
CANADA / JUDGMENT

R. v. Frigon

2020 BCCA 315

COURT

British Columbia Court of Appeal

DECIDED

19 November 2020

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2020 BCCA 315 R. v. Frigon

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Frigon,

2020 BCCA 315

Date: 20201119

Docket: CA45289

Between:

Regina

Respondent

And

Joseph Wilfrid Frigon

Appellant

Corrected Judgment: The text of the judgment was corrected on the cover page and at para. 1 on January 21, 2021.

Before:

The Honourable Mr. Justice Groberman

The Honourable Mr. Justice Goepel

The Honourable Madam Justice Fisher

On appeal from: An order of the Provincial Court of British Columbia, dated January 10, 2018 (conviction) and May 8, 2018 (sentence)

(R. v. Frigon, Nelson Docket 25063-1).

Counsel for the Appellant:

J. Narwal

A.M. Boldt

R. Mansoori-Dara

Counsel for the Respondent:

S.E. Elliott

Place and Date of Hearing:

Vancouver, British Columbia

September 10, 2020

Place and Date of Judgment:

Vancouver, British Columbia

November 19, 2020

Written Reasons by:

The Honourable Madam Justice Fisher

Concurred in by:

The Honourable Mr. Justice Groberman

The Honourable Mr. Justice Goepel

Summary:

The appellant challenges his conviction of assault that arose from a physical altercation between himself and the complainant. The trial judge based his decision primarily on witness testimony and the gross disparity in injuries between the two men. The appellant sought to tender fresh evidence on appeal, which included the previously undisclosed criminal record of the complainant and a medical opinion. The appellant alleges errors in the trial judge's findings and credibility assessment and contends that fresh evidence would undermine the judge's findings regarding the complainant's injuries. He also contends that he received ineffective assistance of counsel at trial. Held: Appeal dismissed. The complainant's criminal record should have been disclosed, but there is no reasonable possibility that the non-disclosure affected the outcome or overall fairness of the trial. The medical opinion evidence was inadmissible as fresh evidence but other fresh evidence was admissible for other purposes, most notably for assessing the ineffective assistance of counsel ground. The few errors identified had little, if any, effect on the trial judge's overall analysis. The appellant failed to prove that the conduct of trial counsel fell below the reasonableness standard or resulted in prejudice. The cumulative effect of the few

errors or irregularities that occurred did not result in a miscarriage of justice under s. 686(1)(a)(iii) of the Criminal Code.

Reasons for Judgment of the Honourable Madam Justice Fisher:

- [1] The appellant, Joseph Wilfrid Frigon, was convicted of assault causing bodily harm contrary to s. 267(b) of the Criminal Code, after a four-day trial in the Provincial Court. The incident giving rise to the charge was a physical altercation between the appellant and the complainant, William Kenneth Graff, in the washroom of a pub. The primary issue was whether the appellant or the complainant had instigated the fight.
- [2] The trial judge was faced with two conflicting versions of what occurred. Both men claimed to have been attacked by the other and to have then engaged in the altercation in self-defence. As to this issue, there were no witnesses other than the appellant and the complainant. There were other witnesses who testified about events before and immediately after the fight started.
- [3] The trial judge found a stark difference in the accounts of the two men and concluded that one of them was not telling the truth. He rejected the appellant's evidence. He did not accept all of the complainant's evidence, but he found that his evidence as to the sequence of events in the fight was supported by the evidence of his injuries, which were more severe than those of the appellant, and corroborated by the evidence of witnesses to the aftermath of the fight. He therefore concluded that the Crown had proved the charge beyond a reasonable doubt.
- [4] The appellant raises numerous grounds of appeal, contending that their cumulative effect resulted in a miscarriage of justice under s. 686(1)(a)(iii) of the Code and requires this court to intervene by setting aside the conviction and ordering a new trial. The Crown contends that the appellant is attempting to retry the case by asking this court to re-weigh the evidence and make inferences the trial judge was not willing to make, and therefore the appeal should be dismissed.
- [5] It is my view that there were some errors made by the trial judge and some irregularities in the trial process, but when considered in light of the evidence and the reasons for judgment as a whole, none of these errors or irregularities are sufficient to justify intervention from this court. For the reasons that follow, I would dismiss the appeal.

The decision below

- [6] The trial judge described the incident and the central issue in the opening paragraphs of his reasons:

- [1] On the evening of April 1, 2016, two men became engaged in a fight in the tight confines of the men's washroom at the Black Rooster Pub in Castlegar. One of the men, Ken Graff, suffered serious head injuries in the altercation. The other, Willy Frigon, suffered a swollen eye with a small cut and a minor injury to one hand. Mr. Frigon is charged with assault causing bodily harm.
- [2] How the two men became engaged in this fight is the central question in this case.
- [7] The judge then noted that there were no witnesses to the start of the fight other than the appellant and the complainant, and the witnesses to the aftermath of the fight each had some prior relationship with one or both men. He noted in particular the "stark" difference in the accounts of the appellant and the complainant that could not be explained "by faulty recollection or some error in perception", and expressed the view that one of the two men was not telling the truth. He recognized that the case required a careful examination of the credibility of the witnesses and he had to bear in mind that "a trial is not a credibility contest in which the court ultimately decides which version of events is preferred" but rather the decisive question was "whether, considering the evidence as a whole, the guilt of the accused has been proved beyond a reasonable doubt" (at paras. 3-4).
- [8] After referring to the principles in *R. v. W.(D.)*, [1991] 1 S.C.R. 742, the trial judge commented first on the evidence of the complainant. Although he did not accept all of the complainant's testimony, the judge found his evidence about the fight itself provided "a plausible explanation for the injuries he suffered" (at para. 9).
- [9] The judge then turned to motive. He reviewed the history of a conflict between the appellant and the complainant's wife that had occurred three years prior, following which the two men had exchanged insulting text messages. He did not accept the evidence of either the appellant or the complainant that they had no ill will towards the other, finding that "both men had reason to dislike each other and did dislike each other" (at para. 21). He found the appellant had a reason to bear a grudge for the following reasons:
- [22] First, while the conflict did not result in any disciplinary action, internal or otherwise, the conflict itself and the ensuing internal investigation would obviously have been of some consequence to Mr. Frigon.
- [23] Second, it is to be noted that it was Mr. Graff who made a written complaint by email to Mr. Frigon's employer demanding action concerning Mr. Frigon's alleged assault, and threatening criminal charges. While Mr. Frigon and Ms. Olsen may have eventually reached an agreement to put the complaint behind them, there was no similar agreement to resolve the harsh feelings arising out of the words exchanged between Mr. Frigon and Mr. Graff.
- [24] Third, by Mr. Frigon's own evidence, Mr. Graff's words caused Mr. Frigon to worry about Mr. Graff getting revenge on him. While Mr. Frigon, by April 1, 2016, may have been less worried about any threat from Mr. Graff, I do not accept that he did not bear any grudge against Mr. Graff for making him feel this way in the past.

