

Case Name:

R. v. S.B.

Between

**Her Majesty the Queen, Respondent, and
S.B.1, T.F., M.W. and S.B.2, Appellants**

[2018] O.J. No. 5186

2018 ONCA 807

Dockets: C59241 and C59382

Ontario Court of Appeal

G.R. Strathy C.J.O., R.G. Juriansz and L.B. Roberts JJ.A.

Heard: May 23-24, 2018.

Judgment: October 10, 2018.

(195 paras.)

Criminal law -- Criminal Code offences -- Offences against person and reputation -- Homicide -- First degree murder -- Appeal by two accused, MW and TF, from convictions for first degree murder dismissed -- 16-year-old victim was shot and killed, execution style -- Trial judge found SB was shooter and TF was with him -- MW, who had been in cellphone communication with SB and TF before shooting, was on his way to scene when shooting occurred -- Trial judge was entitled to infer appellants participated in plan to murder victim based on their post-offence conduct -- Trial judge did not commit error in dismissing other inferences as speculative.

Criminal law -- Evidence -- Methods of proof -- Inferences -- From conduct -- Appeal by two accused, MW and TF, from convictions for first degree murder dismissed -- 16-year-old victim was shot and killed, execution style -- Trial judge found SB was shooter and TF was with him -- MW, who had been in cellphone communication with SB and TF before shooting, was on his way to scene when shooting occurred -- Trial judge was entitled to infer appellants participated in plan to murder victim based on their post-offence conduct -- Trial judge did not commit error in dismissing other inferences as speculative.

Appeal by two accused, MW and TF, from their convictions for first degree murder. The appellants were 16-years-old at the time of the offence. The 16-year-old victim was shot and killed, execution style, in the stairwell of a residential complex. The trial judge found SB was the shooter and TF was with him. MW, who had been in cellphone communication with SB and TF before the shooting, was on his way to the complex when the shooting occurred. Text messages between the accused revealed a plan to connect TF and SB to enable SB to gain access to the complex and to contain the victim in the stairway. Just prior to the shooting, MW texted that he was on his way with his "girlfriend", which the trial judge accepted was slang for gun. In text messages after the killing, TF indicated he was leaving town because of the murder. In another text, he asked his mother to dispose of something. MW texted someone suggesting they spread a rumor that other people committed the killing. The trial judge found the killing was planned and deliberate. He found the appellants liable as joint principals. He found the absence of any surprise, horror or disbelief in the appellants' post-offence communications removed any doubt that the purpose of the parties' plan was to kill the victim.

HELD: Appeal dismissed. The trial judge was entitled to infer that the appellants participated in a plan to murder the victim based on their post-offence conduct. The post-offence conduct was relevant to the issue of participation. The appellants' post-offence conduct was inconsistent with a spontaneous unplanned killing and consistent with a planned murder. The trial judge did not commit a so-called Villaroman error in dismissing other inferences as speculative. He did not reverse or misapply the burden of proof. He had not misapprehended the evidence. He did not make inappropriate use of ante-mortem hearsay evidence.

Statutes, Regulations and Rules Cited:

Criminal Code, R.S.C. 1985, c. C-46, s. 21(1)

Youth Criminal Justice Act, s. 110, s. 111(1), s. 138(1)

Appeal From:

On appeal from the convictions entered by Justice Ian V.B. Nordheimer of the Superior Court of Justice on May 29, 2013, sitting without a jury, with reasons reported at 2013 ONSC 3139.

Counsel:

Peter Copeland, for the appellant T.F.

Erika Chozik, for the appellant M.W.

Christopher Webb, Lorna Bolton and Brock Jones, for the respondent.

WARNING

THIS IS AN APPEAL UNDER THE *YOUTH CRIMINAL JUSTICE ACT* AND IS SUBJECT

TO:

110(1) Subject to this section, no person shall publish the name of a young person, or any other information related to a young person, if it would identify the young person as a young person dealt with under this Act.

- (2) Subsection (1) does not apply
 - (a) in a case where the information relates to a young person who has received an adult sentence;
 - (b) in a case where the information relates to a young person who has received a youth sentence for a violent offence and the youth justice court has ordered a lifting of the publication ban under subsection 75(2); and
 - (c) in a case where the publication of the information is made in the course of the administration of justice, if it is not the purpose of the publication to make the information known in the community.
- (3) A young person referred to in subsection (1) may, after he or she attains the age of eighteen years, publish or cause to be published information that would identify him or her as having been dealt with under this Act or the *Young Offenders Act*, chapter Y-1 of the Revised Statutes of Canada, 1985, provided that he or she is not in custody pursuant to either Act at the time of the publication.

111(1) Subject to this section, no person shall publish the name of a child or young person, or any other information related to a child or a young person, if it would identify the child or young person as having been a victim of, or as having appeared as a witness in connection with, an offence committed or alleged to have been committed by a young person.

138(1) Every person who contravenes subsection 110(1) (identity of offender not to be published), 111(1) (identity of victim or witness not to be published), 118(1) (no access to records unless authorized) or 128(3) (disposal of R.C.M.P. records) or section 129 (no subsequent disclosure) of this Act, or subsection 38(1) (identity not to be published), (1.12) (no subsequent disclosure), (1.14) (no subsequent disclosure by school) or (1.15) (information to be kept separate), 45(2) (destruction of records) or 46(1) (prohibition against disclosure) of the *Young Offenders Act*, chapter Y-1 of the Revised Statutes of Canada, 1985,

- (a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years; or
- (b) is guilty of an offence punishable on summary conviction.

The judgment of the Court was delivered by

1 G.R. STRATHY C.J.O.:-- These reasons explain why I would dismiss the appeal.

2 The dispositive issue is whether the trial judge was entitled to infer that the appellants participated in a plan to murder Tyrone Bracken based on their post-offence conduct. In my view, he was. There was ample evidence that the appellants participated in a plan to do something to Tyrone. Aspects of their post-offence conduct, when considered together with the totality of the evidence, supported an inference that the plan was murder. The trial judge did not commit a so-called "*Villaroman error*" in dismissing other inferences as speculative.

Introduction

3 Sixteen year-old Tyrone Bracken was shot and killed at approximately 3:37 p.m. on November 17, 2010, in the stairwell of a residential complex in Toronto.

4 Tyrone was killed by a single bullet. It entered his skull behind his right ear and lodged in his left temple. That wound was immediately fatal. A second bullet grazed his right cheek and nose before coming to rest in the wall of the staircase. Based on expert evidence and the presence of gunshot residue near the facial wound, the judge found that the fatal shot was fired from behind, "mere inches" from Tyrone's head.

5 In simple terms, as the trial judge put it, Tyrone was executed. The central issues at trial were the identity of the participants and their degree of culpability.

6 MW and TF, both 16 years old at the time, were charged with first degree murder, together with

SHB, who was also 16, and SB, age 17.¹

7 Following a 25-day judge-alone trial, SB, MW, and TF were convicted of first degree murder. SHB was acquitted.

8 The trial judge found that SB was the shooter. That finding was not disputed on this appeal.

9 The trial judge also found, and it is beyond dispute, that TF and SHB were in the stairwell with SB and Tyrone at the time of the shooting.

10 MW, who had been in cellphone and text message communication with SB and TF before the shooting, was on his way to the complex to meet up with them when the shooting occurred. He arrived shortly thereafter.

11 The Crown's case at trial was almost entirely circumstantial. There were no witnesses to the crucial events other than the four accused. None of them testified or made any statements to police. Most witnesses in the complex were either unwilling or unable to assist the police investigation.

12 But the appellants and SB left an electronic trail behind them, captured and preserved by their cell phones, which they used to text and call one another before and after the killing. The times and duration of their phone calls were recorded, but the calls themselves were not intercepted. Their text messages were preserved. Many of the text messages were in slang form. A police witness, qualified as an expert in "urban slang," assisted in the interpretation of the text messages. Some of their movements were recorded by security cameras inside and on the exterior of the complex. Painstakingly piecing together and interpreting this evidence, police were able to construct a record of their text communications and of some of their actions leading up to and after the offence.

13 In addition to this evidence, there was *viva voce* evidence from some residents of the complex, including Tyrone's mother and his sister Skyy and TW, the resident of an apartment near the staircase where the shooting occurred. Tyrone's friend F, who was visiting the complex with him on the day of the killing, also testified. The trial judge also heard forensic and other expert evidence, some of which is discussed below.

14 MW and TF appeal their convictions for first degree murder. They also appealed their adult sentences of life imprisonment with parole ineligibility of ten years. On May 10, 2016, this court allowed their sentence appeals, substituting youth sentences of ten years: six years in closed custody for MW and four years in closed custody for TF. The court also made intensive rehabilitative custody and supervision orders: 2017 ONCA 22, 134 O.R. (3d) 1, leave to appeal refused, [2017] S.C.C.A. No. 109.

15 This appeal is almost entirely fact-based. The appellants contend, among other things, that the trial judge reversed the burden of proof, failed to consider reasonable alternatives inconsistent with guilt and erred in his use and assessment of evidence of post-offence context. It is accordingly

necessary to review the central features of the evidence in some detail.

The Evidence at Trial

16 I will summarize the most important evidence in relation to the grounds of appeal.

17 The Crown's theory was that all four accused were involved in a plan to kill Tyrone and participated in the execution of that plan. No motive was identified.

