SUPREME COURT OF YUKON

Citation: *R v Silverfox*, 2023 YKSC 2

Date: 20230104
S.C. No. 20-01517
Registry: Whitehorse

BETWEEN

HIS MAJESTY THE KING

AND

WAYNE SILVERFOX

Pursuant to s. 648(1) of the *Criminal Code* no information regarding this portion of the trial shall be published before the jury retires to consider its verdict.

Before Justice M. D. Gates

Counsel for the Crown — Leo Lane

Counsel for the Accused — Amy Steele

REASONS FOR DECISION
(Ruling on Crown's Pre-Trial Application to Admit Certain Evidence as Spontaneous Utterances or under the Principled Approach to the Admission of Hearsay Evidence)

Introduction and Overview

[1] The accused, Wayne Silverfox, is charged with a series of offences relating to a driving incident alleged to have taken place on September 4, 2020, in Whitehorse, Yukon. These offences include dangerous driving, failing to stop a motor vehicle when directed to do so, and impaired driving. A further charge of refusing to provide a breath sample was stayed by the Crown on December 2, 2022, at the outset of the hearing of this pre-trial application. The accused's jury trial is scheduled to commence on January 9, 2023.

[2] The Crown seeks the admission of two 911 telephone calls from private citizens to the RCMP's Operational Communications Centre ("OCC") on the date of the alleged offence, both reporting a suspected impaired driver. The first call was received at 8:14 p.m. ("911 call #1"), while the second call was received at 8:21 p.m. ("911 call #2"). The Crown seeks admission of these recorded 911 calls as spontaneous utterances under the common law hearsay exception, sometimes described as *res gestae*, or, in the alternative, under the principled exception to the hearsay rule. In addition, the Crown's applications seek the admission of various radio transmissions between RCMP officers and an OCC dispatcher on the date of the alleged offence.

[3] It is common ground between the parties that the principal issue at trial will be identity, specifically whether or not the Crown has established beyond a reasonable doubt that the accused was at all material times the driver of the vehicle observed by the various police and civilian witnesses who were in the vicinity at the time of the alleged offences.

[4] This application was heard on December 2, 2022 and continued on December 5, 2022. At the conclusion of counsels' oral submissions, I reserved my decision until December 16, 2022, at which time I advised the parties of my decision with written reasons to follow. These are my Reasons for Decision.

Facts

[5] The Crown called one witness, Corporal Natasha Dunmall, the non-commissioned officer in charge of RCMP Traffic Services Division, and the RCMP lead investigator relative to this matter. The Crown also filed the affidavit of Jerri Huddle, Manager, OCC, the emergency dispatch call service for the Yukon RCMP, attaching a USB memory stick containing: audio recorded radio transmissions; video footage from

the RCMP's Watchguard dashboard cameras retrieved from various police vehicles involved in this investigation; a surveillance video recording obtained from Super A grocery store and gas bar in Riverdale; and the recorded 911 calls (Exhibit #VD-1).

[6] Corporal Dunmall was on duty during the evening of September 4, 2020. At 8:14 p.m., she received a report from an OCC dispatcher regarding a 911 call reporting a possible impaired driver leaving the Riverdale area of Whitehorse. At the time, Corporal Dunmall was alone and driving an unmarked police vehicle.

The 911 Calls

[7] The first 911 call was received at 8:14 p.m. from a woman who declined to provide her name or contact information. During a follow-up telephone call with Corporal Dunmall later that same evening, the caller again declined to provide her name or complete a statement for the police. The caller identified the accused by name and told Corporal Dunmall that she feared retaliation if she identified herself.

[8] 911 call #1 is 1 minute and 37 seconds in duration and consists of the following exchanges with the OCC dispatcher:

Q RCMP, bonjour.
A Hi, there is a little white vehicle just leaving the Super Store in Riverdale. This person is just drunk and driving a little white Mazda.
Q Okay, how do you that they're impaired?
A It's going towards ah, it's going down towards the um, holy smokes, he's going down towards like the, oh my gosh, he's going to what they call it? Um, he's going down towards downtown. Drunk.
Q Towards the bridge then?
A In a white Mazda. Huh?
Q Towards the bridge then?
A Yeah. I'm going pretty fast too.
Q Ok and do you know if they're – how do you know that they're impaired?
A Because he got out of the vehicle, staggered just drunk and then got back in and then took off.

[9] At 8:21 p.m., 911 call #2 was received from Mickey Lamothe. The call is 2 minutes and 2 seconds in duration and consists of the following exchange with the OCC dispatcher:

Q Do you need police, fire or ambulance?
A Police.
Q What's going on?
A I'm just driving down 2nd and some guy in a Toyota pickup just blew like three red lights, swerving into the other lane to pass people and shit.
Q Did you happen to see the licence plate?
A No I didn't, it was covered in mud, but he's headed to – he's headed into Riverdale.
Q How long ago since you last saw it?
A I'm on the bridge right now, my friends driving and we – he just like me – he must be like ten cars ahead of me now, so he's probably at around the new French school.
Q Oh okay. What colour?
A It's like a beige-ish colour.
Q Okay. Just get –
A Never mind, he just turned into the…where like by the hospital.
Q Turned into the – onto Hospital road?
A Yeah. I'm not sure if he's going down Long Lake or to the hospital, but that's where he just turned to.
Q Okay, just give me one second, okay?
A And there's a canopy on it too.
Q A canopy?
A Yeah.
Q Ok, just one second.
A Okay.
Q Can I grab your name, sir?
A Uh yeah, sure, uh Mickey – M I C K E Y
Q And your last name?
A Uh Lamothe, L A M O T H E.
Q And this is your phone, 689-3121?
A Yeah.
Q Were you able to see how many occupants?
A Um I did not, it was a single cab if that helps. I don't know.
Q Okay.
A With a canopy on it.
Q Okay, and were you able to see where it went from Hospital Road?

