

CANADA / JUDGMENT

R. v. Gallagher

2025 BCCA 451

COURT

British Columbia Court of Appeal

DECIDED

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2025 BCCA 451 R. v. Gallagher

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Gallagher,

2025 BCCA 451

Date: 20251127

Docket: CA49451

Between:

Rex

Respondent

And

Steven Gallagher

Appellant

Before:

The Honourable Mr. Justice Groberman

The Honourable Mr. Justice Butler

The Honourable Madam Justice Horsman

On appeal from: An order of the Supreme Court of British Columbia, dated

May 12, 2023 (conviction) (R. v. Gallagher, 2023 BCSC 824,

Penticton Docket 48395).

Oral Reasons for Judgment

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S.J. Runyon

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J.R.W. Caldwell

Place and Date of Hearing:

Victoria, British Columbia

November 27, 2025

Place and Date of Judgment:

Victoria, British Columbia

November 27, 2025

Summary:

The appellant appeals his convictions for breaking and entering and arson at a pharmacy in Oliver, British Columbia. The only issue at trial was identification. The judge accepted the evidence of two police officers who testified as recognition witnesses and identified the accused from security video in the pharmacy. The judge also concluded he was able to identify the accused based on the video evidence. On appeal, the appellant argues the judge erred in failing to properly scrutinize the reliability of the evidence of the recognition witnesses and that the verdict was unreasonable. Held: Appeal dismissed. The judge made no error in his approach to the analysis of the officers' recognition evidence and the video evidence. As the identification evidence directly linked the appellant to the arson, the argument that the verdict was unreasonable could not succeed.

[1] BUTLER J.A.: Steven Gallagher appeals his convictions for breaking and entering, and arson at the Remedy RX Pharmacy in Oliver, British Columbia, on May 15, 2021, contrary to ss. 348(1)(b) and 434 of the Criminal Code, R.S.C. 1985, c. C-46. The only issue at trial was identification. Following a three-day judge-alone trial, Justice Crerar accepted the evidence of two police officers who identified Mr. Gallagher as the individual seen on video captured by a security camera in the pharmacy. In reasons for judgment indexed at 2023 BCSC 824 ("Reasons"), the judge rejected the defence argument that the officers' evidence should be given little or no weight. The judge also determined he was able to identify Mr. Gallagher as the arsonist based on the video evidence.

- [2] On appeal, Mr. Gallagher argues the judge erred in failing to properly apply the required level of scrutiny to the identification evidence and that the verdict was unreasonable. The Crown submits the guilty verdicts should stand as the judge did not err in concluding the Crown had proved the identity of the appellant as the perpetrator of the offences beyond a reasonable doubt.

Reasons

- [3] The circumstances of the offence and the evidence at trial are described in the Reasons.
- [4] The judge began by setting out the location of the pharmacy in relation to the RCMP detachment and Triangle Park, near downtown Oliver. He noted that Mr. Gallagher's residence is located about two kilometres from the pharmacy: Reasons at paras. 6-10.
- [5] There were two sources of evidence for the events of May 15, 2021: the testimony of Corporal Symons and Constable Hubert; and video evidence from surveillance cameras including one located in the pharmacy.
- [6] Corporal Symons and Constable Hubert attended at Mr. Gallagher's residence shortly after 1:00 a.m. after receiving a call that gunshots had been heard in that area. Both officers were familiar with Mr. Gallagher and had attended at his residence on previous occasions. When they arrived, they saw numerous vehicles parked or situated on the property. One of the vehicles was a 1990s model Ford Ranger pickup which was distinctive because of its dark green colour and factory-printed wave decal: Reasons at paras. 11-12.
- [7] When the officers arrived at Mr. Gallagher's residence, he was standing in the driveway. They saw five other people in the yard: two men; and three women. He denied that any gunshots had been fired in the vicinity of his house and took the officers for a tour of the house. The officers saw no evidence of criminal activity. Mr. Gallagher became agitated at some point during the tour, stating words to the effect of "I don't know why you cops don't like me" and listed his complaints. He ordered the police officers to leave his property and escorted them to their cars.
- [8] The officers left around 2:15 a.m. They parked in the vicinity to await further developments instead of returning to the detachment. They heard loud talking from Mr. Gallagher's property, the revving of car engines, and saw vehicles leave the property at high speed. The officers decided there was no reason to follow the vehicles and so returned to their detachment: Reasons at paras. 13-15.
- [9] At approximately 4:00 a.m., the officers heard what they thought sounded like gunshots outside their detachment. They found bullet holes in the bumper of one of the police cars. The officers believed they saw the Ford Ranger pickup truck that they had seen at the accused's property heading towards Main Street through the detachment window. A few minutes later, the officers received a call that a pickup truck was on fire in Triangle Park. They arrived at the park where they found the Ford Ranger pickup truck in flames and saw a

