

CANADA / JUDGMENT

R. v. Zamora

2020 BCSC 1261

COURT

Supreme Court of British Columbia

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2020 BCSC 1261 R. v. Zamora

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Zamora,

2020 BCSC 1261

Date: 20200820

Docket: 28159

Registry: Vancouver

Regina

v.

Austin Isaias Zamora

Before: The Honourable Madam Justice Duncan

Oral Reasons for Judgment

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Place and Dates of Trial:

Vancouver, B.C.

June 22-26 & 29-30, 2020

July 3, 2020

Place and Date of Judgment:

Vancouver, B.C.

August 20, 2020

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Introduction

[1] The accused, Austin Zamora, is charged on a 13-count indictment with various firearms-related offences contrary to the Criminal Code:

Counts 1 through 6: possession of various firearms and prohibited devices for the purpose of transferring or offering to transfer them, contrary to s. 100(1);

Counts 7 through 11: possession of unloaded prohibited firearms with readily accessible ammunition, contrary to s. 95(1);

Count 12: possession of a non-restricted firearm, knowing he was not the holder of a licence or registration certificate, contrary to s. 92(1); and

Count 13: possession of oversized magazines, which are prohibited devices under s. 92(2).

[2] At the outset of her submissions, Ms. Steele, counsel for the Director of Public Prosecutions (the Crown), conceded that the Crown could not prove Counts 10 and 11 because there was no evidence of readily accessible ammunition in relation to the firearms specified in those counts. Accordingly, Mr. Zamora is acquitted of Counts 10 and 11.

Summary of Facts

[3] The charges arose in the context of a larger investigation by the Drugs and Organized Crime Section of the Coquitlam RCMP into suspected fentanyl trafficking ("Project E-Nightlife"). The investigation began in March 2016. Two of its primary targets were Andrew Leach and his girlfriend, Arghavan Ebrahimi.

[4] In May 2017, investigators obtained a Part VI wiretap authorization to intercept the private communications of Mr. Leach and others, through cell phones and audio probes in residences and vehicles. One of the vehicles identified in the authorization, associated with Mr. Leach, was a black Mercedes SL55 (the "Mercedes"). Investigators installed an audio probe in this vehicle. Ms. Ebrahimi was associated with a white Acura TL (the "Acura").

- [5] On June 7, 2017 at 1:07 p.m. a civilian line monitor in the wire room intercepted a conversation from the audio probe in the Mercedes ("Session 225"). Mr. Leach was present and he was recorded in conversation with an unknown male ("UM"). The two men talked about a variety of subjects before their conversation turned to Mr. Leach's interest in obtaining firearms. They discussed a Steyr AUG and a fully automatic shotgun. UM said he should take Mr. Leach to the storage facility later that day.
- [6] Investigators began surveillance of Mr. Leach to follow up on discussion in Session 225 about obtaining firearms. At 6:39 p.m. they observed him travel with Ms. Ebrahimi in her Acura from his home in Port Coquitlam to the 1000 block of Barclay Street in Vancouver. A male ("UM1") got into the Acura and it travelled to Public Storage on Terminal Avenue.
- [7] The Crown maintains that Mr. Leach and UM1 went into Public Storage, using the code associated with locker 2035, and spent about ten minutes inside the building. They returned to the Acura and drove to an area behind 1028 Barclay Street. An Asian male ("UM2") approached the Acura and got in for a few minutes. After UM2 got out of the Acura, Mr. Leach and UM1 had a conversation outside the Acura for a few minutes. UM1 then used a key fob to enter the rear of the residential tower at 1028 Barclay Street.
- [8] Police obtained and executed a general warrant on locker 2035 on June 9, 2017. They located and seized six firearms and a variety of magazines and ammunition. The firearms were estimated to be worth approximately \$40,000 on the black market. Police also located a piece of paper which, in the opinion of a forensic expert, bore an impression of Mr. Zamora's left index finger.
- [9] Austin Zamora was completely unknown to the surveillance team. A member of the Vancouver Police Department initially identified UM1 as an individual by the name of Dustin Viscount. The detection of Mr. Zamora's fingerprint on an item in the storage locker shifted the focus of the investigation.

Positions of the Parties

Crown Position

- [10] The Crown submits that the evidence supports the conclusion that Mr. Zamora was UM on Session 225 and UM1, the individual who got into the Acura near an apartment building at 1028 Barclay Street and accompanied Mr. Leach into the building at Public Storage. As a result, the Crown submits that it has proven beyond a reasonable doubt that Mr. Zamora had possession of the firearms, ammunition and devices seized in the search of the storage locker and intended to sell them to Mr. Leach.

Defence Position

- [11] The defence position is that the evidence identifying Mr. Zamora as UM on Session 225 is woefully inadequate. Counsel maintains that the evidence led to establish UM1's identity as Mr. Zamora also carries doubt, as does the evidence supporting the surveillance team's account of continuously observing UM1 in the company of Mr. Leach on the evening of June 7. The defence submits that even if Mr. Zamora was at the storage locker with Mr. Leach, it is not proof that he had the requisite knowledge and control over the items in the storage locker to make the Crown's case for possession with intent to transfer or possession of any of the items seized.

Evidence at Trial

Project E-Nightlife

- [12] Sgt. Luke Rettie was the Team Commander of Project E-Nightlife. He was familiar with Mr. Leach's appearance and with the vehicle he drove - a black Mercedes SL55 - at the time the matters before the Court arose. Sgt. Rettie had conducted surveillance on Mr. Leach on numerous occasions before June 7, 2017 and at one point purchased fentanyl from him, although Leach directed someone else to complete the transaction. Sgt. Rettie was also familiar with Mr. Leach's voice as a result of a long conversation with him during the course of the fentanyl transaction.
- [13] Sgt. Rettie described Ms. Ebrahimi as Mr. Leach's long-time partner or girlfriend, although the two had a tumultuous relationship. He had observed her multiple times while conducting surveillance.
- [14] Sgt. Rettie was notified about Session 225 on June 7, 2017 by a civilian line monitor, who had intercepted the conversation. As a result, Sgt. Rettie dispatched a surveillance team to locate Leach and the Mercedes later that day.

The Contents of Session 225

- [15] Session 225 contains terminology that requires some expertise to understand. Frank Grosspietsch, recently retired from the RCMP at the rank of Sergeant, provided opinion evidence in this regard. I will review his evidence later in these reasons, but I have inserted some of his explanations in square brackets in the following summary of the intercepted conversation in Session 225.
- [16] Session 225 began at 1:07 p.m. on June 7, 2017. Mr. Leach and UM exchanged pleasantries and talked about how Mr. Leach needed a place with a pool, how he went to buy some designer swim trunks and loafers, and mentioned that his mother was going to call him any second. The conversation returned to designer swim trunks, a "vape king" who had a Maybach and was rich, and the need to rely on "shady money" to get "legit money".

