
CANADA / JUDGMENT

R. v. Bailey

2020 BCSC 2245

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 2245 R. v. Bailey

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Bailey,

2020 BCSC 2245

Date: 20201204

Docket: 68911

Registry: Chilliwack

Regina

v.

Darcy Peter Bailey

Before: The Honourable Mr. Justice Crabtree

Oral Reasons for Judgment

Counsel for the Crown, appearing by videoconference:

S. Authier

Counsel for the Accused, appearing by videoconference:

A.H. Zipp

Place and Dates of Trial/Hearing:

Chilliwack, B.C.

September 14, 2020

December 3, 2020

Place and Date of Judgment:

Chilliwack, B.C.

December 4, 2020

INTRODUCTION

- [1] THE COURT: Mr. Bailey, who I will refer to as Mr. Bailey or the accused, is charged on Indictment 68911-2 with three offences, which were alleged to have occurred on July 22, 2017.
- [2] At the outset of the trial prior to the accused entering pleas, the Crown entered a stay of proceedings with respect to Counts 1 and 2. The trial proceeded on Count 3, the sole remaining count, which alleged that Mr. Bailey possessed a restricted weapon, to wit, a modified Heckler and Koch flare gun, without being the holder of a licence or registration certificate under which he may possess such item, contrary to s. 91(1) of the Criminal Code, R.S.C. 1985, c. C-46.
- [3] I will pause here to say that I will reserve the right to edit the reasons for clarity, to put in case citations, and I suppose more generally for readability, but obviously will not change the reasoning or the result.

BACKGROUND

- [4] The allegations arose as the accused was attempting to enter Canada at the Sumas Huntington port of entry on July 22, 2017, just before 10:00 a.m. The port of entry is commonly referred to as the Sumas border crossing and is located near the City of Abbotsford.
- [5] Shortly before 10:00 a.m. on July 22nd, a Dodge pickup truck towing a trailer approached Officer MacLean's booth at the border crossing. The officer noted that there was a sole occupant in the vehicle who was subsequently identified as Darcy Peter Bailey. Mr. Bailey was the operator of the 2005 red Dodge Ram diesel pickup truck with licence plate JX 0066. The pickup truck was towing a trailer carrying two Sea-Doos. The trailer bore a Colorado licence plate.
- [6] Mr. Bailey's passport was scanned, resulting in the search of a database accessible through Canadian Border Services. The search indicated there was a possible outstanding warrant for Mr. Bailey. On noting the results of the search and completing the mandatory questions, Mr. Bailey was directed to park his vehicle and to proceed to a secondary examination. Once the vehicle was parked, Mr. Bailey entered the Immigration Services building. Officer Kennedy was the primary investigator engaged in the secondary examination of Mr. Bailey and Mr. Bailey's vehicle at the border crossing.

- [7] Officer Kennedy was assisted by Officer Nicol. Officer Kennedy was aware of the possibility of an outstanding warrant for Mr. Bailey. The agency's practice, when an officer becomes aware of an outstanding warrant, is to hold the individual and contact the police detachment nearest the location where the warrant was issued, to confirm that the warrant was still outstanding.
- [8] The accused was detained at 10:08 a.m. and provided the right to counsel. The three made their way to a less-public part of the building, which is described as the secondary examination area. During a cursory search, Officer Kennedy noted a receipt in Mr. Bailey's personal contents dated the same day from the duty-free shop located across the street from the customs offices. The receipt indicated the purchase of four cartons of cigarettes. Based on the information, Officers Kennedy and Nicol went to the accused's vehicle to locate insurance papers and to examine the vehicle for cigarettes and other undeclared goods. The vehicle and the trailer were searched. The trailer had attracted some interest to the officers because, as they stated, it had a Colorado licence plate affixed to it.
- [9] Constable Oakman, a member of the Abbotsford Police Department, happened to be on scene when the events of this incident began to unfold. The constable became engaged in assisting to determine whether the warrant from Fort St. John relating to Mr. Bailey remained outstanding or valid. In the process of doing so, the officer noted that Mr. Bailey was prohibited from driving. As a result, the officer embarked on his own police investigation, which culminated in the arrest of Mr. Bailey at 11:29 a.m.
- [10] The accused was informed of his right to counsel. He indicated to the officer he wished to speak to a lawyer, which he then did. While this was taking place, Officer Nicol was continuing with the ongoing examination about goods being brought across the border. The officer had a concern whether the Sea-Doos were legally imported to Canada. Mr. Bailey indicated the Sea-Doos were acquired in Canada and, in order to provide proof of this, he invited Officer Kennedy to examine his cellphone to look at photographs and message exchanges dealing with the acquisition of the Sea-Doos. When examining Mr. Bailey's cellphone, the officer noted several photographs of firearms. One depicted Mr. Bailey holding a firearm; another depicted a rifle on a tripod; and others, which depicted a table with a number of weapons on it.
- [11] As a result of the observations, border officers had Cst. Oakman undertake a check to determine if Mr. Bailey had any firearms registered to him. As a result of reviewing the photographs, the border officers undertook a search of the rear of Mr. Bailey's pickup truck and discovered a locked Pelican case amongst its contents. The locked Pelican case was brought into the immigration office and Mr. Bailey was informed of this. He subsequently provided the code to access the Pelican case. When the case was opened, the officers discovered a flare gun with a metal tube or insert located in the barrel of the flare gun, and a quantity of ammunition including flares, shotgun ammunition, "bear bangers", and .22-calibre ammunition.

