# COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Chiarelli, 2025 ONCA 428
DATE: 20250612
DOCKET: C70113

Zarnett, Coroza and Favreau JJ.A.

BETWEEN

His Majesty the King

Respondent

and

Adam Chiarelli

Appellant

Jassi Vamadevan and Deepak Paradkar, for the appellant

Jeanette Gevikoglu, for the respondent

Heard: November 27, 2024

On appeal from the conviction entered by Justice Vanessa V. Christie of the Superior Court of Justice, sitting with a jury, on July 19, 2021.[1]

**Favreau J.A.:**

[1] The appellant has abandoned the sentence appeal.

## A. OVERVIEW

[1] The appellant, Adam Chiarelli, was found guilty by a jury of possession of cocaine for the purpose of trafficking. The police found the cocaine in the trunk of a car driven by Mr. Chiarelli. There were two passengers in the car.

[2] Mr. Chiarelli appeals his conviction on several grounds, including that the trial judge failed to provide a limiting instruction on the use of opinion evidence provided by the two police officers who conducted the traffic stop. He also alleges that the trial judge erred in failing to provide a *Vetrovec* instruction regarding the evidence of one of the passengers in the car and by inviting the jury to infer that Mr. Chiarelli was aware the cocaine was in the trunk based on its value and the number of cell phones in the car. Mr. Chiarelli also argues that the jury rendered an unreasonable verdict.

[3] I would allow the appeal on the basis that the trial judge erred in failing to provide a limiting instruction regarding the opinion evidence of the arresting officers. I would dismiss the other grounds of appeal. I also conclude that this is not an appropriate case for application of the curative proviso in s. 686(1)(b)(iii) of the *Criminal Code*. I would therefore order a new trial.

## B. BACKGROUND

### (1) Circumstances leading to Mr. Chiarelli's arrest

[4] On December 1, 2017, Mr. Chiarelli was driving his mother's car north on Highway 400. There were two passengers in the car, Nicholas Van de Ven and Brandon Proctor.

[5] OPP Officer David Desroches was conducting roadside traffic patrol and observed Mr. Chiarelli's vehicle speeding. He obtained a reading of 151 kilometers per hour on his radar, 51 kilometers per hour over the speed limit.

[6] Officer Desroches then pursued the vehicle and conducted a traffic stop. Mr. Van de Ven was seated in the front passenger seat and Mr. Proctor was sitting in the back. While they were on the roadside, Officer Desroches took steps to suspend Mr. Chiarelli's driver's licence for seven days and to impound the car pursuant to the *Highway Traffic Act*, R.S.O. 1990, c. H.8. He called for a tow truck and another officer so that they could transport the vehicle and all three men to a nearby gas station.

[7] The officer who arrived on the scene in response to the call from Officer Desroches call was Scott Orsan. After Officer Orsan arrived, Mr. Chiarelli and his two passengers were placed in police cruisers and taken to the nearby gas station, along with Mr. Chiarelli's car. Once they arrived at the gas station, Officer Orsan noticed an odour of raw marihuana coming from the vehicle. He

searched the inside of the car, and found two cannabis cigarettes and a marihuana grinder, amongst other items, inside a jacket pocket. All three men were then arrested for possession of cannabis contrary to the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19.

[8] The officers then continued their search of Mr. Chiarelli's car. When they searched the trunk, they found a vacuum-sealed brick of cocaine inside a red shopping bag. The cocaine was later weighed at just over a half-kilogram.

**(2) The evidence at trial and jury verdict**

[9] Initially, all three occupants of the vehicle were charged with possession of cocaine for the purpose of trafficking. However, prior to the preliminary inquiry, the charges against Mr. Proctor and Mr. Van de Ven were withdrawn in exchange for statutory declarations.

[10] Officers Desroches and Orsan testified at trial regarding the circumstances under which they found the cocaine. I provide more detail about their evidence in the analysis below.

[11] Mr. Van de Ven testified but Mr. Proctor did not. Mr. Van de Ven's evidence at trial was that he went to Mr. Chiarelli's house the night before they were stopped on Highway 400. That night, all three men decided to drive from Guelph to Sudbury to "meet up with some girls". He testified that none of them packed an overnight bag and he did not see anyone place anything in the trunk of the vehicle.

