

**PROVINCIAL COURT OF NOVA SCOTIA**

**Citation:** *R. v. Hudder*, 2014 NSPC 105

**Date:** 2014-12-19

**Docket:** 2528213 to 2528227

**Registry:** Halifax

**Between:**

Her Majesty the Queen

v.

Andrew Jason Hudder

---

**DECISION ON TRIAL**

---

**Judge:** The Honourable Judge Marc C. Chisholm

**Heard:** May 23, 2014, May 26, 2014, September 8, 2014, September 12, 2014, November 6, 2014, in Halifax, Nova Scotia

**Decision:** December 19, 2014

**Charge** Section 239 x2; 267(a) x2; 244; 85(1)(a); 86(1); 86(2); 87(1); 88(1); 92(1); 94(1); 244.2(1)(a) x2 CC

**Counsel:** Geoff Newton, for the Defence  
Rick Woodburn & Tanya Carter, for the Crown

**By the Court:**

[1] The accused is charged on or about the 3<sup>rd</sup> day of November, 2012, at or near Halifax, Nova Scotia, did, unlawfully attempt to murder Ngoc Nguyen, contrary to Section 239 of the Criminal Code; and further at the same time and place aforesaid, did unlawfully attempt to murder Jacey Cox, contrary to Section 239 of the Criminal Code; and further at the same time and place aforesaid, did in committing an assault on Ngoc Nguyen use or threaten to use a weapon, or imitation thereof, to wit., a firearm contrary to Section 267(a) of the Criminal Code; and further at the same time and place aforesaid, did in committing an assault on Jacey Cox use or threaten to use a weapon, or imitation thereof, to wit., a firearm contrary to Section 267(a) of the Criminal Code; and further at the same time and place aforesaid, with intent endanger the life of Ngoc Nguyen did discharge a firearm, to wit, .22 calibre, contrary to Section 244 of the Criminal Code; and further at the same time and place aforesaid, with intent endanger the life of Jacey Cox did discharge a firearm, to wit, .22 calibre, contrary to Section 244 of the Criminal Code; and further at the same time and place aforesaid, did use a firearm, to wit., a .22 calibre, contrary to Section 85(1)(a) of the Criminal Code; and further at the same time and place aforesaid, without lawful excuse carry &

point a restricted weapon, to wit., a .22 calibre pistol in a careless manner, contrary to Section 86(1) of the Criminal Code; and further at the same time and place aforesaid, without lawful excuse, use, store or carry a firearm, to wit., a .22 calibre pistol, in a careless manner, contrary to Section 86(2) of the Criminal Code; and further at the same time and place aforesaid, without lawful excuse point a firearm at Ngoc Nguyen, contrary to Section 87(1) of the Criminal Code; and further at the same time and place aforesaid, did unlawfully have in his possession a weapon, to wit., a firearm for a purpose dangerous to the public peace, contrary to Section 88(1) of the Criminal Code; and further at the same time and place aforesaid, did possess a firearm, to wit., a .22 calibre pistol knowing he was not the holder of a license under which he may possess it and registration certificate for the firearm, contrary to Section 92(1) of the Criminal Code; and further at the same time and place aforesaid, was an occupant of a motor vehicle, to wit., a 2007 Nissan Altima, in which he knew that there was a firearm to wit., a .22 calibre pistol, contrary to Section 94(1) of the Criminal Code; and further at the same time and place aforesaid, did intentionally discharge a firearm into or at a place, knowing that or being reckless as to whether another person is present in the place, contrary to Section 244.2(1)(a) of the Criminal Code; and further at the same time and place aforesaid, did intentionally discharge a firearm into or at a place, knowing that or

being reckless as to whether another person is present in the place, contrary to Section 244.2(1)(a) of the Criminal Code.

### **Introduction**

[2] On November 3<sup>rd</sup>, 2012, cameras inside the Casino on Lower Water Street, Halifax, Nova Scotia recorded Jacey Cox gaming and consuming alcohol. Shortly after 2:00 am, he was seen leaving by the main entrance and getting into a taxi.

[3] Those same cameras showed Andrew Hudder, Everett McNeil, Kyle Shipley and Kyle Wright at the casino that night following Mr. Cox until he left the Casino at 2:08 am.

[4] When Mr. Cox exited the casino, Mr. Wright, Mr. Shipley and Mr. McNeil followed within thirty seconds. Mr. Shipley and Mr. McNeil went to Mr. Cox's cab and tried to open the rear door, without success. Then Mr. Shipley kicked at the cab's rear passenger door window. The cab, with Mr. Cox, drove off. By this time Mr. Hudder had exited the casino. He joined the other three men.

[5] Within seconds a car, an Altima (hereinafter referred to as "the Altima") drove to the front of the casino. The Altima was driven by Shea Durnford, a friend of Mr. Hudder and the other three men.

[6] The four men began to get into the Altima. Mr. Durnford pulled away before Mr. Shipley was able to get into the car and before the doors were all closed. Mr. Durnford drove quickly out of the casino lot onto Lower Water Street failing to yield to traffic and almost causing an accident. He drove approximately 100 yards on Lower Water Street and then stopped his car, without signalling, causing a car following to have to veer around him. He got out of the driver's seat, reached back in for something, then went around the Altima and got into the front passenger seat. The Defence admitted that the accused, Andrew Hudder slid over the center console into the driver's seat. Mr. Shipley caught up and got in the car. Once everyone was in the car Mr. Hudder drove off. Mr. Hudder turned right onto Upper Water Street and immediately signalled and turned into the left passing lane. Seconds later he was seen taking the ramp going north onto Barrington Street, following two other vehicles.

[7] It is admitted by the Defence that, only minutes later, the cab carrying Mr. Cox and the Altima were both on Robie Street near McCully Street. The Altima pulled out alongside the cab and Mr. Durnford fired several shots at Mr. Cox. The Defence admitted that Mr. Durnford was charged and pled guilty to the attempted murder of Mr. Cox.

[8] The Crown alleged that Mr. Hudder was still the driver of the Altima at the time of the shooting and pulled alongside the cab for the purpose of aiding Mr. Durnford in attempting to murder Mr. Cox. The Crown alleged that Mr. Cox was a member of a rival gang of drug dealers with whom Mr. Hudder and his friends were in a turf war.

[9] The Defence position was that Mr. Hudder was not the driver at the time of the shooting. The Defence position was that Mr. Hudder drove from the casino to his home on Compton Street, just off Robie Street, at which time he got out and went inside his home. Then, Everett McNeil got into the driver's seat and was the driver at the time of the shooting.

### **Issue To Be Decided**

[10] Does the evidence prove beyond a reasonable doubt that, at the time Shea Durnford fired shots at Jacey Cox from the Altima, the accused was still driving the Altima?

### **The Crown Evidence**

Ian Hardie

[11] Mr. Hardie is employed by the Casino in Halifax, Nova Scotia. His area of responsibility is security. This includes the monitoring of images gathered from more than 300 cameras at the Casino.

[12] He testified that on the morning of November 3, 2012, police officers attended the Casino and advised of an incident involving a cab that left from the Casino. He and the officers watched a video clip showing the cab departing the Casino.

[13] Mr. Hardie testified that he and the officers identified Jacey Cox leaving the Casino and a group of persons unknown to him following Mr. Cox out of the Casino.

[14] At the request of the police, he collected and collated all the footage from all of the cameras showing the movements of Mr. Cox at the Casino that morning.

[15] Mr. Hardie introduced and explained the Casino video evidence, marked Exhibits 4, 5, 7. I found his comments on the video evidence entirely accurate. He demonstrated no bias for or against the accused. His comments were borne out by my review of the video evidence.

[16] The video evidence covered the time period from 12:55 am to 2:10 am on November 3, 2012. Because there were a number of views from different cameras covering the same activities, the total footage is several hours in length. A summary of what is depicted will suffice.

[17] Mr. Cox arrived at the Casino at 12:55 am on November 3, 2012.

[18] At 11:58:42 Mr. Hudder, Mr. McNeil, Mr. Shipley and Mr. Wright arrived at the Casino together.

[19] At 1:22:24 Mr. Cox walked by Mr. Hudder who was seated facing a gaming machine. Mr. Hudder raised his arm and touched Mr. McNeil immediately after Mr. Cox walked by. According to Mr. Hardie, this was the first interaction between the parties. Seconds later Mr. Hudder was on his cell phone.

[20] Minutes later, Mr. Cox had a brief verbal interaction with the friends of Mr. Hudder, not including Mr. Hudder. From that point until Mr. Cox left the Casino, Mr. Hudder and his friends kept Mr. Cox in their sight, moving as necessary to maintain their observation of him.

[21] To assist in explaining the movements of Mr. Cox and Mr. Hudder and his friends, Mr. Hardie designated each area of the Casino by a color. He described



how Mr. Hudder's group moved to an area when Mr. Cox moved. The timing of the group's movement and the place to which they moved followed a pattern matching the movements of Mr. Cox.

[22] At 1:45 am the group of men were in a lounge across from an area called Pit #1, where Mr. Cox was seated. Mr. McNeil and Mr. Shipley were actively watching Mr. Cox. At 1:49 am Mr. McNeil moved a chair so he could sit and watch Mr. Cox. At 1:50 am other Casino patrons entered the area and blocked Mr. McNeil's view. He stood and looked towards Pit #1. Mr. Shipley and Mr. Hudder joined him and looked toward Pit #1. This was one example of Mr. Hudder participating in the watching of Mr. Cox.

