
CANADA / JUDGMENT

R. v. Nelson

2010 BCSC 2033

COURT

Supreme Court of British Columbia

DECIDED

29 July 2010

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2010 BCSC 2033 R. v. Nelson

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Nelson,

2010 BCSC 2033

Date: 20100729

Docket: 25296

Registry: Vancouver

Regina

v.

Karl Danny Nelson

Before: The Honourable Madam Justice Gray

Oral Reasons for Judgment

Counsel for the Crown:

J.R. Dow

Counsel for the Accused:

R.P. Enright

Place and Date of Trial:

Vancouver, B.C.

May 31 to June 4, 2010

June 7 - 11 and 21, 2010

Place and Date of Judgment:

Vancouver, B.C.

July 29, 2010

- [1] THE COURT: Mr. Nelson stands charged by indictment with 11 offences relating to four bank robberies, all of which occurred in November 2009 in Vancouver, British Columbia. The first three robberies occurred at a Scotiabank branch near 12th and Granville Street. The fourth robbery occurred at a Scotiabank branch on Broadway near Burrard Street.
- [2] The charges proceeded to an 11-day judge-alone trial. With respect to all but one count, the sole issue is identification of the robber. There are two issues relating to Count 9, sexual assault. The issues are both identification of the alleged assailant and whether what occurred was a sexual assault.
- [3] The evidence included videotapes from bank surveillance cameras.
- [4] I will first summarize the charges. I will quote the relevant sections of the Criminal Code, R.S.C. 1985, c. C-46, the first time, and afterwards just refer to the description of the charge.
- [5] In connection with the first robbery of November 6, 2009, Mr. Nelson is charged in Count 1 with robbery of two tellers, contrary to s. 344(1)(b) of the Criminal Code, and in Count 2 with having his face masked with intent to commit an indictable offence, contrary to s. 351(2) of the Criminal Code.
- [6] In connection with the second robbery of November 19, 2009, Mr. Nelson is charged in Count 3 with robbery of two tellers, and in Count 4 with having his face masked with intent to commit an indictable offence.
- [7] In connection with the third robbery of November 26, 2009, Mr. Nelson is charged in Count 5 with robbery of two tellers, in Count 6 with having his face masked with intent to commit an indictable offence, and in Count 7 with using an imitation firearm while committing or attempting to commit the indictable offence of robbery, contrary to s. 85(2) of the Criminal Code.
- [8] In connection with the fourth robbery of November 27, 2009, Mr. Nelson is charged in Count 8 with robbery of a teller, in Count 9 with sexually assaulting a bank employee using a weapon of an imitation firearm contrary to s. 267, in Count 10 with having his face masked with intent to commit an indictable offence, and in Count 11 with using an imitation firearm while committing or attempting to commit the indictable offence of robbery.

- [9] As I have said, the only issue with respect to Counts 1 through 8 and Counts 10 and 11 is whether the Crown has established beyond a reasonable doubt that it was Mr. Nelson who committed the offences. With respect to Count 9, in addition to the issue of identification of the perpetrator, there is an issue about whether the Crown has established beyond a reasonable doubt that what occurred was a sexual assault.
- [10] Before commencing my analysis, I will refer to fundamental principles of law applicable to this case. First and foremost, as with every criminal case, the accused is presumed innocent and the Crown bears the burden of proving each essential element of each offence charged beyond a reasonable doubt. The accused does not have to prove anything. The burden of proof relates to each essential element of the offence and not to the individual pieces of evidence led by the Crown: see *R. v. Morin*, [1988] 2 S.C.R. 345, 66 C.R. (3d) 1.
- [11] The finding of guilt or innocence is based on the whole of the evidence. In *R. v. Lifchus*, [1997] 3 S.C.R. 320, Justice Cory canvassed the standard of proof in a criminal case. The standard of proof is a high one. It does not require proof to the level of absolute certainty, but it does not tolerate a reasonable doubt. An accused cannot be convicted on the basis that he or she is probably guilty or likely guilty. In those circumstances, the Crown must give the benefit of the doubt to the accused and acquit, because the Crown will have failed to prove the guilt of the accused beyond a reasonable doubt.
- [12] Another fundamental principle of law applicable in this case is that the evidence against an accused in one count in an indictment may not be used to prove the guilt of that accused in another count in the indictment. An accused may only be convicted of an offence on the basis of evidence that he or she committed that offence, and not on the basis of an inference that because the accused committed some other offence, he or she must also have committed this offence.
- [13] The court must consider each count on the indictment separately and may not use the evidence against the accused on one count to prove his guilt on another count. The court cannot use the conduct of an accused in relation to one count in an indictment to form an opinion that he was the type of person who might engage in the criminal activity referred to or related to the allegations in another count: see for example, *R. v. Nduwayo*, 2008 BCCA 255.
- [14] This is not one of those exceptional cases in which the Crown has established that there was a distinctive pattern of conduct permitting consideration of what is often called "similar fact evidence". In this case, the Crown did not apply for consideration of similar fact evidence, and so each count must be considered separately. For example, in considering whether the Crown has proven beyond a reasonable doubt that the accused committed the third robbery as alleged in Count 5, the court cannot consider evidence relating to the accused committing the fourth robbery as alleged in Count 8.

