WARNING

THIS IS AN APPEAL UNDER THE

*YOUTH CRIMINAL JUSTICE ACT*

AND IS SUBJECT TO:

110(1) Subject to this section, no person shall publish the name of a young person, or any other information related to a young person, if it would identify the young person as a young person dealt with under this Act.

(2) Subsection (1) does not apply

(a) in a case where the information relates to a young person who has received an adult sentence;

(b) in a case where the information relates to a young person who has received a youth sentence for a violent offence and the youth justice court has ordered a lifting of the publication ban under subsection 75(2); and

(c) in a case where the publication of the information is made in the course of the administration of justice, if it is not the purpose of the publication to make the information known in the community.

(3) A young person referred to in subsection (1) may, after he or she attains the age of eighteen years, publish or cause to be published information that would identify him or her as having been dealt with under this Act or the *Young Offenders Act*, chapter Y-1 of the Revised Statutes of Canada, 1985, provided that he or she is not in custody pursuant to either Act at the time of the publication.

111(1) Subject to this section, no person shall publish the name of a child or young person, or any other information related to a child or a young person, if it would identify the child or young person as having been a victim of, or as having appeared as a witness in connection with, an offence committed or alleged to have been committed by a young person.

138(1) Every person who contravenes subsection 110(1) (identity of offender not to be published), 111(1) (identity of victim or witness not to be published), 118(1) (no access to records unless

authorized) or 128(3) (disposal of R.C.M.P. records) or section 129 (no subsequent disclosure) of this Act, or subsection 38(1) (identity not to be published), (1.12) (no subsequent disclosure), (1.14) (no subsequent disclosure by school) or (1.15) (information to be kept separate), 45(2) (destruction of records) or 46(1) (prohibition against disclosure) of the *Young Offenders Act*, chapter Y-1 of the Revised Statutes of Canada, 1985,

(a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years; or

(b) is guilty of an offence punishable on summary conviction.

# COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Layne, 2024 ONCA 435
DATE: 20240531
DOCKET: C68427

Tulloch C.J.O., Nordheimer and Gomery JJ.A.

BETWEEN

His Majesty the King

Respondent

and

Adam Layne

Appellant

Riaz Sayani, for the appellant

Benita Wassenaar, for the respondent

Heard: January 31, 2024

On appeal from the conviction entered on April 26, 2019 by Justice Fletcher Dawson of the Superior Court of Justice, sitting without a jury.

**Tulloch C.J.O.:**

## A. OVERVIEW

[1] The law has developed safeguards to protect against honest but mistaken eyewitness identifications of the accused as the perpetrator. Evidence independent of the identifying eyewitness that confirms the identification's accuracy is a critical safeguard. So are an eyewitness's opportunity to accurately

observe the perpetrator and a fair pre-trial identification procedure. Together, these and other safeguards can often validate the identification's accuracy.

[2] The trial judge in this case concluded that the presence of these safeguards made it safe to convict the appellant, Adam Layne, of attempted murder. He found that the victim had a good opportunity to see the gunman who shot him because the shooting occurred in broad daylight after a face-to-face interaction, that the victim's detailed descriptions of the gunman closely matched the appellant, and that the pre-trial line-up in which the victim selected the appellant's photo was fair. He reasoned that the victim's description of the shooting strongly suggested that the gunman was the appellant because the gunman referenced a confrontation between the appellant and the victim the night before the shooting. The trial judge also concluded that powerful independent evidence confirmed the victim's testimony, including video footage showing the gunman driving the same make and model of car that the appellant drove during a confrontation with the victim the night before. These multiple, interlocking, and mutually reinforcing factors rebutted the appellant's alternative suspect theory and convinced the trial judge beyond a reasonable doubt that the appellant was the gunman.

[3] The appellant argues that his conviction was unreasonable and unsupported by the evidence. He submits that the trial judge failed to scrutinize the identification and alternative suspect evidence together and minimized the dissimilarities between the victim's description of the gunman and the appellant's features.

[4] I disagree and would dismiss the appeal. The trial judge carefully scrutinized all of the evidence together, including the identification evidence, the alternative suspect evidence, and the similarities and dissimilarities between the victim's descriptions of the gunman and the appellant. His conclusion that the multiple, interlocking, and mutually reinforcing factors that I have described above made it safe to convict the appellant was rational, logical, and supported by the evidence. While he made a single error by using the victim's prior descriptions of the gunman's cursive writing hand tattoos to prove their own truth, this error was harmless and does not require a new trial because his reasons for judgment show that it made no difference to his verdict.

## B. FACTUAL BACKGROUND

### (1) The Appellant Confronted The Victim

[5] On the night of July 4, 2017, the victim decided to amuse his girlfriend by screaming out food orders in a Wendy's drive-through line as the driver of a black Mazda Tribute SUV ahead of his vehicle was placing an order. The victim testified that this SUV had a red licence plate validation sticker with an August date.

[6] After exiting the drive-through line, the driver of the Mazda Tribute confronted the victim. He pulled up beside the white Hyundai the victim was driving, asked the victim if he was the screamer, and stated that he thought he knew the victim. The victim testified that the driver was "aggravated" and

"aggressive." When the victim decided to leave, the Mazda Tribute followed him for about two minutes before turning away.

