

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:)	
)	
HIS MAJESTY THE KING)	
– and –)	Michael Hill and Heather Cook, for the
)	Crown
JACOB NORN)	
)	
Defendant)	Peter Thorning for Mr. Norn
)	
)	
)	HEARD: Jan. 8-12, 18, 19, 2024

REASONS FOR DECISION

M.L. EDWARDS, R.S.J.:

Overview

- [1] It is a well published fact that the number of drug overdoses has been growing exponentially in frequency. The deputy chief pathologist for the Province of Ontario testified in this trial that over the last few years approximately twenty percent of all cases that he sees for an autopsy are related to drug toxicity. In this case the cause of death of an otherwise healthy 18-year-old Tyler Ginn (Tyler) was determined to be “combined fentanyl and etizolam toxicity”. Tyler was found by his father facedown on his bed in his bedroom at around 9:00 a.m. on March 12, 2021.
- [2] Mr. Norn was arrested on March 19, 2021 and charged with a number of counts of possession of a controlled substance; three counts of trafficking and one count of manslaughter. Mr. Norn pleaded guilty before me prior to this trial to one count of trafficking in fentanyl. The issue before this court is whether the Crown has proven beyond a reasonable doubt that it was the fentanyl that Mr. Norn sold to Mr. Ginn that caused his death. There is also an issue as to whether or not a warning given by Mr. Norn to Mr. Ginn not to use too much fentanyl broke the chain of causation.

The Facts

- [3] There are a number of facts in this case that are not in dispute and in fact are agreed to.

- [4] It is admitted that Mr. Norn sold Tyler Ginn \$20 worth of fentanyl on March 11, 2021 at approximately 7:29 p.m. Prior to the actual transaction, which took place outside of Tyler's family residence, there are a number of recorded text conversations between Tyler and Mr. Norn. These conversations begin at 6:59 p.m. and end at approximately 7:29 p.m. A review of these text conversations, in my view, makes clear that Tyler was anxious to purchase fentanyl from Mr. Norn. Tyler paid Mr. Norn by e-transfer which is reflected as part of the Agreed Statement of Fact.
- [5] There is no dispute that Tyler's girlfriend Serenity Storey (Serenity) arrived at the Ginn residence at approximately 6:51 p.m. Video cameras outside the Ginn residence show Serenity waiting to be allowed entry into the residence. She actually enters the residence at about 6:59 p.m.
- [6] The video cameras outside the Ginn residence show a vehicle pulling up outside the residence at approximately 7:30 p.m. The video shows someone leaving the Ginn residence; entering the vehicle and then returning to the residence at about 7:31 p.m. It is beyond dispute that the person seen exiting the Ginn residence was in fact Tyler. The inescapable conclusion is that what is depicted on the video is the purchase and sale of the fentanyl that resulted in Mr. Norn's plea of guilty to trafficking in fentanyl. What Mr Norn disputes is whether the Crown has proven beyond a reasonable doubt that it was the fentanyl he sold to Tyler that caused Tyler's death.
- [7] The video cameras outside the Ginn residence also depict a period of time at about 8:21 p.m. when Tyler and Serenity are seen exiting the residence and entering into a van parked in the driveway. The video appears to depict Serenity and Tyler looking for something in the van. At about 8:24 p.m. Tyler and Serenity leave the van and re-enter the house. Tyler is then seen at about 8:26 p.m. leaving the house alone; entering the van and then re-entering the house at about 8:27 p.m.
- [8] It is also a fact that between 6:59 p.m. and 9:44 p.m. while Serenity was at the Ginn residence she was for the most part in Tyler's bedroom. Serenity left the residence at 9:44 p.m. as depicted in the outside video. She is seen carrying a box. Serenity was the last person to see Tyler alive. Her evidence, which I accept, is that when she left Tyler he was alive but not conscious likely due to his use of fentanyl.
- [9] As a result of a search conducted of Tyler's cellphone it is clear that Tyler was active on his cellphone. Exhibit 16 is an Agreed Statement of Fact reflecting the investigative police report of Tyler's cellphone the evening of March 11. The report reflects the various conversations between Tyler and Mr. Norn. It also reflects two relatively brief telephone calls as well as various messages between Tyler and his grandmother. The report also reflects a relatively brief phone call and one email from Tyler to his employer. Finally, the report reflects two email transfers from Tyler to Serenity.
- [10] The evidence from the police extraction report of Tyler's cellphone reflects that there were no outgoing messages either email, text messages, phone calls or any other from of

communication from Tyler after approximately 9:28 p.m. There was however incoming activity that was not responded to by Tyler.

