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2023 BCPC 124

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IN THE PROVINCIAL COURT OF BRITISH COLUMBIA

REX

v.

NATHAN TYLER SPROUT

REASONS FOR JUDGMENT
OF THE
HONOURABLE JUDGE STEWART

Counsel for the Crown:	Jordan Petty
Counsel for the Defendant:	Sarah J. Runyon
Place of Hearing:	Campbell River, B.C.
Dates of Hearing:	October 3, 5, Nov. 30, Dec. 2, 2022 and January 9, 2023
Date of Judgment:	March 14, 2023

INTRODUCTION

[1] On December 7, 2021 an individual wearing a disguise, entered the Campbell River Walmart (the "Suspect"). The Suspect was familiar to the security guards at Walmart as he was believed to be a shoplifter and had previously been asked to leave the store. The security guards did not know the Suspect's name.

[2] The Suspect stabbed[i] and robbed[ii] Ronald Beaven a security guard who worked at Walmart. The Suspect also threatened to use a knife to assault Leanne Szasz[iii], also a security guard working at Walmart. The Suspect also threatened to use a knife to assault George Moczulski and Ronald Kerr[iv], other Walmart customers in the store that day (the "Assaults").

[3] At some time after the Suspect committed the Assaults and left the Walmart with stolen merchandise, a power disruption at the Walmart interfered with the CCTV[v] security systems and no video footage from the store was available.

[4] RCMP forensic identification officers were unable to find useable evidence of fingerprints or other physical evidence. Footwear imprints were taken in the snow, but no footwear was provided for comparison. Canvassing of the neighbourhood did not reveal other CCTV footage.

[5] The Assaults occurred sometime before the dispatch of the RCMP at 10:53 a.m.

[6] At or about 12:42 p.m., RCMP officers investigating this crime located Nathan Sprout near the location where the stolen items had been thrown over a fence (that fence was brambled with Blackberry bushes) onto the property beside the Walmart; Island Furniture.

[7] Cst. Garrett Chow had already taken statements from certain of the eyewitnesses, and was aware that tattoos were observed on the arms of the Suspect.

[8] When Nathan Sprout was located near the location of the stolen items, he was briefly detained and Cst. Chow took photographs of tattoos on Nathan Sprout's arms.

[9] Cst. Chow then carefully compared still images (he obtained from bystander cell phone videos taken during the incident of tattoos on the forearms of the Suspect to the photographs of the tattoos he observed on Nathan Sprout.

[10] Cst. Chow concluded that the tattoos on the bystander video, and the tattoos he photographed on Nathan Sprout were the same. He then notified the detachment that Nathan Sprout was arrestable. Nathan Sprout was located on 16th Avenue, again close to the Walmart, and Nunn's Creek Park.

[11] Nathan Sprout was arrested at approximately 4:53 p.m., on December 7th, 2021 and subsequently charged with these offences.

[12] There is no doubt that the Suspect committed the offences alleged in the information and there is no doubt that the essential elements of the crimes alleged are proven. The sole issue in this trial is whether Nathan Sprout is the individual who committed these crimes.

[13] Evidence in a trial must never be weighed piecemeal. I have carefully reviewed all of the evidence admitted at trial. The analysis of that record benefits from the following structure:

a. The assessment of the eyewitness observations of the Suspect.
b. The assessment of the testimony of Ms. Szasz concerning the following;
    i. Her familiarity with an individual from prior security work doing mobile patrols in Campbell River, (referred to as the "Patrol Individual");
    ii. Her familiarity with the Suspect as someone believed to be a shoplifter who was previously asked to leave the store, and;
    iii. Her process in identifying the Patrol Individual from her patrols, the Suspect, and Nathan Sprout.
c. The assessment of the tattoos observed and photographed on Mr. Sprout and the tattoos on the Suspect captured in the still frames from the bystander videos. This comparison may involve considerations of both direct and circumstantial evidence.
    i. Can the observed, photographed and video imaged tattoos, be proven to be the same actual tattoo – the same inked image on the same skin on the same individual? This would then be direct identification evidence that

the individual who committed the assaults, and captured in the bystander video is Nathan Sprout.

ii. Are the observed, and recorded tattoos the same or a similar tattoo designs? This would be circumstantial evidence – that the same, or similar tattoo designs are observed on both Nathan Sprout and the Suspect who committed the assaults.

d. The assessment of the circumstantial evidence that Mr. Sprout was found close to the location where the stolen items were left near the Walmart by the individual who committed the assaults.

e. Subject to the considerations at a. and b. above, a further assessment of circumstantial evidence may be required; that Mr. Sprout was both:

i. found near the scene, and

ii. has the same or similar tattoo designs to the individual who committed the assault.

GENERAL CONSIDERATIONS OF A CRIMINAL TRIAL

[14] It will be apparent to anyone listening to this introduction that this decision focuses on the record – the evidence tendered and admitted at trial – and the analytical framework for its assessment.

[15] I am aware that this community has an interest in this case. Indeed, its coverage by the traditional news media, as well as its discussion on social media, is of some relevance in this trial.

[16] This community is understandably and deservedly concerned about this degree of unprovoked and severe violence involving the use of a weapon against four people in the middle of the day in a busy public place in Campbell River. One of those victims, Mr. Beaven, nearly lost his life and suffered, and still suffers severe physical and emotional injuries. Ms. Szasz, also a victim of the Suspect, is married to Mr. Beaven, and no doubt suffers the trauma of witnessing the moment when she thought she might lose her life partner to violent crime.

[17] My role as a trial judge must never ignore those concerns. Indeed, I must view evidence through the lens of human experience. I must consider how the testimony of a

witness is impacted by their experience with trauma, or their relationship with a victim. However, the central duties of a trial judge are based in a somewhat rigid discipline.

[18] That discipline begins with the presumption of innocence, and its most fundamental rules;

- that the burden of proving the guilt of the accused is on the prosecution.
- that I must be satisfied beyond a reasonable doubt of the existence of all of the essential elements of the offence.
- AND that I must take care never to inadvertently shift the onus of proof to the accused.

[19] With very limited physical evidence, and the resulting need to consider circumstantial evidence in the identification of the individual who committed these assaults, the duty to remain disciplined here requires that proof beyond a reasonable doubt must not be viewed as an "either/or" choice, and that the evidence must not be weighed piecemeal.

[20] Even if I conclude that Nathan Sprout is probably guilty, or said another way, that Nathan Sprout is more likely to be guilty than innocent, this is not sufficient. I am required to determine whether, on the total body of evidence, viewed as a whole, the Crown has proven beyond a reasonable doubt that Nathan Sprout is the individual who committed these assaults. Short of that degree of proof, the presumption of innocence remains intact.

[21] From the oft quoted passage from *the Queen v. Lifchus*[vi],

> The reasonable doubt standard is a single, objective and exacting standard of proof. It is not the same as a proof of probability, and it is not like subjective standards of care that we apply in important everyday situations.
>
> It is not proof to an absolute certainty. It is not proof beyond any doubt, nor is it an imaginary or frivolous doubt. It is based on reason and common sense, and not on sympathy or prejudice.

[22] Further, proof beyond a reasonable doubt falls much closer to absolute certainty than to proof on a balance of probabilities[vii].

[23] The leading case of *R. v. W.D.*[viii] -- decided before I started law school -- suggests a structure to ensure the required discipline in a criminal trial. It is not some magic incantation, nor does it need be adhered to slavishly, but its suggested approach assists in the parallel duty to explain my decision, so that it may be understood by the accused, the victims, and this community, and so that it may be subjected to appellate review, should it be determined that this decision would benefit from that oversight.

[24] Professor David M. Paciocco, now a Justice of the Ontario Court of Appeal, in his paper, *Doubt about Doubt: Coping with R. v. W(D) and Credibility Assessment*[ix], recast the *W(D)* test as follows:

a) the trial judge who believes evidence that is inconsistent with the guilt of the accused cannot convict the accused;
b) even if the trial judge does not entirely believe evidence inconsistent with guilt, if left unsure whether that evidence is true there is a reasonable doubt and an acquittal must follow;
c) even where the trial judge entirely disbelieves evidence inconsistent with guilt, the mere rejection of that evidence does not prove guilt; and
d) even where the trial judge entirely disbelieves evidence inconsistent with guilt, the accused should not be convicted unless the evidence that is given credit proves the accused guilty beyond a reasonable doubt.

CONSIDERATIONS IN TREATMENT OF CIRCUMSTANTIAL EVIDENCE

[25] Proof in a criminal trial may be based on both direct and circumstantial evidence. However, in the consideration of circumstantial evidence, discipline must be exercised in determining the reasonable inferences to be drawn from those circumstances.[x]

[26] The leading case on the correct approach in the treatment of circumstantial evidence is *R. v. Villaroman* 2016 SCC 33 (CanLII). I include, in its entirety, the following passage from this important case:

> (ii) The Relationship Between Circumstantial Evidence and Proof Beyond Reasonable Doubt

[25] The Court has generally described the rule in *Hodge's Case* as an elaboration of the reasonable doubt standard: *Mitchell*; *John v. The Queen*, 1970 CanLII 199 (SCC), [1971] S.C.R. 781, per Ritchie J., at pp. 791-92; *Cooper*; *Mezzo v. The Queen*, 1986 CanLII 16 (SCC), [1986] 1 S.C.R. 802, at p. 843. If that is all that *Hodge's Case* was concerned with, then any special instruction relating to circumstantial evidence could be seen as an unnecessary and potentially confusing addition to the reasonable doubt instruction.

