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R. v. Blue

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**IN THE PROVINCIAL COURT OF BRITISH COLUMBIA**  
Criminal Court

**REX**

v.

**BRANDON BLUE, GREGORY JACKSON AND BEAU SPENCER**

**REASONS FOR JUDGMENT  
OF THE  
HONOURABLE JUDGE J. SOLOMON**

Counsel for the Crown:	P. Campbell
Counsel for the Accused, B. Blue:	D. Jardine, KC
Counsel for the Accused, G. Jackson:	K. Westell
Counsel for the Accused, B. Spencer:	C. Hatcher
Place of Hearing:	Vancouver, B.C.
Dates of Hearing:	September 25-28; October 3, 4; December 21, 22, 2023
Date of Judgment:	January 12, 2024

[1] On the evening of May 24, 2017, the three accused, police officers employed with the Vancouver Police Department (“VPD”), responded to a call for urgent assistance by a brother officer, Cst. Joshua Wong. Cst. Wong was in pursuit of a suspect, David Cowie, said to be arrestable for obstruction and theft of a bicycle from a parkade. In these reasons, I will refer to Mr. Cowie as the suspect. I mean no disrespect to him by doing so.

[2] In the course of the arrest, it is alleged that the suspect was assaulted by each accused and suffered personal injuries that included multiple left lateral rib fractures and a collapsed lung. Cst. Blue is charged in Count 1 of the Indictment with assault causing bodily harm. The Crown concedes that it cannot prove that Cst. Blue caused bodily harm to the suspect and seeks a conviction for assault simpliciter. Csts. Spencer and Jackson are charged in Count 2 with assault simpliciter.

[3] There is no doubt that the suspect was struck several times by the accused with punches and knee strikes over a 30-second period between 10:10:24 p.m. and 10:10:55 p.m. CCTV cameras in the Commercial and Broadway SkyTrain Station captured the arrest. Each accused submits that they used reasonable and necessary force as per s.25 of the *Criminal Code* and are entitled to an acquittal. In these circumstances, the Crown has the burden to negative the defence advanced to the standard of proof beyond a reasonable doubt.

### **Summary of the Evidence**

[4] The CCTV video evidence establishes that Cst. Wong chased the suspect into the SkyTrain Station. The suspect entered the station on a bicycle while Cst. Wong ran behind him. The suspect looked back over his shoulder while Cst. Wong gained on him. The suspect discarded his bicycle directly into the path of Cst. Wong. I infer that this action was intended to impede or injure Cst. Wong in order to disrupt the pursuit. Cst. Wong leapt over the bicycle and took the suspect down to the ground by jumping on his back.

[5] After this take down, at 10:09:46 p.m., Cst. Wong made the following broadcast over the police radio that was audible to all the accused: “Just got him in custody the SkyTrain Station. I need Code 3 cover, Just holding him down.” And then at 10:09:57 p.m., “Not in cuffs, just holding him down and he’s fighting”. Code 3 is a call for an officer requiring cover or urgent assistance.

[6] The accused were in police vehicles nearby when they heard the broadcast. They responded immediately and rushed to the assistance of Cst. Wong. In the course of this assistance, these cover or assisting officers delivered punches and knee strikes to the suspect until handcuffs were applied to both his hands. The Crown alleges that the force used was excessive in the circumstances that include the size difference between the suspect and the officers, the number of officers, and the absence of assessments and reassessments before the application of force.

[7] The Crown called a number of witnesses to give evidence, including some civilians who witnessed parts of the incident, a use of force trainer, and a medical expert. Each accused gave evidence, and a use of force expert was called by the defence. The arresting officer Cst. Wong and the suspect, the two parties who were integral to this incident, did not testify on this trial.

[8] A transcript of the Computer Automated Dispatch (“CAD”) is filed as Exhibit 9 on this trial. It provides a chronology of the incident. It is admitted by all accused that the CCTV files obtained from the SkyTrain station accurately recorded the incident, and the date and time stamps are true. The CCTV uses the 12-hour clock and the CAD uses the 24-hour clock. For clarity, the incident occurred after 10 p.m. on May 24, 2017.

[9] There are three video files, two of which capture most of the physical incident, and the other captures the first two officers arriving to provide assistance to Cst. Wong.

[10] In summary, the chronology on the CCTV is as follows:

- 10:09:32 The suspect is on a bicycle moving northbound into the station and being pursued on foot by Cst. Wong.

- 10:09:40 The bicycle is discarded by the suspect at the feet of Cst. Wong. Cst. Wong leaps over the bicycle and tackles the suspect to the ground with force.
- 10:09:46 Cst. Wong appears to be using effort to keep the suspect down on the ground and at the same time with one hand accesses his police radio. (This is consistent with the CAD broadcast at 10:09:46 where Cst. Wong advises that the suspect is in custody, Code 3 cover needed, and he's just holding him down. Then at 22:09:57, he broadcasts that the suspect is not in cuffs, he's just holding him down and he's fighting.)
- 10:10:02 The suspect places his left arm behind his back while leaning on the right side of his body.
- 10:10:12 Cst. Wong pulls the suspect into a straight posture on his stomach with head facing down. Cst. Wong is positioned at the head of the suspect. Both arms and hands of the suspect are now visible on the ground at his sides.
- 10:10:15 Cst. Wong delivers a punch with his right fist to the left flank or rib area of the suspect. This causes the suspect to roll onto the right side of his body with his legs slightly bent up towards his stomach. The suspect places his left arm and hand behind his back in position to be cuffed. The suspect's right arm and hand disappear from view of the camera. Cst. Wong pushes down on the suspect's upper back, lifts himself up, and repositions himself to the right of the suspect.
- 10:10:24 Cst. Wong produces handcuffs from his right hip and makes a movement consistent with the application of a handcuff to the left hand of the suspect. With his left hand, Cst. Wong makes a pulling motion consistent with trying to pull out the suspect's right arm or hand out from underneath him.
- 10:10:24 Cst. Blue, wearing a ball cap, leaves the passenger side of a police vehicle that pulled up to the north entrance of the station and runs southbound towards where Cst. Wong is with the suspect. He slides into the suspect's left side with a knee and pushes on his back.
- 10:10:30 Cst. Spencer, wearing shorts, leaves the driver's side of the same vehicle, jumps the turnstile at the north entrance and runs southbound towards the other two officers. Cst. Spencer delivers one knee strike to the suspect.

