NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Falconer*, 2016 NSCA 22

Date: 20160330
Docket: CAC 424542
Registry: Halifax

Between:

Christopher Alexander Falconer

Appellant

v.

Her Majesty the Queen

Respondent

Judges:	MacDonald, C.J.N.S., Beveridge and Bourgeois, JJ.A.
Appeal Heard:	November 12, 2015, in Halifax, Nova Scotia
Held:	Appeal dismissed, per reasons for judgment of Beveridge, J.A.; MacDonald, C.J.N.S. and Bourgeois, J.A. concurring
Counsel:	Lee Seshagiri, for the appellant Timothy O'Leary, for the respondent

Reasons for judgment:

INTRODUCTION

[1] A jury convicted the appellant of the first degree murder of a young woman. He argues that his conviction is tainted by legal error, and asks this Court to quash his conviction and order a new trial.

[2] The appellant's arguments focus on agreements made by his trial counsel and the Crown, and what the trial judge said, or should have said, to the jury about those agreements. The agreements were documented as "Admissions" pursuant to s. 655 of the *Criminal Code*.

[3] Specifically, the appellant suggests that the trial judge, the Honourable Justice N. M. Scaravelli, erred in his jury instructions by conflating admissions with concessions about admissibility of certain evidence. The grounds of appeal are:

> 1. The trial judge erred in his instructions to the jury by conflating formal admissions with informal admissibility concessions and thereby inappropriately exposed the Jury to legal rationales for admissibility. In particular:
>
> > a. The jury was inappropriately informed about the voluntariness of Mr. Falconer's inculpatory statements and erroneously instructed that the statements were formal admissions of fact;
> >
> > b. The jury was inappropriately informed that Mr. Falconer's inculpatory text messages were admitted "for the truth of their contents" and erroneously instructed that the texts were formal admissions of fact;
> >
> > c. The jury was erroneously informed that six expert reports tendered by the Crown were admitted as formal admissions of fact.

[4] I agree that, in some circumstances, trial fairness can be jeopardized if a jury is unnecessarily exposed to legal rationales for admissibility of evidence. This case is not one of them. I am not satisfied that the trial judge committed reversible error in how he instructed the jury.

[5] However, I do agree that the parties should have taken more care in ensuring that their concessions about the admissibility of evidence did not create concerns that the jury might be confused as they tackled their adjudicative functions.

[6] In order to place in context the role of the "Admissions" and the trial judge's instructions to the jury, I will provide an overview of the trial process and the theories of the Crown and defence.

THE TRIAL

[7] There is no dispute about the basic facts. The Crown's case against the appellant was entirely circumstantial, but nonetheless, as can often be the case, a powerful one. I need only refer to some of the evidence.

[8] Amber Kirwan was a young woman. She had a boyfriend, Mason Campbell, and a large circle of friends. She and Mason hosted a party on October 8, 2011. Later that night, Ms. Kirwan went to Dooly's in a taxi with several of her friends. Mason stayed home with others.

[9] Ms. Kirwan left Dooly's shortly after 1:30 a.m. She used a friend's phone to call Mason to have him pick her up at Big Al's. Mason went there, but Ms. Kirwan was not there. He looked for her, but could not find her. The next day an investigation began into her disappearance.

[10] On October 14, 2011, Ms. Kirwan's recently purchased jewellery and some of her clothes were found next to a logging road in Heathbell, Nova Scotia. Ms. Kirwan's naked and bound body was found in a shallow grave in the same general area on November 5, 2011.

[11] A search of a camper owned by the appellant's stepsister in Heathbell turned up evidence that established that Ms. Kirwan had been in that camper. Strands of her hair were located on a bed (matched by DNA). In addition the police found: duct tape with the mirror image of a blue ink stamp from Dooly's; distinctive towels from the camper that matched the fabric used to bind Ms. Kirwan; and fragments that appeared to be from her sweater on the floor.

[12] Trace amounts of codeine and acetaminophen were found in a Dasani water bottle. Ms. Kirwan's blood test revealed a quantity of codeine, acetaminophen and caffeine.

[13] The police seized the appellant's car. In it were found: latex gloves, a Dasani water bottle, a roll of duct tape, and a plastic shopping bag. In the bag there was more duct tape, an extra-large black tank top, and an empty pill bottle with trace amounts of codeine, acetaminophen and caffeine. A witness identified

the tank top as belonging to the appellant. DNA on the tank top matched that of Ms. Kirwan, the appellant, and another unknown individual. Tests revealed the presence of human blood on the top.

[14] Prior to her disappearance, Ms. Kirwan had never been to the camper and was unknown to the appellant.

[15] Before the police found Ms. Kirwan's body, Cst. Leil of the RCMP asked the appellant if he would voluntarily go to the police department to be interviewed. The appellant cooperated. The interview was recorded. The appellant offered little detail about his whereabouts the weekend of October 8, 2011, but vehemently denied any involvement or knowledge about the disappearance of Ms. Kirwan.

[16] Some weeks later, the appellant was taken into custody on allegations of violating his parole. While in jail, the authorities recorded his telephone conversations. By this time, the appellant was a suspect. Police had seized cars that he had had access to. Officers had carried out a prolonged search of the camper located in Heathbell.

[17] The Crown tendered the audio and transcripts of calls between the appellant, his stepmother and his father on November 17, 2011. During these calls, the appellant mused that based on rumours, he was going to be charged with murder, and, "I was thinking I'm just going to end up pleading guilty on it anyway, if they do, just so it will save us a lot of stress".

