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COURT OF APPEAL FOR ONTARIO

CATZMAN, WEILER and MACPHERSON JJ.A.

B E T W E E N :	)	
	)	
HER MAJESTY THE QUEEN	)	***Kenneth Campbell*** **and**
	)	***Howard Leibovich***
Respondent	)	**for Her Majesty The Queen**
- and -	)	
	)	
STEPHEN JOHN TROCHYM	)	***James Lockyer*** **and**
	)	***Joanne McLean***
Appellant	)	**for Stephen Trochym**
	)	
	)	
	)	
A N D B E T W E E N :	)	
	)	
HER MAJESTY THE QUEEN	)	
	)	
Appellant	)	
- and -	)	
	)	
STEPHEN JOHN TROCHYM	)	
	)	
Respondent	)	
	)	
	)	**Heard: June 15, 16 and 17, 2004**

On appeal from the conviction entered by Justice J. David McCombs of the Ontario Court of Justice, sitting with a jury, on July 6, 1995, and on appeal from the sentence imposed on September 15, 1995.

MACPHERSON J.A.:

A. INTRODUCTION

[1] The appellant[1], Stephen Trochym, was tried by Justice J. David McCombs, sitting with a jury, on a single count of second degree murder. The indictment alleged that on October 14, 1992 the appellant murdered Donna Hunter. On July 6, 1995, after a trial lasting 14 weeks, the jury returned a verdict of guilty. The appellant was sentenced to the mandatory term of life imprisonment. Pursuant to s. 745(c) of the *Criminal Code*, the trial judge set the period of parole ineligibility at 10 years.

[2] The appellant appeals the conviction on several grounds relating to the admissibility of evidence, the conduct of Crown counsel, and the trial judge's charge to the jury.

[3] The Crown appeals the sentence and seeks an increase in the period of parole ineligibility to 12-15 years.

B. FACTS

[4] The appellant and Donna Hunter met on New Year's Eve, 1991. They began a relationship. In April 1992, they started living together at Ms. Hunter's apartment at 100 High Park Avenue in the west end of Toronto.

[5] Donna Hunter was last seen alive late Tuesday evening or early Wednesday morning on October 13-14, 1992. No one heard from her in the next three days. As a result, on Friday, October 16, her friend Barbara Corbett asked the superintendent of the apartment building to let her into Ms. Hunter's apartment. The superintendent suggested that she call the police. She did so and when the police arrived at 11:00 p.m. and entered the apartment, they found Ms. Hunter dead, in a sitting position on her living room floor with her back against the couch. Her throat had been cut, her jugular severed and she had numerous other knife wounds. It was obvious that she had been dead for some time. The appellant was arrested and charged with her murder on January 18, 1993.

[6] The Crown theory was that Ms. Hunter's murder was the culmination of her troubled relationship with the appellant. Several of Ms. Hunter's friends, including Barbara Corbett, Verner Kure and Jonathon Nicol, testified that the appellant was a jealous and obsessive partner who could not countenance Ms. Hunter leaving him. Verner Kure testified that on the night of her death, Ms. Hunter had planned to tell the appellant that their relationship was over and he should move out of her apartment. The

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[1] Stephen Trochym appeals his conviction. The Crown appeals against the sentence imposed by the trial judge. Hence both are appellants and both are respondents. In these reasons, I will refer to Mr. Trochym as the appellant.

Crown contends that the appellant murdered her in the apartment in a rage in response to her decision.

[7] Gity Haghnegahdar, who lived across the hall from Ms. Hunter, heard a man banging on Ms. Hunter's door and demanding to be let in between 1:00 and 2:00 a.m. on Wednesday, October 14. Ms. Haghnegahdar heard the door open to admit the man. The Crown alleged that the appellant was the man who entered the apartment. In support of its position, the Crown was permitted to introduce evidence that, two years earlier, following his break-up with Darlene Oliphant, a previous girlfriend, the appellant had returned to her apartment and banged on the door demanding to be allowed entry.

[8] The Crown further alleged that the appellant left his workplace at Canada Post unseen around 1:30 p.m. the following afternoon and returned to the deceased's apartment to pick up some of his belongings. While there, he decided to 'stage the scene' by moving the deceased's body and pulling back her nightgown to make it seem as if there had been a sexual motive for the attack. Gordon Raymer, the building superintendent, Phyllis Humenick, a babysitter at the superintendent's apartment, and Ms. Haghnegahdar all testified that they saw the appellant in the building between 1:55 and 3:00 p.m. Indeed, Ms. Haghnegahdar said that she saw the appellant come out of Ms. Hunter's apartment at 3:00 p.m. Her evidence was attributable in part to memory that had been enhanced during a hypnosis session arranged by the police. The testimony of the witnesses about the appellant's presence in the building at the time was particularly important because the medical evidence at the trial was that the deceased had been killed in the early hours of October 14 and that her body had been repositioned at least eight to twelve hours after the murder.

[9] The appellant testified and the defence called several witnesses to support his testimony. The defence position was that Ms. Hunter's friends did not accurately describe the appellant's relationship with her. Unlike Ms. Hunter and her friends, the appellant had steady employment, as a supervisor at Canada Post. His relationship with Ms. Hunter foundered on her psychiatric and drinking problems. After a short argument in her apartment on the night of her death, he decided to leave her and move in with his parents. According to the appellant, when he left the apartment at 12:30 a.m. on October 14, Ms. Hunter was alive.

