NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Barrett*, 2022 NSCA 3

Date: 20220114
Docket: CAC 451442
Registry: Halifax

Between:

Thomas Barrett

Appellant

v.

Her Majesty The Queen

Respondent

Judge:	The Honourable Chief Justice Michael J. Wood, The Honourable Justice Cindy A. Bourgeois and The Honourable Justice Carole A. Beaton
Appeal Heard:	November 15 and 16, 2021, in Halifax, Nova Scotia
Subject:	Appeals – Ineffective Assistance of Trial counsel
Summary:	Mr. Barrett alleged his trial counsel was ineffective resulting in his conviction for murder. His complaints included failure to exclude a K.G.B. statement of a deceased witness, agreeing to redact prejudicial aspects of the statement, inability to impeach the credibility of crown witnesses, and failure to follow instructions concerning the conduct of the trial. Mr. Barrett applied to admit fresh evidence in the form of an affidavit and *viva voce* testimony. An affidavit of trial counsel was filed in response. The evidence was provisionally admitted for consideration. The deponents were cross-examined.
Issues:	Did Mr. Barrett establish he received ineffective assistance of trial counsel resulting in a miscarriage of justice?
Result:	The Court accepted the evidence of trial counsel that Mr. Barrett was engaged in discussions concerning evidence and

trial strategy. He had no complaint about the conduct of the trial until after he was convicted. After considering the entirety of the trial record and the trial judge's reasons for conviction the Court concluded no miscarriage of justice was proven. The appeal was dismissed.

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Judges:	Wood, C.J.N.S.; Bourgeois and Beaton, JJ.A.
Appeal Heard:	November 15 and 16, 2021, in Halifax, Nova Scotia
Held:	Appeal dismissed, per reasons for judgment by the Court
Counsel:	Thomas Barrett, the appellant, in person Jennifer MacLellan, Q.C., for the respondent

Reasons for judgment (by the Court):

[1] On March 21, 2016, Justice Robin Gogan of the Nova Scotia Supreme Court convicted Thomas Barrett of second degree murder in relation to the death of Brett Elizabeth MacKinnon. The trial took place over eight days in January and February 2016.

[2] During the course of trial, Justice Gogan held a *voir dire* to determine the admissibility of a statement given to police by Sheryl Flynn, who passed away prior to trial. On February 4, 2016, the trial judge issued a written decision (2016 NSSC 43) admitting the Flynn statement after applying the principles set out in *R. v. Khelawon*, 2006 SCC 57.

[3] Mr. Barrett appealed his conviction alleging errors on the part of the trial judge as well as his trial counsel. His Notice of Appeal raised a number of complaints about his conviction. Those which were ultimately addressed on appeal fall into the following categories:

1. Improper admission of the Flynn statement;
2. Unreasonable verdict; and
3. Ineffective assistance of trial counsel.

[4] Mr. Barrett's appeal was bifurcated with the issues falling under the first two categories being heard on October 26, 2020. At that time, Mr. Barrett was represented by legal counsel. Following the hearing, Mr. Barrett made a motion for removal of his appeal counsel. The motion was granted on November 26, 2020, and from that point Mr. Barrett was self-represented. On December 3, 2020, the Court issued a decision (2020 NSCA 79) dismissing the first part of Mr. Barrett's appeal.

[5] In support of the ground of appeal raising allegations of ineffective trial counsel, Mr. Barrett made a motion to file fresh evidence. The evidence was provisionally accepted, and the motion, as well as the merits of the appeal, were heard on November 15 and 16, 2021.

[6] For the reasons which follow, we would dismiss the motion to adduce fresh evidence and dismiss the appeal.

Principles applicable to ineffective trial counsel appeals

[7] Ineffective counsel appeals are not simply an opportunity to second guess decisions made by trial counsel. A trial is a dynamic process involving witness testimony and physical evidence and does not always unfold as anticipated. Counsel, particularly defence counsel, are called upon to make many strategic and evidentiary decisions in the course of trial.

