

CANADA / JUDGMENT

R. v. Dunn

2025 BCSC 195

COURT

Supreme Court of British Columbia

DECIDED

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2025 BCSC 195 R. v. Dunn

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Dunn,

2025 BCSC 195

Date: 20250106

Docket: 93994-2

Registry: Kelowna

Rex

v.

John Andrew Dunn

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Before: The Honourable Justice Stephens

Oral Reasons for Judgment

Counsel for the Crown:

M. Chiu

Counsel for the Accused:

N. Acker

Place and Date of Trial:

Kelowna, B.C.

September 24-26, 2024;

December 2-4, 2024

Place and Date of Judgment:

Kelowna, B.C.

January 6, 2025

Table of Contents

Overview.. 3

Background.. 5

Fundamental principles. 6

Presumption of Innocence and Proof Beyond a Reasonable Doubt 6

W.(D.) Principles. 7

Credibility and Reasonable Doubt 8

Elements of the Offence Alleged.. 9

Possession for Purposes of Trafficking (s. 5(2) of the CDSA) 9

The Crown's evidence. 14

Corporal Tanguay. 14

Corporal Goodwin. 15

Constable Paul Mounsey. 17

The Defence's Evidence. 19

Assessment of the Evidence. 20

Evidence About the Substances. 21

Did Mr. Dunn Possess the Substances Found in the Ford Mustang?. 22

Conclusion-Possession for the Purposes of Trafficking.. 26

Operation of a Conveyance While Prohibited -- Count 5. 26

Disposition.. 27

Overview

[1] THE COURT: The accused, John Andrew Dunn, is charged in Indictment 93994-2 with four counts of possession of a controlled substance for the purposes of trafficking contrary to s. 5(2) of the Controlled Drugs and Substances Act, S.C. 1996, c. 19 [CDSA], namely Fentanyl, Fentanyl/A Benzodiazepine, Cocaine, and Methamphetamine (Counts 1-4), and on Count 5 charged with operating a motor vehicle while prohibited contrary to s. 320.18(1)(a) of the Criminal Code, R.S.C. 1985, c. C-46 [Code]. (Count 6 in the Indictment was stayed by the Crown on the first day of trial and the Crown directed an acquittal on Count 6 at the close of its case at trial.)

[2] Counts 1-5 of the Indictment read:

John Andrew DUNN stands charged that

Count 1

John Andrew DUNN, on or about the 1st day of December, 2021, at or near the City of Kelowna, in the Province of British Columbia, did unlawfully possess a controlled substance, to wit: Fentanyl, for the purpose of trafficking, contrary to Section 5(2) of the Controlled Drugs and Substances Act.

Count 2

John Andrew DUNN, on or about the 1st day of December, 2021, at or near the City of Kelowna, in the Province of British Columbia, did unlawfully possess a controlled substance, to wit: Fentanyl / A benzodiazepine, namely Flubromazolam, for the purpose of trafficking, contrary to Section 5(2) of the Controlled Drugs and Substances Act.

Count 3

John Andrew DUNN, on or about the 1st day of December, 2021, at or near the City of Kelowna, in the Province of British Columbia, did unlawfully possess a controlled substance, to wit: Cocaine, for the purpose of trafficking, contrary to Section 5(2) of the Controlled Drugs and Substances Act.

Count 4

John Andrew DUNN, on or about the 1st day of December, 2021, at or near the City of Kelowna, in the Province of British Columbia, did unlawfully possess a controlled substance, to wit: Methamphetamine, for the purpose of trafficking, contrary to Section 5(2) of the Controlled Drugs and Substances Act.

Count 5

John Andrew DUNN, on or about the 1st day of December, 2021, at or near Kelowna, in the Province of British Columbia, did operate a conveyance, a motor vehicle, while prohibited from doing so by reason of an order made

under the Criminal Code, contrary to Section 320.18(1)(a) of the Criminal Code.

- [3] Drugs were found by police in a bag on the passenger seat of a Ford Mustang that the accused Mr. Dunn was driving on December 1, 2021. The bag was closed at the time it was found, and the substances were not visible in plain view. There is no evidence there was anyone else travelling in the vehicle at the time. Mr. Dunn was not the owner of the Ford Mustang car.
- [4] The Crown submits that this is a circumstantial case and submits that Mr. Dunn's guilt is the only reasonable inference that can be drawn from the evidence: *R. v. Villaroman*, 2016 SCC 33; *R. v. Cashman*, 2024 BCCA 317 at para. 29 [Cashman BCCA].
- [5] The defence submits, among other things, that the evidence is insufficient to establish guilt for Counts 1 to 4, and that the circumstances support other reasonable inferences other than Mr. Dunn's guilt.
- [6] In determining whether the Crown has met its burden in a circumstantial case such as this, I must apply logic and common sense to the totality of the evidence, including gaps in that evidence. Ultimately, I must consider whether other reasonable possibilities or plausible theories exist that are inconsistent with guilt: *Villaroman* at paras. 35-37.
- [7] A main question to be answered on Counts 1 to 4 is whether, in considering the totality of the circumstantial evidence, I can conclude that Mr. Dunn had knowledge and control over, and therefore possession of, the substances found in the Ford Mustang that he was driving before his arrest. To answer this question, I must decide whether there are other inferences available that raise a reasonable doubt as to his guilt.
- [8] The defence does not contest a conviction on Count 5, of driving while prohibited.
- [9] These reasons address chiefly Counts 1 through 4, and I will address Count 5 at the end of these reasons.

