

CANADA / JUDGMENT

R. v. Watroba

2025 BCSC 2192

COURT

Supreme Court of British Columbia

DECIDED

10 October 2025

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2025 BCSC 2192 R. v. Watroba

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Watroba,

2025 BCSC 2192

Date: 20251010

Docket: 93995-2; 93995-3

Registry: Kelowna

Rex

v.

Darren Chester Watroba

Corrected Judgment: The text of the judgment was corrected at paragraph 173(b) on March 12, 2026.

Before: The Honourable Justice Stephens

Oral Reasons for Judgment

Counsel for the Crown:

J.M. Le Dressay

Counsel for the Accused:

M.S. Lowe, appearing as agent for N. Acker

Place and Date of Trial:

Kelowna, B.C.

March 3-5, and 7, 2025;

September 29, 2025; and

October 1-3, 2025

Place and Date of Judgment:

Kelowna, B.C.

October 10, 2025

Overview

[1] THE COURT: The accused, Darren Chester Watroba, is charged with three counts in an indictment:

Count 1

Darren Chester WATROBA, on or about the 19th day of December, 2021, at or near Kelowna, in the Province of British Columbia, did carry or have in his possession, the machete, for a purpose dangerous to the public peace or for the purpose of committing an offence, contrary to Section 88(1) of the Criminal Code.

Count 2

Darren Chester WATROBA, on or about the 19th day of December, 2021, at or near the City of Kelowna, in the Province of British Columbia, did unlawfully possess a controlled substance, to wit: Fentanyl / a benzodiazepine namely Flualprazolam, for the purpose of trafficking, contrary to Section 5(2) of the Controlled Drugs and Substances Act.

Count 3

Darren Chester WATROBA, on or about the 19th day of December, 2021, at or near the City of Kelowna, in the Province of British Columbia, did unlawfully possess a controlled substance, to wit: Fentanyl, for the purpose of trafficking, contrary to Section 5(2) of the Controlled Drugs and Substances Act.

[2] The charges relate to events on December 19, 2021, at around noon outside the Orchard Park Mall in Kelowna.

Background

[3] On Sunday, December 19, 2021, at approximately 12 noon, the accused was present at the entrance of the Orchard Park Mall in Kelowna, British Columbia.

[4] He was approached, detained, and then arrested by police officers, Constable Erbes and Constable Cumming.

Admitted facts

- [5] The accused made certain admissions of fact as set out in Exhibit 2 at trial, including:
- [6] The accused admitted that he had certain items in his possession as shown in photographs marked as Exhibit 1 at trial, including, among other admissions:
- in a sheath attached to his back, a machete;
 - in his pockets, a bandana with a large steel nut;
 - in a fanny pack worn by the accused, two bags:
- (a) one of which contained fentanyl which weighed 22.3 grams, and
 - (b) the second one which contained fentanyl and a benzodiazepine, namely Flualprazolam, which weighed 2.4 grams.
- [7] I note in passing that the 22.3-gram bag containing fentanyl is the subject of Count 3 in the indictment, and the 2.4-gram bag containing fentanyl and a benzodiazepine is the subject of Count 2 in the indictment.
- [8] The accused further admitted that in a backpack worn by the accused, he possessed other items including, among other things:
- a) a folding knife and a box cutter;
 - b) sheets of tin foil;
 - c) drug pipes;
 - d) hypodermic needles;
 - e) a container approximately one-half full of caffeine;
 - f) unused plastic baggies; and
 - g) a working scale.
- [9] I note here, while not included in the admitted facts, the accused in his evidence referred to the large knife shown in Photos 1, 2, and 7, not as a machete but as a large bowie knife.
- [10] I further note here, while not also included in the admitted facts, that the container of "caffeine" referred to in the admitted facts, as depicted in Photo 19, is a tub labelled "Caffeine Anhydrous".

The Crown's Witnesses

- [11] Two police officers, Constables Erbes and Cumming, testified during voir dire about the search and seizure of evidence in this case. Their evidence, by consent, formed part of this trial without need for repetition, although with the limitation that only that part of their evidence from voir dire which was admissible at trial formed part of the trial and specifically excluding any evidence which is inadmissible at trial such as, for example, character evidence concerning the accused or hearsay.
- [12] In this regard, I have disregarded and placed no weight on an asserted statement of the accused which was read to him in cross-examination by Crown counsel and his answer to that question.

Constable Erbes

- [13] Constable Erbes gave evidence about the detention, arrest, and search and seizure of evidence from Mr. Watroba.
- [14] I make no finding that Constable Erbes was being dishonest in his testimony, but I do find there were inconsistencies in his evidence about the sequence of events of searches and seizure as it relates to the drugs at issue in this case, and that detracts from the reliability of his evidence.

Constable Cumming

- [15] Constable Cumming also gave evidence about the detention, arrest, and search and seizure of evidence from Mr. Watroba outside the mall.
- [16] I found Constable Cumming to be generally a credible and reliable witness in his evidence. I did not find his answers at times to be evasive, but instead generally to reflect a desire to be careful when giving evidence.

Sergeant Woodcox

- [17] Following a voir dire on his qualifications, I ruled that Sergeant Greg Woodcox was qualified to provide expert opinion evidence in this trial on the topics of:
- a) pricing and packaging of fentanyl of street-level sales;
 - b) the purchasing habits of drug users; and
 - c) the indicia of street-level distribution of fentanyl,
- in the Kelowna area.

- [18] Sergeant Woodcox assumed 24.71 grams of fentanyl and fentanyl mixed with benzodiazepine, which is the approximate total of the two bags containing fentanyl, which I will refer to as the "smaller bag" (shown in Exhibit 1, Tab 1, Photo 14), and the "bigger bag" (shown in Photo 16). He testified that this 24.7-gram amount is less than one ounce, which is 28.35 grams.
- [19] He testified that 24.71 grams is 247 individual "points" or individual doses of fentanyl, a point being 0.1 of a gram.
- [20] He testified if this is sold by the point of fentanyl, that would total \$4,940 at the very low level.
- [21] He testified that an ounce of fentanyl (28.35 grams) when purchased in bulk costs between \$2,000 and \$2,500. He testified, with reference to this purchase price, that you could double your money if you purchase an ounce of fentanyl and then sell it by the point.
- [22] He testified that fentanyl can also be purchased by the gram.
- [23] He testified if you buy fentanyl in a gram quantity, it could cost \$200 to \$300 per gram which is what (in his police capacity) he has observed paid for a gram of fentanyl. Selling 24.71 grams by the gram would yield, in his opinion, between \$4,942 and \$7,413.
- [24] Using these calculations, he opined that a person can realize substantial profit by selling fentanyl.
- [25] Referring to Photo 9 of Tab 1, Exhibit 1, he testified that caffeine anhydrous is the main buffing and diluting agent for fentanyl, that this increases the weight of fentanyl to make profit. He testified you could mix one gram of fentanyl and 10 grams of caffeine to get 11 grams of fentanyl. He testified there is no other reason to have caffeine than to mix it with fentanyl for profit, which is how people finance their addiction to drugs.
- [26] Sergeant Woodcox opined that people who use fentanyl do not want to dilute their fentanyl, and no one asks to add caffeine to their fentanyl, since it dilutes the purity of the fentanyl. He testified a user does not want caffeine, since they want the purest fentanyl they can get. He opined that the presence of caffeine is evidence of a desire to make a profit.
- [27] He opined that people buy fentanyl to fund their own habit, which he has observed in undercover operations talking to people. He testified that he has seen, for example, on cheque day, people buy more and add caffeine to say two grams to sell it to realize a profit, and that they finance their own addiction by selling drugs.
- [28] Referring to Photo 5, he testified that 90 to 95% of people use tinfoil (shown in that photo) with a lighter to create fumes and then a tube called a hooter tube to smoke fentanyl. He opined that Mr. Watroba had paraphernalia associated with use of fentanyl in his possession.