18 The Crown claimed that MW played a coordinating role in furthering the crime by connecting TF with SB and, through TF, SHB with SB. TF and SHB were both residents of the complex, SB was not. TF gave SB access to the building, lured Tyrone into a stairwell and kept him there until he was shot by SB.

(1) Events prior to the shooting

19 The text messages exchanged between the parties revealed a plan to connect TF and SB (who did not know each other), to enable SB to gain access to the complex, and to contain Tyrone in a stairway in the complex. MW, who was in school at the time, was planning to join the other two and was in fact on his way at the time of the shooting. He told SB he was bringing his "girlfriend", a slang word for a gun.

20 TF alerted MW that Tyrone had arrived at the complex. MW informed SB and connected SB with TF. When SB arrived, TF let him into the building. TF complied with SB's request to keep Tyrone at the complex and told SB that Tyrone was in a staircase.

21 The trial judge found that the communications between the parties demonstrated that Tyrone was being set up for "something".

22 TW came home from school on the day of the shooting and entered the west stairwell of the building at about 3:25 p.m. He lived on the main floor, next to the stairwell. When he entered the stairwell, he saw SHB and heard three or four other voices, but he could not see who was speaking. He continued through the hallway to his apartment and went inside to play video games. TW heard two gunshots, one after the other, ten or twenty minutes later. He did not hear any argument or raised voices.

(2) The events after the shooting

Flight from the stairwell

23 Video surveillance showed SB, TF, and SHB running from the west stairwell at the ground level of the building at 3:37 p.m. This pinpoints the time of the shooting. SHB appeared first and ran towards his home in another building in the complex. His arms swung fully while he ran. Video surveillance from earlier that day showed a bulge, which appeared to be of some weight, in the front

pocket of his sweatshirt. That bulge was not present in the video of events following the shooting.

24 TF was the second person to run out of the stairwell. The video showed TF turning back towards SB, whose arms were stretched out towards him, before TF reversed and ran across a parking lot toward his building.

25 The trial judge found that although TF ran at a full sprint, his arms were held tight to his body. There was expert evidence that this was consistent with someone concealing a firearm.

26 SB came out of the building last and, after the interaction with TF, ran off in another direction.

"Yur dum"

27 Immediately after the shooting, TF called MW at 3:38 p.m. (lasting 11 seconds), and again at 3:39 p.m. (lasting 100 seconds).

28 Shortly after these calls, at 3:44 p.m., MW and TF exchanged text messages. The texts will feature centrally in the discussion of post-offence conduct. MW's text said: "yur dum [You are dumb]." To this, TF responded: "how [?]". Shortly thereafter, TF texted again: "I didn't bring him [i.e., SHB] the d [Tyrone] did".

29 The reference to "him" was interpreted to be a reference to SHB. That is, in response to MW's text "You're dumb [for bringing SHB]" TF was replying, "I didn't bring SHB, Tyrone did".

TF changes his clothes

30 MW first appeared on video surveillance at 4:11 p.m., when he and TF exited the lobby of one of the buildings in the complex. TF was no longer wearing the green and white jacket and the ball cap he had been wearing before the shooting, and he had changed his shoes from white to black.

"Tell no one"

31 Later in the day, at 6:48 p.m., SB texted MW, "Yo don't tell no one." And shortly thereafter, "Send out the word the jungle niggas r going off." This was a suggestion that MW should put out the word that people from a rival neighbourhood nearby were responsible for the shooting. MW responded, "Yaya."

TF leaves town -- because of "M" [Murder]

32 Shortly after the killing, TF left Toronto for Barrie, Ontario. At 6:30 p.m., he sent a text to an unidentified person, saying that he had to leave and that they should look at the news: "Yo famz I need to cut look on the news." When the recipient asked what was happening, TF replied, "M", which the trial judge accepted meant "murder". TF added, "I need somewhere to chill".

Skyy asks TF why she was hearing he set up Tyrone

33 At 8:34 p.m. on the day of the shooting, Tyrone's sister, Skyy attempted to call TF. TF told Skyy that he could not pick up his phone, and to text instead. Skyy then texted him at 8:50 p.m. to ask why she was hearing that he set up her brother. TF denied having done so, but Skyy's text clearly rattled him.

"He told Sky[y] and the mom"

34 Shortly after receiving Skyy's message, TF sent a text to MW at 8:51 p.m. asking MW to "call right now". MW called TF at 8:53:17 p.m. (lasting 94 seconds). At 9:01 p.m., TF texted MW: "He [SHB] told sky aand the mom". TF concluded that SHB had told Skyy and Tyrone's mother that TF had set up Tyrone.

"I should have dropped [killed] him"

35 Later in the evening at 10:17 p.m., SB texted TF, asking what was happening with the "next youte", referring to SHB. TF answered that he suspected that SHB was snitching: "Dwag [Dawg] I think he told his sister. And hes sister told sky the d [Tyrone's] sister."

36 SB responded: "Yo I should of drop him [I should have killed him]."

37 SB added: "Yo tell lo [MW] that he [i.e., SHB] has to go by the end of the week".

38 To which TF replied: "Hes not with me" [referring to MW].

39 To which SB replied: "Delete everything".

Tyrone asks his mother to dispose of something

40 In the early hours of November 18, 2010, the day after the shooting, there was an exchange of text messages between TF and his mother. TF's mother indicated she had found something in her apartment. She says, "Ur my son n I love you hope you didn't mak da wrong choice in life". TF told her to throw "it" out of the window and that he was sending someone for "it". His mother responded, "My han on it" [my hand is on it], to which TF replied, "Clean it then throw it out." A few minutes later, TF asked, "U did it?" and his mother responded, "I did."

TF fears SB will kill him

41 On November 22, 2010, TF and MW exchanged text messages in which TF told MW he feared SB wanted to "slap [him] out [i.e., kill him]."

SHB and TF surrender to police

42 SHB surrendered to police on November 22, 2010. TF surrendered the following day.

SB and MW discuss killing SHB

43 On November 23, 2010, SB texted MW suggesting that if they had proof that SHB had told the police they should kill him, as well as his mother and his sister. MW responded that they did not need to wait for proof and he knew that SHB was not being loyal.

SB is arrested

44 SB was arrested on March 26, 2011, after police executed a search warrant on his apartment.

The absence of surprise, shock, or horror at the killing

45 As I will discuss shortly, the trial judge found that nowhere in the text communications between MW and TF after the shooting was there any indication that they were shocked, surprised, or horrified by what they alleged was the unplanned and unanticipated shooting of their friend, Tyrone. The absence of any such evidence played a pivotal role in the trial judge's conclusion that the shooting was planned and deliberate.

The Trial Judge's Reasons

46 In order to appreciate the submissions of the parties and my analysis of the issues, I will briefly summarize the trial judge's reasoning process and will set out a few key passages of his reasons.

47 As a preamble, it bears noting that this court has repeatedly stated that a trial judge's reasons are not to be read or analyzed as though they were a jury instruction: see *R. v. Morrissey* (1995), 22 O.R. (3d) 514 (C.A.), at pp. 524-25. As Doherty J.A. said in *Morrissey*, at p. 525: "They are not intended to be, and should not be read as a verbalization of the entire process engaged in by the trial judge in reaching a verdict." See also *R. v. Villaroman*, 2016 SCC 33, [2016] 1 S.C.R. 1000, at para. 15.

48 Moreover, reasons must be read as a whole, in the context of the evidence, the issues and the arguments at trial, together with an appreciation of the purposes or functions for which they are delivered: *R. v. Laboucan*, 2010 SCC 12, [2010] 1 S.C.R. 397, at para. 16, citing *R. v. R.E.M.*, 2008 SCC 51, [2008] 3 S.C.R. 3, at para. 16.

49 The reasons began with an 80-paragraph background section in which the trial judge summarized the evidence. He then set out the applicable legal principles, including the elements of first degree murder and the requisite *mens rea*. It was self-evident, he said, that the person who shot Tyrone in the head either meant to kill him or was reckless as to whether he lived or died. Others who participated in the planning could be found liable as joint principals or could be parties to the offence as aiders and abettors.

50 He found the killing of Tyrone was planned and deliberate. There was an organized plan, arranged in advance, to find him and to kill him. While there was no evidence of motive, it was not necessary for the Crown to establish a motive. There was nothing in the evidence to suggest that the killing was accidental or impulsive and the conduct of the participants after the fact confirmed their participation in a planned murder. He set out his conclusions on this issue, at para. 93:

It is clear, beyond any reasonable debate, from the evidence, especially the text messages, that there was an organized plan to find Tyrone and to kill him. This plan was developed in advance and was then implemented. Whatever the reason may have been for wanting Tyrone dead, it is clear that the killing was set up in advance of it occurring. The communications that occurred, including that Tyrone had arrived at the [complex], where he was within that complex, the instruction to keep him in the building and to have him in a staircase allow for no other conclusion. While these communications do not speak of a murder occurring, they clearly demonstrate that Tyrone is being set up for something. Tyrone is then killed. There is simply nothing on the evidence that could sustain a finding that the shooting of Tyrone was done on impulse or on the spur of the moment or as the result of some unexpected or spontaneous event. Nothing in the evidence points to anything like that having occurred. For example, there is no evidence of a dispute or fight or other confrontation that could have led to a sudden decision to kill Tyrone. One could only reach that conclusion by engaging in complete speculation. However, if there was any doubt regarding that conclusion, the events subsequent to the murder remove all doubt. [Citing *R. v. MacKinnon* (1999), 132 C.C.C. (3d) 545 (Ont. C.A.), at para. 15]. [Emphasis added.]

