

CANADA / JUDGMENT

R. v. Schirmer

2020 BCSC 2257

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 2257 R. v. Schirmer

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Schirmer,

2020 BCSC 2257

Date: 20201126

Docket: 173568-3

Registry: Victoria

Regina

v.

Horst Francisco Schirmer

Ban on Publication: Pursuant to s. 648(1) of the Criminal Code, R.S.C. 1985,

c. C-46. This ban restricted the publication, broadcasting or transmission,

in any way, of any portion of the trial at which the jury was not present.

The publication ban applied until the jury retired to consider its verdict.

Before: The Honourable Madam Justice Matthews

Oral Reasons for Judgment

Re Application for Mistrial and Application to Discharge Jurors

Counsel for the Federal Crown:

C. Fast

A.L. Russell

Counsel for the Accused:

R. Horne

Place and Date of Trial/Hearing:

Victoria, B.C.

November 25-26, 2020

Place and Date of Judgment:

Victoria, B.C.

November 26, 2020

Overview

- [1] Horst Francisco Schirmer is charged with five counts of possession for the purpose of trafficking contrary to s. 5(2) of the Controlled Drugs and Substances Act, S.C. 1996, c. 19. The five counts relate to possession of cocaine, heroin and fentanyl, MDMA, GHB, and methamphetamine.
- [2] At the morning break on November 25, 2020, the eighth day of the evidentiary portion of this jury trial, I received a note via the Sheriff from a juror. The note, which has been entered as a lettered jury exhibit, advised that a juror had conducted internet research on a piece of evidence.
- [3] After discussions with counsel, the juror who handed the note to the Sheriff, Juror 7 whose juror summons number is 0050, was brought into the courtroom in the absence of the other jurors and asked if that juror was the one who had written the note. She confirmed she had and that she is the juror referred to in the note. She confirmed that she had discussed her internet research with the other jurors present in the jury room. She also advised that earlier in the trial she had done research on another topic, which she discussed with one juror. Juror number 7 was asked to step outside the courtroom and wait.
- [4] After further discussion with counsel, I determined I should ask Juror 7 further questions and then question each of the other jurors in turn about what they learned from Juror 7 and what effect they have on their consideration of the evidence. After the process concluded, I asked counsel for submissions.
- [5] The Crown's position is the issue can be addressed adequately with a strong mid-trial warning, reminding the jurors that they cannot undertake research or consider anything other than the evidence presented in the courtroom.

- [6] Mr. Schirmer's position is that I should declare a mistrial, because there remains a question as to what information the jurors, other than Juror 7, received and it cannot be cured with a mid-trial instruction. If I do not order a mistrial, he submits that Juror 7 and two other jurors ought to be discharged because the answers to their questions raised concerns or indicated ambiguity about whether they would only consider what they learned from the research of Juror 7.
- [7] The issues are whether I should declare a mistrial, and if not, whether I should dismiss any of the jurors.
- [8] I delivered these reasons orally during the trial. I have edited them without changing the substance.

Mistrial

- [9] The problems arose because Juror 7 used the internet to look up information related to evidence she heard at trial. As matters unfolded, she did so twice.
- [10] The issue came to the attention of the Court at a court break. At the time of the break, defence counsel was cross-examining a police constable who was an exhibit officer during the search of the premises in which the Crown alleges Mr. Schirmer resides. During the search, the Victoria City Police Department seized handwritten notes. Defence counsel cross examined the exhibit officer on a particular note, part of Exhibit 14, and suggested the note looked like an internet service provider address. The officer replied that it looked to him like a geographic coordinates, i.e. longitude and latitude. He testified that he did not know what location the note referenced.
- [11] In Juror 7's note to me, she advised that she recognized the coordinates as relating to Victoria and wanted to know where in Victoria, as a matter of curiosity. In answer to the first round of questions I posed to her, she advised that she had used the internet to see if the numbers came up with a geographic location, and they did. When asked to be more specific, and why she had done it, she said that when she heard the evidence of the coordinates, she wanted to know where it was. I asked her if the result of her search was a specific address. She advised that it was not.
- [12] I pause to note that when other jurors were asked whether they had become aware of the research Juror 7 did, one indicated that he had seen a map on her phone, one referred to a park, and two referred to "the location".
- [13] During the first round of questions I asked Juror 7, I asked if she had done any other research; she said that she had. She testified that she noted on one of the exhibits a recipe for GHB and a reference to lye. She thought that lye is a pretty dangerous thing to put in a human body, so she decided to see if it was an ingredient in GHB. She looked it up and determined that it was. I asked her if she had discussed this research with any other juror and she said she mentioned it to one other juror. She did not know that juror's number but

she did know where the juror sat in the jury box.