- 10:10:30 Cst. Jackson runs northbound towards the other officers and assists in pinning the suspect to the ground.
- 10:10:37 Cst. Blue appears to use force to pull up on the suspect's right shoulder or arm three times.
- 10:10:38 Cst. Spencer delivers three punch strikes and two knee strikes to the suspect.
- 10:10:45 Cst. Spencer delivers a knee strike to the suspect.
- 10:10:49 Cst. Blue delivers a knee strike to the suspect.
- 10:10:55 Cst. Jackson delivers two punches to the suspect. Cst. Spencer delivers three punches to the suspect and one further knee strike. The officers soon after disengage from the suspect.

[11] In general, the CCTV video of the incident appears to depict a struggle between the attending officers and the suspect to apply handcuffs to both hands; however, at times the view of the suspect's hands are obstructed by the position of the surrounding officers.

[12] A number of civilians who made observations of the arrest were called to give evidence for the Crown. Christian Guerra made observations from the escalator but due to the passage of time since the event, his evidence is not reliable. In cross-examination, after considering the video of the incident, he agreed that most of his evidence in his direct examination was mistaken.

[13] Earl Read testified that he was employed with BC Transit and was working at the SkyTrain station at the time of the arrest. He was initially on the upper platform but came down to the lower floor as soon as he was advised of a fight in progress. When he came down the stairs, he observed officers arresting a suspect. He came within six feet of the arrest and identified himself from the video. Mr. Read testified in direct examination that he recalled that officers were trying to secure the hands of the suspect and make the arrest. The suspect was on the ground and there was very little movement from him, the suspect "wasn't really doing anything". He observed the officers trying to put handcuffs on the suspect and his impression was that the suspect

was not resisting. In cross-examination, his transcribed statement was put to him. After considering his statement, Mr. Read agreed that the officers were in fact struggling to get the suspect's hands in cuffs and the suspect was moving his feet and twisting his arms. The suspect on the ground was not yelling. He heard an officer say stop resisting and stop struggling.

[14] Special Constable John Roberts testified that he is the officer in charge of VPD officer safety and tactics team. His unit trains officers in the use of force. Every officer does 16 hours of training per year. The VPD uses the National Use of Force Framework that requires an officer to continuously assess the situation and act in a reasonable manner to ensure officer and public safety. The graphical representation of the various factors an officer might consider was marked as Exhibit 7, and Exhibit 8 is a written explanation of the framework.

[15] Cst. Roberts testified that the use of force options available to an officer range from communication with a subject to lethal force. Exhibit 8 describes physical control options to include soft and hard techniques. Soft techniques are control oriented and include joint locks. "Hard Techniques are intended to stop a subject's behaviour or to allow the application of a control technique and have a high probability of causing injury. They may include empty hand strikes such as punches and kicks." Mr. Roberts testified that officers are trained to gain control of a subject before applying handcuffs, as the handcuffs could become a weapon in the hands of the subject.

[16] Dr. Ross Berranger was qualified to give expert opinion evidence in the area of field emergency and mechanics of injury. After considering a hypothetical that matched the CCTV video and the St. Paul's Hospital records, he opined that the suspect's rib fractures and lung injury were likely caused by knee strikes delivered by the officer dressed in shorts (Cst. Spencer). These appeared to be knee strikes delivered to the chest of the subject. He did not observe any other strikes forceful enough to cause the injuries suffered by the suspect. I am able to address Dr. Berranger's opinion summarily. After viewing the CCTV video considered by Dr. Berranger, and considering the evidence of Cst. Spencer, I find that it is unlikely that the knee strikes of Cst. Spencer

connected to the chest of the suspect. I am unable to accept the opinion of Dr. Berringer regarding the specific cause of the rib injuries to the suspect.

[17] Each accused testified in their defence.

[18] Cst. Blue testified that he is 39 years old and has been a police officer since 2011. On May 24, 2017, he was on shift in a police vehicle with Cst. Beau Spencer. Over the police radio he heard Cst. Wong requesting Code 3 cover. Cst. Wong is a strong and capable officer and would not request Code 3 cover unless the situation was serious and exigent. It was important to get to his location quickly.

[19] Over the radio, he also heard Cst. Wong being out of breath and exhausted. The broadcast included that the suspect was arrestable for obstruction and theft, and fleeing from the scene. A fleeing suspect indicates active resistance. He then heard over the radio that the suspect was on the ground, not in cuffs and fighting. Code 3 is the most serious request for assistance, and relates to an officer being assaulted, a firearm could be involved, and there is a risk of death or grievous bodily harm.

