

CANADA / JUDGMENT

R. v. Smith

2021 BCSC 1626

COURT

Supreme Court of British Columbia

DECIDED

21 May 2021

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2021 BCSC 1626 R. v. Smith

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Smith,

2021 BCSC 1626

Date: 20210521

Docket: 54389-3

Registry: Vernon

Regina

v.

Jevon Daniel Smith

Before: The Honourable Mr. Justice S. Wilson

Oral Reasons for Judgment

Counsel for the Crown:

B. Bellrichard

Appearing as amicus curiae:

C. Matthee-Johnson

Appearing on his own behalf

by videoconference:

J.D. Smith

Place and Date of Trial/Hearing:

Kelowna, B.C.

May 11 - 14, 2021

Place and Date of Judgment:

Kelowna, B.C.

May 21, 2021

[1] THE COURT: The accused is charged with four counts under the Criminal Code:

Count 1: using an imitation firearm while committing an indictable offence, namely, assault with a weapon;

Count 2: assault with a weapon of David Prebushewski;

Count 3: possession of a weapon for a dangerous purpose; and

Count 4: uttering threats of bodily harm to Constable Fred Maraca.

[2] The accused, Mr. Smith, and the complainant, Mr. Prebushewski, were known to each other. Mr. Prebushewski was the owner and operator of the Armstrong Hotel also known as the Blue Hotel in Armstrong, BC, where Mr. Smith was a tenant. Mr. Smith had been a tenant since September 2019 along with his then spouse, Ms. Melissa Little.

[3] The events that give rise to these charges occurred on February 19, 2020. A few days earlier, Mr. Prebushewski endeavoured to terminate Mr. Smith's tenancy by way of a handwritten 10-day eviction notice.

[4] The Crown alleges that shortly before noon on February 19, 2020, Mr. Smith parked his car in front of Mr. Prebushewski's truck while Mr. Prebushewski was reversing, got out of his car while holding an imitation handgun, whereupon he yelled and threatened Mr. Prebushewski. Mr. Smith then returned to his vehicle and drove away.

[5] Immediately after Mr. Smith's departure at around 11:47 a.m., Mr. Prebushewski attended the Armstrong police detachment and gave a statement to Corporal Blake.

[6] Approximately two hours later, Mr. Prebushewski called the Armstrong police detachment again, on this occasion to advise that he had seen Mr. Smith in his car in Enderby. Mr. Smith was driving south. Mr. Smith was pulled over and then arrested approximately twenty-five minutes later in the vicinity of the commercial weigh station in Vernon.

- [7] At the time of his arrest, Mr. Smith had a passenger in his vehicle, Ms. Lucille Bonneau. The accused says that Ms. Bonneau witnessed the altercation between he and Mr. Prebushewski and that her evidence ought to be preferred to that of Mr. Prebushewski. In particular, he says that Ms. Bonneau's evidence that there was no weapon in his hand during the confrontation should be accepted.
- [8] The first three counts on the indictment relate to Mr. Smith's confrontation with Mr. Prebushewski at the motel. The fourth count for uttering threats arises from comments made by Mr. Smith to Constable Maraca when Mr. Smith was in the back seat of Constable Maraca's police vehicle while driving to the Armstrong detachment immediately following Mr. Smith's arrest.

The trial

- [9] Mr. Smith represented himself at the trial. However, he was assisted by counsel, Mr. Johnson, who conducted the cross-examinations of both of the complainants and the direct examination of Ms. Bonneau. Mr. Johnson remained at the trial throughout and was able to consult with Mr. Smith throughout the trial, including when Mr. Smith was examining and cross-examining witnesses.
- [10] In addition to Mr. Prebushewski, the Crown called three police witnesses: Constable Maraca, who I referred to earlier, Constable Warrens who conducted a search of Mr. Smith's vehicle subsequent to arrest and found a toy handgun under the driver's seat, and Corporal Blake who took Mr. Prebushewski's statement shortly after the event and was present at the time of Mr. Smith's arrest at the weigh scale in Vernon.
- [11] There were two witnesses for the defence, Ms. Lucille Bonneau who was the passenger in Mr. Smith's car, and Mr. Smith's former spouse, Melissa Little. The accused did not testify.