Background

- [10] On December 1, 2021, Mr. Dunn drove a Ford Mustang to a 7-Eleven store on Gordon Drive in Kelowna, B.C.
- [11] He exited the vehicle and went into the 7-Eleven.
- [12] An RCMP officer arrested him inside the 7-Eleven for driving while prohibited.
- [13] On his person was cash and a meth pipe, and a bag, among other items.

- [14] After Mr. Dunn was arrested, the Ford Mustang was searched by police.
- [15] In the Ford Mustang on the passenger seat, the police found a closed Under Armour bag, which was referred to at trial by a Crown witness as a lunch bag, and near to it was a smaller black case that, when later opened, contained a second meth pipe.
- [16] The police searched the Under Armour bag and retrieved various substances.
- [17] At trial, the Crown alleged that, in total, the following amounts of controlled substances were found in the Under Armour bag: 54.2 grams of fentanyl, 33.4 grams of cocaine, and 14.7 grams of methamphetamine.
- [18] At trial, the Crown sought a conviction on Counts 1 to 3 for possession for the purposes of trafficking with respect to fentanyl and cocaine, and a conviction for the lesser included offence of simple possession on Count 4 with respect to methamphetamine.

Fundamental principles

Presumption of Innocence and Proof Beyond a Reasonable Doubt

- [19] A basic premise which is fundamental to all criminal trials is the presumption of innocence: *R. v. Lifchus*, [1997] 3 S.C.R. 320 at para. 27. To be presumed innocent until proven guilty by the evidence presented to the court is a fundamental right of a person accused of criminal conduct.
- [20] Interconnected with the presumption of innocence is the standard of proof which is required by the Crown in order to displace that presumption: *Lifchus* at para. 27. The Crown must prove each element of the alleged criminal offence to a point beyond a reasonable doubt. The burden never shifts from the Crown to prove every element of the offence beyond a reasonable doubt: *R. v. W.(D.)*, [1991] 1 S.C.R. 742 at para. 8, and *R. v. J.H.S.*, 2008 SCC 30 at para. 13.
- [21] Beyond a reasonable doubt "falls much closer to absolute certainty than proof on a balance of probabilities": *R. v. Starr*, 2000 SCC 40 at para. 242. However, reasonable doubt must still be "based on reason and common sense which must be logically based upon the evidence or lack of evidence": *Lifchus* at para. 30.
- [22] The majority in *Lifchus* provided the following instruction on reasonable doubt at para. 36:
- [36] Perhaps a brief summary of what the definition should and should not contain may be helpful. It should be explained that:
- the standard of proof beyond a reasonable doubt is inextricably intertwined with that principle fundamental to all criminal trials, the presumption of innocence;
 - the burden of proof rests on the prosecution throughout the trial and never shifts to the accused;

- a reasonable doubt is not a doubt based upon sympathy or prejudice;
- rather, it is based upon reason and common sense;
- it is logically connected to the evidence or absence of evidence;
- it does not involve proof to an absolute certainty; it is not proof beyond any doubt nor is it an imaginary or frivolous doubt; and
- more is required than proof that the accused is probably guilty -- a jury which concludes only that the accused is probably guilty must acquit.

[39] A reasonable doubt is not an imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence.

Even if you believe the accused is probably guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the accused and acquit because the Crown has failed to satisfy you of the guilt of the accused beyond a reasonable doubt.

On the other hand you must remember that it is virtually impossible to prove anything to an absolute certainty and the Crown is not required to do so. Such a standard of proof is impossibly high.

In short if, based upon the evidence before the court, you are sure that the accused committed the offence you should convict since this demonstrates that you are satisfied of his guilt beyond a reasonable doubt.

[23] I have instructed myself accordingly.

W.(D.) Principles

[24] The accused, Mr. Dunn, testified at trial.

[25] In W.(D.), the Supreme Court of Canada established the following framework for applying the concept of reasonable doubt in cases involving conflicting evidence from the accused and witnesses for the Crown:

- a) if the evidence of the accused is believed, they must be acquitted;
- b) if the evidence of the accused raises a reasonable doubt, even if some or all of it is not believed, they must be acquitted;
- c) if the evidence of the accused does not raise a reasonable doubt, it must be determined whether the guilt of the accused has been established beyond a reasonable doubt by the evidence that is accepted.

- [26] A fourth consideration has also been articulated: If, after careful consideration, I am unable to decide whom to believe, I must acquit: J.H.S. at para. 12; R. v. C.W.H., 1991 CanLII 3956 (B.C.C.A.) at para. 24.
- [27] The W.(D.) framework is intended to ensure that verdicts are not based on a contest between the evidence of the accused and the evidence of Crown, but instead that the trier of fact considers whether there is reasonable doubt as to an accused's guilt based on consideration of the whole of the evidence. There is nothing sacrosanct about the formula set out in W. (D.): J.H.S. at para. 13 and R. v. Boucher, 2005 SCC 72 at para. 29. Whether the three-step framework must be strictly followed depends on the context of the case. What matters is the substance of the instruction from W.(D.), and that the focus remains on the principle of reasonable doubt as the central consideration: R. v. Tyers, 2015 BCCA 507 at para. 15.
- [28] In R. v. Ryon, 2019 ABCA 36 at para. 35-39, the Alberta Court of Appeal provided further guidance on the application of W.(D.). In particular, in applying the second prong of the framework, I must be mindful there is a middle ground whereby the trier of fact is unsure whether the evidence is true or false.
- [29] The guidance provided in Ryon as to the application of the W.(D.) framework has been followed in this Court: see for e.g., R. v. E.A.G., 2020 BCSC 1691 at paras. 189-191; R. v. Gerrard, 2020 BCSC 1833 at para. 113.
- [30] In applying W.(D.), I am not required to examine the evidence in any particular order, but I must have regard to the basic principles underlying the W.(D.) instruction: R. v. Turmel, 2004 BCCA 555 at para. 14, citing R. v. Minuskin, 68. O.R. (3d) 577, 2003 CanLII 11604 (O.N.C.A) at para. 22.

