COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *R. v. Ball,*
2019 BCCA 32

Date: 20190128
Docket: CA43606

Between:

Regina

Respondent

And

Jonathan David Ball

Appellant

Before: The Honourable Madam Justice D. Smith
The Honourable Madam Justice Dickson
The Honourable Madam Justice Fisher

On appeal from: Orders of the Supreme Court of British Columbia, dated January 25, 2016 (conviction) (*R. v. Ball*, Nanaimo Docket No. 77086) and March 24, 2016 (sentence) (*R. v. Ball*, 2016 BCSC 79, Nanaimo Docket No. 77086).

Counsel for the Appellant: G. Kosakoski
N. Moses

Counsel for the Respondent: M. Scott

Place and Date of Hearing: Vancouver, British Columbia
March 16, 2018

Place and Date of Judgment: Vancouver, British Columbia
January 28, 2019

Written Reasons by:
The Honourable Madam Justice Dickson

Concurred in by:
The Honourable Madam Justice D. Smith
The Honourable Madam Justice Fisher

Summary:

The appellant challenges his conviction for arson and breaking and entering in connection with fires set to the house and garage of an estranged acquaintance. He contends the judge failed to instruct the jury adequately on the relevance of his psychiatric condition to his defence of false confession, trial counsel failed to provide him with effective assistance and, viewed separately or in combination, the judge's errors and trial counsel's ineffective assistance resulted in an unfair trial and a miscarriage of justice. The appellant also applies to admit fresh evidence in support of the ground of appeal relating to ineffective assistance of counsel. Held: Appeal allowed, fresh evidence admitted. The judge admitted key Crown evidence without testing its questionable admissibility and failed to intervene when Crown counsel elicited irrelevant and prejudicial character evidence. The judge also expressed undue scepticism regarding the appellant's self-report of poor mental health, which the appellant relied upon in advancing his defence of false confession. The cumulative effect of these errors and irregularities rendered the appellant's trial unfair and resulted in a miscarriage of justice.

Reasons for Judgment of the Honourable Madam Justice Dickson:

Introduction

[1] Jonathan Ball confessed to police that he burned down the house and garage of an estranged acquaintance. According to his former girlfriend, he told her the same thing. On January 25, 2016, following a six-day trial, a jury convicted Mr. Ball of two counts of arson and two counts of breaking and entering in connection with the fires. On March 24, 2016, the presiding judge sentenced him to 15 months' imprisonment followed by two years of probation.

[2] Mr. Ball appeals the convictions on the basis that his trial counsel and the judge committed numerous errors and prejudiced his right to a fair trial, which led to a miscarriage of justice. In particular, he contends, his trial counsel failed to mount his false confession defence effectively, the judge failed to instruct the jury on the defence adequately and both failed to intervene when Crown counsel adduced inadmissible evidence throughout the course of the trial. As a result, Mr. Ball says, he was deprived of his fair trial rights and there was a miscarriage of justice. In consequence, he asks us to set aside the verdict and order a new trial.

[3] In my view, Mr. Ball has not established his claim of ineffective representation. Nor has he established that the judge instructed the jury inadequately. Nevertheless, for the reasons that follow, I conclude a series of errors and irregularities occurred during the trial which, considered as a whole, rendered it unfair and resulted in a miscarriage of justice. I would, therefore, allow the appeal, set aside the verdict and order a new trial.

Background

[4] In June of 2013, Mr. Ball was an anxious, depressed, socially isolated 26-year-old. He lived with his parents in Qualicum Beach and took medication daily for his poor mental health. He also consulted periodically with a psychiatrist and received many psychiatric diagnoses, including generalized anxiety disorder, depression and panic disorder. However, despite his mental health challenges, Mr. Ball was able to work from time to time as a cook and he played guitar in a band.

[5] One of Mr. Ball's bandmates was Mark Maskell. Mark Maskell's parents, David and Sandra Maskell, owned a property in Errington, a small rural community near Qualicum Beach. Located on five acres, the Maskell property had several buildings, including a two-level house, a detached garage and a fishing cabin. Mr. Ball often spent time at the Maskell house for band rehearsals and, on occasion, left his music equipment there.

[6] In addition to working and playing in the band, Mr. Ball carried on sometimes overlapping romantic relationships with women. Between 2011 and early-2013, he and Carmen Lacey lived together in a turbulent "on-and-off" relationship. By June of 2013 they had broken up, but they remained in contact and were considering the possibility of a reconciliation, although, unbeknownst to Ms. Lacey, Mr. Ball was also romantically involved with Brooklyn Mrychka. Ms. Mrychka was Mark Maskell's former girlfriend.

[7] Messrs. Ball and Maskell fell out when Mr. Ball started dating Ms. Mrychka. As a result, Mark Maskell quit the band. Shortly thereafter his father returned most,

but not all, of Mr. Ball's music equipment. In particular, Mr. Maskell did not return an amplifier that belonged to Mr. Ball.

[8] On June 26, 2013, the garage on the Maskell property burned down. The police suspected the fire was set deliberately and Constables Kiperchuk and Racz attended to investigate the next day. When they arrived they found a broken window at the back of the house, smoke coming out the door and, within minutes of their arrival, the house was fully on fire. The officers immediately called the fire department and firefighters arrived promptly, but they could not save the house.

[9] After the fire, the police continued to investigate. Early on, they suspected the owners, David and Sandra Maskell, might be responsible. They also considered Brooklyn Mrychka's father, David Mrychka, a suspect based on a report that Mr. Mrychka had threatened the Maskell property. As a result, they arrested and forcefully questioned Mr. Mrychka, but he steadfastly maintained his innocence. At the end of the interview, he was released and arson charges were not laid.

[10] Approximately two weeks after the fires, Ms. Lacey walked into the Parksville RCMP detachment and informed Constable Carr that Mr. Ball told her he set the fires at the Maskell property. Ms. Lacey said she discussed the fires with Mr. Ball, in person and over Facebook, and she called up several Facebook messages on a detachment computer monitor, which Constable Carr photographed. The first photograph was of a message sent, according to the history timeline, at 3:27 p.m. on June 27, 2013 by "Johan Gorrific Amputation", which Ms. Lacey identified as Mr. Ball's Facebook name. It read: "I was at Marks. There's nothing left of the garage. I broke in the basement of the house and looked for anything of value, couldn't find anything so I lit the basement on fire". Other photographed messages included discussion of the fires and Ms. Lacey's advice that Mr. Ball "[e]rase anything u said here".

[11] Constables Carr and Racz worked at different detachments. After Ms. Lacey made her statement, Constable Carr contacted Constable Racz, informed him of what had occurred and passed on the photographs of the Facebook messages. As

a result, he arrested Mr. Ball and interviewed him regarding the fires. During the first part of the interview, Mr. Ball denied any involvement and, when Constable Racz confronted him with the messages, he responded that they didn't "look right at all", they were "very fake" and Ms. Lacey might want revenge because he chose Ms. Mrychka. As the interview progressed, however, Constable Racz suggested that Mr. Ball broke into the Maskell property to get his amplifier back and lit the place on fire when he could not find it. After more denials and an attempt to implicate Ms. Lacey, Mr. Ball confessed that he set the fires.

[12] Mr. Ball told Constable Racz he was angry at Mark Maskell for how he had treated Ms. Mrychka and that he wanted to get back his amplifier. Among other things, he said that he broke a *basement* window of the Maskell house with a rock, entered the house through the window and set the fires spontaneously. He also said that he lit some plastic hanging along the basement wall, told Ms. Lacey he set the fires and sent her the Facebook messages, which he later deleted. When the interview concluded, Constable Racz gave Mr. Ball 75 milligrams of his psychiatric medication, Venlafaxine.

[13] The police did not attempt to identify and search the computing device used to record the Facebook messages or locate the rock that Mr. Ball said he used to break the basement window at the Maskell property. Nor did they find forensic evidence linking him to the fires. After he confessed, Mr. Ball was charged with two counts of arson and two counts of breaking and entering. He retained trial counsel to represent him and elected to be tried by a judge and jury.

At Trial

The Crown Case

[14] The only Crown evidence implicating Mr. Ball in the fires was his confession to Constable Racz and his alleged admissions to Ms. Lacey, in person and via Facebook. Before the trial began, trial counsel conceded that the confession was voluntary and thus admissible, although, he told the judge, it was a "false confession". He said nothing about the admissibility of the photographed Facebook

messages and they were not mentioned in formal admissions filed by the Crown. For his part, Crown counsel asked that several items be marked in advance as exhibits for identification, including the photographs, which occurred.

[15] In his opening address, Crown counsel told the jury that the Crown's case had two key elements: Mr. Ball's confession and his admissions to Ms. Lacey. Then he called Constable Kiperchuk as the first Crown witness. Constable Kiperchuk testified that he and Constable Racz arrived at the Maskell property at approximately 2:45 p.m. on June 27, 2013, that he noticed a broken *upper* window at the back of the house and that he did not see any other broken windows. He also testified that Constable Racz told Mr. Ball about the Facebook messages during the police interview. At that point in his testimony, Crown counsel showed Constable Kiperchuk the photographs, he identified them as photographs Constable Carr took of Facebook messages that Ms. Lacey showed her and Crown counsel asked that they be made a trial exhibit. No one raised any concern, the photographs were marked compendiously as Exhibit 5 and copies were immediately distributed to the jury.

[16] The second Crown witness was Constable Racz, who introduced Mr. Ball's confession into evidence. Among other things, he confirmed there was no investigation regarding the computing device used to record and send the Facebook messages.