- [15] I will first describe what occurred in the four robberies and some of the events in the police investigation, to give context to the analysis. I will refer to the robber in the first robbery as Robber #1, and so on for each robbery. This is not a finding that the robbers were different people, but is simply to assist in considering the evidence on each count separately.
- [16] Both of the bank branches are laid out so that a person entering from the street first enters an area with automated banking machines which I will call the "ATM Vestibule". There are surveillance cameras in this area, as well as in other parts of the branches. The video evidence consisted of still images, apparently at the rate of about one image per second, except for one camera where the images appeared to be two images per second.
- [17] Both branches are laid out so that a person entering the branch itself from the ATM Vestibule must pass through a set of inner doors, and then can walk to the teller counters. The teller counters are designed so the customers stand on the side with the writing surface at roughly chest height. The tellers stand on the side with the working surface at roughly waist height.
- [18] The first robbery occurred on November 6, 2009, at around 12:30 p.m. Robber #1 was wearing a black ball cap, sunglasses, blue jeans, and a brown "hoodie", meaning a zippered sweater with a hood. The hood was down on Robber #1's shoulders and there was a handkerchief tied around his neck.
- [19] Robber #1 entered the ATM Vestibule, and the bank surveillance video includes frames with the lower part of his face exposed below the cap and sunglasses.
- [20] While in the ATM Vestibule, Robber #1 pulled the handkerchief up so that it covered his nose and mouth, and he then passed through the bank's inner doors. An apparent accomplice waited in the ATM Vestibule. This man was bearded, wearing sunglasses, a red ball cap, an Adidas zippered sweater under a hooded jacket with the hood pulled up over his head and cap, and blue jeans.
- [21] Robber #1 announced that this was a robbery and demanded money. He did not appear to have any weapon. The two named complainants were the tellers on duty. One teller gave Robber #1 about \$1,000 and the other teller gave him about \$1,600. The tellers also gave Robber #1 dye packs wrapped around cash. The dye packs were designed to explode when taken outside the branch, in order to assist in identifying robbers. Robber #1 threw the dye packs back. Robber #1 left the bank.
- [22] The time stamps on the bank surveillance video show that the time between Robber #1's first entry into the ATM Vestibule and his exit to the street after the robbery was less than one and one-half minutes.

