

In the Court of Appeal for the Northwest Territories

Citation: *R v Avadluk*, 2023 NWTCA 3

Date: 2023 04 27

Docket: A1-AP-2014-000011

Registry: Yellowknife, N.W.T.

Between:

His Majesty the King

Respondent

- and -

Noel Avadluk

Appellant

Restriction on Publication

Identification Ban – See the *Criminal Code*, section 486.4.

By Court Order, information that could identify the victim must not be published, broadcast, or transmitted in any way.

NOTE: Identifying information has been removed from this judgment to comply with the ban so that it may be published.

The Court:

The Honourable Justice Frans Slatter
The Honourable Justice Bruce McDonald
The Honourable Justice Kevin Feehan

Memorandum of Judgment

Appeal from the Conviction by Justice K.M. Shaner
sitting with a jury August 29, 2017

Memorandum of Judgment

The Court:

[1] The appellant appeals his conviction by a jury in 2017 for sexual assault. He was acquitted of a second count of attempting to suffocate the complainant to overcome her resistance.

[2] The appellant was initially represented by counsel provided by Legal Aid, but he discharged those counsel and elected to represent himself. Counsel was appointed to cross-examine the complainant: *R. v Avadluk*, 2013 NWTSC 63. Some of the appellant's grounds of appeal arise from his being self-represented, and he has applied to introduce fresh evidence to demonstrate an oversight by counsel appointed to cross-examine the complainant.

[3] The appellant was given limited permission under s. 276 of the *Criminal Code* to cross examine the complainant about their prior romantic relationship, in support of the appellant's contention that the complainant had fabricated the allegations of sexual assault because of her dissatisfaction with their relationship: transcript p. 183, 1. 1-12; p. 220, 1. 18-36.

Facts

[4] In her sentencing reasons the trial judge summarized the facts as follows:

. . . On the evening of April 14, 2012, Mr. Avadluk and another man went to the victim's home. When it was time for them to leave, the victim escorted them to her door. The other man left. Mr. Avadluk remained, and he propositioned the victim to have sex. She said no. He then proceeded almost immediately to drag her to the bathroom, where he threw her on the floor and forced her to have sexual intercourse. She resisted, and he put his hand over her nose and mouth. He then took her into the bedroom, put her on the bed, and sexually assaulted her a second time. He once again covered her nose and mouth with his hand. She passed out. Mr. Avadluk then fell asleep in another room. When the victim awoke, she chased him out of her apartment, and she sought assistance from the police. . . .

This was a summary of the evidence of the complainant and the other Crown witnesses, which the trial judge concluded was the basis of the jury's conviction.

[5] The appellant testified and acknowledged having sexual intercourse with the complainant. His evidence, however, was that any sexual contact was consensual, and consistent with their prior relationship. Contrary to the complainant's evidence, the appellant testified he had stayed at the complainant's residence on previous occasions, and slept with her about twice a month. On the night in question, he testified the complainant was intoxicated. She asked his friend to leave, but told the appellant he could stay. After the friend left, they had consensual sexual intercourse. The appellant testified the complainant then became angry because the appellant was seeing other women, she became combative, and hit him with a fan.

[6] Since the complainant and the appellant both testified that sexual intercourse occurred, the only issue for the jury to decide on the count of sexual assault was whether the Crown had proven the absence of consent beyond a reasonable doubt.

Grounds of Appeal

[7] The appellant raises seven grounds of appeal:

- (a) The jury rendered inconsistent verdicts.
- (b) The trial judge failed to answer a jury question.
- (c) The trial judge failed to give an instruction on alcohol intoxication and consent.
- (d) The trial judge failed to provide adequate assistance to the self-represented accused and improperly interfered with the conduct of his defence.
- (e) There was improper reliance on the appellant's statements.
- (f) The Crown's closing address was improper.
- (g) The trial judge's instruction on assessing conflicting evidence was inadequate.

Inconsistent Verdicts

[8] The appellant argues that, based on the evidence before the jury, his acquittal of attempted suffocation is irreconcilable with his conviction for sexual assault. For an appellate court to interfere with a conviction on the ground that it is inconsistent with an acquittal, the court must find that the guilty verdict is unreasonable. The test is summarized in **R. v R.V.**, 2021 SCC 10 at para. 29, 402 CCC (3d) 295:

29 In an appeal involving inconsistent verdicts, the applicable test to determine whether a verdict of a jury is unreasonable is: "Are the verdicts irreconcilable such that no reasonable jury, properly instructed, could possibly have rendered them on the evidence?" . . . Put another way, a conviction is unreasonable and must be set aside where the verdicts cannot be reconciled on any rational or logical basis and no properly instructed jury, acting reasonably, could have rendered the verdicts it did based on the evidence . . .

