
CANADA / JUDGMENT

R. v. Wiens

2016 BCCA 34

COURT

British Columbia Court of Appeal

DECIDED

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2016 BCCA 34 R. v. Wiens

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Wiens,

2016 BCCA 34

Date: 20160126

Docket: CA41140

Between:

Regina

Respondent

And

Keith Gregory Wiens

Appellant

Corrected Judgment: The text of the judgment was corrected at paragraph 51 on March 3, 2016.

Before:

The Honourable Mr. Justice Frankel

The Honourable Madam Justice D. Smith

The Honourable Mr. Justice Savage

On appeal from: An order of the Supreme Court of British Columbia, dated
July 23, 2013 (R. v. Wiens, Penticton Docket 40090-K).

Counsel for the Appellant:

R.S. Fowler, Q.C.

E. Purtzki

Counsel for the Respondent:

M.T. Ainslie, Q.C.

T.A. Livingston

Place and Date of Hearing:

Kelowna, British Columbia

October 6, 2015

Place and Date of Judgment:

Vancouver, British Columbia

January 26, 2016

Written Reasons by:

The Honourable Mr. Justice Frankel

Concurred in by:

The Honourable Madam Justice D. Smith

The Honourable Mr. Justice Savage

Summary:

Appeal by W., a retired member of the RCMP, from his conviction for second degree murder. At trial, W. testified that he shot and killed his common law spouse in self-defence. On appeal, W. argued evidence of his spouse's peaceful disposition was improperly admitted at trial and, in the alternative, that the jury was improperly instructed with respect to the use of that evidence. W. also argued that the trial judge applied the wrong test in ruling inadmissible expert evidence on police firearms training tendered by the defence. Held: Appeal dismissed. The peaceful disposition evidence was properly admitted. The test is whether the disposition evidence is relevant and whether its probative value outweighs its prejudicial effect; it is not necessary for the disposition evidence to have "exceptional" probative value. It was unnecessary for the trial judge to instruct the jury on peaceful-disposition evidence with the degree of detail W. suggested. The expert evidence on firearms training was properly ruled inadmissible; the prejudicial effect of that evidence outweighed its limited probative value.

Reasons for Judgment of the Honourable Mr. Justice Frankel:

Introduction

- [1] Keith Gregory Wiens appeals his conviction on a charge of second degree murder following a trial in the Supreme Court of British Columbia before Mr. Justice Barrow sitting with a jury. The victim was Lynn Kalmring, Mr. Wiens's common law spouse. She died as a result of a single shot from a pistol fired by Mr. Wiens, which struck her in the face. The shooting occurred in the couple's bedroom. In convicting, the jury rejected Mr. Wiens's evidence that he acted in self-defence.
- [2] Mr. Wiens contends that the trial judge erred in three respects, namely:
- (a) admitting evidence of Ms. Kalmring's "peaceful disposition";
 - (b) inadequately instructing the jury with respect to that evidence; and
 - (c) refusing to allow him to call opinion evidence to the effect that when he shot Ms. Kalmring he was acting in a manner consistent with his training as a police officer. (Mr. Wiens is a retired member of the Royal Canadian Mounted Police.)
- [3] For the reasons that follow, I would dismiss this appeal.

Background

- [4] In August of 2011, Mr. Wiens and Ms. Kalmring were living in a home he had purchased in a gated retirement community in Penticton, British Columbia. They had been in a relationship for about eight years. Mr. Wiens was 57 years old, five feet ten inches tall, and weighed 200 pounds. Ms. Kalmring was 55 years old, five feet six inches tall, and weighed about 150 pounds. He was employed as a school bus driver; she was not then working.
- [5] The couple owned a home in Arizona that Mr. Wiens had purchased. He placed the title to that home in both of their names.
- [6] At approximately 11:45 p.m. on August 15, 2011, Ms. Kalmring spoke to her sister, Shelley Pertelson on the telephone. Ms. Kalmring was sobbing and told Ms. Pertelson she and Mr. Wiens had been arguing and that she had thrown \$2,000 (U.S.) at him, along with a ring he had given her. She said Mr. Wiens told her to get a job and had gone to bed. Ms. Kalmring said she tried to find a motel room, but nothing was available. Ms. Pertelson suggested Ms. Kalmring sleep in the spare bedroom. Ms. Kalmring said she loved Mr. Wiens and did not want to leave.
- [7] Shortly after midnight on August 16, 2011, Mr. Wiens called 9-1-1 to report he had shot his wife two minutes before. He told the 9-1-1 operator he was an ex-policeman and that what happened "is just a huge mistake" and that "something got out of hand here tonight".

- [8] At around 12:30 a.m. the police arrived at the residence. They found Ms. Kalmring's body on the floor in the master bedroom. She was lying on her back having been shot once in the face at close range, i.e., less than 30 inches. That shot came from a nine millimetre semi-automatic pistol belonging to Mr. Wiens. The police located the pistol in a holster on the bed.
- [9] Ms. Kalmring's left arm was extended at almost a 90 degree angle from her body. There was a large knife in her left hand, pointing downwards. At trial, the Crown's position was that the knife had been planted, i.e., placed in Ms. Kalmring's hand after she was shot. The Crown called expert medical evidence to support that position. Mr. Wiens called expert medical evidence to support his position that the knife had not been planted.
- [10] An examination of the residence by the police revealed:
- The sheets on the bed in the master bedroom had been turned down on one side.
 - A bathrobe lying on the bed in the master bedroom had a large blood stain. There was a beige hand towel on the bed.
 - There were sex toys and a bottle of lubricant on a bedside table in the master bedroom.
 - The sheets on the bed in the guest bedroom had been turned down.
 - Ms. Kalmring's ring and about \$2,000 (U.S.) were on an island in the kitchen together with handwritten documents which appeared to record payments Ms. Kalmring made to Mr. Wiens towards household expenses in January, February, March, April, and May of 2011.
 - A brown wooden box, in which Ms. Kalmring kept personal possessions, was near the door of the master bedroom.
 - A letter written by Mr. Wiens to Ms. Kalmring shortly after midnight on January 1, 2011, in which he states: (a) he does not take kindly to being told "fuck you"; (b) is no longer prepared to pay all the expenses for a home they own in Arizona; (c) suggests they sell that home thereby giving her "a very nice profit for doing fuck all. (financially speaking!)"; (d) "starting January, 2011 it will be a two way street regarding financial matters"; and (e) if she wants them to stay together and get married "we each start paying our way as of today". [Emphasis in original.]
- [11] Ms. Kalmring's daughter, Brandy Cummings, testified that at a family picnic about ten days before her mother was killed, Mr. Wiens complained to her that Ms. Kalmring was not working. Using derogatory language, he stated that while he has a pension Ms. Kalmring has no money and needed to get back to work. Ms. Cummings testified Mr. Wiens also told her he had lost money when the stock market crashed.
- [12] Over Mr. Wiens's objection, the Crown called three former husbands of Ms. Kalmring to give evidence with respect to her peaceful disposition. That evidence and the trial judge's ruling permitting it to be called are discussed below.

