

CANADA / JUDGMENT

R. v. Bradshaw

2020 BCCA 97

COURT

British Columbia Court of Appeal

DECIDED

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2020 BCCA 97 R. v. Bradshaw

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Bradshaw,

2020 BCCA 97

Date: 20200324

Docket: CA45698

Between:

Regina

Respondent

And

Robert David Nicholas Bradshaw

Appellant

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Before:

The Honourable Mr. Justice Harris

The Honourable Madam Justice Fenlon

The Honourable Mr. Justice Abrioux

On appeal from: An order of the Supreme Court of British Columbia, dated May 16, 2018 (R. v. Bradshaw, New Westminster Docket X075093-4).

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Place and Date of Hearing:

Vancouver, British Columbia

February 12, 2020

Place and Date of Judgment:

Vancouver, British Columbia

March 24, 2020

Written Reasons by:

The Honourable Mr. Justice Harris

Concurred in by:

The Honourable Madam Justice Fenlon

The Honourable Mr. Justice Abrioux

Summary:

The appellant appeals two murder convictions by judge and jury. He contends that the judge erred in her response to a jury question by refusing to answer a question he contends was clear and by inviting the jury to rephrase the question. The jury did not come back with a rephrased question, but with its verdict. He also contends that the judge erred in failing to direct the jury on bad character and post-offence conduct. Held: Appeal dismissed. The judge dealt with the question appropriately and did not err in refusing to answer the question as posed because doing so was potentially confusing. She also did not err in the circumstances of this case in not providing a limiting or no-probative value instruction regarding bad character or post-offence conduct.

Reasons for Judgment of the Honourable Mr. Justice Harris:

Introduction

- [1] Mr. Bradshaw appeals his convictions by a jury of two murders. The jury convicted him of the second-degree murder of Laura Lamoureux and the first-degree murder of Marc Bontkes.
- [2] Mr. Bradshaw raises three grounds of appeal. First, he contends that the judge erred in failing to answer a jury question relating to party liability. Second, he argues that the judge erred in failing to provide a cautionary instruction relating to bad character evidence and past disreputable acts. And, third, he alleges the judge erred in failing to provide a post-offence conduct limiting instruction to the jury. Each of these grounds, standing alone, he argues justifies a new trial.
- [3] Before turning to address the specific grounds of appeal, I will describe sufficient background to place the issues in context.

Background

- [4] Mr. Bradshaw was tried by a judge and jury for the first-degree murders of Ms. Lamoureux and Mr. Bontkes. The murders took place five days apart. Ms. Lamoureux was shot and killed in the early morning hours of March 14, 2009 in a residential area of Langley. Mr. Bontkes was shot and killed at Hi-Knoll Park in Surrey on March 19, 2009.
- [5] There was no issue at trial but that both victims were murdered. The principal live issue was whether Mr. Bradshaw was involved in the killings, and if so, whether as a principal or as a party who aided or abetted the murders.
- [6] Each of the victims, as well as those alleged to have been involved in the killings, were connected to and involved in the drug trade.
- [7] The Crown alleged that Mr. Bradshaw, along with a Roy Thielen, committed the murders. The Crown theory was that Mr. Thielen shot Ms. Lamoureux, and was aided and abetted in doing so by Mr. Bradshaw. Regarding Mr. Bontkes, the Crown's principal contention was that Mr. Bradshaw was the shooter, while being aided and abetted by Mr. Thielen and a third person, Michelle Motola.
- [8] The Crown case against Mr. Bradshaw was that he was involved in selling drugs to customers as part of a dial-a-dope scheme. Mr. Bradshaw delivered drugs to Ms. Lamoureux, and had done so earlier on the night in which she died. He and Mr. Thielen were together when Ms. Lamoureux called to arrange another meeting. Mr. Thielen vented his anger about Ms. Lamoureux to Mr. Bradshaw, who told Mr. Thielen, "There's your hit", and then drove Mr. Thielen to the drug meeting near Ms. Lamoureux's residence. Mr. Bradshaw waited in a car across the street while Mr. Thielen shot and killed Ms. Lamoureux. Mr. Bradshaw then drove the two of them away from the scene.

- [9] According to the Crown, five days later, Ms. Motola, Mr. Bradshaw and Mr. Thielen planned the killing of Mr. Bontkes. Ms. Motola dropped off Mr. Bradshaw and Mr. Thielen at the Hi-Knoll Park parking lot where they checked the area, cleaned bullets, hid and waited for Ms. Motola to return with Mr. Bontkes. When Ms. Motola returned with Mr. Bontkes to carry out a fake drug deal, Mr. Bradshaw, wearing gloves, shot and killed Mr. Bontkes.
- [10] Before Mr. Bradshaw's trial, Ms. Motola pleaded guilty to manslaughter in respect of her role in the murder of Mr. Bontkes. On November 3, 2011, Mr. Thielen pleaded guilty to two counts of second-degree murder in respect of the homicides.
- [11] This was Mr. Bradshaw's second trial. Crown counsel called 19 witnesses and filed 43 exhibits, including written admissions of fact. The defence called no evidence. Mr. Thielen testified at trial (he had refused to give evidence at the first trial), acknowledging his involvement in the murders and describing Mr. Bradshaw's role in them. The evidence also included a surreptitiously video-taped conversation and subsequent tape-recorded conversation between Mr. Bradshaw and Mr. Thielen in which, the Crown alleged, the two men discussed their respective roles in the killings. In addition, the Crown led cell phone evidence, forensic evidence, evidence of an undercover operation targeting Mr. Thielen, and evidence from other witnesses, to support its case against Mr. Bradshaw.
- [12] The defence contended that the case against Mr. Bradshaw had not been proven beyond a reasonable doubt. Counsel suggested that Mr. Thielen's evidence was not credible or reliable. Insofar as his evidence implicated Mr. Bradshaw, it was essentially uncorroborated. Mr. Thielen committed both murders, but Mr. Bradshaw was not involved, or at least did not know that Mr. Thielen intended to kill either victim. Counsel suggested that Mr. Bradshaw's recorded statements left too many unanswered questions to ground any confidence that they were admissions of his personal involvement in the murders. Rather, plausibly, Mr. Bradshaw and Mr. Thielen concocted a story of Mr. Bradshaw's apparent involvement to bolster Mr. Thielen's credibility in the eyes of his new criminal associates.
- [13] I will return to discuss some aspects of this evidence in connection with the second and third grounds of appeal. I turn now to deal with the issue of the jury question.

