

CANADA / JUDGMENT

R. v. Bidesi

2017 BCSC 2027

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2017 BCSC 2017 R. v. Bidesi

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Bidesi,

2017 BCSC 2027

Date: 20171030

Docket: X077493

Registry: New Westminster

Between:

Regina

v.

Russell Bidesi

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Before: The Honourable Madam Justice Duncan

Oral Ruling

Counsel for the Crown:

J. Fogel

Counsel for the Accused:

S. Buck

Place and Dates of Hearing:

New Westminster, B.C.

October 6 & 26, 2017

Place and Date of Judgment:

New Westminster, B.C.

October 30, 2017

Introduction

- [1] The accused is on trial for the second-degree murder of Bradley McPherson. The circumstances relate to a shooting at an after hours party in the early morning hours of December 24, 2011. The Crown called Brittany Ulmer-Wightman as a witness. As I will explain below, she claims to have no memory of the events or of the contents of a statement she gave to the police in May 2012. The Crown now applies to have the witness's statement admitted into evidence for the truth of its contents. The defence is opposed.
- [2] At the time Ms. Ulmer-Wightman gave the statement she used the surname Ulmer. I will refer to her as Ms. Ulmer throughout.
- [3] In *R. v. Bradshaw*, 2017 SCC 35 Justice Karakatsanis, for the majority, summarized the hearsay evidence rule:
 - [1] Hearsay is an out-of-court statement tendered for the truth of its contents. It is presumptively inadmissible because -- in the absence of the opportunity to cross-examine the declarant at the time the statement is made -- it is often difficult for the trier of fact to assess its truth. Thus hearsay can threaten the integrity of the trial's truth-seeking process and trial fairness. However, hearsay may exceptionally be admitted into evidence under the principled exception when it meets the criteria of necessity and threshold reliability.
- [4] *Bradshaw* is the most recent case from the Supreme Court of Canada concerning hearsay. While the majority formulated a four-step paradigm to analyze corroborative evidence in the threshold reliability inquiry, the judgment does not depart from the principles articulated in *R. v. Khelawon*, 2006 SCC 57. Threshold reliability may be established by a variety of factors, including corroboration from other sources.

Necessity

- [5] The Crown called Ms. Ulmer as a witness and attempted to elicit evidence from her. She initially evinced an intention to refuse to testify, but after legal advice she affirmed she would tell the truth. Ms. Ulmer said she had no memory of the events in question, that being a party on December 23/24, 2011 where there had been a shooting or giving a statement to police about the incident in May 2012.
- [6] I permitted the Crown to cross-examine the witness on an inconsistency between Ms. Ulmer's statement and her evidence, under s. 9(2) of the Canada Evidence Act. Subsequently, I declared Ms. Ulmer adverse in interest to the Crown under s. 9(1) of the Canada Evidence Act and permitted the Crown to cross-examine her on the circumstances of the May 2012 statement and the circumstances surrounding her attendance for two pre-trial interviews, one in 2015 and one in 2017.
- [7] No evidence of substance was gleaned from Ms. Ulmer as a result of examinations pursuant to the 9(2) and 9(1) rulings. The Crown then asked for a voir dire concerning the admission of Ms. Ulmer's statement in evidence as an exception to the hearsay rule.
- [8] I find on the basis of the foregoing that the Crown has satisfied the necessity prong of the hearsay test. Whether Ms. Ulmer is genuinely forgetful or, more likely, as the evidence of Staff Sergeant Dadwal suggests, has chosen to hold the evidence hostage because the police would not act on her request to do something about her boyfriend's drug charges, the evidence is not available. Mr. Buck for the defence does not argue otherwise. The issue to be determined is whether threshold reliability has been proven by the Crown.