[10] The appellant continued to go to work routinely for the rest of the week. He further testified that he returned to Ms. Hunter's apartment building after work – not between 1:55 and 3:00 p.m. – on October 14 to retrieve his car from the underground garage. He did not go up to Ms. Hunter's apartment. In support of his position that he was not at the apartment earlier in the afternoon, the defence tendered evidence that the appellant's computer at Canada Post was in use between 1:20 and 3:11 p.m. on October 14. Moreover, the defence introduced a Canadian Tire receipt (4:58 p.m.) and a parking

receipt (5:35 p.m.) to support the appellant's testimony that he had gone to the apartment building after work.

[11] At the conclusion of the 14 week trial, the jury returned a verdict of guilty of second degree murder. The trial judge imposed a sentence of life imprisonment and set the period of parole ineligibility at 10 years. The appellant appeals his conviction. The Crown appeals the parole ineligibility component of the sentence[2].

[12] There are other facts relevant to the disposition of the appeals. I find it convenient to introduce those facts in the context of the legal issues to which they specifically relate.

C. ISSUES

[13] I would frame the issues as follows:

Conviction appeal

(1) Did the trial judge err in his treatment of the evidence relating to the appellant's post-offence conduct?

(2) Did the trial judge err in his treatment of the Crown's assertion that the appellant had concocted a false alibi?

(3) Did the trial judge err in his treatment of the alleged similar fact evidence relating to the appellant's conduct respecting a previous girlfriend?

(4) Did the trial judge err in his treatment of the post-hypnotic statements of a Crown witness?

(5) Did the Crown's cross-examination of the appellant render the trial unfair?

(6) Did the trial judge's charge create a reasonable likelihood that the jury misapprehended the correct burden of proof in a criminal trial?

(7) If any of the errors in (1) to (6) is established, should the appellant's conviction be affirmed by the application of the curative proviso in s. 686(1)(b)(iii) of the *Criminal Code*?

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[2] The trial took place in 1995. The appeal was argued nine years later. The appellant was released on bail pending his appeal in 1999. The long delay in the progress of the appeal, which is unconscionable, was, unfortunately, principally the result of persistent problems with a court reporter who took six years to prepare the transcripts of the trial proceedings.

Sentence Appeal

(8) Did the trial judge err by imposing the statutory minimum of 10 years parole ineligibility, and, if so, what is an appropriate period of ineligibility?

D. ANALYSIS

Conviction appeal

(1) The appellant's post-offence conduct

[14] Throughout the trial, the Crown developed the position that the appellant's conduct in the days following the deceased's murder was an important indicator of his guilt. Since the trial took place in 1995, this issue was framed in the language of 'consciousness of guilt', by counsel in their submissions and closing addresses and by the trial judge in his jury charge. In *R. v. Peavoy* (1997), 117 C.C.C. (3d) 226 at 237 (Ont. C.A.), Weiler J.A. suggested that "the use of more neutral terminology is desirable" and proposed the term "after-the-fact conduct" which "avoids labelling the evidence with a conclusion which the jury might not wish to draw and is therefore more accurate." The Supreme Court of Canada accepted Weiler J.A.'s suggestion in *R. v. White* (1998), 125 C.C.C. (3d) 385 at 398 and proposed usage of either "after-the-fact conduct" or "post-offence conduct". In *White*, Major J. used the latter term. Since I will be making several references to *White*, I will use the same term.

[15] The appellant contends that the Crown misused evidence of his post-offence conduct in four domains: (1) the appellant's reaction to his former girlfriend's death; (2) his interaction with a police officer at the deceased's apartment on Saturday, October 17; (3) his interview with police on Sunday, October 18; and (4) his purported avoidance of further contact with the police after the initial interview.

[16] The starting point for analysis on this issue is recognition that post-offence conduct evidence is similar to most other categories of evidence. As expressed by Major J. in *White*, at p. 398:

> Evidence of post-offence conduct is not fundamentally different from other kinds of circumstantial evidence. In some cases it may be highly incriminating, while in others it might play only a minor corroborative role.

See also *Peavoy* at p. 237 and *R. v. B. (S.C.)* (1997), 119 C.C.C. (3d) 530 at 542-43 (Ont. C.A.), Doherty and Rosenberg JJ.A.

[17] It follows that, as a general proposition, the question of whether the post-offence conduct of an accused is related to the offence is one for the trier of fact which, in a murder trial, is often the jury. Major J. gave clear voice to this general proposition in *White*, at pp. 400-01:

> As a general rule, it will be for the jury to decide, on the basis of the evidence as a whole, whether the post-offence conduct of the accused is related to the crime before them rather than to some other culpable act. It is also within the province of the jury to consider how much weight, if any, such evidence should be accorded in the final determination of guilt or innocence. For the trial judge to interfere in that process will in most cases constitute a usurpation of the jury's exclusive fact-finding role.

