COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Theriault, 2021 ONCA 517
DATE: 20210719
DOCKET: C68671, C68489 & C68490

Tulloch, Roberts and Trotter JJ.A.

DOCKET: C68671

BETWEEN

Her Majesty the Queen

Respondent

and

Michael Theriault

Appellant

DOCKET: C68489

AND BETWEEN

Her Majesty the Queen

Appellant

and

Michael Theriault

Respondent

DOCKET: C68490

AND BETWEEN

Her Majesty the Queen

Appellant

and

Christian Theriault

Respondent

Michael Lacy and Deepa Negandhi for the appellant (C68671) and respondent (C68489), Michael Theriault

Alan D. Gold and Laura Metcalfe for the respondent (C68490), Christian Theriault

Susan Reid and Rebecca Schwartz for the appellant (C68489 & C68490) and respondent (C68671), Her Majesty the Queen

Heard: May 12 and 13, 2021 by video conference

On appeal from the conviction entered by Justice Joseph Di Luca of the Superior Court of Justice on June 26, 2020, with reasons reported at 2020 ONSC 3317, and the sentence imposed on November 5, 2020, with reasons reported at 2020 ONSC 6768 (C68671).

On appeal from the acquittals entered by Justice Joseph Di Luca of the Superior Court of Justice on June 26, 2020, with reasons reported at 2020 ONSC 3317 (C68489 & C68490).

Tulloch J.A.:

A. INTRODUCTION

[1] In the early morning hours of December 28, 2016, Michael Theriault and his brother, Christian, were smoking cigarettes in their parents' garage in a suburban town east of Toronto.[1] The brothers heard a sound coming from outside and slid under the garage door to investigate. They caught some teenagers stealing from their parents' truck. One of those teenagers was Dafonte Miller.

[2] Mr. Miller is a young Black man. The accused brothers are white. At the material time, one of the brothers, Michael, was an off-duty police officer.

[3] Once the Theriault brothers emerged from the garage, the teenagers ran in different directions. Michael and Christian pursued Mr. Miller for a distance of approximately 130 metres before Mr. Miller ran between two houses. As Mr. Miller attempted to scale a fence between the houses, Michael body checked him.

[4] A violent struggle ensued. At some point, one of the individuals introduced a metal pipe into the melee. The fight quickly became one-sided, with Mr. Miller as the victim. As a result of this altercation, Mr. Miller sustained serious injuries that resulted in a permanently blind left eye, as well as associated physical and emotional trauma. The Theriault brothers sustained minor, if any, injuries.

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[1] As the two brothers have the same last name, I will refer to them in these reasons by only their first names. I do this not out of disrespect, but to distinguish between them.

[5] Months later, the Theriault brothers were jointly charged with committing an aggravated assault against Mr. Miller and with attempting to obstruct justice by lying about it to the police thereafter.

[6] After a ten-day trial, the judge acquitted the brothers of aggravated assault and attempting to obstruct justice. The trial judge's reasonable doubt stemmed from his holdings that the brothers may have been: (i) attempting to execute a lawful arrest, and (ii) acting in self-defence.

[7] The trial judge convicted Michael of the lesser and included offence of assault in relation to the final part of the struggle, in which he was alleged to have struck Mr. Miller in the head with a metal pipe as Mr. Miller sought assistance at a nearby house. The trial judge sentenced Michael to nine months' imprisonment.

[8] Michael appeals his conviction and sentence for common assault. For the reasons that follow, I would dismiss the defence appeal on both grounds.

[9] The Crown also appeals both brothers' acquittals of aggravated assault and attempts to obstruct justice. However, in its factum, and again at the oral hearing, the Crown confirmed that it would seek a new trial only if the defence appeal also succeeded. The Crown framed its position in its factum as follows:

> The Crown has appealed the acquittals so that, if Michael Theriault's conviction appeal is successful and a new trial is ordered, the trial can proceed on the original charges of aggravated assault and attempt to obstruct justice. The

> Crown is satisfied that, if Michael Theriault's conviction for common assault is upheld, it is not in the public interest to seek a new trial on the offence of aggravated assault, or the charge of attempt to obstruct justice, against either Theriault brother, and in those circumstances the Crown will not seek an order for a new trial. [Emphasis added.]

[10] Accordingly, since I would dismiss the defence appeal, and the Crown has indicated it will not pursue a retrial should its appeal succeed, it is not in the interests of judicial economy to address the Crown's appeal. My dismissal of the Crown's appeal, however, should not necessarily be taken as agreement or disagreement with the trial judge on the issues the Crown raises. My reasons do not consider the merits of the Crown appeal. Rather, given the Crown's position and my decision to uphold the conviction for common assault, these reasons focus only on the grounds of appeal raised by Michael.

B. THE EVIDENCE AT TRIAL

[11] Since this case was in its nascency, Mr. Miller and the brothers have advanced very different versions of events concerning what happened on December 28, 2016. This section summarizes Mr. Miller's evidence, the Theriault brothers' evidence, the evidence of other witnesses, the 911 calls, the physical evidence, and the evidence pertaining to the injuries sustained by Mr. Miller and the brothers.

(1) Mr. Miller's Evidence at Trial

[12] On the evening in question, Mr. Miller testified that he was hanging out with his friend, Antonio Jack, and an acquaintance, Bradley Goode. According to Mr. Miller, after smoking marijuana at a friend's house, he and his friends decided to meet up with some women that Mr. Goode knew. He denied that he was breaking into cars that evening. As I return to below, Mr. Miller's denial regarding his activities that night was inconsistent with the physical evidence at the scene and the testimony of one of his companions, Mr. Goode. Notably, Mr. Goode admitted that they were stealing valuables from cars that night.

[13] Mr. Miller and his friends set out on foot. Mr. Miller testified that, as they walked through a residential neighbourhood toward their destination, he observed two individuals standing outside an open and lit garage. Mr. Miller later learned that these individuals were the two accused brothers: Michael and Christian.[2]

[14] Mr. Miller testified that the Theriault brothers randomly approached him and his friends. Mr. Miller recalled Christian asking whether they lived in the area. Mr. Miller testified that Mr. Jack responded "no" and gestured in the direction of the neighbourhood they do live in. Christian then asked what they were doing in the neighbourhood. Mr. Miller testified that at the time, he felt like he and his friends

[2] In his testimony, Mr. Miller differentiated between the two brothers by their hairstyles. For simplicity, I have used their names instead of their descriptors.

were being questioned. Mr. Miller further recalled Michael identifying himself as a police officer. According to Mr. Miller, Michael said he was a cop and could ask whatever he wanted.

[15] Mr. Miller testified that he "started walkin'…the way we were goin'". Moments later, when he glanced back, he saw the Theriault brothers coming towards him. Mr. Miller and his friends ran. Initially, he thought he was running in the same direction as his friends, but quickly realized that he was on his own, with the Theriault brothers quick on his trail. He recalled the brothers trying to grab him, but he managed to keep running. When he turned back, he did not remember seeing anything in either brother's hands.

[16] Mr. Miller recalled his pursuers trying to grab him for a second time. He then turned in an attempt to make it to a door of a house to get help. Instead, according to Mr. Miller, he and the brothers ended up between that house and another house (the houses would later be identified as the Silverthorn and Forde residences). While between the houses, Mr. Miller recalled Christian placing him into a headlock. Mr. Miller remembered facing down, "pretty much" on the ground. He felt hits to his back and head.

[17] Mr. Miller testified that he first saw a metal pipe in Michael's hands when he managed to get out of the headlock. Mr. Miller recalled standing up, turning around, and being struck with the pipe. He felt Christian grabbing his leg, and next

remembered being on the ground facing the fence. He recalled Michael repeatedly hitting him with the metal pipe, while Christian hit him with his hands and feet. He testified that the pipe struck him on the side of his face. He recalled just laying there, looking at the fence. He remembered being unable to feel the blows anymore.

[18] Mr. Miller then recalled a moment when it stopped, and he struggled to his feet. He made his way around the Silverthorn residence to the front door, touching the walls of the house with his hands as he walked. He testified that he was still receiving blows with the pipe by the time he reached the door of the Silverthorn residence. According to Mr. Miller, although he attempted to block some of the blows with his arms, he did not otherwise fight back.

[19] Mr. Miller next recalled knocking on the door. In his words, he was “tryin’ to just use the rest of [his] strength to get help.” He turned towards Michael, who was still holding the pipe. Mr. Miller remembered saying “you are going to kill me” to Michael. According to Mr. Miller, it is in that moment that Michael then hit him in the eye with the pipe. Mr. Miller remembered blood pouring on the ground before him. He then turned around and continued to bang on the door for help.

[20] After realizing that no one was coming to his assistance, Mr. Miller recalled walking over to the driveway. He testified that Michael kept hitting him in the back with the pipe until he fell over. Christian was on the sidewalk, some distance away.

[21] Mr. Miller next remembered being on the ground, sitting against a car. He took out his phone and called 911. According to Mr. Miller, at this point, Michael was yelling at him to put his phone down, while still holding the pipe. Michael then put Mr. Miller face down on the ground. Mr. Miller testified that Michael had his knee on his upper back. He could not breathe and asked to be turned over.

[22] According to Mr. Miller, Michael first told him that he was under arrest when he was on the phone with 911. After initially being evasive in his testimony, he eventually agreed that he could be heard on the 911 call recording saying: “I know.”

[23] Michael remained on top of Mr. Miller until police officers arrived on the scene. Michael handcuffed Mr. Miller. Police officers helped him up, searched him, and placed him under arrest. An ambulance took him to the hospital.

[24] Mr. Miller testified that the only person he saw wield the pipe was Michael. He denied ever using the pipe to assault Michael or Christian.

(2) Mr. Miller’s Prior Evidence

[25] Before testifying at trial, Mr. Miller made a number of statements about the incident, including statements to the Special Investigations Unit (“SIU”), a complaint to the Office of the Independent Police Review Director (“OIPRD”), and his testimony at the preliminary inquiry. In all of these statements, Mr. Miller denied

involvement in any illicit activity leading up to the encounter with the Theriault brothers and maintained that he did not pick up the pipe at any time.

[26] Certain other details in Mr. Miller's account of the events that night varied considerably each time he provided a statement or testimony, including:

a. the time that he met up with Mr. Jack and Mr. Goode;

b. whether he, Mr. Jack, and Mr. Goode went to visit a third friend's house before setting out to meet the "girls";

c. whether he smoked marijuana that night;

d. whether he told police the name of his friends when speaking with the officers at the scene;

e. whether he knew the names of the "girls" that he and his friends were purportedly going to visit;

f. whether he saw Michael and Christian smoking and drinking in their garage;

g. whether he reviewed his own criminal disclosure; and

h. whether he knew the version of events advanced by his friend, Mr. Jack (which is detailed below).

