

In the Alberta Court of Justice

Citation: R v Jaffrey, 2023 ABCJ 241

Date: 20231121
Docket: 220011860P1
Registry: Calgary

Between:

His Majesty the King

- and -

Scott Timothy Jaffrey

Decision of the Honourable Justice L.W. Robertson

Introduction

[1] On July 21, 2021 significant injuries were inflicted on Lucy, a six-year-old cat. Scott Timothy Jaffrey (the accused), was charged with causing those injuries, contrary to s 445(1)(a) of the *Criminal Code* RSC 1985 c C-46 – (the *Code*). There is no direct evidence establishing who or what caused the injuries suffered by Lucy. The case against Mr. Jaffrey is based on a combination of circumstantial evidence, primarily the opportunity to commit the offence, and expert evidence in the disciplines of veterinary medicine and forensic veterinary medicine. The accused has denied committing the offence. The primary issue before the court is whether the Crown has proven that the accused committed the offence beyond a reasonable doubt.

Evidence

[2] The court heard *viva voce* testimony from five witnesses. Kirsten Somerset is Lucy's owner and primary caregiver. Ms. Somerset met the accused through online dating in November 2020. She moved in with the accused in May 2021, about two months prior to these events. The court also heard from Magdalene Wojcick, Ms. Somerset's friend. The Crown introduced the evidence of two expert witnesses, Dr. Kathryn Shandruck and Dr. Margarete Doyle. Dr. Shandruck was qualified as an expert in the field of Veterinary Medicine. Dr. Doyle was qualified in that field as well and also in the discipline of Forensic Veterinary Medicine. The accused testified and denied causing any harm to Lucy.

[3] Additional evidence was placed before the court. These include a comprehensive Agreed Statement of Facts (ASF), photographic evidence, X-ray photographs and a series of short videos. The videos were taken from a motion activated video camera installed at the front door of the townhouse condo residence shared by the accused and Ms. Somerset. There is no direct evidence establishing who or what caused the injuries suffered by Lucy.

1. Kirsten Somerset

[4] Ms. Somerset and the accused jointly moved into a townhouse property in the *Eau Claire* district of Southwest Calgary on May 3, 2021. Ms. Somerset brought Lucy, an approximately 5 lb. cat, into the home when she arrived. The accused also had two Weimaraner dogs which were much larger than Lucy at 80 and 100 lbs. respectively. The dogs and Lucy were not necessarily compatible. Special arrangements were observed to ensure Lucy's safety. A "safe zone" for Lucy was created in the master bedroom. This room was secured by a gate. The dogs were accommodated in a spare bedroom. At least one other gate was placed at the entrance to a stairway. Ms. Somerset and the accused agreed that they would only allow Lucy to roam free, in the company of the dogs, when someone was present to supervise the animals. If this was not possible, procedures were put in place to separate the dogs from Lucy.

[5] Lucy was injured twice. The first incident occurred in early July. On the morning of July 2, 2021 Ms. Somerset saw a puncture wound on Lucy's tail. She also observed dried blood. Ms. Somerset took Lucy to the VCA Western Veterinarian Clinic on 10th Ave. SW for emergency treatment (VCA).

[6] Ms. Somerset was advised that the injury was likely caused by a canine tooth. A partial tail amputation was performed and the wound was treated with sutures. Lucy was released from the clinic on July 3, 2021.

[7] Miss Somerset informed the accused that the dogs had caused the injury to Lucy. He agreed to pay the veterinary bills as a result. Lucy's sutures were later removed by her regular veterinarian on July 20, 2021.

[8] The second time Lucy was injured was July 21, 2021. On that day Ms. Somerset left their shared residence to hike with her friend, Ms. Wojcick, in Canmore. Ms. Somerset returned home near lunchtime as she believed the accused would be working, requiring her to attend to the dogs. While en route back to the residence she received a message that the accused had not left for work. The accused told her that he had had some cheques stolen and needed to attend his bank to cancel his account.

[9] Ms. Somerset and Ms. Wojcick arrived at the residence near 12:00 PM. They reported finding the doors locked and the dogs properly crated. The accused was not at home. Ms. Somerset and Ms. Wojcick examined Lucy and picked her up. Everything seemed fine. The accused returned shortly afterwards and the dogs were let out of their crates. Ms. Somerset said she informed the accused that she and Ms. Wojcick would go paddleboarding in Kananaskis and would return in the late afternoon. Ms. Somerset testified that the accused agreed to monitor the dogs as required and that she did not need to secure Lucy before leaving. Ms. Somerset said that Lucy was in good health when they departed.

[10] Ms. Somerset returned later that afternoon to find Lucy in distress. She said Lucy's face was covered in blood, as was her tail. The right side of Lucy was described as soaking wet. Ms.

Somerset testified that she also noticed clusters of fur near where Lucy was found. The accused was not home. Ms. Somerset said that she took Lucy back to the VCA clinic for another emergency examination. Lucy was treated by Dr. Shandruck. Ultimately it was discovered that Lucy had suffered another injury to her tail, requiring further sutures. Lucy had also experienced trauma to her head, the source of the facial bleeding, and fractures of three ribs on her right side.

[11] Ms. Somerset was informed that Lucy's condition required that the incident be reported to the Calgary Humane Society. She informed VCA staff that she suspected the accused had caused the injuries. Ms. Somerset testified that she left the residence she shared with the accused shortly afterwards and did not return to live with him again.

[12] Ms. Somerset confirmed that she knew of four keys to the residence. One belonged to her and one belonged to the accused. Two spare keys were distributed to Emma Jaffrey, daughter of the accused, and Ms. Wojcick. I accept that neither Emma Jaffrey nor Ms. Wojcick caused any harm to Lucy.

