

SUPREME COURT OF NOVA SCOTIA

Citation: *R. v. Newman* 2018 NSSC 113

Date: 20180511

Docket: CRH No. 470024

Registry: Halifax

Between:

Her Majesty the Queen

v.

Shawn Patrick Newman

Judge: The Honourable Justice Jamie Campbell

Heard: April 25, 26, and 27, 2018, in Halifax, Nova Scotia

Counsel: Kim McOnie, for the Crown
Luke Craggs, for the Defence

By the Court:

[1] Shawn Newman has been charged with robbery and assault with a weapon. A robbery took place at The Trove Boutique on the Herring Cove Road on February 23, 2017. The owner, Kye Dorey, was assaulted by somebody using what appeared to him to have been a wrench. The issue is whether the Crown has proven beyond a reasonable doubt that the person who did it was Shawn Newman.

[2] Two people gave direct evidence about Mr. Newman's alleged involvement. One of them was Kye Dorey and the other was Shawn Newman. Kye Dorey said that the person who robbed and assaulted him was a person whom he recognized, having seen him before in the community. He was later able to put a name to the face. Shawn Newman said that it was not him and that he was not even in the store on the day of the robbery and assault. They are two starkly different narratives. The case is not a contest between them.

The Evidence

[3] Kye Dorey says that on February 23, 2017 at around noon he was in his store. A person came in. The person was known to him. He had not met the guy and didn't know his name. But Mr. Dorey had seen him walk by the store with his girlfriend many times. He had seen him in places like Sobeys and Shoppers Drug Mart. He had seen the man standing outside his store when the man's girlfriend had come in to do business at the store. He "felt like" he knew the man. He didn't know him by name and had never spoken with him but nonetheless he "felt like" he knew him. His facial features were the same and his "body language" such as his gait, was the same. The person was wearing a white toque that Mr. Dorey said he typically wore, had on dark track pants, a black sweater that zippered at the neck, and black sunglasses. There was nothing unusual about that. Mr. Dorey recognized the man in the same way that people routinely recognize other people whom they have seen before. When Kye Dorey said that he "felt like" he knew the person he was expressing that sense a familiarity that one has with a person whom one sees regularly without knowing the person's name or anything about them, beyond their appearance.

[4] Mr. Dorey and the man engaged in some basic conversation that day as the man moved about the store. While the man was wearing sunglasses and a toque Mr. Dorey did not indicate that he was startled or concerned by the man's appearance. While the sweater was zipped up, and the glasses and hat would have

obscured some of the man's features he was not so obviously disguised as to have alarmed Mr. Dorey enough that he would comment on it. Mr. Dorey could not remember if the man was wearing gloves.

[5] The man told Mr. Dorey that the front step of the shop was icy. Mr. Dorey stepped out to put salt on the step. He said that took only about 25 seconds or so. When he got back the person was standing near the counter where he kept his cash. That was also close to some pictures that were for sale so it was not alarming. When Mr. Dorey turned around from stowing the salt away the person hit him with what appeared to be a wrench of some kind. He was struck in the face and head. Several blows landed as he struggled with his assailant. The man fell over a trunk near the counter and Mr. Dorey took the opportunity to run from the store. He went to a neighbouring store from where the police were called.

[6] The manager of the other shop was Claudette Frizzell. She helped Mr. Dorey when he arrived. He was bleeding profusely from a wound in his head. She administered what she described a rudimentary first aid. She called the police about 2 or 3 minutes after Mr. Dorey's arrival. The call was received by the police at 12:14 pm. Based on Ms. Frizzell's evidence, Mr. Dorey would have arrived in her store at 12:11 or 12:12 pm and the robbery would have occurred some moments before that. She said that she saw a man running up the street across from her shop, in the direction away from Herring Cove Road. Mr. Dorey saw him as well and identified him as the man who had robbed and assaulted him.