[7] The appellant did not testify but admitted through counsel that he was driving the Mazda Tribute during the confrontation. His mother owned that SUV, and it has the red licence plate validation sticker with an August date that the victim observed.

**(2) The Gunman Shot The Victim**

[8] The next afternoon, a gunman driving a black SUV shot the victim in broad daylight.

[9] The victim was smoking a cigarette on the afternoon of July 5 while parked in his white Hyundai near his girlfriend's residence. He testified, and security footage confirmed, that a black SUV drove by him, braked suddenly, and backed-up towards him. He testified that he saw a red licence plate validation sticker with an August date on that SUV as it was reversing, the same type of sticker he had seen on the black SUV the appellant was driving during the Wendy's confrontation.

[10] The victim testified that the black SUV pulled up close beside him, driver's side to driver's side. He testified that the gunman asked him if he was the same man who interfered with his food order at the Wendy's the previous night and, similar to the Wendy's confrontation, told him that he thought he knew him.

[11] The victim testified that the gunman became aggravated when the victim did not answer his questions. According to the victim, the gunman pulled out a gun

and said “let me see your hands.” When the victim did not comply, the gunman shot him in the neck.

[12] Security footage from a nearby home showed a black SUV speeding away from the area of the shooting around the time it occurred. A Mazda dealership employee gave lay opinion evidence identifying that black SUV as a Mazda Tribute, the same make and model of vehicle that the appellant was driving during the Wendy’s confrontation.

[13] The encounter with the gunman was not a fleeting glance situation. Rather, the gunman interacted with the victim before he shot him. The victim testified that, while this interaction could have lasted for less than a minute, it felt longer. He was also adamant that he was focused on the face of the gunman driving the black SUV during the interaction, although he briefly looked around to see if anyone was nearby and looked behind right before the gunman shot him.

**(3) The Victim Identified The Appellant As The Gunman**

[14] The victim gave several statements to police on the day of the shooting. The victim told the first officer to arrive that the gunman was a Black male with dreadlocks who drove a black SUV. In the ambulance, the victim repeated these features to that officer and added that the gunman had cursive writing hand tattoos, arm tattoos, a goatee, grills in his teeth, and a Jamaican accent. At the hospital later that day, the victim gave another statement to a different officer that, like the

ambulance statement, described the gunman as a Black male with a goatee, dreadlocks, and cursive writing hand tattoos.

[15] On July 13, more than one week after the shooting, the victim told police that the gunman had cursive writing tattoos on his fingers, rather than on his hands as the victim stated on the day of the shooting. The July 13 statement was otherwise consistent with the victim's earlier statements.

[16] The victim's descriptions of the gunman substantially matched the appellant. Consistent with those descriptions, the appellant had dreadlocks, a goatee, and tattoos on his neck, shoulders, and arms. Likewise, a music video uploaded to YouTube three months before the shooting also showed him wearing grills, and he had a cursive writing tattoo on one of his hands.

[17] On July 27, three weeks after the shooting, the victim identified a photo of the appellant in a photo line-up as the gunman. A police civilian employee with no other involvement in the investigation created the line-up, and police provided fair and comprehensive instructions. While police told the victim that a suspect was in custody, they also said that the person he saw might not be in the line-up.

[18] After the line-up, police made comments and showed videos to the victim that were capable of suggesting that his identification of the appellant was correct. For instance, an officer told the victim that "You don't forget a face." Because police were concerned that the appellant's associates might retaliate against the victim,

they showed him music videos featuring those associates so that he could recognize them. Those videos also featured the appellant, and the victim testified that he recognized him as the person he selected in the line-up.

**(4) The Alternative Suspect Evidence**

[19] At trial, the defence pointed to Emery McNichols as an alternative suspect. Police arrested him 11 months after the shooting for unlawful possession of a handgun that forensic testing showed was the shooting weapon. He has prior convictions for possession of a firearm and armed robbery using a firearm. He was born in St. Vincent and his arrest video shows him speaking with a Caribbean accent. I note that his photo was not in the photo line-up because, through no fault of the police, they had no reason to suspect him at that time.

[20] The alternative suspect evidence had significant weaknesses. Aside from the shooting weapon, there was no evidence of links between Mr. McNichols and the appellant, the victim, or any vehicles, cell phones, or locations relevant to the shooting. Further, Mr. McNichols' appearance differed from both the appellant and the victim's description of the gunman. For instance, Mr. McNichols was wearing eyeglasses at the time of his arrest, which the victim did not describe the gunman as wearing, and which the photos and videos of the appellant adduced at trial did not show him wearing. Similarly, there was no evidence that Mr. McNichols ever

wore grills, which the victim stated that the gunman was wearing and there was evidence that the appellant also wore.

## C. THE TRIAL JUDGE'S REASONS FOR CONVICTING THE APPELLANT

[21] The trial judge convicted the appellant of attempted murder. He concluded that the photo line-up and other aspects of the victim's identification evidence were compelling, and that the discrepancies between the victim's description of the gunman and the appellant did not undermine the identification's reliability. He also found that several pieces of independent evidence, principally the security footage and the red licence plate validation sticker with an August date, confirmed the victim's testimony and made it safe to convict the appellant notwithstanding the defence's challenges to the victim's credibility and reliability. Finally, he determined that the alternative suspect evidence did not give rise to a reasonable doubt because Mr. McNichols looked different than the appellant and, aside from the shooting weapon, no evidence linked Mr. McNichols to the victim.

