**NOVA SCOTIA COURT OF APPEAL**
**Citation:** *R. v. Purvis*, 2024 NSCA 54

**Date:** 20240522
**Docket:** CAC 508365
**Registry:** Halifax

**Between:**

Gregory Maxwell Purvis

Appellant

v.

His Majesty the King

Respondent

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| **Judge:** | The Honourable Justice Anne S. Derrick |
| **Appeal Heard:** | February 14, 21 and 22, 2024, in Halifax, Nova Scotia |
| **Subject:** | Criminal law. Second degree murder. Police interrogation – admissibility of its contents. Jury instructions. *R. v. Vetrovec*, [1982] 1 S.C.R. 811. Use by jury of a co-accused's guilty plea to manslaughter. After-the-fact evidence. Co-principal theory of liability. Ineffective assistance of trial counsel. Fresh evidence in relation to an appeal raising ineffective assistance of counsel. |
| **Summary:** | Following a jury trial, the appellant was convicted of second degree murder. The victim had died of injuries caused by a brutal beating. The appellant and his nephew were arrested and charged. The appellant was subject to a lengthy police interrogation in which he repeatedly asserted his right to remain silent. The interrogation contained prejudicial content and the appellant's statement that he had not touched the victim. His nephew pleaded guilty to manslaughter and testified as a witness for the prosecution. The nephew's parents—the appellant's brother and sister-in-law—also |

testified for the Crown. They testified the appellant had disposed of evidence and made a confession to them. The Crown presented the jury with alternate theories of liability: (1) that the appellant assaulted the victim on his own; or (2) that the appellant and his nephew, as co-principals, assaulted the victim together. The appellant did not testify and called no evidence. The appellant argued on appeal there were numerous errors of law in the judge's instructions to the jury. He said there should have been a *voir dire* of his police interrogation to determine what of its content was admissible as probative and not prejudicial evidence and what needed to be redacted. He also claimed ineffective assistance of counsel, principally in relation to the issue of him not testifying in his own defence.

**Issues:**

1) Did the trial judge err in law by admitting the appellant's police interrogation into evidence without holding a *voir dire* to determine the admissibility of its contents on the basis of a probative value versus prejudicial effect analysis?

2) Did the trial judge err in law in her mid-trial instructions and final jury charge by:

   (a) Providing an inadequate *Vetrovec* warning in relation to the evidence of the appellant's nephew; and,

   (b) by failing to provide *Vetrovec* warnings regarding the evidence of the appellant's brother and sister-in-law?

3) Did the trial judge err in law by providing an inadequate instruction in relation to the nephew's guilty plea to manslaughter?

4) Did the trial judge err in law by failing to properly instruct the jury on the use they could make of the after-the-fact conduct evidence?

5) Did the trial judge err in law by failing to adequately instruct the jury on the required *mens rea* and pathway to

a manslaughter conviction under the co-principal theory of liability?

6) Did trial counsel provide ineffective assistance resulting in a miscarriage of justice by:

   (a) Failing to cross-examine the appellant's brother and sister-in-law on their criminal records and failing to request a *Vetrovec* warning in relation to their evidence?

   (b) Failing to require further redactions of the appellant's police interrogation or request a *voir dire* to determine the admissibility of its contents?

   (c) Failing to recognize the appellant's intellectual disability and account for it in his advice on the issue of the appellant testifying in his own defence?

**Result:** Appeal allowed. Fresh evidence admitted for the limited purpose of assessing the ineffective assistance of trial counsel allegations. These claims were dismissed. The police interrogation should have been subject to a *voir dire* and significant redactions should have been made to its contents. There were reversible errors of law in the trial judge's instructions to the jury. The *curative proviso* did not to apply. New trial ordered for second degree murder.

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| | |
|---|---|
| **Judges:** | Farrar, Derrick, Beaton, JJ.A. |
| **Appeal Heard:** | February 14, 2024, February 21, 2024 and February 22, 2024 in Halifax, Nova Scotia |
| **Held:** | Appeal allowed, per reasons for judgment of Derrick, J.A.; Farrar and Beaton, JJ.A. concurring |
| **Counsel:** | David Mahoney, K.C. and Robert Tibbo, for the appellant<br>Glenn Hubbard, for the respondent |

**Reasons for judgment:**

## Introduction

[1] On April 23, 2021 the appellant was convicted by a jury of the second degree murder of Derek Miles. He was sentenced on July 9, 2021 to life imprisonment with 14 years' parole ineligibility. He appeals his conviction.

[2] Derek Miles died on January 18, 2018 from severe internal injuries following a beating at his apartment in Dartmouth. The appellant and his nephew, George Purvis, Jr., were both charged with second degree murder. In December 2018, George, Jr. pleaded guilty to manslaughter and ultimately testified as a Crown witness against the appellant.

[3] George Jr.'s parents, George Purvis, Sr. and Mary Ann Purvis, also testified for the prosecution, as did an independent witness, Henry Rising. The appellant did not testify. George, Jr., George, Sr., and Mary Ann Purvis all have criminal records.

[4] Although the appellant did not testify, he had been subject to a lengthy police interrogation in which he made certain statements, including ones that were exculpatory. A partially redacted version of his interrogation was admitted into evidence at trial by consent.

[5] The fact that the appellant was present when Mr. Miles was beaten has not been in dispute. Repeatedly pressed by police about whether he had beaten him, the appellant eventually said: "I never beat nobody".

[6] The appellant's trial was presided over by Justice Denise Boudreau. Her jury instructions and charge to the jury included: a *Vetrovec*[1] warning respecting the testimony of George Purvis, Jr.; a warning about George Purvis, Jr.'s guilty plea to manslaughter in relation to the death of Mr. Miles; an instruction on the use the jury could make of after-the-fact conduct evidence; and an instruction on the modes of participation, including the alternative Crown theory that the appellant and George, Jr. were co-principals in the homicide.

[7] The appellant says the trial judge's jury instructions contained errors of law. He also alleges the judge erred in law by admitting his police interrogation into

[1] *Vetrovec v. The Queen*, [1982] 1 S.C.R. 811 [*Vetrovec*].

evidence without an admissibility *voir dire* and without directing further redactions to edit out statements of limited or no probative value and high prejudicial effect.

[8] The appellant says his trial counsel failed him by not requiring a *voir dire* to review and redact his police interrogation before it was admitted into evidence and played to the jury. He says trial counsel failed to take reasonable steps to challenge the credibility of George Purvis, Sr. and Mary Ann Purvis who both gave highly incriminating evidence against him.

[9] This appeal involves a fresh evidence application. The appellant says the fresh evidence supports his complaint that trial counsel was ineffective. He asks us to find it reveals he has a Severe Intellectual Developmental Disability (Severe IDD) that resulted in him being denied a fair trial. He says it should have been obvious to his lawyer he is cognitively impaired and could not process his advice. He says his lawyer failed to provide proper legal advice on the issue of whether he should testify at trial, including in relation to whether doing so would make him a "rat". He says trial counsel's advice on what constitutes being a "rat" misled him and deprived him of his right to testify.

[10] Under s. 686(1)(a) of the *Criminal Code*, an appeal against conviction may be allowed where the verdict is unreasonable or unsupported by the evidence, where there has been a wrong decision on a question of law, or where a miscarriage of justice has occurred. The appellant says the errors he has identified should result in his conviction being overturned and a new trial ordered.

[11] As these reasons explain, I am satisfied errors were committed by the trial judge in relation to the admission of the appellant's police interrogation and her instructions to the jury. I would order a new trial. I would admit the fresh evidence for the limited purpose of assessing the ineffective assistance of counsel allegations but, as I explain, would dismiss this ground of appeal.

[12] I will discuss the issues under three broad categories: (1) the admission of the appellant's police interrogation; (2) the trial judge's jury instructions; and (3) the fresh evidence and the allegation of ineffective assistance of counsel. First, I will provide an overview of the facts.

**The Facts**

[13] I will be referring to George Purvis, Jr. and George Purvis, Sr., respectively, as George, Jr. and George, Sr. to avoid confusion. For consistency, I will refer to George, Jr.'s mother, married to George, Sr., as Mary Ann. No disrespect is intended by this use of first names.

*Homicide and Charges*

[14] Derek Miles was discovered dead in his apartment on January 19, 2018. A subsequent autopsy revealed he had sustained serious internal injuries that led to his death through blood loss: eight fractured ribs, a collapsed lung, and a severely ruptured spleen. He had also suffered head trauma including surface abrasions, lacerations, bruises, and subdural injuries.

[15] Two months later, the appellant, George, Jr., and a third man, Murray Timmons, were arrested and charged with second degree murder.

[16] The charge against Murray Timmons was subsequently withdrawn and the prosecution proceeded against the appellant and George, Jr.

*George, Jr.'s Guilty Plea to Manslaughter and Sentencing*

[17] The appellant and George, Jr. had a Preliminary Inquiry in November 2018. George, Jr. testified, indicating he had not participated in beating Mr. Miles and that the perpetrator of the beating was the appellant. On December 20, 2018, George, Jr. pleaded guilty to manslaughter in relation to Mr. Miles' death, on the basis of a statement of facts agreed between himself and the Crown. Crown counsel cross-examined him at the sentencing and secured George, Jr.'s sworn confirmation that he was telling the truth about Derek Miles' beating and understood what it meant to commit perjury. He was sentenced on February 4, 2019 to six years in prison, less credit for time in pre-sentence custody.

*The Evidence at the Appellant's Trial about the Beating of Mr. Miles*

[18] The evidence at trial brought the relationship of Derek Miles with George, Jr. and the appellant into focus. Mr. Miles was living in his Dartmouth apartment with his son when, on December 19, 2017, the police executed a drug trafficking warrant. They seized marijuana, hashish, a small bag of cocaine, money and other items from the apartment. Mr. Miles had been trafficking marijuana and hashish for George, Jr. who was a mid-level drug dealer. Mary Ann admitted in her

evidence that she had been assisting George, Jr. in his drug business by making drug deliveries to Mr. Miles.

[19] The drug raid led to Mr. Miles' son being removed from his custody. He fell into a depression. The appellant had known him for a number of years and visited regularly to offer support and give him hope that he would eventually get his son back. This was confirmed by Crown witnesses.

[20] The drug search led to speculation about who had provided information to the police causing them to conduct the raid.

[21] Around 9:30 or 10:00 p.m. on the evening of January 18, 2018, George, Jr. was at his home in Chezzetcook, Nova Scotia, about to eat his dinner, when he received a telephone call. The caller told him there were Facebook messages indicating Derek Miles was accusing George, Jr. and his mother of being police informants, in other words, "rats". George, Jr. was very upset by this news as he knew being labeled a "rat" could have lethal consequences. He immediately left home with the intention of paying Mr. Miles a visit. During the drive to Dartmouth, he called the appellant who asked to be picked up.

[22] George, Jr. collected the appellant from his residence in Dartmouth and then picked up Murray Timmons who had been drinking and wanted to come along for the purpose of getting a re-supply of beer.

[23] On the way to the apartment building at Pinecrest Drive, there was no discussion between George, Jr. and the appellant about what they planned to do when they arrived at Mr. Miles' apartment.

[24] At approximately 11:00 p.m., the three men arrived at the Pinecrest Drive apartment building where Mr. Miles lived. George, Jr. and the appellant went up to Mr. Miles' apartment on the third floor. Murray Timmons did not accompany them and waited in the building.

[25] In his factum the appellant described the evidence of what happened next:

> 16. The events that followed in the apartment are the subject matter of this appeal. George Jr. was called as a witness for the Crown to give evidence against the Appellant. He testified that when they knocked on the door, Derrick Miles answered and let them in. He was only wearing boxer shorts and when he came in, George told him to sit down on the couch as he wanted to talk to him. He said

> that Derrick replied, “Fuck off and leave me alone”, to which George replied, “We’re not here to hurt you, just sit on the couch. We want to fucking talk to you”. Derrick suddenly “threw himself on the floor” at which point the Appellant pushed George Jr. out of the way and began stomping on Derrick’s head, ribs and shoulders, approximately a dozen times. George Jr. said he felt Derrick touch him with his hands or feet but George Jr. did not assault or touch him in any way. He said the Appellant was calling Derrick a “piece of shit, fucking goof” and that he “lost [N]” (his son) while he was stomping him. George Jr. said that he shoved the Appellant once or twice saying, “Fuck off, we’re not here for that.” but did not otherwise try to stop the Appellant who continued to stomp and kick Derrick Miles with his foot. George Jr. said that he then turned away, headed out of the apartment, and could hear the Appellant continue to stomp Derrick Miles a few more times before he exited the apartment behind him.

[26] George, Jr. testified that he did not participate in any way in the beating of Mr. Miles. He said when he and the appellant left the apartment, Mr. Miles was still moving around on the floor and groaning. He did not believe him to be dying. He did not think the appellant thought he was badly injured either. He did not recall Mr. Miles saying anything during the beating.

[27] George, Jr., the appellant and Murray Timmons left Pinecrest Drive for the Cold Beer store drive-through to purchase beer for Murray Timmons. George, Jr. said he then drove the appellant and Murray Timmons back to Mr. Timmons’ residence.

[28] Samantha Randell, the neighbour who lived immediately below Mr. Miles, was called as a Crown witness. She testified to hearing noises coming from Mr. Miles’ apartment, consistent with a beating, around 11:00 p.m. on January 18, 2018. She heard beating and banging sounds for several minutes and Mr. Miles saying, several times: “Fuck off, leave me alone”. A door slammed and through her apartment peep hole, she saw three men coming down from the third floor, and continue down the stairs. Other witnesses reported vibrations through the building; one said, “…like it was a hard stomping”.

[29] Contrary to George, Jr.’s testimony about statements made by the appellant to Mr. Miles as he beat him, Ms. Randell did not hear any other voices than Mr. Miles. In particular, she did not hear anyone say: “fuck you”, “you lost [N]”, “you lost your son”, or “you’re a goof”.

[30] Two fingernail clippings obtained at Derek Miles’ autopsy were found to have George, Jr.’s DNA on them. As an explanation for this, George, Jr. testified

that Mr. Miles could have touched him somehow when on the floor. The appellant's DNA was not found on Mr. Miles.

*Evidence of Events on January 19, 2018*

[31] George, Jr. learned on the evening of January 19, 2018 that Mr. Miles was dead. He immediately took steps to eliminate evidence of his involvement. He disposed of his sneakers in woods off the highway some distance from his home. He rendered the truck he had been driving the night before less distinguishable by removing its snow plow and various decals. He cleaned the inside of the truck cab.

[32] George, Sr. and Mary Ann testified they saw the appellant on January 19, 2018, the day after Mr. Miles was beaten to death. They said they had picked the appellant up to go for a drive. They differed in their recollections of what happened during the drive and the route that was taken. Mary Ann said the appellant made admissions during the drive about his sole responsibility for beating Derek Miles. Also of significance was her evidence about a black cloth bag she said the appellant had with him when he got into their truck. According to Mary Ann, after a stop to let the appellant out on the side of the highway to urinate, they drove on to Tim Horton's where she went in and bought beverages. George, Sr. also testified there had been a roadside stop for the appellant to relieve himself. He recalled no discussion during the drive but said while he and the appellant waited for Mary Ann to come back with the drinks, the appellant told him George, Jr. had had nothing to do with the beating of Mr. Miles. According to George, Sr., it was while they were driving the appellant home that he made admissions about stomping and kicking Mr. Miles. Like Mary Ann, George. Sr. said the appellant got into the truck with a black bag that he did not have with him on the drive home.

[33] The jury heard evidence about the black bag reappearing some months later. I will return to this discovery shortly.

