SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Riley*, 2023 NSSC 360

Date: 20231002
Docket: CRH-502058
Registry: Halifax

Between:

His Majesty the King

v.

Randy Desmond Riley

DECISION ON AFTER-THE-FACT CONDUCT EVIDENCE, BAD CHARACTER EVIDENCE, BOLSTERING THE CREDIBILITY OF CROWN WITNESS, VOID IN THE EVIDENCE AND *VETROVEC* CONFIRMATORY EVIDENCE

Judge:	The Honourable Justice Arnold
Heard:	September 27, 28, 29, October 1, 2023, in Dartmouth, Nova Scotia
Counsel:	Peter Craig, K.C., and Stephen Anstey, for the Crown Trevor McGuigan, Desiree Jones, and Jordan Richard, for Randy Riley

Overview

[1] Randy Riley's retrial for second-degree murder and unlawful possession of a firearm commenced on September 5, 2023, and the jury acquitted him on October 5, 2023.

[2] In accordance with our Court of Appeal's direction in *R. v. Desmond*, 2020 NSCA 1, I provided the parties with my bare bones bottom-line decisions in relation to several applications during the trial, including whether the Crown had improperly bolstered the credibility of Kaitlin Fuller, whether the Crown introduced the bad character of Mr. Riley, whether the Crown asked the jury to make improper inferences in relation to a void in the evidence, what use could be made of the after-the-fact conduct evidence and what could be considered confirmatory evidence in relation to two *Vetrovec* cautions. These are my written reasons.

Facts

[3] Chad Smith was shot and killed on October 23, 2010. Randy Riley and Nathan Johnson were both charged with first-degree murder and unlawful possession of a firearm in relation to the shooting. They both successfully applied for severance. Nathan Johnson was convicted of first-degree murder by a jury on December 4, 2015. His appeal to the Nova Scotia Court of Appeal was unanimously dismissed (2017 NSCA 64). Randy Riley was convicted of second-degree murder and unlawful possession of a firearm in 2018. The majority of the NSCA dismissed his appeal (2019 NSCA 94), but the Supreme Court of Canada ordered a retrial (2020 SCC 31).

[4] An issue arose during the retrial regarding the Crown eliciting from their witness Ms. Fuller that her mother "prostituted" her as a teenager and introduced her to drugs to "numb the pain", leading to her addiction issues. The defence objected on the basis that the Crown was bolstering its own witness's credibility.

[5] A critical aspect of Ms. Fuller's testimony was whether she was telling the truth regarding a meeting in Cole Harbour between her and Mr. Riley on October 24, 2010, the day after the shooting. At that time, Ms. Fuller says, Mr. Riley threatened to kill her and her brother if she told the police he was involved. Cell phone tracking evidence had Mr. Riley in other locations at the time Ms. Fuller testified he was with her, but there was a period of time in which Mr. Riley's phone was not used and thus could not be located. An issue arose as to whether

the Crown could positively assert that Ms. Fuller was mistaken about the time this meeting took place and whether the Crown could ask the jury to make inferences on the basis of a gap in the cell phone tracking evidence.

[6] In its closing address to the jury, the Crown asked the jury to excuse the problems with Ms. Fuller's credibility and her unsavoury character stating, *"What sort of person would you expect to see who was in a relationship with Nathan Johnson? She literally grew up in the WPP (Witness Protection Program). You think about who would have the confidence, what kind of person would have the confidence of the accused and Nathan Johnson?"*. The defence objected and said that these comments would encourage the jury to improperly consider allegations of Mr. Riley's bad character in their reasoning process.

[7] Crown and defence could not agree on what constituted confirmatory evidence for the *Vetrovec* cautions, nor could they agree on what use the jury could make of after-the-fact conduct evidence.

Bolstering the Credibility of Kaitlin Fuller

[8] During the retrial the Crown called Kaitlin Fuller, who was the subject of a traditional *Vetrovec* caution. Issues arose during the trial regarding a complaint by Mr. Riley that the Crown had bolstered Ms. Fuller's credibility by eliciting evidence from her regarding her mother's "prostituting" her as a young teenager and introducing her to drugs to "numb the pain". Specifically, direct examination of Ms. Fuller included:

> MR. CRAIG: What sort of activities would you be involved with, Kaitlin, say, from the time you were 13 years old until you were 17 years old and entered the Witness Program? Tell the jury a little bit about your life at that point in time.
>
> MS. FULLER: My mom was very addicted to drugs, and she was abused very badly – broken bones, broken nose, everything, like, um, and I had…
>
> …
>
> Q. What was your life like? What was…what sorts of things were you involved in at that point in time?
>
> A. Um, I had to drop out of school, and I raised my sisters, um, and I also…my mom gave me her prescription medications, um, and got me extremely addicted to them.
>
> …

Q. Prescription medication…what kind of prescription medication were you taking?

A. Uh, she was prescribed Oxycontin.

Q. Okay, and she gave that to you?

A. Yes.

Q. And were you taking your mother's prescription medication?

A. Yes, she would give them to me so that I could go steal with her, do things for her.

Q. Okay. I know this is difficult, Kaitlin, but you were doing other things for her. Can you tell the jury, please, what it is specifically you're talking about?

A. When, like, what time frame?

Q. From the time you were 13 until you entered the Witness Protection Program as a 17-year-old.

A. She made me, um, my mom prostituted me, um, and gave me drugs to numb the pain. So…and I had to give her the money so that I could take care of my siblings.