[18] In a similar vein, the learned authors of Wigmore, *Evidence in Trials at Common Law* (1979, Chad. Rev.), vol. 2, in their comprehensive discussion of "conduct as evidence of guilt", cautioned at p. 117:

> *[N]o fixed rules should be laid down*. Repeated judicial warnings tell us that the evidence is merely to be estimated as best we can in light of our knowledge of human nature in general and of the accused in particular ….
>
> [Emphasis in original.]

[19] Of course, the "general rule" enunciated in *White* is just that: a general rule, not an absolute rule. There are exceptions. One exception relates to evidence that has no probative value at all: see *e.g. R. v. Arcangioli* (1994), 87 C.C.C. (3d) 289 (S.C.C.). A second exception arises when the prejudicial effect of the evidence outweighs its probative value: see *e.g. B. (S.C.)*, *supra*. An example of the second exception has developed in the case law recently (and after the appellant's trial) – evidence about a person's demeanour when informed or accused of the murder of a victim should be admitted "with caution": see *R. v. Levert* (2001), 159 C.C.C. (3d) 71 at 81 (Ont. C.A.); *R. v. Baltrusaitis* (2002), 162 C.C.C. (3d) 539 (Ont. C.A.); and *R. v. Bennett* (2003), 179 C.C.C. (3d) 244 (Ont. C.A.).

[20] The appellant contends that both of these exceptions are applicable and that most of the evidence relating to his post-offence conduct should have been excluded because it had no probative value or because it related to the appellant's demeanour in the days following his former girlfriend's death. I disagree, essentially for four reasons.

[21] First, the admissibility of the appellant's post-offence conduct was not a live issue at trial. It appears that Crown and defence counsel and the trial judge accepted that most of the evidence was admissible. Importantly, experienced defence counsel[3] did not object to the admission of most of the evidence in this domain. Indeed, the defence dealt extensively with the evidence. Much of the defence treatment of the evidence seemed to be based on the strategy that it was not particularly difficult to rebut the inferences the Crown tried to draw from the evidence.

[22] Second, the evidence relating to the appellant's conduct after the murder of his former girlfriend, taken as a whole, is the type of evidence that should be left to the jury. For example, the Crown alleged that the appellant returned to the deceased's apartment approximately 12 hours after the murder to 'stage' the crime scene. In addition, the appellant's explanation for not attending the funeral – that the police broke a promise to inform him of its details – was contradicted by the testimony of the relevant police officers. Further, his explanation for going to the deceased's apartment on Saturday, October 17, when her death had not been reported, was that he wanted to retrieve his belongings following the break-up several days before. Yet he arrived at the apartment dressed in a shirt and tie and accompanied by his frail father. The Crown contended that this appearance had an entirely different motivation – to 'discover' his former girlfriend's body and to be ready to 'perform' for the police. In my view, these are precisely the kinds of human activity where, in Wigmore's words, a jury's "knowledge of human nature" in general should be brought to bear. The assessment of this kind of evidence is, as Major J. said in *White*, a question of weight for the jury.

[23] It is true that a reading of the trial record, coupled with the vigorous and eloquent submissions of appellate counsel, can promote a sense that some of the post-offence conduct evidence was of limited value or even contrary to the inferences sought to be drawn by the Crown. For example, to my eyes the appellant's answers to the police questions in his interview on Sunday, October 18 were responsive and appropriate. I do not interpret his answers in a 'consciousness of guilt' fashion.

[24] In contrast, the appellant's decision to not attend any of the memorial events relating to the deceased and his explanation (he said that he did not attend the funeral because the police broke a promise to inform him of when it would take place; the police officers denied this) strike me as matters that tell against the appellant.

[25] However, these reactions – by a judge, in hindsight, and on the basis of a paper record – miss the point. Except in rare cases, the assessment of this type of evidence is a

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[3] The appellant makes no allegation on this appeal that he received ineffective representation at his trial. On the basis of the record, there would be no basis for such an allegation.

task for the jury; it should not, as Major J. cautioned in *White*, be usurped by the trial judge.

[26] Third, although some of the evidence admitted at the trial did relate to the appellant's demeanour in the days following Ms. Hunter's death, and therefore probably runs afoul of the subsequent jurisprudence in *Levert*, *Baltrusaitis* and *Bennett*, I do not regard this error as fatal. The vast majority of the post-offence conduct evidence at this trial related to the appellant's *conduct*, and not his demeanour, after Ms. Hunter's death. He made many decisions, and acted on those decisions, as police attention focussed on him. It was those decisions and actions, not his demeanour, that formed the core of the Crown case in this domain. Moreover, as I noted above, the appellant seemed content at trial to deal with all of this evidence – conduct and demeanour – on the footing that he had valid explanations that the jury should hear and would accept. Accordingly, as in *Levert*, I do not think that the admission and use of the demeanour evidence in this case impaired the fairness of the trial.

