

CANADA / JUDGMENT

R. v. Kizmann

2023 BCSC 799

COURT

Supreme Court of British Columbia

DECIDED

28 March 2023

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2023 BCSC 799 R. v. Kizmann

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Kizmann,

2023 BCSC 799

Date: 20230328

Docket: 70169-2

Registry: Chilliwack

Rex

v.

Jeffrey Michael Kizmann

Before: The Honourable Mr. Justice Thomas

Oral Reasons for Judgment

Counsel for the Crown:

S.J.K. Gill

Counsel for the Accused:

S.A.L. Williams

(as Agent for W. Jessop)

Place and Date of Trial/Hearing:

Chilliwack, B.C.

March 6-8 and 10, 2023

Place and Date of Judgment:

Chilliwack, B.C.

March 28, 2023

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[1] THE COURT: So I said I would provide my decision and my reasons today and I am ready to do so.

Facts

The theft

[2] On April 10, 2021, Mr. Van Geel had two chainsaws stolen from his property. He reported the theft to the police.

The sell back

[3] On April 12, 2021, he noticed one of the chainsaws, that he identified through distinctive markings, advertised for sale on Facebook Marketplace by a Jeff Kizmann for \$650. The chainsaw was worth approximately \$1,500.

The meet

[4] Mr. Van Geel contacted the seller at the advertised number and arranged to meet Mr. Kizmann at the Twin Rinks parking lot, between the rinks and the library, at 7:30 p.m. Shortly thereafter, Mr. Van Geel notified the police and advised them of the meet.

[5] The police advised Mr. Van Geel not to attend at Twin Rinks. Contrary to police advice, Mr. Van Geel's brother Michael and his wife attended at the Twin Rinks parking lot at some time prior to 7:30 p.m. in a black Explorer truck.

[6] The Van Geels parked the Explorer by backing into a spot on the library side of the Twin Rinks parking lot in a row of parking spaces bordering on a curb that separated the parking lot from a park and the library. There were few cars parked in that area of the parking lot.

The Crime Prevention Team

- [7] On April 12, 2021, at around 7:00 p.m., Constable Jeffrey, acting corporal of the Priority Target Crime Prevention Team, was contacted by Constable Schofield of the Property Crime Team and advised of the meet and related particulars.
- [8] There were four other constables on the team with Constable Jeffrey: Constables Mendela, Angus, Tielman, and Powell. The team uses unmarked vehicles that they are assigned at the start of their shift. The team is involved primarily in street drug crime, but also property crime. No one recalls if anything was in the trunk of their vehicles at the start of their shift.
- [9] Constable Jeffrey was partnered with Constable Mendela and shared a vehicle with him. Constables Angus, Tielman, and Powell had their own unmarked vehicles.
- [10] Constable Jeffrey directed Constables Angus, Tielman, and Powell to go to the meet to set up surveillance. She would obtain further particulars, and then she and Constable Mendela would meet them there.

The surveillance

- [11] When the constables arrived, the Van Geels were seated in the black Explorer, which was parked in a line of spaces close to the library and park. Constable Tielman was stationed closest to the black Explorer and was in his car. I deduce that he was in a parking row closer to Twin Rinks with a clear view of the Explorer.
- [12] Constable Angus was on the other side of the parking lot outside of her car. She did not have a direct view of the Explorer. Constable Powell was also some distance from the Explorer; exactly where is unclear.
- [13] Constable Jeffrey and Tielman arrived sometime later and parked some distance from the Explorer, close to the library and the park. The vehicle was "away from the scene" meaning away from where the Explorer was parked. The constables got out of their vehicle and conducted surveillance from the park, where they had a clear view of the back of the Explorer.

Additional information

- [14] At some point, the team received information that Mr. Kizmann would be late and would be driving a truck with a distinctive grill.
- [15] Constable Angus searched Facebook Marketplace on her phone during the surveillance and found a listing from Jeff Kizmann for the chainsaw. She took a screenshot of the ad and sent it to her colleagues, so they would know what the chainsaw looked like. The ad had been placed at 3:45 p.m. that day.

[16] In addition, she searched the Facebook Marketplace to see if any other items were for sale by Jeff Kizmann. He had listed a number of other items for sale on Facebook Marketplace, including a 2002 grey Honda Civic.

[17] She sent this information to her colleagues, so they would know that it was possible that Mr. Kizmann might arrive in the Honda Civic.

