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R. v. Lecoy, 2024 MBKB 115

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Date: 20240725
Docket: CR 23-01-39673
(Winnipeg Centre)
Indexed as: R. v. Lecoy
Cited as: 2024 MBKB 115

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COURT OF KING'S BENCH OF MANITOBA

B E T W E E N:

HIS MAJESTY THE KING,	)	Bryton M.P. Moen
	)	Melanie Pass
- and -	)	for the Crown
	)	
JOEY ROBERTSON LECOY,	)	Martin D. Glazer
	)	Caleigh M.A. Glawson
accused.	)	for the accused
	)	
	)	
	)	Judgment Delivered:
	)	July 25, 2024

Restriction on Publication: No information regarding any portion of this *voir dire* shall be published in any document or broadcast or transmitted in any way before judgment is given in this case. **This publication ban expired on May 11, 2026.**

Reasons for Decision on the *Voir Dire* into the Admissibility of Audio-Video Surveillance Recordings

INNESS J.

INTRODUCTION

[1] Joey Robertson Lecoy ("the accused") is charged on a direct indictment with the second degree murder of Star Thomas in Winnipeg, Manitoba on January 3, 2023. He has elected a judge alone trial. The Crown seeks a pre-trial ruling on the admissibility of an audio-video surveillance recording ("original recording") obtained from a security camera affixed to the exterior of a residence near the building where it is alleged that Star Thomas was shot and killed, as well as an enhanced version of the original recording ("enhanced recording") (collectively "the recordings").

[2] The Crown argues that the recordings capture sounds from the scene of the crime that are relevant to establishing the timing of the offence, the individuals present during the offence and the shooter's intent for murder. The defence argues that the Crown has not established a connection between the recordings and the offence, therefore the recordings are irrelevant, lack probative value and are prejudicial to the accused's right to a fair trial.

[3] This is my decision on the *voir dire* regarding the admissibility of the recordings. For the reasons that follow, I have determined that the recordings are admissible for the purposes of proving the timing of the offence and the individuals present during the offence, but not for the purpose of proving the intent for murder.

BACKGROUND

[4] This is the first pre-trial *voir dire*. I have very little information about the Crown's case, the proposed evidence, and the issues in dispute, other than what I have learned

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from the pre-trial memorandum and the submissions of counsel. However, my understanding of the case is as follows. The defence admits jurisdiction, the identity of the deceased and the date of the offence. The Crown will be required to prove all elements of the offence. The primary issue in dispute is the identity of the person who shot and killed Star Thomas. The accused may also rely upon the defences of intoxication and accident. It is anticipated that as many as four Crown witnesses may recant at trial. In addition to their use at trial for the purposes identified earlier, the Crown seeks to rely upon the recordings as corroborative evidence on any *K.G.B./Khelawon* applications. (See ***R. v. B.(K.G.)***, 1993 CanLII 116 (SCC), [1993] 1 S.C.R. 740; ***R. v. Khelawon***, 2006 SCC 57 (CanLII), [2006] 2 S.C.R. 787.)

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ISSUES

[5] The issues that require a determination are set out below:

1. Is the original recording admissible pursuant to the ***Canada Evidence Act***, R.S.C., 1985, c. C-5 (the "***CEA***")?
2. Is the enhanced recording admissible pursuant to the ***CEA***?
3. Are the recordings subject to any other exclusionary rule of evidence?
4. Are the recordings relevant to the following issues:
    a. the timing of the offence;
    b. the gender of the individuals in the suite when the offence occurred; and
    c. the intent for murder.
5. Does the probative value of the recordings outweigh any potential prejudicial effect?

THE EVIDENCE ADDUCED ON THE *VOIR DIRE*

[6] James Banega testified that he owned a surveillance system consisting of 12 cameras equipped with either video or audio-video capability affixed to the exterior of his house at 602 Beverley Street in Winnipeg, in January 2023. He purchased the surveillance system in 2020 for $600 and installed it himself. He testified that he previously owned a similar system and was familiar with its operation. He had little knowledge of the quality of the system, agreeing more expensive units could be purchased.

[7] Mr. Banega testified that in January 2023, Detective Roy ("Det. Roy"), a police officer with the homicide unit of the Winnipeg Police Service, requested that he provide him with footage captured by his surveillance cameras on January 3, 2023 between 6:00 a.m. and 10:00 a.m. Mr. Banega testified that he downloaded the footage from his surveillance system onto a USB and then transferred it onto two DVD discs which he gave to Det. Roy. He testified that he received no direction or assistance in doing so. Mr. Banega further testified that to the best of his knowledge his surveillance system was operating properly in January of 2023. He said he did not listen to or watch the footage prior to turning it over to Det. Roy, nor did he modify or change the footage in any way, nor ask anyone else to do so.