[17] Next, Crown counsel called Ms. Lacey. She testified that she first learned of the Maskell fires when Mr. Ball told her, in person, that he lit the garage fire, and, via Facebook, that he broke into the house and set it on fire. She also said that some weeks later she reported his admissions to Constable Carr and called up the Facebook messages on a police computer, and that Constable Carr took photographs. She said further that she "imagined" Mr. Ball used his smartphone to send the messages and that she used hers throughout the exchange.

[18] When she testified, Ms. Lacey repeatedly indicated that she could not recall the precise timing of the events in question. She also said her awareness of how

Facebook operated was general in nature, although she used it quite regularly. As to the timing of events, she said a history timeline on the photographs showed the date and time the messages were exchanged, but said nothing about how or why she thought that information was accurate. Referring to the photographs, she testified that Mr. Ball sent the first message regarding the Maskell fires at 3:27 p.m. on June 27, 2013.

[19] Ms. Lacey was the only Crown witness called to explain the operation of Facebook Messenger, which she characterized as similar to text messaging. She said that Facebook users communicate with others on a "Friends list", but that to do so they must use a password to log in. She also said she did not know Mr. Ball's password, but acknowledged having sent a message on his Facebook account when they were in the same room together. On cross-examination, trial counsel implied that Ms. Lacey accessed Mr. Ball's account and created the Facebook messages, although he did not ask her directly if Mr. Ball's password was stored on her computer.

[20] Near the end of Ms. Lacey's direct examination, Crown counsel asked if the police were ever involved during her relationship with Mr. Ball. She replied in the affirmative. When Crown counsel asked her to elaborate, she said the relationship was physically violent and that Mr. Ball assaulted her by pushing her down stairs, grabbing her hair and choking her. No one objected or intervened as Crown counsel elicited this evidence, although, on cross-examination, trial counsel challenged her claim that she was the victim of the domestic violence and tried to cast Mr. Ball as its true victim. He also elicited evidence from Ms. Lacey that she intensely disliked Mark Maskell, that Mr. Ball had psychiatric problems and that she spoke to Constable Carr on the same day she learned Mr. Ball was romantically involved with Ms. Mrychka.

[21] The other Crown witnesses were David and Sandra Maskell and David Mrychka. The Crown did not call anyone other than Ms. Lacey to authenticate the messages or testify regarding the computer systems on which the data in the

photographs was recorded or stored. Trial counsel made three formal admissions of fact pursuant to s. 655 of the *Criminal Code* which, as noted, were filed as an exhibit, but none related to the photographs.

The Defence Case

[22] After the Crown closed its case, trial counsel made a brief opening address in which he described Ms. Lacey as a vindictive ex-girlfriend and Mr. Ball's confession as tainted by police suggestion. Then he called Mr. Ball as the first witness for the defence. Mr. Ball began by describing his background and mental health challenges, testifying that his memory and cognitive function are poor and stating he suffers from anxiety and depression for which he requires daily medication, regular psychiatric care and occasional hospitalization. He also testified that, if he misses a dose of his medication, Venlafaxine, he becomes "extremely comatose" and "violently ill".

[23] Like Ms. Lacey, Mr. Ball testified about Facebook Messenger. He said that both he and Ms. Lacey used Facebook on her home computer when they lived together, that a user's password can be stored on a computer and that he suspected Ms. Lacey might have his password when Constable Racz showed him photographs of the "faked" messages. As to his relationship with Ms. Lacey, Mr. Ball said it was marked by violence on her part. On cross-examination, he said that he did not see the messages in the photographs on his Facebook account prior to his arrest.

[24] Turning to June 27, 2013, Mr. Ball testified that he did errands that day and visited with his grandmother. A few weeks later, he said, he went to the RCMP detachment and, when he arrived, Constable Racz "blindsided" him by accusing him of a crime. He also said that he did not take his medication that morning, he was in a "very delusional state" and he was struggling with anxiety and a faulty memory throughout the police interview. However, he said, eventually, he began to feel Constable Racz might know his memory better than he did, and, as his medication tapered off, in a dream-like state, hoping to go home, he told the police "exactly what

they wanted to hear". In other words, he said, he falsely confessed to setting the fires, filling in details that seemed plausible or that came from Constable Racz.

[25] The other defence witnesses were Mr. Ball's grandmother, Loretta Ostman, and Brooklyn Mrychka's mother, Shirley Mrychka. Ms. Ostman provided an alibi for Mr. Ball, testifying that he visited her in her home on June 27, 2013 between approximately 12:30 and 3:00 p.m. Ms. Mrychka testified that, before the fires, Mr. Maskell told her the house would never sell and that "it just needs to be bulldozed".

Closing Addresses of Counsel

[26] In his closing address, trial counsel asked the jury to disregard Ms. Lacey's "venomous" testimony and emphasized her prior access to Mr. Ball's Facebook account. After remarking on his quirky character and emotional vulnerability, he asserted that Mr. Ball confessed falsely to police because he wanted to go home. Noting the absence of corroborating evidence, Ms. Ostman's alibi evidence and the Maskell's possible motive for setting the fires, he argued it would be unsafe for the jury to convict Mr. Ball based on his recanted confession.

[27] In his closing address, Crown counsel focused on the Facebook messages and Mr. Ball's confession, telling the jury it could "analyze those things and determine for yourselves whether they are reliable, or believable". He described Mr. Ball's demeanour as relaxed throughout the police interview and said his denials did not hold up, particularly given the details of the crimes he recounted. He also highlighted the details of Mr. Ball's alleged admissions to Ms. Lacey, called the Facebook messages a running conversation "just after the fire is burning" and urged the jury to use its common sense in reaching its verdict.

Judge's Charge to the Jury

[28] Ms. Lacey's evidence and Mr. Ball's confession also featured prominently in the judge's charge to the jury. He reminded the jury that Mr. Ball denied any involvement in setting the fires, denied admitting anything to Ms. Lacey and claimed

she "faked" the Facebook messages by accessing his account. However, he said, if the jury accepted that Mr. Ball sent the Facebook messages, they should consider whether any evidence supported the truth of their content. By way of example, he noted the time of the June 27, 2013 message corresponded closely to the time of the Maskell house fire.

[29] The judge told the jury to follow a similar approach when assessing the truth of the content of Mr. Ball's confession. For example, he noted, there was no evidence of the rock Mr. Ball told Constable Racz he used to break the window at the Maskell house. He also told the jury to consider Mr. Ball's condition when he confessed and, in doing so, called Mr. Ball's medical condition "self-reported":

> Now, in assessing whether or not you conclude that these statements are true, you should consider the condition of the accused at the time he made the statement to police, if you find the accused was suffering from any mental disability, or was under the influence of alcohol or drugs at the time he made the statement, you should take this into account when you determine the weight you will give to the statement. Here, the suggestion is that a combination of [Mr. Ball's] personality, combined with a lack of medication and the manner of the interview led to what the accused says is a false confession. *The accused's medical condition is self-reported.* You should consider his demeanour throughout the whole of the police interview. The accused, while acknowledging he made the statement to the officers, testified, under oath, that certain parts of the statement were not true. In particular, he denied those portions of the statement wherein he acknowledged setting both fires were true.

[30] The judge went on to tell the jury that a person can be convicted on the strength of a confession without any corroborative evidence, although people sometimes confess falsely:

> While it may seem counter-intuitive that someone would admit to a crime they did not commit, it has happened. Confessions can be unreliable. People can be persuaded to utter what amounts to a false confessions for a number of reasons. The criminal justice system is all too aware of the fact that people have been known to confess to things they have not done. People have been known to make false confessions out of fear, out of hope, or promise, or favour. You should not begin your deliberations with the mindset that people only confess to crimes they have actually committed.

[31] Next, the judge instructed the jury in accordance with *R. v. W.(D.)*, [1991] 1 S.C.R. 742. He reminded them that the weight to attach to the evidence was a

matter for their determination and noted Mr. Ball testified regarding both his confession and Ms. Lacey's testimony:

> Ultimately, the weight you attach to the accused's statement to police, your conclusion as to who authored the Facebook messages, marked as Exhibit 5, and the conversations said to have occurred between the accused and Ms. Lacey, will inform the verdict you reach. There is no other evidence implicating the accused in the fires of June 26 and 27, 2013. Mr. Ball testified, he denied he committed the offences, and he offered an explanation as to the statement given by him to police, and challenged the authenticity of the exchange on Facebook with Ms. Lacey. In considering the evidence of the accused you should consider it as follows … [standard *W.(D.)* instruction].

[32] Then, the judge turned to a review of the evidence. Dealing first with Ms. Lacey's testimony, he said that she "acknowledged the volatile relationship" and testified Mr. Ball instigated the violence. He also noted the competing versions as to who was the aggressor and told the jury not to consider Mr. Ball's allegations that Ms. Lacey attacked him when assessing the reliability of her testimony regarding the Facebook messages:

> I will tell you that considerations of the relationship and its volatility are collateral to the issue you are deciding. Some of the accused's testimony regarding Ms. Lacey was never put to her, for her to agree or deny it. Instances of that are the testimony by the accused as to his injuries and of Ms. Lacey's premeditations about harming or murdering people. Please do not consider such allegations when you come to assess the reliability of Ms. Lacey's account of the origins of Exhibit 5.

[33] The judge did *not* instruct the jury not to consider Ms. Lacey's allegations that Mr. Ball attacked her in arriving at its verdict. However, he did summarise Mr. Ball's account of confessing falsely and his denial that he set the fires. As to the former, the judge said this:

> The accused acknowledged making the statement to the police, but testified that same came about as a *combination of his not taking his medications that morning* in his rush to get to the police station to report the missing wallet, *his cognitive function and compliant personality*, and *the aggressive position of the two officers* in failing to believe his original denials of any involvement.
>
> … He testified that he had a *poor memory*, and came to believe after *repeated prodding* by police that maybe his memory was wrong, and he had done the things he was accused of. He said that he became *increasingly scared*, and *wanted to be compliant* with the officers, whom he described as *hostile* in their facial expressions.

