

MENTAL HEALTH COURT

CITATION: *Re Kane* [2015] QMHC 15

PARTIES: **REFERENCE BY THE DIRECTOR OF MENTAL HEALTH IN RESPECT OF EDEN JAMES KANE**

FILE NO/S: No 0197 of 2014

DELIVERED ON: 25 November 2015

DELIVERED AT: Brisbane

HEARING DATE: 2 November 2015

JUDGE: Boddice J

ASSISTING PSYCHIATRISTS: Dr J G Reddan
Dr R E Phillipson

ORDER: **1. At the time of each of the alleged offences the subject of the reference, the defendant was not of unsound mind as defined in the schedule to the *Mental Health Act 2000 (Qld)*.**
2. In respect of each of the alleged offences, the defendant is fit for trial.
3. Each of the alleged offences is to proceed according to law.
4. Copies of the reports and of the transcript are to be released to the parties in the criminal proceedings.

CATCHWORDS: MENTAL HEALTH - DECLARATION OR FINDING OF MENTAL ILLNESS OR INCAPACITY – where the defendant has been diagnosed with a form of bipolar disorder – where the defendant was charged with abduction of a child under 16 years, deprivation of liberty, entering a dwelling with intent at night, entering premises and committing an indictable offence, and two alleged offences of wilful damage of police property – whether the defendant was of unsound mind as at the time of the index offences
Mental Health Act 2000 (Qld)

COUNSEL: C M Kelly for the Director of Public Prosecutions (Queensland)
S J Hamlyn-Harris for the Director of Mental Health
J D Briggs for the Defendant

SOLICITORS: Office of the Director of Public Prosecutions (Queensland)
Crown Law for the Director of Mental Health
Legal Aid Queensland for the Defendant

- [1] By reference, filed 24 July 2014, the Director of Mental Health referred to this Court the mental condition of Eden James Kane at the time of alleged offences of abduction of a child under 16 years, on 10 April 2014; deprivation of liberty, between 9 April 2014 and 12 April 2014; entering a dwelling with intent at night, on 10 April 2014; entering premises and committing an indictable offence, on 14 April 2014; and wilful damage of police property, on two occasions on 15 April 2014.
- [2] There is no dispute the defendant is fit for trial in respect of each of the alleged offences. At issue is whether he was of unsound mind at the time of those alleged offences.

Background

- [3] The defendant was born on 20 December 1968. He is a single, unemployed man. The defendant has a past criminal history, with offending in 2001 and 2005. In respect of the 2005 offences, he was placed on probation and given a wholly suspended sentence of imprisonment. The defendant apparently completed those orders satisfactorily.
- [4] The defendant has no reported significant health problems, although he has been treated in the past for anxiety and depression. He does have a past history of using and abusing cannabis and alcohol. The defendant's offending in 2005 was said to have occurred against a background of intoxication due to alcohol and cannabis.
- [5] The defendant had no contact with Mental Health Services prior to the alleged offences. His mental health deteriorated in custody. The defendant was admitted to the High Security Inpatient Service at The Park on 5 June 2014 in a floridly manic state. His condition settled with treatment. The defendant was discharged from The Park on 2 July 2015. He is currently receiving treatment under an involuntary treatment order. The defendant's mental state remains stable.

Index offences

- [6] The alleged offences of abduction, deprivation of liberty, and entering a dwelling with intent at night arise out of an incident which occurred in the early hours of 10 April 2014. It is alleged the defendant abducted a three year old child from inside her home in Childers. The child was taken from the living room, where she was sleeping with two other children. Entry was gained through a window. The defendant allegedly took the child to his house and kept her there for some hours.
- [7] The child's disappearance was discovered at around 6:30 am on 10 April 2014. Her blanket and toy dog were missing and footprints were discovered on a vehicle parked directly below the open living room window. Despite an extensive search, the child was not located that day or on the following day. On 12 April 2014, police located her in the Childers Showground, very close to her home. The child was well and in a clean condition. She had been showered and her hair had been washed.

- [8] Two days after police located the child, the defendant packed his belongings into his vehicle and left Childers. He was intercepted by police on the roadside after his vehicle ran out of petrol near Bauple. Prior to being intercepted by police, the defendant had allegedly entered the premises of a tennis club. He stole a number of items from that club. Police apprehended the defendant as he was returning to his vehicle. He then allegedly became agitated and damaged the police vehicle. These events form the basis for the remaining alleged offences.

- [9] Police investigations into the abduction allegedly identified one of the defendant's fingerprints on the outside of a window frame at the home of the child. When police apprehended the defendant, he allegedly admitted he took the child and later brought her back. The defendant reported that he felt sorry for the condition in which the child was living. He told police he was driving to Ballina when he ran out of petrol. The defendant said "I had to get out of Childers because of all the heat". Police noted his vehicle was full of his property, including gardening equipment, clothing and other items.

- [10] When police located the defendant at the roadside, he was recorded as speaking in a disjointed speech. He reported that he had not been able to see his own daughter for 17 years. The defendant was also recorded as saying "I'm f...ing God, I'm the devil, I'm f...ing everything, I'm God, I'm bad, I'm evil, I'm sad, I've got the rest of my life to sing f...ing songs". When he was advised he was under arrest, the defendant replied "I f...ing don't care, you could shoot me in the f...ing head, that would be the best thing for me, that would put me out of my f...ing misery". Later, he remonstrated with police, saying "I'm not playing with you guys. Do you think I can't kill you, think again, I could kill you in different ways, I could both of you right now, I've been trained all my life, Bruce Lee, Buddhism, spiritualism ...".

