

CANADA / JUDGMENT

R. v. Schirmer

2020 BCSC 2260

COURT

Supreme Court of British Columbia

DECIDED

9 November 2020

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2020 BCSC 2260 R. v. Schirmer

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Schirmer,

2020 BCSC 2260

Date: 20201109

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 S. Matthews

Oral Reasons for Judgment on Voir Dire #5

Re Admissibility of Cell Phone Data Extraction Report

Counsel for the Crown:

C. Fast

A. Russell

Counsel for the Accused:

R. Horne

Place and Date of Trial/Hearing:

Victoria, B.C.

October 27-30, 2020

Place and Date of Judgment:

Victoria, B.C.

November 9, 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. The Crown intends to prove the charges based on circumstantial evidence of quantities of those drugs, records about the drugs, drug paraphernalia, and evidence the Crown will assert links Mr. Schirmer to the drugs, including portions of data extracted from a cellphone found with some of the drugs.
- [2] On this voir dire, the Crown seeks a ruling that the portions of a report of the extraction performed on the cellphone be admitted into evidence at trial. The Crown seeks to have several hundred pages of the extraction report admitted. The excerpts the Crown seeks to admit consist of:
- a) communications that contain the address of 10-741 Admirals Road as the address of the sender or the receiver of the communication, communications that are addressed to Frank or Franky or Franklin or Francisco H., messages from someone referred to as "auntie," who describes relatives with the last name Schirmer, and messages sent from the phone in which the user of the phone states his name is Frank;
 - b) communications where the communication or part of a string of communications uses language that an expert in controlled substances will testify is consistent with trafficking in controlled substances or transactions pertaining to controlled substances; and
 - c) photographs that appear to have been attached to messages that depict controlled substances and scales that an expert in trafficking controlled substances will testify are typical of quantities and measurement methods for trafficking in controlled substances.

- [3] I will describe the entire extraction report as the "extraction report" and the portions sought to be admitted as the "redacted extraction report". I will refer to the category "a" evidence as "identification evidence"; the category "b" evidence as "trafficking messages"; and the category "c" evidence as "controlled substances and scale photographs". The evidence includes text messages, emails, and Facebook Messenger chats. When I refer to communications or messages, I am referring to any of these types of communications or messages.
- [4] The issues raised as to the admissibility of the redacted extraction report are:
- a) Whether the redacted extraction report meets the test for determining the authenticity and integrity of electronic documents under the Canada Evidence Act, R.S.C., 1985, c. C-5.
 - b) Whether the redacted extraction report, if admissible as an electronic document, is admissible under the documents in possession rule for:
 - i. circumstantial evidence showing Mr. Schirmer's involvement in drug transactions or circumstantial evidence of connection to the drugs found near the cellphone; or
 - ii. evidence that is an exception to the hearsay rule where Mr. Schirmer has recognized, adopted, or acted upon the contents of the redacted extraction report.
 - c) If the redacted extraction report is an authenticated and reliable electronic document admissible as a document in possession by the circumstantial evidence or exception to hearsay purposes, it must be determined whether the probative value of the content outweighs its prejudicial value in relation to evidence that is in its nature evidence of prior bad acts.
- [5] I delivered these reasons orally. I have edited them without changing the substance.

Authenticity and Integrity

- [6] The Canada Evidence Act establishes a procedure for determining the admissibility of electronic documents as defined in s. 31.8 of the Canada Evidence Act.
- [7] It is not in dispute that the cellphone at issue is an electronic document and the extraction report is, also. In order to meet the procedural requirements for admissibility as an electronic document, the Crown must authenticate the document and prove its integrity.

Authenticity

- [8] Section 31.1 of the Canada Evidence Act provides the test for authentication of electronic documents as follows:

31.1 Any person seeking to admit an electronic document as evidence has the burden of proving its authenticity by evidence capable of supporting a finding that the electronic document is that which it is purported to be.