[13] Mr. Wiens gave evidence. He began by relating the details of his service in the RCMP. He was a member of that force for approximately 26 years, from June 1975 until January 2001, retiring as a corporal.

[14] Mr. Wiens said he received basic training in the use of a revolver and a rifle during his initial six-month training period at the RCMP depot in Regina, Saskatchewan. He graduated from the depot in January 1976. In cross-examination, he said the following about the basic training he received:

[S]o the way I was taught is, if you're in a physical confrontation not including a weapon being used against you, you use self-defence techniques. If somebody's coming at you with a weapon, you shoot to kill, is how I was instructed, and this is 1975.

[15] In the mid-1980s, Mr. Wiens became a member of the emergency response team ("ERT"). He received specialized training in Ottawa and, on several occasions, at an RCMP training facility in Carleton Place, Ontario. In Ottawa, Mr. Wiens received expert marksmanship rifle (i.e., sniper) training. The training at Carleton Place dealt with hostage-taking situations. Those training exercises took place in what he referred to as the "killing house". Trainees would enter a three-bedroom house and be confronted with situations requiring them to make instantaneous decisions with respect to whether to fire their weapons in close quarters.

[16] Mr. Wiens said most of his ERT training involved firing a pistol similar to the one with which Ms. Kalmring was killed. He purchased the pistol he used to shoot Ms. Kalmring in the mid-1980s, when he was stationed in Yellowknife, Northwest Territories. One of the reasons he bought it was so his late wife, who passed away in 1997, could use it for protection. He said that since acquiring that pistol he had always kept it at home loaded. The last time he fired it was in the Northwest Territories on December 31, 1989, when he used it to kill some rabid coyotes. He said that during the course of his duties as a police officer he never drew his service firearm other than to shoot an injured animal.

[17] When asked by his counsel to explain the type of shooting he did at Carleton Place, Mr. Wiens stated:

It was all what's referred to as instinctive shooting which is very close range shooting, you don't aim, you point and shoot in very rapid succession and the shooting that they taught us to do was two shots to the head.

[18] In his examination-in-chief, Mr. Wiens related how he and Ms. Kalmring met and started dating in February 2006. They began living together in June 2009. In September 2010, he purchased a home in Penticton. He also purchased a home in Arizona for their impending retirements, which he put in both their names. He said he and Ms. Kalmring were generally happy and that there were new employment opportunities for both of them.

- [19] Mr. Wiens denied using the pejorative language attributed to him by Ms. Cummings, but agreed he had said something about Ms. Kalmring having to go back to work.
- [20] Mr. Wiens said that on the evening of August 15, 2011, he and Ms. Kalmring had been drinking at home. They played a video game and had a bet of a sexual nature. Ms. Kalmring won the bet and put some sex toys on his pillow in the master bedroom. However, he did not want to have sex with her because he had a golf game the next morning; he put the sex toys on a bedside table. She was very upset with him; they argued and she left the bedroom. When she came back into the bedroom she was still upset and agitated. He told her he wanted to go to sleep and asked her to sleep in the guest room. She went to the guest room, but returned a few minutes later.
- [21] When Ms. Kalmring came back to the bedroom she was madder than before. He told her to leave, which she did. He then heard what he took to be her looking through a telephone book; he presumed she was looking for a motel. He fell asleep.
- [22] He testified that he was awakened by Ms. Kalmring hitting him. She was very mad and was screaming. They argued and she left the bedroom. He had never seen her act in this manner before. As the bedroom door did not have a lock he took a wooden box in which Ms. Kalmring kept some items and placed it behind the closed door; he wanted to be alerted if she came back into the room.
- [23] Mr. Wiens said that within a minute Ms. Kalmring came back into the bedroom. She was extremely upset and screamed at him. He described her as having "snapped". Her eyes were "bugging out", she was "purple", and she spit on him. She yelled, "I'll f die, I'm not f leaving and I'm not f living with my f kids. I'm f not doing that. I'll f die". He said she repeated "I'll f die" about six times. In cross-examination, he said they stood nose-to-nose yelling at each other for one-and-one-half to two minutes. He described it as the worst confrontation of his life.
- [24] Mr. Wiens said Ms. Kalmring left the bedroom and he heard her move down the hall towards the kitchen. He felt fearful. He closed the door and then took his pistol from a dresser drawer. He removed the pistol from its holster, threw the holster on the bed, and racked the pistol's magazine to load a bullet into the pistol's chamber. He did this,
- Because I feared Lynn. She was not Lynn, she was crazy, and she had just assaulted me while I was sound asleep, and I was worried about what was coming next.
- [25] He said Ms. Kalmring came "flying through the door", which he was unable to hold shut. She was screaming and had a knife in her left hand. She advanced towards him. He backed away, hitting a bedpost. She was two to three feet away from him and he believed she was going to strike him in the throat or heart. Even as a police officer, he had never been in such a situation. With his elbow towards his chest and the pistol at the height of his head, he fired a single shot at Ms. Kalmring. Her knees buckled and she fell into a seated position and then backwards on to the floor.