Uttering threats

- [12] I will start with the fourth count, that of uttering threats to Constable Maraca. The essential elements of uttering threats are:
- a) the accused in any manner uttered, conveyed, or caused Constable Maraca to receive a threat to cause death or bodily harm to him; and
 - b) the accused knowingly made the threat.
- [13] The offence will be made out if a reasonable person aware of the circumstances in which the words were uttered would have perceived them to be a threat. It is not necessary that the intended recipient of the threat was intimidated by it nor is it necessary to prove that the accused either intended to act on the threat or had the ability to act on it. The Crown must, however, establish the accused intended to intimidate or that the threat be taken seriously.

- [14] Constable Maraca described the accused as "delusional" while seated in the back of his police vehicle. The accused, Mr. Smith, made a number of what could be described as wild assertions.
- [15] Constable Maraca described Mr. Smith as continuously yelling, claiming that his wife and son had been raped, that his wife was providing sexual favours to the police, that he had information on human trafficking, that the police thank him for cleaning up the streets, and that the police should help him by providing him with a gun. Interspersed amongst the delusional ramblings were the two utterances that give rise to the charges. The two utterances were, "I will get the Hells Angels after you," and the second was, "I will fuck you up."
- [16] In all of the circumstances, I am satisfied that a reasonable person in the position of Constable Maraca would not have taken either of the two utterances as a serious threat. Constable Maraca agreed during cross-examination that he did not take the accused's other statements such as his information about human trafficking or that his spouse was providing sexual favours to the police seriously nor did he take the suggestion that the police ought to provide him with a gun to assist with cleaning up the streets as a serious comment. There is no evidence of any connection between the accused and the Hells Angels that would suggest that Mr. Smith knew the Hells Angels. While the absence of a connection does not necessarily assist in the defence to the charge, the evidence does establish that Mr. Smith was nonetheless well known to the local police.
- [17] In the circumstances, while the words of the accused could be interpreted as threats when viewed in isolation, I am satisfied that in the context of numerous other delusional or nonsensical ramblings from Mr. Smith during the relatively brief time that he was securely seated in the back of Constable Maraca's police car that a reasonable person in Constable Maraca's position would appreciate that the two utterances were simply further additional delusional ramblings and that they could not be taken seriously when viewed in the context of everything else that the accused was saying.
- [18] I therefore find the accused not guilty on the fourth count of the indictment.

The charges arising from the incident at the Armstrong motel

- [19] I will now turn to the incident at the motel in Armstrong that gives rise to the first three charges. The three charges are as follows:

Count 1: use of an imitation firearm while committing the indictable offence of assault with a weapon, contrary to Section 85(2) of the Criminal Code;

Count 2: assault with a weapon of David Prebushewski contrary to Section 267(a) of the Criminal Code;

Count 3: possession of a weapon for a dangerous purpose contrary to Section 88(1) of the Criminal Code.

[20] The definition of an imitation firearm is set out in s. 84 of the Criminal Code:

imitation firearm means any thing that imitates a firearm, and includes a replica firearm

[21] In order for an object to be an imitation firearm, it must appear to be a firearm. As such, an object that is obviously a toy gun cannot be an imitation firearm.

Preliminary argument - inadequate investigation

[22] The accused argues that the police investigation was inadequate and requests that the charges be dismissed. The altercation took place along the side of the Armstrong Hotel. The accused argues that:

- a) it is highly likely that there were other witnesses, including witnesses at two adjacent businesses: one bar and one other business known as Pinnacle Energy Solutions; and
- b) that the police ought to have retrieved video surveillance.

[23] Ms. Little's evidence was that on a previous occasion following a heated argument with the accused, she went to Pinnacle Energy Solutions' office and could see on a screen the area adjacent to the motel where the incident occurred. However, there is no evidence that either the adjacent bar or Pinnacle Energy Solutions has video equipment that records and stores video footage nor is there any evidence that suggests that the investigating officers failed to undertake a proper investigation.