- [9] In *R. v. Ball*, 2019 BCCA 32, Madam Justice Dickson explained that the requirement of authentication is met by evidence, direct or circumstantial, that the electronic document is what the tendering party claims it to be. Madam Justice Dickson described it as a low threshold which only goes to authentication and not that it is genuine or determine what weight should be given to it, citing *R. v. Hirsch*, 2017 SKCA 14 at para. 18, and David M. Paciocco, "Proof and Progress: Coping with the Law of Evidence in a Technological Age" (2013), 11 C.J.L.R. 181 at 197. In *R. v. Hamdan*, 2017 BCSC 676 (2017), 349 C.C.C. (3d) 338 (B.C.S.C.), at para. 44, Mr. Justice Butler, then of this court, stated that the party seeking to admit the document does not need to prove it is an exact and complete copy. Evidence of authenticity can be satisfied by circumstantial evidence so long as it is evidence that the document "is that which it is purported to be", citing *Hirsch* and *R. v. C.B.* (2019), 376 C.C.C. (3d) 393 (O.N.C.A.). The Crown submits that this threshold is met in this case by the evidence it led on the voir dire from the exhibits officer who seized the telephone from a safe in a bathroom in the residence where the Crown alleges Mr. Schirmer resides.
- [10] Constable Kay's full-time role with the Nanaimo RCMP is to extract data from digital mediums such as cell phones, computers, and tablets. He does so using hardware and software produced by a company called Cellebrite. After troubleshooting some difficulties with this cellphone, he performed an extraction. The Cellebrite software reported to him that the extraction was successful. A 3,200 page extraction report resulted. The redacted extraction report is a subset of that larger report. The process of extraction, including the difficulties Constable Kay experienced, are discussed below with regard to the integrity requirement.
- [11] Mr. Schirmer submits that beyond the procedural requirements of the Canada Evidence Act, the Crown must also prove authenticity substantively. That includes demonstrating authorship. In this case, authorship is whether Mr. Schirmer was the user of the cell phone in question and, therefore, the author of the outgoing messages, the receiver of the incoming messages, and author of other content on the phone.
- [12] The cell phone content does not identify Horst Francisco Schirmer as the user. The identification evidence includes messages to and from the email address, frankyhollywood250@gmail.com, messages to and from a Facebook user named Frankie Hollywood, and text messages to and from the device's cellphone number in which the user of the device receives messages addressed to Franky, Frank, and Franklin and identifies himself as Frank. There is an email from BC Hydro addressed to Francisco H.
- [13] The Crown asserts that Frank, Franky, Franklin and Francisco H connect the cell phone user to Horst Francisco Schirmer. In addition, the Crown points to emails in which the cell phone user addresses a reply to "auntie", the sender of an email who describes family members including her father whose name was Horst Ernst Schirmer and her brother whose name was Michael Horst Schirmer. The redacted extraction report indicates that the reply to "auntie" was not sent. The Crown submits this evidence is capable of establishing that the cellphone user was the accused.