While the facts in **R.V.** caused the Court to speak in terms of an acquittal and conviction based on "the same conduct", inconsistent verdicts can be reconciled based on different requirements for the two offences of either *mens rea* or *actus reus*.

[9] The appellant argues the complainant's evidence was that the appellant had put his hand over her mouth in order to overcome her resistance, both during the first assault in the bathroom and in the second assault in the bedroom. He argues it was illogical for the jury to believe the complainant's evidence she was sexually assaulted, but to disbelieve that portion of her narrative regarding the attempted suffocation.

[10] The appellant points out that the trial judge did not believe there was any realistic possibility of a conviction on the second count (attempted suffocation) and an acquittal on the first (sexual assault), but that is not what happened. The attempted suffocation offence under s. 246(a) of the *Criminal Code* requires specific intent. As the trial judge instructed the jury:

The Crown's evidence, again, comes from [the complainant]. She said that after Mr. Avadluk dragged her into the bedroom and was on top of her on the bed, he covered her nose and mouth with his hand and he continued to hold it there until she was rendered unconscious. She regained consciousness to find he was having sexual intercourse with her. He then held his hand over her nose and mouth again while he was having intercourse with her and again she lost consciousness.

If you accept [the complainant's] evidence, it is open to you to draw an inference that Mr. Avadluk was attempting to suffocate her with the intention of overcoming her resistance and thus allowing himself to commit sexual assault upon her.

I point out, however, you are not required to accept [the complainant's] evidence on this, nor are you required to draw that inference. Indeed, you must not draw that inference if, on the whole of the evidence, you have a reasonable doubt that Mr. Avadluk did, in fact, do what [the complainant] said he did or that he intended to suffocate her - or attempt to suffocate her, rather, for the purpose of overcoming resistance to sexual intercourse.

If you are not satisfied beyond a reasonable doubt with respect to both elements of this offence, then you must find Mr. Avadluk not guilty on the count of overcoming resistance by attempted suffocation. If, however, you are satisfied beyond a reasonable doubt of both elements of this offence, that being that he held his hand over her nose and mouth and that he intended to do so for the purpose of overcoming resistance to sexual assault, you have to find him guilty of this charge. (transcript, p. 519, l. 14 to p. 520, l. 3) (emphasis added)

The trial judge instructed the jury that even if they found the appellant had placed his hand over the complainant's mouth, if they had a reasonable doubt about his intent they must acquit. The jury was also told they must acquit if they had a reasonable doubt about whether the appellant placed his hand over the complainant's mouth as she testified. Further, the jury was told they could convict on one count and acquit on the other.

[11] The trial judge also made it clear to the jury that they could draw an inference about the appellant's intent from his conduct, but that they were not obliged to draw that inference. Given the detailed instruction given, tied directly to the evidence relating to this issue, there was no need to give a separate instruction on dealing with circumstantial evidence.

[12] As the Crown argues, the jury might well have had a reasonable doubt about the reason why the appellant put his hand over the complainant's mouth: *R. v Freer*, 2020 ABCA 177 at paras. 25, 27; *R. v M.J.H.*, 2021 ONCA 133 at paras. 18, 20. That provides a reasonable and logical basis on which the jury could have convicted on the one count and acquitted on the other. The two verdicts are not inconsistent.

The Jury Question and the Instruction on Alcohol Consumption

[13] The second and third grounds of appeal are related, and can be analyzed together.

[14] There was a considerable amount of evidence about the complainant's sobriety. She acknowledged she had been drinking "straight out of the bottle", but denied being intoxicated. The other witnesses drew various conclusions about her sobriety from their observations and interactions with her. The appellant testified the complainant became increasingly intoxicated throughout the evening, and became aggressive. Neither the complainant nor any other witness testified that the complainant was sufficiently intoxicated to be unconscious or incapable of consenting.

