

CANADA / JUDGMENT

R. v. Nazarek

2017 BCSC 1909

COURT

Supreme Court of British Columbia

DECIDED

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2017 BCSC 1909 R. v. Nazarek

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Nazarek,

2017 BCSC 1909

Date: 20170829

Docket: 29585-2

Registry: Fort St. John

Regina

v.

Dana Andrew Nazarek and

Laura Wensley Nazarek

Before: The Honourable Madam Justice Watchuk

Oral Reasons for Judgment

Counsel for the Crown:

P. Mann

Counsel for the Accused Dana Nazarek:

G. Cranston

Counsel for the Accused Laura Nazarek:

G. Rivard

Place and Date of Trial/Hearing:

Fort St. John, B.C.

June 26-30, 2017

Vancouver, B.C.

August 21, 2017

Place and Date of Judgment:

Fort St. John, B.C.

August 29, 2017

I. INTRODUCTION

- [1] The accused Dana Nazarek is charged on Indictment #29585 with possession of fentanyl and cocaine for the purposes of trafficking (Counts 2 and 1 respectively). In Count 4 he is also charged with possession of proceeds of crime.
- [2] Laura Nazarek, the spouse of Mr. Nazarek, was jointly charged on the Indictment. She has pleaded guilty to the offences of possession for the purposes of trafficking cocaine and fentanyl.

II. BACKGROUND FACTS

- [3] The charges arose on December 16, 2013 when members of the Fort St. John RCMP, including the Drug Section led by Cpl. Jon MacIntyre, attended at a residential property in Fort St. John, British Columbia (the "residence"). The police executed a search warrant pursuant to s. 11 of the Controlled Drugs and Substances Act, S.C. 1996, c. 19 [CDSA]. Cst. Corbeil had sworn the Information to Obtain the warrant attesting to his belief that the offence of possession for the purposes of trafficking was occurring at the property.
- [4] The residence is a relatively small house with a main floor and basement. On the main floor are a living room, kitchen, bathroom, two children's bedrooms and a master bedroom. The only access to the basement is by stairs from the main floor. In the basement are a recreational room, bathroom, laundry room and storage room. The storage room is entered through the laundry room.
- [5] Cst. Corbeil, a member of the search warrant entry team and drug section, arrested both accused. Ms. Nazarek and her two young children were inside the residence when he entered. Mr. Nazarek was outside of the residence on the property. Identity is not in issue.
- [6] In describing the yard of the residence, Cst. Corbeil testified that there was a set of footprints in the snow leading from the deck area of the residence to the garage area and to the driveway. He was not aware if the prints led out to the street.

- [7] In the search of Mr. Nazarek incident to his arrest, Cst. Corbeil located and seized crack cocaine with a total weight, including packaging, of 2.8 grams in the front pocket of Mr. Nazarek's jacket. Cst. Corbeil also located \$4,015 in the same pocket in denominations of: 4 x \$100; 33 x \$50; 96 x \$20; 2 x \$10; and 5 x \$5. The money was subsequently seized from Mr. Nazarek at the cells at the Fort St. John RCMP detachment.
- [8] The numerous other relevant items that were seized during the search will be discussed below.
- [9] The witnesses at the trial were two Crown witnesses, Cst. Corbeil, and an expert witness, S/ Sgt. Arsenault. Documents were also filed by the Crown.

III. THE LAW

1. Possession for the Purpose of Trafficking

[10] The definition of "traffic" is set out in s. 2(1) of the CDSA:

"traffic" means, in respect of a substance included in any of Schedules I to V,

- (a) to sell, administer, give, transfer, transport, send or deliver the substance,
- (b) to sell an authorization to obtain the substance, or
- (c) to offer to do anything mentioned in paragraph (a) or (b),

[11] There are two elements to this offence, possession and an intention to traffic. The *actus reus* requires that an accused possess a substance and that the substance be one which is named in one of the Schedules of the CDSA. The *mens rea* includes knowledge of the nature of the substance, in that the accused must believe that it is a controlled substance, and intent to traffic, in that the accused must have it in their possession for the purpose of trafficking.

[12] On a charge of possession for the purpose of trafficking, the Crown is required to prove beyond a reasonable doubt possession as defined in s. 4(3) of the Criminal Code, R.S.C., 1985, c. C-46:

For the purposes of this Act,

- (a) a person has anything in possession when he has it in his personal possession or knowingly
 - (i) has it in the actual possession or custody of another person, or
 - (ii) has it in any place, whether or not that place belongs to or is occupied by him, for the use or benefit of himself or of another person; and
- (b) where one of two or more persons, with the knowledge and consent of the rest, has anything in his custody or possession, it shall be deemed to be in the custody and possession of each and all of them.

