W A R N I N G

The court hearing this matter directs that the following notice be attached to the file:

This is a case under the *Youth Criminal Justice Act* and is subject to subsections 110(1) and 111(1) and section 129 of the Act. These provisions read as follows:

> **110. Identity of offender not to be published.**—(1) Subject to this section, no person shall publish the name of a young person, or any other information related to a young person, if it would identify the young person as a young person dealt with under this Act.
>
> **. . .**
>
> **111. Identity of victim or witness not to be published.—**(1) Subject to this section, no person shall publish the name of a child or young person, or any other information related to a child or a young person, if it would identify the child or young person as having been a victim of, or as having appeared as a witness in connection with, an offence committed or alleged to have been committed by a young person.
>
> **. . .**
>
> **129. No subsequent disclosure.—** No person who is given access to a record or to whom information is disclosed under this Act shall disclose that information to any person unless the disclosure is authorized under this Act.

Subsection 138(1) of the *Youth Criminal Justice Act,* which deals with the consequences of failure to comply with these provisions, states as follows:

> **138. Offences.—**(1) Every person who contravenes subsection 110(1) (identity of offender not to be published), 111(1) (identity of victim or witness not to be published) . . . or section 129 (no subsequent disclosure) . . .
>
> (*a*) is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years; or
>
> (*b*) is guilty of an offence punishable on summary conviction.

ONTARIO COURT OF JUSTICE

sitting under the provisions of the *Youth Criminal Justice Act*, S.C. 2002, c. 1, as amended;

CITATION: *R. v. CO.-L.*, 2017 ONCJ 900
DATE: December 14, 2017
COURT FILE No.: Toronto

B E T W E E N :

HER MAJESTY THE QUEEN

— AND —

J. CO.-L., a young person

Before Justice E. B. Murray
Heard on November 20 and 21 and December 8, 2017
Reasons for Judgment released on December 14, 2017

Mr. Ed Stimec .....counsel for the Crown
Mr. Andrew Stastny..... counsel for the defendant J. Co.-L.

MURRAY, E.B. J.:

[1] J. Co.-L. was arrested and charged with 6 offences on December 31, 2016. All the charges relate to his alleged possession of a loaded prohibited firearm, a .357 Smith and Wesson Magnum. J. is now 18 years old, but was 17 at the time of the incident.

[2] At the time of the incident J. lived with his mother, A.CO., 49 years of age, at W[…], Toronto. That residence was searched pursuant to a search warrant, and a .357 Smith and Wesson Magnum revolver was located.

[3] At trial, I heard evidence from Crown witnesses A.CO., her friends J.O. and N.K., and from officers involved in the investigation, DC Hamayak Ghazarian, Officer Andrew Purves, and DC Cory Butler. I also viewed surveillance videos and pictures of the home and its contents. I received a Gunshot Residue (GSR) report in evidence. The defence called no evidence.

[4] At the conclusion of the evidence, the Crown agreed that there was no evidence supporting the charge of possession of property (the revolver) obtained by crime, and I dismissed the charge.

The Evidence

[5] Many of the facts in this case are agreed upon.

[6] It is agreed that J. did not have a license to possess a firearm or a registration certificate for a firearm. It is agreed that the weapon seized is a prohibited weapon.

[7] Some of the agreed upon facts have to do with an offence committed earlier on December 31, 2017, an offence which is relevant to the charges which J. faces. Those facts, set out in an Agreed Statement of Facts, are as follows.

1. 5 Wakunda Place, Apartment #612, Toronto, is the apartment unit of Dave Ellison.

2. On December 3JSt, 2016, at just prior to 1:00 a.m., Dave Ellison, Ken Rogers, and Adam Cummings were all present inside 5 Wakunda Place, Apartment #612, Toronto, watching a movie.

3. During the movie, Adam Cummings went to use the bathroom, while Dave Ellison and Ken Rogers remained on the couch in the living room.

4. While Adam Cummings was in the bathroom, 3 male assailants forced their way into the apartment.

5. The 3 assailants ordered Ken Rogers and Dave Ellison to lay on the couch. One of the assailants stated: "Don't look, don't do anything, lay down on the couch, you'll be fine".

