

**SUPREME COURT OF NOVA SCOTIA**

**Citation:** *R. v. Glasgow*, 2022 NSSC 238

**Date:** 20221020

**Docket:** CRH-495911

**Registry:** Halifax

**Between:**

His Majesty the King

v.

Devlin Tyson Glasgow

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**DECISION ON EXCLUSION OF GUNSHOT RESIDUE EVIDENCE**

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**Judge:** The Honourable Justice Joshua Arnold

**Heard:** August 2, 2022, in Halifax, Nova Scotia

**Counsel:** Rick Woodburn and Sean McCarroll, for the Crown  
D. Sid Freeman, for Devlin Glasgow

## Overview

[1] Devlin Glasgow is charged with the first-degree murder of Matthew Sudds. The Crown wants to introduce at trial evidence of gunshot residue (“GSR”) found in a rental car alleged to have been used in the shooting death of Mr. Sudds. The defence objects to the admission of this evidence and says its probative value is far outweighed by its prejudicial effect.

## Facts

[2] The facts provided to the court on this *voir dire* are detailed in the defence brief:

1. Mr. Glasgow is charged with First Degree Murder. The date of the incident that gave rise to the charge was 10<sup>th</sup> October 2013. Mr. Glasgow was arrested on 1<sup>st</sup> October 2019.
2. The Crown seeks to adduce evidence of the presence of gunshot residue (GSR) into Mr. Glasgow’s trial. The GSR was located on swabs taken from a black Dodge Charger bearing New Brunswick plate JGA 034. This car had been rented from Budget by Jasmina Munroe-Last. Ms. Munroe-Last is an associate of the separately charged co-accused, Ricardo Whynder. She admitted to police that she had rented the vehicle for use by Mr. Whynder. During the rental period, Mr. Whynder had been seen driving the vehicle and had also been observed as a passenger in the vehicle. The vehicle had been rented by Ms. Munroe-Last on 8<sup>th</sup> October 2013.
3. CCTV shows the deceased entering the front passenger seat of a black Dodge Charger sometime between 8:42 pm and 8:54 pm on 10<sup>th</sup> October. Prior to walking toward the vehicle he told the persons he was with that he would be back shortly. He was not seen alive again and there was no further outgoing activity on his cell phone. A black Charger was captured on CCTV at approximately 9:27 pm driving toward the location where the deceased was later found. CCTV also showed a black Charger driving away from that area at approximately 9:32 pm.
4. On 11<sup>th</sup> October 2013, at approximately 6:34 am, police received a 911 call in relation to a shooting in Dartmouth. Minutes later a call was received indicating the vehicle involved was a newer model Dodge Charger or Dodge Challenger. Ms. Munroe-Last returned the Dodge Charger rental to Budget at approximately 11:44 am that same day.

5. On 14<sup>th</sup> October 2013, the black Dodge Charger that had been rented by Jasmina Munroe-Last was seized. It had been let out to lease on two occasions following its return to Budget by her on 11<sup>th</sup> October 2013:
  - a. Lisa Hulbert, rented the vehicle from 11<sup>th</sup> October 2013 at 5:27 pm to the 13<sup>th</sup> of October 2013 at 3:52 pm. Ms. Hulbert had two other occupants in the car. They use the car to vacation on Prince Edward Island for the weekend.
  - b. David Arrendell rented the vehicle on 14<sup>th</sup> October 2013 at 8:48 am. Mr. Arrendell had three other occupants in the vehicle with him. All occupants were tourists from Alabama, USA, who had boarded the vehicle after disembarking from a cruise ship. Mr. Arrendell and his passengers were stopped by police shortly after leaving the rental agency. They were directed to return to the agency where the vehicle was then seized.
6. The car was cleaned by a rental company employee when it was returned on 11<sup>th</sup> October 2013 by Jasmina Munrie-Last. It was also cleaned by a rental company employee when returned by Lisa Hulbert. Interior cleaning consists of vacuuming the vehicle seats and floors and wiping the interior with a citrus-based cleaner and a rag. The only part of rental vehicles that do not get cleaned on return is the undercarriage. The vehicle does not appear to have been cleaned after Mr. Arrendell and his passengers disembarked from it.
7. Forensic analysis of swabs taken from the inside of the rental vehicle indicated the following:
  - a. a single particle characteristic of GSR was found on the sampling stub used to sample the rear right interior door frame. No particles characteristic of GSR were found on the sampling stub used to sample the rear right door handle, seat belt, and interior,
  - b. one or more particles characteristic of GSR were found on each sampling stub used to sample the front right door handle, seat belt, interior, and interior door frame,
  - c. particles characteristic of GSR were found on both sampling stubs used to sample the left front door handle, seat belt, interior and interior door frame,
  - d. particles characteristic of GSR were found on both sampling stubs used to sample the rear left door handle, seat belt, interior, and interior door frame,
8. Based on the analysis of the swabs taken from inside the rental vehicle, the forensic analyst concluded the following in his report:

the interior of the 2013 Dodge Charger was in proximity to a firearm being discharged, or was in contact with another source of GSR, or was in contact with a source of GSR-similar particles. Potential sources of GSR-similar particles may include some blank firing devices, some cartridge operated industrial tools, some pyrotechnic devices, and some automotive brake and/or air bag components.

9. At the first trial of Ricardo Whynder, the forensic analyst changed his conclusion in his report to indicate that the particles found could only have originated from a firearm.

[As appears in original]

[3] The Crown added the following facts:

...the defence fails to mention in their submissions that Mr. Glasgow's DNA is found in the back seat of the same Charger near the victims DNA. They further fail to mention that Mr. Glasgow's finger and palm prints are on found that same vehicle. The fact that a shooting takes place in the proximity of the vehicle and Mr. Glasgow's DNA and fingerprints are on/in the vehicle make the GSR extremely probative.

...

2. While one anonymous caller reported a car that is similar to the Charger at the time of the second shooting, another caller refers to the car as a pink Cadillac. There are several conflicting calls on the possible description of the car and no other evidence that tie Mr. Glasgow or Mr. Whynder to that possible shooting that took place after the homicide.

[As appears in original]

[4] An HRP General Occurrence Hardcopy prepared by Constable Andrew Beaton, filed by the defence, stated the following:

2013/10/11 06:31 Hours, A-30 Kennedy Drive, Dartmouth. ATTEMPTED MURDER. Caller Robyn BROWN of \*\* contacted Regional Police on 911 saying that she heard 5-6 shots fired and a car raced up towards Booth St.

Police received numerous calls in regards to hearing gunshots.

At 06:34 Hours Police received a called from Laura GRANT stating that someone just shot out her windows at her residence situated at \*\* Dartmouth.

At 06:37 Hours an anonymous called stated that the vehicle involved was a newer model Dodge Charger or Challenger and it left the area down Kennedy toward Caledonia.

[As appears in original]

[5] According to transcripts of the testimony of Patrick McClelland, agency operator for Budget Rent-A-Car on Kempt Road, at Mr. Whynder's trial, Jasmina Munroe-Last rented the Dodge Charger on October 8, 2013, at 11:30 A.M., and returned it on October 11, 2013, at 11:44 A.M. Ms. Munroe-Last is associated with Mr. Whynder. The Charger was then cleaned and rented to Lisa Hulbert on October 11, 2013, at 5:27 P.M. and was returned by her on October 13, 2013, at 3:52 P.M. The vehicle was then rented to David Arendall on October 14, 2013, at 8:48 A.M., and was returned almost immediately. Mr. McClelland testified as to the details of the rental to Mr. Arendall:

**Q.** All right. So the car's return on October 13th at 3:52 and did somebody else rent it after that?

**A.** Yes, there would have been, the third page shows a David Arrendell picked up the vehicle on 14 October at 8:48 a.m. on 14 October 2013.