[26] However, that is not all that *Hodge's Case* was concerned with. There is a special concern inherent in the inferential reasoning from circumstantial evidence. The concern is that the jury may unconsciously "fill in the blanks" or bridge gaps in the evidence to support the inference that the Crown invites it to draw. Baron Alderson referred to this risk in *Hodge's Case*. He noted the jury may "look for — and often slightly . . . distort the facts" to make them fit the inference that they are invited to draw: p. 1137. Or, as his remarks are recorded in another report, the danger is that the mind may "take a pleasure in adapting circumstances to one another, and even straining them a little, if need be, to force them to form parts of one connected whole": W. Wills, *Wills' Principles of Circumstantial Evidence* (7th ed. 1937), at p. 45; cited by Laskin J. in *John*, dissenting but not on this point, at p. 813.

[27] While this 19th century language is not suitable for a contemporary jury instruction, the basic concern that Baron Alderson described — the danger of jumping to unwarranted conclusions in circumstantial cases — remains real. When the concern about circumstantial evidence is understood in this way, an instruction concerning the use of circumstantial evidence and the reasonable doubt instruction have different, although related, purposes: see B. L. Berger, "The Rule in Hodge's Case: Rumours of its Death are Greatly Exaggerated" (2005), 84 *Can. Bar Rev.* 47, at pp. 60-61.

[28] The reasonable doubt instruction describes a state of mind — the degree of persuasion that entitles and requires a juror to find an accused guilty: Berger, at p. 60. Reasonable doubt is not an inference or a finding of fact that needs support in the evidence presented at trial: see, e.g. *Schuldt v. The Queen*, 1985 CanLII 20 (SCC), [1985] 2 S.C.R. 592, at pp. 600-610. A reasonable doubt is a doubt based on "reason and common sense"; it is not "imaginary or frivolous"; it "does not involve proof to an absolute certainty"; and it is "logically connected to the evidence or absence of evidence": *Lifchus*, at para. 36. The reasonable doubt instructions are all directed to describing for the jurors how sure they must be of guilt in order to convict.

[29] An instruction about circumstantial evidence, in contrast, alerts the jury to the dangers of the path of reasoning involved in drawing inferences from circumstantial evidence: Berger, at p. 60. This is the danger to which Baron Alderson directed his comments. And the danger he identified so

long ago — the risk that the jury will "fill in the blanks" or "jump to conclusions" — has more recently been confirmed by social science research: see Berger, at pp. 52-53. This Court on occasion has noted this cautionary purpose of a circumstantial evidence instruction: see, e.g., *Boucher v. The Queen*, 1954 CanLII 3 (SCC), [1955] S.C.R. 16, per Rand J., at p. 22; *John*, per Laskin J., dissenting but not on this point, at p. 813.

[30] …

[31] …

(iii) "Rational" v. "Reasonable" Inferences

[32] …

[33] …

[34]…

(iv)Whether the Inference Must Be Based on "Proven Facts"

[35] At one time, it was said that in circumstantial cases, "conclusions alternative to the guilt of the accused must be rational conclusions based on inferences drawn from proven facts": see *R. v. McIver*, 1965 CanLII 26 (ON CA), [1965] 2 O.R. 475 (C.A.), at p. 479, aff'd without discussion of this point 1966 CanLII 6 (SCC), [1966] S.C.R. 254. However, that view is no longer accepted. In assessing circumstantial evidence, inferences consistent with innocence do not have to arise from proven facts: *R. v. Khela*, 2009 SCC 4, [2009] 1 S.C.R. 104, at para. 58; see also *R. v. Defaveri*, 2014 BCCA 370, 361 B.C.A.C. 301, at para. 10; *R. v. Bui*, 2014 ONCA 614, 14 C.R. (7th) 149, at para. 28. Requiring proven facts to support explanations other than guilt wrongly puts an obligation on an accused to prove facts and is contrary to the rule that whether there is a reasonable doubt is assessed by considering all of the evidence. The issue with respect to circumstantial evidence is the range of reasonable inferences that can be drawn from it. If there are reasonable inferences other than guilt, the Crown's evidence does not meet the standard of proof beyond a reasonable doubt.

[36] I agree with the respondent's position that a reasonable doubt, or theory alternative to guilt, is not rendered "speculative" by the mere fact that it arises from a lack of evidence. As stated by this Court in *Lifchus*, a reasonable doubt "is a doubt based on reason and common sense which must be logically based upon the evidence or lack of evidence": para. 30 (emphasis added). A certain gap in the evidence may result in inferences other than guilt. But those inferences must be reasonable given the evidence and the absence of evidence, assessed logically, and in light of human experience and common sense.

[37] When assessing circumstantial evidence, the trier of fact should consider "other plausible theor[ies]" and "other reasonable possibilities"

> which are inconsistent with guilt: *R. v. Comba*, 1938 CanLII 14 (ON CA), [1938] O.R. 200 (C.A.), at pp. 205 and 211, per Middleton J.A., aff'd 1938 CanLII 7 (SCC), [1938] S.C.R. 396; *R. v. Baigent*, 2013 BCCA 28, 335 B.C.A.C. 11, at para. 20; *R. v. Mitchell*, [2008] QCA 394 (AustLII), at para. 35. I agree with the appellant that the Crown thus may need to negative these *reasonable* possibilities, but certainly does not need to "negative every possible conjecture, no matter how irrational or fanciful, which might be consistent with the innocence of the accused": *R. v. Bagshaw*, 1971 CanLII 13 (SCC), [1972] S.C.R. 2, at p. 8. "Other plausible theories" or "other reasonable possibilities" must be based on logic and experience applied to the evidence or the absence of evidence, not on speculation.
>
> [38] Of course, the line between a "plausible theory" and "speculation" is not always easy to draw. But the basic question is whether the circumstantial evidence, viewed logically and in light of human experience, is reasonably capable of supporting an inference other than that the accused is guilty.
>
> [39] I have found two particularly useful statements of this principle.
>
> [40] The first is from an old Australian case, *Martin v. Osborne* (1936), 55 C.L.R. 367 (H.C.), at p. 375:
>
> In the inculpation of an accused person the evidentiary circumstances must bear no other reasonable explanation. This means that, according to the common course of human affairs, the degree of probability that the occurrence of the facts proved would be accompanied by the occurrence of the fact to be proved is so high that the contrary cannot reasonably be supposed. [Emphasis added.]
>
> [41] While this language is not appropriate for a jury instruction, I find the idea expressed in this passage — that to justify a conviction, the circumstantial evidence, assessed in light of human experience, should be such that it excludes any other reasonable alternative — a helpful way of describing the line between plausible theories and speculation.
>
> [42] The second is from *R. v. Dipnarine*, 2014 ABCA 328, 584 A.R. 138, at paras. 22 and 24-25. The court stated that "[c]ircumstantial evidence does not have to totally exclude other conceivable inferences"; that the trier of fact should not act on alternative interpretations of the circumstances that it considers to be unreasonable; and that alternative inferences must be reasonable, not just possible.
>
> [43] Where the line is to be drawn between speculation and reasonable inferences in a particular case cannot be described with greater clarity than it is in these passages.

SUMMARY OF EYE WITNESS IDENTIFICATION

[27] I have considered the testimony of the civilian witnesses in two categories:

a. Eyewitnesses unfamiliar with the Suspect (the “Bystander witnesses”).
b. Eyewitnesses familiar with the Suspect (Mr. Beaven and Ms. Szasz).

The Bystander witnesses

[28] Mr. Beaven and Ms. Szasz – both believed they were familiar with the Suspect from previous dealings with him in the Walmart.

[29] The remaining witnesses in the Walmart that day did not believe that they were familiar with the Suspect. These Bystander witnesses were Norman Robichaud, Ronald Kerr and George Moczulski. Their descriptions of the Suspect were based solely on their observations that day. Two of them did have the “presence of mind” in a very stressful situation to use their cell phones to obtain video footage of the Suspect. These video recordings proved to be critical in the police investigation of the identity of the Suspect.

[30] Norman Robichaud was shopping in the Walmart when he observed a person in a disguise “zoom by” riding a shopping cart like a skateboard. The individual had a wig on, he thought the wig was purple, and a mask (but this was during Covid so not something necessarily strange), glasses and a hat. Mr. Robichaud confirmed you could not see who it was but that it was odd. He added further detail: The Suspect was not super big, had on black pants, a coat (the description of which he did not remember) and was wearing a toque. He thought the mask was a blue surgical mask.

[31] When he heard someone say that the individual stabbed someone he took out his phone and recorded what he saw on video. Mr. Robichaud’s video was introduced and marked Exhibit 2.

[32] It was confirmed in cross examination that in Mr. Robichaud’s statement to the police, taken within an hour of the incident he provided the following details in his description of the Suspect: Skinny; Roughly 5’8” to 5’10” in height, Age between 16 and 20 (based on his voice), that he had a round tattoo on his right wrist, that his voice was that of “a punk ass kid”, and that he was “Caucasian” or white.

[33] The next Bystander witness was Jerzy Hrynkiewicz-Noczunski. Mr. Hrynkiewicz-Noczunski tried to stop the Suspect from leaving the store and was himself a victim of the violence at Count 4 in the information.

