

CANADA / JUDGMENT

R. v. Ripley

2025 ONCA 712

COURT

Court of Appeal for Ontario

DECIDED

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COA-23-CR-1086

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Fairburn, J. Michal; Wilson, Darla A.; Rahman, Moiz

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COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Ripley, 2025 ONCA 712

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Fairburn A.C.J.O., Wilson and Rahman JJ.A.

BETWEEN

His Majesty the King

Respondent

and

Devon Ripley

Appellant

Chris Rudnicki, for the appellant

Hannah Freeman, for the respondent

Heard: September 12, 2025

On appeal from the conviction entered by Justice Bruce W. Duncan of the Ontario Court of Justice on August 12, 2022.

Fairburn A.C.J.O.:

I. overview [1] This is an appeal from conviction for aggravated assault. The victim was a two-year-old child. He and his mother lived with the appellant in an apartment in a family shelter in Peel Region.

[2] There is no dispute that one day, while left alone in the appellant's company, the child was gravely injured. The dispute lies in how those injuries came to be. Over the course of the investigation, the appellant provided several accounts of how the child got hurt, each somewhat different from the last. These changing versions culminated in the appellant's trial testimony, where he said that the child was having a temper tantrum and repeatedly fell and injured himself in various ways, including by intentionally banging his head on the floor. He testified that the final injury occurred when the child fell from the bed onto the back of his head, after which he went silent.

[3] The appellant advances a single ground of appeal. He argues that the trial judge erred by acceding to an improper Crown invitation to reject the appellant's credibility on the basis that he tailored his testimony to fit the disclosure he received and what he heard at trial, thereby transforming the right to disclosure and the right to be present at his trial into a trap.

[4] For the reasons that follow, I would dismiss the appeal. Reading the trial judge's reasons as a whole, he did not err and, even if he did, it is appropriate to apply the curative proviso.

II. factual background a. The General Circumstances [5] The appellant, the child, and the child's mother went to a daytime party at a friend's home. According to the mother, the child was acting "cranky" and was "in a mood". Accordingly, the appellant took the child back to the apartment where they lived so the child could nap. The mother remained at the friend's house.

- [6] About an hour after they left, the appellant called the mother and said that the child “wouldn’t stop freaking out” and that he “couldn’t get him to calm down.” The mother testified that she could hear her child screaming in the background. Although she tried to calm the child over the phone, it did not work, and so she instructed the appellant to bring him back to their friend’s house.
- [7] A short time later, the appellant was captured on video surveillance in the lobby of the shelter where the family lived, carrying the child toward the doorway. The child appears limp on the appellant’s shoulder.
- [8] When the appellant arrived back at the friend’s house, he brought the child to his mother and said “look buddy, there’s mommy.” But the child struggled to even lift his head, and his limbs were hanging limp. His mother testified that he appeared “half asleep, like half awake” and that “his eyes were open, but it was like nobody’s home.” She yelled at the appellant to call 9-1-1, which he did.
- [9] The child was taken to the local hospital, and then almost immediately transferred to SickKids in Toronto. There is no dispute that he was a very sick child, having suffered serious injuries, particularly to his head.
- b. The Injuries [10] Dr. Paul Kadar, a staff physician with the Suspected Child Abuse and Neglect (SCAN) program at SickKids, testified as an expert witness at trial. Unsurprisingly, the defence accepted his expertise in the area of pediatrics in the evaluation of childhood injuries, specifically “his assessment of skull fractures, brain injuries, and other bodily injuries in children and their possible causation.”
- [11] He testified that he had been a pediatrician since 2005 and had worked with the SickKids SCAN program since 2010. Prior to this, he had served as a staff physician with the Child Protection Team at the Children’s Hospital of Eastern Ontario, which is analogous to the SCAN program. He had also operated a private pediatrics practice since 2012, having more than 1,000 children in his primary care. Over his career, he had seen around 2,000 children with maltreatment concerns.
- [12] Listing the child’s injuries took some time. The most serious of his injuries was an extensive skull fracture that caused bleeding and injury in his brain. While these kinds of fractures can result from routine, day-to-day events, Dr. Kadar concluded that the severe fracture in this case “would not have resulted from typical accidental falls such as falls from standing heights or a fall from relatively low structures like beds.” Further, in Dr. Kadar’s opinion, the child could not have self-inflicted such a “severe and extensive fracture from head-banging or other self-injurious behaviours”. Dr. Kadar drew this conclusion based on a number of observations.
- [13] First, the skull fracture, an image of which is found in the trial judge’s reasons, was “complex” in nature. As Dr. Kadar wrote in his medical report, the skull fracture had “multiple fracture lines, depressed, diastased (gaping), and comminuted (involving multiple

