WARNING

The President of the panel hearing this appeal directs that the following should be attached to the file:

An order restricting publication in this proceeding under ss. 486.4(1), (2), (2.1), (2.2), (3) or (4) or 486.6(1) or (2) of the *Criminal Code* shall continue. These sections of *the Criminal Code* provide:

> 486.4(1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of
>
> (a) any of the following offences;
>
> (i) an offence under section 151, 152, 153, 153.1, 155, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 286.1, 286.2, 286.3, 346 or 347, or
>
> (ii) any offence under this Act, as it read from time to time before the day on which this subparagraph comes into force, if the conduct alleged would be an offence referred to in subparagraph (i) if it occurred on or after that day; or
>
> (b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in paragraph (a).
>
> (2) In proceedings in respect of the offences referred to in paragraph (1)(a) or (b), the presiding judge or justice shall
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> (a) at the first reasonable opportunity, inform any witness under the age of eighteen years and the victim of the right to make an application for the order; and
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> (b) on application made by the victim, the prosecutor or any such witness, make the order.
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> (2.1) Subject to subsection (2.2), in proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice may make an order directing that any information that could identify the victim

shall not be published in any document or broadcast or transmitted in any way.

(2.2) In proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice shall

(a) as soon as feasible, inform the victim of their right to make an application for the order; and

(b) on application of the victim or the prosecutor, make the order.

(3) In proceedings in respect of an offence under section 163.1, a judge or justice shall make an order directing that any information that could identify a witness who is under the age of eighteen years, or any person who is the subject of a representation, written material or a recording that constitutes child pornography within the meaning of that section, shall not be published in any document or broadcast or transmitted in any way.

(4) An order made under this section does not apply in respect of the disclosure of information in the course of the administration of justice when it is not the purpose of the disclosure to make the information known in the community.

486.6(1) Every person who fails to comply with an order made under any of subsections 486.4(1) to (3) or subsection 486.5(1) or (2) is guilty of an offence punishable on summary conviction.

(2) For greater certainty, an order referred to in subsection (1) applies to prohibit, in relation to proceedings taken against any person who fails to comply with the order, the publication in any document or the broadcasting or transmission in any way of information that could identify a victim, witness or justice system participant whose identity is protected by the order.

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Blake, 2023 ONCA 220
DATE: 20230331
DOCKET: C68634

Simmons, Trotter and Copeland JJ.A.

BETWEEN

His Majesty the King

Respondent

and

Neville Lee Blake

Appellant

Chris Rudnicki and Theresa Donkor, for the appellant

Manasvin Goswami, for the respondent

Heard: March 9, 2023

On appeal from the convictions entered on March 5, 2020, by Justice Nancy J. Spies of the Superior Court of Justice, sitting with a jury.

Copeland J.A.:

[1] The appellant appeals from his convictions for sexual assault causing bodily harm, unlawful confinement, choking, and uttering a death threat. The allegations arise out of an alleged sexual assault on the complainant, who was a sex worker.

[2] The only grounds of appeal raised by the appellant involve allegations of ineffective assistance of trial counsel. The ineffective assistance of counsel claims

are raised under both the unreliable verdict and the procedural fairness branches of the prejudice analysis. The appellant raises five instances of action (or inaction) by trial counsel which, it is argued, alone or cumulatively caused a miscarriage of justice and render the verdicts unreliable. In addition, the appellant argues that trial counsel failed to provide him with meaningful advice about how and whether to exercise the right to challenge prospective jurors for cause on the basis of racial prejudice (i.e., *Parks* challenge for cause: *R. v. Parks* (1993), 15 O.R. (3d) 324 (C.A.)), and that this rendered the trial unfair.

[3] There is some factual dispute with respect to the ground relating to trial counsel's advice in relation to challenge for cause on the basis of racial prejudice. However, there is little factual dispute with respect to the other five alleged areas of ineffective assistance.