[18] Phone records for the appellant, his friends and acquaintances, and some of the Crown witnesses were produced by affidavits from Telus and Bell Mobility employees. Coupled with oral evidence, it showed that the appellant stopped using his phone, including texting or answering texts, from approximately 12:45 a.m. on October 9 until 4:05 a.m.

[19] Later on the morning of October 9, the appellant sent texts to his stepsister that he had slept at her trailer in Heathbell on October 8th and 9th and had left some things in the nearby camper.

[20] The Crown called an expert witness who offered his opinion, based on cell phone tower activation and message content, that the appellant's cell phone was in the downtown area of New Glasgow around 1:40 a.m. October 9 and then ended up in the Heathbell area.

[21] The appellant did not testify. The defence called the appellant's father, Scott Falconer. He described the appellant's mood during the November 17 phone call, and that after he assured the appellant that the family would handle the stress, the appellant affirmed he would plead not guilty.

[22] The Crown and defence agreed that the only real issue at trial was the identity of the person who had confined and killed Ms. Kirwan. The defence theory was that the jury could not be satisfied beyond a reasonable doubt it was the appellant. The Crown's case was circumstantial. Defence counsel downplayed the significance of the presence of acetaminophen, codeine and caffeine in Ms. Kirwan's blood and attempts to link the appellant's ability to access Tylenol 3.

[23] The record contains vague references by the defence to a lack of diligence by the police in pursuing the deceased's boyfriend as a suspect. Evidence was adduced that: Mason had acted nervously when seen in the Heathbell area; the police had searched his car the day after Ms. Kirwan's disappearance where they found duct tape and a shovel in the trunk; and the police failed to do any comparison of tire impressions found on the dirt access road.

[24] Defence counsel also stressed that no DNA (or other physical) evidence linked the appellant to the burial site or the camper; and questioned that had the appellant been involved in the homicide of Ms. Kirwan, why would he volunteer to his stepsister that he had been to the camper and left personal items there. Counsel pointed to the existence of unknown fingerprints found in the camper and that anyone could access it. He conceded that there was a lot of evidence that did not "sound so good", but maintained it did not meet the test of proof beyond a reasonable doubt.

[25] The Crown theory was that the appellant saw Ms. Kirwan in the downtown area of New Glasgow at approximately 1:45 a.m. He abducted her, using duct tape to bind her hands, and took her to the camper located on his stepsister's property in Heathbell. The appellant then forced the victim to ingest Tylenol 3. The victim's clothing was removed, except for pieces of her shirt and sweater that were entangled in binds made of towels from the camper. While the victim was unlawfully confined, the appellant stabbed her at a location somewhere between the camper and the burial site, which was located just a few kilometers from the camper.

[26] With this elementary overview, we can turn to the "Admissions" that are the sole focus of the appeal from conviction.

THE "ADMISSIONS" UNDER S. 655

[27] The Crown attorneys and counsel for the accused signed a document entitled "**ADMISSIONS** (Section 655 of the ***Criminal Code***)". This document became Ex. #2. It was dated January 6, 2014. Edits to the agreements during the trial caused the parties to enter into a new exhibit (Ex. #2A) incorporating the minor adjustments to the details that the parties had endorsed during the course of the trial. Ex. #2A was dated January 23, 2014. Substantively, it is the same as Ex. #2.

[28] Ex. #2 contains 32 paragraphs. Twenty-six reference agreement as to the admissibility of evidence, sometimes without the necessity of having a *voir dire* — other times implicitly agreeing that certain expert reports and related documents were admissible. Affidavits were said to be admitted for the truth of their contents.

[29] The appellant identifies six paragraphs in Ex. #2 that he concedes are proper "admissions". They are as follows:

> The Accused admits the following facts alleged against him for the purpose of dispensing with proof thereof:
>
> 1. The identity of the person found by police on November 5, 2011 at the burial site off the Heathbell Road is the victim named in the Indictment, Amber Kirwin.
> 2. Amber Kirwin is deceased.
> 3. Amber Kirwin's death was ~~a wrongful death~~ by means of an unlawful act, and thereby constituted a culpable homicide and therefore constitutes murder.
>
> **[…]**
>
> 6. The October 9, 2011 Dooly's video surveillance time marker is inaccurate, and is behind in time by 50 minutes.
>
> **[…]**
>
> 11. The 2001 Chevrolet Impala which was seized and searched by police was registered to Scott Falconer Jr., but it was primarily used by the Accused.
> 12. The cellular phone number 902-753-4740 registered to Fred Waters was used at all material times by Rosalie Dean.

[30] There is no need to reproduce all of the remaining 26 paragraphs. I will refer to the ones alluded to in the appellant's Notice of Appeal. With respect to the statements made by the appellant, Ex. #2 reads:

> 8. The voluntariness and admissibility of the Accused's statement to police made on October 26, 2011 without the necessity of a *voir dire*.
>
> 9. The voluntariness and admissibility of the recorded telephone statements made by the Accused to Sue Kelly and Scott Falconer Jr. on November 16 and 17, 2011 without the necessity of a *voir dire*.

[31] The Crown tendered eight affidavits from employees of telephone companies. The affidavits were prepared and tendered pursuant to s. 30 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5. Each attached a hard copy or electronic format of telephone usage; three included text messages sent and received. The relevant text messages were sent to and from phone numbers subscribed to by the appellant, his family and acquaintances.

[32] One of the affidavits was by Joanne Strassen in relation to the appellant's phone. Ms. Strassen deposed that the business records of Telus showed the appellant as the subscriber to cellular phone number 902-818-2262. Ms. Strassen attached exhibits. Exhibit "C" was described as containing true copies of text messages relating to the appellant's phone number from October 8 to November 6, 2011.

