PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. Burgess*, 2021 NSPC 34

Date: 20210702
Docket: 8453554
Registry: Kentville

Between:

Her Majesty the Queen

v.

Keenan Burgess

Judge:	The Honourable Judge Ronda M. van der Hoek
Heard:	June 28, 201, in Kentville, Nova Scotia
Oral Decision:	July 2, 2021
Written Decision:	July 20, 2021
Charge:	Section 320.15(1) of the *Criminal Code of Canada*
Counsel:	William Fergusson, for the Crown Mark Bailey, for the Defendant

By the Court:

Overview:

[1] Keenan Burgess was operating a motor vehicle when he was stopped by RCMP at a roadside checkpoint in Garland's Crossing in the early morning hours of July 5, 2020. A can of an alcoholic beverage was visible in a dashboard cupholder between Mr. Burgess and his passenger and, after collecting and

reviewing the vehicle documentation, Cst. Bracken read Mr. Burgess a demand to provide sample of breath for the approved screening device ("ASD"). He accompanied her to a police cruiser where he was provided numerous opportunities to provide a sufficient sample. He did not.

[2] Cst. Bracken's handwritten notes did not contain much detail about what occurred during each of Mr. Burgess' nine opportunities to provide a sample. She testified that each opportunity was essentially the same and, after demonstrating how to blow, she did not feel air pass through the machine's "finger spot" while Mr. Burgess was blowing into it, and the machine consistently read "insufficient" air.

[3] Mr. Burgess is charged with one count of failing to comply with an approved screening device demand pursuant to s. 320.27, an offence contrary to s. 320.15(1) of the *Criminal Code of Canada*.

Issue:

[4] Defence counsel says Cst. Bracken's handwritten notes lack meaningful detail and, since they are the strongest evidence, the Court should be sceptical of her testimony. Counsel was particularly concerned about a lack of context and

detail regarding why Mr. Burgess could not blow a proper sample and argues *mens rea* has not been proven beyond a reasonable doubt.

General Criminal Trial Principles

[5] Mr. Burgess benefits from the presumption of innocence and the Crown bears the heavy burden of proving his guilt beyond a reasonable doubt. That onus never shifts to Mr. Burgess, asking him to prove that he did not commit the offence.

[6] Proof beyond a reasonable doubt "does not involve proof to an absolute certainty, it is not proof beyond any doubt nor is it an imaginary or frivolous doubt" (*R. v. Lifchus*, [1997] 3 S.C.R. 320) Instead, the burden of proof lies "much closer to absolute certainty than to a balance of probabilities" (*R. v. Starr*, 2000 SCC 40, [2000] 2 S.C.R. 144).

[7] Finally, a "reasonable doubt does not need to be based on the evidence; it may arise from an absence of evidence or a simple failure of the evidence to persuade the trier of fact to the requisite level of beyond reasonable doubt". (*R. v. J.M.H.*, 2011 SCC 45)

[8] Evidence is not assessed in a piecemeal fashion, rather the Court considers the whole of the evidence recognizing a trial is not a credibility contest with the

Court simply preferring one side to that of the other. Instead, some, none, or all of what any witness says can be accepted after assessing the reliability and credibility of their testimony.

[9] Credibility assessments involve the Court considering the veracity or truth of a witness' testimony, while reliability assessments consider the accuracy of the testimony. More particularly, accuracy requires scrutiny of such things as the ability to observe, recall and recount a situation. If witness testimony on an issue is not credible, he cannot provide reliable evidence on the points in issue. However, a credible witness may give evidence that is unreliable, as in the case of mistaken eye-witness identification observation, where circumstances such as having only a brief opportunity to observe render an honest belief unreliable.

