

MEMORANDUM

June 4, 2020

TO: DISTRIBUTION LIST

FROM: Shirley Mair
Senior Judicial EA
Supreme Court Judges' Chambers

RE: *R v Lafferty*, 2020 NWTSC 25

File No.: S-1-CR-2017-000-168

ERRATUM

On page 13 after paragraph [74] the heading reads:

Evidence of Prior Discreditable Conduct

It should read:

Evidence of Prior Discreditable Conduct

Please replace Page 13 with the attached.

Shirley Mair
Senior Judicial EA

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

Respondent

- and -

KELVIN AARON LAFFERTY

Appellant

MEMORANDUM OF JUDGMENT

INTRODUCTION

[1] This is an appeal from conviction following a trial held in Territorial Court. The Appellant was convicted of four offences: one count of sexual assault and three counts of assault.

[2] For the reasons that follow, I conclude that the appeal should be dismissed.

TRIAL

[3] The Appellant was charged with five counts on January 2, 2017 arising from incidents which occurred in December 2016 in Behchokò, Northwest Territories and which involved the same complainant. The Appellant plead not guilty to all charges and the matter was set for trial.

[4] On May 25, 2017, the matter was set for trial in Behchokò. The complainant was subpoenaed for the trial but did not attend. The Crown sought a warrant for the complainant advising that the Crown had been in communication with her and was hoping that she would attend. A warrant was issued for her arrest and the matter was adjourned to the following day.

[5] The following day, the Crown was prepared to proceed and the complainant was present. Counsel for the Appellant applied to be removed from the record citing a breakdown in the solicitor-client relationship. The application was granted. The Appellant sought an adjournment to retain new counsel. The Crown opposed the adjournment stating that the Crown was prepared to proceed, the complainant was “very reticent” to come to court and was “very traumatized and wants to get this over with.”

[6] The Trial Judge granted the application to adjourn the trial. The complainant, who had been arrested and was held in custody overnight, was brought into the courtroom with the public excluded. The Trial Judge advised the complainant that the new trial date would be July 5, 2017 and that she would be released on a recognizance which would require her to attend court on July 5, 2017 at 10:00 a.m. The complainant said “okay” and responded “no” when asked if she had any questions.

[7] The trial was held over several days, from July 5 to 7, 2017 and August 24 to 25, 2017, in Behchokò and Yellowknife. During the trial, the Crown stayed a breach of probation charge leaving one count of sexual assault and three counts of assault before the court.

[8] When the trial proceeded, it was in front of the same judge who had presided in May. The complainant was not present. The Crown advised the Trial Judge that the Crown was not seeking a warrant for the arrest of the witness given that one had been issued previously but was prepared to proceed in the complainant’s absence.

[9] A *voir dire* was entered into on the admissibility of the complainant’s out-of-court statement. The investigating officer, Cst. Meko, testified for the Crown. The complainant’s video-recorded statement and a transcript were played and made exhibits on the *voir dire*. The defence called Jenna Cook, who is a Crown witness co-ordinator, Shirley Lafferty and Marie Lafferty. An Agreed Statement of Facts outlining communications between the complainant and the Crown’s office was entered into evidence.

[10] Following the *voir dire*, the complainant's statement was ruled admissible and made an exhibit at the trial. The Agreed Statement of Facts was also made an exhibit at the trial.

[11] Later in the trial, the complainant testified for the defence. She testified and denied that the Appellant had assaulted or sexually assaulted her. She denied that the Appellant bit her nose, claimed that she had consensual sexual intercourse with the Appellant, and that her injuries were caused by her own actions. She claimed that she was intoxicated when providing her statement, had an incomplete memory of giving the statement and had lied to the police.

[12] The Crown sought to cross-examine the complainant regarding prior incidents of violence involving the Appellant. The defence objected to this line of questioning. After hearing submissions from counsel, the Trial Judge allowed the Crown to cross-examine the complainant in this area. The complainant was asked about her relationship with the Appellant including an incident where the Appellant was convicted of aggravated assault in 2015 for biting her nose.

[13] Following the trial, on September 8, 2017, the Appellant was convicted of the four remaining counts. On November 24, 2017, he was sentenced to 28 months of imprisonment (less remand credit) followed by 3 years of probation.

ISSUES ON APPEAL

[14] The Appellant claims that the Trial Judge erred in admitting the complainant's out-of-court statement because the pre-conditions for admission under the principled approach, necessity and threshold reliability, had not been met. The Appellant also claims that the Trial Judge erred in allowing the Crown to introduce evidence of prior discreditable conduct without properly assessing the probative value and prejudicial effect of the evidence.

