

CANADA / JUDGMENT

R. v. M.Z.

2026 ONCA 4

COURT

Court of Appeal for Ontario

DECIDED

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COA-23-CR-0918

Judges

Roberts, Lois B.; Thorburn, Julie; Madsen, Lene

Subject

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Decision Content

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. M.Z., 2026 ONCA 4[1]

DATE: 20260109

DOCKET: COA-23-CR-0918

Roberts, Thorburn and Madsen JJ.A.

BETWEEN

His Majesty the King

Respondent

and

M.Z.

Appellant

Sherif M. Foda and Emily Dixon, for the appellant

Frank Au, for the respondent

Heard: November 27, 2025

On appeal from the convictions entered by Justice Miriam Bloomenfeld of the Ontario Court of Justice on January 25, 2023.

Thorburn J.A.:

I. OVERVIEW [1] The appellant M.Z. (“the appellant”) was convicted, after trial by judge alone, of two counts of sexual assault, and one count of forcible confinement. He has served his 28-month sentence and is now on parole.

[2] He appeals his conviction pursuant to ss. 686 (1)(a)(iii), (2)(b) and (5)(a) of the Criminal Code, R.S.C. 1985, c. C-46, on the basis that he received ineffective assistance from counsel. He also seeks an order admitting fresh evidence on his appeal against conviction.

[3] At the time of trial, the appellant was a 60-year-old man with no prior criminal record.

[4] On this appeal, the appellant claims that his trial counsel failed to explain, advise, or obtain his instructions regarding (i) his right to a trial by jury; (ii) his right not to testify, knowing that no adverse inference could be drawn should he decide not to testify; and (iii) his right to appear at trial in person rather than remotely. He also claims that his trial counsel failed to develop a trial strategy or conduct a proper cross-examination of the complainant on important issues, and had he done so, the verdict may have been different.

[5] The appellant therefore claims that these failures on the part of his trial counsel denied him a fair trial, resulting in a miscarriage of justice. Trial fairness may be undermined where an appellant has been denied the right to make fundamental and important decisions about his defence: *R. v. G.D.B.*, 2000 SCC 22, [2000] 1 S.C.R. 520, at para. 34; *R. v. White*, 2022 SCC 7, [2022] 1 S.C.R. 64, at para. 7. These decisions include the rights in issue on this appeal: the right to a trial by jury; the right not to testify; and the right to appear in person at trial.

[6] He seeks to set aside his convictions and obtain an order for a new trial before judge and jury.

- [7] It is clear from the record that trial counsel did not follow best practices in the following ways:
- a) Trial counsel never entered into a written retainer agreement with the appellant, and accepted several cash payments from the appellant over a period of two and one half years but seldom provided the appellant with contemporaneous receipts. He continued to do so even after being cautioned by Schreck J. for similar conduct in a separate legal proceeding in June 2023[2];
 - b) Trial counsel acknowledged that his “recordkeeping in this case was poor”. There was no written record, dockets or work product to confirm his review of the disclosure, discussions and advice to the appellant, or instructions received from the appellant; and
 - c) Trial counsel acknowledged on cross-examination that the appellant was unfamiliar with Canadian law and was “often confused” when asked basic questions throughout the retainer. There was therefore an enhanced need to explain, communicate and receive instructions.
- [8] The Crown claims however, that although trial counsel’s record-keeping skills were lacking, and he was both junior and inexperienced, trial counsel did advise the appellant of his rights and obtained instructions, such that the appellant’s ineffective assistance of counsel claim should be dismissed.
- [9] For reasons to follow, I would allow the appeal. The appellant did not receive effective assistance of counsel, leading to the appearance of an unfair trial. As such and at his request, a new trial by judge and jury is ordered.
- (i) Fresh Evidence [10] The appellant seeks to admit fresh evidence on this appeal, which includes his affidavit, trial counsel’s affidavit, and transcripts of the cross-examinations on those affidavits, among other materials.
- [11] Fresh evidence can be received on appeal where ineffective assistance of counsel is alleged, if the evidence is adduced to establish whether representation was ineffective and whether it resulted in a miscarriage of justice: *R. v. Joannis* (1995), 102 C.C.C. (3d) 35 (Ont. C.A.), leave to appeal to S.C.C. refused, [1996] S.C.C.A. No. 347, at pp. 43-44; *R. v. Widdifield* (1995), 25 O.R. (3d) 161 (C.A.).
- [12] In this case, the proposed evidence was admitted because ineffective assistance of counsel is alleged, the fresh evidence bears directly on the issue of whether trial counsel was ineffective in his duties to his client, and the Crown consented to the admission of the fresh evidence.
- [13] In accordance with this court’s Practice Direction Concerning Criminal Appeals at the Court of Appeal for Ontario, this evidence was filed sealed. It remains sealed. Either party or an interested third party may apply to this court to unseal the file.

