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(Brandon Centre)
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COURT OF KING'S BENCH OF MANITOBA
(GENERAL DIVISION)

BETWEEN:)
)
HIS MAJESTY THE KING,) HUGH CRAWLEY
) For the Crown
and)
)
BREANNE STEPHANY VANJAARVELD,) ROBERT HARRISON
Accused.) For the Accused
)
)
)
) JUDGMENT DELIVERED:
) DECEMBER 15, 2022

LEVEN J.

SUMMARY

[1] The accused was charged with possession for the purposes of trafficking methamphetamine (“meth”). For reasons explained below, I find the accused not guilty of possession for the purpose of trafficking, but guilty of the lesser included offence of simple possession. The accused testified at trial.

[2] The accused and a friend ("the Friend") were arrested in a house where meth was found ("the House"). A small quantity (consistent with simple possession) was found near the accused, and the accused freely admitted that it belonged to her. A different small quantity (consistent with simple possession) was found in a bag floating in the bowl of a nearby toilet. The accused denied any knowledge of this.

[3] A large quantity (consistent with trafficking) was found hidden in a box in a nearby alcove. Again, the accused denied knowledge of the box.

[4] There was no fingerprint/DNA evidence. The Crown's case was circumstantial. The issue was whether the accused knew about the meth in the toilet and/or the meth in the alcove.

[5] The evidence was that the accused did not own the House; that the owner and many other people often came and went (including while the accused was absent), and that at least one of the House doors did not lock. No weapons, cash or "scoresheets" (documents showing money owing by drug purchasers) were found in the House.

[6] The accused had a security camera system that allowed her to see the front exterior of the House. The accused testified that she saw the police approaching the house on the system, but claimed that she thought they were only coming to do a curfew check on her.

[7] The Crown's theory was that, on seeing the police on the security system, the accused quickly took most of her meth, threw one bag into the toilet, and put the box with the large quantity into the nearby alcove.

[8] The accused was not a generally credible witness. I do not believe her testimony that she had no knowledge of the meth in the toilet. None of her evidence raised a reasonable doubt about her knowledge of the meth in the toilet. Nor did any other evidence raise a reasonable doubt about the meth in the toilet. There was no plausible alternative theory under which the accused would not have known about the meth in the toilet.

[9] However, although the accused was not a generally credible witness, some of the other evidence (including the fact that so many people, including the owner, had access to the house while the accused was absent, and the fact that no cash, weapons or "score sheets" were found in the house) raised a reasonable doubt about whether the accused knew about the meth hidden in the alcove.

[10] Among other things, there was no plausible reason why the accused would have quickly thrown one bag of meth into the toilet while also quickly placing the box of meth into the nearby alcove. Time was of the essence. If the Crown's theory was correct, the obvious thing for the accused to do would have been to hide all of the meth in the alcove. One logical conclusion is that the accused did not know about the meth in the alcove. It is certainly a plausible theory, based on the evidence as a whole. That would mean that the accused is guilty of simple possession.

THE FACTS

[11] This is not a comprehensive recitation of all the evidence and argument tendered; it is a concise summary of certain important matters.

[12] Counsel settled on several agreed facts, and admitted several documents and photos by agreement.

[13] It was common ground that the accused was subject to release conditions that included a curfew. The accused admitted that she sometimes violated that curfew. She pled guilty to the offence of breaching that release condition.

[14] It was agreed that the accused was arrested on September 3, 2019, in the course of the execution of a search warrant at the House ("the police raid").

[15] It was an agreed fact that individuals "involved in the drug trade are often security conscious and may make use of video surveillance in furtherance of their trafficking [activities] to monitor customers and police activity."

[16] It was an agreed fact that individuals "involved in the drug trade may attempt to flush drugs upon execution of a search warrant to destroy evidence".

[17] An Expert Report (the "Report") about drug trafficking was admitted by consent. The Report includes a conclusion that, on its face, might be relevant.