> He testified that he *either adopted what was being said* by the officers, chiefly Constable Racz, *or that he made things up* on the fly to please them.

[34] The judge went on to outline the essential ingredients of the offences, the positions of the parties and the available verdicts. He ended his charge with several standard instructions, after which the jury retired to deliberate. In the course of their deliberations, the jury returned with a single question: "What time did the officers arrive to find the house in flames?" After consulting with counsel, the judge responded that both officers testified they arrived at the Maskell property at around 2:45 p.m. An hour later, the jury returned with guilty verdicts on all four counts of the indictment.

Sentencing

[35] The judge ordered a presentence report and, in that context, Mr. Ball was referred for a psychological assessment. In his report, the assessor, Dr. Ferguson, outlined Mr. Ball's mental health history and described him as a "fragile and vulnerable young man who lacks coping skills to manage stressful situations" and is impaired by anxiety and dependent personality traits.

On Appeal

Appellant's Position

[36] On appeal, Mr. Ball contends the judge failed to instruct the jury adequately on the relevance of his psychiatric condition to his defence of false confession. Although he provided a general instruction on the phenomenon of false confessions, he says the judge did not relate the evidence of his distinctive behavioural characteristics and vulnerabilities to his claim that he falsely confessed. In Mr. Ball's submission, without an adequate instruction the jury lacked the necessary tools to evaluate the reliability of his confession, which non-direction prejudiced his fair trial rights and amounted to a reversible legal error. The judge compounded this error, he says, by remarking that his medical condition was "self-reported", which was both inappropriately disparaging and manifestly incorrect.

[37] In addition, Mr. Ball contends, trial counsel failed to provide him with effective assistance, which led to a miscarriage of justice. In his submission, this occurred because trial counsel did not appreciate that false confessions can be produced by an accused's vulnerabilities despite the absence of improper police conduct, which led him to focus exclusively on the police misconduct issue. As a result, Mr. Ball says, trial counsel failed to obtain expert evidence such as that of Dr. Ferguson regarding his psychiatric condition and its relationship to his false confession. He also failed to introduce his psychiatric records or object to the judge's inadequate jury instruction and failed to appreciate the significance of the Facebook messages, investigate their authenticity or object to their admissibility when Crown counsel introduced them improperly through Constable Kiperchuk.

[38] Viewed separately or in combination, Mr. Ball submits, the judge's errors and trial counsel's ineffective assistance resulted in an unfair trial and a miscarriage of justice. In consequence, he submits, this Court should set aside the verdict and order a new trial.

Respondent's Position

[39] The Crown responds that the judge's instruction on the false confession defence was adequate. According to Crown counsel, in language approved by this Court in *R. v. Earheart*, 2011 BCCA 490, it dispelled the incorrect assumption that nobody would confess to something they did not do. Emphasizing the absence of evidence of police misconduct and the judge's summary of Mr. Ball's testimony, he says the evidence that Mr. Ball suffered from significant anxiety, took medication and experienced symptoms without it was uncontested. In these circumstances, he submits, the judge's comment that Mr. Ball's medical condition was "self-reported" was simply unnecessary.

[40] However, Crown counsel argues, if the judge erred, the *curative proviso* applies and a new trial should not be ordered. This is so, he says, because, quite apart from his police confession, Mr. Ball admitted that he set the Maskell house fire to Ms. Lacey via Facebook *less than an hour* after it was discovered, *before* anyone

but the arsonist, firefighters and police knew it had occurred. He goes on to say this powerful evidence was not credibly answered by the highly implausible defence theory that Ms. Lacey hacked Mr. Ball's Facebook account and fabricated the messages, given their timing and details. Accordingly, he submits, even if the judge erred in his charge on the false confession defence, it caused no prejudice because the error could not have made a difference to the outcome of the trial.

[41] As to Mr. Ball's claim that trial counsel failed to assist him effectively, Crown counsel emphasizes the presumption that counsel's conduct fell within the wide range of reasonable professional assistance. In his submission, that presumption has not been displaced. On the contrary, he says, trial counsel mounted a competent defence by fully airing credibility issues regarding Ms. Lacey, attempting to demonstrate that she could have fabricated the Facebook messages, calling alibi evidence from Ms. Ostman and eliciting extensive testimony from Mr. Ball concerning his mental health and his reasons for confessing. In addition, he says, the fresh evidence reveals that trial counsel retained a renowned specialist on false confessions, negotiated a favourable plea arrangement and urged Mr. Ball to obtain up-to-date clinical records and a helpful report from a treating psychiatrist, which Mr. Ball failed to obtain.

[42] According to Crown counsel, the foregoing steps were all reasonable, diligent and well within the range of effective assistance by trial counsel. In any event, he argues, Mr. Ball was not prejudiced by any deficiency in his representation given the timing of the damning Facebook messages, which Ms. Lacey authenticated and which, he says, virtually dictated the trial's outcome.

Fresh Evidence Application

[43] In support of the ground of appeal relating to ineffective assistance of counsel, Mr. Ball applies to admit fresh evidence in the form of affidavits from himself and his trial counsel. In his affidavits, Mr. Ball deposes that he has suffered from psychiatric illness for many years and appends extensive clinical records in this regard. He also deposes that, when he misses a dose of his medication, he

experiences “discontinuation syndrome”, which leaves him feeling disoriented and fearful. He says he explained his psychiatric condition and discontinuation syndrome to trial counsel and gave him the records, but trial counsel did not seem interested. Nor, he says, did trial counsel assist him to retain a psychiatric expert to testify on these matters at trial.

[44] Mr. Ball deposes further that he told trial counsel the photographed messages were not in his Facebook conversation history and tried to explain his password might be stored on Ms. Lacey’s computer, but trial counsel did not seem to understand or see the Facebook messages as important evidence. On the contrary, he says, trial counsel expressed a dislike for computers, did nothing to investigate his Facebook account and did not request any Facebook-related information from either the Crown or Facebook.

[45] In addition to appending his psychiatric records, Mr. Ball appends screenshots of his June 27, 2013 Facebook conversations with Ms. Lacey which do not include the conversation about the fires depicted in the photographs. He also describes an experiment which shows a message can be deleted from one Facebook account but remain intact in the other and deposes that Ms. Lacey told him her brother, Eric Lacey, was a volunteer firefighter for the Maskell property area at the time of the fires, which an appended newspaper clipping confirms.

[46] In his responsive affidavit, trial counsel acknowledges that he and Mr. Ball discussed Mr. Ball’s psychiatric issues from the outset and that he reviewed Mr. Ball’s psychiatric records. However, he describes the records as unhelpful for purposes of demonstrating that his confession was coerced because they do not indicate a propensity to fabricate or an unusual susceptibility to police interrogation. He also acknowledges that he did not assist Mr. Ball to obtain a report from a treating psychiatrist and explains this was because it was Mr. Ball’s responsibility and he could not do it independently. As a result, he deposes, he encouraged Mr. Ball to obtain expert evidence connecting his psychiatric condition to the purportedly false confession, but he did not do so.

[47] Trial counsel goes on to depose that he retained a renowned specialist in the field of false confessions, Dr. John Yule. He says Dr. Yule prepared a report stating the police did nothing improper to induce a false confession and advised him over the phone that he considered Mr. Ball's confession spontaneous and genuine. Faced with these results and lacking a helpful expert report, trial counsel says he became discouraged with the false confession defence and considered the Crown's case overwhelming. As a result, he says, he negotiated a favourable plea agreement, but Mr. Ball refused to accept the offer made by the Crown.

[48] As to the Facebook messages, trial counsel deposes that he was interested but says they were only a small part of the evidence, concerned a "peripheral issue" and paled in significance relative to Mr. Ball's confession. He also deposes that he fully understood the password issue and put Mr. Ball's fabrication theory to Ms. Lacey on cross-examination, although he considered it "a very minor point in the trial" and highly implausible in light of the timing and content of the Facebook messages. He goes on to express his opinion that the jury convicted Mr. Ball because he confessed to police.

Issues

[49] In my view, the following issues emerge from the submissions of the parties, the evidence and the judge's instructions to the jury:

a) Did the judge err by failing to instruct the jury adequately on the false confession defence?

b) Did the judge err by admitting the photographed Facebook messages without testing their admissibility?

c) Did the judge err by permitting the Crown to adduce bad character evidence?

d) Is the fresh evidence admissible?

e) Has Mr. Ball established that trial counsel provided ineffective assistance?

f) Has Mr. Ball established a miscarriage of justice?

Discussion

Did the judge err by failing to instruct the jury adequately on the false confession defence?

Adequacy of Jury Instructions

[50] A trial judge has a general duty to ensure trial fairness. In the context of a criminal jury trial, that duty includes an obligation to instruct the jury adequately. The purpose of jury instructions is to educate and guide the jury in reaching a true verdict according to the evidence. Consequently, jury instructions are adequate when they enable the jury to understand the live issues, the relevant law and the salient evidence to be considered in resolving the issues. In other words, jury instructions are adequate when they are legally correct, comprehensive and comprehensible: *R. v. Rodgerson*, 2015 SCC 38 at paras. 30, 50, 54; *R. v. Pearce*, 2014 MBCA 70 at paras. 111-112.

