

CANADA / JUDGMENT

R. v. Roche-Garcia

2024 BCCA 298

COURT

British Columbia Court of Appeal

DECIDED

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2024 BCCA 298 R. v. Roche-Garcia

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Roche-Garcia,

2024 BCCA 298

Date: 20240819

Docket: CA48117

Between:

Rex

Respondent

And

Alvaro Roche-Garcia

Appellant

Corrected Judgment: The text of the judgment was corrected at paragraph 134 on August 26, 2024.

Before:

The Honourable Mr. Justice Fitch

The Honourable Madam Justice Horsman

The Honourable Justice Skolrood

On appeal from: An order of the Supreme Court of British Columbia, dated
November 6, 2021 (conviction) (R. v. Roche-Garcia, Vancouver Docket 28727-2).

Counsel for the Appellant:

B.R. Anderson

T. Talhan, Articled Student

Counsel for the Respondent:

J.R.W. Caldwell

I. Grant (via videoconference)

Place and Date of Hearing:

Vancouver, British Columbia

April 15-16, 2024

Supplementary Written Submissions Received:

May 28 and June 5, 2024

Place and Date of Judgment:

Vancouver, British Columbia

August 19, 2024

Written Reasons by:

The Honourable Mr. Justice Fitch

Concurred in by:

The Honourable Madam Justice Horsman

The Honourable Justice Skolrood

Summary:

The appellant was convicted of the first degree murder of Zenen Cepeda Silva who was shot and killed on January 26, 2019, as he sat on the porch of his residence in the company of his wife, Maria Baldivia. The central issue at trial was identity. The Crown's case against the appellant consisted of four main pillars: (1) identification/recognition evidence from Baldivia, whose preliminary inquiry testimony was admitted at trial pursuant to s. 715(1) of the Criminal Code because she was ill and unavailable to testify at the time of the trial; (2) video surveillance evidence from a nearby parking lot capturing a man arriving just minutes before the shooting in a vehicle that had been loaned to the appellant, and leaving in the same vehicle shortly thereafter in possession with what appears to be a handgun; (3) testimony from the appellant's roommate, who identified the appellant as the man depicted in the video; and (4) firearms evidence confirming the bullet that killed the victim was fired from the same gun as a bullet recovered from the appellant's residence. The appellant did not testify at trial or call evidence in his

defence. The appellant appeals from his conviction on three grounds: (1) the judge erred in law by admitting the deceased's statement identifying him as the perpetrator--the statement having formed a part of Baldivia's preliminary inquiry testimony--without ruling on the admissibility of this hearsay utterance; (2) the judge erred in law by misdirecting the jury on the application of W. (D.) principles to an exculpatory statement made by the appellant to his roommate that was elicited by the Crown; and (3) the judge erred by permitting the Crown to tender Baldivia's prior consistent identifying statements, including to her granddaughter for the first time in re-examination.

Held: Appeal allowed; new trial ordered. The judge erred in law by allowing the victim's identifying declaration to be put before the jury in the absence of an admissibility inquiry. Further, the instructions given to the jury on the use they could make of the appellant's out-of-court denial of guilt also reflect error in law. Finally, the judge erred in law in permitting the Crown to elicit Baldivia's prior consistent identification of the appellant through the granddaughter in re-examination. Despite the formidable nature of the Crown's case, this is not an appropriate case in which to apply the curative proviso.

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Reasons for Judgment of the Honourable Mr. Justice Fitch:

I. Introduction and Overview of the Issues on Appeal

- [1] In the late evening hours of January 26, 2019, Zenen Cepeda Silva ("Cepeda Silva") was shot once in the torso as he sat with his wife, Maria Baldivia ("Baldivia"), on the front porch of their Vancouver duplex. He lost consciousness due to rapid blood loss and, despite emergency medical intervention at the scene, was pronounced dead at the hospital a short time later.
- [2] The appellant, Alvaro Roche-Garcia, was charged with the first degree murder of Cepeda Silva. Following a five-week trial before a judge and jury, the appellant was convicted of the offence charged.
- [3] The central issue at trial was identity. The Crown's case against the appellant may fairly be described as formidable. It consisted of four main pillars. First, Baldivia testified that she was acquainted with and recognized the appellant as the shooter. Second, video surveillance evidence taken from the back of a restaurant near Cepeda Silva's residence captured a man arriving in a vehicle minutes before the shooting. He parked the vehicle and left. Very shortly after the shooting, he returned and briefly placed what appears to be a handgun on the roof of the car before driving away. Allison Latimer ("Latimer") identified the vehicle captured on the video as her own. She had loaned it to the appellant before the shooting. The appellant returned the vehicle to her the morning after the shooting. Third, the appellant's roommate, David Galan Lago ("Galan Lago"), identified the appellant as the person depicted in the video. Fourth, the bullet that killed Cepeda Silva passed through his body and was found lodged in the front door of his side of the duplex. A second spent bullet was found in a search of the appellant's residence. It was lodged in a refrigerator and had been fired from inside the appellant's bedroom. A forensic firearm and tool mark examiner testified that these two bullets were fired from the same gun.
- [4] The appellant did not testify at trial and called no evidence in his own defence.

- [5] Against this background, the appellant appeals from his conviction on three grounds including alleged errors in the admission of inculpatory evidence, and non-direction and misdirection in the charge to the jury.
- [6] First, the appellant submits that the judge erred in law by admitting the deceased's statement to Baldivia identifying him as the perpetrator. The statement at issue, which consists of the words "look how Alvaro has killed me", was said by Baldivia to have been made immediately after the shooting and very shortly before Cepeda Silva died. I will sometimes refer to this statement as the deceased's "identifying declaration".
- [7] Baldivia suffered a stroke shortly before the trial and was unable to testify. The evidence she gave on the preliminary inquiry--which included reference to the deceased's identifying declaration--was admitted at trial pursuant to s. 715(1) of the Criminal Code, R.S.C. 1985, c. C-46 [Code].
- [8] The appellant takes no issue with that ruling on appeal. He complains, however, that there was no separate inquiry into the admissibility of the deceased's post-shooting declaration that "Alvaro has killed me". It would appear that the issue was not identified by counsel or the trial judge. The identifying declaration was whisked into evidence on the coattails of Baldivia's preliminary inquiry testimony. The appellant submits that it is not a foregone conclusion that this evidence, probative of the central issue in the case, would have been admitted had it been subject to scrutiny at the gatekeeping stage. Even if the evidence would inevitably have been admitted pursuant to a recognized exception to the hearsay rule--as a dying declaration or spontaneous utterance--the appellant submits that, as a consequence of the oversight, the ultimate reliability of this evidence was not challenged, and the judge gave the jury no warning about its obvious frailties.
- [9] Second, the appellant submits that the judge erred in law by misdirecting the jury on the application of the principles set out in *R. v. W. (D.)*, [1991] 1 S.C.R. 742, 1991 CanLII 93 to an exculpatory statement he made to Galan Lago. The statement was elicited by the Crown in its direct examination of Galan Lago. Specifically, the appellant takes aim at the judge's instruction to the jury that if they believed his out-of-court denial of responsibility for the offence, they were obliged to consider whether the statement raised a reasonable doubt. The appellant submits the jury should have been instructed that if they believed the appellant's denial or if it raised a reasonable doubt about his guilt, they were obliged to acquit. In addition, the appellant argues that the judge failed to instruct the jury on the application of *W. (D.)* principles to what he characterizes as exculpatory identification evidence given by three witnesses--Latimer, Galan Lago and Hamza El Hrichi ("El Hrichi"), a neighbour who heard a shot being fired, attended at the scene, called 911, and testified about certain observations he made in the aftermath of the shooting.
- [10] Third, the appellant submits that the judge erred by permitting the Crown to lead prior consistent out-of-court statements made by Baldivia that identified him as the shooter. He further complains that the Crown improperly elicited one of these statements in the re-

examination of Baldivia's granddaughter, Kadesha Fuste ("Fuste"). Alternatively, the appellant says the judge erred by failing to caution the jury against using Baldivia's prior consistent statements for a prohibited purpose in both the main charge and in response to a question asked by the jury about whether they could know if Baldivia identified the appellant as the shooter when she was interviewed by the police the evening of the offence.

- [11] In support of the appeal, the appellant seeks to adduce fresh evidence in the form of an affidavit sworn by his trial counsel. Among other things, trial counsel (who was also counsel at the time of the preliminary inquiry), says he did not appreciate that Baldivia had testified at the preliminary inquiry that Cepeda Silva identified the appellant by name as the perpetrator immediately after the shooting and just before he died. In addition, trial counsel deposes that he was unaware at the time of the trial that the W. (D.) framework applies to exculpatory out-of-court statements made by an accused that are tendered in evidence by the Crown.
- [12] The appellant has not raised ineffective assistance of counsel as a ground of appeal. He seeks to have this evidence admitted on appeal for the narrow purpose of rebutting any suggestion that his failure to identify the need for an admissibility voir dire with respect to Cepeda Silva's identifying declaration, and to object to aspects of the charge challenged for the first time on appeal, was motivated by strategic considerations. The fresh evidence application is opposed by the Crown.
- [13] The appellant submits that the appeal should be allowed pursuant to s. 686(1)(a)(ii) of the Code--on grounds that the verdict should be set aside as a consequence of wrong decisions on questions of law. The appellant specifically disclaims reliance on s. 686(1)(a)(iii), which empowers an appellate court to allow an appeal on any ground(s) giving rise to a miscarriage of justice.
- [14] In response to the first ground of appeal, I understand the Crown to concede that the identifying declaration embedded in Baldivia's preliminary inquiry testimony was not made admissible by virtue of the s. 715(1) ruling. It was a further hearsay statement that could only be admitted through application of a recognized exception to the hearsay rule, or pursuant to the principled approach. The Crown's primary position is that it can be said with confidence the jury could not have relied on the deceased's utterance identifying the appellant as the shooter as they were instructed to disregard hearsay evidence. The Crown also submits that the identifying declaration played no role in the outcome of the case, as it was not referred to by counsel or the trial judge at any point during the trial. Finally, the Crown submits that if the admissibility of the identifying declaration had been litigated at trial, the evidence would inevitably have been admitted pursuant to the dying declaration or spontaneous utterance (*res gestae*) exception to the hearsay rule. In these circumstances, the Crown submits that failure to identify the need for an admissibility voir dire in relation to this evidence may properly be characterized as a harmless error curable through application of the proviso found in s. 686(1)(b)(iii) of the Code.

- [15] In response to the second ground of appeal, the Crown submits that the judge properly instructed the jury on the use they could make of the appellant's out-of-court denial of responsibility for the offence, and did so in accordance with a model instruction approved by this Court in an analogous context. In the alternative, the Crown submits that, considering the charge as a whole and looking at the matter from a functional perspective, the jury would have understood they were duty-bound to acquit the appellant if they believed his denial of involvement in the offence, or considered that it might be true. Finally, the Crown submits that no special W. (D.) instruction was required in relation to the identification evidence of Latimer, El Hrichi and Galan Lago. Without necessarily accepting the Ontario jurisprudence upon which the appellant relies in support of this ground, the Crown says the evidence of these three witnesses did not exclude the possibility that the appellant was the shooter. It follows, says the Crown, that the instruction now said by the appellant to have been required would not have been appropriate.
- [16] In answer to the third ground of appeal, the Crown submits that to the limited extent Baldivia's out-of-court statements--consistent with her in-court identification of the appellant as the shooter--were adduced at trial, they were admissible as an established exception to the rule against prior consistent statements. The Crown further submits that as the out-of-court statements were entirely consistent with Baldivia's in-court identification of the appellant as the shooter, no limiting instruction was required in the main charge or in response to the jury's question. Even if the judge erred in law by failing to provide a limiting instruction on the use the jury could make of Baldivia's prior consistent statements, such an instruction would not have inured to the appellant's benefit and may fairly be characterized as harmless in the context of this case. Finally, the Crown submits that Baldivia's out-of-court statement to Fuste identifying the appellant as the shooter was properly elicited in the re-examination of Fuste.
- [17] In addition to relying on the "harmless error" prong of the curative proviso, the Crown says any material errors in law found by this Court may be cured on the alternative footing that the case against the appellant is so overwhelming there is no realistic possibility that a new trial would produce a different result.
- [18] For the reasons that follow, I would dismiss the fresh evidence application. Regrettably, however, I have concluded that a new trial is required.
- [19] In my view, the judge erred in law by permitting the introduction of Cepeda Silva's identifying declaration in the absence of an admissibility voir dire and ruling. The use the jury might have made of Baldivia's evidence that the deceased identified the appellant by name as the shooter cannot be known. The error gives rise to a risk that, in convicting the appellant, the jury gave weight to evidence probative of the central issue in the case, the admissibility of which was never determined. Even if the evidence would likely, or even inevitably, have been admitted, the jury's verdict was uninformed by critical evidence available to the defence the jury never heard--evidence that was capable of undermining the reliability of Baldivia's evidence on this issue. Further, the jury received no instructions from

the judge on how to assess the ultimate reliability of this evidence. At minimum, what the defence lost as a consequence of this error was the opportunity to persuade the jury that Baldivia's evidence on this point was unreliable and deserving of no weight.