- [29] He testified regarding Photo 6, identifying a marijuana pipe and hypodermic needles, but was of the opinion that needles are rarely used to ingest fentanyl and that the needles were not for fentanyl.
- [30] He testified that needles could have been for meth, although there was no evidence at trial of a Health Canada certificate testing for meth relating to substances found in Mr. Watroba's possession, although Mr. Watroba did later testify he did regularly consume meth at the time.
- [31] Sergeant Woodcox testified that a high majority of people at the low end of trafficking are users themselves to finance their addiction, and that is common at the low end of drug trafficking to be a user.
- [32] He described the fentanyl shown in Photo 16 as "pebbled" fentanyl. He testified that this fentanyl looked like kind of raw fentanyl, which is common. He testified that typically when someone buys in a bulk quantity, a big bag, it is consistent with the bigger bag in Photo 16.
- [33] He testified that in his opinion, there are three methods to dispense fentanyl: (1) by handing a buyer a small rock; (2) by putting it in a dime bag; or (3) putting it in keno paper. He testified that fentanyl can be pieced out by hand, which he has seen in buys by police officers.
- [34] He gave opinion evidence drawing on his experience from undercover drug buy operations.
- [35] Sergeant Woodcox testified that when he debriefs people, thousands of people downtown, he always asks them 'how much do you use', and he testified that the majority of people use three to seven or three to eight times a day. That is the majority of people he deals with, not chronic users but regular people. He testified that some people use three to four times a day if they are chronic users managing their addiction, or older. So, he has come up with a mean number of three to seven times per day for regular people (not chronic people) he deals with.
- [36] He testified he has talked to hundreds of people for years.
- [37] He opined that dealers are everywhere and that fentanyl is easy to get, and so people purchase it on an as-needed basis. He testified if they have extra money or it is cheque day, maybe they will buy a gram for themselves to use for the day or the next day.
- [38] He testified there is no need to stockpile, since it is easy to purchase. He opines there is no need to stockpile, it is easy to get.
- [39] He testified it is not common for a user to have an ounce or \$2,000 to \$2,500 of fentanyl in their possession.
- [40] He testified that in all the thousands he has dealt with downtown, he has only ever seized an ounce twice from a user.

- [41] He testified that a user does not need a scale to weigh a small rock purchased for use-- that they can measure it by eye.
- [42] He opined that the only reason to have a scale is to weigh it, and this was commonly seen and almost exclusively seen in drug-trafficking investigations.
- [43] He testified a scale is used to buy a bulk quantity of drugs to make sure, if you buy 25 grams, you pay the correct amount of 25 grams, not 18 grams. Then it could be used to sell by points of a gram.
- [44] He testified there was powder on the scale found in Mr. Watroba's possession that appears to be fentanyl, although he could not say for sure. I note here that there was no evidence of testing done to determine whether the powder shown on the scale was fentanyl.
- [45] He testified the unused blue baggies found in the accused's possession (shown in Photo 10) are not small dime bags and would not be used to sell fentanyl, but could be used to mix caffeine and fentanyl. However, I found there to be a measure of uncertainty in his opinion about what the larger blue bags were for.
- [46] He testified there was powder found in plastic spoons seen in Photo 8, although Constable Erbes and Cumming did not testify to this. There was no evidence of testing of what that powder was, and the powder was not visible in the photographs. He testified the spoons could be used to mix caffeine with fentanyl.
- [47] As to the machete shown in Photos 1 and 5, he testified it is common in investigations for drug trafficking, where a person has an ounce of fentanyl on them, for a person to have a weapon for protection in case of being robbed, to show they mean business. However, he testified these knives are also common with users, given the violence downtown.
- [48] He testified there were some indicia of possession for the purpose of trafficking missing: no cash, and there was no score sheets. He testified that score sheets are more common for mid-level trafficking.
- [49] Dime bags were also missing and cellphones were missing. But living downtown, he testified the majority of low-end dealers on street corners do not have cellphones, it is not necessary.
- [50] He opined that the amount of doses available in this case, the presence of caffeine, the scale, and the presence of some baggies were wholly consistent with someone selling and not using. He acknowledged he did not have all or the perfect indicia of trafficking in this case, but in his opinion it is consistent with someone selling and not using, and being fully consistent with possession for the purposes of trafficking.

- [51] Sergeant Woodcox relied in particular on the caffeine and the presence of a scale, but he testified that the 247 individual doses of fentanyl was probably the most important thing for his opinion (the amount of fentanyl) since, in his opinion, people on the street "rarely" have that quantity.
- [52] In cross-examination, he testified that the caffeine is extremely important to his conclusion, since it is only seen by him in possession for the purpose of trafficking investigations, that the only purpose of caffeine is a buffing agent for fentanyl to maximize profit, and that people using this drug do not have caffeine with their fentanyl. That people do not want less potent fentanyl, and this is one of the main factors for his opinion this was possession for the purposes of trafficking, that there was no other purpose for this caffeine.
- [53] In direct examination, he opined that the 247 doses is an overwhelming amount of fentanyl, individual doses for one person to have on the street in concert with scales and caffeine, and the only purpose of that is what he explained. He testified it was probably the amount of fentanyl which is capable of being produced was the most important thing, combined with the caffeine and the scale.
- [54] In cross-examination, he testified he was confident in his opinion without the presence of cash, score sheets, or a cellphone. He testified that a reasonable conclusion for a bulk quantity of drugs as to the lack of cash could be that a person could have just come into possession of the drugs and not sold them yet.
- [55] In cross-examination, Sergeant Woodcox testified there was caffeine in the samples of bulk quantities found in the accused's possession, which is consistent with the Health Canada certificates of Exhibit 5 and 6, and it could have been put in before Mr. Watroba purchased it or afterwards.
- [56] He testified in cross-examination that people only use caffeine to add weight to fentanyl, and a fentanyl user certainly does not want to dilute their own batch, since they want the fentanyl as pure as possible, especially chronic users. He testified that the users he deals with all the time do not have caffeine, it is the last thing they want. He reiterated his opinion that the only purpose for caffeine is to add weight to fentanyl to sell for profit, and that caffeine is not seen in possession investigations at all, especially a one-kilo bottle, which he opined is alot.
- [57] He acknowledged the bigger bag of 22 grams of fentanyl did not appear to be a pristine brand-new bag but, in his opinion, nothing could be inferred from that. He testified that the lack of cash found indicated that the person had not recently engaged in sales and, if it was for the purpose of trafficking, it was street-level trafficking.
- [58] He testified he would not necessarily expect to find score sheets in street-level trafficking at the very low end like this one, as opposed to mid-level, from his experience making busts on people selling drugs all day and from surveillance.