- [14] Mr. Schirmer relies on *R. v. Andalib-Goortani*, 2014 ONSC 4690 at para. 27, in which Justice Trotter, now on the Ontario Court of Appeal, refused to admit a photograph of an alleged assault when the photograph was sourced from a website to which it had been posted. The taker of the photograph and the person who posted it to the website was unknown. There was expert evidence that the image had been cropped and/or edited, but it was disputed as to whether it had been altered in substance and, if so, to what extent. For reasons that are not clear in the judgment, Trotter J. did not consider admissibility under the Canada Evidence Act provisions for admissibility of an electronic document, but rather under common law principles. He held that the photograph had not been authenticated and was not admissible. While Trotter J. remarked that there was no one to testify that he or she had taken the photograph and it had not been altered or changed in any way, I take that to be a finding that the image had not been proven to be what it purported to be and that authorship might assist with that proof. I do not take it to be that Mr. Justice Trotter held that proof of authorship is necessary to prove authenticity.
- [15] In *R. v. Parsons* (1977), 17 O.R. (2d) 465 (C.A.), the issue was not admissibility of an electronic document, but rather wiretap evidence. The Ontario Court of Appeal held that at the voir dire on admissibility, the Crown must prove that the speaker is the person against whom the evidence is to be admitted. That is the feature of the purpose of the admission of what would otherwise be hearsay evidence, i.e., a statement against interest.
- [16] In *Ball*, the Court of Appeal held that the statutory framework in the Canada Evidence Act relates to authenticity and "best evidence", while the ultimate admissibility of the evidence is also affected by the general rules of evidence and the purpose for which it is tendered.
- [17] The Crown agrees that in addition to satisfying the requirements of the Canada Evidence Act, it must also establish that the evidence is admissible for the purpose for which it is tendered and, if proof of authorship is a precondition of admissibility for that purpose, then it must be established at the voir dire. As I discuss below, the Crown seeks to introduce this evidence under the document in possession rule. Authorship is not a pre-condition for admissibility under that rule, but rather a question for the jury.
- [18] It is also clear that "authorship" may be an issue when proving integrity under the Canada Evidence Act, if the Crown relies on s. 31.3(b), where integrity is presumed if the Crown proves the accused recorded or stored the electronic document. That is an alternate basis on which the Crown seeks to satisfy integrity in this case, but as explained below, because I accept that there is evidence capable of establishing that the cellphone was functioning properly, I do not need to consider s. 31.3(b) and the issue of authorship for the purposes of determining integrity.
- [19] In *R. v. S.H.*, 2019 ONCA 669 (2019), 377 C.C.C. (3d) 335, the Ontario Court of Appeal considered the admissibility of data extracted from a cellphone relating to charges of possession for the purposes of trafficking. When discussing authenticity, the court referred to evidence that the text messages and emails in issue were taken from the accused's son's

cellphone and included messages addressed to "dad." In C.B., the court considered the authenticity of text messages that the defence alleged a sexual assault complainant sent to the accused. The Court of Appeal considered the evidence of the complainant in relation to whether the telephone number from which the messages had been sent was her number. Mr. Justice Watt, for the court, emphasized that on an authenticity voir dire, the threshold is whether there is some evidence capable of establishing authenticity which is whether the thing is what it purports to be. Whether a thing is proven to be what it purports to be is a question for the trier of fact at trial, not for the trier of law at a voir dire. Mr. Justice Watt explained that in relation to the text messages in that case, the question was whether there was some evidence capable of establishing that the text messages were messages sent from the complainant to the accused.

- [20] Similarly, in *R. v. Phagura*, 2018 BCSC 2541, Mr. Justice Crabtree held that messages and photographs were authenticated based on the evidence that they were exchanged between the complainant and the accused.
- [21] I accept the evidence of Constable Buxton-Carr and Constable Kay that the redacted extraction report consists of material extracted from a cellphone found in the safe at Number 10-741 Admirals Road, Esquimalt B.C., on May 4, 2017.
- [22] I conclude that while there is no hard and fast rule that authorship must be proved as part of authenticity, it is often helpful in establishing the electronic document is what it purports to be and may be a necessary element of that. In the case of messages which are said to be messages sent to or received by the accused at the voir dire stage, the Crown must adduce evidence capable of supporting a conclusion that the accused was either a sender or receiver of the messages in order to meet the threshold authenticity requirement that they are what they purport to be.
- [23] There is evidence capable of supporting a finding that Mr. Schirmer was a sender or receiver or connected to the evidence in the redacted extraction report. It consists of the fact that Mr. Schirmer's second name is Francisco and the emails are sent to or from a person named Frank, Francisco H., and some of them refer to Frank, Franky and Franklin. The user of the device uses an email, frankyhollywood250@gmail.com. A person whom the user of the phone referred to as "auntie" in a draft, but unsent, email, describes family members with the last name Schirmer and one of whom would be Mr. Schirmer's grandfather if auntie is Mr. Schirmer's aunt. This evidence is also assisted by the fact that the cellphone was found in a safe in what the Crown intends to prove is Mr. Schirmer's residence. The evidence includes a BC Hydro bill for that residence addressed to the "frankyhollywood" email address.
- [24] In *R. v. Bridgman*, 2017 ONCA 940, the Ontario Court of Appeal held that evidence that a message was addressed to "Art" was circumstantial evidence connecting a cellphone found on the accused whose name was Arthur Bridgman to messages he denied sending.