[4] With the exception of the issues related to challenge for cause, the Crown does not argue that the impugned aspects of the representation provided by trial counsel met the standard of reasonably competent counsel; rather, the Crown argues that the appellant has failed to establish prejudice. With respect to the issues raised regarding the failure of trial counsel to provide meaningful advice in relation to challenge for cause, the Crown argues that the appellant has failed to establish the facts underpinning his claim. The Crown further argues that, even if it is established that trial counsel failed to provide meaningful advice on challenge for cause, the appellant has failed to establish prejudice because the evidence

does not support that he would have made a different decision about exercising his right to challenge the potential jurors for cause on the basis of racial prejudice.

[5] I would allow the appeal, set aside the convictions, and order a new trial. I am of the view that trial counsel's ineffective representation of the appellant renders the verdicts unreliable. I reach this conclusion primarily because of the extremely prejudicial bad character evidence about the appellant elicited by trial counsel in his cross-examination of the complainant. Although the trial judge attempted to remedy the prejudice caused by trial counsel's conduct with limiting instructions, in the circumstances, the evidence was too prejudicial to be cured. Further, there was cumulative prejudice from other deficiencies in trial counsel's representation in relation to failing to seek disclosure of an arrest warrant for the complainant and her criminal record. As a result, it is not necessary to address the remaining allegations of ineffective assistance[1]; although, I briefly address the challenge for cause issue.

Ineffective assistance rendering the verdict unreliable

[6] The parties agree on the legal analysis applicable to allegations of ineffective assistance of counsel. To succeed on a claim of ineffective assistance

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[1] The remaining allegations of ineffective assistance of trial counsel, that I conclude are unnecessary to address, relate to two issues: (i) trial counsel's failure to tender in evidence information about the child safety locks of the appellant's vehicle, which, the appellant argues, would have undermined the credibility of the complainant's account and about which the jury asked a question; and (ii) the failure of trial counsel to tender, in an admissible form, the results of a toxicology report relating to the complainant on the night of the alleged sexual assault.

of counsel, an appellant must demonstrate three things. First, an appellant must establish, on a balance of probabilities, the facts on which the ineffective assistance claims are grounded. Second, an appellant must show that trial counsel's representation was ineffective, in that it fell outside the "wide range of reasonable professional assistance" (the performance component). Third, an appellant must show that "the ineffective representation resulted in a miscarriage of justice, either by rendering the trial unfair or the verdict unreliable" (the prejudice component): *R. v. K.K.M.*, 2020 ONCA 736, at paras. 55, 63-66; *R. v. Joanisse* (1995), 102 C.C.C. (3d) 35 (Ont. C.A.), at p. 62; *R. v. Fiorilli*, 2021 ONCA 461, 156 O.R. 582, at paras. 47-59; *R. v. G.D.B.*, [2000] 1 S.C.R. 520, at paras. 25-29.

[7] The appellant and his wife filed affidavits in support of the ineffective assistance of counsel claim. Trial counsel filed an affidavit in response. Both the appellant and trial counsel were cross-examined. The parties agree that the affidavits and cross-examination transcripts are properly before the court for the purpose of considering the ineffective assistance claim.

[8] I address first the bad character evidence elicited by trial counsel during his cross-examination of the complainant, and then the issues related to the failure of trial counsel to seek disclosure of the arrest warrant for the complainant and her criminal record.

(1) Prejudicial bad character evidence about the appellant elicited by trial counsel

[9] The facts in relation to the bad character evidence about the appellant elicited from the complainant by trial counsel are not in dispute. In cross-examination of the complainant, trial counsel elicited evidence that there were five other women who said that they were attacked by the appellant, and that they had all described his car, his face, and everything that she (the complainant) described. The trial judge immediately intervened and told the jury that they should disregard this evidence and "have no regard to anything that was said about what happened to other women." Despite this intervention, trial counsel insisted on pursuing the issue. He then elicited from the complainant that she was "the last one in the chronology of the girls that got hurt"; that "every single girl that claimed that he hurt her said the same thing" (which she clarified as referring to $20 being thrown out the car window at the end of the attack); that she had spoken to at least three women who told her this; and that they all described a man with a white SUV (the appellant's vehicle was a white SUV). Trial counsel then read out to the complainant a consistent portion of her evidence from the preliminary inquiry with the same details of the appellant having attacked several women and repeating the description of his vehicle as a white SUV. The complainant adopted this evidence as true.

