

CANADA / JUDGMENT

R. v. Boden

2024 BCCA 6

COURT

British Columbia Court of Appeal

DECIDED

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2024 BCCA 6 R. v. Boden

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Boden,

2024 BCCA 6

Date: 20240111

Docket: CA48438

Between:

Rex

Respondent

And

Joshua Joseph Boden

Appellant

Before:

The Honourable Mr. Justice Fitch

The Honourable Madam Justice DeWitt-Van Oosten

The Honourable Mr. Justice Grauer

On appeal from: An order of the Supreme Court of British Columbia, dated
November 4, 2021 (R. v. Boden, Vancouver Docket 27795-1).

Counsel for the Appellant:

R.A. McConchie

M. Winkel

Counsel for the Respondent:

L.A. Chu

I. Grant

(via videoconference)

Place and Date of Hearing:

Vancouver, British Columbia

December 7, 2023

Place and Date of Judgment:

Vancouver, British Columbia

January 11, 2024

Written Reasons by:

The Honourable Madam Justice DeWitt-Van Oosten

Concurred in by:

The Honourable Mr. Justice Fitch

The Honourable Mr. Justice Grauer

Summary:

This is an appeal from conviction for second degree murder in a trial by judge alone. The Crown's case depended on the credibility and reliability of a key witness who was at the scene of the murder. The witness's testimony was heard in a voir dire. On appeal, the appellant alleges that a considerable amount of evidence about his mistreatment of this witness was improperly admitted. He says the trial judge failed to engage in a proper analysis of probative value and prejudicial effect and misapprehended evidence in finding that the witness's identification of the appellant was confirmed or corroborated.

HELD: Appeal dismissed. The appellant has failed to establish reversible error. At trial, the appellant made a tactical decision to consent to the admission of the witness's testimony. The trial judge was aware of the dangers of moral and reasoning prejudice and instructed himself accordingly. The trial judge did not err by misapprehending evidence he found to be confirmatory or corroborative of the witness's version of events. His weighing and assessment of the evidence is entitled to deference.

Reasons for Judgment of the Honourable Madam Justice DeWitt-Van Oosten:

Introduction

- [1] The appellant, Joshua Joseph Boden, was found guilty of second degree murder after a trial by judge alone in the British Columbia Supreme Court. The victim of the murder, Kimberly Hallgarth ("KH"), had an intimate relationship with the appellant and worked for him in the sex trade.
- [2] The trial judge found that in the early morning hours of March 15, 2009, the appellant assaulted KH in her Burnaby home, stomped on her neck, and then strangled her, causing her to asphyxiate. She sustained significant blunt force trauma to her chest, chin, and right cheek. After the killing, the appellant left the residence. KH's body was lying at the bottom of a front entrance stairwell.
- [3] Identity was the main issue at trial. Proving that the appellant was the person who committed the offence depended on the testimony of the Crown's main witness, Heidi Nissen ("HN"). She was present for the murder and identified the appellant as the perpetrator. At the time, HN was also involved in an intimate relationship with the appellant and worked for him in the sex trade.
- [4] The defence vigorously challenged HN's credibility and reliability. The Crown conceded that if the trial judge did not accept HN's evidence, it could not prove identity beyond a reasonable doubt.
- [5] The Crown agreed that HN's testimony should be approached with caution given a history of untruths and recantation. However, the Crown said there was an understandable explanatory context for HN's conduct, namely, a dysfunctional relationship with the appellant that included intimidation and physical abuse. The Crown also argued that HN's evidence about the circumstances surrounding the murder was confirmed or corroborated by other prosecution evidence.
- [6] Considerable evidence was led at trial about HN's relationship with the appellant, both before and after the murder. This included evidence of the appellant assaulting her. The parties agreed the evidence was admissible and relevant to assessing HN's credibility and reliability as an eyewitness.
- [7] On appeal, the appellant takes no issue with the finding that KH's death was intentional. He does not dispute that he was in her home when KH was killed.
- [8] Instead, his challenge to the conviction is focused exclusively on the testimony of HN. The appellant says evidence about the way in which he treated HN should not have been admitted. This was evidence of uncharged (extrinsic) disreputable conduct that is presumptively inadmissible and the appellant says its prejudicial effect strongly outweighed its probative value. The appellant also contends that in accepting HN's testimony as truthful, the trial judge misapprehended evidence he viewed as confirmatory or corroborative. He argues these errors rendered his trial unfair and asks that the Court order a new trial.

[9] For the reasons that follow, I would dismiss the appeal.

Background

[10] It is not necessary to set out the entirety of the background to the case. Instead, I will highlight some of the more salient parts of the record. The reasons for conviction are indexed as 2021 BCSC 2677 ("RFJ").

Victim was known to the appellant

[11] The appellant and KH knew each other. When speaking to the police about her death, he acknowledged that he had known KH for many years. The appellant said that in the days leading up to her death, he had been seeing KH almost every day and their interactions included sexual intercourse.

[12] More than one witness testified about the relationship.

