
CANADA / JUDGMENT

R. v. Phillips

2018 BCSC 1263

COURT

Supreme Court of British Columbia

DECIDED

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2018 BCSC 1263 R. v. Phillips

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Phillips,

2018 BCSC 1263

Date: 20180404

Docket: 27370

Registry: Vancouver

Regina

v.

Brian Ross Phillips

Before: The Honourable Mr. Justice Blok

Oral Reasons for Judgment

Counsel for the Crown:

E. Poll

Counsel for the Accused:

C. Paquette

Place and Date of Trial:

Vancouver, B.C.

March 26-28, 2018

Place and Date of Judgment:

Vancouver, B.C.

April 4, 2018

- [1] THE COURT: I am about to give reasons in this matter. They are not as brief as I would have liked them to be so you should make yourselves comfortable. I will say that should a transcript be ordered of these oral reasons for judgment, I reserve the right to edit them and indeed perhaps to edit them liberally, in order to make them more readable and correct any minor errors, but without changing any of the reasoning or, of course, the ultimate result.

I. Introduction

- [2] In the early morning hours of September 21, 2015, an intruder entered a Commercial Drive area home through a window. The home was occupied by Vicki Scully, her two children, one who was then four-and-a-half-years old and the other one-month old, as well as her father, Lorne Scully, who was visiting his daughter and who was staying overnight. Ms. Scully and the baby were sleeping on the main ground level of the home, which was a carriage house associated with a larger residence on the same lot. Her father and her four-year-old child were sleeping in a loft area.
- [3] Ms. Scully was awoken by the sound of banging at a window of her home. She had heard sounds prior to that, sounds suggestive of activity outside, but she had not investigated them because she was exhausted from a hitherto restless night with her newborn baby.
- [4] The intruder forced the window open by breaking a chain that restricted the window from opening more than about two inches. He then maneuvered himself through the window, breaking the venetian blinds in the process. Ms. Scully shouted at the intruder while the person was still outside and she screamed when he entered. She testified that, after he entered, he grabbed her and attacked her, knocking the both of them down initially. A struggle ensued which consisted primarily of upper body grappling between the two. She called to her father for help. Mr. Scully came to her aid. All three were now engaged in the struggle. Ms. Scully broke off to telephone 911. While she was on the phone, the intruder broke off from the struggle, opened the door, and left.
- [5] Ms. Scully suffered bruises and scrapes as a result of the incident as well as an injury to her knee. One bruise located on the left side of her chin was very prominent, as depicted in a photograph taken three days later. Ms. Scully said that her knee has had ongoing symptoms, specifically pain and swelling, for which she is still getting medical attention. Lorne Scully was not injured in the incident.
- [6] The Crown alleges that the intruder was the accused, Brian Phillips.
- [7] Mr. Phillips is charged in a three-count indictment with the following offences:

1. breaking and entering a dwelling house and committing the indictable offence of assault contrary to s. 348(1)(d) of the Criminal Code;
 2. assault of Vicki Scully contrary to s. 266 of the Criminal Code; and
 3. theft of a motor vehicle contrary to s. 333.1(1) of the Criminal Code.
- [8] On the first day of trial, Mr. Phillips pleaded guilty to Count 3 and so this is no longer an issue, although I will mention the theft of the vehicle later as it forms part of the narrative of events. Accordingly, the issue to be decided is whether the Crown has proven beyond a reasonable doubt that the intruder that night was Mr. Phillips. In short, the issue is identification.

II. Evidence

- [9] Evidence was given through the testimony of witnesses and through a detailed set of admissions. As for the witnesses, in addition to Vicki Scully and Lorne Scully, there were six police witnesses, and I will now summarize the evidence of each of them.

A. Constable Christopher Wiens

- [10] Constable Christopher Wiens is a forensic identification officer. He took photographs of the scene and performed other examinations. He examined the venetian blinds, window, and window sill for fingerprints, but found no suitable prints. He said Ms. Scully's shirt was photographed, but it was not tested for DNA.

B. Constable Emily Florkow

- [11] Constable Florkow and her partner, Constable Kristie Fisher, received a dispatch concerning an incident on Williams Street and arrived there at 5:10 a.m. They attended via the back lane of the residence, a location nearest the coach house. Constable Florkow spoke to Ms. Scully both inside the residence and in the lane area. Ms. Scully pointed out a pair of boots, not belonging to either her or her father, located underneath an open window where there were damaged blinds. There was a small garbage can underneath the window. Photographs show it to be a small perhaps kitchen-sized garbage can. A dog tracker was used on scene with the dog subsequently tracking through the yard towards the front of the property via the eastside walkway. There, Cst. Florkow saw a broken fence and a gate. Photographs show a fence that appears to have been broken by being pushed over.
- [12] Constable Florkow said she noted a large bruise in Ms. Scully's chin area.