[34] Mr. Hrynkiewicz-Noczunski described the suspect to be disguised, wearing a wig, a mask on his face and wearing a woman's dress. He said at first he thought it was a woman, but knew it was a man when he heard the Suspect's voice. He said further that he could not describe the Suspect that "something was not right with this person,"and understandably, that he was paying more attention to the knife that the Suspect was threatening him with.

[35] The final Bystander witness was Ronald Kerr. Mr. Kerr also tried to stop the Suspect from leaving, standing in front of the shopping cart being loaded with T.V.s and asking the suspect "what do you think you are doing?" He described the suspect muttering and acting in an irrational kind of manner, and that he then came at him with a hunting style knife. Fortunately, Mr. Kerr was able to back away, and the Suspect then took off towards an exit door from the Walmart. Mr. Kerr then witnessed the interaction between Mr. Hrynkiewicz-Noczunski and the Suspect detailed above.

[36] Mr. Kerr also used his cell phone to make a video recording while he observed the door where the Suspect exited the store. Mr. Kerr's cell phone video was introduced and marked Exhibit 3.

[37] Mr. Kerr offered a physical description of the suspect, describing him to be 6 foot tall, "wiry", Caucasian, strong, a black mask, and the long stringy hair that was a wig. He knew the Suspect to be male by his voice. He did notice black tattoos on the right arm of the Suspect, which was the hand brandishing the knife. He said that it started at the wrist and went to the elbow, but that he didn't see what it was.

[38] Understandably the three Bystander witnesses are unable to provide much detail in the description of the Suspect insofar as he was wearing a disguise. There is some degree of consistency between them of a male suspect that is; "tall" – somewhere

between 5’8”, 5”10” and up to 6 feet, “wiry” or “skinny,” Caucasian or white, with a black tattoo on his right forearm.

[39] I note that there are moments in the Robichaud video (Exhibit 2) when the Suspect is standing in the frame of the exit door. No evidence was introduced that the door frame was measured to provide a more accurate measurement of the height of the Suspect.

Eyewitnesses familiar with the Suspect

The testimony of Mr. Beaven

[40] Mr. Beaven believed that the Suspect who stabbed him was someone familiar to him. Mr. Beaven had been working at the Walmart in Campbell River for about a month when the assault occurred. He described his duties to include identifying individuals believed to be shoplifting, and individuals who were known shoplifters, and asking them to leave the store.

[41] Mr. Beaven believed that the Suspect was one of those known or suspected shoplifters that he had previously dealt with and asked to leave the store. He testified that in the preceding month he had several interactions with the Suspect.

[42] Mr. Beaven recalled that on December 2, 2021 he only saw the face of the Suspect for 2-3 seconds.

[43] He knew the Suspect was a male, in part because his wife referred to him as “him” in her radio call advising that she’d been threatened. Mr. Beaven confirmed that he knew the Suspect to be male, by his strength and his voice.

[44] Mr. Beaven testified that in the month that he’d worked security at the Walmart, the Suspect was there two or three times a day, “everyday, *darn near*.” He testified that he knew the individual who stabbed him to be the same person he had repeatedly dealt with in the month prior due to his walk, and a “slouch,” and adding that “all you could ever see was the slits of his eyes.”

[45] Mr. Beaven testified that on December 7, 2021, prior to the stabbing, he was able to watch the Suspect's manner of walking for a couple of minutes. It was through the manner that the Suspect shuffled, that he confirmed him to be the known or suspected shoplifter he had interacted with so often in the month prior to the attack.

[46] Mr. Beaven, also described the Suspect wearing a wig, and knowing it to be a wig, because he'd dealt with him on prior occasions when he wasn't wearing one. Asked about the suspect's hair on those prior occasions when he'd seen it, he said it was dark hair, shoulder length.

[47] This description is inconsistent with Nathan Sprout, at least as of December 7th, 2021 when he was first detained by the RCMP. When Nathan Sprout was detained and later arrested his hair was clipped short.

[48] With respect to the Suspect's voice he was asked about an accent, and whether English may not have been his first language, he initially agreed with this. Ultimately, it was clarified that that Mr. Beaven identified the Suspect's voice as distinctive – not that it had an accent. This aspect of Mr. Beaven's testimony in direct may have revealed a degree of suggestibility.

[49] Mr. Beaven remembered that before the Suspect stabbed him he had said "I'm gonna stab you," "I'm going to kill you." He added that that Suspect had also told him this a few times when he was outside (understood to be a reference to earlier in the day or on prior occasions when Mr. Beaven had asked him to leave the store). Mr. Beaven added that in his prior dealings with the Suspect, when he was told to leave the Walmart, the Suspect said go "F" yourself."

[50] Mr. Beaven had no recollection of the Suspect's clothing on December 7, 2021.

[51] Mr. Beaven had not ever learned the name or identity of the individual he became familiar with in the month prior to the stabbing. On each of those numerous prior dealings – telling the individual to leave the store, that individual had always worn a mask so that "only the slits of his eyes were visible."

[52] After the stabbing, Mr. Beaven remained in hospital for about four days. It was confirmed in cross-examination that Mr. Beaven gave a statement to the police on December 8, 2021 when he was still in hospital.

[53] When he gave his statement he said that he didn't have any idea who stabbed him. Mr. Beaven clarified this in his testimony saying that he didn't know his name.

[54] In his statement, Mr. Beaven described the individual as about five feet tall. He said that he made a mistake that he should have said, 5'6" or 5'8", adding that he was under medication and he wasn't clear. He added that when he remembered seeing the Suspect walking; "he was taller." This description of the Suspects' height is consistent with the Bystander observations.

[55] Mr. Beaven confirmed that he described the Suspect as "native," and that his head and his whole face was covered.

[56] Mr. Beaven added that the Suspect "hardly talks to anybody," – clarifying that he would swear when he was told to leave the store.

[57] Mr. Beaven in cross-examination confirmed that he knew the Suspect by the way that he walked. He was unsure where the Suspect lived and could not identify any vehicle associated with the person. Again, it was confirmed in cross that Mr. Beaven did not know the name or identity of the individual who stabbed him.

[58] With respect to any identifying marks on the Suspect, Mr. Beaven did not know whether or not the Suspect had any tattoos. He did not believe he had seen any, recalling that the Suspect was always covered. However, with respect to his general observations of tattoos on customers in Walmart, Mr Beaven added, "we've got lots in there with tattoos," and added; "Lots of people who come into the store with tattoos yeah."

The testimony of Ms. Szasz

[59] Leanne Szasz was working as a security guard with Ronald Beaven at the Walmart on December 7, 2021. In December 2021 Ms. Szasz had been employed as a

security guard for 7 years. Mr. Beaven and Ms. Szasz have also been married for over 14 years.

[60] About one year prior to this incident, Ms. Szasz had been working for a different security company and was conducting mobile patrols in Campbell River. In that role, she would drive around Campbell River patrolling certain locations and, when necessary, removing people she understood to be homeless from loitering in those locations.

[61] In her testimony she described two persons she came to be familiar with in her roles as a security guard: One person she became familiar with in her work doing mobile patrols (the "Patrol Individual"). One person she became familiar with working as a security guard at Walmart (the "Suspect").

[62] The Patrol Individual was one of the people she encountered loitering at or near a professional building behind the 7-11 in Campbell River. She understood the Patrol Individual's name to be "Nate." Nate would gather with other people she understood to be doing drugs. She believed she had encountered "Nate" half-a-dozen times "for sure." She described Nate to be indigenous, not "all that tall," skinny, with eyes that drooped down, and he hunched over. She confirmed that she had an opportunity to take a close look at "Nate's" face in the course of her encounters with him. She specifically noted Nate's eyes, describing them to "droop, downwards toward his upper cheek." She concluded that Nate was indigenous, based on his facial features and skin colour. With respect to his skin colour she said that it was darker than Caucasian, no red tones or yellow tones, and a medium brown.

[63] The Suspect was described by Ms. Szasz to be someone familiar to her and Mr. Beaven as a known or suspected shoplifter who was not permitted to be in the store. She testified that on the morning of December 7, 2021 the Suspect approached one of the entrances and Mr. Beaven approached him outside the entrance and reminded him that he wasn't supposed to be inside the store, and to turn around and leave – which he did. This is consistent with Mr. Beaven's recollection of the Suspect speaking threateningly to him outside when he was asked to leave earlier that morning.

[64] Ms. Szasz testified that about an hour later, the Suspect returned to the store. She said she recognized him by the way he walked and that he was the same person her husband had told to leave at the entrance about an hour earlier. She recalled that she radioed Mr. Beaven, and said that she thought the Suspect had re-entered, and that she was going to confirm his identify. She recalled that the individual had changed the green camouflage rain gear he had been wearing an hour earlier, and was now wearing a wig. She followed the Suspect, and believed he was evading her, but she approached close and looked under his hat, up into his eyes, and confirmed it was the same person who had been there earlier but had since changed his clothes.

[65] Ultimately, it is this unnamed individual, who is known to both Ms. Szasz and Mr. Beaven through their prior dealings with him at the Walmart, who commits the crimes referenced in the information, including threatening Ms. Szasz and stabbing and robbing Mr. Beaven.

