COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *R. v. Grey,*
2013 BCCA 232

Date: 20130514
Docket: CA040258

Between:

Regina

Respondent

And

Steven Wayne Grey

Appellant

Before: The Honourable Madam Justice Saunders
The Honourable Mr. Justice Chiasson
The Honourable Mr. Justice Frankel

On appeal from: Supreme Court of British Columbia, January 25, 2012
(*R. v. Grey*, Dawson Creek Docket No. 30532)

Counsel for the Appellant: G.T. Kosakoski

Counsel for the Respondent: M.A. Street

Place and Date of Hearing: Vancouver, British Columbia
April 12, 2013

Place and Date of Judgment: Vancouver, British Columbia
May 14, 2013

Written Reasons by:
The Honourable Mr. Justice Frankel

Concurred in by:
The Honourable Madam Justice Saunders
The Honourable Mr. Justice Chiasson

Reasons for Judgment of the Honourable Mr. Justice Frankel:

Introduction

[1] Steven Wayne Grey was convicted by Mr. Justice Brown of the Supreme Court of British Columbia, of being a party to the robbery of William Deuling, an employee at the Lone Wolf, a 24-hour truck stop and café located in Arras, a small community approximately 15 kilometers west of Dawson Creek. Mark Lee Gardner was the person who entered the Lone Wolf and committed the robbery. Mr. Gardner testified that Mr. Grey persuaded Freddy Martin Ominayak to drive the three of them to the Lone Wolf to obtain money they could use to buy drugs. The robbery was committed using a tire iron from Mr. Ominayak's vehicle. Mr. Grey testified that it was his understanding that Mr. Gardner wanted a ride to Arras so that he could "jack up" his aunt. He denied knowing that Mr. Gardner intended to commit a robbery.

[2] The trial judge found that Mr. Grey believed Mr. Gardner wanted a ride to Arras so that he could rob his aunt. The judge held that even though Mr. Grey believed that Mr. Gardner's aunt was to be the object of the robbery, Mr. Grey was a party to the robbery of the Lone Wolf. In other words, the judge held that the change in the location of the crime did not affect Mr. Grey's criminal liability as a party.

[3] Mr. Grey challenges his conviction on a number of grounds. However, I find it necessary to discuss only one. As I will explain, I agree with Mr. Grey that the trial judge's finding that he knew Mr. Gardner was going to commit a robbery in Arras is unreasonable and that, as a result, the conviction cannot stand.

Factual Background

[4] On January 4, 2011, Mr. Gardner, who was in the middle of a crack cocaine binge, was walking on the streets of Dawson Creek when he was picked up by a vehicle driven by Mr. Ominayak in which Mr. Grey was a passenger. Mr. Gardner was acquainted with Mr. Grey but did not know Mr. Ominayak. The three then went to Mr. Grey's basement suite where they used crack cocaine. Mr. Grey and

Mr. Ominayak twice left to get more crack cocaine. Eventually they ran out of drugs and began discussing how to get money with which to buy more.

[5] At some point that evening, Mr. Gardner was given a tire iron from Mr. Ominayak's vehicle; it is not clear who physically handed it to him. With Mr. Ominayak driving, they drove to Arras. En route, Mr. Gardner, who was alone in the back seat, used the tire iron to make a slit in the hood of his hoodie. Mr. Gardener planned to wear the hoodie backwards so that its hood covered his face. There was no discussion in the vehicle about what Mr. Gardner was doing.

[6] They arrived at the Lone Wolf around midnight. Mr. Gardner gave Mr. Omniayak directions where to park, which Mr. Ominayak did not follow. Once the vehicle came to a stop, Mr. Ominayak turned off the exterior lights, but left the engine running.