51 The trial judge then considered the evidence in relation to each accused to determine whether they were a party to the murder. He found that SB was the shooter and was the leader of the event both before and after it occurred. The text messages showed that SB was informed when Tyrone arrived at the complex, that he gave instructions to keep Tyrone there until he arrived, and that he was concerned after the shooting about who could identify him. In addition to SB's text message indicating that he should have killed SHB, SB had also written a letter giving explicit and "chilling" directions to kill three Crown witnesses who could implicate him in Tyrone's death.

52 The trial judge found that MW and TF participated in the killing, either as joint principals or as aiders. TF had assisted in the plan to kill Tyrone. He alerted MW, and through him SB, that Tyrone had arrived at the complex. He was with Tyrone in the hallway and in the stairwell on and off from the time of Tyrone's arrival at the complex until he was killed. Immediately after the shooting, TF was observed watching the events unfold from nearby. In the trial judge's view, it was of some significance that, by this time, TF was no longer wearing his identifiable ball cap and green and white jacket. He had also changed his shoes.

53 The trial judge also found it significant that TF had travelled to Barrie after the shooting and had sent texts saying that he had to "cut" because of "M [murder]". He had obtained the assistance of his mother in disposing of a gun, and perhaps bullets. Without making explicit findings, the trial judge said it was a compelling inference that SB had passed the murder weapon to TF as they exited the stairwell, and that TF had his mother dispose of it. He noted, however, that the murder weapon was never found.

54 The trial judge concluded, at para. 120, that the evidence against MW "mirror[ed]" the evidence against TF. MW passed on to SB the information he received from TF that Tyrone was at the complex and provided SB with TF's phone number. MW then confirmed SB was on his way to the complex and relayed that information to TF. He stayed in touch with both SB and TF, keeping abreast of what was happening.

55 Though MW was at school as events unfolded, he texted SB indicating that he was on his way to the complex, and asked SB to confirm what was going on before he arrived with his "girlfriend". The trial judge found, at para. 131, that the only reasonable conclusion to be drawn from this exchange was that MW was intended "to be another armed participant, extra firepower it might be said, to assure the success of the plan."

56 The trial judge was satisfied beyond a reasonable doubt that MW was a joint principal in the plan to murder Tyrone, and that he would be equally liable as an aider in the commission of the offence.

57 SHB, on the other hand, stood in a very different position from the other three, because there were no text messages connecting him to the events on the day of the shooting. TF's text to MW, "I didn't bring him [SHB], the d [Tyrone] did", suggested that SHB was not a part of the plan. These, and other aspects of the evidence, gave rise to reasonable doubt in relation to SHB's guilt and he was acquitted.

58 In the context of his analysis of the culpability of MW, the trial judge referred to the submission of both MW and TF that there was no evidence that the "plan" involved doing harm to Tyrone or killing him. He noted that the "yur dum" exchange between TF and MW indicated that events did not go as planned -- that is, MW was telling TF that he was dumb for bringing SHB to the stairway, something that was not part of the plan. He observed that this exchange, and the absence of "surprise, disbelief, shock or outrage" in their text communications regarding Tyrone's death, had relevance to the objective of the plan.

59 The trial judge explained his reasons for rejecting the defence submission, at paras. 126 and 127:

It is submitted by the counsel for both TF and MW that, even if some plan existed between SB, TF and MW in respect of Tyrone, there is no evidence that the plan involved doing harm to Tyrone or, if harm was intended, that the harm

rose to the extent of killing Tyrone. The problem with that submission is two-fold. First, as I have already said, there is simply no evidence that the killing of Tyrone was spontaneous or was the result of some unexpected event. There is no evidence of a dispute or a fight or of some other unanticipated event that could have spurred the killing of Tyrone. In other words, there is no evidence to which the defence can point that would provide a different interpretation of the various text messages other than there was a pre-arranged plan to kill Tyrone.

Second, if the killing of Tyrone was something that happened out of the blue and with no prior thought or consideration, one would have expected that there would have been some expression of that very sudden and troubling event between MW and TF. MW and TF, on the evidence, were very close friends. Indeed, there are text messages between MW and TF, immediately before TF turned himself into the police, where the two of them express their affection for each other. Yet neither MW nor TF ever express a single word of concern that someone that they know, and with whom they purported to be friends, has, on counsel's version of the events, been randomly murdered without warning by SB whom they also know and with whom they continue to communicate after the killing. If this was an unplanned and entirely spontaneous event, it is inconceivable that these two sixteen year old boys would not have voiced out their surprise and horror to each other, not only as to what had happened but the fact they are now deeply embroiled in it.

60 In concluding his reasons, the trial judge noted, at para. 150, the principle that "where circumstantial evidence, if unexplained or uncontradicted, establishes the guilt of a person then, absent some explanation being offered, the accused person must expect that a conviction will follow": referencing *R. v. Lepage*, [1995] 1 S.C.R. 654, at para. 29. He rejected the submission that the so-called "Code of Silence" could be used as a shield by those accused of criminal offences so as to negate the application of this principle. He stated, at para. 154, that a person accused of a criminal offence "cannot avoid those consequences by his own adherence to a mindset called the Code of Silence and, through that manoeuvre, invite the court to make speculative assumptions favourable to his position or find reasonable doubt where it does not otherwise exist."

The Issues on Appeal

61 The appellants assert the trial judge made the following errors:

- (a) he used the appellants' post-offence conduct to determine their level of culpability;
- (b) he committed a so-called "*Villaroman* error", by reversing the burden of

proof;

- (c) he misapprehended various pieces of evidence;
- (d) he made improper use of *ante mortem* hearsay;
- (e) he found the appellants liable as joint principals; and
- (f) the video evidence he relied upon was misleading.

62 I will consider each of these grounds in turn.

Analysis

A. POST-OFFENCE CONDUCT

63 In my view, the trial judge was entitled to use the appellants' failure to express "surprise and horror" or "disbelief, shock or outrage" after the murder to infer their participation in a pre-arranged plan to kill Tyrone and to exclude any other reasonable alternative. His use of the evidence is consistent with the authorities, including *R. v. MacKinnon* (1999), 132 C.C.C. (3d) 545 (Ont. C.A.), at para. 15, and *R. v. Fatima* (2006), 42 C.R. (6th) 239 (Ont. S.C.), at para. 68, to which he made reference. The evidence was inconsistent with the theory of a spontaneous and unintentional shooting and highly probative of intent to commit murder. He was entitled to draw the inference he did. His admission of the evidence is entitled to deference.

64 The trial judge did not otherwise review the law of post-offence conduct and he did not always express the purpose for which he used particular pieces of post-offence evidence. But he is presumed to know the law. There was ample evidence from the appellants' messages before the shooting and their conduct thereafter, from which the judge could find that they participated in a plan to do something in relation to Tyrone. The real issue was whether that "something" was murder.

65 I will examine the trial judge's use of the post-offence conduct shortly. I turn first to the law with respect to post-offence conduct in general and its use for the purpose of determining level of culpability in particular.

The governing principles

66 As has been pointed out on many occasions, post-offence conduct evidence invokes retrospectant reasoning. The occurrence of a subsequent act, state of mind or state of affairs is used

to infer the occurrence of a prior act, state of mind or state of affairs. Post-offence conduct is circumstantial evidence, used to infer the existence of a fact in issue from the accused's post-offence conduct: see *R. v. Salah*, 2015 ONCA 23, 319 C.C.C. (3d) 373, per Watt J.A., at paras. 223-225; *R. v. Adamson*, 2018 ONCA 678, per Watt J.A., at paras. 55-68.

67 Post-offence conduct evidence "is circumstantial evidence that may help the trier of fact determine the accused's culpability for the crime": *R. v. Vorobiov*, 2018 ONCA 448, per Laskin J.A., at para. 54. It is "generally admissible to show that the accused acted in a manner which, based on human experience and logic, is consistent with the conduct of a guilty person and inconsistent with the conduct of an innocent person": *R. v. Angelis*, 2013 ONCA 70, 296 C.C.C. (3d) 143, at para. 51.

68 The probative value of post-offence conduct depends on the nature of the evidence, the issues in the case, and the positions of the parties: *R. v. MacKinnon*, at para. 14. Post-offence conduct is admissible where, as a matter of logic, common sense, and human experience, it has a tendency to help the trier of fact resolve a live factual issue and there is no exclusionary rule barring its reception. It is then for the trier of fact to determine whether the evidence relates to the offence charged and, if so, how much weight should be attached to the evidence: see *R. v. Adamson*, at paras. 60, 62.

69 In *R. v. MacKinnon*, Doherty J.A. pointed out, at para. 14, that post-offence conduct may sometimes, as a matter of common sense and human experience, be capable of supporting an inference that the accused had a particular state of mind at the time of the offence.

70 That said, "[n]ormally, post-offence conduct cannot help to determine the state of mind of an accused": *R. v. Chambers*, 2016 ONCA 684, 342 C.C.C. (3d) 285, at para. 103; *R. v. Adamson*, at para. 63. That is because in many cases, post-offence conduct is equally consistent with different levels of culpability -- for example, equally consistent with murder and manslaughter: see *R. v. White*, [1998] 2 S.C.R. 72; *R. v. Angelis*, at paras. 52-53. For this reason, great care must be exercised in using post-offence conduct to infer intent for murder: *R. v. Arcangioli*, [1994] 1 S.C.R. 129, at pp. 145-47.