[33] Using this affidavit as an example, paragraph 30 of Ex. #2 reads:

> The affidavit of Joanne Strassen regarding the call detail records for cellular phone number 902-818-2262, subscriber Chris Falconer, for the period of October 8, 2011 and November 6, 2011 is admitted for the truth of its contents.

[34] With respect to the expert's reports, the Crown called six witnesses to give opinion evidence. Five of those witnesses authored one or more reports documenting their analysis and opinion. One offered his opinion by a video animation.

[35] The appellant agreed that the experts were qualified to give expert opinion evidence, and their reports were admissible. Again, for reasons not disclosed in the record, the parties chose to document the appellant's agreement in Ex. #2.

[36] It is unnecessary to recite all of the paragraphs for each expert. The language and structure of the "admissions" were the same for each. The expert was named; his or her field of expertise described; and the witness could give evidence without the necessity of a *voir dire*. The date of the expert's report(s) and *curriculum vitae* were identified. Only two need to be quoted to illustrate. First, the medical examiner, Dr. Bowes:

> 13. Dr. Matthew John Bowes, M.D., F.R.C.P. (C), is an expert in the investigation, means, mechanisms and causes of death, and may be qualified as such, without the necessity of a *voir dire*.
>
> 14. The expert report of Dr. Bowes dated May 18, 2012 and his *curriculum vitae*.

[37] The second is for the Crown's DNA expert, Thomas Suzanski:

> 19. Thomas William Suzanski, M.Sc. is an expert in the field of forensic biology, and specifically in the areas of (1) DNA typing; (2) the application of population genetics for determining the statistical significance of DNA typing results; (3) the identification, classification, and analysis of bodily fluids; and (4) the dynamics of DNA transfer. He may be so qualified without the necessity of a *voir dire*.
>
> 20. The expert reports of Mr. Suzanski dated November 14, 2011; February 21, 2012; March 8, 2012; April 24, 2012; June 4, 2012; August 1, 2012; November 8, 2012 and October 21, 2013 and his *curriculum vitae*.

[38] Before addressing the specifics of the appellant's complaints, I will set out the principles that govern formal admissions permitted by s. 655 of the *Criminal Code*, as well as other common types of admissions.

THE GOVERNING PRINCIPLES OF ADMISSIONS

[39] The common law did not permit an accused charged with a felony to make admissions at or during his or her trial (other than a plea of guilty). Since its inception, the *Criminal Code* cured this inconvenience:

> 690. Any accused person on his trial for any indictable offence, his counsel or solicitor, may admit any fact alleged against the accused so as to dispense with proof thereof.[1]

[40] This provision now exists as s. 655, with no substantive change in the wording:

> 655. Where an accused is on trial for an indictable offence, he or his counsel may admit any fact alleged against him for the purpose of dispensing with proof thereof.

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[1] The *Criminal Code*, 1892, S.C. 1892, c. 29

[41] The common law and the import of the *Criminal Code* provision was considered by the Supreme Court of Canada in *R. v. Castellani*, [1970] S.C.R. 310. At the accused's trial for the murder of his wife, his counsel produced an eight paragraph document purporting to admit to certain facts pursuant to the predecessor section to s. 655. The Crown objected to the eighth paragraph. The Admissions were amended to delete that paragraph and were tendered at trial.

[42] The accused was convicted. The British Columbia Court of Appeal concluded that the trial judge should have permitted all of the admissions, but dismissed the appeal from conviction on the basis that the error by the trial judge had caused no prejudice. The accused's further appeal to the Supreme Court was unsuccessful.

[43] Cartwright C.J., writing for the full Court, concluded that the trial judge had not erred. He explained it is for the Crown to propose admissions, and the accused to admit or decline:

> In a criminal case, there being no pleadings, there are no precisely worded allegations of fact which are susceptible of categorical admission. An accused cannot admit a fact alleged against him until the allegation has been made. When recourse is proposed to be had to s. 562 it is for the Crown, not for the defence, to state the fact or facts which it alleges against the accused and of which it seeks admission. The accused, of course, is under no obligation to admit the fact so alleged but his choice is to admit it or to decline to do so. He cannot frame the wording of the allegation to suit his own purposes and then insist on admitting it. To permit such a course could only lead to confusion. The idea of the admission of an allegation involves action by two persons, one who makes the allegation and another who admits it.

[44] Chief Justice Cartwright explained that his conclusion was directed by the wording of the *Criminal Code*, and by what is necessarily involved in the idea of an accused admitting an allegation of fact in a criminal case. He viewed his conclusion as being strengthened by the purpose of the statutory provision. After referring to the common law, he explained the purpose of the section:

> In my opinion the purpose of enacting s. 562 and its predecessors was to alter the common law rule by eliminating the necessity, on the trial of an indictable offence, of proof by the Crown of any fact which it desires to prove and which the accused is prepared to admit at his trial.

[45] Once tendered, formal admissions under s. 655 of the *Criminal Code* are conclusive for the trier of fact. Subject to relief being granted from the consequence of the admission, the fact admitted is conclusively established. It is not open to challenge.