The Report says:

It is my belief that the accused intended to sell all or part of the methamphetamine that they were in possession of. It is plausible that the Accused is a user of meth, however the amount and other seized items are not consistent with someone who is **solely** a user. I believe that the amount of meth seized combined with all of the factors detailed above is consistent with someone who would be in possession of meth for the purpose of trafficking.

[18] It was agreed that the substance in question was meth. It was agreed that the three bags of meth found in the living room contained about 5.7 grams, 5.1 grams, and 5.7 grams of meth. It was agreed that the bag found in the toilet contained about 8.3 grams. It was agreed that, of the 11 bags in the box (in the alcove), nine contained about 29 or 30 grams each, and two contained about nine grams each.

[19] It was agreed that a total of about 285 grams were found in the House. It was agreed that a heavy meth user might use about half a gram per day. Therefore, all the meth in the House might last a heavy user for about a year. It was agreed that the street value of all the meth might be roughly \$14,000 to about \$28,000.

[20] There was some dispute about where in the House the accused was located when the police raided the House on September 3, 2019. The police said she was in the living room.

[21] It is common ground that no cash, weapons or scoresheets were found in the House.

[22] There were two toilets in the House – one in the basement and one on the main floor. The accused testified that the basement toilet did not work. There was no evidence to refute this assertion.

[23] It was common ground that there were security cameras in the House that showed a view of the front of the House. The accused freely admitted that the

security system was hers. She said she had once been the victim of human trafficking, and she kept the system to protect her from such threats.

[24] It is common ground that police found a digital scale in the living room during the raid. At trial, the accused freely admitted that it was hers. She said she needed it because she was a heavy meth user, and that meth came in varying densities (e.g. powder and chunks). She said the key to determining the effect of meth is mass, not volume. Therefore, the accused weighed her meth before using it, to prevent accidental overdoses. There was no evidence to contradict this assertion.

[25] The accused testified about the name of the man who owned the House ("the Owner"). There was no evidence (e.g. a land title) to contradict this assertion.

[26] The accused testified that the Owner lived in a shack in the back yard of the House. There was no evidence to contradict this assertion.

[27] It is common ground that the police watched the House for at least a couple weeks before the police raid, and prepared a report about many of the comings and goings from the House. The report was an agreed document.

[28] The accused testified that her former boyfriend ("the Boyfriend") lived with her in the House for a few months before the police raid, but moved out about a day before the raid. The police surveillance report mentions the Boyfriend by name and shows that he came and went many times in the weeks before the raid.

The report last mentions him as entering and leaving the House between 2:19 a.m. and 4:18 a.m. on September 1, 2019.

[29] The accused testified that the Owner asked the accused and the Boyfriend to live in the House. The accused testified that the Owner was afraid of being assaulted, and that he felt safer if the accused and the Boyfriend would live in the House, while the Owner would live in a shack in the backyard. There was no evidence to refute this version of events.

[30] The accused testified that the Owner often entered and exited the House. There was no evidence to refute this assertion.

[31] The police surveillance report mentions the accused, the Boyfriend, the Friend and a couple other people by name. It also mentions a lot of unnamed males and females. Sometimes it uses a descriptor (e.g. "bald male").

[32] The accused said that, on September 2, 2019, she left the House and went with a friend to Steinbach, to buy meth for personal use. She brought it back to the House.

[33] Police photos of the living room at the time of the police raid show three small baggies of meth. The baggies have the logo to the Disney Movie "Frozen" on them. The accused testified that there were two small baggies of meth in the living room (one belonging to the accused and one belonging to the Friend).

[34] Police photos showed the alcove in the main floor bathroom. It was a small area between two walls. There was a portable shelving unit (roughly three feet high) blocking access to the alcove. However, it would be possible for a person to

reach over the shelving unit and around to the alcove, and to drop an item into the alcove. The item would then be invisible, unless one moved the shelving unit away. The police found the box with the large quantity of meth (about eight ounces) in the alcove. The meth was in "Frozen" baggies in the box. The box was sealed with blue tape.

