COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Burkhard, 2024 ONCA 353
DATE: 20240506
DOCKET: C67232

Lauwers, Hourigan and Nordheimer JJ.A.

BETWEEN

His Majesty the King

Respondent

and

Lance Burkhard

Appellant

Lance Beechener, for the appellant

Jeremy Streeter, for the respondent

Heard: April 8, 2024

On appeal from the conviction entered by Justice Robert F. Goldstein of the Superior Court of Justice dated December 6, 2018, sitting with a jury.

Hourigan J.A.:

Introduction

[1] Wasfi Ghalban was stabbed in the neck and killed during a home invasion at his apartment. Four men were charged in relation to the homicide. Philip Frauts, who organized the robbery, and Christopher Fuller, who acted as the lookout, pleaded guilty to manslaughter. The appellant and Kyle Schindermann, who

entered Mr. Ghalban's apartment and carried out the robbery, were charged with first degree murder on separate indictments.

[2] The appellant was convicted of first degree murder. He appeals his conviction, advancing a single ground of appeal: the trial judge erred in admitting a statement that Mr. Schindermann made to the police. During the course of oral submissions on the appeal, the argument narrowed to two central points relied on by the appellant. First, the trial judge failed to weigh the probative value of the statement against its prejudicial effect. According to the appellant, had he done so the statement would not have been admitted given its overwhelming prejudicial impact. Second, given that the statement contained both prior inconsistent statements and consistent statements, the prior consistent statements should have been excised, or, in the alternative, if they were included, the trial judge should have warned the jury regarding the prohibited use of prior consistent statements.

[3] For the reasons that follow, I would allow the appeal based on the argument regarding the prior consistent statements. I would set aside the conviction and order a new trial. The brief factual summary in the next section of my reasons will place my analysis in context.

Factual Background

[4] Mr. Ghalban owned a tattoo parlour where Mr. Frauts was employed. Mr. Frauts believed that Mr. Ghalban kept large sums of cash at his apartment. He decided to rob Mr. Ghalban and persuaded Mr. Schindermann to carry out the robbery. Mr. Schindermann, in turn, enlisted the appellant to assist. The appellant agreed to the plot and recruited Christopher Fuller to act as the lookout.

[5] During the police's investigation of the homicide, they received a lead about Mr. Frauts' involvement in the crime. Two undercover officers, with the codenames Sophie and Stew, approached him and pretended to be sophisticated criminals with connections to corrupt government officials and law enforcement agents. The officers told Mr. Frauts that they could fix complex criminal problems. Over the course of several months, they were in contact with Mr. Frauts but made no progress in establishing a relationship of trust where he would confide in them.

[6] In an effort to accelerate the establishment of a trust relationship, another undercover police officer was introduced to the ruse, posing as the victim's girlfriend. This officer claimed to possess a video of the robbery and killing of Mr. Ghalban from hidden cameras in the apartment. She threatened to go to the police if Mr. Frauts did not pay her. As a consequence of this development, Mr. Frauts went to Sophie and Stew for assistance. They assured him that they could take care of the problem by using their law enforcement connections to make the

evidence disappear. However, they stated that they needed to know who else was involved in the robbery.

[7] Mr. Frauts then introduced Mr. Schindermann to Sophie and Stew. The officers told Mr. Schindermann that they had access to the video and could help him. To do so, however, they required full disclosure of the details of the robbery and killing in order to eliminate the incriminating evidence. Over the course of more than four hours, Mr. Schindermann provided the officers with an account of the robbery and killing of Mr. Ghalban. During his statement, which was audio-recorded, he told the officers that the appellant stabbed the victim on the balcony when he went to retrieve zip ties.

[8] There was no issue at trial that the appellant and Mr. Schindermann entered the victim's apartment and carried out a home invasion robbery. The identity of the person who stabbed Mr. Ghalban along with the appellant's level of knowledge and participation were the key issues. The Crown relied on s. 231(5)(e) of the *Criminal Code* to establish the appellant's liability for first degree murder. Three routes to liability for first degree murder, all of which involved Mr. Ghalban being killed during his unlawful confinement, were left with the jury: (1) the appellant either stabbed Mr. Ghalban or kicked him in the head while Mr. Schindermann stabbed him (s. 21(1)(a)); (2) Mr. Schindermann stabbed the victim with the appellant's participation as an aider (s. 21(1)(b)); or (3) Mr. Schindermann stabbed Mr. Ghalban in the course of carrying a common unlawful purpose in

circumstances where the appellant knew that murder was a probable consequence (s. 21(2)).