Q. How long did that go on for, Kaitlin?

A. Until I met my spouse.

Q. Okay, and how old were you when that happened?

A. Um, I would have been 18 almost…or 18, sorry.

Q. So, how old were you when you started?

A. I would have been 17.

Q. And the…the addiction you refer to, did you become addicted?

A. Yes.

Q. To the prescription medication?

A. Yes.

Q. Do you take, or did you take, medication in relation to the addiction?

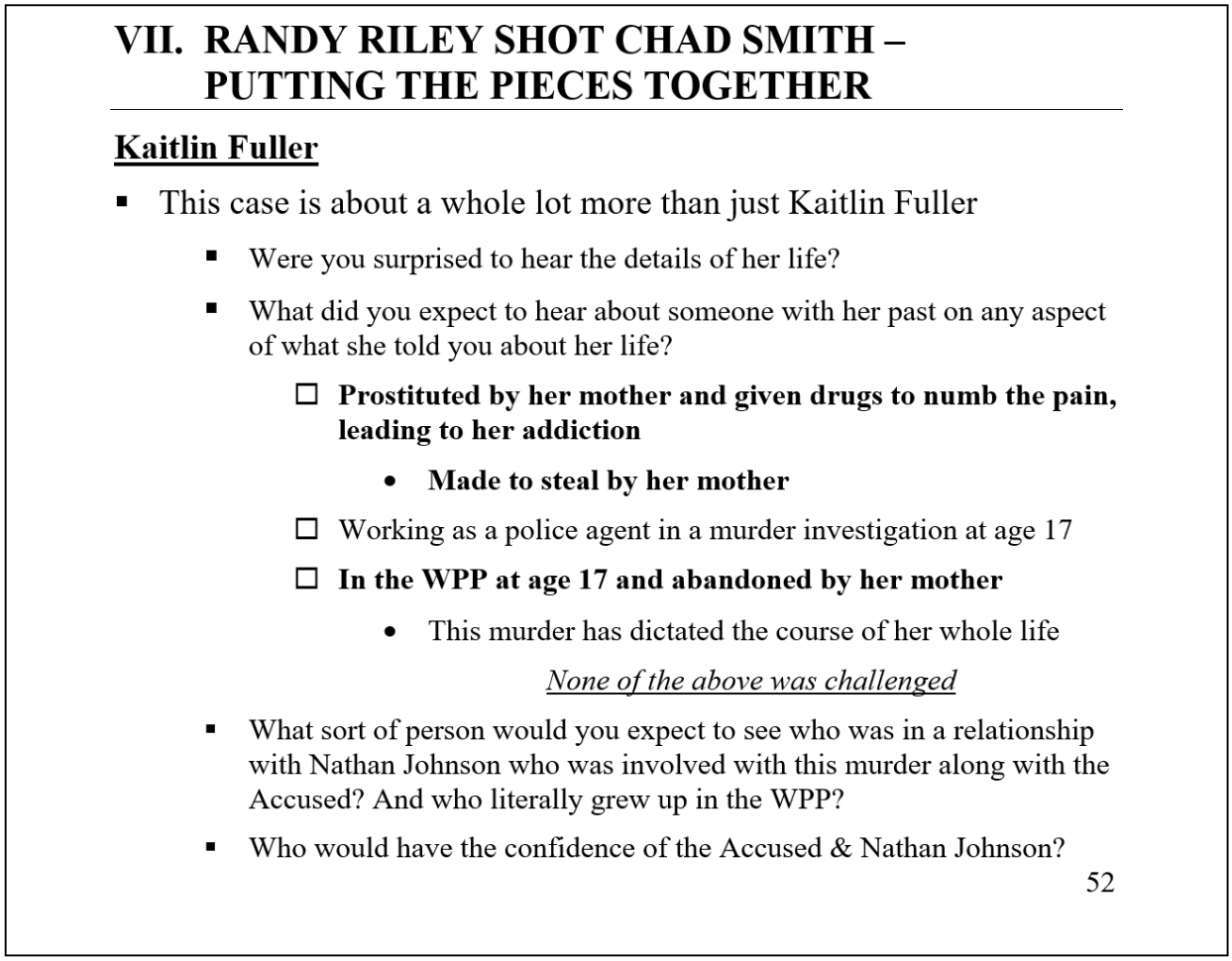
A. After I found out I was pregnant with my daughter.

[9] The defence objected and said that the Crown was engaging in impermissible bolstering of its witness's credibility. In response, the Crown said it was merely "putting a face" on Ms. Fuller, and attempting to pre-emptively address the "inevitable" questions that would arise during cross-examination about

her drug addiction and criminal record. The Crown relied on *R. v. Lebrocq*, 2011 ONCA 405, where the Court stated:

> [14] In a brief cross-examination of one of the defence witnesses, Crown counsel elicited responses indicating that the complainant was a good student and a smart and intelligent girl with a lot of potential. In the context of the evidence as it unfolded at trial, we do not consider these questions put to the defence witness as amounting to impermissible oath helping. Crown counsel is entitled to put a human face on the complainant within limits. Moreover, the same evidence had already been elicited by defence counsel during the witness' examination-in-chief.

[10] In its closing address, the Crown directed the jury to the following PowerPoint slide on this issue:



VII. RANDY RILEY SHOT CHAD SMITH – PUTTING THE PIECES TOGETHER

Kaitlin Fuller

- This case is about a whole lot more than just Kaitlin Fuller
  - Were you surprised to hear the details of her life?
  - What did you expect to hear about someone with her past on any aspect of what she told you about her life?
    - ☐ **Prostituted by her mother and given drugs to numb the pain, leading to her addiction**
      - **Made to steal by her mother**
    - ☐ Working as a police agent in a murder investigation at age 17
    - ☐ **In the WPP at age 17 and abandoned by her mother**
      - This murder has dictated the course of her whole life

    None of the above was challenged
  - What sort of person would you expect to see who was in a relationship with Nathan Johnson who was involved with this murder along with the Accused? And who literally grew up in the WPP?
  - Who would have the confidence of the Accused & Nathan Johnson?

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[Emphasis added.]

[11] The Crown also stated to the jury:

> She was prostituted by her mother and given drugs to numb the pain, leading to her addiction. She was made to steal by her mother. She worked as a police agent in a murder investigation as a 17-year-old. She was in the WPP around that very age and abandoned by her mother.

[12] This evidence was initially elicited by the Crown in direct examination. No questions had been put to Ms. Fuller on cross-examination when the Crown asked her about these topics.

