

CANADA / JUDGMENT

## R. v. Ameyaw

2025 ONCA 673

### COURT

Court of Appeal for Ontario

### DECIDED

25 September 2025

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R. v. Ameyaw

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Judges

Hourigan, C. William; Monahan, Patrick J.; Dawe, Jonathan

Subject

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Decision Content

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Ameyaw, 2025 ONCA 673

DATE: 20250925

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Hourigan, Monahan and Dawe JJ.A.

BETWEEN

His Majesty the King

Respondent

and

Ronny Ameyaw

Appellant

Victor O'Brien, for the appellant

Owen Goddard, for the respondent

### **Heard: September 23, 2025**

On appeal from the convictions entered by Justice Mary E. Misener of the Ontario Court of Justice on February 7, 2022, and from the sentence imposed on November 21, 2022.

#### **REASONS FOR DECISION**

- [1] The appellant worked as a call centre representative for TD Visa ("TD"). It was alleged that he used his position to obtain confidential customer account information and passed it on to confederates, who used it to make fraudulent bank transactions. It was also alleged that on one occasion the appellant personally used a customer's information to make a fraudulent automated teller machine ("ATM") withdrawal.
- [2] Many of these fraudulent transactions were for only a few thousand dollars, but some were considerably larger and involved sums in the hundreds of thousands of dollars. Overall, TD had to reimburse its defrauded customers and suffered a total loss of more than \$1.5 million.
- [3] After a three-day trial in the Ontario Court of Justice, at which the appellant did not testify or call any evidence, he was convicted of multiple counts of fraud, attempted fraud, and identity theft, and a single count of fraudulent personation. He later received a global sentence of three and a half years' imprisonment, along with a \$300,000 restitution order.
- [4] The appellant appeals against his convictions, and also appeals against the size of the restitution order. On September 23, 2025, we dismissed the conviction and sentence appeals with reasons to follow. These are our reasons.
- [5] The conviction appeal turns on an application by the appellant to adduce fresh evidence both to explain why he did not testify at his trial, and to establish what his evidence would have been if he had testified. Specifically, he seeks to adduce a psychiatric report from Dr. Julian Gojer, who offers the opinion that the appellant's depression, anxiety, sleep disturbances, and substance abuse issues "would have had a significant impact on his ability to communicate with counsel and participate in the trial." The appellant told Dr. Gojer that his trial had been conducted virtually or mostly virtually, and that:

He wanted to testify and explain what had happened but because of COVID and limited communication with counsel, this discussion did not occur. He simply allowed his lawyer to proceed.

- [6] The appellant also tenders his own affidavit, in which he claims that he “never had the opportunity [of] testifying in my defence at trial”. The appellant goes on to explain what his evidence regarding the allegations against him would have been if he had testified.
- [7] The admissibility of fresh evidence on appeal generally requires courts to consider and weigh four factors: (1) whether the fresh evidence could not have, by the exercise of due diligence, been available at trial; (2) whether the fresh evidence is relevant in that it bears upon a decisive or potentially decisive issue; (3) whether the fresh evidence is credible in the sense that it is reasonably capable of belief; and (4) whether the fresh evidence, if believed, is such that it could reasonably, when taken with the other evidence adduced at trial, have affected the result: see *Palmer v. The Queen*, [1980] 1 S.C.R. 759, at p. 775; *Truscott (Re)*, 2007 ONCA 575, 225 C.C.C. (3d) 321, at paras. 92-93.
- [8] The appellant relies on Dr. Gojer’s opinion evidence to overcome the objection that his own proposed fresh evidence fails the *Palmer* due diligence requirement, since he could have given this evidence by testifying at trial. Although the appellant does not expressly claim that he received ineffective assistance from his trial counsel, he seems to be alleging that his trial counsel did not properly allow him to choose whether or not to testify.
- [9] The Crown has filed a responding affidavit from the appellant’s trial counsel in which he explains that before the start of the appellant’s trial – which was conducted in person, not virtually – they discussed the possibility of the appellant testifying, and the appellant signed written instructions directing his trial counsel that he did not wish to give evidence. In these instructions, which are dated a few days before the first day of trial, the appellant stated:

Counsel further advised me that whether or not I testify is a decision for me, and me alone, to make.

I have considered this option for the past week and have come to the conclusion that I do not want to testify. I realize that if I do not testify, the judge will not hear my side of what happened directly from me. I understand that. I do not want to testify and I instruct my lawyer to not call me as a witness.

- [10] The appellant bears the onus of demonstrating that he was deprived of the ability to choose whether he would testify in his own defence: see *R. v. Archer* (2005), 202 C.C.C. (3d) 60 (Ont. C.A.), at para. 140. We are not satisfied that he has met this burden. The document the appellant signed shortly before his trial, in which he expressly instructed his trial counsel that he did not wish to testify, is “inherently more reliable than the appellant’s post-conviction protestations that he was denied the opportunity to testify”: *Archer*, at para. 144. Moreover, Dr. Gojer acknowledged that his opinion was based entirely on the appellant’s description of his communications with his trial counsel before and during the trial. This

description is contradicted by trial counsel's evidence. Significantly, the appellant chose not to cross-examine trial counsel on his affidavit.