Arrival of Mr. Kizmann

[18] Constable Tielman observed a Honda Civic enter the parking lot and back into a spot close to the Explorer. He advised the team.

[19] Constable Mendela observed the Civic's trunk pop open and a man exit the Civic, walk to the back of the Civic, and remove a chainsaw from the trunk. The man was wearing a COVID-19 face mask.

[20] Constable Mendela ordered the team to close in and make the arrest.

[21] Constable Tielman drove his car and parked it facing the park, beside the driver's side door of the Honda Civic. This blocked the access to the driver's door of the Civic. He then got out of his car and moved up to the man with the chainsaw, and told him he was under arrest. He approached the man from the east side of the Honda Civic.

The arrest by Constable Mendela

[22] Shortly thereafter, Constable Mendela arrived from the west. He grabbed the man's arm and told him he was under arrest. The man dropped the chainsaw and complied with the instructions.

[23] The man pushed aside his COVID-19 mask and identified himself as Mr. Kizmann. Constable Mendela also recognized him as Mr. Kizmann. He was satisfied that the man was Mr. Kizmann by virtue of his appearance.

[24] Constable Mendela handcuffed Mr. Kizmann. Mr. Kizmann was prohibited from driving and carrying tools. Constable Mendela advised Mr. Kizmann he was under arrest for stolen property and driving while prohibited. He recorded the time and the details of the conversation in his notebook.

[25] Mr. Kizmann requested to speak with a lawyer named Chase Readily. Constable Mendela advised Mr. Kizmann he would immediately facilitate a call to the lawyer, but it would have to take place in the back of a police car where he would be observed, but where the conversation could not be overheard. Constable Mendela recorded that he told Mr. Kizmann this at 8:41 p.m.

[26] Constable Tielman observed the arrest, searched Mr. Kizmann, and then went to his car and called for a caged vehicle to attend to transport Mr. Kizmann to the cells.

- [27] At some point, Constable Mendela was advised by Constable Jeffrey that a significant amount of controlled drugs had been found in the Honda Civic. At that point, Constable Mendela advised Mr. Kizmann of the change in jeopardy and told him that he was being charged with possession of a controlled substance for purposes of trafficking. This occurred at 8:46 p.m.
- [28] Constable Mendela placed Mr. Kizmann in the back seat of the caged vehicle. Mr. Kizmann made his phone call to counsel from the back seat of the vehicle in the Twin Rinks parking lot at 8:53 p.m. After that, Mr. Kizmann was turned over to the corporal that drove the caged vehicle to take Mr. Kizmann to the Chilliwack department.
- [29] Constable Mendela was driven back to the detachment and then met with Mr. Kizmann in the cellblock. He then obtained a statement from Mr. Van Geel about the chainsaws and the Facebook Marketplace ad.

Location and actions of the other constables

- [30] There is some dispute as to what was seized from the Honda Civic, who removed various items from the Civic, and where the items were placed. Therefore, I will set out the evidence of the constables involved in the search of the Civic in some detail.

Constable Tielman

- [31] After Constable Tielman called for the caged vehicle, he began to search the Honda Civic at the trunk and the front passenger side of the vehicle. He cannot recall which he searched first.
- [32] In the trunk, he located numerous tools: a cloth kit containing wrenches, a number of cordless drills, and behind a speaker box he found a collapsible baton. He stated that it was possible that he put the baton on the roof of the vehicle so it would not be forgotten; i.e., he might have put the baton in a place where it could be identified. He agreed that generally you try to leave items where they are, so the exhibit officer can identify where the items were found.
- [33] On the front passenger side, there was a cellphone on the dash, a cellphone in the glove box, a screwdriver on the floor of the front passenger seat. He advised Constable Jeffrey of the location of the items, as she was the exhibit officer.
- [34] After he advised Constable Jeffrey of the location of the items he located, he returned to the detachment. He fingerprinted and photographed Mr. Kizmann at 23:50 at the detachment.