71 But there is no rule automatically preventing the use of post-offence conduct as proof of the level of an accused's culpability: see *R. v. White*, 2011 SCC 13, [2011] 1 S.C.R. 433, at paras. 40, 42, per Rothstein J.; *White (1998)*, at para. 32. Rather, the use of post-offence conduct for this purpose is governed by the principle of relevance: evidence of post-offence conduct is admissible if it is relevant and its probative value is not outweighed by its prejudicial effect.

72 The case law, including decisions of this court, indicates that in circumstances similar to this case, post-offence conduct has been used to infer the intent to commit first degree murder. Where, based on logic and human experience, the evidence of post-offence conduct is more consistent with the inference advanced by the Crown than with competing inferences, it is relevant to and probative of the degree of culpability of the accused.

73 I turn to those cases.

74 In *R. v. MacKinnon*, the case cited by the trial judge, to which I have already made reference, MacKinnon and Crookes were charged with first degree murder of Norman Chow, who worked at a gun club. The Crown's theory was that MacKinnon had planned to steal guns from the club. Because he was known to employees of the club, he knew that he would have to kill whoever was working at the club when he stole the guns. He enlisted Crookes to participate in the robbery. The appellants shot Chow, stole a gun and some money, and fled in a car driven by Ransome. Ransome testified that MacKinnon and Crookes were excited and laughing when they returned to the car and said that they had sent Chow "back to China." Ransome drove them to a schoolyard where they disposed of some things in a dumpster.

75 MacKinnon argued on appeal that the trial judge should have instructed the jury that evidence of the post-offence conduct could not assist them in determining his level of culpability, if they found he was a party to a culpable homicide.

76 In words that might equally be applied to the circumstances of this case, Doherty J.A. observed that the conduct of MacKinnon and Crookes, when viewed in its entirety, could support the Crown's argument that the killing was planned and deliberate and not the consequence of some other illegal activity, such as robbery, which had gone off the rails. As the evidence had some probative value on the issue of intent, it was properly left to the jury for consideration. He said, at para. 15:

The appellants' conduct as described by Ransome, from the time they fled the club until they disposed of evidence in the dumpster could, when viewed in its entirety, support the inference that they had done exactly what they had planned to do, that is, enter the club, commit a robbery and shoot Mr. Chow. This inference would lend considerable support to the Crown's claim that the murder was planned and deliberate. As the evidence had some probative value on the question of whether the appellants had engaged in a planned and deliberate murder as opposed to a robbery or some other illegal activity which had gone awry, the trial judge could not have instructed the jury that the evidence had no value in determining the appellants' level of culpability. The alleged non-direction does not constitute misdirection on the evidence adduced in this case.

77 The court dismissed this ground of appeal.

78 *White (2011)* is another case in which the arguments bear some similarity to this case. There, the appellant shot the victim during an altercation and immediately fled the scene. He was charged with second degree murder. He conceded that he had shot the victim unlawfully and was guilty of manslaughter, but the Crown argued that the shooting was intentional. The issue, therefore, was whether White had the requisite intent for murder.

79 The defence argued that the shooting was accidental. In response, the Crown pointed out that the appellant had fled the scene without hesitation: "no hesitation here, no shock, no uncertainty on his part" and argued that one would expect hesitation if the shot had been anything other than intended. The trial judge instructed the jury that they could consider this post-offence conduct, but told them that they had to be careful with it and it might not be of much value to them in determining White's state of mind at the time the shot was fired. White was convicted.

80 On appeal, the appellant argued that the trial judge should have specifically instructed the jury that the evidence about his flight had no probative value because it was equally consistent with manslaughter and second degree murder.

81 The majority of the Supreme Court rejected this submission. Rothstein J., writing for four justices, found that evidence of lack of hesitation before flight is more consistent with an intentional act than with an accident and, in turn, is probative of the state of mind of the accused at the relevant time. He observed, at para. 67:

As a matter of logic and human experience, one would expect an ordinary person to present some physical manifestation, such as hesitation, at a gun in their hand accidentally discharging into someone's chest, thereby killing them. It was open to the jury to infer that a failure to react in this way was incongruous with the theory, advanced by the defence, that the gun went off by accident as the two men struggled with each other. To use the language of *Arcangioli* and *White* (1998), lack of hesitation was not "equally consistent with" or "equally explained by" accidentally as opposed to intentionally shooting the victim. It is less consistent with accident.

82 He found that the evidence that White did not hesitate when the gun was fired in response to this "unexpected and calamitous turn of events" supported the inference that White deliberately pulled the trigger.

83 Distinguishing between inferences that might be drawn from flight, as opposed to inferences that might be drawn from lack of hesitation before flight, he continued, at para. 70:

On the other hand, logic and human experience suggest that people are more likely to show some outward sign, such as hesitation, before continuing on with their actions, when they do something accidentally than when they do it on purpose. This is all the more so when the accident involves a sharp physical effect on the person (the discharge of a gun in one's hand) and results in a terrible consequence, such as having killed another person. As I have discussed, lack of hesitation prior to flight, is less consistent with shooting and killing someone accidentally than it is with doing so intentionally. Thus, in the context of determining relevance, evidence of flight *per se* is different from evidence of lack of hesitation prior to flight. [Emphasis added.]

84 Charron J., writing for two justices, agreed with Rothstein J. that the evidence of the appellant's flight was properly left with the jury: at para. 130.

85 In *R. v. Vorobiov*, 2018 ONCA 448, the appellant was convicted of first degree murder committed in an underground parking garage in Toronto. He and another accused, Smith, were at the parking garage at the time of the killing. Smith pleaded guilty to being an accessory after the fact, in helping Vorobiov to flee. There was a substantial body of evidence against Vorobiov, including the evidence of Smith, who identified him as the shooter, cellphone records, and intercepted telephone calls. There was also Vorobiov's post-offence conduct, which included driving to Port Perry with Smith after the shooting.

86 Vorobiov acknowledged that he had brought a gun and silencer to the parking garage on the day of the shooting, but claimed that he had changed his mind once in the garage and that Smith had taken the gun from him and shot the victim. He claimed that he was angry at Smith for having done so. It was in this context that the Crown pointed to Vorobiov's post-offence conduct as circumstantial evidence of his culpability for the offence charged.

87 Laskin J.A., speaking for the court, found that a jury could conclude that Vorobiov's post-offence conduct was more consistent with his being the shooter rather than the accomplice. The only live issue was the identity of the shooter. Vorobiov admitted he was involved in the murder plot, but denied he was the shooter.

88 Laskin J.A. asked whether logic and human experience would suggest that Vorobiov would be equally likely to flee the scene and drive away with Smith to Port Perry if he had shot Davis, or if Smith had shot Davis and he was angry at Smith for having done so. He stated, at para. 64:

Do logic and human experience suggest that Vorobiov would have been equally likely to flee the scene of the murder and drive with Smith to Port Perry if either he shot Davis or if he had a last minute change of heart and was angry at Smith for shooting Davis? If the answer to this question is "yes", then the trial judge erred by failing to give the jury a no probative value instruction on Vorobiov's post-offence conduct.

89 He observed, at para. 65, that logic and human experience suggested that if Vorobiov had in fact had a change of heart and was indeed angry at Smith for shooting Davis, he would have wanted to get as far away from Smith as possible. Instead, he did the opposite. He remained at the scene of the murder; he allowed his own car to be used as the getaway car; he travelled with Smith to Port Perry; along the way he and Smith disposed of the gun, silencer, and backpack; and then he and Smith spent Davis' cash at the casino in Port Perry.

90 Laskin J.A. concluded, at para. 65, that a jury could infer from this conduct that Vorobiov was the shooter:

The jury could legitimately infer that Vorobiov's post-offence conduct was far more consistent with the conduct of a person who had shot Davis, than with the conduct of a person, who though planning to kill Davis, had changed his mind and refused to go ahead, and yet knew that his accomplice had done the shooting and was angry at him for doing so.

91 It was up to the jury, he said, to decide what inferences to draw from the conduct.

92 Finally, in *R. v. Aravena*, 2015 ONCA 250, 333 O.A.C. 264, at paras. 125-30, leave to appeal refused, [2015] S.C.C.A. No. 497, Doherty and Pardu JJ.A. held that the trial judge properly instructed the jury that it could consider that the accused was elated and excited after the killings in deciding whether he committed a planned and deliberate murder. The accused argued his post-offence conduct had no probative value concerning the degree of culpability for the homicides, because it was equally consistent with guilt of manslaughter, second degree murder, and first degree murder. Doherty and Pardu JJ.A. disagreed. They explained that the accused's happiness suggested a number of logical possibilities -- namely that he had obtained his goal, the events were not shocking but had unfolded according to plan, he knew about the plan, and/or he aided the killers with knowledge of the plan: "[a]s a matter of logic and human experience, [the accused's] conduct after the killing was relevant to whether he was a party to a planned and deliberate murder": at para. 130. See also: *R. v. Khan*, 2007 ONCA 779, 230 O.A.C. 174, at paras. 3-5.