- [14] During the second round of questions of Juror 7, I asked her what effect the information she learned would have on her consideration of future evidence, if there was some, that called into question whether the numbers were geographic coordinates or otherwise contradicted the officer's testimony. She replied that she would take both sources of information into account. She was asked if the information she had learned affected her ability to have an open mind and to be impartial, and she said that it did not.
- [15] With regard to the lye, I asked Juror 7 if the fact that she undertook this research or the information she learned caused her to view a person charged with the offences that Mr. Schirmer is charged with in a different light in terms of moral blameworthiness. She said no. I asked her whether the research she did caused her to draw any conclusions about whether Mr. Schirmer was in possession of GHB and she said no. I asked her if she felt what she learned affected her ability to hear the evidence with an open mind or view the evidence impartially and she said no.
- [16] After conferring with counsel, I had each of the other jurors come into the courtroom and asked them questions. I asked them whether they were aware of the coordinates research that Juror 7 had done. If the juror had become aware, I asked how it would affect their ability to consider any other evidence on the same topic after what they had learned. I asked those who were aware of the research whether what they had learned would impact their ability to hear the evidence with an open mind and be impartial. I asked each of them whether they had any information about this case other than what they had heard in the courtroom. The answers from the 11 other jurors broke down as follows:
- a) four of the jurors were not in the jury room or could not hear the discussion about the research; seven did;
 - b) of the seven who did hear the discussion about the research, five said they would disregard it or they understood they could only consider the evidence presented in the courtroom or something similar; two gave other answers which I will discuss below;
 - c) all seven who learned of the research said it did not affect their ability to hear the evidence with an open mind and to be impartial; and
 - d) all 11 jurors said they did not have any other information about the case other than what they had heard in the courtroom.
- [17] In addition, I asked Juror 12 (summons number 01274) whether Juror 7 had talked to her about the lye research; she said yes. I asked her if what she had learned caused her to view a person charged with the offences that Mr. Schirmer was charged with in a different light in terms of moral blameworthiness; she said no. I asked her whether it caused her to draw any conclusions about whether Mr. Schirmer was in possession of GHB and she said no. I asked her if she felt what she learned affected her ability to hear the evidence with an open mind or view the evidence impartially and she said no. Juror 12 is one of the four jurors who did

not hear about the coordinates research.

- [18] Mr. Schirmer submits that there must be a mistrial because the information that the Juror 7 told me and counsel about the coordinates is inconsistent with what the other jurors said. He submits this demonstrates that we really do not know what information the jurors have and gives rise to the apprehension that Mr. Schirmer could not have a fair trial. He says the nature of the responses and the demeanours of the jurors is that they know they did something wrong and that causes an apprehension that they cannot be fair.
- [19] The Crown submits that the information, both about the coordinates research and about the lye research, are on tangential or collateral points. The Crown submits that a reasonable person would not apprehend that these jurors cannot be fair and these circumstances are not so concerning that the extreme step of a mistrial is warranted.
- [20] In *R. v. Khan*, [2001] 3 S.C.R. 823, the Supreme Court of Canada held that on a mistrial application the overriding question is whether the trial is fair. If an irregularity occurs, the question is whether it amounts to a miscarriage of justice because it is severe enough to render the trial unfair or create an appearance of unfairness. That compels a consideration of the significance of the irregularity or the issue it impacts. In a jury trial, it is appropriate to consider whether the irregularity can be cured by a warning to the jury.
- [21] With regard to the demeanour of the jurors, the questions I put to them were not an examination or a cross-examination under oath. They are not witnesses. It is not appropriate to consider individual answers to demonstrate a collective attitude as though they are witnesses to the will of the collective. Having said that, I did not observe by what any of them said or the way they said it that they felt they did something wrong. The jurors were serious. Some of them answered the questions with a degree of anxiousness. Others bluntly advised that they intended to disregard what Juror 7 told them. Juror 7 appeared somewhat defensive. The manner in which the various jurors answered the questions does not give rise to a reasonable apprehension that they cannot, as a collective, be fair. I will address concerns about individual jurors below.
- [22] With regard to the significance of the issue to which the coordinates research relates, Mr. Schirmer's counsel advised that his present instructions do not permit him to address the significance of the evidence pertaining to the coordinates. I observe that the Crown has not closed its case and the defence is not yet required to assert whether he will call evidence. I also observe that the Crown has led evidence that another handwritten note found in the same premises had a hand drawn map which one of the search officers regarded as significant. I accept that at this stage I cannot assume the evidence is not important enough to disregard its impact on trial fairness and the right to make full answer in defence.
- [23] The question of fairness must also address whether the research that Juror 7 did has tainted or infected this jury as a whole. Mr. Schirmer relies on *R. v. Masuda* (1953), 106 C.C.C. 122 (B.C.C.A.), cited with approval by the Ontario Court of Appeal in *R. v. Afghanzada*, [2000] O.J. No. 4425 (Ont. C.A.), for the proposition that the jury must be free of taint and must appear