[15] The Respondent argues that the Trial Judge did not err in admitting the out-of-court statement of the complainant. The Trial Judge's conclusion on necessity was reasonable and entitled to deference. The Trial Judge properly considered procedural and substantive reliability in her assessment of threshold reliability. The Respondent also argues that the Trial Judge did not err in allowing the complainant to be cross-examined about prior violence between the complainant and the Appellant in their relationship.

ANALYSIS

Admissibility of the Out-of-Court Statement

[16] Hearsay evidence is presumptively inadmissible unless it fall under an exception to the hearsay rule. It may be admissible under an existing hearsay exception or it may be admitted pursuant to the principled approach if it meet the requirements of necessity and threshold reliability.

[17] Where evidence is admissible pursuant to an exception to the hearsay rule or the principled approach, a trial judge still retains residual discretion to exclude evidence if its prejudicial effect outweighs its probative value.

Standard of Review

[18] The standard of review in an appeal relating to the admissibility of hearsay evidence was re-stated in *R v Youvarajah*, 2013 SCC 41 at para 31:

The admissibility of hearsay evidence, such as the prior inconsistent statement in this case, is a question of law. Of course, the factual findings that go into that determination are entitled to deference and are not challenged in this case. As well, a trial judge is well placed to assess the hearsay dangers in a particular case and the effectiveness of any safeguards to assist in overcoming them. Thus, absent an error in principle, the trial judge's determination of threshold reliability is entitled to deference: *R. v. Couture*, 2007 SCC 28, [2007] 2 S.C.R. 517 (S.C.C.), at para 81.

Necessity

[19] In trials, witnesses testify before a trier of fact who is able to observe their evidence and assess their demeanour. Their testimony can also be tested by cross-examination. The introduction of an out-of-court statement, hearsay evidence, makes it more difficult for a trier of fact to assess the witness' evidence because they are unable to observe the witness testify and the evidence is not subject to cross-examination. One of the greatest dangers associated with the admission of hearsay evidence is the inability to cross-examine the maker of the statement.

[20] It is also recognized that a blanket exclusion of hearsay evidence would result in the loss of valuable evidence, evidence which might be necessary and reliable.

[21] In considering whether the admission of the evidence is necessary, it is most often because the maker of the statement is unavailable for some reason such as the

witness is out of the jurisdiction, deceased, refuses to attend court or is otherwise unavailable. Necessity can arise in a number of situations.

[22] Necessity is to be considered flexibly and is interpreted as being “reasonably necessary”. Reasonable necessity requires that “all reasonable efforts” be made to obtain the evidence of the witness. *R v Khan*, [1990] 2 S.C.R. 531 at para 29; *R v Khelawon*, 2006 SCC 57 at para 104.

[23] Where a witness is not present in court, necessity is not satisfied simply because the proponent of the statement claims that the witness is unavailable. As stated in *R v O’Connor*, [2002] OJ No 4410 (CA) at para 57:

Necessity cannot be equated with the unavailability of a witness. Rather, it must be shown that hearsay is the only available means of putting the evidence before the court.

[24] One of the concerns expressed in *R v Kopalie*, 2009 NUCJ 09, was that the police and Crown could not expect to routinely rely on the introduction of an out-of-court statement when a witness does not attend court without evidence of the efforts made to obtain the evidence of the witness. That is a valid concern. Necessity is a flexible concept but it still requires that the proponent of the statement demonstrate that reasonable efforts to obtain the evidence of the witness were made before it will be met.

[25] Whether necessity has been satisfied will depend on the particular facts and circumstances of each case: why the witness is not available and what efforts have been made to obtain the evidence of the witness.

[26] In submissions on the *voir dire*, counsel specifically addressed the issue of necessity. The Trial Judge questioned both counsel on the issue of necessity. The Crown argued before the Trial Judge that a witness warrant was not required in the circumstances of the case given the complainant had previously not attended court and referred to evidence on the *voir dire* about the complainant’s reluctance to testify. The Trial Judge questioned the Crown about whether it had been established that the complainant was unavailable.

[27] The defence argued that because a warrant had not been sought for the arrest of the complainant (as it was on the first trial date), that necessity had not been made out. The Crown had not made reasonable efforts to secure the attendance of the complainant.

[28] In this case, there was no specific evidence of recent efforts to locate the complainant by the police or the Crown. The Crown did not seek a warrant for the arrest of the complainant when she did not attend on the second trial date. This is something that the Trial Judge considered, she acknowledged twice in her ruling that the Crown could have sought a warrant. Despite this, on the basis of the other evidence before her and her knowledge of what had occurred on the previous trial date, the Trial Judge was satisfied on a balance of probabilities that the complainant was not available for trial and that necessity had been met.

