

CANADA / JUDGMENT

## R. v. Fisher

2026 ONCA 220

### COURT

Court of Appeal for Ontario

### DECIDED

27 March 2026

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R. v. Fisher

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COA-23-CR-0794

Judges

Gillese, Eileen E.; Dawe, Jonathan; Madsen, Lene

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COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Fisher, 2026 ONCA 220

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Gillese, Dawe and Madsen JJ.A.

BETWEEN

His Majesty the King

Respondent

and

John William Fisher

Appellant

Michael W. Lacy and Marcela Ahumada, for the appellant

Emily Marrocco, for the respondent

### **Heard: March 2, 2026**

On appeal from the convictions entered by Justice Patrick J. Monahan of the Superior Court of Justice, on November 10, 2022, with reasons reported at 2022 ONSC 5832.

#### **REASONS FOR DECISION**

- [1] On the early morning of February 17, 2019, Joshua Maier-McKenzie was stabbed in the face in a Toronto bar. The trial judge determined that there was overwhelming evidence that the appellant, John Fisher, was the assailant who stabbed Mr. Maier-McKenzie. Mr. Fisher was convicted of aggravated assault, assault with a weapon, carrying a concealed weapon without authorization, and possession of a concealed weapon for a dangerous purpose contrary to ss. 268(2), 267(a), 90(1) and 88.1(1) of the Criminal Code, R.S.C. 1985, c. C-46.
- [2] The trial concluded on September 22, 2022, about 43 months after the laying of the information. The trial judge dismissed Mr. Fisher's 11(b) Charter application at the outset of trial with reasons to follow. He released his reasons on November 10, 2022, which was also the date that he delivered his reasons for judgment finding Mr. Fisher guilty as charged.
- [3] On appeal, Mr. Fisher makes two arguments[1]: First, he argues that the trial judge erred in dismissing his 11(b) application, specifically by deducting twelve months of delay in rescheduling Mr. Fisher's preliminary inquiry when seven of those months resulted from the Crown's unavailability. If the entirety of this period had not been deducted, the presumptive ceiling set out in *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631 would have been exceeded, and a stay of the charges would have been required. Second, Mr. Fisher argues that the trial judge erred in admitting the opinion evidence of Officer Lymer that Mr. Fisher was the man who can be seen on a video recording swinging what looks like a knife at Mr. Maier-McKenzie. He argues that the officer was insufficiently familiar with Mr. Fisher and in no better position than the trial judge to assess the assailant's identity.
- [4] For the following reasons, the appeal is dismissed.

A. Brief Background [5] Two police officers, Officers Nanton and El-Halabi, responded to a call regarding gunshots fired at the Rivals Sports Bar (the “bar”) in the early hours of February 17, 2019. The officers attended the bar and learned that a patron had been stabbed or, more specifically, slashed on the left side of his face, shortly before the shots were fired.

- [6] After arriving at the bar, the officers interacted with a man outside the bar, who appeared intoxicated and agitated, and who wanted to retrieve his charging cell phone from inside the bar. The officers described this man as a white male wearing a baseball hat with the Nirvana smiley-face logo on it (the “Nirvana baseball hat”) and glasses. When the officers told the man he had to wait to get his phone he yelled, several times, something along the lines of, “I’m John William Fisher. I run Greenwood and Danforth.”[2] Officer Nanton ultimately retrieved the man’s phone for him, and the man left the scene.
- [7] While officers investigated at the bar, other officers responded to a disturbance call at the emergency department of Centenary Hospital. The male subject of that call was Mr. Maier-McKenzie, who was being treated for a large laceration on the left side of his face. He initially gave the police a false name, and indicated that he had been injured in a fall at a park. The police made certain inquiries and came to suspect that Mr. Maier-McKenzie was the shooter at the bar, and he was subsequently arrested and charged with that offence. The police also formed the view that he was the patron who had been stabbed in the bar shortly before the shooting.
- [8] The investigating officers obtained video surveillance from the bar, including a video clip capturing what they believed was the stabbing. That clip depicted a white male wearing a Nirvana baseball hat and glasses thrusting his right hand, which can be seen holding an object resembling a knife, toward the left side of Mr. Maier-McKenzie’s face in a slashing motion.
- [9] Security video footage from upstairs then showed Mr. Maier-McKenzie leaving the bar at 2:17 a.m., holding his left hand to the side of his face. The bar owner testified that a man wearing a baseball cap who can be seen leaving the bar a minute later was the same person who had left his phone at the bar to be charged earlier that evening.
- [10] Officer Lymer attended his shift in the Toronto Police Service Major Crime Unit the following day and learned that there had been a shooting and stabbing overnight at the bar. He was asked to review video surveillance from the bar depicting the incident. Upon review, Officer Lymer recognized the man in the Nirvana baseball hat as Mr. Fisher.
- [11] Mr. Maier-McKenzie testified at the appellant’s preliminary inquiry but did not respond to the subpoena for trial. This led Mr. Fisher to successfully apply to tender Mr. Maier-McKenzie’s preliminary inquiry testimony as evidence at his trial. Mr. Maier-McKenzie had testified at the preliminary inquiry that the man in the basement of the bar who had swung his hand at Mr. Maier-McKenzie’s face had been holding a cell phone, not a knife, and had not hit him. He maintained that he had then been stabbed while walking back up the stairs to the main floor, and that the person who stabbed him was a different man: a light skinned