[15] The charge to the jury provided a general instruction that intoxication might affect the reliability of a witness's testimony. During their deliberations, the jury posed a question: "What is the law regarding alcohol intoxication and consent?". The trial judge discussed possible responses to this question with the parties, but ultimately concluded the question as posed was too vague to answer, as it could relate to intoxication of the accused or the complainant. The trial judge accordingly told the jury:

Ladies and gentlemen, when your question was discussed, it gave rise to some confusion because there is not enough context. The law of intoxication and consent is extremely broad and the answer very much depends on whether you are talking about the intoxication on the part of an accused person or on the part of a complainant. So what I am going to ask you to do, rather than try and summarize a very broad area of law into a few sentences and possibly lead to more confusion, is I'm going to ask you to go back, discuss this question amongst yourselves and see if you can perhaps be more specific, and in particular are you talking about consent and intoxication with respect to Mr. Avadluk or [the complainant]? And then we can try and answer your question from there.

The jury did not respond or ask any further questions on this topic before it rendered its verdict.

[16] The appellant argues that the jury should have been given a precise answer to the question, but in the context of the evidence this response was appropriate. It was open to the trial judge to decline to give a potentially confusing answer to the question given the way it was posed: *R. v Bradshaw*, 2020 BCCA 97 at paras. 21, 36. As noted, there was considerable evidence about the complainant's sobriety, including the complainant's admission that she had been drinking. The jury would not have required any further assistance to assess its impact on her reliability. The effect on her credibility of inconsistencies did not require a separate charge. No witness suggested the complainant was too intoxicated to be capable of consent, and any instruction on that topic would have been superfluous. That was not the theory of the Crown at trial. There is no air of reality to the suggestion the jury might have convicted on the basis that the complainant was too intoxicated to consent.

[17] The appellant acknowledged he had been drinking moderate amounts, but he did not testify that his evidence of the events was clouded by intoxication. He never testified he was too intoxicated to form the specific intent required, nor that he was too intoxicated to appreciate the

complainant was not consenting. No further instruction on intoxication was called for to present his defence to the jury.

[18] How a trial judge should deal with a verdict rendered in the face of an unanswered question should obviously depend on the nature of the question considered in the context of the evidence: *R. v Ellis*, 2013 ONCA 9 at paras. 60, 66, 113 OR (3d) 641. However, given the facts and the evidence here, the jury was entitled to essentially withdraw its question, and render a verdict based on the instructions previously given. There is no general obligation on a trial judge to ask the jury if it has any further questions before it renders its verdict, if only because such questions create a risk of exposing jury deliberations: *Bradshaw* at paras. 39-41.

[19] The appellant has not identified any reviewable error relating to the jury question or the instruction on intoxication.

Inadequate Assistance to the Self-Represented Appellant and Interference with the Defence

[20] The appellant raises a number of issues respecting the conduct of the trial. The appellant, not surprisingly, was unfamiliar with the finer points of criminal procedure and the rules of evidence. The law is clear that, within limits, the trial judge should attempt to assist a self-represented accused. In addition, counsel who was appointed to cross-examine the complainant assisted the Court and the appellant on other issues. The appellant concedes that no single issue he raises would justify a new trial, but he argues that the cumulative effect of them prevented him from having a fair trial.

[21] On several occasions the trial judge had to intervene when the appellant was proceeding on a misapprehension, or when he followed improper procedures. For example, the appellant was under the mistaken belief the Crown's entire disclosure package was evidence on the record: transcript p. 157, l. 47 to p. 161, l. 7. The appellant challenged that intervention and other rulings of the trial judge on procedure and the admissibility of evidence, he implied that the Crown was manipulating witnesses, and he accused the trial judge of bias. He frequently objected to questions posed by the Crown, and was not reticent in intervening in the trial process.

[22] The complainant had made statements to the police officers. One of them was a statement she made to the police the next morning that she was now "sobering up" (transcript, p. 323, l. 24-25). While counsel appointed to cross-examine the complainant examined her sobriety in detail, he did not explore this one statement, or any potential inconsistencies arising from it. The appellant attempted to extract the contents of some of those statements when cross-examining the police officers, after the complainant had already testified, but the trial judge ruled these questions invited hearsay. The appellant argues he was prevented from showing inconsistencies in the complainant's statements that would undermine her credibility.

[23] It is unclear whether the appellant was attempting to elicit the complainant's statements for the truth of their contents, or merely on the basis that they were made and were inconsistent. It is unlikely the appellant appreciated the distinction. Despite the trial judge's ruling, some of the complainant's statements about her sobriety did end up on the record. In particular, the appellant opened his address to the jury by stating:

Okay. My closing argument is – I’m going based on the evidence that she gave in previous statements also and from previous statements from the preliminary inquiry in which she swore under oath at the preliminary inquiry also. (transcript p. 494, l. 16-21)

He then referred to a number of these prior statements, even though they were not in evidence, arguing that they were inconsistent with the complainant’s and other evidence at trial (transcript pp. 494-98). This caused the trial judge to intervene:

I think it’s important that you don’t get too far into statements that were not put in evidence. I will let you - I will just tell you now that I will be giving the jury an instruction on what to do with previous inconsistent statements.