A Uh, it turned onto Hospital Road, but as we were going into Riverdale (inaudible)
Q Yeah, okay fair enough.
A But my guess would be he went down the Long Lake Road.
Q Yeah, okay perfect. Thank you so much for that.
A Yeah. He was – he was just swerving and passing people on red lights, so I thought I might as well call it in.
Q Yeah, no we appreciate that.
A All right.
Q 'Kay thank you.
A 'Kay thank you, have a nice day.
Q You too.

The Police Investigation

[10] As a result of the information contained in 911 call #1, the RCMP obtained surveillance video from the Tempo Gas Bar next to the Super A grocery store in Riverdale. While the caller in 911 call #1 had referred to "Super Store in Riverdale", Corporal Dunmall testified that there is no Superstore in Riverdale, just a Super A grocery store with an adjacent Tempo gas bar. She initially requested surveillance video for September 4, 2020, between 8:10 p.m. and 8:20 p.m. When the requested video was ultimately received and reviewed, Corporal Dunmall did not observe anything that matched the description provided by the first 911 caller. Corporal Dunmall then expanded her request to cover a greater period of time, believed to be a one-hour time frame. Corporal Dunmall subsequently learned that the time stamp on the video surveillance was inaccurate, though did not provide any evidence as to the extent of the time error. The surveillance video provided in response to this expanded second request contained the footage now before the Court.

[11] When the new surveillance video was received (Exhibit #VD-4), Corporal Dunmall observed a white Mazda pickup truck enter the gas bar area at

8:02:46 p.m., the time recorded on the video. A male that she identified as the accused was observed moving from the driver's side of the vehicle, around the back of the vehicle (8:03:27 p.m.) and then walking along the passenger side and then the front of the vehicle. According to Corporal Dunmall, the accused was unsteady on his feet and supporting himself on the vehicle as he walked around it. The white Mazda and the accused can be seen in several of the 12 different cameras that were recording in the vicinity of the gas bar. At 8:04:22 p.m., the white Mazda can be seen to back up, drive around a vehicle parked at an adjacent gas pump, exit the gas bar, proceed westbound on Lewes Boulevard and then approach the roundabout leading towards the downtown area of Whitehorse or towards Nisutlin Drive or Teslin Road (8:04:47 p.m.).

[12] When Corporal Dunmall received the initial dispatch report of a suspected impaired driver, she was travelling south on 2nd Avenue in the downtown area. Corporal Dunmall's Watchguard vehicle camera recorded two vehicles approaching her police vehicle as she approached Main Street. The two vehicles were travelling northbound on 2nd Avenue.

[13] Corporal Dunmall confirmed that she checked the Watchguard system on her police vehicle at the beginning of her shift that day, and that as a matter of course she routinely confirms the accuracy of the time stamp associated with the Watchguard system. As the lead investigator, Corporal Dunmall collected the Watchguard recordings from all of the RCMP vehicles that were involved in the pursuit and subsequent arrest of the accused on Long Lake Road. A number of these recordings were played in court during this application.

[14] At 8:17:17 p.m., as recorded on the Watchguard system, two vehicles can be seen approaching Corporal Dunmall. She described the vehicle in the outer lane as a

white Mazda pickup truck with a canopy. According to Corporal Dunmall, a 19-year veteran of the RCMP, Mazda motor vehicles are not a model that is popular in Yukon. After observing the Mazda pickup truck, Corporal Dunmall contacted OCC to determine whether the reported impaired driver was operating a car or a truck. She subsequently learned from the dispatcher that the initial call related to a truck, though a review of the transcript of the 911 call reveals that the caller only referred to a "vehicle". Corporal Dunmall advised OCC that she was going to turn around to investigate the white Mazda.

[15] Constable Jason Potter was also on duty on the evening of September 4, 2020, driving an unmarked RCMP vehicle and travelling southbound on 2nd Avenue in the vicinity of Black Street. At 8:17:52 p.m., the Watchguard recording from his vehicle captured a white Mazda pickup truck travelling northbound on 2nd Avenue.

[16] Constable Potter turned his RCMP vehicle around, activated the emergency lights and siren, and pursued the white Mazda northbound on 2nd Avenue and then southbound on 4th Avenue when the Mazda turned left at the intersection of 2nd Avenue and 4th Avenue and returned to the downtown core. The white Mazda did not stop but ran several red lights and crossed into the oncoming lane of traffic. It also passed another vehicle in the turning lane. Given the volume of traffic in the downtown area at the time, Constable Potter made the decision to discontinue the pursuit for reasons of public safety. The Mazda can be seen travelling northbound on 4th Avenue at a high rate of speed as Constable Potter disengaged from the pursuit.

[17] Constable Jordan Booth was also working on the evening of September 4, 2020. At approximately 8:23 p.m., he reported seeing a vehicle on Wickstrom Road/Long Lake Road matching the description of the suspect vehicle. At the time, Constable Booth was

travelling on 2nd Avenue when he observed the vehicle across the Yukon River. In her evidence, Corporal Dunmall confirmed that in the area of Black Street and the Kwanlin Dün Cultural Centre, there is an unobstructed view of Wickstrom Road/Long Lake Road from 2nd Avenue.