## D. ANALYSIS

[22] In these reasons, I explain the legal standards governing this appeal, why the trial judge's reasoning was logical and almost entirely error-free, that the sole legal error the trial judge made does not impact his verdict, and how this verdict is reasonable and supported by the evidence.

### (1) The Law Governing Identification Cases

[23] Identification cases pose the danger of "erroneous convictions based on honest and convincing, but mistaken, eyewitness identification": *R. v. Quercia* (1990), 75 O.R. (2d) 463 (C.A.), at p. 465. These dangers are especially high where: (1) the witness is identifying a stranger, (2), the circumstances of the viewing raise accuracy concerns, (3) the pre-trial identification procedure is flawed, and (4) there is no independent confirmatory evidence: *R. v. Tat* (1997), 35 O.R. (3d) 641 (C.A.), at p. 673. I refer to these as the four *Tat* factors.

[24] Trial judges guard against these dangers by closely scrutinizing identification evidence. They must carefully, cautiously, and critically analyze the reliability of the witness's description of the perpetrator and that description's similarities and dissimilarities with the accused. Further, they must assess the identification evidence against other potentially exculpatory evidence: *R. v. Olliffe*, 2015 ONCA 242, 322 C.C.C. (3d) 501, at paras. 37, 42-44. Finally, they should evaluate the four *Tat* factors: *R. v. Mills*, 2019 ONCA 940, 151 O.R. (3d) 138, at paras. 194-195, leave to appeal refused, [2021] S.C.C.A. Nos. 263 & 274. The fourth factor, independent confirmatory evidence, "can go a long way to minimizing the dangers inherent in identification evidence": *Quercia*, at p. 471. So can the second and third factors, accurate viewing opportunity and fair pre-trial identification: *R. v. Blackman* (2006), 84 O.R. (3d) 292 (C.A.), at para. 28, aff'd, 2008 SCC 37, [2008] 2 S.C.R. 298; *R. v. Longshaw*, 2022 ONCA 88, at para. 21.

[25] Appeal courts also guard against identification evidence's dangers by scrutinizing it more closely under the unreasonable verdict standard of review. Generally speaking, this standard requires the appellant to show that the trial judge's verdict cannot be supported by the evidence or is vitiated by illogical or irrational reasoning: *R. v. Brunelle*, 2022 SCC 5, 412 C.C.C. (3d) 489, at para. 7. It requires deference to the trial judge's factual findings and limits re-weighing the evidence: *R. v. Charron*, 2022 ONCA 394, at paras. 17, 20. But appellate courts apply this standard less deferentially in identification cases to guard against the reliability dangers they pose, which are well-suited to appellate review: *Tat*, at p. 673; *R. v. M.B.*, 2017 ONCA 653, 356 C.C.C. (3d) 234, at para. 30.

[26] Defence counsel in identification cases sometimes attempt to raise a reasonable doubt by pointing to an alternative suspect. Where an alternative suspect theory has an air of reality, the trier of fact must examine whether the evidence supporting it, together with the other evidence, gives rise to a reasonable doubt. The Crown can negate an alternative suspect theory if the other evidence pointing to the accused as the perpetrator overwhelmingly defeats the evidence supporting that theory and negates reasonable doubt: *R. v. Ranglin*, 2018 ONCA 1050, 370 C.C.C. (3d) 477, at paras. 58-60.

### (2) The Trial Judge Critically Analyzed The Identification Evidence

[27] The appellant argues that the trial judge failed to critically analyze the identification evidence in light of the alternative suspect evidence. He submits that the trial judge made three specific errors: (1) failing to consider the evidence of Mr. McNichols' Caribbean accent, (2) reversing the burden of proof by exaggerating the differences between Mr. McNichols and the appellant, and (3) minimizing the significance of Mr. McNichols' possession of the shooting weapon. The appellant also seeks to admit fresh evidence establishing that, after his conviction, Mr. McNichols was convicted for unlawfully possessing the shooting weapon. I disagree. The trial judge properly instructed himself on the law and critically analyzed the identification evidence together with the alternative suspect evidence. His reasoning was logical and error-free, and the fresh evidence is inadmissible because it does not affect his decision.

[28] On a global level, the trial judge's reasons show that he understood the requirement to consider the identification and alternative suspect evidence together and did so. He stated three times that he understood this requirement. While proper self-instruction is not sufficient if the trial judge fails to follow those instructions (*M.B.*, at para. 25), the trial judge's reasons show that he followed them. Consistent with *Ranglin*, he analyzed whether the alternative suspect evidence raised a reasonable doubt by considering it together with the other evidence, including the photo line-up and the independent confirmatory evidence.

[29] The trial judge also did not make any of the specific errors the appellant alleges.

