

CANADA / JUDGMENT

R. v. Medwedrich

2024 BCSC 1849

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Supreme Court of British Columbia

DECIDED

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2024 BCSC 1849 R. v. Medwedrich

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Medwedrich,

2024 BCSC 1849

Date: 20240223

Docket: 183771-2

Registry: Victoria

Rex

v.

Damien James Medwedrich

Restriction on publication: A publication ban has been imposed under s. 486.5(1) of the Criminal Code restricting the publication, broadcasting, or transmission in any way of any information that could identify the witness referred to in these Reasons as X (the "Witness") including the names of parents of the Witness. This publication ban applies indefinitely unless otherwise ordered.

Before: The Honourable Madam Justice V. Jackson

Ruling on Voir Dire #1

re: Admissibility of Cellphone Video

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Place and Date of Hearing:

Victoria, B.C.

February 13-16 and 21-22, 2024

Place and Date of Judgment:

Victoria, B.C.

February 23, 2024

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THE COURT: This decision was delivered in the form of oral reasons for judgment. The reasons have since been edited for publication without changing the substance.

INTRODUCTION

[1] The accused, Damien James Medwedrich, is charged with the first degree murder of Alex William Knatchbell on January 20, 2020, contrary to s. 235(1) of the Criminal Code, R.S.C. 1985, c. C-46. He has elected a judge alone trial.

- [2] The Crown seeks to tender an electronic copy of an electronic recording containing video and corresponding audio (the "Video") taken by its witness, X (the "Witness"), as part of its case. The Video was played during the voir dire, and a transcript of the audio was also filed as an exhibit in the voir dire. The Witness identified the Video and confirmed the accuracy of the transcript of the audio the Video captured. The Witness testified he had recorded the Video using his cellphone and he identified the two voices on the video: his--as the voice saying "who is that"--and Mr. Medwedrich--as the other and primary speaker on the Video. The witness testified that in the Video the Accused is talking to someone on a cellphone after the shooting with which he has been charged.

APPLICABLE LEGAL PRINCIPLES

Admissibility of Electronic Documents

- [3] Part 1 of the Canada Evidence Act, R.S.C. 1985, c. C-5 [CEA] applies to all criminal proceedings (s. 1). The electronic copy of the Video falls within the CEA's definition of an "electronic document" and smartphones fall within its definition of a "computer system": CEA, s. 31.8.
- [4] To be admissible, the CEA requires an electronic document to be authentic and to meet the common law "best evidence" rule: CEA, s. 31.1-31.2; *R. v. Hamdan*, 2017 BCSC 676 at para. 42. See also *R. v. Hirsch*, 2017 SKCA 14 at para. 18; *R. v. Ball*, 2019 BCCA 32 at paras. 65-80.
- [5] In this case the Defence concedes the Video meets those threshold requirements for admissibility under the CEA. That concession was reasonable given the evidence.
- [6] However, s. 31.1-31.2 of the CEA only serves as an instruction on the best evidence rule and authenticating electronic documents. The normal rules governing the admissibility of evidence, including the rule against the admission of hearsay and the exceptions to the hearsay rule, are not displaced or satisfied simply by a determination that an electronic document is admissible under the CEA. Those rules of evidence continue to apply.
- [7] Where, as here, the Crown seeks to rely on an out of court statement--being the words spoken by the Accused captured on the Video--not just as evidence that the words were said, but as evidence of the truth of those words, the analysis must continue by applying the rules of evidence that govern admissibility of evidence for that purpose.

Admissibility of Evidence

- [8] Evidence that is relevant to an issue at trial is admissible, as long as it is not subject to an exclusionary rule and the trial judge does not exercise their discretion to exclude it: *R. v. Schneider*, 2022 SCC 34 at para. 36; *R. v. Corbett*, [1988] 1 S.C.R. 670, 1988 CanLII 80 at paras. 99-101. Assessing the relevance of evidence is a contextual exercise and is done in the context of both the entire case in which the evidence is proffered and the positions of counsel: *R. v. Ansari*, 2015 ONCA 575 at para. 103, leave to appeal to SCC ref'd, 36740 (7 April

2016). The admissibility of all evidence is determined based on a three-part test requiring the judge to consider: (1) whether the evidence is relevant; (2) whether it is subject to an exclusionary rule; and (3) even if it is not subject to any exclusionary rule, whether to exercise their discretion to exclude it: *Schneider* at para. 36; *R. v. P.(R.)*, 58 C.C.C. (3d) 334, [1990] O.J. No. 3418 at para. 38 (H.C.J.).

