

CANADA / JUDGMENT

R. v. Scheirer

2022 BCSC 1907

COURT

Supreme Court of British Columbia

DECIDED

1 November 2022

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

2022 BCSC 1907 R. v. Scheirer

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Scheirer,

2022 BCSC 1907

Date: 20221101

Docket: 89765-2

Registry: Abbotsford

Rex

v.

Marc Andre Scheirer

Restriction on publication: A publication ban has been imposed under s. 486.4(1) of the Criminal Code, restricting the publication, broadcasting, or transmission in any way of evidence that could identify the complainant in the underlying criminal matter. This publication ban applies indefinitely unless otherwise ordered.

Before: The Honourable Madam Justice Ker

On appeal from: Oral Reasons for Judgment of the Provincial Court, dated November 27, 2020 (File No. 89765-1)

Reasons for Judgment

Counsel for Respondent:

M. Dattilo

The Appellant, appearing in person:

M. Eckardt

Place and Date of Hearing:

New Westminster, B.C.

February 7-8, 10-11, 2022

Place and Date of Judgment:

Abbotsford, B.C.

November 1, 2022

Table of Contents

Introduction.. 4

Background Facts.. 5

The Incident 8

The Investigation.. 9

Trial Counsel's Involvement 12

The Trial and Conviction.. 14

Sentencing.. 17

Legal Principles Governing Admission of Fresh Evidence.. 18

The Fresh Evidence Considered in this Hearing.. 20

A. Affidavits of the Appellant 21

B. Affidavits of Former Counsel 28

C. Cross-examination of Trial Counsel and Associate. 36

(i) Trial Counsel 36

(ii) Trial Counsel's Associate. 40

Legal Principles Governing Ineffective Assistance of Counsel.. 41

Positions of the Parties.. 44

A. Appellant's Position.. 44

(i) Advice not to testify. 44

(ii) Directed verdict 45

(iii) Failure to prepare for or attend the sentencing hearing. 45

(iv) Miscellaneous other complaints. 45

B. The Crown's Position.. 46

(i) Advice not to testify. 48

(ii) Directed verdict 48

(iii) Failure to prepare for or attend the sentencing hearing. 49

(iv) Miscellaneous other complaints. 49

Analysis.. 49

Trial counsel did not direct the appellant to not testify and did not fail in deciding not to call a defence. 51

A directed verdict application had no prospect of success in the circumstances that existed at the close of the Crown's case. 56

Trial counsel did not fail to prepare for the appellant's sentencing hearing. 58

Trial counsel did not err in his trial preparations and his assessment of the evidence 60

The remaining miscellaneous complaints raised by the appellant during oral argument 66

(i) The client chairs. 66

(ii) Failure of articling student to attend court 66

(iii) Chilliwack values. 67

Conclusion.. 68

Introduction

[1] On November 27, 2020, following a trial in the Provincial Court of British Columbia, Marc Andre Scheirer (now known as Marc Andre Eckardt), a lawyer, was convicted of sexual assault of a prospective client, K.H.C. For clarity and ease of reference in these reasons I will simply refer to Mr. Scheirer/Mr. Eckardt as the appellant.

[2] The appellant appeals his conviction and advances one ground of appeal: that he received ineffective assistance from his trial counsel. He argues that trial counsel's performance fell below the standard of the reasonable professional judgment expected from a lawyer, and that this ineffective representation prejudiced him in his defence and has occasioned a miscarriage of justice.

- [3] In his written factum, the appellant outlined three specific failures of his trial counsel's representation of him at the trial. At the hearing of the appeal, the appellant advanced further miscellaneous allegations of ineffective assistance by his trial counsel.
- [4] Given the overlap in some of the alleged failures of trial counsel, as advanced by the appellant, I have, for convenience, re-organized the various points advanced by the appellant and grouped some of the points under one collective heading as outlined below in the positions of the parties and analysis sections of these reasons.
- [5] The appellant contends that the various actions by trial counsel which he now disagrees with either on their own, or when considered cumulatively, constitute ineffective assistance of counsel amounting to a miscarriage of justice, such that the Court should set aside his conviction and order a new trial.
- [6] The Court received a number of affidavits as fresh evidence at the hearing of the appeal. They were admitted into evidence for the limited purpose of determining the allegation of ineffective representation in accordance with the Court of Appeal's decision in *R. v. Aulakh*, 2012 BCCA 340. The Court also granted leave to the appellant to cross-examine his former trial counsel and his former counsel's associate, who was an articling student at the time of the criminal trial.
- [7] The appellant represented himself on this appeal.
- [8] I will begin with a brief background of the facts of this case, a summary of the underlying criminal proceedings and the corresponding reasons for judgment, and an overview of the fresh evidence submitted on this appeal. I will then review the governing legal principles and provide my analysis of the appellant's claims of ineffective assistance of counsel. For the reasons that follow, I find that the appellant has failed to establish that his trial counsels' conduct of the case and representation of him throughout the trial proceedings amounts to ineffective assistance of counsel in his criminal trial proceeding. I affirm the conviction entered at the end of the trial. Accordingly, I dismiss the appellant's fresh evidence application and dismiss the appellant's summary conviction appeal. My reasons for doing so are set out below.

Background Facts

- [9] The appellant was called to the bar in the State of California in 1996 and the State of Washington in 2000, where he practiced for a number of years primarily in the areas of insurance and construction law. The appellant was then called to the bar in British Columbia ("B.C.") in 2015, where he practiced primarily in the areas of insurance litigation, personal injury, construction law, criminal law, and family law.
- [10] In his statement to the police, the appellant advised that the focus of his law practice was mainly with ICBC, criminal and family law matters. Most of the appellant's family and criminal law matters were referred to him through Legal Aid.

- [11] A significant contextual point informing the assessment of this appeal is the fact that the appellant had practiced criminal law in B.C. for about three years before the offence and would thus have a basic familiarity with trial preparation, trial procedure, including an accused testifying in their own defence, and the basic principles of reasonable doubt and credibility. However, it goes without saying that passing familiarity with the criminal law does not allow a lesser standard of assistance by his trial counsel.
- [12] During the time of the incident, the appellant shared a law office with his then spouse, B.S., also a lawyer. As of January 2018, the appellant and B.S. had separated their law practices, but continued to share office space, which contains three separate work stations. The law office also shares the floor with a real estate group.
- [13] The complainant, K.H.C. was seeking legal assistance on behalf of her husband, J.C., to remove a condition of his bail which prohibited J.C. from communicating with K.H.C. and visiting their residence, after he had been charged with assaulting K.H.C.
- [14] On February 28, 2018, after being referred to the appellant through the Lawyer Referral Service ("LRS"), K.H.C. spoke to the appellant over the phone for roughly thirty minutes, during which time they scheduled a meeting at 4:00 p.m. that day, at the appellant's office in Abbotsford, B.C., for a prospective intake. The events of this meeting form the basis of the appellant's sexual assault charge. Later that evening, when K.H.C. returned home, she phoned the police and reported her allegations.
- [15] In brief, the complainant alleged that while meeting with the appellant in his office, the appellant sexually assaulted her.
- [16] On June 1, 2018, Constable ("Cst"). La Framboise visited the appellant's office and informed the appellant of the allegations that K.H.C. had made against him.
- [17] At the time of the offence, the appellant was struggling with an unresolved alcohol addiction issue. Once the Law Society of B.C. (the "Law Society") became involved, the appellant started to address his addiction issues and attended residential treatment in the early spring of 2019.
- [18] In January 2019, the appellant first met with his former trial counsel, who agreed to represent him on matters before the Law Society.
- [19] In August 2019, the appellant was served with a summons, formally charging him with one count of sexual assault of K.H.C. On September 23, 2019, the appellant retained trial counsel to represent him on this charge.
- [20] The criminal trial proceeded in the Provincial Court of British Columbia before the Honourable Judge N. Phillips on July 7-10 and October 15, 2020. In reasons delivered on November 27, 2020, Judge Phillips found the appellant guilty of one count of sexual assault of K.H.C.

- [21] On December 17, 2020, at the court appearance to set the date for the sentencing hearing, trial counsel withdrew as the appellant's counsel on the criminal proceedings.
- [22] At the appellant's sentencing hearing, held on February 12, 2021, he was represented by new counsel. On March 8, 2021, Judge Phillips imposed sentence upon the appellant - a suspended sentence with a two-year probation period.
- [23] It is necessary to include a brief general summary of the circumstances that form the basis of the charge the appellant faced. The review is only in broad brushstrokes so as to inform the assessment this Court is called upon to make: whether the appellant has established that the conduct of his trial counsel was so deficient as to be ineffective and has occasioned a miscarriage of justice such that the verdict should be overturned and new trial ordered. The details of the offence and the findings of fact made by the trial judge are thoroughly set out in the comprehensive reasons for judgment delivered on November 27, 2020. The appellant takes no issue with the learned trial judge's reasons for judgment and has advanced no ground of appeal in respect of the reasons.

The Incident

- [24] On February 28, 2018, K.H.C. borrowed her friend, M.O.'s vehicle, and drove by herself to the appellant's office for the client intake meeting, arriving at the building at approximately 3:55 p.m.
- [25] At trial, K.H.C. testified that she went up the stairs and to the left, and that there was a reception area to the right. She said that as she was heading through the door marked for the law office she heard the appellant call out "I am in here," and saw him standing there with his shirt untucked and wearing dark socks with no shoes. She recognized his voice from the earlier phone call.
- [26] At some point during this meeting, K.H.C. showed the appellant photos on her cellphone of the products that she and J.C. designed and sold as part of their business. The appellant then came around from behind his desk to where she was sitting, moving his chair beside hers on her left. He moved closer and put his head on her chest and his right hand behind her back. When K.H.C. asked what he was doing, he put his left hand on her leg and started rubbing it and moving it up towards her crotch. When she pushed him away and went to stand up, he pushed her down and said "Nicer you are to me now, the sooner we get your husband home." These incidents form the substance of the sexual assault charge.
- [27] Shortly after leaving the appellant's office, while still in the car on her way home, K.H.C. spoke to M.O. and then her husband, J.C., on the phone. Phone records established the exact time that these calls occurred. Both M.O. and J.C. testified that K.H.C. was distressed and crying during these calls as she recounted the assault. Later that evening, K.H.C. reported the incident to police.

- [28] For his part, the appellant initially stated that he had no recollection of either the phone call or in-person meeting with K.H.C. The appellant claims that it was not until the trial in Provincial Court, when he saw her in person, that he remembered K.H.C., the telephone call with her and the intake meeting. The timing of his sudden detailed recollection of the meeting with K.H.C. remains unclear.
- [29] Significantly, both trial counsel and his associate depose that the appellant never told them during the trial that he remembered the complainant and the details of the telephone call or meeting with her. They acknowledge the appellant told them he thought he recognized the complainant but could not recall his discussions or meeting with her. Indeed, trial counsel and his associate depose that they were neither aware of nor advised of the appellant's recovered memory until they received the appellant's first affidavit in these proceedings in November 2021.
- [30] The appellant denies ever committing the assault on K.H.C.

The Investigation

- [31] As stated, K.H.C. reported the incident to police later that same evening on February 28, 2018. On July 31, 2018, K.H.C. identified the appellant as the perpetrator though a photographic line-up of men presented by Cst. Poulin, though she indicated only 50% certainty in her selection.
- [32] On June 1, 2018, Cst. La Framboise attended the appellant's law office, where he first met with the appellant in person and notified him of K.H.C.'s sexual assault allegation against him.
- [33] On July 24, 2018, at approximately 2:00 p.m., the appellant voluntarily attended a non-custodial interview at the Abbotsford Police Department conducted by Cst. La Framboise and monitored by his partner, Cst. Killian. This interview was audio and video-recorded. At trial, the appellant agreed that his attendance at the interview was voluntary and the contents of the interview admissible, such that he waived the need for a voluntariness voir dire on the admissibility of his statement. The Crown held the appellant's statement for cross-examination purposes, in case he chose to testify at trial. The transcript of this interview, as well as Cst. La Framboise's notes of this interview, were before the Court on this appeal.
- [34] This interview, much closer in time to the incident, provides the baseline for the appellant's recollection (or lack thereof) for the events of February 28, 2018. Throughout this interview, the appellant repeatedly stated that he had no recollection of K.H.C. nor J.C., or the phone call or meeting with K.H.C. on February 28, 2018.
- [35] In this interview, Cst. La Framboise provided the appellant with details of the allegation, including the name of the complainant and her husband, that they were referred to the appellant through the LRS, and the time and location of the incident. The appellant advised

he had checked his calendar for that day and did not have a K.H.C. on his schedule, but mentioned two other intakes scheduled that day, one at 9 a.m. and the other at 2:00 p.m. He explained that he had up to three or four intakes from the LRS daily, such that he could not remember everybody. At another point in the interview, the appellant acknowledged that LRS had made the referral, although he maintained he had no recollection of speaking to or meeting with the complainant.

- [36] Cst. La Framboise asked the appellant to explain his usual LRS client intake procedure, starting from the point where the LRS first refers a prospective client. The appellant explained that he would typically receive an email from the LRS with the name of the person that has been referred to him. When Cst. La Framboise asked about whether the appellant had any email records from the LRS confirming that K.H.C. was referred to him on that day, the appellant advised that he had checked his emails and that he "couldn't see it." He later explained that he deletes these emails as soon as he receives them. He also explained that he typically would not take notes of a meeting relating to a straightforward file like this one and, if the prospective client did not retain him, he would not keep notes or other documents on file.
- [37] When Cst. La Framboise asked whether the appellant had any recollection of the telephone conversation with K.H.C., the appellant re-iterated that he had no such recollection. When Cst. La Framboise advised the appellant of the complainant's recollection of the phone call, the appellant stated that it did not sound familiar to him.
- [38] When Cst. La Framboise laid out the substance of and circumstances surrounding the allegations, including the appellant's unprofessional attire, his inappropriate touching, and his statement "the nicer you are to me, the sooner we can get your husband home," the appellant denied the allegations saying they were "absolutely ridiculous" and "incredulous."
- [39] When confronted with the fact that LRS had confirmed its referral of K.H.C. to the appellant, and that phone records verified that K.H.C. had phoned his office, the appellant re-iterated that he simply could not remember anything.
- [40] Cst. La Framboise also asked the appellant whether he had a problem with alcohol, which the appellant denied. Cst. La Framboise then made inquiries about two police files documenting incidents where the appellant had alcohol-related interactions with the police.
- [41] One of those incidents occurred on February 25, 2018, just three days prior to the incident with K.H.C. The appellant's spouse contacted the police and said she had taken away the appellant's car keys after he had had several drinks at his law office. She said she did this to prevent him from driving. When the police arrived, they administered an alcohol screening device breath test on the appellant, which registered a fail. The appellant advised Cst. La Framboise that in fact he was the person who phoned the police and explained this incident as a disagreement with his spouse, stemming from his perception that his wife was trying to control his law practice. He stated he had no intention for driving anywhere at that time.