[10] The trial judge, in addition to immediately intervening (although, unfortunately, being disregarded by trial counsel), addressed the issue in her final instructions to the jury. She told the jury that they should "disregard completely any suggestion whatsoever that [the appellant] is responsible for any other sexual assaults." She told them that what the complainant said about other women being attacked was inadmissible hearsay. She also reminded the jury that that appellant was only on trial for the alleged sexual assault of the complainant and that he had no criminal record.

[11] Crown counsel argues that, although the evidence that the appellant had committed other similar sexual assaults on sex workers was prejudicial, the prejudice branch of the ineffective assistance of counsel analysis is not met because the trial judge's timely intervention and the strong limiting instruction in the final charge to the jury cured the prejudice. I do not agree.

[12] Before turning to the prejudice caused by trial counsel's incompetence in eliciting this evidence, I pause to note that trial counsel's explanation in his affidavit filed on appeal for eliciting the bad character evidence about the appellant from the complainant is not credible. Trial counsel deposed in his affidavit that he elicited the evidence that other women had made similar allegations of sexual assault about the appellant in order to challenge the complainant's credibility by showing that she was prepared to repeat stories from other women without first-hand knowledge. In cross-examination, trial counsel maintained this explanation

for eliciting this evidence; however, he admitted that it “was a decision I was making on-the-fly.”

[13] Yet, this purported rationale for eliciting this very prejudicial evidence is not supported by trial counsel’s actions during the trial. In his closing submissions to the jury, trial counsel made no reference whatsoever to the purported theory that the evidence of similar allegations by other women showed that the complainant was willing to repeat unverified information.

[14] I do not accept trial counsel’s evidence about the purpose for which he claims to have elicited this extremely prejudicial evidence. Given the prejudicial nature of the evidence, and the fact that, ultimately, trial counsel made no use of it in his closing submissions to the jury, trial counsel’s actions in eliciting this bad character evidence about the appellant fall well outside the “wide range of reasonable professional assistance” standard framed by the Supreme Court in *G.D.B.*, at para. 27.

[15] The prejudicial effect of the bad character evidence that trial counsel elicited from the complainant was so severe that, despite the best efforts of the trial judge, it was not cured by the limiting instructions she gave. The prejudicial effect of this aspect of trial counsel’s ineffective assistance is sufficient, standing alone, to require a new trial.

[16] The substance of the bad character evidence was that the appellant was a serial rapist, who had committed sexual assaults similar to the one alleged by the complainant on other sex workers, and that the other sex workers had described the assailant, his vehicle, and the attacks similarly to the complainant's allegation. It was evidence that the appellant had a propensity to commit the exact type of offence for which he was on trial. In the circumstances, it was not cured by the trial judge's swift initial intervention, nor her final limiting instruction.

[17] In coming to this conclusion, I do not mean to be critical of the trial judge. The trial judge was faced with a very difficult situation as a result of the ineffective assistance provided by trial counsel, including counsel's persistence in eliciting bad character evidence about the appellant from the complainant in the face of the trial judge's intervention. She did her best to try to limit the prejudice caused by counsel's actions in eliciting the bad character evidence. However, the evidence was so prejudicial that I am of the view that the limiting instructions did not cure it.

[18] Although somewhat factually distinct, this Court's decision in *R. v. Jeanvenne*, 2010 ONCA 706, 261 C.C.C. (3d) 462, supports my conclusion that the prejudicial effect of the impugned evidence was so severe that it was not cured by the trial judge's limiting instructions.

[19] In *Jeanvenne*, this court ordered a new trial based on prejudice caused by two errors in a joint trial for two unrelated murders. The first error was the failure

to grant severance. The second error was the failure to grant a mistrial after a witness blurted out two highly prejudicial pieces of evidence during his testimony. The prejudicial evidence was evidence implicating the appellant in a third murder (not the subject of the trial) and an allegation that the appellant had tried to have the witness killed (also not the subject of the trial). Thus, the prejudicial evidence at issue was evidence portraying the appellant "as a murderer or attempt murderer" with respect to two uncharged incidents, when he was facing trial on two counts of murder.

