

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Cairns-Cushman, 2026 ONCA 238

DATE: 20260331

DOCKET: COA-24-CR-0641

Roberts, Thorburn and Favreau JJ.A.

BETWEEN

His Majesty the King

Respondent

and

Justine Cairns-Cushman

Appellant

Andrew Furgiuele and David Hakim, for the appellant

Anna Martin, for the respondent

Heard: March 12, 2026

On appeal from the convictions entered by Justice Lynn Robinson of the Ontario Court of Justice, on June 28, 2023, and from the sentence imposed on November 9, 2023.

Thorburn J.A.:

OVERVIEW

[1] The appellant, Ms. Cairns-Cushman appeals her conviction for possession of 213 grams of carfentanil and 2.8 grams of fentanyl (together “the drugs”), for the

purpose of trafficking. She also seeks to appeal her sentence and to adduce fresh evidence in support of a reduced sentence.

[2] The appellant claims the verdict was unreasonable as this was a circumstantial case and the appellant's guilt was not the only reasonable inference. She submits that the trial judge failed to address another reasonable inference, namely that one of her former co-accused, Ms. Hutchison, had possession and control over the drugs.

[3] The appellant claims that many of the key facts the trial judge relied on to convict the appellant also applied to Ms. Hutchison and the trial judge did not explain why she rejected the possibility that Ms. Hutchison, not the appellant, was in possession of the drugs.

[4] The appellant also appeals her sentence and seeks leave to admit fresh evidence of exceptional post-sentence rehabilitative efforts which, she says, support a two-year reduction in her ten-year sentence.

[5] After hearing submissions from counsel, the panel dismissed the conviction appeal with reasons to follow and reserved on the sentence appeal and the motion for fresh evidence. These reasons address why the conviction appeal was dismissed, and the sentence appeal and motion for fresh evidence.

THE EVIDENCE

[6] The following evidence was adduced at trial.

[7] From March 16 to April 28, 2021, police observed the appellant and co-accused Mr. Jones participate in what they believed to be several drug trafficking transactions originating from an apartment located at 69 East Main Street in Welland, Ontario (“the apartment”). The apartment had three bedrooms. The drugs were found in the third bedroom (“the bedroom”).

[8] While conducting surveillance, police observed the appellant in the bedroom at least five times. On one occasion, police were called to the apartment and observed both the appellant and Mr. Jones inside the apartment.

[9] On March 25, 2021, the police observed the appellant meet with Mr. Marsh who was known to the police as being involved in drug trafficking and whose name was on a debt list later found in the bedroom.

[10] On April 28, 2021, after the police observed another suspected drug transaction conducted from a motor vehicle, police arrested the appellant, Mr. Jones, Ms. Hutchison, and one other person. They seized a significant quantity of fentanyl and methamphetamine stored in the false bottom of a water bottle located in the back seat of the vehicle. The appellant was seated in the back of the vehicle next to Mr. Jones. A set of keys was seized from the appellant’s purse upon her arrest.

[11] The police executed a search warrant at the apartment. Officers discovered that the keys found in the appellant's purse opened both the rear door to the building, and one of two locks on the door handle of the apartment.

[12] Inside the bedroom, police located 213 grams of carfentanil and 2.8 grams of fentanyl, pellet guns, baggies, cash, digital scales, and the debt list that included Mr. Marsh's name.

[13] The bedroom also contained a framed photograph of the appellant with another woman, makeup, hair styling tools, and a plaque with the phrase "Girl Boss" written on it. Shelving units held bottles of various shades of nail polish, jewelry and perfume. The closet and the laundry hamper were full of women's clothes.

THE TRIAL JUDGE'S DECISION

[14] The issue at trial was whether the appellant had the requisite knowledge and control to be in possession of the drugs seized by police in the vehicle and the bedroom.

[15] The evidence was largely circumstantial.

[16] The trial judge held that the only reasonable inference based on the circumstantial evidence was that the appellant had knowledge and control of the drugs in the bedroom. Given the quantity of drugs, she concluded that the appellant was in possession of the drugs for the purpose of trafficking. However,

the trial judge did not find that the appellant had knowledge or control of the drugs recovered from other areas of the apartment, or in the bottle found in the vehicle.

[17] Therefore, the appellant was convicted of possession for the purpose of trafficking in respect of the 213 grams of carfentanil and 2.8 grams of fentanyl found in the bedroom only.

[18] In sentencing the appellant, the trial judge reviewed the appellant's personal circumstances. The appellant was 33 years old at the time of sentencing, and this was her first offence. She was a dental hygienist until 2020 and had three biological children. Her drug use escalated when one of her children was removed from her care. She was also the victim of significant domestic violence.