[12] Mr. Chiarelli's mother also testified at trial that her son frequently drove her car and that she did not have any personal items in the vehicle.

[13] The evidence at trial included an expert report prepared by Detective Constable Neil Browne. He valued the cocaine that was seized between $20,000 and $50,000. He also stated that the quantity of cocaine found in the car and the way it was packaged were consistent with trafficking rather than personal use. The report was admitted on consent at trial, but only as evidence that the cocaine found was possessed for the purpose of trafficking.

[14] As part of an agreed statement of fact at trial, Mr. Chiarelli admitted that if he was found to be in possession of the cocaine, his possession of the cocaine was for the purpose of trafficking. The only issue at trial was therefore whether Mr. Chiarelli was in possession of the cocaine. The position of his counsel at trial was that the Crown had not proven beyond a reasonable doubt that he knew the cocaine was in the trunk. There was no evidence linking him directly to the cocaine. It could have been placed in the trunk by Mr. Van de Ven or Mr. Proctor, who both had an incentive to make a statutory declaration in order to avoid the charges against them.

[15] The jury found Mr. Chiarelli guilty of one count of possession of cocaine for the purpose of trafficking.

## C. ISSUES AND ANALYSIS

[16] Mr. Chiarelli raises several issues on appeal:

a. Officers Desroches and Orsan gave inadmissible opinion evidence and the trial judge failed to give an appropriate limiting instruction;

b. The trial judge failed to give a limiting instruction regarding the Crown's invitation to the jury to infer knowledge from the number of cell phones in the car;

c. The trial judge failed to give a *Vetrovec* caution in relation to Nicholas Van de Ven's testimony;

d. The trial judge should not have allowed the Crown to invite the jury to infer knowledge based on the value of the cocaine; and

e. The verdict was unreasonable.

### Issue 1: The officers' opinion evidence was inadmissible

#### (1) General principles

[17] This court has previously cautioned against the improper use of opinion evidence from police officers, including in the context of drug offences: *R. v. Nguyen*, 2023 ONCA 531, 429 C.C.C. (3d) 192, at paras. 48-53; *R. v. Jenkins*, 2024 ONCA 533, 439 C.C.C. (3d) 499, at paras. 20-23.

[18] Opinion evidence, even from police officers, is presumptively inadmissible; to be admissible it must satisfy the criteria for expert evidence or for lay opinion evidence: *Nguyen*, at para. 48, citing *R. v. D.(D.)*, 2000 SCC 43, [2000] 2 S.C.R. 275, at para. 49; *Jenkins*, at para. 21.

[19] To be admissible as expert evidence, police officers have to be qualified as experts to provide the opinion at issue, and their evidence must otherwise meet the admissibility criteria: *R. v. Mohan*, [1994] 2 S.C.R. 9, at pp. 20-25; *White Burgess Langille Inman v. Abbott and Haliburton Co*., 2015 SCC 23, [2015] 2 S.C.R. 182, at para. 19.

[20] As this court pointed out in *Nguyen*, at para. 52, it is not uncommon for expert evidence to be required on issues of drug trafficking. For example, in *R. v. Sekhon*, 2014 SCC 15, [2014] 1 S.C.R. 272, at para. 18, an expert witness provided evidence about the “chains of distribution, distribution routes, means of transportation, methods of concealment, packaging, value, cost and profit margins”. The court noted in *Nguyen*, at para. 52, that this type of evidence often requires “specialized knowledge beyond what may ordinarily be acquired by police officers without specific training”. As another example, in this case, on consent, D.C. Browne’s report was admitted as expert evidence for the purpose of establishing that the quantity and packaging of the cocaine were consistent with possession for the purpose of trafficking.

[21] As emphasized in *Jenkins*, at para. 31, where expert evidence is admitted in a drug trafficking case, the opinion must be limited to general terms and not intrude on the jury's role as fact finder:

> [W]here opinion evidence is tendered on issues related to drug trafficking, it must be limited to providing the jury with evidence in general terms about the area of expertise (for example, drug pricing; trafficking quantities; methods of drug trafficking), which they may consider and, if they accept it, apply as part of their fact finding to decide what inferences or conclusions to draw from other evidence (for example, surveillance evidence). Expert opinion may not extend to conclusions or inferences to be drawn about the accused's conduct. The inference-drawing process is part of the jury's fact-finding role, and not the province of the expert witness. Thus, an expert providing opinion evidence about indicia of drug trafficking may not opine that the particular acts of the accused were drug trafficking or were consistent with drug trafficking. Those questions are for the trier of fact. [Citations and emphasis omitted.]

