Citation No. 2017 MBPC 28

THE PROVINCIAL COURT OF MANITOBA

BETWEEN

Her Majesty the Queen	)	Sharyl Thomas and Debbie Buors,
	)	for the Crown
	)	
- and -	)	
	)	
Andrea Giesbrecht	)	Greg Brodsky, Q.C., Matthew Gould
	)	and Zachary Kinahan
	)	for the Accused
	)	
	)	Sentencing Decision delivered:
	)	July 14, 2017

NON-PUBLICATION ORDER:

Note- there is an order of non-publication banning publication in any document or the broadcasting or transmission in any way, of the names or identities of the accused's two living children.

M.P. Thompson, P.J.

Introduction

[1] Andrea Giesbrecht, a forty-three-year-old married woman, was convicted after trial of six counts of "concealing the dead body of a child" pursuant to section 243 of the *Criminal Code of Canada*.

[2] This is my decision on sentencing and my reasons for that decision.

[3] Some of the sentencing principles that I must consider include denunciation, deterrence, rehabilitation, promoting a sense of responsibility in the offender and an acknowledgment of harm to victims or the community.

Sentencing Positions

[4] Crown and defence counsel both filed with the Court casebooks containing relevant sentencing precedents. Both counsel made lengthy oral submissions to the Court on July 7th, 2017.

[5] Section 243 of the *Criminal Code of Canada* prescribes a maximum penalty of two years jail. There is no minimum penalty.

[6] Crown and Defence take vastly different positions on sentencing.

[7] The Crown asks for a total sentence of eleven years: one year for the first offence and two years on each of the five remaining counts to be served consecutively. The Crown argues the principle of denunciation is paramount and that this is the proverbial "worst offender and worst offence". They submit that a total sentence of eleven years is appropriate which it should not be reduced using the totality principle, which requires the sentencing Judge to ensure where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh.

[8] Defence counsel takes the position that a sentence of time already served by Giesbrecht, a credit of 8.4 months, is appropriate and no further jail time is required. The defence argues she was convicted of concealing the remains of still-born or self-aborted fetuses, committed between the dates of March 7, 2014 and October 20, 2014, and she ought to be sentenced on that basis only. They argue the offence of concealment was one, on-going offence, making consecutive sentences and further punishment unnecessary.

[9] After the sentencing hearing, I reserved my decision for one week to today's date, July 14, 2017.

Purpose of Section 243

[10] The relevant section of the *Criminal Code*, section 243, states:

> **243** Every one who in any manner disposes of the dead body of a child, with intent to conceal the fact that its mother has been delivered of it, whether the child died before, during or after birth, is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

[11] The Supreme Court of Canada makes it clear the goal of section 243 of the *Criminal Code* is to facilitate the investigation of possible homicides: *R. v. Levkovic*, 2013 SCC 25.

[12] In *Levkovic*, the Supreme Court quoted with approval at paragraph 60, the words of the trial Judge:

> ...allowing persons to conduct themselves as though pregnancy terminated in still-birth, and to say so if challenged, all without reliable government certification, amounts to an easy and unacceptable escape for those inclined to eliminate a new-born infant by killing it. Unchecked and unreviewable disposal of a still-born child effectively defeats the state's ability to verify that death preceded live birth.

The Offences

(a) Overview

[13] At the heart of any decision on sentencing is the nature of the offences as well as the offender's degree of responsibility, or moral culpability, in committing those offences.

[14] It is noteworthy that the offences for which Giesbrecht is being sentenced can only be prosecuted by indictment.

[15] Although I gave lengthy reasons in my reasons for Judgment (*R. v. Andrea Giesbrecht,* 2017 MBPC 1), it is necessary to review some of the trial evidence and key findings of fact, to place in proper context the seriousness of these offences and Giesbrecht's moral culpability.

[16] These were not victimless crimes.

[17] On October 20, 2014, employees cleaning out a U-Haul storage locker called the Winnipeg Police Service. They were shocked to have found the remains of six fully-formed fetuses in varying stages of decomposition, sealed in separate bins, pails and bags in a storage locker rented by Giesbrecht since March 7, 2014.

[18] Three U-Haul employees were required to take inventory of Giesbrecht's storage locker when she defaulted on rent. They smelled a gross, rotting smell when they opened the containers. The contents were sticky, squishy and liquid brown. Because things didn't feel right, they obtained gloves and went further. After opening a bag inside one of the Rubbermaid totes and viewing the contents, they called police.

