COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Docherty, 2012 ONCA 784
DATE: 20121119
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Sharpe, Simmons and Epstein JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Kenneth Docherty

Appellant

Catriona Verner, for the appellant

Scott Latimer, for the respondent

Heard: September 24, 2012

On appeal from the conviction entered on March 17, 2010 and the sentence imposed on June 23, 2010 by Justice Bonnie J.S. Wein of the Superior Court of Justice, sitting with a jury.

Sharpe J.A.:

[1] The appellant was tried on a charge of second-degree murder by a Superior Court judge sitting with a jury. He was acquitted of murder but convicted of manslaughter and sentenced to 12 years imprisonment less credit for pre-trial detention. He appeals his conviction for manslaughter and seeks leave to appeal the sentence.

[2] The appellant killed the deceased, Tyson Weber, by stabbing him seven times in the neck. The stabbing occurred in the garage attached to the appellant's home. The appellant did not testify at trial but the Crown adduced evidence of a full statement he made to the police within hours of the killing in which he admitted intentionally killing Weber but asserted that he had acted in self-defence. The central issues at the trial were self-defence and provocation. It appears from the verdict that the jury rejected self-defence but accepted that the appellant had been legally provoked into killing Weber.

[3] The central argument on this appeal is the submission that the trial judge erred in her instructions to the jury on self-defence by suggesting that the appellant's failure to retreat from his own home was a factor they could consider. The appellant also contends that the jury was wrongly invited to consider whether the appellant faced actual danger rather than the appellant's perception of the danger and that the trial judge wrongly excluded evidence that could have corroborated self-defence.

A. FACTS

[4] Weber was well-known to the appellant. There was considerable evidence that Weber was engaged in loan-sharking together with an associate, Daniel Puchta. Several witnesses testified that Weber and Puchta intimidated and threatened them in order to collect loans. There was also evidence that the deceased and Puchta were using intimidation and threats in an attempt to collect

money from the appellant. Puchta testified that they were trying to collect a debt. The appellant's position is that he did not owe them anything and that they were trying to extort money from him.

[5] Prior to the stabbing, the appellant was making efforts to collect significant amounts of money to pay Weber and Puchta. In his statement to the police, he admitted that two months before the killing, he forged a cheque from his employer for $6000. At the time of the killing he and his fiancée were attempting to re-mortgage their home for $230,000.

[6] In the weeks preceding the killing, Weber and Puchta called the appellant on a regular basis attempting to collect money from him. In his statement to the police, the appellant claimed that they had threatened to beat him up or kill him.

[7] The appellant attempted to deceive Weber and Puchta into thinking they would be paid. These efforts included depositing an empty envelope into an ATM to feign a deposit of $40,000 a few days before the killing. The night before the killing Weber went with the appellant to the appellant's bank to establish that there was money in his account but the bank was closed and they could not verify anything from the ATM. The appellant and Weber then met with Puchta where it was arranged that Weber would meet the appellant at his home first thing the next morning and that they would then proceed together to the bank. Puchta testified that the appellant offered to go to the bank, while in his statement, the appellant indicated that Weber made these arrangements. The

appellant indicated in his statement that before he arrived the next morning, Weber had determined from a contact at the appellant's bank that the appellant's account was empty.

[8] The only account of the stabbing was that given by the appellant in his statement to the police. It may be summarized as follows.

[9] The appellant was at home waiting for Weber. He called him on his cell phone to find out where he was. Weber told him he was on his way and he then arrived sometime before 8 AM. The appellant told the police that he was afraid: "I thought I was going to get my ass kicked…severely beaten…I was afraid for my life". Weber parked his truck in the appellant's driveway by backing right up to the appellant's car so that the appellant could not get out. The appellant was outside waiting. Rather than proceeding immediately to the bank, Weber suggested that they have a talk in the garage where the appellant's fiancée would not be able to hear them. Weber did not know that the appellant's fiancée was not home. Weber informed the appellant that he had a contact with the bank and that he knew that the appellant had been lying about the $40,000.

[10] They went into the house and proceeded into the garage. On the way to the garage, the appellant grabbed a knife from the kitchen counter. In the garage, Weber grabbed the appellant by the shirt. Weber threatened to break his legs and stated: "Wait till Dan [Puchta] gets a hold of you". The appellant told the police that Puchta was a large, strong man who had grabbed and pushed him to

the ground on several occasions and that Weber had put a gun to his head on a couple of previous occasions.