[22] In some circumstances, the opinion evidence of lay people, including police officers, may be admissible. Lay opinion evidence is admissible where witnesses give "a compendious statement of facts that are too subtle and too complicated to be narrated separately and distinctly": *R. v. Graat*, [1982] 2 S.C.R. 819, at p. 841; *Nguyen*, at para. 53. In other words, where a lay witness testifies about their observations, if it is necessary for them to state their opinion about the meaning of those observations in order to describe them coherently, then the opinion will be admissible. As explained in *Jenkins*, at para. 23, where a police officer gives

evidence about surveillance observations, “they can relate the evidence of the factual observations they made without providing the further opinion evidence that the conduct observed is consistent with drug trafficking”.

[23] Based on these principles, in *Nguyen*, this court found that the trial judge made an error in admitting the opinion evidence of a police officer who testified that the acts of picking up and dropping off property in that case were consistent with drug-related activity. The court held that the officer’s evidence was not admissible as expert evidence because he was not qualified as an expert and because it did not meet the necessity requirement as it was not technical or a matter on which ordinary people are likely to form incorrect opinions: *Nguyen*, at para. 51. The court also did not accept that the officer’s evidence was admissible as lay opinion evidence because the officer “did not have to offer the opinion that the interaction he saw was consistent with drug trafficking to describe effectively the factual observation he had made”: *Nguyen*, at para. 53. Nevertheless, the court ultimately dismissed this ground of appeal based on the curative proviso, finding that the error was so harmless that it could not have impacted the verdict. In reaching this conclusion, at paras. 56-57, the court considered that the case was decided by an experienced trial judge, that the opinion offered by the officer was one that the trial judge could have reached on her own and that she made no reference to the officer’s opinion evidence in her reasons.

[24] In *Jenkins*, five police officers testified regarding their observations of various interactions between the accused and others. As part of the examination-in-chief of each officer, the Crown asked what the police officers made of those interactions based on their experience. In each case, the police officers gave their opinion that the interactions were consistent with drug trafficking. The trial judge ruled that their evidence was admissible as lay opinion evidence. This court found that it was an error to admit the evidence for several reasons: 1) the officers were not qualified as experts in drug trafficking (para. 27); 2) the officers' conclusory opinions were not necessary for the jury to reach a correct judgment on the evidence (para. 28); and 3) the officers could convey their factual observations without giving the added opinion that the interactions at issue were consistent with drug trafficking (para. 29). In *Jenkins*, this court did not apply the curative proviso. The court noted that this was a jury trial and, unlike in *Nguyen*, it was not possible to know whether the jury relied on the improper opinion evidence. In addition, the surveillance evidence was given prominence at trial through the Crown's questions and in closing submissions, and the trial judge did not caution the jury to disregard the opinions of the officers.

**(2) Relevant testimony, submissions by the Crown and jury charge**

[25] In their evidence at trial, Officers Desroches and Orsan both gave evidence that the items they found in the vehicle were consistent with drug trafficking.

[26] Officer Desroches testified that the items found in the car were consistent with “transporting” or “running” drugs:

> A. The reason […] I made a note of [those items] in my notebook later at the office and I didn’t at the Petrocan […] is because not that I didn’t notice them at the Petrocan, it’s that after I found the cocaine, the – and that large an, an, an amount, I made definite note of that at the office because a lot of those articles are consistent with transporting drugs.
>
> …
>
> Q. Burger King cups, that’s just garbage from going through drive-throughs?
>
> A. Yeah, each individual item alone means nothing. But together collectively, it – to me, in my experience, and then having taken drug, you know, enforcement training as well, it – everything in totality points a little bit more towards running, running drugs. [Emphasis added.]