[20] Of particular relevance to this appeal is the court's conclusion in *Jeanvenne* that it would have allowed the appeal on one of the murder counts (the Poulin count) based on the failure to grant a mistrial because the bad character evidence was so prejudicial that it was not cured by a strong mid-trial caution, in which the trial judge told the jury not to use the bad character evidence for any purpose, that it was "rank and gross hearsay", and to ignore it "completely": *Jeanvenne*, at paras. 50-54, 57, 59-62, 65.

[21] Crown counsel argues that the decision in *Jeanvenne* is distinguishable for two reasons.

[22] First, Crown counsel argues that the appeal was allowed in *Jeanvenne* because of the failure to grant severance. Although that is accurate, the reasons in *Jeanvenne* make clear that the court considered the failure to grant a mistrial in

light of the bad character evidence in the outbursts of the witness as an independent basis on which to allow the appeal: *Jeanvenne*, at paras. 3, 59-62, 65.

[23] Second, Crown counsel argues that the conclusion in *Jeanvenne* that a mistrial ought to have been declared based on the bad character evidence in the outburst of the witness, as it related to the Poulin count, was based on particular aspects of the impugned evidence in that case which heightened the prejudice. Crown counsel argues that it was because of particular factual aspects of the bad character evidence in *Jeanvenne* that the court found it could not be cured by a limiting instruction.

[24] Crown counsel is correct that the court found that the impugned bad character evidence in *Jeanvenne*, as it related to the Poulin murder, was particularly prejudicial in the factual circumstances of that trial, and further found that it was because of the particular factual circumstances that the prejudice could not be cured by a limiting instruction: *Jeanvenne* at paras. 60, 62. However, Crown counsel reads the principle enunciated in *Jeanvenne* too narrowly.

[25] The principle arising from *Jeanvenne* is that, although carefully crafted limiting instructions will often be sufficient to address prejudice from improperly admitted evidence, in some circumstances, such evidence is so prejudicial that it cannot be cured by a limiting instruction. As is clear from *Jeanvenne*, and also from

first principles, whether prejudicial evidence improperly put before a jury is so prejudicial that it cannot be cured by a limiting instruction requires a fact-specific assessment of the nature of the evidence led, the nature of the potential prejudice in the context of the evidence and issues in the trial, and whether any limiting instruction given sufficiently addressed the potential prejudice.

[26] As I have explained above, in the circumstances of this case, the prejudicial effect of the bad character evidence about the appellant that trial counsel elicited from the complainant was so severe that it was not cured by the trial judge's limiting instructions. The appellant was facing trial on allegations that he sexually assaulted and forcibly confined a sex worker in his vehicle. The impugned bad character evidence was that multiple other female sex workers had told the complainant that the appellant had sexually assaulted and forcibly confined them in his vehicle. This was evidence painting the appellant as a serial rapist, with a common method of committing offences. In the circumstances, I conclude that trial counsel's ineffective assistance in eliciting this prejudicial evidence, a course of action which he persisted in, despite the intervention of the trial judge, was not cured by the limiting instructions given by the trial judge.

(2) Failure of trial counsel to request disclosure

[27] I am also of the view that trial counsel's failure to request disclosure of an arrest warrant for the complainant and her criminal record fell below the standard

of reasonably competent counsel. Although trial counsel's failures in these two areas may not have warranted a new trial had they stood alone, together with the prejudice caused by the bad character evidence elicited by trial counsel, they caused cumulative prejudice to the appellant, further undermining the reliability of the verdict. I address first the issues regarding the arrest warrant for the complainant, and then the complainant's criminal record.

(a) The outstanding arrest warrant

[28] As with the prejudicial bad character evidence, the facts regarding the ineffective assistance of counsel allegation relating to the arrest warrant for the complainant are not in dispute.