[20] On the CCTV footage, he is the first officer running to assist Cst. Wong and is the one wearing a ball cap. When he arrived, there was only a short time to make an assessment. He did not see Cst. Wong applying a handcuff at first. To him it looked like the suspect was not in control. The suspect's left hand was behind his back but his right arm and hand were underneath or beside him.

[21] His goal was to get control of the suspect's right arm and hand as per his training. His concern was the suspect's ability to access a weapon. He slid into the suspect with his right knee, but the impact might have been to the red backpack that was beside the suspect. His focus was getting the right arm out from underneath the suspect. He tried pulling it out but met with resistance with the suspect pulling back.

[22] In reference to the CCTV video, Cst. Blue pointed out his pulling up on the suspect's right upper arm in an effort to pull it out from underneath him. He issued commands to the suspect to show his hands advising that he is under arrest. He was concerned that the suspect might be attempting to access a weapon from his

waistband. Being unsuccessful in pulling the right arm out, he reassessed and delivered a knee strike to the left shoulder area of the subject. He did this to try to change the suspect's behaviour. Shortly after the knee strike, he was able to get the suspect's right arm out and the handcuff was applied. At all times he was dealing with a suspect who was actively resisting arrest and he applied use of force measures consistent with his training.

[23] In cross-examination, Cst. Blue testified that from the Code 3 he inferred that Cst. Wong was being overwhelmed. He disagreed that when he first observed the suspect, the suspect was not moving. His assessment was a situation of active resistance as one hand was not under control. He did not see Cst. Wong's handcuffs out right away; however, the training is to not attempt to apply handcuffs until the suspect is under control. A knee strike was employed after giving the suspect an opportunity to comply with a command to give his arm. He had already tried to pull his arm out with all his strength and that was unsuccessful. The initial knee impact when he slid into the suspect was not an intentional strike; he was running towards the suspect and slid into him. As soon as the right hand was cuffed, he disengaged from the suspect. It was a dynamic situation.

[24] Retired Constable Gregory Jackson testified that he is 59 years old and was an officer between 2004 and 2018. He was on duty and also responded to the Code 3 cover call. He received training in the National Use of Force Framework. He heard the radio broadcast of an officer pursuing a fleeing suspect arrestable for obstruction and theft. The officer sounded short of breath. Next, he heard that the suspect was on the ground and fighting. He drove to the SkyTrain station, and entered from the south terminal. He ran towards the scene where other officers were trying to take a suspect into custody. He stopped to assess the situation and noticed the suspect's right arm under his body.

[25] The suspect was supine on his belly with face down. He posted his right knee against the suspect's right shoulder to prevent the entire arm swinging out and attempted to pull out the forearm and hand. He needed to control the suspect's arm to



prevent a weapon from coming out. He was operating under a high-risk level due to the Code 3 and suspect fighting broadcast. He felt resistance as he tried to pull the suspect's right arm out. He punched the suspect's right bicep and tricep area. The purpose was to cause a temporary motor dysfunction and pull the arm out. The punch was not effective; there was still resistance, so he punched the suspect harder in the same area. After the second punch the arm came loose and he was able bring it out behind his back where it was cuffed by another officer. He did not apply any other force to the suspect.

[26] In cross-examination, retired Cst. Jackson testified that he has no notes or reports in relation to this incident and was not aware of an investigation until over a year later. He was able to refresh his memory from the CCTV footage. When approaching the scene he witnessed a struggle between the suspect and other officers. The suspect was belly down but he cannot recall if he was flat. It was a struggle since the suspect was not in custody and not in control. He did not see any weapons in possession of the suspect or nearby. He assessed the situation as active resistance, not assaultive. He does not recall strikes delivered by other officers as his focus was on the suspect's right arm. After the second punch, he felt the suspect's arm relaxing and was able to pull it out.

[27] Detective Cst. Beau Spencer testified that he has been an officer with the VPD since 2011. He received training in the National Use of Force Model. He was previously partnered with Cst. Wong and as such knew him well. He knew him to be a capable officer and did not recall him ever asking for Code 3 cover before.

[28] After hearing Cst. Wong's broadcast he was very concerned for his safety and rushed to the scene. He identified himself as the officer in shorts running in to assist Cst. Wong. He assumed the suspect was actively resisting arrest and this was an urgent situation. As he ran towards Cst. Wong, he did not see whether handcuffs were out. He witnessed both officers, Cst. Wong and Cst. Blue, pulling at the suspect's arms and that his legs were tucked-up towards his body. He heard Cst. Wong or Cst. Blue

demanding that the suspect show his hands. He noticed subtle squirming movements from the suspect.

[29] Detective Cst. Spencer noticed that the suspect's legs were not under control so that became his focus, as the suspect could try to stand or kick out. He did not hear the suspect say anything. He delivered knee strikes and punches to the buttocks and hamstring area, and punches to the lower back area of the suspect. The purpose of these strikes was to create a window of opportunity for the other officers to gain control of the suspect's arms for the application of handcuffs. In his mind, the suspect was actively resisting arrest and as such hard strikes to the suspect to create an opportunity for control was within the scope of use of force training. Once the suspect was in handcuffs, he disengaged. When the arms of a suspect are not in control, there is a concern of access to weapons, which are often hidden in the wasteband of pants. He never struck the suspect's upper body.

