NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Farmer*, 2021 NSCA 7

Date: 20210112
Docket: CAC 488053
Registry: Halifax

Between:

George Edward Farmer

Appellant

v.

Her Majesty the Queen

Respondent

Judge:	The Honourable Justice Duncan R. Beveridge
Appeal Heard:	September 10, 2020, in Halifax, Nova Scotia
Subject:	Criminal law: treatment of good character evidence; the elements of the statutory defence to voyeurism and breach of trust
Summary:	An on-duty police officer was observed looking into the windows of occupied motel rooms. He claimed his purpose was to investigate suspected criminal conduct. The trial judge convicted the appellant of voyeurism and breach of trust by a public official. The appellant complained that the trial judge erred by: not referring to the twin significance of the good character evidence called by the appellant; misapplication of the burden of proof; a failure to appreciate there was an air of reality to the statutory public good defence; and, a failure to properly consider the *mens rea* and other elements of the breach of trust offence.
Issues:	(1) Did the trial judge err in his analysis of the good character evidence? (2) Did the trial judge misapply the burden of proof?

(3) Did the trial judge fail to apply the proper legal framework to the "public good" defence to voyeurism?
(4) Did the trial judge err in his legal analysis of the elements of breach of trust?

Result: Leave to appeal is granted with respect to the voyeurism conviction but the appeal is dismissed. The trial judge was well aware of the dual significance of the character evidence. In this case, they were inextricably interwoven and the judge was entitled to give whatever weight he saw fit to the evidence. The judge repeatedly instructed himself on the correct burden of proof, and his analysis does not reveal any deviation from the fundamental requirements. The parties accepted that the appellant's evidence gave an air of reality to the statutory public good defence. The trial judge found the Crown had disproved the defence beyond a reasonable doubt. Hence there was no error. The trial judge committed no reversible error by finding the elements, including the *mens rea* for breach of trust, had been made out by the persistent and repeated use of the appellant's office to carry out his voyeuristic escapades.

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Judges:	Beveridge, Bourgeois and Derrick, JJ.A.
Appeal Heard:	September 10, 2020, in Halifax, Nova Scotia
Held:	Appeal dismissed, per reasons for judgment of Beveridge, J.A.; Bourgeois and Derrick, JJ.A. concurring
Counsel:	Joel Pink, Q.C. and George Franklin, for the appellant Erica Koresawa, for the respondent

Reasons for judgment:

INTRODUCTION

[1] George Farmer is a former police officer with the Halifax Regional Police Service. The Service decided to investigate his on-duty behaviour.

[2] A surveillance team made observations and took video recordings. These established that the appellant looked into the windows of occupied motel rooms at the rear of the Esquire Motel between approximately 11:00 p.m. and 1:00 a.m. in late November and early December 2017.

[3] The police charged the appellant with offences known as voyeurism, trespassing at night, and breach of trust by a public official. The trial judge, the Honourable Christopher Manning, J.P.C., found the appellant guilty of all charges.

[4] At the sentence hearing, the trial judge stayed the trespassing at night charge as subsumed within the voyeurism charge (otherwise known as the "*Kienapple* principle" or the rule against multiple convictions for the same wrong). The trial judge imposed a six month conditional sentence followed by a probation order.

[5] The appellant appeals as of right from the breach of trust conviction and seeks leave to appeal with respect to the voyeurism conviction, pursuant to ss. 675(1) and (1.1) of the *Criminal Code*.

[6] In general terms, the appellant complains that the trial judge committed legal error: by his treatment of the appellant's good character evidence; in his failure to correctly apply the burden of proof; by misapplication of the requirements of the appellant's defence to the voyeurism charge; and, with respect to the elements for the breach of trust charge.

[7] I am not persuaded the trial judge committed these errors, and I would dismiss the appeal. Before setting out the facts and the trial judge's reasons, it is useful to recognize what the trial issues were.

TRIAL ISSUES

[8] The basic legal framework that defines trial issues arises from the essential elements of the offences charged and whatever defences may be available.

[9] The charges against the appellant alleged voyeurism contrary to s. 162(1)(a), trespass at night contrary to s. 177, and breach of trust by a public official contrary to s. 122 of the *Criminal Code*. The information alleged that between November 23 and December 3, 2017 the appellant did:

> 1. surreptitiously observe occupants of the Esquire Motel, located at 771 Bedford Hwy, Bedford, Nova Scotia, who was [*sic*] in circumstances that gives rise to a reasonable expectation of privacy, by being in a place in which a person can reasonably be expected to be nude, to expose his or hers [*sic*] genital organs, or anal region or her breasts, or to be engaged in explicit sexual activity, contrary to Section 162(1)(a) of the Criminal Code.
>
> 2. AND FURTHER that he at the same time and place aforesaid, did without lawful excuse loiter or prowl at night upon property of the Esquire Motel, situate at 771 Bedford Hwy, Bedford, Nova Scotia near a dwelling motel situated thereon, contrary to Section 177 of the Criminal Code.
>
> 3. AND FURTHER that he at the same time and place aforesaid, did being an official, a Police Officer did commit a breach of trust in connection with his duties by voyeurism and prowling at night, contrary to Section 122 of the Criminal Code.

Voyeurism

[10] The offence of voyeurism is defined as follows:

> **162 (1)** Every one commits an offence who, surreptitiously, observes — including by mechanical or electronic means — or makes a visual recording of a person who is in circumstances that give rise to a reasonable expectation of privacy, if
>
> > **(a)** the person is in a place in which a person can reasonably be expected to be nude, to expose his or her genital organs or anal region or her breasts, or to be engaged in explicit sexual activity;

[11] As I will elaborate later, the appellant did not dispute the essential elements of this offence. However, the trial was far from over. He urged he had committed no offence because his actions served the public good and did not extend beyond what served the public good. The *Criminal Code* provides this statutory defence in ss. 162(6) and (7):

> **(6)** No person shall be convicted of an offence under this section if the acts that are alleged to constitute the offence serve the public good and do not extend beyond what serves the public good.
>
> **(7)** For the purposes of subsection (6),

> **(a)** it is a question of law whether an act serves the public good and whether there is evidence that the act alleged goes beyond what serves the public good, but it is a question of fact whether the act does or does not extend beyond what serves the public good; and
>
> **(b)** the motives of an accused are irrelevant.

Trespassing at night

[12] The offence is not actually trespassing—it is an edict against loitering or prowling at night on property near a dwelling house without lawful excuse. Section 177 reads as follows:

> **177** Every person who, without lawful excuse, loiters or prowls at night on the property of another person near a dwelling-house situated on that property is guilty of an offence punishable on summary conviction.

[13] The appellant insisted he had a lawful excuse for his conduct as he was a police officer and his acts were justified by s. 25(1) of the *Criminal Code*, which provides as follows:

> **25 (1)** Every one who is required or authorized by law to do anything in the administration or enforcement of the law
>
> **(a)** as a private person,
>
> **(b)** as a peace officer or public officer,
>
> **(c)** in aid of a peace officer or public officer, or
>
> **(d)** by virtue of his office,
>
> is, if he acts on reasonable grounds, justified in doing what he is required or authorized to do and in using as much force as is necessary for that purpose.