The Jury Question

- [14] The judge instructed the jury on liability as a principal or a party to murder. She also left manslaughter with the jury. No criticism is levelled at the instructions to the jury on murder, including party liability. The sole question on this aspect of the appeal is the adequacy of the judge's response to a question engaging an issue of party liability.
- [15] The jury asked this question:

Scenario:

An individual unknowingly drives a robber to a bank. While waiting in the car a robbery is committed. The robber returns to the car with a bag of stolen money, a loud alarm is heard by all.

The driver, understanding a robbery has taken place, drives the robber to his home.

Question: Is this aiding and/or abetting?

[16] After some discussion with counsel about the question, and with counsels' agreement, the judge had this to say:

I could certainly answer this question for you, ladies and gentlemen, and I'm not going to. And the reason for that is that the offence of robbery is very different from the offences we're looking at and answering this question would mislead you in dealing with the offences that we're looking at. So that's why I'm not going to answer the question.

I will permit you to rephrase the question and address the actual concern you have if you want to do that.

In the meantime, counsel and I have other matters to discuss, so I'm going to ask you to suspend your deliberations, aside from rephrasing this question, if that's what you would like to do. All right?

Thank you.

[17] The jury did not return with a rephrased question. Rather, after other matters had been dealt with and it was told it could continue with deliberations, the jury returned with its verdict.

[18] Mr. Bradshaw argues that this question is clear and called for an answer. He says the question is rooted in an example of "aiding" given by the judge in her charge. In the course of explaining the actus reus element of party liability as an aider, the judge said:

The first [way in which someone can be a party] is by aiding. The word "aiding" has its ordinary English meaning, to help or assist. There are a number of ways in which a person can help or assist another to commit an offence. For example, an aider can supply the principal offender with the instruments needed for committing an offence, such as tools for breaking into a house or car, or driving to or away from the scene of the robbery, or the aider may act as a lookout, ready to warn the other of the approach of the police.

[Emphasis added.]

[19] The jury, Mr. Bradshaw argues, simply wanted to know when an aider or abettor had to acquire knowledge of the principal's intent in order to establish party liability. Failing to answer the question was a reversible error. It affected both convictions because the jury was instructed on party liability in respect of both. Even if the question was ambiguous, Mr. Bradshaw says, it could not be ignored. A trial judge must "clarify a question that is unclear or ambiguous so the answer properly addresses the precise nature of the jury's concerns or confusion": R. v. Penner, 2019 BCCA 76, at para. 40. The trial judge failed in her obligation to

assist the jury as she failed to provide any answer to the jury's question, let alone a full, careful and correct response.

- [20] In Mr. Bradshaw's submission, at the very least and in the alternative, the judge should have directed the jury to reformulate the question by reference to the offence before it, and she should not have accepted a verdict until the question was answered.
- [21] As I explain in what follows, I cannot accede to Mr. Bradshaw's argument. The judge did not err in refusing to answer the hypothetical question as posed. Answering that question would have been unhelpful, confusing and potentially prejudicial. Having decided the question could not be answered as posed, the judge appropriately avoided speculating about the actual concern underlying the hypothetical question, and instead appropriately sought clarification from the jury of that concern by permitting the jury to rephrase the question. The judge did not err in proceeding the way she did. Finally, the jury was entitled to deliver a verdict without having rephrased its question. The judge was entitled implicitly to accept the jury's delivery of a verdict as an indication that the concern underlying the hypothetical question had been resolved.
- [22] The importance of jury questions in a criminal trial is beyond doubt. As Justice Cory explained in *R. v. S.(W.D.)*, [1994] 3 S.C.R. 521 at 528:

It is true that directions to a jury must always be read as a whole; however, it cannot ever be forgotten that questions from the jury require careful consideration and must be clearly, correctly and comprehensively answered. This is true for any number of reasons which have been expressed by this Court on other occasions. A question presented by a jury gives the clearest possible indication of the particular problem that the jury is confronting and upon which it seeks further instructions. Even if the question relates to a matter that has been carefully reviewed in the main charge, it still must be answered in a complete and careful matter. It may be that after a period of deliberation, the original instructions, no matter how exemplary they were, have been forgotten or some confusion has arisen in the minds of the jurors. The jury must be given a full and proper response to their question. The jury is entitled to no less. It is the obligation of the trial judge assisted by counsel to make certain that the question is fully and properly answered.

- [23] As Chief Justice Lamer put it in *R. v. Naglik*, [1993] 3 S.C.R. 122 at 139:

Answers to questions from the jury are extremely important, and carry influence far exceeding instructions given in the main charge. If the jury asks a question about an issue addressed in the main charge, it is clear that they did not understand or remember that part of the main charge, and it is also clear that they must exclusively rely on the answer given by the trial judge to resolve any confusion or debate on the point which may have taken place in the jury room during their deliberations up to that point.

- [24] Given the importance of jury questions, a correct and comprehensive answer is required. Where questions are ambiguous, the trial judge has a duty to clarify the question before answering it. Responding to an ambiguous question without ascertaining its true meaning may amount to a reversible error. As Frankel J.A. said in Penner:
- [40] Further, it is incumbent on a trial judge to clarify a question that is unclear or ambiguous so the answer properly addresses the precise nature of the jury's concerns or confusion: *R. v. Kahnpace*, 2010 BCCA 227 at paras. 48-52; *R. v. Shannon*, 2011 BCCA 270 at paras. 51-53.
- [25] In *R. v. Kahnpace*, 2010 BCCA 227, D. Smith J.A. explained that failing to clarify the meaning of an ambiguous question before responding to it leaves the trial judge to "speculate on the precise nature of the jury's concerns": at para. 48. Similarly, in *R. v. Shannon*, 2011 BCCA 270, Finch C.J.B.C. explained that an ambiguous or unclear question has to be clarified before being answered because, otherwise, "[b]oth the meaning of the question and the adequacy of the answer can only be in the realm of speculation": at para. 70. In short, a judge is not to premise her answer to a jury's question on speculation as to what the jury really wants to know.
- [26] Various suggestions have been made in the case law about how a judge should go about clarifying an ambiguity in a question without risking the jury revealing its deliberations or which particular jurors may be seeking assistance. Handling such a situation is difficult for trial judges who must be accorded latitude in how best to cope with the challenge posed by ambiguous questions in the circumstances that confront them.
- [27] It is also important to recognise that while a judge has an obligation to assist a jury by correctly and comprehensively answering their questions and attempting to clarify questions when they are too ambiguous to be answered, a judge does not have an obligation to answer every question that a jury might pose. A judge is under no obligation to provide a substantive answer to a legally irrelevant question or to provide an answer that might be confusing or misleading: see *R. v. Milijevic*, 2011 SCC 8 at paras. 1-3; *R. v. Willis (TAW)*, 2016 MBCA 113 at para. 233; see also CRIMJI: Canadian Criminal Jury Instructions, 4th ed. (2019 update), (Vancouver: Continuing Legal Education Society of British Columbia, 2005), at §10.02.2.
- [28] On receipt of the question in this case, the judge and counsel discussed its meaning. A primary point of concern -- initially raised by the judge -- was that the robbery offence in the jury's hypothetical may have been a continuing offence, so that it was not complete in fact until the robber had successfully made off with the money. Counsel and the judge discussed the proposition found in *R. v. Vu*, 2012 SCC 40, that "where an accused -- with knowledge of the principal's intention to see a continuing offence through to its completion -- does (or omits to do) something, with the intention of aiding or abetting the commission of the ongoing offence, party liability is established": at para. 59. Accordingly, in the judge's view, the driver in the jury's hypothetical may have been a party. The judge said:

in their scenario, I think the offence has not been completed because robbery involves the taking of the money and the guy hasn't made off with the money yet. But that doesn't say what their issue is with respect to the particular circumstances we face.