to be free of taint. In Masuda, the jury at a murder trial had dinner with their jury guard, some of whom were police officers who were also Crown witnesses. The trial judge questioned each juror about whether they discussed the trial. Each juror answered in the negative. The trial judge continued the trial. The Court of Appeal held that such an inquiry could not address the taint of suspicion that the communal meal raised and would shake the public's confidence in the jury system.

- [24] In my view, those circumstances are not like these. In this case, I asked each juror an open ended question about how they would view the trial evidence, given what they learned. Those answers revealed that most of the jurors have their oath to only consider the evidence in the court at the forefront of their minds. There are concerns with others, which I will address below. I rely on the answers to the open ended question as opposed to the question about open minds and impartiality in making the determination that this jury as a group will be fair.
- [25] Related to the issue of whether the jury has information that we do not know about, Mr. Schirmer's counsel said that in light of the contradicting evidence coming from the jury in response to my questions, we only know the tip of the iceberg. If he is correct, that is concerning because, of course, both Crown and defence must be aware of all the evidence considered by the jury and all of the evidence considered by the jury must be tested through the trial process. In addition to the basic fairness principle, Mr. Schirmer's constitutional right to make full answer in defence cannot be fulfilled if the jury considers evidence he does not know about and has no ability to address.
- [26] In my view, there is no indication that there is an iceberg underlying what we learned from the jurors. Juror 7, when asked the question of whether her research came up with a specific address said, "No". Another juror volunteered that he or she thought it was a park. Two others referred to "the location". None of these answers are de facto contradictory.
- [27] Despite the potential significance of the coordinates issue, I am satisfied that the answers the individual jurors gave, even taking into account there may be some nuances to the coordinates research that were not completely conveyed, does not reveal an infection of this jury. I do not perceive a problem with Juror 7's research that is so pervasive that it cannot be addressed through a mid-trial instruction. I do not perceive from the questioning of each juror that the jury as a collective will not be true to their oaths to be fair and to only consider the evidence presented in the courtroom. I am persuaded that a mid-trial instruction is appropriate and will address any risk that Mr. Schirmer's right to make full answer in defence and both parties' right to a fair trial, could be compromised by the jurors having referenced to evidence that the Crown and defence are not aware of. This includes any possibility of nuances of the coordinates research that may not have been revealed by the questions of the jurors.

- [28] Finally, Mr. Schirmer's counsel argues that Mr. Schirmer has a past (referencing to the fact that Mr. Schirmer has previous charges and convictions to criminal offences) and is concerned that certain erroneous and unfavourable information resides on the internet about Mr. Schirmer. He is also concerned that a journalist spectator to the court proceedings yesterday referred to such information outside the courtroom. Mr. Schirmer's counsel is concerned that what we have learned that has gone on so far indicates a disposition to research, that if it continues among the other jurors could lead to them learning of this information on the internet. That submission is not one that has a factual foundation in the circumstances before us. The jurors have all been instructed not to undertake internet research about the accused or any of the persons that are participants in this trial, among other instructions they have received. Obviously Juror 7 has not complied with those instructions, which I will address in a moment. But a concern that jurors may engage in internet research and learn unfavourable things about accused persons cannot stand on its own as a reason for a mistrial. If that were the case, there could be no criminal jury trials in many cases.
- [29] I am of the view that what occurred here can be addressed through a consideration of whether any of the individual jurors should be discharged and a mid-trial instruction. In my view, the circumstances do not demonstrate a reasonable apprehension that this jury will not be fair. A risk of miscarriage of justice has not been demonstrated. I dismiss the application for a mistrial.