(3) Michael Theriault's Evidence at Trial

[27] Michael testified at trial that, on the evening in question, he and his brother were at their parents' house for a family dinner. They were drinking alcohol. At approximately 2:00 a.m., he recalled going to the garage to smoke cigarettes with his brother. He testified that he was wearing jeans, a shirt, and socks without shoes, while his brother was wearing shorts, a sweater, shoes, and a toque.

[28] Michael next recalled hearing truck doors close right outside the garage. He assumed someone was inside his parents' truck. Michael testified that he told his brother to open the garage door. He remembered rolling under it to get outside as quickly as possible. He denied bringing anything, including a metal pipe, with him for safety.

[29] When he got outside, he saw two teenagers in his parents' truck; one was exiting the front driver's side, the other was exiting the front passenger's side. According to Michael, the teenagers started running right away. He gave chase. Michael indicated that he ran after the person who was sitting in the driver's seat because he "wanted to apprehend … one of the males … arrest him … and wait 'til Durham Police arrived." He yelled to his brother to follow.

[30] Michael denied having any discussion with Mr. Miller prior to the pursuit. Contrary to Mr. Miller's testimony, Michael said he did not tell Mr. Miller and his friends that he was a police officer when they first encountered one another in front of the Theriault residence.

[31] Michael agreed that during the chase, he still did not identify himself in any way as a police officer. His explanation for not saying anything was because "everything happened really fast." He agreed it would have been helpful for Mr. Miller to know what was happening. He also agreed that saying something like "stop, police" would have assisted in the apprehension of Mr. Miller.

[32] Michael did not see Mr. Miller running with the metal pipe and he agreed that it was too big to be hiding in Mr. Miller's pants.

[33] According to Michael, as he and his brother chased Mr. Miller, he turned and ran between two houses. Mr. Miller did not slow down at any point. Michael figured that Mr. Miller was "fleeing and didn't wanna get caught." He denied that Mr. Miller attempted to get to the door of the Silverthorn or Forde residence. Instead, he testified that Mr. Miller attempted to climb a fence between the two properties. He testified that he then body checked Mr. Miller into the fence because he "didn't want him to, to escape, essentially." Michael agreed that he had not said a word before body checking Mr. Miller.

[34] Michael testified that Mr. Miller started hitting him in the body with a "weapon of some sort" immediately following the body check. According to Michael, he realized that Mr. Miller had something in his hand, and he yelled to his brother: "He's got a bat, he's got a bat." Michael testified that he subsequently realized that Mr. Miller had a metal pipe in his hands.

[35] At trial, Michael maintained that he did not know where the pipe came from. As I will explain below, this differed from his initial statement at the scene. At that time, he had said to police: "[l]ooking after it appears [Mr. Miller] took the pole from the gas line at [the Silverthorn residence]."

[36] Michael admitted that he still did not identify himself as a police officer or tell Mr. Miller he was under arrest when the struggle began between the two houses. He testified that his “first and foremost thoughts was he has a weapon, and, uh, I just wanted to make sure that me and Christian were safe.”

[37] Michael next recalled Christian engaging Mr. Miller. He testified that Mr. Miller struck Christian in the head with the pipe. Michael indicated that he then decided to “cut the distance” between himself and Mr. Miller in an effort to disarm him. Michael testified that he began punching Mr. Miller “wherever he could” and “as hard as [he] could” in the face and body. He indicated that in accordance with police training, he punched Mr. Miller in the face to “distract” him so that Mr. Miller would loosen his grip on the pipe, and he could retrieve it.

[38] Michael indicated that Mr. Miller was punching him back, although he could not recall where he was punched. He denied that Mr. Miller was defenceless on the ground, with the brothers beating him repeatedly with the pipe.

[39] This portion of the altercation, according to Michael, occurred closer to the fence.

[40] The altercation then moved towards the flowerbed alongside the Forde residence. Michael testified that he was unsuccessful in disarming Mr. Miller, so he called Christian to “get in here.” Christian was able to get Mr. Miller in a headlock. According to Michael, Christian was on his back, holding Mr. Miller, who

was on top of him, punching him. At this point, Michael indicated that he was able to disarm Mr. Miller. He denied striking Mr. Miller with the pipe. Instead, he testified that he threw the pipe some distance away, and it landed on the snow-covered lawn. According to Michael, he threw the pipe because he “didn’t want Mr. Miller to grab it again, to start using it on us again.” He testified that he then started punching Mr. Miller since Mr. Miller was punching Christian.

[41] According to Michael, Mr. Miller eventually stopped punching Christian, leading Michael to stop punching Mr. Miller. At this juncture, Michael said he told Christian that he was calling the police. He testified that as he pulled out his phone, Mr. Miller started punching Christian again. He indicated that he then threw his phone, re-engaged, and started punching Mr. Miller again.

[42] Michael testified that for a second time, Mr. Miller stopped fighting so Christian let go of him. At this point, Michael said he grabbed the pipe from the lawn because he feared that Mr. Miller was possibly going to arm himself with it again. Michael testified that although he picked up the pipe, he did not use it to strike Mr. Miller.

[43] Michael testified that Mr. Miller walked toward the front door of the Silverthorn residence and started banging on the door. Michael admitted that he was holding the pipe upright with both hands at this time. This posture, according to Michael, was consistent with police training around the use of batons. However,

he denied striking Mr. Miller as he walked from the area between the houses to the front door of the Silverthorn residence. As he followed Mr. Miller to the front of the house, he said that he was yelling at him to “get down.” He also said he yelled at the occupants of the Silverthorn residence to call 911.

[44] Michael recalled Mr. Miller then walking toward the car parked in the driveway. Mr. Miller put both his hands on the hood of the vehicle. Michael testified that he again told Mr. Miller to “get down.” He admitted that it was at this juncture that he told Mr. Miller he was under arrest for the first time.

[45] According to Michael, Mr. Miller was not complying with his order to “get down,” so he grabbed Mr. Miller and put him on the ground. Once he had control of Mr. Miller, with his knee on Mr. Miller’s back, Michael said he threw the pipe to the middle of the lawn. Michael explained that the act of putting Mr. Miller to the ground was consistent with police training. He denied continuing to hit Mr. Miller while he restrained him.

[46] Michael admitted that he still did not tell Mr. Miller why he was arrested because he “figured, uh, once Durham Police came over, and took over the scene, um, they would take over the formalities.” He also said he assumed that Mr. Miller knew that he was under arrest for whatever he did in the car and for attacking him and Christian with a weapon.

[47] Michael said that at this point, Christian was at the end of the driveway, on the phone.

[48] When the police arrived, one of the officers handed Michael a pair of handcuffs and said something to the effect of “you know what you’re doing.” Michael recalled handcuffing Mr. Miller and helping him to his feet. He then handed over custody of Mr. Miller to the uniformed police officers.

(4) Michael and Christian’s Police Statements

[49] Both Michael and Christian gave statements at the scene. Additionally, two weeks later, Christian came into the police station to give a second statement. The statements were generally consistent with the narrative advanced by Michael in his trial testimony, however, neither brother made any mention of Michael’s possession of the pipe beyond disarming Mr. Miller between the houses.

[50] The brothers denied knowing where the pipe came from in their statements but made different suggestions implicating Mr. Miller.

[51] As noted above, Michael indicated that: “[l]ooking after it appears he took the pipe from the gas line at [the Forde residence].” The trial judge found that this “gas line” referred to the air conditioning rough-in near the flowerbed on the Forde property. When asked about this suggestion about the provenance of the pipe during cross-examination, Michael denied returning to the area between the

houses after the police arrived on the scene. He explained that he was just speculating and had no idea what gas line he was talking about.

[52] In both of Christian's statements, he suggested that Mr. Miller had the pipe, which was approximately four feet long, tucked in his pants from the outset. Christian said that Mr. Miller pulled it out when the confrontation began between the houses.

(5) The Evidence of Mr. Miller's companions, Antonio Jack and Bradley Goode, at Trial

[53] Mr. Jack was a classmate and friend of Mr. Miller's. On the night in question, he indicated that he was with Mr. Miller and Mr. Goode. They set out on a quest to locate marijuana. According to Mr. Jack, as the three of them were walking, two guys came out of a garage and approached Mr. Miller and Mr. Goode, who were walking some distance ahead of Mr. Jack. 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 also denied hearing the questions asked by the men who came out of the garage.

[54] 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. According to Mr. Jack, one of the white males who started chasing

Mr. Miller had something in his hand that looked like a silver pipe. Mr. Jack also ran. He did not see the men or Mr. Miller again that night.

[55] In cross-examination, defence counsel confronted Mr. Jack with a number of inconsistencies in his version of events, which differed between his initial statement to a SIU investigator, his testimony at the preliminary inquiry, and his testimony in chief at trial. For example, Mr. Jack had testified at the preliminary inquiry that he had not seen a weapon in the hands of any of the men who pursued Mr. Miller. At trial, he maintained that he now recalled seeing a weapon in one male's hands. When asked about this inconsistency, Mr. Jack admitted that his testimony at the preliminary inquiry on this point was false. Mr. Jack continued to deny that he, Mr. Goode, and Mr. Miller were "car hopping" on the evening of the incident.

[56] Counsel also prodded Mr. Jack about any discussions he may have had with Mr. Miller about the incident in the time leading up to trial. Mr. Jack maintained that he and Mr. Miller did not discuss matters in detail. He further denied that he was lying to protect and/or support Mr. Miller.

[57] Mr. Goode advanced a different narrative altogether. Mr. Goode was an acquaintance of Mr. Miller; they were not close. On the evening in question, Mr. Goode met up with Mr. Miller and Mr. Jack. Mr. Goode testified that Mr. Miller and Mr. Jack indicated that they were going to steal valuables from cars and invited

him to join them. Mr. Goode agreed. 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 ten to fifteen cars that evening.

[58] 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 men 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. He did not see Mr. Miller or the men again that night.

(6) Eyewitnesses' Evidence

[59] James Silverthorn lived in one of the houses adjacent to the altercation (i.e., the Silverthorn residence). The morning of the incident, he woke up to a commotion outside. He realized it was coming from the west side of his house. He looked out the west-facing window of his upstairs bathroom and observed three people located by the wall of his next-door neighbour's house. He noted that: "[T]here were two individuals, and, uh, they were both, um, uh, swinging their arms and

punching somebody that was up against the wall." The punches were described as "very hard and fairly rapid."

[60] According to Mr. Silverthorn, the third person was crouched down and cornered between the wall and the jut-out for a fireplace, near the flowerbed on the Forde property. Mr. Silverthorn could not see whether the third person was retaliating or throwing punches, but he was down low, while the other two punched downward. The punches seemed to hit the third man's torso. From Mr. Silverthorn's vantage point, "it appeared, to me, that, um, one individual was being beaten by two other people." He did not see anyone using a weapon at this point in time.

