NOVA SCOTIA COURT OF APPEAL
Citation: ***R. v. Dugas***, 2012 NSCA 102

Date: 20120925
Docket: CAC 362840
Registry: Halifax

Between:

Luke Earl Dugas

Appellant

v.

Her Majesty The Queen

Respondent

Judges:	Saunders, Oland, and Beveridge, JJ.A.
Appeal Heard:	May 14, 2012, in Halifax, Nova Scotia
Held:	Appeal against conviction is dismissed per reasons for judgment of Oland, J.A.; and Saunders and Beveridge, JJ.A. concurring
Counsel:	Melissa P. MacAdam, for the appellant Mark Scott, for the respondent Stacey Gerrard, for Alexander Pink

Reasons for judgment:

[1] The appellant, Luke Dugas, appeals his conviction by Provincial Court Judge Robert M.J. Prince of break and enter into a dwelling with intent to commit an indictable offence, contrary to s. 348(1)(a) of the *Criminal Code*. He submits that the judge erred in applying the law with respect to reasonable doubt, the judge's questioning of him during the trial created an appearance of unfairness, and he did not receive effective representation from his trial counsel.

[2] For the reasons which follow, I would dismiss the appeal.

Background

[3] The appellant was charged with breaking and entering the home of Jody Kempton-Belliveau at 46 Lakeside Road in Hebron, Nova Scotia on or about June 5, 2011. At trial, he was represented by Mr. Alexander Pink.

[4] Judge Prince presided at the trial on July 27, 2011. The Crown called three witnesses: Corporal Albert Boswell of the Yarmouth Forensic Identification Section, Wendy Cushing, and Ms. Kempton-Belliveau. Ms. Kempton-Belliveau testified that on June 5, 2011 she came up her driveway and noticed that the rear porch door was open. Her evidence continued:

> **A.** ... I shut off the engine of my car and opened the door and was actually getting out, when I looked up and saw a young man trying to exit my porch. My immediate response . . . Initially, I thought someone was selling chocolate bars or collecting for a charity or something, and just by the way he was dressed and the way he looked at me, I knew he didn't belong there and he wasn't there for charity. And I just said to him, What the hell are you doing in my house? And with that, he gave me a funny smirk, pushed my door open all the way, proceeded to jump over the flowers and off the side of the steps and run around the back of my house, around the corner. And I said, You little, it wasn't a nice name, get back here, and I proceeded to chase him. Unfortunately, I was in flip-flops, I hit loose gravel, I was a week away from knee surgery, my knee gave out and I fell on the ground. I got up, just to see him going over the front of my property, sort of like a ditch area, and I quickly went back to my car, emptied my purse out on the, on the seat, looked for my cell phone and called 911 immediately.

[5] Wendy Cushing also lives on Lakeside Road, less than a kilometer from Ms. Kempton-Belliveau. She testified that after she saw a man walking by her barn she got the keys to her car and drove up her driveway to get a closer look. According to Ms. Cushing the man seemed defensive and nervous, and told her that he was just training for a marathon. First she took his picture with her cell phone. Then she zoomed up her driveway to the road, and called 911 and her sister and her husband, next door, who are RCMP officers.

[6] Corporal Boswell's testimony concerned two partial footwear impressions found on the ground under a window of Ms. Kempton-Belliveau's house and athletic type footwear or sneakers that the appellant admitted he was wearing when arrested on June 5, 2011. After comparing them, his conclusion was that one of the crime scene impressions could have been made by the left sneaker. No finger prints were found near the window.

[7] The defence called the appellant's mother, Therese D'Entremont. She testified that she received a text message from the appellant asking to be picked up. When she called him, he said he didn't really know where he was and would meet her at her workplace. She went there and waited. When her son didn't arrive, she eventually went home.

[8] According to the appellant's testimony, on June 5, 2011 he took a taxi to a friend's house in Wellington. There he had seven or eight beers over a couple of hours. When he left, he took the path that leads to the highway. He had taken that path before. The appellant's evidence was that he took a wrong turn somewhere and was suddenly lost. After he texted his mother on his cell phone, she called and they arranged to meet at her workplace which he estimated was 30 to 45 minutes from where he was. According to the appellant, he could text and receive calls but he could not call out on his cell phone.