[13] This included Anastassia Fedossova ("AF"), who lived with KH and said she had seen the appellant at the victim's residence three or four times (perhaps more), with the last time being a week before KH was killed. She said the appellant would argue with KH and they would yell at each other. She did not see any violence, but described the two as being not "good for each other".

[14] The trial judge also heard from Wally Buono, a former coach with the BC Lions football team. The appellant played with the BC Lions between 2006-2008. Mr. Buono testified that during this time, he received a telephone call from KH telling him that the appellant had assaulted her and damaged her vehicle. The appellant was asked about the matter. He acknowledged interacting with KH, but said her description of what occurred was "more than it actually was". The appellant was released from the football team in 2008 because of the allegation of domestic violence.

[15] The Crown also called KH's mother-in-law as a witness. She had a close relationship with KH. She saw the appellant verbally abuse KH and before her death, KH expressed fear of him.

[16] HN testified about the relationship. She said she first learned of the relationship in 2008-2009. The appellant told her that KH "owed him" for "ruining his football career". He said he was "meeting up with [KH] to get money because he felt that she owed him for ruining his football career".

[17] In admitting evidence of the relationship between the appellant and KH, the trial judge cited authorities such as *R. v. Moo*, 2009 ONCA 645, in which the Court noted that in prosecutions for domestic homicide:

[198] evidence is frequently admitted to elucidate the nature of the relationship between the accused and the deceased. This evidence, which often discloses misconduct other than that charged, not only demonstrates the nature of the relationship between the parties, but also may afford evidence of motive and animus relevant to establish the identity of the deceased's killer and the state of mind with which the killing was done

[Internal references omitted.]

[18] On appeal, the appellant does not take issue with the admissibility of evidence about his relationship with KH or the authority of the trial judge to rely on it.

Circumstances surrounding the murder

[19] Evidence about how the murder occurred came predominantly from HN, who the defence submitted should be treated as a Vetrovec witness (*Vetrovec v. The Queen*, [1982] 1 S.C.R. 811, 1982 CanLII 20).

[20] At the time of the offence, HN was 19 years old. She was five feet seven inches tall and weighed 115 pounds.

[21] HN was living with the appellant and testified that on the evening of March 14, 2009, they argued. She left their shared apartment and was screaming at him. He became angry, jumped over the fence, threw her on to the apartment's patio, and began kicking her in the ribs. HN left and went to a safe house. Her arrival at the safe house was independently confirmed. She was described by a staff member as being "absolutely terrified", "withdrawn", and "shaking".

[22] Shortly before 3:00 a.m. on March 15, HN took a taxi cab to see KH. She said she had "no one else to call". She knew KH had the "same type of relationship" with the appellant and she thought she could "confide in her". KH paid for the taxi. Telephone records confirmed calls from the safe house to KH at 2:09, 2:29, and 2:48 a.m. A taxi driver confirmed that he dropped HN at KH's residence and a woman came out to pay the cab fare.

[23] When she arrived at the residence, HN could tell KH was upset and had been crying. When HN got to the top of the stairwell in the entrance to the home, she saw the appellant. He came "barrel[li]ng out" from the living room area and was "livid". He began yelling and screaming at her.

[24] HN started to cry. The appellant accused her of wanting to work in the sex trade for someone else. She threw herself on her knees and apologized. KH did the same, reminding the appellant that he had said he would not hurt HN. After that, KH went in the direction of the bedroom and bathroom. The appellant proceeded to hit HN in the head with a closed fist. He then went in the same direction as KH. She heard the two of them struggle and KH said she was going to call the police.

- [25] The appellant returned to HN and placed one of his hands around her windpipe and the other at the back of her neck. He choked her and she lost consciousness.
- [26] HN testified that when she awoke, the home was silent. She knew something was wrong. She walked to the top of the stairwell and looked down. KH was lying at the bottom of the stairwell by the front door. She was on her back. There were "dark, dark marks all over her neck". The appellant was standing over KH, with one foot on her neck. He had socks on his hands. He lifted his foot, placed it back down, and then "push[ed] all of his weight onto her neck".
- [27] The appellant asked HN to get a pair of socks. She did. She walked down a couple of stairs and handed the socks to him. KH was "gasping for air". The appellant shoved the socks down her throat. He walked up the stairs and went in the direction of the kitchen. He returned with two bottles of prescription pills. He took the socks out of KH's mouth and dumped the pills over her mouth. Some went into her mouth. Others fell around her. The appellant again put rolled up socks into KH's mouth and was "pushing them down her throat". He also choked KH with his hands.
- [28] HN testified the appellant moved KH's body so that her head was facing the front door and her legs, feet, or ankles were at the bottom of the stairs. He told HN to get a blanket. He got two garbage bags. He used a towel to "wipe down" KH. He put the towel into one of the garbage bags with some other things. He proceeded to snap off KH's fingernails.
- [29] The appellant and HN left the home. The appellant called for a taxi cab once they were a couple of blocks away from the residence. This fact was confirmed through phone records. The appellant was carrying the two garbage bags when they left KH's residence. The next day, he told HN he was going to dispose of the bags and he left their apartment for 15 minutes to half an hour.