Constable Angus

- [35] After Mr. Kizmann was detained by Constable Mendela, Constable Angus got into her car and drove close to the Explorer, arriving when Mr. Kizmann was already in custody. She was advised that Mr. Kizmann had been arrested for stolen property, a driving prohibition, and for possession for purposes of trafficking. Constable Jeffrey asked her to assist in searching the Civic, which she did.
- [36] She searched the back seat behind the driver's seat, the front seat compartment, and the back seat behind the front passenger seat. At some point, Constables Powell and Jeffrey left to speak with the Van Geels.
- [37] Behind the passenger seat, she found a Dremel set and a case of watches, neither of which were seized.
- [38] Behind the front seat, she saw a red air intake and another car part.
- [39] In the front seat compartment, she found a pipe, foil with residue, a key, and some money: one \$10 bill, one \$20 bill, and some loose change which she did not count.
- [40] After she searched the Honda Civic, she took some pictures of the vehicle.
- [41] Constable Powell had given her a cellphone. Constable Angus put the money and the cellphone given to her by Constable Powell into the trunk of Constable Jeffrey's car. She would not have bagged the items, as she was not the exhibit officer; however, it is likely the money had been bagged as she would not have put it loose in Constable Jeffrey's trunk. She recalls that everyone put the seized items in the trunk of Constable Jeffrey's car.
- [42] She stood by the Honda Civic waiting for the tow truck, and then followed the tow truck back to the detachment. She gave the keys of the Civic to Constable Jeffrey after they had returned back to the department.

Constable Powell

- [43] Constable Powell arrived at the scene when Constables Jeffrey and Mendela were arresting Mr. Kizmann at the back of the Honda Civic. She immediately approached the Civic, took the keys out of the ignition, and put them on the roof of the Civic. She then checked the licence plate with dispatch. The vehicle was insured and registered to a Mr. Moore.
- [44] She then looked at the front passenger seat of the vehicle, and then went and assisted Constable Jeffrey with something in the parking lot. She does not recall what she assisted Constable Jeffrey with.
- [45] She then returned to the vehicle, removed some tools located in the trunk by Constable Tielman, removed a screwdriver from the floor of the front seat located by Constable Tielman, and removed a cellphone that was on the dashboard.

- [46] She gave all three items to Constable Angus. At some time, she was told Constable Jeffrey would be in charge of the seized items. Constable Powell took the three items to Constable Jeffrey's car and put them in the trunk. She does not recall whether they were bagged at that time or not. She also took the baton off the roof of the Civic and put it in the trunk of Constable Jeffrey's car. She does not know whether the baton had been bagged.
- [47] She then gave the keys of the Civic to the tow truck driver and followed the tow truck to the detachment. At the detachment, she assisted Constable Jeffrey with counting the cash that had been seized from the Honda Civic.

Constable Jeffrey

- [48] She observed the arrest of Mr. Kizmann. Once she was satisfied that the arrest went well, she asked the Van Geels to get back into their truck. After she ensured they were back in the Explorer, she proceeded to the Honda Civic to assist with the search. She may have told the Van Geels to move their vehicle away from the scene at this time, or she may have requested that they move their vehicle sometime after she had assisted with the search of the Honda Civic.
- [49] When she got back to the Honda Civic, Constables Powell and Angus were already searching the vehicle. Constable Tielman was not at the Civic at this time. Both doors of the Civic were open. She looked into the back seat on the driver's side and noticed a camouflaged-coloured fanny pack on the seat.
- [50] She placed the fanny pack on the hood of the car and looked through the pockets. She identified some plastic containers that appeared to have fentanyl in them. She suspended the search of the fanny pack, as she did not want things to fall or get lost from the hood. She told Constable Mendela about the drugs and requested that he arrest Mr. Kizmann for possession of a controlled substance.
- [51] She secured the items in the fanny pack and put the pack back on the back seat of the Honda Civic. A few minutes later, she noticed the black Explorer had moved but was still in the general area. She left the Civic and spoke with the Van Geels, while Constables Angus and Powell continued with the search. The Van Geels did not want to leave right away, as they wanted the chainsaw, but eventually she convinced them to leave.
- [52] When she returned to the Honda Civic, the search was still ongoing. At that time, Constable Jeffrey decided that she would be the exhibit custodian. She went to Constable Powell's vehicle and removed a Rubbermaid exhibit container from the trunk of her car. This container contained gloves, exhibit bags, the exhibit flow sheet, and other items necessary to seize the items.

Items seized

[53] The exhibit flow sheet was handwritten by Constable Jeffrey. Her standard practice is that once she removes an item, she immediately notes where it was removed from on the flow sheet. It is possible that she could have directed other officers to assist her while she was filling out the flow sheet.

