

SUPREME COURT OF NOVA SCOTIA

Citation: *R. v. Downey*, 2017 NSSC 39

Date: 20170214

Docket: CRH 448479

Registry: Halifax

Between:

Her Majesty the Queen

v.

Markel Jason Downey

Decision

Judge: The Honourable Justice Michael J. Wood

Heard: January 9-13, 16-18, 23-25, and February 9, 2017, in Halifax,
Nova Scotia

Oral Decision: February 14, 2017

Counsel: James Giacomantonio and Scott Morrison, for the Crown
Patrick MacEwen, for the Defendant

By the Court:

[1] On the evening of November 30, 2014, four masked individuals entered the home at 52 Arklow Drive in Dartmouth, Nova Scotia. Within a few minutes one of the intruders had shot the three occupants – Logan Starr, Jordan Langworthy, and Ashley MacLean. Fortunately Mr. Starr and Mr. Langworthy have recovered from their injuries, however Ms. MacLean has not. Her spinal cord was injured and she has suffered partial paralysis. She will require care for the rest of her life.

[2] The Crown alleges that the person who did the shooting was Markel Jason Downey. The charges against him are set out in a 28-count indictment dated February 24, 2016. They include attempted murder, robbery, various firearms offences and breaching the terms of a recognizance. In closing submissions Crown counsel conceded that seven of the less serious counts had not been made out and acquittals should be entered.

[3] As in any criminal prosecution the Crown bears the burden of proof. They must satisfy me that they have proven Mr. Downey's guilt beyond a reasonable doubt. This burden is not met if I suspect Mr. Downey is guilty, or even if I believe he is probably guilty. As an accused person in a criminal proceeding Mr. Downey is presumed to be innocent and bears no burden to rebut or explain any of the Crown's evidence.

[4] The sole issue in this case is the identity of the shooter and whether the Crown has proven beyond a reasonable doubt that it was Mr. Downey. The only forensic evidence which potentially links him to the crime is the discovery of one particle of gunshot residue on his right hand as a result of samples taken three and a half hours after the shooting. It is clear that the Crown's case rests primarily on the evidence of Ashley MacLean who testified that she recognized Mr. Downey based upon her prior contact with him.

[5] Ms. MacLean said she believed it was Mr. Downey as soon as she saw him. In addition, once he spoke she said she recognized his voice. The dangers inherent in such evidence are well recognized (see for example **R. v. Leeds**, 2013 NSSC 364). In the context of jury instructions where potential conviction rests upon identification evidence Laskin, JA, of the Ontario Court of Appeal, had the following to say in **R. v. Spatola**, 1970 CanLII 390:

In the course of that judgment, reference was made to the statement of Kingsmill Moore, J., in **The People v. Casey** (No. 2), [1963] I.R. 33 at p. 39, setting out the kind of direction that should be given to juries where the verdict depends substantially on the correctness of an identification and where that identification is challenged. Put briefly, the statement said that the desirable direction was to warn juries to be specially cautious about identification evidence, over and above any question of the honesty of the witnesses and their opportunities for observation. The Court in the Sutton case adopted that statement as a desirable model in all such cases. The learned Irish Judge put his statement forward as a minimum warning, recognizing that particular circumstances attending a case may require amplification or variation, according to the probative value of the item of identification evidence.

The reasons for the kind of minimum warning to juries suggested in **The People v. Casey** (No. 2) are not difficult to appreciate. Errors of recognition have a long documented history. Identification experiments have underlined the frailty of memory and the fallibility of powers of observation. Studies have shown the progressive assurance that builds upon an original identification that may be erroneous: see, generally, 3 Wigmore on Evidence, 3rd ed. (1940), s. 786a; Williams, *The Proof of Guilt*, 3rd ed. (1963), pp. 106-24. The very question of admissibility of identification evidence in some of its aspects has caused sufficient apprehension in some jurisdictions to give pause to uncritical reliance on such evidence, when admitted, as the basis of conviction: see "Comment, Regulation and Enforcement of Pre-Trial Identification Procedures", 69 Col. L. Rev. 1296 (1969); "Recent Cases", 109 Univ. of Pa. L. Rev. 1296 (1969); "Recent Cases", 109 Univ. of Pa. L. Rev. 1182 (1961), commenting on **People v. Gould et al.** (1960), 354 P. 2d 865 (Calif.).