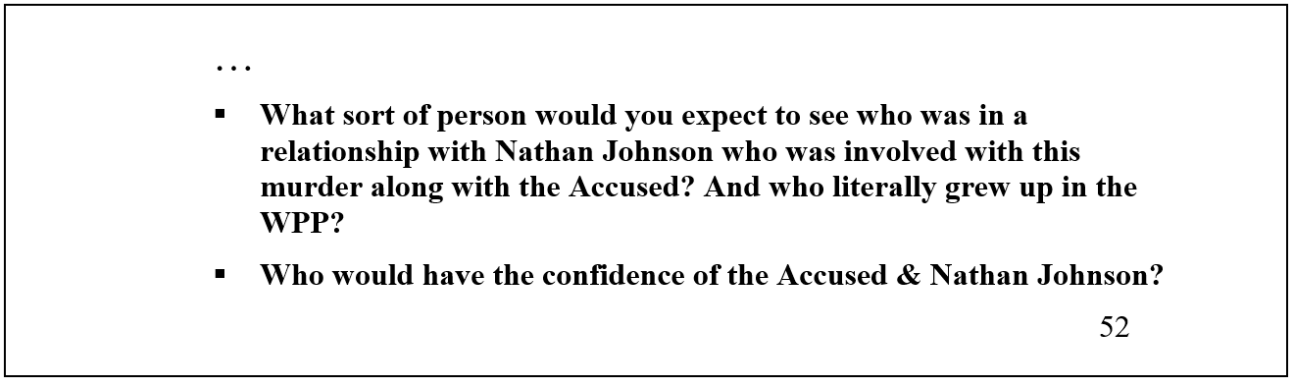
[13] While it may have appeared "inevitable" to the Crown that Ms. Fuller would be asked by the defence about her drug addiction and criminal record in an effort to show her as an unsavory witness with poor credibility, in the context of this case that did not provide the Crown blanket authority to pre-emptively elicit otherwise irrelevant evidence in order to paint Ms. Fuller as a sympathetic character, and therefore somehow more credible. As a result, the jury was instructed as follows:

> **Kaitlin Fuller's involvement in prostitution and introduction to drugs**
>
> You heard Ms. Fuller explain her upbringing and background, in particular she said that her mother prostituted her, introduced her to drugs and that she used drugs to numb the pain. I remind you that, as I stated a few minutes ago, you must consider the evidence at this trial and make your decision without sympathy or prejudice. In particular, you must not be influenced by any sympathy arising from a witness's circumstances and you must make an impartial assessment of the evidence. Ms. Fuller's mother involving her in prostitution and introducing her to drug use has no probative value in this trial.

Bad Character of Randy Riley

[14] As noted, the Crown used a PowerPoint, in conjunction with oral submissions, in its closing address to the jury. The PowerPoint slide noted earlier also included the following, after the references to Ms. Fuller's history:

[Emphasis added]



[15] While this slide was on screen in the courtroom, the Crown, said:

> What sort of person would you expect to see who was in a relationship with Nathan Johnson? She literally grew up in the WPP (Witness Protection Program). You think about who would have the confidence, what kind of person would have the confidence of the accused and Nathan Johnson?

[16] The defence objected following the Crown's closing address on the basis that these comments inferentially invited the jury to consider Mr. Riley's bad character. I agree. The Crown said that it did not intend to infer bad character on the part on Mr. Riley such that the jury might engage in impermissible propensity reasoning. The Crown maintained that they were essentially trying to put the evidence of Ms. Fuller's bad character into context regarding her social circle, which included Mr. Riley. That is no doubt true, but, in the context of this case, there was a real risk that if these comments were left unaddressed, the jury could have engaged in impermissible reasoning based on the bad character evidence, inferentially and directly attributed to Mr. Riley. Therefore, I provided the jury with the following final instruction on this point:

> **Propensity and bad character evidence**
>
> You have heard a lot of information about Kaitlin Fuller and yesterday the Crown stated that "what other sort of person would you expect would be associated with Nathan Johnson and Randy Riley" and "who *else* would have the confidence of Mr. Riley and Mr. Johnson?" You are prohibited from using those comments to determine that Randy Riley is a person of bad character and therefore likely to have committed the offence charged.
>
> It is very important that you do not use those comments to conclude that Mr. Riley is the sort of person who would commit the offences charged. It is also very

> important that you do not reason that you should punish Mr. Riley if you believe he is of bad character.
>
> Again, you are not permitted to use any of those comments to conclude that Mr. Riley is certain type of person and therefore more likely to have committed the offences charged.

Void in the Evidence

[17] Ms. Fuller had provided several traditional statements to the police in 2010, two KGB statements to the police in 2010, had worked as a paid police agent in 2010, had been in and out of the Witness Protection Program between 2010 and 2014, and had testified at Mr. Riley and Mr. Johnson's joint preliminary inquiry, at Mr. Johnson's trial and at Mr. Riley's original trial. In July 2021, she approached the police claiming to have information she had not previously mentioned about Mr. Riley's involvement in the murder.

[18] In all of her previous statements and testimony, Ms. Fuller had said that after the shooting she and another person had picked Mr. Johnson up at his aunt's house on Leeman Drive and driven him to his mother's house on Creighton Street, where she remained for several days, during which time Mr. Johnson made inculpatory admissions, and then assaulted her, leading her to go to the police and tell them about Mr. Johnson and Mr. Riley's involvement in the shooting. However, Ms. Fuller told the police in 2021 that she had not been telling the truth previously. She now said the following was an accurate description of events:

- On the morning of October 24, 2010, she got a text message from Mr. Riley asking Mr. Johnson to call him.
- She overheard the call between Mr. Johnson and Mr. Riley, during which she heard Mr. Riley say that he did not want to speak over the phone and wanted to meet in person.
- After that, she, Mr. Riley, Mr. Johnson, and Mr. Riley's girlfriend, Zenia, arrived at a tunnel in Cole Harbour, near Arklow Drive and John Stewart Drive, where she overheard a conversation between Mr. Riley and Mr. Johnson. She described the conversation as more like an argument. Ms. Fuller said she heard Mr. Riley say that she wasn't meant to know anything that occurred and that Mr. Johnson replied "she's good, she's good".

- About five minutes later Mr. Riley approached her and said "I know that you know some things you shouldn't know about the murder of Chad." He also said that if she said anything he would kill her brother and make her watch, and would kill her.
- After this conversation, Mr. Riley told her he knew she was good and he wasn't going to worry that she would say anything, and made a comment about "pepper". She said that Mr. Riley said he ran over to Tyler Berry's house and washed his hands after the shooting.

[19] On the basis of this new information, Ms. Fuller was readmitted to the Witness Protection Program in 2021.

[20] Ms. Fuller reiterated the gist of her 2021 statement when she testified at Mr. Riley's retrial.