- [29] There was also some discussion of whether the question might relate in some way to manslaughter.
- [30] Each participant to the discussion recognised that buried in the question was likely an issue related to the timing of an accused party's knowledge of the principal's intention to commit the offence, and the accused party's decision to become involved.
- [31] After canvassing the range of possible issues raised by the question, and after considering the issues raised by the potential continuing nature of the offence in the robbery hypothetical, the judge, who had made clear her desire to clarify the question, concluded that the hypothetical scenario and the actual situation before the jury were too different -- so that answering the question as posed would not assist the jury. She decided, with the agreement of counsel, that it was necessary to know exactly what the question was. Again, with the agreement of counsel, she decided that she would tell the jury that the scenario was too different from the issue the jury had to decide, and that answering the question would not assist in deliberations. This course of conduct was then followed, as set out above.
- [32] Mr. Bradshaw says this approach was in error. In appellate counsel's view, the question was clear and simple. What the jury really wanted to know was whether or not it could convict Mr. Bradshaw as a party to murder if it was convinced beyond a reasonable doubt only that Mr. Bradshaw helped the principal with the murder after the fact, but not that he knew the principal intended to commit murder beforehand. In other words, the question invited clarification of the difference between being a party to the offence as an aider or abettor and being an accessory after the fact (with which Mr. Bradshaw was not charged). Mr. Bradshaw says the judge and counsel were led astray by the discussion of continuing offences. He says neither robbery nor murder are continuing offences, so the hypothetical disclosed an unambiguous concern and properly posed a question the judge should have answered, even if in doing so she explained how the answer related to the offence of murder.
- [33] In my opinion, the judge did not err in refusing to answer this question as posed. Neither did she err in refusing to answer the question with additional commentary relating the supposed actual concern embedded in the question to relate the answer to the offence of murder.
- [34] The core concern of the judge and the jury ultimately had to do with whether the hypothetical posed a sufficiently different issue to the issues engaged in the murder case. The judge and counsel were not, contrary to Mr. Bradshaw's submission, wrong to analyse the robbery hypothetical as likely involving a continuing offence. While it is not necessary to firmly answer the legal question of whether, in the jury's hypothetical, the robbery was complete when the driver fled the scene, there was a legitimate basis for the judge to be concerned about the continuing nature of the offence described in the jury's question as

compared to the murders with which Mr. Bradshaw was charged. A number of cases have held that theft (a necessary element of the offence of robbery) may be a continuing offence (in fact if not in law), and that someone who assists a thief in carrying away or concealing the stolen goods may be a party to the offence of theft, rather than only an accessory after the fact: see *The Queen v. Campbell* (1899), 2 C.C.C. 357 (Que. Q.B.); *R. v. C.G.*, [2007] O.J. No. 4045 (Ont. S.C.J.); *R. v. Pelletier*, [1970] 3 C.C.C. 387 (N.B.C.A.).

- [35] The judge and counsel were justified in their concern that the hypothetical question raised legal issues that would not necessarily be the same as those arising in the context of a murder charge. More importantly, they were right to be of the view that to answer the question as posed would have the potential to mislead or confuse the jury. Had the judge answered the hypothetical directly, it would have created a risk that Mr. Bradshaw could be convicted as a party based solely on his participation in helping Mr. Thielen escape the scene on learning of the murder after it had been committed. Answering the question created the risk of the jury treating the murder as an offence continuing in fact and extending party liability to facts to which it would not apply. In my opinion, the judge did not err in declining to answer the question for the reasons disclosed by the record.
- [36] Having decided the question should not be answered as posed, it fell to the judge to navigate a path forward. I cannot agree with Mr. Bradshaw's contention that the judge should have proceeded on an assumption about the jury's real concern without giving the jury an opportunity to clarify the question. While it may be likely that counsel and the judge identified the true concern, looked at now in hindsight and outside of the context of the trial, the judge was rightly cautious about relying to any degree on speculation about the jury's real, implicit question.
- [37] Courts have cautioned against relying on speculation when answering a jury's question: see *Kahnapace*; *Shannon*; *Penner*. It is difficult to reconcile Mr. Bradshaw's reliance on the well-established principle that a judge should clarify an ambiguous question before answering it, with his suggestion that the judge here should have provided an answer based on an inherently speculative inquiry into what the jury truly wanted to know. The jury was fully capable of posing their concern directly -- either in the initial question or upon the invitation to rephrase the question.
- [38] The next consideration is whether, once the judge had decided not to answer the question without clarification, the way in which she proceeded amounts to an error. In my view, it does not.
- [39] Evidently, the judge chose not to attempt to clarify the issue underlying the question by engaging in a discussion in the courtroom with the jury. I cannot say that she erred in her approach. Courts have canvassed different ways to clarify ambiguity, including the judge asking leading questions: see *R. v. Mohammed* (1991), 64 C.C.C. (3d) 1 (B.C.C.A.). Engaging with the jury in the courtroom is fraught with risk, not least of exposing jury deliberations. In my opinion, we should be slow to second guess the way the judge handled the issue. Here

the judge invited the jury to rephrase the question and address the actual concern it had, if it wanted to. As Justice David Watt put it, writing extra-judicially in *Helping Jurors Understand*, (Toronto: Thomson Carswell, 2007) at p. 258:

Where ambiguity occurs, the trial judge should clarify the question before attempting a response. Depending on the circumstances, the better course often is to send the jurors back to the juryroom to redraft the question. This avoids any improper disclosure of deliberations in the courtroom, as well as any identification of the juror or jurors who have raised the question.