[29] The complainant alleged that the sexual assault took place in the back of the appellant's SUV. She testified that she initially got into the back seat in order to provide paid sexual services. She alleged that the sexual assault happened after that. She testified that, at some point during the assault, a police vehicle drove through the parking lot. She testified that she did not call out because the appellant had threatened her and told her the vehicle was soundproof. In his evidence, and his statement to police, the appellant agreed that the complainant had been in his back seat (after having initially provided other inconsistent statements to police). He said that while she was speaking to him in the vehicle, she told him there was a warrant out for her arrest and that she was worried about going to jail. According

to the appellant, she got into the back seat because she saw the police vehicle enter the parking lot and told the appellant that she did not want them to see her. The fact that a police vehicle entered the parking lot while the appellant's vehicle was there was corroborated by surveillance evidence.

[30] The issue of whether there was an arrest warrant for the complainant at the time of the alleged assault was clearly a relevant issue in the case prior to trial. The appellant had raised it in his statement to police, as described above. Further, in his affidavit filed on appeal, the appellant deposed that, before the complainant testified, he reminded trial counsel about the issue of her alleged outstanding arrest warrant. According to the appellant, trial counsel told the him that he did not want to bring it up "if it wasn't sure."

[31] However, trial counsel did not ask the Crown for pre-trial disclosure of whether there was an outstanding warrant for the arrest of the complainant at the time of the alleged offences. Nor did he ask the complainant a single question about whether there was a warrant for her arrest at the time of the alleged offences.

[32] Only after the complainant finished testifying did trial counsel ask for disclosure of any outstanding warrant. The result of that inquiry was corroborative of the appellant's evidence – on the night of the alleged offences, the complainant was subject to an arrest warrant for failing to appear. Trial counsel then raised the issue with the trial judge after the defence closed its case. The trial judge

expressed surprise at trial counsel asking for this disclosure after the complainant's evidence was finished, particularly since the appellant had mentioned the arrest warrant in his statement to police. Trial counsel took the position before the trial judge, as he did in his evidence on appeal, that because the appellant told the police about the warrant, and because the appellant's statement was part of the Crown's case, the Crown was required to lead the evidence about the arrest warrant as part of its case.

[33] Ultimately, trial counsel for the Crown agreed that the arrest warrant should be admitted into evidence by way of an agreed statement of facts, but with a suggestion that the jury should be cautioned in accordance with *Browne v. Dunn* (1893), 6 R. 67 (H.L.), because the issue was not raised in cross-examination with the complainant.

[34] Trial counsel's failure to request disclosure of any outstanding arrest warrant for the complainant fell below the standard of reasonably competent counsel. Whether or not Crown counsel ought to have disclosed the arrest warrant without a request from the defence does not absolve competent counsel of making the request for disclosure where it was clearly relevant. Whether the complainant was subject to an arrest warrant at the time of the alleged offences could have served to corroborate the appellant's evidence. Nor would there have been any risk created by asking for disclosure. It was a basic tool counsel needed in order to decide whether to cross-examine on the issue.

[35] Crown counsel argues that there was no prejudice because the arrest warrant for the complainant was ultimately entered into evidence before the jury by way of an agreed statement of facts. I do not agree that this cured the prejudice.

[36] There were two aspects of prejudice not cured by the arrest warrant being belatedly put before the jury by way of the agreed statement of facts. First, the defence lost the opportunity to use the arrest warrant in cross-examination of the complainant to challenge the credibility of her evidence about why she got into the back seat of the appellant's vehicle. Second, due to trial counsel's failure to observe the rule in *Browne v. Dunn*, the evidence was saddled with a caution by the trial judge because the complainant was not asked about the issue in cross-examination. Again, I do not criticize the trial judge for giving this instruction. But it would not have been required had trial counsel sought disclosure of the arrest warrant in a timely manner and had it available to cross-examine the complaint.

(b) The complainant's criminal record

[37] Turning to the failure of trial counsel to seek disclosure of the complainant's criminal record, again the facts are not in dispute.

[38] Trial counsel failed to seek disclosure of the complainant's criminal record and, thus, did not have it available for cross-examination of the complainant. Trial counsel offered a couple of justifications for not requesting disclosure of the criminal record, including that it was the Crown's obligation to provide disclosure

of the complainant's criminal record, and that he did not need to know if the complainant had a criminal record because he did not want to alienate the jury by appearing to bully her for her past criminality, if she had a record.