[21] At the retrial, evidence was elicited by the Crown that the cellular telephone number of (902) 233-6280 was associated to Mr. Riley in and around the time of the shooting. Joseph Sadoun was qualified, with the consent of both parties, as a radio frequency and wireless network engineer capable of providing expert evidence on the workings of cellular networks, coverage areas of cell sites, and to provide opinion evidence on the likely location of a cell phone within the network. Mr. Sadoun testified that the phone associated with (902) 233-6280 would interact with various phone towers throughout the Metro Halifax area when the phone was in the coverage area for each respective tower.

[22] Ms. Fuller testified at trial that this event in Cole Harbour with Mr. Riley occurred on October 24, 2010, but her evidence was inconsistent as to the time of day:

> MR. CRAIG: Now, Kaitlin, you'll recall earlier today I was asking you some questions about the events of October 24, and you'll recall you were over at Nathan Johnson's, where he was staying on Creighton Street, and you described Mr. Riley and his girlfriend, Zenia, coming over to pick you up, you and Mr. Johnson, and then he took you over to Cole Harbour, right?
>
> MS. FULLER: Correct.
>
> Q. You recall talking about that?
>
> A. Yes.

Q. And I asked you what time, roughly, that occurred when he got there and you guys left Creighton Street in Halifax to head to Cole Harbour, and you said between 1 and 2 p.m.

A. Correct.

Q. Okay. Now, Kaitlin, do you recall meeting with Mr. Anstey and myself on July 5th, 2023, and Sergeant Stanley was there with us as well at that time?

A. Yes.

Q. Okay and you may recall, or you may have noticed, did you see Sergeant Stanley making notes about certain things you said at the time?

A. Yes.

Q. Okay. I want to show you an excerpt of his notes from that day and I want you to look at it. I don't…read it over…don't…just read it to yourself and I want to…do you agree if you looked at the notes it might refresh your memory in relation to the time?

A. Yes.

Q. Okay. That you say Mr. Riley and his girlfriend came to get you and then when you left Creighton Street. Would that refresh your memory?

A. Yes.

Q. …just read it over. Don't say anything yet and, particularly, the excerpt, the portion at the bottom of the page and you see where it begins, "K.F. says," start there and just read that line and then part of the next line below it.

A. Okay.

Q. Okay, you had a chance to do that?

A. Yup.

Q. …So, Kaitlin, you had a chance to read that over and what I want to ask you now, did that refresh your memory on the sole issue of what you say the time was that Mr. Riley showed up at Nathan's and then you left and drove to…over and the rest of what you described today?

A. Yes.

Q. What time would you say that is now?

A. Between 11 and 12.

[23] Mr. Sadoun testified that on October 24, 2010, at 9:14:58 a.m., the phone used the cell tower covering the East Preston and Cherry Brook area, and the

phone was not used again until 11:05 a.m., when the phone was still using the cell tower covering the East Preston and Cherry Brook area,

[24] Mr. Sadoun said that 540 Arklow Drive in Cole Harbour was not within a coverage area of a cell tower used by (902) 233-6280 on October 23 or 24, 2010. He said that between 11:05 a.m. and noon on October 24, the gaps in time that the phone was in use would likely not be sufficient for the person using the phone to travel to Creighton Street in Halifax and back.

[25] Mr. Sadoun said that based on the cell tower data, between 11:05 a.m. and 1:57 p.m. on October 24, 2010, it would not be possible for the person using the phone to have picked someone up on Creighton Street, drive roughly 20 minutes to 540 Arklow Drive, and spend roughly an hour there between uses of the phone.

[26] During the course of the retrial, including pre-charge meetings, Mr. Riley objected to the Crown asking the jury to draw any inference as to what might have happened between 9:14 and 11:05 a.m. on October 24, 2010. The parties made full submissions on this issue. The following exchange then occurred between the court and counsel:

Mr. Craig:	Okay, the issue, as you can well appreciate, My Lord, is whether or not we're going to be able to reference a point of adjusting Ms. Fuller's time…
The Court:	Here is what I'm going to tell you as a bottom-line, okay?
Mr. Craig:	Okay.
The Court:	It's a repetition of what I said before. The Crown cannot ask the jury to make a finding of fact without an evidentiary basis. So, how you choose to close is your intellectual exercise, okay? So, however you choose to phrase it…but you cannot, cannot, ask the jury to make a finding of fact without some sort of evidentiary basis. That's not new law.
Mr. Craig:	No.
The Court:	I'm not ground-breaking…I'm just telling you that you have to craft your words carefully. Doesn't mean that you can't say Ms. Fuller is wrong here and this is what…
Mr. Craig:	No, no.
The Court:	…you cannot ask the jury to make a finding of fact without an evidentiary basis, cannot do it. And that's the concern of Mr. McGuigan, I believe, that you are going to ask the jury to make a finding of fact without evidence. That's your concern, right?

Mr. McGuigan: Yes.

The Court: And you can't do it. So, that answers your question.

Mr. Craig: I think so.

…

The Court: That is a very basic principle, so you just have to craft it in a way that you don't breach that…that very fundamental rule.

Mr. Craig: Fair enough.

[27] Subsequently, in its closing submissions, the Crown showed the jury the following PowerPoint slides:

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Accused's Phone records

- ***Oct. 24 gap in Accused's call usage from 9:14:58 am until 11:05:14 am***
  - You can infer from the existence of the following individual pieces of evidence that the events Kaitlin Fuller testified about on the morning of Oct. 24/10 occurred during this time period.
    - ☐ We are suggesting that she was mistaken when attempting to pinpoint this timeframe
      - She first described the time of being picked up by the Accused at Creighton St. as between 1:00 pm and 2:00 pm
      - She later corrected this timeframe after refreshing her memory to "between 11 &12"
      - When being asked to pinpoint the time of her 6:30 pm call to the Accused on Oct. 23, prior to refreshing her memory, she said, "It's been 13 years"
      - She was not good at pinpointing times generally in her evidence
    - ☐ She said
      - Next morning
      - Got up and made breakfast
      - Got ready to leave to go home and get the bus
      - This is when the Accused and Zenia show up

