

CANADA / JUDGMENT

R. v. Ertmoed

2015 BCSC 2552

COURT

Supreme Court of British Columbia

DECIDED

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2015 BCSC 2552 R. v. Ertmoed

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Ertmoed,

2015 BCSC 2552

Date: 20150930

Docket: 36587-3

Registry: Prince George

Regina

v.

Dillon Benjamin Ertmoed

Ban on Publication 486.5(1) CCC

Before: The Honourable Mr. Justice Tindale

Oral Reasons for Judgment

Counsel for Crown:

L. Phipps

J. Ball

Counsel for Defence:

K. Jones

Place and Date of Trial:

Prince George, B.C.

September 21, 22, 23, 24 & 25, 2015

Place and Date of Judgment:

Prince George, B.C.

September 30, 2015

[1] THE COURT: Dillon Benjamin Ertmoed is charged on Indictment Number 36587-3 with 11 separate counts, relating to a break and enter, on August 24, 2012, at a residence located at 125 South Ogilvie Street in the city of Prince George.

[2] The accused's charges can be summarized as follows:

Count 1: break and enter and commit the indictable offence of robbery, contrary to s. 348(1)(b) of the Criminal Code.

Count 2: break and enter and commit the indictable offence of unlawful confinement, contrary to s. 348(1)(b) of the Criminal Code.

Count 3: break and enter and commit the indictable offence of assault with a weapon, contrary to s. 348(1)(b) of the Criminal Code.

Count 4: break and enter a place having stolen or with the intent to steal, a firearm, contrary to s. 98(1)(b) of the Criminal Code.

Count 5: did rob Kwan-Mei Lee, contrary to s. 344(1)(b) of the Criminal Code.

Count 6: without lawful authority, confined Kwan-Mei Lee, contrary to s. 279(2) of the Criminal Code.

Count 7: in committing assault upon Kwan-Mei Lee, used a weapon, contrary to s. 267(a) of the Criminal Code.

Count 8: did possess a firearm, while not being the holder of a licence and the registration certificate for the firearm, contrary to s. 91(1) of the Criminal Code.

Count 9: did possess a firearm knowing that he was not the holder of a licence and registration certificate for the firearm, contrary to s. 92(1) of the Criminal Code.

Count 10: did commit theft of personal property, the property of Chedat Lee, of a value in excess of \$5,000, contrary to s. 334(a) of the Criminal Code.

Count 11: did have in his possession property, personal property, the property of Chedat Lee, of a value in excess of \$5,000 knowing that the said property was obtained by the commission in Canada of an offence punishable by indictment, contrary to s. 355(a) of the Criminal Code.

BACKGROUND

- [3] By way of brief background: On August 24, 2012, two or more individuals broke into the residence of Kwan-Mei Lee located at 125 South Ogilvie Street in the city of Prince George in the early morning hours. Mrs. Lee was home alone and awoke to individuals in her bedroom who taped her mouth, hands and feet with duct tape. These individuals then stole a number of items from the basement of the residence where Mrs. Lee's son Chedat Lee resided.
- [4] Chedat Lee was away at work and these individuals stole, among other things, a gun safe and three handguns. Mrs. Lee ultimately, was able to free herself, and go to a neighbours and call 9-1-1.
- [5] Mrs. Lee could not identify the people in the residence.
- [6] The central issue in this case is identification. This is a circumstantial case where the evidence of identification is primarily based on DNA analysis of items alleged to have been left behind by the individuals who broke into Mrs. Lee's home.