fire in the nearby Remedy RX Pharmacy: Reasons at paras. 16-18.

- [10] Turning to the video evidence, the judge described various security video clips submitted in evidence that depicted the movement of a pickup truck--ultimately determined to be the green pickup--from the vicinity of Mr. Gallagher's property to downtown Oliver where it was left in the middle of Triangle Park. A video from a building supply store shows a figure walking from the truck, from which smoke is emerging, towards the pharmacy. That figure is seen carrying a dark case. The figure appears to squat down by the front door of the pharmacy: Reasons at paras. 20-21.
- [11] The judge then describes what is seen on the internal pharmacy security video footage:
- [23] At 4:15 am, a rock flies through the doorway, down the leftmost aisle. The figure then enters the pharmacy through the smashed glass door. He squats down beside the drinks cooler, in front of some sundresses displayed for sale. Within seconds, the dresses are aflame. The figure walks down an aisle and disappears out of frame. A few seconds later, he comes back, heading towards the front door.
- [24] Throughout the sequence, the arsonist's hoodie completely obscures his face. Even walking back towards the front door, his facial features are impossible to discern.
- [25] As he approaches the front door, however, the temptation of grabbing a refreshing post-arson drink proves too great. He turns towards the drinks cooler, and steals a beverage. With that turn he provides a decent view of his face, from eyes to chin, both straight-on, as well as at half-profile. He then leaves the pharmacy through the smashed door.
- [12] Sergeant Wrigglesworth, an RCMP officer who had previous dealings with Mr. Gallagher, also gave evidence. The judge found all three officers to be credible and reliable witnesses. Officers Symons and Hubert had been "careful and responsible" in their recollection of the events: Reasons at para. 29. They guarded against overstatement and made appropriate concessions when uncertain about their recollection.
- [13] The court held voir dieres to determine if Sergeant Wrigglesworth and Constable Hubert were qualified to serve as recognition witnesses. After the conclusion of the officers' evidence in chief on the voir dieres, the defence conceded and the court found that both witnesses qualified as recognition witnesses. The court determined that "each officer had sufficient familiarity with the accused, based on multiple, including recent, past interactions, to serve as 'a helpful witness who is in a better position than the trier of fact to identify the accused'", referring to *R. v. Coban*, 2022 BCSC 263, at paras. 12-18: Reasons at para. 30.
- [14] Both officers had several close-up interactions with Mr. Gallagher in the past during police investigations. The interactions included face-to-face conversations in tense situations that required focus. Both officers saw the video soon after the arson. The officers were asked if they recognized the person in the video, and both immediately indicated that they had no doubt Mr. Gallagher was the figure in the pharmacy video: Reasons at paras. 31-33.

