

**SUPREME COURT OF CANADA**

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| **Citation:** R. *v.* Walle,2012 SCC 41, [2012] 2 S.C.R. 438 | **Date:** 20120727  **Docket:** 34080 |

**Between:**

**Adrian John Walle**

Appellant

and.

**Her Majesty The Queen**

Respondent

- and -

**Criminal Lawyers’ Association of Ontario**

Intervener

**Coram:** McLachlin C.J. and Deschamps, Fish, Rothstein, Cromwell, Moldaver and Karakatsanis JJ.

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| **Reasons for Judgment:**  (paras. 1 to 91) | Moldaver J. (McLachlin C.J. and Deschamps, Fish, Rothstein, Cromwell and Karakatsanis JJ. concurring) |

R. *v.* Walle, 2012 SCC 41, [2012] 2 S.C.R. 438

Adrian John Walle *Appellant*

v.

Her Majesty The Queen *Respondent*

and

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**Indexed as: R. *v.* Walle**

2012 SCC 41

File No.: 34080.

2012:  April 13; 2012:  July 27.

Present: McLachlin C.J. and Deschamps, Fish, Rothstein, Cromwell, Moldaver and Karakatsanis JJ.

on appeal from the court of appeal for alberta

*Criminal law — Murder — Elements of offence — Mens rea — Accused convicted of second degree murder after shooting victim in chest at close range —Whether trial judge erred in resorting to common sense inference that person usually knows predictable consequences of actions and means to bring them about without first considering whole of evidence bearing on accused’s mental state at time of shooting.*

*Criminal law — Evidence — Admissibility — New evidence — Accused seeking to admit psychiatric evidence on appeal — Whether evidence could have been adduced at trial with due diligence — Whether evidence could reasonably be expected to have affected result at trial.*

W shot S in the chest at close range with a .22‑calibre rifle and killed him. He was charged with and convicted of second degree murder. The outcome of the trial turned on W’s intent at the time of the shooting. The trial judge, sitting alone, rejected as not credible W’s theory that his act of pulling the trigger was involuntary and that the discharge of the gun had therefore been unintentional. He considered the salient features of the evidence that could have impacted W’s awareness of the consequences of his actions, but was left in no doubt that W was fully aware of the fatal consequences that were likely to follow when he pulled the trigger. He then reverted to the “common sense inference” that a sane and sober person intends the reasonable and probable consequences of his acts, and found that W had the requisite intent for second degree murder.

On appeal, W claimed that in assessing whether he was aware of the consequences of shooting S — and thus possessed one or the other of the specific intents for murder —, the trial judge failed to consider evidence bearing on W’s mental state on the night of the shooting, such as his developmental delays and alcohol consumption. The Court of Appeal dismissed the appeal. It found that no evidence had been led at trial as to W’s mental state that could call into question whether he was able to or did in fact foresee the consequences of his actions when he pulled the trigger.

*Held*: The appeal and the motion to adduce fresh evidence should be dismissed.

A failure of a judge to consider all the evidence relating to an ultimate issue of guilt or innocence constitutes an error of law. However, there is no obligation in law on a trial judge to record all or any specific part of the process of deliberation on the facts. Unless the reasons demonstrate that a consideration of all the evidence in relation to the ultimate issue was not done, the failure to record the fact of it having been done is not a proper basis for concluding that there was an error of law in this respect.

Here, the trial judge did not fail to consider all the relevant evidence. To determine whether the Crown had met its onus of proving that W possessed one or the other requisite intents for murder, the trial judge considered that the rifle was working normally; it had a safety mechanism; it required over six pounds of pressure to fire; W was familiar with the rifle and had previously used it; he knew the gun would fire when he pulled the trigger; he knew the safety was off; he was pointing the gun at S’s chest; he fired from a distance of only five feet; he knew the gun was loaded; he had been drinking but it was clear from the evidence as a whole that he was not impaired. The judge then applied the “common sense inference” and was satisfied beyond a reasonable doubt that when W deliberately pulled the trigger, in the circumstances, he knew that the reasonable and probable consequence was that he would kill S or would cause him grievous bodily harm which he knew would likely cause his death, and was reckless as to whether or not death ensued. At trial, there was no evidence, forensic or otherwise, that could realistically have impacted on the issue of W’s mental state at the time of the shooting. In particular, no evidence was directed at whether in shooting the deceased in the chest at close range, W was aware of — and thus can be said to have intended — the consequences that were likely to follow from his action. Furthermore, W did not suggest that his mental state prevented him from knowing the likely consequences of his acts — nor could he, realistically. The evidence pointed overwhelmingly in the opposite direction. Moments before the shooting, W made it clear to his pursuers that he was aware that the weapon he was holding was lethal. Shortly after, he talked about killing himself with that very weapon. None of the evidence W points to on appeal — his developmental delays, his hospitalization under a mental health warrant, his “blank” affect prior to the shooting, his hand gestures and demeanour while testifying, and the fact that he was waving the rifle around before it was discharged — could have assisted him at trial. While it might have been preferable had the trial judge referred specifically to those items of evidence, he was not obliged to do so. He made no error.

The fresh evidence consisting of a report prepared by a forensic psychiatrist for the sentencing hearing and subsequent testimony, which states that W suffers from Asperger’s disorder, paranoid personality disorder, intermittent explosive disorder, adult antisocial disorder and alcohol abuse disorder, does not meet the test for admission set out in *Palmer v. The Queen*, [1980] 1 S.C.R. 759. Apart from the diagnosis of Asperger’s disorder, there is little evidence in the report that could not have been adduced at the trial. W had long been suspected of suffering from Asperger’s disorder, and medical professionals had noted his social difficulties, aggressiveness, fascination with guns and problems with alcohol for a very long time. A comprehensive report that mirrors the evidence W now seeks to tender had been prepared for sentencing purposes on W’s first trial, yet W made no effort to introduce it at the trial proper. In any event, the evidence, taken together with the other evidence adduced at trial, could not reasonably be expected to have affected the result. It does not suggest that W, by virtue of his diagnosed disorders, may not have been aware of the consequences that were likely to follow upon shooting someone in the chest at close range. Nor does it provide additional information that may have shed light on the unintentional discharge theory advanced at trial.