- [13] The Criminal Code provision identifies three forms of possession, often referred to as personal, constructive and joint. For each, knowledge and control are elements.
- [14] Personal possession requires actual physical possession together with knowledge and control. A person has something in his or her actual physical possession when it is on his or her person, as in a pocket, or when it is inside something that he or she is carrying, such as a briefcase. The physical contact may be very brief. Fingerprints on an article do not necessarily equate to possession of the article (*R. v. Lepage*, [1995] 1 S.C.R. 654).
- [15] It is trite that knowledge and control are the key elements in the definition of constructive possession (*R. v. Bauer*, 2003 BCCA 138 at para. 23; *R. v. Fisher*, 2005 BCCA 444 at para. 24). Constructive possession was addressed by Madam Justice MacKenzie in *R. v. Ahmadzai*, 2012 BCCA 215, with reference to the Supreme Court of Canada case of *R. v. Morelli*, 2010 SCC 8:
- [26] Proof of manual handling of a prohibited item or substance is not required to prove constructive or joint possession under s. 4(3). Rather, to prove constructive possession, the Crown must prove beyond a reasonable doubt that the accused had knowledge of the nature of the prohibited item or substance and some measure of control over it. In *R. v. Morelli*, 2010 SCC 8, [2010] 1 S.C.R. 253, Fish J. for the majority said:
- [17] Constructive possession is established where the accused did not have physical custody of the object in question, but did have it "in the actual possession or custody of another person" or "in any place, whether or not that place belongs to or is occupied by him, for the use or benefit of himself or of another person" (Criminal Code, s. 4(3)(a)). Constructive possession is thus complete where the accused: (1) has knowledge of the character of the object, (2) knowingly puts or keeps the object in a particular place, whether or not that place belongs to him, and (3) intends to have the object in the particular place for his "use or benefit" or that of another person.
- [27] Thus, the question is whether, on the whole of the evidence, the trial judge could reasonably have concluded beyond a reasonable doubt that the appellant had knowledge of and some measure of control over, the weapons and marihuana found in the vehicle. The trial judge acknowledged the applicability of this test and properly set out its contents at para. 31 of his reasons for judgment.
- [16] Joint possession applies to a situation in which more than one person has possession of something. The person who does not have personal possession jointly possesses the item if he knows that the other person has custody or possession of it, and either exercises or has the right to exercise control over it. Joint possession also requires proof of knowledge and control (*Fisher* at para. 24).
- [17] Knowledge and control may be proved either by direct evidence or by circumstantial evidence or a combination of both.

- [18] The requisite element of knowledge is also established if the accused is "wilfully blind" to the nature of the substance, that is, if he or she knows enough that further inquiry ought to be made but wilfully shuts his or her eyes or refrains from making the inquiry. In *R. v. Briscoe*, 2010 SCC 13, Charron J. explained wilful blindness as follows:
- [21] Wilful blindness does not define the mens rea required for particular offences. Rather, it can substitute for actual knowledge whenever knowledge is a component of the mens rea. The doctrine of wilful blindness imputes knowledge to an accused whose suspicion is aroused to the point where he or she sees the need for further inquiries, but deliberately chooses not to make those inquiries. See *Sansregret v. The Queen*, [1985] 1 S.C.R. 570, and *R. v. Jorgensen*, [1995] 4 S.C.R. 55. As Sopinka J. succinctly put it in *Jorgensen* (at para. 103), "[a] finding of wilful blindness involves an affirmative answer to the question: Did the accused shut his eyes because he knew or strongly suspected that looking would fix him with knowledge?"
- [22] Courts and commentators have consistently emphasized that wilful blindness is distinct from recklessness. The emphasis bears repeating. As the Court explained in *Sansregret* (at p. 584):
- . . . while recklessness involves knowledge of a danger or risk and persistence in a course of conduct which creates a risk that the prohibited result will occur, wilful blindness arises where a person who has become aware of the need for some inquiry declines to make the inquiry because he does not wish to know the truth. He would prefer to remain ignorant. The culpability in recklessness is justified by consciousness of the risk and by proceeding in the face of it, while in wilful blindness it is justified by the accused's fault in deliberately failing to inquire when he knows there is reason for inquiry. [Emphasis added.]
- [19] Possession does not require any proprietary interest in the item (*R. v. Arason* (1992), 78 C.C.C. (3d) 1 (B.C.C.A.)).
2. Proof of Possession Based on Circumstantial Evidence
- [20] As stated above, the Crown may prove the essential elements, knowledge and control, through direct evidence or circumstantial evidence, or a combination of both.
- [21] In *R. v. Villaroman*, 2016 SCC 33, Cromwell J. set out the law regarding drawing inferences from circumstantial evidence and the relationship between proof by circumstantial evidence and proof beyond a reasonable doubt. Justice Cromwell explained that when the Crown's case is based on circumstantial evidence, "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". If there is no other such inference, there is no reasonable doubt as to the accused's guilt. In other words, "an inference of guilt drawn from circumstantial evidence should be the only reasonable inference that such evidence permits" (para. 30).

[22] Alternative inferences to guilt "must be reasonable, not just possible" (para. 42). A reasonable doubt "cannot arise from speculation or conjecture" (para. 50). Accordingly, the Crown may need to negative reasonable inferences other than guilt arising from circumstantial evidence, but:

the Crown 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.

(*Villaroman* at para. 47)

[23] In considering whether circumstantial evidence supports an inference of guilt beyond a reasonable doubt, the court must not examine each individual circumstance in isolation. The proper approach is to consider whether all the evidence taken together in its totality proves the accused's guilt and is inconsistent with any other rational conclusion (*Villaroman* at para. 35).

[24] Sometimes a single piece of circumstantial evidence may be such as to exclude reasonable doubt. Robinson Crusoe's discovery of the print of a man's naked foot compelled his conclusion that he was not alone on his island (*R. v. He*, 2008 BCCA 418 at para. 42).