fragments), and crossed suture lines, as well as entered the base of the skull". The areas of depression and gaping "were suggestive of greater force application than is seen with simple skull fractures resulting from household/short falls." The cause of the extensive skull fracture was "one or more significant blunt traumatic impacts to his head, with some of the forceful impact likely having involved the posterior head (back of the head)."

[14] Dr. Kadar further testified why these clinical observations did not point to an accidental or self-inflicted injury:

The nature of [the child's] skull fracture, being what it was, extending from the base of his skull, up the back and then crossing a suture and moving, basically migrating from the side of his head all the way to almost to the front, or side of his forehead with these associated elements of the gaping, the fragmentation and the depression, it speaks to the fact that this was a severe, severe head injury.

And, I say, I emphasize the words severe in the sense to differentiate it from what we would even in rare instances see from falls at home from standing and falls at home off beds and falls at home off change tables.

...

But from a, a story of a young pre-school aged child who's sort of tantrumming and falling, either clumsily or angrily or some combination thereof in a way to have caused this degree of skull fracture and, and brain injury underlying it, which left him sort of quite unwell at presentation and that persisted for days and days, it, it's unprecedented in my work [Emphasis added.]

[15] Importantly, Dr. Kadar opined that with this kind of severe skull fracture, it would be impossible for the child to carry on with his temper tantrum:

I don't see how he picks himself up from that with a brain injury and a complex skull fracture of that magnitude and then continues to throw himself around and then bang his head against concrete and fall repeatedly for minutes longer.

[16] Dr. Kadar's medical report also detailed other injuries to the child's body beyond the skull fracture. For instance, he had multiple, parallel bruises on both sides of his head. He also had corresponding bruises on the outside and inside of each ear. Dr. Kadar wrote that he had never seen or even heard of a child "suffering multiple parallel linear bruises to one or both sides of his head or bruising to his ears as a result of self-injurious behaviour including repeated falls." In the expert's view, the bruises reflected at least two "blunt force impacts to both sides of his head, caused either by impact with a straight-edged object or an open hand forcefully striking or slapping him." As for the ear injuries, Dr. Kadar testified that it is unusual for children to have bruises in this area as it is a "shielded" one. While not categorically impossible, the expert said that where there is extensive bruising to both ears, as in this case, it was "exceedingly rare" for the cause to be accidental.