- [23] The two tellers who were robbed and another bank employee testified about the first robbery. Their evidence about Robber #1's clothing was essentially consistent with each other and the videotape evidence. Their description of Robber #1 varied. Two described him as about five feet 10 inches tall, and the other as over six feet. Their estimates of his weight varied from 160 pounds to 220 pounds. One described him as "stocky", one as "big but neither skinny nor overweight", and the other as "a bulky person wearing baggy clothes".
- [24] The second robbery occurred on November 19, 2009, again at around 12:30 p.m. Robber #2 was wearing a blue or dark grey suit with a white or other light-coloured shirt or sweater over other items of clothing. When Robber #2 entered the ATM Vestibule, he was wearing a black knit cap. The bank surveillance video includes frames with his face exposed from eyebrows to chin. While in the ATM Vestibule, Robber #2 pulled the black cap down to his chin, covering his face. There were two holes for his eyes, but the hole in the cap for his mouth was sewn shut. I will refer to this type of cap as a "balaclava", although the witnesses used various terms, including "ski mask" and "toque".
- [25] Robber #2 then passed through the bank's inner doors. Robber #2 announced that this was a hold up and demanded money. Robber #2 was holding a canister with a spray handle on it. The canister had black and gold on it and appeared to be a can of bear spray or pepper spray.
- [26] Again, the two complainants were the two tellers on duty. One teller gave Robber #2 \$600 to \$800, and the other gave him \$1,400 to \$1,800. One teller gave him a dye pack and Robber #2 yelled about that and dropped it while in the bank. When one teller said he did not have more money, Robber #2 said the Cantonese word for "liar". Robber #2 left the bank.
- [27] The time stamps on the video suggest it was less than one minute from the time Robber #2 entered the ATM Vestibule until he left following the robbery.
- [28] The two tellers who were robbed and another bank employee testified about the second robbery. Their evidence about Robber #2's clothing was essentially consistent with each other and the videotape. Their evidence about Robber #2's physical description varied. One of these eyewitnesses described Robber #2 as six feet one inch tall and 250 pounds, husky and Caucasian. One wrote on a form shortly after the robbery that Robber #2 had blond, short hair.
- [29] The third robbery occurred on November 26, 2009, at around 1:30 p.m. Robber #3 was wearing what I will term "coveralls", although the witnesses used various terms for it, including "overalls". The coveralls covered Robber #3's arms and legs and torso with the opening down the front of his torso. As occurred in the second robbery, Robber #3 was wearing a black knit balaclava as a cap when he entered the ATM Vestibule, and the bank surveillance videos include frames with the lower part of his face exposed. Robber #3's face looks similar to Robber #2's face, although Robber #3 has what appears to be the beginning of a dark moustache, while Robber #2 was clean-shaven.

- [30] While in the ATM Vestibule, Robber #3 pulled the balaclava down to his chin so his face was covered with his eyes exposed, and he then passed through the bank's inner doors. A second person, apparently an accomplice, entered the ATM Vestibule wearing a baggy white and blue or black plaid shirt, and a red ball cap with a kerchief pulled over his nose and mouth. This second person was much shorter than Robber #3. This second person pointed a knife at a security guard during the robbery.
- [31] Robber #3 announced that this was a robbery and demanded money. Robber #3 was holding a real or imitation black handgun. Most of the witnesses thought it was all or partly plastic. Again, the two complainants were the two tellers on duty who were robbed, although only one of those tellers testified. One teller gave Robber #3 \$1,000 to \$2,000.
- [32] During the robbery, the balaclava slipped around on Robber #3's head, and Robber #3 touched it several times, apparently trying to straighten it so that he could see through the eyeholes.
- [33] Robber #3 left the bank. A customer followed him, and saw him get into a blue Dodge Caravan with B.C. licence plate number 173 PAK. The time stamps on the bank surveillance videos suggest that the time between Robber #3's entry into the ATM Vestibule and his departure after the robbery was about one and one-quarter minutes.
- [34] The eyewitnesses to the third robbery who testified were one of the tellers who was robbed, another bank employee, and a bank customer who saw the van. The evidence of the bank employees about Robber #3's clothing was essentially consistent with each other and the videotape, although one described the coveralls as being bluish-grey and the other described them as olive-green. However, the customer who saw the licence plate number on the van described Robber #3 as wearing a long jacket down to his knees and baggy clothes.
- [35] The eyewitnesses differed in their physical description of Robber #3. One described him as 160 to 170 pounds and stocky, and the other as six feet tall and with a fair complexion, perhaps Latino. Two witnesses who spoke Greek described Robber #3 as speaking with an accent.
- [36] At about 2:30 p.m. on November 27, 2009, the day after the third robbery, a man and a woman went into the Eldorado Liquor Store in Vancouver, B.C. The evidence included surveillance videotape from that store. The man was wearing a white and black or blue plaid jacket, which looks like the plaid jacket worn by the accomplice of Robber #3.
- [37] Also on November 27, 2009, Mr. Nelson's parole officer, Ms. Patterson, received an email copy of an image of Robber #2 from the bank surveillance videos. Ms. Patterson works in Vernon. She told Constable Russell that she was 80 percent sure the photograph was of Mr. Nelson, but was not completely certain due to the toque and the clothing.
- [38] The fourth robbery occurred later that day at around 3:45 p.m. Robber #4 was wearing a plaid jacket which appears to be similar or the same as the white and blue or black plaid jacket worn by the accomplice to the third robbery and by the man at the Eldorado Liquor

Store. Robber #4 also wore jeans and a black-knit balaclava. He was pulling the balaclava over his face as he was entering the ATM Vestibule, and the evidence did not include any clear pictures of even the lower part of his face. Robber #4 passed quickly through the bank's inner doors.