Credibility and Reasonable Doubt

- [31] Evidence must be both credible and reliable to support a finding of guilt beyond a reasonable doubt. Credibility and reliability are different. Credibility is concerned with the veracity of a witness's evidence, while reliability is concerned with its accuracy. A credible witness may give unreliable evidence if there is, despite the witness's honesty, reason to doubt the accuracy of their recall of relevant events. Accuracy engages consideration of the witness's ability to accurately observe, recall, and recount: R. v. Plehanov, 2019 BCCA 462 at para. 51; R. v. Khan, 2015 BCCA 320 at para. 44, leave to appeal to SCC ref'd, 36623 (17 March 2016).
- [32] The factors to be considered in assessing credibility are summarized by the Court of Appeal in R. v. J.T., 2019 BCCA 180, leave to appeal to SCC ref'd, 38775 (14 November 2019), and include:
- [31] a witness's demeanor in the witness box, although it is recognized that it would be dangerous to rely wholly on demeanor to convict; internal inconsistencies in a witness's testimony at trial and/or external inconsistencies in a witness's testimony with prior

testimony or out-of-court statements; any explanation by the witness for the inconsistencies; any consistent evidence or corroborating evidence to support the witness's evidence, although corroboration is not a requirement; and how a witness withstands cross-examination.

- [33] I must also be cautious not to place too much reliance on the witness's demeanour. The manner in which a witness testifies is not a reliable measure of their credibility, as there are many factors that can affect a witness's demeanour that are unrelated to whether they are truthfully and accurately recounting the events: *R. v. A.F.*, 2021 BCSC 2662 at para. 23.

Elements of the Offence Alleged

Possession for Purposes of Trafficking (s. 5(2) of the CDSA)

- [34] I must find Mr. Dunn not guilty of possessing the substances alleged in Counts 1- 4 alleging possession for the purposes of trafficking, unless the Crown has proved beyond reasonable doubt that Mr. Dunn is the person who committed the offence on the date and in the place described in the Indictment and, for each of Counts, 1- 4, the Crown must prove each of the following essential elements of the offence beyond a reasonable doubt:

- a) the substance was a controlled substance, namely one named in one of the applicable schedules of the CDSA;
- b) Mr. Dunn was in possession of the substance;
- c) Mr. Dunn knew the nature of the substance, and that it is a controlled substance; and
- d) Mr. Dunn had intent to traffic, and that he possessed the substance for the purposes of trafficking.

See also, *R. v. Nazarek*, 2017 BCSC 1909 at para. 11.

- [35] Traffic is defined in s. 2(1) of the CDSA as follows:

Definitions

2 (1) In this Act,

Traffic means, in respect of a substance included in any of Schedules I to V,

- (a) to sell, administer, give, transfer, transport, send or deliver the substance,
- (b) to sell an authorization to obtain the substance, or
- (c) to offer to do anything mentioned in paragraph (a) or (b),

otherwise than under the authority of the regulations.

- [36] The CDSA in s. 2(1) adopts the definition of "possession" set out in s. 4(3) of the Code:

Possession

- (3) For the purposes of this Act,
- (a) a person has anything in possession when he has it in his personal possession or knowingly
 - (i) has it in the actual possession or custody of another person, or
 - (ii) has it in any place, whether or not that place belongs to or is occupied by him, for the use or benefit of himself or of another person; and
 - (b) where one of two or more persons, with the knowledge and consent of the rest, has anything in his custody or possession, it shall be deemed to be in the custody and possession of each and all of them.
- [37] The law of constructive possession was recently set out by Justice Devlin in *R. v. Cashman*, 2022 BCSC 892, aff'd 2024 BCCA 317, and I shall read some excerpts of paras. 4, 53-54, 57-61:
- [4] The Crown acknowledges that this is a circumstantial case and submits that the only reasonable inference that can be drawn from the evidence is guilt: *R. v. Villaroman*, 2016 SCC 33 [Villaromani]. To support their position, the Crown also referred to a number of other authorities including *R. v. Bransford*, 2019 BCCA 408 [Bransford]; *R. v. Webster*, 2008 BCCA 458 [Webster]; *R. v. Pham*, [2005] O.J. No. 5127, 2005 CanLII 44671 (ONCA) (aff'd: 2006 SCC 26) [Pham].
- [53] The Crown relies on s. 4(3)(b) to establish that Mr. Cashman had constructive or joint possession over the controlled substances seized from the Columbia Street Residence. In *R. v. Ahmadzai*, 2012 BCCA 215, MacKenzie J.A. sets out the test for constructive or joint possession under s. 4(3) as follows (at para. 26):

Proof of manual handling of a prohibited item or substance is not required to prove constructive or joint possession under s. 4(3). Rather, to prove constructive possession, the Crown must prove beyond a reasonable doubt that the accused had knowledge of the nature of the prohibited item or substance and some measure of control over it. In *R. v. Morelli*, 2010 SCC 8, Fish J. for the majority said:

- [17] Constructive possession is established where the accused did not have physical custody of the object in question, but did have it "in the actual possession or custody of another person" or "in any place, whether or not that place belongs to or is occupied by him, for the use or benefit of himself or of another person" (Criminal Code, s. 4(3)(a)). Constructive possession is thus complete where the accused: (1) has knowledge of the character of the object, (2) knowingly puts or keeps the object in a particular place, whether or not that place belongs to him, and (3) intends to have the object in the particular place for his "use or benefit" or that of another person.
- [54] Similarly, in *R. v. Fisher*, 2005 BCCA 444 at para. 24, the Court held that for joint or constructive possession to exist, the accused must have knowledge and be in a position to exercise some element of control over the item.

