
CANADA / JUDGMENT

R. v. Kinley

2020 BCSC 2248

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 2248 R. v. Kinley

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Kinley,

2020 BCSC 2248

Date: 20200911

Docket: 67004

Registry: Chilliwack

Regina

v.

Dean Evan Kinley

Before: The Honourable Madam Justice Wilkinson

Oral Reasons for Judgment

Counsel for the Crown:

H.B. Waldock

Counsel for the Accused:

P.S. McMurray

Place and Date of Trial:

Chilliwack, B.C.

August 31, September 1-4, 2020

Place and Date of Judgment:

Chilliwack, B.C.

September 11, 2020

Introduction

- [1] The accused Dean Evan Kinley is charged with one count of robbery of Cindy Pipe on or about October 10, 2017 at or near Chilliwack, British Columbia contrary to section 344(1)(b) of the Criminal Code, R.S.C. 1985, c. C-46.
- [2] At approximately 1:07 p.m. on October 10, 2017 a man entered the Bank of Nova Scotia branch located at the corner of Yale Road and Princess Avenue in Chilliwack, proceeded to a teller's wicket, told the teller he had something for her to read, opened up a folded piece of paper and handed her a note which read: "THIS IS A ROBBERY. DO NOT PUSH ALARM. GO GET MONEY NOW"
- [3] The teller asked the man if it was a joke and he said no and told her to hurry up. She pulled out cash from her wicket's cash drawer and handed him approximately \$2,500 in bills. The man took the money in his hands and walked out of the bank.
- [4] At approximately 1:12 p.m. a tone alert was broadcast on the R.C.M.P. local detachment radio regarding the robbery. At approximately 2:30 p.m. a call went out over the radio about a person causing a disturbance near Central Elementary School on Young Road. That person was Dean Kinley. He was observed by police officers who attended the scene behaving erratically. He was flailing his arms, wobbling as he appeared to have a hard time keeping his balance, rocking back and forth, mumbling and yelping, and spitting out food. He was sweating profusely. Mr. Kinley was arrested for causing a disturbance.
- [5] Mr. Kinley was taken to the local hospital by police who were concerned about his medical condition. Mr. Kinley's facial features and clothing had similarities to descriptions and security video of the robbery suspect. He was subsequently charged with committing the robbery.

Issues

- [6] The Court in this case must decide the following:
 - a) whether it was Mr. Kinley who robbed the bank;
 - b) if it was Mr. Kinley, whether the robbery was a robbery as it is defined in the Criminal Code; and
 - c) whether Mr. Kinley intended to commit the robbery.

Facts and Evidence

Identification

- [7] The Crown relies upon six kinds of evidence which they say tends to identify Mr. Kinley as the robber: clothing and jewellery found on or near Mr. Kinley when he was arrested; proximity to the bank when Mr. Kinley was found by police; identification of Mr. Kinley in court by the teller Cindy Pipe; identification of Mr. Kinley by Ms. Pipe in a photo-line up the day after the robbery; recognition of Mr. Kinley by Correctional Officer Dale Degagne; and handwriting similarity between the robbery note and handwritten complaint forms purportedly written by Mr. Kinley.
- [8] The video, and a number of still photo extracts, were provided by bank security personnel to the R.C.M.P. The video was taken from 7 security cameras located in the bank.
- [9] While "videotape evidence can present such very clear and convincing evidence of identification that triers of fact can use it as the sole basis for the identification of the accused before them as the perpetrator of the crime" in *R. v. Nikolovski*, [1996] 3 S.C.R. 1197 at para 23, the Crown does not ask me to do that. I am unable to do just that, although certain details I can identify.
- [10] In the video, a man, the robber, is seen wearing a green and orange baseball cap, a black bomber jacket with brass coloured snaps or buttons on the arm cuffs and lapels, a dark hoodie style sweatshirt with salt and pepper coloured lining with the hood sticking out and over the back of the jacket, a large silver watch with a square face on his left wrist, blue running shoes with white bottom liners and a two-toned yellow and blue bottom sole, blue jeans, and a blue bag slung on his back like a backpack, which appears to have something inside.
- [11] When he was arrested in the park Mr. Kinley was wearing a similar hoodie, watch, blue jeans, blue running shoes with a white bottom lining and yellow and blue two-toned soles, and on the ground approximately two to three feet away was a black leather bomber jacket with brass coloured snaps at the cuffs and lapels. He was also wearing a fisherman's style green cloth hat. These items were seized and admitted as evidence at the trial.
- [12] No backpack or baseball cap was found on or near him.
- [13] Mr. Kinley was found approximately 80 minutes after the robbery within a few blocks of the bank.
- [14] On the day after the robbery the bank teller Ms. Pipe picked Mr. Kinley's photo, taken the day after the robbery, out of a 10 picture photo-pack lineup after reviewing the set of pictures twice. None of the photos showed a man wearing a hat. When she placed her hand over the top the head of Mr. Kinley in the photo to replicate her view of the robber's face with a hat on, she identified Mr. Kinley as the robber. Ms. Pipe said she was 99% sure he was the robber. She testified that when the police arrived at her home that day to take her to the station she thought she was probably going to see a picture of the robber in photos. When she arrived at the police station Ms. Pipe was instructed not to guess when identifying the