[30] In cross-examination, Detective Cst. Spencer testified that as he approached Cst. Wong and Cst. Blue he saw a struggle with the suspect. He disagreed with the suggestion that it was apparent that Cst. Wong had exaggerated the description of the incident as a fight. He disagreed with the suggestion that the suspect was on his belly as he approached; the suspect was more in a fetal position, on his side with knees bent.

[31] It appeared to him that the suspect was actively resisting arrest by squirming. After viewing the video, Det. Cst. Spencer agreed that his first knee strike caused the suspect to lurch forward. His focus was on the suspect's legs and relied on the officers to do their jobs in gaining control of the suspect. He disagreed with the suggestion that he did not make his own assessment prior to repeatedly striking the suspect.

[32] He agreed with the suggestion after reviewing that video that within a period of six seconds between 10:10:38 and 10:10:44 he struck the suspect with three punches and three knee strikes. He agreed with the suggestion that none of these strikes appeared to be effective. He disagreed with the suggestion that there were no interim assessments between the six strikes within six seconds. He was unable to straighten the suspect's legs out which was his goal. He could not see where the suspect's arms

were while focused on the suspect's legs. While he was pulling on the suspect's legs the suspect was pulling back, which indicated active resistance.

[33] Sgt. (Retired) Brad Fawcett was qualified to give expert opinion evidence in the area of training and implementation of police use of force techniques. In his 31 years of service with the Vancouver Police Department he became a certified instructor in the use of force and physical training. His curriculum vitae, marked as Exhibit 15, outlines his extensive experience in use of force methods and training. Sgt. Fawcett opines that use of force that includes knee strikes and punches, put to him in a hypothetical that matches the facts herein and the video, are considered an intermediate level of force designed to distract a suspect and obtain compliance with commands. Furthermore, this level of force is consistent with training.

#### **Submission on behalf of the accused**

[34] Counsel on behalf of Cst. Blue submits that the actions of Cst. Blue were reasonable and proportional. Cst. Blue responded to an urgent call that included that the suspect was arrestable, fleeing, and fighting. He observed the suspect not being under control and struggling with Cst. Wong. He slid into the suspect with a knee, he gave commands to release his hand, he tried to pull out the arm or hand as evident on the video, and delivered one further knee strike aimed at a shoulder for the purpose of distraction and compliance. The use of force employed by Cst. Blue was consistent with training as confirmed by the expert Sgt. Fawcett. Counsel submits that in the circumstances the Crown has failed to prove beyond a reasonable doubt that the force used by Cst. Blue was not proportionate, necessary or objectively reasonable.

[35] Counsel for retired Cst. Jackson submits that Cst. Jackson's involvement in the arrest of the suspect was minimal. He struck the suspect twice with short punches intended as distraction strikes to create a window to secure the release of the suspect's right hand. Cst. Jackson responded to a broadcast for urgent assistance and that the suspect was fighting. When he arrived at the scene, three other officers were struggling to secure the suspect. He assessed the situation, he saw that the suspect's right arm was underneath him, and took a position adjacent to the suspect's right shoulder. He

considered that the lack of control of the suspect's right hand created a danger. He attempted to pull the arm out but was met with resistance. He delivered two punches to the suspect's right shoulder area over a couple of seconds to create a temporary motor dysfunction in an effort to gain control of the right arm and hand. The expert, Sgt. Fawcett, testified that Cst. Jackson's use of force in the circumstances was consistent with use of force training. Counsel submits that there is no evidence that Cst. Jackson applied force for any punitive or other inappropriate reason. There is no basis to reject his evidence. The Crown has failed to prove beyond a reasonable doubt that the use of force by Cst. Jackson was not necessary, proportional, or reasonable in all of the circumstances.

[36] Counsel for Cst. Spencer submits that Cst. Spencer responded to an urgent Code 3 call from Cst. Wong. This was very concerning to him, as he knew Cst. Wong to be a strong and capable officer. As he ran towards the scene, he observed that the suspect was not under control and actively resisting arrest. Over the course of the next 30 seconds, he delivered a number of knee strikes and punches to the suspect's left thigh and lower back for the sole purpose of assisting the other officers to gain control of the suspect.

[37] The suspect did not comply with the commands of Cst. Wong and Cst. Blue, and was actively resisting by not giving up his hands. Cst. Spencer testified that he never used his full strength in delivering the various strikes and did not aim for any lethal targets on the body, or for the chest or rib cage. The strikes delivered were not punitive or gratuitous; they were only for the purpose of securing the suspect. Once the suspect's right hand was secured, he did not deliver any further strikes. Counsel submits that the evidence falls far short of proving beyond a reasonable doubt that Cst. Spencer's use of force was unnecessary, unreasonable or disproportionate. Cst. Spencer did not run afoul of s.25 in the course of assisting in the arrest of the suspect.

### **Submission on behalf of the Crown**

[38] Counsel on behalf of the Crown submits that the force used by each accused was excessive, as plainly evident in the CCTV video of the incident. The suspect was

already subdued and being handcuffed by Cst. Wong when Cst. Blue slid into him with a knee strike that was likely to cause grievous bodily harm. Cst. Spencer then delivered indiscriminate and numerous punches and knee strikes to the suspect who is described as a frail person. The purported resistance did not justify Cst. Spencer's level of force that caused significant injury including broken ribs. Cst. Jackson's two punches occurred towards the end of the arrest and compounded the already excessive force already applied. The collective force applied to the suspect was an illegitimate use of power that injured a vulnerable arrestee.