- [39] Robber #4 announced that this was a robbery and demanded money. Robber #4 was holding a black handgun, either real or an imitation. There was one teller on duty who gave Robber #4 about \$2,500 to \$3,000. The teller also gave Robber #4 dye packs which he threw back. During the robbery, Robber #4 frequently adjusted the balaclava.
- [40] Robber #4 left the branch. The time stamps on the video clips suggest that the time between entering the ATM Vestibule and leaving following the robbery was about one and one-quarter minutes.
- [41] There was differing evidence about what Robber #4 said. At one point during the robbery, he pointed the handgun at a bank employee who was near a teller wicket. When she said that she did not have a key to that wicket, Robber #4 said something. Two witnesses testified that he said, "Show me your tits" or "Show me your titty". One testified that he said, "Show me" and then said more which the witness did not hear. Another witness testified that Robber #4 said, "Let me see the kitty" followed by, "take your shirt off, I want to see your breasts."
- [42] The bank employee herself testified that she complied, first by pulling down the neck of her shirt, and then lifting the bottom of her shirt, exposing her chest area. No one testified that they saw her do that, but all the witnesses who testified said they looked away from her or were not looking at her at the time she would have exposed her brassiere and chest area.
- [43] The teller who was robbed, the bank employee who is the complainant in Count 9, two other bank employees, and a customer testified about the fourth robbery. Most of them described Robber #4's clothing in a way which was essentially consistent with the videotape, although one thought that Robber #4 was wearing a jean jacket. One witness said that Robber #4 was wearing at least two or three sets of clothes.
- [44] The evidence of the eyewitnesses about Robber #4's physical description varied. One described him as being at least six foot eight inches tall, but then said he was similar height to another witness who is about six feet two inches tall. One witness described Robber #4 as six feet two or three inches tall. The eyewitnesses' estimates of Robber #4's weight varied from 230 to 280 pounds, although the witness who estimated up to 280 pounds thought Robber #4 was similar to the bank employee who weighs about 230 pounds.
- [45] One witness filled out a form shortly after the robbery, describing Robber #4 as having blue eyes and yellow facial hair, meaning blond facial hair. One described him as having no hair and a blackish-brown moustache.

- [46] The bank employee who is the complainant in Count 8 testified that Robber #4 removed the balaclava while in the bank and that she got a clear view of his eyes. After viewing the video evidence at trial, she agreed that the robber did not remove the balaclava while in the bank. The video shows that the balaclava slipped around Robber #4's face and head. Until the witness saw the video, she also thought that Robber #4 was wearing leather gloves.
- [47] In the hours after the fourth robbery, this complainant was shown a photo collection and she identified a photograph that she thought depicted Robber #4. The photograph she identified is Exhibit 19. The person in the photograph was not named but it is not Mr. Nelson. This witness said at the time that she was 90 percent sure, and that although all the pictures looked the same, the eyes stood out on the man in Exhibit 19. The police officer told her that it was time to say so if she was not sure.
- [48] One of the bank employees identified Mr. Nelson in the courtroom as being Robber #4. This witness testified he was not sure at the beginning and wanted Mr. Nelson to stand up, which Mr. Nelson did not do. This witness had not been shown a photo lineup and said that he recognized Mr. Nelson's nose, eyes, mouth, size, and weight. The only people in the courtroom at the time of the identification were lawyers, court personnel, the witness, and Mr. Nelson.
- [49] At about 4:50 p.m. on November 27, 2009, being about an hour after the fourth robbery, a police constable was making observations of a Dodge Caravan, licence plate number 173 PAK, parked in front of 788 East 53rd Avenue, Vancouver, B.C. That is the vehicle used by Robber #3 to leave after that robbery, and I will refer to that vehicle as the "Van". The constable observed several parties moving around the Van, being at least one or two males and two females.
- [50] At around 5:00 p.m., Constable Primerano turned on his police car's emergency lights and the Van stopped. Constable Primerano went to the driver's side of the Van, and Constable Krzus, who was in a backup vehicle, went to the passenger side. Mr. Nelson was in the passenger's seat and Ms. Melissa Kenoras was in the driver's seat. Mr. Nelson was arrested. The police arranged for a tow truck to tow the Van to the police garage for a search. The tow truck began towing the Van at about 5:50 p.m. Constable Krzus followed it to the police garage and did not see anyone enter or leave it.
- [51] Constable Aitken searched the Van from around 6:00 p.m. to 7:00 p.m. He found an open black lady's purse between the driver and passenger seats. It contained a wad of money and a receipt from the Eldorado Liquor Store concerning a purchase at around 2:30 p.m. earlier that day, November 27, 2009.
- [52] Constable Aitken also found a black cloth bag directly beneath the right side of the front bench seat, behind the front passenger seat. The cloth bag contained a large canister of bear spray with a gold label and black writing, a black balaclava with two eyeholes and the mouth sewn shut, a replica handgun, a screwdriver, and a culinary knife with an eight-inch blade. Constable Aitken also found a number of objects in the Van which were not in the black bag.

