IN THE COURT OF APPEAL
OF NEWFOUNDLAND AND LABRADOR

Citation: *R. v. Chafe*, 2022 NLCA 12
Date: February 22, 2022
Docket Number: 201901H0061

BETWEEN:

TODD THOMAS CHAFE — APPELLANT

AND:

HER MAJESTY THE QUEEN — RESPONDENT

AND:

C. BRAD LEYTE — FIRST INTERVENOR

AND:

RANDELL L. WELLON — SECOND INTERVENOR

Coram: Welsh, O'Brien and Goodridge JJ.A.

Court Appealed From: Provincial Court of Newfoundland and Labrador
St. John's 0118A00720

Appeal Heard: December 14, 2021
Judgment Rendered: February 22, 2022

Reasons for Judgment by: Goodridge J.A.
Concurred in by: Welsh and O'Brien JJ.A.

Counsel for the Appellant: John D. Brooks Q.C. and Bob Buckingham
Counsel for the Respondent: Kathleen O'Reilly
Counsel for the Intervenors: Randolph J. Piercey Q.C.

Authorities Cited:

CASES CITED: *R. v. W.(D.)*, [1991] 1 S.C.R. 742; *Palmer v. The Queen*, [1981] 1 S.C.R. 759; *R. v. White*, 2021 NLCA 39; *R. v. Freake*, 2012 NLCA 10, 318 Nfld. & P.E.I.R. 305; *R. v. G.D.B.*, 2000 SCC 22, [2000] 1 S.C.R. 520; *R. v. Carroll*, 2001 NFCA 59, 206 Nfld. & P.E.I.R. 341; *R. v. Meer*, 2016 SCC 5, [2016] 1 S.C.R. 23.

RULES CONSIDERED: *Court of Appeal Rules*, NLR 38/16, rule 37(3).

Goodridge J.A.:

[1] The primary issue on this appeal is whether the appellant suffered a miscarriage of justice owing to ineffective assistance from his defence counsel and incompetence or bad faith of Crown counsel. The secondary issue is whether the trial judge erred in application of the principles dealing with the standard of proof required of the Crown, as set out in *R. v. W.(D.)*, [1991] 1 S.C.R. 742.

[2] For the reasons that follow, I would dismiss the appeal.

BACKROUND

[3] After a four-day trial, the appellant was convicted of assault, uttering threats, and break and enter. The alleged victim of these crimes was the appellant's brother, Gerard Chafe. The actions that led to the convictions occurred at Gerard's home in Petty Harbour on the evening of February 10, 2018. The two brothers, and a friend, were consuming alcohol together when an argument erupted.

[4] Gerard testified that he was violently assaulted by the appellant during that argument, "… he started hitting me, and hitting me … my facial area, side of me head, and he hit me with his fists" (Transcript at 250-251). Gerard said that after the assault the appellant went outside the home where he continued to

display rage by shouting threats to kill, and by eventually beating out the front window and gaining re-entry into the home through that broken window.

[5] The appellant testified that he did not assault Gerard during the argument; that he did not shout threats to kill Gerard; and that he did not (or at least could not recall) gaining re-entry into the home though the broken window. The appellant says that he was walking away from the home when Gerard came up from behind and stabbed him, and that the only physical fight occurred in front of the home and in response to the stabbing.

[6] Three independent eyewitnesses were watching from across the street. None of these three corroborated the appellant's testimony that there was a physical fight in front of the home. All three eyewitnesses corroborated Gerard's testimony regarding the sequence of events; the rage of the appellant outside the home while shouting threats to kill; and the eventual break and enter through the front window. They heard the appellant shout, "I know you're in there and if I get in there, I'm going to fucking kill you" (Transcript, at 104 and 189); they observed the appellant kicking the front door; they observed the appellant break into the home by smashing out a front window and entering through that window. They could not testify regarding the assault that Gerard said had occurred inside the home, but the photographs entered at trial showed blood and bruising on Gerard's face, consistent with injuries one would expect from the assault that he described.