Threshold Reliability

- [9] Threshold reliability may be established through procedural reliability or substantive reliability or a combination of the two. In Bradshaw, Karatkasanis J., for the majority, said:
- [28] Procedural reliability is established when "there are adequate substitutes for testing the evidence", given that the declarant has not "state[d] the evidence in court, under oath, and under the scrutiny of contemporaneous cross-examination" (Khelawon, at para. 63). These substitutes must provide a satisfactory basis for the trier of fact to rationally evaluate the truth and accuracy of the hearsay statement (Khelawon, at para. 76; Hawkins, at para. 75; Youvarajah, at para. 36). Substitutes for traditional safeguards include a video recording of the statement, the presence of an oath, and a warning about the consequences of lying (B. (K.G.), at pp. 795-96). However, some form of cross-examination of the declarant, such as preliminary inquiry testimony (Hawkins) or cross-examination of a recanting witness at trial (B. (K.G.); R. v. U. (F.J.), [1995] 3 S.C.R. 764), is usually required (R. v. Couture, 2007 SCC 28, [2007] 2 S.C.R. 517, at paras. 92 and 95)
- [10] As to substantive reliability, the majority said:

- [30] A hearsay statement is also admissible if substantive reliability is established, that is, if the statement is inherently trustworthy (Youvarajah, at para. 30; R. v. Smith, [1992] 2 S.C.R. 915, at p. 929). To determine whether the statement is inherently trustworthy, the trial judge can consider the circumstances in which it was made and evidence (if any) that corroborates or conflicts with the statement (Khelawon, at paras. 4, 62 and 94-100; R. v. Blackman, 2008 SCC 37, [2008] 2 S.C.R. 298, at para. 55).
- [11] The standard for substantive reliability is not absolute certainty but it is fairly high. The various expressions of the standard are discussed in Bradshaw:
- [31] [T]he trial judge must be satisfied that the statement is "so reliable that contemporaneous cross-examination of the declarant would add little if anything to the process" (Khelawon, at para. 49). The level of certainty required has been articulated in different ways throughout this Court's jurisprudence. Substantive reliability is established when the statement "is made under circumstances which substantially negate the possibility that the declarant was untruthful or mistaken" (Smith, at p. 933); "under such circumstances that even a sceptical caution would look upon it as trustworthy" (Khelawon, at para. 62, citing Wigmore, at p. 154); when the statement is so reliable that it is "unlikely to change under cross-examination" (Khelawon, at para. 107; Smith, at p. 937); when "there is no real concern about whether the statement is true or not because of the circumstances in which it came about" (Khelawon, at para. 62); when the only likely explanation is that the statement is true (U. (F.J.), at para. 40).

Procedural Reliability in this Case

- [12] The Crown called Staff Sergeant Dadwal as a witness in the voir dire and played the video of Ms. Ulmer's statement. A transcript of the interview, which Staff Sergeant Dadwal had vetted and corrected, was tendered during the voir dire. Mr. Buck filed a portion of the transcript from an interview of Ms. Ulmer earlier on the same day in relation to another investigation.
- [13] In May 2012, Staff Sergeant Dadwal held the rank of Corporal and was in charge of the interview team for IHIT (Integrated Homicide Investigation Team). He became involved in the investigation of Brad McPherson's murder around April 2012. By May 17, 2012, he was fairly familiar with the evidence that had been gathered regarding the murder. On that day a team of eight IHIT investigators went to Quesnel to effect the arrest of Brittany Ulmer.
- [14] The primary purpose of the IHIT team was to arrest Ms. Ulmer for the Christmas Day robbery and homicide of Alok Gupta, a clerk at Ken's Grocery. The secondary purpose was to see if she would cooperate on other matters, including the McPherson homicide and a shooting incident involving an individual named Skea. All of the incidents occurred in Surrey within a period of 24 to 36 hours coinciding with Christmas Day 2011.