- [11] When interviewed at the police station, the defendant told police he took the child with her blanket and toy dog and carried her down the street to his vehicle. He then returned to his house where he showered her, washed her hair and looked after her. He subsequently returned her to the showground with a bag of items and a chocolate. The police interview was not able to continue due to the defendant's disorganised behaviour. The defendant was hostile and aggressive. He was detained in a padded cell. He defecated and used his faeces to write on the walls of the watchhouse cell.

- [12] On the day of his arrest, police executed a search warrant on the defendant's residence. Among items found were children's toothbrushes, a hair brush with blond and brown hair attached, a computer with a hard drive ripped out, and numerous other items strewn around the house. Police also discovered a small fire pit near the clothes line, in which they found two burnt computer hard discs, a burnt part of a Pentax camera, a burnt black Telstra mobile phone and a burnt part of a chocolate wrapper similar to the wrapper of the chocolate the child had when she was located at the Childers Showground.

- [13] After the defendant was charged, he was remanded to the Maryborough Correctional Centre. Whilst there, he was recorded as having deliberately exposed his buttocks to a female officer, attempted suicide, again exposed himself to staff, wore toilet paper as shorts, carried a palm card on which he recorded his thoughts and superficially cut words onto his body. As a consequence, he was referred by the senior psychologist for assessment by the Prison Mental Health Service.

- [14] In that assessment, on 6 May 2014, the defendant was recorded as stating that letters scratched into his arm and thigh were approximations of his name. The letter X was in memory of his cousin. He reported that the self-harm was to document his “integrity” and “honesty”, to show that he was unhappy at his perceived mistreatment. The defendant had scratched his name in his skin in case he developed Alzheimer’s Disease and forgot his identity.

- [15] The mental state examination documented restlessness and irritability. The defendant was recorded as reporting that other prisoner and officers had told him to kill himself and he could hear people mumbling and sneaking around behind him. He said he could sometimes read people’s minds, and people could tell him what he was thinking.

- [16] On 13 May 2014, the Prison Mental Health Service psychiatrist, Dr Eve Timmins, assessed the defendant. He told her his bizarre behaviour was explained by his being a nudist. His mental state examination indicated he was restless, irritable and dysphoric, with grandiose delusions. Subsequent assessments recorded that the defendant had been confrontational, abusive and disruptive and had incited other inmates to be unco-operative.

- [17] The defendant was later transferred to the detention unit, where he was reported to spend extended periods of time rapidly talking to himself. He was also recorded as suddenly beginning to laugh and shout profanities. He lay on the floor groaning and complaining of sore arms. He threatened self-harm and was observed walking around his cell naked and talking to himself.

- [18] The defendant’s unusual behaviour continued while he was in custody. There was documented verbal and physical aggression, destruction of property and deliberate flooding of his cell. On 2 June 2014, correctional officers reported the defendant had been awake and pacing naked in his cell throughout the night. On reassessment by the psychiatrist, the defendant was documented as elated, over-familiar, and “giggling” fatuously. He gave incoherent and thought disordered accounts. He was recommended for assessment to the High Secure Inpatient Service at The Park Centre for Mental Health.

- [19] On admission to The Park on 5 June 2014, the defendant was considered a disorganised and tangential historian. He reported having heard “voices” when he smoked cannabis, including on the day of his arrest. He described these voices as in his head. The voices were derogatory and controlling and made him do stupid things. He reported having marked his forearm and thigh with scratches which he described as “artwork”.

Treating psychiatrist

- [20] Dr Scott was the defendant’s treating psychiatrist at The Park. Dr Scott provided an initial report dated 21 July 2014, and a supplementary report dated 27 October 2015. Dr Scott also gave evidence at the hearing.

- [21] In Dr Scott’s opinion the defendant was, at the time of each of the alleged offences, suffering from an untreated mental illness which deprived him of the capacity to know that he ought not do each of the acts in question. The mental illness was either bipolar

disorder type 1 – manic episode with psychotic features or bipolar disorder – mixed episode – manic episode with psychotic features. The manifested features included elevated, irritable mood, grandiose delusions, grossly impaired judgment and profound insightlessness.

- [22] Dr Scott observed in his report that whilst the defendant did not have a recorded history of mental illness, he did have a past admission to hospital after an accidental overdose at age 15, a history of substance abuse and a past presentation of anxiety and depression. The defendant also had behaved aggressively towards family members and caused significant property damage, including setting fires around his property. In 2005, his behaviour culminated in the defendant arming himself with a samurai sword and threatening police. These incidents led to the convictions in 2005.

- [23] Dr Scott further observed that the defendant's mother reported an eight month deterioration in the defendant's mental state from August 2013. The defendant had become increasingly disorganised and irritable. He neglected his self-care, ate less and lost weight. He was also careless in his financial affairs. At the time, it appeared the defendant was abusing cannabis.

- [24] The defendant's mother's last contact with him prior to the alleged offences was on 1 March 2014. She described the defendant as disorganised and disinhibited ("off his head"). The defendant wanted to climb a tall palm tree and place himself at risk near power lines. On 19 March 2014, the defendant had attended a psychologist reporting anxiety, depression and sleep disturbance.