[27] Fourth, and of particular importance, the trial judge's treatment of the post-offence conduct evidence was careful, balanced and fair. He consistently set out, in an even-handed way, the positions of the Crown and the defence relating to the various aspects of the appellant's post-offence conduct. For example, with respect to the appellant's decision concerning the memorial events, the trial judge instructed the jury:

> You may want to consider other factors as well. You may want to consider Mr. Trochym's failure to find out when the funeral was, his failure to attend the funeral or to send flowers, his promise to Barbara Corbett to sell tickets to the memorial gathering organized in the memory of Donna Hunter and then not doing so, and the fact that he didn't go to the memorial gathering. As well, the fact that he didn't call Donna's father or send him a card, the fact that he didn't take bereavement leave at work, or even tell any of his co-workers about Donna Hunter's death. It is for you to determine what, if any, inference you wish to draw from those facts.
>
> Remember, you have been given an explanation of them by Mr. Trochym. Even if you do not accept it, you must consider whether the evidence is proof of guilt or anxiety out of the realization he was a suspect or they thought he was guilty because he is the boyfriend, and that's the reason he did what he did. It is for you to determine the weight to be given to that evidence.

[28] Moreover, the trial judge's charge to the jury on post-offence conduct actually inured to the benefit of the appellant in at least three important respects.

[29] Overriding a strenuous objection from Crown counsel, the trial judge included only two items in the consciousness of guilt component of his jury charge – the evidence about whether the appellant had lied to the police during the interview of October 18, 1992, and the evidence relating to whether the appellant 'staged' the crime scene on the afternoon following the murder.[4] The trial judge addressed all of the other aspects of the appellant's post-offence conduct as circumstantial evidence; in other words, he did not highlight them as requiring special attention or associate them with the label 'consciousness of guilt'.

[30] In addition, the trial judge essentially removed one of the items of post-offence conduct from the jury's consideration. The Crown contended that after the initial interview, the appellant tried to avoid a second interview, and did so by offering weak excuses, including participation in his weekly darts league and a scheduled haircut. The Crown suggested that these excuses undermined the appellant's assertion at the initial interview that he wanted to cooperate fully with the police investigation.

[31] At trial, the defence offered an explanation for the appellant's reluctance to speak to the police after the initial interview – namely, that his brother had advised him to talk to a lawyer and that he was merely putting off the police until he had met with a lawyer and received legal advice. It is clear that the trial judge regarded this as a strong explanation which the jury should accept. Accordingly, he instructed the jury:

> Ladies and gentlemen, I want you to be aware that every person who is being investigated or questioned by the police has the right to consult with an attorney. It would be completely wrong to draw any adverse inference against the accused from his desire to stall for time because he wanted to consult with a lawyer. I think in all the circumstances it would be best if you not consider the darts and haircut comment in any way to draw an inference adverse to the accused person because it may well be tied to his intention to seek the right to his lawyer, a right we all have.

[32] Finally, the trial judge instructed the jury that evidence could give rise to an inference of consciousness of guilt only if the jury accepted the evidence on the beyond a

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[4] I will address the 'staging' issue in the next section of these reasons under the rubric of 'false alibi'.

reasonable doubt standard. For example, with respect to the appellant's statements to the police in the October 18 interview, the trial judge instructed:

> The doctrine of reasonable doubt, as I explained to you at the beginning, applies to the ultimate question, and since evidence of consciousness of guilt goes to the ultimate question, you must apply the doctrine of reasonable doubt to this evidence. An inference of consciousness of guilt cannot be drawn unless all three points have been proved beyond a reasonable doubt. What you must remember is that you cannot infer consciousness of guilt solely on the basis of concluding Stephen Trochym lied and you must be satisfied beyond a reasonable doubt on the three things, that he made the statement, that he lied and that he did so for purposes of concealing his guilt. However, as I say, if you are satisfied beyond a reasonable doubt that the statements were false or misleading and deliberately made to conceal his guilt, then you may use the statements as evidence of consciousness of guilt.

[33] The jury charge in this trial was delivered in July 1995. This component of the charge complied with the May 1995 decision of this court in *R. v. Court and Monaghan* (1995), 99 C.C.C. (3d) 237. A year later, a five judge panel of this court explicitly overruled *Court and Monaghan* in *R. v. White* (1996), 108 C.C.C. (3d) 1. The Supreme Court of Canada affirmed *White* with Major J. stating, at p. 405:

> It is settled that the criminal standard of proof applies only to the jury's final determination of guilt or innocence and is not to be applied to individual items or categories of evidence …. [T]heir verdict must be based on the record as a whole, not merely on items of evidence which have previously been established beyond a reasonable doubt …. The kind of charge argued for by the appellants is facially inconsistent with these principles, and no persuasive reason has been advanced which would justify creating an exception for evidence of post-offence conduct.

[34] In light of *White*, the trial judge's charge in the present case on this issue was, understandably, in error. However, it was an error that benefitted the appellant.

[35] For these reasons, I conclude that the trial judge did not err in admitting evidence of the post-offence conduct of the appellant. Moreover, his charge to the jury on this issue was, with one exception that benefitted the appellant, sound.

(2) False alibi[5]

[36] At the trial, the Crown alleged that between 1:30 and 3:00 p.m. on the afternoon after the murder, the appellant returned to the deceased's apartment to 'stage' the murder scene to make it appear as if the murder had been sexually motivated and to remove some of his personal belongings to make it seem as if he had moved out the previous night. The Crown led evidence from three witnesses who testified that they saw the appellant in the apartment building between 1:55 and 3:00 p.m. One of the witnesses, Gity Haghnegahdar, testified that she saw the appellant leaving the deceased's apartment at 3:00 p.m. In addition, David Misener, a security guard at Canada Post, testified that he saw the appellant at Canada Post at 4:00 p.m. after the appellant's shift was over (it ended at 3:30 p.m.) and that the appellant was behaving unusually, wanting to be seen in the company of others in the cafeteria.

