
CANADA / JUDGMENT

R. v. Neigum

2014 BCSC 2019

COURT

Supreme Court of British Columbia

DECIDED

7 August 2014

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2014 BCSC 2019 R. v. Neigum

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Neigum,

2014 BCSC 2019

Date: 20140807

Docket: 22253-4

Registry: Salmon Arm

Regina

v.

Donny Glen Neigum

Before: The Honourable Madam Justice Donegan

Oral Reasons for Judgment

Counsel for the Crown:

M. Armstrong

Counsel for the Accused:

J.R. Avis

(appeared at the trial

July 30-August 1, 2014)

A.S. Hubbard

(appeared as agent for J.R. Avis

August 7, 2014)

Place and Date of Trial/Hearing:

Salmon Arm, B.C.

July 30-August 1, 2014

Place and Date of Judgment:

Salmon Arm, B.C.

August 7, 2014

- [1] THE COURT: On December 29, 2012, in Enderby, British Columbia, Kathleen Zambon, the lone employee of the Enderby Inn Liquor Store, was robbed by a man whose face was covered and was armed with a knife. The man stole money and two packages of cigarettes from Ms. Zambon's employer, a numbered company doing business as the Enderby Inn Liquor Store. Arising out of these events, Donny Glen Neigum stands charged with robbery, contrary to s. 344 of the Criminal Code (the "Code"), and having his face masked with intent to commit an indictable offence, contrary to s. 351(2) of the Code.
- [2] As with every criminal trial, the Crown is required to prove each element of these offences beyond a reasonable doubt. The defence quite properly conceded at the conclusion of the trial that the only issue for my determination in this case is whether the Crown has proven identity - that is, whether the Crown has proven beyond a reasonable doubt that it was Mr. Neigum, the accused before the court, that committed this masked armed robbery.
- [3] The Crown called a number of witnesses at trial: (1) Constable Jackson, the first officer on scene; (2) Kathleen Zambon, the employee who was robbed; (3) Arthur Laing, an acquaintance of the accused who lived at the Enderby Lodge, a nearby rental accommodation complex, and who spent time with Mr. Neigum on the evening in question; (4) Calvin Hofer, an acquaintance of Mr. Neigum's who argued with Mr. Neigum that evening at the Enderby Lodge; (5) Peter Moynan, a landlord of the Enderby Lodge; (6) Constable Fast, an officer who seized an article of clothing in the Enderby Lodge parking lot the day following the robbery; (7) Gloria Dudych, the owner of the Enderby Inn Liquor Store at the time; and (8) Constable Rutten, an RCMP dog handler who was qualified to give expert evidence and did give that evidence.
- [4] Through these witnesses, the Crown introduced video surveillance evidence from both the Enderby Inn Liquor Store and the Enderby Lodge from the relevant times on December 29, 2012. A few articles of clothing seized from persons and/or locations in the course of the investigation were also tendered.

[5] Formal admissions were made regarding certain other evidence, which I will outline further in my reasons.

[6] The defence called no evidence.

THE EVIDENCE

[7] The evidence tendered by the Crown pointing to Mr. Neigum as the perpetrator is entirely circumstantial.

[8] Before turning to the evidence, I will first make some general comments about assessing credibility and reliability of witnesses. A court can accept all, some, or none of the evidence of a witness. Assessing credibility and reliability involves examination of a number of factors. These factors can include the witness's ability and opportunity to observe events; the firmness of his or her memory; the ability to resist the influence of interest to modify his or her recollection; whether the witness's evidence harmonizes with independent evidence that has been accepted; whether the witness changes his or her testimony during direct and cross-examination; whether the witness has unexplainable differences between his or her statement to police or his or her preliminary inquiry evidence and testimony at trial; whether the witness's testimony seems unreasonable, impossible, or unlikely; whether he has motive to lie; and the demeanour of a witness generally: *Bradshaw v. Stenner*, 2010 BCSC 1398 at 186 .

[9] I must add, though, that I am cautious about reading too much into the demeanour of a witness. The courtroom setting can be a foreign and stressful place for a witness for a variety of different reasons. Nervousness can manifest itself in a number of different ways.

[10] Ms. Zambon testified that the robbery occurred around 10:00 or 10:15 p.m. that night. She had commenced her closing-out procedures and had gone briefly into the back. While there, she heard the doorbell ring, which signalled to her that someone was entering the store. She turned around and saw a man entering the store through the front doors. At that point, he was approximately 15 to 20 feet away from her. She described that he had a hoodie pulled tight over his head and forehead, and a black scarf pulled high up on his face. He was walking toward her. She could only see his eye area. She started to tell him he had to remove his scarf, when he interrupted her and said firmly, "Oh no I don't" and kept moving toward her. She described his movements as "purposeful". She described his voice as an adult male, being deep, not like a teenager. He had no accent and no discernible speech impediment.

