

# Court of Queen’s Bench of Alberta

**Citation: R v KDS, 2020 ABQB 187**

**Date:** 20200317  
**Docket:** 170472880Q1  
**Registry:** Edmonton

Between:

**Her Majesty the Queen**

- and -

**KDS**

Accused

**NOTE:** This judgment is prepared with initials to comply with the requirement to protect identify of victim and witnesses.

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**Reasons for Decision  
of the  
Honourable Mr. Justice J.J. Gill**

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## I. Introduction

[1] The Accused, KDS, is charged with second degree murder contrary to s 235(1) of the *Criminal Code of Canada*, RSC 1985, c C-46 [*Criminal Code*]. Section 229(a) of *Criminal Code* states:

Murder

229 Culpable homicide is murder

(a) where the person who causes the death of a human being

(i) means to cause his death, or

(ii) means to cause him bodily harm that he knows is likely to cause his death, and is reckless whether death ensues or not;

[2] It is alleged that on or about April 28, 2017, at or near Strathcona County, Alberta, KDS murdered his father, NES (collectively described as “the offence”).

[3] I have attached the Agreed Statement of Facts as an appendix to this Decision. KDS has admitted that he caused the death of his father NES. However, KDS submits he should not be held criminally responsible for the offence pursuant to section 16 of the *Criminal Code* on the basis that he was suffering from a mental disorder at the time of the offence (“the NCR defence”).

[4] Alternatively, the accused submits the defence of provocation should apply in this case, and that the charge of murder should be reduced to manslaughter pursuant to section 232 of the *Criminal Code* (“the provocation defence”).

## II. Section 16 of the *Criminal Code* and the NCR Defence

[5] Section 16 of the *Criminal Code* reads as follows:

Defence of mental disorder

16 (1) No person is criminally responsible for an act committed or an omission made while suffering from a mental disorder that rendered the person incapable of appreciating the nature and quality of the act or omission or of knowing that it was wrong.

Presumption

(2) Every person is presumed not to suffer from a mental disorder so as to be exempt from criminal responsibility by virtue of subsection (1), until the contrary is proved on the balance of probabilities.

Burden of proof

(3) The burden of proof that an accused was suffering from a mental disorder so as to be exempt from criminal responsibility is on the party that raises the issue.

[6] KDS, bears the onus of proving the NCR defence on a balance of probabilities. He must establish that when he attacked his father, he was more likely than not suffering from a mental disorder, which either rendered him incapable of appreciating the nature and quality of his act or incapable of knowing that his act was wrong.

[7] If the NCR defence is made out, the Accused is neither acquitted nor found guilty (see *R v Bouchard-Lebrun*, 2011 SCC 58 at para 53 [*Bouchard-Lebrun*]). The Court renders a verdict of not criminally responsible on account of mental disorder, pursuant to section 672.34 of the *Criminal Code*, which states:

Verdict of not criminally responsible on account of mental disorder

672.34 Where the jury, or the judge or provincial court judge where there is no jury, finds that an accused committed the act or made the omission that formed the basis of the offence charged, but was at the time suffering from mental disorder so as to be exempt from criminal responsibility by virtue of subsection 16(1), the jury or the judge shall render a verdict that the accused committed the act or made the omission but is not criminally responsible on account of mental disorder.

### III. Evidence

[8] This Court heard testimony from the Accused, KDS, SS (KDS's wife at the time of the offence), TB (SS's sister and KDS's sister-in-law), NS (KDS's brother), Constable Sullivan (the arresting officer) and Corporal Harnish (the interviewing officer). Four experts, who clinically assessed KDS prior to the commencement of trial, provided written opinions and testified at trial concerning the Accused's mental state.

[9] Full video recordings of KDS's arrest (taken from the dashboard camera of Constable Sullivan's police vehicle), and of KDS's two interviews with the police following his arrest (on April 28, 2017 and April 29, 2017) were played in court. This Court also heard audio recordings of the 911 call made by SS ("SS") and of the voicemail left by the Accused for his brother, NS ("Nicholas") during the course of the offence. In addition, an audio recording made by a device carried on Corporal Harnish's person, when he escorted KDS to the hospital a few hours after his arrest, was played during the trial.

[10] A Joint Book of Exhibits was tendered, containing an Agreed Statement of Facts, pursuant to section 655 of the *Criminal Code* (the "ASF"), photographs, an autopsy report for NES, transcripts and videos of the police interviews, a video and audio of the arrest, other audio recordings, and medical records for the Accused (including treatment and chart notes) were also tendered into the evidence.

### **A. Early Life and Relationship Between KDS and NES**

[11] In his testimony, KDS recollected on his life with his father. After KDS's parents divorced, he lived with NES and his brother NS, who is three years younger than the Accused. KDS recalled that growing up he felt lonely at times, and had abandonment issues. He described crawling into bed with his father. His father would reach across his body and give him a hug from behind. KDS testified that although he described his father's actions in these encounters as "groping", when he was interviewed by the Psychologists and Psychiatrist at Alberta Hospital, NES never touched him in an uncomfortable way. KDS was adamant during his testimony that he was never sexually abused by his father. He further testified he suffered no physical violence aside from a spanking when he was in the first grade.

[12] KDS described NES as his best friend. In fact, NES was the best man at his wedding to SS. He enjoyed spending time with his father and would assist him with chores around the farm even after he moved out to live with SS at age 25.

[13] KDS moved back to his father's farm with SS and their children (at NES's original suggestion), in around 2011/2012. He testified that they had a good relationship with his father and that he trusted NES completely. He and his family lived with NES on the farm until the date of the offence (April 28, 2017).

[14] NS testified that he believed their family was close and that the Accused and NES had a good relationship. He is unaware of any prior confrontations between his brother and NES. NS has no recollection of NES ever having abused anyone in their family. NS said he was never abused by his father, and he had never previously heard anything about their father having abused KDS.

### **B. Circumstances Preceding the Offence**

[15] At the time of the offence, the Accused and his father NES, lived in separate residences on the same rural property in Strathcona County, Alberta. KDS lived in the main residence with his wife, SS, and their five children. NES lived alone in a small cabin on the property (sometimes referred to as a "trailer" in the evidence), located approximately 100 yards away from the main residence.

[16] KDS admits he had a long history of alcohol abuse that began when he was a teenager. He started drinking at age 16, began drinking heavily at age 19, and his alcohol abuse progressed from there. On March 4, 2017, (or sometime between February 28, 2017 and March 4, 2017), the accused abruptly ceased consuming alcohol. Prior to this date, KDS admits that he drank on average between 10 to 30 beers per day.

[17] KDS testified that he decided to stop drinking after a family friend passed away from alcohol abuse; an event that struck a chord with him. KDS's biggest concern was dying from alcohol abuse and not being there for his children. He testified that it was a difficult decision because he really liked to drink, but he nevertheless decided to quit cold turkey. KDS did not explain his reasons for quitting drinking to SS – he simply announced to her his decision and instructed there would be no more alcohol in the house. SS was supportive of this decision.

[18] In the days before he stopped drinking, KDS testified that he had started to believe his father was spying on his family. He locked the doors of the main residence to keep his father out. He was convinced that NES went through their house while they were away. He also believed

that his father went through their garbage. KDS believed his father was being invasive, watching everything, and taunting him. On February 28, 2017, KDS confronted his father in his cabin and told him to stop spying on his family. At trial, KDS admitted that contrary to his belief at the time, upon reflection, he now believes nothing out of the ordinary was actually going on.

[19] Around the time that the Accused stopped drinking, NS testified that he went to visit KDS after learning he had confronted NES. NES told NS the Accused had told him to move out of the cabin, apparently without providing any reasons. NS then went to talk to his brother about the situation and found KDS pacing back and forth on the deck of the main residence. They had a short conversation. The Accused seemed a little sad and deflated. He told NS that “he was done with it” and “couldn’t do it anymore.”

[20] KDS testified that he had no psychological problems or psychiatric symptoms before he stopped drinking cold turkey in early March 2017. KDS said he experienced no manic episodes, heard no voices, did not experience depression, racing thoughts, or feelings of elation. In his opinion, he felt “normal” before he stopped drinking. SS also denied that her husband had ever had any prior history of mental health issues.

[21] Between March 4, 2017 and March 10, 2017, SS noted that her husband’s behaviour was different, and at times concerning. She testified that KDS began to stress the importance of family togetherness, expressed concerns that SS would leave him, experienced insomnia, started pacing, and consumed excessive amounts of water and coffee. KDS exhibited a depressed emotional state and even made suicidal comments to SS.

[22] On March 10, 2017, KDS and SS attended the Fort Saskatchewan Health Centre (“FSHC”) at approximately 1:30 am. SS had noticed her husband uttering strange statements; she believed he was having a nervous breakdown. KDS testified that he had experienced a type of seizure and was shaking uncontrollably. He recalls having unusual thoughts and that his head was filled with poems and riddles. He was admitted to the FSHC, was subjected to a battery of tests, and was later discharged. He was diagnosed with symptoms of acute alcohol withdrawal.

[23] At approximately 10:30 am that same morning, KDS was taken by ambulance to the Royal Alexandra Hospital in Edmonton (the “Royal Alex”). He reported hearing other people’s thoughts and experiencing heightened senses (i.e. hearing, seeing, and tasting “better”). The symptoms that he reported were attributed by the doctor to a misperception of his own thoughts, related to delirium from alcohol withdrawal and to hyponatremia (very low blood sodium due to excessive water consumption). KDS began an alcohol withdrawal protocol. He was treated with diazepam (Valium), and his hyponatremia was corrected.

[24] SS testified that while her husband was in the Royal Alex, she told him that she was ready to leave him; not because of recent events, but because of longstanding problems in their marriage. She said they talked about ending the relationship and working it out. At trial, however, KDS denied there were any major stresses in his marriage. He said that the only issue they had was SS’s desire for him to spend more time with her and the children. He testified that he was unaware that SS wanted to leave him until he heard her testimony in court.

[25] After two days, on March 12, 2017, KDS was discharged from the Royal Alex. He was sent home with a 4-day course of Valium, which he completed. SS testified that after his hospital stay, and the Valium treatment, KDS seemed normal again. He still seemed lost in thought, but he was no longer pacing. He continued to stay sober. The main difference was her observation

that her husband was now showing an increased interest in spending time together as a family. She testified that although KDS had always been a hard worker and good provider for the family, he never did anything with the children.

[26] KDS testified that from the time of his admission to the Royal Alex to the date of the offence, for a good portion of that time, he felt very scared of his father. He felt paranoid and worried that his father would hurt a member of his family. However, he clarified that he did not fear his father would kill or hurt him. KDS did not tell SS or NS or anyone else about these concerns or fears. He did not tell NES that he was scared of him. He testified that he confronted his father about spying at one point, and that he felt scared and was physically shaking when he did so.

[27] Nicholas confirmed the fact that KDS had confronted NES expressing concerns that NES was spying on him and his family. According to NS, his brother had never complained about their father previously, and he found it strange that KDS was accusing NES of spying.

[28] SS testified that KDS returned to work about a week after his return from the Royal Alex, and worked continuously up to April 27, 2017 (the day before the offence). During this period, he did not drink or take drugs. According to KDS, he found this period exceedingly difficult. While at work, he was hearing the thoughts of other people and felt overwhelmed. He decided to quit, but his boss persuaded him to go home, take a break, and call in every day to see if he was ready to come back to work.

[29] About two days before the offence, SS noticed her husband was acting strangely – he appeared slow, lost in thought, and was pacing back and forth (in a manner described as similar to his pacing in the days immediately after he ceased drinking). On the evening before the date of the offence, KDS seemed mopey and depressed, and he was pacing. Suddenly he stopped pacing, looked at her and said, “I got it figured out.” She asked him what he meant, and he responded “Ha ha” and walked away without explanation.

### **C. The Day of the Offence – April 28, 2017**

#### **i. In the Morning**

[30] On April 28, 2017, KDS did not go to work. He testified that he got up around 5:00 am, made coffee, and went out onto the deck of the main residence. He recalled it was a sunny morning. Around 7:30 am, his daughter AS came onto the deck. He testified he saw the sun shine down on top of her. She was playing on the side of the deck without a hand rail; he got up and moved her away from the danger. A short time later, the sun directed him to the driveway, where his daughter TS was playing. TS was close to some holes in the driveway and he was concerned that she could get hurt, so he told her to get away from the holes.

[31] At around 8:30 am, SS testified that she got up and joined her husband on the deck – they had a smoke and a coffee together. In her view, her husband did not appear to be entirely happy, but he seemed okay. They decided to host a lunchtime BBQ at their property that day. The plan was to stay outside, enjoy a campfire, and have a wiener roast. SS invited her sister, TB (“TB”), to join them. TB testified that she arrived at the property with her children between 11-11:30 am. She joined SS and the Accused at the fire pit, while the children all went off to play together. NES did not join them for the BBQ. He remained in his cabin.

[32] SS observed that KDS was staring and not saying much while they were sitting together at the fire pit. She noted the Accused was hunched over, and appeared sad and mopey. She testified that she tried to have a conversation with KDS, but he did not seem willing to talk, and when he did speak, his speech was monotone.

[33] All of the children were playing outside. LS, AS, and TS were playing on the trampoline. At one point, TS hurt her back jumping off the hay bales onto the trampoline. According to SS, TS came to the fire pit and told the adults what had happened. SS testified that KDS then went and moved the trampoline away from the hay bales and returned to the fire pit.

[34] KDS's testimony paints a different story about the trampoline incident. According to KDS, he saw beams of sunlight shining down onto the west side of their home. He said he left the fire pit and walked over to that area, where he found TS crying. She told him that she had hurt herself jumping from a hay bale onto the trampoline. KDS testified he then carried TS back to the fire.

[35] Next, KDS says he saw a beam of sunlight shining down on the chicken coop. He left the fire again and went over to the chicken coop where he noticed a pitchfork in the bullpen where three of the children were playing. He got them out of the area, and returned to the fire. A few minutes later, KDS observed a beam of sunlight shine down on the driveway. He noticed two of the children were playing too close to the end of the driveway. He left the fire pit and told the children to get away from the end of the driveway because it was too close to the main road.

[36] KDS testified he believed the sun was pointing out to him potential dangers imminently facing his children. He said the sun never spoke to him or directed him to do anything – it simply shone beams down onto areas that he interpreted posed dangers to his children. He would then go to those areas and direct the children to move out of harm's way. KDS testified that he did not tell SS or TB about the sun beams, or about the fact that he had saved the children from danger on multiple occasions that morning.

[37] Neither SS nor TB recalled KDS leaving the fire pit on the occasions he claims he left to protect his children from danger. SS testified that KDS only left the fire pit twice: first, to move the trampoline after TS had come to the fire by herself to tell the adults that she had gotten hurt on the trampoline, and then a second time when he went to retrieve a knife from his truck to cut the packaging for the deer sausage they were cooking on the fire pit.

[38] According to TB, after KDS had returned to the fire, following retrieving the knife from his truck, he suddenly stood up and said in an angry voice something to the effect of "I have had fucking enough!" SS testified that he thereafter grabbed her by the shoulder and told her in a stern voice to: "Pack up the kids and go to Whitecourt" (the town where SS's mother resides).

[39] According to SS and TB's evidence, the Accused then turned and walked away in the direction of NES's cabin. SS was shocked and confused by her husband's behaviour; his tone of voice and actions frightened her. He had never touched her so forcefully before. SS called out after KDS and said something like "What the hell?!", but KDS ignored her and kept walking. SS and TB could not understand what was happening. They started gathering the children and putting them into vans.

[40] NES's cabin was approximately 100 yards away. It was separated from the main house by a large slough. The Accused did not walk around this slough – he walked directly through it. At times, KDS was up to his knees in water, and he lost one of his boots in the slough.

[41] KDS's version of events differs from the testimony of SS and TB. According to KDS's testimony, after returning to the fire with the knife and opening the sausage packaging, he left the fire again to go to the other end of the house where his daughter AS had fallen. He helped her get up and got her back to the fire. He then looked up and noticed the sun shining down on his father's cabin. He observed that this sun beam was two or three times larger than the beams he had observed previously that day. He testified that as soon as he observed the large sun beam, he got up and made his way quickly across the slough to NES's cabin. He said he felt he needed to see what the sun was shining down on. Because it was larger than the previous beams, KDS believed it was more important. KDS does not recall telling SS to pack up the kids and to go to Whitecourt before heading to the cabin. He remembers SS yelling after him as he walked towards the cabin (although he could not recall what she yelled), but he ignored her because he was focused on the beam of sunlight. He described feeling pulled towards the sun, a feeling of grave danger, and the need to protect.

## **ii. The Occurrence of the Offence Inside the Cabin**

[42] Inside the cabin, KDS found NES and his son, LS (age 7). They were seated across from each other, a couple feet apart, at the dining room table. They were leaning towards each other and laughing. KDS testified that he had no idea who was inside the cabin prior to entering it.