- [40] There is no formula governing how a judge invites a jury to rephrase a question. Contrary to Mr. Bradshaw's alternative submission, I think it would have been an error for the judge to direct the jury to rephrase the question. It is for the jury to indicate what assistance it needs to discharge its responsibilities. Equally, it would be an error for a judge to discourage a jury from reformulating a question. The judge has a duty to assist the jury to discharge its obligation and should appropriately convey to the jury his or her desire to do so. In this case, I think it would be wrong to infer that the judge was dismissive of the jury question or discouraged it from reformulating it. I see no error in the judge's handling of the question. I also note that the judge here had specifically asked the jury to pause its deliberations as she dealt with counsel on unrelated matters, but instructed the jury that they could continue with rephrasing their question while their deliberations were otherwise on pause.
- [41] In this case, the jury did not rephrase the question but rather returned with a verdict. Juries are entitled to withdraw a question and here I think one must assume that the jury implicitly withdrew it: see *R. v. Sit* (1989), 47 C.C.C. (3d) 45 (Ont. C.A.) (Cory J.A., dissenting on other grounds but delivering the Court's opinion on this issue), rev'd on other grounds [1991] 3 S.C.R. 124; *R. v. Lavoie* (1990), 107 N.B.R. (2d) 181 (C.A.); *R. v. Ellis*, 2013 ONCA 9 at paras. 50-59. I think the proper view to take is that whatever concern had led to the question being posed had been satisfied and the jury considered it no longer needed assistance on the issue prompting the question. This is not a case like *Ellis*, where a jury returned a verdict after asking a question that clearly revealed a legal misunderstanding, but before the judge had provided any response at all. Here, the jury's question was unclear and the judge invited the jury to rephrase the question, but the jury declined to do so.
- [42] I short, I do not think the judge failed in her duty to respond properly to the question posed by the jury and I would not give effect to this ground of appeal.

Bad Character Evidence

- [43] The jury heard evidence that Mr. Bradshaw was a drug dealer -- a "driver" for a dial-a-dope drug line -- and, through his drug dealing, he was a part of Surrey and Langley's unsavoury drug world. Defence counsel, despite being demonstrably aware of how Mr. Bradshaw's participation in the drug world might reflect on his character, did not ask for a limiting instruction. The trial judge did not provide one.

- [44] The evidence of Mr. Bradshaw's involvement in the drug trade was relevant and admissible as part of the narrative and context of the case. The drug world connected the individuals involved in this case -- the victims, Mr. Thielen, Mr. Bradshaw, and two other witnesses. Mr. Bradshaw's drug dealing was a necessary thread that tied the narrative together. Second, Mr. Bradshaw's employment as a drug dealer working on a specific "drug line" connected him to a cell phone number from which relevant cell tower data was derived.
- [45] Mr. Bradshaw argues that the trial judge committed a reversible error by failing to charge the jury against using the evidence of his disreputable conduct to conclude that he was more likely to be the kind of person who would commit the crimes charged. Mr. Bradshaw specifically argues that the judge's non-direction on this point amounted to a reversible misdirection because the Crown closing invited the jury to draw a link between his involvement in the drug world, the violence associated with the drug world, and the victims' deaths. I will refer specifically to the impugned portion of the Crown's closing in the analysis that follows.
- [46] The law on bad character evidence is not contested and, for the purposes of this appeal, can be summarized briefly.
- [47] Evidence that shows only that the accused is the type of person likely to have committed the offence in question is inadmissible: *R. v. G.*(S.G.), [1997] 2 S.C.R. 716 at para. 63; *R. v. A.L.*, 2020 BCCA 18 at para. 137. However, evidence that is directly relevant to the Crown's theory of the case is admissible even if it also demonstrates the bad character of the accused, so long as its probative value outweighs its prejudicial effect: *G.*(S.G.) at para. 65; *A.L.* at para. 137. As noted, no issue here is taken with the admission of Mr. Bradshaw's disreputable acts into evidence.
- [48] When evidence of an accused's bad character is admitted for limited purposes, it is "generally understood that the judge should instruct the jury about the permitted and prohibited uses of that evidence": *A.L.* at para. 141; see also *G.*(S.G.) at para. 65.
- [49] That said, "the question of whether the failure of a trial judge to give a limiting instruction with respect to bad character evidence constitutes reversible error must be assessed through the lens of reality". In the absence of a "realistic possibility of the jury misusing evidence of disreputable acts", failure to provide a limiting instruction does not constitute reversible error: *R. v. Bhullar*, 2011 BCCA 395 at para. 28. The issue must be assessed viewing the charge fairly, contextually, and as a whole. "At the end of the day, the overriding question is whether the jury was properly equipped to decide the case absent a limiting instruction against general propensity reasoning": *R. v. Calnen*, 2019 SCC 6 at para. 9.
- [50] A relevant factor to consider when assessing a non-direction on bad character evidence is trial counsel's failure to object. A failure to object may indicate "the overall satisfactoriness of the jury charge" (particularly from the defence perspective), or the insignificance of the alleged omissions: *Calnen* at para. 38; see also *R. v. Daley*, 2007 SCC 53 at para. 58; *R. v. Jacquard*, [1997] 1 S.C.R. 314 at para. 38. Weight should be given to the perceived importance

of the issue to trial counsel, who had the benefit of observing the trial unfold in real time. In certain circumstances, the absence of an objection may also suggest that counsel made a conscious tactical decision not to seek a limiting instruction: Calnen at paras. 38-41.

- [51] Turning to the circumstances of this appeal, in my view, it would undoubtedly have been wise for the judge to have raised the issue of bad character with the parties and to have solicited their views. Had defence requested a limiting instruction, it would likely have been prudent to have given one.
- [52] That said, I am satisfied in the circumstances of this case that the trial judge's failure to instruct on bad character evidence was not a reversible error. I take this view for three broad and cumulative reasons.
- [53] First, the nature of the evidence impugning Mr. Bradshaw's character in this case was not likely to risk improper propensity reasoning by the jury. The evidence was that Mr. Bradshaw sold drugs for a drug line. The evidence did not directly show that Mr. Bradshaw had violent propensities, nor was there evidence of any specific past acts of violence. Indeed, particularly when compared to the other actors in the Surrey / Langley drug subculture, the description of Mr. Bradshaw's role was relatively benign. Unlike Mr. Thielen (who Mr. Bradshaw said committed the murders on his own) and Ms. Lamoureux (one of the victims) -- Mr. Bradshaw was not an "enforcer." He was described as a "driver" who picked up the phone and delivered drugs. It was also noted that he, unlike almost anyone else involved in the case, did not personally use drugs.
- [54] When the evidence at trial showed that the drug subculture of Surrey and Langley was violent, the focus was on individuals other than Mr. Bradshaw. Mr. Thielen testified that people would deal with conflicts in the drug world using violence, but specifically noted that it was the enforcers who occupied this role. Moreover, references to violence in the drug world were generally adduced by counsel for Mr. Bradshaw in support of the defence theory that Mr. Thielen likely acted alone, and not by the Crown.
- [55] For example, it was defence counsel who suggested to Ms. Chouinard -- a friend of Ms. Lamoureux -- that the drug world endorsed a "certain casual approach to violence with respect to enforcing debts". This was consistent with defence attempts to paint Ms. Lamoureux, a noted "enforcer", as violent and callous. Counsel went on to suggest that Ms. Lamoureux was "a very fierce, violent drug enforcer" who "enjoyed her reputation as being a heavy". It is apparent that defence counsel wanted to show that any number of people could have had an interest in killing Ms. Lamoureux, or that the nature of Mr. Bradshaw's engagement with her rendered it unlikely that he would have any reason to be involved in her death.

