Firearms References

Forensic Evidence in Canada, Second Edition

Chapter 17 “Firearms and Ballistics”, John W. Matthews

Criminal Code

Section 2 Definition of “Firearm”

”firearm” means a barrelled weapon from which any shot, bullet or other projectile can be discharged and that is capable of causing serious bodily injury or death to a person, and includes any frame or receiver of such a barrelled weapon and anything that can be adapted for use as a firearm;

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Minimum penalties

s. 236(a):	Manslaughter, minimum four years if firearm used
s. 244:	Discharging Firearm with Intent to Wound, minimum four years; minimum five years if prohibited or restricted firearm
s. 273(2)(a):	Aggravated Sexual Assault, minimum four or five years if firearm used
s. 279(1.1):	Kidnapping, minimum four years if firearm used
s. 344(a):	Robbery, minimum four or five years if firearm used
s. 346(1.1):	Extortion, minimum four or five years if firearm used

Case law - Constitutionality

Reference Re Firearms Act, [2000] 1 S.C.R. 783

> The licensing and registration provisions of the *Firearms Act* are constitutional. The *Firearms Act* constitutes a valid exercise of Parliament's jurisdiction over criminal law.

Case law - Proving a Weapon is a "Firearm"

R. v. Osiowy (1997), 113 C.C.C.(3d) 117 (Alta. C.A.) at 125

> It is clear that the Crown bears the burden of proving the weapon used during the offence fell within the definition of "firearm" set out in s. 84. There are a number of ways in which the Crown can establish this, and the cases cited above contain several of these ways. For example, the simplest way of proving it was an operable firearm is to establish that it was fired during the offence. Where it was not fired, but is available for expert examination, the Crown may adduce expert evidence that at the time of the offence the weapon was operable and if fired was capable of causing bodily injury or death. Even if the weapon is not available for examination, a witness who is knowledgeable about guns may be able to satisfy the Court that the weapon used was an operable firearm. There may be other witnesses, such as the gun's owner in the *Sibbeston* decision, who give evidence that the gun was operable. The judge is entitled to draw the inference that the weapon was operable, and thus within the definition of "firearm", if sufficient evidence is presented.

R. v. Richards, [2001] O.J. No. 2286 (C.A.) at para 3 - 4

> The appellant further submits that there is no evidence that the objects pointed at the witnesses were firearms as that term as defined within the meaning of s. 2 of the *Criminal Code*.
>
> [...] having regard to the description of the gun given by the witnesses, the circumstances surrounding the use of the gun - namely that the witnesses were ordered to get down on the floor, had a gun pressed to the head, were threatened, and the *modus operandi* indicating that the appellant had ready access to guns called up from different locations prior to the subsequent robbery - it was open to the trial judge to come to the conclusion that the gun used by the appellant was a firearm. The appeal as to conviction is dismissed.

R. v. Charbonneau, [2004] O.J. No. 1503 (Ont. C.A.)

> The evidence of the complainant may have been equivocal on the question of whether the gun was real or fake, but the trial judge had evidence of the complainant's clear belief that is was a gun, her description of the object, the appellant's conduct in relation to it, and his use of it together with the appellant's threat to shoot while holding it. There was a complete absence of evidence to the contrary. Taken together, this is a sufficient foundation for the trial judge's finding that it was a handgun.

Case law - "Capable of Firing Bullets"

R v. Hasselwander, [1993] 2 S.C.R. 398

> A Mini-Uzi submachine gun, which was readily convertible from semi-automatic to fully automatic, was found to be "capable of firing bullets in rapid succession upon single pressure of the trigger" and thus a "prohibited weapon" within the meaning of s. 84(1) of the *Criminal Code*. The Supreme Court held the word "capable" in para. (c) includes an aspect of potential capability for conversion and, given a reasonable interpretation, should be defined as meaning capable of conversion to an automatic weapon in a relatively short period of time with relative ease.

R. v. Goswami (2002), 164 C.C.C.(3d) 378 (Ont. C.A.)

> The accused was charged with four counts of possessing and transferring firearms contrary to ss. 99(1) and 100(1) of the *Criminal Code*. The accused worked in a sporting goods store that sold real and replica guns, as well as starter pistols that fired blank cartridges. An undercover police officer entered the store and asked about a certain starter pistol and asked the accused how he could drill it out so it could fire live rounds. The officer asked the accused where the screw was that had to be removed before drilling. The accused removed a red tab with pliers and handed the gun back to the officer. When the officer asked if that was the place where it should be drilled, the accused shrugged his shoulders. The officer purchased a gun. The accused would have sold him live ammunition if the officer had produced a driver's licence. The officer returned a week later and purchased six more starter pistols and some ammunition. When asked by the officer how his friends could drill out their pistols, the accused said he did not know and said that "whatever they do is their thing". A firearms expert testified that the pistol could be modified in about three minutes to fire live ammunition. The accused was convicted and the conviction was upheld by the Court of Appeal.