[11] The perpetrator met Ms. Zambon near the counter. She saw that he had a bright yellow object in his hand. It had a blade. He nudged her on her left torso area with something blunt and told her to open the till. She opened the till. She recalled that when he put the knife down on the counter as he rummaged through the till, she could see the yellow handle and kept her eyes on it. She felt the knife was an "exacto" knife or perhaps a paring knife.

- [12] The perpetrator grabbed all of the bills from the till. Ms. Zambon believed there to be a large number of \$5s, some \$10s, and two \$20s. She believed there to be two \$20s, because she had recently dropped a quantity of twenties in the safe area and felt two customers had come in following this drop and paid with \$20s. The perpetrator also scooped out a number of loonies. There were no toonies. She estimated that he took 12 to 20 loonies, with the higher end of that estimate more likely.
- [13] The perpetrator then opened a drawer to the left of the register, looking for something. Ms. Zambon was to his right and he instructed her to open the drawer to the right of the register. She could not recall if she opened it or the perpetrator did, but the drawer was opened. This was the drawer containing the cigarettes to be sold. Ms. Zambon was uncertain as to the number of packages he took. She believed he took at least two, but perhaps three or four packages. She believed the brand he took was Canadian Classic King in blue packaging. She did not see the ones he took, but believes he took this brand because when she looked in the drawer following the robbery some packages appeared to be missing from the row containing that brand.
- [14] A photograph taken of the cigarette drawer following the robbery shows at least four rows of cigarettes containing six different brands. Empty spaces appear in one row above the blue packaged Canadian Classics, as recalled by Ms. Zambon. However, empty spaces also appear in the adjacent row above a package of red Du Maurier cigarettes.
- [15] The unchallenged evidence of the owner, Gloria Dudych, proves that \$174.95 was taken from the till in the robbery, as well as two packages of cigarettes, with a value of \$9.50 each. The inventory records tendered at this trial do not show which brand or brands of cigarettes were stolen, nor do they show the denominations of bills and/or numbers of coins taken.
- [16] After taking the cash and cigarettes, the robber quickly walked out. Ms. Zambon immediately called police and, while doing so, followed him briefly. She saw that after exiting the doors, he turned to the right. He headed northbound along the building and through the parking lot. She was frightened and went back inside.
- [17] Ms. Zambon was a very careful and honest witness, but her observations are subject to some understandable frailties. When asked to describe the perpetrator, she was clear that she only looked at him a couple of times. She explained that she was trying to stay docile during the robbery, because she felt very threatened. For the most part, she kept her head down and her eyes low. She believed the time she was with him to be less than two minutes, although it felt longer to her. The video surveillance reveals the entire robbery to have taken only 30 seconds. From her limited and brief observations, Ms. Zambon made the following observations about the appearance of the perpetrator:
- a) Race:
- [18] She could tell from the two exposed areas of his body, his hands and a strip of eye area visible below the hoodie and above the scarf, that he was Caucasian.

b) Clothing:

[19] She described the scarf worn as black or dark in colour. He wore a jacket over top of a hoodie. The hoodie, which had a drawstring around its perimeter, was pulled tight over his head down to his eyes. It appeared white in colour. It was pulled very tight, appearing to be a stretchy type of material. It was thick enough, however, to cover any hair that might have been visible through it. The jacket, she described as non-descript with no visible brand names on it. She described it as a much darker colour than the hoodie. She believed he was wearing jeans.

c) Height:

[20] Ms. Zambon estimated the robber's height to be approximately 5' 7" or 5' 8". She is 5' 2" and knew she had to look up to him. Ms. Zambon offered in-chief that she was aware she told the police at the time when she gave her statement, shortly after the robbery, that the robber was much taller than this 5' 7" or 5' 8" estimate, but upon calmer reflection later, she felt 5' 7" or 5' 8" was likely more accurate.

d) Build:

[21] Noting that he was wearing two jackets, meaning the jacket over top of the hoodie, Ms. Zambon described his build as average, perhaps no more than 150 pounds.

e) Eyes:

[22] Ms. Zambon described several times in her evidence that the eyes were really, really dark. They looked black to her. While describing the eyes and their darkness, I observed that Ms. Zambon repeatedly gestured to the entire strip of the eye area. Ms. Zambon attempted to identify the eyes she saw that night in the courtroom. She felt the accused's eyes resembled the perpetrator's, but noted that Mr. Neigum's eyes are blue and she felt the perpetrator's eyes were not blue or green. She also felt the shape of my eyes was similar to the robber's, but stressed that the robber's were deeper set and darker than mine.