robber, and was told "You are not obliged to make any identification, so you don't have to pick somebody." She responded: "Right. If they're not there, they're not there."

- [15] The defence questioned the fairness of the photo-pack since none of the other photos had all of the same facial features as Mr. Kinley. Some didn't have any grey or white facial hair which is what Ms. Pipe recalled seeing on the robber. Only Mr. Kinley's photo had a mustache, wide mouth and sunken cheeks similar to the robber's.
- [16] She identified Mr. Kinley in the dock at trial as the robber, noting the differences in his current appearance from that in the photo.
- [17] As the defence pointed out, Ms. Pipe's encounter with the robber lasted approximately 10-15 seconds. During that time she looked away and focussed on retrieving the money he demanded.
- [18] At trial she recalled that he was approximately her age, in his early 60's or late 50's, had a greyish or whitish mustache, had a "beautiful complexion", a very wide large mouth and she thought he didn't have any teeth. He was wearing a baseball cap and she could not see his hair. She testified that at the time of the robbery she thought he was wearing a dark blue bomber jacket. The video, however, clearly shows a black jacket. However, dark blue and black can look similar.
- [19] The defence submits that Mr. Kinley, despite Ms. Pipe's assertion regarding the photo and Mr. Kinley's appearance in court, does not have a beautiful complexion. This may be a case of beauty being in the eye of the beholder. The robber's complexion clearly stood out to Ms. Pipe, and she recognised the same complexion in Mr. Kinley.
- [20] Mr. Degagne's evidence was ruled admissible following a voir dire. He confirmed that he initially recognised Mr. Kinley from stills taken from the video and circulated to staff in the correctional centre where he worked. He was the unit officer from approximately June 2016 to January 2017 in Mr. Kinley's unit, the India Unit, and a prowler officer in the correctional centre where Mr. Kinley was an inmate. During that time he had numerous encounters and conversations with Mr. Kinley in the medication line and in dealings with Mr. Kinley as the unit inmate representative. He testified that he did not need to see Mr. Kinley's photo identification in the medication line at the correctional centre, which would normally be required, because he recognised him.
- [21] On October 11, 2017 he and other correctional staff were sent still photos taken from the video by the police to inquire whether anyone recognised the man in the photos. The request noted he might have been an inmate in the past couple of years. Staff were instructed not to discuss their thoughts about who the suspect was prior to viewing the photos. Mr. Degagne recognised Mr. Kinley in the photos by his body shape, facial features and stance at the wicket where he had leaned in with crossed arms. He did not remember his name at first, but did remember that he was the unit representative of the India Unit. A colleague gave him the name of the unit representative at the time and Mr. Degagne

confirmed the name of Mr. Kinley when he checked his log records. His colleague then looked at the photos and they discussed the identification of the suspect. Mr. Degagne did not change his mind.

- [22] He testified that he liked Mr. Kinley, and that he was reasonable to deal with.
- [23] He later saw the video at the preliminary inquiry and at trial. At trial he testified that the video confirmed his belief that it was Mr. Kinley shown in the footage and stills. He recognised Mr. Kinley's gait from the video as he observed that the robber stepped heavier on one foot and "lilted" by shifting his body weight as he approached the teller. He recognised the robber's approach to the teller and stance at the wicket as the same behaviour of shifting of the body he observed in Mr. Kinley when dealing with him in India Unit. He testified that Mr. Kinley's right side of his mouth drooped slightly and he recognised that feature in the robber. He felt like Mr. Kinley may have had dentures, and recognised the hollow cheek features of his face. At trial Mr. Degagne identified Mr. Kinley in the dock, despite changes in his current appearance which were noted. He was certain that Mr. Kinley was the robber.
- [24] The defence argued that Mr. Degagne's credibility is questionable as he has a history of discipline when he was a correctional officer and is therefore overzealous and more likely to please. I do not find that Mr. Degagne's discipline impacts his credibility. He testified that he liked Mr. Kinley and that he was easy to deal with. Mr. Degagne no longer works for Corrections and I do not find that he has any reason to gain advantage through his identification testimony.
- [25] It is true that the still photographs are not of the highest quality. But they are of sufficient quality to show facial features such as cheeks and mouth and facial hair which to someone familiar with the subject enable them to recognise them. The video provides a better quality of image. Mr. Degagne had extended, repeated and close interaction with Mr. Kinley over a five to six month period, approximately nine months prior to the robbery and original identification.