Black male with whom he had an argument earlier in the evening.

- [12] At trial, Mr. Fisher's position was that the Crown had not proved he was the person seen on the basement video surveillance having an altercation with Mr. Maier-McKenzie. In the alternative, he argued that even if he was the man on the basement video, Mr. Maier-McKenzie's preliminary inquiry testimony that he had been stabbed on the stairs by a different man raised a reasonable doubt about whether Mr. Fisher was the stabber.
- [13] The trial judge ruled that Mr. Maier-McKenzie's preliminary inquiry evidence was admissible for its truth, under either s. 715 of the Criminal Code or the principled exception to the hearsay rule. However, he concluded from the evidence as a whole, including a careful review of all of the bar surveillance footage, that "the assailant had to have been the male wearing the Nirvana baseball cap in the basement", and not the man who Mr. Maier-McKenzie said had stabbed him on the basement stairs. The trial judge determined that the "only possible assailant" was the male wearing the Nirvana baseball hat, who he found further to be Mr. Fisher.

B. No error in dismissing the 11(b) application [14] Mr. Fisher's case, like so many others, was impacted by court delays caused by the COVID-19 pandemic (the "pandemic").

- [15] The information against Mr. Fisher was laid on February 20, 2019. His preliminary inquiry was scheduled to take place between June 1-9, 2020. However, courts were shut down on March 15, 2020, and the preliminary inquiry was ultimately rescheduled to June 7-11, 2021. Mr. Fisher's trial was scheduled to commence March 13, 2022. The pandemic again intervened in late 2021, and the trial was rescheduled to July 4-15, 2022. Crown counsel subsequently fell ill, and the trial ultimately commenced on September 12, 2022. In the result, Mr. Fisher's trial was completed on September 22, 2022 — approximately 43 months after the laying of the information and 13 months beyond the presumptive Jordan ceiling.
- [16] Mr. Fisher brought an 11(b) application, which the trial judge dismissed at the commencement of Mr. Fisher's trial.
- [17] The trial judge found that the pandemic was an exceptional circumstance that had "a system-wide impact of unprecedented proportions" and forced the adjournment of thousands of proceedings, both in the Ontario Court of Justice and the Superior Court of Justice. He emphasized that the analysis of any individual case should account for these system-wide impacts and highlighted that "[n]o single case is entitled to take priority over all others, without regard to the legitimate needs of other accused who are also facing delays".
- [18] The trial judge deducted a total of 14.5 months of the delay as a result of discrete circumstances attributable to the pandemic. This consisted of a twelve-month delay of the preliminary inquiry; and a two-and-a-half-month delay of the trial caused by the resurgence of the pandemic in late 2021 and the backlog of cases in the Superior Court. The trial judge deducted two additional months as a discrete circumstance arising from the illness of the assigned Crown. The trial judge ultimately deducted 16.5 months in total, bringing the net

delay down to 26.5 months, well under the Jordan ceiling.