- [11] Given the evidence from Serenity that Tyler was alive just before she left the residence and given the lack of any outgoing activity on Tyler's cell phone after 9:28 p.m. it is more likely than not that Tyler died shortly after Serenity left the residence. I say this because the cell phone activity on Tyler's phone shows incoming activity that Tyler never responded to. The cell phone activity demonstrates Tyler was a person to respond to incoming calls and texts. His lack of response after 9:28 p.m. leaves with me no doubt that Tyler passed away not long after Serenity left the residence.
- [12] When Tyler's father Sheldon Ginn (Sheldon) went up to Tyler's bedroom at approximately 9:00 a.m. on March 12 he was confronted with the obvious tragedy that his son Tyler was dead. Emergency personnel were dispatched to the residence. Various police officers who attended the residence, as well as the scenes of crime officer observed obvious drug paraphernalia in the bathroom adjacent to Tyler's bedroom. Instructions were given to seize the drug paraphernalia which included four jars of what was suspected to be cannabis. Somewhat remarkably, the other drug paraphernalia including tin foil, a lighter, a propane burner, and purple powder was not seized and remained in Tyler's bathroom after the police and all emergency personnel had left the residence.
- [13] Serenity first discovered that her boyfriend Tyler had passed away at approximately 1:36 p.m. on March 12. Various text messages ensued between Serenity and Sheldon which included a text message at 6:06 p.m. in which Serenity asked Sheldon if he had found any tin foil and any "blue stuff". With the information supplied by Serenity, Sheldon discovered the purple powder and put it into a Ziplock baggie which was eventually picked up by the police a few days later.

Position of the Defence

- [14] It is conceded on behalf of Mr. Norn that there is no doubt that the trafficking of fentanyl is an unlawful act and that the unlawful act is objectively dangerous. The defence however argues that the issue this court must determine is whether or not the Crown has established factual and legal causation beyond a reasonable doubt as between Mr. Norn's unlawful act and Tyler's death and whether trafficking to a sophisticated drug user like Tyler with a warning constitutes an objectively dangerous act.
- [15] Mr. Thorning on behalf of Mr. Norn argues that both Sheldon and Serenity are not credible and reliable witnesses. Mr. Thorning argues that the evidence of Sheldon and Serenity does not establish that Tyler did not have access to or use other fentanyl on the night when he died.
- [16] As it relates to the question of factual causation Mr. Thorning argues that the evidence of the toxicologist did not establish that the amount of fentanyl in Tyler's blood was in the fatal range due to post-mortem redistribution. In that regard Mr. Thorning points to the

evidence of the toxicologist who testified about the variability in post-mortem redistribution which could have been below the range typically associated with fatalities.

- [17] Fundamentally, it is argued on behalf of Mr. Norn that the Crown cannot prove beyond a reasonable doubt that Mr. Norn's actions caused the death of Mr. Ginn. It is argued that there is insufficient evidence of factual causation that the fentanyl supplied by Mr. Norn actually caused his death. It is also argued that Mr. Norn's actions when he warned Tyler against the dangers of using too much fentanyl functioned to eliminate his moral responsibility.
- [18] It is argued on behalf of Mr. Norn that there was abundant evidence at trial that raises a reasonable doubt about whether Mr. Norn's actions caused Mr. Ginn's death. While the evidence of both Sheldon and Serenity establish that Tyler had a drug issue, Mr. Thorning argues that neither Sheldon nor Serenity fully explored in their evidence the extent of Tyler's drug problems. The evidence extracted from Tyler's cellphone is referenced in support of the argument that Tyler was not only a significant drug user but also a drug dealer.
- [19] Mr. Thorning also points to the video evidence which demonstrates that during the evening of March 11, Tyler is seen going to the family van on two occasions and as such it is argued that Tyler had the opportunity to obtain other controlled substances.
- [20] It is argued on behalf of Mr. Norn that the evidence reflects that Tyler had a drug issue with Xanax - a drug also known as etizolam. Mr. Thorning points to the fact that the cause of death was a combination of both fentanyl and etizolam toxicity. As such Mr. Thorning argues that the opinion evidence does not establish beyond a reasonable doubt that Tyler died from a fentanyl overdose.

Position of the Crown

- [21] In his argument Mr. Hill refers to evidence that is not in dispute. Specifically, the fact that Mr. Norn sold Tyler \$20 worth of fentanyl at approximately 7:29 p.m. on March 11 and that within 14 hours Tyler was dead. There is no dispute that Tyler was in good health and that there were only two reasons established in evidence as to why Tyler died. Specifically, that he had a toxic amount of fentanyl in his femoral blood. Etizolam was also detected but the level of etizolam was not toxic. Mr. Hill refers to Exhibit 15, the certificate of analysis that establishes that fentanyl was found in Tyler's bedroom. Mr. Hill acknowledges that Serenity was a flawed witness but argues that fundamental parts of her evidence were not shaken in cross-examination. Specifically, he points to her evidence where she testified that she specifically observed Tyler taking a hit of the fentanyl as well as her observations as to how it affected him in a manner different from how his usage of Xanax would affect him.
- [22] Mr. Hill points to the evidence reflected in Exhibit 16 as well as the Agreed Statement of Fact, which clearly demonstrate that Tyler was anxious to purchase and to use the fentanyl which he ultimately was successful in purchasing from Mr. Norn at 7:29 p.m. Mr. Hill

argues that as a result of these various text messages the court can infer that Tyler did not have access to any other fentanyl as he was anxious to purchase the fentanyl that he purchased from Mr. Norn.