[11] It was at that point that the appellant stabbed Weber in the neck. In his statement, he said he had stabbed him four times but the forensic evidence revealed seven stab wounds. The appellant admitted that he intended to kill Weber, but insisted that he did so in fear of his own life:

> I was in fear of my life because he was gonna kill me, his partner Dan was going to kill me…. I had intent to kill him, in fear of my own life… I'm not afraid to admit that.
>
> …
>
> My instincts for the knife was for protection, but when he grabbed me and told me that, I stabbed him. I wanted no more of it and I snapped.

[12] The appellant stated that he then "panicked". He sat in the chair smoking and watched Weber die. He sat there for "a good hour" and then got sheets to wrap up Weber's body and clean up the blood.

[13] He was in fear of Puchta coming to the house looking for Weber. He called Puchta to tell him that Weber's cell phone was dead and that he and Weber had just gone to the bank and would meet Puchta later. Puchta's evidence was that he did receive a call from the appellant who told him they had withdrawn $30,000 from the bank. The evidence suggested that the appellant also called his closest friend and told him: "I think I killed somebody, he's lying on the floor in the garage, and he threatened to kill me."

[14] The appellant drove to the auto repair shop that belonged to a different friend. He asked the friend to assist him in getting rid of Weber's truck. According to the friend's testimony, the appellant told him what had happened and that Weber had threatened to kill him if he did not pay him money. The friend put him off for an hour and immediately went to the office of his lawyer, on whose instructions he notified the police. When the appellant returned an hour later, he realized that the police had been notified and he then drove Weber's truck to the police station where he surrendered himself.

[15] When asked why he did not call the police before Weber arrived, the appellant stated that Weber and Puchta had "connections" with the police and that he was scared and unable to think straight. He stated that he had met their police friends but he was unable to identify who they were.

[16] Forensic evidence indicated that the wounds had been caused in rapid succession and would have caused death in a matter of seconds, at most minutes.

B. ISSUES

[17] The appellant raises the following issues on his appeal from conviction:

1. Did the trial judge err by inviting the jury to consider the appellant's failure to retreat from his own home in assessing whether he had acted in self-defence?

2. Did the trial judge err by focusing on whether the deceased actually intended to kill the appellant rather than the appellant's reasonable perception of the situation?
3. Did the trial judge err by excluding evidence that could have corroborated the appellant's assertion that the deceased had put a gun to his head and then suggesting to the jury that the appellant's allegation regarding the gun was not corroborated?
4. Did the trial judge err by unnecessarily admonishing defense counsel before the jury?

C. ANALYSIS

1. *Did the trial judge err by inviting the jury to consider the appellant's failure to retreat from his own home in assessing whether he had acted in self-defence?*

[18] The central issue on this appeal is whether the jury was left with the impression that they could consider that the appellant's failure to retreat when assaulted in his own home provided a basis for concluding that he had not acted in self-defence.

(a) Self-defence: s. 34(2)

[19] It was common ground at trial that the jury should be left with self-defence pursuant to the *Criminal Code*, R.S.C. 1985, c. C-46, s. 34(2):

> 34(2) Every one who is unlawfully assaulted and who causes death or grievous bodily harm in repelling the assault is justified if
>
> > (*a*) he causes it under reasonable apprehension of death or grievous bodily harm from the violence with which the assault was originally made or with which the assailant pursues his purposes; and

> (*b*) he believes, on reasonable grounds, that he cannot otherwise preserve himself from death or grievous bodily harm.

[20] There are three components to self-defence under s. 34(2):

- Was the accused unlawfully assaulted by the deceased?
- Did the accused use force against the deceased because he reasonably feared that the deceased would kill or seriously injure him?
- Did the accused use force against the deceased because he reasonably believed that he could not otherwise save himself from being killed or seriously injured by the deceased?

[21] Section 34(2) makes no reference to retreat and, as I will explain in these reasons, there is a long line of authority that a person is not required to retreat in the face of an attack in his or her own home.[1] However, the Crown submits that there is also authority for the proposition that in some cases, when considering the third element of the s. 34(2) defence and assessing whether the accused reasonably believed that he or she could not save him or herself from harm, evidence of a failure to make use of an opportunity to avoid the fatal altercation may be a relevant although not necessarily determinative factor.

[22] The appellant contends that the combined effect of the trial Crown's closing and the trial judge's jury instruction was to invite the jury to reject self-

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[1] Bill C-26, as yet to be proclaimed, significantly re-writes the statutory definition of self-defence. Bill C-26 makes no explicit reference to retreat but does provide that a factor to be considered in determining whether the "act committed is reasonable in the circumstances" is "the extent to which…there were other means available to respond to the potential use of force".

defence because he failed to retreat from his own home. The Crown submits that the line was not crossed and that the jury was merely told they could consider whether the appellant's actions before and during his fatal encounter with Weber were consistent with a reasonable belief that he could not otherwise save himself from harm.