- [17] Leach took a phone call, then returned to the conversation with UM and asked about "these items of fascination that you have", "What you working with?" "Anything big and quiet?" [a larger calibre firearm with a suppresser] UM said there was an AUG [a unique looking service weapon for the Austrian army, manufactured by Steyr] and asked Leach if he knew what an AUG was. Their conversation was interrupted by another call to Leach's phone in which he remarked he was "just DT with bro" about to get his mom. That call was terminated and Leach and UM began talking about the AUG again.
- [18] UM suggested that Leach "Google" it. Leach asked if it was an A3 and UM said it was "the first one". Leach said, "Oh a Steyer [sic, Steyr], oh yeah, I know these things, with the weird, yeah, yeah." And UM said "It has like a weird scope". Leach asked if it was "two, two three" [.223 calibre] and UM said he was not too sure, "I think maybe a nine". It appears that Leach found it on the internet because he asked if it was a full-size or a micro and UM said, "No, no it's fuckin' it's exactly that there. Exactly that guy." This is consistent with Leach finding an image on the internet and UM pointing at it and confirming Leach had located the correct image.
- [19] UM said there was a "fully auto" shotgun, which was "fuckin' pretty badass". Leach asked if it was the tactical short variety and UM said, "Yep, you can come, you know what man, I should just bring you to the storage, just fuckin' show you." Leach replied with a statement to the effect of "you finally got in", presumably referring to the storage facility. UM stated that he did, and that the whole time he was at the wrong one, the one right beside it, but ultimately he got in to the right locker. He said they should go and look once the storage facility was closed, from six onwards.
- [20] Leach said "I don't buy shit that's lit" and "I don't sell guns, right". UM said he did not want to, but he wanted to buy "chicks" from Bogota which he apparently planned to bring in by air, possibly through Toronto. The two men talked for a few moments about UM's plans and then the conversation returned to the topic of firearms. Leach said that he could use some "straps" [handguns], he was planning for war, he thought one was coming. UM said, "Let's fuckin', you know what, let's fuckin', I'll uh, let's go there tonight". Leach agreed and UM said "I need to send fuckin' money to my, my boy like tomorrow like".
- [21] Leach made a reference to "chunks" [handguns]. UM said "Yeah, just come out tonight. And then we'll, and then we'll go to the storage". UM said "I'll show you what I have". He also referred to a golden thing, like a showpiece, that he did not want to get rid of. Leach said, "Golden eagle" and UM agreed [a Desert Eagle, large calibre semi-automatic handgun]. He said he got rid of the silver one and described the gold one as like having a golden AK, like "when they raided drug dealers' homes". UM said to Leach, "Okay holler at me later" and Leach agreed.
- [22] The intercept lasted 18 minutes and 32 seconds.

The key locations where surveillance occurred on June 7, 2017

- [23] Some of the surveillance team's observations occurred at or near 1028 Barclay Street in Vancouver. The building at 1028 Barclay is called the Patina. It is a multi-storey residential building. It was admitted at trial that Mr. Zamora rented unit 2705 in the building from May 2013 until the events on the indictment occurred. The building access device associated with unit 2705 was used to gain entry to the rear door of the building at 8:23 p.m. on June 7, 2017.
- [24] The surveillance team also observed activity at the Public Storage facility on Terminal Avenue in Vancouver. David Cameron, the manager of Public Storage in 2017, described it as a four storey building with approximately 1,070 units. The units had concrete floors, metal sides and mesh tops. A tenant is provided with a code, which is their assigned locker number plus two digits. The code is used to enter the facility's parking area through a one way entry gate, inside the elevator and to access the exit gate. The code is also used, in conjunction with a lock, to access a locker. If the account associated to the locker is in good standing, access is granted to the person who enters the code.
- [25] Public Storage provided a lock for each locker, along with three keys. Renters could access lockers on the upper floors from 6 a.m. to 10 p.m. daily. Ground floor lockers were accessible 24 hours/day. The office, which was at ground level, was staffed every day from 9:30 a.m. to 6 p.m.
- [26] In June 2017, locker 2035 was rented by Tyler Ryan, who had signed a rental agreement in June 2011. Public Storage's records show that the locker was accessed on June 7, 2017. The code was entered at the entrance to the parking area at 7:42 p.m.; at the elevator at 7:43 p.m.; and at the exit gate at 7:59 p.m.
- [27] Business records obtained from Public Storage recorded that the access code for locker 2035 was used on May 9, May 11 and May 23. The May 9 records show the access code was used to enter the parking lot, building and elevator but there is no record of the code being used to exit the parking area. A photograph of the security entrance on May 23 showed a green sport utility vehicle entering the Public Storage lot at the same time the access code for locker 2035 was used. A male wearing shorts and carrying an across the body satchel was photographed in the elevator. He was never identified. The photograph of the green vehicle was not clear enough to enable police to investigate the licence plate or any other details about the vehicle.
- [28] On June 27, an individual was photographed near the elevator at a time associated to the code for locker 2035. He was wearing a sleeveless black shirt and his arms appeared to be heavily tattooed. The code was used to enter the parking area and the elevator, but no exit gate access was recorded on that date. The male with the tattooed arms was never identified.
- [29] There is no evidence connecting Mr. Zamora with these three entries to Public Storage.

[30] The locker tenancy ended on June 29, when an employee found the unit empty, swept the floor and noted that it was "rent ready". Investigation established that Tyler Ryan was overseas in June 2017.

[31] In 2017, the security footage at Public Storage had a limited lifespan and was written over after a certain number of days.

The surveillance team's observations

[32] The surveillance team was briefed at 2:30 p.m. on June 7 about Session 225. The team's objectives were to locate Leach and conduct surveillance to see if he met with an unknown male and went to an unknown storage locker.

[33] At around 3:30 p.m., the surveillance team located Leach's Mercedes via the tracking device that had been covertly installed in it, near First and Slocan in Vancouver.

Cst. Sergei Ostapenko

[34] Cst. Ostapenko and Cst. Cormier were working together. Cst. Ostapenko saw Mr. Leach driving the Mercedes with the top down near First and Slocan. His passenger was an older female, believed to be Mr. Leach's mother. Mr. Leach drove with his mother to a shopping mall on Barnet Highway, then he drove her to her home on Cortez Avenue in Coquitlam. Leach then returned to his apartment in a building at 1215 Pacific Avenue in Coquitlam, where he remained for several hours.

[35] At 6:34 p.m. Cst. Cormier and Cst. Ostapenko observed Ms. Ebrahimi pull up in front of Mr. Leach's apartment in her Acura. At 6:39 p.m., Mr. Leach came out of the building and got into the Acura. The two constables followed the Acura to 880 East Hastings in Vancouver, the site of a medical cannabis dispensary. Ms. Ebrahimi got out and went into the dispensary. She returned to the Acura and drove to the vicinity of 1028 Barclay.

[36] Cst. Ostapenko was across the street from 1028 Barclay, outside his vehicle. He saw Ms. Ebrahimi get out of the driver's side of the Acura, open the door behind the driver's side, reach in and then get back into the driver's seat. Mr. Leach remained in the front passenger seat of the Acura.

[37] About five minutes later, at 7:25 p.m., Cst. Ostapenko saw UM1 walk out of 1028 Barclay and get into the Acura, behind Mr. Leach. Cst. Ostapenko described UM1 as well-built, about 6' tall with black hair, dark pants and a short sleeved dark t-shirt. The Acura did a u-turn on Barclay, then a right turn south, then a left turn two blocks later. Cst. Ostapenko lost sight of the Acura. Cst. Cormier picked Cst. Ostapenko up. The next place he saw the Acura was at a storage facility on Terminal Avenue.