[29] In her ruling on the issue of necessity, the Trial Judge noted that the complainant, while subpoenaed, had not attended on the previous trial date, had been arrested and released on a recognizance to attend court, and had not attended. The Trial Judge also referred to the evidence of Marie Lafferty who had been in contact with the complainant and it was apparent from her evidence that the complainant knew that the trial was proceeding. The Trial Judge stated:

When I consider the fact that [the complainant] did not attend at the last trial date, had to be arrested and brought to court in custody, and even though being released in front of a judge, and it was by me, on a recognizance ordering her to attend court this week for the trial, she did not appear, I am satisfied on the balance of probabilities that [the complainant] will not come to court. And it is not a case simply that she is not available at this proceeding, and perhaps the Crown should have asked for a warrant, they did on the last time and she was arrested. Constable Meko was asked when the last time he saw [the complainant] in the community was, and he testified it was likely the last day when she was in court in May. Marie Lafferty, who is looking after her grandchild and in contact with her does not know where she is.

I do draw an inference that [the complainant] does not want to be found. Whether the Crown should have once again asked for a warrant and an adjournment of the trial, that may have been a step they could have taken, but I am not about to find that it is necessary to take that step. The Crown made a decision to proceed with the matter.

So I am satisfied on the balance of probabilities that the witness was not available for trial.

[30] In determining whether reasonable efforts were made to obtain the evidence of a witness, consideration of what has occurred on prior dates during the proceeding can be relevant. The Trial Judge was entitled to consider the previous trial date and the complainant's failure to attend on that date. The witness had been subpoenaed for the May 2017 trial date, had not attended and a warrant had been issued for her arrest. The complainant had been arrested, held in custody overnight and brought to court the next morning. The trial could have proceeded

on that date with the complainant's evidence, however, the Appellant obtained an adjournment of the trial after his counsel was removed from the record on the basis of a breakdown of the solicitor-client relationship. The complainant was then released on a recognizance to attend for the trial in July 2017 whereupon she did not attend.

[31] There was also the evidence of the investigator regarding his contact with the complainant, that he had not seen her since the last trial date and the ambivalence that she had expressed to him about proceeding with the charges. Two family members of the Appellant, Shirley Lafferty and Marie Lafferty, also testified that they had not seen the complainant and referred to emails that she had apparently sent to the Crown Witness Coordinator seeking to have the charges dropped.

[32] Jenna Cook, a Crown Witness Coordinator, also testified regarding her contact with the complainant and the complainant's communications with her including an e-mail that she had received apparently from the complainant on July 5, 2017, which was the first day of the *voir dire*, stating that the complainant "was intoxicated" and "wanted to punish him over my jealousy."

[33] The Trial Judge is entitled to deference on her assessment of the evidence and her findings of fact. On the record before the Trial Judge and based upon her knowledge of the matter, it was clear that the complainant was not interested in participating in the trial at that point. A review of the record reveals that the Trial Judge's conclusions with respect to necessity were reasonably supported by the evidence. The Trial Judge's decision that necessity had been met in this case was not unreasonable and is entitled to deference.

Threshold Reliability

[34] A trial judge is required to consider whether the statement meets the requirement of threshold reliability in order for an out-of-court statement to be admissible. A statement must be "sufficiently reliable to overcome the dangers arising from the difficulty of testing it." *Khelawon*, para 49.

[35] The inability to contemporaneously cross-examine the maker of the statement is one of the central concerns with the admissibility of hearsay evidence. The focus of the inquiry is whether this concern is sufficiently overcome to justify admitting the evidence as an exception to the exclusionary rule. *Khelawon*, para 61.

[36] The threshold reliability of an out-of-court statement can be established by showing the substantive reliability or procedural reliability of the statement. Substantive reliability is concerned with whether there are sufficient circumstantial or evidentiary guarantees that the statement is inherently trustworthy. Procedural reliability is concerned with whether there are adequate substitutes for testing the truth and accuracy of the statement. *R v Bradshaw*, 2017 SCC 35 at para 27.

[37] To determine whether a statement is inherently trustworthy, the trial judge can consider the circumstances in which it was made and any evidence that corroborates or conflicts with it. *Bradshaw*, para 30.