The objects he observed included medications and documents for Melissa Kenoras, another knife, gloves, a toolbox, about seven fleeces, a tin of BB gun pellets, and a big bag of new clothing with labels still on. Constable Aitken did not find a plaid shirt in the Van. He found car insurance papers for the Van in the glove box in the name of "Pooley".

- [53] The evidence included two undated photos of Mr. Nelson. There was no evidence about when the photographs were taken.
- [54] Constable Krzus testified about his recollection of Mr. Nelson's appearance at the time of the arrest, but he had not made notes about that at the time of Mr. Nelson's arrest. Constable Krzus testified at trial that when Mr. Nelson was arrested, he had a shaved head, probably weighed 200 to 220 pounds, and had a "little darker" complexion.
- [55] Constable Primerano also testified about his recollection of Mr. Nelson's appearance at the time of the arrest. Constable Primerano had made notes about Mr. Nelson's clothing, but not about his physical description. Constable Primerano had seen the photographs of Mr. Nelson prior to the trial.
- [56] Constable Primerano described Mr. Nelson as having a moustache and shaved hair, but with a small amount of stubble. He described Mr. Nelson's clothing as being the same as in the undated photographs. He testified that the undated photographs were accurate descriptions of Mr. Nelson's appearance on November 27, 2009, that his hair and moustache appeared that way on that day, and that the clothing he was wearing in the undated photographs is the same as the clothing he was wearing when he was arrested.
- [57] Constable Primerano described Mr. Nelson's appearance at trial as having no moustache, more hair than when arrested, and possibly weighing less than when he was arrested.
- [58] Constable Russell testified about Mr. Nelson's appearance at about 5:45 a.m. on November 28, 2009. Before Constable Russell saw him at that time, Constable Russell had looked at the video images from the bank and a photograph of Mr. Nelson from 2008. Constable Russell did not write a description of Mr. Nelson on November 28, 2009. Constable Russell described Mr. Nelson on November 28 as being an aboriginal male, six feet to six feet two inches tall, 240 to 250 pounds with a heavy build, with his hair completely shaved, facial stubble around his mouth, lighter skin with a Caucasian tone to it, and aged about 35.
- [59] Constable Russell then identified Mr. Nelson in the courtroom and testified that at trial Mr. Nelson's hair appeared longer. Following that identification, Constable Russell testified that the undated photographs depicted how Mr. Nelson looked on November 28, 2009, although he was wearing different clothes when Constable Russell saw him. Constable Russell first saw those undated photographs during his testimony at trial.
- [60] Constable Aitken saw Mr. Nelson in custody between 5:45 and 6:15 a.m. on November 28, 2009. Constable Aitken did not make a note about that or describing Mr. Nelson. Constable Aitken testified at trial that Mr. Nelson was six foot one to six foot two inches tall with a little pot belly, a head shaved like stubble, a very oval face, about 260 pounds, and appearing

native but with lighter skin, possibly Caucasian. Constable Aitken could not recall whether Mr. Nelson had facial hair or what he was wearing on November 28, 2009. Constable Aitken agreed that his memory was probably influenced by having looked at photographs and bank surveillance videos. He testified that the photographs of Mr. Nelson looked similar to how Mr. Nelson appeared in court and his weight appeared to be similar, but his hair appeared to be longer.