[30] First, he properly treated the accent evidence as going to credibility. While failure to consider evidence relevant to a material issue can constitute a misapprehension of the evidence (*R. v. Morrissey* (1995), 22 O.R. (3d) 514 (C.A.), at p. 538), that did not happen here. Instead, the trial judge reasonably understood and considered the core defence position that the accent evidence went to credibility: *R. v. Sivasubramanian*, 2021 ONCA 61, at paras. 5-7. The defence referenced Mr. McNichols' Caribbean accent in connection with its argument that the victim was not credible because he falsely denied telling police that the gunman had a Jamaican accent. The trial judge and trial Crown stated that they understood the defence to be using the accent evidence to raise a credibility challenge, the defence did not challenge that understanding, and the trial judge thus reasonably treated the accent evidence as a credibility issue.

[31] Further, the trial judge was not required to refer to Mr. McNichols' Caribbean accent in his reasons because it did not materially impact the identity issue. Because failure to mention evidence is only a misapprehension of the evidence if that evidence is significant enough to impact the resolution of the live issues at trial (*R. v. A.A.*, 2024 ONCA 45, at para. 26), trial judges are not required to address more peripheral evidence that does not meet this threshold: *R. v. Gibson*, 2021 ONCA 530, 157 O.R. (3d) 597, at paras. 63-65; see also *Brunelle*, at para. 9. That

rule applies here because the accent evidence was peripheral. To begin with, Mr. McNichols' accent was incapable of exculpating the appellant because, as the trial judge found, there was no evidence that he lacked a Jamaican accent. Further, the evidence that the gunman spoke with a Jamaican accent was doubtful. As the trial judge reasoned, the victim's testimony that police were suggesting to him that the gunman had that accent undercut the reliability of his statement to the officer who accompanied him to the hospital that the gunman had that accent.

[32] Second, the trial judge properly applied the burden of proof in his analysis of the differences between Mr. McNichols and the appellant. He repeatedly instructed himself on this burden and applied it in his reasons. He was entitled to consider the differences between the appellant and the victim's description of the gunman, on the one hand, and the alternative suspect, on the other hand, because they were relevant to whether the Crown met this burden: see, e.g., *R. v. Trotchie*, 2019 SKCA 43, 376 C.C.C. (3d) 351, at paras. 4, 26, 63. The trial judge thus properly considered the arrest video of Mr. McNichols which showed that, unlike both the appellant and the victim's description of the gunman, Mr. McNichols was wearing glasses and was not wearing grills. He also reasonably found that the appellant had a different hairline and dreadlocks, and a more prominent forehead, than Mr. McNichols. These findings rebut the appellant's submission that Mr. McNichols was a "doppelganger" of the appellant.

[33] I reject the appellant's challenge to the arrest video and grills evidence. While the arrest video does not conclusively establish that Mr. McNichols also wore glasses at the time of the shooting or never wore grills, this does not prevent the trial judge from giving weight to the glasses and grills differences together with other evidence that supported the Crown's case: *R. v. M.R.*, 2021 ONCA 572, at para. 24. The trial judge reasonably found that these differences, together with the lack of evidence linking Mr. McNichols to the crime and the considerable evidence linking the appellant to the crime, showed that the Crown had met its burden of proof. Further, the Crown and defence both adduced photos from a music video that showed the appellant wearing grills. This video supported an inference that the appellant was wearing grills near the time of the shooting because the defence conceded that it was published on YouTube less than three months beforehand.

[34] I also disagree with the appellant's argument that the trial judge could not consider the forehead, dreadlocks, and hairline differences. The appellant submits that the victim did not mention that the gunman had a prominent forehead or a particular kind of dreadlocks and hairline. Regardless, the trial judge was still required to consider these differences because it was his duty to consider the alternative suspect theory in the context of all the evidence, including evidence of the appellant's appearance: *Ranglin*, at para. 60. These differences were also relevant to rebut the defence argument that the appellant might have confused the appellant's photo in the line-up with Mr. McNichols.

[35] I also do not accept the appellant's argument that the trial judge improperly relied on the differences between the appellant and Mr. McNichols to avoid having to consider the absence of Mr. McNichols' photo in the line-up. The trial judge understandably did not address the absence of Mr. McNichols' photo because defence counsel did not argue that it was relevant at trial and the police had no reason to suspect Mr. McNichols at the time of the line-up.

[36] Third, the trial judge properly considered the evidence linking Mr. McNichols to the shooting weapon. He reasoned that this evidence was significant but not conclusive, as it could not make up for the absence of any other evidence linking Mr. McNichols to the victim and the considerable evidence linking the appellant to the victim and the shooting. He also appropriately inferred that the gunman had an incentive to dispose of the shooting weapon to avoid detection. No expert evidence was required to draw this inference because it is a "commonsense proposition," especially where, as here, the victim survived the shooting: *R. v. Moore*, 2020 ONCA 827, 153 O.R. (3d) 698, at paras. 65-66, leave to appeal refused, [2022] S.C.C.A. No. 504; *R. v. Kruk*, 2024 SCC 7, 489 D.L.R. (4th) 385, at paras. 76-79.

