, it quickly ended, likely with the pipe being taken away by Michael Theriault as he indicated in his evidence.
- [287] I further find that the fight thereafter quickly became one-sided. In this regard, I accept James Silverthorn's evidence that when he looked out his bathroom window, he observed two individuals rapidly and forcefully punching a third individual in the area of the fireplace "jut out". In reaching this conclusion, I have considered carefully the lighting conditions and vantage point from where the observations were made. I accept that the lighting conditions were poor and that the vantage point was not ideal. However, I am not prepared to find that these factors caused Mr. Silverthorn to misperceive what he was observing. Mr. Silverthorn was candid in admitting the limitations of his observations. He did not purport to identify specific individuals or detailed features. He simply looked out his window and saw two people punching away at a third person who did not appear to be fighting back.
- [288] I also consider that when Mr. Silverthorn first recounted his observations to the 911 operator, he said he was awoken by "two guys fighting between the house". However, I accept Mr. Silverthorn's explanation that he poorly narrated what he had seen and in fact, had seen two guys fighting a third guy. I am also not troubled by the alleged discrepancy between James and David Silverthorn's evidence on whether James saw two or three individuals. To the extent that David Silverthorn corrected James Silverthorn on his comment that he saw two people fighting, I accept that the correction was to James' articulation of what he was seeing rather than what he was actually seeing. In other words, I am satisfied that Mr. Silverthorn actually saw three people, despite articulating that he saw two. More importantly, the portion of events that David Silverthorn observed was the portion in the front of the home and not at the side of the home. On the whole, I accept Mr. Silverthorn's evidence about his observations at the side of the home and I find that his observations are reliable.
- [289] The one-sided nature of the fight is also supported by the evidence suggesting that Michael Theriault had no injuries whatsoever, apart from perhaps some soreness. While I cannot reject the evidence that Christian Theriault had a concussion based on self-reported symptoms and that this concussion was possibly caused by a strike with the pipe, I am not prepared to find that he suffered other significant injuries. The wound on his hand is best described as a "scratch", and the fact that his hand and thumb were sore is hardly surprising given that he was punching Mr. Miller. Christian claimed that his thigh was bruised and his eye was "darkened". I pause to note that Michael never noticed the fact that his brother's eye was darkened. I also note that no photographs of these injuries were taken, despite the suggestion being made by police officers. Ultimately, even accepting that Christian had a concussion and some bruising after the event, I find that

these injuries do not detract from the fact this encounter quickly became a one-sided fight.

- [290] While the struggle on the flowerbed quickly became one-sided, I accept that it initially tapered off likely once Mr. Miller stopped fighting. I accept Michael Theriault's evidence that when Mr. Miller stopped, he let him go and grabbed his phone, ostensibly to call 911. I accept his evidence that the call was not completed and that the phone was dropped.
- [291] I am satisfied that at this stage in the encounter, Mr. Miller had yet to suffer the injury to his eye and nose. I accept Dr. Pickup's evidence that the injury to the nose would have bled profusely and quickly, and that the eye injury would also have resulted in a fair bit of bleeding. Michael and Christian Theriault were engaged with Mr. Miller in close quarters along the flowerbed. Christian had Mr. Miller in a headlock for at least a portion of the incident. Michael was on top of Mr. Miller, wrestling the pipe away from him and also punching him. Tellingly, neither Michael nor Christian had any visible blood on them. There was no blood observed at or around the flowerbed area. There was no blood found on any of the items located near the flowerbed or near the fence. The most obvious inference is that Mr. Miller was not bleeding at this stage of the encounter.
- [292] The first visible signs of blood appear on the wall of the Silverthorn residence and from there, there is a trail of blood to the front door and then to the car on the driveway where Mr. Miller was eventually arrested. The trail of blood is depicted in Appendix "A" for ease of reference.
- [293] According to Mr. Miller, after he left the area of the flowerbed, he ended up on the ground in between the two homes, facing the fence. Michael and Christian Theriault continued to beat him with the pipe and with their fists and feet. The area where Mr. Miller indicates this happened is roughly the same area where Michael's cell phone was found.
- [294] According to Michael Theriault, neither he nor his brother hit Mr. Miller after the interaction by the flowerbed. On their version of events, Mr. Miller left the flowerbed area and moved to the front door of the Silverthorn residence.
- [295] I find that the injury to Mr. Miller's eye was likely caused at some point between the flower-bed and his movement along the wall of the Silverthorn residence. The blood trail at the side of the house confirms that he was injured by the time he made it to that location. The complete absence of blood at the flowerbed and on either Michael or Christian Theriault suggests that Mr. Miller was not injured at that location. I find that what likely happened is that Mr. Miller broke free from Michael and Christian at the flowerbed and started to retreat. Michael likely grabbed his cell phone, ostensibly to call 911, and then dropped it because he re-engaged with Mr. Miller. I do not accept Michael's evidence that he did not hit Mr. Miller after he left the flowerbed. I also do not accept that he threw his phone before re-engaging with Mr. Miller. I find that the phone was dropped at the location where he and Mr. Miller re-engaged, as described by Mr.