While different procedures might have been followed, the appellant was given a full opportunity to advise the jury of allegedly inconsistent statements previously made by the complainant about her sobriety.

[24] The Crown also points out that the proper approach was to put these statements and alleged inconsistencies to the complainant while she was on the stand. The appellant has tendered fresh evidence on this point, in the form of an affidavit from the counsel appointed to cross-examine the complainant. That counsel deposes he had overlooked one prior statement made by the complainant to the police that “she had been drinking earlier that night but was now sobering up”. He deposes he should have cross-examined the complainant on this statement. As the Crown points out, this fresh evidence is not properly tendered in support of an allegation of incompetence of counsel. The appellant argues that this evidence was merely placed on the record to make it clear the failure to cross-examine the complainant on this one inconsistent statement was not incompetence or a tactical decision.

[25] As noted, there was considerable evidence on the complainant’s sobriety. She had admitted she had been drinking on the night in question, directly out of the bottle, but that “I wasn’t drunk, I was sober”. Counsel cross-examined her extensively on her level of intoxication. For example:

Q. You were drunk and passing out?

A. I knew everything what I was doing. I wasn’t even drunk. I was not passing out. Nothing. I knew exactly what was going on and whatever the hell he was doing. I knew exactly what he was doing to me. (transcript, p. 259, l. 32-37)

Counsel confronted her that other witnesses thought she was intoxicated. This evidence was not directed to the substance of the charges, but to the complainant’s credibility or reliability. It was suggested that she was being untruthful, unreliable or inconsistent about her level of sobriety.

[26] The fact the complainant stated to the RCMP constable about eight hours later that she was now sobering up cannot be described as material evidence. “Sobering up” is not specific to any previous level of intoxication. The jury would have been well aware of the issue of the sobriety of all of the witnesses and participants. There is no prospect the tendered fresh evidence would have had any effect on the verdict, nor that the absence of cross-examination on this narrow point created any risk of a miscarriage of justice: *R. v Meer*, 2016 SCC 5 at para. 2, [2016] 1 SCR 23.

The fact that defence counsel may have overlooked one question in cross-examination does not justify a new trial.

[27] Other than with respect to this one topic, there is no suggestion that the cross-examination of the complainant by counsel was inadequate or incomplete. On this record the trial judge was not obliged, on her own initiative, to recall the complainant to allow for further cross-examination.

[28] The police photographer, Constable Um, had taken numerous photographs of the complainant's apartment, but while they had all been disclosed to the appellant, they were not all introduced into evidence by the Crown. The appellant objected to the absence of one photograph in particular, showing a window or curtain, apparently with blood on them. The appellant cannot explain how this photograph would have had any impact on the verdict. In any event, the photograph had been provided to him as part of the disclosure, and it was open to him to put it in evidence if he thought it was material to his defence.

[29] The Crown had disclosed to the appellant a police Occurrence Report, which the appellant assumed had been drafted by Constable Foley. The trial judge instructed the appellant that he could ask Constable Foley what she observed about the complainant's sobriety, and that if her answer contradicted what was written in the Occurrence Report, he could put the inconsistency to the witness. The trial judge advised him, however, that he could not simply read the Occurrence Report into the record. The appellant complains that the trial judge never told him how he could confirm that Constable Foley was the author of the Occurrence Report, but Crown counsel helpfully explained to him exactly that procedure (transcript, p. 320, l. 41-47). When Constable Foley testified that she had not observed the complainant was intoxicated, possibly because she was crying and distraught, the appellant was able to put to her that various parts of the Occurrence Report noted the complainant as being "intoxicated" or "sobering up" (transcript, p. 318, l. 39-46; p. 323, l. 20-25). That was done notwithstanding that the author of the Occurrence Report was never precisely identified. There is no merit to this argument.

[30] Because there was no testing done, the trial judge instructed the appellant not to describe the red substance in the various photographs as blood. The Crown acknowledges that this direction was fastidious, but it first arose as a result of an objection by the appellant to what he felt was a leading question put to a police witness (transcript, p. 253, l. 39). In addition, many of the other witnesses referred to the existence of blood on the scene and in the photographs. The nature of the "red substance" would have been obvious to the jury, which would not have been influenced or distracted by this intervention.