[39] Counsel submits that the accused are entitled to rely on the radio call from Cst. Wong as reasonable grounds to continue the arrest. However, Cst. Wong made a misleading radio call that the suspect was fighting when in fact he was still for 20 seconds from the time he was taken to the ground. The situation appears under control with Cst. Wong in the process of handcuffing the suspect when Cst. Blue arrives. Collectively, the accused delivered seven knee strikes and eight punches to various areas of the suspect's body.

[40] In the course of the arrest, the suspect suffered several rib fractures and a collapsed left lung. Dr. Berringer opined that the knee strikes caused these injuries, although he could not say whether it was the knee strikes delivered by Cst. Blue or Cst. Spencer.

[41] Cst. Blue's claim that the suspect was moving and "actively resistant" when he approached and applied a knee strike defies belief. It is inconsistent with the suspect's lack of movement as evident on the video. The suspect is being compliant and handcuffed. Further, Cst. Blue's knee strikes were not consistent with use of force training and were unlawful.

[42] Cst. Jackson's two punches to the suspect were unnecessary, unreasonable and disproportionate. If Cst. Blue's second knee strike was effective as he claimed, and the suspect subdued, the two punches were unnecessary and excessive, and constitute an assault.

[43] Cst. Spencer's use of force, a continuous barrage of blows, was an order of magnitude greater than the other accused, was unnecessary, unreasonable, and disproportionate to the threat posed by the suspect. Cst. Spencer knew or ought to have known that the knee strikes he delivered could cause grievous bodily harm. All three accused should be found guilty of assault.

### **General Principles of Law**

[44] There are two principles fundamental to every criminal trial, the presumption of innocence and the requirement that the Crown prove its case beyond a reasonable doubt.

[45] The presumption of innocence remains with an accused throughout the trial. It is defeated only if, after considering all of the evidence, the court is satisfied beyond a reasonable doubt of the accused's guilt. The Crown's burden of proof beyond a reasonable doubt applies to each essential element of each offence.

[46] A reasonable doubt is not an imaginary, far-fetched or frivolous doubt or one based on sympathy for or prejudice against anyone. It is a doubt based on reason and common sense, and one that logically arises from the evidence or absence of evidence. Beyond a reasonable doubt is an exacting standard that is more than proof on a balance of probabilities but less than proof to an absolute certainty. As the Supreme Court explained in *R. v. Starr*, 2000 SCC 40 at para. 242, it lies along that measure "much closer to 'absolute certainty' than to 'a balance of probabilities'". Proof beyond a reasonable doubt is achieved if, after considering the totality of the evidence, the court is sure that the accused committed the offence charged or an included offence.

[47] There is no principle of law that requires a trier of fact to believe or disbelieve a witness' testimony in its entirety. On the contrary, a trier may believe none, part or all of a witness' evidence, and may attach different weight to different parts of a witness' evidence.

[48] Each accused testified and as such the following standard *W.(D.)* principles must be considered:

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

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

Third, if, after careful consideration of all the evidence, you are unable to decide whom to believe, you must acquit.

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

[49] The offence of assault is defined in s. 265 of the *Criminal Code* as follows:

**265(1)** A person commits an assault when

- (a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly;
- (b) he attempts or threatens, by an act or a gesture, to apply force to another person, if he has, or causes that other person to believe on reasonable grounds that he has, present ability to effect his purpose; or
- (c) while openly wearing or carrying a weapon or an imitation thereof, he accosts or impedes another person or begs.

[50] The authorized use of force defence is defined in s. 25(1) of the *Criminal Code* as follows:

**25(1)** Every one who is required or authorized by law to do anything in the administration or enforcement of the law

- (a) as a private person,
- (b) as a peace officer or public officer,
- (c) in aid of a peace officer or public officer, or
- (d) by virtue of his office,

is, if he acts on reasonable grounds, justified in doing what he is required or authorized to do and in using as much force as is necessary for that purpose.

[51] The leading case on the police use of force is *R. v. Nasogaluak*, 2010 SCC 6. The court held that the use of force that a police officer may use in executing their duties is constrained by the principles of proportionality, necessity and reasonableness. Further, that the protection of s. 25(1) will apply where officers “use no more force than is necessary having regard to their reasonably held assessment of the circumstances and dangers in which they find themselves.”

[52] At paragraph 32 and 34 the court held:

[32] The Crown emphasized the issue of excessive force in its submissions to this Court, arguing strenuously that the police officers had not abused their authority or inflicted unnecessary injuries on Mr. Nasogaluak. But police officers do not have an unlimited power to inflict harm on a person in the course of their duties. While, at times, the police may have to resort to force in order to complete an arrest or prevent an offender from escaping police custody, the allowable degree of force to be used remains constrained by the principles of proportionality, necessity and reasonableness. Courts must guard against the illegitimate use of power by the police against members of our society, given its grave consequences.

...

[34] Section 25(1) essentially provides that a police officer is justified in using force to effect a lawful arrest, provided that he or she acted on reasonable and probable grounds and used only as much force as was necessary in the circumstances. That is not the end of the matter. Section 25(3) also prohibits a police officer from using a greater degree of force, i.e. that which is intended or likely to cause death or grievous bodily harm, unless he or she believes that it is necessary to protect him- or herself, or another person under his or her protection, from death or grievous bodily harm. The officer’s belief must be objectively reasonable. This means that the use of force under s. 25(3) is to be judged on a subjective-objective basis (*Chartier v. Greaves*, [2001] O.J. No. 634 (QL) (S.C.J.), at para. 59). If force of that degree is used to prevent a suspect from fleeing to avoid a lawful arrest, then it is justified under s. 25(4), subject to the limitations described above and to the requirement that the flight could not reasonably have been prevented in a less violent manner.