- [38] At 7:58 p.m., Cst. Ostapenko took several photographs of Mr. Leach and UM1 as they walked out the front doors of Public Storage. He believed UM1 was the same man he had seen near 1028 Barclay, although UM1 was now wearing a white baseball hat, carrying a black backpack and had a lanyard around his neck. Leach got into the front passenger seat of the Acura and UM1 got in behind him.
- [39] Cst. Ostapenko observed the Acura leaving the Public Storage parking area with Ms. Ebrahimi driving. The Acura drove back to the vicinity of 1028 Barclay, specifically to a parking area behind that building and adjacent to the First Baptist Church. Cst. Ostapenko got out of the car and received radio communication about a grey Toyota Corolla pulling out of a back parking area and he took a photo of it, westbound in the alley at 8:16 p.m. Cst. Ostapenko's next observation was UM1 walking across the back alleyway from the church parking lot to the rear door of 1028 Barclay, where he disappeared at 8:22 p.m.
- [40] On cross-examination, Cst. Ostapenko was a bit vague concerning the type of camera he was using during surveillance. He agreed that some of the photos were better quality than others and that it would be difficult to recognize UM1's face in some of them. Cst. Ostapenko did not take a photo of UM1 as he got into the Acura near 1028 Barclay. He did not notice UM1 wearing a white baseball hat or carrying a backpack. He could not see behind Mr. Leach and was unable to say if anyone was seated there.
- [41] Cst. Ostapenko agreed that he never saw UM1 wearing a long-sleeved shirt. He agreed that a photograph of the Acura leaving the storage locker lot showed something sticking out of the back passenger side window and that there could have been four people in the vehicle at that point.

Cst. Kevin Pollock

- [42] Cst. Pollock saw Leach driving his Mercedes eastbound on either Broadway or Hastings with a female, believed to be his mother. They stopped at Coquitlam Centre, and then Leach dropped his mother off. Cst. Pollock learned from other team members that Leach had gone to his residence and then about an hour later overheard on the radio that Ms. Ebrahimi had arrived at Leach's residence.
- [43] Cst. Pollock next saw Leach and Ebrahimi on East Hastings, where Ebrahimi went into a medical marijuana dispensary at about 7:10 p.m. while Leach waited in the car. Cst. Pollock was advised that the two had picked up an unknown male and proceeded to Public Storage.
- [44] Cst. Pollock was on foot at Public Storage by 7:40 p.m. and saw Ms. Ebrahimi park her vehicle. He saw Leach and UM1 get out of the car. He described UM1 as 20-30 years old with short dark hair, shaved on both sides, a tan complexion, wearing a black t-shirt and carrying a backpack. He observed Ms. Ebrahimi drive out of the storage locker parking lot at 7:59 p.m. and drive west on Terminal Avenue.

- [45] Cst. Pollock was shown security stills from inside Public Storage. He identified Leach as the individual approaching the elevator and said the individual in the elevator was wearing clothing consistent with UM1.
- [46] After Cst. Pollock arrived in the vicinity of the church adjacent to 1028 Barclay, he saw an unknown Asian male (UM2) get out of Ms. Ebrahimi's Acura and walk away. He then observed a grey Corolla drive towards Burrard Street. UM2 was wearing a blue jacket, a white shirt and a backpack. Cst. Pollock said UM2 was definitely a different person than UM1.
- [47] About two minutes after UM2 got out of the Acura, Leach and UM1 got out and talked for about five minutes. UM1 had a lanyard around his neck and was carrying a water bottle and a backpack. At 8:22 p.m. UM1 went to the rear of 1028 Barclay and used a fob to enter the building. Leach got back into the Acura and it drove away.
- [48] On cross-examination, Cst. Pollock agreed that as the Acura left the storage facility parking lot it looked like there was an arm hanging out the rear window. Counsel suggested it looked like a black long-sleeved shirt, but the constable said it was too blurry for him to say for certain.

Cst. Jeff Wiley

- [49] Cst. Wiley was the file coordinator on Project E-Nightlife. On June 7, he was part of the surveillance team and saw Ms. Ebrahimi's Acura on several occasions. He saw it enter the parking lot at Public Storage and he took a video of it leaving the parking area. The driver punched in a code to enter the parking area and to leave the parking area. Cst. Wiley video-recorded Ms. Ebrahimi leaning out of the car and entering the code into the keypad at the exit.
- [50] On cross-examination, Cst. Wiley agreed that it was his role as file coordinator to review the surveillance log for inaccuracies. He acknowledged that in spite of this, he signed off on his remarks by saying no video was taken, when in fact he took the video of the Acura leaving the storage facility. Cst. Wiley agreed there was potential for error in the surveillance logs.

Cst. Dusan Postolovic

- [51] Cst. Postolovic was the exhibit officer for Project E-Nightlife. He was part of the surveillance team on June 7 and served as the team's scribe on that date. His role as scribe was to listen to the team's radio transmissions and write down as much information as possible at the time, in addition to his own observations. Later in the day team members would review the log, correct the entries attributed to them and initial them.

- [52] Cst. Postolovic noted the commencement of surveillance at 3:30 p.m. with a sighting of Leach at First and Slokan. He saw Leach's Mercedes at Coquitlam Centre and saw the woman who was with him get out, go into the mall and get back into the car. Cst. Postolovic made notes of the team's observations at various points between 3:30 p.m. and 7:25 p.m., which is when his personal observations of significance began after the team followed Ms. Ebrahimi's Acura to the vicinity of 1028 Barclay Street.
- [53] At 7:25 p.m. Cst. Postolovic walked past the Acura and had a clear view of Ebrahimi. The Acura was parked on the north side of Barclay. Leach was in the front passenger seat. Cst. Postolovic saw Ms. Ebrahimi get out of the car and reach into the rear passenger seat. He could not see anyone sitting in the back seat.
- [54] At 7:31 p.m., Cst. Postolovic saw UM1 appear near the rear passenger side of the Acura and get in the car. He described UM1 as athletic, late twenties, very distinct haircut, almost completely shaved on the sides and back, longer and gelled on top, black t-shirt, olive complexion, carrying a unique backpack. The texture was like leather and it had prominent gold zippers on it.
- [55] Cst. Postolovic's next direct observation of relevance was at 7:59 p.m. where he saw UM1 and Leach enter the Acura which was parked in the Public Storage lot. The Acura left the secure parking area and Cst. Postolovic got in a vehicle and continued on with the surveillance team. His next direct observation was at 8:10 p.m. in the parking area behind 1028 Barclay that backs on to the church on Burrard. Cst. Postolovic saw the Acura parked nose in, facing east, towards Burrard. He saw an Asian male, UM2, in an unbuttoned blue dress shirt with a white t-shirt underneath, carrying a large army type backpack. He was slim and about 5'8". He was markedly different from UM1, in the constable's opinion.
- [56] UM2 got in the rear passenger side door of the Acura. A video taken by a member of the surveillance team shows an arm opening the door from the inside. About one minute later UM2 got out of the Acura and he walked westbound in the church parking lot, out of Cst. Postolovic's sight. He then saw a grey Toyota Corolla with two Asian males in it and recorded the plate number, suspecting that UM2 had entered the Corolla.
- [57] Cst. Postolovic saw Leach and UM1 outside the Acura, having a conversation. A member of the surveillance team videotaped the two. The constable identified UM1 as the male in the video with the lanyard around his neck and the black backpack with the distinctive gold zipper. Cst. Postolovic said UM1 was the same person who got into the Acura at 7:31 p.m. and who was outside Public Storage with Leach as well as talking to Leach outside the Acura at 8:10 p.m. UM1 walked in the general direction of the rear of 1028 Barclay and disappeared from view at 8:16 p.m.
- [58] On cross-examination, Cst. Postolovic agreed that UM1 was unknown to investigators. After June 7, the only times that Cst. Postolovic was in the presence of Mr. Zamora was on October 4, when a DNA warrant was executed, and January 12, 2018, when he was arrested.