[31] The appellant read portions of Constable Um's written report to her, and asked her to confirm what she had written. The appellant argues that he was not permitted to ask Constable Um if she had only observed an injury to the complainant's finger, and no other injuries, but she was asked and answered that very question (transcript, p. 357, l. 23-26). The complainant admitted that the cut on her finger was the source of much of the blood, and she did not suggest that the appellant was directly responsible for this injury. Other witnesses testified, and there were photographs showing bruising on her arms and an injury to her head. She was taken to the hospital by the RCMP the next morning, but no medical evidence was tendered by the Crown. The absence of any evidence that she suffered any significant injuries was the most telling factor.

[32] In summary, the appellant has not demonstrated that the trial judge failed to give him a reasonable amount of assistance in conducting his defence. The trial judge attempted to do so, and in some cases the appellant was resistant to the advice and directions given. Further, any interventions by the trial judge did not prevent the appellant from making full answer and defence.

Improper Reliance on the Appellant's Statements

[33] The Crown asked questions about a statement the appellant had made about knocking out another man. This statement was made by him to one of the lay defence witnesses. The appellant argues, on appeal, that this was inadmissible evidence of discreditable conduct. This evidence was admitted by the trial judge as it was relevant to an alternative explanation for the appellant's reported injuries. The witness and the appellant testified he acted in self defence, which evidence was uncontradicted. Acting in self defence is not so discreditable to have required any caution from the trial judge, and this information would not have had any improper impact on the jury. The trial judge was not told that the incident would be presented as self defence, and cannot be criticized for not excluding the evidence based on information she did not know.

[34] The appellant also objects to the entry of a statement he made to a police officer. The context was that Corporal Nason arrested the appellant on the outstanding warrant. The Crown asked Corporal Nason a general question about whether she did anything, not intending to elicit any statement made by the appellant. She testified she cautioned the appellant and provided him an opportunity to speak with counsel. She also reported the appellant complained about injuries, which he wanted photographed. The Crown concedes that while this was not a "confession", it was a statement to a person in authority and a *voir dire* should have been held. However, as the Crown correctly points out no prejudice resulted. It was the appellant who asked that his injuries be photographed, and the officer was merely reporting how she came to take the photographs. There is no question that the statement was voluntary. If a *voir dire* had been held the appellant undoubtedly would not have objected to admission of the statement.

[35] The appellant cross-examined Corporal Nason about the photographs she took, and particularly about whether she observed any bruising. He then asked her whether he had reported that "he had got hit with an object in the chest". The Crown properly objected to this as an attempt to introduce a prior consistent statement. The trial judge correctly advised the appellant he would be free to give this evidence if and when he testified (transcript, p. 407, l. 38 to p. 408, l. 1). He subsequently did testify to his injuries, referring to the photographs and what caused them (transcript, pp. 444-46).

[36] The appellant argues, however, that once a portion of his statement to Corporal Nason was introduced, the Crown was required to tender the entire statement, citing as authority *R. v Mallory*, 2007 ONCA 46 at paras. 203-205, 217 CCC (3d) 266 and *R. v Rojas*, 2008 SCC 56 at para. 37, [2008] 3 SCR 111. Constable Nason had testified in chief: "But he insisted that he was sore and that he had been hit there [in the ribs], so I took a photo to document it" (transcript, p. 405, l. 29-31). The appellant was only seeking to have the constable repeat this evidence, not contradict or cross-examine on it. When he testified, the appellant provided his version of how his ribs were injured when the complainant struck him with the lamp (transcript, p. 444, l. 22 to p. 446, l. 17). The Crown also consented to him entering an x-ray report documenting his injury.

[37] Further, although the appellant argues that his whole statement to Corporal Nason should have been admitted, he has not outlined what in that statement was relevant, much less exculpatory. During his cross-examination, the appellant testified:

Q Now these photos - you asked Corporal Nason to take that photos; correct? Take those photos of you?

A She asked me if I wanted to take photos of my injuries and I said yes.

Q Isn't it true that you told Corporal Nason that you had injuries and asked her to photograph them?

A Yes.

Q Yeah. You asked her?

A I did not ask her. She asked me if I had injuries and I told her. I said, "yes". And she said, "do you want to take photos?" And I said, "yes".

There is no apparent relevance or materiality to who initiated the taking of photographs. If there were any exculpatory passages in the statement, the appellant has not identified them.

