

CANADA / JUDGMENT

R. v. Gregory-Allen

2023 BCSC 2142

COURT

Supreme Court of British Columbia

DECIDED

23 November 2023

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2023 BCSC 2142 R. v. Gregory-Allen

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Gregory-Allen,

2023 BCSC 2142

Date: 20231123

Docket: 43441

Registry: Campbell River

Rex

v.

Gerid James Gregory-Allen

Corrected Judgment: The text of the judgment was corrected at paragraph 1 on February 26, 2024

Before: The Honourable Mr. Justice Riley

Oral Reasons for Judgment

Counsel for the Crown:

W. Silliker

Counsel for the Accused:

T. Spettigue

Place and Date of Trial:

Campbell River, B.C.

November 21 and 22, 2023

Place and Date of Judgment:

Campbell River, B.C.

November 23, 2023

Introduction

- [1] These are reasons for judgment following a three-day trial on a charge of break and enter. More specifically, the Crown alleges that on 12 November 2021, the accused Mr. Gregory-Allen broke into the private residence of the complainants Mr. and Ms. Gravelle, with the intent to commit an indictable offence. It is common ground that in the early evening hours on the date in question Mr. and Ms. Gravelle arrived home from running errands to find Mr. Gregory-Allen inside their home, in the back of an attached garage. Thus, it is not really an issue that Mr. Gregory-Allen was unlawfully inside the Gravelle residence. The key issue to be decided is whether the Crown has proven beyond a reasonable doubt that Mr. Gregory-Allen broke into the residence, or was inside the residence, with the intent to commit an indictable offence. To resolve that issue, it will be necessary for the Court to make findings with respect to the reliability of the Crown evidence, and the credibility and reliability of Mr. Gregory-Allen's testimony in light of the well-known principles set out in the leading case of *R. v. W.D.*, [1991] 1 SCR 742, 1991 CanLII 93.

The Crown Case

- [2] The Crown called three witnesses, Cst. Bridgman, Mr. Gravelle and Ms. Gravelle. I am not going to review the evidence of each of these witnesses individually. All three of them were cross-examined and I think it is fair to say that the only issues raised had to do with the accuracy or reliability of their evidence. There was no serious challenge to the credibility of their evidence. In other words, there is no suggestion that any of the Crown witnesses were lying or intentionally trying to mislead the Court as to what they saw, heard, and did on the date in question. The defence has raised questions about the accuracy of the witness testimony, based on matters such as frailty of memory, and the ability of each witness to perceive and accurately recount their observations of and dealings with Mr. Gregory-Allen on the date in question.

The Defence Case

- [3] The defence called one witness, the accused Mr. Gregory-Allen. He admitted that he was inside the Gravelle residence, but he claims to have entered by mistake, in the process of trying to visit a friend who was supposed to be staying at a suite or apartment at the back of a residence on Spring Road, based on a description given to him by the friend. Mr. Gregory-Allen claims to have been under the influence of heroin at the time, and that he has no independent recollection of what happened inside the garage, but surmises that he may

have gotten confused and nodded out. Mr. Gregory-Allen denies that he had any intent to commit an indictable offence.

- [4] The Crown launched a vigorous attack on both the credibility and reliability of Mr. Gregory-Allen's testimony. He was cross-examined extensively. On the reliability front, the Crown emphasizes that Mr. Gregory-Allen was admittedly under the influence of drugs on the date in question, calling into question his ability to accurately recount the events in issue on the date of the offence. However, the focus of Crown counsel's closing submission was on Mr. Gregory-Allen's credibility. The Crown says there are reasons to question the truthfulness of Mr. Gregory-Allen's testimony given his prior convictions for offences of dishonesty. The Crown further contends that Mr. Gregory-Allen's account is vague, involves a self-serving or convenient reliance on lack of memory as to details of what occurred, does not account for some important features of the Crown case, and above all is fundamentally implausible and simply makes no common sense.

Facts

The Setting

- [5] The events in question took place in Campbell River on the evening of 12 November 2021. Mr. Gravelle testified and I accept that it was a rainy and windy evening. The key events relating to the break in relate to a period of time shortly after 6 pm, at which point it was already dark outside.
- [6] The Gravelle residence is located on Spring Road in Campbell River, in a residential area. Mr. Gravelle's uncontested evidence is that Spring Road has about 12 residential properties over a span of about half a kilometer. These are rather large residential lots. Ms. Gravelle's evidence was that the lots are about three-quarters of an acre each.
- [7] The Gravelle property is located about halfway down the street, between the two cross-streets shown on the aerial map marked into evidence. It has a driveway running off Spring Road, about 200 yards in length. The driveway leads up to a concrete slab parking area in front of the house. As one approaches the house, there is an attached double garage on the right side and another attached single garage on the left, with a rolling garage door and a man door.
- [8] It is the attached garage on the left, with the man door, where Mr. Gregory-Allen was found when the Gravelles arrived home on the evening of 12 November 2021.

The Events of 12 November 2021

- [9] The evidence as a whole reflects that when the Gravelles left their house some time earlier in the day on 12 November 2021, the rolling garage door was closed and the man door was closed. It was Ms. Gravelle's evidence that the parties made a habit of locking the man door, although the evidence is not entirely clear that it was actually locked on the date in question.

I say that because Mr. Gravelle had no recollection of closing it or locking it and could not say for sure that it was locked, while Ms. Gravelle testified that Mr. Gravelle actually exited the house through that door and while she could not say for sure that he locked it, they always did so. There was no evidence of any damage to the door. Based on all the evidence I conclude that the door was physically closed but was not locked.

