

Citation: *R. v. Cardinal*, 2025 YKTC 3

Date: 20250121
Docket: 24-00216
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Phelps

REX

v.

COREY ROBERT CARDINAL

Appearances:
Andreas Kuntz
Mark Chandler

Counsel for the Crown
Counsel for the Defence

RULING ON VOIR DIRE

[1] Corey Robert Cardinal is before the Court on a four-count Information alleging offences under the *Criminal Code* contrary to ss. 334(1)(b), 351(2), 88 and 733.1(1). All offences arise out of an incident at a Petro Canada gas station in Whitehorse, Yukon, on April 1, 2024.

[2] The trial proceeded on October 15, 2024, during which the Crown made an application for a ruling on the admissibility of recognition evidence from RCMP Cpl. Samuel Anderson with respect to video images of a masked individual committing

the offences. At the conclusion of the *voir dire*, the trial was adjourned to allow for written submissions.

Identification Issue

[3] At trial, video evidence was admitted from two neighbouring businesses located in downtown Whitehorse. The first business, the Destination Family Hotel, provided video from the early morning of April 1, 2024, close in time to the alleged offences before the Court. The video depicts an individual on a bicycle riding and walking at various times in the parking lot of the hotel, and in the lobby of the hotel. The individual is masked for the majority of the time, except for a brief time outside the hotel when he appears to find part of a cigarette and smokes it. The video captures his face briefly, although the image is small and somewhat grainy. The bicycle is depicted from several angles as it is ridden around the parking lot, and the clothing of the individual in the various images is clear.

[4] The video evidence from the second location is the Petro Canada gas station where the offences were alleged to occur. The individual is shown riding up on a bicycle, laying it on the ground before entering the business, then exiting the business and leaving on a bicycle, captured by an outside camera. Images of the individual are captured inside the business, depicting the offender at the counter purchasing an item, then behind the counter committing the offence. The clothing of the individual depicted in the video from both business locations is the same. In the video from the second business, the hands of the offender are clearly depicted revealing a tattoo on the left hand above the thumb, and a ring on the right-hand index finger.

[5] RCMP investigators noted the tattoo in the video images of the offender and quickly narrowed their search to Mr. Cardinal. They had also received Mr. Cardinal's name from the desk clerk at the Destination Family Hotel who did not see Mr. Cardinal on the day in question but pulled the video and believed he recognized Mr. Cardinal as the masked individual. He had spent seven months at the Whitehorse Correctional Centre with Mr. Cardinal several years prior to the incident and had seen him on many occasions at the hotel, noting he would come in at night, riding a bike, and loiter until kicked out.

[6] Mr. Cardinal was arrested on April 1, 2024, at approximately 7:45 p.m. riding a bicycle with very similar features to that depicted in the videos. None of clothing matched the individual in the videos. Photographs of Mr. Cardinal after his arrest do reveal a tattoo with a similar shape and location on the left hand as depicted in the video, as well as a similar ring on the right-hand index finger as depicted in the video.

Evidence of Cpl. Anderson

[7] Cpl. Anderson first came into contact with Mr. Cardinal in January 2020, when he travelled to the Northwest Territories and escorted Mr. Cardinal to Whitehorse in custody. He attended in cells with Mr. Cardinal to provide him his *Charter* rights and police warning, then spent three to three and one-half hours seated facing him in the airplane, engaging in small talk during the flight. He then transported Mr. Cardinal directly to the correctional facility.

[8] Since January 2020, Cpl. Anderson has arrested Mr. Cardinal approximately six times and estimates that he has had at least 150 interactions with him. Mr. Cardinal was

often wanted by the RCMP, and his picture was regularly posted on a screen of wanted individuals at the Whitehorse detachment. His last face to face interaction with Mr. Cardinal prior to the arrest was in January 2024.

[9] According to Cpl. Anderson, Mr. Cardinal has a distinct gait and stature, and he has spent so much time looking for Mr. Cardinal that he can recognize him from a distance or with his back turned to him.

Legal Principles

[10] Counsel agree on the applicable law for the application, relying on the decision of the Supreme Court of British Columbia in *R. v. Coban*, 2022 BCSC 263. The identification issue in *Coban* related to the police officer testifying to the identification of Mr. Coban in 2016 through photographs received from complainants at that time, at trial in 2022. That is, to assist the Court with identifying Mr. Coban as the individual depicted in the photographs in 2016, given the significant passage of time and changes in appearance to the time of trial in 2022.

[11] While the nature of identification is different in *Coban*, the analysis of the law is applicable to the application before this Court. The Judge summarized the nature of the application at para. 12:

Non-expert opinion that a witness recognizes a person captured in a photograph or on video, based on a prior connection with that person, is admissible in certain circumstances. This principle emerged in *R. v. Leaney*, [1989] 2 S.C.R. 393, 1989 CanLII 28 (SCC) [Leaney] where Justice McLachlin (as she then was), for the majority, noted that such evidence is admissible where the witness had a prior acquaintance with the accused and is therefore in a better position than the trier of fact to

conclude whether the individual in a photograph or video is the accused. Decisions since *Leaney* have further developed this general principle.

