

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *R. v. Streiling*,
2015 BCSC 1044

Date: 20150617
Docket: 159798-2
Registry: Victoria

Regina

v.

Bradley Ryan Streiling

Restriction on Publication: Pursuant to s. 486.5(1) and s. 486.5(9) C.C.C.

Before: The Honourable Madam Justice J. A. Power

Oral Reasons for Judgment

Counsel for the Crown:

D. Scanlan and L. Baskerville

Counsel for the Accused:

M. Allen and M. E. Bates-Smith

Place and Date of Trial:

Victoria, B.C.
April 27 - May 1, 2015

Place and Date of Judgment:

Victoria, B.C.
June 17, 2015

I. INTRODUCTION

[1] A one-count indictment charges Bradley Streiling with the second-degree murder of Noah Cownden. Mr. Streiling elected to be tried by judge alone, and the trial proceeded before me in April 2015, after an earlier *voir dire* in February and March 2015. I reserved judgment at the end of trial, and will now render my decision.

[2] Noah was the natural child of Mr. Streiling's live-in girlfriend, Meadow Dykes, and her former partner, Chris Cownden. Mr. Streiling was effectively Noah's step-parent. He was alone at home with Noah just prior to events that resulted in an emergency health services call and ultimately Noah's death at the Victoria General Hospital. Noah died tragically on April 9, 2008, three days before his second birthday.

[3] The autopsy performed on Noah lists the principal cause of his death as cranial trauma; Noah died as a result of a massive head injury. The evidence indicates that Noah incurred another head injury some three to seven days prior to his death, and that he had been bitten on the left shoulder by a person who was at least fourteen years old in the period leading up to his death. A forensic odontologist, Dr. David Sweet, excluded Mr. Streiling as a possible cause of that bite mark. The defence contends that this shows that Noah suffered abuse at the hands of someone other than Mr. Streiling.

[4] However, in the context of a "Mr. Big" investigation, Mr. Streiling confessed to an undercover police investigator that he assaulted Noah on the day he died. Mr. Streiling described striking Noah's head against the floor more than once, after which Noah appeared to lapse into unconsciousness. Following a *voir dire* to determine the admissibility of the confession, I determined that it possessed sufficient *indicia* of reliability so that its probative value outweighed the prejudicial effect of its admission at trial. As part of that analysis on the *voir dire*, I expressed the view that it was not necessary for me to determine the truth of the confession.

[5] As a result of that decision, the Crown and defence have consented to the evidence on the *voir dire* being considered on the trial of this matter with the exception of Exhibit 25, which relates to the Mr. Big scenarios. An edited Exhibit 25 has now been marked which represents the scenarios that were played in court as edited. The edits were, for the most part, agreed to between counsel.

[6] Mr. Streiling did not testify on the *voir dire*, but gave evidence at trial stating that he fabricated the confession given to Mr. Big. He testified that his original version of events, which he first provided to Ms. Dykes, subsequently to police, and then to an undercover officer during the investigative scenarios prior to the Mr. Big confession, accurately depicted what happened on the day Noah died. In that recounting, Noah's death was preceded not by an assault by Mr. Streiling but rather by Noah falling accidentally from a bathtub and striking his head on the floor.

II. THE ISSUES

[7] The issues before me at trial as framed by the defence are:

1. Is there a reasonable doubt about whether Mr. Streiling assaulted Noah Cownden in a manner consistent with his Mr. Big confession?
2. If I am satisfied beyond a reasonable doubt that the Mr. Big confession is true, is there a reasonable doubt about whether that act caused or contributed significantly, or at all, to Noah's death?
3. If I am satisfied that Mr. Streiling assaulted Noah and that this contributed significantly to Noah's death, is there a reasonable doubt that at the time of the incident Mr. Streiling had the required *mens rea* for either second-degree murder or for manslaughter?

[8] As argued by the defence, if there is a reasonable doubt about any of these issues, then Mr. Streiling must be acquitted.

[9] The Crown acknowledged throughout this proceeding that without the Mr. Big statement they do not have a case against Mr. Streiling. They concede in argument that if I believe Mr. Streiling, I must acquit him.

[10] Having considered all of the evidence, I have determined that I have a reasonable doubt about whether Mr. Streiling committed the offence charged or the offence of manslaughter. I come to that conclusion because I am not satisfied beyond a reasonable doubt that the confession to Mr. Big is true.

[11] My reasons are as follows.

III. **THE EVIDENCE**

[12] As noted, the bulk of the evidence heard on the *voir dire* has been entered into evidence on the trial by agreement between the Crown and defence.

[13] Since I outlined the evidence of the witnesses in my *voir dire* reasons, I will do so only briefly again in this decision. I will provide an overall summary of the facts of this case and then commence my analysis. I will then refer to specific additional aspects of the evidence as necessitated by the analysis.

[14] There are three main categories of Crown evidence: a) background circumstances of Noah's living situation and the events leading to his death; b) police evidence relating to the undercover "Mr. Big" investigation; and, c) medical evidence relating to Noah's injuries. Regarding defence evidence, Mr. Streiling testified at trial, and the defence also called expert pathology evidence on the *voir dire* from Dr. Carl Wigren.

The Crown's Case

Noah's Living Situation and the Events Leading to His Death

[15] Ms. Dykes is a mother of four who studies at the University of Victoria. She began living with Mr. Streiling in late September 2007, approximately eight months prior to the incident in question. They lived in a townhome in a housing cooperative at 1154 Mason Street in Victoria with their blended family of five children:

Ms. Dykes' four children, and Mr. Streiling's son Link, who was three years of age at the time. The other children ranged in age from two to eleven. Noah was the youngest.