Handwriting evidence

- [26] Six inmate complaint forms dated between October 24, 2017 and April 29, 2020 from two different pre-trial centres were admitted into evidence as being authentic inmate complaint forms received and processed by those centres. Each purports to be from Mr. Kinley. They each have Mr. Kinley's CS number and name and match up with times when he was an inmate in those centres. They are handwritten. All bear markedly similar handwriting and signatures. Some are fairly innocuous in content, and one is related to Mr. Kinley's known medication use.

- [27] Jonah Pearson and Ryan Byrne, correctional officers in the respective pre-trial centres, noted similarities in the handwriting between the notes. They each confirmed that they did not see who wrote the complaints. They were familiar with Mr. Kinley and both identified him in the dock. Mr. Pearson recalled discussing one of the complaints with Mr. Kinley. They testified to the complainant form handling process, and the fact that resolution is communicated back to the complainant.
- [28] Their testimony, along with my own review of the forms, confirms that as between the forms, the capital I's are written in the same style in most of the notes but not all. The number 7 is distinctly similar in all, with a few instances of it also being crossed. The capital D's are very similar. The capital and lower case Y are very distinct and similar with the tail going strongly backwards although one example contains this style and a straight down style in lower case. The way the E is formed, drawing an L first then cross bars, is distinct. I also note that the capital letter O and number zero are written similarly leaving a slight gap or curl at the top where the circle is completed.
- [29] On a balance of probabilities I find that the forms were written by Mr. Kinley. It is not plausible for them to have been written by another person impersonating Mr. Kinley from within two different pre-trial centres. They each contain his CS number which is unlikely to be known to other inmates, and even more unlikely to be known to inmates in different pre-trial centres. I heard testimony as well that inmates, except for during COVID-19, are not normally transferred between pre-trial centres with each other.
- [30] In comparing the complaint forms to the robbery note, there are many similarities between the letter T, one style of H, the letter I, but only in one of the forms, the A, both styles of R used in the note, the letter E, the distinctive Y, the O's and zero's are alike, as well as the single stroke styled G.
- [31] I am alert to the caution to trial judges to act with restraint when undergoing handwriting comparisons in *R. v. Flynn*, 2010 ONCA 424 at para. 14. The Crown does not ask me to conclude that Mr. Kinley definitively wrote the robbery note. They submit that finding there are marked similarities in the handwriting in the robbery note to the handwriting in the complaint forms will suffice when taken into consideration with the totality of the evidence.

Circumstantial evidence

- [32] It is an error to discard any item of proof merely because by itself it fails to prove guilt beyond a reasonable doubt. The strengths and weaknesses of the items of evidence may be considered individually, but proof is measured by the cumulative effect: *R. v. McKay*, 2017 SKCA 4.
- [33] The search for doubt in a circumstantial case invites speculation into possible innocent explanations for the evidence before the court. Such speculation is proper so long as it posits only plausible theories. This is described in *R. v. Villaroman*, 2016 SCC 33 as follows:

37 When assessing circumstantial evidence, the trier of fact should consider "other plausible theor[ies]" and "other reasonable possibilities" which are inconsistent with guilt: *R. v. Comba*, [1938] O.R. 200 (C.A.), at pp. 205 and 211, per Middleton J.A., *aff'd* [1938] S.C.R. 396; *R. v. Baigent*, 2013 BCCA 28, 335 B.C.A.C. 11, at para. 20; *R. v. Mitchell*, [2008] QCA 394 (AustLII), at para. 35. I agree with the appellant that the Crown thus may need to negative these reasonable possibilities, but certainly does not need to "negative every possible conjecture, no matter how irrational or fanciful, which might be consistent with the innocence of the accused": *R. v. Bagshaw*, [1972] S.C.R. 2, at p. 8. "Other plausible theories" or "other reasonable possibilities" must be based on logic and experience applied to the evidence or the absence of evidence, not on speculation.

38 Of course, the line between a "plausible theory" and "speculation" is not always easy to draw. But the basic question is whether the circumstantial evidence, viewed logically and in light of human experience, is reasonably capable of supporting an inference other than that the accused is guilty.