[23] She conceded in cross-examination that she did not have a good opportunity to look into the perpetrator's eyes. She kept her eyes mostly downcast and on the yellow handle of the knife. She looked at him briefly and quickly looked away. When she did so, she was only about a foot away from him, but she indicated that they did not make eye contact at that time.

f) Odours:

[24] Ms. Zambon noticed no odours about him, including no odour of alcohol.

[25] Ms. Zambon is aware the robbery was captured on the surveillance video. She testified that the colours reflected in the video recording are a "little off", meaning not true to life. She also testified that the time that appears on the recording was 8 to 10 minutes ahead of the actual time.

- [26] I have had the opportunity to watch the surveillance video of the robbery many times. The camera is behind the till. It corroborates most of Ms. Zambon's recollections. It shows that at a recorded time of 22:27 hours and 36 seconds, so 10:27 and 36 seconds, the robber walked in the front doors to the store. Ms. Zambon is off screen. Seven seconds later he is seen to direct Ms. Zambon to the till. While at the till area, his back is to the camera. He can be seen to have dealings with the contents of the till. He slightly shoves Ms. Zambon to the side to obtain access to the drawer to the right of the till. He takes items from there. He leaves the store at a recorded time of 22:28 hours and six seconds. This is 30 seconds after he entered the store.
- [27] During the robber's seven-second walk across the store, with the benefit of pausing the video recording, several observations can be made.
- [28] First, Ms. Zambon is quite correct about the discolouration in the video recording. At various points in the screen, colours of bright yellow, blue, and pink can be seen that are clearly not reflective of true colours. This discolouration appears more prominent the closer one gets to the camera. One can see the truer colours in the store through police photographs taken the following day.
- [29] Next, as the robber enters the store, he is seen to be wearing a dark green pullover type jacket, with a prominent black stripe travelling down from the collar of the jacket, down the length of each arm. Worn underneath the jacket is a light-coloured hoodie pulled over his head. He is wearing a dark-coloured scarf over his mouth and nose area.
- [30] As he moves across the floor in front of the camera, the colours of his clothing become distorted. One can also see that he is carrying a knife in his right hand. The blade is visible.
- [31] At the recorded time of 22:27:43, he is now with Ms. Zambon. Several observations can be made.
- [32] First, he points to the till, directing her to it. As he does so, his arm is outstretched and one can see black trim around the sleeve of the jacket.
- [33] Next, while at the till area, he has dealings with the contents of the till and grabs items from the cigarette drawer. One can, through his movements, catch a glimpse of the blade of the knife which is now in his left hand.
- [34] I also noted that Ms. Zambon only looked at the robber quickly twice. Of these two occasions, only one was when they were facing each other. The duration of each glance was a second or less. I also noted that when he grabbed the cigarettes from the drawer, Ms. Zambon was not looking at the cigarette drawer.
- [35] While at the till area, Ms. Zambon and the perpetrator are at their closest to the camera. I note that the colours of their clothing appear to become more prominently distorted the closer the object is to the camera. From this angle, the dark-coloured scarf worn by the robber can be seen to have light stitching around its perimeter.

- [36] As the perpetrator crossed back over the floor to exit the store, a yellow-handled knife can briefly be seen in his hand. As he exited the doors, the recorded time was 22:28:06.
- [37] It is difficult to estimate the robber's height from the video, nor would it be appropriate for me to do so. A general observation can, however, be made. The robber remained hunched at the shoulders throughout most of his interactions with Ms. Zambon, particularly at the till area. He was hunched when they were close together, but even in this hunched position, he does appear to be several inches taller than she does.
- [38] When I consider the very limited time Ms. Zambon spent with the robber, 30 seconds, the second or two where she actually looked at his face area, the considerable stress she was under and her desire to remain submissive and not look at him, I can put no weight on Ms. Zambon's description of or attempt to identify the eyes of the robber. I do accept the strip of his face she saw between the hoodie and scarf was very, very dark. The frailties of in-court identification have been repeatedly recognized. Those inherent frailties are exacerbated in this case by her attempt to identify eyes only, and eyes that she saw for, at most, a second or two directly on, in a situation of extreme stress.
- [39] Similarly, I put very little weight on Ms. Zambon's opinion as to the height of the robber. In addition to the difference between her initial estimate to police and her testimony, the video reflects that he was hunched at the shoulders most of the time, making a height estimation difficult. I do, however, accept that Ms. Zambon is 5' 2" tall, and the robber was taller than her, such that she had to look up at him when he was close to her.
- [40] The owner of the numbered company that owned the liquor store at the time of the robbery was Gloria Dudych. She has since sold her shares and is no longer involved with the business. She installed the video surveillance system in the store when it first opened. It had three cameras.
- [41] Ms. Dudych's evidence differed from that of Ms. Zambon when it came to two aspects of the video surveillance system. To Ms. Dudych's recollection, the time on the recording was off by approximately five minutes. In other words, the time on the recording, to her recollection, was five minutes fast. Also to her recollection, the colours as they appear on the video recording are pretty close to true colours.
- [42] Where the evidence of Ms. Zambon and Ms. Dudych differs in respect to the video surveillance system, I accept the evidence of Ms. Zambon. Ms. Dudych was clearly mistaken about the colours being close to true on the recording. As I have outlined, there are very noticeable distortions in colour. It could be that the length of time that Ms. Dudych has now been away from the business has caused her memory to fade.
- [43] Ms. Zambon's memory with respect to the video surveillance system is, on the other hand, fresher. She continues to work at the store. Her memory of the colour distortion on the video recording is proven reliable by observing the recording. I accept Ms. Zambon's evidence that the time on the surveillance video is out eight to 10 minutes.

