CITATION: R. v. [redacted] 2013 ONSC 2349
COURT FILE NO.: 12-40000535-0000
DATE: 20130423

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
HER MAJESTY THE QUEEN	)	*Anna Stanford*, for the Crown
	)	
– and –	)	
	)	
[redacted] and [redacted]	)	*Andrew Stastny*, for the Defendant, [redacted]
[redacted]	)	
	)	
Defendants	)	*John Scandiffio* and *Marsha Kideckel*, for the Defendant, [redacted]
	)	
	)	**HEARD:**
	)	February 19-22, 25-28, and March 1, 2013

SPIES J.

Overview

[1] The defendants, [redacted] and [redacted] are both charged with robbing [redacted] and her former boyfriend, [redacted] while armed with a firearm, in [redacted] home at [redacted], in the City of Toronto, on March 18, 2012, contrary to section 344 of the *Criminal Code*. It is alleged that [redacted] and two other youth offenders who participated in the robbery each had firearms. Although there is no dispute that [redacted] was not armed, the position of the Crown is that he is a party to the robbery and the use of a firearm. The defendants are also both charged with confining [redacted] without lawful authority during the robbery contrary to section 279(2) of the *Criminal Code*. In addition, [redacted] is charged with uttering a threat to [redacted] to cause death to her on March 19, 2012, contrary to section 264.1 of the *Criminal Code*. The defendants were arraigned on other charges that the Crown withdrew at the conclusion of the evidence. The defendants re-elected trial by judge alone and pleaded not guilty to the charges.

[2] At the outset of the trial Ms. Stanford brought an application for an order permitting her to rely on the statement given by [redacted] to police should he choose to testify. She also brought an application to introduce prior discreditable conduct and post-offence conduct with respect to [redacted] These applications were initially contested by Mr. Scandiffio. He also

contested the continuity of the two cell phones that [redacted] had in his possession when he was arrested, one of which is material to the threatening charge. With the agreement of all counsel the trial proceeded by way of a *voir dire* on all of these issues which was blended with the trial. It was agreed that the defendants could call evidence on the *voir dire* and that they would not be put to their election to call a defence until after all of the issues on the *voir dire* were decided.

[3] After all of the evidence was heard on the *voir dire*, which included all of the evidence for the Crown's case on the merits, Mr. Scandiffio conceded the voluntariness of the statement made by [redacted] to police and that there was no longer any issue with respect to continuity of the cell phones. After argument on the other Crown applications, I ruled that the evidence of prior discreditable conduct given by [redacted] of a prior incident when [redacted] is alleged to have been showing off a gun was admissible solely to the issue of whether or not the gun that he is alleged to have had during the robbery was real. After argument began on the post-offence conduct application, Mr. Scandiffio conceded that application. As such I ruled that the Crown could rely on the evidence of the threats alleged to have been made by [redacted] to [redacted] as set out in Count 8 in support of Counts 1 and 2 which allege that [redacted] robbed [redacted] and [redacted] while armed with a firearm. In my view this evidence was admissible on a number of bases including his consciousness of guilt. Arguably the person who made the threatening calls participated in the robbery as otherwise there would be no reason for that person to make the threats that are alleged.

[4] Once all of the issues with respect to the *voir dire* had been dealt with, the defendants were put to their election. Mr. Stastny elected not to call any further evidence on behalf of Mr. [redacted] Mr. Scandiffio called [redacted]

The Issues

[5] There was no challenge to the evidence of [redacted] that she and [redacted] were robbed in her home on March 18, 2012 and in fact Mr. Stastny conceded that [redacted] was at Ms. Peters' house on that date and that he participated in a robbery. It was his position, however, that the firearms used were imitation firearms, that [redacted] was guilty only of robbery and that the Crown had not established his guilt as a party to either the use of firearms or the charges of unlawful confinement.

[6] [redacted] denied participating in any robbery of [redacted] and [redacted] and took the position that [redacted] was either mistaken or lying when she picked him from a photo line-up. It is [redacted] position that she knows [redacted] by the nickname [redacted] Although [redacted] admits knowing [redacted] he denies being known as [redacted] using that name. [redacted] also denies making any threats to [redacted] and testified that the phones found in his possession belonged to someone with the nickname Kid.

The Undisputed Evidence and Preliminary Findings of Fact

Background

[7] Ms. Peters had been living in a townhouse at [redacted] since June 1, 2011. In a map drawn by Officer Christopher Bennoch, [redacted] is in the middle of a complex which consists of a row of townhouses which start at #83, which is by a path to [redacted], to the west of #87 and ends with #93, to the east of #87, which also has a path to the park adjacent to it. In other words, #87 is in the middle of this complex. All the townhouses in this building face south towards a parking lot and back onto the park.

[8] [redacted] is one of a number of courts that run off [redacted] on the east side of [redacted], north of [redacted] To the south of [redacted] is [redacted] On the west side of [redacted] both [redacted] and [redacted] run off [redacted] The area is known as [redacted] It was described by one of the officers as an "at risk area" that police pay special attention to.

[9] At the time in question, according to [redacted] [redacted] spent time during the day at her home but did not live there; he would go to his home at night. [redacted] had two young children at the time; a daughter who was almost three years old and a four year old boy. Their father is [redacted]

[10] [redacted] testified that she recognized the four men that robbed her and [redacted] She knows T.F. as T.F. and this is his government name. He is T.F. who was called as a witness by Mr. Stastny. He pleaded guilty to his participation in the robbery in Youth Court. [redacted] testified that she knows another of the men as R. and that his first name is I.G.; she did not know his last name. I understand that he is I.G. and that he was also dealt with in Youth Court but no evidence was called as to the outcome of his matter or whether or not he was in fact a participant in the robbery. [redacted] testified that she knows the other two men as [redacted] She did not know their government names. Although there is an issue as to whether or not [redacted] used the nickname [redacted] the evidence is clear that he is the one that [redacted] identified as [redacted] As already stated, although the position of the Crown is that [redacted] testified that [redacted] is not his nickname.

[11] [redacted] and [redacted] broke up in September 2012. Although [redacted] testified at the preliminary inquiry, [redacted] said that she hadn't been able to find him for the trial. The Defence did not suggest that any inferences ought to be drawn from the fact that [redacted] did not testify at the trial.

The Relationship between [redacted] and the Defendants

[12] [redacted] testified that the four men she alleges robbed her were known to her because these four men and others came to her home regularly to smoke marihuana that they had purchased elsewhere. [redacted] said that [redacted] was dating one of her friends and that was why

he came. Once he started coming then "everyone" came. She testified that they came whenever they pleased without her permission, they would stay as long as they wanted, they would smoke weed and drink alcohol at the front of her house, in the basement and the living room, that they were not her friends and she did not "chill" with them. She alleged that they would come and take over her house and be disrespectful to her. [redacted] did not like this and would ask them to leave but they would "disrespect me" and would not leave. The men told her that she wasn't from the [redacted] a reference to the [redacted] area and that "if we feel like chilling here we will and if we feel like leaving we will". As I will come to, I find it more likely that people started coming to [redacted] home to buy marihuana from [redacted] and perhaps later Mr. [redacted] and that it was understood that they could then smoke it in the home.

[13] [redacted] identified both [redacted] while they were sitting in the prisoner's dock. She testified that she has known [redacted] since September 2011; that he used to come to her house every day for one and a half months straight to smoke weed and drink alcohol. [redacted] testified that she knows [redacted] the same way as she knows [redacted] although he did not come as often as [redacted] He was a "friend of a friend" and he started coming to her house about one to one and a half weeks later than [redacted]. He would be there a couple of days a week starting in November 2011. [redacted] testified that she did not see R. or T.F. as much as [redacted] According to [redacted] these men stopped coming about a week or so before Christmas until the end of January. They then started coming back but not as often.

[14] [redacted] testified that [redacted] was not a friend of hers or [redacted]. They wouldn't text each other or socialize. She knew him only as [redacted] The name [redacted] meant nothing to her; she had never heard that name until her first court appearance.

[15] [redacted] estimated that she had seen [redacted] over 20 times before the robbery. He would sometimes chill at the house for seven consecutive days and other times just one or two out of seven. She thought it was five times out of seven on average but testified that he was not coming as often in December 2011 and January 2012 and thereafter.

[16] [redacted] testified that she would sell these men Century Sams from time to time but that they would buy their marihuana elsewhere. She eventually got [redacted] to put a stop to these men coming to her home at the end of October, early November 2011, because they were not listening to her. I presume this is why she said that [redacted] and the others did not come as often in December 2011 and thereafter.

The Robbery

[17] [redacted] testified that on March 18, 2012, a little after 5 p.m., she was in her kitchen cooking dinner. Her son was sleeping on an air mattress in the living room. Her daughter and Mr. [redacted] were watching television in the living room.

[18] [redacted] heard a knock at the front door. She is not tall enough to see through the peephole and so she asked who it was. The person at the door identified himself as [redacted]. Ms. [redacted] testified that she recognized his voice and went to open the door. By this time [redacted] was up and coming to see who it was. By the time he reached her, she had already opened the door. [redacted] testified that she opened the door for [redacted] because she assumed he was coming to ask for a "blunt".[1] She testified she did not have any blunts and then corrected herself to say that she believed [redacted] had only come for a Century Sam. [redacted] testified that she would sell them individually from time to time.

[19] At this point [redacted] and three other men pushed their way into the house. According to [redacted] those men were known to her as [redacted], R. and T.F.. [redacted] said that she was pushed out of the way. Once inside she saw that three of the men, namely [redacted], R. and T.F., had pulled out guns. [redacted] testified that the guns were not pointed directly at anyone but were held in a position to shoot. She believed them to be real.

[20] According to [redacted]. then asked her where her baby father was; a reference to [redacted] She told him that he was not there. At this point [redacted] alleges that [redacted] slapped [redacted] in the face and told them both to get into the living room. According to Ms. [redacted] told [redacted] "You can't hustle on our block" or "Why are you hustling?" She was not sure of the exact words.

[21] [redacted] testified that R. and [redacted] were going through her handbag and the cupboards in the kitchen. [redacted] and T.F. then ordered her and [redacted] into the basement. Her daughter was crying and [redacted] told [redacted] she was not going to the basement. She testified that T.F. then pointed his gun towards her daughter and told her to "shut the fuck up". [redacted] testified that her son, who was sleeping in the living room, slept through the robbery. She did not suggest that any of the men tried to get him up or that they spoke to him.

[22] [redacted] testified that she kept Century Sam cigars in a cupboard in the kitchen along with some change. She also had a scale there as she smoked marihuana and would weigh it when she bought it to be sure that she got what she bought.