- [25] Dr Scott noted that, when assessed on 6 June 2014, the defendant presented with formal thought disorder and grandiose delusions. He remained irritable, demanding and was highly disorganised in the ensuing days. Nursing staff observed him talking to himself and responding to internal stimuli. He was also observed talking to the television.

- [26] On 12 June 2014, the defendant was secluded for his own safety. He then threatened not to eat or drink and to refuse medication. He threatened nursing staff. He became aggressive and later took off all his clothing. He was released from seclusion and on the next day was recorded as yelling, punching walls and kissing windows. He was again restrained and placed in seclusion.

- [27] In respect of the alleged offences, Dr Scott noted that while the defendant acknowledged he had become mentally unwell before he was alleged to have committed the index offences, he declined to discuss the circumstances of his alleged offences. Notwithstanding the lack of information, Dr Scott opined that there appeared to have been no premeditation or preplanning and the behaviour was quite disorganised. The defendant also showed observable thought disorder when he made statements against his interests to police. Dr Scott opined the defendant was actively psychotic following his arrest.

- [28] In Dr Scott's opinion, whilst the defendant understood what he was doing and had control of what he was doing, he was so unwell at the time of all of the alleged offences that he was deprived of the capacity to know that he ought not do each of the acts which gave

rise to the alleged offences. The defendant was not able to reason with even a moderate degree of sense and composure or to think rationally of the reasons why it was wrong to do what he did.

- [29] In Dr Scott's opinion, the recordings made by police personal field recording devices clearly demonstrated that when the defendant was detained by police, he was experiencing a manic episode with intermittent psychotic features, including grandiose delusions and formal thought disorder. He was clearly agitated and aggressive. His recorded statements, which occurred without the defendant's knowledge, were consistent with an episode of mania with psychotic features.

- [30] Further, the defendant's account of how he came to abduct the child was consistent with him responding to command auditory hallucinations and/or passivity phenomena. The defendant's behaviour in the watchhouse, as observed by CCTV, showed the defendant pacing, posturing, pointing to unseen persons or objects and using his faeces to write on the cell walls. His behaviour in correctional custody was consistent with the defendant remaining manic and actively psychotic.

- [31] Dr Scott opined there was no evidence the defendant was intoxicated at the relevant time. Although the defendant admitted to Dr Scott that his use of cannabis had increased considerably from February 2014, there was no report of alcohol or substance use when the defendant was arrested and there were no physical examination findings consistent with recent intravenous substance use.

- [32] Dr Scott noted that the defendant had reported to Dr Kovacevic that he drank alcohol and smoked cannabis around the time of the alleged offences, but opined there was no objective evidence the defendant was intoxicated at the relevant time. A witness who had been with the defendant on the previous evening, Russell Pearson, did not refer to any observation of the defendant appearing to be intoxicated or affected by alcohol or substances. Police also did not record any evidence of alcohol or substance abuse when the defendant was detained some days later.

- [33] Dr Scott considered it highly improbable the defendant could have taken the child from a room, in which there were two other sleeping children, and returned to his own residence, if he had been intoxicated. Dr Scott considered the defendant's account of his substance use unreliable. He was manic, disorganised and likely psychotic.

Reporting psychiatrist

- [34] Dr Kovacevic examined the defendant on 12 June 2015, pursuant to a Court examination order. The defendant provided an account of a deteriorating mental state for about six months prior to the alleged offences. The defendant was drinking, smoking cannabis and not sleeping well. He reported becoming increasingly depressed and anxious. In January 2014, his general practitioner changed his antidepressant medication. This initially caused some improvement and increase in energy, although people around the defendant expressed concerns about his argumentative attitude, poor appetite and weight loss.

- [35] The defendant reported living alone with limited contacts in the weeks before the alleged offences. He mostly stayed at home drinking alcohol and smoking cannabis. The cannabis made him feel paranoid. The defendant said he began hearing voices argue in his head and telling him to do things some weeks prior to the alleged offences. Some of the voices issued specific demands that he take a little girl. The defendant said he knew the alleged victim and was aware she lived not far from his residence. Although he had never approached the girl or her parents, the defendant reported that he knew the girl's parents were drug addicts and did not care adequately for their children. He felt sorry for the children and contemplated raising one of the girls as his own daughter.
- [36] The defendant told Dr Kovacevic that his use of cannabis and alcohol escalated during the week leading up to the alleged offences. On average, he was drinking two litres of wine per day, five days a week. During the three to four days leading up to the alleged offences, the defendant smoked an average of 20 cones of cannabis a day. He recalled smoking cannabis the day prior to the abduction up to within a few hours of the alleged offences. The defendant said he did not sleep at all the night he took the child until after he brought the child to his house. He desisted smoking cannabis the following day.
- [37] The defendant believed he was affected by alcohol and cannabis at the time he committed the alleged offences. He reported that cannabis made him feel tired and paranoid and made his "voices" worse. The defendant indicated he used to hear voices only after smoking cannabis. The defendant reported that he was saving the child from neglect by taking her from her parents' home. It never crossed his mind that what he was doing was wrong and illegal. He believed he would be allowed to raise the girl as his own daughter.
- [38] The defendant said he made the decision to abduct a child the day before the alleged offence. He recalled climbing in the window and seeing three girls sleeping on mattresses on the floor. He took the smallest, as she was the easiest to carry. He picked up a blanket and a doll the girl had in her hands. The child remained asleep during the short walk back to the defendant's vehicle but woke up whilst being placed into the vehicle. She appear frightened but did not cry. The defendant reassured her and took her to his house, a relatively short distance away. They watched TV together and then went to bed. The child was put to sleep in a separate bedroom. The defendant reported that the girl was happy. She only complained of missing her parents once. He did not lock the girl's bedroom, although the house was locked with all the windows closed.
- [39] The defendant reported that the following morning when he awoke the child was still sleeping. The defendant made breakfast for them. They watched television and DVDs for the balance of the day. After dinner, the girl showered and the defendant helped wash her hair. Sometime before dark, the defendant took the child to an oval across the road from her house. The defendant saw a police car parked on the road. The defendant pointed the child in the direction of her house and left the scene. The defendant recorded that earlier in the day there was a news report about the girl's abduction on TV. The defendant said he thought about what he had done, and knew he should take her back.
- [40] The defendant reported that after leaving the child and returning to his house he engaged in further drinking. The defendant subsequently decided to leave Childers for a while and head to Byron Bay. As the defendant was driving, his vehicle ran out of petrol. The defendant decided to break into the tennis club. The defendant returned to his vehicle