93 With these principles in mind, I return to the evidence in this case.

Application of the principles

94 Post-offence conduct evidence must be assessed on a case-by-case basis bearing in mind the nature of the evidence, the issues at trial, and the positions of the parties. Therefore, as discussed above, some post-offence conduct may properly be relevant to one issue, but not relevant to another. Here, as I have noted, the two central issues were the identification of the parties to the plan and their level of culpability.

95 The trial judge identified the elements of first degree murder: (a) the accused caused the victim's death; (b) the accused caused the victim's death unlawfully; (c) the accused had one of the states of mind required for murder; and (d) the murder of the victim was both planned and deliberate. On the issue of culpability for first degree murder as it related to TF and MW, the critical question before the trial judge was whether the killing was planned and deliberate. The communication between the accused prior to the killing indicated that there was a plan to do something, but not what that something was. The defence position was that the execution-style killing of Tyrone by SB was not part of the plan and was unanticipated. The Crown sought to use some of the post-offence evidence to refute this theory and to establish that the killing was planned and deliberate.

96 The trial judge considered various evidence of post-offence conduct. A significant portion of

the trial judge's analysis was taken up with the identification of the participants in the plan. Much of the post-offence conduct was relevant to this issue of participation. For example, TF's change of clothing after the shooting and his instructions to his mother concerning the disposal of a gun were circumstantial evidence of his participation in the plan. Likewise, MW's willingness to "blame it [the killing] on the jungle" and his enthusiastic support of SB's suggestion that they should kill SHB were circumstantial evidence of his participation.

97 While these aspects of post-offence conduct were relevant to the issue of participation, they were not treated as central or determinative by the trial judge in his consideration of the separate issue of intent. The trial judge made it clear that it was the absence of expression of any surprise and horror or disbelief, shock, or outrage that removed any doubt that the purpose of the plan was to kill Tyrone.

98 The question, then, is whether the trial judge could reasonably conclude that this aspect of the appellants' post-offence conduct, viewed in light of logic and human experience and in the context of the evidence as a whole, was more consistent with a planned and deliberate killing than with an unplanned and accidental killing. In my view, he could reasonably come to that conclusion and did not err in using the evidence for that purpose.

99 Consider the context. MW and TF professed to be close friends of Tyrone. There was independent evidence that they were close. Their good friend Tyrone was brutally executed in front of TF as a result of a turn of events that was allegedly wholly unanticipated. The very first text exchange between them, minutes after the murder, was from MW, "Yur dum [for bringing a witness]."

100 And the response was not "I didn't know that SB was going to kill him." It was, essentially, "I didn't bring the witness, Tyrone did."

101 In my view, it was open to the trial judge to conclude that this exchange, which centres on the appellants' concern about a witness to the killing rather than on the horrific incident TF had just witnessed, was inconsistent with a spontaneous unplanned killing and consistent with a planned murder.

102 In closing argument, the trial judge challenged counsel on the theory that there was no plan to kill Tyrone. He suggested that on that theory, there should have been some expression of surprise by TF and MW at the shocking turn of events when their friend Tyrone was murdered -- executed -- right in front of TF. Trial counsel conceded that surprise would be expected, but suggested that the "yur dum" message meant, "Your dumb, how could you let this happen? Why did you let this get out of hand? You're the guy who was there." But, as the trial judge noted, TF's response, "I didn't bring him, the d [Tyrone] did" is inconsistent with this theory.

103 As the trial judge said: "You would expect [TF] -- if that was the -- the telephone call, when [MW] texts him "yur dum", you would expect [TF] to say, "Well, I -- I didn't know anything about

this either and I don't control [SB] and I was as surprised as you are."

104 The judge then asked counsel:

Putting aside that particular exchange of text messages, can we agree that there's not a single text from [MW] expressing any type of shock or surprise or even concern that this happened? I mean there's nothing that -- where he says, you know, "Oh my God, what were you guys doing? This isn't something I signed up for."

105 Counsel did not disagree with this proposition.

106 The trial judge revisited this issue in his reasons at para. 127, quoted earlier, when he discussed the appellants' lack of concern, shock or horror at the shooting of their friend. He pointed to the exchange of text messages between TF and MW on the evening of November 22 and the early morning of November 23, 2010, the night before TF turned himself in to police. Again, consider the context. As the appellants would have it, the plan was only to rob, intimidate, or threaten Tyrone. The plan had gone horribly wrong. Tyrone's sister Skyy had accused TF of setting up Tyrone. TF had become a suspect in a murder investigation and was about to surrender to police. In their lengthy exchange of texts, TF and MW expressed their affection for each other.

107 It was in considering these texts, and others exchanged between the two youths after the shooting, that the trial judge observed, at para. 127:

... Yet neither MW nor TF ever express a single word of concern that someone that they know, and with whom they purported to be friends, has, on counsel's version of the events, been randomly murdered without warning by SB whom they also know and with whom they continue to communicate after the killing. If this was an unplanned and entirely spontaneous event, it is inconceivable that these two sixteen year old boys would not have voiced out their surprise and horror to each other, not only as to what had happened but the fact they are now deeply embroiled in it.

108 In this context, could logic and common sense suggest that there would be some expression, not only of shock and surprise, but of consternation that SB had acted contrary to the plan, had killed their good friend, and had implicated them in a murder?

109 In my view, they could. The appellants' failure to express any shock, surprise, or horror in their text communications in the six days after the shooting is circumstantial evidence that they were not surprised by the shooting and, inferentially, that the shooting was part of the plan. The trial judge was entitled to conclude that the absence of a single word about the subject in their communications was consistent with the Crown's theory and inconsistent with the appellants'.

110 The appellants acknowledge that shock and surprise might be expected, but suggest that shock and surprise may have been expressed in the telephone conversations between MW and TF after the shooting. In closing submissions, trial counsel for MW submitted that MW may have expressed surprise in his telephone conversations with TF in the immediate aftermath of the killing. But the trial judge suggested that this was not consistent with the appellants' subsequent text message exchange. He found, at paras. 125 and 127, that there were no communications between the appellants in which they expressed surprise or shock regarding Tyrone's death.

111 The trial judge was entitled to reject as illogical the suggestion that, if the shooting was unanticipated, the appellants would have expressed their shock, horror and outrage in their phone conversations but would have said nothing in their texts, which they exchanged frequently, freely, and privately.

112 The trial judge read hundreds of text messages between the participants in the period before and after the killing and he was well positioned to assess the likelihood that they would have discussed the shooting in their texts, had the killing been accidental or unanticipated.

113 The trial judge's use of the post-offence conduct in this case was similar to the use made of such evidence to infer planned and deliberate murder in the cases I have discussed. Like MacKinnon's excitement and laughter, White's flight without hesitation, Vorobiov's failure to flee, and Aravena's elation, the conduct was inconsistent with the theory advanced by the accused and more consistent with the inference urged by the Crown.

114 It is further suggested that even if the evidence was relevant, it should have been excluded because its prejudicial effect exceeded its probative value. It is contended that the appellants' lack of reaction to the shooting is understandable because gun violence was common in their neighbourhood.

115 First, as I have noted, the post-offence conduct in question was relevant. As Binnie J. explained in *R. v. Handy*, 2002 SCC 56, [2002] 2 S.C.R. 908, at para. 73, "[p]robative value cannot be assessed in the abstract. The utility of the evidence lies precisely in its ability to advance or refute a live issue pending before the trier of fact." See also *R. v. Luciano*, 2011 ONCA 89, 273 O.A.C. 273, at para. 230. In this case, whether the appellants had the requisite intent for first degree murder was a live issue. Evidence that they were not surprised by Tyrone's death had a tendency to establish the proposition for which it was tendered -- namely, that they intended to kill him.

116 Second, the trial judge clearly saw the evidence as highly probative. His reasons, at paras. 93 and 126-127, make it clear that he viewed the appellants' lack of shock, surprise, and outrage at the killing to be highly probative of their intent. He said, at para. 93, that the evidence removed all doubt. The "yur dum" exchange minutes after the shooting, combined with the absence of any expression of shock, surprise, and outrage in the messages exchanged in the hours and days after the killing, support the inference that the appellants were not surprised by the killing and are therefore probative of the appellants' intent to kill Tyrone.

117 I do not agree that the trial judge should have discounted the probative value of the absence of shock and surprise because the appellants lived in a violent environment. The trial judge spent over three weeks of trial immersed in the culture and language of that environment. Isolated examples of conduct of others who were peripheral to the events says nothing about what would be expected from the appellants, who were deeply involved in setting Tyrone up for "something". The trial judge was entitled to conclude that if the appellants did not expect Tyrone to be killed, they would have displayed some evidence of that surprise in their many communications in the six days after the killing. And he was entitled to infer from this that the appellants intended that Tyrone would be killed.

118 Third, the risk of prejudice was substantially attenuated, if not eliminated, in this judge-alone trial. The risk of prejudice in a jury trial is that the jury may "jump too quickly from evidence of post-offence conduct to an inference of guilt," without giving appropriate consideration to alternative explanations for the conduct: *White (1998)*, at para. 57. This may cause the jury to give the evidence more weight and persuasive value than it warrants: *White (2011)*, at paras. 133, 137.

119 In a jury trial, we rely on judicial experience and intervention to inform the jury of competing explanations and inferences available from the evidence. The trial judge is called upon to caution the jury that inferences from post-offence conduct should only be drawn after they have considered all the evidence. See *White (1998)*, at para. 57. As Rothstein J. noted in *White (2011)*, at para. 33, "[t]he purpose of such a caution is to alert the jury to the danger, which has been recognized through judicial experience, but then to allow the properly informed jurors to evaluate the evidence with care."