- [19] As he did at trial, Mr. Fisher fairly acknowledges the impact of the pandemic on court scheduling and that the delay occasioned by the pandemic is a discrete circumstance appropriately deducted from the gross delay. However, he says that the seven-month period from the start of the re-scheduling window for his preliminary inquiry in September 2020 to when the Crown was first able to proceed in April 2021 must be the Crown's responsibility. He argues there was little "concrete evidence" linking the Crown's unavailability to the pandemic during this period and no evidence that the Crown made attempts to reassign the matter to an alternate Crown with greater availability, making it unreasonable for the trial judge to include this entire period in the delay attributable to the pandemic. He says a "fair and reasonable apportionment" of the delay would be to allocate half of the delay between June 2020 and June 2021 to the pandemic, bringing net delay to thirty-two and a half months, two and a half months over the Jordan ceiling.
- [20] We do not accept these arguments.
- [21] As this court has repeatedly held, while characterizations of periods of delay and the ultimate decision on whether there has been unreasonable delay are reviewed on a standard of correctness, deference is owed to the underlying findings of fact: *R. v. A.N.*, 2025 ONCA 300, at para. 7, leave to appeal to the S.C.C requested, 41863; *R. v. Kirkopoulos*, 2024 ONCA 596, at para. 42; *R. v. Grant*, 2022 ONCA 220, 413 C.C.C. (3d) 491, at para. 30. Whether a delay results from a discrete event and whether the Crown took reasonable steps to mitigate the delay are fact-driven determinations: *R. v. Mengistu*, 2024 ONCA 575, at para. 14. Trial judges are generally in the best position to determine whether exceptional circumstances exist: *Jordan*, at para. 98; *R. v. Picard*, 2017 ONCA 692, 137 O.R. (3d) 401, at para. 137; *R. v. Zahor*, 2022 ONCA 449, at para. 120.
- [22] The trial judge was entitled to find that periods of delay, including the 12-month preliminary inquiry delay, were attributable to the pandemic. He clearly set out the link between the pandemic and the rescheduling of the preliminary inquiry, as is required: *R. v. Kovacs*, 2025 ONCA 49, 175 O.R. (3d) 401, at para. 14.
- [23] It is true that when efforts were initially made to reschedule the preliminary inquiry, the Crown was not available for a number of months. However, the trial judge found that the Crown took active steps to reschedule the preliminary inquiry as soon as reasonably possible, and acted diligently, "while also taking into account the legitimate needs of other accused to have their matters heard in a timely way". He found that it was not surprising or unusual that the Crown only had availability commencing on April 1, 2021 in these circumstances.
- [24] These findings were open to the trial judge. The Crown only had to show that it reasonably attempted to avoid delay, which it did: *R. v. Coates*, 2023 ONCA 856, 169 O.R. (3d) 401, at para. 46. Further, the seven-month period of concern to Mr. Fisher cannot be looked at in isolation, but alongside the broader consideration of pandemic-related factors: *Kovacs*, at

para. 12. Viewed from a systemic perspective, while accounting for the specifics of this case, it was open to the trial judge to treat the seven-month delay as flowing directly from the court closure in March of 2020, and as remaining attributable to the pandemic. The trial judge recognized that the preliminary inquiry was adjourned at the height of the pandemic and that the case had to be considered in the context of a plethora of cases requiring rescheduling. We agree with the respondent that the trial judge was well placed to understand the local conditions and realities as a result of the pandemic, and was entitled to account for same: Coates, at paras. 6, 42-46.

[25] Accordingly, there is no basis to interfere with the analysis or conclusion of the trial judge on the 11(b) application.

C. No error in admitting The recognition evidence [26] The main issue at trial was whether Mr. Maier-McKenzie's assailant was Mr. Fisher.

[27] The evidence of identity was extensive, and included, but was not limited to: video surveillance from the bar; evidence from the officers at the scene who heard a man outside the bar repeatedly identify himself as Mr. Fisher; evidence that, when arrested, Mr. Fisher was wearing glasses similar to those worn by the assailant on the video surveillance from the bar; and, Officer Lymer's recognition of Mr. Fisher as the man wearing the Nirvana baseball hat in the basement video surveillance, based on his prior dealings with Mr. Fisher (the "recognition evidence").

