

CANADA / JUDGMENT

R. v. Smith

2024 BCSC 461

COURT

Supreme Court of British Columbia

DECIDED

20 February 2024

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2024 BCSC 461 R. v. Smith

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Smith,

2024 BCSC 461

Date: 20240220

Docket: 55751-5

Registry: Vernon

Rex

v.

Jevon Daniel Smith

Restriction on Publication: Pursuant to 486.5(1) & 648(1) C.C.C.

Before: The Honourable Mr. Justice G.P. Weatherill

Oral Ruling on Voir Dire 1

Re Voluntariness of Accused's Statements

Counsel for the Crown:

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Counsel for the Accused:

T.D. Anderson

A.J. Lagemaat

Place and Date of Trial/Hearing:

Kelowna, B.C.

January 8 - 11, 16 - 18, 2024

Place and Date of Judgment:

Kelowna, B.C.

February 20, 2024

- [1] THE COURT: This is an oral ruling on a blended voir dire. If a transcript is ordered, I reserve the right to edit, although the process will not involve a change in the decision or in the reasoning.
- [2] On September 20, 2021, Dakota Samoleski was found deceased in a gravel pit near Enderby, British Columbia. Mr. Smith is charged with second degree murder in relation to the death.
- [3] Mr. Smith elected to be tried by judge and jury, with the trial to commence on February 26, 2024. This voir dire was held to determine:
- a) the voluntariness of various audio/videotaped interactions Mr. Smith had with various members of the RCMP on September 21 and 22, 2021 (the "Interactions"), such that the Crown may use them in cross-examination should he testify in his own defence; and
 - b) whether Mr. Smith's ss. 10(a) and (b) Charter rights were violated such that the Interactions ought to be ruled inadmissible under s. 24(2) of the Charter.

Onus of proof

- [4] The Crown has the onus of proving the voluntariness of the Interactions beyond a reasonable doubt. Mr. Smith has the onus of proving that his Charter rights were violated on a balance of probabilities.
- [5] At the outset of the voir dire, counsel advised that, despite the burdens of proof being different, they agreed on the procedure to be followed to keep the burdens of proof separated. Accordingly, I agreed to a blended voir dire so that the evidence could be heard only once, with submissions on the voluntariness of the Interactions and Charter issues made separately.

Circumstances of Mr. Smith's arrest

- [6] All the Crown witnesses on the voir dire were RCMP officers, some general duty ("General Duty Officers") and some from the RCMP's Emergency Response Team based out of Kelowna ("ERT").

- [7] At approximately 11:45 a.m. on September 20, 2021, following the report of a gun being fired inside a blue Kia Sportage SUV ("Kia") in the Enderby/Armstrong area, ERT members Constable Matthew Shaw, Constable Ryan Velcich, and Constable Mark Williams were dispatched to Enderby, BC, from Kelowna, BC, driving two unmarked pickup trucks. All wore their standard-issue ERT olive/flack uniforms with body armour. General Duty Officers from the Armstrong/Enderby detachment were also dispatched.
- [8] The officers heard by radio that a person known as "Dan Smith" was involved and had fled the scene in the Kia. The ERT members' primary task was to locate the Kia and take Mr. Smith into custody. The ERT members were told that he was last seen wearing a COVID face mask and that he may have mental health issues. Although this information was very general, the ERT members' concern for officer and public safety was heightened, because they suspected he could be in crisis and/or unstable.
- [9] In addition to the officers, the RCMP had the support of a police helicopter.
- [10] Corporal Jackson, one of the General Duty Officers, attended Back Enderby Road, where two other officers and a female, A.C., were located. A.C. owned the Kia and said she witnessed the shooting in the Kia. She was taken to the Armstrong detachment where she gave a statement monitored by Corporal Jackson. She said the shooter was Mr. Smith, whom she had just met the evening before. Corporal Jackson suspected she was describing Mr. Smith, because he was known to the police in the Enderby area.
- [11] A.C. stated that after the shooting, Mr. Smith drove off in the Kia, but she did not know where he went.
- [12] Meanwhile, on arrival in the Enderby area, the ERT members were soon advised that Mr. Samoleski's body (not yet identified) had been located in a gravel pit off the Back Enderby Road. They attended at the gravel pit briefly before heading out to locate the Kia and apprehend the driver. Corporal Jackson also travelled towards the gravel pit with another General Duty Officer in an unmarked police vehicle. As he was driving to the gravel pit, he passed the Kia travelling in the opposite direction, performed a U-turn, and followed at a safe distance until other units and the police helicopter were in position. He saw the Kia turn onto Powerhouse Road. Other units, including the ERT units, converged and set up roadblocks. Attempts to stop the Kia were unsuccessful. The driver was able to avoid capture by swerving around and/or ramming the police barricades and driving away at high rates of speed. ERT members followed in hot pursuit.
- [13] The Kia travelled onto Demorest Road, a gravelled forest service road that ends some distance later in a dead end at a nearby residence. The Kia pulled into the residence's driveway, stopped, and Mr. Smith got out. Constable Shaw and Constable Williams shouted that Mr. Smith was under arrest for murder. They ordered him to put his hands up and lie facedown on the ground. Mr. Smith complied.