[23] [redacted] testified that [redacted] and T.F. brought [redacted] to the basement. She believed R. was in the basement at this point too. [redacted] was still in the kitchen. [redacted] then picked up her daughter and ran out of the house. As she left the house she said she was going to call police. She testified that the men had been in her house about five minutes by this time. [redacted] said

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[1] On the evidence a "blunt" is a cigarette made from using the wrapper from a cheap cigar; in this case Century Sams, and adding marihuana.

that she ran out the front door and ran knocking on neighbours' doors and ended up at #89 Bagot and used her neighbour's phone to call 911.

[24] [redacted] testified that at the time of the robbery each of the men was wearing black gloves. She said [redacted] was wearing blue jeans, a navy blue silk jacket, but no hat. [redacted] was wearing a fitted cap. R. was wearing a red and black jacket, black pants, a red polo t-shirt, but no hat. T.F. was wearing a black and grey toque, a black hoodie, sweatpants, and black Nike Air Max running shoes. Each of the men had a gun save for [redacted].

[25] In cross-examination Ms. Kideckel reviewed the very detailed descriptions of the men that [redacted] gave to police in her statement of March 20, 2012. With respect to [redacted] she said that he was 18, has a space between his two upper front teeth, that he has dark skin, is six feet tall and skinny, that he is Somolian, that his hair is "semi African" in that it is curly but not too curly. She confirmed that she told the police the truth and that the event was fresh in her memory at the time.

[26] [redacted] denied having any guns in her house at the time of the robbery. She said there was no marihuana in the house when the kids were home. [redacted] testified that [redacted] did not sell drugs out of her house. I will come back to this.

[27] [redacted] testified that the men took [redacted] wallet which had all of her and her children's identification in it, her cell phone, [redacted] cell phone and her kitchen scale. When she went back to her home the next day she realized that her camera was gone as well.

[28] The photographs taken by the Scenes of Crime Officer Bennoch before 9 p.m. on March 18, 2012 were introduced into evidence. They show kitchen cupboard doors open and cushions on the couch in the living room on end, consistent with the rooms being ransacked. He dusted the townhouse for fingerprints but did not obtain any results apart from items he seized. I heard no evidence about those results.

The Alleged Firearms

[29] [redacted] described [redacted]'s gun as being all black, R.'s gun as silver or gold with black on the handle grip and T.F.'s gun as small; the size of her palm. She believed them to be real; they were all made of metal and none looked fake. Later in her evidence she testified that she thought the guns were real because "they walk around talking about having guns". Apart from one incident involving [redacted] she gave no particulars about this.

[30] [redacted] testified that she believed R.'s gun was a 9 mm or 40 calibre gun but this was based on what she has seen in the movies so it is clearly not reliable. [redacted] testified that she had seen guns before but admitted that she has no experience with guns. [redacted] has never held or shot a gun. She has never seen a gun being shot. She has no experience with imitation

guns although she said she had seen a fake BB gun before. She did not explain how she knew it was fake.

[31] As part of the prior discreditable conduct application [redacted] testified that [redacted] had walked around the neighbourhood bragging and showing off his new gun. She couldn't remember when but thought it was probably a couple of months before the robbery. She was in the kitchen and [redacted] was standing sideways to her, between the screen and her front door which was open. There were a few people there; she couldn't say how many or who. She testified that he said "look at my new ting". In re-examination when she was asked what he said again, she added for the first time that he said "it has an extended clip" and said that this was a direct quote. She did not hold or touch this gun. [redacted] admitted that this gun is not the same gun that she saw [redacted] with at the time of the robbery.

[32] In cross-examination by Mr. Stastny, [redacted] testified for the first time that when Mr. [redacted] put an end to [redacted] and the others coming to her house to smoke weed in November 2011 that [redacted] threatened [redacted], in her presence, that he was going to shoot him in the face.

The 911 Call

[33] The 911 call made by [redacted] was introduced into evidence. [redacted] sounded very hysterical on that call and could barely speak. She told the 911 operator that she knew the four guys and knew their names and that they were between 15 and 18 years old. She named [redacted] first, then [redacted] and then changed topics and started screaming, presumably because she saw the men now outside the townhouse. She can be heard yelling at them that they should bring her phone and that she had called the police on them. The 911 operator told her to stay back. She told the operator that they had her phone and that her mother had no way to get in contact with her. She then told the operator that the men were T.F., I.G. and [redacted], that they were wearing all black and that they had come to the house to rob her boyfriend. She was hysterical and crying throughout the call while the operator kept her on the line. It was difficult to tell what she was saying for parts of the call. She told the operator that they had put a gun to her three year old's head, that they had gloves on, that she didn't know their last names and that although some did not live in the neighbourhood they would come to the neighbourhood, that she had seen them in the neighbourhood before, that she had just moved there and that she would say "hi" to them and had seen them walk past her house. [redacted] also told the 911 operator that she had never chilled with them. When asked about this statement in cross-examination [redacted] said that she meant she did not hang out with them and said that she told the 911 operator that she knew [redacted] "through" the neighbourhood not that he lived in the neighbourhood.

[34] [redacted] testified at trial that she did not see the men leave her house but she saw them at the end of [redacted] When she saw them after they left her home, they were running towards [redacted] Three were on foot and one was on a bike. (I note that [redacted] testified that he has a cousin who lives in [redacted].) [redacted] then came out of the house with her son. She explained that she was concerned about her phone because her mother had just had a

stroke and her phone was the only way her mother could call her. That is why she kept yelling at the men about the fact that they had taken her phone.

The Police Investigation

[35] A surveillance tape from a camera located on the corner of number [redacted] facing the parking lot was introduced through Officer Bennoch. He was not able to testify as to when it was taken, but that evidence was given by [redacted] who identified herself on the surveillance tape walking on the sidewalk outside her neighbour's house while she was on the phone to the 911 operator following the robbery. This video is about 20 minutes long and it is clear that it starts before the robbery and continues until the police arrive in response to the 911 call.

[36] What is very significant is that about three minutes into the video, you can see four men talking together just east of her townhouse building. One is on a bicycle and the description of the four, to the extent you can see, matches [redacted] description of the four robbers save for one exception. When [redacted] was shown the surveillance video she testified that now that she saw the video, [redacted] was wearing the fitted baseball cap, not [redacted] She identified which person [redacted] was on the video. As I will come to this evidence was never specifically denied by Mr. [redacted]

[37] The officer in charge, D.C. James McDonald, testified that he did not try to obtain any records with respect to the Samsung phone seized from [redacted] until he was asked to do so by the Crown just before Christmas 2012. He said that in his experience he has always been able to go back to these records but in this case he hit a wall. He was looking for a record that would show incoming and outgoing calls, the times of text messages and possibly the actual texts.

[38] D.C. Hawkins was one of the officers who took the first statement from [redacted] He was also one of the officers who picked her up on March 20, 2012 to bring her into the station for a further photo line-up. During the course of the drive to the station [redacted] told D.C. Hawkins and his escort about threats that she had received. She gave D.C. Hawkins a cell phone number that she said belonged to [redacted] This evidence was confirmed by [redacted] although she no longer recalled the number on the cell phone that was used to make the threats. When D.C. Hawkins dialed this number shortly thereafter, one of the cell phones seized from [redacted] which was in the office in a property bag, rang. He passed this information on to Officer Stinson.

[39] [redacted] refused to talk to the 911 operator or to cooperate with the police or give a statement. Officer Daniel Janeczko, who responded to a call to attend [redacted] spoke to [redacted] He observed that [redacted] forehead was injured and a bottle was found on the stairs to the basement as was one glove.

The First Photo Line-up

[40] There was no issue raised with respect to the first set of three photo line-ups conducted with [redacted] by Detective Palermo on March 18, 2012 at about 9 p.m. She identified T.F. as

"this is one of the guys who entered my house. I know him as "T.F.". She identified a photo that is admitted to be of [redacted] as one of the guys who entered her house that she knows as [redacted] As for R.; I.G., she identified his photograph as "I know this guy as I.G. aka R.. This is one of the guys who entered my house." She was not shown a photo line-up with a picture of Mr. [redacted]

The Alleged Threats to [redacted]

[41] [redacted] testified that [redacted] transferred his cell phone number over to another cell phone; a Public Mobile phone. On March 19, 2012 an unfamiliar telephone number rang this phone and they didn't answer it. They could see the number on the caller ID of the phone. She believes that just before dinner on that day she answered the phone and said "hello". The person on the other end said "you fucking rat – don't come to [redacted] [a short form for the [redacted] a reference to [redacted]] – I'm going to fly you". [redacted] testified that the statement "I'm going to fly you" meant to her that he was going to kill her or do harm to her. She testified that although the person did not identify himself, she recognized the voice as [redacted] voice from the tone and the way he spoke. She laughed it off and hung up but it made her feel uneasy because her and her children's lives were in danger. The phone rang more on that day with the same number but she didn't answer it. The next day she saw the same number and picked up the phone again and a similar threat was made. This time the phone was on speakerphone and Mr. [redacted] was present and heard the threat.

[42] In the meantime [redacted] was given a Blackberry by [redacted] and she used it to call the number on her stolen phone a few times. She had asked her mother and cousin to do so as well. On March 19th [redacted] testified that when she called her stolen phone [redacted]. answered; she could recognize his voice. This was in the morning sometime between 11 a.m. and 12 noon. He told her not to go to "fucking court" and called her a "fucking rat" and told her not to sleep at her house that night as he was going to "beat shots through your window".

[43] On March 20, 2012, [redacted] testified that her cousin forwarded a text to her that she had received from the number of the phone that had been stolen from [redacted] That text said something like "laugh out loud – I'm going to fucking kill you if you come back to J[redacted] you snitch". The text was saved but she does not know where her Blackberry is and her cousin did not testify about this. For these reasons I do not find this text proven.

The Arrest of [redacted]

[44] [redacted] was arrested on March 20th, 2012 by Officers Samson and Dolghii. Officer Samson testified that he was very familiar with the [redacted] area as he had been with 42 Division for eight years. They had been dispatched to deal with a low priority call and decided to drive through [redacted] on the way as there had been a recent shooting in the area and they wanted to maintain a police presence.