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VII. RANDY RILEY SHOT CHAD SMITH – PUTTING THE PIECES TOGETHER

Accused's Phone records

- The Accused's phone was active and being used after 8:00 am starting at 8:37 am. It remained active and in use until after 9:14 am call.
- Sadoun testified the Accused's phone was connected to the Preston tower near his home in Cherrybrook for both of these calls (9:14 am & 11:05 am)
- The Accused's phone is in the Cherrybrook area at 9:14 am
  - ☐ Sgt. Habib testified that this drive from Cherrybrook to Creighton St. is a little over 18 minutes
- Everyone drives to John Stewart/Arklow Dr.
  - ☐ Fuller says this was about a 20 minute drive
  - ☐ Sgt. Habib says this was 23 mins, 12 secs
- Fuller says they stay there for about an hour or so
- Fuller says she is then dropped off at her home on Auburn Dr.
  - ☐ Fuller says less than a 5 minute drive
  - ☐ Sgt. Habib says 4 mins, 20 secs

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VII. RANDY RILEY SHOT CHAD SMITH – PUTTING THE PIECES TOGETHER

Accused's Phone records

- The Accused's phone is in the Cherrybrook area at 11:05 (Sadoun's evidence)
  - Sgt. Habib has drive time from Auburn Dr. to Cherrybrook as 3 mins, 45 secs
- Total Time Calculation – Drive time (49 mins, 17 secs) + about an hour at John Stewart/Arklow Dr. = approx. 1 hr., 50 mins
- Total gap time between calls – 1 hr., 50 mins, 16 secs
  - **NB** – Remember Mr. McGuigan's cross-examination of Fuller
  - She testified she was not aware of any cell tower evidence from the last trial, and there is no evidence to suggest she was aware of or saw any of the Accused's phone records
- ***Can't use your phone when you're in the process of driving and threatening witnesses***

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VII. RANDY RILEY SHOT CHAD SMITH – PUTTING THE PIECES TOGETHER

Accused's Phone records

- Accused's Records indicate call usage commences again at 11:05 am
  - He calls Smith at 11:22
  - He then immediately calls Borden at 11:24
- Accused's phone is located in the coverage area of the Tacoma tower
  - 12:13 pm, 12:15 pm (from Mason Borden whose phone is connected to the same tower [Lawrence St. area; see Ex. 23/26]) and 12:17 pm
- Accused's phone is located in the coverage area of Highfield Park
  - 12:22 pm and 12:29 pm

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[28] Mr. Riley objected to the Crown's closing submissions and PowerPoint slides on this point.

[29] During its submissions, the Crown stayed within the parameters of the law and my earlier bottom-line ruling on this point. There is nothing objectionable in asking the jury to draw the inference that Ms. Fuller was mistaken about the time of her meeting with Mr. Riley, and that it took place during the time his cell phone was not in use.

Confirmatory *Vetrovec* Evidence

[30] While Crown and defence counsel agreed that Paul Smith was a mixed *Vetrovec* witness (*Vetrovec v. HMQ*, [1982] 1 S.C.R. 811), whereby a *W.(D).* instruction (*R. v. W.(D.)*, [1991] 1 S.C.R. 742) was required regarding his exculpatory evidence, and that a *Vetrovec* caution was required for his inculpatory evidence, and also agreed that a traditional *Vetrovec* caution was required in relation to Ms. Fuller, the parties could not agree on certain aspects of what would be considered confirmatory evidence.

[31] In particular, one significant issue related to whether there was any evidence that corroborated Ms. Fuller's claim of having contact with, and being threatened by, Randy Riley on October 24, 2010.

[32] Counsel referred me to a host of cases regarding the traditional and mixed *Vetrovec* caution including *R. v. Smith*, [2009] 1 SCR 146; *R. v. Campbell* (2002) 1 CR (6th) 343 (NSCA); *R. v. Kehler*, [2004] 1 SCR 328; *R. v. Ponce* (2012), 292 C.C.C. (3d) 171 (Man. C.A.); *R. v. Khela*, [2009] 1 SCR 104; and *R. v. Archer*, (2005), 202 C.C.C. (3d) 60 (Ont. C.A.). The most instructive of these are *R. v. Rowe*, 2011 ONCA 753*; R. v. Riley*, 2020 SCC 31; and *R. v. Sparks and Ritch*, 2022 NSCA 52. As the defence noted in its written submissions:

> The Crown suggest that the fact that a pedestrian tunnel as described by Ms. Fuller actually exists is potentially confirmatory. The Defence disagrees. The fact the public geographical location where events are alleged to have occurred is a real place does nothing to assist the jury in finding support/strength for her version of events.
>
> The Crown also suggests that the rough estimate of how long it took to drive from Creighton Street to the tunnel is confirmed by Sgt. Habib. Again, the rough

> amount of time it takes to go from her then boyfriend's home to her own neighbour is incapable of restoring faith in her testimony.
>
> The Crown also claims that her testimony that Mr. Riley said he went to Berry's place following the murder, and she believed he lived in Highfield, is confirmed by cellphone tower evidence that could place Mr. Riley with a broad, and undefined radius that covers the Highfield area in the hours after the murder is confirmatory. The Defence disagrees. Were there evidence from an independent source that placed Mr. Riley at Mr. Berry's home following the events this could confirm her evidence. But being within a wide range of a densely populated area cannot support her testimony in anyway.
>
> Regarding the Crown's position that a phone call from Ms. Fuller's phone to Mr. Riley's phone at 18:24 on October 23, 2010, confirms her evidence that she placed a call at that time, the cellphone records show that this call was four minutes and 35 seconds in length, which the jury could find is inconsistent with her description of that call – that Mr. Riley simply said Nathan was outside and he would get him to call her back. This should be pointed out by the Court in order provide the jury the means to determine whether the evidence is confirmatory.

[33] Ms. Fuller lived in Cole Harbour. She said that the conversation with Mr. Riley on October 24 took place in and around a tunnel located in around Arklow Drive in Cole Harbour. The fact that such a tunnel exists, in the context of Ms. Fuller's evidence, is not independent confirmatory evidence. It is something that would be common knowledge to anyone who lived in the area, such as Ms. Fuller. Similarly, Sergeant Habib stating that the drive from Creighton Street to Cole Harbour took about 20 minutes is knowledge that anyone who had driven from downtown Halifax to Cole Harbour would know. Describing places or distances is not, on its own, confirmatory evidence of the occurrence of an alleged conversation at that location.

