
CANADA / JUDGMENT

R. v. Doucet

2021 BCSC 1606

COURT

Supreme Court of British Columbia

DECIDED

30 June 2021

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2021 BCSC 1606 R. v. Doucet

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Doucet,

2021 BCSC 1606

Date: 20210630

Docket: 91438-2

Registry: Kelowna

Regina

v.

Jeffrey Lloyd Doucet

Before: The Honourable Mr. Justice Armstrong

Oral Reasons for Judgment

Counsel for the Crown:

D. Maio

Counsel for the Accused:

M.A. Patterson

Place and Dates of Trial:

Kelowna, B.C.

November 16-20, 2020

June 1, 2, 2021

Place and Date of Judgment:

Kelowna, B.C.

June 30, 2021

- [1] THE COURT: These reasons follow several days of trial that were interrupted in November 2020 and concluded in June 2021. I reserve the privilege of editing this text if a transcript should be required, to ensure that the reasons accurately reflect my decision and the intention and reasoning that I have included. No changes will be made to the reasoning or the result.

Introduction

- [2] The accused is charged with a series of drug possession offences, theft of a vehicle, assault of the vehicle owner, threatening a police officer, possession of a dangerous weapon, theft of documents, and resisting or obstructing a police officer.

The Complainants' Evidence

- [3] Kevin Wolff and his wife Mariana resided at 3417 Elliott Road in West Kelowna for a number of years before the events of August 13, 2019, unfolded. In the early morning of that day, Mariana and Kevin were asleep in their home. At approximately 5:00 a.m., Ms. Wolff was awoken by the sound of her husband's truck starting up. Initially, she thought her husband was leaving their house, but quickly noticed he was still in their bed. Mr. Wolff's 2011 Dodge Ram truck was silver and was parked in front of their home the previous night. This truck had a defective exhaust system which caused a much louder noise than normal when driven. The noise attracted Ms. Wolff's attention that morning, and the events of the morning began before first light and continued as daylight dawned.
- [4] Although it was not yet fully light when Ms. Wolff awoke, she saw the truck parked approximately 50 feet away and observed the vehicle leaving the driveway.
- [5] As she looked out the window, she saw a person in the driver's seat of the truck who was not her husband; the truck drove onto Elliot Road toward Highway 97. She woke her husband and he called the police to report the theft.
- [6] Mr. Wolff dressed immediately and took his wife's BMW vehicle and drove on Elliott Road toward Highway 97. He intended to check at a local gas station to determine if anyone had seen his truck. He suspected that the thief may have taken the truck to a gas station, because the broken gas gauge indicated there was no fuel in the vehicle. However, at the gas station he inquired if anyone had seen his vehicle and received a negative response.

- [7] Next, Ms. Wolff reported seeing the truck being driven past her house towards Smith Creek, the opposite direction from which she had originally seen the vehicle go. She phoned her husband to inform him that the truck had just passed in front of their house going towards Smith Creek.
- [8] He then drove in the direction his wife had indicated the truck was headed. The driving distance to Smith Creek from his house was five to 10 minutes, and walking this distance would have taken up to 30 minutes.
- [9] Mr. Wolff drove past his home and up Smith Creek, to an area where there were several roads, and that eventually devolved into rough and unsafe travel paths. He was looking for his vehicle and the person who drove it. As he drove past his home on his way to Smith Creek, he said he noticed a person knelt down tying his shoelace on the road but somewhere in the vicinity of his house.
- [10] He did not see his truck on the way up nor when he came back down from Smith Creek. He drove on the main roads in the Smith Creek area, avoiding the rougher patches, and observed a truck that he mistakenly thought might have been his vehicle. As he began his return trip down to Elliott Road, he became satisfied that this vehicle was not his. He was talking to his wife on the telephone during the drive. She informed him that she had seen a male walking along the road.
- [11] She said that she had seen this individual walking on Elliott Road towards Highway 97. The person had stopped at or near their house on the road and examined another truck parked on the margins of Elliott Road. This truck belonged to the Wolffs' tenant, a man named Chris. She reported that this person looked into the windows and into the box of the truck as he walked past the side of the truck.
- [12] She described the person as a Caucasian male with short hair and facial hair on the jaw and sides. He carried a backpack and wore a black shirt with white writing on the sleeves. She could not identify the accused in the courtroom as the person she observed on the roadway.
- [13] She left her house and walked down to the driveway. She spoke to this person, who responded with words of something in the nature of "be calm" and indicating that nothing was untoward in regard to his presence. This exchange between Ms. Wolff and the person lasted up to two minutes. She said that he then walked down the road towards Highway 97, but cut into another property and just disappeared from the roadway.
- [14] Ms. Wolff was talking to her husband on the telephone as he was driving back toward their home and informed him about the man she saw in front of their house. As he drove back toward their home, he stopped and spoke with his wife.

- [15] Under cross-examination, Mr. Wolff said that he had driven up Elliott Road toward Smith Creek, and confirmed noticing this person tying their shoelaces in front of his residence. In his evidence in chief, he made no mention of this sighting of the man whom he later concluded was the accused. This was revealed only when he was confronted by his police statement during cross-examination.
- [16] At some point after Ms. Wolff had observed the male looking in the tenant's truck, she phoned the tenant, Chris. He came outside and immediately drove his vehicle in the direction of the person who walked away. Mr. Wolff had not yet arrived back at the home. Some time later, a neighbour approached Mrs. Wolff and said that Mr. Wolff's truck was located at his property with the doors open.
- [17] Mr. Wolff did not see his vehicle in his neighbour's driveway as he travelled up to Smith Creek nor when he returned. He said he stopped and spoke to his wife as he passed their house and continued on.
- [18] He said that after his wife had told him about the conversation with the neighbour, he realized his truck had been parked approximately 20 feet off the roadway, and approximately 60 feet toward Smith Creek. This is somewhat inconsistent with Ms. Wolff's testimony that, while standing on the roadway in the front of her house, she could see the truck parked in the neighbour's driveway a much shorter distance than 60 feet away.
- [19] After the individual stopped in front of the Wolff house and had the exchange with Ms. Wolff, she called the police to inform them of the location of the truck. An officer told her not to touch the vehicle. Mr. Wolff, having returned from Smith Creek, continued past the house, presumably looking for his tenant who had left in pursuit of the person. Mr. Wolff found Chris near the intersection of Elliott Road and Butt Road. His vehicle was stopped, blocking both lanes of traffic, and Mr. Wolff stopped behind. Chris appeared to have had eye contact with the person he believed might have taken Mr. Wolff's truck, and they followed this person through a residential area where some people spoke to them from a patio.
- [20] During the pursuit, Mr. Wolff was not certain the person was the person he believed had taken his truck and had come back and examined Chris's vehicle. However, they followed this person through a backyard area and amongst some tall cedars. The person eventually passed through an opening between cedar trees, at which point Mr. Wolff said he saw this person drop an item. He could not describe the item from the distance he was away when the item was dropped. Mr. Wolff increased his speed following the accused and began moving faster. The accused had paper in his left hand and Mr. Wolff took pictures; the vantage point of these pictures appears to be almost beside the accused.

- [21] Mr. Wolff was jogging after the accused through this area; he said saw something tossed to the ground by the person he was chasing. He eventually went to the area where he thought this item had been thrown or dropped and found a set of keys and a fob that he said had been in his truck the night before. He said the fob was for his truck and keys were to his business premises.
- [22] At this juncture, Mr. Wolff became more angry because he then became convinced this is the person who had stolen his truck. He tried to speak to the individual about the theft of the truck after finding his keys. He was approximately 50 feet away and was sprinting towards this person when he noticed that the person took something from his pocket. He said he may have sworn at this person and was angry because he believed this was the thief. He said the person pulled out a knife and pointed it towards him after he had increased his speed and was travelling towards the person. He said the knife was held in the accused's left hand and he saw the blade.
- [23] Mr. Wolff said he had been gaining ground, from a distance of 50 feet to possibly 20 feet away, when the person turned and pointed the knife at him. At some juncture around this time Mr. Wolff pulled out his camera and took the photographs that I referred to earlier. He said the person spoke to him, but he did not clearly understand the words. Mr. Wolff said his adrenaline was running at a high level and he thought he had taken a video of the person, but it turned out he only captured two still photos.
- [24] Mr. Wolff identified the person as wearing a black hoodie with white writing on his arms. During his pursuit of the person, the accused had moved faster as Mr. Wolff approached, and Mr. Wolff was also increasing his speed.
- [25] The person they were following had no gloves on and was noticed to be carrying some paper, although his hands were not clearly visible. The photographs show the accused was carrying a large piece of paper in his left hand.
- [26] Chris and Mr. Wolff followed the individual into an orchard, but because the person had pointed a knife at him, they decided not to pursue the person further and returned to Mr. Wolff's home. Mr. Wolff then went to view his vehicle in the neighbour's driveway and noticed papers and personal things scattered around the cab of his vehicle. He believed the truck was 20 feet off the roadway.
- [27] A police officer attended, and Kevin described the stolen truck and told him about collecting the keys and the fob that had been dropped by the fleeing person. He sent pictures of the person to Constable Goodwin's email.
- [28] When asked by the police about the knife, he could not describe it. He did inform the police that his Armani sunglasses were missing and told them about the keys he had picked up in the field and confirmed that those keys were for his truck and business premises.