[8] Mr. Banega testified that the building at 737 Sargent Avenue in Winnipeg is one house away from 602 Beverley Street and located at the corner of Beverley Street and Sargent Avenue. Mr. Banega testified that the footage from the front camera that he provided to Det. Roy captured the intersection of Beverley Street and Sargent Avenue,

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including part of the building at 737 Sargent Avenue, which he estimated to be about 12 metres to the south of his residence. The video also captured two apartment buildings across the street from his house.

[9] Mr. Banega testified that his surveillance system was connected to his Wi-Fi. A disconnection would cause a loss of audio and the video would go black. He testified that he was not at home on January 3, 2023 between 6:00 a.m. and 10:00 a.m. and therefore he did not see or hear the events being recorded. He said he was unaware if there were any interruptions in the footage that he gave to Det. Roy. Mr. Banega further testified the date stamp on the recording was accurate but the time stamp could be off by one hour due to the software's inability to account for daylight savings time. He said he was not aware of the camera's audio range capability and that he had never been inside the building at 737 Sargent Avenue.

[10] Det. Roy testified that he was involved in the investigation into the death of Star Thomas, alleged to have occurred on January 3, 2023 at approximately 8:45 a.m. inside suite 107 at 737 Sargent Avenue. Det. Roy testified that his duties included conducting a review of the video surveillance seized from the area. Det. Roy said that he spoke to Mr. Banega on January 4, 2023 and requested that he provide him with a copy of his exterior video surveillance footage from January 3, 2023 between 6:00 a.m. and 10:00 a.m. He testified that on January 5, 2023, Mr. Banega provided him with two DVD discs, which he uploaded onto the secure computer server in the homicide unit of the Winnipeg Police Service. Det. Roy testified that he did not modify or change the recording in any way, nor did anyone else to his knowledge.

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[11] Det. Roy testified that he reviewed the footage that was provided to him by Mr. Banega. He said he focused his attention on a portion of the audio-video recording from the exterior front camera where a beeping sound began and continued. Det. Roy testified that he believed the sound to be consistent with a fire alarm, which was significant to him because of his knowledge from the investigation that there was a fire in the building where Star Thomas was believed to have been killed.

[12] During his testimony, Det. Roy identified a portion of the footage from the front exterior camera referred to as "602 Beverley – original short clip". This audio-video recording is two minutes and nine seconds in length capturing the time frame of 8:45:06 a.m. to 8:47:04 a.m. This is the original recording being proposed for admission at trial. Det Roy testified that he used other surveillance footage seized from the area, which captured similar events, to confirm the time stamps were accurate on this original recording.

[13] Det. Roy testified that he listened to the original recording between 24 and 36 times. According to Det. Roy, most of the words were inaudible so he contacted a Winnipeg based sound production and recording company named DACAPO Productions ("DACAPO"), to enquire about enhancing the original recording in the hope that the sounds could be made clearer so they could be better understood.

[14] Det. Roy testified that on January 12, 2023, he spoke on the telephone with Kristen Martin of DACAPO regarding obtaining an enhancement of the original recording, which he then dropped off at their company on January 13, 2023. Det. Roy testified that he received the enhanced recording from DACAPO on January 18, 2023 but it was

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13 seconds shorter than the original recording. Det. Roy contacted Ms. Martin to bring this issue to her attention. He further testified that he returned the recording to DACAPO for the issue to be resolved, and he was subsequently provided with a second enhanced recording that was the same length as the original. This recording was referred by counsel as the "602 Beverley - enhanced full clip with audio and video" and is two minutes and nine seconds in length, beginning at 8:44:55 a.m. and ending at 8:47:04 a.m. This is the enhanced recording being proposed by the Crown for admission at trial.

[15] Det. Roy testified that he made no alterations or modifications to the enhanced recording, nor did anyone else (other than DACAPO) to his knowledge. He further testified that upon receiving the enhanced recording from DACAPO, he listened to it approximately 12 times and believed there was some improvement in the sound quality. He agreed, however, that what was previously inaudible remained inaudible, except for a few more "fuck" words that could be heard. He testified that he could not say how many words were inaudible on the enhanced recording.

[16] Det Roy testified that the house at 602 Beverley Street is approximately 12 metres (39 feet) north of the backside of the apartment building at 737 Sargent Avenue, with one house in between. Det. Roy further agreed that he did not test Mr. Banega's surveillance system to ensure it was working properly, to determine the audio range capability, or to see if the weather conditions may have impacted its recording. He agreed that neither Mr. Banega nor himself, received any technical assistance in the handling of the surveillance footage. Det. Roy testified that he did not see whether any windows were open when he attended to 737 Sargent Avenue on January 3, 2023.