- [14] Constable Shaw and Constable Williams awaited the arrival of Constable Velcich before approaching Mr. Smith. To them, the situation was tense and dynamic with many unknowns. For example, they did not know if another person was hiding in the Kia, or if the persons at the residence might be involved.
- [15] Mr. Smith was held at gunpoint while the Kia and residence were cleared. Constable Shaw and Constable Williams saw a shotgun in the passenger seat of the Kia, and a large amount of blood on the passenger seat. Constable Velcich was the "hands on" officer who used both "zap straps" and handcuffs to restrain Mr. Smith's hands behind his back and then escorted him to his ERT truck. As he did so, he advised Mr. Smith that he was under arrest for murder, although he did not give any details. Mr. Smith's response was, "I don't understand."
- [16] Constable Velcich also cautioned him that he had the right to retain and instruct counsel without delay, and he was not obliged to say anything, but anything he did say could be used as evidence. Mr. Smith did not respond to this warning.
- [17] Constable Velcich's tone was calm and civil. There was no yelling and no use of force. No threats or promises were made and there were no threatening gestures. To Constable Velcich, Mr. Smith appeared to understand the warning he was given.
- [18] By this time, the General Duty Officers had arrived, including Corporal Jackson and Constable Hamilton. Mr. Smith was turned over to Constable Hamilton ending the ERT's involvement. Constable Hamilton escorted Mr. Smith down a hill to his marked police vehicle. As he did so, he told him he was under arrest for murder, gave him a police warning and his s. 10(a) and (b) Charter rights from memory. Mr. Smith stated words to the effect that he did not shoot anyone.
- [19] During this interaction, Mr. Smith interrupted and talked over Constable Hamilton. Constable Hamilton recognized Mr. Smith from a previous encounter when he was admitted to hospital under the Mental Health Act, R.S.B.C. 1996, c. 288. He knew Mr. Smith had a history of mental health issues.
- [20] Corporal Jackson was present at Constable Hamilton's vehicle and began audio recording his Interactions with Mr. Smith. He, too, provided Mr. Smith with a s. 10 Charter warning, also from memory. Corporal Jackson had dealt with Mr. Smith once previously and was aware that he had a history of erratic behaviour and mental health concerns. From this point forward, virtually all Interactions between Mr. Smith and the officers were audio recorded and some had corresponding video recordings. Constable Hamilton and Constable Jackson then escorted Mr. Smith to the Vernon detachment.
- [21] Both officers testified that Mr. Smith had bloodshot eyes and had an orange-like substance on his clothes/face consistent with his complaints that he had been bear sprayed and complaints of eye pain. Nevertheless, Mr. Smith appeared to the officers to have no issues with balance or other impairments and appeared to understand the warnings they had given him. There was nothing to suggest Mr. Smith might be impaired by alcohol or drugs.