[43] According to KDS's testimony, he believed his son was in great danger and that he would get hurt or even killed. The only thought in his mind was that he needed to protect LS. He described feeling an intense emotion and that he was almost in a state of panic. He went up to his father and started yelling at him: "You creep, you fucked me and you fucked Nick."

[44] At some point, the Accused recalls hearing his father's thoughts saying "8 too many, there can only be 7."

[45] According to the ASF, upon entering the cabin, KDS became angry and started yelling and cursing at NES. The Accused punched his father multiple times in the head with a closed fist. The force of the punches caused NES to fall off his chair and onto the floor. The Accused continued to punch NES while he was laying on the ground. The punches caused NES to bleed from the face and head. NES pleaded: "What did I do?" At trial, KDS did not remember any of this – he only remembered striking his father twice while NES was up against the wall, and then recalled that NES was lying on the ground. He remembered LS leaving the cabin and acknowledged at trial that once LS had left, he was no longer in any danger.

[46] While she was packing the kids into vans, SS saw her son, LS, riding his bike towards her from the direction of his grandfather's cabin. LS told his mother, "Dad's punching Grandpa." TB recalled LS saying "My grandpa doesn't know what he did and there's blood everywhere." SS told LS to get into the van and she ran to NES's cabin. When she entered, the Accused was standing near NES, who was lying on the floor, in the fetal position, bleeding. KDS was yelling at his father. NES pleaded to SS, "Don't leave me."

[47] SS testified that she positioned herself over NES's body, with his legs between hers. She pushed her husband and told him to get out. He shoved her back. KDS called NES a "pussy" and

a “cock sucker” and accused him of hiding behind a woman. SS screamed at her husband to stop and to leave, but he did neither.

[48] SS testified that her husband then said to her in a loud voice, “Everybody has secrets. Do you want to know my secret? My dad molested us as kids and he will do it to our kids.” SS had never heard such allegations before. According to SS, KDS then told her that NES needed to be punished for what he did and he instructed her to “Get out or you’re going to get hurt.” In his testimony, KDS did not recall seeing SS in the cabin, let alone saying anything to her. He does not remember talking about a dark secret.

[49] At 12:14 pm, SS stepped away from NES and called 911 using NES’s cell phone. KDS was left standing in front of his father, who was still lying on the ground. While SS was on the telephone with 911, KDS called NS. When Nicholas did not pick up, the Accused left a voicemail message for his brother stating:

I just confronted our family demon that fucking ruined everybody’s fucking lives... I need your backup in court for what the fuck he did and how he fucked everybody’s lives. I had to save my family and I don’t give a fuck about anything else. Call me back when you get this as soon as fuckin possible.

[50] NS testified that he does not know what KDS was talking about in the voicemail. The Accused had never mentioned any family demons previously, and “demon” was not a code name for anything.

[51] At trial, KDS recalled making a phone call in which he mentioned a demon, but he had no independent recollection of calling NS.

[52] The Accused can be heard leaving this voicemail message for Nicholas in the background of the 911 recording. In addition, EMS dispatch recorded the following exchange between SS and the Accused moments prior to the offence:

SS: I’m not leaving. I said no.

KDS: Get the fuck out.

SS: No.

KDS: You can’t see this. Go.

SS: Kris, quit it.

KDS: (*Unintelligible*) no, back up.

SS: (*Unintelligible*) fuck they need, don’t push me again.

KDS: Don’t, back up.

SS: Leave him alone, Kris.

KDS: Fuck, get out.

SS: No. Don’t...

KDS: (*Unintelligible*) fucking piece of shit.

SS: Stop. He’s got a knife. He’s gonna fucking stab him. I said don’t.

KDS: (*Unintelligible*)

SS: Put the fucking knife down.

DISPATCH: I need you to leave, I need you to leave the scene immediately ma'am.

SS: I am not leaving my father-in-law to get killed. Kris (*screaming*)...oh my god, oh my god....

DISPATCH: Ma'am what's going on?

SS: (*crying*) He's stabbing him.

DISPATCH: He stabbed you?

SS: No he's stabbing my father-in-law. Oh my god.

DISPATCH: He's stabbing your father-in-law? Okay...

SS: Yes he's stabbing him right now.

DISPATCH: Ma'am, ma'am you need to leave the scene right now.

[53] SS testified that she saw KDS get down on his knees, on top of NES. The Accused took a folding knife from his pocket, opened the blade and began stabbing NES in the upper chest and neck with the knife. SS ran out of the cabin and back to the van. She drove to a community hall about half a mile away, where she met with the Royal Canadian Mounted Police ("RCMP").

[54] At trial, KDS only recalled stabbing his father three times in the chest. His next memory after that is coming back across the slough. He had no memory of leaving the cabin or of what he did with the knife. Eventually the knife used to stab NES was found by the RCMP on August 29, 2017 under the windshield wipers of a derelict truck located on the property.

### iii. NES's Cause of Death

[55] The autopsy report determined the cause of NES's death to be multiple sharp force injuries. The Accused stabbed the deceased 86 times. 50 of the stab wounds were sustained to the torso. Additional stab wounds to NES's extremities suggest defensive injuries. NES's head was partially severed from his neck. Blunt force injuries to NES's head were also observed.

## D. Events & Circumstances Following the Offence

### i. Arrest & Processing at RCMP Station

[56] Constable Sullivan of the Strathcona County RCMP arrived at the rural property around 12:35 pm. The dash cam on his police vehicle recorded the arrest. He found the Accused on the road, dressed only in his underwear. KDS's hands were covered in blood and he had a dishevelled appearance.

[57] Constable Sullivan arrested KDS at gunpoint because it was considered a high-risk arrest. KDS was ordered to get onto the ground. The Accused followed all police instructions without any resistance or difficulty. The Accused did not respond verbally when he was told he was under arrest, nor did he respond to any questions concerning his rights. Constable Sullivan testified that he was satisfied that KDS understood what he was being told by the police officers. He described the Accused's demeanor during the arrest as being calm and passive. KDS was

placed in the back of the RCMP vehicle and taken to the RCMP detachment. At the detachment, he was photographed, swabbed for DNA, given new clothes, placed in a dry holding cell and given the opportunity to contact a lawyer.

[58] According to Constable Sullivan, while he was being processed at the RCMP detachment, KDS was calm, attentive and he followed instructions. He appeared to be hearing, listening, and understanding what was being said to him. KDS exhibited no signs of aggression, and he was not observed responding to unseen stimuli. His overall mood appeared to be nonchalant.

[59] Corporal Harnish (who was Constable Harnish at the time of these events) took photographs and swabbed the Accused after his arrest. Corporal Harnish testified that he recalled KDS's demeanor as quiet, calm, compliant, and polite. The Accused understood the process; followed directions and did not resist. He did not exhibit any real emotions or facial expressions.

## **ii. Hospital Visit**

[60] At around 6:00 pm, Corporal Harnish took KDS to the hospital to seek treatment for swelling in his right hand. The entirety of this trip was audio recorded by a device carried on Corporal Harnish's person. Near the beginning of the recording, Corporal Harnish said to KDS, "Kind of a shitty day for you," to which the Accused responded "Got a lot of shit solved." At trial, KDS testified that he had no memory of this trip to the hospital.

[61] Corporal Harnish testified that at no point, while at the hospital, did the Accused exhibit any bizarre behaviour or unexplained movements, such as responding to unseen stimuli. When speaking to the healthcare providers, KDS responded to questions and provided information about his age, date of birth, health, address, postal code, and various phone numbers. When a nurse asked him what happened, KDS responded "Assault, bunch of shit." At one point, the Accused said "I've always done things for the right reasons."

[62] When the doctor examined KDS's injured hand and asked him if he had punched something, KDS responded "Yep." When the doctor asked him what he had punched, KDS replied "My father."

[63] KDS later told Corporal Harnish: "For what he did, he deserved it." He also said: "Right now I don't know, I feel, like myself, which I haven't felt in a long, not a long time, a while, but I was struggling with that. [...] Before that it was like in turmoil, everything." He later repeated: "I feel myself now [...] I feel like myself."

## **iii. April 28<sup>th</sup> Police Interview**

[64] The RCMP interviewed KDS twice: on April 28, 2017 ("April 28<sup>th</sup> police interview") and then again on April 29, 2017 ("April 29<sup>th</sup> police interview"). These interviews were video recorded. The Accused admits in the ASF that all the statements he made during the course of the RCMP investigation were voluntary. I note, however, that at the time of trial, KDS testified he had zero recollection of his interactions with the Strathcona RCMP who arrested, processed, and interviewed him. The Accused was thus unable to answer any questions at trial about these interviews in general, or specifically about the inconsistencies between his statements to the police and the subsequent reports he made to experts at Alberta Hospital and in testimony in court.

[65] The April 28<sup>th</sup> police interview commenced at 9:30 pm (approximately 9 hours after the offence). Corporal Harnish, the interviewer, testified that KDS was one of the calmest people he had ever dealt with in this kind of situation. He said in all of his interactions with the Accused, he was not upset; he was consistently calm and polite.

[66] In the video, it is clear that KDS was initially reluctant to talk, but eventually he began to respond. Throughout the interview he appeared to listen attentively and to understand what Corporal Harnish was saying to him. He stayed calm throughout the interview.

[67] KDS talked about facing a decision, about struggling to figure something out for a long time, about being stressed and tormented until he figured it out, and then of finally figuring it out. He said the following to Corporal Harnish:

KDS: He [NES]...was going to hurt somebody. [...] I could not let it happen. [...] When you're faced with that decision you have to make one and it just clicked. Like holy fuck and like... my whole life and I was just like, "Holy fuck. There it is." Like I...I see it and it all fuckin' made sense. Because I know..." [...] And...I was so blind. I couldn't see it for a long time, right? All stressed out and fuckin'... everything come crashing down and then it made sense. [...] You have no idea the torment when you fuckin' figure it out. [...] Because it goes further than that too. [...] Yeah, it goes back...to like my mother, brother, me too and you could just see... it was gonna happen."

[68] The Accused at one point admitted he had been "hurt" by his father (without specifying in what way), and that he believed his father would hurt his son LS next. KDS told Corporal Harnish that, while he was at the fire, he realized LS was in the cabin alone with NES. He then "snapped."

[69] The following exchange occurred between Corporal Harnish and the Accused:

KDS: Me. [...] And...he was going after [LS]. ... The boy. It was in his house.

HARNISH: Today?

KDS: Yep.

...

HARNISH: So when you were sittin' by the fire today um...what ah... made you think he was gonna harm [LS]?

KDS: 'Cause he got him out there by himself.

HARNISH: Okay. So your dad had him at his place?

HARNISH: Okay. Is that something that's kinda out of the ordinary?

KDS: Yeah. [...] I guess so. For the longest time like ever (*unintelligible*) [TS] and [LS] went up there... then [LS] wasn't allowed up there.

...

HARNISH: Um... were you by the fire when you realized something was wrong?

KDS: It's kind of a blur. I think so. [...]

HARNISH: [...] When you realized something was wrong...what happened?

KDS: I snapped.

[70] During the police interview, KDS emphasized his urge to protect his children and his family. He remembered SS "chasing" after him when he headed to his father's cabin. When asked by Corporal Harnish what happened when he got to the cabin, KDS responded:

KDS: [LS] was sitting across the table from...and he was there and I just lost it. I grabbed it and started beating him with my hand, fist. Started calling him a creep... fuckin' word under the sun. Kicking him, beating him, punching him. And then...then he was on...down and she...she didn't know...what was going on 'cause I...so I pushed her out of the way. And then I killed him. Like...I just...stabbed him...stabbed...because of what he's done, of what he was gonna do. (*unintelligible*) I'm not letting that happen...to my family.

HARNISH: [...] Where did you stab him?

KDS: The chest...the chest (*unintelligible*) chest, neck...in...it was just all over. (*making stabbing motion with his right hand as he said this*)

[71] The Accused remembered pushing SS out of the way, and expressed his belief at the time that NES "had to die for what he" had done. KDS could not recall how many times he stabbed NES, but he did remember what knife he used (he could describe it in detail), and he remembered that the knife had come from his truck. He was unable to provide any indication to the police of what he had done with the knife after the stabbing.

[72] When Corporal Harnish asked KDS what made him stop stabbing his father, he responded: "When I knew he couldn't hurt anyone."

[73] From watching the videos and reading the transcript of the April 28<sup>th</sup> interview, I note the Accused appeared coherent, concise, chronological, and generally seemed to remember most things clearly. The Accused did not appear to have difficulty understanding Corporal Harnish, nor did he appear to act in a psychotic manner. His description of the offence, in my non-medical professional view, did not indicate a state of psychosis or delusions.

[74] I note the Accused had a greater recollection of the offence at the time of this interview than he exhibited at the time of trial. He provided details in this interview that he could no longer recall at trial, or which directly contradicted the version he told on the stand. There is no mention anywhere in the April 28<sup>th</sup> police interview of sun beams guiding him that day, or of hearing his father's thoughts in the cabin.

[75] At the time of the April 28<sup>th</sup> police interview, which took place approximately 9 hours after the offence, KDS is clearly aware that he killed his father, how he killed his father, and his reason for doing so. He suggests that he had suddenly figured something out which led him to

make a decision to attack his father. He appeared to feel justified in his actions and did not show any indication of remorse. He insinuated his reason for killing his father was that his father had abused him as a child and he was concerned he was going to do the same thing to his son, LS.

#### iv. April 29<sup>th</sup> Police Interview

[76] The April 29<sup>th</sup> police interview was conducted by Corporal Harnish, with Constable McDuff making several appearances. The police tried again to elicit information about the location of the knife, but KDS again insisted that he had no memory of what he did with it after the attack.

[77] The Accused stated early in the interview, “Like I told you yesterday, I did it for the right fuckin’ reason.” Later, he demanded to see a lawyer (something he did several times throughout the interview), saying to Corporal Harnish, “but I need to make sure that I get the least amount of time possible in there so I may be able to see my family after...because I did it for the right fuckin’ reasons. [...] And I have to trust in the lawyer more than I trust in you.”

[78] KDS acknowledged in the April 29<sup>th</sup> police interview that his family – especially SS and NS – would not understand or cope easily with what he had done:

HARNISH: [...] How do you think Nick is ah... gonna cope with this?

KDS: Unfortunately, terrible. [...] He’s not gonna be happy about it. [...] He’s not. My wife won’t. Nobody will. No one’s gonna be like, “Oh, yeah,” right? But nobody knows that that was the right fuckin’...decision.”

HARNISH: [...] Who ah... who’s gonna have the hardest time out of all this to...to deal with not only ah... the loss of your father um... but the... the aftermath of the whole situation? Who’s gonna be the most hurt?

KDS: The aftermath of it? [...] I always thought it would be me, but it’s not... once I saw... what he was doing. I think Nick... would probably be the most hurt. I mean, my wife’s gonna be hurt like crazy...but not like Nick, right?

HARNISH: Did ah...did Nick know what was going on?

KDS: I don’t know if he did or not. It’s my whole... that’s how it’s been.

...

HARNISH: Did you ever bring it up to Nick... discuss it with him?

KDS: No. [...] Everything’s always been fuckin’ suppressed. [...] It has to be, right, and then you see it happening again and again. Either you just let it go or you don’t, right?

[79] KDS explicitly talked about experiencing the emergence of suppressed or blocked memories of childhood abuse at the hands of his father. He described how it all finally “clicked” or made sense to him. He described his belief that his father was spying on his family and getting the children into his cabin individually. He alleged NES was manipulating his family through “tricks” and mind games, which brought back suppressed memories of an earlier time. The

Accused repeated that he murdered his father to protect his children, and emphatically declared that he was always capable of making decisions. He blamed NES for pushing him to the point where he felt he needed to do this.

[80] The Accused refused to provide the police with details about the precise nature of the abuse that he alleged against his father (he consistently maintained that he would only talk to a lawyer about it):

KDS: I was protecting [LS] and [CS]. [...] And everything fuckin' clicked. It took 36 fuckin' years for it to fuckin' click.

HARNISH: Okay. What made it click?

KDS: All the bullshit and everything fuckin' startin' to make sense. [...] I was protecting both of them... [LS] and [CS]. *(pause)* I can make decisions. I always could make fuckin' decisions, but I try and make everybody else fuckin' happy to do it...and this is the only way it was gonna go because... if it didn't go down this way then... I wouldn't be here...

....

HARNISH: Can you help me understand how you were hurt?

KDS: No, like I said yesterday, I'm getting a lawyer...and I'm gonna explain to the lawyer what the lawyer needs to know to defend me... better. I'm just giving you a glimpse into this shit... so you know that it wasn't... like you said yesterday, hateful what I did. It wasn't fuckin' hateful. It was protecting... is what the fuck it was.