- [44] Therefore, I find the actual times from the video surveillance range as follows: the robber enters the liquor store between 22:17 hours and 22:19 hours, and leaves 30 seconds later, between 22:18 hours and 22:20 hours.
- [45] Constable Jackson arrived at the scene within a minute of his dispatch. Through him, maps of the area were entered by consent. A description of the area, including the proximity of the nearby Enderby Lodge, is critical to an understanding of the circumstantial evidence presented in this case.
- [46] The Enderby Inn, a building which contains the liquor store that was robbed, sits on the corner of George Street, also known as Highway 97A, and Cliff Avenue. George Street runs north-south and Cliff Avenue runs east-west. The exterior public doors to the liquor store face Cliff Avenue.
- [47] The Enderby Lodge is to the north of the Enderby Inn. The lodge sits on the corner of George Street and Stanley Avenue. Cliff Avenue and Stanley Avenue run parallel to one another. The two businesses are two small city blocks apart. The cross street in between Cliff Avenue and Stanley Avenue is Mill Avenue. Between the two businesses are other businesses with parking lots. Foot travel through the parking lots is possible.
- [48] When Constable Jackson arrived at the scene in his police vehicle, he drove by the alleyway between the Enderby Inn and the neighbouring business. He saw a dark fabric item on the ground in the alleyway. He did not get out or seize the item; he went directly to the liquor store. Upon arrival, he learned from Ms. Zambon the direction of the robber's travel, which was to the north of the building.
- [49] Constable Rutten, the dog handler, arrived with his dog approximately 25 minutes later. He was qualified as an expert witness in the areas of how police dogs are trained, how they respond to human scent, and how they communicate those responses.
- [50] Taken to the beginning of the robber's path, as seen by Ms. Zambon, the dog immediately picked up a track. That track took him northbound through the parking lot of the Inn, directly over the fabric item in the alleyway seen earlier by Constable Jackson. The dog paused over that item, which communicated to Constable Rutten that the article is track-related, or in other words an article discarded by the person who laid the track.
- [51] That article was seized and is now marked as Exhibit 4 in this trial. It is a dark green scarf with white stitching around its perimeter. It very closely matches the scarf worn by the person seen in the surveillance video robbing the liquor store.
- [52] This scarf, located in the north area of the parking lot adjacent to the Enderby Inn was submitted for DNA analysis. The results are the subject of the following admission found at Exhibit 1: The results of the DNA analysis revealed that an unknown individual, consistent with being female and not the accused, Donny Glen Neigum.

- [53] A short distance north of the scarf, the dog lost the track. Several possible explanations for this were provided by Constable Rutten, including that the person was apprehended or removed by a vehicle, that the track had become degraded as a result of weather, pedestrian traffic, or vehicular traffic, or that the dog simply missed a corner in its track and could no longer pick it up. Weather and traffic were ruled out by Constable Rutten, but other than that, he could offer no definitive opinion as to why the dog lost this particular track. I can draw no conclusions from the loss of the track in these circumstances.
- [54] Constable Jackson and the other officers continued with this investigation in the days that followed.
- [55] The day following the robbery, December 30, Constable Jackson seized the video surveillance depicting the robbery. It is marked as Exhibit 6 in this trial.
- [56] On that same day, another officer, Constable Fast, interviewed one of the landlords of the Enderby Lodge, Peter Moynan. Mr. Moynan lives at the Lodge and monitors its video surveillance. Mr. Moynan showed Constable Fast surveillance from the Lodge from the previous evening. As a result of viewing the surveillance and receiving direction from Mr. Moynan, Constable Fast attended to an area near the front of Mr. Moynan's truck which was parked in one of the two parking lots of the Enderby Lodge, the lot facing Stanley Avenue. At the front of Mr. Moynan's truck, near the fence and next to a garbage can, Constable Fast located a jacket tucked in the snowbank, partially visible. She seized it at approximately 1:00 p.m. on December 30 and then turned it over to Constable Jackson. It is a dark green fleece pullover jacket with black stripes running from the collar area down both sleeves. It has black trim around the bottom of the sleeves. It is now marked as an exhibit in this trial.
- [57] This jacket matches in every way the jacket worn by the person seen in the surveillance video robbing the liquor store.
- [58] On January 2, 2013, Constable Jackson seized the video surveillance recordings authenticated by Mr. Moynan from the Enderby Lodge. Those recordings are contained on a CD now marked as Exhibit 8 in this trial.
- [59] On that same day, January 2, 2013, the formal admissions filed in this trial reflect that the accused, Mr. Neigum, was arrested by police after he was apprehended driving a van belonging to another named individual. Located in the box area of the van under some articles of clothing was a yellow-handled exacto-style knife. Photographs of this knife were taken by Corporal Cook of the Vernon RCMP Forensic Identification Section and are appended to Exhibit 1. The owner of the van cannot say whether or not he had an exacto knife in his van prior to the police recovery of it.