[25] The court is entitled to bring a measure of common sense to bear on the analysis. The court is not expected to consider the case as a "completely intellectual exercise where no conclusion can be reached if there is the slightest competing possibility" (*R. v. To* (1992), 16 B.C.A.C. 223 at para. 41, cited in *Fisher* at para. 42 and *He* at para. 66).

[26] It is the submission of the Crown that s. 21(1) of the Criminal Code has an application in this matter. It provides that:

Everyone is a party to an offence who

- (a) actually commits it;
- (b) does or omits to do anything for the purpose of aiding any person to commit it; or
- (c) abets any person in committing it.

[27] In *R. v. Bi*, 2011 BCCA 10, the Court of Appeal dismissed the conviction appeals of a husband and wife who had been convicted as parties to the offences of production of marihuana, possession of marihuana for the purpose of trafficking and theft of electricity. The accused had been the tenants in the upper floor of a house where a marihuana grow operation was located in the basement. The trial court had taken into account the value of the marihuana grow operation in considering whether the owner of the marihuana would have permitted upstairs tenants who had no knowledge of the operation. The Court of Appeal found that this had not been speculative reasoning by the trial judge, but rather had been the

application of "ordinary human experience" (para. 16):

...it is common sense reasoning in cases such as this that the owner of the marihuana-grow operation would want exclusive residents of the premises to be involved in some aspect of the operation.

[28] In upholding the convictions in Bi, the Court of Appeal also stated that the trial court was not required to determine whether each accused was a principal, an aider or an abetter, only that each accused was one or another (para. 20).

IV. THE EVIDENCE

A. Factors Regarding Inferences of Knowledge and Control

[29] In this section I will set out the factors identified by the Crown as indicating Mr. Nazarek's possession of the drugs and money, together with the evidence and the submissions of both the Crown and the defence regarding the import and weight of the evidence and the lack of evidence, and the reasonable inferences to be drawn from that evidence and lack of evidence.

1. Ownership by Mr. and Ms. Nazarek

[30] Mr. and Ms. Nazarek became the registered fee simple owners of the residence as of June 17, 2008, the date of the State of Title Certificate from the Land Title Office. The document lists "Dana Andrew Nazarek" and "Laura Wensley Hamer" of the address of the residence as joint tenants and registered owners in fee simple. With regard to the latter name, the Crown submits and I agree that a reasonable inference given the first and middle names, is that "Hamer" is the maiden name of Ms. Nazarek.

[31] A Land Title Form "A" with a June 10, 2008 execution date also indicates freehold transferees with the same names and the address of the address of the residence.

[32] A Certificate of Roll - BC Assessment Certificate, as of November 30, 2014 for the 2015 roll, indicates that the last known owners of the property to be assessed are "Dana Andrew Nazarek" and "Laura Wensley Hamer" of the address of the residence.

[33] Given these three documents, the Crown submits that a reasonable inference is that Mr. Nazarek and Ms. Nazarek have been owners of the residence since 2008 and up to and encompassing the offence date.

[34] The defence submits that the fact that the house was in joint names means nothing.

2. Occupancy by Mr. and Ms. Nazarek

[35] Cst. Corbeil as the assigned Exhibits Officer took photographs of the residence upon execution of the search warrant. He described the residence in detail. The residence was furnished and appeared to be well lived in. There were indicia of children living in the residence. The Crown also notes the following photographs:

- Family photo of Mr. Nazarek and Ms. Nazarek with a child on the hallway wall adjacent to the doorway of a child's room; and
- Photo of Ms. Nazarek with a child in a "Beach" frame in the master bedroom.

[36] The following items are referred to by the Crown as indicia of occupancy by Mr. and Ms. Nazarek:

- Clothing believed to be women's clothing on the left side of the closet, consistent with the size of Ms. Nazarek;
- Clothing believed to be men's clothing on the upper right side of the closet, consistent with the size of Mr. Nazarek;
- Men's underwear and boxers in the upper left side drawer in the master bedroom;
- Driver's License card and Social Insurance Card in the name of Laura Wensely Nazarek, retrieved from a red coloured wallet in the master bedroom, along with Care Card for Dexter Drew Nazarek, 09/04/12;
- Air Miles card in the name of Dana A. Nazarek retrieved from the master bedroom;
- 2 Postal slips in the name of Dana Nazarek for [the residence], on the dresser in the master bedroom;
- Miscellaneous mail located in the kitchen counter area:
 - o Sealed envelope from Canada Revenue Agency addressed to Raw Dog Resources Ltd. c/o Dana Nazarek, [the residence];
 - o Sealed envelope from City of Fort St John addressed to Nazarek, Dana Andrew [the residence], Fort St. John;
 - o Document from Canada Revenue Agency addressed to Laura Nazarek [the residence], Fort St. John;
 - o Pacific Northern Gas letter addressed to Dana Nazarek [the residence], Fort St. John, dated November 22, 2013;
 - o Telus Statement in the name of Dana A. Nazarek with "Individual Detail" in the name of Laura Hamer (amount owing \$112), dated November 5, 2013; and
 - o An additional three recent Phone Bills reflecting names of Dana Nazarek, and/or Laura Hamer.