120 In my view there was no reason, in this judge-alone trial, to exclude the evidence of post-offence conduct because of its prejudicial effect. The trial judge's experience and presumed knowledge of the law can be relied upon to guard against the risks of such evidence and to examine competing explanations and inferences.

121 I would dismiss this ground of appeal.

B. VILLAROMAN -- REVERSING THE BURDEN OF PROOF

122 The appellants claim that the trial judge made what they describe as a "*Villaroman* error". Insofar as I am aware, this term is unique and appears nowhere in the jurisprudence of this court or any other court in Canada. In my view, *Villaroman* is simply a re-articulation and clarification of the law with respect to circumstantial evidence. As Feldman J.A., dissenting but not on this point, said in *R. v. Youssef*, 2018 ONCA 16, at para. 9, *Villaroman* is largely a restatement of the traditional test from *Hodge's Case* (1838), 2 Lewin 227, 168 E.R. 1136. Nor did Cromwell J. state new law when, at para. 35 of *Villaroman*, he said that "[i]n assessing circumstantial evidence, inferences consistent with innocence do not have to arise from proven facts". He cited *R. v. Khela*, 2009 SCC 4, [2009] 1 S.C.R. 104, at para. 58, for that proposition.

123 The appellants point to para. 93 of the judge's reasons, arguing that he reversed the burden of proof by requiring the defence to establish through affirmative evidence an alternative theory inconsistent with a planned killing. They say that reasonable doubt existed by virtue of alternative explanations that were available from "gaps in the evidence". They suggest that the trial judge failed to consider any scenario in which the murder was not planned because he found nothing in the evidence pointing to that scenario.

124 With respect, I do not agree. *Villaroman* reminds us that in a circumstantial evidence case such as this, the trial judge must consider "other plausible theories" and "other reasonable possibilities" that are inconsistent with guilt. Those theories must be based on logic and experience applied to the evidence or absence of evidence, not on speculation.

125 In my view, as I will explain, the trial judge did what he was required to do. And at the end of the day, he concluded that the circumstantial evidence in this case excluded any reasonable alternative to guilt.

The governing principles

126 In *Villaroman*, the accused was charged with possession of child pornography after a computer repair technician discovered it on the appellant's computer.

127 The evidence was circumstantial. It came from the technician and a forensic computer specialist. The computer was a laptop and was not password protected. The Crown presented no evidence to show that the accused was using the computer when the pornography was accessed. The trial judge rejected the accused's theory that the pornography could have been accessed by someone else when he was not using the computer.

128 The trial judge in *Villaroman* described this and other theories as hypothetical, finding that there was no evidence to support them. The Crown did not have the "added burden of negating every conjecture to which circumstantial evidence might give rise and which might be consistent with the innocence of the accused": 2013 ABQB 279, 562 A.R. 105, at para. 47, quoting *R. v. Paul*, [1977] 1 S.C.R. 181, at p. 191. *Villaroman* knew the nature of the material, had the intention to possess it, and had the necessary control over it. The trial judge convicted the accused.

129 The trial judgment was reversed by the Alberta Court of Appeal: 2015 ABCA 104, 320 C.C.C. (3d) 50. It found that the trial judge erred by requiring that reasonable doubt be based only on evidence, as opposed to an absence of evidence. The court stated, at para 19: "The trier of fact must find no evidence, and no gap in the evidence, which raises a reasonable doubt. Such gaps include a gap in the evidential support for an inference needed to prove an element of the offence. That is, of course, a factual question for the trier of fact."

130 The Court of Appeal found that a properly-instructed jury acting reasonably could not have found the appellant guilty of possession of child pornography. It reversed and entered an acquittal.

131 At the Supreme Court, Cromwell J. noted, at paras. 35-36, that conclusions alternative to guilt can arise from both evidence and the absence of evidence. Requiring proven facts to support explanations inconsistent with guilt reverses the burden of proof and is inconsistent with the principle that reasonable doubt is assessed by a consideration of all the evidence. A reasonable doubt, or a theory alternative to guilt, is not speculative because it arises from a lack of evidence.

132 But whether inferences arise from evidence or lack of evidence, they must be plausible and reasonable inferences that flow logically from the evidence, in light of human experience and common sense. He said, at para. 37:

When assessing circumstantial evidence, the trier of fact should consider "other plausible theor[ies]" and "other reasonable possibilities" which are inconsistent with guilt: *R. v. Comba*, [1938] O.R. 200 (C.A.), at pp. 205 and 211, per Middleton J.A., aff'd [1938] S.C.R. 396; *R. v. Baigent*, 2013 BCCA 28, 335 B.C.A.C. 11, at para. 20; *R. v. Mitchell*, [2008] QCA 394 (AustLII), at para. 35. I agree with the appellant that the Crown thus may need to negative these reasonable possibilities, but certainly does not need to "negative every possible conjecture, no matter how irrational or fanciful, which might be consistent with the innocence of the accused": *R. v. Bagshaw*, [1972] S.C.R. 2, at p. 8. "Other plausible theories" or "other reasonable possibilities" must be based on logic and experience applied to the evidence or the absence of evidence, not on speculation. [Emphasis added.]

133 He added, at para. 38, that while the line between a "plausible theory" and "speculation" is not always easy to draw, the "basic question is whether the circumstantial evidence, viewed logically and in light of human experience, is reasonably capable of supporting an inference other than that the accused is guilty." Put another way, at para. 41, "to justify a conviction, the circumstantial evidence, assessed in light of human experience, should be such that it excludes any other reasonable alternative."

134 Referring to *R. v. Dipnarine*, 2014 ABCA 328, 584 A.R. 138, at paras. 22 and 24-25, he noted that the circumstantial evidence "does not have to totally exclude other conceivable inferences" and "the trier of fact should not act on alternative interpretations of the circumstances that it considers to be unreasonable; and that alternative inferences must be reasonable, not just possible."

135 Cromwell J. found that although there were some "problematic" statements in the trial judge's reasons, there was no reversible error when those statements were considered in context and against the reasons considered as a whole. The trial judge recognized and applied the standard of proof beyond a reasonable doubt, and properly noted that reasonable doubt cannot arise from speculation or conjecture.

136 On the contrary, the Alberta Court of Appeal had erred "by focusing on hypothetical

alternative theories and, at times, engaging in speculation rather than on the question of whether the inferences drawn by the trial judge, having regard to the standard of proof, were reasonably open to him": at para. 67.

137 At para. 71, Cromwell J. referred once again to *Dipnarine*, noting that "it is fundamentally for the trier of fact to draw the line in each case that separates reasonable doubt from speculation. The trier of fact's assessment can be set aside only where it is unreasonable." He concluded that "[w]hile the Crown's case was not overwhelming, my view is that it was reasonable for the judge to conclude that the evidence as a whole excluded all reasonable alternatives to guilt."

138 Decisions of this court since *Villaroman* demonstrate that merely because a trial judge rejects an alternative theory inconsistent with guilt does not mean that he or she committed a so-called *Villaroman* error. It may simply mean that there was no available inference, other than guilt, that was reasonable, given the evidence and the absence of evidence, and in light of human experience and common sense: *R. v. Arnaud*, 2017 ONCA 440, at para. 17. Nor does the use of expressions such as "no evidence to the contrary" or "no competing narrative" signal a "*Villaroman* error" or a misplacement of the burden of proof: *R. v. Pun*, 2018 ONCA 240, leave to appeal refused, [2018] S.C.C.A. No. 133; *R. v. Caporiccio*, 2017 ONCA 742.

139 Consistent with the observations of Cromwell J. in *Villaroman*, the cases illustrate a high level of deference to a trial judge's conclusion that there are no reasonable alternative inferences other than guilt. In *R. v. Loor*, 2017 ONCA 696, this court observed, at para. 22, that, "[a]n appellate court is justified in interfering only if the trial judge's conclusion that the evidence excluded any reasonable alternative was itself unreasonable."

Application of the principles

140 I turn to the appellants' submissions with respect to the "*Villaroman* error".

141 The appellants argue that the trial judge reversed the burden of proof. It was not the responsibility of the defence to show alternative theories, and the trial judge should have considered whether the absence of evidence or "gaps" in the evidence raised a reasonable doubt about the existence of a plan to kill Tyrone. The shooting could have been spontaneous in spite of the absence of affirmative evidence of a dispute.

142 The only theory alternative to guilt advanced in the court below and in this court, was that the "plan" was something less than murder and that it went offside. MW's position before the trial judge was that he had no knowledge why SB wanted to confront Tyrone at the building. SB may have acted on an impulse while there for some other purpose, such as intimidation.

143 TF's submission was that while he allowed SB to enter the complex, and while SB was the shooter, he was unaware of SB's intentions and did not knowingly aid in the commission of an offence. In this court, he further suggested that the killing was part of a plan related to Tyrone's drug

debt, an explanation not advanced in argument at trial.

144 Leaving aside the fact that this explanation was not advanced in the court below, and the trial judge's finding that there was no apparent connection between the appellants and Tyrone's drug debt, the complaint is that the trial judge did not consider any other theory inconsistent with guilt that could arise from the evidence or from the absence of evidence. However, the only conceivable theory is the one advanced by the appellants -- namely, whatever the underlying motivation for their actions, the appellants intended to set Tyrone up for some purpose other than murder -- for example, to be robbed, intimidated or assaulted.

