
CANADA / JUDGMENT

R. v. Heatley

2014 BCSC 601

COURT

Supreme Court of British Columbia

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2014 BCSC 601 R. v. Heatley

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Heatley,

2014 BCSC 601

Date: 20140407

Docket: X076623

Registry: New Westminster

Regina

v.

Michael Heatley

Before: The Honourable Mr. Justice Josephson

Reasons for Judgment

Counsel for Crown:

J. Gahunia

Counsel for Accused:

M. Swartz

C. Bauman

Place and Date of Trial:

New Westminster, B.C.

March 3 - 6, 2014

March 10, 11, 13, 14, 2014

March 17, 20 and 21, 2014

Place and Date of Judgment:

New Westminster, B.C.

April 7, 2014

- [1] The accused is charged with seven counts of robbery of small businesses while his face was masked, contrary to ss. 344(1) and 351(2) of the Criminal Code, R.S.C. 1985, c. C-46. One robbery occurred May 8, one on August 26, two on August 29, one on August 30 and two on September 1, 2011. I will not refer to all the relevant evidence, but have considered it all.
- [2] The sole issue on all counts is that of identity. None of the witnesses purported to identify the accused as his face was masked. The Crown relies firstly on circumstantial evidence for some of the alleged offences. Secondly, the Crown relies on confessions made to a person in authority admitting to the alleged offences, as well as a letter of apology written by the accused to the victims of those offences. A letter written by the accused to Ms. Napier, his girlfriend and driver of the vehicle used to transport the accused to and from some of the robberies, is also in evidence. The circumstances in which that occurred were set out in the voir dire admitting that evidence. The defence theory is that the confessions are unreliable as the accused falsely confessed in order to protect Ms. Napier, who was initially in custody charged as a party to some of the offences. I have concluded that, even where that motive existed early after his arrest, the resulting confessions were nonetheless reliable.
- [3] An unusual aspect of this case is that the accused was under covert police surveillance on September 1, 2011, when the last two robberies occurred. That surveillance was lost during the actual commission of the robberies, but reacquired after the last robbery, at which time the accused and Ms. Napier were arrested. In a search of the vehicle they had been driving that day, items were seized which the Crown says tie the accused to certain robberies.
- [4] The defence fairly and properly acknowledges that, for the last robbery of the Fox and Hound Liquor Store on September 1, 2011, the Crown has its "best case" and chose not to make "strong submissions" in that regard. I will turn to that incident first.
- [5] The veracity of the witnesses and victims is not in issue. However, the reliability of their recollection is. With few exceptions, the contradictions in their evidence are relatively few and of no great import. It must be kept in mind that, for each robbery, the perpetrator acted quickly in what was a traumatic and stressful event for the witnesses. While there were no express threats made, potential violence is implicit in such circumstances.

Counts 13 and 14: Fox and Hound Liquor Store

- [6] The victim, Mr. Gerry, described the robbery, which took place on September 1, 2011 at approximately 9:15 p.m. His description of the masked perpetrator, as confirmed by the security video, is generally not inconsistent with that of the accused. As the perpetrator entered the premises, he briefly revealed to Mr. Gerry the end of what appeared to be a switchblade knife in his front hoody pocket. The perpetrator quickly removed the bills from two tills and poured the coins into a black bag before fleeing. Mr. Gerry was a credible witness. I accept his evidence regarding the flashing of the knife handle even though that action was not captured on the security video because of the timing and location where that act occurred.
- [7] When the accused was arrested, he was first seen at the trunk of his vehicle and then moved to the front right passenger door. On the floor of the front passenger floor was found a black Super Store grocery bag with coins and wrappers consistent with that used in the robbery. Boots found in the trunk of the vehicle were consistent with those seen in the security video. The boots were highly distinctive as they were covered with what appeared to be a dry, mud-like substance, and over the top left front of the left boot, a piece of that dried mud appears to have fallen off, leaving a distinct black area in the midst of the caked-on, mud-like substance. This exact pattern was revealed on the boots seized from the vehicle on arrest. I caution that there was no forensic evidence in that regard, but this is a distinct accidental pattern that forms a part of the circumstantial evidence as a whole. Less significantly, the flaps of the work boots found in the trunk were placed in the same manner as those in the security video.
- [8] In his post-arrest statement to Cpl. McCauley, the accused stated that he did stucco work, consistent with the dried, mud-like substance on the boots described by witnesses and seen on security video.
- [9] The accused began the inculpatory portion of his statement by saying, "[s]he didn't even see the money. I put it in the truck right away and when they pulled up, that's when I was, that's when I brought it up to the front". This evidence is consistent with the evidence of Cst. Savage that, on approaching the vehicle just prior to the arrest, the accused exited the passenger side of the vehicle, left the door open and then opened the trunk before returning to the passenger side. The accused stated he brought the bag of money from the trunk to count it.
- [10] Mr. Gerry gave evidence that the loss in the robbery would have been from \$400 to \$700, depending on the timing of the last money drop. When Cpl. McCauley asked how Ms. Napier could not have noticed that much money, the accused replied that: "[t]here's no way it was \$700", adding that he thought it was "maybe four".
- [11] The accused acknowledged that a portion of the money was used to acquire drugs for himself and Ms. Napier. Also he expressed a desire to get them a place to live.