HARNISH: Now, a lot of times people go through things um... traumatic events, in their life and ah... some people remember them, some people don't. Um... I don't know if you've heard about that... how that happens. Like a lot of times like children or whatever, I'm just making an analogy here. It's like sometimes the children, if they're abused or something, they'll... they'll block it out of their mind...

HARNISH: ...and then later remember, you know? Like the... like that's something that happens. Um... has... was... was that your... your... your situation with (unintelligible)?

KDS: Yes, that was my fuckin' issue. [...] Shit got blocked out of my mind and until shit started going over it again because like pretty much history always repeats itself...

[81] Contrary to what he told SS in the cabin during the offence, KDS admitted in the police interview that his father did not abuse NS, but maintained that NES had abused him:

HARNISH: Um... did your father hurt Nick?

KDS: No. [...] He hurt me.

HARNISH: Yeah? Tell me about that.

KDS: No.

HARNISH: No?

KDS: Lawyer.

....

HARNISH: Right. When did you ah... start remembering some of the repressed stuff?

KDS: When I started seeing it happen again in my own life.

....

KDS: [...] Like he would get the kids up there separately. He would walk by the house and glare at my wife if he was mowin' the lawn or doin' something. Thrown' stuff on there. I caught him in his tricks and bullshit. Like he would snoop through the house, go through stuff...watch, spy and that's what brought up a bunch of this, which is what brought back a lot of the suppressed memories. [...] And then that's when everything really started clicking because then if I started looking and listening you would actually see that it was going back to how it was before. I mean, it's just... it's bullshit. [...] He would watch and spy and plant little fuckin' seeds... to try to get things that he wanted. [...] I don't know what you would want to call it. Whether it's like psychotherapy or fuckin' whatever, but it's an attack on you is what it is.

[82] KDS told Constables Harnish and MacDuff things finally “clicked” when he realized his son, LS, was alone in the cabin with NES – this is what caused him to head straight for the cabin prior to the offence:

HARNISH: Okay. And your father was in the trailer here?

KDS: Yeah.

HARNISH: Okay. And that's where [LS] was also?

KDS: Yeah.

HARNISH: Okay. Did you go... which... which path did you take to get from the fire pit to the trailer?

KDS: Direct path as soon as I knew [LS] was in there alone.

....

KDS: [...] Like I was protecting my family. What happened had to happen. [...] ...and it. it clicked. Like I had to save [LS] and... it, okay... I just... and you don't... you guys don't understand.

....

MACDUFF: ... And you say it clicked. So help me understand. Help SS understand. What at that moment clicked for you? What for you at

that moment made the ev... horrific events that happened just after that happened?

KDS: ‘Cause everybody was having a great time and being happy and he got [LS] away individually. And that’s when it clicked.

MACDUFF: Okay. So tell me how he got [LS] away. Was there... was there a pattern that you had seen um... based on things that you’d experienced maybe that made you feel that that was not right? Like how did he get [LS] away?

KDS: He would wait on certain ages... of children to... do things and the pattern that was leading up to it would have followed my life. He would not have [LS] in the house for the longest time, like his place, whatever, because he was too young and then when he started accepting [LS] is when he would...

....

KDS: No, it... not even alone for a year. It hadn’t been all that long and it just... it fuckin’ clicked. I was like it’s gonna be my life all over again and it took 30 fuckin’ six fuckin’ years... 35 years for it to fuckin’ click and I was like “Holy fuck.” It... S...he needs to stop now. [...] Like I...I...I’m not watching my kid go through what the fuck...I went through. Like and that’s the only thing I fuckin’ had. I was like “It’s happening fuckin’ now. I don’t care.” Like I don’t care about my fucking self. [...] I am saving my family. [...] And I hurt for how he had to see that. I didn’t want my boy there, but I had to save my boy. And I...it...you have no idea how hard this struggle is for me to say what the fuck he did to me. I just ah...

....

KDS: ...like I don’t... I don’t even know because everything fucking clicked and it’s just... like still it comes back in waves and shit, right?

...

MACDUFF: [...] Um... did anyone else know?

KDS: That’s why it’s so hard for me to let it go on because nobody else knew. I’m not a liar. I...

...

KDS: It fucked me. He used me. He’d throw me away and then he’d bring me back. I’d do anything he fucking... wanted and I was not gonna let that happen to my son... or my daughter. And that’s why. [...] And it just clicked when I was 36 and I knew to stop it.

[83] KDS emphatically stated that what happened to his father “had to happen.” He described feeling torn about simultaneously “helping” and “hurting” his family.

[84] KDS has now had a couple of years to reflect on the offence. He testified that he has come to accept that it happened. However, he has a hard time understanding why it happened – none of it makes sense to him. He also said it is hard for him to deal with the loss of his father and the loss of his family, but he is learning to cope with it in his own way.

[85] I note a continuation of the same themes from the April 28<sup>th</sup> police interview. KDS made references to being abused in some way by his father earlier in life (and stated that no one else knew), talked about the emergence of suppressed memories of this earlier abuse, and said he finally figured it out (something “clicking”) when he realized NES was alone with LS in the cabin. He repeated that his motive was to protect his family from something bad that his father would do to them – implying that it would be similar to what his father had done to him.

[86] Throughout the interview the Accused appeared very much in control – he was coherent, logical, calm. At one point he got angry and demanded to speak to a lawyer, implying that he could only tell a lawyer further details regarding his childhood abuse, and indicating a distrust of the police. During the April 29<sup>th</sup> police interview, KDS seemed to be in full control of his faculties and did not exhibit symptoms to suggest he was in a psychotic state. He appeared to have a full recollection of what occurred.

#### **v. Edmonton Remand Centre and Alberta Hospital**

[87] After the interviews with the RCMP, KDS was transported to the Edmonton Remand Centre (“ERC”). On July 14, 2017, the Accused was transferred from the ERC to Alberta Hospital in Edmonton (“Alberta Hospital”). While at Alberta Hospital, KDS was subjected to two NCR assessments: one conducted by Drs. Gabriela Corabian and Andrew Haag and the other by Dr. Santoch Rai. He was interviewed multiple times by the assessors during the assessment process.

[88] At trial, KDS exhibited rather selective memory about the NCR clinical interviews. On the one hand, the Accused was able to recall aspects of the interviews in great detail, including the types of questions that he was asked and how he answered those questions. He suggested that some of his comments may have been taken out of context or misinterpreted – especially on the topic of childhood sexual abuse. However, he was unable to answer any questions at trial about the various details that he provided to the assessors regarding his thoughts, state of mind, and actions at the time of the offence. KDS conceded that if it was contained within the expert reports, he must have said it during the assessment interviews.

[89] KDS was discharged from Alberta Hospital on February 23, 2018 and transferred back to the ERC where he has remained since then. In September 2018, a second Psychiatrist conducted an NCR assessment and interview with KDS at the ERC.

#### **E. Expert Evidence**

[90] Four experts gave evidence at trial concerning KDS’s mental condition. All were qualified as experts without objection. The Crown called Dr. Gabriela Corabian, Dr. Andrew Haag, and Dr. Santoch Rai. Defence called Dr. Pierre Flor-Henry. Drs. Corabian and Haag co-wrote a report dated August 24, 2017 (the “Corabian-Haag Report”), Dr. Rai wrote a report dated October 10, 2017 (the “Rai Report”), and Dr. Flor-Henry wrote an opinion letter dated September 16, 2018 (the “Flor-Henry Letter”), all of which were tendered as exhibits. The expert

evidence is critical to the determination of this case, and expert testimony constituted the majority of the trial. I start with a principled assessment of the strengths and weaknesses of the expert evidence.

[91] In *R v Neve*, 1999 ABCA 206 [*Neve*], the Alberta Court of Appeal outlined the factors that may impact a court's weighing of psychiatric evidence. These are enumerated at para 189 (emphasis in original):

1. the qualifications and practice of the psychiatrist;
2. opportunity the psychiatrist had to assess the person, including: length of personal contact, place of contact, role with ongoing treatment, and involvement with the institution in which the person is a patient or prisoner;
3. the unique features of the doctor-patient relationship, such as hostility or fear by the patient (or the psychiatrist) arising from the personalities, the circumstances of the contact, and the role of the psychiatrist;
4. *specifically and precisely* what documents the psychiatrist had available and reviewed, for example, from earlier court proceedings, institutional records, other medical consultations, or treatment;
5. the nature and scope of consultations (this could include: personal contact with third parties, information from other health care professionals, prison authorities, police, lawyers, family);
6. *specifically and precisely* what the psychiatrist relies on in coming to an opinion; and
7. the strengths and weaknesses of the information and material that is relied on.

[92] This Court was presented with evidence from two Psychiatrists and two Clinical Psychologists. Although *Neve* was a case dealing specifically with psychiatric evidence, in the context of a dangerous offender hearing, I consider the *Neve* factors to be equally applicable to the weighing of psychological and psychiatric evidence in the present case. I find these factors useful when assessing the different expert opinions before me.

[93] Because some of the *Neve* factors overlap, I have found it more efficient and logical to consider the information pertaining to several factors together. First, I assess the qualifications and practice of the experts (factor 1). Then, I consider the experts' opportunity to assess KDS alongside the unique features of the doctor-patient relationship (factors 2 and 3). I consider the remaining factors (factors 4 to 7) together within an assessment of the overall basis underlying each expert's opinion. Finally, I consider separately the overall role of experts in such proceedings.

#### **i. Qualifications and Practice of the Experts**

[94] Dr. Gabriela Corabian was qualified as an expert in forensic and clinical psychology. She was registered as a Clinical Psychologist with the College of Alberta Psychologists in December 2017, after attaining her PhD from the University of Saskatchewan. At the time of trial, approximately 80% of Dr. Corabian's practice was in a forensic setting at Alberta Hospital. A predominant focus of Dr. Corabian's research interests and her clinical and forensic work is risk

assessments of offenders, or of individuals who have been found NCR. Dr. Corabian assessed KDS during the final month of a six-month residency program at Alberta Hospital, which she completed under the supervision of Dr. Haag. Dr. Corabian co-authored approximately 5 other NCR assessment reports with Dr. Haag during her Alberta Hospital residency.

[95] Dr. Andrew Haag was qualified as an expert in forensic psychology. He received a PhD in Psychology from the University of Calgary in 2005. In addition to teaching at multiple post-secondary institutions in Alberta, Dr. Haag has worked at two federal correctional facilities. Since 2009, he has been a member of the Forensic Assessment Unit at Alberta Hospital. Dr. Haag has been qualified as an expert in court on 10 previous occasions with respect to NCR determinations.

[96] Dr. Santoch Rai was qualified as an expert in forensic psychiatry. He became a Member of the Royal College of Psychiatrists in the UK in 1999 and attained a specialist qualification in forensic psychiatry in the UK in 2002. He has been working as a Forensic Psychiatrist at Alberta Hospital and at Northern Alberta Forensic Psychiatry Services since 2002. Dr. Rai has substantial experience in conducting NCR assessments; he testified that between 2002 and 2011 he conducted about one NCR assessment per month (which adds up to about 100 NCR assessments during that time period). Dr. Rai testified that of the approximately 250 NCR patients presently in Alberta, he has managed between 100 – 150 in various ways, at different times.

[97] Dr. Flor-Henry was qualified as an expert in psychiatry and in the neurological basis of psychopathology. He completed a medical degree from the University of Edinburgh with distinction in Psychiatry in 1957, followed by a doctorate from the same institution in 1966. Dr. Flor-Henry became a Member of the Royal College of Psychiatrists in the UK in 1971, and a Fellow of the Royal College of Psychiatrists in the UK in 1985. He worked at Alberta Hospital for approximately 30 years. Dr. Flor-Henry served as the Clinical Director of Adult Psychiatry at Alberta Hospital from 1977 to 2008, and as Director of the Clinical Diagnostics and Research Centre at the same institution from 1993 to 2008. He retired in 2013.

[98] During his 50-year career, Dr. Flor-Henry worked in general psychiatry, including diagnosis and clinical work. Although he testified that he has conducted other NCR assessments, he was unable to provide an estimate of how many assessments he has completed.

[99] Dr. Corabian is certainly qualified to give a forensic psychology opinion in this case, but I note that she is the least experienced of the experts. However, her limited experience is mitigated by the fact that she did not work alone – she conducted her assessment under the supervision of Dr. Haag. They formed their opinion together and co-authored the Corabian-Haag Report.

Dr. Haag is an experienced and qualified expert in forensic psychology with significant experience in NCR assessments.

[100] I understand that Dr. Flor-Henry is a researcher of international renown in the area of general biological psychiatry and psychopathology, but his career and experience have not focused on diagnosing individuals within a forensic setting. This fact is reflected in his qualification as an expert in *general* psychiatry by this Court. Dr. Flor-Henry admitted he did not receive training specific to the role of Forensic Psychiatrists who make determinations within a legal setting.

[101] Of all the experts, I consider Dr. Rai to be the most experienced and qualified expert with respect to NCR assessments. My opinion is informed by Dr. Rai's specialization in forensic psychiatry, his decades of experience, the sheer number of NCR assessments that he has completed, and the number of NCR patients that he has managed.

[102] Overall, on this factor, I consider that although all the experts were qualified and experienced, the Crown experts – and particularly Dr. Rai – were more qualified and experienced with respect to forming an opinion in a forensic setting than Dr. Flor-Henry.

## **ii. Opportunity of the Experts to Assess KDS**

[103] Drs. Corabian, Haag, and Rai conducted their NCR assessments of KDS pursuant to a Court Assessment Order after KDS was transferred from the ERC to Alberta Hospital. All three Crown experts formed part of a multidisciplinary team treating KDS while he was an Alberta Hospital patient (from July 14, 2017 to February 23, 2018). They conducted their respective NCR assessments of KDS in this context.

[104] Drs. Corabian and Haag conducted 5 clinical interviews over the course of 3 weeks on July 19, 2017; July 25, 2017; August 1, 2017; August 2, 2017; and August 8, 2017. The 5 interviews comprised a total of 5 to 6 hours of interview time with KDS, and were described as semi-structured interviews.

[105] Dr. Rai conducted 7 separate clinical interviews with KDS at Alberta Hospital between July and September 2017 on July 18, 2017; July 21, 2017; July 24, 2017; August 9, 2017; August 15, 2017; September 6, 2017; and September 8, 2017. Dr. Rai testified that this was an above-average amount of interview time for an NCR assessment.

[106] In addition to conducting an NCR assessment, Dr. Rai was also one of KDS's treating physicians during the first half of his stay at Alberta Hospital. Dr. Rai first met KDS upon his arrival at Alberta Hospital on July 14, 2017, when Dr. Rai conducted a routine admission interview. Dr. Rai subsequently saw KDS several times a week for a brief review of his clinical progress (a total of about 30 times for that purpose). In the Rai Report, Dr. Rai states that as a treating physician, at Alberta Hospital, he had access to assessment information about KDS from various members of the unit's team, including nursing, psychology, and social work.

[107] Dr. Flor-Henry was retained privately by Defence Counsel. He assessed KDS at the ERC during a single 2 to 2.5-hour interview on September 6, 2018. Dr. Flor-Henry also conducted a follow-up interview with the accused at the Edmonton courthouse on September 17, 2019 (while this trial was ongoing), which lasted for at least 30 minutes.

[108] Drs. Corabian, Haag, and Rai had the opportunity to assess KDS just a few months after his arrest. These experts had the advantage of interviewing KDS much closer in time to the offence than Dr. Flor-Henry. The Crown experts also had the benefit of assessing KDS over a longer period of time before forming their opinions. Conducting multiple interviews on different days was beneficial because it allowed Drs. Corabian, Haag, and Rai to observe KDS at different times and to look for variations in his presentation and (in)consistencies in his reporting.

[109] Moreover, Drs. Corabian, Haag, and Rai benefitted from assessing KDS while he was a patient in Alberta Hospital. This meant they had ready access to KDS's daily chart notes, they could observe him on the unit, and they participated in weekly case conferences in which all

members of the multidisciplinary treatment team would discuss the status and progress of the various patients on that unit, including KDS.

[110] Dr. Flor-Henry, on the other hand, had the disadvantage of having only one limited opportunity to interview and assess KDS prior to forming the opinion that he outlined in the Flor-Henry Letter. Moreover, Dr. Flor-Henry's interview was conducted an entire year after the other two NCR assessments. It was therefore further removed in time from the offence. His interview was conducted in the ERC rather than at the Alberta Hospital.

[111] Dr. Flor-Henry never treated KDS, and did not have the chance to converse with other treatment providers or to observe KDS on the unit in a hospital setting. Although Dr. Flor-Henry had the opportunity to briefly interview KDS during the course of this trial, almost exactly a year after Dr. Flor-Henry's initial assessment, this Court was provided with very few details about how this subsequent interview affected Dr. Flor-Henry's general opinion regarding an NCR determination, nor was there any report tendered with respect to this second interview. The opinion contained in the Flor-Henry Letter was based solely on his initial assessment on September 6, 2018.