· Motor Vehicle Registration and Licensing Inquiry indicating that "Nazarek Laura Wensley, [the residence], Fort St. John, BC" is the registered owner of a Black Hummer (BCLP 772 SXS) as of December 13, 2013.

[37] In addition to this evidence cited by the Crown, Cst. Corbeil testified that there were two black Hummer vehicles present at the residence at the time of the search. He believed them to belong to Mr. and Ms. Nazarek. He had seen two black Hummers there frequently. He believed that Mr. and Ms. Nazarek lived at the residence as, being in the Fort St. John drug section up to the time of the execution of the search warrant and thereafter, it was his job to keep tabs on people who may be involved in drug trafficking.

[38] Although the Crown submits that the footprints observed in the snow lead to the reasonable inference that Mr. Nazarek had been in the yard of the residence for some time, that evidence is of little assistance.

[39] The defence submits that there was no surveillance evidence which established that Mr. Nazarek was ever in the house, or even visited other than on the date of the execution of the search warrant. There were no witnesses to confirm that Mr. Nazarek lived in the residence. When Cst. Corbeil attended for a domestic dispute some years earlier, both accused were present and Mr. Nazarek left the residence. The police did not ask him then if he lived there.

[40] Further, the defence says that on the date of the arrest, Mr. Nazarek was outside with a jacket on as it was cold outside. He had no house keys with him. The medical card in his name in the residence may well have been there so that Ms. Nazarek could use it for the children, as there is no evidence that she had her own medical card.

[41] The defence says that there was no evidence of who paid the utility bills or the mortgage if there was one. With regard to the men's clothing, there were no names on any of the items, and no evidence regarding Mr. Nazarek's waist size or pant length.

[42] The defence also submits that it is totally possible that the two accused were not getting along and that Mr. Nazarek was providing the house for his wife and children but had no control over it.

[43] Although the defence submission is that Cst. Corbeil testified that Mr. Nazarek had another address, the evidence of Cst. Corbeil regarding that other address was that he did not know Mr. Nazarek to live there. Cst. Corbeil believed that he may have seen Mr. Nazarek there early in his career.

3. Absence of indicia of occupancy by any individuals other than both accused

[44] The Crown submits that it is of some significance that no documents in the name of any other individuals were located in the residence. Aside from two children's rooms and the master bedroom, there was no other evidence of another sleeping area. There was a mattress located in the storage room downstairs but it was so over-piled with boxes that it is difficult to imagine how it could suffice as a sleeping area. There was no visible bedding on

or near the basement mattress. Even the downstairs bathroom seemed to have limited use given the items piled in the shower/tub area.

[45] Although no specific submissions regarding occupancy by others or the downstairs mattress were made by the defence, in cross-examination Cst. Corbeil was challenged regarding his belief that there were no sleeping areas in the downstairs.

4. The Drug Trafficking Operation

[46] The Crown seeks an inference that the residence was the location of a drug trafficking operation. The Crown submits that Mr. Nazarek's knowledge can be inferred from the items located in the search.

[47] Located in the search and seized from the Master Bedroom were:

- In the left dresser drawer:

- o 8 separate bundles (bound by elastic bands) of cash, totaling \$11,000 (6 bundles of \$1000; 2 bundles of \$2500);

- o an additional \$360 loose bills; and

- o \$730.50 change in a bag; and

- A bag of elastic bands found adjacent to the dresser on a lower shelf, and another bag of elastic bands.

[48] In the downstairs room used for storage, which contained piled up boxes, and which was entered by way of the laundry room, these items were located:

- A black backpack containing 13 separate bundles of cash (most of which contained "sub-bundles"), totalling \$95,154 CAD and \$2,340 USD, bound by elastic bands, as follows:

- o 1 bundle: \$2500;

- o 4 bundles: \$2500 each (\$10,000);

- o 4 bundles: \$2500 each (\$10,000);

- o 1 bundle: \$2500;

- o 4 bundles: \$2500 each (\$10,000);

- o 4 bundles: \$2500 each (\$10,000);

- o 4 bundles: \$2500 each (\$10,000);

- o 4 bundles: \$2500 each (\$10,000);

- o 4 bundles: \$2500 each (\$10,000);

- o 10 bundles: \$1000 each in \$20s (\$10,000);

- o 10 bundles: \$1000 each in \$20s (\$10,000); and
- o "old bills" amounting to \$154.

- A "Stink Sack" brand black coloured bag; and
- Various items with security tags or store tags.

[49] Cst. Corbeil observed a substantial amount of powder on the bills contained in each of the bundles he designated as Bundles #4, #5, and #6. A NIK test confirmed the powdered substance as cocaine.

[50] In the basement were also located bags with drugs as follows:

- A black camera bag on a drying rack next to the side of the doorway leading into the storage room from the laundry room, containing:

- o Outside Pocket:

- § 1 bag containing 1000 blue fentanyl "CDN" "80" pills;

- § 1 bag containing 557 green "CDN" "80" pills;

- o Side pocket:

- § 1 baggy with "252" written on it in red ink, containing cocaine either in powder or hard form, weighing 16.3 grams;

- o Main compartment:

- § 1 bag containing 200 "CDN" "80" fentanyl pills with black spots pressed within the pills;

- § 1 vacuum sealed bag, "brick of powder cocaine", weighing 526 grams, a sample of which tested as hydrochloride 27%;

- § 10 pre-packaged "ounce" bags of crack cocaine, weighing 275.8 grams (4 x 27.5 g, 4 x 27.6 g, 2 x 27.7 g); and

- § 1 bag of cannabis resin, weighing 17.2 grams.

