

IN THE PROVINCIAL COURT OF NOVA SCOTIA

Citation: R. v. Ogden 2014 NSPC 7

Date: February 14, 2014

Docket: 2582297 -
2582306

Registry: Halifax

Between:

Her Majesty the Queen

v.

Shondell James Ogden

TRIAL DECISION

Judge: The Honourable Judge Anne S. Derrick

Heard: January 24, February 3 and 4, 2014

Decision: February 14, 2014

Charges: sections 267(a); 86(1); 86(2); 87(1); 88(1); 90(2)(a); 92(1);
95(1); 244; 244.2 of the *Criminal Code*

Counsel: Scott Morrison, for the Crown

Lyle Howe, for Shondell Ogden

By the Court:

Introduction

[1] On April 5, 2013, someone shot Jason Byers in the leg. The fundamental issue in this case is whether the Crown has proven beyond a reasonable doubt that it was Shondell Ogden. Shondell Ogden knew Jason Byers and admitted in a statement to police that he had seen him on the night of April 5. Mr. Ogden was emphatic however that he had only punched Mr. Byers in the face that night and had not shot him. He told police he did not know how Mr. Byers had ended up with a gunshot wound to his leg.

[2] At approximately 7:30 p.m. on April 5, Jason Byers was admitted to the Dartmouth General Hospital, bleeding heavily and dizzy from loss of blood. The treating orthopedic surgeon, Dr. Eric Anderson, determined that Mr. Byers had sustained an entry wound to his right leg, on the right side of his thigh, just above the knee. Dr. Anderson also located an exit wound on Mr. Byers' right leg, on the left side of his calf muscle, just below his knee and approximately 15 centimeters from the entry wound. A projectile, which was no longer present, had tracked between the two wounds. (*Exhibit 3, Admissions of Fact – Medical Evidence*)

[3] Dr. Anderson, a Specialist Orthopedic Surgeon with the armed forces, had done a nine-month deployment as a trauma surgeon in Kandahar, Afghanistan and had experience treating numerous gunshot wounds. In Dr. Anderson's opinion, there is "no question" that Mr. Byers' wounds were consistent with wounds inflicted by a firearm. (*Exhibit 3, Admissions of Fact – Medical Evidence*) This opinion has been accepted by the Defence as authoritative.

[4] Mr. Byers was interviewed on three occasions by police investigators. On the third occasion he told investigators that he was shot by someone he knew as "Mitch" at an address on Tacoma Drive in Dartmouth. Police investigators followed up this information and Mr. Byers' blood and DNA were found at the Tacoma Drive residence. In a photo line-up Mr. Byers identified a photograph of Shondell Ogden as the shooter. There is no dispute that Mr. Byers was driven to the hospital after being picked up just down the street from the Tacoma Drive address.

The Charges

[5] The charges laid against Shondell Ogden as a result of being identified by Jason Byers included attempted murder, Count 1 of 11 counts on the Information. When the trial opened, the Crown offered no evidence on the attempted murder charge and I entered a verdict of not guilty.

[6] Counts 2 through 11 on the Information laid against Shondell Ogden are, in brief, as follows: Count 2 – assault with a weapon, a revolver, contrary to section 267(a) of the *Criminal Code*; Count 3 – careless use of a firearm, a revolver, contrary to section 86(1) of the *Code*; Count 4 – careless handling of a firearm, a revolver, contrary to section 86(2) of the *Code*; Count 5 – pointing a firearm at Jason Byers without lawful excuse, contrary to section 87(1) of the *Code*; Count 6 – unlawful possession of a weapon, a revolver, for a purpose dangerous to the public peace or for the purpose of committing an offence, contrary to section 88(1) of the *Code*; Count 7 – unlawfully carrying a concealed weapon, a revolver, contrary to section 90(2)(a) of the *Code*; Count 8 – possession a firearm, a revolver, knowing he was not the holder of a license or registration certificate for the firearm, under which he may possess it, contrary to section 92(1) of the *Code*; Count 9 – possession of a restricted firearm or a loaded prohibited firearm together with readily accessible ammunition capable of being discharged in the same firearm and not being the holder of a license or registration certificate for the firearm, under which he may possess it, contrary to section 95(1) of the *Code*; Count 10 - discharging a firearm, a revolver, with intent to wound, maim, or disfigure Jason Byers, contrary to section 244 of the *Code*; and Count 11 – intentionally discharging a firearm while being reckless as to the life or safety of another person, contrary to section 244.2 of the *Code*.

