

COURT FILE NO.: 327/95CR

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

HER MAJESTY THE QUEEN

Respondent

- and -

VYTAUTAS BALTRUSAITIS

Applicant

Michael Martin, for the Respondent

Paul Slansky, for the Applicant

Thompson, J.

PRE-TRIAL RULING #9

ADMISSIBILITY OF THE EXPERT EVIDENCE OF ROBERT WARBURTON,
FIREARM AND TOOLMARK EXAMINER

[1] This voir dire was conducted to determine the admissibility of the evidence of Robert Warburton. Mr. Warburton is attached to the Centre of Forensic Sciences as a forensic firearms and toolmark examiner.

[2] In the course of the police investigation, the police observed and seized spent (fired) shotgun casings located at the murder scene and unspent (not fired) shotgun cartridges located in

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the accused's camper. Initially five (5) spent shells and eight (8) of the unfired shells were sent to Mr. Warburton for his examination. On a later date, 20 unspent shotgun cartridges seized from the accused's camper were forwarded to Mr. Warburton for his examination.

[3] Mr. Warburton's examination of the aforementioned items resulted in two reports setting forth his opinions. The initial report is dated March 24, 2003, while the second report is dated June 16, 2003.

[4] In his initial report Mr. Warburton stated that, in his opinion, after examining the submitted items, the five fired shells were cycled through the same firearm. He further stated that one of the unspent cartridges found in the accused's camper, although not fired, had been cycled through the same firearm as the fired cartridges found at the scene of the murder. In his second report, Mr. Warburton stated that three (3) of the unspent cartridges had been cycled through the same firearm used to commit the murder, that three (3) of the remaining shells had been cycled through some unknown firearm, and the remaining cartridges had not been cycled.

[5] It is this evidence which the defence asks be ruled inadmissible.

[6] In the course of the voir dire, the Crown called as a witness Gregory Klees, a firearm and toolmark examiner with the Bureau of Alcohol, Tobacco, Firearms and Explosives, stationed at the Washington Forensic Science Laboratory, in Maryland, U.S.A. The defence did not challenge Mr. Klees' credentials as an expert in the area of firearms and toolmark examination. - I might add for good reason, as Mr. Klees is a most knowledgeable and experienced professional in this field.

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[7] Mr. Klees testified as to the science of firearm and toolmark examination. He related the principles applied, the methodology involved, and the protocols developed to ensure quality examination and comparison. Mr. Klees explained that sometimes, not always, impressions are left on the cartridge casings by parts of the mechanism of the firearm. These marks are impressed on the softer metal of the casing by the parts of the firearm's mechanism utilized in the course of cycling a round of ammunition through the firearm whether the firearm is fired or not.

[8] The science is neither unique nor complex. It involves an initial macroscopic view of the item and then a microscopic view, utilizing the stereo microscope (which is in three dimensions) or the comparison microscope (which allows the viewing of two objects placed side-by-side through one eye-piece). Having made note of the marks on the object, the examiner then relies on his own knowledge gained from experience to determine the source of that mark, or not having the knowledge, research to determine the origin of the mark. As previously noted the methodology is not complicated.

[9] Mr. Klees testified that it is critical that an examiner be familiar with or have information available as to, the various mechanisms of a firearm and the manufacturing processes utilized to create that firearm. Armed with this knowledge, the examiner can then proceed with his observations and determinations.

[10] Mr. Klees explained that there were three types of toolmarks considered by the examiner in arriving at a conclusion. These markings were described as "general characteristics" (created in the manufacturing process and not individual to each firearm; "sub-class characteristics", i.e.

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marks made in a specific position and orientation that can identify the brand and even model of firearm. An example is the orientation of the ejector/extractor markings (if present). Some markings are oriented 180 degrees while others have different configurations. If the casings do not have similar orientation markings, then they can be excluded as having been cycled through the same firearm. It is the third category, "individual characteristics" of a mark, that can identify that mark on two items as having been caused by the same source. These markings have individual impressions caused by one of three (3) sources: the manufacturing process, wear, or abuse. Such imperfections are unique to the tool and allow the examiner to conclude that the source of the impression is the same.

[11] Counsel for the accused does not dispute that the science of firearm and toolmark examination is a valid science. This science has been in existence and has been accepted by courts through the world for many decades. Counsel suggested that the methodology employed within the science was flawed. It was his contention that there was a dispute within the science as to whether one could identify markings without the presence of the weapon itself. I do not agree with his assertion. While there may be some dispute, that is a matter for the triers of fact to weigh.

[12] Counsel has no dispute with the protocol employed by the practitioners of the science (what to do, how to do it, and when to do it, in the course of the examination, i.e. the calibration of the instruments employed). He argued that there was no evidence that CFS had followed the methodology of protocols. The short response to this argument is that that is a matter for the jury to consider.

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[13] In R v Terceira, Mr. Justice Finlayson stated:

"Given that the technology existed and was generally accepted in the scientific community, the contest as to the validity of its application to the particular case was in the last analysis a matter for the jury to assess. An important distinction must be drawn between assessing the reliability of a methodology and determining the propriety of the application of the methodology in particular factual circumstances. The latter determination is strictly for the jury, while the former threshold determination is the responsibility of the trial judge".

[14] In R v Terceira, 123 C.C.C. (3d), 1 (affirmed by the Supreme Court of Canada) Mr. Justice Finlayson referred to the reasoning of Sopinka, J. in R v Mohan as to the four criteria for the admissibility of expert testimony. Those criteria are:

- (a) relevance;
- (b) necessity in assisting the trier of fact;
- (c) the absence of an exclusionary rule;
- (d) a properly qualified expert.

[15] The only criteria that could be in issue here is whether the expert evidence, although probative, is far more prejudicial and thus should be excluded. I find no merit in this argument. I am not convinced, nor concerned, that the jury will be overcome by the "mystic infallibility" of the expert evidence. Such evidence is easily understood and can be accepted or rejected as the

jury sees fit. The jury will have the physical evidence together with enlarged photographs to assist it.

[16] I am satisfied as to Mr. Klees' qualifications as an expert in firearm and toolmark examination. His evidence is capable of assisting the jury in its determinations in areas that would be outside their knowledge or experience. The science is in no manner novel and would be easily understood by the jury. They would have a clear choice of accepting some, all, or none of his testimony and opinion. It would be open to them to determine whether the CFS observed the methodology and protocols of the science. It is a matter for their determination, not mine.

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Thompson, J.

Released: July 4, 2003