- A green plastic bag inside the bottom backside of an old washing machine, which Cst. Corbeil testified was recovered without moving anything, containing:

- o 1 bag containing 300 blue/green fentanyl pills marked "CDN" "80";

- o 1 bag with 10 pre-packaged "ounce" bags of crack cocaine (6 x 27.6 g, 3 x 27.4 g, 1 x 27.5 g); and

- o 1 bag with 9 pre-packaged "ounce" bags of powdered cocaine (2 x 28.6 g, 3 x 28.5 g, 2 x 28.4 g, 2 x 28.7g), which tested as hydrochloride 66%.

[51] The Crown submits that in addition to the presence of these items, there were several indicia that would have made it obvious to any person occupying the residence that a drug operation was in place. At the very least, the items would have aroused suspicion that some criminal activity was occurring on the property and that there was a need to make further enquiries. Such indicia included the following very visible items in the laundry room:

- A functional "Infinity" scale with white residue (tested as cocaine via a NIK test) on top of a new washing machine;
- A functional "Easy-E" scale with white residue (tested as cocaine via a NIK test) on top of the new washing machine;
- A "Seal Store" sandwich bags box on top of the new washing machine;
- A see-through Rubbermaid container with a green lid on top of the new washing machine, containing 20.7 grams of powder cocaine;
- An "IRobot" box on top of the new washing machine containing:
 - o A Ziploc bag containing 69.6 grams of a white substance believed to be cocaine by virtue of its appearance, although no sample was taken;
 - o A baggie containing 4.2 grams of an unknown white powder (no sample taken);
 - o A baggie containing 0.5 grams of an unknown white powder (no sample taken);
 - o A "smiley face" baggie containing 10.5 grams of an unknown white powder (no sample taken); and
 - o 11 white fentanyl pills;
- A see-through Rubbermaid container with a red lid on top of the new washing machine, containing 90.2 grams of cocaine;
- A Mason jar on top of the new washing machine containing pills (59 blue/green fentanyl pills marked as "CDN" "80"); and
- Sandwich bags appearing to have their corners cut off in a garbage can next to the new washing machine. When these bags were examined by Cst. Corbeil, the bags were observed to be the same type of bags as those in the "Seal Store" sandwich bags box on top of new washing machine, but with the bottom ends cut off.

[52] The Crown submits that evidence of the usage of the laundry room includes a diaper that was recovered about halfway through the discarded sandwich bags in the garbage bag. Cigarette butts were located in the garbage bag and in the laundry room sink.

[53] The laundry room sink had a detergent bottle that was open with a lid beside it. Although not testified to, in a photograph the dryer door is open and there appears to be cloth material visible inside it.

- [54] Powder, tested to be cocaine via a NIK test, was visibly strewn across the laundry machine.
- [55] Laundry baskets were found in the master bedroom and also in a child's bedroom in which there was a crib. The laundry room was the sole laundry facility in the residence. It appears to have been used as a laundry room.
- [56] There were three functioning cell phones on the table in the living room and one on the kitchen counter.
- [57] Both Cst. Corbeil and S/Sgt. Arseneault testified that the same type of elastic bands that were used to wrap the monies found in the backpack were also used to wrap the monies found in the master bedroom dresser underneath the men's underwear and boxers.
- [58] The Crown submits that, given the presence of a safe in the child's room and a safe in the garage, it is notable that none of these monies were secured or locked away. In addition, the backpack containing the monies, the camera bag containing the drugs, and the green bag containing drugs were not locked away in rooms. Access to these items was unfettered and open to anyone inside the residence. Only a children's "baby gate" at the top of the stairs separated the upstairs from the downstairs laundry room and storage area.
- [59] It is the submission of the defence that there is no evidence that Mr. Nazarek, even if he had control over the residence, had any knowledge that the pills were drugs. He may have believed that they were some sort of vitamins, antacids, or even breath mints.
- [60] Further, there were no witnesses who testified to ever purchasing drugs from the house, let alone from Mr. Nazarek. There is no evidence of where the pills came from.
- [61] There were no usable fingerprints obtained from the items seized in the search of the residence. There was no DNA taken from the cigarette butts in the laundry room or any evidence that Mr. Nazarek smoked.

B. Nature of the Substances

- [62] The nature of the substances is admitted by the defence in the Admissions filed pursuant to s. 655 of the Criminal Code. Other admissions related to the continuity of the scene, continuity of exhibits, and the expert qualifications of S/Sgt. Arseneault.
- [63] Cst. Corbeil took samples of various drugs that were seized from the residence. The samples of the seized drugs were analyzed and confirmed by Health Canada to be controlled substances. The samples are described in the Major Incident Flowchart. The filed Certificates of Analyst from Health Canada confirmed that samples were cocaine, fentanyl and marijuana.