[34] By contrast, Ms. Fuller stating that Mr. Riley told her that he went to Tyler Berry's home on Trinity Avenue right after the shooting, and cell phone evidence placing him in the general area of Trinity Avenue/Highfield Park, is independent evidence that a trier of fact could rely on to confirm the accuracy of Ms. Fuller's testimony. Similarly, the phone call Ms. Fuller said she had with Mr. Riley on October 23 around 6:30 p.m. was independently confirmed through cell phone records, although the duration of the call (4 minutes and 35 seconds) did not match Ms. Fuller's description of the conversation (several words/very brief).

[35] An extensive *Vetrovec* caution regarding Ms. Fuller was explained to the jury during the final charge. The following facts were referred to as potential confirmatory evidence in relation to Ms. Fuller's testimony:

> Ms. Fuller said that she was communicating with Mr. Johnson throughout the day on Mr. Riley's phone. Ms. Fuller testified that the phone number she used to communicate with Mr. Riley was (902) 233-6280. The phone records contained in Exhibit 17 show a number of phone calls exchanged between her phone and that number on October 23, 2010.
>
> Ms. Fuller said that she spoke with Mr. Riley at approximately 6:30pm on October 23, 2010. The phone records contained in Exhibit 17 show a call between Ms. Fuller and Mr. Riley at 6:34pm on October 23, 2010 of duration 4 minutes and 35 seconds. Ms. Fuller described the phone call as her speaking with Mr. Riley, asking him where Nathan was, and Mr. Riley telling her that he was outside and that he would get him to call her back, however the call was 4 minutes and 35 seconds in duration.
>
> Ms. Fuller said that she sent Mr. Riley a text message asking him to tell Mr. Johnson to call her back. A copy of a text message sent to (902) 233-6280 was extracted from her phone and is included in Exhibit 19.
>
> Ms. Fuller said that Mr. Riley said that after the shooting of Mr. Smith he ran over to Tyler Barry's house. She said that Mr. Barry lived in Highfield Park. You heard evidence from Paul Smith that Mr. Riley's girlfriend, Zenia, lived on Trinity Avenue. You heard evidence that Highfield Park is a densely populated area. Mr. Sadoun said that between 8:36 and 11:09 pm on October 23, 2010, the (902) 233-6280 phone was in the area of the cell tower in Exhibit 25 which covers the Highfield Park area, as well as Trinity Avenue.

[36] The other disagreement regarding confirmatory evidence was how to categorize evidence provided by Paul Smith, considering that he was a "mixed" *Vetrovec* witness. As noted in the defence submissions:

> Similar to Ms. Fuller, the Defence position is that the Court needs to give the jury necessary context of the potential conformity evidence, so that they have the tools determine whether it is capable of restoring their faith in his evidence. Different than Ms. Fuller, the warning for Mr. Smith only applies to his evidence that incriminates Mr. Riley.
>
> Therefore, if there is evidence that equally confirms his 2018 testimony **and** his testimony in this trial, this evidence cannot logically assist the trier of fact in strengthening their faith in his incriminating version of events. This would include all of the following pieces of evidence put forward by the Crown:

• Spoke with Riley on the phone around 7; we have a call between them at 19:04:17 and another at 19:16:15.

• Says he took them to an area behind the Superstore by Lake Banook, near the MicMac Hotel; located pinging off the Tacoma tower at 19:57:44/evidence from D/Sgt. Habib re: location of MicMac Hotel/area identified on the map at this/prior trial.

• Says he dropped them off in Highfield Park area; phone pings off the tower in that area starting at 20:36:10, and that first call is to Smith, who agreed they weren't calling each other when together, i.e. he had been dropped off at that point.

• Says next day Riley called him before lunch; call to Smith at 11:22:00.

• Says Riley came to visit him about an half hour (prior testimony)/hour (this trial testimony) later; location data has him in the Highfield Park area at 12:22:02 and 12:29:16.

These pieces of evidence equally support his exculpatory version given at this trial. Therefore, including them in the list of potentially confirmatory evidence does not seem appropriate in the context of this case. If the Court decides to include all or some of these points, the Defence position is that it should be made clear, with each item, that the evidence equally supports what Mr. Smith said at this trial.

Next, the Crown has listed the following:

- Says Riley told him this white guy worked at a pizza shop and was working that night; David Bryant confirms

To ensure that that jury has the necessary context to consider whether this is confirmatory, the Court should point the following: that during his 2018 testimony Mr. Smith said that he could not be sure that Mr. Riley actually said that the person was delivery pizza; that Mr. Smith testified at this trial that prior to proving information to the police on July 24, 2013, he was aware that the deceased was a pizza delivery driver.

Next, the Crown listed:

- Says Riley said he had to go and pick up a gun and came out of the apartment with a gun in his pants which was "a couple of ruler sticks"

in length; shotgun which is entered into evidence is confirmed as the murder weapon by Rioux's report and is consistent with the description provided by Smith

Mr. Smith testified that he never saw what was in Mr. Riley's pants, and that he never saw a firearm. For this to be confirmatory, there is an additional inference required – that is, that what Mr. Riley possessed according to Mr. Smith's 2018 testimony, was the shotgun that exhibited at trial, which is a fact that he cannot confirm.

Next:

- Says Riley came out wearing "doctor gloves" and gave a pair to Johnson; gloves matching this description were found proximate to the location of where the murder weapon was located

The Defence is fine with reference to gloves being located, but with language like: "*latex gloves were discovered by police somewhere with Jason McCullough park on November 2, 2010*"

Next:

- Says Riley told him Nate made a call to a pizza place to a phoney address to set it up
    - Bryant's evidence that call came from payphone to order pizza, and that had to correct the caller about the address the order was for
    - Cresswell's evidence about the two men at the payphone where the call came from, based on the admission and the number written down by Bryant

The fact that Mr. Smith attributes a comment to Mr. Riley about the phone call and that David Byrant says a phone call was made to order the pizza is fine with the Defence. Again, however, we feel the court would need to mention that Paul testified that Cst. Fairbairn told him on July 23, 2010, that police believed that Nathan made the phone call to set it up. We do not agree that Kevin Cresswell's evidence is confirmatory of anything.