[13] Ms. Somerset testified that there was no sign of their shared condo having been broken into or damaged. When the matter was investigated by the Calgary Police Service Ms. Somerset provided several video recordings captured by a camera installed at their front door. This "Arlo" camera was a motion-sensitive device capable of recording images and sound. It captured all entry and exit activity on the day of the alleged offence. However, not all of the recordings from the period July 21-22, 2021 were preserved. In total, 58 of 155 videos were sent to the investigators. Ms. Somerset testified that CPS investigators did not initially ask for the videos and this resulted in some videos being inadvertently deleted or overwritten instead of being preserved. Ms. Somerset acknowledged that only she had access to the videos and the online account and software Application (App), that stored them. Eleven of the videos that were captured were placed before the court in Exhibit 5. A further ten videos were entered as Exhibit 8.

[14] Ms. Somerset also described a bizarre encounter with a man outside the residence sometime in July before Lucy's second injury. This incident may have prompted the installation of the Arlo camera. It may also be related to the loss of Mr. Jaffrey's cheques. Ms. Somerset recalled a stranger walking through their neighborhood who yelled at her as she worked at her desk inside the residence. The man claimed to have a key fob belonging to the accused's truck. Ms. Somerset went outside the residence's front door to briefly engage the man in conversation. She observed a key fob in the man's hand. In fact he seemed to have several such keys. Ms. Somerset asked for the key but the man walked away. Ms. Somerset also reported having a bicycle stolen. It appears to have been out of concern for general security that she asked the accused to install the camera (transcript, April 3, 2023 at pp 22, 59-60).

[15] Ms. Somerset confirmed that the accused's employment often took him outside the city for extended periods. When this occurred it was her responsibility to look after all the animals in the home.

2. Magdalena Wojcick

[16] Ms. Wojcick is a long-time friend of Ms. Somerset. She agreed she went hiking and paddleboarding with her on July 21, 2021. Ms. Wojcick used her smartphone to take photographs of their time together that day which were entered as Exhibit 4. There are time stamps on the photos.

[17] Ms. Wojcick agreed that the morning was occupied by a hike in the Canmore area. Following the hike they returned to the residence Ms. Somerset shared with the accused. Ms. Wojcick said the afternoon paddleboarding occurred in the area to the West of Bragg Creek.

[18] Ms. Wojcick approximated that they had arrived at Ms. Somerset's residence between 11:30 - 12:00 PM. She recalled greeting Lucy at this time. She picked Lucy up and noticed nothing unusual about her appearance or condition.

[19] The accused was not at home when she and Ms. Somerset first arrived but showed up before they left for paddleboarding. She recalled the accused agreeing to look after Lucy and the dogs that afternoon.

[20] Ms. Wojcick said Ms. Somerset dropped her off at her residence in Northeast Calgary following the paddleboarding session. She recalled receiving a phone call from Ms. Somerset later that day. Ms. Wojcick also recalled helping Ms. Somerset find a new residence after Ms. Somerset decided to move out of her shared residence with the accused.

[21] The timestamps on Ms. Wojcick's photos revealed that she and Ms. Somerset were still on the pond, at least as late as 4:32 PM on July 21, 2021. Ms. Wojcick did not observe any injuries to Lucy on that day.

3. The Accused

[22] The accused denied the offence. He is a 48-year-old man who emigrated to Canada from Great Britain in 1995. He is a logistics supervisor for an old field company. He has been separated from his spouse since 2020 and has three adult daughters. The accused owned two Weimaraner dogs, a female who has since died, was 80 lbs, and a male 104 lbs.

[23] The accused met Ms. Somerset and moved with her to their shared condo residence in May of 2021. The accused said that his employment often took him into the "the field." He said that he worked more than three hundred days per year and would often be away from home for several days at a time. The location of his duties took him to such places as Red Deer and Grand Prairie.

[24] The accused said he was not at the residence on July 1-2, 2021 as he was working. He remembered receiving a call from Ms. Somerset that Lucy had been injured. He understood from this telephone call that one of the dogs had been responsible. He said he returned home for the sole purpose of paying the veterinary bill for Lucy's treatment.

[25] The accused agreed that procedures had been adopted by himself and Ms. Somerset to protect Lucy from the dogs. This included separating the two species by crating the dogs and the use of gates. He agreed that the basic rule was that if Lucy was out of her sanctuary the dogs would be supervised or crated. He also acknowledged that he was seldom home to ensure the procedures were followed.

[26] The accused acknowledged installing the Arlo door-camera at Ms. Somerset's request. He agreed that there had been some neighborhood incidents which also convinced him this was necessary. Included in this was the incident regarding the stranger who claimed to have a vehicle key fob belonging to him. Although he installed the camera he had no knowledge of how the videos could be stored or accessed. He did not install the camera software on his personal phone

or computer. He was aware, however, that the time-stamp on the camera was either missing or incorrect. He took no steps to address this.

[27] The accused described July 21, 2021 as an unusual day for him. He had originally planned to be at work but his schedule had been interrupted by the theft of his chequebook. He maintained the cheques were either in his truck or the residence. On July 20 he discovered that there had been fraudulent activity on his bank account. Someone had cashed a fifty-dollar sum using one of the stolen cheques. The accused said he cancelled his work commitments to attend his bank, close the previous account, and open a different account. He devoted the morning of July 21 to this task.

[28] The accused testified that he woke only after Ms. Somerset and Ms. Wojcick had left. He assumed Lucy was in the bedroom because he heard her feeding. He did not recall seeing Lucy for the remainder of the day.

[29] The accused testified he first walked the dogs before attending twice at his bank. He said he met with the bank's fraud department and was able to have the missing funds returned to his account. A new account was opened. He estimated he returned to the residence around lunchtime after completing these tasks. He said he fed and walked the dogs a second time.

