Corrected decision: The text of the original judgment was corrected on March 30, 2023, and the description of the correction is appended.

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Merritt, 2023 ONCA 3
DATE: 20230105
DOCKET: C65316 & C65594

MacPherson, Paciocco and Thorburn JJ.A.

DOCKET: C65316

BETWEEN

His Majesty the King

Respondent

and

Melissa Merritt

Appellant

DOCKET: C65594

AND BETWEEN

His Majesty the King

Respondent

and

Christopher Fattore

Appellant

Mark C. Halfyard and Chloe Boubalos, for the appellant, Melissa Merritt

Paula Rochman and Daisy McCabe-Lokos, for the appellant, Christopher Fattore

Elise Nakelsky, for the respondent

Heard: September 28, 2022

On appeal from the convictions entered on January 13, 2018 by Justice Fletcher Dawson of the Superior Court of Justice, sitting with a jury.

Paciocco J.A.:

OVERVIEW

[1] Caleb Harrison was fatally attacked on August 23, 2013. Prior to his death he had been engaged in an ongoing and bitter custody and access dispute with his former wife, the appellant, Melissa Merritt, relating to their two children. Previously, Caleb's parents, Bill Harrison, and Bridget Harrison, who had become embroiled in the custody dispute, also met untimely and sudden deaths in the same home where Caleb died, Bill on April 16, 2009, and Bridget on April 21, 2010.[1]

[2] Compelling forensic evidence linked Ms. Merritt's common law spouse, the appellant, Christopher Fattore, to Caleb's death. He was ultimately charged with first degree murder in all three deaths. At his trial, Mr. Fattore attempted to plead guilty of manslaughter in Caleb's death, but the Crown rejected his plea, and he

[1] I use first names for clarity and mean no disrespect.

was tried on charges of first degree murder relating to Caleb, Bridget, and Bill. There were significant questions relating to the cause of Bill's death, and Mr. Fattore was acquitted on that charge, but he was convicted of first degree murder in the deaths of Caleb and Bridget.

[3] Ms. Merritt was tried jointly with Mr. Fattore for first degree murder in the deaths of Caleb and Bridget, on the theory that she encouraged Mr. Fattore to murder them. The jury could not reach a verdict with respect to Ms. Merritt in the death of Bridget but found her guilty of first degree murder in the killing of Caleb.

[4] Both Ms. Merritt and Mr. Fattore appealed their convictions to this court.

[5] Mr. Fattore claimed in his appeal that the trial judge erred in admitting into evidence a police statement in which he confessed to the planned and deliberate killings of both Bridget and Caleb. At the end of the oral appeal hearing, we dismissed Mr. Fattore's appeal for reasons to follow. Those reasons are explained below.

[6] Ms. Merritt appealed her first degree murder conviction in Caleb's death, arguing that the trial judge committed significant errors in his jury instruction relating to key evidence. Specifically, she argued that the trial judge misdirected the jury on the use it could make of an intercepted statement Ms. Merritt made (the "airport intercept statement"), that had been transcribed as partially "unintelligible". She also argued that the trial judge erred in his jury instruction relating to the use,

as circumstantial evidence of her guilt, of her omission to mention in two police statements that on a family mall visit the evening before Caleb's body was found, Mr. Fattore had gone to a Walmart store to purchase shoes (the "Walmart omissions"). Video evidence was subsequently presented at trial showing Mr. Fattore, alone, purchasing the shoes at the Walmart, as well as forensic evidence linking those shoes to Caleb's killing.

[7] For the following reasons, I would allow both of Ms. Merritt's grounds of appeal, reject the Crown request to apply the proviso, set aside Ms. Merritt's conviction and order a new trial.

THE MATERIAL FACTS

The Custody Dispute and the Deaths

[8] Caleb and Ms. Merritt met in 2000 and were married in 2002. They had two children together (the "children"). In 2005, after Caleb was charged with assaulting Ms. Merritt, they separated. Caleb moved in with Bill and Bridget. Ms. Merritt initially moved in with her parents but in 2006 she met Mr. Fattore and they quickly began cohabitating, having four children of their own by 2012.

[9] Immediately after their separation, Ms. Merritt had sole custody of the children but through litigation Caleb secured access to the children which he exercised at his parents' home, with their assistance. Caleb's parents became

enmeshed in the custody dispute. Indeed, in the course of the ongoing litigation Ms. Merritt made a failed allegation against Bridget of abusing the children.

[10] Caleb's access time with the children increased over time, ultimately to 50% parenting time. However, in March of 2009 he was sentenced to 18-months imprisonment as the result of a conviction of impaired driving causing death. On March 18, 2009, the custody order was varied to provide Bill and Bridget with Caleb's parenting time while Caleb was incarcerated.

[11] Within the month, on April 16, 2009, Bill was found dead in a locked bathroom in his home. There were no obvious signs of physical trauma other than a sternum fracture. Notwithstanding the sternum fracture, violence was cast into doubt as a cause of his death because there were no associated injuries, as one might expect if the injury to the sternum had occurred at the time of his death. His cause of death was therefore undetermined. The pathologist attributed Bill's death to "acute cardiac arrythmia", a diagnosis of exclusion.

[12] The same day that Bill died, Ms. Merritt abducted the children and left the province with Mr. Fattore and their four children, going initially to Alberta and then to Nova Scotia. On November 27, 2009, Ms. Merritt was arrested in Nova Scotia for abducting the children contrary to a court order, and the children were returned to Bridget.

[13] When Caleb was released from jail, he sought sole custody of the children. On April 21, 2010, before Caleb's application for sole custody was resolved, Bridget was found dead in her home. Bridget's body was found at the bottom of the main floor staircase. Her cause of death was determined to be from neck injuries sustained either by a fall down the stairs due to a medical event at the top of the stairs, or manual strangulation. There was no forensic evidence linking any suspects to Bridget's death. Expert witnesses who would later testify at the appellants' trial disagreed on the likely mechanism of her death, with three of the four expert witnesses concluding that her death was caused by neck compression, with the remaining expert witness contending that Bridget likely died in a fall.

[14] During the appellants' trial the Crown placed importance on the fact that Bridget died eleven days after she had reported Ms. Merritt to the police for breaching her bail release conditions on the child abduction charge, while the decision in Caleb's custody application was still outstanding.

[15] On April 26, 2010, an order was made giving Caleb interim sole custody, and Ms. Merritt was provided with only supervised access. In August of 2010, as the result of a settlement between the parties, a permanent order was subsequently made on similar terms. This order prohibited Ms. Merritt from applying for a variation before January 2012.

[16] In July 2013, custody litigation was back underway. Ms. Merritt was seeking joint custody of the children after claiming that Caleb was obstructing her access to the children.

[17] On August 23, 2013, while Ms. Merritt's custody application was outstanding, Caleb was found dead in his bed. Caleb had died from neck compression that demonstrated manual strangulation, likely from an arm bar chokehold, or trauma from a weapon, or both. Caleb had also sustained abrasions and bruises to his upper body and his right arm. There were signs of a struggle in the bedroom where he died, but no signs of forced entry. His death was an obvious homicide.

The Initial Police Interviews

[18] Ms. Merritt was interviewed by the police that day. She told the police that things had been fine between her and Caleb and that they "don't even have to go to Family Court anymore" but sort things out on their own outside of court. She recounted her movements with Mr. Fattore the evening before, on August 22, 2013, telling the police that they went to Subway and the Pita Pit at a mall after going to a softball game. As indicated above, Ms. Merritt did not mention that while they were at the mall, Mr. Fattore went to the Walmart to buy shoes that would later be linked forensically to Caleb's killing. However, there was no direct evidence confirming that Ms. Merritt knew that Mr. Fattore had done so.

[19] In that police statement Ms. Merritt also said that the family arrived home at 9:20 p.m., that Mr. Fattore did not go out that night, and that she went to bed around 11:00 p.m. and slept with Mr. Fattore that night. She said that Mr. Fattore was in the bed with her when she fell asleep around 12:30 a.m., when she got up to feed the baby at 4:00 a.m., and when she awoke at 6:00 a.m. to start her day.

[20] On August 23, 2013, Mr. Fattore provided a statement in which he gave a similar description of the family's movements the prior evening and night. He also omitted mention of the Walmart visit during the mall outing, said he was in bed all night, and told the police that he did not have a problem with Caleb.

[21] On August 26, 2013, Ms. Merritt gave a follow-up statement to the police that was consistent with her statement of August 23, 2013, including the Walmart omission. She added that she would have woken up if Mr. Fattore had left their bed during the night before Caleb's body was found.

[22] Mr. Fattore was reinterviewed on August 27, 2013. He twice recounted his movements on the evening of August 22, 2013, without mentioning the Walmart visit. When asked, he said that he had access to only one pair of shoes, the pair he had worn to the softball game.

The Move to Nova Scotia

[23] On September 6, 2013, as the lone surviving parent, Ms. Merritt secured sole custody of the children. Shortly after, she and Mr. Fattore moved to Nova Scotia.