after collecting items, including tennis rackets and cans of Coke. The defendant told Dr Kovacevic that he burnt the computer discs, camera and mobile phone, because they contained personal information and he anticipated police would search his house.

- [41] In his initial report, Dr Kovacevic opined he agreed with Dr Scott's diagnosis of bipolar affective disorder. Dr Kovacevic considered it likely that the use of two different antidepressants in 2005 may have triggered the onset of his first manic episode. In Dr Kovacevic's opinion, the defendant's offending behaviour was driven by a severely disordered mental state characterised by elevated mood, delusions and hallucinations. The defendant was hearing command auditory hallucinations directing him to abduct a little girl. This state deprived him of the capacity to appreciate that what he was doing was wrong. Dr Kovacevic also considered the defendant was deprived of the capacity to control his conduct.
- [42] Dr Kovacevic further opined that as the defendant admitted to drinking heavily and using cannabis in the lead up to the alleged offending, and admitted that the cannabis made him paranoid and exacerbated his auditory hallucinations, it was difficult to argue that alcohol and cannabis did not contribute to any extent to the total mental state which deprived the defendant of those capacities. Accordingly, Dr Kovacevic did not support a finding of unsound mind.
- [43] In his supplementary report, dated 28 October 2015, Dr Kovacevic advised that as a consequence of the receipt of additional material, including witness statements and other documentation, he no longer supported a finding that the defendant was deprived of any of the requisite capacities as a consequence of any mental illness at the time of any of the alleged offences.

Evidence

- [44] Dr Kovacevic expanded on his change of opinion in evidence. The additional material caused him to question the veracity of the defendant's account and the genuineness of his observed symptoms in the period following his arrest. Dr Kovacevic opined that it was significant that Mr Pearson, who had only known the defendant for a very short period of time, and who spent a significant period of time with the defendant shortly prior to the alleged abduction, gave no account indicating any serious disturbance in the defendant's state of mind prior to the alleged offences. The first observed signs of mental disturbance occurred after, not before, the abduction. Further, witness accounts reported attempts by the defendant to cover up his conduct. Those attempts were compelling, and caused Dr Kovacevic to question whether the defendant was deprived of any of the requisite capacities.
- [45] Dr Kovacevic elaborated on the significance of Mr Pearson's account. Mr Pearson reported drinking and smoking cannabis with the defendant at his home. Mr Pearson reflected on the defendant's appearance on the day before the alleged abduction. Nothing in that account was suggestive of observations of any unusual disturbed behaviour. Mr Pearson described the defendant's demeanour and appearance as normal, relaxed and tired. If the defendant was manic, he would be anything but relaxed. The defendant also appeared normal on the subsequent days.

- [46] Mr Pearson also observed that the house contained a child's bed and television equipment. When Mr Pearson returned to the house, after the alleged offences, the house had been cleaned and there were bottles of shampoo in the bathroom which seemed strange in a house occupied by a bald man. Mr Pearson did not comment on the TV equipment observed previously.
- [47] In Dr Kovacevic's opinion, Mr Pearson's account is consistent with the defendant taking steps in the days following the alleged abduction to avoid detection by cleaning the house and destroying incriminating evidence. This behaviour is inconsistent with a person who could not reason with a moderate degree or sense of composure.
- [48] Significantly, Mr Pearson reported the defendant's behaviour changed when he became aware police were taking an interest in the defendant's motor vehicle. The defendant said he had to get out of town and that he wanted to burn the house and start to self-harm. This is the first time Mr Pearson describes changes in the defendant's attitude and behaviour and mental state. On the following day, the defendant burnt items in his backyard, including cameras and mobile phones. Dr Kovacevic considered this significant, particularly having regard to the defendant's later admission that he was burning incriminating evidence he did not want police to find when they searched his house.
- [49] Dr Kovacevic accepted that the defendant's behaviour subsequently, in breaking into the tennis club and taking items, may appear crazy and irrational. However, there was a reasonable explanation for taking those items. The defendant, in his interview with police, said he did not have any money and he relied on exchanging items to barter for other things. Taking a few expensive tennis racquets could give him food along the way.
- [50] Dr Kovacevic opined that the defendant's conversation with police, whilst ultimately abusive and inappropriate, contained interesting references to his knowledge about the publicity of the event. The defendant's conversation during the journey was also relatively standard, with little evidence of mania. There was very little evidence of pressure of speech or flight of ideas. The defendant's conversation was reasonably coherent and logical. The defendant diverted the conversation to other topics and evaded questions. Not much mental disturbance was evident during that conversation.
- [51] Dr Kovacevic also opined that the defendant's behaviour during his first two weeks in custody was not consistent with that of a seriously mentally disturbed person. The defendant was not referred to the Prison Mental Health Service until more than two weeks in custody. The notes and entries of correctional staff did not indicate any particular concerns about the defendant's mental state.
- [52] Further, the defendant was not seen by a psychiatrist until about five weeks after his admission to prison. That psychiatrist's initial assessment was that the defendant may have had hypomania, but did not appear psychotic. That assessment was confirmed by another psychiatrist, who also diagnosed possible hypomania. None of these psychiatrists prescribed the defendant with antipsychotics during his first six weeks in custody.