*Henry Rising's Evidence*

[34] The jury heard from Henry Rising, who knew the appellant on a very limited basis, about conversations he said he had with him in March 2018. He said the appellant mentioned going with his nephew to a guy's place, a fight broke out, they started beating him, and the guy ended up on the floor. They then left. Mr. Rising said the appellant spoke about going back to the guy's apartment the following day

and finding him dead. On one of the several occasions when they spoke, Mr. Rising said the appellant showed him a piece of paper that indicated he was being investigated for murder. This prompted Mr. Rising to go to the police. He was seeking custody of his grandson, whom he was seeing on access visits, and did not want his case jeopardized by proximity to a homicide investigation.

*The Black Cloth Grocery Bag*

[35] The black cloth bag, said by George, Sr. and Mary Ann to have been in the appellant's possession on January 19, 2018, took on considerable significance in the Crown's case. Mary Ann was the cause of its discovery.

[36] Mary Ann testified that in May 2018 she went looking for the black bag she and George, Sr. said the appellant had with him on the evening following Derek Miles' death. She said she saw it near the side of the highway where they had stopped so the appellant could relieve himself. She said there was something about the bag that "just bothered me". She contacted the police with a full description of where she said the bag could be found. She testified that she told the police "right where it was". She testified her delay in looking for the bag was due to not wanting to get involved.

[37] The police, using Mary Ann's directions, did not find the bag. Advised of that, Mary Ann testified she went back to make sure it was still where she had seen it. On May 17, 2018 she gave a statement to police investigators with further details about the location of the bag and the admissions she said the appellant had made on January 19. In cross-examination, Mary Ann denied placing the bag off the highway and was adamant she had not known its contents.

[38] Corporal James Skinner of the RCMP testified he had searched for the black bag on two occasions, using Mary Ann's description of its location. His first search was on May 8, 2018 as a result of a call from Mary Ann that day indicating that some belongings of the appellant could be found at a specific location off the highway. She said the bag contained the appellant's shoes and a hat.

[39] Corporal Skinner conducted his May 8 search over a three hour period with the assistance of a dog handler. It was fruitless. He discovered a number of grocery bags covered in salt and dirt but none that matched Mary Ann's description. Mary Ann and George, Sr., in their May 17 statements, provided Corporal Skinner with further instructions about where to look, and advised the bag was still where Mary

Ann said she had discovered it. Corporal Skinner left directly after the interviews and quickly located in the brush off the highway a black cloth Superstore bag containing a yellow grocery bag.

[40] Corporal Skinner testified that the location where the bag was found on May 17 had been searched "really well" on May 8 and if the bag had been there, he would have found it. He had been "very motivated" to find what was potential evidence so he was "searching pretty hard".

[41] Corporal Skinner also noted the bag was not covered in dust or salt and did not look as though it had been exposed to the elements for months. The Crown entered into evidence colour photographs of the bag, taken by Forensic Identification Services who were called by Corporal Skinner to handle the scene, take photographs and seize the bag from where it had been located. In the photographs, the bag looks to be in pristine condition.

[42] The bag contained various items, including a pair of sneakers which yielded a DNA profile matching the appellant.

*The Appellant's Police Interrogation*

[43] The appellant was taken to the Halifax Police Department for questioning following his arrest on March 19, 2018. After speaking with a lawyer, he was interrogated by police investigators from shortly after 1:00 p.m. to 12:37 a.m. on March 20, 2018.

[44] The lengthy interrogation was edited to remove several hours of dead time. An audio/visual recording of approximately 6.5 hours was played for the jury. The version entered into evidence had been redacted to remove references to the appellant's prior history of incarceration, to an unrelated investigation of him on a charge of attempted murder, and to his prior criminal record.

[45] I will discuss the appellant's police interrogation in more detail later in these reasons. He admitted very little. Asked if Derek Miles was breathing when they left, he said "probably". He said "no" when asked if he went to the apartment to kill him. He responded "probably" to the question of whether he would do anything differently now, such as stay home. He eventually told the police he didn't put a beating on anyone. He said it was a shock to learn Mr. Miles had died: "He was still alive when…we left…I don't know what happened after that".

*The Criminal Records of George, Jr., George, Sr. and Mary Ann*

[46] George, Jr. had a prior criminal record that included offences for mischief, property damage, breaching court conditions, common assault, causing a disturbance, resisting arrest, and uttering threats.

[47] Both Mary Ann and George, Sr. had criminal records. George, Sr.'s record was extensive although his last conviction was in 2014. On May 8, 2018, Mary Ann received a six-month conditional sentence of imprisonment[2] for possession of marijuana for the purpose of trafficking.

[48] The appellant's trial counsel did not cross-examine George, Sr. and Mary Ann on their criminal records nor did he request a *Vetrovec* warning in relation to their evidence. In response to the allegations of ineffective assistance, trial counsel provided explanations for these decisions.

## The Crown's Theory of the Appellant's Liability for Murder

[49] Later in these reasons, I will discuss the theories presented to the jury. The Crown advanced two: in the first instance, Crown counsel asked the jury to believe George, Jr. that the appellant alone had beaten Mr. Miles to death. The jury was also invited to consider an alternative theory: that the appellant and George, Jr. together, as co-principals, had beaten Mr. Miles. The alternative theory was incompatible with George, Jr.'s testimony.

## The Trial Judge's Instructions and Charge to the Jury

[50] The trial judge gave mid-trial and final instructions to the jury that included:

- Once George, Jr. testified that he had pleaded guilty to manslaughter, a mid-trial instruction on the meaning of party liability, and a *Vetrovec* warning in relation to his evidence overall.

- The mid-trial and final *Vetrovec* warnings cautioned the jury to look for confirmatory evidence independent of George, Jr., evidence "coming from

[2] Pursuant to s. 742.1 of the *Criminal Code*, a conditional sentence of imprisonment is served in the community under court-imposed conditions.

another witness or witnesses, or other evidence". The trial judge did not instruct the jury the evidence should not be connected to George, Jr.

- A final instruction to the jury that George, Jr.'s guilty plea was not to be used to determine that the appellant was guilty.
- A final instruction about after-the-fact conduct, including in relation to the black cloth bag found by the side of the highway.
- A final instruction on the theories of liability.

[51] The appellant says the trial judge committed reversible errors in her instructions to the jury. He claims trial counsel contributed to certain errors, thereby providing him with ineffective assistance.

**Issues**

[52] The appellant raises the following issues:

1) Did the trial judge err in law by admitting the appellant's police interrogation into evidence without holding a voir dire to determine the admissibility of its contents?

2) Did the trial judge err in law in her mid-trial instructions and final jury charge by:

   (a) Providing an inadequate Vetrovec warning in relation to the evidence of George, Jr. and,

   (b) by failing to provide Vetrovec warnings regarding the evidence of George, Sr. and Mary Ann?

3) Did the trial judge err in law by providing an inadequate instruction in relation to George, Jr.'s guilty plea to manslaughter?

4) Did the trial judge err in law by failing to properly instruct the jury on the use they could make of the after-the-fact conduct evidence?

5) Did the trial judge err in law by failing to adequately instruct the jury on the required mens rea and pathway to a manslaughter conviction under the co-principal theory of liability?

6) Did trial counsel provide ineffective assistance resulting in a miscarriage of justice by:

    a) Failing to cross-examine George, Sr. and Mary Ann on their criminal records and failing to request a Vetrovec warning in relation to their evidence?

    b) Failing to require further redactions of the appellant's police interrogation or request a voir dire?

    c) Failing to recognize the appellant's intellectual disability and account for it in his advice on the issue of the appellant testifying in his own defence?

[53] Where they overlap, I will address the appellant's claim of ineffective assistance of counsel (Issues 6(a) and (b)) in the context of the errors he says were committed by the trial judge. At the end of these reasons I will deal separately with Issue 6(c), the appellant's criticisms of trial counsel's handling of his police interrogation, and the failure to address his purported intellectual disability.

**Standard of Review**

[54] I will address the applicable standard of review under each issue.

**Issue #1 – Did the trial judge err in law by admitting the appellant's police interrogation into evidence without holding a *voir dire* to determine the admissibility of its contents?**

[55] The appellant's lengthy interrogation by police investigators was video and audio recorded and transcribed. It has been referred to as a "statement" although insofar as it suggests the appellant gave a version of the events, "statement" is not quite accurate. For convenience however, I will at times refer to what the appellant said to the investigators during the interrogation as a "statement".

[56] In an Admission of Fact tendered as Exhibit 1 at trial, it was indicated that the appellant's statement was voluntary and that "certain redactions, agreed to by the Crown and Greg Purvis" had been made to it.[3]

[57] In his factum, the appellant explains how his police interrogation was presented to the jury by the Crown as part of their case against him:

> 56. The Appellant's statement was obtained over several hours following his arrest on March 19, 2018. Both the 418-page transcript and audio recording were submitted as exhibits at trial and were played in front of the jury after redacting the Appellant's lengthy history of incarceration, all references to an earlier interview on an attempted murder charge, and references to his prior criminal activity.

[58] Much that was prejudicial to the appellant, not probative of the issues the jury had to decide, or was simply inadmissible, remained in the statement the jury had before them as evidence. The appellant says there should have been a *voir dire* to determine admissibility issues relating to the content of the statement, or, at the very least, to rigorously examine what more needed to be redacted. He says the following in his factum:

> 57. Unfortunately, the six-and-a-half-hour statement (after speeding through deadtime) contained prejudicial and irrelevant commentary, discussions, and responses from the Appellant which should have been excised based on probative value versus prejudicial effect, or on the grounds that the evidence was simply inadmissible. Further, it is submitted that there were enough warning signs for the trial judge to trigger her need to hold a *voir-dire* respecting the admissibility of the statement, or at least review it in the absence of the jury prior to it being played in court for their consideration.

[59] The appellant also faults trial counsel for not seeking to have all the "many irrelevant and prejudicial comments"[4] redacted from the statement before consenting to its admission, or, failing that, requesting a *voir dire* for the purpose of determining its admissibility and/or securing additional redactions.

[60] The insufficiently redacted interrogation the jury had as evidence contained the appellant's repeated assertions of his right to silence ("I'm not saying

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[3] The appellant is not disputing his statement to police was voluntary.
[4] Appellant's factum, at para. 102.

nothing"), comments that revealed his violent propensity, and references to the time he had spent incarcerated.

[61] I agree with the appellant. Trial counsel should have pressed for the required redactions by way of an editing application[5] or insisted on a *voir dire* to address what portions of the interrogation should be redacted.[6] Ultimately, it was the trial judge's responsibility to ensure the jury considered only evidence that was admissible and had probative value that outweighed any prejudicial effect. The failure to have done so was a legal error.[7]

[62] A trial judge's obligation to hold a "redaction" *voir dire* arises once there is something to trigger it.[8] In this case, a review by the trial judge of the transcript of the police interrogation would have revealed the requirement for a voir dire to determine the admissibility of its contents. The trial judge could have ordered redactions to the statement to ensure only relevant and admissible evidence, that is, probative content, not substantially outweighed by prejudice, went to the jury.

[63] The following are some examples of the inadmissible and prejudicial/not probative content in the police interrogation:

- D/Cst. Dooks-Fahie's observations at several points in the interrogation that she had met the appellant before.

- Her references to the appellant's sons being in (or out of) jail; to the appellant knowing how police work: "…you could probably walk me through a police investigation, I'm sure", and having a nephew in prison on gun offences.

- The appellant's statements that he can "handle" himself: "Still got it in me. Don't matter if I'm old. I still got it in me".

- D/Cst. Dooks-Fahie's comments about the insult associated with someone being labelled a "rat" and the appellant having "a name to uphold in that community. You have a reputation there and no one's going to cross you…".

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[5] *R. v. Greenwood*, 2014 NSCA 80, at paras. 136, 141 [*Greenwood*].
[6] *Greenwood* at para. 142.
[7] *Greenwood* at para. 149.
[8] *Greenwood* at para. 134, citing *R. v. Hodgson*, [1998] 2 S.C.R. 449, at para. 41.

- D/Cst. Dooks' observations that the appellant appeared indifferent to the news that Derek Miles had died: "You're kind of emotionless through this whole thing. I don't know it you don't feel bad or you've just kind of dealt with this before, it is what it is".

- D/Cst. Wagg telling the appellant: "You've been around the block" and saying: "You're kind of an old-school guy and you're kind of old-school rules…".

[64] The jury would have heard (and read) statements by D/Cst. Wagg about the appellant's ability to handle situations with violence:

> …You're one of those guys. You've been around. You've been around the block, you know? Everyone knows you can throw hands…Everyone knows you're a capable guy, right?

[65] The appellant agreed with D/Cst. Wagg complimenting him for knowing "how to throw a punch" and being able to use "Fists of fury and feet of fury, too…you got to do what you got to do…". In this exchange, the appellant acknowledged having been a kickboxer, using a knife in a fight, as well as hands and feet.

[66] The jury also heard the appellant resisting, time and time again, the police investigators' determined efforts to get him to talk about what happened at Derek Miles' apartment. The appellant repeatedly asserted his right to silence—113 times in the course of the interrogation—referencing the advice he had received from his lawyer not to say anything.

[67] The appellant's invocation of his right not to answer the questions of the police investigators should not have been admitted into evidence. As the Supreme Court of Canada held in *R. v. Chambers*, it was clearly prejudicial:

> [51] It has as well been recognized that since there is a right to silence, it would be a snare and a delusion to caution the accused that he need not say anything in response to a police officer's question but nonetheless put in evidence that the accused clearly exercised his right and remained silent in the face of a question which suggested his guilt. In *R. v. Robertson* (1975), 21 C.C.C. (2d) 385 (Ont. C.A.), this very issue arose and the Court considered whether a police officer's accusation and the subsequent silence of an accused could be admitted in evidence. Dubin J.A., as he then was, dissenting in part, stated at p. 395:

> In my opinion the purported resumé of the facts as stated by Inspector Lyle, coupled with the response of "nothing", after being cautioned, was so highly prejudicial that I am not satisfied that the learned trial Judge's instructions to the jury could erase the prejudicial effect which that evidence would have on the jury. **I cannot help but feel that most juries would assume that an innocent man would be prompted to deny any false accusations against him, and his failure to do so would tend to prove belief in the truth of the accusations.**[9] [emphasis added]

[68] Even more prejudicial in this case is the fact the appellant's assertions of his right to silence were embedded in lengthy monologues by police investigators expressing their opinions about his involvement in Derek Miles' death. Those opinions were irrelevant and highly prejudicial.

[69] There are circumstances where, during a police interrogation, an accused's refusal to answer questions will be admissible as "an inextricable part of the narrative".[10] That scenario did not apply here. And even where an accused's silence is admitted into evidence, a trial judge is obliged:

> …to tell the jury in the clearest of terms that it could not be used to support an inference of guilt in order to contradict an intuitive impulse to conclude that silence is incompatible with innocence.[11]

[70] A *voir dire* would have flagged the appellant's repeated assertions of his right to silence and led to redactions or the exclusion of the statement altogether. The latter result would have been made more likely given other aspects of the interrogation that were inadmissible and/or had no probative value. If it proves impossible to appropriately edit a statement, then it should not be admitted into evidence.[12]

[71] With respect, trial counsel's opinion about the admissibility of the interrogation, revealed in his affidavit and cross-examination on the fresh evidence motion, underscores the need for trial judges to assess such statements themselves. Trial judges play "a fundamentally important role as evidentiary gatekeeper" in ensuring juries only consider relevant evidence, the probative value of which "is not substantially outweighed by its prejudicial effects".[13]

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[9] [1990] 2 S.C.R. 1293.
[10] *R. v. Turcotte*, 2005 SCC 50, at para. 58 [*Turcotte*].
[11] *Turcotte* at para. 58.
[12] *R. v. Bonisteel*, 2008 BCCA 344, at para. 45.
[13] *R. v. Grant*, 2015 SCC 9, at para. 44, 54.

[72] Trial counsel testified he believed the appellant's statement to be "presumptively admissible" because it was voluntary. While acknowledging that he "likely could have had more redacted", he said the jury could not be left with an unbalanced picture. He seemed to be of the view there was a strategic benefit in consenting to the statement being admitted as it was: the Crown would then not oppose a *Corbett* application[14] in the event the appellant testified, or call rebuttal evidence concerning the appellant's character.