[9] After walking for more than an hour, the appellant approached Ms. Kempton-Belliveau's house. He testified that the first door to the rear porch was open six or seven inches, and continued:

> **A.** I walked in. I got to the main door. There was another door, so I knocked there. Nobody answered. I knocked again, nobody answered. On my way out, a car pulled in, right?

Q. Right.

A. The woman screamed. She screamed out loud. I just panicked and ran.

Q. Why . . . Okay. You didn't ask her . . .

A. No. I didn't want to have an argument or nothing, because she was yelling.

Q. Okay. And why did you go to the house?

A. To use the phone, to call my mother to tell her where I was.

The appellant's evidence was that he was only at the property for 20 seconds, long enough to knock at the inside or main door twice, and then he came out and encountered the homeowner. He denied entering the house through the side window, or being inside the house other than the porch.

[10] The appellant went into the woods, and after he came out, he ended up in Wendy Cushing's yard. His evidence was that he left the road for the woods because he felt safe there; he did not ask Ms. Kempton-Belliveau, the first person he came across after becoming lost for help, because she screamed; and he did not ask Ms. Cushing, the second person, because she didn't look in the mood to talk.

[11] After the appellant finished giving his evidence under direct and cross-examination, the judge asked him several questions. I will set out their exchanges later in this decision.

[12] At the conclusion of the trial, after hearing the submissions of counsel, the judge gave an oral decision. He was satisfied that the appellant was guilty of the charge of break and enter with intent beyond a reasonable doubt. A few weeks later, the judge sentenced the appellant to three years incarceration, less three months for remand time.

[13] The appellant appeals from conviction.

Fresh Evidence

[14] The appellant sought to admit fresh evidence for the ground of appeal alleging ineffective representation. That material consisted of the affidavit of the appellant and, in reply, that of Mr. Pink. At the hearing of his appeal, the appellant wanted to correct one of the dispositions in his affidavit. That necessitated each of him and Mr. Pink giving brief oral evidence on that point.

[15] In his affidavit, the appellant alleged that Mr. Pink had received Crown disclosure which included reports by Constable Stephane Benoit and an audio recording of Ms. Kempton-Belliveau's statement to the police, yet his defence lawyer neither called the Constable to testify, nor cross-examined Ms. Kempton-Belliveau on certain comments in her audio statement or the Constable's report. He deposed that his counsel following conviction made further inquiries about police observations of Ms. Kempton-Belliveau's patio door, her reaction upon encountering the appellant, and from their inspection of her window, and attached the additional Crown disclosure obtained as a result.

[16] In his affidavit, Mr. Pink recounted his retention by the appellant and his preparation for trial, including review of the Crown disclosure. He acknowledged that he had received the audio statement by Ms. Kempton-Belliveau to the police as well as reports by Constable Benoit, one of the investigating officers. He explained why he did not call Constable Benoit to testify, and what comments from that officer's report and from Ms. Kempton-Belliveau's audio statement he put to her on cross-examination.

[17] In *R. v. Fraser*, 2011 NSCA 70, Saunders J.A. writing for the court, stated:

> [34] The law governing the admission of fresh evidence on appeal is well settled and has been extensively considered by this Court in recent cases. See, for example, **R. v. West**, 2010 NSCA 16; **R. v. Hobbs**, 2010 NSCA 53; and **R. v. Messervey**, 2010 NSCA 55. Section 683(1) of the **Criminal Code** permits the Court of Appeal to allow the introduction of fresh evidence "where it considers it in the interests of justice". In **R. v. Palmer**, [1980] 1 S.C.R. 759, at p. 775, the Supreme Court said the "interests of justice" in s. 683(1)(d) are governed by four factors:

> (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. ...
>
> (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.

[18] In *R. v. Ross,* 2012 NSCA 56, Bryson J.A. for the court added:

> [26] When assessing admission of fresh evidence of counsel's ineffectiveness, the court should receive the evidence if the court could conclude that a miscarriage of justice occurred. Otherwise, there would be no way of considering this issue in context. Subject to admissibility and reliability, such evidence should be received "in the interests of justice" (*R. v. Strauss*, [1995] B.C.J. No. 1461 (C.A.); *R. v. Joanisse*, [1995] O.J. No. 2883 (C.A.); *R. v. Widdifield*, [1995], 25 O.R. (3d) 161 (C.A.); *R. v. Gumbly* (1996), 155 N.S.R. (2d) 117 (C.A.); *Wolkins*, para. 67).