ARGUMENT

[35] The Crown argued that the accused knew about all of the meth. She saw the police coming on her security system. She grabbed the 8.5 gram bag of meth and the box of the meth (containing roughly eight ounces of meth). She raced into the bathroom, dropped the 8.5-gram bag into the toilet and flushed, and dropped the box into the alcove. The flush turned out to be unsuccessful. She then left the bathroom before the police saw her. Whether she was in the living room or near the exterior door when the police first saw her is not crucial. This theory would explain why the accused owned a scale; why she maintained a security system; why all the meth was in "Frozen" baggies, and why the blue tape on the box was the same as the blue tape in the living room.

[36] As for the absence of cash in the House, the Crown's theory was that the accused had just spent all of her cash to buy the meth, and that she had not sold any of it yet.

[37] The defence theory was that the accused did not know about the meth in the toilet or the meth in the alcove. This meth must have belonged to someone other than the accused. Perhaps it was the Owner, who came and went frequently.

Perhaps it was the Boyfriend, who also came and went frequently. Perhaps it was one of the many unnamed people who entered the House in the days before the raid.

[38] As for the rest of the circumstantial evidence against the accused, defence counsel offered alternative theories to each piece of circumstantial evidence. The accused testified that she kept the security system because she had once been a victim of human trafficking. The accused testified that she used the scale to measure the substantial quantities of meth that she consumed herself. The scale would help ensure that she did not accidentally overdose. The accused testified that the Owner bought the "Frozen" baggies and left them in the living room. The accused and the Friend used two (or three) of the baggies for their own personal quantities of meth, but it is plausible that the Owner (or someone else) also used the "Frozen" baggies to package the meth in the box (in the alcove).

[39] In closing argument, the Crown conceded that the small quantity of meth in the toilet was consistent with simple possession, not with possession for the purpose of trafficking.

THE CONTROLLED DRUGS AND SUBSTANCES ACT

[40] Relevant sections of the *Controlled Drugs and Substances Act*, SC 1996, c. 19 ("**CDSA**") include:

Trafficking in substance

- **5 (1)** No person shall traffic in a substance included in Schedule I, II, III, IV or V or in any substance represented or held out by that person to be such a substance.

- **Possession for purpose of trafficking**

(2) No person shall, for the purpose of trafficking, possess a substance included in Schedule I, II, III, IV or V.

CASE LAW

[41] ***R. v. W.(D.)***, [1991] 1 SCR 742 [“***W.(D.)***”] was a sexual assault trial in which the accused testified. The court outlined a useful approach for analyzing the credibility of an accused and the principle of reasonable doubt. At page 758, the majority set out the framework for instructing a jury:

First, if you believe the evidence of the accused, obviously you must acquit.

Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.

Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

[42] Later cases have elaborated upon ***W.(D.)***. ***R. v. Menow***, 2013 MBCA 72, was also a sexual assault case involving a ***W.(D.)*** analysis. At the appeal stage, the accused argued that the trial judge had erred by considering the evidence of the complainant and of a witness in concluding that the accused was not credible.

At paragraph 23, the appeal court observed:

To assess the evidence of the accused in a vacuum ignores the fact that the whole purpose of the trial is to determine whether or not he accused is guilty...It is impossible for an accused’s evidence to be considered without a factual or contextual backdrop for the charge itself.

[43] In ***R. v. Vuradin***, [2013] 2 SCR 639, the court considered the ***W.(D.)*** framework. At paragraph 21, the court pointed out:

The order in which a trial judge makes credibility findings of witnesses is inconsequential as long as the principle of reasonable doubt remains the central consideration.

[44] ***R. v. Lewin***, 2020 MBCA 13, was an example of how a ***W.(D.)*** analysis interacted with a drug trafficking case. The accused was arrested while riding a bicycle that he borrowed from a drug dealer. The accused had a small amount of meth in his pocket. When the police searched the bike, they found 14.35 grams of meth hidden inside the bike seat. The accused denied knowing about the meth in the bike seat. An expert witness testified that 14.35 grams of meth would indicate trafficking, but conceded that it might be for personal use. The accused was convicted of possession for the purpose of trafficking. The trial judge did not believe the accused. The trial judge ignored the expert evidence that 14.35 grams might be for personal use because the defence theory of the case was that the accused did not know about the 14.35 grams at all. The appeal court concluded that the trial judge misapplied the third step of the ***W.(D.)*** analysis, and ordered a new trial. The onus was always on the Crown to prove every element of the offence, including the assertion that the meth was for the purpose of trafficking.