- [23] Mr. Hill acknowledges that the evidence establishes that Tyler did receive a phone call from Mr. Norn and that it was overheard by Serenity. In this phone call Mr. Norn told Tyler not to use too much of the fentanyl as he didn't want anything to happen. More importantly Mr. Norn did not want anything to "come back on him". Mr. Hill argues that this court can draw a number of inferences from this phone call. The most important inference is that Mr. Norn knew just how lethal the fentanyl was that he had sold to Tyler. It is also argued that it can be inferred that Mr. Norn knew how desperate Tyler was to purchase the fentanyl and that Tyler was the type of person who would in fact use it as soon as he purchased it.
- [24] In dealing with the question of whether it was the fentanyl sold by Mr. Norn that killed Tyler, Mr. Hill argues that in fact the correct question this court should answer is whether the fentanyl sold by Mr. Norn was a significant contributing cause to Tyler's death. Mr. Hill argues that there is absolutely no evidence that Tyler purchased any other fentanyl. This is further reflected in the cellphone records that demonstrate that Tyler was only interested in purchasing fentanyl from Mr. Norn.
- [25] As it relates to the argument raised on behalf of Mr. Norn that Tyler may have consumed fentanyl when he used Xanax, Mr. Hill argues that there is no evidence of this so-called phantom fentanyl and that the Crown does not have to prove a negative. Fundamentally Mr. Hill argues that this argument amounts to nothing more than pure speculation.
- [26] As it relates to the defence argument that Mr. Norn's phone call warning Tyler of the danger of using too much fentanyl as breaking the chain of causation, Mr. Hill argues that this argument simply cannot succeed as fentanyl is a well-known and inherently dangerous drug. Anyone participating in the trafficking of fentanyl is fundamentally involved in an inherently dangerous enterprise.
- [27] As it relates to other evidence concerning the tin foil and the straw, Mr. Hill argues that this evidence establishes that Tyler had asked Mr. Norn for these items; items which were found in Tyler's bedroom. There is no evidence that the tin foil and straw came from any other source other than Mr. Norn.

The Expert Evidence

- [28] Cara Shepherd is a toxicologist at the Centre of Forensic Sciences (CFS). She was qualified as an expert in pharmacological toxicology. Her expert report was marked as Exhibit 9. A blood and urine sample taken from Tyler was sent to the CFS for analysis. Initially Tyler's death was treated as a suspected drug overdose and Ms. Shepherd's task was to conduct an examination for drugs and alcohol. Subsequently she was asked to reopen the case and conduct a homicide analysis.

- [29] The sample of blood upon which Ms. Shepherd conducted her examination was drawn from Tyler's femoral artery. The testing conducted involved tests for numerous drugs. In the end result Ms. Shepherd's testing revealed 6.9 ng/ml of fentanyl and 17 ng/ml of etizolam.
- [30] The level of fentanyl in Tyler's blood is significant. The lowest fentanyl concentration associated with fatality is according to the evidence of Ms. Shepherd 3 ng/ml. As for the level of etizolam Ms. Shepherd testified that 17 nanograms is a "therapeutic dose" associated with drowsiness. She described this level of concentration as a "low dosage". Significantly, Ms. Shepherd also testified that there have been no reliable reports of etizolam being associated with fatalities by itself.
- [31] In cross-examination Ms. Shepherd conceded she could not quantify the amount of fentanyl that Tyler had consumed. She was also asked whether there had been any post-mortem redistribution that could be associated with a rise in the level of fentanyl in Tyler's blood that could account for the level of toxicity detected. Because she could not confirm that there might have been some post-mortem redistribution she could not confirm that the amount of fentanyl in Tyler's blood would be associated with fatality.
- [32] Dr. Michael Pickup is the Deputy Chief Forensic pathologist with the Ministry of the Attorney General (MAG). Dr Pickup was qualified as an expert in forensic pathology and cause of death. Dr. Pickup conducted an autopsy on Tyler's body that did not involve an internal examination. Dr. Pickup determined that Tyler was an otherwise healthy 18 year old who presented with no obvious evidence of injury or disease. He testified however that there was clear evidence of fentanyl toxicity and etizolam.
- [33] In coming to his ultimate conclusion Dr. Pickup testified in cross-examination that he took into the account the possibility of post-mortem distribution of drugs. As for the level of toxicity associated with fentanyl and death Dr. Pickup testified that 3 ng/ml is the minimum level based on the literature and that anything higher than this was sufficient for him to opine that Tyler had a toxic/lethal level of fentanyl in his blood.
- [34] As for the findings of both etizolam and fentanyl in Tyler's blood, Dr. Pickup confirmed in his cross-examination that he could not rule out etizolam as the cause of death. More significantly Dr. Pickup testified that both the fentanyl and the etizolam were the cause of death.
- [35] I take from the evidence of Dr. Pickup that there were two reasons why Tyler died. The first is he had a toxic/fatal level of fentanyl in his body. The second is he also had a non-toxic level of etizolam in his body. Based on the expert evidence it is safe to conclude that the level of etizolam increased the toxic effects of the fentanyl.
- [36] The question this court then has to grapple with is whether the fentanyl sold to Tyler was the fentanyl that Tyler consumed and whether that fentanyl (assuming it was Mr. Norn's fentanyl) was a significant contributing cause of Tyler's death.

