

PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. Cooper*, 2024 NSPC 19

Date: 20240216

Docket: 8530511, 8530512, 8530513

Registry: Dartmouth

Between:

His Majesty the King

v.

Cory Cooper

LIBRARY HEADING

Judge: The Honourable Judge Pamela S. Williams

Heard: January 8, 9 and 10, 2024, in Dartmouth, Nova Scotia

Written Decision: February 16, 2024

Subject: *Robbery – Weapons – Identification Evidence –
Circumstantial Evidence*

Summary: A tall lanky masked male, covered from head to toe, enters a local pharmacy demanding narcotics, which he is given. He leaves the store. After an extensive investigation, including review of video footage, two executed search warrants and DNA analysis, the accused is arrested. There is no direct evidence linking him to the robbery.

Issue: Is the guilt of the accused the only reasonable inference to be drawn from the circumstantial evidence?

Result:

From the totality of the evidence I am not able to conclude, beyond a reasonable doubt, the only reasonable inference to be drawn is that the accused committed the robbery. Other reasonable inferences can be drawn that are inconsistent with his guilt.

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DECISION

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Charges: Sections 344, 88(1), 90(1), Criminal Code of Canada

Counsel: Kacie Oliver and Tiffany Thorne for the Crown
Drew Rodgers for the Defense

By the Court:

Introduction:

[1] Cory Cooper is charged with robbing the Lawton's Pharmacy in Sheet Harbour, Nova Scotia, on May 11, 2021, while possessing a gun for a purpose dangerous and carrying it in a concealed manner.

[2] Just before 5:00 p.m. a person, covered from head to toe in long-sleeve coveralls, a bandana-like mask, ball cap, sunglasses and white shoes enters the drugstore. This does not raise suspicion as we are in the midst of the COVID pandemic. The person approaches the pharmacy counter, presents a green reusable bag, and asks the pharmacy assistants/pharmacist to fill it with narcotics. The individual shows the handle of what is thought to be a gun saying, "Please don't make me pull this out." Narcotics are placed in the bag, given to the masked robber who then leaves the store. No one can identify the suspect.

[3] Neither the credibility nor the reliability of the witnesses is challenged. There are two minor inconsistencies, neither of which goes to the central issue at trial: Was the handle of the object in the suspect's waistband brown or black? And was the known sample of DNA taken by way of buccal swab or blood?

[4] I am told that a third party, not called to give evidence, tells Constable Hall that Jimmy Stevens is responsible for the robbery. Mr. Stevens is arrested and released without charges. I place no weight on this information.

Issue:

[5] The issue is one of identity and the case is circumstantial; that is, there is no direct evidence linking Mr. Cooper to the robbery. Neither the pharmacist, nor the pharmacist assistants, who interacted with the suspect, can identify the person, or their voice, although they agree it is a male. Based on their evidence, I am satisfied the suspect is male.

Admissions:

[6] Authenticity and continuity of the photos, videos and all other exhibits is admitted. The parties likewise agree that the actions of the suspect constitute a robbery – narcotics are stolen accompanied by threats of violence.

Circumstantial Evidence:

[7] The case presented by the Crown rests largely upon photos, video clips, items of clothing and DNA from a cigarette butt they say point to Cory Cooper as the person responsible for the robbery.

The Law:

[8] In circumstantial cases, the Court must be satisfied beyond a reasonable doubt that the guilt of the accused is the only reasonable inference to be drawn from the evidence as a whole: ***R. v. Villaroman*, 2016 SCC 33**. That assessment is done, not by isolating each piece of evidence and considering it individually, but rather by applying the standard of proof against the evidence in its entirety.

[9] I am permitted to consider inferences inconsistent with guilt that do not arise from proven facts. Indeed, they may flow from the absence of evidence. They may flow from what are considered plausible and reasonable possibilities, provided such possibilities are grounded in logic and experience. In such instances, the Crown must negate these inferences or possibilities before I can make a finding of guilt. This does not require the Crown to disprove *all* possibilities. Fanciful or irrational possibilities need not be overcome, but only ones that are considered reasonable and plausible.

[10] The line between a “plausible theory” and “speculation” is not always easy to determine. But the basic question is whether the circumstantial evidence, viewed logically and based on human experience, is reasonably capable of supporting an inference other than the guilt of the accused.