[56] When it came to cross-examining Mr. Thielen, defence counsel's interest in portraying a cruel, proudly violent member of the drug world was clear. Defence counsel suggested to Mr. Thielen that things happened in the drug world that are "hard to imagine". At one point, when objection was taken to the relevance of defence counsel's line of questioning, he explained:

Well, the -- the point, generally, I can tell the court, and I don't think it's any surprise to my friends. The point is I'm trying to flesh out the history and the extent of Mr. Thielen's criminality. And his violent criminality, in particular, and his attitude towards it.

I think that -- I think it's going to be illustrative to the jury, some of his answers that I expect will, in their own right, just the -- the message will be just in how he comments on some of these things that normal people would find very disturbing. I would expect we're going to get some answers that -- that will be much more casual. So that's the reason I'm asking this question.

[57] In sum on this point, while the evidence showing Mr. Bradshaw was a drug dealer and a member of the drug subculture must be taken seriously, the risk attached to the evidence in this case is mitigated because: none of the allusions to violence attach to Mr. Bradshaw personally; Mr. Bradshaw's role was explicitly a driver rather than an enforcer; and defence counsel extracted evidence of violence in the drug subculture as a part of a strategy which he viewed as favourable to Mr. Bradshaw. I would add, in the context of this case, where every key actor was part of the drug world, the "relative effect on the appellant's character would have been minimal": see *R. v. MacDonald* (1990), 54 C.C.C. (3d) 97 (Ont. C.A.).

[58] Second, the Crown's case was not presented in a way that would have realistically been taken by the jury as an invitation to embark on propensity reasoning.

[59] The Crown opened its case by telling the jury that "at the heart of this case are drugs, illegal drugs, and the use and selling of illegal drugs." As I see it, this was an objective and non-prejudicial summary of the evidence that was to follow. The Crown's case would make no sense detached from the drug world, which was what connected the victims, Mr. Thielen, Mr. Bradshaw, and two of the civilian witnesses.

[60] As the Crown called its case, it did not adduce evidence for the purpose of suggesting that Mr. Bradshaw had any particular disposition or a propensity to violence.

[61] In response to Mr. Bradshaw's most specific argument on this ground, the Crown closing, taken in context, did not risk inviting propensity reasoning. In the passage impugned by the appellant, Crown counsel said:

You will recall when we started I said at its heart this case is about illegal drugs. I think now you will probably agree. You have heard quite a bit of evidence about the whole drug subculture in Langley and Surrey in and around the time of these murders. You have heard and seen what it has done to witnesses and to people's lives.

You have heard from Ms. Chouinard, a drug addict for many years. You have heard from Dwayne Nelson. You have heard from Mr. Thielen. You have heard about Ms. Motola. You have heard about Mr. Bradshaw. All of these people are deeply immersed in the drug world and that is a world which is full of lies, full of violence, full of criminality, full of a lot of things that most of us can't imagine in our own lives.

You will recall Mr. Nelson had some blunt insight into this world. He said the drug world that he was a part of in 2009 could be vicious. He said there was conning, conniving and lies, no trust and no loyalties, you never go up, you always go down, you always think you're above, but you're so, so below.

At the beginning of this trial I also told you, of course, Laura Lamoureux and Marc Bontkes are at the centre of this case, two people murdered because of their involvement in the Surrey/Langley drug culture, and there certainly is no doubt both Ms. Lamoureux and Mr. Bontkes were murdered. It is apparent these were intentional killings.

What all the evidence in this trial has shown is that Mr. Thielen intentionally killed Laura Lamoureux with Mr. Bradshaw's help, and Mr. Bradshaw intentionally killed Marc Bontkes with Mr. Thielen's and Ms. Motola's help.

[Emphasis added]

[62] This was the opening passage of the Crown's closing. As the Crown moved from its introduction to its substantive theory of the case, there were no references to Mr. Bradshaw's disposition or propensities. While this introductory passage as a whole is, arguably, rather rhetorical, the one comment of concern is that these people, including Mr. Bradshaw, are immersed in a drug world which is full of violence and criminality. The concern is that Mr. Bradshaw was linked to the drug world, which was then linked to violence and ultimately the two murders. No doubt it would have been preferable for Crown counsel not have linked Mr. Bradshaw to a "world full of violence [and] criminality."

[63] That said, I am persuaded that this passage, in the entire context of the case, did not introduce a realistic risk of the jury embarking on impermissible propensity reasoning. First, defence counsel responded directly to this passage, as I explain below. Second, this passage was followed by the remainder of the Crown's closing, which was fair and objective and did not invite the jury to rely in any way on Mr. Bradshaw's bad character or disposition. It was also followed by defence closing, where Mr. Thielen's character was specifically impugned and Mr. Bradshaw's character issues were confronted and minimized. And it was followed by a fair and balanced jury charge. Finally, the Crown's comments were not an explicit invitation for the jury to consider Mr. Bradshaw's character in reaching its conclusion. Viewed as a whole, I understand Crown counsel to be setting the stage for the evidence that follows, and attempting to situate the jury such that it could properly evaluate the Crown's narrative.

[64] Third, in the context of this case, considerable weight should be given to the fact that defence counsel, who was clearly alive to the bad character issue, did not ask for a direction. In closing, defence counsel said:

This is the other concept that I want to address you because it's -- it's certainly something -- I think it's very critical in this case. Everybody knows, this is just like common sense. This is a suspicious -- suspicious set of circumstances for Mr. Bradshaw.

He starts off, he's a drug dealer. Now, he's not on trial for being a drug dealer. I take a little bit of issue with how my friend introduced his submissions to you this morning, just -- just a little bit. I mean he said this is a case about -- about the drug world, and about the nefarious horrible impact that drugs have had on our society.

Well, Mr. Bradshaw, through me I guess you could say, it's commonplace, he is an admitted drug trafficker. That's pretty ugly, that's pretty nefarious, but he's not on trial for that, okay? And so it's not -- it's not really about that, but in any event I concede, and I have to, that on the face of it the fact that he was friends with these guys, the fact that he said some of the things that he said, it's suspicious.