Bare recognition unsupported by reference to distinguishing marks, and standing alone, is a risky foundation for conviction even when made by a witness who has seen or met the accused before. Of course, the extent of their previous acquaintanceship must have a very important bearing on the cogency of the identification evidence, as will the circumstances in which the alleged recognition occurred. Where some distinguishing marks are noticed and later verified, there is a strengthening of credibility according to the nature of such marks. But the initial issue of the caution with which identification evidence must be received, particularly where it is the unsupported evidence of one witness, remains; all of this is, in a jury trial, for the jury to evaluate on proper direction. If that direction should embrace an admonition of caution where there is questioned identification evidence, and such a direction is not given, an appellate Court cannot say that a conviction in such a situation must be sustained.

[6] These comments are equally applicable where the trial is before a judge alone, as in this case. The dangers of identification evidence, particularly where the witness

is both honest and convincing, was discussed by the Alberta Court of Appeal in **R. v. Atfield**, 1983 ABCA 44, at para. 3:

3 The authorities have long recognized that the danger of mistaken visual identification lies in the fact that the identification comes from witnesses who are honest and convinced, absolutely sure of their identification and getting surer with time, but nonetheless mistaken. Because they are honest and convinced, they are convincing, and have been responsible for many cases of miscarriages of justice through mistaken identity. The accuracy of this type of evidence cannot be determined by the usual tests of credibility of witnesses, but must be tested by a close scrutiny of other evidence. In cases, where the criminal act is not contested and the identity of the accused as the perpetrator the only issue, identification is determinative of guilt or innocence; its accuracy becomes the focal issue at trial and must itself be put on trial, so to speak. As is said in **Turnbull**, the jury (or the judge sitting alone) must be satisfied of both the honesty of the witness and the correctness of the identification. Honesty is determined by the jury (or judge sitting alone) by observing and hearing the witness, but correctness of identification must be found from evidence of circumstances in which it has been made or in other supporting evidence. If the accuracy of the identification is left in doubt because the circumstances surrounding the identification are unfavorable, or supporting evidence is lacking or weak, honesty of the witnesses will not suffice to raise the case to the requisite standard of proof and a conviction so founded is unsatisfactory and unsafe and will be set aside. It should always be remembered that in the famous **Adolph Beck** case, twenty seemingly honest witnesses mistakenly identified Beck as the wrongdoer.

[7] Voice identification evidence is no different than visual identification and should be treated with extreme caution (**R. v. Clouthier**, 2012 ONCA 636, at para. 19). When voice identification is based upon recognition from prior conversations with the accused, it is important to carefully consider the circumstances under which the identification was made and the basis for the witness's belief that they heard the voice on an earlier occasion. A number of cases have considered voice recognition evidence and identified factors to be considered in assessing the reliability of that evidence. One of the leading cases is **R. v. Williams**, [1995] O.J. 1012 (ONCA). In **R. v. Saddleback**, 2013 ABCA 250, the Alberta Court of Appeal described the factors from the Williams case as follows:

D. Voice Identification

25 In **R. v. Williams** (1995), 23 OR (3d) 122 at paras 13 and 14, [1995] O.J. No. 1012, the court summarized a number of factors to be considered with respect to voice recognition evidence:

- (1) Is there direct or circumstantial evidence that the speaker is in fact the appellant?
- (2) Are the events following the conversations in which the appellant was identified consistent with the speaker being the appellant? For instance, in the case on appeal, a meeting was arranged but the appellant never carried through with it.
- (3) Is there some peculiarity or distinctiveness to the appellant's voice that would make it more readily identifiable? Are there "internal patterns" or patterns of speech, distinctly associated with the appellant?
- (4) Did the speaker disclose facts known by the appellant or, more compellingly, known only to the appellant?
- (5) Are the "context and timing" of the conversation consistent with the theory that the speaker is the appellant? Or, on the other side of the coin, was the identity of the speaker tainted by the witness' expectation that he would be the appellant?
- (6) The trial judge must advert the jury to the possibility that the speaker may have been disguising his voice.
- (7) The trial judge must direct the jury and impress upon the jury that unless they were satisfied beyond a reasonable doubt that the witness was not only honest and reliable, but also correct, it would be unsafe to convict and they should acquit.
- (8) The lack of distinctiveness in the voice identified made the evidence of identification inadmissible.

[8] In **R. v. Pinch**, 2011 ONSC 5484, Justice Hill reviewed the caselaw with respect to voice identification evidence and identified a number of factors affecting the reliability of voice recognition and voice identification including the following:

1. Is the witness sufficiently familiar with the speaker's voice to be able to recognize it?
2. In light of the susceptibility of memory error and degradation, what is the delay period between the times when the witness has heard the person's voice?
3. What is the confidence level of the witness in purporting to make an identification? While confidence does not substantially correlate to reliability, the witness' lack of confidence is certainly probative.
4. Recognition that different utterances of the same word by the same speaker are not acoustically identical and there is variability within a person's speech as well as variability between speakers.

5. Was the speaker trying to disguise his voice or was his speech otherwise not “normal“ for that person on account of illness, intoxication, drowsiness, stress, emotional state, etc.

[9] It is apparent that credibility and reliability of identification evidence are important but separate considerations. Credibility assesses whether the witness is truthful, biased, exaggerating or trying to tailor their evidence in some fashion. Reliability involves a consideration of the weight to be given to the evidence including an assessment as to whether the witness’s opinion about identity is actually correct. The danger in identification cases is that the witness who firmly and honestly believes they have named the perpetrator, and are therefore very credible, may also be mistaken.

[10] In assessing the reliability of a witness’s identification the court must look at why they believe it was the person in question. Is there something about their appearance, voice, what they said or did, their posture or manner of moving? The court must also consider the witness’s opportunity to observe the person at the time of the incident as well as their prior familiarity with them. Extensive previous contact increases the likelihood that the identification is reliable.

[11] The evaluation of the strength of a particular witness’s testimony is unique and depends on a wide range of considerations. Other court decisions involving identification evidence are not particularly helpful in deciding whether another witness in a different trial is reliable but they do illustrate some of the considerations which may arise.

[12] **R. v. “X”**, 2013 NSPC 127 dealt with a shooting in a school playground where the face of the shooter was partially concealed. The two witnesses who identified the accused as the shooter lived in the same small community as him and had known him all their lives. He was also their cousin. The shooting was in broad daylight and the shooter was 15 – 20 feet away. Both witnesses had seen the accused in the area a half hour earlier. There was also a history of animosity between the accused and the victim. In light of the “long standing and ongoing contact” with the accused and that he was “very familiar” to them Judge Derrick accepted the witnesses’ evidence to prove the identity of the shooter. She said they had “an unobstructed view of a person they had known all their lives” and saw “a good part of his face”.

[13] There are two primary areas of focus in my assessment of Ms. MacLean’s testimony. The first is the evening of November 30, 2014, and her opportunity to

observe and identify the shooter including her explanation about why she feels it was Mr. Downey. The other is the nature and extent of Ms. MacLean's prior interactions with Mr. Downey and whether they form a sufficient basis to reliably support her subsequent identification.