[51] The extent to which the judge must review and relate the evidence to the issues to achieve trial fairness is highly case-specific. Generally speaking, the judge's task is "to decant and simplify": *R. v. Jacquard*, [1997] 1 S.C.R. 314 at para. 13. As Justice Bastarache explained in *R. v. Daley*, 2007 SCC 53:

> [57] The extent to which the evidence must be reviewed "will depend on each particular case. The test is one of fairness. The accused is entitled to a fair trial and to make full answer and defence. So long as the evidence is put to the jury in a manner that will allow it to fully appreciate the issues and the defence presented, the charge will be adequate": see Granger, at p. 249. The duty of the trial judge was succinctly put by Scott C.J.M. in *R. v. Jack* (1993), 88 Man. R. (2d) 93 (C.A.), aff'd [1994] 2 S.C.R. 310: "the task of the trial judge is to explain the critical evidence and the law and relate them to the essential issues in plain, understandable language" (para. 39).

[52] An accused is entitled to an adequately instructed jury, but not a perfectly instructed jury: *Jacquard* at para. 2. For this reason, appellate courts adopt a functional approach in conducting a review. The functional approach requires an appellate court to consider jury instructions in the context of the conduct of the trial as a whole, including the nature of the evidence, the live issues, the theories and

positions of the parties, the addresses of counsel and counsel's submissions with respect to the instructions. If the jury was properly instructed on the law and left, overall, with a sufficient understanding of the facts as they relate to the issues, on appeal the instructions will be considered adequate: *Daley* at paras. 57-58. If they fail to meet these criteria, a legal error will be found: *Rodgerson* at para. 28; *Colpits v. The Queen*, [1965] S.C.R. 739.

False Confessions

[53] A confession is an out-of-court statement made by an accused to a person in authority, often a police officer. Presumptively inadmissible unless proven voluntary, confessions are a particularly powerful and damning form of evidence. This is true, at least in part, because it seems inherently unlikely that an innocent person would incriminate himself or herself by falsely confessing to a crime in response to police questioning. People do not normally confess to crimes they have not committed: *Pearce* at paras. 48-53; *R. v. Hart*, 2014 SCC 52 at para. 102. As Justice Iacobucci put it in *R. v. Oickle*, 2000 SCC 38 at para. 34, the proposition that a confession is false is "counterintuitive".

[54] However, false confessions can and do occur for a variety of reasons in a wide range of circumstances. When admitted as evidence, they can lead to miscarriages of justice because they have a significant impact on the decision-making process undertaken at trial. An accused can be convicted on the basis of a confession alone, despite the absence of any confirmatory evidence whatsoever: *R. v. Singh*, 2007 SCC 48 at para. 29. And judges and juries tend to disbelieve *ex post facto* recantations by those who have previously confessed: *Pearce* at paras. 48-53, 129.

[55] In *Oickle*, Justice Iacobucci discussed the phenomenon of false confessions in the context of considering the common law confessions rule. After noting the close relationship between false confessions and wrongful convictions, he emphasized the importance of understanding why they occur:

> [37] Ofshe & Leo (1997), *supra*, at p. 210, provide a useful taxonomy of false confessions. They suggest that there are five basic kinds: voluntary, stress-compliant, coerced-compliant, non-coerced-persuaded, and coerced-persuaded. Voluntary confessions *ex hypothesi* are not the product of police interrogation. It is therefore the other four types of false confessions that are of interest.

[56] In reviewing the four types of possibly involuntary false confessions, Justice Iacobucci stated that proper police interrogations rarely produce a false confession. As a result, the common law confessions rule is well-suited to protect against them, particularly as concepts of voluntariness and reliability overlap to a significant extent: *Oickle* at paras. 45, 47. Nevertheless, not all false confession claims can be properly adjudicated by applying the common law confessions rule and excluding those that are not proven voluntary. Although rare, even admissible confessions may be false: *Pearce* at para. 60.

[57] In *Pearce*, Justice Mainella conducted a thorough and thoughtful review of the phenomenon of false confessions and the related risk of wrongful convictions. In addition to the common law confessions rule, he identified residual judicial discretion to exclude evidence and appropriately informed fact-finding as available safeguards against both. As to the latter, he observed that accused persons sometimes adduce expert evidence regarding their "distinctive behavioural characteristics" and vulnerabilities to help explain why their voluntary confession is nevertheless false or unreliable and he noted that experts and academics say factors such as mental illness, significant personality traits and intoxicant withdrawal may cause false confessions. However, he stated, the admissibility of expert evidence on these matters must be determined on a case-by-case basis and it is subject to the *Mohan* criteria. He also stated that, where a false confession defence has an air of reality, a trial judge should instruct the jury about the phenomenon of false confessions and relate the essential evidence on the point to the defence so that jurors can appreciate its value and effect: *Pearce* at paras. 56, 59-64, 81, 104-105, 118; *R. v. Phillion*, 2009 ONCA 202 at para. 217.

[58] As I have already discussed, the extent to which a judge should review and relate the evidence to the live issues when instructing a jury is also case-specific. In cases involving a purportedly false confession, the content and form of an appropriate jury instruction is a discretionary matter for the judge based on the exigencies of the case. That said, in my view, in addition to cautioning the jury generally about the phenomenon of false confessions, the judge should review the accused's explanation for allegedly confessing falsely, relate the salient evidence to the false confession defence and review the extent to which the confession's details are consistent with or conflict with independently verifiable circumstances. In doing so, the judge should avoid expressing any personal disbelief, direct or inferential, in the accused's *ex post facto* recantation. Overall, the instruction will be adequate so long as it dispels the common assumption that nobody would confess falsely and it provides the jury with necessary assistance to evaluate the reliability of the confession in conducting the fact-finding process: *Pearce* at paras. 118-120, 127-135; *Colpits* at 753.

Analysis

[59] With these principles in mind, I turn to the question of whether the judge instructed the jury adequately on Mr. Ball's defence of false confession. While he could have said more, in my view, considered functionally and in the context of the conduct of the trial as a whole, his charge on the defence, though imperfect, was adequate. He dispelled the common assumption that people do not confess to crimes they have not committed by providing a general instruction on the false confession phenomenon in language approved in *Earheart*. Contrary to Mr. Ball's submission, the judge also reviewed Mr. Ball's explanation for confessing, related the evidence of his compliant personality, poor cognitive function and compromised medical condition to his false confession defence and noted several consistent and inconsistent independent circumstances, including the absence of evidence of the rock Mr. Ball said he used to break the Maskell house window. Although he did not mention that Mr. Ball also said he broke a *basement* window whereas Constable Kiperchuk testified he saw only a broken *upper* window at the Maskell house, this

was likely because counsel did not draw the potential inconsistency to his attention. However, this omission did not render the charge inadequate.

[60] The judge summarised Mr. Ball's testimony regarding his psychiatric condition, his emotional state and his perception of and reaction to police questioning briefly, without delving deeply into the details. That was his prerogative. The trial was short, the evidence was fresh and his task was "to decant and simplify". In my view, it would have been helpful to provide more detailed, specific summaries of the evidence on these matters, but the judge said enough to enable the jury fully to appreciate the factual issues related to Mr. Ball's defence of false confession. In other words, he gave the jury sufficient assistance to evaluate the truth and reliability of the confession in the light of the salient evidence. That being so, the content and form of the instruction were matters within his discretion.

[61] As Mr. Ball points out, the judge did not specifically instruct the jury that his "distinctive behavioural characteristics" or vulnerabilities compromised the reliability of his confession. That is unsurprising. There was no evidence to this effect. As Justice Mainella explained in *Pearce*, accused persons will sometimes adduce expert evidence on mental illness and personality traits to help explain why a confession is false or unreliable, but it is case-specific and must satisfy the *Mohan* criteria. In the absence of any such evidence, the judge was not entitled simply to *assume* that Mr. Ball's psychiatric condition and personal vulnerabilities compromised the reliability of his confession or instruct the jury that it should do so.

[62] Unfortunately, however, the judge did convey a measure of personal scepticism regarding Mr. Ball's *ex post facto* recantation when he characterized his medical condition as "self-reported". He made this remark when instructing the jury on how to assess the truth of the confession. The remark followed his statements that the jury should take into account Mr. Ball's condition "*if* you find the accused was suffering from any mental disability" and that the defence "suggested" Mr. Ball's personality, combined with a lack of medication and the manner of the interview, led to a false confession. It also immediately preceded his instruction that the jury

should also take into account Mr. Ball's demeanour throughout the interview, which demeanour the Crown contended did not accord with his self-described mental state when he was interviewed.

[63] Considering the judge's remark in this context, the jury could have inferred that he thought the absence of independent evidence regarding Mr. Ball's medical condition diminished the reliability of his self-report and thus detracted from his explanation for confessing falsely. In my view, he erred in making the remark. It was subtly disparaging and factually inaccurate. As the Crown acknowledges, in addition to being uncontested, Mr. Ball's testimony that he suffered from poor mental health was corroborated at trial by both Ms. Lacey and police witnesses. Nor did the judge remind the jury that their recollection and impression of the evidence on the point was paramount.

[64] Mr. Ball focused heavily on his poor mental health when explaining why he allegedly confessed falsely. Taking into account its central role in his defence, in my view, the judge's inferential expression of scepticism was not a minor or inconsequential misstep. Nevertheless, considered on the whole, it did not render the charge on the false confession defence inadequate, nor, standing alone, seriously compromise fundamental trial fairness. However, as discussed below, it was not the only error of consequence that was made in the course of the trial.

Did the judge err by admitting the photographed Facebook messages without testing their admissibility?