- [10] The Gravelles arrived home from running errands some time around 6 pm, when it was already dark outside. Ms. Gravelle was driving and Mr. Gravelle was in the passenger seat. As they approached their property they noted two or three people on the street, a short distance from their driveway, with a shopping cart. This was unusual and caught the attention of both Mr. Gravelle and Ms. Gravelle.
- [11] Ms. Gravelle further testified that she observed a second shopping cart, unaccompanied and empty, near the entrance to the driveway. Ms. Gravelle did not mention this in her police statement on the date of the incident. I mentioned earlier that the defence took issue with the reliability of some aspects of Ms. Gravelle's evidence. Ms. Gravelle admitted that when she came upon Mr. Gravelle inside the garage, as I will describe in somewhat more detail in a few moments, she panicked. She was fearful and in an elevated or excited state. She admitted that she was "not thinking clearly" as she approached and entered the garage. On this basis, defence counsel submits that the Court should be reluctant to accept the finer details of Ms. Gravelle's account. With respect to the shopping cart in particular, counsel points out that she did not mention it in her police statement. Mr. Gravelle did not give any evidence about a second shopping cart, nor did the police officer.
- [12] I have considered all of these arguments, but in the end I do not find them convincing. It is one thing for a witness to misperceive events while in a state of excitement or fear, or make assumptions about what they see. But even allowing for that I do not conclude that Ms. Gravelle simply misremembered or made up in her own mind that she saw an unattended shopping cart near the entrance to her driveway. I accept that she did not mention this in her initial statement but I consider that to be a mere oversight in recounting all the relevant details. Ms. Gravelle generally had a clear recollection of the night in question. As I say, even allowing that Ms. Gravelle's perception of some aspects of what occurred could be affected by her state of mind, I accept her evidence about seeing the unattended shopping cart near the base of the driveway.
- [13] To continue on with the narrative, as the Gravelle vehicle approached the house at the end of the driveway, Ms. Gravelle noted that the man door to the garage on the left side of the house was open. She pointed it out to Mr. Gravelle who also saw that the door was ajar.
- [14] Ms. Gravelle got out of the car and went to the garage. She pushed the door open and saw a person, later identified as Mr. Gregory-Allen, on the far end of the garage, about 15 feet or 15 steps away from the entrance, with his back facing her. There was one interior light on inside the garage, apparently activated by a motion sensor, although it was not well lit. Ms. Gravelle could see that Mr. Gregory-Allen was facing the work bench at the back of the

garage. Ms. Gravelle testified in chief that he appeared to be rummaging. When asked to describe in more detail what Mr. Gregory-Allen was doing, Ms. Gravelle explained that while she could not see his hands, she could see his arms and elbows moving back and forth in front of him. The area where Mr. Gregory-Allen was situated contained a shelf and a work table with tools on it.

- [15] Now, there is a potential logical inconsistency in Ms. Gravelle's evidence on this point in that she says that immediately upon pushing the door open she yelled out to Mr. Gregory-Allen to "get out" or words to that effect, and he froze. Of course, if it is true that Ms. Gravelle yelled at Mr. Gregory-Allen immediately and thereafter he froze, this would be hard to square with Ms. Gravelle's testimony that she saw Mr. Gregory-Allen rummaging or moving his hands around in the area of the bench in front of him. However, on the whole of Ms. Gravelle's evidence, I find that when she used the term "froze" she was describing an observation where before saying anything to Mr. Gregory-Allen she saw him moving his arms back and forth - to use Ms. Gravelle's term "rummaging" - and that when Ms. Gravelle yelled for him to get out, he reacted by freezing in place, that is, by ceasing to move. If Ms. Gravelle never saw Mr. Gregory-Allen in motion she would not have testified that he "froze", she would have stated that he did not respond. At another part of her cross-examination, Ms. Gravelle testified that she saw Mr. Gregory-Allen moving and apparently "looking through stuff", and then after Ms. Gravelle yelled out to him Mr. Gregory-Allen stopped moving. Thus while Ms. Gravelle did say that she called out to Mr. Gregory-Allen immediately upon entering the garage, I find on her evidence as a whole that she made observations of Mr. Gregory-Allen moving, rummaging as she put it, and then when she called out he stopped moving.
- [16] Again, continuing on with the narrative, there is the evidence of Mr. Gravelle that he got out of the passenger seat of his vehicle and followed Ms. Gravelle into the garage. When he got to the man door he could see the man later identified as Mr. Gregory-Allen at the back of the garage, about 10 to 12 feet away from Mr. Gravelle who had entered through the man door. Mr. Gregory-Allen started moving toward him. Mr. Gravelle stopped Mr. Gregory-Allen and pinned him against the wall with some wood. He explained how he leveraged a piece of wood against a shelf and used it to hold Mr. Gregory-Allen's hands down so that he was immobilized.
- [17] In cross-examination, Mr. Gravelle admitted that he struck Mr. Gregory-Allen over the head several times with a piece of wood in order to subdue him. Mr. Gravelle was not really able to account for how he hit Mr. Gregory-Allen in the back of the head if Mr. Gregory-Allen was facing him while walking toward him on his way to the man door. Mr. Gravelle testified that it was dark, that Mr. Gregory-Allen might have turned his torso, or that he could have somehow been facing Mr. Gregory-Allen's back when he struck him. Mr. Gravelle added that he could not recall the precise interaction. When it was put to Mr. Gravelle that he said in his police statement that he grabbed Mr. Gregory-Allen and threw him in the corner, Mr. Gravelle admitted saying this but did not adopt it as true. He maintained that he simply

pinned Mr. Gregory-Allen down with a piece of wood across his hands.