[37] Because the trial judge properly considered the evidence linking Mr. McNichols to the shooting weapon, I would not admit the fresh evidence of his conviction for unlawfully possessing that weapon. This evidence is inadmissible because there is no reasonable expectation that it could have affected the verdict: *R. v. O.F.*, 2022 ONCA 679, at paras. 31, 37-38. It does not establish any further

links to the appellant, victim, or shooting because the trial judge who convicted Mr. McNichols did not make findings concerning who he obtained the weapon from or for how long he possessed it. Rather, all the fresh evidence shows is that Mr. McNichols possessed the weapon. This could not have affected the verdict because the trial judge accepted the defence evidence that Mr. McNichols possessed or was in proximity to the shooting weapon and rejected the alternative suspect theory for other reasons.

### (3) The Trial Judge Carefully Considered The Victim's Descriptions

[38] After carefully scrutinizing the similarities and dissimilarities between the victim's descriptions of the gunman and the appellant's features, the trial judge found that those descriptions were detailed, non-generic, and closely matched the appellant. The appellant challenges this finding by pointing to two discrepancies: (1) the victim's testimony that he did not see tattoos on the gunman's face, and (2) his July 13 statement and trial testimony that the gunman had cursive writing finger tattoos. I reject this challenge. The trial judge found that both discrepancies were not significant, as the victim's description of the shooter was consistent with the appellant's appearance, and, in addition, independent evidence confirmed the identification of the appellant. The trial judge's reasoning was logical and rational.

[39] While the trial judge did err by preferring the victim's inconsistent earlier July 5 statements that the gunman had cursive writing hand tattoos over his July

13 statement and trial testimony, as I will explain, this error does not require a new trial because it did not impact his decision.

[40] First, the trial judge reasonably found that the victim's testimony that he did not see tattoos on the gunman's face did not undermine the identification. Because the facial tattoos were a distinctive feature, the victim's testimony that he did not see them was a badge of potential unreliability that required close scrutiny: *R. v. Jack*, 2013 ONCA 80, 294 C.C.C. (3d) 163, at para. 29. But the trial judge was entitled to discount this discrepancy's significance because, as he reasoned, the victim's descriptions were otherwise substantially consistent with the appellant's appearance and the independent evidence confirmed the identification: *R. v. Carroo*, 2010 ONCA 143, 259 O.A.C. 277, at para. 37. As the trial judge found, the victim's descriptions were detailed, closely matched the appellant, and mentioned other distinctive features such as grills and neck, shoulder, and arm tattoos.

[41] The trial judge also reasonably discounted this discrepancy because the victim could have easily missed the tattoos from his head-on vantage point. The trial judge found that they were impossible or very difficult to see head-on because they were on the sides of the appellant's face. This finding entitled him to discount the discrepancy: *R. v. J.S.R.*, 2012 ONCA 568, 112 O.R. (3d) 831, at para. 94.

[42] I reject the appellant's challenges to this factual finding. The appellant's mugshot supported the finding that the facial tattoos were difficult to see head-on.

That mugshot's black-and-white nature did not prevent the trial judge from considering it: *R. v. Keating*, 2020 ONCA 242, at paras. 21-26. Further, the victim's testimony established that he was primarily viewing the gunman face-to-face. He testified that the gunman's black SUV was driver's side to driver's side with the white Hyundai he was driving, that the gunman spoke to him and pointed a gun at him, and that he was focusing on the gunman's face aside from two brief glances away. It is illogical to infer that the gunman was not looking in the same direction as he was speaking and pointing his gun. Finally, the trial judge did not speculatively assume that the victim would have shared the trial judge's own difficulty seeing the facial tattoos. Instead, he reasoned that it would be difficult for anyone to see those tattoos head-on because they were at the sides of the appellant's head, not the front.

[43] I wish to clarify that I do not endorse the trial judge's distinction between failing to mention the facial tattoo distinctive feature and stating that this feature does not exist. The trial judge referenced a leading Superior Court decision, *R. v. Gonsalves*, which stated that the former type of discrepancy is less significant than the latter: (2008), 56 C.R. (6th) 379 (Ont. S.C.), at para. 48. However, this court's subsequent decisions establish that failure to mention a distinctive feature is a badge of potential unreliability that requires close scrutiny: *Jack*, at para. 29; *R. v. Huerta*, 2020 ONCA 59, 385 C.C.C. (3d) 481, at para. 39. While *Gonsalves* continues to provide important guidance on the need to closely scrutinize

identification evidence, those decisions have overtaken it on this specific point. I also agree with the appellant that this distinction can be difficult to draw in practice. Instead of parsing the transcript to determine which side of this distinction the identifying witness's testimony falls on, courts should focus on whether there is an adequate explanation for the failure to notice the distinctive feature, whether the description otherwise matches the accused's appearance, and whether independent evidence confirms the identification: *J.S.R.*, at paras. 93-95; *Carroo*, at para. 37.

[44] Nonetheless, the trial judge's reference to this distinction had no bearing on his decision. This is so because, consistent with the approach these reasons outline, he focused on the fact that the victim could have easily missed the appellant's facial tattoos, the independent confirmatory evidence, and the rest of the description's close match with the appellant.