- [22] In response to being asked if he wanted to speak to a lawyer, Mr. Smith replied, "Obviously." To both officers, this meant that they were not to attempt to question or solicit any statements from him related to the offence. They agreed that any discussions with Mr. Smith should properly be restricted to health or safety concerns, or to the de-escalation of emotions. They agreed that communications with Mr. Smith ought to be kept to a minimum.
- [23] During the travel from the scene of Mr. Smith's arrest to the Vernon detachment, Corporal Jackson made several inquiries of Mr. Smith as to whether he wanted to speak to a lawyer. He agreed that a detainee in apparent distress sometimes needs a stronger recitation of his or her Charter rights to ensure he or she fully understands them. Further, Corporal Jackson was aware that Mr. Smith had a history of mental health issues, which heightened his safety concerns. From his experience, persons suffering from mental health issues can be unpredictable.
- [24] Corporal Jackson and Constable Hamilton noted that from first taking custody of Mr. Smith, he was behaving erratically, speaking irrationally, and interrupting. He was demanding to be "cut loose" and be taken home so he could go to work. Mr. Smith suggested that he would prefer to negotiate his release with Corporal Jackson instead of speaking with a lawyer.
- [25] To the officers, Mr. Smith's excited behaviour was consistent with someone suffering from drug abuse or mental health issues. During the transport, Corporal Jackson attempted to calm the situation, maintained a friendly dialogue, and tried to answer Mr. Smith's questions. Mr. Smith repeatedly complained that the handcuffs were too tight and hurting him, and his hands were going numb. Constable Hamilton's check of his cuffed hands revealed nothing of concern.

Officer interactions with Mr. Smith at the Vernon cells

- [26] I shall refer to the police officers involved with Mr. Smith collectively as "the Officers".
- [27] Mr. Smith was processed at the Vernon detachment and a video of the processing was filed in evidence, along with the audio/transcript of the interaction. Gunshot residue swabs were taken from Mr. Smith's hands and face, and his clothes were seized following a strip search. Throughout this process, Mr. Smith continued to ask to be released. Once again, Corporal Jackson suggested that Mr. Smith should contact a lawyer. Towards the end of the interaction, when Mr. Smith was again asked if he wanted to speak to a lawyer, he replied, "Certainly. I'm going to have to, I guess."
- [28] Corporal (then Constable) Patti Ramsay and Sergeant (then Corporal) Joseph MacDonald are members of the Southeast District Major Crimes Unit. On the evening of September 20, 2021, they were dispatched to the Vernon cellblock for the purpose of obtaining a warned statement from Mr. Smith.
- [29] From a briefing, reviewing PRIME, CPIC, and other sources of background information, they had learned that:

- a) Mr. Smith had a significant number of prior interactions with the police and had a history of mental illness;
 - b) Mr. Smith had displayed odd behaviour in the past, including attending at the Enderby RCMP detachment and stating that he was the prime minister of Canada, and seeking access to their computers;
 - c) Mr. Smith had been admitted to hospital under the Mental Health Act;
 - d) Mr. Smith had expressed a desire to consult a lawyer, had not yet done so, and at no time waived that right;
 - e) Mr. Smith appeared unstable, delusional, and was difficult to speak to;
 - f) Mr. Smith had been obsessing about conspiracies and the safety of his ex-wife and daughter, whom he said had been kidnapped and murdered;
 - g) Mr. Smith had likely been bear-sprayed in the face, that he was complaining of significant eye pain since his arrest, and that his eyesight was deteriorating.
- [30] This information was a red flag to the Officers that Mr. Smith might be vulnerable, suffering mental health issues, and should be treated accordingly. They knew that detainees displaying mental health issues require extra care to ensure they understand their rights. They also knew that it was important for them not to talk to Mr. Smith until he had spoken to a lawyer. Notwithstanding this knowledge, Sergeant MacDonald and Corporal Ramsay met with Mr. Smith and audio-recorded these meetings at various times on September 21 and 22, 2021, before he had spoken to a lawyer. They did not tell Mr. Smith that the Interactions were recorded.
- [31] Sergeant MacDonald formed the opinion early on that proper "legals" had not been completed and instructed Corporal Ramsay to advise Mr. Smith of his Charter rights. Corporal Ramsay first attempted to do so at 12:26 a.m. on September 21, 2021, by waking Mr. Smith from sleep in his cell and introducing herself. Mr. Smith stated that it was not the best time to talk, that his eyes hurt, and that he wanted to sleep. He asked her to come back in the morning.
- [32] She woke him again at 12:56 a.m. and they discussed what to do about his eyes. Mr. Smith stated he could not see properly.
- [33] Corporal Ramsay's next interaction with Mr. Smith was at 8:15 a.m. on September 21, 2021. Again, Mr. Smith requested she come back because he wanted more sleep. Corporal Ramsay told him that it was in his best interests to contact a lawyer.
- [34] Corporal Ramsay returned to Mr. Smith's cell at 9:13 a.m. on September 21, 2021, this time with Sergeant MacDonald. During this meeting, Mr. Smith rambled on about various matters and the Officers simply let him talk. This discussion was interspersed with them encouraging him to speak to a lawyer.

