COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Boudreau, 2012 ONCA 830
DATE: 20121128
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MacPherson, Cronk and Blair JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

James Earle Boudreau

Appellant

Brian H. Greenspan and Naomi M. Lutes, for the appellant

Gregory J. Tweney, for the respondent

Heard: November 8, 2012

On appeal from the convictions entered on May 28, 2008 by Justice J. Bryan Shaughnessy of the Superior Court of Justice, sitting with a jury.

By the Court:

A. INTRODUCTION

[1] The appellant, James Boudreau, was charged with two counts of first-degree murder in connection with the deaths of James Pearce and Gordon Smith. Following a 16-day trial presided over by Shaughnessy J. of the Superior

Court of Justice, a jury returned verdicts of guilty of first-degree murder in the death of Smith and second-degree murder in the death of Pearce.

[2] The appellant appeals his convictions on four grounds, the principal one being that the Crown's closing address to the jury was improper and deprived the appellant of a fair trial.

B. FACTS

[3] The appellant, Pearce and Smith had been good friends for many years. They were also involved in an illegal activity known as 'pot piracy', which involved stealing marijuana crops from dangerous people such as the Satan's Choice motorcycle club. These 'drug rips', as they were called, had the potential to be violent; the participants wore masks and carried guns. The 'rough' stolen marijuana was brought to a 'safe house' in Colborne, where it was cleaned and trimmed in preparation for sale.

[4] On October 3, 1999, the appellant and his group stole a 'mother lode' of marijuana and brought it to their safe house. The next evening, October 4, the marijuana was stolen from the safe house.

[5] On October 5, 1999, everyone who worked at the safe house was called to a meeting there. The appellant, Smith and the 'clippers' who prepared the marijuana for sale were there. Pearce did not attend. The participants, and especially the appellant, formed the view (wrongly, as it turned out) that Pearce

was responsible for the theft of the marijuana. The appellant was angry and said, in relation to Pearce, “I’ll kill him. I’ll fucking kill him”.

[6] Pearce disappeared the same day. He left without identification, extra clothing, or even his dentures. He has not been seen or heard from since October 5, 1999, and there is no record of any activity on his banking, employment, health or other records. His body has never been found.

[7] The following year, Smith was in custody on drug charges. He and the appellant spoke regularly while Smith was in custody. Their calls were intercepted and it is obvious they were planning more drug rips once Smith was released. In their telephone conversations, Smith also told the appellant that the police had been asking him questions about Pearce’s disappearance. During this time, and while Smith was still incarcerated, the appellant was told by an acquaintance that Smith had ‘ratted out’ this acquaintance with respect to some stolen property.

[8] Smith was released from jail on September 6, 2000. He stayed at the appellant’s house. However, he spent one night at his girlfriend’s house, which clearly annoyed the appellant, who had developed a relationship with Smith’s girlfriend while Smith was in jail.

[9] On September 8 between 11 a.m. and 1 p.m., the appellant and Smith left the appellant’s house together. Smith was wearing a Pink Floyd t-shirt. Just after

2 p.m. that afternoon, a cottage owner near Cobourg heard eight gunshots – four quick shots, a pause, and then four more shots.

[10] Smith's body was found less than two weeks later in a heavily wooded area just 183 meters from the cottage. He had been shot at least seven times at close range with a 12-gauge shotgun. He was still wearing his Pink Floyd t-shirt.

[11] In the weeks following Smith's disappearance, the appellant gave various people conflicting explanations for Smith's whereabouts. Sometime before Smith's body was found, the appellant told his teenage daughter that Smith had been shot in the back of the head. Her evidence of what her father said to her was: "Well if God can kill people then why does it matter if he does"?

[12] There are other facts relevant to the disposition of this appeal. They are better addressed in the context of the issues to which they relate.

C. ISSUES

[13] The appellant raises four issues:

(1) Did the trial judge err in failing to declare a mistrial as a result of improprieties in the Crown's closing submissions to the jury?

(2) Did the trial judge err in permitting the Crown to lead opinion and hearsay evidence through Steven Gault, a paid police agent, with respect to identity and motive in relation to the two murders?