- [15] Staff Sergeant Dadwal was informed by other officers that Ms. Ulmer was arrested for the Gupta homicide at about 2:15 p.m. She was with her boyfriend Jamie Crosson who was arrested on drug charges. Staff Sergeant Dadwal had dealt with Ms. Ulmer several weeks earlier when she was in custody in Surrey, so he had some familiarity with her.
- [16] Police interviewed Ms. Ulmer in the Quesnel RCMP detachment on May 17, 2012 about three different incidents. First, she was interviewed by Corporal McPherson about the homicide at Ken's Grocery. Next, she was interviewed by Staff Sergeant Dadwal about the homicide at the party early on December 24, 2011. Finally, she was interviewed in relation to the Skea shooting. Following the three interviews, Ms. Ulmer was released from custody with no charges.
- [17] Staff Sergeant Dadwal could not at first recall Ms. Ulmer's age. He believed she had just turned 18. He monitored the first interview by Corporal McIntosh but did not recall her telling him that she was 16. As far as Staff Sergeant Dadwal was aware, Ms. Ulmer had been given access to legal counsel and to her mother prior to the interviews.
- [18] Staff Sergeant Dadwal agreed that police enlisted Mr. Crosson while interviewing Ms. Ulmer in relation to the homicide of Mr. Gupta in order to convince her to be more forthcoming about that offence.
- [19] Ms. Ulmer was taken into custody at 2:15 and the first interview concerning the Gupta homicide began at 7:30 p.m. In the interval between the arrest and the first interview Ms. Ulmer had gone back and forth between cells to contact counsel. By the time Staff Sergeant Dadwal began his interaction with Ms. Ulmer it was about 10:30 p.m. He assumed she had been provided with food but on the tape of the interview she was eating pizza. She was offered something to drink other than water but declined.
- [20] At about 10:30 p.m., Staff Sergeant Dadwal interrupted the McIntosh interview concerning the Gupta homicide. He agreed he did so to put some gentle pressure on Ms. Ulmer. The transcript of his dealings with Ms. Ulmer was filed as an exhibit. Their interaction was as follows:

DADWAL: Do you remember when you got released last time out of Surrey?

ULMER: Yeah.

DADWAL: Remember I came out of the room?

ULMER: That was, thank you.

DADWAL: I'm in, I'm a Major Case Manager. Brittany can you hear me out for a sec?

ULMER: Yes.

DADWAL: 'Kay, I'm gonna tell you exactly why he's upset okay? [I infer this is a reference to her boyfriend Jamie Crosson]

ULMER: Okay.

DADWAL: I'm going to tell you exactly what's going to happen, okay? I'm the one who got you released last time (INDECIPHERABLE) and his dad. So I'm a straight shooter, I'm not gonna

ULMER: Bull shit.

DADWAL: I'm not gonna bull shit I'm going to tell you the way it is whether you like it or not.

ULMER: Okay.

DADWAL: I've done this a few times, okay? Brittany what do you think is going to happen right now?

CROSSON: Brittany you're fucked.

DADWAL: You know you're fucked right?

CROSSON: You're fucked okay, you're totally fucked, you're totally fucked.

DADWAL: And I've already told Jamie that you've told us half the truth, you've told us about being there, which is good okay? You wanna know your options? Okay, Jamie (INDECIPHERABLE) I need you guys to pay attention.

CROSSON: (INDECIPHERABLE) really bad.

DADWAL: Listen (INDECIPHERABLE) I need your full attention.

CROSSON: (INDECIPHERABLE)

DADWAL: Jamie knows what I'm about to say, your mom knows what I'm about to say

CROSSON: (INDECIPHERABLE) life with you okay (INDECIPHERABLE).

ULMER: Okay, baby, I'm sorry baby.

DADWAL: Brittany look at me for a sec

ULMER: Yeah.

DADWAL: you gotta pay attention here, just leave him alone for one minute, he'll be fine. Okay you gotta pay attention 'cause

[Staff Sergeant Dadwal testified that Crosson and Ulmer were comforting each other at this point and Ulmer was crying a bit]

ULMER: Okay.

DADWAL: 'cause it's the biggest decision that you're about to make in your life now. Okay, that's why he's here for you because it's the biggest decision you're going to make in your life time.

