

CANADA / JUDGMENT

## R. v. McDowell

2020 BCCA 52

COURT

British Columbia Court of Appeal

DECIDED

10 February 2020

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2020 BCCA 52 R. v. McDowell

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. McDowell,

2020 BCCA 52

Date: 20200210

Docket: CA45222

Between:

Regina

Respondent

And

Ronald George McDowell

Appellant

Before:

The Honourable Madam Justice Bennett

The Honourable Mr. Justice Willcock

The Honourable Mr. Justice Goepel

On appeal from: An order of the Provincial Court of British Columbia, dated  
February 1, 2016 (R. v. McDowell, Chilliwack Docket 62322-2-C).

Counsel for the Appellant:

C.L. Bauman

Counsel for the Respondent:

A. Adams

Place and Date of Hearing:

Vancouver, British Columbia

January 30, 2020

Place and Date of Judgment with

Written Reasons to Follow:

Vancouver, British Columbia

January 30, 2020

Place and Date of Written Reasons:

Vancouver, British Columbia

February 10, 2020

Written Reasons by:

The Honourable Madam Justice Bennett

Concurred in by:

The Honourable Mr. Justice Willcock

The Honourable Mr. Justice Goepel

Summary:

Mr. McDowell appeals from his convictions of breaking and entering, uttering threats, assault, and mischief. Held: Appeal allowed. The trial judge erred in relying on voir dire evidence that was not admitted into the trial proper to establish identity. The curative proviso does not apply. A new trial is ordered.

Reasons for Judgment of the Honourable Madam Justice Bennett:

[1] It is trite law that evidence heard on a voir dire is not evidence on the trial proper unless that evidence is either called again, or entered with the consent of counsel: *R. v. Gauthier*, [1977] 1 S.C.R. 441 at 452-453; *R. v. Vizslai*, 2012 BCCA 442 at para. 68. In this case, evidence called on the voir dire, including the in-court identification of the appellant, was not tendered on the trial proper. The judge, however, relied on that evidence when convicting the appellant. As a result, this Court ordered a new trial with reasons to follow. These are the reasons.

## Factual overview and decision below

- [2] Ronald McDowell was charged with breaking and entering with intent to commit an offence; assault with a weapon; uttering a threat to cause death or bodily harm; and possession of an incendiary device for the purpose of committing an offence under any of s. 433 (arson related offences) of the Criminal Code. Following a trial in provincial court, he was convicted of breaking and entering as charged; acquitted of assault with a weapon but convicted of the included offence of assault; and acquitted of possession of an incendiary device but convicted of mischief.
- [3] The incident from which the charges arose is described in detail below.
- [4] On April 3, 2014, a break and enter occurred on Fairfield Island in Chilliwack. The rural area is known to be quiet, with minimal traffic in the early morning hours.
- [5] Kylie Lanting was working late at night when she heard a loud vehicle near her home. She looked out of her window and saw a two-tone truck pull up and park outside her neighbour's house. Two men dressed in dark clothing got out of the truck and walked away from her. One appeared to be carrying something, like a "construction worker's lunchbox." She described one man as more slender than the other, and one of the two as wearing camouflage. Ms. Lanting called the police non-emergency line to report what she observed, as it was unusual to see such activity in her neighbourhood at that time. This call was received at 1:28:51 a.m.
- [6] About 15 minutes later she saw the men running back to the vehicle. They got into the truck and drove away. Ms. Lanting called the police again, at 1:45:14 a.m. Shortly afterwards, she heard an ambulance, and called the police once more, at 1:52:35 a.m.
- [7] Not far away, at around 1:30 a.m., Kristie Peters heard a pounding on the door of the house she was sharing with Roland Bouthillier and her young children. Mr. Bouthillier went to the door and heard someone say, "Roland, it's me. I need help." Mr. Bouthillier unlocked the door, and someone started pushing it in on him. Mr. Bouthillier told the individual on the other side that there were children in the house, to which a man replied, "I don't care. We're coming for the weed." Mr. Bouthillier had a medical marihuana grow-operation in his basement.
- [8] Ms. Peters tried to help Mr. Bouthillier hold the door closed. During the altercation, she could see a second person standing outside. She dialed 9-1-1. Her call was received at 1:40:14 a.m.

- [9] Mr. Bouthillier was sprayed in the face with what he thought was pepper spray. He could not hold the door any longer and fell to the ground. He believed the intruder may have been using a pry bar in the hinges of the door. In his evidence, Mr. Bouthillier said that two men subsequently entered the house and then turned around and ran. However, he agreed that when he gave his statement to the police, he did not recall anyone actually coming into the house.
- [10] After the two men ran down a set of stairs and into the driveway, Ms. Peters observed one of them pouring gasoline from a red jerry can onto a pole of the deck. He said "I'm going to light it up." Ms. Peters believed this was the same individual who tried to push his way into the house. Both men fled.
- [11] Ms. Peters was not able to see their faces, but said the men were wearing black clothes. For the first time in court, she described the individual who was pushing his way into the door as "taller, muscular and husky" and the second individual as shorter and more slender.
- [12] Mr. Bouthillier described the man pushing on the door as wearing a light or white coloured ball cap and a blue ski jacket. In court, he said it could have been a "denim jacket." The second man was wearing a hoodie and a mask.
- [13] Mr. Bouthillier refused to participate in viewing a line-up. His impression at the time was that he probably would not be able to recognize the intruders, since the incident happened so fast and he had been pepper sprayed in the eyes before seeing anyone's face.
- [14] Nonetheless, Mr. Bouthillier believed the man pushing on the door had a scruffy face and was a little bit taller than him. He said they came face to face for two seconds during the altercation. Mr. Bouthillier claimed to have also seen the same person around the court house on the day of the trial. In his examination in chief, Mr. Bouthillier identified Mr. McDowell in the court room as the man who had been pushing on the door.
- [15] The police stopped a loud, two-tone truck a short distance from Ms. Lanting's home at 2:03 a.m. Officer Horwood and Constable Premierl attended the scene.
- [16] At trial, as Officer Horwood began to describe the stopped vehicle, a voir dire was requested by the Crown. The following evidence was tendered within that proceeding: Officer Horwood identified Mr. McDowell as the driver of the truck; Officer Horwood identified Mr. McDowell in the court room; and Officer Horwood recalled a statement made by Mr. McDowell that he had just fueled his vehicle with a jerry can, he was living with his daughter on Quarry Road in Chilliwack (which was about two to three kilometres away), and he had been by the river.
- [17] After the voir dire evidence of Officer Horwood concluded, the officer identified the co-accused in the court room and stated that he was sitting beside Mr. McDowell.