Crown’s Theory:

[11] The Crown's theory is that Cory Cooper, who lives nearby, struggles with a drug addiction. He drives his mother's car to the Sheet Harbour Lawton's Pharmacy where he demands narcotics to support his habit. His DNA is located on a cigarette butt in coveralls found by a third party the following day, about half a kilometer from the crime scene. Sunglasses like the ones worn by the suspect are seized from Cory Cooper's mother's residence. Latex gloves, like the ones worn by the suspect, are found in the glove box of his mother's car. An open-source query (*Facebook*) shows Cory Cooper wearing an Under Armour camo hat and sunglasses like those worn by the robbery suspect.

[12] The Crown asks that I make three inferences:

1. The suspect that commits the robbery is the same person seen in the Nova Scotia Liquor Corporation (NSLC) video footage.
2. The grey Toyota depicted in the NSLC video footage belongs to Joyce Erskine.
3. The suspect is Cory Cooper, based on the following:
 - a. Cory Cooper is the only person who could have been driving the Toyota.
 - b. The coveralls located the next day are those worn by the robber.
 - c. The cigarette butt in the coveralls have Cory Cooper's DNA on it and thus links him to the coveralls.
 - d. Cory Cooper possesses a similar hat and sunglasses.
 - e. Cory Cooper appears to fit the description of the suspect.

- f. The pills and drug paraphernalia found at Cory Cooper's residence support the theory he is struggling with a drug addiction and has motive to rob the Lawton's Pharmacy.

Evidence:

Video Footage

[13] The video footage from Lawton's interior and exterior cameras and from the exterior camera of the nearby NSLC show the robbery suspect. I am satisfied the person in each of the videos is the robbery suspect. The combined footage establishes this person is tall and lanky, wearing dark blue, long-sleeve coveralls, partially zipped up, with buttons and a *Dickies* logo on the left chest area. Underneath is a black shirt with some white lettering "FIS". His face is fully covered by a camo mask, an *Under Armour* camo ball hat and tinted sunglasses. He is said to be wearing transparent white surgical-like gloves. The videos capture the movements of the suspect ten minutes leading up to and including the robbery.

[14] I am satisfied from in-court observations that Cory Cooper's height and build resemble that of the robbery suspect. However, neither the witnesses' evidence nor the videos enable me to identify the person responsible.

Grey Toyota

[15] The NSLC video footage shows a grey four-door *Toyota* sedan entering the NSLC parking lot 4:48 p.m. The suspect exits the vehicle, walks toward Highway

7 in the direction of Lawton's Pharmacy, then returns to the car, and drives out of the parking lot, turning left onto Highway 7 in the direction of Lawton's at 4:53 p.m.

[16] Although the license plate is not visible, distinguishing features of the *Toyota* (black tape around the passenger's mirror, red tape on the rear passenger's side bumper, and a faded *Truro Toyota* sticker) satisfy me the suspect is driving the car belonging to Mr. Cooper's mother, Joyce Erskine.

[17] During the search of Joyce Erskine's home at 8926 Highway 224 on September 8, 2021, the grey *Toyota* with the same distinguishing features is in the driveway. Ms. Erskine confirms the vehicle is hers, and that the mirror and bumper were damaged prior to the robbery.

[18] Ms. Erskine also tells us she suffered a stroke in 2020 and in 2021 had medical procedures involving her eyes. She permits her son, Cory, who visits daily, to drive her car "but not too often". None of her other five children drive it. However, she admits to always leaving her car unlocked, and the window down, depending on the weather. She admits to having an "awful habit" of leaving the keys in the car. She does not lock her home either; her children know this. When the keys are not in the ignition, they are either on the end table or on the counter in her home or, in her pocket. To her knowledge, Ms. Erskine is not aware of anyone entering her house and taking her keys or her car.

[19] Cory Cooper has access to his mother's *Toyota* but does not have exclusive access or opportunity.

Coveralls and Cigarette Butt

[20] Coveralls like those worn by the suspect are found by Lewis Wambolt about one-half kilometer from the scene of the crime. He finds them the day after the robbery as he returns from the store between 1:15 and 1:45 p.m. The coveralls are about 15 feet from his driveway near the center line at 708 Highway 224. He turns them over to police saying the coveralls are damp, not wet, and were not on the road when he went to the store an hour earlier.

[21] The coveralls are unremarkable, other than they are worn, that is, not new. They have no unique identifiers linking them to those worn by the robber. They are *Dickies* brand, but as Ms. Erskine tells us, she has seen coveralls like those, only shorter, in her house. They belonged to her late husband who had worked at Atlantic Explosives, a nearby business employing five to six people. There is no business logo on the employee coveralls. Her son Caleb also worked at Atlantic Explosives. No coveralls are seized from her residence.