[19] The trial judge held that the following mitigating factors were present:

- (a) the appellant had no prior criminal record;
- (b) she was previously a productive member of the community;
- (c) she had family support and support within the community;
- (d) she demonstrated excellent rehabilitation prospects; and
- (e) she expressed significant remorse and regret.

[20] The trial judge rejected the appellant's contention that she only trafficked small quantities to support her substance abuse disorder. The trial judge also noted that carfentanil is more potent and lethal than fentanyl, and the Niagara Region's high rate of opioid mortality.

[21] The trial judge found the following aggravating factors:

- (a) the appellant was a wholesale commercial trafficker;
- (b) carfentanil is a very dangerous drug; and
- (c) the impact of carfentanil on the community is devastating.

[22] The trial judge imposed a ten-year sentence for possession for the purpose of trafficking in carfentanil less pre-sentence custody, and three years for the fentanyl charge, to be served concurrently.

ANALYSIS

[23] The appellant submits that the inference that the appellant was in possession and control of the drugs found in the bedroom was not the only reasonable inference.

[24] In *R. v. Villaroman*, 2016 SCC 33, [2016] 1 S.C.R. 1000, at para. 37, Cromwell J., for the court, explained that to convict an accused on circumstantial evidence, the trier of fact must consider other reasonable inferences. However, Cromwell J. further cautioned that the trier of fact is not required to disprove every speculative theory or possibility inconsistent with the accused's guilt:

When assessing circumstantial evidence, the trier of fact should consider "other plausible theor[ies]" and "other reasonable possibilities" which are inconsistent with guilt. I agree with the appellant that the Crown thus may need to negative these *reasonable* possibilities, but certainly does not need to "negative every possible conjecture, no matter how irrational or fanciful, which might be consistent with the innocence of the accused". "Other

plausible theories” or “other reasonable possibilities” must be based on logic and experience applied to the evidence or the absence of evidence, not on speculation. [Citations omitted.] [Emphasis in original.]

[25] Inferences may be drawn from the presence or absence of evidence. Inferences must be made in light of all of the evidence, logic, human experience, and common sense: *Villaroman*, at para. 30; and *R. v. Lights*, 2020 ONCA 128, 149 O.R. (3d) 273, at paras. 36-38.

[26] Deference is owed to a trial judge’s conclusion that there are no alternative reasonable inferences other than the appellant’s guilt: *R. v. Bakal*, 2023 ONCA 177, at para. 36. As this court instructed in *R. v. Loor*, 2017 ONCA 696, at para. 22: “An appellate court is justified in interfering only if the trial judge's conclusion that the evidence excluded any reasonable alternative to guilt was itself unreasonable.”

[27] In this case, the trial judge correctly articulated the rules for convicting an accused on circumstantial evidence. She found, however, that there was “ample evidence beyond a reasonable doubt” that the appellant had knowledge and control of the drugs in the bedroom and she concluded that the only reasonable inference was that the appellant was in possession of the drugs found in the bedroom.

[28] In so finding, the trial judge relied on the fact that the appellant had a key to the building and to the apartment and had been seen with Mr. Marsh (whose name

was on the debt list) on March 25, 2021. Most importantly, she had been observed by police many times in the bedroom, once as recently as the day before her arrest.

[29] In my view, the alternative inference proposed by the appellant, that Ms. Hutchison was the person in possession and control of the drugs in the bedroom, is not reasonable as Ms. Hutchison was never seen in the apartment, much less the bedroom.

[30] Unlike the appellant, police did not recover keys to the apartment building or unit from Ms. Hutchison. She had not been recently seen with Mr. Marsh, whose name appeared on the debt list found in the bedroom with an amount owing. Nor had she been observed inside the bedroom.

[31] The appellant's alternative theory is nothing more than speculation. It rests on an assumption that the bedroom could have been connected to any female occupant. However, as discussed, the trial judge based her inference of the appellant's knowledge and control of the contents of the bedroom on more than the presence of those items. She considered the appellant's access to the apartment and a record of surveillance.

[32] The appellant also submits that Ms. Hutchison had been seen with the appellant during at least one suspected drug transaction on April 21, 2021. While there was evidence that Ms. Hutchison drove the appellant to a location to complete a drug transaction on April 21, 2021, the appellant went inside alone.

Moreover, this fact does not sufficiently connect Ms. Hutchison to the bedroom or present a plausible alternative theory to the appellant's guilt justifying this court's intervention.

[33] For these reasons, I see no error in the trial judge's conclusion that the only reasonable inference was that the bedroom belonged to the appellant, and that she was in possession and control of the drugs found in the bedroom. I would therefore uphold the trial judge's finding that the only reasonable inference was that the appellant was in possession and control of the drugs found in the bedroom.

SENTENCE APPEAL

[34] It is agreed that the sentence was fit when it was imposed in November 2023.

