

PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. Auld*, 2022 NSPC 55

Date: 20221123

Docket: 8330052; 8330053

Registry: Dartmouth

Between:

His Majesty the King

v.

John Auld

Judge:	The Honourable Judge Theodore Tax,
Heard:	December 22, 2021, April 14, 2022, and July 28, 2022, in Dartmouth, Nova Scotia
Decision	November 23, 2022
Charge:	Section 344 and 351(2) of the Criminal Code of Canada
Counsel:	Tiffany Thorne, for the Public Prosecution of Nova Scotia Jonathan Hughes, for the Counsel for the Defence

By the Court:

[1] John Auld has been charged with unlawfully robbing Birgit Conrad, contrary to section 344 of the **Criminal Code**. He is also charged that at the same time and place, he did with intent commit an indictable offence and did have his face masked contrary to section 351(2) of the **Criminal Code**. The charges are alleged to occurred at or near Lower Sackville, Nova Scotia, on or about April 8, 2019.

[2] The Crown proceeded by indictment and Mr. Auld elected to have his trial in the Provincial Court. Trial evidence was heard on December 22, 2021, and on March 8, 2022.

[3] In addition, on March 8, 2022, the Crown Attorney called Const. Grant Thomas to testify during a *voir dire* with respect to whether the recognition evidence that the Crown sought to elicit from him would be admissible during the trial. The parties agreed that the evidence of Const. Thomas would be part of a blended *voir dire* and if the evidence was admissible, there would be no need to repeat the evidence. On July 28, 2022, the Court ruled that the evidence of Const. Thomas in relation to what was referred to as his recognition evidence was admissible as it had met the two-part “prior acquaintance/better position” test for threshold admissibility.

[4] The Crown Attorney had indicated at the conclusion of Const. Thomas’s testimony that, regardless of the Court’s decision, the Crown would not be calling any further evidence and indicated that she would close her case. Following the Court’s decision on July 28, 2022, which concluded that the evidence was admissible, Defence Counsel indicated that they would not be calling any evidence. As a result, immediately following that indication, the Crown Attorney and Defence Counsel made their closing submissions.

Positions of the Parties:

[5] The Crown Attorney submitted that, while this is a question of identification of the person who robbed the Medicine Shoppe on the morning of April 8, 2019, there is a combination of direct and circumstantial evidence upon which she submits that the Crown has established the identity of Mr. Auld as that person. She points to the video surveillance evidence in the Medicine Shoppe, video surveillance of vehicles entering into the parking area of that store around the time

of the robbery and GPS positioning of the vehicle which was driven by Mr. Auld on the morning in question.

[6] It is the position of the Crown that there are several pieces of circumstantial evidence, in particular, in relation to cell phone searches conducted by Mr. Auld which, according to the expert who extracted data from his cell phone, had searched websites for how to erase GPS information off a device, which could be installed in a vehicle to determine when and where it had gone.

[7] The Crown Attorney submits that there can be no doubt with respect to all of the essential elements in terms of the charges before the court, except with respect to the contested issue of the identification of the person who robbed the Medicine Shoppe on the morning of April 8, 2019. She submits that it is important for the Court to consider the totality of the circumstantial evidence which supports the direct evidence, in particular, the timing of the operation of the motor vehicle and its location, post-offence conduct and ultimately the recognition evidence which was admitted to be part of the record from Const. Thomas.

[8] During her submissions, the Crown Attorney outlined the three bases upon which she submits that they have established, beyond a reasonable doubt, the identity of Mr. Auld as the person who perpetrated the robbery on the morning in question. It is the position of the Crown that each one of those bases standing alone would probably be insufficient to establish the identity of the robber as Mr. Auld, beyond a reasonable doubt. However, she submits that the clock used for the “timestamp” on the video cameras was off the true time by one hour. In addition, she submits that the recognition evidence in combination of the bases of direct and circumstantial identification evidence, does establish that Mr. Auld was the robber, beyond a reasonable doubt.

[9] Defence Counsel submits that there can be no doubt that the direct evidence from the witnesses and the video evidence confirms that there was a robbery at the Medicine Shoppe on April 8, 2019, in Lower Sackville, Nova Scotia. The key question is the identification of the male who walked into that pharmacy at the date and time in question and demanded a bottle of hydromorphone. It is the position of the defence that the timestamps on the videos are accurate and so is the GPS information with respect to the business truck which was operated by Mr. Auld, which shows that the truck started moving at 8:12 AM and did not double back into the Lower Sackville area. In those circumstances, there is no basis upon which

the Court could infer that the truck driven by Mr. Auld was anywhere near the Medicine Shoppe at the time of the robbery.

[10] Moreover, Defence Counsel submits that any after-the-fact or so-called post-offence conduct which involved searches of Mr. Auld's phone does not support the Crown's theory and timeline of the case. The search questions with respect to how to fool a vehicle's GPS tracking certainly have an alternate explanation as Mr. Berry, the owner of the company, stated that he had a concern that employees were using his vehicles for personal purposes. Furthermore, the fact that Mr. Auld deleted some but not all of the searches or text messages does not show a particular pattern of behaviour which supports the Crown's theory of the case.

[11] In the final analysis, Defence Counsel submits that the time of the robbery must be considered with the times established by the operation of the truck, phone calls from Mr. Berry, the video of the truck similar to the one owned by Mr. Berry going into the area where the Medicine Shoppe is located, but all of those videos and the GPS data and times do not support the theory of the Crown. The times that the truck is not moving or is moving are not consistent with the other video evidence introduced by the Crown.

[12] It is the position of the defence that even if the court was to conclude that the times on one of the videos were off by an hour, those times still do not line up with the other information with respect to the truck being stationary or moving. Moreover, if the GPS is accurate, and there is no reason to doubt that it was not accurate, given the fact that there was no backtrack of that truck, at about the time of the robbery, Mr. Auld's truck was in Bedford, not in Lower Sackville.

[13] Finally, when Mr. Auld was arrested by the police, roughly 2 hours after the robbery at the Medicine Shoppe, his hands were not greasy as described by the witness at the store, his face was clean and no balaclava hoodie or any stolen drugs were found on him. Based upon the Crown theory of the timing of all the events in question, the GPS information and Mr. Berry's evidence essentially amounts to an alibi, that Mr. Auld was not in the area when the robbery occurred.

[14] Based upon the totality of the circumstances, Defence Counsel submits that the direct and circumstantial evidence does not establish that the only reasonable inference is that Mr. Auld was the person who committed the robbery on the date in question. Given the onus on the Crown to establish the identity of the perpetrator beyond a reasonable doubt, they have not met that threshold in this case and Mr. Auld should be acquitted.

Overview of Trial Evidence:

[15] Ms. Birgit Conrad is the owner and pharmacist at the Medicine Shoppe located at 601 Sackville Dr., in Lower Sackville, Nova Scotia. She had just recently opened her pharmacy and shortly after doing so on that April 8, 2019, a man walked into the store, wearing a ski mask. She asked him if it was that cold outside, and that his response was that he wanted her to immediately give him a bottle of hydromorphone. She initially thought he was joking, but he had one hand in his pocket and the other hand was gesturing to her. Ms. Conrad recalled the man's words in response were: "No I am serious, I want a bottle of hydromorphone, give me one and I will leave."

[16] She found a bottle of hydromorphone pills and out of concern for everyone's safety and to "decelerate" the situation, she handed over the bottle. She added that, given the fact that one hand was in his pocket, and she did not know if anything was in that hand, she wanted to minimize any harm and pulled out the lowest dose hydromorphone to give him. She believed that the bottle contained 100 pills of 1 mg hydromorphone pills.

[17] Ms. Conrad described the person who demanded the hydromorphone as having a full ski mask, mirrored sunglasses with a white frame, being tall, slender, and approximately 6 feet tall. She also noted, because she could view one hand and the person's forehead, that there appeared to be grease marks in those two locations. Based upon those observations, she believed that the perpetrator might have been someone who had work like a mechanic.

[18] Shortly after Ms. Conrad handed the male who had made the demand for the hydromorphone, the technician who was also in the store at that time came out of the room, saw the man exit from the store and immediately pressed the emergency alarm button which would send a call to the police.

[19] After providing that general description, the Crown Attorney introduced to video surveillance clips from the Medicine Shoppe which the parties agreed raised no issues of the continuity or authenticity. There were two short video clips from Medicine Shoppe which were filed as Exhibit 1 in the trial. At the end of the questions with respect to the videos, Ms. Conrad did confirm that they are accurate representations of what she actually saw that day.

[20] The first video on channel 4 which starts at 9:28:45 on the morning of April 8, 2019, is a view of the front counter of the Medicine Shoppe. As the video starts,

Ms. Conrad pointed out that the perpetrator walks into the store, playing with his sweater and then approaches the dispensary area where he speaks to her over the high counter. The man demanded the bottle of hydromorphone and a few moments later, Ms. Conrad hands over a bottle of hydromorphone pills. As the man is walking out of the store, Christa Terrio, the technician who was at the back of the store, comes forward, pushes the emergency button, and then goes to the front door to see which way the man went after leaving the store at about 9:30:58 or 9:31 AM.

[21] The next short video clip was on channel 2 which starts at 9:28:43, on April 8, 2019, which Ms. Conrad said again shows her in the dispensary area, but this camera is directed more towards the front door of the pharmacy. In this view, the man walks up to the dispensary counter with his left hand in a pocket and making gestures with his right hand as he demanded the hydromorphone. She added that given the height of the counter in front of her and the fact that the man kept his left hand in the pocket, she could not tell if there was a weapon in that pocket. After the bottle was handed over, Ms. Conrad pointed out, once again, where Christa Terrio comes out of the back area goes to the front door. The timestamp on the short video ends at 9:30:23 or approximately 9:31 AM.

[22] On cross-examination, Ms. Conrad agreed with Defence Counsel that the man was not aggressive, but in her opinion, he was “adamant” and “determined” that he was not going to leave the pharmacy without getting the hydromorphone that he had demanded. She described the man’s voice as being deep and gravelly. In terms of his body build, she stated that he was slim, tall, and slender. The sweater that he was wearing seemed to be loose on him and she agreed with Defence Counsel that he may have had a slender to muscular build in adding, that her meeting with the man was relatively brief.

[23] Ms. Conrad stated that the ski mask looked like a balaclava with an open oval around the eyes and back a little bit on his forehead, where she saw a little bit of grease. It appeared to be a dark smudge that looked like he rubbed his forehead with something that was on his hands. She saw a darker/blackish smudge on his light skin. Finally, she stated with respect to the timestamps on those videos, she believes that they were accurate because they had been set up by the security company during the previous six months.

[24] Ms. Christa Terrio was working in a backroom at the Medicine Shoppe on April 8, 2019, while the owner, Birgit Conrad was in the front area of the

dispensary. She heard Ms. Conrad talking to someone and she thought she heard the man say that he wanted tablets and he leave. Ms. Terrio came to the front area of the pharmacy asked Ms. Conrad if they were being robbed, she said yes and Ms. Terrio pressed the alarm button which contacted a security company and then, the police.

[25] She stated that, as the man was leaving the pharmacy, she went to the front door and stepped outside to see which way he went after he left the store. He went toward the street in front of her and turned left at the end of the building. She never got a look at his face, so she could not provide any details. After looking at the videos which had been introduced during Ms. Conrad's testimony, she made the same observations as she had previously stated.

[26] In addition, however, during the testimony of Ms. Terrio, the Crown Attorney introduced a second set of video images as Exhibit 2 which presents a view of the end of the building where the Medicine Shoppe is located to the left. In this image, the man who just left the pharmacy is walking towards the surveillance camera, but it was noted that the views were fuzzy. The video start according to the timestamp on this camera is April 8, 2019, at 9:25:07, roughly 9:25 AM and concludes about three minutes later at 9:27:52 or roughly 9:28 AM. She identified herself standing outside the pharmacy and indicated that it was an accurate representation of what she had seen.