[38] In *Bradshaw*, the Supreme Court of Canada set out a framework for determining whether corroborative evidence can assist in the substantive reliability inquiry (at para 57):

1. identify the material aspects of the hearsay statement that are tendered for their truth;
2. identify the specific hearsay dangers raised by those aspects of the statement in the particular circumstances of the case;
3. based on the circumstances and these dangers, consider alternative, even speculative, explanations for the statement; and
4. determine whether, given the circumstances of the case, the corroborative evidence led at the *voir dire* rules out these alternative explanations such that the only remaining likely explanation for the statement is the declarant's truthfulness about, or the accuracy of, the material aspects of the statement.

[39] In considering corroborative evidence, it must show that the only likely explanation for the statement is the truthfulness or accuracy of the material aspects of the statement. Corroborative evidence which is equally consistent with truthfulness and accuracy as with an alternative, even speculative, explanation is of no assistance in the inquiry. *Bradshaw*, paras 47-48.

[40] Procedural reliability is concerned with whether there are adequate substitutes for testing the truth and accuracy of the statement. These substitutes can include video recording of the statement, the presence of an oath, a warning about the consequences of lying and some form of cross-examination of the witness, such as at the preliminary inquiry or at trial. *Bradshaw*, para 28.

[41] Substantive reliability and procedural reliability may work in tandem and are not mutually exclusive. The factors that are relevant to one may also be relevant to the other. The threshold reliability standard is, however, high and the statement must be sufficiently reliable to overcome the specific hearsay dangers. A combined approach must not lead to the admission of statements with procedural

safeguards and guarantees of inherent trustworthiness that are insufficient to overcome the hearsay dangers. *Bradshaw*, para 32.

[42] The Appellant claims that the Trial Judge erred in the consideration of the threshold reliability of the statement in two respects: 1) by failing to consider whether contemporaneous cross-examination of the complainant would add anything to the trial process; and 2) by failing to consider or identify any alternative explanations for the hearsay statement.

[43] The Appellant argues that the Trial Judge failed to meaningfully consider whether contemporaneous cross-examination of the complainant would add anything to the trial process.

[44] In the ruling on the *voir dire*, the Trial Judge considered the reliability of the statement in her analysis. The Trial Judge reviewed the circumstances surrounding the taking of the statement, the statement itself, the corroborative or confirmatory evidence and the evidence of the intoxication of the complainant.

[45] The Trial Judge then stated:

Also I have considered that there is no cross-examination, which is often said to be one of the best ways to test the evidence of a person, and because she is not here, she has not been able to be cross-examined. I am not deciding whether or not what she says in the statement is true, simply whether or not it is sufficiently reliable to be considered on the trial as evidence. So I am not making any findings of credibility, simply whether there is a threshold reliability with respect to the statement.

[46] In a trial, cross-examination of a witness is the ideal and it permits the evidence of the witness to be tested. In considering the admission of an out-of-court statement, the inability to cross-examine the witness, as mentioned above, is one of the greatest dangers associated with the admission of hearsay evidence.

[47] In the analysis of threshold reliability, the trial judge's "pre-occupation" is whether contemporaneous cross-examination would add anything to the trial process. *Bradshaw*, para 40.

[48] In this case, the focus of the *voir dire* was on the unavailability of the complainant and whether the statement was sufficiently reliable to warrant its admission. Underlying this consideration was the concern about whether contemporaneous cross-examination of the complainant would add anything to the trial. The Appellant's counsel at trial specifically raised the inability to cross-

examine the complainant in his submissions before the Trial Judge. At that point, no one expected that the complainant would be available for cross-examination.

[49] The Trial Judge concluded that the complainant was unavailable to testify at the trial. The Trial Judge also considered whether there was other evidence which could be adduced instead of the complainant's statement. Keith Washie was apparently a witness to part of what occurred but the Trial Judge concluded that while he was present, it was not clear that he witnessed the entire assault.

[50] While the Trial Judge did not specifically ask and answer the question of "whether contemporaneous cross-examination of the complainant would add anything to the trial process," she did consider the issue. Ultimately, the lack of cross-examination which would occur with the admission of the complainant's statement was considered by the Trial Judge and alluded to in her reasons.

[51] The Appellant also argues that the Trial Judge failed to consider or identify any alternative explanations for the hearsay statement as required in *Bradshaw* and, therefore, failed to consider a rational basis to reject the alternative explanations.

[52] In *Bradshaw*, the Supreme Court of Canada clarified the test for threshold reliability of a hearsay statement and limited when corroborative evidence could be used to establish substantive reliability.