[37] A detailed "mixed" *Vetrovec* caution was provided to the jury in the final charge regarding Paul Smith. Much of the confirmatory evidence related to Mr. Smith's testimony at Mr. Riley's original trial (inculpatory) and also to his testimony at the retrial (exculpatory). The jury had to be reminded where the independent evidence confirmed both versions of Mr. Smith's testimony. Therefore, the following was explained to the jury regarding the confirmatory evidence in relation to Mr. Smith:

> Paul Smith testified that on October 23, 2010, he received a call from Randy Riley around 7:00 p.m. to pick Mr. Riley up. Exhibit 17, which are the phone records, shows a call between 902-233-6280 and 902-292-7192 – which was Paul Smith's phone number, occurred at 19:04:17 and another at 19:16:15 on October 23, 2010.
>
> However, I must point out that this evidence is equally confirmatory of Paul Smith's exculpatory evidence at this trial.
>
> Paul Smith said that on October 23, 2010, after picking Mr. Riley up on Trinity Drive, he drove Randy Riley and Nathan Johnson to an area behind the Superstore by Lake Banook, near the MicMac Hotel. According to Mr. Sadoun and Exhibit 17 at 19:57:44, the 902-233-6280 cell phone location indicated that it was pinging off the Tacoma tower. Exhibit 26, and the evidence of Sgt. Andre Habib, describe the location of the MicMac hotel and it is identified on the map.
>
> Again, this evidence is equally confirmatory of the exculpatory evidence Paul Smith gave at this trial.
>
> Mr. Smith said that Mr. Riley said he had to go and pick up a "thing" and came out of the apartment with something in his pants which was a "couple of ruler sticks" in length, referring to foot long rulers. The sawed-off shotgun marked as Exhibit 11 was found by Cst. Ron Chaulk along the path which Cst. Jamie Cooke gave opinion evidence was a human track. Jacques Rioux gave opinion evidence in his report (Exhibit 21) that the combination wad (Exhibit 10) retrieved from the sawed-off shotgun and the pellets (Exhibit 29) retrieved from the body of Chad Smith could not be eliminated as having been fired from the shotgun, and that they were consistent in style, shape, size, and materials with the spent and unspent shells recovered from the shotgun (Exhibits 9 & 10).
>
> Paul Smith said that on October 23, 2010, after leaving the Superstore area, he dropped Randy Riley and Nathan Johnson off in the Highfield Park area. Mr. Sadoun said that between 20:36:10 - 23:09 the 902-233-6280 cell phone location indicated that it was pinging off a tower in that area and the call was to Paul Smith, who testified that he and Randy Riley were not calling each other when together.
>
> That evidence of where and when Mr. Riley was dropped off is equally confirmatory of Paul Smith's exculpatory evidence at this trial.

Mr. Smith said that on October 23, Mr. Riley told him that "this white guy" worked at a pizza shop and was working that night. The body of Chad Smith is depicted in Exhibit 1, photo #7. David Bryant testified that Mr. Smith worked at Panada Pizza and was working on the night of October 23, 2010.

Paul Smith said that on October 23, 2010, Randy Riley came out of the apartment building wearing "doctor's gloves" and gave a pair to Nathan Johnson.

On November 1, 2010, Det/Cst Praught was asked to take photos of three latex gloves that were discovered by other officers in Jason McCullough Park and as seen in Exhibit 2, photograph 29, he placed a #2 evidence marker between two latex-type gloves located immediately to the north of the ramp at 4 Franklyn.

Paul Smith said that he was told that the gloves were discovered when the police came to take his DNA a few months later, so this could impact on whether you find this evidence to be confirmatory.

Paul Smith said that Randy Riley called him before lunch on October 24, 2010. Exhibit 17, shows that a call between 902-233-6280 and 902-292-7192, Paul Smith's phone number, occurred at 11:22:00.

Paul Smith said that Randy Riley came to visit him sometime between a half hour and an hour later after the phone call at 11:22:00. Mr. Smith lived in the Highfield Park area. The 902-233-6280 cell phone location indicated that it was pinging off a tower in the Highfield Park area at 12:22:02 and 12:29:16.

This evidence is equally confirmatory of Paul Smith's exculpatory evidence at this trial.

Paul Smith said that Randy Riley told him that "Nate" made a call to a pizza place to a phoney address to set it up. David Bryant testified that the call came from phone number (902) 465-9696 to order the pizza The Aliant payphone at 14 Highfield Park is agreed to have had that number on October 23, 2010. Mr. Bryant testified that the order was originally called in for 15 Highfield Park Drive, Apt 3 and he told the man on the phone that he must have meant 15 Joseph Young and the man said that was what he meant. William Cresswell testified that he saw two people at the phone booth at 14 Highfield Park Drive dressed in dark clothing for around 2 minutes, although he did not see them using the phone, approximately 30 minutes before he saw police cars going up with lights and sirens toward Joseph Young Street.

Paul Smith also said that on July 23, 2013, Cst. Steve Fairbairn told him that police believed that Nathan made the phone call to set up the shooting. Cst. Fairbairn said he did not mention Nathan to Mr. Smith.

Use of After-the-Fact Conduct Evidence

[38] Crown and defence agreed that the following constituted after-the-fact conduct evidence and agreed to the use that could be made of that evidence:

A. The Accused's visit to Paul Smith's apartment on Oct. 24/10; and

B. The Accused's attendance at the residence of Nathan Johnson on Oct. 24/10; his subsequent drive to Arklow Drive; and the events which occur there.

[39] Crown and defence disagreed on the categorization and use of the following after-the-fact conduct evidence:

A. The Accused's calls after the murder on Oct. 23 & 24/10, including those with Nathan Johnson, Paul Smith & Mason Borden; and

B. Location data coupled with Mr. Sadoun's opinion regarding the Accused's location after the murder on Oct. 23/10 and into Oct. 24/10.

[40] Because the parties could not agree on the categorization and use that could be made by the jury, of some of the after-the-fact conduct evidence, they referred to various cases on this issue. The principles espoused in *R. v. Calnen,* 2019 SCC 6 and *R. v. Whynder*, 2020 NSCA 77, were most instructive.