[27] Ms. Terrio was also shown a black and white video which was ultimately marked as Exhibit 6 showing traffic on Sackville Drive on the morning of April 8, 2019. The Court was advised that the video was approximately seven minutes long and with the timestamp for the start of the video being 9:28:42 or approximately 9:29 AM. Ms. Terrio had never previously seen that video and said that she did not recognize anyone that looked familiar to her. The second portion of that video showed the area to the left of the Medicine Shoppe, and she noted the other stores located beside the pharmacy in that strip mall.

[28] On cross-examination, Ms. Terrio confirmed that she did not have any personal observations of the man after he went around the corner of the building to the left. When she got to the end of the building, she did not see the man in the area and repeated that she had not seen his face. She did not have any specific description of the clothing worn by the man.

[29] Following a *voir dire*, Sgt. Dustin Thornton was qualified as an expert in the analysis of computers and cell phones, and that he would be capable of providing

opinion evidence regarding the forensic analysis of cell phones and computer systems for the recovery and interpretation of data. Sgt. Thornton's curriculum vitae was filed as Exhibit 3 and he testified by video link from the RCMP's national headquarters in Ottawa, Ontario.

[30] Sgt. Thornton stated that he did an extraction and analysis of the data located on an iPhone 6S. When he prepared his extraction report and forwarded to the Crown dated June 16, 2019, he was stationed in Charlottetown, PEI. He described the process for the extraction and review of data and information on the phone. There were two Apple IDs for that phone – one being johntheroofer@hotmail.com and dummydummydummydummy@iCloud.com. He also confirmed that the telephone number associated with the iPhone that was obtained from Mr. Auld was 1-902-221-6064.

[31] Sgt. Thornton explained that on page 4 of his report, there is a list of the call logs and the time and date of the parties involved either from this Apple iPhone going out or people making the calls to the iPhone. If the phone which he was analyzing had a number associated with the person's name, then the phone would search that number and the extraction report would also include that person's name. He also pointed out that the extraction report was able to show the date and time of the call, the duration of the call and whether the call had been deleted from the list of calls, but obviously remaining in the data of the telephone itself which could be extracted and reviewed by him.

[32] As an example, on page 6 of Sgt. Thornton's report [Exhibit 4] the first message to the cell phone which had been seized from Mr. Auld which had the user's number 902-221-6064 was from Chris. Sgt. Thornton stated that this was a chat or text message from Chris to that phone number on April 8, 2019, at 9:08:09 AM [UTC- 3] and apparently read by a person with that cell phone five seconds later at 9:09:14 AM. The message received on the phone was "The guy is waiting for us and because of you we won't even be there until 1030. Nice."

[33] In addition, at page 16 of his report, Sgt. Thornton was able to extract items searched on that phone using "Safari" as a web browser. He indicated that the user of that phone had done a Safari search on April 8, 2019, at 11:19:56 AM with the inquiry "value" being the actual words of the search "how to fool a GPS in the vehicle." There was a second search with that same question being entered one second later and Sgt. Thornton pointed out that the second message at 11:19:57 AM was deleted, whereas the one just moments before, had not been deleted.

[34] Sgt. Thornton also pointed out, during his testimony, that he was able to use a program which was able to recover information which had been deleted from the phone. He also pointed out that the phone listed the time of the message or the call for a location in Nova Scotia, which was indicated on the phone as UTC-3. He also pointed out that the phone itself applied a “timestamp” for when those phone calls, chats or searches were made and recorded if they had been deleted.

[35] Det/Const. Kristin Bradley had been informed of the robbery at the Medicine Shoppe on April 8, 2019, and immediately proceeded to the pharmacy, arriving there at about 10:10 AM. He and another officer took some statements from the people in the pharmacy and based upon their description of the suspect, he was a tall, slender, white male, with dirty hands wearing a black balaclava, with white framed reflective sunglasses.

[36] Shortly thereafter, Det/Const. Bradley indicated that he had received some information from Const. Thomas and Const. Thibodeau regarding the robbery and that they had identified two possible suspects. He had been informed that one of the possible suspects was John Auld. As a result, Det/Const. Bradley and Sgt. Hovey went to locate the other possible suspect. He stated that, at about 10:44 AM, they located Derek McColl, who he believed might be the other possible suspect. Mr. McColl was with Stephen Brautman at 513 Thorn Avenue, in Beaverbank. The police officers asked if they had seen Mr. Auld that morning and were informed that they had not seen him. However, the police officers were also advised that Mr. Auld lived a short distance away at 157 Milo Terrace in the Woodbine Trailer Park, also located in Beaverbank, Nova Scotia.

[37] Det/Const. Bradley arrived at 157 Milo Terrace around 10:55 AM April 8, 2019, and spoke to Kathy Auld, who is John Auld’s mother. Although the Crown Attorney noted that his information was hearsay, since Kathy Auld was not being called as a witness, it was only being provided for the narrative and not necessarily for the truth of the contents, but rather, to explain the subsequent actions of the police officers. Ms. Auld stated that her son was a roofer and that he had gone to work, earlier that morning, in the pickup truck of the roofing company which was owned by Chris Berry.

[38] After receiving that information, Det/Const. Bradley and Sgt. Hovey called Mr. Berry, explained why they were contacting him and during the conversation learned that the roofing company’s vehicles were equipped with GPS locators.

They arranged to meet with Mr. Berry at the Tim Horton's located at 14 Highfield Park Drive to look at the GPS data for the truck operated by Mr. Auld.

[39] Once Mr. Berry arrived around 11:20 AM, they reviewed the GPS data for the work truck being operated by John Auld, which showed that it had started the day from 157 Milo Terrace and that it was presently located in Burnside, at 101 Ilsley Dr., which was a Wendy's/Tim Horton's restaurant location. Exhibit 5 was a Google map upon which Det/Const. Bradley marked the various addresses where he had gone prior to meeting with John Auld at 101 Ilsley Dr. around noon on April 8, 2019

[40] Det/Const. Bradley and Sgt. Hovey then went over to that Wendy's restaurant location at 101 Ilsley Dr. in Burnside and saw a grey, Chevrolet extended cab truck with a ladder above the roof with license number GDA 862 parked outside the restaurant. Shortly after identifying that vehicle as being the roofing company's truck, they saw Mr. Auld walking back to the truck and moments later, they arrested him shortly after 12 noon on April 8, 2019, for the earlier robbery of the Medicine Shoppe. He confirmed that Mr. Auld was provided with his **Charter** rights and cautions at that point in time.

[41] Once Mr. Auld was transported to the police station, Det/Const. Bradley planned to interview him, if he was prepared to speak with him. However, before meeting with Mr. Auld, Det/Const. Bradley wanted to view the surveillance video from the Medicine Shoppe. After viewing the video surveillance, he noted that the suspect walked into the pharmacy wearing dark jeans, black sneakers with white on the side near the tread, a dark coloured baggy hoodie. He also noted that suspect's hand which was extended while he was speaking to Ms. Conrad appeared to be dirty but did not have any tattoos on it.

[42] After viewing the second surveillance video, which was more for the view of the suspect leaving the Medicine Shoppe, Det/Const. Bradley noted that the suspect walked left towards the Money Mart location and the driveway between the buildings which goes toward the cemetery. He noted that there is also a road behind Tom's Restaurant which goes to the main street in the area. On the video, he noted that the video ends as the suspect walks towards the Money Mart.

[43] Then, Det/Const. Bradley met with Mr. Auld and Defence Counsel confirmed that there was a no need to conduct a common-law *voir dire* as it was clear that Mr. Auld was aware that he was speaking with a police officer and that

Mr. Auld had been advised of his **Charter** rights and cautions and that the voluntariness of the statement was not in question.

[44] During the interview, Mr. Auld had mentioned that a couple of other people might have been involved in the incident at the pharmacy. The people mentioned by Mr. Auld were the two men with whom Det/Const. Bradley had met, earlier that morning, at 513 Thorn Ave. Det/Const. Bradley added that Steven Brautman had been arrested shortly after their meeting by other officers on outstanding warrants. In his opinion, it was unlikely that either one of those two men were the possible suspect in the robbery. He indicated that Mr. McColl was shorter than the person who he had seen on the surveillance video. Mr. Brautman had tattoos on the back of his hands, while the white male suspect in the video had no tattoos on the back of his right hand which was observed by Ms. Conrad and visible on the video during the white male's short interaction with her.

[45] Based upon those differences in height between the suspect and Mr. McColl and the tattoos on the back of the hand of Mr. Brautman, with no tattoos on the hand visible of the suspect at the pharmacy, Det/Const. Bradley formed the opinion that he had arrested the right suspect. Following the meeting with Mr. Auld, Det/Const. Bradley seized Mr. Auld's shoes, his T-shirt and his jeans.

[46] In addition, Det/Const. Bradley had also obtained a surveillance video from the Hong's Restaurant, which is located on Sackville Drive opposite the mall where the Medicine Shoppe and Money Mart are located. He pointed out that between the mall where the Medicine Shoppe and the Money Mart, there is a lane between that mall and Tom's Restaurant which goes back towards the cemetery, but it also connects to another road that goes behind the mall.

[47] Det/Const. Bradley obtained the video from Hong's Restaurant for the period of time around 9:30 AM on April 8, 2019, which shows traffic travelling on Sackville Drive at that time. He had obtained that video surveillance for that timeframe from the Hong's Restaurant, based upon the information provided to him by Mr. Berry as to the movements of his work truck that morning based upon the GPS information, the information obtained from the people who were working at the pharmacy that morning relating to time of the robbery and the exterior surveillance video obtained from the Medicine Shoppe.

[48] Det/Const. Bradley pointed out that a grey Chevrolet truck, with an extended cab and a ladder on top can be seen turning left off Sackville Drive and parking beside 601 Sackville Drive at approximately 9:30 AM. At that point, an individual

walks in front of the businesses located at that mall and about 1 to 1 ½ minutes later, that individual returns to the truck, which goes out of the video images. At the same time as that, Det/Const. Bradley pointed out that you can see a woman leave one of the businesses and walk across to an area to look in the direction where the masked man had gone and then she walks back to where she had come from.

[49] With respect to the video from Hong's Restaurant, Defence Counsel initially raised an issue with respect to the authenticity and accuracy of the video. As a result, the Court entered into a *voir dire* in relation to that video evidence and Det/Const. Bradley provided information with respect to the timing and location of the video. After Defence Counsel heard that background information from Det/Const. Bradley, he advised the Court that it would not be necessary to continue with the *voir dire* relating to either the authenticity or continuity of the video. However, Defence Counsel indicated that there might be issues with respect to the accuracy of the timestamps on the videos. It was confirmed that the evidence heard during the brief *voir dire* could now be considered as part of the evidence in the trial proper and the video was then marked as Exhibit 6 in the trial.

[50] The surveillance video was obtained from Hong's Restaurant, which is located across the street from the Medicine Shoppe on Sackville Drive in Lower Sackville. Det/Const. Bradley pointed out that the Medicine Shoppe is located in the centre of the plaza which is located on the opposite side of the road from Hong's Restaurant. The time stamp on the Exhibit 6 video for April 8, 2019, starts at 09:28:43 and he pointed out that to the right of that plaza is a driveway and in the top right corner of the image is the cemetery with Tom's Restaurant being a little further to the right. He also pointed out that if you continue down Sackville Drive to the right on the image, you would be travelling towards Bedford, Nova Scotia.

[51] After the issue of the *voir dire* was sorted out, Det/Const. Bradley pointed out that, at 09:32:30 according to the timestamp on the video, the suspect grey truck, based upon the black and white image of the video, with the ladder turns left and parks the truck in an area beside the building where the Medicine Shoppe is located. After parking the truck, an individual gets out, walks in front of the building towards where the Medicine Shoppe is situated in the centre of that building and then goes out of sight.

[52] Det/Const. Bradley points out that, within a couple of minutes, the person who had driven the pickup truck with the ladder to that location walks back to the pickup truck with the ladder on the roof, gets in and goes up the hill. Det/Const. Bradley pointed out that there are only two possible places for traffic to go in that direction, either into the cemetery or turn and go behind Tom's Family Restaurant and then return to Sackville Drive. He added that the GPS information obtained from Mr. Berry confirmed that his work truck then went towards Bedford on Sackville Drive.