C. Constable Kristie Fisher

- [13] Constable Kristie Fisher also attended at the Williams Street residence. As Cst. Fisher walked towards the door of the carriage house from the rear, she noted a window was ajar, the horizontal blinds appeared to be bent and damaged, and underneath the window there

was a small garbage can and a pair of leather boots. Constable Fisher then knocked on the door and spoke to Ms. Scully. Photographs taken that evening show the small garbage can as well as a pair of leather hiking or perhaps work boots sitting upright and side by side. Constable Fisher also observed the pushed-down fence on the east side of the property. Constable Fisher said she seized Mr. Scully's t-shirt for possible DNA testing, but she did not know what became of it.

D. Constable David Menzies

- [14] Constable David Menzies attended at the subject residence at 7:00 a.m. on the morning of the incident. His other investigations and findings, which were largely the subject of admissions, were summarized in a large map marked as Exhibit 7, which showed the movements of Mr. Phillips between noon on September 20, 2015, and about 6:00 a.m. on September 21, 2015. I will return to this later when I discuss the admissions.

E. Constable Daniel Martin

- [15] Constable Daniel Martin, a forensic identification officer, was dispatched to the Scully residence on September 26, 2015, five days after the incident. He spoke to Ms. Scully, who directed him to a child's playhouse on the property, where she had located clothing, a jacket and a baseball cap. He took photographs of the items as he found them inside the playhouse and he then seized them.

F. Sergeant James Flewelling

- [16] Sergeant James Flewelling is a member of the Emergency Response Team of the Vancouver Police Department. At 6:10 a.m. on September 21, 2015, Sgt. Flewelling was just arriving at the police station at 2120 Cambie Street to start his work day. Another officer directed his attention to a panel van that had been associated with a person claiming he had been kidnapped. Sergeant Flewelling then cleared the van for security purposes, at which time, he was told the individual was in a nearby Starbucks coffee shop. Sergeant Flewelling proceeded to the Starbucks where he saw a male in front of the counter. He said the male was in his late 40s or early 50s, looked disheveled, was wearing a blue Canucks jersey, which is how he described it, as well as blue jeans with dirty knees. He had no shoes on, just white socks. He said the man appeared to have a cut on his lip. The man tried to flee, but was restrained by Sgt. Flewelling and two other officers who secured him after a struggle. After the man was given a Charter warning, the man said, "Yes, I stole the van".

G. Admissions

- [17] Among other things, the admissions verify the various surveillance video images and still images that indicate the movements of Mr. Phillips from approximately noon on September 20, 2015, to 6:00 a.m. on September 21, 2015. They also address certain DNA testing results. Generally speaking, the sequence of events revealed by the admissions is as follows.

- [18] On September 20, 2015, Mr. Phillips was terminated from his employment at Bridge Studios in the Boundary Road area of Burnaby. Surveillance video from the Bridge Studios location captured images from the property at 2400 Boundary Road, Burnaby, around 1233 hours on September 20, 2015. In that video and still pictures, Mr. Phillips is observed wearing a black jacket, a Canucks t-shirt, a black hat, blue jeans, and work boots.
- [19] At 0539 hours on September 21, 2015, surveillance from a transit bus captured images and video taken in the 1900 block of Commercial Drive, Vancouver. These show an individual wearing a Canucks t-shirt attempting to flag down the bus. The admissions also include the evidence from the bus driver as follows: at approximately 0539 hours on September 21, he was driving a bus northbound on Commercial Drive at 6th Avenue in Vancouver and he witnessed a white male between 35 and 45 years of age wearing blue jeans, possibly a green t-shirt, and possibly not wearing shoes.
- [20] Mr. Phillips was then captured on other surveillance video in the 2000-block of Commercial Drive at around the 0539 hours. The images depict a man in a Canucks t-shirt running southbound.
- [21] The next video comes from the Broadway/Commercial SkyTrain Station and depicts a man in a Canucks t-shirt entering the station and then riding a SkyTrain.
- [22] The next surveillance captures images taken in the 600 block of Granville Street, which image I will confess I found to be unhelpful in that the image was so poor, and perhaps my attention was not drawn to the right things, but I did not derive anything from that. In any event, none of this is contentious insofar as Mr. Phillips gave evidence about his movements in any event.
- [23] At about 0600 hours on September 21, 2015, the owner of a GMC Savana van parked his van in the 500-block of Robson Street in order to make a bread delivery. He left the keys in the ignition. While he was making his delivery and as he returned to his van, someone took the vehicle without his permission. Shortly after calling 911, the owner was retrieved by police and taken to the Yukon Street area in Vancouver, close to the Cambie Street police station, and the owner there identified his vehicle as his.
- [24] As I have indicated, the admissions also cover DNA evidence and, briefly, it is as follows: a DNA typing profile obtained from both heel pulls of the boots found outside the window of the Scully residence matched the known sample which contained the DNA of Mr. Phillips. A sample taken from the sweatband area of the baseball hat or cap retrieved from the playhouse matched the DNA of the accused, Mr. Phillips. A DNA profile taken from the underside of the front top portion of the brim of the baseball cap was found to be of mixed origin consistent with having originated from two individuals. The profile of the major component matched that of Mr. Phillips.