Analysis***Manslaughter – The Essential Elements***

[37] Mr. Norn, as was his right, did not testify. The onus is on the Crown to prove beyond a reasonable doubt each of the essential elements of the charge of manslaughter. The essential elements that the Crown must prove beyond a reasonable doubt are as follows:

- (a) that Mr. Norn caused Tyler's death;
- (b) that Tyler's death was caused by an unlawful act; and
- (c) that the unlawful act that caused Tyler's death was objectively dangerous.

See *R. v. Creighton*, [1993] 3 S.C.R. 3 at paras. 72-28 and *R. v. H.C.*, 2022 ONCA 409 at paras. 33-34.

[38] In this case the unlawful act, given Mr. Norn's plea of guilty to trafficking fentanyl, was the sale of fentanyl to Tyler. The central issue in this case is whether the sale of the fentanyl by Mr. Norn to Tyler caused his death and whether the sale of the fentanyl was objectively dangerous. The defence argues that the act of trafficking in this case was not inherently dangerous and that the Crown has failed to prove beyond a reasonable doubt that the fentanyl sold by Mr. Norn actually caused Tyler's death.

[39] The issues raised by both the Crown and defence require this court to consider both factual and legal causation. The Crown is required to prove beyond a reasonable doubt a nexus between the sale of the fentanyl by Mr. Norn and Tyler's death.

[40] The issue of factual causation was reviewed recently by the Court of Appeal in *R. v. H.C.*, 2022 ONCA 409 where at para. 38 Coroza J.A. stated:

Factual causation is whether but for the accused's actions, the death would have occurred: see *R. v. Nette*, 2001 SCC 78. The accused's actions will have caused death when their actions are a "significant contributing cause of death" beyond a *de minimis* range: see *Nette*, at para. 71; *R. v. Smithers*, [1978] 1 S.C.R. 506, at p. 519. Factual causation focuses on the connection between the act of the accused and the prohibited consequence, in a mechanical or physical sense: *Romano*, at para. 26.

[41] Another way to frame the issue as it relates to factual causation, is to ask how did Tyler come to his death from a medical, mechanical or physical sense i.e. but for the act of Mr. Norn would Tyler have died: see *R. v. Maybin*, 2012 2 S.C.R. 30 at paras. 4 and 15; *R. v. H.C.* at para. 52 and *R. v. Brazier*, 2023 ONSC 3191 at para. 153.

[42] In establishing factual causation the Crown must establish that Mr. Norn's action in trafficking fentanyl to Tyler was a significant contributing cause of his death beyond the

de minimis range. Stated in a different way, Mr. Norn's act need not be the only cause of death or even the direct cause of death. It may be that his act would not have by itself caused Tyler's death: see *Maybin* at paras. 114 and 120 ; *H.C.* at paras. 38 and 52.

[43] The issue of legal causation provides a limiting function which narrows a wider range of factual causes to those "which are sufficiently connected to a harm to warrant legal responsibility". It is concerned with the question of whether in this case, Mr. Norn is morally innocent and should not be punished. The legal concepts of reasonable foreseeability of harm and intentional independent act are engaged as part of the issue of legal causation: see *Maybin* at paras. 4, 5 and 16 and *H.C.* at para. 38.

[44] As it relates to the issue of reasonable foreseeability and independent intervening act the Court of Appeal in *H.C.* stated a para. 41:

The court explained, at para. 28, that the principles of reasonable foreseeability and independent intervening act are relevant but not dispositive on the issue of causation:

[W]hile such approaches may be helpful, they do not create new tests that are dispositive. Neither an unforeseeable intervening act nor an independent intervening act is necessarily a sufficient condition to *break* the chain of legal causation. Similarly, the fact that the intervening act was reasonably foreseeable, or was not an independent act, is not necessarily a sufficient condition to *establish* legal causation. Even in cases where it is alleged that an intervening act has interrupted the chain of legal causation, the causation test articulated in *Smithers* and confirmed in *Nette* remains the same: Were the dangerous, unlawful acts of the accused a significant contributing cause of the victim's death?

[45] As it relates to the issue of reasonable foreseeability this issue was also addressed by the Court of Appeal in *H.C.* at para. 42 as follows:

With respect to reasonable foreseeability, the court in *Maybin* stated as follows, at para. 30:

An intervening act that is reasonably foreseeable will usually not break or rupture the chain of causation so as to relieve the offender of legal responsibility for the unintended result. This approach posits that an accused who undertakes a dangerous act, and in so doing contributes to a death, should bear the risk that other foreseeable acts may intervene and contribute to that death. Because the issue is whether the actions and

consequences were reasonably foreseeable prospectively, at the time of the accused's objectively dangerous and unlawful act, it accords with our notions of moral accountability. This approach addresses the question: Is it fair to attribute the resulting death to the initial actor?