[66] Ms. Szasz testified to making a point to get close enough to look into the eyes of the Suspect to be 100% sure it was the same person that she had identified an hour earlier that morning. She confirmed that she maneuvered herself so that she could get a good look at his face, and bent down so that she could look up under the bangs of his wig so that she could get a good look at his eyes. She confirmed that she was 2 to 3 feet away from the Suspect when she looked into his eyes.

[67] Ms. Szasz confirmed that she had seen the Suspect numerous times before. She also testified that she recognized the Suspect's voice from him swearing at her on previous occasions.

[68] When Ms. Szasz gave her statement to the police on December 7, 2021 Ms. Szasz was clear that she did not know the name of the person she was familiar with from her patrols at Walmart – the Suspect who had just stabbed her husband.

[69] At no time did she suggest that the Suspect was also someone she was familiar with from her mobile patrol work, the Patrol Individual known as Nate.

[70] The only available inference is that as of December 7, 2021, Ms. Szasz had made no connection between the Suspect and the Patrol Individual.

Nathan Sprout is identified as the person arrested for these assaults.

[71] On December 7, 2021 Nathan Sprout was arrested for these crimes. Sometime shortly after his arrest this was reported in local news media. Constable Chow confirmed that the RCMP media relations officer had spoken to the media about these assaults.

[72] While no such news reports were introduced as exhibits at trial, it was not controversial that Mr. Sprout's name as the person arrested for these assaults was in the public realm.

[73] Mr. Beaven agreed that in the aftermath of the assaults, they received considerable media coverage. He confirmed that while he does not watch Chek news, he thought that the story might have been on Global T.V. In general he was aware that Nathan Sprout's picture had been in the media. He said that he never did see a picture, but that he went looking for it, having heard that it was on Facebook. He confirmed that to his knowledge his wife used Facebook.

[74] In a pre-trial interview with Crown counsel, Mr. Kerr stated that he believed that Nathan Sprout's picture had been "floating around" on Facebook. He said that the name of the person arrested for these assaults came up and that there was a picture identifying the person. Mr. Kerr, himself, did not remember the picture.

[75] My notes of Ms. Szasz' testimony in direct on her exposure to information concerning Mr. Sprout prior to participating in a photopack investigation in March 2022 include the following;

iii. Prior to viewing the photopack she was aware of the name of the person arrested; Nathan Sprout.

iv. She was made aware of this by a previous co-worker who worked with her on the mobile patrols. The co-worker stated that Nathan Sprout was "Nate" – the Patrol Individual referenced above.

v. Ms. Szasz questioned the co-worker about who he was talking about, because she didn't make a connection between "Nate" and Nathan Sprout.

vi. Ms. Szasz also admitted to viewing news media in the days and weeks after the incident, and recalled that there was coverage in the news media. She confirmed that Nathan Sprout was named in the news media.

vii. Ms. Szasz was then asked whether, prior to participating in the photo line-up, had she seen any photographs of Nathan Sprout. I have re-listened to this carefully in the DARS recording at trial. The pause before Ms. Szasz answered was 12 seconds.

viii. I find that this is a long pause before answering a question. One inference may be that a witness is taking care with their oath. The inference I drew was that Ms. Szasz understood the significance of the question, and was hesitant to answer.

ix. After this long pause, Ms. Szasz answered; "I can't say for sure."

x. When asked if she had ever gone looking for a photograph of Nathan Sprout she said "no." When asked if she had ever seen any photos of Nathan Sprout on a particular Facebook group, she said "I don't recall, I'm not sure if I was a member." She did concede that it was possible that she had seen Nathan Sprout's picture on the news. She added, "I'm not sure whether the media had photographs in some of the media stories or not, I don't remember."

[76] In direct examination, Ms. Szasz never denied seeing a photograph of Nathan Sprout either in the traditional news media or on social media, at most her answers were that she did not recall or that she was not sure.

Ms. Szasz' Photopack Identification

[77] On March 14, 2022, Ms. Szasz attended the Campbell River RCMP detachment to review a "Photopack" consisting of photographs of ten individuals.

[78] Again, I have carefully reviewed the video of the administration of the photopack.

[79] Ms. Szasz pauses in her review of photo 2 and says "I might have to come back to this one," and moves the photo to set it to the side of the table. She says of photo 2 that "he's moving his lips there." When I look at Photo 2, in the photopack I infer Ms. Szasz' comment to be a reference to the "askew" mouth of the individual in that photo. Every other photo in the photopack Ms. Szasz quickly "dismisses" flipping them over almost immediately.

[80] When Photo 9 is shown she says “yep” immediately, flips it over and signs it. The officer says “so that’s a positive ID on that one,” and as the officer says this, Ms. Szasz reaches out for the next photo, and flips it over almost instantaneously. Ms. Szasz does this without ever returning Photo 9 to the officer. She then looks back at Photo 9 (that she’s held onto and appears to study it further). She say’s “I’m not doubtful, I just want to look at the photo again when you are done.” She then says, “I don’t know if you can tell me is this his mug shot, then she comments to herself; “no it wouldn’t be.”

[81] The officer leaves the room, then comes back and, confirms that Ms. Szasz made a positive identification, and asks “can you tell me why you think it’s him?” Ms. Szasz then covers the bottom half of his face (below his nose) with her hand on the photo and says that “it’s totally because of his eyes … I know those eyes” She adds – that the only way I would identify him when he came into the store was with his eyes (explaining that the people in the store were always covering their faces), and said whenever I saw him, I would be sure that it was him, but that she would bend down and look under the brim of his hat, and that it was the eyes that made her sure it was him.” The officer then states that he will double check with Cst. Chow just to make sure that there isn’t anything else he needs you for on the way out.

[82] I note that Ms. Szasz is never taken back to photo 2, the photo she’d earlier indicated she might need to come back to. By my observation, the only two photos that are similar in the Photopack are Photo 2 and Photo 9. Of note is that it is the appearance of the person’s mouth in Photo 2 that causes Ms. Szasz to hesitate, and seek to look at that photo again. This is of some relevance, insofar as Ms. Szasz indicates that she only ever saw the slits of the eyes of the Suspect - between a mask or bandana (presumably covering from the nose down, and under the brim of a hat).

Ms. Szasz’ In-court Identifications

[83] Ms. Szasz recalled that the Suspect had a tattoo on the top of his hand or wrist area on his right arm. She said that she had observed this when the Suspect reached

up to grab certain of the stolen items. She was 10 feet away when she made this observation.

[84] She described the tattoo to have a "flat edge, and a "kind of swirl, cobra like." She believed that it was a blue black or "blacky green," and that she saw it for about 5 or 6 seconds.

[85] She was then asked to look at the tattoos on Nathan Sprout in court. Ms. Szasz said that it was not the same, that what she had observed on the Suspect come down further on the top of his hand. She was then asked to look at the tattoos on Nathan Sprout's left arm, again, she hesitated, and said that "it's different, but the location, the placement" is where she saw the Suspect's tattoo. She also said that she did not see in the tattoos on Nathan Sprout, what she described as a "spiral-type" pattern in the tattoos on the Suspect.

[86] Ms. Szasz was most certain about the Suspect's eyes that she described as distinctive, describing them to droop, like a sideways teardrop. She also described the Suspect's skin tone to be a light brown.

[87] In my review of the photos of Nathan Sprout taken on December 7, 2021, I can see how his eyes may be described as distinctive – but from my observation, this is so mostly because of their dark appearance in the photos rather than their shape. As to his skin tone, I can't say that either in the photos from December 2021, or in his appearance in court at trial, that his skin tone was anything but the "light pink" colour, incorrectly referred to colloquially as "white." The only thing distinctive about his skin in the photos were his freckles – prominent on his nose and brow line.

Ms. Szasz' testimony in cross-examination

[88] During the cross-examination, it was established that Ms. Szasz participated in a Facebook discussion group called "Campbell River Rant, Rave and Randomness."

[89] It was further confirmed that on December 13, 2021 Ms. Szasz posted to that discussion group the following:

> Unbelievable the courts let the Walmart stabber thief out. He wasn't allowed to be in Campbell River. To no surprise, he was picked up, back in Nunn's Creek, and put in custody again. So disheartening. Does someone have to actually die in order for them to start taking these events seriously, and keep these criminals in jail.

[90] The post itself is understandable. Ms. Szasz is the spouse of a victim of violent crime. She herself is also a victim of the Suspect's threats to her. This community is deservedly concerned about such violence.

[91] The relevance of the post is only that Ms. Szasz was engaged with, and following, the story of hers and her husband's suspected assailant on social media. It is confirmed with Ms. Szasz that there were then 171 comments on her post. Included in those comments were posts naming Nathan Sprout and at least one post by a follower that he "just looked up his profile", and posting what appeared as Nathan Sprout's profile photo on Facebook.

[92] As indicated above in the review of Ms. Szasz direct evidence, she never denied seeing Nathan Sprout's photo, merely that she was not sure, and that she did not recall.

[93] Having reviewed with Ms. Szasz the comments made to her own Facebook post on December 13, 2021, including the reference to Mr. Sprout's photo, (and it is clear, none of the Facebook comments were marked as exhibits at trial) the only reasonable inference is that Ms. Szasz did see Mr. Sprout's photo during this period.