The Law:

[10] The relevant sections of the *Criminal Code* are as follows:

> Section 320.27(1):
>
> **Testing for presence of alcohol or drug**
>
> 320.27 (1) If a peace officer has reasonable grounds to suspect that a person has alcohol or a drug in their body and that the person has, within the preceding three hours, operated a conveyance, the peace officer may, by demand, require the person to comply with the requirements of either or both of paragraphs (a) and (b) in the case of alcohol or with the requirements of either or both of paragraphs (a) and (c) in the case of a drug:

> (b) to immediately provide the samples of breath that, in the peace officer's opinion, are necessary to enable a proper analysis to be made by means of an approved screening device and to accompany the peace officer for that purpose;

[11] Section 320.27(2) of the *Criminal Code* reads as follows:

> **Mandatory alcohol screening**
>
> (2) If a peace officer has in his or her possession an approved screening device, the peace officer may, in the course of the lawful exercise of powers under an Act of Parliament or an Act of a provincial legislature or arising at common law, by demand, require the person who is operating a motor vehicle to immediately provide the samples of breath that, in the peace officer's opinion, are necessary to enable a proper analysis to be made by means of that device and to accompany the peace officer for that purpose.

[12] The charging section, 320.15(1), reads as follows:

> Everyone commits an offence who, knowing that a demand has been made, fails or refuses to comply, without reasonable excuse, with a demand made under section 320.27 or 320.28.

[13] The required elements of the offence, can be nicely summarized as follows:

1. the defendant knows that a demand has been made,

2. the demand was lawful,

3. there was an intentional failure to comply with the demand.

[14] Once the Crown has established the elements of the offence, Mr. Burgess may choose to prove, on a balance of probabilities, that he had a "reasonable excuse" for failing to comply with the demand. (*R. v. Goleski*, 2015 SCC 6, [2015] 1 S.C.R. 399).

Failure to provide a sample:

[15] This case focuses on whether *mens rea* has been proven, and case law has considered what that means in the context of this charge. While the wording of the charge has been amended slightly, the older cases are still relevant to defining this element of the offence. The Crown is required to prove Mr. Burgess intended to produce the failure. (*R. v. Lewko*, 2002 SKCA 121 at para. 9)

[16] In *R. v. Soucy*, 2014 ONCJ 497, at para. 57, Paciocco J. considered the *mens rea* requirement and concluded the Crown must establish the defendant failed to provide a breath sample "on purpose". The Court went on to consider *R. v. Dolphin*, 2004 MBQB 252, adding "as a matter of common sense, if the device was shown to be in good working order, the accused was given a clear explanation of its operation, and a sufficient opportunity to provide a sample was furnished, it can generally be inferred in the absence of evidence raising some question about the ability of the accused to comply, that the accused intended to avoid furnishing a suitable sample". The reasoning in *Soucy*, was endorsed by then Judge Hoskins in *R. v. Bonang*, 2016 NSPC 73 and by Judge Tax in *R. v. Downey*, 2018 NSPC 24.

[17] Where the defendant leads evidence suggesting that he tried to provide a sample, proof that a device was properly functioning can be considered in evaluating his testimony.

[18] Finally, in *R v Slater*, 2016 ONSC 2161, Nordheimer J. as he then was, said of the following when considering the *mens rea* element:

> ... absent evidence to the contrary, or evidence that raises a reasonable doubt, proof of the requisite mens rea for the offence will be met by the application of the general principle that a person, who does something that has predictable consequences, usually intends or means to cause those consequences. Put more directly, evidence that a person who tries multiple times to provide a breath sample, and in each instance fails to provide a sample, gives rise to an inescapable inference that s/he is intending that result, absent some other evidence being present that would suggest an absence of such an intent, or at least raise a reasonable doubt about it.

[19] Before considering whether *mens rea* has been proven, I will set out the testimony of the witnesses and make findings of fact. Before considering the contentious evidence, it is useful to address first that which is not in issue.