- [46] Where an intervening act is alleged to have interrupted the chain of legal causation, the question for the court's determination still remains whether the dangerous unlawful act of Mr. Norn was a significant contributing cause of Tyler's death: see *H.C.* at para. 46. An independent or intervening act can only break the causal chain if they are so overwhelming as to make the original unlawful act of the accused "merely part of the history" that leads to the victim's death. The ultimate question remains whether at the time of death did the Mr. Norn's unlawful act continue to be a contributing cause of death: see *Maybin* at paras. 23 and 47 and *H.C.* at para. 46.

Analysis

- [47] Mr. Norn disputes that the fentanyl that he sold Tyler was the fentanyl that actually caused his death. It is argued that the evidence at trial establishes that there could have been other sources of fentanyl available to Tyler that he used which ultimately caused his death. There can be no dispute that the combination of fentanyl and etizolam was the cause of death. The video evidence of Tyler and Serenity searching the inside of the van, it is argued, is suggestive of Tyler searching for drugs. It is also argued that the evidence from Tyler's cell phone establishes that he was not only a drug user but also a drug dealer and had available to him other sources for his drugs other than Mr. Norn.
- [48] As it relates specifically to fentanyl, it is beyond dispute that it is a particularly dangerous drug and that anyone who traffics in fentanyl must know that there is a high risk of fatal overdoses. The prevalence of fentanyl overdoses are reported in the media on a daily basis. As Boswell J. noted in *Brazier* at para. 164 "those who traffic in fentanyl traffic in death. They cannot be said to be morally innocent of the foreseeable consequences of so doing". I completely agree.
- [49] The issue as framed by the defence is whether based on the evidence at trial it can be established that the Crown has proven beyond a reasonable doubt that it was the fentanyl supplied by Mr. Norn that caused Tyler's death.
- [50] The case for the Crown is largely based on circumstantial evidence. Mr. Norn however can only be convicted of manslaughter based on circumstantial evidence if I am satisfied the only reasonable conclusion drawn from the evidence taken as a whole establishes his guilt beyond a reasonable doubt see *R. v. Villaroman*, 2016 SCC 33 at para 32.
- [51] While the Crown may need to negative reasonable possibilities the Crown does not need to negative every possible conjecture, no matter how irrational or fanciful, which might be consistent with the innocence of the accused. "Other plausible theories" or "other

reasonable possibilities" must be based on logic and experience applied to the evidence or the absence of evidence, not on speculation. Circumstantial evidence, viewed logically and in light of human experience, may be reasonably capable of supporting an inference other than that the accused is guilty. *Villaroman*, at para. 38. To justify a conviction, the circumstantial evidence, assessed in light of human experience, should be such that it excludes any other reasonable alternative. *Villaroman*, at para. 39. Alternative inferences must be reasonable, not just possible. *Villaroman*, at para. 42.

- [52] The circumstantial evidence in this case is substantial. It begins with the indisputable fact that Mr. Norn sold Tyler fentanyl. It is also beyond doubt that a lethal dose of fentanyl combined with etizolam was the cause of Tyler's death. As previously discussed the only real issue is whether it was the fentanyl sold by Mr. Norn to Tyler that was the cause of Tyler's death. Framed differently, does the evidence establish a reasonable doubt that Tyler had access to other fentanyl other than what he purchased from Mr. Norn and thus leave open to this court to conclude that it was the "other" fentanyl that killed Tyler.
- [53] There is very little evidence that Tyler was a regular user of fentanyl. His cell phone was searched by the police and the results of that search were entered into evidence as an Agreed Statement of Fact - Exhibit 16. The results of that search would lead me to conclude Tyler was a regular user and even a dealer in illicit drugs. Nothing in Exhibit 16 establishes that Tyler was a regular user of fentanyl.
- [54] The text messages between Tyler and Mr. Norn between 7:00 p.m. and 7:30 p.m. establishes that Tyler was anxious to purchase fentanyl from Mr. Norn. The text messages make clear that Tyler was keen to get access to fentanyl as soon as he possibly could. It is not an unfair inference to draw from these text messages that if Tyler had access to other fentanyl other than what he was purchasing from Mr. Norn he would not have badgered Mr. Norn with numerous follow up texts enquiring where he was and when he would be arriving at his home. The text messages in my view establish that the only fentanyl available to Tyler the night of March 11 was the fentanyl sold by Mr. Norn.
- [55] Mr. Thorning, on behalf of Mr. Norn, argues that the video evidence of Tyler and Serenity entering the van around 8:20 p.m. establishes that he was looking for something. Mr. Thorning asks the court to infer that Tyler was looking for fentanyl that he had hidden somewhere in the van. While I accept that Serenity can be best described as a flawed witness, I do not accept that her evidence is unreliable when she testified she has no idea what Tyler was looking for when they got into the van.
- [56] If Tyler was in fact looking for another source of fentanyl in the van i.e. he had left some in the van, it would not be an unfair suggestion that Tyler would have told Serenity that they were in the van to look for drugs. Serenity testified she had no idea what they were looking for. From her evidence in this regard I can only conclude Tyler never told her they were looking for drugs.
- [57] What is also significant in Tyler's text messages to Mr. Norn are the requests that Tyler made for Mr. Norn to supply him not only with the fentanyl but also the means by which