[24] I do not accept the accused's arguments regarding the investigation and I will go on to consider the evidence.

Mr. David Prebushewski's evidence

[25] Mr. Prebushewski was the manager of the Blue Hotel in Armstrong at 2715 Pleasant Valley Road at the time of the incident. His duties at the motel included cleaning and any maintenance that may be required. He and his wife were also responsible for collecting rents and dealing with tenants. There were long-term tenants in the building including Mr. Smith and Ms. Little. He could not recall the exact number, but there were between five and seven long-term tenancies at the time of this incident on February 19, 2020.

[26] Prior to the incident, but on the day in question, Mr. Prebushewski had driven to the municipal landfill to empty the motel's garbage. He was returning in his pickup truck towing the garbage trailer behind his truck. Mr. Prebushewski pulled in towards the rear of the motel in order to back the trailer into its storage location.

[27] Mr. Prebushewski's truck was a large one-ton truck with an eight-inch lift. As he was backing up and looking out of his driver-side mirror, he heard a squealing of tires. A man he recognized as Mr. Smith was driving in a white Buick four-door sedan. Mr. Prebushewski said that Mr. Smith was alone in the vehicle except for his dog which was in the back seat.

- [28] Mr. Smith had what appeared to be a pistol in his hand and he was yelling and screaming and cussing and swearing, waving the gun at him near the driver-side door of Mr. Prebushewski's truck. He accused Mr. Prebushewski of having sexual relations with Ms. Little and having a threesome with Ms. Little and Mr. Prebushewski's wife. He said that he was cheating with Ms. Little and said that he would kill him.
- [29] Mr. Prebushewski said that he told Mr. Smith he had not been with Mr. Smith's wife, but Mr. Smith said that was not what he had heard. Mr. Smith then told Mr. Prebushewski that he would get Mr. Prebushewski and his wife removed from the motel. Mr. Prebushewski described Mr. Smith's appearance as "whacked out" and that he was slobbering and spitting.
- [30] Mr. Smith calmed down a little, but said that he belonged to a Mexican cartel and that he knew Hells Angels and they were going to be looking for him. I pause to note that these allegations regarding both Mr. Smith's wife and the threats regarding the Hells Angels are quite similar to what Mr. Smith said to Constable Maraca. Mr. Prebushewski's focus was on Mr. Smith's finger. He was hoping that Mr. Prebushewski did not put his finger on the trigger of the gun and he never did so.
- [31] Mr. Prebushewski was personally familiar with Mr. Smith because he was one of the tenants of the suites along with Ms. Little. Mr. Smith moved in in September of 2019, but then lived elsewhere for a while. Ms. Little remained and paid rent. Mr. Smith returned around the end of December that year and stayed until approximately the end of February. Ms. Little was there from time to time and there were often arguments between them.
- [32] In the days before the altercation, Mr. Prebushewski had served Mr. Smith with an eviction notice for non-payment of rent. Mr. Prebushewski's evidence was that the eviction did not seem problematic for Mr. Smith because he said he was going to be working up north and would pay the rent later. From Mr. Prebushewski's perspective, the eviction was proceeding uneventfully other than the police attended to assist Ms. Little in retrieving her belongings because she did not have a key.
- [33] Mr. Prebushewski described the gun in Mr. Smith's hand as eight to 10 inches in length and pure black. He saw the pistol right away when Mr. Smith got out of the car. Mr. Smith was waving it about. While it was pointed at him from time to time, there were also times when it was pointed elsewhere including at the motel while Mr. Smith was yelling and screaming and waving the pistol around. The barrel of the pistol was within two or three feet of Mr. Prebushewski. He described Mr. Smith as out of control with eyes dilated. He could not accurately estimate the duration of the exchange, but thought it was between five and 15 minutes. He observed Mr. Smith squeal the tires as he left the parking lot and headed out of town.