Forensic Evidence

[24] The investigation that was underway into Caleb's death led to a powerful forensic case against Mr. Fattore. Most notably:

- DNA consistent with his own was found under Caleb's clipped fingernails.
- Mr. Fattore could not be excluded from the mitochondrial DNA profile of a beard hair found on Caleb's chest.
- Mr. Fattore's DNA could not be excluded from samples taken from the inside of a latex glove collected from the garbage bin at his home days after Caleb was killed, and Caleb could not be excluded as the DNA source located on the outside of the glove.
- Walmart running shoes were found in Mr. Fattore's garbage bin which contained a DNA profile similar to Mr. Fattore's, as well as a dog hair consistent with a hair from Caleb's dog. The police secured video footage of Mr. Fattore buying shoes at the Walmart the evening before Caleb's murder.

The Nova Scotia Audio Tapes

[25] Unbeknownst to Ms. Merritt and Mr. Fattore, the police secured authorization to intercept their private communications in their Nova Scotia residence and vehicle (the "Nova Scotia audio tapes"). The police also took steps to stimulate conversation between them, including by disclosing "results" of the investigation through officers posing as a victim liaison officer and a life insurance investigator. Those "results" were not always true but would be likely to spark conversations between Mr. Fattore and Ms. Merritt, and in fact did so.

[26] Most notably, the transcribed Nova Scotia audio tapes contain self-incriminating statements by Mr. Fattore relevant to the killings of both Bridget and Caleb:

- On January 1, 2014, after the police had caused Mr. Fattore to believe that they had linked him to Bridget's killing with DNA, Mr. Fattore can be heard suggesting that the DNA must have been from his hair because Bridget did not touch him.
- On January 8, 2014, he said with respect to Caleb, "I killed him fuckin' perfect", or words to the effect of, "I killed him, then fuckin' prove it".[2] Later that day he said, "I went in there and the fuckin' coward didn't fight".

[2] In his trial testimony Mr. Fattore said that the transcribed words, "fuckin' perfect", are inaccurate. He testified that what he said was, "okay, well, then fuckin' prove it".

[27] With respect to Ms. Merritt, the Nova Scotia audio tapes provided evidence that:

- She was aware, at least by the time of the Nova Scotia audio tapes, that Mr. Fattore had killed Caleb. Most specifically:
    - When Mr. Fattore said of Caleb on July 8, 2014, “I killed him fuckin’ perfect” (or “I killed him, then fuckin’ prove it”), Ms. Merritt responded, “I know but”.
- Ms. Merritt was also privy to Mr. Fattore’s comment about the DNA that the police claimed would link him to Bridget’s killing and expressed no apparent surprise.
- Ms. Merritt discussed strategies with Mr. Fattore to avoid his apprehension:
    - They discussed, for example, what should be said about the Walmart shoes and how Mr. Fattore’s DNA could have been innocently transferred in relation to the deaths of Bridget and Caleb.
    - There were conversations with Ms. Merritt’s oldest child that the Crown interpreted as coaching sessions, preparing the young boy for a potential police interview.

[28] When the police sent an email that purported to be from a victim liaison officer disclosing that the police suspected Ms. Merritt of having misled them by

failing to disclose Mr. Fattore's Walmart visit, Ms. Merritt expressed concern about being charged as an accessary after the fact.

The Arrests and Mr. Fattore's Post-Arrest Statement

[29] On January 28, 2014, Ms. Merritt and Mr. Fattore were arrested for murder in the deaths of Bridget and Caleb. While in the police car, Mr. Fattore could see the six children of their household being removed from the home. An audio recording from the police car shows that Mr. Fattore was crying at the time.

[30] The police had arranged that Sergeant ("Sgt.") King, an expert police interrogator, who had spent more than a month preparing to interview Mr. Fattore upon his arrest, would be the only officer to have contact with him. Once at the police station Sgt. King questioned Mr. Fattore for fifteen hours and seventeen minutes.

[31] After more than eleven hours, Mr. Fattore confessed to having killed Bridget and Caleb. He said that he killed them of his own initiative, without Ms. Merritt's knowledge, because Ms. Merritt was always sad, crying, and anxious when the children were with the Harrisons.

[32] With respect to Bridget, Mr. Fattore said he attempted to gain entry to her home by giving her a blank piece of paper that he told her was a letter from the children. When she refused the "letter" he forced himself in and "attacked her" hitting her a couple of times and grabbing her neck with the crook of his arm and

squeezing it until she stopped breathing. He said he did this to improve the odds that Ms. Merritt would get custody.

[33] He explained that after deliberating about killing Caleb for a long time he decided it had to be done to get the children home. He described using one of the children's keys he had surreptitiously taken to enter Caleb's home in the middle of the night. He struck Caleb in the upper body with an aluminum baseball bat he had brought, and they began fighting. He overpowered Caleb and choked him with his forearm, then put Caleb's body on the bed with his sleeping mask on and left Caleb's house, before arriving home at approximately 4:02 a.m.

[34] Mr. Fattore was not taken before a justice of the peace before the interrogation. He was, however, brought before a justice of the peace within twenty-four hours of his arrest.

The Airport Intercept Statement

[35] On January 31, 2014, Mr. Fattore and Ms. Merritt were taken to the airport for transport to Ontario. They were left to sit alone while waiting for their flight, but unbeknownst to them, their conversations were being intercepted. Police transcripts of their extensive conversation describe portions of many of the exchanges as "unintelligible".

[36] It is not contested that during the conversation Ms. Merritt was interested in what Mr. Fattore had told the police. Mr. Fattore told her that he had confessed to

killing both Bridget and Caleb and said he was taking the rap to get her the lesser charge of accessory after the fact. He advised her that he told the police that he had not told her about the killings until what would have been after her police statements and that he told the police that she did not turn him in because she loved him.

[37] Ms. Merritt asked Mr. Fattore, "[w]hy d' you admit to Bridget they had nothing on her [?]" Mr. Fattore said that he intended to retract everything, say he was under duress and would "go for [an] insanity [defence]". She commented that she was still charged with murder and wondered if she would make bail.

[38] After further conversation, Mr. Fattore and Ms. Merritt returned to Ms. Merritt's potential culpability as an accessory after the fact. Mr. Fattore said that he had asked the police what would happen if she knew of the murders after the fact and was told that Ms. Merritt would be an accessory after the fact, which is "not at all as big" as murder. They discussed Mr. Fattore's DNA being under Caleb's fingernails. The following exchange, as transcribed with the approval of Cst. Lowe, the officer responsible for transcription, was then intercepted:

> Merritt: (whispers) You shouldn't have said anything to them
>
> Fattore: Huh
>
> Merritt: You shouldn't have said anything
>
> Fattore: (whispers) I was thinking about (unintelligible) and the children

> Merritt: (whispers) (unintelligible) the audio tapes would've fucked us anyways.

I refer in these reasons to the last comment attributed to Ms. Merritt as the "airport intercept statement".

THE ISSUES

[39] As indicated, Mr. Fattore is appealing his first degree murder convictions in the deaths of Bridget and Caleb, and Ms. Merritt is appealing her first degree murder conviction relating to Caleb. It is convenient to discuss trial events that are relevant to their appeals when considering the issues that require attention. Those issues are as follows:

The Fattore Appeal

A. Did the trial judge err in finding Mr. Fattore's post-arrest statement to be voluntary?

The Merritt Appeal

B. Did the trial judge err in his charge to the jury on the airport intercept statement?
C. Did the trial judge err in his charge to the jury on Ms. Merritt's Walmart omissions?
D. If the trial judge committed any of these errors, should the proviso be applied?

ANALYSIS

Fattore Appeal: Did the trial judge err in finding Mr. Fattore's Post-Arrest statement to be voluntary?

[40] On April 24, 2017, the trial judge found Mr. Fattore's post-arrest statement to be voluntary beyond a reasonable doubt and admitted it into evidence. Mr. Fattore claims that the trial judge erred in arriving at this conclusion. He also argued that the erroneous admission of the statement was a material error. He submitted that it played a critical role in his conviction for killing Bridget and contributed to the rejection of his trial testimony in which he gave an account of unintentionally killing Caleb, an account that if not rejected beyond a reasonable doubt would have led to a manslaughter rather than a murder conviction. He argued, as well, that the erroneous admission of his post-arrest statement influenced his decision to testify, requiring a new trial.

[41] In advancing his appeal, Mr. Fattore did not suggest that the trial judge erred in law. Nor could he have done so persuasively. The trial judge correctly identified the well-established legal principles that apply.[3]

[42] Mr. Fattore argued instead that the trial judge erred in the application of those principles. He submitted that it is evident on the record that his choice to

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[3] Those principles are so well known that it is unnecessary to review them in this judgment.

self-incriminate after more than eleven hours of resistance was caused by improper inducements being held out in oppressive circumstances. Specifically, he urged that Sgt. King improperly induced him to self-incriminate, after he was worn down from hours of interrogation, by exploiting his greatest vulnerability, his deep commitment to his blended family. He argued that shortly before his abrupt change from denying his guilt to confessing to two murders, Sgt. King had made clear that if he wanted to help Ms. Merritt so that she could gain her liberty and return to parenting their children he had to make the choice to accept the "time limited offer" to "man up" and take responsibility for the killings. He argued that in the face of this pressure, and in all of the circumstances, his choice to self-incriminate was not voluntary.