6. One of the assailants opened the bathroom door and began to demand money from Adam Cummings.

7. An altercation ensued between Adam Cummings and the one assailant in the bathroom, and the assailant's firearm was discharged, striking Adam Cummings in the throat with a bullet.

8. All three assailants then fled the apartment.

9. One firearm was displayed and used during the course of the robbery at 5 Wakunda Place, apartment #612. The witnesses did not observe the assailants possess any other firearm during the course of the robbery.

10. A later search of the residence at 5 Wakunda Place apartment #612 by Toronto Police Service would result in the seizure of a .22 calibre cartridge casing and a .22 calibre magazine at the scene of the shooting. This would indicate that the firearm used during the shooting was a .22 calibre firearm, not a revolver.

11. Surveillance cameras in the area captured the assailants exit 5 Wakunda Place at Time stamp 12:50-12:51 a.m. and run northbound towards a nearby townhouse complex.

12. Surveillance cameras captured one of the assailants place a black messenger style shoulder bag into a nearby dumpster at timestamp 1:15 am. The bag contained a loaded .22 calibre LRHV Blue Line Solutions firearm without a magazine. The .22 calibre magazine located inside 5 Wakunda Place unit #612 functions as an operational magazine for this .22 calibre firearm. Further DNA testing also confirmed the presence of the victim's blood on this .22 calibre firearm located inside this dumpster. This was the firearm used to shoot the victim Adam Cummings.

13. Surveillance cameras captured the 3 assailants enter the address known as W[…], Toronto at approximately timestamp 1:16 a.m.

14. At approximately timestamp 1:54 am, surveillance cameras capture the 3 assailants exit
W[…], and walk towards and enter 30 Wakunda Place unit #8. At approximate timestamp 2:32 am., surveillance cameras capture one of the assailants, suspected to be B.G., leave this unit and return back to W[…]. The other 2 assailants were not located by police that day.

15. The descriptions of the 3 assailants who participated in the attempted robbery are as follows:

Suspect #1: Male, black, wearing dark grey hoody sweater with a Roots logo on the front, covering his head, matching grey track pants, white running shoes. This person is displayed in the 151 image attached and is suspected to be C. L.

Suspect #2: Male, black, maroon or burgundy hoody covering his head, multicoloured running shoes with thick black laces, light grey track pants with a logo on front left leg. This person is displayed in the 2nd image attached and remains unknown.

Suspect #3: Male, black, black track pants, white Nike running shoes, black hoody sweater with 2 white squares on the front. Upper square containing the word 11CROOKS", white rectangular squares on either sleeve, carrying a black, over the shoulder bag with the word Nike. This person is displayed in the 3rd image attached and is suspected to be B.G..

16. J. Co.-L. was not one of the 3 assailants who participated in the attempted robbery of Adam Cummings.

17. ETF Police officers called out the occupants of W[…] at approximately 3:40 am. J.O. Ogden and her daughter, A.Co. Co., J. Co. Livingstone and B.Graham exited the residence.

18. Upon searching W[…], Toronto, a loaded Smith & Wesson, .357 Magnum revolver was located. This handgun is a "restricted firearm" pursuant to the *Criminal Code* of Canada.

[8] Neither the Crown or defence challenged the reliability or credibility of any of the witnesses. I make findings of fact below in accordance with that evidence.