[39] There can be no debate that the complainant's criminal record ought to have been provided as Crown disclosure without an express request from the defence: The Honourable G. Arthur Martin, O.C., O. Ont., Q.C., LL.D., Chair, *Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure and Resolution Discussions* (Toronto: Ontario Ministry of the Attorney General, Queen's Printer for Ontario, 1993), at p. 242. But this failure by the Crown does not excuse trial counsel's failure to request disclosure of the complainant's criminal record. The criminal record of the central witness in a case – in particular, here, where there was reason to believe that the complainant had a criminal record – is a basic piece of disclosure that any competent counsel would request. Failure of trial counsel to request disclosure of the complainant's criminal record fell below the standard of reasonably competent counsel. Whether and how counsel would ultimately choose to use (or not use) the record is secondary. The failure to request disclosure left trial counsel in deliberate ignorance of relevant evidence.

[40] Crown counsel argues that there was no prejudice from the failure of trial counsel to request disclosure of the complainant's criminal record because the complainant volunteered some aspects of her criminal record in her evidence and

cross-examining the complainant further on her criminal record would have had little impact on her credibility. I disagree.

[41] In cross-examination, the complainant effectively blamed her criminal record on the alleged sexual assault, saying that her record for thefts was “nothing” prior to the assault and that she now had a huge record for thefts because the assault changed her life. However, a review of her criminal record, filed on appeal, shows a significant number of entries prior to the date of the alleged assault and, arguably, no discernable change in the pattern of entries after the alleged assault. Trial counsel was unable to attempt to impeach the complainant on this issue because he had failed to ask for disclosure of her criminal record.

[42] I am satisfied that the cumulative effect of these three areas of ineffective assistance by trial counsel undermine the reliability of the jury’s verdict and resulted in a miscarriage of justice.

Ineffective assistance in relation to advice on challenge for cause

[43] The appellant also argues that trial counsel failed to meaningfully advise him with respect to his right to challenge prospective jurors for cause on the basis of racial prejudice.

[44] I am satisfied on the record before the court that trial counsel failed to provide competent, meaningful advice to the appellant about how and whether to exercise the right to challenge prospective jurors for cause on the basis of partiality

due to racial prejudice. There are at least three aspects of trial counsel's conduct that fall below the standard of reasonably competent counsel.

[45] The first arises from trial counsel's position that it was his "standard practice" not to challenge jurors for cause because he does not want to "accuse them of racism", and that *Parks* challenge for cause amounts to "play[ing] a race card" and is "offensive." These views on the part of trial counsel exhibit a failure to understand the nature of challenge for cause.

[46] Conceptualizing challenge for cause as "accusing" potential jurors of "racism" fundamentally misconceives the nature of *Parks* challenge for cause. Challenge for cause is not designed to accuse potential jurors of racism; rather, it is a means to "foster candid reflection [on the part of potential jurors] about their ability to consider the evidence impartially": *R. v. Chouhan*, 2021 SCC 26, 401 C.C.C. (3d) 1, at para. 67; *Parks*, at pp. 332-34, 338-42, 351-52. The leading model jury instructions regarding challenge for cause include the trial judge explaining to jurors that challenge for cause is a tool used to select an impartial jury: Canadian Judicial Council, "*Model Jury Instructions*", Part 2, Instructions Relating to the Jury Selection Process, 2.2 Challenges for Cause – Procedure (online: www.nji-inm.ca/index.cfm/publications/model-jury-instructions/); David Watt, *Watt's Manual of Criminal Jury Instructions*, 2nd ed. (Toronto: Carswell, 2015), Preliminary 12-A – Challenge for Cause (Procedure). Thus, the risk that jurors would view the challenge questions as accusing them of racism seems unfounded.

To conceptualize this fundamental tool to achieve the selection of an impartial jury as "play[ing] a race card" or accusing potential jurors of racism shows a basic misunderstanding of criminal procedure in jury trials. I am satisfied that trial counsel's misguided conception of *Parks* challenge for cause as "offensive" interfered with his ability to provide meaningful advice on this issue to the appellant.