[7] Mr. Grey got out of the vehicle and went into the Lone Wolf. While inside, he spoke with a customer whom he knew. After obtaining a piece of paper and a pen from Mr. Deuling, Mr. Grey wrote out his telephone number and the words "Steve" and "Ride". Mr. Grey gave the piece of paper to that customer and then walked out of the Lone Wolf. In his testimony, Mr Grey said the note related to an underground taxi service he operated.

[8] Mr. Gardner went into the Lone Wolf after Mr. Grey came out. He had the hood of the hoodie pulled up over his face. He walked directly to the cash register and, tapping the tire iron on the counter, said to Mr. Deuling, "Hand it over, buddy." Mr. Deuling complied, handing Mr. Gardner approximately $150.00 from the cash register. Mr. Gardner then ran outside, jumped in Mr. Ominayak's vehicle stating, "I got the money, let's go." The three drove back to Dawson Creek where Mr. Gardner was dropped off. During the drive back, Mr. Gardner threw his sweatshirt out of the vehicle and gave Mr. Grey some of the money. The trial judge found that Mr. Grey took the money "apparently seeing it as compensation for the cost of the gas": para. 74.

[9] Mr. Gardner testified that Mr. Grey and Mr. Ominayak took him to the Lone Wolf after he told them that if he got a ride there he could probably get money out of the till. He said that they asked him if it was a "sure thing" and he said that it was. He also told them that he needed a "stick or something ... to go in with and make it ... quicker and easier ... to get the money from the till." Mr. Gardner had worked as a dish washer at the Lone Wolf. In cross-examination, he said he had not said anything about an aunt and that he does not have any relatives in Dawson Creek.

[10] In his examination in-chief, Mr. Gardner did not use the words "rob" or "robbery" in relating the conversations he had with Mr. Grey and Mr. Ominayak prior to going to the Lone Wolf. The only time he used the word "rob" in relation to this period was during his cross-examination by Mr. Ominayak's counsel:

> Q Okay. No [inaudible]. And then - - and then your conversations with them is that you basically said you wanted to get some drugs and some money? We covered that. You - -
>
> A We wanted to get drugs, and we wanted to get money.
>
> Q But you tell them that you want to go rob a place, right?
>
> A I want to go rob - - well, yeah, yeah. I said, you know, I could - - I could get some money out of this too, yes, I could.
>
> Q Okay. You, during that drive downtown - - we're not talking about the Lone Wolf. During the drive downtown you told [Mr. Grey] and [Mr. Ominayak] is that you're going to want to go rob a place, and actually specifically the pet store, the Total Pet?
>
> A I don't re - - mentioned any pet store, robbing any pet store, no.
>
> Q Okay. But you don't remember robbing a pet store, you said, right?
>
> A I don't remember saying that I was going to rob any pet store.

[11] Mr. Grey provided a different explanation for the drive to Arras. That explanation was put before the court in a most unusual manner. In effect, he "adopted" as his evidence in-chief a statement he had made to Corporal James A. Rutledge of the Royal Canadian Mounted Police during a post-arrest interview. The video of that interview had been played on a *voir dire* during the Crown's case. Although the trial judge ruled the statement admissible, the Crown did not tender it in evidence, but held it back for possible use in cross-examination. I will have more to say about how Mr. Grey's evidence was presented later in these reasons. For the

present, it is enough to note that no objection was taken by the Crown, either at trial or on appeal, with respect to how Mr. Grey's evidence was presented, except for the reference in the Crown's factum to the procedure followed being "unorthodox".

[12] In his statement, Mr. Grey denied participating in a robbery. When asked what "robbery" meant to him, he replied:

> Robbery I don't know fucking robbery with gun fucking gun going into a store I guess robbery.

[13] Mr. Grey stated that Mr. Gardner wanted a ride to Arras to "jack up" his aunt's place. When asked by the officer if Mr. Gardner wanted to go there to break in, Mr. Grey replied:

> (Indiscernible) break in I guess cause that's what the I thought that's what the tire iron was for.