[42] The main theme throughout the July 24, 2018, interview with Cst. La Framboise was that the appellant repeatedly asserted that he had absolutely no recollection of K.H.C., including the telephone call and in-person meeting with her on February 28, 2018, and no notes or other documentation related to the call or meeting, except that he conceded that the LRS had referred K.H.C. to his law practice.

Trial Counsel's Involvement

[43] The appellant's trial on the sexual assault charge was scheduled for July 2020.

[44] On September 23, 2019, the appellant signed a counsel designation notice, designating trial counsel as the appellant's trial counsel.

[45] In January 2020, the appellant signed a retainer agreement for his trial counsel to represent him in various pending matters, including the criminal trial.

[46] Trial counsel's articling student at the time of the criminal trial became involved in assisting with the appellant's matters in March 2020. In or around May 2020, the articling student began assisting trial counsel in representing the appellant in the criminal matter.

[47] On June 10, 2020, trial counsel sent a letter to the appellant regarding the criminal matter, as well as two proceedings with the Law Society. This letter and the following correspondence were before the Court in this appeal. In it, trial counsel outlined the issues that the appellant faced and the decisions he would need to make over the course of the proceedings. In terms of the criminal matter, he discussed that, given the content of the appellant's statement to the police and his lack of recollection of K.H.C. or the matters underlying the allegations against him, "it seems likely that any doubt that can be raised on the evidence will have to come through cross-examination of Crown witnesses."

[48] In response to this letter, the appellant sent his counsel an email dated June 12, 2020, with instructions regarding his defence in the criminal matter. These instructions included the following:

I understand the risks and costs associated with proceeding to trial on the criminal matter. I understand that the Law Society would use any guilty plea I would enter as a basis to impose harsh sanctions against me. And I understand the consequences and costs I would face should I be unsuccessful at trial.

[49] Also, on June 12, 2020, the appellant, his trial counsel, the articling student and a paralegal at counsel's firm had a teleconference to discuss both the Law Society matters that the appellant was facing and the upcoming criminal trial. As evidenced in the articling student's handwritten notes of this meeting (which were before the Court in this appeal), during this call, the appellant and trial counsel discussed the appellant's possible defence in the criminal matter, as well as its impact on the other Law Society proceedings. The appellant clearly instructed trial counsel to run the trial and to resist any adjournment should the Crown seek one

- [50] Specifically, trial counsel brought up the appellant's statement to the police, in which he said he had no recollection of K.H.C. or any meeting with her, and asked whether this was still the case. The appellant confirmed to his trial counsel that this remained the case. During this meeting, trial counsel also asked the appellant if he could think of any other potential witnesses, apart from B.S., including other staff or professionals who were in the building at the time. The appellant could think of no one else.
- [51] Trial counsel represented the appellant in the criminal trial in July and October 2020, as well as the Law Society matters occurring throughout this time.
- [52] In the lead-up to this appeal, this Court ordered that trial counsel deliver his file on these matters to the appellant and the appellant received the file.
- [53] The Court also had before it, trial counsel's correspondence with Crown counsel in the lead-up to this appeal, dated December 22, 2021, which outlined counsel's involvement in various disclosure issues leading up to the criminal trial.
- [54] Between October 21, 2019 and July 6, 2020, trial counsel's office received seven disclosure packages, many of which were not received until the week before the criminal trial, including:
- the initial disclosure materials were provided to counsel in court on October 21, 2019, and counsel couriered these to the appellant on October 24, 2019 (as established by the covering letter attached as an exhibit);
 - the December 20, 2019 and January 28, 2020 disclosure materials were not provided in a timely manner by the Crown. Trial counsel said that his firm requested these materials on June 30, 2020, and received them on July 2, 2020. To the best of the appellant's recollection, these materials were provided to him in person at the trial;
 - the February 26, 2020 disclosure materials were provided to the appellant via email on March 18, 2020 (as established by the email correspondence between the paralegal and the appellant, attached as an exhibit);
 - the June 22, 2020 disclosure materials were provided to the appellant via email on June 24, 2020 (as established by the email correspondence between the paralegal and the appellant, attached as an exhibit); and
 - the July 3, 2020 and July 6, 2020 disclosure materials were, to the best of trial counsel's recollection, provided to the appellant in person at the commencement of trial.

The Trial and Conviction

- [55] The trial in the Provincial Court of B.C., heard by Judge Phillips, occurred over five days; July 7-10 and October 15, 2020. The Crown called six witnesses at trial: two Abbotsford police officers, Csts. La Framboise and Poulin; and four civilians, K.H.C.; J.C.; M.O; and B.S. The Crown presented its case over July 7-10, 2020 and closed its case on July 10, 2020. At the conclusion of the Crown's case, trial counsel indicated that the defence was not calling any evidence. Discussions occurred about the protocol for setting a date for closing submissions.
- [56] Closing submissions by both Crown and defence occurred on October 15, 2020. On November 27, 2020, Judge Phillips convicted the appellant, and delivered lengthy and detailed reasons for conviction, which fully and thoroughly considered the defence arguments advanced at trial. These reasons were before the Court in their entirety on this appeal. As noted earlier, the appellant advances no ground of appeal in respect of the trial judge's reasons. The reasons for judgment are comprehensive, thorough and entirely sufficient for appellate purposes.
- [57] The comprehensive written submissions filed by the defence at trial were also before the Court on this appeal. Trial counsel advanced two central avenues of argument which he submitted raised a reasonable doubt about the appellant's guilt: (1) that there were significant credibility and reliability concerns with regard to K.H.C.'s evidence, such that the events described by K.H.C. could not have occurred as alleged; and (2) that there were significant issues regarding the identification of the appellant as the perpetrator of this assault.
- [58] With regard to concerns about the reliability and credibility of K.H.C.'s evidence, trial counsel emphasized the inconsistencies in her evidence pertaining to her recollection of the layout of the appellant's office, the appellant's appearance and attire, the appellant's exact statements to her, and one specific instance of sexual touching (where K.H.C. later added that the appellant had also put his hand inside her shirt). Her evidence on these matters differed slightly between her police statement, her handwritten notes that she kept in a notebook, and her testimony at trial.
- [59] Trial counsel vigorously challenged K.H.C.'s testimony regarding the chair in which she sat during the incident. K.H.C. resolutely described this chair as the type you might find in a waiting room - an armless, black, plastic chair with chrome legs and no wheels. Yet, B.S. testified that the appellant instead used two identical antique Windsor chairs for clients in his office. These Windsor chairs had arms and were made of wood that was painted black. Trial counsel argued that B.S. was a credible witness and that the alleged assault could not have occurred as described if the complainant was sitting in a chair with arms.
- [60] Judge Phillips acknowledged the inconsistencies and potential frailties in K.H.C.'s evidence but nonetheless found K.H.C. to be a transparent and believable witness on the whole. In particular, Judge Phillips noted that most of the inconsistencies in K.H.C.'s evidence were about peripheral matters that a person in her shoes would have been unlikely to notice at

the time, let alone recall nearly two-and-a-half years later. Judge Phillips also noted that, with the exception of the allegation about the appellant placing his hand inside her shirt, K.H.C.'s description of the touching was consistent over time and was not contradicted by other evidence.

[61] With regard to the identification defence, trial counsel challenged the reliability of K.H.C.'s identification evidence of the person who had assaulted her, as well as Cst. Poulin's methods regarding the photo pack identification process through which K.H.C. first identified the appellant as the perpetrator. Trial counsel also submitted that K.H.C. should have told the police about a time in July 2019 when she says she saw the appellant at the Chilliwack courthouse, as this could have affected her selection from the photo pack. Additionally, trial counsel raised concerns about K.H.C.'s docket identification of the appellant since, besides counsel and court staff, the appellant was often the only other man in the courtroom.

[62] Judge Phillips scrutinized this evidence and ultimately gave very little weight to K.H.C.'s photo pack and docket identification of the appellant. Instead, Judge Phillips held that identification was established on the basis of:

- The referral by name and phone number by the Lawyer Referral Service;
- The telephone call to a person who held himself out as the lawyer Marc Scheirer at the same phone number;
- K.H.C.'s testimony that she followed the information about Mr. Scheirer to the site of the law firm and saw signage in the building identifying it as "Scheirer Law Office";
- The voice recognition;
- The continuation of the conversation started on the phone during the in-person meeting; and,
- K.H.C.'s description of what the perpetrator looked like.[1]

[63] In the end, Judge Phillips found that K.H.C.'s evidence was compelling and that ultimately, on a consideration of the whole of the evidence, it did not leave her with a reasonable doubt on any element of the offence. Based on the entirety of the evidence adduced at the trial, Judge Phillips found that the only rational conclusion she could draw was that the appellant sexually assaulted the complainant and convicted the appellant accordingly.[2]

Sentencing

[64] Upon conviction, the matter was adjourned to December 17, 2020, for an appearance to set down a one day sentencing hearing. Shortly before this appearance, around December 16, 2020, trial counsel advised the appellant he could no longer represent the appellant in light of the appellant's failure to pay his outstanding legal fees.

- [65] On December 17, 2020, at the appearance to fix a date for the sentencing hearing, trial counsel appeared before the Justice of the Peace and sought leave to withdraw from the record. The appellant raised no objection to his counsel withdrawing. The presiding Justice of the Peace permitted the withdrawal.
- [66] The appellant advised the Justice of the Peace that he was in the process of retaining counsel through Legal Aid BC to represent him both on a conviction appeal and at the sentencing hearing, and suggested it was prudent to put the matter over to the new year to fix a date for the sentencing hearing.
- [67] The matter was adjourned to January 7, 2021, to permit the appellant time to retain counsel. It was expected that at that next appearance, the appellant would have counsel and would be in a position to fix a date for a one-day sentencing hearing.

Legal Principles Governing Admission of Fresh Evidence

- [68] Section 822(1) of the Criminal Code [Code], which incorporates s. 683(1) of the Code, grants summary conviction appeal courts the authority to admit fresh evidence where it is in the interests of justice.
- [69] It has been recognized that it is in the interests of justice to receive fresh evidence in the context of a claim of ineffective assistance of counsel for the limited purpose of assessing those allegations: Aulakh at para. 59.
- [70] The fresh evidence must be directly relevant to either counsel's performance or to any prejudice that may have resulted: *R. v. Dunbar*, 2003 BCCA 667 at para. 73.
- [71] In Aulakh at para. 68, the Court of Appeal offered the following approach in considering an application to adduce fresh evidence:
1. Determine if the fresh evidence is admissible under the rules of evidence (e.g., no hearsay, speculation, opinion or mere argument).
 2. If the fresh evidence complies with the rules of evidence and if it is apparent from the trial record that the fresh evidence could not reasonably have affected the result (assuming the allegations of ineffective representation could be established) there is no miscarriage of justice and the application to adduce fresh evidence and the appeal should be dismissed.
 3. If that determination is not apparent and the fresh evidence in support of the allegation of ineffective representation is relevant to that issue and credible, admit the fresh evidence for the limited purpose of determining the allegation of ineffective representation, an issue that was not adjudicated at trial. At this stage the fresh evidence will not be admissible to determine the substantive issue of whether a miscarriage of justice has occurred.

4. In considering whether the performance component of the test for ineffective representation has been established, apply the standard of "reasonable professional judgment", remembering that the appellant must establish the facts underlying the claim of ineffective assistance on a balance of probabilities.
 5. If the performance component of the ineffective assistance of counsel claim is established, consider whether the appellant has established the prejudice component of the test, namely a "reasonable probability" that the outcome of the trial would have been different if the appellant had received the effective assistance of counsel (i.e., if there has there been a miscarriage of justice). If the answer is yes, the fresh evidence application should be granted, the appeal allowed, and a new trial ordered. If the answer is no, the fresh evidence and the appeal should both be dismissed.
- [72] Where fresh evidence goes to the integrity of the trial process, which includes an allegation of ineffective assistance of counsel, it may be admitted on appeal for the limited purpose of assessing the appellant's complaint about the integrity of the process, provided that the evidence: (i) complies with the rules of evidence; (ii) is relevant to the issue raised on appeal; and, (iii) is credible: *R. v. Ball*, 2019 BCCA 32 at paras. 103-104, applying *Aulakh* at paras. 59, 64.
- [73] A majority of the affidavit and cross-examination evidence tendered on this appeal complies with the rules of evidence. However, the content of some of the documents relating to Law Society complaints and proceedings against the appellant are inadmissible pursuant to s. 87 of the Legal Profession Act, S.B.C. 1998, c. 9 [Act].[3]
- [74] Additionally, extracts of the affidavits contain only opinion, argument, or hearsay statements and therefore do not comply with the rules of evidence. Given the voluminous nature of the affidavit materials, I do not propose to reproduce each example of inadmissible portions within the six affidavits. However, I have carefully reviewed each affidavit. I have not relied on those portions which contain inadmissible evidence in respect of the Law Society materials, nor have I relied on those components of the affidavits that contain inadmissible opinion, argument, or hearsay statements.[4]
- [75] Most of the fresh evidence is relevant to the sole issue raised on appeal - namely, whether the appellant received ineffective assistance of counsel at trial. However, certain aspects of the evidence are relevant only for context underlying the decision-making process in the criminal trial, but are otherwise irrelevant. For example, while I have already determined above that the contents of certain documents relating to Law Society proceedings against the appellant are inadmissible because they do not comply with the rules of evidence or s. 87 of the Act, the fact of their existence is nonetheless admissible and relevant, but only for the limited purpose of providing context for the decisions made in the criminal trial. My summary of the fresh evidence below is informed by these parameters.