(b) Trial Crown's closing address

[23] In her closing address to the jury, the trial Crown suggested that the appellant's failure to retreat was an important factor to consider. The appellant cites the following passages from her closing address:

> Ken Docherty says, "I know what I did and it clued in to me that what I did was wrong, but I had no choice." Well, that part is simply not true. Ken Docherty had lots of choices. You can count his choices, starting at the night before. He could have called police the night before. He could have called police that morning. He could have gone to the police station. He could have parked his car out on the road if he was in fear, for a quick getaway after getting his coffee at the Daisy Mart. *He could have left the house. He could have gone to a neighbour's. There were lots of neighbours around. He didn't have to go back into the house, he was outside when Tyson got there.* Didn't have to go into the garage with Tyson. He could have slammed the – if Tyson went into the garage first – and I'm going to address later why you should find that – I'm going to suggest Tyson went into the garage first. He could have slammed the garage door behind Tyson after Tyson went into the garage. *He could have flipped the deadbolt that was on that door and ran outside. Maybe when he went into the garage, he could have pushed Tyson away and then ran outside. Mr. Docherty, after*

all, was a lot bigger. He had the advantage of weight and mass on his side.

…

Now, did Ken Docherty reasonably believe that he could not otherwise save or preserve himself by being killed or seriously injured by Tyson Weber? I've referred to Ken Docherty's choices before. There were a lot of alternatives available to him. If he's in fear, fear and doesn't think he can otherwise save himself except by killing Tyson, there are many, many other options. Why did he invite Tyson to come for breakfast? Why didn't he call the police after he apparently got off a beating the night before? *Why didn't he simply clear out, go hide somewhere, make sure he's not at home when Tyson comes? Why didn't he go to a neighbour for assistance?* There were lots of them around.

He calls Tyson. He finds out Tyson is on his way. He gets another reprieve. He's got another chance to get out of harm's way, but he doesn't do anything. He's already outside when Tyson Weber arrives. Well, don't invite Tyson into the house, keep the situation out in public view. Why go into the garage? There's no need. You can talk outside. You can talk in the kitchen. Michelle Ballum's not home. Ken Docherty follows Tyson Weber into the garage. If he hadn't followed him, there's a good chance that Tyson would have seen Ken grabbing the knife that was on his kitchen counter. *So following Tyson into the garage, why didn't he slam the garage door behind Tyson, throw the deadbolt and run out of the house?* Once in the garage, there are still options. Look at the size of Ken, his mass, his weight, his height. *He could have kicked Tyson Weber away while he was at the top of the stairs. He could have shoved Tyson and left the garage. He could have punched Tyson and left the garage,* shut the door and locked it. He didn't do any of that. He stabbed Tyson as soon as they got into the garage. The killing zone is right at the base of the stairs. [Emphasis added.]

[24] In these passages, Crown counsel appears to have invited the jury to find that there were several options open to the appellant to avoid the altercation with Weber. First, as the appellant knew that Weber was on his way to meet him, he could have left his home to avoid any confrontation. Second, at various points, the appellant could have contacted the police. Third, once the two were inside the house, the appellant could have taken steps to preserve his safety – pushing Weber away or locking a door – short of killing Weber. Fourth, after he went into the house, the appellant could have left his home and fled from the assault.

(c) Trial judge's jury instruction

[25] In her charge to the jury, the trial judge summarized the Crown's position as follows:

> Mr. Docherty, the Crown notes, failed to take advantage of the many opportunities he had to remove himself from harm's way. He could have called the police, left his house, he could have gone to a neighbour's. Using the advantage of his height and weight, he could have pushed or shoved Mr. Weber away from him and left the garage.

[26] When it came to instructing the jury on the elements of self-defence, the trial judge identified the three elements of the s. 34(2) defence as set out above. Under the heading of the third element, whether the appellant reasonably believed that he could not otherwise save himself from being killed or seriously injured by Webber, the trial judge made two specific references to the possibility of retreat.

[27] In the first she stated:

> Did Mr. Docherty believe that he could not save himself from being killed or seriously injured by Mr. Weber other than by killing or seriously injuring Mr. Weber? Would a reasonable person have the same belief in the same circumstances? *You should be aware that especially where a person is on his own property, there is no obligation to retreat, however, failure to retreat is a factor for you to consider.* [Emphasis added]

[28] The second reference to retreat is contained in the following passage;

> Remember that it is not just his honest belief, but whether that belief was reasonable. *Would a reasonable person retreat* or call the police, or do something other than use the knife?
>
> …
>
> He could have saved himself earlier, or in the garage by taking other action, or perhaps simply by knocking him out rather than stabbing him as he did. [Emphasis added]

[29] In order to assess whether the trial judge erred in the way in which she left the issue of retreat in relation to self-defence with the jury, I now turn to the jurisprudence and applicable legal principles that govern this contentious area of the criminal law.

