NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. A.W.H.,* 2019 NSCA 40

Date: 20190523
Docket: CAC 463053
Registry: Halifax

Between:

A.W.H.

Appellant

v.

Her Majesty the Queen

Respondent

Restriction on Publication: s. 486.4 of the Criminal Code

Judge:	The Honourable Justice Peter M. S. Bryson
Appeal Heard:	January 30 and 31, 2019, in Halifax, Nova Scotia
Subject:	Sexual interference. Sexual assault. Miscarriage of justice. Ineffectiveness of counsel. Fresh evidence.
Summary:	A.W.H. appeals his conviction for sexual interference involving a young child. He claimed that the trial judge erred in admitting out of court videotaped evidence of the child because it was not recorded within a reasonable time as required by s. 715.1 of the *Criminal Code*. He also argued that his trial counsel was ineffective by failing to have him testify, contrary to his instructions or alternatively incompetently advising him not to testify. He also submitted that counsel failed to adduce evidence that could have challenged credibility of the complainant and her mother and could have explained evidence on which the judge relied to convict. He claimed that counsel's advice not to testify constituted ineffectiveness of counsel in the circumstances of the case.

Issues: (1) Did the trial judge err in admitting videotaped evidence of child complainant?
(2) Did a miscarriage of justice occur as a result of ineffectiveness of counsel?

Result: Appeal allowed. New trial ordered. Counsel was mistaken that A.W.H.'s prior criminal record would count against him with respect to guilt or innocence. Guilt could not be so inferred (*R. v. Handy*, 2002 SCC 56, ¶31-36). A.W.H.'s fresh evidence was relevant to decisive issues concerning credibility and reliability of the complainant's evidence and could have affected the outcome. The evidence was not led owing to counsel's advice, grounded on a misunderstanding of the law. Counsel's advice fell below a reasonableness standard. Trial reliability and fairness was both affected. A miscarriage of justice occurred. Owing to A.W.H.'s success on this ground of appeal, it is unnecessary to rule on alleged errors regarding the admissibility of the complainant's videotaped evidence.

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Judges:	Beveridge, Fichaud and Bryson, JJ.A.
Appeal Heard:	January 30 and 31, 2019, in Halifax, Nova Scotia
Held:	Appeal allowed, per reasons for judgment of Bryson, J.A.; Beveridge and Fichaud, JJ.A. concurring
Counsel:	Roger A. Burrill, for the appellant Glenn A. Hubbard, for the respondent

Order restricting publication — sexual offences

486.4 (1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of

(a) any of the following offences:

(i) an offence under section 151, 152, 153, 153.1, 155, 159, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 210, 211, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 286.1, 286.2, 286.3, 346 or 347, or

(ii) any offence under this Act, as it read from time to time before the day on which this subparagraph comes into force, if the conduct alleged would be an offence referred to in subparagraph (i) if it occurred on or after that day; or

(b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in paragraph (a).

Mandatory order on application

(2) In proceedings in respect of the offences referred to in paragraph (1)(a) or (b), the presiding judge or justice shall

(a) at the first reasonable opportunity, inform any witness under the age of eighteen years and the victim of the right to make an application for the order; and

(b) on application made by the victim, the prosecutor or any such witness, make the order.

Reasons for judgment:

Introduction

[1] A.W.H. appeals his conviction for sexual touching of a minor (2017 NSPC 19). He says the trial judge, the Honourable Anne S. Derrick (as she then was), erred in admitting a videotaped interview with the complainant, G.M. (2016 NSPC 69). He also says there was a miscarriage of justice because his trial counsel did not allow him to testify in his own defence or alternatively, incompetently advised him not to testify, and failed to adduce or cross-examine on relevant evidence.

[2] The court heard a fresh evidence motion in support of A.W.H.'s allegations against Tara Smith, A.W.H.'s trial counsel, who also filed evidence in reply.

[3] Because trial counsel's advice to A.W.H. not to testify in his own defence was based on a clear and material error of law which vitiated A.W.H.'s waiver of his right to testify, a miscarriage of justice resulted and a new trial should be ordered. As a result, it will not be necessary to rule on A.W.H.'s other grounds of appeal. But those grounds will be reviewed for context.