[112] For the reasons just outlined, I consider that the Crown experts – and especially Dr. Rai – had a far better opportunity to assess KDS than Dr. Flor-Henry. This factor weighs heavily in favour of the opinions formed by the Crown experts, and most strongly in favour of Dr. Rai. Dr. Rai had the greatest opportunity to observe KDS at Alberta Hospital, he conducted the lengthiest NCR assessment of KDS, and he produced the most detailed report.

### **iii. Basis of the Experts' Opinions**

[113] Both the Corabian-Haag Report and the Rai Report were exceptionally detailed, demonstrating the considerable effort made by these experts to consider all relevant evidence from multiple sources before reaching their respective conclusions. Both reports include detailed accounts of the information that KDS reported to the experts during the clinical interviews, including numerous verbatim quotes.

[114] In addition to the information gleaned during hours of clinical interviews with KDS, the information reviewed by Drs. Corabian and Haag, as part of their NCR assessment, included the following:

- Transcript of the EMS recording with SS (April 28, 2017)
- Transcript of the voicemail recording from KDS to his brother NS (April 28, 2017)
- KDS's Alberta Hospital inpatient medical chart, including nursing notes
- Transcripts of police interviews with SS (April 28, 2017), LS (April 28, 2017), and KDS (April 28, 2017; April 29, 2017)
- Videos of police interviews with KDS (April 28, 2017; April 29, 2017)
- Prisoner Report by D. Kirk (April 28, 2017)
- Royal Alexandra Hospital outpatient consultation note by Dr. Marsh-Joyal (March 10, 2017)

- Social Work Assessment Report by L. Ng (August 15, 2017)

[115] Dr. Haag testified that he and Dr. Corabian watched the videos of the police interviews in their entirety (while following along with the interview transcripts) before they conducted the clinical assessment of KDS.

[116] Drs. Corabian and Haag covered numerous topics during their NCR assessment, including the circumstances surrounding the offence (from all available evidentiary sources), KDS's psychiatric history, physical medical history, childhood history, history of abuse, marital and work situation, substance abuse history, educational history, and current diagnostic state at the time of the assessment. Dr. Haag described the methodology that he followed in the NCR assessment as follows: he looked at all the evidence and considered how that evidence supported or disconfirmed certain diagnoses. Only at the very end, after assessing all the evidence and the possible diagnoses, did he form his opinion about the most likely diagnoses.

[117] Drs. Corabian and Haag assessed KDS with the MMPI-2-RF, a common test used in forensic psychological assessments. But the results were invalid and could not be interpreted because KDS over-reported symptoms that are rare even in individuals suffering from severe psychological difficulties who report credible symptoms.

[118] Dr. Haag was able to observe large portions of this trial prior to his own testimony – including the testimony of the lay and police witnesses, the testimony of his co-author Dr. Corabian, and the audio recording of the hospital trip made by KDS and Corporal Harnish a couple of hours after the arrest. On the stand Dr. Haag confirmed that none of the trial evidence that he observed changed his expert opinion regarding KDS. Dr. Haag had the chance to review the Rai Report during the course of his cross-examination. He testified that although the contents of the Rai Report did not change his overall diagnostic opinion, the report did raise questions in Dr. Haag's mind about the Accused's credibility, because there were inconsistencies between what KDS reported to Dr. Rai and to Drs. Corabian and Haag about the day of the offence.

[119] Dr. Rai reviewed all the materials that he received from the Crown, including the materials reviewed by Drs. Corabian and Haag listed above. As previously mentioned, Dr. Rai had access to the assessment and treatment information from staff members of the Accused's unit at Alberta Hospital. As a treating physician, Dr. Rai observed KDS on a weekly basis during the first part of his stay at Alberta Hospital and assessed his clinical progress.

[120] As part of his NCR assessment, Dr. Rai covered the following topics: the weeks leading up to the offence, the circumstances surrounding the offence (from all available evidentiary sources), KDS's psychiatric history, substance use history, medical and medication history, family history, personal history, education, employment, relationships, and current mental state at the time of the NCR assessment.

[121] Dr. Rai also considered the result of CT head scans taken of KDS on March 10, 2017 and July 28, 2017 (both reported as normal), an EEG dated August 2, 2017 (reported as being within normal limits with no evidence of focal epileptic activity), and KDS's serum sodium levels taken at various times during his stay at Alberta Hospital between July and September 2017 (reported as borderline on September 15, 2017, but otherwise within normal limits).

[122] Dr. Rai reviewed the Corabian-Haag Report and specifically considered the invalid results of the MMPI-2-RF test the Psychologists conducted. Dr. Rai also considered the results of

a memory assessment conducted by Dr. Chevalier, a Clinical Neuropsychologist, at Alberta Hospital. Dr. Chevalier conducted a memory assessment of KDS due to concerns about possible exaggeration of cognitive impairment.

[123] Dr. Rai was able to observe some portions of the trial preceding his testimony, including the testimonies of SS, TB, and NS. He testified that the additional information that he gleaned from watching their testimony strengthened his ultimate diagnostic opinion at trial.

[124] Dr. Flor-Henry testified that he conducted a semi-structured interview in which he asked KDS about his background, education, medical and psychiatric history, and drug abuse history. During cross-examination, Dr. Flor-Henry admitted there were some salient issues that he did not discuss with KDS during the interview, including the issue of childhood sexual abuse, and whether SS was present in the cabin at the time of the offence.

[125] During the interview at the ERC, on September 6, 2018, Dr. Flor-Henry rated KDS on the Zung Depression Rating Scale (which assesses someone's level of depression). He also administered the Mood Disorder Questionnaire ("MDQ"). The MDQ asked KDS to indicate which bipolar symptoms he had experienced *during his lifetime*. In Dr. Flor-Henry's opinion, the MDQ questionnaire is sufficient and accurate for detecting the presence of bipolar disorder in someone like KDS. KDS reported that he experienced 10 hypomanic symptoms at some point in his life on the MDQ.

[126] Dr. Flor-Henry testified that when he re-administered the MDQ to KDS on September 17, 2019, KDS's score went down to 0. Dr. Flor-Henry did not provide an explanation for this significant discrepancy in the results of the MDQ and what implications it might have for a diagnostic opinion.

[127] Dr. Flor-Henry testified that prior to interviewing KDS at the ERC, he reviewed the Rai Report. He later acknowledged during cross-examination that he did not read all 47 pages of the Report and that he only looked at Dr. Rai's main headings and conclusions. I note Defence Counsel was present throughout this interview at the ERC.

[128] The Flor-Henry Letter indicates that Dr. Flor-Henry also reviewed some of the medical records from KDS's time at Alberta Hospital. He also considered KDS's medication.

[129] Dr. Flor-Henry testified that he received additional materials to review *after* his September 6, 2018 interview with KDS - including the Corabian-Haag Report, the Social Work Assessment Report (by L. Ng), preliminary inquiry transcripts pertaining to expert evidence, and transcripts and videos of the police interviews. However, he later acknowledged during cross-examination that he did not actually review all of this evidence. Dr. Flor-Henry testified that he did not watch the videos of the police interviews in their entirety – he only saw segments of a few clips. He did not hear the audio recording of KDS's trip to the hospital with Corporal Harnish. Dr. Flor-Henry conceded that it would have been prudent for him to review *all* the material that was made available to him and to read every page.

[130] Dr. Flor-Henry testified that he did not feel the need to interview KDS's brother about the hypomanic symptoms that KDS reported experiencing from the age of 13, or about KDS's report that his brother and father experienced similar emotional disturbances. Dr. Flor-Henry said he had no reason to believe that KDS was lying to him and testified that "One does not

systematically look for corroboration as a matter of common sense. No one is going to lie or invent by telling the doctor that family members have problems.”

[131] On the stand, Dr. Flor-Henry indicated uncertainty about the basis for some of the assertions that he made in the Flor-Henry Letter. For example, Dr. Flor-Henry wrote that upon discharge from Alberta Hospital KDS “at that time had hyponatremia.” However, the only evidence of KDS being discharged with hyponatremia is at the time of his discharge from the Royal Alex on March 10, 2017 (the month *before* the offence). At trial, Dr. Flor-Henry was unable to explain this error. Dr. Flor-Henry nevertheless testified that is the facts contained in his Letter are the facts critical to the formation of his diagnostic opinion.

[132] I find that the opinions of Drs. Rai, Corabian, and Haag were made on strong evidentiary foundations. All three Crown experts reviewed in their entirety all the documents made available to them, and it is clear from the Corabian-Haag Report and the Rai Report that those documents were given careful consideration and consequently impacted the conclusions reached by these experts. Dr. Rai, in particular, had the advantage of additional sources at his disposal – including the results of the MMPI-2-RF conducted by Drs. Corabian and Haag and the results of the memory assessment by Dr. Chevalier. As a treating Psychiatrist for KDS, Dr. Rai also had the benefit of observing KDS’s progress on a weekly basis while he was in Alberta Hospital, and he conducted the largest number of clinical interviews with KDS. It is clear from the exceptionally detailed Rai Report and from Dr. Rai’s testimony that he carefully considered all the available sources of evidence before reaching his opinion.

[133] By comparison, the basis on which Dr. Flor-Henry formed his opinion is significantly lighter and somewhat unclear. Because Dr. Flor-Henry did not provide a full report, I am restricted to what I can glean from the Flor-Henry Letter and his testimony at trial. Dr. Flor-Henry seemingly relied on relatively little information when he formed his opinion about KDS. The opinion in the Flor-Henry Letter was based on the Zung Depression Rating, the MDQ, and one 2 to 2.5 hour semi-structured clinical interview. It is unclear what role, if any, the information contained within the Rai Report played in the formation of Dr. Flor-Henry’s opinion given Dr. Flor-Henry admitted that he only read the headings and conclusions of the Rai Report before he interviewed KDS. He did not explain at trial the discrepancies between his description of KDS’s mental state at the time of the offence and what KDS reported to Dr. Rai.

[134] Although Dr. Flor-Henry confirmed he was given a number of other documents and videos to review after the September 6, 2018 interview, he did not review these in their entirety, even acknowledging that it would have been prudent for him to do so. Moreover, Dr. Flor-Henry’s opinion was formed *after* the September 6, 2018 interview and *before* he reviewed any subsequently-received documents – so those documents cannot be said to have formed the basis of his initial opinion (an opinion which he has maintained). Moreover, the Flor-Henry Letter contained basic errors that he could not explain at trial.

[135] Dr. Flor-Henry testified that he does not routinely look for collateral information to corroborate what a patient reports to him. This probably explains why Dr. Flor-Henry did not feel the need to review most of the documents that were reviewed in detail by the other experts. Dr. Flor-Henry said he had no reason to disbelieve what KDS told him. Although it is clear that Dr. Flor-Henry believes KDS is *credible* (i.e. he is not lying or malingering), it seems Dr. Flor-Henry also equates credibility with *reliability*. Dr. Flor-Henry conceded during cross-examination that KDS is an *unreliable* reporter due to what he characterized as psychosis-

induced memory problems and confusion. And yet, Dr. Flor-Henry testified that his diagnostic opinion was formed almost entirely on the basis of KDS's self-reported symptoms during a single interview.

[136] Overall, Dr. Flor-Henry's expert opinion is significantly undermined by the fact that it was based on self-reported symptoms that were inconsistent with KDS's testimony at trial and his self-reports to the other experts. Dr. Flor-Henry acknowledged during cross-examination that an expert's opinion is only as good as the information on which it is based. He testified the facts enumerated in his letter formed the foundation of his opinion. Therefore, since Dr. Flor-Henry's opinion is based on the unreliable and inconsistent self-reporting of KDS, and considering the errors and omissions within the Flor-Henry Letter, I find that Dr. Flor-Henry's opinion is significantly less convincing or authoritative than the opinions of the other experts in this case and I attach little to no weight to his conclusions and opinion.

#### iv. Role of the Experts

[137] The duty of experts has been recently summarized for this Court by Justice Renke in *R v Longridge*, 2018 ABQB 145 at paras 18 to 22. Experts have a duty to be impartial, independent, and unbiased when presenting their opinions to the court. As Justice Cromwell explained in *White Burgess Langille Inman v Abbott and Haliburton Co*, 2015 SCC 23 at para 32 [*White Burgess*]:

The expert's opinion must be impartial in the sense that it reflects an objective assessment of the questions at hand. It must be independent in the sense that it is the product of the expert's independent judgment, uninfluenced by who has retained him or her or the outcome of the litigation. It must be unbiased in the sense that it does not unfairly favour one party's position over another.

[138] Drs. Corabian, Haag, and Rai assessed KDS while he was a patient at Alberta Hospital. Although they were aware of each other's NCR assessments, Dr. Rai performed his NCR assessment independently from Drs. Corabian and Haag, and each arrived at separate and independent opinions regarding KDS's mental condition.

[139] I am satisfied that Drs. Corabian, Haag, and Rai provided impartial, independent, and unbiased opinions to this Court, based on conclusions which were the product of independent judgment uninfluenced by the outcome of the litigation or the interests of a particular party (per *White Burgess* at paras 27, 32, 37 and 49). All three Crown experts duly considered evidence that could support inferences contrary to their conclusions, and demonstrated this during extensive cross-examinations. All three Crown witnesses took care to corroborate as much as possible the information self-reported by KDS, including his self-reported symptoms and version of events.

[140] In contrast, Dr. Flor-Henry did not appear as impartial as the Crown experts in his opinion and his overall approach appeared to be results focused. Dr. Flor-Henry did not adequately consider malingering and he did not seek out corroborating evidence. This significantly affects the weight of his opinion when compared to the opinions of the other three experts. During the trial, Dr. Flor-Henry was not prepared to reconsider his opinion when faced with new information, which is one of the elements of proper expert evidence.

[141] In *R v Abbey*, [1982] 2 SCR 24, at 45-46, Justice Dickson (as he then was) commented on the weight to be given to a medical expert's evidence when that evidence is based purely on what the patient told him:

Counsel for Abbey said that the passages in which the trial judge seemed to take symptoms as findings of fact were merely "unfortunate language". But it goes further than that. As Woods J.A. said in *R. v. Perras* (1972), 8 CCC (2d) 209, at p. 213: "The evidence of a physician stating what a patient told him about his symptoms is not evidence as to the existence of the symptoms. To accept it as such would be to infringe the rule against hearsay." It was appropriate for the doctors to state the basis for their opinions and, in the course of doing so, to refer to what they were told not only by Abbey but by others, but it was error for the judge to accept as having been proved the facts upon which the doctors had relied in forming their opinions. While it is not questioned that medical experts are entitled to take into consideration all possible information in forming their opinions, this in no way removes from the party tendering such evidence the obligation of establishing, through properly admissible evidence, the factual basis on which such opinions are based. Before any weight can be given to an expert's opinion, the facts upon which the opinion is based must be found to exist.

[142] The Alberta Court of Appeal in *R v Lindsay*, 2018 ABCA 194 [*Lindsay*] recently discussed the weighing of expert evidence in the context of an NCR case, at paras 18-23:

18 ...When weighing expert evidence the trier of fact is entitled to examine the factual foundations of the opinion and afford it less weight when it is based upon facts not established at trial: *R. v. Abbey*, [1982] 2 S.C.R. 24 (S.C.C.); *R. v. Lavallee*, [1990] 1 S.C.R. 852 (S.C.C.); *R. v. Molodowic*, [2000] 1 S.C.R. 420 (S.C.C.) at para 7.

...

19 The appeal turns on the trial judge's weighing of the expert evidence. The appellant suggests that there was ample evidence to support his NCR defence. However, much of it was based on what the Supreme Court in *Abbey* termed "second hand evidence". In *R. v. Bingley*, 2017 SCC 12 (S.C.C.) at paras 13-17, [2017] 1 S.C.R. 170 (S.C.C.) the Court confirmed the following proposition: "[w]here the psychiatric evidence is comprised of hearsay evidence, the problem is the weight to be attributed to the opinion".

20 Mr Lindsay did not testify but Dr Nesca's report was informed in part by what Mr Lindsay told him. The trial judge held that "what is critical is to determine how much of Lindsay's hearsay statements to an expert are reflected in the evidentiary record. If not, the reliability and weight of the expert's opinion may be significantly compromised".

21 No error is demonstrated by this approach. The expert evidence was also informed by what Mr Lindsay's parents told the expert. Although they testified, their testimony did not include some of what they told Dr Nesca, and upon which he relied in forming his opinion. Experts routinely rely on second-hand information but the "more an expert relies on facts not proven in evidence, the

less weight should be given his opinion”: *R. v. Borowiec*, 2015 ABCA 232 (Alta. C.A.) at para 72, (2015), 602 A.R. 254 (Alta. C.A.), aff’d 2016 SCC 11, [2016] 1 S.C.R. 80 (S.C.C.).