- [53] In Dr Kovacevic's opinion, the defendant's mental health deterioration whilst in custody may be due to stress or other factors. It did not mean the defendant was manic at the time of the alleged offences. Dr Kovacevic also noted that whilst in The Park High Secure the defendant, on 15 December 2014, was found in possession of several pictures of pre-pubescent girls wearing swimwear and several articles about paedophilia. Dr Kovacevic considered that incident "quite significant".¹
- [54] Dr Kovacevic accepted that the defendant was psychotic whilst in the Park. Whilst it was unclear when that psychosis commenced, Dr Kovacevic did not accept that the defendant might have been psychotic before the offences. The evaluation at the Maryborough Correctional Centre noted that the defendant had a history of depression but there were no risk issues. There were then no notes made in his health records for nine days. This would be highly unusual for somebody who was psychotic on reception to that Centre. Symptoms of mania are easier to observe than psychosis, and difficult to conceal.
- [55] Dr Kovacevic considered it significant that the first recordings of mental disturbance occurred the day prior to the defendant going to court. This would have been a major stressor for him, as would being targeted by fellow prisoners. Dr Kovacevic also noted that the defendant had a history of misrepresenting his symptoms, including admitting to making up symptoms for the purposes of getting himself out of a unit in the past.²
- [56] In Dr Kovacevic's opinion, the defendant's recorded statements in the watch house were the writings of an individual who was angry and distressed, having just been arrested for the offences. Those statements, including the references to religious themes, should be considered in that context. Dr Kovacevic did not consider that these statements, in that context, were compelling evidence of psychosis at the time of the alleged offences.
- [57] Dr Kovacevic also considered it important that the defendant was seen by two psychiatrists whilst in prison and was not considered to be psychotic by either of them throughout the period until 2 June 2014. Dr Kovacevic did not consider that the defendant's letter dated 8 May 2014 was consistent with psychosis. The letter was conversational, made sense and did not contain any bizarre claims or unusual factual circumstances.
- [58] Dr Kovacevic also considered it significant that whilst the defendant had given, as an explanation for taking the child, his concern for her living conditions, there was no evidence to suggest that that motive was delusional. There were no statements suggestive of a mission from deity or some complex delusional symptom. There was nothing from witnesses suggesting the defendant had expressed any particular thoughts about saving the child or anybody else. There was nothing pointing in the direction that the defendant had formed a delusional belief system which ultimately drove his behaviour.³
- [59] Dr Kovacevic accepted it was possible the defendant's mental state changed as a consequence of his increasing cannabis use. The defendant had admitted that he substantially increased his use of cannabis in the months prior to the alleged offences. In

¹ T.1-16/25.

² T.1-21/35.

³ T.1-33/40.

the event there was a deprivation of any capacity, Dr Kovacevic considered there was a clear history suggesting intoxication played a part in that deprivation.

- [60] Dr Scott did not agree with Dr Kovacevic's assessment of the significance of the witness statements and medical records. In his opinion, Mr Pearson would not be a particularly reliable witness about very much of the night in question, and the conversations recorded on the police listening devices were consistent with the defendant being at least manic, if not psychotic. They record the defendant as being agitated, yelling, abusing and saying things that were "frankly, manic, psychotic".⁴ Dr Scott did not consider these recorded conversations could be the work of a manipulative person; it was difficult for people to reliably malingering psychosis or thought disorder.
- [61] Dr Scott agreed that Mr Pearson's account recorded a marked difference between the defendant's presentation on or around 9 April 2014 and when the men next came into contact with each other around 14 April 2014. Dr Scott accepted it was interesting that on the earlier occasion Mr Pearson described the defendant behaving relatively normally, but that on or after the 14th he described him as behaving very erratically. This difference was explicable by the fact the defendant was more disturbed in his mental state after 14 April 2014. Dr Scott accepted that Mr Pearson appeared to have been an accurate historian in respect of bland chronological events, but did not accept he could be accurately relied upon to support a conclusion the defendant was not in a disturbed mental state at or around 9 April 2014.
- [62] Dr Scott further opined that the defendant's behaviour in the watch house was very disturbed, with the defendant clearly responding to internal stimuli. The fact that the correctional records did not record evidence of psychosis was unsurprising as they "have a very high tolerance for disturbed behaviour" in the Maryborough Correctional Centre.⁵ It is likely that staff were hoping he would settle down, but his behaviour throughout was that of a very disturbed prisoner who was in the detention unit for lengthy periods.
- [63] Dr Scott opined that it was likely that the defendant's mental state fluctuated, with periods where he presented less manic and less psychotic. Dr Scott agreed there were no reported observations consistent with mania in the period leading up to the alleged offences, but did not consider there were any reliable informants at that time. The fact the defendant returned the child, whilst consistent with realising he was in trouble, did not say anything about his capacity to think about the wrongness of what he did when he took the child.⁶ The defendant's mental state could change quickly.
- [64] Dr Scott accepted there was little evidence of disturbed behaviour prior to the alleged abduction, but did not consider that meant there was no disturbed behaviour. Dr Scott accepted that the most compelling evidence of mania or psychosis was after the night of 14 April 2014. Dr Scott acknowledged it was possible the mania or psychosis only began on the evening of 14 April 2014, and that that deterioration was because the defendant became aware he was of interest to the police in relation to the abduction.⁷ Dr Scott