[73] In his July 27, 2023 affidavit, trial counsel said, in light of the appellant insisting "from the outset" he would not testify, it was important to put before the jury his denial that he went to the apartment intending to kill or was even involved in the beating, and his indication that Derek Miles was still breathing when they left. Trial counsel did not think the commentary about the appellant's fighting prowess rose "to the level to establish propensity or character", presumably meaning, bad character. But that is exactly what it disclosed—a propensity for violence and a bad character.

[74] Trial counsel agreed there was a potential risk the jury would think the appellant exercising his right to silence indicated he was hiding something inculpatory, but said the jury would have had to follow the trial judge's instructions. Trial counsel said the theories and opinions of D/Csts. Dooks-Fahie and Wagg could not be relied on by the jury and therefore could not be prejudicial to the appellant. He said the trial judge gave mid-trial instructions and a final caution in her jury charge that parts of the interrogation not attributable to the appellant could not be used as evidence against him.

[75] With respect, aspects of trial counsel's analysis were simply incomplete or wrong. Although the trial judge told the jury the appellant could "only be held responsible for what he actually says, not for what anyone else says", there were no more specific instructions to the jury about what were permissible and impermissible uses of the appellant's police interrogation. Before the appellant's interrogation was played for them, the trial judge, referring to the fact there were redactions, told the jury: "Please know that you are seeing and hearing all of the parts that are relevant for you to see".

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[14] Named after *R. v. Corbett*, [1988] 1 S.C.R. 670, a *Corbett* application seeks to limit the Crown's ability to cross-examine an accused on their criminal record.

[76] The "careful balance" trial counsel thought he had to achieve led to him consenting to the police interrogation going before the jury without a *voir dire* and significant further redactions.

[77] The trial judge was aware substantial redactions had been made to the police interrogation and the nature of them. She was told by Crown counsel:

> On Wednesday, it's anticipated the Crown, depending on how today and tomorrow go, obviously, anticipated the Crown will be introducing Greg Purvis' cautioned statement. My colleague[15] and I have went [*sic*] to great lengths to redact that statement both in the video and the transcript. Redactions as it relates to such issues as Greg Purvis' lengthy history of incarceration. There was the interviewer actually interviewed Mr. Greg Purvis previously on an attempted murder charge. That's been redacted, and any reference to any prior criminal actions has been redacted…

[78] The trial judge should have been alerted by the nature of the redactions made and the fact that what remained of the appellant's police interrogation still consumed 418 pages of transcript. In the circumstances, a *voir dire* was a necessary step in the trial judge ensuring the jury heard only admissible evidence. Despite the lack of assistance from trial counsel on the issue, there were triggers in this case that should have animated a *voir dire*. It was an error not to have held one.

## Conclusion

[79] With respect, I find the trial judge erred in law by not holding a *voir dire* in this case to determine what in the appellant's police interrogation was admissible evidence and what redactions were required.[16]

[80] I would allow this ground of appeal.

## Jury Instructions and Charge to the Jury

[81] The next series of issues require me to discuss the trial judge's instructions to the jury. The appellant has criticized her *Vetrovec* caution required for unsavoury witnesses (Issues 2(a) and (b)); her charge in relation to George, Jr.'s guilty plea to manslaughter (Issue 3); her charge on after-the-fact conduct (Issue

[15] This is a reference to Jonathan Hughes, the appellant's trial counsel.
[16] *Greenwood* note 5 at paras. 134-135.

4); and her charge on the co-principal theory of liability for manslaughter (Issue 5). In my examination of these complaints I have applied the principles that govern appellate review of jury instructions.

[82] Appellate review of jury instructions has been shaped by repeated direction from the Supreme Court of Canada, most recently in *R. v. Abdullahi* [17] which reiterates the functional approach to be taken on appeal. *Abdullahi* emphasizes the basic principles that apply:

> [4] This Court has indicated that appellate courts should adopt a "functional approach" to the review of jury instructions for legal error. This respects the jury's role as the trier of fact while enabling effective review of the trial judge's duty to ensure the jury understands the law that it is to apply. The approach supports the function of jury instructions: to equip the jury properly to decide the case according to the law and the evidence. The meaning of "properly" equipping a jury is therefore essential to understanding the appellate court's task of identifying legal error in jury instructions. Such errors have been described using a variety of terms in the jurisprudence, notably "misdirection" and "non-direction". In these reasons, I will explain why it is helpful to understand the concept of "misdirection" in terms of whether the instructions would have equipped the jury with an *accurate* understanding of the law to decide the case. Similarly, it is helpful to understand the concept of "non-direction" in terms of whether the instructions would have equipped the jury with a *sufficient* understanding of the law to decide the case. These concepts direct the appellate court's focus to the function of the instructions and the overall understanding of a given issue in the mind of the jury. Thus, a properly equipped jury can be understood as one that is both *accurately* and *sufficiently* instructed to decide the case.

[83] The fundamental question on appeal is whether a trial judge's instructions "properly equipped the jury to decide the case". A properly equipped jury is one that has been instructed accurately and sufficiently to decide the case, "as well as how the circumstances of the trial can inform the analysis".[18]

[84] With reference to its guidance from previous cases, the Supreme Court in *Abdullahi* enumerates the principles that govern appellate review of jury instructions. I have excerpted the ones most relevant to this appeal:

- Challenges to a judge's jury instructions are analyzed as an error of law.

[17] 2023 SCC 19 [*Abdullahi*].
[18] *Abdullahi* at para. 29.

- The trial judge bears the responsibility to instruct the jury on the law.

- Juries do not have the benefit of judicial experience on certain issues, such as the need for a *Vetrovec* warning for unsavoury witnesses. (I discuss this further below.)

- Appellate review ensures the trial judge has fulfilled their role to properly instruct the jury.[19]

[85] The functional approach to reviewing jury instructions on appeal is reflected in the following principles distilled in *Abdullahi*:

- An accused person is entitled to a jury that is properly, not perfectly instructed.

- The jury charge must be read as a whole and not considered in isolation, but in the context of the trial as a whole.

- The "overriding question is whether the jury understood or was "properly equipped" with the law to apply to the evidence".[20]

- The appellate court must determine whether the overall effect of the charge properly equipped the jury in the circumstances of the trial to decide the case according to the law and the evidence.

- A properly equipped jury is both accurately and sufficiently instructed.[21] Regard must be had to what the trial judge said and what they did not say in their instructions.[22]

[86] Because perfection is not the standard, a jury charge may survive appellate review where a "single ambiguous or problematic statement in one part" has not deprived the jury of an accurate understanding of a relevant legal issue. "At all times, the focus is on whether the jury had an accurate understanding of the law from the charge".[23]

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[19] *Abdullahi* at para. 32.
[20] *Abdullahi* at para. 35.
[21] Inaccurate instructions on the law has been referred to as "misdirection" by the trial judge. Insufficient instructions has been referred to as "non-direction" (see: *Abdullahi* at para. 37).
[22] *Abdullahi* note 17 at paras. 35-37.
[23] *Abdullahi* at paras. 41, 43.

[87] Where it is alleged the trial judge did not say something in the charge that was required for the jury to be properly equipped to decide the case, this constitutes a complaint about the sufficiency of the instructions. This will have to be assessed by considering two questions: (1) was the instruction required and not given, and (2) was a required instruction provided with sufficient detail. The level of detail required will depend on the circumstances of the case.

[88] Jury instructions are not rendered sufficient because they happen to track model jury instructions. Model jury instructions, while useful, "are the beginning of the process, not the end".[24] As *Abdullahi* held:

> [55] Model jury instructions serve as important guides, but they are not decisive of the sufficiency of an instruction. On one hand, the judge is not required to give a formulaic instruction, and a less detailed instruction may be sufficient if the circumstances of the case do not require as much detail as the model instruction sets out. On the other hand, the circumstances of the case may require an instruction with *greater* detail than a model instruction provides. This Court has cautioned against overreliance on model instructions; they are a valuable tool, not the final product (*R. v. R.V.*, 2021 SCC 10, at para. 64; *Rodgerson*[25], at paras. 51 and 54).

[89] Review of jury instructions in the context of the whole of the trial will include in its scope an examination of the nature of the evidence, the closing arguments of counsel, and, in an appeal against conviction on the basis of errors in the charge, the absence of objection by defence. Certain principles apply to these considerations:

- For contingent instructions, such as *Vetrovec* warnings or instructions about after-the-fact conduct evidence, whether the instruction is required and the level of detail will depend on the evidence.

- Final jury addresses by counsel form part of the overall circumstances of the trial, and can inform the sufficiency of the trial judge's instructions. "Notably, the closing arguments of counsel can be relevant to whether a contingent instruction was required".[26]

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[24] *R. v. Whynder*, 2020 NSCA 77 at para. 43 [*Whynder*]
[25] 2015 SCC 38.
[26] *Abdullahi* at para. 63.

- Final addresses by counsel are capable of filling in the gaps in the trial judge's review of the evidence but they "cannot *replace* an accurate and sufficient instruction on the *law*".[27] Juries are routinely told to follow the law provided to them by the judge and not statements on the law from counsel.

- Although the failure by counsel to request the inclusion of an instruction, or object to the jury charge, "can be a relevant consideration, it should be recalled that the responsibility for the jury charge lies with the trial judge, not counsel".[28]

- And while silence from counsel "may be particularly relevant" to the issue of whether a contingent instruction was required, it cannot be over-read. Silence could indicate a tactical decision, but appellate courts must not privilege a possible tactical decision by counsel where there may have been a miscarriage of justice.[29]

**Issue #2(a) – Did the trial judge err in law in her mid-trial instructions and final jury charge by providing an inadequate *Vetrovec* warning in relation to the evidence of George, Jr.?**

***The Vetrovec Warning – General Principles***

[90] A *Vetrovec* caution—"a clear and sharp warning to attract the attention of juror[s] to the risks of adopting, without more, the evidence of the witness"[30]—will be merited for witnesses who are "unsavoury", "untrustworthy", "unreliable", or "tainted".[31] This will include,

> [3] …all witnesses who, because of their amoral character, criminal lifestyle, past dishonesty or interest in the outcome of the trial, cannot be trusted to tell the truth-even when they have expressly undertaken by oath or affirmation to do so. [32]

[27] *Abdullahi* at para. 65 (emphasis in the original).
[28] *Abdullahi* at para. 67.
[29] *Abdullahi* at para. 68-69.
[30] *Vetrovec* note 1 at p. 831.
[31] *R. v. Khela* 2009 SCC 4 at para. 3 [*Khela*].
[32] *Khela*.

[91] As the Supreme Court of Canada has noted, juries may not appreciate, in the way judges do, that “unsavoury witnesses are prone to favour personal advantage over public duty”.[33] A functional approach to assessing a *Vetrovec* caution must:

> [47] … take into account the dual purpose of the *Vetrovec* warning: first, to alert the jury to the danger of relying on the unsupported evidence of unsavoury witnesses and to explain the reasons for special scrutiny of their testimony; and second, in appropriate cases, to give the jury the tools necessary to identify evidence capable of enhancing the trustworthiness of those witnesses.[34]

[92] The Supreme Court of Canada in *Abdullahi* characterized *Vetrovec* warnings as a “contingent instruction”, as contrasted to a mandatory instruction—required in some cases but not in others.

[93] The caution warns a jury "of the danger of relying on the impugned witness's testimony without being comforted, by some other evidence, that the witness is telling the truth about the accused's involvement in the crime".[35] The instruction to the jury should also point to "the type of evidence capable of providing such comfort".[36]

[94] It is the comforting evidence aspect of the *Vetrovec* warning that is in issue in this appeal. Such evidence has to be material and independent. The guidance from the Supreme Court of Canada in *R. v. Khela* provides that:

> [39] Common sense dictates that not all evidence presented at trial is capable of confirming the testimony of an impugned witness. The attribute of independence defines the kind of evidence that can provide comfort to the trier of fact that the witness is telling the truth. Where evidence is "tainted" by connection to the *Vetrovec* witness it can not serve to confirm his or her testimony.
>
> [citations omitted]

[95] For obvious reasons, George, Jr. merited a strong *Vetrovec* caution. The caution the trial judge provided, both mid-trial and in her final charge, fell short of what was required.

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[33] *Khela* at para. 4.
[34] *Khela*.
[35] *R. v. Smith*, 2009 SCC 5 at para. 2 [*Smith*]
[36] *Smith* at para. 2.

### *The Trial Judge's Mid-trial and Final Vetrovec Instructions*

[96] The trial judge gave the jury a mid-trial warning about George, Jr.'s evidence:

> I also want to give you another special instruction about George Purvis, Jr. It is an instruction that you must keep in your mind when you are considering how much or how little you will believe of or rely upon his evidence in making your decision.
>
> You have heard George Purvis, Jr. say that he was present on January 18, 2018 at Derek Miles' apartment with Dereck Miles and Greg Purvis. George Purvis, Jr. said he that brought Greg Purvis to Derek Miles' apartment. He says that Greg Purvis assaulted Derek Miles. He says, George Purvis, Jr. says that is, that he himself did not assault Mr. Miles. George Purvis, Jr. told you that he was originally charged with second degree murder in the death of Mr. Miles, along with Greg Purvis and Murray Timmons, and that he pled guilty to the lesser offence of manslaughter. Common sense and experience tell us that testimony from Crown witnesses in these circumstances must be approached with great care and caution. A witness such as George Purvis, Jr. might be telling the truth, or he might wish to minimize his involvement in the event and maximize the involvement of another.
>
> You are entitled to rely upon George Purvis, Jr.'s evidence even if it is not confirmed by another witness, or other evidence, but there is some danger in your doing so. You should look for some confirmation of George Purvis, Jr.'s evidence from somebody or something other than George Purvis, Jr. before you rely upon his evidence in deciding whether Crown counsel have proven the case against Greg Purvis beyond a reasonable doubt.
>
> To be confirmatory of the evidence of George Purvis, Jr., it must be independent of George Purvis, Jr. Meaning that it must come from another witness or witnesses, or other evidence.
>
> To be confirmatory it must also tend to show that George Purvis, Jr. is telling the truth about the guilt of Greg Purvis. It must give you comfort that George Purvis, Jr. can be trusted when he says that Greg Purvis committed the offence.
>
> Having said that, you may believe George Purvis, Jr.'s testimony if you find it trustworthy, even if no one or nothing else confirms it. As I told you at the beginning of this trial, you are the sole judges of the facts. When you consider this evidence, however, keep in mind who gave you the evidence and the circumstances under which he testified. Thank you.

[97] In her final charge to the jury, the trial judge gave a very similar caution:

I am going to give you a special instruction now about George Purvis, Jr. and Murray Timmons. It is an instruction that you must keep in mind when you are considering how much or how little you will believe of or rely upon their evidence in making your decision.

You have heard George Purvis, Jr. say that he was present on January 18, 2018 at Derek Miles' apartment with Derek Miles and Gregory Purvis. He says that Gregory Purvis assaulted Derek Miles alone. George Purvis, Jr. says that he himself did not assault or touch Mr. Miles. George Purvis, Jr. told you that he was originally charged with second degree murder in the death of Mr. Miles along with Gregory Purvis and Murray Timmons, and that he pled guilty to the lesser offence of manslaughter as a party.

George Purvis, Jr. is the only Crown witness who gave evidence about what happened inside the apartment of Derek Miles on January 18, 2018. You have heard Murray Timmons say that he was present on January 18, 2018 at Derek Miles' apartment building, along with George Purvis, Jr. and Gregory Purvis. He says he did not go past the first floor and he did not go into Derek Miles' apartment. Murray Timmons told you that he was originally charged with second degree murder in the death of Mr. Miles, along with George Purvis, Jr. and Gregory Purvis, and that the charges were withdrawn against him.