[53] Det/Const. Bradley also stated that, prior to the interview with Mr. Auld, he had obtained the GPS route of Mr. Berry's work truck. He stated that the interview of Mr. Auld occurred about two or three hours after he had been arrested. After the interview, he asked Mr. Auld to provide his cell phone and its password. He advised Mr. Auld that he was under no obligation to do so, but Mr. Auld voluntarily provided his cellphone to the police officer. Later, Det/Const. Bradley learned that the cell phone had been provided to Mr. Auld by the owner of the roofing company, Mr. Chris Berry. He showed Mr. Auld the GPS coordinates which also showed that the truck had been at 601 Sackville Drive where the Medicine Shoppe was located, and Mr. Auld said that he had stopped there to send a text message to his boss, Mr. Berry.

[54] Det/Const. Bradley could not confirm whether a text message had been sent at that time but happened to see that there had been a recent search on the web browser for "how to disable a GPS location." After seeing that basic information on the phone which had been voluntarily provided to him by Mr. Auld, Det/Const. Bradley obtained a warrant to seize the phone to have it searched for data and contacts.

[55] On cross-examination, Det/Const. Bradley confirmed that after Mr. Auld was arrested and transported to the police station, the police searched the truck that he had been driving. He confirmed that the police did not locate a dark hoodie, any Hydromorphone pills, or a balaclava in the truck or anywhere else. He added that the police had not really conducted a search around that Wendy's restaurant.

[56] With respect to the GPS information provided by Mr. Berry for his work truck with license plate GDA 862, which was shown on a Google map and then filed as Exhibit 7, Det/Const. Bradley confirmed that Mr. Berry had sent him a PDF copy of that Google map. On the map, it marked points where the truck had started that day, at 157 Milo, and that the last point of the GPS locator was at the

Wendy's Restaurant in Burnside. Mr. Berry had given the locations where the truck had gone, and Det/Const. Bradley believed that the times as noted by him, were based on the GPS information provided by Mr. Berry. He agreed that there was a record of the truck going to Capstone Drive for shingle supplies and after that the police met up with Mr. Auld at the Wendy's/Tim Horton's restaurant.

[57] At some later point in time, Det/Const. Bradley learned that Derek McColl and possibly someone else had probably let Mr. Auld know that the police were looking for him. He agreed with Defence Counsel that, based upon the time shown when Mr. Auld was probably at the Wendy's/Tim Horton's restaurant on Ilsley Avenue, was when the police officer was at the Tim Horton's on Highfield Park Drive waiting for about 20 or 25 minutes until he met with Mr. Berry.

[58] With respect to the video, which was marked as Exhibit 6 from Hong's Restaurant, Det/Const. Bradley agreed with Defence Counsel that the resolution was not really the "best." He agreed that you could not really tell about the individual who initially walked away from the truck and then a few moments later, he returned to the truck. All that could be noted was that there was white male in the video who appeared to be wearing dark clothing, but you could not tell much more.

[59] With respect to the view on Exhibit 6 at specific timestamps, first, at 9:32:40, Det/Const. Bradley noted that the truck was parked in the top right-hand corner of the video and if a person walked in front of it, it would obscure the view. He agreed that, at 9:32:54 AM, a person emerges from the side of the truck, but you could not see if the truck door opened or closed and then you could not see the person walk by. However, at 9:34:50 AM, he agreed that you could see a person walk back in the direction of the truck, but you could not see if the door opened or closed. Det/Const. Bradley agreed that, in total, the amount of which the truck appeared to remain in that location was about two minutes and 15 seconds.

[60] Defence Counsel posed questions as to whether the officer felt that the grey truck in the video was the one owned by Mr. Berry. Det/Const. Bradley stated that the ladder on the back of the truck against the roof seemed "distinct" but agreed that it might not be "unusual" for an extended cab truck like that one. He also agreed that the truck did not have any signage or label on it, and in that regard, there was nothing unique that he could point out.

[61] In terms of the route taken by the truck and where it had stopped, Det/Const. Bradley stated that according to the GPS on Exhibit 7, he believes that the truck

had gone on Sackville Drive, then stopped beside the Medicine Shoppe building and then after that went up and behind Tom's Restaurant. He added that, again based upon the GPS information provided by Mr. Barry, after going behind Tom's Restaurant, the truck turned back onto Sackville Drive and proceeded towards Bedford. At his request, Mr. Berry had printed out the GPS coordinates for his work truck with license plate number GDA 862, however Mr. Berry had only provided him with the first page of information regarding the operation of the truck, which was filed as Exhibit 7. Det/Const. Bradley confirmed that he had asked Mr. Berry for the GPS information from the start time on April 8, 2019, until the police met with the truck at the Wendy's/Tim Horton's restaurant on Ilsley Drive around noon.

[62] On further cross-examination, Det/Const. Bradley confirmed that, based upon the GPS data, one page printout from Mr. Berry [which was eventually filed as Exhibit 7 in the trial], there were two locations where the truck was marked as being stationary for about 2 minutes at an "unnamed" location and then driving for about 45 seconds on an "unnamed" location before going back onto Sackville Drive and then to Highway 101 towards Bedford. Det/Const. Bradley stated that the "unnamed" locations and the times are certainly consistent with the truck stopping around Tom's Restaurant, except for the fact that the time as stated on the printout appears to be about one hour "off" the real-time of the day.

[63] Det/Const. Bradley pointed out that the ignition is turned on at 08:12:58 according to the GPS printout at Milo Terrace and then about a minute later the truck is driving on Welkin Drive and to the Beaver Bank Road. It is stationary for about a minute at 08:19:22 on the Walker Connector Road and then after driving and stopping for another minute at Acadia Lane, the truck is stationary from 08:25:52 for one minute and 46 seconds and at 08:27:40, according to the GPS data, the truck is driving again on an "unnamed" street to Sackville Drive. Det/Const. Bradley stated that the location where the truck stopped is consistent with being near Tom's Restaurant.

[64] Finally, Det/Const. Bradley confirmed that he was present when Mr. Auld was arrested, and he described him as being tall, slender, lanky, and thin, not stocky and without an athletic build. As for seeing any grease marks on his face or his hands, that stood out, he stated that "he did not know and did not remember."

[65] Det/Const. Mark Stevens of the Forensic ID section of the Halifax Regional police took a series of photographs of Mr. Auld on April 8, 2019, which were

marked as Exhibit 8, shortly after his arrest around 2 PM. Photos #1, #3 and #4 show Mr. Auld wearing a grey T-shirt over a black long sleeve shirt, over blue jeans, which have some dust or dirt marks just below the waist. Photos #4, #5 and #6 show the backs of Mr. Auld's hands and I find that there appears to be dark marks on the tips of the fingers, the knuckles, and the base of the fingers on both hands. The palms and fingers as shown in photos #7 and #8 appear to be clean, however, on a close-up of his palms, there appears to be some dark marks on the fingers of his right hand.

[66] There is no indication from those photographs as to the height of Mr. Auld, but I do find that he appears to be of a slim build. Photo #9 is of the back of his blue jeans and his shoes, with the area below the knee on the back of the jeans showing wear or dirt marks. The rear view of the shoes shown in photo #10 are black with a thick white heel and white bottom to the shoes. The front of the black shoes with white laces and a white sole are shown in photo #11, with some dirt or abrasion on the front of those shoes being grey in colour.

[67] Keith Berry testified that he has been the owner of the Central Roofing Services for over 24 years. He confirmed that he knows John Auld as a person who had worked for him for a period of time about 12 years ago and then, there was a significant period of time where Mr. Auld did not work for Mr. Berry. However, Mr. Berry added that Mr. Auld had recently been rehired by him and he worked for his company until April 8, 2019.

[68] Mr. Berry provided Exhibit 7 which is a printout of the activity of the central Roofing Truck with license plate GDA 862 on Monday, April 8, 2019, with the first noted timestamp being 08:12:58 AM when the ignition is on at Milo Terrace to 08:35:12 with the last noted entry showing that the work truck was driving on Windmill Road [Highway 7] in the Bedford area. Mr. Berry also provided Exhibit 9 which is a Google map provided from the GPS company, showing the movement of the roofing company truck which had been equipped with the GPS locating device. Mr. Berry confirmed that his work truck with license plate GDA 862 was a 2013 GMC Sierra truck which is silver in colour. The company printout on the Google map shows what he described as a "cookie crumb" record of the movements of the truck on the date.

[69] Mr. Berry confirmed that, on Exhibit 7, where the "Ram" report indicated ignition of the vehicle was started at 08:12:58, the truck was located at Milo Terrace and that is where John Auld was living at that time. Mr. Berry confirmed

that, on April 8, 2019, which according to Exhibit 7 was a Monday, Mr. Auld was scheduled to work. Mr. Berry recalled phoning Mr. Auld between 8:30 AM to 8:40 AM to meet him at our work location in Dartmouth within about a half-hour. He confirmed that his telephone number was 902-830-1800.

[70] Looking at page 4 of Exhibit 4, which was the extraction report prepared by Sgt. Thornton, Mr. Berry confirmed that the “incoming call” to that phone was from him on his phone number 902-830-1800 to Mr. Auld around 8 AM, according to the document, to meet him at a worksite. He may have also told Mr. Auld to pick up some materials before meeting him at the worksite. However, Mr. Berry added that Mr. Auld never came to that worksite that day to meet him.

[71] Mr. Berry believed that he also phoned Mr. Auld on one occasion prior to the time when the report confirmed that the ignition on the work truck had been started. The next time that he saw Mr. Auld was when he was at the Wendy’s/Tim Horton’s restaurant in Burnside, when the police met him there and he was arrested. Mr. Berry confirmed that Mr. Auld worked with him and that, he had one of the company’s work trucks and that they had worked together every day.

[72] Going back to Exhibit 4 at page 5 of that document, Mr. Berry was asked about the blue message “sent” message to Mr. Auld at 9:08:00 a.m. on April 4, 2019. He confirmed that his message to Mr. Auld was “The guy is waiting for us and because if you won’t even be there until 10:30. Nice.” Mr. Berry stated that the message was obviously showing that he was “frustrated” with Mr. Auld, which based upon the information on Exhibit 4, appears to have been read by Mr. Auld at 9:09:14 AM. According to Exhibit 4, at page 5, the message back to Mr. Berry from Mr. Auld on his phone number 902-221-6064 at 9:09:26 AM was “if you are leaving your car will be there in like 15 minutes.”

[73] Mr. Berry confirmed that, on the morning of April 8, 2019, the police called him about his vehicle and its license plate number and then, he arranged to meet with the police in Dartmouth at a Tim Horton’s. He talked to the police at that location and then he went to another nearby Tim Horton’s location where he saw John Auld for the first time that day.

[74] With respect to Exhibit 6 which was a video of Sackville Drive, in black and white, Mr. Berry stated that at a certain point he saw a truck that “looked like” his vehicle with a ladder on the back. He stated that it was the truck that he saw driving on the street by a sign near the road and then it turned left off that street.

[75] On cross-examination, Mr. Berry stated that he put the GPS monitoring system on his vehicles to ensure that the employees did not use his trucks for personal purposes and to check on when gas was put in the truck. He did not recall John Auld calling him to ask if he could give him a credit card number to purchase gas. Mr. Berry stated that all he knew that morning was that “we were going to work.” In addition, with respect to Exhibit 9, the GPS report for the truck with license plate GDA 862 at the “start” is likely where Mr. Auld was residing, but on the zoomed and enlarged image of the printout, it is blurry.

[76] With respect to the call listed at 8:00 AM on Exhibit 4, which according to Exhibit 4 appears to have been about one minute in duration, Mr. Berry said that the call to Mr. Auld was “common to wake him up and get him going.” He agreed that the times on Exhibit 7 seem to “make sense” and look accurate to him. Going back to Exhibit 4, Mr. Berry said that his recollection was that they were running late, and he was getting frustrated with Mr. Auld, adding that he ended up doing the job himself.

[77] Defence Counsel suggested that Mr. Berry had made a call to John Auld to tell him that the police were looking for him. He replied that it was possible that he had done that, as it was his vehicle, and he was “concerned.” Looking at Exhibit 4 which is the call log prepared by Sgt. Thornton, I note that there was a call from Chris Berry to Mr. Auld at 11:05:43 AM (UTC-3) on April 8, 2019, which according to the extraction report lasted about 2 ½ minutes.