- [18] Now, at this point I should address the defence submission about the reliability of Mr. Gravelle's trial testimony. Mr. Gravelle was clearly angry and agitated when he gave his trial testimony. He referenced a prior incident in which members of his family had been victimized. In his police statement, he denied being fearful of Mr. Gregory-Allen during the encounter, and he adopted that assertion at trial. Mr. Gravelle also admitted in cross-examination that due to his injuries from a recent motorcycle accident he was using crutches, he was very likely heavily medicated on pain killers, and he was in a physically weakened state due to his prolonged convalescence. Further, Mr. Gravelle admitted that he was angry upon encountering Mr. Gregory-Allen as an intruder in his garage. Mr. Gravelle testified that it was quite dark inside the garage, and as noted a minute ago, he admitted that he could not really remember the precise interaction. He testified in cross that Mr. Gregory-Allen had a flashlight but admitted that he never mentioned that in his police statement. No flashlight was recovered from Mr. Gregory-Allen and no flashlight associated with Mr. Gregory-Allen was located or seized by the police at the scene.
- [19] I have taken all of this into account, and I agree with the defence that Mr. Gravelle was not really able to give a reliable account of his interactions with Mr. Gregory-Allen. Most notably, Mr. Gravelle could not say how he came to hit Mr. Gregory-Allen over the head twice with a piece of wood, though he clearly did, because Mr. Gregory-Allen had a head injury that led to a hospital visit and resulted in stitches. Further, Mr. Gravelle testified that he restrained Mr. Gregory-Allen by pinning his hands down on a table saw bench, but the evidence of both Ms. Gravelle and Cst. Bridgman was that Mr. Gravelle was restraining or holding Mr. Gregory-Allen down by pinning him to a sit-down lawnmower at the back of the garage. There is evidence, namely a photo taken by Cst. Bridgman at the hospital, that Mr. Gregory-Allen had injuries to his hands consistent with being restrained by being pinned down by the hands.
- [20] To return to Ms. Gravelle's evidence for a moment, her account was that after Mr. Gravelle entered the garage, he approached Mr. Gregory-Allen from behind. Mr. Gregory-Allen did not appear to react to Mr. Gravelle's approach. Mr. Gravelle put his hands on Mr. Gregory-Allen's back and by some process was able to pin Mr. Gregory-Allen down against the sit-down lawnmower, holding him there with his knees. Ms. Gravelle did not see Mr. Gravelle hit Mr. Gregory-Allen, although, as I have said a few minutes ago, that clearly happened. Ms. Gravelle conceded that she was further away from Mr. Gregory-Allen than Mr. Gravelle was during the struggle.
- [21] The evidence is clear that Mr. Gravelle held Mr. Gregory-Allen in place while Ms. Gravelle came and went from the garage three times: once while she called 911; a second time to deliver Mr. Gravelle's shotgun at his request; and a third time to bring Mr. Gravelle the shotgun shells. After Mr. Gravelle got the shotgun and the shells, he loaded it, while continuing to restrain Mr. Gregory-Allen. Mr. Gravelle further testified that while Mr. Gregory-Allen was being restrained, he was saying things like I am sorry. Mr. Gravelle

conceded in cross-exam that Mr. Gregory-Allen was whimpering and may have also said I am in the wrong place or I should not be here. Ms. Gravelle further testified that at one point she went outside the house and she believes one of the people on the street said something to her, which made her fearful so she went back inside, locked the door, and reported her concern about the goings on outside the house to the 911 dispatcher.

The Arrival of the Police

- [22] The only police witness to testify was Cst. Bridgman. Cst. Bridgman was on duty in full uniform on the evening of 12 November 2021 when she was dispatched to 2500 Spring Road, the Gravelle property. Cst. Bridgman arrived at the property within seconds of another officer, Cst. Wallace. Cst. Wallace entered the garage first. When Cst. Bridgman reached the garage, the overhead rolling door was open and Cst. Wallace was coming out with a shotgun, which he had obviously retrieved from Mr. Gravelle.
- [23] Cst. Bridgman entered the garage through the overhead door. She did not give evidence about how the overhead door was opened but I infer from all the evidence that Cst. Wallace must have opened it.
- [24] When Cst. Bridgman got inside the garage she saw a man later identified as Mr. Gravelle restraining a second man, later identified as the accused Mr. Gregory-Allen. Mr. Gravelle was restraining Mr. Gregory-Allen by pressing him up against a sit-down lawn mower at or near the rear right corner of the garage. Mr. Gregory-Allen had a sweater pulled up over his head and hands.
- [25] When Cst. Bridgman got into the garage Mr. Gravelle asked if he could leave while she arrested Mr. Gregory-Allen. After Mr. Gravelle left the garage, Cst. Bridgman took custody of Mr. Gregory-Allen and placed him under arrest. Cst. Bridgman was present when Mr. Gregory-Allen was searched incident to arrest. He was found in possession of a small canister of bear spray and nothing else of any note.
- [26] Cst. Bridgman gave a great deal of evidence relative to Mr. Gregory-Allen's state of sobriety. At the time of this incident she had been a police officer for some 2.5 years during which she had regular, more or less daily dealings with individuals under the influence of drugs and alcohol. I accept that Cst. Bridgman has sufficient experience in relation to this issue to be able to give a reliable lay opinion as to indicia of impairment by drugs and alcohol. (No objection was taken at trial to Cst. Bridgman's lay opinion evidence. This is unsurprising, because lay opinions on matters of ordinary human experience, such as impairment, can be admissible pursuant to *Graat v. The Queen*, [1982] 2 S.C.R. 819).
- [27] Cst. Bridgman's opinion was that, ranked on a scale of 1 to 10 where 1 is sober and 10 is a state of drug or alcohol induced unconsciousness, Mr. Gregory-Allen's initial state of sobriety was 4 out of 10. There is some evidence to support Cst. Bridgman's opinion that Mr. Gregory-Allen was impaired to some extent by drugs when she initially dealt with him. When asked questions about his Charter rights Mr. Gregory-Allen was responsive. I pause

here to note that the defence objected to the elicitation of the details without a voluntariness voir dire, but the parties agreed that Cst. Bridgman was permitted to give evidence about Mr. Gregory-Allen's alertness, apparent comprehension, and degree of responsiveness to the questions as descriptions of his physical state, independent of the content of his answers. To continue, all of this indicates that Mr. Gregory-Allen was not incoherent at the point when Cst. Bridgman first encountered him. However, Cst. Bridgman also noted that Mr. Gregory-Allen's movements were unusually slow, consistent with drug impairment. The officer further recorded in her incident notes, adopted as true during her trial testimony, that Mr. Gregory-Allen was slumped over, although he was not doubled over in what Cst. Bridgman would consider to be a classic drug stupor. When Cst. Bridgman advised Mr. Gregory-Allen of his Charter rights, in general Mr. Gregory-Allen was responsive and appeared able to follow, although Cst. Bridgman did have to put one of the Charter questions to Mr. Gregory-Allen twice and evidently never got a response to that query. Later, when Cst. Bridgman got Mr. Gregory-Allen into her police car and started driving him to the hospital to treat his head injury, he appeared to nod off in the back of the police vehicle. After being treated at the hospital, Mr. Gregory-Allen fell asleep on a hospital gurney. Cst. Bridgman opined that during the time she dealt with Mr. Gregory-Allen at the hospital, his level of impairment was 6 out of 10.