[41] During the course of pre-charge discussions, the parties agreed that because Chad Smith was shot in the chest and upper arm with a 12-gauge shotgun, there was no issue that the shooting was unlawful and that whoever did the shooting had the intent required for murder. Therefore, the issue for the jury was whether the Crown had proven beyond a reasonable doubt that Randy Riley caused Chad Smith's death (i.e. did he shoot and kill Chad Smith). Because of this, the issue as to the use of the after-the-fact conduct in determining Mr. Riley's intent was less significant than it otherwise might have been. The evidence of after-the-fact conduct included:

- At Mr. Riley's original trial, Paul Smith said that on October 24, 2010, he received a call from Mr. Riley before noon, and that Mr. Riley arrived at his apartment about half an hour later. He said that he and Mr. Riley discussed the events of the night before.

- Paul Smith said at the retrial that Mr. Riley called him on October 24, 2010, “maybe” before lunch, and came to his apartment “maybe” an hour or so later.
- Exhibit 17 is the cell phone records for (902) 233-6280. Kaitlin Fuller said that this was the phone number she used to communicate with Mr. Riley on October 23, 2010.
- Exhibit 17 shows that on October 24, 2010, there was a series of calls between (902) 233-6280, and the number Paul Smith said was his at the time, (902) 292-7192. These calls occurred at 11:22 am, 8:26 pm, and 9:54 pm. Paul Smith confirmed that the calls on October 23, 2010, between (902) 292-7192 and (902) 233-6280 contained in Exhibit 17 were calls between himself and Mr. Riley.
- Paul Smith said at the retrial and at the original trial that he and Mr. Riley had contact in person and by phone every other day.
- Mr. Smith said at the original trial and at the retrial that it was normal for he and Mr. Riley to see each other.
- Mr. Smith said at the retrial that he and Mr. Riley simply had a normal conversation on October 24, 2010.

[42] The jury was instructed that they had to determine whether they believed that Mr. Riley had contact with Paul Smith on October 24th by phone and in-person. If they were satisfied that this occurred then they had to go on to decide whether this was because Mr. Riley committed the offence charged on October 23, 2010, as Mr. Smith said at the original trial or for some other reason, as he said at the retrial.

[43] The jury was then instructed that, when considered with all of the evidence, if believed, this evidence could be used to determine whether Randy Riley shot and killed Chad Smith. The jury was also told that they must be careful not to immediately conclude that Mr. Riley called and met with Paul Smith because he committed murder, and not for some other reason. (I note that I had initially ruled that this evidence could also be used to determine Mr. Riley’s intent in shooting Chad Smith. However, both counsel urged me not to instruct on intent, given the agreement that if Mr. Riley was proven to have shot and killed Chad Smith, intention for murder would not be in dispute).

[44] In relation to after-the-fact conduct relating to the evidence of Kaitlin Fuller, the jury was told that she said that on October 24, 2010, Mr. Riley and Nathan Johnson were speaking on the phone while she and Mr. Johnson were at his Creighton Street residence. She said that Mr. Riley then arrived in a vehicle he was driving, and that he drove Mr. Johnson, Ms. Fuller and Ms. Sanchez (Mr. Riley's girlfriend at the time) to a location near the intersection of John Stewart Drive and Arklow Drive in Cole Harbour. While at that location, Ms. Fuller says she overheard a conversation between Nathan Johnson and Mr. Riley, during which Mr. Johnson said, "She's good, she's good". She said that Mr. Riley then approached her, spoke directly with her, and threatened her and her brother.

[45] On this point, the jury was instructed that, if believed, the evidence of Mr. Riley's threats to Ms. Fuller could be used to determine whether he shot Chad Smith. (As with the evidence about the meeting between Mr. Riley and Paul Smith, I had initially ruled that this evidence could also be used to determine Mr. Riley's intent in shooting Chad Smith but ultimately did not instruct on intent in view of counsel's agreement.)

[46] Additionally, the jury was told that Exhibit 17 showed calls made and received from (902) 233-6280, between 12:03 a.m. on October 23, 2010, and 11:20 p.m. on October 24, 2010. Exhibit 17 shows that on October 23, 2010, there was a series of seven calls between (902) 233-6280, and (902) 240-0004, which was the phone number subscribed to by Mason Borden. The Oct. 23, 2010, calls to (902) 240-0004 after 9:20 p.m. were at 9:27 p.m., 9:38 p.m., and 11:28 p.m. The Oct. 24, 2010, calls to (902) 240-0004 were at 11:24 a.m., 12:15 p.m., 3:30 p.m., 3:54 p.m., and 4:34 p.m. Exhibit 17 also shows that two calls were initiated from (902) 233-6280 to Kaitlin Fuller's phone on October 24, 2010, at 7:56 p.m. and 9:55 p.m. Kaitlin Fuller said there was a call between Randy Riley and Nathan Johnson while she and Nathan Johnson were at the Creighton Street residence prior to being picked up by Mr. Riley. Exhibit 17 does not contain any record of this call.

[47] Exhibit 17 also contains location data regarding phone towers in the Metro Halifax-Dartmouth area. As noted earlier, Joseph Sadoun said that when (902) 233-6280 was in use, it would interact with various phone towers throughout the Metro Halifax area when the phone was in the coverage area for each respective tower.

[48] In relation to the evidence of Joseph Sadoun as to the number and timing of calls made to Paul Smith, Kaitlin Fuller, and Mason Borden from the cellular

telephone number of (902) 233-6280 (which was associated with Mr. Riley in and around the date of the shooting), this after-the-fact conduct evidence could be used to determine whether or not it was Randy Riley who shot Chad Smith.

[49] In relation to the evidence of Joseph Sadoun as to the location of the cellular telephone using telephone number (902) 233-6280, the jury was instructed that the evidence was not directly probative as to whether Mr. Riley shot Chad Smith, but, if the jury determined that this was Randy Riley's cellular telephone, this after-the-fact conduct evidence could be used to either confirm or refute the inculpatory evidence of Paul Smith and what Kaitlin Fuller said occurred on October 24, 2010.

Conclusion

[50] This decision comprises my reasons for the jury instructions on the issues of bolstering Ms. Fuller's credibility, bad character evidence relating to the accused, the "void" in the evidence relating to the timing of the meeting at the tunnel, the *Vetrovec* cautions, and the use of after-the-fact conduct evidence.

Arnold, J.