- [29] After Mr. Wolff had returned to his home, he met a police officer, but could not recall the details or the sequence of events concerning the report by the neighbour of his truck being on the neighbouring property. Mr. Wolff never mentioned the neighbour to the police, although the police had requested an email from them to describe the events.
- [30] His wife typed an email, collaboratively prepared, and sent the email to the police that he described as a joint effort.
- [31] Mr. Wolff did not see the suspect at or near his truck or pulling on the handles of Chris's vehicle at the house, neither did Ms. Wolff make any observation of this person touching the tenant's vehicle.
- [32] Mr. Wolff was unable to recall if any papers had been strewn outside of the truck while at his neighbour's property.
- [33] The accused was eventually apprehended at the Dairy Queen off of Highway 97. He was sitting on a concrete table, on seats, with items on the table. The police officer had called Mr. Wolff and Ms. Wolff later in the morning as they were driving to Mr. Wolff's workplace in Penticton, and the Constable asked them to return to the Dairy Queen to examine items he had found.
- [34] When Mr. Wolff arrived at the Dairy Queen, he could not recall how many police officers were present. He said that on arrival, the police officer pulled things out of a backpack. He also saw the officer pull drugs out of the backpack. Under cross-examination, he said he believed drugs were pulled out of this bag; this clearly indicated to me that he was uncertain on the point. He said some money was pulled out of the backpack and other random items were produced.
- [35] Under further cross-examination, Mr. Wolff resiled from his earlier testimony when he said he saw the police officer take all of these items out of the backpack.
- [36] On review of the two photographs taken by Mr. Wolff, he could not confirm that the sunglasses worn by the suspect were his glasses. On review of the photographs not taken by Mr. Wolff but taken by Constable Goodwin, he could not confirm that the sunglasses worn by the suspect were in fact his glasses. On looking at Photograph 13, he confirmed though, "those are my sunglasses". When asked to explain how he could identify these glasses as his, he said they were purchased while on a trip and "you don't find Armani glasses on sale in Kelowna". Nevertheless, he said his Armani glasses were missing from the truck when he went back to it. He said he assumed they were his glasses because, as he said, no one in Kelowna sells those type of sunglasses and that, absent any distinguishing features on the glasses found, he was certain they were his.
- [37] Ms. Wolff confirmed that she and Mr. Wolff were close to Peachland when the call came from the constable to return to the Dairy Queen.

- [38] She said that they picked out some items, including a hunting knife, sunglasses, a Sharpie pen, and a utility tool belonging to Mr. Wolff. Ms. Wolff did not know if the Sharpie pen had been in the truck at the time of the theft. She confirmed that the utility tool had been a gift from Mr. Wolff's sister, but was not certain if it was in the truck that morning. Concerning the sunglasses, she said they were a fancy brand but she could not remember the name; they were always kept in the centre console of Mr. Wolff's truck along with the hunting knife.
- [39] Ms. Wolff said they collected their items from the table outside the Dairy Queen and drove back to Penticton.
- [40] Ms. Wolff had no further involvement with the matter and could not be 100 percent certain that the person she had seen outside her house was in fact the accused in the prisoner box at the trial.
- [41] Ms. Wolff did indicate that Mr. Wolff could have been away from the house between 30 and 60 minutes. She was unclear.
- [42] She was informed that the truck was towed from the neighbour's property for the purposes of a fingerprint examination.
- [43] She confirmed that a person driving on Elliott Road toward or from Smith Creek would have seen the truck in the neighbour's driveway.
- [44] She said also that at the time she saw the suspect in front of her home, he did not appear to have any weapon in hand.

PO Rick Goodwin's Evidence

- [45] On the date of the incident, Constable Goodwin was a general duty member of the West Kelowna detachment. He had been a member since 2007.
- [46] He had barely started his shift at 6:00 a.m. in the morning when he received a report of a stolen vehicle. He described collecting his equipment and driving off to the Wolff residence on Elliott Road as something of a hastily undertaken venture. He said he received the report that the Wolff vehicle had been taken from the front of their house and was later informed that it had been returned to their home.
- [47] Constable Goodwin arranged for a tracking dog to assist in searching for the perpetrator of the theft. Constable Roberts was the dog handler and unsuccessfully searched for the suspect. Constable Goodwin left Mr. Wolff's residence and began searching parts of West Kelowna for the suspect. He went to an area near a gas station and the Dairy Queen, which he said was a place known to be used by drug users. As he approached the parking lot near to the Dairy Queen, he saw a male sitting at a table. The Dairy Queen was closed and he identified the person at the table as matching a picture of the person with distinctive clothing, a backpack, blue jeans, and a black shirt with white writing on it. This was

consistent with the photograph that he had received from Mr. Wolff. When he was approximately 20 feet away from the accused, he observed the backpack and papers on the table.

- [48] While he was still in his police vehicle, he asked the accused his name. The accused responded, Jeffrey Doucet, and Constable Goodwin did a computer search that revealed information about this person. At the time, the accused was bound by certain conditions and under some other charges.
- [49] The officer left his car and advised the accused that he was under arrest for theft and attempted theft of a motor vehicle. The accused remained sitting at the table focusing on the items on the table. He seemed to be sweating and paying no attention to the officer.
- [50] The officer came toward the accused from behind and grabbed his shoulders; Mr. Doucet started to rise and push back against the constable. He seemed quite muscular. Constable Goodwin was intending to put handcuffs on the accused and was bringing his hands to behind the accused for that purpose. The officer noted there was a needle, a knife, a backpack, and papers on the table. The accused was gathering these items off the table into the backpack. As he stepped around the chair, the accused grabbed the backpack and threw it back at the constable, hitting him in the chest.
- [51] The accused looked left and right and the officer removed his Taser. He said he had heard about the accused's threats to Mr. Wolff. He was watching the accused to determine which direction he might run, and deployed his Taser, felling the accused to the ground. The accused lay on the ground and the officer observed a knife nearby. Constable Roberts eventually attended and assisted in placing the accused in handcuffs.
- [52] After the other constable arrived, the accused was searched and a needle found in his pocket. Constable Goodwin said he picked up some items that had fallen from the accused's pocket and were placed on the table. He said he had seen a bulge in the accused's pocket and withdrew three baggies; one apparently labelled by the constable as pink heroin, 29 grams; one labelled by the constable as cocaine, 30 grams; and another labelled as crystal methamphetamine, 29 grams. Strangely, the bag with the pink drugs had a label on it indicating 28 grams on the exterior.
- [53] Constable Goodwin also found some cash, a lighter, jewellery, a phone, sunglasses, various identification documents, a multi-purpose tool, a pen, and a propane cylinder.
- [54] He did not find the usual drug paraphernalia that might be expected to be held by a trafficker. He said there were no scales, baggies, or score sheets.
- [55] The drugs were placed in an exhibit bag, and the constable noted that there were papers in the name of a Mr. McKee, addressed to Mr. McKee's address a short distance from the Wolffs' home. Constable Roberts took those items and intended to return them to the owner.

- [56] Mr. Wolff arrived at the Dairy Queen with his wife and they identified the items that had been taken, including the knife and the Armani sunglasses. He said that Mr. Wolff informed him that he had picked up keys to his business and fob in the orchard, and these worked for his vehicle, and were in the area where he observed the accused throw something.
- [57] Constable Goodwin later attended the residence of a Mr. McKee a few houses away from the Wolffs' home. He returned some of the documents recovered from the accused, including some repair sheets and insurance documents that appeared to belong to Mr. McKee. It appeared someone had rummaged through his vehicle.
- [58] The Wolff vehicle was towed from the place where it had been left, to a place where it was left for fingerprint investigation.
- [59] Constable Goodwin reported that the fingerprint investigation was negative for any indication of the accused's fingerprints.

The Accused's Evidence

- [60] Mr. Doucet is 35 years of age and in August 2019 was a very heavy drug user; he consumed drugs throughout every day and over all days. He had a criminal history from 2014, 2015, and 2018. Approximately one month before the alleged offences, the accused had been released from a lengthy period of incarceration that had ended in June or July 2019.
- [61] At this time, he was living in Penticton and sleeping on a couch.
- [62] On the night of August 12, Mr. Doucet said he had been having a party with friends in a four-by-four, travelling about; they moved their party up into the hills. The accused said that he drank alcohol and he used drugs throughout the night and into the early morning of August 13.
- [63] In the early morning just before sunrise, Mr. Doucet said the party had died down and he was going to get a friend to pick him up. He did not identify the friend. When Mr. Doucet continued his testimony in chief, he said he had called his friend to pick him up at the Dairy Queen and that, "[he] was supposed to be meeting a friend around 6:00 a.m." There was no evidence that this friend appeared at any time at the Dairy Queen in the morning, until certainly after Mr. Doucet was removed from the scene and Constable Goodwin remained there.
- [64] Mr. Doucet said he was very high as he walked the 30 to 45 minutes down from Smith Creek, along Elliott Road toward Highway 97. He said he came across "some stuff" on the roadway, including some paperwork. He continued down the road and found a backpack located in a bush off the road. He picked it up. He said the backpack had a brand-name label on it.