[53] While *Bradshaw* was referred to by Crown counsel in submissions, the Trial Judge's analysis of the corroborative evidence was not structured following the four steps outlined in *Bradshaw*. *Bradshaw* was released on June 29, 2017 and the Appellant's trial began a week later, on July 5, 2017, so perhaps it is not surprising that the Trial Judge's analysis did not follow the four step analysis outlined in *Bradshaw*. What has to be considered is whether the Trial Judge's ruling considered the substance of those steps in the context of the circumstances of the case in determining whether threshold reliability had been met.

[54] The first step is to identify the materials aspects of the hearsay statement that are tendered for their truth. The complainant's statement detailed several violent incidents involving the Appellant over a period of approximately two weeks. The materials aspects of the statement that were tendered for their truth were an assault where the Appellant bit the complainant's nose and sexually assaulted her on December 20, 2016, an assault where the Appellant hit the complainant's head and another assault where he pushed her to the ground, both of which occurred between December 4-9, 2016.

[55] The specific hearsay dangers raised by the statement were the sincerity and accuracy of the out-of-court statement. The accuracy of the statement was a danger because the complainant had consumed alcohol and was intoxicated during the incident and when providing the statement. The sincerity of the statement was a danger because there was evidence that the complainant was motivated to lie because of jealousy.

[56] The intoxication of the declarant of the statement is a concern when considering threshold reliability because of the impact that the consumption of alcohol and/or drugs can have on the memory and perception of the declarant and whether she accurately recounted the events in question in her statement.

[57] In her ruling, the Trial Judge considered the intoxication of the complainant. The Trial Judge acknowledged that the complainant was intoxicated to some degree but that there was nothing to cause her to conclude that the complainant was “so drunk that she did not know what she was doing or what she was saying.”

[58] The Trial Judge reviewed the complainant’s statement and noted that the complainant did not appear too intoxicated, was fairly clear and quite detailed about some aspects of the statement, that the complainant made sense, appeared to understand the questions and corrected herself at one point. The Trial Judge also observed that the questions asked by the police officer were not leading questions.

[59] In reviewing the record, the conclusions of the Trial Judge on the issue of intoxication were reasonably supported by the evidence and are entitled to deference. The Trial Judge adequately considered the issue of the intoxication of the complainant.

[60] The analysis set out in *Bradshaw* requires the court to consider alternative, even speculative, explanations for the statement. In submissions on the *voir dire*, the Appellant’s counsel proposed alternative explanations for the statement: that the complainant was motivated by jealousy and that another person, possibly Mr. Washie or another unknown person, was responsible for the complainant’s injuries.

[61] On appeal, the Appellant raised another alternative explanation which was not argued before the Trial Judge at the *voir dire*: that the complainant injured herself by falling while intoxicated, which was what was claimed by the complainant later in the trial when she testified. While this was not argued before the Trial Judge on the *voir dire*, she did address the issue in her reasons convicting the Appellant. It can be inferred that had this alternative explanation been raised at

the *voir dire*, the Trial Judge would have addressed the issue in the same manner as she did in her reasons convicting the Appellant.

[62] The Trial Judge considered whether the complainant was motivated to lie by jealousy. The Trial Judge noted that there was some evidence that the complainant or the Appellant may have been jealous and that the complainant may have a motive to be untruthful. The Trial Judge acknowledged that the complainant said “I was jealous.” However, the Trial Judge concluded that she could not find that there was a motive to fabricate simply because of that statement. In coming to that conclusion, the Trial Judge considered the evidence of the bloody sheet and the complainant’s injuries which she had found corroborative of what the complainant had said occurred.

[63] The Trial Judge concluded that the photographs of the complainant’s injury to her nose which showed a wound in the crease of her nose and bruising around the tip were consistent with the complainant’s claim that the Appellant had bit her causing her to bleed profusely. The photographs of the bloody bed sheet were also found to be corroborative of the complainant’s claim.

[64] The Trial Judge rejected the complainant’s testimony at trial about how she had received the injury stating:

That story is ridiculous and completely at odds with the photographs of both the injury and the blood on the sheet and the blood on the mattress topper.

[65] In rejecting the complainant’s evidence, the Trial Judge found that it did not explain the wound or the injury to her face or the fact that the complainant was crying and upset and frantic when the police officer first encountered her.

[66] At trial, the complainant had testified that she had assaulted the Appellant. She testified that he “moved me” and then she fell down on the floor. She bled out of her nose after she hit it on the floor or on the side table. The complainant also described receiving a “scratch” on the side of her nose which healed quickly.

[67] The complainant’s evidence about her injury was contradicted by Cst. Meko, the officer who responded to the call, and the photographs. Cst. Meko testified that when he encountered the complainant, she was bleeding substantially and there was a slit in the crease of her nose and cheek and that her nose was red like it was bruised.