Events after the fact and disclosure to the police

- [30] HN remained in a relationship with the appellant for many years after KH's death. She continued to work for him in the sex trade.
- [31] On multiple occasions in March 2009, the police approached HN to speak to her about the death. She testified that she lied to them, telling the police things the appellant directed her to say. When asked why she lied, she said was afraid of the appellant. However, she also had a "very strong" bond with him and felt that he was the "only person" she had in the "whole entire world". She was "scared of him", but also loved him.
- [32] HN became increasingly afraid of the appellant and left their residence to live with an uncle. In April 2009, after an altercation in which the appellant revealed he had a gun, HN contacted the police and told them what she knew about the murder.

- [33] HN learned she was pregnant and subsequently returned to live with the appellant. In May 2010, she withdrew her identification of the appellant as the murderer, telling the police the information she had provided was second-hand.
- [34] The appellant and HN were together on-and-off for about ten years after the murder. By 2017, they had two children. There was much discord, police involvement, and involvement by the Ministry of Children and Family Development. They mutually breached no-contact orders that were put in place to keep them apart.
- [35] In 2018 or 2019, HN began to live with her children in an undisclosed location with the financial support and assistance of the police. Ultimately, she testified at the trial and described the appellant's involvement in the murder.

Cause of death

- [36] A pathologist testified that KH died from asphyxiation by prolonged manual strangulation. Blunt force injuries to her face and chest were consistent with someone having stomped on her. These injuries required a significant amount of force. The pathologist acknowledged, however, that the injuries could have been inflicted by any adult.

Noises heard in neighbouring suite

- [37] At trial, the Crown called two witnesses who lived on the ground floor of KH's residence.
- [38] One of these witnesses described that he was awoken at 3:30 a.m. on March 15, 2009 by a "loud sound" akin to a chair or table being moved above him, as well as a female's "[l]oud, brief, penetrating shriek". He then heard a male and female "arguing or fighting". About five or ten minutes later, he heard a "loud sound coming from the stairs" that led into KH's residence, as if "someone was quickly going down the stairs, running or jumping, skipping several steps ". It was as if " someone either threw something down or jumped and ran quickly downstairs. And there was no other sound".
- [39] The witness subsequently heard someone go down the stairs once and then back up. It was the " ordinary sound that people make when they go up and down the stairs".
- [40] The second witness from the ground floor also testified that she was awoken at around 3:00 a.m. She heard voices--a male voice and a female voice. They were talking. It was a "calm conversation". It then sounded " like they started arguing about something". She then heard "someone shout". As if " someone yelled as a surprise". It was a female. Seconds later, there was a " very sharp sound, as if furniture was being moved ". It was quiet for "a minute or two". And then, " there was a very strong, dull falling noise. It sounded like either someone or something fell down the stairs".
- [41] At this point, the witness got out of bed. There was a shared wall between the living room and KH's stairwell. The witness heard " heavy breathing, very heavy breathing as if someone was doing exercises or had been jogging or had been carrying something heavy". This sound

was coming from the "bottom of the staircase". The witness heard a female voice talking to a male, saying "It's okay", "It's going to be fine", or, "Everything is going to be fine". The female was not at the bottom of the stairwell. "She was on the stairs. Not at the very bottom, but somewhere on the stairs".

- [42] The witness returned to bed. It was quiet. She did not hear anyone going up or down the stairs. She then heard the sound of "women's shoes, heels". It was "as if someone came to a place as if they had forgotten something, stood there for a few seconds, and left". That was the end of any sounds.

DNA evidence

- [43] The appellant's DNA was found on the exterior of the waistband and one ankle of the pants KH was wearing when her body was found.

Observations at the scene

- [44] When KH's body was discovered, the police saw a broken handrail about halfway down the stairwell. There were blood stains at the top of the stairwell, as well as a piece of a fingernail. DNA extracted from carpet fibres at the top of the stairwell and from the fingernail matched KH.

Victim was intoxicated

- [45] The trial judge found KH was intoxicated at the time of her death. However, he also concluded that if she fell down the stairs due to intoxication, the fall did not cause her to die.

Reasons for Judgment

- [46] As the appeal is focused on the evidence of HN, I will set out only the findings specific to her testimony.
- [47] As stated, HN's evidence was vigorously challenged. The defence sought to establish she could not be believed or, at the very least, her evidence was so problematic it should raise a reasonable doubt as to whether it is the appellant who killed KH.
- [48] Among other things, the defence said HN: (1) had a history of lying and a demonstrated disregard for the law; (2) recanted statements made to the police in this case, as well as others; (3) was inconsistent in her testimony at trial, in previous statements about the case, and in previous statements in unrelated matters; (4) was argumentative and illogical in her testimony; (5) described things that were implausible; (6) led a criminal lifestyle; and (7) for a variety of reasons, was motivated to lie and falsely accuse the appellant of murder. The defence argued that HN had reason to harm KH and as such, could have been the murderer.
- [49] In assessing HN's evidence, the trial judge was alive to these concerns. Citing *Vetrovec* and *R. v. Khela*, 2009 SCC 4, he instructed himself that "where the guilt of the accused is made to rest exclusively or substantially on the testimony of a single witness of doubtful credit or

veracity, the danger of a wrongful conviction is particularly acute": Khela at para. 2. Consequently, before convicting on the basis of this evidence, a court " should look for evidence from another source tending to show that the untrustworthy witness is telling the truth as to the guilt of the accused ": Khela at para. 37, internal references omitted.