[8] In order for an ineffective counsel appeal to be successful, it is necessary to establish two elements. First, the conduct of counsel fell below a minimum standard of competency and, second, this resulted in a trial which was unfair, or had a serious appearance of unfairness, resulting in a miscarriage of justice.

[9] The governing principles for appeals based on allegations of ineffective trial counsel were summarized by this Court in *R. v. Snow*, 2019 NSCA 76:

> [25] There are now legions of cases that have found or dismissed allegations that trial counsel provided ineffective assistance. For a claim to succeed, the appellant must establish on a balance of probabilities that trial counsel's acts or omissions constituted incompetence and a miscarriage of justice resulted.
>
> [26] Incompetence is to be determined by application of a reasonableness standard. There is a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. The conduct of counsel is not to be assessed simply with the clairvoyance of hindsight.
>
> [27] If no prejudice can be demonstrated, it is appropriate to dispose of the claim on that basis and leave the issue of counsel's conduct or performance to the profession's self-governing body (see *R. v. G.D.B.*, 2000 SCC 22, at paras. 26-29).
>
> [28] What is meant by prejudice? An appellant must satisfy the Court that the failings of counsel caused a miscarriage of justice. This requirement can be satisfied by different considerations. In a general way, an unfair trial, or one tainted by a serious appearance of unfairness, amount to a miscarriage of justice. In *R. v. Wolkins*, 2005 NSCA 2, Cromwell J.A., as he then was, discussed the broad scope of this nomenclature:
>
> > [89] The clearest example is the conviction of an innocent person. There can be no greater miscarriage of justice. Beyond that, it is much easier to give examples than a definition; there can be no "strict formula ... to determine whether a miscarriage of justice has occurred": *R. v. Khan*, [2001] 3 S.C.R. 823 *per* LeBel, J. at para. 74. However, the courts have generally grouped miscarriages of justice under two headings. The first is concerned with whether the trial was fair in fact. A conviction entered after an unfair trial is in general a miscarriage of justice: *Fanjoy, supra*; *R.*

> *v. Morrissey* (1995), 97 C.C.C. (3d) 193 (Ont. C.A.) at 220-221. The second is concerned with the integrity of the administration of justice. A miscarriage of justice may be found where anything happens in the course of a trial, including the appearance of unfairness, which is so serious that it shakes public confidence in the administration of justice: *R. v. Cameron* (1991), 64 C.C.C. (3d) 96 (Ont. C.A.) at 102; leave to appeal ref'd [1991] 3 S.C.R. x.
>
> (See also: *R. v. Joanisse*, [1995] O.J. No. 2883 at para. 67; *R. v. G.K.N.*, 2016 NSCA 29 at paras. 39-42.)

[10] The degree of unfairness necessary to give rise to a miscarriage of justice was described in *R. v. G.K.N.*, 2016 NSCA 29:

> [78] An unfair process resulting from an ineffectiveness of counsel argument means that an accused has been actually or constructively deprived of counsel's assistance, (*Joanisse* ¶ 78; *Ross*, ¶ 59). The circumstances here do not approach that fundamental failure of counsel's assistance. G.K.N. was not prevented from making "full answer and defence".

[11] In some cases, an appellant may allege their trial counsel did not adequately consult them with respect to decisions made in the course of trial. It is important to remember that there is no obligation on counsel to have client approval for every strategic decision made; although, there are some issues on which client instructions are essential. This Court in *Snow* described it this way:

> [29] There are numerous decisions an accused must make. Sometimes they are difficult. Counsel, when advising an accused on those decisions, often must balance multiple conflicting considerations. Frequently there is no one right answer.
>
> [30] During the course of a trial, counsel need not get instructions on each issue that may present. But on at least two, they have a duty to advise and get instructions: whether to plead guilty and whether to testify.
>
> [31] If counsel fails in this duty, procedural fairness and the reliability of the result can sustain a miscarriage of justice pronouncement (see: *R. v. G.D.B.*, *supra* at para. 34).