[25] Finally, there were two other aspects that I will refer to and again I will emphasize that I am not repeating all of the admissions as they, of course, all form part of the evidence in this case. A booking photo was taken of Mr. Phillips and the booking sheet and photograph were admitted. Finally, the evidence of a Constable Richardson was also admitted. It was to this effect: Cst. Richardson arrived for work at the Cambie Street police station at approximately 0609 hours on September 21, 2015. He saw the accused emerge from a white van facing in the wrong direction. He was flailing his arms and yelling for the police. When Cst. Richardson approached him the man said, "I've been kidnapped".

H. Vicki Scully

[26] I will now summarize some of the further evidence of Vicki Scully. Ms. Scully said she wears glasses, but she did not have her glasses on during her encounter with the intruder. She said that during the struggle the intruder was close to her and, at some point, she was pushing his face. At some point, he said, "Come with me", or words to that effect as well as, "I want to be with you". At the time he spoke, she felt he was pulling her in the direction of the door. The police arrived quickly, coming onto the property via the back gate.

[27] Ms. Scully said she did not see the intruder's face. She said the intruder was likely several inches taller than her and she is five-foot-six-inches tall. She said he had a regular or medium build. She said she felt no facial hair and said he had no dreadlocks or a shaved head, glasses, or piercings. She touched his clothing which she said felt like a sweatshirt or inside clothing of some sort. She did not smell any alcohol. She did not think he was wearing the jacket that was found in the playhouse, reiterating that it was more of a sweatshirt type of clothing. Ms. Scully noted that the garbage can underneath the outside of the window had a dented lid.

[28] In cross-examination, Ms. Scully said:

- a) the intruder was not overly muscular. He was of medium build, a solid weight, but she could not estimate his weight other than to say it was more than hers;
- b) she did not recall that the intruder had any smell;
- c) she thought their height difference would have been two to three inches, though she said they were mostly crouching during the altercation. They did both stand at some point. When she was asked to compare the intruder's height with her father's, she said, "They were quite equal in height and in stature", the latter of which I took to mean build. She agreed he might have been about five-ten, but added that, "I felt he was taller than me, but not very tall".

[29] She made contact with his face perhaps early on as well as near the front door, but she said she did not have a specific recollection of touching for any length of time. When asked if he had no facial hair, Ms. Scully said, "That would be my recollection". When asked if that meant not even any stubble, she said the event was very fast and it was very stressful and said, "Probably some, but not a significant amount". When shown the booking photograph

taken of Mr. Phillips later that morning, she acknowledged that the man in the photo had facial hair and said, "I expect I would have felt that".

- [30] She disagreed he had brown skin tone saying, "I believe it was light, maybe tanned, but it was very dark", meaning dark in the room. She acknowledged that in her statement to police when she was asked, "Did you see skin colour?", she said, "No, I don't think it was glowing white", and then the police officer said, "So it might be like brown", and she said, "It might be like brown", but she did not believe it was dark brown or black. She agreed that his top, which she believed was a sweatshirt, covered the intruder's arms so she would not see his skin colour that way, but she again said, "except it was quite dark". Later, she said her impression was that it was cotton or sweatshirt material.
- [31] The interviewing police officer suggested to her that the intruder was five-ten to six feet since she told the officer the intruder was a little bit less than the officer's height and Ms. Scully said five-ten to six feet "maybe", but in cross-examination she said, "I don't do a lot of" and I took this to be, "height and weight descriptions". She went on to say: "The detective was giving me a comparison. I say the comparison to my father was more accurate." The intruder was heavier than her, but not by a lot. At that time, she weighed 150 pounds. She told the police he was wearing a grey toque, but she said she mentioned this because she had no recollection of his hair. At trial, she said, "Today I really can't say". Finally, during the incident, she was alarmed, terrified, very scared, and angry. It was a very chaotic situation.