[4] After reviewing the facts and the *voir dire* decision to admit the videotaped evidence, these reasons will address the law of fresh evidence, the fresh evidence offered and whether it reveals a miscarriage of justice owing to ineffectiveness of counsel.

Factual Background

[5] A.W.H. was engaged in a dating relationship with M.M. between October 2013 and October 2014. The complainant, G.M., was the youngest of M.M.'s three children. M.M. and her children all lived together with M.M.'s parents in a residence in Halifax County. A.W.H. stayed in this family home periodically between November 2013 and October 2014. He participated in the routines of the household. G.M. was between three and four during the period that A.W.H. resided with her family.

[6] In October of 2014, G.M. told her mother that she did not want to be taken to preschool by A.W.H. She told her mother that she did not want him touching her any more. G.M. was upset. This disclosure precipitated an end to the relationship between A.W.H. and M.M. However, M.M. continued to see A.W.H. at work because they were both employed by the same business. Initially M.M.

did nothing about her daughter's comments to her. In early 2015, M.M. said that "a couple of things happened at work … so I called the police just to find out how I went about finding out if anything actually happened to my daughter."

[7] A videotaped statement was taken from G.M. at the IWK Children's Hospital in February of 2015. G.M. indicated that she and A.W.H. shared a secret, but she did not say what it was. G.M. complained that A.W.H. was not nice. She described him as "he's my boyfriend before".

[8] The interview revealed no criminal offence and no charges were laid.

[9] In June of 2015, M.M. started taking G.M. and her brother to see a psychologist for counselling. By this time, M.M. had been informed by police that A.W.H. had been arrested for violating court orders that he was not allowed around children. Accordingly, she thought it would be "very beneficial" for her children to have counselling. M.M. said that G.M. had expressed no worries or concerns about A.W.H. before going to counselling.

[10] M.M. testified that she informed G.M. that A.W.H. had "done bad things" and that he was in jail and could not hurt her. These reassurances occurred routinely during G.M.'s psychological counselling.

[11] After G.M. was counselled for eight or nine months, she disclosed to her mother that she had been "punched on her vagina". M.M. informed the psychologist about this disclosure. The police were called and a second videotaped interview was conducted at the IWK on February 11, 2016.

[12] In her February 2016 interview, G.M. claimed that A.W.H. did "stuff bad to me" saying he touched her vagina with his hand and feet. She also said he had touched her while sleeping on her bed, inside and outside her clothes. Some of the evidence was more colourful and plainly not reliable.

[13] A.W.H. submits that in the second videotaped interview G.M. made a number of statements that were "bizarre" in nature. Certainly some of her evidence about alleged sexual assaults appears to have been fanciful because the adults she placed on the scene did not corroborate what she said, and the trial judge disbelieved much of her evidence. Where G.M.'s evidence differed from her mother's, the trial judge accepted her mother's evidence.

[14] At trial, G.M. did not disclose what she had previously stated in her second videotaped statement. The Crown successfully applied under s. 715.1 of the *Criminal Code* to admit her videotaped evidence instead. Since G.M.'s second videotaped statement was admitted into evidence, the parties agreed that the first videotaped statement should be admitted as well.

[15] Having admitted the videotaped evidence, the trial judge found A.W.H. guilty, largely on the strength of that evidence. A.W.H. did not testify or lead any evidence, although his position now is that he told his trial counsel that he wanted to testify.

When videotaped evidence may be admitted:

[16] Videotaped statements of children are presumptively inadmissible. As out-of-court statements tendered for their truth, they represent hearsay. However, Parliament has provided for the admission of these statements in s. 715.1 of the *Code* if:

1. The witness is under the age of 18 at the time of the alleged offence.
2. *The video recording is made within a reasonable time after the alleged offence.*
3. The video recording describes the acts complained of.
4. The witness adopts the contents of the video.
5. The judge is satisfied that the admission of the video would not interfere with the proper administration of justice.

[17] In this case, all parties agreed that G.M. adopted the contents of her February 2016 videotaped statement to police. As A.W.H. puts it, the first question on appeal is whether the judge made a reviewable error when she found that the statement was given "within a reasonable time after the alleged offence".

[18] The statute is silent on what criteria should inform the reasonableness inquiry. Various cases have commented on it.