Mr. Gregory-Allen's Evidence

- [28] Mr. Gregory-Allen testified on his own behalf. He gave a brief account of his upbringing and personal circumstances. He had a difficult childhood and was in the foster care system at a young age. I will not give the details as they do not have a direct relevance to the present break and enter allegation.
- [29] Mr. Gregory-Allen gave evidence about his history of drug abuse and his rather lengthy criminal record. Mr. Gregory-Allen explained that the offences on his record were committed while he was in the throes of addiction. He said that during periods when he had been abusing drugs, he was willing to do what he had to do to get drugs, including engaging in criminal activity. His criminal record includes multiple convictions for fraud and other offences of dishonesty. Mr. Gregory-Allen explained that these offences were committed while he was under the influence of his addiction and that he had always admitted to and pleaded guilty to offences of which he was guilty. He has never pleaded guilty to an offence he could not remember committing at the time of his plea.
- [30] Mr. Gregory-Allen testified that in the three or four year period prior to the incident in question he had been living in Port Hardy, where he had a job, was in a relationship, and was sober. However, several months before the break and enter incident Mr. Gregory-Allen and his girlfriend broke up, which led Mr. Gregory-Allen back into drug use. For the two months or so prior to the break and enter incident Mr. Gregory-Allen had been using drugs quite heavily, in Port Hardy, although he was not using heroin that much because it was not easy to find in Port Hardy.

- [31] Moving closer in time to the break and enter incident, Mr. Gregory-Allen's evidence was that several weeks beforehand he accepted a ride from a friend, intending to travel from Port Hardy to Courtenay to get an appraisal on a diamond. The friend got into a fight with his partner who was also in the car, and they ended up stopping in Campbell River for a break. Basically, Mr. Gregory-Allen got left in Campbell River, with no ride to Courtenay or back to Port Hardy. He was still in the throes of drug use and started using more heroin, which was his drug of choice. At some point his wallet and his phone were stolen, so he was effectively stranded in Campbell River.
- [32] Mr. Gregory-Allen was in Campbell River for about six or eight weeks leading up to 12 November 2021. He was homeless. He was staying with a group of other homeless people in an encampment in the woods near the skate park, a short distance from downtown Campbell River. Someone gave him a tent which is where he slept.
- [33] Mr. Gregory-Allen testified in chief that over this time he was using drugs, heroin and methamphetamine, daily, and more or less constantly. In cross-examination, Mr. Gregory-Allen admitted that he was using about \$180 of heroin per day and about \$20 of methamphetamine per day. Mr. Gregory-Allen admitted that he would do what he had to do to get drugs, including committing criminal offences. In chief and in cross-examination he said he would sometimes sell drugs to get money to fund his own habit. He said in chief that he had a lengthy criminal record and admitted the copy of the criminal record tendered in evidence was accurate. It contains multiple convictions for offences of dishonesty such as fraud, personation with intent, and also property crimes. Mr. Gregory-Allen testified in chief that in the past, when he has been charged with an offence, he has always plead guilty. However, in this particular instance, speaking of the 12 November 2021 charge of break and enter for which he is now on trial, Mr. Gregory-Allen says he is not guilty for reasons that I will explain in more detail below.
- [34] Moving forward to the date of the incident, Mr. Gregory-Allen testified that he had become acquainted with a woman, Sarah, whom he had been spending more and more time with in the week or so leading up to 12 November 2021. They had discussed going to Vancouver together to sell drugs. On 12 November 2021, at around 4:30 pm (prior to dinner time) Sarah gave Mr. Gregory-Allen \$50 and asked him to go and buy yogurt with it. She wanted a particular brand that was only available at Superstore. Mr. Gregory-Allen testified that this was a kind of trust test that Sarah had given him, to see if he could be trusted with the \$50, to go and buy the yogurt rather than using the money for drugs.
- [35] Sarah instructed Mr. Gregory-Allen to get the yogurt and take it to her at her new apartment. She said it was a suite located at the back of a house on Spring Road. The house was at the end of a long driveway leading off of Spring Road. The house itself had a carport (in his testimony Mr. Gregory-Allen seemed to use the terms carport and attached garage interchangeably) and a door next to the carport which led to the back of the house. Sarah's instructions were to go through the door, to the back of the house, come out the other side and then turn right to reach the door to her suite.