- [12] In the course of dealing with the border officers, Mr. Bailey provided several statements. One included a conversation between Officer Nicol and the accused, and the second was an audiotaped statement taken by the investigative officer, Officer Simeoni. Officer Simeoni was the on-duty investigator on July 22, 2017. She had received a call from the border officers at the Sumas border crossing seeking her assistance. Ultimately, Officer Simeoni travelled out to the border crossing for the purposes of engaging in a criminal investigation involving Mr. Bailey and the resultant discovery of the flare gun in the Dodge Ram vehicle.
- [13] Upon her arrival, Officer Simeoni spoke to the officers involved in the secondary examination and inspected the flare gun. Officer Simeoni's role was to conduct an interview of Mr. Bailey. The statements were admitted on trial on the basis that the statements were made voluntarily. The statement involving Investigator Simeoni was admitted with one exception; counsel agreed that the portion of the statement contained in the printed transcript commencing at page 38, line 10, and concluding at page 39, line 6, to be redacted and not form part of the statement admitted at trial.
- [14] The interview of Mr. Bailey lasted approximately 40 minutes, during which time the accused provided the following information:
1. Mr. Bailey had crossed the border earlier in the day, from Canada into the United States, to pick up some parts he had ordered for the Sea-Doo. On his return to Canada, he was detained on account of an outstanding warrant;
 2. Mr. Bailey acknowledged the flare gun that was located in the vehicle, stating that it had been provided to him by his employer, ConocoPhillips, in 2008 or 2009;
 3. Mr. Bailey stated that everyone working in remote areas was provided with one of these devices. The device came with a metal insert enabling a variety of different cartridges to be fired by it;
 4. Mr. Bailey stated that whatever ammunition came with the kit was still located in the Pelican case. He stated that he never fired the device with the ammunition, only the flares and the bear bangers;
 5. Mr. Bailey had retained the flare gun and ammunition contained in the Pelican case, after he had left his employment with ConocoPhillips.
- [15] Mr. Bailey was noted as being cooperative throughout the interview and responsive to questions posed by the investigator.
- [16] After the investigation by the border officials and the driving while prohibited investigation was concluded, Mr. Bailey was released at the scene. The flare gun, ammunition, and the case were seized. Ultimately, a flare gun, two Colt calibre .45 cartridges, and two .410 shotgun shells were forwarded to the RCMP laboratory in Ottawa for examination.

[17] Mr. Champion is a civilian member of the Royal Canadian Mounted Police engaged at the National Forensic Laboratory Services in the Firearms Section located in Ottawa, he has been engaged with the RCMP at the lab for the past 16 years. Mr. Champion was qualified as an expert to express opinion evidence in the following areas:

1. the mechanical assessment of firearms;
2. the legal classification of firearms and related devices;
3. the identification of firearms, ammunition, and related devices; and
4. serial number restoration.

[18] Mr. Champion was designated on March 16, 2005, as an analyst of weapons, prohibited devices, ammunition, prohibited ammunition, or any part or component of such things for the purposes of s. 117.13 of the Criminal Code.

[19] Mr. Champion, at the time he testified, headed up the Firearms Department at the forensic laboratory and in that capacity was engaged in the following:

1. undertaking of analysis and assessment of items provided to him for determination of them that is within the scope of his expertise that I indicated moments ago.
2. instructing analysts at the laboratory; and
3. reviewing the reports prepared by the firearm analysts.