[18] Constable David Pompeo was on duty on the evening of September 4, 2020. The Watchguard recording from the RCMP vehicle he was operating reveals that his vehicle was travelling northbound on Long Lake Road at 8:27:29 p.m. Shortly after making a sharp right hand turn in the road, Constable Pompeo's vehicle can be seen driving towards a white Mazda pick-up truck then travelling towards him down a secondary road or driveway off of Long Lake Road. At 8:29:45 p.m. Constable Pompeo executed a low-speed pit maneuver to block the white Mazda between his police vehicle and a tree. A sole male occupant can be observed inside the white Mazda, moving across the front seat and exiting the vehicle on the passenger side. Constable Pompeo drew his service revolver and directed the driver of the white Mazda, Wayne Silverfox, to stop, put his hands up, and to lie down on the ground. The accused complied with these directions. Corporal Dunmall arrived at the scene at approximately 8:35 p.m. and placed the accused under arrest. He was handcuffed, advised of his *Charter* rights and transported to the Arrest Processing Unit ("APU") at the Whitehorse Correctional Centre ("WCC").

The Law - Spontaneous Utterances *(Res Gestae)*

[19] Counsel have referred to a large number of authorities in support of their respective positions on this application. These authorities include *R v Byrnes*, 2012 ONSC 2090; *R v Dakin* (1995), 80 OAC 253 ("*Dakin*"); *R v Guerra*, 2022 ONSC 3019 ("*Guerra*"); *R v Nicholas* (2004), 184 OAC 139 ("*Nicholas*"); *R v Powers*, 2016 BCSC 2605; *R v Sesook*, 2014 ONCJ 553 ("*Sesook*"); *R v Sylvain*, 2014 ABCA 153 ("*Sylvain*");

R v Villeda, 2011 ABCA 85; *R v Borel*, 2021 ONCA 16; *R v Chung*, 1999 BCCA 69; and *R v Grahovac*, 2008 ONCJ 211. I have carefully considered all of these authorities and have made specific reference to some of them in these reasons. I am grateful to counsel for having identified these various case authorities.

[20] The definition of hearsay evidence, as well as the circumstances in which such evidence is admissible in evidence, is discussed in some detail in the Supreme Court of Canada's decision in *R v Starr*, 2000 SCC 40 ("*Starr*"). At para. 153, the court explained:

> The law of hearsay in Canada and throughout the common law world has long been governed by a strict exclusionary rule relaxed by a complex array of exceptions. Recently, as noted in *Smith, supra*, at p. 932, this Court has moved in a new direction by adopting a principled approach to hearsay "governed by the principles which underlie the rule and its exceptions alike". According to this approach, hearsay evidence may be admissible, notwithstanding the inapplicability of the categorical exceptions on the facts of the case, provided the criteria of necessity and reliability set out in *Khan* are met.

[21] In examining the interaction between the principled approach and the recognized exceptions, the court in *Starr* concluded that "the principled approach must prevail" in the event of a conflict between the two. As such, it found that "[t]he governing principles for hearsay admissibility must be reliability and necessity" (para. 155). The traditional hearsay exceptions are to be interpreted in a fashion that is consistent with the principled exception requirements of necessity and reliability (para. 213). At the same time, the court acknowledged that "the existing exceptions are a long-standing and important aspect of the law of evidence" (para. 211). In this regard, the court noted that "in the clear majority of cases, the presence or absence of a traditional exception will be determinative of admissibility" (para. 211).

[22] Evidence that falls within one of the traditional hearsay exceptions is presumptively admissible as importing an inherent reliability component, or as affording circumstantial guarantees of reliability (para. 212). A party that seeks to challenge the admissibility of hearsay evidence that is otherwise presumptively admissible bears the onus of establishing that the evidence should be excluded on the basis of issues pertaining to either necessity or reliability. The exclusion of otherwise admissible hearsay evidence on this basis will be rare (para. 214).

[23] The Alberta Court of Appeal in *Sylvain* and *R v D(DL)*, 2014 ABCA 218 ("*D(DL)*), explained the spontaneous utterance (*res gestae*) exception to the hearsay rule. The court noted that "[a] statement relating to a startling event or condition may be admitted to prove the truth of its contents if it is made while the declarant is under the stress o[r] excitement caused by the event or condition" (*Sylvain* at para. 30). In *D(DL)*, the court held that *res gestae* statements include excited utterances, statements of present physical condition, statements of present mental state and statements of present sense impression (para. 15).

[24] In *Sylvain*, the Court of Appeal found that "the mere making of a 911 call does not necessarily bring that call within the "excited utterances" exception" (para. 32). The court went on to explain the role of the trial judge in determining whether statements fall within the scope of the spontaneous utterance exception. Again, at para. 32, the court held that "…the trial judge must assess all the relevant evidence relating to the call, including the *content*, timing and circumstances of the 911 call ...". I would also note that the Ontario Court of Appeal in *Dakin* noted, at para. 20, that: "[t]he admissibility of the declaration is assessed not simply by mechanical reference to time but rather in the

context of all of the circumstances obtaining at the time, including those which tell against the possibility of concoction or distortion."

[25] Quoting Paciocco JA in *The Perils and Potential of Prior Consistent Statements: Let's Get It Right* (2013) 17:2 Can Crim L Rev 181 at 192-93, the court in *Sylvain* found that "the 'excited utterances' exception to the hearsay rule does not arguably contain a necessity requirement" (para. 33).