[37] Based on this and other evidence, in his closing address Crown counsel advanced the argument that the crime scene at the deceased's apartment had been 'staged', that the only person who would have staged the crime scene was the killer, that the appellant was the only person with the opportunity and motive to stage the crime scene (a stranger would have no motive to return approximately 12 hours after the murder), and that the appellant had in fact returned to the deceased's apartment "under the cover of work" on the afternoon of October 14 "hoping to have an alibi" for his activities in the apartment.

[38] The appellant testified that he went to work at Canada Post on October 14. He admitted that he went to the deceased's apartment building that afternoon. However, he said that he went there after work, not between 1:55 and 3:00 p.m. He also testified that he did not go up to the deceased's apartment; rather he returned to the building only to retrieve his car which he had left in the underground parking garage the previous night. In support of his testimony, the appellant introduced evidence indicating that his office computer was being used for most of the 1:55 - 3:00 p.m. period, including at 3:00 p.m. when Gity Haghnegahdar said she saw him leaving the deceased's apartment. In addition, the appellant produced Canadian Tire and parking receipts that suggested he was not at Canada Post after 4:00 p.m.

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[5] The word 'alibi' strikes me as a bit of a misnomer for this issue because the events being considered in this section are not events at the time of the murder; rather they took place more than 12 hours later. However, since there is a link between the two sets of events, and since counsel and the trial judge (and appellate counsel) all use the word 'alibi' as a general descriptor, I will do the same.

[39] The appellant contends that the Crown closing address embraced inappropriate speculation about the evidence concerning his activities on the afternoon of October 14. I do not agree. There was solid evidence – from both sides – about the events on the afternoon of October 14. The trial judge properly admitted it. None of it was determinative of whether the appellant returned to the deceased's apartment and 'staged' the crime scene.

[40] To take but one example, the appellant's forceful submission that the computer records at Canada Post conclusively established he was at work at 3:00 p.m. is undercut by evidence that supervisors sometimes shared computer passwords, that someone else used the appellant's password on at least one other occasion, and by the appellant's own testimony that the records showing that he was logged on to the computer for almost five hours on October 14 "couldn't possibly" be correct.

[41] Finally, the trial judge's charge to the jury on this issue was comprehensive, balanced and legally sound. He stated that two issues relating to whether the appellant was the person who killed the deceased were whether the appellant had the opportunity to be absent from his workplace at the time in question and whether he went to the deceased's apartment that afternoon. He then reminded the jury of the positions of the parties concerning those issues and conducted a full and fair review of the evidence. Importantly, the trial judge expressly advised the jury that, while it was entitled to draw reasonable inferences, it could not draw inferences based on "mere speculation or hunches". Defence counsel made no objection to any of the trial judge's charge on this issue.

[42] In summary, the evidence about the appellant's activities on the afternoon of October 14 was admissible. Crown counsel did not make inappropriate submissions concerning this evidence in his closing address to the jury. The trial judge's jury charge on this issue was appropriate.

(3) Similar fact evidence

[43] Gity Haghnegahdar testified that, from her apartment across the hall, she heard someone banging on Donna Hunter's apartment between 1:00 and 2:00 a.m. on the night Ms. Hunter was murdered. After a few minutes, she heard Ms. Hunter open the door to admit the person banging on her door. The appellant testified that he left the deceased's apartment at 12:30 a.m. and did not return.

[44] The trial judge admitted the evidence of Darlene Oliphant, a former girlfriend of the appellant, and Sharon Weeden, a friend who was staying at Ms. Oliphant's apartment, who testified that the appellant came to Ms. Oliphant's apartment a day after she had terminated their relationship and caused a ruckus while demanding entry. In admitting Ms. Oliphant's and Ms. Weeden's testimony as similar fact evidence, the trial judge said:

> Although most of the evidence of the prior relationship is, in my view, not sufficiently relevant to the issue before us, I have concluded that the evidence of the behaviour of the accused when he returned to Ms. Oliphant's house demanding entry after being rejected should be admitted. Because the probative value is sufficiently strong and outweighs the prejudicial effect, I have concluded the evidence is circumstantially relevant to the issue of identity, and I accept Mr. Fisher's submission it is admissible to show a pattern of emotional involvement which, when followed by rejection, turns to violence. Or, to put it another way, specifically it is evidence that the Oliphant relationship can show a pattern of violent behaviour engaged in by the accused when rejected by a girlfriend following a serious relationship.

[45] The appellant challenges the role the Oliphant and Weeden similar fact evidence played in the trial in three respects: (1) it should not have been admitted; (2) Crown counsel strayed beyond the permissible uses of the evidence; and (3) the trial judge's charge to the jury on this issue was inadequate.

[46] A trial judge's decision concerning the admission of similar fact evidence is entitled to substantial deference: see *R. v. Arp* (1998), 129 C.C.C. (3d) 321 (S.C.C.); *R. v. Harvey* (2001), 160 C.C.C. (3d) 52 (Ont. C.A.); *R. v. R.N.*, [2003] O.J. No. 263 (C.A.); and *R. v. Multani*, [2004] O.J. No. 1311 (C.A.).