C. The Expert Opinion

- [64] S/Sgt. Arseneault was qualified as an expert on: the use, price, packaging, common street language (vernacular), and distribution (including hierarchy of drug distribution schemes and proceeds of crime) of cocaine, fentanyl and oxycodone as of December 16, 2013.
- [65] The Crown presented a hypothetical based on assumed facts with facts identical to the evidence in this case.
- [66] S/Sgt. Arseneault opined that the drugs, cocaine and fentanyl, were possessed for the purpose of trafficking and not personal use given the quantity and packaging. S/Sgt. Arseneault explained how cocaine, both powder and crack, and fentanyl could be consumed. He explained the medicinal or pharmaceutical applications of fentanyl and its potency.
- [67] The evidence included an explanation of the fact that OxyContin tablets were discontinued in March 2012, thereby making significant the fentanyl pills with "CDN" markings on one and "80" markings on the other side. They were likely counterfeit oxycodone tablets. It was his opinion that perhaps one to four, or even ten at a time, may be sold by a street trafficker to a user.
- [68] It was his opinion that the laundry room machines were used as a processing area for cocaine. The scale would be used to weigh ounce quantities from a larger amount. The weighed quantity of cocaine would then be placed into the corner of a bag; the bag would be twisted; and the corner containing the drug would be cut off. The bags in the garbage with their corners cut off were the excess parts of bag not used in packaging the cocaine into baggies.
- [69] In S/Sgt. Arseneault's opinion this drug operation was indicative of a mid-level supplier, given the quantities of the drugs and the significant amount of cash. The supplier was providing a variety of different drugs. Together with all the other items found in the locations nearby, the monies in the backpack were consistent with being illicitly obtained at the level of a mid-level supplier. The fact that monies were also found in the master bedroom did not change his opinion; he considered these monies to be part of the same operation. The bundling of monies held significance in his opinion as bundling allows for easier counting, quick counting, and, simultaneously, easy access to the supply. He explained that cash is commonly found in houses of those engaging in trafficking due to issues of tracking in financial institutions and to avoid reporting to Canada Revenue Agency.
- [70] The overall potential value of the drugs, less the weight of packaging, was \$125,720 to \$137,920.
- [71] In S/Sgt. Arseneault's opinion, even higher level drug traffickers need to communicate and lower level traffickers need to be resupplied. The inference sought by the Crown is that cell phones still have significance at this higher level of operation.

- [72] The witness was asked in cross-examination about everyday persons using elastic bands. He advised that from his personal experience of his family running a pharmacy, where he worked as a cashier and as a business owner, businesses use the brown paper bank bands and not elastics.
- [73] S/Sgt. Arseneault testified that cocaine has a chemical smell. He was not familiar with the "Stink Sack" but opined that it was a bag used to conceal smells based on some research he had done on the internet. Fentanyl pills also have a smell which is not as noticeable but police dogs are trained to detect it.
- [74] S/Sgt. Arseneault opined that the fentanyl in the residence included a range of dosages. This opinion was based on the sheer amount of fentanyl located, as well as fentanyl's potency.

V. Positions of the Parties

A. Crown Submissions

- [75] The Crown submits that, as set out in the authorities, the requirement for control is merely "some measure of control." Complete or exclusive control is not the test. In addition, the test is the existence of that element of control, not whether that control is actually exercised.
- [76] It is the Crown's position that Mr. Nazarek and Ms. Nazarek had control of the residence including the basement as the owners and occupiers of the property. The only access to the basement area, where the drugs and monies were found, was via the main floor of the residence. The main floor housed the bedrooms (two children's rooms and one master bedroom) and the general living space (living room and kitchen area, with main bathroom). The downstairs contained the only laundry room in the residence and appeared to have been in use both as a laundry room and as a processing centre for drugs. There was no divide between the upstairs and downstairs area, other than a "flimsy" baby-gate at the top of the stairs.
- [77] In terms of knowledge attributable to both accused, and in particular to Mr. Nazarek, in the upper part of the residence \$11,000 of bundled money was located in the master bedroom dresser underneath men's undergarments. Two bags of elastics were also recovered from the bedroom. These elastics were consistent with those that were used to bind the \$11,000 and those used to bind the \$95,154 CAD and \$2340 USD found in the backpack in the storage room downstairs. There were four cell phones found in the upstairs area. Cell phones are indicative of use in the drug trade.
- [78] Also, a vehicle attended the residence at the time the search warrant was being executed. In the centre cup holder area of that vehicle, Cst. Lorne Smith located a water bong. S/Sgt. Arseneault testified that this could be used to consume cocaine. The driver was arrested and money, two phones, a substance believed to be cocaine, and a baggie of an unidentified brown powder were located. A reasonable inference is that this individual was a buyer or user/trafficker attending at the residence for drugs. Specifically, in relation to Mr. Nazarek,

further knowledge can be imputed given that cocaine, albeit a small amount, and \$4115, a significant amount, was located on his person.