**Q.** All right. And do you have a real time for when David Arrendell returned it?

**A.** That specific vehicle, he was escorted back by officers. He had probably gotten less than a kilometer away when the vehicle was stopped to my recollection and the officer had stopped them because they were looking for the vehicle and he brought that gentleman back to my location to let us know that they were impounding the vehicle and to get this gentleman a different vehicle.

**Q.** Okay. And I ... I apologize, I'm flipping pages here and the jury might so I have ... it would be ... that would be the 5<sup>th</sup> page I guess or the third ... front of the third page is where we look at ... this would be David Arrendell?

**A.** Yeah.

**Q.** Okay. So this would be the last, his name is right there. And I see it's ... the time it went out was ... or the time of rental was October 14, 2013 at 8:48 in the a.m.?

**A.** Yeah.

**Q.** And we have a return date of October 14th at 5:40 but was that when it came back?

**A.** That's not when that specific vehicle came back if we're talking about the vehicle that they originally rented. That's when that gentleman dropped off the

vehicle that he was given in replacement for that vehicle and that would be the time that he dropped that vehicle off.

**Q.** Okay. So you mentioned that they made it about a kilometer?

**A.** Mm-hmm.

**Q.** So although you probably weren't in the car with them?

**A.** No.

**Q.** Tell me ... tell me what happened that ... that morning. You rented this to Mr. Arrendell and he drove it off the lot?

**A.** Yeah, I remember that these folks were in for a ... on a cruise ship and here for a day. They were going to Peggy's Cove. I gave them some information on how to get to Peggy's Cove and they were following my directions quite well because they got onto Young Street which is, yeah, less than a kilometer from ... from our location and then they were turned around. I say they because he had his wife with him.

**Q.** Okay. And that vehicle was brought back by who ... well, he drove it back but who ... who was accompanying them?

**A.** An officer, an HRP officer.

**Q.** Okay. And what did they do with that vehicle?

**A.** They took it. To where I don't know but they took it away.

**Q.** So that vehicle was impounded?

**A.** Correct.

[6] A General Occurrence Hardcopy prepared by HRP Constable Matthew Peters, also filed by the defence, stated:

<b>Type</b>	SUPPLEMENTAL REPORT – 1
<b>Subject</b>	SR-CST PETERS
<b>Author</b>	866593 PETERS,MATTHEW
<b>Related date/time</b>	MONDAY, 2013-OCT-14 09:59

Monday October 14<sup>th</sup> 2013

0901 hours, I, Cst Peters was patrolling out bound on Bayers Rd, Halifax. I noted a Black Dodge Charger in front of me, New Brunswick license plate JGA034. I knew that members in GIS were looking for that vehicle in relation to a shooting in East that occurred on October 11<sup>th</sup>. I performed a traffic stop on the car in front of 6803 Bayers Rd.

There were 4 occupants in the vehicle, All 4 were tourists from Alabama that just got off a cruise ship and had rented the car from Budget car rental on Kempt Rd. Occupants of

the car were Driver – David Arendall, His wife Gwendolyn and Ernest and Renita Rigney, Both couples reside in Vestavia Alabama.

0916 hours, I followed the car to Budget on Kempt Rd, the Arendall's and Rigney's got a new rental car while I informed Patrick McClelland, staff at Budget that the vehicle was going to be seized. McClelland printed off the last weeks rental agreements.

[As appears in original]

[7] At Mr. Whynder's trial, Ms. Hulbert testified about her rental of the Charger:

Q. ... Did you have an opportunity to rent that ... rent a car?

A. Yes.

Q. What kind of car did you rent?

A. A Dodge Charger.

Q. All right. And what did ... what did you do with that Dodge Charger?

A. I went to P.E.I. for the weekend.

Q. Okay. Who was with you?

A. Two of my friends.

Q. All right. And was it vacation or?

A. Just vacation.

Q. All right. And where'd you rent it from?

A. Budget on Kempt Road.

Q. And do you know anybody by the name of Ricardo Whynder?

A. No.

Q. How about anybody by the name of Devlin Glasgow?

A. No.

Q. Evan Carvery?

A. No.

Q. And did you have any of those people or anybody that you didn't know in the car?

A. No.

Q. And so how many people were in that car on the way over?

A. Three altogether.

Q. Okay. And where was everybody seated, do you remember?

A. I was driving and then one in the backseat and the other one in the front with me.

Q. And this is going to sound funny but you guys didn't happen to have any guns with you or anything like that?

A. No.

Q. All right. And did you know a person by the name of Matthew Sudds?

A. No.

Q. Do you know whether or not anybody ... your friends invited anybody that you didn't know into that car when you weren't around?

A. No.

[Emphasis added]

[8] Ms. Hulbert passed away on January 25, 2020. The Crown applied to have her prior testimony admitted for the truth of its contents. On August 5, 2022, Mr. Glasgow consented to the Crown's application, agreeing that the Crown had established threshold necessity and reliability, but reserving the right to argue the ultimate reliability and weight of her previous testimony in front of the jury.

[9] As noted earlier, the GSR Report filed by Dr. Nigel Hearn, of the RCMP Forensic Science and Identification Services Laboratory, concludes as follows:

1. Of the eight sampling stubs from Exhibits C7, C8, C9 and C10, reportedly used to sample the interior of the 2013 Dodge Charger (licence #JGA034):

- A single particle characteristic of gunshot residue (GSR) was found on the sampling stub of Exhibit C7, reportedly used to sample the rear-right interior door frame. No particles characteristic of GSR were found on the sampling stub of Exhibit C7, reportedly used to sample the rear-right door handle, seat belt and interior.
- One or more particles characteristic of GSR were found on each sampling stub of Exhibit C8, reportedly used to sample the front-right door handle, seat belt, interior and interior door frame.
- Particles characteristic of GSR were found on both sampling stubs of Exhibit C9, reportedly used to sample the front-left door handle, seat belt, interior and interior door frame.



- Particles characteristic of GSR were found on both sampling stubs of Exhibit C10, reportedly used to sample the rear-left door handle, seat belt interior [*sic*] and interior door frame.

Therefore, the interior of the 2013 Dodge Charger (licence #JGA034) was in proximity to a firearm being discharged or was in contact with another source of GSR, such as the surface of a firearm, or was in contact with a source of GSR-similar particles. Potential sources of GSR-similar particles may include: some blank firing devices, some cartridge operated industrial tools, some pyrotechnic devices, and some automotive brake and/or airbag components.

[10] In his testimony at Mr. Whynder's trial, Dr. Hearn confirmed that in his opinion the particles identified as gunshot residue originated from a firearm. As to the quantity of particles, his evidence was as follows:

**Q.** And what about the amount of GSR particles on the stubs that you found? And I know you don't do quantitative. But would you say there was a lot there to view and examine or ... and how does that compare with what you would normally see?

**A.** That's a difficult question to answer because we see a great wide variety of things. What I can say is that there was a significant amount of gunshot residue on the stubs that were submitted to us reportedly used to sample the car. We see sometimes samples that come in with one or two particles, some that come in with ten or more particles, some that come in with a hundred or more particles. It's very difficult to draw a concrete conclusion on these because we don't know what actually happened. But the point is that what I would describe as a significant amount of gunshot residue was found on the sampling stubs used to sample the interior of this vehicle to indicate to me either it was exposed to discharge or recently exposed to another source of GSR.

**Q.** And that could come in your expert opinion from a transfer from a person or people who either fired the gun or were in close proximity.

**A.** Again, as the conclusion is written in the report, 9 particles characteristic of gunshot residue were found on the sampling stubs used to sample the interior of the vehicle, and that means one of two generalized conclusions. Either the vehicle interior was in proximity to the discharge of a firearm, or was exposed to a source of GSR by contact by transfer.