- [25] There are some messages that are not addressed to Frank or any other version of that name, but refer to that name on the cellphone. They appear to be messages sent to the cellphone number of the "frankyhollywood" email account or the associated Facebook account, but reply to a person other than the user who refers to himself as Frank or Franky. Those messages have no evidence that is capable of supporting a conclusion that they are connected to the accused as messages he received or sent. They have not been authenticated. Indeed, that evidence is some evidence which shows that someone other than Frank or Franky had access to and used the cellphone.
- [26] I conclude that the portions of the identification evidence, trafficking evidence, and photographs of controlled substances and scales that are communications or are part of strings of communications where the body of one of the communications shows that the communication is to or from Frank, Francisco H, Franky, or Franklin, or to or from a person residing at Number 10-741 Admirals Road, Esquimalt, B.C., are supported by evidence capable of establishing that they are what they purport to be, messages or parts of strings of messages to or from Mr. Schirmer. The portions of the redacted extraction report are not messages or strings of messages addressed to Frank, Franky, Franklin, Francisco H or to a person residing at 10-741 Admirals Road, B.C., are not authenticated and not admissible.

Integrity

- [27] Sections 31.2 to 31.3 of the Canada Evidence Act set out the requirements for establishing the integrity, also referred to as the reliability, see Hirsch, of an electronic document. They are a codified "best evidence" rule:

Application of best evidence rule -- electronic documents

31.2 (1) The best evidence rule in respect of an electronic document is satisfied

- (a) on proof of the integrity of the electronic documents system by or in which the electronic document was recorded or stored; or
- (b) if an evidentiary presumption established under section 31.4 applies.

Printouts

- (2) Despite subsection (1), in the absence of evidence to the contrary, an electronic document in the form of a printout satisfies the best evidence rule if the printout has been manifestly or consistently acted on, relied on or used as a record of the information recorded or stored in the printout.

Presumption of integrity

31.3 For the purposes of subsection 31.2(1), in the absence of evidence to the contrary, the integrity of an electronic documents system by or in which an electronic document is recorded or stored is proven

- (a) by evidence capable of supporting a finding that at all material times the computer system or other similar device used by the electronic documents system was operating properly or, if it was not, the fact of its not operating properly did not affect the integrity of the electronic document and there are no other reasonable grounds to doubt the integrity of the electronic documents system;
 - (b) if it is established that the electronic document was recorded or stored by a party who is adverse in interest to the party seeking to introduce it; or
 - (c) if it is established that the electronic document was recorded or stored in the usual and ordinary course of business by a person who is not a party and who did not record or store it under the control of the party seeking to introduce it.
- [28] The Canada Evidence Act allows for the proof of the integrity of an electronic document by either proof of the integrity of the electronic document system which stores or records the documents, s. 31.2(1)(a), or on the basis of a statutory presumption of integrity, s. 31.2 and s. 31.3. The Crown relies on the statutory presumption of integrity in ss. 31.3(a) and 31.3(b).
- [29] The Crown asserts that the evidence that the Cellebrite hardware and software was able to complete an extraction is evidence that is capable of supporting a finding that the computer system was operating properly, s. 31.3(a), and the location of the cellphone and the identification evidence on the cellphone establishes that its contents were recorded or stored by a party adverse in interest to the party tendering the document, namely, Mr. Schirmer, s. 31.3(b).
- [30] In *S.H.*, the Ontario Court of Appeal explained that the threshold required by the wording of s. 31.3(a), "evidence capable of supporting," imported a lower threshold than "establish" in s. 31.3(b). The evidentiary threshold to support a finding that the cellphone was working properly in that case was met by an extraction report that produced data in a chronological manner with coherent conversations, messages, and messages that were indicated as "read," as well as conversations that were contextually consistent with other facts in the case.
- [31] The Crown argues that the same reasoning is applicable in this case pointing to the following evidence capable of demonstrating that the cellphone was functioning. Constable Kay was able to turn it on. He was not able to access its contents because it had a security locking feature which he could not unlock. The Cellebrite software produced a report that an extraction was complete. The extraction report shows coherent conversations. They are chronological. The text messages, emails, and Facebook messages show conversations with messages and replies to messages that appear intact and coherent. Constable Kay testified that he had completed many other extractions (hundreds at the time he testified and dozens before he completed this extraction) and the extraction report was in the form he expected it to be. Crown counsel pointed to the fact that the redaction report included an email from BC Hydro attaching a Hydro bill and the message was in the form one would expect such a message to be.

