

CANADA / JUDGMENT

R. v. Cantrill

2020 BCSC 1110

COURT

Supreme Court of British Columbia

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2020 BCSC 1110 R. v. Cantrill

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Cantrill,

2020 BCSC 1110

Date: 20200717

Docket: 65047

Registry: Chilliwack

Regina

v.

Neil Cantrill; Stephan Cantrill; Robert Lowry

Before: The Honourable Mr. Justice Branch

Oral Reasons for Judgment

Counsel for the Crown:

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Counsel for Neil Cantrill:

P. McMurray

Counsel for Stephan Cantrill:

E. Warren

Counsel for Robert Lowry:

R. Gregory

Place and Dates of Trial:

New Westminster, B.C.

September 16-20, 2019

December 12, 2019

January 20-22, 2020

February 19, 2020

June 22-26, 2020

Place and Date of Judgment:

New Westminster, B.C.

July 17, 2020

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I. INTRODUCTION

- [1] This case arises out of an alleged assault by three men on a former business associate on August 1, 2016. The three accused are charged with five counts: aggravated assault, kidnapping, extortion, forcible confinement, and overcoming resistance. The Crown agreed to stay an additional count against Neil Cantrill ("NC") for possessing brass knuckles contrary to s. 92(2) of the Criminal Code.
- [2] The key issues are identification, continuity, and, most importantly, the credibility of the alleged victim, Richard Houle ("Houle").

II. THE EVIDENCE

Richard Houle

- [3] Houle gave the following evidence. He operated illegal marijuana grow-ops for many years prior to the alleged assault.
- [4] In about 2001 or 2002, he entered into an agreement with NC to have NC's organization serve as the distributor for his product. Houle would arrange for product to be delivered to Edmonton, where NC resided, and NC would take over distribution from that point forward. The product from several different grow-op properties controlled by Houle and his partners was distributed in this manner. The expenses of each grow-up would be taken off the top before the distribution of profits between Houle, NC, and Houle's other partners.
- [5] Houle earned about \$60,000-\$100,000 annually but, not surprisingly, did not file any tax returns. Houle held one of the marijuana grow properties at 66576 Johnson Road, Hope ("Johnson Road") through a nominee, in an admitted attempt to minimize the risk of proceeds of crime seizure. Houle also resided in the house at Johnson Road.
- [6] Houle says that there were no major difficulties in his business relationship with NC, at least from his perspective. During this period, Houle did suffer certain police seizures or third party thefts at his properties, including a series of thefts at the property known as the "Dogwood House" from 2009-2012. A last theft in August 2012 resulted in operations at that location being shut down (the "Dogwood Theft").
- [7] On December 28, 2014, Houle advised NC at a meeting in Edmonton that their business relationship would be coming to an end, as Houle no longer intended to deal in growing marijuana plants. He advised NC that he could have certain growing equipment when and if NC needed it. Houle does not recall NC raising any concerns about this change in their relationship.

[8] Houle had no contact with NC for a couple of years thereafter.

[9] On July 31, 2016, Houle found a note on his fence at Johnson Road (the "Note"). The front of the Note read:

Redgy: This is Neil- I really need some information on something we talked about Call me pls.
[phone number deleted].

[10] The back of the Note, which Houle did not read, stated:

My son and I are in town for a bit.

[11] Houle assumed the Note was from NC, as he did not know anyone else named Neil. He surmised that NC might be wanting the equipment they had discussed earlier. Houle called the phone number on the Note. Houle recognized NC's voice. They had a discussion about where their meeting should take place. NC declined to meet for a meal at a restaurant that day. He suggested they meet the next day. Houle presumed the meeting would be at their usual meeting place at Coquihalla Park. NC called back later and asked if they could meet somewhere else, as there was a B.C. Day event taking place at their usual spot. NC asked Houle to consider whether there was a quieter spot. Houle suggested a pullout near the Hope Garden Centre (the "Pullout"), and NC agreed.

[12] On August 1, 2016, Houle drove to the Pullout in his truck. He saw a white SUV (the "SUV") and NC walking with his dog. Houle asked what NC wanted to meet about, and NC said he would like to have the equipment back. They walked towards two other men. NC introduced them, the first as his son Stephan ("SC"). Houle knew from their past dealings that NC has a son named Stephan. Houle was then introduced to the third man, but Houle no longer recalled his name (the "Third Man"). The Third Man was the tallest of the group, approximately six feet tall.

[13] Houle asked where the Cantrills were thinking of setting up operations and they were rather vague. NC then suggested they move to a shadier spot because his dog was panting as it was a warm day. Houle suggested they move to the more treed area up the embankment from the Pullout (the "Embankment"). Houle led the way, and the others followed. NC was behind and to his right, the Third Man was further to his right and he believes SC was behind and to his left.

[14] At the top of the Embankment, NC grabbed Houle by the throat and said "So you think you can rip me off!" Houle rotated his body to the right to speak to him. He was then hit by the Third Man on the right side of his face. He started bleeding profusely from his nose. He tried to escape, and the Third Man jumped on his back, putting his arm around his throat. He could not breathe. He was straining so hard that he soiled himself, and almost lost consciousness. The Third Man told him he would stop if Houle stopped struggling. Houle complied. His right eye was swollen shut and he couldn't see well out of his left eye, given that he had lost his glasses, including their sunglasses clip-on.

- [15] Houle was then taken by the arm and directed to the SUV. He did not want to get into the SUV, but he felt that he did not have much of a choice as he did not want to be harmed further. Houle sat in the rear seat on the driver's side. He says he was aware that SC was driving, and that NC was in the passenger seat, leaving the Third Man beside him in the back. The Third Man held his head down, but he was able to look up periodically. He tried to ask NC what was going on, but NC just said "Don't call me Neil". The person in the seat beside him began to strike him repeatedly on the right side of his face. This caused further bleeding.
- [16] After driving for about 15 minutes, the SUV came to a stop. Houle believes they were at the Ruby Creek turnout ("Ruby Creek"). Houle continued to ask what this was all about. One of the three explained it was because they believed that Houle had organized the Dogwood Theft himself, and that therefore he owed them compensation for their losses. They told him they understood that Houle had a million dollars buried somewhere. Houle denied this, but said he had \$5000 he could give them. They were not satisfied. SC said that Houle would be "sucking dick on the street corner" unless he yielded to their demands. SC said they would take everything he had. SC swung his arm around to the back seat a number of times. One of these blows cut Houle on the forehead. Houle believes this may have been caused by a ring on his hand. This new injury started bleeding as well.
- [17] SC said he was going to stomp on Houle's head and kick his teeth in to see if that would necessitate \$5000 worth of dental work. Either SC or the Third Man also threatened to throw him out of the vehicle. NC said that, if Houle did not tell them where his money was, he would "burn his dick with a hot spoon". NC proceeded to heat up a spoon with a lighter, and placed it on the top of Houle's head, creating a burn mark.
- [18] NC asked Houle about Johnson Road and the Third Man said, "We want your house". They asked about the property's appraisal and the amount of the mortgage. They did some calculations about the equity they would receive if the property were transferred to them. They told Houle that he was going to have to sign Johnson Road over to them. Houle says he agreed to do what they asked because he was in fear for his life.
- [19] They started driving back towards Johnson Road. They stopped at a Chevron station. NC told SC to go in and get some paper towels and vinegar. There was some conversation about the vinegar being used to clean up the blood. Upon SC's return, Houle thinks he may have been given a piece of paper towel to wipe off some of the blood.
- [20] When they arrived at Johnson Road, the other three men discussed that Houle did not look very good. They decided to put a ball cap and sunglasses on him. Houle went to open the door on his side of the SUV, but the Third Man said to stop, and that he would open the door. After they were out of the SUV, Houle calmed his dog, who was fenced in the front yard. NC went around the back of the house to get a ladder. The others went to the house. When Houle went to open the door, SC told him to stop, and that he would open the door with Houle's keys. Houle went to wash his face in the bathroom. SC watched over him. They

returned to the living room. At some point they pulled out beers, which were placed on the coffee table.