[45] Officer Samson was driving and testified that they drove into the area on [redacted] Road at about 4:40 p.m. They saw a group of males loitering in front of [redacted] Officer Samson decided to ensure all was in order and drove into [redacted] As he drove towards [redacted], the group of men dispersed. At this point Officer Samson said that his attention was drawn to a grassy laneway area between [redacted] and a walkway there. He testified that he saw two men separate from the group and start walking in the laneway towards [redacted] The men looked back and it appeared to Officer Samson that they saw the police car and then started walking quickly towards [redacted]. Officer Samson testified that he drove the scout car onto the grassy laneway between [redacted] and [redacted]. He lost sight of the two men for about 30 seconds. Once he got to [redacted], he saw the two men again and when they saw the police car they immediately turned around and started walking back towards [redacted]. At this point Officer Samson realized the two men were trying to avoid them and he wanted to determine what they were up to. He drove up to the laneway where he last saw them going back into [redacted] As Officer Samson pulled up to the curb of the laneway he saw that both men were now running towards [redacted]; one went right at the end of the laneway and the other left.

[46] Officer Samson testified that after he put the car in park and got out, the men were out of sight. He chased the man running to the left and ran around back into [redacted] as he assumed that is where this man ran; there is an entranceway into the court. Officer Dolghii ran after the man that ran to the right. As Officer Samson reached [redacted] he saw the male he was following standing on the island in the middle of the parking lot for [redacted] He was stopped and Officer Samson yelled stop and asked him to come towards him. The man complied and was cooperative and showed no intention of trying to run away. They spoke in front of one of the townhouses. As the male approached, within seconds, he said that he had two cell phones that he was not supposed to have and that he was holding them for someone. Ms. Stanford admitted that this statement is admissible as part of the *res gestae*. At this point Officer Samson did not know where Officer Dolghii was. At trial Officer Samson confirmed that the person who came to him was [redacted]

[47] Officer Samson told [redacted] that he was detaining him for possible breach of his conditions. He did a pat down search for weapons and found two cell phones in one pocket of his vest. At this point Officer Dolghii came over, having failed to catch the man he was chasing. Officer Samson handed the two cell phones to him. [redacted] verbally identified himself as [redacted] and Officer Dolghii checked his name with the station. At this point [redacted] was sitting down but he was getting fidgety so Officer Samson handcuffed him. Officer Dolghii determined that [redacted] was under a condition not to have any cell phones and that he was wanted under a surety warrant. [redacted] was given his rights to counsel and cautioned from the back of Officer Samson's memo book. [redacted] said that he wanted a lawyer.

[48] The evidence of Officer Samson was largely confirmed by Officer Dolghii who also testified that the men ran and as a result he and Officer Samson chased them. As I will come to,

although questions were asked about the path the officers took, neither officer was challenged about the fact that [redacted] i ran from police in cross-examination.

[49] The officers left the area with [redacted] at 4:54 p.m. As they start to drive away, the in-car video shows [redacted] asking what his charges are and he mentions home invasion. There is no response to this question from the officers. On the way to 32 Division Officer Samson stopped to talk to officers from a Community Response Unit ("CRU") as he wanted them to try to find the man who got away from Officer Dolghii. The in-car video shows the door opening to the backseat and [redacted] asks again about his charges. All I can make out is that there was a reference to the surety warrant. When [redacted] asks this question a little later of one of the CRU officers who was talking to him while he was in the backseat he told this officer that "the officer" said he was being charged with home invasion. Once the car was moving again and Mr. Hersi asked Officers Samson and Dolghii this question he was told he had been arrested for fail to comply and the surety warrant.

[50] This exchange seemed important to Mr. Scandiffio and he suggested Officers Samson and Dolghii were really arresting [redacted] for home invasion. [redacted] testified that he was told at the time of his arrest that there were a bunch of charges including home invasion and he testified that Officer Samson commented on his hair and asked him to open his mouth. There is some support for this from the statements made by [redacted] in the in-car video I have already referred to. Officer Samson had no recollection of [redacted] asking him about a home invasion in the car nor did he have any recall of asking [redacted] to open his mouth to see if there were any spaces between his teeth. Officer Samson testified that they were not looking for a robbery/home invasion suspect. Officer Samson testified that he was advised by Detective Palermo that night at 7:40 p.m. that [redacted] was also going to be charged with robbery with a firearm and threatening death.

[51] I do not have any evidence as to how and when the police determined that [redacted] was the fourth suspect in the robbery or how they knew he went by the name [redacted] as that is who they told [redacted] had been arrested. I accept the evidence of Officer Samson that he did not know that [redacted] might be involved in a home invasion when he first arrested him. Officer Dolghii also testified that he did not know about these additional charges until after the arrest of Mr. [redacted] and they arrived at the station. Their evidence is consistent with what they said during the booking hall video. Furthermore, if they believed [redacted] was the fourth suspect in the home invasion I can think of no reason why the officers would not admit this and why they would not have charged him with that as well. The officers were not asked if they knew about the home invasion at the time of arresting [redacted] If they did, and if they were aware of the detailed description of the men provided by [redacted], it is possible that they considered whether or not [redacted] matched the description. This, however, was not asked either. I have, therefore, concluded that this issue, which is otherwise not relevant, does not adversely impact on the credibility of the officers or [redacted]

[52] Officer Dolghii testified that the Samsung cell phone was charged and working when he seized it from [redacted]. He checked the contacts on the phone and the entry for the first name and number under "My Profile" came up without a name and with the number [redacted]. As I will come to, that is the number that [redacted] said was showing for the phone used to make the threats to her.

The Second Photo Line-up

[53] [redacted] testified that on March 20th she received a call from police and was told there was one more line-up to look at. She was picked up from her home by D.C. Hawkins and his escort and brought to the station. Although D.C. Hawkins could not recall this, [redacted] testified that on the way to the station the police told her that [redacted] was arrested; he was referred to as [redacted] admitted that she was going to the photo line-up to see if she could find [redacted]

[54] The second photo line-up was done at 7:11 p.m. and [redacted] gave a second statement to police shortly thereafter. During the second photo line-up, Officer D'Cunha advised Ms. [redacted] during the course of asking her the pre-photo line-up questions that they were investigating a home invasion robbery that occurred on March 18, 2012 at [redacted]. Directions then followed and included a statement as follows:

> As part of our investigation into this home invasion that occurred on March 18, 2012 you will be shown individual photographs to see if you recognize anyone in the photographs, *for any reason*.

[55] The standard photo line-up instructions and questions were then put to Ms. Peters which included the fact that:

> The person or persons involved in this incident may or may not be in the selection of photographs that you are about to view. It is just as important to eliminate innocent persons as suspects, as it is to identify guilty parties. "Do you understand?" to which [redacted] answered "Yes".

[56] The directions went on to advise [redacted] that once she looked at a photograph there were only two options; either to say "Yes" you recognize the person or "No" you do not. Ms. [redacted] was told that if she did not recognize the person to say "No" but if she recognized the person for any reason to tell the officer "Yes" and "why" she recognized the person.

[57] When [redacted] came to the photo that is admitted to be of [redacted] she paused for approximately fourteen seconds while looking at the photo before she said "Yes" which she then wrote on the back of the photograph. She did not state at the time who she believed this person to be nor was she asked why she recognized this person by Officer D'Cunha or Detective Marsden who was also present.

[58] [redacted] testified that he thought this picture in the photo line-up was taken when he was arrested in August 2011. Assuming this is correct, having compared this picture to how Mr. [redacted] appears in the in-car video when he was arrested, I find there was no material change in his appearance between the time of the photo and the time of his arrest for the charges before me.

[59] [redacted] testified that she recognized the photo that she identified during this photo line-up and that it was a photo of [redacted] She was asked in her examination in chief when she looked at the photograph why she identified that photo. She answered that she said "yes" because "it's [redacted]" and then confirmed that he was the person who came into her house. She testified that she took a little time in saying "yes" because she was thinking "why did he do it?" and taking in his picture. In cross-examination [redacted] denied the suggestion that she couldn't instantly pick [redacted] out in the photo line-up. She said that she instantly knew it was [redacted] but took longer to look at the picture and digest it because she was more upset with [redacted] because he was older than the other three or at least two of them. She added that she had seen [redacted]. at her house and that that is how she knew it was him.

The Evidence of T.F.

[60] T.F. was called by Mr. Stastny on the *voir dire* and for the trial. He was an extremely reluctant witness and gave very short answers, often only when prompted a number of times. He made it very clear that he did not want to testify and that he did not know why he had been subpoenaed. Eventually I advised him that if he failed to answer questions to the best of his ability, I would have no alternative but to find him in contempt. This did not seem to make much of a difference. Generally, however, when counsel persisted, he would give at least a "yes" or "no" answer to a question.

[61] Mr. T.F. pleaded guilty in Youth Court to the robbery of [redacted], to using an imitation firearm in the commission of that robbery and to the forcible confinement of [redacted]. Mr. T.F. claimed that his firearm was an imitation although he could not give any specifics as to how it came into his possession. When pressed Mr. T.F. testified that he picked this firearm up somewhere where he found it lying on the ground in the neighbourhood. He said this gun did not fire bullets.

[62] When Mr. T.F. was asked if he knew if anyone was dealing drugs from [redacted] house he simply said he had no information. Mr. T.F. testified that he knows [redacted] but not as [redacted] He testified that he knows him as [redacted], that he knows him from the neighbourhood, and they had hung out before although he denied they were friends. As for Mr. [redacted], he said that he knows him as [redacted] and denied knowing him as [redacted] or by any other nickname. They had hung out before as well. Mr. T.F. denied hanging out with either of these defendants at [redacted]' house.

[63] After some persistence by Ms. Stanford, Mr. T.F. finally admitted that the persons he did the robbery of Ms. [redacted] were the other persons he was charged with and that they were R.,

[redacted] He was then asked about the defendants in the prisoner's dock and admitted that he was pretty sure [redacted] and when asked if [redacted] he answered "Yes, I guess so". In re-examination he said that he did not know [redacted] and he didn't think he had ever heard anyone call him by that name.

[64] Mr. T.F. initially testified that the group was carrying imitation firearms, but later it was clear that he really had no information about the other firearms. He never touched them or tested them. In re-examination Mr. T.F. said that he was told by the others that their guns were fake. He agreed that [redacted] used what appeared to be a gun during the robbery as did R. and that [redacted] did not have a gun.

The Evidence of [redacted]

[65] [redacted] was 19 years old at the time and he described the circumstances leading to his arrest. He grew up in the [redacted] area until the end of 2011 when he moved to the [redacted] area which is about a fifteen minute drive away. This is where he was living at the time of his arrest. At the time he had a cousin who lived in [redacted] that he visited two to three times a week and an aunt that lived at [redacted] which is also in the area.