Miller and by Christian. I also accept that both Michael and Christian continued to hit and kick Mr. Miller in this location.

- [296] In terms of medical causation, I accept the expert evidence of Dr. Pickup that the eye injury was most likely caused by a punch and not a strike with a metal pipe. Dr. Pickup's opinion was that the rupture to the eyeball, including the fracture to the bottom of the orbital bone, was most consistent with the application of blunt force trauma coming from a fist. In his view, if the pipe had been used to cause the injury, he would have expected to see injuries to the bridge of the nose, the outside edge of the orbital bone and/or the eyelid tissues.
- [297] To be clear, however, Dr. Pickup was only able to opine that the ruptured eyeball was likely caused by at least one very hard punch. He could not indicate how many punches Mr. Miller suffered. He could not offer an opinion on whether Mr. Miller had been hit with the pipe on his head, face or body, in a manner that did not cause a significant injury or leave a "tram track" bruise.
- [298] In terms of the injury to Mr. Miller's wrist, I accept that it is possibly a defensive wound. However, I also accept that it could easily have been caused as Dr. Pickup suggested, which was by falling backwards with an arm outstretched to break the fall.
- [299] I accept that Mr. Miller also suffered a number of other bruises during the encounter. There is no doubt that he was punched many times with significant force, and I accept that apart from the facial injuries he would have been very sore after the incident.
- [300] Before leaving the injuries, I want to address the defence argument that Mr. Miller has exaggerated the evidence of his injuries and that his evidence in this regard tells against his credibility generally. The defence cites a number of examples in support of this submission. For instance, Mr. Miller explained that the "structural bones" in his face and neck were broken, when it appears that apart from the injuries noted by Dr. Pickup they were not. He explained that he had bruises "all over", though these are not visible in the photographs. He believed he might lose sight in his other eye, though this concern does not appear to be corroborated by the medical records. I agree that Mr. Miller has not recounted his injuries with medical precision. He was wrong in some regards and in others he appears to have exaggerated his injuries to some degree. That said, in view of the objectively documented injuries, I am not prepared to find that his additional evidence about his injuries tells against his credibility in any significant sense. To the contrary, given the nature of the interaction and the severity of the injuries, it is hardly surprising that Mr. Miller used the language he did in describing his injuries.

(iv) The Events at the Front of the Silverthorn Residence

- [301] After the altercation in between the houses, Mr. Miller moved towards the front door of the Silverthorn residence and away from Michael and Christian Theriault. Mr. Miller testified that as he was moving towards the front door he continued to get hit in the head

area with the pipe. I accept that his movements to the front door roughly follow the blood trail depicted in Appendix “A”.