Electronic Evidence

[65] The use of information technology in modern society is ubiquitous. Given their prevalence, such technologies can generate a "treasure trove" of relevant evidence, but that evidence may be malleable and its sources may not be widely understood. Our general rules and principles of evidence law developed long before the advent of these technologies and, as a result, the law has had to adapt to facilitate the admission of electronic documents while screening for threshold authenticity and integrity. Building on established rules and principles, it has done

so by imposing a complementary set of admissibility rules via statute and related jurisprudence: David M. Paciocco, “Proof and Progress: Coping with the Law of Evidence in a Technological Age” (2013), 11 C.J.L.T. 181.

[66] The applicable statutory provisions for present purposes are ss. 31.1 to 31.8 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5. These provisions create a framework for the admission of all forms of “electronic document”, which is broadly defined in s. 31.8 together with several related terms:

> **Definitions**
>
> 31.8 The definitions in this section apply in section 31.1 to 31.6:
>
> “computer system” means a device that, or a group of interconnected or related devices on or more of which,
>
> a) contains computer programs or other data; and
>
> b) pursuant to computer programs, performs logic and control, and may perform any other function.
>
> “data” means representations of information or of concepts, in any form.
>
> “electronic document” means data that is recorded or stored on any medium in or by a computer system or other similar device and that can be read or perceived by a person or a computer system or other similar device. It includes a display, printout or other output of that data.
>
> “electronic documents system” includes a computer system or other similar device by or in which data is recorded or stored and any procedures related to the recording or storage of electronic documents…

[67] Facebook posts and messages, emails and other forms of electronic communication fall within the definition of an “electronic document”. Home computers, smartphones and other computing devices fall within the definition of a “computer system”. Accordingly, the admissibility of Facebook messages and other electronic communications recorded or stored in a computing device is governed by the statutory framework. As with other admissibility issues, where there is reason to question whether an electronic document meets the statutory requirements, a *voir dire* should be held and a reasoned determination made as to its admissibility. This step is particularly important in the context of a jury trial: *R. v. Soh*, 2014 NBQB 20 at paras. 26, 32; *R. v. Donaldson*, 2016 CarswellOnt 21760 at para. 3; *R. v. K.M.*, 2016 NWTSC 36 at para. 40; “Proof and Progress” at 195.

[68] Pursuant to s. 31.7 of the *Canada Evidence Act*, the statutory framework does not affect any rule of law relating to the admissibility of evidence except rules relating to authentication and "best evidence". Although its requirements must always be met, standing alone they do not determine ultimate admissibility. Rather, the admissibility of an electronic document *also* depends on the purpose for which it is tendered and any related general rule of evidence. For example, in addition to meeting the statutory criteria, the content of an electronic document must be legally relevant and it must comply with general evidentiary rules such as those relating to hearsay, character and opinion evidence: *K.M.* at para. 23; *Soh* at paras. 41-52; "Proof and Progress" at 193.

[69] In many cases, electronic documents are tendered to prove the truth of a statement allegedly input into a computer (for example, Mr. Ball's alleged statement that "I lit the basement on fire"). In these circumstances, general hearsay rules apply. Relevant content might also include information created mechanically by the computer, such as coded Internet Service Provider information or date and time stamps (for example, the history timeline shown on the photographed Facebook messages). "Computer by-product evidence" of this kind is original or real evidence, not hearsay. Depending on the circumstances, expert evidence may be required to explain the meaning of the computer-generated information or the accuracy or reliability of the generating technology, although, in the absence of cause for doubt, circumstantial evidence or lay witness testimony is often sufficient. Regardless, expert evidence is not required to explain generally how commonplace technologies such as Facebook, text messaging or email operate if a lay witness familiar with their use can give such testimony: *K.M.* at paras. 12-15, 40-44; *Soh* at paras. 27-30; "Proof and Progress" at 184-186, 188, 198, 211.

[70] The statutory rule relating to authentication codifies the common law authentication rule. The burden of proof is on the tendering party and the threshold is low: is there evidence, direct or circumstantial, to support a finding that an electronic document is what the tendering party claims it to be? If so, the document is adequately authenticated, although this does not necessarily mean that it is

genuine. That is a question of weight for the fact-finder which often turns on determinations of credibility: *R. v. Hirsch*, 2017 SKCA 14 at para. 18; "Proof and Progress" at 197.

[71] Section 31.1 of the *Canada Evidence Act* provides:

> **Authentication of Electronic Documents**
>
> 31.1 Any person seeking to admit an electronic document as evidence has the burden of proving its authenticity by evidence capable of supporting a finding that the electronic document is that which it is purported to be.

[72] The statutory "best evidence" provisions augment the authentication process. At common law, the "best evidence" rule requires the tendering party to produce an original document or the next best available alternative, primarily because alterations are most readily detectible on an original. However, the concept of an "original" is poorly-suited to electronic documents. As Justice Paciocco explains in "Proof and Progress", it is not immediately obvious whether the original is "… the actual hard drive containing the code, the translation of the code that is displayed by the electronic device, a copy of the file, or the first print out". Consequently, the statute adopts an inclusive approach; for framework purposes, an original is any translation of the computer code in observable form: "Proof and Progress" at 193, 199-200; *Hirsch* at paras. 22-23.

[73] Like the common law best evidence rule, the statutory rule is intended to help ensure that an electronic document accurately reflects the original information input into a computing device by its author. The framework provides alternative methods of satisfying the rule, some of which rely on statutory presumptions available in the absence of evidence to the contrary. Section 31.2 provides for proof, direct or circumstantial, of the integrity of an electronic documents system, proof via secure electronic signature and proof via printout; s. 31.3, for presumptions of integrity with respect to electronic documents systems; s. 31.4, for presumptions regarding secure electronic signatures; and s. 31.5, for consideration of relevant standards, procedures, usages and practices. The standard of proof for the prerequisites to

admissibility is the balance of probabilities: *R. v. Oakes*, [1986] 1 S.C.R. 103; "Proof and Progress" at 202.

[74] The relevant best evidence provisions are ss. 31.2(1)(a), 31.2(2) and 31.3(a) and (b):

> **Application of Best Evidence Rule – Electronic Documents/Printouts**
>
> 31.2(1) The best evidence rule in respect of an electronic document is satisfied
>
> (a) on proof of the integrity of the electronic documents system by or in which the electronic document was recorded or stored…
>
> (2) Despite subsection (1), in the absence of evidence to the contrary, an electronic document in the form of a printout satisfies the best evidence rule if the printout has been manifestly or consistently acted on, relied on or used as a record of the information recorded or stored in the printout.
>
> **Presumption of Integrity**
>
> 31.3 For the purposes of subsection 31.2(1), in the absence of evidence to the contrary, the integrity of an electronic documents system by or in which an electronic document is recorded or stored is proven
>
> (a) by evidence capable of supporting a finding that at all material times the computer system or other similar device used by the electronic documents system was operating properly or, if it was not, the fact of its not operating properly did not affect the integrity of the electronic document and there are no other reasonable grounds to doubt the integrity of the electronic documents system;
>
> (b) if it is established that the electronic document was recorded or stored by a party who is adverse in interest to the party seeking to introduce it…

[75] Canadian courts adopt a functional approach to interpretation and application of the statutory framework. In *Soh*, Justice LaVigne held that both screen capture printouts of Facebook messages and photographs of a computer screen displaying those messages are "electronic documents" and she conducted a *voir dire* with respect to their admissibility. Given the absence of evidence to the contrary, she found that the electronic documents system on which the messages were recorded was reliable based on the testimony of a lay witness who exchanged them with the accused and the investigating officer who captured, printed and photographed them. However, she admitted only the screen capture printouts because, she held, they

constituted the best evidence of the accused's recorded admissions whereas the photographs of the computer screen did not.

[76] *K.M.* also illustrates the functional approach to the admissibility of electronic documents. Like Justice LaVigne in *Soh*, Justice Charbonneau conducted a *voir dire* to determine the admissibility of a printout of Facebook messages purportedly exchanged by a witness and the accused and called up on a computer that belonged to the witness's sister. Like Justice LaVigne, she admitted the printout despite the absence of expert evidence regarding the integrity of the electronic documents systems in question based on lay witness testimony and the presumption of integrity in s. 31.3.

[77] The relevant content of the messages in *K.M.* included both hearsay (admissions by the accused) and computer by-product evidence (time and date stamps). After noting that the lay witness, Mr. Boniface, testified "when he uses Facebook, the dates and times that appear next to the messages correspond to the actual dates and time in Fort Good Hope", Justice Charbonneau stated:

> [42] Mr. Boniface may not understand all the ins and outs of Facebook but he was able to create his account, select his password, and use Facebook as a means of communication with people, including K.M. There is no evidence that he is not capable of recognizing his own Facebook page. He testified that the printout is consistent with what was on the screen when he logged on to his account at his sister's office.
>
> [43] There is no evidence to the contrary calling into question the proper functioning of either of these computers (the one Mr. Boniface used at home during the exchange with K.M. or the one he used to call up the message chain and have his sister print it). There is no evidence, or even any suggestion of tampering by Mr. Boniface, his sister, or anyone else.
>
> [44] While tampering with electronic document and hacking into systems does happen, the mere possibility of that is not sufficient to call into question the authenticity of an electronic document. Otherwise, the framework set out in the *Canada Evidence Act* would be useless: expert evidence would be required in each case to negate that possibility of tampering or malfunction.