[7] The trial judge accepted Gerard's testimony, and the testimony of the three eyewitnesses, and rejected much of the appellant's testimony.

[8] The appellant argues that the rejection of his testimony was a consequence of ineffective assistance from his counsel (the first and second intervenors) and incompetence or bad faith of Crown counsel. He seeks to introduce fresh evidence to support these arguments.

FRESH EVIDENCE

[9] When an allegation of ineffective assistance from counsel is made on appeal, affidavits from the appellant and counsel are properly admitted without consideration of the *Palmer v. The Queen*, [1981] 1 S.C.R. 759, factors that ordinarily apply to the admission of fresh evidence. In addition, upon request, counsel will be granted intervenor status (*R. v. White*, 2021 NLCA 39, at para. 6, and *R. v. Freake*, 2012 NLCA 10, 318 Nfld. & P.E.I.R. 305, at paras. 10-14).

[10] The appellant sought to file two affidavits outlining various allegations of ineffective assistance from his counsel, and several attachments – photographs, medical records, and expert medical affidavits. The attachments, the appellant submits, have relevance to his credibility, potentially corroborating his oral testimony. The failure to tender that evidence at trial is part of the appellant's argument for ineffective assistance.

[11] Appellant's counsel who were challenged also filed affidavits. All affiants were cross-examined.

[12] While the affidavits from counsel and the appellant are properly admitted as fresh evidence, the admission of the attachments included on one of the appellant's affidavits – the photographs, medical records, and expert medical affidavits – fall to be considered under the four factors established in *Palmer*, at 775, and adopted by this Court as rule 37(3) of the *Court of Appeal Rules*, NLR 38/16:

> (a) whether, by due diligence, the evidence could have been brought in the court appealed from;
> (b) the relevance of the evidence in the sense that it bears upon a decisive or potentially decisive issue in the appeal;
> (c) the credibility of the evidence;
> (d) whether the evidence, if believed, could reasonably have affected the result; and
> (e) any other relevant factor.

[13] Regarding the first factor, insofar as the attachments to the affidavit were available, they could have been adduced at the time of trial. However, this omission is not a determining factor, and in the criminal context, this requirement may be less strictly applied. Further, it is but one factor to be considered (*R. v. G.D.B.*, 2000 SCC 22, [2000] 1 S.C.R. 520, at paras. 19-22, and *R. v. Carroll*, 2001 NFCA 59, 206 Nfld. & P.E.I.R. 341, at paras. 9-10).

[14] Regarding the second and fourth factors, and as explained in more detail in the paragraphs below, the attachments to the affidavit are not relevant and could not reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

[15] The photographs that the appellant seeks to introduce as fresh evidence show the shirt, sweater and sneakers that he was wearing on the night of this incident, as well as Gerard's sneakers. The appellant suggests that these photographs have relevance to his credibility in describing his wounds and his

denial that he entered Gerard's home through the broken front window. On the latter point, the appellant says that photographs of the clothing do not reveal any cuts or tears that would occur from contact with broken glass, and that the interior footprints in blood on the floor of Gerard's home do not match his sneaker soles.

[16] Whether the appellant's re-entry into the home through the broken front window would leave glass cuts or tears to his clothing is irrelevant. The three eyewitnesses testified that the appellant entered the home through the broken front window, evidence that the judge accepted. In any event, the lack of visible damage to the sweater was known to the court – Constable Roberts testified at trial that he observed no visible damage to the sweater, beyond the bloodstains. It was not contentious that Gerard stabbed the appellant; accordingly, there was no evidentiary value in matching stab wounds in the torso with clothing damage. The photographs of the appellant's clothing are not relevant and their admission as evidence would not have affected the result.