[7] The street that the man ran up is called either McMullen Street or McIntosh Street. Apparently, it is known by both names. Ms. Frizzell said that the person was of average build and was wearing a dark puffy jacket, dark athletic trousers with a white stripe, and a white baseball cap. She said she saw the "beak" of the cap as the man was in profile. She said that she had visual contact with the person for "maybe a second". The man observed by Claudette Frizzell, running up the street generally matches the description of the person whom Kye Dorey said had robbed and assaulted him. Ms. Frizzell said that the white headwear was a baseball style cap while Mr. Dorey said it was a toque. There is other evidence that points strongly to the conclusion that the robber was wearing a toque. Ms. Frizzell observed a stripe on the track pants. Mr. Dorey did not.

[8] When the police arrived, Mr. Dorey provided a description. The police tried to apprehend the robber. The K-9 unit picked up a scent in the area where Mr. Dorey and Ms. Frizzell said they had seen the man running. The dog handler found

what looked like a fresh footprint in the snow and the police service dog was able to follow the track to an area behind a nearby house at 196B Herring Cove Road. That house is about 100 metres from The Trove Boutique. While doing that the police service dog gave indications to the handler that an article had been found. In the snow, somewhat buried, there was a cash box, identified later as being the cash box from The Trove Boutique. In very close proximity was a pair of black gloves and a white toque. There was no DNA found on the gloves. On the white toque, there was sufficient DNA to allow for analysis. The DNA on the toque could not be said to be the DNA of Shawn Newman with scientific certainty. But the chance of it being the DNA of anyone other than Shawn Newman is infinitesimally small. For any practical purpose, the DNA was Shawn Newman's. In any event, Mr. Newman confirmed that the white toque had been his.

[9] A surveillance video from a convenience store that is very close to Mr. Newman's home, shows Mr. Newman buying cigarettes. The time of the video is 12:27pm, a few minutes after the robbery at The Trove Boutique. He is seen wearing dark track pants with a white stripe. He is wearing a blue shirt but as he is leaving the store, he puts on a heavy black pull over style sweater with a zipper at the neck. He has black sunglasses perched on his head. He is not shown with either a toque or black gloves. In the recording from the store, Shawn Newman is seen paying for his cigarettes using a quantity of change. Kye Dorey said that the cash box from The Trove Boutique contained some small bills and a fairly large number of one and two dollar coins. It is not clear from the surveillance video whether Mr. Newman was using those denominations or smaller coins.

[10] There was no evidence as to the exact distance between The Trove Boutique and the convenience store in which Mr. Newman was observed. The police drove the distance in about 15 seconds and estimated it to be about 500 metres. It's in the same neighbourhood.

[11] Shawn Newman's spouse Brittany Pearce testified at the trial. She said that she and Shawn Newman had gone out that morning to get their methadone at the Shoppers Drug Mart. They came home and she took a shower. While she was doing that, Shawn Newman went out to the convenience store to get some cigarettes. He was gone for only about 5 minutes or maybe a bit longer. That was the only time that he was out of the house around noon that day. Five minutes would not have given him enough time to have gone down Herring Cove Road to The Trove Boutique where the robbery took place. Ms. Pearce said that she was not a good judge of time or distance.

[12] Ms. Pearce said that she had done some business with The Trove Boutique. She had sold a Bench jacket and traded a purse for another purse. She said that she was not upset about the amount that she got for the jacket.

[13] Ms. Pearce identified the white toque as a toque she had given Shawn Newman at Christmas. She couldn't remember the year but in the context, she clearly meant that it was the Christmas of the year before, 2016. She thought it looked very good on him but he didn't like it at all. They regularly donated clothing to the charity boxes in the neighbourhood. A few days before January 23, 2017, she went into The Trove Boutique but they could not buy most of her items. She donated them to one of the bins outside the Guardian Pharmacy, close to The Trove Boutique. She described hats, mitts, coats, and a number of winter articles. When asked why they would be donating winter items in February she said that she and Shawn Newman regularly culled through the things they were not using and gave them away. She specifically recalled putting that white toque in a garbage bag and putting it with the donations. As it turns out, the charity boxes were full and they had to put their two garbage bags of items next to the donation bin.

[14] Shawn Newman testified. He agreed that the toque that had been found next to the stolen cash box had been his. He said that he didn't like toques or white clothing. He was adamant about that. That was why he gave the white toque away. But the toque had his DNA on it. He said that he had worn it once. But the toque looked worn and a bit stained. He said he had only worn it once, for a 16-hour long day, working at shoveling snow. That would explain why it had his DNA on it and looked well-worn even though he didn't like it.