[27] In his testimony, Officer Orsan also described the items he found when searching the car and provided his opinion that these items were consistent with drug trafficking:

> I saw that there was a rear-view – you know those little black trees, they’re like a Black Ice air freshener, the small trees. It was hanging from the rear-view so I’m like, Okay, that’s a really strong one of all the air fresheners. And then I saw that there was, like, fast-food cups in the centre console and then the, the smell of cologne was really fresh and strong in the vehicle and I’m, like, that, that – and with the marihuana and then, and then smelling that I’m, like, wow, that’s – those are, like, used as masking agents in my experience. Like, people just spray it so, Oh, the cops are here, and they spray it, right? So I’m just – in my experience. The – there were three

> cell phones in the glove box. There was one cell phone in the centre console. So that's a lot of – that's already from – as I remember that's, that's, like, five phones, right? Like they got three in the in the glovebox, one in the centre console, Proctor had one and, and possibly there was another from Van de Ven. I – there's so many I just kind of lost track of, of how many there were. I found that Lacoste perfume in the glovebox as well. It's kind of odd but not just – that's probably where the smell's coming from, but it's a weird spot to put it. There were ZigZag rolling papers – that's just a brand name for marihuana roll papers. Those were in the centre console as well so that's, like, it's not in luggage. It's just out and open. So that put some flags up in my head. And the vehicle had like a really lived-in look, consistent with what I thought in my experience I've seen with people who are running drugs, they don't want to leave their vehicle because they don't want to leave product in the vehicle. So that's just an opinion. There were granola wrappers from Kirkland. So Kirkland's a Costco brand if you don't know. Like, you can get them in bulk. But these wrappers just were everywhere in the car, which is just odd to me. And the was a, a battle – a couple of "Battleship" boards in the rear seats. Nothing really – other than that in there. [Emphasis added.]

[28] In closing submissions, the Crown argued that the officers' evidence regarding the significance of the items found in the car pointed to Mr. Chiarelli's guilt:

> I want to bring a few things to your attention that will hopefully reenforce the notion that Mr. Chiarelli had the requisite knowledge and control of the cocaine in the trunk of his vehicle that day. So at the time that this vehicle was pulled over and the gentlemen are arrested you'll note according to the officer testimony that the vehicle had a certain lived in look to it. This is according to P.C. Scott Orsan. During a search numerous cell

> phones ended up being retrieved – during that search – and P.C. Desroches even mentioned during cross-examination how the items throughout the vehicle in conjunction with the cocaine pointed to a more suspect, bigger picture.

[29] In her jury charge, the trial judge did not caution the jury against relying on the opinions of Officers Desroches and Orsan regarding the significance of the items found in the car. In fact, when summarizing the Crown position, she repeated the Crown's reliance on this evidence:

> After conducting his search P.C. Desroches specified that although each of the items in the car by themselves did not mean much taking into account his training and experience in conjunction with the presence of a brick of cocaine the constellation of items located in the car was significant to him. P.C. Orsan spoke to the state of the car as having looked lived in with granola bar wrappers peppered throughout the vehicle, the strong scent of cologne and various cell phones that were retrieved during the course of his duties.

**(3) Analysis**

[30] As in *Nguyen* and *Jenkins*, it was an error for the trial judge to admit the opinion evidence provided by the police officers. Their testimony that the items found in the car were consistent with drug trafficking was akin to the evidence of the officers in *Nguyen* and *Jenkins*.

[31] Officers Desroches and Orsan were not qualified as experts. Their evidence was not necessary for the jury to reach a correct judgment. Moreover, their evidence did not meet the test for admissibility of lay opinion evidence. The officers

could have conveyed their factual observations without giving the added opinion that the items at issue were consistent with drug trafficking.

[32] Unlike in *Jenkins*, the Crown did not actively solicit this opinion evidence. On the contrary, the officers both spontaneously offered the opinion that the items in the car were consistent with drug trafficking. In the circumstances, a limiting instruction may well have been sufficient. However, instead of giving a limiting instruction, the trial judge allowed the Crown to rely on the opinion evidence in closing and then highlighted the Crown's view of the evidence in the jury charge.

[33] Also, as in *Nguyen*, the fact that defence counsel at trial did not object is of no moment. Given how prejudicial opinion evidence can be, trial judges are to play a gatekeeping role in making sure opinion evidence is not improperly admitted: *White Burgess*, at para. 16; *Nguyen*, at para. 54.

[34] In this case, given that Officer Desroches' opinion was spontaneous and unsolicited, after he gave his evidence, the trial judge should have immediately held a voir dire with counsel to address the admissibility of the evidence and to discuss whether a caution or limiting instruction to the jury was necessary. If the trial judge had done so after the issue first arose during that testimony, it may have diminished the risk that the same issue would occur during Officer Orsan's testimony and it would certainly have prevented the Crown from relying on this evidence during closing submissions.