I. Lorne Scully

- [32] Mr. Scully said he heard loud banging and his daughter shouting, "Get out of my house", and then his daughter called to him for help. He looked down from the loft and saw his daughter struggling with someone over her. Mr. Scully said the room where they were struggling was virtually pitch black with only some ambient light. Mr. Scully engaged with the intruder. At some point, all three of them were on their feet. He was exchanging pushes or grasps with the intruder. He told his daughter to call 911. At one point, he was pushed to the couch. He determined later that this was where the baby was and he might have been very close to sitting on the baby's head at that point. He said the scuffle ended soon after his daughter separated from the fray. The intruder opened the door and left. Mr. Scully chased for just a few steps, but he had bare feet so that was it for his pursuit.
- [33] When asked about the gender of the intruder, Mr. Scully he could not see anything, but he assumed it was a man. In the brief pursuit, Mr. Scully swore at the intruder and the intruder said something back. It was a man's voice. Mr. Scully said that as he grappled with the intruder, "He seemed similar to my height". Mr. Scully said, "My impression was that he was of a similar build". Mr. Scully is five-foot-nine-tall and weighs 170 pounds. When asked what the intruder was wearing, he said he could see nothing in the dark and assumed he was wearing dark clothing. When asked about skin tone or colour, he again said it was dark and he could not see. He said, "I assumed dark. It was just black against a background".

- [34] In cross-examination, Mr. Scully said he saw his daughter from upstairs, her legs and underwear. It was a dark room and her legs were white. He did not recall saying, while his daughter was on the phone to the 911 operator, that the intruder was black. He could not say that he did not say it, but he added that, "It was a very emotional moment and everyone was in a panic". He acknowledged telling the police that the intruder had dark skin, but at trial, he said he did not recall skin colour and he merely had an impression of a blank dark outline.
- [35] That concludes my summary of the Crown's case, and so I turn now to the defence case, beginning with Mr. Phillips.

J. Mr. Phillips

- [36] Mr. Phillips began his testimony with events of September 20, 2015. He said he was scheduled to work at Bridge Studios the following day. He was at that point living in his car. He later said that he had not showered or shaved for perhaps a week. He parked at the studios and drank three beers and then fell asleep. Around noon, a person who identified himself as the transport coordinator at the studios knocked on his window, asked Mr. Phillips what he was doing, and Mr. Phillips said, "Working on [a named show]" and the man said, "No, you're not. We don't want you", and told him to leave. The man called the RCMP who also told him to leave. His car was impounded.
- [37] He said he then walked to some apartments near East Hastings and Clark Drive where some friends lived. He took his beer with him and drank with his friends, at one point stepping out for "a beer run" to get more alcohol.
- [38] Mr. Phillips described an unfortunate history he had with people associated with those apartment buildings. The year before, he was drinking with a friend in one of the apartments and Mr. Phillips decided to confront some drug dealers who had "taken over the place". Three or four of them came after him so he jumped out a window and called 911. The recording of that 911 call was played at trial. The call made by Mr. Phillips at that time was generally to the effect that he needed "a lot of police" because he was going to kick out the drug dealers from the building.
- [39] At trial, he said he called 911 in order to "make a record", which perhaps explains why in the recording Mr. Phillips used the phrase, "If I don't come out alive". In that 2014 incident, there was a further scuffle, as Mr. Phillips described it, with the alleged drug dealers as Mr. Phillips came down the fire escape. When he walked to the front of the building, the police were on scene but, in Mr. Phillips' words, he was "made to be the bad guy in the end" and he was barred from the building.
- [40] Mr. Phillips said that when he went to the apartments on September 20, 2015, that was the first time he had been back since the 2014 incident.

- [41] On his September 20, 2015 visit, he spent the time drinking with friends. He said he had eight to 12 beers and two shots of whiskey. At one point, one of the tenants "popped his head in". It happened to be one of the same people involved in the event the year before or, as Mr. Phillips put it, "The same guy who tried to take my head off with a two-by-four". That man saw Mr. Phillips. Mr. Phillips said, "He had a look on his face like he had seen a ghost". Mr. Phillips left the building 15 minutes later. He said he had an uneasy feeling.
- [42] He walked along East Pender Street. He saw a group of people in a back alley, perhaps six in number, five of whom were wearing hoodies. They followed him. He heard them say, "There's the rat. You're going to get it", or "You're gonna get it". Mr. Phillips then bolted. The group followed. He ran to Commercial Drive and hid in an alley. He saw all six nearby. He went into another alley and, here, he took his boots off because his legs were getting heavy. He threw them over a fence. He then went to squeeze under a car, but he could not fit so he took his coat off and threw it over a fence farther down the alley. He stayed there 20 minutes, then ran to Commercial Drive, going southbound on Commercial. He tried to use a phone at a grocery store in order to call police, but the clerk would not let him. He tried to flag a bus down, but the driver would not let him on.
- [43] He went to the SkyTrain station and took a train downtown, getting off at Granville Street. He went to a convenience store and asked the clerk to phone the police and the clerk said he would. However, in Mr. Phillips' words, "It took forever", and he then noticed the clerk had his finger on the lever in the cradle of the telephone, the lever that cuts the call when the receiver is put back in its cradle. I took this to be effectively saying that the clerk only faked making a phone call.
- [44] Mr. Phillips saw a delivery van across the street. Keys were in it. He started the van intending to drive to the police station which he, in fact, did. At the police station, he drove up to a group of officers. He was about to speak with them when one officer went to grab his gun. Mr. Phillips said he panicked and then went to a nearby Starbucks to contact the police from there. That was where he was arrested.
- [45] Mr. Phillips was asked why he did not use his own phone to call the police. He said he tried and it either would not go through or the phone would not work.
- [46] Mr. Phillips said his alcohol consumption from the Bridge Studios event to the very end was eight to 12 beers and two shots of whiskey. He said at the time he left the friends' apartment building he was "walking fairly straight", although he was "feeling good". He said he remembered the events well, although he was not sure if he drove the van again after the first stop in front of the police station.
- [47] As to his own height and weight, Mr. Phillips said he is "five-foot-seven or under" in height and weighs 165 to 170 pounds.