[78] With respect to the truck shown in the black and white video, which was filed as Exhibit 6, Mr. Berry stated that the truck looks “familiar” to him as a 2013 GMC 1500. He agreed that it is not a unique vehicle, that the truck is actually silver in colour and the video is in black-and-white, and based on that, the truck with the ladder could possibly be white or silver. Looking at Exhibit 7, the “Ram” Report, Mr. Berry confirmed that at 08:35:12, the GPS report indicates that the truck was in Bedford and on it, there is no circling back indicated from Bedford.

[79] With respect to Exhibit 9, he indicated that the yellow, green and red arrows indicate the direction of the vehicle as well as the speed of the truck. He confirmed that there are a lot of green arrows as the truck got into the Dartmouth area from Bedford and once again confirmed that there were no arrows to point back to Sackville after the truck went into Bedford until it stopped in Dartmouth

[80] The final witness in the trial was Const. Grant Thomas of the RCMP and based on the indication of the Crown Attorney with respect to his anticipated

evidence, the Court entered into a “*voir dire*” with respect to the admissibility of his “recognition evidence.” At the outset, the parties confirmed that this was not an attempt by the Crown introduce any possible “character” evidence, but when and where Const. Thomas may have met or seen Mr. Auld to provide recognition evidence going to the possible identification of the perpetrator of the robbery.

[81] Const. Thomas stated that he has had over 10 occasions in a one-year period where he interacted to various extents with Mr. Auld. He recalled having two main occasions on March 17, 2019, and January 29, 2019. With respect to the March meeting, Const. Thomas mentioned that he spent about 1 to 2 hours with Mr. Auld on that occasion. As for the January 29, 2019 meeting, he did not recall the specific amount of time, but he met with Mr. Auld during an investigation.

[82] Const. Thomas was asked about any idiosyncrasies that he may have noticed during those meetings, and he stated that Mr. Auld was a relaxed individual, who tended to move slowly. Const. Thomas viewed the videos of the robbery at the Medicine Shoppe with respect to any aspects that related to his recognition evidence opinion. He believed, based upon the way the man walked into the pharmacy and the gestures that he made once in the pharmacy, that the perpetrator of the robbery was Mr. Auld.

[83] Furthermore, Const. Thomas also noted the way the person was calmly and loosely moving their hand gesturing to the pharmacist and that the hand was dirty. As the perpetrator walked away, with the slow gait, Const. Thomas noted that the man’s toes were pointed outward. When the man placed his hand on the counter, Const. Thomas again noted the slow gestures that the person was making with his hand. As the perpetrator walked out of the pharmacy, Const. Thomas noted that the man took his other hand out of his pocket, and he had noted the swinging of the arm at his side as he walked. He also noted the toes being pointed out and smaller strides being taken quickly. He was “confident” that he “recognized” the person depicted in the video as being John Auld.

[84] On cross-examination, Defence Counsel confirmed that Const. Thomas had no particular expertise in this area and that Const. Thomas only had one lengthy interaction with Mr. Auld and the other one was shorter than the one previously mentioned. Const. Thomas also added that for the most part Mr. Auld was seated but on one occasion stood and walked beside the officer while they interacted on the street. On another occasion, Mr. Auld was seated, but did walk a bit while they

met in a police station. Apart from those two interactions, Const. Thomas conceded that the others were relatively brief.

[85] Following the evidence on the *voir dire*, the Crown Attorney's submissions on the admissibility of that evidence were based upon **R. v. Leaney**, [1989] 2 SCR 393 and **R. v. Berhe**, 2012 ONCA 716. While this was not expert opinion evidence, the key determination with respect to the admissibility of this evidence is whether the witness, based upon a prior connection or acquaintance with that person is in a better position than the trier of fact to identify the perpetrator.

[86] The Crown Attorney also submitted that in **R. v. Brown**, [2006] O.J. No. 5077 [ONCA] at para. 39, Rosenberg JA stated that "this type of nonexpert opinion evidence is admissible provided that the witness has a prior acquaintance with the accused and is in a better position than the trier of fact to identify the perpetrator."

[87] In the Court's decision on the *voir dire*, rendered on July 20, 2022, I found that Const. Thomas did have "sufficient familiarity" and was in a "better position" than the trier of fact to provide admissible evidence on the issue.

[88] While the Court concluded that the evidence of Const. Thomas met the threshold requirements for admissibility, this opinion evidence would have to be considered with all of the other direct and circumstantial evidence and assess what, if any, weight to attribute to his opinion evidence in determining its ultimate reliability with respect to the identification of the perpetrator of the robbery.

ANALYSIS:

[89] In a criminal trial, the most fundamental rule is that the burden of proving the guilt of the accused beyond a reasonable doubt, rests upon the prosecution and does not shift to the accused at any stage in the proceedings. The accused person is presumed innocent until proven guilty beyond a reasonable doubt. The trier of fact must be satisfied beyond a reasonable doubt of the existence of all of the essential elements of each of the offences in order to convict an accused person.

[90] Reasonable doubt has been defined by the Supreme Court of Canada in **R. v. Lifchus**, [1997] 3 SCR 320 and in **R. v. Starr**, [2000] 2 SCR 144. Those cases have determined that a "reasonable doubt" does not involve proof to an absolute certainty, but more is required than proof that the accused is probably guilty.

[91] The Supreme Court of Canada also pointed out that reasonable doubt is not based upon sympathy or prejudice, nor is it an imaginary or frivolous doubt. It is a doubt based upon reason and common sense which is logically connected to the evidence or the lack of evidence. Reasonable doubt may arise through the evidence presented by the Crown, if the Court determines that the evidence was vague, inconsistent, improbable or lacking in cogency. Of course, reasonable doubt may also arise from testimony of an accused, or any other evidence tendered by the defence from any other sources.

[92] As both counsel pointed out during their submissions, the Court's decision on whether the charges against Mr. John Auld have been established beyond a reasonable doubt will have to be determined by the direct evidence and circumstantial evidence. Circumstantial evidence may be considered by the Court to establish a fact in issue by an inference reasonably and circumstantially drawn from a fact or group of facts, which the Court has concluded to be established by the evidence.

[93] Given the fact that the decision of the Court will be based upon direct and circumstantial evidence, it is important to instruct myself on the issue of circumstantial evidence, and in particular, the facts in issue which may be inferred from that evidence. As with direct evidence, a piece of circumstantial evidence should be considered, not in isolation or by a piecemeal analysis of each piece individually, but rather, together with all the other evidence, taken as a whole, in reaching the burden.

[94] It is a well-established principle that a conviction based upon circumstantial evidence requires the trier of fact to be satisfied, beyond a reasonable doubt, that the guilt of the accused is the only reasonable or rational inference to be drawn from the proven facts: See **R. v. Griffin**, 2009 SCC 28 at para. 33; **R. v. Liberatore**, 2010 NSCA 82 at para. 14.

[95] In **R. v. Villaroman**, 2016 SCC 33 (CanLii), which was a trial based entirely upon circumstantial evidence and inferences from the circumstantial evidence in relation to a charge of possession of child pornography, the unanimous Court endorsed the comments of Charron J. in Griffin.

[96] In **Villaroman**, *supra*, at para. 35, Cromwell J. stated that, in circumstantial cases, it was often stated that "conclusions alternative to the guilt of the accused must be rational conclusions based upon inferences drawn from proven facts." However, Justice Cromwell added, at para. 35, that "in assessing circumstantial

evidence, inferences consistent with innocence do not have to arise from proven facts, as requiring proven facts to support explanations other than guilt wrongly puts an obligation on an accused to prove facts.

[97] The key issue with respect to circumstantial evidence is the range of reasonable inferences that can be drawn from it. As Justice Cromwell noted, in **Villaroman**, *supra*, at para. 36 that “(A) certain gap in the evidence may result in inferences other than guilt. But those inferences must be reasonable given the evidence and the absence of evidence, assessed logically and in light of human experience and common sense.”

[98] The Supreme Court of Canada stated, in **Villaroman**, *supra*, at para. 37 that “when assessing circumstantial evidence, the trier of fact should consider “other possible theories” and “other reasonable possibilities” which are inconsistent with guilt. Thus, the Crown may need to negative reasonable possibilities, but certainly does not need to “negative every possible conjecture, no matter how irrational or fanciful, which might be consistent with the innocence of the accused.”

[99] In **Villaroman**, *supra*, at para. 38, Cromwell J. said that the “line between a “plausible theory” and “speculation” is not always easy to draw, however the key question is whether the circumstantial evidence, viewed logically and in the light of human experience, is reasonably capable of supporting an inference other than that the accused is guilty.” Cromwell J. added, in **Villaroman**, *supra*, at para. 42 that “the trier of fact should not act on alternative interpretations of the circumstances that it considers to be unreasonable; and that alternative inferences must be reasonable, not just possible.” The Court concluded that this would be a helpful way of describing the line between plausible theories and speculation.

*Has the Crown Established all of the Essential Elements of the Robbery Charge contrary to section 344 of the **Criminal Code**?*

[100] In this case, Mr. John Auld has been charged that he did “unlawfully rob Birgit Conrad, contrary to section 344 of the **Criminal Code** on or about April 8, 2019, at or near Lower Sackville, Nova Scotia.

[101] Section 344 of the **Criminal Code** is the section which sets out the punishment for an offender who is convicted of a robbery offence, which is an indictable offence and subject to a maximum penalty of life imprisonment. In certain circumstances, which are not applicable in this case, a conviction for

robbery may also include a minimum term of imprisonment as the punishment for person convicted of this offence.

[102] The essential elements of the offence of robbery are contained in subsections 343(a)-(d) of the **Criminal Code**, which outlined the different ways in which a robbery may be committed. Justice David Watt's commentary in his 2022 **Annotated Tremear's Criminal Code** at page 716 states that a robbery may be committed in several ways, but theft is an essential ingredient of the external circumstances of a robbery under subsections 343 (a), (b) and (d) of the **Code** with other varied additional essential elements.

[103] Pursuant to the definition of a "robbery" under subsection 343(a) of the **Code**, the prosecution must prove, beyond a reasonable doubt, the *use or threat of violence* by the defendant to a person or property *for a specified purpose*. A charge of robbery under section 344 of the **Code**, as in this case, which does not specify a particular mode of committing the robbery, does not require the Crown to establish, beyond a reasonable doubt, the essential elements of some of the other ways in which a robbery could be committed.

[104] Based upon the facts and circumstances of this case which are, in reality, not in dispute between the parties, it would appear from the evidence of the witnesses and the video evidence that the particular essential elements to establish for this charge are outlined subsection 343(a) of the **Criminal Code**. Therefore, I find in this case, that the Crown must establish, beyond a reasonable doubt, that the accused stole something, and for the purpose of extorting whatever was stolen or to prevent or overcome resistance to the stealing, used violence or threats of violence to a person or property.

[105] For further clarity with respect to the essential elements of the robbery charge, which is applicable in the circumstances of this case, I refer to Justice Watt's summary of the case of **R. v Jean** (2012,) 293 CCC (3rd) 66 (BCCA); leave to appeal refused (2013), 458 NR 394n (SCC) -- Robbery under section 343(a) requires the contemporaneous use of violence or threats of violence in the course of, and for the purpose of taking the cash [or any other subject matter].

[106] In terms of the mental element or *mens rea* of a robbery charge which is required to be established by the Crown beyond a reasonable doubt, Justice Watt goes on to indicate that the prosecution must establish, under subsections 343(a), (b) or (d) of the **Criminal Code**, that there was an intention to cause the external

circumstances described in each of those paragraphs if they have been specifically alleged.

[107] With respect to those essential elements, the Court heard the uncontradicted evidence of Ms. Conrad, the owner and pharmacist at the Medicine Shoppe located on Sackville Drive in Lower Sackville, Nova Scotia that a masked man came into the pharmacy and demanded a bottle of hydromorphone pills. She stated that he was forceful in making that demand and out of a concern for safety as the masked man maintained one hand in a pocket, she handed over about 100 x 1 mg hydromorphone pills and he left the pharmacy. This all occurred around 9:30 AM on April 8, 2019.