The Presumption of Innocence and Reasonable Doubt

[7] It is not Mr. Ogden's responsibility to demonstrate, establish, or prove his innocence or to explain away the allegations made against him. He is not required to establish who shot Jason Byers nor is he required to explain the evidence presented by the Crown. He is presumed to be innocent until proven guilty beyond a reasonable doubt. The Crown bears this onus of proof beyond a reasonable doubt throughout the trial and it never shifts.

[8] The onus resting upon the Crown to prove Mr. Ogden's guilt beyond a reasonable doubt is inextricably linked to the presumption of innocence. (*R. v. Lifchus*, [1997] S.C.J. No. 77, paragraph 27) A reasonable doubt is a doubt based on reason and common sense which must be logically based upon the evidence or lack of evidence. A reasonable doubt is not a doubt based on sympathy or prejudice, or one that is imaginary or frivolous. Proof establishing the probability of guilt is not sufficient to establish guilt beyond a reasonable doubt. It is not proof beyond a reasonable doubt when guilt is suspected. Proof beyond a reasonable doubt falls much closer to absolute certainty than it does to a balance of probabilities. (*R. v. Lifchus*, paragraph 36; *R. v. Starr*, [2000] S.C.J. No. 40, paragraph 242)

A Brief Summary of the Evidence

[9] The evidence advanced by the Crown was comprised of witness testimony, including from Jason Byers, forensic evidence, agreed facts, a photo line-up, an interview by police with Shondell Ogden on April 7, 2013, and documentary evidence confirming that Shondell Ogden was not the holder of either a firearm registration certificate on April 5, 2013 (*Exhibit 1, Affidavit of James W. Mullen, Senior Registration Analyst, Canadian Firearms Registry*) or a Possession Only License or a Possession and Acquisition License. (*Exhibit 2, Affidavit of John William Parkin, Chief Firearms Officer for Nova Scotia*)

[10] As is his right, Mr. Ogden did not testify or call any evidence. Expressly raising no *Charter* issues and conceding voluntariness, he did agree that his police interview of April 7 could be admitted into evidence. I must consider what Mr. Ogden said in that interview according to the principles in *R. v. W.(D.)*, [1991] S.C.J. No. 26. I must assess whether I believe Mr. Ogden's version of the events and even if I do not, whether it still leaves me with a reasonable doubt, or whether on all the evidence I have a reasonable doubt about the allegations against him.

What Jason Byers Told Police Investigators

[11] Mr. Byers was first interviewed by Cst. Ross Burt at the hospital. He told Cst. Burt he did not know the shooter and could not provide a description. He said

he had been shot in the parking lot of 95 Caledonia Road, an address in Dartmouth. A subsequent police search of that location turned up nothing.

[12] Mr. Byers has readily admitted he gave police a fairly detailed story about how he came to be shot near Jessy's Pizza on Caledonia Road. He described witnessing an altercation there between a man and a woman and getting shot when he intervened. He provided a description of a vehicle the couple left in.

[13] Mr. Byers repeated his Caledonia Road version of events in a formal police statement. However police were not satisfied and interviewed Mr. Byers again, which produced a second and different statement about the shooting. This time Mr. Byers told police he had been shot by a man he knew as "'Mitch'" in the laundry room of Donald Lindsay's home on Tacoma Drive.

Jason Byers' Trial Testimony

[14] Jason Byers' testimony about being shot on April 5, 2013 was a "warts and all" description. He acknowledged that in April 2013 he had long-standing addictions to both crack cocaine and alcohol. He says however that on April 5 he was not using either as he was at his son's hockey game in Bedford. After the game he had his ex-partner, Melody MacLaughlin, drop him off at the Burger King on the corner of Tacoma Drive. From there he walked to Donald Lindsay's home.