- [48] Mr. Phillips said he was not the intruder at Ms. Scully's residence. He said the last time he saw his boots and jacket was when he tossed them over a fence at a location four to five houses from Commercial Drive.
- [49] In cross-examination, Mr. Phillips said he drove to Bridge Studios the day before his work shift because he wanted to clean up first. Instead, he stayed in his car and drank. He was not clear who impounded his car or why it was impounded and did not recall if it was the result of a 24-hour driving suspension. He walked from Bridge Studios to the apartment buildings on East Hastings, a distance of perhaps four or five miles. He took it upon himself to confront the drug dealers in 2014 because he was concerned about his friends. That decision had not been fueled by alcohol as he had consumed just one drink on that occasion.
- [50] When he left the apartments and saw the group in the alley, they were about 160 to 200 feet away. They got as close as 100 to 120 feet away. He ran across a busy street, Clark Drive, which separated him from all but two of them, who also ran across Clark Drive. He ducked into an alley near the Britannia Rec Centre on Commercial Drive in order to rest. He then moved to an east-west alley on the east side of Commercial Drive. There, he decided to lighten his load by taking off his boots. He threw them into a yard. He ran 20 feet further and tried to hide under a car, then took his coat off and threw it over a fence. This fence was 20 feet farther away from the other. He agreed that his jacket was made of soft material. He did not know what happened to his hat. He agreed the video surveillance showed him trying to flag down a bus in the 1900 block of Commercial Drive at 5:39 a.m. and, at that point, he was not wearing any boots, jacket, or hat.
- [51] Although his object in stealing the van on Robson Street was to drive to the police station to get help, when he arrived there and saw police, he got back in the van and went to a nearby Starbucks. He said he thought one of the officers was going for his gun. He reasoned that the police would not be able to beat him up in a Starbucks café.
- [52] There were two other defence witnesses. Constable Jonathan Black, a Vancouver Police officer, was inside the police station at 2120 Cambie when another officer asked for his assistance. Constable Black was then told the suspect had gone to the Starbucks located at 2nd and Yukon. Constable Black located him there and identified himself as police. The suspect said, "No, no, no", and went for an exit. Another officer, Cst. Flewelling, physically apprehended the suspect and the suspect flailed and fought. After the suspect was calmed down, he said, "Thank you, thank you, thank you".
- [53] In cross-examination, Cst. Black said no officers on the scene at the police station went for their guns.
- [54] Sergeant Ryan Wray is another Vancouver Police officer. At 0609 hours on September 21, 2015, Sgt. Wray was walking towards the police station, crossing West 2nd Avenue very close to the station. He saw a panel van drive the wrong way eastbound on the westbound-only street, which is West 5th in front of the station. It was driving erratically, stopping and starting. A man got out. He yelled something and then got back in the van. The van drove a

further quarter block on 5th, then stopped, and the driver got out and yelled at people on the sidewalk, "Cops", and, "Help". He left the van running and headed towards 2nd Avenue. Constable Wray then enlisted the assistance of some other officers, while maintaining visual contact with the man and phoning 911. He said the man was in the middle of an intersection and shaking his arms and grabbing his head.

- [55] In cross-examination, Cst. Wray said he was in plainclothes and had no weapon and the other officers he enlisted to help were similarly in plainclothes and he did not see any sidearms on them.