[45] In ***R. v. Villaroman***, 2016 SCC 33 ("***Villaroman***"), the court explained the modern principles for analyzing circumstantial evidence. At paragraph 35, the court observed:

The issue with respect to circumstantial evidence is the range of reasonable inferences that can be drawn from it. If there are reasonable inferences other than guilt, the Crown's evidence does not meet the standard of proof beyond a reasonable doubt.

[46] At paragraph 37, the court added:

When assessing circumstantial evidence, the trier of fact should consider "other plausible theor[ies]" and "other reasonable possibilities" which are inconsistent with guilt...the Crown may need to negative these reasonable possibilities, but certainly does not need to negative every possible conjecture, no matter how irrational or fanciful, which might be consistent with the innocence of the accused...

[47] At paragraph 38, the court further added:

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.

FINDINGS

[48] The accused freely admitted that she had knowledge of the small quantity of meth found in plain view in the living room. The accused said that one small baggie was hers and one small baggie was the Friend's. The Crown pointed out that there were actually *three* small baggies in the living room. In any event, by her own free admission, the accused was guilty of simple possession of meth.

[49] In closing argument, the Crown conceded that the small quantity of meth in the toilet was consistent with simple possession, not with possession for the purpose of trafficking.

[50] Therefore, it is arguable that the meth in the toilet was almost irrelevant. The accused denied knowing about the meth in the toilet. However, even if she were lying about this issue, her knowledge about the meth in the toilet would not change the "bottom line". The accused is at least guilty of simple possession.

[51] Nevertheless, I will comment further about the meth in the toilet, because it is relevant as part of a full analysis of the meth in the House.

[52] The Expert Report includes a conclusion, which, on its face, assists the Crown. The Report says:

It is my belief that the accused intended to sell all or part of the methamphetamine that they were in possession of. It is plausible that the Accused is a user of meth, however the amount and other seized items are not consistent with someone who is **solely** a user. I believe that the amount of meth seized combined with all of the factors detailed above is consistent with someone who would be in possession of meth for the purpose of trafficking.

[53] Of course, the Report was written before the trial. At the trial, the Accused freely admitted to being a heavy user of meth. She also freely admitted to knowing about the small amount of meth in the living room, some of which belonged to her. However, the major issue at the trial became whether the accused knew about the meth in the alcove. The Report sheds no light on that question. It simply assumes that the accused knew about *all* of the meth in the House (about 285 grams). Therefore, this aspect of the Report is essentially irrelevant.

[54] The big question is whether the accused knew about the meth in the alcove. It is common ground that possession requires both knowledge and control. If the accused had no knowledge of the meth in the alcove, she had no possession.

[55] There was certainly some circumstantial evidence against the accused (in respect of the meth in the alcove). At the time of the arrest, the only two people in the House were the accused and the Friend.

[56] One agreed fact was that individuals "involved in the drug trade are often security conscious and may make use of video surveillance in furtherance of their trafficking [activities] to monitor customers and police activity."

[57] It was an agreed fact that individuals “involved in the drug trade may attempt to flush drugs upon execution of a search warrant to destroy evidence”.

[58] One police officer testified that he saw someone who looked like the accused in a window of the House just as the police raid was starting. The window was very near to the bathroom.

[59] All of this circumstantial evidence is consistent with the Crown’s theory of the case. The Crown argued that the accused knew about all of the meth. She saw the police coming on her security system. She grabbed the 8.5 gram bag of meth and the box of the meth (containing about nine ounces of meth). She raced into the bathroom, dropped the 8.5 gram bag into the toilet and flushed, and dropped the box into the alcove. The flush turned out to be unsuccessful. She then left the bathroom before the police saw her. Whether she was in the living room or near the exterior door when the police first saw her is not crucial. This theory would explain why the accused owned a scale; why she maintained a security system; why all the meth was in “Frozen” baggies, and why the blue tape on the box was the same as the blue tape in the living room.