In jury trials where impairment by intoxication or otherwise might have contributed to the accused’s actions, the common sense inference instruction need not be tied to a rigid formula. While trial judges may choose to refer to the “sane and sober” person, a simple instruction along the lines that a person usually knows what the predictable consequences of his or her actions are, and means to bring them about, would suffice. What is critical is that the jury be made to understand, in clear terms, that in assessing the specific intent required for murder, it should consider the whole of the evidence that could realistically bear on the accused’s mental state at the time of the alleged offence.

**Cases Cited**

**Applied:** *R. v. Morin*, [1992] 3 S.C.R. 286; *R. v. J.M.H.*, 2011 SCC 45, [2011] 3 S.C.R. 197; *Palmer v. The Queen*, [1980] 1 S.C.R. 759; **considered:** *R. v. Daley*, 2007 SCC 53, [2007] 3 S.C.R. 523; **referred to:** *R. v. Seymour*, [1996] 2 S.C.R. 252.

**Statutes and Regulations Cited**

*Criminal Code*, R.S.C. 1985, c. C‑46, s. 229(*a*).

**Authors Cited**

Canadian Judicial Council. *Model Jury Instructions – Homicide*, Offence Instructions, 229.a, 2012 (online: http://www.cjc‑ccm.gc.ca/english/lawyers\_en.asp?selMenu=lawyers\_modeljuryinstruction\_en.asp).

APPEAL from a judgment of the Alberta Court of Appeal (O’Brien, Bielby and Sulatycky JJ.A.), 2010 ABCA 384, 493 A.R. 306, 502 W.A.C. 306, 265 C.C.C. (3d) 27, [2010] A.J. No. 1427 (QL), 2010 CarswellAlta 2408, affirming the conviction for second degree murder entered by Hart J., [2008] A.J. No. 1602 (QL), 2008 CarswellAlta 2333. Appeal dismissed.

*Karen B. Molle* and *Jennifer Ruttan*, for the appellant.

*Jolaine Antonio* and *Kyra M. Kondro*, for the respondent.

*Michael W. Lacy* and *Bradley Greenshields*, for the intervener.

The judgment of the Court was delivered by

Moldaver J. —

I. Introduction

1. The appellant, Adrian John Walle, shot and killed Jeffrey Shuckburgh on the evening of January 7, 2004. He was arrested shortly after the event and charged with second degree murder. He was tried and convicted of manslaughter in 2005, a conviction which was overturned on a Crown appeal in 2007. On April 4, 2008, following his retrial before Hart J. of the Court of Queen’s Bench of Alberta, sitting alone, the appellant was found guilty of second degree murder (2008 CarswellAlta 2333). His appeal from conviction to the Court of Appeal of Alberta was dismissed on December 13, 2010 (2010 ABCA 384, 493 A.R. 306).
2. The appellant now appeals to this Court, with leave. He seeks to have his conviction set aside and a new trial ordered.
3. Central to this appeal is the appellant’s mental state at the time of the offence and, in particular, whether he had the requisite intent for murder when he shot and killed the deceased. That intent consists of an intent to kill or an intent to cause bodily harm that the offender knows is likely to cause death and is reckless as to whether or not death ensues: s. 229(*a*) of the *Criminal Code*, R.S.C. 1985, c. C-46. Fundamentally, the appellant maintains that the trial judge erred in applying the “common sense inference” — that a sane and sober person intends the natural and probable consequences of his or her actions — to find that he had the requisite intent for murder, without first having considered the whole of the evidence bearing on his mental state at the time of the shooting. According to the appellant, had the trial judge considered his developmental delays, in conjunction with his alcohol consumption on the evening in question, he may have entertained a reasonable doubt about the appellant’s intent when he fired the fatal shot.
4. As a fallback position, the appellant seeks to introduce fresh evidence on the appeal consisting of a report and testimony from a forensic psychiatrist prepared for the sentencing hearing. According to the appellant, the evidence bears directly on his mental state at the time of the shooting and it could have affected the result of the trial. He submits that it should be admitted in the interests of justice.
5. For the reasons that follow, I would not give effect to the sole ground of appeal raised by the appellant. Nor would I admit the proposed fresh evidence. Accordingly, I would dismiss both the motion to adduce fresh evidence and the appeal.