- [34] Mr. Prebushewski called the RCMP detachment in Armstrong and then drove over to the detachment to report what had happened and provided a statement to Corporal Blake. Later in the day, Mr. Prebushewski saw Mr. Smith driving in Enderby. Mr. Smith was heading in the direction of Vernon. He saw a passenger in Mr. Smith's car. This all happened at approximately 1:50 p.m. whereas Mr. Smith had been alone at the time of the confrontation. Mr. Smith's dog was still in the back seat as it had been earlier.

Ms. Lucille Bonneau's evidence

- [35] Ms. Lucille Bonneau testified for the defence. In February 2020, Ms. Bonneau was residing in Vernon. On the morning of February 19th, she hitchhiked to Enderby to visit her children and then saw a friend. Ms. Bonneau was picked up while hitchhiking by Mr. Smith in Enderby after she had seen her children. Her intended destination when she was picked up by Mr. Smith was to go back to Vernon. She was familiar with Mr. Smith because there was some connection with her former husband's side of the family.
- [36] Ms. Bonneau had very little recollection of the events of the day other than of the time when Mr. Smith was arrested. She referred to a statement she had provided to police within three weeks of the incident, but even when she was given a copy of the statement to review, it did little to refresh her recollection of the events. She testified that she previously had a brain injury and admitted that she had been drinking on the day in question.
- [37] Despite her best efforts, Ms. Bonneau was simply unable to reconstruct any sort of chronology of the day when questioned both in direct and on cross-examination. She could not recall whether she went straight to Vernon from Enderby with Mr. Smith after she was picked up. At one point while she was in the Enderby area, she visited with a friend named Stan, but she could not recall whether she saw Stan before or after Mr. Smith had picked her up. She also may have gone to Salmon Arm and back with Mr. Smith, but again, she could not recall. At some point between Enderby and Armstrong, they pulled over on the side of the road near the river and were talking. Ms. Bonneau used the bathroom and she was drinking beer.
- [38] When asked when she had seen her children, she said, "afternoon-ish," because she is not an early person. She had already seen her children before she was picked up by Mr. Smith. At one point in her evidence, Ms. Bonneau said that she thought she was with Mr. Smith for four or five hours. Mr. Smith was arrested shortly after 2:15 p.m. She initially said there was no dog in the vehicle, but later acknowledged that there might have been a dog, but she could not be sure.
- [39] Ms. Bonneau testified that at one point Mr. Smith pulled into the area of the Blue Hotel in Armstrong and parked his car behind a large black truck. She is familiar with the Blue Hotel in Armstrong because she used to live nearby. She heard an argument and she heard one or two people in the truck shouting. At some point, she saw something thrown or at least saw something fly by.

- [40] Ms. Bonneau said she saw someone get out of the truck and charge at Mr. Smith during the exchange. Mr. Smith then got back into the vehicle and drove off. Ms. Bonneau testified that she never saw anything resembling a gun during this altercation.
- [41] Mr. Smith told Ms. Bonneau that the person he had confronted was someone who had raped his wife or girlfriend. Mr. Smith said that he "had to get out of there" and, while her recollection was extremely hazy, Ms. Bonneau said that they then drove to Vernon and the arrest followed shortly thereafter.