[30] The accused testified that he was not at the residence in the afternoon of July 21. He said he spent the afternoon kayaking on the Bow River. He parked his truck at the Baker Park day-use facility and paddled down-river to their residence. He estimated this involved a twenty-to-thirty-minute drive followed by a 1.5 – 2 hour paddle. After transporting his kayak back to the residence he took a long bicycle ride back to Baker Park to retrieve his truck. The accused testified that he received a call from Ms. Somerset while collecting his truck. It was then that she informed him that Lucy had been taken to emergency veterinary care.

[31] Mr. Jaffrey denied seeing Lucy that day or causing any harm to her.

[32] Some of the videos captured on the Arlo door camera were played for the accused. He and Ms. Somerset are featured in many of them. He did not deny the accuracy of the videos. However, he said he had no memory of the events depicted on the videos.

[33] The accused agreed he would have locked the residence while he was away from it, including while walking the dogs, while at the bank or while on the paddling trip. He did not notice any sign of a break-in when he returned to the residence on any occasion. He agreed that at some point during that day he would have been alone in the residence with all the animals, including Lucy. While his cheques had gone missing, and had interrupted his previously planned activities, the matter was quickly resolved. He said he was not under any unusual stress because of the stolen cheques and the bank reimbursed the funds immediately.

[34] The accused agreed that Ms. Somerset appeared annoyed at him because she had returned early from her hiking activities when, since he was home, that ultimately proved unnecessary. The accused also acknowledged that his relationship with Ms. Somerset had become strained, almost from the moment they moved in together.

4. The Arlo Door Camera Video Evidence

[35] As previously mentioned, some video activity was presented in evidence. The videos came from the Arlo door camera installed by the accused. Some of the videos were provided to the investigators. However, many of the originally captured videos from the relevant times were missing. These were evidently subject to the practice of routine deletion unless the videos were identified for preservation through the camera's software application. Ms. Somerset conceded that only she had access to the camera's account and software.

[36] The videos were marked as Exhibits 5 and 8. Exhibit 5 contains eleven videos. These show Ms. Somerset, Ms. Wojcick and the accused at various points in the day. The videos are complete with sound. Conversations occurring near the doorway are clearly audible.

[37] Ms. Somerset can be seen leaving and returning from her Canmore hike. She can also be seen leaving again for the paddling trip west of Bragg Creek and returning. One video demonstrates the accused returning home from a bicycle journey and entering the front gate. Ms. Somerset was home alone in the dwelling prior to his arrival. The audio portion of the recording reveals that Lucy had already been taken to the VCA clinic by Ms. Somerset by the time the accused returned.

[38] Exhibit 8 contains ten videos and is focused on the activities of the accused, particularly surrounding his river kayaking journey. He is shown packing and preparing for the initial drive to Baker Park and departing. He is also shown returning with only the kayak and its equipment. He is later shown leaving with his bicycle for the return journey to pick up his truck.

[39] The viewpoint of the Arlo camera is fixed. The camera only captures activities outside the front door to the shared residence. The front gated enclosure, the adjacent sidewalk and the street are in the background of the image view. There are no times or dates enveloped into the images. The only way to detect the approximate time of day is through the angle of the sun revealed by its interaction with the background street view.

[40] The camera reveals nothing of how Lucy came to be injured.

5. Expert Evidence

[41] The Crown led evidence of two expert witnesses. Dr. Kathryn Shandruck was qualified in the field of Veterinary Medicine. Dr. Margarete Doyle was qualified in the fields of Veterinary Medicine and Forensic Veterinary Medicine. The purpose of their evidence was to identify and characterize the injuries suffered by Lucy on July 21, 2021. Dr. Doyle additionally testified about the causes of the injuries while excluding the innocent explanations of accident, self infliction or attack by another animal, particularly dogs. The conclusion arrived at through their combined evidence strongly suggested that Lucy's injuries were caused by non-accidental blunt force trauma inflicted by at least three separate assaults. The assaults were directed at Lucy's head, her forelimbs or ribs and her abdomen.

a) Dr. Kathryn Shandruck

[42] Dr. Shandruck was the attending veterinarian for VCA when Lucy was admitted on an emergency basis on July 21, 2021. Although Lucy's vital signs were normal she was bleeding from

her tail and both of her nasal cavities. She presented with “hyperemic,” a term meaning a reddened line extending along the roof of her mouth. This was not a normal finding. The tail wound, which had previously been repaired, was “dehiscenced,” or split apart and actively bleeding. Dr. Shandruck re-sutured the tail injury to resolve that issue.

[43] Importantly, Dr. Shandruck noticed no puncture wounds, a finding later repeated and interpreted by Dr. Doyle.

[44] Dr. Shandruck ordered blood samples from Lucy. The samples were withdrawn by technicians within VCA facilities. The results were made available to Dr. Shandruck within twenty minutes (transcript, April 4, 2023 at p 22). The results revealed an elevation of a significant liver enzyme known as “ALT.” There are various causes for an elevated ALT score. Dr. Shandruck testified that these are limited to:

1. liver disease;
2. liver injury; and
3. skeletal muscular damage.

[45] Dr. Shandruck testified that ALT elevation was a significant finding which pointed to an acute (sudden), and severe cause rather than a chronic disease process. ALT has a very short half-life, or rate of decay, within feline physiology (transcript, April 4, 2023 at p 30). Follow up blood samples were also obtained in the hours and days after the first samples to monitor changing ALT levels.

[46] Dr. Shandruck’s examination revealed no abdominal or liver abnormalities which would account for the elevated ALT measurement. She also testified that Lucy's face and mouth appeared painful to the touch during the examination. Pain medication was given to Lucy because of this.

[47] Dr. Shandruck said that a CT scan of Lucy's dorsal palate was conducted the following day by radiologist Dr. Amoyave.

[48] Doctor Shandruck's testimony was primarily based on her personal observations of Lucy during the physical examination. The findings arrived at were personally noted by her on Lucy's chart. She also relied on the health records routinely created at the clinic during the term of Lucy’s stay at VCA.