[26] In *D(DL)*, a sexual assault case involving text messages sent by a complainant to a friend, the Court of Appeal adopted (at para. 16) the criteria set out by the Ontario Court of Appeal in *Nicholas*, at para. 88, quoting from their earlier decision in *R v Khan* (1988), 42 CCC (3d) 197 ("*Khan*") at 207:

> … [A] spontaneous statement made under the stress or pressure of a dramatic or startling act or event and relating to such an occasion may be admissible as an exception to the hearsay rule. The stress or pressure of the act or event must be such that the possibility of concoction or deception can be safely discounted. The statement need not be made strictly contemporaneous to the occurrence so long as the stress or pressure created by it is ongoing and the statement is made before there has been time to contrive or misrepresent. The admissibility of such statements is dependent on the possibility of concoction or fabrication. Where the spontaneity of the statement is clear and the danger of fabrication is remote, the evidence should be received.

[27] The decision of the Ontario Court of Appeal in *Kahn* was upheld by the Supreme Court of Canada (1991), 59 CCC (3d) 92. Writing for the court, McLachlin J (as she then was) described the spontaneous utterance exception as relating to statements "made under pressure or emotional intensity which would give the guarantee of reliability…" (at 100).

[28] The timing and circumstances of the statements claimed to fall within the spontaneous utterance exception to the hearsay rule in this case are central issues to be determined. As such, the court may consider the tone of voice, as well as the declarant's emotional state, what she/he actually said, and the circumstances in which the statements were made, in determining whether the statements were spontaneous in nature. Consideration may also be given to the overall context in which the statements were made. In *Sylvain,* the court noted that "[e]vidence existing independent of the declaration can assist in establishing the existence of the shocking event and therefore the spontaneity of the statement" (para. 37). The court also found that "[a]ll of these facts and circumstances go on the scale in assessing the existence of the shocking event and spontaneity of the 911 call" (para. 38).

[29] A number of the cases relied upon by the Crown deal with the contemporaneity requirement of the spontaneous utterance exception, including *Dakin* and *Sylvain*.

[30] In *Dakin*, the Ontario Court of Appeal upheld the trial judge's ruling that found five statements made by the deceased over the course of an hour were admissible as spontaneous utterances. In that instance, Dakin poured a jar of gasoline on his ex-girlfriend and her daughter while they were asleep. He then set the gasoline on fire. The ex-girlfriend and her daughter suffered severe burns, and both ultimately died in hospital. The last of the five statements of the ex-girlfriend was critical to the Crown's case and was made to a nurse in the hospital emergency room an hour after the fire. The trial judge held that there was "little to distinguish the existing circumstances in the hospital emergency room from the circumstances that existed throughout the hour since the horrible event, other than time" (para. 18).

[31] The Court of Appeal upheld the trial judge's admission of the statements as spontaneous utterances, noting:

> [21] ...in the present case, the trial judge specifically adverted to the time interval between the fire and the hospital utterances and concluded that the intervening events did not "change the severity of the pain nor the circumstances that existed since the traumatic event, [a]nd that created the unlikelihood of time for reflection to the extent of being able to form or create a fabrication of the event or its cause".

[32] In *R v Brown*, 2015 ONSC 4121, Fairburn J. (as she then was) found that a 911 call following a robbery was evidence falling within the *res gestae* exception to the hearsay rule. She held:

> [39] First, I find that Mr. Singh's voice, captured on the 911 tape, that I have had the opportunity to listen to, is clearly one of a man who is still suffering from the shock of what just happened to him. While he was able to communicate, he was clearly concerned and anxious on the phone. In short, his tone of voice sounds like someone who has just been robbed. ...

[33] In *Guerra*, reference is made to the Ontario Court of Appeal's decision in *R v Nurse*, 2019 ONCA 260 ("*Nurse*"), a case involving the admission of a pointing gesture by the victim of a very serious assault. The Court of Appeal upheld the trial judge's decision to admit the pointing gesture as non-verbal assertive conduct amounting to a *res gestae* statement.

[34] In *Nurse*, the court endorsed the decision of the House of Lords in *R v Andrews*, [1987] AC 281 (H.L.) ("*Andrews*") in which Lord Ackner provided guidelines to trial judges in approaching the spontaneous utterance exception. These guidelines were reproduced by Dambrot J in *Guerra*, at para. 35, as follows:

> My Lords, may I therefore summarise the position which confronts the trial judge when faced in a criminal case with

> an application under the *res gestae* doctrine to admit evidence of statements, with a view to establishing the truth of some fact thus narrated, such evidence being truly categorised as “hearsay evidence?”
>
> 1. The primary question which the judge must ask himself is- can the possibility of concoction or distortion be disregarded?
>
> 2. To answer that question the judge must first consider the circumstances in which the particular statement was made, in order to satisfy himself that the event was so unusual or startling or dramatic as to dominate the thoughts of the victim, so that his utterance was an instinctive reaction to that event, thus giving no real opportunity for reasoned reflection. …
>
> 3. In order for the statement to be sufficiently “spontaneous” it must be so closely associated with the event which has excited the statement, that it can be fairly stated that the mind of the declarant was still dominated by the event. Thus the judge must be satisfied that the event, which provided the trigger mechanism for the statement, was still operative. The fact that the statement was made in answer to a question is but one factor to consider under this heading.
>
> 4. Quite apart from the time factor, there may be special features in the case, which relate to the possibility of concoction or distortion. …
>
> 5. As to the possibility of error in the facts narrated in the statement, if only the ordinary fallibility of human recollection is relied on, this goes to the weight to be attached to and not to the admissibility of the statement and is therefore a matter for the jury. However, here again there may be special features that may give rise to the possibility of error. In the instant case there was evidence that the deceased had drunk to excess, well over double the permitted limit for driving a motor car. Another example would be where the identification was made in circumstances of particular difficulty or where the declarant suffered from defective eyesight. In such circumstances the trial judge must consider whether he can exclude the possibility of error.