Breach of trust

[14] The offence of breach of trust by a public official has a long history as a common law crime. That history and the statutory offence found in Canada's *Criminal Code* were thoroughly explored in *R. v. Boulanger*, 2006 SCC 32. The language of the offence in Canada is straightforward:

> **122** Every official who, in connection with the duties of his office, commits fraud or a breach of trust is guilty of an indictable offence and liable to imprisonment

> for a term not exceeding five years, whether or not the fraud or breach of trust would be an offence if it were committed in relation to a private person.[1]

[15] Despite the uncluttered expression of the offence, uncertainty as to the elements of the offence went unresolved until *R. v. Boulanger*. It is easy to understand why: s. 122 and its predecessors have simply used the language of the common law offence of breach of trust by a public official.

[16] In *Boulanger*, McLachlin C.J. traced the struggle of common law jurisdictions to come to grips with the issue of what constitutes the *actus reus* and *mens rea* of the common law offence of breach of trust. In Canada, some authorities found neglect (non-feasance) was caught by s. 122; others, that the Crown must establish the accused received a personal or derivative benefit.

[17] McLachlin C.J. explained that s. 122 only captures misfeasance in public office (para. 41). Further, while receipt of a significant personal benefit may be evidence an official acted in their own interest rather than that of the public, the offence may be made out where no personal benefit is involved (para. 56). She expressed her conclusion on the essential elements as follows:

> [58] I conclude that the offence of breach of trust by a public officer will be established where the Crown proves beyond a reasonable doubt the following elements:
>
> 1. The accused is an official;
> 2. The accused was acting in connection with the duties of his or her office;
> 3. The accused breached the standard of responsibility and conduct demanded of him or her by the nature of the office;
> 4. The conduct of the accused represented a serious and marked departure from the standards expected of an individual in the accused's position of public trust; and
> 5. The accused acted with the intention to use his or her public office for a purpose other than the public good, for example, for a dishonest, partial, corrupt, or oppressive purpose.

[18] With this legal framework in hand, I turn to a précis of the trial evidence and the trial judge's key findings.

THE TRIAL EVIDENCE

[1] This was the version in force at the time of the offence. It has since become a dual or hybrid offence: S.C. 2019, c. 25, s. 35.

[19] Beginning in September 2017, a surveillance team determined that the appellant, during his night shifts, visited various apartment buildings and dwellings. He would leave his vehicle without notifying Dispatch. Most of these stops appeared to be random—except every night shift, he would visit the Esquire Motel on the Bedford Highway.

[20] The team staked out the Esquire Motel on four nights: November 23 and 24; and, December 1 and 2, 2017. Video-cameras were placed. The officers wore night-vision goggles.

[21] Sgt. Pepler and Cst. Cross were assigned to observe the appellant at the Esquire Motel; Sgt. Pepler at one end of the motel and Cst. Cross at the other. On November 23, Sgt. Pepler saw the appellant arrive, access the property through a gap in the fence and stay behind the motel for twenty minutes. Sgt. Pepler did not see the appellant look into any windows.

[22] That same night, Cst. Cross observed the appellant unscrew the north-facing security light. Cst. Cross's night-vision goggles did not perform well. He could not clearly make out the appellant's actions.

[23] Cst. Cross was the only witness who testified about the appellant's November 24, 2017 actions. At approximately the same time as the previous night, he saw the appellant arrive and again unscrew the north-facing security light. Cst. Cross saw the appellant looking towards the motel room windows, when the appellant suddenly turned and ran at full speed along the back of the motel and into the woods. The appellant remained in the woods for two minutes before he returned to head back along the path toward the motel's south end.

[24] After midnight, Cst. Cross observed the appellant return to the rear of the motel by using the open breezeway between the north and south ends of the motel. The appellant went to the south side where he remained for ten minutes before he left.

[25] For the nights of December 1 and 2, 2017, the police stationed an undercover female officer in Room 15 of the motel. Sgt. Pepler saw the appellant again arrive around 2300 hours. The appellant stayed behind the motel for 17 minutes. During that time, he made three separate visits to the window of Room 15. The young female undercover officer was on the bed, dressed in a tank-top and shorts, watching TV.

[26] Just prior to his second visit to the window of Room 15, the appellant unscrewed the security light, which is close to that room. It turned the whole area into complete darkness except for the light from Room 15. Sgt. Pepler testified that the appellant approached the window, bent at the waist, taking baby steps as if he were walking on eggshells. After the third visit, the appellant left the south side of the motel without screwing the security light back in.

[27] Cst. Cross testified that on December 1 the appellant showed up on the north end of the motel, unscrewed the north-facing security light, and looked into the window of an occupied room. When he left the north end of the motel, he screwed the security light back in.

[28] On December 2, the appellant arrived at the rear of the Esquire Motel just before midnight. He stayed for some 33 minutes. During that time, he approached four occupied rooms, sometimes on multiple occasions. However, his first action was to unscrew the security floodlight just outside Room 15.

[29] Room 15's curtains were open about a foot. The appellant looked in the window where the undercover officer was lying on the bed. Room 24 had its curtains pulled together, with a 'V' opening at the top. The appellant went to middle of the motel, got two stacked plastic chairs, and used them to stand on to look into the window of Room 24.

[30] Sgt. Pepler also observed the appellant look into the window of Room 21 at least three times, each time using small steps, as if he were walking on eggshells. On one occasion, his shoulder was directly against the motel wall. He did a similar thing with respect to Room 19.

[31] In a separate eleven-minute time frame, just prior to 0100, the appellant was again outside Room 15. By arrangement, the undercover officer came to the window. The appellant quickly backpedalled away and stayed in the darkness for two minutes before moving.

[32] Cst. Cross testified that when the appellant arrived within his field of vision, he saw him unscrew both security floodlights and approach the window of an occupied room. The appellant then left to go to the south end of the motel. Cst. Cross observed the appellant return to the north end. In all, the appellant appeared to look into the window of an occupied room five times.

[33] There is one last incident of note. The appellant left the Esquire Motel just after 0109. Dispatch had directed him to respond to a call. Then, at 0120, the undercover officer called in an anonymous complaint that someone had been looking in the rear windows of the Esquire Motel approximately twenty minutes earlier. The complaint described the individual as dressed in black and looked suspicious.

[34] Dispatch directed the appellant to answer the anonymous call at the Esquire Motel. The video cameras captured him at the rear of motel where he screwed the security floodlights back in. He then advised Dispatch that everything was in order, the lights are back on and no one is around. At no time did the appellant advise anyone that he had been at the rear of the motel at the very time a suspicious individual had been looking in the rear windows.

[35] Pursuant to s. 655 of the *Criminal Code*, the parties tendered a detailed Agreed Statement of Fact. In it, the appellant admitted that civilians had stayed in certain motel rooms and they had had a reasonable expectation of privacy.

[36] The appellant testified and called two character witnesses. As is customary with character witnesses, their evidence was short. One testified she had known the appellant for 18 years. She opined the appellant's general reputation in the community was that he was honest and truthful. The second character witness had known the appellant for 11 years through her work as a fellow Halifax Regional Police officer. She also offered that the appellant's general reputation in the community was that of an honest, truthful person of integrity.