[19] Here the evidence which the appellant seeks to adduce on appeal relates to evidence which he contends the trial judge did not hear because of the incompetence of counsel. He says that his counsel was neither diligent in his trial preparation nor effective in the conduct of his trial, and thus fell below the reasonable standard of professional judgment which resulted in a miscarriage of justice, namely his conviction after an unfair trial.

[20] This is essentially the same argument that was presented in *Fraser*. There, this court carefully reviewed the due diligence criteria in the context of appeals claiming ineffective assistance of counsel and stated:

> [37] But even more significant is the fact that the first criterion requires any applicant seeking leave to adduce fresh evidence on appeal, to demonstrate in effect, that the exercise of reasonable diligence at trial would not have mattered. In other words, careful preparation would not have uncovered the new

> information. But here the principal ground of appeal is that Mr. Fraser's trial counsel was neither diligent in his preparations, nor effective in providing legal representation. Surely, in such circumstances, when an appellant bases his appeal on a claim of ineffective assistance of counsel, one will not expect that appellant to make the case for due diligence. For it is the very lack of diligence upon which he rests his complaint and pins his hope for a new trial. In such circumstances, it would hardly be in the "interests of justice" to refuse to admit evidence which forms the principal ground of appeal, simply because the applicant may have difficulty in refuting the argument that the evidence should not be admitted because it could have been adduced at trial had due diligence been exercised.

[21] I am satisfied that the evidence presented by the appellant and Mr. Pink by affidavit and at the hearing under oath is credible. It is also relevant in the sense that it bears upon the judge's assessment of the evidence, and the truthfulness and reliability of the testimony given by the witnesses at trial.

[22] Where it is argued that trial counsel's conduct resulted in a miscarriage of justice, it is in the interests of justice to receive this fresh evidence.

Issues

[23] The appellant raised the following grounds on appeal:

> (a) That the Learned Trial Judge erred in applying the law with respect to reasonable doubt in that he did not consider or apply the third part of the *W-D* test;
>
> (b) That the nature and extent of the questioning of the Appellant by the Learned Trial Judge during the trial created at least an appearance of unfairness in the trial process; and
>
> (c) The Appellant did not receive effective representation from his trial counsel in that the trial counsel failed to conduct proper cross-examinations of Crown witnesses, including failing to test the reliability of Crown witnesses, which resulted in a miscarriage of justice.

Mr. Pink did not seek intervenor status with regard to the third ground of appeal. His counsel was present at the hearing of the appeal.

Reasonable Doubt

[24] Before I begin my analysis relating to this ground, it would be useful to set out here the *Criminal Code* provision under which the appellant was charged. The appellant argues that the trial judge failed to address all the elements of the offence of break and enter with intent. Section 348(1)(a) provides:

> **348.** (1) Every one who
>
> > *(a)* breaks and enters a place with intent to commit an indictable offence therein,
> >
> > ...
>
> is guilty
>
> > *(d)* if the offence is committed in relation to a dwelling-house, of an indictable offence and liable to imprisonment for life...

[25] The *Criminal Code* includes presumptions applicable to the offence:

> **348.** (2) For the purposes of proceedings under this section, evidence that an accused
>
> > *(a)* broke and entered a place or attempted to break and enter a place is, in the absence of evidence to the contrary, proof that he broke and entered the place or attempted to do so, as the case may be, with intent to commit an indictable offence therein; ...

[26] In his oral decision, the judge stated:

> The real issue is whether or not the court accepts that the evidence of the defendant establishes a reasonable excuse or establishes sufficient evidence -- or sufficient reasonable credible evidence -- to raise a reasonable doubt. And I have to pause that even though I perhaps wouldn't believe what the defendant said to a complete extent, I still would have to consider whether that rejected evidence might raise a reasonable doubt. In other words, if I didn't disbelieve it completely, I'd have to rely on that, and determine whether it was capable of raising a reasonable doubt.