- [32] The circumstances in S.H. on which the s. 31.1(a) of the Canada Evidence Act integrity requirements were held to have been met are not all present in this case. In S.H., the officer who completed the extraction testified that he verified that the extraction he made accurately reflected the data on the cellphone. He testified that the cellphone was in good working order. He testified he obtained the username and telephone number from the unlocked phone.
- [33] In this case, there was no comparison done between the extraction report and the cellphone contents. Constable Kay was not able to unlock the phone or determine anything about its user. There was no direct evidence that the cellphone was in working order. The evidence is the last time it was used was February 10th, 2017, two months and three weeks prior to when it was seized.
- [34] With regard to the Crown's reliance on the fact of the successful extraction as evidence of a functioning cellphone, there was no evidence that Cellebrite is not capable of extracting data in a coherent manner or at all from a device that does not work. In other words, there is no evidence that the fact of an extraction report is probative of a functioning device. In addition, the evidence is that another RCMP officer attempted an extraction prior to Constable Kay and was not able to accomplish it. When Constable Kay initially attempted extraction, he was not able to ascertain the Cellebrite process for the particular cellphone make and model and had to seek assistance from others. When he obtained the process for a generic cellphone type (a Chinese manufactured android) he was not able to accomplish the transaction. He then cleaned the charging port he used to connect to the phone to the Cellebrite hardware, after which the extraction was possible.
- [35] In my view, the evidence in relation to the Cellebrite extraction is not evidence of a functioning cellphone. However, the evidence does not call into question the functionality of the cellphone. It simply does not assist.
- [36] I agree that the data extracted is coherent and of the nature that one expects to see on a device of this sort. Constable Kay was able to turn the device on. A locking function prevented him from accessing the device beyond the lock function. The question is whether that is enough, in the absence of any evidence either way as to the functionality of this device at the time the data on it was created or at the time it was extracted and the absence of evidence of what role its functioning status would play in the integrity of the extraction report.
- [37] In my view, the low threshold has been met. The coherence of the data and the fact that the device would turn on and the lock function functioned as intended is evidence that is capable of supporting a conclusion that the device was functioning properly pursuant to s. 31.3(a) of the Canada Evidence Act.

- [38] Because of this conclusion, I do not need to consider whether there is evidence that establishes that the data on the cellphone was stored on it by Mr. Schirmer pursuant to s. 31.3(b) of the Canada Evidence Act.

Relevance, probative value and prejudicial effect

- [39] Crown counsel seeks to admit the evidence under the documents in possession rule which allows for the admissibility of the documents for either or both of two purposes: (1) documents found in the possession of the accused can be admitted as original circumstantial evidence showing the accused's complicity in the matter to which the documents refer; and (2) where the accused has recognized, adopted, or acted upon the documents, they may be admitted as an exception to the hearsay rule, see *R. v. Turlon* (1989), 49 C.C.C. (3d) 186 (Ont. C.A.), at p. 190.
- [40] Mr. Schirmer argues that the evidence sought to be admitted is evidence of prior discreditable conduct that is only admissible if its probative value outweighs its prejudicial effect and, in this case, the lack of evidence connecting the phone to Mr. Schirmer and the dated nature of the messages is such that the trafficking messages are not probative of whether Mr. Schirmer was in possession or control of the substances found on May 4th, 2017.
- [41] Mr. Schirmer argues that the identification evidence is a circular proposition. I understand that submission to be that in order for it to be admissible as a document in possession, which is circumstantial that Mr. Schirmer was in possession and control of the controlled substances with which it was found, there must be evidence that the phone was in the possession of Mr. Schirmer. The cellphone itself was not found on his person and, as discussed above, there is no direct evidence that it belonged to Mr. Schirmer or that he was the user of it. The Crown seeks to tender the identification evidence on the phone together with where the phone was found as evidence that Mr. Schirmer was the user of the phone. At the same time, the Crown wishes to tender the phone for the proposition that, because it was found in a safe with some of the drugs listed in the indictment, it is evidence that those drugs were in the possession of Mr. Schirmer.