[46] In *R. v. Baksh*, [2005] O.J. No. 2971, the Crown wanted to tender s. 655 admissions previously made in a trial (that had resulted in a mistrial) in a subsequent trial. Justice Hill explained the import of s. 655 admissions:

> [84] An admission validly made in the context of s. 655 of the *Code* is an acknowledgement that some fact alleged by the prosecution is true. Such an admission dispenses with proof of that fact by testimony or ordinary exhibit and the accused is not entitled to set up competing contradictory evidence in an attempt to disprove the judicial or formal admission. In other words, the formal admission is conclusive of the admitted fact…

[47] After a thorough review of the governing case law, Hill J. concluded that the agreed statement of facts was admissible as evidence at the subsequent trial, but as rebuttable, not binding, admissions. He set out his conclusion as follows:

> [118] In summary, in the January 5, 2004 trial, the Agreed Statement amounted to judicial or formal admissions. Voluntarily made, with the benefit of legal advice, the unqualified admissions were, in the former trial, conclusive proof against both parties of the matters asserted. The mistrial, in my view, was precipitated by Mr. Baksh's desire to no longer be bound by the entirety of the Agreed Statement as formal admissions. Having already benefitted from the withdrawal of charges and certain advantages associated with the delay of the trial's completion, the mistrial order then freed the accused from the conclusive nature of those admissions although the accused had raised no demonstrable case of mistake or ineffective assistance of counsel justifying repudiation of para. 15 of the Agreed Statement. In these circumstances, the admissions in the first trial survive as ordinary admissions…[2]

[48] Parties pursuing the laudable goal of shortening and streamlining trials frequently enter into informal agreements about admissibility of evidence or other matters that fall outside the parameters of s. 655. Care is required by the parties and the trial judge to understand the difference and understand the consequences

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[2] The accused was convicted ([2005] O.J. No. 5399). Justice Hill's approach to this issue was approved by the Ontario Court of Appeal (2008 ONCA 116; leave ref'ed [2008] S.C.C.A No. 155).

that flow from such agreements. *McWilliams' Canadian Criminal Evidence* explains the distinction:

> The distinction between the solemn or formal admission and an evidentiary or informal admission is "a radical one" as the former "more stringent" form of admission admits of no contradiction while the latter genre of admission, for example, agreeing what a witness if present would testify to without any agreement "that the tenor of the desired testimony is true", leaves it open to impeach or contradict the credibility of the absent witness by other evidence.
>
> Hill, Tanovich & Strezos, *McWilliams' Canadian Criminal Evidence*, 5th ed. looseleaf, (Toronto: Canada Law Book, 2013), Sec. 25:30, p. 25-7.

[49] There are a number of cases where the parties appear to have misunderstood this difference. *R. v. Korski*, 2009 MBCA 37 illustrates. There were several agreed statements of fact. The ones that turned out to be contentious dealt with the introduction of evidence by tendering witness statements. The judge told the jury that they could weigh the "agreed statements of fact" along with the *viva voce* evidence. The appellant claimed this was wrong — the agreed statements of facts were formal agreements and hence amounted to proven facts. Steel J.A., for the Court, quoted with approval the discussion from *McWilliams* about the difference between formal and informal admissions. She then explained the role that the latter played in general and in the trial of Mr. Korski:

> [125] In the case at bar, counsel may have labelled all the exhibits agreed statements of facts, but that does not make them so. Instead, what in fact happened was that some of the seven exhibits were formal admissions and some were informal admissions and they should have not been lumped together. There is a distinction between agreed facts and a statement that a certain witness will say a certain thing. The various "Agreed Statement of Fact re: Evidence of [a witness]" were merely agreements as to what the witnesses would have said, not that what they say is necessarily true. The trial judge recognized the difference and brought it to the attention of defence counsel in the excerpt from the transcripts referred to previously, and to the attention of Crown counsel…

[50] The last type of admission has to do with the admissibility of evidence. Ordinarily, if a party objects to evidence being proferred during a trial, an objection is made. The objection can be disposed of after argument in the presence or absence of the jury without the hearing of the contentious evidence in a separate proceeding (a *voir dire*).

[51] But there are some types of evidence that should not be heard by the trier of fact without the trial judge first being satisfied as to certain requirements.

Statements allegedly made by an accused to persons whom he believes to be in authority and expert opinion evidence are two of them. Both were adduced at the appellant's trial, and their admissibility were conceded in Ex. #2.

[52] The requirements for admissibility for these two types of evidence and the burden of proof the proponent must meet to gain admission are different.

[53] A trier of fact should not hear evidence describing statements made by an accused to persons in authority (usually police officers) unless the Crown first establishes, in a separate proceeding (a *voir dire*), that the statements were made "voluntarily".

[54] Neither should a trier of fact hear expert opinion evidence without being satisfied that it meets the criteria for admission set out in *R. v. Mohan*, [1994] 2 S.C.R. 9, and recently refined by the Supreme Court in *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23.

[55] Yet, for both types of evidence, the Crown and the accused routinely agree that the intended evidence is admissible without the necessity of a formal or even informal *voir dire*.

[56] The rules are strict with respect to statements by an accused to a person in authority. To gain admission, the Crown must establish beyond a reasonable doubt that the statement was voluntary, in the sense that it was not obtained by either fear of prejudice, or hope of advantage exercised or held out by a person in authority, or other oppressive conduct. (See, for example, *R. v. Erven*, [1979] 1 S.C.R. 926; *R. v. Oickle*, 2000 SCC 38.)

[57] The rule applies whether the statement is inculpatory or exculpatory and whether the trial is by judge and jury or by judge alone. (See: *R. v. Piché*, [1971] S.C.R. 23; *R. v. Gauthier*, [1977] 1 S.C.R. 441; *R. v. Powell*, [1977] 1 S.C.R. 362.) A *voir dire* is required to be held whether the accused was even a suspect at the time or that the circumstances appear to make it plain that the statement in question was voluntary (*R. v. Erven, supra*.)