- [9] The general rule is that preliminary questions, which are a condition for the admissibility of a piece of evidence, are for the trial judge in their capacity as the judge of the law rather than as the trier of fact: *R. v. Evans*, [1993] 3 S.C.R. 653, 1993 CanLII 86 at 664. Even on a judge alone trial, the judge must keep in mind their different functions at different stages of the process: *Evans* at 666.

Hearsay

- [10] Hearsay evidence is subject to an exclusionary rule and various exceptions: *Schneider* at para. 46. Hearsay evidence has three components: (1) a statement (or action) made outside of court by a declarant; (2) which a party seeks to adduce in court for the truth of its content; (3) without the ability of the other party to contemporaneously cross-examine the declarant (*Schneider* at para. 47).
- [11] Historically, hearsay evidence was excluded as a safeguard against inaccurate fact finding, based on the primary concerns that it might be unreliable and did not afford parties the ability to test its reliability by cross-examination: *Schneider* at para. 48. However, to overcome situations where the exclusion of hearsay impeded rather than furthered accurate fact finding, a number of exceptions to the exclusionary rule developed: *Schneider* at para. 49. In time, these exceptions became viewed as a labyrinth which, if rigidly applied, could also detract from accurate fact finding: *Schneider* at para. 49. To respond to those concerns, the law developed the "principled approach to hearsay", under which hearsay evidence remains presumptively inadmissible unless it falls under a recognized exception to the hearsay rule, which presumptively remain in place: *Schneider* at para. 50.

Party Admissions

- [12] Admissions by a party are admissible as a recognized exception to the hearsay rule. The party admissions exception is the same for both criminal and civil cases, subject to the special rules governing confessions (i.e., statements made to persons in authority, which is not the case here) that apply in criminal cases: *Schneider* at para. 52.
- [13] Admissions include any acts or words of a party offered as evidence against that party, and can include silence and demeanour: *Schneider* at paras. 56-57.

- [14] Admissions are presumed to be truthful and are admitted without any necessity and reliability analysis, based on "the theory of the adversary system that what a party has previously stated can be admitted against the party in whose mouth it does not lie to complain of the unreliability of his or her own statements": *Schneider* at para. 55; *Evans* at 664.
- [15] If there is some evidence identifying the accused with words, the evidence constitutes admissions by the accused and will be presumptively be put before the trier of fact who will, at the end of the trial, consider (1) whether, on the basis of all of the admitted evidence, the Crown has established that the statement is that of the accused; and if so, (2) consider the contents of the statement, along with other admissible evidence in the trial, to determine whether the Crown has discharged its burden to prove, beyond a reasonable doubt, the accused is guilty of the offence(s) charged: *Evans* at 668.
- [16] As Justice Rowe observed in *Schneider* at para. 37, the SCC has noted in obiter that a voir dire may not be necessary for party admission evidence (citing *R. v. S.G.T.*, 2010 SCC 20 at para. 20). Whether a voir dire is needed for such evidence is to be determined in the circumstances of each case. In this case, the parties both agreed to proceed on the basis of a voir dire.

ISSUES

- [17] The Defence raises two arguments on this voir dire:
- 1) The utterances "I did it" and "it's done. Done. Done" are not relevant, because they are devoid of the necessary context to uncover their meaning; and
 - 2) The "prejudicial effect" of the Video outweighs its probative value.

APPLYING THE LEGAL PRINCIPLES

- [18] The Video is an out of court statement which the Crown seeks to tender for its truth, which triggers the application of the exclusionary hearsay rule. The Defence admits the words captured on the Video are those of the Accused and so the Video is an admission (in the broad sense of the word). As such, the Video is presumptively admissible for its truth as a recognized exception to the hearsay rule.
- [19] The Video captures only part of a longer telephone conversation and only what was said by the Accused. The Video does not capture the other participant to the call.