- [76] The remaining consideration in respect of the filed affidavits is credibility. There are conflicting versions in the affidavits about what happened at trial as between trial counsel and the appellant. Despite these conflicts, I have admitted the fresh evidence for the limited purpose of assessing the integrity of the trial process - being the appellant's claim of ineffective assistance of counsel - with the unresolved issues about credibility to be dealt with as a matter of weight: *R. v. Nelson*, 2021 BCCA 343 at para. 49 citing *R. v. Hamzehali*, 2017 BCCA 290 at paras. 34-39, leave to appeal ref'd 37792 (15, March 2018); *Aulakh* at paras. 59-68; *R. v. Zhou*, 2022 BCSC 362 at para. 42; *R. v. Gondara*, 2020 BCSC 865 at para. 29.
- [77] Indeed, similar to the position of the Crown in *Nelson*, Crown counsel on this appeal agrees that all the affidavits filed should be admitted for the limited purpose of assessing the ineffective representation ground of appeal.[5]
- [78] Cross-examination of trial counsel and his associate was also permitted in order to assist in the resolution of contradictions in the affidavit evidence regarding the ineffective representation issue.

The Fresh Evidence Considered in this Hearing

- [79] As noted above, a voluminous amount of fresh evidence (six affidavits in total) was filed for the hearing of this appeal - three affidavits from the appellant and three affidavits from trial counsel (two from senior counsel and one from the then articling student, now associate, who assisted trial counsel). The affidavits were marked as lettered exhibits and received for the limited purpose of assessing the merits of the appellant's allegations.

A. Affidavits of the Appellant

- [80] The appellant filed three affidavits in this appeal. They were marked as Exhibits A, D and F on this appeal.
- [81] The appellant's first affidavit - In his first affidavit, filed October 7, 2021, (Exhibit #A ("Ex.") on the appeal), the appellant outlines in detail the timeline of events from when he first learned of the allegations to the present. He explains that he has conducted hundreds of intakes over the years, such that, if a prospective client did not retain him, he would not remember them. He says that he only remembered K.H.C. when he saw her in person at trial and that he was never shown a photo of K.H.C. during the police interview or at any other time. He maintains that he did not commit the acts alleged.
- [82] The appellant also outlines the timeline of a complaint made against him to the Law Society, as well as his issue with alcohol during this period. During the latter part of 2018, the appellant admits that he was in denial about his drinking problem and eventually sought help for it through resources available through the Law Society. In early March through late April 2019, he attended a private fee-for-service residential centre for the treatment of addiction. The appellant deposes that has not consumed alcohol since before entering this treatment centre and that he continues to attend Alcoholics Anonymous meetings and

meetings with his counsellor.

[83] The appellant sets out that, in the fall of 2019 (after he had been charged with the sexual assault of K.H.C.) through to the beginning of 2020, he was addressing several issues resulting from investigations and disciplinary actions by the Law Society, for which he retained his trial counsel. The appellant's confidence in his trial counsel was bolstered by a positive result in one of the Law Society matters.

[84] The appellant outlines what he describes as several notable events during his criminal trial in July 7-10 and October 15, 2020. He says that, at the lunch break on July 10, 2020, following the cross-examination of K.H.C., that

[trial counsel] told me that he had raised "more than enough evidence to overcome the criminal evidentiary standard of "beyond a reasonable doubt" during his cross examination of [K.H.C.] and that [his] testimony would not be required or advisable."

[85] The appellant deposes that his trial counsel was very confident about this advice and did not tell the appellant that he intended to rely primarily on a "lack of identification" defence. The appellant contends that he understood from his own assessment of the evidence that the primary basis for a defence was that, based on the inconsistencies in K.H.C.'s evidence about the physical construction of the chairs and office layout, the sexual assault could not have happened as alleged. The appellant deposes that during this lunch break meeting, he told his trial counsel, as he had before, that he was more than ready and willing to testify if counsel thought it was advisable. He deposes that his trial counsel again reassured him that it was not. After this lunch break, the appellant deposes that he and trial counsel had no further discussions about whether they should present a defence case or whether the appellant would testify.

[86] The appellant further deposes that his counsel's comments to the court on July 10, 2020, made him feel confident that all was going well in the case. I pause here to note that all trial counsel told the court at this time was that the defence would not be calling evidence and that they would be ordering a transcript of the complainant's evidence to review for the argument component of the trial.

[87] The appellant deposes that at no time after the close of the Crown's case on July 10, 2020, did trial counsel ever apply to the Court for a directed verdict of acquittal and never mentioned this option to the appellant. Surprisingly, the appellant, a practicing lawyer who formerly represented individuals accused of crimes and conducted trials on their behalf, further deposes that he did not know of such a procedure at the time and only learned about it long after his criminal trial had concluded. Respectfully, such an assertion stretches the bounds of credulity. I am unable to accept this statement and, accordingly, ascribe no weight to it.

[88] The appellant deposes that he does not recall having any communications with his trial counsel between July 10, 2020 (the close of the Crown's case), and October 15, 2020 (submissions). He says he is certain that, during this time, trial counsel did not discuss with

him, nor ask for his input into, the argument he was preparing for the submissions. The appellant further says that it was not until he met with trial counsel in the courthouse hallway moments before the scheduled proceeding on October 15 that counsel informed him that the focus of his argument will be an "identification defence," relying on K.H.C.'s evidence elicited during her cross examination. I pause again to note that these two statements by the appellant are contradicted by the documentary evidence attached to the affidavits of trial counsel which establish a considerable amount of communication between trial counsel, the articling student and the appellant (albeit largely in respect of the Law Society proceedings). They are also not supported by the written and oral closing submissions of trial counsel, which are not solely focused on an identification defence.

- [89] The appellant deposes that the Provincial Court scheduled a sentencing hearing for December 17, 2020, and that a few days before this hearing, his trial counsel advised him that he intended to get off the record.
- [90] I pause here to note that the appellant's belief that the December 17, 2020, appearance was for the actual sentencing is contradicted by other independent evidence, including trial counsel's email correspondence with the appellant, Crown counsel and the Judicial Case Manager ("JCM"), as well as the transcript of the next appearance, on December 17, 2020, before a Justice of the Peace. Collectively these materials establish that the December 17, 2020, appearance was simply a fix date to set a one day sentencing hearing before Judge Phillips. On that date, the matter was adjourned to January 7, 2021, to give the appellant time to retain new counsel to represent him.
- [91] The sentencing hearing was ultimately held on February 12, 2021, at which time the appellant had retained new counsel. On March 8, 2021, the appellant received a suspended sentence with a two-year probation period.
- [92] In this first affidavit, the appellant also outlines in some detail the testimony that he would have provided in the criminal trial had he testified, which largely relies on his now recovered recollection of the phone and in person meeting with K.H.C.[6] Although the appellant provides a fairly detailed recollection in this affidavit, nowhere does he explain when he regained this recollection. Nor does he depose that he communicated this recollection to his trial counsel.
- [93] Although I have reviewed the appellant's affidavit where the appellant outlines his detailed recollection of what happened and what he would have testified to if he had been called at trial, I do not propose to outline it here. It is not material to a determination of the issues on this appeal, coming as it does well after the conclusion of the trial proceedings and the initiation of this summary conviction appeal.
- [94] The appellant goes on to depose in detail the basis of his appeal in terms of the level of preparation for trial, advice regarding whether or not to testify, and failure to apply for a directed verdict.

· First, he says that trial counsel did not take steps to adequately prepare for the trial. To that end, the appellant deposes that trial counsel failed to communicate with him about the evidence he would lead, and also failed to communicate with B.S. The appellant further says that he believes B.S. tried to phone trial counsel but that her calls were never returned. He also believes that trial counsel was not prepared for her cross-examination.

· Second, he deposes that trial counsel failed to provide adequate advice that would enable the appellant to give informed instructions on whether he should call evidence and whether he should testify, which he maintains he was prepared to do. The appellant believes that his counsel's "misplaced confidence" in the identification defence was a significant factor in his claim that trial counsel advised him not to testify. The appellant further says that trial counsel grossly mis-assessed the evidence and that it should have been clear to counsel that there was insufficient evidence following the close of the Crown's case to raise a reasonable doubt on the appellant's behalf.[7] The appellant believes that his testimony, if counsel would have let him provide it, would have raised a reasonable doubt.[8]

· Third, in leading with the identification defence, the appellant says trial counsel failed to consider the following critical facts:

o That K.H.C. identified him on the first day she took the stand, and

o That although he had no recollection of K.H.C. prior to the trial, as soon as he saw her on the stand at trial on July 8, 2020, his recollection of her and their meeting came back to him. The appellant says he talked to trial counsel about this at the first opportunity, which was at the mid-morning break on July 8, 2020.[9]

The appellant deposes that in his view there was insufficient evidence to support the identification defence, which he says counsel advanced without consulting him. He says he would have advised trial counsel against making this argument, as he believes that it had no merit.

· Fourth, the appellant takes issue with the fact that his counsel never asked K.H.C. if someone other than the appellant had touched her; if the touching never occurred; or, if she was mistaken about the touching.

· Finally, the appellant contends that his trial counsel failed to apply for a directed verdict of acquittal.[10]

[95] A number of other miscellaneous points were raised by the appellant for the first time during the course of his oral argument. I will deal with those points under the positions of the parties and analysis sections of these reasons.

[96] An important contextual piece of evidence in relation to the appellant's allegation that he received ineffective assistance from his trial counsel, is what the appellant deposes to as being his own position during the time of the trial:

It is true that I am a lawyer, I have practiced some criminal law, and I am in my 50s. But throughout the trial, I was an absolute mess emotionally and psychologically and I did not trust my own judgment. This was compounded by the fact that I had been deemed unfit to practice criminal law by the Law Society. So I relied on [trial counsel] to do what was in my best interest. This is what I hired him to do.[11]

[97] In respect of the above point, it is important to note at this stage, that this assertion that he was "deemed unfit to practice criminal law by the Law Society" is unsubstantiated in the evidence. As will be outlined below, the appellant entered into an undertaking not to practice criminal law in order to "cool down the controversy" with the Law Society and provide him an opportunity to at least maintain aspects of his practice.

[98] The appellant opines in his first affidavit that had he been adequately represented, he would not have been convicted of sexual assault.

[99] The appellant goes on to outline the prejudice he has suffered following his conviction, including the breakdown of his marriage and a pending civil proceeding by K.H.C. He describes the conviction as devastating to his mental health and reputation as a lawyer. He is also awaiting further related proceedings with the Law Society. While the appellant no doubt has suffered as a result of the conviction, the asserted prejudice flowing from the conviction as outlined in this affidavit[12] is irrelevant to the issue of prejudice to be determined on this appeal, which will be discussed later in these reasons.

[100] The appellant's second affidavit - In his second affidavit, filed January 5, 2022 (Ex. #D on the appeal), the appellant outlines the timeline of obtaining disclosure of trial counsel's file related to his criminal trial. He outlines that on October 13, 2021, the Court ordered that trial counsel deliver this file to him by November 1, 2021, and says that he received this file on November 2, 2021. He says that this is the first time he saw the undertakings which were the subject of why K.H.C. visited his office on February 28, 2018.

[101] The appellant's third affidavit - In his third affidavit, filed February 7, 2022 (Ex. #F on the appeal), the appellant discusses and attaches the correspondence between trial counsel and Crown counsel on December 23, 2021, as well as a copy of Crown particulars as of July 2020. In trial counsel's letter to Crown counsel on this appeal, trial counsel outlined the timeline of disclosure materials for the trial, which I have summarized above. Trial counsel included correspondence to the appellant in October 2019 and March 2020, where Crown counsel provided further particulars and disclosure. In response, Crown counsel sent a letter to trial counsel requesting that he provide a second affidavit addressing the following:

- Attaching trial counsel's December 22, 2021, letter and its attachments as an exhibit;
- Attaching the appellant's statement to Cst. La Framboise as an exhibit; and

· Trial counsel's advice about whether the appellant should testify or not, including whether trial counsel advised the appellant of the associated risks of not testifying and any other details about this issue.

[102] The tenor of the appellant's third affidavit appears to be more in the vein of a complaint that he had not yet received a copy of his trial counsel's second affidavit. By the time the appeal was heard, however, the appellant had received a copy of trial counsel's second affidavit and the appellant was content to proceed with the appeal with the affidavit materials as tendered on this appeal. He did not seek an adjournment of the hearing of the appeal and took no issue with the second affidavit being filed.

B. Affidavits of Former Counsel

[103] Trial counsel filed two affidavits and his then articling student, now associate, filed one affidavit in this appeal.

[104] Trial counsel's first affidavit - In his first affidavit, filed December 2, 2021 (Ex. #B on the appeal), trial counsel outlines the timeline of his retainer with the appellant, as well as his articling student's involvement and assistance with the matter.

[105] In her affidavit, also filed December 2, 2021 (Ex. #C on the appeal), trial counsel's associate explains that she was an articling student with trial counsel's law firm at the time (from March 2020 to March 2021) and started assisting in the matters concerning the appellant in March 2020. She says that she was present for all meetings during breaks, and before and after court, save for bathroom breaks.

[106] Both affidavits note that the articling student started PLTC around September 2020, but continued to work regularly on the appellant's matters, and that the appellant was kept informed on an ongoing basis. The articling student's recollection of important timelines and discussions, including the June 10, 2020, correspondence, the June 12, 2020, teleconference, and the trial proceedings in July and October 2020, aligns with trial counsel's recollections.

[107] Trial counsel deposes that he prepared carefully and diligently for the trial. With regard to the issue of whether the appellant would testify, trial counsel says that he outlined the relevant considerations and told the appellant that it was ultimately the appellant's decision. He deposes that the appellant's complete lack of recollection of meeting with K.H.C. informed his advice, and further notes that the appellant's lack of memory of the events was also reflected in the appellant's statement to the police in his interview that was more contemporaneous to the events, having occurred in July 2018.