[26] In cross-examination, when asked whether he intended to kill Ms. Kalmring, Mr. Wiens stated:

I can't answer that. I mean, I -- I know enough about weapons to say that when you point a weapon at somebody and pull a trigger that bad things are going to happen. I mean, I did basically what I did, what I was trained to do, and it took one and a half seconds, and I did what I did because if I didn't do it I would have died. I mean, I felt my life was in danger when I saw a 15 inch butcher knife coming at my throat. So did I intend to kill her? I - I intended to protect my life.

[27] The trial judge would not permit Mr. Wiens to call opinion evidence on how a police officer would be expected to react in the sort of confrontation Mr. Wiens described. That proposed evidence and the judge's ruling are discussed below.

[28] Whether Mr. Wiens shot Ms. Kalmring in self-defence was the critical issue that the jury had to decide. Mr. Wiens's counsel submitted to the jury that on the whole of the evidence there could be no other conclusion. Crown counsel asked the jury to reject Mr. Wiens's evidence of the altercation and to find that he intentionally shot Ms. Kalmring following an argument over money, and then planted a knife in her hand to make it look like self-defence.

Analysis

Admissibility of the Peaceful-Disposition Evidence

[29] A voir dire was held to determine whether the Crown would be permitted to call Ms. Kalmring's former husbands to give evidence that she had a peaceful, non-violent, disposition; that evidence reached back to 1974. It was not necessary for the former husbands to testify on the voir dire, as counsel agreed the admissibility question could be decided on the basis of statements the husbands had given to the police. During submissions, Mr. Wiens's counsel stated that the defence did not intend to attack Ms. Kalmring's character by leading evidence she had acted aggressively on other occasions.

[30] The statements of the former husbands contained the following:

Robin Kuraoka: He and Ms. Kalmring were married from 1973 until 1984. When they married she was 17 and he was 23. She was never violent towards him. He never saw Ms. Kalmring being violent towards anyone, even when she had been drinking. She would get affectionate when she had been drinking.

Elmer Leroy Marchant: He and Ms. Kalmring were married from 1985 until 1993. She was not violent, even when she had been drinking. He never saw her hit anyone. Ms. Kalmring was bad with finances and money; she spent a lot of money.

Blaine Richard Kalmring: He and Ms. Kalmring were married for about six years. When they argued it was basically over finances. She never showed any physical aggression towards him. He never saw her be violent towards anyone. She did not have a drinking problem.

[31] In ruling the evidence admissible, the trial judge said this:

[32] I am satisfied the evidence is relevant in this case on the basis that, as the authors of the [Report of the Federal Provincial Task Force on Uniform Rules of Evidence, (Toronto: Carswell, 1982)] noted, self-defence has been raised and by necessary implication the issue of whether the deceased was the aggressor arises. Evidence of the disposition of the victim, whether towards violence or otherwise, is relevant to the resolution of that issue.

[33] Next, I find that the evidence in this case has significant probative value. I recognize that it spans a period that begins some 40 years before the events in question and ends some 10 years before the events. Its probative force lies in part in the duration of the aspect of the deceased's character to which it relates. Evidence of a disposition or inclination based on an isolated event years ago will likely be of little value. Evidence of a disposition over the course of a few years many years ago is also likely of little value. Evidence of a persistent trait over the course of most of the adult life of the deceased may, however, have significant probative value. Evidence of that trait in the context of intimate relationships, all of which ended in divorce, is the more probative, given the circumstances in the matter at bar.

[41] The greater the tendency of the evidence to evoke sympathy, the less likely it is that any prophylactic instruction given to constrain that risk will be effective. The tendency of the evidence to give rise to this kind of prejudice in this case is, in my view, reasonably low. Although the three former spouses may have some lingering attachment to the deceased, it is nothing like the attachment and hence the emotional quality that accompanies a parent giving evidence about his or her deceased child.

[42] Related to this concept is the risk that the jury might "conclude that the respondent was a repugnant individual deserving of punishment and a conviction would, as a matter of rough equivalence, give him his just deserts": from [R. v. Handy, 2002 SCC 56, [2002] 2 S.C.R. 908] at paragraph 25. Although this comment was made in the context of evidence about an accused person as opposed to a complainant or victim, the risk identified may operate not because the jury is improperly prejudiced against the accused, but rather because they are moved to sympathy towards the victim. It seems to me unlikely that a properly-instructed jury would fall into such an error in this case. The evidence itself does not give rise to anything approaching a "rough equivalency" or the equivalent of a rough equivalency in this context, and thus the tendency to that end is relatively low.

[43] On balance, I am satisfied that the probative value of this evidence significantly outweighs any potential it has to work prejudice, and in the result I am satisfied it is admissible.

[32] The testimony of the former husbands before the jury was consistent with their statements, save for the following:

- (a) Mr. Kuraoka described Ms. Kalmring as a "loving, kind, gentle person"; they would argue about "day-to-day things" like grocery money, or relationship issues. They married in 1974 not 1973.
- (b) Mr. Marchant said he and Ms. Kalmring would argue about money once in a while.
- (c) Mr. Kalmring stated he and Ms. Kalmring were married from 1993 until 2001.

Their testimony with respect to Ms. Kalmring having a peaceful disposition was not challenged in cross-examination.

