

CANADA / JUDGMENT

R. v. Tschritter

2023 BCSC 298

COURT

Supreme Court of British Columbia

DECIDED

1 March 2023

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2023 BCSC 298 R. v. Tschritter

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Tschritter,

2023 BCSC 298

Date: 20230301

Docket: 109985

Registry: Kamloops

Rex

v.

Ashleigh Danielle Tschritter

Before: The Honourable Mr. Justice Groves

Reasons for Judgment re Mistrial Application

Counsel for the Crown:

T.A. Livingston

D. Heighes

Counsel for the Accused:

B. Movassaghi

B. Kendregan

Place and Date of Hearing:

Kamloops, B.C.

November 21, 2022

Place and Date of Judgment:

Kamloops, B.C.

March 1, 2023

- [1] The accused, Ashleigh Danielle Tschritter, faced a one-count indictment in which it is alleged she committed second degree murder of her then husband, David Simpson.
- [2] The trial began on November 14, 2022, at which time the Crown gave their opening statement. A mistrial application related to the contents of that opening statement was argued on November 21, 2022 and, at that time, I dismissed the application for a mistrial, with reasons to follow. These are those reasons.
- [3] On November 14, 2022, Danika Heighes, co-counsel for the Crown on this matter, provided the Crown's opening statement to the jury. The opening statement began at 2:42 p.m. and finished at 2:52 p.m., slightly over ten minutes in total. In that opening statement, Ms. Heighes explained briefly the purpose of an opening statement and stated the following:

Before I provide you a brief outline of the Crown's case, please remember that what I say to you is not evidence. The only evidence for you to consider in determining whether the Crown has proven its case is that which you hear from the witnesses or see in the exhibits. With that caution in mind, I'll tell you how I anticipate that the evidence in this case will unfold.

- [4] Later on, Ms. Heighes referenced that the Crown would be calling as a witness, Kerry-Jo Klingbeil. Ms. Klingbeil's involvement in the factual matrix to be laid out by the Crown in their case was that after the victim Mr. Simpson was shot with a shotgun, Ms. Tschritter, the accused, attended at Ms. Klingbeil's home with her children. In regards to that evidence, Ms. Heighes noted this:

The Crown expects Ms. Klingbeil will tell you how Ms. Tschritter rummaged through the truck at various times, passing her a bottle of Jägermeister and other items to hide. Ms. Tschritter also passed Ms. Klingbeil two guns and told her to hide them.

- [5] Of note, it is not in dispute that the guns which Ms. Tschritter allegedly wanted to be hidden did not include the shotgun which was the actual weapon that caused Mr. Simpson's demise.
- [6] Additionally, related to these guns, Ms. Heighes in commenting on the evidence of a police constable stated as follows: "The Crown expects Constable Myer will tell you about going to Ms. Klingbeil's residence and seizing the two guns "

- [7] Prior to calling Ms. Klingbeil, defence counsel objected to Ms. Klingbeil advancing any evidence about the guns she allegedly received that night from Ms. Tschritter. The argues it was bad character evidence, and was extremely prejudicial to their client. Unfortunately, there was no advance notice of this concern and as such it was not dealt with in a voir dire prior to trial or prior to Crown's opening to the jury.
- [8] After an argument about its admissibility, I ruled that questions related to Ms. Tschritter's alleged request to Ms. Klingbeil to hide unrelated firearms from the police was bad character evidence, evidence which I determined was prima facie admissible as part of the narrative, but its prejudicial effect outweighed its probative value.
- [9] As a result of ruling that the evidence about these two non-related firearms was in admissible, the defence applied for a mistrial.
- [10] Largely for the reasons advanced by the Crown, and as noted earlier I dismissed the mistrial application.
- [11] A mistrial is a discretionary remedy. In exercising its discretion, as directed in *R. v. Cawthorne*, 2016 SCC 32, a court is to weigh a consideration of whether an error has caused the fairness of the trial to be compromised, or whether there is another remedy which could cure the error.
- [12] Additionally, in *R. v. Lawson*, [1991] B.C.J. No. 297 (C.A.), our Court of Appeal has noted that a mistrial should only be used in the clearest of cases. Only when there is "a fatal wounding of the trial process", which cannot be cured by other remedies, should the court entertain a mistrial.
- [13] In *R. v. A.G.*, 2015 ONCA 159, the Ontario Court of Appeal talks about a trial judge being in the best position to assess the circumstances to determine if a mistrial is warranted, with the direction that mistrials should only be declared so as to avoid a miscarriage of justice.
- [14] Here, the Crown indicated briefly in their opening that the evidence about these two guns would be attested to by either Ms. Klingbeil or by Constable Myer, who seized the guns. But also of note, the Crown made clear to the jury in their opening that their opening was not evidence, and the only evidence that they could consider was the evidence they heard in court, or could glean from the exhibits. A reminder that the Crown's opening was not evidence was clear.
- [15] Additionally, in the factual matrix of the case, I determined it would be clear to the jury that the deceased, Mr. Simpson, was killed with a shotgun and that that shotgun was found in the vicinity of his body, shortly after his death.
- [16] In all those circumstances, I determined that a strict instruction to the jury about what use they can make of statements in Crown's opening would remedy any problem or potential miscarriage of justice that might befall this case if members of the jury actually consider, or remember for that matter, the very limited reference in the Crown's opening to this type of

evidence. In that mid-trial direction to the jury I would remind them that they are the triers of fact and I am the judge of the law. Additionally, and periodically, I may need to give them instructions of a legal nature, which they must follow. I would then remind them that they are to decide the facts of this case only based on the evidence they hear in court, that the Crown's opening is not evidence, and what the Crown says in their opening about what they anticipated the evidence to be might not in fact be the evidence.

- [17] I will instruct the jury that they must only consider as evidence the words that come from witnesses, exhibits, or any admissions that may be filed.
- [18] Finally, I will instruct them that if anything was said during the opening statement of the Crown that is not borne out by the evidence they hear in court, or what they can take from the exhibits filed, or through admissions of counsel, they are to totally disregard what was said.
- [19] I indicated I would repeat that direction on the law, and the limits to what the jury can consider, in the charge to the jury.
- [20] In my view, that strict warning, to be given mid-trial and repeated in the jury charge, will sufficiently deal with any concerns about possible prejudice to the accused.
- [21] As such, the application for a mis-trial was dismissed.

"J.R. Groves J."

GROVES J.

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