[19] In *R. v. L. (D.O.)*, [1993] 4 S.C.R. 419, Justice L'Heureux-Dubé described the purposes of s. 715.1 as:

1. Preserving an early account of a child's complaint in order to assist in the discovery of truth and provide a procedure for the reception of the child's story into evidence at trial;

2. Diminishing the stress and trauma suffered by children as a by-product of their role in the justice system; and
3. Balancing these two objectives with the right of the accused to a fair trial.

(pp. 44-45)

[20] In *R. v. R.A.H.*, 2017 PECA 5, the Prince Edward Island Court of Appeal considered what criteria might apply to a reasonable time assessment under s. 715.1. The Court observed that the longer the delay, the greater the impact on a child's memory and the greater the chance of outside influence and third party suggestion poisoning memory. The Court then listed these as factors that could assist in conducting an inquiry into the reasonableness of delay:

- the age of the child
- the relationship of the child to the accused
- the length of time and frequency of the offence
- the seriousness of the offence
- any developmental stages which the child may have gone through
- any evidence that something might have occurred which may have influenced the statement or impacted the reliability of the statement.

The voir dire decision admitting the videotaped evidence:

[21] In her *voir dire* decision the trial judge gave four reasons for admitting the evidence in accordance with s. 715.1:

1. There are recurrent themes expressed by G.M. of being scared and having a secret with A.W.H.
2. G.M. opened up in a logically progressive fashion.
3. She was in therapy for eight months before she says to her mother that she had a secret with A.W.H. she could not reveal.
4. There is no evidence that during the overall 16 month period M.M. or anyone else did or said anything that would have unduly influenced G.M. to make the disclosure she made in the February 2016 interview.

[22] A.W.H. challenges all of the judge's reasons for admitting the second videotaped statement.

[23] With respect to the trial judge's first reason, A.W.H. says that, in the 2015 interview, having a "secret" was in response to a leading question and was only mentioned once more thereafter. Similarly, being "scared" was mentioned only once in the 2015 video in which M.M. also said she felt "safe" with A.W.H., he was "nice" to her and she felt "comfortable" around him. A.W.H. adds that the two videotaped statements are "fundamentally contradictory" regarding sexual touching. He complains that the judge made no effort to account for the differences in substantive content when assessing "reasonable time" in relation to admissibility of the second videotaped statement. Despite being interviewed by a police officer and a social worker, G.M. disclosed no criminal behaviour in her first videotaped statement, given within four months of the alleged offences.

[24] Second, A.W.H. says the judge does not explain how M.M. "opened up" in a "logically progressive" fashion, when the authorities note the suggestibility of children and their diminishing recent recollection—which is more pronounced with children than with adults.

[25] Third, the fact that G.M. was in therapy for eight months before she told her mother that she had a secret with A.W.H. should not have been a positive reason for admitting the evidence, but the opposite, especially in light of M.M.'s pejorative descriptions to G.M. of A.W.H. during that time. Moreover, the Crown led no evidence about the therapy G.M. received or what effect it may have had on the reliability of G.M.'s evidence in the second videotaped statement taken thereafter.

[26] Finally, A.W.H. says that the judge's comment that there was no evidence of G.M. being "unduly influenced" was not correct in light of G.M.'s evidence that her mother had told G.M. that he was a "bad man" who had done "bad things to her" and was "in jail". M.M. confirmed that she had reassured G.M. that A.W.H. could not hurt G.M. because "the bad man is in jail, he can't hurt you anymore, and you're safe from him". Although the judge said in her conviction decision that there was no deliberate attempt to "incubate a negative attitude in G.M. toward" A.W.H., in her decision on admissibility of the videotape, the judge did not address the impact of her mother's evidence on G.M. and the impact it may have had on the reasonableness of delay in this case.

[27] As earlier indicated, because a miscarriage of justice occurred owing to ineffective assistance of counsel, it is not necessary to rule on these criticisms of the trial judge's decision.

Was there a miscarriage of justice as a result of ineffectiveness of counsel?

[28] A.W.H. says he received ineffective assistance of counsel, resulting in a miscarriage of justice. He alleges his trial lawyer, Ms. Smith, did not follow his instructions to call him to testify, gave him incorrect advice about testifying and failed to pursue evidence that would have impeached M.M. on cross-examination and would have provided alternative explanations for evidence relied upon by the judge to find guilt.