- [21] The Third Man started rifling through Houle's closed filing cabinet next to the living room, in which his land title documents were kept. They told Houle they wanted him to sign his name on some blank paper they placed on the coffee table. They asked him to produce something with his signature on it, as they wanted to be sure he was reproducing his signature accurately. Houle said his wallet was still in his truck, which threw a wrench into this plan. Houle said perhaps there was something in the file cabinet they could use to compare any signatures.
- [22] At this point, the police arrived outside. SC and the Third Man discussed whether they should make a run for it. After some discussion, SC told Houle to go change his bloody clothes, which he did, leaving his old clothes on the floor. The two men told Houle to advise the police that he was being beaten up by "three n*ggers" at the Pullout, and that they had saved him. When Houle did not respond, the Third Man yelled at him to answer. Houle said he would do as they asked.
- [23] SC told the Third Man to go wash his hands because they had blood on them. The Third Man did so. After he returned, SC told him that he better wash his hands again, as he could still see blood. The Third Man did so.
- [24] The three men then left by the front door of the house. SC and the Third Man were arrested. Houle did not see what had happened to NC.
- [25] After sitting with the police for a while, Houle was taken to Fraser Canyon Hospital in Hope, and was later transferred to the Chilliwack Hospital. He was told that the lining of his sinuses had been torn, which explained why he bled so heavily. The cuts on his forehead and under his right eye were glued shut. His orbital bone was fractured under his right eye. The cut under his eye took about three weeks to heal. His cheekbone had moved downwards, but not to a sufficient degree to require surgery. The burn on his head scabbed over after a day or two. He had bruising and swelling for two to three weeks. The gash on his forehead took almost a year to heal. Skin kept growing over it before it would properly heal. The skin would then have to be removed. This left a minor scar.
- [26] Houle was interviewed by Corporal Mark Dunn on August 2, 2016. Houle asked to be placed in the R.C.M.P.'s Witness Protection Program ("WPP"). In this discussion, Houle described the Third Man as taller and slimmer than the other two. He also said he was white, but darker. He suggested the Third Man might have had a good tan, or that "he could have been Metis part Hindu, part Native too". He described the Third Man's hair as dark.
- [27] Houle was able to identify NC in court, but he did not purport to perform a courtroom identification of the other two accused. There was no photo or in-person lineup performed.

- [28] Houle was later interviewed by officers with the WPP. In one of those interviews, Houle indicated that he understood that "there's accountability because of the funds Funds are being spent. You guys want results". Houle received about \$1600 per month from the police for living expenses for about 12 months. He was also given some financial assistance to facilitate a relocation, and the police helped organize the sale of Johnson Road, to which Houle never returned. Houle earned a substantial profit on this sale. Houle has not received any immunity agreement in return for his testimony in this matter.
- [29] Houle admitted that he had loaded guns illegally stored at Johnson Road. He has not been charged with any offences to which he admitted in his interviews.
- [30] Houle has a criminal record for dangerous driving, but it dates back to 1983.

Constable Crystal Leblanc

- [31] On August 1, 2016, Cst. Crystal Leblanc received a call advising that dispatch had received a report of an assault by three males against a fourth man at the Pullout. Arriving at the Pullout, she saw a truck. She found the Note on the floor of the truck, along with Mr. Houle's wallet. After arranging for a tow truck to bring Houle's truck back to a secure location, she returned to the detachment. Based on a call advising there was a vehicle in Houle's driveway, she went to Johnson Road with three other officers. When she arrived, there was a white SUV in the driveway. There was a dog in the SUV. There was also a dog in the fenced area in front of the house.
- [32] She went around to the back of the house. She saw a male with curly grey hair holding a tall ladder. She asked him his name. He said it was Neil. She was able to identify NC both before and in court as the person she saw that day. She helped put him in handcuffs. She got his full name as Neil Patrick Cantrill. She ran his name through the Alberta driver's license system, and it provided the same phone number that was on the Note. NC was then taken away by other officers.
- [33] Cst. Leblanc then saw three males come out of the house. Houle was in the middle. The right side of his cheek was so swollen that she could not see his right eye.
- [34] In terms of the two others, one was about 6'1" tall and the other was about 5'10". She dealt with the shorter one first. She told him he was under arrest for assault. She searched him, and he had an Alberta driver's license for a Stephan Cantrill which included a photo that appeared to match the person before her. She was able to identify SC outside the courtroom and in the courtroom. SC suggested to her that they had gotten into a drunken fight.
- [35] She then dealt with the Third Man. He said his name was Rob Lowry. He had visible tattoos. I note that tattoos were also visible in photographs of the Third Man taken at the Hope detachment. Cst. Leblanc was again able to make an identification of the Third Man as Robert Lowry both outside court and in the courtroom.

Constable Ryan Fillmore

- [36] Cst. Fillmore testified that certain clothing was seized from the three accused once the accused arrived at the detachment, including jeans which were tested for DNA during the course of trial. He had neither notes, nor a specific recollection, of who seized the jeans from Lowry. There were no entries in the prisoner's log about Lowry being given new clothes or a change of clothes.
- [37] Cst. Fillmore also searched the SUV and found (1) Alberta vehicle rental documents noting the name of Stephan Cantrill, (2) hotel receipts for Neil Cantrill from the Best Continental Motel in Hope, B.C. for two rooms with a July 31, 2016 check-in date, and (3) inhalers prescribed to Neil Cantrill located in the glove box. He also found what appeared to be a bloody napkin on the floor behind the driver.
- [38] Cst. Fillmore was able to perform an identification of NC and SC both at the courthouse before the relevant trial day commenced, and in the courtroom during his testimony.

Constable Evan Inkman

- [39] Cst. Inkman confirmed that August 1, 2016 was a hot day. He attended at the Pullout based on the same report noted earlier about a fight between males, where the aggressors were trying to force another male into a vehicle. He found Houle's parked vehicle. He saw the Note inside the vehicle and passed it over to Cst. Leblanc. He then drove to Johnson Road based on the address associated with the vehicle. There was no activity. He asked a neighbour to alert them to any activity, and then returned to the detachment. The neighbour later called and indicated that a white vehicle had just driven into the driveway. Cst. Inkman returned to Johnson Road. He observed a dog in the back of the SUV. Constables Leblanc and Remple came from the back of the house with an individual. Cst. Inkman took charge of the search. The individual said his name was Neil. Cst. Inkman examined his Alberta driver's licence and compared the photo to the individual, which matched. Cst. Inkman asked him his address and the man gave an Edmonton address which matched the address on the driver's licence. Cst. Inkman took the individual to the detachment's cells. He was able to identify NC in the courtroom as the individual he arrested.