[15] Mr. Newman said that he had gone with Brittany Pearce to Shoppers for their morning methadone. They came home and he went out to get cigarettes at the convenience store while she was in the shower. That was the only time he had been out alone that morning. Mr. Newman was asked about paying for the cigarettes using some quantity of change. He said that he did not like carrying change but put it in a jar to save it and took some out to specifically to pay for the cigarettes that he was going to buy.

[16] Mr. Newman said that he had not been in The Trove Boutique and absolutely had nothing to do with the robbery and assault that took place there.

[17] In his interview with the police on the day of the robbery, Mr. Newman agreed with the suggestion made to him by the police, that Brittany Pearce had been selling things to get money for diapers. The implication was that the couple

needed money. In his cross-examination in the trial, Mr. Newman was asked again about that. He said that even though they were not working the couple was not struggling financially. He explained the statement in the police interview by saying that he had told Brittany Pearce to tell the clerk at The Trove Boutique that they needed the money for diapers. He said that was just to push the clerk along in case he was trying to decide whether to buy the items. That is not an explanation for what he told the police. He specifically agreed with the interviewer that Ms. Pearce had in fact been selling items to get money that they needed. Both Mr. Newman and Ms. Pearce refused to accept any suggestion made to them that they were in financial need at the time of the robbery. Mr. Newman made it clear that in his view he had no motive to rob the store and assault Mr. Dorey.

[18] Mr. Newman acknowledged that Brittany Pearce was upset with The Trove Boutique because Mr. Dorey had given her so little for the \$700 Bench jacket that she sold them. He was clear that he believed that she was upset. Despite their very close relationship, Mr. Newman said that just because she was upset would not mean that he would be. Ms. Pearce said that she was not upset about the amount given for the Bench jacket.

Recognition Evidence

[19] The case against Mr. Newman involves recognition evidence from Kye Dorey supported by circumstantial evidence.

[20] A very recent decision of the Court of Appeal in *R. v. Downey*¹ addresses the distinction between identification and recognition. Identification evidence is the kind of evidence given by an eyewitness who is a stranger to the accused person. The witness later testifies that the person on trial is the person who was observed at the scene of the crime. The eyewitness reporting is then sometimes confirmed by pointing out the individual in a police lineup. That is distinguished from the evidence that is offered by a witness who is “familiar” with the accused. The witness can recognize the voice or appearance of the accused based on familiarity and interaction with one another. Recognition evidence is generally more reliable and will carry more weight than identification evidence.

[21] The Court of Appeal has written about the problems with eyewitness testimony and the false sense of reliability that it sometimes produces. The dangers of identification evidence are present especially when the witness appears both

¹ 2018 NSCA 33

honest and convincing. Fact finders must be satisfied both as to the credibility and the reliability of eyewitness testimony. In *Downey* the court noted that the witness knew all four intruders into her home based on her contact and relationships with each one of them in high school. There is no requirement for a witness to be able to point out identifying features or idiosyncrasies that would differentiate a person from a normal crowd. People have different abilities with regard to identifying and articulating features of people who they know, recognize and distinguish on a regular basis. When a witness has little acquaintance with the accused his recognition of the person may be of little value unless he can explain the basis for it in some detail. When the person has a long and close familiarity with the person, a bare conclusory statement may still have substantial value. The Court stated the following about the factors to be considered:

To summarize then, the importance of articulating identifiable features or idiosyncrasies will vary depending upon the level of familiarity the witness has with the person to be identified. In some cases a witness may be sufficiently familiar with the person, so as to render the identification by the witness of any unique identifiable feature unnecessary, in order for a court to properly assign substantial value to that evidence. Common sense and one's life experience reminds us that people have vastly different abilities when it comes to identifying or expressing the particular features of people they know and recognize, through their contact with one another. Where contact is fleeting, a person's recognition evidence may be of little value unless the witness can explain its basis in some detail. On the other hand, a simply conclusory recognition without additional elaboration of any points of distinctiveness, may still be of highly probative value in the case of a person who is closely familiar with the accused.²

[22] A judge has to assess of the reliability of a witness' statement that he or she can identify or recognize another person. It is not enough that the witness believes what he or she has said. Firmly convinced and credible people are often wrong. Credibility is not a substitute for reliability. Reliability can be assessed by examining at least four variables. One of those is the opportunity for observation and with respect to the incident giving rise to the purported recognition or identification. Another involves the ability of the witness to recall that incident. Another involves the degree of familiarity between the witness and the person whom they are purporting to recognize or identify. And the fourth is the extent to which the person purporting to identify another can articulate identifying features.