[23] At 1:53 am Mr. Cox was seen leaving the area of Pit #1. The group of four men immediately proceed in the same direction as Mr. Cox to enable them to watch him. All four men were clearly watching Mr. Cox.

[24] The group of four men were not always together. Mr. Hudder wandered away from the group on at least two occasions for several minutes each time.

[25] During the period of observation of Mr. Cox, Mr. Hudder and Mr. McNeil were, at times, seen using a cell phone.

[26] Mr. Hardie did not recall seeing Mr. Wright or Mr. Shipley using a cell phone that morning.

[27] At 1:57 am Mr. Hudder was seen on his cell phone again.

[28] At 2:03 am Mr. Hudder was seen walking away from the others.

[29] At 2:05 am Mr. Hudder returned.

[30] At 2:08 am Mr. Cox was being escorted out by Casino staff. Mr. Hardie testified that Mr. Cox was asked to leave because he was intoxicated. At 2:07-2:08 am Mr. Cox was cashing out and on his phone. He then proceeded to the main entrance.

[31] Within thirty seconds of Mr. Cox's exit, Mr. Shipley and Mr. MacNeil and Mr. Wright followed him out. Mr. Hudder stayed behind. He was on his cell phone and got himself a drink.

[32] Mr. MacNeil and Mr. Shipley approached Mr. Cox's cab as it was moving away and tried to open the rear doors. The doors didn't open. Mr. Shipley kicked the window of the rear door. The window didn't break. The cab drove off. The time display showed 1:09:20. Mr. Shipley and Mr. MacNeil joined Mr. Wright and Mr. Hudder on the sidewalk in front of the Casino. They did not appear to be

rushing. Mr. Hudder had exited the Casino 27 seconds after his three friends. An Altima driven by Shea Durnford pulled to the curb near the Casino entrance. That car arrived at 2:03 am and parked, approximately 200 feet from the Casino entrance. At 2:05 am Mr. Durnford was out of the car and appeared to be talking on a cell phone.

[33] When Mr. Durnford pulled up, Mr. Hudder got into the front passenger seat of the Altima. Mr. MacNeil and Mr. Wright got into the rear seat. Mr. Shipley was attempting to get into the rear seat of the Altima when Mr. Durnford pulled away. He drove onto Lower Water Street without yielding to an oncoming car nearly causing a collision. He drove another 100 yards or so before stopping. He stopped without signalling, forcing a car following to veer around him. Mr. Durnford got out, reached back in by the steering column and then hurried around the front of the car and got into the front passenger seat.

[34] The video did not permit an observer to clearly see who moved into the driver's seat. Once Mr. Durnford and Mr. Shipley, who had caught up to the Altima, were in the car, it drove off. The car turned right onto Upper Water Street. The Altima went into the passing lane and passed a car. The Altima then went out

of sight. It reappeared near the top of Upper Water Street and was seen taking the ramp north onto Barrington Street. It was following two other cars.

[35] Mr. Hardie testified that he believed the time on the Casino videos to be accurate. He testified that the Casino system “has a digital clock on it that technicians go through weekly and sync up with real time” (Volume I - p. 123-line 15) He did not indicate when the system was last checked prior to November 3, 2012, nor whether on the subsequent check any error was found.

[36] Having watched the views from the various cameras for the morning of November 3, 2012, I find that the camera times were all in sync with each other.

[37] The Defence did not question the accuracy of the Casino video. I found it to be a clear and reliable depiction of what took place at the Casino on the morning of November 3, 2012.

Ngoc Nguyen – Cab Driver

[38] Ngoc Nguyen testified that he has driven a taxi in Halifax for more than 20 years. He is originally from Vietnam and still speaks with a significant accent.

[39] In the early morning of November 3, 2012, he was parked outside of the Casino in downtown Halifax. A man got into his cab. Mr. Nguyen asked, “Where

to?” The passenger told him “just go”. As he was moving off, another man tried to open the cab door but it was locked. Mr. Nguyen left the Casino lot onto Lower Water Street. The passenger told him to go to Dartmouth. Mr. Nguyen went on Lower Water Street to Upper Water Street and then to Barrington Street. On Barrington Street, the passenger changed his mind and directed him to turn left onto North Street. He did. On direction of his passenger he turned right off North Street onto Agricola Street. Then he stated: (Volume I - p. 7 line 3)

“And go for about a minute, and he told me to turn around and – turn around on Agricola and...”

Q: “Okay?”

“Yeah, and turn right on McCully”.

[40] He proceeded on McCully to Robie where, as directed, he turned right onto Robie. He went north on Robie “a little bit” to May Street where he was directed to turn right onto May Street. He did. He drove east on May Street to Agricola where he, as directed, turned right onto Agricola. He drove south on Agricola and, as directed, turned right onto McCully. He drove on McCully Street to Robie Street where, as directed he turned right onto Robie Street. He drove on Robie to May and then, as directed turned right onto May Street, again.

[41] He drove on May to Agricola where he turned right onto Agricola. He drove on Agricola to McCully where he turned right onto McCully for the third time.

[42] He stated: (Volume I - p. 8, line 9)

“...[W]hen I turned right on McCully, I see the car go behind me”.

[43] He proceeded on McCully to Robie where he turned right onto Robie. The car behind followed.

[44] He testified: (Vol. I - p. 10, line 2)

“But the guy behind me, he pull on the same side with my and then he shoots.”

[45] He testified that he heard “about three” shots and heard glass fall.

[46] He stated: (Vol. I - p. 10, line 14)

“And slow my car and I turn – I turn left on the parking lot...”

Q. Okay.

“...and then I turned around and go right on Robie to go straight to the gas station.”

Q. To the gas station.

“Yeah. Irving station on Robie.”

[47] At p. 11, line 3 of Vol. I, he stated:

“...when I stop, when I turned left on the parking lot, right, I stop my car, he opened the door and run away.”

“He gave me \$20 for the fare.” (Vol. I - p. 11, line 9)

[48] Mr. Nguyen testified that upon arrival at the Irving service station, he stopped his car, got out and checked the condition of his car. He saw that his car had been shot.

[49] A police van pulled into the Irving station. He went and reported the shooting to the police.

[50] He was asked (Vol. I - p. 12, line 16)

“How long after you pulled into the parking lot did the police pull in behind you?

A. Into the ...well, two minutes. That's it.

[51] He estimated his speed on Barrington Street and North Street at 40/50 kilometers per hour (kph) and on the other streets he estimated his speed at 20/30 kph.

[52] Mr. Nguyen testified that until his third time on McCully there were no other cars around. On that third time on McCully, when halfway between Agricola and Robie, he saw the lights of a car very close, two metres, behind him.

[53] Mr. Nguyen testified that he couldn't see anyone in the other car. He doesn't know how many people were in the other car and he couldn't identify

anyone in that car. He recalled the night being very dark and that there was mist or rain.

[54] Mr. Nguyen provided no direct evidence of the accused being in the Altima at the time of the shooting.

[55] Mr. Nguyen provided no evidence of how many people were in the Altima at the time of the shooting.

[56] On Mr. Nguyen's evidence there was not a vehicle closely following his cab on North Street or Agricola Street or during the first two trips around the blocks of McCully, Robie, May and Agricola Street.

[57] Mr. Nguyen's evidence did not include any information which may explain why Mr. Cox chose the route he directed Mr. Nguyen to take, nor what Mr. Cox was doing while they proceeded along that route. Mr. Nguyen gave no information regarding Mr. Cox's behaviour or emotional state. The Crown argued that the only rational inference to be drawn from the cab's unusual pattern of travel was that Mr. Cox was attempting to evade pursuit by persons in the Altima. I do not find that to be the only rational inference. Mr. Cox may have been looking for something in the area, perhaps an address.



[58] Mr. Cox was not a witness at the trial.

[59] The Defence did not challenge the credibility or reliability of Mr. Nguyen's evidence. I found his evidence credible. The reliability of his speed and time lapse estimates was uncertain.

Cst. Joseph Allison – RCMP Halifax Integrated Crime Squad

[60] Cst. Allison testified that the Halifax City Police received a 911 call of a shooting on Robie Street at 2:15 am on November 3, 2012. He stated that patrol members were on scene within 2 minutes and met the cab driver, Mr. Nguyen, at the Irving station on Robie Street. Cst. Allison did not indicate how he was aware of these circumstances.

[61] Cst. Allison gave evidence that he was on duty November 3, 2012. He stated that a call came in at 2:40 am for him to assist with the investigation of the shooting on Robie Street. Cst. Allison proceeded to scene of shooting.

[62] He stated that he left the scene and proceeded to the Irving service station on Robie Street where he observed a cab with apparent bullet holes. He interviewed Mr. Nguyen, the cab driver.

[63] Based upon information obtained from Mr. Nguyen, he proceeded to the Casino. There, he viewed a video of the cab leaving the Casino. He identified Jacey Cox as the man getting into the cab in question. He did not identify any suspects at that time.

[64] The following day he, under the authority of a production order, seized the Casino video.

[65] Cst. Allison testified to observing, on the video, Andrew Hudder, Everett McNeil, Kyle Shipley and Kyle Wright arrive at the Casino, together, by taxi, at 1:00 am.