(d) No obligation to retreat from an assault

[30] As already mentioned, the element of retreat is not mentioned in s. 34(2). In contrast, retreat is found in s. 35, which deals with self-defence in cases where the accused was the initial aggressor or where the accused provoked an assault upon him or herself. In those situations – plainly not relevant to the case at bar –

one of the elements that determine whether the accused's use of force subsequent to his initial assault can be justified as self-defence is whether the accused "declined further conflict and quitted or retreated from it as far as it was feasible to do so before the necessity of preserving himself from death or grievous bodily harm arose."

[31] Where self-defence arises in circumstances, such as the present case, where the deceased was the initial aggressor and thus self-defence turns on the application of s. 34(2), there is no requirement that an accused person retreat from the initial assault: see *R. v. Cain*, 2011 ONCA 298, 278 C.C.C. (3d) 228 at para. 9, discussed in greater detail later in these reasons.

(e) No obligation to retreat from one's home

[32] Of particular importance to this case is a second and distinct doctrine pertaining to the notion of retreat: namely, a person is not required to retreat from his or her own home. This rule was most recently considered by this court in *R. v. Forde*, 2011 ONCA 592, 277 C.C.C. (3d) 1, a decision that was not available to the trial judge as it was handed down after the trial in the present case.

[33] In *Forde*, the appellant and the deceased were arguing in the appellant's bedroom. The deceased pulled out a knife to threaten the appellant. The appellant grabbed a knife hidden in a closet and fatally stabbed the deceased. The determinative issue that led this court to set aside the conviction for manslaughter was that the trial judge had erred by permitting the jury to consider

whether the appellant ought to have retreated from his own home as a factor in assessing the availability of self-defence under s. 34(2).

[34] As in the case at bar, the trial Crown in *Forde* suggested that one option open to the appellant was to flee his home in order to remove himself from danger. In his jury instruction, the trial judge did not specifically refer to retreat but did invite the jury to consider "the availability of other options for [the accused] to extricate him from the confrontation with [the deceased]."

[35] The Crown's argument, as summarized at para. 35 of this court's reasons, was similar to that advanced before us in the present case:

> …the Crown submits that while there is no specific duty or requirement to retreat in s. 34(2), the ability to retreat is nonetheless a factor that may be taken into account in considering whether the accused had no other means to preserve himself – including in cases where the attack occurs in the accused's own home. According to the Crown, this factor is relevant to the reasonableness of the accused's belief that he could not otherwise save himself in the circumstances as he perceived them to be.

[36] Writing for the court, LaForme J.A., at para. 55, rejected "the Crown's position that while retreat from one's own home is not a necessary element to claiming self-defence, it may nonetheless be a factor for the jury to consider." He held that an instruction along those lines leaves the unacceptable danger "that the jury would all too quickly leap from the factor of retreat to the inference that there is no entitlement to self-defence". That, he held, would be inconsistent with the case law establishing that "a jury is not entitled to consider whether an

accused could have retreated from his or her own home in the face of an attack (or threatened attack) by an assailant in assessing the elements of self-defence under s. 34(2)".

[37] As the Crown had urged the jury to consider the accused's failure to retreat, LaForme J.A. held, at para. 56: "The trial judge was obliged to instruct the jury that they should not consider retreat as a factor in determining whether the appellant's conduct met the standard set out in s. 34(2)." As a consequence, the conviction was set aside and a new trial was ordered, despite the fact that no objection on this issue had been made to the charge by defence counsel at trial.

[38] LaForme J.A. recognized, at para. 37, that self-defence can only be accepted as a last resort and is not available where other reasonable options are available but held that "different considerations apply where a person is attacked in his or her own home". In that situation, he stated, at para. 38, the ancient common law "castle doctrine" gives "rise to the principle that a person has the right to defend him or herself in his or her own home without the duty to retreat from the home in the face of an attack." The "castle doctrine" rests on the idea that the home provides protection for a person, his family and his possessions and that mandating a duty to retreat would force people to leave the security of their home, leaving their family members exposed to danger and their belongings vulnerable to theft. The castle doctrine also involves the idea that one's home is the last refuge, the last line of self-defence.

(f) Pre-*Forde* case law on retreat from the home

[39] In *R. v. Antley*, [1964] 1 O.R. 545 (C.A.), the complainant came into the accused's home, threatening him. The accused hit the complainant with a heavy piece of railing. At pp. 549-550, the court commented: "In the instant case the accused was certainly not required to retreat. He was on his own property and far from retreating he would have been entitled, as I earlier pointed out, to use such force as was necessary to remove the complainant there from."