(3) Did the trial judge err in allowing the Crown to invite the jury to draw a series of inferences in support of a theory of motive that was based entirely on speculation?

(4) Were the verdicts unreasonable and contrary to the weight of the evidence?

D. ANALYSIS

(1) The Crown closing address

[14] The appellant contends that the Crown closing address was, in part, sarcastic and inflammatory in tone and speculative and factually inaccurate in content.

[15] Both counsel are entitled to a fair degree of latitude in their closing addresses to the jury. As expressed by this court in *R. v. Daly* (1992), 57 O.A.C. 70, at p. 76:

> A closing address is an exercise in advocacy. It is a culmination of a hard fought adversarial proceeding. Crown counsel, like any other advocate, is entitled to advance his or her position forcefully and effectively. Juries expect that both counsel will present their positions in that manner and no doubt expect and accept a degree of rhetorical passion in that presentation.

See also: *R. v. Mallory*, 2007 ONCA 46, 217 C.C.C. (3d) 266 , at para. 339.

[16] However, there are important and well-settled limits on Crown advocacy. While the Crown may argue its case forcefully, it must abstain from inflammatory

rhetoric, demeaning commentary and sarcasm. The Crown must not misstate the facts or the law. The Crown must not invite the jury to engage in speculation or express personal opinions about either the evidence or the veracity of a witness: see *Mallory*, at para. 340.

[17] The appellant alleges that certain passages in the Crown closing address were sarcastic and inflammatory, included improper comments on the veracity of witnesses, and invited the jury to speculate about the evidence. He submits that these defects rendered the trial unfair.

[18] We do not accept this submission. Crown counsel made a lengthy closing address at the conclusion of a 16-day trial in a double murder case. Arguably, some of Crown counsel's remarks, during a closing address that covers 120 pages of transcript and lasted over four hours, were sarcastic, appeared to express an opinion about the veracity of some witnesses' testimony, and could be construed as inviting the jury to speculate about certain matters.

[19] However, the trial judge, on his own initiative, without any objection or request from defence counsel, decided to deliver an addendum to his jury charge. In his blunt and strongly-worded addendum, he identified and explicitly discussed several statements by Crown counsel that he considered fell into the realm of sarcasm and speculation. He also explicitly instructed the jury that counsel's opinion of witnesses was irrelevant. Defence counsel did not object to

these corrections, or ask for anything more or different, or, importantly, seek a mistrial.

[20] In our view, the trial judge's addendum effectively overcame any problems that might have been created by Crown counsel's perceived sarcasm, stated opinions about the veracity of witnesses, or invitations to speculate. In many cases, appeal courts have accepted a timely and focussed correction by a trial judge of deficiencies in a Crown closing address: see for example, *R. v. Finta*, [1994] 1 S.C.R. 701, at paras. 281-82; *R. v. Trochym*, 2007 SCC 6, 1 S.C.R. 239, at para. 184; *R. v. Munroe* (1995), 96 C.C.C. (3d) 431 (Ont. C.A.), at p. 452; and *R. v. Gordon*, 2012 ONCA 533, at para. 6. In our opinion, the trial judge's correction here was timely, comprehensive and crystal clear. Thus, as Bastarache J. said in relation to the same issue in *Trochym* at para. 184, "deference should be shown to the trial judge's handling of this case." This is particularly so where, as here, an accused attacks a trial judge's discretionary decision not to declare a mistrial.

(2) <u>Steven Gault's evidence</u>

[21] The appellant submits that the trial judge erred in permitting Steven Gault, a paid police agent, to provide his opinion in respect of the identity of Pearce's and Smith's killer; namely, that it was the appellant.

[22] At trial, when Gault was asked and answered questions in this domain, defence counsel objected and the Crown conceded that the answers were based on hearsay, namely, what Gault had been told by others. However, the Crown contended that this evidence was not being tendered for its truth, but rather to explain Gault's state of mind leading to his subsequent actions, especially his role as a police agent and his attempt to surreptitiously record a conversation with the appellant about Pearce's disappearance. The trial judge agreed with the Crown position, allowed the testimony, and instructed the jury that this part of Gault's evidence was narrative only and could not be used as evidence concerning the appellant.