[12] In *G.K.N.*, the obligation on counsel to exercise their own independent judgment, rather than simply adhere to client instructions, was highlighted:

> [57] While counsel must take instructions regarding election and plea and whether or not to testify, the conduct of the case generally does not require client instructions. Indeed, it may well be the obligation of counsel to resist client

> instructions where these conflict with counsel's judgment about the client's best interests, (*Joanisse*, ¶¶ 109-111, 118-120; *R. v. B.(G.D.)*, 2000 SCC 22, ¶ 34).
>
> [58] Counsel's decision to admit facts for the purposes of *voir dire* is within the realm of trial tactics which is for him to decide. He did not require the instructions of his client for doing so. In *Joanisse*, for example, the Ontario Court of Appeal did not fault counsel for conceding the admissibility of his client's confessions to police.

[13] In most cases, it is preferable to begin the appellate analysis by considering whether a miscarriage of justice took place. It is only when the appellant is able to establish this element that the performance of trial counsel should be evaluated. In *G.K.N.*, the approach was described this way:

> [43] Where an alleged miscarriage of justice is founded on an assertion of the ineffectiveness of counsel, the Court will generally first decide whether a miscarriage has occurred. If not, the question of counsel's performance does not arise: *R. v. G.D.B.*, 2000 SCC 22, ¶ 29; *R. v. Messervey*, 2010 NSCA 55 at ¶ 21; *R. v. L.B.*, 2014 ONCA 748, ¶ 8; *R. v. Meer*, 2015 ABCA 141, ¶ 27.
>
> [44] The appellant must show that but for counsel's error there was a "reasonable probability" that the trial outcome would have been different, (*Joanisse*, ¶¶ 81-82), or that trial fairness was otherwise compromised, (*Wolkins; Ross*).

[14] Typically, an appellant alleging ineffective trial counsel will provide evidence to the court in support of that assertion by way of a motion to adduce fresh evidence. The principles applicable to the admission of such evidence were discussed by this Court in *R. v. PCH*, 2019 NSCA 63:

> [41] This Court, most recently in *R. v. Finck*, 2019 NSCA 60, has articulated the principles that govern the admission of fresh evidence on appeals involving allegations of ineffective assistance of counsel:
>
> - There is wide discretion for the Court to admit fresh evidence "where it considers it in the interests of justice": *Criminal Code*, s. 683(1).
> - Fresh evidence in such appeals will generally fall into the categories of, evidence relating to an issue adjudicated at trial, and evidence relating to the trial process. The former correlates to miscarriage of justice due to an unreliable verdict; the latter correlates to miscarriage of justice occasioned by an unfair trial (*R. v. Finck*, *supra*, para. 19).
> - Fresh evidence directed at issues adjudicated at trial generally must satisfy the well-established test in *R. v. Palmer*, [1980] 1 S.C.R. 759 for the admission of fresh evidence on appeal. The criteria require consideration of due diligence, relevance, whether the evidence is

> reasonably capable of belief, and whether, if believed, the evidence, taken with other evidence admitted at trial, could reasonably be expected to have affected the result (*R. v. Finck*, *supra*, para. 20; *R. v. Ross*, 2012 NSCA 56, para. 23).

[42] The appellant's fresh evidence is directed at both the reliability of his convictions and trial fairness. He says he has evidence to present on the merits of his defence that was not put before the trial judge as a result of the incompetence of his trial counsel. He further says that his trial counsel's preparation, strategy, and conduct fell below a reasonable standard of professional judgment, causing a miscarriage of justice (*R. v. Ross*, *supra*, para. 25; *R. v. Finck*, *supra*, para. 23).

[43] The appellant bears the burden of demonstrating that Mr. Lattie's representation of him was incompetent and that his incompetence compromised the fairness of the trial or the reliability of the verdict (*R. v. Finck*, *supra*, para. 62; see also: *R. v. A.W.H.*, 2019 NSCA 40, para. 32, citing *R. v. Gogan*, 2011 NSCA 105, para. 29; *R. v. Fraser*, 2011 NSCA 70, para. 53; *R. v. Ross*, para. 34-35). *R. v. Finck* reiterates the standard that the appellant must satisfy: to succeed in his appeal, he must show that there is a reasonable *probability* that Mr. Lattie's representation could have affected the verdict or prevented him from making full answer and defence such that he was actually or constructively deprived of the assistance of counsel (*R. v. Finck*, *supra*, para. 53; see also: *R. v. A.W.H.*, *supra*, para. 33; *R. v. Ross*, *supra*, para. 59).