THE EVIDENCE

Admissions of Fact

- [7] Exhibit 1 in these proceedings is an admissions of fact made pursuant to s. 655 of the Criminal Code by the accused. Among other things, the accused has admitted that the facts and conclusions found in the DNA reports of Christine Martin dated November 20, 2013 and January 18, 2013 are accurate and admitted for all purposes.
- [8] The report of Christine Martin dated January 18, 2013 has been marked as Exhibit 5 on this trial. Her report of November 20, 2013 has been marked as Exhibit 6 on this trial.
- [9] In addition, the accused has admitted that on August 24, 2012, a robbery occurred at 125 South Ogilvie Street, in the City of Prince George. During that robbery, the following three firearms were taken: a Glock 9mm Model 17 pistol, Serial Number KYN287; a Springfield 45 Model 1911-A1, Serial Number NM25412; a Springfield 9mm Model XDM, Serial Number MG966863.
- [10] Finally, the accused admitted that on August 24, 2012, he did not possess a licence or registration certificate authorizing him to possess or acquire firearms.

The Crown's Case

- [11] Chedat Lee is the youngest son of Kwan-Mei Lee and is employed as a cook in a work camp. He resides at 125 South Ogilvie Street in the basement and his mother lives upstairs. Mr. Lee met the accused approximately five years ago when he was working at Shooters Bar as a cook. Mr. Lee described the accused as an acquaintance. Mr. Lee also knew a Don Schmidt and a Mr. X who are also acquaintances.

- [12] Mr. Lee testified that in August 2012, he was working in Fort Nelson, British Columbia. He left to go to work approximately one to two days before the break and enter. Mr. Lee testified that, at that time, he smoked Export A (Blue) Medium cigarettes. He also testified that he owned three handguns which were kept in a safe that was approximately six feet in height and weighed between 200 and 300 pounds.
- [13] Exhibit 8 in these proceedings is a booklet of photographs of the crime scene. Mr. Lee testified that the cigarette butts that can be seen in Photograph 3 are not his and were not there when he left to go to work. He also testified that the partially consumed Diet Pepsi bottle that can be seen in the Photographs 13 and 14 and the second partially consumed Diet Pepsi bottle that can be seen in Photographs 23 and 24 were not present in the basement when he went to work.
- [14] Mr. Lee testified that in addition to the firearms, his 60-inch television set, his home theatre system as well as some clothes were taken during the break and enter. Mr. Lee testified that the approximate value of the television set was \$5,000; the home theatre system was approximately \$1,500 and the combined value of the three handguns was approximately \$4,100.
- [15] Mr. Lee testified that he often put photographs of himself shooting at the gun range on the social media site Facebook.
- [16] Mr. Lee testified that the accused had not been at his residence within six months of this offence and he was adamant that the cigarette butts and partially consumed Diet Pepsi bottles were not in his house when he left to work.
- [17] On cross-examination, Mr. Lee testified that in August 2012, he had been working for almost one year at his new job. He also denied that he was selling items from his house that he did not want the police to know about.
- [18] Corporal Peter MacMillan is a 12-year member of the RCMP, and in September 2012, he executed a search warrant at 4247A Quentin Avenue in the city of Prince George, which was the house of Don Schmidt. There, he located a black duffle bag which contained firearms stolen from Mr. Lee as well as other items taken from the Lee residence.
- [19] Kwan-Mei Lee is retired and was born in Hong Kong. She came to Canada in 1968 and has lived at 125 South Ogilvie Street for approximately 30 years.

She has four children; three sons, all of whom reside in Prince George and one daughter who lives in Vancouver. She does not know the accused. On August 24, 2012, she awoke in the middle of the night with a cushion on her face and someone in her bedroom. She testified that she was scared and asked them not to hurt her. One or two individuals put tape on her mouth and around her hands and feet. She could hear a male's voice and thought there were two people in the bedroom. She could not identify her attackers.

