

CANADA / JUDGMENT

R. v. Kuang

2026 ONCA 72

COURT

Court of Appeal for Ontario

DECIDED

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R. v. Kuang

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Miller, Bradley; Trotter, Gary T.; Monahan, Patrick J.

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COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Kuang, 2026 ONCA 72

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Miller, Trotter and Rahman JJ.A.

BETWEEN

His Majesty the King

Respondent

and

Ziyang Eric Kuang

Appellant

Emily Lam and Paul Socka, for the appellant

Dana Achtemichuk, for the respondent

Heard: October 8, 2025

On appeal from the convictions entered by Justice Nyron Dwyer of the Ontario Court of Justice on October 15, 2020.

Trotter J.A.:

A. Introduction [1] The appellant was convicted of assault (Criminal Code, R.S.C. 1985, c. C-46, s. 266), assault causing bodily harm (s. 267(b)), break and enter (s. 348(1)(b)), and two counts of threatening to use a weapon (s. 267(a)).

[2] At trial, the trial judge found that the appellant and his co-accused, Zichong Deng, were owed money by the victim. Along with three other unidentified men, the appellant and Mr. Deng tracked the victim down. They demanded repayment of the money. When the victim said he could not pay the full amount, the unidentified men beat and threatened the victim with what the trial judge found to be an imitation handgun.

[3] The appellant appeals his convictions. He denies having knowledge of any plan to attack the victim. He submits that he received ineffective assistance from his trial counsel, who deprived him of his right to elect his preferred mode of trial and his right to testify. He also submits that the trial judge erred in his application of the principles in *R. v. Villaroman*, 2016 SCC 33, [2016] 1 S.C.R. 1000.

[4] I would allow the appeal and order a new trial based on the appellant's ineffective assistance of counsel ("IAC") claim. In the circumstances, it is not necessary to address the Villaroman ground of appeal.

B. Factual Background [5] The trial judge found the following facts at trial. The victim was involved in the clothing business. He knew the appellant and Mr. Deng from that business. In late 2018, he obtained a loan of about \$30,000 from the appellant and Mr. Deng. The victim made interest payments for four months, but then stopped making payments and started to avoid them.

- [6] On July 4, 2019, the appellant and Mr. Deng located the victim at a house in Markham. People gambled at this house two to three days a week. The attack transpired on one of those days. The house was situated close to commercial premises and a parking lot equipped with security cameras. The cameras showed five men arrive at the parking lot in several cars over a span of about 20 minutes. This included the appellant and Mr. Deng, as well as three other unidentified men. There was some discussion among the men before they all walked towards the house. The front door was apparently unlocked. They let themselves in.
- [7] Upon entering the house, the appellant, Mr. Deng, and one of the other men went downstairs, where they found the victim playing poker. The appellant and Mr. Deng asked the victim to go upstairs to talk. Once upstairs, the victim was told to sit on a couch. The appellant and Mr. Deng demanded repayment of the debt. The victim offered to pay \$500 per week, which was not satisfactory to them.
- [8] Without warning, one of the unnamed men hit the victim from behind. The victim was then attacked by the other two unnamed men. The victim could not see what the appellant and Mr. Deng were doing during the attack because he was protecting his eyes.
- [9] The victim was dragged into the backyard, where the beating continued. The appellant was not present for the assault outside. Some of what happened next was caught on surveillance cameras.
- [10] In the midst of the beating outside, another person who was already in the house attempted to intervene. However, once he joined the fray, the unnamed men kicked him in the face, chest and ribs. One of them pointed what appeared to be a gun at his face and said, "You want this shit motherfucker?" This person retreated to the house.
- [11] Mr. Deng, along with two of the unnamed men, went back to the victim, who had been left laying on the grass. The beating continued. One of the unnamed men pointed the gun at the victim's legs and at his head and said, "Your legs or the money?"
- [12] Shortly afterwards, the attack ended. The appellant, Mr. Deng, and the three unnamed men walked back to the parking lot and left in two vehicles.
- [13] The victim testified that neither the appellant nor Mr. Deng participated physically in the assault on him. The victim said that the appellant did not threaten him and he did not know where the appellant was during the beating outside. However, Mr. Deng was present and making demands for money as the attack continued outside.
- [14] As a result of this attack, the victim suffered a broken nose and bruises to his feet, jaw, legs, knee, and chin.
- [15] The appellant was arrested on August 30, 2019. He gave a videotaped statement to the police in which he admitted being with Mr. Deng on July 4, 2019. The appellant's first language is not English. During the interview, he received some assistance from a police officer with English-Mandarin translation. During this interview, he conveyed to the police that the

victim owed Mr. Deng money, but not him. He acknowledged meeting the three other men that day, but he did not know them, did not know of any plan to assault the victim, and was unaware of the presence of a weapon prior to the attack.