- [59] On cross-examination, Sergeant Woodcox testified that if you were unhoused and sit and deal drugs all day, you do not need a cellphone, and the absence of a cellphone was not determinative of a possession for the purpose of trafficking opinion or not.
- [60] He testified you do not need a cellphone to be a drug trafficker at the low end. He testified he hears every day that people's phones are stolen on the street. He further testified that they watch people on surveillance all day long making deals for hours on end, and they do not touch a phone.
- [61] In cross-examination, he testified that the only reason someone has caffeine in a one-kilogram bottle in concert with locating 22 grams of fentanyl is to use it as a buffing agent to increase the weight, that people do not buy a one-kilogram bottle of caffeine anhydrous to use it, they do not dilute it for their own personal use, this just does not happen. He testified that the only theory he can see with the one-kilogram bottle is to add to fentanyl bought in bulk to increase the weight substantially to realize a profit margin.
- [62] He testified he is absolutely certain and very confident that the person selling this fentanyl was also a fentanyl user, based on the items he saw, including the pipes in the photo, which is not uncommon.
- [63] He testified he talks to users who sell fentanyl and what they all tell him, and in debrief they tell him, from conversations that he routinely has, that they take good pieces for themselves, and he is of the opinion they sell diluted fentanyl to other people.
- [64] When asked on cross-examination whether a person who is managing their addiction may stretch their own drug supply, he responded he does not see that happening. He testified a chronic user will want good quality quantity fentanyl and the last thing they want, with a bulk quantity of fentanyl, is to dilute their own supply with caffeine, that they do not use caffeine to wean themselves off the drug, but simply to increase the weight in order to sell it to continue their own use of the drug.
- [65] He acknowledged in cross-examination, if you go somewhere else, it may be more difficult to make contacts and it may take time to build contacts to purchase fentanyl in a new city.
- [66] He acknowledged there is no evidence of possession of a large amount of dime bags or lotto paper to sell fentanyl. However, he testified in the larger bag, it would be rather easy to take a small pebble out to sell as a point, that is to pull a point out of it, and he saw 50 to 75 or 50 to 60 small pieces, that he sees that done.
- [67] When put to him in cross-examination it is possible to purchase a point (0.1 of a gram) for \$10 not \$20, he opined one can probably buy for less than \$20, but that out of 700 times he has directed a purchase of fentanyl, he paid \$20 for it, which he regarded to be consistency.
- [68] He testified that the smaller two-gram bag could be ready for sale potentially, but the bulk quantity of 22 grams was not ready for individual sale and was not a personal-use amount.

- [69] In cross-examination, he testified that a drug user would not buy 22 grams. A drug trafficker would buy this bulk quantity, but a drug user would not buy 220 individual doses, that they do not need that. He testified an ounce, or 28.35 grams, is a quantity commonly used to sell to drug traffickers.
- [70] He testified the smaller bag of two grams would be in a weight to be sold, or for a personal stash.

Limits of Expert Evidence

- [71] Especially towards the end of his direct testimony, Sergeant Woodcox expressed the opinion whether the particular substance in this case were possessed by the accused Mr. Watroba for the purposes of trafficking.
- [72] Defence counsel submitted in closing submissions that Sergeant Woodcox cannot speak specifically to what happened in this case.
- [73] In assessing this expert evidence, I am mindful of the principles of and the limitations to expert evidence in possession for the purposes of trafficking cases. In *R. v. Jenkins*, 2024 ONCA 533, the court stated:
- [30] To be clear, I am not suggesting that expert opinion evidence could not be led on the issue of indicia of trafficking if a trial judge was satisfied that it met the White Burgess admissibility criteria: *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23, [2015] 2 S.C.R. 182. This court and the Supreme Court have recognized that expert opinion evidence may be tendered on issues related to drug trafficking, such as "chains of distribution, distribution routes, means of transportation, methods of concealment, packaging, value, cost and profit margins", where the evidence is based on specialized knowledge outside the knowledge of a lay trier of fact: *R. v. Sekhon*, 2014 SCC 15, [2014] 1 S.C.R. 272, at para. 18; *Nguyen*, at para. 52.
- [31] I would also emphasize that where opinion evidence is tendered on issues related to drug trafficking, it must be limited to providing the jury with evidence in general terms about the area of expertise (for example, drug pricing; trafficking quantities; methods of drug trafficking), which they may consider and, if they accept it, apply as part of their fact finding to decide what inferences or conclusions to draw from other evidence (for example, surveillance evidence). Expert [evidence] may not extend to conclusions or inferences to be drawn about the accused's conduct. The inference-drawing process is part of the jury's fact-finding role, and not the province of the expert witness. Thus, an expert providing opinion evidence about indicia of drug trafficking may not opine that the particular acts of the accused were drug trafficking or were consistent with drug trafficking. Those questions are for the trier of fact: *R. v. Abbey* (2009), 2009 ONCA 624 (CanLII), 97 O.R. (3d) 330 (C.A.), at paras. 30-31, 98-102; *Gill*, at para. 44; *Sekhon*, at paras. 46 and 50; *Nguyen*, at paras. 50-51; David M. Paciocco, Palma Paciocco & Lee Stuesser, *The Law of Evidence*, 8th ed. (Toronto: Irwin Law, 2020), at p. 234.

[32] However, DC Ford's opinion about indicia of drug trafficking was properly limited to providing a list of indicia of drug trafficking, rather than a conclusory opinion that the appellant's conduct as observed during the surveillance was, or was consistent with, drug trafficking.

[Italics in the original; underline emphasis added]

See also R. v. Chiarelli, 2025 ONCA 428 at para. 21 ("where expert evidence is admitted in a drug trafficking case, the opinion must be limited to general terms and not intrude on the jury's role as fact finder"). See also R. v. Cashman, 2024 BCCA 317 at paras. 59 to 80, and Robert J Frater, Bruce A Macfarlane & Croft Michaelson, Drug Offences in Canada, 4th ed (Toronto: Thomson Reuters, 2015) (loose-leaf updated 2025, release 2) at 18.35 at 18-54, and 18.35.50 at 18-55.

[74] In R. v. Sekhon, 2014 SCC 15, the court stated on the topic of expert evidence and drug cases at para. 48 (see also para. 45 to 47):

[48] Judges are accustomed to disabusing their minds of inadmissible evidence. It goes without saying that where the expert evidence strays beyond its proper scope, it is imperative that the trial judge not assign any weight to the inadmissible parts.

[75] Without expressing any criticism of Sergeant Woodcox, who I found testified fairly and forthrightly and in a professional manner at this trial, I shall disregard any opinions which he expressed in his evidence as to whether the accused's conduct in this case at bar is consistent with trafficking (as opposed to evidence in general terms about the areas he was qualified in to give opinion evidence).

The Defence

Darren Watroba

[76] Mr. Watroba testified at trial.

[77] He testified he is 36 years old, being born in 1989.

[78] He initially testified that his mother died in January 2021.

[79] He testified he was staying at a shelter in Kelowna on December 19, 2021, and he was not employed at the time.

[80] He testified that at that time, he was struggling with addiction to speed and fentanyl and benzos. He testified he was using speed since high school when he was about 15 years old, and that in December [2021] was a casual user, using about one gram per day which he thought cost about \$20 a day at the time.

[81] He testified on December [2021], he was getting disability support of about \$1,100 per month in PWD, meaning persons with disabilities, and he had saved about \$3,400 in his bank account.

- [82] He testified in December 2021, he was addicted to fentanyl and had been using since he had been in high school, and when asked about the state of his addiction in December 2021, he said it had gotten pretty bad from his mother passing away.
- [83] He testified that in December 2021, he would use probably an ounce sometimes of fentanyl in a day. He testified that would cost about \$1,400 or, if he got better stuff raw, it would be a lot cheaper, like for a couple hundred dollars.
- [84] He testified on December 19, 2021, he was staying at the Richter Shelter, and he left to go for a walk, and that is what got him to go to the mall, because his mom ended up calling him and said she would pick him up to go to Calgary for Christmas. He clarified his earlier answer about when his mother died, he testified he was arrested before his mother passed away.
- [85] He testified he had talked to his mother that night and that morning and was literally standing in front of the mall, waiting for her to pick him up.
- [86] He testified the plan was for him to go to Calgary and wean himself off dope and get clean.
- [87] He testified the object described as a machete was not a machete but a large bowie knife. He testified he had just bought it at a store called House of Knives in the mall as a present to himself. He referred to this knife as "brand new" or "brand spanking new" that day.
- [88] He testified that his intent with that knife was that whenever he goes camping, it is a great tool to have if he came across a bear, and it made him feel safe up around the rail trail, since he had heard stories of people passing away up there. He testified he put his name on the sheath to register it out and sign it in at the shelter. He testified in cross-examination, he bought this bowie knife on that day and he bought the sheath with it.
- [89] He testified the bandana and nut also found in his possession was for defending against racoons. He also identified a Leatherman utility knife, a buck knife, and an X-Acto knife from the photos in evidence in his possession. He testified he used the X-Acto knife and another yellow X-Acto knife, for use on copper.
- [90] He testified he was selling the caffeine at the time and it was worth about \$100 an ounce, and he would weigh it and place it into the blue bag shown in Photo 10. He testified the scale shown in Photo 11 was to assist him selling the caffeine.
- [91] He testified that the small bag shown in Photo 14 with two grams of fentanyl in it was actually found empty by him on the ground, and that the fentanyl in the smaller bag probably came from the bigger bag of fentanyl.
- [92] He testified, with regard to the fentanyl in Photo 14 in the small bag, that his intention was to wean it down, that is to consume it, to get off drugs when he was at his mother's house by adding caffeine to it, since he would prefer to smoke weaker dope.