- [65] He said he also tried to put the paperwork in the backpack and walked away. As he proceeded, he found a blue utility knife or tool, a knife that he put on his belt, and he continued walking past a pickup truck parked on the other side of the road. He did not search the backpack at the time and eventually put the papers inside and continued walking.
- [66] In front of the house, he noticed a truck parked in the driveway with the interior light on, but he did not enter the vehicle. He continued walking and passed another truck and he looked into it. He said he was quite high. As he was looking into the truck, he said a lady came out of the house behind the vehicles and said something to the effect, "it's my property". He agreed that there had been a brief conversation with the lady in front of the Elliott Road house, but he continued to walk and she did not follow.
- [67] He denied taking Mr. Wolff's truck from in front of his house; he denied removing the blue utility tool, the sunglasses, the set of keys, or a knife from the truck. He acknowledged that there was another truck parked in front of the Wolffs' house, but denied that he had tried the doors or that he had tried to enter the truck or even touch the truck.
- [68] Continuing down the road, the accused crossed Elliott Road when a person approached him and began yelling. He carried on walking and another person showed up and started running towards him with the first person. He turned off the road into a yard. He could not recall exactly what was said, but believed it was something like an accusation of him stealing a truck. As he continued walking, the accused changed directions, because these two individuals were coming behind and were threatening and chasing him. He was high and did not want to confront these two individuals.
- [69] He was frightened and wanted to leave. The two persons were chasing him and he admonished them to leave him alone. He said, "I've got a knife." He was getting scared but did not open the knife to expose the blade. These two people stopped and began videotaping or taking pictures of him. He was scared and then produced the knife.
- [70] He said he never had a set of keys, nor did he throw keys away while the other two pursued him. He said he held a knife in his hand at one stage, but the blade was closed, and he did not make any threat to the two pursuers and did not open the blade in their presence.
- [71] He eventually went through a fence and some orchards and escaped the pursuit, and came to rest at the local Dairy Queen picnic benches.
- [72] He was heading to the place where he was expecting to meet his friend, when he emerged at the West Kelowna Dairy Queen. He stopped at a table outside the Dairy Queen to use some drugs left over from the evening's events that he was intending to use. He said he had one flap of drugs.

- [73] As he waited at the table, the accused dropped the flap of drugs from his pocket while sitting at the concrete bench outside the Dairy Queen. He could not recall if he actually used those drugs. He said Constable Goodwin pulled up and asked his name; he said he believed he answered the question, but was uncertain on that point.
- [74] Constable Goodwin informed him that he fit the description of a suspect, and exited his vehicle moving closer to the accused, and told him, "You're coming with me." Mr. Doucet said, "No I am not." He grabbed his bag, swooped up personal items, and stuffed them into the bag.
- [75] He said the constable came toward him. He tried to go to the left, but the constable pulled him back, and he said he turned back and dropped everything. His next memory was waking up face-first on the pavement. Constable Goodwin had employed a Taser and the probes were in his back and upper left shoulder.
- [76] Mr. Doucet conceded that the photographs taken by Mr. Wolff were pictures of him and that he was walking with papers in his left hand. He identified many items laid out on the table including the sunglasses, a cellphone, a wallet, a knife, a backpack, and the blue utility knife. He denied that the three bags of drugs were purchased by him or belonged to him; he said he found the backpack and noticed the drugs were inside it.
- [77] He acknowledged that he had picked up a knife and a blue utility tool while walking on the road. He said he was not sure if the sunglasses were his, but he recognized his hat.
- [78] It should be noted that the accused's testimony was discontinued on November 20, 2020, because he was ill and his condition clearly affected his ability to testify.
- [79] When he returned to testify in June 2021, he reiterated much of his earlier evidence but made some changes. In particular, he said he had a flap containing some drugs he intended to use at the picnic table before his arrest. He said did not bring the methamphetamine, cocaine, or fentanyl with him. He said those drugs were in the backpack he had picked up on the roadside near the complainant's address. He specifically denied these drugs were found in his pockets, although there was a propane torch in his bag.
- [80] The accused was emphatic in saying that he found the backpack in a bush on the side of the road and there was no one in the vicinity as he walked down Elliott Road. Contrary to his evidence in chief, he said he did look into the bag after picking it up. He was asked if he intended to utilize the drugs; he answered, "I did not know drugs were in there."
- [81] He said that as he walked down Elliott Road, he observed a car going up Smith Creek. Approximately three to five minutes later, the vehicle returned after he picked up the things on the road.
- [82] He reiterated that he had picked up, again, the multi-tool, the sunglasses, and a pocket knife. He repeated his denial that he had driven any vehicles or had stolen the vehicle from in front of the Wolffs' home.

- [83] At another juncture, he testified that he had planned to use the drugs found in the backpack, but did not contemplate ever selling the drugs. He said he never sold drugs, although he acknowledged he had been convicted of possession for the purposes of trafficking controlled substances in 2004.
- [84] In the second iteration of his testimony, he said that while at the Dairy Queen the constable spun him around and he began to run to the parking lot when he was tasered.
- [85] He repeated his denial that he had purchased any drugs in the packages that were found. He had been released from prison one month before and received only \$700 per month social services, and from that sum he paid his rent. He said he did not have \$5,000 to buy the drugs that were in the backpack.
- [86] He testified that he was a user of heroin, fentanyl, and methamphetamines, but did not use cocaine. He had been using drugs for a long time and was quite familiar with the value. He said when he was younger, he might have purchased as much as 29 grams of drugs, but had not done so in quite a long time.
- [87] Nevertheless, he said that he did plan to use the drugs he had seen in the backpack.
- [88] He also conceded that he had money, matches, a lighter, and most likely a needle. All of these items he describes were picked up from the road, except for the pen.
- [89] Under cross-examination about his encounter with Ms. Wolff, the accused confirmed the brief conversation he had with her as he crossed over the street. He repeated he did not go into either truck, and reiterated his denial that he threw anything while he was being chased by Mr. Wolff and Chris. He particularly denied ever having a set of keys or a key fob. He reiterated that when brandishing the knife, the blade remained closed, and he said he was becoming frightened as the two people came closer to him.
- [90] The accused denied throwing his backpack at Constable Goodwin and testified that he had kept the knife in his pocket. He said he did not use the knife or point the knife at Constable Goodwin.

The Charges:

- [91] The charges against Mr. Doucet are alleged to have occurred on August 13, 2019, at or near the city of West Kelowna. The charges are as follows:
1. That he did unlawfully possess a controlled substance, to wit: fentanyl, for the purpose of trafficking, contrary to s. 5(2) of the Controlled Drugs and Substances Act.
 2. That he did unlawfully possess a controlled substance, to wit: cocaine, for the purposes of trafficking contrary to s. 5(2) of the Controlled Drugs and Substances Act.
 3. That he did unlawfully possess a controlled substance, to wit: methamphetamine, for the purposes of trafficking, contrary to 5(2) of the Controlled Drugs and Substances Act.

4. That he committed theft of a motor vehicle, the property of Kevin Wolff, contrary to s. 333.1(1)(a) of the Code.
5. That he committed an assault of Kevin Wolff by carrying, using, or threatening to use a knife, contrary to s. 267 of the Code.
6. That he uttered a threat to Kevin Wolff, to cause death or bodily harm, contrary to s. 264.1(1) of the Code.
7. That he carried or was in possession of a weapon, a CRT black hunting knife, for a purpose dangerous to the public peace or for the purpose of committing an offence, contrary to s. 88(1) of the Code.
8. That he committed theft of insurance documents and receipts, the property of Ron McKee, contrary to s. 334 of the Code. And,
9. That he resisted or wilfully obstructed Constable Goodwin, a peace officer in the execution of his duty, contrary to s. 129(a) of the Code.