- [33] Mr. Wiens accepts that when self-defence is raised in a murder case, the Crown can tender evidence of the victim's peaceful disposition. However, he says where an accused is not suggesting the victim had a violent disposition or character, evidence of peaceful disposition can be admitted only if it has "significant" or "exceptional" probative value. He says that in the present case the trial judge erred in admitting the evidence because its probative value was tenuous at best and outweighed by its prejudicial effect, as it could garner sympathy from the jury. In advancing his position, Mr. Wiens submits greater care and caution must be exercised before admitting peaceful-disposition evidence in what he describes as a "simple" self-defence case, i.e., one in which the accused is not alleging that the victim had a violent disposition. I do not agree.
- [34] It is settled that it is open to the Crown to lead evidence of a deceased victim's peaceful disposition when that evidence is relevant to the issue of whether the accused acted in self-defence, e.g., whether the deceased was the aggressor. The Crown's ability to lead such evidence is not contingent upon the accused attacking the deceased's character. However, the probative value of such evidence must outweigh its prejudicial effect: *R. v. Dejong* (1998), 125 C.C.C. (3d) 302 at paras. 49, 77, 79 (B.C.C.A.); *R. v. Diu* (2000), 144 C.C.C. (3d) 481 at paras. 49-51 (Ont. C.A.); *R. v. Krasniqi*, 2012 ONCA 561 at paras. 61-63, 291 C.C.C. (3d) 236.
- [35] I reject Mr. Wiens's contention that evidence of peaceful disposition must have "significant" or "exceptional" probative value to be admissible; a proposition for which he cites no direct authority. The decision whether to admit evidence of peaceful disposition requires a trial judge to determine the relevancy of such evidence to the issues raised and, if the evidence is relevant, to assess whether its probative value outweighs its prejudicial effect. It is not a precondition to the making of that assessment that evidence which is relevant also be "significantly" or "exceptionally" probative. Rather, the cogency of the evidence is a factor to be weighed in making that assessment.
- [36] The concept of relevance was discussed in *R. v. Chahley* (1992), 72 C.C.C. (3d) 193 (B.C.C.A.). In that case, Mr. Justice Wood said (at 204):

Evidence is relevant if it is probative of either a fact in issue or a fact which itself is probative of a fact in issue. In *Morris v. The Queen*, [1983] 2 S.C.R. 190, the Supreme Court of Canada rejected Wigmore's concept of "legal relevancy", which requires something more than "merely probative" value as a condition of admissibility. In his dissenting judgment, with which other members of

the court concurred on this point, Lamer, J. (as he then was) confirmed Thayer's analysis which applies principles of logic and common sense to determine relevance, and which, subject to the exclusionary rules, admits all evidence logically probative of some matter required to be proved, reserving for the court only a narrowly defined discretion to exclude.

Evidence which tends to make the existence of a fact in issue either more or less probable is logically probative of that fact: *Regina v. P.(R.)* (1990), 58 C.C.C. (3d) 334 (Ont. H.C.), Cross on Evidence (7th ed.), p. 51.

In *R. v. Watson* (1996), 108 C.C.C. (3d) 310 at 323 (Ont. C.A.), Mr. Justice Doherty stated:

Relevance as explained in these authorities requires a determination of whether as a matter of human experience and logic the existence of "Fact A" makes the existence or non-existence of "Fact B" more probable than it would be without the existence of "Fact A." If it does then "Fact A" is relevant to "Fact B". As long as "Fact B" is itself a material fact in issue or is relevant to a material fact in issue in the litigation then "Fact A" is relevant and *prima facie* admissible.

- [37] In the case at bar, evidence that in three previous relationships Ms. Kalmring never displayed violent tendencies towards either her partners or third parties was relevant to one of the principal issues the jury had to decide, namely, whether Ms. Kalmring attacked Mr. Wiens with a knife. Put otherwise, evidence of Ms. Kalmring's lack of propensity for violence over a 27-year period was probative of whether on the night in question she had been the aggressor. That the last of those relationships ended about ten years before the events in issue was, in the context of this case, a matter going to the weight to be given to the evidence, not its admissibility. Although the Crown was not aware of precisely what defence evidence would be called, it was apparent from the outset of the trial that Mr. Wiens would be asserting Ms. Kalmring came at him with a knife and that he shot her in self-defence.
- [38] Mr. Wiens further submits that while the peaceful disposition evidence was of minimal probative value, its prejudicial effect was significant as it was likely to garner sympathy from the jury. Once again, I disagree. For the reasons just stated, I am of the view that the evidence was more than minimally probative.
- [39] With respect to prejudice arising from sympathy, as the trial judge noted in para. 41 of his ruling, this was far less a concern than it would have been had the witnesses been the parents of the victim or, I would add, a person with a recent and close personal relationship with the victim. It should be noted that Mr. Kuraoka's statement during his examination-in-chief that Ms. Kalmring was a "loving, kind, gentle person" was not in his statement and appears to have been an unprompted and unanticipated comment. It should also be noted that immediately after Ms. Kalmring's daughter testified and shortly before Mr. Kuraoka and the other former husbands testified, the judge instructed the jurors, as he had prior to any evidence being called, that they should not be influenced by sympathy for or prejudice against anyone involved in the case.

[40] The task of determining whether the probative value of evidence outweighs its prejudicial effects is an exercise of judicial discretion entitled to appellate deference: *R. v. Oseguera*, 2014 BCCA 352 at para. 19, 315 C.C.C. (3d) 542; *R. v. McCotter*, 2012 BCCA 54 at para. 50, 287 C.C.C. (3d) 423. In this case, Mr. Wiens has not been shown that in exercising that discretion the trial judge made any error in principle or that his decision to admit the evidence was plainly unreasonable.

[41] I would not accede to this ground of appeal.

Jury Charge with respect to the Peaceful-Disposition Evidence

[42] In his closing submissions to the jury, Mr. Wiens's counsel accepted Ms. Kalmring had been a person who normally had a peaceful disposition. He asked the jury to find that on the night in question a confluence of circumstances--what he described as a "perfect storm"--caused her to act completely out of character. In advancing that position, counsel stated, in part:

Through Lynn's life she had experienced many difficulties with a number of failed relationships. In fact we've heard from a number of these relationships. This is not to disrespect her in any way, but as is true for all of us, our current makeup is a function of our past experience. We heard evidence of her peaceful disposition. We don't dispute this, nor did Keith when you heard him on the witness stand. But the factors that led to the perfect storm that I will talk about, started long before August 16th, 2011, ladies and gentlemen. It started with her failed relationships. Past relationships can scar you forever. I can certainly identify with this, and I'm sure many of you can.