- [17] There was also bruising to other parts of the child's body, including his neck, ribcage and back.
- [18] In the end, Dr. Kadar, who estimated he had seen tens of thousands of children over his career, said that these injuries constituted "an unprecedented extent of injury and bruising" if they had been caused by "self-infliction".
- c. The Appellant's Cascading Versions [19] In his initial call to 9-1-1, the appellant said that the child had been freaking out and that he had run into a folding wagon in their apartment. The mother overheard the appellant tell this to the 9-1-1 operator. It was the first she had heard of any potential injury to her child, having initially only heard that he was having a tantrum and would not settle down.
- [20] Later the same day, the appellant provided a statement to the police. In that statement, he described the child as falling onto the floor when going to and coming from the washroom, where he had been looking for his mother. He also described the child falling into the wagon and hitting his head, which he said accounted for the "red mark right across his face." He also said that the child intentionally struck his head twice on the floor. When the child tried to do it a third time, the appellant said he intervened to stop him. The appellant did not tell the police, on the day the child was injured, that there were any further blows to the child's head.
- [21] The next day, the appellant told the mother that the child had been freaking out and that he had flung himself off of the bed and hit his head on the wagon, the bed, and the floor. She testified about his evolving accounts as to what had happened in the months that followed: "his story kept on changing". The mother said that he "would start adding more details in, and then forgetting the other things that he had told me that [the child] had apparently done to cause the injuries to himself, and things that he was telling me didn't make sense with what the doctors had explained to me at the hospital ... [A]nd it just didn't add up anymore."
- [22] In the meantime, the appellant gave another police statement almost two weeks after the incident, on June 12. He initially told the police in this statement that the child fell getting out of his toddler bed and then he ran to the washroom to look for his mother and fell again running back. He got up and ran again and fell into the wagon. He then started hitting his forehead on the concrete floor, twice, before the appellant intervened.
- [23] After a short break in the interview, the appellant told the police that he had forgotten something. The appellant then recounted that after he had put on one shoe, he went to the washroom while the child "was up on the bed", and when he came out of the washroom, the child was on the floor screaming and crying and continuing to freak out. He did not know whether the child had perhaps fallen off of the bed. As the trial judge put it: "The point of this addendum appears to be to suggest that [the child] could have climbed up on the bed and then could have fallen back to the floor and could have sustained an injury" (emphasis in original). The trial judge went on to highlight that, in this version of the appellant's story, after potentially falling from the bed, the child "continued to freak out and then engaged in

the intentional head banging” on the floor (emphasis in original).

- [24] Finally, the appellant testified at trial and provided yet another version of events, one that morphed from a potential fall from the bed, followed by more screaming and self-injurious conduct, to a definitive fall from the bed, followed by silence. In his reasons for judgment, the trial judge noted the appellant’s testimony that after the child had engaged in his self-injurious conduct, the appellant left him on the bed while he went to use the washroom. The appellant testified that, while he was in the washroom, he heard a “thud”. When he emerged from the washroom, the child was no longer on the bed where he had left him but was instead lying on his back on the floor. The child was now “quiet and seemed like he was falling asleep.”
- d. Reasons for Judgment [25] For reasons I will get to in the next section, the trial judge rejected the “material parts” of the appellant’s evidence and found that his evidence did not raise a reasonable doubt. Based largely on the medical evidence, he concluded that the Crown had proven guilt beyond a reasonable doubt. The trial judge ultimately accepted the medical evidence that the injuries suffered would not have resulted from typical accidental falls or self-inflicted wounds. There was simply no indication of any plausible accidental injury here as the child “was not hit by a car, nor did he fall off a roof.” In the end, there was “no rational conclusion other than that the injuries were inflicted.”

III. analysis a. Overview [26] The appellant argues that the trial judge’s reasons for judgment are infected by reversible error. He contends that the trial judge erred by rejecting his evidence on the basis that his trial testimony was tailored to the disclosure of the medical evidence he received prior to trial and to the medical evidence he heard during the trial proper, thereby turning his right to disclosure and right to be present at trial into a credibility trap. Specifically, the appellant points to the following passage in the reasons for judgment as reflective of this error:

What on June 12 had been merely a possible fall from the bed became a definite fall – he left [the child] on the bed, not the floor; he heard a thud; he found [the child] on his back; his demeanour changed dramatically; he was obviously hurt. Perhaps most significantly, the version given June 12 had [the child] intentionally pounding his head on the floor after this fall from the bed.

However, by the time the defendant’s evidence was given at trial both the SCAN report (August) and Dr. Kadar’s evidence had pointed out the extreme implausibility of that having occurred after a supposed skull-shattering fall from the bed. In short, the accounts given by the defendant not only changed but they evolved in sync with and to dovetail with the revelations from the medical evidence. [Emphasis added.]

- [27] The appellant notes that the trial judge was drawn into this error by an improper Crown cross-examination, where it was suggested to the appellant that he had tailored his evidence to explain away the types of injuries reflected in the medical reports disclosed to him in advance of trial. The appellant contends that the trial judge erroneously picked up on this improper line of questioning when explaining why he rejected the appellant’s credibility. By

suggesting that the appellant's testimony "evolved in sync with and to dovetail with the revelations from the medical evidence," the trial judge is said to have turned the right to disclosure and the right to be present at one's trial into a sword for purposes of rejecting the appellant's evidence.