Constable Jackie Remple

- [40] On August 1, 2016, Cst. Remple received information on her radio about a possible abduction. She attended at Johnson Road. There was no one present, so she spoke to the neighbours. She returned to Johnson Road when the neighbour called back about the SUV being in the driveway. She went around to the back of the house. There was a man there with grey hair and dark clothing with a ladder. She took him under arrest for breaking and entering. He verbally identified himself to her as Neil Cantrill. Cst. Inkman took him into custody. Cst. Remple saw the Alberta driver's licence in the name of Neil Cantrill. She confirms that she would have compared the driver's licence photo to the person before her,

and that she did not note any material difference.

- [41] After Cst. Remple arranged for NC to be brought to the detachment, she returned to the house. She saw Houle with Corporal Lesley Norman. He was injured. He complained that his teeth hurt. She attended at the hospital in Hope with Houle. She took photographs showing his injuries. She noted injuries, scratches, bruises and abrasions to his eyes, elbows, ear, and chin. Houle expressed a concern to her that his glasses had been knocked off and asked for her help in locating them. Houle also expressed a concern for his safety, and she advised him that she would speak to Cpl. Norman about this issue. Houle was then transported from Hope to Chilliwack General Hospital.
- [42] She returned to the detachment and dealt with the accused in terms of re-arresting them on more serious charges, facilitating the exercise of their right to counsel, and dealing with the dog found in the SUV.

Corporal Lesley Norman

- [43] Cpl. Norman was in charge of the shift on duty in Hope on August 1, 2016. She attended at Johnson Road after the call from the neighbour advising of the presence of the SUV in the driveway. She arrived after Cst. Leblanc, Inkman and Remple. She also noted the dog in the SUV. She saw the three men walk out of the front door of the house. She noted the injuries to Houle's face. She interacted briefly with the tallest of the three men, and then handed over responsibility for him to Cst. Leblanc. She returned to attend to Houle. There was blood coming from his eye. There was a gash on his forehead. She looked after him until the ambulance arrived. She later arranged for Houle to be interviewed by other officers.

Constable Samara Bilmer

- [44] Cst. Bilmer was tasked with searching Johnson Road on August 2, 2016, along with the forensics officer, Cst. Joseph Lebine. There were jeans with blood and stool stains found in Houle's bedroom. There were boots and a towel with blood on them. There were beer cans on the coffee table in the living room. They found a handgun in the kitchen, a shotgun in the bedroom, and a baton on the coffee table in the living room. The shotgun was loaded. The guns were not secured. There were also two sheathed knives. There was unsecured ammunition in the bedroom and elsewhere in the house.

Constable Joseph Lebine

- [45] Cst. Lebine took a number of photographs of the SUV, the Pullout, Johnson Road, and of the accused after they arrived at the detachment.

[46] In terms of the SUV, Cst. Lebine noted a large number of what he believed to be blood spots and stains, primarily around the back seat behind the driver. He took a photograph showing a roll of paper towels on the front dash. He performed certain additional forensic steps. In particular, he found no fingerprints on the beer cans. While he took DNA swabs from the cans, these were never processed.

Constable Andrew Barr

[47] Cst. Barr attended at the Pullout to seize certain items on the Embankment that had been identified by previous officers and a police dog. He seized a water bottle with blood spots and some clip-on sunglasses.

[48] Cst. Barr also attended at Johnson Road. He located a marijuana grow-op in the basement.

Corporal Bradley Wolbeck

[49] Cpl. Wolbeck was a member of the Lower Mainland Forensic Investigative Unit. He also attended at the Pullout on August 1, 2016. He collected certain evidence on the Embankment, including the clip-on sunglasses. In court, Houle identified these as the same as those he was wearing on the day in question.

[50] Cpl. Wolbeck took a swab of some blood that he found on a stump on the Embankment, but it was never submitted for DNA testing. He took a series of photographs. During the trial, he performed certain preliminary tests on the jeans said to have been seized from Lowry to determine whether there was blood. His preliminary test suggested that it could be blood.

Admissions of Fact

[51] As noted above, during the course of the trial, I allowed the jeans said to have been seized from Lowry to be tested for DNA. This testing was done at the British Columbia Institute of Technology ("BCIT"). Their testing results resulted in the parties agreeing to certain admissions, including that:

- a) From the first sample taken from the jeans, "[t]he DNA typing results are at least 1 trillion times more likely if they originated from Houle and one unknown individual than if they originated from two unknown males in the Caucasian population. This analysis provides very strong support for the proposition that HOULE is a contributor to the DNA obtained from Sample 01-A."
- b) From a second sample, "[t]he DNA results for Sample 01-0B are at least 1 trillion times more likely if they originated from Houle and one unknown individual [sic] that [sic] if they originated from two unknown individuals in the Caucasian population. This analysis provides very strong support for the proposition that HOULE is a contributor to the DNA obtained from Sample 01-B"

- c) From a third sample, the DNA typing results were "at least 1 trillion times more likely if they originated from HOULE and two unknown individuals that [sic] if they originated from three unknown individuals in the Caucasian population. This analysis provides very strong support for the proposition HOLE [sic] is a contributor to the DNA obtained from sample 01-C."

[52] The accused called no evidence.

III. THE LEGAL FRAMEWORK

A. Overarching Principles

- [53] Justice Kent summarized the fundamental legal principles applicable to all criminal matters in *R. v. Rochemont*, 2017 BCSC 930:

Reasonable Doubt and the Presumption of Innocence

- [99] It is a fundamental principle of Canadian criminal law that any person charged with an offence is presumed to be innocent until proven guilty and convicted in a court of law. First articulated in the common law, this principle is also prescribed by s. 6(1) of the Criminal Code, and is now enshrined in s. 11(d) of the Canadian Charter of Rights and Freedoms.
- [100] In a criminal case, the obligation is upon the Crown to prove all elements of an offence beyond a reasonable doubt, and only then can a court convict. The burden remains on the Crown throughout. Where a reasonable doubt exists respecting any of the constituent elements of the offence charged, the accused must be acquitted of that offence.
- [101] Reasonable doubt means a doubt that is based upon reason and common sense. Such doubt must be logically connected to the evidence or absence of evidence. It must not be based on sympathy or prejudice. The Crown is not required to prove all elements of an offence to an absolute certainty ... as this would be an impossibly high standard. However, the reasonable doubt standard falls much closer to absolute certainty than to the standard of proof used in civil cases, i.e., the balance of probabilities. Indeed, in a criminal case if the court can only find that the accused probably committed the offence, the accused must be acquitted. See *R. v. Lifchus*, [1997] 3 S.C.R. 320 and *R. v. Starr*, 2000 SCC 40.
- [102] The difference between these various standards of proof is a critical component of our system of criminal justice. In a case such as the present one, involving unsavoury characters and an exchange of gunfire in public space, the court of public opinion might well be inclined to "convict" based on a combination of poor character, presence at the scene of events, and perceptions of what likely or probably occurred. In criminal matters, however, the law rightly imposes a very high standard of proof before an individual, no matter how unsavoury, can be convicted of an offence under the Criminal Code.

