

CANADA / JUDGMENT

R. v. Batstone

2021 BCCA 398

COURT

British Columbia Court of Appeal

DECIDED

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2021 BCCA 398 R. v. Batstone

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Batstone,

2021 BCCA 398

Date: 20211022

Docket: CA46377

Between:

Regina

Respondent

And

Lisa Deanne Batstone

Appellant

Before:

The Honourable Chief Justice Bauman

The Honourable Madam Justice Saunders

The Honourable Mr. Justice Goepel

On appeal from: An order of the Supreme Court of British Columbia, dated March 22, 2019 (R. v. Batstone, 2019 BCSC 476, New Westminster Docket X-079455-2).

Counsel for the Appellant

(via videoconference):

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Counsel for the Respondent

(via videoconference):

M. Levitz, Q.C.

Place and Date of Hearing:

Vancouver, British Columbia

March 30, 2021

Place and Date of Judgment:

Vancouver, British Columbia

October 22, 2021

Written Reasons by:

The Honourable Mr. Justice Goepel

Concurred in by:

The Honourable Chief Justice Bauman

The Honourable Madam Justice Saunders

Summary:

The appellant challenges her conviction for second-degree murder alleging the trial judge erred in concluding she had the requisite intent for the crime. The appellant argues the trial judge committed this error by (1) misapprehending important evidence, (2) speculating how the offence occurred, and (3) failing to provide sufficient reasons for the finding that all after-the-fact evidence supported an intent to kill.

Held: Appeal Dismissed. First, the trial judge only misapprehended the substance of the evidence concerning the length of time it would have taken the victim to die by smothering, however the error would not have changed the outcome regarding the appellant's intent. Second, the trial judge made two erroneous conclusions with regard to speculating how the offence occurred, however they were harmless errors and did not impact the trial judge's conclusion that the appellant had the requisite intent. Finally, the trial judge did not find that every after-the-fact action was consistent with intent, rather she properly considered actions relevant to intent and the defences raised by the appellant.

Reasons for Judgment of the Honourable Mr. Justice Goepel:

INTRODUCTION

- [1] On December 10, 2014, the appellant, Lisa Batstone, killed her sleeping eight year-old daughter Teagan by suffocating her with a plastic bag. Following a judge alone trial, the appellant was convicted of second-degree murder. The appellant admitted that she suffocated her daughter. The sole issue at trial was whether she intended to cause her daughter's death and accordingly, should be convicted of second-degree murder or manslaughter.
- [2] The trial judge found that the appellant had the requisite intent for second-degree murder. On the appeal, the appellant alleges that the trial judge erred by misapprehending important evidence, speculating how the offence occurred, and failing to provide sufficient reasons for the finding that all after-the-fact evidence supported an intent to kill.
- [3] The Crown agrees that the trial judge did misapprehend one aspect of the evidence but submits the misapprehension did not play an essential role in the reasoning process that the appellant had the requisite intent. The Crown denies that the trial judge made the other errors alleged but says that if she did make any of those errors, the curative proviso should be applied because the errors were so harmless that they could not have affected the verdict, or that the errors, while serious, did not result in a miscarriage of justice or a substantial wrong because the case against the appellant was overwhelming.

BACKGROUND

A. Overview

- [4] At trial the Crown led evidence from 36 witnesses, including police officers and health care workers who interacted with the appellant after her arrest, people who testified to the appellant's increasingly erratic behaviour in the weeks leading up to the offence, a forensic pathologist, and a forensic toxicologist. The defence led evidence from two experts in the field of forensic psychiatry, Dr. Jeanette Smith and Dr. Shabehram Lohrasbe. The appellant did not testify. However, her post-arrest statements to the police and others were entered into evidence for the truth of their contents.
- [5] In her reasons that are indexed at 2019 BCSC 476 ("RJ"), the trial judge set out in great detail the events prior to and following Teagan's death. These reasons will focus on the events that are relevant to the issues raised on the appeal.

B. Evidence at Trial

- [6] The appellant was 41 years old at the time of the offence. Teagan was eight. They lived together in Surrey, where the appellant worked as a teaching assistant. The appellant was deeply devoted to Teagan and Teagan's well-being.

- [7] The appellant and Teagan's father, Gabe Batstone, separated in 2008 when Teagan was two, and were divorced in 2010. Their divorce was acrimonious and they had ongoing difficulties communicating about Teagan. The appellant never came to terms with the marital breakdown and felt great resentment toward her former husband.
- [8] Following their separation, Mr. Batstone moved to Ontario where he lives with his current wife and children. Teagan lived with the appellant but regularly spent time with her father both when he came to B.C. to visit her and in Ontario. The appellant believed Mr. Batstone was mentally and emotionally abusive and at times deficient in his treatment of Teagan, causing Teagan to have separation anxiety and other struggles.
- [9] The appellant was under a variety of stressors in the months leading up to Teagan's death. These included resentment towards Mr. Batstone and difficulties parenting with him; mental health issues; a falling out with a friend leading to the appellant leaving her church, which had been a source of community support; a back injury requiring rehabilitation; financial struggles; her mother's failing health; and the withdrawal of the parenting coordinator she and Mr. Batstone had worked with since 2008. However, at the time of the killing, the appellant's back was on the mend and she was scheduled to return to work in January 2015. The weekend prior to the killing, the appellant and Teagan had an enjoyable time at a Cultus Lake retreat.
- [10] None of the appellant's actions in the weeks leading up to the offence suggested that she was planning to commit suicide or harm Teagan. Rather, her emails indicated that she was planning for the future. On December 7 and 9, 2014, the appellant sent emails to various people inquiring about after-school care and activities for Teagan in January 2015. On the morning of December 9, 2014, the appellant confirmed Teagan's dentist appointment for December 11, 2014.
- [11] On the evening of December 9, 2014, Teagan and the appellant had a "camp-out" in their living room, intending to sleep there for the night. At some point between 2:04 am and 4:35 am on December 10, 2014, the appellant smothered Teagan.
- [12] After Teagan's death, the appellant wrote a four-page letter explaining what she had done and why. She then posted notes saying "You win Gabe" and "You broke me" by the entry to her home. She then attempted to take her own life by putting over her head two plastic bags secured by duct tape. She was unable to go through with her suicide attempt. She then placed those bags and the bag used to smother Teagan in the garbage, along with another note saying "I'm so sorry."
- [13] The appellant then googled ways to kill herself, and did Internet searches of Mr. Batstone's new wife and family. The appellant sent emails to Mr. Batstone, Teagan's school, and others advising that Teagan had the flu and would not be at school that day. She later told police that these messages were sent to give herself time to commit suicide.