[65] Counsel specifically noted that Mr. Bradshaw was not on trial for his drug dealing, and responded directly to the Crown's opening. Counsel found the Crown's point that the case was about the drug world to be a "little bit of [an] issue," but not significant enough for him to seek a limiting instruction. In this passage, counsel also sought to confront and minimize Mr. Bradshaw's association with the drug subculture -- he "was friends with these guys" and "said some of the things that he said."

[66] The fact that defence counsel was alive to the issue, and saw it fit to remind the jury himself that Mr. Bradshaw was not on trial for his past disreputable acts while also minimizing his past, must be taken as some indication that counsel did not view a limiting instruction as important, or perhaps viewed it as potentially prejudicial. In my view, this reflects a considered decision by the defence and one which we should respect.

[67] Part of the defence strategy was to paint Mr. Thielen in as negative a light as possible, particularly relative to Mr. Bradshaw. As the judge said, summarizing the defence position, "Thielen testified that he was targeting Lamoureux, Bontkes, and Sigurdson at the direction of his boss, Wade Bryant. This was his agenda, not Bradshaw's." This aspect of the defence strategy was bolstered to some extent by the inclusion of a Vetrovec charge regarding Mr. Thielen's evidence: see *Vetrovec v. The Queen*, [1982] 1 S.C.R. 811. The Vetrovec charge placed unique focus on Mr. Thielen's disreputable character, while the balance of the charge said nothing at all of Mr. Bradshaw's bad character. Defence counsel may have viewed it as more harmful than helpful for the judge to say anything which brought Mr. Bradshaw's disreputable past to the forefront: see Calnen at para. 40.

[68] As a final observation, I note that one particularly important aspect of the judge's charge would have minimized the risk of impermissible propensity reasoning. The judge charged the jury against drawing improper inferences from Mr. Thielen's guilty plea:

Mr. Thielen's guilty plea has absolutely no bearing on whether Mr. Bradshaw is guilty. You must not think that because Mr. Thielen has pleaded guilty, Mr. Bradshaw must be guilty too.

[69] This aspect of the charge cuts against the appellant's concern that the jury may have convicted Mr. Bradshaw in part because of his association with a vicious and violent drug subculture. In view of all of the evidence, the most likely impermissible inference the jury was at risk of drawing was that Mr. Bradshaw was more likely to be guilty because of his obvious association with Mr. Thielen, who was guilty by his own admission. Here, the judge spells out that such an inference is unavailable. Mr. Thielen's guilt has no bearing on Mr. Bradshaw's guilt or innocence. This put the jury on notice that Mr. Bradshaw's association with violent members of the drug world -- even his association with the admitted killer of the two victims -- was not probative of guilt.

[70] In light of the foregoing, I am satisfied that the jury was properly equipped to decide the case absent a limiting instruction. I do not think there was a realistic risk of the jury engaging in prohibited reasoning. I would not accede to this ground of appeal.

Post-Offence Conduct

[71] Mr. Bradshaw submits that two pieces of evidence should have attracted a no probative value limiting jury instruction. The first involved Mr. Bradshaw's reaction to being approached by a police officer in a mall and informed that he was a suspect in the two murders. Very shortly thereafter, Mr. Bradshaw called Mr. Thielen and left a message. Within a fairly short time, the two men arranged the meeting in the hotel room, where they were being videotaped. The second was a statement by Mr. Bradshaw to Mr. Thielen, in the videotaped meeting, that he had burned his shoes after whatever they had been involved in. On appeal, Mr. Bradshaw concedes that the evidence was probative of his involvement in the homicides but not the manner of his involvement or whether he was liable for murder.

[72] At trial, defence counsel did not initially ask for a post-offence limiting instruction. He did, however, raise the issue after the jury had returned with its question and been sent back to rephrase it. His argument to the judge was that Mr. Bradshaw's conduct was probative of being involved in some way with the homicides but not necessarily in a way grounding liability for murder. The judge decided not to give the instruction because she considered that she had adequately charged the jury that they could convict only after considering all of the evidence and it would be a mistake at this stage to highlight particular evidence that had been dealt with by defence counsel in a manner consistent with its theory of the case; namely, that the discussion and its content was all about helping Mr. Thielen concoct a story for his criminal associates.

- [73] It is not necessary, in my view, to rehearse at length the law about when post-offence conduct attracts a limiting or no probative value instruction. The proper legal treatment of after-the-fact conduct is highly context and fact specific: see *Calnen* at para. 106 (Martin J. dissenting but not on this point); *R. v. White*, 2011 SCC 13 at para. 185 (Binnie J. dissenting but not on this point). Not everything done or said by an accused after the alleged offence calls for a caution to the jury.
- [74] Often, evidence of the accused's after-the-fact conduct will enter the trial record as "an unremarkable part of the narrative of relevant events," requiring no special treatment: *R. v. Adamson*, 2018 ONCA 678 at para. 57; see also *White* at paras. 47, 140.
- [75] As a general rule, even where the evidence of post-offence conduct goes to a material issue in the Crown's case, it is "for the jury to decide, on the basis of the evidence as a whole, whether the post-offence conduct put in evidence against the accused is related to the crime before them rather than to something else, and if so, how much weight, if any, such evidence should be accorded in the final determination of guilt or innocence": *White* at paras. 105, 137.
- [76] That said, in some cases, certain types of post-offence conduct call for special instruction. Experience teaches that jurors might find certain types of post-offence conduct to be persuasive of a particular fact when it is equally consistent with another fact, classically the presence of criminal intent or the lack or degree thereof. In such cases, "it only makes sense for the judges to alert the jurors to what the courts have collectively learned over the years, especially when that learning may for some jurors be counter-intuitive": *White* at para. 138; see also para. 106.
- [77] In the context of this case, in my opinion, the need for a limiting instruction did not arise with respect to either of the pieces of evidence highlighted by the appellant.
- [78] I begin with the evidence of Mr. Bradshaw's claim about burning his shoes. Some context is necessary. The source of the evidence that Mr. Bradshaw burned his shoes was Mr. Bradshaw himself. He said so in a secretly recorded hotel room discussion with Mr. Thielen. Mr. Bradshaw told Mr. Thielen that he had burned his shoes after what the jury was invited to conclude was the second murder. The following extract is from an edited transcript of the video recording:

RT [Mr. Thielen]: On the second one, did we touch the van?

RB [Mr. Bradshaw]: No, we had gloves on the whole time.

RT: 'Kay.