Common sense and experience tells us that testimony from Crown witnesses in these circumstances must be approached with great care and caution. Witnesses such as George Purvis, Jr. and Murray Timmons might be telling the truth, or they might wish to minimize their involvement in the events and maximize the involvement of another or others. You're entitled to rely upon the evidence of George Purvis, Jr. and/or the evidence of Murray Timmons even if it is not confirmed by another witness or other evidence, but there is some danger in your doing so.

First in relation to George Purvis, Jr. You should look for some confirmation of his evidence from somebody or something other than him before you rely upon his evidence in deciding whether Crown counsel has proven the case against Gregory Purvis beyond a reasonable doubt. To be confirmatory of the evidence of George Purvis, Jr. it must be independent of George Purvis, Jr., meaning it must come from another witness or witnesses or other evidence. To be confirmatory it must also tend to show that George Purvis is telling the truth about the guilt of Gregory Purvis. It must give you comfort that George Purvis, Jr. can be trusted when he says that Gregory Purvis committed the offence.

I would suggest to you that within the evidence you have heard you could quite easily find confirmatory evidence to the evidence of George Purvis, Jr. to the events – in relation to the events before and after the events in Derek Miles' apartment. For example, evidence of the drug raid on Derek Miles, evidence of the drug trafficking between George Purvis, Jr. and Derek Miles, and evidence of

> the comings and goings of George Purvis, Jr., Gregory Purvis, and Murray Timmons on the evening of January 18, 2018.
>
> You could also find confirmatory evidence in relation to what George Purvis, Jr. said happened in the apartment, although there is less confirmatory evidence of those events. For example, you could find some evidence of confirmation of the evidence of George Purvis, Jr. in the evidence of Samantha Randell who told you what she heard Mr. Miles saying during the event, and/or the evidence of Dr. Bowes who told you about the injuries he found on Mr. Miles and their location on his body.
>
> You could look at the statement of Gregory Purvis when he says that Mr. Miles was still breathing when they left. You might conclude that this is confirmatory evidence of Mr. Gregory Purvis being in the actual apartment, or you might conclude that this is only confirmatory evidence that he was in the building, or that he was on the third floor.
>
> Having said that, within your assessment of whether there is confirmatory evidence to the evidence of George Purvis, Jr., you might consider that George Purvis, Jr. acknowledged having been given a copy of the police disclosure, therefore being aware of what other witnesses would say before he testified, although he denied tailoring his evidence to fit the evidence of others. Those circumstances may or may not affect your assessment of whether the evidence he proffered was actually confirmed by others.

### *Arguments on Appeal*

[98] The appellant says the trial judge made two errors in her *Vetrovec* warning in relation to George, Jr.'s evidence:

1. She did not make it clear to the jury that evidence tainted by connection to George, Jr. could not be considered confirmatory of his evidence because it lacked independence, an essential feature of a legally-compliant *Vetrovec* caution.
2. She told the jury, incorrectly, that the evidence of Samantha Randell and Dr. Bowes supported George, Jr.'s evidence about what happened inside Derek Miles' apartment.

[99] The appellant submits the omission of an emphasis on the need for independent confirmation opened the door for the jury to use the evidence of George, Sr. and Mary Ann as comfort for finding George, Jr. was telling the truth about the appellant beating Mr. Miles to death. Their connection to George, Jr., and the untrustworthy aspects of their evidence, meant they were not independent

witnesses, which the appellant says was not adequately explained to the jury. In the appellant's submission this amounted to an error of law.

[100] The respondent says the appellant's argument is much ado about nothing. The trial judge did not instruct the jury they could use the evidence of George, Sr. and Mary Ann to confirm the truthfulness of George, Jr.'s testimony and that, in any event, they had not provided direct evidence about the events described by George, Jr. The respondent says their evidence was factually independent of George, Jr.'s and they had not been shown by the appellant, on the basis of any evidence, to be biased in favour of their son. The respondent submits the appellant has advanced nothing more than a mere suggestion George, Sr. and Mary Ann failed to qualify as suitably independent confirmatory witnesses.

[101] The respondent also says the trial judge's instructions overall covered off the appellant's complaint about her *Vetrovec* warning in relation to George, Jr., pointing to the following:

> Did the witness seem honest? Is there any reason why the witness would not be telling the truth? Did the witness have any reason to give evidence that is more favourable to one side than the other?

[102] The trial judge gave the jury a specific caution about the evidence of George, Sr. and Mary Ann, in the context of her instruction on after-the-fact conduct, telling them to assess their evidence, to determine if they accepted some, all or none of it. And in reviewing the theory of the defence for the jury, the trial judge recited the appellant's position on Mary Ann's evidence about the black cloth bag, that she deposited it off the highway "to obscure[e] the case against her son". The trial judge correctly told the jury they were entitled to accept the evidence of George, Jr. even without confirmatory evidence, if they believed it to be true.

***The Principles Applied***

[103] I find the trial judge's George, Jr. *Vetrovec* instructions did not meet the functional requirements. I do not agree with the respondent that deficiencies in the instructions were compensated for in other parts of the jury charge as was found in the cases of *Khela* and *R. v. Boyce*.[37] *Khela* reminds us it is not "overly formalistic"

[37] 2014 ONCA 150 at para. 36.

to require that *Vetrovec* warnings equip juries with the tools "to identify evidence capable of enhancing the truthworthiness" of an unsavoury witness.[38] The jury in this case was not sufficiently equipped by the isolated references cautioning them about the evidence of George, Sr. and Mary Ann. More targeted instructions were necessary.

[104] It was not enough to merely tell the jury that evidence confirmatory of George, Jr.'s evidence "must come from another witness or witnesses, or other evidence". As held in *Khela*:

> [42] …when looked at in the context of the case as a whole, the items of confirmatory evidence should give comfort to the jury that the witness can be trusted in his or her assertion that the accused is the person who committed the offence.

[105] Not all evidence "is capable of providing a level of comfort or confidence required for conviction".[39] The trial judge should have told the jury explicitly that if they doubted the credibility of Geroge, Sr. and Mary Ann, they "should be wary about relying on their evidence"[40] as support for the testimony of George, Jr.

[106] In the circumstances of this case, the trial judge should have instructed the jury they could not use the evidence of George, Sr. and Mary Ann as confirmatory of George, Jr.'s testimony that it was the appellant who beat Derek Miles to death. The suspicious circumstances in which the black cloth bag was discovered, and the inconsistencies in the descriptions by George, Sr. and Mary Ann about the January 19, 2018 trip to Tim Horton's and the appellant's purported admissions, raise the red flag of potentially tainted evidence.

[107] There are additional problems with the trial judge's *Vetrovec* instructions in relation to George, Jr. The jury was told in the trial judge's final instructions that Samantha Randell's evidence was "some evidence" of confirmation of George, Jr.'s evidence. The "some evidence" was identified as Ms. Randell's testimony about what she heard Mr. Miles say on the night of January 18, 2018. But, as I noted in paragraph 29 of these reasons, what Ms. Randell did <u>not</u> say she had heard directly contradicted George, Jr. who claimed the appellant verbally accosted Mr. Miles with a number of insults and accusations.

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[38] *Khela* note 31 at para. 47.
[39] *Khela* at para. 53.
[40] *Khela* at para. 54.

[108] The respondent points to Ms. Randell's testimony about the audible banging noises coming from Mr. Miles' apartment, his utterances—"Fuck off, leave me alone"—and the three men leaving after the loud noises, as confirmatory evidence. The respondent submits this evidence "would seem to corroborate that Derek Miles was beaten severely at the time and place that George Purvis, Jr. described".[41]

[109] There is little value in what comfort the jury could have drawn from this evidence. The fact of Mr. Miles being very badly beaten at a time when George, Jr. and the appellant visited the apartment was not the testing ground for the issue of George, Jr.'s truthfulness.

[110] Ms. Randell's evidence, presented to the jury as confirmatory of George, Jr.'s truthfulness, was missing critical details. Had her testimony been more fully described it would have been inconsistent with what was required to afford the jury comfort that George, Jr. could be believed.

[111] The trial judge instructed the jury to look to the evidence of Dr. Bowes, the Medical Examiner[42], as confirming George, Jr.'s testimony. With respect, it is difficult to understand how Dr. Bowes' evidence about the injuries sustained by Mr. Miles and where they were located on his body could be used to confirm that George, Jr. was telling the truth that it was the appellant who had delivered the lethal blows. There was no dispute that Mr. Miles died from a severe beating. Autopsy findings establishing that could provide no comfort to the jury that George Jr.'s evidence could be believed.

[112] The evidence of Dr. Bowes was neutral on the issue of who was responsible for beating Mr. Miles to death, not confirmatory. The trial judge's instruction that the evidence was confirmatory, when it was not, was an error of law.[43]

[113] I find the jury was not equipped by the trial judge's instructions to properly assess the independence and materiality of the evidence purported to confirm George, Jr.'s testimony.

**Issue #2(b) – Did the trial judge err in law by failing to provide a *Vetrovec* warning in relation to the evidence of George, Sr. and Mary Ann?**

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[41] Respondent's factum, at para. 103.
[42] Dr. Bowes, a forensic pathologist, was the provincial Medical Examiner who conducted the autopsy of Mr. Miles.
[43] *R. v. Sanderson*, 2003 MBCA 109, at paras. 63-64.

[114] The appellant says the trial judge committed legal error by not providing the jury with a *Vetrovec* instruction for George, Sr. and Mary Ann. The *Vetrovec* legal principles I reviewed previously are applicable to an analysis of this issue.

***Arguments on Appeal***

[115] The appellant says a *Vetrovec* warning to the jury for George, Sr. and Mary Ann would have been justified as they fall into the category of witnesses whose evidence should be treated with skepticism and particular scrutiny. In Mary Ann's case there was her drug trafficking, and in particular, drug trafficking in support of George, Jr.'s drug business.[44] She had a recent criminal conviction for possession for the purpose of drug trafficking. George, Sr. had a lengthy criminal history, although it was dated.

[116] Both George, Sr. and Mary Ann had an interest in the outcome of the trial in which their son was a key Crown witness. I have already discussed the questionable provenance of the black cloth bag. The appellant submits inconsistencies in their narratives and the black bag evidence smacks of collusion.

[117] The respondent says there was no need for a formal *Vetrovec* warning for George, Sr. and Mary Ann given the emphasis by trial counsel on rejecting their evidence as concocted. The trial judge cautioned the jury about assessing the credibility of witnesses with criminal records. In the respondent's submission, a *Vetrovec* warning would have been "redundant".[45]

***Vetrovec Principles Applied***

[118] In her review of the testimony of George, Sr. and Mary Ann, the trial judge pointed out inconsistencies and contradictory evidence. In relation to their evidence about the appellant's admissions of beating Mr. Miles, the trial judge mentioned discrepancies in their narratives:

> You have also heard Mary Ann Purvis and George Purvis testify that in the days after the events at Derek Miles' apartment, they spent time with Gregory Purvis, and he made certain statements to them. Mary Ann Purvis said that she and her husband, George Purvis, Sr., picked up Gregory Purvis outside his residence for a

[44] Mary Ann testified that she would deliver drugs to Mr. Miles for George, Jr. and pick drugs up, activities which constitute the offence of drug trafficking.
[45] Respondent's factum, at para. 95.

> drive on Saturday, January 20, 2018. She said that during this drive that Gregory Purvis spoke to them and said Georgie had nothing to do with it. I did it all. I booted Derek's head in and kept booting it. Ms. Purvis said that she told Gregory Purvis, I want the truth, and that he replied Georgie did nothing, I did it all. They stopped at Tim's for some drinks and then she drove Gregory Purvis home. Ms. Purvis acknowledged that she knew her son, George, had been to Derek Miles' house the previous evening and thought she might have discussed it with him prior to this conversation with Gregory Purvis.
>
> George Purvis, Sr. testified that he and his wife, Mary Ann, picked up Gregory Purvis for a drive on Saturday, January 19, 2018. He said that when his wife, Mary Ann, went into Tim's for drinks, Gregory Purvis told him George had nothing to do with it. When Ms. Purvis got back in the truck, Gregory Purvis said I stomped the guy and kicked him. Nothing else was said during that drive, and Gregory Purvis was taken home.
>
> …George Purvis, Sr. told you that the next day he and wife again picked up Gregory Purvis to take him to visit their son, George Purvis, Jr. When they discovered that George, Jr. was not home, they went to Lawrencetown and parked there for 20 or 25 minutes talking. George Purvis, Sr. told you that Gregory Purvis then said he had stomped a guy in the head and ribs, and your son Georgie had nothing to do with it.
>
> I note to you that some of the evidence of George Purvis, Sr. and Mary Ann Purvis is quite different on some rather key points. For example, Ms. Purvis does not remember Gregory Purvis being in her vehicle at any time after the first drive, even though her husband says she was there for the second drive the next day.
>
> Their evidence about the first drive is very much different from each other in regard to a number of details, including the timing of the statements of Gregory Purvis, what exactly he is alleged to have said, the route they took that day, and the position of the truck and Gregory Purvis at the time of pick up and drop off.

[119] The trial judge also reviewed for the jury the evidence of George, Sr. and Mary Ann about the black cloth bag when she provided her instructions on after-the-fact evidence. The theory of the defence, which the trial judge read to the jury, also touched on it. These aspects of the judge's jury charge did not constitute a *Vetrovec* warning.

[120] In considering this ground of appeal, I have considered the role of trial counsel who did not ask for a *Vetrovec* warning. The Supreme Court of Canada in *Khela* had the following to say on the subject:

> [50] …I think it important to reiterate that counsel have a responsibility in summing up for the jury to address the issue of unsavoury witnesses and the

> presence or absence of confirmatory evidence. The Crown should direct the jury's attention to evidence that tends to reinforce the credibility of the tainted witness; defence counsel, to avoid any apprehended misunderstanding in this regard, should identify for the jury's benefit evidence that cannot be considered confirmatory at all. In addition, it may be helpful to assist the trial judge in crafting an appropriate *Vetrovec* warning by way of a pre-charge conference.

[121] In his July 27, 2023 affidavit on the fresh evidence motion, trial counsel indicated his opinion the criminal records of George, Sr. and Mary Ann, Mary Ann's drug trafficking, and the potential they might lie to support their son, were insufficient to establish a basis for a *Vetrovec* warning. He said he had perceived a risk in pursuing a *Vetrovec* warning for George, Sr. and Mary Ann because of "the existence of significant corroborating evidence that would be highlighted by the Court in issuing this warning…as well as the comprehensiveness of the final charge". He testified it was a tactical decision not to seek the warning and said the corroborating evidence that concerned him was that of the Medical Examiner.

[122] In place of a *Vetrovec* warning, trial counsel was satisfied to rely on his cross-examination of George, Sr. and Mary Ann which elicited inconsistencies in their narratives of the January 19, 2018 drive with the appellant, and the suspicious discovery and condition of the black cloth bag. In his jury address, he had reminded the jury of this evidence, and suggested George, Sr. and Mary Ann had concocted evidence to help their son. He told the jury this should cause them "great concern about relying on the evidence of George Purvis, Jr., George Purvis, Sr. and Mary Ann Purvis".

[123] In his July 27, 2023 affidavit, on the issue of a *Vetrovec* warning, trial counsel said:

> 43. …In my opinion, these inconsistencies may have been overwhelmed and outweighed, and the *Vetrovec* warning may have weakened the defence, if the Court was to highlight all of the corroborative evidence of what Maryann and George, Sr. testified to the Appellant telling them.

[124] With respect, I fail to see how a *Vetrovec* warning in relation to George, Sr. and Mary Ann could have had a negative impact on the appellant. I have already indicated the Medical Examiner's evidence was not confirmatory of George, Jr.'s truthfulness. In the circumstances of this case, the jury should have been warned by the trial judge of the danger associated with relying on George, Sr. and Mary Ann in the absence of confirmatory evidence. Evidence confirmatory of what the

appellant purportedly admitted to them came most directly from George, Jr. A *Vetrovec* warning would have identified his evidence as not independent.