[60] As for the absence of cash in the House, the Crown’s theory was that the accused had just spent all her cash to buy all the meth, and that she had not sold any of it yet.

[61] The Crown’s theory is, on its face, one plausible theory.

[62] The defence theory was that the accused did not know about the meth in the toilet or the meth in the alcove. This meth must have belonged to someone

other than the accused. Perhaps it was the Owner, who came and went frequently. Perhaps it was the Boyfriend, who also came and went frequently. Perhaps it was one of the many unnamed people who entered the House in the days before the raid.

[63] As for the rest of the circumstantial evidence against the accused, defence counsel offered alternative theories to each piece of circumstantial evidence. The accused testified that she kept the security system because she had once been a victim of human trafficking. The accused testified that she used the scale to measure the substantial quantities of meth that she consumed herself. The scale would help ensure that she did not accidentally overdose. The accused testified that the Owner bought the "Frozen" baggies and left them in the living room. The accused and the Friend used two (or three) of the baggies for their own personal quantities of meth, but it is plausible that the Owner (or someone else) also used the "Frozen" baggies to package the meth in the box (in the alcove).

[64] The accused testified. Therefore, to analyze the various theories of the case, it is necessary to do a **W.(D.)** analysis of the accused's testimony.

[65] As noted above, in general, I did not find the accused to be a credible witness. Her choice of words, her body language and her tone of voice were not consistent with those of a witness attempting to be sincere. The Crown pointed out that, in response to one question during cross-examination, the accused sneered: "prove it!" That did not enhance her credibility. Her criminal record,

which included crimes of dishonesty, did not enhance her credibility. In terms of the **W.(D.)** analysis. I did not believe the accused.

[66] Continuing with **W.(D.)**, did the testimony of the accused raise a reasonable doubt about her guilt? Her evidence was that she knew about the small amount of meth found near her (an amount consistent with simple possession), but that she did not know about the meth in the toilet or the meth in the alcove.

[67] I conclude that the evidence of the accused raised a reasonable doubt in respect of her knowledge about the meth in the alcove. It is plausible that the accused knew about the meth in the alcove and, therefore, "possessed" it. It is equally plausible that the Owner or some unnamed person put the meth in the alcove without the knowledge of the accused.

[68] In her testimony, the accused offered plausible explanations about some aspects of the Crown's circumstantial evidence, which explanations were inconsistent with the accused's guilt (of possession for the purposes of trafficking). The accused offered a plausible explanation for her possession of the digital scale. She freely admitted to being a heavy user of meth and she testified about her desire to avoid an overdose. This explanation at least raised a reasonable doubt about the theory that the scale was proof of trafficking.

[69] The accused testified that her personal meth (whether it was one baggie or two) was in "Frozen" baggies because the Owner bought a box of "Frozen" baggies and left the box in the living room. The accused used them because they were

there. If the Owner was the one who bagged the meth in the alcove, it would be plausible that he would also use "Frozen" baggies for that purpose. The testimony of the accused at least raised a reasonable doubt about this aspect of the Crown's theory.

[70] The accused testified that she maintained the security camera system because she was once the victim of human trafficking. The Crown's theory was that she maintained it because she was afraid of being arrested for trafficking in meth. Although the accused did not say so, the fact is that she was a heavy meth user out on bail, and she did not want the police to find her holding even small amounts of meth. That might provide a sensible reason for the security system. In short, the system might plausibly point towards simple possession as opposed to possession for the purpose of trafficking. The testimony of the accused raised at least a reasonable doubt about this aspect of the Crown's theory.

[71] In the event that I am wrong about the evidence of the accused raising a reasonable doubt, I conclude (in the alternative) that the evidence as a whole raised a reasonable doubt in respect of the meth in the alcove (and thus about the accused's being guilty of possession for the purpose of trafficking).

[72] Again, **Villaroman** says that, if the evidence is circumstantial, where there is a plausible theory inconsistent with guilt, the accused is not guilty.