> Even in its most favourable light, in my view, the evidence of the defendant is unbelievable. The story that he tells with respect to being lost in the wilds of Hebron, Yarmouth County, Nova Scotia, is, in my view, incredible. In my view, it does not make sense that a person -- even with eight beer in them -- walking hours -- or a long, long time, as he said -- would get so lost in the backwoods of Hebron, Yarmouth County, Nova Scotia, that he would shun the roads in favour of traversing through wooded areas from house to house, in an attempt to get a telephone to make a call to his mother so that she could pick him up at her place of work, which wouldn't be all that far away from where he was located. It just doesn't make sense.
>
> I reject the evidence of the defendant; I find it incredible, and I don't believe it. It is therefore incapable of providing evidence to rebut the presumed intent that's contained in Section 348(1)(a). That being the case, on all of the evidence, I'm satisfied that the guilt of the defendant's been proved beyond a reasonable doubt. ...

[27] The appellant acknowledges that, in the first paragraph quoted above, the judge set out the first two elements of the *W.(D.)* test. He argues, however, that the judge did not mention that, even if the evidence of the accused is disbelieved in its entirety, he must also consider whether there is reasonable doubt, from the totality of the evidence. The Crown had to prove not only the *actus reus* of the accused being in the building, but also the *mens rea* of not having a lawful excuse for being there and having the intent to commit an indictable offence: *R. v. Letto,* 2008 CanLII 76110 (NL PC). The appellant urges that the judge failed to consider or apply the third part of the *W.(D.)* test to his evidence of lawful justification or excuse.

[28] Here the appellant testified that he was in the porch to Ms. Kempton-Belliveau's house hoping to use the phone, and there only momentarily before the homeowner arrived. He denied having entered the residence through the window. However, the trial judge found as a fact that he had done so. As the Crown observed, that finding implicitly answers all of the *W.(D.)* questions. The judge's rejection of the appellant's story that he had not gone inside the home proper, and his determination on the method of entry, eliminated any need for him to fully articulate the third stage of the *W.(D).* test and to deal with the respondent's arguments regarding lawful excuse.

[29] I would dismiss this ground of appeal.

Questioning By The Judge

[30] After the appellant finished testifying under cross-examination, the judge stated that he was "just trying to figure something out here". He proceeded to ask the appellant about the house in Wellington and its driveway which led to the highway, how it was that he went through the woods instead, and how he was going to get to his mother's workplace when he was lost.

[31] After the appellant confirmed that when he got to the houses, he could see the lakes, the judge continued:

> **Q.** No. Okay. No, but one of the houses that was portrayed in some picture, you can see the lake down below. Didn't that give you your bearings?
>
> **A.** I followed the lake for quite awhile.
>
> **Q.** Well, how come, when you were at that location, you just didn't go up the driveway to the nearest road?
>
> **A.** I really don't know.
>
> **Q.** Well, wouldn't that be the sensible thing to do?
>
> **A.** Yeah, it would have been.
>
> **Q.** And you had a second chance, when you spoke to Ms. Cushing, telling her you were training for a marathon, to go up that driveway and go back to the road. Why didn't you do that?
>
> **A.** Because I didn't have a chance to ask her any question.
>
> **Q.** No, but you saw there was a road at the end of the driveway.
>
> **A.** Yeah, that's where she took off to.
>
> **Q.** Well, she took off. Why didn't you go up to the road?

A. I just panicked.

Q. Why did you panic, by the way?

A. Just … I don't … My nerves have always been bad.

Q. It wasn't because you'd just been in a house, breaking in?

A. No.

Q. Okay. Thanks. [Emphasis added]

[32] The judge then asked counsel if there was anything arising from his exchange with the appellant. Defence counsel questioned the appellant on re-direct regarding his cell phone. The judge asked questions; both counsel confirmed that nothing arose from his inquiries. The judge inquired as to any rebuttal and, with the consent of the Crown, defence counsel re-called Ms. Kempton-Belliveau. Afterwards, the judge heard submissions and gave his oral decision.

[33] When is it appropriate for a judge to question a witness?