- [35] Finally, Corporal Ramsay reminded Mr. Smith that he should not say too much until he had a chance to speak to a lawyer. Mr. Smith gave them Mr. Jordan Watt's name as the lawyer he wished to speak to. Corporal Ramsay left the cell to contact Mr. Watt and make the arrangements, while Sergeant MacDonald stayed behind. Sergeant MacDonald acknowledged that when an accused with mental health issues starts talking, it is best for the interviewing officer to simply leave the room, especially if that accused had not yet had the benefit of speaking to counsel.
- [36] Sergeant MacDonald acknowledged that while Corporal Ramsay was attempting to facilitate access to Mr. Watt, Mr. Smith continued to talk. Sergeant MacDonald did not caution him not to say anything pending his telephone call with Mr. Watt. Sergeant MacDonald agrees that he should not have spoken to Mr. Smith until after he had spoken to Mr. Watt. Instead, Sergeant MacDonald stayed with Mr. Smith in his cell and allowed Mr. Smith to talk.
- [37] After some unsuccessful attempts to contact Mr. Watt, Mr. Smith was finally able to speak with him at approximately 10:50 a.m. on September 21, 2021.
- [38] On September 21, 2021, at approximately 12:30 p.m., Mr. Smith was formally charged with the second-degree murder of Mr. Samoleski. It was then that Sergeant MacDonald was content that the "legals" had been satisfied.
- [39] Mr. Smith's first court hearing was held by telephone before a justice of the peace at approximately 3:00 p.m. on September 21, 2021, from the Vernon cells. Mr. Watt attended that hearing via telephone. Mr. Smith was remanded in custody.
- [40] Mr. Smith was finally made aware that the Interactions were audio recorded as he was waiting for his first appearance. The following exchange took place wherein Mr. Smith expressed surprise [as read in]:

Mr. Smith: Is that recording?

Corporal Ramsay: Yes.

Mr. Smith: As we're talking?

Corporal Ramsay: Yes.

Mr. Smith: Oh man, I promised not to say a fucking word, man.

Corporal Ramsay: But you know that when you're in police custody anywhere in the building, it's being, um, audio or video taped, correct?

- [41] Following this exchange, Sergeant MacDonald continued to engage Mr. Smith and let him talk. Mr. Smith gave further details surrounding the shooting, A.C.'s involvement, and attempted to persuade Sergeant MacDonald that he should not be charged with murder because it was self-defence.

- [42] Sergeant MacDonald had a further interaction with Mr. Smith shortly after his first appearance, during which Mr. Smith confirmed that his lawyer told him not to say anything at all. Nevertheless, Sergeant MacDonald told him that there was value in Mr. Smith knowing where the second-degree murder charge came from, and suggested that it would be beneficial if Mr. Smith could shed some light on things. Sergeant MacDonald's parting comments included that he would check with his team and "then we can bounce some stuff back and forth, try and figure out what . . . led to this situation."
- [43] Sergeant MacDonald returned to Mr. Smith's cell at 5:55 p.m. to get a warned statement, but Mr. Smith's eyes were still in "pretty rough shape" and the attempt was postponed pending an ambulance crew attending at 6:36 p.m. to check his condition. A discussion ensued about whether Mr. Smith should be taken to a hospital. Corporal Ramsay arranged to have him transported to the hospital, but Mr. Smith declined, stating that he thought his eyes would be fine in time.
- [44] Sergeant MacDonald returned to Mr. Smith's cell at approximately 7:32 p.m. on September 21, 2021, in a further attempt to get a warned statement. Again, Mr. Smith told him that his lawyer told him to say nothing at all. Nevertheless, Sergeant MacDonald remained and continued to engage him, and Mr. Smith continued to state that his lawyer said he could not say anything because a charge had been laid and there was nothing that Sergeant MacDonald could do for him.
- [45] He stated that had the charge not been laid so quickly, he would have been more open to talk. He stated it was unfortunate it was out of Sergeant MacDonald's hands. Nevertheless, Sergeant MacDonald continued gently prompting Mr. Smith, who eventually began talking about the police chase, the downturn in his relationship with his ex-wife, his unsavoury living conditions, and negative persons he associated with. Gradually he began speaking about the situation he was in and how lucky he was that he was not the person killed. The interview ended when Mr. Smith was overwhelmed with emotions.
- [46] The following morning on September 22, 2021, Mr. Smith was fingerprinted and, at 2:44 p.m., was transported to the Kamloops Regional Correctional Centre (KRCC), still complaining of eye pain, having difficulty seeing, and wanting to be taken to the hospital.