1. On the date in question J. and his mother A.CO. lived at W[…], Toronto. They had lived there for 16 years. They had been the only occupants of that address for over a year, since J.'s older brother Tre. moved to Calgary.
2. The home is a small 2 story townhouse with a central hallway.
    a. There are two bedrooms on the second floor, one occupied by A.CO. (BR#1) and one by J. (BR#2). A landing separates the bedrooms.
    b. The kitchen and living room are on the first floor.
    c. The basement contains a laundry room and Tre.'s former bedroom (BR#3). BR#3 contains an X-box, TV, and play station and functions as a games room used by J.
3. A.CO. testified that when J. is at home and awake, he is usually in the games room.
4. J. suffers from epilepsy, and has frequent and unpredictable seizures. A.CO. worries about this, and tries to keep him at home. She is indulgent about his having neighborhood friends to the house frequently for this reason. A.CO. said that she expected J. to send his friends home when she went to bed, but that he did not always comply.
5. B.G. and C. L. are J.'s friends from the neighborhood. B.G. and J. had been friends since they were small. C.L. had been J.'s friend for several years.
6. On December 30, 2017 A.CO. came home from work at about 6 p.m. J. was there. She made supper for the two of them.
7. A.CO. had to work early the next morning, and had planned to celebrate New Year's Eve with her friend J.O. J.O. is an old friend of A.CO.'s. She is 41 years old and the mother of three children.
8. J.O. and her daughter T. were to spend that evening (December 30th) at A.CO.'s house, and then J.O. was to pick A.CO. up from work on December 31st.
9. J.O. and T. arrived at about 9:30 p.m. J. was saying good bye to a friend when they arrived, and then he went to the kitchen. A.CO. was already in her bedroom, relaxing. J.O. and T. went up to see her, and chatted for about 10 minutes.
10. J.O. and T. went to the living room, got blankets, and settled down couches. They put on a video. J.O.'s evidence is that she fell asleep while the video was running. She estimates that she fell asleep by 11-11:30 p.m.
11. A.CO. got into bed at about 11:30 p.m. She estimates she was asleep within 30 minutes. As she was going to bed, she texted J. to say good night. He texted back that his friend DeS. was with him downstairs, and was leaving.
12. Neither A.CO. nor J.O. woke until Toronto Police banged on the door at 3:40 a.m. to execute their search warrant.
13. J.O.'s evidence on what happened at that time is as follows.
    a. She heard a loud banging on the door, and someone call "Toronto Police".
    b. T. was scared, and began to run upstairs; A.CO. was coming down the stairs from the 2nd floor.
    c. J.O. asked her what to do, and was told to open the door. She did so.

d. Police told her to come outside. She did and was cuffed and taken to a car. As she was sitting in the scout car, she saw J. be escorted from the house.
e. At no time did she see anyone in the house except A.CO., J. and T..
f. She did not bring a firearm to the house, or see a firearm in the house.

14. A.CO.'s evidence on what happened at that time is as follows.
    a. She awoke when J. came to her room saying that police were outside the house. She was "stunned".
    b. As she left her room to go downstairs, she saw "an image"; turning, she saw B.G. behind her. She was upset and confused, and did not understand what the boy was doing in her bedroom. His presence scared her.
    c. When she reached the ground floor, police directed her outside, and into scout cars.
    d. She did not bring a firearm to the house, or see a firearm in the house.
15. Detective Ghazarian searched the games room. The room was messy. It contained a bed, and two brown pillows were atop the bed. He noticed one pillow much heavier than the other. He unzipped the pillow case, and probed the filling, finding a black handgun, a .357 Smith and Wesson Magnum revolver. There was one bullet in the chamber. The handle was covered with black electrical tape.
16. Detective Ghazarian seized other things from the games room. One was a blue T-shirt with a blue Jays logo, on a hanger, lying on a couch. This item was seized because surveillance photos show a thin line of blue protruding under Suspect #2's maroon hoodie, indicating that he may have worn a blue shirt underneath.
17. Officer Purves also helped search the games room. He found a TD bank envelope with correspondence addressed to J. on an end table in the room.
18. In a search of J.'s bedroom on the second floor a number of items were located, listed below.
    a. A black garbage bag containing some clothing matching the description of the clothing worn by the 3 suspects in the home invasion at 5 Wakunda featured in surveillance videos : a Crooks and Castle black hoodie with white squares on the sleeve, blue denim pants with belt, dark gray Roots hoodie and matching dark gray Roots track pants. The Roots hoodie and pants were later tested and shown to have C.L.'s DNA profile.
    b. A small blue backpack with a Blue Jays logo containing a zip-lock bag with 21 rounds of 22 calibre ammunition.
    c. A certificate of achievement in the name of J. Co.-L., as well as a TD bank statement in his name, and envelope and card addressed to him.
19. The evidence did not indicate where these items were found in J.'s room.
20. DC Butler testified that the search did not reveal the outer clothing worn by Suspect #2, a maroon hoodie and light gray track pants with logo on front left leg.