[108] Ms. Conrad's evidence was supported by Ms. Christa Terrio who was also working in the store at about 9:30 AM, moments after it opened for the day. Ms. Terrio heard a man come in the store and demand something, and shortly after the masked man left the store, she confirmed with Ms. Conrad that they had just been robbed. She immediately pressed the alarm button to alert a security company and ultimately the police about the incident.

[109] In addition, the Crown introduced video surveillance evidence taken from two different locations, which graphically demonstrated in real time the masked perpetrator of the robbery walking into the store, demanding something from Ms. Conrad, her handing over something to him and him leaving the store. The video surveillance of the interior of the pharmacy confirms the approximate time as being around 9:30 AM on April 8, 2019. n

[110] In fact, I find that there was, in reality, no real dispute between the Crown Attorney and the Defence Counsel that the evidence of Ms. Conrad and the video surveillance evidence established, beyond a reasonable doubt, the date, time and place of a robbery in Lower Sackville, Nova Scotia. I find that the pharmacy's owner, Birgit Conrad had testified that about 100 x 1 mg hydromorphone pills were stolen from her pharmacy by the masked man on April 8, 2019. I find that her evidence established that the perpetrator's words and gestures, objectively conveyed to her, at the very least, threats of violence if she did not hand over those hydromorphone pills.

[111] However, the key issue in this trial is whether the Crown has established, beyond a reasonable doubt, that Mr. John Auld was identified as the person who committed the robbery of the Netizen Shop on April 8, 2019.

[112] In those circumstances, I find that the witness testimony and the video surveillance confirmed that the robbery was committed by a man wearing a balaclava to cover his head and his face to his neck wearing reflective sunglasses covering his eyes and making those firm demands and gestures. I have no doubt that, a reasonable person in the position of Ms. Conrad, would become fearful that violence may be used if the demand was not immediately complied with. Ms. Conrad was obviously concerned and stated that she complied with the demand to in her words “de-escalate” the situation.

[113] Based upon those facts and circumstances, I find that the Crown established that the masked man did commit a “theft” as defined in section 322(1)(a) of the **Criminal Code** as he fraudulently and without colour of right stole, for his own use, the hydromorphone pills, with the intent to deprive absolutely, the owner of it who had the property or interest in those hydromorphone pills. Based upon the video surveillance and other evidence, I find that the Medicine Shoppe or in particular, Ms. Conrad was the victim of an unlawful robbery contrary to section 344 of the **Criminal Code**.

[114] Having come to those conclusions, the key essential element of the offence which is in dispute between the parties is whether the Crown has established, beyond a reasonable doubt, that John Auld was the perpetrator of the robbery at the Medicine Shoppe on the morning of April 8, 2019.

Has the Crown Identified, Beyond a Reasonable Doubt, that John Auld was the Person who Committed the Robbery of Ms. Conrad at the Medicine Shoppe?

[115] In terms of the identification evidence and the reasonable inferences from the direct and circumstantial evidence, I find that the determination of the identification issue requires the Court to carefully consider and determine, from the direct and circumstantial evidence, the factual issues in relation to:

1. The timing of the robbery at the Medicine Shoppe;
2. The description of the perpetrator of the robbery provided by the witnesses and by video surveillance;
3. The GPS data from a “Ram” printout in Exhibit 7 relating to the times, movements and location of the Central Roofing work truck with Nova Scotia license number GDA 862, which was operated by John Auld on the morning of April 8, 2019;

4. The times and video surveillance images of a silver or grey truck with a ladder in its truck bed for cargo, leaning against the roof of the truck's cab from a surveillance camera located at Hong's restaurant located on Sackville Drive in Lower Sackville on the morning of April 8, 2019;
5. Post-offence or after the fact conduct of Mr. Auld with respect to data and information extracted by an expert from the iPhone that Mr. Auld was using on the morning of April 8, 2019;
6. Analysis in relation to any similarities or differences between the witnesses' description of the perpetrator of the robbery, the video surveillance images of that person at or near the Medicine Shoppe and the police identification photographs of Mr. Auld taken on the afternoon of April 8, 2019;
7. The determination of the ultimate reliability and appropriate weight of the "recognition" evidence proffered by Const. Thomas.

The Timing of the Robbery at the Medicine Shoppe

[116] I find that the evidence of Ms. Birgit Conrad, the owner and pharmacist of the Medicine Shoppe, which she indicated was located at 601 Sackville Drive in Lower Sackville, Nova Scotia occurred shortly after opening the pharmacy on April 8, 2019. She indicated that, very shortly after opening the pharmacy, a masked man walked into the pharmacy, demanded hydromorphone and a few moments later, Ms. Conrad handed him a bottle of hydromorphone pills and he left the pharmacy.

[117] I find that the two different video surveillance views [Exhibit 1] of the masked man entering and leaving the Medicine Shoppe pharmacy established that the approximate time of the robbery. At the time of the robbery, only Ms. Conrad and the technician Ms. Terrio were in the pharmacy. The first video of Exhibit 1 which shows the entry door and the masked man entering the pharmacy and then approaching the dispensary counter with a start time and date of April 8, 2019, at 09:28:45, according to the timestamp on that video surveillance. The masked man comes to the dispensary counter and demands the hydromorphone pills for about 30 seconds, before Ms. Conrad hands him a bottle of hydromorphone pills. The masked man walks out the entry door at 09:29:46.

[118] Ms. Terrio followed the masked man to the entry door and stepped outside. Her evidence is that he turned to the left and walked towards the end of the strip mall in which the Medicine Shoppe was located. A fuzzy video of the masked man walking towards the surveillance camera was filed as Exhibit 2. The timestamps on Exhibit 2, which is the exterior view showing the masked man after the robbery at the Medicine Shoppe and walking by other stores in that strip mall starts at 9:25:07. The exterior surveillance video concludes at 9:27:52, after the masked man has gone out of view and Ms. Terrio identified herself standing outside the pharmacy to view where the man had gone.

[119] One final point about the timestamps on the video surveillance at the Medicine Shoppe, I note that Ms. Conrad believed that the timestamps on the video were accurate, because the security company had set up those cameras during the previous six months. I find that the evidence of Ms. Conrad and the stores surveillance video camera established that the robbery took place just after the Medicine Shoppe opened on April 8, 2019, at about 9:30 AM. Given the timestamp on the video of the masked man who had just robbed the pharmacy, walking outside and away from the pharmacy, I find that it defies common sense and logic that the masked man who had just robbed the pharmacy could be walking away from the scene of the robbery, as early as 9:27 AM, at a time when, according to the evidence of the witnesses and timestamp of the pharmacy surveillance video, the one and only masked man who robbed the pharmacy on April 8, 2019 entered the store at about 9:29 AM on April 8, 2019.

[120] As a result, I find that the timestamps on the shopping plaza's video surveillance cameras, presumably having been set by the technician who installed them, may not have had entirely uniform timestamps with other surveillance video cameras used by the individual stores in that plaza, such as the Medicine Shoppe pharmacy. In this case, I find that the evidence established that fact, as I have found with respect to the surveillance video of the pharmacy and the external surveillance video of the mall, there were obviously slight differences in the settings for the specific time of day. Having made those findings of fact, I find that the timestamps on the pharmacy's surveillance videos are more accurate and consistent with the evidence of the witnesses that the robbery occurred and when the masked white male walked out of the Medicine Shoppe pharmacy with a bottle of hydromorphone pills.

[121] In those circumstances, I conclude that the evidence established that the robbery occurred, as stated by Ms. Conrad, shortly after opening the pharmacy, around 9:30 AM on April 8, 2019.

The Description of the Perpetrator of the Robbery provided by the Witnesses and the Video Surveillance

[122] Ms. Conrad's description of the male who entered the store with a ski mask and reflective sunglasses, was "tall, slender and approximately 6 feet tall." She also noted what she believed to be grease marks on two locations on the masked man, one on his forehead and on the right hand which he used to gesture his demand for the hydromorphone pills. Based upon those grease marks which she described as darker/blackish smudge on his light skin, she believed the perpetrator might have had work like a mechanic.

[123] Neither Ms. Conrad nor Ms. Terrio got a good look at the masked man's face, as it was masked with a black balaclava covering his head and most of his face, with only an opening just above his nose to his forehead, but he was wearing reflective sunglasses, so his eyes were not visible.

[124] Det/Const. Kristin Bradley arrived at the Medicine Shoppe at about 10:10 AM on April 8, 2019, after the police were notified about the robbery, presumably, upon the alarm having been activated by Ms. Terrio to their security company. He met with the witnesses at the pharmacy to obtain their description of the suspect. Det/Const. Bradley stated that they had informed him that the suspect was a tall, slender, white male with dirty hands wearing a black balaclava, with white framed reflective sunglasses.

[125] From my own review of the video surveillance evidence of the masked man who perpetrated the robbery of the Medicine Shoppe, I find that the video evidence established that the suspect was a white male, wearing a dark coloured hoodie, with the hood resting on his shoulders. The hoodie is not completely done up by the zipper and the upper chest and area around the left shoulder shows that he is wearing a grey crew-necked shirt under the black or dark coloured hoodie.

[126] In addition, from my own review of that video evidence, I also find that the masked male was wearing blue jeans and black shoes which appear to have white laces. In my opinion, based upon the detailed review of the video evidence, I find that the black shoes worn by the masked male appear to have four (4) relatively distinctive features. First, I find that the shoes do not appear to be runners, but

rather they are a black shoe with what appears to be white laces. Second, on walking into the pharmacy and then exiting from the pharmacy, I find that those black shoes have white soles at the bottom of the shoe that touches the ground. Third, the white sole at the heel of the shoes is thicker than the white sole in the middle or at the toes of the shoe. Fourth, the video of the masked male standing in front of the dispensary counter, clearly shows what appears to be significant grey marks from either dirt being on or from the black colour the shoes being rubbed off in some manner around the toe of the shoes, with a larger area of grey marks, dirt or scuffing being on the black shoe of the masked man's left foot.

The GPS data [Exhibit 7] relating to the times, movements and location of the Central Roofing work truck operated by John Auld on the morning of April 8, 2019

[127] I find that the evidence of Chris Berry established that he is the owner of Central Roofing and that at the time of the robbery, Mr. John Auld worked for his company as a roofer. Mr. Berry's evidence also established that he had provided Mr. Auld with a work truck, which was a silver 2013 GMC Sierra truck, with Nova Scotia license plate GDA 862. Mr. Berry's evidence also established that, out of his concern that his employees may be using his work vehicle for personal purposes, he had a device installed in his work vehicles utilized by his employees which would be able to track whether the vehicle was stationary or being driven, the specific times of those activities and given the GPS information the location where the vehicle was either stationary or being driven.

[128] With respect to the GPS tracking evidence related to the roofing company work truck operated by Mr. Auld, which was related to the court by Det/Const. Bradley, there was an issue between the parties with respect to the noted times when the truck was started, was driving in specific locations, when it was stationary at an "unnamed" street location and then where the truck continued being driven until Mr. Auld was met by Det/Const. Bradley and Sgt. Hovey at a Wendy's/Tim Horton's restaurant located on Ilsley Ave. in Burnside, based upon the officer's evidence around noon on April 8, 2019.

[129] However, with respect to that GPS tracking evidence, Exhibit 7 is a report entitled "Detail report for GDA 862 (Central)" which outlined times and movements from 08:12:58 to 08:35:12 on Monday, April 8, 2019. The report for the Central Roofing work vehicle being operated by Mr. Auld starting the ignition at 08:12:58 at Milo Terrace. I find that the evidence of Det/Const. Bradley

established that he had gone to 157 Milo Terrace around 10:55 AM on April 8, 2019 and spoke with Kathy Auld, who identified herself as John Auld's mother and as result of that conversation which was not submitted for the truth of the contents, but rather the narrative, Det/Const. Bradley believed that John Auld lived at that address and had gone to work earlier that day.

