NOVA SCOTIA COURT OF APPEAL
Citation: R. v. Weagle, 2008 NSCA 122

Date: 20081223
Docket: CAC 286012
Registry: Halifax

Between:

Jason Weagle

Appellant

v.

Her Majesty the Queen

Respondent

Judges:	Roscoe, Bateman and Saunders, JJ.A.
Appeal Heard:	December 4, 2008, in Halifax, Nova Scotia
Held:	Appeal is dismissed per reasons for judgment of Roscoe, J.A.; Bateman and Saunders, JJ.A. concurring.
Counsel:	Luke A. Craggs, for the appellant William D. Delaney, for the respondent

Reasons for judgment:

[1] Jason Weagle was convicted of failure to stop a motor vehicle while being pursued by a peace officer (s. 2491(1)), dangerous driving (s. 249(1)(a)), assault using a motor vehicle as a weapon (s. 267(a)) and assaulting a police officer in the execution of his duty (s. 270(1)(a)), after trial before Judge Jamie Campbell of the Provincial Court. He was sentenced to a total of 10 months incarceration. Mr. Weagle appeals his convictions alleging ineffective assistance of trial counsel, that the trial judge erred in law in relying on hearsay evidence and that the verdict is unreasonable. He also applies for the admission of new evidence on the appeal to support his submissions.

Evidence at trial:

[2] On January 12, 2007, at approximately 10:00 p.m. RCMP Constables Todd Taylor and Stephanie Stevens, were conducting surveillance in downtown Halifax of a blue Honda Accord believed to be associated with Jason Weagle. They had been given a picture of the appellant earlier that day in the course of the investigation of drug offences. They had been advised by another officer that as a result of transactions observed in a grocery store parking lot, the vehicle should be stopped. They followed the Honda for several blocks and then activated the emergency lights and siren of the police car on Bell Road. The Honda failed to pull over until it was forced to stop behind a line of vehicles at a red light at the Willow Tree intersection.

[3] Constable Taylor drove the police vehicle alongside the Honda and angled it close to the front bumper of the Honda to prevent the driver's door from opening. Both police officers exited the vehicle and approached the Honda, Constable Taylor on the driver's side and Constable Stevens on the passenger side. Constable Taylor held his badge in front of him and told the driver to stop the vehicle. He testified that he had a good look at the driver and he identified him as the defendant Jason Weagle. He said it was the same person shown in the picture. Constable Stevens also identified the driver as Jason Weagle, who was the same person shown in the photograph. There was a male in the front passenger seat and a female in the backseat.

[4] Shortly after the officers approached the vehicle, the car in front of the Honda moved ahead a few feet and the driver of the Honda turned the wheels of the car and accelerated to get around the police car and the car ahead of the Honda. Constable Taylor indicated that he had to jump out of the way in order to avoid being run over by the Honda.

[5] The police officers testified that the Honda drove through a red light at the Willow Tree intersection, continued north on Robie Street, and ran another red light at the corner of Robie and Cunard, narrowly missing other vehicles in the intersection. Other officers in the Cunard Street area testified that they followed the Honda which turned right on North Street, passing other vehicles at approximately 100 km. an hour, then travelled over the MacDonald Bridge at a high speed. The police officers following the vehicle lost sight of it as it exited from the bridge. Constable Taylor also testified that later that evening the same Honda motor vehicle was involved in another police pursuit in Dartmouth.

[6] The appellant was arrested several days later as he left an apartment building believed to be his residence at 56 Evans Ave. in Fairview. The Honda motor vehicle was parked in the parking lot of 56 Evans Ave.

[7] Robin Adams testified for the defence. She indicated that Jason Weagle visited her on the evening of January 12 arriving after it was dark and staying the whole night. She remembered the date because it was her nephew's birthday. In a police statement given in July 2007 she said that Mr. Weagle arrived at her place at approximately 9:00 or 10:00 p.m. Under cross-examination with respect to the time of his arrival she indicated she could not say an exact time "like a 10:20 or 9:11, you know. But I know it was early because I would not have anyone over."