[54] In this case, she wrote on the flow sheet the listed items from the Civic, bagged them, numbered them, and noted where she removed them from the vehicle. She did this for Items 1 to 6 and 9 at the scene. She noted when she received Items 7 and 8 at the detachment.

- Item 1 is a chainsaw, which was located in the hands of the accused;
- Item 2 was a Samsung cellphone, located on the dash of the Honda Civic;
- Item 3 was \$32.35, located in the cubby in the front dash of the Civic;
- Item 4, a silver key, located in the cubby in the front dash of the Civic;
- Item 5, a black extendable baton, located in the trunk of the Civic behind the speaker box;
- Item 6, a screwdriver and wrench set, located in the front passenger floor;
- Item 7 was a 2002 Honda Civic;
- Item 8 was the Honda Civic keys and fob; and
- Item 9 was an Under Armour fanny pack with contents, with three zipper pouches.

[55] Constable Jeffrey did not note the location of Item 9, the camouflaged- coloured fanny pack, but has a clear recollection that she found it in the back seat on the driver's side of the Civic. No pictures were taken documenting where the fanny pack was located and what other items were in the immediate vicinity of the fanny pack.

[56] Constable Angus advised her that the Honda Civic had been impounded, and provided her with the Honda Civic keys and fob back at the department.

[57] Constable Jeffrey had a clear recollection of finding the baton between the rear back seat and a speaker. She removed the baton by lowering the back seat forward and pulling it out. This was not in her notes.

[58] Both Constable Jeffrey and Constable Angus testified that there was additional drug paraphernalia located in the Honda Civic that was not seized. No details were provided of what this entailed, nor were notes made of these items.

[59] After Constable Jeffrey bagged and recorded Items 1 to 6 and 9 on the flow sheet, she then testified that they placed these items in the trunk of Constable Powell's vehicle. The items were in a container in the trunk. When she returned to the detachment, she put the container in the exhibit room and then had a meal.

[60] After her meal, she photographed the items and went through the fanny pack, identified what was in the pack, photographed them, obtained samples of the suspected drugs, and sent the samples to the lab, and also updated the flow sheet with respect to Items 7 and 8, the Honda and the keys to the Honda.

[61] The items were returned to the container and then the exhibit room.

Contents of the fanny pack

[62] The fanny pack had three pockets. The following items were seized and listed on the flow sheet:

1) The first pocket contained:

- a) \$21.35;
- b) a drug spoon and pipe with residue;
- c) eight small weights;
- d) one 22-calibre bullet.

2) The second pocket contained:

- a) a lottery ticket with the name Donna Dean, and the address, and what appeared to be credit card information;
- b) a quarter;
- c) an unmarked pill bottle containing 31.5 pills, which the lab determined to be hydromorphone;

3) The large pocket contained:

- a) \$60.00;
- b) one 22-calibre bullet;
- c) a small leather wallet with a Monteris gift card and a SIN card with the name Jeffrey Michael Kizmann on it;
- d) a glass pipe with residue;
- e) a mini scale with residue, the lab determined this residue to be cocaine, fentanyl, and caffeine;

- f) a zip-lock bag of a purple substance, which was determined to be 33.48 grams of fentanyl, paraflurofentanyl, benzodiazepine, and caffeine. No prints were found on the bag;
 - g) a blue bottle with white crystals in it, which was determined to be 29.03 grams of methamphetamine;
 - h) a three-layer stackable container:
 - i. the first layer contained 23.389 grams of three substances: a blue substance which was determined to be carfentanil, fentanyl, benzodiazepine, and caffeine; a purple substance which was determined to be carfentanil, fentanyl, and caffeine; and a white substance which was determined to be fentanyl and caffeine;
 - ii. the second layer contained 18.64 grams of a dark blue substance which was determined to be fentanyl, carfentanil, benzodiazepine, and caffeine; and
 - iii. the third layer which contained 7.43 grams of a purple substance which was determined to be fentanyl, carfentanil, benzodiazepine, and caffeine;
 - i) a seven-layer stackable container:
 - i. the red container contained 9.72 grams of what was determined to be fentanyl, carfentanil, benzodiazepine and caffeine;
 - ii. the pink container contained 4.12 grams of what was determined to be fentanyl, carfentanil, benzodiazepine, and caffeine;
 - iii. the yellow container contained 1.97 grams of fentanyl, carfentanil, benzodiazepine, and caffeine;
 - iv. the purple container contained 12.4 grams of what was determined to be fentanyl, carfentanil, benzodiazepine and caffeine;
 - v. the blue container contained 3.13 grams of what was determined to be fentanyl, benzodiazepine, and caffeine;
 - vi. the green container contained 0.24 grams of an undetermined substance; and
 - vii. the final container was empty.
- [63] There were a number of additional items contained in the fanny pack that were not seized or listed on the flow sheet.
- [64] The amount of substances seized totalled:
- 114 grams of fentanyl, consisting of 77 grams of carfentanil and 37 grams of fentanyl, with a value ranging from \$12,000 to \$22,840;
 - 29 grams of methamphetamine with a value ranging from \$500 to \$1,740; and
 - 31.5 pills of hydromorphone.