- [60] On January 4, 2013, Constable Jackson interviewed an acquaintance of Mr. Neigum's, Arthur Laing. At that time, Mr. Laing gave the officer a light grey hoodie, which is now marked as Exhibit 7 in this trial. The light grey hoodie opens with a zipper in front. It has a drawstring through the hood area which would enable one to pull it tight. This hood resembles, in colour and style, the hood worn by the robber seen in the surveillance video.
- [61] This brings me to the evidence of Arthur Laing.
- [62] Arthur Laing is an acquaintance of Mr. Neigum. At the time of the robbery, he lived at Unit 11 of the Enderby Lodge. The Enderby Lodge has a ground floor and an upper floor. It appears to have two buildings to it. Mr. Laing lived in an upper unit in the building facing George Street. This upper floor has an exterior hallway with a railing, again facing George Street. Mr. Laing's unit is accessed by an exterior door at the far end of this upper exterior hallway, which leads to an interior hallway and the door to his unit.
- [63] On the front of this building is a parking lot. I will call this the George Street parking lot.
- [64] The Inn does have another parking lot which is located to the side of this building. This parking lot faces Stanley Avenue. I will call this the Stanley Avenue parking lot. Access to the upper exterior hallway can be accessed from the Stanley Avenue parking lot through a set of exterior stairs. Video surveillance covers all of these areas.
- [65] Mr. Laing testified that he arrived at his apartment at approximately 7:00 to 9:00 p.m. on December 29, 2012, to find Mr. Neigum there waiting for him. In cross-examination, Mr. Laing conceded that he testified at the preliminary inquiry it could have been late in the afternoon to early evening. He invited Mr. Neigum inside and they discussed purchasing some crack cocaine. Mr. Neigum advised him that somebody owed him some money for something to do with a vehicle, and that he needed to collect it. This discussion lasted about five to 10 minutes before Mr. Neigum left to collect this money.
- [66] Mr. Laing recalled that Mr. Neigum was wearing a coat with a hood when he left. He was gone for maybe 10 minutes before he returned to Mr. Laing's apartment. Mr. Neigum returned with money and a couple of packages of cigarettes. Mr. Laing was not certain if he saw all or just some of the money. He saw a number of bills but did not count them. When his memory was refreshed in cross-examination by his statement to police, he agreed he told police he saw a lot of \$20 bills. He described the cigarettes as Du Mauriers in red packages. He did not see or hear any coins.
- [67] Mr. Laing recalled that Mr. Neigum was wearing a hoodie upon his return. Mr. Laing recalled that it had "Harley" on it. He liked it, so he asked Mr. Neigum if he would trade him hoodies. Inexplicably, Mr. Neigum agreed and exchanged his hoodie, which Mr. Laing described as nice, for the one owned by Mr. Laing, which Mr. Laing described as not very nice. Mr. Laing also believed that he gave Mr. Neigum some dark coloured warm sweatpants to wear. No explanation was offered for why Mr. Neigum needed to put on different pants.