- [93] He testified he used the smaller bag to dispense fentanyl from the bigger bag of fentanyl in Photo 16, since he did not want to pull out a big bag, since people would flow over to you. So he testified the smaller bag at Photo 14 was used to refill with the bigger bag.
- [94] He testified again that for the Photo 16 bigger bag, his intent was to go to Calgary to wean himself off the drugs. He testified his mother told him that was the last time he would get to buy drugs.
- [95] He testified he did not have any intent to traffic these drugs, although he did intend to sell the caffeine on its own.
- [96] In cross-examination, he testified he spoke with his mother about arrangements to go to Calgary a few days prior. He later on cross-examination testified she told him she would be there in a couple of hours.
- [97] He testified in cross-examination that the sheath was brand new, but the masking tape with his name came off a previous knife he had. He testified he bought a lanyard for the bowie knife at the dollar store and used tape to attach it. He did not agree with the suggestion that the sheath of the bowie knife looked worn.
- [98] He testified in cross-examination he sold caffeine to people at the shelter, to people who want to wean their drugs down, and that lots of people mix caffeine with their drugs to dilute it, so it lasts longer.
- [99] In cross-examination, he testified he sees racoons around the Rail Trail, but when it was suggested to him that the only reason he goes to the Rail Trail is to sell homeless people fentanyl, he then answered that he never goes to the Rail Trail, which was an inconsistency in his evidence.
- [100] He testified the makeshift mace he had on him was to protect himself when outside.
- [101] He testified he just bought the fentanyl on him that morning for about \$600 or \$700.
- [102] In cross-examination, he had testified that his mother was not alive in December 2021, but his brother was. That evidence that his mother was not alive in December 2021 is contrary to his evidence that his mother had called him to pick him up on December 19, 2021, to take him to Calgary.
- [103] He testified in cross-examination that meth costs at least \$20 a day.
- [104] He testified in regard to Sergeant Woodcox's evidence, that consuming five points a day is a "baby habit". He maintained he can consume 280 points in a day of fentanyl if he wanted to, though later testified he could consume everything from a quarter of an ounce to about an ounce.
- [105] He testified that caffeine is a hot commodity.

Issues

[106] The issues I must consider in this trial are:

1 Count 1, has the Crown proved beyond a reasonable doubt that the accused did carry or have in his possession the machete for a purpose dangerous to the public peace, for the purpose of committing an offence contrary to s. 88(1) of the Criminal Code, R.S.C. 1985, c. C-46?

2 On Count 2, has the Crown proved beyond a reasonable doubt that the accused lawfully possessed a controlled substance, to wit: fentanyl, a benzodiazepine, namely Flualprazolam, for the purpose of trafficking contrary to s. 5(2) of the Controlled Drugs and Substances Act, S.C. 1996, c. 19 [CDSA]?

2(a) If not, has the Crown proved beyond a reasonable doubt Mr. Watroba is guilty of the included offence of simple possession of that controlled substance, contrary to s. 4(1) of the CDSA?

3 On Count 3, has the Crown proved beyond a reasonable doubt the accused unlawfully possessed a controlled substance, to wit: fentanyl, for the purposes of trafficking contrary to s. 5(2) of the CDSA?

3(a) If not, has the Crown proved beyond a reasonable doubt that Mr. Watroba is guilty of the included offence of simple possession of that controlled substance, contrary to s. 4(1) of the CDSA?

Fundamental Principles

Presumption of innocence and proof beyond a reasonable doubt

[107] A basic premise which is fundamental to all criminal trials is the presumption of innocence: *R. v. Lifchus*, [1997] 3 S.C.R. 320 at para. 27. To be presumed innocent until proven guilty by the evidence presented to the court is a fundamental right of a person accused of criminal conduct.

[108] Interconnected with the presumption of innocence is the standard of proof which is required by the Crown in order to displace that presumption: *Lifchus* at para. 27. The Crown must prove each element of the alleged criminal offence to a point beyond a reasonable doubt. The burden never shifts from the Crown to prove every element of the offence beyond a reasonable doubt: *R. v. W.(D.)*, [1991] 1 S.C.R. 742 at 758; *R. v. J.H.S.*, 2008 SCC 30 at para. 13.

[109] Beyond a reasonable doubt falls much closer to absolute certainty than to proof on a balance of probabilities: *R. v. Starr*, 2000 SCC 40 at para. 242. However, reasonable doubt must still be based on reason and common sense, which must be logically based upon the evidence or lack of evidence: *Lifchus* at para. 30.

[110] The majority in *Lifchus* provided the following instruction on reasonable doubt at para. 36:

36 Perhaps a brief summary of what the definition should and should not contain may be helpful. It should be explained that:

- the standard of proof beyond a reasonable doubt is inextricably intertwined with that principle fundamental to all criminal trials, the presumption of innocence;
- the burden of proof rests on the prosecution throughout the trial and never shifts to the accused;
- a reasonable doubt is not a doubt based upon sympathy or prejudice;
- rather, it is based upon reason and common sense;
- it is logically connected to the evidence or absence of evidence;
- it does not involve proof to an absolute certainty; it is not proof beyond any doubt nor is it an imaginary or frivolous doubt; and
- more is required than proof that the accused is probably guilty -- a jury which concludes only that the accused is probably guilty must acquit.

[Emphasis in original]

39 A reasonable doubt is not an imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence.

Even if you believe the accused is probably guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the accused and acquit because the Crown has failed to satisfy you of the guilt of the accused beyond a reasonable doubt.

On the other hand you must remember that it is virtually impossible to prove anything to an absolute certainty and the Crown is not required to do so. Such a standard of proof is impossibly high.

In short if, based upon the evidence before the court, you are sure that the accused committed the offence you should convict since this demonstrates that you are satisfied of his guilt beyond a reasonable doubt.

[111] I have instructed myself accordingly.

W.(D.) principles

[112] The accused, Mr. Watroba, testified at trial.

[113] In W.(D.), the Supreme Court of Canada established the following framework for applying the concept of reasonable doubt in cases involving conflicting evidence from the accused and witnesses for the Crown:

- a) if the evidence of the accused is believed, they must be acquitted;

- b) if the evidence of the accused raises a reasonable doubt, even if some or all of it is not believed, they must be acquitted;
- c) if the evidence of the accused does not raise a reasonable doubt, it must be determined whether the guilt of the accused has been established beyond a reasonable doubt by the evidence that is accepted.

[114] A fourth consideration has also been articulated: If, after careful consideration, I am unable to decide who to believe, I must acquit: J.H.S. at para. 12; R. v. C.W.H., 68 C.C.C. (3d) 146 at 155 (BC CA).

[115] The W.(D.) framework is intended to ensure that verdicts are not based on a contest between the evidence of the accused and the evidence of the Crown, but instead that the trier of fact considers whether there is reasonable doubt as to an accused's guilt based on consideration of the whole of the evidence. There is nothing sacrosanct about the formula set out in W.(D.): J.H.S. at para. 13, and R. v. Boucher, 2005 SCC 72 at para. 29. Whether the three-step framework must be strictly followed depends on the context of the case. What matters is the substance of the instruction from W.(D.) and that the focus remains on the principle of reasonable doubt as a central consideration: R. v. Tyers, 2015 BCCA 507 at para. 15.