- [10] The judge also noted that both men, while not grossly intoxicated, had consumed a significant amount of alcohol, "the emotionally disinhibiting effects of which are well known" (at para. 25). He then reviewed the injuries of each man, noting an "obvious imbalance" in that the complainant's injuries were much more serious than those of the appellant (at paras. 30-32).
- [11] The trial judge did not accept the appellant's description of how the fight occurred. He found that it did not provide an explanation for the "gross disparity" in the injuries suffered by the two men and was inconsistent with the evidence of the witnesses who testified about the aftermath of the fight (at paras. 68-71). He accepted the evidence of one witness, David Longton, who said he heard the appellant threaten to punch the complainant before the altercation took place. Ultimately, the judge rejected the appellant's evidence as untruthful (at para. 73). He then considered "the whole of the evidence" that he accepted:
- [74] I have already commented on the evidence of Mr. Graff, those portions that I accept and those that I do not. As noted, his evidence as to the sequence of events in the fight is supported by the evidence of the injuries he suffered and the relatively few suffered by Mr. Frigon. It is further corroborated by the evidence of the witnesses who attended the washroom to interrupt the fight.
- [75] The evidence of Mr. Longton is strong evidence of Mr. Frigon's intention of doing harm to Mr. Graff that evening. When Mr. Graff got up to go to the washroom, Mr. Frigon was in a position to see the opportunity to carry out this intent. I infer from all of the evidence that he did see this opportunity and followed Mr. Graff to the washroom. Once there, he attacked Mr. Graff without warning and while Mr. Graff was in a vulnerable position.
- [76] Mr. Graff suffered significant injury as a result of this attack. There is no question that those injuries constituted bodily harm.
- [12] The trial judge therefore concluded that the Crown had proven each of the elements of the offence beyond a reasonable doubt.

On appeal

- [13] The appellant asserts the following grounds of appeal:
1. the Crown failed to comply with its disclosure obligations;
 2. the trial judge erred in finding that the appellant had animus towards the complainant;
 3. the trial judge erred in his assessment of credibility;
 4. the fresh evidence, if admitted, undermines the trial judge's findings concerning the complainant's injuries;
 5. the Crown breached its obligations by leading false evidence concerning the complainant's injuries; and

6. the appellant received ineffective assistance of counsel.

[14] In support of grounds 1, 4, 5 and 6, the appellant seeks to admit fresh evidence. I will address this application first.

Fresh evidence

[15] The appellant seeks to admit the following fresh evidence:

- the complainant's criminal record, the underlying facts concerning his convictions, and a YouTube video presumably depicting the complainant when under arrest (ground 1);
- a medical opinion in the form of a report by Dr. Michael Orde, along with the complainant's medical records (grounds 4, 5 and 6);
- an oral statement made by the complainant to police on April 1, 2016, a recorded statement made by the complainant to police on April 5, 2016, a written statement made by the complainant to his union on April 22, 2016, and statements made by two witnesses to police (Nettie Olson on April 1, 2016 and Ryan Van Rooyen on June 8, 2016) (ground 6).

[16] I note that the complainant's statement to his union is not fresh evidence, as it was marked as an exhibit at the trial.

1. The legal test

[17] Pursuant to s. 683(1) of the Criminal Code, an appellate court may receive fresh evidence where it considers it to be in the interests of justice. The test for the admission of fresh evidence is well known. The proposed evidence must be admissible under the rules of evidence and meet the following criteria, set out in *Palmer v. The Queen*, [1980] 1 S.C.R. 759 at 775:

- (1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial
- (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.
- (3) The evidence must be credible in the sense that it is reasonably capable of belief, and
- (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

[18] The due diligence criterion is not applied as strictly in criminal cases, as it must "yield where its rigid application might lead to a miscarriage of justice": *R. v. G.D.B.*, 2000 SCC 22 at para. 19; *R. v. Aulakh*, 2012 BCCA 340 at para. 57. The Palmer criteria are also relaxed where the fresh evidence is adduced to challenge the integrity of the trial process and directed to a new issue on appeal, such as ineffective assistance of counsel. In that case, the fresh evidence is admissible if it complies with the rules of evidence, is credible, and is relevant to the issue. The expectation that the fresh evidence would affect the result (the fourth Palmer

criterion) is addressed by the parallel prejudice component of the test for ineffective assistance of counsel: Aulakh at para. 64; R. v. Dunbar, Pollard, Leiding and Kravit, 2003 BCCA 667 at paras. 35-36 [Dunbar]. Moreover, the Palmer test is modified where the fresh evidence relates to non-disclosure by the Crown. The test to be applied in this circumstance is whether the right to a fair trial may have been affected, as articulated in R. v. Dixon, [1998] 1 S.C.R. 244: see R. v. Taillefer, 2003 SCC 70 at paras. 75-77. Finally, opinion evidence is no more admissible as fresh evidence on appeal than it is at trial: Dunbar at para. 37.

2. Application of the test

[19] I will address the application in relation to the relevant grounds of appeal.

Evidence relating to ground 1: the complainant's criminal record, the underlying facts concerning his convictions, and a YouTube video

[20] It is not contested that the complainant's criminal record is admissible as fresh evidence related to the integrity of the trial process. I would also admit the evidence of the underlying facts relating to the complainant's 2003 conviction for assault, which is contained in oral reasons for sentence and the transcript of proceedings before the Provincial Court dated December 8, 2003. While neither party made submissions on this evidence, Crown counsel referred to the circumstances of this conviction and I consider the evidence to meet the modified Palmer criteria.

[21] I would not, however, admit the YouTube video. This video shows a man, presumably the complainant and apparently in the course of an arrest, making a rude gesture, being hit by something in the stomach, and then kneeling down with his hands up. It is very short, and the incident is repeated in slow motion.

[22] The appellant made no submission about the relevance or admissibility of this video but his materials show that he or his counsel discovered it. I agree with the Crown's submission that the video is not authenticated and has obviously been doctored. There is some reference to photographs of this incident in the transcript of the sentencing proceedings of December 8, 2003.

[23] In my view, this evidence would not be admissible at trial and it is not admissible as fresh evidence, nor does it relate to the integrity of the trial process, having been obtained by the appellant or his counsel.

Evidence relating to ground 6: statements of the complainant, statements of two witnesses and the complainant's medical records

[24] None of this evidence is admissible per se, but it is admissible under the modified Palmer criteria for the limited purpose of supporting the appellant's contention of ineffective assistance of counsel. The Crown did not object to its admission for this purpose.

Evidence relating to grounds 4 and 5: Dr. Orde's medical opinion and the complainant's medical records

- [25] The appellant seeks to adduce expert opinion evidence in the form of a report by Dr. Michael Orde for the purpose of undermining the trial judge's findings regarding some of the complainant's injuries, as well as the cause of the complainant's head injury (ground 4). Dr. Orde's report attaches numerous documents, including a copy of the complainant's medical records. The appellant submits that the report and the medical records undermine the trial judge's finding that there was a "gross disparity" in the injuries suffered by the two men. He also seeks to adduce this evidence to support his submission that the Crown led medical evidence at trial that it ought to have known was false (ground 5).
- [26] The Crown objects to the admission of Dr. Orde's report primarily on the basis that it could not reasonably be expected to have affected the result at trial. It also objects to the admission of the medical records as documents independently of Dr. Orde's report. It submits that the evidence at trial from other witnesses supported the complainant's evidence as to the extent of his injuries, and Dr. Orde's opinion has such little probative value that it would not have affected the trial judge's findings. The Crown also submits that Dr. Orde's report is inadmissible in any event as not meeting the threshold requirements for admission under *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23.
- [27] I agree with the Crown that Dr. Orde's report has very limited probative value, to the extent that it could not reasonably be expected to have affected the result at trial. Dr. Orde was given a limited task based on a limited review of the complainant's medical records. None of his opinions provide a basis to seriously undermine the essential findings of the trial judge regarding the complainant's injuries or the gross disparity between his injuries and those of the appellant.
- [28] There was ample evidence at trial that the complainant suffered a serious head injury, evidenced by a large lump on the right side of his forehead, as well as several other injuries around his head and face. The head injury was serious enough that the complainant lost consciousness after the fight and spent three and a half days in the intensive care unit of the hospital. None of this was contested.
- [29] Dr. Orde was asked to consider only some of the less serious injuries described by the trial judge, most notably a "broken" nose and broken teeth. Based on his review of the complainant's medical records, Dr. Orde calls into question only whether the complainant suffered a broken nose, three broken teeth and a misaligned jaw. However, the complainant did not testify that he had a broken nose, the judge noted only a "bent or broken nose", and the medical records do note some observations of injury to the nose, damage to the teeth, and some injury to the left cheek and jaw. Dr. Orde also considers other possible soft tissue injuries that did not factor into the issues at trial.