II. THE TEST TO ESTABLISH INEFFECTIVE ASSISTANCE OF COUNSEL [14] The right to effective assistance of counsel is constitutionally protected. It is a principle of fundamental justice, and part of the right to a fair trial: G.D.B., at para. 24; Joannis at p. 57.

- [15] In addressing allegations of ineffective assistance of counsel, an appellant must establish: (i) the facts on which the claim of incompetence is based, on a balance of probabilities (the factual component); (ii) trial counsel's representation fell below the standard of reasonableness expected of a lawyer (the performance component); and (iii) a miscarriage of justice resulted from the incompetence (the prejudice component): R. v. Zock, 2025 ONCA 483, 450 C.C.C. (3d) 459, at para. 4; R. v. Fiorilli, 2021 ONCA 461, 156 O.R. (3d) 582, at para. 48; R. v. K.K.M., 2020 ONCA 736, at para. 55; and Joannis, at p. 59.
- [16] Allegations of incompetence must be assessed in light of the strong presumption that trial counsel was competent: Fiorilli, at para. 51. This is because "the confidential nature of the relationship between a lawyer and [their] client can make it easy for the client to make all kinds of unfounded allegations against [their] former lawyer": R. v. Archer, (2005), 202 C.C.C. (3d) 60 (Ont. C.A.), at para. 141.
- [17] However, the absence of written instructions is "in tension with 'the strong presumption of competence in favour of counsel'": R. v. Kaczmarek, 2021 ONCA 771, 407 C.C.C. (3d) 34, at para. 54.
- [18] Written instructions may resolve competing claims on appeal: see e.g. Archer, at para. 143; R. v. Wells (2001), 139 O.A.C. 356 (C.A.), at para. 61.
- [19] The failure to obtain written instructions is a question of professional prudence, not incompetence. However, a lawyer who fails to obtain written instructions risks exposure to unfounded allegations of unprofessionalism, and the failure to obtain written instructions may undercut trial counsel's attempts to defend against those claims: R. v. R.W., 2023 ONCA 250, 167 O.R. (3d) 1, at para. 24; R. v. Trought, 2021 ONCA 379, 156 O.R. (3d) 481, at paras. 76-77; see also R. v. Hamzehali, 2017 BCCA 290, 350 C.C.C. (3d) 71, at para. 76, leave to appeal refused, [2017] S.C.C.A. No. 380.
- [20] In assessing the performance component, incompetence is assessed using a reasonableness standard. The appellant must establish that the act or omission of counsel could not have been the result of reasonable professional judgment. Hindsight plays no part in the assessment: G.D.B., at para. 27. A strong presumption in favour of counsel also plays a role in this analysis: Archer, at para. 119.
- [21] The Law Society of Ontario's Rules of Professional Conduct (the "Rules") may be used to assist in showing what may reasonably be expected of trial counsel: R. v. White (1997), 114 C.C.C. (3d) 225 (Ont. C.A.), at p. 247, leave to appeal refused: [1997] S.C.C.A. No. 248.
- [22] The Rules specify that competent lawyers must ascertain client objectives, consider possible options, and advise the client on appropriate courses of action. Further, the Law Society's Practice Management Guidelines provide that client instructions should be obtained and

that in doing so, the lawyer should advise the client of the available options, the impact of choosing those options, and the estimated fees in proceeding with those options. It is also recommended that counsel explain the law, the facts, the circumstances and the assumptions upon which the advice is based.