[8] Jason Weagle testified in his defence. He denied being the driver of the Honda on January 12. He indicated that he lived at 56 Evans Ave. He said that he took a cab and arrived at Ms. Adams' place between 7:30 or 8:00 on January 12, watched a movie with her and stayed until the next morning. He denied knowing that the Honda had been parked behind 56 Evans Avenue.

The decision under appeal:

[9] In his oral decision Judge Campbell reviewed the evidence and acknowledged that identification was the main issue. He correctly instructed himself in accordance with **R. v. W.D.**, [1991] 1 S.C.R. 742 and reviewed the evidence of Mr. Weagle and Ms. Adams. He continued:

> In this case, the alibi was not raised until July, six months after the events in January of 2007. Mr. Weagle says that he did not want to get Ms. Adams involved at the time. Yet in January of 2007, he knew that he was facing serious charges, and knew that he had an alibi yet failed to raise it.
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> His failure to do so allows me to draw inferences. It suggests that there should be some kind of an explanation as to why that would be the case. Why would it take so long for the alibi to come forward? Mr. Weagle answers that by saying he is not that kind of person. That to me is not a very forceful response if it is, indeed, able to be characterized at all as a response. He is not that kind of person.
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> The fact is, six months went by from January to July and that makes it difficult for anyone to re-create the situation in their mind. Ms. Adams was not firm on the time when Mr. Weagle is said to have arrived at her home. She says between 9 and 10, but also says that it was getting dark – it was dark. It could have perhaps been later than 10 but it seems to be, in her view, around that time.
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> As to why she believed it was that particular day, there is also some issue. She indicates that it was her nephew's birthday party and she remembers it because this happened on the day of the birthday party. What is interesting to note there is that, according to her, nothing happened that day.
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> Nothing out of the ordinary happened and nothing that would distinguish it from any of the other evenings when Mr. Weagle would have gone to her home, or to her sister's home where she was living. Yet, she was able to remember the movie they watched that night, but not able to remember the movie they watched any other night.
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> She was not able to remember any other detail about that night other than the fact that they watched a movie and it seemed to have melded into her memory with any number of other nights where they engaged in exactly the same course of action. Mr. Weagle, for his part, says he remembers that evening because he gave her $20 to give her nephew because she had no money to buy a gift for him.

The alibi is certainly not an airtight one. It also has to be weighed even in light of **R. v. W.(D.)**. The alibi has to be weighed against the evidence that contradicts it. And what evidence contradicts the alibi?

There is an eyewitness account from two police officers. They are unequivocal in their statement that the man in the picture, C-2, which is described as being Mr. Weagle, and who Mr. Weagle says is Mr. Weagle, and who Mr. Weagle says actually looks very much like Mr. Weagle, that the person in that picture is the person they saw in the car.

The street was well-lit. They had an opportunity to look at the person face-on and were able to make an identification. Any descriptors that they might provide regarding facial hair, glasses, the way that he had his hair tied up, or a gap or unusual formation of his teeth, is not really the issue.

The fact is they saw the man in the car, they saw the picture and they both determined that it was the same person. It was unnecessary for them then to go into a detailed analysis in their own mind of each of the identifying characteristics. The characteristic that allowed them to identify him was the fact that he looked exactly like the person in the picture.

Based upon that and the significant weaknesses in the alibi, I am not satisfied here that there is a reasonable doubt that Mr. Weagle was the person driving the car. I am satisfied beyond a reasonable doubt, in fact, that the officers are correct, and that Mr. Weagle was driving the blue Honda.

That is confirmed, in my view, by the fact that they had received information that Mr. Weagle was associated with the blue Honda and that they should follow a blue Honda which, in fact, Mr. Weagle was driving.