Uncontroverted evidence:

[20] There is no doubt Cst. Bracken delivered a lawful ASD demand, it was properly read, and there is no reason to doubt Mr. Burgess understood it. The demand could be based on either section 320.27(2) CC, because she was engaged in her duties under the MVA and had an ASD in her possession, or under s. 320.27(1) because she saw the bottle of alcohol within reach of the driver. In her

testimony Cst. Bracken said she relied on s. 320.27(1) CC, and that, I find, authorized her decision to make the demand.

[21] Cst. Bracken is trained in the use of the Alcosensor SFT an approved screening device listed in the *Criminal Code.* The machine was tested and determined to be operational at all relevant times.

[22] While there is debate as to the number of opportunities provided Mr. Burgess – nine or five, I find either represents a sufficient number of opportunities to gain comfort with the machine.

The testimony of Keenan Burgess:

[23] Keenan Burgess testified, confirming that he was dealt with by Cst. Bracken near the hardware store sometime between 11:45 pm and midnight. He acknowledged the open container of alcohol, Blue Lobster Lemon Lime, belonging to his passenger was in the dashboard cupholder.

[24] Mr. Burgess says Cst. Bracken attended at his car and asked for his licence and registration, collected them, and went to her car. She was gone for approximately 10-15 minutes during which time he smoked a cigar.

[25] He believes Cst. Bracken noticed the can of alcohol upon returning to the car. He did not, however, testify as to what led him to reach this conclusion other than the request to provide a sample and to put out the cigar because it would affect the ASD results. He had to wait before taking the test and testified that he was both nervous and anxious around “cops”, but “I knew I had to do it”.

[26] Mr. Burgess says he “was taken” to the back of the police car where Cst. Bracken read to him “about what would happen”. He says he “tried to provide a sample” five times, and on the third attempt the machine stopped/timed out for a second, she reset it, and he blew two more times.

[27] He also testified that on the last two attempts he was trying to blow into the device but could not do so because he did not have enough breath to “get the device to read”. Mr. Burgess says he was not doing anything to “make it not happen”.

[28] Asked how Cst. Bracken was acting, he said “alright”. When asked the somewhat leading question whether she was frustrated, Mr. Burgess agreed she was so after a few attempts to obtain his breath samples. He testified there was a little more “tone” in her voice, “a little frustration”.

[29] Mr. Burgess says he was increasingly anxious and nervous, denied sucking the device instead of blowing into it, and says he was actively trying to provide a sample because he was not impaired – "zero and tired".

[30] On cross-examination he confirmed no previous experience blowing into an ASD, severe asthma that has not been a factor in his life for a very long time and agreed he did not provide Cst. Bracken a reason why he could not provide a proper sample.

[31] When the Crown asked why Mr. Burgess could not provide a sample, he ascribed nervousness, anxiety, and an inability to "get his breath" as the cause.

The testimony of Mr. Comeau:

[32] The passenger, Mr. Comeau, testified, agreeing it was his Coldstream cooler alcoholic drink, not a Labatt Blue, in the car cup holder in front of him. He later testified it was in the centre console within reach of both he and Mr. Burgess.

[33] The order of events, according to Mr. Comeau: Mr. Burgess provided information to the police officer, she asked questions, she gave the information back, she noticed the can in the cup holder, and he was outside the car when the ASD was administered to Mr. Burgess.

[34] From his location, seated on the curb 20 to 30 feet away, he says he could hear Cst. Bracken and Mr. Burgess talking, and while he could not see what was going on between them, believes Mr. Burgess attempted to blow into the ASD device five times. Mr. Comeau says he heard words to the effect “you have five times”.

[35] He also recalled an issue with the machine and concluded it was not working. He recalls Cst. Bracken mentioning that Mr. Burgess would have to do sobriety testing before managing to get the machine working.

[36] He says Cst. Bracken was quite friendly with Mr. Burgess.

The testimony of Cst. Bracken:

[37] Cst. Bracken testified that she was stationed at a roadside check point after midnight at Garland’s Crossing. She was in uniform using her marked police car along with other officers when Mr. Burgess drove toward the check point and, at first, did not appear to be stopping his grey Audi motor vehicle. Eventually he did stop near the hardware store where Cst. Bracken approached the vehicle occupied by two people. She noted an empty can of beer on the dash and told the driver she would read the approved screening device demand.