- [302] I am satisfied that Mr. Miller was vigorously banging on the door. It is also clear that he was badly injured and was trying to get help. There is some divide in the evidence as to who was shouting “Call 911”. James Silverthorn indicated that he believed the black male at the door was the one shouting and he heard it several times. However, according to Cst. Gendron, Mr. Silverthorn initially pointed out Christian Theriault as the person who was banging on the door and shouting “Call 911”. Cst. Gendron is likely mistaken on this issue. Indeed, according to Michael Theriault, Christian was standing towards the sidewalk at the foot of the driveway when this occurred. Mr. Miller does not recall shouting “Call 911”, though he maintains that he was clearly trying to get help. Michael indicates that he was the one shouting “Call 911”, though he accepts that it could also have been Mr. Miller.
- [303] Considering this evidence, I am prepared to find that at least one person was yelling “Call 911” and that it was likely Mr. Miller. I also accept that Michael Theriault may also have been yelling “Call 911”. Regardless of who was shouting it, I have no doubt Mr. Miller went to the door to get help as he had been injured and wanted to get away from Michael and Christian Theriault.
- [304] Mr. Miller testified that as he was banging on the door, he looked back to see where Michael Theriault was and he was struck in the face by the metal pole. Mr. Miller believes that this is when his eye was injured. He noted blood on the floor and on the door and realized he was bleeding profusely. He then walked over to the car and essentially surrendered.
- [305] I am satisfied that Mr. Miller was struck in the face with the pole when he was standing at the front door of the Silverthorn residence. While I must be very cautious in relying on Mr. Miller’s evidence, I find that the available external evidence provides sufficient confirmation of Mr. Miller’s evidence on this point. In short, in view of all the evidence, I believe him on this issue. I reach this conclusion for the following reasons:
- a. The glass on the front door at the Silverthorn residence has a gouge/scrape on it as depicted in photograph 0082 of Exhibit 2, Tab 2, and photograph 095451 of Exhibit 18. I am satisfied that this gouge/scrape occurred during the incident and was not present on the door prior to the incident. While I am satisfied that the crack in the window/door frame that appears next to the gouge/scrape in the glass also occurred during the incident, I accept that it could have been caused by Mr. Miller while banging on the door with his hand or fist. However, a hand or fist would not have caused the gouge/scrape on the glass. Ultimately, I am satisfied that the gouge or scrape was caused by contact with the edge of the metal pipe used in the incident, and that this would have been caused when Mr. Miller was struck in the face with the pipe. I reject the defence argument that if the pipe

had hit the glass one would have expected the glass to shatter. While it is true that a blow with a metal pipe could shatter the glass, I am not prepared to infer that the absence of shattered glass suggests that the pipe did not come into contact with the glass.

- b. Mr. Miller's blood is on one end of the pipe. I find that blood was placed on the pipe when the pipe came into contact with Mr. Miller's face which was already bloodied. On this issue, I reject Michael Theriault's evidence that he never struck Mr. Miller with the pipe. I also reject the suggestion that the blood was transferred to the pipe by Mr. Miller. Even assuming that Mr. Miller held the pipe during the initial portion of the incident, this was well before he was bleeding and, as a result, his possession of the pipe would not account for the presence of his blood on the end of the pipe. The only person who held the pipe after the initial stage of the confrontation was Michael. The presence of Mr. Miller's blood on the end of the pipe significantly contradicts Michael's denial of using the pipe to strike Mr. Miller.
- c. On Michael Theriault's evidence, once Mr. Miller walks away from the area in between the homes and heads towards the front door of the Silverthorn residence, Michael runs to retrieve the metal pipe. He indicates that he did this to prevent Mr. Miller from getting the pipe again. I reject this evidence. I accept that once Mr. Miller broke free he was moving along the wall of the side of the Silverthorn residence and heading towards the front door. He was touching the side of the house as he was doing so, likely because he was injured. This portion of Mr. Miller's evidence is confirmed by the presence of blood on the side wall and eaves downspout at the Silverthorn residence. Importantly, during this portion of the incident, Mr. Miller was not going near the pipe which had been thrown somewhere in between the two homes. Even if I were to accept that Michael ran towards the pipe to prevent Mr. Miller from getting it, it would not explain why he brandished it in both hands, ready for use. In my view, this is a telling admission. On Michael's own evidence, Mr. Miller was in retreat at this stage. I find that regardless of why Michael initially retrieved the pipe, once he had it, he decided to use it to hit Mr. Miller.
- d. I consider the fact that James Silverthorn does not specifically suggest seeing or hearing the pipe come into contact with his door during the portion of the incident that he observes from his foyer area. His failure to observe the strike with the pipe does not undermine my conclusion that it occurred much like Mr. Miller said it did. Mr. Silverthorn recounted that the banging on the doors was very loud. The doors were shaking. He was concerned that the doors would give way and that the melee that was outside would spill into his home. He and his son armed themselves with makeshift weapons in case they had to