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[17] Kristen Martin testified that she is the production manager at DACAPO and held that position in January 2023, though she has worked for the company in other roles since 2015 when she was hired as a dialogue editor. She testified that DACAPO has been retained on occasions by the Royal Canadian Mounted Police ("RCMP") to conduct technological enhancements of evidence and that in her role she is responsible for booking the sessions and organizing the materials for the engineers. Ms. Martin testified that she received the recording from Det. Roy. She did not review the recording herself, nor did she make any changes or modifications to it. As standard practice, she placed the recording in her desk so it could be retrieved by Steven Payne, the senior audio engineer at DACAPO, who would be conducting the enhancement. Ms. Martin testified that she believes Mr. Payne retrieved the recording the day after she placed it in her desk. While Ms. Martin testified that she has no knowledge of whether any of the other seven staff members at DACAPO accessed the recording, it is understood that only herself and Mr. Payne took possession of the materials provided by the police agencies.

[18] Ms. Martin further testified that it was her understanding that Det. Roy wanted the audio in the recording enhanced so that he could hear the sounds and spoken words more clearly. She explained in her testimony that the initial length of the enhanced audio was off by 13 seconds due to a conversion error with the codec, or software used for converting the recording for use in DACAPO's system. She also testified that the process can, at times, result in a loss of words but the error was fixed by using a different codec and the full duration of the enhanced audio recording was provided to Det. Roy.

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[19] Ms. Martin testified that a number of factors can result in poor quality of audio recordings, including vehicle noise, wind, other sounds or voices. She explained the process of attempting to adjust various frequencies so the audio can be heard more clearly. The audio is not cut or edited, merely enhanced. She explained that a bad recording cannot be "fixed". She agreed that to her understanding, the recording provided to DACAPO by Det. Roy was unable to be enhanced much.

[20] Steven Payne also testified. He provided a summary of his education and work experience within the music production and recording industry. From 2011 to present Mr. Payne has been the senior audio engineer at DACAPO. This role requires him to be involved with recording, editing and creating sounds. While at DACAPO, he has done recording enhancement work for the RCMP and Winnipeg Police Service, often on 911 calls or surveillance recordings. Mr. Payne was proffered as a fact witness, not to provide expert opinion evidence, however his qualifications to conduct the enhancement process were led on the *voir dire* and not disputed.

[21] Mr. Payne testified that upon receiving the recording in the present case, he understood his task to be the same as in other police investigations – attempt to make the audio recording clearer and easier to hear the dialogue or voices. Mr. Payne testified that it was not his task, nor did he focus his attention on determining whether there was one or more voices on the recording. He further explained that it is always more challenging to enhance dialogue when multiple people are speaking. He testified that he first listened to the recording a few times to understand what the challenges might be. He then began applying different plug-ins or software tools in order to enhance or amplify

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the frequency where the human voice tends to exist and reduce the other unnecessary background noise, such as air conditioning and vehicles in order to hear the dialogue better. Mr. Payne testified that he listened to the original recording over and over while adjusting the frequencies until the dialogue was as clear as he could get it to be, without impacting any other sounds. He explained the process is an attempt to reduce the "low end rumble" on the recording.

[22] According to Mr. Payne, no audio was altered or lost in the process he used to create the enhanced recording. He explained the initial codec used to play the recording on DACAPO's system resulted in a frame error which resulted in the video playing at a faster speed, appearing as if 13 seconds was lost. He testified that the recording was reprocessed using a different codec, which did not result in the loss or alteration of any of the information on the recording. He confirmed that the enhanced recording that was ultimately provided to Det. Roy played at the same speed as the original recording and matched its length.

LAW AND ANALYSIS

[23] The burden lies on the Crown to establish the admissibility of the original recording and the enhanced recording in the present case.

Preliminary Issue – Continuity of the Recordings

[24] As a preliminary matter, the defence argued that the Crown has not proven the continuity of the recordings and therefore they are inadmissible. Continuity is a matter of weight, not admissibility (***R. v. Penney***, 2002 NFCA 15, at para. 45). In any event, I find that although the recordings passed through a number of individuals, that fact alone

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does not give to a reasonable concern on my part that someone has tampered with or manipulated the recordings. All of the witnesses who testified on the *voir dire* about the handling and transferring of the recordings gave credible, reliable evidence about how the recordings were kept, processed and transferred by and between the witnesses. The suggestion that someone, unknown to any of the witnesses, obtained, viewed, and manipulated or altered the recordings is speculative. The mere possibility in this case that this could have happened is not sufficient for me to conclude that it did happen. I find there is no issue with the continuity of the recordings.

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1. Is the Original Recording Admissible Pursuant to the *CEA*?