[38] The appellant has suffered no prejudice from the technical breach of the entire statement rule. No reviewable error has been established regarding this ground of appeal.

The Crown's Closing Address

[39] In its address to the jury, the Crown presented the defence as being that the complainant had made up the allegation of sexual assault because of jealousy. Given the cross-examination of the complainant (transcript p. 260, l. 16-22; p. 265, l. 28-33), the appellant's evidence (transcript p. 442, l. 29-32; p. 443, l. 34-37), and the premise of the s. 276 order (see *supra*, para. 3) that was a fair characterization. In light of the suggestion of fabrication it was not improper for the Crown to ask the jury whether it was consistent with common sense that the complainant would fabricate the allegations: *R. v Batte*, (2000), 49 OR (3d) 321 at paras. 120, 123, 145 CCC (3d) 449 (CA). There was no "oath helping" here, as occurred in *R. v R.M.*, 2022 ONCA 850 at paras. 38-42. The appellant argues the jury should have been cautioned that the absence of a motive to lie did not mean the complainant was telling the truth. The Crown's address confirmed the appellant did not have to prove anything, including any motive to lie, and no request was made for this issue to be addressed in the jury charge. No reviewable error has been shown.

[40] The Crown also invited the jury to consider that the complainant had "not wavered from" her account of the assault. The appellant argues this implicitly relied on prior consistent statements, but no such prior statements were actually on the record. This comment was made during the Crown's submissions on the frailties of some aspects of the complainant's evidence, and was not improper. The Crown's point was that the complainant's memory of the sexual assault itself was clear.

The Instruction on Assessing Conflicting Evidence

[41] The appellant challenges the instruction on assessing conflicting evidence, arguing it did not comply with *R. v W.(D.)*, [1991] 1 SCR 742. The appellant argues the charge did not

sufficiently outline the option that the jury might be left in a state of doubt, because they did not believe either the complainant or the appellant. However, the trial judge's *W.(D.)* instruction included:

. . . When a defendant testifies or calls evidence and you are trying to determine the facts, you do not do that by comparing the accused version of the events with the other - with the Crown's witnesses' version of events and then choosing or preferring one or another. . . . (transcript, p. 515, l. 27-32)

The trial judge told the jury there was a "particular reasoning process" to apply when the accused testifies, and included as part of the charge:

. . . Even if you do not believe all of Mr. Avadluk's evidence, if his evidence leaves you - or not just his evidence but the evidence of Mr. Feldberg and Mr. Epelon as well. If that leaves you with a reasonable doubt about Mr. Avadluk's guilt with respect to any element of the offence - in other words if it leaves you unsure - then you have to find him not guilty and again your deliberations are over. . . . (transcript, p. 516, l. 36-44)

The guideline in *W.(D.)* does not require some sort of "literal tripartite incarnation": *R. v Szczerbaniwicz*, 2010 SCC 15 at para. 14, [2010] 1 SCR 455. The appellant has not identified any error.

[42] The appellant also argues the instruction on the second part of the *W.(D.)* test did not confirm the burden on the Crown to prove the case beyond a reasonable doubt, but that immediately followed in the third part of the instruction. In addition, the charge made frequent references to the burden being on the Crown, and never shifting. The charge given to the jury was sensitive to the evidence on the record and was legally sufficient.

Conclusion

[43] In conclusion, the appellant has been unable to show any reviewable error that would undermine the jury's verdict. The tendered fresh evidence is not admitted, because it would not have any impact on the outcome of the appeal: *R. v A.A.K.*, 2023 MBCA 8 at para. 27. The appellant did not receive a perfect trial but he did receive a fair trial, which is what the law requires. It is important not to conflate a fair trial with the most advantageous trial possible from the accused's point of view: *R. v Bjelland*, 2009 SCC 38 para. 22, [2009] 2 SCR 651 quoting *R. v Harrer*, [1995] 3 SCR 562 at para. 45. There is no risk of a miscarriage of justice on this record and the appeal is accordingly dismissed.

Appeal heard on April 18, 2023.

Memorandum filed at Yellowknife, NWT
this 27th day of April, 2023

Slatter J.A.

Authorized to sign for: McDonald J.A.

Feehan J.A.

Appearances:

B. Green
for the Respondent

R. Clements
for the Appellant

IN THE COURT OF APPEAL
FOR THE NORTHWEST TERRITORIES

Between:

His Majesty the King

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- and -

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MEMORANDUM OF JUDGMENT