- [59] Cst. Postolovic was also asked in cross-examination about the notation of "VCB" (visual contact broken) on the surveillance log. He acknowledged that someone on the surveillance team could lose visual contact with a target and not say "VCB" for the scribe to write down. VCB is only noted when the team loses sight of a target or person of interest, so Mr. Leach's mother's movements at Coquitlam Centre did not require a notation of VCB.
- [60] Cst. Postolovic could not recall whether he saw the Acura arrive at 1028 Barclay but it was stationary before he got out of his car to commence surveillance on foot. His handwritten notes about his observations were done the following morning, as was a TAR (Task Action Report). He noted the Acura was parked on the north side of Barclay, facing east towards Burrard. In that configuration it was illegally parked because it was facing the wrong direction.
- [61] Cst. Postolovic could not say for certain exactly where he was in relation to the Acura as he walked past it because he was looking for a location to maintain visual surveillance. Half of Ebrahimi's body was in the car, he could not see what she was doing. The rear windows were tinted but did not completely obscure the view in. He could only make out Mr. Leach and was certain there was no one in the back of the vehicle.
- [62] Cst. Postolovic did not see where UM1 originated from. He did not make any mention of the distinctive backpack in his notes, but he did in the surveillance log. He made no mention of a gelled hair cut in his handwritten notes, or of a hat or lanyard. He said he remembered the hairstyle. In the TAR he identified UM1 as Viscount.
- [63] At Public Storage, Cst. Postolovic recorded UM1 and Leach in the general vicinity of the door and inferred they came from the building. His naked eye observations were better than what he recorded because he could see a wider field of view. His opinion that the two got into the Acura is based on the two pairs of feet seen in the video as well as the flash of Leach's white t-shirt. When the video was played he agreed that it did not show Leach or UM1 walking from anywhere, but he saw them for a split second before he began recording.
- [64] Back at the parking area behind 1028 Barclay, Cst. Postolovic video recorded UM2 approaching the Acura. The Acura was already parked when he arrived back on scene. He agreed that in the video, one could not see through the back window of the Acura.

Sgt. Rettie

- [65] Sgt. Rettie was kept apprised of the surveillance team's movements. He went to Public Storage and met with the team but made no observations of his own at that point. He also went to 1028 Barclay when the team radio advised that the Acura had gone back there. Sgt. Rettie arrived in time to see UM2 get out of the Acura and get into the grey Toyota. He followed the Toyota to record the licence plate. Further investigation of the registered owner of the Corolla did not yield any information of assistance.

The calls on Leach's phone during surveillance on the evening of June 7

Before the Acura arrived at Public Storage

[66] At 7:35 p.m. on June 7, a call was intercepted from Leach's phone to (604) 499-xxxx. A voice designated as UM1 initiated the call and had a brief conversation with a voice designated as UM2. UM2 said he was "pretty much round the location now". UM1 said he had left, he was going to Main and Terminal. UM1 asked if UM2 wanted to meet him around the Mercedes dealership there. UM2 asked how long UM1 needed. UM1 said he was going to get dropped back off and he would be about 20 minutes so UM2 said he would be around "here".

When the Acura Arrived back near 1028 Barclay

[67] At 8:08 p.m., after the Acura had returned to the vicinity of 1028 Barclay, there was another call from Leach's cell phone to the same number. UM1 said, "I just got back home" and asked if UM2 was close. UM2 said he was just around the corner. UM1 said he was going to be behind the church, sitting in the white car. UM2 asked UM1, "Right now?" UM1 said, "Yeah, I'm here right now". The call lasted 57 seconds.

[68] UM2 appeared in the vicinity of the Acura shortly after this call before Sgt. Rettie saw him leaving in the grey Toyota Corolla.

The (mis)identification of UM1

[69] After surveillance on June 7, the team requested assistance from another law enforcement agency to determine the identity of UM1. Cst. Postolovic testified that Sgt. Rettie sent him a known photograph of Dustin Viscount and he concluded that UM1 was in fact Viscount.

[70] On cross-examination, Cst. Postolovic agreed that he put "is" in capital letters and underlined it for emphasis in his notes. He also noted that he was "certain" that UM1 was Dustin Viscount and stated it in the Report to Crown Counsel. He held that firm belief until June 22, when a fingerprint identified to Mr. Zamora was obtained from a piece of paper seized during the execution of the search warrant.

[71] Cst. Postolovic viewed a booking photo of Mr. Zamora on September 21 when the team attempted to obtain cast-off DNA from him. He was not comfortable with the conclusion that UM1 was Mr. Zamora until October 4, when the DNA warrant was executed, because of his early mistaken conclusion. By that time, Cst. Postolovic was aware that Mr. Zamora lived at 1028 Barclay, pursuant to fob and CCTV footage obtained by Cpl. Auger.

[72] Sgt. Rettie was also convinced that the known photograph of Dustin Viscount matched UM1. His opinion also changed when Mr. Zamora's fingerprint was identified by Cpl. Howorth on June 22.

The search warrant

[73] The investigative team obtained a general warrant to search locker 2035 at Public Storage. The search team arrived on site on June 9 at 10:27 p.m. and gained entry with the assistance of members of the special engineering unit, who specialize in covert entry.

[74] Cst. Postolovic was the exhibit officer. Cpl. Auger, Cst. Cormier and Sgt. Rettie were also present. When the locker was opened, they saw a red and black Hockey Canada bag on wheels, a green backpack and two blue Rubbermaid tubs, stacked one on top of the other.

[75] The top Rubbermaid tub contained:

- 45 12-gauge shotgun shells;
- Two Steyr AUG magazines with 30 round capacity;
- 180 rounds (9 full boxes) of .223/5.56 ammunition;
- A sawed-off Winchester Cooey shotgun Model 840;
- A Wilkinson Arms Model Linda 9 mm Luger Carbine;
- 9 mm ammunition;
- Norinco 7.62x39R calibre ammunition (178 rounds)

[76] The bottom Rubbermaid tub contained 25 shotgun shells and two 9 mm magazines in addition to some cloth shopping bags.

[77] The Hockey Canada bag contained a Franchi SPAS 12 shotgun, a Steyr Aug assault rifle and a Norinco SKS carbine.

[78] The green and black backpack contained a Sterling submachine gun.

[79] Sgt. Rettie decided that the covert search would become an overt seizure, due to public safety concerns about the firearms.

[80] Cpl. Auger made the firearms safe for transport and gave them to Cst. Postolovic to log on the exhibit flow chart.

Further processing of the items seized

[81] Cst. Postolovic took the Rubbermaid containers, the backpack and the Hockey Canada bag to the Coquitlam detachment and secured them in an exhibit locker. On June 13, he examined the exhibits and determined which ones to send for forensic processing, both for the purpose of determining if any DNA or fingerprints were present on any exhibit and then for the firearms, ammunition and related devices to be examined.

- [82] One of the items Cst. Postolovic sent for forensic processing was a piece of paper with "Aleks Armor" and some information about ballistic vests printed on it. He found it in the bottom Rubbermaid tub but could not say with any certainty or precision where in the tub it was located, either at the storage locker or when it was removed during his examination on June 13. He had no note of its location. He agreed that the paper was folded and crumpled.
- [83] Mr. Zamora's DNA was not located on anything that was sent for testing.
- [84] Cpl. Howorth, an expert in forensic fingerprint identification, received a request on June 14 from Cst. Postolovic to examine some of the exhibits seized. The only finding of note he made was a single impression of Mr. Zamora's left index fingerprint on the back of a piece of paper with "Aleks Armor" on the front.
- [85] Cpl. Howorth could not say when the impression was left on the paper, whether the impression was made before the text was printed on the paper, or anything about the way the paper might have been handled which resulted in the impression being placed on it.

The firearms, ammunition and prohibited devices seized from the locker

- [86] Sgt. Grosspietsch (retired) was qualified to give expert opinion evidence in the legal classification, examination, mechanical assessment and testing of firearms, ammunition, firearm accessories, firearm magazines and any components thereof, and in the distribution, terminology and black market value of firearms in the Lower Mainland. He worked in NWEST (National Weapons Enforcement Support Team), an integrated police force supporting front line investigators. His specific tasks there included dealing with the grander nature of the domestic and international traffic of firearms. He has worked with US law enforcement agencies and Interpol.