Listen, you are fucked out of this investigation make no bones about it, okay? You've already told us half the truth about being there and there's a lot more evidence that we haven't even played for you or shown you that we're not going to show you. We know the truth about exactly how it went

down, exactly who went in the store, exactly what you were doing, exactly who came out first, we know everything that's even after (INDECIPHERABLE) it's not a secret.

ULMER: Okay.

DADWAL: I know every single fucking detail.

ULMER: Okay.

DADWAL: Okay? The bottom line is you have two choices to make today, okay? The two choices you're going to make is, there's no free passes, I don't give out free passes as the Major Case Manager of the province, the two choice you're going to make today is either you're going to gamble your life and be a suspect and you will be charged in the morning and you will go to Surrey Pre-Trial with the Sheriff's, transported in the afternoon and you can hire a lawyer and go defend yourself the next few years and, and gamble your life, gamble with his life and gamble with your mom's life. That's one of the choices (Indecipherable)

ULMER: (INDECIPHERABLE) I know I'm sorry.

DADWAL: Brittany, listen to me, the second choice you can make here you can decide to be a witness and walk away from all this. Right now (INDECIPHERABLE)

CROSSON: Your mom wants this and I want this, I don't know why, I'm sure it sounds bad but I don't (INDECIPHERABLE) fucking (Indecipherable)

DADWAL: Jamie wants this and your mom wants this.

CROSSON: (INDECIPHERABLE)

ULMER: I just didn't want to do it because I though [sic] you.

CROSSON: No I want you to do it.

ULMER: Okay.

DADWAL: He wants you to do the right thing, you deserve a second chance at life.

CROSSON: (Indecipherable) we can go somewhere far.

DADWAL: You're not a gangster, you're not a drug dealer you (INDECIPHERABLE).

[21] The interview concerning the Gupta homicide continued for approximately 50 pages of transcript. It ended at approximately 11:00 p.m. Staff Sergeant Dadwal left the room and re-entered it at 11:17 p.m. Ms. Ulmer remained in the same room.

[22] When Staff Sergeant Dadwal re-entered the room he told Ms. Ulmer that he wanted to separate the two statements. He testified that as far as he was aware Ms. Ulmer did not know what the subject matter of the second statement would be. I will deal with the contents of the second statement in the substantive reliability portion of my reasons; however, the opening comments of Staff Sergeant Dadwal relate to the procedural reliability analysis:

DADWAL: Okay, recording's back on. I just wanted to do some, we need to talk about something else here. It's May 13, Thursday 11:17 pm. What I wanted to do is I just wanted to separate the ah, two statements. So, let me tell you this, ah, what we just talked about before this, we're not going to talk about that right now, this is something new, this is something else. So I've said, I've, I've split it.

ULMER: Okay.

DADWAL: So it's like a long recording, we talked about the, the last incident, leave that alone now, let's just put that aside.

ULMER: Okay.

DADWAL: I'm going to introduce something else to you. I think you now where I'm going. It's to do with the house party that you were at.

ULMER: The house party on Christmas Eve?

DADWAL: Yeah.

ULMER: Okay, yeah.

DADWAL: So, what I want you to do is, well we're going to talk about that and I want you to, so that's why I made a separate recording, it's a separate statement now.

ULMER: Oh okay.

DADWAL: So, you know how we talked about jumping in the pool?

ULMER: I can, I can kind of help you with that

DADWAL: Yeah.

ULMER: I'm, I'm telling you, I cannot tell you who did it.

DADWAL: Nope we

ULMER: I was not there, I got told to leave.

DADWAL: Okay no, you're just going to do your best.

ULMER: Okay.

DADWAL: Right, I, I already know what your role was and where you were, I already know those things

ULMER: Yeah, okay.

DADWAL: don't worry okay. Um, but what we'll do is, um, start from the beginning about that, even before you get there.