[61] Mr. Silverthorn told his wife to call 911 and went downstairs. Through the living room window at the front of the house, he observed someone go between the houses towards the street. At the same time, a Black male began banging frantically on the front door. According to Mr. Silverthorn: "[T]he person banged so hard on the door, it, they are double doors, um, I thought that the doors, uh, were not gonna hold their security." The Black male screamed "call 911" several times and then left.

[62] Mr. Silverthorn went back upstairs, where he joined his son and wife, who had called 911. He took the phone from his wife. As he spoke to the 911 operator, he was looking down from his upstairs window and observed two people on the

driveway near his wife's vehicle. One person was on the ground between the car and a snowbank, while the other stood above him holding what appeared to be a silver or white "broom, like, a broomstick, or a piece of pipe" around four feet in length. According to Mr. Silverthorn: "[T]he person, a few times, tried to lift up, and the person would, uh, would stab down with this thing to hold the person where they were." Mr. Silverthorn also observed a third person on the street, pacing back and forth, who appeared to be on the phone.

[63] In addition to James Silverthorn, the trial judge heard evidence from two other witnesses who saw the last stage of the incident, as Michael restrained Mr. Miller in front of the Silverthorn residence. The witnesses described Michael holding the pipe near Mr. Miller at the front of the Silverthorn residence. However, neither of these witnesses saw Michael use the pipe to keep Mr. Miller down on the ground.

(7) The Evidence of George Forde

[64] Mr. Forde lived in the other house adjacent to the altercation (i.e., the Forde residence). Soon after the incident, he told police that the pipe may have been from his property. He explained that he often uses old sticks, like brooms or rakes, to hold up his plants in his yard. However, at trial, he was unable to positively identify the pipe in question as his own. Indeed, he denied that it was associated

with his property, and further denied that the pipe was anything that he recognized as something he might use to keep plants up.

(8) 911 Calls

[65] Three 911 calls were entered into evidence on consent.

[66] First, Christian called 911 at 2:48:13 a.m. He told 911 dispatchers that: “We caught guys trying to break into our cars.” He said that they “caught” one of the culprits, and his brother was restraining him. He also said that the person who was being restrained needed an ambulance. When asked about the nature of the injury that required medical attention, Christian said: “He was fighting. He’s fighting us back we were trying.” He continued, “we’re all – all fucking bloody right now.” Christian did not mention a weapon. Christian was then heard speaking to Mr. Miller, saying: “I’m on 911 you fucking, you fucking in our cars and shit, eh? You picked the wrong cars.”

[67] At 2:48:33 a.m., 911 operators received a call from the Silverthorn residence. Mr. Silverthorn told the operator that someone was banging on his door and yelling to call 911. He described his observations and indicated that he saw one person bent over his wife’s car and another holding a “stick” that was approximately four feet long. He then stated: “Jesus, I think he’s gonna’ strike the guy again.”

[68] At 2:52:21 a.m., Mr. Miller also placed a call to 911. Michael can be overheard telling Mr. Miller he is under arrest and Mr. Miller is overheard saying “I know.” Mr. Miller also said: “Please get the police here and an ambulance now.” Twice he said, “turn me the other way” and “you have the wrong person man.”

(9) Evidence Found at the Scene

[69] Police seized the pipe used during the altercation from the front yard of the Silverthorn property. It is a hollow aluminum pipe, approximately four feet in length. The blood found on the end of the pipe was tested for DNA and Mr. Miller could not be excluded as the contributor.

[70] Police also found blood on the hood of the car parked in the driveway of the Silverthorn residence, as well as in the snow nearby. Drops of blood continued up the walkway towards the front door of the residence. Blood was present at the base of the Silverthorn’s front door, on the glass window of that door, and by the bench placed to the right of the door. Mr. Silverthorn also testified that when he later inspected the side of his home leading towards the fence, he observed blood on the eavestrough downspout. Otherwise, there was no visible blood in between the houses or on the objects found between the houses.

[71] Both the Silverthorn and Forde properties were damaged: the frame around the glass window of the front door of the Silverthorn residence was cracked; the

window on the door had scrapes or gouges in the glass; and the bricks that surrounded the flowerbed along the wall of the Forde residence were dislodged.

[72] The sweater worn by Mr. Miller on the night of the incident had significant blood stains along the sleeves, cuffs, and lower front portion. There was no visible blood on either of the Theriault brothers or their clothing on the morning in question.

[73] Finally, when police searched Mr. Miller, they found loose change, a lighter, a pair of sunglasses, a car key, and some marijuana on his person. They also found a pair of gloves at the scene, which contained Mr. Miller's blood.

(10) The Injuries Sustained by Mr. Miller and the Theriault Brothers

[74] Dr. Michael James Pickup is a forensic pathologist who was qualified as an expert on consent. He testified that Mr. Miller sustained the following injuries:

a. A left globe rupture with retinal herniation, resulting in a permanently blind left eye which required two surgeries.

b. A left orbital floor fracture.

c. A left nasal fracture.

d. Two small forehead lacerations above the left eye.

e. One 0.5 cm laceration on the right forehead or eyelid which required suturing.

f. A right ulnar styloid (wrist) facture.

g. A left lower eyelid injury which required surgical removal of scar tissue.

[75] Dr. Pickup testified that injuries (a), (b), (c) and (g) could have occurred as a single event, or single blow. Dr. Pickup also hypothesized that the likely cause for these injuries was blunt force trauma, by way of a punch or punches, rather than a metal pipe or pole. In his expert report, Dr. Pickup explained his reasoning underlying his favoured mechanism for the eye injury:

> A metal rod can be used two ways to inflict injury depending on which surface (the end or the side) strikes the body. 1. If the side of a metal rod was wielded with enough force to rupture the globe, I would expect fractures to the bridge of the nose, and the lateral wall of the orbit (zygomatic bone), possibly with overlying lacerations. 2. If the end of the metal rod was used to puncture the globe, I would expect more eyelid injuries. For these reasons, the metal rod as an instrument causing the observed injuries is considered less likely, but not entirely excluded.

[76] Dr. Pickup opined that the nasal fracture would have bled profusely and immediately, whereas the eye injury would have bled, but not as profusely as the nose injury.

[77] Dr. Pickup testified that it was “difficult to say” what his favoured mechanism for the fractured wrist was. He indicated that the more likely mechanism for the fractured wrist was the forceful bending of the wrist, such as when someone tries to break a backwards fall with their hand. However, a strike with a metal pipe could have caused this injury while Mr. Miller held his arm in a defensive pose. Dr. Pickup

opined that it "would be difficult to explain this [injury] by a punch. Um, a hitting with a, with an instrument would be more likely."

[78] It was agreed at trial that Mr. Miller's eye injury satisfied the "wounds, mains, disfigures" element of aggravated assault.

[79] Michael had no visible injuries but reported feeling general soreness.

[80] On the night in question, the only injury that police photographed on Christian was a small scratch on his hand. Since then, Christian reported several other relatively minor injuries: a bruise on his right thigh, tenderness over the right anterior parietal area of his head and base of his thumb, and pain in his right elbow. He was also later diagnosed with a concussion based on self-reported symptoms.

C. THE TRIAL JUDGE'S FINDINGS OF CREDIBILITY AND FACT

[81] The trial judge grappled in great detail with the various inconsistencies in the witnesses' testimony. He made extensive findings of credibility and fact. This section will summarize each in turn.

(1) Credibility Findings

(a) The Theriault Brothers' Credibility

[82] While the trial judge accepted portions of the brothers' testimony, he rejected "significant aspects" of their evidence that made him "concerned about their overall credibility."

[83] With respect to Michael, the trial judge stated the following at para. 239 of his reasons:

> 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.

[84] With respect to Christian, the trial judge accepted portions of his police statements while rejecting others. He rejected the suggestion initially advanced by Christian that the pipe possibly came from Mr. Miller's pants. This suggestion was seen as an "obvious attempt to paint a less than favourable picture of Mr. Miller" and "may also have been an attempt by Christian to distance himself and his brother from the pipe." The trial judge was also troubled by Christian's comment that can be overheard on the 911 call (namely, "you picked the wrong cars"). The trial judge found that this statement undermined the self-defence narrative advanced in both of Christian's police statements, and instead suggested that Christian believed a degree of retribution had been administered.

(b) Mr. Miller's Credibility

[85] The trial judge found that Mr. Miller presented significant credibility problems, noting that "[h]e proffered a version of events that was false in certain material aspects." Specifically, he found that Mr. Miller "attempted to maintain that false narrative despite the evidence to the contrary" in relation to his illicit activities leading up to the incident.

[86] The trial judge noted that it is dangerous to convict a defendant solely on the unconfirmed word of a person who has demonstrated a willingness to lie under oath, and accordingly instructed himself that he "must approach Mr. Miller's evidence with great caution." He went on to note that he must consider whether other independent evidence confirms key points of Mr. Miller's testimony in a manner that may restore the court's faith in his evidence.

[87] As I will return to below, the trial judge accepted only Mr. Miller's evidence regarding what happened in front of the Silverthorn door. He rejected Mr. Miller's narrative about what he and his friends were up to that night. He also rejected Mr. Miller's evidence concerning what happened in front of the Theriault residence, prior to the struggle. Finally, due to Mr. Miller's credibility issues, the trial judge could not accept his evidence concerning what happened between the Forde and Silverthorn houses because there was a lack of independent evidence to corroborate Mr. Miller's account.

[88] At the conclusion of his assessment of Mr. Miller's credibility, the trial judge made the following comment at para. 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.

(c) The Credibility of Mr. Jack, Mr. Goode, and Mr. Silverthorn

[89] The trial judge rejected most, if not all, of Mr. Jack's evidence. The trial judge found that he posed significant credibility problems since he was intent on offering a version of events that supported Mr. Miller regardless of the truth.

[90] The trial judge thought that Mr. Goode, on the other hand, was credible and told the truth about what he, Mr. Miller, and Mr. Jack were doing on the night in question.

[91] Finally, the trial judge found Mr. Silverthorn's account compelling, dispassionate, and objective. There were, however, potential reliability concerns as he made his observations from an upstairs window in less than ideal conditions in a highly emotive environment. That said, the trial judge generally accepted Mr. Silverthorn's evidence as credible and reliable.

(2) Findings of Fact

(a) The Events That Precipitated the Altercation

[92] The trial judge was satisfied that Mr. Miller, Mr. Jack, and Mr. Goode were "car hopping" before they encountered the Theriault brothers. He was further satisfied that Mr. Miller and Mr. Jack had opened the unlocked doors to the vehicle on the driveway at the Theriault residence, and Michael and Christian essentially caught them in the act of stealing items from that vehicle.