[35] Accordingly, I find that it was an error for the trial judge to admit the police officers' opinion evidence that the items they found in the car were consistent with drug trafficking or, at the very least, it was an error not to give a limiting instruction regarding those items.

[36] I next address the other grounds of appeal, after which I will address the issue of whether the curative proviso should be applied to this error.

**Issue 2: The trial judge did not err in suggesting that possession for the purpose of trafficking could be inferred from the number of cell phones**

[37] Mr. Chiarelli submits that the trial judge erred in failing to correct the Crown's suggestion that Mr. Chiarelli's possession of the cocaine could be inferred from the number of cell phones in the car.

[38] The police found seven cell phones when they searched the car. As mentioned above, the expert report of D.C. Browne was admitted on consent. In his report, D.C. Browne stated that, in his experience, "drug traffickers typically utilize several mobile devices". At trial, it was agreed that, given the quantity of cocaine found and the packaging, the report could be used as evidence that the cocaine was possessed for the purpose of trafficking. However, it could not be used as evidence that Mr. Chiarelli was in possession of the cocaine. The jury was clearly directed on this point.

[39] Mr. Chiarelli claims that, despite the parties' agreement about the permissible use of the report, in closing submissions, the Crown improperly invited the jury to infer Mr. Chiarelli's possession of the cocaine based on the number of cellphones in the car. He further claims that the trial judge erred in failing to give a correcting instruction.

[40] I disagree. In closing submissions, the Crown did invite the jury to draw an inference of Mr. Chiarelli's knowledge and control of cocaine based on the cell phones, but this was not only based of the number of cell phones or D.C. Browne's evidence. Rather, the Crown carefully pointed out that the placement of the cell phones tended to link Mr. Chiarelli, as the regular driver of the car, to the activity of trafficking, which in turn linked him to the cocaine in the trunk:

> Now I'll start with the cell phones. I'm sure we've all done our best to try and keep track of the devices that were located during the course of this search. I too have kept a tally of the devices that were seized during the course of the search and I've counted a total of seven. Now at the time this traffic stop takes place P.C. Desroches provided Adam Chiarelli with one of the phones from the glove box. The remainder of the phones were not recognized by Mr. Van de Ven who was sitting in the front seat. That's one out of seven. We then heard from Mr. Van de Ven that on the day in question he brought one phone. That's two out of seven. Brandon Proctor brought one phone with him when being taken to the cruiser by P.C. Orsan – that's three out of seven. Now when P.C. Orsan conducts a search of the vehicle at the gas station at Lone Pine Road he locates three cell phones in the glove box, one in the centre console. When P.C. Desroches conducts a search back at the detachment he

> locates three cell phones in the glove box and one in the centre console. That sounds like a total of seven to me.
>
> So now we have four cellular devices disbursed through the glove box and centre console but we have each individual's cell phone accounted for yet we have four more cell phones in compartments that are accessed and utilized by drivers of vehicles on a consistent and regular basis, the front two compartments. Now you'll note in [D.]C. Neil Browne's report that was made an exhibit he states that numerous mobile devices are associated with drug trafficking. You'll also note that P.C. Orsan during the course of his testimony testified to that number of phones compared to that number of occupants as seeming unusual. So once all the phones are accounted for and attributed to the occupants of that car we are left with four in compartments that are normally and easily accessed by vehicle drivers.

[41] In the circumstances, the Crown's closing was not improper and did not require any correcting instruction. The lack of an objection also reinforces my view that there was nothing prejudicial about the submission.

**Issue 3: The trial judge did not err by failing to give a *Vetrovec* instruction in relation to Mr. Van de Ven's evidence**

[42] As mentioned above, Mr. Van de Ven and Mr. Proctor were initially charged along with Mr. Chiarelli. The charges against them were withdrawn prior to the preliminary inquiry and they made statutory declarations. Only Mr. Van de Ven testified at trial. He testified that the cocaine was not his and that he did not see who placed it in the car. He also gave evidence that one cell phone in the car was his and that Mr. Proctor only brought one cell phone into the car. This left the jury

with the possible inference that the other cell phones were Mr. Chiarelli's. While Mr. Van de Ven did not directly testify that the cocaine was Mr. Chiarelli's or that he saw Mr. Chiarelli put the cocaine in the trunk, if believed, his evidence supported an inference that the cocaine was Mr. Chiarelli's.