- [15] The judge rejected the defence position that the officers' evidence should be given little or no weight because it was tainted by "confirmation bias and 'groupthink'" given Mr. Gallagher's past history with the RCMP and the officers' suspicion that he was the arsonist.
- [16] In doing so, the judge distinguished the case at hand from *R. v. Collins*, 2008 CanLII 36899 (N.L.P.C.) and *R. v. Hudson*, 2020 ONCA 507, which were relied upon by the defence. The judge noted how *Collins* concerned identification rather than recognition evidence. The issue was noticeably different, arising from: the invalidity of the photo pack and unique wall background for the accused's photograph; and an identification exercise tainted by its description as the "Collins matter" before identification. In *Hudson*, the judge's error was in qualifying an officer as a recognition witness who had a lack of familiarity with the accused and for placing weight on his evidence. The appeal was dismissed as the "error was not significant" and the judge still independently came to identify the accused: at para. 45.
- [17] The judge then explained his reasoning:
- [38] In the present case, both officers were solely asked, independently and neutrally, if they recognised the person in the video. The defence's argument would bar recognition evidence wherever surveillance video shows an ostensible crime, or wherever police, reasonably, have initial suspicions as to the culprit. It would particularly bar such evidence in a smaller population centre such as Oliver, with a finite number of people who could have committed such a crime, and where recognition evidence would often be more reliable.
- [39] In any case, as in *Hudson*, even without these police officers' experienced recognition of Mr Gallagher as the figure in the surveillance video, the Court is convinced beyond a reasonable doubt that the video shows Mr Gallagher to be the arsonist.
- [40] Mr Gallagher has very distinctive facial and bodily features. Although he has a markedly round face and strong jawline, he has a relatively sharp chin. His nose is sharp, pronounced, and slightly curved. His eyes stand in dark contrast to his relatively pale skin. His mouth is distinctively slightly agape when in a resting position. He has broad, hunched shoulders. He is squat and heavy set. All of these features are clearly discernable in the pharmacy video, and in zoomed-in screenshots showing the suspect's face straight on, and in partial profile.
- [41] The identification of Mr Gallagher in the pharmacy video is bolstered by the totality of the circumstantial evidence surveyed above. It is unlikely that many people were up and active in the metropolis of Oliver at 4 am: the exterior videos confirm the lack of other vehicles and people in the heart of Oliver. Apart from his history with the police, Mr Gallagher had had a confrontation just hours before the arson, and the police visit was followed by vehicles squealing away from the Gallagher residence. Gunshots were fired before the early morning police visit to the Gallagher residence, then just before the arson, at the police station, and then just after the arson, just before Corporal Symons saw a vehicle speed away from the PetroCan station.

[42] The distinct green Ford Ranger pickup truck ignited and abandoned at Triangle Park, from which truck the arsonist emerged, provides a compelling lynchpin. Officer Symons had seen the truck at the Gallagher residence before the morning in question, and he saw it there during his morning visit. The truck is seen on the Sandpoint Drive camera minutes before it is seen near the RCMP station, just after the sound of gunfire, and just before its abandonment at Triangle Park. Shell casings were found in the truck the next morning, consistent with the trio of gunshot sounds.

On appeal

[18] Mr. Gallagher alleges two errors in judgment:

1. The trial judge erred in law by failing to properly scrutinize the reliability of the recognition evidence; and
2. The verdict is unreasonable as the recognition evidence, properly scrutinized, cannot support a finding of guilt.

[19] The appellant's second argument that the verdict was unreasonable is based on his assertion that there was no forensic or other direct evidence to link Mr. Gallagher to the arson. He argues that an inference of guilt was not available without such evidence. Referring to *R. v. Villaroman*, 2016 SCC 33, he submits that the judge could not find that the only reasonable conclusion based on the circumstantial evidence was Mr. Gallagher's guilt.

[20] There is no need to separately consider the second alleged error. The conviction was not based solely on circumstantial evidence. The judge arrived at guilty verdicts only after accepting the identification evidence that linked Mr. Gallagher to the scene of the arson, including his own independent determination of identity--as he was entitled to do: *R. v. Nikolovski*, [1996] 3 S.C.R. 1197 at para. 23, 1996 CanLII 158. There is direct evidence linking Mr. Gallagher to the arson if the judge did not err in his consideration and acceptance of the identification evidence. Such a finding on the first alleged error would mean there is no basis on which to find the verdict unreasonable, and the conviction must stand.

[21] Regarding the first alleged error, Mr. Gallagher argues the judge failed to exercise caution when grappling with the problems raised by the recognition evidence. He stresses that recognition evidence suffers from the same frailties as identification evidence generally. Mr. Gallagher advances several arguments:

- a) Neither of the recognition witnesses referenced most of the "distinctive facial and bodily features" mentioned by the judge in the Reasons (at para. 40) including his chin, mouth and shoulders. He argues the judge improperly sought to bolster the recognition evidence through his own observations from the video by surmising a basis for identification that the recognition witnesses themselves did not claim.
- b) One of Mr. Gallagher's most distinctive features is a scar over his left eyebrow. However, no witness made reference to the scar and it cannot be seen on the video.