- [20] There are two mechanisms in the law of evidence for excluding incomplete statements offered as admissions: an insufficient context to enable meaning to be given to identified words, rendering them irrelevant and therefore inadmissible, and exclusion through the exercise of a trial judge's residual discretion where the incomplete statement lacks sufficient probative value (*R. v. Merritt*, 2023 ONCA 3 at para. 78, leave to appeal to SCC ref'd, 40634 (24 August 2023)).

Is the Video Admissible as Relevant Evidence?

- [21] Evidence is relevant if it tends to increase or decrease the probability of a fact at issue, including credibility: *Schneider* at para. 39. In determining admissibility, the threshold for relevance is low; the evidence does not need to firmly establish the truth or falsity of a fact in issue: *Schneider* at para. 39; *Ansari* at para. 104. Evidence does not have to be unequivocal to be relevant: *Schneider* at para. 43.
- [22] The Video meets the low threshold of relevance for admissibility. It is relevant to whether Mr. Medwedrich shot Mr. Knatchbell, the alleged planned and deliberate nature of the shooting, and the credibility of the Witness.
- [23] I turn next to consider whether the Video ought to nonetheless be excluded because its probative value outweighs its prejudicial effect.

Is the Probative Value of the Video Outweighed by its Prejudicial Effect?

- [24] The "cost-benefit analysis" is the expression often used to describe the assessment of whether the trial judge should exercise their residual discretion to exclude the evidence because its prejudicial effect outweighs its probative value: *Schneider* at para. 60.
- [25] Probative value relates to the degree of relevance to trial issues and the strength of inference that can be drawn from evidence: *Schneider* at para. 60.
- [26] Prejudicial effect relates to the likelihood the trier of fact will misuse the evidence, and may involve moral prejudice and/or reasoning prejudice: *Schneider* at para. 60. See also *R. v. Johnson*, 2010 ONCA 646 at paras. 82-86; *Ansari* at paras. 106-108. The probity of the evidence, or the potential that the evidence will work to the detriment of the accused, does not create prejudice: *R. v. Goudreau*, 2015 ONSC 5329 at para. 73; *R. v. Bridgman*, 2017 ONCA 940 at para. 64, cited in *R. v. Mootoo*, 2021 ONSC 5984.
- [27] In this voir dire, the Defence argues there is a risk of reasoning prejudice which she identifies as the risk that excessive weight will be given to the utterances. The Defence argues the risk is present because the utterances' content and the lack of sufficient context may cause them to be prone to misinterpretation and inherently tied to speculative reasoning. The prejudice alleged by the Defence in this voir dire is similar to the reasoning prejudice identified by the court in *R. v. Ferris*, 1994 ABCA 20, aff'd [1994] 3 S.C.R. 756. In *Ferris*, the Alberta Court of Appeal held at para. 27 the reasoning prejudice involved the "enormous temptation for any trier of fact to look at the outside evidence that tends to

implicate the accused in the murder, use those facts to conclude that the accused probably committed the murder, and use that evidence to interpret the meaning of the words "I killed David" as an acknowledgment that he had done so, and use that (flawed) finding to raise their assessment of the accused's probability of guilt to a conclusion of guilt".

- [28] The Defence argues the utterances "I did it" and "it's done. Done. Done" have no probative value because they are devoid of the necessary context to uncover their meaning and are therefore irrelevant. In advancing that argument, Defence relies on para. 44 of Schneider:

Of course, parties are not permitted to "bootstrap" their argument on the admissibility of a party admission to any and all evidence. The party seeking to admit the proposed evidence should limit their submissions to the evidentiary context that is relevant to determining the meaning of the statement at issue. In a criminal case, the Crown may not argue that any evidence pointing towards the accused's guilt provides relevant context. The focus should remain on whether the jury can give meaning to the witness's testimony in a manner that is non-speculative, not the overall strength of the Crown's case.