[50] The trial judge did not agree with the defence that HN was unresponsive, evasive, or argumentative when testifying. She was impatient at times, but overall, he found her " appropriately responsive to questions, even on emotionally-charged issues that brought her to the verge of tears". She was forthcoming on conduct that "put her in a bad light". She "readily acknowledged" mistakes about dates or the specific timing of events. In any event, none of those mistakes was " particularly germane to the substantive issues to be decided" in the case.

[51] In response to specific allegations of untrustworthiness, the trial judge found that:

- HN's prior lies to the police and while under oath were largely intended to assist the appellant in avoiding incarceration and at least in part, driven by her dependence on him;
- HN's demonstrated disregard for the law required that her evidence be treated with caution. However, it had to be considered in the context of the appellant's control over HN in a "tumultuous, obsessive" relationship;
- HN's recantation or pull-back from the 2009 police statement about the appellant's involvement in the murder required that the " totality of her evidence be reviewed with caution". However, the recantation also had to be assessed " having regard to the same tumultuous, financial, and personal dynamics that characterized the entirety of their relationship and her acknowledged obsession with and also fear of [the appellant], not only before but also after the birth of their two children";
- she had made other allegations against the appellant in matters unrelated to the murder from which she also pulled back, but they all occurred after KH's murder and again in the context of HN's " tumultuous and on-and-off relationship " with the appellant;
- inconsistencies between HN's testimony at trial and previous statements she made to the police or other people related mostly to peripheral issues, and in any event, they did not cause the trial judge to reject HN's testimony on the substantive issues at trial. They were not of "sufficient significance or magnitude" to require that her evidence be rejected in its entirety;
- challenges to HN's testimony on the ground that things she said were illogical or implausible were not " sufficient to cast doubt upon the core aspects of her testimony as to what occurred at [KH's] residence"; and,
- evidence of possible motive for HN to harm or kill KH was not sufficient to support an inference that HN was the perpetrator. The trial judge accepted that "for most of her life" after meeting the appellant, HN was "obsessed" with him. However, without more, that fact did not establish a motive to kill.

[52] Ultimately, the trial judge accepted HN's testimony about the killing:

[379] While aspects of her testimony do give rise to serious issues of credibility sufficient to approach her evidence with caution and to subject it to careful scrutiny, I am satisfied that taken in its totality and most significantly having regard to the important confirmatory and corroborative evidence adduced by the Crown to which I have referred, I can safely rely upon her eyewitness testimony that she saw [the appellant] kill [KH] in her home on March 15, 2009, by first stomping on her neck and chest, and then strangling her with his thumbs on her throat and his fingers on the back of her neck

[Emphasis added.]

[53] The "important confirmatory and corroborative evidence" relied upon by the trial judge is discussed below.

Issues on Appeal

[54] The appellant challenges his conviction on two bases. He says:

- a) the trial judge erred in admitting and relying upon uncharged disreputable conduct evidence in his assessment of HN's credibility and reliability; and,
- b) the trial judge misapprehended certain evidence that he found confirmatory or corroborative of HN's testimony.

[55] The appellant says these errors had a material impact on the decision to accept HN's testimony and given the centrality of her evidence, they necessitate a new trial.

Discussion

First ground of appeal--uncharged disreputable conduct

[56] The main thrust of the appellant's first challenge to the verdict is that the trial judge erred in admitting HN's testimony about uncharged disreputable conduct because the prejudicial effect of this evidence significantly outweighed its probative value. This error attracts a deferential standard of review: *R. v. Schneider*, 2022 SCC 34 at para. 62; *R. v. Badyal*, 2020 BCCA 127 at para. 57.

[57] In resolving the issue, it is necessary to consider: (1) the procedure followed in admitting HN's evidence; (2) the legal principles governing the admissibility of uncharged disreputable conduct; and (3) whether the appellant has established reversible error.

Procedure

[58] Prior to HN's testimony, the Crown told the defence and the trial judge that it would lead evidence from HN about her relationship with the appellant. This would include evidence that she worked in the sex trade for him and that he physically abused her. The parties agreed that HN's evidence should be heard in a voir dire. Defence counsel (who is not

counsel in the appeal), acknowledged there was a "legitimate narrative purpose" for the evidence, or parts of it, but said he might object to some of the testimony. He told the trial judge he would "flag" the problematic parts when they arose.