In the weeks leading up to August 19th [sic], 2011, you heard the evidence about a number of things that were on the mind of the deceased. Any single one of us -- any single one of which would cause us all hardship. There were multiple things on her mind. Her son had been charged with a serious sexual assault in Grande Prairie. Any mother would be mortified by that. She talked about her daughter Brandy and the abortion of her twins. She talked about her growing older and the fact she didn't like being 55 years of age. There was her inability to go back to work because of the enrolment at the place that she was instructing at, and the fact that Keith was going to leave her -- perhaps leave her side to journey to Grande Prairie. Was Keith going to leave her like everyone else had in her life? We'll never know. Ladies and gentlemen, all of these factors, her past relationships, everything that was on her mind at the time leading up to August 16th, 2011, led to the perfect storm.

Keith described his wife during these confrontations. He described the intensity of these -- of these confrontations, and he was quite fair when he said, "It wasn't just her, I was getting angry too. She kept coming into the room, she kept making these allegations. She kept" -- and as he said, she started to get crazy. Now, ladies and gentlemen, the only evidence you've heard about what happened that night is from Keith. There is nothing else in the evidence before you that can refute that. Nothing.

[Emphasis added.]

[43] Crown counsel, in asking the jury to reject Mr. Wiens's version of what happened relied on the peaceful-disposition evidence. In part, counsel stated:

The point is, I suggest, how likely is it that a woman never known to be violent, and openly expressive of a dislike of weapons, would arm herself with a knife for an offensive purpose following a fight? And why would she advance with that knife towards someone who has a gun in their hand? It simply does not make sense.

These men established that for the whole of Lynn Kalmring's adult life in relationships of some duration she was never violent. She got over fights quickly, she didn't stew over things. She was a person of peaceable disposition whether sober or even after she had been drinking alcohol.

Now, it might be suggested that people change, and to some extent that's true, but I suggest to you, ladies and gentlemen, that people's character, their essential disposition, the core of who they are doesn't change over time. So the person described to you by Keith Wiens on the fatal evening bears no relationship to the Lynn Kalmring that was described by others. The description of her spitting, eyes bulging out, turning purple is just not true.

[44] Mr. Wiens's objection to the jury charge relates to para. 117 of the written version of the charge provided to the jury. That paragraph appears in the following section of the charge:

a) Has the Crown proved beyond a reasonable doubt that Ms. Kalmring did not assault Mr. Wiens?

[114] The question is whether Ms. Kalmring assaulted Mr. Wiens and, if she did, whether Mr. Wiens killed Ms. Kalmring in repelling that assault.

[115] Assault includes the application of force or the threat to apply force. To put this another way, it is not necessary that a person apply force to another to constitute an assault; a threat to apply force made by a person who has the present ability to carry out the threat is sufficient. You should consider all the evidence when determining whether Ms. Kalmring applied force to Mr. Wiens or threatened to apply force to Mr. Wiens in circumstances in which she had the present ability to carry out that threat.

[116] The evidence in relation to this issue comes from a number of sources. There is the evidence from Ms. Kalmring's former spouses. You will recall that each of them testified that in their experience with her and whether in the course of their experience with her they saw her resort to violence. They all said that from time to time they argued with Ms. Kalmring during the course of their relationship with her and they all said that finances was a subject that they argued about, they all said that she was never violent towards them or anyone else either when the [sic] argued or otherwise. They said that alcohol did not seem to have a negative effect on her; both Mr. Kuraoka and Mr. Kalmring said that when she drank she tended to become happy. Their collective experience with Ms. Kalmring was from about 1974 when she married Mr. Kuraoka to 2001 when she separated from Mr.

Kalmring. Thus their most recent experience with Ms. Kalmring was 10 years before August 2011.

- [117] The evidence of Ms. Kalmring's disposition may be used by you in deciding whether the Crown has proved beyond a reasonable doubt that she did not assault Mr. Wiens. This evidence and other evidence in this case, may evoke feelings of sympathy for Ms. Kalmring. As I have instructed you already, your decision is not to be based on sympathy for or prejudice against anyone involved in this case.

[Emphasis added.]

- [45] The trial judge went on to summarize the other evidence in the case, at the conclusion of which he stated:

- [143] You should consider Mr. Wiens's evidence on this issue in the context of all of the evidence. If, in the context of all the evidence, you believe Mr. Wiens's evidence on this issue then you will conclude that the Crown has not disproven this element of the defence of self-defence beyond a reasonable doubt. Even if you do not believe Mr. Wiens's evidence that Ms. Kalmring assaulted him, if his evidence leaves you in a state of reasonable doubt about whether she did, then you will conclude that the Crown has not disproven this aspect of the defence of self-defence beyond a reasonable doubt. Finally, even if you do not believe Mr. Wiens's evidence on this point and even if his evidence does not leave you in a state of reasonable doubt about this aspect of the defence of self-defence, you must still ask yourself whether, on all the other evidence, you are satisfied beyond a reasonable doubt that Ms. Kalmring did not assault Mr. Wiens.

- [144] If the Crown has proved beyond a reasonable doubt that Ms. Kalmring did not assault Mr. Wiens then the defence of self-defence fails.

- [46] In the course of summarizing the Crown's position, the trial judge said:

- [200] Finally, the Crown argues that from this evidence you should conclude that Ms. Kalmring was not a violent person, either when drinking or not. Support for that proposition comes from the evidence of her former spouses. In addition the Crown says that Ms. Kalmring was not angry on the night she was killed. She was upset to be sure but, at least according to her sister, she was upset in the sense that her heart was hurting. Further, the Crown says that from all of this evidence you can and should conclude that Ms. Kalmring disliked weapons of all kinds but guns in particular.