- [108] Trial counsel attaches as an exhibit to his affidavit the letter he sent to the appellant on June 10, 2020, discussing the matters under retainer and the issues that the appellant would need to confront in the criminal trial. In the appellant's response via email on June 12, 2020, also attached as an exhibit, the appellant gave instructions regarding his defence, where he stated that he understood the risks and costs of proceeding to trial.
- [109] Trial counsel recalls and attaches as an exhibit, notes from a June 12, 2020, teleconference between himself, the articling student, the firm's paralegal and the appellant where, inter alia, trial counsel discussed potential defences in the criminal trial. The central points of this discussion were captured in the articling student's handwritten notes of this meeting. The affidavit and exhibits establish that during this call, the appellant again denied having any recollection of the incident. When asked whether the appellant could identify any other witnesses to assist his defence, the appellant instructed that he was unaware of other witnesses besides his spouse, B.S. Trial counsel deposes that he advised the appellant of the risk of prejudice to the appellant if in testifying he said that he had no recollection, and that the appellant's testimony would be most effective if he was able to provide his own version of events. Based on this, trial counsel advised the appellant that it would likely be prudent to build the defence on the evidence elicited through the cross-examination of the Crown witnesses. Significantly, trial counsel deposes that the decision about how to proceed, including whether to testify at the trial, was the appellant's decision. More specifically, trial counsel deposes as follows:
21. I discussed the possible defences that could be advanced in the Criminal Trial. I brought up the interview of Mr. Scheirer conducted on July 24, 2018 by Cst. La Framboise and the fact that, in the interview transcript, Mr. Scheirer denied having a recollection of speaking to or meeting Mrs. C. [redacted], I asked Mr. Scheirer if that was still the case, and Mr. Scheirer confirmed that it was. I canvassed with Mr. Scheirer if there were any other witnesses he could identify other than his wife B. [redacted], who we could consider calling to testify. Mr. Scheirer instructed me that he was unaware of any other witnesses. Contrary to the allegations of Mr. Scheirer, I did speak with B.S. in advance of her testimony to determine what helpful evidence she could give at the Trial.
22. I said that the fact that Mr. Scheirer had no recollection either way of the phone call or meeting with Mrs. C. [] may impact Mr. Scheirer's defence and, specifically, his possible testimony. I asked Mr. Scheirer whether, if Samiran Lakshman, the Crown prosecutor assigned to the Criminal Matter, asked Mr. Scheirer on cross-examination, whether Mr. Scheirer had ever spoken to or met with Mrs. C. [], Mr. Scheirer could definitively say that he had not. Mr. Scheirer reiterated that he could not recall either way whether he had met or spoken to Mrs. C. [] and could not give a "no" answer to such a question from Mr. Lakshman. I explained the risk of prejudice to Mr. Scheirer if Mr. Lakshman could elicit such an admission. I said that Mr. Scheirer's testimony would be most effective if he was capable of giving his own version of events and could truthfully say that the meeting with Mrs. C. [] was not as she alleged, but actually took place a different way which Mr. Scheirer could

truthfully describe.

23. I advised Mr. Scheirer that because Mr. Scheirer apparently could not refute the expected evidence of Mrs. C. [], it would likely be advisable to build the defence on cross-examination of the Crown's witnesses. I reiterated, however, that it was Mr. Scheirer's decision on how to proceed, including whether to testify at the Criminal Trial. I implored Mr. Scheirer to think carefully about anything that might help his defence, including whether there might have been anyone else in the Scheirer Law Office and the adjoining office who may have been in the office at the time of the Alleged Assault. Other than his wife B. [], Mr. Scheirer could not provide me with the identity of any other potential witnesses.
- [110] Contrary to the appellant's assertions, trial counsel also deposes that he spoke to B.S. ahead of the trial to determine what helpful evidence she could give.
- [111] Trial counsel deposes that prior to the start of trial, the appellant never told him that he recognized K.H.C. However, on July 8, 2020, the appellant told him that he believed he recognized K.H.C. but still could not recall his discussions with her.
- [112] In her affidavit, trial counsel's associate deposes that the appellant never told her that he recognized K.H.C. during the proceedings. She further swears that when she and the appellant were in the hallway outside of court during a break on July 7 or 8, 2020, they specifically discussed K.H.C.'s appearance and that the appellant told her that "now that he had seen what [K.H.C.] looked like, he knew nothing could have happened because she was not his type." Trial counsel swears that his articling student advised him of this conversation and that he did not consider this information to be helpful to the appellant's defence.
- [113] Trial counsel further notes in his affidavit that the appellant sent two emails over the course of the July proceedings regarding evidentiary issues at trial, relating to the chairs in his office. These emails are attached as exhibits to trial counsel's affidavit. They contain no mention by the appellant of recognizing K.H.C. or remembering his phone call and in-person meeting with her.
- [114] Trial counsel includes in his first affidavit that throughout the July trial proceedings, he and his then articling student discussed the progress of the trial with the appellant during court breaks, and before and after the proceedings. None of these discussions were rushed, and all were detailed and specific with respect to the evidence and proceedings. To that end, the articling student made detailed notes of the proceedings, which were before the Court in this appeal, and recorded matters including:
- On July 7, 2020, the appellant said that the client chair in his office was a Windsor chair. The articling student then showed trial counsel a Google image search result for this type of chair.
 - On July 7, 2020, the appellant said that Cst. Poulin, in his testimony, did not describe his entire involvement in the investigation because he failed to mention that he had spoken to [B.S.] a few weeks earlier and the day before.

- [115] When the Crown's case concluded on July 10th, trial counsel deposes he discussed with the appellant the various considerations as to whether the appellant would give evidence, including arguments regarding identification and credibility. Significantly, the appellant still could not recall the substance of any meetings with K.H.C. Trial counsel deposes that he did not assess the evidence that the appellant might be able to give as compelling. He also had concerns about the appellant's credibility. Accordingly, trial counsel deposes that he advised the appellant that it was his assessment that there were significant risks to the appellant testifying that, in his view, outweighed any potential benefit. Trial counsel further deposes that he emphasized to the appellant that he could not guarantee the outcome of the trial nor his assessment of it, and that if the appellant wished to testify he would follow his instructions notwithstanding that he considered it likely that the Crown could elicit prejudicial evidence in his cross-examination.
- [116] More specifically, trial counsel deposes to a long discussion he recalled having in the parking lot between himself, the articling student and the appellant on July 10, where the appellant said that he was very pleased with how the July proceedings had gone. They discussed the favorable testimony of B.S., the deficiencies and inconsistencies of in K.H.C.'s evidence, the layout and chairs in his law office, the deficiencies in the photo line up, and the apparent absence of proof of identification beyond a reasonable doubt along with the exculpatory evidence that someone other than the appellant committed the assault, if it occurred.
- [117] The associate deposes that the appellant never communicated to her that he wanted to testify at trial, and, trial counsel deposes that the appellant never communicated this to him before 2021. The exhibit evidence establishes that between the end of the July proceedings and October 15, 2020, the appellant and his trial counsel remained in regular communication as they continued to deal with the Law Society proceedings.
- [118] Trial counsel further deposes he did not discuss with the appellant the option of bringing an application for a directed verdict. In his professional opinion it was obvious that the Crown had advanced admissible evidence which, if believed, would entitle a reasonable judge to reach a verdict of guilty.
- [119] Trial counsel and his associate both depose that between the end of the evidence on July 10, 2020, and closing submissions on October 15, 2020, the appellant never mentioned to either of them that he remembered the phone call or meeting with K.H.C.
- [120] With regard to the October 15, 2020 continuation, trial counsel deposes that on October 15, 2020, he arrived at the courtroom with his articling student and found that the courtroom doors were locked, so they waited outside. The appellant arrived a few minutes later, at which point they gave him a copy of the bound written argument and book of authorities, both of which are attached as exhibits and address:

- The reasonable doubt left in the Crown's case based on the framework in *R. v. W. (D.)*, [1991] 1 S.C.R. 742, [1991] S.C.J. No. 26 (S.C.C.) ("W.D.");
- The lack of reliability and credibility of K.H.C. on key matters including office layout, client chairs, and the descriptions of the alleged assault and assailant;
- The credible and reliable evidence of B.S. regarding the office layout and the client chairs; and
- The Crown's failure to prove the requisite element of identification in the offence of sexual assault, due partly to the inadequate police investigation, the deficiencies in the compilation and administration of the photo line-up, and the negligible probative value of the in-dock identification.

[121] Trial counsel deposes that he had discussed the proposed legal argument with the appellant on both July 10, 2020, and October 15, 2020, and that on both days the appellant expressed agreement with the proposed approach and did not convey any opposition to this argument. Trial counsel also says that he did not tell the appellant that the "focus" of the argument was the identification issue, nor did he hold that view. Trial counsel's associate also deposes that trial counsel never told the appellant that the focus of the argument was the identification issue. She further deposes that trial counsel discussed the legal argument with the appellant and that the appellant agreed with the legal strategy and expressed no opposition to it.

[122] Trial counsel's second affidavit - In his second affidavit, sworn February 4, 2022, trial counsel attaches numerous documents of correspondence between himself and the appellant, and himself and Crown counsel. In this affidavit, he clarifies the advice he gave to the appellant during the criminal proceedings. In particular, he expressly confirmed with the appellant that the appellant had the option to testify if he wished to do so. Because he knew that the appellant was a lawyer, he was very confident that the appellant understood that fundamental election. Trial counsel deposes that he provided the following information to the appellant in order for the appellant to make a good decision for himself:

- 1) Regarding the identification argument, the appellant considered the evidence of K.H.C. to be weak, given that she was "only 50% sure" of her photo pack identification and that he could advance a legal argument that the in-court identification should be given little weight. Trial counsel deposes that he informed the appellant that these arguments did not require any evidence from him.
- 2) Regarding the alternative theories of identification argument, trial counsel says that he assessed that there appeared to be grounds to make submissions that janitorial staff or male staff from adjoining offices could have had access to the appellant's office. He advised that he did not think this was a strong argument, but that it may give rise to a reasonable doubt if the Court did not fully accept the credibility of K.H.C. Trial counsel recalls explaining to the appellant that his evidence would not be necessary on this issue.

- 3) Next, trial counsel recalls discussing with the appellant the credibility issues he believed would arise if the appellant testified. Trial counsel says he remained uncertain throughout the trial about the substance of the appellant's testimony given his lack of recollection and was concerned about the credibility of any testimony about a sudden and significant recollection arising only after K.H.C.'s evidence was delivered. With respect to credibility, he says he also reminded the appellant of the contemporaneous evidence of K.H.C. and corroborative evidence provided by M.O. and J.C., as well the evidence relating to K.H.C.'s narrative of the alleged incident to police. He says he explained to the appellant that if he elected to testify, the arguments relating to identification would likely be unavailable and, in the absence of some alternate reason for the phone calls and information K.H.C. gave to M.O. and J.C., it would be a serious risk for the appellant to give evidence. Trial counsel was satisfied that the appellant understood and was able to comprehend the import of these issues and considerations, and that the appellant himself considered it best to not give evidence on this basis.
- 4) Regarding similar fact issues, trial counsel says he reviewed with the appellant before and after trial the risk to which he would be exposed if he testified and Crown counsel began to question the appellant about his alcohol use or Law Society matters, particularly regarding a pending Law Society disciplinary matter arising from allegations by a former client of the appellant that were similar to K.H.C.'s allegations.
- 5) Regarding the office chair evidence, trial counsel deposes that he was aware that B.S. would testify that the Windsor chairs were the only office chairs she had ever seen in his office, such that the appellant would not need to give evidence in order to advance this argument.

[123] I note that many of these considerations and arguments that trial counsel says he discussed with the appellant are actually reflected in the way that the written submissions of the defence at trial were crafted.

[124] Trial counsel concludes this second affidavit by re-iterating that the appellant never raised with him any questions regarding his analysis of the evidence and gave no indication that he disagreed with it. Trial counsel deposes that, to the contrary, the appellant agreed with this assessment and understood that it was the appellant's decision whether or not to testify. Trial counsel deposes that the appellant agreed that there were too many risks involved for him to testify in the circumstances and instructed his trial counsel to make the submissions as trial counsel had described.

[125] Trial counsel also refutes the appellant's suggestion that he simply abandoned his representation of the appellant at his sentencing. Instead, he deposes that the appellant had agreed to pay only heavily discounted legal fees for the trial and that, after the trial, counsel advised the appellant of the significant amount outstanding. He says that the appellant gave numerous reasons for his inability to pay and that the monies remain outstanding. Trial counsel states he advised the appellant to apply to Legal Aid and, and that he cooperated with the appellant's Legal Aid counsel with respect to the sentencing

hearing, and possible grounds of appeal. Trial counsel also deposes that the appellant never expressed any opposition to trial counsel's withdrawal from the record in these circumstances.

C. Cross-examination of Trial Counsel and Associate

[126] At the hearing of this appeal, the appellant had the opportunity to cross-examine trial counsel and his associate on their affidavit evidence to address the contradictions that are central to the issues on appeal. The appellant conducted the cross-examination himself.

[127] Crown counsel also had the opportunity to cross-examine trial counsel and the associate on their affidavit evidence. Crown counsel elected not to cross-examine the appellant on his affidavit evidence.

(i) Trial Counsel

[128] The appellant challenged his trial counsel on several points in his affidavit evidence. First, the appellant asked his former trial counsel whether and where in his affidavit he advised the appellant of the risks of not testifying. In response, trial counsel explained that, although he has not used that express language, he had fully explained to the appellant the option of whether to testify or not, as well as the risks of testifying, and that these discussions also informed the risks of not testifying. Trial counsel was unshaken on this point and the related point that he provided the pros and cons of testifying but that the decision as to whether or not to testify remained the appellant's alone.

[129] Next, the appellant questioned trial counsel as to the Crown disclosure that the defence received on July 3, 2020, four days prior to trial, which contained a video of K.H.C. Trial counsel confirmed that the appellant was not provided with this video before trial but declined to opine whether this could have triggered the appellant's memory of the incident at issue.