[20] Mr. Champion prepared a report that was introduced at the trial and also testified at the trial. Mr. Champion's report concluded in part as follows [as read in]:

The item was a Heckler and Koch, model P2A1, 26.5 mm-flare, single-shot flare pistol bearing serial number 53-069616, with a barrel insert. The item was test fired using conventional ammunition designed to attain a velocity exceeding 152.4 metres per second [I believe it is] and an energy exceeding 5.7 joules.

[21] Mr. Champion found it to be a firearm as defined by s. 2 of the Criminal Code, in that it is a barrelled weapon from which a projectile can be discharged that is capable of causing serious bodily injury or death to a person. It is a handgun within the meaning of s. 84(1) of the Criminal Code. It is a restricted weapon within the meaning of s. 84(1) of the Criminal Code.

[22] At the close of the Crown's case, the defence elected to call no evidence and raised three issues, based on which it argued that the Crown had failed to establish beyond a reasonable doubt the essential elements of Count 3 of the indictment. The three arguments advanced are summarised as follows:

1. that the Crown failed to establish continuity of the item seized from Mr. Bailey at the scene, such that the item seized and the item analysed at the RCMP lab by Mr. Champion, the expert civilian member, were not one and the same. In other words, the item that Mr. Champion examined and found to be a restricted weapon, was not linked back to the item seized from Mr. Bailey at the scene;
2. that the accused lacked the necessary mens rea to support a finding of guilt. In particular, that he knew the item was a restricted firearm; and
3. that the item is exempt from being classified as a firearm pursuant to s. 84(3)(b) of the Criminal Code.

ISSUE 1

- [23] Was continuity of the flare gun deficient in that the Crown failed to prove beyond a reasonable doubt that the item analysed was the item seized from the accused?
- [24] Mr. Bailey submits that the only evidence proffered that the flare gun seized at the scene is the one analysed by the firearms expert is a number noted or taken from the item by the CBSA officers at the scene, referred to as serial number 53-069616. Defence counsel submits that without more of a description, the evidence of continuity has not been established.
- [25] The defence submits that the number could be a generic reference to a particular model of flare gun manufactured by the company, or alternatively a reference to a specific parts number.
- [26] The Crown, in their submissions, drew upon the continuity of seized drug exhibits in support of the importance that is placed upon there being a sufficient evidentiary foundation to establish continuity, and then referenced and applied this to the case at bar.
- [27] The following are some of the cases that my review took me to, as well as authorities referred to by counsel.
- [28] In *R. v. Larsen*, 2001 BCSC 597, aff'd on other grounds, 2003 BCCA 18, Romilly J. reviewed the law respecting proof of continuity in narcotics cases. At para. 62, he stated as follows:
- [62] It is important to appreciate what the Crown must prove in a narcotics-related case. In essence, the Crown must show beyond a reasonable doubt that the material seized from an accused was a prohibited substance. To that end, the Crown must prove that the substance dealt with by, or in the possession of, the accused is the same substance that is alleged in the information or indictment (and prohibited by law). Undoubtedly, then, continuity of possession of the substance from the accused to the law enforcement officer to the analyst is crucial. However, Canadian case law makes it clear that proof of continuity is not a legal requirement and that gaps in continuity are not fatal to the Crown's case unless they raise a reasonable doubt about the exhibit's integrity. ... These cases establish there is no duty upon the Crown to show detailed continuity of the location and handling of the exhibits from the

time of their seizure by law enforcement officers to their deposit with analysts. [Internal citations omitted.]

- [29] In *R. v. Torrie*, [1967], 2 O.R. 8 (Ont. C.A.) a decision of the Ontario Court of Appeal, the Court stated that it should not engage, in considering the issue of continuity, in speculation. In particular, the Court noted at p. 303:

I recognize that the onus of proof must rest with the Crown to establish the guilt of the accused beyond a reasonable doubt, but I do not understand this proposition to mean that the Crown must negative every possible conjecture, no matter how irrational or fanciful, which might be consistent with the innocence of the accused.

- [30] In *R. v. Oracheski* (1979), 48 C.C.C. (2d) 217 from the Alberta Supreme Court, Appellate Division, the issue of continuity was addressed with respect to seized exhibits. In this case, McDermid J.A. commented that the court ought not to speculate as to what might have happened to an item once it is in police possession unless there is some kind of evidence to support that speculation.