[17] Regarding the photographs showing the sneaker soles, the appellant suggests that footprints from his sneakers are not visible in photographs taken inside Gerard's home, and that supports the credibility of his story that the assault occurred outside, that he was the victim, and that he did not re-enter the home. The trial judge found that blood on the floor visible in the photographs was not a factor in his decision because it was impossible to say whose blood was in each photo, or whether the blood resulted from the injuries that occurred inside the home or was tracked in afterwards. By the same logic, the absence of visible footprints from the appellant in those photographs would not be a factor because it was not possible to determine when the blood, or the bloody footprints, were deposited on the floor. The judge relied on other evidence, in particular, the testimony of the three eyewitnesses who had a clear view, in finding that the appellant re-entered the home though the broken front window and that the assault and stabbing occurred inside the home. As the judge observed in his reasons, none of the three eyewitnesses watching events from across the street corroborated the appellant's story that a stabbing and physical fight occurred outside Gerard's home. The photographs of the sneakers are not relevant and their admission as evidence would not have affected the result.

[18] The medical records, when supplemented by the expert medical affidavits from Dr. Mann, clarify that the lateral cut on the appellant's torso, visible in the photographs entered at trial, is the surgical incision the doctor made during the thoracotomy. The records and affidavits do not assist in proving or disproving any point of relevance; in particular, the records and affidavits from Dr. Mann

do not assist the court in determining the source of blood visible in photographs or in assessing the appellant's credibility in denying that he re-entered Gerard's home through a broken front window. The medical records and expert medical affidavits from Dr. Mann are not relevant and their admission as evidence would not have affected the result.

[19] The affidavits from the appellant and counsel are admitted as fresh evidence, but without the attachments on the appellant's second affidavit, i.e., the photographs, medical records, and expert medical affidavits. I would dismiss the fresh evidence application as it relates to these attachments.

INEFFECTIVE ASSISTANCE FROM COUNSEL

[20] To succeed in setting aside a trial verdict on the basis of ineffective assistance of counsel, the appellant must show first, that counsel's acts or omissions constituted incompetence and second, that a miscarriage of justice resulted (*R. v. Meer*, 2016 SCC 5, [2016] 1 S.C.R. 23, at para. 2, *G.D.B.*, at para. 26, and *White*, at para. 11). In *G.D.B.*, Major J., writing for the Court, discussed the approach appellate courts should follow for appeals based on ineffective assistance of counsel:

> *General Approach to the Issue*
>
> [26] The approach to an ineffectiveness claim is explained in *Strickland v. Washington*, 466 U.S. 668 (U.S. Sup. Ct. 1984), *per* O'Connor J. The reasons contain a performance component and a prejudice component. For an appeal to succeed, it must be established, first, that counsel's acts or omissions constituted incompetence and second, that a miscarriage of justice resulted.
>
> [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).
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> . . .
>
> [34] Where, in the course of a trial, counsel makes a decision in good faith and in the best interests of his client, a court should not look behind it save only to prevent a miscarriage of justice. ...

[21] The appellant submits that the following instances of ineffective assistance, when taken together and considered in light of the evidence that was adduced at trial, undermined the reliability of the verdict and caused a miscarriage of justice. I deal with each of the alleged instances of ineffective assistance separately, and then assess the cumulative potential effect.

(i) Failed to caution against giving a statement to police

[22] The appellant says that the second intervenor, during a telephone conversation 12 days after the incident, gave ineffective assistance by failing to caution him against giving a statement to police.

[23] The second intervenor explained, in his affidavit and on cross-examination, that during this telephone contact the appellant disclosed that he was the victim of a stabbing and that police had asked him to give a statement as part of their investigation; the appellant gave no indication that he might be charged. The appellant agrees that he disclosed that he was the victim, but disagrees that he gave no indication that he might be charged.

[24] I accept the second intervenor's affidavit and testimony on cross-examination that the appellant did not tell him that he might be charged. I do not accept the appellant's evidence insofar as it is inconsistent with the second intervenor's evidence. In the circumstances, the second intervenor had no reason to caution the appellant against giving a statement to the police. In any event, the appellant's statement to police had no impact on the outcome. It was not a factor in the judge's decision to convict, and caused no prejudice to the appellant.

(ii) Failed to challenge voluntariness of statement

[25] The appellant says that the first intervenor, who was counsel for the trial, gave ineffective assistance by failing to recommend, and pursue, a challenge to the voluntariness of the statement that he gave to the police.