- [20] At one point, a male came into her bedroom and asked her where her son's stuff was. She told him it was downstairs. Within approximately five minutes, a man came and asked her for the code for the gun safe. She told him she did not know that.
- [21] Approximately one-half hour later, she was asked where the keys to her Honda Civic automobile were. She heard people going upstairs and downstairs. Eventually it was quiet in her house and she was able to free herself and run to her neighbour's house where the police were contacted.
- [22] Mrs. Lee testified that approximately two days before the break and enter, just after her son went to work, she cleaned up the basement where he lived. She testified that the two Diet Pepsi bottles, which were found at different locations in the basement, were not there when she cleaned up the basement. She also testified that the cigarette butts outside in her driveway were not there prior to the break and enter.
- [23] Mrs. Lee testified that in addition to the other items taken, she noticed later that her wedding ring, which was worth approximately \$6,000, was missing as well.
- [24] Mrs. Lee testified that Photographs 6, 7, 9 and 10 all show the basement window that she says was closed, before the break and enter. Mrs. Lee testified that the window had frame damage and was broken, after the break and enter.
- [25] On cross-examination, Mrs. Lee confirmed that she swept the driveway within one or two days before the break and enter and the cigarette butts were not there.
- [26] Allen Olson is the next door neighbour to Mrs. Lee, and he testified that at approximately 4 a.m. on August 24, 2012, Mrs. Lee came over to his house. She had duct tape in her hair and she was scared and shaking. He called 9-1-1 and the RCMP attended within five to 10 minutes.
- [27] Linda Wiebe, on August 24th at approximately 6:45 a.m., noticed a grey Hyundai or Honda vehicle parked and two individuals exited the vehicle who had hoodies pulled over their head and drawn close to their face. Mrs. Wiebe thought this was suspicious. She said the individuals were approximately five-foot-five inches tall. However, she could not say if they were male or female or comment on what race they were. The vehicle was parked there for a period of time and eventually she phoned the police.
- [28] Constable Greg Stewart is a member of the RCMP, and he received a dispatch at approximately 4:53 a.m. on August 24, 2012 to attend at 125 South Ogilvie Street. He arrived at approximately 5 a.m., and he noticed an Asian female who was frantic and had duct tape in her hair. He seized this duct tape as well as some other tape that he found at the location. He left at approximately 7 a.m.

- [29] Constable Van Turmel is a member of the RCMP who also attended at 125 South Ogilvie Street. He testified that he saw the tape in Mrs. Lee's hair. He noted the cigarette butts on the driveway which can be seen in Photos 1 through 4 in Exhibit 8. He placed plastic evidence bags over the cigarette butts to preserve them from the elements.
- [30] Constable Jason Dickinson attended the crime scene around 5 a.m. He noticed a distraught female with tape in her hair and he described the downstairs of the house as being a mess.
- [31] Corporal Robert Lamont was the lead investigator on this file. He investigated the suspicious vehicle complaint of Linda Wiebe. The vehicle was located one block west and one block south of Don Schmidt's house and turned out to be the vehicle owned by Mrs. Lee. Corporal Lamont was present when Constable McMillan found a firearm at the residence of Don Schmidt, which belonged to Chedat Lee.
- [32] Chehing Lee is the oldest son of Mrs. Lee. He currently resides in Prince George. He testified that the only people that he brings to his mother's house are his wife and son. He does not know the accused.
- [33] Corporal Kimberley Tremblay is a member of the RCMP Forensic Identification Section. She took the photographs labelled 1 through 49 in Exhibit 8. In addition, she seized the cigarette butts on the driveway as well as the two Diet Pepsi bottles found in the basement. With regard to the two Diet Pepsi bottles, she emptied the contents from them and took DNA swabs of the mouthpieces for analysis. Corporal Tremblay was also able to locate a fingerprint on one of the Diet Pepsi bottles. This print did not match that of the accused. She was unable to identify that fingerprint.
- [34] Corporal Tremblay testified that the cigarette butts were also sent for DNA analysis. Corporal Tremblay found footwear impressions on the TV stand in the basement. However, she could not identify these impressions. Corporal Tremblay also located fingerprints on the TV stand which she could not identify. She did not compare these fingerprints to the accused.
- [35] Corporal Tremblay testified that the basement window, which is seen in Photograph 6 in Exhibit 8, had frame damage and tool marks on it.
- [36] Cheman Lee testified that he is the son of Kwan-Mei Lee. He is the middle son in terms of age and resides in Prince George. He visits his mother frequently to assist her with yard work. He testified that he has never brought visitors to her house when she was not there and he does not smoke. He does not know the accused.
- [37] Christine Martin was qualified as an expert in the interpretation of body fluid identification tests and the interpretation and comparison of DNA profiles and the application of statistical significance.