[43] Mr. Chiarelli claims that the trial judge erred in failing to give a *Vetrovec* instruction in relation to Mr. Van de Ven's evidence. I disagree.

[44] In *R. v. Khela*, 2009 SCC 4, [2009] 1 S.C.R. 104, at para. 3, the Supreme Court explained that, in a jury trial, it is of "utmost importance" for the jury to understand that it is unsafe to find an accused guilty based on the unsupported evidence of witnesses who are "unsavory", "untrustworthy", "unreliable" or "tainted". There are no definite categories of witnesses for whom a *Vetrovec* caution is required, but one may be warranted where a witness cannot be trusted to tell the truth because of their "amoral character, criminal lifestyle, past dishonesty or interest in the outcome of the trial". In such cases, the trial judge may include, and in some cases must include, "a clear and sharp warning to attract the attention of the juror[s] to the risks of adopting, without more, the evidence of the witness": *Khela*, at para. 5, quoting *Vetrovec v. The Queen*, [1982] 1 S.C.R. 811, at p. 831.

[45] As a general rule, the decision whether a Crown witness's testimony should be subject to a *Vetrovec* caution is within the trial judge's discretion: *R. v. Carroll*,

2014 ONCA 2, 304 C.C.C. (3d) 252, at para. 60. In deciding whether to include a *Vetrovec* caution in the jury instruction, the trial judge should consider the witness's credibility and the importance of the evidence to the Crown's case: *R. v. Brooks*, 2000 SCC 11, [2000] 1 S.C.R. 237, at para. 4; *Carroll*, at para. 61.

[46] In *Carroll*, at para. 66, this court emphasized that, when assessing whether a *Vetrovec* caution should be given, "the fact that a witness seeks to avoid incarceration – and I would add, prosecution – by testifying is a factor which may undermine credibility but, on its own, is not enough to require a *Vetrovec* caution" (emphasis in original).

[47] In this case, the only concern with Mr. Van de Ven's evidence was his self-interest in avoiding a prosecution. There was no evidence of a prior criminal record or any other concern regarding his credibility. Notably, Mr. Chiarelli did not request a *Vetrovec* instruction at trial. While this is not fatal, it is a relevant consideration: *Khela*, at paras. 49-50; *R. v. Boone*, 2016 ONCA 227, 347 O.A.C. 250, leave to appeal refused, [2016] S.C.C.A. 238, at para. 53.

[48] It was not an error for the trial judge not to give a *Vetrovec* instruction in this case. There was no indication that Mr. Van de Ven was an untrustworthy witness other than his self-interest in avoiding prosecution. Based on the conduct of the trial, the jury would have been well aware that, in assessing Mr. Van de Ven's evidence, they had to consider his self-interest. The defence's cross-examination

of Mr. Van de Ven highlighted his involvement in the events at issue, and the defence's closing submissions emphasized the negative inference that could be drawn from his desire to avoid prosecution. Further, the trial judge gave the standard instruction that, when deciding whether to believe a witness or not, the jury should consider whether that witness had a motivation to lie.

[49] Furthermore, Mr. Van de Ven's evidence did not directly implicate Mr. Chiarelli. Mr. Van de Ven testified that the cocaine was not his and that he did not see who placed it in the trunk of the car. He also gave some evidence about the ownership of the cell phones. If the jury believed him, his evidence could support an inference that Mr. Chiarelli was in possession of the cocaine, but it was not direct evidence that Mr. Van de Ven saw Mr. Chiarelli place the cocaine in the trunk or that the cocaine was Mr. Chiarelli's. In addition, Mr. Van de Ven's testimony was also not the only evidence available on the issue. There was evidence from Mr. Chiarelli's mother and from the police officers.

[50] Accordingly, I am satisfied that a *Vetrovec* caution was not required in this case.