[22] Constable Hall locates a cigarette butt in the left front pocket of the retrieved coveralls. He says it is smoked to the butt – a finished cigarette. Ms. Erskine tells

us Cory Cooper is a smoker, but so are three of her other sons, Caleb, Wayne, and Billy.

[23] DNA belonging to Cory Cooper is located on the filter tip of the butt. The coveralls themselves are not tested for DNA. I remind myself there is no evidence linking the coveralls found by Mr. Wambolt to the coveralls worn by the suspect during the robbery. At best, they are the same brand and appear to have been worn. No coveralls are seized from Cory Cooper's residence at 52 Highway 336.

[24] But for the DNA on the cigarette butt, there is nothing linking Cory Cooper to the dark blue coveralls located on the road.

What do we know about the cigarette butt and the DNA?

[25] Louise Cloutier, a biology forensics specialist, is qualified to testify as an expert in the interpretation and reporting of body fluid and hair examination results, the interpretation and comparison of human DNA typing profiles, and in the forensic application of statistics for forensic DNA typing results.

[26] Ms. Cloutier tells us DNA is "the blueprint of life". We each get one-half from our biological mother and the other half from our biological father. Humans share 99% of the same characteristics; only 1% differ. There are 15 regions of interest for comparison with a known sample.

[27] The DNA typing profile obtained from the filter tipping paper (the part you put your mouth on) matches (on all 15 regions of interest) the DNA of Cory Cooper. The quantity of human DNA on the exterior (remainder of the cigarette) is insufficient for further processing. Ms. Cloutier does not observe the butt, but notes confirm the folded cigarette butt measures 2.5 cm and, when laid out flat, measures 7.8 cm. There is no burn-like material at the nonfilter end though there is faint light yellow to brown coloring on the exterior portion.

[28] Ms. Cloutier confirms biological material was deposited on the filter tip but cannot say how or when; that is, she cannot say if the butt was handled (skin cell transfer) or put in the mouth (saliva). Because there is insufficient DNA on the exterior, she is not able to say if there were one or more DNA sources or a mixture of sources on the exterior.

[29] Although there is a discrepancy in the evidence whether the known DNA sample from Cory Cooper comes from a buccal swab (as indicated by Constable Hall) or a blood sample (as noted by Ms. Cloutier), I am nonetheless satisfied the known sample analysed belongs to Cory Cooper and that it matches the filter tip of the butt.

[30] That said, I still do not know if the coveralls containing the cigarette butt were ever worn by Cory Cooper or if they were the actual coveralls worn by the suspect in the robbery.

Under Armour Camo Ball Cap

[31] Joyce Erskine confirms the *Facebook* screen shot of a male wearing a camouflage *Under Armour* ball cap and sunglasses is her son, Cory. I accept this to be so. We know the screen shot is taken by Constable Hall three months after the robbery, but we do not know when the photo is taken or posted. There are no distinguishing features on the cap linking it to the cap worn by the suspect. No *Under Armour* camo ball cap is found during the search of either Ms. Erskine's or Mr. Cooper's home. *Under Armour* camo ball caps are common, as are *Dickies* dark blue coveralls.

Sunglasses

[32] The sunglasses worn by Cory Cooper in the *Facebook* screen shot are similar to those worn by the robber. During the search of Ms. Erskine's home four months after the robbery, Constable Hall notes Ms. Erskine having sunglasses on her head resembling those worn by the suspect of the robbery. Three pairs of sunglasses are seized from this search – all similar to those worn by the robber. Two pair are generic and do not have a brand name. The third are a *DeWalt* brand (exhibit 10). No sunglasses are seized from Cory Cooper's residence.

[33] Constable Ashton Barter, the exhibit custodian for both searches, says none of the video clips show the type of sunglasses worn by the suspect. I agree. At best, they are similar to the sunglasses worn by the suspect.

[34] Constable Hall says there is a likeness between the sunglasses worn by the suspect and those worn by Cory Cooper in the *Facebook* screen shot. He says they are tinted safety glasses with a sharp triangle around the nose and they wrap around the eye.

[35] Nikita Kenny, one of the pharmacy assistants who encounters the robber (for 15 to 30 seconds) says one of the pair of sunglasses (exhibit 8) seized from the Erskine residence looks like those worn by the robber because they are tinted, and she could not see his eyes.