- [57] It is not necessary for knowledge to be proven based on direct evidence; in the absence of a credible explanation, an inference of knowledge may properly be drawn from circumstantial evidence. In *R. v. To*, (1992), 1992 CanLII 913, 16 B.C.A.C. 223 (BCCA) [To] at para. 38, Chief Justice McEachern canvassed the law in this area, noting that in proper circumstances, it is "legitimate to infer knowledge from mere physical possession" (at para. 38). The inference of knowledge can be rebutted if an accused offers an alternative explanation that raises a reasonable doubt or if an alternative inference consistent with innocence may be drawn from the proven facts: *To* at paras. 38-39.
- [58] In *R. v. Choudhury*, 2021 ONCA 560, Jamal J.A. (as he then was) summarized the relevant legal principles for constructive possession as follows (at para. 19):
- Constructive possession is established when an accused does not have physical custody of an object but knowingly has it in the actual possession or custody of another person or has it in any place for their own or another's use or benefit: Criminal Code s. 4(3)(a); *R. v. Morelli*, 2010 SCC 8, [2010] 1 S.C.R. 253, at para. 17; and *R. v. Lights*, 2020 ONCA 128, 149 O.R. (3d) 273, at para. 47.
 - Knowledge and control are essential elements of constructive possession, which is established when the Crown proves beyond a reasonable doubt that the accused: (i) has knowledge of the character of the object said to be possessed; (ii) knowingly puts or keeps the object in a particular place, whether or not the place belongs to or is occupied by the accused; and (iii) intends to have the object in the place for the use or benefit of the accused or another person: *Morelli*, at paras. 15, 17; *Lights*, at paras. 44, 47.
 - Tenancy or occupancy of a place where an object is found does not create a presumption of possession: *Lights*, at para. 50; *R. v. Watson*, 2011 ONCA 437, at para. 13; *R. v. Lincoln*, 2012 ONCA 542, at paras. 2-3; and *R. v. Bertucci* (2002), 2002 CanLII 41779 (ON CA), 169 C.C.C. (3d) 453 (Ont. C.A.), at para. 18.
 - When the Crown relies largely or wholly on circumstantial evidence to establish constructive possession, a conviction can be sustained only if the accused's knowledge and control of the impugned objects is the only reasonable inference on the facts. The trier of fact must determine whether any other proposed way of looking at the case as a whole is reasonable enough to raise a doubt about the accused's guilt, when assessed logically and in light of human experience and common sense: see *R. v. Villaroman*, 2016 SCC 33, [2016] 1 S.C.R. 1000, at paras. 55-56; *Lights*, at para. 39; and *R. v. Stennett*, 2021 ONCA 258, at paras. 60-61.
- [59] Justice Cromwell, writing for the Court in *Villaroman*, set out the approach the trier of fact must take when assessing circumstantial evidence. Specifically, he explained that in assessing circumstantial evidence, if, considering all of the evidence, there are reasonable inferences that can be drawn other than guilt, the Crown's evidence does not meet the standard of proof beyond a reasonable doubt (para. 35). Inferences that may be consistent with innocence do not, however, have to arise on proven facts. 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": Villaroman at para. 35. A theory alternative to guilt is "not rendered 'speculative' by the mere fact that it arises from a lack of evidence", as a reasonable doubt may properly be based on evidence or a lack of evidence: Villaroman at para. 36 .

- [60] When assessing circumstantial evidence, the trier of fact should consider other plausible theories or reasonable possibilities that are inconsistent with guilt. However, such plausible theories or reasonable possibilities "must be based on logic and experience applied to the evidence or the absence of evidence, not on speculation": Villaroman at para. 37. The line between a "plausible theory" and "speculation" is not always an easy line 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": Villaroman at para. 38.
- [61] With respect to the standard of proof required, where proof of the offence or its essential elements depends wholly or substantially on circumstantial evidence, "an inference of guilt drawn from circumstantial evidence must be the only reasonable inference available on that evidence": *R. v. Gibson*, 2021 ONCA 530 at para. 77. The standard of proof "applies to the evidence taken as a whole" and "not to each individual item of circumstantial evidence": *Gibson* at para. 78. When determining whether the standard of proof has been met, it is "the cumulative effect of all the evidence, taken together, each item in relation to another and the whole, that must be considered": *Gibson* at para. 79; see also *R. v. Greer*, 2022 BCCA 78 at para. 32.
- [38] The Court of Appeal in *Cashman*, BCCA, also quoted portions of *R. v. Choudhury*, 2021 ONCA 560 at para. 28.
- [39] In short, one of the elements of the offence of possession for the purposes of trafficking, as well as the lesser included offence of simple possession, is that the accused be found beyond a reasonable doubt to possess the substance. Constructive possession is established when the Crown proves beyond a reasonable doubt that the accused has both knowledge of the nature of the prohibited item or substance and some measure of control over it. In a circumstantial case such as this, a conviction can be sustained only where the Crown proves beyond a reasonable doubt that the accused's knowledge and control over the substances is the only reasonable inference available on the totality of the evidence.
- [40] With these legal principles in mind, I turn to an assessment of the evidence.

The Crown's evidence

Corporal Tanguay

- [41] Corporal Tanguay testified that while on patrol, he noticed Mr. Dunn at about 8:20 p.m. as a disqualified driver, on December 1, 2021, in a Ford Mustang.