[16] Ms. Dykes testified that her children seemed to get along "okay" with Mr. Streiling. While they mostly preferred to be with her, she did not see any problems in their relationship with Mr. Streiling, nor did she receive any negative reports about him from the children. She agreed that when Mr. Streiling got frustrated with the children, he would walk away and that he did not shout at the children. She agreed that Mr. Streiling's relationship with Noah was good.

[17] Ms. Dykes shared custody of her four children with their biological father, Chris Cownden and his wife Kelly Cownden (previously Revel). The eldest child spent alternating weeks with each family, and the youngest three, including Noah, were with Ms. Dykes Sunday through Thursday, and spent the balance of the week with the Cowdens. The exchange of the children would take place outside of church on Sunday mornings.

[18] During the four to six weeks prior to Noah's death, Ms. Dykes noticed that he seemed dizzy, slept a lot, and ate little. She noted in cross-examination that he always seemed tired when he returned from Mr. Cownden's care. She also said that Noah suffered from allergies, which she believed Mr. Cownden caused or aggravated by smoking around Noah. She stated that Noah "always seemed like he had a cold", and that he wanted to be picked up a lot. She was keeping a diary or journal of his symptoms because of her concerns.

[19] However, in the six weeks leading up to Noah's death, Mr. Cownden began noticing Noah returning from the Mason Street home with injuries. Mrs. Cownden began to document these injuries, which included bruises and bite marks.

[20] On one occasion in mid-March, Mr. Cownden learned from Ms. Dykes that Noah had fallen down some stairs. He subsequently observed some balance problems and took his son to a walk-in medical clinic. Dr. Jacob Sturmwind was the

general practitioner who saw Noah that day. He testified that he did not see any indication of head injury or other neurological symptoms that day, despite looking for them. Otherwise, the Cowdens testified that Noah did not vomit, suffer falls or have difficulty walking while in their care.

[21] The day before his death, Noah vomited during his afternoon nap and so instead of participating in an evening swimming lesson at the Crystal Pool, he sat in the viewing area with his mother. Mr. Cowden saw Noah that evening, noting that Noah's cheeks were flushed and his eyes glossy. He thought that Noah looked tired or unwell.

[22] The morning of Noah's death, Ms. Dykes left the house with the other children to go to the Hillside Mall. One of the purposes of that trip was to buy Noah a birthday present. She did not bring Noah because there were not enough seats in the van, leaving him in the care of Mr. Streiling. When she saw Noah that morning she said he seemed like "typical Noah".

[23] When she arrived at the Mall at around 10:00am, she phoned Mr. Streiling to see if he wanted to bring Noah to "Story Time". an activity at the Mall. She received a call back from Mr. Streiling at around 10:20 a.m. He told Ms. Dykes that Noah had thrown up, and that they would not be able to join the others at the Mall.

[24] At around 11:20 a.m. Ms. Dykes received another call from Mr. Streiling. He informed her that there was some difficulty with Noah and that he did not know what to do. He told her to come home, which she did. When she arrived and went upstairs, Noah was lying on the floor of his bedroom, unresponsive. She initially called the Nurse Helpline, and then on their instructions, 9-1-1.

[25] Mr. Streiling provided Ms. Dykes with his version of what happened that morning while they awaited the arrival of an ambulance. Mr. Streiling told Ms. Dykes that he had given Noah a bath. When he turned around to get a towel, Noah climbed up on the side of the tub to get out, but then slipped and fell, striking his head on the ground. Mr. Streiling asked Noah if he was okay, to which Noah

responded by saying “I’m okay, are you okay?” or something to that effect.

Mr. Streiling then instructed Noah to go into the bedroom to dress. He heard a crash shortly thereafter, and then went into the bedroom to find Noah unresponsive on the floor.

[26] Based on the information given by Mr. Streiling, Ms. Dykes testified at trial that the events relayed to her by Mr. Streiling sounded like “typical Noah and typical Brad”. In her evidence, she described Noah as “not one to wait around” and “accident prone”. She stated that when Noah fell and was queried about his condition, it was his habit to say, “I’m okay, are you okay?” She also testified that she had baby gates on all of the stairs because Noah was prone to falls.

[27] Paramedics Mark Evans and Al Wickheim responded to Ms. Dykes’ 9-1-1 call, arriving at the Mason Street residence at around 11:30 a.m. They made various observations about Noah’s condition that morning, including that he had an abnormally high blood pressure and “trismus”, a condition resulting in a tightly clenched jaw. Both paramedics described the difficulty in establishing an airway for Noah. They administered muscle relaxant drugs and used “medication and physical manipulation” in order to establish an airway before rushing Noah to the hospital.

[28] Police Constables Scott Buckler and Matthew McNichol also responded to Ms. Dykes’ 9-1-1 call. Cst. Buckler overheard an account provided to the paramedics by Mr. Streiling and Ms. Dykes. He examined a bathroom adjacent to the bedroom where Noah was found. His examination confirmed that there was water on the floor near the bathtub. He also noted some water on the ledge near the back of the bathtub. Cst. Buckler also observed vomit on a bib and highchair in the kitchen.

[29] Ms. Dykes rode to the hospital in the ambulance with Noah. She described the course of events there, including Noah’s death after being taken off life support.

[30] Ms. Dykes continued in a relationship with Mr. Streiling for approximately one year after Noah’s death. They ultimately broke up in April 2009.