II. Background Facts

A. *Evidence at Trial*

1. A detailed review of the evidence is required because, in my view, this appeal is largely fact-driven.
2. The facts giving rise to the murder charge against the appellant are straightforward and, for the most part, uncontested.
3. On January 7, 2004, the appellant, then age 20, shot and killed Jeffrey Shuckburgh, the owner of a local bar in the City of Calgary. The murder weapon was a .22-calibre rifle that the appellant had stolen from his uncle’s farm a few weeks earlier. At the time of the shooting, the appellant was cradling the barrel of the rifle in his left hand and had his right index finger poised to squeeze the trigger. According to eyewitnesses, just before the gun went off, Mr. Shuckburgh was about five feet from the appellant, and the appellant was pointing the gun at Mr. Shuckburgh’s chest. A single shot was fired. It pierced Mr. Shuckburgh’s heart.
4. In the several weeks leading up to the shooting, the appellant had been living at the home of a friend, Michael Stewart, and Michael’s mother, Adina Stewart. Before moving in with the Stewarts, the appellant had been hospitalized for a few days in December 2003 under a mental health warrant. In her testimony, Ms. Stewart described the appellant as having “developmental disabilities”. He was “a little awkward socially” and had “a difficult time obtaining and keeping jobs” (A.R., at p. 107).
5. As indicated, the murder weapon turned out to be a rifle the appellant had recently stolen from his uncle’s farm. To avoid detection, the appellant had modified the rifle by cutting off its wooden stock. He and his friend Michael Stewart fired the gun on a few occasions before the shooting incident. The appellant concealed the weapon under his coat whenever he carried it in and out of the Stewart residence.
6. On the evening of the murder, the appellant and Michael Stewart consumed some beer at home and then headed to a nearby field to shoot the gun. Instead of going to the field, they decided to go to a local bar. The appellant concealed the rifle under his coat so that he could take it inside.
7. While at the bar, the appellant consumed more beer. He would later testify that his level of sobriety changed from “tipsy” to “more so, more drunk or intoxicated” over the course of the evening (A.R., at pp. 148 and 150).
8. A bartender noticed that the appellant was hiding something under his coat and confronted him. The appellant denied the allegation but then said that he was concealing a “pellet gun” (A.R., at p. 153). The appellant was told to leave the gun outside and he agreed to do so. Upon his return, the appellant walked up to the bar and opened his coat to show that the gun was no longer there.
9. The appellant was asked to leave the bar a second time because the staff believed he was disturbing some female patrons. The appellant protested but left without incident. He retrieved his rifle and went to a local convenience store where he purchased and ate a hamburger.
10. Minutes later, he went back to the bar, allegedly in search of Michael Stewart. This time, when he entered the bar, his demeanour was different. He was pacing back and forth. One witness said he seemed nervous. Another testified he appeared “stunned” and had a “blank” look on his face (A.R., at p. 84). The appellant readily admitted at trial that he was “nervous” when he returned to the bar for the third time (A.R., at p. 158): he knew that he was carrying the gun despite having been told that he was not allowed to have it in the bar.
11. A bartender noticed the appellant and escorted him out of the bar when he refused to leave. Mr. Shuckburgh and another employee assisted with the removal. In the process, the gun fell from the appellant’s coat as he crossed the doorway. The appellant grabbed the gun with both hands. Cradling the barrel in his left hand and placing his right hand around the trigger at waist level, he pointed the rifle at Mr. Shuckburgh and the two employees. He slowly started backing down a ramp towards the street, while the bar personnel kept advancing toward him, telling him to “get out of here” (A.R., at p. 40). The appellant later testified that he was not planning to use the rifle: he just wanted to scare the three men who were after him. He said he was getting increasingly “nervous” and “more scared” and worried that Mr. Shuckburgh might find out where he lived and hurt him (A.R., at p. 168).
12. According to the two employees who were with Mr. Shuckburgh, the confrontation seemed over when the appellant suddenly started advancing back up the ramp towards them. At one point, the appellant rested his rifle on the top of a wall, sniper-style, turned it at one of the employees and said “stern[ly]”: “This isn’t just a BB gun” (A.R., at p. 40). The appellant later testified that he did so in order to scare the bar staff.
13. As the appellant eventually started moving back towards the bottom of the ramp, Mr. Shuckburgh continued to walk towards him. By this time, the two other bar employees had fallen back, leaving Mr. Shuckburgh in front facing the appellant. One of the two employees testified that the appellant would not step back unless Mr. Shuckburgh took a step forward.
14. The appellant testified that as he moved off the ramp onto a sidewalk, Mr. Shuckburgh began to walk faster towards him. In turn, the appellant stepped back faster. The next thing he knew, the gun “went up . . . and it went off” (A.R., at p. 177). When asked at trial if he intended for the gun to come up, the appellant replied: “I don’t know. I don’t think so.” Asked to explain what happened, he said: “I don’t know. . . . stupid thing went off” (A.R., at p. 178). The appellant testified that his finger pulled the trigger, but that he did not mean for the gun to go off and did not want to shoot anyone.
15. Mr. Shuckburgh was about five feet away from the appellant when the gun went off. The bullet pierced Mr. Shuckburgh’s heart. The wound proved to be fatal.
16. After the shooting, the appellant ran to the Stewarts’ residence. Ms. Stewart testified that the appellant told her that he had pulled out the gun, pointed it at the man who was advancing towards him and asked the man to leave him alone. As the man kept advancing, the appellant told Ms. Stewart that he panicked: “Something went crazy in my head at that point”, and he pulled the trigger (A.R., at p. 100).
17. According to Ms. Stewart, the appellant initially seemed “dazed” but grew more agitated as he recounted the events that had led to the shooting (A.R., at p. 100). He took out the gun he had been hiding under his coat and began gesturing and waving the muzzle of the gun back and forth. Ms. Stewart testified that the appellant seemed “very upset and very frightened” about what he had done (A.R., at p. 110). At one point, according to Ms. Stewart, the appellant said that “he wanted to kill himself, that he did not want to deal with what the consequences were of this . . . [to] spend years in jail and so on, so he would rather kill himself” (A.R., at p. 104).
18. The police arrived quickly. They found the appellant outside of the Stewart home. He was non-responsive and appeared emotionless. He ignored commands to drop the gun and lie down on the ground and, with a “blank” look on his face, started walking backwards to the house while holding the gun in his right hand (A.R., at p. 116). Ultimately, he had to be tackled.
19. One of the police officers testified that it was apparent that the appellant had been drinking but he was not staggering or slurring his speech. He appeared to understand what was going on around him. In the officer’s view, the appellant was not impaired.
20. At the station, having been arrested for murder, the appellant told an officer that he “didn’t mean to kill [Mr. Shuckburgh] (pause) on purpose” and that he “didn’t mean to shoot anybody” (R.R., at p. 87). He also made suicidal statements and asked an officer to shoot him or to give him his service revolver so that he could shoot himself.