[73] There were no weapons, cash or scoresheets found in the House at the time of arrest. In and of themselves, these facts are not fatal to the Crown's case, but they do make it weaker.

[74] It is undisputed that the Friend was in the House at the time of the arrest. The accused testified that a small amount of meth (consistent with simple possession) in the living room belonged to the Friend. There was a passing reference to the Friend's pleading guilty to simple possession, but she was not called as a witness and there was very little information about her.

[75] Police surveillance showed that, in the day before the arrest, the accused was absent from the House for some time. The police surveillance report (an agreed document, which admittedly does not record all comings and goings), mentions the accused being seen in the driveway on September 2 at 3:31 p.m. The Report mentions a car pulling up and someone leaving the car and entering the House at 11:23 p.m. The accused testified that, on September 2, she left for Steinbach at about 3:30 p.m. and returned home at about 11:00 p.m. The raid happened on September 3 at about 12:41 a.m. (about two or three hours after the accused returned).

[76] It is plausible that the accused knew about the meth in the alcove (either because it was hers or because someone told her about its existence). However, it is equally plausible that the meth belonged to the Owner, and the accused was not aware of its existence. This theory would be consistent with the scenario in which the accused, on seeing the police on the video cameras, quickly grabbed the largest bag of meth that she knew about, and tried (unsuccessfully) to flush it down the toilet. Not being aware of the alcove, she did not think of the alcove as an alternative to the toilet.

[77] It is also plausible that one of the unnamed individuals who entered and left the House in the accused's absence, stored the meth in the alcove. Frankly, this is less plausible than the theory that the meth belonged to the Owner (who lived on the property). However, it is at least a plausible possibility.

[78] The theory that the meth belonged to the Owner, or the Boyfriend, or an unnamed person would be consistent with the absence of weapons, cash and scoresheets in the House. The weapons and/or cash and/or scoresheets would have been somewhere outside of the House.

[79] The accused testified that the Owner lived in a shack on the property. She said that he was afraid of being assaulted if he lived in the House. She said that the Owner wanted the accused and the Boyfriend (particularly the Boyfriend) to live in the House. This part of the evidence is, frankly, odd. However, it is at least plausible. The Crown offered no evidence at all to negate it. For the purposes of this case, it is not necessary for me to determine *why* the Owner did what he did. It is sufficient that I find that the accused was credible in testifying that the Owner often entered the House.

[80] Therefore, the evidence as a whole raised a reasonable doubt that the meth in the alcove belonged to the accused, or that she even knew about its existence.

[81] The meth in the toilet is different. The accused and the Friend were the only people in the House at the time of the police raid that led to the arrest. The meth floating in the toilet was in plain view for anyone entering the washroom.

[82] One police officer testified that, just before the police raid he saw a woman who resembled the accused in a window of the House. If the woman he saw was the accused, that would have placed her very close to the washroom just before the raid.

[83] It is obvious that one does not put meth in a bag floating in a toilet bowl as a method of storage. The only plausible inference is that someone tried to flush the meth down the toilet but failed (perhaps the bag was too buoyant for a single flush). The accused testified that, on her security cameras, she saw the police arrive outside the House. The accused did not testify that the Friend ran to the bathroom at that moment. The only reasonable conclusion is that the accused saw the police, ran to the bathroom, and unsuccessfully tried to flush a bag of meth down the toilet.

[84] In summary, at a minimum the evidence as a whole raises a reasonable doubt about the allegation that the accused is guilty for the purposes of trafficking meth. By her own evidence, the Accused knew about the small amount of meth found in two or three baggies in the living room. Therefore, even if I were to ignore the meth in the toilet, the accused would be guilty of simple possession of meth.

[85] In the event that it might be relevant at the sentencing stage, I also find that the Crown has proved beyond a reasonable doubt that the accused possessed the meth in the toilet (she had knowledge and control), which would confirm that she was guilty of simple possession of meth.

[86] I thank counsel for agreeing to various facts and documents, and for their courteous conduct.

_____ J.