[78] As Justice Paciocco explained in *Donaldson*, all trial participants must attend to the requirements of the statutory framework when electronic evidence is gathered and presented. While easily met, they are governing and important for purposes of admissibility: *Donaldson* at paras. 3-4. After noting the absence of any investigation

to determine the account from which the Facebook messages in question were secured and the vague authentication evidence, Justice Paciocco held the statutory requirements were not met and declined to admit the evidence. In doing so, he stated:

> [22] If you have a case that is important enough to take the court's time … and you have evidence that is significant enough that it should be put before a court, then the resources and attention to demonstrate the admissibility of that evidence should be committed, both at the investigative stage and at the prosecutorial stage.

[79] *R. v. Bernard*, 2016 NSSC 358, also illustrates the risk of failure to attend to the statutory requirements. In *Bernard*, Justice Gogan declined to admit photographs of Facebook posts purportedly made by the accused because those requirements were not satisfied. In doing so, he rejected the Crown's argument that photographs of the posts were real evidence, holding, correctly in my view, that the statutory requirements cannot be circumvented simply by photographing electronic information and noted that:

> [40] … no steps were taken to search the computer of the accused nor was there any attempt to access the Facebook account of the accused directly, at the police detachment, or anywhere else.

[80] Like trial courts, appellate courts adopt a functional approach when considering the admissibility of electronic documents. For example, in *Hirsch*, the Saskatchewan Court of Appeal upheld the judge's admission of screen captures of the accused's Facebook page in a judge-alone trial although the Crown did not formally authenticate them under s. 31.1, nor did the judge refer to the statutory best evidence rule. Nevertheless, taking into account the underlying rationale of the statutory rules, the parties' trial arguments, the judge's detailed reasoning and the entire body of evidence, the court declined to interfere with the decision to admit the screen captures, primarily because the complainant testified that she recognised them as depicting the accused's Facebook page, which amounted to s. 31.1 authentication, and because the surrounding circumstances would have supported application of the s. 31.3(b) presumption of integrity. In other words, in *Hirsch* the

result on appeal turned on the fact that the substance, if not the form, of the framework requirements was plainly satisfied.

Analysis

[81] The Facebook messages were extremely important Crown evidence. They included Mr. Ball's alleged admission to setting the fires and a computer-generated time stamp associating the first message with the time of the Maskell house fire. The Crown's closing address, the judge's charge and the jury's question all highlighted the significance of the time stamp and the defence challenged the authenticity of the messages. Nevertheless, their admissibility was not questioned and a *voir dire* was not conducted. Therefore, the judge did not make a reasoned determination on whether the photographed messages were admissible and, if so, the permissible use for their computer by-product content.

[82] There was good reason to question the admissibility of the photographed messages, which depended, in part, on compliance with the statutory framework. However, it appears no one considered the framework's requirements at the investigative or trial stage of the proceedings. Nor, it seems, was the distinct evidentiary nature of the text of the messages, on the one hand, and their computer-generated time stamps, on the other, ever considered.

[83] In my view, there were several admissibility issues that required consideration and attention. The Crown proffered the electronic documents in photographic form and introduced them through Constable Kiperchuk, who had no personal knowledge of their source or origins. Constable Carr, who took the photographs and presumably operated the police computer system on which the data was called up, was not called and, while trial counsel could have made admissions on these matters, he did not. Nor did trial counsel concede that the photographs met the applicable admissibility criteria, as he did with respect to the confession.

[84] Ms. Lacey was able to recognise the text in the photographs based on her personal involvement in the exchange of the messages and, therefore, the statutory

authentication requirement in s. 31.1 was met, albeit implicitly. However, Ms. Lacey also testified she could not remember exact times and she provided neither direct nor circumstantial evidence specifically concerning the accuracy of the computer-generated time stamps or the reliability of the computer systems on which the data was recorded, displayed and photographed.

[85] This was not a case like *Soh*, *K.M.* and *Hirsch*, where, in the absence of evidence to the contrary or any suggestion of tampering, Facebook evidence was admitted based on lay recognition, personal involvement and the s. 31.3 presumption of integrity. In contrast, in this case, Mr. Ball contended a tamperer created the Facebook messages by accessing his account on a computing device that he did not own and the Crown's only authenticating witness, Ms. Lacey, was the alleged tamperer. In addition, unlike *K.M.*, there was no evidence, direct or circumstantial, regarding the accuracy or reliability of the computer-generated time stamp.

[86] On the other hand, this case was, in some respects, similar to *Bernard*, where Justice Gogan ruled evidence of Facebook posts inadmissible because the statutory requirements were not satisfied. Much like the circumstances in *Bernard*, in this case no one investigated whether the messages were recorded using Mr. Ball's computing device, although police knew he claimed they were "faked" and was advancing a defence of false confession. In addition, here, as in *Bernard*, at trial the Crown proffered photographs rather than printouts as proof of the electronic information in question.

[87] In my view, it is neither necessary nor desirable for present purposes to determine, at the first instance, whether the photographed Facebook messages met the statutory best evidence rule on a balance of probabilities. The same is true of whether, if so, the computer-generated time stamps were shown to be sufficiently accurate and reliable for use as evidence of when the messages were sent. It is sufficient to say there is a realistic possibility that, properly scrutinized, the judge may have justifiably excluded or limited the evidentiary use of the photographs. In

these circumstances, in the absence of a clear concession from counsel, the judge should have made these determinations in the first instance, on a *voir dire*, in the absence of the jury. However, he did not, apparently because all concerned overlooked the need for him to do so.

[88] At the very least, this was a procedural error. Mr. Ball was entitled to be tried on only carefully scrutinized and plainly admissible evidence, particularly where that evidence was critically important. Unfortunately, however, the admissibility of the photographs was not scrutinized and, unlike the circumstances in *Hirsch*, it is not clear on the record that all prerequisites were established to the necessary standard. Accordingly, in my view, Mr. Ball was deprived of an important procedural protection, which compromised trial fairness and contributed to what was, overall, a miscarriage of justice.

Did the judge err by permitting the Crown to adduce bad character evidence?

Bad Character Evidence

[89] As is clear from the foregoing, the trial judge plays a key role in ensuring that the jury considers only properly admissible evidence. While counsel are expected to comply with evidentiary rules, ultimate responsibility for keeping irrelevant, unduly prejudicial or otherwise inadmissible evidence from the fact-finding and reasoning process lies with the judge: *R. v. J. (J.)*, 2000 SCC 51 at paras. 1, 28; *R. v. Barton*, 2017 ABCA 216 at paras. 111-112. This gatekeeping function requires that a judge vigilantly assess and exclude evidence that might jeopardize the fundamental fairness of the trial, taking into account the positions of counsel but unconstrained by them. One of many contexts in which the duty may arise involves the presentation of bad character evidence.

[90] The Crown may not prove that an accused committed an offence by relying on evidence of his or her bad character. This is because such evidence can distract the jury from focusing on the real issues and because propensity reasoning is generally impermissible. A jury is not entitled to infer from evidence of an accused's

bad character that the accused was likely to have committed the crime charged: *R. v. G.(S.G.)*, [1997] 2 S.C.R. 716 at para. 63; *R. v. Dvorak*, 2001 BCCA 347 at paras. 40-42. Therefore, the Crown is prohibited from adducing evidence of an accused's bad character, subject to three exceptions: i) where the accused's character is relevant to a live issue in the case; ii) where the accused puts his or her character in issue; or iii) where the evidence is adduced incidentally to proper cross-examination of the accused on credibility: *G.(S.G.)* at para. 63; *R. v. Lawrence*, 2015 BCCA 358 at paras. 47-51.

[91] Where an exception to the general prohibition applies and the Crown is permitted to adduce bad character evidence, a trial judge should typically instruct the jury that it must not use that evidence to find the accused is the sort of person who would have a propensity to commit the offence in question. An instruction to this effect is mandatory unless it would unduly confuse the jury because the bad character evidence is central and inextricably linked to the motive or mechanism of a crime: *R. v. Van Dyke*, 2014 BCCA 3 at paras. 16-21. If the judge fails to give a limiting instruction where it is required, that failure can amount to a reversible error of law: *Dvorak* at paras. 39-45.

[92] In *Dvorak*, the Crown adduced evidence that the accused was an inveterate liar when he had not put his character in issue. While she accepted that Crown counsel should not have adduced such bad character evidence, Justice Prowse would not have found the accused's right to a fair trial was fatally compromised solely by virtue of its admission because admissible evidence of relevant lies was also before the jury. However, she concluded the absence of any limiting instruction or caution regarding the inadmissible bad character evidence amounted to a fatal flaw that compromised trial fairness:

> [35] It is not seriously disputed that the Crown led evidence of Mr. Dvorak's bad character when Mr. Dvorak had not placed his character in issue. Although defence counsel did not object to most of this evidence at the time it was led, it should not have been admitted. It placed Mr. Dvorak in the untenable position of having either to ignore that evidence at his peril, or having to explain it away. Both options were risky; he chose the latter.
>
> …

> [45] In my view, the trial judge could have offset any damage done by the admission of the irrelevant lies and the exacerbating effect of the Crown's address had he given them a clear, sharp warning that they were not entitled to use his lies as evidence that he was more likely to have committed the offences with which he was charged. In other words, the trial judge should have instructed the jury that it was not open to them to infer from the evidence that Mr. Dvorak was a seasoned liar, that he was also a rapist. I am unable to find anything in the trial judge's charge which can be interpreted as such a warning. Nor am I able to conclude that the jury would have understood the limited use they could make of Mr. Dvorak's propensity for lying in terms of the critical issue of consent. In my view, this non-direction amounted to misdirection.