- [42] Corporal Tanguay testified he monitored the Ford Mustang and it was moving.
- [43] Corporal Tanguay observed Mr. Dunn exit the driver side door and go into a 7-Eleven, and that Mr. Dunn was the only occupant.
- [44] Corporal Tanguay then arrested Mr. Dunn for driving while disqualified under the Criminal Code at the 7-Eleven store on Gordon Drive in Kelowna, B.C.
- [45] Following the arrest on Mr. Dunn's person, Corporal Tanguay found a meth pipe and currency of \$440 in what was described as a man-purse, and additional currency of \$400 in his wallet. Corporal Tanguay testified as to the denominations of the \$440 being one 100-dollar bill, four 50-dollar, and five 10-dollar bills, and 18 five-dollar bills, and the \$400 was comprised of four 50-dollar bills and 10 20-dollar bills.
- [46] Corporal Tanguay testified after he searched Mr. Dunn, then he searched the Ford Mustang parked outside the 7-Eleven.
- [47] In the Ford Mustang vehicle, he located a repair receipt (for a Honda Civic) with the name "John" (no last name) on it, and on the resting area of the passenger seat, a black Under Armour lunch bag and a black case that, when opened, had a meth pipe in it. He initially could not see the contents of the Under Armour bag.
- [48] Corporal Tanguay could not say if he had moved any of the items photographed in the interior of the vehicle, the Under Armour bag, and the meth pipe before the photo was taken on the front passenger seat at Photo 6 of Tab 1 of Ex. #9.
- [49] He testified on cross-examination that no forensic testing had been done on the Under Armour bag to obtain fingerprints or DNA.
- [50] Corporal Tanguay testified he opened the Under Armour bag and Corporal Goodwin took photos.
- [51] Corporal Tanguay testified that Photos 9 and 10 of Ex. # 9, Tab 1, are the photos of the interior of the lunch bag which he opened.
- [52] Corporal Tanguay testified that he and Corporal Goodwin later processed the evidence seized at the RCMP Kelowna detachment.
- [53] He gave evidence about the substances processed following Mr. Dunn's arrest and the Health Canada certificates which the Crown relies on.
- [54] Corporal Tanguay testified he processed substances and sent them to Health Canada for testing.
- [55] Corporal Tanguay was assisted by Corporal Goodwin on December 1, 2021, with processing evidence.

- [56] Corporal Tanguay testified there are no photos in Exhibit 9, Tab 2, of the items on a scale with the weight of the item of substances processed on December 1, 2021 (at photos 14-21), and does not recall if any photos were taken. He acknowledges best practices would be to take photos of the substances when on a scale.
- [57] Corporal Tanguay did not recall who did the weighing or measuring or put samples in bags for testing on December 1, 2021.

Corporal Goodwin

- [58] Corporal Goodwin testified that he assisted Corporal Tanguay at the scene after Mr. Dunn had been arrested on December 1, 2021, at the 7-Eleven, including by taking photos and processing the Ford Mustang vehicle.
- [59] Corporal Goodwin took photos of the scene which are located at Tab 1 of Exhibit 9. He photographed items on the hood of the car, including a murse and pipe and keys, which he believed were taken from Mr. Dunn's person. He also took photos of Mr. Dunn's ID card and B.C. Services card.
- [60] Corporal Goodwin also took photos of the interior of the Ford Mustang car, including an Under Armour bag, and a black case. They were located on the passenger front seat.
- [61] Corporal Goodwin testified he took photos of the contents of the Under Armour lunch bag which had substances in plastic bags, and the contents of the black case which had a second meth pipe in it.
- [62] Corporal Goodwin testified he took photos of the receipt found in the glove box. The receipt had the name "John" on it (with no last name) and refers to a Honda Civic.
- [63] Corporal Goodwin took a photo of what he described as brass knuckles found in a car door packet.
- [64] Corporal Goodwin testified about an hour later that he assisted Corporal Tanguay process evidence seized at the detachment. He initially testified he took all the photos of substances at pages 3-21 in Tab 2 of Exhibit 9 (other than pages 1 and 2), but changed this evidence on cross-examination after further consideration because Photos 1-13 had date stamps on them of August 17, 2022, which were probably not taken by him.
- [65] Constable Goodwin testified he weighed substances in bags, and so the weight he measured includes the substances as well as the bags.
- [66] Corporal Goodwin testified he assisted Corporal Tanguay process evidence on December 1, 2021, including by putting stickers on evidence bags. He testified that Corporal Tanguay sent envelopes to Health Canada. Corporal Goodwin testified he did not assist with processing evidence after that. He did not take any photos other than the date of the occurrence on December 1, 2021. Corporal Goodwin was not present for any reprocessing of the evidence.