[93] In making this finding, the trial judge rejected the evidence of Mr. Miller and Mr. Jack, noting that they "attempted to proffer a false version of events that avoids any mention of car hopping." Their various statements were inconsistent on material issues, were contradicted by physical evidence at the scene, and were inconsistent with the evidence of Mr. Goode, who admitted they were car hopping that evening.

[94] While the trial judge did not address this point explicitly, he rejected Mr. Miller's entire explanation about what happened in front of the Theriault house, which included his memory of Michael identifying himself as a "cop." The trial judge instead accepted Michael's version of events on this point, in which he failed to identify himself as a police officer at that time.

(b) The Provenance of the Metal Pipe

[95] Based on the evidence before him, the trial judge identified three possible ways that the metal pipe could have been introduced into the altercation: (1) Mr. Miller had the pipe with him initially, either down his pants or perhaps in his hands; (2) Michael or Christian took the pipe from the garage as they left to confront the unknown persons in their parents' vehicle; or (3) the pipe was located in between the Silverthorn and Forde residences and was grabbed by either Mr. Miller or one of the brothers at some point during the altercation.

[96] The trial judge disposed of the first option easily, finding it to be "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 [Theriault brothers]."

[97] With respect to the second option, the trial judge thought that it made sense for Michael or Christian to grab the metal pipe as they were leaving the garage. First, they were confronting an unknown individual or individuals who they believed to be committing an offence and who could potentially pose a safety risk. A trained police officer would think twice before entering that type of situation without anything to protect himself. Second, it would explain why Michael body checked Mr. Miller against the fence instead of grabbing him: he was holding the pipe in his hands. The trial judge found this option to be a reasonable possibility.

[98] Turning to the third option, the trial judge accepted 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. The trial judge was troubled by Michael's evidence as to how the pipe was produced by Mr. Miller: it seemed quite unlikely that as Mr. Miller was body checked, he simply landed right where the metal pipe happened to be. The trial judge was also troubled by Michael's evidence that the pipe could have come from the "gas line" at the side of the house. The trial judge noted that Mr. Miller would have had to run past the air conditioning rough-in on his way to the fence while being chased, and it is highly unlikely that in so doing he would have managed to spot and grab the pipe without Michael noticing it.

[99] Ultimately, the trial judge did not decide with certainty where the pipe came from. He also did not decide who first wielded the pipe.

(c) The Theriault Brothers' Intent to Arrest

[100] From the outset of this case, the Theriault brothers maintained that their intent was always to arrest Mr. Miller, notwithstanding that Michael did not identify himself as a police officer or utter words of arrest until the last portion of the encounter. The trial judge rejected Michael's explanation that "everything unfolded quickly and that he just did not have time to identify himself as a police officer and utter words of arrest." Rather, the trial judge found that this was not "simply a momentary delay in the midst of a rapidly unfolding and dynamic situation," but a

"prolonged and sustained failure to abide by police training that is rooted in common sense."

[101] The trial judge found the fact that nothing was said during the chase to be "telling" especially given the distance covered on a cold night in the middle of winter, when Michael was only wearing socks. The trial judge found it "equally, if not more telling" that nothing was said to Mr. Miller at the time of the body check or when the incident escalated into a violent struggle. He also found it to be telling that, by the stage of the encounter when Michael pulled his phone out to call 911, Michael still did not identify himself or utter words of arrest. Lastly, the trial judge was troubled that, as the struggle subsided and Mr. Miller moved towards the front door of the Silverthorn residence, Michael again failed to identify himself as a police officer or utter words of arrest. Instead, the trial judge pointed out that Michael retrieved the metal pipe and brandished it.

[102] The trial judge concluded his commentary on this point with the following comments at paras. 276-277:

> 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.
>
> 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.

[103] With respect to Christian, the trial judge paid particular attention to his comment “You picked the wrong cars”, and concluded that “at least in Christian’s mind, retribution had been served.”

[104] With respect to Mr. Miller’s state of mind at the time of the chase, the trial judge made the following comment, at para. 279:

> …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.

(d) The Events that Transpired between the Homes

[105] The trial judge accepted Michael’s account concerning the beginning of the struggle: namely, that he body checked Mr. Miller against the fence as Mr. Miller attempted to scale it in an effort to escape. He rejected Mr. Miller’s explanation that he was attempting to go to a house for help.

[106] After the body check, the trial judge found that a violent struggle ensued near the area of the fence. As the struggle continued, it progressed over to the fireplace jut out and flowerbed alongside the Forde residence. The trial judge found that the metal pipe 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, the trial judge was unable to accept that he never had the

pipe in his hands and it was “a reasonable possibility” that he wielded the pipe at some point during this initial encounter.

[107] He next found that there was a further struggle at the side of the Forde residence near the fireplace jut out and flowerbed. He accepted that by this stage, Christian had joined the melee and was holding Mr. Miller in a headlock for at least some period of time.

[108] While the trial judge could not reject the possibility that Mr. Miller wielded the pipe initially, he was satisfied that if he did, it quickly ended, likely with the pipe being taken away by Michael as he indicated in his evidence. He further found that the fight thereafter quickly became one-sided. In this regard, he accepted Mr. 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.

[109] The trial judge found that the struggle initially tapered off “likely once Mr. Miller stopped fighting.” He accepted Michael’s evidence that when Mr. Miller stopped, he let him go and grabbed his phone, ostensibly to call 911. He further found that the call was not completed, and the phone was dropped.

[110] What likely happened, according to the trial judge, was that Mr. Miller broke free from Michael and Christian at the flowerbed and started to retreat. Michael then re-engaged. The trial judge rejected Michael’s evidence that he did not hit

Mr. Miller after he left the flowerbed. He accepted that both Michael and Christian continued to hit and kick Mr. Miller when they were between the houses. The trial judge did not make any finding that Mr. Miller was still acting aggressively at this stage of the encounter.

[111] The trial judge found that the eye injury was likely caused at some point between the flowerbed and Mr. Miller's movement towards the door of the Silverthorn residence. He made this finding based on Dr. Pickup's evidence that the injury would have caused profuse blood loss, and the blood trail at the side of the house confirmed that the injury was caused while the parties were still in between the houses. Further, the trial judge reasoned that the injury could not have occurred on the flowerbed as there was no blood in that location and neither Michael nor Christian had any blood on them, despite the struggle occurring in close quarters at that stage.

[112] The trial judge accepted Dr. Pickup's evidence that the eye injury was most likely caused by a punch, and not a strike with a metal pipe. With respect to the wrist fracture, the trial judge found that it could have been a defensive wound or caused when Mr. Miller fell backwards with an arm outstretched to break the fall. He further found that the multitude of punches with significant force caused Mr. Miller's bruises.

(e) The Events in Front of the Silverthorn Residence

[113] After the altercation in between the houses, the trial judge accepted that Mr. Miller moved toward the front door of the Silverthorn residence, away from Michael and Christian. He was further satisfied that Mr. Miller was vigorously banging on the door of the Silverthorn residence. It was also clear that he was badly injured and seeking help.

[114] The trial judge accepted that Michael followed Mr. Miller to the front of the house, and that Michael was brandishing the pipe at this time. The trial judge rejected Michael's explanation that he retrieved the metal pipe to prevent Mr. Miller from rearming himself. In this portion of the incident, "Mr. Miller was not going near the pipe" and in fact was "in retreat."

[115] The trial judge was satisfied that Michael struck Mr. Miller in the face with the pipe when he was standing at the front door of the Silverthorn residence. He made this finding based on Mr. Miller's evidence, in combination with "the available external evidence" which provided "sufficient confirmation of Mr. Miller's evidence on this point." This evidence included the following:

a. Mr. Miller testified that as he was banging on the door, he turned around and was struck in the face by the metal pipe.

b. There was a gouge/scrape on the glass of the front door of the Silverthorn residence, which was not present before the incident. While Mr. Miller banging on the door could have caused the crack in the window/door frame, the gouge/scrape

on the glass must have been caused by contact with the edge of the metal pipe. According to the trial judge, "this would have been caused when Mr. Miller was struck in the face with the pipe."

c. Mr. Miller's blood was on the end of the pipe. The trial judge concluded that the blood was placed on the pipe when it came into contact with Mr. Miller's face, which was already bloodied from the punch that injured his eye. Again, the only person alleged to have held the pipe after the eye injury – which was sustained between the houses – was Michael.

d. Michael brandished the pipe with two hands and followed Mr. Miller in front of the house.

e. While Mr. Silverthorn did not suggest seeing or hearing the pipe come into contact with his door, he did note that the banging was very loud, and the door was shaking. The trial judge reasoned that the failure to observe the strike against the glass did not undermine the remaining evidence.

[116] The trial judge went on to find that Mr. Miller walked toward the driveway and surrendered onto the hood of the car. The trial judge accepted Michael struck Mr. Miller further times with the pipe after he was struck at the door and before police arrived at the scene. This finding was based on Mr. Silverthorn's observation that Michael was using the pipe to downward jab Mr. Miller when he tried to get up off the ground. The fact that the other witnesses did not see Michael use the pipe in any way did not undermine Mr. Silverthorn's observations, as "they were all observing the same event…at different times, from different vantage points, while having been suddenly awoken in the middle of the night."

[117] Police subsequently arrived on the scene, and as explained above, they handcuffed, searched, and arrested Mr. Miller.

D. THE TRIAL JUDGE'S ANALYSIS

(1) The Trial Judge's Analysis of Whether the Brothers Attempted to Lawfully Arrest Mr. Miller

[118] The trial judge's reasons with respect to the arrest issue were confined to one paragraph. At para. 315, he wrote:

> 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. [Emphasis added.]

[119] In other words, the trial judge had a reasonable doubt that the brothers were only trying to capture Mr. Miller to assault him; there was a possibility that they were also trying to effect a lawful arrest. Although not stated explicitly, it seems the trial judge concluded that the body check constituted reasonable force.

(2) The Trial Judge's Analysis of the Self-Defence Claim

[120] The trial judge assessed the self-defence claim from the vantage point that it was a reasonable possibility that Mr. Miller initially wielded the pipe and that Michael and Christian were responding to this aggressive action.[3] The trial judge then emphasized, at paras. 320-321, that he must treat the events that unfolded from the flowerbed stage onward as one continuous event:

> 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.
>
> 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

[3] As noted above, due to the credibility issues with both parties, the trial judge was unable to determine who initially wielded the pipe. However, he recognized that if the pipe was first introduced by Mr. Miller, it was quickly removed from him and the incident became one-sided.

> Michael goes to retrieve the metal pipe. [Emphasis added.]