The W.D. Analysis

- [92] Taking into account all of the evidence presented by the Crown and the accused, it is necessary to independently assess the credibility and reliability of that evidence. I am required to apply the principles of *R. v. W.(D.)*, [1991] 1 S.C.R. 742 [W.(D.)]
- [93] It is important in the W.(D.) analysis that I consider whether I believe the accused to have been truthful and reliable in his denials that he entered and drove Mr. Wolff's truck, removed items from Mr. Wolff's vehicle, possessed the knife for the prohibited purpose, possessed the drugs for the purposes of trafficking, and resisted or obstructed Constable Goodwin, or used the knife in a prohibited manner. If I do not believe Mr. Doucet's testimony, but I have a reasonable doubt concerning the veracity of his testimony, I would be left with a reasonable doubt and would be required to acquit him.
- [94] In this analysis, I am guided by the paper written by Mr. Justice Paciocco, (now of the Ontario Court of Appeal), discussing *Doubt about Doubt: Coping with R. v. W.(D.) and Credibility Assessment* (2017) 22 Can. Crim. L. Rev. 31, where he addressed the principles animating W.(D). He reiterated that it is not a formula with "a magical incantation or something to be slavishly followed". In his article, he said:
1. Criminal trials cannot properly be resolved by deciding which conflicting version of events is preferred;
 2. A criminal fact-finder who believes evidence that is inconsistent with the guilt of the accused cannot convict the accused;

3. Even if the criminal fact-finder does not entirely believe evidence inconsistent with guilt, if the fact-finder is left unsure whether that evidence is true, there is a reasonable doubt and an acquittal must follow;
4. Even where the fact-finder entirely disbelieves evidence inconsistent with guilt, the mere rejection of that evidence does not prove guilt; and
5. Even where the fact-finder entirely disbelieves evidence inconsistent with guilt, the accused should not be convicted unless the evidence that is given credit proves the accused guilty beyond a reasonable doubt.

[95] In addition to those principles discussed in *W.(D.)*, the court must also consider the comment of Wood J.A. in *R. v. C.W.H.* (1991), 3 B.C.A.C. 205, 1991 CanLII 3956 (B.C.C.A.) [C.W.H.], suggesting a further component to the *W.(D.)* framework. That is, he said:

[24] I would add one more instruction in such cases, which logically ought to be second in the order, namely: if, after a careful consideration of all of the evidence, you are unable to decide whom to believe, you must acquit.

[96] The Supreme Court of Canada in *R. v. Dinardo*, 2008 SCC 24, informed courts that the accused's evidence must be considered in light of the evidence as a whole:

[23] . . . In a case that turns on credibility, such as this one, the trial judge must direct his or her mind to the decisive question of whether the accused's evidence, considered in the context of the evidence as a whole, raises a reasonable doubt as to his guilt. Put differently, the trial judge must consider whether the evidence as a whole establishes the accused's guilt beyond a reasonable doubt.

[Emphasis added.]

Circumstantial Evidence

[97] In submissions, the Crown and defence agreed that this case must be decided on the principles applied when the proof of an offence involves circumstantial evidence. In *R. v. Camille*, 2020 BCCA 32 [Camille], the court reviewed the principles articulated in *R. v. Villaroman*, 2016 SCC 33 [Villaroman]. In *Camille*, the court said:

[37] In *R. v. Villaroman* . . . the Court settled the test to be applied when assessing circumstantial evidence, drawing inferences from the evidence or absence of evidence, and determining if guilt is proved beyond a reasonable doubt.

. . .

[39] In *Villaroman*, Cromwell J., writing for the Court, examined the applicable reasoning when there is an absence of evidence raised to support an alternative theory to guilt, offering the following guidance . . .

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

[38] Of course, the line between a "plausible theory" and "speculation" is not always easy to draw. But the basic question is whether the circumstantial evidence, viewed logically and in light of human experience, is reasonably capable of supporting an inference other than that the accused is guilty.

[Emphasis added.]

[40] Finally, the Court identified "useful statements" of the principle:

[40] The first is from an old Australian case, *Martin v. Osborne* (1936), 55 C.L.R. 367 (H.C.), at p. 375:

In the inculcation of an accused person the evidentiary circumstances must bear no other reasonable explanation. This means that, according to the common course of human affairs, the degree of probability that the occurrence of the facts proved would be accompanied by the occurrence of the fact to be proved is so high that the contrary cannot reasonably be supposed.

...

[42] The second is from *R. v. Dipnarine*, 2014 ABCA 328, 584 A.R. 138, at paras. 22 and 24-25. The court stated that "[c]ircumstantial evidence does not have to totally exclude other conceivable inferences"; that the trier of fact should not act on alternative interpretations of the circumstances that it considers to be unreasonable; and that alternative inferences must be reasonable, not just possible.

[Emphasis added by Cromwell J.]

[98] In *R. v. Bransford*, 2019 BCCA 408, the court discussed permissible inferences by trial judges regarding the use of circumstantial evidence. Madam Justice DeWitt-Van Oosten said:

[31] An appeal from conviction in a circumstantial case that seeks to challenge the inferences drawn (or rejected) by a trial judge attracts a deferential standard of review. It is "fundamentally for the trier [of] fact to decide if any proposed alternative way of looking at the case is reasonable enough to raise a doubt": *Villaroman* at para. 56, citing *R. v. Dipnarine*, 2014 ABCA 328 at para. 22. As a result, the question on appeal is whether the "trier of fact, acting judicially, could reasonably be satisfied that the accused's guilt was the only reasonable conclusion available on the totality of the evidence": *Villaroman* at para. 55, citing *R. v. Yebes*, 1987 CanLII 17 (SCC), [1987] 2 S.C.R. 168.

- [199] Circumstantial evidence does not have to eliminate all possible inferences and a verdict is not unreasonable solely because the trier of fact concludes that the alternatives were not reasonable enough to raise a doubt. And the basic question was whether the circumstantial evidence, viewed logically and in the light of human experience, was reasonably capable of supporting an inference that the accused was guilty.
- [100] In *R. v. Redden*, 2021 BCCA 230, the Court of Appeal dealt with a defence based on the alleged involvement of a third party and framed the analysis as follows:
- [80] In deciding whether he believed the appellant, or, even if he did not believe him, whether the appellant's evidence raised a reasonable doubt, the judge was entitled (and indeed obliged) to consider the appellant's testimony in the context of the other evidence before him.
- [81] A court does not assess the evidence of an accused in isolation: *R. v. Wanihadie*, 2019 ABCA 402 at para. 31. As a result, there will be cases where a denial, defences that rely heavily on the testimony of the accused, or hypothesized inferences are rejected outright "based on a considered and reasoned acceptance beyond a reasonable doubt of the truth of conflicting credible evidence": *R. v. D. (J.J.R.)* (2006), 2006 CanLII 40088 (ON CA), 215 C.C.C. (3d) 252 (Ont. C.A.) at para. 53, leave to appeal ref'd, [2007] S.C.C.A. No. 69. This does not mean that the trial judge has erroneously chosen between competing narratives, simply preferring one to the other. To do so would constitute reversible error. Rather, it represents a finding that the testimony of the accused cannot stand in light of the cogency of the other evidence.
- [86] There is no question that evidence of a connection between a third party and the crime can provide the basis for a reasonable doubt. In this case, the judge understood the bases advanced in support of that defence. Colin Young was at the concert and in the appellant's car. The appellant's laundry was scattered about the vehicle, implying that Mr. Young went through it. The appellant testified that he had previously given clothes to his friend. Mr. Young insisted on leaving the concert site, he had drug issues at the time of the offence, and he subsequently left the jurisdiction (RFJ at paras. 41, 60-61, 63, 76-78, 81, 93).
- [87] However, the defence suggestion that Mr. Young took the appellant's clothing from the vehicle (or received it at some other time) and wore that clothing while committing the offence, or left the appellant's clothing at the scene for some other purpose, was inherently problematic given the appellant's adamant denial in his evidence that he owned or ever wore that clothing. An inference of a third party's involvement must be reasonable and not amount to speculation: *R. v. Grandinetti*, 2005 SCC 5 at para. 47.

Analysis

Credibility and Reliability

[101] My analysis of the witnesses' credibility and reliability is informed by all of the evidence presented, including the details concerning the allegations that the accused was involved in the offences charged.

[102] Facts which I think are significant are this:

- a) The accused said after a long night of drug and alcohol use, he was walking on Elliott Road and found a backpack in a bush that contained \$5,000 worth of cocaine, heroin, and methamphetamine at the side of the road.
- b) While walking along the road, he came upon the backpack in the bushes off the shoulder of the road. He picked it up but did not inspect it. He continued walking until he saw a vehicle with a light on, doors open, and material was strewn about. He picked up a number of items, including the blue utility knife, and put them in the backpack he had found. He also found papers from another truck, and found a knife that he attached to his belt.
- c) As he was walking further down Elliott Road, he stopped outside the Wolffs' home and looked at their tenant's truck parked on the side. He had a conversation with Ms. Wolff and told her to be calm. He continued further down Elliott Road and disappeared.
- d) Ms. Wolff had observed this man looking in her tenant's truck, but she did not see him touch it and could not identify him at the trial.
- e) On his way to Smith Creek, Mr. Wolff said he saw a male tying a shoelace in front of his home. He did not stop at that juncture nor did he observe his stolen vehicle parked one residence away. He said the man tying his shoelaces was the man they ultimately chased down Elliott Road.
- f) The accused said a guy showed up and yelled at him. A second person showed up and someone started running after him, and he said he wanted to get out of there. While fleeing, Mr. Wolff said the accused threw an item to the ground. Mr. Wolff observed the accused throw this item and walked to the place where he believed it had been thrown and landed, and he found on the ground in this area the keys and fob that he identified as for his truck and for his business premises. He had left these keys in his truck the night before.
- g) The accused denies taking Mr. Wolff's truck, taking any property out of Mr. Wolff's truck, or throwing anything while Mr. Wolff and his tenant were pursuing him.
- h) He admitted some knowledge of drugs in the backpack, but denied any intention of selling or trafficking.
- i) During the time Mr. Wolff and the tenant followed the accused, they did not observe any other persons in the area.