- [12] When considered together, this circumstantial evidence and his post-arrest statements firmly establish the identity of the accused as the perpetrator of the robbery described by Mr. Gerry and I find him guilty of Counts 13 and 14.

Counts 1 and 2: Mother's Day Robbery of Langley Subway

- [13] On May 8, 2011, this store was robbed by a masked man who quickly entered and repeatedly demanded money. Employee Tanner Sigalet complied by providing between \$200 and \$300 in bills from the till, which the perpetrator placed in the front pocket of his hoody. He and the security video revealed a general description with no significant inconsistencies with the accused's general appearance. He described the perpetrator as wearing gloves, with one of them being white.
- [14] Ms. Napier's now 11 year old daughter, Faith Agnew, gave evidence. She recalled a trip in her mother's vehicle that day, with the accused in the front passenger seat, her mother in the driver's seat and her younger sister beside her. Prior to departing home, her mother asked her to look for a pair of black gloves from the "glove bag", but there were none.
- [15] She described having told her grandmother words to the effect that she thought her mom and her boyfriend robbed "a company" somewhere in Aldergrove. She described it as occurring "at night" on Mother's Day. Her mother stated that they were driving to the grocery store. They parked "at the back of a building". The accused departed the vehicle after they parked. She believed he went into "a shop that sells food". Her mother stated the accused was getting lunch for tomorrow "but he came back with no lunch." She believed it was a robbery,
- [b]ecause my mom's boyfriend, when he got back into the car, he pulled money out of his like, shirt- lots of money. And then my mom drove away really quickly.
- [16] She believed the robbed building had a yellow tarp. There was no evidence led as to whether this Subway had the yellow awning commonly seen for this business.
- [17] She estimated that the accused had been gone for five to ten minutes before he returned with the money in his pocket.
- [18] The incident frightened her and she did not reveal it to anyone until she came to live with her grandmother and felt it was then safe to do so.
- [19] In his statement to Cpl. McCauley, the accused stated: "[t]he Subway one was because the kids had nothing to eat for school or dinners ."
- [20] He added that it was in May and that he did not recall much about the incident, but that he obtained less than \$300 from the robbery. Prior to the robbery, he told Ms. Napier that he needed gloves to work on his buddy's vehicle.

- [21] Faith Agnew presented as a bright and well-spoken young witness. Wisely, her credibility was not challenged.
- [22] The evidence taken as a whole, including the statements of the accused to Cpl. McCauley, lead to only one rationale conclusion: that the accused was the perpetrator of this robbery. I find him guilty of Counts 1 and 2.

Counts 3 and 4: The Chilliwack Subway Robbery

- [23] This robbery occurred on August 26, 2011. The description of the masked perpetrator by victim Ms. Boulrier and customer Aaron Pete together with the security video footage provide a description not significantly inconsistent with the general appearance of the accused. The robbery was carried out in the same general fashion.
- [24] The perpetrator wore what Ms. Boulrier described as a "New York" baseball hat with pin stripes. A baseball hat found in the vehicle after the accused's arrest appears to be the same as that described and witnessed in the video, except that the "N" has been rotated to a "Z". While it appears to be the usual New York logo, only closer inspection reveals it to be a "Zoo York" logo, representing a skater brand.
- [25] Now 18 year old customer Aaron Pete was a regular customer of that Subway and attended that day with a female friend. When the perpetrator carried out the robbery, he and his friend moved from the drink machine to seats by the front door.
- [26] The perpetrator wore boots with apparent dried mud caked on as seen in the security video, consistent in appearance with the boots removed from Ms. Napier's vehicle trunk after the accused was arrested.
- [27] After the perpetrator departed with the money from the till, Mr. Pete followed him at a distance and described his route of travel. At one point, the perpetrator stopped to pick up a bill he had dropped. Mr. Pete stopped as well and believed the two had made eye contact. The perpetrator then entered a white vehicle that reminded Mr. Pete of a Hyundai. Mr. Pete testified that the perpetrator entered the rear driver's side of the vehicle and that another person was driving. He believed that person to be male because of short hair.
- [28] In his statement to Cpl. McCauley on September 6, 2011, the accused initiates a conversation about this incident and how it came to pass. He related his recall of two customers in the store and provided a description of what could only be Mr. Pete and his friend, including their youth, gender and movements. That recollection included Mr. Pete having followed him and being in a position to see him drop and retrieve a bill.
- [29] The confession is demonstrably reliable. Any possible motive to falsely confess in order to protect Ms. Napier has no air of reality.
- [30] The evidence as a whole leads to only one rational conclusion: that the accused was the perpetrator of this robbery. I find him guilty of Counts 3 and 4.