- [47] In the course of summarizing Mr. Wiens's position, the judge said:

- [209] As I understand the submissions of Mr. McKay on behalf of Mr. Wiens they are these. First, he argues there is simply no reason why Mr. Wiens would shoot Ms. Kalmring other than to defend himself in precisely the manner he told you. The evidence supports the conclusion that theirs was a happy relationship. Mr. McKay asks rhetorically if money issues were a concern why it is that Ms. Pertelson seemed unaware of that? Even if money was a concern

it does not begin to explain why Mr. Wiens would deliberately shoot his spouse. On the other hand, there are reasons for why Ms. Kalmring behaved in the manner Mr. Wiens described. The reasons can be found in her background, a background that came to the fore with the prospect of Mr. Wiens travelling to Grand Prairie to work. Mr. McKay argues that Ms. Kalmring was fearful of losing her relationship with Mr. Wiens. The prospect of returning to live with one of her children, an alternative which she saw as the only realistic short term outcome, was completely unpalatable to her. She did not want to start over in another relationship at her age.

- [210] These concerns were percolating in her life. They had a significance informed by her life experiences. She had been in past relationships some of which ended sadly from her point of view. On top of that she had other issues. One related to her work and the fact that the course she hoped to teach was not going to be offered and another related to her son's legal situation. This all came to the fore on August 15 when, after the video game, Mr. Wiens wanted to go to bed rather than pay the bet, a payment which involved sexual relations with Ms. Kalmring. This is what caused Ms. Kalmring to react in the manner that Mr. Wiens said she did.
- [48] Before charging the jury the trial judge provided counsel with a draft of his proposed instructions for discussion. As those discussions proceeded, the draft went through a number of revisions. The initial draft did not contain the paragraph which is now impugned. That paragraph appeared for the first time in the final draft given to counsel. The trial judge's decision to include it was not based on any submissions made to him. Counsel for Mr. Wiens (who are not counsel on this appeal) had an opportunity to review the final draft before the jury was instructed and did not object to this paragraph. Further, in the post-charge discussions, Mr. Wiens's counsel did not object to it.
- [49] Mr. Wiens now contends the charge was deficient. He says the trial judge should have instructed the jury to exercise caution in relying on the peaceful-disposition evidence because people do not always act in a manner consistent with their past behaviour; in other words, people sometimes act out of character. In addition, Mr. Wiens says the jury should have been told to consider the temporal proximity of the evidence of peaceful disposition to the events in issue and any differences between the nature of Ms. Kalmring's past circumstances and her present situation when assessing the weight to be given the peaceful-disposition evidence. He submits that in the absence of such an instruction there is a significant risk that the jury reached its verdict without scrutinizing the peaceful-disposition evidence.

- [50] In discussing the jury instructions and the peaceful-disposition evidence, Mr. Wiens cites *R. v. Handy*, 2002 SCC 56 at paras. 31, 35, 39, [2002] 2 S.C.R. 908, and *R. v. Last*, 2009 SCC 45 at para. 40, [2009] 3 S.C.R. 146, cases which discuss the dangers associated with propensity reasoning in the context of evidence with respect to the character of the accused. He says since it is dangerous to base a finding of guilt on the character of an accused it is equally dangerous to base a finding of guilt on the disposition of a victim.
- [51] In considering Mr. Wiens's objection to the jury charge it is important to keep in mind, as discussed in *R. v. Jacquard*, [1997] 1 S.C.R. 314 at para. 32, that an appellate court must take a "functional approach" in reviewing a jury charge. Further, as stated in *Jacquard* at para. 38, "defence counsel's failure to object to the charge says something about both the overall accuracy of the jury instructions and the seriousness of the alleged misdirection." See also: *R. v. Rodgeron*, 2015 SCC 38 at para. 50, [2015] 2 S.C.R. 760; *R. v. Daley*, 2007 SCC 53 at para. 58, [2007] 3 S.C.R. 523.
- [52] More recently in *R. v. Alexander*, 2015 BCCA 484, Madam Justice Stromberg-Stein, succinctly described the approach to be taken in reviewing a jury charge:
- [110] An appellate court, when reviewing a jury charge, must consider the alleged error in the context of the charge and the trial as a whole. A trial judge is allowed flexibility in instructing the jury. The precise words used in the jury charge are a matter of discretion for the trial judge and will depend on the circumstances of the case. It is the overall effect of the instructions that matters: *R. v. Araya*, 2015 SCC 11 at para. 39.
- [111] An accused is entitled to a properly instructed jury, not a perfectly instructed one. If perfection were the standard, no jury charge would pass appellate review: *R. v. Jacquard*, [1997] 1 S.C.R. 314 at paras. 1-2.
- [112] It is the trial judge's obligation to properly instruct the jury; however, it is expected that counsel will assist the trial judge and identify aspects that may be problematic in the charge. A failure to object to a jury charge is not determinative; however, trial counsel's position at trial is an important factor to consider when evaluating complaints raised on appeal: *Jacquard* at paras. 35-38; *R. v. Purchase*, 2015 BCCA 211 at paras. 3-4.
- Also apposite is the judgment of Mr. Justice Doherty in *R. v. MacKinnon* (1999), 132 C.C.C. (3d) 545 (Ont. C.A.):
- [27] In *Jacquard*, Lamer C.J.C. stressed that a functional approach must be taken when assessing the adequacy of jury instructions. I take this to mean that instructions must be tested against their ability to fulfil the purposes for which they are given and not by reference to whether any particular approach or formula has been used. By the end of the instructions, whatever approach is used, the jury must understand:
- the factual issues which had to be resolved;
 - the law to be applied to those issues and the evidence;

- the positions of the parties; and
- the evidence relevant to the positions taken by the parties on the various issues.

[53] In my view, having regard to the submissions of counsel and the charge as a whole, there was no need for the jury to be instructed to exercise special caution in considering the peaceful-disposition evidence. Mr. Wiens did not take issue with the fact that ordinarily Ms. Kalmring was a non-violent person. His defence was founded on her having acted completely out of character on the night in question. Based on his counsel's closing submissions and the summary of those submissions provided by the trial judge, the jurors would have been aware of Mr. Wiens's position. More particularly, they would have been aware that to reject self-defence they had to be satisfied beyond a reasonable doubt, on all the evidence, that Ms. Kalmring had not acted in the manner Mr. Wiens described. The unchallenged evidence of her peaceful disposition was just one of the pieces of evidence the jurors had to consider in making that determination. I am, accordingly, unable to find that Mr. Wiens was prejudiced by the trial judge's failure to instruct the jury to exercise special caution in considering the peaceful-disposition evidence.