[53] In *R. v. Lopez*, 2016 BCSC 1359 at para. 11, the court summarized the law set out in *Nasogalauk*:

I would summarize those paragraphs [of *Nasogalauk* set out above] as follows:

- a) the police do not have an unlimited power to inflict harm on a person in the course of their duties;
- b) police are limited to using the degree of force which is proportionate, necessary, and reasonable;
- c) there are special limitations on the use of force that is intended to cause death or grievous bodily harm or is likely to do so;
- d) the use of force is to be judged on a subjective/objective basis, having regard to the circumstances as they existed at the time the force was used; and
- e) police actions should not be judged against the standard of perfection and police should not be expected to measure the force used with exactitude, but instead police actions should be judged with recognition that the police engage in dangerous and demanding work and often have to react quickly to emergencies.

[54] Similarly in *R. v. Kempton*, 2022 BCPC 21, I held at paragraph 38:

[38] In considering this issue, I bear in mind the following principles: police actions are not to be judged against a standard of perfection; some allowance must be made for an officer facing a dynamic situation and misjudging the degree of force necessary to restrain a prisoner; there is no obligation on an officer to impose the least amount of force which might achieve their objective; it is often necessary for police officers to take control of a situation as quickly as possible to prevent an escalation; and finally, an officer cannot be held to a standard of conduct which one sitting in the calmness of a courtroom later might determine was the best course.

[55] In *R. v. Pompeo*, 2014 BCCA 317, the court provided guidance in assessing the reasonableness of a police officer's belief on a subjective-objective basis:

[40] In my view, it is misleading to speak of the doppelganger imagery as "the test in *Berntt*." The use of the concept of a "doppelganger" in *Berntt* was merely a manner of illustrating the nature of the subjective-objective test of reasonableness. *Berntt* does not establish a test separate from the subjective-objective one, nor does it suggest that the "doppelganger"

imagery must be adopted in order to correctly apply the law. That said, the doppelganger imagery, if used carefully, may be helpful in applying the subjective-objective approach.

...

[46] The judge in this case carefully considered Cst. Pompeo's training, experience, and circumstances. I do not read his reasons as failing to take into account either the detailed circumstances of the accused or ordinary human frailties. The judge carefully set out the nature of the inquiry. He noted that factors unique to Cst. Pompeo had to be considered, and recognized (citing *R. v. Asante-Mensah*, 2003 SCC 38, and several other cases) that "a certain amount of latitude is permitted to police officers who are under a duty to act and must often react in difficult and exigent circumstances" (*Asante-Mensah* at para. 73).

[47] The analysis of reasonableness on a subjective-objective basis includes both subjective and objective elements. It requires the court to place itself in the shoes of the police officer, and to take into account considerations unique to that individual. Once those considerations are taken into account, however, objective elements of the analysis are applied. While I do not suggest that the test to be applied is identical to the test for "reasonable suspicion" discussed in *R. v. MacKenzie*, 2013 SCC 50, there are significant similarities in the manner in which the individual characteristics of the police officer must be taken into consideration in applying an objective test. In that case, at paras. 63-64, Moldaver J., for the majority, said:

... [I]n assessing whether a case for reasonable suspicion has been made out, the analysis of objective reasonableness should be conducted through the lens of a reasonable person "standing in the shoes of the police officer" (*R. v. Tran*, 2007 BCCA 491, 247 B.C.A.C. 109, at para. 12; see also *R. v. Whyte*, 2011 ONCA 24, 272 O.A.C. 317, at para. 31).

That is not to say, however, that police training and experience must be accepted uncritically by the courts. As my colleague Karakatsanis J. notes in *Chehil* [*R. v. Chehil*, 2013 SCC 49], "hunches or intuition grounded in an officer's experience will [not] suffice", nor is deference necessarily owed to a police officer's view of the circumstances because of his or her training or experience in the field (para. 47). Reasonable suspicion, after all, is an objective standard that must stand up to independent scrutiny.

[56] Although expert evidence related to use of force training and policies could be helpful to the Court, it is not determinative of the reasonableness of the force used. As

the court in *R. v. Tranter*, 2022 ONCJ 51, held at paragraph 63, “police training should correspond to what the court considers objectively reasonable and not the other way around.”

[57] Similarly in *R. v. Deslauriers*, 2020 QCCA 484, the court held:

[122] The defences codified in ss. 25 and 34*Cr.C.* required that the trial judge consider whether the appellant had reasonable grounds to use his firearm and whether, in the context, the use of that potentially lethal force had been justified. In that regard, it was relevant, although not binding on the judge, to know what police officers are taught about the use of force and, more precisely, to hear the expert’s opinion on the accused’s conduct at every step of the intervention in light of such training.

[58] Regarding the use of video evidence, the leading authority is *R. v. Nikolovski*, 1996 CanLII 158 (SCC), at paragraphs 22 and 28 the court held:

[22] The video camera on the other hand is never subject to stress. Through tumultuous events it continues to record accurately and dispassionately all that comes before it. Although silent, it remains a constant, unbiased witness with instant and total recall of all that it observed. The trier of fact may review the evidence of this silent witness as often as desired. The tape may be stopped and studied at a critical juncture.

...