Issue Number 1: Were the Interactions voluntary?

- [47] Statements given to the police are inadmissible unless the Crown proves voluntariness beyond a reasonable doubt. Even if statements are held to be voluntary, if they are obtained in a manner that breached the detainee's Charter rights, they can be excluded under s. 24(2): *R. v. Beaver*, 2022 SCC 54 at paragraph 45.
- [48] A statement may be ruled involuntary if it was unfairly obtained and ran afoul of the principle against self-incrimination and the right to silence. The voluntariness rule is flexible and contextual. The assessment of voluntariness requires a determination placing the whole case in context and whether the statements were reliable and whether the

conduct of the state served in any way to unfairly deprive the accused of their free choice to speak to the person in authority. All relevant factors must be considered, including whether the accused had an operating mind: Beaver at paras. 47 and 48.

- [49] On this voir dire, the voluntariness and s. 10 Charter applications overlap. Both deal with whether the Interactions can be used for Mr. Smith's cross-examination should he testify. As part of the voluntariness inquiry, the entire circumstances of the Interactions must be considered and must include a consideration of Mr. Smith's personal circumstances as known to the Officers.
1. The Crown's position
- [50] The Crown says that all the Interactions were voluntary because Mr. Smith understood that he had been arrested for murder, was cautioned not to speak, was given his s. 10 Charter rights multiple times, understood what was going on, and exercised his right to counsel. Despite these cautions and being told by his lawyer not to say anything, he voluntarily spoke to the Officers, initially to negotiate his release, because in his mind he had done nothing wrong. Throughout the Interactions, he was anxious to speak, despite the police and Charter cautions and his counsel's advice, indicating that he understood the severity of the situation.
- [51] The Crown maintains that the Officers gave no inducements. The atmosphere was not oppressive. No trickery was used, and Mr. Smith had an operating mind throughout. The Crown points out that throughout Mr. Smith's arrest, transport, and lodging in the Vernon cells, he was comfortably treated with respect and was provided food and water on request. No aggressive or intimidating tactics were used.
2. The defence's position
- [52] The defence argues that the Crown has not met its burden of proving the Interactions were voluntary beyond a reasonable doubt because:
- a) Mr. Smith was, to the Officers' knowledge, suffering from some sort of undiagnosed mental health issue, was displaying bizarre and delusional behaviour, and stated from the outset that he did not understand why he was being arrested for murder. As such, he was a vulnerable person in distress and needed to be treated differently and cautiously. Mr. Smith says this affects the operating mind requirement, the oppression doctrine, and his ability to meaningfully exercise his Charter protections.
 - b) The Officers failed to explain Mr. Smith's Charter rights in a meaningful fashion that was responsive to his known condition.
 - c) The Officers breached Mr. Smith's Charter rights by failing to interpret them purposively and failing to afford him a second opportunity to speak with counsel when his jeopardy changed from being arrested to formally charged.

- d) The Officers knew or ought to have known that Mr. Smith was holding out hope of being released from custody and continually sought to bargain his explanation of the circumstances in exchange for that release. Although this hope was generated by Mr. Smith, the Officers made no effort to discourage that hope and induced him to continue believing in that possibility, despite there being no chance of him being released.
- e) It was clear to Sergeant MacDonald that Mr. Smith was hoping to trade his self-defence explanation for the murder charge to be dropped. In response, Sergeant MacDonald stated he would be happy to talk about what happened. For example, this exchange took place:

[Mr. Smith]: I, yeah I do, um, but here's the thing . . . so, I take, I've just been arrested so I wonder if that there's . . . a way that I can, like, like . . . explain to, to you the circumstances, the situation, I wonder if this charge can be removed if it's, uh . . .