[47] Second, it is clear from trial counsel's evidence filed on the appeal that he lacked a basic understanding of the mechanics of challenge for cause. His view that the jury pool would be "offended" by challenge for cause was based in part on his belief that the entire jury panel had to be present for the challenge for cause process. Trial counsel testified that the jury panel would be "sitting behind the Crown and the defence when the *Parks* challenge is discussed" and that he was unaware that the panel could be excluded during the challenge for cause.

[48] Trial counsel was simply wrong that challenge for cause must be conducted in the presence of the full jury panel. At the time of this trial, s. 640(2) permitted either the accused or the Crown to apply for the exclusion of all jurors, sworn and unsworn, from the courtroom during the challenge for cause.[2]

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[2] Indeed, even prior to the 2019 amendments to the *Criminal Code* in relation to jury selection, challenge for cause could be conducted in the absence of the panel either with static triers (on application of the accused), pursuant to what was then ss. 640(2.1) and (2.2) of the *Criminal Code*, or with rotating triers, pursuant to the common law discretion of the trial judge to exclude the panel: *R. v. Grant*, 2016 ONCA 639, 342 C.C.C. (3d) 514, at paras. 20-41.

[49] Third, trial counsel's reliance on his "standard practice" not to challenge jurors for cause because he does not want to "accuse them of racism" resulted in his failure to consider the particular facts of this case in deciding what advice to give the appellant in relation to a potential challenge for cause.

[50] Whatever counsel's "standard practice", advice to a client must be considered in the particular circumstances of each case. Trial counsel's evidence is clear that he based whatever advice he gave the appellant about challenge for cause on his "standard practice" that he did not do it. Trial counsel agreed in cross-examination that there was "merit" to the suggestion put to him that "anti-Black stereotypes are particularly dangerous in sexual assault cases where a Black man is accused of raping a White woman." However, trial counsel's evidence was clear that he did not consider the Black man accused/White woman complainant aspect of the allegations to be an important consideration in formulating his advice in relation to challenge for cause. He said that he turned his mind to this aspect of the allegations "minimally", and elaborated: "And so the Black-White scenario wasn't *not* in my mind when I was saying it. The fact that she was a White complainant wasn't really my issue."

[51] The circumstances of this case, involving an allegation of a sexual assault by a Black man against a White woman, increased the risk of partiality on the basis of conscious or unconscious racial bias: *R. v. Campbell* (1999), 139 C.C.C. (3d) 258 (Ont. C.A.), at paras. 2-8. I am satisfied that trial counsel failed to grapple with

this issue in considering what advice to provide to the appellant in relation to challenge for cause.

[52] In the circumstances, given trial counsel's misguided conception of *Parks* challenge for cause, lack of knowledge about the mechanics of how it is exercised, as well as his failure to meaningfully consider the particular circumstances of the allegations in formulating advice to give in relation to challenge for cause, I am satisfied that he did not give the appellant meaningful advice about whether to exercise the right to challenge prospective jurors for cause. The appellant has satisfied the performance branch of the ineffective assistance analysis in relation to the advice trial counsel gave him regarding challenge for cause on the basis of racial prejudice.

[53] In light of my conclusion that a new trial must be ordered as a result of prejudice caused by bad character evidence about the appellant elicited from the complainant by trial counsel, it is not necessary to determine the disputed issue of whether the appellant would have exercised the right to challenge prospective jurors for cause, had he been given adequate legal advice. However, I would make two observations. First, given the inadequacies of trial counsel's legal advice to the appellant on the issue of challenge for cause, it is difficult to see how the appellant could have exercised meaningful choice regarding whether or not to pursue *Parks* challenge for cause. Second, as I have noted, in the circumstances of this case –

an alleged sexual assault by a Black man against a White woman – the concerns that were identified in *Parks* appear to be very apposite.

Disposition

[54] I would allow the appeal, set aside the convictions, and order a new trial.

Released: March 31, 2023 “JS”

“J. Copeland J.A.”
“I agree. Janet Simmons J.A.”
“I agree. Gary Trotter J.A.”