[28] Once it is established that a videotape has not been altered or changed, and that it depicts the scene of a crime, then it becomes admissible and relevant evidence. Not only is the tape (or photograph) real evidence in the sense that that term has been used in earlier cases, but it is to a certain extent, testimonial evidence as well. It can and should be used by a trier of fact in determining whether a crime has been committed and whether the accused before the court committed the crime. It may indeed be a silent, trustworthy, unemotional, unbiased and accurate witness who has complete and instant recall of events. It may provide such strong and convincing evidence that of itself it will demonstrate clearly either the innocence or guilt of the accused.

[59] In *R. v. Dobbs*, 2016 ONSC 4957, the court expressed caution of a frame-by-frame analysis when assessing an officer's behaviour. At paragraphs 45 to 49 the court held:

[45] In my view, the frame-by-frame analysis put forth by the Crown is not how Officer Dobbs' conduct should be examined. Rather, the entire circumstances must be reviewed in context. To engage in freeze-frame, second-by-second reconstruction is to engage in the reflective hindsight or the "Monday morning quarterbacking" of police conduct that the courts caution against: see *R. v. Cornell*, 2010 SCC 31, [2010] 2 S.C.R. 142, at para. 24.

[46] That said, let me be clear. There is no issue that the video depicting 10 or more hard blows in a row is shocking. The optics of the force used by Officer Dobbs are not good, and trigger a visceral reaction that the aggression was unnecessary.

[47] However, in establishing the contextual background to support its position that the use of force was excessive, the Crown cannot rely on the evidence of Mr. Costain. It is entirely unreliable and at times unbelievable. The Crown is left with the videos.

[48] The Crown points to the facts in *R. v. Rice*, 2015 ONCA 478, in support of its position that the force used was excessive. In *Rice*, during a police investigation into a disturbance at an apartment building, a surveillance video captured the police officer leaning over a suspect as he was lying on the stairwell floor. The video shows the respondent hitting the suspect in the face with an open palm and twice kicking him, once in the ribcage area and once in the back. The trial judge found that hitting the suspect in the face was not excessive force. However, he found that the two kicks to the suspect, evidenced on the video, were unnecessary, amounting to excessive force. He convicted the police officer of assault, a conviction that was upheld by the Ontario Court of Appeal. The trial judge referred to the video in that case as the "tie breaker". The Court of Appeal described it as a "very telling video".

[49] In contrast, the videos in this case provide only half the picture. The videos are inconclusive on what actions Mr. Costain was taking, and in particular, if he was tensing his arms in resistance and trying to place them as Officer Dobbs described.

[60] Similarly in *R. v. Jacobson*, 2015 BCPC 291, the court expressed caution in undertaking a frame-by-frame review of police behaviour. At paragraphs 137 to 144 the court held:

[137] A number of the witnesses were asked to comment on the video footage as it was advanced frame by frame. Life is not experienced in slow motion or freeze frame. I must remind myself that I had the luxury of watching the video frame by frame in the calmness of the courtroom. Constable Jacobson did not have this same luxury.

[138] The incident from the point in time that Mr. McCormick twisted free from the handcuff to the last punch took mere seconds. Although cameras do not lie, they only capture a single and limited perspective. A video cannot articulate the perspective of human experience. It lacked audio and to some extent image clarity. While very valuable in this case, the video was not without its limitations.

[139] Judges must guard against an over-reliance on hindsight. In *R. v. Cornell*, 2010 SCC 31 (CanLII), [2010] 2 SCR 142 the Court said at para. 24:

...[police] cannot be expected to measure in advance with nuanced precision the amount of force the situation will require: *R. v. Asante-Mensah*, 2003 SCC 38 (CanLII), [2003] 2 S.C.R. 3, at para. 73; *Crompton*, at para. 45. It is often said of security measures that, if something happens, the measures were inadequate but that if nothing happens, they were excessive. These sorts of after-the-fact assessments are unfair and inappropriate when applied to situations like this where the officers must exercise discretion and judgment in difficult and fluid circumstances. The role of the reviewing court in assessing the manner in which a search has been conducted is to appropriately balance the rights of suspects with the requirements of safe and effective law enforcement, not to become a Monday morning quarterback.

[140] It is the reasonable belief of the officer in light of all the circumstances that is important in the analysis. Detached reflection cannot be demanded in dangerous circumstances.

[141] I believed Constable Jacobson when he said that he thought Mr. McCormick still posed a risk while he was on the ground. Although the video is not consistent with Constable Jacobson's recollection of Mr. McCormick's hand still being close to or on his tool belt, an inconsistency like this is not surprising given the fact that only mere seconds passed from the tug he initially felt.

[142] Police are not obliged to wait and see what will happen. Doing so would invite injury. It is only common sense, especially in a busy bar that the sooner the potential dangerous situation is dealt with in a conclusive way the better. Although police have a duty to use no more force than is necessary, they must be satisfied that the active resistance has been overcome.

[143] Constable Jacobson's blows were calculated not to seriously injure Mr. McCormick. Instead of striking blows to his head, he struck blows to the side of his body. The force was reasonable in the circumstances. One cannot expect police to place themselves in dangerous situations in order to arrest an individual without, at the same time, acknowledging their authority to protect themselves and others when making an arrest.

[144] Furthermore, where an officer acts within a reasonable range of forcible response, s/he is entitled to the protection of section 25 even if they fail to use the least amount of force that would achieve the desired result. Police are entitled to be wrong but they must be reasonable - they need not demonstrate the correct decision was made but a reasonable one.

### **Analysis**

[61] As set out above, each accused testified in their defence. I find that each accused gave credible and reliable testimony. Their evidence was internally consistent, consistent with each other, and, importantly, consistent with what is objectively discernible from the CCTV video.