[125] Trial counsel's tactical decision was built on a faulty foundation. It was ultimately the trial judge's responsibility to provide the jury with a *Vetrovec* warning. I find the trial judge should have warned the jury that it was dangerous to accept the evidence of George, Sr. and Mary Ann without independent confirmation to indicate they were likely telling the truth. It was an error of law not to have done so.

### *Trial Counsel's Decision Not to Cross-Examine George, Sr. and Mary Ann on their Criminal Records*

[126] This is a logical place to briefly discuss trial counsel's decision not to cross-examine George, Sr. and Mary Ann on their criminal records. He did not think cross-examination would be fruitful. George, Sr.'s record was dated and he admitted to it in his direct examination by the Crown. Mary Ann had a single conviction for possession for the purpose of trafficking. Trial counsel says he thought the better strategy was to focus on the inconsistencies in their evidence and Corporal Skinner's testimony about the black cloth bag.

[127] Trial counsel's decision is a small piece of the overall canvas of the appellant's trial. I find it did not play a major role. Cross-examination on a criminal record that was stale—George, Sr.'s—and minimal—Mary Ann's, would not have been pivotal to the appellant's defence. However, there was no downside reason to have foregone the opportunity of highlighting these witnesses' disregard for the law. It would have focused additional emphasis on George, Sr.'s statement in direct examination that he had not wanted to have anything to do with Mary Ann's decision to contact police because: "I'm not a law abiding citizen". In Mary Ann's case, the jury was not informed that she even had a criminal record.

[128] Cross-examination on the criminal records of George, Sr. and Mary Ann would at least have provided an additional basis for seeking a *Vetrovec* warning in relation to their evidence. That said, the decision on this aspect of the cross-examination was not a pivotal factor in this trial.

## Conclusion

[129] In my respectful view, the trial judge's *Vetrovec* instruction in relation to George, Jr., and the failure to provide a *Vetrovec* warning in relation to George, Sr. and Mary Ann, constituted errors in law.

[130] I would allow the grounds of appeal in relation to the *Vetrovec* warning issues.

**Issue #3 – Did the trial judge err in law in her mid-trial instructions and final jury charge by providing an inadequate instruction in relation to George, Jr.'s guilty plea to manslaughter?**

***General Principles***

[131] As the appellant notes, it is settled law that a co-accused's (or accomplice's) guilty plea has no relevance to the ultimate guilt or innocence of the accused.[46] A jury must be given this instruction and told they are not to think that because the co-accused (or accomplice) has pleaded guilty, the accused must be guilty as well.

***The Trial Judge's Mid-Trial and Final Guilty Plea Instructions***

[132] In her mid-trial instruction to the jury on George, Jr.'s guilty plea, the trial judge said:

> Thank you. Good morning, everyone. Before we go on to the next witness this morning, there is an instruction that I want to give you, and that instruction relates to one of the witnesses that you heard from at the end of last week, George Purvis, Jr., and the instruction is as follows.
>
> You have heard George Purvis, Jr. say that he pled guilty to manslaughter in the death of Derek Miles as a party to that offence. I want to explain to you what party to an offence means from a legal perspective.
>
> There is more than one way that a person can be guilty of committing an offence. For example, a person can commit by personally committing the offence, but that is not the only way. There are a number of other ways one can be guilty of an offence even if one does not personally commit the act that constitutes the offence. I will give you some examples.

[46] *R. v. Berry*, 2017 ONCA 17, at para. 35.

> For example, a person can also be guilty of an offence by doing something for the purpose of helping another person commit the offence. Also, a person can be guilty of an offence by actively encouraging someone else to commit the offence.
>
> As another example, a person could be involved in a joint criminal enterprise with others, and if in the course of carrying out that criminal enterprise, one member of the group commits an offence, any other member who knew or should have known that the offence would likely be committed by a group member in carrying out the joint criminal enterprise, would also be guilty of the offence that someone else actually committed.
>
> I am not saying that any of these situations applied in the specific case of George Purvis, Jr.'s involvement in the death of Derek Miles. I am merely explaining to you that there are various ways in which a person can be guilty of an offence even if that person is not the one who directly committed the offence.

[133] In her final charge to the jury, the trial judge referred to George, Jr.'s guilty plea at various points:

> You have heard George Purvis, Jr. say that he was present on January 18, 2018 at Derek Miles' apartment with Derek Miles and Gregory Purvis. He says that Gregory Purvis assaulted Derek Miles alone. George Purvis, Jr. says that he himself did not assault or touch Mr. Miles. George Purvis, Jr. told you that he was originally charged with second degree murder in the death of Mr. Miles along with Gregory Purvis and Murray Timmons, and that he pled guilty to the lesser offence of manslaughter as a party.
>
> …
>
> Sometimes when more than one person have been charged with an offence, one of them may plead guilty to that offence or a related offence, and then testify for the Crown at the other's trial. In this case Gregory Purvis and George Purvis, Jr. were both charged with second degree murder, along with a third man, Murray Timmons, in respect of whom the charge did not proceed. George Purvis, Jr. pled guilty to manslaughter. Gregory Purvis has pleaded not guilty. George Purvis, Jr.'s guilty plea has absolutely no bearing on whether Gregory Purvis is guilty. George Purvis, Jr. may have had any number of reasons for pleading guilty and any number of reasons for testifying against Gregory Purvis.
>
> …
>
> George Purvis, Jr. testified that he did not assault or even touch Derek Miles, and that the injuries on Derek Miles were entirely caused by Gregory Purvis. George Purvis, Jr. was charged with second degree murder, along with Gregory Purvis and Murray Timmons, but pled guilty to manslaughter as a party to that offence You will remember that I gave you an instruction about the expression "party to the offence". It is possible to be guilty of an offence in a variety of ways. George

> Purvis, Jr. says that what he did wrong was in bringing Gregory Purvis to the home of Derek Miles which led to the death of Derek Miles.

[134] The trial judge made references to the jury needing to consider "all of the evidence" in deciding if the Crown had proven causation, one of the essential elements of the offence of second degree murder—had the appellant caused or contributed significantly to Derek Miles' death? After the instructions I have excerpted above, the trial judge concluded her review of the evidence by saying: "That completes my review of the evidence which you might find significant in answering that first question, that is did Gregory Purvis cause or contribute significantly to the death of Derek Miles?"

***Arguments on Appeal***

[135] In his factum, the appellant explains his complaints about the trial judge's jury instructions in relation to George, Jr.'s guilty plea:

> 74. Crown evidence respecting the guilty plea of George, Jr. to the lesser offence of manslaughter required a sharp and clear warning from the trial judge respecting both the permitted and prohibited uses that the jury could make of that evidence. It is submitted that not only did the trial judge's instruction fail to provide an adequate warning, but her subsequent charge actually invited the jury to consider the guilty plea as evidence against the Appellant.
>
> …
>
> 80. It is submitted that the trial judge's failure to adequately warn the jury of the prohibited use of the guilty plea, combined with her suggestion that the guilty plea of George, Jr. could be used as evidence to find the Appellant guilty of committing the offence constitutes a significant error in law that deprived the Appellant of a fair trial.

[136] The appellant's reference to the trial judge's "invitation" is a criticism of her generic instruction for the jury to consider all the evidence she had reviewed, a review that included several repetitions of George, Jr.'s guilty plea to manslaughter "as a party".

[137] The respondent submits the trial judge made no errors in her instructions that included references to George, Jr.'s guilty plea. He says the trial judge made a factual reference only to the guilty plea in her review of the trial evidence and had given the appropriate instruction to the jury that it could not be used to prove the appellant's guilt. The respondent says the trial judge's instructions would have left

the jury in no doubt that George, Jr.'s testimony was to be approached with caution, and that his guilty plea to manslaughter had no bearing on the appellant's guilt or innocence.

***Principles Applied***

[138] I have already discussed the shortcomings of the trial judge's *Vetrovec* warning in relation to George, Jr.'s testimony. The jury was not adequately equipped to assess George, Jr.'s credibility and the trial judge's instruction on his guilty plea compounded the problem. The instructions also have to be reviewed in in the context of the Crown's jury address. I will deal with that first.

[139] The Crown's jury address on the issue of George, Jr.'s credibility and his guilty plea should have been the subject of a clear, sharp instruction from the trial judge. Characterizing George, Jr. as "a very credible witness" whose evidence had "a ring of truth", Crown counsel went on to say:

> …**George's story has been the same from the beginning. During cross-examination Defence was unable to identify a single material inconsistency between what he said before during his police statement when he testified previously at a preliminary inquiry, and what he said to an undercover police officer. George has been unequivocal from the beginning.** He did not touch Derek during this incident. It was Greg alone who violently stomped Derek in the apartment that night. George clearly didn't want to testify in this trial. He has a dislike for the police. He readily said that by him testifying in this trial he himself is a rat. He understands the potential personal consequences of that choice, and he came to court and he told the truth. His motivation for testifying, he's under subpoena, and he wants to provide Derek's family with closure. George pled guilty to manslaughter within months of being charged. He accepted the responsibility for his role in this matter , which is a party by bringing his Uncle Greg to Derek's apartment. For his role he went to the penitentiary. In his words, I did my years for what I did, I owned up to what I did. He says I loved my uncle at the time. Why would I come in here and lie about Greg doing this? If I did it I'd be sitting inside, I would've owned up to it. I have nothing to hide, not a damn thing…
>
> [emphasis added]

[140] Crown counsel invited the jury to assess George, Jr.'s credibility on the prohibited basis that he had previously said the same thing, that the appellant alone had inflicted the fatal beating on Derek Miles. The trial judge did not instruct the jury that a witness' prior consistent statements cannot be used to find the witness

has, in repeating the same version in his evidence, testified truthfully. The inference that a witness' testimony is more likely to be true because it has been repeated more than once is prohibited.[47] Put another way: "Telling the same lie twice does not make it true".[48]

[141] The trial judge also did not instruct the jury they must not think because George, Jr. pleaded guilty to manslaughter, the appellant must also be guilty of homicide.

[142] As I noted above, in her review of George, Jr.'s evidence, the trial judge said the following:

> …George Purvis, Jr. testified that he did not assault or even touch Derek Miles, and that the injuries on Derek Miles were entirely caused by Gregory Purvis. George Purvis, Jr. was charged with second degree murder, along with Gregory Purvis and Murray Timmons, but pled guilty to manslaughter as a party to that offence. You will remember that I gave you an instruction about the expression "party to the offence". It is possible to be guilty of an offence in a variety of ways. George Purvis, Jr. says that what he did wrong was in bringing Gregory Purvis to the home of Derek Miles which led to the death of Derek Miles…

[143] It was some time before this guilty plea reference that the trial judge had told the jury, "George Purvis, Jr.'s guilty plea has absolutely no bearing on whether Gregory Purvis is guilty". The earlier instruction had insufficient resonance in the overall charge.

[144] In the review of George, Jr.'s evidence and her jury instructions overall, the trial judge did not give clear direction that would have left the jury in no doubt about how to factor his guilty plea into their deliberations.

[145] With respect, I do not agree with the respondent that the trial judge's instructions to the jury were free of error and enabled the jury to make proper use of George, Jr.'s guilty plea. Correct and robust instructions were required, especially in light of Crown counsel's final submissions.

## Conclusion

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[47] *R. v. Langan*, 2019 BCCA 467, at para. 42 (aff'd 2020 SCC 33).
[48] *R. v. Angel*, 2019 BCCA 449, at para. 69.

[146] It is my respectful conclusion, the trial judge's instructions to the jury in relation to George, Jr.'s guilty plea to manslaughter were marred by legal error.

[147] I would allow this ground of appeal.

**Issue #4 – Did the trial judge err in law in her final jury charge by failing to properly instruct the jury on the use they could make of the after-the-fact conduct evidence?**

***General Principles***

[148] After-the-fact conduct "encompasses what the accused both said and did"[49] in the aftermath of the offence charged in the Indictment that would permit an inference the person:

> …acted in a manner which, based on human experience and logic, was consistent with the conduct of a guilty person and inconsistent with the conduct of an innocent person.[50]

[149] The Supreme Court of Canada, most recently in *R. v Calnen*[51], and this Court in *R. v. Whynder*[52], have extrapolated the essential principles that apply to after-the fact conduct evidence. The discussion in these cases offers profitable reading on the issue. However I am adopting a narrow focus on the legal principles that are most relevant to this appeal.

[150] In *Calnen*, Martin, J. for the majority of the Court stated:

> [113] In addition to being aware of the general principles, it is important for counsel and trial judges to specifically define the issue, purpose, and use for which such evidence is tendered and to articulate the reasonable and rational inferences which might be drawn from it. This often requires counsel and the court to expressly set out the chain of reasoning that supports the relevance and materiality of such evidence for its intended use. Evidence is to be used only for the particular purpose for which it was admitted. When evidence is admissible for one purpose, but not for another, the finder of fact, whether judge or jury, needs to be mindful of and respectful of its permissible and impermissible uses. In such

[49] *R. v. Calnen*, 2019 SCC 6, at para. 106 [*Calnen*].
[50] *Whynder* note 24 at para. 130.
[51] *Calnen*.
[52] *Whynder* note 24.

> cases, a specific instruction to a jury that certain evidence has a limited use or is of no probative value on a particular issue is required.

[151] *Calnen* directs that jury instructions on after-the-fact conduct must focus on "the intended use of the evidence" and should "expressly state the inferences available to the jury".[53] The dangers associated with after-the-fact conduct cannot be lost sight of as we know such evidence can be:

> …highly ambiguous and susceptible to jury error...the danger exists that a jury may fail to take account of alternative explanations for the accused's behaviour, and may mistakenly leap from such evidence to a conclusion of guilt.[54]

[152] After-the-fact conduct may be relevant to an accused's intent and can be used by a jury "to distinguish between different levels of culpability".[55] The probative value of after-the-fact conduct with respect to the accused's level of culpability "depends entirely on the specific nature of the conduct, its relationship to the record as a whole, and the issues raised at trial".[56] A jury, having heard all the evidence at trial, will determine:

> …how much, if any, weight they will place on [the after-the-fact evidence], how it fits with other evidence, and whether, based on the totality of the evidence, the Crown has proved the charges beyond a reasonable doubt.[57]

### *The Trial Judge's After-the-Fact Conduct Jury Instructions*

[153] In her jury charge, the trial judge gave a lengthy instruction on the after-the-fact conduct evidence represented by the black cloth bag:

> There is some evidence here that falls into the category of what we call "post offence conduct". You will recall that the Crown called evidence from Mary Ann Purvis and George Purvis, Sr. about events that they say happened a day after the events of January 18, 2018. They say that they picked up Gregory Purvis in their truck on Saturday, January 19th or January 20th. They went for a drive. They said that he had a cloth bag in his possession when they picked him up. They said that he asked them to stop the car so that he could urinate at a certain location on

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[53] *Calnen* note 49 at para. 115.
[54] *R. v. White*, [1998] 2 S.C.R. 72, at para. 22.
[55] *Calnen* at para. 119.
[56] *Calnen* at para. 119, citing *R. v. White*, 2011 SCC 13, at para. 42.
[57] *Calnen* at para. 134.

Forest Hills Parkway. They say that the bag was no longer in his possession when he was dropped off at home.

Mary Ann Purvis testified that in May of 2018 she remembered those events, so she went out and looked for the bag and saw the bag in the ditch in the location where Gregory Purvis had gone out to urinate, and she notified police.

…

Evidence about what a person did or said after an offence was committed may help you decide whether it was that person who committed the offence. It may help or it may not. You may find it helpful to approach the evidence of what Gregory Purvis is alleged to have done after January 18, 2018 in two steps.