Furthermore, the same vehicle was found behind the apartment building where Mr. Weagle resides. Even though he claims he does not drive, the fact is there is much to connect him with the car over and above the very clear connection of the eyewitness account, unequivocal eyewitness accounts, by the two police officers.

So in my view, the alibi does not raise a reasonable doubt, and the other evidence does not raise a reasonable doubt. I do not accept Mr. Weagle's evidence and accept the evidence of the police officers in this case so that I am satisfied that the Crown has proven that Mr. Weagle was the person driving the vehicle. Then the question is with regard to each of the four charges.

[10] From there the trial judge dealt with elements of each of the offences, and found that each had been proven beyond a reasonable doubt.

Issues:

[11] The issues raised on appeal can be stated as:

1. Is the new evidence admissible to establish that trial counsel's performance was inadequate?
2. Was the appellant deprived of the effective assistance of counsel to the extent of causing a miscarriage of justice?
3. Did the trial judge's acceptance of the eye witness identification evidence lead to unreasonable verdicts?
4. Did the trial judge err in law by basing his decision on hearsay evidence?

New evidence on appeal:

[12] The new evidence sought to be admitted on the appeal consists of an agreed statement of facts and an affidavit of Peter Nolen, the appellant's trial counsel. The agreed statement of facts states that on January 13, 2007 at 1:10 a.m. the same blue Honda Accord involved in the earlier incident described by Constable Taylor was involved in a police pursuit in Dartmouth. The car was observed by police travelling at a high speed through a red light. As a result, the vehicle was followed. It did not slow down or stop in response to the siren and flashing lights, and in the course of the chase, the vehicle spun out of control. The driver exited the car and was chased on foot. The driver was caught, arrested and identified as Peter Jason McKenna. The passenger, Genevieve Guerette, was the registered owner of the vehicle. Mr. McKenna's mug shot is attached to the agreed statement of facts. It states that he is a 36 year old white male with brown hair and blue eyes.

[13] The affidavit of Mr. Nolen says that when he was first retained in respect to this matter Mr. Weagle advised him that he was a passenger in the vehicle when it was stopped on Bell Road and Peter McKenna was the driver. Mr. Weagle at that time hoped that Mr. McKenna would take responsibility for the events on Bell Road. Some time later, Mr. Weagle advised Mr. Nolen that Mr. McKenna would not acknowledge being the driver and Mr. Weagle would provide an alibi witness for the trial. Mr. Nolen indicates that he was aware of the charges against Peter

McKenna, however based on the new alibi evidence “I was never instructed to call the investigating officer from the McKenna matter in Dartmouth. The only person I was told to call as a witness was the alibi witness. All cross examinations of Crown witnesses were conducted pursuant to Mr. Weagle’s instructions.”

[14] The appellant submits that his trial counsel should have presented evidence about the McKenna incident at his trial and that the failure to do so is evidence of a lack of due diligence, and constituted incompetence which resulted in a miscarriage of justice.

[15] In **R. v. G.D.B.**, 2000 SCC 22, the Supreme Court of Canada confirmed the general approach to the admission of fresh evidence on appeal and specifically in the context of an ineffective assistance of counsel argument. Justice Major for the court stated:

> 16 This appeal centers on the existence of fresh evidence. The well-known criteria applicable to this issue were stated in **Palmer**, *supra*, and reaffirmed recently in **R. v. Warsing**, [1998] 3 S.C.R. 579, at para. 50:
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> (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. ...
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> (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.
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> (3) The evidence must be credible in the sense that it is reasonably capable of belief, and
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> (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.