[93] Although the Crown case in *Dvorak* was strong, Justice Prowse did not apply the curative proviso because the judge failed to warn the jury about the dangers of the bad character evidence and the importance of not reasoning from propensity to lie to propensity to commit the offences in issue:

> [47] In my view, this is not an appropriate case for the application of the curative proviso. Here, not only was the evidence of bad character improperly led by the Crown, but the trial judge failed to warn the jury concerning the potential dangers of that evidence and the importance of not reasoning from propensity to lie to propensity to commit the offences in issue. In the result, the fairness of the trial was compromised. There is a risk that the accused was convicted for the wrong reasons; that is, because he was a "liar and a jerk", rather than because the Crown had established lack of consent on the part of the complainant.
>
> [48] It is not without misgivings that I come to this conclusion because, in my view, the case for the crown was a strong one. But I cannot say that the case was so strong that the verdict would necessarily have been the same in the absence of error.

Analysis

[94] While this issue was not raised by the appellant, it arises on the record and was addressed in oral submissions at the hearing. In my view, the judge erred in permitting the Crown to adduce evidence from Ms. Lacey that Mr. Ball assaulted her and, having done so, in failing to warn the jury not to engage in propensity reasoning with respect to Mr. Ball's alleged acts of domestic violence. This bad character evidence was untethered to a live issue when the Crown adduced it. Nor was it covered by any other exception to the general prohibition which prevents the Crown from adducing such evidence.

[95] Like Mr. Dvorak, Mr. Ball was placed in the untenable position of either having to ignore the bad character evidence or try to explain it away before the jury. Like Mr. Dvorak, Mr. Ball chose the latter path. This was not a choice he should have faced. It meant that he had to deal with irrelevant and damning allegations that he pushed, grabbed and choked Ms. Lacey, as well as meet the charges that he set the fires at the Maskell property. It created a risk that the jury might infer from the evidence that Mr. Ball was an abusive partner that he was also a malicious arsonist.

[96] Regardless of whether trial counsel objected, the judge should have stopped Crown counsel when he elicited evidence from Ms. Lacey that Mr. Ball assaulted her. On its face, this evidence was irrelevant, inadmissible and prejudicial to Mr. Ball. If there was an arguable basis for the Crown's apparently improper questions, the judge should have canvassed it with counsel in the absence of the jury. Instead, he admitted the evidence without comment or intervention.

[97] The damage was not offset by an appropriate warning in the judge's charge to the jury. On the contrary, it may have been exacerbated. Although he did not warn the jury not to consider Ms. Lacey's allegations that Mr. Ball assaulted her, he did warn them not to consider Mr. Ball's allegations that Ms. Lacey assaulted him when assessing the reliability of her testimony because those allegations were not put to her in cross-examination. This may have reminded the jury that there were competing allegations of domestic violence. Regardless, the charge did not include the necessary and important warning to the jury not to engage in propensity reasoning in determining whether the Crown had proved the arson charges. The latter non-direction amounted to misdirection.

[98] In my view, the admission of the bad character evidence and the lack of appropriate warning, both legal errors, compromised trial fairness. As in *Dvorak*, there is a risk that the accused was convicted for the wrong reasons; in this case, because he was an abusive partner, rather than because the Crown proved beyond a reasonable doubt that he set the fires. Although I see that risk as minimal, when

these errors are considered together with other trial irregularities, I conclude they also contributed to an overall miscarriage of justice.

Is the fresh evidence admissible?

[99] Crown counsel concedes that most of the fresh evidence is admissible for the limited purpose of assessing Mr. Ball's allegation of ineffective assistance. However, in his submission, the fresh evidence that Eric Lacey worked as a volunteer firefighter at the time of the fires is obviously inadmissible and should be rejected summarily because it is irrelevant to any issue on the appeal.

[100] Subsection 683(1) of the *Criminal Code* authorizes this Court to receive fresh evidence where it is in the interests of justice to do so. Pursuant to the test articulated in *Palmer v. The Queen*, [1980] 1 S.C.R. 759, in addition to the requirement that fresh evidence comply with general rules of evidence, the relevant criteria considered on an application to adduce fresh evidence on appeal are as follows (at 775):

> (1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases: [citation omitted];
>
> (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial;
>
> (3) The evidence must be credible in the sense that it is reasonably capable of belief; and
>
> (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

[101] The *Palmer* test applies where fresh evidence is directed to issues decided at the trial level. Its due diligence criterion promotes finality and order in the litigation process by encouraging parties to put forward their best available case at trial: *R. v. Hamzehali*, 2017 BCCA 290 at para. 35, quoting from *R. v. Wolkins*, 2005 NSCA 2.

[102] Where a miscarriage of justice is alleged, the applicable procedure is as described in *R. v. Stolar*, [1988] 1 S.C.R. 480. The fresh evidence application should be heard and, unless the fresh evidence is obviously inadmissible, the court should reserve judgment on the application. If the court ultimately determines that the fresh

evidence could reasonably have affected the result, it should admit the fresh evidence and allow the appeal. On the other hand, if the court determines that the fresh evidence could not reasonably have affected the result, it should dismiss both the fresh evidence application and the miscarriage of justice ground of appeal.

[103] However, where ineffective assistance of counsel is a ground of appeal, the *Palmer* test and the *Stolar* procedure are modified. In such cases, the appellate court is asked to admit fresh evidence for the purpose of considering an issue that was not considered below: *R. v. Aulakh*, 2012 BCCA 340 at para. 59. In these circumstances, the fresh evidence relates to the integrity of the trial process itself, not to a substantive factual or legal issue decided at the trial level. Accordingly, as Justice Smith explained in *Aulakh*, the due diligence criterion is relaxed and the court may admit the fresh evidence in the interests of justice for the limited purpose of assessing the professional incompetence allegations:

> [64] Thus, fresh evidence directed to a new issue on appeal relating to the integrity of the trial process (rather than a substantive issue adjudicated at trial) will be admissible for the limited purpose of assessing the allegation of ineffective representation of counsel if it: (i) complies with the rules of evidence; (ii) is relevant to the new issue; and (iii) is credible. If the fresh evidence also relates to a substantive factual or legal issue adjudicated at trial, the *Palmer* due diligence criteria may be relevant. It goes without saying that the fourth *Palmer* criterion, the expectation that the fresh evidence would affect the result, is addressed by the parallel prejudice component of the test for ineffective assistance of counsel.

[104] The modified *Palmer* test and *Stolar* procedure apply on a case-sensitive basis whenever fresh evidence is directed to matters that go to the integrity of the trial process or to a request for an original remedy: *Hamzehali* at para. 35.

[105] In my view, all of the fresh evidence is admissible for the purpose identified by Crown counsel. It generally complies with the rules of evidence, it is relevant to the assessment of counsel's performance and potential prejudice, and it is sufficiently credible and reliable to meet the modified *Palmer* test. The hearsay evidence that Eric Lacey worked as a firefighter in 2013, confirmed by the newspaper clipping, relates to whether the defence theory that Ms. Lacey fabricated the Facebook

messages was doomed to fail because she could not possibly have known about the Maskell house fire when the messages were sent.

Has Mr. Ball established that trial counsel provided ineffective assistance?

Ineffective Assistance of Counsel

[106] An accused who is represented by counsel is entitled to receive effective legal assistance. Our adversarial system operates on the premise that competent partisan advocacy will best expose the truth of a criminal allegation. Effective representation ensures that the prosecution case is tested and the defence case is advanced by a knowledgeable and skilled advocate performing these functions adequately. It also enhances the adjudicative fairness of the process by ensuring that the accused receives the full benefit of all available procedural protections: *R. v. Joanisse*, [1995] O.J. No. 2883 (C.A.) at paras. 65-66. Both contribute to the fairness of a trial.

[107] A claim of ineffective assistance of counsel has two distinct components, performance and prejudice. To succeed, the appellant must establish both that counsel's acts or omissions were incompetent (performance) and that, as a result, a miscarriage of justice occurred (prejudice). Professional incompetence is assessed on a standard of reasonableness and it must be proven on a balance of probabilities. A miscarriage of justice resulting from professional incompetence must also be proven on a balance of probabilities and it may take many forms: *R. v. G.D.B.*, 2000 SCC 22 at paras. 26-28; *R. v. Dunbar*, 2003 BCCA 667 at para. 34.

[108] The bar for establishing professional incompetence is high and surpassing it is challenging. It is strongly presumed that counsel's conduct fell within the wide range of reasonable professional assistance, deference will be accorded to counsel's strategic and tactical decisions and the "wisdom of hindsight" has no place in the analysis. Nevertheless, unreasonable acts or omissions by counsel might include a failure properly to challenge the Crown's case, bring a necessary application or make duly diligent efforts to adduce relevant defence evidence, any of

which could amount to assistance so deficient that it was ineffective. Alternatively, unreasonable acts or omissions might include representing the accused while in a compromised state or failing to comply with instructions, both of which could deny real assistance altogether and thus taint the adjudicative process by which the verdict was reached: *Aulakh* at paras. 46-48; *G.D.B.* at paras. 27, 29.

[109] On appeal, a court should analyze the prejudice component of an ineffective representation claim before the performance component. If prejudice is not proven to the requisite standard, the court should typically end the analysis. This is because grading counsel's performance is not the object of the exercise. As Justice Major pointed out in *G.D.B.*, that is a matter for the self-governing body of the legal profession, not the court: *G.D.B.* at paras. 27, 29; *Dunbar* at paras. 24-25.