The first step requires you to decide whether Gregory Purvis actually did what he is alleged to have done at that time. This means you have to assess the evidence from Mary Ann Purvis and George Purvis, Sr. to determine if you accept some, all, or none of their evidence as to this post offence conduct. In other words, to put it most simply, do you accept that Gregory Purvis is the person who discarded that bag on that occasion? In deciding whether Gregory Purvis actually did this, you should use your common sense. Consider the circumstances in which the event allegedly took place. Bear in mind anything else that might make the evidence of Mary Ann Purvis or George Purvis, Sr. more or less reliable.

…

On the other hand, if you do find that Gregory Purvis actually did what he is alleged to have done on that occasion, you must next go on to consider whether what he did was related to the commission of the offence or to something else.

What a person does or says after an offence was committed is a type of circumstantial evidence. Like any circumstantial evidence it is for you to say what inference should be drawn from this evidence. You may use this evidence along with all the other evidence in the case in deciding whether Crown counsel has proven – proven an accused's guilt beyond a reasonable doubt. But because it is circumstantial evidence, you must not infer an accused's guilt from this type of evidence unless when you consider it, together with the rest of the evidence, you are satisfied beyond a reasonable doubt that his guilt is the only reasonable inference that can be drawn from the evidence.

As circumstantial evidence – evidence of after the fact conduct has only an indirect bearing on the issue of an accused's guilt. You must be careful about inferring that an accused is guilty on the basis of evidence of after the fact conduct because there might be other explanations for the conduct, something unconnected with participation in the offences charged.

You may use this evidence of after the fact conduct, along with other evidence to support an inference of guilt only if you have rejected any other explanation for the conduct.

> To decide the reason for what Gregory Purvis did afterwards, you should consider all the evidence. Of particular importance is evidence that offers another reasonable alternative for what he did. You must not use this evidence about what Gregory Purvis did afterwards in deciding or helping you decide that he committed the offence unless you reject any other reasonable alternative for what he did. If you do not or cannot find that what he did afterwards was related to the commission of the offence charged, you must not use this evidence in deciding or in helping you decide that he committed the offence.
>
> On the other hand, if you do find that what he did afterwards was related to the commission of the offence, and not to something else, you may consider this evidence, together with all the other evidence in reaching your verdict.

### *Arguments on Appeal*

[154] The appellant's complaint about the trial judge's jury charge on after-the-fact conduct—the disposal of the black cloth bag—focuses on there being no instruction about the conduct being irrelevant to the issue of his intent, if they accepted he was present when Mr. Miles was beaten.

[155] The respondent says the trial judge properly instructed the jury they could use the conduct "along with other evidence to support an inference of guilt" but only if they had rejected any other explanation for it. In the respondent's submission, the "other evidence" that provided context for the disposal of the bag was the testimony of George, Sr. and Mary Ann that during the same trip, the appellant had made admissions to them about beating Derek Miles. The respondent says those admissions, along with the autopsy evidence of Mr. Miles' catastrophic injuries, support an inference the appellant was guilty of second degree murder. The respondent notes the jury was told they were to consider all the evidence in assessing the after-the-fact conduct evidence:

> ... you must not infer an accused's guilt from this type of evidence unless when you consider it, together with the rest of the evidence, you are satisfied beyond a reasonable doubt that his guilt is the only reasonable inference that can be drawn from the evidence.

[156] The respondent says the jury charge, when viewed in its totality, was sufficient. Later in the trial judge's charge, she discussed the issue of intent, telling the jury they were to acquit the appellant of murder if they were not satisfied he recklessly engaged in conduct he knew was likely to cause Mr. Miles' death. In the

event the jury accepted the appellant played a role in the beating but did not have the requisite intent for murder, the verdict would be manslaughter.

[157] Finally, the respondent says the trial judge's instructions on after-the-event conduct was not limited to the issue of the appellant's intent. The disposal of the black cloth bag containing the appellant's sneakers was relevant to establishing he was present at Derek Miles' apartment.

***Principles Applied***

[158] To convict the appellant of second degree murder, the jury had to be satisfied beyond a reasonable doubt that he had either intended to kill Mr. Miles or had intended to cause bodily harm he knew was likely to cause death and was reckless whether death ensued or not. To be admissible, the after-the-fact conduct the jury heard about from George, Sr. and Mary Ann—the appellant's disposal of the black cloth bag—had to be relevant to the issue of whether the appellant had committed second degree murder. The trial judge's instructions had to equip the jury to properly assess that evidence and determine what weight to give it in determining whether the Crown had proven the requisite intent for murder beyond a reasonable doubt.

[159] The trial judge correctly told the jury their assessment of the after-the-fact conduct required them to first decide whether the appellant had disposed of the bag as claimed by Mary Ann and George, Sr. Other than the omission of a *Vetrovec* warning and no mention of Corporal Skinner's evidence at this juncture in the instructions, she gave the jury some limited guidance on that first step.

[160] The trial judge continued with instructions that lacked specifics. It was insufficient for the trial judge to simply say to the jury that: "Like any circumstantial evidence it is for you to say what inference should be drawn from the evidence".[58] The jury was told they could use the evidence along with all the other trial evidence to decide if the appellant's guilt had been proven beyond a reasonable doubt. The jury was not instructed however on the limitations of the evidence.

[161] The trial judge could have told the jury that if they accepted the evidence about the disposal of the black cloth bag in which the appellant's sneakers were

[58] *Whynder* note 24 at para. 149.

found, they were entitled to determine this evidence was relevant to an inference the appellant had tried to hide a link to his presence at Mr. Miles' fatal beating. It was probative of an inference the appellant knew he had been involved in culpable conduct and was trying to discard evidence that could connect him to the homicide. But otherwise, the disposal of the black cloth bag was irrelevant to the issue of the intent required for murder.

[162] The jury was given no instruction on how the disposal of the bag could be used as evidence to support the necessary intent for second degree murder.

[163] However, greater specificity would have been detrimental to the appellant. The "proper legal treatment of after-the-fact conduct is highly context and fact specific".[59] The other evidence available as context for the jury's assessment of the disposal-of-the-bag evidence was George, Sr. and Mary Ann's testimony about the admissions they said the appellant had made that same night. In her instructions on the after-the-fact conduct, the trial judge did not mention the admissions evidence. She only did so immediately afterwards as she moved on to other issues. (Of course, the jury would have been considering the admissions evidence in any event and, if accepted, it was far more damning than the black cloth bag).

[164] While the disposal of the black cloth bag, on its own, was irrelevant to the issue of the intent required for murder, *Calnen* held the inferences to be drawn from after-the-fact conduct, which can include what an accused has said, must be contextualized. Here, the discarding of the bag, taken with the evidence of the appellant's admissions, if that evidence was accepted by the jury, plus the evidence of the Medical Examiner, could be used to support an inference the appellant committed murder as charged.[60]

[165] Not acknowledged by the appellant is the fact that aspects of the trial judge's charge on after-the-event conduct—the absence of greater specificity in relation to the evidence—were under-inclusive. In discussing the disposal of the black cloth bag, the trial judge focused her remarks on the evidence about how the bag was disposed of and eventually located. She did not tie in what George, Sr. and Mary

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[59] *Calnen* note 49 at para. 106.

[60] A conviction for second degree murder could be reached on the basis that either the appellant intended to cause Mr. Miles' death or intended to cause bodily harm to Mr. Miles he knew was likely to cause death and was reckless whether death ensued or not. The trial judge correctly instructed the jury that although their verdict had to be unanimous, they did not all have to agree guilt had been proven in the same way to find the appellant guilty as charged.

Ann said about the appellant making admissions. The jury was not specifically directed to factor this evidence into their consideration of the black bag evidence. The fact the jury charge may have been under-inclusive to this extent was to the appellant's benefit.

**Conclusion**

[166] In the circumstances, I would not give effect to this ground of appeal.

[167] I conclude with a final observation on the after-the-fact conduct, and the fact the evidence for it came from George, Sr. and Mary Ann. The potential for that evidence to have significant resonance with the jury on the issue of the appellant's intent and therefore culpability for murder underscores the need, as I discussed earlier, for there to have been a *Vetrovec* warning in relation to George, Sr. and Mary Ann.

**Issue #5 – Did the trial judge err in law in her final jury charge by failing to adequately instruct the jury on the required *mens rea* and pathway to a manslaughter conviction under the co-principal theory of liability?**

***General Principles***

[168] The co-principal theory of liability arises in the context of a prosecution for homicide where two (or more) people individually assault a victim who then dies. Which attack caused the victim's death as opposed to the non-lethal injuries, may be unclear. The Ontario Court of Appeal in *R. v. Spackman* explained how the law deals with these circumstances:

> [183] …Legal principle does not require the trier of fact to determine who struck the "fatal blow" for co-principal liability to attach to each participant. Whether this wound or that, or some combination of the two, caused the victim to die is of no concern for co-principal liability, provided both assaults are found to be a "significant contributing cause" of death".[61]
>
> [citations omitted]

[169] And, while in the context of several people acting together pursuant to a common purpose, the blow of one is, in law, the blow of all, a conviction for

[61] 2012 ONCA 905.

murder requires a finding that each party to the attack on the victim had the requisite intent for murder.[62] A party to a homicide may be found guilty of manslaughter even though a co-principal is guilty of murder.[63]

### *The Trial Judge's Instructions on the Theories of Liability*

[170] The jury was left with three possible scenarios for how Derek Miles was killed: (1) the Crown's primary theory—the appellant alone beat him to death; (2) the defence theory—George, Jr. beat him to death; and (3) both the appellant and George, Jr. were involved in beating him to death. This was an alternative theory—the co-principal theory of liability—advanced by the Crown, for the appellant's liability for murder.

[171] The trial judge's instructions referenced the three theories of liability:

> Under our law a person may commit an offence either alone or with others whether the other person or persons are on trial or not. In this particular case the Crown has put to you those two alternatives. The first is that Gregory Purvis kicked and stomped on Derek Miles alone and thereby caused his death. The second, in the alternative, is that Gregory Purvis and George Purvis, Jr. both kicked and stomped on Derek Miles, and that they jointly caused his death.
>
> All of you do not have to agree on one of those alternatives as long as everyone is sure that one of those alternatives has been proved beyond a reasonable doubt. Our law says that where two or more persons engage in an assault on a victim that leads to his death, the Crown does not need to prove which person inflicted the fatal blow or blows. If the blows were delivered by two participants, both of whom participated in a meaningful way, they are both responsible for the consequences.
>
> Now as you know, Gregory Purvis has argued that George Purvis, Jr. alone committed this offence. A person charged with an offence may rely on evidence that shows or tends to show that somebody else, not the person charged, committed the offence. The evidence may be direct, it may be circumstantial, or it may be both. Evidence that shows or tends to show that George Purvis, Jr. committed the offence with which Gregory Purvis is charged, taken together with the rest of the evidence, may cause you to have a reasonable doubt about whether it was Gregory Purvis who committed the offence with which he is charged.

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[62] *R. v. Wakefield*, 2018 ABCA 360 (aff'd 2019 SCC 6).
[63] *R. v. Jackson*, [1993] 4 S.C.R. 573, at para. 43.

[172] The trial judge then proceeded to review the evidence the defence had said supported the inference that George, Jr. had acted alone. She went on to instruct the jury that if the George, Jr.-acting-alone evidence did not raise a doubt about the appellant's culpability for murder they "must still consider whether the rest of the evidence that you accept satisfies you beyond a reasonable doubt that Gregory Purvis committed the offence".

[173] The trial judge next tackled the issue of whether the appellant unlawfully caused or contributed significantly to Mr. Miles' death. She finally focused on the "next and last question":

> The next and last question, number three: Did Gregory Purvis have the state of mind required for murder?
>
> The crime of murder requires proof of a particular state of mind for an unlawful killing to be murder. Crown counsel must prove beyond a reasonable doubt either that the accused person meant to cause the death of the victim, or meant to cause the victim bodily harm that the accused knew was likely to kill the victim and was reckless whether the victim died or not. Crown counsel does not have to prove both. One is enough.
>
> In this particular case the Crown has put forward only the second option for your consideration, so in other words Crown counsel say that in his actions Gregory Purvis meant to cause bodily harm to Derek Miles, that Gregory Purvis knew was so serious and dangerous that it would likely kill Derek Miles, and proceeded despite his knowledge that Derek Miles would likely die as a result of that bodily harm.
>
> To put it another way that Gregory Purvis saw the likelihood that Derek Miles could die from his actions and took the chance anyway.
>
> If Gregory Purvis did not have that state of mind, that is to say if he did not mean to cause Derek Miles bodily harm that he knew was likely to kill Derek Miles and was reckless whether Derek Miles died or not, then Gregory Purvis committed manslaughter.

### *Arguments on Appeal*

[174] In his factum the appellant says the trial judge:

> 88. …failed to adequately explain the law and relate the evidence to the Crown's theory of co-principal liability, which prevented the jury from appreciating the minimal amount of credible and reliable evidence inculpating the Appellant as a co-participant, and the lack of credible and reliable evidence

> inferring that he had the requisite intent for murder. She also did not explain to the jury how the evidence could lead to a conviction for manslaughter in the co-principal pathway to liability proposed by the Crown.

[175] As the appellant notes the Gregory Purvis-acted-alone theory of liability was promoted by the Crown on the basis of the evidence from George, Jr., George, Sr., and Mary Ann. The Crown's alternative theory, that the appellant and George, Jr. acted together to assault Mr. Miles, could only ground the appellant's liability for murder if the jury rejected the collective Purvis evidence.

[176] The appellant says the trial judge in her instructions reviewed the law and evidence in relation to the Crown's primary theory of liability but did not do so for the alternative theory, which, if the jury were to have accepted it, necessarily required them to conclude that George, Jr.'s version of events was a lie. It was a version of events he had sworn under oath was true—at his preliminary inquiry, his sentencing hearing (where he was cross-examined by Crown counsel), and at trial.

[177] As I set out in paragraph 139 of these reasons, Crown counsel's jury address placed great emphasis on George, Jr. as a highly credible witness whose story about the events in Derek Miles' apartment, including that he had not touched Mr. Miles, had remained consistent under oath throughout formal legal proceedings. Yet, under the Crown's co-principal theory of liability, George, Jr. had to have been a perjurer.

[178] The respondent says the co-principal theory of liability advanced at trial was justified on the basis the jury could accept all, some, or none of a witness' testimony, an instruction properly given by the trial judge. If the jury rejected George, Jr.'s evidence that he did not participate in beating Mr. Miles, and, likewise, did not accept the evidence of George, Sr. and Mary Ann, then a co-principal route to liability for the appellant was available to them.

[179] The respondent submits the trial judge's instructions on the issue of co-principal liability were correct. The respondent says that even without the evidence of George, Jr. and his parents, liability could be found on the basis of the appellant's statements during the police interrogation, the admissions made to Henry Rising, and evidence that put him at Mr. Miles' apartment. In the respondent's submission:

> 158. Focusing exclusively on the co-principal path to liability, the Jury would be comfortably able to infer that the beating administered, in part by the Appellant, by his own admission, met the *mens rea* requirement for 2nd degree murder given the location (head and chest) and severity of the injuries (equivalent to a car accident/combined with the evidence of the apartment complex shaking) as described by Dr. Bowes and supported by Samantha Randell. Further, there is nothing to suggest, within his multiple confessions, that the Appellant demonstrated any restraint or reluctance while the beating was being administered (that he was anything other than meaningfully involved), nor did he alert emergency services personnel when, by his own admission, he did not know whether Mr. Miles was still breathing when he left.[64] Finally, the Appellant made his views clear on "Rats" and the consequences for anyone who would engage in such behaviour.