[Emphasis in original.]

[54] As this case is based in part on circumstantial evidence, the following passage from *R. v. Villaroman*, 2016 SCC 33 is germane:

[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] 2 O.R. 475 (C.A.), at p. 479, aff'd without discussion of this point [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.

[Emphasis added.]

B. The Offences

[55] The offences are defined in the Criminal Code as follows:

Count 1: Aggravated assault

268 (1) Every one commits an aggravated assault who wounds, maims, disfigures or endangers the life of the complainant.

Count 2: Kidnapping

279 (1) Every person commits an offence who kidnaps a person with intent

- (a) to cause the person to be confined or imprisoned against the person's will;
- (b) to cause the person to be unlawfully sent or transported out of Canada against the person's will; or
- (c) to hold the person for ransom or to service against the person's will.

Count 3: Forcible confinement

279 (2) Every one who, without lawful authority, confines, imprisons or forcibly seizes another person is guilty of

- (a) an indictable offence and liable to imprisonment for a term not exceeding ten years; or
- (b) an offence punishable on summary conviction.

Court 4: Extortion

346 (1) Every one commits extortion who, without reasonable justification or excuse and with intent to obtain anything, by threats, accusations, menaces or violence induces or attempts to induce any person, whether or not he is the person threatened, accused or menaced or to whom violence is shown, to do anything or cause anything to be done.

Count 5: Overcoming resistance to commission of offence

246 Every one who, with intent to enable or assist himself or another person to commit an indictable offence,

- (a) attempts, by any means, to choke, suffocate or strangle another person, or by any means calculated to choke, suffocate or strangle, attempts to render another person insensible, unconscious or incapable of resistance, or
- (b) administers or causes to be administered to any person, or attempts to administer to any person, or causes or attempts to cause any person to take a stupefying or overpowering drug, matter or thing,

is guilty of an indictable offence and liable to imprisonment for life.

[56] These various counts obviously trigger potential Kienapple issues, which the Crown indicated it would address at any sentencing.

D. The Party Provisions

[57] The Crown also relies on the party provisions of s. 21 of the Criminal Code:

Parties to offence

21 (1) Every one is a party to an offence who

- (a) actually commits it;
- (b) does or omits to do anything for the purpose of aiding any person to commit it; or
- (c) abets any person in committing it.

Common intention

- (2) Where two or more persons form an intention in common to carry out an unlawful purpose and to assist each other therein and any one of them, in carrying out the common purpose, commits an offence, each of them who knew or ought to have known that the commission of the offence would be a probable consequence of carrying out the common purpose is a party to that offence.

[58] The Supreme Court of Canada provided guidance on the interpretation of these provisions in *R. v. Briscoe*, 2010 SCC 13 in paras 14, 16 and 17.

- [14] The actus reus of aiding or abetting is doing (or, in some circumstances, omitting to do) something that assists or encourages the perpetrator to commit the offence. While it is common to speak of aiding and abetting together, the two concepts are distinct, and liability can flow from either one. Broadly speaking, "[t]o aid under s. 21(1)(b) means to assist or help the actor. . . . To abet within the meaning of s. 21(1)(c) includes encouraging, instigating, promoting or procuring the crime to be committed": *R. v. Greyeyes*, [1997] 2 S.C.R. 825, at para. 26 .
- [16] The mens rea requirement reflected in the word "purpose" under s. 21(1)(b) has two components: intent and knowledge. For the intent component, it was settled in *R. v. Hibbert*, [1995] 2 S.C.R. 973, that "purpose" in s. 21(1)(b) should be understood as essentially synonymous with "intention". The Crown must prove that the accused intended to assist the principal in the commission of the offence. The Court emphasized that "purpose" should not be interpreted as incorporating the notion of "desire" into the fault requirement for party liability. It is therefore not required that the accused desired that the offence be successfully committed (*Hibbert*, at para. 35). The Court held, at para. 32, that the perverse consequences that would flow from a "purpose equals desire" interpretation of s. 21(1)(b) were clearly illustrated by the following hypothetical situation described by Mewett and Manning:

If a man is approached by a friend who tells him that he is going to rob a bank and would like to use his car as the getaway vehicle for which he will pay him \$100, when that person is . . . charged under s. 21 for doing something for the purpose of aiding his friend to commit the offence, can he say "My purpose was not to aid the robbery but to make \$100"? His argument would be that while he knew that he was helping the robbery, his desire was to obtain \$100 and he did not care one way or the other whether the robbery was successful or not.

(A. W. Mewett and M. Manning, *Criminal Law* (2nd ed. 1985), at p. 112)

The same rationale applies regardless of the principal offence in question. Even in respect of murder, there is no "additional requirement that an aider or abettor subjectively approve of or desire the victim's death" (*Hibbert*, at para. 37 (emphasis deleted)).

- [17] As for knowledge, in order to have the intention to assist in the commission of an offence, the aider must know that the perpetrator intends to commit the crime, although he or she need not know precisely how it will be committed. That sufficient knowledge is a prerequisite for intention is simply a matter of common sense. Doherty J.A. in *R. v. Maciel*, 2007 ONCA 196, 219 C.C.C. (3d) 516, provides the following useful explanation of the knowledge requirement which is entirely apposite to this case (at paras. 88-89):

. . . a person who is alleged to have aided in a murder must be shown to have known that the perpetrator had the intent required for murder under s. 229(a): *R. v. Kirkness* (1990), 60 C.C.C. (3d) 97 (S.C.C.) at 127.

The same analysis applies where it is alleged that the accused aided a perpetrator in the commission of a first degree murder that was planned and deliberate. The accused is liable as an aider only if the accused did something to assist the perpetrator in the planned and deliberate murder and if, when the aider rendered the assistance, he did so for the purpose of aiding the perpetrator in the commission of a planned and deliberate murder. Before the aider could be said to have the requisite purpose, the Crown must prove that the aider knew the murder was planned and deliberate. Whether the aider acquired that knowledge through actual involvement in the planning and deliberation or through some other means, is irrelevant to his or her culpability under s. 21(1).