[43] In Mr. Fattore's submission, the trial judge erroneously failed to appreciate that his statement was involuntary because he did not give sufficient attention to the oppressively long interview. He also suggested that the trial judge did not pay sufficient attention to the sudden change that led to the confession, or to Sgt. King's improper "time limited offer". Mr. Fattore also argued in his appeal factum that the trial judge erred by giving no consideration to the failure by the police to bring him before a justice after his arrest, as required by s. 503(1)(a) of the *Criminal Code*, R.S.C. 1985, c. C-46.

[44] At the end of Mr. Fattore's oral argument we dismissed this, Mr Fattore's only ground of appeal. We did so because, to succeed in his appeal arguments,

Mr. Fattore had to identify a palpable and overriding error in the trial judge's evaluation: *R. v. Oickle*, 2000 SCC 38, [2000] 2 S.C.R. 3, at paras. 22, 71; *R. v. Wabason*, 2018 ONCA 187, at para. 8. In spite of Mr. Fattore's counsels' able arguments we were shown no reasoning errors in the trial judge's careful and exhaustive analysis, let alone any palpable and overriding errors.

[45] Indeed, after paying close regard to the length, condition, and progress of the interview the trial judge offered cogent explanations available to him on the evidence for concluding that Sgt. King had not offered any improper inducements. He also found that Mr. Fattore "made a reasoned choice to say what he did, of his own volition without his will being overborne as a result of improper inducements or oppressive circumstances emanating from the police." This finding, too, was supported by the evidence.

[46] We found there to be no merit in Mr. Fattore's suggestion that in coming to these conclusions the trial judge failed to pay sufficient attention to the length and conditions in which Mr. Fattore was interviewed. The trial judge commented early in his decision that the length of the interview was a factor that raised particular concern about voluntariness, a point he repeated in his analysis. After closely examining the record, including a videotape of the entire interview, he concluded that Mr. Fattore was not worn down or weakened in his resolve by the length of the interview, his will was not overborne, and fatigue was not a major factor in Mr. Fattore's decision to speak. The trial judge observed that despite the more

than eleven hours that passed before Mr. Fattore admitted to the killings, he had remained engaged and “was in full control of his faculties and abilities”.

[47] In coming to this determination, the trial judge paid close attention to Mr. Fattore’s personal characteristics, as he was required to do. The trial judge canvassed Mr. Fattore’s imposing size, his assertiveness and confidence, the considerable preparation he had done in anticipation of the interview, his readiness to debate what Sgt. King was claiming, his emotional state, and his demeanour.

[48] The trial judge also canvassed the record for other indications of oppression, finding none. Specifically, he noted that Mr. Fattore was provided with his rights to counsel; given breaks of between ten and forty minutes; promptly provided with washroom breaks upon request; permitted to keep his coat; and offered food and beverages. Although Sgt. King was “firm and steadfast” in insisting on Mr. Fattore’s guilt, he was not disrespectful or intimidating, instead building a rapport with Mr. Fattore.

[49] There is therefore no basis for concluding that the trial judge failed to pay sufficient regard to the length or the circumstances of the interview.

[50] Nor were we satisfied that there is any basis for interfering with the trial judge’s conclusion that no *quid pro quo* promises had been made. The trial judge offered a meticulous canvas of each stage of the interview and was entirely alive to the transition from denial to self-incrimination and its causes. The trial judge did

not find this change to be sudden. He explained why he concluded that after being confronted with the evidence against him and his prospects of conviction, Mr. Fattore engaged in a period of reflection. There was an ample evidentiary footing for the trial judge's conclusion that Mr. Fattore made a "calculated assessment of his situation and decided to confess because he was satisfied there was a strong case against him and he hoped that by doing so he may be able to assist his wife and family".

[51] Mr. Fattore stressed on appeal that the trial judge's finding that he "was motivated [to confess], at least in part, by a desire to help Melissa Merritt and his children" establishes that his statement was involuntary. We rejected that submission. The trial judge was acutely aware that Sgt. King used Mr. Fattore's loyalty to his family, including his desire to protect Ms. Merritt, to persuade Mr. Fattore to speak. But he found, as he was entitled to on the evidence before him, that Sgt. King had not offered any promises relating to the treatment of Ms. Merritt or the blended family in exchange for a confession from Mr. Fattore. Put otherwise, even though Mr. Fattore may well have confessed to protect his family, he did not do so as the result of any *quid pro quo* inducements held out by a person in authority.

[52] In support of this finding the trial judge noted that Mr. Fattore "had been advised in the clearest terms that there was no *quid pro quo*" benefit being offered by Sgt. King in exchange for Mr. Fattore's confession. He also found that when

Mr. Fattore attempted to negotiate guarantees or assurances for Ms. Merritt, Sgt. King made it clear that he could offer no guarantees as such decisions had nothing to do with him. And he found that Sgt. King was direct with Mr. Fattore, telling him that he could see no scenario in which Ms. Merritt would be released without being processed. The evidence before the trial judge supported each of these findings as well as the trial judge's finding that the only assurance Sgt. King gave was that those with decision-making power would consider any truthful and corroborated information provided by Mr. Fattore that might show that Ms. Merritt was less involved than the police thought. The trial judge was correct in recognizing that this assurance was not the promise of a benefit that would be provided in exchange for a confession. It was simply an accurate description of how authorities would and should treat such information.

[53] In challenging the trial judge's finding that no *quid pro quo* inducements had been offered, Mr. Fattore argued that the trial judge failed to pay sufficient attention to the fact that Sgt. King told Mr. Fattore that he had to decide which route to take and referred to Mr. Fattore's opportunity to confess as a "limited time offer".

[54] In our view, the trial judge gave these facts close and appropriate attention. He recognized explicitly that these comments were a "problematic" "red flag" that, in the context of the interview, "raise[d] particular concern". However, he found that Mr. Fattore understood that in making these comments Sgt. King was not referring to a *quid pro quo* offer. Instead, Sgt. King was seeking to persuade Mr. Fattore in

a “common sense fashion” that his ability to help Ms. Merritt would diminish if he waited until after the police interview to disclose information that Ms. Merritt’s role in the killings was less than the police believed. As the trial judge put it, Sgt. King sought to persuade Mr. Fattore to confess by presenting him with “the practical reality that once he and Ms. Merritt were in contact with family members the potential for contamination and collusion could ‘diminish’ the potential benefits that might otherwise arise” from anything Mr. Fattore might say on her behalf. The trial judge’s finding that the reference to a “limited time offer” did not relate to a *quid pro quo* promise is supported both by a contextual examination of the relevant exchanges, and by the fact that there was no evidence that Sgt. King had made any other “offer” to which he could have been referring.

[55] Mr. Fattore effectively suggested in his submissions that the trial judge’s findings relating to the “limited time offer” are unreasonable. He argued that any suggestion that a later statement would be less credible than a statement made during the police interview is not a matter of “common sense”, and indeed, is unpersuasive. He submitted that “it is fanciful to find that [he] could collude with anyone” and he pointed out that the police intercepts already raised concern that he and Ms. Merritt had been colluding about what they would tell the police. But these submissions miss the point. The material issue is not whether Sgt. King was correct in suggesting that an immediate statement would actually be more credible than a later one, or even whether Mr. Fattore was persuaded of this. The material

question is whether, viewed objectively, Sgt. King offered Mr. Fattore a *quid pro quo* inducement. The trial judge's finding that he had not done so is entirely reasonable.

[56] Nor does the decision in *R. v. Othman*, 2018 ONCA 1073, 371 C.C.C. (3d) 121, assist Mr. Fattore. In *Othman*, the police provided Mr. Othman with legally incorrect information by telling him that his silence during the interview would undermine his credibility at trial, and they suggested to him that he may never get another opportunity to tell his side of the story. In contrast, Sgt. King never mislead Mr. Fattore about his right to silence nor did Sgt King cause Mr. Fattore to believe this would be his only chance to speak. On the findings made by the trial judge, Sgt. King simply gave Mr. Fattore reason to believe that, functionally, it would be better to offer information that could assist Ms. Merritt during the interrogation rather than later.

[57] Finally, there is no merit in the suggestion made in Mr. Fattore's factum that the trial judge erred by giving "no consideration … to the Police's failure to get Fattore before a Justice of the Peace within 24 hours as required under section 503(1)(a) of the *Criminal Code*". The unchallenged factual findings of the trial judge show that Mr. Fattore was taken before a justice within 24 hours of his arrest, and we were offered no basis for questioning the trial judge's decision to accept the explanation offered for Sgt. King's failure to bring him before a justice more promptly.

[58] We therefore rejected Mr. Fattore's only ground of appeal and dismissed his appeal.

Merritt Appeal: Did the trial judge err in his charge to the jury on the airport intercept statement?