[45] Second, the trial judge reasonably found that the victim's July 13 police statement and trial testimony that the gunman had cursive writing finger tattoos rather than hand tattoos did not undermine the reliability of his identification. This testimony created a discrepancy that required close scrutiny because the appellant does not have finger tattoos: *R. v. Miaponoose* (1996), 30 O.R. (3d) 419 (C.A.), at p. 430. But not all discrepancies are fatal, and courts can consider their relative significance and whether they reflect a mistake by the witness: *R. v. Keshane* (1992), 11 B.C.A.C. 86, at para. 14; *J.S.R.*, at paras. 91-95. Here, the discrepancy

was less significant because the appellant had a cursive writing tattoo on the side of his left hand—the same hand that was outside the SUV and most visible to the victim—that began shortly after the base of his pinky finger.

[46] The trial judge reasonably found that this discrepancy had limited value. He reasoned that, because the victim initially told police on July 5 that the gunman had hand tattoos and admitted that his memory deteriorated over time, his subsequent July 13 police statement and trial testimony that the gunman had finger tattoos likely reflected memory deterioration. This finding was reasonable because memory deterioration following initial descriptions is a well-recognized phenomenon: *Tat*, at pp. 656-657. The trial judge was entitled to conclude that this discrepancy had limited value because, as he reasoned, the description was otherwise substantially consistent with the accused's appearance, and independent evidence confirmed the identification: *Carroo*, at para. 37.

[47] I reject the appellant's challenge to the trial judge's finding that the appellant's other, non-cursive hand tattoos had curvilinear aspects to them. The hand tattoo photo exhibits show that the writing tattoo near the wrist of the appellant's left hand and the marks above the Toronto City Hall tattoo on his right hand have curvilinear aspects. Regardless, as the appellant did not contest, his left hand cursive writing tattoo was the most significant hand tattoo because that hand was outside of the car during the encounter preceding the shooting.

[48] In addition to finding that the discrepancy had limited value, the trial judge treated the victim's July 5 police statements that the gunman had cursive writing hand tattoos as admissible hearsay and preferred them over the victim's inconsistent July 13 police statement and trial testimony. The appellant argues that the trial judge erred in law by doing so because the July 5 statements were not admissible for the truth of their contents. I agree that the trial judge committed this legal error, but it does not require a new trial because there is no reasonable possibility that the verdict would have been different.

[49] Prior identifications and descriptions of the perpetrator are routinely admitted to buttress in-court identifications because the former are usually more reliable than the latter. In-court identifications typically have little value on their own because the identifying witness's memory has usually deteriorated by the time of trial, other people may have suggested to the victim that the accused is the perpetrator before the trial, and the fact that the accused is on trial suggests to the witness that the accused is the perpetrator. In contrast, prior identifications and descriptions are normally more reliable because they were made while the witness's memory was sharper and often before suggestions that the accused was the perpetrator. For these reasons, they are admissible to confirm an in-court identification's reliability and rebut the possibility that suggestions tainted it: *Tat*, at pp. 655-657; *R. v. Langille* (1990), 75 O.R. (2d) 65 (C.A.), at pp. 72-75.

[50] *Tat* distinguished between hearsay and non-hearsay uses of prior identifications and descriptions. These prior statements are not hearsay if admitted to buttress the in-court identification rather than to prove their own truth. While identifications and descriptions used for that buttressing purpose are prior consistent statements, they are excepted from the rule against those statements and are admissible even if not adopted and if no hearsay exception applies: *Tat*, at pp. 655-657, 661; *R. v. Triolo*, 2023 ONCA 221, 166 O.R. (3d) 179, at paras. 63-66, *per* Paciocco J.A. (dissenting in part, but not on this point), and at para. 174, *per* Doherty J.A. (concurring on this point)), aff'd, 2024 SCC 18. In contrast, prior identifications and descriptions are hearsay if the witness does not adopt them and the Crown uses them to prove their truth rather than to bolster in-court testimony: *Tat*, at p. 661; *R. v. Coutu*, 2008 MBCA 151, 231 Man. R. (2d) 275, at paras. 72-73.

[51] *Tat* also held that prior identifications and descriptions used to prove their truth are not categorically excepted from the hearsay rule. Rather, those identifications and descriptions are only admissible to prove their truth if: (1) an exception to the hearsay rule applies, or (2) the witness adopts them: at pp. 657-664; *R. v. Appleton*, 2024 ONCA 329, at para. 123. To adopt them, witnesses must testify that they made them and presently recall them to be true: *R. v. Abdulle*, 2020 ONCA 106, 149 O.R. (3d) 301, at para. 136.

[52] *Tat*'s distinction between hearsay and non-hearsay uses of prior identifications and descriptions matters if those prior statements are inconsistent with the identifying witness's trial testimony. For instance, if the Crown argues that the trier of fact should find that a prior description inconsistent with the witness's in-court testimony accurately described the perpetrator's appearance on the day of the crime, then the prior description is being used to prove its own truth and not to bolster the in-court testimony that it contradicts. This triggers the hearsay rule, which makes the prior description inadmissible to prove its own truth unless a hearsay exception applies or the witness adopts it: *Tat*, at pp. 661-662; *R. v. Campbell*, 2006 BCCA 109, 207 C.C.C. (3d) 18, at paras. 80, 83, 87, 97; David M. Paciocco, Palma Paciocco, & Lee Stuesser, *The Law of Evidence*, 8th ed. (Toronto: Irwin Law, 2020), at p. 181. In contrast, this distinction is unimportant if a prior description is consistent with in-court testimony because they then bolster each other's reliability: *R. v. Lugela*, 2020 ABCA 348, 393 C.C.C. (3d) 157, at para. 42, citing David M. Paciocco, "The Perils and Potential of Prior Consistent Statements: Let's Get It Right" (2013) 17 Can. Crim. L. Rev. 181, at pp. 211-212; Paciocco, Paciocco, & Stuesser, at p. 181.