- [23] Finally, in assessing the prejudice component, a miscarriage of justice may occur where 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: G.D.B., at para. 28; White, at para. 7; Zock, at para. 64; R. v. Papasotiriou, 2023 ONCA 358, 166 O.R. (3d) 266, at para. 138; Joannis, at pp. 62-64.
- [24] In this case, the appeal turns on the issue of trial unfairness that amounts to a miscarriage of justice.

III. ANALYSIS OF THE ISSUES [25] The appellant alleges three grounds of incompetence on the part of trial counsel in respect of the alleged failure to explain, advise or obtain instructions on important issues resulting in a loss of trial fairness, or the appearance of trial fairness. I will address each separately, noting that it is the cumulative effect of counsel's conduct that must be considered: Papasotiriou, at para. 141.

- (1) The Choice to Elect Trial by Jury [26] An accused person may choose to be tried by judge and jury or by judge alone. The right to elect the mode of trial under s. 536 of the Criminal Code is a fundamental right that counsel cannot take from a client and on which the client is entitled to be adequately advised by counsel: R. v. Stark, 2017 ONCA 148, 347 C.C.C. (3d) 73, at para. 18. As a demonstration of a jury trial's importance, section 11(f) of the Charter of Rights and Freedoms guarantees a right to trial by jury for offences punishable by a sentence of five years or more and is integral to the court's jurisdiction over an accused and the fairness of the proceeding.
- [27] Trial counsel's failure to discuss and obtain instructions on fundamental decisions relating to an accused's defence, such as the choice of mode of trial, may in some circumstances raise questions of trial fairness: White, at para. 7; G.D.B., at para. 34.
- [28] The appellant claims he was not given an opportunity to consider whether he would prefer to be tried by judge and jury. He also claims that trial counsel assured him that he would win. This, he says, was reiterated in a text message trial counsel sent to the appellant's son where he said, "I'm a very very aggressive lawyer. It's because I can't lose. Period. I refuse."
- [29] The appellant maintains that had he known and understood the choice to be made, he would have chosen trial by jury as this would have allowed him to be tried by a group of his peers.
- [30] He claims the additional cost would not have prevented him from doing so as his children were assisting him financially. This was confirmed by his son.

- [31] The appellant received only an estimate for a judge-alone trial in the provincial court. He claims this supports his submission that trial counsel did not offer him the choice, as if he had, trial counsel would have provided him with an estimate of services for both a trial by judge alone and a trial by jury.
- [32] Trial counsel acknowledged in cross-examination that he failed to file a written notice of election on behalf of the appellant prior to trial. At the outset of trial, trial counsel waived the reading of the election and instead, advised the court that the appellant wished to proceed with a trial by judge alone in the provincial court.
- [33] Moreover, although trial counsel and the appellant communicated by text message, none of those messages referenced the choice to elect trial by judge or trial by judge and jury. Similarly, no notes were taken by trial counsel of either discussion, and no written instructions were obtained notwithstanding that the appellant was a person unfamiliar with the Canadian legal system, and whose first language was not English.
- [34] Trial counsel attests, however, that he had two conversations with the appellant prior to trial in which he told the appellant he had a right to a trial by jury. In his affidavit, trial counsel swore that:

I advised him that jury trials involved being judged by a group of his Canadian peers. While I do not specifically recall whether or not he told me if there was a jury system in [his country of origin], I remember that he remained interested in having his matter dealt with quickly, and in the most economical way. [Emphasis added.]