- [59] HN took the stand and began testifying about her relationship with the appellant. Among other things, she described an incident in which the appellant became angry with her for not wanting to do sex work and kicked her to the foot of their bed. Defence counsel objected. He conceded there was "some relevance to the dynamic in the relationship" between the appellant and HN. However, he expressed concern about the "level of detail" the Crown was eliciting from HN, including testimony about "discrete violent incidents". Defence counsel described this evidence as "far more prejudicial than probative overall".
- [60] In response, the Crown explained the purpose of leading the evidence. The trial judge would hear that HN lied to the police in some of her statements about the appellant's involvement in the death of KH. She also recanted some statements and there was evidence she had lied under oath. Her credibility was the "lynchpin of the Crown[s] case". The lies and recantations were explicable, at least in part, by the nature and dynamics of HN's relationship with the appellant. The Crown argued that if the trial judge did not have access to that context, he would be required to assess HN's credibility "in a vacuum".

- [61] The trial judge ruled on the objection, saying this:

I anticipate, and already have heard much evidence about discreditable conduct, however, in the totality of the circumstances of this particular case, and the importance of this particular witness to the determination of the issues before the court, I am satisfied that the Crown is not leading evidence at this stage that is more prejudicial than probative having regard to the dynamics of the situation, and the importance of the dynamics to the issues of credibility, which are ultimately crucial to the determination of [the appellant's] guilt or innocence in this case.

So I will allow it, bearing in mind this is on a voir dire, and in the event that at the end of the day there are specific aspects of that evidence that you wish to have excluded from consideration by the court, at the end of the day, because in the totality of the evidence a specific issue becomes more prejudicial than probative, I'll certainly hear submissions about that, and the extent to which I may be prepared or not prepared to take that into consideration on my determination of the evidence that is admissible at trial.

[Emphasis added.]

- [62] There were no further objections to HN's testimony in the voir dire. Once the Crown finished its examination, HN was cross-examined for five days. This included questions about her relationship with the appellant, various incidents that occurred between them, and her lifestyle, both before and after the death of KH.
- [63] On completion of the voir dire, the parties addressed admissibility. The Crown provided the trial judge with a transcript of the voir dire. In the transcript, the Crown colour-coded HN's testimony, using various colours to distinguish between specific subject matters addressed

by her. The Crown conceded that a certain portion of the relationship evidence should not be admitted (highlighted in orange). However, from its perspective, the rest of the evidence was admissible. Defence counsel agreed, saying that " much of [that] stuff was raised in cross-examination by the accused ", and that it would not be "fair to lie in [his] mouth to now say exclude it." Instead of opposing the admissibility of the remainder of the evidence, the defence said it would make submissions about weight and use.

[64] With the consent of the defence, the trial judge admitted all of HN's evidence in the voir dire, except the orange highlighted portions of the transcript. The Crown reiterated the intended purpose of the evidence, including acts of physical abuse. The evidence was necessary to:

to understand [HN's] evidence, giving so many statements, instances of recantation, a reunion with [the appellant], currently being in hiding, to give it any meaning to [HN's] evidence, we have to understand the context. And that includes working for [the appellant], the physical abuse she described, the bail breach she testified about, the MCFD breaches, and so on and so forth.

[65] In his reasons for conviction, the trial judge explained his decision for admitting the evidence. From his perspective, it:

[118] so inform[ed] the relationship between [the appellant] and [HN], and their lifestyle and is so intertwined with the central issues concerning [HN's] credibility and the reliability of her testimony, that without such evidence of discreditable conduct, the Court would be left to assess the totality of the evidence in a contextual vacuum.

[198] The evidence is admissible because I am satisfied that its probative value outweighs its prejudicial effect in explaining and giving context to the nature of their relationship and assisting in my understanding of [HN's] credibility, and is also relevant to the issues at trial including, most importantly, the reliability of [HN's] eyewitness testimony identifying [the appellant] as [KH's] killer

[Emphasis added, internal references omitted.]

[66] The trial judge instructed himself more than once that uncharged disreputable conduct cannot be used to infer that the accused is the type of person who would commit a murder. This instruction is found in the reasons for conviction, as well as in reasons produced in a voir dire testing the admissibility of Mr. Buono's evidence: 2020 BCSC 2314. It is clear from the record the trial judge understood that inferring guilt based on a "general disposition or propensity" for violence would constitute a "forbidden chain of reasoning": citing *R. v. Handy*, 2002 SCC 56 at para. 139.

Legal principles governing admissibility

[67] The parties agree that the legal framework for admitting uncharged disreputable conduct evidence is properly set out in *R. v. Z.W.C.*, 2021 ONCA 116 [Z.W.C.].