- c) Although the judge described Mr. Gallagher's "sharp chin, strong jawline, round face and "heavy set" body type", none of these characteristics are sufficiently unique to exclude other perpetrators. He submits this is significant because there was no evidence that would allow the judge to identify and rule out the other individuals the officers saw milling about the Gallagher residence from being possible perpetrators.
- d) The judge failed to consider or comment on the poor quality of the surveillance video from inside the pharmacy.
- e) The judge erred in finding that the identification of Mr. Gallagher was "bolstered by the totality of the circumstantial evidence": Reasons at para. 41.
- f) The judge failed to consider and respond to the defence submission that the principal concern surrounding the officers' recognition evidence was the possibility of confirmation bias. The officers regarded Mr. Gallagher as having a poor reputation as a result of their previous dealings with him. Their negative view of Mr. Gallagher combined with their interaction with him at his property that evening gave them a strong reason to jump to the conclusion that he committed the offences.

[22] I would not accede to these arguments. In my view, the judge made no error in his approach to the analysis of the officers' recognition evidence and the video evidence they considered.

Standard of review

- [23] The standard of review applicable to the issue raised by the appellant is deferential. This Court has long held the view that the sufficiency of identification evidence is a question of fact for the trial judge.
- [24] In *R. v. L.(W.M.)*, 2010 BCCA 355, Justice Groberman summarized the principles of appellant review of a trial judge's conclusions as to eyewitness testimony:
- [27] This Court must be conscious of its limited role in reviewing findings of fact. In order to overturn such a finding, it must find a palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, 211 D.L.R. (4th) 577. A verdict will not be found to be unreasonable where it is one that a properly instructed jury, acting judicially, could reasonably have rendered: *R. v. Biniaris*, 2000 SCC 15, [2000] 1 S.C.R. 381, 143 C.C.C. (3d) 1. The threshold of appellate review is not lowered in cases involving eyewitness testimony: see *R. v. Kuczko*, 2010 BCCA 221, [2010] B.C.J. No. 807.
- [28] In *R. v. Keshane* (1992), 11 B.C.A.C. 86, [1992] B.C.J. No. 450, this Court, while recognizing the need for eyewitness evidence to be carefully scrutinized, also acknowledged the limits of appellate review in respect of verdicts based on such evidence:
- [14] There is no special formula by which to assess eyewitness identification. Rather, such evidence is to be examined on a case by case basis. And even where the witness' identification is not based on the recognition of a distinctive characteristic of the accused

this does not necessarily undercut the efficacy of the identification. Similarly, where there is a discrepancy between the description given by a witness and the person subsequently identified by that witness, this is not necessarily fatal to a positive identification. The sufficiency of the identification evidence will depend on the circumstances surrounding the original identification, the nature of the discrepancy, and whether there is other cogent evidence in the case pointing away from the guilt of the accused.

- [15] Whether or not evidence of identification is sufficient is a question for the trial judge. In the absence of error, it is not an arena in which this Court will interfere. The function of this Court is not to retry the case but to assess the evidence adduced before the trial judge and to determine whether the conclusion he reached is unreasonable or cannot be supported by the evidence.