- [29] The Defence argues the Court is deprived of context because the fact can be inferred that a substantial portion of the telephone conversation was not captured on the Video, because there is no evidence of what was said to the Accused by the other participant to the call, and because the only context for the call is provided by a witness who, it is argued, is neither credible or reliable. The Defence argues that in those circumstances the meaning of the words on the Video can not be discerned.

- [30] At the outset I observe that the admissions of the Accused in this case are captured on a digital recording. To my mind that form of evidence is analogous to text messages which have been recognized as involving "circumstances distinct from those in in both Ferris and Schneider, where the statement attributed to the accused was introduced through the recollection of a witness": R. v. Bottomley, 2023 BCSC 406 at paras. 61-62; R. v. Nicholas, 2023 ONSC 1533 at para. 21; Mootoo at para. 79. Video recordings that include audio of the words spoken provide the added context of the speaker's tone, pace of speech, volume, and even ambient sounds. The credibility and reliability of the witness testifying about their recollection of what the maker of the alleged admission said does not arise.

- [31] However, the evidence of the Witness is that he decided when to start recording the Video. In that sense the Video is similar to the "user input system" used to record some of the videos at issue in R. v. Elite Farm Services Ltd., 2021 BCSC 1583 (at paras. 114-115). In Elite Farms the accused raised concerns similar to those raised by the Defence in this case. Namely a concern that the self-selected videos had been captured by a biased camera operator, a concern that not all the videos had been disclosed, and a concern of a lack of context for the recordings, in that case in circumstances where the accused was not present: Elite Farms at paras. 116, 142.

- [32] Proof a video recording has not been altered is not a precondition of admissibility: *Elite Farms* at para. 121, citing *R. v. Bulldog*, 2015 ABCA 251. In any event, I am of the view that any concerns about there being other videos that were not disclosed by the Witness, or about the editing of the Video, are speculative. Justice Crabtree found the context surrounding the involvement of the maker of the videos in *Elite Farms* was a factor to be considered when assessing and weighing the evidence, but was not a basis to render the videos themselves inadmissible. I agree with that analysis.
- [33] An incomplete statement can be admitted where there is sufficient context capable of enabling the trier of fact to give the utterances meaning: *Merritt* at para. 73, citing *Schneider*.
- [34] Defence relies heavily on the decision of *Ferris*. *Ferris* dealt with whether the incomplete utterance by the accused in that case ("I killed David") was "capable of discernible meaning so as to be relevant and admissible": at para. 1. In *Ferris*, a jury trial, the accused had been arrested for murder and taken into police custody. While in that custody and in the course of obtaining legal advice, the accused was taken to the homicide office where a common cloth divider separated the police desk from the desk used by the accused. There, the accused was overheard by the police to have said something indiscernible, followed by "I've been arrested ", followed by further indiscernible words, followed by "I killed David", followed by more indiscernible words. The officer's evidence was that the words "I killed David" could have been at the beginning, the end, or the middle of the sentence in which those words had been spoken.
- [35] The trial judge admitted the utterance and the evidence was put before the jury. The accused was convicted by the jury and advanced the admission of that evidence as a ground of appeal.
- [36] The Defence references para. 29 of *Ferris* in which Justice Conrad, speaking for the majority, held that "[i]t is not the good faith of the police that is in issue but the meaning of the words." I do not understand that passage to be support for the proposition that the meaning is to be determined at the voir dire stage. The Court of Appeal framed the issue on appeal as being "whether any meaning can be put on the words", or said another way, "whether or not there is a statement discernible of meaning": at paras. 15-16. It is significant in my view, and consistent with other authority, that the issue on the voir dire was not what the meaning of the utterance was. Where, as here, the Crown seeks to tender an utterance, at the voir dire (if held) "it is the onus of the Crown to adduce words capable of meaning": *Ferris* at para. 29.
- [37] The facts in *Ferris* were "unique in that there exist[ed] no circumstances or context from which the true meaning of the words [could] be inferred" and as a result "a trial judge could not ascertain, nor could the jury, the meaning of the words": at para. 17. The Alberta Court of Appeal in *Ferris* found, based on the unique facts of that case, it was "impossible to ascertain the meaning of the words": at paras. 27, 39.