The November 30, 2014, Home Invasion

[14] The three occupants of 52 Arklow Drive testified about their recollection of the home invasion. At the time the intruders came through the front door Logan Starr and Jordan Langworthy were playing video games in the living room, while Ashley MacLean was in a bedroom doing the same.

[15] Logan Starr said he saw four people come through the front door. They were all dressed in dark clothing with their faces covered and were wearing gloves. One had a gun. Because of their face coverings he could only see their eyes. He was unable to visually tell what race they were and could not identify them. Based upon their speech he thought the individuals were black.

[16] Mr. Starr said the intruders kept asking "where is the money?" and "where is the shit?" After a few minutes in the living room the intruders took he and Mr. Langworthy into the bedroom where Ms. MacLean was. The only light in the bedroom was from the television, however there was a light in the bathroom which illuminated the room. In the bedroom the person with the gun kept asking for their stuff and their money. The conversation in the bedroom lasted one to two minutes before the shooting started.

[17] Jordan Langworthy said he was playing video games in the living room with Logan Starr when four masked individuals came in the front door. He said he recognized three of them. He did not recognize the person with the gun. All were wearing dark clothing which appeared black to him and their faces were masked. They were wearing gloves.

[18] Mr. Langworthy recalls that the lights were on the bedroom and did not go off. He remembers the intruders asking for money and weed, but he is not sure who was speaking. He remembers the gunman saying "do you want to die here" and "who is going to make us leave". He initially testified that the confrontation in the bedroom lasted three to six minutes before the shooting. In cross-examination he acknowledged that it may have been as short as two to three minutes.

[19] Ashley MacLean testified that she was playing a video game in the bedroom with a light on when Logan Starr and Jordan Langworthy came in followed by four individuals wearing bandanas. She said that within the first second she recognized all of them. She said Jason Downey was the one holding a gun and dressed entirely in red. The others were dressed in black. She initially said Mr. Downey's face was covered by a bandana, however in cross-examination she acknowledged that it might have been a ski mask.

[20] Ms. MacLean did not explain what it was about Mr. Downey's physical appearance that allowed her to identify him immediately. The only part of his face she could see were his eyes and cheekbones. In her cross-examination she agreed she couldn't really describe anything distinctive about Mr. Downey's eyes, however in redirect she said they reminded her of a pit bull.

[21] Ms. MacLean indicated that once the person with the gun began to speak she recognized the voice as being that of Jason Downey, although she could not describe anything distinctive about it. She said she recognized it because of her prior conversations with Mr. Downey. The first time she mentioned that she knew it was Mr. Downey's voice was at the preliminary inquiry. She did not tell this to the police in her statement given five weeks after the shooting although she did tell them she recognized the voice of one of the other intruders.

[22] Ms. MacLean said the only person who spoke in the bedroom was the gunman who kept repeating things such as "so what's up". She told them to leave them alone and not shoot them and that they were going to get caught. The gunman asked who was going to snitch on them and said "who is this white girl to tell me to leave".

[23] Ms. MacLean estimated that the conversation in the bedroom lasted five to ten minutes, following which the lights were turned off briefly. She said she started to freak out and the lights were turned on and the shooting started.

Ms. MacLean's Prior Contact with Mr. Downey

[24] Ms. MacLean testified that she first met Mr. Downey when both were in grade ten at Cole Harbour High School, which would have been September of 2011. They did not attend any classes together except for gym in September 2012. They were in that class together for one week, until Ms. MacLean dropped out of it after a dispute with Mr. Downey and some of his friends.

[25] Ms. MacLean said she and Mr. Downey did not socialize outside of school. They did not share the same circle of friends.

[26] Ms. MacLean's family lived at 333 Arklow Drive for more than ten years prior to the shooting. Between September 2013 and early July 2014, Mr. Downey's family lived across the street. Although Ms. MacLean says she visited her home every day, she rarely stayed over night as she was living with her boyfriend during 2013 and 2014. Most mornings she would stop by to get a change of clothes before she went to work. During the time the Downey family resided on Arklow Drive, Mr. Downey spent a significant portion of his time at his girlfriend's home in Lawrencetown. He was also training at a boxing gym for several hours a day.