[47] I can see no basis for interfering with the trial judge's decision to admit the similar fact evidence in this trial. Although he did not have the benefit of the leading decisions of the Supreme Court of Canada in *Arp* and in *R. v. Handy* (2002), 164 C.C.C. (3d) 481, the trial judge's reasoning is faithful to those decisions and his conclusion is well within their parameters.

[48] Although Crown counsel, in his questioning of witnesses and closing address, occasionally strayed outside the careful limits set by the trial judge in his ruling, in my view these transgressions were corrected by the clear and accurate charge the trial judge gave on this issue:

> Some evidence that can be used only for a limited purpose is as follows: the evidence of Darlene Oliphant and Sharon Weeden. You remember them. Darlene Oliphant was the former girlfriend of the accused man, Stephen Trochym. Sharon Weeden was her friend. They gave evidence about the break up of Mr. Trochym and Darlene and how the

> accused man, in their version of events, came back in the early morning hours, that he pounded on the door, that he called Darlene names, such as "whore", "slut" and "dike", and threatened her.
>
> This evidence may be used by you for a limited purpose, and I will not go into it in detail now because I think you have enough rules except to say this, that basically it's evidence, which you may or may not take into account when you are weighing the question of who the person was at the door, banging on the door in the early morning hours of October 14, that Gity Haghnegahdar testified she heard. If you can decide that there was someone banging on the door – and I think it is reasonable to assume there was somebody in that apartment because Donna Hunter lost her life at some point. If you conclude that somebody was banging on the door at that time, you are going to want to consider who it was, and when you consider who it was, you may take into account the evidence of Darlene Oliphant and her friend, Sharon Weeden, because that evidence of what Mr. Trochym did, if you accept it, is some evidence, circumstantial evidence of the identity of the person banging on the door on Wednesday, October 14. *But you cannot use it for some other reason, like bad character, as we talked about. You cannot say, well, he is the type of person who would – if you accept this evidence that he calls his ex-girlfriend names and kicked the window and so on – is the type of person who would commit this crime. That would be improper use of the evidence. It is for a limited use only.*
>
> [Emphasis added.]

Later in his charge, the trial judge repeated, in only slightly different language, this instruction about the similar fact evidence, including the warning in the emphasized passage.

[49] In summary, I conclude that the similar fact evidence was admissible and the transgressions of Crown counsel concerning its use were corrected by the trial judge's excellent charge on this issue.

(4) Post-hypnotic statements of a Crown witness

[50] In her initial interview with the police, Gity Haghnegahdar was unclear about the date she heard the banging on the deceased's apartment door and the afternoon she saw the appellant leave the deceased's apartment. She agreed to a police suggestion that she undergo hypnosis. Following the hypnosis, she was able to fix these events as having occurred on, respectively, Wednesday, October 14, after midnight, and Wednesday, October 14, in the afternoon.

[51] The trial judge ruled that Ms. Haghnegahdar could testify in accordance with her 'enhanced' post-hypnotic memory. Following a *voir dire* in which he heard expert opinion evidence called by the Crown and by the defence on the subject of hypnotically enhanced evidence, the trial judge delivered a comprehensive and careful ruling. Following a long line of trial court decisions in several provinces, including Ontario, he declined to adopt a rule excluding all hypnotically enhanced evidence. He said:

> The rule in this situation was succinctly stated by Campbell J. in *R. v. Terciera*, *supra*, at page 40:
>
> > "[T]he fact that a witness has been hypnotized is a matter that generally goes to weight."

[52] The trial judge adopted the guidelines for the assessment of hypnotically enhanced evidence articulated by Wachowich J. in *R. v. Clark* (1984), 13 C.C.C. 117 (Alta. Q.B.), and followed in several Ontario cases. Based on his assessment of the *Clark* factors, the trial judge decided to admit Ms. Haghnegahdar's testimony.

[53] Following this ruling, and at the initiative of the defence, counsel agreed that so long as defence counsel did not cross-examine Ms. Haghnegahdar about her pre-hypnotic statements, the jury would not hear that she had been hypnotized. The trial judge accepted this agreement, and it was carried into effect.

[54] The appellant challenges the use made of Ms. Haghnegahdar's testimony on two grounds: he contends that there should be a rule of absolute exclusion of all testimony based on memory enhanced by hypnosis[6] and he submits that the trial judge erred by accepting the agreement of trial counsel concerning how Ms. Haghnegahdar's testimony would be presented to the jury.

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[6] The appellant candidly concedes that if there is no absolute rule of exclusion, and if the *Clark* guidelines are appropriate, there is no basis for challenging the trial judge's application of those guidelines in his ruling.