[29] These submissions are supported by a fresh evidence application with affidavits from A.W.H. and a friend who had possession of A.W.H.'s cellphone. A.W.H.'s trial counsel filed an affidavit in reply, supported by the affidavit of an articled clerk who was present at an interview between Ms. Smith and A.W.H. All were cross-examined.

[30] Accordingly, these reasons will proceed by considering:

(a) The law of admissibility of fresh evidence;

(b) In view of the fresh evidence offered, whether A.W.H. instructed counsel that he wanted to testify;

(c) Alternatively, whether trial counsel's erroneous advice fell below a reasonableness standard, giving rise to a miscarriage of justice.

Admissibility of fresh evidence:

[31] The Court may receive fresh evidence "in the interests of justice" (s. 683(1)(d) of the *Criminal Code*). Subject to admissibility and reliability, "fresh evidence will be received where it shows that counsel's conduct fell below the standard of reasonable professional judgment and a miscarriage resulted" (*R. v. Ross*, 2012 NSCA 56, ¶24 citing *R. v. Wolkins*, 2005 NSCA 2, ¶61; *R. v. Joanisse*, [1995] O.J. No. 2883 (C.A.), (1995) 102 C.C.C. (3d) 35 (ON CA), ¶18-20).

[32] A.W.H. bears the burden of demonstrating incompetence of his lawyer. He must also show that this undermined trial fairness or reliability of the verdict (*R. v. Gogan*, 2011 NSCA 105, ¶29; *R. v. Fraser*, 2011 NSCA 70, ¶53; *Ross*, ¶34-36). Whether or not to testify is one of those things which must be discussed with the client. The client's decision must be an informed one: *Ross*¸¶40; *R. v. Moore*, 2002 SKCA 30, ¶51; *R. v. Archer* (2005), 202 C.C.C. (3d) 60 (ON CA), ¶139.

[33] To succeed, A.W.H. must demonstrate that there is a reasonable probability that had he testified, the result could have been different or that he was "actually or constructively deprived of counsel's assistance" or "prevented from making full answer and defence" (*R. v. G.K.N.*, 2016 NSCA 29 at ¶78; *Ross*, ¶59-60). The former goes to the reliability of the verdict; the latter, to trial fairness.

Did trial counsel fail to implement A.W.H.'s instructions that he should testify?

[34] A.W.H. makes two complaints here against his trial lawyer. First, and more seriously, he says that his instructions that he should testify were not followed by his lawyer. Second, he says that his lawyer's advice against testifying was based on an error of law.

[35] Ms. Smith strongly denies that A.W.H. instructed her that he wanted to testify. She says she advised A.W.H. that it would be preferable if he did not testify and he accepted that advice. I would accept her evidence and reject A.W.H.'s for the following reasons:

1. A.W.H. filed his own Notice of Appeal. The allegation he made against Ms. Smith about testifying was:

   > I was told not to testify because I would not be believed.

   He does not allege he instructed Ms. Smith that he wanted to testify.

2. A.W.H. is an experienced criminal litigant. He is no stranger to the courtroom. After the *voir dire* hearing went against him, he dismissed his then counsel. He carried on for a brief time without a lawyer. He had no difficulty telling the Court what he thought and why at that time.

3. At his meeting with Ms. Smith in cells, he claims that he told Ms. Smith that he wanted to testify. Ms. Smith denies this, and she is corroborated by Mr. Mitchell Gallant, then an articling student, who was present.

4. After the Crown closed its case and his lawyer advised the Court that no defence evidence would be called, A.W.H. said nothing. He concedes he could have said something, but he did not.

5. After his lawyer's alleged failure to implement his instructions to have him testify, A.W.H. never complained to her about it. He admits that in meetings with his lawyer in cells afterwards he never remonstrated with her about not testifying.

6. There was some delay between the conclusion of the evidence and the verdict. When A.W.H. returned to Court for the verdict, he did not complain that he had not been given an opportunity to testify.
7. Ms. Smith and Mr. Gallant testified clearly. They made concessions where appropriate. They did not attempt to embellish or improve their evidence. They were credible witnesses.
8. A.W.H. was evasive when confronted with improbable behaviour by him.