- [36] Mr. Gregory-Allen went to Superstore, bought the yogurt, and then got a ride to a gas station which was a walking distance away from Spring Road. He then walked 10 or 15 minutes to Spring Road. When he got onto Spring Road a man drove up in a blue truck. Mr. Gregory-Allen did not know the man but the man stopped and said he would take the yogurt. Mr. Gregory-Allen assumed from this that it was Sarah's roommate. The man said thanks and gave Mr. Gregory-Allen a package of drugs, some heroin. Mr. Gregory-Allen said it was sort of like a reward or a gesture of good will by the man for running the errand at Sarah's request. Mr. Gregory-Allen said from his experience it looked to be about one to two points, or one to two tenths of a gram of heroin. Mr. Gregory-Allen says the man then drove off in the truck and he could not tell where he was going. Mr. Gregory-Allen was at that point preoccupied with the drugs and decided to smoke some right away. When later pressed on this in cross-examination Mr. Gregory-Allen appeared to concede that he must have used all of the drugs right away, at roadside. Mr. Gregory-Allen says his intention at that point was to continue on to Sarah's apartment because he intended to hang out with her and get high. However, the heroin was unexpectedly strong and Mr. Gregory-Allen claims that he got so high that he has no memory of what happened next.
- [37] Mr. Gregory-Allen testified that when he uses heroin sometimes he nods out. He can slump over while remaining physically conscious but not entirely coherent. He also said that when high on heroin he can still move and function but that he can be so high he will not remember what he was doing. Mr. Gregory-Allen testified in cross-examination that the drugs he got from the man in the truck were unexpectedly strong.
- [38] Mr. Gregory-Allen's evidence was that after getting and using the drugs, he has no recollection of anything up until the point of being inside what he called the carport, with someone hitting him in the back of the head. Mr. Gregory-Allen said at that point he was scared and did not know what was happening. He said something about it being a mistake or that he should not be there.
- [39] Mr. Gregory-Allen says his memory is then blank again up until he came to, briefly, in the back of what he assumes was the police vehicle. His next memory after that was waking up in the hospital, where someone gave him a sandwich and directed him to a nearby homeless shelter. His head injury had been treated with stitches. Mr. Gregory-Allen said that when he left the hospital it was still dark out and someone told him it was 1 am.
- [40] Mr. Gregory-Allen's testimony was that this kind of thing has never happened to him before, that is, blanking out and later being charged with an offence that he is alleged to have committed while he was high but that he could not remember. Mr. Gregory-Allen says in the past when he has been charged with an offence that he committed, he admitted his guilt, and plead guilty. He has never plead guilty to an offence that he did not, at the time of the plea, remember committing.

- [41] With respect to the 12 November 2021 incident, Mr. Gregory-Allen admits he was in the Gravelle's garage without authority, but claims he had no intent to commit any offence. He says his intention when he went onto Spring Road was to visit his friend Sarah at her apartment. He has no independent recollection of what happened after using the heroin but speculates that he must have gone into the man door next to the garage on the Gravelle property, thinking the house matched the description that Sarah had given him, and once inside, he must have nodded out from the heroin.
- [42] Crown counsel cross-examined Mr. Gregory-Allen at length. I am not going to go into all the questions, as I will address that in my analysis of Mr. Gregory-Allen's credibility under the framework set out in *R. v. W.D.* I will simply summarize the themes or key aspects of the cross-examination.
- [43] First, with respect to Mr. Gregory-Allen's criminal record, he admitted that he has multiple prior convictions for offences of dishonesty. He admitted that while in the throes of drug addiction he would do what he had to do, including committing criminal offences, to keep using drugs.
- [44] Second, Mr. Gregory-Allen was cross-examined at length about his evidence with respect to the trip from Port Hardy to Campbell River. I am not going to go into detail about that as I did not find the cross-examination on that issue to be particularly elucidating.
- [45] Third, Mr. Gregory-Allen was questioned about what he did and how he sustained himself during the six to eight week period when he was living in Campbell River, homeless, prior to 12 November 2021. As I said above, Mr. Gregory-Allen admitted that he was using some \$200 per day worth of drugs. To get money for drugs, Mr. Gregory-Allen would run errands or deliver things. He did not say so directly but I infer that this may well have involved trafficking of drugs. Later in cross-examination Mr. Gregory-Allen expressly stated that he would sometimes sell drugs himself, make a bit of money on the side, and use it to fund his own drug use. He also conceded the general point that he was in the throes of drug use and that he would do what he had to do to keep getting drugs.
- [46] Fourth, Mr. Gregory-Allen was cross-examined at length about the events leading up to him being in the Gravelle residence on 12 November 2021. Various aspects of his account that were said to be implausible were put to him. Among other things, it was put to Mr. Gregory-Allen that the description allegedly given to him by Sarah was incredibly generic and might well apply to any house on Spring Road. Mr. Gregory-Allen did not really have much of an answer other than to say that there were not many houses on Spring Road, he thought he could find the house in question, and he would know it when he saw it. Mr. Gregory-Allen was also questioned about the appearance of the man in the blue truck, agreeing that he had never seen the person before and simply guessed or inferred it was Sarah's roommate. When it was suggested to Mr. Gregory-Allen that exchanging roughly \$50 worth of yogurt for a package of heroin made no sense, Mr. Gregory-Allen tried to explain that it was not really an exchange of drugs for yogurt, it was someone helping him out with drugs after Mr.

Gregory-Allen had run an errand. Mr. Gregory-Allen was also questioned about where the truck went, why he did not get a ride with the man, and why he did not watch where the truck went to see where Sarah's house was. Mr. Gregory-Allen's only responses were that the man drove away too quickly, that he did not know where the man was going, and could not say whether the man was coming or going from Sarah's place.

- [47] Fifth and finally, Mr. Gregory-Allen was questioned about what happened inside the garage. He denied that he was rummaging although he conceded that on his account he had no independent recollection of what he did inside the garage. He speculated about what he might have been doing, namely that he might have gotten to the back of the garage and simply nodded out while in that location. When asked about details Mr. Gregory-Allen's response was that he could not remember.

Analysis

- [48] The Crown and defence are in agreement that with the exception of proof of intent to commit an indictable offence, all of the other elements of the offence of break and enter with intent contrary to s. 348(1)(d) of the Criminal Code have been proven. Identity is admitted. It is further admitted, and indeed it is undeniable in the circumstances, that Mr. Gregory-Allen was inside the Gravelle's attached garage without authority or permission, that this was part of the Gravelle residence, and that to get inside the residence Mr. Gregory-Allen would necessarily have had to go through the man door which would constitute break and enter within the meaning of the Criminal Code. The sole issue is whether the Crown has proven beyond a reasonable doubt that Mr. Gregory-Allen had the specific intent to commit an indictable offence inside the Gravelle residence.
- [49] As I have indicated, this is a matter of specific intent, not general intent. This is an elevated state of mind or elevated mental state requiring proof beyond a reasonable doubt that the accused had in mind the intention to commit an indictable offence. State of mind can be proven directly, through a statement or admission of the accused as to his state of mind, or it can be proven indirectly from evidence that would allow the court to infer that the accused had the requisite state of mind.
- [50] In this case, the Crown says that the obvious and only logical inference to be drawn from all of the evidence weighed together is that Mr. Gregory-Allen broke and entered into the Gravelle home with the intent to commit a theft. There are many circumstances that the Crown would rely upon to support that inference, but these include the fact that he was in the garage at night, at the back of the garage, and the evidence of Ms. Gravelle that Mr. Gregory-Allen was rummaging around, in an area where there were items of personal property like tools that could easily be stolen from the residence. The Crown also relies on the evidence of Ms. Gravelle that there was an empty, unattended shopping cart near the entrance to the Gravelle's driveway. The Crown says this evidence supports a logical inference that Mr. Gregory-Allen proceeded from the street to the residence and into the garage with the intention of taking property and carting it away. Now, the Crown

emphasizes that this is just one piece of the evidence against Mr. Gregory-Allen and need not or cannot be assessed in isolation. Taken alone it is not proof of intent, but taken together with all the other evidence it helps the Crown to meet its burden, says Crown counsel.