B. *The Position of the Defence at Trial*

1. The defence conceded at trial that the appellant was guilty of manslaughter. The only live issue at trial, according to defence counsel, was the appellant’s intent when he pulled the trigger. As defence counsel explained in his closing submissions:

The theory put forward by the defence is this: that Adrian Walle, on the night in question, in a nervous, shaky, highly agitated state, at a time when he consumed a certain amount of alcohol, and while being almost continually pursued and advanced upon by a numerically superior force, unintentionally discharged that .22 [rifle] at a time when it was pointed at Jeffrey Shuckburgh. [A.R., at pp. 198-99]

1. In urging the trial judge to find that the discharge of the gun was unintentional, defence counsel said that “Mr. Walle, at the time when his finger pressed that trigger, did not mean to pull that trigger” (A.R., at p. 212). In response to a question from the trial judge, defence counsel clarified his position as follows:

Again, the only possible explanation is there was . . . a physical mechanical malfunction of the person of Mr. Walle, that his finger pulled the trigger, but without the brain actively telling the finger to pull the trigger. There was a lack of communication between the brain and the finger. [Emphasis added; A.R., at p. 212.]

1. At a later point in his submissions, defence counsel noted that in assessing the issue of intent, the trial judge was obliged to consider “all the circumstances surrounding this [event]” (A.R., at p. 217). In that regard, one of the factors to be considered was the appellant’s alcohol consumption that night. According to defence counsel, however, the appellant was not “drunk”, nor had he “reached a state of intoxication that made him incapable of forming intent”. As such, the appellant’s alcohol consumption was insufficient of itself to warrant a finding of manslaughter. It was simply “something that goes into the mix” (A.R., at p. 217).
2. Defence counsel further suggested that the appellant’s “highly agitated” emotional state as he was being pursued by the three men from the bar could also have resulted in unintentional discharge (A.R., at p. 217). According to counsel, the appellant is “a man who, at levels of agitation, gets jerky, gets spasmodic, gets mobile with his hands” (A.R., at p. 218) — as evidenced during his testimony on the witness stand.
3. Taking these factors into account, defence counsel submitted, it was at least possible that “this was an unintentional discharge” and that the appellant “never meant to pull that trigger and shoot Jeff Shuckburgh or anyone else” (A.R., at p. 218). Hence, the appellant should be found guilty of manslaughter, not murder.

C. *The Position of the Crown at Trial*

1. The Crown maintained that the appellant was angry and resentful towards the bar staff and he chose to threaten them with the gun when they removed him from the bar for a third time that evening.
2. As for the appellant’s contention that his mind did not go with the act of pulling the trigger (the unintentional discharge theory), the Crown urged the trial judge to find that this theory was something the appellant had concocted in an effort to escape full liability for the crime he had committed. The Crown argued that there was “no medical evidence . . . whatsoever that there is anything wrong with the functioning of Mr. Walle’s brain. Nothing” (A.R., at p. 229). There was also no evidence that the appellant’s alcohol consumption that night had any effect on his ability to think clearly, as demonstrated by his conduct in the bar, the local convenience store, and upon arrest. On that basis, the Crown urged the trial judge to apply the common sense inference and find that the appellant possessed the requisite intent for murder at the time of the shooting.

D. *Judgment at Trial (Court of Queen’s Bench of Alberta) (Hart J.),* *2008 CarswellAlta 2333*

1. The trial judge recognized that the outcome at the trial turned on the appellant’s intent at the time of the shooting. He was fully aware of the appellant’s position, which he summarized in brief compass as follows:

. . . as the accused Walle was backing down the street . . . the deceased suddenly quickened the pace of his advance, at which point the accused hastened his backward retreat, causing the rifle which Walle was pointing at Shuckburgh to discharge accidentally.

The cause of this accident, according to the defence, was Walle’s heightened state of tension and agitation . . . which . . . resulted in a disconnect between his brain and his body, such that he was unable to control the movement of his right index finger, as it squeezed the trigger and fired the lethal shot into the heart of Mr. Shuckburgh. [paras. 6-7]

1. After outlining the Crown’s position, the trial judge reviewed the pertinent evidence and arguments put forward by both sides. In the end, he rejected the appellant’s version of the events surrounding the shooting:

. . . I am satisfied that [the appellant] is a habitual liar, whose evidence is unworthy of belief. . . . With this said, the question becomes: Can the Court believe him when he testifies that the gun went off accidentally? On the whole . . . record before me, I conclude that it cannot.

In my judgment, the accidental discharge theory is no more than that. Not only a theory but a false theory, contrived and concocted by the accused to save himself from the full consequences of his criminal conduct. Thus, as to the evidence of the accused, I reject it as an untruth. I do not believe it and it does not raise a reasonable doubt about his guilt. [paras. 16-17]

1. Having rejected the appellant’s “accidental discharge” theory, the trial judge moved on to determine whether the Crown had met its onus of proving that the appellant possessed one or the other of the requisite intents for murder at the time of the shooting. To that end, the trial judge considered some of the more salient features of the evidence, including the following:

• The rifle was working normally; it had a safety mechanism; it required over six pounds of pressure to fire;

• the appellant was familiar with, and had previously used the rifle; he knew the gun would fire when he pulled the trigger;

• the appellant knew the safety was off;

• at the time of the shot, the appellant was pointing the gun at the victim’s chest;

• the appellant fired from a distance of only five or so feet away;

• the appellant knew the gun was loaded; and

• the appellant had been drinking but it was clear from the evidence as a whole that he was not impaired.

1. After noting these facts, the trial judge applied the “common sense inference” — that a sane and sober person intends the reasonable and probable consequences of his acts — to the facts of this case. He then completed his analysis on the issue of intent as follows:

I am satisfied, beyond a reasonable doubt, that when the accused Walle deliberately pulled the trigger, in the circumstances I have just described, he knew that the reasonable and probable consequence was that he would either cause Mr. Shuckburgh’s death or would cause him grievous bodily harm which would likely cause his death and was reckless, whether death ensued or not. [para. 24]

1. In view of that finding, the trial judge concluded that at the time of the shooting, the appellant possessed the requisite intent for second degree murder. Hence, he found the appellant guilty as charged.