- [30] Importantly in my view, Dr. Orde does not consider the complainant's head injury, other than to opine that "the majority of the reported injuries to his head and neck could potentially have been sustained whilst being held in a 'headlock'--either by Mr. Frigon or Mr. Cyr". This opinion has very limited value given Dr. Orde's own qualification that it was "not possible to state with any meaningful degree of confidence that being in a headlock would have been a factor in the origin of [the complainant's] injuries". I do not see how this evidence could undermine the trial judge's findings as to how the fight took place and the resulting cause of the complainant's head injury. Moreover, such an opinion could have been procured for trial, and the appellant does not assert his counsel's failure to do so as a basis to support ground 6.
- [31] Therefore, I am not satisfied that it is in the interests of justice to admit Dr. Orde's medical report as fresh evidence. The medical records themselves would be admissible only as documents purporting to support Dr. Orde's opinion. However, I would admit them for the limited purpose of assessing ground 5.

The issues

1. The Crown's failure to disclose

- [32] The complainant has a criminal record with three prior convictions: a theft in 1981, impaired driving and failure to provide a breath sample in 1982, and an assault in 2003. The Crown failed to disclose this record to the appellant before trial.
- [33] The appellant submits the Crown thereby breached its disclosure obligations under *R. v. Stinchcombe*, [1991] 3 S.C.R. 326, which is not disputed by the Crown. He further submits there is a reasonable possibility that the non-disclosure affected both the outcome of the trial and the overall fairness of the trial process, citing *Dixon*. The Crown disputes the latter assertion.
- [34] It is well known that the right to disclosure under *Stinchcombe* is one of the components of the right to make full answer and defence, which in turn is a principle of fundamental justice under s. 7 of the Canadian Charter of Rights and Freedoms: *R. v. Carosella*, [1997] 1 S.C.R. 80 at 106 (cited in *Dixon* at para. 22).
- [35] In *Dixon*, the court held that this Charter right will be impaired where an accused demonstrates a reasonable possibility that the undisclosed information could have been used in meeting the case for the Crown, advancing a defence or otherwise making a decision that could have affected the conduct of the defence. As the non-disclosure in that case was raised on appeal from conviction, the court went on to articulate what an accused had to demonstrate in order to merit the remedy of a new trial: (1) a violation of the right to disclosure, and (2) an impairment of the right to make full answer and defence as a result of the failure to disclose. It succinctly stated the test (at para. 34) as whether there is "a reasonable possibility the non-disclosure affected the outcome at trial or the overall fairness of the trial process", explaining the rationale as follows:

[34] Imposing a test based on a reasonable possibility strikes a fair balance between an accused's interest in a fair trial and the public's interest in the efficient administration of justice. It recognizes the difficulty of reconstructing accurately the trial process, and avoids the undesirable effect of undermining the Crown's disclosure obligations. This would be the result if the Crown were placed in a better position by withholding rather than disclosing information of relatively low probative value. However, the reasonable possibility to be shown under this test must not be entirely speculative. It must be based on reasonably possible uses of the non-disclosed evidence or reasonably possible avenues of investigation that were closed to the accused as a result of the non-disclosure. If this possibility is shown to exist, then the right to make full answer and defence was impaired.

[Emphasis in original.]

[36] The court then set out a two-step analysis to determine whether the right to make full answer and defence was impaired:

[36] First, in order to assess the reliability of the result, the undisclosed information must be examined to determine the impact it might have had on the decision to convict. Obviously this will be an easier task if the accused was tried before a judge alone, and reasons were given for the conviction. If at the first stage an appellate court is persuaded that there is a reasonable possibility that, on its face, the undisclosed information affects the reliability of the conviction, a new trial should be ordered. Even if the undisclosed information does not itself affect the reliability of the result at trial, the effect of the non-disclosure on the overall fairness of the trial process must be considered at the second stage of analysis. This will be done by assessing, on the basis of a reasonable possibility, the lines of inquiry with witnesses or the opportunities to garner additional evidence that could have been available to the defence if the relevant information had been disclosed. In short, the reasonable possibility that the undisclosed information impaired the right to make full answer and defence relates not only to the content of the information itself, but also to the realistic opportunities to explore possible uses of the undisclosed information for purposes of investigation and gathering evidence.

[Underline emphasis in original; italic emphasis added.]

[37] Finally, the court noted that all of the factors must be appropriately balanced:

[39] In situations where the materiality of the undisclosed evidence is, on its face, very high, a new trial should be ordered on this basis alone. In these circumstances, it will not be necessary to consider the impact of lost opportunities to garner additional evidence flowing from the failure to disclose. However, where the materiality of the undisclosed information is relatively low, an appellate court will have to determine whether any realistic opportunities were lost to the defence. To that end, the due diligence or lack of due diligence of defence counsel in pursuing disclosure will be a very significant factor in deciding whether to order a new trial.

- [38] Although one of the appellant's complaints about his counsel at trial was that he failed to make further disclosure inquiries, there is no basis for the suggestion that defence counsel failed to exercise due diligence in pursuing disclosure. As I outline below, I have found no merit in the appellant's complaint in this regard.
- [39] The appellant submits that the non-disclosure was material given the context of the issues at trial: credibility, who the likely aggressor was, and self-defence. He says that the complainant's record would have impacted his credibility, especially when considered along with the evidence relevant to motive--in this case the animus of each against the other--and more particularly the evidence of the complainant's threatening text messages to the appellant and his denial that he held a grudge against the appellant.
- [40] The appellant also submits that the complainant's record would clearly have been of some use to him within the meaning of *Stinchcombe*, and the non-disclosure placed the Crown in a better position by insulating its chief witness from scrutiny and shutting the door to avenues of attack by the defence.
- [41] The Crown submits that the complainant's record does not itself affect the reliability of the result reached at trial, stressing that a single act of assault does not demonstrate a disposition to act violently in wholly different circumstances 14 years later. As the fresh evidence demonstrates, the assault conviction stemmed from an incident of excessive discipline of the complainant's stepdaughter. The complainant pleaded guilty and received a suspended sentence and two years' probation.
- [42] The Crown also submits that the non-disclosure deprived the defence only of the opportunity to cross-examine the complainant on his record, and not the opportunity to pursue additional lines of inquiry with witnesses or garner additional evidence. It says that the existence of this dated criminal record is irrelevant to the material findings made by the trial judge, which included the appellant's threat overheard by Mr. Longton, the undisputed fact that the appellant followed the complainant into the washroom, and the significant disparity in their injuries.
- [43] It is my view that the non-disclosure limited a line of inquiry related to the complainant's credibility and insulated him from scrutiny to some extent, but I agree with the Crown that it did not deprive the defence from garnering additional evidence that would ultimately have affected the trial judge's material findings. While the fact of the complainant's criminal record was relevant to his credibility generally, given the content of the record, I am not satisfied that there is a reasonable possibility that cross-examination on that record would have had an impact on the decision to convict. Nor am I satisfied that the non-disclosure deprived the appellant of realistic opportunities to explore possible uses of the record for purposes of investigation and gathering evidence.
- [44] Therefore, I would not accede to this ground of appeal.
2. The finding of animus by the appellant towards the complainant