22 The trial judge admitted Dr Nesca’s testimony and report but placed restricted weight on it because Dr Nesca’s opinion relied on “evidence not before the court”; he was “overly reliant” on psychometric testing which occurred several years after the murder, he accepted the appellant’s word “uncritically” and some of the testing results were inconclusive or invalid; further Dr Nesca’s testimony “suggest[ed] a results-driven rather than data-based analysis”.

23 The trial judge gave Dr Hediger’s conclusion that the appellant had a disease of the mind virtually no weight. He did so because he concluded that his opinion suffered from “lack of evidentiary foundation”; essentially, Dr Hediger referred to “psychiatric hospital admissions” and “medical records” without specifying what exactly these admissions or records were. Such generalities did not meet the test in *Abbey* for admissibility of facts in support of an expert report.

[143] In this case, I place no weight on Dr. Flor-Henry’s opinion for many of the same reasons noted about Dr. Nesca in paragraph 22 of *Lindsay*. Compared to the other experts, I find Dr. Flor-Henry was overly reliant on psychometric testing which occurred almost a year and a half after the offence. Dr. Flor-Henry accepted KDS’s self-reporting uncritically, he did not seek corroborating evidence and he relied heavily on test results which I do not consider conclusive. In particular, I note Dr. Flor-Henry’s heavy reliance on the MDQ, which asked KDS to report which of the listed symptoms he may have experienced at some point over his lifetime. The MDQ yielded significantly different results when it was administered in September 2018 and September 2019, respectively. Yet, seemingly only on the basis of the MDQ results, Dr. Flor-Henry confidently diagnosed KDS with bipolar disorder since adolescence. In fact, Dr. Flor-Henry went so far as to conclude that the Accused’s brother and father had suffered similar symptoms. I find that Dr. Flor-Henry’s testimony and opinion suggested a results-driven rather than data-driven analysis.

[144] Finally, I note the Supreme Court of Canada’s caution in *R v Mohan*, [1994] 2 SCR 9 that expert evidence not be allowed to distort the fact-finding process or usurp the role of the trier of fact. The Supreme Court further cautioned too liberal an approach could result in a trial becoming nothing more than a contest of experts with the trier of fact acting as referee in deciding which expert to accept.

#### v. Conclusion Re Weight of Expert Evidence

[145] For the aforementioned reasons set out in my analysis of the *Neve* factors, I place the greatest weight on the evidence and opinions of Drs. Rai, Haag and Corabian. I place no weight on the evidence and opinion of Dr. Flor-Henry. For this reason, and in the interest of brevity, in my analysis of the two defences raised by the Accused, I will concentrate on the evidence and opinions of Drs. Rai, Haag and Corabian.

### III. Mental Disorder

#### A. What is a Mental Disorder for the Purpose of S 16 of the *Criminal Code*?

[146] As previously indicated, section 16 of the *Criminal Code* sets out the NCR defence as follows:

Defence of mental disorder

16 (1) No person is criminally responsible for an act committed or an omission made while suffering from a mental disorder that rendered the person incapable of appreciating the nature and quality of the act or omission or of knowing that it was wrong.

[147] Section 2 of the *Criminal Code* defines “mental disorder” as a “disease of the mind.” Using medical, psychiatric, or psychological evidence, the trial judge must decide whether a mental condition should be legally characterized as a “disease of the mind” (*R v Cooper*, [1980] 1 SCR 0016 [*Cooper*]; *R v Parks*, [1992] 2 SCR 871 at 898-900; *R v Stone*, [1999] 2 SCR 290 at paras 195-197 [*Stone*]; and *Bouchard-Lebrun* at paras 59-62).

[148] Justice Dickson, as he then was, writing for the majority in *Cooper*, summarized what is meant by disease of the mind at 1159:

In summary, one might say that in a legal sense “disease of the mind” embraces any illness, disorder or abnormal condition which impairs the human mind and its functioning, excluding however, self-induced states caused by alcohol or drugs, as well as transitory mental states such as hysteria or concussion. In order to support a defence of insanity the disease must, of course, be of such intensity as to render the accused incapable of appreciating the nature and quality of the violent act or of knowing that it is wrong.

[149] Writing for a unanimous court in *Bouchard-Lebrun*, Justice LeBel described the scope of the legal concept of “mental disorder” as follows:

59 The line of authority based on *Cooper* clearly confirms that the scope of the legal concept of “mental disorder” is very broad. In *Cooper*, Dickson J. stated that the “disease of the mind” concept includes “any illness, disorder or abnormal condition which impairs the human mind and its functioning” (p. 1159). In *Rabey*, Dickson J. explained that “the concept is broad, embracing mental disorders of organic and functional origin, whether curable or incurable, temporary or not, recurring or non-recurring” (p. 533). While it must be borne in mind that a verdict of not criminally responsible triggers a special mechanism for the management of the accused, the inclusive nature of the definition of “mental disorder” can be explained in particular by Parliament’s wish to give the public a high level of protection from persons who could be a threat to others (J. Barrett and R. Shandler, *Mental Disorder in Canadian Criminal Law* (loose-leaf), at p. 4-12).

60 The “mental disorder” concept continues to evolve, which means that it can be adapted continually to advances in medical science (*R. v. Simpson* (1977), 35 C.C.C. (2d) 337 (Ont. C.A.)). As a result, it will undoubtedly never be possible to define and draw up an exhaustive list of the mental conditions that constitute

“disease[s] of the mind” within the meaning of s. 2 *Cr. C.* As Martin J.A., writing for the Ontario Court of Appeal, stated in *R. v. Rabey* (1977), 17 O.R. (2d) 1 (Ont. C.A.), this concept “is not capable of precise definition” (p. 12). It is thus flexible enough to apply to any mental condition that, according to medical science in its current or future state, is indicative of a disorder that impairs the human mind or its functioning, and the recognition of which is compatible with the policy considerations that underlie the defence provided for in s. 16 *Cr. C.*

[150] The Supreme Court of Canada has directed judges to perform a “more holistic” assessment of whether a mental condition constitutes a “disease of the mind,” taking into consideration whether the relevant conduct was “internally caused,” whether the accused poses a continuing risk of danger to others, and whether policy factors count against classifying the accused’s condition as a “disease of the mind” (*Stone* at paras 203-218 and *Bouchard-Lebrun* at para 69-70).

[151] It is the function of the expert Psychiatrists and Psychologists in this case to describe the Accused’s mental condition and how it is considered from the medical point of view. It is for this Court to decide whether the condition described legally constitute a “disease of the mind” (*Cooper* at 1157 – 1158).

## **B. Did KDS Suffer from a Mental Disorder at the time of the Offence?**

### **i. KDS’s Mental Conditions**

[152] Drs. Corabian and Haag concluded that at the time of the offence the Accused was suffering from three diagnoses: major depressive disorder, alcohol abuse that was in remission, and symptoms of alcohol withdrawal. In their opinion the emergence of repressed memories relating to childhood abuse caused increased stress and distress which in turn caused or contributed to the depressive symptoms that KDS was experiencing during the time period leading up to the offence. Dr. Haag opined that the sudden cessation of alcohol, the relationship stress in KDS’s marriage, and the stress with his father were likely also major contributors to KDS’s depressed state.

[153] Dr. Haag explained that when someone is suffering from severe alcohol abuse like KDS, alcohol is likely serving as a coping mechanism. After the sudden cessation of alcohol intake, that person is suddenly forced to confront numerous daily stressors without the aid of that coping mechanism – this situation can cause or contribute to depression. Dr. Rai similarly testified that depression can emerge or become more prominent after someone stops drinking due to the loss of a coping mechanism, and he agreed that KDS had likely been using alcohol to cope.

[154] Drs. Corabian and Haag justified their diagnosis of major depressive disorder by pointing to the various symptoms of depression exhibited by KDS in the weeks leading up to the offence (based on his self-reporting, and corroborated by evidence from other sources). They noted KDS was walking hunched over, had thoughts of wanting to die, appeared downtrodden, sullen, and even suicidal to those around him, experienced sleep disturbance and agitation, and exhibited irritability and sluggish speech. Around the time of the offence, KDS was struggling in his marriage and he had been experiencing insomnia, irritability, and restlessness for weeks.

[155] In regards to KDS’s alcohol withdrawal, Dr. Haag and Dr. Rai both testified that the symptoms can persist anywhere from 3 to 6 months after the cessation of alcohol consumption.

Based on the *DSM-5*, Dr. Haag noted that KDS fell into the “severe alcohol use disorder” category because he regularly consumed more than 8 drinks per day. As an example of one symptom of withdrawal, Dr. Haag pointed to psychomotor agitation in the form of pacing – a behaviour that KDS exhibited around the time of the offence and again later in Alberta Hospital. Other symptoms of withdrawal include KDS’s excessive consumption of water (indicative of cravings), insomnia, and KDS’s self-report of seizure-like symptoms after he first stopped drinking alcohol in early March 2017. Dr. Haag also opined that KDS’s self-reporting of hearing people’s thoughts in a transient fashion after he stopped drinking is consistent with alcohol withdrawal, and he testified that it is possible for this withdrawal symptom to have persisted up to the date of the offence.

[156] The Rai Report concluded that during the time immediately preceding the offence, and at the time of the offence, KDS was suffering from alcohol use disorder that was in remission, and he may have been suffering from symptoms consistent with an unspecified anxiety disorder or an unspecified depressive disorder.

[157] During the trial, Dr. Rai said he was more confident in his opinion that KDS was likely suffering from major depressive disorder at the time of the offence after he heard KDS’s family members testify about KDS’s presentation on April 28, 2017. His family members had observed signs of psychomotor retardation and well recognized symptoms of severe depression. For example, KDS’s state of activity was observed to be lower than normal (he sat by the fire, hardly active, hardly engaging in what was going on that day), he appeared depressed, he exhibited a depressed hunched up posture, he had delayed responses (indicating psycho-retardation in his thinking), his speech was slow, and he appeared sluggish. Dr. Rai noted there were multiple stressors in KDS’s life at this time, including difficulties in his marriage, the loss of alcohol as his coping mechanism, the fact that he was forced to leave work due to struggles in functioning at his job, and the resurgence of suppressed memories about childhood abuse (which KDS now faced without alcohol). Dr. Rai testified that the cessation of alcohol and the stress of experiencing withdrawal likely contributed to KDS’s depressed state.

[158] Dr. Rai was unable to conclude whether KDS was still suffering from hyponatremia at the time of the offence (because no contextual lab testing was done at the time to assess his blood sodium level), but Dr. Rai opined that if KDS was hyponatremic at the time of the offence this could have caused his mood to be more labile (i.e. unstable and shifting).

[159] Dr. Rai ultimately concluded during his direct examination, “I would say that his mental state and mental condition was disturbed, that he had significant symptoms of a mental disorder, and he did have some issues with seeing reality the way it was, but not to a psychotic degree”

[160] I am satisfied on the basis of the evidence of Drs. Corabian, Haag and Rai that at the time of the offence, KDS was suffering from major depressive disorder and symptoms of alcohol withdrawal following a long history of alcohol abuse.

[161] In the Flor-Henry Letter, Dr. Flor-Henry concluded that at the time of the offence KDS was suffering from “bipolar psychosis and chronic alcoholism,” and specifically that he was “in a state of psychotic mania”. He concluded that KDS has been suffering from symptoms of untreated bipolar disorder since the age of 13.

[162] On their part, Drs. Corabian and Haag considered both Bipolar-1 and Bipolar-2 diagnoses. Dr. Haag explained at trial that these diagnoses were ruled out because there was insufficient evidence for either a manic or hypomanic episode at the time of the offence.

[163] Dr. Rai testified that after he wrote his report he reached the conclusion that bipolar disorder is a differential diagnosis for KDS. He reached this conclusion because KDS had an episode wherein he exhibited a cluster of symptoms suggestive of possible hypomania (or mania) as observed in the Alberta Hospital clinical chart notes for December 25, 2017. In those notes, KDS's then treating Psychiatrist wrote "sounds like manic".

[164] Having heard from all four experts on this issue, I find there is insufficient evidence to conclude on a balance of probabilities that KDS suffers from bipolar disorder, or that he was experiencing a manic or hypomanic episode or other symptoms of bipolar disorder at the time of the offence. I do, however, accept bipolar disorder as a differential diagnosis.

#### **ii. Was KDS in a Psychotic State at the Time of the Offence?**

[165] There is disagreement among the experts about how to classify – and even whether to believe – KDS's self-reported visions of sun beams guiding him to protect his children and his alleged ability to hear people's thoughts during the morning of April 28, 2017.

[166] Dr. Corabian testified that she did not believe KDS's self-reported symptoms, at the time of the offence, constituted true "delusions" in the clinical sense (as defined in the *DSM-5*), but that he likely experienced some "transient hallucinations or illusions" as a result of alcohol withdrawal. Drs. Corabian, Haag, and Rai all testified that psychotic symptoms can co-occur with depression. However, all three agreed this did not happen to KDS on the day of the offence because his self-reports about the sun guiding him and hearing people's thoughts did not constitute psychotic symptoms.

[167] Drs. Corabian, Haag, and Rai all testified that they did not observe any indications of overt psychosis in the videos that recorded interactions between the police and KDS on the day of the offence. There was no indication that KDS was responding to unseen stimuli and no evidence of odd ideas or bizarre speech. Dr. Haag testified during cross-examination that although KDS's self-reports about the sun could *possibly* be understood as a "referential delusion" under the *DSM-5*, in his opinion KDS's description of the sun beams is not sufficiently consistent with his understanding of this diagnostic category.

[168] Dr. Rai concluded in the Rai Report that within a reasonable degree of medical certainty KDS "was probably not laboring under a psychotic medical mental disorder" at the time of the offence, and "if he was, there is insufficient collateral evidence to support his self-reported psychotic symptoms at the material time."

[169] When KDS described his experiences with the sun beams to Dr. Rai on August 15, 2017, he told him, "(I) didn't tell anyone else about it... you're the first person." Dr. Rai felt KDS's sun beam visions seemed to be, in Dr. Rai's clinical experience, "medically very unusual and rather fantastic." Dr. Rai explained at trial that KDS's visions, as described by him, were very vivid, unusually obvious, isolated (lasting a few minutes at a time, all occurring within about a 3-hour time period during a single morning), and not persistent (they did not occur before April 28, 2017 and have not occurred since the time of the offence). In Dr Rai's opinion, although psychotic symptoms can occur for only a few minutes at a time in conditions like epilepsy (for

which there is no evidence in the present case), it would be very unusual for psychotic symptoms to last for only a few minutes at a time in mental illnesses like schizophrenia, bipolar disorder, or depression. In such disorders Dr. Rai would expect symptoms to persist longer (i.e. psychosis would persist for a greater part of that day) and to keep recurring if left untreated.

[170] Moreover, Dr. Rai explained that visual symptoms like the ones that KDS described are more likely to occur in organic or toxic states, such as a physical brain tumour, meningitis, head trauma, poisoning, or drug intoxication (due to methamphetamines or cocaine, for example). Dr. Rai testified that in functional (i.e. non-organic) psychiatric disorders (like schizophrenia, bipolar disorder, or depression), psychotic symptoms tend to be *non-visual* and are consistent with the patient's mood. Dr. Rai hypothesized that if KDS did *not* malingering these visual symptoms, they were more likely the result of extremely low sodium levels (hyponatremia – a form of physical toxicity), which KDS might have had at the time of the offence due to excessive water consumption, but which cannot be confirmed due to a lack of evidence (there are no relevant blood tests contemporaneous with the offence date).

[171] Dr. Rai further concluded the “voices” or “thoughts” that KDS reported – if they were *not* malingered – were likely *not* true hallucinations and would not be properly categorized as psychosis. As Dr. Rai explained, true psychosis deprives someone of the ability to understand that the experience is abnormal. KDS did not lose this capacity. He understood to some degree that what he was experiencing was not normal. In Dr. Rai's opinion, KDS's retention of insight and a rational mind while he experienced these symptoms is more consistent with symptoms that have an organic or physical origin, such as hyponatremia, rather than ones caused by a mental disorder.

[172] KDS told Dr. Rai that he did not tell others about the voices or thoughts that he was hearing on the day of the offence because, “no one would believe you... they'd think you're crazy.” From this Dr. Rai concluded that KDS retained enough understanding to know that this was an abnormal experience – since he believed others would consider him crazy. Dr. Rai explained if KDS had been truly psychotic he would have lost complete insight, believing the experience was normal.

[173] Drs. Corabian, Haag, and Rai all noted the only evidence for KDS's alleged psychotic symptoms pertaining to the sun comes from KDS himself, when he reported these visions for the first time during the NCR clinical interviews – months after the offence. Dr. Rai opined in the Rai Report that “in the absence of sufficient corroborating evidence, I am unable to confirm that these phenomena were genuine psychiatric symptoms at the material time.” Dr. Rai concluded that within a reasonable degree of medical certainty, KDS's actions at the time of the offence were probably *not* driven by an inherent psychotic mental state.

[174] Based on this evidence, I conclude KDS was not in a psychotic state at the time of the offence.