- [38] Ms. Martin explained what DNA is and the types of tests that are carried out on DNA samples to create a DNA profile. Ms. Martin in her forensic science and identification service laboratory report dated November 20, 2013 which is marked as Exhibit 6 in this trial, concluded that the swabs taken from the mouthpieces on the two Diet Pepsi bottles matched the known sample for the accused. The estimated probability of selecting an unrelated individual at random from the Canadian Caucasian population with the same profile is one in 18 trillion.
- [39] Ms. Martin also concluded that a cigarette butt from the driveway matched the known sample for the accused. The estimated probability of selecting an unrelated individual at random from the Canadian Caucasian population of the same profile is one in 18 trillion.
- [40] On cross-examination, Ms. Martin agreed that she was not able to date the age of the DNA samples which were located at the crime scene.
- [41] Mr. X has known the accused since he was young. He also knew Chedat Lee. During the course of his testimony, I granted the Crown's application pursuant to s. 9(1) of the Canada Evidence Act and declared him an adverse witness. Mr. X is currently incarcerated. Upon being cross-examined by Crown counsel, Mr. X testified that he heard conversations between the accused, Mr. Schmidt and others about robbing Mr. Lee. He also testified that the accused was aware of the photographs of Mr. Lee with his firearms which were on Facebook.
- [42] Mr. X testified that he saw a gun safe in his bedroom at his residence which belonged to Mr. Lee when he came home one evening. He also testified that when he gave his statement to Corporal Lamont, he was intoxicated.
- [43] I had the opportunity to review the video portion of the statement given by Mr. X to Corporal Lamont, and he did not exhibit any signs of impairment. Also during the voir dire on the s. 9(1) application, Corporal Lamont testified that Mr. X was not exhibiting any signs of impairment.
- [44] That was the evidence for the Crown.
- [45] The accused, as is his right, did not call any evidence.

POSITION OF THE PARTIES

- [46] The Crown concedes that there is no evidence of a weapon being used during this incident and therefore, Counts 3 and 7 have not been made out. Crown does, however, urge the court to convict the accused of the lesser included offence of common assault pursuant to s. 266 of the Criminal Code. Crown submits that all other counts on the indictment have been proven beyond a reasonable doubt.

- [47] The accused has admitted that there was a robbery at 125 South Ogilvie Street and three handguns were stolen. In addition, the evidence discloses that a gun safe, Honda Civic vehicle, a wedding ring, and some telephones and clothing were also stolen. Crown argues that none of the Lee family know the accused, other than Chedat Lee, who has not seen him since he worked with him at Shooters Bar.
- [48] The evidence of a damaged window in the basement, along with the DNA evidence, in the Crown's submissions, put the accused at the scene during the relevant time. The Crown submits that there is no other explanation for the DNA of the accused being at the Lee residence other than he was involved with the break and enter. Crown counsel argues that any other explanation would be mere speculation.
- [49] The Crown submits that Mr. X was a very reluctant witness. However, much of what he said was corroborated by other evidence. The Crown notes that Mr. X observed the gun safe in his residence. He was aware that Chedat Lee worked away from home at a camp job and that he posted pictures of himself on Facebook of his guns. The Crown submits that Mr. X should be believed when he says that the accused, Mr. Schmidt and others discussed robbing Mr. Lee.
- [50] The Crown submits that the accused participated in the break and enter and is either a party, pursuant to s. 21 of the Criminal Code to the crimes that occurred in the residence, or he committed these crimes himself. Crown counsel further submits that it is clear given the request of the assailants to Mrs. Lee for the code to the gun safe, that it was their intention to break into the Lee house to steal firearms.
- [51] Finally, the Crown submits that the accused had the requisite knowledge and a measure of control over the firearms to warrant a finding that he was in possession of the firearms.
- [52] The accused argues that while there is no doubt that his DNA was found in the residence, it is the Crown's obligation to refute any possible innocent explanations for that evidence. The accused further argues that he knew Chedat Lee and that Mr. Lee's evidence should be considered very carefully because the accused argued that Mr. Lee was flustered when asked if he was selling anything from his residence that he did not want the police to know about.
- [53] The accused further argues that Mr. X was clearly an adverse witness and it is not clear whether or not he adopted his statement to the police.
- [54] The accused points to the fact that the fingerprint found on one of the Diet Pepsi bottles was not his. The accused also argues that with regard to the gun safe being at a residence where he was present does not mean he exercised any degree of control over it. The accused argues that there is a reasonable doubt as to identification and he should be found not guilty of all charges.