- [20] In my respectful view, the instruction given to the jury on the use they could make of the appellant's out-of-court denial of responsibility for the shooting also reflects error in law.
- [21] Finally, even if it was open to the Crown to adduce, through Fuste, Baldivia's prior consistent identification of the appellant as the shooter, this evidence was not admissible in re-examination. Respectfully, the judge erred in law in permitting this highly prejudicial evidence to go before the jury in the re-examination of Fuste.
- [22] Despite the formidable nature of the Crown's case, I do not consider this to be an appropriate case in which to apply the curative proviso in the face of what I consider to be serious legal errors.

II. Summary of the Evidence and Proceedings at Trial

- [23] I will summarize under this heading only the essential evidence adduced at trial. Additional evidence and background required to address the grounds of appeal will be set out when I turn to address each of the appellant's complaints.
1. Baldivia's Evidence
- [24] Baldivia testified over two days at the preliminary inquiry. On the first day, she testified through a Spanish speaking interpreter, who also provided translation assistance for the appellant. On occasion, Baldivia's evidence could not be transcribed because it was indiscernible. Part of the problem appears to have stemmed from the fact that the translator was attempting to provide simultaneous interpretation rather than listening to Baldivia's evidence, waiting for her to finish her response to a question, and then translating it. The judge eventually intervened, noting that the way in which the evidence was being elicited would give rise to difficulties in having a transcript prepared. He directed the interpreter to wait until the witness had finished her response before translating it. This direction came after Baldivia had testified that Cepeda Silva identified the appellant by name as the shooter at the time of the incident and very shortly before he died.
- [25] As to the circumstances of the offence, Baldivia testified that she was having a cigarette with the deceased on their front porch. The entrance to both front doors of the duplex is accessed by a small landing, three or four stairs up from the yard. A pony wall runs along the front of the landing, separating the porch from the yard. Baldivia and the deceased lived on one side of the duplex and Baldivia's relatives, including Fuste, lived on the other.
- [26] Baldivia testified that she and Cepeda Silva were facing the front door about to go back inside when she heard a big bang. Her husband fell in through the door when she opened it. She saw the appellant on the other side of the pony wall holding a gun in his outstretched arm. He was wearing light-coloured clothing. She did not see him approach until after the

shot had been fired. There was no verbal exchange between the appellant and the deceased before the shot was fired. Baldivia testified that they did not speak with anyone else while sitting on the front porch that evening.

- [27] Baldivia testified that she recognized the appellant. She said they met "a long time ago" when both of them were living in Albuquerque, New Mexico. Baldivia said she lived in Albuquerque for approximately four years. She would see him "now and then" in that context. She identified the appellant in court as the shooter.
- [28] In cross-examination, Baldivia testified that, at the time of the shooting, she had been living with the deceased in Vancouver for approximately 12 years. She gave virtually no evidence about the nature of her relationship with the appellant after she moved to Vancouver, or the frequency with which she would see him. She said only that when her older brother, Celestino, passed away at a pharmacy on Commercial Drive, the appellant was at the scene. It was an agreed fact at trial that Celestino Baldivia passed away from natural causes on April 9, 2018.
- [29] As noted earlier, Baldivia testified that as she tried to hold her husband up after the shooting, he said to her, "[L]ook how Alvaro has killed me." There was evidence that the appellant was called "Alvaro" by others who lived in Vancouver and socialized in the Cuban community.
- [30] When the trial began, it was uncertain whether Baldivia's declining health would render her unable to testify. The ruling admitting Baldivia's preliminary inquiry testimony was not made until the end of the third week of the trial. Following the ruling, the judge instructed the jury that she was unavailable to testify at trial due to medical circumstances. The jury was instructed that counsel could not have anticipated this turn of events at the time of the preliminary inquiry.
- [31] The jury listened to a recording of Baldivia's preliminary inquiry testimony after the s. 715(1) admissibility ruling. The jury was also provided with a transcript of her testimony as an aid to follow along as the recording was being played.
- [32] I have listened to the audio recording of Baldivia's preliminary inquiry evidence. Despite the translation difficulties alluded to earlier in these reasons, Baldivia's attribution to the deceased of his identifying declaration can clearly be heard. It is also clearly reflected in the transcript of her testimony.
- [33] In the course of their deliberations, the jury asked to relisten Baldivia's evidence. It was replayed for them and the jury was again supplied with a transcript of her testimony as an aid. In the result, the jury heard Baldivia's evidence--including her reference to the deceased's identifying declaration--on two occasions, and did so with the benefit of a transcript of her testimony.

- [34] Baldivia testified that Fuste was on the scene shortly after the shot was fired. Baldivia told her to call the police and an ambulance. She recalled Fuste using El Hrichi's phone to do so.
- [35] Baldivia said the appellant crossed the sidewalk and "ran off". She said the appellant turned around the block "really quickly like running" and "in a hurry". She later testified that the appellant left the scene "in a real hurry almost running".
- [36] Baldivia acknowledged having been convicted of a violent offence in Cuba and of a drug-related offence in the United States.

2. Baldivia's Statements to the Police: What the Jury Heard

- [37] Baldivia gave two statements to Detectives Gow and Wong; on January 27, 2019, and on April 10, 2019. Neither statement was put before the jury.
- [38] The Crown called both officers at trial. Detective Gow was asked whether Baldivia provided the name of a potential suspect in her January 27, 2019, statement. He confirmed that she did. He was specifically instructed by Crown counsel not to name the person so identified. Detective Wong provided similar evidence, noting that Baldivia could only provide a first name and some information about how she knew this person. He, too, was instructed by Crown counsel not to name the suspect identified by Baldivia as the shooter. The jury did not hear any further evidence concerning the substance of Baldivia's out-of-court statement to Detectives Gow or Wong on January 27, 2019.
- [39] Later in the trial, Crown counsel (not counsel on appeal) advised the trial judge that he did not elicit from Detectives Gow and Wong the name of the suspect provided to the police by Baldivia because, in his view, "that would be considered a prior consistent statement of the witness". I take from this that Crown counsel with carriage of the prosecution understood that a prior consistent statement made by an identifying witness was inadmissible, even in circumstances where the witness identified the accused in court as the perpetrator.
- [40] The Crown also called Detective Campbell at trial. Shortly after the shooting, he was tasked with identifying the registered owner of the vehicle depicted in the video surveillance. Detective Campbell blurted out that when he became involved in the investigation, the police "already had" information identifying a suspect by the name of "Alvaro". This was before Latimer's car had been located, and more than a day before she was interviewed by the police.
- [41] Although the Crown did not concede this point on appeal, I am satisfied on the basis of Detective Campbell's evidence that an astute jury would infer Baldivia had identified the appellant as the shooter in her statement to Detectives Gow and Wong.

3. The 911 Call and the Observations of Others at the Scene

- [42] Police attendance at the scene was initiated by a 911 call placed by El Hrichi on January 26, 2019, at 11:47:49 p.m. El Hrichi placed the call at Fuste's behest. After placing the call, he turned his phone over to Fuste, but he and others, including Fuste, were recorded on overlapping calls providing information to the 911 call taker.
- [43] El Hrichi testified that when he arrived at the scene, he "saw just one person, looked like a man, running away from the scene." He could not say whether this man was the shooter. The man was moving quickly and El Hrichi had only had a few seconds to make his observations. As a consequence, El Hrichi did not get a good look at him.
- [44] In cross-examination, El Hrichi confirmed that in his 911 call, he described the person running from the scene as a "young man". The appellant was 58 years old at the time of the shooting. El Hrichi gave a handwritten statement to the police very shortly after the shooting. In it, he described the young man running away from the scene as being "a bit taller than I am [El Hrichi is 5'11"] and around 170 pounds, short hair, black hair with a beige T-shirt, not holding anything on him that I noticed." The appellant was estimated by one police officer to be about 6'2" tall and 270 pounds.
- [45] While El Hrichi had no memory of the recorded events at the time of trial, he acknowledged being truthful and accurate when he provided this information to the police. While the issue was not specifically addressed at trial, El Hrichi's evidence appears to meet the requirements for admission as a past recollection recorded: see *R. v. Fliss*, 2002 SCC 16 at para. 63.
- [46] On the night of the shooting, Fuste saw the deceased talking with a man who was standing on the sidewalk in front of their house. The man was Hispanic and using crutches. She had previously seen this man in the neighbourhood and testified that the deceased knew him. Her evidence on this point was at odds with Baldivia's testimony that neither she nor the deceased had a conversation with anyone else that evening while they were sitting on the porch. Fuste also said the deceased was on bad terms with some people.
- [47] After making these observations, Fuste went back inside to watch a movie. Five to 20 minutes later, Fuste heard a gunshot. She ran outside and was on the scene within five seconds. Her grandmother was screaming for the police. She overheard the deceased repeatedly say, "Look how this sonofabitch just killed me" and "Call the police. I've been shot." She did not see a young man or anyone else running from the scene. She did not overhear her grandfather identify the shooter by name.
- [48] Constable Cox attended at the scene shortly after the shooting. She testified that there was some light shining out from the interior of the duplex and some illumination from streetlights. She agreed, however, that the exterior of the residence was very dark. There were no light bulbs in the exterior lights on the porch.

4. The Further Evidence of Kadesha Fuste

- [49] Fuste was recalled for further cross-examination after the ruling was made admitting Baldivia's preliminary inquiry evidence. Defending counsel sought to cross-examine Fuste on two issues: (1) whether, contrary to her preliminary inquiry testimony, Baldivia told her that the shooter was in a black SUV; and (2) Baldivia's memory problems and when they arose. The Crown did not oppose the defence request to recall Fuste for further cross-examination "on the agreement with my learned friend that I'm able to ask her that specific question", being whether Baldivia may have said to her that Alvaro owned a black SUV, not that the shot was taken from a black SUV. The judge seemingly agreed to this proposal. The Crown did not seek to reopen its examination-in-chief of Fuste after the admissibility ruling was made to elicit a prior consistent statement made by Baldivia to her identifying the appellant as the shooter.
- [50] Fuste testified in the further cross-examination that it was apparent Baldivia was experiencing memory problems in January 2019. She said Baldivia's mental health gradually declined after the death of her husband. A few months after her grandfather's death, Baldivia left a pot on the stove which caused a devastating fire in the duplex.
- [51] Fuste was also cross-examined on a statement she gave to the police in the early morning hours of January 27, 2019. Fuste confirmed that she had a conversation with Baldivia about what had happened shortly after the shooting and before she was interviewed by the police. In that conversation, Fuste said Baldivia told her "they" were driving a black SUV and that "it was from a black SUV". Fuste understood from this conversation that Baldivia was telling her the shooter was in a black SUV. It was common ground at trial that the appellant drove what Galan Lago referred to as a big, black Lincoln sedan.
- [52] In re-examination, Fuste testified that she had no memory of Baldivia telling her that the appellant owned a big car. She also testified that Baldivia never drew any connection between the black SUV and Alvaro. Fuste explained that Baldivia actually used the Spanish word "camioneta" in describing the car, which she understood to mean a larger vehicle like an SUV or pickup truck. She also agreed in re-examination that it was "definitely possible" she misheard what Baldivia told her about this vehicle because she was scared, Baldivia was distraught, and she was not really paying attention to what Baldivia was saying. Neither Fuste nor El Hrichi saw a black SUV leaving the scene after the shooting.
- [53] Crown counsel asked Fuste in re-examination whether Baldivia told her the name of the shooter. He did so without seeking leave of the trial judge to ask this question or a ruling on the admissibility of the evidence the question sought to adduce. The relevant portion of the re-examination is reproduced below:

Q. And I'm going to ask you about what the conversation was you had with your grandmother and ask you whether it's possible that she said to you -- firstly, she named -- she told you who had done the shooting?