[16] The situation in **G.D.B**. was similar to this case, in that trial counsel had knowledge and possession of useful evidence but elected not to use it at trial. Like here, the appellant argued that defence counsel was incompetent and thus deprived him of any opportunity to exercise the due diligence required by the **Palmer** test. Justice Major emphasized the purpose of the due diligence requirement:

> 19 The due diligence criterion exists to ensure finality and order -- values essential to the integrity of the criminal process. **R. v. M. (P.S.)** (1992), 77 C.C.C. (3d) 402 (Ont. C.A.), *per* Doherty J.A., at p. 411:
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> > The interests of justice referred to in s. 683 of the **Criminal Code** encompass not only an accused's interest in having his or her guilt determined upon all of the available evidence, but also the integrity of the criminal process. Finality and order are essential to that integrity. The criminal justice system is arranged so that the trial will provide the opportunity to the parties to present their respective cases and the appeal will provide the opportunity to challenge the correctness of what happened at the trial. Section 683(1)(d) of the **Code** recognizes that the appellate function can be expanded in exceptional cases, but it cannot be that the appellate process should be used routinely to augment the trial record. Were it otherwise, the finality of the trial process would be lost and cases would be retried on appeal whenever more evidence was secured by a party prior to the hearing of the appeal. For this reason, the exceptional nature of the admission of "fresh" evidence on appeal has been stressed: **McMartin v. The Queen**, *supra*. ...

[17] The Court did not accept the appellant's argument regarding due diligence:

> 20 In determining whether or not the due diligence required by **Palmer** has been met, an appellate court should determine the reason why the evidence was not available at the trial. The reason for the evidence not being available at first instance is usually one of fact. In this appeal the evidence was available. The reason it was not used, placed in its most favourable light for the appellant, was the unilateral decision of his counsel that the tape would be more prejudicial than helpful in the trial.
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> 21 It was submitted by the appellant's new counsel that the decision not to use the tape was incompetent, and that the appellant's obligation to exercise due diligence was met by this alleged incompetence. The argument concluded that the test of due diligence was therefore met, the tape as new evidence should be admitted, and a new trial ordered.
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> 22 In the absence of a miscarriage of justice, that submission fails.

[18] In this case the evidence about Peter McKenna was available to both Mr. Weagle and his counsel before trial. It is not evidence that has surfaced after the trial or for some other reason was not available to be presented at trial. Based on the affidavit of Mr. Nolen, which is not challenged, Mr. Weagle did not instruct

him to call evidence relating to Mr. McKenna. Therefore, as in **G.D.B,**. I would find that the appellant has not met the first part of the **Palmer** test. The issue of whether there is a miscarriage of justice based on incompetence of counsel will be dealt with below.

[19] The second and third parts of the **Palmer** test appeared to have been met by the appellant. However, in my view the fresh evidence could not reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result. First of all, the McKenna incident happened approximately three hours after the Bell Road incident. The evidence that Mr. McKenna was driving the vehicle at 1:00 a.m. does very little to challenge the evidence of the police officers that Mr. Weagle was driving the vehicle a few miles away at 10:00 p.m. That there were three people, two men and a woman, in the car at 10:00 p.m. and two people, a man and a woman, at 1:00 a.m. does not help Mr. Weagle. Most importantly, given the fact that Mr. McKenna and Mr. Weagle bear absolutely no resemblance to each other, one being Caucasian with short hair and the other being African Canadian with long hair in a ponytail, the new evidence does little to support the position that the two police officers confused Mr. McKenna for Mr. Weagle. Next, as in **G.D.B**., it is necessary to consider whether there has been a miscarriage of justice.

2. Ineffective assistance of counsel:

[20] The appellant submits that his trial counsel's failure to call evidence relating to Peter McKenna amounts to incompetence which resulted in a miscarriage of justice. He relies on **G.D.B**. and **R. v. S.C.** 2005 NSSC 351.