[37] The appellant gave evidence about an incident in the summer of 2016 where he responded to a taxi driver fraud complaint at the Esquire Motel. A passenger had not paid her fare. The appellant located two teenaged girls. Shortly thereafter, two young men arrived. They paid the cab driver. The appellant suspected the men were handlers, using the Esquire Motel for prostitution services.

[38] Thereafter, the appellant would do a foot patrol of the rear of the motel on every evening shift. He did them mostly during his lunch break because that is when he said he expected the caretaker, Philip White, to be out on his deck.

[39] The appellant had met Mr. White many times and explained to him that he was there to do foot patrols. White welcomed the appellant's presence and stated purpose of checking on things.

[40] Philip White had already testified as a Crown witness. He thought he had met the appellant in the fall of 2017, but admitted it could have been 2016. Mr. White confirmed he felt comfortable the appellant was checking the rear of the motel. His unchallenged evidence was that he noticed problems with the security lights in the fall of 2017—he found them loosened or unscrewed. He thought high winds or vibration from the laundry room were possible causes. After January 2018, there were no further problems.

[41] The appellant explained that in the summer of 2017 he responded to a citizen assist call at the nearby Bluenose Motel. A young female complained she was involved in prostitution against her will. Based on the information he said he acquired from her, the appellant believed the incident originated at the Esquire Motel.

[42] As a consequence, when he continued his foot patrols at the Esquire Motel, the appellant looked into the windows to ensure no female was being assaulted and to determine if there was any other illegal activity. He admitted that he unscrewed the security floodlights. He said he did so for his own safety—so no one would see him and he could look into the windows to detect illegal activity.

[43] The appellant admitted the accuracy of the video recordings and surveillance team observations. Nonetheless, he offered explanations for some of the more interesting observations about his conduct. For example, he said he had run into the woods because he had had to urinate.

[44] With respect to the use of a chair to look into the ‘V’ at the top of drawn curtains, the appellant claimed he saw a man leaning out the window as he walked by. This caused him to suspect there were drugs inside.

[45] For his repeated interest in Room 15, he offered that when he first saw the undercover officer on the bed, she resembled the young woman he encountered in 2016—he finally came to the conclusion it was not her.

[46] While it was important for officer safety and to document his work, the appellant at no time advised Dispatch that he had left his police car to do foot patrols at the rear of the motel. He should have done so, but did not. The appellant put this down to laziness.

[47] The appellant rationalized that his evening shift foot patrols were animated by his concerns about prostitution activities. However, at no time did he tell his supervisors or colleagues about his concerns or his foot patrols.

[48] On the last night, he acknowledged that he was present at the time the undercover officer complained someone was looking in the rear windows. He answered the call, screwed the security lights back in, radioed Dispatch that everything was good, and cleared the call. He did not tell Dispatch that he had been at the rear of the motel at the relevant time because he did not want to be judged—even though he claimed he had been acting lawfully in the execution of his duties.

THE TRIAL JUDGE'S FINDINGS

[49] As a general rule, judges decide what they are asked to decide. The parties' submissions inform judges what issues they need to determine.

[50] In this case, the parties made their closing arguments in writing. As the appellant called evidence, his submissions came first, on November 21, 2018. Despite their length, absent was any mention of the breach of trust charge, other than a stark reproduction of the section.

[51] The appellant focussed on the voyeurism (s. 162) and trespass at night (s. 177) counts. After a canvass of the authorities, the appellant concluded that the Crown must prove beyond a reasonable doubt the following:

> The date of the offence;
>
> The place of the offence;
>
> The identity of the accused; and,
>
> That the accused surreptitiously observed a person or persons in circumstances that give rise to a reasonable expectation of privacy.

[52] The appellant did not suggest the Crown had not proven these elements beyond a reasonable doubt. Instead, his argument focussed on the "public good" defence found in s. 162(6) of the *Criminal Code*. He cited the leading Supreme Court of Canada cases that had addressed the defence in child pornography cases (*R. v. Sharpe*, 2001 SCC 2; and, *R. v. Katigbak*, 2011 SCC 48).

[53] From *R. v. Katigbak*, counsel stressed the following:

> [42] At this step of the analysis, the trial judge must decide whether the possession of child pornography served the public good. **The court must begin by reaching factual conclusions about what the accused did, and the effects of his actions. Once his or her conduct has been characterized, the court must consider whether the accused's actions served the public good. The focus is on the *effect* of the activity, not the motives of the accused. This distinguishes the public good defence from the legitimate purpose branch of the new defence. As a preliminary matter, the trial judge must determine whether, considered objectively, there is evidence that the activity in question advanced the public good. If so, the Crown bears the burden of proving beyond a reasonable doubt that the public good was not served by the actions of the accused.**
>
> …
>
> [44] **If the court is left with a reasonable doubt that the activities, viewed objectively, served the public good, the court must go on to ask whether the conduct of the accused extended "beyond what served the public good".**
>
> [Bold emphasis by counsel]

[54] The appellant urged the foot patrols were in furtherance of his duties as a police officer and done with the permission of Philip White. Hence, they served the public good and did not contravene s. 177; furthermore, his actions could be excused by s. 25(1) of the *Criminal Code*.

[55] Lastly, the appellant made extensive submissions on the lodestar principles of credibility assessment. He stressed the appellant's good character, supported by two witnesses who spoke to his reputation for honesty and integrity.

[56] The Crown filed its written submissions on November 29, 2018. It set out the essential elements of the three offences and submitted that based on the surveillance, the Agreed Statement of Facts, and the appellant's own evidence, the Crown had proven its case beyond a reasonable doubt. In sum: the actions of the appellant, viewed objectively, did not actually serve the public good; Philip White's authorization or permission did not extend to looking into people's windows; the appellant's conduct amounted to a marked departure from the standards expected of a police officer; and, the necessary *mens rea* could be inferred from the whole of the evidence, including his attempts to conceal his acts.

[57] As for the appellant's character evidence, the Crown proposed it be afforded little to no weight. Instead, it urged the appellant's credibility should be assessed on the totality of the evidence, the videos, observations, and common sense.

[58] The appellant enjoyed the right of reply. He did so on December 4, 2018. I will return to these written submissions later when I comment on the substance of some of the appellant's complaints.

[59] On January 18, 2019, the trial judge delivered an oral decision. It is unreported. I need not set out a complete synopsis of it. It is thorough and responded to the issues the parties framed.

[60] In brief, the trial judge attached little weight to the character evidence and found the appellant had surreptitiously observed occupants of the motel in a manner and circumstances that violated s. 162(1)(a) of the *Criminal Code*. He concluded: the appellant's actions could not be justified as being in the public good; the prowling offence was made out; and, the appellant did not have a lawful excuse for his conduct, nor was it excused or justified by s. 25 of the *Criminal Code* as the appellant was not authorized by law to look into the windows, nor act on reasonable grounds. The trial judge convicted the appellant of breach of trust since: he was a public official; his conduct was a serious and marked departure; and, he had the requisite *mens rea*.