The 2002 Honda Civic

- [65] A CPIC inquiry was performed on the Honda Civic. The history of the vehicle indicated that it had been transferred to many registered owners and had been associated with criminal activity.
- [66] The Honda Civic was owned by Mr. Moore. A disclosure request indicated that Mr. Moore had been convicted of fraud over \$5,000 and identity theft in 2013.

The chainsaw

- [67] Mr. Van Geel provided an affidavit affirming that chainsaw with the distinctive markings on it that was seized from Mr. Kizmann was returned to him. He did not give anyone permission to take the chainsaw from his property, and Mr. Kizmann did not have permission to be in possession of the chainsaw.

Expert opinion evidence

- [68] An expert report was tendered by Constable Lewis, who reviewed the items seized and, based upon the items in the fanny pack, opined:
- the methamphetamine seized from the fanny pack was possessed for trafficking purposes at a street level (drug users) or at a mid-level of trafficking (to other drug traffickers);
 - the heroin/fentanyl seized from the fanny pack was possessed for trafficking purposes at a mid-trafficking level, or had not yet been broken into quantities suitable for trafficking at a street level; and
 - the quantities and other items in the fanny pack were not consistent with possession for personal usage.
- [69] He was not cross-examined on his opinions.

Issues

Continuity of evidence

- [70] The Crown must show beyond a reasonable doubt that the material seized from an accused is the same substance that is alleged in the indictment. Continuity of possession of the substance from the accused to the officer to the analyst is crucial. However, Canadian case law makes it clear that proof of continuity is not a legal requirement and that gaps in continuity are not necessarily fatal to the Crown's case, unless they raise a reasonable doubt about the exhibit's integrity.

- [71] In this case, there were four officers involved in searching and/or seizing exhibits from the Honda Civic. Neither Officer Angus or Powell were able to recall whether seized items had been bagged at the scene, and both officers testified that they put the seized items into the trunk of Constable Jeffrey's vehicle.
- [72] Constable Jeffrey testified that her standard procedure was to fill out the master exhibit flow sheet as she removed and bagged items from the vehicle. Once the items were bagged, they placed them in the back of Constable Powell's vehicle.
- [73] Although there are inconsistencies in the evidence with respect to which trunk the seized items were placed in, and Officer Angus and Powell could not recall if the seized items were bagged at the time they placed them in the trunk, in my view these issues are relatively minor and do not raise a reasonable doubt about the integrity of the exhibits, specifically the fact that they were seized from the Honda Civic.
- [74] However, I do not accept the Crown's assertion that the evidence establishes that the fanny pack was in plain view in the back seat of the Honda Civic. Although Constable Jeffrey testified to this, she had no notes of this fact, nor did she take a photograph of the location of the fanny pack with respect to the other items in the back seat. Constable Angus did not notice the fanny pack when she looked at the back seat, although she did notice a number of other items.
- [75] In *R. v. Whitton*, 2016 BCSC 1799, Justice MacKenzie noted that contemporaneous evidence through notes or photographs reduces the risk of police officers importing their general knowledge into their recollections of particulars of a particular evidence when giving evidence.
- [76] Given all of the circumstances, I am satisfied beyond a reasonable doubt that the items listed by Constable Jeffrey on the exhibit flow sheet, including the fanny pack and items contained therein, were seized from the Honda Civic. However, I am not satisfied that the fanny pack was in plain view in the back seat of the Honda Civic.