[49] Dr. Shandruck informed Ms. Somerset that she was required to report Lucy’s new injuries to the Calgary Humane Society. This ultimately led Dr. Doyle to investigate the case.

[50] It is important to note that the continuity of Lucy's stay at VCA, until her transfer to Dr. Doyle's facility on July 24, 2021, was proven through paragraph 2 of the ASF. Additionally, radiographs of Lucy's abdomen, later relied on by Dr. Doyle, were also admitted under paragraph 6 of the ASF.

[51] By agreement of counsel and the court, Dr. Shandruck’s *viva voce* evidence was observed by Dr. Doyle and used as part of the basis for the latter's opinion.

b) Dr. Margarete Doyle

[52] Dr. Doyle's evidence was advanced through a blended *voir dire* procedure. I admitted her opinion evidence under the disciplines of Veterinary Medicine and Forensic Veterinary Medicine. Dr. Doyle's ultimate conclusions about Lucy's condition can be summarized as follows:

- i. Lucy suffered multiple injuries.
- ii. The onset of the injuries was sudden, severe and acute. They were not the product of natural disease or chronic natural illness.
- iii. Accidental causes or self infliction were ruled out as possible causes.
- iv. The injuries were not inflicted by other animals, particularly dogs.
- v. The injuries were caused by three intentional applications of blunt force trauma. The force was directed at Lucy's head, her ribs, and her abdomen.
- vi. Sustaining the injuries would have been painful for Lucy.

[53] Dr. Doyle primarily based her opinion on her own physical examination of Lucy. She performed this in isolation from Dr. Shandruck. This was done in an effort to remain objective. Dr. Doyle did rely on medical records, particularly analyzed blood samples from VCA, as well as those created at her own clinic. She also relied on the radiograph images I have referred to. Dr. Doyle also considered the observed testimony of Dr. Shandruck when presenting her own opinion to the court.

[54] Dr. Doyle began by excluding the tail injury to Lucy, both sustained on July 2, and on July 21, 2021, from her opined evidence. She conceded that dog activity could not be ruled out as the cause for the previous July 2, 2021 tail injury. However, she saw no evidence of dog attack on the July 21, 2021 injuries.

[55] Dr. Doyle agreed with Dr. Shandruck that the elevated ALT findings were significant. Clinical readings found ALT levels to be so high that it surpassed the upper measurable limit possible on their equipment. This was derived from the VCA records. She opined that high ALT demonstrates damage to the liver or muscles within the feline body. It is common for animals suffering trauma to the abdomen to present in this way. Dr. Doyle ruled out liver disease as a possible cause for the ALT elevation when subsequent readings showed a rapid lowering of the enzyme levels, even less than 24 hours after the initial readings. Dr. Doyle testified that a rapid decline in ALT is not the pattern of ALT presentation when ALT elevation is caused by underlying chronic disease (transcript, April 4, 2023 at pp 57).

[56] Dr. Doyle agreed with Dr. Shandruck that ALT enzymes decay rapidly within feline physiology. Dr. Doyle concluded that the trauma causing the ALT enzyme elevation could not have occurred more than 24 hours prior to Lucy's July 21, 2021 presentation to the VCA facility (transcript, April 4, 2023 at 68).

[57] Dr. Doyle found the rib fractures to be a significant finding. Dr. Doyle observed that the location of those ribs within the feline body serves to protect those bones through the significant muscle tissue of the forelimbs. The rib breakage showed no sign of healing and was indicative of recent injury (transcript, April 4, 2023 at p 67). The rib injuries would have caused pain to Lucy while breathing or when using the forelimbs.

[58] Dr. Doyle noted that the bleeding from the nasal cavities, observed by Dr. Shandruck had resolved. This was also the case with the hyperemic line inside the roof of the mouth. She did notice bruising on Lucy's lower right eyelid. Dr. Doyle testified that the resolution of the nasal bleeding and the inner mouth reddening was indicative of an acute rather than chronic cause (transcript, April 4, 2023 at p 67). This conclusion was enhanced by, but not dependent on, the CT scan by VCA radiologist Dr. Amoyave. Dr. Doyle conceded that she only read the notes of the doctor performing the scan, not the images contained in the scan itself. Dr. Doyle said the findings in the scan revealed no underlying disease process in the skull. The VCA blood records also demonstrated no clotting deficiency as the source of the bleeding. Dr. Doyle observed that the fact that the nosebleed stopped on its own also ruled out a clotting issue (transcript April 4, 2023 at pp 69-71). Dr. Doyle concluded that blunt force trauma was responsible for the head injury. That trauma caused the nasal bleeding and the eye injury.

[59] Dr. Doyle specifically ruled out dog activity as the cause of Lucy's July 21, 2021 injuries. Dr. Doyle testified that she has identified and treated dog related injuries in over one hundred cases. She is very familiar with how dog attack injuries are created and present forensically. Lucy's injuries bore no resemblance to typical dog mauling activity. Dr. Doyle testified that while dogs are capable of inflicting blunt force trauma it is always accompanied by the sharp force injuries inflicted by canine incisor teeth. None of accepted telltale signs of canine trauma were detected on Lucy. These would have included puncture wounds, lacerations or significant tissue trauma and would have been readily apparent (transcript, April 4, 2023 at pp 72-73).

[60] Additionally, Dr. Doyle ruled out that the injuries could have been the result of an accident or another innocent cause.

[61] Dr. Doyle's professional opinion was that Lucy's injuries were caused by three separate blows inflicting blunt force trauma. The blows were received in the head, the ribs and the abdomen. Blows inflicted by a person, using their fists, feet, or another blunt object would have been consistent with the cause of the injuries. The injuries sustained by Lucy would have been painful to experience (transcript, April 4, 2023 at p 75).