ISSUES

[61] Initially, the appellant advanced six grounds of appeal. They were:

> 1. That the honourable trial judge erred in law by failing to properly apply *R. v. W(D)*, [1991] 1 S.C.R. 742 when assessing the evidence of Mr. Farmer – in particular the second and third branches of the test from *W(D)* for assessing the evidence of an accused. This error led the honourable trial judge to improperly apply the fundamental principle that the Crown prove the guilt of the accused beyond a reasonable doubt.
>
> 2. That the honourable trial judge erred in applying s. 162(6) of the *Criminal Code*, the public good defence to voyeurism, and erred in appreciating the evidence that the appellant's actions served the public good. This error denied the appellant the benefit of this defence.
>
> 3. That the honourable trial judge erred in applying s. 25(1) of the *Criminal Code*, and as such denied the appellant the benefit of this defence.
>
> 4. That the honourable trial judge erred in his application of the *mens rea* element of s. 122 of the *Criminal Code* (breach of trust) and as such failed to hold the Crown to its burden of proving each element of the offence beyond a reasonable doubt.

> 5. That the honourable trial judge erred in his application of s. 122 of the *Criminal Code* (breach of trust) in regards to the requirement that the accused's conduct represent [*sic*] a serious and marked departure from the standards expected of an individual in the accused's position (see *R. v. Boulanger*, 2006 SCC 32). As such, the honourable trial judge failed to hold the Crown to its burden of proving each element of the offence beyond a reasonable doubt.
>
> 6. That the honourable trial judge erred in his application of evidence of the appellant's good character by equating the appellant's actions with sexual assault.

[62] The appellant's factum did not advance a complaint about s. 25(1) of the *Criminal Code*, and reduced the issues to four. The Crown summarized the refined issues as follows:

> 1. Did the trial judge err in the law of character evidence by:
>
> a) Failing to appreciate that evidence of good character can support an accused's credibility,
>
> b) Applying *R. v. Profit*, and
>
> c) Failing to recognize that, even if *R. v. Profit* applied, evidence of good character still carried weight regarding the Appellant's credibility?
>
> 2. Did the trial judge err in failing to apply the second step of the *W.(D.)* analysis?
>
> 3. Did the trial judge err in considering the "public good" defence by:
>
> a) Failing to apply the proper legal framework when considering the "public good" defence to voyeurism, and
>
> b) Failing to appreciate that there was an "air of reality" to the defence?
>
> 4. Did the trial judge err in considering the elements of breach of trust by:
>
> a) Concluding that the *mens rea* requirement was met,
>
> b) Concluding that the "marked departure" requirement was met, and
>
> c) Conflating the "voyeurism" and "breach of trust" charges?

[63] At the hearing, the appellant voiced no complaint with this summary. I will use it as a general template.

ANALYSIS

Character evidence

[64] I am far from convinced that the trial judge committed the errors alleged.

[65] The law is settled. Good character evidence is admissible on the issue of guilt or innocence if the evidence of a particular character trait relates to a relevant issue or with respect to the accused's credibility (See: *Sopinka, Lederman & Bryant: The Law of Evidence in Canada*, 5th ed at §10.17[2]).

[66] Because the appellant contends the trial judge erred in how he applied the principles from *R. v. Profit*, it is useful to set out what that case was about. The Ontario Court of Appeal ((1992), 58 O.A.C. 226) unanimously agreed that the trial judge had properly considered the good character evidence on the issue of the appellant's credibility (paras. 27 and 45 respectively). However, the Ontario Court of Appeal majority and dissent disagreed about the significance of the trial judge's failure to specifically discuss that the good character evidence would make it less likely the appellant had committed the offences of indecent assault and various sexual offences.

[67] The majority (per Goodman J.A.) viewed the trial judge's silence on the potential for character evidence to support the inference of the reduced likelihood the appellant committed the offences to be determinative of the appeal.

[68] Justice Goodman's approach is best captured in these two paragraphs:

> [28] The trial judge, however, made no reference whatsoever to the use of character evidence as a basis of an inference that the appellant was unlikely to have committed the crime charged. In that respect he failed to give any recognition to the dual significance of such evidence. Although a trial judge need not in his reasons specifically refer to each principle of law upon which he relies, there are cases where the reasons given are such as to create at the very least a reasonable doubt as to whether such judge has misdirected himself or has failed to direct himself as to the proper principle of law applicable to a particular issue in the case. In the case at bar the trial judge dealt specifically in his reasons with the use that he made of the character evidence which had been adduced. In view of his failure to refer to its admissibility as the basis for an inference that the appellant was unlikely to have committed the crime charged, it is a matter of considerable doubt as to whether he was aware of its admissibility for that purpose or whether he directed his attention to its use for such purpose.
>
> …
>
> [36] It is not apparent from the reasons of the trial judge that he considered the character evidence as a basis for drawing an inference with respect to the probability of the appellant having committed the offence. The reasons would

[2] Sidney N. Lederman, Alan W. Bryant & Michelle K. Fuerst, *Sopinka, Lederman & Bryant: The Law of Evidence in Canada*, 5th ed (Markham: LexisNexis, 2018).

> appear to indicate that he did not do so and in my opinion, in not doing so, he fell into error.

[69] Griffiths J.A. disagreed. He reasoned that the good character evidence of the appellant for honesty, integrity and morality had little weight beyond the issue of the appellant's credibility. The character witnesses swore they had never seen nor heard that the appellant had conducted himself in a sexually inappropriate manner or make a sexually inappropriate statement. Griffiths J.A. wrote as follows:

> [49] However, I accept the position that there was some testimony offered that met the requirements of character evidence, that is, evidence of the reputation for good character enjoyed by the appellant in the community. In my opinion, however, while such evidence may be relevant in cases involving crimes of commercial dishonesty, it has little probative value in cases involving sexual misconduct against children by persons in positions of trust or control.

[70] Further, even if the trial judge had in fact overlooked the additional role for character evidence, it did not warrant a new trial:

> [56] Assuming, in this case, that the trial judge overlooked the additional consideration to be given to good character evidence, I am not persuaded that this omission was of such significance and seriousness as to warrant a new trial.
>
> [57] In the alternative, I am not satisfied that the trial judge necessarily overlooked the relevance of good reputation to the improbability of the offences being committed, or that this factor would necessarily have changed his decision, having regard to his findings of credibility. As I have mentioned earlier, the trial judge was apparently satisfied beyond a reasonable doubt that the complainant was telling the truth and that the appellant was not. I find it somewhat unreal to expect that the trial judge, having made those findings of credibility, might have acquitted the appellant on the basis of the second consideration to be given to good character evidence.

[71] The Supreme Court of Canada ([1993] 3 S.C.R. 637) endorsed the reasons of Griffiths J.A. and reinstated the respondent's convictions.