A. She didn't have to tell me.

Q. Okay. But did she mention the name?

A. She may have not mentioned the name. It was kinda just known between us.

Q. Don't get into that.

A. Yeah.

Q. But --

A. Okay.

Q. -- what was the name?

A. She told me it was Alvaro who did it.

[Emphasis added.]

[54] No objection was taken to the elicitation of this evidence in re-examination. The judge did not interject and defending counsel did not seek leave to further cross-examine Fuste on this point.

[55] I note that in Fuste's statement to the police, she was asked whether Baldivia told her who had done the shooting. She responded that, "I know who did it and my grandma knows who did it and my whole family knows who did it, it's fairly obvious ". When asked "who is this person that you guys suspect did this?" (emphasis added), Fuste said that his name is "Alvaro". She did not say in her statement to the police that Baldivia named Alvaro as the shooter.

5. Cause of Death

[56] It was an agreed fact at trial that death was caused by a single gunshot wound which traversed the deceased's pelvis and severed his iliac artery. The injury caused the victim to bleed to death.

[57] In his Postmortem Report and in his evidence, Dr. Orde opined that the gunshot wound most likely entered the victim's upper right buttock region. Assuming the victim was then in a standing position, the bullet tracked from rear to front, from right to left, and slightly downwards. The bullet passed through Cepeda Silva's body, exiting over the front of his left groin region. The appellant relied on this evidence, along with Baldivia's evidence that she and her husband had turned away from the street and were going into the house when the incident occurred, to submit that neither Baldivia nor the deceased were facing the assailant when the shot was fired.

6. Circumstantial Evidence Connecting the Appellant to the Commission of the Offence

a) The Forensic Firearm Evidence

- [58] As noted earlier, the bullet that passed through Cepeda Silva's body was found lodged in the door of the duplex.
- [59] In the yard at the base of the pony wall, the police found an unused round of ammunition and a spent cartridge.
- [60] Robert Caunt, who was qualified to give opinion evidence in the field of forensic firearm and tool mark examination, testified that the bullet recovered from the door was fired from the same gun used to fire a bullet from the appellant's bedroom through a wall and into a refrigerator located in the kitchen of the residence the appellant shared with Galan Lago.
- b) Video Surveillance Evidence and the Evidence of Latimer
- [61] On January 26, 2019, at 11:37:50 p.m., video surveillance evidence captured the arrival of a black Hyundai in a parking stall behind a restaurant located very close to the scene of the shooting. A man wearing what appears from the video to be a beige jacket and baseball cap exited the vehicle and began walking in the direction of the scene at 11:40 p.m., about eight minutes before the first 911 call was placed. The same man was captured walking back to the vehicle at approximately 11:47:20 p.m., about 30 seconds before the first 911 call. Before getting into the car and driving away, the man momentarily placed what appears to be a handgun on the roof of the vehicle. The man's facial features cannot clearly be seen. While his gait might be described as irregular or laboured, he was not walking with an obvious or pronounced limp.
- [62] Latimer, who knew the appellant as a regular customer of the bar she was working at, identified the Hyundai depicted in the video surveillance evidence as her vehicle. She testified that she loaned it to the appellant a week or two before the shooting. Latimer explained the context in which the loan was made. A few weeks before the loan, the appellant attended at her apartment with significant facial injuries. He told her that he had been beaten up and that his assailants struck him in the knees, ribs, and back. She took him to the hospital. Latimer testified that he had a difficult time getting in and out of her vehicle. It was an admitted fact at trial that on January 4, 2019, the appellant attended at St. Paul's Hospital in Vancouver. He presented with facial injuries and multiple contusions to both knees. He complained of being assaulted.
- [63] A week to 10 days after taking the appellant to the hospital, the appellant told Latimer that someone had attempted to run him over in a parking lot. She was worried the appellant's assailants would recognize his vehicle and target him for further attack. She suggested they temporarily switch vehicles for his own protection. He agreed. He returned her Hyundai the morning after the shooting. He came by for coffee that day and stayed for about 10 minutes. Latimer testified that she did not see the appellant walk very much and only saw him take "a few steps" that day. She agreed, however, that his walking was very slow. He was otherwise acting normally. Latimer acknowledged never having seen the appellant walk in urgent circumstances.

- [64] Latimer was asked whether she recognized the man depicted in the video surveillance evidence. She testified that she could not identify this person because she could not see his face.
- [65] The appellant was arrested on January 28, 2019. At the time of his arrest, the appellant was wearing a two-tone jacket. The back of the jacket and the sleeves appear to be black while the front appears to be beige or light grey in colour.
- [66] Detective Gow testified that the appellant was favouring his right knee and that his mobility was quite compromised at the time of his arrest. Detective Wong similarly testified that the appellant was walking with a noticeable limp. They both testified that the appellant needed assistance getting into and out of the police wagon. Their evidence on this point was confirmed by a video taken of the appellant's arrival at the Vancouver Jail.
- [67] It was also an admitted fact at trial that on February 11, 2019--about two weeks after the shooting--the appellant was seen by a nurse to be using a wheelchair.
- [68] This body of evidence, said to be inconsistent with the appellant being able to "run away" from the scene, was relied on by the defence to seed a reasonable doubt on the issue of identity.

7. The Evidence of Galan Lago

- [69] Galan Lago lived with the appellant for more than five years before the shooting. He was friends with the appellant and the deceased. He testified that "the three of [them] would know each other as co-nationals [Cubans] and friends." Galan Lago testified that the appellant always wore a black jacket.
- [70] Galan Lago testified in examination-in-chief that he told the appellant on January 27 that people were saying on social media the appellant had shot Cepeda Silva. The appellant replied that it was a lie and denied being the shooter.
- [71] The judge immediately instructed the jury that what others may have said about the appellant's responsibility for the shooting was hearsay, inadmissible for the truth. The jury was properly instructed that what the appellant said to Galan Lago was, however, admissible for the truth of its content.
- [72] Galan Lago identified the appellant as the person depicted in the surveillance video driving Latimer's Hyundai. He recognized the appellant because of the way he walked and because of the car, with which he was familiar. He also recognized the appellant because of his thickness, width and size.
- [73] Galan Lago testified that two weeks before the shooting, the appellant was walking with a limp. The appellant told him he had been attacked on Hastings Street. He agreed that the limp was not evident in the video depicting the appellant with Latimer's car.

[74] Galan Lago testified that the appellant had Latimer's car for about a week before the shooting, and that he was driving his own car again on January 27, 2019, the day after the shooting.

[75] The Crown acknowledged in a pre-charge conference that Galan Lago's identification evidence "would not have much weight on its own", but was nonetheless significant because it linked Latimer's vehicle, which had been loaned to the appellant, to the crime scene.

8. The Closing Addresses of Counsel

a) The Crown

[76] The Crown submitted to the jury that the direct evidence of Baldivia and Galan Lago identifying the appellant as the shooter was powerfully confirmed by: (1) forensic evidence that the bullet recovered from Cepeda Silva's door and the bullet recovered from the appellant's apartment were fired from the same gun; and (2) the appellant's possession of Latimer's vehicle in the days before the killing, and the video surveillance evidence showing this vehicle arriving and departing from a place very near the scene and at a time proximate to the shooting.

[77] The Crown never expressly referred to Baldivia's evidence that Cepeda Silva identified "Alvaro" as the shooter in its closing address. On one occasion, however, the Crown submitted to the jury that Baldivia repeated a number of times "that they had not seen Alvaro until after the shot had been fired" (emphasis added).

[78] The Crown did not suggest to the jury that Baldivia made a prior consistent statement identifying the appellant as the shooter, much less suggest that any out-of-court statement made by her could be relied on to add cogency to her in-court identification of the appellant as the perpetrator.

[79] Finally, Crown counsel made no direct mention in his closing address of the evidence elicited in the re-examination of Fuste that Baldivia told her very shortly after the event that "Alvaro" was the shooter. The Crown did, however, remind the jury that "Ms. Fuste attributes to her grandmother as having said that Alvaro had attended to the residence in a black SUV".

[80] On the question of motive, the Crown suggested that it was reasonable to conclude the appellant believed the deceased to be responsible for the attack which sent him to the hospital, and decided thereafter to exact his revenge.

b) The Defence

[81] Defending counsel emphasized Latimer's inability to identify the appellant as the driver of the vehicle captured on video surveillance, and El Hrichi's description of the "young man" he observed "running" from the scene. He submitted that Baldivia was not a credible witness and her identification evidence was unreliable. He emphasized her evidence that the shooter "ran" from the scene--something the appellant was unlikely to be able to do given his limited mobility at the time. Defending counsel also suggested that the video surveillance

evidence confirmed that the shooter was wearing a mask. He submitted that if the jury accepted this evidence, it would undermine Baldivia's ability to identify the perpetrator and, therefore, the reliability of her account. Finally, the defence emphasized Fuste's evidence that Baldivia: (1) told her that the shooter was in a large black vehicle, like an SUV; and (2) was having memory problems that predated the shooting. He submitted that this latter piece of information raised questions about whether her memory problems were operative when she testified at the preliminary inquiry. He suggested that these factors, taken together, were sufficient to raise a reasonable doubt about whether the appellant committed the offence.

- [82] Defending counsel made no mention of the identifying declaration Baldivia attributed to Cepeda Silva in her preliminary inquiry testimony. In addition, counsel did not make any mention of the evidence of Detectives Gow, Wong or Campbell about what they learned from Baldivia's January 27, 2019, statement to the police.

9. The Jury Charge

- [83] The judge made no reference in the charge to Cepeda Silva's identifying declaration embedded in Baldivia's testimony. Further, he did not refer to the evidence of Detective Campbell or Fuste concerning the prior statements made by Baldivia identifying the appellant as the shooter. No instruction was given to the jury on the use they could make of Baldivia's prior consistent identification of Alvaro as the shooter. At the same time, the judge did not suggest to the jury that Baldivia's in-court identification of the appellant as the shooter was made more reliable by virtue of the fact that she had consistently conveyed this account.
- [84] The judge instructed the jury that if they believed the appellant's denial of responsibility for the offence, or if they thought that denial might be true, they were obliged to consider this evidence in deciding whether they entertained a reasonable doubt about whether he shot Cepeda Silva.

10. Jury Questions

- [85] The jury deliberated for portions of five days before returning a guilty verdict.
- [86] In addition to asking that Baldivia's preliminary inquiry testimony and El Hrichi's evidence be replayed on the first day of their deliberations, the jury asked a number of other questions. The questions that follow, which were asked on the second day of the jury's deliberations, have relevance to the appellant's third ground of appeal:

Was Maria Baldivia interviewed by VPD [Vancouver Police Department] at scene of crime? Did she give a written statement later that night at VPD station? If so, can we see or hear them read? If not, can we know if she identified Alvaro Roche-Garcia at the scene questioning +/- or later at VPD station?