- [68] The trial judge cited Z.W.C. The appellant does not allege he misunderstood the legal framework; rather, he takes issue with its application.
- [69] Z.W.C. affirms that evidence of uncharged disreputable conduct is subject to an exclusionary rule and presumptively inadmissible: at para. 96. See also *R. v. R.G.S.*, 2023 BCCA 52 at paras. 35-36, leave to appeal to SCC ref'd, 40607 (24 August 2023) [R.G.S.]. However, there are exceptions. This type of evidence may be admitted where the Crown is able to establish it is relevant and material to a live issue at trial, and that its probative value outweighs its prejudicial effect: Z.W.C. at para. 97.
- [70] Admissibility is determined case-by-case. However, it is not uncommon to see this evidence in prosecutions alleging intimate partner violence: Z.W.C. at para. 106. In those circumstances, the evidence might be admitted as part of the narrative of relevant events; to provide context for other evidence; to understand the nature of the relationship between the principal parties; to show motive or animus for committing the charged offence; to explain why a complainant did not leave the relationship post-abuse or report the matter; or to rebut a claim of fabrication: Z.W.C. at para. 108, citing from *R. v. J.H.*, 2020 ONCA 165 at paras. 54-55.
- [71] In assessing the probative value of uncharged disreputable conduct, a court will consider factors such as the strength of the evidence that the conduct occurred; the connection between the conduct and the accused; the extent to which the evidence supports the inferences the Crown seeks to make; and the materiality of the evidence: Z.W.C. at para. 98, citing David Paciocco, Palma Paciocco & Lee Stuesser, *The Law of Evidence*, 8th ed. (Toronto: Irwin Law, 2020), at pp. 74-75.
- [72] In assessing prejudicial effect, a court must consider the possibility the evidence could cause "moral" and "reasoning" prejudice: Z.W.C. at para. 101.
- [73] "Moral prejudice" involves the risk that the evidence will portray the accused as a "bad person" and result in a conviction based on the belief that they are someone with a propensity to have committed the charged offence: Z.W.C. at para. 102. This risk will increase with particularly inflammatory or egregious disreputable conduct: Z.W.C. at para. 104; *R.G.S.* at para. 39.
- [74] "Reasoning prejudice" occurs when evidence diverts the trier of fact from their task to decide the subject matter of the prosecution or renders the trial unduly confusing. Uncharged disreputable conduct must not overwhelm the case and attract more attention or more weight than logically justified. It must not leave the accused unable to respond properly because of the amount of time that has passed since the conduct occurred, because they are surprised by the evidence, or because of its collateral nature. Disreputable conduct evidence must not consume a disproportionate amount of court time and cause the trier of fact to unduly focus its attention on whether those acts occurred: Z.W.C. at para. 103; *R.G.S.* at para. 45.

[75] Where they can, especially in a jury trial, judges should take reasonable steps to minimize the prejudicial effect of this evidence. They must also ensure it is not misused. For example, they may decide to limit the volume and extent of the evidence adduced by the Crown: Z.W.C. at paras. 111-112. Alternatively, the judge may direct that certain portions of the evidence be edited or presented in a way that ameliorates its prejudicial effect: Z.W.C. at para. 113. Finally, if evidence of uncharged disreputable conduct is admitted in a jury trial, the trial judge must instruct the jury on its use. That instruction (including a mid-trial instruction where appropriate), should identify the evidence and explain its permitted and prohibited uses: Z.W.C. at para. 109.

Has the appellant established reversible error?

- [76] With this framework in mind, the question we must answer is whether the trial judge erred in this case. The appellant says he did: the trial judge admitted a "vast body of discreditable conduct evidence" about the appellant and HN "without properly assessing its probative value and prejudicial effect".
- [77] The appellant argues the trial judge admitted the evidence based on a "generalized" sense of relevance, but failed to identify specific inferences the Crown sought to have drawn from the evidence and then assess the legitimacy of those inferences in light of the primary issue at trial--identity. Even if the evidence of uncharged disreputable conduct was relevant, the trial judge did not ask whether the whole of it was necessary. He also did not undertake a meaningful analysis of prejudicial effect, including unfairness caused to the appellant by not being able to respond effectively given its historical and collateral nature.
- [78] The appellant says the trial judge did not consider the cumulative effect of the evidence, which consisted of "numerous bad acts". Had he properly analyzed the cumulative effect, he would have concluded the evidence was of "tenuous probative value" and gave rise to "significant prejudice". The "vast majority" of this evidence would likely have been excluded; or, alternatively, the trial judge would have made "more limited use" of it. Instead, a significant body of disreputable conduct evidence was admitted and received a disproportionate amount of weight. It did little more than "paint the appellant as a violent and exploitative abuser of a woman he was in a relationship with".
- [79] In my view, the appellant's first ground of appeal is without merit.
- [80] First, the transcript reveals an unequivocal and informed decision by the defence to consent to admission of the impugned evidence at trial. Defence counsel cross-examined extensively on the evidence, eliciting details beyond what was led by the Crown. From his written closing submissions, it is readily apparent defence counsel sought to use the cross-examination not only to challenge HN's credibility and reliability, but also to lay a foundation for her as the perpetrator of the murder. In the words of defence counsel, the evidence on the voir dire "clearly show[ed] that during their relationship, [HN] would go to any length to have and keep [the appellant] in her life, including lying in court, lying to the police and lying to [the appellant], himself. This is exactly the type of person who would kill

a rival [KH] who stood in the way of the happy family life with [the appellant] that she longed for".