- [45] The appellant challenges the trial judge's finding that he had an animus against the complainant. He submits the judge's chain of reasoning about this reflects numerous errors that include admitting presumptively inadmissible evidence of animus without holding a voir dire, improperly taking judicial notice of the disinhibiting effects of alcohol, failing to give the appellant an opportunity to make submissions about the 2013 complaint against him as the source of his animus, and relying on inadmissible evidence or evidence without probative value to corroborate the evidence of Mr. Longton. In essence, the appellant says that there was no evidence to support the judge's finding on this important issue.
- [46] I see no merit in all but one of these submissions. There is no question that evidence which seriously tends to establish motive is admissible: *R. v. Barbour*, [1938] S.C.R. 465; *Lewis v. The Queen*, [1979] 2 S.C.R. 821; *R. v. G.(S.G.)*, [1997] 2 S.C.R. 716 at para. 64. The evidence of the conflict between the appellant and the complainant following the 2013 incident was relevant to motive in respect of both men, and the judge found that each held a grudge against the other.
- [47] The transcript shows that the appellant had ample opportunity to make submissions about this issue. He relied on the evidence of the 2013 complaint and the communications that followed to support an argument that the complainant harboured ill will against him, not the other way around. The Crown argued that the appellant had reason to resent the complainant for having made a complaint to his employer. The trial judge's rejection of the appellant's submission and his finding that the appellant held a grudge is supported by the evidence, including the appellant's own evidence that he perceived the complainant's text messages to him at the time as a threat to his safety.
- [48] As to the judge's reference to the disinhibiting effects of alcohol, I do not see this as being material to his reasoning. What was critical was the judge's acceptance of Mr. Longton's evidence regarding the appellant's threat to harm the complainant just before he went to the washroom. The appellant's submission on this issue, that there was no admissible evidence of sufficient probative value to corroborate Mr. Longton's evidence, needs to be addressed.
- [49] The appellant submits that the trial judge improperly used a prior consistent statement of Mr. Longton, admitted through another witness, to corroborate his evidence. He also submits that this hearsay evidence was inaccurate and incomplete, such that its meaning was so speculative and its probative value so tenuous that it should never have been admitted, let alone relied upon by the judge: see *R. v. Ferris*, [1994] 3 S.C.R. 756 and *R. v. Foerster*, 2017 BCCA 105 at paras. 73-74.
- [50] This argument stems from para. 62 of the trial judge's reasons:
- [62] Mr. Longton, in his evidence, also said that he felt responsible for what had happened, that he had "dropped the ball" by not talking to Mr. Frigon when he heard the threats being made at the table. Under cross-examination, Mr. Longton said when visiting Mr. Graff he told him about the threats and was trying to let go some of his feelings in this regard. I found this aspect of Mr. Longton's sincere and compelling and I note there is support elsewhere in the

evidence for this part of his testimony. Mr. Graff, for example, described Mr. Longton as crying and apologizing when visiting him in hospital. Further, Ryan Van Ruen [Rooyen] testified that when he saw Mr. Longton at the table in the pub immediately after the fight, Mr. Longton was angry at the situation and said it should never have happened.

[Emphasis added.]

[51] The appellant points out that Mr. Longton did not testify to such a conversation with Ryan Van Rooyen, and to the contrary, said that he did not realize what was going on at that time and learned about the fight when he went outside.

[52] I agree with the appellant that the evidence of Mr. Van Rooyen on this point had very little, if any, probative value, assuming it was admissible at all. I note that it was not intentionally elicited by the Crown, but rather emerged as an aside by the witness in the following manner:

Q Do you recall if Bucky [Mr. Longton] was still at the table when you got back to the table or was he somewhere else?

A I don't recall.

Q Okay.

A I don't think he was sitting down. I think he was -- I think he was standing up, because I remember him saying that it was - "This should never have happened." I can remember him saying that.

Q Bucky said that?

A Correct. He was angry with the situation that happened.

[53] Mr. Longton testified that he was paying his bill when he heard loud bangs and a girl screaming, but he "didn't really realize what was going on". He then went back to his table and sat down:

Q Okay. And when you went back and sat down at the table that you had been sitting at, with the men that you described, were there other men still at that table?

A No. There was nobody at the table at this point. I was all by myself at that table.

Q Did that surprise you?

A Well --

Q Did you have any -- aside -- did you -- did you ask as to where they may have gone to?

A No. I didn't really have any inkling on what was really happening at that moment.

- [54] Mr. Longton added that a number of men returned and sat down, including Mr. Van Rooyen, and when he asked them what was happening, they said "nothing". He next saw Mr. Van Rooyen after he went outside and talked to the complainant, which is when he learned about the fight. He said that Mr. Van Rooyen came out of the pub with the appellant.
- [55] I agree with the appellant that the hearsay evidence of Mr. Van Rooyen as to what Mr. Longton said, when considered in the context of Mr. Longton's evidence, ought not to have been considered by the judge. However, this formed a small part of the judge's assessment of Mr. Longton's testimony.
- [56] The judge clearly recognized the importance of Mr. Longton's evidence:
- [56] Mr. Longton's evidence, if accepted, is powerful evidence in the Crown's case. In brief, it is that while sitting across from Mr. Frigon in the pub before the altercation on April 1, 2016, he overheard Mr. Frigon say, "I'm going to punch that fucker out" and, "I hate all them fuckers." Mr. Longton testified that Mr. Frigon was looking across to the table at which Mr. Graff, Kelly Olsen, and others were sitting when he made these remarks.
- [57] The appellant had argued that no weight should be given to Mr. Longton's evidence because he was a partisan witness in favour of the complainant, and no one else at the same table heard the remarks Mr. Longton attributed to the appellant. The judge rejected that argument, finding Mr. Longton's sense of remorse for what happened to the complainant to be "palpable". Mr. Longton testified that he blamed himself for what happened because he said nothing to the appellant about his threats. Despite his sympathy toward the complainant, the judge did not find him to be a partisan witness:
- [67] In my view, although Mr. Longton displayed some sympathy towards Mr. Graff in his evidence, this was related to the injuries suffered by Mr. Graff and Mr. Longton's feelings of responsibility for them. Mr. Longton's sense of remorse for what happened to Mr. Graff was palpable in his testimony. Despite his long work relationship with Mr. Graff, Mr. Longton did not come across as a partisan witness who was deliber[ately] shading his evidence favourably towards Mr. Graff. I accept his evidence as to the comments made by Mr. Frigon at the CIMS table before the fight.
- [58] It is not the function of this court to re-weigh the evidence. The trial judge saw and heard the witnesses and was in the best position to assess the credibility and reliability of Mr. Longton's evidence. Despite this error, I see no basis on which this court can intervene and I would not give effect to this ground of appeal.