- [79] S/Sgt. Arseneault opined that the monies found in the master bedroom upstairs were linked to the drug operation and monies found downstairs. He also opined that cell phones were consistent with use by traffickers. Therefore, in all of these circumstances, Crown says that knowledge and control should be imputed to both accused, and to Mr. Nazarek.
- [80] The Crown submits that Mr. Nazarek and Ms. Nazarek were the principal operators of the drug trafficking operation and in possession, constructive or joint, of the drugs and proceeds of monies found in the residence. Whether any other individuals were involved is pure speculation and conjecture in the absence of any evidence to the contrary. This was a valuable enterprise, with the overall potential value of the drugs, less the weight of packaging, being between \$125,720 to \$137,920, and the bound bundles of monies totalling approximately \$108,000.
- [81] The Crown says it has established a prima facie case supporting findings of guilt beyond a reasonable doubt. The necessary inferences are supported by a compelling constellation of evidence and, in the absence of evidence supporting alternative interpretations, those inferences are the only reasonable ones to be made.

B. Defence Submissions:

- [82] The defence says that the evidence falls far short of proof beyond a reasonable doubt when dealing with circumstantial evidence for the following reasons:

Crown must prove two things in order to satisfy the law regarding knowledge. They fail in both, it is respectfully submitted.

1. That the greenish pills were drugs.
2. That these pills were in the house.

These things, of course, are important only if the Court finds the accused had any connection or control of the premises.

It is police speculation that:

1. Mr. Nazarek lived there.
2. Mr. Nazarek may have paid bills.
3. That the children are his children.

As to fentanyl, it was a new drug when this case happened.

The expert testified that most people thought it was oxycodone and treated it accordingly.

- There are no confessions.

- No one ever saw the accused buying or sell drugs at that residence.
- There were no vehicles belonging to the accused at that address when the search was conducted.
- The co-accused had a vehicle there.

Similarly there is no evidence that the accused even knew those items were in the house, as they were not upstairs or in plain view.

The defence also submits that the lack of evidence is evidence. The gaps in evidence regarding Mr. Nazarek are:

- No fingerprints ("useable");
- No witness of Mr. Nazarek at house;
- No evidence of a buy or sell with Mr. Nazarek;
- No evidence vehicle registered to him on the property;
- Never seen on the property;
- No evidence of his direct knowledge of the drugs;
- No DNA on cigarette butts or evidence that he smoked; and
- No evidence re cell phones' numbers.

The reasonable inference of a third person is not speculation.

VI. DISCUSSION

[83] The Crown must prove the elements of the offences in the indictment beyond a reasonable doubt. It is those elements of those offences that are subject to the criminal standard of proof; individual pieces of evidence are not subject to that same standard. Rather than examining pieces of evidence in isolation, a trier of fact must consider the total body of evidence and assess whether, taken as a whole, it proves the elements of the offences in the indictment beyond a reasonable doubt. The facts of each case are determinative.

[84] In assessing the evidence, I am guided by the case law including that which counsel have provided. All of those cases have been considered although not all are referred to.

[85] In this circumstantial evidence case, the Crown submits that from the totality of the evidence, inferences can and should be drawn that the elements of knowledge and control are proven beyond a reasonable doubt. Thus it is established that Mr. Nazarek was in possession of the cocaine, fentanyl, and cash being proceeds of crime.

[86] The defence submits that the evidence and gaps in evidence give rise to alternate inferences.

- [87] At the outset it is important to note that there is an agreement between the parties that it is not necessary to prove that Mr. Nazarek knew that the pills, which were counterfeit oxycodone, contained fentanyl. It is sufficient to prove that he had knowledge that they were an illicit drug.
- [88] Firstly, the issue is whether Mr. Nazarek had control of the items within the residence that were seized and are relied upon by the Crown as listed above. These can be grouped as the cocaine, the fentanyl pills, and the cash, mostly bundled, all of which were located primarily downstairs and in the master bedroom.
- [89] That Mr. Nazarek owned the residence is proven on the documents of title, purchase and tax assessment. That he was an occupant is proven on the utility bills and documents and the clothing in the residence, as well as by the evidence of Cst. Corbeil. The lack of evidence of who paid the utility bills or mortgage does not raise a reasonable alternate inference, nor does the absence of evidence of his presence at times other than on the date of the search warrant and the earlier date of the domestic dispute.
- [90] I find that Mr. Nazarek, as an owner and occupant, had control of the items located within the residence. It is not necessary that he be a full-time occupant in order to exercise that control. Control does not require that Mr. Nazarek in fact exercised a power over the drugs and money but rather that he was able to so exercise that power. I am satisfied beyond a reasonable doubt that he was able to exercise the requisite measure of control over all of the drugs and cash located in the residence in a number of locations on the main floor and in the basement.
- [91] I understand the defence submission to be that even if Mr. Nazarek had the requisite control over those items in the residence, he did not have any knowledge of their nature or presence in the residence.
- [92] As observed by Cst. Corbeil and opined by S/Sgt. Arseneault, the laundry machines were the processing centre for the drug operation, including the weighing, crushing, and packaging of drugs. S/Sgt. Arseneault testified that the baggies were consistent with packaging of cocaine whereby plastic bags containing cocaine were knotted off at the ends. For example, the individually wrapped pre-packaged cocaine baggies located in a bag inside the green plastic bag found in the washing machine were packaged in that manner. I find on a balance of probabilities that there was a drug processing centre in the laundry room of the residence.
- [93] The cash and drugs seized from the residence were: \$112,089 and \$2,230 US; and, 1.54 kilograms of cocaine and 2,116 fentanyl pills with a combined value of between \$125,720 and \$137,920.