- [81] On appeal, the appellant has suggested that once the trial judge rejected the first defence objection in the voir dire, the die was cast. The Crown was permitted to elicit evidence of physical abuse towards HN and the defence had little choice but to cross-examine extensively on the evidence, agree to its admission in the trial proper, and focus its efforts on weight and use. I do not accept this characterization of the defence position at trial. Respectfully, it is not borne out by the transcript.
- [82] The whole of HN's evidence was called in a voir dire. The trial judge made it clear while ruling on the first objection that if there were "specific aspects" of the evidence the defence sought to have excluded, because of its cumulative effect or otherwise, the defence was free to make submissions in that regard. There were no further objections, with an agreement at the end of the voir dire to exclude only the orange coded testimony.
- [83] The absence of an objection is not determinative of appellate review; however, it is a relevant factor in assessing whether the admission of evidence resulted in a miscarriage of justice: *R. v. Lawrence*, 2015 BCCA 358 at para. 57, leave to appeal to SCC ref'd, 36756 (14 April 2016); *R. v. Ratté*, 2012 BCCA 352, leave to appeal to SCC ref'd, 35128 (9 May 2013); *R. v. S.G.T.*, 2010 SCC 20 at paras. 36-37; *R. v. Belliveau*, 2005 BCCA 283, leave to appeal to SCC ref'd, 31053 (19 January 2006).
- [84] On my reading of the transcript, the defence made a deliberate tactical decision at trial to oppose only the orange coded evidence and sought to use the remainder in support of his challenge to HN's testimony. There is no reason to believe this choice was uninformed, in error, or contrary to the appellant's instructions. The appellant has not alleged ineffective assistance of his trial counsel. As aptly noted in *R.G.S.*, it is not this Court's "role to second guess counsel's strategy unless squarely an issue in the appeal": at para. 62, internal reference omitted.
- [85] Second, it is clear from the reasons for conviction that the trial judge properly instructed himself on the admissibility framework. The appellant does not suggest the contrary.
- [86] The trial judge also independently assessed the evidence, consistent with his gatekeeper role, and he turned his mind to both its probative value and prejudicial effect. That assessment attracts a deferential standard of review.
- [87] The judge provided a logical rationale for admitting the evidence. As I interpret his reasons, read as a whole, he considered the evidence necessary to ensure a full context for assessing the credibility and reliability of HN's testimony and her conduct vis-à-vis the appellant, including (but not limited to) her prior statements about the appellant's involvement in the murder, inconsistencies in those statements, and HN's explanations for why she changed her narrative over time. This is an acceptable basis for admission (*R. v. Gillespie*, 2019 BCCA 8 at paras. 35-39), and HN's credibility and reliability were indisputably central issues at trial.

As the trial judge himself noted, proof of identity was "dependent upon the credibility of [HN], the key Crown witness, and the reliability of her evidence" (emphasis added).

- [88] The judge appropriately cautioned himself about improper use of the disreputable conduct evidence. Before us, the appellant did not suggest that the judge misdirected himself in law on this issue, or that he used the evidence for a clearly impermissible purpose that materially undermined the verdict. Contrary to the appellant's suggestion, the trial judge was not obliged to set out a detailed basis for the exercise of his discretion, especially in the face of the defence concession: *R. v. O'Brien*, 2011 SCC 29 at paras. 17-18. As noted in *R. v. Candir*, 2009 ONCA 915, leave to appeal to SCC ref'd, 34622 (26 April 2012): "The line between enough [presumptively inadmissible evidence] and too much is not always easy to fathom, even with hindsight": at para. 85. Trial judges are entitled to latitude in this area, particularly when sitting without a jury.
- [89] Given these features, I view the case at bar as profoundly different from *Z.W.C.*, in which the admission of uncharged discreditable conduct evidence resulted in a new trial. *Z.W.C.* was a jury trial in which the risk of moral and reasoning prejudice was more acute (*R. v. West*, 2015 BCCA 379 at para. 78); the defence objected to the evidence in its entirety; and importantly, the jury was not sufficiently instructed on the serious risk of reasoning prejudice, and how to avoid it.
- [90] This case is also profoundly different from *R. v. B.D.*, 2016 ONCA 673 [B.D.], another authority cited by the appellant. In *B.D.*, there was no voir dire to test admissibility. On appeal, the Crown conceded that parts of the evidence were irrelevant. The evidence was heard by a jury, with the attendant heightened risk, and there was no limiting instruction on use. The trial judge also highlighted the problematic evidence in his charge to the jury, increasing the risk of misuse. In those circumstances, the prejudice was palpable.
- [91] On the whole, and in the particular circumstances of this case, the appellant has not persuaded me of reversible error. Consequently, I would not give effect to the first ground of appeal.