[130] The bulk of the appellant's cross-examination focussed on whether the central argument advanced by counsel at trial was in respect of the identification issue, and to what extent other arguments, like the defence relating to the type of client chairs in the appellant's office, were prioritized and adequately advanced. To that end, for example, the appellant pointed to the significant number of pages dedicated to this issue in trial counsel's written argument filed at trial. Throughout this line of questioning, trial counsel maintained that identification was a serious issue but not the only issue that he advanced. Trial counsel explained that he also advanced several other serious, meritorious issues as part of the defence argument, including the so-called "chair" defence. Trial counsel explained that the significant number of pages in the written argument dedicated to the identification issue were a result of the complexity of the legal principles in that area, whereas other meritorious issues were less legally complex and accordingly required less explanation.

- [131] Significantly, trial counsel also maintained that his assessment of these defences continued to be informed by the appellant's continued lack of recollection of his meetings with K.H.C., together with the evidence elicited in the testimony of witnesses at trial, all of which ultimately informed trial counsel's advice to the appellant regarding whether the appellant should exercise his option to testify at trial.
- [132] In cross-examination by Crown counsel, trial counsel was asked about his advice to the appellant regarding the possible adverse consequences of the criminal proceeding, and particularly any negative credibility finding, on the appellant's pending Law Society proceedings. Trial counsel explained that he discussed with the appellant the difficult decisions he would need to weigh in terms of testifying, given the possible implications for other proceedings. To that end, trial counsel explained that his advice to the appellant took into account the appellant's total lack of recollection of events, coupled with the detailed testimony of K.H.C., and the additional risks that the appellant needed to consider vis-à-vis the Law Society. Trial counsel maintained that he and the appellant spoke about these considerations in a number of discussions.
- [133] In re-direct cross-examination, the appellant appeared to challenge trial counsel about the appellant's ability to make clear, logical decisions at the time of the trial. In particular, the appellant suggested to his former trial counsel that the Law Society had "ordered" the appellant to sign an undertaking not to practice criminal law "because they thought [he] was incapable of that." Trial counsel could not comment on why the undertaking was signed but explained that the Law Society took a strident position about the appellant not practising law at all pending determination of the criminal matter. Trial counsel testified as follows:

what I do recall is there was -- there was quite a controversial issue which resulted in multi days of hearings resulting from the Law Society's position that pending the criminal trial you would need to be suspended from all areas of practice, the entirety, in the interests of protecting public safety. It wasn't something that you agreed with or that I agreed with and that was challenged by me on your behalf and challenged successfully, and there was no interim suspension. But I do recall discussions with you in which we were attempting to cool down the controversy with the Law Society and I do recall asking you how much criminal law you practiced and having the impression it wasn't a significant part of your practice and discussing with you whether that undertaking may be worth giving in order to try to calm down the concerns that were evolving into what eventually we couldn't avoid which was a very controversial and lengthy application where the Law Society attempted to suspend you from all practice completely.

- [134] The appellant then questioned trial counsel about his earlier comment regarding his assessment of K.H.C.'s detailed contemporaneous evidence and how it was corroborated, in respect of his advice to the appellant. On this point, trial counsel clarified that he had not accepted that K.H.C.'s evidence was reliable nor credible, but rather that he assessed that the detailed nature of K.H.C.'s narrative would require similarly detailed evidence from the appellant to meet the allegations. In terms of the contemporaneous nature of the evidence,

trial counsel further explained that he was simply referring to the fact of K.H.C.'s phone calls with M.O. and J.C. shortly after the incident, as well as her complaints to police that same evening. In terms of corroboration, trial counsel clarified that he was referring to the fact of the phone calls, as well as M.O. and J.C.'s corroboration of K.H.C.'s distressed state at the time of these calls. Trial counsel re-iterated that his advice to the appellant was based on all of these considerations, coupled with the fact that the appellant had never discussed having any memory of what occurred (apart from mentioning during the trial that he believed he recognized K.H.C.).

[135] Trial counsel was unequivocal in his evidence that he never told the appellant not to testify.

[136] In addition to explaining the intricacies of the parallel proceedings with the Law Society, the flatlined memory of the appellant and the suddenly recently re-established memory of the appellant, trial counsel's evidence on the appeal included the following points:

- The circumstances that presented itself at the trial led to discussions about the pros and cons of approaching the matter either with testimony or without.
- There were consequences that would flow from the decision to give evidence.
- Counsel's assessment and approach was to weigh that and share with the appellant, to the best of counsel's ability, the pros and cons of the decisions issue by issue, including pointing out meritorious defence arguments that did not require the appellant's evidence.

[137] More specifically, trial counsel repudiated the appellant's suggestion that he told the appellant not to testify and testified as follows:

My evidence is there were a number of discussions. It was topical, it was complicated. [The appellant] was aware that I had intimate knowledge of the Law Society proceedings and how they may interact, and we spoke about it very openly to try to plot a pathway that would allow [the appellant] to be able to deal with troublesome charges and also place him in a position where he could also deal with what seemed very likely to be some [indiscernible] Law Society proceedings arising out of the very same incident.

And I thought that was something that deserved some very careful assessment in terms of taking the view that the witness -- or the complainant could be easily challenged on those points. And all of that -- those were things that were expressly discussed with Mr. Eckardt and he was very -- my impression was he was very comfortable with it not only because he's a lawyer.

I found him to be an intelligent gentleman and throughout those conversations, if he had a question, he asked about it and, as I said in my affidavit, from my point of view there really wasn't any controversy about what [the appellant] - how he wanted to proceed. He never disagreed with my analysis and my exposition of the pros and cons. He said he understood and agreed, and he understood he was going to make a decision.

And from my point of view I don't think, as we talked about it, it was a decision that was giving him a lot of angst. It seemed to him to be quite clear how the better way to proceed would be and that's what I was instructed and that's what I did.

Q And the upshot of all that is that he accepted your advice and decided on his own after listening to you not to testify?

A That's 100 percent the way I took it. All I know is with absolute certainty, I would never tell somebody they could not testify. That would be an outrageous thing to think. And certainly, as a lawyer, [the appellant] wouldn't have had a moment's difficulty recognizing that, "I have a right to testify, so surely this lawyer isn't tell[ing] me I'm not allowed".

So, it was always the decision as to what would be best and I gave advice. My advice was, as I've recounted here in some what I thought to be very considerable detail and I thought with -- with -- I thought it was with quite a level of sophistication and the factors being considered.

I gave him what I felt about the pros and cons of each of the issues, tried to give him enough information so he could make a decision.

There's no question I pointed out to him some downsides of testifying, but I most certainly would never have told him, "You cannot or should not or must not testify". It was much more detailed and sophisticated than that.

[Emphasis added].

(ii) Trial Counsel's Associate

[138] The appellant cross-examined trial counsel's associate about her attendance in court on October 15, 2020. The associate explained that, as she was enrolled in the B.C. Law Society's Professional Legal Training Course ("PLTC") at the time, she was not able to take notes or sit at the counsel table during this day of the proceeding, but that she was nonetheless present in the gallery of the courtroom. The associate also explained that in July 2020, she attended the trial every day and sat at counsel table next to trial counsel.

[139] The appellant also questioned the associate about her review of the video evidence of K.H.C. that was in the disclosure package. The associate explained that she had watched the photo lineup video of K.H.C. in June 2020, which was in the disclosure package mailed to trial counsel's firm on December 20, 2019 (months before she had started articling with the firm).

Legal Principles Governing Ineffective Assistance of Counsel

[140] Before turning to the analysis of the evidence and my findings in respect of the fresh evidence, I will review the legal principles that govern the assessment of an allegation of ineffective assistance of counsel.

- [141] The legal principles applicable to this appeal are not in dispute. Rather, the parties dispute the application of these principles to the evidence tendered at this hearing.
- [142] The right of an accused person to effective assistance of counsel is a principle of fundamental justice derived from the common law, s. 650(3) of the Code and ss. 7 and 11(d) of the Canadian Charter of Rights and Freedoms [Charter]: *R. v. G.D.B.*, 2000 SCC 22 at para. 24.
- [143] Ineffective assistance of counsel may result in a miscarriage of justice where it affects the reliability of the verdict, or where it undermines procedural fairness in arriving at a verdict: *Aulakh* at para. 41; *Nelson* at para. 45.
- [144] In order to succeed in a claim of ineffective assistance of counsel brought on appeal, the appellant must first establish the underlying factual foundation for the claim on a balance of probabilities - that the acts or omissions of counsel that are said to have been incompetent actually occurred: *Aulakh* at paras. 44, 45, 68.
- [145] If the facts are proven, the appellant must then establish that trial counsel's acts or omissions constituted incompetence (referred to as the performance component); and that a miscarriage of justice resulted (referred to as the prejudice component): *R. v. White*, 2022 SCC 7 at para. 6, citing *G.D.B.* at para. 26; *Aulakh* at paras. 44-45; *Nelson* at para. 43.
- [146] The onus is on the appellant to establish both the performance and prejudice components on a balance of probabilities: *Aulakh* at para. 45.
- [147] In *G.D.B.*, Justice Major described the approach to considering the performance and prejudice components, clarifying that incompetence is assessed on a reasonableness standard, and without invoking hindsight. In cases where it is apparent that no prejudice has occurred (there has been no miscarriage of justice), the claim should be disposed of on that basis and there is no need for the appellate court to consider trial counsel's performance:

27 Incompetence is determined by a reasonableness standard. The analysis proceeds upon a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. The onus is on the appellant to establish the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The wisdom of hindsight has no place in this assessment.

28 Miscarriages of justice may take many forms in this context. In some instances, counsel's performance may have resulted in procedural unfairness. In others, the reliability of the trial's result may have been compromised.

29 In those cases where it is apparent that no prejudice has occurred, it will usually be undesirable for appellate courts to consider the performance component of the analysis. The object of an ineffectiveness claim is not to grade counsel's performance or professional conduct. The latter is left to the profession's self-governing body. If it is appropriate to dispose of an ineffectiveness claim on the ground of no prejudice having occurred, that is the course to follow (Strickland, *supra*, at p. 697).

- [148] The performance component presents a difficult hurdle to clear. Appellate courts take a cautious approach to assessing performance because of the deference that must be accorded to the strategic and tactical decisions made by trial counsel. This deference raises a strong presumption of competency, and recognizes that there may be a wide range of reasonable decisions in a given case, based on the all of the circumstances at the time. Counsel's performance will not be considered to be deficient simply because another lawyer would have acted in a different way, or because the wisdom of hindsight shows that another decision may have produced a better result: Aulakh at paras. 48-51.
- [149] The Court must assess whether the appellant has established that this conduct fell below the range of reasonable professional assistance, allowing for a wide margin of deference towards elements of professional judgment and without scrutiny through the wisdom of hindsight: G.D.B. at para. 27. As summarized by Justice Dickson in *R. v. Ball*, 2019 BCCA 32 at para. 108, "[t]he bar for establishing professional incompetence is high and surpassing it is challenging." The point of the analysis is neither to grade counsel's performance, nor to engage in a forensic autopsy of it: G.D.B. at para. 29; *R. v. Joannis* (1995), 44 C.R. (4th) 364, [1995] O.J. No. 2883 at para. 68 (O.N.C.A.).
- [150] The considerations on a review of trial counsel's performance were succinctly summarized by Justices Laskin and Charron in *R. v. White* (1997), 32 O.R. (3d) 722, [1997] O.J. No. 961 (O.N.C.A.):
- [65] An appellate court's review of trial counsel's performance should be deferential. In addition to the policy considerations discussed by Doherty J.A. in *Joannis*, deference is called for because of the broad spectrum of professional judgment that might be considered reasonable. In most cases, even among the most skilled counsel, no two lawyers will defend an accused in the same way. Different defence counsel will use different trial strategies and tactics, different approaches to the examination and cross-examination of witnesses, different styles in opening and closing argument, all of them reasonable. The art of advocacy yields few, if any, absolute rules. It is a highly individualized art. What proves effective for one counsel may be ineffective for another. Most cases, therefore, offer defence counsel a wide scope for the exercise of reasonable skill and judgment. Appellate judges, many of them advocates in their own practices, should not be too quick to conclude that a trial lawyer's performance was deficient because they would have conducted the defence differently.

- [151] In other words, and equally clear from the above legal principles, in determining whether an appellant has established their claim of ineffective assistance of counsel, appellate courts are not to engage in Monday-morning quarterbacking trial counsel's performance: Dunbar at para. 151.
- [152] The prejudice component also presents a challenging burden to meet. The appellant must establish a reasonable probability that counsel's errors caused prejudice that resulted in a miscarriage of justice in the form of an unreliable verdict or unfair adjudicative process. Absent the causal connection between the demonstrated incompetence and prejudice, there is no basis to find a miscarriage of justice: Aulakh at para. 52.
- [153] A reasonable probability is found "somewhere between a mere possibility and a likelihood" and is one "sufficient to undermine confidence in the outcome": Dunbar at para. 26, citing Joannis at para. 82.

Positions of the Parties

A. Appellant's Position

- [154] The appellant's position is that he suffered a miscarriage of justice caused by the ineffective assistance of his trial counsel. He seeks an order admitting the fresh evidence in the form of his own affidavits and the affidavits of his trial counsel, and an order for a new trial.
- [155] The appellant asserts that his trial counsel's performance fell below the standard of the reasonable professional judgment expected of a lawyer in the following main ways, each of which will be explained further below:
- a) trial counsel advised the appellant not to testify, and did not call any evidence for the defence;
 - b) trial counsel failed to apply for, or advise the appellant of his right to apply for a directed verdict of acquittal; and
 - c) trial counsel failed to prepare for or attend the sentencing hearing, but instead withdrew from the record, resulting in an adjournment.
- [156] The appellant submits that these were serious errors in performance that impacted the reliability of his conviction and resulted in an unfair adjudicative process. In the appellant's submission, had he received effective legal assistance, there is a reasonable probability that he would not have been convicted.
- (i) Advice not to testify
- [157] The appellant alleges that trial counsel advised him not to testify because of credibility concerns, and based on a tactical decision to argue that the Crown had not established that the appellant had committed the alleged offence (the "identification defence"). However, he says that counsel's advice was deficient as there was no explanation of the risks of testifying

or not, and the identification defence had no merit and should not have been pursued. The appellant submits that the substandard advice precluded him from making an informed choice about whether or not to testify, and without his testimony, there was no evidence contradicting the complainant's evidence. If counsel had provided reasonable advice regarding the risks and benefits of testifying or not, he would have decided to testify, and the trial judge would have had an evidentiary basis on which to acquit him.