- [23] Staff Sergeant Dadwal testified that the "jumping in the pool" reference related back to the earlier interview about the Gupta homicide. During that interview Ms. Ulmer said she wanted to be a witness and he told her she needed to fully jump in the pool, all in, tell the truth and see the process through and turn her life around. His comment about knowing what her role was in the house party incident came from his knowledge of what another witnesses, Janessa Wallace, had said.
- [24] Staff Sergeant Dadwal agreed that Ms. Ulmer was speaking quickly but he thought she was motivated and energetic to get the process done rather than edgy or nervous. He had considered whether she was under the residual effects of drug use and had asked her about drugs. Ms. Ulmer said she had not used drugs for quite some time and he was satisfied by his observations that she was not on any substances.
- [25] Staff Sergeant Dadwal was aware that in some cases witnesses are put under oath before a statement is taken. In his experience, that decision is made by the police in consultation with the Crown. He considered doing so in this case but decided against it. Staff Sergeant Dadwal said the first time he speaks with a witness he looks for the truth, then he wants the investigative team to talk with Crown about corroboration and in some cases a subsequent statement is taken under oath.
- [26] The Crown submits that while the statement was not taken under oath, I have the ability to assess the interview by viewing the video. Mr. Fogel notes the comments of the majority in *R. v. B.(K.G.)*, [1993] 1 S.C.R. 740 where Chief Justice Lamer observed that the advent of video technology allows the trier of fact to hear and see the hearsay declarant make the statement rather than to hear another witness repeat what the declarant said [at pages 780-781].
- [27] Later in the majority's reasons, Lamer C.J.C. said:
- [T]he best indicium of reliability on the principled approach of Smith in the case of prior inconsistent statements is that the statement, to be substantively admissible, has been made (i) under oath, solemn affirmation, or solemn declaration, and (ii) following the administration of an explicit warning to the witness of his or her amenability to prosecution if it is discovered that he or she has lied. This indicium satisfies the first hearsay danger entirely: in no case will the trier of fact be asked to accept unsworn testimony over sworn testimony, verdicts will not be based on unsworn testimony, and the circumstances which promote truthful trial testimony will have been recreated as fully as is possible. [at p. 791]
- [28] Lamer C.J.C. went on to emphasize that the majority was not creating a technical categorical requirement of an oath as a pre-requisite to admission:

It follows from Smith that there may be situations in which the trial judge concludes that an appropriate substitute for the oath is established and that notwithstanding the absence of an oath the statement is reliable. Other circumstances may serve to impress upon the witness the importance of telling the truth, and in so doing provide a high degree of reliability in the statement. While these occasions may not be frequent, I do not foreclose the possibility that they might arise under the principled approach to hearsay evidence. [at p. 792]

- [29] The statements at issue in K.G.B. were videotaped, and Lamer C.J.C. remarked upon the ability of the audio-visual medium to capture elements of the statement lost in a transcript, such as the witness nodding or shaking his head, non-verbal indicium of credibility, a close-up of the witness's face capturing nuances of expression and other subtle observations or cues.
- [30] Mr. Fogel says the same applies here. The video illuminates things that are not apparent in the transcript, such as Ms. Ulmer's body language, tone of voice and ability to recall. Mr. Fogel notes that in some portions of the video Ms. Ulmer is clearly processing thoughts in the moment then adding or clarifying the narrative. She had made the choice to cooperate with police. She was not a suspect in the McPherson homicide and there were no threats or promises to her about being involved in the homicide.
- [31] Mr. Buck maintains that a videotaped statement to police without anything more is an insufficient basis for the procedural aspect of threshold reliability. He relies on a statement to that effect from Khelawon which was quoted by the British Columbia Court of Appeal in R. v. Bradshaw, 2015 BCCA 195 at para. 28.
- [32] Khelawon involved the admissibility of videotaped statement made by a witness who died prior to trial. The witness was elderly and frail with a questionable mental capacity. He answered the police officer's question about whether he understood the importance of telling the truth a simple "yes" which in the view of the Justice Charron, writing for the full Court, did not illuminate whether he had an understanding of the importance of telling the truth and the consequences for the person he was accusing of harming him. The statement was not given under oath. The witness did not testify at the preliminary hearing. No efforts were made to preserve the evidence.
- [33] Charron J. said, at para. 106, that the principled exception to the hearsay rule "does not provide a vehicle for founding a conviction on the basis of a police statement, videotaped or otherwise, without more. In order to meet the reliability requirement in this case, the Crown could only rely on the inherent trustworthiness of the statement."