[21] In **G.D.B**, the Court explained that there is a presumption that trial counsel's performance fell within the reasonable range:

> 26 The approach to an ineffectiveness claim is explained in **Strickland v. Washington**, 466 U.S. 668 (1984), *per* O'Connor J. The reasons contain a performance component and a prejudice component. For an appeal to succeed, it must be established, first, that counsel's acts or omissions constituted incompetence and second, that a miscarriage of justice resulted.
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> 27 Incompetence is determined by a reasonableness standard. The analysis proceeds upon a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. The onus is on the appellant to establish the acts or omissions of counsel that are alleged not to have been the

> result of reasonable professional judgment. The wisdom of hindsight has no place in this assessment.
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> 28 Miscarriages of justice may take many forms in this context. In some instances, counsel's performance may have resulted in procedural unfairness. In others, the reliability of the trial's result may have been compromised.
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> 29 In those cases where it is apparent that no prejudice has occurred, it will usually be undesirable for appellate courts to consider the performance component of the analysis. The object of an ineffectiveness claim is not to grade counsel's performance or professional conduct. The latter is left to the profession's self-governing body. If it is appropriate to dispose of an ineffectiveness claim on the ground of no prejudice having occurred, that is the course to follow (**Strickland**, *supra*, at p. 697).

[22] Applying that approach to this case, the question becomes whether the outcome likely would have been any different if trial counsel had presented evidence regarding Peter McKenna. If there is no proof of prejudice, it is not necessary to judge the performance of the trial counsel.

[23] Appellate courts generally take a cautious approach to claims of ineffective assistance of counsel. See for example: **R. v. Rideout**, 2001 SCC 27; **R. v. Missions** (2005), 196 C.C.C. (3d) 253 (N.S.C.A.); **R. v. Persad**, [2001] O.J. No. 1589 (Ont.C.A.); **R. v. Joanisse** (1995), 102 C.C.C. (3d) 35 (Ont.C.A.)**; R. v. Boudreau** (1991), 105 N.S.R. (2d) 15 (N.S.C.A.); **R. v. Strauss** (1995), 100 C.C.C. (3d) 303 (B.C.C.A.); **R. v. L.C.B.** (1996), 104 C.C.C. (3d) 353 (Ont.C.A.) **R. v. E.J.B.** (1992), 76 C.C.C. (3d) 530 (Sask.C.A.); **R. v. Davies**, 2008 ONCA 209). These cases emphasize that it is not the function of this court to second guess or perform a retrospective analysis of trial tactics, strategy or the judgment exercised by trial counsel. Considerable deference is owed to counsel’s decisions made during the trial.

[24] In **R. v. Joanisse**, Doherty, J.A. explained some of the reasons appellate courts are reluctant to scrutinize the conduct of trial counsel:

> 66 This court, following the lead of the Supreme Court of the United States, has taken a cautious approach to claims based on the alleged incompetence of trial counsel: **R. v. McKellar** (1994), 19 O.R. (3d) 796 at 799 (Ont. C.A.). Such claims can be easily made. It would be a rare case where, after conviction, some aspect of defence counsel's performance could not be subjected to legitimate

> criticism. Convictions would be rendered all too ephemeral if they could be set aside upon the discovery of some deficiency in counsel's defence of an accused. Appeals are not intended to be forensic autopsies of counsel's performance at trial.
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> 67 The spectre of retrospective appellate analysis of counsel's conduct of the defense could discourage vigorous and fearless representation at trial and encourage defensive advocacy aimed more at protecting counsel from subsequent criticism than advancing the cause of his client. Appellate review, perhaps influenced by the clarity which comes with hindsight, could also undermine the independence of the defence bar and the client-solicitor relationship. If critical appellate assessment of counsel's performance were to become an accepted part of the criminal process, I would expect that trial judges would feel an obligation to create a proper record for that assessment. This obligation could lead to inquiries at trial of both counsel and the accused with a view to ensuring that decisions made on behalf of the accused were competent ones. For example, when counsel announced that no defence would be called, a trial judge might make inquiries of both counsel and the accused to determine whether the decision was a considered one which the accused understood and supported. These kinds of inquiries, particularly colloquies between the trial judge and accused, could detract from counsel's right to make such decisions free from judicial interference and could do serious damage to the confidentiality and mutual trust essential to a proper client-solicitor relationship: **U.S. v. Decoster** 624 F. 2d 196 (D.C. Cir., 1976) (per Leventhal J. at 208, per MacKinnon J. concurring at pp. 228-229); S. Gilles, "Effective Assistance of Counsel: The Sixth Amendment and the Fair Trial Guarantee" (1983) 50 U. Ch. L.R. 1380 at 1401-02.
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> 68 There are also practical difficulties involved in an appellate court's attempt to assess the quality of the service provided by a trial counsel. In many situations, and this case provides an excellent example, the facts underlying the claim of incompetence are contested. The appellate forum is ill-suited to resolving these factual disputes. Claims based on the alleged incompetence of trial counsel also tend to disrupt the normal adversarial balance on appeal. Trial counsel, the true "target" of the appellant's allegations, has no standing in the appeal. Instead, the Crown is placed in the position of justifying or explaining conduct over which it had no control and with respect to which it usually had no knowledge prior to the receipt of the fresh evidence.