Issues

1. Whether physical abuse by a human was responsible for the injuries suffered by Lucy. The Crown relied on expert opinion evidence to establish that Lucy's injuries were the result of intentional blunt force trauma. The experts partly relied on background medical tests such as blood work and CT image scans, which they did not personally perform, to found their opinions. Could this evidence be characterized as inadmissible hearsay requiring a reduction in weight of the opinion evidence?
2. Whether the accused can be proven to have committed the actus reus of the offence by application of the concept of exclusive opportunity.

Position of the Parties

1. Position of the Crown

[62] The Crown argued that the deliberate nature of Lucy's injuries has been established. The Crown relies on the opined evidence of two Veterinary Medicine specialists supported by their personal examinations of Lucy and their interpretation of additional medical tests. These particularly included blood tests, radiographic imaging and CT imaging scans. The Crown argues that all accidental or innocent explanations for Lucy's condition have been eliminated leaving physical abuse as the only possible cause for her condition.

[63] The Crown argues that only the accused was in a position to commit the offence. The Crown submits that the accused has proven his exclusive opportunity to commit the offence through the combined effect of the viva voce testimony of Ms. Somerset, Ms. Wojcick and the accused himself. The Crown also relies on the objective evidence of the photographs and videos entered into evidence.

2. Position of the Accused

[64] The accused urges the court to place no weight on the expert evidence as it is predicated entirely on background medical procedures which must be characterized as inadmissible hearsay. The accused particularly points to the blood tests showing variations in the ALT enzyme, and the CT imaging scan as inadmissible hearsay. The accused maintains the expert Veterinary Medicine specialists did not personally complete those procedures but relied entirely on the work of others, whose evidence were not introduced into the proceedings. The accused urges the court to place no weight on the expert opinion evidence or to reduce its weight substantially for these reasons.

[65] In the alternative the accused maintains that exclusive opportunity has not been proven by the Crown. He argues that the stringent requirements for proof through circumstantial evidence, outlined in *R v Villaroman*, (2016 SCC 33), have not been established. The accused argued there were several other possibilities for how Lucy was injured, including mauling by one or both of the dogs which shared the residence. Even if the court finds that Lucy's injuries were caused by a human abuser, the accused argued that other persons, including Ms. Somerset, or perhaps an unknown assailant had opportunity to commit the *actus reus*.

Legal Framework

1. General Principles

[66] There are some very basic principles of Canadian Criminal Law which apply to this and every trial. First, pursuant to s 11(d) of the *Canadian Charter of Rights and Freedoms*, the accused is presumed to be innocent. The Crown has the burden of proving the guilt of the accused beyond a reasonable doubt. To achieve this, the Crown must prove each and every element of the offence beyond a reasonable doubt. This burden never shifts. It remains constantly with the Crown. There is no obligation on the accused to prove his innocence or even to testify in his own defence.

[67] What is meant by the phrase "proof beyond a reasonable doubt?" This question has received much attention. However, the views expressed by the Supreme Court of Canada in *R v*

Lifchus still prevail. I take those principles, carefully set out by our Supreme Court, to be as follows:

- i. The concepts of proof beyond a reasonable doubt and the presumption of innocence are inextricably intertwined. They are fundamental to our system of justice. A fair trial cannot exist without them.
- ii. “Reasonable doubt” cannot be based on sympathy or prejudice. Rather, the concept is grounded upon reason and common sense. It is logically connected to the evidence, or absence of evidence, in a particular case.
- iii. It is not necessary to satisfy this standard by proving the guilt of the accused to an absolute certainty, or to prove the guilt of the accused beyond any doubt whatsoever. Such a standard of proof is impossibly high. Further, a reasonable doubt is not one which is imaginary or frivolous in nature.
- iv. Finally, it is insufficient to prove that an accused is “probably guilty” or “likely guilty”. If I find that the accused is only “probably guilty” then I must conclude that the requirement for proof beyond a reasonable doubt has not been achieved. An acquittal must be the inevitable result in such situations. *R v Lifchus*, [1997] 3 SCR 320

2. Credibility and Reliability

[68] Several witnesses have testified in this matter. Their personal recollections and observations are before the court. Credibility and reliability are key factors for the consideration of that evidence.

[69] Credibility and reliability are separate and distinct concepts. Both affect the concept of reasonable doubt. Credibility refers to a witness’s veracity. Reliability refers to a witness’s accuracy. Reliability and accuracy depend on a witness’s ability to observe, recall and recount the events properly. A credible witness may nevertheless be inaccurate, or unreliable. The honest but mistaken witness is a particularly worrisome example and very difficult for triers of fact to deal with. A witness must be both credible and reliable to be believed.

[70] There is an established procedure for assessing credibility and reliability in the context of a trial. This procedure was first outlined by the Supreme Court of Canada in *R v W(D)*, [1991] 1 SCR 742. Several subsequent cases (such as *R v Ay*, (1994) 93 CCC (3d) 456 (BCCA), and *R v CWH*, 1991 CanLII 3956 (BCCA)), have served to further explain and refine the procedure.

[71] This process must first start with an assessment of the credibility and reliability of the Accused’s evidence. However, the court should not engage in a formulaic approach.

[72] I am also informed on this principle by the recent decision of the Alberta Court of Appeal in *R v Ryon*, 2019 ABCA 36. I will now set out this procedure, paraphrased, as follows:

- (i) If the evidence of the accused is believed, the accused must be acquitted.
- (ii) Even if the evidence of the accused is not believed, if it raises a reasonable doubt, the crown has not met its burden and the accused must be acquitted.
- (iii) If the court is uncertain of whether to believe the evidence of the accused, or the competing evidence, the accused must be acquitted.

- (iv) Finally, even if the evidence of the accused is rejected, or even if it fails to raise a reasonable doubt, the court must still ask itself whether, on the basis of the evidence which it does accept, the crown has proven each and every element of the offence beyond a reasonable doubt. If it has, the accused must be convicted. If it has not, the accused must be acquitted.