[38] Challenged as to her recollection of exactly when she noticed the can, before or after she collected Mr. Burgess' driving related documentation and returned from her car following a review of them, she reconfirmed noticing the can right away when she first approached the vehicle. She did not personally recall collecting his driving information but agreed it was likely she did so in the circumstances.

[39] I will say that while Mr. Burgess and his passenger believe Cst. Bracken noticed the alcohol can only upon her return to the car after checking his documentation, I find nothing turns on this dispute but will consider it in the mix when assessing the constable's overall credibility. It was not argued that Cst. Burgess lacked lawful authority to make the demand based on when she saw the can, and in my opinion the new section 320.27(2) certainly does away with the need to set out grounds for a demand when an ASD is at the ready, as it was in this case.

[40] After the demand was read, Mr. Burgess accompanied the officer to her cruiser where he was told he did not need to sit in the vehicle, but if he chose to do so the door could be left open. Cst. Bracken testified that Mr. Burgess got in the vehicle and shut the door. She stood beside him outside the car, and I conclude the test was administered through the window.

[41] Cst. Bracken obtained a fresh mouthpiece, attached it to the unit, and turned on the device. She explained to Mr. Burgess how to take a deep breath and blow. She demonstrated this during her testimony. Her demonstration clearly represented an intake of air and a slow blowing out.

[42] Cst. Bracken explained to the Court that the device has a “finger spot” where, when air is blown into the machine, one can feel it leave. During Mr. Burgess’s nine attempts to blow, she says she was not able to feel air coming out of that spot.

[43] She testified that at one point she changed to a new mouthpiece and continued to provide Mr. Burgess instructions “over and over” with respect to how to blow into the machine.

[44] Cst. Bracken explained that the machine indicated “insufficient” airflow and it beeped.

[45] She testified that there were nine attempts by Mr. Burgess to blow into the ASD and none of those nine attempts were in any way different one from the other. She concluded he did not provide a proper sample because, as she explained, you hear a click and see a line and a reading if a proper sample was provided into the

machine. Overall, the Alcosensor SFT machine indicates four different outcomes: pass, warn, fail, and insufficient sample.

[46] After the eighth attempt to blow, Cst. Bracken says she advised Mr. Burgess that he would be charged with failure to provide a sample and she gave him a final ninth opportunity to blow.

[47] According to her notes, she read the demand at 12:24 am and all nine attempts occurred by 12:52 am when she arrested Mr. Burgess.

[48] On cross-examination defence counsel challenged Cst. Bracken's less than robust note taking. She agreed that she did not take notes about the can she believed was a Labatt's Blue beer. She is involved in checkpoints once or twice a week and between five and 10 times a month, and agreed notes are important.

[49] I will say the defence evidence all supports the presence of the can and one of those witnesses described it as blue. I find there was an alcoholic beverage can even if the name on it differs as between the witnesses.

[50] Defence counsel pointed to a lack of notes about: the exact time Mr. Burgess was stopped, when Cst. Bracken saw the alcohol can, their interaction before she saw the can, collecting his documentation, and the check of same.

[51] Addressing each in turn, I am unsure the import of not noting the exact time Mr. Burgess was stopped in a case such as this. The demand and the attempts to blow all occurred in fairly short order.

[52] Cst. Bracken testified that she remembered seeing the can right away. Asked if it was possible she saw the can when she came back from checking Mr. Burgess' roadside documents, Cst. Bracken said no. I find, it really does not matter when she noticed the can in the car, she says right away, the defence witnesses infer she did not, but none testified about any conversation about the can and defence witness inferences about when she noticed it does not make it so in the absence of evidence to support such a conclusion. The testimony of each defence witness was to simply state their belief that she did not notice it when she first approached the vehicle. What is clear, Cst. Bracken based her grounds to read the demand on the presence of the can.