[36] Karen Barkhouse, a second pharmacy assistant present during the robbery, is not able to identify any of the three pairs of sunglasses shown to her (exhibits 8, 9, and 10).

[37] Joyce Erskine is shown the 'safety glasses' (Exhibit 8) but cannot say they are hers. She says her husband would bring some home and all her kids wear them, except her daughter.

[38] None of the seized sunglasses are tested for DNA.

Mask

[39] The ‘camo mask’ worn by the suspect is also described by witnesses as a ‘camo neck gator’ (Constable Hall), ‘a bandana’ (Pharmacist Samantha Zwaagstra and Constable Barter), and a ‘pull-up scarf’ (Karen Barkhouse). No such item(s) are seized during the searches.

Gloves

[40] The pharmacist, Ms. Zwaagstra, says the robber is wearing gloves ‘maybe white’.

[41] Nikita Kenny makes no observations about the suspect’s hands. She says his skin, what she could see of it – on the hands and around the ears – is tanned but not like an August tan. He is Caucasian.

[42] Karen Barkhouse makes no observations about the suspect’s hands.

[43] Constable Hall, in reviewing the Lawton’s interior video clip, channel 3 at 16:55:40, says the suspect is wearing ‘white surgical gloves.’ In reviewing channel 16 he says the suspect is wearing ‘white plastic gloves.’ He finds white plastic gloves (exhibit 11) in the glovebox of Ms. Erskine’s Toyota during the search four months later. On cross-examination he says the ‘white surgical gloves’ are generic and are found in the cupholder of Ms. Erskine’s *Toyota*.

[44] Constable Barter describes exhibit 11 as ‘white translucent latex gloves.’ There is no brand name visible. He agrees that COVID was “a going concern” in May 2021 and it was common for people to wear such gloves. The gloves are not tested for DNA.

[45] I reviewed both channel 3 and channel 16 of the Lawton’s interior video clips. I cannot say for certain the suspect is wearing gloves during the robbery. At best, I can say it is likely.

Black shirt with white lettering ‘FIS’

[46] The suspect is wearing a black shirt with some white lettering. Only ‘FIS’ is visible. No shirt of this description is seized during the searches.

White shoes

[47] The suspect is wearing white shoes, with black at the heels and a red Nike ‘swoosh’. No shoes are seized during the searches.

Gun

[48] Nikita Kenny, the first to encounter the suspect, says she is sure he ‘flashes’ a gun. As she leans down under the Plexi-glass to hear what the suspect is saying, she sees the ‘tip’ of a gun when he moves his clothing halfway up his stomach area. The handle is brown like guns in the “old western movies.” There is a design on it;

it is about four to five inches long and two to three inches wide. She draws a sketch of the handle (exhibit 21).

[49] Karen Barkhouse, who next waits on the suspect, says he shows her the handle of a gun saying, "Please don't make me pull this out". The handle is black and appears to be a pistol. The handle is four or five inches long, but she cannot recall the shape of the handle. The 'gun' is in the suspect's waistband. She cannot say if she sees a trigger or guard.

[50] During the search at Ms. Erskine's residence, Constable Barter confirms a 'BB pistol' (exhibit 12) is seized. It has a black handle with a screw in the middle on both sides. One side is rusted.

[51] Joyce Erskine is shown the BB pistol and says it belongs to her youngest son, Calin. She is not sure where it was stored in her house. The last time she saw it was "years ago". Constable Barter photographs the BB pistol (exhibit 19 photo date-stamped 15:50) located in a box with other miscellaneous items.

[52] Nikita Kenney is shown the BB pistol. She says it is not the 'gun' she observed.

[53] Karen Barkhouse is shown the BB pistol. She does not recognize it but says the handle is similar to a real firearm.

[54] If the handle of the item shown by the suspect is a gun, I am not able to conclude it is the BB pistol seized from Joyce Erskine's home.

Drugs

[55] Nikita Kenney says the suspect asks for "dilaudid" in a couple of different strengths.

[56] Samantha Zwaagstra recalls the suspect requesting "narcotics" in two different strengths. She fills the green reusable cloth bag but does not say with what types of narcotics, or how much.

[57] Joyce Erskine confirms the Gabapentin pills found in the glovebox of her *Toyota* (four months later) belong to Cory Cooper, who has a "script" for them. She knows he also has a prescription for ADHD. She recalls having taken him to "rehab" "many years ago" but cannot recall why.