- [34] Mr. Buck notes that Ms. Ulmer's statement was not under oath or solemn affirmation, although Staff Sergeant Dadwal was aware of that process and had used it in the past. There was nothing to ensure she understood the moral obligation to tell the truth. At trial, Ms. Ulmer balked at testifying then after obtaining legal advice changed her mind and was affirmed. Mr. Buck submits it is likely she testified simply to avoid the penal consequences of contempt.
- [35] As to the quality of the video in this case, Mr. Buck says it is not of sufficient quality to permit the court to assess Ms. Ulmer's demeanor or expression. There are no close-ups of her face to assist the court with subtleties of facial expression.

Conclusion on Procedural Reliability

- [36] The video sheds some light on Ms. Ulmer's demeanour and tone of voice as she told Staff Sergeant Dadwal what she could recall, although it is perhaps not the best quality in terms of lighting or camera angle. But most significantly, there was nothing in what Staff Sergeant Dadwal said to the witness that would imprint the interview concerning Mr. McPherson's homicide with something analogous to an oath or solemn affirmation.
- [37] Staff Sergeant Dadwal's role was to interview the witness and attempt to ascertain the truth. He considered taking the option of taking the statement under oath or solemn affirmation but did not choose that path. Nor was Ms. Ulmer interviewed on a later occasion, after police had obtained corroboration of her statement, or cross-examined at a preliminary inquiry. She is not a recanting witness, giving a different version of events now than in her statement, which could lead to a conclusion that cross-examination might be possible.
- [38] In this case, circumstances in which the statement was taken bear no hallmarks of procedural reliability that stand as adequate substitutes for testing truth and accuracy of the statement.

Substantive Reliability

- [39] The substantive reliability inquiry is focussed on whether the statement is inherently trustworthy. In deciding upon inherent trustworthiness, the trial judge can consider the circumstances in which it was made as well as evidence that corroborates or conflicts with it. The standard for the substantive reliability inquiry is high, incorporating a range of concepts summarized in para. 31 of Bradshaw, reproduced earlier in these reasons.
- [40] To reiterate some of those concepts, I must be satisfied the statement is so reliable that contemporaneous cross-examination of the declarant would add little if anything to the process; or that it was made under circumstances which substantially negate the possibility that the declarant was untruthful or mistaken; or that the statement is so reliable it is unlikely to change under cross-examination; or where the only likely explanation is that the statement is true.

- [41] Corroborative evidence must go to the truthfulness or accuracy of the material aspects of the hearsay statement [Bradshaw, at para. 45]. The function of corroborative evidence at the threshold reliability stage is to mitigate the need for cross-examination on the very point that the hearsay is tendered to prove
- [42] Karakatsanis J. set out a four-part test for trial judges to apply to corroborative evidence in the substantive reliability inquiry. As I observed earlier in my reasons, I do not understand this to be a new test but rather an organization of the foundational principles concerning threshold reliability. The four steps are:
1. Identify the material aspects of the hearsay statement that are tendered for their truth.
 2. Identify the specific hearsay dangers raised by those aspects of [the] statement in the particular circumstances of the case.
 3. Based on the circumstances and these dangers, consider alternative, even speculative [or hypothetical], explanations for the statement.
 4. Determine whether, given the circumstances of the case, the corroborative evidence led at the voir dire rules out these alternative explanations such that the only remaining likely explanation for the statement is the declarant's truthfulness about, or the accuracy of, the material aspects of the statement. [para. 57]
- [43] As to the fourth step, I note that the evidence which the Crown maintains corroborates the material aspects of Ms. Ulmer's statement was not led in the voir dire but in the trial proper. Mr. Buck did not take issue with that and both counsel simply referred to evidence heard in the trial proper in argument on the voir dire.