[58] The sole exception is where an accused waives the requirement for a *voir dire*. In other words, an admission by the accused that the statements in question are "voluntary". The juridicial basis to permit such an admission was debated for many years. It is not necessary to delve too deeply into the controversy, other than

to say that the ability to make the admission exists either as a formal admission under s. 655 or independently of it (see *R. v. Park*, [1981] 2 S.C.R. 64).

[59] I will now return to the appellant's specific complaints.

COMPLAINTS OF LEGAL ERROR

[60] By way of overview, although the appellant cites sound principles to ground his complaints of error, the complaints are, in the circumstances of this case, without merit.

The appellant's voluntary incuplatory statements

[61] The appellant takes issue with the admissions documenting the agreement that the appellant's statements were voluntary and admissible without the necessity of a *voir dire*.

[62] A trial judge flirts with danger if he or she informs a jury that a *voir dire* has been held and statements by an accused have been found to be "voluntary". To do so can be fatal to a subsequent conviction (see *Krishna v. The State*, [2011] UKPC 18; *R. v. Gallant* (1982), 70 C.C.C. (2d) 292 (Que. C.A.); *R. v. Main* (1993), 67 O.A.C. 350; *R. v. Viszlai*, 2012 BCCA 442). But not necessarily so (*Thompson v. The Queen*, [1998] UKPC 6).

[63] The reason why it can amount to legal error is succinctly explained by Mainella J.A. in *R. v. Pearce*, 2014 MBCA 70:

> [100] Once the confession was determined to be voluntary and admissible, it was a question for the jury to decide if it was true applying normal principles of evidence (*Gauthier* at p. 448-49; *Erven* at p. 931; and *Park* at p. 77). The fact that the confession had been ruled voluntary was meaningless to the jury's consideration of the appellant's claim that he made a false confession. No mention of a judge's ruling as to admissibility of a confession can be made in front of the jury because it may prejudice an accused by giving the jury the impression that the judge has already decided on the credibility of the witnesses against the accused (*R. v. Viszlai (J.G.)*, 2012 BCCA 442 at paras. 67-72, 330 B.C.A.C. 46; *Mitchell v. The Queen*, [1998] A.C. 695 at 703-4; and *R. v. Main (B.J.)* (1993), 67 O.A.C. 350 at para. 5 (C.A.)).

[64] None of these concerns apply here. There was no *voir dire*. There was no ruling by the trial judge that could possibly prejudice the jury's view of the reliability of the statements. I would add that the appellant's counsel on appeal

(not counsel at trial) acknowledges that the concession of admissibility was appropriate and tactically sound.

[65] Immediately after the Crown had read to the jury the contents of Ex. #2, the trial judge instructed the jury:

> THE COURT: Thank you. Members of the jury, throughout that admission of fact statement, I think you heard the Crown refer several times to "without necessity of a *voir dire*." What that means is without the necessity of having to prove the admissibility of that evidence.

[66] This was correct in law and appropriate. The appellant admitted the statements were admissible without the necessity of a *voir dire*. I fail to see how the references in Ex. #2 to the statements being "voluntary" could possibly have been prejudicial. The appellant identifies no unfairness.

[67] Although the parties meant "voluntary" in the sense of meeting the legal threshold without compulsion or inducement by the police by way of threats, fear of prejudice, or hope of advantage (and hence admissible), that is not the sense that the jury would have taken from those words. There was no explanation to the jury to that effect. Even if such an explanation had been given, it could hardly have been prejudicial to the appellant.

[68] In any event, the jury would have understood "voluntary" as it is used in ordinary parlance — the appellant willingly spoke to the police (this is hardly a distant cousin to the legal technical meaning of the term). The evidence, the arguments of counsel to the jury, and the trial judge's instructions make this clear. Cpl. Leil, who took the statement on October 14, 2011, testified:

> I attended that location and found the accused, Mr. Falconer, to be at that address. I spoke to him. Clearly advised him he was not under arrest. Asked him if he would voluntarily accompany me to the New Glasgow Police Service for the purposes of … of the interview.

[69] Defence counsel stressed to the jury that they should credit the appellant's cooperation with the authorities:

> Mr. Falconer was visited by police during the early stages of the investigation. He was asked if he would go and talk to them and he said sure. He goes and talks to them. By all accounts it sounded like he was very cooperative with them.

[70] This same sense was conveyed to the jury by the trial judge in his final instructions:

> This was a voluntary statement. Christopher Falconer was not charged with the offence of murder. You may recall Christopher Falconer stated he had nothing to do with Amber Kirwan's disappearance…

[71] As to the appellant's complaint that the trial judge wrongly instructed the jury that the statements were formal concessions of fact, the appellant cannot point to any such instruction. At best, there was a theoretical risk that the jury might infer such was the case.

[72] The appellant's argument is based on this logic: the trial judge told the jury that where the parties admit facts pursuant to s. 655, they must accept those facts; the statements of the appellant were included in the s. 655 Admissions; hence, they had to accept what those statements said as fact.

[73] With respect, that risk is fanciful. It is not borne out by common sense and by the trial judge's instructions. The trial judge at the outset of the trial told the jury:

> THE COURT: Let me address the jury with respect to this exhibit. Members of the jury, what you've just heard is that the Crown has made reference to an admission of facts, pursuant to Section 655 of the *Criminal Code*. This means that both the Crown and Defence have admitted to certain facts in this case and they have prepared and signed an agreed admission of facts. And this means that you must accept those facts as being proved. When the Crown and Defence formally agree, pursuant to the provisions of the *Criminal Code*, that certain facts are admitted, you must accept those facts as being admitted.