- [18] Constable Premierl, who had stopped the vehicle, also testified. The voir dire re-commenced. Within the voir dire, Constable Premierl identified Mr. McDowell as the driver of the truck. He also identified Mr. McDowell in the court room.
- [19] At the end of Constable Premierl's evidence, the Crown asked that the ruling on the voir dire be postponed until Constable Hastie (formerly known as Constable Pillon) testified. Constable Hastie did not give any evidence in the voir dire.
- [20] The voir dire was not conducted as one separate hearing, but rather stopped and started as each witness was called. No ruling was given on it. Everyone involved appeared to have overlooked this critical point, as the within evidence was not repeated in the trial proper. Consequently, there was scant evidence that the man in the court room was in fact Mr. McDowell--the driver of the truck.
- [21] However, during the trial proper, a photograph of the driver of the vehicle taken by Officer Hastie was tendered. Officer Horwood said the photograph depicted the driver he arrested, who he described as wearing light camouflage type pants, and a blue denim jacket.
- [22] There was other circumstantial evidence. A red jerry can and a tire iron were found by a police dog (although the dog handler was not qualified to give some of the evidence provided, nothing turns on that oversight); gloves were seized from the passenger floor of the vehicle; and a jerry can gas cap or plug was found on the ground near the stopped truck, which fit the recovered jerry can. As well, both men purportedly smelled of gasoline.
- [23] Ultimately, the trial judge relied on the in-court voir dire evidence of the police to establish identity and convict Mr. McDowell.

## Issue on appeal

- [24] The only issue on appeal was whether the error made by the trial judge should result in a new trial, or whether the curative proviso in s. 686(1)(b)(iii) of the Criminal Code should be applied.

## Discussion

- [25] A voir dire and a trial proper are two separate proceedings. Evidence called on a voir dire cannot be used on the trial proper unless it is called again or all counsel consent to it being entered: Gauthier at 452-453. This did not happen, and the trial judge erred in law by relying on the voir dire evidence.
- [26] The Crown submits that the appeal should be dismissed because the verdict would have necessarily been the same. In making her argument, she relies on the combined effect of the following evidence: the identification of Mr. McDowell in the court room by the complainant; the photo taken of a person who Officer Horwood said was the driver of the truck; that when identifying the co-accused (who later pleaded guilty), Officer Horwood said, "[the passenger] is sitting by Mr. McDowell"; and what she characterizes as an admission by

trial counsel that Mr. McDowell was indeed the driver of the truck.

- [27] Mr. McDowell submits that a new trial should be ordered. He concedes that the body of evidence could have met the burden of establishing identity, had it been treated properly.
- [28] Where there is an error of law (unlike a miscarriage of justice or an unreasonable verdict), the Crown may rely on s. 686(1)(b)(iii) to sustain the conviction by showing that, notwithstanding the error, there is no substantial wrong or miscarriage of justice. In order to do this, the error must be either (1) so harmless or minor that it could not have had any impact on the verdict, or (2) not minor, but the evidence against the accused was so overwhelming that any other verdict would have been impossible: see *R. v. Van*, 2009 SCC 22 at para. 34. If proceeding under the second category, any possible measure of doubt concerning the strength of the Crown's case is afforded to the accused: *Van* at para. 36.
- [29] The law, in my view, is clear that first instance in-court identification is frail. In this regard, the trial judge properly found that the in-court identification of Mr. McDowell by Mr. Bouthillier was to be accorded little weight. It was made for the first time in the court house, after Mr. Bouthillier refused to participate in viewing a line-up. His prior exposure to the intruder's face was limited to the two seconds during the altercation at the door, and he had been sprayed in the face with a chemical. This could not on its own, as noted by the trial judge, support the conviction.
- [30] The difficulty with the other pieces of evidence relied on by the Crown to support the conviction is that their value is inherently tied to the evidence improperly tendered. For example, without the name and identification of Mr. McDowell elicited in the voir dire, there was no basis in the trial record to link the photograph of the driver of the truck to the accused sitting in the court room. The gap may have been partially remedied by an in-court identification by the trial judge, but this did not occur.
- [31] Rather, the evidence properly before the trial judge tying Mr. McDowell to the crime was limited. Without the evidence called in the voir dire, there was a reasonable possibility that the error could have affected the verdict. In my view, while the evidence relied on by the Crown is sufficient to overcome a no evidence motion, it cannot be said that the verdict would necessarily have been the same had the error not occurred. It follows that the curative proviso does not apply.

[32] I would therefore allow the appeal and order a new trial.

"The Honourable Madam Justice Bennett"

I AGREE:

"The Honourable Mr. Justice Willcock"

I AGREE:

"The Honourable Mr. Justice Goepel"

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Prepared on 26 October 2026 · Esheria