Counsel agreed that the GSR report should go in to evidence without a voir dire and without cross-examination of its author. The report was of limited evidentiary value. It indicated that some GSR was found on B.G.'s hands, on the Blue T-shirt from the games room, on clothing seized from J.'s bedroom (the Roots hoodie and jogging pants and on the Levi blue jeans). No GSR was found on J.'s hands.

The report states that presence of GSR particles on a person's hands or clothing is not proof that they have discharged a firearm; there are other explanations for the presence of GSR. The report does not indicate how long GSR particles are detectable after deposit. The report also states that the absence of GSR particles is not proof that a person did not discharge a firearm, and offers several alternative explanations.

The law

[9] The Criminal Code defines "possession" in S. 4(3):

> (3) For the purposes of this Act,
>
> (a) a person has anything in possession when he has it in his personal possession or knowingly
>
> (i) has it in the actual possession or custody of another person, or
>
> (ii) has it in any place, whether or not that place belongs to or is occupied by him, for the use or benefit of himself or of another person; and
>
> (b) where one of two or more persons, with the knowledge and consent of the rest, has anything in his custody or possession, it shall be deemed to be in the custody and possession of each and all of them.

[10] To establish possession, the Crown must prove control and knowledge[1]. Possession may involve actual possession or constructive possession of the thing or joint possession by more than one person with the other's consent.

[11] The Crown asserts that J. had constructive possession of the revolver and relies on circumstantial evidence to prove its case. In R. v. Anderson-Wilson, (2010) O.J. 377 (SCO), Mr. Justice Hill offered guidance as to a judge presiding in such a case.

> In crimes of unlawful possession, it is "not necessary for the prosecution to prove the required knowledge by direct evidence ... it could be inferred from the surrounding circumstances": R. v. Aiello (1978), 38 C.C.C. (2d) 485 (Ont.C.A.) at 488 (aff'd [1979] 2 S.C.R. 15); see also R. v. Pham (2005), 203 C.C.C. (3d) 326 (Ont.C.A.) at para. 18 (aff'd [2006] 1 S.C.R. 940); R. v. Anderson, [1995] B.C.J. No. 2655 (C.A.) at para. 15-16. Frequently then, such cases are proven by circumstantial evidence: see R. v. Meggo, [1998] O.J. No. 2564 (C.A.) at para. 1.

[1] R. v. Gray, 28 O.R. (3d) 417 (O.C.A.)

This includes proof of unlawful possession of a firearm: R. v. Ali, 2008 ONCA 741 at para. 3-7.

The essential component of self-instruction on circumstantial evidence is that the trier of fact must be satisfied that the only rational inference that can be drawn from the circumstantial evidence is that the accused is guilty: R. v. Griffin; R. v. Harris (2009), 244 C.C.C. (3d) 289 (S.C.C.) at para. 33. Circumstantial evidence must be viewed as a whole and not each piece individually: R. v. Warkentin et al. (1976), 30 C.C.C. (2d) 1 (S.C.C.) at 20. "[T]he mere existence of any rational, non-guilty inference is sufficient to raise a reasonable doubt": R. v. Griffin; R. v. Harris, supra, at para. 34.

The Crown may seek to establish the existence of a fact in issue by submitting that an inference may reasonably and circumstantially be drawn from the primary facts - there exists an inferential gap between the primary fact and the fact to be proved: R. v. Arcuri (2001), 157 C.C.C. (3d) 21 (S.C.C.) at 31-2; R. v. Cinous (2002), 162 C.C.C. (3d) 129 (S.C.C.) at 172-3. Whether the inference is a reasonable one to draw usually involves an application of "human experience and common sense" (R. v. Figueroa et al., [2008] O.J. No. 517 (C.A.) at para. 33; U.S.A. v. Huynh (2005), 200 C.C.C. (3d) 305 (Ont.C.A.) at 307). Circumstantial inferences are ones which "can be reasonably and logically drawn from a fact or group of facts established by the evidence": R. v. Morrissey (1995), 97 C.C.C. (3d) 193 (Ont.C.A.) at 209. A trier of fact "cannot be invited to draw speculative or unreasonable inferences": R. v. Figueroa et al., at para. 35, 42. Most cases "will involve hiatuses in the evidence which can be filled only by inference": Lameman v. Canada (Attorney General), [2006] A.J. No. 1603 (C.A.) at para. 87. "The process of drawing inferences from evidence is not, however, the same as speculating even where the circumstances permit an educated guess": U.S.A. v. Huynh, at 307.