Legal principles: Recognition evidence

- [25] The governing principles applicable to recognition evidence are described in Hudson at paras. 28-35. Where video evidence capturing the commission of the offence is available to the court, one way in which the Crown may seek to prove that the accused is the perpetrator is by adducing evidence from a witness sufficiently familiar with the accused to identify the accused from the video: Hudson at para. 28, citing R. v. Leaney, [1989] 2 S.C.R. 393.
- [26] The trial judge must first determine whether the recognition evidence meets the threshold requirements for admissibility applying the "prior acquaintance/better position" test: Hudson at para. 30, citing R. v. Berhe, 2012 ONCA 716. This consists of determining whether: 1) the witness is sufficiently familiar with the accused to have some basis for their identification opinion; and 2) the witness, because of their prior acquaintance with the accused, has an advantage or is in a better position than the trier of fact to identify the perpetrator: Hudson at para. 30.
- [27] Once recognition evidence is admitted, a judge must assess the witness' ultimate reliability and the weight to be attributed to the evidence by considering the following non-exhaustive factors: 1) the circumstances of the identification including whether it was independent or suggested; 2) the level of detail provided including whether there are unique identifiable features--however, the existence of such features becomes less important the better a witness knows the person identified; 3) the quality of the video or photographic evidence; and 4) the circumstantial or direct evidence available that can corroborate or undermine the reliability of the recognition evidence. In doing so, the judge must be cognizant of the fact that recognition evidence can suffer from the same, well-documented frailties as identification evidence: Hudson at paras. 33-35.

Analysis

- [28] In my view, the judge correctly adopted the approach to recognition evidence described in Hudson.

- [29] The threshold of admissibility was met. At trial, the defence conceded, and the judge found that based on the voir dire evidence that the evidence of both witnesses was admissible.
- [30] Once the evidence was admitted, the judge appropriately assessed the reliability of the evidence.
- [31] The judge considered the circumstances of the identification, noting that both officers independently and neutrally--in other words without suggestion--identified Mr. Gallagher as the perpetrator. The judge accepted their evidence only after assessing the officers' credibility and reliability. The judge did not specifically comment on the level of detail provided by the officers; however, he noted their familiarity with Mr. Gallagher and that they highlighted his distinctive appearance: Reasons at para. 33.
- [32] The quality of the video evidence was also taken into consideration. The judge's own identification of the accused's features based on the pharmacy video as "clearly discernable", both straight on and in partial profile make it clear he contemplated this factor: Reasons at para. 40.
- [33] Finally, the judge clearly considered the circumstantial evidence available in finding it supported his conclusion on identification, including: 1) the lack of other active people and vehicles in Oliver at 4:00 a.m. as confirmed by exterior videos; 2) the accused's police confrontation hours before the arson and subsequent vehicles "squealing away from the Gallagher residence"; 3) the firing of gunshots before the police visit to the accused's residence, just before the arson, and just after the arson; and 4) the emergence of the arsonist from the ignited and abandoned green Ford Ranger pickup truck which was also seen at the Gallagher residence during the police's morning visit.
- [34] I will also consider the specific arguments advanced by the appellant.

Failure to consider the possibility of confirmation bias

- [35] The appellant argues that the reliability of the witnesses is undermined by confirmation bias given the accused's reputation with the police. This was a primary submission of the defence at trial but was unsuccessful: Reasons at para. 34.
- [36] First, the identification process was independent and neutral, as discussed earlier in the analysis of the judge's approach to the principles of recognition evidence. The evidence available supports this finding. Both Constable Hubert and Sergeant Wrigglesworth were alone at the time they received emails with a photo of a suspect at their desks and were given no potential names. Both immediately identified the appellant as the person seen in the video. The judge also considered the integrity of the officers in their caution against overstatements and honest concessions.

- [37] Second, as a trier of fact, the trial judge was entitled to conclude that the circumstances of this case did not taint the process of identification. It must be assumed that the judge understands the law and applied it accordingly.

Alleged discrepancy of features recognized by judge and witnesses

- [38] The appellant argues the judge inappropriately referred to features of Mr. Gallagher that had not been mentioned by the officers and by doing so improperly bolstered their evidence. I disagree.
- [39] The judge's description of Mr. Gallagher's distinctive features at para. 40 of the Reasons was not an attempt to bolster the officers' identification. Rather, the judge was setting out his observations in support of his own identification of Mr. Gallagher as the perpetrator. Those observations were made based on his assessment of the video evidence. The judge is permitted to make such an assessment if satisfied that the video evidence allows him to and is of sufficient quality to do so: Hudson at para. 45. The factual findings of the judge are entitled to deference on appeal and having reviewed the video evidence I cannot say that the judge erred in arriving at that conclusion. The judge also had the advantage of seeing the accused in court for the three days of the trial: R. v. Lowry, 2023 BCCA 60 at para. 52.
- [40] Furthermore, the trial judge's observations aligned in part with the evidence of the recognition witnesses. These common observations included: 1) the accused's unique nose; 2) the description of the person in the pharmacy as "squat and heavy-set"; and 3) his round face and "strong jawline": Reasons at para. 40.
- [41] Finally, the assessment of eyewitness evidence is a case-by-case analysis with no "special formula"; discrepancy alone does not merit appellate court interference: L.(W.M.). Even where the "witness' identification is not based on the recognition of a distinctive characteristic of the accused this does not necessarily undercut the efficacy of the identification": L.(W.M.) at para. 28, citing R. v. Keshane (1992), 11 B.C.A.C. 86 at para. 14, 1992 CanLII 736.