3. The assessment of credibility

- [59] The appellant concedes that the trial judge correctly set out the principles for assessing credibility set out in W.(D.) but submits that he failed to properly apply those principles. He contends that the judge effectively reversed the burden of proof, failed to take into account or give effect to relevant factors, and failed to address or explain significant contradictory evidence.
- [60] More particularly, the appellant submits that the trial judge's assumption at the outset that one of the men was not telling the truth effectively turned the resolution of guilt or innocence into a credibility contest, and eliminated the second stage of the W.(D.) analysis that requires an acquittal if the trier of fact is unable to decide whom to believe. This alleged error arises in para. 4 of the reasons for judgment:
- [4] The difference in the accounts given by Mr. Graff and Mr. Frigon is so stark it cannot be explained by faulty recollection or some error in perception. One of the two men is not telling the truth. This is thus a case which requires a careful examination of the credibility of the witnesses who have testified. I must, in conducting an analysis of conflicting evidence, bear in mind that a trial is not a credibility contest in which the court ultimately decides which version of events is preferred. The decisive question is whether, considering the evidence as a whole, the guilt of the accused has been proved beyond a reasonable doubt.
- [61] The Crown submits that the judge's explicit recognition in this paragraph that a trial is not a credibility contest refutes this alleged error.
- [62] There is no question that credibility was squarely in issue, and the judge properly instructed himself on the W.(D.) principles. He stated those principles at para. 5 of his reasons:
- [5] At the conclusion of my analysis, therefore, I must apply the principles set out in R. v. W.(D.), [1991] 1 S.C.R. 742, as augmented by the B.C. Court of Appeal in R. v. H.(C. W.) (1991), 68 C.C.C. (3d) 146. Those principles are as follows:

§ If I believe the evidence of the accused, I must acquit.

§ If, after a careful consideration of the evidence, I am unable to decide whom to believe, I must acquit.

§ If I do not believe the evidence of the accused, but I am left in reasonable doubt by it, I must acquit.

§ If the accused's evidence does not raise a reasonable doubt, if I reject his evidence, I must look to the whole of the evidence which I do accept to determine whether on the remaining evidence before the court the Crown has proven each of the elements of the offence beyond a reasonable doubt.

- [63] However, before he commenced his credibility analysis, the judge concluded that the two versions of the events were so divergent that one of the two men was not telling the truth. He followed this by considering the complainant's evidence and finding that it provided "a plausible explanation for the injuries he suffered".
- [64] I understand the appellant's argument to be based on the assumption that the judge's statement, "[o]ne of the two men is not telling the truth" means, "one of the two men is not telling the truth, so I conclude that the other is telling the truth". In his submission, this either/or statement foreclosed consideration of other explanations for the divergent accounts (i.e., neither was telling the truth, or he could not decide whom to believe) and along with the early acceptance of the complainant's explanation, indicated that the judge was preferring the complainant's evidence to that of the appellant.
- [65] If the appellant's interpretation of para. 4 of the reasons is correct, I would agree that it gives an impression right from the start that the judge preferred the evidence of the complainant over that of the appellant. However, I consider the judge's either/or statement to be quite ambiguous, and when interpreted in the context of the entire judgment, it cannot be interpreted as the appellant suggests.
- [66] When the reasons as a whole are considered, it is apparent that the trial judge did assess credibility in accordance with the W.(D.) principles. He clearly recognized that an acquittal was required if he believed the appellant, was unable to decide whom to believe, or was left in reasonable doubt by the appellant's evidence. His reasons also demonstrate that he looked to the whole of the evidence to determine whether the Crown had proven each element of the offence beyond a reasonable doubt. I do not agree with the appellant that the judge effectively reversed the burden of truth. As this court noted in *R. v. Brown*, 2018 BCCA 17 at para. 22:
- [22] *R. v. W.(D.)* does not mandate a specific form or sequence of analysis. As the Supreme Court of Canada noted in *R. v. J.H.S.*, 2008 SCC 30, and this Court noted in *R. v. Mann*, 2010 BCCA 569 at para. 31, not proceeding with the analysis in the sequence followed in *R. v. W.(D.)* "may increase the risk of error, [but] it is not appropriate for [appellate courts] to instruct trial judges on how to undertake W.(D.) analyses. At the end of the day, this Court must be satisfied that the analysis was done and that there was no compromise of the burden of proof that remains throughout on the Crown".
- [67] The judge carefully assessed the evidence of not only the complainant, but also of each of the witnesses and the appellant. He accepted some of the complainant's evidence, but not all, as he was entitled to do. He assessed the evidence of both the complainant and the appellant in light of other evidence, notably the injuries suffered by each and the surrounding circumstances before and immediately after the fight started. Ultimately, the judge found that the appellant's account was inconsistent with other evidence and he rejected it as unbelievable and untruthful. His reasons demonstrate that he responded to the live issues in the case and resolved what he considered to be the major inconsistencies in

the evidence of the material witnesses: see *R. v. R.E.M.*, 2008 SCC 51 at para. 64; *R. v. Dinardo*, 2008 SCC 24 at paras. 30-31; *R. v. A.M.*, 2014 ONCA 769 at para. 14.

- [68] The appellant further submits that the trial judge's rejection of the evidence of the complainant on two key points (that he did not hold a grudge against the appellant and he did not attack the appellant) evinced a positive finding that the complainant lied under oath. He says that the judge erred by failing to consider this, as well as other evidence that was not consistent with the complainant's evidence.
- [69] I do not accept these submissions. It does not necessarily follow that the rejection of evidence means that the judge considered that testimony to be a deliberate lie. It is always open to a trier of fact to accept some, all, or none of a witness's evidence. The trial judge made no express finding that the complainant was lying about the matters he rejected or that this tainted other parts of his evidence. He rejected the evidence of both the complainant and the appellant as to their denials of holding a grudge against the other, and expressly accepted the appellant's evidence that the complainant tried to poke his eye out while the two were being separated.
- [70] Moreover, this is not a case where the judge failed to consider all of the evidence in determining his verdict, as in *R. v. C.M.M.*, 2020 BCCA 56, or made cumulative errors in principle that resulted in an unbalanced scrutiny of the evidence, as in *R. v. Roth*, 2020 BCCA 240. Here, the trial judge clearly considered the parts of the complainant's evidence that he rejected, explaining why he did so: at paras. 13, and 20-21. He did not limit his analysis to the evidence he accepted, nor did he fail to address material inconsistencies. He explained why he accepted the complainant's account of the fight and there was evidence to support his finding.
- [71] I would not give effect to this ground of appeal.
4. The fresh evidence undermines the trial judge's findings concerning the complainant's injuries
- [72] As the evidence of Dr. Orde is inadmissible, there is no need to address this ground of appeal.
5. The Crown breached its obligations by leading false evidence of the complainant's injuries
- [73] The appellant submits that the Crown breached its duties when it led medical evidence that it ought to have known was false, and this resulted in a miscarriage of justice. This submission is premised on an assertion that the Crown led evidence that the complainant suffered a "bent or broken nose" that was not supported by the complainant's medical records.
- [74] There is no merit in the appellant's submission on this point. There are notations in the medical records of observations of a "deviated" nose and a "probable fracture". Corporal Brett Turner, one of the investigating officers, testified about his observations of the

complainant, which included what he perceived to be "a recently broken nose". This observation was not elevated to opinion evidence, or even evidence that supported an important factual finding. The complainant himself testified only that his nose was "bent". The judge's finding of a "bent or broken nose" was non-conclusive and of relatively little moment in the context of the complainant's primary head injury.