- [94] It is not reasonable to conclude that the drug operation, representing a significant financial investment as drug trafficking is a profit-motivated criminal activity, permitted unknown persons to have ready access to the downstairs area. Due to the layout of the residence, the only access to the downstairs was through the main floor. There is no evidence of occupants other than Mr. and Ms. Nazarek and the two young children. This was a small residence that was a well lived-in family home.
- [95] The fact that Mr. Nazarek was found in possession of cocaine (2.8 grams), although a small amount, and the substantial sum of \$4115, lends support to the reasonable inference that Mr. Nazarek was involved in the drug trafficking operation in the residence. The submission that he was in possession of that cash for the purpose of Christmas shopping is speculative.
- [96] The defence relies heavily on the case of *R. v. Marc*, 2006 QCCA 57, in which the Quebec Court of Appeal reversed the trial judge's findings that the four appellants were guilty of possession of various drugs for the purpose of trafficking. The police arrested six people in or near two apartments in the same building in which a substantial quantity of drugs was found in a variety of locations. Some of the drugs were in plain view and some were concealed, including in spaces under two windows which were accessible from the outside by opening the windows. Other items found on scene included scales, a lease in a name not belonging to any of the appellants, and three letters addressed to three of the appellants at other addresses. Each of the appellants was found with either a small quantity of drugs or a significant quantity of cash, or both.
- [97] The Court of Appeal held that although the appellants' knowledge of the drugs found in the apartments could be inferred, the trial judge had erred in finding that the appellants had the requisite control to be in possession of the drugs found in the apartments. The appellants' presence at the apartments was insufficient for a finding of control. Similarly, their mere presence was insufficient to find them guilty as parties to the offence. The cash and drugs found on the appellants indicated some kind of transaction but did not establish that the appellants were involved in the drug trafficking operation based out of the apartments. The two appellants found only with cash were acquitted and the two appellants found with small quantities of drugs were found guilty of simple possession.
- [98] While the law set out in *Marc* is common ground, the facts of *Marc* are distinguishable. In *Marc* there was no evidence linking the appellants to the apartments except for their presence there at the time of the execution of the warrant, and, in respect of three of the appellants, the presence of the letters addressed to them at different addresses.
- [99] Here, Mr. Nazarek is one member of a partnership that owns and occupies the residence. As set out above, a number of pieces of physical evidence tie Mr. Nazarek to the residence. His presence at the residence during the execution of the warrant corroborates a link between him and the residence.

- [100] A case which has more similarities to the present circumstances is *R. v. Singh*, 2004 BCCA 428. In that case, the offender appealed his conviction for possessing a handgun which was found inside a bag in a toolbox in his rental suite. Hall J.A., in finding the accused and his wife jointly possessed the firearm, wrote at para. 12:
- [12] In the present case the gun was discovered concealed in the toolbox located in plain view in the main living area of this suite. This was, as I noted, a compact living area that the appellant and his family had occupied for several years. There was clear evidence of exclusive occupancy by the appellant. The submission that the weapon might have been placed there by a visitor to the suite seems to me purely speculative. This was not some remote outbuilding on a large property nor was it a separate part of an occupied home as was the case in *Egresits*. Rather, this was the central living area of a rather small residential premises. In my respectful opinion, in the circumstances of this case, in the absence of any evidence to the contrary, it was eminently reasonable for the trial judge to infer that the weapon found in the toolbox was an item that was in the possession of the appellant. I do not consider that it has been shown that this finding was in error and I would not interfere with it.
- [101] In this case I find that the only reasonable inference on the totality of the evidence is that Mr. Nazarek as an owner and occupant of this small residence with these contents in these locations had the requisite knowledge of the drugs and cash in the residence. The drugs in the processing centre in the laundry room and the cash in the dresser drawers were visible or easily accessible in areas that were well-used.
- [102] In the alternative, the principle of wilful blindness is relevant to his knowledge of the drugs under the washing machine and drugs and cash in the camera bag and backpack: the question is one that should have been asked by Mr. Nazarek given the visibility of a drug processing centre in the laundry room of his residence.
- [103] The only alternate inference sought is that Mr. Nazarek was not an occupant and thus could not have had the requisite knowledge. On the evidence, that inference is speculative. Even disregarding the speculation that the children were not his and thus he had no need to be there, the evidence as a whole cannot support the inference sought by the defence. Further, if a reasonable inference could be drawn of part-time residency, which again is not available on the evidence (including the question put to Cst. Corbeil regarding another residence associated with Mr. Nazarek which is not in itself evidence), the extensive evidence, including the drug processing area and the large amounts of cash in the drawer with male underwear, can only support an inference of knowledge. There is no other rational inference on the evidence as a whole.
- [104] The inference of Mr. Nazarek's knowledge and control of the cash and drugs in the residence is established beyond a reasonable doubt. I therefore find that he was in possession of the drugs and cash.

[105] With regard to the element of intention, I accept the evidence of S/Sgt. Arsenault that the drugs were possessed for the purpose of trafficking. That element is also proven beyond a reasonable doubt. I find on the totality of the evidence on the same standard of proof that the cash was proceeds of crime as charged.

[106] Mr. Nazarek, please stand sir.

[107] I therefore find you guilty on Counts 1, 2 and 4.

"The Honourable Madam Justice Watchuk"

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