[74] I agree with the submissions of Mr. O'Leary, on behalf of the Crown, that it is appropriate to assume that the jury was comprised of ordinary citizens who, although not legal specialists, bring common sense to the legal process (*R. v. Corbett*, [1988] 1 S.C.R. 670; *R. v. Morningchild*, 2011 ABCA 215 at para. 13). Common sense dictates that the jury would have understood exactly what Ex. #2 said, the parties had merely agreed that the statements were voluntary and admissible, not that the contents were somehow incontrovertible facts.

[75] Keep in mind, the appellant's police statement was, for the most part, exculpatory. He denied any knowledge or involvement in Ms. Kirwan's

disappearance. If the jury believed that they had to accept these assertions as being true, they would have acquitted the appellant.

[76] Instead, the trial judge instructed the jury to assess and weigh the appellant's police statement. The trial judge gave an *R. v. W.(D.)* instruction:

> If you believe Mr. Falconer's statement, you must find him not guilty. Even if you do not believe Mr. Falconer's statement, if the statement leaves you with a reasonable doubt about the guilt of the offence charged, you still must find him not guilty. Even if Mr. Falconer's statement does not leave you with a reasonable doubt about his guilt, you may convict him only if the rest of the evidence that you accept in this case proves his guilt beyond a reasonable doubt.

[77] As to the appellant's statements to his father, these were viewed by the parties as some sort of post-offence conduct that the jury could use, along with other evidence, to infer guilt. There was no attempt at trial to exclude this evidence. With respect, the evidence had little probative value. In any event, there was nothing in the statements which the jury could have misunderstood as requiring them to accept the statements as being true.

[78] The appellant called his father, Scott Falconer, to describe the appellant's depressed mood, and to reinforce that the appellant's musings about pleading guilty were driven by concern for his family and friends.

[79] The trial judge instructed the jury about how to assess this evidence:

> To decide the reason for Mr. Falconer's comments, you should consider all of the evidence. Of particular importance is the evidence that offers any explanation for his conduct regarding these statements.

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

The Experts' Reports

[81] The appellant's argument about the expert reports parallels his first argument. He says the jury were told they had to accept as fact matters that the parties had agreed to under s. 655, and since the expert reports were listed as formal admissions of fact, the jury had to accept them as such, and this prejudiced the appellant's right to a fair trial. With respect, I am unable to agree.

[82] The jury was not told by the words of Ex. #2, submissions by counsel, or the trial judge's instructions that what the experts said in their reports had to be

accepted as fact pursuant to s. 655 of the *Criminal Code*, or otherwise. I will explain.

[83] For ease of reference, I repeat the wording of one of the sets of paragraphs from Ex. #2 with respect to an expert, along with the opening words of that exhibit:

> The Accused admits the following facts alleged against him for the purpose of dispensing with proof thereof:
>
> **[…]**
>
> 13. Dr. Matthew John Bowes, M.D., F.R.C.P. (C), is an expert in the investigation, means, mechanisms and causes of death, and may be qualified as such, without the necessity of a *voir dire*.
>
> 14. The expert report of Dr. Bowes dated May 18, 2012 and his *curriculum vitae*.

[84] The jury could not have been confused with respect to the agreement documented in paragraph 13 (and repeated for all of the experts). The parties stipulate that the named witness is an expert in the defined areas; he or she can give evidence as an expert without the necessity of a *voir dire*.

[85] As I described earlier (¶65), the trial judge explained to the jury that the phrase "without the necessity of a *voir dire*" simply meant without the necessity of the Crown proving the admissibility of the evidence in question.

[86] Grammatically, the meaning of paragraph 14 of Ex. #2 (and the corresponding paragraphs for the other expert reports) is difficult to discern. It does not actually say that the expert report and CV are admissible, but that seems the most logical interpretation.

[87] The paragraphs certainly do not say that the opinions, and the factual details set out in the various expert reports, were admitted under s. 655 of the *Criminal Code*.

[88] In fact, the trial judge instructed the jury appropriately on numerous occasions about how to assess and weigh expert opinion evidence.

[89] The first expert was Dr. Matthew Bowes. Before commencing his testimony, the Crown referred to Ex. #2 as documenting the agreement that he was an expert, who could testify without a *voir dire*. Dr. Bowes' C.V. and expert report were marked as exhibits. He testified as to his qualifications and addressed

what was set out in his report of May 18, 2012. Defence counsel cross-examined Dr. Bowes.

[90] At the end of Dr. Bowes' evidence, the trial judge gave the jury a mid-trial instruction about expert evidence. The judge explained a number of key things: that the parties had agreed that the named experts were qualified to give opinions; but despite the expert's entitlement to give an opinion, it was up to them to weigh that evidence, including whether the facts the expert relied on had been established to their satisfaction. His instructions were:

> Members of the jury, I'm just going to talk to you for a moment a bit about expert opinion evidence. You've heard this morning the evidence of Dr. Bowes, and he was qualified, as you know, as an expert in the investigation, means, mechanisms, and causes of death. I am going to give you this instruction now because you may have learned that there will be more experts being called in this trial **and these experts will be qualified, as you know from the Agreed Statement of Facts, by agreement, and they will give opinions.**
>
> So, normally, witnesses, when they testify, are not entitled to testify about their opinions. In the cases of experts, for example, Dr. Bowes, because of his special education and training, he was permitted to give an opinion about the means and causes of death, because he was qualified as an expert in that area. And that's necessary in order for a person to give an expert opinion.
>
> **So although an expert would be entitled to give an opinion, once qualified and agreed to, you still have to consider the expert's opinion. You have to consider the expert's qualifications and experience, because you'll hear about that. You'll have to consider the reasons the expert has given for the opinion. You would consider the suitability of the methods that any expert uses to give their opinion. You would want to know whether, in giving their testimony, whether the expert appeared to be impartial, and you'd also want to consider the other evidence in the case, as a whole, in considering an expert's opinion.**
>
> In some cases, an expert may be asked to rely on certain facts to give his or her opinion. Those facts may be the same or they may be different from the facts that you find to be the facts in the evidence of the case. So the closer the facts are to the facts that an expert may assume to be true, the more you may wish to rely upon it. But if the expert's relying on facts that you don't find to be the case, then you may wish to give it less weight, because you are the persons who must determine what facts you accept or reject in this case. So in terms of whether an expert's opinion would be helpful, you would consider those things that I've just discussed.
>
> [Emphasis added]