Assessment of Ms. Bonneau's evidence

- [42] The accused argues that Ms. Bonneau's evidence should be preferred over the evidence of Mr. Prebushewski. He argues that the incident described by Ms. Bonneau at the Armstrong Hotel was the same confrontation with Mr. Prebushewski and that her evidence as to the events should be accepted or, alternatively, that it raises a reasonable doubt. As such, Mr. Smith does not deny that a confrontation took place between he and Mr. Prebushewski, but he denies that there was an imitation firearm involved.
- [43] Ms. Bonneau has a very limited recollection of the events of the day, including of the sequence and timing of events. Mr. Prebushewski's initial report to the police in Armstrong was before noon as confirmed by Corporal Blake. The altercation obviously preceded that report. Mr. Prebushewski's subsequent call to Armstrong police to say that he had seen Mr. Smith and which culminated in Mr. Smith's arrest was not until 1:50 p.m. Ms. Bonneau's evidence was that Mr. Smith drove to Vernon following the altercation she had seen. This is a drive of approximately ten minutes.
- [44] Although Ms. Bonneau was unable to recall with any certainty whether she and Mr. Smith drove to Salmon Arm and then back to Enderby or not and she could not recall whether her visit with her friend, Stan, was before she was picked up by Mr. Smith or afterwards, she never suggested that they drove from Enderby to Armstrong but then backtracked to Enderby.
- [45] Ms. Bonneau's recollection of the events of the day is unclear and I conclude her evidence is unreliable. Although she said she was with Mr. Smith for perhaps four to five hours that day, his arrest was at 2:15 p.m. which would suggest that she had been with him since 10:15 a.m. or earlier. However, she saw her children before Mr. Smith picked her up and she thought she had seen her children in the afternoon.
- [46] Ms. Bonneau admitted to having been drinking that day which undoubtedly contributed to her confusion and uncertainty. To the extent that Ms. Bonneau believes that she may have witnessed an angry altercation between Mr. Smith and the occupant or occupants of a black truck at the Armstrong Hotel, I conclude that it could not have been the incident that gives rise to these charges because whatever she may have seen happened shortly before Mr. Smith was arrested whereas the altercation between Mr. Prebushewski and Mr. Smith was at least two-and-a-half hours prior to his arrest.

- [47] I find that Ms. Bonneau was not present when Mr. Smith confronted Mr. Prebushewski and that Mr. Smith was alone in his car at the time, other than for the dog.
- [48] Although Ms. Bonneau provided a statement to the police within three weeks of Mr. Smith's arrest, her version of events regarding witnessing an altercation at the Blue Hotel was never put to Mr. Prebushewski on cross-examination. I do not doubt that Ms. Bonneau was attempting to tell the truth as best she could, but she simply has no recollection of the majority of the events of the day while she was in Mr. Smith's company and prior to Mr. Smith's arrest. I therefore find her evidence to be unreliable and I can give it no weight.

Assessment of Mr. Prebushewski's evidence

- [49] Just because I cannot rely on the evidence of Ms. Bonneau does not necessarily mean that I must convict Mr. Smith. Rather, I must consider whether the evidence I do accept is sufficient to prove the charges beyond a reasonable doubt. I turn now to Mr. Prebushewski's credibility and the reliability of his evidence.
- [50] Although the accused represented himself at the trial, counsel was appointed to conduct cross-examination of the complainant, Mr. Prebushewski, on Mr. Smith's behalf. Cross-examination of Mr. Prebushewski proved challenging.
- [51] Mr. Prebushewski's cross-examination commenced at the beginning of the second day of trial. After slightly more than an hour, counsel noted that Mr. Prebushewski needed a break. Mr. Prebushewski was subsequently taken to Kelowna General Hospital for observation where he remained for a few hours. Mr. Prebushewski returned to court the following day, at which time, he testified behind a screen so that he could not see or be seen by the accused.
- [52] Mr. Prebushewski was not prepared to accept basic propositions that were put to him including that his memory of the events would have been better when he first gave a statement to the police only 15 minutes after the incident than it was over a year later at trial.
- [53] Mr. Prebushewski was also argumentative and combative at times. However, I also accept that at times he did not fully understand the questions he had been asked. For example, he was asked whether Mr. Smith ever told him that he recognized him from a tire shop in Edmonton. Although he denied the suggestion most adamantly, I conclude that Mr. Prebushewski interpreted counsel's question as asking him if he had ever owned a tire shop in Edmonton and not whether Mr. Smith had ever asked him that question, even if it were not true.
- [54] Mr. Prebushewski was a lot calmer when cross-examination resumed the following day. He was prepared to agree at this point that his memory would have been fresher on the day of the incident than it is now, for example. That said, there were some inconsistencies in Mr. Prebushewski's evidence.