[15] Ms. MacLaughlin testified that Mr. Byers "jumped out" at the McDonald's in the same area. I find nothing turns on this small discrepancy between the evidence of Mr. Byers and Ms. MacLaughlin.

[16] Mr. Byers had known Donny Lindsay for about 15 years. He thought of him as a friend. He also knew Mr. Lindsay's late mother whom he had helped out doing yard work. He had visited Mr. Lindsay's house on Tacoma Drive quite often and was able to identify it in the police photographs (*Exhibit 9, Booklet of Police Photographs of 109 Tacoma Drive*)

[17] Mr. Byers was candid about what activities went on at Mr. Lindsay's house. He said it was a "drop in place to do drugs." He testified that Mr. Lindsay used both alcohol and drugs and would consume any drugs he could "get his hands on."

[18] It was not yet dark when Mr. Byers arrived at the Tacoma Drive home. He used the back door. He believes Mr. Lindsay opened the door and let him in. Mr. Byers was able to identify photograph 005 in a booklet of police photographs (*Exhibit 9*) as the back entrance to the house, and photograph 008 as Mr. Lindsay's basement rec room.

[19] When Mr. Byers stepped into the basement rec room there were two other people present with Mr. Lindsay – an unknown girl and a young man Mr. Byers knew as “Mitch”. “Mitch” was sitting at the coffee table right across from where Mr. Lindsay was sitting on the sofa. Mr. Byers testified that these three were just talking when he arrived.

[20] It was Mr. Byers' evidence that “Mitch” owed him money and either he or “Mitch” suggested going into the laundry room adjacent to the rec room to discuss the issue. Mr. Byers testified that “Mitch” entered the room first. He had his back to Mr. Byers. When he turned to face Mr. Byers he had a gun in his right hand. Mr. Byers looked at the gun and “Mitch” fired it at his right leg below the knee. It was Mr. Byers' evidence that “Mitch” pointed the gun down toward his right leg before he shot him. It all happened “within a minute.” Mr. Byers testified that once “Mitch” turned around “all he had to do was pull the trigger.”

[21] At first Mr. Byers thought he might have been shot by a pellet gun. He felt a burning in his leg. Then he saw all the blood. He couldn't believe “Mitch” had shot him. He testified he has never been shot before.

[22] For a split second after shooting him in the leg, “Mitch” pointed the gun at Mr. Byers' chest and gritted his teeth, “like he was going to shoot me again.” “Mitch” said nothing when he did this.

[23] “Mitch” took off and ran out of the house. Mr. Lindsay was yelling at Mr. Byers who was bleeding in the doorway of the laundry room. There was blood everywhere. Mr. Byers grabbed a towel hanging in the laundry room and went to the back door and deck. He saw “Mitch” running down the street, “babbling” something at him that he could not make out.

[24] Mr. Byers wanted an ambulance but Mr. Lindsay was anxious to avoid having the police show up. Mr. Byers did not want to get anyone in trouble so he

called Ms. MacLaughlin to come and get him. He was mobile enough to get down to the intersection near Mr. Lindsay's where Ms. MacLaughlin picked him up. She drove him to the hospital.

Jason Byers' Injuries

[25] Diagnostic imaging showed no bone fragments between the wounds in Mr. Byers' leg and confirmed that the nerves in his leg were intact. (*Exhibit 3, Admissions of Fact - Medical Evidence*) Nevertheless Mr. Byers now has permanent numbness in his leg. He testified that he has lost feeling in his right leg from his knee to his toes.

Shondell Ogden's Interview with Det/Cst. Scott Bowers

[26] Mr. Ogden says that Jason Byers is lying and has vigorously denied shooting him. In his police interview, he took great exception to the accusation that he was the shooter, emphatically telling Det/Cst. Bowers he has never shot a gun and saying about Mr. Byers, "...I don't even know his fucking name."

[27] Mr. Ogden admitted to having punched a guy whose name he didn't know for "being fucking rude to people." Shortly after this he told Det/Cst. Bowers that he had loaned the man \$200, "You told me you'd be back by midnight. He didn't come back with my money." A little later in the interview, he says the money was so the man could buy Christmas presents for his kids: "And he was going on about how he didn't have enough money to buy his kids Christmas shit, blah, blah, blah...I said, Look, buddy, I have no problem lending you the \$200, if you have it. He showed me a cheque. I have a cheque. Can you lend me \$200 right now? Tomorrow morning, I'll go cash the cheque, blah, blah. Fair enough. Tomorrow morning didn't come. He didn't pay me..."