deal with intruders. It was the middle of the night. The glass of the doors is almost entirely frosted. In these circumstances, the failure to specifically observe a strike against the glass does not undermine the remaining evidence.

- [306] Mr. Miller's belief that this is when his eye was injured is understandable even if it is mistaken. Mr. Miller had been involved in a violent struggle. He had been punched in the head and face many times. He was bleeding profusely and had significant injuries. On his version of events, he had essentially "stopped feeling" any hits while he was still on the ground in between the two homes. Further, while he had noticed some blood on his sweater prior to getting to the front door of the Silverthorn residence, he noticed the blood pooling on the ground once he was at the door.
- [307] Following the strike to the face, Mr. Miller walked down the pathway onto the driveway and surrendered on the hood of the car. As he was walking, he was touching the wall of the Silverthorn house. Again, I find that this is likely because he was badly injured. According to Mr. Miller, as he was moving towards the car, he continued to get hit on the back with the pipe. He wanted to shield his head and face from any further strikes.
- [308] I accept that Mr. Miller was struck further times with the pole after he was struck at the door. Again, the available evidence provides a sufficient degree of confirmation on this point.
- [309] In particular, I accept that James Silverthorn observed more than one strike with the pole. He described the strikes as essentially "downward stabs" with the pole, and explained that he saw Michael Theriault jab the pole down on Mr. Miller when Mr. Miller was trying to get up. He explained that he saw this happen more than once. Mr. Silverthorn was challenged on his recollection and the words he initially used to describe his observations. In the 911 call, Mr. Silverthorn states that there was a "a guy bent over" his wife's car. At trial, he explained that he used the word "bent over" to mean that the person was on the ground on all fours. He also used the word "bent over" to describe how Christian Theriault was positioned during a portion of his observations. He explained that in that context, he meant "crouching". I accept Mr. Silverthorn's explanations for the apparent discrepancies in his evidence. When he was on the 911 call, his intention was not to narrate a detailed account of his observations. It was to get police to attend at the scene. In hindsight, he did not articulate his observations with precision. I accept this explanation. I do not find him less credible or less reliable because of his failure to completely articulate what he was seeing.
- [310] I also accept that he sees Michael Theriault use the pole to jab down on Mr. Miller on more than one occasion. I accept that when he tells the 911 operator "I think he's gonna strike the person again", he had already observed one strike and then saw a second one. I am not concerned that this is a recollection that was tainted by later knowledge of the case.

- [311] Further, I accept that neither Michael Hastie nor David Silverthorn see Michael Theriault use the pipe in any way, though they both see him holding the pipe during this portion of the incident. The fact that they do not see the same thing as James Silverthorn does not, in my view, undermine the credibility or reliability of James Silverthorn's observations. While they were all observing the same event, they were doing so at different times, from different vantage points, while having been suddenly awoken in the middle of the night.
- [312] I am also not troubled by the fact that Mr. Miller does not specifically describe "downward jabs" with the pole. Mr. Miller testified that he was being hit in the back while in the area of the parked vehicle. He also indicated that he had stopped feeling hits even before getting to the door. He had suffered a significant eye injury and was bleeding profusely. I accept that he vomited on the hood of the car and this was likely because he had suffered a head injury. It is not surprising that in these circumstances, Mr. Miller would not be able to perceive and accurately describe what was happening to him.