The Undercover Operation

[31] The undercover operation consisted of fifty-two investigative scenarios conducted between November 13, 2012 and April 5, 2013. As noted, the parties filed an edited Exhibit 25 on the trial, representing a pared-down version of the scenarios filed on the *voir dire*. Since I described the Mr. Big investigation in detail on the *voir dire*, I provide merely a general outline in these reasons.

[32] By conducting a “Mr. Big” operation, investigators intended to lead Mr. Streiling to believe that certain persons, actually undercover police operatives, were members of a criminal organization. This organization would not exist in reality, but would merely be a fiction perpetuated for the purpose of investigating Mr. Streiling. The undercover operatives would then recruit Mr. Streiling into the organization, and utilize his relationships with the organization and its purported members to obtain a confession implicating him in Noah’s death. In this regard, the operation could perhaps be considered a success.

[33] JB, one of the undercover investigators, acted as Mr. Streiling’s primary contact with the criminal organization. JB testified about his responsibilities in that role, particularly that he imparted to Mr. Streiling the “values” of the organization: honesty, loyalty and trust. JB acted as Mr. Streiling’s employer during the operation and paid Mr. Streiling over \$10, 290 in that capacity. By January 2013, Mr. Streiling quit his regular job in security to work for the criminal organization full-time.

[34] JB and Mr. Streiling are around the same age, and learned that they had a number of interests in common during the operation. JB and Mr. Streiling engaged in numerous interactions and spent a significant amount of time with one another. These interactions included trips to Saskatchewan and Quebec, skiing in Vancouver, and countless hours in bars and restaurants, all at public expense.

[35] Investigators exposed Mr. Streiling to police-orchestrated scenarios designed to demonstrate the criminal organization’s emphasis on truth and loyalty. Other scenarios attempted to demonstrate the financial success of the organization and the financial rewards available to members of it. Ultimately, just prior to his

confession and arrest, Mr. Streiling was led to believe that he would have the opportunity to earn \$35,000 in connection with an upcoming job in Saskatchewan.

[36] Mr. Streiling was also exposed to scenarios involving violence, and to scenarios involving violence associated with a “non-braggable” offence -- that is, offences involving violence to women and children. This was done so that Mr. Streiling would feel comfortable discussing his potential involvement with Noah’s death, by making it clear to Mr. Streiling that he would not be judged by other members of the organization if he admitted involvement in such a non-braggable crime.

[37] Mr. Streiling was first introduced to Mr. Big at a Christmas party which took place early in the investigation. Mr. Big is so-called because he is the purported leader of the criminal organization. In this circumstance, Mr. Big was portrayed by MD, a senior officer posing as JB’s uncle. At the party, MD distributed \$5,000 Christmas bonuses to all members of the organization, save for Mr. Streiling, who received the lesser sum of \$500 in light of his recency with the organization. MD did so to impress upon Mr. Streiling the financial opportunities presented by membership with the criminal organization.

[38] Mr. Streiling’s confession to Mr. Big occurred during the forty-sixth scenario on March 22, 2013. It occurred after investigators “stimulated” Mr. Streiling through a visit to his home by uniformed police officers. Those officers informed Mr. Streiling in no uncertain terms that he would be imminently charged and prosecuted in connection with Noah’s death. Mr. Streiling then informed JB of the situation, who directed him to attend at a covert location to discuss options with MD for dealing with Mr. Streiling’s legal peril.

[39] During this conversation, MD informed Mr. Streiling that he had received details of the investigation through his contacts in the police department. He told Mr. Streiling that he understood Mr. Streiling to have “big problems” and offered to help Mr. Streiling as a favour to his purported nephew JB.

[40] MD told Mr. Streiling that a terminally ill member of the organization, whom Mr. Streiling had met during a previous scenario, would confess to killing Noah, but that he would have to be provided with an accurate recounting of the death by Mr. Streiling in order to provide a convincing story to investigators.

[41] Mr. Streiling then gave a confession in response to MD's ruse. He initially struggled in recalling the events and in discerning "the truth from the fiction". He also said that he had "spent the last five years burying everything that happened". However, Mr. Streiling eventually confirmed that Noah fell from the bathtub on the day he died. Afterwards, when Noah and Mr. Streiling were in the bedroom, he told MD that he grabbed Noah's lower jaw and hit the back of his head against the floor more than once, describing the number of strikes variously as a "couple" and "several". Mr. Streiling then told Mr. Big that after the assault, Noah's "eyes glossed over and he kind of made a wheezing sound and never woke up again."

[42] Mr. Streiling related to MD that he did what he could to wake Noah up on his own, describing this as "the biggest problem with the initial report ... because they said I waited too long to call the police." He described employing a few different methods to awaken up Noah, including spraying aerosol on his foot. He then started to panic because "it dawned on me I wasn't getting any reaction at all, like no flinching, nothing."

The Medical Evidence

[43] My *voir dire* decision outlines the medical evidence in detail, and I do not intend to repeat it at length in these reasons. By way of brief summary, the medical evidence called by the Crown supports overall the cause of death as being consistent with the confession Mr. Streiling gave to Mr. Big.

[44] Generally, the Crown experts say that Noah died as a result of an abusive and non-accidental head injury, opining that the medical evidence is inconsistent with the accidental circumstances described by Mr. Streiling, a short fall from a bathtub. They made a number of observations in support of that position.

[45] For instance, Dr. Richard Little, who attended on Noah when he first arrived at the hospital on the day he died, opined that it was improbable that Noah sustained a brain injury of such magnitude by merely falling from a bathtub. He was joined in that opinion by Dr. Jean Hlady, an expert witness regarding the physical examination of children in the area of abusive trauma.