[55] In the record before the trial judge, and on the basis of the case law available in 1995, there was no basis for a rule of absolute exclusion of testimony based on hypnotically enhanced memory. Nothing in the record before us, or in developments in the case law since then, would support such a rule. Indeed, such a rule would run contrary to a general theme of Canadian evidence law – namely, a reluctance to deprive the finders of fact of relevant information. As expressed by L'Heureux-Dubé J. in her concurring judgment in *R. v. L.(D.O.)* (1993), 85 C.C.C. (3d) 289 at 313:

> The modern trend in this field has been to admit all relevant and probative evidence and allow the trier of fact to decide the weight to be given to that evidence in order to arrive at a result which will be just. A just result is best achieved when the decision-makers have all relevant and probative information before them. It would seem contrary to the judgments of our court (*Seaboyer* and *B.(K.G.), supra*) to disallow evidence available through technological advances, such as videotaping, that may benefit the truth-seeking process. Consequently, adherence to such strict rules as suggested by the respondent, besides not being constitutionally required, may result in valuable information not being brought to the court's attention. Moreover, the court has recently sought to further remove obstacles to the truth-seeking process, in a genuine attempt to return to the basic goal of truth-finding: see *R. v. Khan* (1990), 59 C.C.C. (3d) 92, [1990] 2 S.C.R. 531, 79 C.R. (3d) 1; *R. v. W.(R.), supra*, and *R. v. Marquard*, S.C.C., No. 22940, October 21,1993 [reported *ante*, p. 193, 159 N.R. 81, 21 W.C.B. (2d) 184]. Rules of evidence, as much as the law itself, are not cast in stone and will evolve with time. This is amply demonstrated by even a superficial overview of our legal history and the way in which rules were developed through the centuries.

[56] A similar point was made more recently by Binnie J. in *R. v. J.-L.J.*, [2000] 2 S.C.R. 600. In that case, the trial judge excluded expert scientific evidence. The Supreme Court of Canada upheld the trial judge's exercise of discretion. In the course of his reasons, Binnie J. said, at p. 616:

> A case-by-case evaluation of novel science is necessary in light of the changing nature of our scientific knowledge: it

> was once accepted by the highest authorities of the western world that the earth was flat.

As such, on this record I would not accede to the appellant's request for a categorical exclusionary rule.

[57] Turning to the appellant's second challenge on this issue, I see no basis for concluding that the trial judge erred by accepting the agreement of trial counsel concerning how Ms. Haghnegahdar's testimony would be presented to the jury. The agreement was initiated by defence counsel who clearly was concerned that if the jury heard that Ms. Haghnegahdar's memory had been enhanced by hypnosis, this knowledge might increase her credibility in the jury's eyes. Accordingly, the genesis of the agreement was very much a tactical decision by defence counsel. I do not fault the trial judge for accepting the agreement. In the absence of an allegation of incompetence or ineffective representation, which the appellant specifically disclaims, there is no basis for interfering with the trial judge's decision to accept and implement a procedure agreed to by both counsel.

(5) Cross-examination of the appellant

[58] The appellant contends that the cross-examination of the appellant by Crown counsel was unfair in three respects.

[59] First, the appellant submits that Crown counsel's tone throughout the cross-examination was patronizing, sarcastic, mocking and editorial. I disagree. The cross-examination was detailed and vigorous. None of the adjectives submitted by the appellant accurately characterize the cross-examination. Moreover, experienced defence counsel objected on only one occasion during the appellant's cross-examination, to a question he described as "argumentative".

[60] Second, the appellant submits that Crown counsel's closing address exceeded the bounds of propriety in his use of one of the appellant's previous convictions:

> Turning to the evidence that the Defence did call. Turning first to the evidence of the accused, what do we know about the accused? The accused is a man with a criminal record, including a 1993 conviction for breach of a bail order, an offence which strikes right at the heart of the very administration of justice.

[61] It is probably an exaggeration to describe breach of a bail order in this fashion. However, it is difficult to conceive of a jury, deliberating in a murder case at the end of a

14 week trial, attaching any significance to an exaggeration in a half-sentence. Moreover, the trial judge effectively removed four of the appellant's five convictions from the jury's consideration in terms of its assessment of his credibility.

[62] Third, the appellant contends that Crown counsel engaged in an unfair tactic during his cross-examination of the appellant. Crown counsel asked the appellant to compile a list of witnesses with whom he disagreed. As the cross-examination progressed, Crown counsel would put forth testimony of a witness that contradicted the appellant's evidence. If the appellant agreed that there was a contradiction, the witness' name would be added to the list. By the end of the cross-examination, there were 28 names on the list.

[63] I see nothing wrong with this tactic. When Crown counsel introduced the list, the trial judge asked defence counsel if he had a position on its use. Defence counsel did not object, so long as the list was not made an exhibit. It was not. Moreover, at no time did Crown counsel cross the line and ask the appellant if he thought the witnesses who contradicted him were lying or to explain why they might be lying: see *R. v. R.(A.J.)*, (1994), 94 C.C.C. (3d) 168 (Ont. C.A.).

(6) <u>Burden of proof</u>

[64] The trial judge delivered his jury charge in July 1995, well before the seminal decisions of the Supreme Court of Canada dealing with the concept of reasonable doubt: see *R. v. Lifchus* (1997), 118 C.C.C. (3d) 1 and *R. v. Starr* (2000), 147 C.C.C. (3d) 449.

[65] The appellant contends that the jury charge at his trial did not comply with *Lifchus* and *Starr* in three important respects: (1) the trial judge said that the term 'reasonable doubt' has a natural and ordinary meaning; (2) he did not say that reasonable doubt can arise from the evidence or an absence of evidence; and (3) he did not make it clear that the criminal standard of proof is substantially higher than the civil standard of proof.