Counts 5 and 6: Port Moody Booster Juice

- [31] This robbery occurred on August 29, 2011. The victim, Ms. Milliard, described the perpetrator as a male approximately 6 feet in height. One young female employee described the perpetrator as 5' 7" in height. She was distraught and crying as a result of the robbery. I prefer the evidence of two other witnesses that he was 6' tall or more. He wore thick soled construction boots with apparent dried mud on them, consistent with the boots found in the truck of Ms. Napier's vehicle after the accused's arrest. He carried a folded, black reusable grocery bag, consistent with the bag found on the passenger-side floor of Ms. Napier's vehicle after the arrest. The perpetrator fled past the adjacent business, Aurifex Jewellers, and then out of view as he turned right down Capilano Road towards the 300 block.
- [32] While this store did not have a working security video, adjacent businesses did. This video footage reveals the perpetrator approaching and sitting on a public bench briefly before standing and crossing a lane behind him towards the Booster Juice store at the time the robbery occurred. A couple minutes later, it shows that same perpetrator running back in the direction from which he had arrived. He wore boots consistent with those found in the search of the vehicle after arrest.
- [33] Security video from Onni Group Construction from before and after the robbery reveal a vehicle consistent with that seized on arrest travelling in that area. It was consistent in size, shape and color, and had tinted rear windows, no front plate, and a green sticker to the left of the rear plates consistent with the "N" sticker observed that day on the vehicle containing the accused and Ms. Napier. The vehicle is first observed some 20 minutes before the robbery.
- [34] In his statement, the accused admitted his involvement in this robbery. In so doing, he provided details largely consistent with the evidence provided by the victim witnesses. He stated that he left the vehicle, came around the corner and sat on the bench. When asked what he was thinking when sitting on the bench, he replied: "[t]hat I fucking hate my life" and that "[w]ell, I pretty much had to do it." He stated that there were two girls who hesitated at first when he demanded money from the till. They relented when he repeated the demand. The only discrepancy of any significance is that, in repeating the demand, the accused said he added that he was not going to hurt them, something not in the two victims' evidence.
- [35] When asked where he put the money at the time of the robbery, he replied: "[t]hat fucking Superstore bag".
- [36] At the time of the interview, police did not have all the security video of businesses adjacent to the Booster Juice. When asked what he thought the video would reveal, he replied: "[p]retty much me running back to the car." When asked if he confessed for a sense of closure, the accused replied in the affirmative and added that he did not want to be dealing with the matter "ten years down the road".

[37] The evidence, taken as a whole, clearly and convincingly establishes beyond a reasonable doubt that the accused was the person who committed this robbery. I find him guilty of Counts 5 and 6.

Counts 7 and 8: Aldergrove Booster Juice

[38] This robbery also occurred on August 29, 2011, some four hours before the robbery set out in the prior two counts, and fits a similar pattern. The description of the perpetrator again generally fits that of the accused. The perpetrator wore work boots with apparent dried mud. Both victims described him wearing gardening gloves which were white with green rubber on the gripping surface, though one thought that gripping surface had poka dots. Both testified that they were similar in appearance to the gloves seized from Ms. Napier's vehicle after the accused's arrest. Security photographs reveal the perpetrator was wearing boots remarkably similar to those seized from Ms. Napier's vehicle, including the black spot on the left boot over the smaller toes.

[39] In his statement, towards the end of the interview, Cpl. McCauley drew his attention to this robbery as having occurred four hours before on the same day as the Port Moody robbery. The accused stated they were in that area so Ms. Napier could get her prescription methadone from a Shoppers Drug Mart in that area. When asked for details of this incident, the accused replied: "[l]ike I say, they're just kinda blurred together." It was pointed out to him that he was wearing the same "gear" in both robberies and a discussion of the color of the dried mud on the boots, the accused stated that, "I'm not trying to get out of it." Then the following conversation took place:

Q. No, no, no, I hear ya. What made ya do two that day? Was the first one not a good score?

A. Pretty much, yep.

Q. Do ya remember how much ya got?

A. Probably like less than a hundred bucks.

[40] The accused added: "[y]eah, I wouldn't have doin' fuckin' another one if I fuckin' got anything that amounted to anything, right." The accused responded affirmatively to the suggestion that he went on to Port Moody as he did not get much money in the first robbery.