[116] In R. v. Ryon, 2019 ABCA 36 at paras. 35 to 39, the Alberta Court of Appeal provided further guidance on the application of W.(D.). In particular, in applying the second prong of this framework, I must be mindful there is a middle ground whereby the trier of fact is unsure whether the evidence is true or false.

[117] The guidance provided in Ryon as to the application of the W.(D.) framework has been followed in this court: see e.g., R. v. E.A.G., 2020 BCSC 1691 at paras. 189 to 191, and R. v. Gerrard, 2020 BCSC 1833 at para. 113 to 116.

[118] In applying W.(D.), I am not required to examine the evidence in any particular order, but I must have regard to the basic principles underlying the W.(D.) instruction: R. v. Turmel, 2004 BCCA 555 at para. 14, citing R. v. Minuskin, 68 O.R. (3d) 577.

Credibility and reasonable doubt

[119] Evidence must be both credible and reliable to support a finding of guilt beyond a reasonable doubt. Credibility and reliability are different. Credibility is concerned with the veracity of a witness's evidence, while reliability is concerned with its accuracy. A credible witness may give unreliable evidence if there is, despite the witness's honesty, reason to doubt the accuracy of the recall of relevant events. Accuracy engages consideration of the witness's ability to accurately observe, recall, and recount: R. v. Plehanov, 2019 BCCA 462 at para. 51; R. v. Khan, 2015 BCCA 320 at para. 44, leave to appeal to the SCC refused.

[120] The factors to be considered in assessing credibility are summarized by the Court of Appeal in *R. v. J.T.*, 2019 BCCA 180, leave to appeal to the SCC refused, and include (at para. 31):

... a witness's demeanor in the witness box, although it is recognized that it would be dangerous to rely wholly on demeanor to convict; internal inconsistencies in a witness's testimony at trial and/or external inconsistencies in a witness's testimony with prior testimony or out-of-court statements; any explanation by the witness for the inconsistencies; any consistent evidence or corroborating evidence to support the witness's evidence, although corroboration is not a requirement; and how a witness withstands cross-examination.

[121] I must also be cautious not to place too much reliance on the witness's demeanour. The manner in which a witness testifies is not a reliable measure of their credibility, as there are many factors that can affect a witness's demeanour that are unrelated to whether they are truthfully and accurately recounting the events: *R. v. A.F.*, 2021 BCSC 2662 at para. 23.

[122] In *R. v. Kruk*, 2024 SCC 7, the use of common sense and human experience when assessing reliability was discussed at paras. 72 and 73:

[72] Reasoning about how people generally tend to behave, and how things tend to happen, is not only permissible, it is often a necessary component of a complete testimonial assessment.

[73] common-sense assumptions necessarily underlie all credibility and reliability assessments. Credibility can only be assessed against a general understanding of "the way things can and do happen"; it is by applying common sense and generalizing based on their accumulated knowledge about human behaviour that trial judges assess whether a narrative is plausible or "inherently improbable" Common sense underpins well-established principles guiding credibility assessment -- including the now-universal idea that witnesses who are inconsistent are less likely to be telling the truth -- and assists in assessing the scope and impact of particular inconsistencies. Reliability also requires reference to common-sense assumptions about how witnesses perceive, remember, and relay information, invoking generalizations about how individuals tend to present information that they are remembering accurately and completely, as opposed to matters about which they are unsure or mistaken. [citations omitted]

[Emphasis in original]

Testimony of Sergeant Woodcox for the Crown

[123] I found Sergeant Woodcox to be a forthright and fair expert witness. I found he testified with professionalism, and I did not detect advocacy in his testimony.

Credibility and reliability of Mr. Watroba's evidence

- [124] I accept Mr. Watroba's evidence that he was, in December 2021, a regular fentanyl drug user, and that he was unhoused at the time and living in a shelter.
- [125] However, I have difficulty with the reliability of some of Mr. Watroba's other evidence. He had difficulty recalling his mother's date of death, which was relevant to his version of events on December 19, 2021, and contradicted himself in other ways during his testimony: for example, by testifying he felt safer around the Rail Trail with the bowie knife, but then later testifying he never went to the Rail Trail.
- [126] Further, he testified that he bought the bowie knife and sheath that day at the mall and it was brand new. And while the knife and sheath look like they could be new, I find it more likely than not he had not purchased the knife and sheath on December 19, 2021, given that the attachments to the sheath (including the piece with his name taped on it) appear used, and the electrical tape wound around the sheath shown in Exhibit 1, Tab 1, Photo 7.
- [127] There were contradictions in his evidence that detract from the reliability of his evidence.
- [128] Nevertheless, I do accept that the events occurred almost four years ago, and that the passage of time may have impacted some aspects of his memory of the events of that day to some extent.
- [129] A further inconsistency with his evidence includes that he testified he used the small bag to put fentanyl from the bigger bag into it, but there were different substances in the two bags (one contained fentanyl with caffeine, and the other fentanyl with benzodiazepine with caffeine), so that could not be the case. There is no evidence of benzodiazepine on its own in Mr. Watroba's possession.
- [130] There are also differences between his evidence and Sergeant Woodcox's opinion evidence on certain matters which I will return to below.
- [131] However, the plausibility of some aspects of Mr. Watroba's evidence is difficult to assess like, for example, the type of items he had with him, or did not have with him on December 19, 2021, for what he testified was a trip to go to Calgary. I have to consider that Mr. Watroba was, at the time, living in a shelter and take that into account when assessing his evidence.
- [132] I find Mr. Watroba was probably inaccurate with the court in some of his testimony, but I am uncertain whether this was due to the unreliability of his evidence or whether he was being deliberately dishonest and trying to mislead the court.
- [133] Further, I do not place any weight on Mr. Watroba's evidence of his account of his interaction with police officers doing the police search, which was not put to the two officers in cross-examination.

Law regarding circumstantial evidence

- [134] The Crown's case against Mr. Watroba for possession for the purpose of trafficking is based on circumstantial evidence.
- [135] When the Crown relies on circumstantial evidence to establish guilt, the trier of fact may only convict if guilt is the only reasonable inference from the evidence: Kruk, para. 62, citing R. v. Villaroman, 2016 SCC 33 at para. 30.
- [136] The law of circumstantial evidence was set out by Justice Devlin in R. v. Cashman, 2022 BCSC 892, affirmed 2024 BCCA 317, and is established in the leading case of Villaroman::
- [59] Justice Cromwell, writing for the Court in Villaroman, set out the approach the trier of fact must take when assessing circumstantial evidence. Specifically, he explained that in assessing circumstantial evidence, if, considering all of the evidence, there are reasonable inferences that can be drawn other than guilt, the Crown's evidence does not meet the standard of proof beyond a reasonable doubt (para. 35). Inferences that may be consistent with innocence do not, however, have to arise on proven facts. Requiring proven facts to support explanations other than guilt "wrongly puts an obligation on an accused to prove facts and is contrary to the rule that whether there is a reasonable doubt is assessed by considering all of the evidence" A theory alternative to guilt is "not rendered 'speculative' by the mere fact that it arises from a lack of evidence", as a reasonable doubt may properly be based on evidence or a lack of evidence: Villaroman at para. 36 [emphasis added in Cashman].
- [60] When assessing circumstantial evidence, the trier of fact should consider other plausible theories or reasonable possibilities that are inconsistent with guilt. However, such plausible theories or reasonable possibilities "must be based on logic and experience applied to the evidence or the absence of evidence, not on speculation": Villaroman at para. 37. The line between a "plausible theory" and "speculation" is not always an easy line to draw, but "the basic question is whether the circumstantial evidence, viewed logically and in light of human experience, is reasonably capable of supporting an inference other than that the accused is guilty": Villaroman at para. 38.
- [61] With respect to the standard of proof required, where proof of the offence or its essential elements depends wholly or substantially on circumstantial evidence, "an inference of guilt drawn from circumstantial evidence must be the only reasonable inference available on that evidence" The standard of proof "applies to the evidence taken as a whole" and "not to each individual item of circumstantial evidence" When determining whether the standard of proof has been met, it is "the cumulative effect of all the evidence, taken together, each item in relation to another and the whole, that must be considered" [citations omitted]

[Emphasis added.]