[66] In *R. v. Rhee*, [2001] 3 S.C.R. 364, Arbour J. reviewed the *Lifchus* charge and subsequent cases in which it had been considered by the Supreme Court of Canada, including *Starr*, *R. v. Beauchamp*, [2000] 2 S.C.R. 720, *R. v. Russell*, [2000] 2 S.C.R. 731, and *R. v. Avetysan*, [2000] 2 S.C.R. 745. She said:

> Appellate review of a charge of the jury is not a mechanical task, but rather an assessment of whether the deficiencies in the charge, as compared to the *Lifchus* standard, cause serious concern about the jury's verdict. However, the failure of such charges to reflect *Lifchus* principles "cannot be taken to raise by that alone the spectre of an unfair trial or miscarriage of justice" (*Russell*, *supra*, at para. 24). Rather, the key question

> to ask is whether the charge in question substantially complies with the principles expressed in *Lifchus*, so that, as a whole, it does not give rise to the reasonable likelihood that the jury misunderstood the correct standard of proof.

[67] Based on my review of the trial judge's jury charge, I do not conclude that it gave rise to a reasonable likelihood that the jury misunderstood the correct standard of proof. Indeed, although the charge does contain at least two of the three defects alleged by the appellant (arguably, the trial judge's instruction that the jury should acquit the accused if it had a "nagging" or "lingering" doubt about his guilt properly situated the reasonable doubt standard well above the civil standard of proof), there are many cases in which pre-*Lifchus* jury charges containing all three defects have been upheld: see, for example, *Rhee*; *R. v. Feeley* (2003), 171 C.C.C. 353 (S.C.C.); *R. v. Tavenor* (2001), 140 O.A.C. 78; *R. v. Satkunananthan* (2001), 152 C.C.C. (3d) 321 (Ont. C.A.); *R. v. Phillips* (2001), 154 C.C.C. (3d) 345 (Ont. C.A.); *R. v. Varga* (2001), 159 C.C.C. (3d) 502 (Ont. C.A.); *R. v. Nguyen* (2002), 161 C.C.C. (3d) 433 (Ont. C.A.); and *R. v. Rochon* (2003), 173 C.C.C. (3d) 321 (Ont. C.A.).

[68] In my view, the trial judge delivered a well-organized and well-worded jury charge following a long and difficult trial. The components relating to the presumption of innocence and the assessment of the credibility of witnesses were accurate and are important contextual points when considering the charge on reasonable doubt.

[69] In summary, based on my review of the trial judge's jury charge and my understanding of the similar cases listed above, I reach the conclusion that the trial judge's charge relating to reasonable doubt complies with the test set out by Arbour J. in *Rhee*.

(7) The proviso

[70] In light of the foregoing, the issue of the potential application of the curative proviso in s. 686(1)(b)(iii) of the *Criminal Code* does not arise.

Sentence Appeal

(8) Period of parole ineligibility

[71] The trial judge sentenced the appellant to the mandatory term of life imprisonment for the offence of second degree murder. He fixed the period of parole ineligibility at the statutory minimum of 10 years.

[72] The Crown contends that the period of parole ineligibility for a brutal murder of an unarmed girlfriend or wife should be in the 12-15 year range: see *R. v. McKnight* (1999), 135 C.C.C. (3d) 41 (Ont. C.A.); *R. v. Wristen* (1999), 141 C.C.C. (3d) 1 (Ont. C.A.); and *R. v. McLeod*, [2003] O.J. No. 3923 (C.A.).

[73] I do not agree, for three reasons.

[74] First, the sentence imposed by the trial judge, who has seen the accused and heard all the evidence, is entitled to substantial deference: see *R. v. Shropshire* (1995), 102 C.C.C. (3d) 193 (S.C.C.).

[75] Second, the trial judge gave detailed reasons for sentence in which he carefully considered all of the relevant factors relating to the offence and the offender. In particular, the trial judge was aware of, and affected by, the devastating impact of the death of Ms. Hunter on her family and friends:

> The murder of Donna Hunter has robbed her loving father of his only surviving child. Her murder has also robbed a young man and woman of their loving mother and her loss has also deeply affected her many friends and acquaintances.

[76] It is true that the trial judge did not refer specifically to the domestic context of the murder. However, the trial took place in 1995. The cases relied on by the Crown which attach strong weight to this factor were decided after 1995. Moreover, s. 718.2(a)(ii) of the *Criminal Code*, which specifically identifies spousal abuse as an aggravating factor for sentencing purposes, did not come into force until 1996. In any event, it is clear from the trial judge's reasons that he regarded this as a terrible murder.

[77] Third, six members of the jury made no recommendation concerning parole ineligibility and six members recommended a period of parole ineligibility of 10 years. The trial judge took this recommendation into account. One of the overarching themes of the Crown submissions on the appellant's conviction appeal is the need to repose great confidence and trust in the jury. I have essentially agreed with this submission. There is an obvious irony in the Crown attempt to reverse field on the sentence appeal.

E. DISPOSITION

[78] I would dismiss the appellant's conviction appeal and the Crown sentence appeal.

RELEASED: July 5, 2004 ("MAC")

"J. C. MacPherson J.A."
"I agree: M. A. Catzman J.A."
"I agree: K. M. Weiler J.A."