Constable Paul Mounsey

- [67] In a voir dire ruling on December 2, 2024, Constable Mounsey was qualified to give opinion evidence at this trial, including in the area of: (1) Pricing; (2) Packaging; (3) Use/Rate of Consumption (how much of X substance would a user consume in a period of time); (4) Methods of Consumption; and (5) Trafficking and Distribution Methods, all with respect to cocaine, fentanyl, and methamphetamine in the Kelowna and surrounding areas in December 2021.
- [68] Constable Mounsey was questioned on the assumption there were three bags of cocaine seized, being of weights 11.6, 12 grams, and 9.8 grams, being 33.4 grams in total. He was questioned on the assumption of 54.2 grams of fentanyl (in bags of 18.5 grams, 6.2 grams, and 29.5 grams) was seized, and that 14.7 grams of methamphetamine was also seized. He was aware two meth pipes were seized, a scale, packaging material, money, and the item described as brass knuckles. He placed little significance on the existence of a single cellphone and noted he had no information about any text messages or phone numbers retrieved from it.
- [69] He testified that the weights of 11.6, 12 grams, and 9.8 grams of cocaine are unusual amounts to be trafficked.
- [70] He opined that 33.3 grams of cocaine would be valued at approximately the \$1,800 to \$2,000-dollar mark. He testified that 54 grams of fentanyl would, if sold in bulk, be approximately \$4,800 to \$5,000. He testified that meth sold for \$40 a gram, and that 14.7 grams of meth would cost around \$200 at the low end.
- [71] In his opinion, given the combination of the three substances when looked at in totality with the other items he understood were seized, the fentanyl and cocaine were possessed for the purposes of trafficking, but some of the methamphetamine was for personal use. Constable Mounsey's opinion was that the assumed amounts of cocaine and fentanyl were possessed for the purposes of trafficking, but he was not in a position to opine the methamphetamine was for the purposes of trafficking.
- [72] He was unable to provide an opinion about pills, since he did not have enough information about them.
- [73] After Constable Mounsey's evidence, the Crown advised during the trial that it was not pursuing a charge for possession for the purposes of trafficking for methamphetamine, on Count 4, but instead for simple possession of this substance.
- [74] In cross-examination, Constable Mounsey testified about his being requested to give expert opinion evidence in advance of this trial. He testified he was requested to step in for another RCMP officer he understood that it was to assist the court on a written opinion that had already been written by that other officer (a Constable Carruthers), which he agreed on cross-examination seemed odd. He did not initially believe his own written opinion was being requested of him. Subsequently he did provide some handwritten notes to Crown

counsel and a brief synopsis on the day of commencement of the trial. These were not put in evidence at trial.

- [75] The only thing Constable Mounsey reviewed on the file was the previous constable's written report (including photos in it) which is where he received the assumptions for his opinions. He relied on that other officer to have accurately reported the circumstances. He did not review any photos which were not in Constable Carruthers' report. He did not review any of the RCMP exhibits or anything from the file. He testified that he crossed some portions of the other officer's report that he was not comfortable speaking to and made some comments in the margins. This annotated version of the previous RCMP officer's report was not in evidence at this trial. He was cross-examined about certain photographs in this previous report, but these photographs were not in evidence at trial.
- [76] When asked in cross-examination about, other than the quantities of the substances, what else indicated to him there was an intention to traffic the substances, he referred to seeing in Constable Carruthers' report a photo of a small scoop.

The Defence's Evidence

- [77] Mr. Dunn testified.
- [78] He testified he is 41 years old, and currently residing in a treatment facility, and in the past he used meth.
- [79] He testified on December 1, 2021, he was living in his uncle's house on Gordon Drive in Kelowna which is about four blocks from the 7-Eleven on Gordon Drive where he was arrested.
- [80] He testified on that date he asked another tenant if he could use her Ford Mustang to go to the 7-Eleven, and she said he could borrow the car. He testified he went directly to the 7-Eleven since he did not want to spend much time on the road, since he was a prohibited driver at the time.
- [81] He testified that when he was arrested, he had his personal-use meth pipe on his person. He testified he had no meth with him on his person.
- [82] He testified he used methamphetamine earlier in the day on December 1, 2021. He testified he was struggling with addiction to meth, which he had used since his early twenties.
- [83] He testified when he was in the car, he had noticed the Under Armour bag on the passenger seat of the car which was closed. He testified he had no idea what was in it and would not have gone for a drive if he had known that. He testified he had no connection with methamphetamine in the Under Armour bag, or any of the substances in that bag.
- [84] He testified he does not know who the substances in the bag might belong to, and testified the meth pipe, which was in a case in the car, did not belong to him.

- [85] He testified the receipt with the words Honda Civic on it found in the Ford Mustang with the name "John" on it was not his. I add there was no evidence at trial that Mr. Dunn owned a Honda Civic, and there was no other evidence linking him to this receipt.
- [86] Mr. Dunn testified he was not associated with the item referred to as brass knuckles found in the car.
- [87] He testified he had borrowed the Ford Mustang car from a female tenant of the house where he was living, and testified he did not know there might be controlled substances in that car.
- [88] On cross-examination, he testified that at the time there were seven tenants living in the house he lived in, and everyone was using the Ford Mustang vehicle, and this female tenant was the only one with a vehicle, although he had not used the Ford Mustang before.
- [89] Mr. Dunn testified it was not the best decision to drive the car while he was prohibited. In cross-examination, he testified it was a short drive, so he thought he could get away with it.
- [90] He testified in cross-examination that after getting arrested, he did not later find out who the substances in the vehicle belonged to.
- [91] He testified he received money from a COVID cheque or from doing odd jobs from managing his uncle's rental property.
- [92] On cross-examination, when asked whether it was possible in late 2021 he was selling drugs to get money to buy meth, he denied it.

Assessment of the Evidence

- [93] In my analysis, I am to consider the cumulative effect of all the evidence to decide whether the Crown has met the burden of proof: *R. v. Gibson*, 2021 ONCA 530 at para. 79. If, on the whole of the evidence, there are reasonable inferences that can be drawn other than guilt, the Crown's evidence will have failed to discharge the burden of proof. As set out in *Villaroman*, alternative interpretations or inferences must be reasonable and not just possible, and such inferences do not have to arise from proven facts: *Villaroman* at para. 35 and 42.