[94] It is then suggested that Ms. Szasz reviewed the Facebook comments to her post before she went and identified the photograph of Nathan Sprout in the photopack. Again, Ms. Szasz did not deny this, she said "I don't know if I read all of the comments, I mean I would have read some but I don't know if I read them all."

[95] Ms. Szasz is then reminded that Cst. Chow specifically asked her whether she had seen the photo of the person arrested before attending the photopack, and that she had told Cst. Chow that she had not seen this individual's photo on social media. When it is suggested to Ms. Szasz that her statement to Cst. Chow was not true, she

answered; “I, I … My mind was so messed up, I don’t recall. I didn’t recall at the time whether I had seen it or not. I can’t remember.”

[96] It was further confirmed with Ms. Szasz that during her first pre-trial interview with Crown Counsel, she had said nothing about viewing Nathan Sprout’s Facebook profile picture, posted on the discussion forum.

[97] It was then suggested that when Ms. Szasz went to participate in the Photopack identification that she was expecting to see a picture of Nathan Sprout that resembled the photo in the Facebook posting. This was denied by Ms. Szasz.

ANALYSIS OF THE EYEWITNESS IDENTIFICATION EVIDENCE

Guidance from other decisions:

[98] The discipline required in the assessment of eyewitness identification evidence is well canvassed in Canadian case law. In making this decision I read a number of decision that repeated those familiar cautions;

[99] In *R. v. Edwards*, 2022 ONCA 78 (CanLII), the court writes:

> [22] Concerns over the reliability of eyewitness identification evidence have been recognized in a number of cases. As Epstein J.A. stated in *R. v. Jack*, 2013 ONCA 80, 302 O.A.C. 137:
>
> > [13] The dangers inherent in eyewitness identification evidence and the risk of a miscarriage of justice through wrongful conviction have been the subject of much comment. Such evidence, being notoriously unreliable, calls for considerable caution by a trier of fact.
> >
> > [14] It is essential to recognize that it is generally the reliability, not the credibility, of the eyewitness' identification that must be established. The danger is an honest but inaccurate identification.
> >
> > [15] The jury must be instructed to take into account the frailties of eyewitness identification as they consider the evidence relating to the following areas of inquiry. Was the suspect known to the witness? What were the circumstances of the contact during the commission of the crime including whether the opportunity to see the suspect was lengthy or fleeting? Was the

> sighting by the witness in circumstances of stress? [Citations omitted.]

[100] In *R. v. Admasu*, 2021 ABQB 150 (CanLII), the court writes:

> [46] It has long been recognized that eyewitness identification is a notoriously frail source of evidence that carries with it a danger of wrongful conviction. The danger is enhanced because the honesty and sincerity of the witness can make the evidence "deceptively credible": ***R v Hibbert***, 2002 SCC 39 at para 50-53. This principle was also expressed by the Alberta Court of Appeal in ***R v Atfield***, 1983 ABCA 44 at para 3:
>
> > The authorities have long recognized that the danger of mistaken visual identification lies in the fact that the identification comes from witnesses who are honest and convinced, absolutely sure of their identification and getting surer with time, but nonetheless mistaken. Because they are honest and convince, they are convincing, and have been responsible for many cases of miscarriages of justice through mistaken identity.

[101] In *R. v Gilbert,* 2022 BCSC 1352 (CanLII), the court writes:

> **Applicable Legal Principles— Identification**
>
> [238] …
>
> [239] Eyewitness identification is subject to inherent frailties calling for special scrutiny of such evidence. The dangers are acute because inaccurate identifications are often made by sincere and confident witnesses who are mistaken. It is important to keep in mind that a witness' confidence does not ensure the accuracy of their identification: *R. v. Ambrose,* 2015 ONCJ 813 at para. 4 [*Ambrose*].
>
> [240] In *R. v. Miaponoose* (1996), 1996 CanLII 1268 (ON CA), 30 O.R. (3d) 419 (C.A.) [*Miaponoose*] Justice Charron (as she then was) addressed the issue with a particular focus on the nature of human memory as follows:
>
> > Eyewitness testimony is in effect opinion evidence, the basis of which is very difficult to assess. The witness's opinion when she says "that is the man" is partly based on a host of psychological and physiological factors, many of which are not well understood by jurists. One example is pointed out by the Commission (at p. 10):
> >
> > > Simply by way of illustration, psychologists have shown that much of what one thinks one saw is really perpetual filling-in. Contrary to the

> belief of most laymen, and indeed some judges, the signals received by the sense organs and transmitted to the brain do not constitute photographic representations of reality. The work of psychologists has shown that the process whereby sensory stimuli are converted into conscious experience is prone to error, because it is impossible for the brain to receive a total picture of any event. Since perception and memory are selective processes, viewers are inclined to fill in perceived events with other details, a process which enables them to create a logical sequence. The details people add to their actual perception of an event are largely governed by past experience and personal expectations. Thus the final recreation of the event in the observer's mind may be quite different from reality.
>
> Witnesses are often completely unaware of the interpretive process whereby they fill in the necessary but missing data. They will relate their testimony in good faith, and as honestly as possible, without realizing the extent to which it has been distorted by their cognitive interpretive processes. Thus, although most eyewitnesses are not dishonest, they may nevertheless be grossly mistaken in their identification.
>
> While the circumstances surrounding the witness's identification can be subject to scrutiny in cross-examination, many of the more subjective processes that have led to it are impossible to expose in this fashion.

[241] The evidence must be subject to strict scrutiny having regard to the conditions under which the observation was made including the duration of the observation, lighting and anything that might have impaired the witness' ability to make an accurate observation, and the ability of the witness to discriminate between individuals, to observe and to recall details. In doing so, the court should ask:

> a) whether the witness was in a situation of stress at the time;
>
> b) whether the individual was known to the witness and if so, the extent and timing of their earlier dealings;
>
> c) whether the witness provided a detailed description of the accused as opposed to being generic and vague;

> d).whether there are any discrepancies between the description provided and the appearance of the accused;
>
> e). whether there was any intervening event that could have contaminated the identification; and
>
> f) whether there is other evidence that can provide independent confirmation.

See *Ambrose*; *R. v. Gonsalves*, 2008 CanLII 17559 (ON SC), [2008] O.J. 2711 at paras. 37–39 (S.C.J.) [*Gonsalves*]; *R. v. Virk*, 2015 BCSC 981 at para. 117.

…

[244] The police have a duty to ensure the integrity of the identification process, as Charron J.A., as she then was, noted in *Miaponoose* at 453:

> … it is clear that the police also have a duty to ensure the integrity of the identification process. Their role indeed may be most important of all since they are usually in control of the methods chosen to recall or refresh the memory of eyewitnesses. While it may not be possible to improve upon the reliability of a witness's original perception of a person, it is crucial that procedures which tend to minimize the inherent dangers of eyewitness identification evidence be followed as much as possible in any given case. Irreversible prejudice to an accused may flow from the use of inappropriate police procedure and, unless adequately counterbalanced during the course of the judicial process, may result in a serious miscarriage of justice.

[245] However, the failure of the authorities to follow the proper procedures in the identification process does not result in an automatic exclusion of the identification evidence. The appropriate approach was set out in *R. v. Doyle*, 2007 BCCA 587 at para. 13:

> The admissibility and weight of lineup identification evidence will fall to be assessed in individual cases having regard to all the circumstances. The governing consideration must always be whether identification procedures have been fairly conducted by investigators.

[246] With respect to the maintenance of the integrity of the photo line-up procedures, The Honourable Peter Cory recommended in *The Inquiry Regarding Thomas Sophonow: The Investigation, Prosecution and Consideration of Entitlement to Compensation* (Winnipeg: Manitoba Justice, 2001) that a police officer should not speak to an eyewitness after showing them a photo pack regarding their identification or their inability to identify anyone. As cited by Justice Hill in *Gonsalves* at para. 52, “[t]his

> can only cast suspicion on any identification made and raise concerns that it was reinforced."

[102] Crown was very fair in closing submissions to describe Ms. Szasz as an interesting and challenging witness, and urged the court to scrutinize her evidence carefully.

[103] Of particular significance here is the consideration of the intervening events that could have contaminated the identification.

[104] I find I cannot believe that Ms. Szasz did not see Nathan Sprout's photograph either in the traditional news media, or social media, or both. In particular, I find it improbable that she did not see Nathan Sprout's photograph on Facebook, when it was attached to comments responding to her own post in late 2021.

[105] Ms. Szasz was understandably expressing her frustration, and seeking the support of her community using social media. In their support of her, and each other, the person arrested and charged with these assaults was identified with his Facebook profile picture.

[106] I find that it would be unsafe to view Ms. Szasz identification of Nathan Sprout's photograph within the Photopack, as an identification of the Suspect. She was clear that she had never seen the Suspect's face. She had only ever seen his eyes, his face was always covered by a mask.

[107] At no time prior to being contacted by her former mobile patrol co-worker (at some time after Nathan Sprout's arrest was in the media) had she ever drawn any connection between the Patrol Individual, known as Nate, and the Suspect. Indeed, in her recollection of when she was told by her former co-worker that Nathan Sprout is "Nate," it is apparent that even then, she did not make an immediate connection.

[108] It is unfortunate that Ms. Szasz did not advise Cst. Chow of the discussion with her former co-worker, or of her social media involvement, and any possible prior exposure to photographs of the accused. Had Cst. Chow been aware of the extent of

Ms. Szasz' likely exposure to Nathan Sprout's photograph, he would have had an opportunity to better protect the integrity of the Photopack identification.