[46] Dr. Michael Sargent, a qualified radiologist with subspecialties in pediatric radiology and pediatric neuroradiology, noted that it was unlikely that Noah died as a result of a re-bleed of a chronic hematoma, because these are uncommon in children and rarely lead to cerebral edema. He also observed that where bleeding occurs only inside the brain, as was the case with Noah, this suggests non-accidental abusive injury, as he would otherwise expect to find bleeding both inside and outside of the brain.

[47] Dr. Glenda Hendson, a pediatric pathologist with an interest in pediatric neuropathology, opined on the unlikelihood that Noah died as a result of an accidental aggravation of a previous brain injury. She testified that any such aggravation would progress slowly and likely resolve without medical intervention. Both Dr. Hlady and Dr. Craig Litwin, the qualified forensic pathologist who performed the autopsy on Noah, agreed with that characterization.

[48] Dr. Valerie White, a qualified pathologist with a specialty or interest in ophthalmic pathology, told the court that the pattern of injury to Noah's eyes, specifically the evidence of retinal hemorrhage in conjunction with optic nerve hemorrhage indicated that his injuries occurred as a result of non-accidental trauma.

[49] The Crown experts agree that as a result of severe head trauma on the day of his death, the right side of Noah's brain began to bleed. This led to what the experts described as a "mass" or "cascade" effect, in which the formation of a hematoma near the brain led to increased pressure within the skull. The pressure exerted by the hematoma caused Noah's brain to herniate away from the hematoma and downwards, compressing blood vessels and damaging other structures of his brain. The compression of blood vessels then deprived Noah's brain of blood and oxygen,

causing cerebral edema and resultant swelling, which then further increased the pressure within Noah's skull, inflicting additional damage to the brain which ultimately resulted in Noah's death.

The Defence Case

The Medical Evidence

[50] The defence forensic pathologist, Dr. Wigren, explained to the court his opinion that Noah could have incurred the injuries in question by falling from a bathtub as described by Mr. Streiling.

[51] Specifically, Dr. Wigren opined that a pre-existing subdural hematoma caused by a prior brain injury, in conjunction with coagulopathy resulting in an increased tendency to bleed, substantially enhanced Noah's susceptibility to a subsequent catastrophic brain injury at and around the time of his death. The evidence of the Crown experts confirmed the existence and significant extent of Noah's prior brain injury and the fact that Noah exhibited coagulopathy when he died. Dr. Wigren testified that in these circumstances, Noah could have suffered a significant brain bleed as a result of relatively minor trauma, such as a short fall from a bathtub, leading to death by a mass or cascade effect as described by the Crown experts.

Mr. Streiling's Evidence

[52] As I have indicated, Mr. Streiling testified on the trial. He is now 31 years of age and has completed Grade 12, along with some college credits.

[53] He recalled meeting Ms. Dykes in May 2007 and moving in with her at the Mason Street residence in September of that year. He described a "very close, warm" relationship with Ms. Dykes, though there had been some "minor communication issues" in the days leading up to Noah's death. He said he got along "great" with all four of Meadow's children. He explained that he and Meadow used "timeouts" as their "go-to" disciplinary technique.

[54] In respect of Noah's health, Mr. Streiling described Noah as "sick more often than [he] would have expected from a child his age, but it had been explained off as

him being a premature baby.” He recounted Noah’s symptoms as “sleepy, throw up some, his balance sometimes would not be a hundred percent. Just standard sick.”

[55] Mr. Streiling related the events the morning of Noah’s death in a manner consistent with the original version of events he gave to Ms. Dykes and the police. He realized at some point when Noah was eating breakfast that they were not going to make the magic show at the Mall. He described Noah crying while sitting in the high chair at breakfast, and then realizing that Noah had vomited. He then took Noah upstairs to give him a bath. He did so because after Noah had thrown up “when he was wiping away his tears, he got some of the throw up on his face and a bit in his hair.” Mr. Streiling decided that a bath would be the easiest way to clean up Noah.

[56] When the bath was finished, Mr. Streiling pulled the plug to drain the water and turned to retrieve a towel. The nearest towel was still damp so he went to the other side of the bathroom to grab a fresh towel. When Mr. Streiling turned around, Noah was getting himself out of the tub. Instead of straddling the bathtub, Mr. Streiling said that Noah stepped “up onto the edge of the tub” and then “his foot slipped, and he went head first into the floor.”

[57] Noah seemed stunned at first but when Mr. Streiling asked if he was okay, Noah looked at him and asked Mr. Streiling if he was okay. Mr. Streiling then sat Noah on the toilet to pee, and he then noticed a bruise or welt developing on Noah’s forehead. He sent Noah to his room to pick out his clothes and then he heard a crash. When entering the room he observed Noah’s body convulsing as if in the throes of a seizure. Mr. Streiling described it as “very reminiscent of what I had seen before in friends and my cousin,” who also suffered from seizures.

[58] Noah then passed out, and Mr. Streiling waited for him to awaken. He thought it was a manageable event and testified that it “wasn’t an emergency”. When Noah did not wake on his own, Mr. Streiling tried to wake him by spraying aerosol on his foot. He also dressed Noah while waiting for him to awaken, since Noah had commented in the bathroom that he was cold.

[59] Mr. Streiling described becoming more and more concerned when Noah did not wake. He “couldn’t wrap his head around what was going on” and at some point his head cleared enough to call Meadow for help. He did not call 9-1-1 partly because of the way events unfolded, and partly because he did not trust doctors as a result of previous dealings with doctors and the Ministry of Children and Family Development in relation to an incident involving his son Link.