[44] The fresh evidence offered by the appellant is accepted provisionally for the purpose of assessing whether the appellant has established that Mr. Lattie's representation of him led to the verdicts being unreliable or deprived him of a fair trial (*R. v. Gogan*, *supra*, para. 31). As noted in *R. v. Finck*, *supra*:

> [24] ...without evidence to support an allegation that counsel's incompetence compromised trial fairness, an appellate court could not determine the merits of such an argument: see *Ross* at ¶26.

[15] A court will usually, as we did here, admit this evidence provisionally so that it can be considered in the context of the appeal issues.

Mr. Barrett's allegations of ineffective counsel

[16] Mr. Barrett's complaints about the conduct of his trial counsel, Mr. Brian Bailey, Q.C., can be described as follows:

> 1. Failure to successfully oppose the admissibility of the videotape statement of Sheryl Flynn. This allegation has a number of components including:

a. Agreeing with the Crown, prior to the *voir dire* to redact portions of the statement which referenced:

i. other potentially criminal activity involving Mr. Barrett (including murder),

ii. comments allegedly made by Mr. Barrett concerning sexual activities with the deceased,

iii. references to third party associates of Mr. Barrett.

b. Having a secret agreement with the Crown to admit the statement and, therefore, not arguing strenuously against admission.

c. Failure to make all possible arguments against admission including that Ms. Flynn did not properly understand the police KGB caution.

d. Failure to properly advise Mr. Barrett with respect to the test for threshold reliability in *Khelawon*.

2. Calling Shawn Chislett as a defence witness when his evidence was not helpful and, in fact, potentially harmful to Mr. Barrett's case.

3. Failure to cross-examine Crown witness John Hynes about whether he was trying to make a deal with the police for some benefit (financial or otherwise) in exchange for making his statement.

4. Failure to do an internet search to determine whether the trunk of his car was large enough to hold Ms. MacKinnon's body as described by Mr. Hynes.

5. Failure to call the chief investigating officer to confirm that the DNA of Ms. MacKinnon was not found in Mr. Barrett's car.

6. Failure to prove that a person whose evidence was relied upon by the Crown was a police informant.

The Fresh Evidence

[17] Mr. Barrett filed an affidavit setting out the fresh evidence that he wanted the Court to consider. In addition, at his request, the Court gave him permission to

supplement the affidavit at the hearing by giving direct testimony. He was cross-examined by Crown counsel.

[18] In response to Mr. Barrett's affidavit, his trial counsel filed his own affidavit that attached, as exhibits, a number of letters which he sent to Mr. Barrett in the period leading up to and during trial. The Crown also filed an affidavit of Kathryn E. Pentz, Q.C., who was one of the Crown counsel at trial. This affidavit attached email correspondence with Mr. Bailey dealing with redaction of the Flynn statement. Mr. Barrett cross-examined the deponents of these affidavits.

[19] This evidence confirmed the following points:

1. Mr. Barrett and Mr. Bailey had a good working relationship throughout the proceeding below. There were active discussions between them concerning evidence and strategy.

2. The redactions made to the Flynn affidavit were the result of negotiations between the Crown and Mr. Bailey, and Mr. Barrett was aware of the proposed redactions. The motivation of both the Crown and Mr. Bailey was to eliminate inadmissible, irrelevant, and potentially prejudicial material from the statement.

3. At the time, Mr. Barrett had no complaints with respect to the manner in which Mr. Bailey conducted the trial, and if he had, he would have interrupted the proceeding to speak with Mr. Bailey and voice his concerns.

The trial judge's decision to convict

[20] In order to consider whether trial counsel's representation resulted in a miscarriage of justice, it is necessary to review the basis of the trial judge's decision to convict Mr. Barrett. It is through an analysis of her reasons for conviction that the fairness of the trial process must be considered.