[14] Crown counsel cross-examined Mr. Grey extensively on his statement, including the following portion:

GREY:	Anyway ah Mark wanted a fucking ride out there cause he said he could fucking go jack up his aunty behind the fucking she lives behind the fucking Esso
RUTLEDGE:	Mm hm
GREY:	They were all drunk or somethin' I could go fucking rob her for a couple of hundred bucks

[15] When Mr. Grey was cross-examined about Mr. Gardner having used the word "rob", the following exchange occurred:

Q	Now, that's not your words. You're repeating what [Mr. Gardner] told you; correct?
A	No, he said he could go see his auntie. And he never said "rob", right? He just - - he just said that he'll go see his auntie.
Q	Well let's look at [line] 428. You don't say - - you're not saying, "I, Steven Grey, am going to go fucking rob her." That's not what you're saying?
A	No, I never said - -
Q	No.
A	- - I could rob her by myself, no.

Q That's right. Because you could read that to say "I." You're talking Steven. "I could go fucking rob her for a couple hundred bucks." But that's not what you're saying. These are [Mr. Gardner's] words that you're repeating to [the officer]; right?

A Basically, yeah, but he never said "rob". He just said he'd go see his auntie. He said he had an auntie that lived out there.

Q Now, there's a big difference between "borrow" and "rob." Yes?

A There is, I guess, yeah.

Q "Borrow" means I'm going to ask for permission, and I'm going to give it back. Yes?

A That's just what he told me.

Q Rob - -

A That was his auntie.

Q - - meant - - rob means I'm going to take it, and I'm going to take it with violence, right?

A Really? Is that what "rob" means?

Q That's what "rob" means. Is that right?

A I guess that's what it means.

Q And when you knew that [Mr. Gardener] was going to go rob his auntie, like you told [the officer] - -

A He said he was going to jack her. He didn't say nothing about robbing. I don't know why I said that shit. He said he was going to go out there and see his auntie.

Q So he said he was going to go jack his auntie. That's what you thought he was going to do?

A Yeah, there's a different meaning for jacking. Could be borrowing money, could be asking, begging money, whatever. Lots of different scenarios for jacking.

[16] Mr. Ominayak called Mr. Grey's sister as a witness. She testified that she overhead Mr. Gardner tell Mr. Grey and Mr. Ominayak that he wanted a ride to the Lone Wolf to get some money from his "auntie".

Trial Judge's Reasons

[17] The principal issue for the trial judge was whether the conduct engaged in by Mr. Grey and Mr. Ominayak made them parties to the robbery committed by Mr. Gardner. That issue engaged the following provisions of the *Criminal Code*, R.S.C. 1985, c. C-46:

> s. 21(1) Every one is a party to an offence who
>
> (b) does or omits to do anything for the purpose of aiding any person to commit it ...
>
> s. 343 Every one commits robbery who
>
> (a) steals, and for the purpose of extorting whatever is stolen or to prevent or overcome resistance to the stealing, uses violence or threats of violence to a person or property;
>
> (b) steals from any person and, at the time he steals or immediately before or immediately thereafter, wounds, beats, strikes or uses any personal violence to that person;
>
> (c) assaults any person with intent to steal from him; or
>
> (d) steals from any person while armed with an offensive weapon or imitation thereof.

[18] The Crown's position was that the evidence established that Mr. Grey and Mr. Ominayak had taken Mr. Gardner to Arras for the purpose of assisting him in robbing the Lone Wolf. In the alternative, the Crown argued that they could be convicted of being parties to the robbery of the Lone Wolf even if they believed that Mr. Gardner was going to rob some other place.

[19] Mr. Grey's position was that the evidence did not establish that he knew Mr. Gardner was going to commit a robbery in Arras, let alone at the Lone Wolf. He submitted that the expressions "jack" and "jack up" are ambiguous, and could not be taken to be synonymous with "rob" or "robbery". In a somewhat similar vein, Mr. Ominayak submitted that the evidence was not sufficient to fix him with knowledge of Mr. Gardner's intent to rob the Lone Wolf. He argued that he was not sufficiently involved in the conversations between Mr. Grey and Mr. Gardner to understand why Mr. Gardner wanted a ride to Arras.