[54] I would not accede to this ground.

Admissibility of Expert Evidence

[55] Mr. Wiens sought to call Murray Charlton to give opinion evidence. Mr. Charlton had been a member of the RCMP from 1964 to 1977. In the 1970s he served as a firearms instructor at the RCMP depot in Regina, Saskatchewan. Since leaving the RCMP he has been involved in training peace officers in the use of firearms. Part of the training he administers involves placing trainees in stressful situations. Mr. Charlton had not trained RCMP ERT members in the handling of firearms, nor had he visited or participated in training at the RCMP facility in Carleton Place, Ontario. He did not interview, test, or otherwise assess Mr. Wiens.

[56] Mr. Wiens sought to place before the jury Mr. Charlton's opinion in response to the following questions:

1. Was Mr. Wiens's response to the alleged knife attack reasonable and expected considering his background?
2. How would Mr. Wiens's past training have affected his reaction?
3. What is "muscle memory" in this context?
4. What is significant about the fact of one shot being fired?
5. In terms of self-defence, was Mr. Wiens's response proportionate?

- [57] A voir dire was held to determine the admissibility of Mr. Charlton's evidence. Mr. Charlton testified on the voir dire and a written report prepared by him was filed as a voir dire exhibit. The opinions expressed in that report are based on a summary of the facts that is consistent with Mr. Wiens's description of the events on the night in question. The report is silent with respect to Mr. Charlton's knowledge of the firearms training Mr. Wiens received.
- [58] The trial judge would not permit Mr. Charlton to express an opinion on any of the five questions. On appeal, Mr. Wiens contends the judge erred in refusing to permit Mr. Charlton to opine on question 4 and, to the extent it is related, question 2. He does not challenge the judge's refusal with respect to questions 1, 3, and 5.
- [59] As set out in Mr. Charlton's written report, if permitted to testify before the jury, he would have answered Questions 2 and 4 as follows:

Question 2:

With his past training, it would be more than reasonable for him to pull the firearm close to his body before discharging it. This would have been part of his training for what is call [sic] "Close Quarter Drills." Extending ones [sic] firearm out at arm's length when the threat is within 30 inches is not practical with the possibility of your duty sidearm being pushed aside or grabbed is too real.

Question 4:

With respect to one shot being fired this is not unusual in that with training, officers at [sic] taught to use deadly force to prevent grievous bodily harm and once any threat is removed or neutralized, there is no more need to continue firing.

- [60] In his ruling, which is indexed as 2013 BCSC 1579, the trial judge considered the four criteria set out in *R. v. Mohan*, [1994] 2 S.C.R. 9 for determining the admissibility of opinion evidence, namely: (a) relevance; (b) necessity in assisting the trier of fact; (c) the absence of any exclusionary rule; and (d) a properly qualified expert.
- [61] The trial judge held the answers to questions 2 and 4 were inadmissible for four reasons. The first was that those answers were only marginally relevant. In reaching this conclusion, the judge began by noting that the events in issue occurred years after Mr. Wiens retired from the RCMP. He also noted that although Mr. Charlton was a highly qualified firearms instructor, he had no knowledge of the ERT firearms training Mr. Wiens received. The judge then stated:
- [23] Mr. Wiens did not testify about whether he was trained to fire a single shot or fire multiple shots when faced with a deadly threat. He merely testified that he was taught to shoot to kill. Mr. Charlton testified on the voir dire about what constitutes an acceptable "course of fire". He said that has changed or evolved over time. "Course of fire" involves a number of shots that peace officers are trained to discharge and where they are trained to hit their targets. Initially, they were trained to empty their weapons into the torso of the threat. Next, they

were taught to fire once at the torso, once at the head, and once again at the torso. Mr. Wiens did not testify which of these approaches he was taught. Thus, in a general sense, Mr. Charlton's opinion about the significance of Mr. Wiens' decision to fire a single shot at his spouse is of some relevance, but not great relevance.

- [24] In [R. v. Mohan, [1994] 2 S.C.R. 9], Sopinka [J.] pointed out that subsumed within the notion of relevance as a criterion for the admission of expert opinion evidence is the notion of the cost of the admission of such evidence to the trial process. In that respect, the criteria of relevance involves an assessment of the probative value of the evidence and its potentially prejudicial effect. While I accept that Mr. Charlton's evidence has some relevance, its probative value is not high for the reasons indicated. His evidence has the potential to operate prejudicially. That is so, in part, because of his impressive credentials. Those credentials do not necessarily translate to the circumstances of this case. This is the second overarching objection that the Crown raises. As Mr. Charlton pointed out, the training he administered and with which he is familiar is training used by police officers in the course of their duties as police officers. He pointed out that the training is administered to and expected to be utilized by peace officers who are on duty and sober. Mr. Wiens was neither. He was 12 years post-retirement and was not sober at the time of the events in question. He testified that he did not think he could operate a vehicle legally given the amount of alcohol he had consumed. These features, that is, the consumption of alcohol, the fact that Mr. Wiens was not employed as a police officer at the time in question, the fact that he was some 11 or 12 years into his retirement, and the fact that there is no evidence as to the training he received in terms of "course of fire" all serve to diminish the probative value of the evidence. The prejudicial effect lies in a combination of the impressive credentials of the witness and the substance of his opinion which must necessarily be advanced from the perspective of an individual employed as a peace officer and sober. These two things in combination serve to tip the balance in favour of exclusion.
- [25] A further consideration in relation to question 4 involves an assessment of what the opinion is relevant to. It is not clear to me whether the opinion is offered to account for the fact that only one shot was fired, and yet one might expect that faced with a homicidal attack, someone acting in self-defence would fire repeatedly. If that is the basis upon which the evidence is proffered, it has limited value and would not assist the trier of fact. I say that because, on the evidence, the wound that Ms. Kalmring sustained rendered her instantly unconscious and killed her almost instantly. She would have dropped to the floor more or less immediately. That would have been apparent to anyone, including Mr. Wiens given his proximity to her and where he knew the bullet had struck her. Whether his training caused him to fire only a single shot is something he did not allude to in his evidence. It seems to me that Mr. Charlton's opinion on this point would be of limited assistance at best.
- [28] The proffered evidence from Mr. Charlton is evidence which, in my view, should attract a strict application of the relevance and necessity criterion. As to the former, I find the evidence is not particularly probative. I note that relevance in this context means something