D. The Vetrovec Caution

- [59] The accused argued that that court should apply to Houle's evidence the caution outlined in *Vetrovec v. The Queen*, [1982] 1 S.C.R. 811. In *Vetrovec* at 831, the Supreme Court of Canada called for the giving of a "clear and sharp warning" regarding the testimony of disreputable or unsavoury witnesses in order "to attract the attention of the juror to the risks of adopting, without more, the evidence of the witness".
- [60] In *R. v. Khela*, 2009 SCC 4, the court elaborated on the concern that arises when the possible conviction of an accused rests upon the testimony of a single witness of doubtful credibility:
- [2] [W]here the guilt of the accused is made to rest exclusively or substantially on the testimony of a single witness of doubtful credit or veracity, the danger of a wrongful conviction is particularly acute.
- [3] It is therefore of the utmost importance, in a trial by judge and jury, for the jury to understand when and why it is unsafe to find an accused guilty on the unsupported evidence of witnesses who are "unsavoury", "untrustworthy", "unreliable", or "tainted". For present purposes, I use these terms interchangeably. And I mean to include all witnesses who, because of their amoral character, criminal lifestyle, past dishonesty or interest in the outcome of the trial, cannot be trusted to tell the truth -- even when they have expressly undertaken by oath or affirmation to do so.
- [61] In terms of corroboration, the Supreme Court in *Khela* stated in paras 39-43:
- [39] Common sense dictates that not all evidence presented at trial is capable of confirming the testimony of an impugned witness. The attribute of independence defines the kind of evidence that can provide comfort to the trier of fact that the witness is telling the truth. Where evidence is "tainted" by connection to the *Vetrovec* witness it can not serve to confirm his or her testimony (N. Harris, "Vetrovec Cautions and Confirmatory Evidence: A Necessarily Complex Relationship" (2005), 31 C.R. (6th) 216, at p. 225; *R. v. Sanderson*, 2003 MBCA 109, 180 C.C.C. (3d) 53, at para. 61).

[40] Materiality is a more difficult concept. In *Vetrovec*, the Court did away with the requirement that corroborating evidence implicate the accused. As Dickson J. noted, such evidence is not the only type capable of convincing a jury that a witness is telling the truth. In *Kehler*, the Court confirmed that evidence, to be considered confirmatory, does not have to implicate the accused. We maintain that position here.

[41] Individual items of confirmatory evidence need not implicate the accused. As Dickson J. explained in *Vetrovec*:

The reason for requiring corroboration is that we believe the witness has good reason to lie. We therefore want some other piece of evidence which tends to convince us that he is telling the truth. Evidence which implicates the accused does indeed serve to accomplish that purpose but it cannot be said that this is the only sort of evidence which will accredit the accomplice. [p. 826]

[42] However, when looked at in the context of the case as a whole, the items of confirmatory evidence should give comfort to the jury that the witness can be trusted in his or her assertion that the accused is the person who committed the offence. Again in *Vetrovec*, Dickson J. thus noted, with respect to evidence capable of being confirmatory:

All of this incriminating evidence, when considered together, strongly strengthens the belief that Langvand was telling the truth regarding the participation of *Vetrovec* and Gaja. It rebuts any suggestion that he is falsely implicating innocent individuals. [Emphasis added; p. 833.]

[43] This passage was cited with approval in this Court's unanimous judgment in *Kehler*, where the Court concluded that confirmatory evidence must be capable of restoring the trier's faith in relevant aspects of the witness' account (para. 15). As a matter of logic, where the only issue in dispute is whether the accused committed the offence, the trier of fact must be comforted that the impugned witness is telling the truth in that regard before convicting on the strength of that witness's testimony.

[Emphasis in original]

E. Identification

[62] The accused raise certain identification issues. The decision in *R. v. Truong and Nguyen*, 2008 BCPC 191 helpfully summarizes the law on identification:

[11] Regardless of the kind of evidence that is tendered, the Crown must prove that the person named in the information and who is before the court, is the person who committed the offence. Identification of the accused in a criminal trial is most often established through a witness who points out the accused in court.

[12] In circumstances where a witness cannot directly identify the accused, the Crown may rely on evidence which establishes identification indirectly. For example, the Crown may lead the following evidence:

- A police officer arrested a person for the commission of the offence or offences set out in the Information.
- The person identified him/herself by stating a name and address. The person also produced a driver's licence in that name and with a photo on it and which appeared to be photo of the person.
- The arresting officer released the person on a Promise to Appear. An Information was sworn which confirmed that appearance notice.
- A person appeared in court on the date set for the appearance or someone appeared on his/her behalf.
- A person entered a plea to the charge and remained in court for the trial.

[13] The Alberta Court of Appeal considered similar circumstances in *R. v. Nicholson*, 1984 ABCA 88, [1984] A.J. No. 2522. The court held that the only rational conclusion available from such evidence is that the person who appeared in court for the trial is the person to whom the officer gave the appearance notice. The officer gave the appearance notice to the person who committed the offence. Therefore, the person who committed the offence is the accused - that is, the person who appeared in court. This conclusion would be correct regardless of what his name was.

[14] *Nicholson* was followed in British Columbia in *R. v. Walters*, [1992] B.C.J. No. 2233. In that case, Selbie J. upheld a conviction in circumstances where the arresting officer had not identified the accused in court. On arrest, the accused had produced a photo driver's licence in the name of Lloyd Alexander Walters. The officer released him on a Promise to Appear. On that document he wrote the police file number for the case.

[15] Leave to appeal was denied in the Court of Appeal. [1993] B.C.J. No. 2194. In his reasons, Cumming J.A. summarized the reasoning process used to establish identification as follows, at paragraph 18:

" identification was established by proof that the person who was charged with the offence and was named in the information was the very same person that the police officer saw commit the offence, whom he arrested, and whom he released on an appearance notice or promise to appear which can be uniquely tied to the Information before the Court. "

[17] The fact that a person has attended court and answered to the Information is evidence that he or she is the person named in the indictment or Information. It is not, however, evidence that the accused is the person who committed the offences named in the charging document. *Nicholson*, supra at paragraph 18. The person who is named in the document is properly described as the accused, but the Crown has to prove that he/she is the actual offender.

[18] In *Regina v. Chandra*, 1976 29 C.C.C. (2d) 570 (B.C. C.A.), at p. 573 per McIntyre J.A (as he then was), the British Columbia Court of Appeal made the following comment on the evidentiary significance of the fact that the accused's name is identical to that of the offender:

"In my opinion, mere identity of name affords some evidence of identity of a person. When accompanied by other factors such as the relative distinctness of the name, or the fact that it is coupled with an address, or appears upon a licence or other document of significance, its weight is strengthened. The trier of fact must consider it, weigh it and reach its determination ."

[Emphasis added]

III. Application of the Facts to the Elements of the Offences

A. Houle's Credibility

[63] The Crown did not dispute that Houle should be treated as a *Vetrovec* witness given his many years as an illegal marijuana cultivator, as well as other criminal activities. However, the Crown argued that:

- a) there was voluminous corroborative material supporting his evidence; and
- b) Houle was otherwise credible, making reasonable concessions, providing detailed answers where he had a specific recollection, and freely admitting where his recollection was hazy.