(ii) Directed verdict

[158] The appellant submits that trial counsel's failure to apply for a directed verdict of acquittal after the Crown closed its case was a significant error that denied him the opportunity to make a fundamental decision about the conduct of the defence, and therefore undermined the fairness of the trial. In the appellant's submission, if a directed verdict application had been made and denied, he would have insisted on testifying despite his counsel's advice to the contrary in order to respond to the complainant's evidence.

(iii) Failure to prepare for or attend the sentencing hearing

[159] The appellant submits that his trial counsel failed to prepare for or attend the sentencing hearing, but instead abandoned the file by withdrawing from the record, leading to an adjournment of the hearing, which resulted in procedural unfairness.

(iv) Miscellaneous other complaints

[160] As outlined in the introduction section of these reasons, at the hearing of the appeal, the appellant raised a variety of other complaints regarding the performance of his trial counsel, which he said demonstrated ineffective representation, including counsel's failure to provide him with certain documents and materials that he said would have jogged his memory about who the complainant was and the purpose of their meeting where the complainant alleged the offence occurred. The gist of the appellant's argument appears to be that this was an intentional decision by counsel to prevent him from remembering what happened and testifying, which could potentially undermine the identification defence that counsel wished to run. I note that this innuendo was not raised directly with trial counsel during the course of the appellant's cross-examination of him.

[161] The areas of miscellaneous complaints advanced by the appellant for the first time during the course of the oral argument include that trial counsel:

- a) Failed to advise the appellant of the "W.D. defence".
- b) Failed to provide or review with the appellant a photograph or video of the complainant and did not obtain same until the eve of trial;
- c) Failed to obtain a copy of the undertakings for the complainant's husband (which was the basis for the consultation with the complainant on the date of the offence) until the eve of trial (July 3, 2018) when they were finally disclosed by the Crown;

- d) Failed to communicate with and prepare for the cross-examination of B.S., the appellant's former spouse and former law partner;
- e) Conducted the trial entirely as an "identification" case;
- f) Failed to challenge the complainant's credibility on the origins of a handwritten note not disclosed until the eve of trial;
- g) Failed to have the appellant's client chairs (Windsor-style chairs) entered into evidence as physical exhibits; and
- h) Failed to approach the evidence of the complainant with an understanding of Chilliwack values instead of Vancouver values.

B. The Crown's Position

- [162] The Crown's position is that the appellant has not met his burden of establishing a miscarriage of justice on a balance of probabilities, and the fresh evidence application and appeal should be dismissed.
- [163] In respect of the proposed fresh evidence, the Crown submits that certain portions of the appellant's first affidavit, and the affidavits of his trial counsel are inadmissible as fresh evidence on the first criteria in Aulakh, as they consist of irrelevant information, hearsay or argument, and as such are non-compliant with the rules of evidence. The Crown further submits that certain portions of the various affidavits filed violate s. 87 of the Act, which provides that a "report" as defined in that section is not admissible in any proceeding, except with the consent of the executive director.
- [164] The Crown submits that the inadmissible portions of the affidavits should be redacted, prior to considering the four remaining Aulakh criteria. As noted earlier (see footnotes 3 and 4), the Court has proceeded in this fashion and not considered the inadmissible portions of the affidavits in its determination of this summary conviction appeal
- [165] On the second Aulakh criteria, the Crown concedes that it is possible that the portions of the affidavits in compliance with the rules of evidence could have affected the result of the trial (assuming that the ineffective representation allegations could be established). As such, the Crown urges the Court to admit the proposed fresh evidence on the third Aulakh criteria, for the limited purpose of determining the allegation of ineffective representation, but not the substantive issue of whether a miscarriage of justice occurred.
- [166] The Crown submits that the fourth and fifth Aulakh criteria for admission of fresh evidence, blend with the test in G.D.B. on the substantive issue of ineffective representation, and should be considered together to dispose of the application and appeal.

[167] If the answer to the fourth (performance) and fifth (prejudice) steps is yes, the fresh evidence application should be granted, the appeal allowed, and a new trial ordered. If the answer is no to either of those latter two steps, then the fresh evidence application and the appeal should both be dismissed.

(i) Advice not to testify

[168] The Crown's position is that the evidence demonstrates that trial counsel's advice to the appellant about whether or not to testify was reasonable in all of the circumstances, and did not deprive the appellant of the opportunity to make a meaningful decision in that regard. The Crown submits that trial counsel's evidence shows that the appellant made an informed decision not to testify after trial counsel advised him about the potential risks of doing so, including issues with the appellant's credibility, and it is not for this court to employ the benefit of hindsight to reweigh the considerations in play at the time. The Crown further submits that trial counsel's evidence on this issue should be preferred over the appellant's evidence where the two conflict, on the basis that trial counsel's evidence is more consistent with independent facts, including that the appellant expressed no dissatisfaction with trial counsel's representation until the appeal, even rejecting trial counsel's suggestion made after the conviction, that he consider other counsel to represent him.

[169] The Crown submits that the appellant has not established that he was prejudiced in any way in respect of counsel's decision to advance the identification defence, or that the decision shows incompetence. It is clear from the reasons for judgment that the credibility of the complainant's evidence was the key to the conviction, and the defence had little impact. Further, defence counsel has a wide discretion to advance the defence case in the best interests of the client, and this type of tactical decision is not one within an accused's sole responsibility such as a plea or whether to testify. The appellant's complaint with respect to this defence also invokes the benefit of hindsight, which is improper. While the defence may not have been successful, it was not unreasonable for counsel to advance it.

(ii) Directed verdict

[170] In the Crown's submission, the allegation that trial counsel erred by failing to bring an application for a directed verdict at the end of the Crown's case has no merit as it would have been a futile exercise. The complainant's testimony would have met the test - that taken in its best light, a reasonable jury properly instructed could convict on it - and the trial judge would have dismissed the motion without any advantage to the defence.

(iii) Failure to prepare for or attend the sentencing hearing

[171] The Crown submits that the appellant has not established the factual basis for the allegation that trial counsel failed to prepare for or appear at the sentencing hearing, and that this conduct resulted in an adjournment of that hearing. The record shows that trial counsel requested leave to withdraw as the appellant's counsel during an appearance to fix a date for

the sentencing hearing. The appellant then requested, and was granted, an adjournment of a few weeks to retain new counsel to represent him at the sentencing hearing. The presiding Justice of the Peace confirmed that a date for the hearing would be fixed at the next appearance.

(iv) Miscellaneous other complaints

[172] In response to the appellant's numerous other complaints regarding counsel's conduct, the Crown submits that there is nothing in the evidence that demonstrates that the appellant was prejudiced in any way by counsel's representation of him. The evidence shows that counsel was prepared, knew the case against his client well, and employed a reasonable strategy in the circumstances.

Analysis

[173] I propose to address the appellant's claim of ineffective assistance of counsel by dealing with each complaint raised by the appellant. In summary, I conclude that the appellant has failed to establish on a balance of probabilities the facts underlying his claims. Even if the appellant had established the facts underlying his claims, I have no hesitation in concluding that he has failed to demonstrate prejudice resulting from counsel's performance. The decisions made by trial counsel, in consultation with the appellant throughout the course of the criminal trial, were all within the wide range of reasonable professional assistance expected in the circumstances. Indeed, all of the acts or omissions complained of, when examined in the context of the trial and the overall circumstances, establish that trial counsel carefully exercised reasonable professional judgment. In light of these conclusions, it is unnecessary to determine whether the appellant has failed to establish that counsel's acts or omissions constituted incompetence under the performance branch of the analytical framework: Nelson at paras. 46, 50.

[174] In this appeal there was a conflict in the affidavit evidence on key points that the appellant contends amounted to ineffective assistance from his trial counsel. In particular, the appellant and trial counsel provided seemingly diametrically opposed versions of what occurred in respect of the decision as to whether the appellant should testify in his own defence. The appellant contends that trial counsel told him not to and insinuates that his trial counsel did not let him testify in his own defence. Trial counsel, on the other hand, is unequivocally clear that he outlined to the appellant the pros and cons of testifying but left the decision to the appellant as to whether or not he would testify.

[175] Given the conflict on this critical point it is important to recall the factors to be considered when assessing credibility. They were summarized by Justice Dillon in *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, *aff'd* 2012 BCCA 296, leave to appeal *ref'd*, 038545 (7 March 2013):

[186] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis*, [1926] 31 O.W.N. 202 (Ont. H.C.); *Faryna v. Chorny*, [1952] 2 D.L.R. 152 (B.C.C.A.) [Faryna]; *R. v. S.(R.D.)*, [1997] 3 S.C.R. 484 at para.128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (*Faryna* at para. 356).

[176] In deciding which facts are more likely than not, I have weighed the competing evidence on the conflicting issues, applying the words of Justice O'Halloran in *Faryna v. Chorny*, [1952] 2 D.L.R. 354, [1951] B.C.J. No. 128 at para. 10 (B.C.C.A.):

. . . In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions . . .

[177] I will outline my factual findings as they pertain to each complaint the appellant makes with respect to his trial counsel's representation of him at the trial and the lead up to the trial.

Trial counsel did not direct the appellant to not testify and did not fail in deciding not to call a defence

[178] The appellant contends in his affidavit and in his submissions on this appeal that his counsel either told him not to testify, did not let him testify, or did not provide him with sufficient advice to inform him of the risks of not testifying.

[179] In *R. v. Mehl*, 2021 BCCA 264, Justice Fitch, writing for the Court of Appeal made the following observation about ineffective assistance of counsel in the context of a claim that an accused was denied the opportunity to testify at his trial:

[145] The appearance of trial fairness, if not the actual fairness of the trial, may also be undermined where an appellant has been denied the right to make a fundamental decision about the conduct of the defence, such as whether to testify or elect the mode of trial: *R. v. K.K.M.*, 2020 ONCA 736 at para. 91; *D.G.M.* at paras. 32; *Stark* at para. 20. This will occur when counsel makes the decision, or when counsel provides no advice or advice so deficient that the appellant is effectively precluded from making an informed choice about a matter of fundamental importance to the conduct of the defence: *K.K.M.* at para. 91; *Stark*

at para. 20; R. v. Trought, 2021 ONCA 379 at paras. 69, 74-75.

- [146] Effective representation includes providing an accused with reasonable advice about whether or not to testify: Archer at para. 139. Reasonable advice, in this context, means "a reasoned explanation of the advantages and disadvantages of testifying that would enable the appellant to make an informed decision about whether to testify": D.A. at para. 35. While the form and content of the advice will vary in almost every case, "the client cannot make an informed decision unless he or she understands what is at stake at this crucial moment in the proceedings": D.A. at para. 33.

[Emphasis added]

- [180] As the Crown respondent properly notes, the issue is not what counsel did not tell the appellant or what trial counsel should have said or done, rather the question is whether what trial counsel said or did was reasonable in the circumstances: R. v. K.K.M., 2020 ONCA 736 at para. 66. In K.K.M., the defence did not authenticate a screenshot where the young complainant said she lied about a sexual encounter. Counsel advised the accused not to testify because it was his opinion that the witnesses were not credible. The accused elected not to testify. He was convicted. At his conviction appeal he argued that trial counsel's representation had been ineffective. Justice Doherty, writing for the Court in dismissing the appeal, noted as follows:
- [81] The adequacy of counsel's advice cannot be determined in the abstract, but must be measured, having regard to the dynamic of the specific trial. Trial counsel had concluded the Crown witnesses were not credible and their evidence could not successfully carry the burden of proof. In counsel's view, the best defence lay in the assertion the Crown had failed to prove its case because the Crown witnesses, especially M.A., were not credible. Not surprisingly, given counsel's assessment of the evidence, his discussions with the appellant about testifying focused on the harm done to the Crown's case in cross-examination and the dangers inherent in testifying.
- [82] Trial counsel was obliged to make it clear it was the appellant's decision whether to testify. He was equally obliged to give the appellant the full benefit of his advice, including an explanation of his reasons for that advice. In my view, counsel met those obligations in his discussions with the appellant. The appellant made an informed decision not to testify.
- [83] Trial counsel was not obliged to go through all of the evidence and identify the pros and cons of testifying and not testifying associated with each piece of evidence. [] Counsel had fully explained to the appellant why he did not think the appellant should testify. The explanation included counsel's assessment of the credibility of the Crown witnesses and the risks inherent in the appellant testifying. The reasonable professional assistance standard did not require trial counsel to go on and explain to the appellant how M.A.'s credibility, which trial counsel believed was badly damaged on cross-examination, could be further damaged were the appellant to act against his advice and take the very real risk of testifying so he could give evidence about the screenshot in the hope the jury would believe that

evidence and have yet another reason to disbelieve M.A. I have difficulty seeing how that kind of information could assist the appellant in deciding whether to testify.