[66] [redacted] denied being chased by Officer Samson. He drew and marked a diagram as well of the area. He recalled being part of a group and seeing the officers drive by. According to [redacted] the group did not start to disperse until someone said that the "cops" were on foot. Then everybody scattered. He was in the alleyway with Kid. He does not know Kid by his real name. According to [redacted] he *walked* into [redacted] and saw Officer Samson after taking only a couple of steps after the group scattered. He said the officer would not have been able to see him behind the townhouse. When he saw that one of the officers waved he then started walking towards the officer. [redacted] denied ever running as alleged by Officers Samson and Dolghii. [redacted] denied running around the corner or "busting" the corner; which is what he told police. He said if had "bust the corner" he would have been gone.

[67] According to [redacted]i, as he was walking towards Officer Samson he realized that he had two cell phones in the left pocket of his vest. He testified that a person known as "Kid" slipped the phones into his pocket. [redacted] was clear in his evidence that he only realized that he had cell phones in his pocket when he put his hands in his pocket *after* he started walking and *after* he saw Officer Samson. He had no idea they were in his pocket before. He testified that he would not have taken the phones if he had known Kid was giving them to him. If he had he would have run as well and thrown them away because he was on a condition not to have a cell phone. [redacted] said that from where he was he could have run from police and that he knows a lot of ways towards the mall where he could have run. However, in [redacted] statement to police he said that Kid gave the phones to him on the spot to put in his pocket "when we bust the corner".

[68] Mr. [redacted] testified that he took the phones out of his pocket and gave them to Officer Samson because he had nothing to hide. It was suggested to [redacted] that it was not smart for him to put his hands in the pocket of his vest once he saw Officer Samson as it would be better for him to keep his hands in view. His repeated that he had nothing to hide. [redacted] testified that at this point he told Officer Samson that he was on condition not to have cell phones. He was then handcuffed.

[69] [redacted] alleges that after he gave his name he was told that he was wanted on a surety warrant and that there were a bunch of charges against him including home invasion and armed robbery. [redacted] testified that he was asked to take off his hat and Officer Samson commented on his afro hair. He was then told to open his mouth, asked to smile and asked for his name. At this point Officer Dolghii was coming towards them.

[70] [redacted] did not know anything about this person with the nickname "Kid". He did not know his government name, his age or where he lives. All he knew was that he has a younger brother that goes to school or works. He said he had known him for about a year to see him in the neighbourhood.

[71] When [redacted] was questioned as to how he knew it was Kid who slipped the cell phones into his pocket he testified that he saw Kid with these phones in his hands. Although he agreed that there are a lot of black cell phones, he suggested that he recognized these particular phones as belonging to Kid. He knew that Kid had a Public Mobile phone. He admitted in cross-examination however, that he had no reason to pay attention to those phones. In re-examination [redacted] testified for the first time that before the police arrived they were playing music on the phones that Kid had. [redacted] testified that when he arrived at the police station he was able to get a good look at the phones and said that they were Kid's phones.

[72] [redacted] admitted knowing [redacted] although he said he did not know her as a friend. He met her one day when he went to buy weed from [redacted] He testified that he had seen Ms. Peters at the mall as well but would not say "hi" to her. [redacted] admitted that he was able to recognize [redacted] and that she would recognize him.

[73] According to [redacted] he was only at [redacted] place in [redacted] on four occasions; he could not say for sure when he was last there but said that it was always to buy weed from [redacted] He later testified that he went to [redacted] house to buy marihuana in July/August and after the end of September he did not go back there. [redacted] admitted that he would see [redacted] at the house with [redacted]. When [redacted] sold marihuana it would be weighed on the scale that they kept in the kitchen. According to [redacted] if you bought a Century Sam and weed from [redacted] you could smoke the "blunt" in their basement. He did this on three of the four occasions and there was always a group of people in the basement every time he went there. According to [redacted] and Mr. [redacted] made their house a neighbourhood hangout. When he did stay to smoke his weed [redacted] and [redacted] were also there smoking weed. He testified that on one of the four occasions Mr.

[redacted] was not there and [redacted] sold him weed and a Century Sam. He did not stay that time to smoke the blunt. [redacted] admitted that selling marihuana is a cash business and that he was aware there would be potentially a fair amount of cash in [redacted] house.

[74] [redacted] denied knowing the relationship between [redacted] and [redacted] Mr. [redacted] denied ever meeting [redacted] and said he did not know if [redacted] was dealing drugs in the [redacted] area.

[75] [redacted] also admitted that he knows the other three men alleged to have been involved in the robbery. With respect to the person [redacted] identified as [redacted] namely [redacted] testified that he knows him as [redacted] He knows the person identified by [redacted] as R. as I.G.; he had heard the nickname R. but that is not what he called him. He knows T.F. by his first name. During his cross-examination [redacted] admitted that when he was shown a picture of [redacted] he told police that he had seen him before but he did not know him by name. He also told police he knew R. by his nickname and did not know his real name.

[76] [redacted] testified that he is not [redacted] He denied being at [redacted] house showing off a firearm about a month prior to the incident and denied ever having any firearms on his person. He lives with his mother and father and testified that there are no firearms in his house; there was never any search of his house. [redacted] denied ever seeing any guns in [redacted], even imitation guns.

[77] In his evidence in chief [redacted] said that he was "pretty sure" that he was at home during the afternoon of March 18, 2012. He did not think that he left his house. At the time he was on house arrest and was subject to a 9 p.m. curfew. He said the only time he may have gone out was to get something to eat. He then said he was pretty sure that he did leave to go to a plaza around his area to have something to eat and that he came back to the house. [redacted] also denied making any phone calls on the cell phones found in his possession at the time of his arrest and he denied having possession of those phones before March 20th.

[78] In cross-examination by Ms. Stanford, [redacted] confirmed that he was home all day on March 18th and that his mother, who he is still in touch with and who is in good health, could confirm this. He said she would have no difficulty coming to testify that he was home on that day. It was put to him that he was not home and he responded that he was 100% sure that he was home all day save for having a meal at the plaza and possibly going out to have a cigarette. Mr. [redacted] statement to police was then put to him where he told police that he had come to his house at 9 p.m. and before that he was in the area of [redacted]. When this inconsistency was put to [redacted] he stated that this was why he had said he didn't remember where he was a year ago and whether he left the house or not. That had not been his evidence at all.

[79] Ms. Stanford reviewed the description that [redacted] had given to police about [redacted] Mr. [redacted] admitted that in March 2012 he was just past his nineteenth birthday, that he is of Somolian descent and that he was skinny. He admitted to having semi-afro curly hair that was

not too curly but said this was like a lot of Somolian people. [redacted] said that he thought he was taller than six feet. He testified that he has four gaps between his teeth but when I asked him to show me I observed that the biggest and most obvious gap was between his two upper front teeth.

[80] When Ms. Stanford asked [redacted] whether he could explain what she called the amazing coincidence of one of the cell phones in his pocket at the time of his arrest being attached to the number that [redacted] alleged threats came from, he said he guessed it was a setup but did not know by whom. By this he was referring to the fact that Kid was on house arrest so presumably he was suggesting that Kid had set him up although he did not say this. Ms. [redacted] was never asked if she knew someone named Kid and there was never any suggestion in the evidence that a person named Kid was involved in the robbery or would have reason to threaten her.

Analysis

[81] I now turn to my analysis. Since [redacted] testified, the principles set out in the decision of the Supreme Court of Canada in *R. v. W.(D.)*[2] apply. I must acquit [redacted] if I believe his evidence or, even if I do not believe his evidence, I am left in a reasonable doubt by it. If I am not left in doubt by his evidence, then I must ask myself whether, on the basis of the evidence which I do accept, I am convinced beyond a reasonable doubt by that evidence, of his guilt. In my analysis, I am not bound by the strict formulaic structure set out in *W.(D.)*, but rather must adhere to the basic principle underlying the *W.(D.)* instruction that the burden never shifts from the Crown to prove its case beyond a reasonable doubt.[3]

[82] In considering the evidence, I am entitled to believe all, some, or none of each witness's evidence. Further, in assessing the evidence of [redacted], I am entitled to consider it in the context of all of the other evidence.[4] However, I must remind myself that this is not a credibility contest.[5] *W.(D.)* prohibits me from concluding that the Crown has met its burden simply because I might decide to prefer the evidence of the Crown witnesses to that of [redacted][6]

[83] Although [redacted] did not testify, he did call evidence; Mr. T.F. and so *W.D.* applies to the analysis of that evidence and the charges against [redacted] as well.

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[2] [1991] 1 S.C.R. 742.
[3] See *R. v. C.L.Y.*, 2008 SCC 2 at paras. 7, 9; *R. v. J.H.S.*, 2008 SCC 30 at para. 13.

[4] See *R. v. C.L.Y., ibid.* at para. 6; *R. v. Mends*, 2007 ONCA 669 at para. 18. *R. v. Carriere* (2001), 159 C.C.C. (3d) 51 at para. 48 (Ont. C.A.).
[5] *R. v. J.H.S., supra* at para. 9.
[6] *R. v. Hull*, [2006] O.J. No. 3177 at para. 5. See also *R. v. Van*, 2009 SCC 22 at para. 23.

Credibility Assessments

(a) [redacted]

[84] There was nothing about Mr. Hersi's demeanour that assists in determining his credibility. However, as I will come to, his evidence changed materially when he was challenged and I have concluded that I cannot believe much of his evidence and that some of it was simply incredible.

[85] [redacted] has a criminal record as follows:

- August 13, 2011 – [redacted] was found guilty of breaching his recognizance and sentenced to seven days and five days pre-trial custody;

- December 1, 2011 – [redacted] pleaded guilty to breach of recognizance and received six days pre-trial custody and nine months probation;

- August 30, 2012 – [redacted] pleaded guilty to possession of cocaine for the purpose of trafficking. He testified that at the time he had nowhere to live and so had gone to live with a friend. He claimed not to have known that there was cocaine in the apartment but then when he was asked if he knew that people in the apartment were involved in cocaine he said "yes". [redacted] denied that the drugs found in the house were his but said that he pleaded guilty because the police said the cocaine came out of his pocket. He figured with his word against the officers, the officers would be believed.