Final Assessment of the Charges Against Each Defendant

- [313] In view of the facts as I have found them, I turn lastly to assessing whether the Crown has proven each offence against each defendant beyond a reasonable doubt.
- [314] Starting with the aggravated assault, given the air of reality to the defences advanced, for the Crown to prove an unlawful assault, it must disprove beyond a reasonable doubt that the defendants were acting in lawful self-defence and/or used reasonable force in the course of a lawful arrest.
- [315] I am satisfied that Michael Theriault's initial intent was likely not to arrest Mr. Miller but rather to capture him and assault him. That said, I cannot exclude the reasonable possibility that his intent was also to arrest him, notwithstanding the manner in which he conducted himself. As such, I cannot conclude that the Crown has proven beyond a reasonable doubt that the initial body check against the fence amounts to an assault in law. To be clear, it was probably an assault as Michael probably intended only to capture and assault Mr. Miller at this stage. However, as with all criminal cases, probability is not a sufficient standard of proof. As such, I have a reasonable doubt about whether this initial interaction amounts to an unlawful assault.
- [316] In terms of what happened following the body check against the fence, I cannot exclude the reasonable possibility that Mr. Miller first wielded the metal pipe, having retrieved it from the side yard of the Forde residence at some point after body check. To be clear, it is also reasonably possible that the pipe was first wielded by either Michael or Christian Theriault, who either brought it with them from their garage or retrieved it from the side of the Forde residence during the fight. Given the credibility issues with the evidence, I am not in a position to determine the issue one way or the other.
- [317] In terms of the possibility that Mr. Miller initially wielded the pipe, I note that from his perspective, it would have been obvious that he was being chased because he was caught inside the Theriault vehicle. There is no other reasonable inference. That said, in the

absence of words of arrest or words identifying his chaser as a police officer, I am not satisfied that Mr. Miller would have perceived that he was being chased only for the purpose of being arrested. Rather, I am satisfied that he likely would have perceived that he was going to be captured and assaulted, especially after the body check against the fence. In this regard, he may well have had a good reason to grab a nearby item like a pole in order to protect himself.

- [318] In view of the fact that I cannot exclude the possibility that Mr. Miller initially wielded the pipe, I must assess the self-defence claim on the basis that Michael and Christian Theriault were responding to Mr. Miller using a metal pole against them in between the houses. In this regard, I remind myself that a defensive response must be reasonable in the circumstances. However, it need not be measured to perfection.
- [319] Even assuming that the pipe was first introduced by Mr. Miller, it was quickly removed from him and the incident became one-sided with Mr. Miller essentially being beaten by Michael and Christian Theriault. The portion of the incident that is initially viewed by James Silverthorn confirms the one-sided nature of the incident at this stage.
- [320] When I assess this evidence, I remind myself that this incident unfolded quickly and in real time, without an opportunity for reflection. I must guard against artificially dissecting the incident to determine at precisely which point a punch turned from a lawful exercise of self-defence into an unlawful assault. Again, the law does not require clinical precision. The test is reasonableness and the onus on the Crown is to disprove self-defence beyond a reasonable doubt.
- [321] It is tempting to divide the portion of the incident that occurs on the flowerbed from the portion of the incident that occurs roughly in between the homes when Mr. Miller is on the ground facing the fence. However, I find that it is artificial to do so. The reality is that this portion of the incident is essentially one continuous event. The defendants and Mr. Miller are engaged at the flowerbed and the struggle moves over to the spot in between the houses. During this portion of the incident, Michael Theriault tries to use his phone to call 911. The fighting then resumes and Mr. Miller suffers his eye injury at some point. He then moves over to the front door while Michael goes to retrieve the metal pole.
- [322] Credibility issues prevent me from making definitive findings about this stage of the incident. However, when I consider the whole of the evidence, I am left with reasonable doubt about whether Michael and Christian Theriault were acting in lawful self-defence during this portion of the incident. If Mr. Miller initially wielded the pipe, Michael and Christian would have been entitled to act in self-defence by repeatedly punching Mr. Miller to disarm him and thereafter to prevent him, within reason, from engaging in any further assaultive conduct. While in a perfect world, once Mr. Miller was disarmed, the defendants would have stopped hitting him, clinical precision is not required. Allowing for a reasonable degree of variability in terms of a response, I am satisfied that the scope of permissible self-defence could, in these circumstances, extend beyond the initial disarming of Mr. Miller. However, and to be clear, I am simply left with reasonable doubt on this issue. The defendants were probably *not* acting in self-defence at this stage and by

the end of this portion of the incident, the self-defence justification would have been razor thin. By that stage, they were probably just beating on Mr. Miller. Probability, however, is not the test for a criminal case.