[26] The appellant acknowledges that at the police station after being advised that he would be charged, he was read the appropriate *Charter* rights and cautions, before he agreed to give a statement. The appellant also acknowledges that the statement was reviewed with him by counsel during pre-trial meetings, and that during the trial he advised counsel that he had no problem conceding that the statement was voluntary. Now the appellant says he did not appreciate the significance of that concession, "I assumed it was like a formality" (Cross-examination on the affidavit).

[27] Trial counsel says that there was a full discussion several months prior to trial on the content and circumstances of the statement, and that the appellant accepted his opinion that the statement was voluntary.

[28] I accept the evidence of trial counsel. Further, the statement had no impact on the outcome, and caused no prejudice to the appellant. The extracts from the statement raised during cross-examination were consistent with the appellant's trial testimony; the statement was not a factor in the judge's reasons for convicting.

[29] Counsel for the appellant on this appeal argued that there was an inconsistency apparent from the statement, regarding the alleged re-entry through the broken front window. At trial the appellant said, "I have no memory of getting in through the window"; in his statement the appellant said, "I don't think [I re-entered through the window]" (Transcript, at 401-403). That is not an inconsistency and I reject counsel's argument suggesting otherwise.

(iii) Conflict of interest

[30] The appellant alleges that trial counsel was in a conflict of interest in relation to the second intervenor's advice with respect to giving a statement to police because, he submits, trial counsel did not want to take a position that would mean that the second intervenor, his law partner, had given advice contrary to the appellant's best interests. This allegation is without merit. Trial counsel gave reasons why he concluded that there was no basis on which to argue that the statement was involuntary and should be excluded. He discussed this issue with the appellant in advance and the appellant agreed to concede that the statement was voluntary. I accept trial counsel's evidence on this point.

[31] In any event, for the reasons already set out above, the concession that the statement was voluntary, and the statement itself, had no impact on the trial outcome, and caused no prejudice to the appellant.

(iv) Advised that photographs could only be entered by Crown

[32] The appellant says that his trial counsel gave ineffective assistance by advising in a text message, incorrectly, that only the Crown could enter police photographs into evidence. The relevant text message, sent by trial counsel to the appellant on the second day of trial, says, “Only the author of the photos can introduce them and the Crown chose not to”. Trial counsel explained that the appellant misinterpreted his text; he was attempting to communicate that if a police officer had taken photographs then those photographs would have to be entered through that officer. Trial counsel says that he did not give any advice suggesting that only the Crown could enter police photographs.

[33] There were several photographs entered at trial, by both Crown and defence witnesses. The police photographs that the appellant is concerned about, that were not entered, show his shirt, sweater and sneakers, and Gerard’s sneakers. As stated above in the discussion of fresh evidence, the appellant suggests that these photographs have relevance to his credibility in describing his wounds and denying his re-entry into Gerard’s home though the broken front window. On the latter point, the appellant says that his clothing photographs do not reveal any cuts or tears that would occur from contact with broken glass, and that the interior footprints in the blood on the floor of Gerard’s home (visible in some of the photographs that were tendered as evidence) do not match his sneaker soles.

[34] For the reasons discussed above under the fresh evidence analysis, I would conclude that the photographs of the clothing and sneakers were not relevant to the appellant’s credibility and were not probative of any other issue at trial. The failure to enter these photographs had no impact on the trial outcome, and caused no prejudice to the appellant.

(v) Did not seek remedy for destruction of clothing and sneakers

[35] The appellant argues that trial counsel provided ineffective assistance by not insisting that the clothing and footwear items seized by police be produced as evidence at trial. The actual items were photographed but were then lost or destroyed.

[36] I accept trial counsel’s evidence that the loss or destruction of the clothing and footwear was discussed and the appellant agreed that these items had no relevance to his defence, “[We] agreed that the real issue at trial was the eyewitness evidence of the three witnesses; the absence of the clothing and

sneakers in no way impacted or lessened Mr. Chafe's ability to make full answer and defence" (Counsel affidavit, at para. 13).