- [14] The appellant then texted numerous people with messages that she was sorry. She reached out to her former friend and former church community, asserting among other things that the former friend was evil and had killed them. Concerned, Ms. Ogilvie, a member of the church, tried calling the appellant but got no answer. She then went to the appellant's house and knocked on the door. The appellant did not answer. Ms. Ogilvie and the appellant then exchanged text and email messages. The appellant denied she was intending to hurt herself and asked Ms. Ogilvie to leave her alone. Upon receiving these messages, Ms. Ogilvie drove a short distance away and called the police and advised them of her concern for the appellant's well being.
- [15] After Ms. Ogilvie left, the appellant put Teagan's body in the back of her car and drove away. She also put the dog in the car. She said that she left the home to give herself more time to commit suicide, and intended to drop the dog at the dog sitter. On the way to the dog sitter, her car got stuck in a ditch. Ms. Batstone exited the car and approached a nearby home, asking the resident to call 911 and saying to the resident "my baby is dead." When emergency personnel arrived, they found the appellant in the trunk of her car, cradling Teagan's body.
- [16] The appellant made many statements to emergency personnel at the scene, to medical officials at the hospital she was subsequently brought to, and to the police. These statements were all found voluntary and admissible. The general theme of the statements was that the appellant was sorry, that she had killed her daughter, and that she wanted to die.
- [17] Constable Cucheran, who had initially responded to Ms. Ogilvie's call to police and subsequently was dispatched to the scene, saw a large kitchen knife on the seat in the car. The appellant had a superficial cut on her neck. The emergency personnel at the scene did not notice any signs of intoxication, but Cst. Cucheran was able to detect the odour of liquor once the appellant was confined in the back of a police vehicle. Cst. Cucheran advised the appellant that she was under arrest.
- [18] The appellant was brought to a hospital after a paramedic who assessed her at the scene determined she was distraught and suicidal. A psychiatrist who spoke with her at the hospital testified that she was distraught, remorseful and that he was concerned by the risk of suicide. He did not observe anything abnormal in her thought processes, or evidence of thought disorder, hallucinations, or psychosis.

THE TRIAL REASONS

- [19] The main issue at trial was whether the Crown had proved beyond a reasonable doubt that the appellant had intended to cause Teagan's death and was thus guilty of second-degree murder as opposed to manslaughter.
- [20] The defence argued that there was reasonable doubt as to whether Ms. Batstone had an intent to kill due to her alcohol consumption, her reduced executive functioning that was caused by mental disorder and psychosocial stressors, or a combination of these factors.

The defence pointed to circumstantial evidence, including a blood alcohol reading taken at hospital, in support of their intoxication argument. The defence called two expert witnesses in support of their mental disorder argument. The Crown argued that while there was some evidence of alcohol consumption prior to the appellant's arrest, a history of mental and emotional instability, and evidence that she was experiencing some stressors, the circumstances did not raise a reasonable doubt.

- [21] The judge began her reasons by reviewing the background events and the evidence at trial (RJ 1-97). She then considered the law on second-degree murder and manslaughter, proof of intent, intoxication, mental disorder, "cumulative effect" defences, and after-the-fact evidence (RJ 110-40). The judge then analysed the defences.
- [22] The judge rejected the intoxication defence, concluding that even if the appellant had consumed alcohol prior to smothering Teagan, this did not impair her ability to understand and foresee the consequences of her act (RJ 143-51). The judge found that none of her electronic communications before or after the killing suggested any level of impairment; that smothering someone requires several actions and decisions, as well as an extended period of focus to execute the act; that her actions after the smothering indicated no confusion of thought; that her letters and notes were neatly printed and intentionally positioned to be found; and that she was able to craft a head covering for the purposes of suffocating herself with considerable care. The judge also noted that the appellant had strong, clear, detailed memories of the event, and her statements at the time indicated an understanding that Teagan was dead and she was responsible. Furthermore, none of the witnesses noted any impairment; only Cst. Cucheran could smell liquor, and that was in an enclosed vehicle. Finally, the factual foundation was lacking because there was no evidence of a drinking pattern.
- [23] On the mental disorder defence, the judge found that the appellant was likely suffering from depression, anxiety, and borderline personality traits at the time, and that she was also experiencing psychosocial stressors. However, the judge rejected this defence (RJ 152-77). In assessing the evidence on this point, the judge preferred the opinion of expert witness Dr. Lohrasbe that all the evidence must be considered, with acts and statements closest in time to the act being the most reliable in helping to determine the appellant's mental state at the time of the act (RJ 156-61).
- [24] The judge went on to note that smothering someone requires conscious forethought and deliberate action, and found that the appellant did not stop smothering Teagan until death was a certain outcome. This finding was based on the evidence of the forensic pathologist. The judge used this evidence to find that the appellant had held the bag over Teagan's face for about four to five minutes, without interruption.
- [25] The judge noted that afterwards, the appellant did not call for help. The judge had previously noted that failure to render aid is more consistent with murder than manslaughter (RJ 138). The judge held that the appellant's after-the-fact conduct was consistent only with the

intention to cause death. She found the appellant's statements, both voluntarily offered and given to police and doctors, were consistent only with having meant to cause Teagan's death and nothing else. There was nothing either said or done by the appellant after Teagan's death that is inconsistent with this intention (RJ 173-75). Moreover, the trial judge held that an intention to send Teagan to heaven is still an intention to cause Teagan's death.

[26] Finally, the trial judge dismissed the "rolled up" factors defence (RJ 178-82). The trial judge reiterated that the killing was deliberate, that smothering involved a series of choices, decisions and some effort, that the appellant's actions were purposeful and goal-directed, and that she had her reasons for wanting Teagan dead (these reasons included among other things, ending Teagan's pain). The trial judge noted that "[h]aving regard to the totality of the evidence there is nothing that indicates [Ms. Batstone] had anything other than the intention to cause her daughter's death" (RJ 179).