- [35] Trial counsel provided only one block fee quote for trial by judge alone in the provincial court. He said that:

I was candid with him from the beginning – a Superior Court of Justice trial (either judge alone or jury) would be more expensive and would take longer to make its way through the system. It would allow the Crown and complainant to have two attempts to run their case, given that the sexual assault with a weapon charge was preliminary hearing eligible (this option was later removed when the Crown reduced the charge to a sexual assault simpliciter).

The Appellant maintained that he wanted the fastest possible trial and outcome. It was very clear that finances were an issue for him. I never provided him with a Superior Court of Justice trial fee estimate because he never expressed an interest in a trial at the Superior Court of Justice. His choice to have a trial in the provincial court was centered around his financial concerns, coupled with his desire to have his matter dealt with quickly. [Emphasis added.]

- [36] Trial counsel stated that he revisited discussions about jury trials after receiving disclosure and after the appellant was charged with a breach of his bail, and the appellant maintained that he wanted the matter dealt with quickly and at an affordable price. Trial counsel maintained his position on cross-examination.

- [37] In sum, trial counsel states that he took the appellant through: (i) the financial implications of a trial by jury; (ii) that the Crown would have an opportunity to conduct both a first “run” or preliminary inquiry and a trial if the appellant elected a trial by jury; and (iii) a trial by jury would take longer.
- [38] The appellant also argues that trial counsel failed to provide him with meaningful advice about his right to elect his mode of trial, thereby depriving him the opportunity to make this significant decision. Trial counsel’s evidence was that he explained some of the key considerations facing the appellant in choosing the mode of trial. However, there is no evidence that he addressed some other possible advantages of a trial by jury such as collective reasoning, community involvement and being judged by those with a diversity of perspectives. The appellant further submits that the failure to provide a written recommendation or obtain written instructions, is concerning given trial counsel’s acknowledgement that the appellant was not familiar with the Canadian legal system and was “not fluent with legalese”.
- [39] However, I am not persuaded that the appellant has established the factual component of this allegation. Given the strong presumption to be attributed to trial counsel’s competence in assessing the evidence, I accept trial counsel’s evidence that there was a discussion about several advantages and disadvantages of a trial by jury, and that he received instructions from the appellant to proceed with a trial by judge alone as the appellant was concerned with costs. While it is troubling that these instructions were not documented, I am not satisfied that ineffective assistance of counsel is established on this basis.
- (2) The Choice to Testify [40] The appellant’s second complaint is that trial counsel failed to advise him of his right not to testify.
- [41] Trial counsel must clearly inform the client that they may choose whether or not to testify. This, too, is a fundamental decision about the conduct of the defence: G.D.B., at para. 34.
- [42] Effective representation by counsel includes advice as to whether or not to testify and a review of the advantages and disadvantages of testifying in language that the accused person understands: R. v. D.A., 2020 ONCA 738, 396 C.C.C. (3d) 151, at paras. 32-33. Defence counsel are ethically bound to discuss the decision to testify and must obtain instructions from their clients about the client’s choice: Archer, at para. 139; G.D.B., at para. 34.
- [43] A client cannot make an informed decision to testify unless they understand what is at stake: D.A., at para. 33. Counsel should document that discussion: D.A., at para. 33.
- [44] In most cases, the accused must also demonstrate that there is a “reasonable possibility” the accused would have acted differently: White, at paras. 7 to 8; and Zock, at para. 61. This can be established by showing subjective prejudice.
- [45] The appellant claims in his affidavit that trial counsel “did not tell me that it was my choice whether to testify in my own defence”.

[46] In contrast, trial counsel swore that the appellant was:

... adamant that he wanted to take the stand, clear his name, and provide his version of events in court. Though the choice was ultimately his, I agreed with him that it was a good idea to testify. Without his testimony explaining the nature of his friendship/relationship, I was concerned he might have been perceived as preying on the complainant.