The Position of the Parties

[35] The Crown maintains that the timing and content of the two 911 calls is critical to the Crown's case in establishing that the accused was at all material times the driver of the white Mazda. As such, the Crown seeks to rebut any suggestion that another unidentified driver may have been involved in the incident. The Crown says that both 911 calls meet the requirements of admissibility as spontaneous utterances. Alternatively, the Crown says that at least the first 911 call also meets the requirements of reliability and necessity under the hearsay exception principled approach.

[36] The Defence, on the other hand, says that there are sufficient concerns arising from the circumstances of both 911 calls as to call into question the reliability of this evidence. Specifically, the Defence says that the possibility of distortion or concoction is not adequately discounted in relation to both calls. The Defence raises particular concerns with 911 call #1 on the basis that the identity of the caller is unknown. Further, the Defence contends that 911 call #2 fails to meet the necessity requirement under the principled exception and, as such, should not be received in evidence. In all of the circumstances, the Defence maintains that neither 911 call should be admitted in evidence either as a spontaneous utterance or under the principled exception. Finally, the Defence urges the Court to invoke its residual discretion to exclude this evidence on the basis that the prejudicial effect outweighs the probative value.

Analysis

[37] I propose to deal with the two 911 calls separately. In my view, somewhat different considerations arise relative to each of these calls.

911 Call #1

[38] With respect to the first 911 call, it is clear that the caller is disclosing events as they are unfolding. She reports that she has just observed the white Mazda at the Super Store in Riverdale and that she is proceeding in her own vehicle behind the Mazda as it heads for downtown Whitehorse. I am satisfied that there is no concern relative to the contents of this 911 call as regards the issue of contemporaneity. The Defence concedes that there is no issue in this case with the contemporaneous nature of both 911 calls.

[39] I am also satisfied that the contents of the call have been captured through the copy of the 911 recording that is before the Court in evidence. A transcript of the call is also available. There is no issue with respect to the accuracy of this transcript.

[40] I accept the Defence contention that the 911 call is not under oath, clearly a reliability consideration when addressing the Crown's alternative position that the 911 calls are properly admitted under the principled exception. It was, however, a call made to the RCMP via 911, a vehicle that is well-known to members of the general public as a means to contact the police and other first responders in circumstances of urgency or emergency. I agree with the Crown's suggestion that there is a degree of inherent solemnity associated with a citizen's resort to this reporting mechanism that provides some circumstantial guarantees of reliability.

[41] In my view, the existence of both the recorded call and a transcript of same, together with the inherent solemnity that I find to exist relative to 911 calls generally, provides procedural reliability assurances that go some distance in addressing the hearsay dangers flowing from the absence of an oath, the lack of actual physical presence and, most particularly, the absence of cross-examination.

[42] I have listened carefully to the 911 call. It is readily apparent that the caller was in an excited or agitated state during the course of her conversation with the 911 dispatcher. I am satisfied that her choice of language and, most particularly, her tone of voice relay her distress relative to the events being reported. She was clearly startled and surprised by the unusual events unfolding before her. Her real time reporting of these events afforded her no real opportunity for reasoned reflection or, indeed, fabrication.

[43] I also take into consideration the fact that Corporal Dunmall had a follow-up conversation with this 911 caller later on September 4, 2020. Part of that conversation was inadvertently recorded and, as such, is available for consideration in this pre-trial application. The purpose of this telephone call was to try and persuade the caller to identify herself and to provide a statement. While Corporal Dunmall was not successful in convincing the caller to disclose her identity, it is clear from the content of this second conversation that the caller was motivated to make the 911 call by her concern about the threat to public safety presented by the suspected impaired driver. I am satisfied that she was motivated by concern for the safety and well-being of both the driver of the white Mazda and the members of the public who happened to be in the immediate vicinity at the time. In my view, this is a factor supporting the reliability of the information previously conveyed in the 911 call and assists in discounting any concern relative to the possibility of fabrication or concoction.

[44] The Defence offer a number of arguments in support of the contention that the first 911 call should not be received in evidence, either as a spontaneous utterance or under the principled exception. First, the Defence says that, unlike most of the referenced authorities, neither of the 911 callers in this instance were involved as a

victim or complainant in the underlying offence. According to the Defence, this is an unusual aspect of this particular case. By way of response, the Crown maintains that the spontaneous utterance exception does not include any requirement that the maker of the proffered statement be a victim, or someone directly impacted by the commission of the crime alleged.

[45] In my view, there is no merit to the Defence argument in this regard. In *Andrews*, the House of Lords referred to the earlier decision of the Privy Council in *Ratten v R*, [1971] 3 All ER 801, in which the Law Lords made it clear that a *res gestae* hearsay statement may be made either by a victim or a bystander (*Andrews* at 518). While the Defence may well be correct in asserting that most of the reported cases deal with spontaneous utterances emanating from a complainant or victim, I am not persuaded that the spontaneous utterance exception is unavailable to statements made by a witness or bystander.

[46] The Defence also maintains that the fact that the identity of the first 911 caller is unknown makes it impossible to assess the caller's motive and whether or not the content of the 911 call was concocted or fabricated. According to the Defence, this case is unlike any of the other referenced authorities where the speaker was a known or identified individual. The Defence says that we simply do not know anything about the person who made the call in this instance.