[21] Although the trial judge admitted the Flynn statement, she acknowledged in her trial decision (unreported) the weaknesses in this evidence which were raised by Mr. Bailey during the *voir dire*:

> For the time being, however, my preliminary comment on this evidence is that although I found sufficient indicia of reliability to admit the statement into evidence, I find in the sense of ultimate reliability, that the absence of cross-examination either contemporaneously or at trial, impairs the value of the statement to a significant degree. Standing alone as a single piece of Crown

> evidence, I would find that it deserves very little weight. **In my view, the issues raised by the Defence during the *Voir Dire* and then pursued at trial are cause for care and scrutiny on the ultimate assessment of this piece of evidence.**
>
> [emphasis added]

[22] In her decision, the trial judge summarized the evidence on which she relied and set out the inferences that she drew in order to determine Mr. Barrett's guilt:

> Brett MacKinnon was seen by several witnesses with the accused in 2006, either at his home or in his car. Krista Newell saw Brett MacKinnon leaving the home of the accused in June 2006. John Hynes saw Brett MacKinnon at the home of the accused in June or July of 2006. The last time Chris Andrews saw Brett MacKinnon was at the home of the accused in 2006. The accused admitted to various people that he had killed a girl or that he had choked or strangled Brett MacKinnon until she died. That the remains ... that he kept the remains in an upstairs bedroom and then disposed of the remains using his blue Corsica.
>
> In the fall of 2006, the accused told Krista Newell that he had killed a girl in his house, moved the remains around the house by a rope tied to the body and then kept the remains in an upstairs bedroom. He said that he had suffered a bruise from dragging the remains through the house. Ms. Newell saw the bruise in June or July of 2006. In the fall of 2006 after being picked at by Ashley MacDonald over the death of Brett MacKinnon, the accused made a gesture ... pardon me. In the fall of 2006, after being picked at by Ashley MacDonald over the disappearance of Brett MacKinnon, the accused made a gesture and a noise to Ms. MacDonald, suggesting that he put both his hands around Brett MacKinnon's neck and choked her until he thought he broke her neck.
>
> The accused drove a blue Corsica which he had purchased from a relative until December, 2006 when he told Ashley MacDonald it had broken down and he had abandoned it. In late 2008 the accused told Christopher Andrews that he had caught Brett MacKinnon taking drugs from him, that things got heated and that he grabbed her by the neck and choked her until he thought he broke her neck and that her ... and that her life was gone. He said he knew her life was gone because of the look in her eyes. He said he then wrapped her in a carpet or a sheet and disposed of her remains using the Corsica motor vehicle. During one of the various conversations that the accused had with Christopher Andrews about Brett MacKinnon, the accused acted it out in reference to how he strangled her in a fit of anger until she was dead.
>
> In the summer of 2009, the accused told Sheryl Flynn that he had killed Brett MacKinnon and that it was an adrenaline rush to strangle someone and watch them die. He also told her that he had disposed of the remains but did not say how. John Hynes saw Brett MacKinnon with the accused a number of times. Within a short time after last seeing her at the home of the accused, John Hynes

> helped Mr. Barrett dispose of a carpet which the accused took down to the kitchen from the upstairs of his house. They disposed of the carpet using the blue Corsica. Mr. Hynes believed that he was helping the accused dispose of a body given all the surrounding circumstances.
>
> After disposing of the carpet in the area of the Cameron Bowl, the accused drove the Corsica through The Hots, heading through The Hub. As he drove through this area, he threw something out the window that Mr. Hynes thought looked like ID and said that, "Nothing could connect him now." The accused later threatened to kill John Hynes if he told anyone what they had done. I find that the disposal of the carpet by the accused and John Hynes was the disposal of the remains of Brett MacKinnon and that the accused was disposing of the remains in order to conceal that he had killed her.
>
> Parts of Brett MacKinnon's driver's licence were found by John MacLeod around the end of the first week of July 2006. Mr. MacLeod was mowing the lawn at 80 Third Street in Glace Bay at the time. Third Street is in The Hub in an area adjacent to The Hots. The police were called on July 15, 2006, and recovered more pieces of the driver's licence. I find that the pieces of the driver's licence found by John MacLeod and the Cape Breton Regional Police were from the ID that the accused threw out the window on the night that he and John Hynes disposed of the remains.
>
> I infer from the cumulative weight of the admissions and the circumstantial evidence that the accused moved the remains from the original location to the final location in an attempt to more effectively conceal them. The particulars of this move may be forever unknown. I find, however, that it is unnecessary to resolve this question to dispose of this case.