- [28] The respondent accepts that the Crown cross-examination crossed the line, but notes that there was no objection and, in any event, this was a judge-alone trial and so we should remain focussed on the trial judge's reasons for rejecting the appellant's credibility and whether those reasons reflect error. While this may well have been a different scenario had the appellant been tried by a jury, we have the benefit of reasons for judgment. Therefore, the question, says the respondent, is not whether the trier may have been infected by a series of improper questions, but whether the reasons for judgment are reflective of this error.
- [29] As I explain, they are not.
- b. Adverse Inferences from an Accused's Access to Disclosure and Presence at Trial [30]
Although much has been written on the topic that forms the subject of this appeal, the rule really distills down into one simple proposition: in general, a trier of fact cannot find an accused less credible because the accused has received disclosure or because an accused has been present during his trial. No matter how logical the inference may be that an accused person who receives disclosure and testifies last may have tailored their evidence to fit the Crown's case, with a few exceptions, this inference cannot be drawn because it has the effect of turning "fundamental constitutional rights into a trap for accused persons": *R. v. White* (1999), 42 O.R. (3d) 760 (C.A.), at para. 20.
- [31] In short, an accused person has the constitutional right to disclosure and the right to be present at his trial. Not only does he have the right to be present at his trial, but I would add that, barring exceptions, he must be present at his trial: Criminal Code, R.S.C. 1985, c. C-46, s. 650(1).
- [32] Disclosure and presence at one's trial are core features of criminal law, ones that lie beyond dispute. To infer that an accused is less worthy of belief because he received disclosure or because he was entitled to and, indeed, was required to sit through his trial, places an accused in an impossible situation, one where his rights and obligations can be easily transformed into a weapon for purposes of rejecting his credibility. While it is true that some accused may well tailor their evidence because of having learned critical information arising from either disclosure or the unfolding of the trial evidence, it is not easy to distinguish between those accused who are tailoring their evidence from those who are simply telling the truth, a truth that answers the Crown's case. Therefore, if we permit the tailoring inference to be drawn too easily, it would place testifying accused in an impossible situation, always vulnerable to the suggestion of tailoring. It is in this sense that their rights and obligations would be transformed into a trap. Accordingly, subject to very few exceptions, attempts to trigger the prohibited inference are unfair, whether in the cross-

examination of an accused (see *White*), in a Crown closing (see *R. v. Peavoy* (1997), 34 OR (3d) 620 (C.A.); *R. v. Gordon*, 2012 ONCA 533), or in reasons for resolving credibility findings (see *R. v. G.V.*, 2020 ONCA 291, 392 CCC (3d) 14; *R. v. Thain*, 2009 ONCA 223, 243 CCC (3d) 230; *R. v. M.D.*, 2020 ONCA 290, 392 CCC (3d) 29; *R. v. C.T.*, 2022 ONCA 163).

[33] Yet the rule against using disclosure and presence at trial as a makeweight against the accused's credibility does not mean that these factors are never relevant to a credibility assessment. This is precisely why this court has made clear that the matter is to be assessed on a case-by-case basis: *R. v. F.E.E.*, 2011 ONCA 783, 108 OR (3d) 337, at paras. 71-2; *R. v. Cavan* (1999), 139 CCC (3d) 449 (Ont. C.A.), at para. 41, leave to appeal refused, [1999] S.C.C.A. No. 600 (Cavan), and [1999] S.C.C.A. No. 560 (Scott); *R. v. Mohamad*, 2018 ONCA 966, 369 CCC (3d) 211, at para. 183, leave to appeal refused, [2019] S.C.C.A. No. 162. One such example is where the Crown moves to undermine a defence of alibi: *F.E.E.*, at para. 71; *R. v. Khan* (1998), 126 CCC (3d) 523 (B.C.C.A.), at paras. 50- 52, leave to appeal refused, [2001] S.C.C.A. No. 126; *G.V.*, at para. 28.

c. The Trial Judge Did Not Err by Rejecting Evidence as Tailored [34] In my view, the challenged passage in the reasons for judgment constitutes nothing more than an accurate, factual observation on the part of the trial judge. For ease, I repeat the disputed passage here:

What on June 12 had been merely a possible fall from the bed became a definite fall – he left [the child] on the bed, not the floor; he heard a thud; he found [the child] on his back; his demeanour changed dramatically; he was obviously hurt. Perhaps most significantly, the version given June 12 had [the child] intentionally pounding his head on the floor after this fall from the bed.