[20] In convicting Mr. Grey, the trial judge found that although Mr. Grey was not aware that Mr. Gardner intended to rob the Lone Wolf, he was aware that Mr. Gardner intended to commit a robbery and assisted him in getting to Arras for that purpose:

> [97] In the present case, the question arose as to whether, under s. 21(1)(b), the Crown must establish Mr. Grey had knowledge of how, where,

> and against whom the robbery would be committed before he could be found guilty as an accessory to the principal offence. It is the conflicting testimonies of Mr. Gardner, the principal offender, who testified the plan was always to rob the café, and of Mr. Grey, who testified that the plan was to rob an auntie of Mr. Gardner's who had lived nearby, that raises the question.
>
> . . .
>
> [106] I find the evidence establishes beyond a reasonable doubt that Mr. Grey was aware or had knowledge of the type of crime Gardner intended to commit. With this knowledge, Grey assisted Gardner and thereby aided him in its commission by providing transportation to the scene or at least convincing Ominayak to drive Gardner to the scene.
>
> [107] Grey did not have a clear understanding, evidently, of the specific nature of the crime that Gardner intended to commit, in the sense that he did not expect it to be occurring in the Lone Wolf café, where he had been handing out his contact information to an acquaintance minutes before. I find, however, the evidence more than sufficiently demonstrates that Grey understood Gardner was going to commit a robbery, but not at that exact place.
>
> [108] Grey was upset later, not that Gardner had committed a robbery, I find, but that it had occurred at a place different than the one he had anticipated and one that exposed him to potential liability as an aider.
>
> [109] The fact that it occurred in a place other than what he expected does not raise a reasonable doubt. I have accepted some of Steven Grey's evidence and rejected other portions of it, but his evidence, both accepted and rejected, does not raise a reasonable doubt that he is guilty of the offences he is charged with. Neither does all the evidence, both accepted and rejected, and considered as a whole, raise a reasonable doubt.

[21] The trial judge acquitted Mr. Ominayak because he was not satisfied that Mr. Ominayak knew what Mr. Gardner intended to do in Arras: paras. 115, 116.

Grounds of Appeal

[22] In his factum, Mr. Grey sets out his grounds of appeal as follows:

> 25 The Learned Trial Judge erred in finding that the Appellant had the level of *mens rea* required to be found guilty of being a party to Mr. Gardner's robbery of William Deuling, pursuant to ss. 21(1)(b) and 344(1)(b) of the *Criminal Code*.
>
> 26. In particular, the Learned Trial Judge made the following errors in judgment:
>
> (a) There was no evidentiary basis upon which to find the Appellant had knowledge that Mr. Gardner was planning to use violence, or its threat, in his acquisition of money, as required by s. 343 of the *Criminal Code*. As such, the Learned

Trial Judge's verdict cannot be supported by the evidence and was unreasonable, pursuant to s. 686(1)(a)(i) of the *Criminal Code*.

(b) The Learned Trial Judge erred in law in finding that, although the Appellant did not know that Mr. Gardner was going to commit the charged robbery, he may be found to be a party to the charged robbery because he suspected Mr. Gardner was going to commit a "related" offence against a different person at a different location.

(c) The Learned Trial Judge provided insufficient reasons explaining his decision to convict the Appellant of the robbery of William Deuling. The Appellant has been left in the dark as to why a conviction was entered against him. It is not possible to conduct an adequate review of the verdict.