[121] Ultimately, the trial judge was left with a reasonable doubt about whether Michael and Christian were acting in lawful self-defence during this portion of the incident. He reasoned that, 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. He then noted that "while in a perfect world, once Mr. Miller was disarmed, the defendants would have stopped hitting him, clinical precision is not required." The trial judge was satisfied that "the scope of permissible self-defence could, in these circumstances, extend beyond the initial disarming of Mr. Miller." He concluded with the following comment, at para. 322:

> 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. [Emphasis in original.]

[122] The trial judge accepted that the eye injury (which satisfied the "wounds, maims, disfigures" element of aggravated assault) occurred between the houses, while self defence was still in play. As such, the trial judge acquitted Michael and Christian of aggravated assault in relation to the incident between the houses.

[123] However, for the trial judge, the events in front of the Silverthorn residence extended beyond the permissible scope of self-defence. Once Mr. Miller moved to the side wall of the Silverthorn residence, he was badly injured, in retreat and seeking refuge. The trial judge noted that "[t]he already razor thin self-defence justification evaporates at this stage."

[124] The trial judge was satisfied beyond a reasonable doubt that when Michael struck Mr. Miller with the pipe at the front door of the Silverthorn residence, he was neither acting in self-defence nor attempting to effect a lawful arrest. As such, Michael committed an unlawful assault contrary to s. 265 of the *Criminal Code*. However, as explained above, the trial judge was not satisfied beyond a reasonable doubt that this assault caused the eye injury and therefore it could not fulfil the "wounds, maims, disfigures" requirement of aggravated assault under s. 268(1) of the *Criminal Code*.

[125] The trial judge found that Christian was not a party to the assault simpliciter offence because, at that point, Christian was some distance way.

[126] The trial judge was "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." However, he could not enter a conviction for the offence of assault

with a weapon because it was neither a charge before the court, nor is it a lesser and included offence of aggravated assault.

(3) The Trial Judge's Analysis of the Attempts to Obstruct Justice

[127] The trial judge ultimately could not conclude beyond a reasonable doubt that the core narrative of the statements provided by the brothers at the scene were false, given his conclusions on the self-defence issue. He noted: "Again, it is probably false, but probably false is not enough."

[128] He was, however, troubled by the absence of any mention that Michael wielded the pipe and struck Mr. Miller once Mr. Miller was seeking assistance at the Silverthorn residence. He agreed 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."

[129] The trial judge also noted that the issue in relation to Christian's second statement was more difficult because the statement was detailed and still did not mention Michael's use of the pipe. Ultimately, the trial judge found that "Christian Theriault was not completely open and forthright about what happened" but he was not satisfied beyond a reasonable doubt that the failure to mention Michael's possession and use of the metal pipe at the end of the incident amounted to an attempt to obstruct justice.

E. ISSUES IN THE DEFENCE APPEAL

[130] Michael appeals his conviction of common assault in relation to the events in front of the Silverthorn residence. He makes the following arguments on appeal:

a. the verdict was unreasonable, and the trial judge misapprehended the evidence;

b. the trial judge failed to explain why Michael's corroborated evidence did not raise a reasonable doubt or analyze whether his use of force was reasonable;

c. assault simpliciter was not an included offence in this case; and

d. the sentence was unfit.

[131] I analyze each ground of appeal in the above-noted order.

F. ANALYSIS OF DEFENCE APPEAL

(1) Was the Verdict Unreasonable?

[132] Section 686(1)(a)(i) of the *Criminal Code* bestows a duty on an appellate court to set aside a verdict "that is unreasonable or cannot be supported by the evidence." A conviction is reasonable if the verdict is one that a properly instructed jury or judge could reasonably have rendered: *Corbett v. The Queen*, [1975] 2 S.C.R. 275, at p. 282; *R. v. Yebes*, [1987] 2 S.C.R. 168, at p. 185; *R. v. Biniaris*, 2000 SCC 15, [2000] 1 S.C.R. 381, at para. 37. In applying that test, a "[c]ourt must re-examine and to some extent reweigh and consider the effect of the

evidence": *R. v. Sheppard*, [2002] 1 S.C.R. 869, 2002 SCC 26, at para. 34 (citing *Yebes*, at p. 186).

[133] In this case, Michael argues that his assault conviction was unreasonable due to the trial judge's treatment of Mr. Miller's evidence, given that Mr. Miller presented significant credibility issues. Specifically, Michael submits that the trial judge failed to give effect to his finding that Mr. Miller perjured himself, and instead "explained and excused it." On this point, Michael places great significance on para. 246 of the trial judge's reasons, which I repeat for convenience:

> 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.

[134] In reference to this paragraph, Michael submits that: "Mr. Miller's perjury was not explicable or explainable and could not be laundered through speculative assertions by the trial judge as to why Mr. Miller might have lied based on the colour of his skin or his distrust for law enforcement."

[135] The Crown argues the following: the trial judge's credibility assessment of Mr. Miller is entitled to considerable deference; his reasons disclose no error; and

the trial judge looked for and found confirmatory evidence before he relied on aspects of Mr. Miller's account of events. The Crown further submits that the trial judge's substantial rejection of most of Mr. Miller's evidence shows that he did not "excuse" the frailties in Mr. Miller's evidence at all; instead, his reasons reveal quite the opposite.

[136] For the reasons that follow, I agree with the Crown.

[137] The record gives no indication that the trial judge abandoned his obligation to strictly scrutinize the evidence of a witness whose credibility was in question. There could be no dispute that Mr. Miller presented significant credibility issues, and this fact was not lost on the trial judge. Indeed, it is precisely why the trial judge rejected most of Mr. Miller's evidence and accepted only his evidence about what happened in front of the Silverthorn residence, which he viewed as sufficiently corroborated.

[138] In any event, the trial judge was entitled to accept Mr. Miller's evidence about what happened in front of the Silverthorn residence notwithstanding the credibility issues he identified. Trial judges may rely upon the evidence of someone who demonstrated a willingness to lie under oath, provided they do so with great caution: *R. v. Khela,* 2009 SCC 4, [2009] 1 S.C.R. 104, at para. 37. Where a particular risk attaches to a critical element of that person's evidence, trial judges

must be satisfied that the “potentially unreliable” evidence can be relied upon as truthful: *R. v. Kehler*, [2004] 1 S.C.R. 328, 2004 SCC 11, at para. 20.

[139] The trial judge was entitled to accept all, some or none of Mr. Miller’s evidence. He plainly emphasized the dangers inherent in convicting Michael on the basis of Mr. Miller’s evidence but was satisfied that the potentially unreliable evidence he accepted from Mr. Miller could be relied upon as truthful. In particular, he found that Mr. Miller’s narrative about what happened in front of the Silverthorn residence was independently supported by several pieces of evidence, including a gouge/scrape on the glass of the front door, Mr. Miller’s blood on the end of the pipe, and Michael’s own admission that he brandished the pipe. None of this evidence was tainted by any connection to Mr. Miller or concerns about the truthfulness of his testimony.

[140] While I return to the trial judge’s reliance on this evidence below, as Michael also argues that it amounted to a misapprehension, for now, suffice to say, the trial judge was clearly satisfied that Mr. Miller’s evidence about what happened in front of the Silverthorn house was true. I see no error in the trial judge’s credibility assessment, and his assessment is entitled to significant deference on appeal: *R. v. M. (O.),* 2014 ONCA 503, 318 O.A.C. 390, at para. 19; *R. v. A. (A.),* 2015 ONCA 558, 337 O.A.C. 20, at para. 121.

[141] Moreover, I see no merit to Michael's argument that the verdict was unreasonable because the trial judge recognized and observed that he must assess Mr. Miller's credibility "in a fair context and with a sensitivity to the realities that racialized individuals face in society" and that he "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."

[142] Contrary to Michael's suggestion, this paragraph of the trial judge's reasons does not "explain" and "excuse" Mr. Miller's credibility issues. Rather, these comments simply acknowledge the racialized context of this case.

[143] The existence of anti-Black racism in Canadian society is beyond reasonable dispute and is properly the subject matter of judicial notice. It is well recognized that criminal justice institutions do not treat racialized groups equally: Robin T. Fitzgerald and Peter J. Carrington, "Disproportionate Minority Contact in Canada: Police and Visible Minority Youth" (2011) 53 *Can. J. Crimin. & Crim. Just.* 449, at p. 450; *R. v. Le,* 2019 SCC 34, 375 C.C.C. (3d) 431. This reality may inform the conduct of any racialized person when interacting with the police, regardless of whether they are the accused or the complainant.

[144] The social context of anti-Black racism was relevant in the case at hand. I agree with the trial judge that it would have been understandable for Mr. Miller to distrust law enforcement. When police arrived on the scene, Mr. Miller was

severely injured; he was bleeding profusely from his face and unable to stand on his own. The Theriault brothers had no visible injuries, except for a scratch on Christian's hand. Yet, police permitted Michael to handcuff and search the severely injured Mr. Miller. The trial judge was right to point out that the matter may have unfolded differently had "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." Mr. Miller's charges were not stayed until months later.

[145] This context does not excuse Mr. Miller's choice to lie about his illicit activities that night, nor the fact that he was unlawfully rummaging through cars, looking for items to steal. While Mr. Miller may have been justifiably arrested for his conduct, his actions did not justify the severe beating that the Theriault brothers meted out on him. The trial judge was correct to consider the social context of anti-Black racism, and its effect on Mr. Miller's actions and how he was treated on the night in question. It is common sense that being a Black man in our society could have affected Mr. Miller's trust in law enforcement and the criminal justice system more broadly.

[146] In my view, it is incumbent on trial judges to consider relevant social context, such as systemic racism, when making credibility assessments. The trial judge did

not err in doing so, and his findings are entitled to considerable deference on appeal.

[147] It also should be noted that the trial judge's contextualization of Mr. Miller's evidence did not overwhelm nor determine the trial judge's credibility assessment by any stretch of the imagination. The impugned comments are part of one paragraph in a three hundred and thirty-six paragraph judgment. And again, the trial judge rejected most of Mr. Miller's testimony, and only gave weight to his testimony regarding the events at the door of the Silverthorn residence after considering independent evidence which confirmed it.

[148] A court of appeal reviewing a trial court's assessments of credibility to determine whether the verdict is reasonable cannot interfere with those assessments unless it is established that they "cannot be supported on any reasonable view of the evidence": *R. v. R.P.,* 2012 SCC 22, [2012] 1 S.C.R. 746, at para. 10. The trial judge's reasons disclose no such error. In my view, the trial judge's treatment of Mr. Miller's evidence and his credibility in no way compromised the reasonableness of the verdict. I would dismiss this ground of appeal.

(2) Did the Trial Judge Misapprehend the Evidence?