## **Position of the parties**

### ***The Defence***

[11] Counsel for Mr. Glasgow says the GSR is inadmissible on the grounds of both probative value and prejudicial effect:

10. The existence of particles consistent with GSR in the vehicle has no probative value to the issue of whether Devlin Glasgow was a principle or party to the homicide of Matthew Sudds.

11. Given the many other possible vectors for the introduction of particles characteristic of GSR into the vehicle, the existence of such particles inside the vehicle has been stripped of whatever slight probative value it may have had.

12. Permitting the introduction of this evidence would have a prejudicial effect on Mr. Glasgow by at least two mechanisms:

a. it would require the defence to adduce evidence through crown witnesses of the other shooting involving a black Dodge Charger to demonstrate the existence of a contaminating event, risking the jury concluding Mr. Glasgow was involved in another serious violent crime involving the use of a firearm,

b. it may force counsel for Mr. Glasgow to call a defence to introduce evidence from witnesses about the existent contamination issues.

13. Permitting the introduction of this evidence would prejudice the trial process by distracting the jury with GSR contamination issues and with other bad conduct issues relating to Mr Glasgow.

14. Permitting the introduction of this evidence would unnecessarily complicate the trial process by requiring mid-trial instructions and jury charge instructions to deal with the issues set out in the preceding paragraph.

[12] In short, the defence says the GSR evidence has “negligible” probative value and significant prejudicial effect if admitted.

### ***The Crown***

[13] The Crown says the following:

Without getting into the entirety of the case, the Crown submits that the GSR has high probative value for this homicide trial. The GSR may lead the Jury to believe a shooting took place within proximity to the vehicle in the area outlined in the evidence. (Which is corroborated with other evidence).

...

Our friend states that the prejudicial effect on her client relates to a possible shooting done with that vehicle after the homicide of Matthew Sudds.

1. There is no probative, coherent or reliable evidence that can point to the vehicle being used in another shooting. If that was case, the Crown may well have decided to call that evidence.
2. While one anonymous caller reported a car that is similar to the Charger at the time of the second shooting, another caller refers to the car as a pink Cadillac. There are several conflicting calls on the possible description of the car and no other evidence that tie Mr. Glasgow or Mr. Whynder to that possible shooting that took place after the homicide.
3. It is always left to the defence to suggest other alternative sources for the DNA, however, it is also up to them to put forward that evidence. Frankly, we would be objecting to any cross examination on this other shooting.
4. This is not a case where “innocence is at stake”. The Crown submits, but could be wrong, the defence is that Mr. Glasgow was nowhere near the car at the time of the shooting of Matthew Sudds. In fact, they will probably state that Crown hasn’t proven he was there at all. Whether GSR is tied to the car or not should have little effect on Mr. Glasgow’s defence.

Given all the above, the Crown submits the evidence has probative value that is not outweighed by the prejudicial effect.

## Analysis

[14] The sole issue in this application is whether the probative value of the GSR evidence outweighs its prejudicial effect.

[15] In *R. v. Hart*, 2014 SCC 52, Moldaver J. discussed the principled analysis and explained the concept of probative value versus prejudicial effect. Regarding the assessment of probative value, he said:

[94] Determining whether the probative value of an item of evidence outweighs its prejudicial effect requires engaging in a “cost benefit analysis” (*R. v. Mohan*, [1994] 2 S.C.R. 9, at p. 21). That is, trial judges must assess “whether [the evidence’s] value is worth what it costs” (*ibid.*). The first step in conducting this exercise, then, is to assess the value of the proposed evidence.

[95] How are trial judges to assess the value of evidence? This requires more than asking whether the evidence is logically relevant; it necessitates some weighing of the evidence. After all, probative means “tending to prove an issue” and “questionable evidence will have less of that tendency” (*R. v. McIntyre*, 1993 CanLII 1488 (Ont. C.A.), at p. 2). It would be “artificial” and “self-defeating” for trial judges to ignore defects in the evidence during the assessment of its value (D. M. Paciocco and L. Stuesser, *The Law of Evidence* (6th ed. 2011), at p.