Case law - Careless Storage of a Firearm

R. v. Finlay, [1993] 3 S.C.R. 103

> The offence of careless storage of a firearm (s. 86(2) of the *Code*) does not violate s. 7 of the Charter because it allows for at least a defence of due diligence. The fault element under s. 86(2) is conduct that constitutes a marked departure from the standard of care of a reasonably prudent person.

Case law - Expert Opinion on How Firearm was Shot

R v. Sutherland (1993), 84 C.C.C.(3d) 484 (Sask. C.A.)

> 13 The theory of the defence is that the gun discharged accidentally and the bullet struck the gravel and ricocheted, striking the victim and killing her instantly. […]
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> 16 Dr. Vetters, the pathologist called by the Crown, testified that he performed an autopsy on the victim and that the bullet entered the body from the front to the back, from the left to the right, in a victim in the standing position. The entry wound was oval, not round. […]
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> 17 Two firearms experts, Mr. Kramer Powley of the firearms and toolmark section of the RCMP forensic laboratory and Retired Staff Sergeant Shane Kirby, former head of the firearms

and toolmark section of the RCMP forensic laboratory were called to testify for the Crown and the defence respectively. Both experts agreed that given the position of the entry and exit wounds, one would expect the entry wound to be circular rather than oval as a result of a shot fired perpendicularly into the victim, that is at an angle of close to 90 degrees. […]

18 Mr. Powley, the Crown's firearm expert testified that he had been present at the autopsy performed by Dr. Vetters and in his opinion the entry wound was round not oval. He did not however measure the wound. […]

24 Retired Staff Sergeant Kirby testified for the defence. He had listened to the testimony of both Dr. Vetters and Mr. Powley and had examined all the photographs and reports prepared by them. In his opinion the weight of the 303 itself could have caused the accidental firing of the rifle. The rifle weighed approximately eight pounds and that weight alone is sufficient to cause the accidental discharge of the rifle if a person holding the rifle with his finger on the trigger lost his grip momentarily and the rifle started to fall.

25 In Staff Sergeant Kirby's opinion, Dr. Vetters' measurements were accurate and the entry wound was oval and not round. He based that opinion on the examination of the photographs and on hearing Dr. Vetters' testify. In his opinion, if the bullet struck nose on, the entry wound would be round and the bullet wipe around the wound would also be round. In Staff Sergeant Kirby's opinion, the entry wound as described by Dr. Vetters is not consistent with a nose on entry of a bullet directly from the muzzle of the rifle to the chest of the victim. In his opinion the entry wound is consistent with a tumbling bullet and not consistent with having been fired at an acute angle. His opinion was further supported by the fact that the copper jacket on the bullet had broken away from the lead core of the bullet. That was an indication to him that the bullet had struck a hard surface before entering the body of the victim. He was also of the opinion that the path of the bullet through the body was consistent with the bullet having ricocheted off the gravel.

Case law – The Limitation of Expert Opinion (Muzzle Flash)

R v. Neven Belic, *2011 ONCA 671*

1. Firearms expert and muzzle flash evidence

[6] The Crown led the evidence of Shane Staniek of the Centre for Forensic Sciences. Staniek was qualified as an expert in the area of tool mark and firearms identification. He testified that a gun recovered after the shooting was the weapon used to shoot and kill the deceased. He further testified that the marks on the ammunition found in a dresser in a room to which the appellant fled after the incident, also matched the gun used in the shooting.

[7] In cross-examination, defence counsel elicited evidence from Staniek as to the nature of muzzle flash without any objection from the Crown or comment from the trial judge. Defence counsel also advanced the hypothesis that seeing muzzle flash would not enable a witness to identify one person in a group as the shooter. When posing this question, defence counsel used a diagram indicating that the appellant was standing in a group at the time the fatal shots were fired. This diagram, however, was prepared by a witness who did not actually see the muzzle flash.

[8] While Staniek agreed that it would be difficult to attribute the muzzle flash to one person in a group, he added "I don't know if I can really give any kind of qualified answer to that." In re-examination by the Crown he stated:

> If we're just dealing with a flash, I'm finding it difficult to really specifically relate it to some one individual. That's really beginning to be outside my area of firearms expertise.