[109] What is equally clear in this assessment of Ms. Szasz' testimony is that she is not merely a witness, she is a victim of violent crime, both directly, and in witnessing the attack on her husband.

[110] Our justice system is trying better to understand the varied experiences of victims of trauma. It is understandable that a victim would seek information about their assailant. Not knowing the identity of a perpetrator, not knowing whether they have been apprehended, not knowing whether you may encounter them again, may all be in the minds of those exposed to random public violence. In this regard, it is entirely understandable that a victim would read the news, and would read and participate in their communities' concerns and support on Facebook.

[111] I find that Ms Szasz' testimony identifying Mr. Sprout, whether in the photopack or this courtroom is not credible. I do not find that this is dishonesty. Ms. Szasz may well have convinced herself that her identification is based on her recollection, independent of the intervening events of her conversation with a co-worker, and probable review of photographs of Nathan Sprout. Her desire for certainty is human, and it is understandable. It is this process of trial that must provide the necessary safeguards against any associated risks of misidentification.

[112] In this regard I pause to note Crown Counsel; Mr. Petty's demonstrated clear understanding of his duties in this regard. When submissions were made on the admissibility of the evidence of Ms. Szasz' prior conversation with her co-worker, which I found to be an intervening event critical to the assessment of this identification evidence, Mr. Petty acknowledged that this evidence was important to explore because of all of the frailties of eyewitness identification. He conceded that Ms. Szasz may have been suggestable, and that this evidence may weaken the identification. He asked that the court consider what may have been put in her mind that jogged her memory, or whether "she was led down the garden path" by this.

[113] What then is equally important is that police investigations identify and recognize this new reality, in particular, the presence of social media. Ms. Szasz and other victims might be better prepared to understand the impacts of such intervening events and exposures to an identification case such as this, and the investigators might then be better able to assist in preserving the reliability of later identifications.

[114] Indeed in this case for the photopack to have had more probative value, it may have been better to have each of the individuals' faces covered, and only shown their eyes. Had this been done, the process may have "immunized" the photopack, from the contaminating effect of the prior photographic identification of the accused.

[115] At most, the identification of Photo 9 in the photopack, is Ms. Szasz' identification of the Patrol Individual known as Nate. It is more likely only the identification of the photograph of Nathan Sprout she more than likely saw on social media.

[116] I find that the photopack identification and the in-court identification are unreliable. I find that it would be unsafe for me to give that evidence any weight.

[117] The overwhelming inference is that in the numerous interactions at Walmart between Mr. Beaven, Ms. Szasz and the Suspect in the month proceeding December 7, 2021, – at no time did Ms. Szasz make any connection between the Suspect and the Patrol Individual, known to her as Nate. In submissions, Crown made the point that she is a professional witness, trained to make reliable observations. With this training she did not identify the Suspect as Nate – the individual known to her through her mobile patrols.

[118] It is just as clear that Mr. Beaven had no idea who the Suspect was. This is further evidence that Ms. Szasz made no connection between the Patrol Individual and the Suspect. Otherwise, given her close relationship with Mr. Beaven – she would have told him that the Suspect was familiar to her from her prior work on mobile patrols.

[119] I find that at no time prior to December 7, 2021 had Ms. Szasz made any connection between the Patrol Individual, known as Nate, and the Suspect. She did not recognize them to be the same person. These were two individuals, both of whom she

had degrees of familiarity with, and she believed she could recognize. The strongest inference is that on December 7, 2021 Ms. Szasz did not think that the person she knew as Nate, was the Suspect.

[120] What remains in terms of identification evidence is a description of a skinny male with light brown skin, possibly indigenous, but also (as described by one witness) "possibly a Canadian white guy kind of deal," somewhere between 5'8 and 6', with long dark hair, with tattoos on both arms. With respect to those tattoos, most significantly we have the still photographs of those tattoos taken from the bystander videos.

ANALYSIS OF THE TATTOOS

[121] In order to discuss the evidence concerning the tattoos it is necessary to differentiate between a tattoo, and a tattoo design. I will refer to skin with ink inserted into the dermis as a "tattoo." I will refer to the image, or art that is applied by tattooing the skin as the "tattoo design." Using this language, I will turn to the separate assessments of;

i. Whether it has been proven that the still images from the bystander video of the Suspects' tattoos are in fact Nathan Sprout's tattoos, or
ii. Whether the Suspects tattoo designs are the same as Nathan Sprout's tattoo designs?

Is it proven to be the same tattoo(s)?

[122] At the conclusion of trial I was asked to look at Nathan Sprout's tattoos as he stood in the prisoner's dock, and compare them to the still images of the Suspect's tattoos -- captured when the bystander videos are paused and then magnified.

[123] My conclusions that day were to find that the observable portions of the tattoo designs certainly appeared to be the same, but that there are points of comparison that I wish I had an expert to assist with. I raised with counsel how photogrammetry had been considered in two cases; *R. v. Aitken*, 2008 BCSC 1423 and *R. v. Spezzano*, 2020 QCCS 553 (CanLII).

[124] In *R. v. Aitken*, an expert used Photoshop to enhance and overlay known images on enhanced questioned images to detect similarities and differences. He also looked for "individualizers," such as scars, marks, moles, etc., that could lead to positive identification or exclusion of individuals depicted in the photographs. Justice Satanove found that such evidence was inadmissible, that it neither met the test of legal relevance nor necessity, finding that the comparison evidence did not offer any information outside of the purview of the ordinary jury, and therefor does not meet the test of necessity. Part of Justice Satanove's concern was the manner in which the comparison evidence was presented, in part using a power point with arrows, and the concern that it was overly suggestive.

[125] In *R. v. Spezzano*, the court arrived at a similar conclusion, finding at paragraph 219 that comparative inferences belong exclusively to the jury. What was permitted was to invite the jury to compare the images of known and unknown vehicles, and permitting the Crown to juxtapose relevant stills in its own demonstration.

[126] With the necessary comparison left to me, I will not attempt to describe those comparison images in detail. Should anyone think that this decision would benefit from appellate review, those printed images and electronic images are marked as Exhibits as well as the bystander videos. I also benefited from Crown's helpful summary in submissions referred to as the Electronic Image Comparison Guide. The best resolution of the Suspect's images are achieved using the Bystander videos, in particular the Robichaud video, pausing and then magnifying the image.

[127] The most identifiable point of comparison between the tattoo designs on the left forearm is a curved line in the still image, which appears consistent with the curved line of a cursive or calligraphy letter in the tattoo on Mr. Sprout. The other comparable features are what I would describe as shading, albeit somewhat distinctive, including a pointed feature, referred to in the Crown's closing as a "peninsula."

[128] The still image from the video of the "smoking skull" tattoo on the right arm of the Suspect is smaller, with more distortion when magnified than the still image of the tattoo

designs on the left arm. With the smoking skull tattoo it is also more difficult to compare the orientations, or location where the tattoo designs are placed on the arm.

[129] I return to my comments in colloquy about an expert, or the use of photogrammetry. My difficulty in comparing the images is that I cannot determine whether they may be in a different scale, and insofar as a tattoo design is two-dimensional, it is then applied to the three-dimensional surface of a forearm. Any certainty, or confidence in the comparison, is impacted by the inability to measure relative distances, or the comparable ratios between common points in an image.

[130] My inability to make such measurements, or use available software to reconcile two dimensional designs, on three-dimensional objects, which are captured in two dimensional photographs, impacts accuracy. I am left uncertain about the accuracy of any comparison of the available evidence.

[131] I find that I cannot determine with sufficient accuracy that the tattoos in the still images are the same tattoos as those photographed and observed by me on Nathan Sprout. While I can find that the tattoo designs are very similar, I am not confident that that the tattoos are the same.

Has it been proven to be the same tattoo designs?

[132] Insofar as I have found that the tattoo designs are very similar, it remains necessary to assess the inferences to be drawn from the circumstantial evidence that the Suspect and Nathan Sprout have similar tattoos.

[133] Visible on the right forearm of the Suspect is a portion of what appears to be a “smoking skull” tattoo. Nathan Sprout has a tattoo on his right forearm with two smoking skulls and a rose. Also on Nathan Sprout’s right arm is a tattoo of a skeleton, wearing what appears to be a construction helmet, sitting on a stump. That tattoo has shading above it, not dissimilar to the shading in the left forearm tattoo designs. Also on Mr. Sprout’s right arm is a tattoo of a person’s name in calligraphied lettering.

[134] Visible on the left forearm of the Suspect is a portion of an unidentified tattoo. It is what I have referred to above as “shading”. It has an identifiable pointed feature in the shading, referred to as a “peninsula’. Nathan Sprout has a tattoo on his left arm that includes logging equipment, including a logging truck. Below the logging truck is what I have referred to above as shading, which essentially extends the tattoo into a “sleeve.” Of note is that there is no aspect of the logging industry scene, visible in the small portion of the tattoo captured in the still image of the Suspect.

[135] As indicated above, the most identifiable, and comparable aspects of the two tattoo designs are the pointed peninsula and the shading, and more significantly a small portion of a calligraphied letter. Within Mr. Sprout’s tattoo sleeve of the logging industry seen is a calligraphied name. The calligraphied “R” in Mr. Sprout’s tattoo closely matches the portion of what appears to be the same calligraphied letter in the Suspect’s tattoo.