[68] The photographs (which are in black and white in the Appeal Book) depict a wound between the complainant’s nose and cheek and a darker area at the tip of

her nose, which is consistent with the evidence of Cst. Meko and appearing to be more than the scratch described by the complainant.

[69] The Trial Judge's conclusion that the complainant's explanation that she injured herself was contradicted by the photographs of the injury and the blood on the sheet and mattress topper and that the injury was consistent with a bite were reasonably supported by the evidence and are entitled to deference.

[70] While the Trial Judge's decision does not explicitly address the issue of alternative explanations for the statement as contemplated by *Bradshaw*, those issues were raised before the Trial Judge and a review of the Trial Judge's reasons demonstrate that she considered the alternative explanations that were raised before her.

[71] The Appellant also argued that the Trial Judge erred in admitting the complainant's statement without ever considering whether threshold reliability had been established for all of the incidents detailed in the statement.

[72] The most serious allegations were the incidents that occurred on December 20, 2016. These allegations constituted the bulk of the complainant's statement. The analysis of the Trial Judge with respect to reliability focused on those events and the corroborative evidence which was considered related to those events. The incidents had occurred shortly before the complainant provided her statement to the police officer. They had resulted in injuries to the complainant. Naturally, the focus of the complainant and the police officer during the statement was on the December 20, 2016 incidents.

[73] I do not understand that the law requires that every material aspect of the statement must be corroborated by evidence on the *voir dire* before the statement can be found to be admissible. The fact that not all of the statement was corroborated by other evidence and, in particular, the other incidents of assault described by the complainant, is not determinative of whether the statement could be found to be substantively reliable. The issue is whether the statement as a whole can be considered substantively reliable. See *R v Hall*, 2018 MBCA 122 at paras 79-85.

[74] An analysis of the Trial Judge's reasons, read as a whole and considering the submissions of counsel and the trial record, demonstrate that she adequately considered the substance of the steps outlined in *Bradshaw* in the context of the facts and the issues of the case. Absent an error in principle, the Trial Judge's determination on threshold reliability is entitled to deference.

Evidence of Prior Discreditable Conduct

[75] In order to be admissible in a trial, evidence must be relevant, material and not subject to an exclusionary rule. Evidence of prior discreditable conduct of an accused, or bad character evidence, is a form of propensity evidence and is presumptively inadmissible. While this type of evidence is often relevant, it is presumptively inadmissible to introduce propensity evidence against an accused person.

[76] This evidence can be admitted, exceptionally, where the probative value of the evidence in relation to an issue in question outweighs the prejudicial effect of the evidence. *R v Handy*, 2002 SCC 56.

[77] Evidence of prior discreditable conduct in a domestic relationship is usually relevant because it can provide a contextual narrative to the relationship, it can demonstrate an animus on the accused's part toward the complainant, consistent with the offences charged, and it can be relevant to the complainant's explanation for her failure to leave the relationship and to report the abuse earlier. The evidence can also be relevant to the credibility of the complainant. *R v F(DS)*, [1999] OJ No 688 (CA).

Standard of Review

[78] The standard of review with respect to the admissibility of evidence was stated in *R v Larsen*, 2012 NWTCA 9 at para. 10:

The admissibility of evidence is usually an extricable question of law reviewable on the correctness standard, although underlying fact findings are reviewed for palpable and overriding error: *R v Blea*, 2012 ABCA 41, [2012] AJ No 106 (QL) at para 31. As the task of balancing probative value against prejudicial effect involves an exercise of judicial discretion, in the absence of a clear error of law, a trial judge's decision to admit similar fact evidence is entitled to substantial deference: *Blea* at para 33; *R v Buna*, 2009 BCCA 536, 249 CCC (3d) 156 at para 53.

Admissibility of Prior Discreditable Conduct

[79] In *Handy*, the Supreme Court of Canada established a framework for the analysis of the admissibility of this type of evidence. In *Watt's Manual of Criminal Evidence*, 2019 (Toronto: Thomson Reuters) at p. 605, the framework was described as follows:

The admissibility of evidence of similar acts is determined by

- i. the relevance of the evidence to an issue in the case, otherwise than by demonstrating propensity of [the accused] to commit crimes or otherwise disreputable acts;
- ii. the probative value of the evidence;
- iii. the prejudicial effect of the evidence; and
- iv. a balancing of the probative value against the prejudicial effect of the evidence.