However, by the time the defendant's evidence was given at trial both the SCAN report (August) and Dr. Kadar's evidence had pointed out the extreme implausibility of that having occurred after a supposed skull-shattering fall from the bed. In short, the accounts given by the defendant not only changed but they evolved in sync with and to dovetail with the revelations from the medical evidence. [Emphasis added.]

[35] Taken on its own, the impugned passage - most specifically, the trial judge's comment that the appellant's account kept changing in a way that "evolved in sync with and to dovetail with" the revelations arising from the medical evidence - is concerning. After all, to reject an accused's credibility on the basis that he used the disclosure prior to trial and evidence at trial to dovetail his evidence to meet the Crown's case would be to use the appellant's rights as a sword against him. But that is not what happened here.

[36] Appellate courts are not in the business of parsing reasons in search of error. It is the rare set of reasons, both reasons for judgment and appellate reasons, that could not be parsed for imperfections along the way. The job of an appellate court is not to seek out those imperfect sentences and passages, but to consider alleged errors in the context of the reasons as a whole, and against the backdrop of the trial as a whole, to determine whether a reversible error exists. If there exists ambiguity on the point, that ambiguity should be resolved in

favour of an interpretation that involves a correct application of the law: *R. v. G.F.*, 2021 SCC 20, [2021] 1 S.C.R. 801, at paras. 76, 79; *R. v. C.L.Y.*, 2008 SCC 2, [2008] 1 S.C.R. 5, at paras. 10-12. In this case, a proper contextual approach reveals no ambiguity and no error of law.

[37] The trial judge properly understood his task in this trial:

The injuries to [the child] were sustained within a limited time period during which the defendant had sole custody control and access to the child. If the injuries were inflicted – that is, they were not accidental or self-inflicted – the defendant had exclusive opportunity to have been the injury-inflicting party. The issue then is whether the Crown has proven beyond a reasonable doubt that the injuries were not accidentally sustained or the product of self-injurious behaviour.

[38] In resolving this issue, the trial judge largely focused in on the medical evidence and the appellant's explanation as to what happened in that small room on the fateful day. The medical evidence clearly and unequivocally supported the view that the child's injuries were not self-inflicted or accidental in nature. As for the appellant's evidence, the trial judge provided numerous reasons for rejecting it, none of which are attacked on appeal.

[39] First, he observed that even if he accepted the appellant's explanations as to what had occurred, those explanations were inconsistent with the medical opinion evidence that he did accept, which supported the conclusion that the injuries would not have occurred with the types of falls and activities described by the appellant.

[40] Second, the trial judge noted the sheer depth of the inconsistencies in the appellant's cascading explanations as to what had occurred in that small room. While the trial judge found that some inconsistencies would be expected in a situation where a child was having a temper tantrum, there was one inconsistency between the various versions of events that seriously undercut the appellant's credibility. This was the fall from the bed. This fall "was not mentioned in any explanation to the mother, to the police on May 30, or the first part of the statement of June 12 – and then only suggested as something that could have happened" (emphasis in original). Only at trial did the appellant describe the fall from the bed as the "major and final event," after which the child "went from wild to quiet." As the trial judge said, it was "inconceivable" that the appellant would have overlooked that critical event when recounting to others what had happened. This was, as the trial judge put it, "indicative of fabrication."

[41] Third, the trial judge noted that the appellant's accounts provided no explanation for some of the bruising, especially to the child's ears and face. As he noted, "even toddlers – don't fall on their ears." The distinct parallel pattern found on the child's face was indicative of the "fingers of a hand" and not consistent with a collision with the edge of a wagon.

[42] Finally, the trial judge found that the events as described by the appellant seemed "inherently implausible." The trial judge echoed the trial Crown's observation that the child "seemed to fall so much it was [as] if he had been on ice." It made no sense that if the child was falling that much, the adult in the room did not intervene to stop him.