- [181] The appellant contends in his affidavit, and in his argument, that his trial counsel told him he should not or could not testify or that he failed to explain the risks of not testifying.[13] Indeed, in his submissions as to trial counsel's evidence on cross-examination, the appellant suggested that trial counsel testified that he told the appellant not to testify. The appellant has a fundamentally flawed and selective interpretation of his trial counsel's evidence on this point. Trial counsel is clear in his evidence that he discussed the pros and cons of testifying with the appellant and that he anchored the pros and cons analysis and advice to a number of issues but left the decision to the appellant as to whether he would testify. He was adamant that he never told the appellant he could not testify.
- [182] Having had the benefit of hearing the viva voce evidence from trial counsel and his now associate who assisted him through the preparation for the trial and during the trial, as well as reviewing the detailed affidavits from trial counsel and his associate which contain supporting contemporaneous notes related to the pre-trial meetings with the appellant, I accept, without hesitation, that trial counsel never advised the appellant not to testify and never told him he could not testify. I see no plausible basis on which to reject trial counsel's evidence on this point. That evidence is detailed and consistent with the documents describing the advice provided (the June 10, 2020 letter) and the notes of the June 12, 2020, teleconference meeting.
- [183] Trial counsel was clear and unequivocal on this point both in his affidavits, and more specifically in his viva voce evidence. To the extent that there is a conflict in the affidavit evidence as between the appellant and trial counsel, I accept and prefer the evidence of trial counsel. It more properly accords with the reality of the situation as it unfolded at the time. In contrast, the appellant's evidence is largely lacking in detail, unsubstantiated by any real confirming independent evidence, and is seemingly incongruous with what the appellant, as a practicing lawyer, would have a basic understanding of at the relevant time - that the decision to testify is that of the accused alone, not his counsel.
- [184] A further point in respect of this allegation is that at no time after the close of the Crown's case and the election to call no evidence on July 10, 2020, and the closing arguments on October 15, 2020, did the appellant ever express any reservations or concerns to his counsel about the legal strategy being advanced and about not being called to give evidence in his own defence. The absence of a contemporaneous objection from the appellant about trial counsel's failure to call him to testify, particularly in light of the fact that the appellant was a practising lawyer with criminal Legal Aid clients, is an important consideration that reinforces my conclusion that the appellant made an informed choice not to testify after having received his trial counsel's considered opinion: Dunbar at para. 133.

- [185] I accept the evidence of trial counsel and his associate that they had several discussions with the appellant about the trial strategy including whether he would testify and that trial counsel discussed the pros and cons of testifying. Trial counsel related his advice in this regard to the various issues presented by the Crown's case and the appellant's unique circumstances, including the risks and problems presented by both the appellant's lack of recollection of the events and in respect of the Law Society proceedings. I have no hesitation in saying that I reject the appellant's evidence to the extent that it is inconsistent with evidence from his trial counsel and the associate.
- [186] An important consideration in trial counsel's advice was that the appellant could not provide any evidence about his meeting with the complainant. On June 10 and 12, 2020, trial counsel asked whether the appellant could honestly testify that he met the complainant and did not sexually assault her. The appellant's answer that he could not recall speaking and meeting with the complainant was problematic given the objective evidence (the LRS referral and telephone records) but also because it was the missing foundation for any testimony. The appellant never told trial counsel that upon seeing the complainant he recalled the meeting. The appellant's subsequent full recovery of a memory (post-conviction) about meeting the complainant did not ameliorate things. Indeed, it precipitated another Citation by the Law Society.
- [187] Trial counsel's concerns expressed about the risks and the advice he provided on whether the appellant should or should not testify do not reveal incompetence in the advice provided, indeed the advice was eminently reasonable in the circumstances.
- [188] Having been provided advice on the advantages and disadvantages of testifying - the risks essentially - and clearly having laid out for him what was at stake with the decision about testifying, the appellant made an informed choice and elected not to testify: *R. v. D.A.*, 2020 ONCA 738 at para. 33.
- [189] As noted in *K.K.M.* at paras. 62 - 66, a client needs proper advice to make meaningful choices. The Court went on to state that:
- [91] An accused is denied his right to choose whether to testify when counsel actually makes the decision, or when counsel provides no advice or advice that is so wanting, as to preclude the accused from making a meaningful decision about testifying. In those situations, counsel's ineffective representation denies the accused the right to make a fundamentally important decision about the conduct of his defence. That denial goes to the appearance of the fairness of the trial, if not the actual fairness of the trial. Either results in a miscarriage of justice, regardless of the impact of the ineffective representation on the reliability of the verdict.

- [190] The case at bar does not rise to this level at all, indeed, the appellant has failed to establish the factual foundation for his allegations that his trial counsel either told him not to testify, did not let him testify or provided him with advice so wanting as to preclude him from making an informed election on whether to call evidence. I would not accede to this point advanced by the appellant.
- [191] In oral argument, the appellant contends that a further facet of his counsel's ineffective assistance at trial was his failure to advise him of the "W.D. defence". More specifically, the appellant contends that his counsel failed to advise him of the "legal defence" that he says arises from the decision in W.D. which the appellant describes as being to the effect that even if the trier of fact does not believe the accused, but it is possible that a person could believe them, there is a reasonable doubt and the accused must be acquitted. The appellant submits that his counsel was bound to inform him of this defence and by not doing so injected unfairness into the process.
- [192] I would not accede to the appellant's submissions that his trial counsel failed to advise him of the "W.D. defence", primarily for the reason that W.D. is not a defence per se. Indeed, as his trial counsel makes clear in his written submissions to the trial judge at the end of the criminal trial, W.D. is an analytical framework employed in the assessment of the reliability and credibility of the evidence, particularly defence evidence, but also exculpatory evidence adduced in the Crown's case.[14] The trial judge accepted this proposition in her reasons for judgment at paras. 52 and 131.
- [193] In addition, the appellant's "W.D. defence" claim is not addressed in the appellant's affidavits or, more importantly, his cross-examination of his trial counsel. There is no merit to the argument advanced by the appellant that trial counsel failed to advise him of the "W.D. defence".
- [194] Even if the appellant's claims about the "W.D. defence", taken at their absolute highest, could be interpreted to mean that the appellant was not fully informed of all the pros and cons of testifying or not in his criminal trial, in my view that does not undermine the overall context of the careful and nuanced discussions that did occur that addressed the pros and cons of the appellant testifying in his own defence. The appellant was advised by his trial counsel of the risks of testifying and not testifying and made an informed and calculated decision not to testify. I would not accede to this aspect of the appellant's allegation of ineffective assistance of counsel.

A directed verdict application had no prospect of success in the circumstances that existed at the close of the Crown's case

- [195] The appellant contends that he suffered prejudice as a result of his trial counsel's failure to apply for a directed verdict or to advise the appellant of his "right to apply" for a directed verdict of acquittal, representing a second instance of ineffective assistance of counsel. The appellant outlines in his argument that he should have been advised of this "right" and that if the directed verdict application had been dismissed, he could then have testified against the advice of his counsel.
- [196] In so far as the appellant's complaint about the failure to apply for a directed verdict complaint is concerned, trial counsel's evidence stands uncontradicted on this point - such a motion would have been pointless in light of the state of the evidence at the close of the Crown's case. I accept trial counsel's evidence on this issue.
- [197] I have already rejected the appellant's contention that his trial counsel told him not to testify. Indeed, I am satisfied beyond a reasonable doubt that trial counsel advised the appellant of the pros and cons of testifying at his trial and left the decision to the appellant as to whether or not he would testify. I am further satisfied that the appellant made an informed decision not to testify.
- [198] In so far as the directed verdict "right" is concerned, respectfully, while applying for a directed verdict is certainly a procedural option that trial counsel can pursue, it is informed by the state of the evidence at the close of the Crown's case.
- [199] The test to be applied in considering an application for a directed verdict of acquittal is whether or not there is any evidence upon which a reasonable jury, properly instructed, could return a guilty verdict: *R. v. Charemski*, [1998] 1 S.C.R. 679, 123 C.C.C. (3d) 225 at para. 2 (S.C.C.); *R. v. Arcuri*, 2001 SCC 54 at para. 21; *R. v. Wright*, 2009 BCCA 514 at para 19.
- [200] Trial counsel is clear in his affidavit evidence that he did not discuss the option of bringing an application for a directed verdict with the appellant based on the fact that the evidence at the close of the Crown's case provided a more than sufficient basis on which a reasonable jury properly instructed could convict. The appellant did not challenge his former trial counsel about failing to apply for a directed verdict when the appellant cross-examined him. I accept trial counsel's affidavit evidence on this point.
- [201] On the basis of the evidence at the close of the Crown's case, it is clear that all essential elements had been established - whether this had been done to the requisite standard is not the issue. There was evidence before the trial judge on which a reasonable jury properly instructed could convict. Trial counsel's assessment of the case was informed by the volume of evidence adduced in the Crown's case that, if believed by the trial judge, could lead to a conviction. The evidence included K.H.C.'s detailed narrative, the contemporaneous evidence, the corroborative evidence of M.O. and J.C., the phone records, and the identification evidence. There is no doubt that the trial judge would have dismissed any such motion. And, dismissal of the motion would have provided the appellant with no further information about the state of his defence.

[202] It follows that I reject the appellant's contention that his trial counsel's failure to apply for a directed verdict, or to advise him of the ability to apply for a directed verdict, constitutes an instance of ineffective assistance of counsel. The appellant has failed to establish that the failure of trial counsel to apply for a directed verdict, or even advise him of that option, in anyway prejudiced him such that a miscarriage of justice has been occasioned. Accordingly, I would not accede to the appellant's arguments on this issue.

Trial counsel did not fail to prepare for the appellant's sentencing hearing

[203] The appellant deposes that after the trial judge provided her decision on November 27, 2020, the court scheduled a sentencing hearing. The appellant's evidence amounts to an allegation that his trial counsel abandoned him at the sentencing hearing. Respectfully, the most favourable interpretation of this evidence of the appellant is that he is mistaken in his recollection of what happened. The independent evidence of the emails and letters from trial counsel, Legal Aid and the JCM, and significantly the transcript of the hearing before the Justice of the Peace on December 17, 2020, establishes beyond any doubt that the purpose of the court appearance on that day was to set a date for the sentencing hearing, not the sentencing hearing itself.

[204] As described in detail earlier these reasons, the fresh evidence unequivocally establishes the following points:

- Following the appellant's conviction on November 27, 2020, the matter was set over to December 17, 2020, to arrange a one day sentencing hearing;
- Trial counsel wrote the appellant on November 27, 2020, seeking to discuss next steps and preparation and advising him that he would be happy to continue to represent the appellant going forward, provided the appellant resolved the outstanding fee issue;
- Email correspondence and a letter from trial counsel's office on December 16, 2020, establishes that it was the appellant who was completely unresponsive to trial counsel's efforts to discuss the outstanding issues, including preparation for the sentencing and ancillary matters;
- Email correspondence from the Provincial Court's JCM from December 16, 2020, establishes that the appellant contacted her to advise he may no longer be represented by his trial counsel. As a consequence, he wished to be able to appear at the court appearance for the next day;
- The transcript of the proceedings before the Justice of the Peace on December 17, 2020, unequivocally confirms that the appearance was to set a date for the sentencing hearing. It was not the actual sentencing hearing; and
- The appellant voiced no concerns or objections to trial counsel's application on December 17, 2020, to withdraw from the record.

[205] The appellant's claim that his trial counsel failed to prepare for or attend the appellant's sentencing hearing - indeed that he was effectively abandoned by his trial counsel - is completely unsubstantiated and devoid of merit. The appellant has failed to establish the underlying factual foundation for the claim on a balance of probabilities - that the acts or omissions of counsel that are said to have been incompetent actually occurred: Aulakh at para. 40.

[206] I accept without reservation, the evidence of the appellant's former trial counsel and find that he did not fail to prepare for or attend the sentencing hearing. I reject the appellant's evidence on this point; it is completely unsupported by the record. I would not accede to this component of the appellant's argument that he received ineffective assistance from his trial counsel.

Trial counsel did not err in his trial preparations and his assessment of the evidence

[207] The appellant makes a number of discrete complaints about trial counsel's conduct of his case, which for convenience, I have grouped into one overarching theme of trial preparation and conduct of the trial. Notwithstanding the appellant's assertions to the contrary, an examination of the totality of the circumstances, including (i) the affidavit materials filed on the fresh evidence application, (ii) the evidence adduced in cross-examination of trial counsel and his associate, (iii) the transcripts of the trial proceedings, (iv) the written submissions filed by trial counsel at the conclusion of the trial, and (v) the trial judge's reasons for judgment, collectively establishes that trial counsel was thoroughly prepared for the appellant's trial, and the appellant suffered no prejudice in this regard.

[208] The appellant appears to contend that his trial counsel was generally unprepared for trial, and relies in part on the fact that late disclosure was received on the eve of trial. While late disclosure can create problems for the conduct of the defence in a criminal trial, the appropriate remedy is to seek an adjournment and in this case, none was sought.

[209] In the case at bar, while there may well have been late disclosure of some facets of the Crown's case, they were inconsequential details that had already been outlined in the earlier disclosure. For example, the actual undertaking of the complainant's husband was disclosed on the eve of trial. It is unclear how earlier disclosure of this document would have assisted in trial preparation in light of the fact that the complainant never brought it to her meeting with the appellant and the appellant still had no recollection of the meeting.

[210] While it might have been prudent to obtain a copy of the complainant's video or a photograph of her to see if the image tweaked the appellant's memory, counsel's failure to do so in the circumstances of this case does not fall outside the wide range of reasonable professional assistance. Significantly, between his interview with the police in July 2018 through to the commencement of the trial, the appellant consistently had no recollection of meeting with the complainant. And, even when he saw the complainant at trial, he did not advise his trial counsel that he had a clear memory of the meeting with her. At best, seeing

the complainant at the trial caused the appellant to believe he recognized her but nothing else (apart from his comment to the articling student that the complainant was "not his type").

- [211] The appellant contends that his trial counsel did not adequately prepare for the cross-examination of B.S. Trial counsel's evidence on this point and his performance in cross-examining B.S. at trial completely contradicts this assertion. Indeed, trial counsel deposes that he did speak to B.S. in advance of her testimony to determine what helpful evidence she could provide at trial. Furthermore, trial counsel elicited in cross-examination of B.S. that the appellant had only two client chairs (the Windsor chairs), described as his prize possessions, and she identified them in a photograph tendered by the defence that was marked as Ex. #18 in the trial. This evidence contradicted the complainant's description of the chairs they were seated in at the time of the offence. The evidence of B.S. on the physical construction of the client chairs and the complainant's description of an altogether different type of chair (plastic office chair with no arms) provided fertile grounds for the defence to argue that the complainant was an unreliable historian and ought not to be believed in respect of the allegations.
- [212] To the extent that there is a conflict in the evidence between the appellant and trial counsel, I accept the evidence of trial counsel and reject the appellant's evidence on this point of preparation for the cross-examination of B.S. Counsel was thoroughly prepared and obtained what he needed from B.S. in order to advance one plank of the defence - that the complainant was an unreliable and not credible witness.
- [213] Although the appellant's affidavit evidence and his submissions appear to contend that the sole focus of the defence was on the "identification issue", this is contradicted by an examination of the detailed written submissions filed by trial counsel and supported by his oral closing argument to the trial judge on October 15, 2020. It is also contradicted by the trial judge's reasons for judgment. This contention is also contradicted by trial counsel's detailed evidence on this appeal and nuanced summary of the arguments advanced at trial. In particular, as soon as the appellant raised the issue of the nature of the appellant's client chairs in his office, trial counsel pursued this point in his cross-examination of the complainant.
- [214] The appellant further contends that his input was not sought on the trial strategy or approach taken by his trial counsel. Trial counsel deposes in his affidavit and outlined in his evidence that input was sought from the appellant on all aspects of the defence in the lead up to the trial and through the trial.
- [215] In particular, pre-trial client discussions occurred on June 10, 2020 (via letter and email), that addressed (i) the risks of proceeding to trial, (ii) the need to consider making reasonable admissions, (iii) the fact that given the appellant's statement to the police and his continuing lack of recollection of the events appeared to limit viable approaches to raising a doubt through cross-examination of the Crown witnesses, and (iv) the

complicating considerations that the various Law Society matters created. Trial counsel implored the appellant to think carefully about what he wanted to do and to contact him without delay.