[40] In *R. v. Lavallee*, [1990] 1 S.C.R. 852, the appellant killed her partner by shooting him in the back of the head as he left her room. The two had been in a long-term, abusive, common law relationship. The appellant argued that she was acting in self-defence. On the issue of retreat, Wilson J. cited *Antley* and held, at pp. 888-9, that "traditional self-defence doctrine does not require a person to retreat from her home instead of defending herself. A man's home may be his castle but it is also the woman's home even if it seems to her more like a prison in the circumstances" (citation omitted).

[41] Other cases in this line of jurisprudence include: *R. v. Deegan* (1979), 49 C.C.C. (2d) 417 (Alta. C.A.), at p. 439: it was the duty of the trial judge to instruct the jury lest they be "left with the mistaken impression that it was imperative for the accused to retreat to a point of giving up his 'house to his adversary' before self-defence would justify his actions"; *R. v. Jack* (1994), 91 C.C.C. (3d) 446 (B.C.C.A.) at p. 454: the trial judge was required to give instructions to the jury to

protect against the danger that the jury would believe that “the failure of the appellant to walk away from what was happening in his home by leaving it through the back door was fatal to his plea of self-defence”; *R. v. Irwin* (1994), 49 B.C.A.C. 143, at para. 34: it would have been misdirection for the judge to suggest to the jury “that the appellant could have otherwise preserved himself by going out the front door and concealing himself or escaping into the woods”; *R. v. Rode*, 2004 BCCA 393, 187 C.C.C. (3d) 1, at para. 17: “the law is clear that a person need not retreat from his or her own home in order to claim self-defence”; and *R. v. Abdalla*, 2006 BCCA 210, 209 C.C.C. (3d) 172, at para. 22: “there are, of course, special rules relating to a person attacked in his home - the concept that ‘a man's home is his castle’ pretty much attenuates any need to retreat in the sanctuary of one's home.”

(g) Crown’s submission that failure to retreat is “a factor to be considered”

[42] The Crown submits that by excluding consideration of evidence of retreat, *Forde* is inconsistent with *R. v. Ward* (1978), 4 C.R. (3d) 190 (Ont. C.A); *R. v. Charlebois*, [2000] 2 S.C.R. 674 and *R. v. Lavallee*. The Crown asserts that those cases affirm that failure to retreat from a dwelling-house may, in some circumstances, be a relevant consideration under s. 34(2). The Crown submits that we should limit the reach of *Forde* to its own facts and refuse to apply *Forde* in this case.

[43] *Forde* is a recent and considered decision of this court. It is based upon a thorough review of the prior jurisprudence and I do not agree that it is inconsistent with the three authorities cited by the Crown. The Crown did not ask us to constitute a five-judge court to reconsider *Forde* and as a three-judge court, we are bound by *Forde*: see *David Polowin Real Estate Ltd. v. Dominion of Canada General Insurance Co.* (2005), 76 O.R. (3d) 161 (C.A.).

[44] On the other hand, I do not read *Forde* as holding that when assessing whether the accused used force against the deceased because he reasonably believed that he could not otherwise save himself from being killed or seriously injured by the deceased, the jury is barred from considering evidence that the accused failed to avail himself of readily available means to avoid the fatal altercation. As I will explain, provided that the jury is properly instructed on the use of such evidence in a manner that does not undermine the rule that a person is not obliged to retreat from his or her home, it may be considered.

[45] Let me turn to the authorities relied on by the Crown.

[46] *Ward* was a brief oral judgment by Martin J.A. I do not agree that *Ward* is inconsistent with *Forde*. *Ward* involved a fatal stabbing. The reasons for the court do not detail the facts and do not state where the stabbing occurred. That, in itself, indicates that the court did not intend to make any definitive pronouncement on the law of self-defence in the home. The trial judge had instructed the jury that the use of force in self-defence was “a last resort and it is

only justified where there is no other reasonable means whereby a person can successfully retreat from the assault." Martin J.A. held., at p. 192, that the instruction was "clearly erroneous" as "[i]t is not correct to say as a matter of law that self-defence is only justified where there is no other reasonable means whereby a person can retreat." Martin J.A. held that the trial judge also erred by instructing the jury that the force used must be proportionate to the assault against which the accused was defending himself.

[47] Martin J.A. added, in the passage relied on by the Crown, as follows:

> The jury may well have concluded that the trial judge was summarizing the effect of s. 34, rather than merely indicating that *the failure to retreat was a relevant item of evidence*, as was the proportion between the force used by the appellant and the nature of the assault made upon her in considering whether her actions, said to be taken in self-defence were justifiable. [Emphasis added.]