ON APPEAL

[27] The appellant raises the following grounds of appeal:

- i. The trial judge misapprehended evidence central to her decision to convict;
- ii. The trial judge engaged in speculation to make critical findings of fact; and
- iii. The trial judge's reasons on the issue of the probative value of the post-offence conduct evidence were deficient and reveal legal error.

[28] I will deal with each ground in turn.

DISCUSSION

A. Misapprehension of Evidence

i. Overview

[29] The appellant alleges two misapprehensions of evidence by the trial judge. Firstly, she submits the trial judge's finding that the appellant "weighed options" about how to kill her daughter before deciding to smother her, misapprehended the substance of the evidence respecting the appellant's statement to the police. Secondly, the appellant submits that the judge misapprehended the substance of the forensic pathologist's evidence respecting the length of time it would have taken for Teagan to die by smothering. The appellant submits this misapprehension led to an erroneous factual finding about how the killing occurred, which was central to the judge's finding that the appellant had acted with the intent to kill.

[30] The test for demonstrating a misapprehension of evidence warranting appellant intervention is stringent. The appellant bears the onus of showing that: 1) the misapprehension went to substance; 2) it was material to the judge's reasoning process; and 3) it played an essential part in the reasoning process resulting in conviction. To suggest a difference in interpretation of the evidence does not amount to misapprehension of the evidence: *R. v. Swales*, 2014 BCCA 350 at paras. 48-49, leave to appeal ref'd [2016] S.C.C.A.

No.36862.

- [31] In *R. v. Lohrer*, 2004 SCC 80, the Court emphasized the centrality that misapprehension of the evidence must play in a trial judge's reasoning process leading to the conviction in order to overturn that conviction on appeal. The misapprehension must go to the core of the reasoning process which resulted in the conviction: *R. v. Shen*, 2010 BCCA 554 at para. 29. One way of determining whether the misapprehension played an essential role in the reasoning process is to consider whether striking it from the judgment would leave the reasoning on which the conviction is based on unsteady ground: *R. v. Zedeh*, 2020 BCCA 93 at para. 38.

ii. Statement re Suffering

- [32] In her reasons, the judge found that the act of smothering Teagan required conscious forethought and deliberate action that required a number of decisions and several steps. The judge found that one of those steps was deciding that she would kill her by smothering her. In that regard, she said:
- [164] Next she decided that she would kill her by smothering her. In coming to this conclusion she weighed options as she told the police later that she decided to suffocate Teagan so she would not suffer.
- [33] The appellant submits that the trial judge's finding reflects a misapprehension of the substance of the evidence respecting the appellant's statement to the police. Read in context, the appellant submits that she did not say she chose suffocation over other methods for killing her daughter in order to prevent Teagan from suffering; rather, she said, she did not know why she chose suffocation.
- [34] During the appellant's lengthy interrogation, the police repeatedly pressed her to explain her thinking at the time of the death. The appellant was only able to say she was trying to protect Teagan from suffering. Towards the end of the interrogation, Sergeant Carr and the appellant had an exchange where he asked why the appellant had chosen suffocation:

Sgt. D. CARR: And you know in the eyes of the law that killing someone's wrong as well. Right?

Lisa BATSTONE: Yeah. I was just trying to save her from being in pain.

Sgt. D. CARR: But you didn't expect that you'd be caught. You didn't think you was gonna be here. Right?

Lisa BATSTONE: I thought I was going to die with her. We could both be in no more pain.

Sgt. D. CARR: Yeah. Well, why, why did you, why did you choose suffocation? Why, why did you come with that idea?

Lisa BATSTONE: 'Cause I didn't want her to suffer.

Sgt. D. CARR: And I understand that but like there's lots of ways you could end someone's life. Right? Why did, what, why, how did you come up with that idea?

Lisa BATSTONE: I don't know. I just did it. And then I looked online for ways to do it myself.

Sgt. D. CARR: Did you look online for ways to kill Teagan?

Lisa BATSTONE: No.

Sgt. D. CARR: No. Okay.

[35] The trial judge found that the explanation for why she chose to suffocate Teagan as opposed to using a different method to kill her was because she did not want her to suffer. The appellant submits that that is not a reasonable interpretation of the appellant's statement. She submits that she was just repeating her consistent explanation for why she killed Teagan: to protect her from pain and suffering. The appellant submits that Sgt. Carr understood that this is what the appellant meant, so he asked the question again, clarifying what he wanted to know was why she chose suffocation as the way of killing Teagan as opposed to something else. Once Sgt. Carr clarified his question, the appellant responded that she did not know--she just did it.

[36] The appellant submits that the trial judge's finding that the appellant had weighed options about how to kill her daughter and decided to use suffocation as opposed to other methods was an important factual finding in terms of the appellant's mens rea. It was evidence that the appellant had engaged in an assessment of the consequences of her actions, thereby supporting a conviction for murder as opposed to manslaughter. It was an evidentiary pillar upon which the trial judge formed her conclusion that the plaintiff was guilty of second-degree murder.

[37] The Crown submits that the judge did not misapprehend this evidence, and that the appellant is simply inviting this Court to substitute a finding that is more favourable to her, based on an interpretation of the evidence that the appellant would have preferred. The Crown submits that the judge's finding was reasonable based on what the appellant said to Sgt Carr.