[27] When Ms. MacLean saw Mr. Downey on her street she would wave to him and say hi, but that was the extent of their interaction. She would sometimes see Mr. Downey, his brother and their friends playing basketball in a neighbours' driveway.

[28] According to Ms. MacLean, the times she attended Cole Harbour High School when Mr. Downey was also there, would have been in grade ten (academic year 2011/2012), grade eleven (academic year 2012/2013), one week in September 2013 and a month in January 2014.

[29] When Ms. MacLean dropped out of school in September 2013 and again in January 2014, it was to work full time at Dave's Fruit and Vegetables.

[30] Ms. MacLean did not see or speak to Mr. Downey since his family moved from Arklow Drive in early July, five months prior to the shooting. Between January and July 2014, she may have seen Mr. Downey and others playing basketball during the warmer weather. If she did, she would have said hi but had no other conversation. During this period she would sometimes walk to work which took her past Cole Harbour High School. If she had time and saw her friends outside smoking she might stop to see them. If she saw Mr. Downey at that time, she would have said hi and asked how he was doing.

[31] Ms. MacLean said she attended school for a few weeks in January 2014. She did not specifically indicate what contact, if any, she had with Mr. Downey during that time. In cross-examination she testified that in the 15 months prior to the shooting she did not see Mr. Downey at school or socialize with him. She was not positive whether she had a conversation with him during the year prior to the shooting. During her cross-examination Ms. MacLean said she recognized Mr. Downey's voice from the "few times" they spoke over the prior year, which she

described as “small talk” as well as the more extensive conversations they had in grade ten. When in school she described she and Mr. Downey as “acquaintances” who would have “little conversations” if they saw each other. This would usually be in the stairwell where people hung out.

Assessment of Ms. MacLean’s Identification Evidence

[32] Ms. MacLean testified that she is 100% certain it was Mr. Downey who shot her and she came to that conclusion immediately upon seeing all four of the masked individuals enter the bedroom. She said that she knew the identity of all of them right away. When she heard the gunman speak, Ms. MacLean said it confirmed her belief that it was Mr. Downey.

[33] When she was in the ambulance on the way to the hospital Ms. MacLean told Cst. Pike that she did not know who shot her. A few minutes later she said it was “Baby Jason” which, according to Mr. Downey’s father, is a nickname used by his close friends. This statement by Ms. MacLean cannot be used to make her identification of Mr. Downey more reliable; saying the same thing more than once does not make it more or less accurate. However, this evidence can be used to show that her opinion that Mr. Downey was the gunman did not arise because of hearing about his arrest or reading discussions on social media about the incident.

[34] I accept that Ms. MacLean is convinced she has correctly identified the shooter and that this is a honestly held belief. The law requires me to examine the basis for that conclusion in order to assess its reliability and accuracy.

[35] None of the three occupants of 52 Arklow Drive noticed anything distinctive about the body shape or size of the gunman. None of them commented on anything unique about the way he stood or moved. The only part of the gunman’s body that was visible was his eyes and possibly his cheek bones. Mr. Starr and Mr. Langworthy were unable to identify anything unusual about those features and in fact, Mr. Starr could not identify the gunman’s race based upon visual observation.

[36] In Ms. MacLean’s direct examination she never explained how she was able to immediately identify Mr. Downey as the gunman when he entered the bedroom. In cross-examination she said there was nothing really distinctive about the partial facial features she could see on any of the intruders. She went on to say that the only basis for her identification of the others was their eyes, which were all different. She explained this by saying “when you know someone you just know who they are”. She said Mr. Downey “sort of” had average eyes. In redirect examination she

explained that his eyes reminded her of a pit bull, but could not give any further description. Ms. MacLean was sitting on the bed and was further from the gunman than either Mr. Starr or Mr. Langworthy. She also spent less time observing the intruders since she was not in the living room for the interaction there.