- [61] The Crown called the evidence of Ms. Patterson as a lay recognition expert. She had seen Mr. Nelson 17 times in the period of about three and a half months before the first robbery. She had interviewed Mr. Nelson at the home he shared with Ms. Melissa Kenoras in Salmon Arm, B.C. Ms. Patterson described Mr. Nelson as having strong facial features, shaved or short hair that was quite thick, and as a strong-looking First Nations man whose skin is lighter brown than some First Nations people's skin.
- [62] Ms. Patterson described Mr. Nelson's appearance at trial as being similar to how he appeared when she met with him, except that his hair may have been longer at trial. Ms. Patterson identified the photo from the second robbery, which had been emailed to her. In her responding email on November 27, 2009, she had referred to the image as showing a "strong similarity to Mr. Nelson, I cannot say for certain it is him." She wrote a report in November 2009 in which she wrote that she "noted a strong resemblance to Mr. Nelson. Given that the person had a toque, the identity was not definite."
- [63] Subsequently, Ms. Patterson was provided with information about the police investigation in which the police referred to Mr. Nelson as the robber and which discussed the circumstances of his arrest, including the articles found in the Van, and set out a description of Mr. Nelson.
- [64] At trial, Ms. Patterson was shown bank videotapes. She testified that Robber #2 "looks very much like" Mr. Nelson, although there is less of his face to see, and with the sunglasses and cap pulled down, she could not see his eyes. She referred to Mr. Nelson's strong jaw set, strong nose, and having eyebrows and eyes like Mr. Nelson. She thought she could see enough of Robber #2's face to say that it was Mr. Nelson and his body size appeared the same as Mr. Nelson's.
- [65] Ms. Patterson testified that Robber #3 "looks like" Mr. Nelson, although she could not see his forehead and hair. She referred in particular to his strong jaw, face, and eyes.
- [66] Ms. Patterson was shown a video clip from the Eldorado Liquor Store. She did not recognize the man in the plaid jacket. She believed that the video portrayed the man as being bald and with fine facial features. She testified that she was very certain it was not Mr. Nelson. She believed the woman in the store at the same time as the man in the plaid jacket was Ms. Melissa Kenoras.

- [67] I will go through the evidence relating to identification for each robbery, generally by first referring to the video evidence itself, next to the recognition evidence of Ms. Patterson, next to the eyewitness observations, and lastly to the connection, if any, to articles found in the Van.
- [68] Robber #1 appears in the video evidence with his head covered by a ball cap and his eyes covered by sunglasses. It looks significantly like Mr. Nelson, but I am not satisfied beyond a reasonable doubt that the video depicts Mr. Nelson. For example, the unnamed individual whose photograph is Exhibit 19 and who the complainant in Count 8 selected as Robber #4 also looks like Robber #1 as he appears in the video.
- [69] I found Ms. Patterson to be straightforward in her evidence and to be making a sincere effort to compare the images with her memory of Mr. Nelson. However, by the time she made the identification, she had been exposed to information from the police about Mr. Nelson and his arrest which she may well have thought corroborated Mr. Nelson as being the robber. I am not satisfied beyond a reasonable doubt that Ms. Patterson correctly identified the person appearing in the videos of the first robbery to be Mr. Nelson.
- [70] The eyewitness evidence is not sufficient to support a conviction. There were important differences in the eyewitness evidence. That is not surprising, in light of the short time period of the robbery, the natural fear and upset that the robbery would incite, and the lack of familiarity with the robbery. Eyewitness identification is well known to be frail evidence which is often simply wrong.
- [71] The evidence does not establish beyond a reasonable doubt that Robber #1 was Mr. Nelson. As a result, acquittals must be entered on Counts 1 and 2.
- [72] Robber #2 appears in the video evidence with his head covered by a balaclava worn as a cap. It looks significantly like Mr. Nelson, but I am not satisfied beyond a reasonable doubt that the video depicts Mr. Nelson. Again, for example, the unnamed individual pictured in Exhibit 19 also looks like the person in the videos of the second robbery.
- [73] Ms. Patterson acknowledged some hesitation in her initial identification of Mr. Nelson from the still photograph which was part of the videotape of the second robbery. Her initial responses by email and in the November report demonstrate some reservations about the identification. While she appeared somewhat more certain at trial, she had been exposed to reports and information which probably suggested to her that she had accurately identified Robber #2 as Mr. Nelson. Particularly in light of her initial uncertainty about the identification, I am not satisfied beyond a reasonable doubt that Ms. Patterson can recognize the person appearing in the video of the second robbery to be Mr. Nelson.
- [74] The eyewitness evidence is not sufficient to support a conviction. Again, as would be expected, there were important differences in the eyewitness evidence.