- [55] At trial, Mr. Prebushewski said he saw Mr. Smith arrive in his Buick and stop in front of his truck, but at the preliminary hearing, he said that Mr. Smith was already stopped when he first saw him. To this end, at the preliminary hearing, he said, "He could have dropped from the sky" to illustrate the point that he did not see the Buick arrive, an answer that could be described as flippant.
- [56] Mr. Prebushewski agreed that he testified previously that he first saw the gun when Mr. Smith got out of the car and was waving it around. However, he later testified that he first saw the gun in Mr. Smith's hand before he got out of his car and that Mr. Smith had to reverse the car to open his door, that he put the gun down while he reversed, and picked it up again only after he had stopped.
- [57] Mr. Prebushewski described what he thought was a bullet-proof vest under Mr. Smith's t-shirt at the time of the altercation and also testified that he was wearing red running shoes. At the time he was arrested, he was wearing black and white running shoes. However, over two hours had passed since the altercation, plenty of time for Mr. Smith to have changed shoes if indeed he were ever wearing red shoes.
- [58] As for the vest, Constable Warrens described it as more of a fishing vest and that Mr. Smith was wearing it outside of his t-shirt at the time of arrest. What Mr. Smith was wearing at the time of his arrest is not of significant importance because he would not necessarily have been wearing the same items some two-and-a-half hours earlier. This is not a case where identity is in issue.
- [59] In this case, there is no question that Mr. Smith was the person involved, that Mr. Smith stopped his Buick immediately in front of Mr. Prebushewski's truck, and that a confrontation followed. The main issue was whether or not Mr. Smith was holding an imitation firearm. For example, it does not matter in terms of the elements of the offence whether Mr. Smith's Buick was completely stopped or not when he was first seen by Mr. Prebushewski. However, inconsistencies in a witness' evidence must always be considered when assessing whether the witness was credible and if the evidence provided by the witness was reliable.
- [60] Although there were some inconsistencies, they were largely insignificant and inconsequential when considering Mr. Prebushewski's evidence as a whole. Human memory fades over time and some details become less clear. Mr. Prebushewski's evidence regarding the confrontation including the presence of what he believed was a gun was unshaken and did not waiver at any time during his evidence.
- [61] Mr. Prebushewski acknowledged during cross-examination that he wanted Mr. Smith to move out of the motel. He wanted to evict him because he believed, based on the comments of other tenants, that Mr. Smith was engaged in illegal activity involving drugs and stolen property.

- [62] At the preliminary hearing, he agreed that he would do what it takes to get him out of the motel. However, Mr. Prebushewski denied that he was prepared to fabricate these allegations in order to get Mr. Smith out of the motel. He says that what he meant was that he would help Mr. Smith move his belongings because he had a truck and a trailer whereas Mr. Smith only had a car. Mr. Prebushewski also denied that he decided to report that Mr. Smith was waving a gun in order to get him out of the motel when, in fact, Mr. Smith was only waving his finger at him.
- [63] Ms. Little testified that Mr. Smith took a toy gun from one of their two children on February 13 or 14, a few days before these events. She described the boys as playing with toy guns behind the emergency stairs of the motel on an area of built-up snow.
- [64] Each of the two boys had a toy gun. One of the toys had a red tip, but Ms. Little could not recall if the other one did. The boys were playing, but then they started fighting. Mr. Smith took one of the toy guns away from one of the children and put it in his car. Ms. Little said that Mr. Prebushewski was there when this happened.
- [65] The significance of this evidence is twofold, according to Mr. Smith. Because Ms. Little said that Mr. Prebushewski was present, Mr. Smith argues firstly that Mr. Prebushewski would have known that the police would be able to find the gun under the driver's seat of his car if they searched it, and second, that Mr. Prebushewski knew that the gun in Mr. Smith's car was obviously a toy.