[12] In assessing circumstantial evidence, it is an error of law to hold that an accused must rely on “proven facts” to ground an alternative explanation. An accused is required to prove nothing, and is entitled to an acquittal if there is “a reasonable doubt on all the evidence, a conclusion sustainable at a threshold significantly lower than a reasonable inference from proven facts”. [2]

[13] The Supreme Court of Canada recently observed as follows on the assessment of circumstantial evidence[3].

> “Of course, the line between a “plausible theory” and “speculation” is not always easy to draw. But the basic question is whether the circumstantial evidence, viewed logically and in light of human experience, is reasonably capable of supporting an inference other than that the accused is guilty”.

Argument

[2] R. v. Robert, 131 O.A.C. 136; R. v. Bui, 2014 ONCA 614
[3] R. v. Villaroman, (2016) S.C.J. 33

[14] The Crown submits that the evidence establishes the following facts and the logical inferences to be drawn from those facts.

- J. had control of both his bedroom on the second floor and of the games room in the basement.
- J. had control over the contents of both rooms.
- J. assisted the suspects in hiding paraphernalia from their criminal activity in his bedroom—the .22 calibre ammunition and clothing.
- There is no evidence that a second firearm (the .357 revolver) was used in the 5 Wakunda home invasion.
- Even if there was such a firearm, it is illogical to think that the suspects would have thrown the .22 calibre gun in the dumpster, but continued to carry the revolver to J.'s home.
- Further, it makes no sense that the suspects, who had fled the scene of their crime in a panic, would stuff most of the incriminating paraphernalia in a garbage bag upstairs and then go to the basement and carefully hide the gun in a pillow.
- There is no evidence that any of the suspects was in the games room that evening. It speculative to infer that the Blue Jays T-shirt found in the games room belonged to Suspect #2. Suspect #2 may have worn a blue T-shirt of some type under his hoodie, but it makes no sense that he would divest himself of the T-shirt and not discard his distinctive outer clothing, the maroon hoodie and light gray pants with logo. Although the T-shirt had gunshot residue, there is no evidence as to when the residue would have been deposited.
- The relationship of J. to the suspects was close and friendly. It is not reasonable to believe that, even if B.G. and C.L. and their friend had the .357, that they would have hidden it without J.'s knowledge.

[15] The defence concedes that J. had a measure of control over the games room, and says that the question for this case is whether there is evidence establishing beyond a reasonable doubt that J. had knowledge of the revolver hidden in the pillow in that room.

[16] Counsel initially argued that there was no evidence that J. was present during the time the suspects were in the home, or that he admitted them to the home. Counsel did not press these arguments in his further submissions.

[17] Defence counsel does not suggest that one of J.'s friends left the valuable firearm in the games room on some day before December 30, 2016, or that A.CO. or her friend could be responsible for its presence in the pillow. Counsel submits, however, that there are reasonable inferences to be drawn from the evidence other than an inference that J. had knowledge of the revolver.

[18] Counsel argues as follows.

- Three persons who were involved in a violent robbery attended the CO. home immediately after the robbery. Their intention—to dispose of incriminating

paraphernalia—is clear from the fact that one of them discarded a firearm in a dumpster a minute before entering.

- At least two suspects left distinctive clothing and 22 calibre ammunition in J.'s bedroom. The defence concedes that, as J. did not testify, the only available non-speculative inference is that, at a minimum, he allowed the suspects to do so, and that although J. may not have known that a shooting had occurred, he did know that these items were evidence of some illegal activity.
- Although there is no evidence that one of the suspects had a second firearm, it is not improbable to think that more than one of the three men planning to commit a violent robbery would have armed himself. The victims in the robbery had been cautioned by the suspects "not to look" when they entered the apartment.
- The fact that J. allowed the suspects to store some criminal paraphernalia in his room does not prove that he knew about or let them hide the revolver.
- The three suspects had the opportunity to hide the revolver without J.'s knowledge. All three were in the CO. home between 1:16 a.m. and 1:54 a.m.; B.G. returned later, and was in the home for over an hour before the arrival of police at 3:40 a.m.
- There is evidence that J. may have been absent from the home for short periods[4] twice while the suspects were in the home, allowing one of them to hide the revolver in the games room without his knowledge.
- It is reasonable to think that the suspects would have gone to the games room during the extended period they were in the home that evening, rather than risk waking A.CO. or J.O. and her daughter. The presence in the games room of the blue T-shirt containing gunshot residue, the same colour as the undershirt worn by Suspect #2, is some evidence that the suspects were there.
- Further, there is no evidence as to the temporal gap between when police arrived on the scene and when the search took place. J. and B.G. were able to see the lights of the scout cars outside the home. B.G. would have had the motive and opportunity to hide the revolver, knowing that he was about to be removed from the home.