[34] In *R. v. Brouillard*, [1985] 1 S.C.R. 39 (Q.L.) at ¶ 17, the Supreme Court of Canada stated that judges are no longer required to be passive "sphinx judges". It recognized that, not only is it permissible for judges to intervene in the adversarial debate, but it is sometimes essential in order for justice to be done. At ¶ 21, 23 and 25, it explained that there can be a *duty* to clarify obscure answers, resolve possible misunderstandings, remedy omissions, and/or bring out relevant matters and that any interventions must be done in such a way that justice is *seen to be done*. According to the court, it is all a question of manner.

[35] The decision of the Ontario Court of Appeal in *R. v. Valley* (1986), 26 C.C.C. (3d) 207 (Ont. C.A.), is a leading case on judicial intervention. Martin J.A. for the court described the role and responsibilities of a judge in a criminal trial, and when judicial interventions would be warranted at p. 230:

> The judge's role in a criminal trial is a very demanding one, sometimes requiring a delicate balancing of the interests that he is required to protect. The

> judge presides over the trial and is responsible for ensuring that it is conducted in a seemly and orderly manner according to the rules of procedure governing the conduct of criminal trials and that only admissible evidence is introduced. A criminal trial is, in the main, an adversarial process, not an investigation by the judge of the charge against the accused, and, accordingly, the examination and cross-examination of witnesses are primarily the responsibility of counsel. The judge, however, is not required to remain silent. He may question witnesses to clear up ambiguities, explore some matter which the answers of a witness have left vague or, indeed, he may put questions which should have been put to bring out some relevant matter, but which have been omitted. Generally speaking, the authorities recommend that questions by the judge should be put after counsel has completed his examination, and the witnesses should not be cross-examined by the judge during their examination-in-chief. Further, I do not doubt that the judge has a duty to intervene to clear the innocent. The judge has the duty to ensure that the accused is afforded the right to make full answer and defence, but he has the right and the duty to prevent the trial from being unnecessarily protracted by questions directed to irrelevant matters. This power must be exercised with caution so as to leave unfettered the right of an accused through his counsel to subject any witness' testimony to the test of cross-examination. The judge must not improperly curtail cross-examination that is relevant to the issues or the credibility of witnesses, but he has power to protect a witness from harassment by questions that are repetitious or are irrelevant to the issues in the case or to the credibility of the witness: see *R. v. Bradbury* (1973), 14 C.C.C. (2d) 139 at pp. 140-1, 23 C.R.N.S. 293 (Ont. C.A.) ; *R. v. Kalia* (1974), 60 Cr. App. R. 200 at pp. 209-11. (Emphasis added)

[36] The test as to when a verdict can be set aside on the ground of judicial interference is set out in *Valley* at p. 232:

> ...The ultimate question to be answered is not whether the accused was in fact prejudiced by the interventions but whether he might *reasonably* consider that he had not had a fair trial or whether a reasonably minded person who had been present throughout the trial would consider that the accused had not had a fair trial: see *Brouillard v. The Queen, supra*; *R. v. Racz*, [1961] N.Z.L.R. 227 (C.A.). (Emphasis original).

[37] The question is not whether the interventions were such that a reasonably minded person who had been present throughout the trial *could* conclude that the accused had not received a fair trial, but whether such a person *would* come to such a conclusion: see *R. v. Parmar*, 2005 BCCA 187, at ¶ 28-33. The test is an objective, rather than a subjective one: *R. v. Stucky*, 2009 ONCA 151, at ¶ 68.

[38] *Stucky* provides a useful illustration of the application of the test. There, the accused operated a direct mail business that sold lottery tickets and merchandise only to persons outside of Canada. He was charged with multiple counts of making false or misleading representations "to the public" contrary to provisions of the *Competition Act*, R.S.C., 1985, c. C-34. During the trial which lasted over 60 days, the trial judge interrupted examination and cross-examination of defence witnesses, including the accused himself, over 20 times. His interventions included vigorous cross- examination of witnesses, often after Crown counsel had indicated that he was finished dealing with that particular area. He also made sarcastic comments, some of which indicated that the judge had prematurely judged witness' credibility. The accused was found not guilty, and the Crown appealed.