[87] The judge initially instructed the jury there was no evidence Baldivia was interviewed by the VPD at the scene and no evidence that she gave a written statement later that night to the police. In response to the last question, the judge instructed the jury that the evidence was closed and they were obliged to decide the case on the basis of the evidence they had heard and nothing else. He warned them against speculating about what someone might have said on another occasion. He instructed the jury that out-of-court statements made by a witness do not ordinarily form part of the evidence. As the judge was concluding his answer with the expression of his wish that it would be of assistance to the jury, the following exchange occurred:

THE JURY FOREPERSON: Do you want to just [give] me a second just because I want to make sure --

THE COURT: Okay.

THE JURY FOREPERSON: -- that [indiscernible/not near mic]. I think it's important. We've had some questions concerning [indiscernible].

CROWN COUNSEL: My Lord --

THE COURT: Just hold on, please. Yes?

CROWN COUNSEL: I apologize for interjecting at this time, but the question caught me by surprise. I wasn't ready for it and I want to tell you there's some amplification that needs to be made. I just wanted --

THE COURT: Okay. Should I excuse the jury to hear what you have to say?

CROWN COUNSEL: Yes.

[88] In the absence of the jury, it was brought to the judge's attention that evidence was called that Baldivia did provide a statement to the police the night of the offence. In the result, the jury was provided with this corrective instruction:

THE COURT: Folks, I'm going back now to the last series of questions that you asked and counsel were good enough to review their notes quite carefully and it turns out, I think, that the answer I gave you a few moments [ago] may have been incorrect. Your question was -- the thrust of your question is whether Ms. Baldivia gave a statement at the scene or later at the VPD facility, and the answer is this.

Both Detective Wong and Detective Gow who testified before you said essentially this They went to the police station to interview Ms. Baldivia. One said she provided a name and background, the other said she provided a name of a potential suspect.

Now, that's their evidence and it's not for me to go one millimetre past the boundary of their evidence

So, you folks are ready to get back underway and begin your deliberations?

THE JURY FOREPERSON: Yes.

[89] In their submissions to the judge on how the question should be answered, neither Crown nor defending counsel made any mention of the evidence of Detective Campbell. As is apparent from the corrective instruction set out above, neither did the trial judge.

III. Analysis

1. The Fresh Evidence Application

[90] The application to adduce fresh evidence is unusual given the absence of an ineffective assistance of counsel ground of appeal. I leave for another day a broader discussion of the admissibility of the kind of fresh evidence the appellant seeks to adduce on this appeal.

[91] For the purposes of this case, I am not prepared to conclude from anything in the record that the appellant's trial counsel (not counsel on appeal) failed to question the admissibility of the deceased's statement for strategic reasons. Similarly, I think it obvious that the appellant's trial counsel did not remain silent in the face of the proposed W. (D.) instruction for tactical reasons. There was no advantage accruing to the defence from silence on either of these issues, and the Crown does not suggest otherwise. In the context of this case, it is my view that trial counsel's failure to identify the admissibility of Cepeda Silva's identifying declaration as an issue, or object to the instruction on the potential effect of the appellant's out-of-court denial of responsibility for the shooting are largely, if not wholly, irrelevant to the disposition of this appeal. The application therefore fails on the second branch of the well-known test governing the admission of fresh evidence on appeal that was set out in *Palmer v. The Queen*, [1980] 1 S.C.R. 759 at 775, 1979 CanLII 8.

2. Analysis of the Grounds of Appeal

a) Ground #1: The Admission of Cepeda Silva's Identification of the Appellant Embedded in Baldivia's Preliminary Inquiry Evidence

[92] I understand the Crown to accept the proposition that a hearsay statement embedded in testimony admitted under s. 715(1) of the Code is not admissible unless it qualifies for admission pursuant to an established hearsay exception or the principled approach. Put simply, presumptively inadmissible hearsay cannot ride into evidence on the coattails of an admissibility ruling made pursuant to s. 715(1): *R. v. Hoffman*, 2021 ONCA 781 at paras. 58-63.

[93] The Crown bore the initial burden of establishing that Cepeda Silva's hearsay statement identifying the appellant as the shooter was admissible. If the evidence was found to be admissible pursuant to an established hearsay exception, the burden would shift to the appellant to show that the evidence, despite falling within a traditional exception, should nevertheless be ruled inadmissible: *R. v. Starr*, 2000 SCC 40 at para. 214.

- [94] The Crown submits that the appellant's failure to object to the admission of this evidence at trial is a factor that should be given significant weight in addressing this ground of appeal. In particular, the Crown relies on *Lam v. Chiu*, 2014 BCCA 32, in which the common-sense observation was made that if a party objects to the admissibility of evidence, the objection should be made in a timely manner; namely, at the time the evidence is tendered: at para. 47. The failure to object creates a significant hurdle to raising the objection for the first time on appeal: *Del Bianco v. Yang*, 2021 BCCA 315 at para. 48. At the same time, the failure to make timely objection to the admission of evidence does not preclude the making of appellate complaint: *R. v. Bero* (2000), 151 C.C.C. (3d) 545 (Ont. C.A.) at para. 13, 2000 CanLII 16956. An appellate court may, however, be more reluctant to entertain an admissibility challenge raised for the first time on appeal where it is apparent--as it was in *Bero* and *Lam*--that the failure to make timely objection reflects an informed choice.
- [95] On the record in this case, and without relying on any of the proposed fresh evidence, I am satisfied that the failure to raise the admissibility of this evidence does not reflect an informed choice made by or on the appellant's behalf. The Crown does not suggest otherwise. It is apparent to me that counsel and the trial judge simply overlooked the issue. I suspect the oversight arose as a consequence of Baldivia's preliminary inquiry evidence being admitted late in the proceedings, and perhaps contrary to the expectations of counsel when the trial began.
- [96] In any event, I am not prepared to give defending counsel's failure to object to the admission of this evidence the substantial weight the Crown asserts it should have. I emphasize that the Crown bore the initial burden of establishing the admissibility of the deceased's identifying declaration. Further, even though he received no assistance from counsel on this point, it was the ultimate responsibility of the trial judge to ensure that presumptively inadmissible evidence, highly prejudicial to the appellant, not be ushered into evidence without an admissibility ruling. As I noted in *R. v. A.L.*, 2020 BCCA 18 at para. 150, leave to appeal ref'd, [2020] S.C.C.A. No. 83, "[t]he gatekeeping function of trial judges is such that they have a duty to vigilantly assess and exclude inadmissible evidence regardless of the positions taken (or not taken) by counsel."
- [97] At the same time, the fact that the issue was not identified at trial puts this Court in the difficult position of being asked to undertake an admissibility analysis now, and do so on an undeveloped record: *Bero* at para. 12. The issue is further complicated by the absence of any suggestion of ineffective representation at trial.
- [98] I will begin my analysis of this ground of appeal by first addressing the submission of the Crown that the jury could not have relied on the deceased's identifying declaration because they were instructed in the main charge to disregard hearsay. In support of its position, the Crown relies on the judge's general instruction to the jury on hearsay evidence excerpted below:

The general rule in a trial is that the evidence you will consider will come from the mouths of witnesses who are in this courtroom, who have sworn an oath or taken an affirmation, and whom you will observe testifying and being cross-examined. We believe that all of those methods are important to enabling the trier of fact to assess the value of the evidence of a given witness, specifically its reliability.

Where a witness has testified to the effect that other persons have told them things, then that evidence is not to be considered by the trier of fact for its truth value, because there is no way that you, as the triers of fact, are able to assess its reliability.

[Emphasis added.]

[99] The judge told the jury, "[t]here are some exceptions to that rule and I don't intend to delve into them all." He told the jury that the appellant's out-of-court denial of responsibility for the shooting when confronted by Galan Lago about what people were saying on social media was admissible for its truth.

[100] The jury also received a mid-trial instruction on the use they could make of Baldivia's evidence. This instruction, given before Baldivia's preliminary inquiry evidence was played for the jury, is set out below:

Maria Baldivia, a person whom you've heard referenced in this trial, she's the wife of the deceased, Mr. Cepeda Silva, gave evidence at a preliminary inquiry

Ms. Baldivia is not available to testify here at trial. She's not available because of medical circumstances. Her testimony at the preliminary inquiry was recorded and a transcript was prepared. That recording will be played for you and you'll have a copy of the transcript to follow along. That's how the evidence of this witness, Ms. Baldivia, will be put before you

Of course, because she's not here, she's not here to be cross-examined. So, the examination and cross-examination at the preliminary inquiry will stand as her evidence in this trial.

Now, it's up to you to decide how much or how little you'll believe or rely upon her evidence. As is the case with any witness, you may believe and rely on all, part or none of it in deciding the case. However, when you consider this evidence, remember that you didn't see or hear Ms. Baldivia testify, and also consider to what extent there's a dispute about what she said in her evidence.

[Emphasis added.]

[101] Against this background, I cannot conclude with any degree of confidence that the jury would have understood from the general hearsay instruction given in the main charge that they could not have regard to Cepeda Silva's identification of "Alvaro" as the shooter.

[102] I have come to this conclusion for a number of reasons. First, as Cepeda Silva's declaration embedded in Baldivia's preliminary inquiry evidence was not identified by counsel or the judge, the general hearsay instruction was not specifically linked to this evidence. Second, the instruction affirmed that the rule against hearsay is a general one subject to exceptions.

Third, it is reasonable to conclude that the jury would regard the mid-trial instruction on the use they could make of Baldivia's evidence as a specific instruction applicable to her evidence. Nowhere was the jury instructed that Cepeda Silva's identification of the shooter, embedded in Baldivia's evidence, was inadmissible hearsay. There was no dispute about what Baldivia heard her husband say, and the jury was instructed that it was open to them to believe and rely on all of her testimony. Finally, our abiding faith in the ability of juries to understand and follow instructions is premised on those instructions being clear: *R. v. Corbett*, [1988] 1 S.C.R. 670 at 692, 1988 CanLII 80. I think it most unlikely that the jury would have regarded the general hearsay instruction given in the main charge as displacing the specific and unqualified instruction they received six days earlier on the use they could make of Baldivia's testimony.

[103] I turn next to the Crown's submission that Cepeda Silva's identifying declaration, as testified to by Baldivia, would inevitably have been admitted under one or both of two established exceptions to the hearsay rule--as a dying declaration or as a spontaneous utterance.

[104] The criteria for admissibility under the dying declaration exception are not in issue in this case. The declaration must be made under a settled, hopeless expectation of almost immediate death, the statement must concern the circumstances of the death, the statement must be such that it would have been admissible had the deceased been able to testify, and the index offence must be the homicide of the declarant: *R. v. Nurse*, 2019 ONCA 260 at paras. 71-72.

[105] As noted in *Nurse* at para. 73:

Dying declarations can be very powerful. After all, the statements come from the very person who was killed, speaking about the circumstances of their death, often moments before the solemn event of their death. However, these inherent strengths are counterbalanced against the obvious inability to cross-examine the declarant. It is for this reason that the "courts have insisted on strict adherence to the prerequisites of the exception before granting admissibility": see *Lederman, Bryant and Fuerst*, at p. 377. *Davis J.* in [*R. v. Schwartzenhauer*, [1935] S.C.R. 367, [1935] S.C.J. No. 7] at p. 369 S.C.R., underscored this caution by adopting the following passage from *Byles J.* in *R. v. Jenkins*, [(1869), L.R. 1 C.C.R. 187]:

These dying declarations are to be received with scrupulous, I had almost said with superstitious, care. The declarant is subject to no cross-examination. No oath need be administered. There can be no prosecution for perjury. There is always danger of a mistake that cannot be corrected.

[Emphasis added.]

[106] The spontaneous utterance exception involves a statement "made under the stress or pressure of such a dramatic or startling act or event" that the possibility of concoction or deception can safely be discounted: *Nurse* at paras. 79-82, citing the judgment of *Robins J.A.* in *R. v. Khan*, [1988] O.J. No. 578, 42 C.C.C. (3d) 197 (C.A.), *aff'd* [1990] 2 S.C.R. 531, [1990] S.C.J. No. 81.