- [323] The analysis changes when I consider what happened at the door of the Silverthorn residence and thereafter on the driveway. In my view, it is obvious that once Mr. Miller moves to the side wall of the Silverthorn residence and heads towards the door, he is in retreat. He is heading to the door to seek assistance and he is badly injured. The already razor thin self-defence justification evaporates at this stage.
- [324] I am satisfied beyond a reasonable doubt that when Michael Theriault struck Mr. Miller with the pipe at the front door of the Silverthorn residence and thereafter, he was neither acting in self-defence nor in the course of a lawful arrest. As such, he committed an unlawful assault. In view of the medical evidence and evidence relating to the timing of the injury, I am not satisfied beyond a reasonable doubt that this assault caused the eye injury. Mr. Miller had already suffered the eye injury by that point in the incident. As such, Michael can only be found guilty of assault and not aggravated assault.
- [325] To be clear, while the finding of guilt is for assault, I am satisfied beyond a reasonable doubt that the pipe was used as a weapon and it was used on more than one occasion, including at least one strike to the face at the door and at least two downward jabs while on or near the driveway. Despite this finding, a conviction for the offence of assault with a weapon is not available in this case. Assault with a weapon is neither a charge before the court, nor is it a lesser and included offence of aggravated assault. Nonetheless, the fact that a weapon was used in committing the assault will be considered an aggravating factor on sentence.
- [326] In terms of Christian Theriault's liability, my conclusions on the issue of when Mr. Miller suffered the eye injury apply equally to him and, as such, he also cannot be found guilty of aggravated assault. Further, I cannot find that he was a party to his brother's assault simpliciter on Mr. Miller. By the time Michael Theriault armed himself with the pipe and moved towards the front of the home where Mr. Miller was seeking help, Christian was moving towards the foot of the driveway and was either already on his phone or about to be on his phone. There is no evidence suggesting that Christian has any direct involvement in what happens at the door. There is no evidence suggesting that he was either aiding or abetting Michael's assault of Mr. Miller at this stage. I therefore find Christian not guilty on the aggravated assault count.
- [327] I turn lastly to assessing the individual counts of attempting to obstruct justice. The Crown alleges that the attempt to obstruct justice in this case stems from the intentionally false and/or misleading statement made by each defendant to members of the Durham Police. The Crown does *not* allege an attempt to obstruct justice based on a broader effort to "cover up" the offences allegedly committed by the defendants.
- [328] In order to support a conviction for the offence of obstruct justice as alleged, I must find not only that the statement made by each defendant, respectively, is false, but also that it

was made for the purpose of obstructing the course of justice. Where the alleged attempt to obstruct justice arises in the context of a statement made to an investigating police officer, the court must be mindful of the contextual considerations at play. A person has the right to remain silent and is not required to answer any questions, whether they are an accused person or a complainant. However, if a person chooses to speak with police, they have no right to lie. Similarly, while a person has no duty to confess the commission of a crime, they do not have the right to mislead the police and falsely accuse others of committing an offence in order to divert attention away from themselves.