Lack of reference to the accused's distinctive scar

- [42] The appellant argues that the accused has a distinct scar over his left eyebrow which cannot be seen on video footage or in stills. That is correct and explains why the focus of the identification was on the features of the perpetrator's face, from "eyes to chin" (Reasons at para. 25): the scar was simply not in view on the video. As I have already indicated, the judge concluded there was a strong basis to accept the recognition witnesses' identification of the appellant as the arsonist (and for the judge to identify him) without reference to the scar.

Lack of sufficiently unique characteristics to exclude other perpetrators

- [43] The appellant argued that the described features found in the court below were not "sufficiently unique to exclude other perpetrators".

- [44] First, the totality of the appellant's descriptions of notable features collectively allowed the trial judge to determine that the appellant was the same person as the arsonist in the video. Features described in the context of identification do not need to be so distinct as to ensure they only belong to one specific individual.
- [45] Second, the judge's consideration of the recognition witness' ability to identify a unique identifiable feature aligns with the second factor to determine reliability and attribute weight to recognition evidence as laid out in Hudson: at para. 33. The appellant's nose was described by both recognition witnesses as very distinct, and this was considered by the judge accordingly.

Error by the judge in finding identification was bolstered by circumstantial evidence

- [46] At para. 41 of the Reasons, the judge states that the "identification of Mr Gallagher is bolstered by the totality of the circumstantial evidence". Mr. Gallagher argues the judge erred in doing so because the circumstantial evidence did nothing to "bolster" the recognition evidence of the officers.
- [47] In R. v. G.F., 2021 SCC 20, the Court noted, in describing the mandate of an appellate court, that appellate reviewers must not search for error on "the basis of parsing imperfect or summary expression on the part of the trial judge", but rather by considering the trial judgment to see if the "trial judge discerned and decided the live issues so as to permit meaningful appellate review": G.F. at para. 109, citing R. v. Sheppard, 2002 SCC 26 at para. 28.
- [48] The appellant's argument appears to fall into the former category of imperfect summary expression. While I agree that the circumstantial evidence could not "bolster" the recognition evidence, when paras. 40 and 41 of the Reasons are read in context, it is clear the judge was not stating that the recognition evidence was "bolstered", but that the circumstantial evidence provided support for the conclusion he arrived at on identification. That evidence could be used to infer that Mr. Gallagher was one of a limited number of people who could have been in the vicinity of the pharmacy at the time of the break-in and arson. That is a conclusion the judge could properly reach based on his assessment of the circumstantial evidence.

Failure to comment on the poor quality of the pharmacy surveillance video

- [49] The appellant argues that the trial judge did not consider the quality of the video footage in his assessment.
- [50] The quality of the video evidence was in fact taken into consideration, as outlined above in my analysis of the judge's approach to recognition evidence. The judge clearly determined that the video and the stills were sufficient to enable reliable identification of "his face, from eyes to chin, both straight-on, as well as at half-profile".

[51] In my view, based on the trial judge's approach, I find he did not err in properly scrutinizing the reliability of the recognition evidence. His findings were not unreasonable and are supported by the evidence.

Disposition

[52] I would dismiss the appeal.

[53] GROBERMAN J.A.: I agree.

[54] HORSMAN J.A.: I agree.

[55] GROBERMAN J.A.: The appeal is dismissed.

"The Honourable Mr. Justice Butler"

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