- j) When the accused was arrested, Constable Goodwin found the accused in possession of a number of items consistent with the items missing from Mr. Wolff's truck, again including the sunglasses, a knife, a banknote, a utility tool, and a pen. Although each of these items contain characteristics that were general and might have belonged to persons other than Mr. Wolff, the presence of Mr. Wolff's keys that had been in his truck the night before lead to a conflict in the evidence between he and the accused.
- k) No person was able to identify the accused as the person driving Mr. Wolff's truck. Mr. Wolff testified that the person he chased to the Dairy Queen, as I said, was the same person tying a shoelace in front of the house.
- l) The knife and sunglasses had been kept in the console of Mr. Wolff's truck; this was the vehicle that was taken. The accused's attention was focused on items seen in the photograph in evidence. He said the sunglasses "look like" his, the knife in the Photograph Number 6 was found by him walking on Elliott Road, and the blue thing was the utility tool he also found.
- m) He said the drugs found in the bag were not his and he had no drugs in his pocket. He said he had not purchased nor did he ever intend to sell drugs. He found the bag containing the drugs in a bush alongside Elliott Road.

[103] Assessing credibility requires the court to focus on various factors that have been part of our law since *Faryna v. Chorny*; [1952] 2 D.L.R. 354 (B.C.C.A.), and more recently crystallized and summarized by Madam Justice Dillon in *Bradshaw v. Stenner*, 2010 BCSC 1398. This decision is often referred to as a good guide for the assessment of credibility:

[186] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 1919 CanLII 11 (SCC), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis*, [1926] 31 O.W.N. 202 (Ont.H.C.); *Faryna v. Chorny*, 1951 CanLII 252 (BC CA), [1952] 2 D.L.R. 354 (B.C.C.A.) [*Faryna*]; *R. v. S.(R.D.)*, 1997 CanLII 324 (SCC), [1997] 3 S.C.R. 484 at para.128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (*Faryna* at para. 356).

[187] It has been suggested that a methodology to adopt is to first consider the testimony of a witness on a 'stand alone' basis, followed by an analysis of whether the witness' story is inherently believable. Then, if the witness testimony has survived relatively intact, the testimony should be evaluated based upon the consistency with other witnesses and with

documentary evidence. The testimony of non-party, disinterested witnesses may provide a reliable yardstick for comparison. Finally, the court should determine which version of events is the most consistent with the "preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions" (*Overseas Investments (1986) Ltd. v. Cornwall Developments Ltd.* (1993), 1993 CanLII 7140 (ABQB), 12 Alta. L.R. (3d) 298 at para. 13 (Alta. Q.B.)). I have found this approach useful.

[Emphasis added.]

[104] In this case, there is little conflict between the testimony of the accused and Mr. and Ms. Wolff. The most notable distinction is the accused's denial that he threw anything out onto the ground during the chase carried out by Mr. Wolff and his tenant.

[105] Also, at one stage, the accused said the sunglasses may have been his sunglasses but he was uncertain. Several of the other items were indisputably picked up by him from Elliott Road.

Decision

[106] In addressing each count in the indictment, I intend to deal with the counts in order of the events alleged by the Crown, beginning with the theft of Mr. Wolff's truck, the chase, the accused's knife, and the events at the Dairy Queen.

Count 4

[107] As I have said, the charges allege that Mr. Doucet committed theft of Mr. Wolff's truck.

[108] In my view, the central question is what inferences can be drawn from the circumstances set out by the Crown. This is tied to the question of whether the accused stole Mr. Wolff's truck or simply came upon the truck after some other person had abandoned it, leaving the doors open and debris strewn around the interior and exterior. The absence of several items consistent with those owned by Mr. Wolff from his truck and found in the possession of the accused are also factors influencing this analysis.

[109] The accused denies stealing the truck and contends the sequence of events described by Mr. and Ms. Wolff could not have happened if he was the thief.

[110] I do not believe the accused's testimony that he did not take Mr. Wolff's truck and return it a short time after. First, the accused conceded that he was high on drugs after a long night of consumption and was simply walking along when he found items strewn on the ground, which he picked up. His measure or degree of impairment at the time would appear, by his own estimation, to have been considerable.

[111] In this analysis, I must also consider all of the facts surrounding the taking of the vehicle and the aftermath. As I will discuss later, I find the accused to be lacking in credibility. The accused's finding of a backpack with \$5,000 in drugs appears to be a somewhat unusual suggestion, which I will deal with later in these reasons. However, although it is

speculatively possible that another person drove Mr. Wolff's truck toward Highway 97 and returned the truck within a short time, and began walking past the Wolffs' residence and dropped many items from the truck. I also take into account and the accused was walking past the Wolffs' house when observed by Ms. Wolff and Mr. Wolff. He was observed with many items from the Wolff's truck in his possession. I find that the evidence, viewed logically and in light of human experience and common sense, has convinced me that any contrary inference that someone else took the truck is not reasonable.

- [112] I am satisfied Mr. Wolff identified the accused. Mrs. Wolff did not identify the accused, but Mr. Wolff identified the accused as the person in front of their home and in front of him during the chase. The evidence, viewed logically and in light of human experience and common sense, convinces me that the contrary inference that someone else took the truck would not be reasonable.
- [113] I am satisfied that Mr. Doucet confirmed his interaction with Ms. Wolff shortly after she saw the truck driving towards Smith Creek, having stopped only 60 feet or less from their property, with the doors open.
- [114] The central factor that leads me to disbelieve the accused is his denial that he threw anything to the ground during the chase by Mr. Wolff and his tenant. In my view, it is against any reasonable possibility that the keys found by Mr. Wolff had not been in the accused's possession and thrown to the ground, but instead had been left there by some other person or some other means. That suggestion, which underpins the Crown's case, is essential.
- [115] Although there was no direct evidence that the accused stole the truck, I find that his testimony, standing alone, contained inconsistencies on the face, as well as uncertainties, that I am not able to believe him in the context of all of the evidence that I heard. At one point, he said he did not know about the drugs in the backpack and on another occasion he said he knew about the drugs and contemplated using them.
- [116] Although demeanour is not an overly significant feature in credibility analysis, Mr. Doucet was glib and uncertain about many details, all of which might reflect that he had been high on drugs all night long and had not had any sleep before his arrest. I formed the view of his testimony that he did not have a firm memory nor did his evidence harmonize with independent evidence that I have accepted. I have no reasonable doubt in disbelieving his allegation concerning throwing the keys, nor concerning his assertion that he did not have the keys and did not throw them.
- [117] I observed that the police took Mr. Wolff's vehicle and performed a fingerprint analysis on the exterior and interior and no fingerprints were found. Although fingerprints can be a compelling piece of evidence in a case of this nature, nothing in the evidence satisfied me that the absence of fingerprints indicated that the accused had not been in the vehicle. The absence of fingerprints is a factor I take into account, but is not determinative. I also recognize that the Crown did not produce photographs of the keys and the fob found by Mr.

Wolff, nor did they produce the keys or fob at trial. However, I accept Mr. Wolff's testimony on that point was not undermined in cross-examination, and I do not find that the absence of the physical evidence of the keys and the fob contributes to or raises any reasonable doubt.

- [118] Where the accused's testimony conflicted with Mr. Wolff's recounting the finding of the keys to his vehicle and business premises along the path as he was being chased I have rejected Mr. Doucet's testimony on its own. I accept Mr. Wolff's evidence and reject the accused's account, in part because his testimony is consistent and logical, and demonstrates a consistency with the probabilities that an ordinary person would ascribe to the events that transpired. This was not a competition to decide which of the two versions about the keys I can accept. There were aspects of the accused's testimony, standing alone, that have led me to the result I have reached.
- [119] I reiterate, the accused said he was high and had been drinking and consuming drugs throughout the evening and the early morning. His trial testimony gave the further impression that his memory of these events was clouded, possibly by his impaired state, and overall his denial that he threw the keys in the location where Mr. Wolff found them is an impediment to any positive finding that I could rely on his credibility.
- [120] As part of the W.(D.) analysis, I reject the accused's testimony concerning his involvement in the theft of the truck and I find it to be unbelievable. It does not raise any reasonable doubt for me. Addressing the second leg of the W.(D.) test, I have no uncertainty that Mr. Doucet's testimony might be true, based on a consideration of all of the evidence.
- [121] However, I must still consider whether there is evidence proving his guilt beyond a reasonable doubt. He can only be convicted if, on all of the evidence, I am satisfied that he is guilty, and the burden of proof for these offences always rests with the Crown and the accused is presumed innocent.
- [122] I am satisfied that the accused's guilt is the only reasonable conclusion I can reach based on the totality of the evidence. Albeit the evidence against Mr. Doucet is circumstantial and must be assessed for logic in light of human experience and common sense, the degree of probability that another person or persons entered Mr. Wolff's truck, dropped substantial items from his truck at a place near to a backpack containing \$5,000 worth of drugs, and another person dropped a bag with costly drugs nearby, or that some other person picked up Mr. Wolff's fob and keys, leads me to conclude that no other reasonable inference can be drawn to explain these circumstances other than the accused's guilt..
- [123] In the result, I would find Mr. Doucet guilty of Count 4, contrary to s. 333.1(1)(a) of the Code.