III. Positions of the Parties

A. The Defence

- [56] Counsel for Mr. Phillips reminded the Court of the fundamental concepts of the presumption of innocence and of the Crown's burden of proving its case beyond a reasonable doubt. Counsel submits that the Crown has not met that burden in this case. Counsel acknowledged the Crown evidence relating to the boots and clothing and the evidence that Mr. Phillips was in the area at the relevant time, but submits that the physical descriptions of the intruder given by Vicki Scully and Lorne Scully are materially different from Mr. Phillips' actual description generally, as well as his description that night. Counsel submits there were differences relating to facial hair, height, weight, skin colour and clothing, and that the lack of any detected body odour or smell of liquor is not consistent with Mr. Phillips' condition that night.
- [57] Defence counsel also notes the lack of any demonstrable motive for the break-in on the part of Mr. Phillips.
- [58] As for the boots found at the scene, counsel submits that there would be no apparent reason why Mr. Phillips would take off his boots in order to break into the premises and notes, as well, the lack of any evidence that the intruder was, in fact, shoeless and the fact that there were three DNA profiles taken from the interior areas of the boots. Counsel submitted this evidence suggests that other people touched the boots and may well have done so after he tossed them over the fence.
- [59] In summary, counsel submits that virtually all of the actual identification evidence about the intruder fails to live up with Mr. Phillips' actual characteristics. The Crown evidence relating to the boots and clothing is circumstantial only and guilt based on circumstantial evidence must be the only reasonable inference that can be drawn from the proven facts. In any event, counsel says there is an explanation for the presence of boots and clothing provided by Mr. Phillips, whose evidence ought to be accepted.

B. The Crown

- [60] The Crown acknowledged that this is a R. v. W.(D.) situation [R. v. W.(D.), [1991] 1 S.C.R. 742]. The Crown also acknowledges that the Scullys' descriptions of the intruder are inconsistent in some respects with the actual characteristics of Mr. Phillips, but Crown reminds the court that the circumstances that night were highly stressful and afforded only a very impaired opportunity to observe and remember those kinds of details. The Crown noted that certain descriptions given by the Scullys were, in fact, not inconsistent, such as height and weight, the soft surface of the intruder's top, and the evidence about facial hair. The Crown also notes that Cst. Flewelling observed Mr. Phillips to have a cut on his lip, yet Mr. Phillips in his own testimony described no event that would have caused that.
- [61] The Crown recounted Mr. Phillips' movements that night, noting the considerable alcohol consumption on Mr. Phillips' part and various assertions by Mr. Phillips, and emphasized that those assertions by Mr. Phillips simply make no sense. Included in the latter are:
1. Mr. Phillips' assertion that in 2014 he took it upon himself to rid a building of drug dealers when he was not even a resident there;
 2. in 2015 a person popped his head into the unit occupied by Mr. Phillips and his friends and "looked like he had seen a ghost" in circumstances where, according to Mr. Phillips' account, it was Mr. Phillips who had almost been killed in the 2014 incident and who should have been afraid;
 3. Mr. Phillips' conclusion that a group of men in the area of the apartment (a) must have been part of the same gang; and (b) that they were out to get him was based on words spoken in a mere conversational volume that he said he heard from perhaps 200 feet away;
 4. Mr. Phillips' solution to what he said was a pursuit by drug gang members was to seek out a dark alley and cubbyhole, the worst type of location in the circumstances, rather than an area where there was activity, people around and good lighting, just as he did later when he sought refuge in the Starbucks café;
 5. taking his boots off when he said he was being chased which can only have made it harder for him to run or even walk;
 6. according to his version of events, at 5:00 a.m. in the morning or so someone must have found the tossed boots and placed them neatly under the window, a person that apparently proceeded to break into the Scully residence;
 7. the latter event would have had to have happened in a very tight timeframe given that the police were on the scene at 0509 hours and Mr. Phillips was observed on Commercial Drive just 30 minutes later;
 8. his conclusion that the convenience store clerk was faking a call to police; and

9. his actions at the police station and the Starbucks café of wanting police help, then being frightened of the police and bolting.
- [62] The Crown summarized these points by saying many aspects of Mr. Phillips' testimony and his actions make no sense, just like breaking into the Scully residence and assaulting Ms. Scully make no sense. Crown submits that the true situation is that Mr. Phillips, in a state of intoxication, broke into the Scully residence, and his subsequent actions were all for the purpose of getting away from this crime.

IV. Discussion

A. General Principles

- [63] In order to secure a conviction against Mr. Phillips on Counts 1 and 2, the break-and-enter count and the assault count, the Crown must establish beyond a reasonable doubt that Mr. Phillips was the intruder who entered the Scully residence and assaulted Ms. Scully that early morning.
- [64] There are two other general principles applicable here. The first is the so-called W.(D.) principle, as augmented by our court in *R. v. C.W.H.* (1991), 68 C.C.C. (3d) 146. These cases establish the proper approach to be taken in cases turning on credibility where the accused has testified. That approach is articulated in the following suggested jury charge. First, if you believe the testimony of the accused that he did not commit the offence charged, you must acquit; second, if you do not believe the testimony of the accused, but you are left in reasonable doubt by it, you must acquit; third, if after careful consideration of all the evidence, you are unable to decide whom to believe, you must acquit; and fourth, even if you are not left in doubt by the testimony of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.
- [65] The final general principle I will refer to arises from the fact that the Crown case relies in large measure on circumstantial evidence, certainly for its case on identification. In such a case, before a finding of guilt may be made, I must be satisfied that the identification of Mr. Phillips as the intruder is the only reasonable inference to be drawn from the evidence in the case.