[47] The Defence goes on to suggest that the Crown's reliance on the decisions in *Nicholas* and *Sesook* is misplaced and, specifically, that both decisions turn on their own particular facts. *Nicholas* was a case involving a complainant who suffered from post-traumatic stress disorder as a result of a violent sexual assault following a break-in to her home. At trial, her physician gave evidence suggesting that forcing her to testify

could result in a complete inability to function. Her 911 calls immediately following the attack were admitted as spontaneous utterances notwithstanding her unavailability for cross-examination.

[48] In *Sesook*, the proposed witnesses were the 8- and 12-year-old children of the accused. After the children provided statements to the police regarding their father's drinking and speeding while conveying them in his vehicle, the children's mother refused to allow them to further participate in the criminal process. In such circumstances, the trial judge concluded that their statements were admissible as spontaneous utterances, notwithstanding the fact that they were unavailable for cross-examination.

[49] I agree with the Defence that these cases are factually distinguishable and of limited assistance in resolving the issue in this application. As the Defence rightly suggests, both *Sesook* and *Nicholas* involved situations where the maker of the statement sought to be adduced in evidence was known, but unavailable to give evidence due to extenuating circumstances. In this case, as previously discussed, the first 911 caller has not been identified. Accordingly, I agree with the Defence that this is a factor that must be taken into consideration when assessing the overall circumstances in which the statement was made and, in particular, considering the possibility of concoction. I cannot, however, accede to the Defence suggestion that the unknown identity of the first caller is determinative of the issue of admissibility of this evidence.

[50] In this regard, I would note the Supreme Court's decision in *R v Smith*, [1992] 2 SCR 915. In that instance, the court held that "[w]here the criteria of necessity and reliability are satisfied, the lack of testing by cross-examination goes to weight, not admissibility, and a properly cautioned jury should be able to evaluate the evidence on

that basis" (at 935). In my view, this same consideration applies in this instance. The fact that the identity of the first 911 caller is unknown, and the fact that this individual is therefore unavailable for cross-examination, are matters that primarily go to weight and not admissibility.

[51] The Defence urges the Court to consider the fact that virtually all of the referenced cases involve horrific events and criminal charges that are significantly more serious than the current matters before the Court. In oral submissions, Defence counsel suggested that this particular matter is not nearly as dramatic and startling as the very serious underlying circumstances found in *Byrnes*, *Dakin*, *Nicholas*, Powers, *Sylvain*, and other cases. While the Defence is correct to point out these clear factual differences, I am not persuaded that this provides a proper basis to restrict the application of the spontaneous utterance exception or, indeed, the principled approach to the admission of hearsay evidence. Even assuming the correctness of the defence characterization of the relative seriousness of this matter in relation to those set out in the various decided cases, I am not aware of any authority for the proposition that the general rules of evidence are to be applied differently depending upon the relative seriousness of the underlying charge.

[52] The Defence also raises concerns with the content of the first 911 call and, specifically, what are alleged to be leading questions posed by the dispatcher during the interaction with the caller. According to the Defence, the question: "how do you know that they're impaired" was a leading question and, as such, tends to undermine the spontaneous nature of the caller's response, thereby negatively impacting the statements' overall reliability. In my view there is no merit to this submission. First, I am not satisfied that it was a leading question in light of the fact that the caller had already

stated, unprompted, that the driver was drunk. The dispatcher was simply seeking to gather additional information, namely the particulars relating to the caller's "conclusion" that the driver was drunk. Under the circumstances, I am not prepared to find that the dispatcher's efforts to elicit additional information from the caller somehow eroded the spontaneous nature of the caller's responses or otherwise undermined the overall reliability of the caller's statements.

[53] Finally, the Defence points to the caller's mistaken reference to the Super Store in Riverdale and suggests that this error should give rise to doubts regarding the overall reliability of the information contained in this 911 call. According to the Defence, the caller was either referring to an entirely different event that she observed at the actual Super Store in Whitehorse, or was mistaken in her observations or recollections so as to adversely affect the overall reliability of the events she described.

[54] I accept Corporal Dunmall's evidence that there is no Super Store in Riverdale, but rather a Super A grocery store. Under the circumstances, particularly, the caller's agitated state at the time of making the 911 call, I find that this was a minor error in the nature of a "slip of the tongue" that is of no real consequence. Based on all the evidence before me, it is clear that the first 911 caller was describing the same set of events that are captured on the surveillance video from the gas bar at the Super A store in Riverdale on the date in question. I am satisfied that the caller's error was the result of "the ordinary fallibility of human error" as described previously in *Andrews*. The significance of this so-called error does not affect the admissibility of this evidence, though it may well go to the weight to be attributed to this evidence by the jury at trial.

[55] In assessing the reliability of the 911 call, I also take into consideration that portions of the call were confirmed or corroborated by the content of the surveillance

video from the gas bar. While there is a discrepancy of approximately 10 minutes between the time stamp on the surveillance video and the time of the first 911 call, I am satisfied that this discrepancy is potentially explained by Corporal Dunmall's evidence that she discovered the existence of a time error in the surveillance video during the course of her investigation. The details of that error are not before me in evidence on this application. This will be an issue for the jury's consideration based on whatever evidence is ultimately placed before them at trial. However, for the purposes of this application, I am satisfied that the portion of the surveillance video that shows the accused's arrival at the gas bar in a white Mazda, as well as his actions of briefly walking around the vehicle, using the vehicle to support himself in the process, and then showing the white Mazda departing the gas bar and heading towards the traffic circle on Lewes Boulevard, are the same events described by the first 911 caller. It is significant, in my view, that Corporal Dunmall identified the individual in the surveillance video as the accused, while the 911 caller also identified the accused by name as being the person she observed at the gas bar and operating the white Mazda.