[25] The ***CEA*** defines "electronic document" broadly, therefore its provisions govern the admissibility of video and audio recordings (***R. v. Jennings***, 2020 NCLA 40, at paras. 13-14; ***R. v. A.S.***, 2020 ONCA 229, at para. 28). The relevant provisions within the ***CEA*** are set out below:

> **Authentication of electronic documents**
>
> **31.1** Any person seeking to admit an electronic document as evidence has the burden of proving its authenticity by evidence capable of supporting a finding that the electronic document is that which it is purported to be.
>
> **Application of best evidence rule — electronic documents**
>
> **31.2(1)** The best evidence rule in respect of an electronic document is satisfied
>
> **(a)** on proof of the integrity of the electronic documents system by or in which the electronic document was recorded or stored; or
>
> **(b)** if an evidentiary presumption established under section 31.4 applies.

Presumption of integrity

31.3 For the purposes of subsection 31.2(1), in the absence of evidence to the contrary, the integrity of an electronic documents system by or in which an electronic document is recorded or stored is proven

(a) by evidence capable of supporting a finding that at all material times the computer system or other similar device used by the electronic documents system was operating properly or, if it was not, the fact of its not operating properly did not affect the integrity of the electronic document and there are no other reasonable grounds to doubt the integrity of the electronic documents system;

(b) if it is established that the electronic document was recorded or stored by a party who is adverse in interest to the party seeking to introduce it; or

(c) if it is established that the electronic document was recorded or stored in the usual and ordinary course of business by a person who is not a party and who did not record or store it under the control of the party seeking to introduce it.

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[26] The party seeking to authenticate electronic evidence has the burden of putting forward some evidence that is "*capable of supporting a finding*" that the electronic document is what it purports to be. The standard of proof is very low and merely requires *some* evidence establishing that it is logically probative of what it purports to be. Electronic evidence may be authenticated even when there is a dispute over whether it *is* what it purports to be. The evidence need only be "*capable of supporting a finding*"; it is not necessary that it *determine* a finding or be "*capable of determining a finding*". Proof of authentication can be established through direct or circumstantial evidence. (***R. v. Martin***, 2021 NLCA 1, at paras. 41 and 46-47; ***R. v. C.B.***, 2019 ONCA 380, at paras. 66-68.)

[27] Section 31.7 of the ***CEA*** makes it clear that the provisions do not affect any rules of law relating to the admissibility of evidence, *other* than the rules relating to

authentication and "best evidence". Therefore, the provisions of the ***CEA*** set the standard for threshold, or conditional admissibility but do not determine ultimate admissibility. The ultimate admissibility of electronic evidence depends upon the purpose for which it is being tendered. Not only must the electronic evidence be relevant, it must also comply with any other rule of evidence (such as hearsay) and its probative value must outweigh any prejudicial effect. (***R. v. Andalib-Goortani***, 2014 ONSC 4690, at para. 25; ***Martin***, at para. 30; ***Richardson v. R.***, 2020 NBCA 35, at para. 24; ***R. v. Bulldog***, 2015 ABCA 251, at paras. 31-33.)

[28] Satisfaction of the authentication and integrity requirements of the ***CEA***, however, does not mean that the electronic evidence is genuine or that the trier of fact will ultimately rely upon it. Issues of whether the evidence has been altered, tampered with, distorted, or is incomplete are questions of weight and may depend on determinations of credibility and consideration of other evidence in the case. What matters is not whether the electronic evidence has been altered, but the degree of accuracy of its representation. Provided that it is a substantially accurate and fair depiction of what it purports to show, it is conditionally admissible. To make the distinction clear, once the authentication threshold test has been met, it is then up to the trier of fact to determine whether the evidence *actually* is what it purports to be (***R. v. Nikolovski***, 1996 CanLII 158 (SCC), [1996] 3 S.C.R. 1197, at paras. 28-31; ***R. v. Linklater***, 2021 MBCA 65, at paras. 37-38; ***C.B.***, at para. 78; ***Martin***, at paras. 49-51).

[29] The original recording begins at 8:44:55 a.m. and ends at 8:47:04 a.m. It is two minutes and nine seconds in length. I am satisfied from the evidence of Det. Roy

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that the time stamps are accurate, based on his comparison of the recording to other surveillance footage seized.

[30] At the outset I wish to emphasize that any preliminary comments I make about the potential frailties or interpretation of the sounds or words on the recording are made only for the purposes of assessing the admissibility of the evidence in the context of this *voir dire*. My comments on the evidence are not intended to be, nor are they, conclusory of any factual findings I may make at trial.