[130] In those circumstances, apart from the timing of when the ignition was turned on and the Central Roofing work truck was being driven by John Auld, I find it is logical and reasonable to infer from those facts, that the Milo Terrace reference in Exhibit 7, is in fact a reference to the work truck having been parked overnight at 157 Milo Terrace prior to the ignition being turned on and starting to be driven on Welkin Drive and then to the Beaver Bank Road on the morning of April 8, 2019.

[131] I find that the combination of the movements of the truck as documented by Exhibit 7 starting from Milo Terrace and the evidence of Mr. Berry that he had only provided that work truck to Mr. Auld for the purpose of work related travel, but not personal usage, as well as the fact that the truck was parked until started on April 8, 2019 where Mr. Auld apparently lived with his mother, establishes that the work truck was, in fact, being operated by Mr. Auld at all material times relevant to this trial.

[132] Moreover, I find that there was absolutely no evidence or any basis to reasonably infer that anyone other than John Auld was operating that vehicle at all material times relevant to this trial. Furthermore, I find that the GPS data established that the work truck had been driven to a Wendy's/Tim Horton's restaurant located on Ilsley Ave. in Burnside, and that is exactly where police officers went to meet and arrest Mr. Auld around noon on April 8, 2019.

[133] The GPS data in Exhibit 7 documenting the movements of the Central Roofing work truck being driven by Mr. Auld show about a two-minute interval of being stationary on the Walker Connector Road in Lower Sackville, starting at 08:19:22 according to Exhibit 7, then continuing on the Walker Connector Road from 08:21:22 to timestamp 08:23:07 where the work truck is stationary for about one minute on Acadia Lane.

[134] From the truck's stationary location on Acadia Lane, I find that the GPS data in Exhibit 7, which also indicates the direction of travel and speed of the work truck, established that the work truck was then driven onto "Sackville Drive (Hwy-1)" in a southeasterly direction for about one minute, and then for about one

minute on Sackville Drive in a north east direction until it was parked and stationary on an “unnamed” street or road location. The work truck remains “stationary” on that “unnamed” street or road from 08:25:52 until 08:27:40, being just less than 2 minutes. When the work truck starts being driven again at 08:27:40, it proceeds in a southeast direction for 6 seconds on an “unnamed” street or road and then in a west direction, once again, on an “unnamed” street or road for 26 seconds in a westerly direction before returning to Sackville Drive and proceeding in a southerly direction at 08:28:12. From there, the work vehicle continues to be driven in a southeasterly direction along Sackville Drive, onto Highway 101 and ultimately Windmill Road (Hwy-7) at 08:35:12 on April 8, 2019, which is the last entry on Exhibit 7.

[135] Putting aside for a moment what Det/Const. Bradley stated as about the one hour “difference” in the time with respect to the accuracy of when and where the Central Roofing Truck being driven by John Auld was located either moving or in a stationary position, I find that GPS information established that the truck was, at a certain point, on Acadia Lane, then turning onto Sackville Drive and shortly thereafter turning off that main road and being “stationary” for almost 2 minutes on the “unnamed” street or road.

[136] When I consider that GPS information, I find that it is completely consistent with and supports Det/Const. Bradley’s evidence that the Central Roofing Truck driven by Mr. Auld was parked or “stationary” beside the Plaza at 601 Sackville Drive where the Medicine Shoppe pharmacy is located for slightly less than two minutes. The GPS evidence also established that when the Central Roofing truck began moving again, it proceeded to another “unnamed” lane or road, turned back onto Sackville Drive and proceeded in the direction of Bedford.

The times and video surveillance images of a silver or grey truck with a ladder in its truck bed taken from Hong’s Restaurant located on Sackville Drive on the morning of April 8, 2019

[137] During the testimony of Det/Const. Bradley, he introduced Exhibit 6, which is a few minutes of surveillance video which he had obtained from Hong’s Restaurant for the period of time around 9:30 AM on April 8, 2019. He stated that the Hong’s Restaurant is located on the opposite side of Sackville Drive from the strip mall where the Medicine Shoppe pharmacy and the Money Mart are located. The surveillance video captures the images of traffic moving in both directions on Sackville Drive in the area of Hong’s Restaurant.

[138] As the Hong's Restaurant surveillance video of Exhibit 6 was played on the monitor, the timestamp for the start of the video is 09:28:43 on April 8, 2019. Det/Const. Bradley pointed out that there is a driveway between the Plaza where the Medicine Shoppe is located and on the other side of that driveway or lane is where Tom's Restaurant is located. He pointed out that in the top right corner of the image you can see the cemetery located behind the Plaza where the Medicine Shoppe is located and Tom's Restaurant to the right of the image.

[139] Then, as the Hong's Restaurant surveillance video continued, Det/Const. Bradley pointed out that the extended cab Chevrolet truck which appeared to be grey in this black-and-white surveillance video, with a ladder in the truck bed on top of the cab, turns left off Sackville Drive and at timestamp 09:32:30, that truck parks in the lane located beside the building where the Medicine Shoppe is located. After parking the truck, an individual gets out, walks in front of that building towards the Medicine Shoppe and goes out of the video images.

[140] Det/Const. Bradley then pointed out, on the images from that surveillance video about 1 to 1½ minutes after the individual walked away from the truck, that same individual returns to the grey or silver extended cab truck with a ladder leaning against the roof of the truck's cab and drives up the hill towards the cemetery. Det/Const. Bradley pointed out that, going in that direction, there were two options for traffic, either continue straight and go into the cemetery or turn to the right and go behind Tom's Family Restaurant to another "unnamed" road which would allow the driver to return to Sackville Drive.

[141] Based upon his understanding of the time of the robbery at the Medicine Shoppe from the witnesses and its video evidence which confirmed that the robbery occurred shortly after the pharmacy opened around 9:30 AM, Det/Const. Bradley was of the view that the Hong's Restaurant video around that same time had captured the images of the truck and person involved in the robbery. As a result of that evidence and what those images portrayed, he was of the view that the GPS times for when and where the Central Roofing work truck operated by Mr. Auld was moving or was stationary were, in his opinion, "off" by one hour from the actual time of day on April 8, 2019, when the robbery actually occurred.

[142] After having reviewed the Hong's Restaurant video surveillance and my own detailed analysis of the GPS data for the Central Roofing truck driven by Mr. Auld, I agree with the evidence of Det/Const. Bradley that, apart from the times listed in the GPS data, the movements of the truck shown in the Hong's Restaurant

surveillance video are entirely consistent with the GPS data for the silver or grey Central Roofing truck with an extended 4-door cab.

[143] From my own review of the GPS data, the Google map and the Hong's Restaurant video surveillance cut, the Central Roofing truck, before getting to the Plaza where the Medicine Shoppe is located had proceeded on Acadia Lane and then made a right turn to proceed on Sackville Drive. After proceeding on Sackville Drive for a few moments, the GPS data confirms that the Central Roofing Truck then turned off Sackville Drive to be "stationary" on an "unnamed" street or lane for about two minutes. Based upon the GPS locations and directions of the Central Roofing extended cab truck in order to get to the location where it was temporarily "stationary" for a couple of minutes, required the truck to turn left off Sackville Drive. I find that the Hong's Restaurant video surveillance clearly shows a silver or grey extended cab truck with the ladder leaning on the roof, turn left from Sackville Drive on April 8, 2019, and park next to the Plaza where the Medicine Shoppe is located at about 09:32:30 according to the timestamp on the Hong's restaurant video.

[144] Apart from the GPS times being "off" one hour as mentioned by Det/Const. Bradley and then each of the surveillance cameras diverging by a few minutes one way or the other, I find that the combination of the GPS notations of the movements of the Central Roofing truck from Acadia Lane, to Sackville Drive, then a left turn off of Sackville Drive to an "unnamed" lane where it is stationary for a couple of minutes are completely consistent with, and in fact, identical to what was captured by the Hong's Restaurant Surveillance camera on the morning of April 8, 2019 around 9:30 AM.

[145] Furthermore, in addition to the consistency of the GPS movements of the Central Roofing Truck with the Hong's Restaurant video surveillance evidence around 9:30 AM on April 8, 2019, there is also the evidence of Mr. Keith Berry, the owner of the Central Roofing Services with respect to the images of the extended cab truck with the ladder in the truck's bed leaning against the roof of the cab. He had stated that the company's 2013 GMC Sierra truck was silver in colour but stated that the truck shown in the black and white video from Hong's restaurant which was filed as Exhibit 6 did look "familiar" to him as a 2013 GMC 1500. He had earlier stated, after reviewing that black and white video during his direct examination that the extended cab truck with the ladder in the truck bed resting against the roof "looked like" his vehicle.

[146] When I consider the totality of the evidence of Det/Const. Bradley, the video evidence from Hong's Restaurant and from the Medicine Shoppe, the consistency in the GPS data with the Hong's Restaurant video of Sackville Drive with respect to when and where the silver or grey truck with the extended cab and a ladder leaning against the truck cab's roof, was moving or "stationary" and Mr. Berry's evidence that the vehicle in the video images "looked like" his company vehicle, I find that when logic and common sense is applied to the totality of those facts and circumstances, I agree with the evidence and opinion of Det/Const. Bradley that the GPS timestamps in Exhibit 7 are indeed one hour "off" from what was the "real" or actual time on the morning of April 8, 2019.

[147] In addition to the Hong's Restaurant Video surveillance at about 9:30 AM on April 8, 2019, being entirely consistent with the GPS data which documented the roads [named or "unnamed"] and directions taken by the Central Roofing Truck, I also find that the Hong's Restaurant Video surveillance, although being a blurry image, did capture images of the person who exited from the driver's side of that silver or grey extended cab truck and walk across a laneway to the plaza where the Medicine Shoppe is located. Then, within a couple of minutes, the blurry images of the video clearly show that same person return to that truck and drive off within seconds. Although the images of the person are blurry and at a distance, I find that the black and white video images do show that the person who exited from the truck and returned to it moments later, was wearing a dark coloured jacket or sweater covering their upper body and wearing lighter coloured pants. I find that the black hoodie and blue jeans worn by the perpetrator of the robbery as shown on the Medicine Shoppe videos are entirely consistent with the images of the perpetrator of the robbery as shown from the Hong's Restaurant video.

[148] Although the timestamps on the Medicine Shoppe surveillance video and the Hong's Restaurant surveillance video are, as mentioned, differing by a few minutes from each other, I find that they do establish that a silver or grey extended cab truck with a ladder leaning against its cab, was stationary according to the Hong's Restaurant video for about two minutes beside the plaza where the Medicine Shoppe is located, before the perpetrator of the robbery returned to the truck and drove off. Bearing in mind that the witnesses' evidence and the Medicine Shoppe's video surveillance of the robbery in relation to the timing of the robbery at the Medicine Shoppe on the morning of April 8, 2019, regardless of the slight differences in the timestamps of the video surveillance cameras, I find that there can be no doubt whatsoever that the Hong's Restaurant video provided blurry images of the perpetrator of the robbery, together with much clearer details of the

truck that he was operating, the arrival time and temporary parking of that truck and a short time later, returning to that truck and driving off within seconds, after the robbery of the pharmacy.

[149] Furthermore, after having considered the video surveillance evidence from the Medicine Shoppe, the GPS evidence with respect to the operation of the Central Roofing work truck by Mr. Auld, reviewing the video evidence from Hong's restaurant, Mr. Berry's evidence with respect to the fact that the extended cab truck "looked familiar" or "looking like" his work truck and that John Auld was the only person authorized by him to operate that work truck and then considering all those completely consistent facts and circumstances, I find the only reasonable inference from the totality of that direct and circumstantial evidence is that the extended cab truck with the ladder leaning against the cab's roof, as shown in the Hong's Restaurant video surveillance, which parked next to the Plaza where the Medicine Shoppe is located was, in fact, the Central Roofing work truck, which was being operated by Mr. Auld at all material times on April 8, 2019.

[150] As I previously mentioned, I would not be surprised that there would be slight variations in the timestamps on different surveillance videos from different cameras located in different positions, in this case in the Medicine Shoppe and Hong's Restaurant, by a few minutes one way or the other. However, in agreeing with the opinion of Det/Const. Bradley that the GPS timestamps are "off" by one hour, I find that it would be highly unusual for any technician to inaccurately program the time by that margin or for a computer to set the time so far off the actual time of day.