The Material Aspects of the Statement

- [44] Ms. Ulmer's statement included details about who she was with in the evening leading up to the party where the shooting occurred, her activities at the party, her interaction with the accused and the circumstances of her departure from the party. Many of those details are corroborated by other witnesses.
- [45] Much of what Ms. Ulmer relates to Staff Sergeant Dadwal is in a free flowing narrative interspersed with details of what she was told by others. The material portion of her statement relates to things the accused told her after the party when her group had returned to "the Shack", the house they had been at earlier in the evening. The group included Person X, Ian Langthorne, Julian Page, Janessa Wallace, Ms. Ulmer and the accused.
- [46] The accused was "talking about stupid shit" and the group decided to leave him there and to go to Julian's house to get away from him. A short time later the accused showed up at Julian's house and started being really loud. Julian's mother and little sister were sleeping. Ms. Ulmer said:

And he's like [given the narrative it appears the "he" is Julian], shut the fuck up or I'll blah blah and he's like [this he is the accused], no, no don't, what you fuck me there after everything, he's like, I did that shit for you and shit and Julian's like, don't fucking use me as an excuse. Like I remember them having a whole argument and then um, I remember him, like um, pointing the gun as a, a joke and Julian told him to fucking leave. He's like, I got my little sister here, you're going to point that shit around, I remember him having to leave and then .

DADWAL: Who, who was pointing the gun?

ULMER: Russell.

DADWAL: Okay.

ULMER: And then I remember him dropping it and making a really loud sound and then that's what kind of pissed J up to the max like

DADWAL: Mm-hm.

ULMER: um nerves or something.

DADWAL: Mm-hm.

ULMER: And that's when he told him to leave. And then he still like kind of stick around, called a cab then left.

[47] Staff Sergeant Dadwal sought clarification:

DADWAL: So you said ah, your words that you just told me right now is, he told Julian, I did that shit for you, so he was taking responsibility for the murder then?

ULMER: Who?

DADWAL: Russell.

ULMER: Well.

DADWAL: Tell me exactly what he says.

ULMER: Well obviously it was him, who else would it be.

DADWAL: Yeah.

ULMER: I mean I-I can't, of course I wasn't there.

DADWAL: Yeah.

ULMER: Can't, but I know

DADWAL: Yeah.

ULMER: inside my heart right. And I know like um that probably

DADWAL: Like what's he saying, what he's saying?

ULMER: Oh God, he's, it, that's the person, I shot the guy, so I know, like he, it came out of his own mouth right.

DADWAL: Okay yeah.

ULMER: He's like I fucking shot that guy, blah blah blah, he's dead and shit and then I'm, um, then (INDECIPHERABLE) is like no no no, it was in the arm and that's when it was like, that's when everyone was like (INDECIPHERABLE) six o'clock news, we got to watch it, so it came to the news and yep, that guys dead. And we saw like, um, all the police tape on the news and house, same house number, like holy fucking way.

[48] Ms. Ulmer went on to clarify that when the accused arrived at the Shack after the shooting, he started "getting really bad", apparently as a result of using G, which I take to mean GHB. When the accused showed up later at Julian's he started "freaking out" because he was so affected by G. Ms. Ulmer said "we thought he was just some loser and shot some guy in the arm and thought he was cool." "Okay, like we were obviously convinced that he didn't kill this guy."

[49] The material portions of the statement boil down to Ms. Ulmer saying she saw the accused with a gun after the shooting and heard him say he had shot someone.

The Specific Hearsay Dangers of the Statement

[50] The particular hearsay dangers of Ms. Ulmer's statement relate to both the truthfulness and accuracy of the statement. Three factors related to accuracy are memory, narration and perception, per Bradshaw at para. 44. The statement was given some five months after the event in question, rather than close in time, although that alone might not be fatal to admissibility depending on the nature of the corroborative evidence.