Conclusion – 911 Call #1 – Spontaneous Utterance

[56] I have carefully considered the various authorities that establish the criteria governing the admissibility of spontaneous utterances, particularly the five guiding principles set out in *Andrews*. For the reasons set out above, I find that 911 call #1 is admissible in evidence as a spontaneous utterance. The call was clearly contemporaneous with the events being described. I am satisfied that the possibility of concoction or distortion can be disregarded in these circumstances, and that there are no special features or considerations arising in this instance that relates to the possibility of concoction or fabrication.

[57] I am also satisfied that any error regarding the location of the caller's observations is a matter that does not affect admissibility but rather the possible weight to be attributed to this evidence by the trier of fact. Further, I am not persuaded that the discrepancy between the time stamp on the surveillance video at the gas bar and the time of this 911 call undermines the admissibility of this evidence. In my view, it will be for the jury to determine, on the basis of all the evidence placed before them, the significance, if any, of this discrepancy.

The Principled Approach: Necessity and Reliability

[58] As previously discussed, the Supreme Court of Canada in *Starr* recognized that there might be rare instances where evidence otherwise admissible under a recognized hearsay exception fails to meet the necessity and reliability requirements of the principled approach to the admission of hearsay evidence. A party seeking to challenge the admissibility of otherwise admissible hearsay evidence on the basis of necessity or reliability bears the onus of establishing that the evidence should be excluded. With respect to 911 call #1, the Defence has not persuaded me that they have met this onus. Accordingly, I find that the content of this first 911 call is also admissible in evidence under the principled approach to the hearsay rule.

Probative Value v Prejudicial Effect of Admitting this Evidence

[59] Even where evidence is otherwise admissible either under a recognized hearsay exception or pursuant to the principled exception framework, a court may still refuse to admit the evidence if its prejudicial effect outweighs its probative value.

[60] In this instance, the Defence urges the Court to exercise this discretion on the basis of the alleged significant prejudice flowing to the accused from the admission of this evidence. The Defence says that the content of the first 911 call regarding the

timing and circumstances of the accused's attendance at the gas bar are highly prejudicial, particularly the caller's "conclusion" that the accused was drunk, a conclusion that the Defence will have no ability to challenge through cross-examination. The Defence also question the probative value of this evidence given the caller's apparent mistaken reference to the "Super Store" in Riverdale and the time discrepancy between the time stamp on the gas bar surveillance video and other evidence regarding the timing of the 911 call. In my view, there is some evidence to explain the time discrepancy between the time stamp on the surveillance video and the time of the 911 call as recorded by the RCMP. I am also of the view that the 911 caller was obviously mistaken in her reference to the "Super Store" in Riverdale. This was a minor error that does not undermine the threshold reliability of the essence of the information she provided to the police. As such, I find that the evidence is, overall, highly probative.

[61] In terms of prejudice, I acknowledge that this evidence "works against the interests [of the accused]" in that it may well "increases the risk of conviction": Paciocco, Paciocco & Stuesser, "*The Law of Evidence*", 8th ed (Toronto: Irwin Law, 2020). However, it is only prejudicial "where it is prone to being misused, its reliability cannot adequately be tested, or it may otherwise operate unfairly or produce problematic collateral costs": *The Law of Evidence*, quoting from *R v Fucile*, 2020 ABCA 189 at para. 31. I accept the Defence contention that there is some prejudice flowing from the unknown identity of the first 911 caller. However, considering all the surrounding circumstances, I am satisfied that the probative value of this evidence outweighs the prejudicial effect of admitting this evidence and allowing it to be placed before the jury.

911 Call #2

[62] Like 911 call #1, 911 call #2 described events as they were actually unfolding. It is clear from the audio recording that the caller, Mickey Lamothe, was a passenger in a vehicle in motion and following some number of car lengths behind the vehicle that was the subject of his call. The contemporaneous nature of this call is conceded by the Defence.

[63] However, the Defence challenges the second 911 call on the basis that it does not meet the criteria to constitute a spontaneous utterance and that it also does not meet the necessity and reliability criteria of the principled exception. In particular, the Defence points to the fact that the statements are not under oath; were the result of close questioning by the dispatcher so as to deprive them of the required degree of spontaneity; and that the caller described the vehicle as a Toyota and “beige-ish” in colour. The Defence maintains that it is quite possible that the caller was describing some vehicle other than the white Mazda operated by the accused.

[64] While the contents of the call are not under oath, for the reasons previously given, I am satisfied that the circumstances of a 911 call involve a degree of inherent solemnity that provides some circumstantial guarantee of reliability. I am also satisfied that the question-and-answer format of the proposed evidence does not undermine the spontaneous nature of the real-time reporting or, indeed, its reliability.

[65] The Defence correctly points out that the caller described the vehicle as a “beige-ish” Toyota with a cap on the back. Based on other evidence before me, it is clear that the accused was driving a white Mazda truck with a cap on the back at the time of his arrest. Likewise, the Watchguard recordings from the various police vehicles, as well as the verbal descriptions of the vehicle being operated in an erratic fashion, all refer to the

vehicle as being white. However, I take into consideration that the second 911 caller indicated that the licence plate of the vehicle was obscured by mud, suggesting that at least part of the vehicle was dirty. In my view, it would certainly be open to a jury to conclude that a dirty white vehicle may have appeared "beige-ish" in colour.