E. *Alberta Court of Appeal (O’Brien, Bielby and Sulatycky JJ.A.), 2010 ABCA 384, 493 A.R. 306*

1. On appeal, the appellant submitted that the trial judge was wrong to have applied the “common sense inference” without first having considered the whole of the evidence bearing on his mental state at the time of the shooting. Had the trial judge considered the appellant’s developmental delays and alcohol consumption, he may well have entertained a reasonable doubt about the appellant’s intent. The Court of Appeal made the following observations about the trial decision:

Having rejected as incredible the appellant’s evidence that he lacked such intent [for second degree murder], the trial judge made no error in inferring intent based on the “common-sense” inference that a sane and sober person intends the natural and probable consequences of his actions. Here the appellant shot the victim, Mr. Shuckburgh, in the chest from a point five feet away. Evidence that the appellant had recently been held in hospital under a mental health warrant, had developmental delays, and had been drinking to a point short of impairment before the killing was insufficient, in and of itself, to lend an air of reality to the argument that he may therefore have lacked the requisite intent to kill.

. . .

No expert or other evidence was led as to the appellant’s mental state or any effect it may have had on his ability to form the intent to kill. Relatively extensive evidence as to his autism and its effects was heard for the first time at the sentencing hearing.

In arriving at the decision under appeal to convict, the trial judge was presented no evidence that the appellant had a diminished capacity to form intent, or either did not or could not foresee the consequences of his actions. [Emphasis added; paras. 2, 15 and 16.]

In sum, having reviewed the record, the Court of Appeal found that no evidence had been led at trial as to the appellant’s mental state that could call into question whether he was able to or did in fact foresee the consequences of his actions when he pulled the trigger. On that basis, the Court of Appeal found no fault with the trial judge’s reasoning and dismissed the appeal.

III. Issues

1. This appeal raises two issues:

(1) Did the trial judge err in resorting to the “common sense inference” without first having considered the whole of the evidence bearing on the appellant’s mental state at the time of the shooting? and

(2) If the trial judge did not err in resorting to the “common sense inference”, should the fresh evidence tendered by the appellant be received in the interests of justice?

IV. Analysis

A. *Issue 1 — Did the Trial Judge Err in Resorting to the “Common Sense Inference”?*

(1) The Trial Judge Correctly Resorted to the “Common Sense Inference”

1. The appellant’s principal argument on appeal is that the trial judge was wrong to apply the “common sense inference” before considering all of the evidence bearing on the appellant’s mental state at the time of the shooting, namely, the appellant’s developmental delays and his alcohol consumption. As will become apparent when I address the proposed fresh evidence under the second issue, the appellant is said to suffer from a number of psychological disorders including Asperger’s disorder, paranoid personality disorder, intermittent explosive disorder, adult antisocial disorder, and alcohol abuse disorder. That said, at trial there was no forensic evidence relating to these disorders — nor, as I shall explain, any other evidence — that could realistically have impacted on the issue of the appellant’s mental state at the time of the shooting. In particular, no evidence was directed at whether in shooting the deceased in the chest at close range, the appellant was aware of — and thus can be said to have intended — the consequences that were likely to follow from his action.
2. That leads me to one of the main problems I have with this appeal, at least in so far as the first issue is concerned. The appellant’s primary position at trial was that there was a miscommunication between his brain and his finger, such that while he did pull the trigger, he did not “mean” to do so (the “unintentional discharge theory”). While the appellant relied on this theory at trial, he improperly characterized it as going to the specificintent required for murder. In fact, the appellant was really claiming that his act of pulling the trigger was involuntary. The trial judge rejected the appellant’s theory as unworthy of belief, and the appellant does not pursue it here.
3. On appeal, the appellant’s focus has shifted. He now claims that the trial judge failed to consider evidence bearing on his mental state on the night of the shooting, such as his developmental delays and alcohol consumption, in assessing whether he was aware of the consequences of shooting Mr. Shuckburgh — and thus possessed one or the other of the specific intents for murder. That is a far cry from the position he took at trial.
4. As I have explained, at trial, the appellant did not suggest that his mental state prevented him from knowing the consequences that were likely to follow upon shooting someone in the chest at close range — nor could he, realistically. The evidence pointed overwhelmingly in the opposite direction. By way of illustration, moments before the shooting, the appellant made it clear to his pursuers that the gun he was holding was not “just a BB gun” (A.R., at p. 40) — a comment that showed that he was aware of his earlier false description of the gun at the bar and equally aware that the weapon he was holding was a lethal weapon. As well, shortly after the shooting incident, the appellant talked about killing himself with the very weapon he had just used to kill Mr. Shuckburgh so as to avoid facing the consequences of what he had done. Not long after that, at the police station, he asked a police officer to kill him with his service revolver.
5. In sum, nowhere in his submissions to the trial judge did defence counsel argue that the appellant was unaware of the consequences of his actions. That is important because it places in focus the appellant’s present complaint, namely, that in relying on the “common sense inference” to find intent, the trial judge failed to consider all of the evidence bearing on the appellant’s mental state at the time of the shooting.
6. Despite this, the appellant now points to various features of the evidence which he says the trial judge should have considered, along with his alcohol consumption, in deciding whether he possessed one or the other of the requisite intents for murder at the time of the shooting. In particular, the appellant submits, at para. 49 of his factum, that the trial judge failed to consider the following items of evidence that may have served, either individually or collectively, to render the common sense inference inapplicable:

• The appellant’s developmental delays;

• his recent hospitalization under a mental health warrant;

• his “blank” affect at the bar prior to his being removed for a third time;

• his hand gestures and demeanour while testifying;

• the fact that he was waving the rifle around before it was discharged.