[38] It is not enough for the appellant to merely suggest a different interpretation of the evidence. Differences in interpretation are not misapprehensions, but disagreements with the judge's differing view of the evidence. I agree with the Crown that it was open to the judge to find that the appellant decided to suffocate Teagan so she would not suffer. The judge's finding was consistent with the appellant's testimony. I would not accede to this ground of appeal.

iii. Dr. Litwin's Evidence

- [39] The second alleged misapprehension concerning the evidence of Dr. Litwin raises a more difficult question. The Crown concedes that the judge misapprehended the substance of Dr. Litwin's evidence respecting the length of time it would have taken for Teagan to die by smothering. It submits, however, that this ground of appeal ought to be dismissed because the misapprehension did not play an essential role in the judge's reasoning process in finding the appellant had the requisite intent for murder.
- [40] Resolution of this ground of appeal requires a detailed review of Dr. Litwin's evidence and the use the trial judge made of that evidence. There is no dispute amongst the parties that Teagan died from asphyxia by smothering. Dr. Litwin explained that death from asphyxia involves a body being deprived of oxygen, leading to death due to tissue death and/or a disruption of the body's vital functions, such as the heart's ability to beat. Smothering is asphyxia due to an external blockage of the airways, and can occur without physical injury to the victim's body.
- [41] Dr. Litwin gave evidence concerning the length of time a person's airways would need to be blocked in order for the person to die. He explained that how long it took a person to feel the deadly effects of oxygen deprivation varied from person to person depending on their unique traits and other factors. In the course of his examination in chief, just after Dr. Litwin had finished explaining that asphyxia could cause death by disrupting the vital functions of the body, the trial judge asked, "How quickly does this start?" Dr. Litwin replied as follows:

So My Lady, it's -- again, that -- that's a question that can't be answered with any precision because it depends upon the circumstances. It can occur relatively quickly, perhaps within several seconds, maybe half a minute, 30, something of that nature, many seconds, the effect can occur. And this can occur -- this can include a relatively rapid loss of consciousness at which point the person can no longer react, and then the process of tissue damage and death continues. And uninterrupted beyond four to five minutes of the body being deprived of oxygen, particularly the brain, there's increasingly less ability to meaningfully recover. That sounds perhaps confusing, My Lady. What I would say is once the oxygen is completely blocked from getting into the body, within several seconds to -- that the person may develop an irregularity of heartbeat or lose consciousness, and then beyond several minutes, four or five minutes, the damage and the ability to recover becomes less and less likely.

- [42] The Crown then followed up on that question and the following exchange took place:

Q So let's just drill down to that just a little bit. So the person is now deprived -- in a hypothetical, again, let's talk about a plastic bag -- of oxygen. Let's start with the loss of consciousness, the range of that would be -- and, again, I appreciate these are just ranges.

A So it would be several seconds. And this is, again, assuming there's a complete conclusion, or a complete -- that the -- the blockage is constant, and we're not talking about intermittent blockage, but within several seconds, potentially, the person could lose consciousness and within that timeframe irregularities of heartbeat could begin. Upwards of several minutes to the person becoming unconscious and irregularities of heartbeat and/or other vital functions occurring, resulting in irreparable damage to the body.

Q What sort of length of time, again, I appreciate it's a range, would this complete - the deprivation of oxygen cause a person's death? How long would it have to be completely deprived?

A If we're talking -- the -- the brain can survive probably no more than several minutes, four or five minutes, something like that, on average, before the damage becomes irreparable and meaningful recovery becomes less and less likely.

Q And --

A But again, that's -- that's a -- that's a range and it depends upon many factors unique to that individual. How well they're able to tolerate the lack of oxygen delivery to the brain.

Q So it could be less, I take it?

A Potentially, it could be less.

[43] In cross-examination, defence counsel returned to this subject, and the following exchange took place:

Q And I just want to ask a little bit of clarification on that. So you told my friend that in terms of -- I can't remember if this was during the plastic bag hypothetical, or not, but presuming a consistent blockage of the external airways, loss of conscious -- consciousness can occur within several seconds, right?

A Potentially, yes.

Q And this is all potentially, right?

A Yes.

Q We're not -- never going to be able to know exactly how long it took with Teagan, right?

A Correct.

Q But within several seconds, the person could be unconscious, right?

A Yes.

Q And there could be an irregularity of the heartbeat, correct?

A Yes.

Q And that irregularity of the heartbeat can lead to death, correct?

A Yes.

Q So within several seconds, essentially, the pathway to death has been established?

A Correct.

Q If I can put it that way?

A Yes. Yes.

Q So even if nothing further was done after this several seconds had passed, death could still occur?

A Potentially, yes.

[44] In her reasons, the trial judge found that the act of smothering Teagan required a number of decisions and several steps. In that regard, she said:

[162] Based on all of the evidence I conclude that the act of smothering Teagan required conscious forethought and deliberate action. It was not a hasty, spur of the moment act. It required a number of decisions and several steps.

[163] First the accused formed the idea to kill Teagan.

[164] Next she decided that she would kill her by smothering her. In coming to this conclusion she weighed options as she told the police later that she decided to suffocate Teagan so she would not suffer.

[165] Then she chose the tool to commit the act - a plastic bag. She had to get up from the couch or mattress, walk into the kitchen, and retrieve a bag from under the sink. She did not grab just any bag; she chose a heavy enough bag that she could use it alone. That was clearly part of the thought process as when the accused tried to kill herself using the same method a short time later she used lighter plastic bags and put two of them together, one inside the other. With Teagan she just needed the one.

[166] The accused then returned to the living room and positioned herself beside or on top of her sleeping daughter and according to the evidence of the forensic pathologist Dr. Litwin, held the bag over her mouth and nose, with enough pressure to block the airways, for about 4 to 5 minutes. Without interruption. Until she was certain that she was dead. According to Dr. Litwin had there been any interruption Teagan may have revived.

[167] As per Dr. Litwin, Teagan would have been rendered unconscious within approximately 30 seconds but before that it is possible that she, once aware of what was happening, may have struggled to try to remove the smothering object. However the accused told police that Teagan did not suffer and Dr. Litwin did not see any injuries that he could confidently say were defensive injuries.