⁴ T.1-39/15.

⁵ AB1-40/15.

⁶ AB1-43/20.

⁷ AB1-50/25.

accepted it was also possible the defendant was not deprived of any of the capacities prior to the evening of 14 April 2014.

- [65] Dr Scott opined that the letter written by the defendant on 8 May 2014, whilst containing no bizarre statements, showed he was hypomanic. In his opinion, all of the circumstances, together with the pattern of symptoms evident before the alleged offences and after the alleged offences, were consistent with grandiose religious-type delusions. Dr Scott could not be “more emphatic” that the defendant was deprived of the requisite capacity as a consequence of his mental illness at the time of all the alleged offences.⁸ The defendant was hearing voices in the Park, and was a very unwell patient who remained unwell and required considerable medication and periods in seclusion.
- [66] Dr Scott opined that the information provided by the defendant to Dr Kovacevic, about his consumption of alcohol or drugs prior to the alleged abduction, was of no assistance. That account did not indicate the defendant was intoxicated at the time of the alleged offences and his behaviour, and what happened on the night was inconsistent with intoxication. Dr Scott did not consider using 20 cones of cannabis a day was suggestive of intoxication. The defendant’s prior use would have caused him to develop a tolerance for cannabis. Dr Scott also did not consider that the use of 20 cones a day would have contributed to any extent to the deprivation of the relevant capacity, although he could not exclude that it may have contributed to some extent.⁹
- [67] Dr Scott did not consider the steps taken by the defendant, subsequent to the abduction, to destroy evidence of his involvement inconsistent with a deprivation of capacity. Dr Scott agreed he did not ask the defendant why he had burnt the various items, but said he could not as the defendant would not discuss the circumstances of the offences. Dr Scott accepted the defendant told him he burnt the items as he was destroying identifying evidence. The defendant also told Dr Scott he was leaving town.¹⁰
- [68] Dr Scott agreed that the fact he was able to identify specific items that would identify him, and attempt to destroy them, may seem inconsistent with mania, but opined the defendant has had periods where he did not appear as manic. These fluctuating periods were evidenced by times when he cooperated with police and answered questions coherently. Dr Scott did not consider this supported a conclusion the defendant was not deprived of the requisite capacity:

“he decides he’ll drive to Byron Bay and he breaks down – he runs out of petrol near Bauple, and his next decision is I’ll rob a store while I – I’ve got no means of transport. I’m in a small town on the highway. I think that there are lots of episodes of things that he does that show that he’s manic and not thinking clearly, and there are other times when he’s able to think clearly. That doesn’t mean he’s recovered or that his symptoms have gone into remission. And the behaviours that are very disordered, during those behaviours he’s of unsound mind because he’s deprived of the capacity to think about the wrongfulness of what he’s doing, to think in a composed way. Other times he can think. I think you have to look at specific instances, and

⁸ AB1-54/2.

⁹ AB1-53/25.

¹⁰ AB1-16/35.

you might be able to detect a coherence, a reasoning, and then other times you can't.”¹¹

- [69] Dr Scott also did not consider the circumstances of the alleged abduction to be inconsistent with a deprivation of capacity. The specific activities of making a decision to abduct a girl the day before, climbing in the window, choosing the smallest child (who would be easier to carry), and picking up a blanket and a doll did not speak of deprivation of capacity. However, the defendant contemplating the possibility of raising the child as his own daughter was consistent with a deprivation of capacity.¹²
- [70] Dr Scott accepted that the defendant's actions in leaving the child somewhere else when he saw the police were suggestive of some decision-making capacity, but considered this was consistent with his decision-making capacity having improved as part of his fluctuating condition. Dr Scott accepted that it was possible the defendant's psychosis only started on 14 April 2014, with his mood altering and dramatically becoming markedly worse.¹³
- [71] Dr Scott did not consider the fact the defendant was found, some months later, with photographs of children in swimwear a close enough connection with the alleged offending to render his behaviour no longer bizarre.¹⁴