- [51] There is also a statutory presumption at play here, namely s. 348(2) of the Criminal Code, which provides that evidence that an accused broke and entered into a place is, in the absence of evidence to the contrary, proof that the accused broke and entered with intent to commit an indictable offence therein. The effect of s. 348(2) was aptly described in *R. v. Holland*, 2013 NBCA 69 at para. 11 to 13, where the court said this:
- [11] The presumption set out in s. 348(2) reflects the legal and logical relationship between the proven fact of Mr. Holland having broken and entered the victim's home and the inference that, as he had no right to be there, he must have done so with the intent to commit an offence. In the usual course of things, people have no business breaking and entering into a stranger's home, and it is logical to presume that, where one has done so, it is for an improper purpose. Of course, in some cases, there may be an innocent explanation. Thus, the legal effect of the presumption is that it is applied unless there is evidence to the contrary.
- [13] As Pigeon J. points out in *Proudlock*, the presumption, in what is now s. 348(2), is not one expressed in terms as to require the accused to "establish" or "prove" a given fact or excuse. All the accused has to do is raise a reasonable doubt. "If there is nothing in the evidence adduced by the Crown from which a reasonable doubt can arise, then the accused will necessarily have the burden of adducing evidence if he is to escape conviction. However, he will not have the burden of proving his innocence, it will be sufficient if, at the conclusion of the case on both sides, the trier of fact has a reasonable doubt" (p. 549).
- [52] And then there is a quote from *Proudlock*, which I will not read into the record as part of these reasons but which I bear in mind for the purposes of the analysis. Where the presumption arises, which it does in this case, there is a burden on the accused to point to or offer evidence to displace the presumption. The accused does not need to prove anything but simply identify evidence in the record, or offer evidence himself, that would displace the presumption. At the end of the day, the question will be whether a reasonable doubt arises on all the evidence before the court. But of course if nothing in the way of admissible evidence is offered to rebut the presumption, the Crown could rely on the presumption to satisfy this particular element of the offence, that is, proof that the accused intended to commit an indictable offence.

- [53] Ultimately, the Crown must prove beyond a reasonable doubt that Mr. Gregory-Allen had the intent to commit an indictable offence. The presumption in s. 348(2) is engaged and applies in the absence of evidence to the contrary. The burden is not an onerous one. The accused need not disprove intent. The accused need only point to evidence, either in the Crown's case itself or defence evidence, that could displace the presumption in the sense of raising a reasonable doubt.
- [54] In this particular case the defence says the evidence to the contrary comes from basically three sources. To be clear, this is really my assessment of the defence position rather than precisely how defence counsel put it. The three sources are as follows. First, there is the evidence of Cst. Bridgman that Mr. Gregory-Allen was in a state of impairment by drugs. Second, there is the evidence of Ms. Gravelle that Mr. Gregory-Allen was effectively unresponsive inside the garage, both when Ms. Gravelle yelled at him and when Mr. Gravelle approached him. Third, there is the evidence of Mr. Gregory-Allen himself, which is affirmative evidence that he had no intent to commit an offence inside the Gravelle residence. To be clear, Mr. Gregory-Allen has no direct evidence of his intent at the time he was inside the residence because he professes to have no independent recollection of what he was doing, but his evidence taken as a whole, if accepted or if it raises a reasonable doubt on the issue, is certainly evidence that his intent in going onto Spring Road and ultimately approaching any particular residence on that street was to go and visit a friend, not to commit a theft or any other indictable offence.
- [55] The case law reflects that while voluntary consumption of alcohol or drugs cannot negate intent to commit a general intent offence, impairment by alcohol or drugs can raise or contribute to a reasonable doubt in relation to a mental element requiring proof of specific intent. Break and enter with intent to commit an indictable offence under s. 348(1) is a specific intent offence. So, voluntary intoxication or impairment by alcohol or drugs can be relevant to the question of this particular form of intent. Having discussed all this, the bottom line is that the accused testified in his own defence and he relies on his own testimony as a basis for displacing the statutory presumption and raising a reasonable doubt. In that context, I will proceed to consider Mr. Gregory-Allen's testimony under the three-step process articulated in *R. v. W.D.*
- [56] The first question is whether I believe Mr. Gregory-Allen's testimony that he had no intent to commit an indictable offence, because his only intention in going into any house on Spring Road was to visit his friend Sarah. I can say there are some aspects of Mr. Gregory-Allen's testimony that I accept without difficulty, in terms of his personal background, his struggles with substance abuse, his recent living situation in Port Hardy, the breakup with his girlfriend, his relapse, and the circumstances in which he found himself effectively stranded in Campbell River, ultimately devolving into using heroin and methamphetamine on a daily basis.