[35] The question is whether it should be reduced in the light of the fresh evidence.

Whether the Fresh Evidence Should be Admitted

[36] The fresh evidence demonstrates the appellant's rehabilitative efforts since she was sentenced and includes approximately 80 certificates for completing programming while in custody. This programming covers topics such as recovering from addictive behaviour, conflict resolution, and employment skills. It shows that the appellant has consistently received excellent feedback.

[37] The Crown opposes the admission of this fresh evidence on the basis that it does not meet the fourth criterion set out in *Palmer v. The Queen*, [1980] 1 S.C.R. 759, as it would not have affected the sentencing outcome. The four-part test for admitting fresh evidence on a sentence appeal, is as follows:

- i. The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases;
- ii. The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial;
- iii. The evidence must be credible in the sense that it is reasonably capable of belief; and
- iv. It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result: See also, *R. v. Lévesque*, 2000 SCC 47, [2000] 2 S.C.R. 487, at paras. 14, 35; *R. v. LaPierre*, 2018 ONCA 801, at para. 22; *R. v. I.M.C.*, 2014 ONCA 312, 120 O.R. (3d) 1, at para. 59.

[38] Fresh evidence that attempts to show a change in the offender's circumstances since sentencing has not been admitted where it could not be expected to have affected the result: see for example, *R. v. Jeannotte*, 2026 ONCA 79, at para. 54; *R. v. D.V.B.*, 2010 ONCA 291, 100 O.R. (3d) 736, at para. 97,

leave to appeal refused, [2011] S.C.C.A. No. 207; and *R. v. E.M.M.*, 2021 ONCA 436, at para. 39.

[39] Even where fresh evidence regarding an offender's changed circumstances has been admitted, the courts may nonetheless uphold the sentence imposed: See *R. v. Mercier*, 2023 ONCA 98, 166 O.R. (3d) 171; *R. v. Seed*, 2025 ONCA 698; *R. v. Sureskumar*, 2023 ONCA 705, 431 C.C.C. (3d) 210; *R. v. Luu*, 2021 ONCA 311; and *R. v. Dodman*, 2021 ONCA 543, 494 C.R.R. (2d) 22.

[40] The Crown does not contest that the fresh evidence meets the first three *Palmer* criteria of: due diligence, relevance to a potentially decisive issue, and credibility. The Crown submits, however, that the fourth criterion is not met because the appellant's excellent rehabilitative prospects were a key mitigating factor at sentencing, and the proposed fresh evidence demonstrates that the appellant has continued on that rehabilitative path.

[41] Further, the Crown submits that, even if the evidence were admitted, it would not justify a sentence reduction because a reduction based on post-sentence rehabilitative developments is an exceptional remedy that is not warranted in this case.

[42] In my view, although the fresh evidence provides further extensive evidence of the appellant's ongoing commitment to rehabilitation, which was not available at the time of sentencing, it could not be expected to affect the result as the

sentencing judge already recognized the appellant's significant efforts and "excellent" rehabilitative prospects in mitigation of her sentence. As such, it should not be admitted.

Whether the Sentence Imposed Remains Fit

[43] However, even if this court admitted the fresh evidence, it would not justify intervention as the sentence imposed remains fit.

[44] Section 687(1)(a) of the *Criminal Code*, R.S.C. 1985, c. C-46, empowers this court, on appeal, to consider the present fitness of a sentence in light of fresh evidence and to vary it where appropriate. In some circumstances, post-sentencing changes may justify intervention, even where the sentence was fit when imposed: *R. v. Ghadban*, 2015 ONCA 760, 342 O.A.C. 177, at para. 14.

[45] In *Ghadban*, the appellant had made great strides during an extended period on bail pending appeal from his conviction and then from his sentence. In addressing whether the appellant should be reincarcerated given his positive rehabilitation, the court also set out some general principles to assess the fitness of a sentence in light of fresh evidence showing a change in circumstances. The court stated, at para. 14, that "if there is fresh evidence to show a change of circumstances after a fit sentence was imposed, an appellate court may 'exercise its discretion and act on it pursuant to the obligation to assess the fitness of the sentence at the time when the appeal is heard'".

[46] However, courts must guard against undermining finality by placing undue weight on subsequent developments: *Ghadban*, at para. 15; *R. v. Sipos*, 2014 SCC 47, [2014] 2 S.C.R. 423, at para. 30. Even fresh evidence of institutional hardship will not ordinarily warrant a change in sentence although “particularly harsh or exceptional custodial effects may warrant mitigation”: *R. v. Oryia*, 2026 ONCA 166, at paras. 28-30; and *R. v. Holden*, 2024 ONCA 393, at para. 9. Fresh evidence of positive steps taken and progress while in custody is better directed to the parole board: *Jeannotte*, at para. 55.