[64] In relation to the presence of corroborative evidence, I agree that there was confirmation of certain material particulars of Houle's evidence. Specifically:

- a) Houle's truck was found at the Pullout, where he said the meeting had been arranged, and where he said he left it;
- b) The Note he says he received was found in his truck;
- c) The Note suggests that plans were going to be made with "Neil" and his son;
- d) Cst. Inkman confirmed it was a hot day, providing some corroboration for Houle's evidence that this is why they decided to go up into the shade of the Embankment;
- e) Clip-on sunglasses were found at the top of the Embankment, which Houle identified as the same as those he was wearing when he was attacked;
- f) There was apparent blood on a stump on the Embankment in the area where Houle says he was attacked;
- g) There was blood in the SUV, where Houle says the attack continued;
- h) The blood in the SUV was largely surrounding the driver's side back seat, where Houle says he was sitting;

- i) There was a mark on the top of Houle's head consistent with the burn mark Houle said was caused by NC placing a heated spoon on his forehead;
 - j) The DNA analysis provides "very strong support" that Houle is a contributor to the DNA obtained from the jeans said to have been seized from the Third Man, and Houle says the Third Man was in the back seat beside him administering blows to his head that caused bleeding;
 - k) There was a bloody napkin on the floor of the SUV where Houle says he was sitting when a paper towel was given to him at the Chevron station;
 - l) There were bloody and stool-stained clothes found in Houle's bedroom, consistent with his evidence that he was told to change by the accused;
 - m) NC was found by the police holding a ladder, consistent with what Houle says NC went to do after their arrival at Johnson Road;
 - n) There was blank paper on the coffee table where Houle says he was asked to provide a sample of his signature;
 - o) There was an open filing cabinet where Houle says the accused were rifling through his papers;
 - p) Subject to the identification discussion below, the SUV, the dog in the SUV, and the three accused were all found by the police at Houle's property, where Houle says they were;
 - q) There are photographs of Houle showing injuries consistent with the attacks he describes.
- [65] I find that all of this corroborative evidence provides substantial comfort that Houle's evidence can be relied upon. I note again that the corroboration discussed in *Vetrovec* need not be directed to any specific evidence that serves as an element of the offence: *R. v. Kehler*, 2004 SCC 11 at paras. 15-16.
- [66] Furthermore, there were other indicia of credibility in relation to Houle's evidence:
- a) Houle had a good recall of many factual details.
 - b) His version of events includes details unnecessary to include if his only object were to implicate the accused. For example, why have the group stop twice during their return to Johnson Road? A direct return to Johnson Road would have accomplished the same objective.
 - c) His version of events allows for uncertainty where one would expect there to be uncertainty. He did not purport to remember exactly how many blows he received, exactly who said what in the SUV, or in what order each statement was made. Given the ongoing attacks, it would have been more suspicious if he had been able to provide that level of total recall.

- d) He did not push his evidence to maximize the prospect for conviction. Most notably, he did not purport to identify SC or Lowry in the dock, when there would have been very little means of confronting him as to the accuracy of such an identification.
- e) There were no material inconsistencies noted between his evidence at trial and any past statements.
- f) He freely admitted to facts that cast him in a poor light, such as being a long-time illegal drug cultivator and a tax evader. He admitted to organizing land ownership to avoid proceeds of crime seizures. He admitted having loaded guns improperly stored and without the necessary permits.

[67] In terms of his demeanour, I found him to be forthright and responsive, if a touch arrogant.

[68] The key piece of evidence relied upon by the accused to undermine Houle's credibility was his stated understanding that because he was being financially supported the police wanted results. I find that in the broader context of his evidence, there is no particular reason to treat this assertion as undermining Houle's evidence. "Results" does not necessarily mean fraudulent results. It could simply mean that he was intending to cooperate fully. Indeed, Houle asserted under oath that "justice is [his] agenda".

[69] The accused also suggest that some of the details Houle provided were unnecessarily inflammatory, and designed to "add ginger to his evidence", such as the references to "sucking dick" and attacks by "n*ggers". I had no sense that Houle was falsely adding these details simply to enhance the case against the accused. Indeed, those statements were largely unnecessary to support conviction. Obviously, a judge alone can be expected not to be unduly affected by such language.

[70] Finally, the accused raised that Houle has not been charged for any of his crimes, and has been left with all of his property. I do not find that this materially undercuts Houle's credibility given that there was no evidence that the absence of charges was causally related to the provision of his evidence in this matter.

[71] As such, at the end of the day, although applying the Vetrovec caution, I find that Houle's evidence was credible, and I accept it.

B. Continuity

[72] Lowry raised a concern about continuity in relation to the bloody jeans. More particularly, he expressed a concern that there was no direct evidence as to which officer seized the jeans. There was also no entry by the guards in the prisoner's log to indicate that Lowry was given new clothes or a change of clothes.

- [73] Continuity concerns are not fatal unless they raise a reasonable doubt about the exhibit's integrity: *R. v. Larsen*, 2001 BCSC 597 at para. 62, aff'd on other grounds, 2003 BCCA 18. In this case, I am content that an adequate level of continuity has been established to allow me to infer that these were Lowry's jeans given that:
- a) The design of the jeans had a horseshoe shape on the rear pockets, and were a brand called "True Religion", and Lowry was photographed wearing jeans of the same design and brand at the detachment immediately following his arrest;
 - b) The other two accused were not photographed wearing similar jeans;
 - c) There were no other accused in the jail at the time of the arrests, nor for a couple of days thereafter;
 - d) Lowry is notably taller than the other two accused, and the jeans are quite long;
 - e) The evidence bag did not appear to have been tampered with, nor was there evidence that it had been out of the police or the court's possession after Constable Fillmore took possession of the jeans;
 - f) There was no evidence of contamination; and
 - g) The DNA tests performed on the jeans provide strong support for the proposition that Houle's blood was on the jeans.
- [74] All of this evidence is sufficient for me to conclude that the jeans Lowry was wearing when arrested are the jeans entered into evidence at trial.

C. Identification

- [75] There were certain identification issues raised by the accused. Most notably, the accused assumed to be Stephan Cantrill declined to even confirm that he was a Stephan Cantrill. However, as outlined above, based on his plea and his attendance at court, I am at least entitled to find that he is the person named in the indictment. In other words, he is at least "a Stephan Cantrill".
- [76] The next hurdle is to confirm that SC is the same SC who was arrested. Based on the photographs taken upon arrest, and my observation of SC throughout the trial, I am satisfied beyond a reasonable doubt that it is the same person, even after directing myself on the frailties of identification evidence. The photographs are of reasonably good quality. There was no evidence that they have been altered. The Court is thus in a position to make its own identification, even absent other corroboration: *R. v. Nikolovski*, [1996] 3 S.C.R. 1197 at paras. 22, 28-32. The prospect that SC has a doppelganger, who also appears to share the same name, is infinitesimally small. There was no evidence to support an "evil twin" theory.
- [77] Beyond the court's own identification, Cst. Leblanc and Cst. Fillmore also recognized SC at the courthouse before their testimony, and in the courtroom.

[78] This leaves the question of whether it was SC that committed the alleged offences. While it is true that Houle did not recall meeting SC before the day in question:

- a) the Note said that Neil was in town with his son, and NC and SC share the same last name;
- b) Houle said he was introduced to SC at the Pullout as NC's son Stephan.

[79] There is no other reasonable inference from the totality of the evidence than that SC is the individual to whom Houle assigned the role described in his testimony. Having accepted Houle's account as truthful, I am satisfied beyond a reasonable doubt that SC is the individual alleged to have been involved in the offences.

[80] Turning to Lowry, his counsel argued that the identification evidence was flawed because:

- a) Houle did not know Lowry previously;
- b) Houle did not perform a courtroom identification; and
- c) Houle's description of Lowry immediately after the incident was inconsistent with Lowry's actual physical characteristics.