1. I would not give effect to this submission. The appellant’s chief complaint is that the trial judge failed to consider all the evidence relevant to intent before deciding on that issue. A failure of a judge to consider all the evidence relating to an ultimate issue of guilt or innocence constitutes an error of law:  *R. v. Morin*, [1992] 3 S.C.R. 286, at p. 296; *R. v. J.M.H.*, 2011 SCC 45, [2011] 3 S.C.R. 197, at paras. 31-32. However, as Sopinka J. made clear in *Morin*, there is “no obligation in law on a trial judge to record all or any specific part of the process of deliberation on the facts”, and “unless the reasons demonstrate that [a consideration of all the evidence in relation to the ultimate issue] was not done, the failure to record the fact of it having been done is not a proper basis for concluding that there was error in law in this respect” (p. 296). I see no failure to consider all the relevant evidence in this case.
2. First, the appellant’s evidence about his developmental delays is based on Ms. Stewart’s testimony. Ms. Stewart testified as a lay witness. Her evidence did not address the issue of the appellant’s intent and, more particularly, what impact, if any, the appellant’s “developmental delays” may have had on his awareness of the consequences of firing a bullet into someone’s chest at close range.
3. The evidence of the appellant’s hospitalization on a mental health warrant is equally unhelpful. No evidence was led at trial as to the nature of the health problem or what impact, if any, it may have had on the appellant’s mental state at the time of the shooting.
4. The appellant’s “blank” affect at the bar, as described by one witness, is of little import. The appellant himself admitted to being nervous when he entered the bar for the third time, knowing that he had the gun concealed under his coat. His own evidence shows that he was aware of what he was doing and very much alive to the potential consequences of his actions.
5. As for the appellant’s hand gestures while testifying and the evidence that he was waving the gun around before it discharged, the trial judge was clearly aware of these features. They related directly to the appellant’s primary, if not singular, defence that his act of pulling the trigger was involuntary and that the discharge of the gun was therefore unintentional. The trial judge considered and rejected the appellant’s “unintentional discharge” theory. He found the appellant to be not credible. Accordingly, the appellant was not entitled to have the same evidence taken into account by the trial judge in his assessment of the appellant’s awareness of the consequences of firing a gun at close range into someone’s chest.
6. Finally, the trial judge considered the evidence of the appellant’s alcohol consumption and found that it did not leave him in a state of reasonable doubt as to whether the appellant knew that death would likely result if he shot the deceased in the chest at close range.
7. In short, none of the evidence that the appellant points to could have assisted him at trial on the issue of his awareness of the consequences of firing a gun into a person’s chest at close range. Thus, while it might have been preferable had the trial judge referred specifically to the items of evidence that the appellant has identified, he was not obliged to do so any more than he was obliged to refer to all of the evidence that pointed in the opposite direction — of which there was a good deal.
8. The trial judge considered the salient features of the evidence that could have impacted on the appellant’s awareness of the consequences of his actions. In the end, the trial judge was left in no doubt that the appellant was anything other than fully aware of the fatal consequences that were likely to follow when he pulled the trigger. Only then did the trial judge revert to the “common sense inference” as a basis for finding that the appellant had the requisite intent for second degree murder.
9. I see no error in the trial judge’s analysis or conclusion. Accordingly, I would not give effect to this ground of appeal.

(2) The “Common Sense Inference” Has a Role to Play Even in Cases Where an Accused is Impaired

1. Ordinarily, I would end my discussion of this issue here. However, the intervener the Criminal Lawyers’ Association of Ontario (“CLA”) has raised concerns about the “common sense inference” and its impact on jurors.
2. I propose to address the CLA’s concerns relatively briefly, as they do not bear directly on the case at hand, where there was no jury. To the extent they arise at all, they do so only tangentially.
3. The thrust of the CLA’s submission is found at para. 11 of its factum as follows:

In cases where there is an air of reality to the suggestion that impairment (by intoxication or otherwise) contributed to the accused’s actions, an instruction which incorporates a “sane and sober” common sense inference should never be given. There is a real danger that juries will misuse the inference to incorporate objective *mens rea* into a specific intent offence and fail to focus on the accused’s actual intention at the time of his actions. [Emphasis in original.]

1. With respect, the CLA’s argument runs counter to this Court’s recent decision in *R. v. Daley*, 2007 SCC 53, [2007] 3 S.C.R. 523, in which we reaffirmed the relevance of the common sense inference in particular circumstances. The facts of that case are straightforward. Daley killed his wife after a night of heavy drinking and was charged with first degree murder. At trial, Daley maintained that, as a result of his alcohol consumption, he had no recollection of the events surrounding the death of his wife. He defended the charge of murder on the basis that he lacked the requisite intent by virtue of his alcohol consumption. Daley led expert evidence in support of his position.
2. In his charge, the trial judge instructed the jury on the common sense inference about which the CLA now complains. He also cautioned the jury that they could draw the inference only after considering all of the evidence, including the evidence of the appellant’s alcohol consumption. The jury convicted Daley of second degree murder.
3. On appeal to this Court, one of the issues raised by Daley was whether the trial judge should have gone further than he did in explaining to the jury why the common sense inference might not apply in that case, given his high degree of intoxication.
4. At para. 104 of his reasons for the majority, Bastarache J. reinforced this Court’s admonition in *R. v. Seymour*, [1996] 2 S.C.R. 252, that it was incumbent on trial judges to link the common sense inference to the evidence of intoxication. Bastarache J. then made the following observations about the common sense inference:

It seems to me that it will be necessary to instruct the jury on the common sense inference in most cases, for it assists the jury in understanding how they are to conclude whether or not there was the necessary intent: see *Seymour*, at para. 19. So long as the members of the jury are instructed that they are not bound to draw this inference, particularly in light of the evidence of intoxication . . . I find nothing objectionable about instructions on the common sense inference. I do not think the trial judge must take pains to tell the jury they are not bound to draw the inference where there is evidence of a significant degree of intoxication, as this is a matter of common sense. In this respect, I approve of the comments made by Huddart J.A. in *R. v. Courtereille* (2001), 40 C.R. (5th) 338 (B.C.C.A.), at para. 32:

[The common sense inference] does not die with the first drink. The collective common sense and knowledge of life possessed by twelve jurors is of fundamental importance to the unique value of juries. . . . It is equally good sense and common experience that the effect of alcohol on thought processes is a continuum. . . . The more intoxicated a person becomes, the greater the likelihood that drink will result first in uninhibited conduct, and ultimately in unintended conduct. It is proper to remind the jury that they may use their common sense with respect to this, even if intoxication is advanced, provided the reminder includes the admonition that the inference is permissive and subject to a consideration of the evidence of intoxication. [Emphasis added; para. 104.]