[31] At the start of the recording, there appears to be the sound of a faint voice or voices, including what sounds like the word "fuck". The Crown submits that the following can be heard on the recording: At 8:45:02, a single gunshot is heard. At 8:45:34, a female voice says, "*yeah, yeah, yeah that's right he fucking shot you fuck. He fucking got you motherfucker*". At 8:45:45 a male voice says, "*That's the last time you ever fuck with me you fuck*". The Crown asserts that during this dialogue, a beeping sound consistent with a fire alarm can be heard. As stated earlier, the defence disagrees with the interpretation of the sounds and dialogue suggested by the Crown.

[32] While it is possible the sound interpreted by the Crown to be a gunshot is in fact a gunshot, the sound is also similar to the noise made by the bus that can be seen passing through the intersection of Beverley Street and Sargent Avenue at 8:45:16 a.m., as well as a similar sound that can be heard at 8:29:17 a.m. I further note that while Det. Roy testified that the sound heard at 8:29:17 a.m. was of interest to him, neither counsel asked him any further questions about the sound or to listen to it again. Both Mr. Banega and Det. Roy testified that the area captured by the recordings is a "high crime" area.

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This underscores the live factual issue as to which, if any, of the sounds played for the court are the sounds of a gunshot.

[33] It is possible that a voice says the word "fuck" at 8:45:25 a.m., followed by some words that are inaudible. Following those inaudible words there is dialogue that is difficult to make out. It is certainly possible that the words suggested by the Crown, "*he fucking shot you*" are the words being spoken. It is also possible, however, that the voice may have said, "we fucking got you", "she fucking got you" or "he fucking got you". As well it could be, "we fucking shot you", "she fucking shot you", or "he fucking shot you". Furthermore, the word "motherfucker" cannot clearly be heard. It appears to me that there may be some other words interspersed within the dialogue of interest to the Crown. I agree that it is possible for a trier of fact to conclude that the beeping sound is a fire alarm from 737 Sargent Avenue. While it is possible a voice says the words, "*that is the last time you ever fuck with me you fuck*", the words "*with me*" are difficult to make out. Also, there are inaudible words immediately before and after these words. It is arguable as to whether the words are spoken by one or more than one voice and by a male or female or both. For the remainder of the recording, there are inaudible words while the beeping continues.

[34] Having reviewed the recording, and upon considering the arguments of counsel, I have concluded that the Crown has adduced evidence "*capable of supporting a finding*" that the original recording depicts the circumstances surrounding the killing of Star Thomas on January 3, 2023 at or near suite 107 at 737 Sargent Avenue in Winnipeg, Manitoba at approximately 8:45 a.m. I have come to the conclusion that the Crown has

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sufficiently authenticated the original recording pursuant to the ***CEA*** for the reasons discussed below.

[35] I am satisfied that Det. Roy's knowledge regarding the investigation, which led him to focus on the portion of the original recording that begins at 8:44:55 a.m., is relevant to the authentication of the recording. While the investigative evidence he relied upon to inform him of the significance of the sounds is not being adduced for its truth, it is relevant to establishing the Crown's theory and what it seeks to prove at trial. The Crown seeks to prove at trial that Star Thomas was killed inside suite 107 at 737 Sargent Avenue on the date and time captured by the recordings.

[36] From my review of the recordings, I am satisfied that they depict the images and sounds from the area around 602 Beverley Street, including the intersection of Sargent Avenue and Beverley Street and the nearby apartment building at 737 Sargent Avenue. It is not necessary for the Crown to adduce evidence on the exact range of audio that could be captured by the camera or exactly where the sounds emanated from. It is sufficient that I am satisfied that the recordings are substantially a fair and accurate audio-video representation of the surrounding general area where and when it is alleged that Star Thomas was killed.

[37] I recognize that in some cases, such as ***Nikolovski***, an eyewitness provides testimony that the video depicts the scene of the crime. Authentication, however, does not require direct evidence. Furthermore, in ***Nikolovski***, the issue was not whether the video accurately depicted the scene of the robbery or its admissibility for that purpose. The issue was whether the trial judge was entitled to rely solely on their own comparison

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of the person in the video and the accused in the courtroom to conclude that the accused committed the robbery. The Supreme Court of Canada held that the trial judge could use the video for that purpose.

[38] In ***Penney***, there were valid reasons for excluding the video as it had been recorded on a camera operated by a witness who lacked credibility and selectively chose to film only portions of the events. The lack of independent, credible and continuous recording of the events caused the trial judge to conclude that the offence was not accurately and fairly depicted in the video. Furthermore, the video was being tendered by the Crown to prove the offence, which required the Crown to prove that a marine mammal had been killed in a manner other than that designed to kill it quickly. The selective recording of the offence compromised the ability of the court to determine if the offence had been made out.

[39] Similar to ***Nikolovski***, the recordings at issue here were obtained from an automatic security camera system owned by an uninvolved third party. The concerns arising with videos generated by hand-held cameras or by persons who have access to manipulating the recording or selectively recording portions of the events, like in ***Penney***, do not arise in the present case. The law has trended towards the admission of audio-video recordings generated by "automatic" camera systems that do not involve human intervention in their recording (***Pierre-Paul v. R.***, 2019 QCCA 1722, at para. 8).