### **iii. Did KDS Malingering his Symptoms?**

[175] Intimately tied to the question of whether KDS was in a psychotic state at the time that he killed his father, is the issue of whether the accused malingered the symptoms that he described experiencing on the day of the offence. As Dr. Rai testified, in a forensic setting, experts must always be alert to the possibility of malingering. During the trial, Dr. Rai defined “malingering” as follows:

So malingering is – encompasses a range of behaviours in a medical context where symptoms are either completely fabricated or they are exaggerated, and they may be exaggerated to increase their intensity or their value or they may be minimized, depending on the intent of the individual. It's a conscious phenomena [*sic*], so it's done consciously and deliberately and knowingly, and also it is done with – there has to be evidence of secondary gain. So for example, if there is no secondary gain, then you have to question whether it's malingering. So in this legal context, the secondary gain would be to be found NCR as opposed to be found criminally responsible.

[176] As previously set out, there is no corroborating evidence for KDS's self-reported experience about the sun guiding him at the time of the offence or about hearing people's thoughts. It is noteworthy that KDS did not mention any of this to the police when he was interviewed after the offence. The first time that KDS described these alleged symptoms was during the NCR clinical interviews at Alberta Hospital. Moreover, KDS gave inconsistent details about these symptoms to the different experts, and to this Court during his testimony.

[177] Dr. Haag testified that the absence of evidence corroborating KDS's alleged sun beam visions is inconsistent with someone who claims to have been receiving guidance from the sun that day, especially because KDS subsequently started claiming (during the NCR clinical interviews) that the sun's guidance played such a critical role in his state of mind at the time of the offence. Dr. Haag found it difficult to conclude that the sun was profoundly motivating KDS at the time of the offence in the absence of some corroborating evidence.

[178] Although she did not conclude that KDS malingered the symptoms about the sun, Dr. Corabian testified that she was not sure whether KDS held this belief about the sun on the day of the offence, whether he held this belief on the day of the NCR clinical interview, or whether it was both. Dr. Corabian was uncertain whether KDS's belief about the sun guiding him was part of KDS's attempt to make sense of those events *ex post facto*, or whether they reflected his actual experience at the time of the offence.

[179] During the trial, Dr. Rai expressed he had concerns about KDS's different versions of why he killed his father. He also had concerns about the symptoms that KDS reported having on the day of the offence, "which relate to him experiencing the sun in a special way...before he entered his father's cabin." Dr. Rai believed there was sufficient evidence to indicate that those symptoms were malingered. He also doubted that the symptom of hearing his father's voice was genuine. He believed it was probably malingered as well.

[180] Dr. Rai's concerns about malingering were increased by the fact that KDS did not mention anything about hearing his father's thoughts during the police interviews. Further evidence of malingering was the fact that KDS told Dr. Rai that each time he went to save one of his children from some kind of danger pointed out to him by the sun, he told his wife SS about it (albeit without telling her about the sun). But SS testified that KDS never told her anything about him having saved the children that morning.

[181] At trial, Dr. Rai concluded that he was confident within a reasonable degree of medical certainty – which he specified was up to 75% certainty in this case – that KDS is malingering rather than psychotic.

[182] Dr. Flor-Henry was the only expert who did not turn his mind to malingering. He testified that he did not feel the need to look for collateral information that might corroborate or disconfirm what KDS self-reported because he had no reason to believe that KDS was lying to him.

[183] During cross-examination, Dr. Flor-Henry was confronted with multiple inconsistencies and contradictions between the version of events and symptoms that KDS reported to him, and what KDS reported to the other experts and to the court. Dr. Flor-Henry opined that rather than being an indication of malingering, these contradictions and inconsistencies are evidence that KDS is confused and that he is suffering from memory problems due to the psychotic state that he experienced at the time of the offence.

[184] I conclude that KDS is more likely than not malingering the symptoms he reported experiencing on April 28, 2017. I am not convinced on a balance of probabilities that KDS was guided by the sun or that he heard his father's thoughts that day. Beyond the one comment made in the voicemail to NS about a "family demon," KDS did not describe or even imply a perception of supernatural phenomena or psychotic symptoms around the time of the offence. I do not find KDS's reports about perceiving the sun as guiding him that day, or of hearing his father's thoughts at the time of the offence, credible. I observed no indication of psychosis in the police interviews. Neither SS, TB, nor the police witnesses saw indications that KDS was observing or responding to unseen stimuli. KDS mentioned these symptoms, for the first time, months after the offence, in the context of NCR clinical interviews at Alberta Hospital.

[185] Moreover, the Accused has reported inconsistent and contradictory descriptions of these symptoms to different experts, and in his testimony at trial. I find Dr. Rai's opinion and analysis regarding malingering to be persuasive. The fact that Dr. Flor-Henry failed to even consider the possibility of malingering significantly undermined the reliability and utility of his expert opinion. My conclusion that the Accused was malingering is based primarily on his implausible, incredible, and inconsistent evidence concerning visions of the sun guiding him and of hearing people's thoughts.

#### **iv. Was KDS Sexually Abused as a Child by his Father?**

[186] Another topic of disagreement within the evidence pertains to the question of whether KDS was sexually abused by his father as a child. KDS revealed to SS just prior to the offence that NES had molested him and his brother as boys. SS testified that the Accused said to her "Everybody has secrets. You want to know my deepest, darkest secret? Well it's my dad molested us as kids. And he was going to do it to ours." This issue became significant at trial because the experts disagreed about whether KDS was struggling with the emergence of repressed memories of actual historic abuse at the hands of his father, or whether KDS's allegations of abuse were part of a delusion (i.e. a false psychotic belief) operating in his mind at the time of the offence.

[187] KDS described childhood sexual abuse during the NCR clinical interviews with Drs. Corabian, Haag, and Rai. When Drs. Corabian and Haag asked the Accused if he was ever sexually abused, KDS prefaced his answer by saying "I don't know if I would classify it as sexual abuse," but then proceeded to describe behaviour and touching of a sexual nature that could be consistent with sexual abuse. KDS also described verbal and emotional abuse at the hands of his father to Drs. Corabian and Haag.

[188] Dr. Rai wrote that KDS told him about “experiences consistent with having been emotionally and sexually abused as a child by his father.” Dr. Rai also noted that KDS used the word “molested” when he described this abuse to SS in the cabin – a word typically synonymous with sexual abuse.

[189] KDS specifically connected these experiences with the offence, telling Dr. Rai that when he walked into the cabin and saw LS and NES sitting close to each other, “I knew (his son [LS]) was in danger...same thing he did to me.”

[190] No other witnesses who gave evidence were able to corroborate this alleged abuse. KDS’s brother NS testified that his father had never abused him, and he denied any knowledge that his father may have abused the Accused. SS said that KDS’s revelation in the cabin about NES having molested him was the first time she had ever heard of such an allegation. In the police interview, KDS admitted that NES did not abuse NS, that he never talked about it with his younger brother, and that no one else had ever known about the abuse. KDS made it clear to the police that the suppressed memories which were emerging in his mind around the time of the offence pertained to this childhood abuse.

[191] KDS became very animated during the police interviews and often would ask to speak to a lawyer whenever the issue of childhood abuse was mentioned. Dr. Haag opined that in the police interviews KDS showed a revealing pattern of behaviour in his reaction to the topic of abuse. He exhibited persistent and clear discomfort and showed incredible resistance to talking about it. The Accused adamantly refused to provide any details to the police about the alleged abuse, and only reluctantly talked about it with Drs. Corabian and Haag. During the police interviews, KDS admitted that it was very hard for him to talk about what had happened to him. He told Corporal Harnish that he was only providing the police with “a glimpse” of what had occurred, and that he would reserve more details for his lawyer.

[192] Despite the lack of corroboration from other witnesses, in the opinions of Drs. Corabian, Haag, and Rai, the information gathered during their respective NCR clinical interviews suggests KDS had likely been sexually abused by NES as a child or a teenager, and that memories of this abuse played an important role in KDS’s mental state at the time of the offence.

[193] The three Crown experts rejected as unlikely the idea that KDS was operating under a completely false circumscribed delusion about historic abuse at the time of the offence. With regards to what KDS said in the voicemail that he left for NS, Dr. Rai testified that there are “non-psychotic reasons which better explained what he articulated, which include... a likely history of sexual abuse or perhaps combination of sexual and emotional abuse when he was a child.”

[194] In Dr. Rai’s opinion, the story of KDS’s childhood abuse was not the result of a delusion or psychotic belief. He explained that in a clinical setting the standard practice is to believe patients when they report such abuse, unless there is reason to disbelieve them. Dr. Rai feels there is no strong reason to disbelieve KDS.

[195] KDS told Drs. Corabian, Haag, and Rai that he had always tried to protect his brother from this abuse. During cross-examination, KDS explained he was referring to his attempt to protect NS from becoming a “big emotional baby” rather than from any sexual abuse. He claimed the experts had misinterpreted what he had meant by that statement when they assumed he was referring to sexual abuse. I do not find this explanation credible.

[196] Dr. Rai explained that most children do not disclose sexual abuse in childhood due to dependence on the caregiver, affection for the caregiver, and the fear of rejection that could result from disclosure. He testified that repression of memory through denial is often a mechanism employed by abuse survivors to enable them to function in life moving forward (i.e. so they can develop normal relationships with others). Dr. Rai also noted that it is not uncommon for such survivors to disclose later in life if they feel it is necessary to do so in order to protect other children (including their own) from the perpetrator that abused them. It can be an extremely stressful situation for someone who has chosen not to disclose throughout their life, to suddenly feel the pressure to disclose due to a sense of responsibility towards their own children. Dr. Rai opined that this can be an exceedingly difficult choice for someone in KDS's position to have to make.

[197] Dr. Rai expressed his opinion in the Rai Report that, within a reasonable degree of medical certainty, KDS may not have committed the offence "had he not been exposed to experiences that appear to be consistent with being sexually abused, emotionally abused, and deprived as a child" by his father. Dr. Rai testified that he believed it to be significant that KDS referenced this historic sexual abuse right before he started stabbing his father, and opined that memories of childhood abuse played an important role in the offence and may explain why KDS killed his father.

[198] Drs. Corabian, Haag, and Rai were all of the view that repressed memories of this childhood abuse emerged around the time that KDS stopped drinking. The fact that he was forced to confront these memories without alcohol (his coping mechanism) caused or contributed to KDS's depression, and to his negative feelings and anger towards NES.

[199] In these three experts' opinions, the way KDS answered the question about abuse, the memories that he described, his persistent resistance to talking about this topic, and even KDS's uncertainty about whether to label it as "abuse" are all consistent with how victims subsequently disclose memories of abuse.

[200] Dr. Haag specialized in sexual violence as part of his doctoral dissertation research. He testified that KDS cried and sobbed heavily during the clinical interview on August 8, 2017 and told him his father was "my best friend...was my best man" and that "He never fucked me. He never fucked Nick. It's just what I said." Dr. Haag noted that such ambivalent feelings toward an abuser are not uncommon, and moreover, opined that it was not inconsistent for KDS to say that his father had not "fucked" him because technically the sexual abuse he described did not include penetration. Dr. Rai testified that the Accused specified to him that he was "never penetrated" and told him that he had "Not been sexually abused as in having sex but being groped and hugged."

[201] Based on the totality of the evidence and the persuasive analyses of Drs. Corabian, Haag, Rai, I find that KDS was more likely than not sexually abused as a child or teenager by his father.

#### **v. Inconsistencies in KDS's Story on Salient Aspects of the Offence**

[202] KDS told several different and contradictory stories with regards to multiple salient aspects of the offence. I note the following examples:

- During the clinical interviews with Drs. Corabian and Haag, on August 8, 2017, the Accused explicitly denied being able to read NES's thoughts. However, in his clinical interview with Dr. Rai on September 6, 2017, he reported hearing his father's thoughts saying "8 too many, there can only be 7". He added later that he also heard NES's thoughts say "one needs to die." On the stand, KDS recalled only hearing NES's thought saying "8 is too many, there can only be 7." He did not recall hearing any other thoughts from NES.
- During the police interviews, KDS recalled that SS was present in the cabin during the offence, and he remembered pushing her out of the way. He also reported during the NCR clinical interview with Drs. Corabian and Haag on August 8, 2017, and the interview with Dr. Rai on September 6, 2017, that at the time of the offence he remembered his wife yelling at him, but that he nevertheless kept hitting his father. He recognized that he should have listened to his wife, but felt he couldn't stop. However, at trial KDS claimed he could not recall there being anyone else in the cabin after he started to hit NES. He testified that he had no memory of SS being there or of interacting with her.
- KDS specifically recalled during the interview with Drs. Corabian and Haag on August 8, 2017, that he phoned NS, during the offence, and said to him "you need to face your demons." He also told Dr. Rai on September 6, 2017 that he remembered calling NS saying "you need to face the family demon." At trial, however, KDS only vaguely remembered making a phone call about a demon, but denied recalling who he called.
- KDS told Dr. Rai on September 6, 2017 that every time he went and "saved" one of his children from some kind of danger, after the sun shone down on them, during the morning of April 28, 2017, he told his wife SS what he had done (although he did not share with her the actual experience of seeing the sun). KDS testified at trial that he did not tell SS when he saved the children from danger. In her testimony, SS did not mention KDS having revealed to her that he had saved his children the morning of the offence.
- During the police interviews, KDS said everything "clicked" when he realized that NES was alone in the cabin with LS – this is what caused him to get up and head straight for the cabin. KDS told Dr. Rai on September 6, 2017 that when he saw the sun beam shine down on his father's cabin, he "couldn't see [LS]" and then specified that he believed LS "had to be in trouble." He later said to Dr. Rai that he was "not sure" if it was LS who was in danger, but that he believed "one of his kids" was in danger. On the stand, however, KDS was adamant that he did not know LS was in the cabin when he headed towards it.
- KDS reported to Dr. Rai on July 24, 2017 that he went over to his father's cabin to "save my boy", and that upon entering the cabin and seeing LS and NES sitting close together he knew his son "was in danger...same thing he did to me." However, at trial, KDS denied knowing what kind of danger his son was facing. Specifically, he testified that at the time of the offence he did not believe the

danger posed by his father was in any way related to something he believed his father may had done to him. He emphasized at trial “my father never hurt me.”

#### **vi. Conclusion**

[203] Based on both the expert evidence and the non-expert evidence that I find credible, I conclude that KDS was suffering from a “mental disorder” for the purpose of section 16 of the *Criminal Code* at the time of the offence. The mental disorders that have been established on a balance of probabilities are: alcohol withdrawal following a long history of alcohol abuse and major depressive disorder. I find that both of these disorders can be legally characterized as “diseases of the mind”. In my view, symptoms of both alcohol withdrawal and major depression impaired KDS’s mind and its functioning at the time of the offence.

[204] As mentioned previously, I accept bipolar disorder as a differential diagnosis, and also conclude that it could be legally categorized as a “disease of the mind.” But I find there is insufficient evidence to conclude that KDS suffered from symptoms of bipolar disorder at the time of the offence. Because of this conclusion, I find KDS did not suffer from bipolar-induced psychosis or delusions at the time of the offence. I do not find the evidence supports a diagnosis of delusional disorder.

[205] I am further not convinced, on a balance of probabilities, that KDS was in a psychotic state or experienced psychotic symptoms at the time of the offence. For the reasons already outlined above, I conclude that KDS most likely malingered the symptoms concerning the sun guiding him and hearing the thoughts of his father on the date of the offence.

[206] Without a blood test taken contemporaneously to the time of the offence (to confirm low sodium levels), there is little evidence to support the theory that KDS suffered from delirium delusions or psychosis resulting from hyponatremia.

[207] I also find that, on a balance of probabilities, memories of childhood abuse at the hands of his father played an important role in KDS’s consciousness and state of mind at the time of the offence. These memories, which likely lay suppressed for a long time, seemingly emerged after KDS suddenly stopped drinking a few weeks prior to the offence. As KDS suffered through alcohol withdrawal and concomitant major depressive disorder, he was forced to confront these traumatic memories without the aid of his longstanding coping mechanism: alcohol. The emergence of these suppressed memories further contributed to the Accused’s negative perception of his father around the time of the offence, influencing his thinking and decision-making. Although I accept that these traumatic memories affected the Accused’s mental state at the time of the offence, I am not convinced that the emergence of suppressed memories of childhood abuse should be legally characterized as a “disease of the mind”.

#### **IV. Incapacity to Appreciate the Nature and Quality of His Act**

[208] The existence of a mental disorder does not, on its own, establish the NCR defence under section 16 of the *Criminal Code*; it is merely a necessary prerequisite. I now turn to the balance of section 16. The question that remains to be answered is whether symptoms of alcohol withdrawal and major depressive disorder had the effect of depriving KDS of the capacity to appreciate the nature and quality of his act or of knowing that his act was wrong when he killed his father on April 28, 2017.