[39] In ordering a new trial, Weiler and Gillese JJ.A. writing for the court, determined that the trial judge's interventions had undermined the appearance of the fairness of the trial. They stated:

> **72** Interventions by a trial judge which can reasonably be said to create the appearance of an unfair trial may be of more than one type, and trial fairness may be undermined by one or more types of interventions: *Valley* at p. 232. However, it is important to emphasize that no trial is perfect. Accordingly, the record must be assessed in its totality and the interventions complained of in a given case must be evaluated cumulatively, not as isolated occurrences, from the perspective of a reasonable observer present throughout the trial. As stated by Doherty J.A. in *R. v. Stewart* (1991), 62 C.C.C. (3d) 289 (Ont. C.A.), at p. 320:
>
> > It is a question of degree. At some point, incidents which, considered in isolation, may be excused as regrettable but of no consequence, combine to create an overall appearance which is incompatible with our standards of fairness.

[40] *R. v. Russell*, 2011 BCCA 113, is another helpful case on whether, in exercising his discretion to ask questions, the trial judge compromised the integrity of the trial process resulting in a miscarriage of justice. The accused was charged with trafficking cocaine. After cross-examination ended, the trial judge asked him a series of questions regarding his membership in a certain organization. The British Columbia Court of Appeal held that although those questions were relatively extensive, neither their extent or their manner, taken in

the context of the entire trial, conveyed the impression that the judge had placed his authority on the side of the prosecution.

[41] Was the interference by the trial judge here permitted under one of the three areas set out as acceptable in *Valley*, namely to clear up ambiguities, explore matters which the witnesses' answers have left vague or, to put questions which should have been asked to bring out some relevant matter?

[42] The appellant accepts that, at the beginning of the judge's questioning of him, the judge was trying to confirm his testimony with regards to specific facts. Those inquiries would fall under the category of clearing up ambiguities. However, the appellant submits that the further questioning by the judge went beyond the permitted areas of judicial intervention or involvement.

[43] In particular, the appellant points to the final question asked by the judge: "It wasn't because you'd just been in a house, breaking in?" He says that this amounts to cross-examination to the degree that the judge became an interrogator, rather than an impartial adjudicator. He submits that this is especially concerning due to the conclusions the judge reached regarding the appellant's credibility, and leads to the appearance of an unfair trial. The appellant candidly acknowledges that had the judge not posed his last question, he would have no foundation for this ground of appeal.

[44] With respect, I am not persuaded that the judge's questioning of the appellant, either cumulatively or his final question in isolation, undermined trial fairness in this particular case. It is unclear why, having obtained the appellant's clarifications of his evidence, the judge asked that last question. However, there is no suggestion that his tone then or during any other of his inquiries was sarcastic or aggressive, or that the judge conveyed the impression that he disbelieved the appellant. The judge did not interrupt the appellant's testimony in examination or cross-examination, but waited until questioning by counsel was finished. His questions were not extensive and none were aggressive. After he exercised his discretion to ask questions, the judge gave the Crown and defence counsel full opportunity to ask further questions and allowed rebuttal evidence.

[45] The final question by the judge was unfortunate and is certainly cause for concern. However, after careful consideration and in the context of this

proceeding, neither that inquiry nor his other questions of the appellant give rise to a perception of bias. In my view, a reasonable observer present throughout the trial would not consider that the accused had not had a fair trial.

[46] I would dismiss this ground of appeal.

Ineffective Assistance of Counsel

[47] The appellant claims that he did not receive effective representation from his trial counsel, Mr. Pink. In particular, he alleges that he was prejudiced by his lawyer's failure to appropriately cross-examine Ms. Kempton-Belliveau on the differences between her statement of police and her testimony at Court, and by his failure to call a police officer to give evidence.

[48] According to his affidavit evidence, Mr. Pink was retained by the appellant in June 2011. In the days after their first meeting, he contacted the Crown and received disclosure, including Ms. Kempton-Belliveau's audio statement to the police. In that brief statement, recorded on the same day that the incident took place, the homeowner stated:

> ...as I was getting out of my car a young guy came flying out of my back porch.
>
> He slammed the door. I got out of the car and yelled at him some obscenity and started -- he jumped over my back steps and started to run on the other side of my house. And I started to chase him yelling at him but only for about 20 feet when I realized that was a stupid thing to do.