[28] Mr. Ogden described being angry about the outstanding debt. When he didn't get paid back, he "suckered the fuck out of him...I smashed him."

[29] In response to Det/Cst. Bowers expressing some surprise that Mr. Ogden would loan \$200 to a man whose name he didn't even know, Mr. Ogden had something to offer: "Jason, maybe." He went on to say: "...it could be a few different names. Right? I'm pretty sure it was Jason."

[30] Mr. Ogden described the incident with “Jason” happening in the room with the couch. After the punch which Mr. Ogden says caused “Jason” to fall over the couch, “Jason” stood up and “goes toward the door”, that is, the back door at Tacoma Drive. Mr. Ogden told “Jason” that “you can drop it and leave it alone or you can keep making a scene of it. Do not leave it alone and we can go do whatever. And he’s like, Let’s go...”

[31] Mr. Ogden did not minimize the amount of force he used against “Jason”. At one point he told Det/Cst. Bowers, “So as soon as he stood up, I fucking give him everything I fucking had.” Later he said: “He’s probably pissed at me because I broke his fucking face.” He also pointed to cuts on his hand which he said were caused by punching “Jason” and indicated “Jason” was hurt: “I punched him in his face. Did you see his eye?...Did you see his eye?...No, you didn’t see his eye? You didn’t see right there where it’s all fucking cut up?...You guys really need to do a little more investigating because my hand is cut up. His eye is cut up. There are no witnesses...I punched his fucking head off. I whacked him.” He emphasized once again that he did not shoot “Jason” but returned to the damage he inflicted: “...his eye is all fucked, straight up...”

[32] As the interview progressed, Mr. Ogden revealed a greater degree of familiarity with “Jason” than he originally claimed. He described “Jason” as a “crackhead” and said: “Go do a drug test on him. He’s not a reliable fucking witness...” He indicated knowledge of a history of drug abuse: “...he’s a fucking junkie, he’s been a junkie for fucking years...” He also asked Det/Cst. Bowers: “Do you know how many people he’s ripped off for crack? And he mentioned an earlier occasion when he was at the Lindsay house with “Jason”, saying that “Jason” approached his girlfriend and asked her if she wanted to make some money.

[33] Tellingly, close to the end of the interview when Mr. Ogden was pointing out to Det/Cst. Bowers which of the cuts on his hands were from punching “Jason” and which were from punching lights out at the police station, he says: “That’s from when I punched Jason Byers in his face. And that is his fucking whole name, because it just fucking clicked.”

[34] Mr. Ogden admitted to being familiar enough with Mr. Byers to know that he made good money as a truck driver (which Mr. Byers testified had been his occupation) and that he watched him spend his pay cheque on crack. Late in the interview he said he loaned Mr. Byers \$200 because “I knew he was good for it because he makes good fucking money.”

[35] The interview shows that Mr. Ogden plainly understood the central difference between Jason Byers’ version of the April 5 events and his own. When Det/Cst. Bowers noted that “the stories are pretty close” and asked him: “You know what the difference is?”, Mr. Ogden hit the nail on the head: “He’s saying I shot him. I’m saying I punched him.”

The Forensic Evidence

[36] Det/Cst. Scott Bowers executed a search warrant at 109 Tacoma Drive on April 7 at 1:55 a.m. When he knocked on the rear door, Donald Lindsay answered it. Det/Cst. Bowers recognized Lindsay from a photograph he had seen prior to executing the search. In addition to Mr. Lindsay there were three other males in a basement rec room just inside the rear door, one of whom was Mr. Ogden. He was arrested and searched.

[37] Det/Cst. Bowers went into an adjacent laundry room to see if he could locate a crime scene based on the second interview with Jason Byers. He saw a smudged area on the floor that looked like blood and a towel hanging up that looked as though it had been used to wipe something up. On the stairs leading to another level from the rec room Det/Cst. Bowers found a bucket of water and some carpet cleaning products. He was unable to see any leak that would explain the water in the bucket.