- [168] In order to know that Teagan did not suffer and to ensure that she was maintaining the blockage of her airways, the accused must have been watching her throughout the time she was holding the bag over her face. Four to five minutes in these circumstances is a long period of time. Never did she waiver from her goal. As in Damin, she did not stop until death was a certain outcome.
- [171] The accused's actions were systematic, focussed, purposeful and goal directed. That goal: to end her daughter's short life.
- [172] The consequence of holding a bag over Teagan's mouth and nose was predictable. The accused was aware of that. The fact she wanted to die the same way Teagan did proves that she knew it led to death.
- [45] The appellant submits the judge's findings reflect a misapprehension of the substance of Dr. Litwin's evidence about the length of time to cause death by asphyxia. She submits the trial judge's misapprehension of Dr. Litwin's evidence resulted in her finding the appellant engaged in a lengthy, sustained act of smothering when the reality was that the appellant may have only engaged in several seconds of action. The appellant submits that this was a significant factual finding about how she killed her daughter, and that the finding was central to the trial judge's conclusion that the appellant intended to kill her daughter. The appellant submits that for the trial judge, Dr. Litwin's evidence proved the appellant's act was not a hasty or impulsive action. The appellant submits that the judge's finding that the expert evidence established that the appellant must have smothered Teagan for four or five interrupted minutes was critical to her reasoning respecting the appellant's intent.
- [46] The Crown agrees with the appellant that the judge misapprehended the substance of Dr. Litwin's evidence respecting the length of time it would have taken for Teagan to die by smothering. They submit, however, that the apprehension did not play an essential role in the judge's reasoning process in finding that the appellant had the requisite intent for murder. In this regard, they submit that the issue is not whether the judge misapprehended this one aspect of Dr. Litwin's evidence, but rather whether she erred in her appreciation of the evidence in a manner that could have affected the outcome. The Crown disagrees with the appellant's submission that misapprehension of Dr. Litwin's evidence as to the length of time it may have taken to kill Teagan was central to her conclusion that the appellant had the requisite intent for murder.
- [47] The Crown submits that the judge's finding was multi-faceted. Dr. Litwin's evidence on the duration of the smothering was just one of a number of factors that the judge relied on in finding the appellant had the requisite intent. The Crown highlights the following findings:
- the appellant formed the idea to kill Teagan (RJ 163);
 - the appellant decided she would kill Teagan by smothering her (RJ 164);

- in coming to her conclusion to smother Teagan, the appellant decided to suffocate Teagan so she would not suffer (RJ 164);
- the appellant chose the tool to commit the act--a plastic bag (RJ 165);
- the appellant had to get up from the couch or mattress, walk into the kitchen, and retrieve the bag from under the sink (RJ 165);
- the appellant then returned to the living room, positioned herself beside or on top of her sleeping daughter and held the bag over her mouth and nose with enough pressure to block the airways until she was certain that she was dead (RJ 166).

[48] The Crown submits that whether the appellant held the bag over Teagan's face with enough pressure to block the airways for at least several or 30 seconds, as opposed to about four or five minutes, does not take away from the judge's finding that the act of smothering required a number of decisions and steps. One of the undisputed steps was the appellant holding the plastic bag over Teagan's face long enough--uninterruptedly--to stop Teagan from breathing.

[49] I agree with the Crown that the trial judge's findings of intent was multi-faceted. In addition to the decisions and actions highlighted above, the judge also considered the appellant's writings and statements about the killing. In this regard she said:

[174] The accused's statements both voluntarily offered and given to police and doctors are consistent only with having meant to cause Teagan's death and nothing else.

[175] There is nothing either said or done by the accused after Teagan's death that is inconsistent with this intention.

[50] The judge also pointed out the appellant had reasons for wanting her daughter dead, as referenced in her statements as well as the letter she wrote and left at her residence. In the context of all of these individual findings, I find the appellant has not established that the judge's finding that the appellant had held the plastic bag over Teagan's face uninterruptedly, with enough pressure to block the airways for about four or five minutes--as opposed to potentially at least several or 30 seconds--would have made a difference to the judge's finding of intent. The judge's error on the duration of the smothering is relatively unimportant in the context of the evidence as a whole. Striking the error from her reasons would not leave her reasoning on intent on unsteady ground. I would not accede to this ground of appeal.

B. Speculation in Making Critical Findings of Fact

i. Overview

- [51] Triers of fact are often required to make factual findings based on inferences drawn from the evidence. There is a distinction between conjecture and speculation on the one hand, and rational conclusions from the whole of the evidence on the other. In *R. v. Morrissey*, (1995) 22 O.R. (3d) 514 at 530 (C.A.), 1995 CanLII 3498 (ON CA) at 22, the Court of Appeal for Ontario described the distinction:

A trier of fact may draw factual inferences from the evidence. The inferences must, however, be ones which can be reasonably and logically drawn from a fact or group of facts established by the evidence. An inference which does not flow logically and reasonably from established facts cannot be made and is condemned as conjecture and speculation.

- [52] Where a trial judge has employed speculative reasoning, the convictions touched by that error must be quashed unless the Crown can demonstrate that the error caused no substantial wrong or miscarriage of justice: *Morrissey* at 531.
- [53] In finding that the appellant had the mens rea for murder, the trial judge made numerous factual findings that established that the appellant acted with "conscious forethought", making "a number of decisions" and acting in a "systematic, focussed, purposeful, and goal directed" manner to fulfill her "plan" of killing her daughter (RJ 162-171). The appellant submits that certain findings were the result of speculation, not reasonable inferences drawn from proven facts. In particular, they refer to her findings that the appellant used a particular bag to smother Teagan, that the appellant was watching Teagan throughout the time she was holding the bag over her face and her findings concerning the order of events that occurred after Teagan's death.
- [54] The Crown submits the judge did not make any palpable or overriding errors that would permit this Court to interfere with these factual findings. Alternatively, it submits, that if this Court finds the judge improperly drew inferences based on speculation, the errors were harmless and insignificant, and could not have affected the verdict: *R. v. White*, 2011 SCC 13 at para. 93. The Crown says whether the appellant chose to use a heavier plastic bag, whether she watched her daughter when she smothered her, and whatever time she wrote the letters and sent the emails or googled ways to kill herself are minor matters on the issue of intent when considered in context of the entirety of her actions and decisions.

ii. Choice of Bag

- [55] The trial judge found that the appellant choose a particular plastic bag to smother Teagan:
- [165] Then she chose the tool to commit the act - a plastic bag. She had to get up from the couch or mattress, walk into the kitchen, and retrieve a bag from under the sink. She did not grab just any bag; she chose a heavy enough bag that she could use it alone. That was clearly part of the thought process as when the accused tried to kill herself using the same method a short time later she used lighter plastic bags and put two of them together, one inside the other. With Teagan she just needed the one.

[Emphasis added.]