[28] On February 17, 2019, Officer Lymer was asked by his colleagues to view some video surveillance from the incident at the bar. He was not provided with any information about the assailant's possible identity. Upon review, Officer Lymer recognized the man in the Nirvana baseball hat as Mr. Fisher, based on certain details of Mr. Fisher's appearance. He had interviewed Mr. Fisher in person for about 30 minutes[3] about a year prior in connection with an unrelated investigation. Around that time, Officer Lymer also viewed photographs on Mr. Fisher's Facebook page, under the name "Casper Mac", and saved certain photos from that page.

[29] Although he was not the lead investigator in relation to the February 17, 2019 barroom stabbing, Officer Lymer was then involved in Mr. Fisher's arrest on February 19, 2019. In May 2021, Officer Lymer obtained further photos of Mr. Fisher from the same Facebook page.

[30] At trial, the Crown sought to admit the recognition evidence. Following a careful application of the test for the admission of prior acquaintance evidence from *R. v. Leaney*, [1989] 2 S.C.R. 393, the trial judge admitted the recognition evidence. He found that the first prong of the test was met because Officer Lymer had a clearly articulable basis for identifying Mr. Fisher based on the prior interview and the social media searches. The trial judge noted that Officer Lymer was able to identify Mr. Fisher in the video surveillance based on features of Mr. Fisher's appearance, including his build, chin-strap beard, and glasses. The trial judge further found that, based on the prior contact between Officer Lymer and Mr. Fisher, that

Officer Lymer was in a better position than he was to identify Mr. Fisher. Further, the probative value of the recognition evidence was high. This satisfied the second prong of the test.

- [31] Mr. Fisher makes several submissions in support of his argument that the trial judge erred in admitting the recognition evidence. The heart of the arguments is two-fold. First, in light of the brief duration of the interview a year prior to the incident and the lack of detail Officer Lymer could provide about that interview, Mr. Fisher argues that Officer Lymer was really relying on the Facebook photos he obtained, including some as recently as May 2021, not his memory of the 2018 interview, when purporting to identify Mr. Fisher on the video. This would put the officer in no better position than the trial judge to make the identification. Second, in oral argument, Mr. Fisher submits that in any event, given that Officer Lymer participated in the investigation, it was inappropriate for the trial judge to admit purported recognition evidence which carried a “significant risk of confirmation bias”. It was misguided, Mr. Fisher asserts, to have an investigating officer be a Leaney witness.
- [32] Mr. Fisher also points to alleged misapprehensions in the trial judge’s reasons about when exactly Officer Lymer initially viewed the Facebook page (i.e., whether he did so just before or after the 2018 interview), and Officer Lymer’s recollection of whether Mr. Fisher was wearing glasses during the interview (Officer Lymer could not recall, but the trial judge noted otherwise). Mr. Fisher further argues that the trial judge erred in using the “immediacy” of Officer Lymer’s identification of Mr. Fisher in his review of the video surveillance as a badge of reliability.
- [33] These arguments cannot succeed.
- [34] Leaney recognition evidence is an example of non-expert identification evidence stemming from the witness’s recognition of a person based on prior acquaintance, which is admissible in some circumstances: *R. v. Berhe*, 2012 ONCA 716, 113 O.R. (3d) 137, at para. 13. The trial judge carefully and correctly set out the law governing the admissibility of such evidence, sometimes referred to as the “prior acquaintance/ better position test”: Leaney at p. 413; *R. v. Brown* (2006), 215 C.C.C. (3d) 330 (Ont. C.A.), at para. 39; *Berhe*, at paras. 14, 20-21. It is trite law that the determination of the admissibility of identification evidence is entitled to deference, absent an error in principle or an unreasonable ruling: *R. v. Hudson*, 2020 ONCA 507, 391 C.C.C. (3d) 208, at para. 32.
- [35] The trial judge made no error in his application of the prior acquaintance/better position test. First, he did not effectively permit Officer Lymer to make a Nikolovsky assessment in his place, as Mr. Fisher alleged: see *R. v. Nikolovsky*, [1996] 3 S.C.R. 1197. Rather, the trial judge found that Officer Lymer was familiar with Mr. Fisher based on his previous interview and the roughly contemporaneous social media investigation of Mr. Fisher, and that Officer Lymer was therefore in a better position than the trial judge was to identify Mr. Fisher as the person on the bar surveillance video. This is a reasonable ruling on the evidence and is entitled to deference. Whether Officer Lymer conducted the social media investigation just