[34] In this case, it may very well be plausible that in Ms. Pipe's photo-pack identification, while Mr. Kinley clearly does have distinctive facial features as identified by Ms. Pipe, there could have been another man whose face is similar that she might mistake one for another. The photo-pack did not force Ms. Pipe to make a decision between two or more very similar photos. Furthermore, it is possible that this similar man was in the area of the bank, where Mr. Kinley was as well.

[35] However, Mr. Degagne, who is familiar with Mr. Kinley, also identified Mr. Kinley as being the robber as shown in the stills and video. This was based on his familiarity with Mr. Kinley's bearing, his distinctive drooping right side of the mouth and cheek line. He made his identification long before identifying him in a courtroom.

[36] Mr. Kinley was also wearing clothing very similar to that worn by the robber. The shoes are very distinctive, as is the salt and pepper lined hoodie. The jacket found beside him is also very similar to the one worn by the robber, as is the watch Mr. Kinley was wearing. While none of the robbers' clothing had visible logos or slogans, they are still identifiable as an outfit. He was not found wearing the baseball cap but was wearing a different hat. Nor was he found with the backpack. However, the cap and backpack are easily dropped, deposited or otherwise left and a hat is easily switched out, perhaps with a hat from the backpack.

[37] The handwriting similarities between the robbery note and the complaint forms are, as Crown submits, marked.

[38] Both Crown and defence caution me in my consideration of eyewitness identification evidence, as well as in court or dock identification, for good reason. It is well known that miscarriages of justice have occurred as a result of faulty reliance of this type of identification. The trier of fact must "be satisfied of both the honesty of the witness and the correctness of the identification" where relying solely on that evidence to prove identification: *R. v. Reitsma*, [1998] 1 S.C.R. 769, *rev'g* (1997), 97 B.C.A.C. 303. As well, where identification is only made in the dock or courtroom that evidence generally is to be given

little to no weight.

- [39] I do note that Ms. Pipe had a short encounter with the robber. It was a stressful time. She was honest in her testimony. She was not accurate about the colour of the jacket. The photo line-up only showed headshots, with no torso. The defence submits that Ms. Pipe only chose Mr. Kinley's photo since all the others were so different from him and easily discarded. My viewing of the other photos does not show them to be so disconnected to Ms. Pipe's description of the robber, but they do differ from Mr. Kinley in a number of ways. This identification preceded her in court identification of Mr. Kinley.
- [40] I do not reject the eyewitness identification evidence of Ms. Pipe outright as being unreliable. Like the circumstantial evidence in this case, I do not rely upon it solely in deciding whether Mr. Kinley was the robber.
- [41] This evidence, taken together with Mr. Degagne's photo and video recognition evidence, Mr. Kinley's proximity to the scene, the similarities in clothing found on or with Mr. Kinley, and Mr. Kinley's handwriting similarity with the robbery note, on its totality, viewed logically and in light of human experience, is not reasonably capable of supporting an inference other than that Mr. Kinley is the robber. I find that the Crown has proven beyond a reasonable doubt that Mr. Kinley is the robber.

Was the robbery a robbery under the Criminal Code?

- [42] Mr. Kinley is charged with committing a robbery contrary to s. 344(1)(b) of the Criminal Code. "Robbery" is defined in s. 343 of the Criminal Code:

343 Every one commits robbery who

- (a) steals, and for the purpose of extorting whatever is stolen or to prevent or overcome resistance to the stealing, uses violence or threats of violence to a person or property;
- (b) steals from any person and, at the time he steals or immediately before or immediately thereafter, wounds, beats, strikes or uses any personal violence to that person;
- (c) assaults any person with intent to steal from him; or
- (d) steals from any person while armed with an offensive weapon or imitation thereof.

344 (1) Every person who commits robbery is guilty of an indictable offence and liable

- (a) if a restricted firearm or prohibited firearm is used in the commission of the offence or if any firearm is used in the commission of the offence and the offence is committed for the benefit of, at the direction of, or in association with, a criminal organization, to imprisonment for life and to a minimum punishment of imprisonment for a term of
 - (i) in the case of a first offence, five years, and
 - (ii) in the case of a second or subsequent offence, seven years;

(a.1) in any other case where a firearm is used in the commission of the offence, to imprisonment for life and to a minimum punishment of imprisonment for a term of four years; and

(b) in any other case, to imprisonment for life.