145 The trial judge did, in fact, turn his mind to this theory. As I have pointed out in the discussion of post-offence conduct, the trial judge challenged counsel on this alternative theory in light of the "yur dum" message and its response.

146 At paras. 93, 126, and 127 of his reasons, the trial judge considered, and rejected, the possibility that the shooting was impulsive, spontaneous, or unexpected. He gave two reasons for rejecting this theory. The first was that there was no evidence of any spontaneous occurrence, such as a dispute, fight, or confrontation, that might have led to a sudden decision to kill Tyrone. Although the judge did not specifically mention it at this point in his reasons, not only was there no evidence of a spontaneous occurrence, there was evidence he referred to earlier in his reasons that tended to exclude that possibility: the "execution-style" nature of the killing; the absence of other injuries to the victim; and the evidence of TW who heard no loud voices or argument when he was passing through the stairwell shortly before the killing.

147 The appellants impugn the trial judge's observations that there was "nothing on the evidence" to sustain a finding that the shooting of Tyrone was unexpected or spontaneous (para. 93) and "no evidence of a dispute or fight or some other unanticipated event" (para. 126). They say that this signals a focus on proven facts, rather than the evidence or absence of evidence.

148 In *R. v. Caporiccio*, above, similar complaints were made that the trial judge's language indicated a reversal of the burden of proof by requiring the appellant to adduce positive evidence of his innocence. This court did not give effect to this argument, observing that the judge was simply signalling that there was no evidence contradicting the evidence that she had accepted as true. She made no error in stating that there was no evidence to the contrary when that was in fact the case.

149 The court stated, at paras. 30-31:

While on a few occasions the trial judge references the fact that there was "no evidence to the contrary", taken in context this expression does not reveal a reversal of the burden of proof. At no time does the trial judge suggest that she accepts evidence *because* there was no evidence to the contrary. Instead, in using the impugned expression, she is simply signaling that there was no evidence contradicting certain pieces of evidence that she accepted as true. There was

nothing wrong with making this observation.

The appellant also claims that the trial judge erred by noting the absence of evidence supporting the appellant's position that the monies Mr. Sabato paid to the appellant's companies were extraneous to the fraudulent loans. The trial judge was not bound to find that the money disbursed to the appellant by Mr. Sabato was "clean" money. Her observation that there was no evidence supporting the defence suggestion that the monies were extraneous to the fraud is true; there was no such evidence. There was nothing wrong with her saying this. She did not reverse the burden by making this observation. [Emphasis in original].

150 In my view, similar expressions used by the trial judge in this case, considered in context and together with his reasons as a whole, simply signal that the inference he accepted based on the totality of the evidence -- a planned and deliberate murder -- removed any doubt about an alternative inference.

151 The second reason the trial judge gave for rejecting the theory, as I have noted, was the absence of any communications between TF and MW indicative of surprise or horror about the allegedly random and unplanned killing of their friend Tyrone -- and in the case of MW, his continued communications with SB, including a discussion of killing SHB.

152 In my view, the appellants' complaints of a "*Villaroman* error" are unfounded. The trial judge did precisely what *Villaroman* instructs. He considered the evidence and the absence of evidence in light of human experience and rejected as speculative the theory that the shooting was spontaneous and unplanned. He was entitled to draw the line between plausible theory and speculation exactly where he did. There was no evidentiary gap in the Crown's case that as a matter of common sense, logic, and human experience gave rise to a reasonable inference that the shooting was unplanned.

153 The appellants are inviting this court to do what the Alberta Court of Appeal did in falling into error in *Villaroman*. The Supreme Court reminds us that the circumstantial evidence does not have to "totally exclude other conceivable inferences": *Villaroman*, at para. 42, citing *Dipnarine*, at para. 22. Rather, it is for the trier of fact to decide whether the circumstantial evidence, when considered in light of human experience and the evidence as a whole, including the absence of evidence, excludes all reasonable inferences other than guilt: *Villaroman*, at para. 41.

154 When the trial judge's reasons are read as a whole and in the context of the live issues and arguments at trial, as they must be, he did not misapply the burden of proof. In particular, when para. 93 of the reasons is considered alongside paras. 126 and 127, it is apparent that the trial judge applied logic and human experience to conclude that the evidence and the lack of evidence did not raise a reasonable doubt. He considered the only available alternative theory and rejected it. His conclusions are reasonable and are entitled to deference.

C. MISAPPREHENSION OF THE EVIDENCE

155 The appellants claim that the trial judge misapprehended several aspects of the evidence. In my view, none of their complaints meet the test for appellate review -- a test repeatedly described as a stringent one. The misapprehension must relate to material parts of the evidence and the error must play an essential part in the reasoning process of the trial judge resulting in the conviction: *R. v. Morrissey* (1995), 97 C.C.C. (3d) 193 (Ont. C.A.), at p. 221; *R. v. Lohrer*, 2004 SCC 80, [2004] 3 S.C.R. 732, at para. 4.

156 In *R v. Orwin*, 2017 ONCA 841, this court added, at para. 45, that:

Said in another way, an error in the assessment of evidence will amount to a miscarriage of justice only if striking it from the judgment would leave the trial judge's reasoning on which the conviction is based on unsteady ground: *R. v. Sinclair*, 2011 SCC 40, [2011] 3 S.C.R. 3, at para. 56.

157 I will briefly consider each complaint.

"Girlfriend" to the residential complex

158 MW contends that the trial judge misapprehended the evidence about his text to SB, before the shooting, stating "You make me know wagwan b4 I go there with my girlfriend. ["you let me know what's going on before I go there with my gun.]" He contends that the trial judge erred in treating "there" as referring to the complex, when the expert on urban slang had concluded that it referred to a trip MW and SB were planning to a rival neighbourhood the following day.

159 I do not accept this submission. It was for the trial judge and not the expert witness to interpret this piece of evidence in the context of all the other evidence. The trial judge did so. The conclusion that "there" referred to the complex and hence that MW was intending to bring his gun ("girlfriend") to the complex was a reasonable one.

"No y"

160 The appellants submit the trial judge made a second error by interpreting SB's text "no y" as meaning, "You know why", when the correct interpretation was "No. Why?"

161 The trial judge addressed this argument in his reasons, at para. 52:

It is suggested by counsel for MW that this last message is SB telling MW that he will not tell him what is going on and why would he do so. I do not accept that suggested interpretation. There is nothing in the messages that would suggest that SB would rebuff MW in this fashion. It is also important to realize that the word "no" is often used in these text messages as a short form of "know". In my view, given the overall context of these messages, the proper interpretation of this

message is that SB is telling MW that MW knows what is going on as in "you know why".

162 The trial judge considered the evidence in context. I am not satisfied that he misapprehended it, but if he did, it was of no significance and did not impair the reasoning process leading to conviction.

Transfer, concealment, removal of firearm

163 TF contends that the trial judge misapprehended the evidence in concluding: that SB handed the gun to him when they left the stairwell after the shooting; that TF ran from the stairwell carrying the gun; and that TF asked his mother to dispose of the gun.

164 The trial judge did not find it necessary to determine what became of the gun, which was never found. There was ample evidence to support his conclusions on this issue and I would not give effect to the appellant's submissions.

The observation regarding membership in a gang

165 The appellants contend that the trial judge erred in concluding that they were members of the same gang as SB. The impugned portion of the reasons is at para. 95:

There is also some indication on the evidence that SB and MW were part of some loosely defined group or gang. It seems likely, if that was the case, that TF was also part of this group or gang given the close relationship between him and MW. There is no evidence that Tyrone was part of this same group or gang, however, nor is there any evidence that he was part of any other group or gang. A conclusion that the existence of this group or gang somehow played a role in Tyrone's death could, once again, only be founded on speculation.

166 In my view, this statement is the antithesis of a finding. Moreover, there were text messages between MW and SB, discussed by the trial judge, at paras. 54 and 55, which were capable of the interpretation that: MW was a more junior member of the gang than SB; MW was concerned that he had somehow fallen out of favour; and SB was reassuring him that this was not the case.

167 In any event, the misapprehension of the evidence, if there was one, clearly played no role in the trial judge's reasoning.

The finding that TF was not with Tyrone throughout

168 At the outset of his analysis concerning TF's liability, the trial judge said, at para. 108:

I now turn to TF. There is no interpretation of the text messages that took place between TF and MW and between TF and SB that allow for any conclusion other

than TF was assisting in the plan to kill Tyrone. Indeed, it is evident that TF's friendship with Tyrone is of some importance to the plan. It is TF who alerts MW, and through him to SB, that Tyrone has arrived at [the complex]. It is TF who goes to see Tyrone shortly after his arrival including brushing past F when she tries to pretend that Tyrone is not home. It is TF who, because of his relationship with the Bracken family, can come and go within the Bracken apartment without raising any concern. It is TF who is with Tyrone in the hallway and in the staircase off and on throughout the time after Tyrone's arrival until Tyrone is killed as established by the evidence of both F and Tyrone's mother. [Emphasis added.]

169 The appellant TF submits that the trial judge misapprehended the evidence because he was not with Tyrone throughout. The judge did not say he was. The judge said he was with Tyrone "off and on" throughout the material time. There was no misapprehension of the evidence.