[37] When the gunman spoke Ms. MacLean said she recognized the voice as Mr. Downey's. She said it was not distinctive but she was used to hearing it from the previous times when they had spoken. It is clear from her evidence that she and Mr. Downey had not had any conversations for at least ten months prior to the shooting, other than to perhaps say hi in passing. I am satisfied that the only times when Mr. Downey and Ms. MacLean did more than exchange greetings was when they were both attending school. This would have been during the academic years of 2011/2012 and 2012/2013, one week in September 2013 and the month of January 2014. At school they were not friends and did not travel in the same circles. They did not have any classes together except for a few days in September 2012. Ms. MacLean described them as acquaintances and said if they were hanging out in the same area they might engage in small talk. Ms. MacLean's testimony in cross-examination was that she recognized Mr. Downey's voice from the "few times" they spoke over the year prior to the shooting, which she described as "small talk" as well as the longer discussions which took place when she was in grade ten.

[38] The issue which I must address is the risk that Ms. MacLean's identification of Mr. Downey amounts to what has been described as an honest but mistaken belief. Her evidence is central to the Crown's submission that there is no reasonable doubt left with respect to the identification of Mr. Downey as the shooter.

[39] I have a number of concerns with respect to the reliability of Ms. MacLean's identification evidence and these include the following:

1. The identification was immediate and based only on a very brief observation of a masked individual. She had no prior indication that a home invasion was underway and was surprised by their appearance in the bedroom. Her only explanation for the visual identification was to say that there was something about the gunman's eyes that made her think it was Mr. Downey, but she could not elaborate.
2. Ms. MacLean's evidence that the gunman was dressed entirely in red conflicts with the testimony of Mr. Starr and Mr. Langworthy, as well as other witnesses who apparently observed the intruders running from the

scene. I believe she is mistaken in this recollection which calls into question the reliability of her memory of other details.

3. She had not seen Mr. Downey in more than five months and had very little contact in the prior year. There were no conversations beyond brief exchanges of pleasantries for many months prior to the shooting.
4. The atmosphere in the bedroom was highly charged. Ms. MacLean said her attention was focused on the gun. There were death threats and yelling, and Ms. MacLean says she was freaking out. If Mr. Downey was the gunman, I would not expect his tone of voice to be the same as when he was engaged in chitchat in the stairwell at Cole Harbour High. Trying to recognize voices in such dramatically different circumstances is problematic.
5. Ms. MacLean's voice identification evidence carries a risk of confirmatory bias. Once she had decided the gunman was Mr. Downey, her recognition of the voice may have been an unintentional confirmation of the visual identification already made. In addition, she first raised this as a basis for recognition after Mr. Downey was arrested and charged. She did not mention his voice in her initial police statement even though she said she recognized the voice of one of the other intruders.

[40] Mr. MacEwen argued that there might be an issue of cross racial identification since Ms. MacLean is white and Mr. Downey is black. This is a legitimate concern in some cases but requires an evidentiary basis. It will usually arise where the witness has little familiarity with individuals from the race or culture of the accused. There is no such evidence here and I take judicial notice that Cole Harbour High School has a significant number of African Nova Scotian students. Ms. MacLean would likely be quite familiar with individuals from that community.

[41] The Crown called a large amount of evidence about the other three individuals alleged to have participated in the home invasion. They said that Ms. MacLean was correct in her identification of those people and this supports her evidence that Mr. Downey was the shooter. I disagree. Whether her belief in the identity of the others turns out to be true does not impact on my assessment of her credibility and reliability in relation to Mr. Downey. That will depend on her prior contact with them as well as her observations on November 30th. She could very well be correct for three of the intruders and wrong with respect to the fourth. The Crown has not argued that there is any evidence connecting Mr. Downey to the other three people

alleged to be involved on the evening of the shooting. As a result their identities are irrelevant.