[60] After breaking up with Ms. Dykes and at the time the Mr. Big investigation began, Mr. Streiling said he was “more or less lost” emotionally speaking. He described spending a lot of time trying to “pull his life back together”. Link was removed from his care. Mr. Streiling moved around, eventually residing on a boat owned by a friend and moored in Oak Bay. He held a few jobs, working in security when the Mr. Big investigation commenced.

[61] Mr. Streiling took no issue with the rendition of the Mr. Big investigation described in JB’s evidence, except for one scenario where he recalled that he indicated to JB that he was not willing to inflict violence against a woman or a child, testifying that he explained to JB that this represented a very firm line for him.

[62] While giving his evidence, Mr. Streiling spoke about the Mr. Big investigation in a manner that suggested it was still real to him, even though he now knows it to be a fictitious criminal organization. In describing his relationship with JB, Mr. Streiling stated:

Professionally, he was a good teacher, he tried to show me as much of the ropes as possible as we went along. Personally, we developed what I was led to understand at the time was a very close friendship.

[63] At the time, he wanted to become a full-time employee of the organization because of the “lifestyle it afforded ... it was a very lush existence.” He also saw a lot of respect amongst the guys and the relationships that evolved.

[64] JB and Mr. Streiling discussed Noah’s death on two occasions during the investigation. At trial, Mr. Streiling testified that he told JB the truth when he told JB that Noah died as a result of an accidental fall from the bathtub.

[65] The “stimulation” of Mr. Streiling by the police, in which they boarded his boat in order to inform him of impending and inevitable prosecution in connection with Noah’s death, did not cause him to be “terribly concerned”, as he assumed the police action was mere “puffery”. Although they claimed they had reopened the investigation, his understanding was it was never closed in the first place. He called his lawyer to let him know what had happened, and next called JB, who said he would have MD look into the matter.

[66] On March 22, 2013, when Mr. Streiling met with MD in Vancouver, he understood that there was a large job coming up later in April in Saskatchewan and that was going to have a significant payout. He understood that his role in the job was contingent on MD saying that he was “good to go”.

[67] During the March 22 discussion, MD informed Mr. Streiling that the version of Noah’s death he recounted to the police and JB, that Noah’s death resulted from an accidental fall, was obviously a fabrication. Mr. Streiling understood from MD that if he continued to adhere to that accounting of events he would be let go from the organization and would almost certainly end up in prison for killing Noah. Essentially, if Mr. Streiling continued to assert that Noah died as a result of an accident, he understood that, to use his own words: “I was done ... I would be convicted of whatever charges they decided to put down on me.”

[68] At that point Mr. Streiling testified that he saw only two options “to continue to be honest, as I always had been, and tell the truth, [that] Noah’s death was an accident, which [MD] had already told me was a lie in his eye ... and which would undoubtedly end with me just shaking hands with them, leaving and waiting for the police to come pick me up pretty much. Or try to come up with something that worked, that [MD] might believe ... but would work with whatever it was the science was suggesting.”

[69] As a result, Mr. Streiling told the court that he decided to lie to MD, saying that he then “hemmed and hawed, kind of broke up as much time as possible to let myself think.” He claims that he then concocted the story in which he caused

Noah's death through an assault, recounting this version of events to MD by stating that he held Noah by the face and hit his head on the floor more than once.

Mr. Streiling testified that this story "was the first thing that came to mind and it was vague enough that I figured I could adjust it if I needed to."

IV. **THE PARTIES' POSITIONS**

[70] The Crown argues that the previous brain injury that Noah suffered is irrelevant to the analysis before the court and that the intentional acts of Mr. Streiling, as detailed in the Mr. Big statement, meet the test for the offence of murder. The Crown argues that the Court should accept the Mr. Big statement as the truth, and submits that the actions confessed by the accused exceed significantly the *de minimus* standard to meet the required test for causation. The Crown contends in the alternative that if the Court is not satisfied that the *mens rea* of the offence of murder is proven, that I should instead convict the accused of the included offence of manslaughter.

[71] The defence argues that there is a reasonable doubt on all of the issues that this case presents. The defence argues that there is no reason to reject Mr. Streiling's evidence, submitting that he was unshaken in cross-examination and that his testimony is both internally consistent and corroborated by other evidence in the trial.

[72] The defence also argues that there is a reasonable doubt based on the evidence as a whole at trial. The defence points to the inherently unreliable nature of Mr. Big confessions and that the confession was induced by the promise of a lucrative career, a "lush" lifestyle with the organization, and, most significantly, the promise of salvation from his legal imperilment. Conversely, if Mr. Streiling refused to provide the confession, he would lose his position in the organization and very likely end up serving a life sentence for the murder of Noah.

[73] Finally, the defence argues that on the medical evidence it cannot be said that what Mr. Streiling described in the Mr. Big confession either caused or

significantly contributed to Noah's death. The defence argues therefore that he cannot be found guilty of either second degree murder or manslaughter.

V. **ANALYSIS**

[74] Since Mr. Streiling testified on the trial, I must be guided by the instruction on credibility set out in *R. v. W.(D.)*, [1991] 1 S.C.R. 742, which serves as a reminder of some fundamental principles of our criminal law: that an accused person is presumed innocent until proven guilty beyond a reasonable doubt, that the Crown bears the burden of proof beyond a reasonable doubt, which never shifts to the accused, and that a conviction cannot result merely because a trier of fact rejects all or some of the accused's evidence (para. 28).