Later in re-examination, he stated:

> Well one can infer that between the flash and person, there is a gun, but it's dealing with peoples' perceptions which I'm not comfortable commenting on.

However, when pressed further by the Crown in re-examination, Staniek repeated that he did not think it was possible to identify the shooter standing in a group of people on the basis of muzzle flash.

[9] In his closing address to the jury, defence counsel placed substantial reliance on Staniek's evidence in relation to whether the location of muzzle flash could be used to identify the shooter. Defence counsel described Staniek as "a genius" and "brilliant" and submitted:

> He will not attribute who the shooter is in terms of the muzzle flash. That is the firearms expert. Whose evidence are we going to rely on? Eye-witnesses in a bar who probably have never seen a flash of a gun before in their lives, [or] a guy whose life is dedicated to that science. That's reasonable doubt.

[10] Before charging the jury, the trial judge asked both counsel to provide him with a written summary of their respective positions to put to the jury. The trial judge read those summaries into his charge verbatim; including defence counsel's position that Staniek was a "compelling witnesses" who had been "adamant" that a muzzle flash near a person did not necessarily mean that person was the shooter. In articulating the defence position he specifically stated: "[t]his expert's opinion undermines the entire theory of the Crown's case, and questions the observations of most witnesses as it relates to their perception of the exact location of the shooter."

[11] The trial judge then made the following comment which is the focal point of this ground of appeal:

> With respect to that, I would add the following; I note that Mr. Staniek was not qualified as an expert regarding muzzle flash establishing the location of the shooter. Rather, Mr. Staniek was allowed to provide expert opinion evidence as a firearms and tool marks examiner. The issue of a muzzle flash and the location of the shooter in relation to the muzzle flash, is not part of his expert testimony. Rather, that determination does not require expert opinion and may be determined by you the jurors, as part of your common sense interpretation of the evidence before you.

[12] The appellant submits that the trial judge erred in two respects; first, by ruling that evidence as to muzzle flash was inadmissible as expert opinion evidence; and second, by failing

to inform the defence in a timely manner of this ruling thereby undermining the position taken by defence counsel in his closing.

[13] We are unable to accept these submissions.

[14] We see no error on the part of the trial judge in ruling that the significance of muzzle flash evidence as a means of identifying the shooter did not fall within Staniek's area of expertise. While Staniek was permitted to answer questions on the nature of muzzle flash despite only being qualified as a tool mark and firearms identification expert, he was clearly reluctant to offer expert evidence regarding the capacity of a witness to identify a shooter standing in a group on the basis of muzzle flash. Even if he was competent to give expert evidence on the nature of muzzle flash, it was open to the trial judge to interpret his evidence as stating that he was unable to offer an expert opinion on that matter and equally open to the trial judge to so instruct the jury. Accordingly, we see no error in the impugned portion of the charge as it simply reflects a reasonable interpretation of Staniek's evidence.

[15] Furthermore, we are not persuaded that the trial judge erred by failing to provide defence counsel with an earlier warning that the jury would be instructed in this manner. The trial judge gave defence counsel a considerable degree of latitude by permitting him to explore the implications of muzzle flash in view of the fact that he was only qualified as an expert on tool mark and firearms identification. However, it does not follow that having given such latitude, the trial judge was compelled to accept counsel's interpretation of that evidence.

[16] Moreover, given the equivocal and hesitant nature of the evidence defence counsel was able to elicit from Staniek on the issue of using muzzle flash to identify the shooter, the trial judge had no reason to anticipate that defence counsel would interpret the evidence as he did, placing such heavy reliance on it in his closing address. We note here that defence counsel did not provide the trial judge with his written position until immediately before the trial judge commenced his instructions to the jury. It is clear from the exchange between defence counsel and the trial judge mid-way through the jury charge and before he gave the impugned instruction position, that the trial judge was surprised by defence counsel's position. In response to defence counsel's objection to the impugned portion, the trial judge stated:

> With Mr. Staniek, it would appear to me that you were trying to take evidence that isn't part of what he was qualified to give expert opinion evidence about, and juice it up into being expert opinion evidence. So I'm going to correct it.

[17] Given the manner in which the treatment of Staniek's evidence by defence counsel unfolded, we are not persuaded that the trial judge erred by failing to rule on the matter earlier or to warn defence counsel in advance of the nature of the impugned instruction.