- [16] The main issue at trial, at least as far as the appellant was concerned, was whether, beyond his presence at the scene, he participated in the offences. The Crown contended that he was a knowing participant who aided and abetted the others in the offences. It was the appellant's position that he was an innocent bystander in a financial dispute that did not involve him.
- [17] The appellant did not testify at trial, nor did Mr. Deng. However, the appellant's interview with the police was entered into evidence by the Crown. The appellant relied on it in his defence.
- [18] The trial judge found both men guilty of the aforementioned offences. The trial judge was unsure whether the appellant or Mr. Deng inflicted any of the blows to the victim. However, he found that both men were parties under s. 21 of the Criminal Code. He determined that the appellant and Mr. Deng enlisted the assistance of the three other men as enforcers, as evidenced by the following circumstances of the attack: the men arrived together; they were engaged in a discussion during the twenty-minute interval before heading toward the house; neither the appellant nor Mr. Deng attempted to stop the assault; and the men left together after the assault. The trial judge concluded that the attack did not happen spontaneously. This was a planned attack which involved the appellant, who was owed money from the victim.
- [19] Along the path to conviction, the trial judge rejected as false the appellant's account of the attack during his police interview. As he said in his written reasons for judgment:[1]

I have reviewed and discussed [the appellant's] evidence in the course of these reasons and indicated my findings. I do not believe his evidence that he was going to [the house] to only discuss payment and that he did not know what was going to happen if the debt was not satisfied. I also do not believe that he had no interest in the \$30,000 debt. He was present when the debt was incurred. He was part of the overall effort including the assaultive behaviour. I have already stated my reasons for the conclusion that this was a criminal effort to collect a debt that employed a break and enter and assaultive behaviour. His evidence alone and in combination with other evidence did not leave me in a reasonable doubt. [Emphasis added.]

- [20] The appellant was sentenced to four and a half years' imprisonment.

C. Ineffective Assistance of Counsel 1. Introduction [21] After being found guilty in the Ontario Court of Justice following a trial at which he did not testify, the appellant claims on appeal that he wanted a jury trial and wished to testify in his own defence. He faults his trial counsel for not giving effect to both wishes. He contends that these failings amounted to ineffective assistance.

- [22] The principles that apply to IAC claims are well-settled. The appellant must establish: (1) the facts material to the claim of ineffective assistance, proven on a balance of probabilities (the factual component); (2) the representation provided by counsel fell below the standard of reasonable professional assistance in the circumstances (the performance component); and (3) the ineffective representation resulted in a miscarriage of justice (the prejudice component): *R. v. Archer* (2005), 202 C.C.C. (3d) 60 (Ont. C.A.), at paras. 119-120; *R. v. Fiorilli*, 2021 ONCA 461, 156 O.R. (3d) 582, at paras. 47-54.
- [23] The adjudication of IAC claims requires caution. There may be a strong incentive to make unfounded claims against trial counsel when things did not go as the accused person hoped: *Fiorilli*, at para. 51. As the court said in *R. v. Nwagwu*, 2015 ONCA 526, at para. 12: “Put more generously, time and reflection may have caused him to persuade himself that counsel’s strong advice amounted to coercion.” As a result, in *Archer*, at para. 141, Doherty J.A. warned that: “[c]ommon sense dictates a cautious approach to allegations against trial lawyers made by convicted persons who are seeking to avoid lengthy jail terms.” There is “a strong presumption that counsel’s conduct fell within the wide range of reasonable professional assistance”: *R. v. G.D.B.*, 2000 SCC 22, [2000] 1 S.C.R. 520, at para. 27; *R. v. White* (1997), 32 O.R. (3d) 722 (C.A.), at p. 745, leave to appeal refused, [1997] S.C.C.A. No. 248.
2. Fresh Evidence [24] Fresh evidence is not always required to establish an IAC claim. Ineffective assistance is sometimes apparent from the trial record. However, in most cases, fresh evidence is relied upon to make out the claim, and to defend against it. This court has consistently held that “[t]he interests of justice favour admitting fresh evidence where it is necessary to establish, and to challenge, allegations of ineffective assistance”: *R. v. Zock*, 2025 ONCA 483, 450 C.C.C. (3d) 459, at para. 10; *R. v. Joannis* (1995), 102 C.C.C. (3d) 35 (Ont. C.A.), at pp. 43-44, leave to appeal refused, [1996] S.C.C.A. No. 347.
- [25] In this case, the parties agree that the fresh evidence tendered should be admitted. I would admit all of the fresh evidence. I will review the relevant aspects of the fresh evidence below and explain why I accept, in part, the appellant’s IAC claim.
- [26] With respect to trial election, I conclude that the appellant has not established the necessary facts to prove that he was denied the right to elect his preferred mode of trial. Even if the appellant had adduced this factual foundation, I would still reject this claim because the appellant has failed to establish that he would have elected differently had he not been denied this right.
- [27] With respect to the decision to testify, I conclude that, although there was discussion and advice provided by trial counsel on this issue, the appellant has established that it was never made clear to him that the decision to testify was his to make, and not counsel’s. A significant consideration in reaching this conclusion is trial counsel’s failure to obtain written instructions from the appellant on this issue. Further, I am satisfied that the ineffective assistance of trial counsel resulted in a miscarriage of justice.