[36] Where A.W.H.'s evidence differed from Ms. Smith's, I would prefer her evidence. I reject A.W.H.'s evidence that he instructed Ms. Smith that he wanted to testify. I accept Ms. Smith's evidence that A.W.H. agreed with her advice that he should not testify. But as discussed further below, that advice was founded on an error of law about the risk to A.W.H. of doing so.

Did trial counsel incompetently advise A.W.H. of the risks of testifying or failing to testify?

[37] A.W.H.'s trial counsel testified that her advice to A.W.H. not to take the stand was based on her concern that his prior criminal record—which included convictions for sexual offences against children—would count against him in the Court's finding of guilt or innocence. On the fresh evidence application she testified:

> **Justice Beveridge:** I see. Now, when you say that you were concerned about credibility because he would be cross-examined on his prior sexual assaults involving children and I explained to him that testifying would likely be more prejudicial than probative. How would being cross-examined on prior sexual assaults involving children be prejudicial to Mr. H. at his trial?
>
> **A.** I felt it would be a very, it would be, it would be a concern. I mean certainly, you know, it's not going to be readily relied upon, however it shows a history of offences against children which are similar to the offence he currently, he currently is facing.
>
> **Justice Beveridge:** How would the trial, you were concerned the trial judge would use that against him in her assessment of guilt or innocence. Is that what you're saying?
>
> **A.** ***I was concerned it would come into it.*** And now, not to say that it would specifically come into it, but I was concerned. And I raised those concerns with Mr. H., and I was (inaudible) I raised the credibility issue and Mr. H. agreed with me that credibility would be a concern.

> **Justice Beveridge:** ***So this would count against him on the guilt or innocence scale. Is that correct?***
>
> **A.** ***Yes.***
>
> [Emphasis added]

[38] It is a basic rule that general disposition evidence cannot be used to infer that the accused committed the offence alleged (*R. v. Handy*, 2002 SCC 56, ¶31-36; *R. v. Corbett*, [1988] 1 S.C.R. 670, pp. 688-689; *R. v. Seymour*, 2005 NSCA 5, ¶47).

[39] A criminal record cannot be used to impeach credibility beyond having the accused confirm the record (*R. v. Upton*, 2008 NSSC 338, ¶21; *Corbett*, pp. 696).

[40] To the extent that there may have been a hypothetical concern that subconscious moral prejudice may have influenced the Court, that concern should have disappeared in this case for at least two reasons: first, A.W.H. was not being tried by a jury but by a very experienced Provincial Court judge who is presumed to know the law and whose comments in this case leave no doubt that she was aware of that law. Second, having heard an abuse of process application and the *voir dire*, the trial judge already knew of A.W.H.'s unsavory record. There was no downside to him taking the stand and considerable risk of conviction to him if he remained silent in the face of the videotaped evidence once it was admitted.

[41] A.W.H. also argued that by failing to secure a transcript of text messages on A.W.H.'s telephone that occurred post-separation from M.M., counsel lost an opportunity to contradict M.M. on the stand when she denied any post-separation contact with A.W.H.

[42] A.W.H. says it was he who ended the relationship, not M.M. as she claims. He says he was considering a small claims court action against M.M. He argues this would be relevant to any motive M.M. might have for advancing her child's complaint against him. He adds that the messages would have disclosed no allegations post-separation of A.W.H.'s sexual impropriety.

[43] The Court can consider whether this fresh evidence "could reasonably be expected to have struck a serious blow to [M.M.'s] credibility" (*Fraser*, ¶104). The Court does not have to gauge precisely what impact this cross-examination may have had on M.M., but there needs to be at least a "significant potential for impeachment" (*R. v. M.B.*, 2009 ONCA 524, ¶63, 66).

[44] The texts and A.W.H.'s evidence that he left the relationship and that he was considering a small claims court action against M.M. should not be admitted for the purpose of impeaching M.M.'s credibility.

[45] There is no reasonable prospect that the texts and A.W.H.'s evidence could have impeached M.M.'s credibility with respect to this proposed evidence. The texts do not contradict M.M. directly. They were sent within two months from the end of the relationship. Both M.M. and A.W.H. agreed the relationship ended in October 2014.

[46] I would not admit the evidence solely for the purpose that M.M. allegedly had a motive to prompt her daughter to lie in retaliation for A.W.H.'s efforts to recover money for a car loan from her.