[86] I have doubts about [redacted] evidence as to why he pleaded guilty to the cocaine charge but that conviction is not relevant to his credibility *per se*. The other convictions suggest disrespect for court orders but I find they are not of much assistance in determining the credibility of [redacted]

[87] What I found most significant in assessing [redacted] credibility are the serious inconsistencies between Mr. Hersi's evidence at trial and his statement to police as follows:

(i) Ms. Stanford impeached [redacted] on his statement to police as to how he got the cell phones which, as I have reviewed, was materially different than his evidence at trial. Also in his statement to police he said that Kid gave the phones to him "when we bust the corner" which with the word "bust" suggests that they were both running. When these differences were put to [redacted] at trial he agreed that there was a difference in his evidence but said he wasn't given any choice because the two officers who took the statement had beat and kicked him multiple times before he gave the statement. He also alleged that they put words in his mouth and told him that if he said something they would beat him up even more. This explanation was in my view totally fabricated. There had never been any hint of such an issue during the *voir dire*.

It seems that [redacted] is prepared to make up serious allegations of police misconduct when he feels it will help him explain a problem in his evidence.

(ii) Ms. Stanford put a portion of [redacted] statement to police to him when he was shown a picture of [redacted] and he denied knowing him by name. [redacted] denied changing his story at trial and said he was nervous when he was speaking to police and "said stuff that he didn't mean". This explanation was incredible.

(iii) With respect to [redacted] statement to police that he knew a person as R. and did not know his real name, which contradicted his evidence at trial, again his explanation for the difference was that he was nervous at the time. He also testified that he did not see this "as a big deal", suggesting a casual attitude to being accurate when he testified. I agree with Ms. Stanford that [redacted] lied to police and at trial about the extent to which he knew [redacted] and Mr. I.G. and how he knew them and that his likely purpose in doing so was to try to distance himself from these men and the use of nicknames.

(iv) Ms. Stanford put a portion of [redacted] statement to police to him where he stated that he had no idea why Ms. Peters had picked out "my name". For at least one of these occasions the officers had put to Mr. Hersi that Ms. Peters had identified him as [redacted] Ms. Stanford's argument was that Mr. Hersi had slipped when he spoke to police by referring to [redacted] as his "name." When this was suggested to [redacted] at trial he responded that the officers were telling him that [redacted] was [redacted] In argument Mr. Scandiffio submitted that [redacted] had been told eight times by police that Ms. Peters said he was [redacted] That however, is not in evidence as the transcript is not in evidence. Mr. Scandiffio also submitted that Mr. Hersi had been "interrogated" for 73 minutes and that there was a "straight attack" on him. These submissions suggest issues with the voluntariness of the statement even though voluntariness was conceded by Mr. Scandiffio after all the police officers involved were called on the *voir dire*. It is also alleged that the officers told [redacted] that T.F., [redacted] and R. used his "name"; again there is no evidence of this. Finally, Mr. Scandiffio submitted that I should consider what [redacted] meant by his "name". Although I think there is some merit to the position taken by Ms. Stanford, [redacted] explanation was not implausible. I have, therefore, not considered this statement as an implicit admission that Mr. Hersi is [redacted]

(v) I have already set out the inconsistencies in [redacted] evidence about where he was at the time of the robbery. He was clearly not being truthful about his whereabouts on the day of the robbery which is a very significant inconsistency.

[88] Mr. Scandiffio made a number of submissions in support of his position that I should find that the evidence of [redacted] is true or demonstrates his innocence. He began his submission by stating that [redacted] had demonstrated his innocence by taking the stand given the code of silence in [redacted] There are a number of problems with this submission including the

fact that since [redacted] denied he was present for the robbery, he did not implicate himself or any one else. In any event this submission applies to [redacted] with equal force. Although she moved from the area as a result of this incident, [redacted] was not living there at the time either.

[89] Mr. Scandiffio spent some time in his submissions trying to reconcile the evidence of Officers Samson and Dolghii and the evidence of [redacted] in support of his position that Mr. [redacted] is telling the truth when he says that he did not run from police. He submitted that this was important to show that [redacted] had no fear of police and nothing to hide and as such demonstrated his innocence to these charges. Mr. Scandiffio submitted that if [redacted] knew about the phones in his pocket he could have run or thrown them away and that as he knew the neighbourhood he would have known where to run. Instead, when Officer Samson asked him to come over he walked towards him.

[90] Setting aside whether or not there is merit to Mr. Scandiffio's premise, it is impossible to reconcile the evidence as he attempted to do because the officers were both very clear that they actually saw [redacted] run from them. They did not base this evidence on assumptions about what he was doing when he was out of their sight for 30 seconds. Furthermore this is a specific area where [redacted] evidence changed materially at trial. I prefer the evidence of Officers Samson and Dolghii on this issue, which was not challenged when they testified. They both said that [redacted] ran and that he was chased by Officer Samson.

[91] Mr. Scandiffio also relies on the fact that [redacted] immediately told Officer Samson about the cell phones. That is true but again I do not see how that establishes that [redacted] is innocent of these charges. In any event given the inconsistencies in his evidence, I do not accept [redacted] evidence as to how he came into possession of those cell phones.

[92] For these reasons I have serious concerns about the credibility of [redacted] and I find that I do not believe the evidence he gave me at trial denying his involvement in the robbery, nor does it raise a reasonable doubt.

(b) T.F.

[93] Ms. Stanford submitted that for the most part Mr. T.F.'s evidence was at best evasive and at worst an outright lie. It is her position that he was doing his best to help and protect his friends and that since this was his intent, I should only accept his evidence when his evidence contradicted the interests of his friends.

[94] To the extent that Mr. T.F. gave exculpatory evidence supporting the defence of either defendant, it need only raise a reasonable doubt. To the extent his evidence was incriminating of either defendant, I have considered it with caution. I have already commented on Mr. T.F.'s extreme reluctance to testify. I agree with Ms. Stanford that he did not want to give any evidence that would hurt his friends and in particular, the defendants. I therefore agree with Ms. Stanford that the evidence that he gave that is adverse to their position, which came only very reluctantly,

is likely true. However, I could not consider Mr. T.F. a reliable witness and so I must consider his evidence very carefully. I have decided not to place much weight on it.

(c) The Police Officers

[95] There was no suggestion during the cross-examination of any of the officers that they were being untruthful or that their evidence was not reliable. However during his closing submissions Mr. Scandiffio challenged the evidence of Officers Samson and Dolghii that Mr. [redacted] was running at any time before his arrest. Given the serious concerns I have about the credibility of [redacted] as I have already said, I prefer the evidence of the officers on this issue. Otherwise, I also found the evidence of the officers credible and reliable.

(d) [redacted]

[96] Ms. Stanford submitted that [redacted] was a very credible witness and that she was not shaken in any substantial way on her evidence concerning the details of the robbery, the identification of [redacted] and the threats that came thereafter. It is her position that her evidence in this regard was clear, credible, consistent, both internally and externally, and corroborated. She also pointed out that [redacted] did not embellish her evidence. For example, although she testified that T.F. pointed the gun towards her daughter, she did not suggest the guns were ever pointed at her or [redacted]

[97] It is Ms. Stanford's position that the only real area of concern is the possibility of illegal drug activity taking place at [redacted] She submitted that one can understand [redacted] reluctance to admit that there was drug dealing from her home particularly if she was on the periphery. The only direct evidence that she personally was selling drugs is the evidence of Mr. [redacted]

[98] Mr. Stastny submitted that there are major shortcomings with the credibility of Ms. Peters although he acknowledged that she was telling the truth about persons entering her home under false pretenses, that she was the victim of a robbery that occurred in her home and that she expressed genuine emotion in the 911 call. He also conceded that her evidence concerning the firearms she saw at the time of the robbery was fair. He submitted however, that her credibility was in issue with respect to the "finer details". His main submission was that [redacted] was not truthful in her denial that drugs were being sold from her home and he argued that [redacted] is capable of lying to the police and to the court when it suits her interests. On this basis he submitted that evidence of what [redacted] alleges that she saw with respect to guns before the robbery would be unsafe to rely upon.

[99] Ms. Kideckel adopted the submissions of Mr. Stastny. She also submitted that the evidence of [redacted] should cause the court much concern and that it was exaggerated and full of contradiction, implausible and incredible. Ms. Kideckel submitted it is difficult to believe that [redacted] son would not wake up and that she would leave the home without him. I do not accept this submission. First of all there was never any suggestion in the evidence that Ms.

[redacted] son did wake up; certainly this was not put to [redacted] Furthermore, from the surveillance video it is obvious that she only had her daughter with her. This is therefore not an attack on [redacted] as a witness but rather as a mother. I do not see how it is relevant but in any event, in my view it is unfair to challenge [redacted] decision to leave the house with her daughter and let her son lie sleeping in the living room. Given the genuine terror in her voice during the 911 call it is impossible to second guess her after the fact. She did what she believed to be in the best interests of her children, namely leave the house with her daughter and call police.

[100] There were some inconsistencies in the evidence of [redacted] that Ms. Kideckel relied upon. I have already referred to the issue of who was wearing a baseball cap. Considering the accuracy of the detailed description she did give to police, being mistaken about who was wearing a baseball cap is not surprising and her correction at trial was what I would expect from an honest witness.

[101] In cross-examination [redacted] denied telling the police that her house was a chill house. She was taken to her preliminary hearing evidence where she testified that people, including [redacted], used to "take my house as a 'chill spot'" and that this occurred from the end of September to the end of October. When it was suggested this was an inconsistency Ms. Peters testified that at the preliminary hearing she said that they "took" her house as a "chill house" but that she did not see it as a chill house. She saw it as a family house. I accept that explanation even though as I will come to, I find it likely that her home was being used for the sale and smoking of marihuana. I expect that was more likely the result of the men [redacted] was living with although she clearly knew about it and participated in it.

[102] Ms. Kideckel also submitted that [redacted] evidence concerning guns during the robbery made no sense. She argued that Ms. Peters alleged that [redacted] was holding a gun and since he is right-handed he must have been holding it in his right hand. Ms. Peters testified that he slapped the left cheek of [redacted] with an open hand. Ms. Kideckel submitted that he could not have done that without using his right hand and yet [redacted] presented herself as being sure of these kinds of details. In my view these types of inconsistencies are ones that naturally arise from a witness doing her best to tell the truth about a traumatic incident that took place almost a year ago.

[103] Ms. Kideckel relied on the statement by [redacted] in the 911 call as to how well she knew C.Y. and submitted that her evidence was inconsistent on this issue at trial. Mr. Stastny also submitted that in the 911 call [redacted] was evasive as to how she knew the people involved in the robbery and suggested that she did not want to admit how she did know them. I agree there is an inconsistency there although it is more in the form of an understatement of how well she knew these men. I accept Ms. Stanford's submission that although what [redacted] told the 911 operator was true she did not tell the operator everything. She had seen these men in the neighbourhood before, they were not her friends. However, as I will come to, I do not accept her statement that she did not chill with them. This, however, was only a small part of the call. Ms.