Analysis

[19] I am satisfied that J. was in the home that evening, with the possible exception of two brief periods of about 4 minutes each. It is established that he was there at 11:30 p.m. when his mother was going to bed, and that he was there at 3:40 a.m. when the warrant was executed[5].

[20] I am also satisfied that J. admitted B.G, C.L., and Suspect #2 to the home at 1:14 a.m. The video surveillance shows the three men approaching the door of the home, one man making a call on a cellphone and, after a wait of 33 seconds, the door opening. The evidence establishes that all occupants of the home that night other than J. were asleep after midnight.

[4] As noted above, the video shows a male who is not one of the suspects leaving twice for about 4 minutes.

[5] According to the video surveillance tapes, an unidentified person exited Unit 8 for 2 occasions between 1 a.m. 3:40 a.m., going to Unit 3, and it is possible that that was J.

[21] The evidence also establishes that the games room was J.'s space. As his mother said, when J. was awake, that is where you'd find him. J. exercised control over the room and, in most respects, the things in it. There is evidence that would allow the court to find that J. had knowledge of and therefor constructive possession of the revolver.

[22] Are there other reasonable inferences available when the totality of the evidence is considered? In my view, the answer is yes.

[23] One perhaps not probable, but reasonable explanation flowing from the evidence as a whole is that one of the suspects hid the .357 in the pillow in the basement without J.'s knowledge. In my view, it is not required, as argued by the Crown, that the defence prove the existence of a second gun being used in that robbery in order for this inference to be available. I accept that it is reasonable to believe that these men, in planning a violent crime, could well have decided a second firearm was useful.

[24] It must be remembered in assessing the evidence that we are dealing with three suspects. It cannot be presumed that they were acting in concert and with one mind at all times. Although the suspect carrying the .22 calibre firearm thought to toss it into a dumpster, the suspect carrying another firearm might not have noticed this opportunity. Whoever was carrying the ammunition did not use the dumpster to dispose of it.

[25] The suspects were in the home for over 40 minutes; B.G. was there for an additional hour. It is reasonable to believe that the suspects, or some of them, did spend at least part of the l time they were in the home in the basement games room. It is there that they would avoid waking A.CO. and J.O. and her daughter.

[26] I agree with the Crown that the evidence connecting the Blue Jays T-shirt with the 5 Wakunda robbery is far from conclusive. However, the gunshot residue on the T-shirt found in the games room is some evidence that its wearer may have been present at the robbery that evening. It may have been discarded by its wearer for just that reason. He may have not been able to acquire other clothing at the CO. home that would allow him to get rid of his hoodie and pants.

[27] Although it may be improbable that B.G. or C.L., being good friends of J., would have hidden incriminating evidence in the CO. home without J.'s consent, there is no evidence about the relationship between Suspect #2 and J.. Suspect #2 had opportunity to hide an item without J.'s knowledge. If he did so, it is not surprising that he secreted the firearm in a place other than where J. knew the other incriminating items were hidden.

[28] I also agree that it is a reasonable, although not probable inference from the evidence that B.G. may have hidden the .357 at the last minute, when it became clear that the police were going to enter the home. As defence counsel pointed out, the revolver was valuable. B.G. may have wished to hold on to it for his own purposes, and hidden it only when the police arrived in a hiding place from where he hoped to be able to retrieve it later.

[29] The evidence is highly suspicious, but I cannot conclude that there is no other reasonable inference to be drawn from that evidence other than J.'s guilt. I find him not guilty of the remaining charges.

Released: December 14, 2017
Signed: Justice E. B. Murray