[80] The Trial Judge's role in this analysis is one of a gatekeeper which involves the exercise of considerable discretion. The Trial Judge must assess the relevance and the weight of the proposed evidence to determine the probative value of the evidence and then determine if the probative value of the evidence is sufficiently great that it exceeds the prejudicial effect. There will always be a prejudicial effect to this type of evidence and there is a risk that the trier of fact will engage in a forbidden chain of reasoning in considering this type of evidence. Moral prejudice and reasoning prejudice can arise when this type of evidence is admitted at trial.

[81] In this trial, the complainant testified for the defence and recanted her statement, testifying to a different version of events that did not implicate the Appellant. During the cross-examination of the complainant, the Crown sought leave to cross-examine the complainant regarding previous violence between the complainant and Appellant. While initially the application was framed as something that had been brought up by the complainant in her evidence, a review of court reporter's notes did not reveal that to be the case. The Crown subsequently argued that it was for the limited purpose of understanding the dynamic in their relationship. The relationship dynamic was important to the determination of ultimate reliability of the complainant's statement.

[82] The defence objected to the line of questioning arguing that it raised the issue of propensity evidence and that it permitted the Crown to introduce the Appellant's criminal record through the complainant. The defence conceded that the relationship had been tumultuous but argued that it was not necessary to delve into the details of the previous offences. The defence pointed out that prior convictions and the facts underlying them could only be admitted for a limited purpose.

[83] The Trial Judge permitted the line of questioning stating:

Clearly, from what we know of the nature of domestic violence, it is not unusual for a witness to recant, and the evidence that the Crown seeks to elicit may be very helpful. I am not sure what it will be, but it may be very helpful in

understanding the position that [the complainant] is in and to assist in assessing her credibility.

The circumstances of this case, as I said, I realize this evidence will not go to propensity, nor is it to be considered as evidence of bad character. That is at the forefront of my mind, but I will allow the Crown to cross-examine on the areas that the Crown has sought to.

[84] The Appellant claims that the Trial Judge could not properly assess the admissibility of the proposed evidence without knowing what the evidence was and why it might be relevant. The Appellant argues that the Trial Judge failed in her role as an evidentiary gatekeeper because she did not properly assess the evidence and whether its probative value outweighed its prejudicial effect.

[85] A trial judge cannot rule upon the admissibility of similar fact evidence without knowing what the proposed evidence is and its relevance to the issues in question. Similarly, a determination about whether probative value outweighs prejudicial effect cannot be made without knowing what the evidence is. *R v Roberts*, 2004 ABCA 114 at para 39.

[86] A *voir dire* into the admissibility of the evidence was not held. When this issue was raised, it was suggested by the Crown that a *voir dire* be entered into and the Trial Judge declined to do so, stating that it was not required if the witness was being excused. The complainant was excused from the courtroom during counsel's submissions and the Trial Judge's ruling.

[87] At this point in the trial, the complainant had testified and provided a version of events which differed significantly from the statement she had provided to the police. In addition, the motive of jealousy had been raised by the complainant in her e-mail communication with the Crown Witness Coordinator. The credibility of the complainant was going to be a significant issue in the trial.

[88] The evidence of prior violence in the relationship between the Appellant and complainant was a relevant consideration. It could provide context to the dynamics of the relationship and be relevant to the issue of the complainant's potential motive to fabricate evidence.

[89] The Trial Judge did not need to hear the evidence to make a determination about the relevance of the proposed evidence given that it is not unusual for incidents of prior violence to arise during a domestic violence trial. Evidence of prior violence does not require *viva voce* evidence, provided that the Crown has advised the Trial Judge about the evidence that the Crown proposes to adduce. *R v*

Vernacchia (1988), 40 CCC (3d) 561 (Que CA); *R v Snow*, 190 CCC (3d) 317 (Ont CA).

[90] In this case, the complainant had recanted her statement, was not a cooperative witness for the Crown, testified on behalf of the defence and was subject to cross-examination by the Crown. As a result, it would have been awkward to attempt to adduce this evidence through the complainant on a *voir dire*. Advising the Trial Judge about the nature and relevance of the proposed evidence was an acceptable alternative.

[91] The Crown advised the Trial Judge that the Crown was seeking to ask the complainant about “prior assaultive behavior or violent interactions” between the Appellant and the complainant but no further details about this evidence were provided to the Trial Judge by the Crown.

[92] The Trial Judge proceeded to make a ruling without knowing the nature or the extent of the evidence the Crown was seeking to adduce. The Trial Judge was aware that the Appellant had a prior conviction for assaulting the complainant as the Appellant’s Probation Order for an aggravated assault on the complainant was entered as an Exhibit but she did not know what other evidence the Crown might be seeking to adduce.