Evidence About the Substances

- [94] The Crown led evidence of eight Health Canada certificates (marked as Exhibits 1- 8):
- a) Exhibits 1, 5, and 6, of the test results for fentanyl and caffeine said to relate to substances with weights of 6.2 grams, 18.5 grams, and 29.5 grams, for a total of 54.2 grams;
 - b) Exhibits 2, 3, and 7 of the test results for cocaine (in the case of Certificate 2) and cocaine and phenacetin (in the case of Certificates 3 and 7), and said to relate to substances of weights of 12 grams, 9.8 grams, and 11.6 grams. For a total of 33.4 grams; and
 - c) Exhibit 4 for methamphetamine said to relate to a 14.7-gram substance.

- [95] Crown led evidence that the substances with respect to Exhibits 4, 5, 6, and 7 were processed on December 1, 2021, by both Corporal Tanguay and Corporal Goodwin.
- [96] The evidence is that the substances with respect to Exhibits 1, 2, and 3 were processed by Corporal Tanguay on August 22, 2022, who, on that date, reprocessed some of the substances which were processed on December 1, 2021.
- [97] There were photographs in evidence at trial of substances linked to Certificates 1, 2, and 3, being weighed on August 22, 2022.
- [98] But there were no photographs in evidence from the weighing of the substances related to Exhibits 4, 5, 6, and 7 on December 1, 2021.
- [99] There was also an Exhibit 8 in evidence, a Health Canada certificate for a test result for Fentanyl / A benzodiazepine, which in his evidence Corporal Tanguay related to Xanax bars or 10 tablets taken from the lunch bag, but of which there was no evidence of weight. The evidence at trial relating to the substances to which Exhibit 8 relates was in general unclear. Constable Mounsey offered no opinion about Xanax bars or tablets in his testimony, and no witness testified about any photographs of Xanax bars or tablets. I understand that this Exhibit 8 is the only Health Canada certificate which concerns Count 2 in the indictment.

Did Mr. Dunn Possess the Substances Found in the Ford Mustang?

- [100] At the outset, I refer to the comments of Justice Bouck in *R. v. Amado*, [1996] B.C.J. No. 1943, 1996 CanLII 2961 (SC), cited with approval in *R. v. McKnight*, 2024 BCSC 1500 at para. 52, which apply to the circumstances in the present case:

33 Not everyone who drives or rides in a car containing concealed illegal objects necessarily knows the nature of those objects. If there is to be a conviction for possession of such objects based on knowledge of the occupants of the car, the evidence relating to their knowledge must arise above mere suspicion.

- [101] Further, in *R. v. Tsang*, 2014 BCSC 1055 at para. 43, the court cited *R. v. McIntosh*, [2003] O.T.C. 246 (Ont. S.C.J.), stating:

Not everyone who drives or rides in a car containing concealed illegal objects necessarily knows the presence or nature of those objects . . . where the prohibited item is concealed or not readily visible in a vehicle driven by the accused, the courts have generally required more than simply evidence of the proximity of the accused and the item . . . [citations omitted]

- [102] Here the Under Armour bag in the Ford Mustang was closed, and the substances found within it were not visible.

- [103] At paras. 54-55 in Tsang, the court summarized Amado. The court in Amado found there was no direct evidence the accused knew of the contents of the bag in which the drugs had been found. There was circumstantial evidence from which one could argue that Mr. Amado had knowledge of the drugs, but on the totality of the evidence this was insufficient to prove knowledge beyond a reasonable doubt, and it was not the only reasonable inference that could be drawn.
- [104] Ultimately, the court in Tsang concluded that the evidence was "too thin" and "did not go far enough in this case to prove the Crown's case beyond a reasonable doubt", therefore finding the accused not guilty: paras. 71-72; see also R. v. Agnew, 2012 BCSC 1161 at paras. 11 and 14.
- [105] While case authorities are useful, possession is a matter of fact to be determined on the facts of each case: R. v. Ahmadzai, 2012 BCCA 215 at para. 37.
- [106] I therefore return to the evidence in this case.
- [107] Mr. Dunn testified he made a short drive to a 7-Eleven in someone else's car, not knowing what was contained in the closed black Under Armour bag located in the car. He testified this was the first time he had borrowed that car.
- [108] The Ford Mustang was owned by another person (not Mr. Dunn), and I require more than his mere proximity to the bag in question to establish beyond a reasonable doubt that he knew what was in its contents: Tsang at para. 43. In his evidence, he denied driving it before.
- [109] The Under Armour bag was closed on the passenger seat when found by the police and Mr. Dunn testified he did not know what was in it when driving the car. He testified he had borrowed the car and that it was a vehicle used by other people. He had cash on his person, but he testified he was receiving money from COVID cheques and from working for his uncle.
- [110] Mr. Dunn testified he did not know drugs were in the Under Armour bag, he did not know there was a meth pipe in the black case located near the Under Armour bag in the car, and he was not aware of the item described as brass knuckles in the vehicle's door packet.
- [111] I did find some aspects of Mr. Dunn's evidence unreliable. For example, he testified he had gone to the 7-Eleven on December 1, 2021, to get cigarettes and a slush, since it was hot out, and he planned to do yard work later on-- but he was arrested at the 7-Eleven in the evening on December 1, 2021, and it is unlikely it was hot out or he was going to do yard work when it was dark out. He also testified he had consumed meth earlier that day and felt it probably affected his ability to remember what happened on December 1, 2021.