[40] Authentication of electronic evidence from automatic surveillance systems, however, does not necessarily require that the recording be continuous or uninterrupted. In ***Jennings***, audio-video recordings from a motion-activated doorbell camera that

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captured a conversation between the accused and the complainant were admitted into evidence to prove the offence of extortion. The accused objected to the admissibility of the recording due to the lack of continuous, uninterrupted recording. The trial judge accepted the evidence of the complainant that, notwithstanding some gaps, the recordings captured the entire event. There was no basis to conclude that the admissibility of the video would be unfair or mislead the trier of fact. Once the authentication and integrity threshold for admissibility had been met, the court assessed whether the evidence was relevant and probative. The Newfoundland and Labrador Court of Appeal upheld the conclusion of the trial judge that the recording was a fair and accurate depiction of the events and was properly used by the trial judge in finding the offence had been proven (at paras. 23-25).

[41] Mr. Banega believed that his camera was operating properly during the time of the recording. There is no evidence on the recording, or otherwise, establishing that it was not working properly. There are no noticeable gaps or blackouts during the two minutes and nine seconds recording. From what I have observed and heard, the recording is uninterrupted and continuous. The audio and visual aspects of the recording appear to correspond. For example, the sound of a vehicle can be heard contemporaneous with a vehicle passing through the frame of the video, including at the intersection of Beverley Street and Sargent Avenue. I am, therefore, satisfied that the camera was operating properly during the recording.

[42] I am also satisfied that although Mr. Banega was not supervised or provided direction on how to download a copy of the recording, he was capable of doing so as he

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was familiar with the operation of the security system, having installed it himself. The process he described to download a copy of the recording was not complex. He did not have any difficulties in doing so. I find that Mr. Banega did not alter the recording in any way, either intentionally or unintentionally, during the process.

[43] Based upon the evidence adduced before me, it is possible that the sounds on the recording depict a gunshot and a fire alarm as argued by the Crown. That is not to say they *actually* depict those sounds, just that the evidence is capable of supporting such a conclusion. Furthermore, although the words uttered on the recording are difficult to make out, some of them can be heard more clearly than others and it is possible that the words support an interpretation argued by the Crown. Again, at this stage I am only concluding that the evidence heard on the recording is "*capable of supporting a finding*" that it depicts the circumstances surrounding the killing of Star Thomas, not that it actually depicts the offence.

[44] In conclusion, I am satisfied that the Crown has adduced sufficient evidence to meet the low threshold test of establishing that the recording is capable of supporting an inference that the sounds heard on the recording depict the circumstances surrounding the killing of Star Thomas. The original recording being tendered captures images and sounds between 8:44:55 a.m. and 8:47:04 a.m. in and around the location and time when it is alleged that Star Thomas was killed. As stated earlier, whether it actually depicts the events associated with the offence will be for me to determine as trier of fact at trial, within the full context of trial evidence and upon hearing further arguments from counsel.

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[45] I have determined that the original recording is conditionally admissible pursuant to ss. 32.1, 32.2(1) and 32.3(a) of the ***CEA***.

2. Is the Enhanced Recording Admissible Pursuant to the *CEA*?

[46] Recordings that have been enhanced in a manner that improves quality while preserving accuracy are admissible. Care must be taken to ensure the enhanced recording remains a substantially accurate and fair depiction of the events and is not misleading. Enhancements are often necessary to ensure the "best evidence" is available to the trier of fact. (***Bulldog***, at para. 28; ***R. v. Pasqua***, 2008 ABQB 124, at paras. 9-10; ***R. v. Pépin***, 2021 QCCS 286, at para. 46.)

[47] I have listened to the original recording and the enhanced recording. I am satisfied that the enhanced recording has not been altered or changed in any way that results in it being an unfair or misleading representation of the sounds and dialogue heard in the original recording. I am satisfied that the process applied by Mr. Payne to reduce the background noises so voices could be heard more clearly does not result in an unfair, distortive or misleading representation. I am satisfied that the enhanced copy of the original recording is somewhat clearer and of a slightly better quality than the original recording. It appears as though a few more "fuck" words can be heard on the enhanced recording, as well as other inaudible words. However, despite the attempt to "clean up" the recording, the inaudible sounds appear to remain inaudible. Therefore, my comments with respect to the sounds and voices heard on the original recording also apply to the enhanced recording.

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[48] I have determined that the enhanced recording is conditionally admissible pursuant to ss. 32.1, 32.2(1) and 32.3(a) of the ***CEA***.