Analysis

- [137] I choose to analyze Count 2 and Count 3 first and then return to Count 1.

Counts 2 and 3: Possession for the purposes of trafficking, s. 5(2) of the CDSA

Elements of the offence alleged

[138] I must find Mr. Watroba not guilty of possessing the substances alleged in Counts 2 and 3, alleging possession for the purpose of trafficking, unless the Crown has proved beyond a reasonable doubt that Mr. Watroba is the person who committed the offence on the date and in the place described in the indictment, and that for each of Counts 2 and 3, the Crown must prove each of the following essential elements of the offence beyond a reasonable doubt:

- a) the substance was a controlled substance, namely one named in one of the applicable schedules of the CDSA;
- b) Mr. Watroba was in possession of the substance;
- c) Mr. Watroba knew the nature of the substance and that it is a controlled substance; and
- d) Mr. Watroba had intent to traffic and that he possessed the substance for the purposes of trafficking.

See *R. v. Nazarek*, 2017 BCSC 1909 at para. 11.

[139] Traffic is defined in s. 2(1) of the CDSA as follows:

2 (1) In this Act,

traffic means, in respect of a substance included in any of Schedules I to V,

- (a) to sell, administer, give, transfer, transport, send or deliver the substance,
- (b) to sell an authorization to obtain the substance, or
- (c) to offer to do anything mentioned in paragraph (a) or (b),

otherwise than under the authority of the regulations.

See also CDSA s. 2(1) which adopts the definition of possession set out in s. 4(3) of the Criminal Code.

[140] Here I find in respect of each of the small bag and the bigger bag, both containing fentanyl:

- a) the substance was a controlled substance, namely one named in one of the applicable schedules of the CDSA;
- b) Mr. Watroba was in possession of the substance; and
- c) Mr. Watroba knew the nature of the substance and it is a controlled substance.

[141] The main issue before me on Counts 2 and 3 is whether Mr. Watroba had intent to traffic and he possessed the substance for the purpose of trafficking it.

[142] I choose to analyze the evidence relating to Counts 2 and 3 together.

Counts 2 and 3 - assessment of the evidence

[143] I find that Mr. Watroba was a regular fentanyl user and he had been for many years. The items, including tin foil and the hooter tube, found in his possession were used for personal use of fentanyl. Sergeant Woodcox gave opinion evidence of such items being indicia of use of fentanyl.

[144] The case of the Crown is that Mr. Watroba was a fentanyl user who, on December 19, 2021, possessed 24.7 grams of fentanyl in two bags for the purposes of trafficking in order to finance his fentanyl use.

[145] I have considered all of the evidence, including assessing the accused's accounts of events: Kruk at para. 63.

[146] Mr. Watroba testified he did not intend to sell the fentanyl in his possession, that he was planning to wean himself off it using the caffeine which he had, and he intended to sell that caffeine on his own to others, and that on December 19, 2021, he was waiting to go to Calgary to stay at his mother's home.

[147] When applying the W.(D.) test and the principles of R. v. Villaroman concerning proof by circumstantial evidence, I find that a main body of evidence I must assess concerns the differences between Sergeant Woodcox's opinion evidence and the accused's evidence concerning the purpose of the accused's possession of fentanyl and the caffeine.

[148] Those differences in the evidence at trial include:

- a) Sergeant Woodcox opined that no one adds caffeine to fentanyl for their own use; but the accused, who I find was a regular drug user of fentanyl, testified that is what his intention was with the caffeine found in his possession;
- b) Sergeant Woodcox opined that people using fentanyl do not have caffeine with their fentanyl, they do not want to dilute it, since people do not want less potent fentanyl; but the accused, who was a fentanyl user, testified he wanted less potent fentanyl to wean himself off of it;
- c) Sergeant Woodcox opined that fentanyl users do not buy caffeine; but the accused's evidence is that he sold caffeine anhydrous at the time to other users;
- d) the accused's evidence was that his intent was to wean himself off fentanyl using the caffeine he had, which was materially different than the opinion evidence from Sergeant Woodcox that chronic users do not dilute their own fentanyl;

- e) Sergeant Woodcox testified that in all his experience he has seized an ounce of fentanyl only twice from a user; but Mr. Watroba's evidence was that the fentanyl in his possession, which measured approximately 3.5 grams less than an ounce, was for his personal use, not for trafficking.
 - f) Sergeant Woodcox opined that an ounce of fentanyl costs about \$2,000 to \$2,500, but the accused testified an ounce of fentanyl could cost \$1,400 or cheaper if it was raw, like a couple of hundred dollars.
- [149] Considering all of the evidence, I conclude that the evidence does not establish that the only reasonable inference is that Mr. Watroba was in possession of the fentanyl seized from him on December 19, 2021, for the purposes of trafficking. I rely on the following.
- [150] There are material differences between the opinion evidence of Sergeant Woodcox on the one hand, who is a credible expert witness, who was qualified to give opinion evidence in certain areas, and who testified that he gained experience through undercover operations, surveillance, drug trafficking investigations, and debriefing with drug users. And on the other hand, the accused, Mr. Watroba, who I find was an actual fentanyl user at the time and I find who lived in the fentanyl user subculture in Kelowna at the time. These are material differences in the evidence at trial important to the assessment of the evidence of the accused's purpose of possessing the fentanyl which he had.
- [151] Further, there is evidence that it is possible for fentanyl to be mixed with caffeine prior to consumption, as Mr. Watroba testified.
- [152] Both bags of fentanyl in his possession contained caffeine.
- [153] There was no cash in Mr. Watroba's possession (other than a \$10 bill shown in Photo 8), reflecting the absence of one indicia of trafficking.
- [154] Sergeant Woodcox testified the absence of cash can be an indication of drug sales not having recently occurred.
- [155] There were no score sheets or cellphones which, when found, can be indicia of trafficking, although Sergeant Woodcox testified he would not expect to see that necessarily in low street-level fentanyl trafficking.
- [156] There was no evidence of Mr. Watroba's possession of dime bags to use in the sale of fentanyl found in his possession (other than one bag with Nike swooshes on it in Photo 8, and the small bag containing 2.4 grams of fentanyl with benzodiazepine shown in Photo 14). There is no evidence that the fentanyl found in his possession was packaged for sale, other than the smaller 2.4 gram which was of a quantity that could be for personal use.
- [157] Sergeant Woodcox opined it would easy for some (50 to 60 pieces) of the fentanyl in the bigger bag to be sold by the point by hand, but he did not opine that all of the fentanyl in the bigger bag containing 22.4 grams of fentanyl could be sold by hand.