Identification Evidence

- [42] In order for the documents and possession rule to apply, the document, in this case, the phone, must be or have been in the possession of the accused. Possession can be based on circumstantial evidence and is a question for the jury: *R. v. Black*, 2014 BCCA 192, at para. 34; and *R. v. Christurajah*, 2017 BCSC 992. In *Black*, the trial judge admitted a note setting out a to-do list in relation to a marijuana grow operation. The note was found in the premises that the accused had been seen leaving shortly before the note was found. The note was addressed to "Chrissy" and the accused's first name was Christina. The trial judge held that the name on the note and the evidence that the accused was seen leaving the premises shortly before the note was found to be evidence that the accused was in

possession of the note. However, there was no evidence that the accused had acted on the note (i.e., no evidence that she had done anything on the to-do list), and therefore, it was not admissible for the proof of its contents, but merely as circumstantial evidence connecting the accused to the place where the note was found which was the premises of a marijuana grow operation.

- [43] In this case, the phone was found in the premises during a warranted search. I understand that the Crown will lead evidence that Mr. Schirmer was in those premises the day the search began and perhaps that he had resided there for some time. Given that Mr. Schirmer's second name is Francisco and the messages were to or from Frank, Franky, Francisco H., as well as messages in which the user set out his residence as the one in which the cellphone was found, there is evidence on which a jury could base a finding that the cellphone had been in his possession.
- [44] Below, I address the issue of the gap between the most recent dated content of the cellphone, February 10, 2017, and the date the phone was found. While that gap in time reduces the probative value of the cellphone content as evidence of trafficking in controlled substances, the presence of the cellphone in the safe where controlled substances were found is not similarly affected by the date gap. If the jury accepts the identification evidence as evidence that Mr. Schirmer was in possession of the cellphone, they may use that evidence as circumstantial evidence to link Mr. Schirmer to the controlled substances. The fact that there is no evidence that he had used the cellphone recently does not eliminate its probative value because it was found with the drugs on May 4, 2017.
- [45] The question of whether the accused recognized, adopted, or acted upon the document such that it is admissible for the proof of its contents, is also for the jury.
- [46] I conclude that the identification evidence that I have described does not raise issues of bad character or prior discreditable conduct, unlike the evidence of the trafficking messages and the photographs of controlled substances and scales.
- [47] I conclude that the identification which has been authenticated under the Canada Evidence Act as described above may go to the jury. The jury will be instructed on its uses depending on whether they find it was or had been in his possession or control and whether they find Mr. Schirmer acted on its contents.

Trafficking Messages

- [48] Evidence of telephone calls or text messages that are said to be drug transactions can be part of the circumstances that establish possession for the purpose of trafficking in a circumstantial case where the evidence has a nexus in time and subject to the charge so long as the probative value outweighs the prejudicial effect: *R. v. Rowe*, 2012 ONSC 2600, citing *R. v. Ly*, [1997] 3 S.C.R. 698.