- [107] These two exceptions "share certain functional features": Nurse at para. 78. In both, the circumstantial guarantee of trustworthiness springs from the context in which the statement is made. In the case of a dying declaration, it has been said that, when every hope of this world is gone, "the mind is induced by the most powerful considerations to speak the truth": *R. v. Woodcock* (1789), 1 Leach 500, 168 E.R. 352 (K.B.) at 353. The rationale for the spontaneous utterance exception lies in the fact that the statement is made while the impact of the shocking event is still operative, and before any opportunity to fabricate has arisen: Khan at 208.
- [108] Applying these criteria, the Crown submits it could easily have established that Cepeda Silva's identification of "Alvaro" as the shooter met the criteria for admission as either a dying declaration or a spontaneous utterance.
- [109] The appellant submits that the judge had an independent duty to ensure that presumptively inadmissible hearsay not go before the jury without inquiring into the basis upon which such evidence could be received. I agree with the appellant on this point and conclude that the judge erred in law by failing to exercise his gatekeeping responsibilities with respect to the admission of this evidence.
- [110] The appellant also submits that the admissibility of Cepeda Silva's identification of the appellant as the shooter could have been challenged at trial through a number of different routes.
- [111] First, he could have challenged the two exceptions on a categorical basis, arguing that neither of them is supported by the indicia of necessity and reliability required by the principled approach: *R. v. Mapara*, 2005 SCC 23 at para. 15(b). Failing that, the appellant could have argued that the evidence does not meet the admissibility requirements of either of the two exceptions.
- [112] In the alternative, the appellant could have argued that this was a "rare", "unusual" or "exceptional" case in which evidence shown to fall within a valid hearsay exception--and, thus presumptively admissible--should nevertheless be excluded because it does not meet the threshold reliability requirements of the principled approach: Mapara at para. 15(c); Starr at para. 214; *R. v. Terrico*, 2005 BCCA 361 at para. 23. In support of this submission he notes the observation of one author that "[d]ying declarations would seem well suited to the moderating influence of the case-by-case 'rare' exclusion considered under the fail-safe" as "there may be cases in which the impairment of [the declarant's] capacity to perceive are so significant that it would be unfair to oblige the accused to answer the allegation contained in the out-of-court statement without the forensic benefits (cross-examination etc.) associated with in-court testimony": S. Casey Hill, David M. Tanovich & Louis P. Strezos, *McWilliams' Canadian Criminal Evidence*, 5th ed. (loose-leaf) (Toronto: Thomson Reuters Canada, 2013) at §7:57.

- [113] The burden on the appellant to demonstrate that this was a rare case warranting the exclusion of evidence shown to fall within an established exception to the hearsay rule would not easily have been met. The exceptions were developed over time for statements considered to be inherently trustworthy because of the circumstances in which they are made: *R. v. Youvarajah*, 2013 SCC 41 at para. 20. It follows that reliability challenges to a piece of evidence shown to be admissible under an established hearsay exception must raise concerns that supplant the premise of threshold reliability upon which the exception rests. As McLachlin C.J. noted in *Mapara*: "[i]n all but the most exceptional cases the argument is spent at the point where an exception to the hearsay rule is found to comply with the principled approach to the hearsay rule": at para. 34.
- [114] In the further alternative, the appellant could have argued that even if Cepeda Silva's identifying declaration was found to satisfy the criterion of threshold reliability, the court should nevertheless exercise its discretion to exclude the evidence on grounds that its prejudicial effect outweighed its probative value: *R. v. Seaboyer*, [1991] 2 S.C.R. 577 at 609-611, 1991 CanLII 76; *R. v. Hawkins*, [1996] 3 S.C.R. 1043 at para. 85, 1996 CanLII 154; *McKinnon Estate v. Cadegan*, 2021 NSCA 79 at para. 36.
- [115] In support of these submissions, the appellant highlights: the difficult viewing circumstances in which Cepeda Silva's observations were made given the poor lighting conditions at the time of the shooting and the fact that his back was at least partially turned away from his assailant when the gun was discharged; questions about Cepeda Silva's honesty sourced in malice and a motive to falsely implicate the appellant in the shooting; and, concerns about Baldivia's credibility and reliability so profound as to raise issues about whether the identifying declaration she imputes to Cepeda Silva was even made. The appellant did not identify the precise stage at which these considerations would be relevant to the admissibility analysis and I need not weigh in on the emerging jurisprudence in this area to resolve this appeal.
- [116] The appellant did not address the test he would have to meet to succeed on this ground of appeal. I note that in *Bero*, the Court held that, in the absence of an ineffective assistance of counsel ground of appeal, a similarly-situated appellant was obliged to do more than merely show a possibility that the evidence may have been excluded had the issue been raised: *Bero* at para. 13. While I am inclined to the view that *Bero* correctly states the law in this context, I need not definitively resolve the issue to decide this appeal and I decline to do so, particularly in the absence of hearing from counsel on this point.
- [117] Finally, even if the evidence was found to fall within one of the exceptions and not subject to exclusion either on exceptional grounds or pursuant to the judge's discretion to exclude evidence, the prejudicial effect of which outweighs its probative value, the appellant points out that he could have argued before the jury that they should not accept the reliability of Baldivia's claim that the identifying declaration was made because of its inherent frailties. In addition, the appellant says he could have sought an instruction alerting the jury to aspects of the evidence that could undermine the jury's faith in the reliability of Baldivia's

claim that Cepeda Silva identified him as the shooter.

[118] Without foreclosing litigation of this issue on the retrial, and on the basis of the limited submissions we heard on appeal, I see no realistic prospect that the deceased's identifying declaration would have been excluded on grounds that one or both of the two potentially applicable hearsay exceptions are invalid. Similarly, and on the basis of the argument made on appeal, it is my tentative view that the evidence would likely have been found to meet the criteria for admission as a dying declaration or a spontaneous utterance.

[119] On this latter point, I would specifically reject the appellant's argument that the identifying declaration could not have been admitted at trial because it was no more than the expression of an opinion. He relies on *R. v. Chapdelaine*, [1935] S.C.R. 53, 1934 CanLII 46 in support of this submission. There are two insurmountable flaws with the appellant's submission on this point. First, identification evidence of the type called in this case is routinely admitted. Whether properly characterized as a statement of fact or an admissible form of lay opinion evidence (see *R. v. Graat*, [1982] 2 S.C.R. 819 at 837, 1982 CanLII 33) is a matter I need not address in these reasons. Second, the appellant can derive no comfort from *Chapdelaine*. In that case, the deceased surmised in a statement made days before his death that he had been poisoned by his wife. The statement was a speculative one, not founded on personal knowledge. There is no parallel between *Chapdelaine* and the case at bar.

[120] Given the undeveloped state of the record on factual matters of potential relevance and the disposition I am proposing, I decline to express any definitive view about whether the appellant had a realistic chance of having this evidence excluded on exceptional grounds--that, despite falling within a valid exception to the hearsay rule, the evidence lacks the indicia of threshold reliability that would be required to gain admission under the principled approach. The appellant would have to respond to the Crown's position that many of its arguments appear either to be subsumed by the requirements of the exceptions themselves, or are relevant to the assessment of ultimate, not threshold, reliability. Further, the appellant would have to contend with the considerable body of independent evidence confirming the reliability of Baldivia's evidence.

[121] For the same reasons, I decline to express any definitive view about whether the appellant had a realistic chance of persuading the judge to exercise his discretion to exclude Baldivia's evidence that the appellant verbally identified "Alvaro" as the shooter on grounds that its prejudicial effect outweighed its probative value. On the record available to us, what might be said in support of the argument is this:

· In her January 27, 2019, statement (which was entered as an exhibit on the s. 715(1) admissibility voir dire), Baldivia did not attribute the identifying declaration to the deceased. She did not tell the police that her husband identified "Alvaro" by name as the shooter. She told the police that the deceased said only: "Look at how he killed me"; "He has killed me"; "He killed me this guy killed me, this man killed me"; and/or "Look how this man has killed me";

- Baldivia's April 10, 2019, statement to the police was also entered as an exhibit on the s. 715(1) admissibility voir dire. Although the circumstances of the shooting were discussed again, Baldivia did not tell the police that the deceased said, "Look how Alvaro has killed me" after the shot was fired;
- The first occasion on which Baldivia made any mention of the identifying declaration appears to have been in her preliminary inquiry testimony;
- Baldivia was not available for cross-examination on this issue at trial;
- Fuste overheard the deceased repeatedly say, "Look how this sonofabitch just killed me." She must, therefore, have been present in the immediate aftermath of the shooting. She did not, however, hear Cepeda Silva name the appellant as the shooter;
- Fuste made no mention in her statements or in her testimony of Baldivia having told her during the conversation they had very shortly after the shooting that the deceased made the identifying declaration;
- El Hrichi, who was also on the scene very shortly after the shooting did not overhear Cepeda Silva name the appellant as the shooter; and
- The evidence of the pathologist would suggest that the deceased's body was turned away from the perpetrator when the fatal shot was fired.

[122] While I am not in a position to forecast with any degree of confidence how the judge might have exercised his discretion on this issue, there is, in my view, some basis in the evidence for a submission that the prejudicial effect of Baldivia's evidence that Cepeda Silva identified "Alvaro" as the shooter in a dying declaration outweighs its probative value.

[123] Even assuming the evidence would have been admitted as a dying declaration or a spontaneous utterance, it remains the case that what the appellant lost as a consequence of the issue not being identified at trial is the opportunity to challenge the ultimate reliability of Baldivia's evidence on this point.

[124] I do not think it is an answer to this ground of appeal to say that what was lost is attributable to the ineffective assistance of counsel, and to dismiss it because ineffective assistance has not been raised by the appellant. Respectfully, and even though he did not receive from counsel the assistance to which he was entitled, what was lost is attributable to the trial judge's failure to exercise his gatekeeping function at the admissibility stage. If an admissibility inquiry had been conducted, as it should have been, it is likely that the frailties associated with this evidence, identified by counsel on appeal, would have been identified in the court below. Even if the judge ruled the evidence to be admissible, the jury would have been alive to the need for close consideration of the reliability of this evidence, certainly through the submissions of the appellant's trial counsel and, quite possibly, through a direction from the trial judge warning the jury of the need for caution before acting on it. I consider the consequences of this error in law to be serious. Identity was the

main issue at trial. As is evident from their questions, the jury was focused on this very issue.

- [125] The jury heard that Cepeda Silva identified the appellant as the shooter shortly before he succumbed to his gunshot wound. The evidence can clearly be heard on the recording of Baldivia's preliminary inquiry testimony. Indeed, the jury heard that evidence twice and with the benefit of a transcript reflecting Baldivia's account that the deceased said, "look how Alvaro has killed me" almost immediately after the shot was fired.
- [126] As noted in *Nurse*, evidence of this kind is powerful and potentially very persuasive: at para. 73. The Crown (perhaps inadvertently) reminded the jury that "they"--Baldivia and Cepeda Silva--had not seen Alvaro until after the shot had been fired. The jury may well have understood this submission to harken back to Cepeda Silva's identifying declaration as testified to by Baldivia.
- [127] At the end of the day, we cannot know what use the jury might have made of this evidence. We do know that the jury did not hear the evidence or submissions that could conceivably cast doubt on whether the statement was even made. Nor did the jury receive any instructions alerting them to the need for caution before acting on this aspect of Baldivia's account. In *R. v. McIntosh*, [1938] 1 W.W.R. 211 at 214 (B.C.C.A.), Martin J.A. said that "every principle of justice requires that every reasonable opportunity should be afforded the accused to answer accusations so difficult to meet as those made by a 'witness' from the grave." The remarks have obvious application to this appeal.
- [128] In my view, the question becomes whether the curative proviso should be applied to this ground of appeal because the evidence against the appellant is overwhelming and his conviction is inevitable. I will return to this issue after addressing the remaining grounds of appeal.
- b) Ground #2: Failure to Properly Instruct the Jury on the Application of W. (D.) Principles to the Appellant's Out-Of-Court Denial
- [129] As is well-known to practitioners and trial judges, in *W. (D.)*, the Court held that a "trial judge is required to instruct the jury that they must acquit the accused in two situations. First, if they believe the accused. Second, if they do not believe the accused's evidence but still have a reasonable doubt as to his guilt after considering the accused's evidence in the context of the evidence as a whole" (at 757, citations omitted, emphasis in original). The Court suggested the following formula at 758, which is routinely followed by trial judges presiding with and without a jury:

First, if you believe the evidence of the accused, obviously you must acquit.

Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.

Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

- [130] It is settled law that where the Crown elects to adduce an out-of-court declaration made by the accused, the declaration, including its exculpatory portions, become substantively admissible in favour of the accused: *R. v. Hughes*, [1942] S.C.R. 517 at 521, 1942 CanLII 22; *R. v. Rojas*, 2008 SCC 56 at para. 37. It is also settled law that *W. (D.)* principles apply to a case where, as here, the accused elects not to testify but to rely, instead, on exculpatory evidence adduced by the Crown: see *R. v. Sanhueza*, 2020 BCCA 279 at paras. 29-34. It follows that the jury was obliged to acquit the appellant if, after considering his out-of-court denial of responsibility for the offence in the context of the evidence as a whole: (a) they believed his statement that he did not shoot Cepeda Silva; or (b) they did not believe the statement (in the sense that they could not be sure of its truth) but nonetheless concluded that it raised a reasonable doubt as to his guilt.
- [131] There is, of course, "nothing sacrosanct" about the formula set out in *W. (D.)*: *R. v. Dinardo*, 2008 SCC 24 at para. 23. Appellate courts take a functional approach when reviewing jury charges: *R. v. Abdullahi*, 2023 SCC 19 at paras. 34-35. In all cases, the relevant question is simply whether the charge, viewed in the context of the proceedings as a whole, properly equipped the jury to decide the case according to the law and the evidence. When examining particular language used in a jury instruction, what matters is the general sense the words used must have conveyed to the jury: *R. v. Daley*, 2007 SCC 53 at paras. 30-31. Consequently, "[a] single ambiguous or problematic statement in one part of a charge will not necessarily be an error of law where the charge as a whole equipped the jury with an accurate understanding of the relevant legal issue ...": *Abdullahi* at para. 41. The principles of appellate review applicable to jury charges have been restated on many occasions, including in *R. v. Araya*, 2015 SCC 11 at para. 39; *R. v. Goforth*, 2022 SCC 25 at paras. 20-22; and *Abdullahi* at para. 72.
- [132] Failure to object at trial to an alleged deficiency in the charge raised for the first time on appeal is a factor on appellate review, but not necessarily a determinative one. In all cases, responsibility for the correctness of instructions on the law rests with the judge: *R. v. Khill*, 2021 SCC 37 at para. 144. At the same time, counsel's failure to object to the charge may say something, perhaps even something significant, about its sufficiency, overall accuracy, and the seriousness of the non-direction or misdirection alleged on appeal: *R. v. Jacquard*, [1997] 1 S.C.R. 314 at paras. 35-38, 1997 CanLII 374; *Daley* at para. 58; *Goforth* at para. 39; *Abdullahi* at para. 68. This is more likely to be the case when the impugned instruction has been vetted with trial counsel in a pre-charge conference: *R. v. Polimac*, 2010 ONCA 346 at para. 96, leave to appeal ref'd [2010] 3 S.C.R. vi. Failure to object may also be a consideration in determining whether to apply the curative proviso: *Abdullahi* at para. 70.

[133] In this case, what matters is whether the jury would have understood from the language used by the judge in the context of the proceeding as a whole that they were obliged to acquit the appellant if they believed his out-of-court denial of responsibility for the offence or if the denial raised a reasonable doubt about his guilt.

[134] The instruction given to the jury on this issue is excerpted below:

Mr. Galan Lago testified that he had a conversation with Mr. Roche Garcia after he, that is Mr. Galan Lago, heard that Mr. Cepeda Silva had been killed. He testified that he told Mr. Roche Garcia that people on a social network site had suggested that Mr. Roche Garcia had shot Mr. Cepeda Silva. He said that Mr. Roche Garcia responded that wasn't true, he had not done that.

In this particular case, because the person whose utterance is being reported is the accused, a special rule applies. This is a statement that you are entitled to consider for its truth value.

Specifically, because it is what we characterize as an exculpatory statement, that is a denial of guilt, if you accept that the accused made that statement or at least you are not convinced he didn't say it, then you will proceed as though he did say those words. You are then entitled to consider them for their truth value. If you believe them or even if you think they might be true, then you will consider them in deciding whether there is a reasonable doubt that Mr. Roche Garcia shot Mr. Cepeda Silva.

Some or all of the statement may help Mr. Roche Garcia in his defence. You must consider these remarks that may help him, along with all of the other evidence, unless you conclude that he did not make them. In other words, you must consider all the remarks that might help Mr. Roche Garcia, even if you are not sure whether he said them.

I am not directing you that you must believe that statement, but rather that unless you are certain he didn't say it, you are obliged to consider whether that statement raises a reasonable doubt for you.

Do not consider this evidence, however, by itself. It is only part of the evidence in this case. Take it into account along with other evidence that may make it more or less reliable. It is up to you to decide how much or little you will believe of and rely upon it to decide this case.

[Emphasis added.]

[135] No objection was taken to this instruction despite the fact that it was included in the first draft charge circulated to counsel, and in two revised versions of the charge provided to counsel and vetted before final instructions were given to the jury.

[136] The judge did not instruct the jury in accordance with the principles set out in W. (D.) anywhere in the charge. The jury was instructed that the central issue in the case was whether the Crown proved beyond a reasonable doubt that the appellant is the person who shot Cepeda Silva. They were also instructed that unless they were satisfied beyond a reasonable doubt that the appellant shot the deceased, they "must" find him not guilty.

- [137] Critically, the jury was not instructed, as they should have been, that they were obliged to acquit the appellant if, having regard to the evidence as a whole: (a) they believed his denial of responsibility for the offence; or (b) the denial raised a reasonable doubt about whether the appellant was the shooter. While the judge was not required to adhere to the W. (D.) formula, he was required, in some fashion, to unpack for the benefit of a lay jury what reasonable doubt means in the context of evaluating conflicting accounts: *R. v. J.H.S.*, 2008 SCC 30 at para. 9.
- [138] I think it apparent that the judge was, in the impugned instruction, attempting to explain to the jury two things.
- [139] First, the two circumstances in which they could take the appellant's denial into account; specifically, if they accepted that the accused made the statement to Galan Lago, or if they could not be sure he did not. The appellant can take no issue with this instruction; indeed, it may have been unduly beneficial to him. Second, the judge instructed the jury about the use they could make of the appellant's out-of-court denial--that it was an exculpatory statement admissible for its truth.
- [140] Unfortunately, the language the judge used in this portion of the charge had the inadvertent effect of instructing the jury that if they believed the appellant's denial or considered that it might be true, they would proceed to consider the denial in the context of the evidence as a whole and determine whether it raised a reasonable doubt. Again, the jury had to understand from the judge's instruction that if, in the context of the evidence as a whole, they believed the appellant's denial or considered that it raised a reasonable doubt about his guilt, they were required to acquit him.
- [141] I see nothing in the balance of the charge or in the submissions of counsel that would put this misdirection in some broader explanatory context. And, while it would be tempting to conclude that the jury would understand that belief in the appellant's denial would lead directly to an acquittal, that is not what they were told. Indeed, the jury was instructed that they were required to accept what the judge said about the law.
- [142] I would assign little significance to the failure of defending counsel to object to this portion of the charge. The failure to do so was clearly not tactical and, in the circumstances of this case, counsel's silence says very little about the sufficiency of the charge or the seriousness of the misdirection.
- [143] I would also reject the Crown's related contentions that: (1) the instruction given in this case was modelled on the specimen jury instruction for an accused's out-of-court exculpatory statement found in *The Honourable David Watt, Watt's Manual of Criminal Jury Instructions*, 2nd ed. (Toronto: Carswell, 2015), Final 24A, "Out-Of-Court Utterances and Statements of Accused: General Instruction" at 175-177 [WMCJI]; and (2) this instruction was approved for use in a case of this kind in *Sanhueza*.

[144] First, the specimen jury instruction upon which the Crown relies does not contain the problematic language used by the judge in this case. Second, the specimen instruction was not designed for use where the accused's out-of-court statement is exculpatory. As is made clear in WMCJI, where the out-of-court statement is exculpatory, the jury should be instructed along the lines suggested in Final 16, "Testimony of Accused: The W. (D.) Instruction" at 152-153. Final 16 recommends an instruction along these lines:

If you believe the accused's out-of-court statement that he did not commit the offence charged, you must find him not guilty.

Even if you do not believe the accused's out-of-court statement, if it leaves you with a reasonable doubt about his guilt, you must find him not guilty.

[145] Further, this Court in Sanhueza was not endorsing the specimen jury instruction proposed in Final 24-A of WMCJI for use in this context. The Court referred to this model instruction simply for the purpose of demonstrating that W. (D.) principles apply to exculpatory, out-of-court statements made by an accused.

[146] The misdirection on this issue cannot be characterized as a harmless error.

[147] I would, however, reject the appellant's further contention that the judge erred by failing to instruct the jury on the application of W. (D.) principles to the evidence of Latimer, El Hrichi and Galan Lago. The appellant's argument on this point rests on a line of authority developed in Ontario in cases like *R. v. T. L.*, 2008 ONCA 763 and *R. v. Panovski*, 2021 ONCA 905. The essence of the appellant's position is that if an eyewitness provides a description of the perpetrator that is in any way inconsistent with the appearance or personal characteristics of the accused, the trial judge must instruct the jury on the application of W. (D.) to that evidence. As he puts it, evidence which "may exclude the accused as the perpetrator", or "was capable of excluding the appellant as the shooter depending on how the jury weighed it" requires a W. (D.) instruction.

[148] In support of his position, the appellant highlights, among other things, that El Hrichi testified that he observed a young male running away from the scene. The appellant is neither young nor swift of foot. Latimer testified that the gait of the person depicted in the surveillance video was less impaired than the appellant's. Galan Lago agreed that the appellant had a limp several days prior to the shooting while the person depicted in the video did not.

[149] This Court has not had occasion to consider the line of authority relied on by the appellant. Assuming, for the purposes of this appeal, that such an instruction may be required in a case where the evidence of an eyewitness excludes the possibility of guilt, I agree with the Crown that such an instruction was not required on the evidence in this case.