[redacted] may have been concerned about disclosing that her house was a place where drugs were sold from or may have only said what she did because of the traumatic experience of the robbery. Either way I do not find it significant and in any event, given the admissions of [redacted] it is clear that [redacted] knew him well enough to recognize him if he was in fact at the robbery.

[104] I agree with Defence counsel that [redacted] was not entirely truthful when she testified about whether drugs were being dealt out of her home. Her evidence about selling only Century Sam cigars made no sense. She admitted smoking marihuana recreationally and testified that is why she had the scale. [redacted] denied that people were coming to her house to buy drugs and denied that marihuana was being sold from her house or that this was why her house became a "chill spot". In that regard I prefer the evidence of [redacted] his evidence makes much more sense and explains why [redacted] still had Century Sams that she would sell from her home and why her house became a chill spot. In fact at one point in her evidence when being questioned by Mr. Stastny, [redacted] did say that they were selling "blunts" which had already been described in the evidence as a marihuana cigarette made from the paper of a Century Sam cigar. Because this evidence appeared to be at odds with her evidence that they were only selling Century Sams without marihuana, I asked [redacted] a question. She responded that she used the term "blunt" meaning just a Century Sam. I do not accept that evidence and believe she was trying to justify her mix up in using the term blunt when she did not intend to. I also agree with Mr. Stastny that the fact drugs were being dealt out of her home is corroborated by a post she admitted that she made on Twitter after the robbery and in particular her reference to "stacks"; which I will come to.

[105] There is also the inconsistency in [redacted] evidence generally concerning the Twitter messages following the robbery. In her evidence in chief [redacted] admitted that she posted something on Twitter the day of the robbery or the day after. She was not sure of exactly what she said but it was along the lines of querying how someone could do a home invasion with two children there. She testified that after she posted it I.G.'s brother said something ignorant to her and so she took it down. Mr. Stastny showed Ms. Peters copies of messages that she had posted on Twitter. She recognized them and gave evidence about them. Although I appreciate, as submitted by Ms. Stanford, that because we do not have all the tweets, there is a question of context to consider, in my view these tweets are very much at odds with [redacted] evidence in chief, even if I accept that they were in response to a tweet that she was a "fucking rat".

[106] In the first message [redacted] tweeted that they were "still sitting on those stacks you wanted to eat us for". "Stacks" means money and "eat" means to rob. She denied that stacks was a reference to money from selling drugs and said that it was a reference to legal money she got from OSAP as she was a student and the child tax benefit. I do not accept that evidence; there would be no reason for her to be bragging about this if the money was legal. I believe that Ms. [redacted] had a better recollection of these messages when she testified in chief than she admitted to, likely because she would not expect to be confronted with copies of them. This is consistent with the fact that she did not want to admit any knowledge of her house being used as a place for the sale of drugs.

[107] Although for the reasons given I do not accept parts of [redacted] evidence, the areas where I do not accept her evidence can all be explained by her reluctance to admit that her house was being used to sell marihuana. Although I do not make light of the fact she was not truthful to the court in these areas, I do not find that this means that I should reject all of her evidence. I can understand why she would not want to admit knowledge of illegal activity in her home. Overall, in all other areas, I found [redacted] to be a truthful and credible witness particularly with respect to the details of the robbery and the description of the men who committed it. Furthermore, as I will come to, given her prior interactions with [redacted] and [redacted] I find her identification evidence reliable.

Findings With Respect to [redacted]

(a) The Alleged Robbery with a Firearm

[108] Ms. Stanford submitted that she had proven beyond a reasonable doubt that [redacted] used a real gun in the robbery and that [redacted] was a party to the robbery and the use of a firearm. She conceded that once the men were inside [redacted] house, [redacted] sole role was searching the kitchen and that he did not participate in any threats and did not have a firearm or order anyone to go to the basement. She queried however, whether this was a joint enterprise among the four men as they are seen talking together on the surveillance video just before the robbery and all four were wearing gloves during the robbery according to the evidence of Ms. [redacted] Ms. Stanford submitted that it strained credibility to think that [redacted] would not know the others were armed given that there was a discussion among the four men so close in time to the actual robbery. Furthermore, [redacted] must have known about the guns once the guns were drawn. On the evidence of [redacted] Mr. T.F. pulled out a gun right by the kitchen and [redacted] must have seen this. Nevertheless, [redacted] continued searching the kitchen. In fact she argued that he was able to do so because of the forcible confinement of [redacted] and [redacted] As I will come to, Ms. Stanford relied on a number of cases in support of her position that the firearm used by [redacted] was real.

[109] Mr. Stastny conceded that [redacted] was a party to the robbery but submitted that the Crown had not proven beyond a reasonable doubt that he knew anyone had a *real* firearm. He argued that many of the cases provided by the Crown in support of her position that the firearm was real are cases where the court has deferred to findings of fact of the trial judge.

[110] As Ms. Stanford submitted, the evidence of a robbery is overwhelming. The 911 call was made at the time and given the demeanour of [redacted] on that call it seems very unlikely that she had any time to think about fabricating anything as she was in hysterics. That could affect the reliability of her evidence in respect of some details, but not in my view the essence of what she told the operator about a robbery occurring. Furthermore, the evidence of [redacted] that there was a robbery was not contested. In addition since I have found that marihuana was being sold at [redacted] and that this was common knowledge in the neighbourhood; it does provide a motive for the robbery in that as [redacted] conceded, selling drugs would be a cash business. It also

supports the evidence of [redacted] that he couldn't "hussle" in the neighbourhood. That could also have been part of the motive.

[111] The other evidence that corroborates [redacted] evidence of a robbery is the surveillance video. Four young black men are seen very close to her home dressed virtually identically as she described in her evidence. She identified [redacted] as the one wearing a very dark navy blue jacket and a baseball cap. On the issue of the cap she testified at trial that having now seen the tape she was mistaken as to who was wearing the baseball cap. There is no evidence about whether or not she had seen the surveillance video before; certainly if she had she appeared to have forgotten it. I have not found that inconsistency to be significant. Furthermore as I have already stated, Mr. Stastny conceded that [redacted] participated in a robbery as did [redacted]

[112] For these reasons I am satisfied that the Crown has proven beyond a reasonable doubt that [redacted] was a party to the robbery as a principal in that he was ransacking [redacted] kitchen.

[113] The cases relied upon by the Crown in support of her position that a real firearm was used are as follows:

(i) *R. v. Richards*, [2001] O.J. No. 2286 (Ont. C.A.). At paragraph 4 the court noted that having regard to the description of the gun given by the witnesses, the fact that the witnesses were ordered to get down on the floor, had a gun pressed to their head, were threatened, and the *modus operandi* indicating that the accused had ready access to guns called up from different locations prior to the subsequent robbery, left it was open to the trial judge to come to the conclusion that the gun used by the appellant was a firearm.

(ii) *R. v. Mills*, [2001] O.J. No. 3675 (S.C.J.). In this case the complainant described what appeared to her to be a sawed-off shotgun. She did not know anything about guns, she only had general familiarity with firearms that a person in Canada might pick up in ordinary society, there was no evidence to suggest that what she saw was not a firearm and the accused was using it to intimidate suggesting he was using it as a firearm. At para. 19 Justice Eberhard stated that "where all the circumstances lead to an inference that the item looking like a firearm is a firearm, *it is open to the trier of fact to draw such an inference.*" (Emphasis added) She noted that in the case before her the operability of the shotgun was never really made an issue and she drew the inference that the item being brandished, causing alarm and fear, was a firearm.

(iii) *R. v. Carlson*, [2002] O.J. No. 1884 (Ont. C.A.). The court found that taken cumulatively the following items of evidence could reasonably support a finding that the handgun in issue was a firearm: the evidence included the fact that during the course of the robbery the appellant brandished the gun, waved it around and eventually pointed it at the back of an employee's head all the while screaming

that this was a "hold up" and demanding money, that various witnesses described the gun as "small" and "black" with a 6-8 inch muzzle and the fact that the appellant had access to guns according to the combined testimony of his accomplice and his common law spouse. With respect to this case Ms. Stanford pointed out that [redacted] testified that Mr. T.F. pointed his gun at her daughter and told her to shut up. She also relies on the prior incident when he was bragging about a different gun, which she argues means that [redacted] had access to guns.

(iv) *R. v. Charbonneau*, [2004] O.J. No. 1503 (Ont. C.A.). The court noted that the trial judge had the evidence of the complainant's clear belief that the gun was real although she could not tell for certain, her description of the object, the appellant's conduct in relation to it and his use of it together with the appellant's threat to shoot while holding it. Furthermore there was a complete absence of evidence to the contrary. The Court of Appeal concluded that this was a sufficient foundation to support the trial judge's finding that it was a handgun.

[114] Mr. Stastny referred to the following cases:

(i) *R. v. Argueta*, 2011 ONCJ 576. In this case Justice Watson concluded that the Crown had not satisfied its burden of establishing beyond a reasonable doubt that the object was a real firearm. The evidence before the court was considerably stronger than the case at bar save that the court noted that there was no evidence that the defendant had ready access to guns. Justice Watson stated however, at para. 12(6) that:

> …in my experience in the courts, it is not uncommon to be advised of imitation firearms that appear to be real that have been used in the commission of violent crimes. Although the gun was cocked once and cartridges were seen by at least one victim, and one victim indicated that the defendant attempted to show him where the cartridges were, absent expert evidence, I am unable to draw any definitive conclusions from this evidence as to the nature of the firearm on the totality of the evidence.

[115] No firearms were recovered and so I have only the evidence of Mr. T.F. and [redacted] on this issue. Mr. T.F. testified that he had been told the guns were fake and that his gun was fake. His evidence about his own gun was dubious as he could not explain how he got his gun. It defies belief that he would not be able to give any details about that. His evidence about the other guns was hearsay and not detailed enough to ascertain reliability. I therefore do not rely on this evidence.

[116] That leaves the evidence of [redacted] There is no question that [redacted] is not able to tell the difference between a real gun and an imitation gun, just by looking at them. She has never handled any gun and certainly did not handle any of the guns she alleges were used during

the robbery. Ms. Stanford relies on the evidence of [redacted] that on an earlier occasion she saw [redacted] in her front yard bragging about his "new ting" and argues that [redacted] would not brag about a fake gun. [redacted] did not do or say anything to suggest the gun was real, save that he was bragging about the gun. Although this perhaps makes it more likely that the gun was real, having read in particular the judgment of Justice Watson in *Argueta* I do not accept that this is the only reasonable inference to draw from the statement. [redacted] did say that [redacted] said the gun has an extended clip but that evidence was only given in re-examination and I am concerned about whether that additional evidence is reliable. Accordingly I do not rely on that evidence and in any event, this could be true of an imitation firearm. Furthermore, it is significant that the gun used during the robbery by [redacted], according to [redacted] was a different gun.