- [68] The hoodie Mr. Laing took from Mr. Neigum that evening was turned over to police and is now marked as Exhibit 7. It bears the words "Genuine Harley-Davidson" on the left front area where a pocket might be.
- [69] After approximately 15 or 20 minutes following Mr. Neigum's arrival with the money and cigarettes, Mr. Laing left the apartment to locate the person to purchase drugs. He left Mr. Neigum alone in his suite.
- [70] Mr. Laing further testified that when he returned to the Lodge, approximately 20 or 30 minutes after he left, he saw another gentleman, Calvin Hofer, in the George Street parking lot. Mr. Hofer was yelling up to Mr. Neigum, where Mr. Neigum stood on the upper exterior hallway. He recalled that the landlord, Mr. Moynan, was outside, and to his recollection so was the other landlord, Ken. Mr. Hofer and Mr. Neigum were told to leave.
- [71] Mr. Laing testified that he knew Mr. Neigum for a few days at that point. He estimated Mr. Neigum's height to be 5' 10" or 5' 11", and his build to be thin or medium at the time.
- [72] Mr. Laing watched the surveillance video from the Lodge that evening.
- [73] The CD containing the recordings has two files of relevance: One file contains recordings from a few different cameras, commencing at 22:21 hours on December 29, 2012. Mr. Moynan testified that he always checked the dates and times on the surveillance recordings and that they were accurate at the time. In cross-examination, he acknowledged that the time recorded on the video was different than the police clocks by approximately three minutes.
- [74] This time, 22:21 hours, would be within a few minutes of the robbery of the liquor store, a short distance away. The camera angles include the Stanley Avenue parking lot, the George Street parking lot, and the upper floor exterior hallway leading to Mr. Laing's suite.
- [75] The second file on the CD contains recordings of the same camera angles commencing at 23:15 hours that same night, or 11:15 p.m.
- [76] The recordings commencing at 22:21 hours show a person running across Stanley Avenue toward the Stanley Avenue parking lot. This person would be coming from the direction of the Enderby Liquor Store. It is a dark image, but the person seen running is wearing lighter-coloured clothing on top. He is holding something in his hands of a loose fabric nature. He is seen to try to open the back of the first truck parked nose in, in a parking stall. We know this now to be Mr. Moynan's truck. The person does not appear to gain access and carries on past the truck to the front of it, toward the area of the fence and the garbage can. This is toward the precise location where the jacket was found the next day. The person goes out of camera view at this point. The recorded time is 22:21:05 when the person goes out of view.

- [77] Twenty-four seconds later, at 22:21:29, the person comes back from where he travelled, back into camera view, along the same path beside the truck. He jogs across the Stanley Avenue parking lot to the area where the stairs leading to the upper floor exterior hallway are located. While jogging across the lot, he is no longer carrying the loose fabric-type item in his hands.
- [78] Several seconds later, the recording of the upper floor exterior hallway shows a male entering the hallway from the area of the top of the stairs one accesses from the Stanley Avenue parking lot. The male is wearing a white or light grey hoodie with a zipper. He has nothing in his hands. He is travelling the length of the hallway and enters the door leading to Mr. Laing's suite. As he travels down the hallway toward the door to Mr. Laing's suite, he gets closer to the camera.
- [79] Mr. Laing watched this video and positively identified Mr. Neigum, the accused. He knows Mr. Neigum. His identification was not challenged.
- [80] Mr. Moynan watched this video recording as well. He identified the man travelling down the hallway as Mr. Neigum. He knows Mr. Neigum. He also identified Mr. Neigum in a photo lineup on January 1, 2013. His identification of Mr. Neigum was not challenged.
- [81] Given the events I have just described in detail, the evidence clearly establishes that the person seen running into the Stanley Avenue parking lot of the lodge to the truck and off camera briefly, before running across the lot to the bottom of the stairs leading to the upper floor, is the same person then seen walking along the upper exterior hallway to Mr. Laing's door. I am satisfied beyond a reasonable doubt that person is Mr. Neigum.
- [82] As well, given the location of the fleece jacket, now marked as an exhibit in this trial, found hidden in the snowbank, is the precise location where Mr. Neigum was seen to travel with a clothing-type item in his hand and 24 seconds later emerge without that item, I am also satisfied beyond a reasonable doubt that Mr. Neigum hid that jacket at that location at that time.
- [83] The second set of surveillance video images from the Lodge commences at 23:15 hours. A person is seen entering the George Street parking lot at approximately the same time as a person comes out of the door leading to Mr. Laing's suite onto the upper area exterior hallway. These two people, as seen from the separate camera images, appear to be verbally engaging one another.
- [84] Calvin Hofer testified. He was a difficult witness. I accept his identification of himself in this video as the man in the parking lot arguing with Mr. Neigum. Otherwise, except where his evidence is corroborated by other evidence I accept, I do not accept any of his evidence.