[72] With this background, we can turn to the trial judge's reasons. The judge accurately set out the substance of the character evidence, and then said this:

> Evidence of good character is not a defence to a criminal charge, but it is one factor considered, and it may make it less likely that an accused person has committed an offence. Character evidence, however, has a greater utility in cases involving honesty such as theft or possession of stolen property (see, for example, **R. v. S.R.J**.), and will have less impact in other types of cases such as sexual

> offences (see **R. v. Profit**) because in those cases the misconduct alleged occurs in private and not in public.
>
> In my view, similar considerations to the **Profit** case apply in the case that's before the Court, particularly the case of voyeurism. And therefore, I have carefully considered but I attach little weight to the character evidence led in this matter.

[73] As explained above, *Profit* was a case where the trial judge was said to have erred by not considering the probative value of character evidence on the guilt or innocence of the appellant—the improbability that the appellant would have committed the criminal act alleged. As in *Profit*, the trial judge here attached little weight to such evidence. I agree it was open for him to do so.

[74] Sexual predatory behaviour usually occurs in private and hence may not taint an accused's general reputation for honesty and integrity. Here, the appellant's impugned conduct occurred secretively. The undisputed evidence revealed: he acted in a surreptitious manner to access the rear of the motel where he unscrewed security lights so he would not be seen; he failed to notify Dispatch of his conduct; he snuck up to the windows, only to run away when he feared his presence was detected; and, covered up his attendance at the motel when he investigated the anonymous prowler complaint.

[75] That does not end the appellant's complaint. He also argues the trial judge erred because he did not expressly advert to the potential dual purposes for the character evidence. With respect, that oversight does not *per se* equate to reversible legal error. I say this for three reasons.

[76] First, it could hardly have escaped the trial judge's attention that there were two available purposes for the character evidence. The appellant stressed in his two editions of written submissions that the evidence could be relevant to the likelihood he had not committed the offences and to his testimonial credibility.

[77] Second, trial judges are presumed to know the law. The failure to mention uncontroversial principles does not automatically equate to legal error (see for example: *R. v. R.J.S.*,[1985] O.J. No.1047 (C.A.) at para. 35; *Profit* (Ont. C.A.) at para. 28).

[78] A similar complaint of error found no traction in *R. v. Minuskin*, [2003] O.J. No. 5253 (C.A.) where Rosenberg J.A. reasoned:

> [24] As to the use of the good character evidence, the trial judge found that this evidence was of little assistance in the case. He stated that there is "no particular pathology ... to domestic violence, it is often committed by persons of otherwise good character and judgment". The appellant says that while the evidence of peaceful reputation may have been of little use, the trial judge erred in failing to consider the evidence of the appellant's reputation for honesty in judging his credibility. I have reviewed the character evidence. I think it was open to the trial judge to find it was of limited use in this case. While the appellant had a sterling reputation for honesty in the business community the witnesses had limited or no information about his reputation outside that context. The trial judge did not disregard the evidence. The weight to be attached to it was a matter for him as the trier of fact. I see no error of law.

[79] Similarly, the trial judge here said he had carefully considered the character evidence, but attached little weight to it.

[80] Third, the character evidence adduced did not suggest the presence or absence of a character trait relevant to the issue of propensity distinctly different from the issue of the appellant's testimonial credit. The purposes were inextricably interwoven and the failure to mention the two separate theoretical uses is of no moment. *R. v. Flis* (2006), 207 O.A.C. 228[3] illustrates.

[81] In that case, two police officers were convicted of assault on a young man they had arrested when they were off-duty. The Summary Conviction Appeal Court quashed the convictions because the trial judge had not commented on the two possible uses of the character evidence of the officers' unblemished reputations for honesty and professionalism in the performance of their duties. The Crown sought leave to appeal to the Ontario Court of Appeal. Moldaver J.A., as he then was, wrote for the Court to allow the appeal and reinstate the convictions.

[82] Justice Moldaver paraphrased the reasons by the summary conviction appeal judge as follows:

> [39] The summary conviction appeal judge focused on the trial judge's stated use of the character evidence and he found that it constituted misdirection. In so concluding, he observed, correctly in my view, that the character evidence in question was admissible for two purposes. First, it was capable of supporting the respondents' credibility (the first purpose) and second, it was capable of supporting an inference that they were unlikely to have committed the offence charged, thereby potentially casting doubt on the complainant's evidence and weakening the Crown's case (the second purpose). According to the summary

[3] Leave denied, [2006] S.C.C.A. No. 120.

> conviction appeal judge, in these circumstances, where "evidence of good character is advanced for the dual purposes of supporting the testimonial trustworthiness of an accused and as circumstantial evidence supporting his or her denial of the offence," a trial judge must "advert to these two aspects of the proffered testimony."

[83] This "formulaic approach" was rejected:

> [42] For reasons that follow, I do not agree that the trial judge's treatment of the character evidence constituted a basis for overturning the respondents' convictions.
>
> [43] To begin with, I do not share the summary conviction appeal judge's view that in cases other than those involving the sexual abuse of children, a trial judge commits reversible error if he or she does not expressly advert in the reasons for judgment to the two evidentiary purposes which good character evidence may serve. Case law from this court holds to the contrary: see e.g. *R. v. R.S.* (1985), 1985 CanLII 3575 (ON CA), 19 C.C.C. (3d) 115 at 127 (Ont. C.A.) where Lacourciere J.A. found that the trial judge's failure to mention the character evidence in his reasons did not amount to "self-misdirection or non-direction" and that it was "unreasonable to suppose that the factor [the appellant's reputation for honesty] was not present to the judge's mind having regard to his entire findings on the issue of credibility": see also Griffith J.A.'s dissenting reasons in *Profit*, *supra*, at pp. 114 and 115.
>
> …
>
> [52] In the final analysis, I am respectfully of the view that the summary conviction appeal judge took too formulaic an approach to the character evidence. Viewed realistically, this was a case in which the second purpose for which the character evidence was introduced (improbability) was inextricably interwoven with the first purpose (the respondents' credibility). As such, while I acknowledge that it would have been preferable had the trial judge specifically adverted to the second purpose, in the circumstances, I am not persuaded that his failure to do so constituted error.

[84] While it may have been better had the trial judge referred to both purposes of the appellant's good character evidence, the two were inextricably interwoven; his failure to do so, in these circumstances, does not amount to legal error.

[85] I would not accede to this ground of appeal.

Burden of proof

[86] Appellant's counsel suggests the trial judge erred because he failed to ask himself if the evidence of the appellant raised a reasonable doubt. This complaint

rests on a literal reading of the seminal expression by Cory J. in *R. v. W.(D.)*[4] of a suggested jury charge to protect against misapplication of the burden of proof on the issue of credibility:

> First, if you believe the evidence of the accused, obviously you must acquit.
>
> Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.
>
> Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

[87] The parties recognize that a trial judge's reference to this framework does not safeguard against appellate interference, nor does its absence amount to fatal legal error. Some of the authorities on this issue were reviewed by Bourgeois J.A. in *R. v. N.M.*, 2019 NSCA 4:

> [25] The following general principles are of assistance when considering the trial judge's *W.(D.)* analysis:
>
> - The purpose of the *W.(D.)* framework is to "explain what reasonable doubt means in the context of evaluating conflicting testimonial accounts" where the credibility of those accounts are at issue (*J.H.S.* at para. 9);
> - An allegation that a judge erred in applying *W.(D.)* is a question of law, reviewable for correctness (*R. v. J.A.H.*, 2012 NSCA 121 at para. 7);
> - Failing to use the precise wording in *W.(D.)* is not fatal, either before a jury (*W.(D).* at pg. 758; *J.H.S.* at para. 14), or by a judge alone (*R. v. Vuradin*, 2013 SCC 38 at para. 26);
> - An exact articulation of the three factors in *W.(D.)* will not prevent appellate intervention if a trial judge's reasons reveal that the underlying principle of reasonable doubt was not applied correctly (*R. v. J.P.*, 2014 NSCA 29 at paras. 62 to 64, 73 and 85);
> - In considering a trial judge's reasons, they should not be "cherry-picked", or parsed, but rather considered as a whole to determine whether the trial judge correctly applied the principles *W.(D.)* intended to safeguard.