Submissions

- [72] The defendant's counsel submits that the only capacity in issue is the capacity to know wrongness. A deprivation of that capacity did not require the loss of all reasoning ability. The issue is whether or not the defendant, at the time of the alleged offences, was, as a consequence of his mental illness, unable to appreciate the wrongness of what he was actually doing when he did the acts in question. An ability to rationally carry out the mechanics of the alleged offences was not inconsistent with the deprivation of the ability to appreciate the wrongfulness of those acts. The steps taken by the defendant to destroy evidence subsequently also not inconsistent with the deprivation of the relevant capacity at the time of the alleged offences. The existence of a motive also was not inconsistent with such a deprivation.
- [73] The defendant's counsel submits that careful regard should be had to the defendant's recorded statements to police. They revealed the defendant was being informed by voices and acting at their command. The defendant was “pulled” to the victim's house. Dr Scott's evidence carefully considered these statements. Dr Kovacevic failed to appreciate their significance. Dr Kovacevic's evidence was also internally inconsistent.
- [74] The defendant's counsel submits there was no evidence intoxication contributed, to any extent, to the deprivation of the requisite capacity. There was no objective sign or symptom of intoxication at the relevant time. The defendant's mechanical activities were inconsistent with intoxication. Dr Kovacevic's opinion to the contrary was speculative.

¹¹ T.1-63/25.

¹² AB1-64/30.

¹³ AB1-63/45.

¹⁴ T.1-66/1.

- [75] The Director of Public Prosecutions submits that the Court would accept the opinion of Dr Kovacevic. That opinion was based on a considered analysis of all of the material and was consistent with the lack of any observed signs or symptoms of mania prior to 14 April 2104. The Court would also accept Dr Kovacevic's opinion that intoxication contributed to any deprivation of capacity at the time of the alleged offences. The defendant's own account to Dr Kovacevic was of the consumption of significant amounts of alcohol and cannabis within hours of the alleged abduction. Dr Scott's opinion ignored that self-report and placed too much emphasis on an alleged tolerance to the consumption of alcohol and cannabis.
- [76] The Director of Mental Health did not make any submission as to what conclusion should be reached by the Court.

Assisting Psychiatrists

- [77] Dr Reddan advised it was significant that Dr Scott acknowledged that the defendant refused to discuss the specifics of the alleged offences with him at all. In contrast, Dr Kovacevic obtained a detailed account. Against that background, it was difficult to see how Dr Scott could give an opinion about unsoundness of mind at the time of the alleged offences.
- [78] Dr Reddan advised the Court ought to accept and prefer Dr Kovacevic's opinion that the defendant was not deprived of any of the requisite capacities at the time of the alleged offences of abduction, deprivation of liberty and entering a dwelling with intent at night. In any event, consuming 20 cones of marijuana per day, even in a person with a high tolerance to drugs and alcohol, would have contributed, to an extent, to any deprivation of the requisite capacity.
- [79] Dr Reddan advised that in respect of the remaining alleged offences there was evidence the defendant was deprived of the requisite capacity. That is consistent with the defendant's mental state rapidly deteriorating under the stress of his knowledge of the police interest in him. However, in that event, the issue of intoxication was still very much alive in respect of those alleged offences.
- [80] Dr Phillipson agreed with Dr Reddan. Dr Phillipson advised that the defendant's behaviour was more likely more disturbed at the time of the alleged offences on 14 and 15 April 2014 than at the time of the earlier alleged offences. There was little evidence the defendant was so manic in relation to the earlier alleged offences that he was deprived of any requisite capacity. There was evidence to suggest pre-planning, planning within the event and some evidence to suggest at some point the defendant understood the wrongfulness of his act and wanted to return the child. Significantly, there was no evidence to suggest any manic activity around that event.

Discussion

Generally

- [81] While the defendant clearly developed a psychosis whilst in The Park, the issue for determination is whether the defendant was suffering that mental condition at the time of the alleged offences and, if so, whether as a consequence thereof he was deprived of the capacity to know he ought not do the acts in question. On this issue, I found Dr Kovacevic's evidence both cogent and persuasive. By contrast, I found Dr Scott's evidence unpersuasive.

- [82] While Dr Kovacevic initially expressed the opinion that the defendant was psychotic and as a consequence deprived the requisite capacity at the time of each of the alleged offences, that opinion was very much based on an acceptance of the defendant's detailed account to Dr Kovacevic. However, Dr Kovacevic reviewed and altered that opinion once he had access to collateral material which significantly called into question the accuracy of the defendant's account. I found his explanation for that change in opinion highly persuasive.

- [83] As Dr Kovacevic observed, there were no eyewitness accounts suggestive of any psychotic symptoms in the lead-up to the alleged offences. There were also no eyewitness accounts supportive of bizarre type behaviour or lighting fires after January 2014. The mother's account of changed circumstances was entirely consistent with the defendant's admitted significantly increased cannabis use from February 2014.

- [84] Importantly, Mr Pearson, who spent time with the defendant in the days before and after the alleged abduction, made no observations consistent with mania or psychosis. While Mr Pearson may have been a heavy user of alcohol, there is no reason to doubt the reliability of those observations. Mr Pearson's recorded account of events was factually correct. Further, Mr Pearson reported observable changes in the defendant's behaviour after the defendant became aware police were interested in his motor vehicle. That change occurred after the defendant had returned the child to a location near her home.