[151] Having said that, I find that there is one very logical and completely rational reason for the variation of one hour between the GPS timestamps and every other time mentioned by any of the witnesses and the timestamps attached to the other surveillance videos, including the Hong's Restaurant video, which are all consistent with the evidence of Ms. Conrad that the robbery at the Medicine Shoppe occurred at about 9:30 AM on Monday, April 8, 2019. I am prepared to take judicial notice that, on Sunday, March 10, 2019, at 3 AM local time, the clocks in Nova Scotia and most parts of Canada were moved "forward" by one hour when we switched to Daylight Savings Time.

[152] In that manner, I find that, for whatever reason, the timestamps on the GPS report for the Central Roofing work truck operated by Mr. Auld, inadvertently failed to "leap forward" in the Spring to reflect the Daylight Savings Time, which

resulted in the GPS times recorded on Exhibit 7 incorrectly reflecting a time that was one hour earlier than the actual Daylight Savings Time of day on April 8, 2019. In those circumstances, I find that when I review Exhibit 7 with the actual Daylight Savings Times on April 8, 2019, being inserted, they reflect the ignition being turned on at Milo Terrace at 9:12:58 AM and the final GPS entry on that page being at 09:35:12 driving on Windmill Road (Hwy-7) towards Bedford.

[153] In those circumstances, I find that the timestamps on the surveillance videos at the Medicine Shoppe and Hong's Restaurant, while possibly being at a minimal variance with one another by a minute or two in terms of their settings, they did, in my opinion, properly adjust their timestamps on their video cameras as of March 10, 2019, to "leap" forward by one hour to Daylight Savings Time. In those circumstances, I find that the Central Roofing work truck which was being driven by Mr. Auld was parked for approximately two minutes on an "unnamed" street or lane beside the Plaza where the Medicine Shoppe pharmacy is located at about 9:26 AM [ADT] and remained stationary in that location for about two minutes before driving off at about 9:28 AM [ADT] and then going onto Sackville Drive in the direction of Bedford and ultimately Windmill Road at about 9:35 AM [ADT] on April 8, 2019.

Post-offence or after the fact conduct of Mr. Auld with respect to data and the information extracted by an expert from Mr. Auld's iPhone

[154] In terms of the after-the-fact conduct which may be considered by the Court as part of the circumstantial evidence in addition to the totality of the facts and circumstances in rendering the decision in this case, the Crown Attorney pointed to a couple of cell phone searches which had been deleted by Mr. Auld but were recovered by an extraction process. According to the evidence of Sgt. Thornton and the extraction information obtained from Mr. Auld's iPhone in Exhibit 4, there were two searches on his iPhone using "Safari" with the value "how to fool GPS in a vehicle." According to the Extraction report in Exhibit 4, the timestamp on Mr. Auld's iPhone for those two inquiries were made about a second apart with the first one being on April 8, 2019, at 11:19:56 AM (UTC-3). The second search with that same value "how to fool a GPS in a vehicle" was deleted by Mr. Auld but was able to be recovered in the Extraction report.

[155] Based upon the timestamp from the Extraction report of Mr. Auld's iPhone, his search on "Safari" with the "value" of "how to fool a GPS in a vehicle" occurred a little less than two hours after the robbery at the pharmacy. The search

for that information is certainly consistent with Mr. Berry's evidence that he had provided a work truck to Mr. Auld, but he equipped that work truck with a device to collect GPS data on the movements of the work truck to ensure that the employees did not use his vehicles for personal purposes. As Defence Counsel pointed out, Mr. Auld's inquiry may not have been related to the alleged offence, and in fact, I note that there was a text message from Mr. Auld to Mr. Berry at 10:01 AM on April 8, 2019, stating that he only went straight home last night after stopping in Fall River to give his sister money but "wasn't running around."

[156] However, on April 8, 2019, looking at page 5 of Extraction Report [Exhibit 4], it is apparent that Mr. Auld did not arrive with the Central Roofing work truck at the worksite for a client where he was supposed to meet Mr. Berry. I find that Mr. Berry's message to Mr. Auld at 9:08:09 AM, clearly expresses his frustration by the fact that Mr. Auld was not at the worksite: "The guy is waiting for us and because if (sic) you we will not be there until 1030. Nice." About a minute later, Mr. Auld's text message reply to Mr. Berry at 9:09:26 AM on April 8, 2019, was "if you're leaving your car, will be there in like 15 minutes." Despite that assurance from Mr. Auld that he would be at the worksite in a few minutes, I find that Mr. Berry's evidence established that Mr. Auld never did join him at the worksite that morning and that the first time that Mr. Berry saw him was when he was arrested at around noon outside a Wendy's/Tim Horton's restaurant located on Ilsley Ave. in Burnside.

[157] In addition. I find that another fact to consider as Mr. Auld's post-offence or after-the-fact conduct in this case relates to reasonable inferences from a couple of phone calls received by Mr. Auld on his iPhone around 11 AM on April 8, 2019. In that regard, Det/Const. Bradley had indicated that he and another officer had met with Derek McColl and another individual who were apparently co-workers of Mr. Auld at about 10:44 AM on Thorn Avenue. During that meeting, he had indicated that the police were looking for Mr. Auld and that those individuals had indicated that they had not seen him. After hearing that Mr. Auld lived nearby, Det/Const. Bradley stated that, at 10:55 AM, he spoke to John Auld's mother, Kathy Auld at 157 Milo Terrace, with respect to the whereabouts of her son, John Auld.

[158] When I look at Exhibit 4, the Extraction report of the information on Mr. Auld's iPhone, I find that the report indicates that very shortly after the police officers left Mr. Derek McColl, he telephoned Mr. Auld at 10:47:41AM (UTC-3) on April 8, 2019, but the record shows that Mr. Auld "missed" that call. However, the Extraction report confirms that about 15 seconds later there was an "incoming"

call from Mr. McColl to Mr. Auld at 10:47:56 AM and they had a conversation being just over 2 minutes in duration. In addition, in Exhibit 4, the extraction report prepared by Sgt. Thornton also confirms that Mr. Auld received an “incoming” call on his iPhone from his mother, Kathy Auld at 10:57:22 AM, with the call being just over 5 minutes in duration.

[159] I find that both of those calls to Mr. John Auld, were placed very shortly after Det/Const. Bradley and another police officer met with Mr. McColl and Ms. Auld. In those circumstances, I find that it is reasonable to infer from the timing of the calls made by those people to Mr. Auld and subject of their meetings with police officers, which had just concluded, that it is reasonable to infer that they informed Mr. Auld that the police were looking for him.

[160] In addition, I find that is reasonable to infer from the timing of those phone calls to Mr. Auld being made immediately after the police met with those individuals and that their information likely precipitated a decision by him to delete a large number of text messages, chats or searches which were made from or to his iPhone prior to 11:30 AM on April 8, 2019. Although the Extraction report did not indicate a time when the messages were deleted, just that they were deleted, I find that it is reasonable to infer that the deletion of those text messages, chats or searches from Mr. Auld’s iPhone, which were confirmed by the Extraction report [Exhibit 4], that they did, in all likelihood, occur after the call from Mr. McColl and his mother but before Mr. Auld was arrested around noon.

[161] Furthermore, I also find it is reasonable to infer from those phone calls being made to him moments after the police had met with one of his co-workers and his mother that those phone calls likely precipitated the importance of where he had been that morning with the Central Roofing work truck. Based upon the evidence of Mr. Berry and a text message exchange by Mr. Auld with Mr. Berry, I find that Mr. Auld was certainly aware of the fact that the work truck was equipped with a GPS device to monitor its movements and when it was stationary. In those circumstances, I find that it is reasonable to infer from those two calls from Mr. McColl and his mother provided a rationale for Mr. Auld to make the inquiry using “Safari” on his iPhone to pose the question “how to fool a GPS in a vehicle,” a few minutes after those calls at about 11:20 AM on April 8, 2019.

[162] Given those facts and circumstances around the phone calls from Mr. McColl and his mother to Mr. Auld, I find it is reasonable to infer from Mr. Auld’s search on “Safari” of “how to fool a GPS in the vehicle” that he was, at that time,

looking for a means to alter, conceal or delete the GPS information as to his whereabouts that morning, instead of joining Mr. Berry at the worksite that morning, as Mr. Berry had expected. In that regard, I find that the evidence of Mr. Berry established that Mr. Auld never did attend at the worksite to work with him, on the morning of April 8, 2019.

[163] In addition, given the timing and length of the phone calls made to Mr. Auld shortly after police officers visited with Mr. McColl and his mother, Kathy Auld, I find that it is reasonable to infer that he was probably aware that the police officers were looking for him. Based upon the timing of those two phone calls to Mr. Auld, I find that it is reasonable to infer that he had been forewarned that the police were looking for him about 90 minutes after the robbery at the pharmacy, and in those circumstances, it certainly provided an opportunity to take some steps to dispose of anything that might confirm his identification as the perpetrator of the robbery.

[164] While being forewarned that the police were looking for Mr. Auld may be a reasonable inference from the established facts and circumstances before the court, that inference alone does not establish, beyond a reasonable doubt, the identity of Mr. Auld as the perpetrator of the robbery. With respect to the identification of the perpetrator of the robbery, I am also mindful of the fact that was established by Defence Counsel during the cross-examination of Det/Const. Bradley, that the police did not locate a dark hoodie or a balaclava or any hydromorphone pills on Mr. Auld or in his work truck at the Wendy's Restaurant when he was arrested shortly after noon on April 8, 2019.

[165] One final point with respect to the timestamps from the Extraction Report [Exhibit 4] of Mr. Auld's iPhone, which was prepared by Sgt. Thornton, I find that the times noted beside the text messages and phone calls are reflective of the actual time Daylight Savings Time of the day in Nova Scotia on April 8, 2019.

Analysis of any similarities or differences between the witnesses' description of the perpetrator of the robbery, the video surveillance images of that person and the police photographs of Mr. Auld on the afternoon of April 8, 2019

[166] In this case, the only person who provided a first-hand description of the perpetrator of the robbery at the Medicine Shoppe after interacting with him on April 8, 2019, was Ms. Birgit Conrad. She described the suspect as being a white male, tall and slender, about 6 feet tall with some dark marks which she believed was grease smudged on the one hand that she could see as well as his forehead. I

find that the police photographs are consistent with a white male being of a slender build, but there is no indication in those photographs from which it is possible to determine Mr. Auld's height. In addition, I find that there was no clear reference point in the video surveillance evidence from which one could reasonably ascertain the height of the perpetrator of the robbery.

[167] However, Ms. Conrad also stated that she believed that the dark or blackish grease marks on the suspect's right hand, which was visible to her, led her to believe that the perpetrator might be someone who worked as a mechanic. From my own review of the police identification photographs which were filed as Exhibit 8, I find that the palm and inside of Mr. Auld's hands appear to be clean. However, from my review of the photographs of the back of Mr. Auld's right and left hand [Exhibit 8, photos #5 and #6], I find that there are some dark marks at the tip of the fingers on both hands, on the knuckles of his right hand and the base of the fingers on both hands. In those circumstances, I find that my review of the police photographs of the outside of Mr. Auld's hands is certainly consistent with what was observed and described by Ms. Conrad.

[168] Det/Const. Bradley interviewed the people in the pharmacy shortly after the robbery to obtain a general description of the perpetrator. In addition, he also viewed the surveillance video of the perpetrator entering and leaving the pharmacy and noted that the white male was wearing dark jeans, black sneakers with white on the side near the tread, a dark coloured baggy hoodie and he noted that the extended hand when speaking to Ms. Conrad, appeared to be dirty, but had no tattoos. He also had mentioned that the other possible suspects, with whom he had met prior to the arrest of Mr. Auld, but he had eliminated both of them, based upon the fact that one of them was much shorter than the description provided by Ms. Conrad and as seen on the video surveillance and the other one having tattoos on the outside of his hands.