[23] As is clear from her reasons, the trial judge was satisfied of Mr. Barrett's culpability because of evidence beyond the Flynn statement. She would not have convicted him based solely on this statement.

Analysis of Ineffective Counsel Allegations

The Flynn Statement

[24] Mr. Barrett was clearly an engaged client who had a good rapport with his trial counsel. They debated trial strategy and discussed admissibility of evidence.

[25] Mr. Barrett's primary complaint about his trial was the admission of the Flynn statement. Without this, he said that he would not have been convicted. The trial judge's reasons indicate otherwise. In any event, the record demonstrates that Mr. Bailey mounted a vigorous, although ultimately unsuccessful, opposition to the

admissibility of the Flynn statement. His arguments caused the trial judge to be hesitant about relying on the statement for purposes of conviction.

[26] Mr. Barrett relies heavily on the unreported *voir dire* decision of Justice Frank Edwards of the Nova Scotia Supreme Court, which was made during the prosecution of Mr. Barrett for the murder of Laura Jessome. He was not convicted of that charge. In that case, Justice Edwards refused to admit the statement of Sheryl Flynn because he did not find that threshold reliability had been established by the Crown, and there was no corroborative evidence which might have overcome the reliability concerns. He also found the prejudicial effect of the statement outweighed its probative value.

[27] Mr. Barrett's argument is simple; since Justice Edwards did not admit the Flynn statement, the trial judge in this matter would also not have done so if Mr. Bailey had not been incompetent in his conduct of the *voir dire*.

[28] We have limited information about the Jessome matter and the hearing before Justice Edwards; however, we have a complete record of the work of Mr. Bailey in this case. We have already concluded, in our earlier decision, that the trial judge did not err in admitting the Flynn statement. Mr. Bailey presented forceful arguments, which caused the judge to weigh the Flynn statement with a great deal of caution. His decision to negotiate redactions of inadmissible and prejudicial evidence was a matter of strategy based on sound principles.

[29] Mr. Barrett's arguments that the trial judge should have excluded the Flynn statement because Ms. Flynn did not understand the *K.G.B.* caution that she be truthful or that threshold reliability was not established were considered and dismissed in the first part of this appeal.

[30] There was no unfairness or appearance of unfairness in the conduct of the admissibility *voir dire* by Mr. Bailey. Mr. Barrett did not demonstrate there was any evidence or argument omitted, which might have changed the trial judge's decision to admit the Flynn statement. The decision not to admit a differently redacted version in an entirely different proceeding is not evidence of incompetence of Mr. Bailey, nor does it establish a miscarriage of justice in this matter.

Examination of Witnesses

[31] Cross-examination is the purview of trial counsel within which they have significant latitude in relation to topics they believe merit inquiry. For example, whether Mr. Hynes should have been asked about his motivation for making the statement to police is not for this Court to second guess. In his affidavit, Mr. Bailey says Mr. Barrett did not indicate any dissatisfaction with the cross-examination of Mr. Hynes at the time. The trial transcript shows Mr. Bailey requested a break prior to concluding the examination in order to consult Mr. Barrett.

[32] Whether trial counsel ought to have asked a witness a particular question in cross-examination is rarely a matter which would lead to a miscarriage of justice. The exception is when counsel neglects to question an important witness about material inconsistencies in their evidence. That is not what Mr. Barrett alleges in this case.

[33] Shawn Chislett was called as a witness by the defence to refute the testimony of Christopher Andrews, who said that Mr. Barrett confessed to him that he had killed Ms. MacKinnon and disposed of her body. Mr. Chislett's evidence was to the effect that he never saw Mr. Andrews with Mr. Barrett. The trial judge did not find this testimony credible because of an effective cross-examination by the Crown counsel, which included an admission that he was afraid of Mr. Barrett.