**Issue 4: The trial judge did not err in suggesting that knowledge could be inferred from the value of the cocaine**

[51] At trial, the Crown sought to argue that, given the value of the cocaine, the jury could infer that Mr. Chiarelli knew that it was in the trunk of his car. In other

words, even if someone else put the cocaine in the trunk, Mr. Chiarelli must have known about it. Mr. Chiarelli objected and took the position that the value of the cocaine was only relevant to the issue of whether the possession of the cocaine was for the purpose of trafficking.

[52] The trial judge held a voir dire and ruled that the Crown could argue that the value of the cocaine supported an inference that Mr. Chiarelli knew about the cocaine. In reaching this conclusion, the trial judge reviewed a number of authorities from this court and concluded that it was permissible for the Crown "to suggest that at least one reasonable inference is that it is unlikely that another person would have left this valuable item in the trunk of Mr. Chiarelli's car, a car that he used regularly." The trial judge further stated that it would be open to Mr. Chiarelli to argue that other inferences were available.

[53] Based on this ruling, in closing, the Crown made the following argument:

> The second scenario I'd like to bring to your attention is the concept of joint possession. Now even if you, ladies and gentlemen, are of the impression that the cocaine had been put in Adam Chiarelli's vehicle, in the trunk of his vehicle by a third party I'll submit to you that common sense tells us that this cocaine is far too substantial and valuable of an amount for someone to have just blindly entrusted Mr. Chiarelli with it. The only reasonable scenario is that he was privy to this brick of cocaine existing in the trunk of his vehicle while he was going from Guelph to his destination.

[54] Mr. Chiarelli submits that the trial judge erred in allowing the Crown to put this potential inference to the jury. He argues that such an inference is only available in situations where the cocaine has been "relinquished" to an accused or the accused is in sole possession of the cocaine. In making this argument, Mr. Chiarelli relies on *R. v. Treleaven*, [2023] O.J. No. 750 (Ont. C.J.), at paras. 46-49.

[55] With all due respect, Mr. Chiarelli's position and the decision in *Treleaven* are inconsistent with several decisions of this court which have held that the value of drugs or other items can support a common sense inference of knowledge and control – in other words, an inference that the person entrusted with a valuable item would be aware of its presence: *R. v. Fredericks*, 1999 CanLII 949 (Ont. C.A.), at para. 3; *R. v. Bains*, 2015 ONCA 677, 127 O.R. (3d) 545, at para. 157, leave to appeal refused, [2015] S.C.C.A. No. 478; *R. v. DaCosta*, 2017 ONCA 588, at para. 21; *R. v. Buchanan*, 2020 ONCA 245, 150 O.R. (3d) 209, at para. 61.

[56] In this case, the cocaine was found in the car of Mr. Chiarelli's mother. Mr. Chiarelli was the driver of the car on the day it was searched, and the evidence was that he had regular use of his mother's car. In his expert report, D.C. Browne valued the cocaine at between $20,000 and $50,000. The trial judge committed no error in allowing the Crown to suggest to the jury that it was reasonable to infer,

based on the value of the cocaine found in the trunk, that Mr. Chiarelli knew it was there, and that he therefore had knowledge and control of the cocaine.

**Issue 5: The verdict was not unreasonable**

[57] Mr. Chiarelli argues that the verdict was unreasonable because there was no admissible evidence from which the jury could infer knowledge of the drugs.

[58] To succeed on an argument that the jury reached an unreasonable verdict pursuant to s. 686(1)(a)(i) of the *Criminal Code*, Mr. Chiarelli would have to persuade this court that no properly instructed jury, acting judicially, could reasonably have found him guilty: *R. v. Arias-Jackson*, 2007 SCC 52, [2007] 3 S.C.R. 514, at para. 2; *R. v. Chacon-Perez*, 2022 ONCA 3, 159 OR (3d) 481, at para. 79.

[59] When the evidence at trial is wholly or substantially circumstantial, the question is whether the trier of fact, acting judicially, could reasonably be satisfied that the appellant's guilt was the only reasonable conclusion available on the totality of the evidence: *R. v. Villaroman*, 2016 SCC 33, [2016] 1 S.C.R. 1000, at para. 55. As this court explained in *Chacon-Perez*, at para. 80, "[t]he circumstantial evidence does not have to totally exclude other 'conceivable inferences'. Nor is a verdict unreasonable simply because the alternatives did not cause a doubt in the jury's mind. It remains fundamentally for the trier of fact to decide whether any

proposed alternative way of looking at the case was reasonable enough to raise a doubt".