[75] In my view, there is simply no basis here on which to ground such a serious allegation about Crown counsel's integrity.

6. Ineffective assistance of counsel

[76] The appellant submits that he did not receive effective assistance of counsel. He contends that his trial counsel failed to cross-examine witnesses about material inconsistencies, failed to lead material evidence in support of his account of the fight, failed to object to the Crown cross-examining its own witness and leading inadmissible opinion and hearsay evidence, failed to inquire about new and outstanding disclosure, and failed to properly review and employ medical information. He submits that these actions, when considered collectively, fall below the standard of reasonable professional judgment and resulted in a miscarriage of justice.

[77] The fresh evidence admitted for the purpose of supporting this ground of appeal includes affidavits of the appellant and his trial counsel, as well as the complainant's criminal record, his medical records, statements made by the complainant to police, and statements made by two witnesses to police. The appellant also relies on the complaint letter the complainant made to his union that was an exhibit at trial.

[78] The appellant's affidavits describe the complaints that are set out in his factum and his belief that his trial counsel provided ineffective assistance to him. With respect to his instructions, he deposes only that he did not recall his counsel speaking with him, seeking his instructions or advising him regarding the details of the evidence about which he complains.

[79] Trial counsel provided two responsive affidavits, the second of which sets out in some detail the instructions he received from the appellant about the sequence of events during the fight, Mr. Longton's relationship with the complainant, and witnesses who would provide helpful corroborative evidence. He also deposes that he consulted with the appellant "at great length" about his evidence, the evidence of the complainant and the evidence of the witnesses.

[80] The Crown objected to an attachment in one of the appellant's affidavits, being a legal memorandum prepared by appellant's current counsel. It is not necessary to refer to this document, as all of the issues raised in this ground of appeal are canvassed in the appellant's factum.

The legal test

- [81] An ineffectiveness claim has two components: performance and prejudice. As the Supreme Court of Canada explained in *G.D.B.*, an appellant must establish that (1) counsel's acts or omissions constituted incompetence, and (2) a miscarriage of justice resulted:
- [27] Incompetence is determined by a reasonableness standard. The analysis proceeds upon a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. The onus is on the appellant to establish the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The wisdom of hindsight has no place in this assessment.
- [28] Miscarriages of justice may take many forms in this context. In some instances, counsel's performance may have resulted in procedural unfairness. In others, the reliability of the trial's result may have been compromised.
- [29] In those cases where it is apparent that no prejudice has occurred, it will usually be undesirable for appellate courts to consider the performance component of the analysis. The object of an ineffectiveness claim is not to grade counsel's performance or professional conduct. The latter is left to the profession's self-governing body. If it is appropriate to dispose of an ineffectiveness claim on the ground of no prejudice having occurred, that is the course to follow.
- [82] The performance component is a fact specific inquiry that is difficult to successfully establish. Counsel's conduct is not judged by a standard of perfection: *R. v. Seymour*, 2014 BCCA 301 at para. 27. A cautious approach is required given the presumption in favour of trial counsel's competence. This was discussed in *Dunbar* at para. 29:
- [29] Appellate courts have adopted a cautious approach to claims based on the alleged incompetence of trial counsel. This is often articulated as deference to the choices made by trial counsel and a presumption in favour of trial counsel's competence: *G.D.B.*, supra ¶27; [*R. v. Joannis* (1995), 102 C.C.C. (3d) 35], supra at 58-59, 61; [*R. v. White* (1997), 114 C.C.C. (3d) 225], supra. Indeed, in the recent decision of *R. v. Jim* [2003 BCCA 411], supra ¶12, Hall J.A. reviewed the authorities and concluded that "this is a ground of appeal that will usually be difficult to successfully establish. This is so because of the wide latitude properly afforded to counsel in deciding on appropriate trial strategy and conduct".
- See also *Aulakh* at paras. 40-55.
- [83] The prejudice component was discussed in *R. v. Ball*, 2019 BCCA 32 at para. 110:
- [110] The prejudice component of an ineffective assistance claim is established where the appellant proves that professional incompetence is linked to a miscarriage of justice. A miscarriage of justice can result where there is a reasonable probability that the outcome of the proceedings below would have been different but for the errors made by counsel. In *Joannis*, Justice Doherty explained that a reasonable probability is a probability which is

sufficient to undermine confidence in the reliability of the outcome and it "lies somewhere between a mere possibility and a likelihood": Joannis at para. 82. Alternatively, a miscarriage of justice may result where the outcome was reached through an unfair process, regardless of the reliability of the outcome. In other words, professional incompetence may result in a miscarriage of justice by reason of procedural unfairness alone: G.D.B. at para. 28; Dunbar at para. 26.

- [84] The Crown submits that the appellant has not established a reasonable probability of prejudice and in any event, his argument represents the sort of "Monday-morning quarterbacking", derived with the benefit of hindsight, which does not form a proper foundation for a claim of solicitor incompetence, citing Dunbar, at para. 151.
- [85] In general, I agree with the Crown's submission. While the preferable approach is to consider the second component of prejudice first, this is a case where the two components are inter-related given the appellant's submission that the cumulative effect of the alleged errors demonstrate both incompetence and a consequent miscarriage of justice.
- [86] For the following reasons, I am not satisfied that the appellant has established either the performance or the prejudice component. Practically all of his complaints essentially second guess trial counsel's approach to the case with the benefit of hindsight, and his evidence that he did not recall his counsel seeking his instructions or advising him provides only a vague allegation that is wholly contradicted by his trial counsel. Trial counsel's responsive affidavits establish that he acted consistently with the instructions he was given and consulted with the appellant about strategic decisions during the trial where possible.

The claims and the evidence

- [87] To address the appellant's submission that the cumulative effect of the alleged errors demonstrates both components of the test, I will review to some extent his specific allegations of incompetence. As I explain below, I see no merit to all but a few of the appellant's complaints, and those that have some merit cannot be said to fall below the requisite standard, individually or cumulatively, or to have resulted in a miscarriage of justice.
- i. Failure to cross-examine the complainant on material inconsistencies
- [88] The appellant says that the complainant's out of court statements either contradicted or omitted significant portions of his evidence about the sequence of events, none of which were utilized by his counsel in cross-examination. He cites a number of examples:

- a) At trial, the complainant testified that the appellant was looking directly at them [he and Derek Bachman] and appeared to be staring at him right after the appellant sat down at his table. In his police statement, the complainant stated that the appellant was looking at Derek, and his union statement was silent on this point. The appellant submits that this inconsistency could have raised a doubt as to whether the threats overheard by Mr. Longton were directed at the complainant.

The Crown says that defence counsel did cross-examine the complainant on whether the appellant was staring at Derek or at him, and in any event this issue was insignificant given the evidence that the appellant followed the complainant into the washroom.