[149] A misapprehension of evidence encompasses at least three errors: (1) the failure to consider evidence relevant to an issue; (2) a mistake about the substance of an item or items of evidence; and (3) a failure to give proper effect to evidence: *R. v. Stennett*, 2021 ONCA 258, at para. 50.

[150] If there is an allegation of a misapprehension of evidence, the first step is to consider the reasonableness of the verdict. If the verdict is not unreasonable, then this court determines whether there was a misapprehension of evidence that occasioned a miscarriage of justice: *R. v. Morrissey* (1995), 97 C.C.C. (3d) 193 (Ont. C.A.), at p. 219; *Stennett*, at para. 51. A misapprehension of evidence will occasion a miscarriage of justice and render a trial unfair where the trial judge "is mistaken as to the substance of material parts of the evidence and those errors play an essential part in the reasoning process resulting in a conviction": *Morrissey,* at p. 221; *R. v. Lohrer,* [2004] 3 S.C.R. 732, 2004 SCC 80, at paras. 2, 8. If the appellant fails on this ground as well, the court must then consider whether the misapprehension rests on an error of law: *Morrissey,* at pp. 219-20; *Stennett*, at para. 51. If so, an appellate court may nonetheless dismiss the appeal if the Crown shows that no substantial wrong or miscarriage of justice occurred: *Morrissey,* at p. 220; see also *Criminal Code,* s. 686(1)(b)(iii).

[151] In this case, Michael argues that a misapprehension of evidence occasioned a miscarriage of justice. In particular, he takes issue with the trial judge's finding that Michael struck Mr. Miller in the face with the pipe in front of the Silverthorn residence. Again, in addition to Mr. Miller's testimony, the trial judge cited the following evidence in support of that conclusion:

a. there was a gouge/scrape on the glass door of the Silverthorn residence, which was not there before the incident and seemed consistent with the impact of a metal pipe;

b. police found Mr. Miller's blood on the end of the pipe, and it was common ground that he did not possess the pipe after he obtained his eye injury (which caused him to bleed); and

c. Michael admitted that he picked up the pipe between the houses and held it upright with two hands as he followed Mr. Miller to the door of the Silverthorn residence, when Mr. Miller was clearly injured and seeking refuge.

[152] Michael argues the trial judge erred by misapprehending this evidence in five ways. I will address each alleged misapprehension in turn. In essence, the Crown submits that each finding in question was supported by the record when viewed in its totality, and none of Michael's complaints rise to the level of a misapprehension of evidence.

[153] Ultimately, I agree with the Crown. As I will explain, none of Michael's complaints meet the exacting standard required to overturn the assault conviction on the basis of a misapprehension of evidence.

(a) Finding #1: *Michael caused the gouge/scrape when he struck Mr. Miller in the face with the pipe*

[154] First, Michael takes issue with the trial judge's reliance on the gouge/scrape on the glass door of the Silverthorn residence to support the conclusion that Michael struck Mr. Miller in the face with the pipe. Michael points out that no expert evidence was called on this issue, nor was the glass made an exhibit. Michael also argues that there was no basis to infer that Mr. Miller did not cause the gouge/scrape when he was banging on the door for help.

[155] Defence counsel made similar arguments in its written submissions at trial in reply to the following argument advanced by the Crown:

> The Crown relies on common sense and human experience to submit that this diagonal gash visible on the glass was not made by Mr. Miller's hand banging for help. It was made by Michael Theriault hitting it with the pipe as he swung at Mr. Miller, consistent with what Mr. Miller described. It [is] impossible to look at this diagonal gash and attribute its cause to anything other than being hit by an object.

[156] Defence counsel submitted that it could not be credibly claimed that the gouge/scrape was caused by the pipe coming into contact with the door in the absence of any witness testimony confirming that this indeed occurred. Rather, defence counsel offered an alternative inference: the evidence disclosed that the gouge/scrape was caused by Mr. Miller's fist when he was banging on the door.

According to defence counsel, it followed that the evidence was only capable of supporting the finding that Mr. Miller caused the gouge/scrape in the glass.

[157] In my view, it was within the trial judge's discretion, as the trier of fact, to reject defence counsel's theory. The trial judge found that a hand or fist would not have caused the gouge/scrape in the glass, whereas, it would have been caused by contact with the edge of a metal pipe. While this finding was neither supported by any expert evidence, nor expressed by any of the witnesses, it nevertheless rested on common sense. One would think that a pounding hand or fist would cause a crack, not a scrape. It seems more likely that a metal pipe, as a hard surface, would have caused a gouge/scrape in the glass. This non-technical matter did not require expert evidence as it was within the knowledge and experience of the ordinary person and trier of fact: *R. v. Mohan,* [1994] 2 S.C.R. 9, at pp. 23-25. Moreover, defence at trial did not argue that expert evidence was required to prove the pipe gouged the glass; it only offered another cause for the damage – namely, the fist pounding – which defence argued was equally plausible. I see no error in the trial judge's analysis on this point.

[158] Michael also argues that "it is illogical to reason that because the pipe made contact with the door, it must have at the same time made contact with Mr. Miller's face." While I agree that there is no way to prove with absolute certainty that the pipe made contact with both surfaces in the same motion, I do not understand the

trial judge to have made such a finding. Rather, the trial judge found 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." In other words, the striking of the door and Mr. Miller's face was part of the same incident.

[159] The trial judge arrived at his conclusion that the pipe made contact with Mr. Miller's face and the door as part of the same incident because independent evidence supported Mr. Miller's version of events (again, the gouge/scrape in the glass, the blood on the end of the pipe, and Michael's own admission about brandishing the pipe). When viewed in totality, I agree with his assessment. This finding is owed deference on appeal and does not amount to a misapprehension of evidence.

(b) Finding #2: *The blood on the pipe was placed there when Michael struck Mr. Miller in the face*

[160] Second, Michael submits that the trial judge also erred in his assessment of the blood on the pipe. He notes that no expert evidence was called on the issue of transference or the lack of blood spatter. He instead offers an alternative explanation on appeal: "Mr. Miller's blood could have come on the pipe from it being transferred from [Michael's] hands after punching him and causing the eye

injury when [Michael] grabbed the pipe to prevent Mr. Miller from re-arming himself."

[161] For the trial judge, the bloodied pipe was extremely telling given the sequence of events and Dr. Pickup's evidence regarding Mr. Miller's blood loss. Again, the trial judge found that Mr. Miller sustained the eye injury when he was punched in the face between the two houses. His nasal fracture – which Dr. Pickup testified could have resulted from the same blow as the eye injury – is what caused him to bleed profusely. By Michael and Christian's own evidence, the metal pipe was not involved in the altercation at this point in time. Michael then went and picked up the pipe, as Mr. Miller retreated to the Silverthorn residence. Michael brandished the pipe with both hands as he followed Mr. Miller to the front door. He maintained that he did not use the pipe on Mr. Miller at any point going forward. Yet, somehow, Mr. Miller's blood ended up on the tip of the pipe. Something clearly did not add up.

[162] As noted above, Michael argues that he somehow transferred Mr. Miller's blood to the end of the pipe. The trial judge did not address or consider this possibility, as it was not raised by defence counsel at trial. However, I agree with the Crown that Michael's submission was not a reasonable inference on the facts. First, there was no visible blood on Michael after the incident. Second, this explanation is inconsistent with how he said he held the pipe (upright and with two

hands). If he transferred the blood to the pipe, one would expect blood marks where his hands would have been, rather than on the tip of the pipe. In my view, the trial judge did not err by failing to consider this alternative possibility.

[163] It is also difficult to conceive of how Mr. Miller could have transferred his own blood to the pipe. Taking Michael's own version of events at its highest, he was the only one who held the pipe after the bleeding started, and he never touched Mr. Miller with the pipe.

[164] That leaves us with the only other rational explanation: the blood was left on the pipe because Michael used it to strike Mr. Miller's bloodied face. No expert evidence was necessary to draw this inference, as it rested on common sense. This finding did not amount to a misapprehension of evidence.

(c) Finding #3*: Michael brandished the pipe and therefore he used it to strike Mr. Miller*

[165] Third, Michael argues that the trial judge operated under a misplaced assumption: because he brandished the pipe, he must have used it. On this point, the trial judge said as follows at para. 305:

> 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.

[166] With respect, I disagree with Michael's characterization of the trial judge's reasoning. I do not understand this passage to suggest that there was a causative relationship between Michael picking up the pipe and Michael using it to strike Mr. Miller. Rather, in my view, the trial judge was simply treating Michael's admission that he retrieved the pipe as corroboration for the proposition that he was acting offensively, not defensively. In this regard, it was fair for the trial judge to consider Michael's demeanour in the context of the other evidence. It was telling that Michael brandished the pipe with both hands when Mr. Miller was badly injured and seeking refuge.

[167] Moreover, the reliance on the fact that Michael brandished the pipe to ground the trial judge's finding that Michael indeed struck Mr. Miller must not be overstated. There was also other evidence showing that the pipe was used in a

violent manner: namely, Mr. Miller's testimony, the gouge/scrape on the glass, and the blood on the pipe. Michael brandishing the pipe was one piece of the puzzle and must properly be viewed in the context of the totality of the evidence.

[168] I am not convinced that the trial judge erred in his consideration of Michael's admission that he brandished the pipe. His reasoning on this point does not rise to the level of a misapprehension of evidence.

(d) Finding #4: *Mr. Miller was struck in the face by the pipe notwithstanding the absence of confirmatory medical evidence*

[169] Fourth, Michael argues that Dr. Pickup's evidence contradicted the trial judge's conclusion regarding the assault with the pipe. Specifically, in his factum, Michael asserts that: "In addition to concluding that the most likely cause of the injury to Mr. Miller's eye was a punch, [Dr. Pickup] also testified that there were no other injuries on Mr. Miller's person that were consistent with being struck with a pipe."

[170] Respectfully, I interpret Dr. Pickup's evidence differently. Dr. Pickup only opined that the eye injury was likely not caused by the pipe. He indicated that he could not fully exclude the possibility that Mr. Miller's eye injury was caused by the pipe, and he could not determine 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. Indeed, Dr. Pickup testified that Mr. Miller could have received

a number of blows (from punches and/or the pipe) that would not necessarily show up as an injury:

> Q: …is it possible that Mr. Miller could have received a number of blows, whether it be a punch, or a rod that would not result in a fracture to that area of his face?
>
> A: Yes, of course. Uh, so, injury or blows from a fist, or so-forth, uh, wouldn't necessarily show up as an injury.

[171] The trial judge did not misapprehend the evidence by failing to give effect to any absence of confirmatory evidence from Dr. Pickup about Mr. Miller being struck in the head with the pipe. His testimony clearly left open the possibility that Mr. Miller could have sustained blows from the pipe without any resulting visible injuries.