[34] With respect to Mr. Chislett's testimony, Mr. Barrett insisted on having him called as a witness over the objections of trial counsel. It turns out trial counsel was correct as Mr. Chislett provided nothing of value to the defence. His testimony was not detrimental to Mr. Barrett and the trial judge did not refer to it in her recital of the reasons for conviction. This is hardly an example of a miscarriage of justice.

[35] We are satisfied Mr. Barrett's concerns with respect to the examination of witnesses were not raised with Mr. Bailey during the trial and only arose following his conviction. There is no basis to conclude that any of these points, individually or collectively, would have impacted the trial judge's evaluation of the evidence or her reasons for convicting Mr. Barrett.

Failure to Present Evidence

[36] Mr. Barrett says he asked Mr. Bailey to find out the size of trunk for the car model he was driving when Mr. Hynes alleged they transported the body of Ms. MacKinnon. He suggests this information would have shown the trunk was too small for the body wrapped in a carpet to be placed in it, thereby undermining the credibility of Mr. Hynes' testimony.

[37] Mr. Hynes' testimony in his direct examination about placing the carpet wrapped body in the trunk was:

> Q. Okay. And so you said you picked up an end of this carpet, okay. How was the carpet ... like, in what condition, like, was the carpet? Was it a flat carpet, was it ...
>
> A. It was old. It was rolled up.
>
> Q. Okay, all right. And when you picked up the end of it, what did you do with it then?
>
> A. Carried it to the car.
>
> Q. Okay. Did you carry it alone?
>
> A. No.
>
> Q. Okay, who helped you ... who helped carry it with you?
>
> A. Just me and Tom.
>
> Q. Okay. And where did you take it to the car, what part of the car?
>
> A. To the trunk.
>
> Q. Okay.
>
> A. Tried the back seat first, but it wouldn't fit so ...
>
> Q. Okay. What about it wouldn't fit? What was ...
>
> A. Well, the door wouldn't close.
>
> Q. Okay, all right. So when it wouldn't fit in the back seat, what did you do then?
>
> A. Ahh, put it in the trunk.
>
> Q. Okay. And how easy was it to get it in the trunk?
>
> A. It took a few minutes. It wasn't easy but ...
>
> Q. Okay, all right. So once the carpet was in the trunk, what did you do then?
>
> A. Ahh, got in the car.

[38] At the appeal hearing, Mr. Barrett testified he asked Mr. Bailey to Google the trunk size of his vehicle because this would show it was too small to have contained the carpet and body. Mr. Bailey testified he did not recall this specific request but knew Mr. Barrett felt the trunk was small. He did not believe questioning Mr. Hynes about this would impact his evidence about the movement of the carpet wrapped body.

[39] We accept Mr. Bailey's evidence that Mr. Barrett did not voice any objection to the Hynes' cross-examination and was consulted before its conclusion. Mr. Bailey's strategic decision not to question Mr. Hynes about the size of the car trunk is entitled to deference. There is no evidence before us that a Google search would have generated admissible evidence which would have impeached Mr. Hynes' testimony about putting the body in the trunk of Mr. Barrett's car.

[40] Mr. Barrett also alleges he wanted Mr. Bailey to call a police witness to say his car was searched and DNA samples taken, which did not indicate the presence of DNA from Ms. MacKinnon. This was not referred to in Mr. Barrett's affidavit but was raised in his testimony at the appeal hearing. The trial transcript shows Mr. Bailey questioned the Exhibit Officer, Cst. Rolland Morrison, about whether Mr. Barrett's car was searched for DNA and he testified:

> Q. Now were, in relation to this investigation, were you aware of any searches of any motor vehicles?
>
> A. No, sir, I was not.
>
> Q. And specifically, any Corsica motor vehicles?
>
> A. No, sir.
>
> Q. And specifically, the trunks of any Corsica motor vehicles?
>
> A. No, sir.
>
> Q. Were you aware of any searches in relation to residences, and, specifically, the residence of my client?
>
> A. No, sir.
>
> Q. So you're not ... You were certainly aware ... You, Mr. Barrett is known to you?
>
> A. Just by name only.
>
> Q. Right. And you were certainly aware that Mr. Barrett became a person of interest in relation to this file fairly early?
>
> A. There was ... I was given three names at the time, yes, and his was one of them.
>
> Q. And Mr. Barrett's name was one of them?
>
> A. Yes.
>
> Q. And when were you given Mr. Barrett's name?
>
> A. When I was going to Toronto to process the bag.
>
> Q. Which was when?