- [85] The defendant's behaviour before, during and after the alleged abduction was also inconsistent with the presence of mania or psychosis. There was a degree of planning in the execution of the abduction and in the return of the child. Further, the defendant took specific steps to destroy what he perceived to be incriminating evidence once aware police were interested in him. The nature of that evidence was significant. It related to computer discs, a camera and mobile phone. Those are specific items which would require a degree of consideration in determining that they ought to be destroyed before police searched his home. The method of destruction also evidenced planning on the part of the defendant. They were not disposed of in a bin. The defendant took steps to destroy them by fire so that they could not be accessed by the police.

- [86] In addition to that behaviour, mental health professionals did not observe any evidence of psychosis in the initial weeks of the defendant's incarceration. That lack of observation is highly significant. If the defendant was psychotic at the time of the alleged offences, it is inexplicable that signs of his psychosis were not observed in those initial few weeks.

The behaviour observed in the watch house and in initial custody, whilst unusual, does not of itself support a conclusion that the defendant was psychotic having regard to the absence of recorded signs of psychosis by these mental health professionals, including experienced psychiatrists. In considering that recorded behaviour, it is also significant that the defendant has a past history of feigning medical conditions in order to change his incarceration conditions.

- [87] I accept Dr Kovacevic's opinion that the defendant was not, prior to, during, or in the days subsequent to the alleged abduction, suffering a mental illness. I also accept Dr Kovacevic's opinion that the defendant was not deprived of any of the requisite capacities at the time of those alleged offences.
- [88] I do not accept Dr Scott's opinion to the contrary. Dr Scott's conclusion that the defendant was suffering a mental illness at the time of the alleged offences was clearly affected by his observations of the defendant whilst treating him in the Park some months later. I am satisfied Dr Scott used those observations as a basis to work backwards to find evidence supportive of the existence of psychosis at the time of the alleged offences. That approach was confirmed by Dr Scott's response that it would be "a very brave call to say that there was no evidence of mania when we don't have any good collateral evidence to say there was no mania". That response evidenced a view that because the defendant was subsequently psychotic, he must have been psychotic at the time of the alleged offences.¹⁵
- [89] I also do not accept the accuracy of aspects of Dr Scott's evidence. Dr Scott's opinion that using 20 cones of cannabis of day would not be suggestive of intoxication defied logic. Similarly, his explanation for aspects of the defendant's behaviour, which were indicative of a significant level of reasoning, as occurring at a time when the defendant was well due to the fluctuating nature of his mental illness, gave scant regard for the significance of those actions. The defendant's deliberate actions in destroying incriminating evidence before leaving town was not explicable by a so-called fluctuating condition.
- [90] I also accept the force of Dr Reddan's advice that the defendant's refusal to discuss any aspect of the alleged offences with Dr Scott significantly limited Dr Scott's ability to consider all of the circumstances when assessing the defendant's mental condition at the time of the alleged offences.
- [91] Whilst the observed deterioration in the defendant's mental health after he realised police were interested in him may be said to support a conclusion that he was suffering a mental illness at the time of the alleged offences on 14 and 15 April 2014, which deprived him of the requisite capacity, I am satisfied the defendant was not suffering a mental illness which deprived him of any of the requisite capacities at the time of those alleged offences. I accept Dr Kovacevic's opinion that the defendant at that time was not suffering a psychosis. I accept the observed changes were due to the defendant being under extreme stress at the time. The fact that mental health professionals recorded no signs of psychosis in his initial weeks in custody is strongly supportive of that conclusion.

- [92] As Dr Kovacevic observed in evidence:

¹⁵ T.1-41/20.

“He was seen by psychiatrists in prison. He was seen by two psychiatrists, two experienced psychiatrists, who see people in prison all the time. He was seen by experienced prison nurses and he was not considered to be psychotic throughout all this period until [the] ... 2nd of June. He was not prescribed any anti-psychotic medication. There was no reference to any psychotic symptoms. In fact, psychiatrists made references to him not having psychotic symptoms. He was diagnosed with hypomania which by definition rules out psychotic symptoms, because when you find psychotic symptoms then you don’t diagnose somebody with hypomania, you diagnose them with mania. So there’s clearly – clearly distinguishing features. So it’s not ... me saying that he was not psychotic, it’s actually the entire evidence from a number of clinicians from Prison Mental Health, they say that he was not psychotic.”¹⁶

- [93] Even if I had been satisfied that the defendant was suffering a mental illness at the time of the alleged offences which deprived him of the requisite capacity, I would have accepted Dr Kovacevic’s evidence that that deprivation was to an extent contributed to by intoxication. The defendant gave a clear and unambiguous account to Dr Kovacevic of using, on a daily basis, significant quantities of alcohol and cannabis, including having used cannabis in the hours prior to the alleged offences. That use extended to an average of 20 cones of cannabis per day.

Conclusion

- [94] I am satisfied that at the time of all of the alleged offences the subject of the reference, the defendant was not suffering from a mental illness. I am also satisfied the defendant was not deprived of any of the requisite capacities. The defendant was not of unsound mind at the time of any of the alleged offences.
- [95] I accept the defendant is fit for trial. There is no reason why the alleged offences ought not proceed according to law.

Orders

- [96] I order:
1. At the time of each of the alleged offences the subject of the reference, the defendant was not of unsound mind as defined in the schedule to the *Mental Health Act 2000* (Qld).
 2. In respect of each of the alleged offences, the defendant is fit for trial.
 3. Each of the alleged offences is to proceed according to law.
 4. Copies of the reports and of the transcript are to be released to the parties in the criminal proceedings.

¹⁶ T.1-23/60-T.1-24/10.