[93] The Trial Judge clearly expected the Crown to lead general evidence regarding the nature of the relationship as she stated to the Crown:

I’m not sure how much detail you need to get into in here. As I understand, you’re trying to establish the nature of the relationship between the two.

[94] The Crown then proceeded to cross-examine the complainant about specific incidents of violence eliciting details of the Appellant’s 2015 conviction for aggravated assault which involved the Appellant biting the complainant on the face and on the nose. The Crown also asked the complainant about incidents in 2011 or 2012 that appeared to be without foundation.

[95] There were obvious similarities between the 2015 incident and what the complainant told Cst. Meko had happened in her statement. That both involved the Appellant biting the complainant’s nose raised the spectre of similar act evidence and the danger of propensity reasoning.

[96] If the Trial Judge had been advised of the details of the incident that the Crown wished to cross-examine the complainant about, she would have been able to properly assess whether this evidence was admissible in the context of the

Handy framework. Admitting this evidence without conducting this analysis was an error.

[97] The admission of this evidence may not be fatal because these issues were addressed in the submissions of counsel and it was clear from the Trial Judge's ruling that she was aware of the dangers of propensity reasoning and bad character evidence.

[98] Trial judges are presumed to know the law and the proper and improper uses of evidence, and the risk of prejudice is reduced when it is a trial by a judge rather than a jury. A trial judge is less likely to be distracted by evidence of similar acts. *R v B(T)*, 2009 ONCA 177.

[99] In the Trial Judge's reasons for convicting the Appellant, she referred to the Appellant's prior conviction for aggravated assault against the complainant, stating:

I know that Mr. Lafferty has previously been convicted of an aggravated assault on [the complainant], and to be clear, I am not considering the previous conviction as propensity evidence or as evidence that he assaulted her this time, but I am simply taking into account that theirs is a relationship in which there has been violence before.

[100] A review of the Trial Judge's reasons demonstrate that she considered the evidence that was adduced that showed the nature and dynamics of the domestic relationship for the limited purpose of considering how the case had unfolded:

The circumstances and the evidence on this case show the nature and the dynamics of [the complainant's] and Mr. Lafferty's relationship. Her numerous recantations, though at other times willing to cooperate with the prosecution, her reference to she and Mr. Lafferty having a young daughter and the fact that Mr. Lafferty's parents took care of her daughter and that Mr. Lafferty was going to raise her daughter with his parents give an understanding of the relationship, as does her testimony that she always caused the violence in the relationship, that she wanted to reconcile with Mr. Lafferty, that she still loved him, and she did not want him to go to jail. While none of this proves whether or not Mr. Lafferty did assault [the complainant], it does help to understand the development of this prosecution or the way this prosecution unfolded.

[101] In addition, the Trial Judge's reasons for convicting the Appellant focused on the relevant evidence before the court: the complainant's out-of-court statement; the photographs of the complainant's injury, the bloody sheet and mattress topper; the testimony of the investigating officer; and the testimony of the complainant.

[102] In finding the Appellant guilty of the offences, the Trial Judge's focus was on the relevant evidence, she was aware of the dangers of the evidence of prior violence in the relationship and I do not find that she improperly used the evidence of the prior violence in the relationship. Her conclusions on the Appellant's guilt were reasonably supported by the evidence and I would not disturb the convictions.

CONCLUSION

[103] In conclusion, the Trial Judge's assessment of the admissibility of the complainant's out-of-court statement was reasonable. The Trial Judge's conclusions on necessity were reasonably supported by the evidence and her conclusions on threshold reliability, while not following the *Bradshaw* analysis, adequately considered the substance of the steps outlined in *Bradshaw*. As such, her conclusions on the admissibility of the complainant's out-of-court statement are entitled to deference.

[104] It was an error to admit the evidence of the prior discreditable conduct of the Appellant without knowing the specific evidence that the Crown proposed to adduce, given that the evidence bore a similarity to one of the charges before the Court. However, the Trial Judge was aware of the dangers of propensity reasoning and bad character evidence and was careful to use the evidence in a proper manner.

[105] For these reasons, the appeal is dismissed.

S. H. Smallwood
J.S.C.

Dated at Yellowknife, NT
this 1st day of June, 2020.

Counsel for the Respondent: Jeannie Scott

Counsel for the Appellant: Ryan Clements

S-1-CR-2017-000-168

**IN THE SUPREME COURT OF THE
NORTHWEST TERRITORIES**

BETWEEN:

HER MAJESTY THE QUEEN

Respondent

-and-

KELVIN AARON LAFFERTY

Appellant

MEMORANDUM OF JUDGMENT OF
THE HONOURABLE
JUSTICE S.H. SMALLWOOD