- [31] In *R. v. DeGraaf*, (1981), 60 C.C.C. (2d) 315 (B.C.C.A.), a decision of the B.C. Court of Appeal, the Court, referencing *Oracheski*, stated that the continuity of an exhibit need not be proven from beginning to end without gaps and further, that the trial judge is not permitted to engage in pure conjecture.

- [32] Similarly, in *R. v. Grunwald*, 2008 BCSC 1738, a decision of Mr. Justice Joyce, at para. 30 noted:

- [30] The Crown has to prove beyond a reasonable doubt that the accused was in possession of the substance alleged in the Indictment; in this case, cannabis marihuana. It is not necessary, in my view, for the Crown to prove beyond a reasonable doubt every detail of the location and handling of the exhibit from the time of seizure until analysis. Further, it appears to me from my review of the law that it may be possible to prove the nature of the substance that was seized even without a chemical analysis although a certificate of analysis under the Controlled Drugs and Substances Act is no doubt the best proof.

- [33] Justice Joyce went on to emphasize at para. 35 that doubt about the integrity of the exhibit must arise from a consideration of the evidence as a whole; and again, reiterated that it cannot be based on mere speculation.

- [34] In *Grunwald*, despite what was noted to be the ineptitude of the police, Joyce J. found that the material sent to the laboratory and analysed was the material seized from the accused.

- [35] In the case at bar, items were seized by border officers at the Sumas crossing. In the course of the investigation, Officers Kennedy and Nicol seized a Pelican case which, when opened, was observed to contain what was described as a Heckler and Koch, model P2A1 26.5 mm-flare single-shot pistol with a barrel insert and a number of rounds of ammunition, bear bangers, and flares. Some of the rounds of ammunition were particularised, such

as .45-calibre Colt model cartridge and .410-gauge shells. Not all of the ammunition present in the case, however, was so identified.

- [36] Once the Pelican case was opened and seized, it remained in the supervisor's office. Officer Kennedy noted that the flare gun had what she described as a serial number, 53069616. Officer Nicol was with Officer Kennedy when the Pelican case was located in the truck and noted that the flare gun had a serial number, the same number that I have just referenced that Officer Kennedy noted. Officer Nicol described a number of different types of ammunition, including different flares and bear bangers.
- [37] Investigator Simeoni also observed the flare gun when she attended at the border office for the purposes of interviewing Mr. Bailey. Investigator Simeoni testified that the item was sent to the RCMP lab located in Ottawa. She prepared a request to send the item to the lab but was not involved in the actual forwarding of the item. She explained that the Document Evidence Control office was responsible for shipping the item to the lab.
- [38] Mr. Champion testified that he received the flare gun and four rounds of ammunition. He explained that the package containing the items came from the CBSA office in Surrey. There was no evidence as to who ultimately took control of the flare gun and ammunition which was located in the supervisor's office, or who took possession of it after that; although I infer that Investigator Simeoni did, as she was in charge of this aspect of the investigation.
- [39] Investigator Simeoni made the request that the item be examined by the lab in Ottawa, and stated that the standard procedure would be to ship the item through their document evidence office to Ottawa. No specifics of that process were provided.
- [40] There is no evidence as to what was shipped, who packaged the material, or how it was shipped to Ottawa. Upon receipt in Ottawa, the firearms expert testified that when an item is received at the lab, it is logged into the evidence management system. In this case, Mr. Champion was assigned the responsibility of conducting an examination of the item, testing the item, and preparing a report setting out his findings. Once Mr. Champion took control of an item, it remained in his possession, or in his secure locker, until the analysis and report was prepared. Once he had completed the task, the item was returned to the central evidence locker and eventually returned to the originating office and client.
- [41] Mr. Champion testified that he received three exhibits, including the Heckler and Koch model P2A1 26.5mm flare gun, bearing serial number 53069616, with a barrel insert. When asked where the exhibit came from, Mr. Champion stated that all he knew was that it came from the Canadian Border Services Agency in Surrey.
- [42] During Mr. Champion's testimony, there was some confusion over the description of the item. By that, I mean on one occasion it was described as a 26.5 mm flare gun; on another, a 26.6 mm flare gun. Mr. Champion was unable to tell from his notes, stating that he was relying on an unclear photograph of the item and was unable to say whether it was a .5 or .6 in his notation. He testified that it is a European model and that they are commonly referred

to either as a 26.5 or 26.6 mm flare gun. No measurement of the barrel was undertaken by Mr. Champion.