The failure to deal with the "20 minute gap"

170 Related to the preceding issue is TF's complaint that the trial judge failed to consider what took place during "gaps" when there was no video surveillance of some or all of the participants. This included times when SHB and TF were together without Tyrone and times when SHB was with Tyrone and TF was absent.

171 Again, I am not satisfied that this alleged misapprehension of the evidence had any impact on the trial judge's assessment of the evidence.

That TF pressured Tyrone to leave

172 Early in his reasons, the trial judge described some of the events at Tyrone's mother's apartment, after Tyrone arrived. He observed, at para. 13, that Tyrone's mother believed that TF and the "other male" (SB) were pressuring Tyrone to leave the apartment.

At some later point, Tyrone's mother believes that yet another male arrived because Tyrone came into the apartment and asked F for her cell phone. The expressed reason for wanting the phone was so that Tyrone could record the telephone number for this male in F's phone. Tyrone did not have a cell phone nor was he permitted to be in possession of one because of his bail conditions. It appears that Tyrone avoided this condition by using other people's phones especially F's. Tyrone's mother says that about ten minutes after Tyrone came in looking for F's phone, Tyrone said that he was leaving. Subsequently, F told her that Tyrone had left and that he was going to the store. Tyrone's mother added that, prior to Tyrone leaving, she felt that TF and this other male were pressuring Tyrone to leave.

173 The appellant TF asserts that the trial judge misapprehended the evidence in stating that Tyrone was being pressured to leave the apartment.

174 I make two observations with respect to this issue. The first, which TF's counsel concedes, is that there is a portion of the cross-examination of Tyrone's mother by counsel on behalf of SHB that at the very least explains the trial judge's observation.

175 The second, and more important point, is that the judge did not refer to this evidence as part of his analysis of TF's role in the events of the shooting and there is no indication that this alleged error, if it was one, played any role in his reasoning process.

The rap lyrics

176 The appellant TF takes issue with the trial judge's reference to the rap lyrics authored by TF and discovered more than two and a half years after the killing. They were nevertheless admitted in evidence without objection from the defence. Further, the trial judge said that he could not place great reliance on the lyrics and there is no indication that he did so.

177 For these reasons, I would not give effect to this ground of appeal. I turn to the complaint concerning the admission of certain *ante-mortem* statements made by Tyrone.

D. THE ANTE-MORTEM HEARSAY EVIDENCE

178 TF submits that the trial judge erred in relying on hearsay evidence, recounted by F, to find that the relationship between Tyrone and TF was "unsettled." F testified that Tyrone had expressed concern that TF was going to set him up and "expressed distrust of his friends at [the complex] and, in particular, of TF." Tyrone's sister testified that Tyrone did not trust TF.

179 This ground of appeal must be considered in context. At the commencement of trial, the appellants re-elected trial by judge alone. As part of the re-election, it was agreed that certain pre-trial motions by the defence would be abandoned. This included a motion to exclude Tyrone's *ante-mortem* statements. It was agreed that at the end of trial the judge could decide what use could be made of this evidence, after hearing submissions of counsel. In closing submissions, TF's counsel argued that some of the statements (pertaining to Tyrone's dreams) should be given no weight and that others had limited probative value.

180 The trial judge expressly said he did not take the evidence of Skyy and F. regarding Tyrone's distrust of his friends at the complex and TF in particular "very far in terms of their evidentiary value". But he observed that their evidence, coupled with Tyrone's recent tattoo, "trust no one", and statements he made to his mother demonstrated that the relationship between TF and Tyrone was very unsettled at the time of his murder. He concluded, at para. 118: "The submission that TF would have no reason to do harm to Tyrone because TF was a good friend of Tyrone and the Bracken family loses whatever persuasive value it may have in light of this changed relationship."

181 In my view, considered in context, the absence of objection to the admissibility of the evidence and the limited weight given to the statements by the trial judge, indicate that the trial judge did not make inappropriate use of the statements.

E. PARTY LIABILITY

182 The trial judge concluded that MW was a party to the murder as a joint principal. He found that he would be equally liable as an aider in the commission of the offence. MW contends that the trial judge erred in finding him liable as a joint principal.

183 Section 21(1) of the *Criminal Code* sets out the liabilities of parties to an offence:

- (1) Every one is a party to an offence who:
 - a. Actually commits it;
 - b. Does or omits to do anything for the purpose of aiding any person to commit it; or
 - c. Abets any person in committing it.

184 The issue is only of academic interest in light of the trial judge's conclusion that MW was liable as an aider. He played a central role in informing SB that Tyrone was at the complex and in "linking" SB and TF. His pre-offence and post-offence conduct clearly demonstrated that he was a participant in the plan. See *R. v. Fatima* (2006), 42 C.R. (6th) 239 (Ont. S.C.), at para. 68, to which the trial judge made reference: "A person may commit planned and deliberate first degree murder as an aider and abettor, either by participating in the planning and deliberation [of a planned and deliberate murder] or by helping or encouraging what the aider and abettor knows is a planned and deliberate murder": referring to *R. v. Wong* (1992), 71 C.C.C. (3d) 490, at p. 500 (B.C.C.A.), per McEachern C.J.B.C., leave to appeal refused, 20 B.C.A.C. 80; and *R. v. Gray* (1992), 66 C.C.C. (3d) 6, at p. 18-19 (Ont. C.A.), per Dubin C.J.O., leave to appeal refused, 69 C.C.C. (3d) vi.

185 As the trial judge did not outline the factual or legal basis for his conclusion as to joint principal liability, and counsel have not referred us to any authorities directly on point, I do not propose to address the issue. Both appellants were clearly liable as aiders.

F. SUBMISSION CONCERNING THE INTEGRITY OF THE VIDEO EVIDENCE

186 At the hearing of the appeal, counsel for TF raised a new issue, concerning the integrity of the video evidence. The submission focused on the security camera recordings of the movements of SHB, TF, and SB as they exited the west stairwell. The trial judge observed, at paras. 111-112 of his

reasons, that just after TF exited the stairwell door he stopped and turned back towards SB, who had his arms stretched out towards TF, TF hesitated very briefly and then turned and ran towards another building:

...Three people flee the scene of the murder. Two of them are clearly TF and SHB. The third person must be SB because he is the only other person in the staircase other than Tyrone. The first person out is SHB who runs without any hesitation directly towards [another building in the complex] where his mother lives. The next person out is TF followed almost immediately by SB who has his arms stretched out in the direction of TF. TF stops and turns back towards the area of the door and this person. TF hesitates very briefly in this area and then starts to run towards [another building in the complex].

187 The trial judge found a compelling inference from the evidence that SB passed the murder weapon to TF as they left the staircase. He inferred that TF asked his mother to dispose of the murder weapon. As I have noted, he observed that it was not necessary to determine what became of the murder weapon.

188 Counsel for TF submitted that in the conversion of the original security camera video to a medium used for display in court, a distortion was introduced that had the potential effect of creating an artificial "stutter" of the video when it was played, making it appear that TF had paused after leaving the stairwell, when he had not in fact done so.

189 Counsel's submissions, which were disputed by the Crown, were based solely on his own analysis of the recordings. He tendered no expert evidence. At the end of the hearing, it was left with counsel to discuss whether a fresh evidence application would be brought in support of this argument. Counsel subsequently resolved the issue based on an agreed statement of facts, which we received on consent. We did not consider it necessary to receive further submissions.

190 The agreed statement of facts indicates that the source video was recorded at 15 frames per second. It was converted to a rate of 30 frames per second for the purpose of trial. This should have resulted in each frame of the video being displayed twice. Instead, when the 5 seconds of source video (containing 75 frames) were displayed, some frames were displayed only once, some appeared twice, and some three times.

191 Having reviewed the statement of agreed facts and the attachments, I see no basis on which to conclude that this technical anomaly could have affected the trial judge's assessment of the evidence.

192 Counsel for TF acknowledges that there appears to have been some form of contact between SB and TF after they exited the stairwell door. I have noted that TF ran from the scene in a manner consistent with someone attempting to conceal a gun. Later that evening, TF asked his mother to "clean" something and to dispose of it. The trial judge was entitled to draw a reasonable inference

from the foregoing that SB handed the murder weapon to TF and that TF disposed of it. The judge expressly stated that the inferences he drew were not necessary for the purpose of determining TF's liability.

193 In my opinion, this ground of appeal is without merit.

Conclusion

194 This is a difficult case for a number of reasons, not the least being the youth of the victim and the appellants, the circumstantial nature of the evidence, the absence of witnesses, and the impact of the "Code of Silence". As in *Villaroman*, the Crown's case was not overwhelming. As in *Villaroman*, not every trier of fact would inevitably have reached the same conclusion as the trial judge. But, as in *Villaroman*, it was for the trier of fact to draw the line between reasonable doubt and speculation. The trial judge did so and concluded that the post-offence conduct at issue excluded all reasonable alternatives to guilt. I see no basis on which to disturb that conclusion.

195 For these reasons, I would dismiss the appeal.

G.R. STRATHY C.J.O.

R.G. JURIANSZ J.A.:-- I concur.

L.B. ROBERTS J.A.:-- I concur.

¹ In the title of proceedings and in the Reasons for Judgment in the Superior Court, SB is referred to as "S.B.1" and SHB is referred to as "S.B.2".

---- End of Request ----

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