Second ground of appeal--misapprehension of evidence

- [92] The appellant's second alleged error is that the trial judge misapprehended evidence he then relied upon as confirmatory or corroborative of HN's version of events. This error is said to have fatally undermined his assessment of HN's credibility and reliability, resulting in a miscarriage of justice.

[93] In advancing this argument, the appellant makes three main points. He says the trial judge mistakenly concluded that AF confirmed HN's testimony of animus towards KH because of the loss of his football career and that tenants in KH's home heard noises consistent with HN's version of events. The appellant also contends that evidence relied upon as confirmatory or corroborative could not have the value ascribed to it, as it did nothing more than show that the appellant was at the scene.

Legal framework governing confirmatory or corroborative evidence

[94] The Supreme Court of Canada established in *Khela* that evidence relied upon to confirm or corroborate the testimony of a *Vetrovec*-like witness does not have to directly implicate the accused in the offence: at para. 40.

[95] Rather, what is required is evidence that, when considered in the context of the case as a whole, "should give comfort to the jury that the witness can be trusted in [their] assertion that the accused is the person who committed the offence": *Khela* at para. 42 (emphasis added). When identity is the only real issue at trial, this means the "trier of fact must be comforted that the impugned witness is telling the truth in that regard before convicting on the strength of that witness's testimony": *Khela* at para. 43, italics in the original.

Has the appellant established reversible error?

[96] I have reviewed the evidence highlighted by the appellant in support of his second ground of appeal. I do not consider the trial judge to have misapprehended this evidence. Rather, he simply interpreted the evidence differently than the appellant. He was entitled to do so in the context of all else before him. The law is clear that "a disagreement with a trial judge's factual assessment will not meet the stringent test for a misapprehension of evidence": *R. v. Hosack*, 2022 BCCA 226 at para. 51; *R. v. Swales*, 2014 BCCA 350 at para. 49.

[97] In my view, this was a case in which there was abundant evidence independent of HN that was consistent with her version of events. Moreover, I am satisfied it was open to the trial judge to take comfort from this evidence and to view it as confirmatory or corroborative in accepting HN's identification of the appellant as the murderer. As highlighted by the trial judge in his reasons for conviction, this evidence included:

- testimony from more than one witness about resentment and a possible grudge in the appellant's relationship with KH, providing evidence of animus and a possible motive to harm;
- independent confirmation of HN's stated attendance at the safe house the night before the killing; the fact and timing of phone calls made from the safe house; her travel to KH's home; and the fact that the cab fare was paid for by another woman;
- police photographs of the scene of the death, the location, positioning, and condition of KH's body, and the presence of fingernails and pills that were consistent with HN's description of what she saw;

- an autopsy report and forensic opinion evidence that was consistent with HN's description of the injuries she observed on KH, as well as her testimony that the appellant had placed his weight on KH's neck and choked her;
- the appellant's DNA on the waistband and exterior ankle of KH's pants;
- evidence from witnesses who lived on the ground floor of KH's residence that they overheard noises consistent with a male and female arguing, someone or something falling down the stairs, and a male at the bottom of the stairwell; and,
- independent confirmation of a cab having been summoned to an area close to KH's residence after-the-fact and travel to a certain SkyTrain station that was consistent with HN's stated path of travel.

[98] The trial judge was entitled to assess and weigh HN's testimony in the context of all of this. "The weight to be assigned to this evidence and the degree to which it was confirmatory was a matter for the trial judge in [his] consideration of the case as a whole": R. v. Kavanagh, 2022 BCCA 225 at para. 30, citing R. v. Demedeiros, 2018 ABCA 241 at para. 12, aff'd 2019 SCC 11.

[99] To be properly viewed as confirmatory or corroborative, evidence independent of HN did not have to precisely match what she said or on a stand-alone basis, implicate the appellant in the actus reus of the offence. The Crown did not have to show that a confirmatory inference was the only reasonable inference to draw from that evidence. The presence of some inconsistencies between HN's testimony and the independent evidence did not mean the trial judge was precluded at law from treating the independent evidence as confirmatory, in whole or in part.

[100] The appellant does not take issue with the correctness of the self-instruction on Vetrovec and Khela principles. He does not say the trial judge ignored or failed to consider the appellant's position on the credibility or reliability of HN's evidence. Indeed, the reasons for conviction reveal a comprehensive and careful consideration of the defence position, including the specific bases on which the defence said HN's testimony should be rejected. The trial judge was alive to HN's evidentiary frailties and the need to carefully assess her testimony. He understood the importance of this evidence to the Crown's case and the fact that without HN's testimony, the Crown could not prove identity. Throughout his analysis, he remained mindful of the need for caution.

[101] As with the first ground of appeal, the appellant has not persuaded me of reversible error.

Disposition

[102] Accordingly, I would dismiss the appeal from conviction for second degree murder.

"The Honourable Madam Justice DeWitt-Van Oosten"

I AGREE:

"The Honourable Mr. Justice Fitch"

I AGREE:

"The Honourable Mr. Justice Grauer"

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