[91] The appellant acknowledges that not only did the Crown call each of the experts to introduce their qualifications and reports, defence counsel cross-examined each witness to put into context the opinions, lessen the impact of them, and elicit matters favourable to the defence.

[92] Furthermore, the appellant acknowledges that the trial judge's instructions to the jury about the role of expert opinion evidence is above reproach. Nonetheless, he argues that the jury was given contradictory instructions. That is, the jury could weigh the expert opinion evidence, but they had to accept as fact those matters set out in Ex. #2.

[93] With respect, I disagree with the appellant's interpretation. It is far too linear. Neither does it accord with a common sense approach to what the jury would have understood from Ex. #2, the trial judge's instructions about admissions, and the expert evidence adduced at trial.

[94] The trial judge did not spend much time on the s. 655 Admissions. He instructed the jury that it was their role to decide what the facts in the case were. To do so, they had to consider only the evidence they had heard in the courtroom. The judge explained that evidence included what the witnesses had said and the exhibits, including the expert reports. It was up to them to determine the quality of the evidence and how much weight to give to the evidence.

[95] The trial judge directed them that the evidence included facts agreed to by the parties:

> The evidence also includes the facts on which the parties have agreed. You must take what they have agreed as facts of this case. As I explained to you earlier, there are some things that are not evidence. You cannot rely on matters that are not evidence.

[96] The trial judge gave a detailed instruction on the role of expert opinion evidence in the trial and how they should approach weighing that evidence. He referred to each expert and then instructed the jury:

> The opinion of experts are just like the testimony of any other witness. Just because an expert's given an opinion does not require you to accept it. You may believe, you may rely on as much of the opinion as you see fit. Each expert filed their C.V. or resumés, briefly explained their background. You should consider the education, training and experience of the expert and the reasons for the opinion, consider the suitability of the methods used, and the rest of the evidence

> in the case, as well, when you decide how much or little to rely on the opinion. It's up to you to decide.
>
> Experts usually form their opinions by applying their training, education and experience to a number of facts that the expert assumes or relies upon as a basis for their analysis. What an expert assumes or relied upon as a fact for the purpose of offering his or her opinion may be the same as what you find as the facts from the evidence introduced in the case, or it may be different. To the extent that the facts you find are different from the facts assumed on or relied upon by the expert in reaching his or her conclusion, you may consider the expert's opinion less helpful to you. How much or how little you believe or rely upon an expert's opinion is entirely up to you. Where an expert's opinion is not contested and the primary facts upon which it is based are not in dispute, there may not be any good reason to reach a contrary conclusion. You must weigh the evidence of each expert in the context of the evidence as a whole and the standard of proof beyond a reasonable doubt.

[97] The trial judge then immediately said:

> In this case, the parties have agreed on some of the facts. As I indicated, when they agree, no witnesses have to be called or exhibits filed for you to accept those matters as facts. You must take what the parties have agreed to as facts in this case, and I refer you to the Exhibit 2 or 2A, which will be in your jury room, as the document or exhibit that sets out the agreed facts in this case.

[98] With respect to the actual contents of Ex. #2, the only direction to the jury was in relation to paragraph 3, where the Crown alleged, and the accused agreed, that the deceased was a victim of murder:

> For an accused person to be convicted of murder, the Crown would normally have to prove beyond a reasonable doubt that, number one, the person committed an unlawful act; secondly, that the unlawful act caused the death; and third, that the accused person either meant to cause the death or meant to cause bodily harm that he knew was likely to cause death and was reckless about whether or not it caused death. **But you will recall at the beginning of the trial, both Crown and Defence counsel filed an Agreed Statement of Facts pursuant to Section 655 of the *Criminal Code*. I instructed you at that time that you were required to accept the Agreed Statement as proven facts. The Crown and Defence have agreed the ingredients of murder exist and that Amber Kirwan was murdered.** This means that the person who murdered Amber Kirwan committed either first degree murder or second degree murder. You must decide whether the Crown has proved beyond a reasonable doubt whether Christopher Falconer is the person who actually committed the offence of murder at the time and place set out in the Indictment.
>
> [Emphasis added]

[99] The jury could not possibly have been confused that somehow the experts' reports contained formal admissions of fact. I would not give effect to this ground of appeal.

Inculpatory Text Messages

[100] Once again, the appellant attempts to rely on sound theoretical or academic principles to ground an allegation of error.

[101] I agree that there was no need to incorporate in the s. 655 Admissions (Ex. #2) the concession that the affidavits from telephone employees were admissible, nor to introduce concepts of legal terminology by stipulating that the contents of the affidavits were being admitted for the truth of their contents.

[102] In the circumstances, I see no error by the trial judge in permitting the parties to tender Ex. #2 containing the agreement, including the language used. Nor do I see any prejudice to the appellant by what transpired. There was no impairment of the jury's fact-finding function.