38). Generally, what this weighing exercise requires will vary depending on the specific inferences sought to be drawn from a piece of evidence.

[96] As one example, trial judges are routinely called upon to determine the admissibility of expert evidence. Part of the admissibility inquiry involves taking stock of the probative value of the proposed evidence. This requires weighing the evidence and assessing its reliability:

When one looks to potential probative value, one must consider the reliability of the evidence. Reliability concerns reach not only the subject matter of the evidence, but also the methodology used by the proposed expert in arriving at his or her opinion, the expert's expertise and the extent to which the expert is shown to be impartial and objective.

(*R. v. Abbey*, 2009 ONCA 624, 97 O.R. (3d) 330, at para. 87, *per* Doherty J.A.)

[97] Similarly, in *R. v. Humaid* (2006), 81 O.R. (3d) 456 (C.A.), Doherty J.A. held that otherwise admissible hearsay evidence may be excluded on the basis that its prejudicial effect outweighs its probative value. This can occur in circumstances where “the credibility or reliability of the narrator of the out-of-court statement is so deficient that it robs the out-of-court statement of any potential probative value” (para. 57). This Court endorsed that approach in *R. v. Blackman*, 2008 SCC 37, [2008] 2 S.C.R. 298, at para. 51.

[98] Undoubtedly, weighing evidence in this way thrusts trial judges into a domain that is typically reserved for the jury. The jury, as the trier of fact, is ultimately responsible for weighing evidence and drawing conclusions from it. The overlap of roles cannot be avoided, but this is not problematic as long as the respective functions of the trial judge, as gatekeeper, and the jury, as finder of fact, are fundamentally respected. In conducting this weighing exercise, the trial judge is only deciding the threshold question of “whether the evidence is worthy of being heard by the jury” and not “the ultimate question of whether the evidence should be accepted and acted upon” (*Abbey*, at para. 89; see also Paciocco and Stuesser, at p. 38).

[16] In *Halsbury's Laws of Canada - Evidence* (2018 Reissue) at § HEV-10, the authors explain probative value and prejudicial effect as follows:

**Probative Value.** Canadian courts have rarely attempted to define probative value. Since probative value must be assessed by a trial judge when evidence is admitted or excluded, probative value should not be equated with the weight that will be assigned to the evidence at the end of the case by the trier of fact. Rather, probative value is best understood as the trial judge's estimate or forecast of the tendency of the evidence, if used properly by the trier of fact, to prove a fact in issue; it is therefore related to the strength and reliability of the evidence. But where the frailties of the evidence relate to the credibility of the witness, Canadian

courts are reluctant to find that it is of low probative value because credibility is best assessed by the trier of fact.

**Prejudicial Effect.** Evidence is not prejudicial merely because it is unfavourable to a party's case; in order to have prejudicial effect, evidence must operate unfairly against the party or otherwise distort the trial process. The principal danger is that the trier of fact will use the evidence for an improper purpose, and in particular that the evidence may create "moral prejudice" by unfairly arousing the trier of fact's "emotions of prejudice, hostility or sympathy". Canadian law also recognizes several forms of "reasoning prejudice" related to the efficiency and fairness of the trial process itself: the attribution of excessive weight to a particular type of evidence, the creation of distracting side-issues for the trier of fact, the undue consumption of time, the possibility of unfair surprise to the opponent, and the danger of presenting the evidence "in such a form as to usurp the function of the jury". All forms of prejudicial effect are of particular concern where the evidence is proffered against an accused person in criminal proceedings; but evidence tendered by the accused may also be excluded if its prejudicial effect substantially outweighs its probative value, if for instance it supports the improper inference that a complainant or alleged victim is not a person worthy of the law's protection, or in a sexual case where it supports the forbidden inference that the complainant, because of their sexual history, was more likely to have consented to the sexual activity in question.