Discharge or Mid-Trial Warning

Juror 12

- [30] Neither Crown nor the defence submitted that the juror who was told of the lye research, Juror 12, should be discharged. I conclude that Juror 12 received information but that she did not seek any further. Her answers to my inquiries are satisfactory that a mid-trial reminder to only consider evidence that she hears in the courtroom will suffice. I do not consider that she needs to be discharged.

Juror 7

- [31] Mr. Schirmer submits this juror has demonstrated that she will not comply with the instruction to refrain from extraneous research and that she is dishonest. The latter is in reference to what Mr. Schirmer characterizes as the different information that came from different jurors about the result of her research as discussed above.
- [32] The Crown submits that she has shown that she has breached the rules but she has not demonstrated that she cannot comply with the rules. The Crown submits that with the guidance of the court through a sharp warning we should expect that she will comply henceforth.

- [33] I am troubled that when I asked Juror 7 what she would do with what she learned about the coordinate research when evidence was led at trial, she replied that she would take "both" into account. In addition, her research on lye demonstrates that she saw some words printed on an exhibit, including the word "lye" and the acronym "GHB", decided or wondered whether it was a recipe for GHB and wanted to know whether lye was an ingredient. She said she wondered that because she thought lye is pretty dangerous. Not only is this impermissible research, it indicates that she is wondering about issues that impact on the moral culpability of the accused and is taking it upon herself to satisfy her inquiries in this regard. She has done research more than once. She has discussed the results with other jurors.
- [34] Even after being called to explain her behaviour, Juror 7 replied that she would take her own research into account. I conclude that she does not conduct herself in a manner that is consistent with having an open mind, being impartial, and in following the rules put in place to ensure a fair trial. Her conduct is too egregious and its potential to infect the other jurors is too great for her to continue as a juror. I am not satisfied that a sharp mid-trial instruction can be relied upon to ensure that Juror 7 follows instructions. I conclude that I must discharge her.

Juror 9 (summons number 0025)

- [35] Juror 9 was one of the jurors who heard about the coordinates research. When asked how he would consider other evidence on Exhibit 14 that was not consistent with the numbers being coordinates or otherwise contradicted Constable Buckler given what he learned from Juror 7, he said it might cause him to have a "pre-thought" that the numbers written on Exhibit 14 were coordinates. It would not cause him to believe that, but it would be something that he would consider.
- [36] The defence says this cannot be cured with a mid-trial instruction. The Crown says it can.
- [37] I am of the view that Juror 9 must be discharged. While he did not engage in any misconduct, he has received information he is not permitted to have and he has frankly acknowledged that he will take that information into account when weighing the evidence. He did so when he was asked about that in a courtroom, by a judge albeit not under oath. I had previously formally instructed all of the jurors on three occasions that they are not to receive any information about the case from anywhere other than the courtroom. I believe his response was spontaneous and shows that the coordinates research information he received has penetrated his consciousness more deeply than the instructions that I have given so far. I conclude that it is not appropriate to rely on a mid-trial warning with Juror 9.

Juror 10 (summons number 00432)

- [38] Juror 10 was one of the jurors who heard about the coordinates research. When asked how she would consider other evidence on Exhibit 14 that was not consistent with the numbers being coordinates or otherwise contradicted Constable Buckler given what she learned from Juror 7, she said that she was not sure. She said that she was not familiar with the location and that she believed she could set it aside.
- [39] The defence says that this is ambiguous and cannot be cured with a mid-trial instruction. The Crown says it can.
- [40] I am of the view that this juror's answer frankly acknowledges struggle but also demonstrates that her oath to consider only the evidence in the courtroom is dominant. I am of the view that a mid-trial instruction will be effective with this juror and is appropriate.

Conclusion

- [41] I will discharge Jurors 7 and 9. I will provide mid-trial instructions about their discharge and about the remaining jurors' duty to refrain from investigating or considering extraneous information. I will provide my proposed instructions to counsel and receive their submissions.
- [42] The application for a mistrial is dismissed.
- "Matthews J."

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