- [38] Because the utterance in Ferris was incapable of being discerned (and for clarity I would add: by the trier of fact, at the conclusion of the trial after all the admissible evidence has been adduced), the words were not relevant to any fact in issue and had no probative value: at para. 17. This point was affirmed by the SCC: where the meaning of words sought to be adduced as an admission is highly speculative, its probative value is tenuous, and exclusion may be appropriate on the ground that its prejudicial effect outweighs its probative value (*R. v. Ferris*, [1994] 3 S.C.R. 756, 1994 CanLII 31).
- [39] The Defence also referenced *R. v. Hunter*, 54 O.R. (3d) 695, 2001 CanLII 5637 (C.A.), a case similar on its facts to Ferris: at para. 15. In *Hunter*, the Ontario Court of Appeal concluded the trial judge had erred in admitting and putting before the jury an utterance ("I had a gun, but I didn't point it") purportedly made by the appellant to his lawyer and overheard by a passerby because in the circumstances and on the evidence in that case "it would be impossible for a properly instructed jury to conclude that the overheard utterance was an admission or perhaps even what it meant": at para. 21. Because the meaning of the utterance in that case was so speculative that "the trier of fact would have to guess at the words that came before and after to fix on a meaning", its probative value was tenuous and its prejudicial effect substantial: at para. 21.
- [40] The nature, breadth, and content of the admissions in the Video are materially distinguishable from the snippets at issue in those Ferris and Hunter. In both of those cases there was a contextual void which would have made it impossible for the jury to discern the meaning of the incomplete snippets overheard. That is not the situation in the case before me. In my view, this case more closely aligns with the facts in *R. v. Hummel*, 2002 YKCA 6 and *R. v. Assoun*, 2006 NSCA 47. As in *Hummel*, there is "ample evidence" in this case in which the words on the Video can be considered: *Hummel* at para. 32. The evidence of the Witness about the circumstances surrounding the shooting of Mr. Knatchbell, the admissions about the geographic location and physical position of Mr. Knatchbell's body and that his vehicle had hit a tree, the evidence the Crown anticipates that Mr. Knatchbell was strapped into his vehicle when he was found and that drugs, cash and a phone were located in his vehicle, the evidence regarding the location of the Accused's phone, the time of the timing of the call captured by the Video in relation to Mr. Knatchbell's death, the content of the text communications between the Accused and the Witness, all provide context that make the meaning of the words captured on the Video capable of being discerned at the conclusion of the trial after all the admissible evidence has been adduced. If at that stage the meaning of the Video is not discerned, the use of the evidence is precluded and no weight will be attributed to it.
- [41] The Video is therefore not irrelevant. I emphasize that the determination of whether the statements, which the Defence concedes the Accused made, are true, is an issue to be determined at the end of the trial.

- [42] The Defence also referenced *R. v. G.L.*, 2009 ONCA 501, in which the Ontario Court of Appeal concluded the trial judge had considered utterances she determined were inculpatory and which were largely found in the early part of a 111-page conversation between the accused and the officer, without assessing them in their entire context, and thus had erred in failing to assess the statement as a whole: at paras. 17, 25. However, in my view the nature of the issue in that case is very different from the issues in this case and therefore it does not assist me in the analysis required for this voir dire.
- [43] The statements on the Video are statements discernible of meaning. They are relevant to key issues in this case, including whether Mr. Medwedrich shot Mr. Knatchbell, the alleged planned and deliberate nature of the shooting, and the credibility of the Witness.
- [44] The risk of prejudicial effect is reduced in a judge alone trial: *Elite Farms* at para. 141, citing *R. v. L.W.*, [2004] O.J. No. 4163, 2004 CanLII 33349 (C.A.). In my view, the risk of any reasoning prejudice will be avoided. I am confident counsel will assist the Court in doing so through their closing arguments.

CONCLUSION

- [45] It is my conclusion that probative value of the Video is not outweighed by its potential prejudicial effect. Accordingly, I decline to exercise my residual discretion not to admit the Video into evidence.
- [46] The Video is admissible for the truth of its contents.
- [47] In making this conclusion, I have not weighed the evidence. It is open to the parties to argue the meaning and weight to be attributed to the Video at the close of trial.

"V. Jackson J."

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