[43] In *R. v. MacDonald* (1981), 54 C.C.C. (2d) 415 (Man. C.A.) the Court found that the accused committed a robbery by presenting a note to a pharmacist that said "this is a hold-up" and "I want morphine". An implicit threat of violence suffices. In *R. v. Arsenault* (2006), 71 W.C.B. (2d) 80 (Ont. C.A.), the trial judge properly convicted the accused of robbery even though his note merely demanded money. The word robbery was not used. There was no weapon but he behaved in a manner that was serious. He wore a mask and communicated only by nodding and shaking his head.

[44] In *R. v. Hodson*, 2001 ABCA 111, the Court held that the court must take into consideration the whole scene of the alleged offence:

15 Was the offence carried out in an atmosphere of apprehension which was exploited by the thief, including, but not confined to, his spoken words? That was the test which was overlooked here. Was her employer's money given away by Ms. MacLennan under some sense of largesse? Or was it extracted from her because she was in fear as opposed to being merely importuned? The fact-finding must survey the whole scene before it is made. Only then can the Court truly characterize the actual offence that was committed.

[45] Where a demand for money reasonably causes a victim to fear, robbery will be made out: *R. v. Lecky* (2001), 157 C.C.C. (3d) 351, aff'd 2006 CanLII 34406 (Ont. C.A.).

[46] Ms. Pipe testified that bank policy requires tellers in purported robbery situations to relinquish the money even if the teller does not feel frightened. There is good reason for this policy, one such reason is to protect the health and safety of the bank employees. But Ms. Pipe did not hand over the money out of a sense of largesse or pity. She testified that she gave him the money because it was not enough to warrant to risk her life, and that bank policy is that when a threat is involved she is to give the money to the robber. She testified that there was definitely a threat involved. This offence took place in a bank. It was perfectly reasonable for her to perceive a threat in these circumstances and that is what she felt.

[47] I conclude that Ms. Pipe felt threatened and this was reasonable in the circumstances. It is clear the robbery took place at the time and location identified in the indictment. I am satisfied that the Crown has proven beyond a reasonable doubt that the offence was a robbery under s. 344(1)(b) of the Criminal Code.

Did Mr. Kinley intend to commit a robbery?

[48] Robbery is a specific intent offence and as such the Crown must prove beyond a reasonable doubt the Mr. Kinley intended to commit the crime of robbery. Evidence of intoxication can sometimes raise a reasonable doubt that a person intended to do what they did.

- [49] There is compelling evidence of Mr. Kinley being intoxicated to a very high degree some 80 minutes after the robbery. There is very slim, and unreliable evidence of intoxication at the time of the robbery.
- [50] The bank video shows Mr. Kinley walking at a normal pace, steadily to and from the teller's wicket. He stood steadily at the wicket, although he did lean on the counter. Ms. Pipe testified that he spoke clearly to her and she understood what he was saying. He did not appear to her to be sweating. When Ms. Pipe asked him if the robbery was a joke he clearly told her it was not and to hurry up. He reached for the money, took it when she handed it to him, and left.
- [51] There was a video from inside the police car ride to the hospital which the defence allowed was made voluntarily. In it Mr. Kinley is behaving erratically, humming, singing, spitting, and jerking his head. He is still sweating heavily. He is clearly still intoxicated. The police officer asks him if he is okay. Mr. Kinley says he is. When asked "When did you last use" Mr. Kinley clearly says it is Tuesday, so his last use was Sunday. Then his behaviour becomes erratic again.
- [52] It is not plausible that Mr. Kinley was intoxicated to any extent that would impair his ability to form the intention to commit the robbery at the time he committed it. In the bank he was lucid and direct in his demand to hand over the money and further instructions to the teller. He exhibited none of the clearly observed intoxicated behaviours which he exhibited 80 minutes later and for some time after that. Even when he was intoxicated in the police car, he was incredibly able to have moments of clarity when posed questions by the police. Although previously when found in the park he was not communicative.
- [53] The weight of the evidence of capacity far outweighs the probative value of the evidence of intoxication prior to, at the time of, and after the robbery. I find that Mr. Kinley was not intoxicated when he robbed the bank, or was not intoxicated to any extent which would impair his ability to intend the consequences of his actions there. I do not accept the defence's argument that Mr. Kinley was so intoxicated at the time of the robbery that he could not foresee that his actions would constitute a robbery. Mr. Kinley's conduct suggests a physical and manual dexterity that belies the requisite level of intoxication to negate intent for robbery.

Conclusion

- [54] Mr. Kinley, please stand.
- [55] For the reasons I have stated, I find you guilty of the charge of robbery contrary to s. 344(1) (b) of the Criminal Code.

"Wilkinson J."

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