[88] The principle that *W.(D.)* is designed to protect against is a trier of fact simply treating the issue of guilt or innocence as a choice between the Crown's evidence and that of the defence. This either/or approach could dilute the Crown's burden of proof to establish the elements of an offence beyond a reasonable doubt.

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[4] [1991] 1 S.C.R. 742, at p. 758.

[89] In other words, even if a trier of fact does not believe an accused, it is still theoretically possible, based on all of the evidence, including that of an accused, that the charge or charges have not been proven beyond a reasonable doubt.

[90] In this case, the trial judge set out a refined version of the original *W.(D.)* framework. After a reminder the burden of proof always remained on the Crown, what is meant by reasonable doubt, and that it did not apply to individual pieces of evidence, he defined the approach he would apply:

> In this case, the Defendant, Constable Farmer, testified in his own defence. And in doing so, he denied any impropriety in his actions in what he described as patrols of the Esquire Motel. When an accused testifies, the Court must assess their credibility and apply the analysis contained in *R. v. W. (D.)* where the Court directed that the appropriate manner to assess the credibility of the Defendant, as applied in this case, is:
>
> > (1) if I believe the evidence of Constable Farmer, I must acquit;
> >
> > (2) if I do not believe the evidence of Constable Farmer but I'm left in a reasonable doubt by it, I must acquit;
> >
> > (3) if I do not believe his evidence and I am not left in a reasonable doubt by it, I must examine the evidence that I do accept and determine if the Crown has established the guilt of Constable Farmer upon proof beyond a reasonable doubt.

[91] The Crown's evidence about the appellant's conduct was almost entirely undisputed. The appellant conceded the video footage was accurate, as were the observations of Sgt. Pepler and Cst. Cross. Despite that concession, the appellant attempted to justify his conduct and put a different spin on it.

[92] The trial judge found Sgt. Pepler's and Cst. Cross's evidence to be credible and reliable. Where the appellant attempted to explain his conduct, the trial judge rejected his evidence and made clear emphatic findings of fact based on the evidence he did accept. These were: why the appellant unscrewed the security floodlights; why the appellant ran from Room 14 into the woods; why the appellant used chairs to look into Room 24; why the appellant looked into the undercover officer's room (Room 15); the purpose of his patrols at the rear of the motel; and, the manner in which the appellant approached the room windows. A brief capsule demonstrates that the appellant's evidence, where it conflicted with the Crown's case, did not raise a reasonable doubt.

<u>The unscrewed security lights</u>

[93] There was no disagreement that the purpose of the lights was to provide a measure of security for the motel guests. The trial judge set out the appellant's explanation and why he rejected it:

> Constable Farmer on several occasions disabled this security, which he said was for the purpose of his own safety and to be able to surprise any intruders who might be present. Clearly, it would make any person present less visible, and this would include Constable Farmer himself. **If this was done solely to further a patrol by a seasoned police officer, it is inconceivable to me that the lights would not be turned back on at the end of the patrol to ensure continued safety and security for the guests.** It is to be remembered that his attendance at the motel was only when he worked night shift two days a week, and his attendance was only for approximately one-half hour. **I do not accept his explanation for unscrewing the lightbulbs, and I find that disabling the lightbulbs was done by Constable Farmer for the purpose of making him less visible when he was approaching the windows of the motel.**
>
> [Emphasis added]

The flight from Room 14

[94] The appellant approached the window of Room 14, then ran to the north end of the motel, onto a path and into the woods. He explained this behaviour as an urgent need to urinate. The trial judge reasoned:

> Constable Farmer testified to this incident that he needed to urinate and that is why he ran into the woods. Detective Constable Cross was cross-examined on this issue and was very adamant that as a police officer he would not urinate in the woods but would find a place which I took to mean a bathroom.
>
> **In my view, the explanation proffered by Constable Farmer makes no sense.** He was on lunch break, and therefore he had the ability and freedom to go wherever he chose. If he was suddenly struck with an uncontrollable urge to urinate, he could have retreated to the woods that he was standing directly in front of and very close to. **It makes no sense at all that he would run to urinate, and certainly not run almost half the distance the motel complex to enter the woods.**
>
> [Emphasis added]

The use of chairs to look into Room 24

[95] The appellant said he took the chairs to look into Room 24 because he claimed he saw a man leaning out of the window, suspected drugs were present

and wanted to make sure no female was being assaulted. The trial judge found no basis for such a claim:

> […] In my view, there's absolutely nothing to support these suspicions and the actions of the room occupant looking out of his window or indeed leaning out of his window. **And I find that the only purpose of this action by Constable Farmer would have been to look into the room where the occupants were clearly seeking privacy.**
>
> [Emphasis added]

Room 15

[96] The female undercover officer sat on the bed in Room 15 on December 1 and 2 dressed in shorts and tank top with the curtains open about a foot. The appellant approached and looked into Room 15 three times on December 1 and five times on December 2. The appellant explained he had done so in order to determine if the undercover officer (in her mid-20's) could have been the teenager from the taxi incident in 2016. The judge found this explanation to be unbelievable:

> […] In my view, given that it was more than a year and a half since the taxi incident, **this is simply not a credible explanation for even one look or view. But when considered in the context of a total of eight views, it is totally unbelievable.** Furthermore, he indicated some views or looks were for a matter of seconds, but others were a minute or two minutes long. This is a very long time to be looking into a room to either identify a party or to see what is taking place in the room, and it is not credible.
>
> [Emphasis added]

Purpose of his "patrols"

[97] The appellant claimed he had gone to the rear of the motel since 2016 to find information about escort services, child prostitution and drugs. The trial judge observed that all of those visits had not produced one piece of evidence or information about such activities, nor had he ever notified his colleagues or Dispatch about his visits. The trial judge rejected his evidence and found the true purpose of his patrols was to look into the windows:

> […] In summary, I reject his evidence on these points, and I find his purpose was not to patrol the public ... not to patrol to protect the public, but rather to take the opportunity to look into the motel rooms at the Esquire.

Approach to the windows

[98] Sgt. Pepler described the appellant's approach as if he were walking on eggshells. The appellant, despite his testimony that he accepted the surveillance team's evidence, said he had used small but normal steps. His evidence was again rejected and a finding made contrary to the appellant's description:

> […] I do not accept his evidence on this point, and I rely in part on the events of November 24 at room 14 and December 2 at room 15. He clearly did not want to be observed, and I find that he approached the room windows using stealth.