[66] At 1:22 am he observed Mr. Hudder touch Mr. McNeil to get his attention and then pointed out Jacey Cox. (quote p 80-81)

He testified, at Vol. I – p. 80-81:

- A. Okay. So at approximately 1:22 a.m. you see Jacey Cox walk through the video just in around some slot machines. You see Andrew Hudder sitted – seated at one of the slot machines, and Everett MacNeil is standing off to the side of him. As Jacey Cox walks by, you see Mr. Hudder taps Everett MacNeil to get his attention, there's – somebody's walking by here. So that's at 1:22. Approximately a minute later there's another interaction – I wouldn't – not even a minute later, right around the same time you see Mr. Cox approaches these guys and they kind of – you know, they kind of walk away from him as if they're – I don't know, as if they didn't want to be involved in a confrontation. They kind of start walking away from him.

[67] Cst. Allison observed that, as Jacey Cox left the Casino, he looked back behind him and then walked to a waiting cab and got in. Cst. Allison observed that before closing the cab door, he appeared to yell something.

[68] He described watching Mr. McNeil, Mr. Shipley and Mr. Wright follow Jacey Cox out of the Casino. Cst. Allison agreed that Mr. Hudder seemed more interested in finishing his beer than following the other three men out of the Casino.

[69] Cst. Allison observed Mr. McNeil and Mr. Shipley go after the cab but they couldn't get into the cab.

[70] He observed the cab proceed from the Casino onto Lower Water Street to Upper Water Street and then north onto Barrington Street.

[71] He observed Mr. Hudder, Mr. McNeil, Mr. Shipley and Mr. Wright get into a silver Altima.

[72] The Altima proceeded quickly out of the Casino parking area onto Lower Water Street without yielding to a car on Lower Water Street, nearly causing an accident.

[73] The Altima stopped on Lower Water Street.

[74] He observed the driver, Shea Durnford get out of driver's seat, reach into car to the left side of steering column, then rush around to the passenger side and get into the front passenger seat.

[75] He observed the Altima speed off. It proceeded up Lower Water Street to Upper Water Street and took the exit ramp north onto Barrington Street.

[76] The Altima went out of sight of the Casino video at 2:10:47 am.

[77] Cst. Allison testified that Andrew Hudder's father lives on Compton Street, off Robie Street, approximately 6 blocks from the spot of the shooting.

[78] Cst. Allison testified that on November 4, 2014, a video from PNL, a business 150 meters north of the shooting site on Robie Street was picked up by Cst. Basso. He testified that:

“...[I]t shows the Nissan Altima heading north on Robie Street at around the same time as the shooting.

Q. Which is – about what time was the shooting?

A. At 2:13 am in the morning. (Vol. I - p. 63)

### **The Defence Evidence**

Joseph Hudder

[79] Joseph Hudder is the father of the accused. He lives on Compton Street in Halifax. He testified that in November 2012 his son, Andrew Hudder, was living with him and his wife on Compton Street.

[80] He testified that on November 3, 2012 his son Andrew arrived home at around 2:10 am and stayed home until the next morning.

[81] He stated that he remembered this information for two reasons:

(a) The next morning his son left quickly, without showering, which was unusual, and didn't return or call for many months; and

(b) The next morning he heard on the news about the shooting on Robie Street and expected the police would come to see him, suspecting Andrew Hudder of having been involved.

[82] Joseph Hudder claimed to have made a note of the time his son arrived home on November 3, 2012. He stated that he relied on the note for his recollection of the time his son arrived home. He did not produce the note. He testified that, at around the time the alibi was disclosed to the Crown, in May 2014, shortly before the start of the trial, his dog ate the note, ie. chewed it up.

[83] When testifying on cross-examination, Mr. Hudder repeatedly began to give an answer before Crown counsel finished asking a question. He continued to do so after being directed by the Court to wait until the question was completed.

[84] Mr. Hudder testified that his wife is very ill and, until mid-2014 he, for several years, had been her caregiver. He slept on a mattress next to her bed in a room on the main floor. Day after day, night after night he would care for her. He got very little sleep because of caring for her and his own health issues. To keep track of how many hours he'd slept he began recording when he fell asleep and when he awoke. He wrote the times on slips of paper. The next morning he would total the number of hours of sleep and record that on a paper. That paper was the one he referred to for his memory of when his son came home on the morning of November 3, 2012. That was the paper destroyed by his dog.

[85] I found Mr. Hudder's evidence of the time his son came home on November 3, 2012 neither credible nor reliable. Mr. Hudder was a very evasive witness. He, many times, did not give a direct answer to a simple question. He demonstrated bias in favor of his son and animosity towards the police.

[86] If Mr. Hudder's evidence of the time of his son's arrival home was accepted, a conflict would arise between the time on his TV/video equipment and the Casino

video time. That is, Mr. Hudder said the TV time was 2:10 when his son Andrew arrived home. The Casino video records Andrew Hudder outside the Casino at 2:10 am on November 3, 2012. That may merely reflect that the times were not in sync.

[87] Mr. Hudder's evidence regarding the time of his son's arrival home on the morning of November 3, 2012 was unreliable. Even if he made and kept a note of the time his son arrived home that morning, by his own evidence, it only showed the number of hours slept, not the start and stop times of his sleep.

[88] The testimony of Mr. Hudder that the note, this key piece of evidence having been retained since November 2012, was destroyed by the family dog days before it would be sought by police when investigating the Defence alibi, was completely unbelievable.

[89] Mr. Hudder's evidence that he knew it was important to remember the time his son came home but he did not know the time of the alleged shooting on Robie Street, was completely illogical.

[90] In summary, the evidence of Joseph Hudder in relation to the time his son, Andrew Hudder, arrived home on November 3, 2012, was neither credible nor

reliable. His evidence that Andrew Hudder came home, at some time, that morning and left quickly the next morning may have been true.

Evidence of Accused, Andrew Hudder

[91] The accused admitted to having a lengthy and serious criminal record. He stated that he did not have a record for violence. However, he admitted that a conviction for dangerous driving involved him ramming a police car. Further, he admitted that five offences of setting fire to a substance involved him tossing Molotov cocktails into buildings, some of which may have been occupied. Finally, he admitted a conviction as a youth for unlawful possession of a weapon.

[92] Mr. Hudder did not agree that there was a Marriott crime family group or gang or Melvin crime family or gang in the Halifax area but acknowledged that there was a group of friends associated to the Marriott family (Vol II - p. 199) and a group of friends associated to the Melvin family who all were involved in crime. (Vol II - p. 218). The accused agreed that there was an “ongoing issue” between the Melvins and the Marriotts. (Vol. II - p. 201). Further, he testified that there “apparently” was a turf war between the two groups. (Vol. II - p. 218). He denied being a member of a crime group or being involved in the illegal drug trade. He surmised that his friend Everett MacNeil was involved in the illegal drug trade.



[93] He admitted that he was friends with a few of the “friends of the Melvin’s”. He admitted that he had been a co-accused of Jimmy Melvin in the past (Vol. II - p. 201). He stated that when he was in the penitentiary he had been on the same range with Jimmy Melvin (Vol II - p. 200). He acknowledged that when in the penitentiary he understood that Corrections officials viewed him as “incompatible” with inmates who were friends of the Marriotts (Vol. II - p. 198).

[94] Mr. Hudder testified that as of 2010, he did not know Jacey Cox.

[95] He testified that as of November 3, 2012, he did not know Jacey Cox, although he’d heard of him (and at some unstated time he learned that Jacey Cox was a friend of those associated to the Marriott group). He testified that as of November 3, 2012, he did not know what Jacey Cox looked like (p. 143-144).

[96] He testified that, at some point on the morning of November 3, 2012, one of his friends pointed out Jacey Cox and mentioned his name.

[97] On cross-examination it was suggested to Mr. Hudder that the Casino video of November 3, 2012 showed him pointing out Jacey Cox to Everett McNeil. He made several responses:

- A. I would say I don’t believe that happened (Vol. II - p. 145, line 5)  
And later;

- A. I'd say I'd have to see this video (Vol. II - p. 145, line 13)  
And later;
- A. Yeah. No. I don't think that's taken place, no. (Vol. II - p. 145, line 16)  
And later;
- A. Maybe if they were saying, "There's the guy." Like, "Who, that guy?" (Vol. II - p. 145, line 20)  
And further;
- A. To clarify, maybe, but I don't – I don't recall that ever taking place, no." (Vol. II - p. 146, line 1)

[98] Further, in relation to his familiarity with Jacey Cox, the accused acknowledged that on January 2, 2010, when he was an inmate at the federal penitentiary in Renous, he was attacked just outside his cell, by another inmate from another range. The Defence made an admission that the man who attacked Mr. Hudder was Jacey Cox. Mr. Hudder stated that he'd never seen the man before and denied getting a good look at him on that day. Mr. Hudder claimed that on November 3, 2012, he did not recognize Mr. Cox as the inmate who assaulted him in Renous (p. 213). He said he found out it was Jacey Cox who assaulted him in Renous on the day of his cross-examination.

[99] Mr. Hudder denied knowing why Jacey Cox attacked him. He said that type of thing happens, just an inmate from a different range. When asked whether he saw the man's face, his answer was indirect but communicated that he did not get a good look at his attacker. He admitted to calling the man a very derogatory term.

When asked if he tried to find out who the man was, he answered, “I didn’t know who it was.” (p. 209, line 11)

[100] Later he acknowledged asking his friends, on his range, but they didn’t know who’d done it. He said he didn’t ask the guards because he knew they wouldn’t tell him.