Overview

[59] Without objection the Crown proved Ms. Merritt made the airport intercept statement. That statement was transcribed with the approval of Cst. Lowe, as follows: "(unintelligible) the audio tapes would've fucked us anyways."

[60] The Crown position at trial was that this airport intercept statement is an admission by Ms. Merritt of guilt for Caleb's murder. Ms. Merritt takes no issue on appeal with the admissibility of the airport intercept statement but she argues, correctly in my view, that the trial judge erred by failing to direct jurors that if they found this statement to be partially inaudible, they could not treat it as an admission of Ms. Merritt's guilt unless they could determine the meaning of the statement as a whole from its context.

[61] I agree with Ms. Merritt, and I am persuaded that this error was serious. The Crown was inviting the jury, in an otherwise problematic case, to treat the airport intercept statement as an admission by Ms. Merritt of her guilt in Caleb's killing. As Rowe J. noted in *R. v. Schneider*, 2022 SCC 34, at para. 81, "juries are likely to give significant weight to confession-like evidence" and he noted that there is

therefore “significant potential for prejudicial use of confessions” or party admissions “akin to a confession”. The risk of jury misuse of the airport intercept statement was real, and the consequences of misuse would have been devastating. I would therefore allow this ground of appeal.

[62] It is helpful to begin by setting out the relevant principles of law, which give context to the following discussion.

The Principles of Law

[63] As the following discussion will demonstrate, it is settled law that where a partial or incomplete statement is offered into evidence as a party admission, but lacks sufficient context to give meaning to the words, that partial or incomplete statement is irrelevant and lacks probative value. It is therefore inadmissible. It follows that if a partially heard statement – in this case proof of an incomplete sentence – is admitted into evidence in a jury trial and the jury determines that there is insufficient context to give meaning to the words, the jury must disregard the partial or incomplete statement. After all, no jury can properly rely on evidence that is irrelevant and lacking in probative value. Jurors must therefore be provided with a direction that if they cannot determine the meaning of the partial or incomplete statement, they cannot use it as an admission and must disregard it.

[64] *Schneider* is the leading relevant authority, although it is not a jury direction case and did not involve a partially inaudible audio recorded statement, as this

case does. *Schneider* nonetheless illustrates and identifies relevant principles relating to the admission and use of incomplete statements.

[65] Schneider was charged with the murder of a woman. His brother suspected Schneider as the murderer and confronted him, and Schneider told his brother, “it’s true”. The next morning the brother was with Schneider when he attempted a fatal heroin overdose. Schneider told his brother where the body of the woman could be found and then called his wife. The brother could partially overhear Schneider’s side of the conversation with his wife and testified at Schneider’s trial that in the course of that conversation, which was about the deceased woman, Schneider said that “he did it, he killed her”, and that the “gist” of what he overhead was Schneider taking responsibility for the woman’s death.

[66] The trial judge admitted all of this evidence. Schneider appealed his conviction, arguing that the trial judge erred in admitting the brother’s testimony about the overheard incomplete statement that Schneider made to his wife.

[67] The majority of the British Columbia Court of Appeal panel held that in determining the meaning of an alleged party admission statement, a trier of fact may only consider the “micro-context” – the words said before and after the overheard “fragment” – and since it is not possible to determine the meaning of the partially heard statement by doing so, the testimony about this statement was irrelevant and therefore inadmissible. They therefore allowed the appeal.

[68] The Supreme Court of Canada overturned this decision. Rowe J. wrote the Court's decision. He stressed, at para. 2, that the first prerequisite to admission is "whether what the witness overheard had meaning, such that it was relevant to an issue at trial", what he called "logical relevance". He explained that if a jury can give meaning to the statement the accused made in a manner that is non-speculative in light of all of the evidence, testimony about that statement is relevant and admissible unless excluded as a matter of discretion because its probative value is outweighed by the risk of prejudice it presents: *Schneider*, at paras. 44-45, 63-64, 79. At para. 44 he cautioned that, "[t]he focus should remain on whether the jury can give meaning to the witness's testimony in a manner that is non-speculative, not the overall strength of the Crown's case". He then found at para. 63, that in the circumstances of the *Schneider* case, "there was sufficient context for the jury to give meaning to the words that the brother overheard, such that the evidence overcomes the low threshold for (logical) relevance."

[69] In the course of making that determination, Rowe J. commented upon the decision in *R. v. Ferris* (1994), 1994 ABCA 20, 149 A.R. 1 (C.A.), aff'd [1994] 3 S.C.R. 756. In *Ferris*, a witness overheard Ferris making a phone call after his arrest in which he said, "I've been arrested" and then, sometime later, "I killed David". The intervening words were not heard by the witness. The Alberta Court of Appeal concluded that given the unheard words, a jury could not ascribe non-speculative meaning to the words the officer overheard, depriving those words

of relevance and probative value, thereby requiring their exclusion from evidence. In a short endorsement, Sopinka J., for the Supreme Court of Canada, upheld the decision.

[70] In *Schneider*, at para. 69, Rowe J. explained that in *Ferris*, Sopinka J. did not affirm the relevance analysis of the Alberta Court of Appeal, which appears to have been conducted based on the inability to determine what was said from examining the micro-context. Rowe J. explained that what Sopinka J. said was that "even if the testimony was relevant, it should have been excluded after balancing the probative value against prejudicial effect". Rowe J. then affirmed, at para. 72, "*Ferris* is good law, but must be carefully read", and he stressed that "[e]xclusion of a partial conversation is … not automatic and the analysis is above all a contextual one".

[71] After citing related decisions, he said, at para. 76:

> These decisions illustrate that *Ferris* should not be understood as standing for the proposition that incomplete recollection of a party admission leads to exclusion of such evidence or that it is only "micro context" that can inform meaning and, thus, relevance. In assessing (logical) relevance, what matters is whether the evidence tends to increase or decrease the probability of the existence of a fact at issue. [Citations omitted.]

[72] Rowe J. then found that the statement in the *Schneider* case satisfied the basic rule of admissibility requiring relevance, because it was capable of being given meaning. He then went on to consider whether the trial judge was

nonetheless obliged to exclude the statement pursuant to the exclusionary discretion relied upon by Sopinka J. in *Ferris*, on the basis that the probative value of the evidence is outweighed by the risk of prejudice it presents. He concluded that there was no basis to interfere with the trial judge's decision not to exclude the statement.

[73] There can be no question then that *Schneider* permits the admission of an incomplete statement where there is sufficient context to enable the jury to give the overheard words meaning. The context that Rowe J. relied upon to support admission in *Schneider* was that Schneider had accepted responsibility for the killing in his conversation with his brother the day before; immediately prior to the telephone conversation with his wife he told his brother where the body was; and the brother testified to overhearing the identified words as well as the "gist" of the conversation. Jurors could therefore accept the brother's evidence as to the gist of the conversation and confirm the brother's conclusion about Schneider's meaning during the telephone conversation based on what they knew about the context.

[74] This rule makes perfect sense. Obviously, it would be preposterous if partially inaudible statements were automatically excluded. Few witnesses can recall relevant conversations verbatim. It has long been established that where a witness can provide testimony about what a statement communicated, or there is context for assessing the meaning of words spoken, the evidence is admissible, with the weight of the statement being a matter for the trier of fact to determine:

R. v. Bennight, 2012 BCCA 190, 320 B.C.A.C. 195; *R. v. Buttazoni*, 2019 ONCA 645, *R. v. Hummel*, 2002 YKCA 6, 166 C.C.C. (3d) 30. The ratio of *Schneider* is clear and can be expressed using Rowe J.'s words in para. 63: Where "there [is] sufficient context for the jury to give meaning to the words that [are] overheard, such that the evidence overcomes the low threshold for (logical) relevance," a partially inaudible statement will be admissible, subject to exclusionary discretion.

[75] I do not read *Schneider* as holding that partial statements can be admitted into evidence as admissions even where there is not sufficient context to enable meaning to be given to the identified words. Indeed, I read *Schneider* as holding the contrary. As I have explained, Rowe J. made clear in *Schneider* that the admissibility of incomplete statement evidence requires relevance, which is determined as a matter of logic and human experience by inquiring whether the evidence tends to increase or decrease the probability of the existence of a fact at issue: *Schneider*, at paras. 39, 76. If the meaning of a statement offered as an admission cannot be determined, it cannot logically increase or decrease the probability of the existence of a fact in issue and therefore does not meet even the low threshold of relevance.

[76] This outcome is impelled as a matter of principle. It is trite law that if evidence is too equivocal to support logical inferences, it cannot meet the test of relevance because its meaning is speculative. Such evidence will therefore be inadmissible: *Schneider*, at para. 39; *R. v. White*, [2011] 1 S.C.R. 433, at para. 44. It is also a

misapprehension of evidence to rely on irrelevant evidence, and such reliance will bring about a miscarriage of justice rendering the trial unfair if it plays an essential role in the reasoning process that leads to the conviction: *R. v. Morrissey* (1995), 22 O.R. (3d) 514, 1995 CanLii 3498 at p. 36 (C.A.).