3. Legal Standard a. The Election as to Mode of Trial

- [28] The right of an accused person to choose their preferred mode of trial is elemental; it is a decision that belongs to the accused, not counsel: *R. v. Bharwani*, 2025 SCC 26, 450 C.C.C. (3d) 143, at para. 58(2); *R. v. White*, 2022 SCC 7, [2022] 1 S.C.R. 64, at para. 5; Zock, at para. 43; *R. v. R.W.*, 2023 ONCA 250, 167 O.R. (3d) 1, at paras. 20-21; and *R. v. Stark*, 2017 ONCA 148, 347 C.C.C. (3d) 73, at paras. 17-18. Simply put, where options are available under the Criminal Code, an accused person has the personal right to decide by whom they wish to be tried. In Zock, Zarnett J.A. said, at para. 43: “Counsel may, of course, communicate the accused person’s election, after having been appropriately instructed to do so. But the election of the mode of trial is not something that counsel may exercise without any instructions to do so” (emphasis in the original).
- [29] Typically, an accused person considers the choice between being tried by a judge sitting alone versus a trial by judge and jury. Sometimes, however, the critical choice is between a trial in the Ontario Court of Justice or a trial by judge alone in the Superior Court of Justice. A factor that may inform these decisions is the availability of a preliminary inquiry and whether it should be waived on the way to a trial in the Superior Court, whether by judge alone or judge and jury.
- [30] All of this may be mystifying to an accused person, especially if they have only a passing familiarity with the procedural complexities of our criminal justice system. This is where counsel comes in. It is the obligation of defence counsel to provide competent advice, not just to describe the available modes of trial, but on the relative advantages and disadvantages of each mode of trial. Without proper advice, an accused will be ill-equipped to make this important choice: *R. v. K.K.M.*, 2020 ONCA 736, at para. 91.
- [31] Therefore, proof that trial counsel usurped the right of the accused to make their election, or failing to provide adequate advice on this issue, will satisfy the factual basis of the claim that the accused person received the ineffective assistance of counsel.

b. The Decision to Testify

- [32] The decision whether to testify at trial rests on the same footing as the accused’s election rights. It, too, is a decision reserved for an accused person to make. Counsel cannot usurp or override that choice: *Bharwani*, at para. 58(3); *R. v. Trought*, 2021 ONCA 379, 156 O.R. (3d) 481, at paras. 46-49. As with the election as to the mode of trial, an accused person is entitled to competent legal advice in order to properly make this critical decision. In *K.K.M.*, Doherty J.A. said, at para. 91: “An accused is denied his right to choose whether to testify when counsel actually makes the decision, or when counsel provides no advice or advice that is so wanting, as to preclude the accused from making a meaningful decision about testifying.” See also *R. v. Kaczmarek*, 2021 ONCA 771, 407 C.C.C. (3d) 34, at paras. 75-76.

c. Prejudice

[33] Establishing these factual components is necessary but not sufficient for a successful IAC claim. The accused must also establish prejudice. As Zarnett J.A. explained in Zock, at para. 45:

[A]s White makes clear, it is not enough that the appellant, through ineffective assistance of counsel, was deprived of the important right to elect the mode of trial. A new trial on the basis of ineffective assistance of counsel will only be ordered if the appellant also demonstrates that the loss of the right to elect gave rise to a miscarriage of justice: White, at para. 6. The appellant must establish a reasonable possibility that he would have acted differently if he had received effective assistance from trial counsel; in other words, he must establish a reasonable possibility that he would have elected trial by jury: White, at paras. 6-9. [Emphasis added.]