[49] Earlier, I recounted how, in direct examination, Ms. Kempton-Belliveau stated that "And I just said to him, What the hell are you doing in my house?" The Crown also asked her about the tone of voice she used when calling out to the appellant:

> **Q.** How quickly . . . Sorry. Did he say anything to you?
>
> **A.** No.
>
> **Q.** How long after he exited did you speak?

A. Immediately.

Q. What was your tone?

A. What the hell are you doing in my house? Exactly like that.

[50] On cross-examination of this witness, Mr. Pink attempted to clarify the tone she used:

Q. And when he came out, did he say anything to you?

A. No.

Q. And as soon as you saw him, did you start screaming and yelling at him?

A. No.

Q. What did you say? As soon as you . . .

A. I didn't scream or yell.

Q. But as soon as you saw him, what did you do?

A. As soon as I saw him, I said, What the hell are you doing in my house?

Q. Right. And it is possible that you would have had a louder tone than that?

A. No.

Q. That, that would have been the actual tone.

A. I was outside of my car, so it wasn't necessary to yell. I was only six feet from him.

[51] During Mr. Pink's closing arguments, he attempted to indicate why the appellant would have left as suddenly as he did. Defence counsel and the judge had the following exchange regarding the tone of voice Ms. Kempton-Belliveau used:

> **THE COURT:** Well, I guess there's no real reason why he got freaked out and ran away.
>
> **MR. PINK:** Well, his testimony was that he, she screamed at him, and she testified to that, as well, maybe not screamed, but she said, in the tone she used, "What the hell are you doing in my house?"
>
> **THE COURT:** Yeah. That wasn't, that was far from a scream.

[52] The judge also later observed:

> **THE COURT:** Is there evidence . . . His evidence was that she screamed; her evidence was that she gave it just like that.

[53] In recounting the evidence of Ms. Kempton-Belliveau in his decision, the judge stated that she testified that "she said, in a voice that was – that I heard on the stand, which was not loud, nor quiet; a modulated voice – 'What the hell are you doing in my house?'"

[54] The appellant asserts that credibility was key and his defence counsel's failure to question Ms. Kempton-Belliveau on her police statement affected the judge's assessment of her credibility and that of the appellant. The Crown concedes that trial counsel did not alert Ms. Kempton-Belliveau to the apparent inconsistency between her statement to the police and her trial testimony regarding whether she shouted at the appellant when she encountered him at her home.

[55] An appellant seeking to quash a conviction on the basis of ineffective counsel must show that he was prejudiced by his lawyer's acts or omissions. In *R. v. Fraser*, 2011 NSCA 70, this court at ¶ 53 affirmed the test set out in *R. v. West*, 2010 NSCA 16:

> [268] The principles to be applied when considering a complaint of ineffective assistance of counsel, are well known. Absent a miscarriage of justice, the question of counsel's competence is a matter of professional ethics and is not normally something to be considered by the courts. Incompetence is measured by applying a reasonableness standard. There is a strong presumption that counsel's conduct falls within a wide range of reasonable, professional assistance. There is a heavy burden upon the appellant to show that counsel's acts or omissions did not meet a standard of reasonable, professional judgment. Claims of ineffective

> representation are approached with caution by appellate courts. Appeals are not intended to serve as a kind of forensic autopsy of defence counsel's performance at trial. See for example, **B.(G.D.), supra**; **R. v. Joanisse** (1995), 102 C.C.C. (3d) 35 (Ont. C.A.), leave to appeal ref'd [1996] S.C.C.A. No. 347; and **R. v. M.B.**, 2009 ONCA 524.
>
> [269] One takes a two-step approach when assessing trial counsel's competence: first, the appellant must demonstrate that the conduct or omissions amount to incompetence, and second, that the incompetence resulted in a miscarriage of justice. As Major J., observed in **B.(G.D.), supra**, at ¶ 26-29, in most cases it is best to begin with an inquiry into the prejudice component. If the appellant cannot demonstrate prejudice resulting from the alleged ineffective assistance of counsel, it will be unnecessary to address the issue of the competence.