Trial counsel deposed that he cross-examined the complainant on this issue at some length but acknowledged that he did not refer to the inconsistency in the statement. It was his view that the cross-examination on this point arguably neutralized the suggestion that the appellant stared at the complainant in a hostile way and achieved the same benefit as a successful impeachment by pointing out the prior inconsistent statement.

- b) The complainant also testified that the appellant looked "agitated" and "mad" when he first saw him at his table, but both prior statements said nothing about this. The appellant suggests that the absence of this in the union statement is significant because he had turned his mind to his interactions with the appellant by stating, "[n]o verbal exchanges or gestures were made to [the appellant] by anyone at our table or vice versa".

The Crown notes that the union statement was admitted into evidence, so that any omission of detail was before the trial judge. Trial counsel did not recall turning his mind to this detail but did not believe he would have attempted to impeach the complainant's credibility on what he viewed as a minor issue.

- c) The complainant testified that just prior to the assault, the appellant said, "I didn't like this text message that you sent me", but in his police statement he said he did not remember what the appellant said to him and he did not know why the fight happened. The appellant submits that this suggests the complainant's testimony was tailored to create a link between the fight and the 2013 incident.

Defence counsel did put this part of the statement to the complainant but he did not go further and compare it to his testimony in chief. Trial counsel agreed that the complainant's testimony was tailored to create a link with the 2013 incident and deposed that it was a feature of the strategy at trial to show that the complainant was not a credible witness.

- d) The complainant testified that he felt his adrenaline when he knew the appellant was in the washroom because he knew they had their differences, and he immediately went to do up his fly, but such detail was not provided in his prior statements.

Trial counsel deposed that he was alive to the shifting evidence of the complainant but points out that this detail was in fact provided in the complainant's April 5, 2016 statement to police.

- e) The complainant testified that when he heard his stepdaughter in the washroom, he grabbed the appellant to stop him from striking again, and held the appellant there for four or five seconds before someone came up behind him, put him in a headlock and pulled him out to the hallway. In his union statement, the complainant said that the appellant "proceeded to assault me in the men's bathroom until it was stopped by individuals that came into the bathroom".

Trial counsel noted that the union statement, which was in evidence, was a short synopsis of events. He deposed that it would not have been his practice to go through every detail unless it was particularly significant. He added that the complainant testified that he had no independent memory about the union statement and his evidence about the details of the incident were consistent with his April 5, 2016 statement to police.

- f) The complainant testified that he was in the urinal for about five seconds when the appellant walked in, but in his police statement he estimated 30 to 40 seconds.
- g) The complainant testified that Mr. Longton told him about the appellant's threats. While he confirmed this in the union statement, he said nothing about it in his police statement.

Trial counsel did not disagree, with the benefit of hindsight, that establishing this omission from the police statement may have bolstered the defence theory that the complainant and Mr. Longton conspired to invent the threats. However, he pointed out that this theory was well canvassed in cross-examination albeit by a different route.

- h) The complainant's police statement contained inconsistencies as to how the fight started, stating that the appellant threw him head first against the wall, slammed his body and his head right into the wall, and hit him and threw him into the wall. In his oral statement the complainant said he was kicked from behind. Yet, the appellant denied kicking the complainant.

Trial counsel expressed the view that the complainant was fairly consistent about the manner in which he said he was attacked, despite problems with his evidence generally.

[89] In my view, there is little to no merit in these complaints. Although trial counsel did not seek to impeach the complainant about these matters by using his prior statements, he did canvass the more important credibility issues related to those issues in other ways. Moreover, some of the inconsistencies (such as the different time estimates) were insignificant in the context and it is not reasonably probable that they would have had an impact on the judge's findings.

ii. Failure to make reasonable inquiries about new disclosure

[90] The appellant submits that the complainant's testimony to more details than previously disclosed ought to have prompted his counsel to make further inquiries. The Crown characterizes this complaint as frivolous in light of the detail provided in the complainant's police statement. Trial counsel noted that he sent a comprehensive letter regarding the state of disclosure in advance of trial, to which the Crown responded, and he did not recall having any reason to question this either before or during the trial.

[91] There is nothing substantial to suggest that defence counsel was not diligent in pursuing Crown disclosure.

iii. Failure to properly examine and make use of medical records

[92] The appellant submits that information in the complainant's medical records could have undermined the Crown's evidence regarding his injuries, which in turn could have undermined the complainant's credibility. He refers to information refuting some evidence of a broken nose and the complainant's claim that he had three broken teeth.

[93] Trial counsel expressed the view that these alleged inconsistencies were marginal, bodily harm would likely have been made out in any event, and he made a strategic decision not to cross-examine on these issues.

[94] I agree with the Crown's submission that it is not reasonably probable that this evidence would have undermined the trial judge's finding that there was a gross disparity between the injuries of the complainant and the appellant.

iv. Failure to lead evidence that would have undermined the judge's finding that the appellant followed the complainant into the washroom

[95] The appellant's submission on this point arises from the inference drawn by the trial judge that the appellant saw the opportunity to carry out his threat and followed the complainant into the washroom. He refers to possible evidence about the timing of this, including information in Ms. Olson's police statement that the appellant went to the washroom about two minutes after the complainant, which could have contradicted the testimony of her daughter that the timing was about 40 seconds. He suggests that a longer time frame would have rendered the complainant's account placing him at the urinal as unlikely and would have instead corroborated the appellant's claim that he did not know the complainant was in the washroom.

[96] Trial counsel did not recall whether he considered this precise timeline to be relevant but did recall that the evidence all pointed to the appellant having gone to the washroom a short time after the complainant. I agree with the Crown that it was an incontrovertible fact that the appellant followed the complainant into the washroom, and given the judge's acceptance of Mr. Longton's evidence, it is not reasonably probable that any of this would have undermined the judge's findings.

v. Failure to lead evidence supportive of the appellant's testimony

[97] This complaint stems from the appellant's evidence that he had the complainant in a headlock position until others entered the washroom. In rejecting that evidence, the judge found it to be inconsistent with the evidence of the other witnesses, including Ryan Van Rooyen (at para. 40). However, the appellant says that Mr. Van Rooyen's police statement was consistent with his account. Defence counsel made no attempt to introduce this evidence until final submissions, when he referred to Mr. Van Rooyen's statement.

[98] Trial counsel deposed that his cross-examination of Mr. Van Rooyen was consistent with the appellant's instructions at the time. He also deposed that he attached no special significance to the use of the word "headlock" when Mr. Van Rooyen testified. He noted that he did not use that word in his statement to police but acknowledged that his description could be read that way. He stated that it was not his expectation that the court would parse words and he was of the view that the semantic difference between the words "wrestle", "grapple" and "headlock" was marginally relevant in the circumstances of the case.

[99] Mr. Van Rooyen did not use the word "headlock" in either his statement or his testimony. In his statement, he described what he saw as he came through the washroom door as follows:

Willy was in the corner. Uh head down, he had his arm around Kenny, around his head and was holding him down and Kenny was kind of driving him into the wall Willy was a little bit off balance with his arm around his head and um like I said, I got in there and just squeezed the arm in between the two of em and grabbed started pulling on Willy

Like at the point at which I seen them I think uh they were pretty much just tangled up. They weren't hitting, they weren't punching each other or anything like that at that point in time, but they were definitely locked together, not wanting to let go.