[60] Mr. Chiarelli's position that the jury reached an unreasonable verdict depends on his position that the trial judge erred in allowing the Crown to suggest to the jury that his knowledge of the cocaine could be inferred from the number of cell phones in the car and from the weight of the cocaine. As discussed above, I would reject these arguments. While the case against Mr. Chiarelli was circumstantial, there was certainly evidence supporting an inference that he knew about the cocaine in the trunk of the car. As addressed below, I do not accept the Crown's position that the curative proviso should apply to the trial judge's error in admitting the opinion evidence of Officers Desroches and Orsan. However, a properly instructed jury could have found Mr. Chiarelli guilty based on the admissible evidence available at trial.

## D. THE CURATIVE PROVISO

[61] The Crown argues that, if the trial judge erred in admitting the police officers' opinion evidence or in failing to give an appropriate instruction to the jury, this court should apply the curative proviso.

[62] I have concluded that this is not an appropriate case for the curative proviso.

[63] For the curative proviso to apply, the Crown must show that the error caused no substantial wrong or miscarriage of justice, in the sense that there is no

reasonable possibility that the verdict would have been different if the error had not occurred. The Crown can meet this burden in two ways. The error must either be so minor or harmless that the verdict would have been different if the error had not occurred. If the error is serious, the case against the appellant must be "so overwhelming that any other verdict would have been impossible to obtain": *R. v. Van*, 2009 SCC 22, [2009] 1 S.C.R. 716, at para. 34; *R. v. Tayo Tompouba*, 2024 SCC 16, 491 D.L.R. (4th) 195, at para. 76; *Jenkins*, at para. 42.

[64] In *Sekhon* and *Nguyen*, the Supreme Court and this court relied on the curative proviso where police officers gave improper opinion evidence. However, those cases involved judge-alone trials and there was no basis to find that the trial judges were improperly influenced by the inadmissible opinion evidence. In *Sekhon*, the court was satisfied that the case against the accused was so overwhelming that the impugned evidence would not have affected the outcome. In *Nguyen*, this court was satisfied that the error was so minor that, again, it would not have affected the result.

[65] In contrast, in *Jenkins*, which was a jury trial, this court declined to apply the curative proviso because the error was not *de minimis* and the case was not overwhelming.

[66] In this case, a number of factors militate against applying the curative proviso.

[67] This was a jury trial. It is not possible to know what effect, if any, the police officers' opinions had on the jury. In addition, the evidence was given prominence at trial through the Crown's closing submissions and the jury charge.

[68] While I recognize that the evidence at issue was a minor part of the police officers' evidence, and they provided it unsolicited, the error in failing to give a corrective instruction is not so minor that it could not have affected the result. The only issue at trial was whether Mr. Chiarelli knew about the cocaine in his trunk. The case was circumstantial. The defence's position was that the cocaine could have been placed in the trunk by Mr. Van de Ven or Mr. Proctor without Mr. Chiarelli's knowledge. The police officers both gave opinion evidence that the state of Mr. Chiarelli's car was consistent with drug trafficking. This evidence added weight to other circumstantial evidence linking Mr. Chiarelli to the cocaine, such as the cell phones and the value of the cocaine, because it linked Mr. Chiarelli, as the regular driver of the car, to the cocaine in the trunk. For that reason, the evidence was not *de minimis* and could certainly have influenced the jury, especially given that it came from police officers who purported to give an opinion based on their experience in drug investigation.

[69] The case against Mr. Chiarelli was strong but not overwhelming. The evidence linking him to the cocaine depended on the jury concluding that the only inference possible was that Mr. Chiarelli had knowledge and control, and therefore

possession, of the cocaine. Given that there were two passengers in the car, it was possible that the jury would reach a different verdict in the absence of the police officers' opinion evidence suggesting that the lived-in aspect of the car, including food wrappers and other items, was consistent with drug trafficking. Unlike in *Sekhon*, there was no one piece of evidence that was devastating, and neither was the cumulative effect of the admissible evidence overwhelming.

[70] In the circumstances, I would decline to apply the curative proviso.

## E. DISPOSITION

[71] I would allow the appeal and order a new trial.

Released: June 12, 2025 "B.Z."

"L. Favreau J.A."
"I agree. B. Zarnett J.A."
"I agree. Coroza J.A."