Count 5

- [124] Section 267(a) of the Code reads:

267 Every person is guilty of an indictable offence and liable to imprisonment for a term of not more than 10 years or is guilty of an offence punishable on summary conviction who, in committing an assault,

(a) carries, uses or threatens to use a weapon or an imitation thereof,

[125] A clear explanation of the elements of the offence under s. 267 is found in *R. v. Mateo-Asencio*, 2018 ONSC 173, where Justice Petersen said:

[136] Under s.267(a) of the Criminal Code, an assault with a weapon is committed when a person carries, uses or threatens to use a weapon in committing an assault. The definition of "assault" in the Criminal Code includes not only the intentional application of force to another person without their consent (s. 265(1)(a)), but also the threat "by an act or a gesture, to apply force to another person" if the accused "has, or causes that other person to believe upon reasonable grounds that he has, present ability to effect his purpose" (s.265(1)(b)).

[126] The "non-contact assault" in this case was determined by Mr. Justice Petersen to be the accused holding a baseball bat, standing in a "batter's stance". In the case at bar, it is alleged that the non-contact assault with a weapon happened when the accused threatened Mr. Wolff and gestured toward him with a knife in hand.

[127] Even if I might find that Mr. Doucet had the intention to threaten such an assault, I find that the evidence falls short of establishing that he intended to or had the present ability to actually harm Mr. Wolff or the other pursuer. It is unclear whether the knife was open or that the blade was exposed. As well, it is clear that Mr. Wolff and his tenant were some distance of 20 to 50 feet away at some time leading up to this gesture.

[128] Nonetheless, in this case, the accused argued that the gesture with the knife, whether or not the blade was exposed, was triggered by his fear that the two persons chasing him might cause injury. He relies on the self-defence part of s. 34 of the Code.

[129] In *R. v. Cunha*, 2016 ONCA 491, the Ontario Court of Appeal had addressed this question:

[7] As for the objective element of the defence, it is accepted that in considering the reasonableness of the defendant's use of defensive force, the court must be alive to the fact that people in stressful and dangerous situations do not have time for subtle reflection, as this court noted in *R. v. Mohamed*, 2014 ONCA 442, 310 C.C.C. (3d) 123, at para. 29:

As Professor Paciocco notes at p. 36:

The law's readiness to justify "mistaken self-defence" recognizes that those in peril, or even in situations of perceived peril, do not have time for full reflection and that errors in interpretation and judgment will be made.

[]

[130] The test for applying self-defence arising under s. 34 was summarized by the Ontario Court of Appeal in *R. v. Bengy*, 2015 ONCA 397 at para. 28:

- (i) Reasonable belief (34(1)(a)): the accused must reasonably believe that force or threat of force is being used against him or someone else;
- (ii) Defensive purpose (34(1)(b)): the subjective purpose for responding to the threat must be to protect oneself or others; and
- (iii) Reasonable response (34(c)): the act committed must be objectively reasonable in the circumstances.

[131] In determining whether the act of self-defence is reasonable, the circumstances set out in s. 34(2) of the Code provide direction:

- (2) In determining whether the act committed is reasonable in the circumstances, the court shall consider the relevant circumstances of the person, the other parties and the act, including, but not limited to, the following factors:
 - (a) the nature of the force or threat;
 - (b) the extent to which the use of force was imminent and whether there were other means available to respond to the potential use of force;
 - (c) the person's role in the incident;
 - (d) whether any party to the incident used or threatened to use a weapon;
 - (e) the size, age, gender and physical capabilities of the parties to the incident;
 - (f) the nature, duration and history of any relationship between the parties to the incident, including any prior use or threat of force and the nature of that force or threat;
 - (f.1) any history of interaction or communication between the parties to the incident;
 - (g) the nature and proportionality of the person's response to the use or threat of force; and
 - (h) whether the act committed was in response to a use or threat of force that the person knew was lawful.

[132] I have concluded that Mr. Doucet took the knife from Mr. Wolff's truck and carried it to a point where he was arrested by Constable Goodwin. He had collected the knife from Mr. Wolff's vehicle and did not brandish it during much of the chase. The persons following him were shouting and indicating their anger at him, and it was reasonable for him to believe that they might use force against him.

- [133] It is important to note that for much of the chase, Mr. Wolff and his tenant were 50 feet back, but had increased their pace and moved to within 15 or 20 feet of the accused, and it was at that juncture that the accused turned and pointed the knife towards the men. One or both of the men appeared to be angry and swore at him.
- [134] I am satisfied that the presence of the two persons chasing the accused, closing the distance separating them, the absence of any previous history or relationship, that the accused's act was in response to this threat that he did not believe would be lawful, and that he reasonably believed he was in imminent danger at some level.
- [135] In the circumstances, I am satisfied the Crown has not established that Mr. Doucet did not have reasonable grounds to believe that a threat of force was being made against him, and in the circumstances of the accused, and in the rather dynamic situation he was faced with, he can reasonably be believed to have pointed the knife in response to this threat. I am also satisfied that his use of the knife was only for the purpose of dissuading Mr. Wolff from using force against him, and that in the circumstances he acted reasonably.
- [136] Overall, I am satisfied the Crown has not met the burden of proof under s. 267(a) and find the accused not guilty.

Count 6

- [137] Count 6 was a charge alleging that Mr. Doucet had uttered threats against Mr. Wolff under s. 264.1(1) of the Code.
- [138] The Crown recognized that Mr. Wolff could not recall what was said by the accused and invited the court to acquit the accused on the charge of uttering a threat to Mr. Wolff. I am satisfied the Crown has not proven beyond a reasonable doubt that the accused uttered a threat to Mr. Wolff and on Count 6, I find him not guilty.

Count 7

- [139] The Crown also alleged that Mr. Doucet had a black hunting knife in his possession for a purpose dangerous to the public peace, for the purpose of committing an offence, contrary to s. 88(1) of the Code.
- [140] Section 88(1) states that:
- 88 (1) Every person commits an offence who carries or possesses a weapon, an imitation of a weapon, a prohibited device or any ammunition or prohibited ammunition for a purpose dangerous to the public peace or for the purpose of committing an offence.
- [141] Whether the accused had possession of the knife is clear; however, whether it was in his possession for a purpose dangerous to the public peace or for the purpose of committing an offence is less clear.

- [142] The Supreme Court of Canada in *R v. Kerr*, 2004 SCC 44 [Kerr], divided on what it means to be in possession of a weapon for a purpose dangerous to the public peace. In that case, the accused was a prison inmate who had received a death threat. He concealed two weapons in his pants, and when he was attacked with a weapon, an altercation ensued and the attacker was killed by the accused. He was charged with murder and possession of a weapon for a purpose dangerous to the public peace.
- [143] The divisions of the Court in *Kerr* regarding the meaning of possession of a weapon for a purpose dangerous to the public peace were recently summarized by Justice Myers in our court in *R. v. Capot Blanc-Acko*, 2019 BCSC 2087. Justice Myers said:
3. Did Mr. Capot Blanc-Acko have the weapons for a purpose dangerous to the public peace
- [39] Section 88 requires that an accused intended to possess the weapons for a purpose dangerous to the public peace. It is, therefore, a mens rea offence.
- [40] The court in *R. v. Kerr*, 2004 SCC 44 divided on whether the purpose or intent is to be determined on an objective-subjective basis (Justice Bastarache) or a wholly subjective basis (Justice LeBel).
- [41] Unlike *Kerr*, the accused did not testify as to his intent. Also, unlike *Kerr*, the weapons were not used when Mr. Capot Blanc-Acko was shown to be in possession of them inside Walmart. The evidence of intent here is therefore circumstantial. Nevertheless, as was stated in *Kerr*, intent may be inferred in the absence of direct evidence.
- [42] I find the only inference to be drawn is that Mr. Capot Blanc-Acko had the weapons for the purposes of his drug trade. They could have been intended to be used offensively (for example, to collect drug debts) or defensively (for example, to fend off theft of the drugs or a drug transaction gone bad).
- [43] An offensive intent would obviously be one dangerous to the public peace.
- [44] What of a defensive intent? In *Kerr*, Bastarache J. (Justice Major concurring) held that a defensive intent does not negate a dangerous purpose unless the weapon is possessed for the purpose of fending off an inescapable and unavoidable attack. Justice Binnie (dissenting in the result) held that carrying a weapon on a regular basis for a defensive purpose does not negate a dangerous purpose. Justice LeBel (Justice Arbour concurring) concluded that carrying a weapon for self-defence was a dangerous purpose unless the defence of necessity could be made out. Although *Kerr* involved different circumstances and the accused was acquitted those principles are applicable here. There was no imminent threat and there is no defence of necessity or self-defence.
- [45] I conclude that Mr. Capot Blanc-Acko had possession of the weapons for a dangerous purpose and must be convicted of the two weapons offences.
- [144] In *Kerr*, Justice Bastarache (Justice Major concurring) said:

22 I note at the outset that s. 88 seems to create two separate offences: (i) possession of a weapon "for a purpose dangerous to the public peace" and (ii) possession of a weapon "for the purpose of committing an offence". In this case, we are concerned only with the first of these offences.