[47] In cross-examination, trial counsel stated that he discussed the appellant's choice to testify several times prior to the appellant taking the stand to testify. However, although trial counsel initially stated he obtained signed instructions from the appellant to this effect, he later admitted he did not. He acknowledged that he usually gets written instructions when clients do not testify, which was not the case here. Trial counsel also did not offer any evidence about the content of these discussions including whether any advantages or disadvantages about testifying were raised.

[48] There is no evidence of a discussion about the advantages and disadvantages of testifying or any informed instruction received from the appellant that he elected to testify.

[49] Moreover, although trial counsel perceived that the appellant was "often confused" when asked basic questions throughout the retainer, and trial counsel conceded the appellant needed explanation and attention, he did not explain the impact of testifying or advise the appellant that appearing confused or inconsistent may cause him to fare poorly in cross-examination at trial. Nor was the appellant advised that no adverse inference could be drawn by the trial judge should he decide not to testify. Therefore, the factual and performance components of ineffective assistance of counsel are established.

[50] While the appellant may have been dimly aware of the existence of these choices, there is no evidence of a meaningful choice or instruction.

[51] The appellant has established the factual and performance components of his allegations of ineffective assistance. He has also met the prejudice component: since the accused was not advised of the advantages and disadvantages of testifying, this is a case where the circumstances raise sufficient concerns about trial fairness as to lead to a miscarriage of justice: *G.D.B.*, at para. 34; *White*, at para. 7. Trial fairness was undermined here, resulting in a miscarriage of justice because trial counsel provided no advice or advice that was deficient such that the appellant was effectively precluded from making an informed choice about a fundamental decision affecting his defence: *R. v. J.N.N.*, 2025 YKCA 11, at para. 61; *R. v. Mehl*, 2021 BCCA 264, at para. 145; *K.K.M.*, at para. 91; *Stark*, at para. 20.

(3) The Choice to Appear in Person [52] The appellant's third complaint is that trial counsel decided, on the appellant's behalf, that he would appear virtually.

[53] The decision to testify virtually or in person was the appellant's to make. Section 715.21 of the Criminal Code provides that in-person is the norm for criminal proceedings except where the court approves to proceed by videoconference.

- [54] Section 715.23 requires the court to consider the accused's right to a fair and public hearing when deciding whether to allow the accused to appear by videoconference. Section 715.233 further provides that an accused must consent to appear virtually when charged with an indictable offence (and cannot do so during a jury trial when evidence is being presented to a jury).
- [55] This court has held that the difference between a virtual and an in-person proceeding is not insignificant: *Woods (Re)*, 2021 ONCA 190, 154 O.R. (3d) 481, at para. 56.
- [56] The decision to appear in person or virtually is an important decision to be made in the context of criminal proceedings and counsel's failure to permit the appellant to make the decision, or to provide competent advice on the matter, can therefore raise questions of trial fairness: *Fiorilli*, at para. 56; *Trought*, at para. 50.
- [57] The appellant claims that trial counsel:
- ...did not explain to me the trial process. He would tell me to attend court via Zoom. I did not understand what the difference was between an administrative appearance before trial and the trial itself.
- ...
- [He] did not tell me that I had an option to have an in person or virtual trial. Instead, he told me that the trial would be virtual because of the Covid-19 pandemic.
- [58] The appellant also notes that prior to trial, trial counsel initially communicated to the Crown that the trial would be in person. However, trial counsel advised the court that he was content that he and his client appear virtually although the appellant was an unsophisticated client, trial counsel had not received any written instructions agreeing to appear remotely, and counsel and witnesses on the other side appeared in person.
- [59] The appellant claims that, had he known he had the option to appear in person, he would have done so, and if granted a new trial, he would like to appear in person.
- [60] In his affidavit, trial counsel's position is that:

On February 14, 2022, Crown counsel ... wrote to me about problems securing an interpreter and asked whether I would be okay with the interpreters doing simultaneous translation by Zoom. The next day (February 15, 2022) I confirmed that this was agreeable....