[99] A functional analysis of the trial judge's decision shows that he rejected the appellant's explanations and made findings contrary to them. At no time did the trial judge shift or dilute the burden of proof. I would not accede to this ground of appeal.

The "public good" defence

[100] The appellant admitted the elements of s. 162(1)(a). The operative parts of that section are as follows:

> Every one commits an offence who, surreptitiously, observes … a person who is in circumstances that give rise to a reasonable expectation of privacy, if
>
> **(a)** the person is in a place in which a person can reasonably be expected to be nude, to expose his or her genital organs or anal region or her breasts, or to be engaged in explicit sexual activity;

[101] From the very outset of the trial, the appellant relied on the "public good" defence. This statutory defence provides that there is no criminality if the acts served the public good and did not extend beyond what served the public good. I earlier quoted the relevant *Code* provisions. It is useful to repeat them:

> **(6)** No person shall be convicted of an offence under this section if the acts that are alleged to constitute the offence serve the public good and do not extend beyond what serves the public good.
>
> **(7)** For the purposes of subsection (6),
>
> (a) it is a question of law whether an act serves the public good and whether there is evidence that the act alleged goes beyond what serves the public good, but it is a question of fact whether the act does or does not extend beyond what serves the public good; and
>
> (b) the motives of an accused are irrelevant.

[102] The "public good" defence has always been available to excuse possession of obscene materials, and later, child pornography. Today, ss. 163(3),(4) and (5) contain the identical language to the public good defence for voyeurism. In *R. v. Sharpe*, *supra*, McLachlin C.J., for the majority, endorsed this general definition:

> [70] "Public good" has been interpreted as "necessary or advantageous to religion or morality, to the administration of justice, the pursuit of science, literature, or art, or other objects of general interest": J. F. Stephen, *A Digest of the Criminal Law* (9th ed. 1950), at p. 173, adopted in *R. v. American News Co.* (1957), 118 C.C.C. 152 (Ont. C.A.), at pp. 161-62, and *R. v. Delorme* (1973), 15 C.C.C. (2d) 350 (Que. C.A.), at pp. 358-59. …

[103] Ten years later, in *R. v. Katigbak*, *supra*, McLachlin C.J. and Charron J., in joint reasons for the majority, affirmed the utility of this definition for the statutory public good defence.

[104] Importantly, the majority judgment also clarified the two step analytical framework: the first requires the judge to determine if the accused's actions served the public good; and, if so, whether the accused's actions extended beyond what served the public good (para. 41).

[105] To decide if the acts served the public good, the judge must make findings about what an accused did and the effect of their actions. If there is objective evidence the activity advanced the public good, then the Crown must prove beyond a reasonable doubt the public good was not served. They wrote as follows:

> [42] At this step of the analysis, the trial judge must decide whether the possession of child pornography served the public good. The court must begin by reaching factual conclusions about what the accused did, and the effects of his actions. Once his or her conduct has been characterized, the court must consider whether the accused's actions served the public good. The focus is on the *effect* of the activity, not the motives of the accused. This distinguishes the public good defence from the legitimate purpose branch of the new defence. As a preliminary matter, the trial judge must determine whether, considered objectively, there is evidence that the activity in question advanced the public good. If so, the Crown bears the burden of proving beyond a reasonable doubt that the public good was not served by the actions of the accused.
>
> [Emphasis in original]

[106] In *Katigbak*, the appellant's trial evidence had been accepted—that he possessed the child pornography for artistic purposes. He argued this established the public good defence. The Court emphatically rejected this approach:

> [48] As discussed above, the assertion that the accused's *purpose* was to advance the public good is not enough to establish the defence. The question is whether, viewed objectively, the evidence supports the contention that the activities in question actually served the public good. The accused will be acquitted if the trial judge is (1) left with reasonable doubt as to whether "the public good was served" by his conduct, and, (2) if so, the Crown has not established beyond a reasonable doubt that the conduct extended beyond what served the public good. The trial judge addressed neither point. She merely accepted that Mr. Katigbak's *purpose* for possession was to create a public exhibition on child abuse. Therefore, we reject Mr. Katigbak's argument that the trial judge's findings are capable of being applied to the public good defence.
>
> [Emphasis in original]

[107] Here, the appellant claimed at trial that his actions served the public good because he was engaged in crime prevention patrols. On appeal, he advances two interrelated complaints: the trial judge erred because he placed a burden on him to prove the public good was served; and, the judge should have determined there was an air of reality to the public good defence and then required the Crown to disprove it beyond a reasonable doubt.

[108] With respect, there is no merit to these interrelated complaints.

[109] The trial judge assessed the appellant's actions. He found as a fact the appellant surreptitiously observed occupants of the motel in a manner that violated s. 162(1)(a) of the *Criminal Code*. He asked himself if those acts served the public good.

[110] The judge acknowledged the appellant's testimony that he had looked into the windows to prevent under-age prostitution, ensure females were not being assaulted and detect illegal activity. Quite apart from the fact the trial judge had rejected the appellant's evidence about these laudable motives, he also correctly observed that the appellant's motives were irrelevant.

[111] The judge then turned to the defence assertion that the appellant's patrols served the public good because they addressed actual problem behaviour:

> The Defence argues that the evidence demonstrates that the public ... the patrols served their purpose in that his patrols address problems of individuals drinking in the sheds, and on one occasion he confronted and dealt with a drunken man banging on the motel office door. **In my view, this is totally unconnected to the voyeurism charge which deals with surreptitiously looking into private spaces without legal justification, and I do not find these actions can be**

> **justified as being in the public good.** These actions were not necessary or advantageous to religion or morality, to the administration of justice, the pursuit of science, literature, or art, or other objects of general interest. Having found that the acts did not support the public good, **I do not need to consider whether the conduct extended beyond what serves the public good. In the result, I'm satisfied beyond a reasonable doubt that Constable Farmer is guilty, and I find Constable Farmer guilty of voyeurism on count 1.**
>
> [Emphasis added]

[112] The appellant focuses on the first emphasized phrase, that the judge did not find these actions "can be justified as being in the public good" as proof the judge placed the onus on the appellant to establish the defence, rather than just demonstrate an air of reality which would then place the burden on the Crown to disprove the defence beyond a reasonable doubt.

[113] The argument invites us to parse the trial judge's words and interpret "justified" to mean he called on the appellant to bear a persuasive burden to establish the public good defence. I would decline the invitation.

[114] In none of the extensive post-trial submissions did the parties refer to the question whether there was an air of reality to the public good defence. The Crown accepted that it bore the burden to disprove the applicability of the defence beyond a reasonable doubt. It said it did. Appellant's trial counsel, in his written submissions, said it had not done so.

[115] The trial judge assessed the appellant's actions and found they did not serve the public good and concluded the Crown had proven the charge of voyeurism beyond a reasonable doubt.

[116] I would not accede to this ground of appeal.