- [75] The Crown sought to rely on the fact that Mr. Nelson was found in the Van bearing the licence number of the van used leaving Robbery #3 and that the Van contained similar items to those used in the second, third, and fourth robberies.
- [76] The evidence was insufficient to establish that Mr. Nelson was in possession of the items in the black bag. Several individuals were seen moving around the Van prior to Mr. Nelson's arrest, being at least one or two males and two females. Mr. Nelson was not seen holding or touching the bag. There was no evidence connecting him with the articles in the black bag, except that he was in the Van where the police found the bag containing those articles.
- [77] Among the reasonable inferences that can arise from this evidence is the inference that the black bag belonged to someone else who was seen moving around the Van. This evidence could suggest that Mr. Nelson was either associated in some way with the robber in one or more of the robberies, or was himself the robber in one or more of the robberies. However, it fails to establish beyond a reasonable doubt that Mr. Nelson was the robber. For example, the man in the plaid jacket pictured in the Eldorado video may have been the robber, and Ms. Patterson may be correct that the person is not Mr. Nelson. Mr. Nelson may simply have sat in a Van driven by Mr. Nelson's girlfriend which contained the robber's articles.
- [78] The evidence does not establish beyond a reasonable doubt that Robber #2 was Mr. Nelson. As a result, acquittals must be entered on Counts 3 and 4.
- [79] Robber #3 appears in the video evidence with his head covered by a balaclava worn as a cap, but with the lower part of his face exposed. The person looks very similar and probably the same as Robber #2, but again I am not satisfied beyond a reasonable doubt that the videos depict Mr. Nelson.
- [80] Again, particularly in light of her initial uncertainty about identification and her later exposure to information implicating Mr. Nelson, I am not satisfied beyond a reasonable doubt that Ms. Patterson has accurately identified the person appearing in the videos of the third robbery to be Mr. Nelson.
- [81] The eyewitness evidence identifying Robber #3 is not sufficient to prove identification beyond a reasonable doubt. Again, there were important differences in the eyewitness evidence. Once again, the evidence does not establish that Mr. Nelson was in possession of the articles in the Van, so they cannot form the basis for a conviction.
- [82] The evidence regarding Counts 5, 6, and 7 does not establish beyond a reasonable doubt that Robber #3 was Mr. Nelson. As a result, acquittals must be entered on Counts 5, 6, and 7.
- [83] Robber #4 does not appear in the video evidence with his face exposed. Neither the videos themselves nor Ms. Patterson's evidence support identification of Robber #4 as Mr. Nelson. The individual who was wearing a plaid jacket in the Eldorado Liquor Store bears some resemblance to Mr. Nelson, but Ms. Patterson was certain it was not Mr. Nelson.

- [84] The eyewitness evidence concerning Counts 8, 9, 10, and 11 is not sufficient to support a conviction. Again, there were important differences in the eyewitness evidence. The complainant in Count 9 identified a photograph of someone who is not Mr. Nelson. Once again, the evidence does not establish that Mr. Nelson was in possession of the articles in the Van, so that cannot form the basis for a conviction.
- [85] The evidence does not establish beyond a reasonable doubt that Robber #4 was Mr. Nelson. As a result, acquittals must be entered on Counts 8, 9, 10, and 11. It is therefore not necessary to consider whether the evidence established beyond a reasonable doubt that a sexual assault occurred as alleged in Count 9.
- [86] Mr. Nelson has been acquitted of all charges in this 11-count indictment relating to these four robberies.

"Gray J."

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