[81] There are several problems with this argument:

- a) Again, I am able to draw my own conclusion on identity given that there were photographs taken on arrest. It is clear to me that the person in court was the same person arrested on the day in question, even accounting for potential lighting problems.
- b) Houle's description of Lowry after the incident was not wholly inconsistent with Lowry's characteristics. In terms of the hair colour, the photograph of Lowry taken on the arrest shows close cropped hair that appears darker than the blonder hair he had in court during the trial. In relation to the racial identity, it seems to me that Houle was simply being appropriately cautious in a situation where his confidence level would be muted by the fact that he had not met Lowry previously, his glasses had been knocked off early in the attacks, his eyes were injured during the course of the further attacks, and his head was held down during much of the time in the SUV.

[82] Next, I note that Cst. Leblanc was able to identify Lowry as the person arrested both before court, and during her testimony.

[83] Once again, I conclude that there is no other reasonable inference from the totality of the evidence other than that Lowry is the individual to whom Houle assigned the "Third Man" role described in his testimony.

[84] NC did not advance any identification issues with the same vigour. This was appropriate given that:

- a) NC had been known to Houle for many years;
- b) NC's first name was on the Note;

- c) Houle called the number on the Note, and he said that an individual with NC's voice answered the phone;
- d) Houle recognized NC at the Pullout;
- e) On arrest, NC produced a driver's licence in the name of a "Neil Cantrill";
- f) The phone number in the Alberta Driver's Licence system matched that on the Note;
- g) NC's inhalers were found in the glove box of the SUV;
- h) NC was identified in the courtroom by Houle, and by officers Leblanc, Fillmore and Inkman.

[85] In relation to all three accused, the identification is strengthened by the fact that:

- a) Houle says there were three people at the initial meeting, the police arrested three people at the end of the incident (whom I have identified as the accused), and there is no evidence of any other person joining or leaving the group of three over the relevant period;
- b) All three accused look quite different from each other; and
- c) All three accused's characteristics are consistent with the information recorded on the Prisoner Reports prepared upon booking at the detachment.

[86] I am satisfied beyond a reasonable doubt that the three accused before me were the individuals described in Houle's testimony.

[87] The final step is to determine whether the elements of the offences have been established beyond a reasonable doubt.

D. Aggravated Assault

[88] Although Houle was not certain of the actual order and timing of the blows he received, he did attribute at least one assault to each accused:

- a) The "Third Man" (whom I am confident was Lowry given the evidence and my analysis above) struck and choked Houle on the Embankment, and dealt multiple blows to the right side of his face in the SUV;
- b) SC swung back and hit him from the driver's seat, and one of those blows opened up a gash on Houle's forehead;
- c) NC choked him on the Embankment, and burned him with a spoon in the SUV.

[89] I find that each of these assaults was done with objective foresight of bodily harm: *R. v. Pootlass*, 2019 BCCA 96 at para. 104.

- [90] I am satisfied beyond a reasonable doubt that Lowry committed an aggravated assault given that his blows wounded Houle by breaking the continuity of the skin around his eye and nose, resulting in substantial bleeding: Pootlass, para. 113. These injuries interfered in a substantial way with Houle's integrity, health or well-being. The effects were more than "merely transient or trifling": Pootlass, para. 106.
- [91] Lowry suggested that the plaintiff may simply have fallen while on the Embankment, and that his wounds could have resulted when he hit the stump. I find that, at a minimum, Houle was attacked by Lowry in such a way that Lowry must be held responsible for the objectively foreseeable consequences of his acts, including any wounds that may have resulted from Houle hitting the stump consequent to Lowry's attack: Pootlass, para. 104.
- [92] Lowry suggested that there is reasonable doubt about his involvement in any assault raised by the fact that he had no injuries on his hands. I do not find it necessary for there to have been visible injuries to his hands by the time of the arrest in order to meet the absence of a reasonable doubt standard. The absence of such evidence is insufficient to raise a reasonable doubt in my mind. I note that Houle testified that Lowry washed his hands twice after the return to Johnson Road, which could have had a calming effect on any injuries. Furthermore, my acceptance of Houle's evidence is sufficient to remove any reasonable doubt in any event.
- [93] Lowry argued that it was necessary to have medical evidence in order to establish the aggravated assault. However, a court is able to reach the necessary conclusions without the assistance of expert opinion: see for example *R. v. Khalili-Arabi*, 2013 ONSC 5566 at paras. 143 to 145.
- [94] In relation to SC, I find that his blow from the front seat of the SUV resulted in an injury to Houle's forehead that caused a wound resulting in serious bodily harm. I reject SC's suggestion that it is not physically possible to be struck from the front seat of the car. In days gone by, rowdy children on long road trips with their parents would surely be able to confirm otherwise.
- [95] SC raised the point that Houle's suggestion that SC may have been wearing a ring, and that this is what explains the cut on his forehead, was purely speculative. Houle's opinion of what SC may have been wearing on his hand may have been speculative, but the fact that his blow caused a wound was not.
- [96] In Pootlass, the Court of Appeal found that "[a] cut that requires five stitches or staples is a substantial interference with someone's physical integrity" (para. 116). The fact that the treatment given to Houle here was the application of a glue rather than stitches does not materially distinguish the nature of the injury: *R. v. Hoare*, 2015 ONCJ 283 at paras. 26 and 73 to 75. The cut did not properly heal for almost a year, and left a small scar.

[97] If I am wrong in my conclusion that this forehead injury qualified as a wound, I find that SC was a party to the aggravated assault by Lowry, given that he drove the SUV in which Houle was confined, which aided Lowry in continuing his aggravated assault in a location subject to less detection. The nature of the initial attacks on the Embankment, leading to the subsequent deposit of Houle into the SUV driven by SC, is such that it can reasonably be inferred that SC was aware of Lowry's intent to commit aggravated assaults in the SUV, and SC thereby facilitated the carrying out of that intent. SC does not need to have planned or intended to assist in an aggravated assault to be a party to it. He need only have intended to assist in an assault that a reasonable person would realize would subject the victim to the risk of bodily harm: *R. v. Fontaine*, 2011 BCCA 140 at para. 25.

[98] In relation to NC, I find that he was the person who:

- a) made contact with Houle,
- b) started the assaults, and
- c) confirmed to Houle that the assaults were triggered by what NC viewed as improper business practices by Houle.

[99] As such, he is properly viewed as the directing mind of the assaults. By arranging the meeting in a relatively secluded location and weakening Houle's defences with his own initial assault, NC intentionally aided or abetted the aggravated assaults by the others. As such he is also guilty of aggravated assault under the party provisions.

E. Kidnapping

[100] The offence of kidnapping embeds an element of movement of the victim from one place to another: *R. v. Vu*, 2012 SCC 40 at paras. 39, 47; *R. v. Oakley* (1977), 36 C.C.C. (2d) 436 (Alta. C.A.) at paras. 47 to 49. This element is met here through the transportation of Houle in the SUV from the Embankment to Ruby Creek, to the Chevron gas station, and then to Johnson Road.

[101] I find that Houle was confined in the SUV against his will by all three accused, and that they all intended to so confine him. The fact that he did not fight back when being put in the SUV was simply a reasonable response to his earlier beating on the Embankment, and the fact that he was outnumbered three to one.