- [49] In Rowe, Justice Howden considered the admissibility of text messages on a cellular phone which was registered in the name of someone other than the accused, but which was proven to be a cellular number for the cellphone that the accused was using at the time he was arrested for possession of controlled substances for the purposes of trafficking pursuant to s. 5(2) of the Controlled Drugs and Substances Act. The text messages covered a period of six weeks prior to the arrest, including two days prior to the arrest. Similar to the facts of this case, the content of the messages used language the Crown sought to prove was the language of trafficking in controlled substances. The Crown sought to tender the messages as evidence of trafficking in cocaine.
- [50] As explained in Rowe, the evidence of communications that may be drug transactions in a possession for the purpose of trafficking case engages the law pertaining to the admissibility of prior discreditable conduct or bad character evidence. It is a longstanding principle that bad character evidence is presumptively inadmissible as circumstantial proof of conduct based on an inference from the facts that the accused has the propensity or disposition to do the acts that he has been charged with: *R. v. Handy*, 2002 SCC 56 at para. 31. Bad character evidence can cause the trier of fact to conclude that the accused deserves to be punished for the uncharged incidents to which the bad character evidence relates. This is referred to as moral prejudice. Bad character evidence can cause the trier of fact to assume that the accused is more likely to have committed the offences with which he is charged or substitute a conclusion on the bad character evidence for the verdict on the charges on which the accused is being tried. This is referred to as reasoning prejudice, see *Handy* at para. 31; and *R. v. A.L.*, 2020 BCCA 18.
- [51] Bad character evidence is presumptively inadmissible. It may be admissible where it is relevant to a material issue other than the accused's character such as *modus operandi* or where the accused's character is in issue, and its probative value outweighs its prejudicial effect, *R. v. B.(C.R.)*, [1990] 1 S.C.R. 717 at p. 735, and *Ball* at para. 90. Where it is admissible, it must be accompanied by an instruction to the jury that it must not use that evidence to find the accused the sort of person who would have a propensity to commit the offence in question, *Ball* at para. 91.
- [52] Evidence of prior discreditable conduct that is "removed in time, place, and circumstances" from the charge is circumstantial evidence for which the usefulness must be derived from the inferences it supports, *Handy* at para. 26. In order to have probative value, the evidence must be susceptible to an inference other than the accused had the propensity to commit the offence.
- [53] In Rowe, Justice Howden excluded the text messages other than those from the day prior and the day the accused was charged with being in possession. The evidence in the two days prior to the date of the charges was admitted as evidence that was relevant because of the number of calls, many made by the accused, and their content which went to the issue of control and possession and the purpose of control and possession. It was not admitted as hearsay evidence for the truth of its contents. Justice Howden held that the further in time

the messages were removed from the date on the charge, the less probative value they had. He reasoned that the Crown's theory of the probative value of the evidence rested on it asserting that the accused was trafficking in drugs for that period of time, but the Crown had not charged the accused with trafficking for that period of time. That left the relevance of the evidence to be that the accused was trafficking at a time other than for which he was charged. Justice Howden held that evidence was prejudicial and may tarnish the accused before the jury as a drug dealer who was the type of person likely to commit the offence with which he was charged.

- [54] In this case, the messages sought to be admitted go back to 2014. The last message in time on the cellphone was February 10, 2017, two months and three weeks prior to the date on the indictment. The question is whether any of this evidence has a nexus in time and subject such that it is probative in any of the ways that the Crown says it is. If it is, then the prejudicial effect of the probative evidence must be considered and the two weighed to determine if the probative value outweighs the prejudicial effect.
- [55] The Crown argues that the probative value of the messages is based on the documents in possession rule, i.e., that if the jury accepts the cellphone was in Mr. Schirmer's possession, it is admissible as evidence of Mr. Schirmer's complicity in the trafficking messages. If the jury accepts that he acted on the trafficking messages, they may accept the trafficking messages for the truth of their contents relying on Turlon and Black at paras. 24-39.
- [56] The Crown asserts that this is not an impermissible use of prior discreditable conduct evidence, but rather the cellphone is a ledger of a drug transactions that can be admitted to show that Mr. Schirmer created a ledger of drug transactions and kept it in a secure place together with the drugs that underlie the current indictment.
- [57] In my view, even if the jury find that Mr. Schirmer was the user of the cellphone and these messages amount to a ledger of drug transactions, it is a historical ledger that at most shows that prior to his February 2017 charges for possession for the purpose of trafficking, he had a cellphone, to and from which trafficking messages were sent. The probative value in relation to controlled substances found on May 4th, 2017, when the cellphone had not been used for several months, is low. The prejudicial value is high. The documents in possession rule does not transform evidence of prior discreditable conduct into relevant evidence of complicity in a current crime.
- [58] It is not controverted that Mr. Schirmer was arrested and convicted of possession for the purpose of trafficking in relation to drugs found in the apartment of another person on February 9, 2017. Mr. Schirmer argues that any evidence that he was trafficking drugs prior to February 9, 2017 has merged in that conviction.
- [59] The doctrine of merger asks whether there is a legal nexus between the evidence and the charges. In Rowe, Mr. Justice Howden inferentially addressed whether there was a legal nexus by pointing out that the accused had not been charged with trafficking at the time the older messages were sent and received. In this case, the same result obtains because Mr.