[Sergeant MacDonald]: And, and, you, you know what, like, I'm, I'm more than happy to talk about what happened with you, uh, but first we have to, we have an obligation as the police to make sure that all of your rights are taken care of. And you know what, uh, we're citizens as much as we are police officers.

If I was in your situation and I was arrested for something serious like this, I would want to talk to, uh, a professional about it and get some advice. So, that's our obligation is to present you with your options with that regard. Uh, and make sure that you . . . have access to a lawyer. . . if that's what you want.

- f) Despite Mr. Smith stating that he wished to consult counsel, Sergeant MacDonald continued to engage Mr. Smith, instead of telling him that he could not speak to him until he had spoken to counsel.
- g) The Officers not only allowed but encouraged Mr. Smith to believe there was a possibility of trading his story of self-defence for his release.
- h) Despite Sergeant MacDonald conceding that it is important to warn detainees, particularly if they are suffering from mental health issues, that they are being recorded, Mr. Smith was not told that the Interactions were being recorded until shortly before his remand hearing.
- i) Throughout most of the Interactions, Mr. Smith was suffering from the painful effects of being bear sprayed and was not in the frame of mind to fairly consider his options or to fairly appreciate his right to remain silent. Further, the Officers took few steps to ensure his well-being until well into the second day of his detention. Indeed, Mr. Smith continued to complain of eye issues as he was about to be transported to KRCC.
- j) The Officers knew of Mr. Smith's history of mental health issues and knew he was in distress.
- k) For unexplained reasons, Mr. Smith was restrained with both zap straps and handcuffs, which left him in discomfort during the transport.

- l) The Officers allowed and encouraged Mr. Smith to discuss his concerns about the well-being of his ex-wife and daughter, knowing the history of delusions surrounding this issue and the role these delusions may have played in the shooting.
- [53] The defence asserts that fairness to Mr. Smith is an important consideration on the voluntariness issue. The defence argues that the Officers unfairly took advantage of Mr. Smith's mental and physical condition, which in and of itself raises a reasonable doubt about the voluntariness of the Interactions.
3. Discussion
- [54] The common law voluntariness rule exists to protect the rights of accused persons without unduly limiting the police officers' ability to investigate and solve crimes.
- [55] As noted earlier, in determining whether the Interactions were voluntary, it is necessary to consider all relevant factors, including the circumstances under which the Interactions occurred, keeping in mind the protection of Mr. Smith's rights and fairness in the criminal process.
- [56] After considering these factors, the question is whether they give rise to a reasonable doubt as to their voluntariness, considering all aspects of the voluntariness rule, including whether they were a product of Mr. Smith's free will: *R. v. Oickle*, 2000 SCC 38 at paras. 68 to 71.
- [57] Circumstances that raise a reasonable doubt include whether the Interactions were a result of unacceptable threats or promises, oppressive circumstances, police trickery, or whether Mr. Smith had an operating mind during the Interactions. These factors are to be considered contextually with reference to the individual facts of the case and the circumstances of the individual accused: *Oickle* at paras. 48 to 67.
- [58] The Interactions relate to Mr. Smith's comments at the scene of his arrest, during his transport to the Vernon detachment, and at the Vernon detachment over a period of two consecutive days. All were audio recorded and some were video/audio recorded. Most of the recordings at issue were conducted by Corporal Ramsay and/or Sergeant MacDonald, who are trained police interviewers assigned to the task of interviewing Mr. Smith and obtaining a warned statement from him.
- [59] The background information they had included his numerous prior police involvements; his history of mental health issues; his delusional behaviour at the scene of his arrest and during his transport; A.C.'s statement about the events surrounding Mr. Samoleski's death; and the fact that he had been bear sprayed in the face and was in pain.

[60] Save for the use of both zap straps and handcuffs (which I find was excessive) and conducting a strip search of Mr. Smith during processing (which I find was unjustified), I agree with Crown's assertions that Mr. Smith was treated with respect throughout. However, for the Interactions to be considered voluntary, Mr. Smith must have a degree of awareness that what he was saying could be used to his detriment: Oickle at para. 63.

[61] Here, Mr. Smith indicated early on that he did not understand what he was being told:

[Corporal Jackson]: So you understand you were arrested for murder, do you, Dan?

[Answer]: No.

[Corporal Jackson]: 'Kay. So that's what you were arrested for, was murder. Do you understand that?