[75] In *W.(D.)*, Cory, J. discussed the concepts of credibility and the reasonable doubt in the context of instructions to a jury in a criminal jury trial as follows:

[28] Ideally, appropriate instructions on the issue of credibility should be given, not only during the main charge, but on any recharge. A trial judge might well instruct the jury on the question of credibility along these lines:

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

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

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

[76] Although, I am not sitting with a jury, I must, as trier of fact in this case, instruct myself in a similar manner. It is important to note that a criminal trial is not a credibility contest between the evidence of the Crown witnesses and the accused; a criminal case cannot be decided merely by choosing between the evidence of Crown witnesses and that of the accused.

[77] Having considered the evidence of Mr. Streiling, and all of the evidence at trial in accordance with the *W.(D.)* instruction, I have determined that I am left in a reasonable doubt by Mr. Streiling's evidence. There are three main aspects to this

conclusion and they are interrelated: the nature of Mr. Streiling's evidence, including the manner in which he testified; the reliability concerns surrounding Mr. Big confession evidence generally and in the circumstances of this case; and finally, the medical evidence proffered by the Crown cannot overcome the weaknesses in the Crown case against Mr. Streiling. I will discuss each of these areas in turn.

Mr. Streiling's Evidence

[78] I observed Mr. Streiling carefully during his evidence and reviewed the transcript of his testimony while preparing these reasons. Mr. Streiling testified in a careful manner that nevertheless appeared direct and responsive. He made eye contact with both the questioner and the court during direct and cross-examination. He never faltered or appeared shaken during cross-examination. His testimony revealed no obvious inconsistencies in comparison to the version of events that he first provided to Ms. Dykes and then to police on the day of Noah's death.

[79] In his testimony Mr. Streiling made admissions against his interest. For instance, during his direct examination Mr. Streiling admitted that he knew from his first aid training that he was not to move an injured or unconscious person, but acknowledged that he moved Noah in order to dress him. Mr. Streiling also conceded that his failure to call 9-1-1 immediately after Noah lost consciousness "doesn't even make much sense even in [his] own mind." Such admissions lend some credibility to his version of events of that day, since he did not appear to tailor his evidence at trial to present himself in the most favourable light.

[80] Throughout his testimony, Mr. Streiling maintained that he did not assault Noah in any way, that Noah injured himself by falling from the bathtub, and that he fabricated the version of events related to MD. The fact that Mr. Streiling consistently provided an exculpatory account of what happened the day of Noah's death does not make it truer, but does make clear that Mr. Streiling did not recently fabricate his account.

[81] The Crown contends that Mr. Streiling delayed calling 9-1-1 so as to permit himself time to fabricate the exculpatory account of Noah's injury involving the

bathtub. I am not persuaded by that argument because the original exculpatory version of events and the inculpatory account ultimately given to MD both include Noah falling from a bathtub. If I am to accept that the account given to MD is the truth, then I must also accept that Noah fell from the bathtub. That is particularly so given that the medical evidence substantiates the fall from the bathtub, in particular the contusion and subgaleal hemorrhage on Noah's forehead above the right eye. That being the case, Mr. Streiling would have needed little or no time to concoct the exculpatory version of events since it relates what actually happened, merely omitting the assault on Noah.

[82] It also appears to me that external evidence corroborates Mr. Streiling's testimony to some extent. For instance, Cst. Buckler found water on the edge of the bathtub and on the bathroom floor. He also observed vomit on the bib and high chair. Further, Ms. Dykes said that the events of April 9, 2008 were "typical Noah and typical Brad". She noted, for instance, that Noah would typically try to do things on his own without waiting for an adult to assist him, and said that he occasionally hurt himself when doing so. Ms. Dykes' evidence also confirmed Mr. Streiling's description of the circumstances of the morning in question.

[83] The most troubling aspect of Mr. Streiling's evidence concerns his failure to initially call 9-1-1 when he says he found Noah seizing on the floor of the bedroom. This action defies common sense, particularly as Mr. Streiling presents and I find him to be a savvy individual with first aid training.

[84] As noted in *R. v. Feil*, 2012 BCCA 110, I can rely on Mr. Streiling's post-offence conduct in failing to call 9-1-1 to evaluate the veracity of his version of events (paras. 55-56).

[85] While I do not entirely accept entirely Mr. Streiling's stated reasons for failing to call 9-1-1, nor can I entirely reject them. His testimony regarding his mistrust of the authorities and his hesitation in involving them struck me as plausible, particularly given that Ms. Dykes and the Cowdens were then embroiled in a potential custody dispute. I am also of the view that Mr. Streiling's actions must be

considered in the context of Ms. Dykes' actions when she arrived home: she also did not immediately call 9-1-1, but instead called the Nurse Helpline. In her evidence, she did not attribute her own failure to immediately call 9-1-1 to any action on Mr. Streiling's part.

[86] In summary on this aspect of my analysis, I conclude that although I cannot unreservedly accept Mr. Streiling's evidence, particularly the circumstances surrounding his failure to call 9-1-1, I am left in a reasonable doubt by his testimony when considered in the context of all of the evidence at trial.

The Mr. Big Confession

[87] I turn now to the second aspect of my reasonable doubt, the nature of the Mr. Big confession itself. The Crown has been forthright throughout the conduct of this prosecution that without the confession given to MD they do not have a case against Mr. Streiling. Indeed, the lack of evidence against Mr. Streiling motivated commencement of the undercover investigation in the first place. Accordingly, in order for me to be satisfied beyond a reasonable doubt of the guilt of Mr. Streiling, I have to be satisfied at the outset that Mr. Streiling's confession to Mr. Big is true.

[88] As I outlined in my ruling on the *voir dire*, in *R. v. Hart*, 2014 SCC 52, the Supreme Court of Canada developed a new rule of evidence to deal with confessions made during Mr. Big undercover investigations: such statements are presumptively inadmissible.