- [57] The key question is whether I accept Mr. Gregory-Allen's account of his own actions in the time frame leading up to his being found inside the Gravelle residence. I must say that I do not accept his evidence. Except for the independent evidence of impairment by drugs (principally the testimony of Cst. Bridgman), there is no independent evidence to confirm or support Mr. Gregory-Allen's account of his actions. To be clear, there is no burden on the accused to call confirmatory evidence, but the fact is that in the absence of any such confirmatory evidence in the record, the Court is left to assess Mr. Gregory-Allen's account, in conjunction with the surrounding circumstances that are reflected in the other evidence. The Crown points out that Mr. Gregory-Allen's account is also convenient or self-serving in that Mr. Gregory-Allen simply claims to be unable to remember and thus unable to comment on many aspects of his conduct while inside the Gravelle residence. Of course, this is no reason for rejecting Mr. Gregory-Allen's testimony, but this did make it more difficult for the Crown to probe his account with meaningful cross-examination, at least in relation to the events inside the garage.
- [58] I can say that Mr. Gregory-Allen's account did not contain any glaring internal or external inconsistencies. His testimony was not directly contradicted by any independent evidence, except it does not fit with some aspects of the Crown's case which I will touch on in a moment.
- [59] There are reasons to be skeptical of Mr. Gregory-Allen's testimony based on his prior convictions for offences of dishonesty. However, the two principal reasons why I do not accept Mr. Gregory-Allen's account about the events of 12 November 2021 are that his story is so bizarre and irrational as to be unbelievable, and that it does not fit with some features of the Crown's case which I do accept. I will explain each of these two points in further detail.
- [60] First, I find that Mr. Gregory-Allen's story is so implausible as to make it unworthy of belief.
- [61] For one thing I find it highly implausible that Mr. Gregory-Allen's friend, Sarah, would invite him to her new apartment providing him with such a generic description or generic directions as to how to find it. Mr. Gregory-Allen claims that Sarah told him the house was on Spring Road, had a long driveway, and a carport with a door next to it, leading to her suite at the back. That description could fit any number of houses in a residential area. I accept that there were only 12 or so houses on Spring Road and that it was not a long road. However, even if Sarah did not know the address, I find it hard to believe that Mr. Gregory-Allen would not have obtained at least some more identifying features, such as which side of the street the house was located on, or what color the house was, or even roughly how far into the block or how many houses from the end of the street it was. I find Mr. Gregory-Allen's response that he would know the house when he saw it to be glib and unconvincing.
- [62] An even more implausible aspect of Mr. Gregory-Allen's account has to do with the person who pulled up in the truck. The person, whom Mr. Gregory-Allen claims to have never met before, evidently collected the yogurt (worth \$50, which Sarah had already paid for) and

then gave Mr. Gregory-Allen some \$25 or \$30 worth of drugs. Mr. Gregory-Allen claims that when that happened, even though he surmised that the person was Sarah's roommate and the encounter was actually on Spring Road where he was intending to find Sarah's apartment, Mr. Gregory-Allen did not ask the man to take him to the apartment, or even ask him to point it out to him. Mr. Gregory-Allen says he did not have time to do that because the person just gave him the drugs and drove off but I do not accept that as credible. I just do not believe it. If the person had time enough to obtain the yogurt from Mr. Gregory-Allen, exchange some words with him, and provide Mr. Gregory-Allen (whom he had evidently never met before) with a package of drugs, there would have been time for Mr. Gregory-Allen to ask for a ride, or ask where Sarah's apartment was. None of that happened. I find the story to be contrived.

- [63] Second, as noted I find that Mr. Gregory-Allen's account does not fit with several aspects of the Crown's case. One particular feature of the Crown's case that is not addressed in Mr. Gregory-Allen's account is Ms. Gravelle's observation of Mr. Gregory-Allen at the back of the garage, rummaging around on a table or work bench that contained tools. Mr. Gregory-Allen claimed to be unable to give any direct evidence about this because he was under the influence of drugs, but if it is true that Mr. Gregory-Allen was in a drug stupor and either looking for a back door or nodding out from heroin use, he would not have been rummaging the way Ms. Gravelle described it. Defence counsel suggested that Ms. Gravelle's testimony on this point may not be reliable, but I do not agree. Ms. Gravelle had a clear recollection and was able to recount the particular movements she observed. This does not strike me as the kind of evidence that Ms. Gravelle might have reconstructed or pieced together in her own mind after the fact. It is not a question of perception that Ms. Gravelle was trying to piece together but rather a specific observation of Mr. Gregory-Allen's actions.
- [64] The other aspect of the Crown evidence that Mr. Gregory-Allen's testimony does not address is the unattended shopping cart that Ms. Gravelle observed near the start of the driveway to the Gravelle residence. Again, I have considered the arguments about the reliability of Ms. Gravelle's account but they do not cause me to question the accuracy of Ms. Gravelle's evidence on this point. It is again not a matter of perception or reconstruction but rather a specific observation of a rather straightforward sort. I take into account that there was no other Crown evidence about an unattended shopping cart but again that does not cause me to doubt the accuracy of Ms. Gravelle's observation. Now, I should say that the shopping cart of itself would not be enough to reject Mr. Gregory-Allen's account but I certainly factor Ms. Gravelle's evidence on this point into my overall conclusion that I do not find Mr. Gregory-Allen's evidence credible enough to accept it as true.
- [65] That brings me to the second stage of the W.D. analysis, where I must consider whether, even if I do not believe Mr. Gregory-Allen's testimony, it nevertheless raises a reasonable doubt. I find that Mr. Gregory-Allen's evidence does not in fact raise a reasonable doubt either on its own or in conjunction with all the other evidence. I say that because Mr. Gregory-Allen's story about what happened on the afternoon and into the early evening of 12

November 2021 is simply too bizarre and implausible to create a reasonable doubt in my mind. I can appreciate that people do not always act rationally and that human behaviour is not always logical. I am not judging Mr. Gregory-Allen's behaviour against a standard of how a stereotypical person of any description would behave. Rather, my finding is that the particular account given by Mr. Gregory-Allen is implausible to the point where I do not believe it and it does not leave me with a reasonable doubt. In short, I reject Mr. Gregory-Allen's testimony that he ended up in the garage of the Gravelle residence while trying to find his friend's apartment, while in a drug stupor or state of drug impairment as he described, for the reasons I have already listed above. I can accept that Mr. Gregory-Allen was under the influence of drugs, but not in the circumstances or to the extent that he claimed in his testimony.