[19] This was the beginning of a significant number of police officers, pathologists and other experts having to unpack and examine the six bodies, dissect them, photograph them and view them; repeatedly. It is difficult to describe the disturbing impact of viewing the remains or photographs of fully formed, decomposing fetuses and their autopsies. There are just some things you cannot unsee.

[20] A U-Haul worker testified at the trial and described the impact on him as "many, many nights of non-sleeping".

[21] The autopsies concluded that no determination as to cause of death could be made. None of the pathologists could determine that these infants were born alive- meaning there was no evidence that the infants had breathed, been fed or survived for a period of time such that the umbilical cord had begun to dry and fall off.

[22] This determination could not be made primarily due to the advanced state of decomposition of the remains.

[23] The optimal time to determine whether a deceased infant has ever breathed is within a day of delivery.

[24] Because the Crown could not prove that the children proceeded in a living state from the body of the mother, they could not proceed with homicide charges.

[25] The trial evidence established beyond a reasonable doubt that each essential element of the six counts was committed by Giesbrecht:

- She disposed of the dead body of a child;
- She intended to conceal that she had been delivered of the child;
- The child was born at a gestational stage of development where it was likely to have born alive; and,
- Giesbrecht knew the child would likely have been born alive.

(b) Facts

[26] Six fully developed fetuses were discovered. Both the autopsy photos and expert evidence made that abundantly clear.

[27] Their gestational ages ranged from a low of 34 weeks (8 ½ months) to as high as 42 weeks (10 ½ months).

[28] Where decomposition did not preclude this analysis, there were no obvious signs of congenital defect or injury.

[29] I accepted expert evidence that each of these children was likely to have been born alive.

[30] Going further, Dr. Narvey, an expert in neonatology, testified that based on their gestational age and on studies of the probabilities of recurrent stillbirths, some, if not all of the children would have been born alive.

[31] His opinion that some of these children were actually born alive was supported by the testimony of Dr. Naugler, an expert in obstetrics. She reviewed Giesbrecht's medical records and eliminated all known causes of stillbirth. In her opinion, it was highly likely all six children were born alive.

[32] The following circumstantial evidence inevitably led to the conclusion that Giesbrecht would have been aware that each child was likely to have been born alive.

[33] She did not seek medical treatment during these six pregnancies, despite life experience that included two natural live births and treatment for miscarriage as well as accessing the Manitoba health care system for multiple therapeutic abortions. She was knew when she was pregnant and she knew the timing of her menstrual cycle.

[34] Dating of these deliveries was imprecise, but we know documents found with some of the bodies, postdate the birth of her first born in 1997, and others

were dated after 2002, the birth of her second child. Also located with the bodies were children's toys, children and infant's clothing and blankets; all suggestive that at least one small child was present in her household at the time the bodies were disposed of. This is significant as these documents and children's items are evidence of delivery after a time Giesbrecht would have already experienced and recognized the pregnancies, delivery and the birth of her surviving children.

[35] Giesbrecht concealed each of these six pregnancies, even from her husband. She bagged each of the bodies, sealed them or encased them in cement or powder, all in an effort to contain the smell of human decomposition and decay.

[36] She hid the bodies in a storage locker, despite signing a rental agreement prohibiting the storage of human remains. She rented the locker under her maiden name, rather than use her married name. She provided an incorrect address on the rental agreement. She declined her close friend's offer to help move the contents from another storage locker, into the storage locker where the bodies were found.

[37] All of these facts led to one conclusion: Giesbrecht knew these children were likely to have been born alive and she wished to conceal the fact of their delivery and existence.

Analysis

[38] Giesbrecht's moral culpability is extremely high and consecutive sentences are required.

[39] In my Judgement of February 6, 2017, I gave reasons why the dates in the Information were not an essential element of these offences. I will not repeat them here. Accordingly, I have determined these six offences were separate and distinct in time. This coincides with the evidence before the Court. On average, Giesbrecht

was pregnant for nine months on six separate occasions for a minimum of 54 months (or 4.5 years) of pregnancy, which does not account for time between deliveries and her next pregnancy.

[40] These were six separate offences, considered and contemplated by her over a lengthy period of years. The harm accomplished by Giesbrecht is precisely what was contemplated by the trial Judge in *Levkovic* (Supra), when he said:

> "...allowing persons to conduct themselves as though pregnancy terminated in still-birth, and to say so if challenged, all without reliable government certification, amounts to an easy and unacceptable escape for those inclined to eliminate a new-born infant by killing it. Unchecked and unreviewable disposal of a still-born child effectively defeats the state's ability to verify that death preceded live birth. "

[41] There is no evidence of self-induced abortion. There is no evidence of injury to any of the fetuses. I accepted Dr. Naugler's expert evidence that a self-induced abortion at the advanced gestational ages of these fetuses would have caused life-threatening medical consequences to Giesbrecht, which would have required urgent medical care. Giesbrecht's medical records showed no such treatment.