- [56] The only evidence concerning the choice of the bag used on Teagan was inconsistent with the inference drawn by the trial judge. In her police interrogation, the appellant was asked what she smothered Teagan with. She said, "A bag." Sgt. Carr asked, "A bag? What kind of bag was it, Lisa?" The appellant said, "I just grabbed a bag from under the cupboard." There was no suggestion in her evidence that the appellant considered the heaviness of the bag.
- [57] The appellant submits there is no evidence to support the judge's finding that the appellant deliberately chose a heavy enough bag so she could use it on Teagan without doubling up. They note that the evidence on the record only supports the finding that the appellant used a black plastic bag to smother Teagan, and subsequently put two plastic bags (one inside the other) over her own head in an attempt to suffocate herself.
- [58] The appellant submits that the fact the appellant used doubled-up bags on herself does not logically support the inference that the appellant intentionally selected a heavy bag to use on Teagan. They note that there was no evidence that the appellant doubled up the bags she used on herself at the time of her suicide attempt, or that she was even the person who doubled them up. Further, even if the appellant had intentionally doubled up the bags before attempting suicide, that would not logically support the inference that before she attempted suicide, she had foreseen the need to double up with thinner bags, and had therefore intentionally chosen a heavier bag to smother Teagan.
- [59] The Crown submits that there was evidence upon which the judge could reasonably make this inference, including the fact that the appellant used the single black plastic bag to smother Teagan, put two plastic bags (one inside the other) over her head in an attempt to suffocate herself, and the bag the appellant used to smother Teagan was heavier than the thinner plastic bags she used in attempting to suffocate herself.
- [60] I agree with the appellant that the evidence does not support the inference that the appellant deliberately chose a heavy enough bag that she could use on Teagan without doubling it up. I find, however, that the error was harmless and it could not have affected the verdict. The important finding was that the appellant took a bag and used that bag to suffocate her daughter. Whether she did or did not compare various bags is of no import.

iii. Watching Her Daughter

- [61] The trial judge found that the appellant watched her daughter throughout the smothering. In this regard, she said:
- [168] In order to know that Teagan did not suffer and to ensure that she was maintaining the blockage of her airways, the accused must have been watching her throughout the time she was holding the bag over her face.

[62] The appellant submits that the judge's finding that she watched her daughter throughout the smothering was speculative. She submits there was no evidence suggesting where the appellant was looking at the time of the act. While the appellant said Teagan did not suffer, she was not asked, and did not say why she believed this.

[63] The Crown submits there was evidence from which the judge made this inference:

- The appellant articulated two purposes for using the plastic bag: 1) to kill Teagan; and 2) so Teagan would not suffer while the appellant smothered her.
- It would have taken some time to block the airways uninterruptedly before rendering Teagan unconscious.

[64] The Crown submits that reasonable inference based on this evidence is the appellant "must have been watching" her daughter to make sure she did not suffer. I agree with the Crown that in the circumstances the inference that the appellant watched her daughter was an inference that was open to the trial judge.

iv. The Judge's Findings about Order of Events after Teagan's Death

[65] The appellant submits that the trial judge made findings of fact about the order of events that occurred after Teagan's death. In this regard, they refer to certain passages at paras. 169, 170, 173:

[169] After she was finished the accused did not call an ambulance. She did not call anyone for help. She did nothing to try to save her. Instead she wrote the letters and notes to explain her actions and burden others with the responsibility for it. Then she tried to kill herself the same way she killed Teagan.

[170] Dr. Smith found it "odd" that the accused googled suicide methods. According to her this showed confusion and that the accused had not previously thought about killing herself. I disagree. The accused had had a plan. She explained it herself. She was going to kill herself and she did not want to leave Teagan behind. She wanted to die the same way she killed Teagan - by suffocation. The plan was dashed when she could not go through with it. That is when she searched for a different method.

[173] The accused's after-the-fact conduct is consistent only with the intention to cause death. There is no other reasonable explanation. After Teagan's death she sent emails and left notes to avenge Gabe, Ms. Joseph and the church for their perceived betrayal of her and to leave them with the responsibility for the deaths of her and Teagan. She then set about trying to kill herself.

[Emphasis added.]

[66] The appellant submits the judge's findings respecting the order of the appellant's post-offence conduct was speculative. She submits there was no way to know when after the smothering the appellant wrote the handwritten letters and notes; there was simply no evidence on this point.

[67] The Crown submits the judge's reasons as a whole demonstrate she did not speculate with respect to the order of the appellant's actions. The judge set out in detail the appellant's actions after the killing (RJ 30- 45), noting at para. 30 that after she killed Teagan "the accused did many things." She then listed the appellant's actions after the killing. These actions included:

- The appellant wrote a four-page letter and two notes. (RJ 31-33)
- She put two bags over her head to try to smother herself, but she could not go through with it. (RJ 34)
- She googled the "easiest ways to kill oneself." (RJ 36)
- She sent emails to Mr. Batstone, Teagan's school and others stating that Teagan had the flu and would not be at school. (RJ 37)
- She left a message at her rehab program saying that she would not be at the program that day. (RJ 37)
- She texted to a number of people a message saying, "I'm sorry." (RJ 38)
- She sent a number of recriminatory emails to Ms. Joseph and other church members. (RJ 39-42)

[68] The four page letter explained what she had done and why. In the letter she blamed Mr. Batstone, Ms. Joseph and the church group who she believed had betrayed her.

[69] The two notes read "You win Gabe" and "You broke me." The appellant posted the notes at the top of the stairs so to be seen as soon as someone entered the front door of her townhouse

[70] The judge found that the appellant wrote the letter and the notes between the time the appellant killed Teagan and when she tried to kill herself. I agree with the Crown that this is a reasonable inference from the evidence. The letter was clearly written after the appellant killed Teagan, and it is reasonable to infer that the appellant wanted to convey the messages in the notes to Mr. Batstone before she killed herself. Thus, the judge did not speculate in her reasons at para. 169 in finding "She tried to kill herself the same way she killed Teagan after she wrote the letters and notes." Similarly, the judge's finding at para. 170 that the appellant only googled suicide methods after her initial attempt to kill herself had failed was, on the evidence, a reasonable inference to draw.

- [71] I agree that at para. 173 the judge erroneously indicates that she sent emails prior to attempting to kill herself. The emails which were time stamped were only sent after she had tried to kill herself. To the extent that was an error, it is a harmless error and did not impact the judge's conclusion that the appellant had the requisite intent to kill.