[48] LaForme J.A. discussed the effect of this passage from *Ward* in *Forde* at paras. 44-45. He observed that Martin J.A.'s reasons did not indicate that the events in *Ward* took place in the home. For that reason, the case did not establish that failure to retreat from one's home was a factor for the jury to consider. The Crown has provided us with the factums used on the appeal to demonstrate that the deceased was the appellant's common-law husband, that the appellant complained of a long pattern of abuse at the hands of the deceased and that the stabbing took place in their apartment. The appellant testified that she had stabbed the deceased after he had accused her of infidelity, struck her

on the jaw and came after her in a threatening manner. There is no discussion of the issue of retreat in the factums or in the judgment of the court, apart from what is set out above.

[49] In my view, the *obiter* comment in *Ward* relied upon by the Crown is nothing more than a reference to the general proposition that I discuss below, namely, that there are situations in the law of self-defence where evidence that the accused failed to avail him or herself of an opportunity to avoid a threat may be left with the jury as relevant to the assessment of whether the accused reasonably believed that he or she had to use force to save him or herself from harm. The specific point addressed in *Forde* – that the jury should not be told that retreat is a factor to consider in relation to self-defence in the home – was not considered in *Ward.* I therefore do not agree that we can or should put to one side or ignore the clear holding in *Forde* on account of what was said in *Ward*.

[50] *Charlebois* involved the fatal shooting of a man who was staying in the appellant's apartment. The appellant testified that he was in constant fear of the deceased and that on the evening of the shooting, the deceased had threatened him with a knife. The appellant inflicted the fatal gunshot wounds while the deceased was lying asleep on a couch.

[51] The appellant alleged, *inter alia*, a number of errors in relation to self-defence and, on account of a dissent in the Quebec Court of Appeal, had an as-of-right appeal to the Supreme Court of Canada. The central issue on appeal in

relation to self-defence was whether the trial judge had adequately instructed the jury on the subjective element of the third component of s. 34(2) as to the appellant's perception of the threat and whether the curative *proviso* should be applied. Writing for the majority, Bastarache J. held, at pp. 688-9, that the instruction as to the subjective element was adequate and that "the charge could not have given the jury the impression that they were to consider the reasonableness of the appellant's perceptions from the perspective of the hypothetically neutral reasonable man, divorced from the appellant's personal circumstances".

[52] The only reference to the issue of retreat is at p. 688, where Bastarache J. observed:

> *The appellant also argues that the jury should have been directed that there is no formal obligation to retreat from one's home.* In the precise circumstances of this case in view of the general allegation made, I do not think it is necessary to deal with the broader issue. The accused and the victim did not live together. *The issue here is whether there was a reasonable possibility of retreat at the time of the homicide*. [Emphasis added.]

[53] There was no further discussion of this point but elsewhere in the judgment, at pp. 692-3, in relation to a different issue, a passage from the trial judge's charge to the jury is quoted:

> [TRANSLATION] The belief that one cannot preserve oneself otherwise than by killing the assailant, reasonable belief. Did he believe that the only way to preserve himself was to kill the victim? That is the first question you are going to ask yourselves. And of

> course, to help you, you have the evidence that [the appellant's room-mate] was in his room. The [appellant's neighbours] were in apartment 3. The door that was in the hallway was accessible even before entering the living room…

[54] The Crown argues that this indicates that the jury was instructed that they could consider the fact that instead of shooting the sleeping deceased, the appellant could have left his residence to seek assistance and that this indicates that in some circumstances, the failure to retreat can be relevant, particularly where the perceived threat is not immediate.

[55] The Crown also relies on *Lavallee,* where Wilson J. discussed the issue of battered spouses who kill rather than leaving the relationship. After the passage, at p. 888, quoted above to the effect that "traditional self-defence doctrine does not require a person to retreat from her home". Wilson J. stated, at p. 889:

> If, after hearing the evidence (including the expert testimony), the jury is satisfied that the accused had a reasonable apprehension of death or grievous bodily harm *and felt incapable of escape*, it must ask itself what the "reasonable person" would do in such a situation. [Emphasis added.]

[56] The Crown argues that if retreat was an irrelevant consideration, there was no need for Wilson J. to refer to "escape" and that *Lavallee* therefore established that evidence of a failure to retreat may be considered even where it involves an attack in the home of the accused.