he would be able to consume the drug - specifically a straw and tinfoil - both of which were also seen in the photographs of Tyler's bathroom - see Exhibit 2, Photograph 73. If Tyler was a regular user of fentanyl it would not be an unfair inference to suggest he would have ready access to straws and tinfoil. In this case he did not - hence his request to Mr. Norm to provide him with a straw and tinfoil.

- [58] There can be no dispute on the evidence that Tyler was a user of non-prescription drugs. Tyler's father acknowledged in his evidence that to his knowledge, his son was using Xanax and may have experimented with other drugs. In Serenity's evidence it is clear that Tyler's drug use extended to far more than just Xanax and included other drugs, including acid, cocaine, mollies, oxycodone, marijuana, dabs and fentanyl. To her knowledge, Tyler never used any illicit drugs using a syringe.
- [59] In her evidence Serenity acknowledged that on one occasion the oxycodone they used had actually been fentanyl and that she had warned Tyler that they had been lied to. Serenity acknowledged that it was 100% possible that a drug could be sold as one thing and it turns out to be something different. This evidence underlies part of the defence argument that the fentanyl that killed Tyler could well have been fentanyl associated with the Xanax that he had taken that night. All of this was acknowledged in the evidence of Serenity.
- [60] In his written submissions and oral submission, Mr. Thorning points to the evidence that Tyler was a known drug user and that he had multiple ways in which he could access drugs. It is also suggested that he had several drug dealers and that he had accessed drugs within his own home.
- [61] Mr. Thorning points to the video evidence of Tyler getting into the van and retrieving several items he suggests were put into his pockets that were never recovered after his death. Mr. Thorning argues that there is a "chance" that the drugs that Tyler overdosed on were not the drugs sold to him by Mr. Norn. It is argued that many illicit drugs can be laced with fentanyl. This is established in the evidence of Detective Paul McIntosh (Exhibit 12, p. 45). There is however, no evidence that the Xanax previously sold to Tyler was in any way "laced with fentanyl". The evidence as to Tyler's cause of death was a fatal overdose of fentanyl and etizolam. Tyler was a known user of Xanax (also known as etizolam) but there is no evidence that the Xanax that Tyler had purchased was in any way laced with fentanyl. The argument made by Mr. Norn in this regard is nothing more than speculation.
- [62] Serenity's evidence is significant as it relates to her observations of Tyler using the fentanyl in his washroom on one occasion on the evening of March 11. She did not see Tyler use the fentanyl on the second occasion when he went into the bathroom. The credibility of Serenity's evidence was called into question on many occasions during the course of her cross-examination. While there certainly were occasions where her evidence was not consistent with earlier statements to the police or her evidence at the preliminary hearing, I fundamentally accept her evidence as it relates to her observations of Tyler the evening of March 11.

- [63] It would have been easy for Serenity to have embellished her evidence by testifying that she saw the second occasion when Tyler went into the bathroom and closed the door, ostensibly, for the purposes of using the fentanyl. She did not do so. She acknowledged she did not see Tyler use the fentanyl on the second occasion. She only testified to her observations of Tyler after that second occasion when he went into the washroom. The fact that Serenity did not embellish her evidence to suggest she saw both occasions when Tyler went into the washroom adds to the credibility and reliability of her critical evidence in this regard.
- [64] Serenity observed how Tyler reacted to the use of Xanax. She also observed how he responded to what he was using behind the closed door of his washroom. She testified how he looked when she left him on his bed. He was breathing but not responding. His presentation after he used what he did in the washroom is not consistent with his usual presentation of using Xanax. The used tin foil and the analysis reflected in Exhibit 15 lead me to the conclusion that Tyler used fentanyl that resulted in him unconscious on his bed at approximately 9:45 p.m.
- [65] Both the Crown and defence rely on the recent decision of Boswell J. in *Brazier*. *Brazier* involved a factual situation where the accused was convicted of manslaughter after supplying the deceased with fentanyl. Boswell J. was called upon to deal with the preliminary issue of factual and legal causation and specifically whether the Crown had established that the fentanyl sold by the accused to the deceased was the fentanyl that the deceased had overdosed on.
- [66] It is argued on behalf of Mr. Norn that *Brazier* is distinguishable from the facts before this court because on the evidence before Boswell J. there was no evidence that the deceased had sources of drugs other than those from the accused. In para. 75 of his reasons, Boswell J. noted that “the deceased was not reaching out to multiple sources” and that the deceased had only just been released from a rehabilitation centre hours prior to his death.
- [67] In the case before this court it is argued on behalf of Mr. Norn that Tyler “had a supply of drugs within his own home” and as such, it is argued the other sources of illicit drugs available to Tyler may have been the cause of his death.
- [68] Counsel for Mr. Norn refers to another decision of Boswell J. in *R. v. Ali*, 2020 ONSC 1719 where the accused was charged with manslaughter in relation to the death of someone to whom he had provided drugs. The deceased in that case had died of an overdose after taking a mixture of heroin and fentanyl. Boswell J. acquitted the accused in *Ali* as there was a reasonable doubt as to whether or not the drugs sold by the accused to the deceased were in fact the drugs that had killed him. This is precisely the issue that is presented on the facts before this court.
- [69] I accept that there is evidence that Tyler was a user of various controlled drugs other than the Xanax that was acknowledged by Tyler’s father. There is, however, no evidence that there was a source of other drugs available to Tyler on the evening of March 11. The evidence of the state of his bathroom reveals evidence of drug paraphernalia. The police

