
CANADA / JUDGMENT

R. v. Frost

2019 BCSC 1919

COURT

Supreme Court of British Columbia

DECIDED

16 October 2019

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2019 BCSC 1919 R. v. Frost

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Frost,

2019 BCSC 1919

Date: 20191016

Docket: 105900-2

Registry: Kamloops

Regina

v.

Jenna-Lee Elsa Frost

Before: The Honourable Mr. Justice L. Marchand

Oral Reasons for Judgment

Counsel for the Crown:

O. Potestio

Counsel for the Accused:

J. Michi

Place and Date of Trial/Hearing:

Kamloops, B.C.

October 9, 2019

Place and Date of Judgment:

Kamloops, B.C.

October 16, 2019

Introduction

- [1] Jenna-Lee Frost is charged with one count of break and enter and commit theft at a dwelling house owned by Patrick Foidart at 1262 Cornwall Street, in Kamloops on July 30, 2017.
- [2] The case against Ms. Frost is circumstantial and is based primarily on a single fingerprint matched to Ms. Frost that was lifted from the exterior of a window at Mr. Foidart's home. Ms. Frost concedes that the fingerprint is hers, but submits that the evidence adduced by the Crown falls short of establishing beyond a reasonable doubt that she broke into Mr. Foidart's home on July 30, 2017.

Circumstances

- [3] The background is not in dispute.
- [4] Mr. Foidart purchased and took possession of a single-family dwelling on a double lot at 1362 Cornwall Street in late June 2017. He then moved in with his 14-year-old son and 11-year-old daughter. The home has two storeys. The kitchen is on the second storey. There is a covered wrap-around deck surrounding the kitchen area of the home that is accessed by an exterior flight of wooden stairs with a gate at the top. There is a kitchen window at the top of the stairs partially above the gate.
- [5] Mr. Foidart and his family left the residence at about 11:00 a.m. on July 29, 2017, to spend one night at East Barriere Lake. Before leaving, Mr. Foidart testified that he closed and locked all the doors and windows. Mr. Foidart and his family returned the next day, July 30, 2017, at about 9:30 p.m. They noticed that a number of items were missing from the home. Ms. Frost does not contest that over \$6,000 worth of items were stolen from Mr. Foidart's residence including food, alcohol, clothing, tools, a watch, a ring, a cot, electronics, and a suitcase.
- [6] Mr. Foidart telephoned the police soon after arriving home and Constable Meikle was dispatched to respond to Mr. Foidart's call. Constable Meikle arrived at the residence at about 10:55 p.m. and surveyed the scene. Constable Meikle noted that a window screen was sitting on the wrap-around deck below the kitchen window, just inside the gate at the top of the wooden stairs. Constable Meikle shone his flashlight on the window and observed what he believed to be a hand impression. He also observed a line of nine plums and a baseball glove on a table on the wrap-around deck. Mr. Foidart testified that neither he nor his children had put the plums on the table.

- [7] Based on his observations and discussions with Mr. Foidart, Constable Meikle reached the conclusion that the perpetrator or perpetrators had gained access to Mr. Foidart's home through the kitchen window. Constable Meikle advised Mr. Foidart to secure his residence and not move anything. Constable Meikle told Mr. Foidart that a forensic officer would come by the next day. Constable Meikle left the residence at about 11:25 p.m., wrote a report, and requested that a forensic officer attend the scene.
- [8] A forensic identification specialist, Corporal Hebert, attended the Foidart residence at about 8:57 a.m. on July 31, 2017. After an initial walkthrough, he identified locations of interest, and took photographs of the interior and exterior of the home. He noted a number of smudges on the exterior of the kitchen window. He could not say whether all of the smudge marks were made by the same person or at the same time. He was able to lift one fingerprint of a right middle finger on the right-hand window pane of the exterior of the kitchen window. The characteristics of the fingerprint were consistent with it having been deposited at the end of an upward motion. He took a DNA swab from another smudge mark. He also identified one footwear imprint inside the house. The single fingerprint was subsequently identified as belonging to Ms. Frost. The DNA swab was not suitable for analysis and no match was found for the footwear imprint.
- [9] Ms. Frost did not call any evidence.

Legal Principles

- [10] The legal principles are also not in dispute.
- [11] Ms. Frost is presumed to be innocent. That presumption remains in place unless and until the Crown proves that Ms. Frost committed each essential element of the offence beyond a reasonable doubt. Further, Ms. Frost has the right to silence and no adverse inference can be drawn from her decision to exercise that right.
- [12] The leading statements on circumstantial cases come from *R. v. Villaroman*, 2016 SCC 33. At paras. 35-38, the Court held that:
1. In circumstantial cases 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 the guilt of the accused.
 2. Inferences consistent with innocence do not have to arise from proven facts. They may also arise from the absence of evidence.
 3. When assessing circumstantial evidence, the trier of fact must consider plausible theories and reasonable possibilities other than guilt.
 4. While plausible theories and reasonable possibilities cannot be based on speculation, an alternative theory to guilt is not speculative simply because it arises from a lack of evidence.

5. Finally, the Crown is not required to negate every possible alternative theory to guilt no matter how irrational or fanciful.