[57] I am not persuaded that *Forde* is inconsistent with *Charlebois* and *Lavallee*. *Lavallee* dealt with the issue of accused persons who kill an abusive

partner. *Charlebois* dealt with the similar but distinct issue of an accused who kills a sleeping individual whom he claims he fears. Both cases posed the question of whether, given the relevant mental state, the accused perceived no other option but to kill. Neither case involved an immediate attack from the deceased, and neither case purported to offer a considered analysis of the issue of failure to retreat from such an attack in the home, the issue considered in *Forde*.

(h) The Ontario Specimen Jury Instructions (Criminal)

[58] The Crown also relies on the fact that the trial judge appears to have quoted a passage found in the Ontario Specimen Jury Instructions (Criminal). The passage in question is not taken from the body of the specimen instruction but is found in a footnote. To give the full context, I will set out both the text of the specimen instruction and the footnote at issue. The passage is found in the portion of the specimen instruction on the second element of self-defence under s. 34(2): did the accused reasonably fear that the deceased would kill or seriously injure him or her?

> The issue involved in this question is *not* whether [name of the accused] was *actually* in danger of being killed or seriously injured by [name of the deceased]. The issue is whether [name of the accused] *honestly* and *reasonably feared* that s/he was in that kind of danger.[9] [Emphasis in original.]
>
> [9] It may be appropriate, especially where [the accused] is on his or her own property, to add a reference to the lack of any obligation to retreat. Failure to retreat is a factor for the jury to consider. See,

> *R. v. Ward* (1978), 4 C.R. (3d) 190 (Ont. C.A.); and *R. v. Proulx* (1998), 127 C.C.C. (3d) 511 (B.C.C.A.).

[59] It is clear from its cryptic wording that the footnote, written several years before *Forde*, was not intended to be used verbatim in a jury instruction. Nor, in my view, does the footnote stand for or establish the proposition that in the case of self-defence in the accused's home, the jury should be instructed in stark terms that while there is no obligation to retreat, the failure to retreat is a factor for the jury to consider.

[60] The footnote cites two cases. I have already discussed *Ward* and explained why I do not accept the submission that it stands for the proposition that the jury should be told that failure to retreat is a factor to consider in relation to self-defence in the home. I now turn to the other case cited, *R. v. Proulx* (1998), 127 C.C.C. (3d) 511, where the British Columbia Court of Appeal considered the issue in some depth. At para. 45, the court affirmed the proposition that "flight from one's own home is not a reasonable option for self-preservation, and that the defence of self-defence will still apply even if there is another way out of the house" on the rationale "that one's home is already one's last line of defence against an assailant."

[61] The facts of *Proulx* did not involve an attack in the home and when holding that evidence of retreat could be considered, the court clearly distinguished between attacks in the home and attacks elsewhere. With respect to the former, failure to retreat from the home may not be considered, whereas in relation to the

latter, as the court stated at para. 47, “the possibility of retreat is a very relevant consideration when determining whether the accused had no other option to preserve him or herself.” *Proulx* clearly sets out the distinction between attacks in the home and attacks elsewhere; its holding that evidence of failure to retreat may be relevant does not apply to the former and is explicitly limited to the latter.

[62] I note here that in *R. v. Cain*, this court made a similar pronouncement in relation to self-defence elsewhere than in the home. The court held, at para. 9, that although s. 34(2) does not require an accused to retreat in the face of an assault, the possibility of retreat is relevant to the issue of whether the accused had a reasonable belief that he faced serious bodily harm or death and whether the accused had a reasonable belief that he had no other option to avoid harm than to use violence. The accused’s failure to retreat does not bar self-defence under s. 34(2), but it may be a relevant fact for the jury to consider in weighing the defence. But again, that was said in the context of self-defence elsewhere than in the home. As has been made clear from the case law reviewed above, self-defence in the home involves different considerations with respect to retreat.

(i) Relevance of other means to avoid the fatal confrontation

[63] Was the jury entitled to consider the possibility that the appellant could have avoided any threat Weber posed to his safety by taking steps, apart from retreating from or abandoning his home, to avoid the altercation both before and after Weber arrived at the house? Among the possibilities mentioned were that

the appellant could have called the police for help before Weber arrived or he could have locked Weber in the garage before the fatal altercation.

[64] This court's decision in *R. v. Boyd* (1999), 118 O.A.C. 85, is instructive on how evidence of that nature might properly be left with the jury. *Boyd* stands for the proposition that it may be open to the jury to consider whether the accused had available options within the home – other than retreating from the home – to avoid the perceived threat posed by the deceased when assessing his assertion that he had a reasonable belief that he could only preserve himself by using force. But *Boyd* counsels against the use of the word "retreat" to describe such evidence because "retreat" suggests abandonment of the home, something the accused is not required to do.