### *Principles Applied*

[180] The trial judge's instructions to the jury did not discuss what evidence supported the appellant's subjective intent for murder in the co-principal "if you don't believe George, Jr." scenario. The jury should have been explicitly told that to convict the appellant of murder on the co-principal theory of liability they had to find George, Jr. had lied about only being involved to the extent of bringing his uncle to Mr. Miles' apartment. There was evidence that Mr. Miles was alive when the appellant and George, Jr. departed. The appellant told the police Mr. Miles was still breathing and he was shocked to learn he had died. Samantha Randell heard a thump from Mr. Miles' apartment which suggested he had not been rendered motionless. This evidence suggested the absence of the requisite intent for murder.

[181] The jury was entitled to have the evidence relevant to the intent issue reviewed for them so they could determine whether it satisfied proof beyond a reasonable doubt that the appellant was guilty as charged or whether it only proved manslaughter. Had the trial judge's instructions focused the jury on what the Crown's co-principal theory of liability meant for the evidence of George, Jr., they may have concluded he had lied to avoid much more serious liability—that it was he who had had the requisite intent, and by pinning the beating on the appellant he could position himself to face the lesser consequences of a manslaughter conviction.

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[64] This suggests a response by the appellant to police questioning during his interrogation that is open to interpretation.

[182] The trial judge had an obligation to provide the jury with instructions that illuminated the co-principal theory of liability for them and reviewed the evidence that applied to the issue of intent in a co-principal scenario.[65] For a finding the appellant was liable for murder as a co-principal, that review had to spotlight George, Jr. and his parents as liars. This was not done.

[183] It is impossible to know what the jury may have decided if they had been properly instructed on the Crown's co-principal theory of liability.

**Conclusion**

[184] I would allow this ground of appeal.

**The *Curative Proviso***

[185] Legal errors committed by a trial judge do not necessarily lead to a conviction being set aside and a new trial ordered. Pursuant to s. 686(1)(b)(iii) of the *Criminal Code*, an appeal court may dismiss the appeal where, despite a finding of legal error, it is of the opinion "that no substantial wrong or miscarriage of justice has occurred". This is known as the "*curative proviso*".

[186] The respondent says the *curative proviso* should apply if this Court finds merit in the appellant's allegations of legal error in relation to: (1) the unredacted assertions of his right to silence in his police interrogation; (2) the lack of *Vetrovec* warnings for George, Sr. and Mary Ann; and (3) the trial judge's jury instructions on after-the-fact conduct.

[187] On the issue of the appellant's right to silence, the respondent says the "overwhelming nature" of all the other evidence adduced by the Crown "makes the Appellant's statement to the police unnecessary to sustain a guilty verdict".[66] The respondent says in light of other evidence and what the appellant did ultimately say to police, he suffered no prejudice by the jury hearing him exercise his right to silence.

[188] On the George, Sr. and Mary Ann *Vetrovec* issue, the respondent says the evidence of Henry Rising neutralized any error as he testified the appellant had made admissions to him. In the respondent's submission, the evidence of George,

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[65] *Whynder* note 24 at para. 81.
[66] Respondent's factum, at para. 30.

Sr. and Mary Ann "could be disregarded completely, and the end result of the trial would have been the same, given the uncontested evidence of Henry Rising".[67]

[189] And finally, in relation to the trial judge's instructions on after-the-fact conduct, the respondent again says any error does not matter given the evidence that proved the appellant's "meaningful" involvement in the attack on Mr. Miles "combined with the severe nature" of his injuries.[68]

[190] The respondent's invocation of the *curative proviso* seeks to pick off legal errors (which, in fairness, the respondent does not concede were made) and ask this Court to find, on other evidence advanced against the appellant, that the verdict would have been the same. In other words, that no miscarriage of justice occurred. In taking this position, the respondent relies heavily throughout on the testimony of Henry Rising about incriminating admissions he said were made by the appellant.

[191] I am not persuaded the *curative proviso* should be applied. The *proviso* imposes a heavy burden on the Crown. The appellant was entitled to a fair trial in which a properly instructed jury assessed the issue of proof beyond a reasonable doubt on the basis of admissible evidence. I find the legal errors cannot be "cured" such that "it is not warranted for the appellate court to set aside the verdict and order a new trial". I am not satisfied the errors were "harmless" nor that there is an "overwhelming" case against the appellant for second degree murder.[69]

[192] The respondent may say now that the appellant's conviction for murder could have been secured solely on the basis of the evidence of Henry Rising and the Medical Examiner, but it took pains at trial to fortify its case with the testimony of George, Jr. and his parents. This jury heard this evidence against a backdrop of potential prejudice as a result of what was in the appellant's police interrogation.

[193] In conclusion, I would not apply the *curative proviso* to any of the legal errors I have identified.

**Issue #6 - Did trial counsel provide ineffective assistance resulting in a miscarriage of justice by failing to:**

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[67] Respondent's factum, at para. 96.
[68] Respondent's factum, at para. 141.
[69] *Abdullahi* note 17 at para. 33.

(b) have the appellant assessed by a psychiatrist/psychologist and call the psychiatrist/psychologist as an expert witness;

(c) advise and/or provide proper legal advice on whether or not the appellant should testify at trial.

***Factual Background***

[194] The appellant's trial lawyer was Jonathan Hughes who represented him on a legal aid certificate. The appellant claims that apart from any acts or omissions that contributed to errors made by the trial judge, Mr. Hughes provided him with ineffective representation that resulted in a miscarriage of justice in two distinct respects. He says Mr. Hughes did not recognize and act on the fact of his having a severe intellectual disability that impaired his ability to understand his right to testify in his own defence. Added to this, the appellant says Mr. Hughes failed to properly explain how he could testify in his own defence but not be a "rat", and that this led to him not giving evidence.

[195] The appellant says had he testified in his own defence, he would have told the jury he was with George, Jr. at Mr. Miles' apartment and did not touch him. As I noted previously, this is essentially what he eventually said to the police. That testimony would have clearly implicated George, Jr. as the killer. As I will explain, it is in this context the appellant says it was a revelation to him that he could testify in his own defence and not be a "rat", a clarification of what constitutes being a "rat" having been provided to him by his lawyer on appeal.

[196] The appellant says after the Crown closed its case, his trial counsel had him sign a Direction Respecting Testimony (DRT) in which he confirmed he was not going to testify in his own defence. He now says he did not understand what he was signing and that it was not explained to him by counsel.

[197] On appeal, the lawyer who represented the appellant in relation to the issue of ineffective assistance of trial counsel was Robert Tibbo. Mr. Mahoney alone had been representing the appellant, however as the appeal hearing approached, a conflict developed. The appellant's trial lawyer, Mr. Hughes, took a position with Nova Scotia Legal Aid (NSLA) where Mr. Mahoney is a senior staff lawyer. To avoid Mr. Mahoney, being placed in a conflict—presenting arguments that his now-colleague had been ineffective—NSLA enabled the appellant to retain

independent counsel—Mr. Tibbo—who argued the ineffective assistance of counsel issues on appeal. Mr. Mahoney dealt with all the other grounds of appeal.

***Ineffective Assistance of Counsel at Trial – Appellate Standard of Review***

[198] In *R. v. West*, this Court held that:

> [268] …Absent a miscarriage of justice, the question of counsel's competence is a matter of professional ethics and is not normally something to be considered by the courts. Incompetence is measured by applying a reasonableness standard. There is a strong presumption that counsel's conduct falls within a wide range of reasonable, professional assistance. There is a heavy burden upon the appellant to show that counsel's acts or omissions did not meet a standard of reasonable, professional judgment…[70]

[199] A two-step approach is used to assess trial counsel's competence: first, the appellant must demonstrate the acts or omissions amounted to incompetence; and second, that the incompetence resulted in a miscarriage of justice.[71]

[200] As the following explains, I do not find trial counsel to have been incompetent in relation to either (1) the appellant's claim of a severe intellectual disability, and (2) his decision not to testify.

***The Fresh Evidence***

[201] The appellant's motion to adduce fresh evidence on appeal attached: the appellant's affidavit sworn on December 7, 2023; a psychological report by Dr. Douglas Silverman, a registered clinical psychologist, dated November 25, 2023; the appellant's school records for the period of 1979 and 1980 indicating he was "academically slow"; invoices submitted to Nova Scotia Legal Aid (NSLA) by Mr. Hughes; and a copy of Mr. Hughes' file for the period during which he represented the appellant, March 2018 to July 2021.

[202] The respondent Crown filed three affidavits in response to the proposed fresh evidence: the affidavits of Jonathan Hughes, affirmed on July 27, 2023 and January 3, 2024; and the January 12, 2024 affidavit of Dr. Joanna Kayfitz, a registered clinical psychologist with a sub-speciality in forensic psychology.

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[70] 2010 NSCA 16 [*West*].
[71] *West* at para. 269.

[203] The appellant's fresh evidence motion proceeded with cross-examination of the appellant and Dr. Silverman by the respondent, and Mr. Hughes and Dr. Kayfitz by Mr. Tibbo. As I will explain, I am not satisfied the appellant has an intellectual disability. He likely has some literacy and vocabulary deficits but I do not find they would have impacted on his ability to understand legal advice and exercise an independent choice not to testify at his trial.

*The Criteria for the Admission of Fresh Evidence in relation to Allegations of Ineffective Assistance of Counsel*

[204] We consider the fresh evidence proffered in relation to ineffective assistance of counsel claims under the test articulated by this Court in *R. v. Wolkins*.[72] As *Wolkins* explains, in this context, the *Palmer* test does not apply, for obvious reasons:

> [58] Fresh evidence tends to be of two main types: first, evidence directed to an issue decided at trial; and second, **evidence directed to other matters that go to the regularity of the process or to a request for an original remedy in the appellate court. The legal rules differ somewhat according to the type of fresh evidence to be adduced…**
>
> [59] Fresh evidence on appeal which is directed to issues decided at trial generally must meet the so-called *Palmer* test. A key component of that test requires that the proposed fresh evidence could not have been available with due diligence at trial: *R. v. Palmer*, [1980] 1 S.C.R. 759 at 775. This rule makes it clear that the place for the parties to present their evidence is the trial. If evidence that with due diligence could have been called at trial were admitted routinely on appeal, finality would be lost and there would be less incentive on the parties to put forward their best case at trial. The rule requiring due diligence at trial is therefore important because it helps to ensure finality and order, two features which are essential to the integrity of the criminal process:
>
> [citations omitted]
>
> …
>
> [61] The other category of fresh evidence concerns evidence directed to the validity of the trial process itself or to obtaining an original remedy in the appellate court. **In these sorts of cases, the *Palmer* test cannot be applied and**

[72] 2005 NSCA 2 at para. 61 [*Wolkins*].

> **the admissibility of the evidence depends on the nature of the issue raised**…Where the appellant alleges that his trial counsel was incompetent, the fresh evidence will be received where it shows that counsel's conduct fell below the standard of reasonable professional judgment and a miscarriage of justice resulted:
>
> [citations omitted] [emphasis added]

[205] In the appellant's case, the proffered fresh evidence relate to trial counsel's representation of him at trial. As held in *Wolkins*, this evidence is not directed to "an issue resolved at trial and the *Palmer* due diligence requirements do not apply to it".[73] Its admissibility hinges on whether it shows that trial counsel's representation led to a miscarriage of justice.

[206] In *R. v. West*, this Court explained that the issue of whether trial counsel provided ineffective assistance will not always be discernible from the trial record. This is such a case, where the allegations concern off-the-record interactions between the appellant and Mr. Hughes. Accordingly, "…fresh evidence on appeal may be necessary to enable the parties and appeal court to grapple with the issue".[74] The fresh evidence is admitted on this limited basis: to address the allegations by the appellant which I will now discuss.

### *The Ineffective Assistance of Counsel Claims*

[207] There are three major themes in the appellant's claim of ineffective assistance of counsel by his trial counsel: (1) Mr. Hughes gave inadequate attention to his responsibilities in the case, a failure that included not meeting with and talking to the appellant frequently enough; (2) Mr. Hughes did not provide effective advice on the issue of the appellant testifying; and (3) Mr. Hughes failed to recognize and address the appellant's intellectual and literacy limitations.

[208] The ineffective assistance of counsel claims I will now address, with reference to the fresh evidence relate to: (1) the assertion on the appellant's behalf that he has a severe intellectual disability; and (2) his decision not to testify.

#### *The Diagnosis of Severe Intellectual Developmental Disability*

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[73] at para. 63.
[74] *West* note 70 at para. 58.

[209] The assertion that the appellant has a severe intellectual disability emerged from the diagnosis provided by Dr. Silverman. Dr. Silverman conducted testing of the appellant virtually as the appellant was incarcerated at Atlantic Institution (Renous), a maximum security penitentiary in New Brunswick. On the basis of his assessment, Dr. Silverman diagnosed the appellant as having an "Intellectual Developmental Disorder – Severe". He concluded in his report that:

> Mr. Purvis does not have the cognitive capacity to understand the "Direction Respecting Testifying" document as it contained words and phrases that would require cognitive and verbal understanding beyond a 10-year-old's ability. Mr. Purvis demonstrated Extremely Low (formally [*sic*] known as Mentally Retarded) cognitive abilities across all assessed domains, regardless of the method of assessment.

[210] The appellant has also argued that Dr. Silverman's psychological evaluation "has found the results suggest [he] lacked cognitive capacity to have foresight into his actions and being able to understand the consequences of his actions, then he would not have the requisite *mens rea* to be convicted".[75]

[211] I want to briefly comment on the *mens rea* argument. It would only apply if the appellant was involved in beating Derek Miles. It is inconsistent with the appellant's principal argument that had he understood better the option of testifying in his own defence he would have said he did not beat Mr. Miles. As I noted earlier, this is what he said in his police interrogation. I also note the respondent's observation that nothing in Dr. Silverman's report discusses whether the appellant "possessed or didn't possess, the requisite 'limited cognitive capacity' to be convicted of the specific offence charged".[76]

[212] There is no basis for an examination of the tangentially-raised *mens rea* submission. I intend only to address the issue of the appellant's cognitive capacity to process the question of whether he should testify.

[213] As the following reasons explain, I do not accept Dr. Silverman's opinion the appellant has a Severe Intellectual Developmental Disorder (Severe IDD).

[214] I will explain the basis for my conclusions after first providing some detail about the fresh evidence.

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[75] Appellant's supplemental factum, at para. 38.
[76] Respondent's supplemental factum, at para. 38.

[215] The appellant's affidavit of December 7, 2023 lays out his allegations about the ineffective assistance of his counsel at trial. In short, he claims:

- He had limited contact with Mr. Hughes, on the telephone and in person, leading up to the trial.
- Even during the trial, he had few discussions with Mr. Hughes, who never told him what he thought about the strength of the prosecution case and the evidence of the prosecution witnesses.
- Mr. Hughes did not provide advice about whether he should testify on his own behalf at trial and did not explain the risks and benefits of testifying.
- He only said to Mr. Hughes that he did not want to be a "rat" and did not want to testify.
- Mr. Hughes never explained to him what being a "rat" meant. He did not tell him that "I would not be a rat if I testified on the stand in my own defence". The appellant says it was Mr. Tibbo who told him that testifying in his own defence did not amount to being a "rat".
- Mr. Hughes never explained to him that if Henry Rising testified it would significantly increase the chances of conviction. Mr. Hughes did not tell him he should testify in his own defence to counter Mr. Rising's evidence.
- Mr. Hughes had him sign a Direction Respecting Testimony (DRT) without the appellant understanding what it mean "except I was signing it not to testify".

[216] Mr. Hughes refutes the appellant's allegations of ineffective assistance. In his affidavit of July 27, 2023, he says:

- The appellant advised him at their first substantive meeting, "and consistently throughout" his involvement, "that he would not be willing to testify in his own defence, as he did not want to be labelled as a 'rat' ".
- He met with and maintained regular contact with the appellant.

- Based on his initial review of the disclosure, he formed the view that the evidence to be countered in defending the appellant was that of Mr. Rising and the Purvises.

- He indicated throughout his discussions with the appellant that Mr. Rising testifying as a prosecution witness would significantly increase the potential for a conviction. The appellant "confirmed he understood but reaffirmed his resolve not to testify".