[47] The affidavit of A.W.H.'s friend, Mr. Knickle, was only filed for cellphone continuity purposes. So I would not admit that either.

[48] But A.W.H.'s own evidence is different. He claims that he had relevant testimony to give that would have contradicted or explained the allegations of G.M. He admits to touching G.M.'s genital area when changing her diaper and cleaning her. He says that the second time he took G.M. to school she was not happy because he made her wear clothes laid out for her by her mother and he inadvertently pinched her leg with the car seat buckle, causing her to cry and leaving a red mark on her leg, on which he placed a band-aid.

[49] A.W.H. admitted having innocent "secrets" with G.M. He gave her "Kinder Eggs", but asked that she not tell because he did not give them to her brothers. He admitted to tickling G.M. on her neck and armpits, but perhaps was too hard. He says that the "boyfriend" remark was owing to G.M.'s assertion to her mother that she (M.M.) could not be A.W.H.'s girlfriend, because A.W.H. could only have one girlfriend which G.M. claimed to be.

[50] A.W.H. says this innocent exchange was taken out of context by police.

[51] A.W.H.'s evidence would directly address some of the judge's reasons for his conviction. There was evidence before the trial judge that getting G.M. ready for school included removing her Pull-Ups and washing her genital area and that A.W.H. helped with the children. The judge said that the "evidence does not answer the question of whether A.W.H. participated in getting G.M. ready for pre-school". A.W.H.'s testimony would have provided that evidence. It is also reasonably probable that this would have affected the judge's conclusion that she

was "unable to say with certainty if he got G.M. up on those occasions and was responsible for her morning routine" (*Trial Decision*, ¶109).

[52] A.W.H.'s testimony also explains why G.M. discussed with the interviewing police officer the idea of being hurt and having the need for a band-aid. This could reasonably have affected the judge's finding that this statement was made in an effort to avoid answering a question about A.W.H.

[53] Finally, A.W.H.'s other testimony would have provided alternate exculpatory explanations for other statements and incidents relied upon by the judge to find that the Crown had proved guilt. These include: G.M.'s distress at the idea that A.W.H. would drive her to school; her negativity toward A.W.H.; the fact that they had secrets; that he touched the inside of her pajamas; and that he did "bad stuff" to her and was "not nice" to her (*Trial Decision*, ¶99-102).

[54] While G.M.'s reluctant demeanour and reactions when questioned about A.W.H. were factors in the trial judge's decision, it is clear that she relied on these statements and incidents to find that the presumption of innocence had been displaced (*Trial Decision*, ¶106, 108-111, 113, and 115).

[55] In *R. v. D.G.M.*, 2018 MBCA 88, the Manitoba Court of Appeal addressed the impact of counsel's failure to call relevant evidence that would have challenged the complainant's allegations:

> [21] The next issue is whether the presumed incompetence in not leading this evidence resulted in a miscarriage of justice. The evidence of erectile dysfunction was important to any challenge of the complainant's credibility in at least two respects. First, that evidence would have led to further avenues of cross-examination of the complainant as to how the sexual intercourse took place, which was relevant to her credibility. Because the trial lawyer neither obtained any evidence about the accused's erectile dysfunction nor led any evidence in that regard, that cross-examination was neither considered nor attempted.
>
> [22] Further, the fact of erectile dysfunction, if accepted as a fact at trial, when added to the other factors led at trial and/or disclosed in the evidence that challenged the credibility of the complainant's testimony, may reasonably have affected the ultimate determination of the credibility of her testimony and, therefore, the verdict that rested largely on her testimony. Thus, the presumed incompetence resulted in a miscarriage of justice. (See *R v M (PS)* (1992), 1992 CanLII 2785 (ON CA), 77 CCC (3d) 402 at 422 (Ont CA).)

[56] A.W.H.'s proposed new evidence is relevant to decisive issues concerning G.M.'s credibility and reliability and what inferences could reasonably be drawn from her evidence. His evidence is reasonably capable of belief. Finally, if believed, it would reasonably be expected to have affected the result because it provided alternative explanations for ultimately incriminating parts of G.M.'s testimony. The second, third and fourth *Palmer* criteria are therefore satisfied, and the reliability of the verdict has been undermined.