1. In the face of this Court’s recent pronouncement in *Daley*, I see no reason — and the CLA has provided none — for instituting the black and white “thou shalt never” rule the CLA is advocating for jury instructions in cases where the accused might be impaired.
2. In my view, instructing a jury on the common sense inference serves a useful purpose. It provides the jury with a marker against which to measure the rather amorphous concept of intent. A proper instruction also sounds a cautionary note. The jurors are admonished that the inference is permissive, not presumptive, and that before acting on it, they must carefully consider the evidence that points away from it. That is important. Left to its own devices, a jury might too readily turn to common sense for an answer, especially in cases like the present one, where common sense might suggest that anyone who fires a gun into a person’s chest at close range would surely be aware of the consequences.
3. That said, I do not mean to suggest that the common sense inference instruction should be tied to a rigid formula. Thus, by way of example, while trial judges may choose to refer to the “sane and sober” person when instructing a jury on the common sense inference, they need not do so. A simple instruction along the lines that “a person usually knows what the predictable consequences of his or her actions are, and means to bring them about”, would suffice. (See Canadian Judicial Council, *Model Jury Instructions* (2012) (online), at *Homicide*, Offence 229.a, at para. 6.)
4. In the end, what is critical is that the jury be made to understand, in clear terms, that in assessing the specific intent required for murder, it should consider the whole of the evidence that could realistically bear on the accused’s mental state at the time of the alleged offence. The trial judge should alert the jury to the pertinent evidence. How detailed that recitation should be will generally be a matter for the trial judge, in the exercise of his or her discretion.
5. After the jurors have been alerted to the pertinent evidence, they should be told that if, after considering the whole of the evidence, they believe or have a reasonable doubt that the accused did not have one or the other of the requisite intents for murder at the time the offence was committed, then they must acquit the accused of murder and return a verdict of manslaughter.
6. If, however, there is no evidence that could realistically impact on whether the accused had the requisite mental state at the time of the offence, or if the pertinent evidence does not leave the jury in a state of reasonable doubt about the accused’s intent, then the jury may properly resort to the common sense inference in deciding whether intent has been proved.
7. In the instant case, there was no jury. Instead, as discussed above, the trial judge considered the pertinent evidence of alcohol consumption and found that it did not leave him in a state of reasonable doubt as to whether the appellant knew that death would likely result if he shot the deceased in the chest at close range. Only then did the trial judge apply the common sense inference in finding that the appellant had the necessary intent for murder.

B. *Issue 2 — Should the Proposed Fresh Evidence be Received?*

1. Even if the trial judge made no error in considering the evidence adduced at trial, the appellant submits, as a fallback argument, that the fresh evidence he now proposes to introduce on the issue of his mental state at the time of the shooting could reasonably have affected the result at trial. The proposed fresh evidence comes from Dr. George Duska, a forensic psychiatrist. It consists of a pre-sentence report Dr. Duska prepared in 2008 at the appellant’s request for the sentencing hearing before Hart J. following the appellant’s conviction for second degree murder. It also includes Dr. Duska’s testimony from that hearing.
2. In my view, the fresh evidence that the appellant now seeks to tender would not have been of assistance to him on his trial before Hart J.
3. The salient features of Dr. Duska’s report can be summarized as follows. The appellant was suspected of suffering from an autism spectrum disorder as early as 1996. At that time, a psychiatrist suggested that the appellant might be suffering from pervasive development disorder; another psychiatrist considered a diagnosis of attention deficit hyperactivity disorder (ADHD) and oppositional defiant disorder. The appellant attended a mental health program at a junior high school until he was expelled for aggression. In December 2003, shortly before the shooting, the appellant was diagnosed with alcohol abuse, adjustment disorder, pervasive development disorder (possibly Asperger’s disorder), and adult antisocial behaviour.
4. The report went on to state that the appellant has a history of vandalism, lying, and defying rules starting at age 6 and continuing into his adolescent years. He was expelled from junior high school for aggression. Aggressive behaviour was observed after his first admission to hospital and subsequent transfer to a psychiatric centre where he threatened staff and other patients in the forensic unit without any apparent triggers. Dr. Duska testified that he felt physically threatened when interviewing the appellant. The appellant had low frustration tolerance and was unwilling to undergo any type of treatment or therapy in the forensic unit. According to Dr. Duska, the appellant is at a moderate to high risk of reoffending violently within 10 years of being released.
5. In Dr. Duska’s assessment, the appellant suffered from the following five disorders: Asperger’s disorder, paranoid personality disorder, intermittent explosive disorder, adult antisocial disorder (without meeting the full criteria for this disorder), and alcohol abuse disorder. In simple terms, these disorders manifest themselves as follows:

*Asperger’s disorder*: The Asperger’s disorder falls on the higher end of functioning among autism spectrum disorders. The appellant’s IQ is low average. In the appellant’s case, this disorder manifests itself in the appellant’s impaired social interaction, such as his poor use of non-verbal cues, difficulty establishing relationships, preoccupation with certain things like smoking and firearms, as well as repetitive motor mannerisms like facial hair stroking, head jerking, and mouth gestures.

*Paranoid personality disorder*: The appellant is extremely suspicious that others are exploiting or deceiving him and reads demeaning or threatening messages into benign remarks and events.

*Intermittent explosive disorder*: The appellant has difficulty resisting aggressive impulses, where the resultant aggression is grossly out of proportion to any precipitating stressors.

*Adult antisocial behaviour*: The appellant engages in antisocial behaviour and holds antisocial attitudes, but does not meet the full criteria for this disorder.