[17] In *R. v. Handy*, 2002 SCC 56, Binnie J. discussed the assessment of the prejudicial effect of evidence:

100 Under this heading, it is necessary to evaluate both moral prejudice (i.e., the potential stigma of "bad personhood") and reasoning prejudice (including potential confusion and distraction of the jury from the actual charge against the respondent). Of importance in this respect is the inflammatory nature of the sexual and domestic abuse alleged by the ex-wife, and the need for the jury to keep separate consideration of the seven "similar fact" incidents from the only charge they were asked to decide, the sexual assault alleged by the complainant.

[18] In discussing how to weigh those two competing concepts, Binnie J. said:

148 One of the difficulties, as McHugh J. pointed out in *Pfennig*, *supra*, at p. 147, is the absence of a common basis of measurement: "The probative value of the evidence goes to proof of an issue, the prejudicial effect to the fairness of the trial." The two variables do not operate on the same plane.

149 As probative value advances, prejudice does not necessarily recede. On the contrary, the two weighing pans on the scales of justice may rise and fall together. Nevertheless, probative value and prejudice pull in opposite

directions on the admissibility issue and their conflicting demands must be resolved.

[19] Justice Moldaver, in *Hart*, explained the weighing of prejudice versus probative value in this manner:

[108] In the end, trial judges must weigh the probative value and the prejudicial effect of the confession at issue and decide whether the Crown has met its burden. In practice, the potential for prejudice is a fairly constant variable in this context. Mr. Big operations are cut from the same cloth, and the concerns about prejudice are likely to be similar from case to case. As a result, trial judges will expend much of their analytical energy assessing the reliability of the confessions these operations generate.

[109] Determining when the probative value of a Mr. Big confession surpasses its potential for prejudice will never be an exact science. As Justice Binnie observed in *Handy*, probative value and prejudicial effect are two variables which “do not operate on the same plane” (para. 148). Probative value is concerned with “proof of an issue”, while prejudicial effect is concerned with “the fairness of the trial” (*ibid.*). To be sure, there will be easy cases at the margins. But more common will be the difficult cases that fall in between. In such cases, trial judges will have to lean on their judicial experience to decide whether the value of a confession exceeds its cost.

[110] Despite the inexactness of the exercise, it is one for which our trial judges are well prepared. Trial judges routinely weigh the probative value and prejudicial effect of evidence. And as mentioned, they are already asked to examine the reliability of evidence in a number of different contexts, as well as the prejudicial effect of bad character evidence. They are well positioned to do the same here. Because trial judges, after assessing the evidence before them, are in the best position to weigh the probative value and prejudicial effect of the evidence, their decision to admit or exclude a Mr. Big confession will be afforded deference on appeal.

[20] The probative value of the GSR evidence is high. Mr. Sudds was shot and killed. There is evidence linking the Charger to the crime. Mr. Sudds’s DNA was found in the vehicle, as was GSR. Mr. Glasgow’s DNA, fingerprints and palm prints were found in the Charger, near Mr. Sudds’s DNA.

[21] Ms. Hulbert testified under oath that she did not know Mr. Sudds or Mr. Whynder. She also said that no one in her party had a gun during her rental of the Charger and no one, aside from her and her friends, was in the Charger while she had it rented.

[22] David Arendall then rented the Charger. He and his party drove it less than a kilometre before they were stopped by the police and the vehicle was returned to Budget and then seized. There is no evidence that during the brief time the Arendall party had the vehicle that GSR was introduced.

[23] When asked about any defence effort to investigate the introduction of GSR by either the Hulbert party or the Arendall party, Ms. Freeman, counsel for Mr. Glasgow, stated:

Ms. Freeman: ...My overall point on the gunshot residue is this: there is some indication that a Dodge Challenger may have been involved in another shooting after the death of Mr. Sudds. I can't stand here and tell you that there is conclusive proof that it was the same car, but there is some evidence – sufficient evidence – that the materials filed in support of the application indicated that the police pulled the car over and found the four Americans in it, on the basis of the information that they had. And, in addition to that potential vector of contamination, we also have there being two other renters, with a total of seven other people in that vehicle after it's returned to the car rental by the associate of Mr. Whynder. The first renter was Lisa Hulbert and she had two other people in the car, and they had the vehicle for three days, and then we have four Americans from the state of Alabama who rented the car and were in it for a short period of time, but a period of time nonetheless. We know that they had disembarked from a cruise ship, they hadn't flown through an airport, and we don't know what activities they may have been involved in on the cruise ship or in their own lives back in Alabama, a southern state where, I think Your Honour... Your Lordship can take judicial notice that it's a gun culture area of the United States. There were four of them in the car, two of them were in the back. So, there are multiple vectors of possible contamination here. We know that the car was cleaned between renters. We know that notwithstanding the cleaning, that evidence was found consistent with gunshot residue in the car and given all of the circumstances, the probative value of their...of the findings, the scientific findings in the car, is so degraded that the evidence shouldn't be admitted. It's just too...too many possible avenues of contamination to be, to make a meaningful contribution to the jury's deliberations. That's my basic argument on...on the gunshot residue. So, unless you have questions of me, and to supplement the written and my now-verbal submissions, that's what I have to say about the gunshot residue.

[24] The Court then asked Ms. Freeman whether or not defence counsel could have investigated whether the subsequent renters may have introduced the GSR or if there was any evidence that the GSR had been introduced by the subsequent renters, taking the defence claim beyond pure speculation. Ms. Freeman said that she had not undertaken any investigation and suggested that her position was that a reasonable inference that could be drawn from the evidence:

Ms. Freeman: I guess we can argue about what's speculative and what's a reasonable inference. I would have called it a reasonable inference, but you may view it as speculation. We could disagree about that. I've looked in the disclosure for interviews from these people. I don't know how to contact them. This happened, I think it was in 2013 that the car was seized – just make sure I'm not wrong about the date – yes, it was 2013 when the car was seized, so that's nine years ago. Who knows if they're even in the same location? I didn't contact them, I don't have addresses for them, I don't know that the Crown has addresses for them, I don't have any indication they were ever interviewed. I put in the materials what I had access to.

Mr. Woodburn: And...and, for my friend's benefit, Lisa Hulbert died during Covid in South Africa, so we'd be making an application at some point with regards to her evidence, so my friend knows.

Ms. Freeman: So, she wouldn't have been available. Thank you, Mr. Woodburn, for that admission. So, I don't even know if they – I don't...I don't...the American...none of the Americans were called the first Whynder trial. I made an assumption, and I will fully own up to that – I probably should have reached out to Mr. Woodburn to see if he had any way of contacting them. I assumed, on the basis that they weren't called, that he didn't. Had they been called during the first Whynder trial, I would have included their evidence.

The Court: Okay, thanks.

[25] So, while Ms. Freeman argued that she did not know how to contact the American renters, the disclosure included in her brief on this application states: “Occupants of the car were Driver – David Arendall, His wife Gwendolyn and Ernest and Renita Rigney, Both couples reside in Vestavia, Alabama.”

[26] As noted, Ms. Hulbert was questioned under oath at Mr. Whynder's trial about her time renting the Charger and her testimony does not lend any credence whatsoever to any suggestion she or her party were responsible for the GSR.



[27] There is no evidentiary foundation for the defence claim that the GSR in the Charger was introduced by the subsequent renters. Nor is there any plausible speculative foundation.

[28] I do not believe there is a reasonable inference to be drawn from the evidence presented on this application connecting the GSR found in the black Charger to a subsequent shooting, but even if there is, it is tenuous and there would be little or no prejudicial effect resulting from the Crown introducing the GSR evidence at trial.

[29] On the other hand, the GSR is logically relevant and is material to the Crown's allegation of a murder by shooting. It has significant probative value, which, I am satisfied, far outweighs its prejudicial effect.

### **Conclusion**

[30] The probative value of the GSR evidence significantly outweighs its prejudicial effect. The Crown is permitted to introduce evidence of the GSR to the jury at trial.

Arnold, J.