B. Credibility

- [66] I found the principal Crown witnesses, Ms. Scully and her father, Lorne Scully, to be credible witnesses. Defence counsel did not challenge their credibility, only their reliability. I will have more to say about reliability later.
- [67] As for Mr. Phillips, there are a good many aspects of Mr. Phillips' testimony that cause me to have substantial concerns about both his credibility and the reliability of his evidence. Some of these are as follows:

1. he professed to have a good recollection of the events that occurred in the September 20 to 21 period, but Crown's cross-examination of him on the events at Bridge Studios, for example, showed him to, in fact, have a very poor recollection or at least a very poor perception of exactly what went on there;
 2. he said he left Bridge Studios around noon and then walked to the East Hastings apartments. Later he said he arrived at his friends' apartment building on East Hastings "in the evening or later afternoon." Since he estimated the walk took about an hour, this leaves a good number of hours unaccounted for;
 3. the booking sheet for Mr. Phillips lists his height as 173 centimetres which is a little over five-foot-eight-inches. In his testimony, Mr. Phillips said he was "five-seven or under." This is not a large difference, of course, but given the potential importance of his height in the circumstances of this case, his description that he was "five-seven or under" suggests an inclination to alter the facts in his favour;
 4. he was not sure if he remembered if he moved the van after the initial stop in front of the police station, although Cst. Wray confirmed that Mr. Phillips got back in the van and drove it a further short distance. This is another aspect that contradicts his statement that he had a good recollection of events. I would remark, as well, that the further driving of the van in front of the police station occurred at a time when he would have been the most sober as it represented the latest of the events during these various incidents in terms of when he had last consumed anything alcoholic;
 5. he testified that his 2014 decision to confront the drug dealers was a sober considered decision taken after just one drink, yet the 911 recording reveals that Mr. Phillips seemed to have a great deal of difficulty in engaging with the 911 operator or operators; and
 6. on his own admission during the subject timeframe, Mr. Phillips consumed eight to 12 beers and two shots of whiskey. While there is an extended period of time involved, he was evidently intoxicated enough at Bridge Studios for the police to impound his vehicle, and he continued to drink after that.
- [68] I would add that his strange behaviour after leaving the East Hastings apartments causes me to question the accuracy of his testimony as to his alcohol intake or at least his ability to perceive events, leaving aside alcohol consumption. He is seen on video in the middle of a busy street - Commercial Drive - trying to wave down a bus and running shoeless, with nary a pursuer in sight. He stole a vehicle, he says, to drive to the police station. On arrival, he was flailing his arms, telling one officer that he had been kidnapped. Even on his own evidence, there is no suggestion that anyone was kidnapping him. All of this leaves me with substantial concerns that Mr. Phillips was perceiving events at all accurately, that he could remember some or all of the events in question, or that he was being truthful in his testimony.

C. The Identification Evidence

- [69] The primary Crown evidence on identification, though circumstantial, is nonetheless very compelling:
- a) boots testing positively for Mr. Phillips' DNA, and which he admits were his, were found under the window that was used to enter Ms. Scully house;
 - b) the boots were located right next to a small garbage can located directly under the window which by its dented top can be reasonably assumed to have been used by the intruder to gain the height necessary to get into the window;
 - c) a black cotton or some other form of soft material jacket and hat both belonging to Mr. Phillips and testing positively for Mr. Phillips' DNA were found inside a playhouse located next to or underneath some stairs leading to the main house;
 - d) Mr. Phillips admitted he was in that specific area of town. His description of being in an alley on the east side of Commercial Drive places him very close to the Scully residence;
 - e) The police arrived very quickly after being called. They were on scene at 5:10 a.m. Twenty-nine minutes later, Mr. Phillips was captured on surveillance video at a location that was eight-and-a-half blocks from the Scully residence; and
 - f) Mr. Phillips was observed to have a cut on his lip, indicative of some sort of physical interaction, which was not explained by any of the events he described in his testimony.
- [70] Mr. Phillips explains the presence of his boots by saying that he took off the boots to lighten his load and then he threw them over a fence. I agree with the Crown's submission that this explanation makes no sense. The weight of the boots as any sort of impediment would pale when compared to the difficulties he would have in running without footwear.
- [71] Defence counsel submits that it also makes no sense for an intruder to remove boots to enter a home, but I do not accept that submission. An intruder might well remove heavy footwear to make entry to a home as quiet as possible.
- [72] Mr. Phillips' explanation that he threw the boots over the fence also does not explain why they were found upright side by side, albeit with the right boot on the left. There is no evidence that anyone moved or even touched the boots before they were photographed. While defence counsel speculated that someone might have moved them, there was no evidence to this effect and it seems highly unlikely that another person had come along in this private fenced yard sometime prior to 5:00 a.m. in the morning and rearranged the boots.
- [73] The jacket and hat are a bit of a different situation insofar as they were not discovered until a few days later, but on Mr. Phillips' testimony, he threw them over a fence perhaps 20 feet farther on than the boots, yet they ended up in the same yard inside a child's playhouse and behind the closed door of that playhouse. In the case of these items there was a lot more time during which an unknown party might have come along and moved them, but again, there is no evidence that anyone actually did that. Crown noted that the playhouse was