The terminology used in Session 225

- [87] Sgt. Grosspietsch is familiar with coded language concerning firearms and gave his opinion about some of the terminology used in Session 225. Some of his opinion about the terminology used is reflected in the summary of the session and I will not repeat much of it here; however, a specific phrase, "big and quiet", stood out to him and marked more or less the beginning of the discussion about firearms in Session 225.
- [88] Sgt. Grosspietsch said that "big and quiet", in his experience, meant a larger calibre firearm with a suppresser, which is a device to reduce the muzzle blast of a firearm.
- [89] The word "AUG" was significant to Sgt. Grosspietsch. The AUG is the service weapon for the Austrian army. It is either automatic or semi-automatic. It came into use in about 1979. He has only ever dealt with two in the Lower Mainland.

- [90] Steyr is a firearms manufacturer. The Steyr AUG fires .223 calibre rounds, which are .22 calibre but with a longer cartridge, more propellant and more kinetic energy. Consequently, they are capable of doing a significant amount more damage than a .22 calibre round.
- [91] The AUG A3 was the first model manufactured, designed for the military market with a built-in 1.5 scope in the handle, giving it a unique appearance. Later models did not have an integrated scope. In Session 225, UM and Mr. Leach discussed the "weird scope" on the Steyr.
- [92] Sgt. Grosspietsch examined the Steyr AUG A3 seized by police from the storage locker. It was olive drab in colour, whereas most of them are black or sand coloured. To purchase a second-hand one legitimately in the United States would cost approximately \$4,500 USD. On the black market, sellers would mark up that price by three or four times.
- [93] UM referred to a "fully auto shotgun" in Session 225. Sgt. Grosspietsch examined a SPAS shotgun seized in the search of the storage locker, which matched that description. He has never seized one before and neither have his counterparts. It is unique because it was designed purely as a special purpose assault shotgun, built specifically for the military and law enforcement. It is designed to fire in automatic and semi-automatic. Its value would fall in the range of \$10,000-\$15,000 on the black market. It is the type of weapon one would see in movies such as Jurassic Park or the Terminator and it is a prohibited weapon in Canada. It is consistent with UM's characterization of it as "pretty fuckin' badass".
- [94] The gold firearm that UM referred to was likely a gold Desert Eagle, a large calibre semi-automatic handgun favoured by drug cartels. By handgun standards, it is very large. One could fit it in a knapsack but otherwise, it would be difficult to conceal. It would sell for over \$20,000.

Examination of the items seized

Sterling, Model MK4 (L2A3), calibre 9 mm - Count 1

- [95] The Sterling is a submachine gun (SMG). It is a prohibited weapon because, as originally designed and manufactured, it has the capacity of firing projectiles in rapid succession during one pressure of the trigger, whether or not it has been altered to fire one projectile with one application of pressure. The serial number was obliterated.
- [96] An associated ammunition magazine had a capacity of 35 rounds and 9 mm "WIN", Winchester, ammunition was also seized. The ammunition magazine is prohibited because it holds more than five rounds of 9 mm ammunition. The ammunition seized was test-fired from the Sterling.
- [97] On the black market, the Sterling is worth about \$10,000.

Franchi, Model SPAS 12, 12 gauge shotgun - Count 2

- [98] The SPAS functioned correctly as a pump action and semi-automatic shotgun, as designed. It is a prohibited weapon. Sgt. Grosspietsch test-fired it using ammunition from NWEST, which is why the Crown conceded that an acquittal should be entered on Count 10.
- [99] Sgt. Grosspietsch said this weapon is referred to as a "street sweeper". It is very heavy, about 4 kilograms, but can be fired with one hand because of a D link adapter. Its value on the black market is about \$10,000 because it is so unusual.

Steyr, Model AUG SA, calibre .223/5.56 - Count 3

- [100] The Steyr AUG is a semi-automatic rifle and functioned correctly as designed. It is a prohibited weapon. The .223 ammunition that was seized was fired from the Steyr (Count 9). The cartridge magazines that were seized are prohibited devices (Count 13).
- [101] As noted earlier, this is the Steyr AUG with the unique scope and is easily worth \$10,000 on the black market, in Sgt. Grosspietsch's opinion.

Norinco, Model SKS Type 56, calibre 7.62 x 39R - Count 6

- [102] This is a semi-automatic rifle which at the time of the offences before the court was a non-restricted weapon. Ammunition seized was test-fired from the Norinco. The cartridge is the same size as .308, which is fairly large and packs significant kinetic energy. It is relatively cheap to purchase on the black market, as is the ammunition. Its worth is about \$250.
- [103] Mr. Zamora was not the holder of a licence to possess such a firearm at the time the offences occurred (Count 12).

Cooey Model 840 12 gauge single shot shotgun - Count 4

- [104] The Cooey is a standard, break open, single shot shotgun. It was rendered prohibited when the barrel and handle were cut down. It was test-fired with ammunition from NWEST, leading the Crown to concede that an acquittal should be entered on Count 11.
- [105] Sgt. Grosspietsch estimated its value at about \$250.

Wilkinson Arms, Model Linda Carbine, calibre 9 mm - Count 5

- [106] This is a semi-automatic rifle which is a prohibited weapon because of its concealable size and because it was originally designed as a submachine pistol. A cartridge magazine and ammunition were also seized. The cartridge magazine is a prohibited device (Count 13). The ammunition was test-fired from this weapon (Count 8).
- [107] Sgt. Grosspietsch said that to his knowledge, this type of firearm has never been seized in Canada. He opined the value on the black market would be at least \$10,000, but since he has never had one like it he could not say for certain.

Two cartridge magazines, one with 30 round capacity for 7.62x39R ammunition and one with 44 round capacity for .223 calibre ammunition - Count 13.

[108] Both are prohibited devices due to their oversized capacity.

The Aleks Armor document

[109] Sgt. Grosspietsch said that the document appeared to relate to a ballistic panel. Ballistic panels are inserted into vests which are known colloquially as bulletproof vests. Their purchase and possession are governed by the Body Armour Control Act, S.B.C. 2009, c. 24.

[110] In British Columbia, you must possess a firearms licence or be employed with a security company in order to legally purchase or possess a bulletproof vest.

The DNA warrant - October 4, 2017

Constables Postolovic and Cormier

[111] On October 4, 2017, Cst. Postolovic and Cst. Cormier obtained access to the 27th floor of 1028 Barclay and waited for someone to leave unit 2705. They saw Mr. Zamora exit the unit and Cst. Cormier got in the elevator with him.

[112] Cst. Postolovic did not deal with the execution of the warrant. He drove to the Vancouver Police Department station where Mr. Zamora was taken, and viewed him as he was taken from the police van into the building.

[113] Cst. Cormier took the elevator with Mr. Zamora and alerted the other officers by radio when Mr. Zamora got out on the second floor. He knew it was Mr. Zamora because he had previously watched a video taken during surveillance showing a male talking to Leach near an Acura in the parking lot behind the church.

[114] On cross-examination, Cst. Cormier agreed that he knew unit 2705 was associated with Mr. Zamora and assumed he would be one of the people who could possibly come out.

Cst. Gordon Epp

[115] Cst. Epp worked on Project E-Nightlife in various capacities and assisted with executing the DNA warrant for Mr. Zamora. He went to 1028 Barclay at about 11:00 a.m. on October 4 and overheard Mr. Zamora had been detained. He went to the location where the detention had occurred and read Mr. Zamora his Charter rights, which was audio recorded. He also identified himself in photographs with the man his colleagues identified to him as Mr. Zamora.