## A. Law

[209] Under the first branch of section 16(1) of the *Criminal Code*, “[n]o person is criminally responsible for an act committed...while suffering from a mental disorder that rendered the person incapable of appreciating the nature and quality of the act...” (emphasis added). In *Cooper*, Justice Dickson explained the difference between merely “knowing” versus “appreciating” an act: “To ‘know’ the nature and quality of an act may mean merely to be aware of the physical act, while to ‘appreciate’ may involve estimation and understanding of the consequences of that act” (at 1161). Justice Dickson elaborated further on this distinction at 1162-1163:

The test proposed in the McRuer Report, which I would adopt (save for deletion of the “fully” in the fourth line) is this:

The true test necessarily is, was the accused person at the very time of the offence — not before or after, but at the moment of the offence — by reason of disease of the mind, unable fully to appreciate not only the nature of the act but the natural consequences that would flow from it? In other words, was the accused person, by reason of disease of the mind, deprived of the mental capacity to foresee and measure the consequences of the act? (at p. 13)

The legally relevant time is the time when the act was committed.

...

... I accept the view that the first branch of the test, in employing the word “appreciates”, imports an additional requirement to mere knowledge of the physical quality of the act. The requirement, unique to Canada, is that of perception, an ability to perceive the consequences, impact, and results of a physical act. An accused may be aware of the physical character of his action (i.e., in choking) without necessarily having the capacity to appreciate that, in nature and quality, that act will result in the death of a human being. This is simply a restatement, specific to the defence of insanity, of the principle that *mens rea*, or intention as to the consequences of an act, is a requisite element in the commission of a crime.

[210] The following year, in *Kjeldsen v The Queen*, [1981] 2 SCR 617, Justice McIntyre affirmed at 623:

To be capable of ‘appreciating’ the nature and quality of his acts, an accused person must have the capacity to know what he is doing; in the case at bar, for example, to know that he was hitting the woman on the head with the rock, with great force, and in addition he must have the capacity to estimate and to understand the physical consequences which would flow from his act, in this case that he was causing physical injury which could result in death.

## B. Evidence

[211] The Corabian-Haag Report concluded that KDS was capable of appreciating the nature and quality of his actions pertaining to the offence. The Psychologists reached this conclusion based on the following evidence:

KDS's actions during the alleged offence appear to have been intentional and instrumental in nature. Allegedly, after instructing SS to take the children to Whitecourt and retrieving a knife, KDS went directly to the trailer and began assaulting NES. Furthermore, during this assault KDS made a phone call to Nick stating that KDS "just confronted our fuckin' family demon... I had to save my family and I don't give a fuck about anything else." Additionally, during the commission of the alleged homicide, KDS instructed SS to leave the scene because KDS did not want to harm her. This was evidence that suggested that KDS was aware that he was causing harm to NES. KDS stated to police "I pushed her out of the way 'cause he had to die for what he..." KDS stated to police that he initially starting [*sic*] beating NES with his hands as well as punching him. KDS further added "and then I killed him... Like...I just stabbed him...stabbed...because of what he's done." These statements also suggest that KDS was aware of the nature of his actions at the time of the alleged offence.

[212] Dr. Haag explained that these statements on totality suggest KDS was in control of his actions, and prospectively knew what he was about to do. He appeared aware of the situation, of his surroundings, of the fact that his wife was present, and of the implications of his wife witnessing what he knew he was about to do. Dr. Haag also noted that when the doctor asked the Accused what had happened, when he was brought to the hospital by Corporal Harnish, KDS answered that he had punched his father. This interaction took place mere hours after the offence. To Dr. Haag this showed that KDS knew what had happened – he appreciated what he had done.

[213] Dr. Rai testified that KDS's major depressive disorder would not have impaired the accused mentally to such a degree that he was deprived of the ability to be consciously aware of his actions and their consequences. At trial, Dr. Rai opined that when KDS punched and stabbed his father he knew the consequences of those actions. KDS knew that he was handling a knife and that he was stabbing his father, and he understood that this would lead to life-threatening injuries or death. Dr. Rai testified that what KDS told the police hours after the offence indicated to him that he had been aware of what he was doing when he killed his father.

[214] In the April 28th interview with the police, KDS described stabbing and killing his father, indicating clearly his awareness of what he was doing, including his recollection that he pushed SS out of the way in order to commit the act:

KDS: ...And then...then he was on... down and she... she didn't know... what was going on 'cause I... so I pushed her out of the way. And then I killed him. Like... I just... stabbed him... stabbed... because of what he's done, or what he was gonna do. (*unintelligible*) I'm not letting that happen... to my family.

...

KDS: And I pushed her out of the way 'cause he had to die for what he...

...

HARNISH: [...] what made you stop stabbing?

KDS: When I knew he couldn't hurt anyone.

[215] In Dr. Rai’s opinion, the fact that KDS remembered what he did shows that he would have been sufficiently aware of what was going on at the time of the act to have formed memories of it. The fact that KDS remembered the killing and the reason why he killed his father also indicated to Dr. Rai that KDS had the intention to kill at the time of the offence. The fact that KDS told police that he stopped stabbing when he knew that his father could not hurt anyone is consistent with Dr. Rai’s opinion that KDS intended to kill. Dr. Rai therefore concluded that KDS was capable of appreciating the nature and quality of his act when he killed his father.

**C. Conclusion: Was KDS Capable of Appreciating the Nature and Quality of his Act?**

[216] The evidence overwhelmingly leads me to the conclusion that KDS was capable of appreciating the nature and quality of his act when he killed NES. KDS inflicted 86 stab wounds to NES’s neck and chest, partially decapitating his head. Any person with an operating mind would understand that such wounds would kill. In this case, KDS exhibited a high level of cognitive functioning at the time of the offence. I find that KDS was capable of estimating and understanding the consequences, impact, and results of stabbing NES in the chest and neck multiple times.

[217] I find that in the moment that he started stabbing NES, KDS intended to kill his father. The Accused understood in that moment that the act that he was about to commit would be both horrific and dangerous for SS (and others) to witness. Before heading to the cabin, he told SS to leave and take the children to Whitecourt. In the cabin, he repeatedly told SS to get out, pushed her out of the way, and said “You can’t see this. Go.” In the voicemail for NS, KDS asked for his brother’s back-up in court – indicating that he understood the legal consequences of what he was about to do. Mere hours after killing NES (during the April 28<sup>th</sup> police interview), KDS told Corporal Harnish that his father “had to die” and stated unequivocally “I killed him. Like...I just...stabbed him...stabbed...because of what he’s done, of what he was gonna do.” The accused told the police that he stopped stabbing when he knew NES could no longer hurt anyone.

[218] Having established that KDS was capable of appreciating the nature and quality of his act, I now turn to the final question in the NCR analysis: whether KDS’s mental disorder rendered him incapable of knowing that his act was wrong.

**V. Incapacity to Know His Act was Wrong**

**A. Law**

[219] Under the second branch of section 16(1), “[n]o person is criminally responsible for an act committed...while suffering from a mental disorder that rendered the person incapable of...knowing that it was wrong” (emphasis added).

[220] As outlined by Chief Justice Lamer, for the majority, in *R v Chaulk*, [1990] 3 SCR 1303 [*Chaulk*] and Justice Dickson in dissent in *Schwartz v The Queen*, [1977] 1 SCR 673 [*Schwartz*], “wrong” means “morally wrong”, meaning “contrary to the ordinary moral standards of reasonable men and women”, not simply “legally wrong” (*Chaulk* at 1351 and 1354).

[221] Chief Justice Lamer in *Chaulk* stated that the defence of insanity is available where, due to a disease of the mind, the accused is “incapable of knowing that the act is morally wrong in the circumstances according to the moral standards of society” (1354). Lamer CJ clarified that

the defence is available regardless of whether the accused knows the act is contrary to law (1355-1356).

[222] Justice Dickson in *Schwartz* provided further guidance regarding the meaning of “wrong” at 679:

...the wording of s. 16(2) makes it clear that the section is primarily concerned with mental disease and incapacity resulting therefrom. It is the thinking process of the accused, as opposed to his actual knowledge of wrongness, that should be the focus of inquiry in the defence of insanity. The question is not whether the accused knew that the act was wrong but whether he was capable of knowing it was wrong. Was he capable of comprehending that which militated to make the act wrong? Mr. Justice Stephen in *History of the Criminal Law of England*, vol. 2 (1883) at p. 163 poses this question: “Was he deprived by disease affecting the mind of the power of passing a rational judgment on the moral character of the act which he meant to do?” In applying s. 16(2), one must delve into the thought process of the accused, coherence, logic, rationality, rather than merely his knowledge of the wrongness of the particular act. Has disease of the mind so affected the capacity of the accused to make a moral choice that he is unable to discern between what is right and what is wrong?

[223] In *R v Oommen*, [1994] 2 SCR 507 [*Oommen*], McLachlin J (as she then was), writing for a unanimous court, refined the meaning of “wrong” at 516-520:

The crux of the inquiry is whether the accused lacks the capacity to rationally decide whether the act is right or wrong and hence to make a rational choice about whether to do it or not. The inability to make a rational choice may result from a variety of mental disfunctions; as the following passages indicate these include at a minimum the states to which the psychiatrists testified in this case — delusions which make the accused perceive an act which is wrong as right or justifiable, and a disordered condition of the mind which deprives the accused of the ability to rationally evaluate what he is doing.

...

...The issue is whether the accused possessed the capacity present in the ordinary person to know that the act in question was wrong having regard to the everyday standards of the ordinary person. ... the real question is whether the accused should be exempted from criminal responsibility because a mental disorder at the time of the act deprived him of the capacity for rational perception and hence rational thought about the rightness or wrongness of the act.

[224] At 523, Justice McLachlin further advised: “As the cases make clear s. 16(1) of the *Criminal Code* embraces not only the intellectual ability to know right from wrong, but the capacity to apply that knowledge to the situation at hand.”

[225] Thus, the question is whether KDS’s mental disorders rendered him incapable of appreciating that his conduct was wrong according to the moral standards of society.

## B. Evidence

[226] Drs. Corabian and Haag believe KDS could appreciate that his actions were morally wrong; however, he felt justified in killing his father. The Corabian-Haag Report summarized the basis for this conclusion as follows:

KDS reported to police that he had recently remembered the abuse KDS suffered in childhood at the hands of NES. KDS stated that he did not want NES to repeat such actions with his [*sic*] KDS's children. In his interview with police KDS stated, "I did it for the right fuckin' reason." Regarding what he did, KDS stated "it wasn't fuckin' hateful... it was protecting... is what the fuck it was."

During the act of the alleged homicide, KDS called Nick and requested Nick's "backup in court." This statement, in the middle of the alleged offence, was considered strong evidence that KDS was able to discern that the act was legally wrong.

During the police interview, when asked if KDS felt bad about what happened. KDS reported, "I definitely feel badly about subjecting anybody to anything... it just everything like I had to protect... and I knew what the fuck was goin' on... And I had to do something..." This statement suggested that KDS was aware that KDS[s] actions were [wrong]; however, [Mr.] KDS: proceeded with KDS's actions as KDS believed that KDS had good reason for acting in that manner.

### Anger

From the available information, it is apparent that KDS's actions were partly driven by anger towards NES for the abuse KDS reportedly suffered as a child as well as by fear related to the possibility of the abuse happening to one of his children. KDS stated to police that things "fuckin clicked" and KDS noted that "he needs to stop now...Like... I'm not watching my kid go through what the fuck... I didn't want my boy there but I had to save my boy..." Regarding the abuse on KDS by NES, KDS stated "it fucked me. He used me. He'd throw me away and then he'd bring me back. I'd do anything he fucking... wanted and I was not gonna let that happen to my son... or my daughter... And that's why... And it just clicked when I was 36 and I knew to stop it."

From the information reviewed for this report, it was evident that KDS was able to recognize that his behaviours were morally wrong at the time of the alleged offence.

[227] Dr. Corabian opined that KDS telling SS to pack up the kids and go to Whitecourt right before he headed to his father's cabin indicated that he intended for SS to leave the scene, which in turn suggested an organization in thought. This is further corroborated by the recording of the EMS call placed by SS in which KDS says to SS, "Get the fuck out. Out." SS responds "No." and KDS says "You can't see this. Go." Dr. Corabian suggested this exchange suggests linearity and causality in KDS's thinking at the time of the offence.

[228] Dr. Corabian observed that the voicemail left for NS in the middle of the attack suggests that KDS was aware of what he was doing, clear in his thoughts, and that he felt justified in his actions. Dr. Haag testified that this voicemail shows that KDS knew there was in the very least a

legal conundrum in what he is about to do. He concluded in the totality of the evidence this shows the Accused recognized there was a moral issue at play.

[229] Dr. Haag opined that KDS could evidently appreciate that killing someone is wrong and that such an act would land him in legal jeopardy because society would not approve of his actions: this indicates that KDS could appreciate the moral wrongfulness of his actions.

[230] In the April 29<sup>th</sup> police interview, KDS stated “I can make decisions. I always could make fuckin’ decisions” in response to questions about what “made it click” for him at the time of the offence. In Dr. Haag’s opinion, KDS was claiming autonomy over his own behavior, and control over his own decision-making ability.

[231] Dr. Rai testified that KDS’s assertions about making decisions reveal that KDS was aware of the consequences of his actions.

[232] Dr. Haag opined that major depressive disorder may have had some impact on KDS’s state of mind at the time of the offence, but it was not the main driver of the act. The Corabian-Haag Report suggests KDS’s anger towards his father for the childhood abuse he had suffered was a motivating factor in the killing. Dr. Haag testified that in his opinion KDS’s desire to protect his son LS (and his family overall) was a main driver in the offence. Although KDS’s choice to commit homicide in order to protect his family constituted an extreme type of action, it was nevertheless a rational decision; the outcome (NES being dead) was rationally linked with the motivation (to protect KDS’s family from ever being harmed by NES). Dr. Haag opined that KDS had the capacity to make this choice – it may not have been well-informed, it may not have been properly considered in light of other options, and it may have been impulsive, but in the end, it was a rational choice to act instrumentally.

[233] Dr. Rai testified that despite possible cognitive distortion and impaired decision-making ability due to KDS’s depressed state at the time of the offence, he was satisfied that KDS knew that what he was doing was at least legally wrong because in the voicemail that he left for NS he asked for his brother’s back-up in court – indicating he knew right before he killed NES that what he was about to do would land him in trouble with the law. Regarding moral wrongfulness, Dr. Rai conceded that it poses more of a “grey” area, and he conceded that there is no concept for moral wrongfulness in psychiatry.

[234] Nonetheless, Dr. Rai concluded in the Rai Report that within a reasonable degree of medical certainty KDS’s mental condition “probably did not impair his capacity to make a rational choice about moral right and wrong to the extent that he was rendered incapable, compared to the normal capacity of an ordinary person as regards moral wrongfulness.” Dr. Rai considered it possible that KDS may have been more impulsive and irritable because of symptoms of depression and anxiety at the time of the offence, but concluded that “it is unlikely that these factors would have met the [*sic*] all the necessary criteria for exemption from criminal responsibility” under section 16.

### **C. Conclusion: Did KDS Lack the Capacity to Know that his Act Was Wrong?**

[235] I conclude that KDS had the capacity to know that killing his father was contrary to society’s moral standards. At the time of the offence, KDS was not psychotic or delusional. Although I accept that his mental disorders – alcohol withdrawal and major depressive disorder – likely caused some cognitive distortions and catastrophizing in his mind, I find that KDS

retained the ability to rationally decide about the rightness or wrongness of his actions. KDS knew it was morally wrong to kill his father, but he nevertheless chose to kill him because he felt personally justified in doing so.

[236] KDS anticipated the legal consequences that would be imposed by society for his action. He had the presence of mind and the ability to think rationally to the extent that he expressed concern about his wife witnessing the act of killing – urging her to get out (and physically pushing her out of the way), in an attempt to prevent her from witnessing what he was about to do, and to ensure that she would not get hurt. This implies that KDS knew that what he was about to do would be perceived by SS as wrong. Before heading towards the cabin, he told SS to pack up the kids and to take them to Whitecourt – indicating that he did not want them to witness what he was about to do.

[237] As KDS himself declared emphatically during the police interviews – he never lost the capacity to make decisions. He could have chosen to deal with his problems with NES in a different way, but he chose this course of action. He could have chosen to leave the cabin after he punched his father, before stabbing and killing him, and yet he did not make that choice. He ignored SS when she repeatedly pleaded with him to stop – choosing to nevertheless persist in his fatal course of action.

[238] During the April 28<sup>th</sup> police interview, KDS showed he was aware that his closest family members – especially NS, SS, and LS – were hurt by what he did and that they would not understand his actions. This reveals that he was capable of rationalizing that his choice to kill NES would not be condoned or considered morally right by others. Nevertheless, despite indicating regret at having hurt his family, he maintained the position that what he did was necessary, right, and even inevitable.