seized four jars of what were believed to be cannabis. While it is remarkable that the police did not seize the purple powder, the tin foil, the straw and the blow torch, there is no evidence of any other controlled drugs in Tyler's bedroom or washroom or anywhere else in the family residence. To suggest Tyler had access to other drugs in his home is again speculation unsubstantiated by hard evidence.

- [70] It is certainly open to the defence to argue that the police investigation is open to criticism. The failure to see the powder, the tin foil, the straw and the blowtorch is remarkable. But there is no evidence of other drugs in the Ginn residence. I am only left to speculate as to whether Tyler had stored drugs in the van and elsewhere in his home.
- [71] The defence argues there were other potential sources of controlled drugs that could have been laced with fentanyl that might have caused Tyler's death. The defence argues that the Crown has not disproved these other potential sources. The Crown, in my view quite rightly, argues that there is no obligation on the Crown other than to prove its case beyond a reasonable doubt. There is no obligation on the Crown to disprove a negative.
- [72] The cause of death as testified to by Dr. Pickup was a combination of a toxic level of fentanyl and etizolam. I accept this evidence. I also accept that there has been no known fatality associated with etizolam but accept that the combination of the two drugs contributed to Tyler's death. The fentanyl that was found in Tyler's femoral blood was the fentanyl sold to Tyler by Mr Norn. But for the sale of that fentanyl Tyler would not have died.
- [73] While the Crown can not establish that it was exclusively the fentanyl that caused Tyler's death in my view based on the expert evidence the Crown has more than established that the fentanyl sold by Mr. Norn was a significant contributing cause of Tyler's death - well beyond the *de minimis* range as per *Nette* at para 71. Mr. Norn knew he had sold Tyler a dangerous drug. This is well established in the phone call from Mr. Norn to Tyler that was overheard by Serenity. Mr. Norn's phone call and warning amply demonstrates that in Mr. Norn's mind it was reasonably foreseeable that the use of the fentanyl could have deadly consequences.
- [74] In my view, the circumstantial evidence in this case leaves this court with no reasonable doubt other than to reach the conclusion that Tyler was anxious to purchase fentanyl from Mr. Norn; that Tyler was anxious to use the fentanyl from Mr. Norn and that the only source of fentanyl that ultimately resulted in the overdose and his death, was the fentanyl supplied by Mr. Norn and that there is no reasonable doubt in that regard.

Mr. Norn's Warning to Tyler – Factual and Legal Causation

- [75] While it is acknowledged that Mr. Norn trafficked the fentanyl to Tyler it is argued by Mr. Thorning that the chain of causation was broken when Mr. Norn contacted Tyler and warned him not to use too much fentanyl.
- [76] The evidence establishes that in fact, Mr. Norn did contact Tyler. Serenity overheard a conversation with an individual she identified as Mr. Norn. She also testified that she saw

on Tyler's phone screen "J. Norn". I accept Serenity's evidence that she overheard Mr. Norn tell Tyler "not to do a lot of the stuff" that he had given Tyler "as he didn't want to be responsible for anything that happened". I also accept Serenity's evidence that she heard Tyler tell Mr. Norn that he did not have to worry as nothing would happen.

[77] Mr. Thorning argues that with this warning the chain of causation has been broken.

[78] There is authority for the proposition that the voluntary consumption of drugs supplied by an accused person may sever the chain of causation. This legal reasoning arises out of the decision of the House of Lords in *R. v. Kennedy* (No. 2), [2007] UKHL 38, [2008] 1 AC 269.

[79] In *Kennedy* the accused had supplied the deceased person with a syringe of heroin. The deceased injected the heroin into himself and later died as a result of alcohol and opiate intoxication. At trial the accused was convicted of manslaughter. The House of Lords acquitted. The question before the House of Lords was:

When is it appropriate to find someone guilty of manslaughter where that person has been involved in the supply of Class A controlled drug, which is then freely and voluntarily self administered by the person to whom it was supplied, and the administration of the drug then causes his death?