[102] I am satisfied beyond a reasonable doubt that each accused participated in the kidnapping such that they were each directly responsible. NC organized the meeting that allowed them to take Houle and confine him in the SUV, and SC drove Houle away in the SUV. Lowry administered the bulk of the beating within the SUV, ensuring that Houle stayed confined to that place. Alternatively, I find that SC and Lowry each assisted, and had sufficient knowledge of NC's intention to confine Houle, to serve as parties under s. 21: *Vu*, paras. 60 to 63.

F. Forcible Confinement

[103] The Crown advised that this charge was largely invoked to capture Houle's situation on the Embankment and at Johnson Road, time periods before and after the element of movement required for the kidnapping count. For the same reasons expressed above in relation to the kidnapping count, I find that the accused all intentionally committed a forcible confinement during those additional periods. Houle was clearly not allowed to leave the Embankment until the accused allowed him to do so, and Houle was not going to be allowed to leave Johnson Road until the accused obtained financial satisfaction. In any event, the charge stands as an included offence to the kidnapping count: Vu, paras. 42 to 46.

G. Extortion

[104] In terms of the extortion count, the Crown notes that even if an underlying demand is reasonable, that does not excuse efforts to enforce that demand through unlawful threats. In R. v. Ntarelli, [1967] S.C.R. 539 at 545 and 546, the court stated:

There are courses of action which a person might express his intention of taking which would constitute threats within the meaning of that word as used in the section but which would in some circumstances be in themselves lawful; an example is the statement of the intention to place the name of a person on a "stop list" in circumstances such as existed in Thorne v. Motor Trade Association[2].

That decision indicates that while it was lawful for the defendant to threaten to put the name of the plaintiff on a "stop list" it would be criminal to accompany the threat with a demand for the payment of an unreasonable sum as an alternative. It is not authority for the proposition that, because a demand is reasonable and there exists reasonable justification or excuse for the making of it, it is lawful to seek to enforce compliance with it by making threats which are unlawful and for which there is no justification or excuse.

I have already expressed my agreement with the opinion of the Court of Appeal that in the case at bar if the jury found that the threats alleged were made it was impossible as a matter of law for them to find that there was any reasonable justification or excuse for making them.

When it is proved that threats have been made for the making of which there could be no justification or excuse, that the threats were made with intent to gain something and were calculated to induce the person threatened to do something, the commission of the crime defined in s. 291 is established, and it is unnecessary to inquire whether the person making the threats had a lawful right to the thing demanded or entertained an honest belief that he had such a right; that inquiry would be necessary only if the threats were such that there could be reasonable justification or excuse for making them.

Speaking generally, the essential ingredients of an offence under s. 291 are, (i) that the accused has used threats, (ii) that he has done so with the intention of obtaining something by the use of threats; (whatever meaning be given to the word "extort" the word "gain" as used in the section is

simply the equivalent of "obtain") and, (iii) that either the use of the threats or the making of the demand for the thing sought to be obtained was without reasonable justification or excuse; (the question on this aspect of the matter is not whether one item in the accused's course of conduct, if considered in isolation, might be said to be justifiable or excusable but rather whether his course of conduct considered in its entirety was without justification or excuse).

[105] This principle relieves the court from assessing whether Houle did indeed commit the Dogwood Theft. The intentional violence executed by the accused as a result of that allegation is sufficient to engage the section, so long as it occurred in order to induce Houle to do something. In this respect, I am satisfied beyond a reasonable doubt that the accused all subjected Houle to violence in order to extract money or land from him. Beyond my reliance on Houle's own evidence, supported by my credibility findings above, I note the following corroborative evidence on this issue in particular:

- a) the filing cabinet containing Houle's land title information was found open; and
- b) there was blank paper on the coffee table where Houle said he was asked to provide an example of his signature.

[106] This finding is not undermined by the fact that the violence was largely performed before the formal demand was made for the transfer of Johnson Road. I find that the violence was used to "soften up" Houle for the eventual extortive demand. Houle would reasonably treat the demand as being accompanied by a threat that the prior "threats, accusations, menaces or violence" would resume should he refuse.

[107] The accused suggest that it is possible that there was no plan to extort, and that the assaults were simply the result of an argument that got out of control. My acceptance of Mr. Houle's evidence, NC's decision to meet away from a purely public place, and NC's surprise attack on the Embankment, removes any reasonable doubt from my mind that the plan of the accused from the outset was to extort Houle. It is true that there is no direct evidence of the formulation of the plan to extort, but that is not necessary, nor is it surprising given that the accused exercised their right not to give evidence.

[108] The accused suggest that if Houle were being extorted, he would have grabbed one of the weapons stored in his home in order to facilitate an escape from the pressure. Again, I find that such an effort would have been foolhardy given that he was outnumbered by the accused.

H. Overcoming Resistance

[109] This charge is directed at the choking alleged to have been performed by Lowry on the Embankment. During the choking, Houle soiled himself and almost passed out. I am satisfied beyond a reasonable doubt that Lowry intended to, and did in fact, choke the accused and that this was, as noted above, done in an effort to "soften the plaintiff up" for the later kidnapping and extortion.

- [110] I am also satisfied beyond a reasonable doubt that NC and SC are properly treated as parties to this offence under s. 21(2). I find that Lowry's actions were a probable consequence of carrying out their common intention to extort Houle, and that NC and SC foresaw or ought to have foreseen this: *R. v. Vang*, 1999 CanLII 2310 (Ont. C.A.) at paras.15 to18. The common intention is established through their travelling together to the Pullout, the assaults by two of the three on the Embankment, travelling together with Houle from the Pullout, the "three on one" nature of the assaults in the SUV, and Houle's reporting as to how each accused participated in the conversations regarding the transfer of his property: *Vang*, at
- [111] para. 28. In relation to NC, the objective foreseeability conclusion is buttressed by the fact that he himself grabbed Houle by the throat when they first made it to the top of the Embankment. As such I find that NC and SC are parties under s. 21(2).
- [112] Counsel for Lowry suggested that the Crown was not relying on s. 21(2). To the extent that it is necessary for the Crown to advise the court which subsections within s. 21 they are relying upon, I disagree. Crown counsel provided the subsection to the court, read it out at the outset of her oral submissions, and did raise the issue of the overarching plan repeatedly in her submissions.

IV. VERDICT

- [113] Mr. Robert Lowry, please stand. Based on my review of the evidence as a whole in this case, I am satisfied beyond a reasonable doubt that the only rational inference is one of guilt in relation to the Counts 1 to 5, and I find you guilty on those counts.
- [114] Mr. Stephan Cantrill, please stand. Based on my review of the evidence as a whole in this case, I am satisfied beyond a reasonable doubt that the only rational inference is one of guilt in relation to the Counts 1 to 5, and I find you guilty on those counts.
- [115] Mr. Neil Cantrill, please stand. Based on my review of the evidence as a whole in this case, I am satisfied beyond a reasonable doubt that the only rational inference is one of guilt in relation to the Counts 1 to 5, and I find you guilty on those counts.
- [116] This matter will be put over to the next fix date in New Westminster in order to arrange a date for a sentencing hearing.

"Branch J."

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