- [150] In *T. L.*, there was agreement amongst four witnesses that the robber was a black man between 5'2" and 5'10". The appellant was white and over 6 feet tall. As the Court noted, "[t]heir descriptions of the robber, if accurate, excluded the possibility that the appellant was the robber": *T. L.* at para. 3.
- [151] In *Panovski*, a key witness testified that the gunman was in his mid-40s, had black hair, facial hair, and was wearing a beige top with camouflage pants. The appellant was 70, had grey hair, was clean-shaven, and was wearing a blue sweater and black pants. In both cases, there was evidence excluding the possibility that the appellant committed the offence. There are few factual parallels between these two cases and the case at bar.
- [152] Latimer's evidence did not exclude the possibility that the appellant was the shooter. She could not tell whether the appellant was the man depicted in the video surveillance because she could not see his face. She had very little opportunity to see the appellant walk the day after the offence. Further, as the Crown points out, gait is not an immutable characteristic like race or height. One can recover from injuries that affect gait and, in a situation of urgency, one's ability to walk and run if necessary may also be different than would ordinarily be the case. Latimer did not testify that there was a profound difference in the gait of the appellant and the person depicted in the video. It cannot be said that her evidence consisted of "significant and discernibly different features than those of the appellant": *Panovski* at para. 81. Further, she did not testify that the man in the video was not the appellant.
- [153] El Hrichi had very little opportunity to make his observations. He testified that he did not know whether the person he saw running down the street after the shooting was the gunman or a bystander who ran away after hearing the sound of a gunshot. In addition, El Hrichi's evidence cuts both ways. He described the person as "possibly Hispanic" and taller than he was. El Hrichi is 5'11". The appellant is Hispanic and 6'2". I agree with the Crown that this evidence served to include the appellant on race and height, not exclude him.
- [154] Similarly, Galan Lago's identification evidence did not exclude the possibility that the appellant was the shooter. In fact, it did the opposite.
- [155] The circumstances of this case simply do not warrant the type of instruction the appellant seeks for the first time on appeal. On the evidence in this case, it would have been wrong for the judge to separate a witness's most defence-favourable evidence on identification from that witness's other identification evidence and subject it to a special W. (D.) instruction as if it were exculpatory. The manner in which a judge is obliged to instruct the jury on eyewitness identification evidence in the case of this kind is much more nuanced. My conclusion on this issue is fortified by this Court's recognition in *R. v. Keshane* (1993), 11 B.C.A.C 86 at para. 14, 1992 CanLII 736 that a discrepancy between eyewitness's description of the perpetrator and the actual appearance of an accused is not necessarily fatal to a positive identification.

c) Ground #3: Improper Admission of Baldivia's Prior Consistent Statements Identifying the Appellant as the Shooter

[156] The appellant submits that the Crown adduced two prior consistent statements made by Baldivia on the central topic of the identity of the shooter: the first inadvertently and indirectly through the combined effect of the evidence of Detectives Gow, Wong, and Campbell; and the second advertently and directly in the re-examination of Fuste.

[157] The appellant acknowledges that out-of-court statements identifying the perpetrator of an offence are sometimes admitted as an exception to the rule against prior consistent statements through the testimony of the maker of the statement or the testimony of third parties who were present when the identification was made. The out-of-court identification evidence is not admitted to prove the truth of the earlier identification, but to assist the trier of fact in making an informed determination as to the weight it should give to the in-court identification of the accused as the perpetrator.

[158] The leading case in this area is *R. v. Tat*, (1997), 14 C.R. (5th) 116, 1997 CanLII 2234 (Ont. C.A.). In *Tat*, Justice Doherty identified two situations in which out-of-court statements of identification may be admitted:

[35] Firstly, prior statements identifying or describing the accused are admissible where the identifying witness identifies the accused at trial. The identifying witness can testify to prior descriptions given and prior identifications made. Others who heard the description and saw the identification may also be allowed to testify to the descriptions given and the identifications made by the identifying witness [citations omitted]

[36] Clearly, the evidence of the prior descriptions given and the prior identifications made by the identifying witness constitute prior consistent statements made by that witness. Generally speaking, evidence that a witness made prior consistent statements is excluded as irrelevant and self-serving. However, where identification evidence is involved, it is the in-court identification of the accused which has little or no probative value standing alone. The probative force of identification evidence is best measured by a consideration of the entire identification process which culminates with an in-court identification [citations omitted]

[37] If a witness identifies an accused at trial, evidence of previous identifications made and descriptions given is admissible to allow the trier of fact to make an informed determination of the probative value of the purported identification. The trier of fact will consider the entirety of the identification process as revealed by the evidence before deciding what weight should be given to the identification made by the identifying witness. Evidence of the circumstances surrounding any prior identifications and the details of prior descriptions given will be central to that assessment

[38] Where a witness identifies the accused at trial, evidence of prior identifications made and prior descriptions given by that witness do not have a hearsay purpose. In his influential article, *Evidence of Past Identification*, [1977 Crim. L.R. 268] Professor Libling explains the admissibility of the out-of-court statements where the witness makes an in-court identification in this way, at pp. 271-72:

There is no hearsay problem with this kind of evidence. It is not admitted to prove the truth of the earlier identification, but to add cogency to the identification performed in court. As a general rule, a witness is not permitted to testify as to his own previous consistent statements because they add nothing to the in-court testimony. But evidence of previous identification strengthens the value of the identification in court by showing that the witness identified the accused before the sharpness of his recollection was dimmed by time. Furthermore it is important, in assessing the weight of the identification in Court, to know whether the identifying witness was able to identify the accused before he was aware that the accused was the person under suspicion by the police.

[39] I agree with Professor Libling's analysis. When such evidence is tendered, the trier of fact is not asked to accept the out-of-court statements as independent evidence of identification, but is told to look to the entirety of the identification process before deciding what weight should be given to the identifying witness's testimony. In this respect, evidence that the witness previously gave a description which matched the accused or previously selected the accused in a line-up serves no different evidentiary purpose than would evidence showing that the identifying witness had an ideal vantage point from which to observe the perpetrator of the offence. Both are factors which will assist in weighing the witness's in-court testimony.

[41] The second situation in which out-of-court statements of identification have been admitted arises where the identifying witness is unable to identify the accused at trial, but can testify that he or she previously gave an accurate description or made an accurate identification. In these circumstances, the identifying witness may testify to what he or she said or did on those earlier occasions and those who heard the description given by the witness or witnessed the identification made by the witness may give evidence of what the witness said or did.

[159] The appellant acknowledges (and the Crown agrees) that the circumstances of the case at bar engage the first situation contemplated in *Tat. Baldivia* identified the appellant as the perpetrator in her preliminary inquiry evidence which was admitted at trial. I do not understand the appellant to contest the proposition that the admission of *Baldivia's* preliminary inquiry evidence at trial was the equivalent of an in-court identification.

- [160] The appellant submits, however, that evidence of a prior identification led through a third-party--in this case, indirectly through the police officers and directly through Fuste--is not admissible in circumstances where the declarant did not testify as to the fact of the prior out-of-court identification having been made, and is unavailable for cross-examination at trial.
- [161] In support of his position on this point, the appellant relies on *R. v. James*, 2011 ONCA 839 at paras. 43-46, and *R. v. Johnson*, 2013 ONCA 73 at para. 29.
- [162] In *James*, the judge admitted the evidence of a key witness, given on the trial of a co-accused, identifying the appellant, James, from a photo array. At the appellant's trial, the same witness professed to have no memory of ever meeting the appellant or of testifying at the co-accused's trial. The witness's professed total loss of memory of the relevant facts, including the making of the identification, rendered the opportunity to cross-examine that witness at trial valueless as a means of testing the reliability of identification. In these circumstances, the Court held that the Crown failed to establish that the witness's identification of the appellant at the co-accused's trial was sufficiently reliable to justify its admission at the appellant's trial.
- [163] In *Johnson*, Rouleau J.A., writing for the Court, interpreted *Tat* as standing for the proposition that when a witness identifies the accused as the offender in court and testifies that he remembers identifying the same person in an out-of-court identification, the prior identification is admissible in support of the in-court identification made by that witness.
- [164] The appellant notes that Baldivia did not give evidence confirming her previous out-of-court identifications of the appellant to the police officers or Fuste when she testified at the preliminary inquiry. He further notes that she was unavailable for cross-examination at trial.
- [165] Further, the appellant submits that even when prior identification evidence is properly admitted, it is not admissible as substantive evidence of identity. The prior statements made by the identifying witness may only be used by the trier of fact to assess the strength of the witness's evidence at trial: *R. v. Campbell*, 2006 BCCA 109 at paras. 91 and 93. The appellant submits that, even if Baldivia's prior consistent statements identifying the appellant as the shooter were admissible, the judge erred by failing to provide the jury with a limiting instruction on the use they could properly make of them.
- [166] In the further alternative, the appellant submits that the evidence of Fuste that Baldivia made a prior consistent statement to her identifying him as the shooter was not admissible in re-examination.
- [167] In response, and contrary to the position taken by Crown counsel at trial, the Crown submits on appeal that Baldivia's out-of-court statements identifying the appellant as the shooter were admissible under the well-established exception to the rule against prior consistent statements discussed in *Tat*. The Crown submits that the admissibility strictures

posited by the appellant, and set out herein at paragraph 160, are not supported by Tat. Further, the Crown submits that no limiting instruction is mandatory when the out-of-court identification is consistent with the in-court identification. In these circumstances, the instruction the appellant now says should have been given--that the jury must not regard the out-of-court statements as substantive evidence of identity, but could take them into account and conclude that they buttressed Baldivia's in-court identification--would not have been helpful to the defence. It would only have highlighted the consistency with which Baldivia related her account. Finally, the Crown submits that Fuste's evidence that Baldivia told her "Alvaro" was the shooter fell within the permissible scope of re-examination.

[168] In my view, it is sufficient in this case to hold, as I do, that Fuste's evidence concerning Baldivia's out-of-court identification of the appellant as the shooter was not admissible in re-examination.

[169] It is black-letter law that questions permitted as of right on re-examination must relate to matters arising out of cross-examination which deal with new matters, or with matters raised in examination-in-chief which require explanation given the questions posed and answers given in cross-examination: *R. v. Evans*, [1993] 2 S.C.R. 629 at 644, 1993 CanLII 102. As Watt J.A. noted in *R. v. Candir*, 2009 ONCA 915 at para. 148

It is fundamental that the permissible scope of re-examination is linked to its purpose and the subject-matter on which the witness has been cross-examined. The purpose of re-examination is largely rehabilitative and explanatory. The witness is afforded the opportunity, under questioning by the examiner who called the witness in the first place, to explain, clarify or qualify answers given in cross-examination that are considered damaging to the examiner's case. The examiner has no right to introduce new subjects in re-examination, topics that should have been covered, if at all, in examination in-chief of the witness. A trial judge has a discretion, however, to grant leave to the party calling a witness to introduce new subjects in re-examination, but must afford the opposing party the right of further cross-examination on the new facts: *R. v. Moore* (1984), 15 C.C.C. (3d) 541 (Ont. C.A.), at p. 568.

[Emphasis added.]

[170] As had been agreed, Fuste was cross-examined on what Baldivia had told her about how the shooter arrived at the scene. She said Baldivia told her that the shooter was in a black SUV. If Fuste's evidence on this point was accepted, it highlighted an obvious inconsistency in Baldivia's account as she testified at the preliminary inquiry that the shooter fled on foot. The cross-examination of Fuste did not raise the issue of whether Baldivia told her the identity of the shooter, nor was it put to Fuste that Baldivia identified someone other than the appellant as the shooter.

- [171] It was open to the Crown to re-examine Fuste, as it did, for the purposes of eliciting evidence from her that she may have misunderstood what Baldivia told her about how the shooter arrived at the scene. But nothing in the further cross-examination opened the door for the Crown to re-examine Fuste on what Baldivia told her about the identity of the shooter. Baldivia's identification of the appellant as the shooter was an entirely new matter raised for the first time in the re-examination of Fuste.
- [172] While trial judges have a discretion to exercise in determining whether to permit proposed re-examination, what occurred here was not the product of an exercise of discretion. The Crown did not ask for a ruling on whether the proposed question--"what was the name?"--fell within the proper scope of re-examination, and the judge did not exercise his discretion in allowing the question to be asked. In the result, the admissibility of this evidence in re-examination does not attract a deferential standard of review.
- [173] In my respectful view, the judge erred in law in permitting the Crown to elicit this evidence in re-examination. The error was not harmless. The evidence went to the central issue in the case and was the last significant piece of evidence the jury heard. Permitting the elicitation of this evidence in re-examination permitted the Crown to present its case in a piecemeal fashion.
- [174] I am satisfied that the appellant was significantly and unfairly prejudiced as a result of the admission of this evidence in re-examination. It is apparent to me that the appellant's trial counsel was caught flat-footed by the elicitation of this evidence in re-examination. I acknowledge that it was open to trial counsel to seek leave to re-cross-examine Fuste on what Baldivia, in fact, said to her. Indeed, there may well have been fertile ground for re-cross-examination on this issue as Fuste did not say in her handwritten statement or in her recorded statement to the police (both of which were given the evening of the offence) that Baldivia identified the appellant as the shooter. As noted earlier, when Fuste was asked in her police interview whether Baldivia had said anything to her about who was responsible for the shooting, she replied: "Well I know who did it and my grandma [Baldivia] knows who did it and my whole family knows who did it, it's like fairly obviously and my grandma said that they were driving a black SUV when ". When Fuste was asked who she and her family "suspected" of committing the shooting, Fuste replied " his name's Alvaro". I do not consider that trial counsel's failure to seek leave to re-cross-examine Fuste on this issue shifts the calculus. The legal error stems from the improper admission of this evidence in re-examination.
- [175] Further, the Crown used this evidence in its closing address. Specifically, the Crown reminded the jury that Fuste mistakenly attributed to Baldivia in an out-of-court statement that "Alvaro" attended at the scene of the offence in a black SUV.