[117] In cross-examination by Mr. Stastny, [redacted] testified for the first time that when Mr. [redacted] put an end to [redacted] and the others coming to her house to smoke weed in November 2011 that [redacted] threatened [redacted] in her presence, that he was going to shoot him in the face. Again given the timing of when this evidence was given I find it not to be reliable.

[118] [redacted] testified that she believed the guns were real but as Ms. Kideckel submitted, it is difficult to reconcile some of her actions with this belief. She certainly had no problem in advising [redacted] that she was going to call the police and leaving the house. Furthermore, the fact that [redacted] went yelling after the suspects following the robbery suggests that she did not believe the guns were real even though I accept she was concerned about how her mother would reach her. These suggestions were not put to [redacted] however and I accept her evidence that she believed the firearms to be real.

[119] Although I accept [redacted] evidence that she believed the guns being brandished at the robbery were real, I am not satisfied beyond a reasonable doubt that any firearms used by Mr. T.F., R. or the person [redacted] alleges as [redacted] are real. This is a fact the Crown concedes she must prove beyond a reasonable doubt. I am not in a position to even find that any firearm was likely real. It is just as likely that the firearm [redacted] had at the robbery was an imitation firearm. In this regard I prefer the reasoning of Justice Watson in *Argueta*. Given [redacted] lack of experience, her belief that the guns were real does not assist in determining if they guns were real or imitation. Furthermore, there is no evidence that there were any threats made to shoot anyone or any other evidence that would suggest that the guns were real. The guns were never cocked and no ammunition was seen. As for the argument that [redacted] had ready access to guns, I have already dealt with that and set out why in my view that evidence does not mean that Mr. [redacted] had a different real gun on an earlier occasion and therefore had ready access to real guns.

[120] For all of these reasons I am not satisfied beyond a reasonable doubt that any of the firearms [redacted] saw were real. As such, with respect to Counts #1 and 2, I find that Mr. [redacted] is guilty of the included offence of robbery of [redacted] contrary to s. 344(b) of the *Criminal Code*.

(b) The Alleged Unlawful Confinement

[121] Ms. Stanford submitted that [redacted] had to have known there would be a forcible confinement of some duration given the manner he and the other men came into [redacted] home. Mr. Stastny argued that there is no evidence that [redacted] aided or abetted the others in forcibly confining [redacted] He relied on *R. v. D.(M.P.)*, 2003 CarswellBC 793 (BC Prov. Ct.). In that case the court found that the defendant did nothing to facilitate the unlawful confinement or the persons who undertook the violent actions and that his participation in the robbery was that of a looter who took advantage of a proprietor being confined and attacked. The court concluded that it had not been proven to its satisfaction that the defendant knew or ought to have known that the occupant of the residence would be unlawfully confined and / or assaulted. He accepted the evidence of the offender and concluded that he was a naïve young man with little prior exposure to drugs which had been the purpose of the robbery.

[122] There is no suggestion from the evidence that [redacted] committed this offence as a principal. The issue then is whether or not the Crown has proven beyond a reasonable doubt, pursuant to section 21(2) of the *Criminal Code,* that there was a common intention, namely Mr. [redacted] knew or ought to have known that the offence of forcible confinement would have to occur during the course of the robbery.

[123] On the uncontradicted and unchallenged evidence of [redacted] which I accept, Mr. [redacted] is the one who knocked on the door and spoke to [redacted] in order to gain access to the home. Given [redacted] responded, [redacted] must have known that there were people home because he is the one who knocked on the door. He was in the company of three other men who rushed into the home with him. Given that they were seen together on the surveillance video just before the robbery he must have known that it was intended that they would rob [redacted]

[124] Ms. Stanford relies on *R. v. White*, [2009] O.J. No. 2978 (S.C.J.) with respect to the unlawful confinement charges. In that case Justice Sproate held when the accused grabbed the complainant from behind in a bear hug that took two to three seconds he had committed the offence of unlawful confinement. In the case at bar, Ms. Stanford submitted that on the evidence of [redacted] three of the four men drew their guns immediately and ordered [redacted] and Mr. [redacted] into the living room and then to the basement. She said at that point alone there was clearly a forcible confinement of both of them. On the evidence of [redacted] slapped Mr. [redacted] and [redacted] then went to the basement with at least two of the men. It was once all the men with guns were in the basement that [redacted] was able to flee. [redacted] did not try to stop [redacted] when she left the house although as Ms. Stanford submitted he probably did not believe her statement that she was going to call police

[125] I agree with the submissions of Ms. Stanford. On the evidence that I accept, [redacted] was clearly unlawfully confined in the basement for some period of time by at least [redacted] and Mr. T.F. and [redacted] was unlawfully confined for a shorter period of time but for at least a few minutes while the men with the firearms were upstairs. There is no doubt that the confinement

was unlawful and that it was intentional. I find that this must have been something [redacted] would know would inevitably happen when they forced their way into the house. He knew Ms. Peters was home and as soon as he entered the house he knew Mr. Osman was as well. Although Mr. Brown remained in the kitchen, given that the main floor of this home is quite small, and given the layout, he must have heard all the conversation and been able to observe what was going on. Although it may be that Ms. Peters was no longer unlawfully confined once she announced her intention to leave and left the home, she clearly was before that. On the unchallenged evidence of Ms. Peters, Mr. Osman was as well.

[126] For these reasons I find that Mr. Brown had a joint intention with the other men to unlawfully confine Ms. Peters, and once inside the home, Mr. Osman, as alleged in Counts #3 and 4.

Findings With Respect to [redacted]

(c) The Alleged Robbery with a Firearm and Unlawful Confinement

[127] For the reasons already stated, I am satisfied that on the uncontested evidence of Ms. [redacted] as corroborated by the 911 call and the surveillance video, that she and [redacted] were robbed and unlawfully confined. Her evidence that one of those persons was someone she knew to be [redacted] was not challenged. I have also set out my reasons for why I am not satisfied beyond a reasonable doubt that [redacted] or for that matter the other men, brandished real firearms as opposed to imitation firearms.

[128] The sole remaining issue then with respect to [redacted] in connection with these charges is whether or not he is the man whom [redacted] identified as [redacted] and who participated in the robbery and unlawful confinement.

[129] The Crown's case rests largely on the evidence of [redacted] although there is some corroboration of her evidence.

[130] The first consideration is the reliability of [redacted] evidence and whether or not she could have been mistaken when she identified [redacted] I agree with Ms. Stanford that in this regard this is not an identification case but rather a recognition case. Although there is a dispute between [redacted] and [redacted] as to how often they saw each other, [redacted] admitted that he could recognize [redacted] and she could recognize him. In fact on his evidence she smoked weed in the house with him which means that he saw [redacted] for a longer period of time than he initially suggested in his evidence. The unchallenged evidence of [redacted] is that the four men entered her home without masks or disguises. Although the evidence is not clear as to exactly how long the robbery took, it took a few minutes, while the men were directing [redacted] and [redacted] as to what to do. It was enough time for [redacted] to see who was involved. On the unchallenged evidence of [redacted] the man she identified as [redacted] addressed her directly telling her to go downstairs. As such [redacted] had the benefit of voice recognition as well.

[131] There is also the fact that close in time to the robbery [redacted] picked out all four of the men in a photo line-up. There is no doubt that she correctly identified at least two of them; Mr. T.F. and [redacted] I have no evidence about R.. No issues were raised as to the fairness of the second line-up save for the fact [redacted] knew that the person she knew as [redacted] had been arrested. There is as well the issue with respect to [redacted] response to the question during the second line-up when she identified a photo of [redacted] but was not asked who he was or how she knew him.

[132] In my view the fact Ms. Peters knew that [redacted] had been arrested before she participated in the second line-up does not materially affect the reliability of her identification of him. She knew she had identified three of the four men and that she had not yet identified [redacted] Coming in for another photo line-up, that is who she would expect to be looking for. At its highest arguably she might have a higher expectation that a picture of [redacted] would be in the photo line-up since he had been arrested but there is no suggestion that the line-up she was shown was not properly and fairly prepared. Furthermore, there was no suggestion that [redacted] saw [redacted] at the station before the photo line-up which might have influenced her in selecting his photo. I fail to see how this would be any different that many cases where there is only one suspect and a complainant is asked to do a photo line-up.

[133] Although [redacted] clearly should have been asked at the time the name of the person she recognized and how it was that she recognized the person in this photo, I accept her evidence at trial that the reason she identified this particular photograph is because she believed this photo to be of the fourth robber whom she knew as [redacted] She had been through the photo line-up process before and knew why she was there. The instruction given to her related to the home invasion on March 18th. She knew that was the purpose of her identifying the photo of the man she picked out.

[134] That leaves, as counsel for [redacted] stressed, the fact that in the first photo line-up Ms. [redacted] instantly and without hesitation identified three of the four men and that during the second photo line-up she took about 14 seconds to identify the photo as being a photo of [redacted] I agree with Ms. Stanford that [redacted] explanation for taking a little longer to identify [redacted] is credible. This photo line-up was a day after the robbery and it is understandable that a little removed from the trauma of the event she might think about the fact that she could not believe that [redacted] would do this to her. She did say "yes" firmly and unequivocally and was very firm when about this when she testified.

[135] I have also considered whether or not [redacted] lied when she alleged that [redacted] was among the men that robbed her and when she identified [redacted] in the photo line-up. In this regard, there was no suggestion that [redacted] had any reason to wrongly implicate [redacted] in the robbery. There is no evidence of animus or bad history with [redacted] nor did I get a sense of that when [redacted] testified. [redacted] also testified that he had no disagreement with Ms. [redacted] as of March 2012 that he was aware of. In reply submissions Mr. Scandiffio argued that

the reason [redacted] would lie is that she had been told the police had arrested [redacted] and she had picked him from the line-up. In essence he was submitting that having done that she did not want to be found to have lied when she testified at the preliminary hearing and at trial. This was never put to [redacted] and in any event begs the question of why she identified [redacted] in the first place. The Defence of course does not have to establish that [redacted] had a motive to lie. Although the absence of a motive to lie does not mean that [redacted] evidence is true, it is a factor that I may consider.[7]

[136] I have already considered the fact that in [redacted] statement to police she mixed up the person who was wearing the cap and find that that mistake does not suggest that she did not get a good look at the men. She identified the men who robbed her and with respect to [redacted] and in answer to questions from Ms. Kideckel, [redacted] confirmed that she gave a detailed description of [redacted] to police right after the robbery. This description is very detailed and is very close to [redacted] description and included descriptors she would not have seen in the photo lineup including the space between his front teeth. [redacted] admitted that those descriptors were accurate save that he thought he is taller than six feet and that he thought he had four gaps between his teeth. As already stated, when I asked him to show me this, I observed that the biggest gap, which was the most obvious, was between his two upper front teeth. The fact Ms. [redacted] was able to give a very detailed description of [redacted] to police right after the robbery, that fits [redacted], is very significant in my view.