Analysis

[23] As already mentioned, I am of the view that the verdict was unreasonable. I have reached this conclusion because while the evidence supports the finding that Mr. Grey understood that the purpose in going to Arras was to obtain money from Mr. Gardner's aunt, it does not support the finding that Mr. Grey believed he was assisting in a robbery of the aunt. I should note that although the Crown seeks to uphold the conviction on the basis that it is sufficient that Mr. Grey believed he was assisting Mr. Gardner to commit a robbery in Arras regardless of who Mr. Gardner actually robbed, it did not argue that Mr. Grey could be convicted of robbing the Lone Wolf if he believed he was assisting Mr. Gardner to commit some other offence in relation to Mr. Gardner's aunt, e.g., breaking and entering.

[24] I will deal first with Mr. Grey's submission that the trial judge misapprehended the evidence when he stated that Mr. Grey testified that "the plan was to rob an auntie of Mr. Gardner's": see para. 20 above. Referring to the cross-examination set out in para. 15 above, Mr. Grey submits that he never testified that Mr. Gardner used the word "rob" in discussing why he wanted a ride to Arras. However, except for correcting two minor aspects of his statement to the police, Mr. Grey testified in-chief that everything he said in the statement was true and he adopted that statement as his evidence in the trial. Accordingly, there was testimony from Mr. Grey that Mr. Gardner had used the word "rob". That under cross-examination

Mr. Grey denied that Mr. Gardner used that word did not preclude the judge from making the finding that he did. Thus, it cannot be said that he misapprehended the evidence.

[25] This brings me to Mr. Grey's submission that it was unreasonable for the trial judge to find that he understood Mr. Gardner wanted a ride to Arras so that he could engage in acts that amounted to "robbery" under s. 343 of the *Criminal Code*. His position is that, while the evidence supports a finding that he believed Mr. Gardner wanted to obtain money from the aunt, it does not support a finding that he believed that Mr. Gardner intended to steal from her using violence or threats of violence. For example, breaking into the aunt's house to steal money would not be the offence of robbery, but an offence under s. 348 of the *Criminal Code*, i.e., breaking and entering with intent to commit an indictable offence.

[26] The Crown's position is that the evidence supports a finding that Mr. Grey understood that Mr. Gardner intended to engage in acts that would be an offence under s. 343. It submits that the expressions "jack" and "jack up" used by Mr. Grey in his statement to the police are synonymous with "rob" in the *Criminal Code* sense.

[27] Section 686(1)(a)(i) of the *Criminal Code*, permits an appellate court to set aside a conviction on "the ground that it is unreasonable or cannot be supported by the evidence". The principles to be applied under that provision were summarized by Madam Justice Deschamps in *R. v. R.P.*, 2012 SCC 22, [2012] 1 S.C.R. 746:

> [9] To decide whether a verdict is unreasonable, an appellate court must, as this Court held in *R. v. Yebes*, [1987] 2 S.C.R. 168, and *R. v.* Biniaris, 2000 SCC 15, [2000] 1 S.C.R. 381, at para. 36, determine whether the verdict is one that a properly instructed jury or a judge could reasonably have rendered. The appellate court may also find a verdict unreasonable if the trial judge has drawn an inference or made a finding of fact essential to the verdict that (1) is plainly contradicted by the evidence relied on by the trial judge in support of that inference or finding, or (2) is shown to be incompatible with evidence that has not otherwise been contradicted or rejected by the trial judge (*R. v. Sinclair*, 2011 SCC 40, [2011] 3 S.C.R. 3, at paras. 4, 16 and 19-21; *R. v. Beaudry*, 2007 SCC 5, [2007] 1 S.C.R. 190).

[28] In this case, the Crown was required to prove, beyond a reasonable doubt, that Mr. Grey understood that Mr. Gardner intended to engage in conduct falling

within s. 343 of the *Criminal Code*. However, there is a dearth of evidence that Mr. Grey understood the legal meaning of "rob" or "robbery". As pointed out in *R. v. Watson*, 2008 ONCA 614 at para. 51, 240 O.A.C. 370, the colloquial meaning of robbery is theft or stealing, i.e., acts that do not involve violence. That is why someone who returns home to find his or her house has been broken into and items stolen will often say "I was robbed", even though what occurred is not "robbery" in the eyes of the law.