Imitation firearm

- [66] Although Ms. Little testified that Mr. Prebushewski was there when Mr. Smith took a toy gun from one of the children, the evidence does not establish that Mr. Prebushewski either saw Mr. Smith take a toy from a child or what Mr. Smith did with the toy. Ms. Little said that at least one of the two toys that the boys were playing with had a red tip on the barrel. Ms. Little testified that her children have numerous toy guns, cap guns, Nerf guns, and squirt guns. She says that the gun that was seized from underneath the driver's seat of Mr. Smith's car may have been one of the children's toys.
- [67] Mr. Prebushewski denied that he ever saw Mr. Smith take a toy gun away from one of his children and put it in the car.
- [68] While I accept that Mr. Prebushewski could have been in the vicinity when Mr. Smith took a toy gun away from one of the children, there would have been no reason for him to pay any particular attention to Mr. Smith and the children. Mr. Smith and Mr. Prebushewski, while generally cordial, were not close friends. By February 13 or 14, Mr. Prebushewski had already started the eviction process. It is unlikely that they were socializing. I do not accept that Mr. Prebushewski would have any reason to know that the gun in Mr. Smith's car was a toy.

- [69] Ms. Little said that at least one of the two toys that the children were playing with had a red tip on the barrel. She was unable to say whether it was the toy with the red tip that was taken away by Mr. Smith and she was unable to confirm that the gun in Mr. Smith's car that was entered as an exhibit in these proceedings was one of the children's toys, although she said it resembled one. The exhibit that was seized from Mr. Smith's car is black in colour. Constable Warrens, who seized the gun, testified that the tip of an imitation weapon is often painted red or orange in order to depict that it is not a real gun.
- [70] The gun that was seized was described by Constable Warrens as black or mostly black and that it looked like it may have been painted. Constable Warrens said that although he could see some orange, it was primarily on the inside of the barrel and he could not see the orange until he looked very closely. Constable Warrens did not conclude that it was a replica gun until he took a closer look at it.
- [71] During cross-examination, Constable Warrens said that he could not tell if it was a real gun or a replica at first glance and he was only able to conclude that it was a replica when he touched it and looked at it more closely, and that he thought it was real at first glance.
- [72] I find that Mr. Prebushewski would not have known that what Mr. Smith was holding was a toy. Any orange at or near the tip was primarily on the inside of the barrel and would not have been visible to Mr. Prebushewski as Mr. Smith waved the object around.
- [73] I do not accept that Mr. Prebushewski, following the exchange with Mr. Smith, falsely reported that a gun was involved for the purpose of getting Mr. Smith out of the motel. Mr. Prebushewski conceded that he wanted Mr. Smith and Ms. Little to leave on account of complaints from other tenants regarding illegal activity and that also Mr. Smith was behind in his rent.
- [74] However, Mr. Prebushewski's evidence was that Mr. Smith did not seem concerned with the eviction and indicated that he was going to be leaving to work up north. The eviction was not a concern to Ms. Little either. Ms. Little had already moved out in the days preceding the altercation. Ms. Little had signed her acknowledgment on Mr. Prebushewski's handwritten eviction note and even though Mr. Smith had refused to do so, there was nothing to indicate that Mr. Smith was not going to leave.
- [75] Mr. Prebushewski had no need to fabricate the presence of a weapon to get Mr. Smith to leave because he had no reason to believe that Mr. Smith would not be moving out otherwise. I find that Mr. Prebushewski did not fabricate the presence of the weapon.
- [76] I therefore find that Mr. Smith threatened Mr. Prebushewski with an imitation firearm in his hand and that he pointed the imitation firearm at Mr. Prebushewski while threatening him. I find that --
- [77] THE ACCUSED: Unbelievable.
- [78] THE COURT: -- the Crown has proven beyond a reasonable doubt that Mr. Smith --

- [79] THE ACCUSED: Unbelievable.
- [80] THE COURT: -- is guilty of the first three counts of the indictment. That concludes --
- [81] THE ACCUSED: Unbelievable.
- [82] THE COURT: -- my decision.
- [83] Now, we have -- there are three charges and they all seemingly pertain to the same event. What is the contention with regard to noting conviction?
- [84] CNSL BELLRICHARD: I can say that on the outset, given findings of guilt on Counts 1 and 2 and 3, that Count 3 would be pursuant to R. v. Kienapple. A judicial stay of proceedings would be entered given the finding of guilt on Count 2.
- "Wilson J."

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