C. After-the-Fact Conduct

i. Overview

- [72] The appellant submits that the Reasons reveal two legal errors in the trial judge's approach to the after-the-fact conduct evidence in this case. First, the trial judge erred in law by failing to explain her reasons for concluding that all the appellant's post-offence actions and statements were consistent with the intent to kill. Second, the appellant submits the trial judge erred in interpreting the law as holding that a failure to render aid will always be probative of intent because it is more consistent with murder than manslaughter.
- [73] The Crown disagrees. It submits the judge considered just some of the appellant's after-the-fact conduct as relevant circumstantial evidence on intent and she sufficiently explained how she reached that finding. The Crown further submits the appellant is wrong in asserting that the judge said that failure to render aid will "always" be probative of intent because it is more consistent with murder than manslaughter. Rather, she correctly said that it is a relevant consideration.

ii. Sufficiency of Reasons

- [74] The trial judge's reasons will be sufficient if they inform the parties of the basis of the verdict, permit meaningful appellate review, and provide public accountability for the judge's decisions. The reasons will fulfill these functions if, when read in context, they show what the trial judge has decided and why the judge made that decision: *R. v. Sheppard*, 2002 SCC 26 at para. 55; *R. v. R.E.M.*, 2008 SCC 51 at paras. 11, 17.
- [75] A functional test requires that a trial judge's reasons be sufficient for that purpose: *Sheppard* at para. 28. Where it is plain from the record why an accused has been convicted or acquitted, and the absence or inadequacy of reasons provides no impediment to appellate review, there is no cause for appellate intervention: *Sheppard* at paras. 26, 46.
- [76] In *R.E.M.*, McLachlin, C.J., following *Sheppard*, held that a functional context-specific approach is taken to the adequacy of reasons in a criminal case. Reasons must be sufficient to "fulfill their functions of explaining why the accused was convicted or acquitted, providing public accountability and permitting effective appellate review": *R.E.M.* at para. 15. Therefore, appellate courts "considering the sufficiency of reasons should read them as a whole, in the context of the evidence, the arguments and the trial, with an appreciation of the purposes or functions for which they are delivered": *R.E.M.* at para. 16. Reasons will be sufficient if they show why the judge decided as she did. A judge is not required to demonstrate how she arrived at her conclusion but, rather, the foundations of the decision must be discernible when examined in the context of the evidence, the submissions of

counsel and the history of how the trial unfolded: R.E.M. at para. 17.

iii. Positions at Trial

- [77] At trial, the appellant submitted that her after-the-fact conduct was not probative of intent because of the dangers of drawing reliable inferences from after-the-fact conduct given the facts in the case, and because much of the conduct was at least equally consistent with the appellant acting without understanding the true consequences of her actions, as with the intent to kill.
- [78] The Crown submitted that the appellant's purposeful and deliberate after-the-fact conduct was circumstantial evidence that the appellant's mental functioning was not substantially impaired due to intoxication or mental disorder. The Crown noted the law respecting difficulties with inferring level of culpability from after-the-fact conduct, and submitted that it "isn't so much that it [the post-offence conduct] relates directly on intent, but its circumstantial evidence, at least of whatever mental state the person was in at the time of the after-the-fact conduct."

iv. The Judge's Reasons

- [79] The judge dealt with the issue of after-the-fact conduct in four parts of her reasons. She first detailed the appellant's after-the-fact conduct following the killing (RJ 30-45).
- [80] In her review of the relevant principles of law she reviewed the leading case law and the legal principles governing the use and relevance of after-the-fact conduct to the determination of intent (RJ 131-140). From that review she concluded that the appellant's after-the-fact conduct could be considered, along with all of the other evidence, to determine the accused's intent. The appellant does not suggest that the judge erred in her interpretation of the legal principles, except with respect to the law on failure to render aid.
- [81] Next, the judge referred to the appellant's after-the-fact conduct in assessing her state of intoxication on the issue of intent. As there is no evidence of how much, if any, alcohol the accused had to drink before she smothered Teagan, the judge had to consider all of the evidence to determine whether the accused was intoxicated at the time of the killing and if so, whether the impairment raised a reasonable doubt that she could foresee the consequences of her actions. In this regard, she made several findings concerning the appellant's after-the-fact conduct, including the following:
- [147] In assessing the accused's state of intoxication, I note the following:
- 1) None of her electronic communications made before or after she killed Teagan suggest any level of impairment. The content was consistent with the content of her communications of the months prior. She was able to carry on several conversations at the same time. She responded appropriately and coherently. There were no signs of confusion of thought. She had few typographical errors. She even corrected some typos.

- 2) . . .
- 3) Her actions after the act indicate no confusion of thought. The four page letter was neatly written. It made sense. Again the content was consistent with everything she had written before and after Teagan's killing as well as the statements she made after. The accused left in plain view in the living room near where her daughter's dead body would have been found had she not been interrupted, clearly intending it to be found.
- 4) The notes were neatly printed and again were consistent in content to what she wrote and said before the killing and after. She carefully hung the notes in the front hallway, one above the other, so they would be seen immediately on entering the front door.
- 5) The note in the kitchen garbage can was purposefully placed on top of the bag she used to suffocate Teagan. Again, it was positioned to be found.
- 6) Making the head covering to suffocate herself required considerable care and an even hand. She used two plastic grocery bags, putting one inside another. I note that these bags appear to be thinner plastic than the one bag she used to smother Teagan. She then wrapped a substantial amount of duct tape around the bags. Some if not all of it had to be applied with the bag on her head. The tape was neatly cut. There were no balls of duct tape or botched attempts found by the police.
- 7) The accused exhibits a strong memory of the events including what happened before, during and after. She provided details of the killing to both emergency responders, police officers and medical officials including what she was thinking. Her statements clearly indicate an understanding that Teagan was dead and that she was responsible.
- 8)
- [82] Having considered all of the evidence, including the after-the-fact conduct, the judge was satisfied that even if the appellant had consumed some alcohol before the killing she was not impaired to the extent that it affected her ability to understand and foresee the true consequences of her act (RJ 150).
- [83] The judge next referred to the appellant's after-the-fact conduct in the context of analysing the defence of mental disorder short of NCRMD. In this regard, she said:
- [169] After she was finished the accused did not call an ambulance. She did not call anyone for help. She did nothing to try to save her. Instead she wrote the letters and notes to explain her actions and burden others with the responsibility for it. Then she tried to kill herself the same way she killed Teagan.

