CITATION: R. v. Ximines, 2012 ONCA 20
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COURT OF APPEAL FOR ONTARIO

Simmons, Blair and Hoy JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Luan Ximines

Appellant

Luan Ximines, in person

Allan Rouben, as duty counsel

Xenia Proestos, for the Public Prosecution Service of Canada

Heard: December 13, 2011

On appeal from the conviction entered by Justice Jane Milanetti of the Superior Court of Justice, sitting with a jury, on February 25, 2011.

By the Court:

[1] Following a jury trial, the appellant was convicted of possession of cocaine for the purpose of trafficking and acquitted of possession of Canadian currency knowing that it was derived from the offence of possession of cocaine for the purpose of trafficking.[1]

[2] The charges arose out of an incident observed by two plain-clothes police officers, Officers Pauls and Fletcher. The officers claimed that they saw the appellant engage in a hand-to-hand transaction with a woman during which the appellant handed the woman a plastic bag and the woman handed the appellant a $50 bill. When the officers approached and identified themselves, the appellant ran away.

[3] According to the officers, they observed the appellant throwing things from his pockets as he ran down an alley. Officer Pauls pursued the appellant and arrested him. Officer Fletcher picked up various items while following along; he later went back to the alley and picked up some additional items. Among other things, Officer Fletcher picked up 2.3 grams of crack cocaine; 5.5 grams of marijuana; one oxycontin pill and $371.98 in Canadian currency. Officer Pauls testified that the appellant had a $50 bill in his hand when he was arrested.

[4] Although Officer Fletcher testified in-chief that he observed the hand-to-hand transaction, in cross-examination he admitted that at the preliminary inquiry he testified he did not observe a hand-to-hand transaction. He also acknowledged during cross-examination that he made his notes in conjunction with Officer Pauls and that, while

[1] At the request of the Crown, a directed verdict of acquittal was entered on a third charge, possession of Oxycontin.

doing so, the two men discussed how the incident happened. Finally, Officer Fletcher acknowledged that he had no notes or recollection of which items he picked up while following Officer Pauls and the appellant and which items he picked up when he returned to the alley.

[5] The appellant raises two main issues on appeal.

[6] First, the appellant submits that the guilty verdict was unreasonable and that the drugs were planted. In support of this argument, the appellant claims that it is apparent that Officer Fletcher fabricated portions of his evidence at the trial, rendering the whole of his evidence, including his evidence of what he found in the alley, incapable of belief. Further, there were obvious improbabilities and frailties in the other evidence at trial. For example, Officer Pauls' claim that the appellant had a $50 bill in his hand after he had been throwing items from his pockets was highly improbable. Further, the inferential link between the items picked up by Officer Fletcher and the appellant was extremely weak. Finally, the not guilty verdict on the possession of proceeds of crime charge is inconsistent with the guilty verdict on the possession for the purpose of trafficking charge and makes that verdict unreasonable.

[7] We do not give effect to this ground of appeal. While there were obvious problems with the credibility of some aspects of Officer Fletcher's evidence, those problems did not make his evidence about the items he picked up in the alley incapable of belief. The trial judge canvassed the credibility issues in relation to Officer Fletcher's evidence as

well as the other alleged frailties in the prosecution's case in her charge to the jury. In our view, it was open to the jury to make a finding of guilt based on the totality of the evidence at trial.

[8] Further, although the appellant asserts on appeal that the drugs were planted, the closest defence counsel came to advancing that position at trial were the following questions and answers put during cross-examination of Officer Fletcher:

> Q. And if I were to suggest that these charges of possession for the purpose of crack cocaine is something that you've put on Mr. Ximines, would you agree with that?
>
> A. I'm sorry, what's your question?
>
> Q. …This charge of possession for the purpose of crack cocaine, that's not something that stemmed from the interactions and the observations that you made on May 21st, 2009, would you agree with that?
>
> A. It would have been collective observations of me and my partner.

[9] In re-examination, the Crown asked Officer Fletcher if he had any marijuana or cocaine in his pockets when he started duty that day. Crown counsel also asked if Officer Fletcher had made any seizures before dealing with the appellant. Officer Fletcher responded to both questions in the negative. Based on our review of the record there was no evidence before the jury that the drugs were planted.

[10] Further, we are not persuaded that the finding of guilt on the possession for the purpose of trafficking charge is inconsistent with the not guilty verdict on the possession

of proceeds of crime charge. One aspect of the defence position at trial was that the possession of the proceeds of crime charge was particularized as relating to the crime of possession of cocaine for the purpose of trafficking. As the woman who was a party to the hand-to-hand transaction was not apprehended, the defence submitted that the Crown could not prove beyond a reasonable doubt that the money the appellant received from the woman related to any crime, let alone the crime as particularized. In our view, it was open to the jury to acquit the appellant on the possession of proceeds of crime charge based on this submission, but convict the appellant on the possession for the purposes of trafficking charge based on the crack cocaine recovered from the alley.

[11] The appellant's second ground of appeal is that the trial judge erred in failing to give the jury an instruction explaining the importance of the independence of police officers' notes and a sharp warning about the potential impact of police officers collaborating when preparing their notes.

[12] We do not give effect to this ground of appeal. The trial judge instructed the jury about the potential impact of collaboration on two occasions during the course of her charge. When instructing the jury about assessing the credibility of witnesses generally she said the following: "Did the witness seem to be reporting to you what he saw or heard or simply putting together an account based on information obtained from other sources, other than from personal observation?"

[13] Later, she instructed the jury as follows:

> There is evidence from which you could but do not have to find that Officers Pauls and Fletcher had some discussion, as well as some opportunities to talk to one another about the events about which each of them testified. ... Evidence of (*sic*) the witnesses in sharing their stories with each other intentionally or by accident allowed themselves to change or alter their accounts so that their testimony would seem more similar or more convincing is a factor for you to consider in deciding whether or to what extent you believe what they say or rely upon it in deciding the case.

[14] The latter instruction appears to be an adaptation of the specimen instruction relating to Collusion Amongst Similar Act Witnesses found in *Watt's Manual of Criminal Jury Instructions* (Toronto: Thomson Carswell, 2005). We acknowledge that this instruction could have been adapted further to focus specifically on the issue of collaboration in note-making. Nonetheless, in our view, the instructions given by the trial judge were sufficient to draw the jury's attention to the risks arising from the officers' discussing the incident after it happened and collaborating in making their notes. In this regard, we note that defence counsel at trial made no objection in relation to these instructions. We take that as a reliable indication that defence counsel thought the instructions were adequate.

[15] Based on the foregoing reasons, the appeal is dismissed.

Signed: "Janet Simmons J.A."

"R. A. Blair J.A."

"Alexandra Hoy J.A.

RELEASED: "JS" JANUARY 13, 2012