A. Was in January of 2009.

Q. Okay. Were you aware of any searches that were conducted of his residence?

A. No, sir, I wasn't.

Q. So it's fair to say that his residence was never searched?

A. Not that I'm aware of.

Q. Not that you're ... Certainly, you never got any exhibits from his residence?

A. No, I didn't.

Q. Certainly, there was no effort that you're aware of to obtain DNA or other evidence in relation to his residence, any vehicle that he might have had or owned?

A. No.

Q. Correct?

A. Yes.

Q. And certainly, if that was done, as the Exhibit Officer, you would have known about that?

A. You have to realize, when I went into the Forensic Unit, I only went in there in June of 2008, and this happened, the remains were found in November. So anything that happened before June or up to November, I wasn't aware at the time.

Q. All right. But certainly from that point, from the point of time when you were assigned to this file ...

A. Yes.

Q. ... you would know each and every exhibit that was seized or taken in relation to this file?

A. Yes, sir.

Q. And I've asked you several questions about the exhibits and seizures and investigation, and you've told me that none of those transpired?

A. No, sir, not that ... There were never ...

Q. And you're not aware of any of them? And you ... And my question is you would be, if that was done, you would know it, wouldn't you?

A. Yes, sir, I would.

[41] Mr. Barrett now says he wanted to have the original investigating officer testify to establish there was an earlier search of his car with DNA testing that

showed no trace of Ms. MacKinnon's DNA in his trunk. There is no evidence before us to suggest such evidence exists or, if it had, that it would have affected the trial judge's decision, which was based upon various witnesses describing confessions by Mr. Barrett.

Police Informant

[42] Mr. Barrett complains Mr. Bailey did not argue that certain Crown evidence came from a police informer. In fact he did. On February 1 and 2, 2016, the trial judge held an *in camera* hearing to consider motions by both the Crown and defence on the issue of whether the defence would be permitted to call evidence to show a particular person was a confidential police informer. At the conclusion of the hearing, the trial judge gave an oral decision dismissing the request.

[43] The merits of the trial judge's decision have not been appealed, and so we need not refer to the outcome or her reasons. It is sufficient to dispose of this complaint against Mr. Bailey by saying he pursued the confidential informer issue appropriately and in accordance with the proper procedure.

Conclusion

[44] In the first portion of the appeal, we rejected the appellant's assertion the verdict was unreasonable in the sense that it was not capable of being supported by the evidence. In order to succeed on an allegation of ineffective trial counsel, Mr. Barrett must provide evidence that was not before the trial judge, which demonstrates a reasonable probability he would have been acquitted or that trial fairness was compromised. He has failed to do so. He has identified a number of questions, which might have been asked of witnesses and some arguments that could have been made, none of which would lead us to conclude a miscarriage of justice had taken place.

[45] In light of our conclusion on the failure to establish a miscarriage of justice, it is not necessary for us to address further Mr. Bailey's conduct of the admissibility *voir dire* and trial. Despite this, we believe it is important to say that Mr. Barrett's allegations of a conspiracy between Mr. Bailey and the Crown or with Mr. Barrett's previous appellate counsel are completely without merit. Mr. Barrett acknowledged that Mr. Bailey worked diligently and kept him informed at every step of the proceeding. In addition, the submissions Mr. Bailey made concerning the Flynn statement were forceful and applied the proper legal

principles. The adequacy of counsel's representation is not measured by the outcome of the *voir dire* or trial.

Disposition

[46] For the above reasons, we would dismiss Mr. Barrett's motion to file fresh evidence as well as his appeal from conviction.

Wood, C.J.N.S.

Bourgeois, J.A.

Beaton, J.A.