- [43] It is within the context of these four reasons for rejecting the appellant's credibility, any one of which would have sufficed, that the trial judge also made the impugned observation that the appellant's account "not only changed but ... evolved in sync with and to dovetail with the revelations from the medical evidence." In my view, there is nothing in the reasons to suggest that the trial judge was using this observation as a tool with which to assess the appellant's credibility. He had enough tools already and carefully engaged with each of them, providing four solid reasons for rejecting the appellant's credibility.
- [44] While in the future it may be better to avoid making this type of observation, I am entirely satisfied that this is all it was: an observation and not a reason for rejecting the appellant's credibility. And, even if I am wrong in this regard, this case calls out for the application of the curative proviso.
- d. The Curative Proviso Applies [45] Even if the trial judge erred in how he approached this issue, in the sense that he made more than just an observation, this is the type of error that would not warrant appellate intervention, and I would apply s. 686(1)(b)(iii) of the Criminal Code.
- [46] Pursuant to s. 686(1)(b)(iii), the Crown bears the burden of showing that one of the two branches of the curative proviso applies such that no substantial wrong or miscarriage of justice has occurred.
- [47] The branches include: (i) harmless errors, meaning that the error "could not have had any impact on the verdict"; and (ii) overwhelming cases, such that the evidence against the appellant was "so overwhelming that a reasonable and properly instructed jury would inevitably have convicted": *R. v. Van*, 2009 SCC 22, [2009] 1 S.C.R. 716, at paras. 34-6. In my view, both of these branches apply in this case.
- [48] First, the harmless error branch.
- [49] As already described, the trial judge gave numerous reasons for rejecting the appellant's credibility, including that: it was inconsistent with the medical evidence that he accepted; the appellant had given multiple inconsistent and ever-cascading accounts of what occurred; it was "inconceivable" that the appellant would only recall the final critical event at trial; the bruising on the ears was not consistent with an accidental or self-inflicted injury; and, the evidence was just generally "implausible." With or without the impugned comment, it is entirely safe to say that the appellant's evidence was being rejected on several bases. This is why, even if the trial judge erred as the appellant suggests, the error was entirely harmless and had no impact on the verdict. In these circumstances, I lean on and adopt LeBel J.'s comment in *Van*, at para. 35, where he said that "it would detract from society's perception of trial fairness and the proper administration of justice if errors such as these could too readily lead to an acquittal or new trial". In my view, even if the trial judge erred, that error was entirely irrelevant to the end result, in the sense that the reasons clearly reflect that the appellant's evidence was being rejected with or without that observation.

- [50] Applying the second branch of the curative proviso, the evidence against the appellant was overwhelming. The expert evidence, which was accepted by the trial judge, concluded that the severe cranial fracture would not have resulted from typical falls, including from low structures like beds. And a toddler could not “generate” the force necessary to inflict such severe and widespread injury through self-inflicted head banging or throwing themselves around in a temper tantrum. It would have been, as the expert testified, “an unprecedented extent of injury and bruising from self-infliction that I’ve never heard of before, nor seen in my practice”.
- [51] This uncontroverted medical evidence and the appellant’s inability to stick with one version of events gave rise to an overwhelming Crown case, one where any reasonable and properly instructed jury would inevitably have convicted: *R. v. Khan*, 2001 SCC 86, [2001] 3 S.C.R. 823 [Khan 2001], at para. 31. The invariable result here, were a retrial to be ordered, would in fact be a conviction. Against this reality, there being no realistic possibility that a new trial would result in anything but a conviction, I echo the comment of Binnie J. in *R. v. Jolivet*, 2000 SCC 29, [2000] 1 S.C.R. 751, at para. 46: “[I]t is manifestly in the public interest to avoid the cost and delay of further proceedings. Parliament has so provided.” See also: Khan 2001, at para. 90; Van, at para. 36.

IV. conclusion [52] The appeal is dismissed.

Released: “October 22, 2025 J.M.F.”

“Fairburn A.C.J.O.”

“I agree. D.A. Wilson J.A.”

“I agree. M. Rahman J.A.”

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