² *Downey*, at para. 69

[23] Each of those variables or factors can be described as a point along a continuum. The opportunity to observe may range from a glimpse in poor lighting of a partially obscured face to some minutes of interaction. The ability of the witness to recall the incident may range from an alcohol impaired person's vague memory of the incident itself beyond the identification or recognition to a reliable description of the details surrounding incident. The degree of familiarity may be anywhere from an intimate friendship or close family connection to being an acquaintance to being a stranger. The description may range from a simple conclusory statement saying who the person was, to providing a description of clothing to a detailed description of the characteristics used to allow for the identification or recognition. All those things must be considered in assessing the reliability of the evidence.

[24] Eyewitness identification or recognition is far from infallible. People make mistakes even when they believe that they've recognized a friend on the street. Yet people are also able to recognize others in a wide variety of circumstances.

[25] At the time of the robbery Mr. Dorey did not have only a moment with the robber. He was in the store with the person for some minutes and engaged in some conversation with the robber before the robbery took place. He was able to get a good look at the person who robbed him. While some of his features were obscured, the person in the shop was not wearing a disguise. Mr. Dorey was not relying on voice or body type or clothing typically worn by the person. He saw the person who robbed him close-up and for some time.

[26] Mr. Dorey's recall of the incident was not impaired by anything including the injury that he sustained. He was not overcome by the shock of what had happened to him. He provided details of how the robber moved around the shop. He was able to remember what the person was wearing but appeared not fill in the gaps in his memory. He could not remember whether the robber was wearing gloves and he told that to the police.

[27] Kye Dorey was not a friend nor even an acquaintance of Shawn Newman. They had never spoken to each other before the day of the robbery. They had never met or been introduced. But they were not strangers in the sense that Kye Dorey had never seen this person before. Mr. Dorey said that the person who robbed him was the guy who walked by his store at least a couple of times a day. He was the guy whose girlfriend had come in a few times to sell some things. And, indeed, Shawn Newman was a person who walked by the store at least twice a day. Kye

Dorey said that he had seen Shawn Newman around the community in the drugstore or at the grocery store. He was not known by name but he was sufficiently familiar with Mr. Newman to be able to recognize him when he saw him.

[28] Kye Dorey's description of the robber was not merely conclusory. He gave a general description of the height and weight of the person. He mentioned a very light reddish complexion. He described the clothing the person was wearing. He did not simply say that it was the guy with the girlfriend and the baby.

[29] That evidence still has to be treated carefully. There is always a risk that once the person is identified the characteristics of that person become part of the witness' description, perhaps entirely unintentionally. Seeing the white toque might cause Kye Dorey to rush to the conclusion that the person wearing the toque was the person who he had seen before typically wearing the same white toque. The description of the robber could then unintentionally be made to fit with the description of the person whom he had seen on the street wearing the white toque.

[30] Kye Dorey did not simply say the robber was wearing a white toque. He provided a physical description. He recognized the person who robbed him and told the police immediately who it was, without providing a name, within the hour of the robbery occurring. That still carries the risk that the white toque prompted a recollection of the other features of the person who usually wore that toque. But Kye Dorey also described the other clothing that the person was wearing. He provided a description that was accurate in terms of what Mr. Newman happened to be wearing in the moments after the robbery took place. Mr. Newman said that he just put on the dark track pants to run out to get the cigarettes. He changed out of those pants later in the day before he was arrested. Ms. Pearce said that Mr. Newman always wears jeans. Had Mr. Newman not been in the store, Mr. Dorey would have to have made a remarkably accurate guess about what he had been wearing at that time. He did not describe Mr. Newman's typical clothes, but the clothes he was wearing very close to the time that the robbery took place.