[25] In each of the cases cited above (¶ 23) the court rejected the appellant’s claim that misconduct by the trial counsel resulted in a miscarriage of justice. The appellant however relies on **R. v. S.C.**, 2005 NSSC 351, a case where Kennedy C.J., on a summary conviction appeal, determined that there was a miscarriage of

justice as a result of the poor performance of trial counsel. **S.C.** involved allegations of domestic violence in early 2003. The complainant wrote a letter to the accused in May 2003 in which she expressed her love, respect and trust of the accused. Defence counsel chose not to use the letter in cross examination of the complainant during the trial. He explained when he testified before the summary conviction appeal court that he thought the letter made the complainant's story more plausible, so he chose not to use it. Other evidence presented on the appeal included a report and testimony by a law professor who was highly critical of trial counsel's performance.

[26] With respect, the decision in **S.C**. appears to be somewhat of an anomaly compared to the other cases cited above, where in very similar circumstances the appellate court deferred to the judgment of counsel even if it appeared to be questionable, and did not second-guess a decision whether to introduce evidence such as a recantation to attack the credibility of the witness.

[27] In any event, the circumstances of **S.C.** are clearly distinguishable from this case. Kennedy, C.J. found that trial counsel's reasons for not to using the letter was "inexplicable" and "unfathomable" and that it would have been "hugely beneficial" to the trial judge to have heard the complainant cross-examined on the contents of the letter. In this case, Mr. Nolen's explanation is reasonable and there is no evidence from Mr. Weagle contradicting the statement that his instructions regarding which witnesses to call were followed. Furthermore, the failure to call evidence regarding Mr. McKenna's involvement with the police three hours after Mr. Weagle was identified as the driver on Bell Road, does not in my opinion, undermine confidence in the outcome of the trial. Mr. Weagle advised his counsel that he would testify that he was not in the car that evening, that he was visiting Robin Adams, and that she would confirm that alibi. To have presented evidence that Peter McKenna was driving the Honda at 1:00 a.m. may have weakened the alibi defence. That evidence would likely have been accompanied by a photograph of Mr. McKenna which in turn would have given the trial judge an opportunity to see that there is absolutely no resemblance between Mr. McKenna and Mr. Weagle. With the alibi defence, there was the possibility that the trial judge may have had a reasonable doubt on the basis that someone who looked like Mr. Weagle may have been driving the car. Certainly there is not a reasonable probability that but for the absence of the McKenna evidence, the results of the proceedings would have been different.

[28] The appellant has not discharged the burden of showing that he suffered any prejudice as a result of his trial counsel's conduct of the case. There is nothing on the record or presented in argument on appeal that leads to the conclusion that as a result of ineffective assistance of counsel, a miscarriage of justice resulted. I would dismiss the application to admit new evidence and these grounds of appeal.