- [11] We are satisfied that the appellant made a free and informed choice not to testify at his trial, and reject his evidence that he was denied this opportunity. His fresh evidence application accordingly fails to meet the due diligence prong of the Palmer test.
- [12] As Doherty J.A. explained in *R. v. Maciel*, 2007 ONCA 196, 219 C.C.C. (3d) 516, at para. 50, leave to appeal refused, [2007] S.C.C.A. No. 258:

If the evidence could have been led at trial, but for tactical reasons it was not, some added degree of cogency is necessary before the admission of the evidence on appeal can be said to be in the interests of justice. Otherwise, the due diligence consideration would become irrelevant. An accused who did not testify at trial could secure a new trial by advancing an explanation on appeal that was reasonably capable of belief. It would not serve the interests of justice to routinely order new trials to give an accused an opportunity to reconsider his or her decision not to testify at the initial trial.

- [13] The appellant's proposed evidence also fails to satisfy two of the remaining three criteria of the Palmer test. We accept that it meets the second criterion, since his evidence would, if admitted, be relevant to the decisive issues at trial.
- [14] The two remaining Palmer factors are (i) whether the appellant's exculpatory evidence is reasonably capable of belief, and (ii) whether it could have affected the verdicts at trial. Both factors must be assessed contextually, having regard to the evidence as a whole, the positions of the parties, and the trial judge's reasoning process: *R. v. Reeve*, 2008 ONCA 340, 233 C.C.C. (3d) 104, at para. 72; *R. v. Litt*, 2021 ONCA 510, at para 33.
- [15] The case against the appellant consisted largely of bank records establishing that before the various frauds were carried out or attempted, someone using his employee ID credentials accessed the customer profiles of each of the victims. These records also showed that no other TD employees ever accessed all of these same customer profiles during the relevant time period. Although the appellant had valid work reasons for accessing 6 of the 25 customer profiles at issue, he had no legitimate reason for accessing 4 of these profiles again at a later time, and no legitimate reasons for ever accessing the other 19 profiles.
- [16] The appellant now seeks to explain this evidence away as merely an unfortunate coincidence, explaining he used to access customer profiles to correct mistakes he had made, and would also browse random customer profiles "out of curiosity and to learn about the job market." He claims not to have known that doing this was contrary to TD's security policies, although the uncontroverted evidence at trial was that the appellant had been trained about these policies.
- [17] The plausibility of the appellant's explanation must be assessed in light of the evidence as a whole, including the evidence that someone using the appellant's employee ID credentials accessed three of the victims' profiles not only before attempts were made to make

fraudulent transactions using their customer information, but also less than two hours after these attempts were made. The inference the trial judge drew from this pattern of activity is that whoever was accessing these customer profiles must have known about the unsuccessful fraud attempts. As the trial judge explained:

I find that the only reasonable inference is that he provided the confidential information, learned that the personation failed and looked at the customer information afterwards in an attempt to discover why it was unsuccessful.

[18] The appellant's new explanation that it was mere happenstance that he randomly accessed these same customer profiles at these times is not credible.

[19] In the alternative, the appellant suggests that some other TD employee might have taken his employee ID credentials when he left them unguarded. However, this exculpatory possibility must be considered in light of the trial judge's factual finding that the appellant was the person captured in ATM security camera photos making one of the fraudulent withdrawals. The trial judge explained:

The photograph is clear and after comparing it with the photograph of [the appellant] from his TD employment record and with [the appellant] in court, I am satisfied that the person at the ATM is [the appellant]. The bank records also establish that [the appellant] used that same ATM in North York to access his own account [approximately two months earlier].

[20] In our view, this finding of fact is fatal to the appellant's alternative theory that the real criminal was another TD employee who stole and used his employee ID credentials. The appellant has not advanced any grounds for challenging the trial judge's finding that he was the man in the ATM security camera photos, which she made from the advantaged position of being able to observe the appellant in court during his trial.

[21] In summary, we are not persuaded that the appellant's proposed exculpatory evidence, considered in context, is either reasonably capable of belief or capable of having affected the result at trial. We accordingly dismiss his application to adduce fresh evidence and his conviction appeal.

[22] Turning to the sentence appeal, the appellant takes issue with the trial judge's decision to order that he pay \$300,000 in restitution. The trial judge based this amount on what it cost TD to provide additional credit monitoring to the more than 2,000 customers whose data may have been compromised. The appellant argues that he should have only been ordered to reimburse TD for the cost of credit monitoring for the 25 victims named in the charges that led to convictions, which he calculates as \$3,201.02.

[23] We see no basis for interfering with the trial judge's exercise of her sentencing discretion. Although the Crown proposed the \$300,000 figure based on what it had cost TD to provide additional credit monitoring to all of the possibly affected bank customers, Crown counsel at trial noted that this amount could also be viewed as a portion of the loss that TD had suffered from the frauds, which was more than \$1.5 million. The trial judge described the

restitution sought by the Crown as “a very fair and realistic submission representing only a fraction of the loss that is readily ascertainable to TD”. She was entitled to find that it was just and appropriate to order the appellant to pay this amount in restitution.

[24] Accordingly, leave to appeal sentence is granted, but the appellant’s sentence appeal is dismissed.

“C.W. Hourigan J.A.”

“P.J. Monahan J.A.”

“J. Dawe J.A.”

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