[57] The final consideration is that of due diligence—this is met if the evidence was not adduced owing to the ineffectiveness of counsel (*Ross*, ¶27 citing *R. v. Appleton*, 55 O.R. (3) 321 (ON CA), ¶23). As we shall see, this also goes to trial fairness.

[58] Applying the "objective standard through the eyes of a reasonable person" (*Fraser*, ¶80), A.W.H. has met his burden of showing that his counsel's representation fell below the standard of reasonableness and resulted in an unfair process both in fact and in appearance. Trial counsel was wrong that A.W.H. should not testify because his past convictions would be relevant to his guilt in this case. His trial counsel described A.W.H.'s criminal record as a "significant factor" in her ultimate recommendation to him not to testify. She thought there would have been "more information" about his past criminal offences should he be cross-examined. Counsel did not identify what additional information she was referring to, but agreed that the Crown could not get into details of the prior convictions.

[59] A.W.H.'s trial counsel also expressed concern about him being cross-examined on a prior statement that he had made. She admitted that the statement was exculpatory, but she was concerned about "whether or not he would be consistent with the statement he gave". She agreed there was nothing in the prior statement that was contradicted by A.W.H.'s affidavit evidence before this Court.

[60] Finally, A.W.H.'s trial counsel had general concerns about his credibility apart from his criminal record. That is certainly a fair consideration for counsel to take into account, but in this case, A.W.H.'s trial counsel did not prepare A.W.H. or test his credibility so as to inform her opinion about his credibility. As this Court stated in *Ross*:

> [45] Although he expressed concern that Bradley Ross would "give ground" on cross-examination, Mr. Jewett never prepared him to testify and never did a mock cross-examination of him, so it is not clear how he came to that conclusion. He said he thought Mr. Ross would not be credible and that it was difficult eliciting information from him. But these challenges are common with many witnesses

> who are less articulate than counsel might like. They can be substantially mitigated by appropriate preparation. Moreover, properly advised of the risks of his silence, Mr. Ross should have been motivated to present well as a witness. There was no other "downside" to Mr. Ross not testifying. Mr. Ross had no criminal record. This was his first encounter with the law.

[61] Providing advice which is erroneous in law does not automatically constitute incompetence (*G.K.N.*, ¶41), but it is certainly a relevant consideration (*Ross*, ¶58). It is especially so here where the mistake of law was intimately connected to A.W.H.'s failure to testify (*R. v. Moore*, 2002 SKCA 30, ¶46-47, 51).

[62] Counsel's errors were compounded by the failure to put A.W.H.'s version of events before the judge in any manner—either through his testimony or through cross-examination of Crown witnesses.

[63] Moreover, not putting A.W.H.'s version of events to the trial judge was inconsistent with counsel's strategy which included not simply demonstrating that M.M. had coached G.M., but that M.M. did so specifically as retaliation "for the split and the prospect of a small claims action". But counsel made no effort to solicit any evidence from Crown witnesses nor adduce any evidence that would support the theory that M.M. was retaliating. She asked M.M. no questions about her car loan or whether she was aware A.W.H. was considering a claim against her for that loan.

[64] While a failure to put A.W.H.'s version of events before the Court did not deprive him of "any reasonable prospect of successfully defending himself" (*Ross*, ¶1), the failure to do so in this case prevented A.W.H. from making full answer and defence, rendering the trial unfair as well as the verdict unreliable.

[65] A.W.H. waived his right to testify on the basis of an opinion founded on a mistake of law relating to the permissible uses of A.W.H.'s criminal record. Accordingly, A.W.H.'s waiver of the right to testify was uninformed; the trial was unfair and this unfairness was caused by counsel's ineffective assistance. I would order a new trial on this basis alone.

[66] In addition, however, there is a reasonable probability that A.W.H.'s fresh evidence regarding G.M.'s credibility and the inferences that could be drawn from her evidence, if accepted at trial, could have resulted in an acquittal. This evidence addresses the due diligence criterion in *Palmer* because the reason it was not adduced was counsel's ineffective representation of A.W.H.

[67] For all these reasons, I would allow the appeal, quash the conviction and order a new trial.

Bryson, J.A.

Concurred in:

Beveridge, J.A.

Fichaud, J.A.