[34] The prejudice requirement applies with equal weight to the right to testify. “The accused must, in most cases, demonstrate more than the loss of choice”: White, at para. 7.

[35] A miscarriage of justice may arise when counsel denies the appellant his right to make either elemental decision and “counsel’s substandard performance raises sufficient concerns about the reliability of the verdict or about the fairness or the appearance of fairness of the trial”: R. v. M.Z., 2026 ONCA 4, at para. 23. However, the standard for establishing a miscarriage of justice solely based on the appearance of unfairness is high. In order to do so, “[t]he defect must be ‘so serious that it shakes public confidence in the administration of justice’”: White, at para. 9, quoting R. v. Davey, 2012 SCC 75, [2012] 3 S.C.R. 828, at para. 51.

d. The Absence of Written Instructions

[36] Allegations of ineffective assistance of counsel focused on the accused person’s election or the decision to testify naturally lead to questions about who actually made these choices (the accused or counsel) and the instructions received by counsel. Experience shows that there will be differing views as to what happened, what was said, and what was understood. Written instructions to trial counsel will often resolve these disputes. In Archer, the court said, at para. 143: “The largest hurdle faced by the appellant in trying to convince the court that the decision to testify was made by trial counsel is the direction signed by the appellant during the trial.” Similarly, see R. v. Lisenco, 2019 ONCA 691, at para. 14.

[37] Challenges emerge when counsel fail to obtain written instructions. The lack of written instructions exposes trial counsel to unfounded allegations and may hamper trial counsel’s ability to defend against claims of ineffectiveness. In R. v. W.E.B., 2012 ONCA 776, 309 C.C.C. (3d) 44, at para. 10, aff’d 2014 SCC 2, [2014] 1 S.C.R. 34, the court said: “We note that trial counsel’s failure to obtain the appellant’s written instructions regarding his decision not to testify was ill-advised and contrary to counsel’s best interests, as the issues raised on this appeal illustrate. That, however, is a question of professional prudence, not incompetence.”

- [38] The failure to obtain written instructions also makes it more difficult for appellate courts to adjudicate these types of claims: *Trought*, at paras. 76-78; *Fiorilli*, at para. 69; *Kaczmarek*, at para. 54; *R.W.*, at para. 24; *R. v. Ilunga*, 2023 ONCA 471, 428 C.C.C. (3d) 271, at para. 60; *Zock*, at paras. 49-51; and *M.Z.*, at paras. 17-19.
- [39] As noted above, there is a strong presumption of competence in favour of trial counsel. However, depending on the circumstances of the case, this presumption may be displaced when trial counsel fails to obtain written instructions: *Zock*, at para. 51. It is recognized that exigent circumstances may prevent trial counsel from obtaining written instructions in situations when they otherwise should be obtained: *R. v. Aziga*, 2023 ONCA 12, 164 O.R. (3d) 721, at para. 81. Depending on the circumstances, counsel's contemporaneous notes of meetings with the client, reporting letters (see, e.g., *R. v. Faudar*, 2021 ONCA 226, 403 C.C.C. (3d) 43, at para. 82), or email confirmation to the client may be satisfactory substitutes. Similarly, an acknowledgement on the record by the accused person as to the election or the decision to forego testifying (or calling defence evidence) may also assist in resolving competing claims. But sometimes these may be inadequate substitutes for written instructions.
- [40] No written instructions were obtained by trial counsel in this case. Trial counsel testified that it has never been his practice to take written instructions from his clients. This is a common refrain of trial counsel in IAC appeals. But this is not a satisfactory explanation, nor is it an excuse; it is merely a description of an ill-advised practice.
4. Application to this Case a. The Election as to the Mode of Trial
- [41] The appellant elected to be tried in the Ontario Court of Justice. The transcript of his arraignment on January 7, 2020 shows that his counsel indicated on the record that the appellant elected to be tried in the "Ontario Court of Justice with a judge". The appellant then entered not guilty pleas on all counts.
- [42] Even though he made no complaint at the time, the appellant claims that trial counsel made the election without his instructions. The appellant acknowledged that trial counsel "mentioned" his options to him (i.e., Ontario Court of Justice and Superior Court, with or without a jury), but he did not "explain the different options or advise me about what option might be better than another for my case." The appellant claimed not to understand the difference between the Ontario Court of Justice and the Superior Court. As he said in his affidavit:

If I had known I had a choice and understood the differences between the choices, I would have considered a different election. I did not understand the strengths and weaknesses of my case or the evidence against me, which would have impacted my election. It is difficult to say with absolute certainty how I would have elected if I had more information and had an opportunity to review my disclosure and receive proper legal advice. [Emphasis added.]

- [43] The appellant also claimed that trial counsel failed to advise him of the availability of a preliminary inquiry. According to the appellant, he never even mentioned it. However, under examination, the appellant acknowledged there was some talk of a “prelim”, but no explanation of what it meant or its potential value.
- [44] In his evidence, trial counsel contended that the appellant generally deferred to him about how to conduct the case. He explained that he followed his standard practice and advised the appellant as to the “different processes for trial in the [Ontario] Court of Justice and the Superior Court.” He advised that a trial by judge and jury would take place in the Superior Court and would take much longer and would be more expensive than a trial in the Ontario Court of Justice. Trial counsel was unsure whether he described the concept of a preliminary inquiry to the appellant. He said the appellant’s main objective was to obtain an earlier trial date. This was due to the fact that the appellant was detained in custody.
- [45] Trial counsel said that the appellant accepted his advice to have a trial in the Ontario Court of Justice, based on considerations of cost and speed. During his cross-examination, trial counsel said that he explained the differences between the two trial courts and that the appellant deferred to him but expressed his “preference” to be tried in the Ontario Court of Justice, and trial counsel “agreed with him and it felt like the better option.” As the Crown acknowledges on appeal, trial counsel was inconsistent on exactly what he advised the appellant on this issue.
- [46] During his cross-examination, the appellant acknowledged that he told trial counsel to pursue the earliest trial dates possible. But the appellant further testified that he would have been prepared to wait for a later trial date if it would have meant that he could have obtained a better result based on a different election.
- [47] Ultimately, the evidence is equivocal about whether the appellant would have chosen to wait given his circumstances. As it turned out, trial counsel was able to obtain a five-day trial within four months of being retained (and five months after the appellant was arrested).
- [48] In advancing this aspect of his IAC claim, the appellant relies heavily on the manner in which trial counsel handled the bail issue. He claims that, had trial counsel acted differently and facilitated his release, the need for an early trial date would not have arisen. Trial counsel says he had discussions with the Crown about bail. The Crown insisted on a surety bail. Trial counsel believed it was futile to pursue a bail application without a suitable surety, and no surety appeared to be available leading up to trial.
- [49] The criticism of trial counsel’s handling of bail is not helpful. First of all, it has no independent life as an IAC claim. It only has the potential to provide context for the election ground. Second, I am not persuaded that counsel’s judgment about the futility of a bail hearing without a surety was unsound, especially given the Crown’s position. The Crown likely took this position because the charges involved a firearm and the appellant was not ordinarily resident in Canada.