[The accused]: No.

[Corporal Jackson]: 'Kay, what part don't you understand?

[The accused]: Oh, my God, man. This guy, i-, pulled a shotgun on me . . .

[Corporal Jackson]: Okay, so Dan, we won't go down that road quite yet . . .

[The accused, interrupting]: . . . point, listen . . .

[Corporal Jackson]: . . . okay?

[The accused]: . . . pointed at me, I tried, I grabbed it, we started wrestling with it, he . . . grabbed the can of bear spray, he sprayed, look at my eyes. He sprayed my, my eyes. And all of a sudden I didn't even, I had no, my hand was nowhere near the trigger and it just went pop.

[62] After some further attempts by Corporal Jackson to advise Mr. Smith of his Charter rights, including the right to counsel, the following exchange took place:

[Corporal Jackson]: 'Kay. Do you wanna call. .

[The accused]: 'Kay, so . . .

[Corporal Jackson]: . . . a lawyer, Dan?

[The accused]: Well, obviously. But here's the thing, 'kay?

And shortly after:

[Corporal Jackson]: . . . you're not obliged to say anything, but anything you do say may be given in evidence. Do you understand that?

[The accused]: No.

[Corporal Jackson]: Is there any part of it you don't understand?

[Accused]: Yes. Every part of it.

[63] And again, shortly following:

[Corporal Jackson]: . . . obviously your eyes are bloodshot from the pepper spray. I also want you, you ment-, said, "obviously" when I asked you if you wanna talk to a lawyer. So, do you have a lawyer you want to talk to?

[Accused]: No, you know what? I don't need a lawyer. What I want you to do is commend me and fuckin' let me, let me go. This is ridiculous, man. Do you not know what these people are doing, in our communities? Do you not know what these fuckin' people are doing to women and children in our communities right now? They're fucking killing them. They're fucking killing them. They're raping them. They're fuckin' trading them like fucking pieces of meat. They, these are the biggest pieces of shit on the planet. They have no fuckin' bearing on society at this point, moving forward in this world, at all. They're the worst of the scum of the worst. They kill kids, they kill women, they don't give a shit, man.

And at the detachment:

[Corporal Jackson]: . . . just one last question for you . . . I know we asked a couple times on the way here. Do you wanna talk to a lawyer, Dan?

[The accused]: Certainly. I'm gonna have to, I guess.

[Corporal Jackson]: Okay. Do you have a lawyer...

[Accused]: Unless, unless you're willing to work something out with me . . .

[Corporal Jackson]: We can't do it, Dan, so . . .

[Accused]: . . . and uh, we can move forward and, and get me released.

[Corporal Jackson]: I can't do it, Dan. So, do you have a lawyer you want . . .

[64] There are several other examples where Corporal Jackson was encouraging Mr. Smith to speak to a lawyer and was discouraging him from talking until he had done so. Despite these cautions, Mr. Smith was insistent that he wished to speak to Corporal Jackson and tell his version of events, with the belief that he would be released from custody.

[65] Mr. Smith's purpose in speaking to the Officers was clearly a misguided and perhaps delusional attempt to negotiate his release from custody.

[66] Reviewing the circumstances in their entirety, I cannot find that the Officers provided any inducements to Mr. Smith or placed him in an oppressive environment. Mr. Smith was clearly rattled, in pain from being bear sprayed, and felt he could negotiate his release by talking, which he was anxious about.