(e) Finding #5: *Michael pushed Mr. Miller down with the metal pipe*

[172] Fifth, Michael takes issue with the trial judge's finding that he pushed Mr. Miller with the pipe in downward motions while Mr. Miller was on the ground on the driveway. This finding was based solely on Mr. Silverthorn's evidence, who witnessed the altercation from his house, as Mr. Miller did not specifically describe "downward jabs" with the pipe. Two other witnesses did not see Michael use the pipe against Mr. Miller in any way, but they did see him holding it.

[173] The trial judge was entitled to accept Mr. Silverthorn's evidence on this point. Mr. Silverthorn's evidence was clear and credible, and as the trial judge noted,

"[t]he other witnesses viewed the scene from different vantage points, at different times, after being awoken in the middle of the night." This does not amount to a misapprehension of evidence.

(f) Conclusion on the Misapprehension of Evidence Ground

[174] In my view, the trial judge did not misapprehend the evidence. Accordingly, I would dismiss this ground of appeal.

(3) Did the Trial Judge Fail to Analyze Whether Michael's Use of Force Was Reasonable or Explain Why Michael's Evidence Did Not Raise a Reasonable Doubt?

[175] Michael's next ground of appeal alleges that the trial judge failed to address whether Michael's conduct at the time of the alleged assault constituted a lawful use of force in an attempt to arrest Mr. Miller. He also argues that the trial judge failed to provide reasons why Michael's evidence did not raise a reasonable doubt about him using the pipe as a weapon at the doorway and driveway. In other words, Michael alleges that the trial judge erred in his application of the methodology set out in *R. v. W.* (*D.*), [1991] 1 S.C.R. 742.

[176] The Crown argues that it was implicit in the trial judge's findings that Michael's use of the pipe as a weapon to assault Mr. Miller was not a reasonable use of force, and that the trial judge otherwise had no reasonable doubt about the legality of Michael's conduct in front of the Silverthorn residence.

[177] I agree with the Crown. In my view, the reasons, read in the context of the trial record, sufficiently address both of Michael's asserted deficiencies. To hold otherwise, would be to "finely parse the trial judge's reasons in search of error", a foundering that the Supreme Court recently warned against: *R. v. G.F.,* 2021 SCC 20, 71 C.R. (7th) 1, at para. 69.

[178] In fairness, the trial judge did not explicitly address the prospect that Michael could have been attempting to effect a lawful arrest when he used the pipe to strike Mr. Miller in front of the Silverthorn residence. However, I agree with the Crown that it is obvious that the trial judge implicitly found the assault was not a reasonable use of force. Again, by all accounts, Mr. Miller was badly injured and in retreat. In fact, he was the one banging on the Silverthorn door asking the residents to call 911. At that point in time, Mr. Miller was not someone who was intent on evading law enforcement, nor was he someone who was acting aggressively in any way. If Michael was attempting to lawfully arrest Mr. Miller, then he certainly used excessive force and the assault cannot be justified on this basis.

[179] I also see no issue with the trial judge's *W. (D.)* analysis respecting Michael's exculpatory testimony regarding what happened in front of the Silverthorn residence. The conclusion of guilt was not based solely on the trial judge's rejection of Michael's portrayal of events, nor did it amount to a dichotomous credibility

contest between Mr. Miller and Michael. As noted in great detail above, the trial judge pointed to multiple pieces of evidence that sufficiently corroborated the conclusion that Michael struck Mr. Miller with the pipe (namely, the gouge/scrape in the glass, the blood on the pipe, and later, Mr. Silverthorn's testimony regarding the downward jabs). It is clear that the evidence, when viewed as a whole and in its proper context, did not leave the trial judge with a reasonable doubt about Michael's guilt on the assault count. And this conclusion was not based simply on a flat acceptance of the testimony of the complainant over that of the accused. I see no error in the trial judge's application of *W. (D.).*

[180] I would dismiss this ground of appeal.

(4) Assault Simpliciter Was an Included Offence

[181] Michael's final ground of appeal against his conviction concerns whether assault simpliciter is an included offence of aggravated assault. Michael argues that the trial judge did not have the jurisdiction to find him guilty of assault in the context of this case. He submits that assault is not a lesser and included offence of aggravated assault, and the assaultive action was a separate transaction from the assault that caused the aggravated injury. Michael also argues that an assault conviction was unfair because the indictment only put him on notice that he was liable for causing the aggravated injury. The trial judge already rejected this

argument post-conviction in dismissing Michael's application to re-open the trial: see *R. v. Theriault,* 2020 ONSC 5725. I see no error in his disposition of this issue.

[182] This court recently addressed the question of lesser and included offences in *R. v. Tenthorey*, 2021 ONCA 324, albeit under different circumstances. Paciocco J.A., writing for the court, affirmed that an offence will be an included offence if the essential elements of that offence would necessarily be proved if the Crown were to successfully establish any one of the legally available avenues of conviction for the charged offence: *Tenthorey,* at para. 51.

[183] Section 268(1) of the *Criminal Code* provides: "Every one commits an aggravated assault who wounds, maims, disfigures or endangers the life of the complainant." In this case, the indictment was particularized to permit three avenues to conviction for the offence of aggravated assault instead of four: the brothers were alleged to have wounded, maimed, and/or disfigured Mr. Miller. The indictment removes the possibility of a fourth avenue to conviction, namely, through endangerment of life.

[184] Crucially, under each of these avenues to conviction, common assault will necessarily be proved by establishing any of the ways in which the charged offence can be committed. An assault only requires the "intentional non-consensual application of force," and this definition applies "to all forms of assault": *Criminal Code,* s. 265(1)-(2); *Canadian Foundation for Children, Youth and the*

Law v. Canada (Attorney General), 2004 SCC 4, [2004] 1 S.C.R. 76, at para. 1. I reject Michael's argument that aggravated assault is a stand-alone offence under s. 268. Aggravated assault is simply an "aggravated" version of common assault: the only distinguishable feature is the added legal requirement that the assault must wound, maim, disfigure, or endanger the life of another. I am satisfied that common assault is an included offence of aggravated assault: see also *R. v. Rocchetta*, 2016 ONCA 577, 352 O.A.C. 130, at para. 38.

[185] Michael's argument on this ground also seems to challenge the factual nexus between the aggravated assault allegation and the assault conviction. Put another way, he submits that the alleged assault constituted a separate transaction from the charge alleging aggravated assault, as there was a "significant legal break in the factual context" after the dynamic changed and Mr. Miller retreated. Relying on *R. v. Talbot,* 2007 ONCA 81, 217 C.C.C. (3d) 415, at paras. 90-91, Michael argues that this was an "all or nothing" case, and if the Crown had wanted to allege that the assault was criminal even if the aggravated assault was not, it should have laid a separate charge for the assault.

[186] I would not accede to this argument. A single transaction can include a single act, or circumstances that are "successive and cumulative and which comprise a series of acts" that are sufficiently connected: *R. v. Manasseri,* 2016 ONCA 703, 344 C.C.C. (3d) 281, at para. 73, leave to appeal refused, [2016] S.C.C.A. No. 513.

In my view, the events that transpired in front of the Silverthorn residence are sufficiently connected to the events between the houses. Very quickly after the struggle began, the dynamic was, and continued to be, one-sided, with the Theriault brothers exacting a successive and cumulative attack on Mr. Miller. In my view, it constituted a single and continuous transaction.

[187] Simply put, the trial judge's findings belie the argument that there was a significant legal break in the factual context. Critically, Mr. Miller was not acting aggressively when the alleged aggravated assault occurred. Rather, the trial judge found that Michael and Christian re-engaged, and caused the aggravated injury, when Mr. Miller was likely in retreat. Mr. Miller was also not acting aggressively when the assault occurred in front of the house. He was seeking assistance and was badly injured. The factual dynamic did not change. These findings demonstrate that there was a consistent and sustained attack on Mr. Miller. Ciphering the events into two discrete transactions would amount to an artificial dissection of a series of connected acts that occurred over a short and concentrated period of time.

[188] Lastly, in my view, the assault simpliciter conviction occasioned no unfairness to Michael, despite the fact that the indictment only included the aggravated assault count. The factual landscape of this case always involved a series of assaults on Mr. Miller, including assaults at the front door and on the

driveway. The Crown was clear from the outset that the assaults were connected and occurred in the course of one single transaction. In these circumstances, defence had fair notice of the scope of potential criminal liability, notwithstanding the way the offence was charged in the indictment. I see no error in the trial judge's approach in this regard.

[189] I would dismiss this ground of appeal.

G. SENTENCE APPEAL

[190] Michael takes issue with the nine-month sentence imposed for the assault simpliciter conviction. He argues that the trial judge made five errors in principle, and also imposed a sentence that was disproportionately unfit.

[191] Appellate review of sentences is subject to a highly deferential standard of review. An appellate court may only intervene if the sentence is demonstrably unfit or the sentencing judge made an error in principle that had an impact on the sentence: *R. v. Friesen*, 2020 SCC 9, 444 D.L.R. (4th) 1, at paras. 25-26; *R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089, at paras. 11, 41 and 44. The sentencing judge's findings of fact and identification of aggravating and mitigating factors are entitled to deference, to the extent they are not affected by an error in principle: *R. v. R.A.*, 2021 ONCA 126, 154 O.R. (3d) 552, at para. 32; see also *Friesen*, at para. 28.

[192] I would dismiss his sentence appeal for the reasons that follow.

(1) The Trial Judge's Finding of Significant Force

[193] First, Michael takes issue with the trial judge's finding that he used significant force when striking Mr. Miller in the face. He argues this finding was not grounded in the evidence and was unreasonable. I disagree.

[194] The trial judge made this finding post-trial at the sentencing stage. Certainly, the gouge/scrape alone may not prove that Michael used significant force; it is conceivable that a relatively light tap with a metal pipe could cause damage to glass. However, I agree with the Crown that significant force was a reasonable inference due to Michael's own admission that he brandished the pipe. As the trial judge noted, the assault involved a "two handed-strike with a metal pipe held above the shoulders" that left a gouge in the glass front door of the Silverthorn residence. Based on the way Michael wielded the pipe, as well as the damage the pipe occasioned to the glass, it is common sense that the strike involved significant force. I see no error in his reasoning here.

[195] I would dismiss this ground.

(2) The Trial Judge's Consideration of the Use of a Weapon

[196] Second, Michael argues that the trial judge erred in aggravating the sentence based on Michael's use of the weapon since he was not tried nor convicted of assault with a weapon.