[73] Finally, a trier of fact may selectively consider evidence from each witness. A trier of fact may accept all, some, or none of the evidence of each witness. This means that an individual witness may be believed regarding one aspect of their testimony, but not about other parts. Of course, it is possible that all of a witness's evidence might be believed, or absolutely none of it.

3. Circumstantial Evidence

[74] As previously mentioned, there is no direct evidence of how Lucy was injured or who was responsible. Circumstantial evidence of the *actus reus* of this offence has been advanced, particularly evidence of exclusive, or extremely limited, opportunity to cause those injuries. Evidence of opportunity falls under the umbrella of circumstantial evidence.

a) Circumstantial Evidence Generally

[75] The principles of circumstantial evidence have been recently clarified in ***R v Villaroman***, (2016 SCC 33). I will briefly summarize those principles. The general principle that an inference of guilt, drawn from circumstantial evidence, should be the only reasonable evidence that the evidence permits, remains. However, a trier of fact must caution themselves against drawing inferences too readily. All other reasonable explanations must be considered, in the light of all the evidence (including that of the accused), *as well as the absence of evidence*. One must guard against the tendency to too readily “fill in the blanks” or to overlook reasonable alternative inferences.

[76] Alternative explanations must be assessed logically and in light of human experience and common sense. Conclusions which are alternative to the guilt of the accused must be considered, *even if such alternatives have not been proven by the actual facts*. This is a key change to the law of circumstantial evidence. At one time it was required that rational conclusions alternative to the guilt of the accused must be drawn from only proven facts. This wrongly puts the obligation on an accused person to contribute evidence of their innocence during the assessment of circumstantial evidence.

[77] The proper procedure is for a trier of fact to review the range of reasonable inferences which might be drawn, which are alternative to guilt, *even if there is no evidence supporting those other reasonable alternatives*. Of course, those alternatives must be rational. They cannot be unreasonable, entirely speculative, or frivolous. That said, alternative theories to guilt are not rendered speculative, unreasonable, or irrational simply because they may arise from a lack of evidence. As observed in ***R v Blachford***, 2023 ABKB 193 it is always necessary to consider the totality of the evidence, including gaps in the evidence, when assessing circumstantial evidence.

[78] The application of these principles is certainly harder than merely stating them. Courts have struggled with the line between “plausible theory” and “speculation” under an almost infinite range of factual scenarios. Some passages contained in the SCC decision in ***Villaroman*** are

helpful. “*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*” **Villaroman**, *supra* at para 38)

[79] In addition: “circumstantial evidence does not have to totally exclude other conceivable inferences” a 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. **R v Villaroman** at para 42, also citing the Alberta Court of Appeal decision of **R v Dipnarine**, 2014 ABCA 328, paras 22, 24-25.

b) Evidence of Opportunity

[80] The demonstrated opportunity to commit an offence, within the proper range of time and place, is *prima facie* relevant and material. Such evidence is always admissible (Eugene G. Ewaschuk, **Criminal Pleadings and Practice in Canada, 3d ed.**, Toronto: Thomson Reuters, 2022 at 16:688 [notes omitted]). However, non-exclusive opportunity (sometimes referred to as “mere opportunity” or “equal opportunity”), cannot by itself support a finding of guilt (**R v Ferianz**, 1962 Carswell Ont 4 at para 7). Where evidence of mere opportunity is combined with other incriminating circumstances it may prove sufficient to prove the identity of the person responsible for the offence. Each individual case will vary depending on the factual array. (S. Casey Hill, David M. Tanovich and Louis P. Strezos, **McWilliams’ Canadian Criminal Evidence 5th ed**, Toronto: Canada Law Book 2013, at s 31:41 [notes omitted]).

[81] Credible evidence of *exclusive* opportunity, on the other hand, may be highly persuasive, even to establish the party responsible for the *actus reus* of an offence beyond a reasonable doubt (**McWilliams’** *supra* at 31:41, **R v Yebes**, [1987] 2 SCR 168 at pp 188-189, **R v Sandoval-Barillas**, 2017 ABCA 154 at para 42).

[82] A court must proceed carefully when examining the nature and scope of the opportunity, especially where the evidence of opportunity proposes to settle the entire question before the court. The “exclusivity” of the opportunity must be clearly proven. Proof of exclusivity must be anchored in credible, persuasive, and preferably objective evidence. An excellent representation of this concept was enunciated by the Manitoba Court of Appeal in **R v Chubey**, (1999, Carswell Man 379):

25 *There have been cases in which evidence has been led to prove that another with an opportunity equal to the accused’s to commit the crime did not commit it. In this way, the prosecution has tried to turn an accused’s equal opportunity into an exclusive opportunity. One such case was R v Monteleone, [1987] 2 SCR 154 (SCC). In all these cases, however, there was evidence incriminating the accused other than the evidence of opportunity to commit the crime.*

26 *I am not prepared to go as far as saying that, in a case such as this, where the only evidence against the accused is the opportunity to commit the crime, the opportunity cannot be shown to be an exclusive one by calling all those others with an opportunity to say that they did not commit the crime. As a general rule, however, where there is nothing else to implicate the accused, I think it would be dangerous and unreasonable to create an exclusive opportunity for the accused to have committed the crime by eliminating others with a similar opportunity on the*

strength of no more than their bare denials and the perceived unlikelihood of any of them being the guilty party.