[42] A review of her medical records ruled out all known medical risks for still-birth. I accepted expert evidence that the probability for this number of recurrent still-births is astronomically low: all of which lead the experts to conclude that some, if not all, of these infants would have been born alive.

[43] The concealment and disposal of these six fetuses resulted in their decomposition. By her own hand, Giesbrecht has effectively made it impossible for the state to verify if death preceded live birth. This makes the offences as

serious as they can be under s. 243 of the *Code* and the sheer number of offences makes the moral culpability of Giesbrecht extreme.

The Offender

[44] Giesbrecht does not come before the Court as a person of good moral character.

[45] A pre-sentence report was prepared to assist the Court in sentencing the accused. The report is dated April 20th, 2017. A second pre-sentence report from an earlier conviction was also filed with the Court.

[46] The accused has a criminal record as follows:

- September 30, 2014 - Fraud Over $5,000 – Suspended Sentence with 2 years Supervised Probation;
- April 28, 2016 – Breach of Probation (by attending at a casino) and Fraud Over $5,000 – 20 days' jail already served at 1.5 credit for a total sentence of 30 days' jail to be served concurrently, plus two years Supervised Probation and a stand-alone Restitution Order.

[47] Giesbrecht has two children and has been married for 20 years. She has an unremarkable upbringing as the sole child of her parents, with the exception that that her parents had a gambling habit and indulged it frequently.

[48] She does not have any issues with drugs or alcohol.

[49] Despite her pathological behaviour, Giesbrecht reported she does not have a history of mental health problems and has never been diagnosed with any psychiatric disorders. The Psychiatric Nurse at Women's Correctional Centre,

revealed the subject received psychological services in custody and psychiatric triage but did not present with symptoms of a major psychiatric illness.

[50] Giesbrecht has a Grade 12 education and graduated from a business administration program from Red River College in 1994. She has a history of employment and more recently volunteer work.

[51] The pre-sentence report indicates that at the heart of her prior criminal conduct was a longstanding, significant addiction to VLT and card gambling at casinos in Winnipeg in which she lost thousands of dollars; in later years betting $500 per hand for several hours three days per week. After exhausting her own resources, the finances of her parents including their credit cards and lines of credit, and her inheritance after her parents died, she turned to defrauding a close family friend of her parents.

[52] Giesbrecht's second conviction for Fraud Over $5,000 resulted from an investigation into her receiving Employment and Income Insurance Benefits from April 2011 through April 2012.

[53] Giesbrecht spent 188 days in custody after her arrest on October 21st 2014 until her release on bail in April of 2015. Twenty days of her time in custody was used to sentence her on an unrelated conviction, leaving her 168 days of time in custody credit. She is entitled to enhanced credit of 1.5 days giving her total of 252 days, or 8.4 months, of time served.

[54] Since April 24, 2015, Giesbrecht has been on bail with strict conditions. They initially included house arrest, with supervision from The Elizabeth Fry Society.

[55] The defence filed a letter in support of Giesbrecht from Michaela Finch, Supervisor of the Bail and Supervision program for The Elizabeth Fry Society of Manitoba. It can only be described as a glowing letter of support. I must comment that this was not an objective exercise: the letter is one of advocacy and must be viewed through that lens. It does not take into account the actions of the accused that led to her criminal convictions, just her post-offence conduct.

[56] Giesbrecht has done very well on The Elizabeth Fry bail program, has not breached her conditions of release, and has taken programming including gambling prevention.

[57] The Pre-Sentence Report noted she was assessed as a low risk to re-offend. A Manitoba Corrections Level of Service/Case Management Inventory identified significant risk factors causing or likely to cause criminal behaviour including: her family, marital and criminal history.

[58] The author of the Pre-Sentence Report wrote:

> "Given the nature and severity of the offences before the Court, the subject is not a suitable candidate for further community supervision at this time."

[59] While it is solely the role of the sentencing Judge to determine the appropriate sentence to impose, I agree that the seriousness of the offences for which she has been convicted preclude a community-based disposition.

[60] Her probation officer, who is an officer of the Court and an objective source of information, reported a significant change in attitude after Giesbrecht was found guilty for the matters before the Court. Behaviours noted by her Probation Officer since that time, include being argumentative and challenging of the Probation

Officer's direction. She was verbally aggressive, angry and displayed a negative attitude during a reporting appointment in April 2017.