[116] Once at the VPD station, Cst. Epp provided Mr. Zamora with privacy to speak with counsel and secured the DNA sample from him. He next saw Mr. Zamora on January 12, 2018 when he assisted with the arrest for the matters before the Court.

Sgt. Rettie

[117] Sgt. Rettie was present on October 4 for the execution of the DNA warrant. He learned from other officers that Mr. Zamora was taking the elevator to the main floor and shortly thereafter saw him come out of the rear door of the building. Cpl. Auger and Sgt. Rettie approached Mr. Zamora, identified themselves and advised him he was being detained for a DNA sample.

The arrest

[118] Mr. Zamora was arrested on January 12, 2018, based on information received from Children's Hospital. Cst. Ostapenko had alerted hospital staff days earlier that Mr. Zamora's girlfriend, who was about to give birth to their child, might be in danger due to Mr. Zamora's associations with known criminals. Cst. Ostapenko maintained he did so out of concern, but it appears the primary purpose of the alert was to provoke someone on staff to tell police when Mr. Zamora's girlfriend arrived at the hospital so that they could effect his arrest there.

[119] Cst. Postolovic attempted to interview Mr. Zamora at the Coquitlam RCMP detachment. Mr. Zamora refused to talk and repeatedly asked to be returned to his cell.

The video and still photograph evidence

Arrival at and departure from Public Storage associated to locker 2035

[120] There is no photographic or video evidence pre-dating the Acura's arrival at Public Storage. The first image of the Acura at Public Storage resulted from compliance with a production order for the company to produce "fob activity records" related to locker 2035. In one still, the Acura is entering the Public Storage lot at 7:42:20 p.m. In another still, at 7:42:54 p.m., an individual dressed in black wearing a white hat is photographed inside the Public Storage elevator as Mr. Leach is walking towards it. The passcode for locker 2035 was used on the elevator keypad at 7:43:20 p.m. and then again at the exit gate keypad at 7:59:44.

Cst. Ostapenko's photographs

[121] Cst. Ostapenko took four photographs of Leach and UM1 leaving Public Storage and getting into the Acura. The quality of the photographs is poor but Mr. Leach is identifiable by virtue of his white v-neck t-shirt. The other person is wearing a black t-shirt, black pants, white baseball hat and carrying a knapsack, consistent with earlier observations of UM1.

Cst. Postolovic and Cst. Wiley video

- [122] Cst. Postolovic took video of Leach and UM1 getting into the white Acura, but it appears he was at a different angle than Cst. Ostapenko. There is a truck blocking the view of the Acura. The notable aspect of this video is that the Acura leaves the parking lot without anything appearing to be extended out of the right rear window, contrary to a photo from the Public Storage system.
- [123] Cst. Wiley was at yet a different angle to Public Storage, and his video records a female identified as Ebrahimi through the open driver's side window as the Acura pulls into traffic.

Video and photos at the rear of 1028 Barclay

- [124] Cst. Postolovic started recording at 8:15, when someone opened the door from inside the Acura to allow UM2 entry. A minute later, at 8:16, UM2 gets out of the Acura and walks away. At 8:17, Cst. Postolovic records 2 minutes and 49 seconds of footage of Leach and UM1 talking outside the Acura. Leach is facing the camera, UM1 is perpendicular to the camera. He is wearing a black t-shirt, but no hat. He has the black backpack with gold zippers over his shoulder and he puts the lanyard around his neck. He is holding a bottle of water. At the two minute mark, UM1 faces the camera to spit water onto the ground. At 2 minutes and 35 seconds, the two men "fist bump" and UM1 walks away towards the rear door of 1028 Barclay.
- [125] Cst. Ostapenko photographed UM1 heading towards the rear of 1028 Barclay at 8:22 p.m. At 8:23:53 p.m. the building fob reader registered use of the fob assigned to suite 2705, which Mr. Zamora had rented since May 2013.
- [126] Video clips from the building's security system's camera in the back alley show the Acura, then at the 22 second mark, a male with the same appearance as UM1 can be seen pulling the lanyard off his neck. He is carrying a water bottle and has a black backpack with gold zippers. He taps the fob and gains entry to the building.

The Law

The burden of proof and the nature of a circumstantial case

- [127] The Crown bears the burden of proof, and must prove the charges beyond a reasonable doubt. The Crown's case against Mr. Zamora is circumstantial. The Crown must prove that the only reasonable or rational inference to be drawn from the proven facts is the guilt of the accused. Specifically, the Crown must prove that Mr. Zamora had possession in the legal sense of the firearms and devices described in the indictment, along with proof of the other elements of the offences alleged.

- [128] The Crown approached submissions as if this were a case of identity, but it is more accurate to describe it as one involving both identity and possession. Without proof that Mr. Zamora is UM on the intercept, the Crown cannot prove possession with intent to transfer. Visiting the storage locker, without more, proves nothing because there is no evidence of what went on there on June 7.
- [129] In *R. v. Pinch*, 2011 ONSC 5484, a case involving voice identification issues, Hill J. noted that while circumstantial evidence should not be examined on a piecemeal basis, where evidence in a criminal trial is the only evidence or is substantially all of the evidence of the Crown, it follows that such evidence must be proven beyond a reasonable doubt in order to support a conclusion of guilt:
- [78] It is essential that circumstantial evidence not be evaluated piece by piece but rather cumulatively in the context of all of the evidence at trial: [citations omitted].
- [79] Where evidence in a criminal trial "is the only evidence or constitutes substantially all of the evidence of the Crown, it follows that such evidence must be proven beyond a reasonable doubt in order to support a conclusion of guilt": [citations omitted].
- [80] Accordingly, where the evidence of voice identification and the related surveillance evidence is "pivotal to the case" such that a failure to prove it is the accused's voice in the relevant taperecorded calls means the Crown has no case against the accused, then it may properly be said, to use the language of a different case, that "[t]hese two areas of evidence - while not essential elements of the offences charged - were sufficiently central to the determination of the case that they were, for practical purposes, almost the same as essential elements": Quidley, at paras. 26, 35. Proof of the accused's voice in the calls attributed to him is indispensable to finding guilt.
- [130] In a similar vein, Schultes J. said in *R. v. Chen*, 2019 BCSC 2292:
- [122] Mr. Chen's counsel framed his overall submission within the analysis in Supreme Court of Canada in *R. v. Villaroman*, 2016 SCC 33, on the proper approach to be taken to a case based on circumstantial evidence. That decision made clear that when a trier of fact is considering whether the guilt of an accused has been proven by circumstantial evidence beyond a reasonable doubt, they should consider what are described as "other plausible theories and other reasonable possibilities" that are inconsistent with guilt. Crucially, those do not have to be inferences based on the evidence, as was previously expressed in some of the cases. They only need to be based on logic and experience applied to the evidence or the absence of evidence. In essence, the evidence relied on by the Crown should be such that "it excludes any other reasonable alternative".
- [123] A helpful gloss on this analysis was provided in *R. v. Knight*, 2019 ONSC 2443 at para. 20:
- ... it is not enough for the Crown to prove that guilt is the strongest reasonable inference. It must be the only reasonable inference.

The Elements of Possession

[131] Possession in law is a broader concept than physical possession. It is defined in s. 4(3) of the Criminal Code:

4(3) For the purposes of this Act,

- (a) a person has anything in his possession when he has it in his personal possession or knowingly
 - (i) has it in the actual possession or custody of another person, or
 - (ii) has it in any place, whether or not that place belongs to or is occupied by him, for the use or benefit of himself or of another person; and
- (b) where one of two or more persons, with the knowledge and consent of the rest, has anything in his custody or possession, it shall be deemed to be in the custody and possession of each and all of them.