[31] Kye Dorey's recognition of Mr. Newman is reliable.

Circumstantial Evidence

[32] Further, the circumstantial case against Mr. Newman supports Kye Dorey's recognition evidence.

[33] When the robber ran away, he dropped or stashed the store's cash box in a snowbank near 196B Herring Cove Road. That is about 100 metres from The Trove Boutique. The cash box had no money left in it. It was found near a pair of black gloves and the white toque that had been Mr. Newman's. The person who robbed the store and assaulted Kye Dorey had been wearing not only a white toque, but Shawn Newman's white toque.

[34] The surveillance video from a convenience store shows Mr. Newman paying for cigarettes at least in part with change. He is wearing a black zipper necked sweater, dark track pants with a stripe, and has black sunglasses. That matches not only what Mr. Dorey said the robber was wearing but is largely consistent with what Ms. Frizzell observed as the robber who fled. The time that Shawn Newman arrived in the convenience store was about 12:26 pm or about 12 minutes after the call was received by the police about the robbery. The robbery had taken place just a few minutes before that. The person who committed the robbery ran at least part of the distance to 196B Herring Cove Road. A person could walk the remaining distance of roughly 400 meters easily within that time.

[35] Kye Dorey said that Shawn Newman robbed and assaulted him. The only other explanation would require a remarkable confluence of coincidences. A person would have to have got Mr. Newman's white toque from the garbage bag placed next to but not in the donation bin at the Guardian Pharmacy. The robber would have to have obtained the white toque either directly or from someone else. He would have to have been a man, as was described by both Ms. Frizzell and Mr. Dorey. The man would have to have been wearing a black zipper neck sweater, dark track pants and black sunglasses, just like Shawn Newman was wearing minutes after the robbery and a short distance away.

[36] Mr. Newman's counsel acknowledged that this would be strange turn of events. Strange things happen. The test is not whether it is at all possible that such a strange turn of events could take place but whether that strange turn of events could reasonably have happened. It need not be as reasonable as the inference that Shawn Newman was the robber. It just has to be reasonable.

Circumstantial Evidence and Eyewitness Evidence Considered Together

[37] There are two versions of events. The case is not a contest to determine which of those narratives is more likely to be true or which inference from the evidence is the more reasonable. The legal onus is on the Crown to prove the case beyond a reasonable doubt. Mr. Newman should be found not guilty if his evidence

raises a reasonable doubt. That is so even if it is less worthy of belief than Kye Dorey's version of events. It is so even if only some of Mr. Newman's evidence is believed. He should be found not guilty even if his own evidence is not believed at all and does not raise a reasonable doubt but reasonable doubt can be found in any of the other evidence or in the insufficiency or absence of evidence.

[38] Mr. Newman denied his involvement in the robbery. I do not accept his evidence as reliable or credible. The denial does not raise a reasonable doubt as to his guilt. Ms. Pearce's evidence that he had been out of the apartment for a period that was not long enough to allow him to get to The Trove Boutique and back was not reliable. It does not raise a reasonable doubt as to Shawn Newman's guilt.

[39] The Crown does not have to prove motive. It is not appropriate to speculate as to what it might have been.

[40] Strange things do happen. But the number of strange things required to have happened here to justify an inference other than guilt makes that inference unreasonable. Kye Dorey would have to have been wrong in his identification and there is nothing to suggest that he was. The robber would have to have obtained Shawn Newman's toque in the few days between it being discarded and the robbery. The robber would have to have looked like Shawn Newman. The robber would have to have been wearing dark track pants and a dark zipper necked sweater and had black sunglasses just like Mr. Newman had minutes later when he showed up at a convenience store. That person, looking like Shawn Newman and dressed like Shawn Newman was dressed at that time on that day, would have to have decided to rob a shop that Shawn Newman walked by daily, at a time when Shawn Newman himself was within easy walking distance.

[41] The evidence does not permit any reasonable inference other than Mr. Newman's guilt.

[42] I find Shawn Newman guilty of robbery and guilty of assault with a weapon.

Campbell, J.