3. Hearsay – *Res Gestae* or Party Admission Exceptions?

[49] To the extent that the recordings support the interpretation given to them by the Crown, they are being tendered for the truth and are therefore presumptively inadmissible as hearsay. The issue, therefore, is whether an exception to the hearsay rule would allow for their admission.

[50] In the event that the words are found to have been made by someone other than the accused, I agree with the Crown that the *res gestae* exception would apply as the comments are spontaneous utterances made without any time to reflect or concoct, and without an apparent awareness of being recorded.

[51] With respect to the words spoken by the supposed male voice, the Crown seeks to tender them to prove the *mens rea* for murder. There is only one male charged with the offence. The words have no meaning or value in the Crown's case unless they can be attributed to the accused. If they are to be attributed to the accused, and they are interpreted in the manner suggested by the Crown, they would amount to an admission. Admissions against interest are admissible as an exception to the hearsay rule (***R. v. Schneider***, 2022 SCC 34, at para. 52).

[52] I have determined that the words on the recordings fit within recognized exceptions to the hearsay rule and are admissible in accordance with those exceptions.

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4. Relevance

[53] Since the Crown has sought a ruling on the admissibility of the recordings in advance of trial, preliminary determinations with respect to relevance and probative value need to be made. In order to determine relevance, a judge must ask themself whether the proposed evidence tends to increase or decrease the probability of a fact in issue. In exercising their gatekeeper function, the judge is to evaluate relevance as a matter of logic and human experience. In so doing, however, the judge should take care not to usurp the role of the trier of fact, although the evaluation will necessarily involve some weighing of the evidence. While the evidence need not firmly establish the truth or falsity of a fact in issue, it may be too speculative or equivocal to be relevant. The threshold for relevance is low and judges are right to admit evidence that has only modest probative value. Care must be taken not to conflate relevance with probative value (***Schneider***, at para. 39).

[54] The issue of the evidentiary context required for a determination of relevance was in dispute in this case. The defence indicated that all facts were in dispute and no admissions of fact had been made for the purposes of the *voir dire*. In this context, the Supreme Court of Canada in ***R. v. Blackman***, 2008 SCC 37 (CanLII), [2008] 2 S.C.R. 298, cited with approval in ***Schneider***, provides guidance as to how to assess relevance at an early stage of the proceedings, at para. 30:

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> [30] Relevance can only be *fully* assessed in the context of the other evidence at trial. However, as a threshold for admissibility, the assessment of relevance is an ongoing and dynamic process that cannot wait for the conclusion of the trial for resolution. Depending on the stage of the trial, the 'context' within which an item of evidence is assessed for relevance may well be embryonic. Often, for pragmatic reasons, relevance must be determined on the basis of the submissions of counsel. …
>
> [Emphasis in original]

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[55] Recognizing that establishing threshold relevance cannot be an exacting standard, I find that based upon the evidence adduced before me and the submissions of counsel, the recordings are relevant to proving the following issues in dispute: the timing of the offence; the individuals present during the offence, and as potentially corroborative evidence on any *K.G.B.*/*Khelawon* application (***Schneider***, at paras. 42-44).

[56] An admission that is incomplete or contains imperfections, much like the testimony of a witness, is not rendered automatically inadmissible for those reasons. Admissions, like any other form of evidence, need not be unequivocal to be relevant, however the focus remains on whether the trier of fact can give meaning to the admission in a manner that is non speculative (***Schneider***, at paras. 42-44).

[57] In the present case, I find the interpretation of the words on the recordings too speculative or equivocal to be relevant to proving the intent for murder and they are, therefore, inadmissible for that purpose. As stated earlier, despite the *possibility* that the words spoken are capable of being interpreted in the manner suggested by the Crown, there are multiple other interpretations equally capable of being ascribed to the words. Furthermore, the inaudible nature of the words, including the surrounding words, adds to the speculative and equivocal meaning, or interpretation that could be given to the

recordings such that they ought not to be admitted for consideration by the trier of fact. Although I recognize the threshold for establishing relevance is low, it has not been sufficiently met in this case.

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5. Probative Value vs. Prejudicial Effect

[58] The final step in determining admissibility requires a determination of whether the probative value of the evidence outweighs its potential prejudicial effect, often referred to as the "*cost-benefit analysis*" (***Schneider***, at paras. 60-61). While the modern trend is towards a less-stringent test for the admissibility of evidence generally, the general principle of inclusion does not relieve the court of its responsibility to properly scrutinize the admissibility of evidence and resist the temptation to assume that every concern can be adequately addressed by weight (***Nikolovski***, at para. 18; ***Jennings***, at paras. 10-12).