[136] The shading at the bottom portion of the left sleeve, (other than the portion of the calligraphy letter) are less identifiable than any complete design, and may be more representative of a particular tattoo artist or style or school of tattoo artist. I have no expertise or training in such a specialized area such that I can narrow the probability or likelihood of such same designs.

[137] It remains for me to assess the available inferences from the circumstantial evidence that the Suspect and Nathan Sprout have such similar tattoos designs.

[138] Critical to this analysis is the other evidence introduced at trial. In closing argument Crown submitted that the relevant tattoos were distinctive, differentiating them by referencing common tattoo designs such as barbed wire or “I am Canadian.”

[139] I find that the other evidence at trial leaves it unclear how “original” any of Mr. Sprout’s tattoo designs are. In the cross-examination of Cst. Chow, it was confirmed that he had not gone into the local tattoo parlours to ask whether they were familiar with the tattoos on Nathan Sprout. Cst. Chow was also asked whether one entering a tattoo shop could request an original creation of a unique design, or select a graphic from a

catalogue. While Cst. Chow had no specific knowledge of this, he seemed to accept that this could be true, and confirmed that he could not say that the tattoos were "original" designs.

[140] Cst. Chow's assumption, and the proposition asked of him, is supported by looking at all of Nathan Sprout's tattoos. In addition to the tattoos involved in the comparisons above, Mr. Sprout has a "Canadian Pride" tattoo on his right chest, with the maple leaf in the Canadian flag replaced with an identifiable logo from a skateboard company. On his left chest, is what appears to be a type of crest, again with a skull and a skeleton logger cutting an old-growth tree and the words "B.C. Loggers – Endangered Species." On one calf he has a tattoo of Vancouver Island, with what appears to be the word "Sayward" (although I cannot read it clearly) inside the Vancouver Island tattoo. On his other calf is the word Sprout. These are all limited, in that they are merely my observations of those tattoos and what they appear to be.

[141] Insofar as many of Mr. Sprout's tattoos relate to Vancouver Island, and the logging industry, I find it is not unreasonable to expect that tattoos of this type might be attractive to others from north island locations with connections with the logging industry. Otherwise, it would not be unreasonable to expect that smoking skulls and rose tattoos are not somewhat ubiquitous.

[142] I must also consider the other comments at trial concerning the relative prevalence of tattoos in this community. Although Mr. Beaven had no recollection of seeing a tattoo on the suspect he commented that "we've got lots in there with tattoos," and added; "Lots of people who come into the store with tattoos yeah." Similarly, Cst. Chow confirmed that sleeve tattoos are regularly seen on the residents of Nunn's Creek Park.

[143] That the designs are North-Island and logging-inspired further narrows the subset of people with tattoos who may have tattoos of a similar design. Even with respect to the identifiable line of the calligraphied letter in the Suspect's tattoo, that appears to match the calligraphied letter in the name in Mr. Sprout's tattoo, I note that there are four other names tattooed on Mr. Sprout, one of which includes the words, "In

Loving Memory" and a date – consistent with someone's passing. With respect to the compared calligraphied letter, it is not unreasonable that persons would honour or memorialize the same person in a common tattoo design.

Nathan Sprout is located near the stolen items.

[144] The assessment of this evidence requires a consideration of time.

[145] We do not know when the assaults occurred, but Cst. Chow confirmed that he responded to the dispatch at 10:53 a.m. It is clear that the assaults occurred sometime shortly before this.

[146] Sgt. Deley heard about the incident at the Walmart at about 11:30 a.m. and was on scene at 11:55 a.m.

[147] Cst. Biollo was on scene at 12:18 p.m. He then drives to the back corner of the Walmart to record any footwear impressions in the snow. Sgt. Deley is present at that location. Cst. Biollo photographs the impressions in the snow and then attends the adjacent property – the Island Furniture Yard – and locates the stolen items. He confirmed that there were no footwear impressions around the stolen items on the Island Furniture side of the fence – and that they had been pushed over the fence.

[148] It is apparent from the photos that the Suspect threw the stolen items over the fence (and heavy blackberry bushes) between the two properties.

[149] Sgt. Deley remains in this location, when Cst. Chow arrives in his police vehicle and there is some discussion. Just as Cst. Chow is about to get into his vehicle Sgt. Deley notices some movement off to his right, it is someone in red pants walking to the back of Island Furniture. Sgt. Deley knocks on Cst. Chow's window, says go arrest that guy, and I'll follow.

[150] The individual in the red pants has a black garbage bag and a black duffle bag in his hands. This individual exits the Island Furniture yard and is located at the nearby Petro Canada across the street.

[151] Sgt. Deley was asked why he found it unusual that someone was in that area, and it was his belief that “there is really no reason to be there, if you are in the back of that building area, you are an employee or you are not supposed to be there.” It was Sgt. Deley’s belief that this person was “skulking,” or perhaps waiting for the opportunity to retrieve the nearby stolen property.

[152] Asked what it was that led him to believe they were skulking there, Sgt. Deley commented on the fact that there were three police officers present, and that this person did not show themselves, that he was crouched down behind the fence, out of view, trying not to be seen by the police.

[153] Sgt. Deley’s belief that someone was hiding is consistent with Photos 22 and 23 of Cst. Biollo’s crime scene photos. He pointed out recent markings in the snow where it appeared that someone had been there recently, standing around, and then sitting there. He commented that “the items were on the left hand side, there were no footwear there.” He then noted that there were impressions in the snow near a separate area of footmarks, stating; “it looked like someone was sitting or lying in the snow, it looked like the form of a body there, a portion of a backside in the snow there. There were multiple footwear impressions, some time was spent there, it wasn’t a single path, it was milling around.”

[154] Nathan Sprout is identified as the individual located near the stolen property when he is followed and then arrested at the Petro Canada station a short distance away across the street. This occurs at about 12:42 p.m.

[155] It was also noted that the stolen property was not visible from 16th Avenue or from Island Highway.

[156] It was confirmed that the Nunn’s Creek Park to the south, where many homeless people have a camp, is a couple minutes stroll to get to the Walmart. It was further confirmed that the Nunn’s Creek area, and its occupants, are associated with a high incidence of low level property crime, and that stolen goods are often found in the encampment.

[157] In my review of the photos of the stolen property I noted that there appeared to be a Walmart shopping basket in the same location as the other stolen property that appeared to have been there for some time.

[158] In my review of the record I also noted the testimony that when the power went out at the Walmart – sometime after the assaults – everyone who had been inside had been asked to leave.

[159] I find that Nathan Sprout's attendance at the location of the stolen property is of very limited value as circumstantial evidence. The Walmart is across the street from Nunn's Creek Park. Island Furniture is beside Walmart, and around the corner from Nunn's Creek Park.

[160] The officer's conclusion that there was no reason for anyone to be in this location, requires the qualification of a legitimate or legal reason. An easily accessible, but out of the way location, hidden from major streets, may have great value to those who are homeless, many of whom suffering from an addiction to what was then illicit narcotics, many of whom vulnerable to property crimes themselves, and many of whom are involved in the criminal justice system, with their own reasons to avoid any engagement with the RCMP.

[161] Other available inferences are significantly weakened by the passage of time. As much as two hours passed between the stabbings and Nathan Sprout's arrest. When it is that Nathan Sprout arrived at the Island Furniture yard is unknown.

[162] The record is clear that multiple people suspected to be shoplifters were in and out of the Walmart most days. It is apparent that many of those people also lived in the Nunn's Creek Park. It is unknown whether any such persons were amongst those asked to leave the Walmart when the power went out. It is not unreasonable to conclude that people in the area, may have been alerted to the fact that there had been a robbery at the Walmart.

[163] I know almost nothing about Nathan Sprout, other than that he was arrested in the vicinity of Nunn's Creek on December 7, 2021 at both 12:42 p.m. and again at 4:53 p.m., and that this was the location where the arresting officers knew to look for him.

[164] One inference to his presence is that Nathan Sprout hid the stolen property in that location and was returning there to retrieve it. Another reasonable inference is that he learned of this possibility through others that were present at Walmart and returned to Nunn's Creek and he may have been acting opportunistically to take the stolen property for himself. Another inference is that he was skulking around that location, and happened upon the stolen property.

FINAL ANALYSIS

[165] I remind myself of the caution commented upon in my introduction; that evidence in a criminal trial must never be weighed piecemeal. I trust it is apparent that I have reviewed the evidence at trial in considerable detail. As stated in the introduction, that review benefitted from addressing areas of evidence in turn. I have returned to that identified structure in the final analysis of the whole of the record and find as follows:

[166] I do not find that the comparison of the still images of the tattoos on the Suspect to the tattoos on Nathan Sprout can be completed with sufficient accuracy to determine that this is direct evidence that they are the same tattoos.

[167] I do not find that the identification of Nathan Sprout's photograph in the photopack, or the in-court identification of Nathan Sprout, can be relied on as evidence that Nathan Sprout is the Suspect. It would be unsafe and unwise to view this evidence without concluding that the co-worker's suggestion to Ms. Szasz that the Patrol Individual known as "Nate" was Nathan Sprout, the man arrested for these assaults, and that she would have seen Nathan Sprout's photograph whether on social media or in the news, and that this then compromises any reliance that can be placed on this evidence.