[53] I find there is no doubt Cst. Bracken collected Mr. Burgess' motor vehicle related documents and checked them at her cruiser. Mr. Burgess and his passenger witness testified to same and while Cst. Bracken did not mention doing so in examination-in-chief, it appears she was focused on the considerations that supported the *Criminal Code* matter and not her actions pursuant to the *Motor*

Vehicle Act. Incidentally, the Crown Attorney did not ask her questions about document checks conducted to determine Mr. Burgess' identity, etc.

[54] I can easily find there must have been some minimal conversation around collecting documents, but once again nothing turns on same not being recorded in Cst. Bracken's notebook. It is typical that police collect and review documents at roadside checkpoints, and such a review requires a check through the computer system in the police car. I have no reason to doubt a documentation check was conducted in this case.

[55] The above-noted factors, I find do not impact the credibility of Cst. Bracken. More interestingly, when asked about failing to record in her notebook not feeling Mr. Burgess' breath coming from the ASD "finger hole", she agreed that was not recorded in her notes but maintained it was true.

[56] Challenged as to whether there were nine attempts, or fewer, afforded Mr. Burgess to blow into the device, Cst. Bracken testified "definitely nine, we always do nine attempts for charging a refusal, this is based on my training… there are always nine attempts."

[57] Asked if Mr. Burgess appeared nervous, Cst. Bracken said “probably, most people are nervous.” She was not asked to describe what nervous looked like in the case of Mr. Burgess.

[58] Asked if she yelled at Mr. Burgess, Cst. Bracken said “there is no reason to yell... I was talking with him.”

[59] Cst. Bracken was also asked if anything happened after the third attempt to blow. She promptly explained that the ASD “times out” after three attempts and has to be reset by pressing a button. Asked if another officer was involved in this process, she said no, explaining the other officer, to her recollection, dealt with the passenger. She was not asked about the second time the machine would have timed out, after the sixth effort to blow.

[60] On redirect, the Crown confirmed that the handwritten notes Cst. Bracken referenced during her testimony were not in fact her only notes. He confirmed she also created a lengthier General Report from her handwritten notes, her memory, and “other things”. She was not asked about the details recorded in her General Report.

Position of the parties:

[61] The Crown says nine opportunities to blow does not represent a magic number, but Cst. Bracken had a reason for offering nine opportunities – it accorded with her training. Finally, that she did so nine times was recorded in her notes. Mr. Comeau's testimony that he heard Cst. Bracken tell Mr. Burgess there was a cut-off point serves only to confirm her testimony that at some point the blowing would have to stop.

[62] The Crown says Mr. Burgess did not testify about any health reason or excuse for not being able to provide a sample of breath for the ASD. Importantly, he did not offer an explanation to the police officer at the roadside. I took this to mean that he did not provide a reasonable excuse, proven on a balance of probabilities – not to be confused with the Crown requirement to establish *mens rea*.

[63] Cst. Bracken's testimony I am asked to accept supports insufficient air provided on all nine attempts two blow, and since there is no reason to conclude anything other than the machine was operating properly, Mr. Burgess provided inadequate samples of breath resulting in a refusal to provide the legally required sample. *Mens rea* is established.

[64] The Crown also says the Court should be suspicious about the alcohol located within easy reach of Mr. Burgess as potential support for the reason why he did not blow. I presume this is meant to support a conclusion Mr. Burgess was not truthful.

[65] The defence says *mens rea* has not been established, his client was trying to provide a sample but could not. He also says Cst. Bracken's evidence should be viewed with caution due to items not in her notes such as that about the finger hole.

Assessing the evidence of the witnesses:

[66] Mr. Comeau's evidence is that of an interested party. He is the reason Mr. Burgess was read the demand in the first place. It was his alcohol that attracted the interest of the officer, he was impaired by the alcohol he had consumed at the party earlier that night, and for that reason Mr. Burgess was driving them home.