DECISION

[55] The central issue in this case is identification. The identification of the accused as one of the assailants is based on circumstantial evidence.

[56] The British Columbia Court of Appeal in *R. v. Sunshine*, [2013] B.C.C.A. 102, said the following about the analysis of circumstantial evidence at paragraphs 20 - 21:

[20] The formulaic approach to the instruction on circumstantial evidence was first rejected by the Supreme Court of Canada in *R. v. Mitchell*, 1964 CanLII 42 (SCC), [1964] S.C.R. 471, 46 D.L.R. (2d) 384 and *R. v. Cooper*, 1977 CanLII 11 (SCC), [1978] 1 S.C.R. 860, 74 D.L.R. (3d) 731 (cited to S.C.R.). In *Cooper*, the Court was unanimous on this point, as stated by Chief Justice Laskin at 865:

The time has come to reject the formula in *Hodge's* case as an inexorable rule of law in Canada. Without being dogmatic against any use of the formula of the charge in *Hodge's* case I would leave the matter to the good sense of the trial judge with a reminder that a charge in terms of the traditional formula of required proof beyond a reasonable doubt is the safest as well as the simplest way to bring a lay jury to the appreciation of the burden of proof resting on the Crown in a criminal case.

[21] This point was accepted by the majority in *Cooper*, at 881, where Mr. Justice Ritchie said:

It is enough if it is made plain to the members of the jury that before basing a verdict of guilty on circumstantial evidence they must be satisfied beyond a reasonable doubt that the guilt of the accused is the only reasonable inference to be drawn from the proven facts. In this regard it will be seen that I agree with the Chief Justice in his rejection of the *Hodge* formula as an inexorable rule of law in Canada.

[57] Much of the evidence in this case went largely unchallenged by the accused.

[58] I had the opportunity to carefully listen to the evidence of Kwan-Mei Lee. I found Mrs. Lee to be a straightforward and honest witness. She was clearly terrified by the events of August 24, 2012 and was forthright in saying that she could not identify the accused as one of her assailants. I accept her evidence in its entirety. I find that she cleaned the basement shortly after her son went to work which was approximately two days before the break and enter. I find that the two partially consumed Diet Pepsi bottles were not in the basement prior to August 24, 2012.

[59] I also find that the cigarette butts were not on the driveway of her residence prior to the incident on August 24, 2012.

[60] In addition, I find that the basement window, which Ms. Lee found damaged after the break and enter, was damaged as a result of the break and enter.

[61] Finally, I find that Mrs. Lee's wedding ring was taken during the robbery.