[110] The prejudice component of an ineffective assistance claim is established where the appellant proves that professional incompetence is linked to a miscarriage of justice. A miscarriage of justice can result where there is a reasonable probability that the outcome of the proceedings below would have been different but for the errors made by counsel. In *Joanisse*, Justice Doherty explained that a reasonable probability is a probability which is sufficient to undermine confidence in the reliability of the outcome and it "lies somewhere between a mere possibility and a likelihood": *Joanisse* at para. 82. Alternatively, a miscarriage of justice may result where the outcome was reached through an unfair process, regardless of the reliability of the outcome. In other words, professional incompetence may result in a miscarriage of justice by reason of procedural unfairness alone: *G.D.B.* at para. 28; *Dunbar* at para. 26.

Analysis

[111] In my view, Mr. Ball has established the prejudice component of the ineffective assistance claim on a balance of probabilities. The confession and the Facebook messages were the primary pillars of the prosecution. If trial counsel could and should have approached the false confession defence or the Facebook messages as Mr. Ball claims, the force of the prosecution evidence would have been

potentially muted and, but for his errors, there is a reasonable probability that the outcome of the trial would have been different. In other words, the necessary link exists between the alleged professional incompetence and a miscarriage of justice. The real question is whether Mr. Ball has established on a balance of probabilities that trial counsel was professionally incompetent.

[112] I am not persuaded that professional incompetence is established. Although other counsel might have done more or otherwise, Mr. Ball has not proved that trial counsel mounted or presented the false confession defence inadequately, nor has he proved that his treatment of the Facebook message evidence was so flawed that it fell outside the wide range of reasonable professional assistance. That being so, he has not has surpassed the high bar set for proving a claim of ineffective assistance by counsel.

[113] Trial counsel elicited extensive testimony from Mr. Ball regarding his poor mental health and his reasons for purportedly confessing falsely. His testimony regarding his mental health was both uncontested and corroborated. In hindsight, given the judge's sceptical remark on his self-report, it may well have been desirable to present additional information from Mr. Ball's clinical records confirming the details of his psychiatric problems. However, the judge's remark was unpredictable and, in my view, confirmatory evidence was not required to advance the false confession defence adequately, nor was it unreasonable for trial counsel not to adduce it. In the circumstances, trial counsel's choice to rely on Mr. Ball's testimony regarding his poor mental health, as corroborated by Ms. Lacey and the police, is entitled to deference.

[114] The judge's charge on the false confession defence, while rather brief, was not inadequate. It follows that trial counsel was not obliged to object after it was delivered. As to Mr. Ball's contention that trial counsel should have located and adduced expert evidence relating the reliability of his confession to his poor mental health, I find it striking that there was no fresh evidence tendered to this effect. Contrary to Mr. Ball's submission, while Dr. Ferguson did describe him as a fragile

and vulnerable young man, lacking in coping skills under stress and impaired by anxiety and dependent personality traits, he did *not* relate those behavioural characteristics and vulnerabilities to what Mr. Ball told police when he made his confession. Nor, so far as I am aware, has any other psychiatric expert. In my view, one can hardly fault trial counsel for failing to locate and adduce evidence that does not demonstrably exist.

[115] I do not accept that trial counsel failed to appreciate the significance of the Facebook messages. Although, in my view, he understated it in his affidavit filed on the fresh evidence application, his conduct at trial reflects a keen appreciation. As Crown counsel points out, trial counsel fully aired credibility issues regarding Ms. Lacey and attempted to demonstrate that she could have fabricated the Facebook messages by hacking Mr. Ball's account via use of his password. In addition, in his closing address trial counsel urged the jury to disregard Ms. Lacey's "venomous" testimony and emphasized her prior access to Mr. Ball's Facebook account. All of these steps were designed forcefully to challenge the genuineness of the messages. All were reasonable and diligent.

[116] Nor do I accept that trial counsel unreasonably failed to investigate the authenticity of the Facebook messages. The fact that the messages do not appear on Mr. Ball's Facebook account is of no moment. He told police that he deleted them. The issue, if any, requiring investigation was the computing device on which the messages were recorded. That was a matter for police investigation. It was not unreasonable for trial counsel not to encourage any such investigation when he was not and could not be certain of its eventual outcome.

[117] Of greater concern is trial counsel's apparent failure to recognize and address the potential admissibility issues in connection with the photographed Facebook messages. That was an oversight. Nevertheless, in my view, an oversight on a technical statutory point of evidence does not necessarily equate to professional incompetence amounting to ineffective representation. Bearing in mind the high bar that applies, the fact that much of the salient jurisprudence post-dates the trial, the

need to avoid the "wisdom of hindsight" and the wide range of reasonable professional assistance I conclude that, while unfortunate, trial counsel's oversight did not rise to the level of professional incompetence. My conclusion in this regard is buttressed to some extent by the fact that the police, Crown counsel and the judge apparently all experienced the same oversight.

[118] I would not give effect to this ground of appeal.

Has Mr. Ball established a miscarriage of justice?

Miscarriage of Justice

[119] Pursuant to s. 686(1)(a)(iii) of the *Criminal Code*, an appeal from conviction may be allowed where there was a miscarriage of justice. In *R. v. Davey*, 2012 SCC 75, Justice Karakatsanis described a "miscarriage of justice" for the purposes of s. 686(1)(a)(iii) by quoting from *R. v. Khan*, 2001 SCC 86 and *R. v. Wolkins*, 2005 NSCA 2:

> [50] In his concurring opinion in *R. v. Khan*, 2001 SCC 86, [2001] 3 S.C.R. 823 (S.C.C.), LeBel J. considered the scope of the miscarriages of justice contemplated by s. 686(1)(*a*)(iii). He concluded, at para. 69, that when considering whether an irregularity that occurred during a trial rises to the level of a miscarriage of justice, "[t]he essential question in that regard is whether the irregularity was severe enough to render the trial unfair or to create the appearance of unfairness."
>
> [51] In *R. v. Wolkins*, 2005 NSCA 2, 229 N.S.R. (2d) 222 (N.S. C.A.), at para. 89, Cromwell J.A. provided a helpful summary of the two types of unfairness contemplated within the meaning of miscarriage of justice under s. 686(1)(*a*)(iii):
>
> > … the courts have generally grouped miscarriages of justice under two headings. The first is concerned with whether the trial was fair in fact. A conviction entered after an unfair trial is in general a miscarriage of justice. The second is concerned with the integrity of the administration of justice. A miscarriage of justice may be found where anything happens in the course of a trial, including the appearance of unfairness, which is so serious that it shakes public confidence in the administration of justice. [Citations omitted.]

[120] In *Khan*, Justice LeBel explained that, in most cases, the whole of the circumstances must be weighed in determining whether a trial was unfair, in reality or in appearance. Emphasizing that an accused is not entitled to a perfect trial, he

acknowledged that minor irregularities will inevitably occur in legal proceedings. The critical question, however, is whether the irregularity in issue rendered the trial unfair or created an appearance of unfairness, the latter of which is assessed by asking if the irregularity would taint the administration of justice in the eyes of a reasonable and objective observer. He went on to state that, while there is no strict formula for determining a miscarriage of justice, there are several elements that provide helpful reference points:

> [75] First, one should ask whether the irregularity pertained to a question which was, in law or in fact, central to the case against the accused. Thus, an irregularity which is related to a central point of the case is more likely to be fatal than one concerning a mere peripheral point …
>
> [76] Second, the court of appeal should consider the relative gravity of the irregularity. How much influence could it have had on the verdict? ...
>
> [77] When the court considers the gravity of the error, it should also consider the possible cumulative effect of several irregularities during the trial …
>
> [78] Third, one should be mindful of the type of trial during which the error has occurred. Was it a trial by jury or by a judge sitting alone? Sometimes, irregularities can have a more severe impact on the fairness of the trial when they occur during a trial before a judge and a jury …
>
> [79] Fourth, and related, is the possibility that the irregularity may have been remedied, in full or in part, at the trial …
>
> [84] Fifth, one must keep in mind that what matters most is the *effect* of the irregularity on the fairness of the trial and the appearance of fairness. Therefore, it will not be a mitigating factor that the irregularity did not result from a deliberate act by the Crown, the judge, or one of the court officials …
>
> [85] Sixth, the attitude of defence counsel if and when he was confronted with the irregularity may have an impact. Therefore, if defence counsel had an opportunity to object to the irregularity and failed to do so, this militates for a finding that the trial was not unfair. Of course, this is not absolutely determinative, as a trial can be declared unfair even if defence counsel failed to object. [Citations omitted, emphasis in original].

Analysis

[121] In my view, the cumulative effect of the errors and irregularities in Mr. Ball's trial rendered it unfair and resulted in a miscarriage of justice. Near the trial's outset, key Crown evidence was admitted without its questionable admissibility having been tested. The origin of that evidence was not fully investigated, it was introduced in photographic form through a witness with no personal knowledge and it was

immediately provided to the jury, with whom it remained throughout the entire proceeding. As the trial progressed, Crown counsel elicited irrelevant and prejudicial evidence that Mr. Ball was an abusive partner, no one intervened and the judge did not warn the jury to disregard it. At the end of the trial, the judge expressed undue scepticism regarding Mr. Ball's self-report of poor mental health, which condition Mr. Ball relied upon in advancing his defence of false confession.

[122] The charges were serious and the jury upon whom the appellant relied required considerable assistance from the court and from counsel. Although none of the errors and irregularities resulted from deliberately improper acts, all impacted trial fairness and, in my view, were largely borne of insufficient vigilance to ensure its protection. Although the Crown case was undoubtedly strong, I cannot say it was so strong that the verdict would necessarily have been the same in the absence of these errors and irregularities.

Conclusion

[123] I would admit the fresh evidence, allow the appeal, set aside the conviction and order a new trial.

"The Honourable Madam Justice Dickson"

I AGREE:

"The Honourable Madam Justice D. Smith"

I AGREE:

"The Honourable Madam Justice Fisher"