[42] In his closing submissions Mr. MacEwen suggested that Ms. MacLean was adding to or embellishing her evidence in order to make it more persuasive. As examples he referred to her late introduction of voice as an additional ground for her recognition of Mr. Downey as well as her testimony about the September 2012 incident in gym class. At the preliminary inquiry Ms. MacLean said they were never in class together and there were never any issues at all between them. At trial Ms. MacLean described a significant confrontation in the gym class which resulted in her dropping out of the class and led to hard feelings between them for weeks. Another example, raised by Mr. MacEwen, dealt with how much of the shooter's face was visible. At trial Ms. MacLean was adamant that she could see his cheekbones while at the preliminary inquiry she said the cheekbones were covered.

[43] I don't agree that Ms. MacLean was intentionally changing her evidence to add facts that she did not truly recall. My perception is that she was trying very hard to remember anything that might help to strengthen and support her identification of Mr. Downey. This raises the question of whether these additional details are the result of a reconstruction of events or an actual recollection. It may very well be an example of what Justice Laskin in **Spatola** called "the progressive assurance that builds upon an original identification" or as the Alberta Court of Appeal in **Atwell** more colloquially said a witness who is "absolutely sure of their identification and getting surer with time". The discrepancies raised by Mr. MacEwen do not impact on Ms. MacLean's credibility but they do reduce the weight that should be given to her identification evidence.

[44] Ms. MacLean's evidence alone is not sufficient to satisfy me beyond a reasonable doubt that Mr. Downey was the gunman at 52 Arklow Drive. Despite this, I must still consider the other evidence called by the Crown as it may confirm Ms. MacLean's opinion and sufficiently connect Mr. Downey to the shooting to prove that he is, in fact, the perpetrator.

Assessment of Remaining Crown Evidence

[45] The Crown called extensive evidence relating to the circumstances of the shooting on November 30, 2014, and the subsequent investigation. Despite a thorough investigation the only evidence the police found, which potentially connected Mr. Downey to the shooting, was the gunshot residue on Mr. Downey's right hand. This evidence was presented through an expert witness, Ms. Nichole

Faragher, who is employed with the Royal Canadian Mounted Police. The scope of her qualification, which was agreed by the defence, was as follows:

Nichole Faragher is an expert forensic specialist in the area of gunshot residue, able to give opinion evidence on the composition, detection, and mechanism of dispersal of gunshot residue and present conclusions on the forensic significance of those results.

[46] Ms. Faragher said gunshot residue (“GSR”) has a distinctive molecular combination of lead, barium and antimony in a single particle, which is usually spherical and one micron in size.

[47] If someone is within three feet of a firearm being discharged they will most likely have GSR on them. If they are ten feet away they most likely will not.

[48] GSR is stable and will not degrade over time, however it can be removed very easily because it is not sticky. For example, washing of skin will remove GSR. Typically 80% of GSR is removed from skin within four hours through normal processes. GSR will be present longer on clothing because it gets stuck in the fabric. If the clothing is washed 99% of the GSR is removed. On hard surfaces such as furniture, it is easy to brush GSR off and it can be transferred from that surface to a person very easily.

[49] Laboratories engaged in GSR analysis will have deadlines within which samples must be taken from the time of the event under investigation (i.e. a shooting). If the sample is taken outside of that time frame Ms. Faragher said it has no forensic value because of potential contamination from other sources. With the RCMP lab where she is employed, it is a 12 hour time period. With the Centre for Forensic Sciences in Toronto, the period is eight hours, and in some labs in the United States it is as low as four or five hours. In this case the samples from Mr. Downey were taken three and a half hours after the shooting.

[50] Ms. Faragher described the standard kit for collection of samples which involves four stubs or daubers. Separate daubers are used on each of the suspect’s hands and cheeks. In Mr. Downey’s case a single microscopic particle of GSR was found on his right hand.