- [66] I turn to the final stage of the W.D. analysis. The question is whether, on all the evidence, I am satisfied beyond a reasonable doubt that Mr. Gregory-Allen was inside the Gravelle residence with the intent to commit an indictable offence. There is the statutory presumption arising from Mr. Gregory-Allen's breaking into a private residence. I have rejected Mr. Gregory-Allen's testimony and I find that it does not displace the presumption. I must go on to consider whether, even without considering that evidence, there is any evidentiary basis in the record for displacing the presumption.
- [67] The defence points to the evidence of intoxication or impairment by drugs. There is certainly some evidence from Cst. Bridgman that Mr. Gregory-Allen was under the influence of drugs. This includes the evidence of him being slumped over at various points, evidence that his movements were slow, some evidence that he did not respond to at least one of the Charter questions that was put to him, and evidence that he nodded off in the car and again in the hospital. I also accept that Cst. Bridgman had sufficient experience in dealing with signs of drug impairment to give an informed lay opinion on that question. On the other hand, Cst. Bridgman testified that Mr. Gregory-Allen was able to hear and respond to various questions. There is also the fact that Mr. Gregory-Allen was found all the way at the back of the garage. Further, there is Ms. Gravelle's testimony that when she saw Mr. Gregory-Allen inside the garage, his arms and shoulders were moving in a manner consistent with rummaging and that when she called out to him, he "froze". In my view that evidence is all consistent with the behaviour of a person who was coherent and in control of his motor functions. The evidence of impairment does not displace the presumption or otherwise raise a reasonable doubt in my mind as to Mr. Gregory-Allen's intent.
- [68] I have considered the case cited by defence counsel, *R. v. Campbell* (1974), 17 C.C.C. (2d) 320 (Ont. C.A.), but I consider it to be factually distinguishable. In that case the trial judge, while rejecting the accused's claim about breaking into a private room to hide based on some overwhelming, drug-induced fear, nonetheless accepted the accused's testimony together with other evidence that he was "not acting in a rational manner" based on his consumption of drugs and alcohol in the hours preceding his arrest. However, having rejected the accused's principal claim about entering the room based on an irrational fear, the judge

concluded that he was guilty, relying on the statutory presumption. The Court of Appeal found that the trial judge was in error, because the finding that the accused was in an irrational state based on his consumption of alcohol and drugs was enough, in all the circumstances of that case including the nature of the break in, to displace the statutory presumption. Thus, the trial judge fell into error in his approach to the statutory presumption and the conviction was set aside and an acquittal entered on that basis. That is distinguishable from this case, where there is some evidence of drug impairment, but the evidence as a whole shows that Mr. Gregory-Allen was coherent, in control of his movements, and was behaving in a manner that was entirely consistent with an intent to commit an indictable offence after having broken into the Gravelle residence.

- [69] As I say, Mr. Gregory-Allen's conduct was entirely consistent with the action of someone who had broken into a private dwelling and was rummaging for things to steal. The presence of an unattended empty shopping cart near the base of the driveway is also consistent with and adds weight to this conclusion, although this fact alone would clearly not be enough to support a finding of intention to steal. I would say, considering all the circumstances together, and even without the benefit of the statutory presumption, I am satisfied beyond a reasonable doubt that Mr. Gregory-Allen was inside the Gravelle residence with the intent to commit an indictable offence, namely theft.
- [70] I have considered the competing inference or interpretation that when Ms. Gravelle yelled at Mr. Gregory-Allen to get out and Mr. Gregory-Allen did not move subsequently, this was because he was in a drug stupor or, to use the words of Mr. Gregory-Allen himself, he nodded out. That competing interpretation does not raise a reasonable doubt either on its own or in conjunction with all the other evidence, because in my view that interpretation does not fit properly with the evidence of Ms. Gravelle as I have found it. The gist of Ms. Gravelle's evidence was that Mr. Gregory-Allen was moving his arms or shoulders - rummaging - and then he stopped moving and froze when she yelled at him. Thus, it would not be fair to say that Mr. Gregory-Allen was non-responsive or did not respond, but rather his response was to stop his rummaging and to "freeze".
- [71] I must add that I have considered the evidence of Mr. Gravelle about his dealings with Mr. Gregory-Allen inside the garage, but in the end I am not satisfied that Mr. Gravelle's evidence is reliable enough to be part of my analysis. Mr. Gravelle testified that Mr. Gregory-Allen tried to walk past him and that is when Mr. Gravelle confronted him, but that testimony does not fit with the evidence of Ms. Gravelle as to the interaction between Mr. Gravelle and Mr. Gregory-Allen. Recall Ms. Gravelle's evidence was that Mr. Gravelle approached Mr. Gregory-Allen from behind as he was still in the back of the garage, and that was ultimately where he was located, at the back of the garage, when Cst. Bridgman entered. Mr. Gravelle admitted that he was quite possibly under the influence of drugs, and that he was angry and highly agitated. This, together with the inconsistency between his account and the account given by Ms. Gravelle causes me to question the reliability of Mr. Gravelle's evidence with respect to whether Mr. Gregory-Allen actually turned around and tried to walk out the door. Still,

none of this causes me to doubt the conclusion that Mr. Gregory-Allen was sober and alert enough to form the intent to commit theft, and that he was moving his arms and shoulders in a manner consistent with Ms. Gravelle's description of "rummaging" at the back of the garage.

- [72] Thus, even leaving aside this particular aspect of Mr. Gravelle's evidence, the rest of the evidence convinces me beyond a reasonable doubt that Mr. Gregory-Allen broke into the attached garage at the Gravelle residence with the intent to commit an indictable offence, namely to steal property. Under s. 334 of the Criminal Code theft is a hybrid offence and pursuant s. 34(1)(a) of the Interpretation Act it is deemed to be an indictable offence because it is an offence that may be prosecuted by indictment: *R. v. L.D.*, 2014 ABQB 31 at para. 162-163.
- [73] Mr. Gregory-Allen, please stand. For the reasons I have just given I find you guilty of the offence of break and enter into a residential dwelling with the intent to commit an indictable offence contrary to s. 348(1)(d) of the Criminal Code.

"Riley J."

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