[56] Defence counsel appreciated the importance of Ms. Kempton-Belliveau's testimony as to how she spoke to the appellant, which contradicted his client's evidence that he panicked and fled because she screamed. In his cross-examination, he questioned her as to how loud a tone she had used. As the extract from her testimony shows, Ms. Kempton-Belliveau was not shaken under cross-examination. She even went on and explained why it was not necessary to speak louder than she had described. Just how this witness would have responded if confronted with her statement is speculative. She may have maintained, in accordance with her demonstration under direct examination, that her tone was not such as to alarm or panic a legitimate visitor. Moreover, the homeowner's credibility was not the only basis for the finding of guilt on the charge of break and enter with intent. The judge gave other detailed reasons for rejecting the evidence of the appellant as being "incredible". The judge was also presented with evidence regarding the open side window and footprints below it matching the footwear worn by the appellant. Even if I were to have determined that trial counsel could have questioned the witness on this aspect of her police statement, I cannot say that his defence was prejudiced to the extent that a miscarriage of justice resulted.

[57] I am able to quickly dispose of the appellant's remaining allegations concerning his trial counsel's failure to address Ms. Kempton- Belliveau's inconsistences with regard to two other matters, namely, her front patio door and her chasing the appellant.

[58] In her statement to police, Ms. Kempton-Belliveau did not refer to the patio door at the front of her house being open. At trial, she testified that when the Constable attended at her property, they realized that the door was open about four to six inches and she never leaves it that way. However, the record shows that, during cross-examination, defence counsel did point out to Ms. Kempton-Belliveau that she never mentioned an open front patio door in her police statement. Therefore, he did not overlook this inconsistency. In any event, the patio door was of no significance - during trial, attention was only paid to the back porch and a side window as the possible ways of entry.

[59] I then turn to Ms. Kempton-Belliveau's pursuit of the appellant after confronting him. In her statement to the police, Ms. Kempton-Belliveau indicated that she chased after Mr. Dugas, but stopped after 20 feet when she realized it was not a good thing to do. At trial, she testified that she proceeded to chase him but she was in flip-flops and her knee gave out and she fell on the ground.

[60] Ms. Kempton-Belliveau's statement to the police was not lengthy and was directed to identification of the culprit. While the reasons given in her statement and in her testimony are not identical, they are not completely contradictory. As the Crown pointed out, there is nothing to suggest that this witness would not have agreed with the police statement and explained her testimony as an amplification. Moreover, even if this were an inconsistency, it does not raise a doubt as to the appellant's intent.

[61] Finally, the appellant criticizes trial counsel's failure to call Constable Benoit to testify. According to the Crown's disclosure provided to Mr. Pink, that officer arrived at Ms. Kempton-Belliveau's home shortly after she called the police. While he was there, he received a call regarding a man at Wendy Cushing's place and went there. Other officers joined him and they searched for and found the appellant in Dayton. In his General Report, Constable Benoit wrote that the appellant's "breath was overwhelming by liquor".

[62] Without this evidence, the only evidence before the judge regarding his alcoholic state was that of the appellant. Asked whether he was intoxicated when lost somewhere in the back of Yarmouth, he testified that he was starting to sober up because he'd been walking a long time. This led to the judge's conclusion that he was sober by the time he arrived at Ms. Kempton-Belliveau's home.

[63] Mr. Pink deposed that he did not call the Constable to testify because he did not feel that the officer could offer anything to undermine the Crown's position or bolster that of the defence. According to the appellant, his trial counsel's failure to call Constable Benoit deprived him of the opportunity to argue before the judge that his actions were affected by alcohol, and to more strenuously raise the defence of reasonable excuse for break and enter, and evidence to the contrary regarding his intent. However, had the officer testified that the appellant was still heavily intoxicated when the police found him, this would have contradicted the appellant's own testimony in court. This situation could have adversely affected the judge's assessment of his credibility. In my view, defence counsel's decision not to call the officer did not amount to professional incompetence.

[64] I would dismiss this ground of appeal.

Disposition

[65] I would grant leave to admit fresh evidence and would dismiss the appeal.

Oland, J.A.

Concurred in:

Saunders, J.A.

Beveridge, J.A.