located along the escape route taken by the intruder and that Mr. Phillips could well have removed these items as he left, and tossed them into the playhouse without being seen, since Mr. Scully took only a few steps in pursuit and the playhouse does not appear to be easy to see from the doorway area of the carriage house. I agree that the configuration of the yard, et cetera, would allow for this possibility.

- [74] Turning to the first two aspects of the W.(D.) formula, for the reasons I have just discussed, I do not believe the testimony of Mr. Phillips that he was not the intruder at the Scully residence that night. For the same reasons, I am not left with any reasonable doubt as a result of his testimony, either. These conclusions render the third W.(D.) element or aspect irrelevant, the one added by C.W.H.
- [75] So I turn to the fourth element or aspect, which is whether, on the basis of the evidence I do accept, I am satisfied the Crown has made out its case beyond a reasonable doubt. The specific issue here is whether the descriptions of the intruder given by Vicki Scully and Lorne Scully detract from the Crown's other evidence so as to raise a reasonable doubt. Some of the points urged by the defence were unpersuasive. For example, counsel said the two Scullys noticed no smell of either body odour or liquor associated with the intruder. However, no other witnesses who dealt with Mr. Phillips testified about any smell, either. Defence counsel's submission presupposes that Mr. Phillips did, in fact, smell due to the fact he had not showered in some time and that he had been drinking starting the day before. I cannot conclude that Mr. Phillips must have smelled due to the lack of showering and, given that we have no clear idea how long it had been since Mr. Phillips' had last had a drink, I am similarly unable to conclude that he would have smelled of alcohol.
- [76] As to clothing, having examined and indeed touched Mr. Phillips' jacket, which was marked as an exhibit, it is made of a soft material that is generally consistent with Ms. Scully's description of it being perhaps a sweatshirt.
- [77] On the matter of height and weight and skin tone or colour, I bear in mind the evidence that it was very dark during the altercation with the intruder, that it was a very sudden and extraordinarily stressful event for the Scullys, and that Vicki Scully was not wearing the eyeglasses that she normally wears. Yet even then, the descriptions given by the Scullys were not out of line with Mr. Phillips' actual description. Ms. Scully said the intruder was taller than her, perhaps two or three inches taller. Assuming Mr. Phillips' height is as per the booking sheet, 173 centimetres which is just over five-foot-eight, he is, in fact, two inches taller than Ms. Scully. This also accords with her evidence that she felt the intruder was "taller than me, but not very tall." Mr. Scully said, "He seemed similar to my height," and, "My impression was that the intruder was of a similar build." At five-foot-nine-inches tall and 170 pounds, Mr. Scully is, in fact, similar in height and weight to Mr. Phillips. This also accords with Ms. Scully's evidence that her father and the intruder were "quite equal in height and stature."

- [78] As to skin colour, both of the Scullys emphasized their difficulties in describing skin tone or colour. Ms. Scully said, "I believe it was light, maybe tan, but it was very dark." In her police statement, she said she did not see skin colour, but added, "I don't think it was glowing light." This is consistent with Mr. Phillips' booking photograph in which he appears to have something of a weathered look. Mr. Scully acknowledged telling the police the intruder had dark skin, but said he merely had an impression of a blank dark outline.
- [79] Finally, the facial hair, Ms. Scully acknowledged having contact with the intruder's face, but she emphasized that the event was very fast and very stressful. She said that the intruder probably had stubble, but not a significant amount. She conceded she thought she would have felt the amount of stubble shown in Mr. Phillips' booking photo. Given the stressful, fleeting, and terrifying nature of the event and of the circumstances generally, I do not consider that this discrepancy is a significant one.

V. Conclusion

- [80] I conclude on the whole of the evidence that the only reasonable inference here is that the intruder was the accused, Brian Phillips. For the reasons just discussed, I am not left with any reasonable doubt as a result of the identification evidence given by the Scullys. On the basis of the evidence I have accepted, I am satisfied beyond a reasonable doubt that Mr. Phillips was the intruder that night. Accordingly, I find Mr. Phillips guilty on both Counts 1 and 2 of the indictment.

- [81] Those conclude my reasons.

"Blok J."

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