[9] Mr. Schindermann was a Crown witness. He confirmed the audio-recording was accurate and that he told the undercover officers the truth. However, multiple inconsistencies emerged between his statement to the police and his trial testimony. The inconsistencies included: when he noticed blood; whether the victim fell to the ground on his own or was wrestled to the ground by him; whether he held the victim to the ground with his knee and hand or simply hovered over the victim when he was on the ground; when he realized the victim was dead; whether the appellant kicked the victim in the head; and whether the appellant threatened to cut the victim's finger off.

[10] At trial, it was uncontroverted that the differences between Mr. Schindermann's testimony and his statement to the police were relevant to the issues at trial. This was because if the jury rejected Mr. Schindermann's evidence that the appellant had stabbed Mr. Ghalban, it was still open to them to find the appellant guilty of murder as a principal, aider or party. That determination necessarily engaged factual issues about when and where Mr. Ghalban was stabbed, when the appellant would have known Mr. Ghalban had been stabbed, when Mr. Ghalban stopped struggling, whether the victim was kicked in the head, and when Mr. Ghalban died. Due to these inconsistencies, the Crown applied under s. 9(2) of the *Canada Evidence Act,* R.S.C. 1985, c. C-5*,* to cross-examine

Mr. Schindermann. Defence counsel did not oppose that application and it was granted.

[11] Despite the obvious discrepancies between his police statement and trial testimony, during the cross-examination, Mr. Schindermann insisted that there was nothing different between the two versions. The Crown then applied to have the prior statement go to the jury for the truth of its contents. Counsel for the defence at trial (not the appellant's counsel on appeal) objected to its admission on the basis that the prejudicial impact of the statement outweighed its probative value. He did not object on the basis that the statement contained both prior inconsistent and consistent components.

[12] In a brief oral ruling, the trial judge held that the statement should be admitted for the truth of its contents after finding it was procedurally reliable. Subsequently, he released written reasons for his decision. He found that procedural reliability was established based on four reasons: (1) the declarant, Mr. Schindermann, was available to be cross-examined at trial; (2) the circumstances under which the statement was made gave Mr. Schindermann a motive to be truthful; (3) the statement was audiotaped; and (4) Mr. Schindermann did not know that his statement amounted to a confession to first degree murder.

[13] Before the trial judge ruled that the statement was admissible, there was an exchange with defence counsel and the trial judge wherein defence counsel

submitted that the statement should go into record in its entirety, save for a brief reference to a weapon. The trial judge admitted the statement on this basis. When the trial judge reviewed the statement in his jury charge, he instructed them "both the testimony and the earlier statement are evidence of what happened as it relates to Kyle Schindermann. You can consider his statements to the undercover officers as if he had made those statements in court."

Analysis

[14] The dangers of prior consistent statements are well known. They are presumptively inadmissible because they lack probative value. The fact that someone said the same thing on a prior occasion as what they said in court is not probative of whether the witness is offering truthful testimony in court. It would be self-serving to allow a witness to buttress their testimony with prior consistent statements: *R. v. Khan*, 2017 ONCA 114, 136 O.R. (3d) 520, at para. 25.

[15] Prior consistent statements are admissible in limited circumstances (e.g., for narrative purposes). When they are introduced in evidence, the court must be vigilant in how they are used: *R. v. Salah*, 2015 ONCA 23, at paras. 136 - 139. The Supreme Court of Canada described the distinction between the permissible and impermissible uses of prior consistent statements in *R. v. Dinardo*, 2008 SCC 24, [2008] 1 S.C.R. 788, at para. 37:

> In some circumstances, prior consistent statements may be admissible as part of the narrative. Once admitted, the

> statements may be used for the limited purpose of helping the trier of fact to understand how the complainant's story was initially disclosed. The challenge is to distinguish between "using narrative evidence for the impermissible purpose 'of confirm[ing] the truthfulness of the sworn allegation'" and "using narrative evidence for the permissible purpose of showing the fact and timing of a complaint, which may then *assist the trier of fact in the assessment* of the truthfulness or credibility". [Citations omitted.]