- [158] Sergeant Woodcox gave opinion evidence about average fentanyl consumption use of a user, but gave his opinion as to the mean amount of daily fentanyl use in terms of the majority of regular users he deals with. There is some evidence that Mr. Watroba was more than a regular user.
- [159] There is no evidence that the accused was seen selling fentanyl to someone else. He was wearing the fanny pack, which contained the two bags of fentanyl, under his arm, under his jacket.
- [160] And Sergeant Woodcox testified he had seen, albeit extraordinarily rarely, an ounce of fentanyl in the possession of a person he regarded to be a user. Again, the amount here in total is about 3.5 grams less than an ounce.
- [161] There was evidence that Mr. Watroba was a fentanyl user.
- [162] And in his testimony Mr. Watroba denied having an intent to traffic the fentanyl found in his possession.
- [163] Mr. Watroba possessed weapons, including a machete (also referred to by him as a large bowie knife), though Sergeant Woodcox testified that while found present in drug trafficking investigations, it is also common to see them with drug users given the violence present downtown.
- [164] I do not accept the Crown's submission providing a calculation of the monthly cost of Mr. Watroba's drug habit based on his evidence, when considered in the context of the whole of the evidence, to serve to detract from the credibility and reliability of Mr. Watroba's evidence to such a degree as to result in a rejection of his evidence and to lead to a conviction for possession for the purposes of trafficking. I note here that Mr. Watroba testified that he had saved \$3,400 in a bank account as of December 2021, but I have some uncertainty on the evidence as to the state of his personal finances at the time.
- [165] I find Mr. Watroba's account of what he was doing at the mall suspicious, taking into account the credibility and reliability of his evidence and that he was wearing a large knife, the machete, at the time. I find suspicious Mr. Watroba's account of what his intentions were with the fentanyl that he had and with the tub of caffeine he had, and that he was just about to go on a trip to his mother's home in Calgary to get himself off fentanyl.
- [166] Nevertheless, the Crown's case is circumstantial.
- [167] The Crown's case is close to the line. The Crown has tendered evidence from a knowledgeable and professional police officer expert witness who I find has fairly given opinion evidence to assist the court.
- [168] Considering all the evidence, it is likely that Mr. Watroba possessed fentanyl for the purposes of trafficking, but that is not sufficient to prove it beyond a reasonable doubt: Lifchus, para. 39.

- [169] Applying the R. v. W.(D.) framework, I find Mr. Watroba's evidence, when considered in the evidence as a whole, raises a reasonable doubt as to whether the accused possessed the fentanyl in the bigger bag and the smaller bag for the purposes of trafficking, based on the evidence and lack of evidence at trial, and that the Crown has not proved the essential elements of possession for the purposes of trafficking beyond a reasonable doubt.
- [170] After careful consideration, I am unable to decide whom to believe, and I therefore must acquit: J.H.S. at para. 12; C.W.H. at 155.
- [171] In such circumstances, I must give the benefit of the doubt to the accused and acquit on the drug trafficking charges: Lifchus at para. 39.
- [172] After considering the evidence, I am left with reasonable doubt as to Mr. Watroba's guilt on possession for the purposes of trafficking, and I must therefore acquit: W.(D.).
- [173] Put in the terms of Villaroman assessment of circumstantial evidence:
- a) Considering all of the evidence, there is another reasonable inference that can be drawn, other than guilt of possession for the purpose of trafficking, and so the Crown's evidence does not meet the standard of proof beyond a reasonable doubt.
 - b) There exists an alternative theory, based on the evidence at trial and a lack of evidence at trial, being that the accused possessed the fentanyl in the two bags for his personal use, which is a plausible theory that is inconsistent with guilt on possession for the purposes of trafficking.
 - c) I find this on the basis of the evidence and the absence of evidence, and it is not based on speculation: Villaroman, para. 37.
 - d) In short, considering the totality of the evidence at trial, I am not persuaded that the only reasonable inference available from the circumstantial evidence is that Mr. Watroba was in possession of the drugs for the purposes of trafficking, and so I must acquit on the charges of possession for the purpose of trafficking on Counts 2 and 3.

Conclusion - Count 2, possession for the purpose of trafficking and the small bag

- [174] Count 2 relates to the alleged possession for the purposes of trafficking of fentanyl/a benzodiazepine, the evidence of which was the 2.4-gram or the small bag.
- [175] I find the Crown has not proven beyond a reasonable doubt that the accused possessed the 2.4 grams of fentanyl with benzodiazepine for the purposes of trafficking on this count for the small bag.
- [176] However, on Count 2 of the indictment, I find the accused guilty of the included offence of simple possession of that controlled substance, contrary to s. 4(1) of the CDSA: R. v. Bhatti, 2018 BCSC 1657 at para. 47.

[177] Section 4(1) of the CDSA provides that: "Except as authorized under the regulations, no person shall possess a substance included in Schedule I, II or III". Fentanyl is a substance listed on Schedule I: see Item 16.

Conclusion - Count 3, possession for the purpose of trafficking and the bigger bag

[178] Count 3 concerns the alleged possession for the purpose of trafficking of fentanyl, the evidence of which was the 22.3-gram bag, or the bigger bag.

[179] I find the Crown has not proven beyond a reasonable doubt that the accused possessed the 22.3 grams of fentanyl for the purposes of trafficking on this count for the bigger bag.

[180] However, on Count 3 of the indictment, I also do find the accused guilty of the included offence of simple possession of that controlled substance, contrary to s. 4(1) of the CDSA: Bhatti at para. 47.

Count 1: Section 88(1) of the Code, possession of a weapon, the machete, for a dangerous purpose

Elements of the offence alleged

[181] Section 88(1) states:

Possession of weapon for dangerous purpose

88 (1) Every person commits an offence who carries or possesses a weapon, an imitation of a weapon, a prohibited device or any ammunition or prohibited ammunition for a purpose dangerous to the public peace or for the purpose of committing an offence.

[182] Turning to Count 1, to make out this offence, the Crown must prove each of these essential elements beyond a reasonable doubt:

- 1) that Mr. Watroba possessed a weapon;
- 2) that Mr. Watroba knew that what he possessed was a weapon; and
- 3) that Mr. Watroba had possessed the weapon for a purpose dangerous to the public peace or for the purpose of committing an offence.

R. v. Conn, 2024 BCSC 2524 at para. 111.

[183] "Weapon" is defined in the Code as follows:

weapon means any thing used, designed to be used or intended for use

- (a) in causing death or injury to any person, or
- (b) for the purpose of threatening or intimidating any person

and, without restricting the generality of the foregoing, includes a firearm and, for the purposes of sections 88, 267 and 272, any thing used, designed to be used or intended for use in binding or tying up a person against their will;

[184] The leading case on s. 88 of the Criminal Code is *R. v. Kerr*, 2004 SCC 44.

[185] Justice Wilson in *R. v. McCrae*, 2025 BCSC 1372, summarized the *Kerr* holding:

[181] Possession of a weapon for a dangerous purpose is a specific intent offence. The leading case on possession of a weapon for a purpose dangerous to the public peace is *R. v. Kerr*. In allowing the appeal in *Kerr*, the Supreme Court of Canada divided on what it means to be in possession of a weapon for a purpose dangerous to the public peace.

[182] A majority of the Court found that determining whether a purpose is "dangerous to the public peace" requires a two-part assessment, often referred to as a subjective-objective test (Justice Bastarache, with Justice Major concurring, wrote the primary judgment on this point at para. 25, while Justice Fish, with Justice Deschamps concurring, took a similar approach at para. 118). The trier of fact must first determine the accused person's purpose, which is a subjective determination, following which there is a determination of whether the purpose was dangerous to the public peace, which is objective.

[183] Regarding the subjective determination, the court must consider all the circumstances in the case, "including the nature of the weapon, the circumstances under which the accused had it in his possession, his own explanation for that possession, and the use to which he actually put it, if that sheds light on what his purpose was in originally having it": *R. v. M.D.*, 2008 BCCA 538 at para. 16.

[184] Finally, a person's intention for the purposes of s. 88(1) of the Criminal Code does not necessarily always remain constant and may change to a dangerous intention, even if the item was originally taken into the accused's possession for a purpose that was not dangerous. For there to be a conviction, there must be a point where the elements of possession and a dangerous purpose coexist: *Kerr* at para. 24.