[53] While the trial judge understandably relied on the Supreme Court of Canada's seemingly contrary comment in *R. v. Starr*, this comment does not overturn *Tat*'s holding. *Starr* commented that prior identifications and descriptions are an "exception to the hearsay rule": 2000 SCC 40, [2000] 2 S.C.R. 144, at para.

221. But not “every word [of *Starr*] counts as binding legal authority” because that case is “only authorit[y] for what [it] actually decide[d]”: *R. v. Kirkpatrick*, 2022 SCC 33, 471 D.L.R. (4th) 440, at para. 85 (quotation omitted). This comment from *Starr* is not binding because that case did not actually decide that this exception existed. Rather, *Starr* stated that this exception was “not directly brought into play on the[] facts”: at para. 224. *Starr* also did not intend to depart from *Tat*. *Starr* instead endorsed *Tat* and, like *Tat*, held that prior identifications and descriptions admitted to buttress in-court testimony do “not truly constitute hearsay”: *Starr*, at paras. 221-222; see also *Campbell*, at paras. 89-94.

[54] My conclusion is consistent with many post-*Starr* provincial appellate decisions. These cases follow *Tat*’s holding that prior identifications and descriptions are not hearsay if used to buttress in-court testimony and must be adopted or meet a hearsay exception if used to prove their own truth: see, e.g., *Campbell*, at paras. 87-97; *Coutu*, at paras. 77-82, 84, 87; *Lugela*, at paras. 42, 45; *R. v. Downey*, 2018 NSCA 33, at para. 86. Much scholarly commentary also supports this position: Peter Sankoff, *The Law of Witnesses and Evidence in Canada*, (Toronto: Thomson Reuters, 2019) (Release 4, 11/2023), §§ 11.18, 14.25; Paciocco, Paciocco, & Stuesser, at pp. 181-182.

[55] While *Tat*’s continued binding force is a sufficient basis for my conclusion, it is also consistent with sound legal principle. Using prior identifications and descriptions to prove their own truth adds additional hearsay dangers to

identification evidence's inherent dangers. As *Tat* reasoned, the combination of these two types of dangers calls for added caution. Treating prior identifications and descriptions used to prove their own truth as hearsay that is not categorically excepted from the hearsay rule permits courts to take a cautious approach by evaluating those statements' necessity and reliability under the principled approach to the admission of hearsay evidence. In contrast, recognizing a categorical exception short-circuits the necessity and reliability analysis and undercuts the need for caution: at pp. 663-664; see also Sankoff, § 14:25.

[56] It follows that the trial judge erred in law by treating the victim's references to cursive writing hand tattoos in his July 5 descriptions of the gunman as admissible hearsay and preferring them over the victim's inconsistent trial testimony. Because *Starr* did not overturn *Tat*, those prior descriptions were not categorically excepted from the hearsay rule, and no exception to that rule applies. The victim also did not adopt his cursive writing hand tattoo statements because the Crown never specifically asked him if they were true: *R. v. Atikian* (1990), 1 O.R. (3d) 263 (C.A.), at p. 268. Instead, the Crown only asked him if the entirety of his July 5 descriptions, which also addressed the gunman's other features, were true. This was insufficient because the victim inaccurately recalled stating in those descriptions that the gunman had finger tattoos, not hand tattoos.

[57] However, this error does not require a new trial because the curative proviso in s. 686(1)(b)(iii) of the *Criminal Code*, R.S.C. 1985, c. C-46, applies. The error

was harmless because the trial judge relied on multiple, interlocking, and mutually reinforcing non-erroneous reasoning pathways as a sufficient basis for his decision. There is no reasonable possibility that the verdict would have been different but for this error.

[58] I conclude that the Crown properly raised the proviso. The Crown can raise the proviso implicitly by arguing that a legal error did not prejudice the accused: *R. v. Tayo Tompouba*, 2024 SCC 16, at paras. 105-106. The Crown did so by making that argument here. Specifically, the Crown pointed to the trial judge's finding that the discrepancy was not significant and submitted that, even if the prior descriptions were not admissible for their truth, they minimized the discrepancy by showing that it might reflect memory loss.

[59] Under the proviso's first branch, the appellate court can dismiss the appeal if the trial judge makes a serious legal error as long as it can trace that error's impact and ensure that it made no difference to the verdict. Thus, the erroneous admission of hearsay may be a harmless error if it was insignificant to the determination of guilt: *R. v. Khan*, 2001 SCC 86, [2001] 3 S.C.R. 823, at para. 30; *R. v. Gunn*, [1974] S.C.R. 273, at pp. 275-277. Appellate courts assess whether an error is harmless by considering it in the context of the entire case, although this assessment does not consider the strength of the Crown's case: *R. v. White*, 2011 SCC 13, [2011] 1 S.C.R. 433, at para. 93.