RB: As soon as got out of the car, gloves. And then we pulled the piece out. Cleaned all the shells off. Put everything back together and waited. I remember clear as fuckin' last night.

RT: But Michelle [Motola] didn't do the last did she?

RB: She was there, but she didn't see shit. She didn't see what happened, she thought it was you. She didn't even know it was me.

RB: We stashed the thing in my house, took all the shit, you fuckin' left with it. You walked over to fuckin'

RT: And then I came back and got it later.

RB: Yeah.

RT: got rid of it, right?

RB: The only other pieces that were missing were my shoes and I burned them personally.

RT: there's nothing else eh?

[Emphasis added.]

[79] The statement at issue was an admission against interest made in the context of an extended discussion in which it is apparent that the two men were discussing the two murders. It was one statement amongst many in which the details of the killings were discussed, including timing, the sequence of events, the relative roles of the two men, the existence of potentially incriminating evidence, the wearing of gloves, the cleaning of shells, the hiding of the gun, the ability of Ms. Motola to see who shot Mr. Bontkes, and so forth. The statement about burning the shoes was made in the context of a discussion about ensuring there was no evidence linking the men to the killing of Mr. Bontkes.

[80] In closing, the Crown played portions of the video recording. The Crown played the portion where Mr. Bradshaw says that Ms. Motola "didn't even know it was me." The Crown said this was a direct confession to killing Mr. Bontkes. The Crown continued with the recording, and said:

He's talking about burning his shoes. Why else would you burn your shoes when you're talking about this context and worrying about things that the police might have or DNA or anything? It's because he was involved.

[81] On appeal, Mr. Bradshaw's argument is that one of the things he said in the course of this conversation -- that he burned his shoes -- would, if taken as true, be mistakenly viewed by the jury as highly probative of guilt for murder when, in fact, there might be other explanations for so doing inconsistent with involvement in murder. In his view, Crown counsel's comment invited the jury to erroneously conclude that the shoe-burning was probative of guilt for murder, making a limiting instruction necessary.

[82] I cannot accede to this argument.

[83] To start, the Crown did not connect the shoe-burning to Mr. Bradshaw's level of intent or degree of involvement. The Crown specifically said that the shoe-burning was evidence of the fact that Mr. Bradshaw "was involved" -- i.e., that somehow his shoes contained evidence and had to be destroyed. This is a perfectly acceptable submission.

[84] Moreover, the primary defence position at trial was that these statements could not be taken at face value because they were part of a fabricated narrative, concocted to help Mr. Thielen with the story he was telling to the crime boss. In closing, defence counsel summarized this point:

So the Crown's position is, understandably, that the corroboration comes out of the mouth of Bradshaw himself, and there you have -- you have these obvious statements against interest, that they kind of match up with what Bradshaw -- with what Thielen says, it's corroboration for Thielen, Thielen is the direct witness, he says what happened. There's your case. I don't think so.

There is -- so what I suggested to Thielen was something different. I said that you got together with Bradshaw in the bathroom and you concocted this story. You gave him the story, you concocted the story, you told him about the crime boss, you told him that you needed to get the story together for the crime boss, and he denied that of course.

[Emphasis added.]

[85] Assuming that the jury rejected the defence position and accepted that Mr. Bradshaw was being candid in the recorded statements, I see no risk that the jury would misuse the statement in inferring guilt. The comment is most closely connected to discussion of the Bontkes murder ("the second one"). It is made in the context of analysing the state of the evidence capable of tying either man to his death. It supports an inference that Mr. Bradshaw was involved in that incident in the sense that his shoes might contain evidence connecting him to it. But the inferences to be drawn from the statement are a result of the context in which it is made. It is part of a discussion in which Mr. Bradshaw plainly said that he killed Mr. Bontkes and talked about his preparations and ensuring there was no resulting evidence tying him to the murder. The jury did not need a post-offence instruction to guide it in the proper use of the statement: see *R. v. Moir*, 2013 BCCA 36 at para. 60, per Bennett J.A. With respect to the Lamoureux killing, I am also not persuaded that there was any risk of the jury taking the shoe-burning as probative of his involvement in that murder.

[86] Before us, Mr. Bradshaw stressed that the judge left manslaughter with the jury and, as a result, the jury had to grapple with the possibility that Mr. Bradshaw's involvement fell short of liability for murder. With respect, I view this argument as failing to respond to the true live issues in the case. The possibility of Mr. Bradshaw being involved in either killing as a principal or party to manslaughter but not murder was remote. The issue was scarcely raised by defence counsel and there is only the briefest of allusions to it in the judge's charge. The live issue was whether Mr. Bradshaw actively and knowingly participated in the intentional killings and was acknowledging as much in the conversation. The following comment in *R. v. Verma*, 2016 BCCA 220 at para. 60 is apposite:

[60] While the issue of whether the murder was "planned and deliberate" was technically a live one in this case, in the sense that it was a question for the jury to determine, the defence made no submissions directed to the issue. In contrast to Arcangioli, Figueroa, White (2011), and Feil, this was not a case in which the accused contended that his post-offence conduct was explained by one level of culpability in respect of a homicide while the Crown contended for a different one. Rather, this was a case in which the only significant issue was whether Mr. Verma was involved at all in the homicide. His post-offence conduct was clearly relevant to that issue.

[Emphasis added.]

[87] In this case, as I have observed, the defence's principal position was that the apparent confession and statement made within it were unreliable and the jury should treat the possibility that they were concocted as sufficient to raise a reasonable doubt. The defence did not contend that they could otherwise support a lesser level of culpability. For the Crown's part, no alternative theory of liability was advanced. On the Bontkes murder, Mr. Bradshaw was the shooter. On the Lamoureux murder, Mr. Bradshaw knew Mr. Thielen wanted to kill Ms. Lamoureux. He provided the opportunity and assisted Mr. Thielen. In reality, the jury was left to accept the Crown theory and convict on murder, or to reject the Crown theory because it was not proven beyond a reasonable doubt on all the evidence and acquit.

[88] In sum, the jury was entitled to examine the whole of Mr. Bradshaw's conversation with Mr. Thielen and decide whether this was a conversation between two men discussing their respective roles in two murders and the risk that a case could be built against them. The admission about burning shoes did not warrant either a limiting or no probative value instruction.

[89] The second issue goes to Mr. Bradshaw's conduct in attempting to contact Mr. Thielen shortly after being approached by the police in the mall.

[90] The evidence was that Mr. Bradshaw was approached by the police on a "stimulation," where the police told him things which they hoped would stimulate him to engage in discussions about the murders with Mr. Thielen. The stimulation worked, with Mr. Bradshaw calling Mr. Thielen almost immediately. Eventually, this led to the hotel meeting.