[101] In relation to the early morning of November 3, 2012, Mr. Hudder admitted to going to the Casino in Halifax, by cab, in the company of Everett McNeil, Kyle Shipley and Kyle Wright.

[102] Mr. Hudder testified that he was there to drink with friends. He was aware that everything that occurred at the Casino would be captured on video cameras. He was on parole. He admitted that he was “technically” violating the terms of his parole by being in the company of these friends, because they had criminal records.

[103] On my review of the Casino video for November 3, 2012, there was no evidence of any interaction between Jacey Cox and Mr. Hudder or any member of his group of friends until 1:22 am. At that time, the video showed that Mr. Hudder saw Mr. Cox walk by him. He reached up from where he was seated and touched Mr. MacNeil. In my view, the video evidence was conclusive. Mr. Hudder recognized Jacey Cox. He knew that Mr. MacNeil would recognize Jacey Cox. I

reject Mr Hudder's evidence that he did not know who Jacey Cox was or that he did not recognize him as of that date.

[104] He testified that "they", his friends, had an issue with Mr. Cox and wanted to beat him up. He testified that he did not have any "beef" with Jacey Cox and didn't recognize him as the person who attacked him in Renous.

[105] He testified that he wanted no part of any plan to beat up Mr. Cox and told his friends so.

[106] He stated that he did not follow Mr. Cox around. He was just drinking with his friends.

[107] As to whether his friends were following Mr. Cox around the Casino, his answers were, at times, evasive. He conceded that "they" were interested in beating up Mr. Cox.

[108] In my view, the Casino video evidence and the evidence of Mr. Hardie was conclusive. The friends of Mr. Hudder were monitoring Mr. Cox's movements in the Casino. They were intent on keeping him in their sight. They moved as necessary for the purpose of keeping him in sight. Mr. Hudder was with his friends most of that time.

[109] Shortly after 2:00 am, when Mr. Cox was about to leave the Casino, the friends of Mr. Hudder and Mr. Hudder were together looking in the direction of Mr. Cox. At that time, Mr. Hudder was using his phone. He denied a suggestion that he was speaking to Shea Durnford then, or at any time that morning.

[110] Mr. Hudder agreed that as Mr. Cox was leaving the Casino his friends were intent on pursuing him and their plan was to beat him up. Mr. Hudder testified that he was not a participant in that plan. He said he didn't leave on his own because he wouldn't do that to his friends. He did not go out of the Casino with his friends. He came out of the Casino when Mr. Shipley was kicking at the window of the taxi carrying Mr. Cox. The taxi drove off. Mr. Hudder said he perceived that was the end of any plan to beat up Mr. Cox. His plan was to go home. He stated that a car pulled up and he was told to get in. He assumed it was a friend driving so he got in. He said "No one was rushing". (Vol II - p. 267)

[111] He said that he was concerned that the police would be coming to the Casino because of his friend's actions. Nevertheless, he chose not to leave his friends.

[112] He testified that Shea Durnford was driving. Mr. Durnford drove off before Mr. Hudder closed his door and before Mr. Shipley was in the car. Mr. Durnford hadn't turned on the cars headlights. He didn't yield as he entered Lower Water

Street nearly causing an accident. He drove partly on the wrong side of the road on Lower Water Street and nearly caused a second collision with another vehicle. He believed Mr. Durnford was impaired by something.

[113] Mr. Hudder testified that he yelled at Mr. Durnford to stop and “what are you doing?” He stated that Mr. Durnford stopped and told him to drive.

[114] Mr. Hudder testified that Mr. Durnford got out. Then Mr. Durnford reached back into the car for something. Mr. Hudder believed that Mr. Durnford reached for a cell phone. The Casino video was shown to Mr. Hudder. Mr. Hudder testified that as he viewed the video, he believed he saw a phone in Mr. Durnford’s hand.

[115] I find that the video shows that there appears to be a cell phone in Mr. Durnford’s hand. At no time, on the video, was a gun visible in Mr. Durnford’s hand.

[116] Mr. Hudder acknowledged that when Mr. Durnford got out of the driver’s seat, he moved over the center console into the driver’s seat.

[117] Mr. Hudder acknowledged he could have gotten out and walked home or taken a taxi. He didn’t.

[118] He testified that Mr. Durnford's driving was frightening. He expected the police would be called and looking for the Altima. He said he wanted to get away from the Casino and get home as soon as possible.

[119] He testified that he sped to Upper Water Street and followed two other vehicles up the ramp to Barrington Street heading north.

[120] He acknowledged that had he gone straight on Upper Water Street to Cornwallis Street it would have been a shorter route to his home. He stated that he didn't go that way because there was a red light at Cornwallis, and there were more traffic lights on that route, and he was going too fast to slow and stop for the light.

[121] Mr. Hudder testified that when he got into the driver's seat of the Altima his intention was to get away from the area of the Casino and to get home, away from that car, before the police got to them. When asked what the others were planning he testified he wasn't paying attention to anyone else at that time (Vol II - p. 292). He testified that he didn't tell the others he was going home (Vol. II – p. 293).

[122] Then, he testified:

A. "I assume them guys in the back seat probably thought...we were following the cab."

Q. So what are you guys talking about on the way home? What are you talking about? What are you guys doing...

A. I'm fucking going home. You guys are crazy.

[123] This answer was unclear, perhaps because of the duplicitous question. The question asked what they were talking about and doing. It is not clear whether the answer, I'm "f" going home is what Mr. Hudder was doing or something he said. The second part of his answer appears to have been a statement made by him.

[124] Mr. Hudder testified that he drove north on Barrington Street to Artz Street, where he stated he turned left.

[125] There was no evidence that Mr. Hudder saw the cab with Mr. Cox go north onto Barrington Street.

[126] There was no evidence that Mr. Hudder or anyone in the Altima saw Mr. Cox's cab turn left off Barrington Street onto North Street.

[127] Mr. Hudder described the route he took to his home from Artz Street. He remembered going by the parole office on Gottingen Street. He indicated that he ought to have gone right onto Cunard Street from Gottingen but missed the turn because he was going fast and didn't see it until it was too late to slow and make the turn. This lengthened his route home.



[128] Mr. Hudder testified that when he got to his home he stopped the car, got out and went inside.

[129] Mr. Hudder testified that later that morning, after he'd slept, he received a call from Shea Durnford telling him about the attempted murder of Mr. Cox after he left. (Vol. II - p. 136)

[130] He said he left his house because he thought the police would be looking for him. He acknowledged thinking he may not soon return. He said he was concerned that he would go back to prison for a parole violation, even though for two earlier violations he hadn't been recommitted. He testified his parole was revoked once before and did a new two-thirds. He acknowledged that his warrant expiry date was only 31 days away.

[131] Mr. Hudder testified that he didn't think he would be charged with the attempted murder of Mr. Cox (Vol. II - p. 137) but later learned that he had been charged. He testified that he stayed in hiding for a year believing that by the time he was caught those responsible would have dealt with the attempted murder charge and it would be dropped against him. (Vol. II - p. 140)

[132] Mr. Hudder's testimony revealed him to be an intelligent individual. He was very familiar with the evidence against him. He was subjected to a lengthy

probing and thorough cross-examination. The cross-examination brought out additional details but revealed very few inconsistencies in his evidence or as between his evidence and other evidence before the court.

[133] Mr. Hudder's testimony that, on November 3, 2012, he did not recognize Jacey Cox, before Mr. Cox was pointed out to him by one of his friends, was inconsistent with the Casino video evidence at 1:22 am which showed Mr. Hudder tapping Mr. Everett MacNeil immediately after he saw Mr. Cox walk by. Mr. Hudder's answers to questions regarding that video evidence were defensive and evasive.

[134] Mr. Hudder's evidence on that point was not credible. I find that on November 3, 2012, he recognized Jacey Cox, knew who he was, and know that he was known to Mr. MacNeil. This, of itself, does not establish that he recognized Jacey Cox as the man who attacked him in Renous. I did not find credible Mr. Hudder's evidence that he did not get a good enough look at the person who attacked him in Renous to be able to identify him thereafter nor that he wasn't able to find out the name of his attacker.

[135] However, it has not been proven beyond a reasonable doubt that Mr. Hudder's recognition of Jacey Cox at the Casino on November 3, 2012 was based

upon Mr. Hudder identifying Mr. Cox as the person who attacked him in the Renous penitentiary in 2010.

[136] The basis of Mr. Hudder's recognition of Jacey Cox on November 3, 2012 was not proven beyond a reasonable doubt. The action of Mr. Hudder touching Mr. MacNeil which I find was to alert Mr. MacNeil to the presence of Mr. Cox is consistent with a shared interest in Mr. Cox. This is consistent with the Crown theory that the parties, including Mr. Hudder, were members of rival drug gangs. However, in my view, that is not the only rational conclusion which may be drawn. Mr. Hudder's actions are equally consistent with him being aware of Mr. MacNeil having an issue with Mr. Cox and simply alerting his friend to the presence of Mr. Cox. Moments later he did not participate in an argument between his friends and Mr. Cox. Later, in the video evidence he, according to Cst. Allison, seemed more interested in finishing his drink then following Mr. Cox out of the Casino.

[137] The accused's evidence, when driving the Altima, of whether he told his friends that he was heading home appeared inconsistent but I'm not certain that it was, as he wasn't asked to clarify whether he uttered the words that he was going home or whether that was what he was thinking/doing.