[77] Even independently of *Schneider*, it is settled law, binding on this court, that incomplete statements are inadmissible as admissions where there is not sufficient context to enable meaning to be given. In *R. v. Hunter* (2001), 155 C.C.C. (3d) 225, 55 O.R. (3d) 695 (C.A.), which was not overruled by *Schneider*, a witness overheard the accused say to his lawyer, “I had a gun, but I didn’t point it”. The witness did not hear the balance of the conversation and could offer no testimony as to the context in which that statement was made. Goudge J.A., with Rosenberg and Moldaver JJ.A. agreeing, held that the trial judge erred in admitting the statement after expressing agreement, at para. 14, with the proposition that “the utterance cannot meet the threshold of relevance required for admissibility because its meaning cannot be determined without its context or alternatively its meaning is so speculative that it ought to have been excluded because its prejudicial effect outweighed its tenuous probative value.”

[78] As the foregoing quote from *Hunter* makes clear, and as affirmed in *Schneider* at paras. 64 and 69, there are two mechanisms in the law of evidence for excluding incomplete statements that have been offered as admissions. First, if it is found by the trial judge that there is insufficient context to enable meaning to

be given to identified words, such statements are not admissible because they fail to meet the basic rule that to be admissible evidence must be relevant. Second, incomplete statements may lack sufficient probative value to admit, and therefore require exclusion through the application of the exclusionary discretion that Sopinka J. relied upon in *Ferris* to exclude the overheard words extracted from the incomplete statement, “I killed David”.

[79] As *Ferris* illustrates, this rule applies in jury trials. In a jury trial, where a judge determines that an incomplete statement offered as an admission cannot be given meaning or lacks sufficient probative value, it is inadmissible and will never be given to the jury. But as *Schneider* illustrates, where a jury can potentially give meaning to the alleged admission in a manner that is non-speculative, and the statement has sufficient probative value to overcome its risk of prejudice, the statement will go to the jury, but it will be for the jury to determine whether there has been an admission: *Schneider*, at paras. 43, 63-64.

[80] But in my view that does not end matters. It necessarily follows from the principles underlying the rules of admissibility that if jurors who are given an incomplete statement for consideration of whether it constitutes a party admission determine that they cannot give the incomplete statement meaning because its context does not allow meaning to be determined, they cannot use that incomplete statement as an admission. This must be so because *Schneider*, at paras. 39 and 44, recognizes that if the meaning of an alleged admission cannot be determined,

the meaning remains speculative and cannot assist as a matter of logic and human experience in determining a fact at issue. No juror can properly decide a case based on irrelevant, non-probative information, and it is the responsibility of the trial judge to prevent this from occurring.

[81] It follows from this that jurors must be told that if they cannot determine the meaning of the partial statement, they cannot use it as an admission. After all, "[a] charge to a jury is aimed at ensuring that "the jurors would adequately understand the issues involved, the law relating to the charge the accused is facing, and the evidence they should consider in resolving the issues"": *R. v. H.W.,* 2022 ONCA 15, 160 O.R. (3d) 81, at para. 34, citing *R. v. Cooper*, [1993] 1 S.C.R. 146, at p. 163; *R. v. Daley*, 2007 SCC 53, [2007] 3 S.C.R. 523, at para. 32. A functional understanding of what is required to adjudicate the issue of whether a partial statement can be given meaning as an admission necessarily includes an appreciation by jurors that if they cannot give the partial statement meaning, they must disregard it.

[82] Not only is this direction required as a matter of principle. There is authority supporting it. In *Bennight*, the British Columbia Court of Appeal upheld the admission of testimony about a possibly, partially overheard statement where the witness was able to describe its gist and the context in which it was made. In denying the appeal, Bennett J.A. commented, at para. 92, that the jury instructions "put the matter beyond question". Notably, after instructing the jury on its role in

finding what the statement meant, the trial judge said, “It is up to you whether you believe this witness about what Mr. Bennight said to her and when and what he meant. If you are in doubt about any of that, you should ignore the evidence” (emphasis added).

[83] When Rowe J. was considering in *Schneider* whether the trial judge erred in admitting a partially inaudible statement by failing to apply his exclusionary discretion, he recognized, at para. 82, that the trial judge considered whether the risk of prejudice could be ameliorated by a “strong caution” and found that the trial judge “provided such a caution on the proper use of the admission at issue”. The trial judge’s charge is not reproduced by Rowe J., but it is available in the British Columbia Court of Appeal decision, reported at 2021 BCCA 41, 400 C.C.C. (3d) 131. In that direction, the trial judge advised jurors to bear in mind that the brother did not hear what was said before and after the words he overheard. He then told jurors to bear this in mind, “when you consider what, if any, weight can be given” to the brother’s evidence, following which he directed jurors that if they could not determine what Schneider meant by the overheard words, “[they] should ignore the evidence”: *Schneider*, 2021 BCCA 41, 400 C.C.C. (3d) 131, at para. 98 (emphasis added in first quote, original in second quote).

[84] The principles I have just described developed in cases where partial statements were overheard by witnesses but they no doubt apply to statements that are partially inaudible in an audio recording. They therefore apply in this case.

The Material Facts

[85] As I have indicated, the airport intercept statement was transcribed as follows: “(unintelligible) the audio tapes would’ve fucked us anyways.” Ms. Merritt, relying on testimony given by Mr. Fattore, argued that the “unintelligible” words could be heard, and that what she had said in the airport intercept statement was, “They think the video, the audio tapes would have fucked us anyways”. The Crown denied that those words could be heard, and never suggested that the words were audible. At no point did the trial judge suggest that they were. It was therefore open to the jury to find, after listening to the audio tapes, that the airport intercept statement was in fact partially unintelligible, as Cst. Lowe had concluded. The trial judge was therefore faced with the Crown presenting what the jurors could find to be a partially inaudible statement – an incomplete statement – as an admission of guilt by Ms. Merritt.

[86] Despite the fact that the Crown was seeking to present what may have been an incomplete statement to the jury, no admissibility issue was raised or considered, and I take no issue with that. The Crown did not raise an admissibility issue because it wanted the airport intercept statement admitted into evidence, and Ms. Merritt could hardly object to its admission on this basis given that she took the position that the statement was not inaudible at all. Moreover, even if the airport intercept statement was inaudible and was incapable of being admitted as an admission of guilt under the rules I have just described, it would likely have

been admissible for the alternative purpose of unfolding the narrative as part of the airport intercept, which was admissible in its entirety. The debate at trial was therefore not about whether the airport intercept statement was admissible, but rather what use jurors could and should make of it. Put otherwise, the issue was about what the airport intercept statement meant, when understood in context.

[87] Ms. Merritt's trial counsel asked the jury to be very careful about taking any meaning from the airport intercept statement if it was not possible to figure out what was said by listening to the audio tape. And he offered innocent explanations that would cast doubt on the Crown's suggestion that the airport intercept statement was an admission of guilt, in the event that the jury could not hear the part of the statement marked "unintelligible". He suggested that when she made the comment, the context suggests that Ms. Merritt was referring to being "fucked" as an accessory after the fact. Specifically, he submitted that the intercepted tapes as a whole show that she only learned of everything after the fact of the killings, and that the statement was made in a context in which Ms. Merritt had been expressing concern about her potential liability as an accessory after the fact.

[88] In his closing submissions the Crown invited the jury to conclude, to the contrary, that the airport intercept statement was an admission of murder by Ms. Merritt. It suggested that this statement clearly related to the murders. The Crown submitted that Ms. Merritt would not consider conviction as an accessory after the fact as being "fucked", because being convicted as an accessory after the

fact would be "one hell of a deal" given that she is guilty of murder. The Crown then said:

> Because at the end, in the end, as she acknowledges just after two hours and 20 minutes and 56 seconds, "While it may have been better if [Mr. Fattore] hadn't said anything at all, the 'audiotapes would have fucked us anyways.'"
>
> And with great respect to my friend, [counsel for Ms. Merritt], that simply isn't a recognition by Melissa Merritt that the police have said that the video and audiotapes would have fucked them anyways. I submit it's an admission of guilt by Melissa Merritt that there are conversations that the police could have captured on the audio between her and Fattore that she knows they have that would have, "Fucked them both."[4]
>
> And she also knows what they were truly talking about in the audio that has been played for her and it, "Fucks both of them." And even if that part of the intercept that – the airport intercept that – the airport intercept does say video in there and I'm not sure it does, but you will have to hear it, there is video that would implicate them as well. The video from Wal-Mart which is pretty hard to dispute that Chris bought a pair of shoes that he later wore to murder Caleb in while she's sitting nearby. [Emphasis added.]