[80] The answer to the foresaid question as framed by the House of Lords is reflected in para. 25 of its reasons:

In the case of a fully informed and responsible adult, never.

[81] The reasoning behind the House of Lords' decision apparently arises out of the Court of Appeal's decision in *R. v. Dalby*, [1982] 1 WLR 425 where the Court of Appeal stated:

A supply of drugs would itself have caused no harm unless the deceased had subsequently used the drugs in a form and quantity which was dangerous.

[82] The House of Lords in *Kennedy* ultimately determined that because the deceased had voluntarily injected himself with heroin knowing what it was, this was a full answer to any contention that the accused had "caused" the noxious substance to be administered to or taken by the deceased.

[83] The legal reasoning from *Kennedy* if adopted here in Canada would essentially stand for the proposition that a drug dealer selling controlled drugs is immune from prosecution if the user voluntarily then consumes the drugs with fatal consequences.

[84] With few exceptions, Canadian courts have not followed the principles laid down by the House of Lords in *Kennedy*. In *R. v. MacAllister*, 2003 [O.J. No. 6075] it was successfully argued that the voluntary consumption of a drug such as methadone by the deceased could

sever the chain of causation between the unlawful act and the death of the deceased. Similarly, in *R. v. Jackson*, [2014] O.J. No. 3914 the court found that the voluntary act of an adult who chooses to ingest a lethal dosage of an illegal drug is an intentional and independent act which severs any causal link between the accused's unlawful act of trafficking and the death of the deceased. The House of Lords decision in *Kennedy* was relied upon by the court in arriving at that determination.

- [85] A similar argument was advanced on a summary conviction appeal before Gordon J. in *R. v. Pheasant*, 2013 ONSC 7138. At para. 36 of his reasons, Gordon J. acknowledged the finding made in *MacAllister* that the voluntary consumption of a drug by the drug user could sever the chain of causation between the unlawful act and the death of the user. Justice Gordon however went on to state:

...Although that finding was made in *MacAllister*, and there may be other factual circumstances in which voluntary consumption of a drug may sever the chain of causation, I would not accept this as a general principle. ...

- [86] The Manitoba Court of Appeal in *R. v. Haas* (CJ), 2016 MBCA 42 dealt with the argument endorsed by the House of Lords in *Kennedy* and concluded Canadian jurisprudence on causation has developed differently from that in England. In coming to this conclusion the Manitoba Court of Appeal relied on the leading cases on causation being *Smithers v. R.*, [1978] 1 S.C.R. 506 and *R. v. Nette*, 2001 SCC 78. As it relates to the issue of intervening acts, the Manitoba Court of Appeal referenced *Maybin* from the Supreme Court of Canada.
- [87] Counsel for Mr. Norn argues that the warning that Mr. Norn gave to Tyler severed the chain of causation. In making this argument it is implicitly acknowledged on behalf of Mr. Norn that he knew or must have known that the fentanyl that he had sold Tyler was dangerous. There could be no other reason for his phone call other than his concern that if Tyler took too much of the fentanyl it could potentially have dangerous, if not fatal, consequences.
- [88] While I accept that there is judicial authority for the proposition that the chain of causation is broken once the user of a controlled drug voluntarily ingests a drug the governing law in Canada is that reviewed by the Manitoba Court of Appeal in *Haas* and the Supreme Court of Canada in *Maybin*.
- [89] The question properly framed is whether the risk of harm caused when Tyler ingested the fentanyl was reasonably foreseeable to Mr Norn when he committed the unlawful act of trafficking in fentanyl. As Karakatsanis J explained in *Maybin* at para 30 "...an accused who undertakes a dangerous act, and in so doing contributes to a death, should bear the risk that other foreseeable acts may intervene and contribute to that death".
- [90] Mr. Norn clearly understood the risk of serious harm to Tyler if he used too much fentanyl. There was no other reason for his phone call that evening. It was more than reasonably foreseeable that a drug user like Tyler who clearly wanted to buy fentanyl and to then use

it could use more of the fentanyl than was safe and thus cause a fatal result. The facts of this case do not establish an intervening cause that results in a break in the chain of causation.

- [91] Mr. Norn should be held criminally responsible for trafficking the fentanyl to Tyler and the subsequent consequences. Punishing Mr. Norn would not result in a finding of responsibility for Tyler's death as a result of something for which Mr. Norn was morally innocent of. Mr. Norn should be found legally accountable for Tyler's death. His warning, in my view, does not amount to an intervening act that breaks the chain of causation.

[92] For the reasons set forth above there will be a finding of guilt as it relates to the charge of manslaughter.

Justice M.L. Edwards, R.S.J.

Released: March 28, 2024

CITATION: R. v. Norn, 2024 ONSC 1836

ONTARIO

SUPERIOR COURT OF JUSTICE

HIS MAJESTY THE KING

– and –

JACOB NORN

Defendant

REASONS FOR DECISION

M.L. Edwards, RSJ

Released: March 28, 2024