[41] Again, this evidence, taken as a whole, leads to only one rationale conclusion: that the Crown has proven beyond a reasonable doubt that the accused was the perpetrator of this robbery. I find him guilty of Counts 7 and 8.

Counts 9 and 10: Langley Booster Juice

[42] This robbery occurred on August 30, 2011. It followed the usual pattern. The victims and a witness had different recollections of the bag used to carry the stolen money. Otherwise, the description of the perpetrator generally matches that of the accused. After fleeing, the perpetrator was seen entering a white vehicle parked in the loading bay area behind an IGA store. It had no front licence plate and was described as an older model import.

[43] In his statement, Cpl. McCauley drew the accused's attention to this incident and stated that he had been seen entering the white vehicle. The accused replied:

I don't really remember it that much to be honest but, uh, yeah, I pretty [sic] know I did it. I just don't really remember too many details about it there's so fuckin' many of them and the, they're pretty much all the same.

[44] When told that one witness described a gym bag being used, the accused replied: "[w]ell, it was probably a Superstore bag." When asked if it is always a Superstore bag, the accused replied that it was.

[45] While the evidence in support of Counts 9 and 10 is not as strong as the evidence of the earlier counts, the evidence in support of these counts, considered as a whole, leads to one rationale conclusion: that the evidence proves the identity of the accused in these two counts beyond a reasonable doubt. I find the accused guilty of these two counts.

Counts 11 and 12: The Surrey Subway

[46] This robbery occurred on September 1, 2011, shortly after 7:35 p.m., less than two hours before the robbery alleged in Counts 13 and 14. The witnesses' descriptions of the perpetrator's overall appearance are not inconsistent with that of the accused. He used a black reusable grocery bag, which one witness described as a Superstore bag. He had jeans with specks consistent with the jeans recovered from the trunk of Ms. Napier's vehicle on arrest. He wore construction boots or shoes. He ran out of the store and down 188th Street towards the Fraser Highway in a direction entirely consistent with the location Ms. Napier's vehicle was parked while under police surveillance. Shortly before the robbery, Ms. Napier's vehicle was seen parked in that location and a male, who could only have been the accused, was seen emerging from the passenger side of that vehicle and walking in the direction of this Subway store minutes before the robbery. The officer observing this was distracted briefly by another male he believed could have been the accused returning from the direction of the Subway. When he looked again shortly thereafter, Ms. Napier's vehicle had departed and was not seen again until shortly before the arrest.

[47] The identity of the accused in the passenger seat of the Napier vehicle was confirmed at the commencement of the surveillance, and officers had sufficient vehicle descriptors to follow that vehicle until it was lost when travelling through a red light across Fraser Highway shortly before the robbery.

[48] In his statement to Cpl. McCauley after his arrest, the following exchange took place:

A. So I pretty much covered everything in, except for the robberies, right?

Q. Yep

A. Umm, so pretty much what it is is I got Natasha to park in the cul-de-sac, um, and I told her I was going to meet a friend. She had no idea what I was doing because if she did have any idea what I was doing, she wouldn't have stayed with me. So and how I put everything in the trunk before I got back in the car so she didn't find out, she didn't know.

Q. What's everything?

A. The money, the boots, the jeans.

Q. Is that for the first one?

A. Yeah. Well, it was the same scenario for the second one, too.

Q. Let's speak specifically to each one, so you can't group things, they're two different things. So you got her to park in the cul-de-sac, that's for which one?

A. The Subway.

A. I have everything in the trunk, in the bag. And then put it on when I'm outta sight, outta view.

Q. What clothing items do you discard on the way back? On the first one, we're still talkin' about the first one.

A. I didn't discard anything on that one I kept it for the second one.

Q. How much money did ya get on the first one?

A. I dunno, couple of hundred bucks, it that.

[49] To conclude that the accused was lying about his involvement in this incident to better protect Ms. Napier would be speculative as there is no evidence of that. I find the confession to be reliable and consistent with the other circumstantial evidence, which would be sufficient for a conviction even in the absence of a confession.

[50] I find the accused guilty of Counts 11 and 12. They have been proven beyond a reasonable doubt.

"Josephson J."

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