On February 22, 2022, just after midnight, I sent the Appellant the Zoom link for the morning trial via WhatsApp. I have refreshed my memory by looking at the transcript for February 22, 2022 (the first trial date). Her Honour ... appeared by Zoom from the courthouse, but was under the impression that the matter was proceeding in person.

The Appellant and I appeared by Zoom. Crown counsel ... appeared in person in courtroom 409. [Her Honour] asked counsel if the proceeding would go ahead by Zoom as opposed to in person. [Crown counsel] indicated his understanding that it [was] set for an in person trial, and that the complainant was there to testify in person. [Her Honour] then asked whether I was content to proceed in a “hybrid” fashion. I agreed to do so. [Emphasis added.]

- [61] Trial counsel noted that the appellant previously had a kidney transplant and was on medication. He was therefore in delicate health such that the appellant had concerns about going to court in person to testify.
- [62] In cross-examination, trial counsel agreed that he initially set the trial down for proceeding in person and it was to the appellant’s advantage to conduct an in-person trial. This is in keeping with trial counsel’s February 2, 2022 email exchange with Crown counsel, confirming that the trial would be in person, in which trial counsel stated: “I feel this is the type of trial to do it in person.”
- [63] On cross-examination, when asked, “You deny usurping that choice for the appellant?” trial counsel replied, “I can’t recollect exactly what happened, sir. I’m not comfortable saying I usurped that.”
- [64] Notably, trial counsel did not deny the appellant’s assertion that he was not offered a choice and there was no written advice or instruction about the decision to appear virtually.
- [65] Trial counsel appears to have operated on the assumption that it was preferable for the appellant to appear remotely given his health challenges.
- [66] While trial counsel may have acted in what he believed to be the appellant’s best interest, the appellant had a right to make an informed choice about whether to appear at trial in person.
- [67] I am therefore convinced that the appellant has satisfied the factual component of his allegations. He has demonstrated that he was not given the choice to testify in person, or at the very least, was not advised of the advantages and disadvantages of testifying over Zoom, such that a meaningful choice could be made.
- [68] I am also persuaded that the appellant has established the performance component of his allegations. Given the circumstances which include the serious jeopardy facing the appellant, trial counsel’s conduct was deficient and could not have been the result of reasonable professional judgment.
- [69] With respect to the prejudice component, the appellant’s virtual attendance was particularly problematic as the complainant and the Crown attended in person. The appellant’s evidence that he would have appeared in person if properly advised is sufficient to establish subjective prejudice beyond the simple loss of choice, amounting to trial unfairness: White, at para. 7.

[70] For these reasons, I conclude that the appellant was denied the right to make an informed choice and fundamental decision about the conduct of his defence which undermined trial fairness.

(4) A Miscarriage of Justice Arose [71] The appellant has established that he had no informed choice about whether to testify and whether to appear at trial in person. The cumulative effect of trial counsel's conduct on the fairness of the trial shakes public confidence in the administration of justice: White, at para. 9.

[72] Given these findings, it is unnecessary to address the other alleged instances of ineffective assistance and the alleged impact on the reliability of the verdict.

IV. DISPOSITION [73] As a result of these instances of ineffective assistance of counsel, I would allow the appeal, set aside the conviction and order a new trial by judge and jury as requested by the appellant.

[74] The sentence appeal is dismissed as abandoned as the appellant has served his sentence.

[75] The fresh evidence and the facts in which trial counsel's name is mentioned shall remain sealed pending further court order.

Released: January 9, 2026 "L.B.R."

"Thorburn J.A."

"I agree. Roberts J.A."

"I agree. L. Madsen J.A."

[1] This appeal is subject to a publication ban pursuant to 486.4 of the Criminal Code, R.S.C. 1985, c. C-46.

[2] see R. v. Kerr et al., 2023 ONSC 3638, 427 C.C.C. (3d) 480, at paras. 148-9 and 165.

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