before or shortly after his 2018 interview with Mr. Fisher was of no moment, since either way Officer Lymer was well-positioned to satisfy himself that the man in the social media photos was Mr. Fisher. The combination of the interview and initial social media investigation and Officer Lymer's focus on Mr. Fisher, including distinctive features of his appearance, then formed the basis for his recognition of Mr. Fisher as the person on the bar basement video recording.

- [36] Nor do we find error in the trial judge's passing reference to the speed of Officer Lymer's recognition of Mr. Fisher in his review of the video surveillance. The trial judge listed numerous reasons why he found the recognition evidence to be reliable and probative, including Officer Lymer's recollection of Mr. Fisher's distinctive features and that he saved the Facebook photos into a Word document, the latter suggesting he paid particular attention to Mr. Fisher's physical appearance. Nor does any misstatement by the trial judge regarding whether Mr. Fisher was or was not wearing glasses during the 2018 interview, or only in the Facebook photos, have any material bearing on the admissibility of the officer's opinion evidence, since Officer Lymer testified that he was able to identify Mr. Fisher on the video based on the combination of his physical and other features, not merely because of his glasses.
- [37] A trial judge's misapprehension of evidence will only rise to the level of a reversible error when it "play[s] an essential part in the reasoning process resulting in a conviction": *R. v. Morrissey* (1995), 97 C.C.C. (3d) 193 (Ont. C.A.), at p. 221; *R. v. Lohrer*, 2004 SCC 80, [2004] 3 S.C.R. 732, at para. 1. Here, the trial judge's mistaken belief that Officer Lymer specifically remembered Mr. Fisher wearing glasses during the 2018 interview was not central to his conclusion that the officer's recognition evidence was admissible. Moreover, Officer Lymer's recognition evidence played only a small part in the trial judge's conclusion that the evidence as a whole overwhelmingly established that Mr. Maier-McKenzie was stabbed by the man in the Nirvana baseball hat, and that this man was Mr. Fisher.
- [38] Second, the argument that Officer Lymer could not appropriately give Leaney recognition evidence in light of his involvement in the investigation is misplaced in the circumstances here. This argument was not made by counsel at trial. It is without traction in this case in any event. Officer Lymer was asked to review the video surveillance before he had any involvement in the bar investigation. He was given no information about who the man in the Nirvana baseball hat might be before he reviewed the video and recognized Mr. Fisher. He was not the lead investigator in the investigation that followed. In these circumstances, there are no grounds to believe that Officer Lymer's recognition evidence was tainted by his subsequent knowledge that Mr. Fisher was a suspect in the stabbing, or his observations of Mr. Fisher during his arrest two days later.

[39] We therefore find no error in the trial judge's admission of the recognition evidence. While there is no need to rely on the curative proviso in this case, we would further note that the trial judge found that there was "overwhelming evidence" both that the man wearing the Nirvana baseball hat stabbed Mr. Maier-McKenzie in the bar, and that this man was Mr. Fisher. These conclusions would both hold up even if the recognition evidence from Officer Lymer had not been admitted.

D. Disposition [40] This appeal is dismissed.

*"E.E. Gillese J.A."*

*"J. Dawe J.A."*

*"L. Madsen J.A."*

- [1] While Mr. Fisher originally advanced a third argument alleging that the verdict was unreasonable, he abandoned this ground in oral argument.
- [2] Office Nanton heard him say "My name is John Fisher and I run Danforth and Greenwood." Officer El-Halabi heard him say "My name is John William Fisher and I run Danforth and Greenwood." Nothing turns on this. Both heard him identify himself this way three or four times.
- [3] Officer Lymer acknowledged in cross-examination that the interview could have been less than 30 minutes in length.

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