[100] In his testimony in chief, Mr. Van Rooyen also described the two men as being "tangled up":

Q And what positions were they in, relative towards one another when you got there?

A When you walk straight in, Kenny was the -- was first. And Willy was like right here, kind of up against the wall, and Kenny was right here. So what I did is I slipped in there, in-between the two, to break the -- break the two of them up, but they were kind of tangled together

Kind of half -- half slumped over a bit, you know

They were standing but all kind of tangled up towards each other

Well, they weren't standing there, quietly, though. They were trying to get at each other.

[101] He was not referred to the specific description in his statement, but used the same language in cross-examination in response to a question about his observation of the appellant:

Q Did you see [the appellant] do anything that was obviously aggressive?

A Like I said before, they were both tangled up. There was -- it was equal on both sides. At that point, they were just wrestling. It -- you know, without moving anywhere. Stuck in the corner.

[102] While there may be some merit to this complaint, it is notable that the appellant's affidavits make no mention of the instructions he gave to counsel about how the fight occurred. This stands in contrast to trial counsel's fairly detailed description of the instructions he received about this and his confirmation that his cross-examination of this witness was consistent with those instructions. In light of the trial judge's finding (at para. 45) that there was a significant difference between what defence counsel put to the complainant in cross-examination and the evidence of the appellant, I agree with the Crown's submission that it cannot be presumed that the appellant's instructions accorded with his testimony.

vi. Failure to object to improper cross-examination

[103] The appellant says that defence counsel failed to object to the Crown's improper cross-examination of its own witness, Mr. Van Rooyen. The complaint arises from Crown counsel's questioning of Mr. Van Rooyen in re-examination:

Q Mr. Van Rooyen, just following up on that last point, so I understand your evidence to be that when the two men were removed from the toilet, there were words being said by one or probably both of the men towards one another?

A Once there -- once it was broken up?

Q When the -- when the disturbance -- when the two men were separated and taken out of the -- out of the bathroom, that the two men were -- were saying things to one -- towards one another?

A Like I said, the details of what I heard when we broke them up, didn't hear -- I don't know what the details were. When we went outside, there was -- yeah, there was an exchange of words there.

Q Okay. But certainly what was being said in the hallway, when the two were removed into the hallway from the toilet, from the bathroom, you would have been able to hear. It's just -- do I understand you to say that you don't recall what they said?

A Correct.

[104] The appellant says that this appears to have figured into the trial judge's reasoning at the following passage in his reasons:

[65] Ryan Van [Rooyen] testified he was sitting directly opposite Mr. Frigon at the CIMS table that evening. Under cross-examination, Mr. Van [Rooyen] testified he was 100 percent sure that Mr. Frigon did not make any threats while at the table. I am troubled by Mr. Van [Rooyen's] readiness to make this assertion so categorically given his other evidence that he could not recall all of the conversation he had had with Mr. Frigon that evening, that he was speaking with others at the table at times, and that he did not notice Mr. Frigon getting up from the table just before the fight.

- [105] Trial counsel conceded that, in hindsight, he ought to have objected sooner. Either he did not hear or appreciate Crown counsel's reference, a little later in the transcript, to cross-examination of an adverse witness under s. 9(2) of the Canada Evidence Act, R.S.C., 1985, c. C-5 (in response to the judge's interjection). However, he now considers this comment to have been improper because it likely suggested the existence of a prior inconsistent statement, which was not the case.
- [106] While it is true that defence counsel did not object to the improper questioning until the judge himself interjected, the judge did not refer to the evidence complained of, which related to the words exchanged after the fight was broken up. Rather, the judge was obviously troubled by Mr. Van Rooyen's categorical assertion that he did not hear the appellant make any threats while at the table before the fight started. He considered this in light of Mr. Van Rooyen's other evidence that he could not remember "exactly" what they were talking about, he was talking to others, and he did not notice the appellant get up from the table.
- vii. Failure to conduct further inquiries or cross-examine the complainant about his criminal record
- [107] The appellant says that the complainant's statement to police on the subject of fighting, that he did not "do that shit anymore", ought to have put the defence on notice as to the potential existence of a history of violence.
- [108] While counsel could have cross-examined the complainant about that statement, the responsibility for the failure to disclose the complainant's criminal record lies with the Crown, not defence counsel, who made appropriate inquiries and relied on the Crown to fulfill its obligations.
- viii. Failure to object to inadmissible hearsay or opinion evidence
- [109] Finally, the appellant asserts that defence counsel ought to have objected to the Crown leading inadmissible hearsay or opinion evidence regarding the complainant's allegedly broken nose. This arises from Corporal Turner's evidence that the complainant had showed signs of some fairly significant injuries, including what he "believed" was a recently broken nose. Trial counsel noted his practice not to dwell on the minutiae of a complainant's injuries absent some tangible benefit, and expressed the view that the general description of the complainant's injuries did not seem remarkably different from those described in the medical records.
- [110] As noted above, this was a relatively minor piece of evidence that had no real impact on the judge's reasoning, and the failure to object was of little moment.

Conclusion

[111] The few complaints of trial counsel that have any merit do not, in my view, rise to the level of omission that fall below the reasonableness standard, nor can any of these omissions be linked to a miscarriage of justice. I would not give effect to this ground of appeal.

Cumulative errors

[112] The appellant's final submission is that the cumulative effect of all of the errors and irregularities he has identified resulted in a miscarriage of justice under s. 686(1)(a)(iii) of the Criminal Code.

[113] It is clear that the court can consider the cumulative effect of identified errors in assessing whether they rendered a trial unfair and resulted in a miscarriage of justice: Ball at para. 121, and R. v. Khan, 2001 SCC 86 at para. 77. As LeBel J. (in a concurring judgment) explained in Khan, the essential question in considering whether an irregularity that occurred during a trial rises to the level of a miscarriage of justice is whether it was severe enough to render the trial unfair or to create the appearance of unfairness. He also explained that in most cases, the whole of the circumstances must be weighed in making this determination, adding that a trial is not held to a standard of perfection:

[72] In so doing, the court of appeal must bear in mind that the accused is not entitled to a perfect trial. He is entitled to a fair trial, but it is inevitable that minor irregularities will occur from time to time. The trial cannot be held to a standard of perfection, provided it remains fair in reality and in appearance.

[114] Noting that there is no strict formula for determining a miscarriage of justice, LeBel J. set out several elements as helpful reference points, including whether the irregularity pertained to a legal or factual question that was central to the case against the accused, and the relative gravity of the irregularity, including the cumulative effect of several irregularities.

[115] It is my view that this is not a case where the cumulative effect of the few errors or irregularities that I have accepted occurred can be said to have rendered this trial unfair. As I have explained, there was no reasonable possibility that the Crown's failure to disclose the complainant's criminal record affected the outcome at trial or the overall fairness of the trial process, there is no basis for this court to interfere with the trial judge's finding of animus or his assessment of credibility, and the appellant has not established that he received ineffective assistance from counsel.

Disposition

[116] For all of these reasons, I would dismiss the appeal.

"The Honourable Madam Justice Fisher"

I AGREE:

"The Honourable Mr. Justice Groberman"

I AGREE:

"The Honourable Mr. Justice Goepel"

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/ca/20/03/2020BCCA0315cor1.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/r-v-frigon-2020-bcca-315>

Prepared on 29 October 2026 · Esheria