[89] In developing that rule, the Court sought to address the risks of false confessions and wrongful convictions that are often traceable to evidence that is either unreliable or prejudicial. Although the Court in *Hart* fashioned a new rule to deal with Mr. Big confessions, the caution with which the courts have traditionally viewed such statements is not new. For example, in *R. v. McCreery* (1998), 108 B.C.A.C. 161, our Court of Appeal spoke about the inherent unreliability of such statements and the significance in finding confirmation of the content of the confession in other independent evidence (para 27).

[90] By ruling on the *voir dire* that the confession Mr. Streiling made to MD was admissible at trial, I concluded that I only had to evaluate threshold and not ultimate reliability. In other words, my *voir dire* ruling held that I could consider Mr. Streiling's confession as part of the evidence at the trial, because it exhibited sufficient *indicia* of reliability such that its probative value outweighed its prejudicial effect. I made no finding as to the truth of the statement on the criminal standard of proof. At that time, I did not have the benefit of hearing Mr. Streiling's explanation for his confession, nor hearing that explanation tested under cross-examination.

[91] Accordingly, I must proceed with a great deal of caution before convicting Mr. Streiling on the strength of a Mr. Big statement. That is especially so where, as noted by the defence, other evidence corroborates Mr. Streiling's testimony to some degree, and the statement to Mr. Big is internally inconsistent, and inconsistent with other evidence I have heard at the trial.

[92] In terms of internal inconsistency in the confession to MD, Mr. Streiling repeatedly denied responsibility for Noah's death to JB, maintaining that Noah died as a result of an accident. Mr. Streiling did not resile from that position prior to his confession to MD. For example, in Scenarios 16 and 17 Mr. Streiling made it clear that he would not have any part in hurting a child and that he drew the line at hurting children. In Scenario 27, Mr. Streiling showed JB a photo of Noah and made it clear that he had fond memories of him. In Scenario 38, Mr. Streiling stated that "I have no interest in lying to you guys". Further, immediately after the stimulation scenario and two days before the Mr. Big confession, Mr. Streiling called JB and stated, "I didn't do it." Therefore, Mr. Streiling was either lying to JB, with whom he had a candid and trusting relationship, or lying to MD. These inconsistent positions were taken within the context of an organization which had stressed the importance of the truth.

[93] Therefore, the first and only time during the undercover operation that Mr. Streiling confessed to being involved in Noah's death occurred when powerful inducements were brought to bear. Those included fear of dismissal from the

criminal organization and fear of prosecution which he had been led to believe would almost certainly result in his conviction. He was also left with no doubt that his failure to confess would mean the loss of his future income and the lifestyle to which he was becoming accustomed. At the time that he confessed, Mr. Streiling depended completely on the criminal organization for his livelihood, since he had been encouraged to quit his full-time job, and looked forward to a “lush” lifestyle and a big payout for the upcoming job in Saskatchewan.

[94] The circumstances here are similar to those before the Manitoba Court of Queen’s Bench in *R. v. Mentuck*, 2000 MBQB 155, where the Court said:

[100] [T]he police must be aware that as the level of inducement increases, the risk of receiving a confession to an offence which one did not commit increases, and the reliability of the confession diminishes correspondingly. In this case, in my view, the level of inducement was overpowering. As I have already said, it provided nothing but upside for the accused to confess and a downside of frustration and despair in maintaining his denial. I conclude that the confession, if not false, is certainly too unreliable for acceptance as an admission of guilt.

[95] Those comments assume amplified significance where one considers the nature of the confession to MD as explained by Mr. Streiling on the trial.

Mr. Streiling stated that he perceived that he had only two options open to him at the time, to continue to tell what he now alleges to be the truth, which would result in dismissal from the organization, prosecution and likely, incarceration, or to “try to come up with something that would work.”

[96] When faced with this choice, Mr. Streiling says he opted to try to fabricate a story. To accommodate the process, he stalled MD so that he could eke out some time to think. When reviewing the confession, it seems to me that this is indeed what Mr. Streiling did. He appeared to probe for additional information by asking MD questions about the quality of the evidence against him and the nature of the scientific evidence that he had to meet. Viewed with that explanation, the confession is vague and lacking in detail. Further, there are no unique hallmarks to his confession that make it inconsistent with the exculpatory version of events that Mr. Streiling originally provided.

[97] In summary on this point, I am of the view that the nature of the Mr. Big confession in this case is overall too unreliable to accept as a true admission of guilt. In my view, the police must be aware that when they undertake Mr. Big investigations, they are more likely to be successful in obtaining a conviction on the strength of such confessions in cases where there is independent confirmatory evidence that is ironclad, such as holdback evidence, and not evidence that is subject to differing opinions and interpretation such as expert medical evidence.

The Medical Evidence

[98] That leads me to the third aspect of my analysis, the medical evidence. Although I found on the *voir dire* that the Crown medical evidence was on the balance of probabilities confirmatory, I have determined that in the context of the trial as a whole, and on the criminal standard of proof beyond a reasonable doubt, that the medical evidence for the Crown is not strong enough to overcome the weaknesses in the case for the Crown.

[99] I wish to state at the outset that the Court had the benefit of an exceptional group of experts well-recognized in their respective fields. I base my findings not on any specific criticism of the Crown witnesses, whom I found to be very helpful, but rather on my view of the entirety of the medical evidence at trial, including Noah's pre-existing subdural hematoma, and the adult bite mark on Noah's left shoulder.