[168] What remains is the assessment of the circumstantial evidence in this case. I return to the passage from *Villaroman,* included above. I also add the following

commentary from *R v Sandoval-Barillas*, 2017 ABCA 154 (CanLII), where the court writes:

> [37] Circumstantial evidence can narrow down the alternatives sufficiently to support even otherwise unreasonable identification evidence: see *eg* ***R v McCracken***, 2016 ONCA 228, 348 OAC 267. As this Court said in ***R v Roasting***, 2016 ABCA 138, 37 Alta LR (6th) 219, appeal courts tend to take a more penetrating view in identification cases. But this Court does not re-try them. As stated in the non-jury case of ***R v Mohamed***, 2014 ABCA 398, at para 69, 588 AR 89, leave denied [2017] SCCA No 34 (QL) (SCC No 37404).
>
> > [69] A trial judge is not compelled to acquit, however, simply because no eyewitness to a crime can immediately identify the offender based upon a prior acquaintance, or where conditions for observation were sub-optimal. It is open to the trial judge to conclude that other evidence produces the safeguards that abolish reasonable doubt as to guilt. That occurred here. This verdict is safe.
>
> …
>
> [39] As to the circumstantial evidence in this case, it is timely to here note ***R v Villaroman***, 2016 SCC 33 at para 71, [2016] 1 SCR 1000. In reversing this Court and restoring a conviction, relying on the reasons of this Court in ***R v Dipnarine***, 2014 ABCA 328 at paras 22 and 24-25, 584 AR 138, the Supreme Court said:
>
> > [71] The Court of Appeal's analysis overlooks the important point made in *Dipnarine* that it is fundamentally for the trier of fact to draw the line in each case that separates reasonable doubt from speculation. The trier of fact's assessment can be set aside only where it is unreasonable. While the Crown's case was not overwhelming, my view is that it was reasonable for the judge to conclude that the evidence as a whole excluded all reasonable alternatives to guilt.

[169] In closing argument, Crown submitted that I must not speculate on matters not supported by evidence. This is a necessary caution in terms of the Crown's obligation to establish proof to a criminal standard.

[170] But in the process of assessing circumstantial evidence, I have re-read and rephramed paragraph 37 in *Villaroman* – set out above. I must consider "other plausible theor[ies], and "other reasonable possibilities" which are inconsistent with guilt. The

Crown need not negative every possible conjecture, no matter how irrational or fanciful, which might be consistent with the innocence of the accused." However the Crown may need to negative reasonable possibilities, and those "other plausible theories" or "other reasonable possibilities" must be based on logic and experience applied to the evidence or the absence of evidence, not on speculation."

[171] Before considering the whole of the record I returned to *Villaroman* in its entirety and that concluding passage which is set out below:

> [38] Of course, the line between a "plausible theory" and "speculation" is not always easy to draw. But the basic question is whether the circumstantial evidence, viewed logically and in light of human experience, is reasonably capable of supporting an inference other than that the accused is guilty.
>
> [39] I have found two particularly useful statements of this principle.
>
> [40] The first is from an old Australian case, *Martin v. Osborne* (1936), 55 C.L.R. 367 (H.C.), at p. 375:
>
> > In the inculpation of an accused person the evidentiary circumstances must bear no other reasonable explanation. This means that, according to the common course of human affairs, the degree of probability that the occurrence of the facts proved would be accompanied by the occurrence of the fact to be proved is so high that the contrary cannot reasonably be supposed. [Emphasis added.]
>
> [41] While this language is not appropriate for a jury instruction, I find the idea expressed in this passage — that to justify a conviction, the circumstantial evidence, assessed in light of human experience, should be such that it excludes any other reasonable alternative — a helpful way of describing the line between plausible theories and speculation.
>
> [42] The second is from *R. v. Dipnarine*, 2014 ABCA 328, 584 A.R. 138, at paras. 22 and 24-25. The court stated that "[c]ircumstantial evidence does not have to totally exclude other conceivable inferences"; that the trier of fact should not act on alternative interpretations of the circumstances that it considers to be unreasonable; and that alternative inferences must be reasonable, not just possible.
>
> [43] Where the line is to be drawn between speculation and reasonable inferences in a particular case cannot be described with greater clarity than it is in these passages.

[172] I ask myself; Is the occurrence of;

i. Nathan Sprout having the same or similar smoking skull tattoo design on his right arm as the Suspect;

And

ii. Nathan Sprout having the same or similar bottom portion of a tattoo sleeve on his left forearm,

And

iii. Nathan Sprout is found near the stolen items within two hours of the assaults,

result in a probability that Nathan Sprout is the Suspect so high that the contrary cannot be reasonably supposed?

[173] I must consider this in light of other plausible occurrences including the following evidence;

i. While Mr. Sprout may fit the very broad description of a skinny male, between 5'8" and 6', he did not at the time of his arrest, have the long dark hair described by both Ms. Szasz and Mr. Beaven. The testimony of the colour of his skin is equivocal.

ii. Many of the people the police deal with in Nunn Creek Park also have sleeve tattoos. Many of the people in Nunn's Creek Park are also involved in low-level property crimes and it is an area were stolen property is found.

iii. Many of the people suspected of shoplifting at the Walmart have sleeve tattoos.

iv. I find certain of Nathan Sprouts tattoos do not appear to be original designs, and otherwise reference themes consistent with the demise of the logging industry on the north island.

v. It is not implausible that many of the residents of Nunn's Creek Park may also come from logging-reliant communities on the north island.

vi. I cannot ignore the plausibility that other people from the north island would have the same or similar tattoos, or other people in Nunn's Creek Park would have the same or similar tattoos.

vii. I not ignore that Nathan Sprout's interest in the stolen property thrown over the bushes into the yard at Island Furniture was not mere curiosity. However it is not implausible that the fact of the assaults and stabbings would be known to those in the Nunn Creek Park area. Nathan Sprout's interest in the stolen property at some point in the hours that passed is not proof that he is the Suspect who committed the crime.

[174] Finally, I return to the testimony I do accept from Ms. Szasz. Her familiarity with the Suspect, and her familiarity with the Patrol Individual is recognition evidence. At no

time in the month prior to the assaults, when she had near daily interactions with the Suspect, looking directly into his distinctive eyes, did she ever identify the Suspect as the Patrol Individual known as Nate. This is compelling exculpatory evidence.

[175] Ms. Szasz' evidence, viewed along with the other reasonable inferences from the circumstantial evidence, is that someone other than Nathan Sprout, with the same or similar tattoos, may be the Suspect.

[176] Whether this is framed as evidence inconsistent with guilt referenced in the test in *W.D.*, or as that test is recast in the paper of the Professor Paciocco, the record here cannot meet the threshold of proof beyond a reasonable doubt. That threshold does not mandate absolute certainty, but I find the evidence here does not approach certainty, and my degree of uncertainty here is not frivolous or imagined.

[177] It is only when I direct the clerk to record my findings on the record of proceedings that my jurisdiction over this matter concludes.

[178] I will take a moment to address the accused, the victims, and this community.

[179] Mr. Sprout, I know almost nothing about you. What I do know is that the change in your physical appearance since December 2021 and when I first saw you in October 2022 is dramatic. If that is the result of getting off the streets, and getting clean, I encourage you to continue to seek the supports that each and all who experience marginalization in this community deserve.

[180] To the victims and this community: I regret that this trial did not provide you the certainty that is sometimes very powerful in the healing journey of those who experience such trauma.

[181] As I stated in my introduction a criminal trial is a somewhat rigid and structured process. But, it is important for those who are involved in this trial and this community to understand that this trial involved an incredible amount of hard work and the very capable representation of both counsel. Crown counsel and defence counsel,

marshalled, presented, tested, and explained to me both the evidence and the law at the very highest level.

[182] They are deserving of our appreciation, and I offer it to them here.

CONCLUSION

[183] I direct a finding of not guilty on each and every count on the information.

_____
The Honourable Judge Stewart
Provincial Court of British Columbia

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[i] Count 1 alleges an aggravated assault contrary to s.268(1) of the Criminal Code.
[ii] Count 2 alleges robbery contrary to section 344(1)(b) of the Criminal Code.
[iii] Count 5 alleges that in committing the assault of Leanne Szasz he did carry use, or threaten to use a weapon or an imitation weapon, contrary to section 267(a) of the Criminal Code.
[iv] Count 3 and 4 allege that in committing the assaults of George Moczulski and Ronald Kerr he did carry, use, or threaten to use a weapon or an imitation weapon contract to section 267(a) of the Criminal Code.
[v] (Close Circuit Television)
[vi] *R. v. Lifchus*, 1997 CanLII 319 (SCC), [1997] 3 SCR 320, at para 36.

[vii] *R. v. Starr*, 2000 SCC 40 (CanLII), [2000] 2 S.C.R. 144, the court held that the burden of proof, placed upon the Crown, lies "much closer to absolute certainty than to a balance of probabilities" (at para 242).
[viii] *R. v. D.W.* [1991] 1 SCR 742, 1991 CanLII 93 (SCC),
[ix] 22 Can. Crim. L. Rev. 31
[x] National Judicial Institute (NJI) Criminal Jury Instructions (CrimJI) s.10.2 Direct and Circumstantial Evidence,