- [43] In the case at bar, Officers Kennedy and Nicol both observed and provided a description of a similar number situated on the flare gun. The number provided by them in their testimony corresponds with the number recorded by Mr. Champion, firearms expert, in his note, and the same number was referenced in the report.
- [44] None of the witnesses were challenged as to their characterisation of the number when described as a serial number. The witnesses identified from photographs the items that were seized and forwarded to the firearm expert. The firearm expert identified from the photographs the items that were analysed.
- [45] Where there is evidence that the chain of continuity has been broken or is deficient and there is doubt that the exhibit seized and the exhibit analysed are not the same, that doubt must be resolved in the accused's favour. The authorities that I previously referenced are clear that any reasonable doubt about the integrity of the exhibit must be based on evidence, not on conjecture or speculation. The unchallenged description of the number on the flare gun as a serial number, by the expert, which matches the number recorded of the item seized at the Sumas border is sufficient to establish continuity of the item.
- [46] It was suggested that the number could be a generic number imprinted on each flare gun of this make and model produced by the company. We know that the number recorded is not the model number, as this was provided by each witness. It was further suggested that the number could be a reference to a part number. In my view, this assertion requires the court to speculate, as there is no evidence upon which the court can rely on to raise such a possibility.
- [47] I accept the evidence of Officers Kennedy and Nicol and Mr. Champion, when they each described the number observed on the flare gun to be a serial number. Absent any other evidence, I infer that the serial number is a unique number to the particular item. I am satisfied, based on the evidence of the three witnesses, that the item seized was in fact the item analysed at the forensic laboratory in Ottawa.

ISSUE 2

- [48] The defence submits that the Crown has failed to establish that the accused possessed the necessary mental element or mens rea on which to base a conviction.
- [49] It has previously been determined that possession of firearms is a fault-based offence requiring the Crown to establish beyond a reasonable doubt, knowledge as an essential part of the case. In *R. v. Raglon*, 2001 ABPC 117, an Alberta Provincial Court decision, the court stated at paras. 52 and 53 as follows:

[52] Consequently, in my view, the mens rea of s. 95(1) is a subjective mens rea. Specifically, the accused must be subjectively aware of the character of the weapon, and the weapon is loaded. Where the accused did not believe the weapon to be a prohibited weapon this is a mistake of law and would not accord the accused a defence. ... On the other hand if the accused was unaware of the nature or characteristics of the item being a firearm or handgun this would be a defence. ...

[53] The subjective mens rea is applicable to the determination that the gun was loaded. However, this does not mean that the subjective mens rea can only be proven by evidence from which actual knowledge can be inferred. Subjective mens rea can be inferred for some offences from recklessness or wilful blindness. Where offences having as an element "possession" then the basis for subjective mens rea is either actual knowledge or wilful blindness. Recklessness does not provide a basis for the mens rea there.

[Internal citations omitted.]

[50] The analysis set out in Raglon was adopted in *R. v. Porter*, 2004 BCSC 1520, a decision of the Supreme Court in B.C.

[51] Accordingly, the Crown must establish a mental element, namely that the accused who committed the prohibited act, did so intentionally or with knowledge of the facts constituting the offence, or with wilful blindness towards them. In a s. 91 prosecution, the Crown is required to establish the act of possession, which includes the accused had knowledge and an element of control. To defend such a charge, the accused must show that he or she was unaware of the nature or characteristic of the item being a firearm or a handgun.

[52] In this case, Mr. Bailey submits that the evidence demonstrates he was unaware that the flare gun was a firearm. He relies upon his conversations with the Canadian Border Services officers on July 22, 2017, as evidence in support of the submission.

[53] In discussions with Officers Kennedy, Nicol, and Simeoni, the accused constantly referred to the item as a flare gun. He testified that he never fired the flare gun using the ammunition, only the flares which he was required to use in order to ignite above-ground gas pockets to burn off gas that had escaped from a pumping station, and that was in the course of his work-related duties when he worked for his former or previous employer.

[54] Mr. Bailey's awareness of the characteristics of a firearm, and never having utilized the firearm, are two different matters for consideration. The charge here is not one of use of the firearm, but rather possession. At the time he was found in possession of the item, the metal insert which altered the fundamental nature of the flare gun and enabled the ammunition to be fired, as testified by Mr. Champion, was located or positioned in the barrel of the flare gun. When he initially received the kit, it contained the live ammunition as well as the flares.