(*R v Chubey*, supra at paras 25-26, see also *R v SNA*, 2018 ABQB 1052 at paras 341-342)

4. The Application of Secondary Sources to Expert Opinion Evidence

[83] Experts will always, to some degree, rely on secondary sources in formulating an opinion. Should characterization of background information or data as hearsay prohibit the reception of expert opinion evidence? It is clear that there are two foundations for the reception of hearsay material in the context of expert opinion evidence. First, relevant hearsay is minimally admissible for the purpose of explaining the foundations of an expert opinion. Such evidence may not be considered for the truth of its contents and it need not necessarily be proven through independent sources. Where unproven background information is linked directly to an opinion, weight assigned to the opinion may be diminished accordingly as the foundation facts upon which it is based are not proven. However, where the information is considered sufficiently trustworthy, so as to safely eliminate hearsay concerns, that background evidence may be considered and subjected to the same evidentiary assessments as other evidence, despite its hearsay character. (*McWilliams*, supra, s 12:38)

[84] A recognized hearsay exception, particular to the accepted reliability of medical records, has been widely acknowledged since *Ares v Venner*, ([1970] SCR 608, at para 26). Records created in medical and similar environments are admissible for the truth of their contents. These records may be relied on by experts to formulate their opinions. Such records do not detract from the strength of those opinions simply because they were not personally recorded by the expert or placed into evidence by the original record makers.

[85] Additionally, expert reliance on fact or data, widely accepted to fall within the scope of that witness's professional expertise, are afforded protection in the evidentiary analysis. It would be incorrect to entirely disregard an opinion formulated on information gleaned from those practices and procedures professionally and commonly relied on by those in the same field of discipline. This will be especially true where circumstantial guarantees of trustworthiness, as exist in medical or laboratory settings, are present (*R v Lavallee*, 1990 Carswell Man 198 SCC at paras 97-98, *R v Zundel*, 1987 Carswell Ont 83 (Ont CA) at paras 144-146, 150, 152, *R v Terceira*, 1998 Carswell Ont 390 (Ont CA) at paras 37-40, 48).

Analysis

1. The Nature and Cause of Lucy's Injuries

[86] I accept that Lucy was violently assaulted. Blunt force trauma, from human activity, was responsible for her condition on July 21, 2021. I accept the expert veterinary and forensic veterinary medical conclusions to this effect. With one exception, I find that expert reliance on background medical procedures was proper and admissible. Those procedures were completed in a medical or laboratory setting with sufficiently trustworthy guarantees of accuracy to eliminate hearsay concerns. I would not reduce the weight of the expert conclusions for reliance on that data. Even if I am wrong about the hearsay concerns I find that there is ample evidence concerning the

nature of Lucy's injuries from the direct observations of the veterinary examinations and the other admitted evidence.

a. Factual Foundation for the Expert Opinions

[87] I would allow the blood analysis and the resulting expert conclusions, especially regarding the ALT enzyme variations, as admissible foundation evidence. I would not reduce the weight of the expert opinion evidence for reliance on those results.

[88] Blood analysis in a medical or laboratory setting is among the most common and routine procedures. Even the most scientifically naive individual understands that blood analysis is mechanized and regulated. It is a core technique used and understood by professional medical staff and medical technicians. General medical diagnosis and treatment require that these background tests are performed by those who have a duty to accurately complete these tasks, contemporaneously and to record the results properly.

[89] In this case the ALT tests were performed on numerous occasions. Specifically calibrated equipment was used. The ALT enzyme results were reviewed and interpreted on multiple occasions by experts practicing in the same field of discipline as their professional expertise was founded on. Moreover, the evidence established that the blood samples were withdrawn and analyzed within the same facilities as those experts undertook their professional duties. That proximity and directness served to solidify the chain of continuity. In the first ALT test the blood was withdrawn, analyzed, then reviewed by Dr. Shandruck within twenty minutes.

[90] I also find that had the ALT enzyme results produced an unusual or suspected inaccurate reading the professional experts reviewing that information would have detected that fact and repeated the procedure.

[91] In summary, I find the blood tests, especially the significant ALT enzyme variations, are sufficiently trustworthy and accurate. I allow their introduction into evidence, despite their hearsay nature, under the well-recognized hearsay exception introduced in *Ares v Venner* and similar jurisprudence.

[92] I have reached a different conclusion regarding the CT imaging scans of Lucy's head injury. However, I observe that Dr. Doyle's opinion regarding the head injury was not wholly dependent on the CT scan. Other evidence observed by Dr. Doyle also supports the opinion she arrived at.

[93] The CT image is a similarly routine medical imaging practice. CT scans and radiographs are common procedures. In the present case the radiographs were entered through admissions made by the accused in paragraph 6 of the ASF. Dr. Doyle also personally reviewed the radiographs and interpreted the findings. The radiographs were themselves entered as Exhibit 2. The information revealed in the radiographs, that there were three broken ribs, was also visible even to those not medically trained.

[94] In contrast, the CT scan images were not reviewed or interpreted by Dr. Doyle. Nor were the images placed into evidence. Dr. Doyle's evidence was that she only reviewed the report prepared by the person who completed the scan, not the scan images themselves. She did not perform that scan personally (transcript, April 4, 2023 at p 92). While I accept that the CT scan is a common medical procedure it does require more interpretation than blood tests. Only reviewing the summary of what the image is purported to demonstrate amplified the hearsay component of

this evidence. While I hesitate to use the term “double hearsay,” that is, in effect, how this evidence could be characterized. I reduce the weight of this evidence, and the conclusion it supported, that Lucy had no foreign material in her cranial cavity, to nothing. However, this conclusion only minimally supported the finding that Lucy suffered a blunt force trauma injury to her head. I find its weight reduction to be insubstantial in the final result.

[95] Two other findings independently identify that Lucy's nasal bleeding and mouth roof damage were caused by intentional force rather than a disease process or another innocent cause. These were that the bleeding rapidly resolved and that no blood clotting deficiency was detected. Those two findings were part of a set of unconnected observations that all pointed to the same conclusion.

[96] The blood analysis included measurements of Lucy's blood platelets, an important factor in the essential blood clotting process. Lucy had no deficiency in her blood platelet count according to the analysis. In addition, the fact that Lucy's injuries stopped bleeding on their own demonstrated that a clotting deficiency was unlikely, independent of the platelet measurement. Indeed, Lucy recovered with proper clotting from the nasal bleeding episode and the healing of the July 21, 2021 tail injury (transcript, April 4, 2023 at p 70). It is worth noting that Lucy also recovered from the original tail injury on July 2, 2021, without any clotting deficiencies.