[145] Nonetheless, at para. 33, Bastarache J. uses the second offence as an example in understanding the first, distinguishing it and saying it requires a specific intent to commit an offence:

33 The conclusion that s. 88 requires application of a hybrid subjective-objective test is further reinforced through consideration of those other specific intent crimes in the Criminal Code, all of which clearly require by the terms of the particular provision an ulterior intention to achieve a specific consequence. For example, s. 270(1)(b) of the Code makes it an offence to "assaul[t] a person with intent to resist or prevent the lawful arrest or detention of himself or another person". Thus, the accused must specifically intend to resist or prevent arrest. Similarly, s. 343(a) of the Code defines "robbery" as stealing, "and for the purpose of extorting whatever is stolen or to prevent or overcome resistance to the stealing, us[ing] violence or threats of violence to a person or property". Once again, the accused must specifically intend to extort or to prevent resistance. Even the provision at issue, s. 88, in addition to establishing the offence in question, establishes the offence of possession "for the purpose of committing an offence". Here, the accused must specifically intend to commit an offence. It is readily apparent that each of these provisions specifically requires the intention to perform a particular action -- be it resisting arrest, extorting what is stolen, or committing an offence. Every other specific intent crime provision in the Criminal Code reads likewise, and is in this regard conspicuously dissimilar from the provision at issue.

[Emphasis added.]

[146] Prosecution for possession of a weapon for a dangerous purpose requires the Crown to prove the two essential elements: possession of a weapon; and the purpose of the possession must be one that is dangerous to the public peace. Moreover, the two elements must coexist at the same time. This is a specific intent offence: Kerr at paras. 23-24. The purpose of the accused is to be determined either on an objective-subjective basis or wholly subjective.

[147] Similarly, prosecution for possession of a weapon for the purpose of committing an offence requires the Crown to prove two essential elements: possession of a weapon; and the purpose of the possession must be to commit an offence. It is a specific intent offence: Kerr at para. 33.

- [148] I am satisfied that Mr. Doucet did not possess the knife for a purpose that was dangerous to the public peace. I accept that he had taken the knife and placed it in his pocket while he was walking away from Mr. Wolff's home. At that juncture, he did not appear to have any intent to use the knife for a dangerous purpose or for committing an offence. His sudden production of the knife, as noted above, was intended to dissuade Mr. Wolff from pursuing him and possibly assaulting him.
- [149] In the context of the circumstances, I am satisfied the accused did not take possession of the knife for a purpose dangerous to the public peace. I am satisfied he did not turn his mind to any purpose he had formed with regard to the knife, except for stealing it, and that there is no evidence that he carried the knife on a regular basis or for a defensive purpose. This was a short time, a single event, and standalone experience, and I am not satisfied that holding out the knife, as has been described, constituted possession of the knife for a purpose dangerous to the public peace or for committing an offence.
- [150] I found Mr. Doucet to be acting in self-defence on the previous charge to dissuade an imminent attack by his two pursuers, and that were perceived to be real. In all of the circumstances, I am satisfied that there is a reasonable doubt he carried or possessed the knife for a purpose dangerous to the public peace or for committing an offence, and I find him not guilty on Count 7.

Count 8

- [151] Mr. Doucet was also charged with having committed theft of insurance documents that belonged to Ron McKee, contrary to s. 334 of the Code. Crown conceded that there was insufficient evidence to meet all of the elements of that offence. Mr. McKee did not testify and Crown invited the Court to enter an acquittal on those charges, and I do find Mr. Doucet not guilty of the offence of theft of insurance documents from Mr. McKee.

Counts 1, 2, and 3

- [152] I will now deal with Counts 1, 2, and 3.
- [153] I will address the three charges of possession of controlled substances, including fentanyl, cocaine, and methamphetamine, for the purposes of trafficking as a single group because the facts are common to each charge. It is alleged by the Crown that the accused had these substances in baggies in his personal pockets and they were removed from him by Constable Goodwin after he was tasered and arrested. The accused concedes that he was knowingly in possession of all three drugs and that the quantities were 29 grams of fentanyl, 30 grams of cocaine, and 29 grams of methamphetamine.

- [154] I heard expert evidence regarding the value of these drugs. In the Okanagan, 29 grams of fentanyl are valued at \$2,500 to \$3,000 when sold by the ounce, and \$5,800 when sold by the gram; 29 grams of cocaine would be valued at \$1,500 sold by the ounce, and \$3,000 if sold at the gram level; and 29 grams of methamphetamine was valued at \$1,300 if sold by the ounce and \$2,900 if sold by one-tenth of a gram units.
- [155] I think maybe we will stand down for the morning break at this time. I have a bit of -- some distance to go. Thank you.
- [156] THE CLERK: Order in court. Court stands adjourned.
- [PROCEEDINGS ADJOURNED FOR MORNING RECESS]
- [PROCEEDINGS RECONVENED]
- [157] THE CLERK: Court is reconvened, My Lord.
- [158] THE COURT: Sergeant Woodcocks in his report opined that a heavy user of fentanyl might use between 0.5 grams and one gram per day; the cost would be between \$50 and \$100 per day. Thus, 29 grams would equate to a supply for that user spanning some 29 to 50 days.
- [159] Regarding the cocaine, Sergeant Woodcocks indicated that a heavy cocaine user could consume between two grams and five grams per day, with the cost of \$200 to \$500 per day. The cocaine seized from the accused would equate to a supply of six to 15 days.
- [160] Similarly, 29 grams of methamphetamine would equate to a pattern of consumption between 29 and 50 days. He concluded that possession at the amounts found on the accused were "consistent with possession of each substance for the purpose of trafficking". A drug trafficker in possession of these quantities of substances would place the trafficker at risk of robbery; the large financial commitments to purchase the quantity of drugs would be a deterrent to a person possessing this amount of drugs. He said the financial commitment to acquire these quantities could be in the order of \$5,000. That type of financial commitment is also inconsistent with personal use. Individuals do not customarily buy large amounts of these drugs for their own use. Larger quantities of these drugs are usually purchased with a view to sales in smaller quantities for the purpose of generating profits.
- [161] The accused concedes that he was in possession of these drugs. Although he initially denied knowing that the backpack contained drugs or these three specific drugs, he eventually acknowledged that he had looked in the backpack and had intended to use some of those drugs for his own purposes. He denied obtaining the drugs or carrying them on his person for any purpose related to trafficking.
- [162] The analysis on this count also engages the question of circumstantial evidence and the W. (D.) principles. The only question to be determined is whether the Crown has proved beyond a reasonable doubt that the accused was in possession of these drugs for the purposes of trafficking. If I accept the accused's testimony that he found the backpack in a bush on the side of the road and simply noticed the bags of drugs in the backpack without a

specific intention to traffic same, I must find him not guilty of possession for the purposes of trafficking.

[163] The defence objected to the admissibility of Sergeant Woodcocks' opinions.

[164] By and large, I accepted Sergeant Woodcocks' opinions that a person purchasing these amounts of controlled substances would be unlikely to spend the amount of capital required simply for that person's own use. In this case, the accused did not give evidence concerning his usual or normal rate of consuming fentanyl or methamphetamine, although he said he did not use cocaine.

[165] The accused stresses that he had only been discharged from incarceration for 30 days and it would be highly unlikely he could have accumulated \$5,000 to acquire this volume of drugs for the purposes of trafficking. He also pointed out that it would be quite unlikely that he would have gone on an extended party overnight with much drug use and drinking while carrying in a backpack drugs of that value, which would easily have been stolen or otherwise lost. Nevertheless, he does have a significant habit for fentanyl and methamphetamine.

[166] The accused described his financial resources as meagre. He received about \$700 a month of government assistance, that also I understood him to say from which he would pay his rent. He was not questioned about other sources he might have had or other sources of income, or whether he had access to funds that would have enabled him to purchase these quantities of drugs. It was suggested that there is, in drug-trade behaviours, a concept involving consignment sales. It seems to me that consignment sales would be extremely dangerous, given the type of drugs and the accused's lack of apparent resources.

[167] Even if I disbelieve the accused, I am obliged to consider whether his testimony leaves me in any doubt on the question. Thus, the defence invites me to infer that the Crown has failed to prove the accused's intent to traffic in these drugs that he found in the backpack on the side of the road.