- [55] Mr. Bailey never referred to the item as a firearm. He only described it as a flare gun and, as I said a moment ago, he stated that he had never fired anything other than the flares provided.
- [56] Mr. Bailey understood what the metal insert enabled the flare gun to do.
- [57] In the course of discussions with the officers, it was clear the accused was aware the flare gun was equipped with the metal insert which, when positioned inside the flare gun, enabled the flare gun to fire ammunition, particularly a .45 Colt calibre cartridge and a .410 shotgun shell. He acknowledged as much in the interview with Investigator Simeoni.
- [58] Mr. Bailey is a hunter, having previously utilised firearms both for hunting and target shooting. He spoke of hunting moose and grouse with his son. He was aware of the impact and effect that discharging a weapon could have in the event that ammunition was discharged from it.
- [59] Further, during the course of his employment, he was aware that one of the purposes of handing out the flare gun with the metal insert and ammunition was to provide a measure of safety to the employees who, in accordance with their work assignments, often were required to travel into remote areas of British Columbia's backcountry. He explained to the officers that they were given ammunition because they were in bear country, and while he had never placed ammunition in the flare gun to shoot a bear, that was one of the purposes that the kit was provided to each employee who worked in that location.
- [60] In all the circumstances and based on the statements obtained from the accused by the border officers, the Crown established that the accused knew that the item was a barrelled weapon from which any shot, bullet, or other projectile could or can be discharged. Based on his statement to Investigator Simeoni and his experience with previously discharging weapons, Mr. Bailey was aware that firing such ammunition is capable of causing serious bodily harm or death to a person.

ISSUE 3

- [61] The defence submits that the item at issue is exempt from being classified as a firearm, pursuant to s. 84(3)(b) of the Criminal Code.

Relevant Criminal Code Provisions

- [62] To take a step back, Part III of the Criminal Code addresses provisions relating to firearms and other weapons. Under ss. 91(1), it is an offence for a person to possess a prohibited weapon, a restricted weapon, or a non-restricted firearm without holding the necessary licence allowing for its possession, 91(1)(a), and in the case of a prohibited or restricted firearm, without having a registration certificate for the firearm, s. 91(1)(b).

- [63] This is a hybrid offence, which is punishable for up to five years' imprisonment when prosecuted by indictment. That is s. 91(3), and then we come to s. 91(4), which creates exemptions, neither of which are relevant to the facts in this case. Then we turn to s. 84(1) of the Criminal Code, which contains the definitions for Part III and defines terms for the purpose of that part, including the terms: non-restricted firearm, restricted firearm, and prohibited firearm. The definition of "firearm" is found in s. 2 of the Criminal Code.
- [64] Returning to s. 84, s. 84(3) defines a list of weapons that are deemed not to be firearms for certain offences, including unauthorised possession under s. 91. Of particular relevance to Mr. Bailey's submission is s. 84(3)(b), which provides as follows:
- (b) any device that is
 - (i) designed exclusively for signalling, for notifying of distress, for firing blank cartridges or for firing stud cartridges, explosive-driven rivets or other industrial projectiles, and
 - (ii) intended by the person in possession of it to be used exclusively for the purpose for which it is designed.
- [65] So in other words, if a device meets both of the conditions to which I have just referred, it is, by virtue of the section deemed not to be a firearm.
- [66] The accused is charged with possession of a restricted firearm contrary to s. 91(1) of the Criminal Code. The Crown alleges Mr. Bailey is in possession of a restricted firearm, a modified Heckler Koch flare gun, without the necessary licence or authorisation. Without any modification to the flare gun that we have been discussing, the Crown and defence agree the item does not fall within the definition of restricted firearm. However, the Crown submits in this case the modification, which consists of the metal barrel insert which, once inserted, permits the firing of the Colt .45 cartridge and the .410 shotgun shell, changes the character of the flare gun and brings it within the definition of a restricted weapon.
- [67] To repeat, Mr. Bailey argues that s. 84(3)(b) creates an exception for a device designed exclusively for signalling or notifying of distress in circumstances where the device is intended by that person to be used exclusively for that purpose for which it is designed. So the question becomes: Does the flare gun fit within the enumerated exception particularised in ss. 84(3)(b)(i) and (ii)?
- [68] I note that the provision in s. 84(3)(b) is conjunctive. In other words, to be operative, it must be shown that the device was designed exclusively for the stated purpose, and it was intended to be used exclusively for that purpose in order for the subsection to apply.
- [69] The defence relies on the Ontario Court of Appeal decision in *R. v. Goswami*, [2002] O.J. No. 1129 (Ont. C.A.), as authority for the proposition that the test for determining whether the device was designed exclusively and used exclusively is a subjective or modified objective test. *Goswami* was an appeal from conviction for trafficking and possession for the purpose of trafficking firearms. The circumstances in *Goswami* were that an undercover police

officer was investigating a gun retailer who sold starter pistols that could be converted to enable the pistol to fire live ammunition. The purpose of the investigation was to determine whether the retailer was selling pistols with the knowledge that they could be used criminally. The accused worked at the store and sold several starter pistols, together with the ammunition, to the undercover officer after the officer told the accused that he intended to drill out the pistols so they could be used to fire ammunition.