SIN card

- [77] The SIN card was not admitted into evidence as an authentic SIN card. It was entered into evidence pursuant to the documents-in-possession exception to the general rule against the admissibility of hearsay evidence.
- [78] The SIN card is admitted into evidence as circumstantial evidence upon which the court may infer the following:
- a) the SIN card belongs to the person named on the card;
 - b) the owner of the card placed the card in the large pouch of the fanny pack which contained a significant amount of the methamphetamine and fentanyl; and therefore

- c) the owner of the card was aware of the contents of fanny pack.

[79] The distinction between this use and use for the truth of contents is a difficult line to draw, but in my view this interpretation and use of the evidence is consistent with the analysis set out by the Court of Appeal in *R. v. Black*, 2014 BCCA 192, paras. 19-39.

Possession for purposes of trafficking

Legislative regime - s. 5(2) of the CDSA

[80] Counts 1 to 6 of the indictment consist of charges based on s. 5(2) of the Controlled Drugs and Substances Act, S.C. 1996, c. 19 [CDSA]. That section reads:

- (2) No person shall, for the purpose of trafficking, possess a substance included in Schedule I, II, III, IV or V.

[81] Testing confirmed that the substances pertaining to the six counts fall within the schedules.

[82] Possession must be proven pursuant to s. 4(3) of the Criminal Code, which is incorporated into s. 5(2) of the CDSA through s. 2.

Circumstantial evidence of possession

[83] The Crown relies on circumstantial evidence to prove constructive possession of the substances.

[84] The principles upon which a circumstantial case of possession must be established are set out in *R. v. Villaroman*, 2016 SCC 33 at paras. 30-38, which I summarize as follows:

- a) an inference of guilt drawn from circumstantial evidence should be the only reasonable inference that such evidence permits;
- b) each individual circumstance must not be examined in isolation, rather the court must consider all the evidence together and if, considering all of the evidence, there are reasonable inferences that can be drawn other than guilt, the evidence does not meet the standard of proof beyond a reasonable doubt;
- c) inferences consistent with innocence do not have to arise on proven facts, as a reasonable doubt may properly be based on either evidence or lack of evidence;
- d) when assessing circumstantial evidence, the trier should only consider plausible theories or reasonable possibilities that are inconsistent with guilt. Such theories or possibilities must be based on logic and experience applied to the evidence or the absence of the evidence, not on speculation;
- e) the line between plausibility 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 of the accused's guilt; and

- f) alternative inferences to guilt must be reasonable, not just possible. A reasonable doubt cannot arise from speculation or conjecture.

Most pertinent facts

[85] The following facts are the most pertinent within the factual matrix in considering the issue of constructive possession:

- a) Mr. Kizmann was attending a meeting to sell a used item for less than the item's value. In my view, this is a factor that favours Mr. Kizmann not having knowledge of the drugs in the fanny pack.
- b) Initially, Mr. Kizmann planned to drive a truck, but was late and arrived in a different vehicle, the Honda Civic. In my view, this is a factor that favours Mr. Kizmann not having knowledge of the drugs in the fanny pack.
- c) Mr. Kizmann was the sole occupant and driver of the Honda at the time of his arrest. In my view, this is a factor that favours Mr. Kizmann having knowledge of the drugs in the fanny pack.
- d) The Honda Civic was advertised for sale under Mr. Kizmann's Facebook Marketplace account, but the Honda was owned by a third party who had been convicted of identity theft over seven years ago. The Honda had a history of being used in illegal activity. In my view, this is a factor that favours Mr. Kizmann not having knowledge of the drugs in the fanny pack.
- e) The key seized from the ignition of the Honda was on a key ring containing a fob, a car key, and a small key. A Honda key on a key ring with a fob and several other keys was seized from the fanny pack. In my view this is a neutral factor.
- f) Drugs were contained in a fanny pack in the back seat of the Honda. There were lots of items in the car. The fanny pack was not in plain view. In my view, this is a factor that favours Mr. Kizmann not having knowledge of the drugs in the fanny pack.
- g) The drugs were of substantial value, \$12,500 to \$24,500. In my view, this is a factor that favours Mr. Kizmann having knowledge of the drugs.
- h) The fanny pack also contained a wallet with a SIN card with Mr. Kizmann's name on it. The wallet was located in a pouch with a significant amount of the methamphetamine and fentanyl. In a different pocket in the fanny pack, there was credit card information of a third party, not the registered owner of the Honda. In my view, this is a factor that favours Mr. Kizmann having knowledge of the drugs.
- i) The contents of the fanny pack were consistent with mid-level trafficking as opposed to street-level trafficking. In my view, given the circumstances of this case, this is a neutral factor.