- [85] Mr. Laing also identified both men from the video recording. The recording captured the events he described seeing when he returned from looking for the gentleman with drugs. The time these events happened, that is the argument between Mr. Neigum and Mr. Hofer, is recorded by the video surveillance at 23:15 hours.
- [86] As well, Peter Moynan, familiar with both men, identified both Mr. Hofer and Mr. Neigum as the men arguing on the video. The video recording corroborates Mr. Moynan's recollections from that evening. He had been the landlord there for a long period of time. He lived in the building. He testified that on December 29, 2012, at approximately 11:00 p.m., he was watching the live surveillance videos of the Lodge. He saw Mr. Neigum, a man who used to live there and who he knew, coming out of Mr. Laing's apartment and walking back and forth along the upper level exterior hallway. He saw someone come into the George Street parking lot. He heard yelling, so he went out to see what was going on. Mr. Moynan observed Mr. Hofer, a person also known to him, in the parking lot, talking very loudly to Mr. Neigum as Mr. Neigum stood on the upper level exterior hallway. He told them both to get off the property. He saw Mr. Laing on the sidewalk on Stanley Avenue outside the gate. Mr. Hofer took off running.
- [87] Based on the totality of this evidence, I have no doubt that the person in the upper exterior hallway is Mr. Neigum and the person in the parking lot is Calvin Hofer, and that they were arguing at 23:15 hours.
- [88] Mr. Moynan estimated Mr. Neigum's height to be 6' 1" with a slender build.
- [89] These video recordings from the Enderby Lodge prove, among other things, that Mr. Laing's recollections about the time of day these events happened is wrong. I do not find that Mr. Laing was lying or trying to be deceitful about the time of day; he was simply mistaken.
- [90] Mr. Laing testified that after Mr. Neigum came back to his residence with the money and cigarettes, he stayed in the residence for approximately 15 to 20 minutes. Mr. Laing left, leaving Mr. Neigum behind. Mr. Laing came back approximately 20 or 30 minutes after he left. It was at this time that he found Mr. Hofer and Mr. Neigum arguing in the manner they did. Therefore, approximately 35 to 50 minutes after Mr. Neigum returned with the money, the argument between Mr. Neigum and Mr. Hofer occurred.
- [91] Mr. Hofer and Mr. Neigum only argued once that night. The video surveillance proves this happened between 23:15 hours and 23:17 hours, not in the early evening hours described by Mr. Laing.
- [92] Since the argument happened at that time, this logically leads to the conclusion that Mr. Neigum returned with the money and cigarettes some 35 to 50 minutes before the argument, precisely in the timeframe of the 22:21 surveillance video which shows Mr. Neigum running into the parking lot, hiding the jacket, and then up into Mr. Laing's suite.

POSITIONS OF THE PARTIES

- [93] By summarizing their positions, I do not mean to detract in any way from the very fulsome submissions that were made. I have considered all of those submissions.
- [94] Overall, Ms. Armstrong, for the Crown, submits that the totality of the circumstantial evidence, which includes video recordings, items seized, viva voce evidence from the scene of the robbery, along the trail from the liquor store to the Lodge, and at the Lodge, all weave together to prove beyond a reasonable doubt that the only reasonable inference to be drawn is that the accused is guilty.
- [95] Overall, Mr. Avis, on behalf of his client, submits that certain aspects of the evidence point away from the accused and should lead the court to conclude that identity has not been proven beyond a reasonable doubt. In furtherance of this position, he submits there is no evidence such as DNA or fingerprints.

CIRCUMSTANTIAL EVIDENCE AND ANALYSIS

- [96] The facts or premises on which an inference is to be drawn must be proved: *R. v. Frank*, 2011 BCSC 1716 at para. 29.
- [97] Before a verdict of guilty on circumstantial evidence can be reached, the court must be satisfied beyond a reasonable doubt that the guilt of the accused is the only reasonable inference to be drawn from the proven facts: *R. v. Cooper*, [1978] 1 S.C.R. 860 at para. 36. In other words, the only rational inference that can be drawn from the circumstantial evidence is that the accused is guilty: *R. v. Griffin*, 2009 SCC 28 and *Frank* at para. 31.
- [98] The evidence in this case proves beyond a reasonable doubt the following: Money and two packages of cigarettes were stolen from the Enderby Liquor Store by a masked man brandishing a knife on December 2012. The knife bore a yellow handle and looked like an exacto-style knife. The robber covered his face with the use of a scarf and a hood from a hoodie pulled tight. Over his hoodie, he wore a dark green pullover jacket with black stripes on the sleeves and black trim on the bottom of the sleeves. The robber was in the store for 30 seconds before leaving on foot, travelling north in the direction of the nearby Enderby Lodge.
- [99] The scarf worn by the robber was discarded in the alleyway behind the Enderby Inn as he fled. A few minutes after the robbery, Mr. Neigum is seen running from the direction of the liquor store into one of the parking lots of the Enderby Lodge, where he hides a jacket identical to the one worn by the robber. He hides it in a snowbank next to a garbage can, between a parked vehicle and a chainlink fence.
- [100] This post-offence conduct of hiding the jacket is strong circumstantial evidence in support of Mr. Neigum's guilt. As cited by Mr. Justice McEwan in *R. v. Cocks*, 2014 BCSC 1294 at para. 85, post-offence conduct was addressed by the Supreme Court of Canada recently in *R. v. White*, [2011] S.C.J. No. 13, at paras. 22 and 42, where the court wrote:

[22] The principle that after-the-fact conduct may constitute circumstantial evidence of guilt remains good law. At its heart, the question of whether such evidence is admissible is simply a matter of relevance. . . . As with all other evidence, the relevance and probative value of post-offence conduct must be assessed on a case-by-case basis. . . . Thus, while the term "consciousness of guilt" may have fallen out of use, it is still permissible for the prosecution to introduce evidence of after-the-fact conduct in support of an inference that the accused had behaved as a person who is guilty of the offence alleged -- provided that, as with all circumstantial evidence, its relevance to that inference can be demonstrated.