[137] [redacted] was arrested once before for being in a place where cocaine was found. At that time he testified that he was wearing a grey thermal shirt. Mr. Scandiffio submitted that Ms. [redacted] testified that [redacted] normally wears a navy blue jacket and since [redacted] was wearing grey at the time of his earlier arrest and grey at the time of this arrest he can't be [redacted] This submission does not warrant any response. In any event, although [redacted] was wearing a grey sweater and a grey vest at the time of this arrest, neither appear to a thermal shirt.

[138] [redacted] evidence that [redacted] was at the robbery is also corroborated by Mr. T.F.. Mr. Scandiffio submitted that Mr. T.F. lied about this and that this was as a result of pressure from Ms. Stanford in her questioning. I agree that Ms. Stanford persisted in questioning Mr. T.F. but she did so properly and it was clear that she did so because he was not being responsive. I had to intervene as well. As I have said, Mr. T.F. was clearly trying to assist his friends which include [redacted]i. The fact that he ultimately reluctantly confirmed that [redacted] was one of the men who participated in the robbery is some evidence that supports the Crown's position. Although Mr. T.F. was not a reliable witness, this evidence which was adverse to the position of his friends is more likely true. That said, it is not evidence that I put any weight on given my overall impression of Mr. T.F..

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[7] *The Queen v. K.G.B.* (1993), 79 C.C.C. (3d) 257 (S.C.C.) at p. 300.

[139] Finally the identification by [redacted] of [redacted] as [redacted] is corroborated by the surveillance video. When [redacted] testified, she was shown the video and identified which one of the four men was [redacted] This is when she realized her memory about who was wearing the baseball cap was incorrect. Although I am not able to see the face of the man [redacted] alleges is [redacted] in the video to be in a position to confirm [redacted] evidence, [redacted] was not shown this video by his counsel and at no time did he expressly deny that he was the person on the video that [redacted] identified as [redacted] His denial was only implicit in that he denied being at the robbery.

[140] Ms. Stanford also relies on the evidence of the threats made by phone to [redacted] which she submits corroborates [redacted] role in the robbery. For the reasons I will come to, I find that the Crown has proven beyond a reasonable doubt that [redacted] called the phone number of [redacted] phone and uttered the threats as alleged by [redacted]. This strongly corroborates the evidence of [redacted] that [redacted] participated in the robbery. He would have no other reason to make these calls and these threats.

[141] For the reasons already stated, I do not accept [redacted] evidence that he did not participate in the robbery, nor does his evidence about that raise a reasonable doubt. I must consider however whether or not on the evidence as a whole, the Crown has satisfied me that Mr. [redacted]. and that he participated in the robbery of [redacted] I accept the evidence of Ms. [redacted] and find it to be reliable. She knew [redacted] at least well enough to recognize him, she testified that he is in the surveillance video, she said he was one of the robbers in the 911 call, she picked him out of a photo line-up a day after the robbery and she has been firm that he is one of the men who robbed her. Despite having an issue with some of her evidence that I have identified, I find that her evidence in identifying [redacted] as one of the robbers is truthful and reliable. There is therefore no question that [redacted] also participated as a principal in the unlawful confinement of both [redacted]

[142] For the reasons already stated I do not accept Mr. Scandiffio's submission that the evidence only supports an attempted forcible confinement with respect to [redacted] or that Ms. [redacted] evidence is insufficient to make a finding that [redacted] was unlawfully confined. What [redacted] heard and saw is enough to establish this count as well in respect of [redacted] Accordingly, for these reasons I am satisfied beyond a reasonable doubt that [redacted] and that he participated as a principal in the included offence of robbery and unlawful confinement of [redacted] as alleged in Counts #1, 2, 3 and 4.

(d) The Alleged Threats

[143] An important issue with respect to the threatening charge is whether or not the Crown has proven that the phones in [redacted] possession belonged to him and not, as he alleges, to someone known as Kid. As I have already stated, I do not accept [redacted] explanation for

how the phones came into his possession. My first concern is that his evidence that he knew the phones belonged to Kid is not believable given his evidence at trial that he was not even aware of the fact that Kid had slipped them into his vest pocket. Mr. Scandiffio submitted that because they were listening to music on the phones [redacted] would be able to recognize the phones. This evidence on a fairly straightforward issue however came in re-examination and was materially inconsistent with [redacted] evidence in cross-examination. Furthermore, I find it is strange that the group would be listening to music from two phones, not one and in any event, given there were a number of people standing in the group, the suggestion of [redacted] that once he knew the phones were in his pocket he instantly knew they belonged to Kid is difficult to accept. Even if it was not until he saw them during the booking, I find this evidence difficult to believe. The phone is question looks like a typical black flip phone; there is nothing that appears unusual about it. In addition there is no evidence to suggest that a person known as Kid had any involvement in the robbery and therefore any motive to make these calls and utter these threats. For these reasons I do not accept [redacted] evidence and find that the phones were his or in any event were phones that he had in his possession.

[144] Mr. Scandiffio submitted there was a lack of evidence because the phone in question wasn't investigated until it was too late to get the cell phone records. However, there is no evidence that an early request for disclosure of those records was made by the Defence. This is not a situation where the Crown or the police have lost or destroyed records. The records were no longer available when the officer went to retrieve them. In my view this does not mean that the Crown cannot rely on the other available evidence to support the allegations.

[145] Ms. Kideckel submitted that [redacted] cousin did not testify about the text that she sent to the phone that [redacted] said that she misplaced or to the response she received. The same submission could be made with respect to [redacted], who on [redacted] evidence heard the threat on the day after the robbery. [redacted] was not asked about why her cousin or Mr. [redacted] were not at trial to testify and so I have no evidence about this. In my view no adverse inference can be drawn. This simply means the Crown can only rely on the telephone calls to [redacted] that she testified about to prove these allegations.

[146] There was no suggestion from the evidence that [redacted] would have a reason to give his phone number to [redacted] before the robbery. [redacted] testified that he had never met Mr. [redacted] One way for [redacted] to have obtained [redacted] phone number is if he was a party to the robbery of that phone. On the evidence, the only way [redacted] would come to know Mr. [redacted] phone number would be if he used his phone to call her, or in this case, [redacted]

[147] [redacted] admitted that she never talked to [redacted] on the phone and Ms. Kideckel questioned her ability to recognize his voice. I agree that is a consideration but her belief was corroborated by [redacted] possession of the phone that was used to call [redacted] The fact [redacted] was able to give a telephone number to police that was the number that came up on [redacted] phone and was the number of one of the phones in [redacted] possession is very strong evidence of his making the threats. Having rejected [redacted]'s explanation for how the

phones came into his possession, there is simply too much of a coincidence to provide [redacted] with any other possible innocent explanation for why one of the phones found in his possession was the one used to call [redacted]. I am satisfied that he is the one who made the calls.

[148] The remaining question then is whether or not the Crown has proven beyond a reasonable doubt that when [redacted] called [redacted] number and spoke to [redacted] he uttered the words [redacted] testified to and that those words constituted a threat. [redacted] had no motive at that time to make up new allegations against [redacted] Her allegations of robbery were serious enough. There was no direct attack on the wording of the threats alleged by [redacted] save that Ms. Kideckel submitted that [redacted] could have been responding to Ms. Peters' tweets. There is no evidence from [redacted] to this effect and I do not see how that would make any difference. There could be no issue that the words alleged to have been spoken would be considered to mean a threat to cause the death of [redacted] Furthermore, there is nothing in the tweets by [redacted] that could justify the threats made to her by someone on a telephone.

[149] Ms. Kideckel submitted that although [redacted] testified that the first call she picked up on March 18th made her feel uneasy, she still answered a second time the following day on her evidence. Although that call was put on speakerphone according to [redacted], Mr. [redacted] has not testified. [redacted] was not asked why she picked up the phone again but her evidence that she put the phone on speakerphone was not challenged and presumably she would naturally have felt some security given [redacted] was present.

[150] It is not clear how seriously [redacted] considered the threats as she did not report the threats until she was in the police car on the way to the station to do the second photo line-up. The evidence however is that after the robbery she moved and she no longer lives in the [redacted] area. In any event, it is not an essential element of the offence that the recipient of the threats uttered by the accused feel intimidated by them or be shown to have taken them seriously. All that needs to be proven is that they were intended by the accused to have that effect. Given the words used, that has been proven.

[151] For all of these reasons I am satisfied beyond a reasonable doubt that [redacted] called [redacted] telephone and spoke to [redacted] on two occasions, the second time being March 19th, the day after the robbery and he uttered the threats that she alleged when she testified. He is only charged with making a threat on the 19th of March and so the threat I have found made on that day is the basis for a finding of guilt with respect to the charge of threatening as alleged in Count #8.

Disposition

[redacted]

[152] Would you please stand.

[153] For the reasons I have given I find you guilty of the included offence of robbing Ms. [redacted] contrary to s. 344(b) of the *Criminal Code*.

[154] I also find you guilty of unlawfully confining [redacted], as alleged in Counts #3 and 4 contrary to section 279(2) of the *Criminal Code*.

[redacted]

[155] Would you please stand.

[156] For the reasons I have given I find you guilty of the included offence of robbing Ms. [redacted] contrary to s. 344(b) of the *Criminal Code*.

[157] I also find you guilty of unlawfully confining [redacted], as alleged in Counts #3 and 4, contrary to section 279(2) of the *Criminal Code*.

[158] Finally, I find you guilty of uttering threats to [redacted] to cause death to [redacted], contrary to section 264.1 of the *Criminal Code*.

SPIES J.

Released: April 23, 2013

Edited version released April 25, 2013

CITATION: [redacted], 2013 ONSC 2349
COURT FILE NO.: 12-40000535-0000
DATE: 20130423

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

HER MAJESTY THE QUEEN

– and –

[redacted] and [redacted]

Defendants

REASONS FOR JUDGMENT

SPIES J.

Released: April 23, 2013

Edited version released April 25, 2013