[66] The second caller's description of the vehicle as a Toyota pickup is obviously at odds with the rest of the evidence that refers to the suspect vehicle as a Mazda. For the purposes of this application, I am satisfied that a Mazda and a Toyota are both small vehicles. I also note that the second caller's two references to a cap on the back of the pickup is consistent with the other descriptions of the suspect vehicle. It will, of course, be for the jury to determine the weight to be placed on the second caller's description of the vehicle as a "beige-ish" Toyota pickup with a cap on the back. I am not, however, persuaded that the description of the vehicle is at such variance with the other evidence before me as to adversely impact my determination on the issue of threshold reliability. For the purposes of this application, I am satisfied that this alleged error in the second caller's description of the vehicle was, at worst, the result of "the ordinary fallibility of human error", as previously described in *Andrews*.

[67] I have listened carefully to the content of 911 call #2. While the content and tone of voice of the caller do not display the same level of agitation or distress as the first caller, the second caller was sufficiently concerned by his observations of erratic driving as to bring those concerns to the immediate attention of the police via the emergency telephone line. While tone of voice and content of an utterance may provide some indication of a speaker's level of distress or agitation, I am not persuaded that such indicia are determinative of the issue. Rather, it is important to consider all the surrounding circumstances in determining whether the "stress or pressure of the act or

event [was]… such that the possibility of concoction or deception can be safely discounted" (*Khan* at 207).

[68] The content of the call in the circumstances, together with the contemporaneous nature of the call, signal the caller's concern regarding the events unfolding in real time before him. Having found that 911 call #1 meets the requirement of the spontaneous utterance exception, I am reluctant to reach a different conclusion with respect to 911 call #2 on the basis of tone of voice and choice of language. It is, in my view, well established and understood that human response to stressful situations exists on a broad spectrum. In these circumstances, I see no reasoned basis to find the second 911 call to be somehow less reliable than the first call on account of the second caller's somewhat more measured choice of language and tone of voice. The essence or foundation of the exception lies in the fact that the speaker is responding to an unusual or out-of-the-ordinary event in relation to which he or she has no time to contrive or misrepresent (*Khan* at 207). I am satisfied that the second caller, like the first caller, was responding instinctively to a startling or alarming event that prompted an immediate call to action through a report to the police emergency telephone line. In both instances, the callers had no real opportunity for reasoned reflection thus rendering the danger of fabrication remote.

[69] In assessing the reliability of the second 911 call, I take into consideration that the caller's description of the observed erratic driving pattern of the vehicle immediately preceding his call to 911 are confirmed or corroborated by the Watchguard recording taken from Constable Potter's police vehicle during the pursuit on 2nd Avenue. The similarity between the caller's description of what he has just observed and the Watchguard recording are, in my view, striking. As such, it would clearly be open to the

jury to conclude that the 911 caller was describing the same events recorded on the Watchguard recording from Constable Potter's vehicle.

Conclusion – 911 Call #2 – Spontaneous Utterance

[70] I have carefully considered the various authorities that establish the criteria governing the admissibility of spontaneous utterances, particularly the five guiding principles set out in *Andrews*. For the reasons set out above, I find that 911 call #2 is admissible in evidence as a spontaneous utterance. The call was clearly contemporaneous with the events being described. I am satisfied that the possibility of concoction or distortion can be disregarded in these circumstances and that there are no special features or considerations arising in this instance that relate to the possibility of concoction or fabrication. I am also satisfied that any discrepancies between the caller's description of the vehicle and the rest of the evidence are matters that do not affect admissibility but rather the possible weight to be attributed to this evidence by the trier of fact.

The Principled Approach: Necessity and Reliability

[71] With respect to the second 911 call, the Crown conceded during oral argument that it currently lacks a sufficient evidentiary basis to establish the element of necessity. While Mickey Lamothe, the caller in the second 911 call, has not yet been contacted by the RCMP, recent information suggests that the RCMP are aware of his address, phone number and current whereabouts. Mr. Lamothe's father recently reported to the RCMP that he believed his son would be returning to Yukon from Costa Rica in the very near future. While the Crown may seek to establish necessity relative to this second 911 call at a later date, I find that necessity has not been established on the evidence before me in this application.

Probative Value v Prejudicial Effect of Admitting this Evidence

[72] The Defence did not strenuously object to the admission of this evidence on the basis of prejudice. Given my findings with respect to the issue of necessity, it is not, strictly speaking, necessary for me to go further and rule on this issue. However, given the possibility that the Crown will renew its application to seek the admission of this second 911 call, I would be inclined to find that the probative value of this evidence exceeds any prejudice flowing to the accused.

Conclusion

[73] For the reasons set out above, I would summarize my conclusions as follows:

a) 911 call #1 is admissible in evidence as both a spontaneous utterance and under the principled exception to the hearsay rule. The probative value of this evidence exceeds its prejudicial effect;

b) 911 call #2 meets the criteria for admissibility in evidence as a spontaneous utterance, but fails to meet the necessity requirement of the principled exception. It is, accordingly, not admissible in evidence at trial. While not strictly speaking necessary for me to determine in the circumstances, I find that the probative value of this evidence exceeds its prejudicial effect; and

c) The Crown is granted leave to renew its application for the admission of 911 call #2 before the Trial Judge, and to adduce such further evidence as may be permitted touching on the issue of necessity.

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GATES J.