Evidence of Everett McNeil

[138] Mr. McNeil is 25 years old. He is a friend of Andrew Hudder, Kyle Shipley Kyle Wright and Shea Durnford. He has a lengthy criminal record. He admitted to prior convictions for theft, break and enter, robbery, unlawful confinement, illegal possession of a firearm, drug trafficking and numerous breaches of release or sentence orders. He is currently serving a federal sentence of incarceration.

[139] He refused to give the police a witness statement in relation to Mr. Hudder's alibi. He stated that he did so on the advice of his lawyer.

[140] Mr. McNeil testified that he went to the Casino on November 3, 2012 with Andrew Hudder, Kyle Wright and Kyle Shipley. He testified that he saw Jacey Cox there. He testified that he didn't like Mr. Cox, nor did Kyle Shipley, nor Shea Durnford. He stated that his dislike of Mr. Cox related to a girl. He denied that the animosity was because they were members of rival drug gangs. He said they had a brief altercation/argument with Jacey Cox in the Casino on the morning of November 3, 2012.

[141] He admitted that he wanted to beat up Mr. Cox (Vol II - p. 30) and "just kind of followed him around the Casino" (Vol. II - p. 15).

[142] He testified that he called Shea Durnford to the Casino to pick them up "because we needed a drive home" (Vol. II - p. 11). Later in his evidence he added

that they needed to have a car to follow Mr. Cox if he had a car and drove off. He denied telling Mr. Durnford that Jacey Cox was at the Casino. He admitted that he was on his phone while at the Casino and probably called five people for a drive home (Vol. II - p. 24). He admitted that when Mr. Cox left they followed him out and he and Mr. Shipley tried to get into Mr. Cox's cab to beat him up (Vol. II - p. 15) (Vol. II - p. 28).

[143] He admitted that after he and Mr. Shipley failed to get into the cab to get at Mr. Cox, that they got into Shea Durnford's car and the plan was to "try and catch up to him to see where he's at" (Vol. II - p. 35) because he wanted to beat him up at wherever he got out. He couldn't remember who, but someone told Mr. Durnford to follow the cab.

[144] He testified that Andrew Hudder took over driving after they nearly got into an accident. He stated that Andrew Hudder was freaking out. (Vol. II - p. 11) He knew that Mr. Hudder was on parole.

[145] Mr. McNeil testified that after Mr. Hudder got into the driver's seat of the Altima that,

A. "...by that time the car was – we couldn't find him."

Q. You couldn't find who?

A. The cab that JC was in.

Mr. McNeil added

A. "...the cab is gone and there's all kinds of argument in the car. We left. We drove through "the Square". (Vol. II - p. 12)

[146] The only reference point he remembered when going through "the Square" was seeing the parole office. Mr. McNeil agreed that at that time, there was no need to speed (Vol. II - p. 46). He said they were going fast on Barrington, but not speeding on side streets (Vol. II - p. 53). He thought they stopped at stop signs. He then qualified his evidence regarding Mr. Hudder's driving by saying he was probably on the phone, texting, suggesting he wasn't paying close attention. He stated that he wasn't familiar with the streets but remembered going by the parole office (Vol. II - p. 48). After dropping off Mr. Hudder, he stated that, "Up the road we seen a cab so we started following the cab". He testified that he thought he went through one traffic light before they spotted the cab. He stated that he drove around a number of streets like in a square, at least once.

[147] He testified that at Shea Durnford's suggestion, he pulled alongside the cab to see if Jacey Cox was in the cab. He stated that, Shea Durnford pulled out a gun and fired at the cab. He freaked out. He said he was scared, at first, and drove off.

[148] He acknowledged sending a text message to a friend later that morning which said:

“You missed it, LOL”

[149] He claimed he was “high” at the time he sent the text. When questioned on what LOL meant he became defensive and evasive. He agreed that there was nothing funny about what happened.

### **Crown Reply Evidence**

#### **D/Cst. Gary Basso**

[150] D/Cst. Basso was called in reply by the Crown after the Defence presented their alibi evidence.

[151] D/Cst. Basso testified regarding a video from the Mazda dealership on Robie Street in Halifax. He stated at Vol. II - p. 337;

A. “I reviewed numerous video clips from the Casino, as well as PNL Communications on Robie Street, as well as City Mazda located on Robie Street.”

Q. Okay. And what was your understanding of the time of the shooting from watching the Mazda video?

A. I’m just going to have – if I could refer to my notes? It’s 2:13 but if I can just refer to my notes for the -- for how many seconds. (Vol. II - p. 338, line 12)

Permission to use his notes to refresh his memory was granted.

A. So the time on the City Mazda video was 2:13:43 and that would have been on November the 3<sup>rd</sup>, 2012

[152] On cross-examination: (Vol. II - p. 369, line 11)

Q. On Robie Street, yea. What, in your investigation, did you conclude from any syncing of these clocks.

A. I can't say that I – I can't say that they were in sync.

Q. Yeah.

A. I can't say for certain that the Casino time exactly matches up with the Robie Street time.

Q. Right.

A. I can tell you that I looked at the Robie Street time at City Mazda compared to my cell phone and they showed the same. Obviously, that's only to the minute not to the second. I did the same with PNL Communications. I'd have to look at my notes but I think their time was off – like compared to my – my cell phone is on satellite time so I assumed it to be correct. When I compared PNL's video time, I think it was off by something like 12 or 14 minutes plus an hour of daylight savings so that had to be calculated. I didn't compare the time – I assume with the – with the high tech security that the Casino has that there – that their times would be right. I didn't actually compare it to my cell phone.

Q. Okay. So there's no evidence that these times are in sync with each other, these clocks?

A. That's correct.

[153] D/Cst. Basso testified that the route which the accused claimed to have taken from Upper Water Street to his home on Compton Street was not the most direct route, nor the fastest route, nor the route least patrolled by police.



[154] He testified that the shortest route, which involved going west on Cornwallis Street rather than north on Barrington Street was 1.1 km. (Vol. II - p. 361, line 3) The route allegedly taken by the accused was 3.7 km. (Vol. II - p. 356, line 14)

[155] D/Cst. Basso testified that the route allegedly taken by the accused was through a high crime area where a person “would be more apt to see police vehicles in those areas than you would if you travelled straight up Cornwallis...” (Vol. II - p. 374, line 7)

[156] D/Cst. Basso testified that on September 8, 2014 at 2:00 am he drove the route which Mr. Hudder testified to have taken from Lower Water Street to his home on Compton Street and from there to Robie at May Street. He drove the full route twice, each time travelling as fast as he could reasonably proceed. The shortest period of time to travel the route was 3 minutes and 58 seconds. The second trip took 4 minutes and 1 second.

[157] He testified that the travel time to go around May, Agricola, McCully and back to Robie, at the speed estimated by Mr. Nguyen was one minute and ten seconds.

[158] D/Cst. Basso did not travel the route described by Mr. Hudder at the speed estimated by Mr. MacNeil. That trip, at speeds described by Mr. MacNeil, would

obviously take longer than 4 minutes but as to how much longer, there was no evidence.

[159] D/Cst. Basso drove the route which Mr. Nguyen testified he took from the Casino on the morning of November 3, 2012. The officer did this drive at approximately 2:00 am on May 24, 2014. He drove at the speeds estimated by Mr. Nguyen.

[160] D/Cst. Basso testified that when driving the route taken by Mr. Nguyen at the speed estimated by Mr. Nguyen, it took one minute and 39 seconds, approximately, to travel from Lower Water Street to the intersection of Barrington and North Streets.

[161] D/Cst. Basso testified that as a car enters Barrington Street heading north off the ramp from Upper Water Street, the driver will encounter a bend in the road. Once around that bend there is a clear line of sight to the intersection of Barrington and North Streets.

[162] D/Cst. Basso testified that, if the Altima accelerated quickly on Upper Water Street to 70 kph, maintained that speed around a sharp turn on Upper Water Street and while on the ramp to Barrington Street, and until around the bend in the road on Barrington Street, the Altima would be in a position to see to the intersection of

Barrington and North Streets after 32 seconds. Later, he said approximately 30 seconds.

[163] D/Cst. Basso testified that to drive from the Casino onto Lower Water Street and to the intersection of North and Agricola Streets, took two minutes and fifty seconds (Vol. II - p. 341, line 6)

[164] Further he testified that to drive the loop around Robie, May, Agricola and McCully streets took one minute and ten seconds, at the speed estimated by Mr. Nguyen.

[165] He noted that, according to the Casino video, the cab with Mr. Cox left the Casino at 2:09:20 on the morning of November 3, 2012.

### **Analysis of the Time Evidence**

[166] If the Court accepted 2:09:20 as the time when the cab left the Casino with Mr. Cox and, based upon the evidence of D/Cst. Basso, added 2 minutes and 50 seconds for the cab to get to North at Agricola, that would make the time of arrival there as approximately 2:12:10.

[167] According to D/Cst. Basso, the time to make two trips around the loop of Robie, May, Agricola and McCully Streets would have been two minutes and

twenty seconds (one minute and 10 seconds each time). That would bring the time to approximately 2:14:30, an interval of five minutes and ten seconds from when the cab left the casino.

[168] However, that was not the entire route from the Casino to the scene of the shooting as described by Mr. Nguyen.