- [112] But when asked on cross-examination by the Crown if it was possible the drugs in the car were for the purposes of trafficking, he denied it; and he denied that the second meth pipe in the black case found in the car near the Under Armour bag was his, testifying he had his meth pipe on his person. His testimony, when considered in totality with the evidence at trial, leads to reasonable doubt about his knowledge of the contents of the Under Armour lunch bag which contained the substances to which Counts 1- 4 relate.
- [113] I find that the Crown has not proven that the receipt found in the car glove box with the name "John" on it and referring to a Honda Civic belonged to Mr. Dunn. The Crown also did not prove the item described as brass knuckles found in a door packet of the car with some other items belonged to Mr. Dunn.
- [114] When assessing circumstantial evidence, I must consider other plausible theories or reasonable possibilities that are inconsistent with guilt. Such plausible theories or reasonable possibilities must be based on logic and experience applied to the evidence or the absence of evidence, not on speculation: Cashman, BCSC, at paras. 58-60.
- [115] Taking all the evidence into account, I find there is another reasonable possibility and plausible theory on the evidence that is inconsistent with guilt on Counts 1-4 that does not require speculation. That alternative reasonable possibility being that Mr. Dunn borrowed the car, that the substances in the car belonged to or were possessed by someone else, and that Mr. Dunn had no knowledge of what was in the Under Armour bag. This is supported by the following:
- a) a second meth pipe was found in the vehicle near the Under Armour bag;
 - b) Mr. Dunn had a meth pipe on his person and testified the second meth pipe located in the vehicle did not belong to him;
 - c) Mr. Dunn testified denying knowledge of the contents of the Under Armour bag;
 - d) there is no evidence linking Mr. Dunn physically with the other items in the vehicle; and
 - e) my finding that the Crown has not proven that any of the other items in the Ford Mustang belonged to Mr. Dunn.
- [116] It is suspicious that Mr. Dunn, a methamphetamine user at the time, was driving a car where a bag containing substances alleged by the Crown, including methamphetamine, was present-- but that is not consistent only with him knowing drugs were contained in the closed bag. Whether Mr. Dunn likely was in possession of the bag containing the substances is not the standard of proof required to convict Mr. Dunn on Counts 1-4; the Crown must prove possession beyond a reasonable doubt: Tsang at para. 70.

- [117] In short, there is circumstantial evidence at trial from which one could argue that Mr. Dunn had knowledge of the substances in the lunch bag and the Ford Mustang. However, this evidence is insufficient to prove Mr. Dunn's knowledge of the contents of that bag beyond a reasonable doubt. Crown has therefore not proven his possession of the substances in that bag beyond a reasonable doubt, and an essential element of Counts 1-4 is not made out.
- [118] Further, and as expressed within the W.(D.) framework, for Counts 1, 2, 3, and 4, I find Mr. Dunn's evidence, when considered in the evidence as a whole, raises a reasonable doubt as to his knowledge of the substances contained in the Under Armour bag in the vehicle, and that the Crown has not proved the essential element of possession of controlled substances beyond a reasonable doubt. After considering the evidence, I am left with reasonable doubt as to Mr. Dunn's guilt; I must therefore acquit: W.(D.); and J.H.S.
- [119] Having found that the Crown has not proved possession of controlled substances beyond a reasonable doubt, Mr. Dunn must be acquitted of the charges of possession for the purposes of trafficking, as well as the lesser included offence of simple possession for all of Counts 1, 2, 3, and 4.
- [120] Having acquitted Mr. Dunn on these grounds, I need not address the defence's submissions regarding the manner of the police's processing of and documenting the weights of the substances alleged by the Crown in this case.
- [121] Nor do I need to address the insufficiency of evidence with respect to the substances said to relate to Exhibit 8 and Count 2 of the Indictment.
- [122] I also add that there were some frailties in the manner the Crown's expert evidence was adduced arising from Constable Mounsey being asked to provide an opinion based on a written report of another police officer and on which he relied for his assumed facts. But ultimately nothing turns on this for the purposes of the outcome of my decision on Counts 1-4. I have acquitted Mr. Dunn on those counts for the other reasons I have stated.

Conclusion-Possession for the Purposes of Trafficking

- [123] The accused is therefore acquitted on Counts 1, 2, 3, and 4.

Operation of a Conveyance While Prohibited -- Count 5

- [124] Section 320.18 of the Code provides:

320.18 (1) Everyone commits an offence who operates a conveyance while prohibited from doing so

- (a) by an order made under this Act; or
- (b) by any other form of legal restriction imposed under any other Act of Parliament or under provincial law in respect of a conviction under this Act or a discharge under section 730.

- [125] To convict of this offence, I must find Mr. Dunn operated a conveyance while prohibited from doing so by an order made under the Criminal Code, and did so knowingly.
- [126] Mr. Dunn was driving the Ford Mustang, and therefore operating a conveyance within the meaning of s. 320.18 of the Code.
- [127] The Crown tendered in evidence as Exhibit 10 a Certificate of Disqualification certifying that Mr. Dunn was disqualified under the Criminal Code from driving a motor vehicle on December 1, 2021.
- [128] Mr. Dunn acknowledged in his evidence that he was prohibited from driving, and he knew he was prohibited from driving when he drove on December 1, 2021.
- [129] Defence counsel did not contest Count 5 of the charge of driving while prohibited, and invited a conviction on Count 5.
- [130] I find the Crown has proved beyond a reasonable doubt that the elements of this offence for Count 5, driving while prohibited contrary to s. 320.18(1)(a), are made out.

Disposition

- [131] Mr. Dunn, please stand.
- [132] For the reasons I have stated, I therefore find John Andrew Dunn not guilty on Counts 1, 2, 3, and 4 in the Indictment.
- [133] On Count 5 of the Indictment, operating a motor vehicle while prohibited from doing so by reason of an order made under the Criminal Code contrary to s. 320.18(1)(a) of the Criminal Code, I find John Andrew Dunn guilty.

"Stephens J."

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