Analysis

[13] With these principles in mind, and after carefully considering all of the evidence and the absence of evidence, I have concluded that the Crown has failed to satisfy me beyond a reasonable doubt of Ms. Frost's guilt. I base my decision on the following:

1. The Crown concedes that the evidence falls short of conclusively establishing that the kitchen window was a point of entry for the break-in that occurred on July 29 or 30, 2017.
2. It is unclear on the evidence which of the two kitchen window panes slides open, the window pane with Ms. Frost's fingerprint on it, which to gain entry from the outside a person would have to slide right to left, or the opposite window pane which that same person would have to slide left to right.
3. There is no evidence as to which of the two kitchen window panes was covered with the screen, the one with Ms. Frost's fingerprint, or the other one. If the screen was on the opposite window pane, Ms. Frost would not have had to remove the screen in order to leave a fingerprint on the window.
4. The kitchen window is covered by eaves so it is not fully exposed to the elements. As a result, Ms. Frost's fingerprint could have been placed on the window a long time ago and not deteriorated.
5. There is no evidence to establish a close temporal connection between the deposit of Ms. Frost's fingerprint and the break and enter. Mr. Foidart had just purchased the home a month prior to the break-in. He did not clean the windows after moving in. It is unknown when the windows were last cleaned. Further, I cannot accept that Mr. Foidart would have noticed Ms. Frost's fingerprint or the smudge marks earlier if they had been there prior to July 29, 2017. He only testified that he did not notice them from the inside looking out. Perhaps that is because Mr. Foidart is not a particularly observant person. Perhaps that is because the screen was on that window. Perhaps that is because the fingerprint and smudge marks would only be observable in certain light conditions or at certain angles. The fingerprint and smudge marks are certainly not observable in one of the interior photographs of the kitchen taken by Corporal Hebert. Finally, even if the screen was on the window with Ms. Frost's fingerprint, there is no evidence as to when that screen was installed. In other words, the fingerprint could have been left on that window at a time when no screen was in place.

6. Given the extensive nature of the items stolen from the residence, it appears that the perpetrator or perpetrators were in Mr. Foidart's residence for a considerable time. They even had time to arrange a line of plums on the table on the deck. Despite this, no fingerprint or other forensic evidence linking Ms. Frost to the inside of the home was found. As explained by Corporal Hebert, this could be due to the nature of various substrates within the home. On the other hand, this could indicate that Ms. Frost was not inside the home.
 7. Further, no fingerprints of any kind were found inside the home. Again, this could be due to the nature of various substrates within the home. On the other hand, this could indicate that the perpetrator or perpetrators wore gloves which might be considered to be inconsistent with Ms. Frost leaving her fingerprints on the kitchen window.
 8. Ms. Frost's fingerprint on the kitchen window was in a location that is easily accessible from the deck or the top of the stairs. While the upward motion of Ms. Frost's fingerprint on the window is consistent with an attempt to open the window, her fingerprint could just as easily have been deposited there on a different occasion, for example, by peering inside the window, working on the exterior of the home, or reaching out to regain her balance after a stumble.
 9. Ms. Frost was not found in the vicinity of Mr. Foidart's home after the break-in.
 10. Finally, Ms. Frost was not found in possession of any property linked to the break-in.
- [14] While the removal of the screen, and the nature and location of Ms. Frost's fingerprint on the kitchen window are highly suspicious, I am unable to conclude that there is a constellation of factors consistent only with guilt. In that regard, Ms. Frost's case is distinguishable from the cases relied on by the Crown.
- [15] In *R. v. O'Neill*, [1996] B.C.J. No. 398 (S.C.), there was a fingerprint on intercom equipment inside a church that had been broken into and the accused had given a disjointed and unreliable explanation that I would describe as fanciful to explain how it got there.
- [16] In *R. v. G.J.Y.*, 2006 BCCA 309, the accused left fingerprints on a window that had been cleaned only ten days earlier. There was evidence establishing that the window was clearly the point of entry and the fingerprints were consistent with opening the window with a left-to-right motion.
- [17] In *R. v. Gauthier*, 2009 BCCA 24, the accused's fingerprint was on a beer bottle found inside a trailer that had been broken into. The complainant did not know the accused. The accused called no evidence. The Court rejected as speculative the theory that the bottle had been brought into the trailer in some innocent way.
- [18] In *R. v. Bornyk*, 2017 BCSC 849, the accused's fingerprint was on an article that had been stored on a shelf inside the complainant's home and had been moved during the break-in. The trial judge concluded that the only reasonable inference was that the accused had handled the article during the break-in.

[19] Finally, in R. v. Gray, 2018 BCPC 89, the accused's fingerprint was on a cash register drawer in a liquor store in a location consistent with video of the robbery at issue.

Conclusion

[20] In this case, the gaps in the evidence adduced by the Crown leave me unsure as to when Ms. Frost's fingerprint was deposited on Mr. Foidart's window. Further, I would characterize it as a rather sloppy or messy looking fingerprint which is inconsistent with no fingerprints having been left inside the home. There is no other evidence linking Ms. Frost to the crime.

[21] No case was cited to me where a conviction for a break and enter was founded exclusively on an unexplained fingerprint deposited on the exterior of an accessible window at an unknown time. In these circumstances, I need not speculate on how Ms. Frost's fingerprint got there. The whole of the evidence simply falls short of satisfying me beyond a reasonable doubt that Ms. Frost broke into Mr. Foidart's home on July 30, 2017, or had anything else to do with the crime.

[22] In these circumstances, I must find Ms. Frost not guilty.

[23] I thank counsel for their excellent advocacy. Ms. Frost, you are free to go.

"L.S. Marchand J."

MARCHAND J.

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