[51] The narration of the statement is somewhat disjointed and includes things others told her, so the thread of the material evidence is difficult, though not impossible, to follow. There is the danger that her use of "we" in some respects reflects not what she saw or heard but what she discussed with others.

[52] Ms. Ulmer told Staff Sergeant Dadwal early in the statement that she was drunk and high at the time the events occurred. There is no way to gauge how much she had consumed and how intoxicated she was, although the non-material parts of her statement indicate she was able to observe and relate her movements that evening and some of the things that happened at the party.

Alternative Hypotheses for the Statement

[53] I reject the possibility that Ms. Ulmer was eager to pin the shooting on the accused in order to gain favour with the police. She was clear from the outset that she could not tell Staff Sergeant Dadwal who did it. Similarly, there was no indication that anyone close to Ms. Ulmer, such as her cousin Julian, was in jeopardy of being accused of the shooting such that

she sought to deflect blame on to someone else. However, I cannot reject the possibility that Ms. Ulmer was either mistaken about what the accused said at Julian's as a result of her state of intoxication or she was told about the gun by someone else, such as Person X.

- [54] This necessitates an examination of the corroborative evidence to rule out the alternate explanations for the statement such that the only remaining likely explanation is Ms. Ulmer's truthfulness or accuracy about the material aspects of the statement.

Corroboration

- [55] While I agree with the Crown that there is corroboration for many aspects of Ms. Ulmer's statement, the potential corroboration of the material portions come from only one individual, Person X.
- [56] Person X testified that he was present at Julian's after the shooting at the party. The group, which included Ms. Ulmer, had first gone to the house they had socialized at earlier in the evening, which is obviously the Shack referred to by Ms. Ulmer. They left that house without the accused, and proceeded to the townhouse where Julian lived with his mother and younger sister. They went to Julian's room and about five minutes later the accused appeared.
- [57] Person X said the accused sat down on the bed and joked about the group ditching him. The accused then pulled out a black handgun. He leaned down to the floor from the bed and popped five bullets from the magazine, counted them and put them back in the magazine. Nobody said anything as he counted out the bullets.
- [58] The evidence of Person X only corroborates one material aspect of Ms. Ulmer's statement: that the accused had a handgun at Julian's. He does not corroborate her statement concerning admissions made by the accused. Conversely, she did not say in her statement that the accused popped bullets from the magazine of the gun and counted them.
- [59] Person X is a Vetrovec witness. He has a criminal record for serious offences and he entered into an immunity agreement with the Crown to avoid a conviction for second degree murder in the homicide of Mr. Gupta, referenced earlier in these reasons. Ms. Ulmer was arrested in connection with that homicide when Staff Sergeant Dadwal interviewed her in Quesnel. Person X testified at this trial that Ms. Ulmer-Wightman was in the car while he and another individual robbed the grocery store. Person X was in possession of the firearm that discharged and killed Mr. Gupta. This offence occurred about 36 hours after Mr. McPherson's homicide.
- [60] In Bradshaw, the majority said:

- [50] To be relied on for the purpose of rejecting alternative hypotheses for the statement, corroborative evidence must itself be trustworthy. Untrustworthy corroborative evidence is therefore not relevant to the substantive reliability inquiry (see Khelawon, at para. 108). Trustworthiness concerns are particularly acute when the corroborative evidence is a statement, rather than physical evidence.
- [61] Person X's statement is not strikingly similar to Ms. Ulmer's, as was the case in U.(F.J.). There is no physical evidence, such as the semen stain in Khan which corroborated the child's version of what occurred in the doctor's office. I am not satisfied the corroborative evidence of Person X is sufficient to overcome the hearsay dangers raised by the tendered statement. It does not render the statement inherently trustworthy. I cannot be satisfied that contemporaneous cross-examination of Ms. Ulmer would add little if anything to the process, particularly in light of her admitted use of drugs and alcohol on the night in question.
- [62] Consequently, Ms. Ulmer's statement will not be admitted in evidence for the truth of its contents.

"Duncan J."

The Honourable Madam Justice Duncan

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