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[4] I pause to note that the "audio tapes" that Ms. Merritt was referring to in the airport intercept statement were the Nova Scotia audio tapes. None of those Nova Scotia audio tapes contain admissions of murder by Ms. Merritt, only statements showing that she was aware by the time those audio tapes were made that Mr. Fattore had killed Caleb and Bridget, and that she was actively assisting Mr. Fattore in overcoming the evidence that implicated him in the killings. In order to advance its theory that Ms. Merritt's partial comment that the "audio tapes would've fucked us anyways" was a reference to she herself being "fucked" on the murder charges, the Crown was inviting jurors to speculate that she must have made other admissions relating to the murders that "the police could have captured on the audio between her and Fattore" but did not. There was no evidence of this. In my view, the Crown's suggestion that Ms. Merritt had made admissions of guilt that were not caught on the Nova Scotia audio tape amounted to unfair speculation and was highly prejudicial. I recognize that Ms. Merritt's trial counsel did not ask the trial judge for a direction to jurors not to speculate about whether such other admissions had been made, but the Crown's submission underscores the potential prejudicial impact that this evidence may have had on Ms. Merritt's trial.

[89] The trial judge prepared a draft jury charge and distributed it to the parties for their comments before directing the jury. The draft charge did not include a direction to jurors not to treat the airport intercept statement as an admission of guilt unless they could determine what Ms. Merritt was saying. During the pre-charge conference Ms. Merritt's counsel therefore asked the trial judge to direct the jury, "[s]omething to the effect of, 'if you cannot decide what was said, you cannot take anything from it,'" calling this the ultimate ratio of *Ferris*, and *Hunter*.

[90] The trial judge rejected this request, saying:

> No, I'm not going to do that, I'll tell you partly why. It seems to me that one of the things the jury could do here is the simple fact that some of these things get discussed over and over and over again. Could be of some significance or could attribute in some – contribute in some way to their decision. I think it's kind of almost like a moronary, you want me to – so think it's pretty clear here. They been told they've got an example[5] and I think to add that would – doesn't add anything to what's already here.

[91] After further submissions the trial judge said, "I'm not going to add more to it". And he did not do so.

[92] The charge that the trial judge ultimately gave to the jury addressed inaudible statements in several locations, and contained the following material directions, none of which charged the jury not to use the airport intercept statement

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[5] The "example" the trial judge was referring to is included in para. 95, below.

as an admission by Ms. Merritt if they could not decide what the entire statement meant.

[93] First, the jury charge contained a general direction to jurors telling them that the competing transcripts prepared by the Crown and the defence were provided to help them follow the evidence, and the trial judge appropriately stressed "the importance of reaching your own conclusions about what was said in respect of any conversation that you feel is important". Jurors were later told, "[i]f you do not hear [what has been transcribed] you must disregard what is in the transcript. If you hear it differently, or if you hear something in addition to what is in the transcripts, you go by what you hear."

[94] Second, as part of the general charge on the use of intercepted communications, the trial judge said:

> Only an accused person's words, as understood in context, can be used as evidence of what that accused person has done or intended to do.
>
> When it comes to context, keep in mind that there are parts of the conversations that cannot be heard. These are reflected in the transcripts by the word "unintelligible" placed in parentheses. There are lots of those.
>
> Keep in mind that in some cases a missing word or words could be very important in determining the meaning of what was said. [Emphasis added.]

[95] With that, the trial judge ended the jury charge for the day. The next day he resumed speaking generally about how the jury should approach inaudible portions of intercepted communications, saying:

> Anything on the recordings may be helpful in figuring out what a particular accused person says and what his or her words mean….

The trial judge then repeated verbatim what he had said at the end of the prior day as quoted above in para. 95 before continuing:

> I will give you an example from another case. If someone overheard only part of a conversation and testified they heard an accused say, "I had a gun", in some circumstances that could be quite incriminating. However, if the accused actually said, "They say I had a gun", the evidential value of the statement could be very different. The potential for that sort of problem is something you need to take into account in evaluating the extent to which you are prepared to rely on the intercepted communications in deciding this case.
>
> Once you have decided what an accused said, you should treat the statement as out-of-court statements of an accused in accordance with the instructions I have already given to you. That means that the statements made by an accused, and what you find the accused meant by them as understood in context, may be taken into account together with the other evidence when considering the case of that accused only. [Emphasis added.]

[96] Third, later in the jury charge the trial judge twice addressed the airport intercept statement. On the first occasion, when discussing the positions of the parties, he said, in material part:

> The Crown's position is that Ms. Merritt's statements during the airport intercept, properly interpreted in the context of that conversation and the other evidence admissible in relation to her case, amount to an admission of involvement in both Bridget and Caleb Harrison's murders. Considerable emphasis is placed on Ms. Merritt's statement, at page 117 of the airport intercept, that the audio tapes would have "fucked us anyways."
>
> Once again, defence counsel takes a different view of the same evidence. [Ms. Merritt's counsel] says there are additional words you can hear in the "unintelligible" just before the statement at page 117 so that the meaning is changed. He says it is, "They think", referring to the police, the audio tapes would have fucked us anyways.

[97] The trial judge returned to this subject when reviewing the evidence relating to Ms. Merritt's potential liability as an "aider or abetter" in the murders of Caleb and Bridget, adding:

> You will have to carefully evaluate what you are prepared to take from what Ms. Merritt said and did not say, in the context of the conversation at the airport, and in the context of the other evidence admissible in relation to her case.
>
> …
>
> The prosecution relies on the statement made by Ms. Merritt on page 217 of the transcript, that "the audio tapes would have fucked us anyways", to support the inference of an admission of involvement in both murders which they ask you to draw.
>
> This submission calls on you to evaluate whether what was said and not said demonstrates Mr. Merritt's knowledge of Mr. Fattore's involvement and whether it

> demonstrates interest on Ms. Merritt's part in such a deal. [Emphasis added.][6]

Analysis

[98] If jurors determined that they could not hear the inaudible portion of Ms. Merritt's airport intercept statement, "(unintelligible) the audio tapes would've fucked us anyways," they would be considering an incomplete statement. The issue for them would then be whether they could give meaning to the airport intercept statement as a whole, given its context. There was a very real possibility on the evidence before the jurors that they may not be able to do so.

[99] Significantly, the Crown was relying upon part of a sentence as an admission of guilt. A sentence, of course, is a complete thought, and any clause or even a single word of a sentence can direct its meaning. Depending upon what the unintelligible words were, they were capable of changing entirely the meaning of "the audio tapes would've fucked us". By way of example only, if the "unintelligible" portion of the sentence indeed included the words, "they think", then the airport intercept statement would not be an admission of guilt of anything. The missing

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[6] The Crown had submitted that during the conversation in which the airport intercept statement was made, Mr. Fattore and Ms. Merritt were discussing a "deal" in which he would take the rap for both of them on the murder charges, with Ms. Merritt receiving only an accessory after the fact conviction, even though she too was complicit in the murders. This is the "deal" that the trial judge was referring to in this passage. The trial judge went on to review the evidence supporting the Crown position that this is what the conversation leading up to the airport intercept statement was about, as well as the evidence supporting Ms. Merritt's competing position that Mr. Fattore's attempt to take responsibility for the killings and his attempt to ensure that Ms. Merritt was prosecuted only as an accessory after the fact was not evidence that Ms. Merritt had been involved in the killings, but rather an accurate reflection of her actual culpability.

words could well have played a central but unknown role in the meaning of the sentence. If the meaning of the words could not be heard or discerned from context or could not be determined from context to be unimportant, it would be arbitrary for jurors to rely on the words that could be heard.

[100] Moreover, even if context permitted jurors to conclude that notwithstanding the missing words in the sentence she spoke, Ms. Merritt must have been recognizing her guilt, the impenetrable question that remains is: her guilt of what? Ms. Merritt was suspected of complicity in three murders at the time and she was under arrest for two murders. Which murder charge or charges was she saying she believed she was “fucked” on? This mattered because unless jurors could relate the “admission” to a specific charge, it could not provide evidence against her at her trial.

[101] In addition, Ms. Merritt was not only at risk of criminal liability on the murder charges. She was also in jeopardy as an accessory after the fact, and there are compelling reasons to believe that if she was acknowledging guilt in the airport intercept statement, this is what she was referring to. It is not in dispute that the audio tapes Ms. Merritt was referring to in the airport intercept statement were the Nova Scotia audio tapes secured prior to her arrest. Those Nova Scotia audio tapes do not contain any admissions by her of guilt in any of the murders. This reduces materially the prospect that she was expressing concern in the airport intercept statement that those audio tapes disclose her complicity in any of the

murders, let alone in Caleb's murder. What is in fact clearly established in the audio tapes she was referring to is that she was an accessory after the fact. Moreover, immediately before the airport intercept statement was uttered, Ms. Merritt and Mr. Fattore were discussing her jeopardy as an accessory after the fact, giving a context to the airport intercept statement that could cast significant doubt on its meaning.

[102] In this context, unless jurors determined that they could hear the "unintelligible" words, there was a realistic risk that they would not be able to determine what the airport intercept statement meant from its context. This made it gravely important for jurors to understand that if they could not hear the part of the statement marked "unintelligible" and could not determine the meaning of the airport intercept statement as a whole from its context, the partial or incomplete statement that they could hear could not be used as an admission of her guilt.