[169] At Volume I - page 7, line 3, Mr. Nguyen said he drove north on Agricola for “about a minute” before turning back, heading south on Agricola and then turning right onto McCully.

[170] There was no evidence how far Mr. Nguyen drove north on Agricola before turning around. The only evidence in relation to the time to drive this part of the cab’s route was Mr. Nguyen’s testimony that he drove for “about a minute” before turning around. This estimate is the only evidence for the Court to consider on this point. If it took about a minute to drive that distance north, I conclude it would take slightly less time to drive back, because he did not return to North Street but turned at McCully Street. In addition, it would have taken the cab some period of time to turn around. This travel may have added a period of time approaching two minutes to the interval of time before the cab’s arrival at the site of the shooting.

[171] Further, the route travelled by Mr. Nguyen included a third trip on McCully, from Agricola to Robie and from McCully at Robie to the site of the shooting on Robie. This distance appears to be about one third of the distance around those blocks. If as D/Cst. Basso testified it took 70 seconds to drive around those blocks, it would be reasonable to conclude that this portion of the trip required approximately 15-20 seconds.

[172] Adding approximately 2 minutes and 15 seconds to the 2:14:30 time noted by D/Cst. Basso would put Mr. Nguyen's taxi at the place of the shooting at approximately 2:16:45 am using the Casino departure time as the starting point. This would represent an interval of time from the cab leaving the Casino to its being shot at on Robie Street of approximately seven minutes and twenty-five seconds. This is an estimate.

[173] I find that evidence relating to the time for the cab to have proceeded from the Casino to the site of the shooting on Robie Street was incomplete and inconclusive. On the evidence relating to the route taken by the cab, nearly seven and a half minutes may have passed before the cab arrived at the scene of the shooting.

[174] The evidence of D/Cst. Basso persuaded me that if the accused drove the route stated by him from Upper Water Street to Compton Street at a high rate of speed and, if after the accused got out at Compton Street, Mr. MacNeil drove the Altima north on Robie to May Street, the Altima could not have been at that location in less than 4 minutes from the time it left Upper Water Street. I do not agree that it would have taken the Altima one minute and ten seconds to travel around the block of Robie, May, Agricola and McCully Streets. According to Mr. Nguyen, the Altima came up behind the cab. I conclude that the Altima was travelling faster than the cab and would've taken less than one minute and ten seconds to go around the block.

[175] The Casino video showed the Altima leaving Upper Water Street at 2:10:25. Using the Casino reference time, I conclude that the Altima could not have been at the scene of the shooting any earlier than 2:15:25. More importantly, on the Crown evidence, the time period between when the Altima left Upper Water Street and when it was at the shooting on Robie Street may have been as brief as five minutes. That was one minute and twenty seconds less than the time interval for Mr. Cox's cab to have arrived at the shooting scene after leaving the Casino. Clearly, this time evidence did not preclude the Defence scenario.

[176] The Crown relied on the Mazda video to establish the time of the shooting on Robie Street.

[177] The Mazda video was not tendered into evidence. No explanation was given to the Court why it wasn't tendered. No witness from the Mazda dealership was called to speak to the accuracy of the time on their video camera(s).

[178] The only evidence regarding the accuracy of the time on the Mazda video was D/Cst. Basso's evidence that he compared the video time to the time on his cell phone. He said they showed the same time, to the minute. He did not say when he made the comparison. He assumed the time on his cell phone was correct because it was via satellite. No evidence was called to support this assumption.

[179] D/Cst. Basso did not compare the time on his cell phone to the time on the Casino video, nor the police department time.

[180] I found D/Cst. Basso's assumption that the Casino video time and the police time were accurate reasonable given the sophistication of those systems and the importance of maintaining their accuracy. But, without more evidence, I cannot conclude that those times were in sync.

[181] I am not persuaded that the Mazda time is in sync with any of the other time references.

[182] D/Cst. Basso stated that the PNL video time was off by some 12-14 minutes. Cst. Allison testified that the PNL video showed the Altima near the scene of the shooting at 2:13 am. Their evidence was inconsistent. The PNL video was not introduced.

[183] Cst. Allison testified that the police received a 911 call regarding the shooting at 2:15 am on November 3, 2012. He made no reference to seconds. I find that the call may have been received as late as 2:15:59 am. It would have taken the caller some time to react to the sound of the shots fired and dial 911, so the incident must have occurred before that time as per the police department time reference.

[184] In my opinion, the issue is not so much the time showing on any of the time references at any point in the sequence of events, but the time span between events.

[185] The Crown contended that there was insufficient time between the time the Altima left the Casino and the time of the shooting for the accused to have driven home via the route he stated.



[186] On the totality of the evidence, I am not persuaded that the time period from when the Altima left Upper Water Street to the time of the shooting on Robie Street was so brief that it precluded the accused having driven to his home on Compton Street via the route stated by him and then Mr. MacNeil driving the Altima to the point of the shooting during that time.

[187] The Casino video showed Mr. Nguyen's taxi leaving the Casino at 2:09:20 am on November 3, 2012. Based upon the evidence of D/Cst. Basso, the taxi would have been at the intersection of Barrington and North Streets at approximately 2:10:59 am [2:09:20 plus 1 min 39 seconds]

[188] The Casino video showed the Altima leaving Upper Water Street at 2:10:25 am. According to D/Cst. Basso, after 32 seconds, i.e. at approximately 2:10:57, the occupants of the Altima would have been able to see the intersection of Barrington and North Streets.

[189] On the evidence of D/Cst. Basso, there would have been a two second window of opportunity for the occupants of the Altima, to have seen Mr. Nguyen's taxi before it turned off Barrington Street onto North Street. That small window of opportunity was based on certain assumptions: first, D/Cst. Basso's evidence was based upon a speed estimate of Mr. Nguyen's taxi, the reliability of that estimate

being uncertain, and second, D/Cst. Basso assumed the Altima accelerated quickly and maintained a speed of 70 kph. The Casino video showed the Altima following two other cars on the ramp to Barrington Street. Unless both those vehicles were proceeding at 70 kph or more, the Altima could not have maintained a speed of 70 kph on the ramp.

[190] The fact that the Altima was behind Mr. Nguyen's cab on McCully Street just minutes later favors a conclusion that the occupants of the Altima saw the cab turn off Barrington Street onto North Street. But, Mr. Nguyen's evidence that he did not see any other cars on Agricola Street or when making the McCully, Robie, May, Agricola loop until the third time around does not support such a conclusion. (Although it would not be unreasonable to assume that the pursuing Altima may have turned their headlights off to avoid detection.)

[191] The evidence, as to whether persons in the Altima saw Mr. Nguyen's cab turn off Barrington Street onto North Street, was inconclusive.

[192] I am not persuaded that the occupants of the Altima were in a position to see Mr. Nguyen's taxi turn off Barrington Street onto North Street on the morning of November 3, 2012.

**Animosity Between the Accused and Jacey Cox**

[193] The Crown urged the Court to find that:

- 1) The accused was a member of a group who were involved in criminal activity including drug trafficking;
- 2) Mr. Cox was a member of a rival group of criminals;
- 3) Mr. Hudder knew that Mr. Cox was a member of a rival group of criminals; and
- 4) The two groups were engaged in a “turf war”.

[194] Mr. Hudder conceded that there were two groups of persons with criminal records who “apparently” were engaged in a “turf war”. Mr. Hudder related the “turf war” to drug trafficking. He denied any involvement in drug trafficking. He has no record for drug offences. He suspected his friend Everett MacNeil was trafficking in drugs. He was friends with Jimmy Melvin. There was evidence he served time in a federal penitentiary. There was no evidence that Jimmy Melvin was a member of the Melvin group of drug traffickers. There was no evidence of the criminal record of Jimmy Melvin.

[195] There was no evidence of the criminal record of Jacey Cox. There was evidence of him serving time in a federal penitentiary.

[196] As previously stated the Court rejected Mr. Hudder's evidence that he did not recognize Jacey Cox as the man who walked by him in the Casino on the morning of November 3, 2012.

[197] The evidence does not establish the basis on which Mr. Hudder was able to recognize Mr. Cox on November 3, 2012. The evidence established that Mr. Hudder was friends with Jimmy Melvin, Everett MacNeil, Kyle Shipley, Kyle Wright and Shea Durnford. The evidence did not establish beyond a reasonable doubt that he was involved in drug trafficking or that he was a member of a group of criminals engaged in a "turf war" with another group of criminals, of which Jacey Cox was a member.

[198] The evidence did not establish beyond a reasonable doubt any animosity between the accused and Jacey Cox as of November 3, 2012.

### **Assessment of Everett MacNeil's Evidence**

[199] Mr. MacNeil has a lengthy criminal record. He has prior convictions for dishonesty. He is a close friend of Mr. Hudder. He is biased in favour of Mr. Hudder. His evidence corroborated the alibi evidence of Mr. Hudder.

[200] He admitted he didn't like Jacey Cox and wanted to beat him up. He denied his dislike of Mr. Cox was because he was a member of a rival drug gang. He said he just didn't like him. When pressed, he said it had to do with a girl. He added that Kyle Shipley didn't like Jacey Cox either and later added that Shea Durnford didn't like Jacey Cox. He gave no reason for their dislike of Mr. Cox. It seemed oddly coincidental that three of five members of Mr. MacNeil's group would each have an issue with Mr. Cox such that they would want to beat him up.

