

CITATION: R. v. Wong, 2011 ONCA 815

DATE: 20111221

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COURT OF APPEAL FOR ONTARIO

MacPherson, Juriansz and Epstein JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Thomas Wong

Appellant

AND BETWEEN

Her Majesty the Queen

Respondent

and

Paulo Stein

Appellant

Paul J.I. Alexander, for the appellant, Thomas Wong

Douglas Gosbee, for the appellant, Paulo Stein

Alison Wheeler, for the respondent

Heard and released orally: December 15, 2011

On appeal from the convictions entered on May 25, 2010 by Justice Simon C. Armstrong of the Ontario Court of Justice.

ENDORSEMENT

[1] The appellants appeal their convictions of forcible confinement arising out of a home invasion. The only issue at trial was identity. They contest the trial judge's conclusion that they were the perpetrators. They submit that their guilt is not the only reasonable inference from the fact that Wong's DNA and Stein's fingerprint were found at the scene. Wong's DNA was found on the inside of a construction mask matching the description of the one worn by the intruder who was Chinese. Stein's fingerprint was found on the inside of a duct tape roll used to bind the victims.

[2] In advancing their argument, the appellants rely on this court's decisions in *R. v. Mars* (2006), 205 C.C.C. (3d) 376 and *R. v. D.D.T.*, 2009 ONCA 918. In *Mars*, this court stressed that each case must be assessed on its own particular facts. At para. 5, Doherty J.A. said of applying the reasonableness standard to fingerprint cases:

As reasonableness is ultimately a fact-based determination, prior decisions, even those made in similar cases, cannot have binding authority.

[3] The trial judge in this case did not base his conclusion on the DNA and fingerprint evidence alone. His inference linking the DNA and fingerprint to the crime was based on

other evidence. He stated he was “satisfied that the other evidence in the case establishes that Wong’s DNA came in contact with the mask and Stein touched the duct tape roll at the relevant time and place so as to connect them with the crime.”

[4] The other evidence, which he reviewed carefully, included the fact that the descriptions of the perpetrators generally conformed to the appearance of the appellants; the mask containing Wong’s DNA matched the description of the mask worn by the Chinese perpetrator; and considered the pristine condition of the mask and where it was found in relation to the position of the back door and yard gate. He also considered where the duct tape was found and where the fingerprint was located in the context of all the evidence about the duct tape and strands of duct tape.

[5] The facts of this case are quite different to those in *Mars*. There is a great difference between a construction mask and the inside cardboard of a roll of duct on one hand and a pizza box on the other. Several people sharing a pizza may leave their prints on the pizza box, before two of them use it in a home invasion. The circumstances in which Wong’s DNA could come to be innocently deposited on the inside of the pristine construction mask or Stein’s fingerprint could be impressed on the inside of a roll of duct tape used in the crime, in our view, are in the realm of speculation rather than reasonable inference.

[6] In addition, it is significant in *Mars* that the force of the fingerprint evidence was diminished by exculpatory identification evidence. Here, we do not accept that the

descriptions of the perpetrators were exculpatory. In our view, the trial judge's finding of fact that the victims' descriptions of the perpetrators generally conformed with the appearance of the appellants was supported by the evidence.

[7] We are satisfied that a reasonable trier of fact could conclude on the totality of the evidence that the appellants were guilty of the forcible confinement of the victims during the home invasion.

[8] Both appeals are dismissed.

“J.C. MacPherson J.A.”

“R.G. Juriansz J.A.”

“G.J. Epstein J.A.”