[103] When defence counsel asked for such a direction, as recounted in para. 89 above, the trial judge refused. He took the position that it was not necessary to do so because the overall context could be of some significance in assisting jurors to determine what was said in the inaudible portion of the statement. With respect, this response, reproduced in para. 90 above, missed the point of the objection. The trial judge answered an objection to the charge relating to what jurors should be told to do if they could not determine the meaning of the airport intercept statement from context, with the answer that jurors might be able to determine the

meaning of the airport intercept from context. Even if there was a prospect that jurors could give meaning to an incomplete statement by relying on context, they still need to know how to proceed if they could not do so. This is not a case where the trial judge simply failed to give the required direction to jurors to ignore the evidence if unable to determine its meaning from context. He deliberately chose not to give that direction, and in my view, he did so for a mistaken reason.

[104] I have considered the possibility that even though the trial judge made a decision not to tell jurors to disregard the airport intercept statement if they could not determine what it meant from context, jurors would nonetheless have had a functional understanding from what the trial judge did say that this is how they must proceed. I am not persuaded of this, even though there are statements in the charge where the trial judge told jurors to assess the meaning of statements in context, and that “only an accused person’s words, as understood in context, can be used as evidence”. Ordinarily this would arguably be enough to give jurors a functional understanding that they must disregard partial statements if they cannot determine their meaning. But not in this case. I make three points.

[105] First, it must be remembered that where there are missing words, a direction to interpret what the accused “said” may be misunderstood as referring to the audible words – what the accused can be heard to have said - instead of the entire statement in which the missing words appear, which is what properly requires

interpretation. In my view, the trial judge's general comments about interpreting what the accused said in context carries that ambiguity.

[106] Second, the Crown relied heavily on the airport intercept statement as an admission of guilt. As Rowe J. noted in *Schneider*, at para. 81, jurors are likely to give significant weight to confession-like evidence. In examining whether the statement in that case should be admitted as an admission he endorsed the utility of a "strong caution". In my view, general directions by a trial judge, not linked specifically to the potentially problematic evidence, are not a strong caution and should not be relied upon to ameliorate the significant risk of prejudice that arises from the potential misuse of a partial statement that is being offered as an admission. In his jury charge, the trial judge should have given the proper analysis and the limitations on the use of the airport intercept statement dedicated attention but he did not do so.

[107] Third, and most importantly, in other parts of the charge the trial judge gave directions that can only be understood as communicating to jurors that after considering context and that there are missing words, they are free to make what they will from partial statements. This, of course, is a misdirection. Above, when recounting the material parts of the jury charge, I highlighted the elements that are problematic in this regard, but I will repeat them here.

[108] After telling jurors that only words, as understood in context, can be used as evidence of what the accused has done or intended to do, the trial judge told jurors to, "Keep in mind that in some cases a missing word or words could be very important in determining the meaning of what was said" (emphasis added). With respect, this materially understates things. In some cases a missing word or words could be crucial in determining meaning, because if those missing words prevent meaning from being given to a statement, that statement must not be used.

[109] When directing the jury in terms of how to deal with the potential ambiguity of incomplete statements the trial judge said:

> I will give you an example from another case. If someone overheard only part of a conversation and testified they heard an accused say, "I had a gun", in some circumstances that could be quite incriminating. However, if the accused actually said, "They say I had a gun", the evidential value of the statement could be very different. The potential for that sort of problem is something you need to take into account in evaluating the extent to which you are prepared to rely on the intercepted communications in deciding this case. [Emphasis added.]

[110] The clear message here was that jurors, confronted with a partial statement, need to take into account that it is only a partial statement, but having done so they may determine "the extent to which [they] are prepared to rely on" it. To the contrary, the trial judge should have told jurors that if after having taken into account that a statement is only a partial statement they cannot determine the meaning of what the accused said, they must disregard that partial statement.

[111] The trial judge gave jurors a similar misdirection relating specifically to the airport intercept statement:

> You will have to carefully evaluate what you are prepared to take from what Ms. Merritt said and did not say, in the context of the conversation at the airport, and in the context of the other evidence admissible in relation to her case. [Emphasis added.]

[112] This again was an invitation to jurors to determine what they "are prepared to take" from what Ms. Merritt said or did not say in the airport intercept statement, after considering the context. The trial judge should have told jurors that if they could not determine what she meant by the partially inaudible airport intercept statement as a whole after considering its context, they should take nothing from it. The law requires such statements to be given no weight. It does not permit jurors to take from them what they "are prepared to take".

[113] In summary, I am far from persuaded that, in a case where jurors have been invited to decide what they are prepared to take from a partial statement made by an accused, that they would nonetheless glean from general directions to interpret the meaning of statements in context, that they are not to use the airport intercept statement as an admission of guilt by Ms. Merritt unless they can determine its meaning as a whole.

[114] Nor am I persuaded that jurors would have derived a functional understanding of this prohibition based on the remaining elements of the charge that the Crown relies upon. To be sure, the trial judge:

- warned jurors not to rely on transcripts they do not agree with;
- told jurors to use a statement attributed to an accused only if it relates to the commission of the offence;
- properly put the competing positions of the parties before jurors and directed them to consider the different interpretations that had been offered when examining the meaning of the statement; and
- told them to consider after-the-fact conduct evidence with the rest of the evidence to determine whether guilt beyond a reasonable doubt is the only rational inference.[7]

[115] However, none of these directions tells jurors anything about how to proceed if they cannot determine the meaning of the statement, "(unintelligible) the audiotape would've fucked us anyways". It was necessary to do so.

[116] I would therefore allow this ground of appeal.

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[7] In my view, directions on after-the-fact conduct have nothing to do with the proper evaluation of the Crown's invitation to use the airport intercept statement as an admission of guilt because after-the-fact conduct and admissions of guilt are different kinds of evidence, calling for different modes of analysis. After-the-fact conduct evidence is circumstantial proof offered to support an inference that the accused must be guilty because they "acted in a manner which, based on human experience and logic, is consistent with the conduct of a guilty person and inconsistent with the conduct of an innocent person": *R. v. White*, [1998] 2 S.C.R. 72, at para. 19, quoting *R. v. Peavoy*, (1997), 34 O.R. (3d) 620, 117 C.C.C. (3d) 226 (C.A.), at p. 238. The issue with after-the-fact conduct evidence is with the inferences that can reasonably be drawn. In contrast, an admission of guilt is direct evidence, since, by definition, direct evidence is evidence that if believed, resolves a matter in issue: *R. v. Villaroman*, 2016 SCC 33, [2016] 1 S.C.R. 1000, at paras. 23-24. A finding that Ms. Merritt made an admission of guilt, if believed, is a finding that she has directly acknowledged that the alleged charge is true. No inferences are needed to use an admission. The issue here is more basic: Can meaning be given to what the accused said, as an admission of guilt?

Merritt Appeal: Did the trial Judge err in his charge to the jury on Ms. Merritt's Walmart omissions?

Overview

[117] I am also persuaded that the trial judge misdirected the jury relating to the reasoning process it should engage in when determining whether the Walmart omissions constituted after-the-fact conduct by Ms. Merritt indicative of her guilt. I accept her submission that the direction he gave incorrectly imposed a burden on her to provide affirmative evidence to the contrary. I will begin by describing the error in simple terms, before elaborating.

[118] After-the-fact conduct evidence is evidence of conduct by the accused that "is consistent with the conduct of a guilty person and inconsistent with an innocent person": *R. v. White*, [1998] 2 S.C.R. 72, at para. 19. For this reason jurors are told that before using after-the-fact conduct evidence as evidence of guilt, they must carefully consider and reject any innocent explanations for such conduct, and trial judges will assist jurors by reviewing possible innocent explanations.

[119] The Crown position was that Ms. Merritt did not tell the police about the purchase of the shoes in order to hide her own complicity in the killing. A competing possible innocent explanation on the charge of murdering Caleb was that Ms. Merritt did not tell the police about Mr. Fattore's shoe purchase because she wanted to protect him from being held accountable for his guilt. Unless this

innocent accessory after the fact explanation was rejected by the jury, the Walmart omissions could not stand as evidence that she was a party to Caleb's murder.

[120] In his charge the trial judge appropriately instructed the jury to consider the possibility of Ms. Merritt's innocent, accessory after the fact explanation. However, he went on to instruct the jury that rejection of this explanation "could result from … rejection of the submission that there was other evidence which shows that Ms. Merritt was not involved in the crime charged but was merely acting as an accessory after the fact." This is incorrect. Even if there was no affirmative evidence showing that Ms. Merritt was merely acting as an accessory after the fact, if jurors were left unpersuaded because of the absence of evidence that she had lied to hide her own guilt in Caleb's murder rather than to protect Mr. Fattore, they could not properly reject her innocent explanation.

[121] The Crown accepts that this part of the trial judge's direction "may appear problematic" in isolation and was "not ideal". It argues, however, that the jury charge was nonetheless sufficient when read as a whole. As I will explain, I do not agree.

The Material Facts

[122] The Walmart omissions occurred in Ms. Merritt's police statements of August 23, 2013, and August 26, 2013, when she was recounting the movements of family members on the evening before Caleb's death. She did not tell the police

that while the family was at a mall, Mr. Fattore went to the Walmart to purchase shoes. There is a transaction receipt and video evidence from the Walmart store showing Mr. Fattore doing so during a visit to the store that evening. There is also forensic evidence linking those shoes circumstantially to the killing, as well as proof of an attempt to dispose of the shoes.