[58] At Cory Cooper's residence police find a prescription pill bottle with Cory Cooper's name on it, capsules with "hydromorphone" on them, syringes, pills, gabapentin, and a January 12, 2018, prescription pill bottle in the name of Angelina Brooks. There are miscellaneous pills inside.

[59] When Constable Hall arrests Cory Cooper, four months after the robbery, Mr. Cooper is said to have been under the influence of drugs and cannot give a statement.

[60] Cory Cooper likely has or had a prescription drug addiction, at some point, the details of which are unclear. There is no evidence to suggest the pills found at Mr. Cooper's residence are those taken in the robbery.

So, am I satisfied beyond a reasonable doubt that the only reasonable inference to be drawn from the evidence is that Cory Cooper is the person responsible for the robbery?

[61] To recap, the evidence establishes that police retrieve coveralls, sunglasses, and gloves similar to those worn by the suspect. Cory Cooper is linked to the coveralls by DNA on a cigarette butt found in the pocket. Three pairs of sunglasses and latex gloves are found at his mother's residence, during a search. We know that Cory Cooper visits his mother daily. Mr. Cooper is seen on a *Facebook* post wearing a hat and sunglasses similar to those worn by the suspect. And video footage confirms the suspect is driving Cory Cooper's mother's *Toyota* moments before and near the robbery.

[62] That said, no mask, black shirt with white lettering 'FIS' or footwear, matching the description of that worn by the suspect, are found.

[63] The coveralls located the day after the robbery, in the middle of the road, a half kilometer from the pharmacy are, at best, similar to those worn by the suspect. They are not tested for DNA and there are no unique identifying markings on them to link them to the robbery.

[64] The similar sunglasses and gloves are recovered four months after the robbery from Joyce Erskine's home/*Toyota*. No clothing or accessories linked to or similar to those worn by the suspect are seized from Cory Cooper's home. And we do not know when the *Facebook* photo, showing Mr. Cooper wearing a hat and sunglasses similar to the suspect, is taken or posted.

[65] I agree, the coveralls, sunglasses, and gloves recovered are consistent with those worn by the suspect; but I am not able to conclude they are the items worn by the suspect. They are simply too common and do not have any unique identifying features.

[66] Likewise, there is no direct evidence the recovered coveralls were ever worn or possessed by Cory Cooper. But, a cigarette butt, found in the left front pocket, has Cory Cooper's DNA on it.

What can be inferred from this?

[67] Several inferences can be drawn:

1. The coveralls belong to or were worn by Cory Cooper, and he smoked and put the butt in the pocket.
2. The coveralls and the cigarette butt belong to Cory Cooper, but they are worn and discarded by someone else.

3. The coveralls have no connection to Cory Cooper, but he gives someone a smoke by removing it, by the tip, from a pack of smokes. That person puts the butt in the pocket.
4. Someone picks up a butt discarded by Cory Cooper and puts it in the coveralls.

[68] What I do know for certain is the butt was touched by Cory Cooper in some manner, at some point. But, because I do not know whether saliva or skin cells are the source of the DNA, and because I do not know when he touched it, I am not able to conclude that Cory Cooper smoked the butt and put it in the coveralls.

[69] And I am still unable to link the coveralls to the robbery.

[70] Arguably, the strongest piece of evidence linking Cory Cooper to the robbery, is his mother's *Toyota*. He has access to the *Toyota*, and at times, permission to drive it. I infer, given time spent at his mother's home, he knows where the keys are – either in the ignition, on the end table, on the counter, or in her pocket. However, Cory Cooper does not have exclusive opportunity to access his mother's *Toyota*. Given her habit of leaving the keys in the car or in her unlocked home, it is plausible and reasonably possible someone else gets her keys, drives her *Toyota*, and commits the robbery.

Conclusion:

[71] If there were evidence confirming Cory Cooper is driving the *Toyota* on the day of the robbery, the case would be much stronger. Cory Cooper is possibly, even probably, the person who robbed the Lawton's Pharmacy in Sheet Harbour on May 11, 2021. But I am not satisfied beyond a reasonable doubt. From the totality of the evidence, someone else may be responsible for the robbery, given other reasonable inferences to be drawn that are inconsistent with Mr. Cooper's guilt. I therefore find him not guilty on all counts.

[72] Furthermore, I am not satisfied beyond a reasonable doubt that the robbery suspect had a gun in his possession. I accept that two witnesses saw a handle, and it may have been a gun. But the evidence is far from conclusive.

Williams, JPC