Breach of trust

[117] I earlier quoted s. 122 and the essential elements of the offence as set out by McLachlin C.J. in *R. v. Boulanger*. It is not necessary to replicate the section again. But to provide context for the appellant's complaint, it is useful to repeat Chief Justice McLachlin's statement at para. 58 of the essential elements the Crown must establish:

1. The accused is an official;
2. The accused was acting in connection with the duties of his or her office;

> 3. The accused breached the standard of responsibility and conduct demanded of him or her by the nature of the office;
>
> 4. The conduct of the accused represented a serious and marked departure from the standards expected of an individual in the accused's position of public trust; and
>
> 5. The accused acted with the intention to use his or her public office for a purpose other than the public good, for example, for a dishonest, partial, corrupt, or oppressive purpose.

[118] The appellant accepts the trial judge's conclusion the first three elements were made out. He says the trial judge erred when he found the fourth and fifth elements had been established.

Serious and marked departure

[119] It was open to the trial judge to find that the appellant's conduct amounted to a serious and marked departure from the standards of conduct expected of a police officer.

[120] This requirement, along with the requisite *mens rea*, ensures that mistakes or errors in judgment are not criminalized. It is important to emphasize that police officers like other public officials can be guilty of breach of trust for conduct that would not amount to a crime by an ordinary citizen. This can include unauthorized use of a computer system (*R. v. S.(E.M.)*, 2013 ONCJ 773; *R. v. Kramp*, 2014 ONCJ 780; *R. v. Braile*, 2018 ABQB 361; affirmed, *R. v. McNish*, 2020 ABCA 249), or disclosure of confidential information (*R. v. Rudge*, 2013 ONSC 5010).

[121] Like all individuals, a public official can be prosecuted for any criminal offence that they might commit in connection with their duties (*Boulanger*, at para. 51). Furthermore, it seems axiomatic that public officials who exploit their office to commit or facilitate the commission of a crime engage in conduct that demonstrates a serious and marked departure (see: *R. v. Kandola*, 2012 BCSC 968; *R. v. Cook*, 2010 ONSC 1188).

[122] In this case, the trial judge addressed the third and fourth elements together. He said this:

> The third and fourth considerations or points to examine are whether or not Constable Farmer breached the standard of responsibility and conduct demanded of him by the nature of the office and whether this is a serious and marked departure. The police play an integral role in a civilized society. They

> protect the public, enforce the laws, and contribute greatly to the maintenance of a free and peaceful society. They are given broad powers and responsibilities in order to carry out their duties, and they are held to a very high standard of responsibility and conduct.
>
> They are, of course, required to uphold, respect, and obey the laws that they enforce. And any violation of the criminal law is in my opinion not only a breach of the standard of responsibility and conduct demanded by a serving police officer, but also a serious and marked departure from the expected standard of a police officer who occupies a position of public trust.

[123] It is not just the fact the appellant broke the law while in uniform that constituted the breach of trust—it was the fact he misused his public office to commit criminal offences. I see no error in the trial judge's conclusion.

The *mens rea* requirement

[124] The appellant argues the trial judge erred by "relieving the Crown of its burden" to establish a specific intent. He relies on *R. v. Upjohn*, 2018 ONCA 1059, for the proposition that the *mens rea* cannot be established simply by a demonstration the *actus reus* was done for a purpose other than the public good.

[125] With respect, this is not what *R. v. Upjohn* says. In that case, the preliminary inquiry judge committed Mr. Upjohn for trial on a charge of breach of trust. Civilians reported to Upjohn that a young man in the park appeared to be about to commit suicide. They asked for assistance. Upjohn said he was already on a call and left the area. It turns out, he was not on a call. The young man in the park hanged himself.

[126] An application judge quashed the committal by way of certiorari (2018 ONSC 947). The Crown appealed. The Ontario Court of Appeal dismissed the appeal on the basis that a failure to carry out one's duty in order to avoid unpleasant work will not suffice. As explained by McLachlin C.J. in *Boulanger*, breach of trust contrary to s. 122 is about misfeasance in public office, not the common law offence of neglect of official duty.

[127] From *Boulanger*, the *mens rea* is the intention to use the public office for a purpose other than the public good, for example, for a dishonest, partial, corrupt, or oppressive purpose. As observed by Rouleau J.A. in *Upjohn*, there are other improper purposes beyond dishonesty, etc. that would satisfy the *mens rea* requirement (para. 17). This is entirely in line with Chief Justice McLachlin's discussion about *mens rea* in *Boulanger*:

> [56] … **In principle, the *mens rea* of the offence lies in the intention to use one's public office for purposes other than the benefit of the public**. In practice, this has been associated historically with using one's public office for a dishonest, partial, corrupt or oppressive purpose, each of which embodies the non-public purpose with which the offence is concerned.
>
> [57] **As with any offence, the *mens rea* is inferred from the circumstances. An attempt by the accused to conceal his or her actions may often provide evidence of an improper intent**: *Arnoldi*. Similarly, the receipt of a significant personal benefit may provide evidence that the accused acted in his or her own interest rather than that of the public. However, the fact that a public officer obtains a benefit is not conclusive of a culpable *mens rea*. …
>
> ...
>
> Conversely, the offence may be made out where no personal benefit is involved.
>
> [Emphasis added]

[128] In this case, the appellant was on duty, in uniform, with a marked police vehicle. He led the groundskeeper of the motel to believe he was acting in accordance with his duties as a police officer. There was ample evidence of concealment: he entered the property through a gap in a locked fence; he did not record his activities or report his whereabouts to Dispatch or his colleagues; he unscrewed security lights to hide his presence; he ran away when he feared detection; he failed to disclose that he had been the one present at the time of the undercover officer's anonymous prowler complaint.

[129] The trial judge found the necessary *mens rea* to have been established:

> Constable Farmer claims to have acted as a conscientious police officer patrolling the motel grounds to tackle what he states were problems of under-age prostitution, drug use, and violence. But at no time did he keep track of his activities through notes or reports, or notify his department of them or share his concerns with colleagues.
>
> He entered the rear of the property on most occasions noted by an unorthodox and suspicious manner, and he negatively affected the existing security system by turning off the lights. He looked into private rooms, violating the privacy rights of the occupants, and he did this for significant periods of time.
>
> I do not accept the Defence contention that one or two minutes' observation into a private space is a brief observation. I find that the *mens rea* of this offence has been adequately established. His actions were of a nefarious nature, and he clearly tried to conceal them at all times.

> In conclusion, I find the Crown has established all elements of the test set out in **Boulanger** on the basis of proof beyond a reasonable doubt, and I find Constable Farmer also guilty of count 3, namely breach of trust.

[130] The appellant's last complaint is that the trial judge conflated the offence of voyeurism and breach of trust—the latter being made out by the fact the appellant had been found guilty of voyeurism. With respect, I fail to see any basis for this suggestion. The trial judge conducted a separate analysis for the different counts and reviewed the elements of each offence separately. It was not the mere commission of voyeurism that made the conduct a breach of trust—it was the appellant's deliberate and persistent use of his office as a police officer to carry out his voyeuristic escapades.

[131] I would not accede to this ground of appeal.

[132] I would grant leave to appeal where required but dismiss the appeal.

Beveridge, J.A.

Concurred in:

Bourgeois, J.A.

Derrick, J.A.