[186] In *R. v. Kerr*, the judgment of Justice Bastarache includes the following:

51 If *Kerr* were charged with having committed the offence on any other day, the result may very well have been different, either because his purpose on that day would not necessarily be strictly to repel an assault on his person, or because even if his purpose was such, the assault which is anticipated would not necessarily be unavoidable.

53 One might ask what the difference is between possession of a concealed weapon on a daily basis to defend oneself, if need be, specially in a dangerous place, and possession to deal with an imminent threat. I think that in the first scenario the purpose is inconsistent with the duty to avoid violent confrontation by escaping, asking for police protection or even negotiating. It reflects a willingness to engage in physical conflict, if confronted, with a weapon. This purpose is contrary to public peace . . .

56 further, a general atmosphere of violence or a simple fear of an attack do not alone justify the possession of weapons, whether in a penitentiary or elsewhere [Emphasis added]

- [187] At para. 26 of *R. v. Kerr*, Bastarache J. states: "Section 88 requires simply that the accused person have a purpose dangerous to the public peace. Thus, any purpose will do, so long as that purpose is in consequence dangerous to the public peace" (see also para. 27).
- [188] Justice Bastarache further stated at para. 36: "I am prepared to accept, as proposed by Binnie J., that "public peace" refers generally to a state of order or to the normal state of society".
- [189] Further, in *R. v. Capot Blanc-Acko*, 2019 BCSC 2087, Justice Myers stated the principles relating to s. 88 in the context of the facts of the case before him:
- [41] Unlike *Kerr*, the accused did not testify as to his intent. Also, unlike *Kerr*, the weapons were not used when Mr. Capot Blanc-Acko was shown to be in possession of them inside Walmart. The evidence of intent here is therefore circumstantial. Nevertheless, as was stated in *Kerr*, intent may be inferred in the absence of direct evidence.
- [42] I find the only inference to be drawn is that Mr. Capot Blanc-Acko had the weapons for the purposes of his drug trade. They could have been intended to be used offensively (for example, to collect drug debts) or defensively (for example, to fend off theft of the drugs or a drug transaction gone bad).
- [44] What of a defensive intent? In *Kerr*, Bastarache J. (Justice Major concurring) held that a defensive intent does not negate a dangerous purpose unless the weapon is possessed for the purpose of fending off an inescapable and unavoidable attack. Justice Binnie (dissenting in the result) held that carrying a weapon on a regular basis for a defensive purpose does not negate a dangerous purpose. Justice LeBel (Justice Arbour concurring) concluded that carrying a weapon for self-defence was a dangerous purpose unless the defence of necessity could be made out. Although *Kerr* involved different circumstances and the accused was acquitted those principles are applicable here. There was no imminent threat and there is no defence of necessity or self-defence.

Count 1 - assessment of the evidence re s. 88 and the machete

- [190] The defence contended that the elements for this offence have not been made out beyond a reasonable doubt. The defence argued, among other things, that the requisite element of the machete being for a purpose dangerous to the public peace has not been made out by the Crown. The defence argued that the evidence supports a finding that Mr. Watroba's possession of the machete (bowie knife) was to attempt to avoid a situation of using the machete.
- [191] Crown's submission included that the accused's subjective purpose for the machete as it was situated on his person was to inflict harm on people if necessary.

- [192] I have assessed the evidence at trial, including the accused's testimony: Kruk at para. 63.
- [193] The machete is a menacing, large knife.
- [194] I find it is a weapon and that Mr. Watroba knew that it was a weapon.
- [195] I find the machete was worn by Mr. Watroba in an urban environment and positioned in such a way on December 19, 2021, that it was readily accessible by him with his hand.
- [196] When in cross-examination it was suggested to him he had to protect himself since he had fentanyl in his fanny pack he did not want stolen, he testified he had recently just got robbed before.
- [197] And Mr. Watroba, when it was suggested to him in cross-examination the purpose of the weapons he had was to protect his drug stash and use them if need be, testified that it was "to protect myself".
- [198] But there is no evidence of any specific imminent or unavoidable threat to the accused on December 19, 2021.
- [199] There is no evidence that the accused used the machete (bowie knife) on December 19, 2021.
- [200] However, applying the W.(D.) principles and framework, I find the Crown has proved beyond a reasonable doubt on the totality of the evidence that a purpose for the accused possessing the machete on December 19, 2021, was to protect himself and inflict harm on another person if necessary to prevent theft of 24.7 grams of fentanyl in his possession. I also find there was no imminent or unavoidable threat to the accused at the time that could render the defensive purpose not dangerous to the public peace. The evidence of the accused, Mr. Watroba, does not raise a reasonable doubt and I find guilt beyond a reasonable doubt has been established by the Crown on the totality of the evidence at trial.
- [201] I have considered all the circumstances in this case "including the nature of the weapon, the circumstances under which the accused had it in his possession, and his own explanation for that possession": *R. v. M.D.*, 2008 BCCA 538 at paras. 16 to 18, quoting *R. v. Nelson* (1972), 8 C.C.C. (2d) 29 at page 31.
- [202] Following the hybrid purpose approach from *R. v. Kerr*, I find the Crown has proven beyond a reasonable doubt Mr. Watroba had a subjective purpose of possessing the machete to inflict harm on others if necessary; and that, objectively, that is a purpose which is dangerous to the public peace.
- [203] I do not accept the defence's argument that Mr. Watroba possessed the machete simply to avoid violence, which raises a reasonable doubt as to whether he had a dangerous purpose at the time. This argument is belied by: (1) my finding that the machete was being worn by the accused in a manner that was readily accessible by his hand; (2) his own evidence that he possessed weapons to protect himself; and (3) that Mr. Watroba also possessed in his

pocket a makeshift mace made from a bandana and large metal nut, which he testified could be used on other people, evidencing that he had a willingness to inflict harm on another person if necessary.

- [204] I also do not find the evidence that the accused was compliant when, on December 19, 2021, he was approached by the two police officers, raises a reasonable doubt as to whether he had a purpose for possessing the bowie knife on that day which was dangerous to the public peace.
- [205] Put in terms of Villaroman, I find that an inference of guilt that the possession of the machete by the accused on December 19, 2021, was for a purpose dangerous to the public peace is the only reasonable inference that the evidence permits, on the totality of the evidence, including the evidence of the accused: Villaroman, para. 30 and 55.
- [206] I find the Crown has proved beyond a reasonable doubt that on December 19, 2021, the elements of Mr. Watroba's possession and a dangerous purpose to the public peace co-existed: McCrae at para. 184.
- [207] I therefore find the Crown has proved beyond a reasonable doubt that the machete was possessed by Mr. Watroba for a purpose dangerous to the public peace on December 19, 2021.

Conclusion - possession of a weapon, a machete, for a dangerous purpose

- [208] I conclude on Count 1 of the indictment that Mr. Watroba had possession of the machete (also referred to in evidence as a bowie knife) for a purpose dangerous to the public peace and must be convicted of the s. 88 offence.

Disposition

- [209] Mr. Watroba, please stand.
- [210] For the reasons I have stated, I find Darren Chester Watroba not guilty on Count 2 in the indictment of possession of fentanyl/a benzodiazepine, namely Flualprazolam, for the purposes of trafficking.
- [211] However, I do find you guilty of the lesser included offence of simple possession of that controlled substance, contrary to s. 4(1) of the CDSA on Count 2.
- [212] I further find Darren Chester Watroba not guilty on Count 3 in the indictment of possession of fentanyl for the purposes of trafficking.
- [213] However, I do find you guilty of the lesser included offence of simple possession of that controlled substance, contrary to s. 4(1) of the CDSA on Count 3.

[214] I further find Darren Chester Watroba guilty on Count 1 of the indictment of carrying or having in his possession the machete for a purpose dangerous to the public peace, contrary to s. 88(1) of the Criminal Code.

[215] That concludes my reasons. Mr. Watroba, you may sit down.

"Stephens J."

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