[132] UM's remarks in Session 225 conveyed knowledge and control of the items in question. UM was clearly offering to sell guns to Mr. Leach. UM knew where they were and he described the characteristics of two of them, in particular the Steyr AUG.

Is Mr. Zamora UM1?

[133] The identification of Mr. Zamora as UM1 is dependent on a number of factors: police observations, video and still evidence recorded by the police during surveillance and obtained from Public Storage through a production order, as well as video evidence recorded at the rear of 1028 Barclay. Since my conclusion rests in part on my own view of the video and still evidence, I am cognizant of the principles in *R. v. Nikolovski*, [1996] 3 S.C.R. 1197 which provide that a videotape may be admissible and relevant evidence if it depicts the scene of a crime and has not been altered or changed [at para. 28]. Considerations that go to the weight placed upon video evidence include the degree of clarity and quality and the length of time during which the accused appears on it [at para. 29].

[134] The identification of Mr. Zamora as UM1 is not conclusively possible based solely on the police video and still evidence recorded before the conversation between UM1 and Mr. Leach outside the Acura, because it is not as clear as the evidence captured later, but there are several significant factors in the identification process which I have taken into account:

- UM1 was picked up outside 1028 Barclay, Mr. Zamora's residence;
- UM1's hairstyle and clothing remained consistent throughout police observations, with the exception of the ball cap and lanyard, which appear on UM1 at Public Storage;

- The ball cap is not observed after the stop at Public Storage, but UM1 is wearing a lanyard when he approaches the rear of 1028 Barclay and uses the keyless entry device associated with Mr. Zamora's suite to enter the building;

- Mr. Leach was readily distinguishable from UM1 in the videos and stills, even where their quality was poor, because he was wearing a white v-neck t-shirt.

[135] Once the Acura was back at 1028 Barclay, UM1 and Mr. Leach had a two minute conversation outside the car. The video of that conversation is much clearer than any of the video or stills taken at or sourced from Public Storage. It depicts UM1 wearing the same clothing as described since the time he was picked up. His profile is clearly visible and at one point he turns towards the camera. This video ends as UM1 heads towards the rear of 1028 Barclay.

[136] The images that are captured by 1028 Barclay's building's surveillance video are very clear and they are taken from very close range. They provide continuity between the conversation outside the Acura and the entry to 1028 Barclay. I viewed the building's video images in court and have reviewed them since. I formed the conclusion that UM1 in conversation with Mr. Leach outside the Acura is the same individual who uses a keyless entry access device to enter the building. That device was assigned to the unit Mr. Zamora rented.

[137] Further photographic evidence was obtained by police on October 4, when Mr. Zamora was detained for the purpose of obtaining DNA evidence from him. Those photographs are very clear and were taken very close up.

[138] Having reviewed the photographs from October 4, the building security photographs and the video of UM1 talking with Mr. Leach, along with the police surveillance evidence from the time the Acura arrived at 1028 Barclay, I am satisfied that Mr. Zamora is UM1.

[139] The defence maintains that the evidence does not establish non-stop continuity of surveillance on the Acura from 1028 Barclay to Public Storage and back. The Crown argued that the surveillance log was the same as a business record and if "VCB" was not noted, I could rely on it as proof of continuous surveillance.

[140] I cannot accept that the surveillance log is as accurate a document as Ms. Steele asserts. Cst. Wiley agreed on cross-examination that he initialed something that was erroneous and that mistakes are made. Accordingly, there may have been small gaps in the surveillance of the Acura, but the consistency in description of UM1 leads me to conclude that Mr. Zamora got in the Acura at 1028 Barclay, where he lived; got out at Public Storage; accompanied Mr. Leach into Public Storage; left Public Storage in the Acura; talked to Mr. Leach outside the Acura; and was captured on video as he entered the rear door of his residence.

- [141] To find that more than one individual dressed like Mr. Zamora and matching his description might have been swapped into or out of the Acura while out of police surveillance is speculative and fanciful.
- [142] The defence suggested that there may have been four people in the vehicle, because the dark tint on the windows of the Acura would obscure any view of the occupants. I am satisfied that Mr. Zamora was a constant in the vehicle and that it is unlikely there were four people in it, except when UM2 briefly sat in the back seat.
- [143] Mr. Jessop also referred to the image of something hanging out the back passenger side window of the Acura in the security photo. The defence suggested to several of the witnesses that it could have been an arm with a long sleeved t-shirt or a full sleeve tattoo, indicating someone else was in the back seat; however, this image was not apparent in the video taken by Cst. Wiley. It does not detract from the conclusion that Mr. Zamora was a constant in the vehicle and the individual who went into Public Storage with Mr. Leach.
- [144] Finally, being satisfied that Mr. Zamora was UM1, I am also satisfied that he made two phone calls from the Acura using Mr. Leach's phone. I accept the evidence of the officers familiar with Mr. Leach to the effect that it was not his voice on those calls. Therefore, as I have accepted that there were only two males in the vehicle under surveillance, I conclude the person speaking on Mr. Leach's phone can only be Mr. Zamora.

Is Mr. Zamora UM on Session 225?

The voice identification evidence

- [145] The Crown elicited evidence from several of the investigators concerning the identity of UM, based on his voice.

Sgt. Rettie

- [146] Sgt. Rettie listened to Session 225 and the two short phone calls made from Mr. Leach's phone on June 7. In his opinion, it is the same voice on all three and based on hearing Mr. Zamora's voice on October 4 at the arrest for the DNA warrant, he thinks it is Mr. Zamora.
- [147] On cross-examination, Sgt. Rettie agreed that he had not made any notes concerning the words uttered by Mr. Zamora on October 4. He agreed that the quality of the intercept that resulted in Session 225 was substantially poorer than the two cell phone calls. The intercept fades in and out, a radio was playing in the background and there was ambient noise. Sgt. Rettie did not prepare a TAR concerning his opinion that Mr. Zamora's voice was on Session 225 and he talked to other officers who reached a similar opinion, including Cst. Postolovic.

Cst. Postolovic

- [148] Cst. Postolovic spent approximately 30 minutes with Mr. Zamora on the day of the arrest, trying to obtain a warned statement from him. Mr. Zamora repeatedly asked to be returned to his cell. Cst. Postolovic listened to Session 225 before testifying in court as well as the two short phone conversations from Leach's phone. Cst. Postolovic believed that it was Mr. Zamora's voice on Session 225.
- [149] On cross-examination, Cst. Postolovic agreed that he did not know Mr. Zamora before June 7 and that the only times he was in Mr. Zamora's presence were October 4 and January 12. He was very familiar with Mr. Leach but had never heard Mr. Zamora's voice on an intercept before or after June 7. Cst. Postolovic agreed the quality of the audio for Session 225 was not good and that it faded in and out. He could not provide a specific date on which he was satisfied that Mr. Zamora's voice was on Session 225. Due to his misidentification of Mr. Zamora earlier in the investigation, the task of comparing audio was primarily left to other officers. He had no notes about the identification process. He knew other officers had made the match to Mr. Zamora because he prepared the Report to Crown Counsel.

Cst. Epp

- [150] Cst. Epp monitored Cst. Postolovic's attempt at taking a warned statement from Mr. Zamora on January 12, 2018 and he was present at the execution of the DNA warrant. He testified that he heard Mr. Zamora say a few words. In Cst. Epp's opinion, the voice in Session 225 was, more likely than not, the voice of Mr. Zamora.
- [151] On cross-examination, Cst. Epp said he was aware that other officers suspected it was Mr. Zamora's voice, and that he approached his analysis of the calls through that lens. He agreed the quality of the intercept was not good. He has never given voice identification evidence before and he agreed it was an inherently difficult process. Session 225 contained ambient noise and the sound level varied. Mr. Zamora said very few words to Cst. Epp during the DNA warrant process and the constable agreed that Mr. Zamora was emotional that day.