[239] KDS may believe that his conscience at the relevant time told him that he was justified, perhaps even duty-bound to kill NES. Due to his mental disorders, KDS's ability to regulate his emotions and impulses may well have been impaired. He was struggling with the emergence of suppressed memories of historic abuse which inflamed negative feelings towards his father. But despite these factors operating in his mind at the time of the offence, despite the fact that KDS's thinking may not have been as clear or rational as it might have been in the absence of these mental impairments, I conclude, based on the totality of evidence, that at no time did KDS lack the ability to rationalize about the perception of others, or of society as a whole, regarding the moral wrongfulness of stabbing and killing his father. KDS evidently felt personally justified and vindicated. I find that KDS chose to act according to his personal moral conviction at the time of the offence, rather than according to society's moral standards.

## **VI. Conclusion on NCR Defence**

[240] I conclude that KDS has not discharged his burden of proving the NCR defence, under section 16 of the *Criminal Code*, on a balance of probabilities.

## **VII. The Provocation Defence**

### **A. Section 232 of the *Criminal Code***

[241] During final submissions, Defence Counsel raised (for the first time) provocation as an alternative defence to be considered in the event that his NCR defence were to fail.

[242] A successful provocation defence has the effect of reducing a charge of murder to manslaughter. The elements required to make out the provocation defence are contained within section 232 of the *Criminal Code*, which states (emphasis added):

Murder reduced to manslaughter

232 (1) Culpable homicide that otherwise would be murder may be reduced to manslaughter if the person who committed it did so in the heat of passion caused by *sudden* provocation.

What is provocation

(2) Conduct of the victim that would constitute an indictable offence under this Act that is punishable by five or more years of imprisonment and that is of such a nature as to be sufficient to deprive an ordinary person of the power of self-control is provocation for the purposes of this section, if the accused acted on it on the *sudden* and before there was time for their passion to cool.

Questions of fact

(3) For the purposes of this section, the questions

(a) whether the conduct of the victim amounted to provocation under subsection (2), and

(b) whether the accused was deprived of the power of self-control by the provocation that he alleges he received are questions of fact, but no one shall be deemed to have given provocation to another by doing anything that he had a legal right to do, or by doing anything that the accused incited him to do in order to provide the accused with an excuse for causing death or bodily harm to any human being.

[243] I note that *suddenness* is a critical component of the provocation defence. Section 232(1) specifies that the homicide must have been committed “in the heat of passion caused by sudden provocation.” Section 232(2) requires that the accused acted on that provocation “on the sudden and before there was time for their passion to cool.” In *R v Tran*, 2010 SCC 58 [*Tran*], Justice Charron explained that suddenness applies both to the provocative conduct and to the accused’s reaction to it (para 38):

The requirement of suddenness was introduced into the defence as a way of distinguishing a response taken in vengeance from one that was provoked. Therefore, suddenness applies to both the act of provocation and the accused’s reaction to it. The wrongful act or insult must itself be sudden, in the sense that it “must strike upon a mind unprepared for it, that it must make an unexpected impact that takes the understanding by surprise and sets the passions aflame” (*R. v. Tripodi*, [1955] S.C.R. 438, at p. 443).

[244] The Supreme Court of Canada in *R v Thibert*, [1996] 1 SCR 37 noted that the defence of provocation contained in section 232 of the *Criminal Code* contains both an objective and a subjective element; both must be satisfied if the defence is to be invoked. (See also: *Tran* at para 23 and *R v Cairney*, 2013 SCC 55 at paras 33 and 34 [*Cairney*]).

[245] The objective element is two-fold. It requires that there (1) must be a sudden wrongful act or insult; and (2) the wrongful act or insult must be sufficient to deprive an ordinary person of the power of self-control (*Tran* at para 25 and *Cairney* at para 33).

[246] The subjective element is also two-fold. The accused must have acted (1) in response to the sudden wrongful act or insult; and (2) on the sudden before there was time for his or her passion to cool (*Tran* at para 36 and *Cairney* at para 34).

[247] I would add that the “wrongful act or insult” must constitute an indictable offence under the *Criminal Code* punishable by five or more years of imprisonment to satisfy section 232(2).

[248] In *Tran*, Charron J specified that in a judge-alone trial, “the trial judge errs in law if he or she gives effect to the defence of provocation in circumstance where the defence should not have been left to a jury, had the accused been tried by a jury” (para 41). Justice Charron explained that there must be “a sufficient evidential basis in respect of each component of the defence before it is left to the jury: the evidence must be reasonably capable of supporting the inferences necessary to make out the [provocation] defence before there is an air of reality to the defence” (para 41).

### **B. Submissions of Parties**

[249] The Defence submits that the Accused should be found guilty of manslaughter, rather than murder, pursuant to section 232 of the *Criminal Code*. The Defence alleges upon seeing his son LS alone with his father, in his father’s cabin, memories of being sexually abused by his father came flooding back causing the high state of emotional and cognitive arousal the Accused experienced and displayed in the moment that he attacked and killed his father. The uncharacteristically violent acts perpetrated by the Accused was a result of this historical sexual abuse.

[250] The Crown submits there is no air of reality to the defence of provocation; the Accused therefore cannot avail himself of this defence.

[251] The Crown contends the Accused did not act upon a sudden impulse for the following reasons. He testified that he had figured something out the night previously. On the day of the offence he told his wife SS to pack the kids and go to Whitecourt just before he walked to his father’s cabin. While walking to the cabin, he had time to let his passion cool and to return to rational thought.

[252] When the Accused entered NES’s cabin, the deceased was sitting across the table from his grandson LS and was not committing any indictable offence. Any offence relating to the Accused would have occurred approximately 20 years previously when the accused was 12 to 15 years old. In addition, prior to killing the deceased, the Accused took the time to contact his brother and to warn his wife to leave.

[253] Clearly, according to the Crown, the Accused did not act in the heat of passion caused by sudden provocation. In fact, the evidence shows that he made a conscious choice to kill his father.

### **C. Analysis and Conclusion**

[254] Section 232(2) of the *Criminal Code* requires that three elements be satisfied in this case: 1) in the moments before he killed his father, KDS was provoked by NES’s sudden conduct,

which must have constituted an indictable offence that is punishable by imprisonment of five or more years (objective test); 2) NES's sudden provocative conduct was of such a nature as to deprive an ordinary person of the power of self-control (objective test); and 3) KDS was acting in response to NES's sudden provocative conduct, on the sudden, before there was time for his passion to cool (subjective test).

[255] I find there is an insufficient evidential foundation, in respect of each of the aforementioned three elements of the defence, and therefore there is no air of reality to the defence of provocation in this case. When KDS attacked his father, NES was sitting in his cabin at a table across from his grandson, chatting and visiting. In that moment, NES was not committing an indictable offence and his act itself cannot be described as being sudden in the sense contemplated in para 38 of *Tran*. Moreover, neither NES's alleged past conduct (i.e. childhood abuse, allegedly perpetrated decades earlier) nor NES's potential future conduct (i.e. that he may hurt LS) satisfy the suddenness requirement. As a result, NES's conduct did not amount to provocation under section 232(2) of the *Criminal Code*.

[256] As NES's conduct was not provocative, it was not sufficient to deprive an ordinary person of the power of self-control. Finally, KDS was not acting in response to any sudden provocative conduct on NES's part, thus the third element of s 232(2) is not established.

[257] Furthermore, after beating and incapacitating NES, but prior to stabbing and killing him, KDS took the time to speak to SS and to call NS and to leave him a voicemail; both significant breaks in the action. The Accused's subsequent choice to stab NES in the neck and chest were the result of a conscious choice to kill him, not a reaction on the sudden before there was time for his passion to cool.

### **VIII. Disposition**

[258] Based on the evidence, I am satisfied that KDS had the requisite intent for murder under either ss 229(a)(i) or (ii) of the *Criminal Code*. While I accept that KDS was suffering from alcohol withdrawal and major depressive disorder at the time of the offence, the Accused intentionally and knowingly chose to stab NES multiple times in the chest and neck, partially decapitating him. The Accused told the police that his father needed to die, and stated that he stopped stabbing when NES could no longer hurt anyone.

[259] I find KDS guilty of second degree murder.

Heard on September 3-6, 9-13, 16-18, 19-20, 25;

October 1-2,4 and December 4-5, 2019.

**Dated** at the City of Edmonton, Alberta this 17<sup>th</sup> day of March, 2020.

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**J.J. Gill**

**J.C.Q.B.A.**

**Appearances:**

Jeff Rudiak

Trevor Peeters

for the Crown

Marshall Hopkins (Hopkins Law)

for the Accused

## Appendix

### ADMISSIONS OF THE ACCUSED PURSUANT TO SECTION 655 OF THE CRIMINAL CODE

KDS, being a person charged with an indicatable offence, hereby admits the following facts alleged against him for the purpose of dispensing with proof thereof pursuant to Section 655 of the *Criminal Code of Canada*.

1. KDS: (the “Accused”) was born in 1981 (currently 38 years old) (see photo attached as Appendix ‘A’).
2. NES (the “Deceased”) was born in 1945 (71 years old at the time of death).
3. The Accused is the biological son of the Deceased.
4. On April 28, 2017, The Accused and the Deceased resided in separate residences on the same rural property located in Strathcona County, Alberta (see photos attached as Appendix ‘B’).
5. The Accused lived in the main residence on the property with his wife and five children. The Deceased lived alone in a small cabin (see photo attached as Appendix ‘C’).
6. NS is the biological brother of the Accused.
7. SS was the wife of the Accused.
8. TB was the sister-in-law of the Accused.
9. LS is the son of the Accused.
10. TS is the daughter of the Accused.
11. AS is the daughter of the Accused.

#### Accused’s Psychiatric History

12. The Accused has a long history of alcohol abuse that began as a teenager.
13. On February 27, 2017, the Accused abruptly ceased all of his alcohol consumption (see photo of calendar attached as Appendix ‘D’).
14. Prior to February 27, 2017, the Accused had been drinking between 10 and 30 beer per day.
15. Because of the cessation of alcohol, the Accused began to consume significant quantities of coffee and water to compensate for the sudden reduction in fluid intake.
16. Between February 27, 2017 and March 10, 2017, SS noted that the Accused’s behavior was different and, at times, concerning. The Accused began to stress the importance of family togetherness, express concerns that SS would leave him, experience insomnia and consume excessive amounts of water and coffee. During this time, the Accused presented a depressed emotional state.

17. On March 10, 2017, the Accused and SS attended at the Fort Saskatchewan Health Centre at approximately 1:30am. SS had noticed the Accused uttering strange statements and she believed he was having a nervous breakdown. The Accused was admitted to the Health Centre, subject to a battery of tests and later discharged. The diagnosis was acute alcohol withdrawal symptoms (see Medical Records attached in Appendix 'E').
18. On March 10, 2017, SS spoke with an acquaintance at the Fort Saskatchewan Health Centre who recommended that the Accused attend a fully equipped hospital to assess his mental state.
19. On March 10, 2017, at approximately 10:30 am, the Accused was taken by EMS to the Royal Alexandra Hospital in Edmonton. The Accused spoke about hearing voices and having racing thoughts (see Hospital Records attached in Appendix 'F'). The symptoms reported by the Accused were attributed to a misperception of his own thoughts related to withdrawal delirium from alcohol as well as hyponatremia.
20. The Accused began an alcohol withdrawal protocol. The Accused was treated with diazepam (valium) and his hyponatremia was corrected before being discharged from the hospital on March 12, 2017.

### **Offence**

21. On April 28, 2017, the KDS: family hosted a lunchtime family gathering at their home. In attendance were the Accused, SS, the Accused's children, TB and her children. The plan was to stay outside, enjoy a campfire and cook hotdogs.
22. On April 28, 2017 the Accused was not under the influence of any drugs or alcohol.
23. On April 28, 2017, the Deceased was at home in and around his cabin.
24. All of the children were playing outside the house. LS, AS and TS were playing on the trampoline. At one point, TS hurt her back jumping off the hay bales onto the trampoline. She went to the fire pit and told the Accused, SS and TB.
25. After this interaction the Accused asked TB if she wanted a deer hot dog. She agreed. There was a wrapping or packaging on the hotdog. The Accused said that he would go get a knife to deal with the wrapping or packaging. The Accused went into the house to get a knife.
26. The Accused emerged from the house, approached SS and grabbed her by the shoulder. The Accused told SS to pack up the kids and go to Whitecourt (the town where her mother resides).
27. The Accused turned and walked away from SS, taking a direct line towards the Deceased's cabin. The cabin was approximately 100 yards away and separated from the main house by a large slough.
28. The Accused walked into, not around, the slough and trudged through. At times, the Accused was up to his knees in water. The Accused lost one of his boots in the slough.
29. The Accused entered the Deceased's cabin.
30. The Accused's son, LS (age 7), was present in the cabin with the Deceased.

31. LS and the Deceased were visiting at the dining room table.
32. The Accused became angry and began to yell and curse at the Deceased.
33. The Accused punched the Deceased multiple times in the head with a closed fist.
34. The force of the punches caused the Deceased to fall out of the chair and onto the floor. The Accused continued to punch the Deceased the face while he was laying on the ground.
35. The Deceased said, "what did I do?"
36. The Accused's punches caused the Deceased to bleed from the face and head.
37. The wounds were described by LS as, "meat coming out."
38. SS observed LS riding his bike from the Deceased's cabin.
39. LS told SS, "Dad's punching Grandpa."
40. SS ran to the Deceased's cabin and went inside.
41. The Accused was standing near the Deceased who was lying on the floor bleeding.
42. SS screamed at the Accused to leave. The Accused did not leave.
43. At 12:14pm SS called 911 (see Appendix 'G' for audio).
44. While SS was on the line with 911 the Accused made a telephone call to his brother, NS.
45. The Accused left a voicemail message for NS. The Accused stated, "I just confronted our family demon that fucking ruined everybody's fucking lives.... I need your backup in court for what the fuck he did and how he fucked everybody's lives. I had to save my family and I don't give a fuck about anything else. Call me back when you get this as soon as fuckin possible" (see Appendix 'H' for audio).  
The Accused continued to yell obscenities at the Deceased.
46. The Accused told SS to get out of the Deceased's cabin or she would get hurt.
47. SS remained in the Deceased's cabin while the attack continued. The Accused then took a folding knife from his pocket and opened the blade.
48. The Accused began stabbing the Deceased in the upper chest and neck with the knife. The knife was found by the RCMP on August 29,2017 under the windshield of a derelict truck on the property (See Appendix T for photo).
49. SS ran out of the cabin and down to her family waiting in the vehicle.
- 50.
- 51.
52. The Accused caused the death of the Deceased. The Accused stabbed the Deceased 86 times. 50 of the stab wounds were sustained to the torso of the Deceased. Additional stab wounds to the extremities of the Deceased suggests defensive injuries. The Deceased's head was partially severed from the neck. Blunt force injuries to the head were also noted.

53. The cause of death outlined in the autopsy report as multiple sharp force injuries (see attached autopsy report in Appendix ‘J’) (see selected autopsy photos in Appendix ‘K’).

### **Post Offence**

54. Cst. Sullivan of the Strathcona County RCMP was the first to arrive at the rural property.
55. Cst. Sullivan observed the AC wearing only his underwear. The Accused’s hands were covered in blood and his appearance was dishevelled.
56. Cst. Sullivan arrested the Accused at gunpoint and placed him in the back of the RCMP vehicle (see Appendix ‘L’ for audio and video of the arrest).
57. The Accused was taken back to the RCMP detachment where he was photographed, swabbed for DNA and placed in a dry holding cell.
58. On April 28, 2017 at 6:00 pm the Accused was taken to hospital by Cst. Hamish of the RCMP in order to seek treatment for an injury the Accused sustained on his hand. The interactions between Cst. Hamish and the Accused were audio recorded (see Appendix ‘M’ for audio).
59. On April 28, 2017 Cst. Harish interviewed the Accused (see Appendix ‘N’ for audio/video and Appendix ‘O’ for the transcript).
60. On April 29, 2017 Cst. Harish interviewed the Accused (see Appendix ‘P’ for audio/video and Appendix ‘Q’ for the transcript).
61. All statements made by the Accused during the course of the RCMP investigation were voluntary.

### **Accused’s Psychiatric Treatment**

62. On July 14, 2017, the Accused was transferred from the Edmonton Remand Centre to Alberta Hospital for NCR assessment and treatment (Physician, Medication, Clinical and Treatment notes are attached as Appendix ‘R’).
63. On February 23, 2018, the Accused was transferred back to the Edmonton Remand Centre.

**DATED** at the City of \_\_\_\_\_ in the Province of Alberta, this \_\_\_\_\_ day of \_\_\_\_\_, 2019.

KDS  
Accused

Marshall Hopkins  
Designated Counsel for the

\_\_\_\_\_  
Jeff Rudiak, Crown Counsel

\_\_\_\_\_  
Trevor Peeters, Crown Counsel