[123] The Crown argued that Ms. Merritt's failures to tell the police about Mr. Fattore's purchase of the shoes were deliberate and that this deception constituted an attempt by her to hide her own complicity in Caleb's killing. There was a clear foundation in the Nova Scotia audio tapes for the Crown's contention that Ms. Merritt's statement did not include Mr. Fattore's Walmart shoe purchase because she intended to mislead the police, such that the omissions qualified in law as "fabrications". Specifically, in the Nova Scotia audio tapes recorded after her police interviews, Ms. Merritt was overheard expressing apprehension about what she had told the police about the shoes and suggesting an alternative false account that she could have provided.

[124] However, before accepting the Crown's invitation to treat the omissions as an attempt by Ms. Merritt to hide her own guilt in Caleb's murder, the jury had to reject the alternative possibility that she omitted mention of Mr. Fattore's shoes in order to protect him.

[125] Mr. Fattore provided affirmative evidence that, if credited, would support an alternative innocent possibility. He testified that he had acted alone in killing Caleb and only later told Ms. Merritt, and that this conversation occurred before she spoke to the police. If this were true, then Ms. Merritt's misleading omissions had to have been for the purpose of protecting him, and not herself. However, there were significant problems with the credibility of this affirmative evidence. It contradicted what Mr. Fattore had told Sgt. King during his post-arrest interview, namely that he did not tell Ms. Merritt that he had killed Caleb until after her police statements, and he had made a similar statement in the airport intercepts. There was therefore a realistic risk that the jury would reject Mr. Fattore's affirmative evidence and find there was no evidence affirmatively supporting the innocent possibility that Ms. Merritt misled the police by omitting the shoes to protect Mr. Fattore.

The Jury Charge

[126] The material passages from the jury charge relating to the possibility that there may be an innocent explanation for Ms. Merritt's failure to disclose the Walmart visit are as follows:

> You may find the account that Mr. Fattore gave to Sergeant King to be quite inconsistent with Mr. Fattore's trial testimony.
>
> …

> [Y]ou may wish to consider whether this inconsistency is indicative of Mr. Fattore trying to provide Ms. Merritt with a means of neutralizing the effect of failing to mention Walmart on the basis that she was only trying to help him.
>
> …
>
> Keep in mind that you may not use what Mr. Fattore said in his out-of-court statement to Sergeant King as evidence to prove that Ms. Merritt did not know about Mr. Fattore's involvement until August 27. However, this inconsistency may be used by you, together with any other evidence bearing on Mr. Fattore's credibility, to lead you to reject the only direct evidence in this case to the effect that Mr. Fattore told Ms. Merritt what he claims he did before she made the statements to the police which you may find to be fabricated. If you reject Mr. Fattore's evidence which supports the alternative explanation for her fabrication, you should ask yourself whether there is any other evidence admissible in relation to Ms. Merritt which you think could support such an alternative reason for any fabrication which you have found. [Emphasis added.]

[127] Later in the charge, when considering whether the jury could compare Ms. Merritt's police statement to Mr. Fattore's to infer a joint effort to mislead, the trial judge said:

> Before you can engage in this form of reasoning, you would also have to reject that Ms. Merritt was acting only as an accessory after the fact in doing so. As previously discussed, that could result from disbelief of Mr. Fattore's evidence, which is the only direct evidence that Ms. Merritt was an accessory after the fact, and rejection of the submission that there is other evidence which shows that Ms. Merritt was not involved in the crime charged but was merely acting as an accessory after the fact. [Emphasis added.]

[128] Ms. Merritt's trial lawyer objected to the suggestion that the jury could rely on the absence of affirmative evidence showing that Ms. Merritt was not involved in the crime charged as the basis for rejecting the innocent accessory after the fact explanation for the Walmart omissions. He also took exception with the suggestion that an inference of guilt could be drawn because of the absence of evidence of innocence.

[129] I am persuaded that these objections were well taken. There are two related problems. First, it was an error for the trial judge to direct the jurors that they could reject the innocent accessory after-the-fact explanation if they rejected Mr. Fattore's testimony and found there to be no other direct evidence that Ms. Merritt was not involved in the crime but was merely acting as an accessory after-the-fact. As I have explained, even in the absence of affirmative evidence supporting the innocent after-the-fact conduct inference, jurors could appropriately decide that they cannot reject the innocent accessory after-the-fact explanation because of the absence of evidence disproving it.

[130] Moreover, although the Crown does not have to prove beyond a reasonable doubt that the after-the-fact conduct is consistent only with guilt, accused persons are not required to present affirmative evidence consistent with their innocence. Yet the trial judge effectively invited jurors to reject the innocent accessory after the fact inference if there was no affirmative evidence supporting Ms. Merritt's position. To be sure, a jury should consider the absence of affirmative evidence

supporting an innocent inference in deciding whether to reject it, but in my view, it is inconsistent with the presumption of innocence to invite a jury to reject an innocent inference unless such affirmative evidence exists.

[131] The Crown highlights three aspects of the general charge in arguing that the balance of the charge overcomes this error. I find none of these submissions persuasive.

[132] First, the Crown argues that the trial judge charged jurors to consider the alternative innocent explanation. That is so, but this direction can in no way diminish the errors I have identified, which relate to instructions about the circumstances in which the alternative innocent explanation could be rejected after having been considered.

[133] Second, the Crown argues that the trial judge properly directed jurors on “fabrication”. This direction, although correct, is also immaterial. The errors I have identified do not relate to whether there has been fabrication, but rather to whether the fabrication that occurred is evidence of guilt.

[134] Third, the Crown points to jury directions relating to the Crown’s ultimate burden to prove the elements of the offence beyond a reasonable doubt, including:

- On several occasions, directing the jury that a reasonable doubt can logically arise from the lack of evidence;

- Giving jurors what has come to be known as a "*Villaroman* charge" (after the decision in *R. v. Villaroman*, 2016 SCC 33, [2016] 1 S.C.R. 1000), by directing jurors that they would be satisfied beyond a reasonable doubt "if [they] conclude that the guilt of an accused for the offence charged … is the only reasonable inference to be drawn from the proven facts"; and
- Directing jurors that they are not required to choose between competing positions, murder or accessory after the fact liability.

[135] I am unpersuaded by this submission as well. These directions relate to whether the Crown has met the standard of proof that applies to the jury's ultimate determination of guilt or innocence. It is settled law that this standard of proof does not apply to the admission or evaluation of after-the-fact conduct evidence: *White*, at paras. 38-41. It is difficult to see how directions on an inapplicable standard of proof can overcome the misdirections I have identified which are directed at the evaluation of after-the-fact conduct evidence.

[136] Moreover, in order to rely on these instructions to conclude that they should consider the absence of evidence before deciding whether to reject the innocent after-the-fact conduct inference, jurors would have to engage in an unlikely reasoning process. First, they would have to extrapolate that if they are to consider the absence of evidence in deciding the ultimate issue of guilt or innocence, they should do so, as well, in deciding whether to reject the innocent after-the-fact conduct inference. Second, they would have to conclude that they should ignore

the trial judge's dedicated instruction that they could reject the innocent after-the-fact conduct evidence if it is not supported by affirmative evidence, but instead go further and consider whether there is an absence of sufficient evidence to draw the inculpatory inference. I appreciate that jurors must be credited with common sense, and that perfection is not required in jury directions, but I cannot accept that these elements of the charge would give jurors a functional understanding of the task at hand.

[137] I would therefore allow this ground of appeal.

Merritt Appeal: Should the proviso apply?

[138] The Crown submits that even if the errors I have identified occurred, Ms. Merritt's appeal should be dismissed pursuant to s. 686(1)(b)(iii) of the *Criminal Code* because those errors are "'trivial and insignificant' in the context of the ample incriminating evidence against her". I disagree. This is not a case where the evidence is "so overwhelming that a reasonable and properly instructed jury would inevitably have convicted": *R. v. Van*, 2009 SCC 22, [2009] 1 S.C.R. 716, at para. 36; *R. v. Sekhon*, 2014 SCC 15, [2014] 1 S.C.R. 272, at para. 53. The Crown had no direct evidence implicating Ms. Merritt, and, in my view, a properly instructed jury could be left with a reasonable doubt on the circumstantial evidence as to whether Ms. Merritt was an accessory after the fact to Caleb's murder, rather than a party to the killing. It is best that I not engage in a more detailed evaluation

of the evidence to explain my thinking, given that I would set aside the conviction and order a retrial.

CONCLUSION

[139] We have already denied Mr. Fattore's appeal for the foregoing reasons.

[140] I would allow Ms. Merritt's appeal, set aside her conviction, and order a new trial.

Released: January 5, 2023 "J.C.M."

"David M. Paciocco J.A."
"I agree. J.C. MacPherson J.A."
"I agree. J.A. Thorburn J.A."

Erratum

Correction made on March 30, 2023: in para. 3, "acquitted" was replaced by "could not reach a verdict with respect to".