[61] Giesbrecht has a well-documented history of deceiving others, in regards to her gambling addiction, the significant frauds she committed on two separate occasions and the deceit confirmed by these convictions in hiding and concealing her pregnancies, deliveries and disposing of her six fetuses. It gives the Court pause to receive such a glowing letter of support from her Bail Supervisor at Elizabeth Fry, while at the same time hearing such a contrast of attitude towards her Probation Officer, once her fate was sealed by the guilty verdicts.

[62] When discussing victim empathy with the author of the Pre-Sentence Report, Giesbrecht commented:

> "The concealment charge itself of an infant says it all... I think everyone's affected, like my kids."

Sentencing precedents

[63] With one exception, all of the case precedents provided for similar offences typically related to young women, most without permanent partners, often experiencing pregnancy for the first time, who disposed of one child. All those offenders pled guilty. Most did not have prior criminal records and were of prior good character.

[64] Despite those mitigating circumstances, including some offender's having been diagnosed mental health issues, each of those offenders received jail sentences. Some were sentenced to house arrest, some were sentenced to time already served and some received short jail sentences going forward, but all received a custodial sentence.

[65] Andrea Giesbrecht is not that person. She is an outlier; a very different member of a particular group of women who concealed the bodies of children they delivered. While Courts may have some sympathy for a single woman who finds herself pregnant for the first time with no history of criminal or anti-social behaviour: Andrea Giesbrecht is not in that position.

[66] Giesbrecht has a history of lacking empathy and disregarding the consequences of her actions, the consequences of her gambling, of defrauding a family friend, of defrauding the Employment and Income Assistance Program, deceiving friends and family about her pregnancies, disregarding the prohibition of placing human remains in a storage locker and the consequences that followed when staff at the facility discovered the remains of her six decomposing fetuses.

[67] When asked if there existed any sentencing precedents in Canada involving an offender who had concealed the body of more than one child, defence counsel provided to the Court the case of *R. v. Borowiec*. That case dealt with a woman who was convicted after trial of two counts of infanticide. Infanticide is the act or omission of a mother killing her newborn child and at the time of the act or omission her mind is "disturbed". The maximum penalty for each offence was 5 years.

[68] Both the Alberta Court of Appeal decision, *R. v. Borowiec*, 2015 ABACA 232, and the Supreme Court of Canada decision, *R. v. Borowiec*, 2016, SCC11, [2016] were filed at the end of submissions. Neither of those decisions described the sentence imposed.

[69] A CBC news release about that case, filed by defence at the conclusion of submissions, indicated that the offender received a sentence of 18 months jail for

separate offences when she placed two live new-borns in garbage bags and disposed of them in a dumpster steps from her home.

[70] By disposing of six bodies Giesbrecht is unprecedented as an offender in the context of section 243 of the *Criminal Code of Canada*.

The Law

[71] One of the most difficult decisions for a judge is to determine the appropriate sentence in a given case. There are many factors for the Court to consider, including sentencing principles set out in the Canadian *Criminal Code*:

> **Purpose and Principles of Sentencing**
>
> **Purpose**
>
> 718 The fundamental purpose of sentencing is to protect society and to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:
>
> (a) to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;
>
> (b) to deter the offender and other persons from committing offences;
>
> (c) to separate offenders from society, where necessary;
>
> (d) to assist in rehabilitating offenders;
>
> (e) to provide reparations for harm done to victims or to the community; and
>
> (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community.

[72] Other relevant principles of sentencing are set out in s. 718.2 of the *Code*. Essentially, these principles are:

(a) that a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender; that a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;

(b) that where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;

(c) that an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and

(d) that all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders.

Analysis

[73] At tab 5 of the Crown's Case Book, in the case *R. v. R.C.L.*, 2012 BCPC 0053, at paragraph 84, we are reminded of the objective of denunciation:

> Denunciation is the communication of society's condemnation of the offender's conduct. A sentence with a denunciatory element represents a symbolic, collective statement that the offender's conduct should be punished for encroaching on our society's basic code of values as enshrined within our substantive criminal law.

[74] The purpose of s. 243 calls out for denunciation. Six convictions cry out to the public for denunciation as the paramount principle.

[75] These were newly delivered infants, our most vulnerable. Expert evidence at trial showed the real possibility these children would have survived birth. The only person who can protect a newly delivered infant is their mother. We want as a society to believe that a mother would do everything to protect her newborn.

[76] Denunciation, in these circumstances, is paramount or justice will be defeated time and time again.

[77] This law does not contemplate an offender like this, with six concealed bodies. Even so the sentence must reflect the proper application of the law as it stands, not what we think it should be.