- [62] I also had the opportunity to carefully listen to the evidence of Chedat Lee. I do not agree with the accused that Mr. Lee was flustered when he was asked if he was selling anything from his residence that he did not want the police to know about. Mr. Lee did not hesitate when he answered in the negative to that question. I accept Mr. Lee's evidence in its entirety.
- [63] In particular, I find that the two opened Diet Pepsi bottles were not in the basement when he left as well to go to work approximately two days before the break and enter.
- [64] I also find that the cigarette butts were not on the driveway when he left for work.
- [65] Further, Mr. Lee described his relationship with the accused which was little more than being an acquaintance from work. I accept Mr. Lee's evidence when he says that the accused was not at his residence in the six months prior to the break and enter.
- [66] Corporal Tremblay testified as well that there was damage to the basement window and tool marks on the frame of the window. I find that the basement window was the point of entry for the break and enter.
- [67] I also find that based on the evidence of Mrs. Lee and the fact that a 200 to 300-pound safe was taken from the residence, there were multiple assailants involved. Also given the evidence of Mrs. Lee, that one of the assailants asked her for the code to the gun safe. In my view, it is obvious that the primary objective of this break and enter was to steal her son's handguns.
- [68] It is clear on the evidence of Christine Martin that it was the accused's DNA that was found on the two Diet Pepsi bottles in the basement at two different locations as well as on one of the cigarette butts in the driveway.
- [69] Mr. X's evidence was difficult to analyze. He was clearly an adverse witness for the Crown. While I do not accept that he was intoxicated when he gave his statements to the police, I do accept his evidence that during the relevant time in 2012 he was consuming illegal drugs. Also, his evidence was of a very general nature and it was difficult to differentiate and determine who was present during the various conversations about the robbery that he overheard. It was not always clear that the accused was present during some of those conversations. However, I do accept Mr. X's evidence that the accused had at least one discussion with Mr. Schmidt and others about robbing the Lee residence. I also accept that it was Chedat Lee's gun safe and gun that Mr. X saw in his residence and that the accused was present during this time.
- [70] Based on all the evidence, the only reasonable inference that I can draw is that the accused was one of a number of assailants that entered the Lee residence through the basement window with the intention to rob that residence. In particular, this group was looking for firearms.

- [71] While I cannot say that the accused is the person who specifically bound and gagged Mrs. Lee, I find that he was a party to that offence. The accused clearly, given the location of the two Diet Pepsi bottles in different rooms in the basement, did not confine himself to one area of the house. The cigarette butt was found in a different area outside from where the entry was made into the basement window.
- [72] It would have taken considerable effort to move the safe. The assailants tried to get the code for the safe which is a further indication that they not only wanted the firearms, but that was part of their initial plan. I have no doubt that this break and enter was not a spur-of-the-moment decision on the part of the accused or the others involved in this crime. This was an organized plan among the people that committed the crime.
- [73] I find that the accused again was one of the individuals on August 24, 2012 that entered the residence of Mrs. Lee without her consent and participated in the robbery of that residence. Mrs. Lee, during this robbery, was bound and gagged with duct tape without her consent which constitutes an assault. Mrs. Lee was also unlawfully confined as a result of these measures. The items taken from her residence included a safe; three handguns; clothing; a 60-inch TV; a surround system; telephones all of which had considerable value.
- [74] The accused has admitted that on August 24, 2012, that he did not possess a licence or registration certificate authorizing his possession or acquisition of firearms.
- [75] Sir, if you could just please stand. Based on all the evidence, the Crown has proven beyond a reasonable doubt Counts 1, 2, 4, 5, 6, 8, 9, 10 and 11 of the indictment and I find you, sir, guilty of those counts.
- [76] There is no evidence that a weapon was used in assaulting Mrs. Lee and I therefore, find the accused not guilty of Count Number 3. I also find the accused not guilty of Count Number 7. However, I find him guilty of the lesser included offence of common assault pursuant to s. 266.
- [77] You can have a seat, sir.
- [78] Counsel, I would like to hear submissions then on the principles in R. v. Kienapple.
- [SUBMISSIONS RE KIENAPPLE]
- [79] THE COURT: Yes. In terms of the decision, R. v. Kienapple, [1975] 1 S.C.R. 729, applying those principles, I agree with the submissions of the Crown. There will be a conditional stay, pending any appeal, on Count Number 1.
- [80] There will also be a conditional stay, pending any appeal, on Count 6, Count 7, Count 8, Count 10 and Count 11.
- "R.S. Tindale, J."

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