[47] As noted in *Sipos*, at para. 30, “[r]outinely deciding sentence appeals on the basis of after-the-fact developments could both jeopardize the integrity of the criminal process by undermining its finality and surpass the appropriate bounds of appellate review”.

[48] In *Ghadban*, where this court reduced the custodial portion of the appellant’s sentence to time served, it held at paras. 16-25, that the circumstances were “very unusual” because the appellant had been released from custody for some time:

[t]he fresh evidence demonstrates that the appellant ... has undertaken, assumed and fulfilled the responsibilities of a husband and a father. He has become a trusted and productive employee. He has been active as a community volunteer. He now accepts responsibility for his crime. He has complied with his conditions of release and there has been no recurrence of criminal behaviour in the five years since this offence was committed.

...

The appellant's life would be devastated if he were to be sent back to jail at this point. His family would be seriously disrupted and he would be diverted from the strong direction he has taken towards rehabilitation. To return him to jail would, as in *R. v. Porter* (1980), 26 Nfld. & P.E.I.R. 26 (Nfld. C.A.), at para. 11, "have the effect of sacrificing the principle of rehabilitation for the principles for punishment and deterrence".

[49] In *Ghadban*, returning the appellant to a correctional facility was held to constitute a serious disruption, sacrificing the principle of rehabilitation entirely: *Ghadban*, at para. 24. See also *R. v. Gray*, 2021 ONCA 86, at para. 57. The disruption occasioned by returning the appellant to prison would have offset any gain in furtherance of the principles of denunciation and deterrence: *Ghadban*, at para. 23.

[50] By contrast, the appellant in this case remains in custody serving her sentence. The fresh evidence shows that while in custody, she has made great strides to improve herself. The appellant is to be commended for making these significant efforts.

[51] At the sentencing hearing, the trial judge heard submissions about the work the appellant had done prior to sentencing to rehabilitate herself while in custody, which included completing over 40 group or self-study sessions. The trial judge also recognized that while in custody, the appellant "had demonstrated a willingness to work on herself, to move towards rehabilitation".

[52] The trial judge explicitly recognized the appellant's "[e]xcellent prospects at rehabilitation" as a mitigating factor and her strong rehabilitative prospects were reflected in the original sentence. Accordingly, the proposed fresh evidence that indicates the appellant's further significant rehabilitative efforts would not have affected the outcome: *Dodman*, at para. 24; *E.M.M.*, at para. 39.

[53] The sentencing judge emphasized however, the need to give effect to the principles of deterrence and denunciation by assigning a high penitentiary sentence for the distribution of carfentanil.

[54] The appellant's continued incarceration does not result in a disproportionate sentence and her significant efforts to further her rehabilitation are not unanticipated: *Oryia*, at para. 28. I also note that unlike the appellant in *Ghadban*, the appellant here has not accepted responsibility for these offences.

[55] During oral submissions, the appellant also submitted that her circumstances are exceptional as she has a need for specialized drug rehabilitation treatment which is unavailable at the penitentiary where she is housed. She suggests that this warrants a reduction in her sentence so that she will be available to attend residential drug treatment.

[56] Counsel for the appellant advised the panel that the appellant is at the top of the waitlist for residential treatment at Stonehenge Therapeutic Community though it was unclear whether the appellant could attend the program as a non-

resident. With the agreement of the appellant, the Crown advised the panel by letter, sent after the appeal hearing on March 19, 2026, of the following information concerning the appellant's application for admission to Stonehenge.

[57] First, the Admissions Coordinator for Health & Female-Identifying Clients at Stonehenge advised that the appellant applied as a regular community applicant. However, until the conclusion of her custodial sentence, the appellant must apply through the Correctional Service process to attend Stonehenge.

[58] Second, it appears that if the appellant applies through her parole officer and meets the requirements for acceptance as a Correctional Service client, she may attend Stonehenge while on either day or full parole, and possibly sooner through an Unescorted Temporary Absence. It was common ground that the appellant will be eligible to apply for day parole on June 23, 2026 and full parole on December 23, 2026.

[59] In sum, while I recognize and appreciate the great strides the appellant has taken and continues to take to improve her life, in my view, her ongoing rehabilitative progress is best assessed by correctional authorities who are required to consider and take into account her considerable ongoing efforts to rehabilitate herself in determining her eligibility for parole and her desire to participate in further treatment.

[60] As such, I would dismiss the sentence appeal.

CONCLUSION

[61] For the above reasons, I would dismiss the conviction appeal. I would grant leave to appeal the sentence but dismiss the sentence appeal. I would dismiss the motion to adduce the fresh evidence.

Released: March 31, 2026 “L.B.R.”

“Thorburn J.A.”
“I agree. L.B. Roberts J.A.”
“I agree. L. Favreau J.A.”