- [216] The appellant replied to his trial counsel's letter on June 12, 2020, via email at 8:36 a.m. indicating he understood the import of the letter he had received. He was aware of both the risks and costs associated with proceeding to trial and with being unsuccessful at trial and indicated that he was fully committed to continuing his practise of law in the Fraser Valley. Trial counsel responded via email within minutes and a teleconference meeting was arranged for later in the day.
- [217] At approximately 3:00 p.m. on June 12, 2020, the appellant, trial counsel, trial counsel's articling student, and a paralegal had a teleconference and discussed a number of issues in respect of the approaching trial, including the possible defences available and how they were constrained by the limitations of the appellant's recollection of the events as outlined in his statement to the police in July 2018 and in his instructions to his counsel that he could not recall the meeting with the complainant.
- [218] Through the course of the proceedings at trial, the appellant met with his trial counsel and the articling student on breaks and adjournments and discussed the case strategy and how the case appeared to be unfolding. The appellant expressed no dissatisfaction or reservations as to how the defence was being conducted. And, on July 10, 2020, after the close of the Crown's case, and the trial adjourned to October 15, 2020, for closing submissions, the appellant and his counsel discussed the approach that trial counsel proposed to take in his closing submissions.
- [219] As outlined in the evidence of both trial counsel and his associate, the written submissions they provided to the appellant on October 15, 2020, before the closing submissions were made, contained a comprehensive argument that conformed to the discussions they had had with the appellant at the end of the proceedings on July 10, 2020, and that the appellant had agreed to as the appropriate approach to the case. To that end I reject the appellant's evidence and contention that he had no input on the closing submissions or the strategy that trial counsel was proposing as the defences he would advance in the closing submissions. I find that the strategy was discussed with the appellant throughout the proceedings, they were discussed again at the end of the hearing on July 10, 2020, and again on October 15, 2020. I also find that the appellant agreed to the approach developed by his trial counsel and never voiced any objection to the approach adopted by trial counsel, throughout the course of the retainer. On the evidence of trial counsel and his associate, the appellant was consulted on all issues and accepted the advice offered and agreed with the strategy advanced.

- [220] Significantly, the appellant had a number of contacts with trial counsel over the course of the summer and early fall of 2020 between July 10 and October 15, albeit primarily focused on the Law Society matters. At no time did he express to trial counsel or trial counsel's associate any reservations or trepidation as to the approach trial counsel was proposing for the defence of the criminal charges. I find that the appellant had more than adequate input into how trial counsel conducted this case throughout the course of the proceedings.
- [221] Trial counsel and his associate were unshaken in their evidence on this point. I accept their evidence completely.
- [222] For completeness, I note that even if the appellant did establish that trial counsel did not seek his input on the identification defence, or any other aspect of the defence strategy, this does not amount to incompetent conduct on the performance branch of the analysis, nor that it caused the appellant prejudice that occasioned a miscarriage of justice.
- [223] Finally, on this point, the written submissions of counsel filed on October 15, 2020, and the trial judge's reasons for judgment conclusively establish that the identification issue was not the sole defence advanced in the appellant's trial.
- [224] The appellant also contends in his affidavit and his argument that his trial counsel failed to challenge the complainant on whether the sexual assault actually occurred and that this too provides evidence of trial counsel's ineffective representation. Respectfully, I cannot accede to this point. I agree with the Crown respondent's position that it would have been futile to embark on this line of questioning. The complainant was adamant in her evidence that the assault occurred. Questioning her on whether it never occurred, whether someone else was involved or whether she was mistaken about the events would only have undermined the gains trial counsel made in "chipping away" at the complainant's reliability and credibility and would only have reinforced her evidence about the appellant having sexually assaulted her. The Crown respondent is correct in characterizing this as a tactical decision made necessary by the appellant's lack of recollection of the events in his office that constitute the offence.
- [225] It follows that I reject the appellant's evidence and argument that his trial counsel was not adequately prepared for trial and that he mis-assessed the evidence. The notes of trial counsel's associate from the pre-trial June 12, 2020 meeting with the appellant as well as trial counsel's evidence and his associate's evidence to this point establish that the appellant wanted the trial to proceed and that any adjournment application by the Crown should be opposed. And, an examination of the trial record contradicts the appellant in this respect. Trial counsel vigorously challenged the evidence of all the Crown witnesses, extensively testing their evidence in cross-examination. In addition, trial counsel prepared and filed a detailed, comprehensive and thorough written argument outlining the many bases for why the appellant should be acquitted. The appellant's contentions to the contrary amount to nothing more than an assertion that had he been trial counsel he would have done things differently.

- [226] A review of the trial transcripts contradicts the appellant's general contention that his trial counsel was not prepared for trial. Indeed, trial counsel explored numerous issues and inconsistencies in the evidence of the complainant, that could only have occurred through having thorough knowledge of the Crown's case and the evidence. I agree with the Crown respondent that trial counsel diligently prepared for the trial. This conclusion is supported by the written submissions prepared by trial counsel, filed for the closing argument, and is reflected in the reasons for judgment where Judge Phillips summarizes the various points raised by the defence.
- [227] From the foregoing, it is abundantly clear, even from the trial record alone, that trial counsel was well prepared and had a thorough knowledge of the case against his client. Trial counsel challenged the key witnesses in all areas that reasonable counsel would, exposing internal and external contradictions in the complainant's evidence, including getting her to admit a key part of the defence - that the sexual assault could not have occurred in a chair with armrests (the Windsor chairs). There is nothing in the record which suggests how a more intensive preparation or performance could have impacted the result. I would not accede to the appellant's contention that his trial counsel was not prepared for trial.

The remaining miscellaneous complaints raised by the appellant during oral argument

(i) The client chairs

- [228] The appellant contends that his trial counsel failed him by not putting the appellant's actual client chairs as exhibits in this case. I do not see the failure to adduce the actual chairs in evidence as having amounted to anything that remotely approaches conduct that falls below the standard of reasonable professional judgment expected from a lawyer in the circumstances. Counsel elicited in cross-examination of B.S. that the appellant had only two client chairs, which she described as his prize possessions, and she identified them in a photograph tendered by the defence that was marked as Ex. #18 in the trial. He also managed to have the complainant concede that the sexual assault could not have occurred if she was sitting in a chair with armrests. The actual physical Windsor chairs would have been unnecessary. I would not accede to the appellant's claim that failure to put the actual chairs into evidence constitutes ineffective assistance of counsel. The appellant has failed to establish that he was prejudiced by that decision.

(ii) Failure of articling student to attend court

- [229] The appellant appeared to suggest in his affidavit, albeit by innuendo, that trial counsel's articling student did not attend the proceedings on October 15, 2020. The appellant deposes that on October 15, 2020, he met with trial counsel who arrived 20 minutes late for the 9:30 a.m. scheduled start of the hearing. He cross-examined trial counsel's associate on her attendance and she explained that she was in fact present with trial counsel and attended the proceedings on October 15, 2020. However, she did not sit at counsel table as she was enrolled in PLTC at the time. I accept her evidence on this point and find that the appellant

is mistaken in his recollection of the events of October 15, 2020.

[230] Trial counsel's associate also outlines in both her affidavit and her viva voce evidence that she arrived at the Robson Street Provincial Court House with trial counsel. Upon their arrival they discovered the doors to the court room were locked. The appellant arrived a few minutes later and was provided with a copy of his trial counsel's written argument and authorities.

(iii) Chilliwack values

[231] Finally, as noted in the Positions of the Parties section of these reasons, the appellant also appears to allege that his counsel failed in his approach to challenging the evidence of the complainant because he did so from the perspective of Vancouver values as opposed to Chilliwack values. I understood the appellant to be trying to advance the suggestion that people in Chilliwack react differently to events than do people from Vancouver and that his trial counsel was perhaps approaching the complainant's evidence from a Vancouver bias.

[232] When confronted in cross-examination by the appellant with a suggestion that trial counsel was imposing his Vancouver values onto Chilliwack residents, trial counsel was at a loss to say anything other than point out that his law practise takes him throughout the province and that he had not consciously thought that a person from one area of the province will act in a markedly different way than somebody from another area. Frankly, the appellant's bald contention that people react differently to the events they experience, based on their geographic location within the Lower Mainland of B.C., is completely unsupported by any sort of reliable or established evidence addressing the point. There is no legal merit to this assertion advanced by the appellant only in the course of his cross-examination of his trial counsel and in his oral argument on this appeal.

[233] In summary, the appellant has not discharged his burden of establishing on a balance of probabilities the factual foundation underlying his claim let alone cleared the high hurdle of establishing how he was prejudiced by his trial counsel's conduct of the trial. I would not accede to any of these complaints.

[234] None of the miscellaneous conduct complained of by the appellant amounts to ineffective representation of the appellant in isolation or cumulatively. On this point, the appellant's complaints amount to nothing more than Monday-morning quarterbacking the conduct of his trial counsel and proffering his own view of how, in hindsight, he thinks the defence should have been conducted. The complaints considered both in isolation and cumulatively do not amount to ineffective assistance.

[235] The decisions made and the strategy adopted by trial counsel simply represent one approach, and a reasonable choice, made by trial counsel, informed as he was by all of the circumstances, including the appellant's lack of recollection of the events that grounded the charges and the wider issues with the Law Society.

Conclusion

- [236] Trial counsel's evidence establishes that he had full command and proper knowledge of the evidence, the substantive and procedural law, and provided reasonable, competent and appropriate advice as informed by that knowledge, commensurate with the legal issues raised by both the criminal charges and the Law Society issues.
- [237] Trial counsel's advice about the risks of testifying was eminently reasonable in these circumstances. It most assuredly was not "fundamentally flawed" or "so wanting" as to constitute "no meaningful advice" as those concepts are discussed in the jurisprudence: Mehl at paras. 145 and 148; K.K.M. at paras 91-92. Moreover, the choice on whether to testify or not was left to the appellant. The appellant made an informed choice and elected not to testify.
- [238] I accept the evidence of the appellant's trial counsel and his associate as regards all their dealings with the appellant and their approach to the conduct of the appellant's criminal trial. Trial counsel provided a comprehensive and vigorous defence that falls well within the broad spectrum of reasonable professional assistance. I find that the trial counsel's considered and careful approach in this case is the antithesis of incompetence.
- [239] At the conclusion of the Crown's case, the appellant expressed his confidence in his trial counsel's conduct of the case. Throughout the course of the retainer and the proceedings, trial counsel consulted with his client, explained choices, sought answers and directions from the appellant, and followed the appellant's instructions. The appellant's complaints on this appeal about his trial counsel's conduct are more in the vein of expressions of disappointment with the result. They consist "largely of the sort of 'Monday-morning quarterbacking' that is derived with the benefit of hindsight" that the case law eschews: Dunbar at para. 26.
- [240] In the result, I would dismiss both the application to adduce fresh evidence and the conviction appeal itself.

"Ker J."

- [1] R. v. Scheirer, Unreported Judgment (November 27, 2020, Abbotsford File No. 89765) at paras. 129-130.
- [2] Ibid., paras.153-156.
- [3] Significant parts of all the affidavits were either not admissible as they improperly referred to Law Society reports contrary to s. 87 of the Act or were admissible only for limited purposes such as context. Exhibit. #2 filed on this appeal, and a further addendum prepared by the respondent, address what must be expunged or referred to only on a limited basis, such as context. This Court has followed that process in assessing the evidence.

- [4] The Crown respondent's factum at paras. 29-31 contains a chart that outlines the various passages in the affidavits that fail to meet the criteria for admission as they contain inadmissible opinion, argument and, or, hearsay. The Court has been guided by these submissions in assessing the fresh evidence.
- [5] Subject, of course, to the noted limitations in respect of inadmissible materials and those materials admissible on only a limited basis as noted in the preceding footnote.
- [6] Ex. #A at paras 85-112.
- [7] This acknowledgement by the appellant undercuts his contention that trial counsel's failure to apply for a directed verdict is an example of his counsel's ineffective assistance at trial.
- [8] These passages are emphasized simply to reflect that these are the appellant's assertions. Trial counsel unequivocally denies that he prevented the appellant from testifying.
- [9] Trial counsel and his associate contradict the appellant on this point of being advised of his recollection. They acknowledge that the appellant said he believed that he recognized the complainant but nothing else.
- [10] The logic of such a proposition would seem to be contradicted by the appellant's acknowledgement in his second point above that trial counsel mis-assessed the evidence and that it was clear at the end of the Crown's case that there was insufficient evidence to raise a reasonable doubt on the appellant's behalf.
- [11] Ex. #A, para. 127.
- [12] Ex. #A, paras. 129-136.
- [13] The appellant's allegations around the advice on whether to testify shift between being told he should not testify, he could not testify and not being provided advice about the risks of not testifying.
- [14] Ex #B, Tab 1, pp. 5-8.

Source & reproduction note

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

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/22/19/2022BCSC1907.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/r-v-scheirer-2022>

Prepared on 24 October 2026 · Esheria