[78] Mitigating factors include:

- The Manitoba Corrections Assessment that Giesbrecht is a low risk to re-offend;
- Friends and acquaintances who testified at trial described her as a good mother to her two children;
- She did not breach her bail conditions for two years, despite being under a bail supervision program with house arrest for the first 18 months;
- She has employment and a good work record with her current employer;

- She volunteered at Siloam Mission for 8 months in 2014 before her arrest and completed her 100 hours of community service work during her second probation order set to expire on April 27, 2018. She continues to volunteer on occasion.

- She actively engaged in institutional programming while incarcerated and was polite and cooperative with unit staff;

- She regularly visited with her children while on bail release; and

- She sought treatment with the Problem Gambling Program of the Addictions Foundation of Manitoba, attending 58 individual counselling sessions since May, 2015, and has signed a voluntary self-exclusion form with Manitoba Lotteries banning her from casinos for the maximum time of three years.

[79] Aggravating factors far outweigh the mitigating factors in this case:

- Giesbrecht has a criminal record, involving crimes of dishonesty;

- The offences involve six bodies and took place repeatedly over a lengthy period of time;

- She knew she had medical options and chose not to access them;

- She knew birth control was an available option but chose not to use it;

- She was experienced in birth, delivery and therapeutic abortions and knew how to avoid this and did not reach out for help;
- The required a significant degree of deliberation: concealing the pregnancies, renting a storage locker, placing each of the bodies there.
- She has not demonstrated any remorse;
- The manner in which the bodies were concealed, disposed of and left to decompose lacked dignity;
- She put the U-Haul storage workers in a position where they had to discover the remains;
- Her actions will inevitably have a negative effect on her two teenage children;
- The harm to society is significant;
- And perhaps most aggravating, she has defeated the police investigation into the cause of death of six infants.

Decision

[80] In the context of these facts and this offender, denunciation and personal deterrence are paramount. Specific deterrence is required resulting from the number and the duration of these offences. Keep in mind Giesbrecht is 43 years old and still able to conceive. While her husband had a vasectomy in 2011, he did not attend follow up tests to confirm it was effective.

[81] Rehabilitation is a secondary consideration in this case, given the seriousness of the offences.

[82] I have determined Giesbrecht's moral culpability is extreme.

[83] Her conduct needs to be denounced; she and others need to be deterred from committing this offence.

[84] Case law precedents have established that separation from society is necessary for offenders who commit offences such as these.

[85] Giesbrecht has yet to take responsibility for her actions and a sentence sufficient to bring home that point is required.

[86] The gravity of her actions and her moral culpability increased after the first offence and the sentences imposed need to reflect that increase in culpability.

[87] I am satisfied that a fit sentence recognizing the significance of these offences is as follows:

- For count one, a sentence of six months jail;
- For count two, a sentence of one year jail; and
- For each of the remaining four counts, the maximum sentence of two years per count.

[88] I am satisfied that because each set of offences relate to separate remains and were separate acts, that each sentence ought to be served consecutively to the other. Totaled consecutively this would lead to a sentence of 9 ½ years.

[89] Section 718.2(c) of the *Criminal Code* sets out that where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh: otherwise known as the totality principle or the "one last look" principle of sentencing. The Crown submits that taking into account the significance of these convictions the total sentence imposed would not be crushing and should not be reduced for totality.

[90] I do not agree. Giesbrecht has a family, including two children, and is employed. A sentence of this length could be considered crushing. In my view a one last look at this sentence ought to reduce the total sentence by 1 year to one of 8 and one half years.

[91] I sentence Andrea Giesbrecht to serve a global sentence of 8.5 years.

[92] Giesbrecht is entitled to credit for the time she remained in jail from her arrest on October 21, 2014, until she made application for and was granted bail. She behaved well in jail and is entitled to 1.5 days of credit for each day of pre-sentence custody for her good behaviour and to recognize that she would have been eligible for early release if this time was served after conviction. She is entitled to enhanced credit of 1.5 days giving her total of 252 days, or 8.4 months, of time served.

[93] This reduces the remaining time to serve on her 8.5 year sentence to 7.8 years going forward.

[94] I order that you provide a sample of your DNA, pursuant to section 487.051(3) of the *Criminal Code*, as I am satisfied given the nature and circumstances of these offences that it is in the best interests of the administration of justice that you do so.

[95] Victim surcharges of $200.00 per count for a total of $1,200.00 are mandatory and I make that order. There are no court costs as these are Indictable proceedings and the Summary Convictions Act is therefore inapplicable.

"ORIGINAL SIGNED BY:"
THOMPSON, P.J.