[38] Det/Cst. Bowers formed the view that forensic IDENT should be called in.

[39] Det/Cst. Wasson attended 109 Tacoma Drive as the forensic IDENT officer. He took photographs (*Exhibit 9, Booklet of Police Photographs of 109 Tacoma Drive*) and swabbed some areas that looked to be blood stained. A stain on the back deck outside the rear entrance to the residence (*Crime Scene Marker 1 – Photographs 005 and 006, Exhibit 9*) was swabbed and tested and came back as blood with a DNA typing profile matching that of Jason Byers. A stain in the

laundry room (*Crime Scene Marker 6 – Photographs 019, 026 and 027, Exhibit 9*) was swabbed and sent for DNA testing. It came back with a DNA typing profile “that likely originated from more than one individual.” One of the profiles matched Jason Byers. (*Exhibit 11, Admissions of Fact – DNA Evidence*)

[40] The stains Det/Cst. Wasson observed in the laundry room at 109 Tacoma Drive – Crime Scene Markers 3, 5 and 6 – appeared to him to be blood stains. (*Photograph 019, Exhibit 9*)

[41] Det/Cst. Wasson searched for but found no shell casings or projectile damage at 109 Tacoma Drive. He found no evidence that a firearm was used there.

The Photo Line-Up

[42] On April 7, Jason Byers went in to the police station to meet with Cst. Ash Lewis and view a photo line-up that had been prepared by Cst. Jason Joncas. (*Exhibit 7*) Cst. Joncas had viewed hundreds of photographs to select 12 with similar characteristics in relation to age – early to mid-20’s; skin tone – light to medium complexion; and gender – male.

[43] Cst. Joncas was questioned about the process he used to select the 12 photographs for the photo line-up. His answers revealed that he had followed standard procedures. He had no part in the actual photo line-up and only prepared the photo line-up package.

[44] The photo line-up process was video and audio-taped. (*Exhibit 6*) Before conducting it, Cst. Lewis read verbatim to Mr. Byers from the covering instructions. He then showed Mr. Byers the photographs one by one. Mr. Byers did not recognize the males in the first four photographs. Mr. Byers recognized photograph #5 and said he knew him as the person who had shot him. He said he was “100 percent” sure it was him. He circled the photograph, wrote the percentage of certainty at the bottom, and signed the back. He told Cst. Lewis: “That’s the fellow who shot me.”

[45] Cst. Lewis gave Mr. Byers no other instructions than those at the start and did not draw his attention to anyone in the photo line-up.

[46] On cross-examination it was brought out that the background in photograph #5 is darker than the background in any of the other 11 photographs – the 4 that Mr. Byers did not recognize and the 6 he was not shown after he made his “100 percent” certain identification of photograph #5.

[47] Photograph #5 is a recent photograph of Shondell Ogden.

Assessing the Crown’s Case and Applying the Standard of Proof Beyond a Reasonable Doubt

[48] As I mentioned at the start of these reasons, this is a case where the principles in *R. v. W.(D.)* apply and I must consider whether I believe Mr. Ogden’s version of events, described in the course of his interview with Det/Cst. Bowers.

[49] I do not believe Mr. Ogden. I do not believe what he told Det/Cst. Bowers. For example, he claimed he hardly knew Mr. Byers, including not knowing his name, which he later contradicted by admitting he did in fact know him, including his first and last names. I also do not believe Mr. Ogden’s claim that he “smashed” Mr. Byers in the face, injuring his eye. The evidence confirms Mr. Byers had no injuries to his eyes.