[37] As discussed above, when dealing with the photographs, the clothing and sneakers were not probative of an issue at trial, and accordingly, a failure to produce these items did not impair the appellant's right to make a full answer and defence. The items had no relevance to the appellant's defence. With no impairment to the appellant's right to make full answer and defence, the failure of counsel to pursue a remedy for loss or destruction of the clothing and sneakers was of no consequence.

(vi) Failed to enter medical records

[38] The appellant's allegations that the medical records relating to the treatment of his wounds should have been entered at trial are completely without merit. The trial was about the appellant's assault against Gerard, not about the injuries he suffered. Further, the appellant's suggestion that the medical records regarding his treatment could somehow establish that he did not enter the home, in particular through the window, is also without merit. There were three independent eyewitnesses who testified that the appellant had entered Gerard's home through the window. Their evidence was accepted by the trial judge who found, as a fact, that the assault took place inside Gerard's home.

[39] The failure to enter the medical records had no impact on the trial outcome, and caused no prejudice to the appellant.

(vii) Cumulative potential effect

[40] There is no basis on which to conclude that counsel provided ineffective assistance. This is borne out by the focused and careful analysis conducted by the trial judge based on the relevant evidence, together with the fresh evidence in this Court of the second intervenor and trial counsel, which I accept.

INCOMPETENCE OR BAD FAITH OF CROWN COUNSEL

[41] The appellant's allegation of incompetence or bad faith by Crown counsel relates to her cross-examining the appellant about the cause of a wound he received, and then arguing in closing submissions that the wound could have been partially caused from contact with glass as he jumped through the front window. The appellant says that, from the medical records that were disclosed, the Crown should have known (incompetence) or knew (bad faith) that this wound was caused by a surgical incision. If there was bad faith, then the

appellant says this would be an abuse of process by the Crown, offending fundamental principles of justice, and justifying a new trial.

[42] The question put to the appellant about the cause of the wound and the possibility of a glass cut was a fair question made, in my view, in good faith. The medical records did not reveal, with any degree of clarity, that this wound was a surgical incision. Indeed the appellant himself had no idea that the wound was caused by the surgical incision. There was no incompetence or bad faith by the Crown posing the question about the cause of the wound. It was open to the appellant to either accept what was put to him or deny it. He denied it was a glass cut. Unless a witness adopts what is put on cross-examination it is not evidence. The trial judge did not consider it as evidence, and made no mention of the wound in his reasons. As noted in paras. 16 and 17 above, the trial judge relied upon the evidence of the three eyewitnesses in finding that the appellant jumped through the front window.

[43] The fact that Crown counsel cross-examined the appellant with respect to his wound, and argued that it could have been a glass cut, is irrelevant. The cause of the wound was not a factor for the judge when assessing the appellant's credibility, or in his ultimate decision to convict. The Crown's questions and arguments were not an abuse of process and did not offend fundamental principles of justice.

ERRED IN APPLICATION OF *R. v. W.(D.)*

[44] The alleged error in application of *R. v. W.(D.*) was raised in the appellant's factum. The trial judge recited the steps in *R. v. W.(D.*) and reviewed the correct burden and standard of proof to be applied in the context of assessing the appellant's testimony. The judge reviewed the evidence of Gerard, and the evidence of the three eyewitnesses who viewed the incident from across the street. He found that the testimony from these witnesses was consistent on all material aspects. The judge then reviewed the evidence of the appellant before articulating his findings of credibility. At no point did the judge shift the burden of proof from the Crown to the appellant. This ground of appeal is without merit.

DISPOSITION

[45] The appellant has not established that counsels' acts or omissions constituted incompetence or bad faith and he has not established any relevance

of the evidence that he says should have been tendered. There was no miscarriage of justice.

[46] I would dismiss the fresh evidence application for the photographs, medical records and expert affidavits; and I would dismiss the appeal.

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W. H. Goodridge J.A.

I concur: _____

B. G. Welsh J.A.

I concur: _____

F. P. O'Brien J.A.