[97] In summary, even if the CT imaging findings are excluded from the analysis, there is still ample evidence to find that blunt force trauma was responsible for the nasal bleeding and mouth roof damage, to the exclusion of all other reasonable causes.

[98] I found the evidence Dr. Shandruck and Doyle to be persuasive. In particular, I accept all of Dr. Doyle's forensic conclusions as to the type and cause of Lucy's injuries. I accept her conclusions that innocent explanations for Lucy's condition have been eliminated, including disease and dog attack. I accept her findings that three separate blows inflicted blunt force trauma upon Lucy. I accept her conclusions the trauma was directed at Lucy's head, her ribs, and her abdomen.

b. Direct Observation of Lucy's Injuries

[99] Even if I am wrong about the expert forensic reliance on the background medical procedures I would still find that Lucy's injuries were the result of intentional blunt force trauma inflicted on her by a human. The direct observations of Dr. Shandruck and Dr. Doyle amply demonstrate that Lucy was violently attacked. Dr. Shandruck observed nasal bleeding and mouth roof damage.

[100] Dr. Shandruck's evidence was that nasal bleeding is normally caused by head or facial trauma. The hyperemic line on the roof of Lucy's mouth led her to the same conclusions (transcript, April 4, 2021 at p 30).

[101] The facial bleeding had resolved by the time Dr. Doyle did a separate investigation a few days later. Dr. Doyle also observed bruising to the eye. The previously noted conclusion that disease was not responsible for this condition was independent of imaging and blood analysis. I find the conclusions of Dr. Doyle reasonable and persuasive on this subject.

[102] Further, I accept that the admitted radiographs show that three of Lucy's ribs were broken. The fact that no disease process caused that breakage was evident in these admitted images. The radiograph images were not part of the disputed background medical procedures.

[103] Dr. Doyle eliminated the only other innocent causes for Lucy's condition. These were injury from misadventure, self-infliction or dog-attack. Those findings were based on Dr. Doyle's physical examination of Lucy and her accumulated experience in her field of expertise. Dr. Doyle's expert opinion evidence was unchallenged in the sense that there was no competing expert opinion to detract from her findings. I found Dr. Doyle's evidence credible and persuasive. I accept her conclusions that blunt force trauma was responsible for Lucy's condition.

2. Exclusive Opportunity

[104] Having found Lucy's injuries to have been deliberately caused I turn my mind to whether it has been established that the accused was responsible. The Crown must prove this beyond a reasonable doubt. The matter must be given careful scrutiny, as the evidence of opportunity proposes to settle the entire matter before the court.

[105] The accused denied harming Lucy. I find his evidence reasonable and credible. I observed the content of his evidence closely, and his demeanour. His evidence was clear and specific, especially about his activities on July 21, 2021 that took him out of the home. This included two unexpected visits to his bank and long absences associated with his kayak trip on the nearby Bow River. The accused's evidence was corroborated by other sources, including the surviving Arlo door camera videos which show him absent from the home for those reasons. There are no timestamps on those videos to determine exactly when the accused left the residence where Lucy's injuries must have happened. However, they do establish he was away at several points during that day, exactly as he said. There were long periods where he was absent from the home, away from Lucy, and therefore unable to commit the offence for those periods.

[106] Apart from the videos there is the evidence of Ms. Somerset and Ms. Wojcick that they did not find the accused at the residence when they returned from hiking in Canmore, around lunch time. Ms. Somerset also confirmed the accused was not home when she returned in the late afternoon from her paddleboard activities. This was when she said she discovered Lucy's condition.

[107] Of course I accept that there were periods that day where the accused *was* present and alone with Lucy. Yet he was not the only one to be in this position. I do not accept that Mr. Jaffrey had the exclusive opportunity to commit the *actus reus*. The videos and Ms. Somerset's own evidence confirm that she was also alone with Lucy. Like the accused, she has denied harming Lucy. In the end, even if the numerous missing videos are discounted, and the court accepts that no other keyholder nor any undetermined third party gained access to Lucy, the court is still left with a dilemma. Even if the accused was one half of a very limited number of people in a position to commit the offence, I find there is nothing to distinguish between his denials and those made by the remainder.

[108] Of course, the accused's *near exclusive* access to Lucy is highly relevant. Other incriminating circumstances, had they been present, may have combined with that fact to establish his responsibility for the offence. However, no additional circumstances are before the court to reliably arrive at that conclusion. If the accused was motivated to harm an animal, because of his dislike of Ms. Somerset, or frustration with the state of their relationship, or even a temporary angry episode on the day in question, it has not been proven in these proceedings. Nor was there any other physical or objective evidence linking the accused to the offence.

[109] I conclude that the sentiments expressed in *Chubey, supra*, are also applicable here. It would be dangerous and unreasonable to conclude that the accused had the exclusive opportunity to commit the offence by eliminating others with a similar opportunity on the strength of no more than their similar denials and the perceived unlikelihood of that they may be the responsible party themselves.

[110] I accept the accused's denials. Even if that were not the case I find that I would have a reasonable doubt about his involvement in the offence. Put another way, at its highest, the case put before the court would leave the court in the uncertain territory of not knowing whether to believe the accused, or the competing evidence. A conviction cannot be founded on these circumstances.

[111] Accordingly, I am obligated to find him not guilty.

Conclusion

[112] For the reasons I have expressed above I find the accused not guilty.

Dated at the City of Calgary, Alberta this 21st day of November, 2023.

L.W. Robertson
A Justice of the Alberta Court of Justice

Appearances:

R. Greenwood
for the Crown

M. Deshayé
for the Accused