[50] It is an admitted fact that medical staff at the Dartmouth General Hospital “thoroughly examined” Mr. Byers on April 5 and found him to have “no other injuries to his body, including his head, neck or chest area.” (*Exhibit 3, Admissions of Fact – Medical Evidence*) Cst. Burt, the first police officer to meet with Mr. Byers, observed no injuries on Mr. Byers other than to his leg. Although partially in profile, a photograph of Mr. Byers in which his eyes can be seen, shows no injuries to his face. (*Photograph 001, Exhibit 4, Booklet of Police Photographs*)

[51] Mr. Ogden’s statement to Det/Cst. Bowers is also internally inconsistent. He talked about lending Mr. Byers \$200 and first said he expected him to pay it back by midnight. Later he said Mr. Byers had shown him a cheque which he promised to cash in the morning in order to pay Mr. Ogden back then. Further along in the interview Mr. Ogden said when he loaned Mr. Byers the money he knew he “was good for it” because he made “good money.” And although he claimed to be the one to whom a debt was owed, Mr. Ogden described having to tell Mr. Byers to “...drop it and leave it alone or you can keep making a scene of it...” which does

not square with Mr. Ogden being the person who was owed money and agitated about not getting paid back.

[52] I simply do not believe Mr. Ogden nor am I left with a doubt based on his interview with Det/Cst. Bowers.

[53] What remains is for me to consider whether, on all the evidence, I have a reasonable doubt about the allegation that Mr. Ogden shot Mr. Byers.

Jason Byers' Evidence, the Forensic Evidence, and the Photo Line-up

[54] I have no doubt that Mr. Byers was at 109 Tacoma Drive on April 5, 2013 sometime later in the day. Mr. Ogden was, by his own admission, there as well. Mr. Byers' presence is confirmed by forensic evidence - blood and DNA – as well as Mr. Ogden. There was evidence as well from Melody MacLaughlin, Mr. Byers' former partner, who testified that she picked up a bleeding Mr. Byers not far from the Lindsay residence and drove him to the hospital.

[55] There is no evidence to suggest that Mr. Byers' blood and DNA could have been deposited at 109 Tacoma Drive on any other occasion than April 5, 2013. It was Mr. Byers' uncontradicted evidence that he was never previously injured in Mr. Lindsay's laundry room nor had he ever bled at his house before.

[56] The evidence establishes that Mr. Ogden and Mr. Byers had an altercation at 109 Tacoma Drive on April 5, 2013. Mr. Ogden admitted to this in his police interview, saying he punched Mr. Byers as hard as he could over a debt and urging Det/Cst. Bowers to have police investigators check Mr. Byers' eye which he said would show the effects of the punch.

[57] Mr. Ogden has urged me to disbelieve Mr. Byers' evidence about what happened at 109 Tacoma Drive on April 5. He says Mr. Byers cannot be trusted, that he lied to police about being shot on Caledonia Road, and that the narrative he gave at trial about why he and Mr. Ogden had a confrontation on April 5 was a narrative he never told the police at any time.

[58] At trial Mr. Byers testified that "Mitch" had fraudulently withdrawn money from his bank account, something he had not told police investigators even in his second statement where he described "Mitch" shooting him at Tacoma Drive. All

Mr. Byers told police was that he had had “a bunch of money” on him and had given “Mitch” \$200 and expected to get it back.

[59] Mr. Byers testified at trial there was more to the debt story than he had told police. He says that sometime before he was shot, he thinks it was three weeks or a month earlier, he was “fronted” some drugs by “Mitch” and gave him his wallet to hold as collateral against the debt. A couple of days after doing so, when he got his wallet back from “Mitch”, he discovered that someone had figured out his PIN number and used his bank card to make fraudulent withdrawals from his account. Mr. Byers testified he understands this was accomplished by the culprit putting empty deposit envelopes into the bank and withdrawing money against them. About \$1000 - \$1200 was taken out of Mr. Byers’ account. He settled things with his bank, paying back the money, and did not wish to take it further.

[60] Mr. Byers testified he did not tell police investigating the shooting about the theft from his account because it was not the issue. He did not want to trigger a fraud investigation: his focus was on the fact that he had been shot.

[61] Mr. Byers was cross-examined about his statements to the police and the two times he now says he lied about the location and circumstances of his shooting. He testified he knew the police would investigate his initial Caledonia Road story but says he laid a false trail because he did not want to get anyone at the Tacoma Drive residence in trouble.