- [70] It was agreed that the starting pistol met the definition of firearm because it could be readily modified for use as an operating gun. The issue was whether s. 84(3)(b) was applicable, thereby deeming the pistols not to be a firearm.
- [71] The trial judge found that the pistols were not designed exclusively for firing blank cartridges. He also found that the accused knew that he was not authorised to sell the pistols to the officers without the requisite licence because the officer told him that he had intended to drill out the pistols and use them as real guns. On that basis, the trial judge held s. 84(3)(b) was not applicable and the accused was convicted of the offence.
- [72] The accused appealed. On appeal, the Crown argued that the test for whether the pistol was designed exclusively for the purpose of firing the blanks is objective rather than subjective, and it is determined by the ability to convert the starter pistol into a firearm. The Court rejected this argument on the basis that the definition of "firearm" already addresses convertibility of a firearm. The Court reasoned if convertibility was determinative of the issue, then s. 84(3) would be redundant, and at para. 16 the Court stated:
- [16] ... Clearly the fact that a starter pistol is easily convertible into an operating gun cannot by itself determine that the pistol was not designed exclusively to fire blanks. If that were the case, then no firearm caught by the adaptability portion of the definition in s. 2 could ever be deemed not to be a firearm under s. 84(3)(b), making that section ineffective and redundant.
- [73] The Court of Appeal went on to hold that, even if the trial judge erred in his approach to determining whether the exclusive design aspect of s. 84(3)(b) had been met, the appellant still could not succeed on account of the trial judge's specific finding, amply supported by the evidence, that the accused knew the officer intended to drill out the pistols for use as a real gun.
- [74] In my view, Goswami does not stand for the proposition that the test to determine whether the pistol is designed exclusively for a particular use is a subjective or a modified test. Based on the trial judge's findings, it was clear that the provision in s. 84(3)(b)(ii) had not been met and the appeal was determined on that basis. As a result, the Court did not need to determine whether the test under subsection (1) is subjective or objective.
- [75] That said, I am of the view that the test to determine whether the device is designed exclusively for signalling or notifying of distress is an objective one for the reasons that follow. Support for this proposition that the test to determine the use for which devices are

designed is objective, can be found in *R. v. Strong*, 2012 BCCA 279, a decision of our Court of Appeal in British Columbia. In *Strong*, the issue was whether brass knuckles met the definition of "weapon" and "prohibited weapon" in the Criminal Code. The Court commented that the phrase "designed to be used", which is part of the definition of "weapon", has been held to be an objective test on a number of occasions: see *Strong* at paras. 20-21, 38; *R. v. Murray*, (1985), 24 C.C.C. (3d) 568 (Ont. C.A.) at 571-72; *R. v. Fuhr*, 2018 ABCA 15 at para. 69.

- [76] Utilising an objective standard to determine the purpose for which the device is designed also accords with Parliament's paramount objective with respect to the Criminal Code provisions relating to firearms, that of public safety: see *R. v. Dunn*, 2013 ONCA 539 at para. 57, *aff'd* 2014 SCC 69. With this purpose in mind, Parliament has subjected certain weapons that are capable of causing serious bodily injury or death to strict regulation by virtue of their dangerousness alone, even if the person who possesses the weapon does not have a criminal intent or purpose: see *Dunn* at paras. 58-60.
- [77] If the question of whether the device was designed exclusively for use as a flare gun were entirely subjective, an accused could be acquitted based on an unreasonably-held belief that could endanger the public, and undermine Parliament's objective in making unlawful possession of firearms a criminal offence.
- [78] With respect to s. 84(3)(b)(ii) and the question of whether the person in possession of the device intended to use it exclusively for the purpose for which it was designed, I agree with the submission that it must be determined on the basis of the subjective intention of the person who has possession of that item. This is supported both by the clear language of the subparagraph, and by the Ontario Court of Appeal's reasoning in *Goswami*. In *Goswami*, the Court was clear that s. 84(3)(b)(ii) was not met because of the trial judge's finding that the accused knew that the undercover officer intended the pistol to fire ammunition rather than to fire blanks.
- [79] In summary, the test for whether the device is designed exclusively for the stated purpose, in this case for signalling or notifying of distress, under s. 84(3)(b)(i) is determined on an objective basis. Further, with respect to s. 84(3)(b)(ii), this aspect of the test is determined on a subjective basis.