[197] I disagree. The use of a weapon was proven beyond a reasonable doubt and clearly formed part of the circumstances of this case. It called for consideration. Furthermore, proportionality demanded close attention to the circumstances that increased the gravity of the offence. Indeed, facts tending to establish the commission of other offences of which an accused has not been charged or convicted can be admitted to enable a court to determine a just and appropriate sentence: *Criminal Code,* s. 725(1)(c); *R. v. Luu*, 2021 ONCA 311, at para. 30; *R. v. Angelillo*, 2006 SCC 55, [2006] 2 S.C.R. 728, at paras. 22-27; and *R. v. Edwards* (2001), 155 C.C.C. (3d) 473, (Ont. C.A.), at paras. 63-65.

[198] Additionally, this aggravating factor occasioned no unfairness to Michael. Although the Crown omitted the assault with a weapon charge from the indictment, the Crown never abandoned the allegation that Michael wielded the metal pipe. Since this was a critical aspect of the Crown's theory of the case, Michael was fully apprised of the possibility that the weapon could feature in sentencing; no fairness was occasioned when this prospect was actualized. The trial judge did not err by taking the use of a weapon into consideration.

[199] I would dismiss this ground.

(3) The Trial Judge's Consideration of the Self-Defence Context

[200] Third, Michael submits that the trial judge erred in failing to take into account the self-defence context of the incident as a mitigating factor. I would reject this argument for two reasons.

[201] First, it is clear throughout the trial judge's reasons for judgment that he believed this defence, to use his words, was "razor thin" while the altercation was taking place between the houses, and had "evaporate[d]" by the time the assault occurred. Indeed, he was satisfied beyond a reasonable doubt that Michael was not acting in self-defence when he assaulted Mr. Miller with the pipe at the front door and thereafter in the driveway. As he put it at para. 84 of his sentencing reasons:

> To be clear, this is not a case where in the course of self defence an accused simply went too far. This is a case where after any reasonable possible threat abated, the accused armed himself with a weapon and struck the obviously injured and retreating victim.

[202] The trial judge was not obligated to treat his earlier reasonable doubt regarding self-defence as mitigating, given how far Michael's actions strayed from any proper scope of self-defence. As the trial judge said, the assault was gratuitous and violent, and the victim was acutely vulnerable at the time in question.

[203] Second, the trial judge did take into account the self-defence context when assessing the seriousness of the offence and the degree of Michael's moral culpability. Indeed, the trial judge found that Michael's moral responsibility was "modestly moderated by the fact that this incident was preceded by a violent encounter that did not result in any criminal liability." The trial judge properly considered the events that preceded the assault, and the weight he ascribed to this factor is subject to deference.

[204] I would dismiss this ground.

(4) The Trial Judge's Consideration of the Breach of Trust

[205] Fourth, Michael argues the trial judge erred in aggravating the sentence on the basis that the circumstances of the offence were a breach of trust.

[206] This was not improper reasoning. It is well recognized that police are "held to a higher standard than would be expected of ordinary citizens" because they are charged with enormous responsibilities and granted a great deal of trust and power: *R. v. Forcillo,* 2018 ONCA 402, 361 C.C.C. (3d) 161, at paras. 198-99, leave to appeal refused, [2018] S.C.C.A. No. 258. Police officers are duty bound to serve and protect the community. They are also duty bound to uphold the law. When the conduct of a police officer runs contrary to either of these duties, the legitimacy of the rule of law – a postulate of our constitutional structure – rests on

fragile ground. This court has emphasized that the principles of denunciation and general deterrence become magnified in these circumstances: *Forcillo,* at para. 199.

[207] I agree with the trial judge that the fact that a police officer is off duty at the time they commit the offence does not alter the power and corresponding responsibilities that come with their job. This is especially the case when they are purporting to act in a policing or quasi-policing capacity. Police officers are trained to respond properly to volatile encounters; when that training is weaponized in a manner that undermines public safety, public trust will be particularly compromised.

[208] That is exactly what happened here. Taking Michael's evidence at its highest, he was acting in a de facto police capacity throughout his encounter with Mr. Miller that night. The entire basis of Michael's defence was that he was attempting to effect a lawful arrest, which had gone awry. He consistently made reference to his police training when explaining various actions that he took, despite his repeated failings to comply with protocol. He admitted he brandished the weapon in the manner he did at the time of the assault because it was consistent with his police training. He took Mr. Miller to the ground and was ultimately the one to handcuff and search him. Indeed, the fact that he was an off-duty police officer goes a long way to explaining why his version of events was

initially accepted when the police arrived to find a seriously injured Black man, who was then handcuffed and arrested. It therefore stands to reason that Michael was acting in a position of trust, and that trust was egregiously broken with his gratuitous use of force against an acutely vulnerable person.

[209] I agree with the trial judge's assessment of this factor. I would dismiss this ground.

(5) The Trial Judge's Consideration of a Heightened Degree of Denunciation

[210] Fifth, Michael contends the trial judge erred in aggravating the sentence and for misperceiving the need for a "heightened degree of denunciation" on the basis that the victim was Black, and the perpetrator was white. Michael contends that "this was not a racially motivated crime and the concurrence of the victim being Black and the accused being white was happenstance."

[211] The Crown did not prove that this was a racially motivated crime beyond a reasonable doubt. Nevertheless, the racial context within which this offence took place was a relevant consideration.

[212] While often overlooked out of a tendency to distance ourselves from the social ills plaguing our southern neighbour, Canada's long history of anti-Black racism has manifested in the contemporary phenomena of over-policing and disproportionate incidents of violence during interactions between Black people

and the police: *Le,* at para. 93. Systemic and overt racism have long sustained unequal treatment before the law, leading to a crisis of confidence in the administration of justice in some communities. The current moment of reckoning with respect to systemic racism in Canada is long overdue.

[213] As the trial judge put it, Michael's conduct "further sowed the seeds of distrust between the Black community and the police." Michael's actions, as a white off-duty police officer who assaulted a retreating, injured Black youth, cannot, and should not, be divorced from this wider context. As noted above, Michael was a representative of the rule of law in this country, and his actions shattered a community's trust in the very system that is supposed to protect them.

[214] Mr. Miller may have broken the law that night, but he did not deserve what subsequently happened to him. The right to be free from excessive and unreasonable force does not discriminate.

[215] The trial judge's treatment of this larger context in sentencing was laudable and sets a model for future cases of this nature. As I will explain, he did not falter in his role of imposing an individualized and proportionate sentence, while also recognizing that this type of crime warrants heightened denunciation due to its devastating implications.

[216] At all times, the trial judge remained tethered to the fundamental principle of sentencing: that a sentence must be proportionate to the gravity of the offence and

the degree of responsibility of the offender. He recognized that he was not imposing a punishment "in an attempt to right past societal or systemic failings." He took into consideration Michael's mitigating circumstances and maintained a focus on the individualized offence before the court. At the same time, the trial judge acknowledged that denunciation, as a collective statement of society's values, must evolve in tandem with developing social values. This includes increasing awareness about anti-Black racism.

[217] As the Supreme Court instructed in *Friesen,* at para. 35:

> Sometimes, an appellate court must also set a new direction, bringing the law into harmony with a new societal understanding of the gravity of certain offences or the degree of responsibility of certain offenders (*R. v. Stone*, [1999] 2 S.C.R. 290, at para. 239). When a body of precedent no longer responds to society's current understanding and awareness of the gravity of a particular offence and blameworthiness of particular offenders or to the legislative initiatives of Parliament, sentencing judges may deviate from sentences imposed in the past to impose a fit sentence (*Lacasse*, at para. 57). That said, as a general rule, appellate courts should take the lead in such circumstances and give sentencing judges the tools to depart from past precedents and craft fit sentences. [Emphasis added.]

[218] The trial judge correctly concluded that this case called for heightened denunciation and I endorse his approach. As our society comes to grips with disproportionate rates of police violence against Black people, it is integral that the

need for denunciation of crimes that are emblematic of these broader social patterns develops accordingly.

[219] I would dismiss this ground of appeal.

(6) The Sentence Was Not Demonstrably Unfit

[220] Lastly, Michael argues the sentence itself was demonstrably unfit and outside the range of sentences for similar offenders. He submits that a non-custodial sanction would be a fit sentence in this case. He also argues that the trial judge provided insufficient reasons for rejecting an alternative to a custodial sentence.

[221] The trial judge did not err by deviating from the range advocated by defence counsel. Defence counsel sought a sentence ranging from an absolute or conditional discharge to a suspended sentence, or at worst, a conditional sentence. The Crown argued that the case law does not provide a discernable range given the unique circumstances of this case, and to the extent that a range can be extrapolated, the aggravating features of this case called for a departure from the range.

[222] Ultimately, the trial judge accepted the Crown's argument that there is no applicable range of sentence that can be discerned from the case law. He explained that the case law referred to by defence counsel suffered from the

following deficiencies: it was dated and occurred in a different social context; it involved the mitigation of a guilty plea and/or other factual scenarios that are less serious; or it was otherwise distinguishable in that the offences were not committed by police officers. The unique factual nexus in this case meant that the cases provided did not greatly assist in determining the appropriate range. In any event, the fact that a judge deviates from the proper sentencing range does not in itself justify appellate intervention: *Lacasse,* at para. 11.

[223] A sentence will be demonstrably unfit if it constitutes an unreasonable departure from the principle of proportionality: *Lacasse,* at para. 53. This incident was, by any measure, a gratuitous and violent assault on a retreating, badly injured, victim. The events of that night caused irreparable harm to Mr. Miller and to the community at large. A custodial sentence was proportional in the circumstances of this case, as were the ancillary orders. As the trial judge put it at para. 104: “The sentence is substantial, but not crushing.” The sentence was fit and is owed deference on appeal: *Friesen,* at para. 25.

[224] The trial judge’s reasons for imposing a custodial sentence were sufficient in the context for which they were given. The trial judge explicitly considered less restrictive alternatives to imprisonment, but ultimately concluded that “nothing short of a jail sentence will suffice to adequately denounce the offence and to offer the requisite degree of deterrence.” He concluded that a discharge would be

"manifestly contrary to the public interest in these circumstances" and would "risk trivializing the offence and undermining public confidence in the administration of justice." He also considered a conditional sentence, but ultimately concluded that "a very strong denunciatory message … can only be sent by a term of real jail." The trial judge's reasons explain what he decided and why he came to that conclusion, and in so doing, permitted meaningful appellate review.

[225] I would dismiss this ground of appeal.

H. CONCLUSION

[226] I would dismiss the defence appeal against conviction and sentence. As noted above, given the Crown's position on a retrial, I would also dismiss the Crown's appeal without addressing its merits.

Released: July 19, 2021 "M.T."

"M. Tulloch J.A."
"I agree. L.B. Roberts J.A."
"I agree. Gary Trotter J.A."