[62] It was after Mr. Byers gave his initial false statements that he listened to his doctors and his family who told him how close he had come to losing his leg and even his life and how the person who had done this to him should not be permitted to get away with it. Mr. Byers expressed his epiphany this way: “...it kind of opened my eyes.” He said on cross-examination that the factors that changed his mind about what he was saying to police were the pain he was in and people telling him that the person who shot him shouldn’t just “walk.” He testified that he was not afraid of being charged by police for his original false statement.

[63] It was Mr. Byers’ evidence that his second statement to police reflected his decision to “tell the police the truth.”

[64] Mr. Byers testified that when he saw “Mitch” in Mr. Lindsay’s rec room on April 5 he decided to address the fraudulent withdrawals from his account. He went with “Mitch” into the laundry room for the discussion. “Mitch” was wearing a pair of baggy pants and a long hoodie. Mr. Byers now believes that “Mitch” had the gun hidden in his pants.

[65] Mr. Byers identified the laundry room in photograph 016 of Exhibit 9. He testified that he was probably standing in front of the washing machine when he was shot by “Mitch”, who was standing in front of him about 2 to 3 feet away. Mr. Byers looked at photograph 016 and indicated he was standing by Crime Scene Marker 3 in the photograph (although in questions put to him it was not referred to as a crime scene or evidence marker.)

[66] “Mitch” was standing very close by, next to the cleaning supplies and practically up against the water heater. Mr. Byers said the shooting happened “so fast. He had a gun and shot me.” He saw no evidence that “Mitch” was drinking or under the influence of drugs. Mr. Byers testified that he had done no drugs at Mr. Lindsay’s before being shot.

[67] Mr. Byers was able to describe the gun, a .22 calibre pistol, a Colt model with a brown wooden handle and a barrel about 6 – 8 inches long. It was a revolver with a round cylinder.

[68] Mr. Byers was a candid and forthcoming witness. He was very frank about lying to police and withholding information from them, why he did so, and why he gave a further statement that accords with what he testified to in court.

[69] I found Mr. Byers to be very credible. He was a straightforward and unvarnished witness. He was not evasive about anything, including his serious substance abuse issues. The fact that he was not truthful with police about his drug use, minimizing it and not disclosing the nature or extent of his addiction, does not concern me. He testified that he was sure the police knew he used drugs because that is what Mr. Lindsay’s Tacoma Drive home was known for. He said in his evidence that he didn’t disclose his drug usage because he didn’t want to get “a bunch of people in trouble.”

[70] Mr. Byers' explanations for why he initially lied to the police and why he never told them the full story about the debt "Mitch" owed him resonated with credibility. There was nothing about Mr. Byers' testimony that made me doubt his truthfulness. I believe his evidence and I accept that the shooting occurred as he described.

[71] The forensic evidence supports Mr. Byers' testimony that he was shot in the laundry room at 109 Tacoma Drive. The fact that two days after the shooting there was no cartridge casing or projectile found there does not mean the shooting could not have occurred. Two days is plenty of time to remove evidence of a shooting. The police investigators found smeared areas on the laundry room floor and on a piece of carpet in the rec room that suggested attempts had been made to clean up blood. Det/Cst. Wasson noted this in photographs 014, 020 and 021 of Exhibit 9. It is easy to see from these photographs why Det/Cst. Wasson formed this view. I am not left with any doubt about where Mr. Byers was shot.

The Identity of Shondell Ogden as the Shooter

[72] When Mr. Byers did the photo line-up he was not shown any photos beforehand. No one drew his attention to any particular photograph and no one prompted him.

[73] Mr. Byers was asked at trial if he had noticed the darker background in Photograph 5 at the time and said he did. He went on to note that he had 20/20 vision and "there is no mistaking "Mitch"."

[74] Mr. Byers identified the photo-line up (*Exhibit 7*) and his handwriting on the document, including his signature and handwriting on Photograph 5. The inscription "100 %" indicates that he was 100 percent certain that the man in Photograph 5 was the man who shot him. No information was given to Mr. Byers by Cst. Lewis even when Mr. Byers asked if Photograph 5 was the person the police had in custody. Cst. Lewis said he had no idea and "no knowledge of anything." (*Exhibit 6, Video of Recorded Photo Line-up*)

[75] The photo line-up was done correctly and cannot be impugned. There is not a shred of evidence that the darker background in the photograph of Shondell Ogden played any role whatsoever in Mr. Byers' identifying him. I find it did not.