- [50] The appellant also appears to criticize trial counsel for not sourcing or locating a suitable surety. But that is not the role of counsel; it is up to the client or the client's family to identify potential sureties.
- [51] The appellant relies on the fact that he was released on bail, with a surety, after the close of the evidence at trial. The surety was a family friend. Presumably, had that person been identified earlier, the appellant's release may have been secured. However, the appellant offers no explanation as to why this person was not identified to act as surety earlier.
- [52] I accept that a different lawyer may have run a bail hearing without a surety and offered a sizeable cash bail. But it is impossible to know whether that would have been successful.
- [53] Before leaving the discussion of bail, I wish to address another aspect of the appellant's allegations against trial counsel. The appellant is critical of how trial counsel dealt with money, \$70,000, that was advanced to him by the appellant's mother. This money was to be the foundation of an attempt at securing release with a cash deposit. Questions were raised about whether the funds, which were received in cash, were handled properly by trial counsel. It was also unclear whether the funds would be used as cash bail, or whether the funds would be absorbed as fees. The appellant submits that this put trial counsel in a financial conflict of interest that may have dissuaded him from pursuing a bail hearing without a surety.
- [54] I do not rely on these submissions in deciding this appeal. An IAC claim is not a platform upon which to grade the general performance or practices of trial counsel; the purpose is to determine whether a miscarriage of justice has been occasioned as a result of legal advice and/or performance that falls below the level of reasonable competence. More generalized concerns about the propriety or professionalism of trial counsel are best advanced in a different forum.
- [55] Returning to the issue at hand, I am not persuaded that the appellant has established the factual foundation for his claim that his election rights were infringed. I base this conclusion on the transcript of the appellant's arraignment, along with his inconsistent answers on cross-examination about the advice that he received from counsel. In my view, trial counsel explained the appellant's election options in sufficient detail to allow him to make an informed choice as to the mode of trial. Although written instructions would have removed all doubt, the record as a whole supports this conclusion.
- [56] The scenario in this case is similar to *R. v. Young*, 2022 ONCA 153, in which the appellant's evidence was inconsistent on the advice that he received from counsel on his election. In dismissing the IAC claim, the court said, at paras. 8-9:

Trial counsel's evidence demonstrates that he clearly understood the appellant's concern about a speedy trial and, therefore, recommended the matter be tried in the Ontario Court of Justice.

We are satisfied that the appellant clearly understood the various modes of trial and that he was prepared to accede to counsel's suggestion as to how to obtain the most expeditious trial.

I would dismiss this ground of appeal for the same reason.

[57] I would also reject this ground of appeal for another reason. As the Supreme Court of Canada held in *White*, to succeed on this ground, the appellant must demonstrate a "reasonable probability" that he would have acted differently, i.e., elected a different mode of trial: at para. 8. As set out in the appellant's affidavit, reproduced above at para. 42, the appellant claims that, had he understood his options, he would have "considered a different election" and that "[i]t is difficult to say with absolute certainty how I would have elected had I had more information and had an opportunity to review my disclosure and receive proper legal advice." Merely considering a different election does not amount to a reasonable probability of acting differently.

[58] I would dismiss this ground of appeal.

b. The Decision Not to Testify

[59] The appellant also submits that trial counsel denied him his right to testify.

[60] The appellant claims that, soon after he retained counsel, he explained his version of events and told trial counsel that he wished to testify. The appellant says he had a reasonable explanation for his presence in the house that day, which he wanted to attest to in court. The appellant asserts that trial counsel "told me not to testify and did not put me on the stand." Further, trial counsel did not advise the appellant that it was his choice whether to testify. As the appellant explained in his affidavit:

If I had known that it was my choice and if I had understood the strengths and weaknesses of the evidence against me, I would have testified. I explained some things in my statement to the police but there was more I needed to explain for the judge to understand my situation and my evidence. I would have made it clear to the court that, among other things, I could not have known and could not have been expected to know that the people I arrived with would assault anyone. I also believe that the court would have been able to assess my credibility by hearing my side of the story directly from me.

If I had a chance to testify, I believe I would not have been convicted of these offences.

[61] The transcript of proceedings at trial is relevant to this aspect of the IAC claim. At the end of the Crown's case, counsel for Mr. Deng advised the trial judge that he had instructions from his client not to call any evidence. The trial judge then asked Mr. Deng: "Is that right, sir?" Although no response is transcribed, the trial judge said: "All right, okay, he's nodding yes." Immediately after this exchange with Mr. Deng, trial counsel for the appellant said: "I have the same position." The trial judge then said: "Okay, all right, so that's the evidence. I guess we have to get a date for submissions."

- [62] The Crown submits that, based on this exchange between the trial judge and the appellant's counsel at trial, it is reasonable to infer that the trial judge received non-verbal confirmation from the appellant that he would not be testifying, similar to Mr. Deng.
- [63] During the cross-examination on his affidavit on this issue, the appellant's evidence was unconvincing. On the one hand he said he knew "clearly" that he had never been asked about whether he wished to call evidence by the trial judge. Then he speculated that he might not have been in court when the decision not to call evidence was discussed, and that he could have already been returned to the cells. Finally, he said that he did not speak up at the time because he was unfamiliar with the procedure.
- [64] I accept the Crown's submission that, based on the transcript, it can be inferred that, when the appellant was asked in court whether he did not want to call any evidence, he gestured affirmatively in response.
- [65] Nevertheless, and as counsel for the Crown concedes, trial counsel's evidence about the advice he provided to the appellant on his right to testify has its shortcomings. The same can be said about trial counsel's evidence about when and why the appellant waived his right to testify in his own defence.
- [66] To start, trial counsel did not obtain written instructions from the appellant on this issue. Nonetheless, trial counsel maintains that he advised the appellant of his right to testify and the appellant instructed him that he did not wish to testify.
- [67] In his affidavit, trial counsel said he advised the appellant against testifying. He told the appellant that testifying would not add much to his defence. Because the Crown intended to adduce the appellant's police statement as part of its case, the appellant's explanation as to what occurred would be before the trial judge. As trial counsel said: "I also told Mr. Kuang that his statement was essentially his defence". He further elaborated:

At no time did Mr. Kuang identify parts of the police statement that he thought were incorrect or that he wanted to clarify or supplement by testifying. He did not tell me that he had any additional relevant evidence he wanted to tell the court that was not contained in his police statement.

- [68] Trial counsel also said he advised the appellant that testifying would be risky:

I told Mr. Kuang that it was his choice if he wanted to clarify his statement. I explained that I would need to call him as a witness if he was going to clarify his statement and that he would be cross-examined. I told him that the case could be turned upside-down if cross-examination went badly. My general practice is to tell clients that they should not testify unless they want to or unless I believe it is going to help their defence. I believe I gave the same advice to Mr. Kuang.

- [69] I accept that there may well have been risks to testifying. For instance, the appellant may have misled the police when he told them that he was owed no money from the victim and that the money was owed solely to Mr. Deng.

[70] Trial counsel stated that the appellant's decision not to testify was made in October of 2019, three months before the start of trial. However, at this early stage, trial counsel did not know whether the appellant's police statement would be admitted at trial. The appellant's statement was not admissible at the behest of the defence: *R. v. Edgar*, 2010 ONCA 529, 101 O.R. (3d) 161, at para. 24, leave to appeal refused, [2010] S.C.C.A. No. 466. It could only be adduced by the Crown.

[71] It was not until November of 2019 that the Crown indicated that it would seek to admit the appellant's statement. And, even then, the Crown said that it only intended to use the statement for the purposes of cross-examination. Thus, at the time trial counsel says the appellant had already decided not to testify, because his police statement would function as his defence, it was not yet known whether the statement would be admitted into evidence at all, let alone in the Crown's case-in-chief.

[72] Trial counsel's file notes add to this confusion. In October of 2019, the same month that the appellant apparently instructed counsel that he would not be testifying, counsel recorded the following "instructions":

October 31st, 2019 – Call from Eric and family to discuss video statement/not forced hence no Voir Dire. No issue. Will have to tell his side of the story. I did advise on the bright side, when he does testify, he's very honest and loving and good chance of being believed. Plus, he could explain why he made certain admissions in the statement RE: lending money, reason for being at the property ETC.

Based on this note, trial counsel and the appellant seemed to share an understanding that he would testify. The note reflects trial counsel's opinion at the time that the appellant would be a believable witness who might be capable of addressing shortcomings in his police statement. Trial counsel's subsequent notes do not indicate that the appellant changed his mind.

[73] Trial counsel's narrative is further compromised by his evidence that, on every day of the trial, he would visit with the appellant in the cells. He explained, "So, in those discussions, I would have made the decision to come back to say that we're not calling any defence evidence." This further undermines the claim that the decision not to testify was made much earlier in the proceedings.

[74] Notwithstanding these inconsistencies, the Crown submits that the appellant did not conduct himself as someone who was prevented from testifying. He made no complaint to trial counsel in the nine months that passed between the close of the evidence at trial and the date the conviction was entered. The Crown also suggests that the appellant considered retaining trial counsel for his appeal. I accept that this course of conduct is something that may be taken into account in weighing the veracity of the appellant's version of events: see, for example, *Fiorilli*, at para. 80. However, in the final analysis, I am satisfied that the appellant has established the factual foundation of his claim and that trial counsel's conduct fell below the level of reasonable competence in the circumstances.