[176] While the evidence given by Fuste in re-examination may have been admissible on more traditional grounds--to rebut the defence suggestion that Baldivia was in serious cognitive decline at the time of the preliminary inquiry and that her identification of the appellant as the shooter at that time was the product of confabulation--the Crown, in oral argument, firmly disclaimed any reliance on this potential route to the admissibility of Baldivia's prior consistent statement.

[177] Given my conclusion that the evidence elicited by the Crown in the re-examination of Fuste was improperly admitted, I find it unnecessary to address either the admissibility of Baldivia's prior consistent statements or the obligation of the trial judge, in the main charge or in response to the jury's second question, to instruct the jury on the limited use they were permitted to make of those statements.

3. The Curative Proviso

[178] Section 686(1)(b)(iii) of the Code provides that an appellate court may dismiss an appeal in the face of established legal error if it is of the opinion that no substantial wrong or miscarriage of justice has occurred. As Lebel J. noted in *R. v. Van*, 2009 SCC 22:

[34] [N]ot every error in a criminal trial warrants appellate intervention Under [s. 686(1)(b)(iii) of the Code], a conviction can be upheld providing that the error has not resulted in a substantial wrong or a miscarriage of justice. The Crown bears the burden of showing the appellate court that the provision is applicable, and satisfying the court that the conviction should stand notwithstanding the error. To do so, it must establish that the error of law falls into one of two categories. First, that it is an error so harmless or minor that it could not have had any impact on the verdict. In the second category are serious errors that would otherwise justify a new trial or an acquittal, but for the fact that the evidence against the accused was so overwhelming that any other verdict would have been impossible to obtain: [*R. v. Khan*, 2001 SCC 86]; *R. v. Trochym*, 2007 SCC 6, [2007] 1 S.C.R. 239.

[179] In *Colpitts v. The Queen*, [1965] S.C.R. 739 at 744, 1965 CanLII 2, Cartwright J. (with whom Hall J. concurred) noted that even when the Crown establishes a condition precedent to the application of the proviso, an appellate court is not bound to apply the subsection. Instead, it exercises a discretion about whether to do so. In my view, and without attempting to catalogue all of the factors that could conceivably shape the exercise of this discretion, the analysis is capable of taking into account: the seriousness of the offence; the consequences that flow upon conviction; the seriousness of the error(s) committed at trial; and the individual and public interests that exist in having an accused tried before a jury of his or her peers on admissible evidence. I note, as well, that the judgment of Cartwright J. in *Colpitts* was endorsed by this Court in *R. v. Chahley* (1992), 72 C.C.C. (3d) 193 at 214, 1992 CanLII 2387 (B.C.C.A.).

- [180] The errors identified herein were not harmless. Application of the proviso therefore turns on whether the Crown has met its burden of establishing that the case against the appellant is so overwhelming that a trier of fact would inevitably convict.
- [181] The standard for invoking the second branch of the curative proviso is "substantially higher" than "the ordinary standard in a criminal trial of proof beyond a reasonable doubt": Trochym at para. 82.
- [182] In the case at bar, the jury deliberated for more than five days. It is apparent from the questions the jury asked in the first and second day of their deliberations that they were focused on the central issue in the case--identity. They asked for a replay of the evidence of Baldivia and El Hrichi, the only other witness who may have seen the shooter leaving the scene. They also asked for clarification on where Baldivia said the perpetrator was standing when the shot was fired. Finally, they asked whether Baldivia had given a police statement the night of the offence and, if so, whether she identified the appellant as the perpetrator. The jury asked no further questions on the third and fourth days of its deliberation. On the fifth day, the jury asked a question pertaining to the mens rea for murder and sought clarification on the meaning of "deliberate" in the context of the offence charged. The jury returned its verdict very shortly after the last two questions had been answered.
- [183] In oral argument on appeal, the Court asked counsel if application of the second prong of the proviso engages the question of whether this jury would inevitably have convicted absent the errors in law, or whether the inquiry focuses on whether a future jury would inevitably convict on the strength of the Crown's case. While the appeal was under reserve, the appellant sought and obtained leave to file further brief submissions addressing this point. The Crown responded in kind.
- [184] The appellant submits that while the rationale underlying the proviso is prospective (to avoid the costs associated with a second trial in circumstances where the result will inevitably be the same), the test for applying the proviso is always retrospective--that is, whether absent the error(s) the trier of fact would inevitably have convicted the accused. The appellant submits that this approach is consistent with the language of the curative proviso which asks whether a substantial wrong or miscarriage of justice has occurred. He submits that this approach is also consistent with the governing authorities which frame the essential question as being whether the verdict returned by the jury would necessarily have been the same if the error(s) had not occurred: Colpitts at 744, 1965 CanLII 2; R. v. Bevan, [1993] 2 S.C.R. 599 at 616-617, 1993 CanLII 101 (where the test was said to be whether there is any reasonable possibility that the verdict would have been different had the error in issue not been made). Applying this test, the appellant submits that it is appropriate for this Court to take into account the length of the jury's deliberations and the fact that the errors go directly to proof of the very issue the jury was seemingly grappling with--the identity of the perpetrator.

[185] The Crown submits that the approach in deciding whether to invoke the overwhelming evidence branch of the proviso is necessarily prospective. The question is whether another, hypothetical jury would convict based on the evidence properly admitted at trial. In support of its position, the Crown relies on these observations made in *R. v. Jolivet*, 2000 SCC 29:

Ordering a new trial raises significant issues for the administration of justice and the proper allocation of resources. Where the evidence against an accused is powerful and there is no realistic possibility that a new trial would produce a different verdict, it is manifestly in the public interest to avoid the cost and delay of further proceedings. Parliament has so provided.

Applying this test, the Crown submits that the length of this jury's deliberations and the questions it asked are not relevant to the analysis.

[186] I agree with the Crown that the inquiry under the overwhelming case prong of the curative proviso is prospective, but would add that the positions taken by counsel on this point can easily be reconciled within the existing framework for the application of the curative proviso summarized in *Van*.

[187] In my view, both prongs of the curative proviso raise hypothetical questions, but the inquiries are different. The first (harmless error) is retrospective and asks whether the jury would inevitably have convicted had the errors not occurred. The second (overwhelming case) is prospective and asks whether the appellant would inevitably be convicted by a second jury following a retrial. Both are to the end of determining whether the Crown has met its burden of establishing that, despite the legal error(s), no substantial wrong or miscarriage of justice has occurred--in the first scenario because the error is shown to have had no effect on the verdict, and in the second because, even if the propriety of the verdict was compromised by legal error, the case against the accused is so overwhelming that a conviction following a subsequent trial is inevitable.

[188] The retrospective inquiry urged by the appellant aligns with the harmless error prong of the curative proviso analysis. The proviso is applied when an appellate court is satisfied that the legal error could have had no effect on the verdict. The error is, in this sense, a harmless one. The prospective inquiry urged by the respondent Crown aligns with the overwhelming case prong of the curative proviso. The proviso is applied when, despite the existence of material legal error, there is an abundance of evidence so clearly pointing to the guilt of the accused that a conviction is the only realistic outcome of any subsequent proceeding. In my view, the discussions in *R. v. Khan*, 2001 SCC 86 at paras. 26, 28-31 and *R. v. Hibbert*, 2002 SCC 39 at paras. 71-72 are supportive of the foregoing analysis.

- [189] Accepting that the position of the Crown is correct and the inquiry in this case is a prospective one because the errors cannot be characterized as harmless, I am not persuaded that the length of the jury's deliberations (or other factors unique to the proceedings below, including the relationship between the questions of the jury and the identified legal errors) become irrelevant in the context of a prospective inquiry.
- [190] In my view, the inquiry contemplated by the overwhelming case prong of the proviso, like any other predictive exercise, must take account of the past. In this context, appellate courts may have regard to the length of the jury's deliberation. It may be a factor signalling that the case is not an "open and shut" one. It may undermine the ability or willingness of an appellate court to say with the requisite degree of confidence that a conviction is a foregone conclusion or the inevitable result of a new trial: *Hibbert* at para. 72.
- [191] I do not suggest that an appellate court must take the length of the jury's deliberation into account. Rather, it is one factor an appellate court may take into account. Indeed, it is a factor that was taken into account in *R. v. Illes*, 2008 SCC 57 at paras. 21-22, and *Hibbert* at paras. 72-73, although I acknowledge that neither case is factually on all fours with the instant case. Difficulties the jury apparently encountered in reaching a verdict, as reflected in the length of their deliberations, is also a factor this Court has taken into account in determining whether to apply the proviso: *Chahley* at 214.
- [192] Appellate courts must also be mindful of the heavy burden that rests upon the Crown to show that the appellant will inevitably be convicted following a new trial. The second prong of the curative proviso is designed for use in the clearest of cases; it should be invoked only after affording any possible measure of doubt concerning the strength of the Crown's case to the benefit of the appellant: *Van* at para. 36. The rationale underlying this approach was addressed by Lamer C.J. in his concurring opinion in *R. v. B. (F.F.)*, [1993] 1 S.C.R. 697 at 704-705, 1993 CanLII 167:

As Cartwright J. noted in *Colpitts*, the discharge of this burden by the Crown is a condition precedent to the right of the appellate court to apply the terms of the subsection, but the court is not bound to apply the subsection merely because this onus is discharged. Moreover, as he further pointed out, there is a danger that if appellate courts resort too readily to the proviso, "the judges would in truth be substituted for the jury, the verdict would become theirs and theirs alone, and would be arrived at upon a perusal of the evidence without any opportunity of seeing the demeanour of the witnesses and weighing the evidence with the assistance which this affords" (see Cartwright J. in *Colpitts*, *supra*, at p. 744).

Unless used with great circumspection, the provisions of s. 686(1)(b)(iii) of the Code would effectively deprive accused persons of the right to have their guilt or innocence determined by a properly instructed jury of their peers.

- [193] I acknowledge that the case against the appellant is a formidable one even without Cepeda Silva's declaration identifying the appellant as the shooter. It includes compelling, and largely unanswered, circumstantial evidence implicating him in the commission of the

offence. The appellant did not testify in response to the direct evidence and web of circumstantial evidence pointing to his guilt. At the same time, the errors were serious, there are problems with the eyewitness identification evidence, there was no clear evidence of motive, and the jury, or at least some of its members, wrestled with the central issue in the case--whether the appellant was shown beyond a reasonable doubt to have been the shooter. Further, first degree murder is the most serious offence known to law and, on conviction, carries with it a sentence of life imprisonment with no parole eligibility for 25 years. There is, in my view, a compelling individual and public interest in having this charge determined by a jury of the appellant's peers on properly admissible evidence.

[194] While failure to object may be a factor in the application of the proviso, for the reasons given I would assign it virtually no weight in the circumstances of this case.

[195] Taking all of these considerations into account, I have not been persuaded that this is an appropriate case for application of the curative proviso.

IV. Conclusion

[196] For the foregoing reasons, I would allow the appeal and order a new trial.

"The Honourable Mr. Justice Fitch"

I agree:

"The Honourable Madam Justice Horsman"

I agree:

"The Honourable Justice Skolrood"

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