[65] In *Boyd*, the accused found the deceased stealing items from his house. When the deceased went outside to take an item to his car, the appellant went upstairs and retrieved a knife. When the deceased returned inside, the appellant asked him to leave. An altercation ensued and the appellant stabbed the deceased. The Crown cross-examined the accused to show that he could have taken steps to avoid the fatal confrontation, such as locking the door when the deceased went outside to his car. The trial judge instructed the jury on the point as follows:

> ... A failure to retreat, if there was an opportunity to do so, is only a factor to be considered in determining whether the accused believed on reasonable grounds

> that he could not otherwise preserve himself from death or grievous bodily harm.

[66] Writing for the court, Doherty J.A. stated, at para. 13, that “the appellant's failure to flee his own residence, *unlike his failure to lock the front door when the deceased was outside, or to move away from the front door*, could not assist the jury in determining whether the accused's conduct met the objective component of the standard set down in s. 34(2)” (emphasis added).

[67] Doherty J.A. went on to hold that while evidence of available options to avoid the altercation could have been left with the jury, the use of the word retreat to describe such evidence was “regrettable” although not fatal in the circumstances, at para. 13:

> It would have been better for the trial judge to avoid the use of the word "retreat", which suggests an abandonment of the appellant's home, and to refer specifically to the other steps which Crown counsel suggested the appellant could have taken to avoid the confrontation.

[68] In my view, *Boyd* provides the key to explaining how a jury should be instructed in relation to evidence of available means of avoidance in the context of the home. As the word “retreat” suggests abandonment of the home, it should not be used. That is entirely consistent with *Forde*, which clearly bars an instruction to the effect that the failure to retreat in the face of an attack is relevant in the case of self-defence in the home.

[69] As *Boyd* makes clear, evidence that the accused failed to take available steps – other than retreating from the home – to avoid the fatal altercation may properly be left with the jury, provided that the jury is instructed in a manner that respects and preserves the fundamental rule that one is not required to retreat from or abandon one's home. Moreover, it must be clear that, as LaForme J.A. held in *Forde*, the accused's failure to retreat from his or her home is not a proper factor for the jury to consider.

(j) Application to the case at bar

[70] In my respectful view, the trial judge's jury instruction in this case was defective. The jury was instructed that the appellant was under no obligation to retreat from his home but then told that his failure to retreat was a factor the jury could consider – without further explanation. As noted above, the trial judge did not have the benefit of *Forde*, which was decided after the trial. Unfortunately, the instruction she gave is inconsistent with *Forde*. To avoid the danger of diluting the principle that one is not required to abandon one's home in the face of an attack, the trial judge should not have instructed the jury that "failure to retreat is a factor for you to consider".

[71] As I have pointed out, the evidence that the appellant failed to avail himself of available means, other than retreat from his home, to avoid the fatal altercation with Weber could properly be considered when assessing the appellant's perception that he could not otherwise preserve himself from death or grievous

bodily harm. However, a clear instruction was required to avoid confusion on the issue of retreat. Rather than repeating the Crown's position on the issue of retreat, the trial judge should have sharply distinguished evidence of evasive action available to the appellant from the idea of retreat from the home and the word "retreat" should not have been used to describe such evidence.

(k) Was the error harmless?

[72] I am far from satisfied that the deficiency I have identified was harmless in the circumstances of this case and that we should apply the curative *proviso*, s. 686(1)(b)(iii). The Crown invited the jury to reject self-defence on the ground, *inter alia*, that the appellant could have avoided the fatal altercation with Weber by retreating from or abandoning his home. The trial judge repeated that position, and her instruction that the appellant was not required to retreat from the home was undermined by the instruction that failure to retreat was nonetheless a factor for the jury to consider.

[73] The jury acquitted the appellant of second-degree murder and convicted on manslaughter almost certainly on the basis of provocation. This suggests both that the jury did not accept the Crown's position that the appellant had simply killed Weber to avoid payment of a debt and that the jury had a reasonable doubt on the issue of whether the appellant was faced with a wrongful act or insult from Weber. On this record, there is a very real possibility that the jury could have rejected self-defence because the appellant did not retreat from or flee his home

to avoid the perceived threat Weber posed. I am therefore not persuaded that the verdict would necessarily have been the same but for the misdirection.

[74] The appellant's trial counsel did not object to the instruction on these grounds but that is not determinative of this issue: *Forde,* at para. 61.

D. OTHER ISSUES

[75] As I have concluded that the appellant succeeds on the first issue, it is not necessary for me to consider the other issues raised on this appeal.

E. DISPOSITION

[76] Accordingly, I would allow the appeal on this ground, set aside the conviction and order a new trial on the charge of manslaughter.

"Robert J. Sharpe J.A."
"I agree Janet Simmons J.A."
"I agree Gloria J. Epstein J.A."

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