[23] We do not accept the appellant's submission on this issue. Neither Gault's testimony about his actions as a police agent in this case – including his own 'confession' to the appellant that he and two associates, not Pearce, had stolen the appellant's 'mother lode' of marijuana – nor his decision to wear a body pack in a largely successful attempt to obtain a confession by the appellant to Pearce's murder would have made sense if the jury did not have a full understanding of Gault's thinking leading to his conduct.

[24] In any event, even if this evidence were improperly admitted, it would not have affected the verdict. In his long closing address, the Crown said nothing about Gault's opinion. The trial judge said nothing about it in his jury charge. Importantly, in his jury charge the trial judge said that facts, not opinions, should

govern the jury's deliberations and decision. This instruction would have applied to Gault's testimony.

(3) Inferences versus speculation

[25] The appellant submits that the trial judge erred in failing to caution the jury with respect to the Crown's theory of motive respecting the murder of Smith. The Crown's theory was that the appellant suspected that Smith was about to 'rat him out' for the earlier murder of Pearce. The appellant submits that the Crown's closing submission on motive was based on a 'house of cards' involving five propositions, all of which were based on speculation, not evidence and proper inferences from the evidence: (1) Smith had knowledge about the murder of Pearce which could implicate the appellant; (2) Smith lied to the appellant about his interview with the police; (3) the appellant thanked Smith for lying to the police; (4) a witness by the name of Steven Brown recounted to the appellant details of his own interview with the police; and (5) therefore, the appellant believed Smith was about to 'rat him out'.

[26] We do not accept this submission. There was evidence for each of the four propositions leading up to the conclusion in the fifth proposition.

[27] On the first proposition, Smith was at the safe house the day the angry appellant threatened to kill Pearce. Pearce disappeared that same day.

[28] On the second proposition, Smith did lie to the appellant about his interview with the police – he told the appellant that all he had said to the police was that on the day of Pearce's murder, Pearce did not show up for a meeting; in fact, Smith told the police that Pearce was at the appellant's house on the morning of October 5, 1999, the last day Pearce was seen alive. Moreover, and importantly, in his closing address to the jury, the Crown did not characterize Smith's statement to the appellant as a lie; he simply noted that Smith had actually told the police more than what he later disclosed to the appellant about that conversation.

[29] On the third proposition, after Smith told the appellant what he had said to the police, the appellant then said "right, right, thanks bud, right on". This is certainly the language of gratitude.

[30] On the fourth proposition, at around 11:30 a.m. on September 6, 2000, the day Smith was released from jail, Brown agreed to submit to a polygraph test. By 2:50 p.m., he informed the police that he had changed his mind. During this interval, Brown returned to the muffler shop where he worked. Through a series of intercepted telephone calls, the Crown established that the appellant was at the same shop from at least noon to 4:30 p.m. It is a fair inference, not wild speculation, that the two men discussed Brown's conversation with the police earlier that morning.

[31] It follows from this analysis – and from the evidence that the appellant had been told of an acquaintance's suspicion that Smith was a "rat" – that the fifth proposition was not based on speculation. It was proper for the Crown to put the motive that the appellant believed Smith was about to 'rat him out' for Pearce's murder to the jury. It was also appropriate for the trial judge to instruct the jury on this issue, as he did:

> In relation to count number two in the indictment regarding Gordon Smith, Crown counsel submits that James Boudreau was aware that Gordon Smith had knowledge of the motive of Mr. Boudreau to kill James Pearce and also his threat to do so. He also had reason to believe that Gordon Smith was a "rat" who was providing information to the police.
>
> . . .
>
> It is for you to decide whether James Earle Boudreau had such motives, or any motive at all, and how much or how little you will rely on it to help you decide this case.

(4) <u>Unreasonable verdict</u>

[32] The appellant candidly acknowledges that if he does not succeed on any of the previous three grounds of appeal, the unreasonable verdict ground cannot be made out.

E. DISPOSITION

[33] The appeal is dismissed.

Released: November 28, 2012 (“J.C.M.”)

“J.C. MacPherson J.A.”
“E.A. Cronk J.A.”
“R.A. Blair J.A.”