*Alcohol abuse disorder*: There is a pattern of alcohol abuse suggestive of a disorder, as the appellant’s alcohol consumption has caused impairment in social, occupational, and relationship functioning.

1. I have reviewed Dr. Duska’s evidence in some detail because it is his evidence that forms the basis of the appellant’s fresh evidence motion. The question that must be answered is whether it meets the criteria for admission.
2. The test for the admission of fresh evidence on appeal is well established. It consists of four components, identified in *Palmer v. The Queen*, [1980] 1 S.C.R. 759, at p. 775, as follows:

(1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases: see *McMartin v. The Queen*, [1964] S.C.R. 484.

(2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.

(3) The evidence must be credible in the sense that it is reasonably capable of belief, and

(4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

1. I propose to limit my comments to elements (1) and (4) — due diligence and impact on result at trial.

(1) Due Diligence

1. On the requirement of due diligence, the appellant submits that this factor should not be applied too strictly in criminal cases, especially where the interests of justice favour admitting the evidence. In this case, he argues that Dr. Duska’s diagnosis of Asperger’s disorder was not known until after the trial had ended and that justice favours flexibility in applying the due diligence test.
2. For reasons that will become apparent, my decision to reject the proposed fresh evidence does not turn on the due diligence component. I must say, however, that this case is an egregious example of non-compliance.
3. At the appellant’s trial before Hart J. in 2008 (his second trial on this matter), the psychiatric evidence that he now proposes to introduce as fresh evidence on this appeal was, in substance, available to him — and yet, for reasons unexplained, he made no attempt to lead that evidence on the trial proper. Rather, he chose to introduce it at the sentencing hearing.
4. The same holds true in respect of the appellant’s first trial on this matter which occurred in 2005 and ended in a conviction for manslaughter. (That verdict was later overturned on a Crown appeal and a new trial — ultimately resulting in the present appeal — was ordered.) Notably, at his sentencing hearing for the offence of manslaughter, the appellant had introduced psychiatric evidence that for all intents and purposes mirrors the evidence he now seeks to tender as fresh evidence on this appeal. The appellant made no effort to introduce that evidence on the trial proper.
5. The appellant had long been suspected of suffering from Asperger’s disorder, and medical professionals had noted his social difficulties, aggressiveness, fascination with guns and problems with alcohol for a very long time even if they had stopped short of diagnosing him with this specific disorder. There is no reason why the appellant could not have adduced these prior medical opinions before Hart J. at his second trial. Nor is there any reason why he could not have obtained and adduced a comprehensive report like the one Dr. Duska prepared ahead of his second sentencing hearing. Indeed, he had such a report available to him. It had been prepared by Dr. Singh in 2005 for sentencing purposes following the appellant’s conviction for manslaughter at his first trial.
6. While it is true that Dr. Singh’s report did not specifically mention Asperger’s disorder, it did refer to virtually all of the symptoms identified in Dr. Duska’s report. Thus, apart from the new labelling of the symptoms as Asperger’s disorder, I see little in the supposedly “new” evidence contained in Dr. Duska’s report that could not have been adduced at the appellant’s trial, had the appellant and his counsel thought it helpful. And, as we shall see, there are grounds to think that the evidence might have been unhelpful.
7. This failure to adduce the evidence at trial weighs heavily against its admission in this Court. That said, I would not let it stand in the way of admission if I were otherwise satisfied that the proposed evidence could reasonably be expected to have affected the result at trial.
8. But that is not the case. Despite the appellant’s submissions to the contrary, I am not at all persuaded that the proposed evidence, when taken together with the other evidence adduced at trial, could reasonably be expected to have affected the result.

(2) Could the Proposed Fresh Evidence Reasonably Be Expected to Have Affected the Result at Trial?

1. The main failing of the proposed fresh evidence is that nowhere does Dr. Duska suggest that the appellant, by virtue of his diagnosed disorders, may not have been aware of the consequences that were likely to follow upon shooting someone in the chest at close range. Indeed, Dr. Duska’s report could be read to offer an explanation for the appellant’s conduct in shooting the deceased, namely, a symptom of his intermittent explosive disorder that manifests itself in a “failure to resist aggressive impulses that result in serious assaultive acts” (see p. 8 of Dr. Duska’s report). In other words, the report indicates that the appellant gives in to his aggressive impulses where other persons would not.
2. If Dr. Duska was of the view that the appellant’s disorders may have impacted on his awareness of the consequences of firing a gun into a person’s chest at close range, he could have prepared a report to that effect and filed it on this appeal. He did not do so.
3. Nor did Dr. Duska provide additional information that may have shed light on the “unintentional discharge” theory that the appellant advanced at trial. Nothing in Dr. Duska’s report lends credence to the appellant’s contention that there was a disconnect between the appellant’s brain and his finger that resulted in an involuntary pulling of the trigger. The evidence indicates that the appellant exhibits repetitive motor mannerisms, or what might colloquially be called a “tic” (e.g., facial hair stroking, head jerking). But there is no indication that he cannot control his index finger or that he might have involuntarily used his finger to apply the more than six pounds of pressure required to shoot his gun on the night of the shooting.
4. As for the appellant’s alcohol consumption issue, it tells us nothing about his degree of impairment on the night in question. The trial judge, as discussed, did consider the evidence of the appellant’s intoxication and found that it did not raise a reasonable doubt about the appellant’s intent.
5. In the end, I see no basis for concluding that Dr. Duska’s evidence could have raised a reasonable doubt as to whether the appellant voluntarily shot his gun, or as to whether he possessed the requisite intent for murder.
6. Accordingly, I would dismiss the appellant’s motion to introduce fresh evidence.

V. Conclusion

1. The trial judge, as I have explained, made no error in his analysis or conclusion. I would accordingly dismiss the appeal.

*Appeal dismissed.*

Solicitor for the appellant:  Karen B. Molle, Calgary.

Solicitor for the respondent:  Attorney General of Alberta, Calgary.

Solicitors for the intervener:  Lacy Wilkinson, Toronto.