Application to the Facts

- [80] Returning to the circumstances of this case and consideration of the applicability of s. 84(3)(b). The flare gun, in its original form, is designed for the specific purpose of signalling or notifying of distress; and, as the Crown and defence have agreed, in such a circumstance would exempt or deem the item not to be a firearm for the offence that Mr. Bailey faces.

- [81] However, the item had a metal insert in the barrel, which enabled it to do more. The original item had been modified from its original purpose. The case is not like the starting pistol in Goswami, which could be, but had not yet been, modified or adapted for an ultimate purpose. In this case, the flare gun when found on the date in question was in its modified state. Mr. Bailey was aware of the modification to the flare gun and was aware how the metal insert altered the capability and enabled it to fire the ammunition previously described.
- [82] In these circumstances, it cannot be said that the flare gun continued to be designed exclusively for the purpose of signalling or notifying distress. In the course of the evidence, particularly the statements of Mr. Bailey he indicated he was aware that it had been so modified. He was also aware that he ought not to travel with the insert in the flare gun. In fact, in his statement to the officers, Mr. Bailey said he attempted to remove the insert before leaving. He described his effort in the following terms: "I just made a high school attempt as you know, opening it and flicking and shaking, trying to pick it out. Anyway, I couldn't get it out, so I just locked it in the back and threw it in the truck."
- [83] In contrast, Officer Kennedy testified she observed, when they were at the Border Services building during the course of the investigation, that the metal insert was removed from the chamber of the flare gun in about 20 seconds, by one of the officers in the supervisor's office. I find that the insert was easily removable from the flare gun.
- [84] In the circumstances, Mr. Bailey was clearly aware that the flare gun was not designed exclusively for signalling or signifying distress.
- [85] Turning to the second condition, that is 84(3)(b)(ii), and here subjective intention of Mr. Bailey is required when considering whether the device is to be used exclusively for that purpose. Here the evidence of Mr. Bailey is clear and uncontroverted. Mr. Bailey never used or fired the flare gun with the barrel inserted into the chamber. When found in possession of the flare gun at the border crossing, the unchallenged purpose was to have the item in his possession for safety purposes, for signalling and notifying of distress when on his Sea-Doo with his son. I accept he intended to use the flare gun exclusively for the purpose of signalling or notifying of distress.
- [86] In summary, as a result of the consideration of s. 84(3)(b), I find that it is not applicable in the circumstances, on the basis that both conditions in the subsection have not been met.

CONCLUSION

- [87] In conclusion and based on the evidence before the court, I am satisfied that the Crown has established beyond a reasonable doubt the identity of the operator of the vehicle towing the trailer and the sole occupant at the relevant time was Mr. Bailey. Mr. Bailey was aware of the contents of the trailer, which included the Pelican case containing the flare gun and ammunition located in the compartment on the rear area of the truck. The Pelican case and contents were acquired in the course of his former employment for work purposes. He retained the item after he left their employ, and at the material time the Pelican case was

under his control and he was aware of the contents. That case, together with its contents, was located in Canada at the Sumas Border Control offices during the course of the investigation. The flare gun with the metal insert was positioned in the barrel of the flare gun, which converted it from its intended purpose, so that it could fire the ammunition previously described. The firearms analyst was of the view that it was a firearm pursuant to s. 2 of the Criminal Code, and a restricted weapon pursuant to s. 84(1) of the Criminal Code.

[88] Based on the evidence of Mr. Yan, the firearms officer, Mr. Bailey did not hold a possession and acquisition licence, which allows him to possess and to acquire firearms, or the class of firearms including a restricted firearm and prohibited firearms and prohibited handguns on July 22, 2017.

[89] As a consequence, I find Mr. Bailey guilty on the basis that the Crown has established the essential elements of the offence beyond a reasonable doubt and, in particular, with respect to the issues raised by the defence, continuity has been established. The accused had the necessary mens rea to possess the prohibited weapon, and s. 84(3)(b) is not applicable in these circumstances.

[90] This concludes the reasons why I find Mr. Bailey guilty of the one count before the court.

"Crabtree J."

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