- j) Mr. Kizmann displayed a calm demeanour after he recovered from the surprise of being arrested by the police. In my view, this is a factor that favours Mr. Kizmann not having knowledge of the drugs.

Inferences

[86] The Crown argues that the only reasonable explanation is that the accused was in possession of the substances in the fanny pack. In these circumstances, the primary facts supporting this inference are that:

- Mr. Kizmann was the sole driver and occupant of the vehicle containing the fanny pack;
- the drugs in the fanny pack were of substantial value; and
- the SIN card with Mr. Kizmann's name on it was found in a wallet in the fanny pack.

[87] Mr. Kizmann's counsel argues that the Crown is mistaken, as an exculpatory inference consistent with the facts of this case exists, namely that:

- Mr. Kizmann borrowed the Honda from the registered owner to sell the chainsaw; and
- the fanny pack belongs to Mr. Moore, the registered owner of the Honda Civic, who made a false document, the SIN card, for his own purposes, and placed it in the fanny pack which was left in the Civic, unbeknownst to Mr. Kizmann.

[88] Mr. Kizmann's counsel argues that, in this scenario, the primary circumstantial evidence suggesting Mr. Kizmann had knowledge of the substances in the fanny pack are his sole occupancy of the vehicle and the value of the drugs. Mr. Kizmann's counsel says this evidence is insufficient, in the circumstances of this case, to support a finding of knowledge of the substances beyond a reasonable doubt.

[89] The exculpatory explanation for the presence of the SIN card provided by Mr. Kizmann's counsel is that Mr. Moore, who had a conviction of identity theft seven years previously, made or stole the SIN card for his own purposes and put it in his fanny pack, which he then placed in the back seat of the Honda Civic.

[90] Considering this explanation within the context of the facts of this case, I am unable to accept that the proposed exculpatory explanation for the presence of the SIN card in the wallet contained in the fanny pack is reasonable. In my view, this explanation does not rise above speculation or conjecture.

[91] Nor can I conceive of an alternative reasonable exculpatory explanation or inference, an explanation or inference beyond mere speculation or conjecture, for the presence of the SIN card in the fanny pack within the factual circumstances of this case.

[92] When I consider all of the circumstantial evidence flowing from the pertinent facts set out and discussed in these reasons, I am satisfied that the Crown has established beyond a reasonable doubt that the accused had constructive possession of the substances in the fanny pack. In my view, no other reasonable inference can be drawn from the evidence.

Purposes of trafficking

[93] In my view, there is significant expert evidence supporting the proposition that Mr. Kizmann was in possession of the substances for purposes of trafficking. Based on this evidence and the pertinent facts summarized earlier, I conclude the Crown has established beyond a reasonable doubt that the substances were in his possession for purposes of trafficking.

Conclusions

[94] The Crown has established beyond a reasonable doubt that on or about April 12, 2021, within the jurisdiction of Chilliwack, Mr. Kizmann was in possession of a controlled substance for purposes of trafficking as set out in Counts 1 to 6 of the indictment.

Possession of property obtained by crime

[95] The chainsaw seized from Mr. Kizmann had been stolen two days earlier. The chainsaw was valued at \$1,300. Mr. Kizmann was attempting to sell it in the parking lot of Twin Rinks for \$650.

[96] The determinative factor is whether the Crown has established beyond a reasonable doubt that Mr. Kizmann had knowledge, or was aware, that the chainsaw had been stolen.

[97] The Crown relies upon the doctrine of recent possession and the circumstances of the sale.

[98] Mr. Kizmann's counsel says that two days is too long a period of time to satisfy the doctrine of recent possession and that I should not draw an inference of knowledge against Mr. Kizmann.

[99] Given the period of time between the theft and the sale, and the circumstances of the sale, I have no hesitation in finding that the evidence supports an inference, beyond a reasonable doubt, that Mr. Kizmann had knowledge of the fact that the chainsaw was stolen.

[100] The Crown has established beyond a reasonable doubt that on or about April 12, 2021, within the jurisdiction of Chilliwack, Mr. Kizmann was knowingly in possession of the chainsaw, as set out in Count 7 of the indictment.

Disposition

[101] For these reasons, I find Mr. Kizmann guilty of Counts 1 to 7 of the indictment.

"Thomas J."

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