[60] Tracing an error's impact can be more challenging in jury trials because juries do not provide reasons: *R. v. Jacquard*, [1997] 1 S.C.R. 314, at para. 61. It is easier in trials by judge alone if the reasons for judgment provide a roadmap for appellate review. By assessing those reasons, courts may be able to determine that a non-erroneous reasoning path was a sufficient basis for the decision and that any reasoning tainted by the error was not integral to the verdict: see, e.g., *R. v. Boughner* (2002), 159 O.A.C. 316 (C.A.), at paras. 26-31; *R. v. MacIsaac*, 2017 ONCA 172, 347 C.C.C. (3d) 37, at para. 50, leave to appeal refused, [2017] S.C.C.A. No. 152; *R. v. W.O.*, 2020 ONCA 392, 454 D.L.R. (4th) 54, at para. 41, aff'd, 2021 SCC 8, [2021] 1 S.C.R. 99. The reasons thus allow the court to assess whether the error is significant in the context of the entire case: *R. v. Heltman*, 2019 BCCA 468, 384 C.C.C. (3d) 65, at paras. 54, 59-65.

[61] The trial judge's reasons show that he relied on multiple, interlocking, and mutually reinforcing non-erroneous reasoning pathways to find that the finger tattoo discrepancy was not significant and conclude that the appellant was guilty. As I have explained, the finger tattoo discrepancy was less significant because of the cursive writing hand tattoo's proximity to the appellant's pinky finger, and the trial judge reasonably concluded that it had limited value because the victim admitted that his memory deteriorated over time. The trial judge also considered the fact that the victim's earlier July 5 statements mentioned that the appellant had hand tattoos to reinforce his memory loss finding. This was a legitimate use to

assess the probative value of the victim's in-court testimony, not a hearsay purpose: *Tat*, at pp. 656-657; *Campbell*, at paras. 87, 97. Further, the trial judge relied on the close match between the victim's description of the appellant and the independent confirmatory evidence to find that there was no reasonable doubt.

[62] These interconnected, error-free reasoning pathways permit me to trace the impact of the trial judge's error and conclude that it would have made no difference to the verdict. It is apparent from his reasons that these pathways were a sufficient basis for his decision, and the fact that he did not state this expressly does not prevent me from drawing this conclusion: *Boughner*, at para. 31. His brief discussion of the prior descriptions' hearsay uses was thus insignificant and peripheral to his determination of guilt, like the errors at issue in *Boughner*, *MacIsaac*, *W.O.*, and *Heltman*.

[63] Three additional contextual factors support my decision that the first proviso branch applies. First, the finger tattoo discrepancy did not bolster the appellant's alternative suspect argument because Mr. McNichols, like the appellant, had cursive writing hand tattoos but lacked finger tattoos. This is significant because that argument was one of the appellant's principal submissions at trial. Second, the trial judge did not make any additional errors capable of compounding his erroneous use of the July 5 prior descriptions: *Jacquard*, at para. 60. Third, because the appellant did not testify, his failure to provide an innocent explanation for the evidence pointing to his guilt that the trial judge's non-erroneous reasoning

pathways relied on supports applying the proviso: *R. v. Noble*, [1997] 1 S.C.R. 874, at paras. 99-100, 103-104, citing *R. v. Leaney*, [1989] 2 S.C.R. 393, at p. 418.

**(4) The Verdict Was Reasonable**

[64] Because the trial was free of impactful errors, the appellant has a heavy burden to show that the verdict was still unreasonable and unsupported by the evidence: *R. v. Harvey* (2001), 57 O.R. (3d) 296 (C.A.), at para. 20, aff'd, 2002 SCC 80, [2002] 4 S.C.R. 311. He has not met that burden.

[65] The verdict was reasonable because powerful independent confirmatory evidence and additional compelling factors supported it. After carefully considering the four *Tat* factors, the trial judge found that three of them compellingly indicated the appellant's guilt and negated the inherent danger that the remaining factor, identification by a stranger, posed. He found that the victim had a good opportunity to accurately identify the gunman during the shooting and provided detailed descriptions of him that substantially matched the appellant, that the pre-trial identification procedure was fair, and that powerful independent confirmatory evidence negated concerns about the victim's credibility and reliability. This confirmatory evidence was compelling and substantially minimized the eyewitness identification dangers. The trial judge also reasonably placed considerable weight on the gunman's statements referencing the Wendy's confrontation the night

before the shooting. These statements strongly suggested that the appellant was the gunman because he admitted his presence at the Wendy's.

[66] While the identification evidence had weaknesses and discrepancies, the trial judge reasonably found that they did not raise a reasonable doubt due to the powerful confirmatory evidence and other compelling factors described above. He also reasonably rejected the alternative suspect theory because, aside from possessing the shooting weapon eleven months after the shooting, there was nothing linking the alternative suspect to the appellant, the victim, or the shooting. In particular, the absence of evidence linking the alternative suspect to the Wendy's confrontation helped negate that theory because the victim testified that the gunman referenced that confrontation, and the appellant admitted his presence at the Wendy's at the relevant time.

## E. DISPOSITION

[67] I would dismiss the appeal.

Released: May 31, 2024 "M.T."

"M. Tulloch C.J.O."
"I agree. I.V.B. Nordheimer J.A."
"I agree. S. Gomery J.A."