[62] I accept the evidence of each accused that they used force consistent with their training to assist Cst. Wong in arresting the suspect. To effect the arrest, full control of the suspect was required and that included securing both his hands into a set of handcuffs as quickly as possible. I accept their evidence that they did not intend to cause any serious bodily harm to the suspect but struck him only to cause distraction or pain compliance in an effort to create a window of opportunity to obtain control of the suspect's right arm and hand that was lodged beneath the right side of his body.

[63] The involvement of the accused starts with a Code 3, officer in distress, broadcast from Cst. Wong. Although Cst. Wong did not give evidence on this trial, the video discloses a dynamic situation in which a suspect is actively resisting arrest by fleeing on a bicycle and exhibiting assaultive behaviour by discarding the bicycle in the

path of the pursuing officer. I infer from this behaviour that the suspect had a mind-set of avoiding arrest at all costs, including injuring an officer in the execution of his duties if necessary, and thereby posed a significant danger to officer and public safety. In this context, Cst. Wong made a broadcast advising that urgent assistance was needed, as the suspect was not in handcuffs and fighting. I reject the submission of counsel for the Crown that Cst. Wong made a misleading radio call. It is plainly evident, from hearing the broadcast of an out of breath Cst. Wong and watching the video that Cst. Wong was struggling with the suspect at the time he made the broadcast.

[64] Although at 10:10:12 p.m. Cst. Wong was able to straighten the suspect to be mostly flat on his stomach with arms and hands at his side, he was not in a position to apply handcuffs. Shortly after, Cst. Wong delivered a punch to the left side of the suspect, pushed himself up pressing down against the suspect's back, and repositioned himself to the right of the suspect. The punch to the torso caused the suspect to change his position on the ground. The suspect turned or rolled onto his right side, and placed his left arm behind his back, perhaps so he could be placed in handcuffs. Unfortunately, whether intentional or not, I infer from the ensuing struggle with Cst. Wong and the suspect, this rollover caused the suspect's right arm and hand to become lodged beneath his body.

[65] Although the video is from a distance and has limitations, it appears that Cst. Wong who is straddled against the suspect's right side, retrieves his handcuffs with his right hand and places a cuff on the suspect's left wrist, which was readily accessible. Next, with his left hand, Cst. Wong appears to pull at an area beneath the suspect, which I infer is an effort to retrieve the suspect's right hand. It is at that exact second that Cst. Blue commences his slide into the suspect. I accept the evidence of Cst. Blue, and it is consistent with what can be discerned from the video, that as he approached the scene he saw what appeared to him to be a struggle between Cst. Wong and the suspect, with the suspect actively resisting arrest. Cst. Spencer and Cst. Jackson arrived seconds later and I accept their evidence that they made the same assessment that the suspect was actively resisting arrest. This was an objectively reasonable

assessment considering the suspect's apparent resistance and Cst. Wong's broadcast from less than a minute earlier.

[66] The apparent active resistance of the suspect continued with the suspect failing to comply with commands to produce both his hands. It cannot be determined from the video whether the suspect's failure to produce his right arm and hand was intentional or not; however, the accused each testified to feeling active resistance to their efforts. In these circumstances, an intermediate level of force was reasonable and necessary to gain full control of the suspect as soon as possible due to the potential danger he posed to the arresting officers and the public.

[67] I accept the evidence of each officer and that of the expert Sgt. Fawcett that it is crucial for officers to gain control of a suspect's hands as quickly as possible, as hands are the mechanism to access weapons. I also accept their evidence that suspects often conceal weapons including knives and firearms in the waistband of their pants. I reject the submission of the Crown that the accused's concern over the concealment of weapons is somehow the product of an overly negative or jaded view of human behaviour, and is not objectively reasonable. I accept that the suspect's hidden right hand was an objectively significant concern in the context of a fleeing and fighting suspect, and it was not unreasonable for the accused to be concerned that the suspect could access a weapon with his right hand. This was not a casual or friendly interaction with a law abiding member of the public.

[68] Based on the evidence of the accused and that of Sgt. Fawcett, I am satisfied that the knees and punches delivered by each accused are best characterized as distraction or compliance strikes intended to achieve a lawful purpose. Unfortunately, in the course of the arrest the suspect did suffer multiple left lateral rib fractures and a collapsed lung; however, on the totality of the evidence before the court I find that none of the accused can be held criminally liable for that result.

[69] It is certainly possible that a lesser amount of individual or collective force could have achieved the desired result of securing the suspect in handcuffs; however, that is not the applicable legal standard.



[70] Police officers who find themselves before the court charged with a criminal offence stemming from an incident that occurred in the execution of their duties, are entitled to the same presumption of innocence available to all accused. The burden on the Crown remains the same; that is, to prove the offence charged to the standard of proof beyond a reasonable doubt. Where a s.25 defence is raised, as in the case here, the Crown must negative the defence to the standard of proof beyond a reasonable doubt. For the reasons outlined above, I find that the Crown has failed to meet this onus in this case.

[71] In summary, I find that the Crown has failed to prove beyond a reasonable doubt that the use of force by each officer individually or collectively was unreasonable, disproportionate, or unnecessary, to the threat level posed by the suspect.

[72] Accordingly, each accused is found not guilty of the offence of assault and entitled to an acquittal. The charges are dismissed.

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The Honourable Judge J. Solomon  
Provincial Court of British Columbia