Cpl. Auger

- [152] Cpl. Auger listened to Session 225 and the two calls on Mr. Leach's phone as well as a known sample of Mr. Zamora's voice. He thought the voice on Session 225 and the two calls was Mr. Zamora's. He could not describe anything specific about the voice.
- [153] On cross-examination, Cpl. Auger said he received a request from the Crown on June 17 to review the audio. He was aware Sgt. Rettie thought it was Mr. Zamora. Cpl. Auger has no specific training or expertise in voice recognition and has never given opinion evidence about it before. He agreed that Session 225 was not of great quality and that there was ambient noise.

The law concerning voice identification evidence

[154] The jurisprudence has evolved to place voice identification evidence on a similar footing to eyewitness identification evidence in terms of its potential for unreliability.

[155] In *HMTQ v. Chan*, 2001 BCSC 1180, Dorgan J. observed that a person testifying that he or she identifies the voice recorded is doing so not as an expert in voice identification, but on the basis of familiarity with that voice. Expert evidence is not required to identify a voice. The reliability of the identification is a matter of weight: *R. v. Williams* (1995), 98 C.C.C. (3d) 160. Dorgan J. said:

[28] In *R. v. Rumbaut*, supra, at para. 47, the court notes the several methods by which a party to a private communication may be identified:

1. A lay witness familiar with the voice of the accused may express an opinion as to the identity of the parties in the communication even where the witness heard the tapes before listening to the person.
2. Self-identification on the recording itself (use of address or name that identifies the speaker).
3. Physical surveillance that coincides with the audio-recording to establish the identity of the speaker.
4. Direct evidence, such as a person testifying that he or she was with the accused at the time the accused was part of the communication.
5. Spectrographic analysis.

[156] Dorgan J. compiled a list of factors from the authorities, which would be of assistance to a trier of fact assessing the reliability of the witness's identification of an accused's voice [at para. 31]:

- a) Are there distinctive or distinguishing features of the voice: see *R. v. Reid*, *R. v. Savoy*, [2000] B.C.J. No. 695 (S.C.), *R. v. Gulstad*, [1994] Y.J. No. 44 (Terr. Ct.), *R. v. Latchana*, [1997] O.J. No. 2330 (G.D.)?
- b) Did the party to the communication identify him or herself?
- c) Did the party to the communication provide information that would allow the listener to identify him or her?
- d) Was there evidence of physical surveillance at the same time as the private communication to allow the speaker to be identified?
- e) Did the witness hear the voices under the same conditions, or was the emotional state different in each situation: *R. v. Reid*?

- f) What is the length of time during which the witness was able to hear the voice: R. v. Gulstad, R. v. Williams and R. v. Savoy?
- g) Was there any reason for the witness to focus on the voices?
- h) What was the condition of the witness when he or she heard the voices, alert or groggy: R. v. Gulstad?
- i) What was the length of time between the times the witness heard the voices: R. v. Gulstad?
- j) Were there any contradictions in the description given by the witness - did the witness testify that the accused spoke with an accent when he or she did not: R. v. Parsons, [1999] Y.J. No. 3 (Terr. Ct.), R. v. Narsing, [1996] A.J. No. 1263 (Prov. Ct.)?
- k) Did anything compromise the identification process - was the witness assisted in identifying the voice, or was the witness' opinion tainted by the expectation that the voice was that of the accused: R. v. Parsons, and R. v. Williams?
- l) Is the witness' opinion contradicted: R. v. Williams?

[32] As with visual identification, voice identification suffers from the frailty that a witness may simply be mistaken. This is not a question of the honesty or integrity of the witness. However, honesty and integrity of a witness cannot be relied upon to overcome weaknesses in identification evidence. As Lysyk J. noted in R. v. Savoy, [2000] B.C.J. No. 695 (S.C.): "What requires assessment is a risk that he may be mistaken."

See also R. v. Adam, 2006 BCSC 1884 at para. 139.

[157] Applying the factors summarized by Dorgan J. to the voice identification evidence, there were no distinctive or distinguishing features of the voice described by the officers or discernible to me as I listened to the recordings of UM and Mr. Zamora. The officers all agreed that the recording of Session 225 was of poor quality and tended to fade in and out. There was also background noise.

[158] UM did not identify himself or provide information that would allow the listener to identify him, except to the extent that he had firearms for sale and they were in a storage locker. UM offers to take Mr. Leach out to the storage locker later that night, but it is clear that UM and Mr. Leach anticipate further communication to make the arrangements for the evening. There is no evidence of any calls from Mr. Leach to UM, or to anyone else, between the end of Session 225 and the time Mr. Zamora is picked up. Nor is there any evidence from the audio intercept in Ms. Ebrahimi's Acura.

[159] UM offers to sell Mr. Leach firearms, and two of them in particular are rare and expensive on the black market. One would expect UM to show his wares to Mr. Leach, as offered in their conversation, particularly given that UM wanted money for them quickly so he could complete another likely illegal transaction. But that requires an assumption that their plans to meet that night came to fruition. There was an intervening six and one-half hours

between the conversation and the trip to the storage locker with no evidence of any further communication. It is entirely possible that Mr. Zamora was sent along to escort Mr. Leach to the storage locker in place of UM, given the lapse in time.

- [160] Mr. Zamora's fingerprint was found on a piece of paper in one of the boxes in the storage locker. At some point he obviously touched the paper, but there is no direct connection between the piece of paper and the identity of UM. In any event, the Public Storage records show that there was access to the locker several times in May, indicating others may have had access to it and knowledge of its contents consistent with the knowledge UM demonstrated.
- [161] There was no surveillance at the time of Session 225 to establish who was in the car with Mr. Leach. Nor was there any evidence concerning where Mr. Leach's Mercedes was at the time of the intercept. He made a reference to "DT", which I take to mean downtown Vancouver, but that was as specific as it got in terms of location.
- [162] None of the officers were familiar with Mr. Zamora's voice except through repeatedly listening to known recordings of him while he was in police custody. There was little audio when the DNA warrant was executed. When Mr. Zamora was arrested he repeatedly requested to be returned to his cell, making his utterances sound like a monotonous incantation. In both of those known instances Mr. Zamora was in custody and under stress, and therefore the context in which those utterances were captured was significantly different from that of the conversation captured in Session 225.
- [163] There were no contradictions in the description of the similarities between UM and Mr. Zamora's voices, but there was nothing noted by the officers that stood out to connect the two.
- [164] The officers candidly agreed that they were all aware that others held the opinion that the voice on Session 225 was Mr. Zamora's.
- [165] In the result, while the police witnesses honestly believe the voice on Session 225 is Mr. Zamora's, I cannot place much, if any, weight on their evidence.
- [166] It is open to the trier of fact to come to a conclusion about the identity of a voice, but the same circumstances that posed difficulties with the police identification apply to my assessment. The quality of Session 225 is poor and there is nothing about the way UM speaks that stands out to an untrained ear. Nor does the circumstantial evidence and Mr. Zamora's presence in the car and at Public Storage permit the conclusion that Mr. Zamora was UM as the only reasonable inference from the evidence.
- [167] The circumstances as a whole are obviously highly suspicious, but I am not satisfied beyond a reasonable doubt that Mr. Zamora was UM and therefore I am not satisfied he had the requisite knowledge and control over the firearms in the storage locker. Accordingly, I find Mr. Zamora not guilty.

"Duncan J."

The Honourable Madam Justice Duncan

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