- [170] Dr. Smith found it "odd" that the accused googled suicide methods. According to her this showed confusion and that the accused had not previously thought about killing herself. I disagree. The accused had had a plan. She explained it herself. She was going to kill herself and she did not want to leave Teagan behind. She wanted to die the same way she killed Teagan - by suffocation. The plan was dashed when she could not go through with it. That is when she searched for a different method.
- [173] The accused's after-the-fact conduct is consistent only with the intention to cause death. There is no other reasonable explanation. After Teagan's death she sent emails and left notes to avenge Gabe, Ms. Joseph and the church for their perceived betrayal of her and to leave them with the responsibility for the deaths of her and Teagan. She then set about trying to kill herself. Of course she was frustrated when Ms. Ogilvie showed up at her door and then again when her car went into the ditch.
- [174] The accused's statements both voluntarily offered and given to police and doctors are consistent only with having meant to cause Teagan's death and nothing else.
- [175] There is nothing either said or done by the accused after Teagan's death that is inconsistent with this intention.
- [84] The judge ultimately found that there is nothing in the evidence that suggested that the accused's mental disorders prevented her from forming the subjective intent to kill her daughter, and while she may have had a diminished capacity, it did not preclude her from forming the requisite intent for murder (RJ 177).
- [85] The appellant submits that the trial judge's reasons respecting the probative value of the after-the-fact conduct did not meet the functional test set out in Sheppard. The trial judge's reasons show that she found everything the appellant said and did after Teagan's death was evidence of intent to kill. However, the appellant does not know why the judge came to this unusual and important conclusion. The appellant submits the trial judge's reasons in this case are devoid of any articulation of the potential inferences to be drawn from specific pieces of after-the-fact conduct evidence, why she found it unreasonable to draw inferences consistent with manslaughter, or of the chain of reasoning she followed to find the evidence consistent with murder. The appellant submits that much of the appellant's after-the-fact conduct was consistent with manslaughter. She submits it is not obvious in the record why the judge concluded the evidence was wholly consistent with an intent to kill.
- [86] The Crown challenges the appellant's submission that the judge found that "all" of the appellant's after-the-fact conduct was only consistent with the intent to kill. The Crown submits that the judge did not find that "everything the appellant did after the killing was evidence of intent." Rather, she referred to specific after-the-fact actions, and explained why each of these actions informed the appellant's state of mind. In her analysis of this evidence, the judge found that the appellant's actions after she killed Teagan indicated no confusion of thought. She thus concluded these actions were consistent only with the intention to cause death. The judge's finding at para. 175 that nothing said or done after the killing was

inconsistent with the intention to kill is not a finding that "everything" she said and did afterwards was consistent with this intention.

- [87] I agree with the Crown's submission. The judge did not find that every after-the-fact action was consistent with intent. The Crown relied on only some of the appellant's after-the-fact conduct, and only for the limited purpose of refuting the specific defences of intoxication and mental disorder. The judge gave appropriate reasons why those actions informed the issue of intent. While the appellant raises the risk of misusing after-the-fact conduct, the judge relied on the appellant's after-the-fact conduct only for a limited purpose, that is, for determining the appellant's state of mind in the context of the appellant's defences. This is a proper use of such evidence. In *R. v. Jaw*, 2009 SCC 42 at para. 40, LeBel J. stated:
- [40] Post-offence conduct may also be used to discredit a defence that relates to the accused person's state of mind at the time of the offence and that is therefore relevant to his or her ability to form the requisite intent for the offence, such as intoxication (*R. v. Pharr*, 2007 ONCA 551, 227 O.A.C. 112, at paras. 8-15; *Peavoy*, at pp. 630-31) or the "not criminally responsible" defence under s. 16 (*R. v. Jacquard*, [1997] 1 S.C.R. 314, at paras. 42-53).
- [88] The trial judge's reasons show what she has decided and why she made that decision. The reasons provide no impediment to appellate review. The foundations of the decision are discernible when examined in the context of the evidence, the submissions of counsel and the history of how the trial unfolded.
- [89] I would not accede to this ground of appeal.

vi. Consideration of the Appellant's Failure to Render Aid

- [90] The appellant submits the trial judge erred by determining that the law established that the failure to render aid was more consistent with murder than manslaughter. The evidence that a person did not render aid to someone after they harmed them is not necessarily more consistent with the intent for murder. Rather, whether the failure to render aid is probative of an intent to kill will depend on all the circumstances.
- [91] The Crown submits the appellant is wrong in asserting that the judge said the failure to render aid "will always" be probative of intent. What she said was that it is a relevant consideration:
- [138] Evidence that a person did not render aid to someone after they had harmed them is a relevant consideration in the analysis of the mental element for murder as it is more consistent with intending the death of a person than not: *R. v. Campbell*, [2018] O.J. No. 5415 (Ont. C.A.) at para. 12.
- [92] In *Campbell*, the after-the-fact conduct of failure to perform CPR on the victim or to call 911 immediately after shooting the victim was used, like the present case, as circumstantial evidence of intent. The Ontario Court of Appeal held that this was a relevant consideration on the issue of intent.

[93] In analysing the appellant's mental disorder in the context of determining the appellant's state of mind at the time of the killing, the judge said:

[169] After she was finished the accused did not call an ambulance. She did not call anyone for help. She did nothing to try to save her. Instead she wrote the letters and notes to explain her actions and burden others with the responsibility for it. Then she tried to kill herself the same way she killed Teagan.

[94] Whether the failure to render aid is probative of intent will depend on the circumstances. I agree with the Crown that, in the circumstances of this case, the appellant's failure to seek help was probative to rebut the defence's theory that the appellant did not grasp the real-world consequences of her action. At the trial, the Crown argued it was inconceivable that once the appellant realized her daughter was dead, she did not seek any assistance. I agree that the inference the Crown sought was an available inference, and it was reasonable according to logic.

[95] I would not accede to this ground of appeal.

CONCLUSION

[96] In the result, therefore, I would dismiss the appeal.

"The Honourable Mr. Justice Goepel"

I AGREE:

"The Honourable Chief Justice Bauman"

I AGREE:

"The Honourable Madam Justice Saunders"

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