- [329] The context in which these statements were taken is important. Shortly after the Durham Police first arrived on scene, Mr. Miller was handcuffed and arrested. This appears to have been based on Michael Theriault's request for handcuffs and his initial recitation of events, in which he described that he and his brother caught Mr. Miller in the act of stealing from their vehicle, they then chased Mr. Miller in between the houses where in the course of a violent struggle Mr. Miller used the pipe to strike both Christian and Michael.
- [330] Apart from their initial utterances, both Michael and Christian Theriault provided a more formal statement to police prior to departing the scene. It is clear that both of them are being interviewed as complainants and not accused persons. They are not asked detailed questions. The statements are very brief, providing essentially an overview of what happened. Both statements advance a self-defence narrative, wherein Mr. Miller attacked Michael and then Christian with the pipe and a violent struggle ensued, ending with Mr. Miller's eventual submission. In neither statement is there any mention of Michael brandishing the pipe when Mr. Miller heads towards the door of the Silverthorn residence. In neither statement is there a mention of Michael striking Mr. Miller with the pipe.
- [331] In view of my findings on the issue of self-defence, I cannot conclude beyond a reasonable doubt that the core narrative of the statements provided by the defendants at the scene is false. Again, it is probably false, but probably false is not enough.
- [332] I am troubled by the absence of any mention that Michael Theriault wielded the pipe and struck Mr. Miller once Mr. Miller was seeking assistance at the Silverthorn residence. I agree with the Crown that the failure to even mention that Michael was holding the pipe at this point in time is likely an attempt to distance Michael from the pipe.
- [333] However, when I view the statements in context with the nature of the violent and traumatic event that had just happened, the nature of the questions asked by police, and the length and degree of detail provided in the statements, I am not satisfied beyond a reasonable doubt that either defendant gave a false statement with the intent to obstruct the course of justice at the scene of the incident. They were reporting what they believed to be an offence committed against them by Mr. Miller, and they were not confessing the full details of what happened at the end of the incident. In these circumstances, I am reluctant to find criminal liability for an attempt to obstruct justice.

[334] The issue in relation to Christian Theriault's second statement is more difficult. This statement was not given moments after a violent incident, perhaps without time for collecting thoughts and reflecting on events. This statement was given on January 9, 2017, almost two weeks after the incident. This is a relatively lengthy statement that goes well beyond the "what happened?" nature of the initial statement taken at the scene. In this statement, Christian is asked specific questions. He provides a detailed narrative of what happened. Again, in view of my findings on the issue of self-defence, I cannot find any liability in relation to the self-defence narrative advanced in this statement. However, I remain troubled by Christian's failure to mention Michael's involvement with the pipe. While he mentions that Michael managed to grab the pipe from Mr. Miller and throw it, he makes no mention of the fact that Michael then went to grab the pipe when Mr. Miller was moving towards the front door, nor does he mention the fact that Michael brandished and used the pipe during this portion of the encounter. That said, he is also not specifically asked any questions about whether he or his brother ever brandished or used the metal pipe. He is also not asked detailed questions about how the incident ends. Ultimately, when I consider the context in which the statement is given, including the nature of the questions asked and the answers given, I find that Christian Theriault was not completely open and forthright about what happened. However, I am not satisfied beyond a reasonable doubt that the failure to mention Michael Theriault's possession and use of the metal pipe at the end of the incident amounts to an attempt to obstruct justice.

Final Verdicts

[335] Michael Theriault, I find you not guilty of aggravated assault but guilty of the lesser and included offence of assault. I also find you not guilty of obstruct justice.

[336] Christian Theriault, I find you not guilty on both counts, you are free to go.