[29] That "rob" has more than one meaning is reflected in dictionaries. For example, the *Concise Oxford English Dictionary*, 11th ed. revised (Oxford: Oxford University Press: 2008), contains the following:

> **Rob** ■ v.(**robs, robbing, robbed**) **1** take property unlawfully from (a person or place) by force or threat of force. **>** informal or dialect steal (something) **>** informal overcharge. **2** (rob someone of) deprive someone of (something needed or deserved)

[30] Further, there was an absence of evidence that the expressions "jack" and "jack up" are commonly used to refer to acts that would, under the criminal law, constitute a robbery. The Crown did not call any evidence as to the meaning of those expressions and Mr. Grey did not equate them to "robbery" in the criminal law sense, except in a somewhat equivocal way: see paras. 12, 15 above.

[31] In my view, the evidentiary record is such that a properly instructed trier of fact could not reasonably conclude that Mr. Grey understood that Mr. Gardner's purpose in going to Arras was to commit acts that would amount to robbery under s. 343 of the *Criminal Code*. For that reason, Mr. Grey's conviction cannot stand and he is entitled to an acquittal.

Mr. Grey's Evidence In-Chief

[32] Although the outcome of this appeal does not turn on how Mr. Grey's counsel led his evidence in-chief, I think it is appropriate to point out that the procedure followed was flawed. What occurred may well have been precipitated by the fact

that the written transcript and DVD relating to Mr. Grey's statement were marked as trial exhibits after that statement was ruled admissible on the *voir dire*.

[33] At the beginning of the trial, Crown counsel advised the trial judge that both Mr. Grey and Mr. Ominayak had made statements to Corporal Rutledge. She indicated that it was her intention "to lead [those statements] for cross-examination purposes." After Crown counsel had called Mr. Gardner and several other witnesses, she asked the judge to embark upon *voir dires* with respect to the statements made by Mr. Ominayak and Mr. Grey. In doing so, Crown counsel advised the judge that the voluntariness of both statements was being admitted "so we just have to enter into the *pro forma voir dire* so that the court can make its own assessment." Crown counsel further indicated that defence counsel agreed that Corporal Rutledge was the only necessary witness. The trial judge agreed, stating, "So I just need to satisfy myself as to voluntariness."

[34] The first *voir dire* related to Mr. Ominayak's statement. Mr. Ominayak's counsel advised the trial judge that since voluntariness was being admitted, he had no objection to Crown counsel asking Corporal Rutledge leading questions. After asking the officer a few introductory questions, Crown counsel had him play the video (i.e., DVD) of the interview. Corporal Rutledge also produced a transcript of the interview. Mr. Ominayak's counsel indicated the he did not wish to cross-examine the officer.

[35] After Corporal Rutledge was stood down, Crown counsel asked that the written transcript be marked as an exhibit. The trial judge stated that he should first make a finding that the statement was voluntary, which he implicitly did. The judge then directed the court clerk to mark the transcript, giving it the next number in the sequence of trial exhibits. Counsel of Mr. Grey suggested that both the transcript and the DVD be marked and the judge agreed. As a result, the DVD became Exhibit 6 and the transcript Exhibit 6.1.

[36] A *voir dire* was then held with respect to Mr. Grey's statement, generally following the same procedure as on the previous *voir dire*. The interview of Mr. Grey

took place on January 12, 2011, commencing at 2:49 p.m. As the video was being played some minor errors in the transcript were identified and corrected. After the trial judge found the statement voluntary, the DVD was marked as Exhibit 7 and the transcript as Exhibit 7.1.