[91] Without more, the evidence that Mr. Bradshaw called Mr. Thielen immediately after the stimulation would be an unremarkable part of the narrative, which simply explained how the two men ended up at the hotel.

[92] However, Crown counsel raised Mr. Bradshaw's reaction to the stimulation in closing argument. Mr. Bradshaw says the Crown's comments made a limiting instruction necessary. Specifically, Mr. Bradshaw says there is a real risk that the jury viewed the fact that he called Mr. Thielen to arrange a meeting immediately after the simulation as highly probative of guilt when, in fact, it is consistent with a number of innocent explanations.

[93] I disagree.

[94] Understood in context, Crown counsel's comments on Mr. Bradshaw's response to the stimulation were part and parcel of the Crown's explanation of the chain of events culminating in the hotel room discussion. The Crown left the jury to consider the entire context when evaluating what was said between Mr. Bradshaw and Mr. Thielen in the hotel, and the purpose of the phone call leading up to that meeting. In my view, the Crown closing did not generate any real risk that the jury would use the fact that Mr. Bradshaw called Mr. Thielen immediately in response to the stimulation improperly to infer Mr. Bradshaw's guilt.

[95] This is what Crown counsel said, in part. The extract is lengthy, but context matters:

Some people might even be skeptical about some aspects of the technique the police used on Mr. Thielen, but you have to put a lot of that evidence aside at this trial, because this is a trial to determine Mr. Bradshaw's role in these murders, and he was not a part of that vast undercover operation.

Here is the relevancy of all of that evidence to this trial: it explains how the police were able to get two murderers to have a seemingly private conversation with each other, specifically focused on discussing both murders. It explains why neither individual knew they were being recorded. It explains why Mr. Thielen was motivated to talk to his partner in crime and talk to him in a seemingly private hotel room. It explains why Mr. Thielen did what he did. That's the extent of the relevancy of all of that evidence.

To explain why Mr. Bradshaw went to the hotel room and talked about the murders, none of that months' long undercover operation has relevance, because Mr. Bradshaw was not a part of it and he didn't know about it. It didn't take a months' long undercover operation to get Mr. Bradshaw to talk about his role in these murders. It took one carefully orchestrated and timed approach by a police officer, Inspector Dadwal, approaching Mr. Bradshaw in Metrotown on July 20th, 2010, at 4:39 p.m.

The subsequent phone calls between Mr. Bradshaw and Mr. Thielen had started minutes after this conversation to set up the -- oh, started, yes, sorry, wrong emphasis -- started minutes after this conversation to set up the hotel meeting, tell you that's all it took to put the wheels in motion with regard to Mr. Bradshaw.

This evidence is powerful in its own right, because Mr. Bradshaw's actions after Inspector Dadwal's approach prove he was involved in the murders, and this evidence is independent of Mr. Thielen and the undercover operation.

There is only one explanation for why Mr. Bradshaw went to the hotel room. Mr. Bradshaw went to the hotel room to discuss the details of the two murders with Mr. Thielen that they were both involved in, and Mr. Bradshaw was, for our purposes, and I have already said this at this trial, confessing to his role in the murders.

[96] Counsel then went on to discuss the content of Mr. Bradshaw's voicemail message to Mr. Thielen, and a telephone conversation between the men before they met. He outlined Mr. Thielen's reaction and explained how the police also stimulated Mr. Thielen to encourage discussion. Crown counsel described the situation in this way:

During the phone calls leading up to the hotel room you begin to hear -- and I suggest you listen to them, I'm not going to play them right now, but you hear the urgency in both Mr. Thielen and Mr. Bradshaw, and the mutual understanding that we need to talk things over, the heat is on.

Mr. Bradshaw's voice is the evidence, but you can use Mr. Thielen to determine why he is saying what he is and what -- what Mr. Bradshaw understands he is talking about. And again, as I said I recognize -- I recommend that you listen to these calls again, but I'll just paraphrase them. I've picked out little bits of them.

[97] Crown counsel then described some details of the calls in support of the theory that their content:

is the evidence of why and for what purpose Mr. Bradshaw went to the hotel room. IHIT told him he's a suspect in the murders, so he clearly decides he needs to talk about the murders with his accomplice, Mr. Thielen, and make sure they are clean and all is good.

The Dadwal stimulation, these phone calls and Mr. Bradshaw's actions tell you this. Again, all of the undercover operation evidence tells us why Mr. Thielen went to the hotel room and for what purpose. The only reason for the meeting in the hotel room was to talk about their murders. This is the only explanation for what happened in the hotel room, two murderers talking out the details of their killings.

The police managed to set up a situation where you can be sure that you're getting a pure version from both murderers, because neither person knew they were being recorded.

[98] I have discussed this part of the Crown address to the jury to illustrate an important point. This is not the usual case where a limiting instruction on post-offence conduct is called for to protect against a jury inferring guilt from evidence that is not probative of the ultimate finding to be made. The fact that Mr. Bradshaw made calls to Mr. Thielen shortly after being told he was a suspect does not stand alone. It is one fact embedded in a body of evidence which is probative of the reason why he made the call. The evidence is not just the calls, but what was said when the two men made contact and, importantly, what they spoke about when they met. The evidence about making the calls cannot be isolated from their content and what was subsequently discussed.

[99] What matters here is the probative value of all of the evidence from the "stimulation", through to making a call and leaving a message, to the telephone conversation when they reach each other, to the content of the discussion in the hotel room. The jury has a universe of evidence from which it can reach a conclusion about why the meeting was set up.

- [100] It must also be remembered that defence counsel had put to Mr. Thielen on cross-examination that the things Mr. Bradshaw said in the recorded hotel discussion were part of a concocted story the two were putting together for the crime boss. Viewed with that context in mind, much of what Crown counsel said would have been understood by the jury as a rebuttal to the defence theory. It explained, as Crown counsel put it, why the jurors could be sure that "you're getting a pure version from both murderers." Again, all of the evidence would be evaluated by the jury to decide why the calls were made and the meeting set up, and what to make of Mr. Bradshaw's statements in the hotel.
- [101] With respect, I do not think that the jury was invited to infer merely from the fact that Mr. Bradshaw made a call to Mr. Thielen that he was guilty of murder. The inference the Crown sought to have the jury draw depended on assessing the fact of the calls in the context of direct evidence about their content and what was discussed at the meeting.
- [102] I am not persuaded that in these circumstances any limiting instruction was warranted to avoid the risks that underlie special instructions about post-offence conduct. I would not accede to this ground of appeal.

Disposition

[103] I would dismiss the appeal.

"The Honourable Mr. Justice Harris"

I agree:

"The Honourable Madam Justice Fenlon"

I agree:

"The Honourable Mr. Justice Abrioux"

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