- [67] Prior to attending Mr. Smith's cell, Sergeant MacDonald and Corporal Ramsay knew Mr. Smith had a history of mental health issues, knew from A.C.'s statement how he was behaving prior to the shooting, and knew of his bizarre and somewhat delusional behaviour following his arrest.
- [68] When they interacted with Mr. Smith, they were both accommodating and tried to make Mr. Smith as comfortable as they could, letting him sleep or rest when he wanted, providing him with food and water as requested, and providing medical attention for his eyes. They were both gentle and kind. There was no yelling, threatening or promises. There was nothing wrong with the friendly "we are here to help" approach they took to get Mr. Smith to talk.
- [69] I am satisfied that this approach was appropriate and did not contravene any aspect of the voluntariness issue.
- [70] They also suggested to Mr. Smith that all they wanted was the truth about what happened. Again, there was nothing improper about this approach.
- [71] I conclude that in this case, the ultimate question is whether, putting the entire circumstances into context, Mr. Smith had an operating mind during the Interactions, and whether the Officers' conduct served in any way to unfairly take advantage of Mr. Smith's condition. In my view, fairness to Mr. Smith plays an important role: *R. v. Tessier*, 2022 SCC 35.
- [72] The burden is on the Crown to show, beyond a reasonable doubt, that the statements were voluntary at common law, including that Mr. Smith had an operating mind. It is a heavy onus. The operating mind doctrine requires the Crown to show that Mr. Smith possessed the limited cognitive ability to understand what he was saying and to comprehend that it could be used as evidence: *Tessier* at para. 8.
- [73] While there was nothing improper about the Officers attempting to elicit information from Mr. Smith to further their investigation, so far as the law permits, given the surrounding context, I find myself having a reasonable doubt that Mr. Smith had an operating mind throughout the Interactions. He attempted to take charge and continually interrupted the Officers as they attempted to warn him. His distress continued, albeit perhaps to a lesser degree, during his transport to the Vernon detachment, while he was being processed, and throughout the ensuing days.
- [74] The doubt I have about Mr. Smith having an operating mind during the Interactions arises because:
- a) The Officers all knew in advance that Mr. Smith had a history of suffering from mental health issues and his behaviour on being arrested was consistent with someone suffering from mental health issues. Mr. Smith displayed delusional behaviour from the outset of his arrest. The Officers suspected from the outset that he was hampered by some sort of mental deficiency, and they knew they needed to take special care to ensure he understood the warnings he was given. There was a positive indication that he did not understand his right

to counsel. The Crown cannot rely on the Officers' mechanical recitation of rights to Mr. Smith: *R. v. S.L.H.*, 2004 BCSC 410 at para. 14, citing *R. v. Evans*, [1991] 1 S.C.R. 869 at 891.

- b) The Officers agreed that when dealing with a detainee who may be suffering from mental health issues, it is important to take steps to ensure that he/she fully understands their Charter rights, yet the evidence suggests he did not.
 - c) When asked at the scene by Constable Jackson if he wanted to speak to a lawyer, Mr. Smith responded, "Obviously," indicating his desire to speak to a lawyer. Nevertheless, Corporal Jackson did not discourage Mr. Smith from talking and continued to record their Interactions, Corporal Jackson agreeing in hindsight it would have been better for him to have told Mr. Smith to stop talking.
 - d) The Officers knew that once Mr. Smith stated his desire to speak to counsel, they were to refrain from questioning him on anything related to the offence/investigation until he had an opportunity to speak to counsel.
 - e) From the time of Mr. Smith's arrest until he had been transported to the Vernon cells, Mr. Smith complained that the zap straps and handcuffs were hurting his hands and wanted them loosened. There was no reason why both zap straps and handcuffs were required. Either would have sufficed.
 - f) Mr. Smith had been complaining of eye pain from the time of his arrest through to and including two days later when he was transported to KRCC. There was no doubt in the minds of the Officers that he had been bear sprayed in the face and that his eyes were painful. According to the police booking logs, Mr. Smith was not provided with anything for his pain until September 22, 2021, at 12:23 p.m., when he was given two ibuprofens. Given the level of pain he was expressing, I doubt whether Mr. Smith was fully able to comprehend everything that was going on.
- [75] In sum, the evidence fails to establish beyond a reasonable doubt that the statements of Mr. Smith were voluntary. Simply put, the Officers knew that Mr. Smith was likely in a state of diminished capacity through a combination of being bear sprayed and his previous mental health issues, resulting in him having a diminished ability to think clearly. Together these likely were a significant contributing factor in his ramblings to the Officers.
- [76] Accordingly, I find that the Interactions were not voluntary and may not be used in evidence.

Issue Number 2: Were Mr. Smith's s. 10(a) and (b) Charter rights violated?

- [77] As a result of my ruling on the voluntariness issue, it is unnecessary to rule on whether Mr. Smith's s. 10 Charter rights were violated.

Summary

[78] For the above-noted reasons, I conclude that the Crown has failed to prove beyond a reasonable doubt that the Interactions were voluntary. Accordingly, the Crown may not use them for the purpose of cross-examination of Mr. Smith.

[79] That concludes my reasons on Voir Dire Number 1.

"G.P. Weatherill J."

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