[16] In a similar vein, in *R. v. C. (G.)*, 2006 CanLII 18984 (C.A.), Rouleau J.A. stated, at para. 20, "the evidence of prior complaint cannot be used as a form of self-corroboration to prove that the incident in fact occurred. It cannot be used as evidence of the truth of its contents."

[17] In the case at bar, the consistency between the police statement and the trial testimony was the contention that the appellant was the person who stabbed the victim. Repeatedly in both the police statement and his testimony at trial, Mr. Schindermann testified that it was the appellant who stabbed the victim. There was a realistic danger that the jury would rely on this consistency in assessing Mr. Schindermann's credibility. Specifically, a juror might reason that, despite the inconsistencies between the police statement and the trial testimony, Mr. Schindermann was consistent regarding the central issue in this case, that the appellant was the person who stabbed the victim. That consistency could be used to bolster Mr. Schindermann's credibility and support a conclusion that the Crown had proven first degree murder beyond a reasonable doubt. This is particularly so,

in this case, given that Mr. Schindermann made the first statement to persons who he did not know were police officers and at a time when he was not facing a murder charge. The prior consistent statement might have been used by the jury to alleviate any concern that they had that Mr. Schidermann was, by the time of trial, attempting to shift the blame for the murder from him to the appellant.

[18] This problem could have been avoided in one of two ways. The first was to excise the prior consistent statements contained in the police statement. As noted, defence counsel at trial did not ask to do this, so it is difficult to fault the trial judge for not taking this step. However, once a prior consistent statement is adduced into evidence, a clear warning by a trial judge is necessary to eliminate the risk that a jury will use it for a prohibited purpose.

[19] There is a practical reason for a warning. In everyday life when someone is consistent in what they tell us, this may be considered a hallmark of veracity. Yet, in a criminal trial, the fact that a witness is consistent is of no relevance in determining credibility. It is because of this divergence between the rules of evidence and our common sense everyday lived experiences that it is vital that jury instructions provide a clear warning about the use of prior consistent statements. In this regard, there is no magic formula about what must be said. It is sufficient if the trial judge instructs that the fact of the consistency cannot be relied on in support of the jurors' assessments of the credibility of witnesses.

[20] In this case, the trial judge's charge exacerbated the risk that the jury would use the prior consistent statement for the prohibited inference. He instructed the jury explicitly about prior consistent statements at only one point in charge where he said, "as well, simply because Mr. Schindermann, or any other witness, has repeated something does not necessarily indicate that it is true."

[21] With respect, this was an incorrect instruction. Its effect was to reinforce everyday common sense notions regarding consistent statements. The judge essentially told the jury that just because a witness is consistent in their statements, that does not necessarily make them credible. That instruction is in accord with the jurors' lived experience as it instructed them that a prior consistency *may or may not* enhance credibility. However, this instruction is contrary to the law. What the judge should have told the jurors was that the fact of a consistent statement was irrelevant in their credibility assessment.

[22] The Crown quite fairly concedes that the trial judge was obliged to instruct the jury regarding the prohibited uses of prior consistent statements. However, he argues that the trial judge fulfilled that obligation in the *Vetrovec* warning section of his charge.[1] There, the trial judge instructed the jury, among other things, as follows:

> …testimony from witnesses like Kyle Schindermann and Phillip Frauts must be approached with the greatest care

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[1] *Vetrovec v. The Queen*, [1982] 1 S.C.R. 811

> and caution. These men are criminals and liars. Common human experience tells us that a person who is prepared to organize a violent robbery and carry it out is unlikely to be trustworthy or credible. It would be dangerous to base a conviction solely on the unconfirmed evidence of Kyle Schindermann and/or Phillip Frauts. You should consider whether their testimony is confirmed by other evidence in deciding whether the Crown has proved Lance Burkhard's guilt beyond a reasonable doubt.

[23] The trial judge's caution regarding the evidence of Mr. Schindermann and Mr. Frauts was appropriate and met all the criteria for a valid *Vetrovec* warning. However, it did not explicitly mention prior consistent statements, let alone explain their nature and prohibited use. Therefore, this section of the charge does not qualify as a prior consistent statement instruction, which the Crown concedes was necessary in this case.

Disposition

[24] For the foregoing reasons, I would allow the appeal, set aside the conviction on first degree murder, and order a new trial.

Released: May 6, 2024 "P.D.L."

"C.W. Hourigan J.A."

"I agree. P. Lauwers J.A."

"I agree. I.V.B. Nordheimer J.A."