[42] [T]he established rule that circumstantial evidence must be relevant to the fact in issue. In any given case, that determination remains a fact-driven exercise. Whether or not a given instance of post-offence conduct has probative value with respect to the accused's level of culpability depends entirely on the specific nature of the conduct, its relationship to the record as a whole, and the issues raised at trial. There will undoubtedly be cases where, as a matter of logic and human experience, certain aspects of the accused's post-offence conduct support an inference regarding his level of culpability.

[101] Hiding the jacket can only have been done for one purpose in the circumstances of this case - to hide evidence that would link Mr. Neigum to the robbery.

[102] After Mr. Neigum hides the jacket, he further disposes of the clothing he had been wearing. He runs upstairs to Mr. Laing's suite where he gives Mr. Laing the light grey hoodie he was wearing. This hoodie matches the colour and look of the hoodie the robber was seen to wear. It has a drawstring that would enable one to cinch it tight, as was done by the robber. He takes a pair of pants from Mr. Laing and changes into those.

[103] Upon his return to the suite, Mr. Laing sees that Mr. Neigum now has a quantity of money and cigarettes that he did not have when he left some 10 minutes earlier, when he left with the expressed intention of obtaining money in order to buy drugs. The quantity of cigarettes observed by Mr. Laing matches that which was stolen. The brand name and packaging observed also matches one of the types contained within the liquor store cigarette drawer. The photographs taken of that drawer right after the robbery reveal empty spaces above a package of that exact colour and brand in the drawer following the robbery.

[104] A few days later, Mr. Neigum is apprehended driving a van owned by someone else. Located in that van under some clothing is a yellow exacto-style knife.

[105] As Mr. Avis points out, there is no fingerprint evidence in this case. There is no DNA evidence. There is also no eyewitness identification, or other forms of evidence such as a confession.

[106] What there is, however, is a large body of proven circumstantial evidence that I have outlined which, taken in totality, leads to only one rational inference - the robber was Mr. Neigum. I am satisfied beyond a reasonable doubt that the only rational inference that can be drawn from the totality of this proven evidence is that the accused is guilty.

- [107] I have given careful consideration to the discrepancies pointed to by Mr. Avis. In particular, he points to Mr. Laing's evidence that he believed he saw mostly \$20s in Mr. Neigum's hand, and that he heard or saw no evidence of coins and Ms. Zambon's evidence that she believed blue cigarettes to have been stolen and that her eye and height descriptions are inconsistent with descriptions of Mr. Neigum given by other witnesses. None of these apparent discrepancies considered alone or in combination raises any reasonable doubt in my mind.
- [108] Both Mr. Laing and Ms. Zambon were credible and believable in general, but some aspects of their evidence were, as I have found, unreliable. Mr. Laing's evidence about the time of day these events occurred was clearly mistaken for the reasons I outlined. His evidence regarding the denominations of the bills was less than certain, and he testified he did not see all of the money or count it.
- [109] Ms. Zambon's description of an identification of the robber's eyes can be given no weight for the reasons I outlined earlier, nor can her estimation of height be given much weight, given the circumstances under which she made those observations. I note that estimations of Mr. Neigum's height varied from 5' 8" to 6' between the various other witnesses, so Ms. Zambon's height estimation, even if I were to accept it, would be of very little assistance.
- [110] Ms. Zambon opined as to the brand of cigarettes taken based not upon her observation of them being taken, but upon the location of empty spaces in the drawer above the blue Canadian Classic cigarettes after the robbery. She did not actually see what was taken. There are empty spaces above a package of red Du Maurier cigarettes as well.
- [111] Finally, brief submissions were made regarding the possibility that perhaps Mr. Hofer committed this robbery, given his defensiveness and combativeness on the witness stand. There is no evidence to suggest that Mr. Hofer was involved. He was seen in the area roughly an hour or an hour and a half after the robbery, but he also lived in the area. He --
- [112] THE ACCUSED: [Indiscernible] minutes.
- [113] THE COURT: He is the same height as the height Ms. Zambon estimated the robber to be, but I have found her estimation to be unreliable. In any event, these factors do not raise any reasonable doubt in my mind.
- [114] Mr. Neigum, I am going to ask you to please stand, sir.
- [115] I am satisfied beyond a reasonable doubt that the Crown has proven each element of these two offences against you. I find you guilty as charged.

"S.A. Donegan J."

DONEGAN J.

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