Schirmer is not charged with trafficking drugs for any time the messages were sent and received and he was charged with possession for the purpose of trafficking at the time of some of those messages and those charges have concluded. I also agree that there is no factual nexus between messages relating to drug transactions over a period of three years prior to the date on the indictment with the last communication being two months and three weeks prior to the date on the indictment.

- [60] Given that all of the trafficking messages are for a period more than two months and three weeks prior to the date on the indictment, I conclude that they have insufficient probative value to be relevant to whether the accused was in possession of these controlled substances and/or was in possession of them for the purpose of trafficking.
- [61] I cannot discern any probative value of the trafficking messages other than that because Mr. Schirmer was sending and receiving messages using the language of the drug trade in the years and months prior to February 10, 2017, he was likely in possession and control of the controlled substances found on May 4, 2017 for the purpose of trafficking. If the evidence is admitted and the jury is instructed that it cannot rely on it to conclude that Mr. Schirmer is the type of person likely to be in the possession and control of controlled substances for the purposes of trafficking, the evidence would serve no purpose. That demonstrates that its only probative value is impermissible propensity reasoning.

Photographs of Controlled Substances and Scales

- [62] The photographs are not dated, so there is no evidence as to how historical they are. There is no evidence that the user of the cellphone took the photographs or whether they were sent to the user of the cellphone by someone else or whether they were downloaded from the Internet. There is direct evidence that they relate to trafficking drugs. The Crown has not advised that it will lead evidence as to the provenance of these photographs. Without such evidence, they cannot be probative.
- [63] In addition, given that the evidence is that the cellphone had not been used for two months and three weeks before it was seized, and for the reasons given in relation to the trafficking messages, the photographs can have limited probative value in relation to the controlled substances that form the basis of this indictment.
- [64] I can discern very little probative value of the photographs. The only purpose of this evidence would be for the jury to draw an inference that because Mr. Schirmer had taken these kinds of photographs or received messages attaching these kinds of photographs, he has in the past trafficked or possessed controlled substances and so is more likely to have had these controlled substances in his possession for the purpose of trafficking. Their prejudicial value would be that the jury would conclude that such photographs depict controlled substances and the measurement of controlled substances consistent with the trafficking of controlled substances. The jury may conclude that a person who has such photographs is more likely to be involved in trafficking drugs despite that there is nothing to

connect them to the drugs that formed the basis of the indictment. I consider that to be evidence that would result in impermissible propensity reasoning.

Conclusion

- [65] Portions of the redacted extraction report meet the requirements of the Canada Evidence Act for admission as an electronic document. Those portions are the identification evidence, trafficking evidence, and controlled substances photographs that are messages or part of strings of messages where the body of one of the messages shows that the message is to or from Frank, Franky, or Franklin, or to or from a person residing at 10-741 Admirals Road, Esquimalt, B.C., or refers to Francisco H. However, only the identification evidence portions of the report that are messages or are parts of strings of messages that meet those descriptors are admissible. The trafficking messages and the photographs have little or no probative value and are highly prejudicial and so are inadmissible.
- [66] The redacted extraction report must be further redacted to remove the content that is not messages or parts of string messages to or from Frank, Francisco H., Franky, or Franklin, or to or from a person residing at 10-741 Admirals Road, Esquimalt, B.C., and falls into the category of identification evidence described in these reasons, before it is tendered into evidence for the jury.

"Matthews J."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/20/22/2020BCSC2260.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/r-v-schirmer-2020-bcsc-2260>

Prepared on 29 October 2026 · Esheria