- [75] It is clear that there were discussions between the appellant and trial counsel about testifying. As noted above, it was initially contemplated that the appellant would testify, but evidently things changed. The fresh evidence record does not allow us to know when and why this change happened. Irrespective of these discussions, the appellant has established that he was not told that the decision to testify was his to make, and was not that of his lawyer. This may well explain why the appellant made no complaint to trial counsel in the interim between the close of evidence and his conviction. He simply did not know.
- [76] I am unable to act on the presumption in favour of the competence of trial counsel on this issue. This is due to trial counsel's failure to obtain written instructions from the appellant on his decision of whether to testify. In this case written instructions would have resolved this issue. Without them, I do not accept trial counsel's inconsistent account of what transpired.
- [77] But that does not end the matter. The appellant must still establish that he was prejudiced by trial counsel's failings. As noted in the excerpt from the appellant's affidavit reproduced above, at para. 60, the appellant said that "there was more I needed to explain for the judge to understand my situation and my evidence. I would have made it clear to the court that, among other things, I could not have known and could not have been expected to know that the people I arrived with would assault anyone" (emphasis added). The appellant also believed that his account would have been more valuable coming from him directly, in court.
- [78] The Crown submits that the appellant has failed to establish the "more" or the "other things" that he would have conveyed in live testimony. I accept that this detracts somewhat from his assertion of prejudice.
- [79] The Crown's main position on prejudice is that the appellant's position was already before the trial judge in the form of his police statement. Thus, it would not have made a difference had he testified. I do not accept this submission.
- [80] I acknowledge that the trial judge was not left to merely evaluate the appellant's words on a page. The appellant's statement was video recorded. This would have enabled the trial judge to directly observe the appellant as he interacted with the police. However, I do not agree that this video recording was comparable to viva voce testimony.
- [81] The appellant gave his statement after he was arrested and in custody. Although the appellant exercised his right to counsel, counsel was not present during the interview. As noted above, English is not the appellant's first language. He required the assistance of a Mandarin-speaking police officer throughout the interview. Many of the appellant's answers were short, fragmented responses, sometimes monosyllabic. There was no narrative of events from the appellant's perspective. The interviewing officer controlled the narrative and dominated the entire interview.

- [82] None of this is to suggest that the interview was conducted improperly. And I accept that it would appear that the appellant's "position" emerged, albeit piecemeal, through this process. But it cannot be said that, in assessing prejudice, the police interview was even close to being the functional equivalent of in-court testimony.
- [83] When the trial judge reviewed the police interview, he evaluated a person who was not under oath, nor under affirmation to tell the truth. This is typical when the police interview suspects. But when considering whether the statement could function as a substitute for live testimony, it must be remembered that our system of justice places great value on these testimonial formalities in the service of sincerity: *R. v. K.C.*, 2021 ONCA 776, at paras. 6-7.
- [84] In evaluating the appellant's claim of prejudice in being deprived of his right to testify, I rely on the words of Karakatsanis J. in *R. v. Bradshaw*, 2017 SCC 35, [2017] 1 S.C.R. 865, at para. 19:

The truth-seeking process of a trial is predicated on the presentation of evidence in court. Litigants make their case by presenting real evidence and viva voce testimony to the trier of fact. In court, witnesses give testimony under oath or solemn affirmation. The trier of fact directly observes the real evidence and hears the testimony, so there is no concern that the evidence was recorded inaccurately. This process gives the trier of fact robust tools for testing the truthfulness of evidence and assessing its value. To determine whether a witness is telling the truth, the trier of fact can observe the witness's demeanor and assess whether the testimony withstands testing through cross-examination (*R. v. Khelawon*, 2006 SCC 57, [2006] 2 S.C.R. 787, at para. 35).

- [85] As the appellant said in his affidavit, he believed that, had he testified, "the court would have been able to assess my credibility by hearing my side of the story directly from me." There were risks involved in going down this road. But this was the appellant's choice to make. Trial counsel deprived him of this choice. It resulted in a miscarriage of justice.
- [86] I would allow this ground of appeal.

D. disposition [87] I would allow the appeal and order a new trial. The appellant requests that his new trial proceed in the Superior Court with a jury. As he did not make this request in his notice of appeal in accordance with s. 686(5)(a) of the Criminal Code, he seeks leave to amend his notice of appeal to seek this relief. I would grant leave to amend the notice of appeal and order that the new trial proceed by judge and jury.

Released: February 5, 2026 "B.W.M."

"Gary Trotter J.A."

"I agree. B.W. Miller J.A."

"I agree. M. Rahman J.A."

- [1] The trial judge gave oral reasons for judgment on October 15, 2020. He released unreported written reasons on October 23, 2020.

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Prepared on 28 October 2026 · Esheria