[37] After the second *voir dire* ended, counsel for Mr. Grey asked Corporal Rutledge a few questions. In answering some of those questions, Corporal Rutledge stated that he was not the officer who had arrested Mr. Grey and that he believed the arrest had been made on January 12, 2011. Crown counsel then tendered written admissions as exhibits and closed the Crown's case.

[38] Mr. Grey testified on his own behalf. The first questions asked by his counsel elicited his age and where he lived. The examination then continued as follows:

> Q You were - - you were present in court, of course, a few minutes ago when the statement you gave to Constable Rutledge was – was played?
>
> A Yes.

[39] In response to leading questions from his counsel, Mr. Grey corrected two errors in his statement and then confirmed its truthfulness:

> Q All right. With the exception - - with those two exceptions, were you otherwise trying to be truthful with Constable Rutledge that day?
>
> A Yes, I was.

[40] After Mr. Grey answered questions dealing with his use of alcohol and drugs, and an injury to his hand depicted in the video, the following exchange occurred:

> Q ... otherwise what you told Constable - - or Corporal Rutledge that day was the truth?
>
> A Yes, it was.
>
> Q And you're adopting that statement now as part of your evidence in this trial, are you, sir?
>
> A Yes.
>
> Q Okay. I don't think in that case, Mr. Grey, I'm going to go over it in any detail. You still have a fairly clear recollection of the events of that night, as - -
>
> A Yes, I do.

> Q Okay. As good as it was, anyway, on January the 12th?
>
> A Yeah.
>
> Q And you had an opportunity overnight to review a transcript of that statement.
>
> A Yes, I did.

Thus ended Mr. Grey's examination in-chief. He was cross-examined by Mr. Ominayak's counsel and then Crown counsel. As mentioned, Crown counsel made considerable use of the transcript during her cross-examination.

[41] Given that the voluntariness (i.e., admissibility) of both statements was admitted it is not clear why Crown counsel considered a "*pro forma voir dire*" necessary. It has long been the case that defence counsel can admit the voluntariness of a statement and, thus, obviate the need for a *voir dire*: *R. v. Park*, [1981] 2 S.C.R. 64 at 70; *R. v. Hodgson*, [1998] 2 S.C.R. 449 at para. 44. Of course, as discussed in *Park*, a trial judge has the discretion to decline to accept the admission and to conduct a *voir dire*. However, in the case at bar the need for a *voir dire* is not apparent.

[42] Evidence presented on a *voir dire* is not evidence on the trial proper: *R. v. Gauthier*, [1977] 1 S.C.R. 441 at 452; *R. v. Viszlai*, 2012 BCCA 442 at para. 68, 293 C.C.C. (3d) 127. Accordingly, since the Crown did not tender either statement as part of its case, the transcripts and DVDs should not have been marked as trial exhibits. Rather, they should have been marked in such a way as to clearly indicate they were not part of the record of the trial proper, e.g., V.D. Exhibit 1 and so on.

[43] This brings me to what I consider to be the inappropriate way in which Mr. Grey's evidence in-chief was presented, i.e., contrary to the general prohibition on tendering prior consistent statements: *R. v. Stirling*, 2008 SCC 10 at paras. 5, 7, [2008] 1 S.C.R. 272. It was not open to Mr. Grey to give his evidence through the simple expediency of "adopting" his post-arrest statement. His evidence should have been led in the normal way, by having him recount his version of the events from the witness box. Whether he could have been permitted to refer to his prior statement in the course of his evidence in-chief is a matter I need not discuss. The

point I wish to emphasize is that, in general, a witness cannot give his or her evidence simply by referring to a previous out-of-court statement and saying, in effect, "What I said before is the truth." The trier of fact is entitled to hear the evidence a witness has to give directly from that witness.

Disposition

[44] I would allow this appeal, set aside the conviction, and enter an acquittal.

"The Honourable Mr. Justice Frankel"

I agree:

"The Honourable Madam Justice Saunders"

I agree:

"The Honourable Mr. Justice Chiasson"