[169] In terms of general similarities, there was the statement that the perpetrator was wearing blue jeans and the police photographs do show Mr. Auld wearing somewhat dirty dark blue jeans. Certainly, there is nothing really distinctive about him wearing those dark blue jeans, as there are many people who wear jeans when working. However, I find that the dirt marks around the waist and on the knees [Exhibit 8 photos #8 and #11] would be consistent with someone doing work, which might require them to do so, while they were on their hands and knees. The evidence established that Mr. Auld was working as a roofer for Central Roofing on the date in question and according to the text messaging, he would have been

dressed in his work clothes as he was expected to meet with Mr. Berry at a worksite to work on a roofing project that morning.

[170] From my review of the surveillance video of the perpetrator of the robbery at the dispensary area of the Medicine Shoppe, I find that the images of the white male who demanded the hydromorphone was wearing a dark coloured, baggy hoodie. I also noted that the hoodie was only zipped up about three quarters of the way up the white male's chest. From my review of the video, the perpetrator of the robbery was wearing what appears to be a grey crewneck shirt under the hoodie, but there is no way to determine whether that shirt had short or long sleeves. In addition, from my review of a close-up of the perpetrator's right hand, there appears to be a black or darker coloured sleeve outside the arm of the dark coloured hoodie.

[171] Based upon my review of the photographs of Mr. Auld in Exhibit 8, which were taken at the police station, I find that he is wearing a grey crewneck T-shirt and that underneath that grey T-shirt, he is also wearing a long sleeve black shirt as shown in Photos #1, #3, #5 and #9 of Exhibit 8. Looking at still images of the perpetrator of the robbery in the surveillance video, I find that the white male who entered the pharmacy and demanded the hydromorphone is also wearing what appears to be a grey crewneck T-shirt over what appears to be a black long-sleeved shirt, with the end of the black sleeve of a shirt sticking out from the end of the sleeve of the hoodie on his right hand. In those circumstances, I find that there is a certainly a distinct similarity between the shirts worn by Mr. Auld in Exhibit 8 and the shirts that I find to have been worn by the perpetrator at the time of the robbery.

[172] However, what I find to be the most distinctive similarity between the video images of the perpetrator of the robbery and the police photographs of Mr. Auld in Exhibit 8 are the shoes that he is wearing. I find that the video surveillance of the perpetrator of the robbery in the pharmacy clearly showed that the white male was wearing black shoes with white laces. Those shoes also had distinctive white soles at the bottom of the shoe. The shoes of the perpetrator of the robbery also had a thicker white sole at the heel of both shoes. Det/Const. Bradley provided the same description of the white sole and thicker white heels of the shoes of the perpetrator of the robbery, after he viewed the video surveillance evidence. Looking at Exhibit 8, photos #10 and #11, which are the police photographs of Mr. Auld's shoes, I find that he is wearing black shoes with white laces and white soles which appear to be identical to the shoes worn by the perpetrator of the robbery, which also have

the distinctive thicker, white heel and narrower white strip of the sole on the bottom of the shoe to the toes.

[173] Furthermore, what I find to be a significant and certainly distinctive similarity between the shoes worn by Mr. Auld in the police photographs and the shoes worn by the perpetrator of the robbery as shown in the video surveillance at the pharmacy, are the grey dirt, wear or scuff marks on the toes of the black shoes. In both the video surveillance and even more clearly in photograph #11 of Exhibit 8, the black shoes worn by Mr. Auld show those significant grey dirt, wear or scuff marks in the area above his toes, with more prominent dirt, wear or scuff marks at the front and top of the shoe on his right foot. I find that those dirt, wear or scuff marks on the shoes of the perpetrator of the robbery were also very clearly shown in the video surveillance images and I find that those distinctive dirt, wear or scuff marks are identical in location, size and colour contrasted against the black shoes with white laces that Mr. Auld was wearing in the police photographs and those worn by the perpetrator of the robbery on the morning of April 8, 2019, at the Medicine Shoppe.

The determination of the ultimate reliability and appropriate weight of the “recognition” evidence proffered by Const. Thomas

[174] Finally, the Court heard the “recognition” evidence of Const. Grant Thomas with respect to his prior meetings with Mr. John Auld and the determination of whether he was sufficiently familiar with the accused to have “some basis” for his identification opinion. As I mentioned previously, given the number of times that Const. Thomas had met with Mr. Auld and, in particular, on two occasions the meetings were somewhat longer, I concluded that he met the threshold reliability of the “prior acquaintance/better position” test than the trier of fact to be able to offer a “recognition” evidence opinion.

[175] In reviewing the opinion evidence of Const. Thomas, I found that there was not a great deal of detail which could be compared to the witnesses’ description of the perpetrator of the robbery being tall, slender and approximately 6 feet tall. Instead, Const. Thomas commented on the mannerisms which he noted as potential idiosyncrasies when Mr. Auld was making a point, similar to the perpetrator in the video making the point with his right hand that he wanted the hydromorphone to be handed over immediately.

[176] Const. Thomas also stated that the perpetrator was walking with his toes pointing outward in the videos and that he had observed the same thing when Mr. Auld was walking in the meetings that the police officer had with him. However, I found that it was difficult to assess from a review of the videos that I could agree with that statement, with any degree of certainty. One area where Const. Thomas's opinion was consistent with the police photographs and the evidence of Ms. Conrad is with respect to him having seen the perpetrator in the video and on prior occasions when he met with Mr. Auld, having seen him with similar dirty hands, presumably from Mr. Auld's work as a roofer.

[177] In the final analysis when I consider the "recognition" evidence of Const. Thomas, in determining its ultimate reliability and the appropriate weight that can be attributed to it, I find that I cannot accord any significant degree of weight to that opinion evidence. While there were some areas where it was clear that Const. Thomas could express an identification opinion based upon his prior meetings with Mr. Auld, I did not find that he was in that much of a better position than the Court as the trier of fact to identify the perpetrator of the robbery.

Conclusion

[178] After having made several findings of fact and after having considered the totality of the direct evidence which I have accepted and taking into account the circumstantial evidence from which I have determined that certain facts in issue may be reasonably inferred, I find that the only reasonable or rational inference to be drawn from the totality of the evidence in this trial, is that the Crown has established, beyond a reasonable doubt, that Mr. John Auld was the perpetrator of the robbery at the Medicine Shoppe in Lower Sackville, Nova Scotia on April 8, 2019 at about 9:30 AM.

[179] In coming to that conclusion, I have reviewed the totality of the direct and circumstantial evidence with respect to several key areas to determine the timing of the robbery, including the surveillance video from inside and outside the Medicine Shoppe and Hong's Restaurant, made a finding of fact with respect to the actual time in Nova Scotia for the GPS information in relation to where and when the Central Roofing work truck operated by Mr. Auld was moving or stationary and the locations where it was at those times to establish that the work truck arrived and parked beside the Plaza where the Medicine Shoppe is located just before the robbery and just under two minutes later, departed from that area at about 9:35 AM

[according to the time stamp on the Hong's Restaurant surveillance video] on the morning of April 8, 2019.

[180] In addition, I have made several findings of fact with respect to the distinct similarities in the clothing and footwear worn by the perpetrator of the robbery as shown in the video surveillance evidence and photographs of Mr. Auld taken at the police station in Exhibit 8. I have also considered other facts and circumstances in relation to what I have described as the circumstantial evidence of Mr. Auld's "after-the-fact" conduct, which I find to be consistent with and support the identification of Mr. Auld as the perpetrator of the robbery at the Medicine Shoppe on April 8, 2019.

[181] Furthermore, I find that the timing of the robbery and the identification of Mr. Auld as the perpetrator of the robbery at the Medicine Shoppe was established, beyond a reasonable doubt, in several different ways as being around 9:30 AM on April 8, 2019, moments after the pharmacy opened for the day. In coming to the conclusion, I have considered the totality of the facts and circumstances which included the Hong's Restaurant's video surveillance, Mr. Berry's evidence in relation to GPS devices being placed in his work trucks and his evidence that the truck in the Hong's Restaurant video turning into the Plaza where the Medicine Shoppe is located "looked like" his work truck, coupled with the GPS movements of the work truck, which confirmed the locations of the work truck being driven by Mr. Auld and with the corrected Daylight Savings Time for the truck's movements or when it was stationary, as listed in Exhibit 7 by its GPS locations.

[182] Taking into account the totality of those facts and circumstances, I find that the Crown established, beyond a reasonable doubt, that the Central Roofing work truck which was operated by Mr. Auld was "stationary" for just under two minutes beside the plaza where the Medicine Shoppe is located on an "unnamed" road or street around 9:30 AM on April 8, 2019, when the robbery occurred and then drove off for a short distance on another "unnamed" road or street before turning onto Sackville Drive to proceed in the direction of Bedford.

[183] Moreover, in coming to those conclusions, I have accepted proven facts and drawn reasonable inferences from the circumstantial evidence which, after having assessed them logically and in light of human experience and common sense, I find that there are no other reasonable possibilities that are inconsistent with the conclusion that the Crown has established, beyond a reasonable doubt, that Mr.

John Auld has been identified as the perpetrator of the robbery of the Medicine Shoppe on the morning of April 8, 2019.

[184] Having previously concluded that all of the other essential elements of the robbery charge had been established by the Crown, beyond a reasonable doubt, and now having concluded that the Crown has established, beyond a reasonable doubt, that Mr. John Auld was identified as the perpetrator of the robbery at the Medicine Shoppe on April 8, 2019, I find Mr. John Auld guilty of the offence of the unlawful robbery of Birgit Conrad contrary to section 344 of the **Criminal Code**.

Has the Crown established all of the Essential Elements of the Disguise with Intent Charge contrary to section 351(2) Criminal Code?

[185] With respect to this charge, section 351(2) of the **Criminal Code** with respect to the charge of Disguise with Intent reads as follows: “every person who, with intent to commit an indictable offence, has their face masked or coloured or is otherwise disguised is guilty of [a] an indictable offence and liable to imprisonment for a term of not more than 10 years; or [b] an offence punishable on summary conviction.

[186] In this case, the Information alleges that at the same time and place, namely on April 8, 2019, at or near Lower Sackville, John Auld did with intent to commit an indictable offence did have his face masked, contrary to section 351(2) of the **Criminal Code**.

[187] According to Justice David Watt, in his commentary with respect to the essential elements of this offence in his **2022 Annotated Tremear’s Criminal Code** at page 733, states that the external circumstances of this offence require the Crown to establish, beyond a reasonable doubt that the defendant’s face was, at the material time, masked, covered, or otherwise disguised. He notes that there are no definitions for those words provided in the **Criminal Code**, but each is a word of common everyday usage.

[188] I find that a simple dictionary definition of “masked” in relation to the offence of “disguise with intent,” as in this case, that Mr. Auld did have his face “masked” would connote that he was wearing some sort of a “mask” to cover his face fully or partially in order to hide or disguise the characteristics of his face. As a result, I find that the Crown would be required to establish, beyond a reasonable doubt, that Mr. Auld intentionally took some actions which covered or “masked” his face to facilitate the indictable offence of robbery.

[189] I find that the evidence of Ms. Conrad and to some extent Ms. Terrio as well and the video surveillance evidence established, beyond a reasonable doubt, that the perpetrator of the robbery, who entered the Medicine Shoppe pharmacy and demanded hydromorphone pills, had his face almost completely covered or “masked” by a black balaclava leaving only a small opening on his face for his eyes, which were also “masked” by wearing reflective sunglasses to facilitate the robbery of Ms. Conrad. I also find that the proven facts and reasonable inferences from those proven facts have established, beyond a reasonable doubt, that Mr. Auld entered the pharmacy with the intention of committing the robbery of hydromorphone pills from the Medicine Shoppe and that, in doing so, prior to the robbery, he intentionally took steps to wear a “mask” to cover his facial features to minimize the possibility that he would be identified as the perpetrator of the robbery.

[190] Having come to those conclusions, I find that the Crown has established all of the essential elements of the offence of disguise or mask with intent, beyond a reasonable doubt, contrary to section 351(2) of the **Criminal Code**.

[191] In those circumstances, I also find Mr. John Auld guilty of the offence of having committed an indictable offence while having his face masked, contrary to section 351(2) of the **Criminal Code**.

Theodore Tax, JPC