[201] Mr. MacNeil testified that upon Mr. Hudder taking the driver's seat of the Altima they sped off in pursuit of the cab carrying Mr. Cox. He claimed they lost sight of the cab at which point there was no reason to speed. He didn't believe they were speeding. Then, as Crown counsel asked more questions on the speed of the car, he appeared to realize that there may be some importance to the speed and qualified his answers saying he was probably on his phone texting and not paying close attention. That qualification seemed to have been made up at the time he was testifying.

[202] When Mr. MacNeil described Mr. Hudder's route he didn't know any street names but quickly said that he remembered going by the parole office. It seemed suspicious that he would highlight the same landmark as Mr. Hudder, especially if

he was on his phone texting as he claimed. Having said that, both men having served federal time and having been on parole, had a rational basis for being familiar with that landmark.

[203] Mr. MacNeil's evidence that he had no knowledge that Mr. Durnford was in possession of a loaded firearm and intended to shoot Mr. Cox, until seconds before the shooting, was not credible. It made no sense that Mr. Durnford would not only hide the gun from his friends but deceive them as to his intentions by asking Mr. MacNeil to pull alongside the cab to see if Mr. Cox was the person inside. Mr. MacNeil and his friends wanted to beat up Mr. Cox that morning. Mr. Durnford was among friends. It made no sense that he would hide his intention to shoot Mr. Cox.

[204] Several aspects of Mr. MacNeil's evidence were not believable. His evidence of Mr. Hudder's route seemed prepared and his reference to seeing the parole office quite coincidental.

### **Assessment of Mr. Hudder's Evidence**

[205] Mr. Hudder's evidence, with few exceptions, was direct, clear and consistent. He was subjected to a lengthy, probing, detailed cross-examination.

Other than the provision of further details, his evidence on cross-examination was unchanged from his evidence on direct examination. The Crown's main submission was that his evidence was neither logical nor reasonable.

[206] Mr. Hudder did not disclose his alibi defence until days before the start of his trial, some 18 months after the alleged offence, six months after his arrest. This has been considered in assessing the credibility of his evidence and that of other Defence alibi witnesses.

[207] Mr. Hudder's evidence that he did not know or recognize Mr. Cox as of November 3, 2012 was not credible. I find that he recognized Mr. Cox and alerted Mr. MacNeil to Mr. Cox's presence. I reject Mr. Hudder's evidence on this point.

[208] The fact that Mr. MacNeil recognized Mr. Cox and falsely denied this fact is relevant to the Court's assessment of his credibility. It does not, however, establish proof of animosity between Mr. Hudder and Mr. Cox. Having considered the entirety of the evidence, I am not persuaded beyond a reasonable doubt that, as of November 3, 2012, there was animosity between Mr. Hudder and Mr. Cox.

[209] I have considered the apparent inconsistency in the testimony of Mr. Hudder regarding whether or not, when he drove off from Lower Water Street, he told his friends in the Altima that he was not going after Mr. Cox, but going home.

[210] The only other evidence on that point was that of Everett MacNeil. Mr. MacNeil testified that someone told Shea Durnford to follow the cab. Then there were the near accidents on Lower Water Street. Mr. MacNeil testified that there was a lot of screaming and yelling in the car at that time and Mr. Hudder was freaking out. He added, at Vol. II - page 40:

“...[B]y the time the car was – we couldn’t find him.”

[211] Mr. MacNeil’s evidence suggested that an effort was made to find the cab, or at least he believed that was done. That suggested that, at least initially, Mr. Hudder did not tell his friends that his intention was to drive home, if that was his intention.

[212] This inconsistency in the evidence of Mr. Hudder and Mr. MacNeil did not seem unreasonable given the passage of time since the incident and the level of excitement at the time.

[213] The evidence of Mr. Hudder that he raced home was not corroborated by Mr. MacNeil. Mr. MacNeil agreed that they drove fast to Barrington Street but thereafter, having lost the cab with Mr. Cox, there was no reason to speed. He didn’t recall the Altima speeding, thereafter, but qualified his evidence by saying he was probably on his phone, suggesting he wasn’t paying close attention.



[214] The evidence of Mr. MacNeil cast doubt on Mr. Hudder's evidence that he raced home at high speed. It also raised the question, why would Mr. Hudder claim to have driven fast to his home.

[215] Mr. Hudder, in the Court's assessment, was clearly capable of concocting false evidence. He is intelligent. He has numerous prior convictions for offences of dishonestly. He was very familiar with the Crown evidence. He had ample time to concoct a story. He did not disclose his alibi evidence until shortly before the start of his trial, 18 months after the alleged offences.

[216] Mr. Hudder's testimony of speeding home may have been concocted to address the Crown's evidence of there being a limited amount of time between his leaving the Casino and the time of the shooting. However, if that was so, why would he testify that he missed the turn off Gottingen Street onto Cunard Street? Had he claimed to have turned at Cunard Street his route would've been shorter by several blocks and many seconds. This could have been a detailed strategically included to attempt to make his story more believable.

[217] Before the evidence of Mr. Hudder and Mr. MacNeil the Crown evidence had not established beyond a reasonable doubt that Mr. Hudder took the driver's

seat of the Altima when Mr. Durnford got out of the driver's seat. Mr. Hudder took the stand and admitted to having done so.

[218] Mr. Hudder's evidence denying that he was part of a plan to attack Mr. Cox was supported by the video evidence showing his leaving his friends on a number of occasions while they were watching Mr. Cox, including just minutes before Mr. Cox left the Casino. Furthermore, Mr. Hudder didn't leave the Casino until approximately 30 seconds after his friends left to pursue Mr. Cox. This appeared to support his claim that he did not want to take part in an attack on Mr. Cox. This evidence could also be consistent with Mr. Hudder directing the actions of the group and his maintaining some distance to appear not to be involved – knowing his actions were being captured on camera.

[219] Mr. Hudder testified that he didn't just leave the Casino on his own to avoid being caught up in the attack on Mr. Cox because he wouldn't do that to his friends. His evidence that he decided to drive home thus ending his friend's pursuit of Mr. Cox, after they'd spent 50 minutes shadowing Mr. Cox in the Casino, seemed inconsistent with his evidence that he wouldn't just leave his friends and go home on his own.

[220] Mr. Hudder explained why he jumped into the driver's seat after Mr. Durnford got out. His evidence that he was freaking out was corroborated by Mr. MacNeil.

[221] Mr. Hudder gave an explanation why he went north on Barrington Street rather than west onto Cornwallis Street. The Casino video does not show the traffic lights at Barrington and Cornwallis Streets. The accused claimed there were cars waiting at a red light. The evidence does not preclude that having been so.

[222] Mr. Hudder provided a reason for speeding home, i.e. to get away from the Casino and the Altima before caught by the police.

[223] Mr. Hudder provided an explanation for going into hiding on November 3, 2012. He claimed to have gotten a call from Mr. Durnford advising him of the shooting. He claimed he feared that his parole would be revoked, so he fled.

[224] But he testified that he raced home from the Casino earlier that morning to avoid a possible parole violation. So what changed? The shooting merely heightened the likelihood of a violation due to an enhanced police investigative response due to the shooting.

[225] Mr. Hudder testified that when he left his father's home on November 3, 2012 he wasn't sure when he'd return. He stated that his concern was of a possible parole violation. He stayed in hiding for a year. To stay in hiding for a year out of a concern about a parole violation would seem illogical. However, soon after he fled he learned that the police were looking for him in relation to the attempted murder of Jacey Cox. Mr. Hudder's rationale for staying in hiding was then double faceted. Although he claimed to be innocent of the attempted murder, he was untrusting of the police and would know the Casino cameras could place him with his friends shortly before the shooting. These circumstances were considered in assessing the reasonableness of his stated reason for staying in hiding.

[226] If Mr. Hudder's evidence was truthful, then Mr. MacNeil and the others happened to arrive on Robie Street at a point in time when Mr. Cox's cab was on Robie Street between McCully and May Streets, at approximately 2:15 am in the morning, less than 10 minutes after Mr. Hudder and friends left the Casino in pursuit of Mr. Cox's cab.

[227] That would be an amazing coincidence. It is so unlikely that it stretches credibility to the extreme. However, the Crown's scenario of the Altima pursuing Mr. Cox's cab, included unexplained gaps in the evidence of a pursuit. The

Crown's scenario would seem to rely on a fortuitous re-spotting of Mr. Cox's cab, not entirely dissimilar to the Defence scenario.

[228] In summary, Mr. Hudder lied about not recognizing Jacey Cox at the Casino on November 3, 2012. No doubt this was done to support his claim that he had no animosity toward Jacey Cox and was not involved with his friends plan to "beat him up". Mr. Hudder's explanations for his actions on November 3, 2012 were not entirely reasonable. The timing of the disclosure of his alibi evidence raised concerns regarding the credibility of his evidence, which have been considered. The Court did not find Mr. Hudder's evidence credible, however, the Court was not persuaded that his evidence ought to be wholly rejected.

### **The Law Relating to Circumstantial Evidence**

[229] In the present case, the Crown's evidence was entirely circumstantial. There was no direct evidence of the accused being the driver of the Altima at the time of the shooting.

[230] The accused has been charged with criminal offences. He is presumed innocent. An accused person may be convicted only if the evidence proves his guilty beyond a reasonable doubt. The burden of proof rests with the Crown.