3. Unreasonable verdict:

[29] The appellant submits that the trial judge failed to instruct himself on the frailties of eyewitness identification which led to an unreasonable verdict.

[30] The test for determining whether a verdict is unreasonable is stated in **R. v. Matthews**, 2008 NSCA 34:

> [13] On an appeal where it is alleged that the verdict is unreasonable, our role is to determine whether the findings essential to the decision are demonstrably incompatible with evidence that is neither contradicted by other evidence nor rejected by the trial judge and whether the verdict is one that a properly instructed jury, acting judicially, could reasonably have rendered. See: the analysis of **R. v. Beaudry**, [2007] 1 S.C.R. 190 in **R. v. Abourached**, 2007 NSCA 109, 24 - 29.

[31] Judge Campbell’s treatment of the eyewitness identification evidence is set out in ¶ 9 above. The evidence of the officers which he accepted is that Constable Taylor was an arm’s length away from the driver’s window and the driver looked directly at him. Constable Stevens was three or four feet from the driver and also had a direct line of sight to the driver’s face. The driver also looked directly at her. The officers described the driver as having curly, frizzy hair in a ponytail, distinctive eyebrows, a gap between his teeth and wearing glasses. Mr. Weagle was not wearing glasses during his trial but Ms. Adams testified that he normally does wear them. Otherwise, the trial judge was able to observe that the description matched both the picture of Mr. Weagle and his appearance in court. Constable Taylor arrested Mr. Weagle on January 26 and testified that his appearance on that day was the same as it was on January 12. He stated that he was “absolutely positive” that Mr. Weagle was the driver of the Honda on January 12, 2007. The identification by the officers was corroborated by finding the specific Honda parked next to the building where Mr. Weagle was residing.

[32] Given the evidence of the two officers who had the photograph of Mr. Weagle, the opportunities they had to observe him, along with the circumstantial evidence supporting the identification, it cannot in my view be said that the verdict is unreasonable. The acceptance of the identification evidence is not demonstrably incompatible with evidence that is neither contradicted by other evidence nor rejected by the trial judge, and the verdict is one that a properly instructed jury, acting judicially, could reasonably have rendered.

4. Hearsay evidence:

[33] The appellant submits that the trial judge erred in law by relying on hearsay evidence to confirm the eyewitness testimony. He points to the following passage in the decision:

> Based upon that and the significant weaknesses in the alibi, I am not satisfied here that there is a reasonable doubt that Mr. Weagle was the person driving the car. I am satisfied beyond a reasonable doubt, in fact, that the officers are correct, and that Mr. Weagle was driving the blue Honda.
>
> That is confirmed, in my view, by the fact that they had received information that Mr. Weagle was associated with the blue Honda and that they should follow a blue Honda which, in fact, Mr. Weagle was driving.

[34] The officers did not have personal knowledge that Mr. Weagle was associated with the Honda prior to the pursuit on January 12. Constable Taylor said they had received that information from other officers. Constable Stevens testified that Mr. Weagle "was known" to drive the Honda from time to time.

[35] The appellant's submission is weakened by the fact that the judge had already determined guilt beyond reasonable doubt before indicating that the identification was "confirmed" by the information obtained from others. The confirmation was of a finding beyond reasonable doubt that he had previously made. It is apparent from his decision that he was not grounding the finding of guilt upon the hearsay evidence. As well, there was other non-hearsay evidence linking the appellant to the blue Honda in that it was found by Constable Taylor in the parking lot of the building where Mr. Weagle resided.

[36] Although it may have been an error for the trial judge to refer to the hearsay evidence as confirmatory of his finding, in light of all of the other evidence of identification and the connection of Mr. Weagle with the Honda, this is a minor error. I would apply the curative provisions of s. 686(1)(b)(iii) to the error because the error did not cause a substantial wrong or miscarriage of justice.

[37] For these reasons, I would dismiss the appeal.

Roscoe, J.A.

Concurred in:

Bateman, J.A.

Saunders, J.A.