J. Di Luca J.

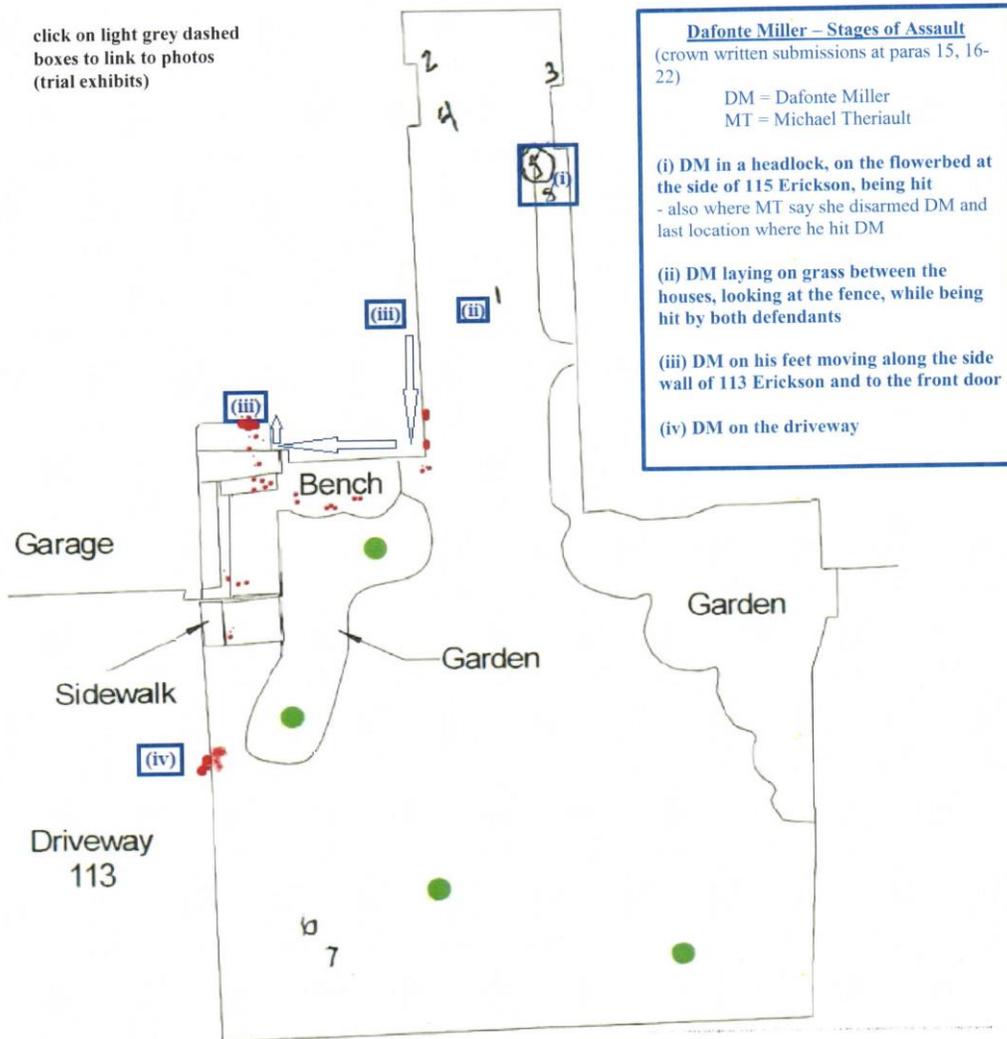
Released: June 26, 2020

APPENDIX "A"

VISUAL AID BY CROWN

(Exhibit 4 further marked by crown illustrating location of blood and Dafonte Miller's stages of assault)

click on light grey dashed boxes to link to photos (trial exhibits)



Dafonte Miller – Stages of Assault
 (crown written submissions at paras 15, 16-22)

DM = Dafonte Miller
 MT = Michael Theriault

(i) DM in a headlock, on the flowerbed at the side of 115 Erickson, being hit - also where MT say she disarmed DM and last location where he hit DM

(ii) DM laying on grass between the houses, looking at the fence, while being hit by both defendants

(iii) DM on his feet moving along the side wall of 113 Erickson and to the front door

(iv) DM on the driveway

LEGEND FOR ORIGINAL MARKINGS (#S 1-8) BY PC BOWLER ON EXHIBIT 4
 (page references below are from the transcript of PC Bowler's testimony on Oct. 29th)

Circle: bricks displaced from retaining wall (p. 39)

| | |
|---------------------------------|--------------------------------|
| 1. MT orange cell phone (p. 39) | 5. DM's house keys (p. 41) |
| 2. sunglasses (pp. 39-40) | 6. The pipe/pole (pp. 51-52) |
| 3. silver flashlight (p. 40) | 7. DM's cell phone (pp. 51-52) |
| 4. bic lighter (p. 40-41) | 8. Mazda key fob (p. 52) |

CITATION: R. v. Theriault, 2020 ONSC 3317

**ONTARIO
SUPERIOR COURT OF JUSTICE**

HER MAJESTY THE QUEEN

– and –

MICHAEL THERIAULT and CHRISTIAN
THERIAULT

Defendants

REASONS FOR JUDGMENT

Justice J. Di Luca

Released: June 26, 2020