[103] Just as a trial judge telling a jury that he or she has determined statements by an accused to be "voluntary" can be problematic, it can equally be precarious to explain to a jury why a statement of a witness is being admitted. Moldaver J.A., as he then was, explained in *R. v. Gilling* (1997), 101 O.A.C. 297:

> [15] I am of the view that it was inappropriate for the trial judge to provide the jury with a detailed analysis of the *B.(K.G.)* decision and his instructions could only serve to prejudice the appellant. By instructing the jury as he did, the trial judge let it be known that he had carefully considered the videotaped statement in accordance with the procedures outlined in *B.(K.G.)*, and after doing so, he had concluded that the statement was sufficiently reliable to warrant its reception as original evidence. Coming from the trial judge, these observations no doubt elevated the reliability of the prior inconsistent statement and may well have influenced the jury in its assessment of the weight to be ascribed to it, both as original evidence and as a statement inconsistent with Mr. Gilling's trial evidence.
>
> [16] While not identical, the situation is analogous to that of an accused who seeks to convince the jury that his or her statement to the police was the product of threats or inducements and therefore not true. It is well settled that in these circumstances, the trial judge should refrain from advising the jury that the issue of voluntariness has already been canvassed and decided against the accused in *voir dire* proceedings: *R. v. Gallant* (1982), 70 C.C.C. (2d) 292 (Que.C.A.), leave to appeal to the Supreme Court of Canada refused September 20, 1982; *R. v. Main* (1993), 67 O.A.C. 350 (Ont. C.A.); *R. v. Thompson*, [1987] O.J. 993 (Ont. C.A.).

> **Likewise, in my view, it was improper for the trial judge in this case to instruct the jury that the videotaped statement had been found sufficiently reliable after a *voir dire* to warrant its reception as original evidence. Accordingly, I am of the view that there is merit in this ground of appeal.**
>
> [Emphasis added]

[104] But the error may not be significant (see *R. v. Foreman* (2002), 166 O.A.C. 60 at paras. 42-43). There may even be circumstances where juror comprehension of the limited purpose of evidence admissibility may assist the jury in carrying out its task (see: *R. v. Rojas*, 2008 SCC 56 at para. 39).

[105] Subject to specific exceptions, evidence that is properly admissible in a trial is being admitted for the truth of its contents. It is then up to the jury to consider and weigh all of the admissible evidence to determine what evidence they will, at the end of the day, accept as true and reliable. From that evidence, facts are found.

[106] The affidavits that contained the "inculpatory text messages" were admissible pursuant to s. 30 of the *Canada Evidence Act*. There was no realistic basis to contest their admissibility. The jury was entitled to consider them for the truth of their contents. There was no predetermination by the trial judge that the evidence was reliable or had passed some other undefined hurdle before the jurors could take them into account in their fact finding function.

[107] There was no language in Ex. #2 that conveyed to the jury that they had to accept as incontrovertible the facts set out in the affidavits. The "truth of their contents" were that the affiants were employees of certain telephone companies, and that the exhibits contained true copies of records kept by those companies in the ordinary course of their business.

[108] It is only the text messages that the appellant says were inculpatory that are the subject of complaint. A reasonable juror would not have been confused and thought that the numerous text messages were meant to be accepted as incontrovertible facts.

[109] The trial judge did not instruct the jury along those lines. Instead, the trial judge referred to the uncontested accuracy of the text messages attached to the affidavits.

[110] Secondly, I fail to see any prejudice whatsoever in the circumstances of this case. The inculpatory aspects of the text messages were the ones authored by the

appellant. In them, he admitted that he had spent the night at his stepsister's property and had left some items in the camper. The other texts established his dropping out of communication with his friends from 12:45 a.m. on October 9 to 4:05 a.m. later that morning. These primary facts were undisputed. It was the inferences that could be drawn from these, and other facts, that were critical.

[111] Lastly, the appellant's trial counsel, an experienced and competent practitioner of criminal law, not once but twice, executed the s. 655 Admissions. And trial counsel voiced no objections about how the trial judge charged the jury on the Admissions or any other aspect of how the trial judge had equipped the jury to carry out its adjudicative functions.

[112] It is well settled that the failure to object to a jury charge is not fatal to a well founded complaint of juror misdirection, but it can be taken into account in considering the adequacy of the overall instructions, as well as assessing the seriousness of the putative error (*R. v. Jacquard*, [1997] 1 S.C.R. 314 at paras. 37-38; *R. v. Daley*, 2007 SCC 53 at para. 58).

[113] The import of all of the appellants' complaints is that the Crown and trial defence counsel by virtue of Ex. #2 sabotaged the trial. However, there is no allegation by appellate counsel that the appellant's trial counsel was in any way incompetent.

[114] To the contrary, the appellant praises trial counsel for his "integrity and professionalism". In his next breath, appellate counsel argues that trial counsel made mistakes that were so prejudicial that it rendered the trial unfair. But he adds, there is no need to allege incompetence — defence counsel simply inadvertently made a mistake. It was then incumbent on the judge to intervene to correct the mistake, and his failure to do so requires a new trial.

[115] For the reasons detailed above, I respectfully disagree. The goal of trial counsel for the appellant was laudable. Shorten the trial. Agree to the admissibility of evidence that was sure to gain admission anyway, and focus on matters that were important to marshalling a defence.

[116] Section 655 admissions were a poor vehicle to use, but the jury was not misinstructed about the informal evidentiary admissions found in Ex. #2, nor how to assess the evidence. I see no error by the trial judge, nor any prejudice to the appellant's fair trial interests.

[117] I would not give effect to any of the appellants' complaints of error, and would therefore dismiss the appeal.

Beveridge J.A.

Concurred in:

MacDonald, C.J.N.S.

Bourgeois, J.A.