[12] The Court in *Coban* relied on *R. v. Hudson*, 2020 ONCA 507, a decision that establishes that the application requires a two-step process, as set out in *Hudson* at para. 29:

In order for such recognition evidence to be relied upon by the trier of fact, two distinct inquiries must first be undertaken. To begin, the trial judge must determine whether the evidence meets the threshold requirements for admissibility. If this test is met, the trier of fact must then assess the evidence to determine its ultimate reliability and the appropriate weight, if any, that can be properly attributed to it.

[13] The Court in *Coban* continues with reference to *R. v. Field*, 2018 BCCA 253, a decision that sets out the guiding principles of the application at para. 34:

...When such evidence is tendered, the trial judge must conduct a *voir dire* to determine admissibility: *Leaney*. The purpose of the *voir dire* is to determine whether the recognition witnesses are in a better position than the trial judge as a result of their prior acquaintance with the accused to determine whether the person depicted in the photo or video is the accused. Provided the trial judge is satisfied that the image in the photo or video is capable of identification, issues as to the quality of the photographic or video evidence will go to the weight of the evidence. Once admitted, the trier of fact will need to consider the recognition evidence along with the evidence as a whole to determine whether the Crown has established identification beyond a reasonable doubt.

[14] The Court in *Coban* summarized the cases reviewed and the process to be followed in these applications at paras. 16 and 17:

16 Procedurally, when recognition evidence is tendered, the trial judge will conduct a *voir dire* to determine threshold admissibility: *Field* at para. 34, *Hudson* at para. 29. The threshold for admitting recognition evidence is that of a helpful witness who is in a better position than the trier of fact to identify the accused: *Field* at para. 29, *Hudson* at para. 30. To determine the witness's degree of familiarity with the accused, the court considers (1) the length of the relationship

between the witness and the accused, (2) the circumstances of their relationship, and (3) the recency of contact between them prior to the event where the witness recognized the accused: *Field* at para. 30, citing to *R. v. Anderson et al*, 2005 BCSC 1346 at para. 25.

17 The thrust of the inquiry is to determine the level of familiarity between the witness and the accused: *Hudson* at para. 31. The fundamental question is "whether the potential witness is sufficiently familiar with the accused such that the witness may be able to provide valuable identifying information about the accused that a trier of fact, with access to only the accused, the video, and photographic evidence during trial, will not be able to or unlikely to ascertain for him or herself": *Hudson* at para. 31. Before permitting a potential recognition evidence witness to testify, a trial judge should be satisfied on a balance of probabilities that the answer to this question is yes: *Hudson* at para. 31.

Analysis

[15] Counsel for Mr. Coban did not dispute that Cpl. Anderson's familiarity of Mr. Cardinal meets the test of the first two of three considerations being (1) the length of the relationship between the witness and the accused, and (2) the circumstances of their relationship. His argument focussed on the third consideration, being (3) the recency of contact between them prior to the event where the witness recognized the accused. He contends that there was too much time between the last in-person interaction in January 2024 and the arrest in April 2024.

[16] Counsel for Mr. Cardinal makes three arguments that he asserts raises serious doubt about the recency of contact and whether Cpl. Anderson recognized Mr. Cardinal:

1. The inability of Cpl. Anderson to give the exact date of the most recent interaction, beyond that he believed it was in January 2024, raises serious doubt as to when the interaction occurred;

2. The inability of Cpl. Anderson to give specific details about Mr. Cardinal, including with respect to his height and weight, and the lack of specifics regarding the physical appearance of Mr. Cardinal in January 2024; and
3. The inability of Cpl. Anderson to articulate how Mr. Cardinal's behaviour changes based on substance use, nor how his weight may change based on time spent incarcerated where he cannot consume substances.

[17] I find, on the evidence of Cpl. Anderson, that he is very familiar with Mr. Cardinal based on the escort in January 2020 and the 150 or more interactions with him since then. I disagree with the assertion that the passage of three months between the last interaction and the arrest does not meet the recency requirement. Even though Cpl. Anderson was not certain of the exact date, I accept that the most recent interaction prior to the identification was in January 2024.

[18] The ability of Cpl. Anderson to recall specific facts about the appearance of Mr. Cardinal in January 2024, and to articulate the reasons that he is able to identify Mr. Cardinal from the images recorded in April 2024, go to the weight of the evidence that may be applied.

[19] I am satisfied that the Crown has met the threshold admissibility of Cpl. Anderson's recognition evidence of Mr. Cardinal. The recognition evidence is admissible.

PHELPS T.C.J.