[168] Constable Goodwin said that he found these drugs in the accused's pocket. If that is accurate, it is less likely that these substances could have been found in a bag on the roadside and, if kept in his pockets, would be inconsistent with his evidence and more consistent with Sergeant Woodcocks' opinion that he intended to traffic each of those drugs. The accused said that he had a flap of heroin that had remained after his night of drinking and drug use, which he intended to use while sitting at the table.

[169] When Mr. Wolff was at the Dairy Queen table with his wife, he met Constable Goodwin at the table on which the bag and other items were located. Constable Goodwin removed several items from the backpack, including the bags of drugs. He asked Mr. Wolff if the drugs were his. Mr. Wolff was adamant they did not belong to him. Constable Goodwin's testimony was in conflict with Mr. Wolff's testimony regarding whether the drugs were found in the bag or in Mr. Doucet's pockets

- [170] There was also a problematic aspect of Constable Goodwin's evidence. He conceded he did not take careful or timely notes of the events of August 13. His memory of those events was not good and his notetaking "could have been better". His notes were out of order and brief. He said that when he began his shift, he did not have all his "normal tools" to assist in his investigation.
- [171] In order to convict, I must be satisfied that the evidence tendered by the Crown that the accused had these substances for the purposes of trafficking same, and that that would be the only reasonable conclusion that could be derived from the circumstances.
- [172] In this trial, I can believe some of the evidence, none, or all of the evidence a witness gives. If the only reasonable inference that can be drawn from these circumstances related to the accused's possession of the drugs is his intention to traffic, then the Crown has met the burden of proof as discussed in Villaroman.
- [173] It will always be remembered that the accused is presumed innocent and bears no responsibility to prove his innocence. The Crown must prove beyond a reasonable doubt that the accused was knowingly in possession of prohibited substances with the intention of trafficking in same.
- [174] I reflected on the accused's concession that he was knowingly in possession of these drugs, but he does not concede that he knew the quantities in the baggies nor did he intend to traffic in those substances. He had turned his mind to using some of those substances for his own purposes.
- [175] For the reasons that follow, I am not able to decide if the accused was truthful in his testimony regarding the finding of the bag and the resulting revelation of the substances that were in the bag. I have some doubt that his version of these events was truthful, but taking into account the principles concerning circumstantial evidence, I have concluded that his version of events, including the suggestion that some other person left the backpack in a bush on the road late on August 12 or the morning of August 13, might be explained by another possibility which is inconsistent with his guilt.
- [176] While I accept that his version of events is unlikely, he was not undermined in cross-examination on his evidence concerning the finding of the bag, and all the Crown actually points to is the circumstantial evidence, which I accept are extremely suspicious, but I cannot, based on all of the evidence, make a decision on whether I can believe the accused's testimony. In a sense, this analysis falls to the fourth part of the W.(D.) test that was articulated by the British Columbia Court of Appeal in C.W.H.
- [177] The comments of the Court in Villaroman address the central question to be considered. The Court went on to say:
- [35] At one time, it was said that in circumstantial cases, "conclusions alternative to the guilt of the accused must be rational conclusions based on inferences drawn from proven facts": see *R. v. McIver*, 1965 CanLII 26 (ON CA), [1965] 2 O.R. 475 (C.A.), at p. 479, aff'd without

discussion of this point 1966 CanLII 6 (SCC), [1966] S.C.R. 254. However, that view is no longer accepted. In assessing circumstantial evidence, inferences consistent with innocence do not have to arise from proven facts: *R. v. Khela*, 2009 SCC 4, [2009] 1 S.C.R. 104, at para. 58; see also *R. v. Defaveri*, 2014 BCCA 370, 361 B.C.A.C. 301, at para. 10; *R. v. Bui*, 2014 ONCA 614, 14 C.R. (7th) 149, at para. 28. Requiring proven facts to support explanations other than guilt wrongly puts an obligation on an accused to prove facts and is contrary to the rule that whether there is a reasonable doubt is assessed by considering all of the evidence. The issue with respect to circumstantial evidence is the range of reasonable inferences that can be drawn from it. If there are reasonable inferences other than guilt, the Crown's evidence does not meet the standard of proof beyond a reasonable doubt.

- [178] The decision I have reached on this point is unlike the conclusion I reached concerning the theft of the vehicle, where the evidence that I was pointed to was not circumstantial evidence but was significant evidence related to the possession of the keys and the throwing away of the keys.
- [179] As I say, I conclude there are a number of questions concerning the origins of these drugs and when they came into Mr. Doucet's possession. He was a man of very limited means, recently released from prison. He did not use cocaine, but conceded he used methamphetamine and heroin.
- [180] Although his explanation of finding the backpack is unlikely, I have enough concern regarding his personal ability to acquire drugs that he was in possession of to require me to take that fact into account. He was not in possession of drug paraphernalia normally used in drug trafficking. There were no baggies, no scales, and no score sheets found in the backpack. While it is unlikely he would have possessed this volume of drugs for personal use, it is not beyond the realm of possibility.
- [181] I do not believe the accused. However, because my uncertainty is based on all of the evidence presented by the Crown, I have reached the conclusion that I cannot find beyond a reasonable doubt that Mr. Doucet was knowingly in possession of these drugs for the purposes of trafficking.
- [182] I find Mr. Doucet guilty of possession of fentanyl under Count 1, but not guilty of possession of fentanyl for the purposes of trafficking. I find him guilty of possession of cocaine, but not guilty for the charge of possession for the purposes of trafficking cocaine and I find him guilty of the added included offence of possession of methamphetamine, but not guilty of the charge of possession of methamphetamine for the purposes of trafficking.

Count 9

[183] Finally, the accused is charged under s. 129(a) of the Code. That section reads:

129 Every one who

- (a) resists or wilfully obstructs a public officer or peace officer in the execution of his duty or any person lawfully acting in aid of such an officer,

is guilty of

- (d) an indictable offence and is liable to imprisonment for a term not exceeding two years, or
(e) an offence punishable on summary conviction.

[184] In *R v. Glowach*, 2011 BCSC 241, Justice Arnold-Bailey of our court heard an appeal from an acquittal. The Provincial Court judge had found the evidence would have supported the offence of "resisting arrest", but not an "obstruction" charge and an acquittal was entered. A central issue on appeal was whether s. 129(a) constitutes two offences, one of resisting and one of wilfully obstructing the peace officer, or a single offence. The court went on to say that:

[69] On the main issue, the third ground of appeal, I find that s. 129(a) constitutes one offence of "resists or wilfully obstructs" where "resist" and "obstruct" are alternate means of committing an offence. It follows that the provincial court judge erred on a question of law in concluding otherwise. The appeal should be allowed.

[70] Section 129(a) is a general intent offence. Neither "resist" nor "obstruct" require an element of physical force or direct confrontation. As stated in *Hale*, "it is only critical that the definition of the word used in the charge be such that it fairly includes the actions said to constitute the offence." The trial judge erred in finding that resisting a lawful arrest could not constitute obstructing and that the Crown could not succeed on an obstruction charge where it had not charged resisting arrest.

[185] Constable Goodwin's testimony concerning the accused's behaviour towards him at the Dairy Queen before deploying the Taser was consistent and not undermined on cross-examination. He said he approached the accused from behind and informed him that he was under arrest. The accused was attempting to replace items on the table in his backpack. Mr. Doucet stood up, he pushed back towards the constable, knocking the constable backward. The accused then went to leave. He walked several feet and threw the backpack at the constable. The accused denies throwing the backpack at the constable, but in my view whether or not the backpack was thrown is not essential to the decision I make on this charge.

[186] The accused turned to the left and to the right and attempted to run off, at which point the Taser was deployed. The constable had yelled at the accused to stop, because he appeared to be preparing to run.

[187] Constable Goodwin was cross-examined about the lack of details in his notes and his poor memory. The accused, as I say, denied throwing the backpack. However, he confirmed that Constable Goodwin had said to him, "You are coming with me," and he responded, "No, I'm not". He said he tried to go and the constable pulled him, and he dropped his bag and the personal items he was attempting to carry away. Mr. Doucet then started to run off.

[188] I find there is no reasonable doubt that Constable Goodwin had arrested Mr. Doucet and approached him from behind, and had begun his efforts to place handcuffs on Mr. Doucet, and that Mr. Doucet manoeuvred himself, pushed away from the constable, and attempted to run away, at which point in time he was tasered. In my view, Mr. Doucet's actions after being informed of his arrest clearly resulted in a resisting of arrest and also the obstruction of the constable in his duty, and I find him guilty of Count 9.

Conclusion

[189] I find Mr. Doucet is not guilty of Counts 5, 6, 7, and 8.

[190] I find him guilty of, as I have indicated Counts 1, 2 and 3, of simple possession of methamphetamine, fentanyl, and cocaine, (but not guilty of the offence of possessing those drugs for the purposes of trafficking).

[191] I find him guilty of Count 4, the offence of theft of Mr. Wolff's truck, and

[192] I find him guilty of Count 9, the offence of resisting or obstructing Constable Goodwin.

"Armstrong J."

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Prepared on 25 October 2026 · Esheria