[76] There is always a need to exercise caution where eyewitness identification evidence is in play. Taking a cautious approach, appreciating that a mistaken witness can still present convincingly, and closely examining the circumstances in which the identification was made are all essential elements of the trial judge's task of assessing eyewitness identification evidence. (*R. v. Shermetta*, [1995] N.S.J. No. 195 (C.A.), paragraph 46)

[77] This is a case where, in a properly conducted photo line-up, Mr. Byers identified a person with whom he was very familiar. There is a significant difference between stranger identification cases and cases in which a witness recognizes a previously-known person. "While caution must still be taken to ensure that the evidence is sufficient to prove identity, recognition evidence is generally considered to be more reliable and to carry more weight than identification evidence." (*R. v. Bob*, [2008] B.C.J. No. 2551 (C.A.), paragraph 13)

[78] The purpose of the photo line-up on April 7, 2013 was to see if Mr. Byers could identify the man who shot him on April 5. When Mr. Byers was shown Shondell Ogden's photograph, Photograph 5 in the photo line-up, he recognized it as "Mitch". In the interview with Det/Cst. Bowers, Mr. Ogden said he sometimes went by the name "Mitch".

[79] Mr. Byers testified that he had met "Mitch" quite a few times before April 5, 2013, probably more than 20 times, in the six months before the shooting. He would see him at Mr. Lindsay's, sometimes for as long as a couple of hours and sometimes for as little as 15 minutes.

[80] This is a case of recognition evidence. I am satisfied beyond a reasonable doubt that the man identified by Mr. Byers as "Mitch" in the photo line-up, Photograph 5, is the man who shot him. That man was Shondell Odgen. The accuracy of Mr. Byers' identification of Mr. Ogden in the photo line-up is amply supported by other evidence in this case: Mr. Ogden's own statements and the forensic evidence.

[81] I reject Mr. Ogden's claim that he only punched Mr. Byers on April 5, 2011. I am satisfied beyond a reasonable doubt on all the evidence that Shondell Ogden shot Mr. Byers on April 5 in the manner in which Mr. Byers described at trial. Mr.

Ogden took deliberate aim and fired into Mr. Byers' leg. I find that Mr. Ogden shot Mr. Byers with intent to wound him when Mr. Byers tried to confront him about the money stolen from his bank account. When Mr. Byers wouldn't "leave it alone", Mr. Ogden shot him. I accordingly convict him of Count 10, the intentional discharge of a revolver with intent to wound, contrary to section 244 of the *Criminal Code*.

[82] I am also satisfied beyond a reasonable doubt that Mr. Ogden is guilty of Count 7 – unlawfully carrying a concealed weapon, a revolver, contrary to section 90(2)(a) of the *Criminal Code*, and of Count 8, possessing a firearm, a revolver, knowing he was not the holder of a license or the holder of a registration certificate for the firearm, under which he may possess it, contrary to section 92(1) of the *Criminal Code*.

[83] I also find, pursuant to sections 2 and 84(1) of the *Criminal Code*, that Mr. Ogden is guilty of an offence under section 95(1) of the *Criminal Code* for possessing a restricted firearm when he was not the holder of an authorization or license and registration certificate under which he may possess the firearm (Count 9). I find that the firearm described by Mr. Byers falls within the description of a "restricted firearm", a handgun that is not a prohibited firearm.

[84] In light of Mr. Ogden's conviction on Count 10, the section 244 offence, and the principle prohibiting multiple convictions for offences involving the same elements, I am applying *R. v. Kienapple*, [1975] 1 S.C.R. 729 to enter stays on convictions for Counts 2, 5, and 6. I am dismissing Counts 3 and 4 as I have found that the firearm was discharged intentionally and not used or handled in a careless manner, and I am dismissing Count 11 on the basis that there is no evidence Mr. Ogden intentionally discharged the firearm "while being reckless as to the life and safety of another person", which is what is contemplated by section 244.2 of the *Criminal Code*. This was not a case of recklessness. Mr. Ogden aimed and fired, intending to wound Mr. Byers, and succeeding.