[67] He offered very little to the case except his assumption there were five attempts to blow and not nine. I do note that he did not observe those efforts, but merely heard something that led him to reach that conclusion from 20-30 meters away. I also did not hear evidence from any witness that the officer or Mr. Burgess were counting out loud the number of attempts. I found it convenient that Mr.

Comeau agreed with the evidence of Mr. Burgess that there were five opportunities to blow.

[68] Overall, I cannot ignore the distance Mr. Comeau was located from Mr. Burgess who was seated in the police car, the lack of visual observation, and the potential impact of alcohol on this witness' credibility and reliability. Both are negatively impacted by these considerations.

[69] His testimony that the device malfunctioned and Cst. Bracken told Mr. Burgess something about "sobriety testing" suggested the machine not working, but that was not the evidence of either Mr. Burgess or Cst. Bracken. She explained the oft reported timing out after test number three and the required reset. And Mr. Burgess also essentially described it as a reset and a timing out. I do not accept there was any irregularity in the operation of the machine based on the testimony of Mr. Comeau.

[70] His testimony about when Cst. Bracken noticed the alcohol can was also conclusory and not explained during his testimony.

[71] Finally, he described Cst. Bracken as friendly which is exactly the opposite of Mr. Burgess' suggestion that she was frustrated but even he did not go so far as

to say she was angry or rude to him. Overall, Mr. Comeau's reliability was impacted by drink and opportunity to observe.

[72] Mr. Comeau's acknowledged impairment, that he had a can of alcohol on the dash, all lead me to conclude his is not a reliable account of what occurred outside his line of vision. His credibility is impacted by his testimony about the operability of the machine and the suggestion of 'sobriety testing' not supported by the testimony of the other witnesses. Overall, I find I cannot accept his testimony as either reliable or credible where it does not benefit from the support of witness testimony that I do find reliable and credible.

Assessing Cst. Bracken's testimony:

[73] I found Cst. Bracken both credible and reliable. This was a straightforward operation for her and one she engages in on a regular basis. She accurately recalled a blue alcohol can, and while she might not have been incorrect as to brand, it was blue, and nothing turns on this in any event. The existence of the can ultimately supported her grounds to make the ASD demand.

[74] She provided Mr. Burgess nine opportunities to blow into the device in accordance with her officer training and recorded this in her notes. She recalled the

absence of air flowing out of the machine “finger hole”, supporting the ‘insufficient’ reading on each of the nine times Mr. Burgess blew into the machine.

[75] Cst. Bracken properly warned Mr. Burgess following his eighth attempt to blow that a failure would result in a charge and, following the ninth attempt, she charged him.

[76] She was not offered an explanation by Mr. Burgess for his failure to provide a proper sample, and she was not required to seek one.

[77] Cst. Bracken’s level of recall satisfied the Court of both her credibility and reliability on points in issue. She was a sincere, careful, and observant witness who withstood cross-examination and was unmoved on material facts.

[78] I find her recall on information not recorded in her notebook unremarkable. While notes can be important for refreshing a witness’ memory, when assessing credibility, in this case I do not find the lack of detail in the handwritten notes impacted this witness’ recollection of events. I also add that there was no exploration of what was contained in the General Report, just a suggestion of a more detailed account.

Assessing the evidence of Mr. Burgess:

[79] Mr. Burgess testified, and his credibility is assessed using the three-step test in *R. v. W.D.*, [1991] 1 S.C.R.742. It is as follows:

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

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

3. Third, even if I am not left in doubt by the evidence of the accused, I must ask myself whether, on the basis of the evidence I do accept, I am convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

[80] The test was clarified in an article by Justice David Paciocco of the Ontario Court of Appeal – "Doubt about Doubt: Coping with R. v. W.(D.) and Credibility Assessment" (2017) 22 *Can. Crim. L. Rev*. 31. At paragraph 72 Justice Paciocco wrote as follows:

> If you accept as accurate evidence that cannot co-exist with a finding that the accused is guilty, obviously you must acquit;
>
> If you are left unsure whether evidence that cannot co-exist with a finding that the accused is guilty is accurate, then you have not rejected it entirely and you must acquit;
>
> You should not treat mere disbelief of evidence that has been offered by the accused to show his innocence as proof of the guilt of the accused; and
>
> Even where evidence inconsistent with the guilt of the accused is rejected in its entirety, the accused should not be convicted unless the evidence that is given credit proves the accused to be guilty beyond a reasonable doubt.

[81] Mr. Burgess relies on anxiety and nerves as the reason he could not blow a sample despite intending to do so. He attributed these two conditions to general nervousness around police officers and Cst. Bracken's increasing frustration.

[82] Also, when questioned about how Cst. Bracken "was" after his first few attempts to blow, Mr. Burgess answered "alright", but when asked the leading question "was she frustrated?", Mr. Burgess agreed and elaborated. I conclude this was a less than genuine effort on his part to affix the officer's actions as a contributing factor for why he could not provide a sample. Mr. Comeau, who says he heard the interaction between Mr. Burgess and the constable, thought her quite friendly – very much the opposite of frustrated.

[83] I certainly accept that many people are nervous around police officers. But there was no evidence I am prepared to accept supported these conditions reaching a level that rendered Mr. Burgess unable to blow into a straw, oft described as the equivalent of blowing up a balloon. As an aside, I frequently hear this comparison and people say they struggle with blowing up balloons, however my memory of doing so always involved a difficulty at the very beginning as the material expands, but once the stiffness of the balloon is breached air flows smoothly. I have never heard testimony that the ASD straw is anything other than a simple device that has no "hump" similar to a balloon, but instead simply accepts air flow.

I also find the suggestion Cst. Bracken was causing him anxiety and nervousness by negative actions completely unfounded.

[84] Mr. Burgess testified that he was taken to the police car, and that is accurate. However, I accept the evidence of the officer that she did not expect him to shut the car door when he entered the police car, she told him it could be left open if he chose to sit there. Shutting the door could be a result of nerves, distraction, or anxiety. It could also support an inference that he was not paying careful attention to what was going on.

[85] His recollection of five attempts to blow, I find suffers from the same inattention to detail. I do not accept his recollection is accurate, it makes no sense in the context of an officer who always provides nine opportunities to blow.

[86] While perhaps a minor point, in examination-in-chief Mr. Burgess testified that he was in the Windsor area to drive his boss home from an event, but this changed quite quickly to the two being in the area all day from 1pm to 11pm to attend a barbecue. The location of that gathering, he could not specify. I am not sure why he does not recall where he was, but the initial suggestion that he was merely acting as a driver for his boss, when in fact he was a guest at the lengthy gathering suggests less than honest testimony.

[87] I do not accept Mr. Burgess' evidence that anxiety and nerves prevented him from providing a suitable sample for the ASD. Mr. Burgess was not a credible witness. I find that he did not provide a sample of his breath and intended that outcome. I do not accept his testimony that he was trying to provide a sample. His testimony did not leave me in a reasonable doubt, or unsure. While he seems like a nice enough young fellow, I simply do not believe that he was trying to blow a proper sample. I do not need to speculate as to why he acted as he did, that is unnecessary in the circumstances. The Crown need only prove the elements of the offence, not a motive to engage in certain actions. While Mr. Burgess opined that his failure to provide a sample may have been caused by nerves, tiredness or possibly a past diagnosis of asthma, I am not satisfied that was the case. I conclude the failure to comply with the demand occurred "on purpose", established by the evidence of Cst. Bracken that whatever air he did blow was insufficient to register a reading and did not leave the machine "finger hole" supporting the reasonable inference he intended that result.

[88] The Crown has proven the case.

[89] Judgment accordingly

van der Hoek J.