[59] I have determined that the recordings have some probative value in establishing the timing of the offence, the individuals present during the offence and as potential corroborative evidence on any *K.G.B.*/*Khelawon* application. I further find that their probative value outweighs any potential prejudice. The evidence may be of assistance to the trier of fact in deciding these issues and there is little risk of improper use or an unfair trial arising from the use of the evidence in proving these issues, other than it being potentially incriminatory. That is not a valid reason, alone, to exclude probative evidence.

[60] Although I have found the recordings do not meet the relevance test on the issue of intention for murder, I would exclude the recordings in any event as their potential

prejudicial effect outweighs any probative value. I disagree with the Crown that there is no prejudicial effect because the identity of the supposed male voice is unknown at this stage. The Crown's theory is that the male voice is the accused. That is what the Crown seeks to prove at trial. If that is not their theory then the evidence lacks probative value.

[61] The probative value of the evidence is assessed by its degree of relevance to the issues and the strength of the inferences that can be drawn from the evidence. In some cases, the meaning of the evidence is so speculative and its probative value so tenuous that it ought to be excluded on the grounds that its prejudicial effect outweighs its probative value. This was the conclusion in ***R. v. Ferris***, 1994 ABCA 20, aff'd 1994 CanLII 31 (SCC), [1994] 3 S.C.R. 756, where an accused who was on the phone with his father was overheard to say, "*I've been arrested*", and later, "*I killed David*". The surrounding context of the conversation was unknown and the words, on their own, did not allow for a proper understanding and appreciation of the statement.

[62] In ***Schneider***, the Supreme Court of Canada upheld the principles in ***Ferris*** but came to a different decision based upon the availability of a context to provide meaning to the admissions. The court upheld the admissibility of comments made by the accused while on the telephone with his wife, which were overheard by his brother. The brother could not recall the exact words spoken by the accused but believed them to be something like, "*I did it*" or "*I killed her*". The court found that, unlike in ***Ferris***, there was a context that informed the meaning of the hearsay. The recipient of the hearsay was the brother of the accused and knew him well. There were also conversations

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between the brother and the accused that led up to the phone call and helped to put the comments in context.

[63] In ***R. v. Hunter***, 2001 CanLII 5637, 54 O.R. (3d) 695 (Ont. C.A.), the Ontario Court of Appeal ruled that comments made by an accused in the hallway of the courthouse to his lawyer, "*I had a gun, but I didn't point it*" were inadmissible. The witness who happened to be walking past and heard the comment agreed that there might have been conversation before or after the comment. The witness could not provide the court with any context for the comment. Despite the significance of the evidence to the prosecution's case in rebutting allegations of police brutality and the planting of evidence, reiterating the principles from ***Ferris***, the Ontario Court of Appeal in ***Hunter*** held the statement ought to have been ruled inadmissible, at para. 19:

> [19] In my view, Sopinka J.'s reasoning is anchored in the important role that context can play in giving meaning to spoken words. Where an overheard utterance is known to have a verbal context, but that context is itself unknown, it may be impossible to know the meaning of the overheard words or to otherwise conclude that those words represent a complete thought regardless of context. Even if the overheard words can be said to have any relevance, where their meaning is speculative and their probative value therefore tenuous yet their prejudicial effect substantial, the overheard words should be excluded.

[64] The legal principles reviewed above with respect to admissions overheard by witnesses also apply to admissions that are partially inaudible in an audio recording (***R. v. Merritt***, 2023 ONCA 3, at para. 84). Even if the evidence is ruled admissible, the trier of fact must exercise its own function in determining whether the context allows for the meaning of the admission to be determined. If it does not, it must not be used as an admission and must be discarded (***Merritt***, at paras. 80-81).

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[65] I have determined that the recordings are inadmissible to prove the intention for murder because the significant prejudicial effect of allowing the trier of fact to consider such speculative and equivocal evidence outweighs its minimal, tenuous probative value.

CONCLUSION

The recordings are admissible for the purposes of proving the timing of the offence and the individuals present, as well for any *K.G.B./Khelawon* application. The recordings are not admissible to prove the intention for murder.

SUBSEQUENT APPLICATIONS

[66] The Crown sought a pre-trial ruling on the admissibility of the recordings. Despite no agreement on the facts and an inquiry by me at the hearing as to whether the application was best heard in the context of the trial, the Crown maintained its preferred approach to seek a pre-trial admissibility ruling. This approach has necessarily impacted my decision-making ability at this stage.

[67] While multiple applications with respect to the admissibility of the same evidence are not to be encouraged, particularly as it relates to the Crown, a trial judge retains discretion to re-visit prior admissibility rulings should the circumstances justify it, for example a change in the evidentiary landscape (***R. v. Whiston***, 2024 ONCA 79, at paras. 3-5). Any subsequent application(s) by either party to re-visit this ruling may be considered with these principles in mind.

_____J.

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