[51] The presence of GSR indicates that within the previous 12 hours Mr. Downey had contact with a source of GSR. In Ms. Faragher’s opinion this means he either:

1. fired a gun,

2. was in proximity to a gun being fired, or
3. contacted a source of GSR, which could include a firearm or other person or object contaminated with GSR.

[52] In cross-examination Ms. Faragher agreed that police and police cars have an increased likelihood of GSR being present and she would also expect an increased level of GSR in a police station. She would not expect a police officer to have GSR on their hands unless they had touched their firearm. She agreed it was possible that if a police officer touched their gun and then arrested a person, that might result in the transfer of GSR. She agreed that if a person fired a gun and then shook hands with another person, that person would likely have GSR on their hands.

[53] Because GSR does not degrade it never goes away and could accumulate in areas like police stations and cars if not properly cleaned. The same is true with respect to clothing worn when firearms are discharged.

[54] When Mr. Downey was arrested he came out of the house at 266 Caldwell Road with A.B. who also tested positive for GSR.

[55] The officer that arrested Mr. Downey was Sgt. Gordon Graham. He was not wearing gloves at the time. Although he did not draw his gun, he had his hand on it at certain points during the events leading to Mr. Downey's arrest. The vest he wore that night was the same one he wore when he last participated in firearms training.

[56] Cst. Wayne Johnson of the RCMP took Mr. Downey into custody from Sgt. Graham and searched him. His practice is to wear gloves when arresting someone but can't recall if he did so that evening. At the beginning of his shift he signed out and handled a carbine rifle at the RCMP detachment. He placed Mr. Downey in the back of the RCMP vehicle, which is not cleaned very often. He was wearing the same vest he wore when he was last involved in firearms training on October 24th, 2014.

[57] Cst. Johnson took Mr. Downey to the Halifax Police Station on Gottingen Street and placed him in an interview room and later moved him to a telephone room to consult counsel. A.B. was in a different room at the station, however he and Jason Downey used the same telephone to consult counsel.

[58] As Ms. Faragher testified, it is important to carry out GSR testing as soon as possible because of the risk of contamination. In her opinion the detection of GSR on Mr. Downey's hand indicates that he had contact with a source of GSR. Two

possibilities are that he fired a gun or was in the vicinity of a gun when it was fired. However, Ms. Faragher indicated there are potentially an infinite number of sources since GSR never degrades. Any person or thing contaminated with GSR is a potential source.

[59] When I look at the circumstances surrounding Mr. Downey's arrest there appear to be a number of potential ways in which the particle of GSR might have been deposited. The first is contact with A.B. who was in the house and arrested with him. A.B. tested positive for GSR. The police officers involved in his arrest and transport to the station each wore a vest that had been exposed to GSR through firearms training. Both handled firearms in the time leading up to the arrest. Police cars and police stations were identified by Ms. Faragher as potential sources of GSR. This could be as a result of the presence of police officers or also civilians who might have been contaminated through contact with firearms or other sources.

[60] I am satisfied that the GSR test results indicate that Mr. Downey may have been present when a gun was fired on November 30, 2014. It is also possible that the GSR was the result of contact with another source, such as A.B., a police officer, the police car or police station.

Conclusion and Disposition

[61] When I consider all of the Crown evidence I am not satisfied they have proven beyond a reasonable doubt that Jason Downey was the masked intruder who shot the occupants of 52 Arklow Drive. My concerns with respect to the reliability of Ms. MacLean's identification evidence remain and the single particle of GSR found on Mr. Downey's hand does not remove my doubt. There are simply too many possible sources of GSR to allow that piece of evidence to overcome the weaknesses in Ms. MacLean's identification of Mr. Downey as the shooter.

[62] For the above reasons I will acquit Mr. Downey of all of the charges against him.

Wood, J.