more than merely helpful. As to the latter, it seems to me that whether a particular response is proportionate in the context of the fact situation presented by this case is a matter within the knowledge of the average juror. In fact, it is a matter which jurors are well suited to assess based on their life experiences and the application of their common sense. Finally, there is some risk that given Mr. Charlton's impressive qualifications, his opinion would be afforded more weight than it warrants in these circumstances.

- [62] In deciding whether to admit opinion evidence, trial judges exercise a gatekeeper function. As those judges are in the best position to make such determinations, their decisions are entitled to appellate deference. Apt in that regard is the following from the judgment of Mr. Justice Mainella in *R. v. Pearce*, 2014 MBCA 70, 318 C.C.C. (3d) 372, recently cited with approval by this Court in *R. v. Orr*, 2015 BCCA 88 at para. 65, 18 C.R. (7th) 158:
- [74] Appellate deference will be afforded to determinations as to the admissibility of expert opinion evidence. The balancing of its potential probative value, reliability, significance to the trial, necessity and its potential prejudicial effect to the trial process, if admitted, in the context of the particular case "does not involve the application of bright line rules, but instead requires an exercise of judicial discretion" [*R. v. Abbey*, 2009 ONCA 624, 246 C.C.C. (3d) 301] at para. 79). Therefore, absent an error in law, a misapprehension of evidence, a failure to consider relevant evidence or abdication by the trial judge of his or her gatekeeper function, an appellate court should decline to interfere with a trial judge's admissibility decision ([*R. v. K.(A.)* (1999), 45 O.R. (3d) 641 (C.A.)] at para. 93; [*R. v. D.D.*, 2000 SCC 43, [2000] 2 S.C.R. 275] at paras. 12-13, 70; [*R. v. J.-L.J.*, 2000 SCC 51, [2000] 2 S.C.R. 600] at para. 61; and *R. v. Woodard (J.)*, 2009 MBCA 42 at para. 14, 240 Man. R. (2d) 24).
- [63] In the present case, Mr. Wiens submits that the trial judge erred in law because he applied the wrong test in considering whether the probative value of Mr. Charlton's evidence was outweighed by its prejudicial effects. He says that because Mr. Charlton was called as a defence witness, the judge was required to consider whether the prejudicial effect of his evidence substantially outweighed its probative value. In support of this argument, Mr. Wiens cites *R. v. Seaboyer*, [1991] 2 S.C.R. 577 at 621; *R. v. Grant*, 2015 SCC 9 at para. 44, [2015] 1 S.C.R. 475; *R. v. Bell* (1997), 115 C.C.C. (3d) 107 at para. 28 (N.W.T.C.A.); *R. v. Doodnaught*, 2013 ONSC 4534 at paras. 30-33; and *R. v. Al-Rassi*, 2013 NSSC 211 at para. 24, 331 N.S.R. (2d) 328. See also: *R. v. M.(B.)* (1998), 130 C.C.C. (3d) 353 at paras. 88-89 (Ont. C.A.).
- [64] In light of the record in this case, it is unnecessary to decide whether the test for the admission of opinion evidence at the behest of an accused is different from the test that applies when such evidence is sought to be tendered by the Crown.
- [65] The first difficulty with Mr. Wiens's argument is that the test he says the trial judge should have applied is not the test he advanced at trial. At trial he relied on *Mohan*, in which Mr. Justice Sopinka, in discussing the relevance criterion, stated (at 21) that, "Evidence that is otherwise logically relevant may be excluded on [the cost benefit analysis] basis, if its probative value is overborne by its prejudicial effect". At no point did Mr. Wiens suggest to

the trial judge that a different standard applied when the defence seeks to tender opinion evidence. Of note, is that Mohan is a case in which the Supreme Court of Canada affirmed a trial judge's decision to exclude the evidence of a defence expert.

[66] The second difficulty with Mr. Wiens's argument is that it is apparent from the trial judge's ruling that had he applied the test now being propounded, he would have reached the same conclusion. The judge found Mr. Charlton's opinion had some relevance but that it was of limited probative value. However, the judge found numerous factors caused the prejudicial effect of Mr. Charlton's opinion evidence to outweigh its probative value including: (a) Mr. Wiens not having testified he fired a single shot because he had been trained to do so; (b) Mr. Charlton's limited knowledge of the training Mr. Wiens received; and (c) the events in issue did not involve a sober police officer acting in the course of his or her duties. In addition, the trial judge found Mr. Charlton's opinion with respect to only one shot being fired would not be of assistance to the jury because it would have been apparent to Mr. Wiens as soon as he fired that single shot, that Ms. Kalmring had been killed.

[67] In this case, the trial judge exercised his gatekeeper function having regard to the facts of the case before him. He was in the best position to determine whether the jury would be able to reach a proper verdict in the absence of Mr. Charlton's opinion. While another judge might have exercised his or her discretion differently, I am unable to say that in making what amounted to a judgment call, the trial judge committed a reversible error.

[68] I would not accede to this ground.

Disposition

[69] I would dismiss this appeal.

"The Honourable Mr. Justice Frankel"

I AGREE:

"The Honourable Madam Justice D. Smith"

I AGREE:

"The Honourable Mr. Justice Savage"

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