[100] As noted by Dr. Hlady, "if it's shown that the child was bitten by someone else, obviously that's an important aspect for the court to consider." Since the evidence does establish that the Noah was bitten by an adult, other than Mr. Streiling, I must consider that fact as an important part of my analysis.

[101] Absent any other explanation, the bite evidence suggests that Noah suffered abuse at the hands of a person other than Mr. Streiling, a troubling factor given the scope of Noah's prior injuries. In addition to the pre-existing subdural hematoma, I also note that Noah exhibited an abnormal thoracic spine. Dr. Michael Sargent, a radiologist with subspecialties in pediatric radiology and pediatric neuroradiology, told the Court that this abnormality likely occurred as a result of trauma. Of course,

the fact that someone else physically abused Noah would not, of itself, rule out the possibility that Mr. Streiling also assaulted Noah.

[102] I found the evidence of Dr. Litwin, the Crown pathologist, to be balanced and fair. His evidence supported the Crown theory in that he opined that Noah suffered a traumatic head injury consistent with the Mr. Big confession, and that it would be very unusual for the spectrum of injuries on Noah's body to have occurred as a result of a short fall, such as a fall from a bathtub. He testified that it would be more typical of a high energy event involving acceleration, followed by deceleration.

[103] Dr. Litwin did, in an appropriate and balanced way, however, make some important concessions to the defence theory of the case. He agreed that the abrasions on the back of Noah's head were not likely caused by the mechanism in the Mr. Big confession and could have been caused by "almost anything". He conceded that these marks could have been associated with Noah experiencing seizure or decerebrate posturing which could have been caused by the tangential contact between the back of Noah's head and the floor.

[104] Similarly, Dr. Litwin agreed under cross-examination that the bruise on Noah's left jaw could be attributable to attempts by medical personnel to open his mouth to permit intubation. Further, Dr. Litwin conceded that it was probably the case that greater force was applied to the front of Noah's head than to the back, which would be consistent with a fall from the bathtub, but not the sequence of events that Mr. Streiling related to MD.

[105] Dr. Litwin testified that Noah's blood contained pseudoephedrine in a concentration of 1.6 mg/L at the time of his death. That concentration is approximately triple the adult dose and is within the range recognized as causing toxicity. He opined that the pseudoephedrine did not contribute to Noah's death, as the concentration did not fall within the fatal or life-threatening range. Nevertheless, he acknowledged that pseudoephedrine could cause stroke or hemorrhage in the brain, which might present partially as a subdural hemorrhage.

[106] Other aspects of the Crown medical evidence also gave me pause. For instance, one week after Noah's death, Dr. Little told police investigators that he "didn't see any evidence to suggest" that Noah's injuries were caused by something other than a fall from a bathtub, although he later resiled from that position. Drs. White and Hlady associated the pattern of injury to Noah's eyes with non-accidental trauma, but Dr. White conceded that a component of that pattern, optic nerve sheath haemorrhage, could have been caused by the migration of blood from the brain rather than by trauma, undermining that association somewhat.

[107] Dr. Hendson attributed damage to Noah's corpus callosum to hypoxia, rather than to the shearing forces which might be expected if Noah had been the subject of an assault involving an acceleration and deceleration injury. Neither she nor any of the other experts could determine the source of the bleeding which caused the mass or cascade effect that killed Noah.

[108] Further, Dr. Hlady conceded the impossibility of saying how long Noah would have remained conscious following trauma capable of causing a significant head injury. Dr. Litwin said that this would be a short interval, "probably ... in the order of minutes", an opinion which appears consistent with Mr. Streiling's exculpatory version of events.

[109] None of the Crown experts could state with any certainty whether the contusion on the right frontal lobe of Noah's brain would be more consistent with a coup or contrecoup injury. The evidence on the whole appears to support the view that, given the relatively higher severity of the external injury to the front of Noah's head as opposed to the abrasions on the back of his head, it is more likely that the contusion on his brain is a coup injury. This state of affairs agrees with Mr. Streiling's exculpatory version of events, and contradicts to some degree the statement he gave to MB.

[110] As noted, the defence called Dr. Wigren, an expert in anatomic and forensic pathology. Dr. Wigren testified that Noah's internal and external injuries, taken

together, were consistent with having been caused entirely by the innocent explanation of the fall from the bathtub.

[111] The Crown urges me to reject Dr. Wigren's evidence by finding the manner he delivered it evasive, and or by finding that he is less qualified than the Crown pathologist, Dr. Litwin. I cannot do so. I did not find the manner in which Dr. Wigren delivered his evidence to be evasive. Further, while his evidence suffers from the fact that it was a "paper opinion" as opposed to an opinion that was formed by actually conducting the autopsy, I am satisfied that his opinion reflects his genuine medical opinion surrounding the cause of Noah's death in an area of considerable scientific debate and controversy. In my view, Dr. Wigren's evidence provides a somewhat persuasive basis for the proposition that Noah's death occurred as described in Mr. Streiling's exculpatory account.

[112] While I have only highlighted some aspects of the medical evidence, I have done so in order to underscore the fact that although there was a body of evidence that could be considered confirmatory of the Mr. Big confession, when it is viewed in the context of the evidence at trial as a whole, and with Mr. Streiling's evidence at trial, it is not sufficiently confirmatory for me to be satisfied that Mr. Streiling is guilty beyond a reasonable doubt.

VI. CONCLUSION

[113] In the result, I find Mr. Streiling not guilty.

[114] I do wish to acknowledge and thank all counsel for their excellent advocacy, outstanding written submissions and the balanced way in which this sensitive and difficult case was litigated.

"J. A. Power, J."

The Honourable Madam Justice J. A. Power