Proof may be established by direct or circumstantial evidence or a combination thereof. Circumstantial evidence involves proof of facts other than the fact in issue. The Court is urged to infer from the proven facts that the fact in issue has been proven.

[231] Where the evidence is entirely circumstantial, in order to convict, the trial judge “must be satisfied beyond a reasonable doubt that the only rational inference that can be drawn from the circumstantial evidence is that the accused is guilty” (**R. v. Griffin**, [2009] S.C.J. No. 28)

[232] In **R. v. Defaveri**, [2014] BCCA 37-, the Court stated “The assessment of circumstantial evidence does not require that inferences found to be inconsistent with guilt must arise from proven facts. Certainly the defense is not burdened with having to establish facts from which such an inference may be drawn.” As stated in **R. v. Bai** 2014 ONCA 614, para 28 (see also **R. v. Khela**, 2009 SCC 4), “the question of whether there exists a reasonable doubt concerning guilt is to be assessed on the totality of the evidence, not simply on the proven facts.”

### **Alibi Evidence**

[233] In May 2014, days before the start of the accused's trial, the Defence gave the Crown notice of their intent to call alibi evidence. The accused's father, James Hudder provided a statement. Everett MacNeil, a second alibi witness declined to give the police a statement prior to trial.

[234] The law of alibi was summarized by the Supreme Court of Canada in **Hibbert v. The Queen** [2002] 2 S.C.R. 445.

There is no obligation on the accused to prove an alibi. The Crown bears the burden of proving beyond a reasonable doubt that the crime was committed by the accused. Consequently, the Crown must disprove an alibi beyond a reasonable doubt.

[235] In **Hibbert**, the Supreme Court approved the following instruction to the jury:

“...[I]f you accept the evidence in support of the defence of alibi, you must return a verdict of not guilty if you find that these terms just do not allow for this accused to have committed the acts alleged. If you do not accept the evidence in support of the defence of alibi, but you are left in a reasonable doubt about it, you must return a verdict of not guilty. Even if you are not left in a reasonable doubt by the evidence in support of the defence of alibi, you must still go on to determine whether or not on the basis of all the evidence the accused is guilty.”

[236] In **Hibbert**, the Supreme Court listed the following principles:

- (i) In the absence of evidence of concoction (deliberate fabrication) an alibi that is disbelieved has no evidentiary value;
- (ii) A disbelieved alibi is insufficient to support an inference of concoction or deliberate fabrication. There must be other evidence from which a reasonable jury could conclude that the alibi was deliberately

- fabricated and that the accused was involved in that attempt to mislead the jury. It is the attempt to deceive, and not the failed alibi, that supports an inference of consciousness of guilty;
- (iii) In appropriate cases, for instance if there were multiple accused, the jury should be instructed that the fabricated alibi may be used to place the accused at the scene of the crime, but may fall short of directly implicating him in its commission;
  - (iv) When there is evidence that an alibi was fabricated, at the instigation or with the knowledge and approval of the accused, that evidence may be used by the jury to support an inference of consciousness of guilt;
  - (v) In cases where such an inference is available, the jury should be instructed that it may, not must, be drawn;
  - (vi) A fabricated alibi is not conclusive evidence of guilt.

[237] When the defence of alibi is to be raised, notice thereof is expected to be given to the Crown. In **Cleghorn v. The Queen**, [1995] 3 S.C.R. 175, the Court held that the timeliness and informational adequacy of the alibi notice will be measured in the circumstances of the case against the standard of “whether a meaningful investigation could have been undertaken as a result of the disclosure”. Failure to give adequate notice of alibi does not result in the evidence being inadmissible but may lessen the weight to be given to the evidence. (**Cleghorn**, supra)

## Conclusion



[238] The Crown's theory was that, for some 45 minutes, on the morning of November 3, 2012, the accused and three of his friends watched and followed Mr. Jacey Cox as he moved about in the Halifax Casino. The Crown urged the Court to find that Mr. Cox was disliked by the accused and his friends, mainly, because he was associated with a rival group of criminals. When Mr. Cox left the Casino area by taxi, the accused and his friends pursued him in the Altima driven by Shea Durnford, another friend, who had been called to come to the Casino for the purpose of pursuing Mr. Cox. Mr. Durnford drove off at high speed in pursuit of Mr. Cox.

[239] After Mr. Durnford nearly caused two accidents he stopped the Altima and switched seats with the accused, Mr. Hudder. Mr. Hudder quickly drove the Altima in pursuit of Mr. Cox. Only minutes later, the Altima pulled alongside of Mr. Cox's cab on Robie Street and Shea Durnford fired shots at Mr. Cox, from the front passenger seat, in an attempt to kill him. Later, that day, Mr. Hudder went into hiding and stayed in hiding for one year. The Crown urged the Court to find that this showed Mr. Hudder's consciousness of guilt.

[240] The Crown urged the Court to find that the only rational inference which can be drawn from the evidence was that Mr. Hudder was still the driver of the Altima at the time of the attempted murder of Jacey Cox.

[241] The Crown's case that Mr. Hudder was still the driver of the Altima at the time of the attempted murder of Jacey Cox was entirely circumstantial. A conviction may be entered only if the Court is satisfied beyond a reasonable doubt that the guilt of the accused is the only rational inference that can be drawn from the facts.

[242] I am satisfied that, based upon the proven facts, it would be rational to infer that the accused, Andrew Hudder, was still the driver of the Altima when shots were fired from it at a cab transporting Mr. Cox, on Robie Street on the morning of November 3, 2012, just minutes after that car left the Casino on Lower Water Street in pursuit of Mr. Cox's cab.

[243] The Defence argued that the guilt of the accused was not the only reasonable inference which may be drawn from the evidence. The Defence presented alibi evidence.

[244] The Defence conceded that on the morning of November 3, 2012, Mr. Hudder's friends watched and followed Mr. Jacey Cox in the Casino and

formulated a plan to beat him up. When Mr. Cox left the Casino, those persons tried to attack Mr. Cox before he left in a cab. Mr. Hudder denied agreeing to take part in their plan or being involved in the plan.

[245] The Defence acknowledged that, after Mr. Cox left in a cab, Mr. Hudder and his three friends got into the Altima driven by Shea Durnford who had been called to come to the Casino in case they needed to pursue Mr. Cox. The Altima left the Casino hurriedly nearly causing two accidents. Mr. Hudder admitted that he then got into the driver's seat of the Altima. He sped off hurriedly. The Defence evidence was that Mr. Hudder drove home and got out. That he was not the driver of the Altima, nor in the car at the time of the attempted murder of Jacey Cox just a minute or so later.

[246] The Defence acknowledged that Mr. Hudder did not take the shortest, nor most direct route home but argued that he had provided a reasonable explanation for the route taken. Further, the Defence urged the Court to find that Mr. Hudder provided a reasonable explanation for why he drove to his home at high speed. Further the Defence urged the Court to find that Mr. Hudder provided a reasonable explanation for going into hiding later that day and staying in hiding for a full year.

[247] Mr. Everett MacNeil, one of the accused's friends who were with him on November 3, 2012 corroborated Mr. Hudder's testimony that he drove home and got out. Mr. MacNeil testified that he was the driver of the Altima as it proceeded north on Robie Street. He claimed that they saw a cab on Robie Street which turned out to be Mr. Cox's cab. They followed it. He admitted to pulling alongside the cab on Robie Street. He claimed that he did so to check to see if Mr. Cox was in the cab. He claimed to be surprised when Shea Durnford took out a gun and fired several shots at Jacey Cox.

[248] The Crown Called reply evidence and based upon that evidence urged the Court to find:

- a) That there was insufficient time between when the Altima left the Casino area and the time of the shooting for Mr. Hudder to have driven home and gotten out of the Altima; and
- b) That the accused and his friends would have been in a position to see Mr. Cox's cab turn off Barrington Street onto North Street to aid in their pursuit of the cab.

[249] The reply evidence failed to establish either of those points beyond a reasonable doubt.

[250] It is the Court's conclusion that the evidence has failed to establish that there was insufficient time for the events to have transpired as the Defence witnesses testified.

[251] Further, on the evidence, it would have been unlikely that the accused and his friends would have been in a position to see Mr. Cox's cab turn off Barrington Street onto North Street.

[252] The Defence alibi evidence was not entirely credible. The Defence alibi relied on a very unlikely coincidence of those in the Altima happening upon Mr. Cox's cab just moments after dropping off Mr. Hudder. Further, Mr. Hudder's evidence was not entirely truthful. His explanations for his actions were not entirely believable, individually or collectively. However, I am not persuaded beyond a reasonable doubt that his evidence ought to be wholly rejected. On the totality of the evidence, it has not been proven beyond a reasonable doubt that the incident could not have happened in the manner testified to by Defence witnesses.

[253] The burden of proof rests upon the Crown. It is a heavy burden of proof. While the Defence evidence was not believed, the totality of the evidence left the

Court with a reasonable doubt as to whether the incident could have occurred as testified to by the Defence.

[254] On the totality of the evidence, I am not persuaded that the only rational conclusion that may be drawn from the evidence was that the accused was still the driver of the Altima at the time of the attempted murder of Jacey Cox. The evidence has failed to disprove the Defence alibi beyond a reasonable doubt.

[255] Further, the evidence has failed to establish beyond a reasonable doubt that the accused knew of the presence of a firearm in the Altima during the time he was in that car.

[256] I find the accused not guilty on all accounts.