- He assessed the appellant as having "a clear recollection of relevant events", however he was adamant about not testifying about them so as not to be a "rat".

- The appellant was completely unwilling to testify even once it became clear Mr. Rising would testify at trial as a prosecution witness and had refused to provide a statement to the private investigator retained by Mr. Hughes.

- The appellant maintained his refusal to testify, providing final instructions in this regard after the close of the prosecution case. The appellant signed the Direction Respecting Testifying confirming his decision not to testify.

[217] In his affidavit of January 3, 2024, Mr. Hughes elaborated on the extent of his contact with the appellant. He also addressed the appellant's claim of a severe intellectual impairment. He said:

- The appellant never raised or exhibited any issues relating to his literacy. Nor did he indicate any challenges due to a mental disability, a learning disability, and did not express having any reading or comprehension limitations in relation to "the legal documents, theories and procedures we frequently discussed".

- None of the appellant's family members with whom Mr. Hughes spoke indicated he had a mental disability.

- The appellant was "highly active in the review and discussion of the disclosure, potential challenges to the Crown's case" and in relation to issues he was having of a disciplinary nature in the correctional facility.

- Mr. Hughes' conducted his discussions with the appellant using plain language, "rather than technical legal jargon". At no point did Mr. Hughes observe any indication the appellant was not understanding his opinion on the strength of the prosecution case and the importance of the appellant's testimony, particularly in relation to Henry Rising. "To the contrary, I had several discussions with Mr. Purvis where his engagement on this topic indicated to me that he clearly understood my opinion and that he was proceeding contrary to it. Mr. Purvis was firmly fixed in his position that he was not willing to testify at every point of my involvement".

- The appellant indicated no confusion in relation to the written Direction Respecting Testifying. Mr. Hughes reiterated his advice that the appellant "likely needed to testify in light of Mr. Rising's evidence or he would likely be convicted…".

[218] My rejection of Dr. Silverman's diagnosis is grounded in the following evidence:

- Frailties in Dr. Silverman's methodology for assessing the appellant;

- The appellant's history;

- The appellant's police interrogation;

- The testimony of the appellant at the appeal on the fresh evidence motion; and

- The evidence of Dr. Kayfitz at the appeal.

[219] I will only review the evidence we heard on the fresh evidence motion to the extent necessary to address the diagnosis issue.

[220] Dr. Silverman testified he was retained only to assess the appellant's ability to understand language and vocabulary. He was not aware the appellant had been convicted of murder and was seeking to have his conviction overturned. He did not know the facts of the case. He had no discussions with correctional officers at Renous where the appellant was incarcerated and did not know his work history or have any information about his criminal record.

[221] In the appellant's Supplemental Factum (on the ineffective assistance of counsel issue) Mr. Tibbo included an excerpt from "Representing Mentally Disabled Persons in the Criminal Justice System: A Guide for Practitioners 2017 Edition, Alberta Civil Liberties Research Centre, Chapter 3". The Guide lists the following as potential difficulties a client with a mental disability may exhibit: reciprocal communication; inability to understand the adversarial process and the roles of the different parties; memory problems; and problems expressing themselves.

[222] Dr. Silverman was not provided with the appellant's police interrogation to consider in his psychological evaluation. This was crucial evidence of the appellant's ability to: engage effectively in reciprocal communication; understand questions and respond appropriately to them; and understand who he was dealing with and the jeopardy he was facing. In the police interrogation, the appellant showed no memory deficits, no difficulty engaging in a dynamic exchange with the police officers, and no communication deficits.

[223] Dr. Silverman was cross-examined by the respondent. Asked to describe the characteristics of a person with an Intellectual Developmental Disorder-Severe, Dr. Silverman said the individual would have severe impairments in language and the practical aspects of daily living. They would show communication difficulties, struggle to follow conversations and respond to questions. They would have difficulty following instructions and communicating what they had heard. Dr. Silverman said he would not be surprised if, through the use of adaptive strategies, they were able to hold down a full-time job.

[224] The police interrogation is evidence the appellant did not show any of the challenges experienced by a person with a mental disability. That was also clear from the appellant's responses in cross-examination before us and his clear ability to understand the questions put to him and provide coherent, responsive answers.

[225] The respondent's response to the fresh evidence motion included the appellant's JEIN report documenting his convictions and sentences and all orders imposed. There were no assessments under s. 672.11 of the *Criminal Code* for NCR-MD[77] or fitness ordered for the appellant in the course of his court proceedings (1986-2021). This is evidence there was nothing to indicate the appellant was having cognitive or mental disorder issues. The appellant indicated

[77] Not criminally responsible due to mental disorder.

in cross-examination that his murder trial was the first time he went to trial: on all the previous occasions he pleaded guilty. There is nothing to suggest any concerns were raised about him doing so.

[226] Staying with the issue of Dr. Silverman's diagnosis, the evidence indicates the appellant was gainfully employed in various capacities during his life. A pre-sentence report ordered for the appellant's parole ineligibility hearing noted the appellant was described as a good worker. In his testimony on the fresh evidence motion, the appellant told us he did landscaping, snow-removal and small demolition work with his nephew[78] for two years and had taken a two-day course, with written exams, to obtain a licence to operate heavy machinery. The appellant received help from the instructors for reading and spelling aspects of the heavy machinery exams. He also completed a First Aid course.

[227] With his heavy machinery "ticket", the appellant did construction work for Maritime Demolition. He operated backhoes, Bobcats and bulldozers at the job site.

[228] The appellant also testified that, prior to his incarceration for murder, he used the Metro Transit bus system (and taxis) to travel "all over" the Halifax Regional Municipality. He used an "app" on his mobile phone: "After someone showed me one day, I figured it out on my own".

[229] Dr. Kayfitz was present for Dr. Silverman's testimony and had read his report. She was an impressive witness: careful in her answers and authoritative. I will focus on what, for the purposes of these reasons, are the most relevant aspects of her critique of Dr. Silverman's diagnosis.

[230] Dr. Kayfitz noted that Dr. Silverman had not provided a measure of the appellant's adaptive functioning nor any psychosocial history in a biographical interview. The school records obtained by Mr. Tibbo and provided to Dr. Silverman were assessed by Dr. Kayfitz as "a very brief snapshot" of the appellant's struggles in school and at home "where there could be other explanations for why he was in special education".[79]

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[78] A different nephew, not George Purvis, Jr.

[79] In his December 7, 2023 affidavit, the appellant states he was in special education from Grades 7 to 10. (at para. 5)

[231] In Dr. Kayfitz's opinion, overall, there was not enough information to determine that the appellant has an intellectual disability. She testified had she been conducting the assessment, she would have sought out other collateral information, including from the penitentiary where the appellant had been since his conviction.

[232] I accept the critique Dr. Kayfitz provided in her report of Dr. Silverman's assessment. This included:

- No psychosocial background history. Intellectual disability is non-progressive, meaning it does not worsen over time. A severe intellectual disability would have contributed to significant social, behavioural, and academic difficulties and would have been evident early in the appellant's life. A severely intellectually disabled individual would very likely have required support for basic activities of daily living.

- No adaptive functioning assessment to determine functional limitations across multiple environments such as home, school, work and community.

- No assessment for "secondary gain agendas", that is, malingering. The evaluation occurred in a forensic context which could precipitate a motivation to feign or exaggerate symptoms. Dr. Kayfitz says in her report that subjects like the appellant would have had "a strong incentive…to present themselves in a manner that benefits the outcome of their case, thereby necessitating some type of objective evaluation of performance validity". No such evaluation was done by Dr. Silverman.

[233] Dr. Kayfitz's critique of the Severe Intellectual Developmental Disability diagnosis is persuasive. I am amply satisfied by her opinions that:

- A person with Severe IDD would be very difficult, "if not impossible" to test virtually.

- Navigating public transport would not be possible for a person with Severe IDD.

- Maintaining employment as an operator of heavy machinery, having a positive work record, and completing a First Aid course, would not be achievable for a person with Severe IDD.

- Even a person with mild IDD would require some supervision or oversight to maintain employment.

[234] As I noted earlier, I reject the appellant's claim he has a Severe Intellectual Disability Developmental Disorder. I find there is no basis to support the assertion by the appellant that his trial counsel should have noticed an intellectual disability, had him assessed for one, and called the psychiatrist/psychologist assessor as an expert witness at trial. I find there is no credible evidence to support the suggestion the appellant was not intellectually capable of understanding the court process, his jeopardy in relation to the prosecution case, and the information and advice provided by his lawyer.

[235] I find the appellant was capable of understanding, and did understand, the essential content of the Direction Respecting Testifying—that he was signing a document confirming his decision not to testify at his trial. And while I am prepared to accept the appellant may not have understood the word "uncontroverted" in the sentence, "Specifically, you have raised your concerns that if I do not testify, the testimony of Henry Rising will remain uncontroverted", as I will explain in more detail below, the appellant knew the Rising testimony had heightened the risk of conviction.

[236] I make these findings having concluded the evidence on the fresh evidence motion establishes the appellant's trial counsel had sufficient opportunities both during trial preparation and the trial itself to assess his client's ability to participate meaningfully in his defence. I do not have to decide, based on trial counsel's invoices and work file, whether his contact with the appellant represented a gold standard of client contact and engagement.

[237] It is relevant to note that, as elicited from the appellant by respondent counsel in cross-examination on the fresh evidence, he had to have supplied information trial counsel used in his cross-examination of the Crown's witnesses. Before us, the appellant acknowledged some instances of being the source of the information. I do not accept his testimony where he denied it. There is no other reasonable explanation for how Mr. Hughes would have known to put certain questions to witnesses. I am satisfied the appellant was a plugged-in and active participant in his defence.

*What It Means to be a "Rat"*

[238] I now move on to discuss the appellant's claim in this appeal that he misunderstood what it meant to be a "rat", and with the understanding he has now acquired, would have testified in his own defence. In other words, the appellant says had Mr. Hughes supplied him with the correct meaning, he would have exercised his right to testify.

[239] I reject this assertion.

[240] It is relevant to understand, for the purposes of analyzing the appellant's decision not to testify, that he has an extensive history in the criminal justice system. He was not an unsophisticated accused. The trial judge reviewed his criminal record in her decision on parole ineligibility:

> [26] In 2015, Mr. Purvis was convicted of aggravated assault. As a result of a verbal altercation, Mr. Purvis stabbed the victim to the neck requiring 15 sutures. Mr. Purvis was sentenced to two years custody.
>
> [27] In 2011, a conviction for assault. Mr. Purvis choked a common law partner during an argument. He was sentenced to six months conditional sentence and 12 months probation.
>
> [28] In 2000, another conviction for aggravated assault. There was a physical altercation between Mr. Purvis and the victim consisting of punches to each other. As the victim was leaving, Mr. Purvis pursued him and stabbed him in the back, requiring significant surgical intervention. This resulted in a sentence of five years in custody.
>
> [29] In 1996, another conviction for aggravated assault. Mr. Purvis and the victim were using drugs. An altercation ensued, involving some pushing. Mr. Purvis produced a knife and stabbed the victim in the chest and back, again requiring surgical repair. This resulted in a three year custodial sentence.
>
> [30] In 1993, Mr. Purvis was convicted of possession of a weapon, i.e., a knife. Mr. Purvis got into a dispute with a staff member at the bar and produced a knife at which time the police arrived. Mr. Purvis was sentenced to a $1000 fine and one year probation.[80]

[241] The point of documenting this history is to note that, when represented by Mr. Hughes for his second-degree murder trial, the appellant was no stranger to the criminal process. As I will discuss below, the fact that his murder trial was the first time he had gone to trial had no impact on his understanding of what it means to be a "rat".

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[80] *R. v. Purvis*, 2021 NSSC 241.

[242] The appellant has not said he had any desire, plan or intention to testify. His consistent position—before and during his trial, and before us—has been one of resistance to the idea. He first expressed an unwillingness to give his version of events during his police interrogation. As stated in his December 7, 2023 affidavit, he told Mr. Hughes he did not want to testify. He said the same thing when cross-examined before us. He recalled in cross-examination that his chance to testify came after the Crown closed its case. He went on to say: "I didn't feel like testifying. I didn't want to get on the stand and testify and be called a rat".

[243] The appellant also told us in cross-examination that his trial counsel's concerns about Henry Rising "rings a bell" and that Mr. Hughes had told him he had retained a private investigator to go and speak to Mr. Rising. Although he claimed before us he was "surprised" when Mr. Hughes indicated to the trial judge no defence evidence would be called, he acknowledged never expressing this to him.

[244] I simply do not accept the appellant did not testify because he had an incorrect understanding of what constitutes being a "rat". As I detail below, the evidence on appeal establishes unequivocally that the appellant has always known testifying about someone else's involvement, indeed, even discussing their involvement with police, are the actions of a "rat".

[245] The appellant was resolute in his assertions to the police investigators during his interrogation that he was not going to talk to them. He emphasized he was:

> …not a rat. Don't ever … ever recall anybody ever calling me a rat…I'm not a rat, period. I'm as solid as you come right here".

[246] He went on to say he had:

> Never, ever ratted on anybody in my life… I'll never, ever rat on anybody else in my life.

[247] It is apparent from the appellant's statements in his police interrogation that he understood being a "rat" was a profoundly dishonourable role that marked a person permanently. "…when people rat on people, it just travels…It goes wherever you go". Even when invited to tell his story, he declined because it would involve talking about someone else's role:

> **D/Cst. Dooks-Fahie**: …I guess I just didn't think, Greg, that you were the person who would sit back and allow other people to tell your story. That's what it comes down to.
>
> **Gregory Purvis**: Let them tell the story. You know what I mean? Everybody tells a story about somebody else all the time. You know what I mean?
>
> **D/Cst. Dooks-Fahie**: Sort of.
>
> **Gregory Purvis**: That's how the rats getting stuff…gets in there. You know what I mean? That's why we call these people R-A-Ts. You know what I mean? And stuff, eh? Telling people…other people's stories.

[248] The appellant made it crystal clear repeatedly during the police interrogation he was following his lawyer's advice not to say anything. He was told by D/Cst. Dooks-Fahie that talking about his involvement did not make him a "rat": "That doesn't mean you're telling on other people". What D/Cst. Dooks-Fahie proposed as the definition of a "rat" had no effect on the appellant's resolve. He didn't buy it, saying: "I'm not saying nothing".

[249] D/Cst. Dooks-Fahie appreciated the appellant had a well-developed understanding of what it meant to be a "rat". As she told him:

> …So, I get your world, and I get in whatever world, that being a rat is pretty much the worst thing…I would say…And I get what you say. Like, you probably grew up with that, like ingrained if…is what I feel. And you're saying it causes a paper trail no matter where you go. So, if you go to jail or whatever, everyone's going to know you're a rat. I get that. I understand that a hundred percent.

[250] D/Cst. Dooks-Fahie understood correctly the appellant had a firm grasp of what was involved in being a "rat". It is not possible to accept that the appellant, with the criminal record he had acquired, which included significant federal incarceration, did not know that talking about another person's involvement in a crime qualified as "ratting". Indeed, the appellant made his understanding known in the following exchange during the police interrogation:

> **D/Cst. Dooks-Fahie:** …and I know you have such hate for that word – rat – but telling your part of the story does not make you a rat….there's two more people.[81] So it's not implicating one person over another, right?
>
> **Gregory Purvis:** It's ratting back and forth. You know what I mean?

[81] D/Cst. Dooks-Fahie was referring here to George Purvis, Jr. and Murray Timmons.

> **D/Cst. Dooks-Fahie:** But you're not.
>
> **Gregory Purvis:** If I give a statement, anybody gives a statement, right? On anything, right?

[251] I excerpt below the appellant's further elaboration of what constitutes being a "rat". Including interjections by D/Cst. Dooks-Fahie is unnecessary.

> And a statement on somebody…say I get out of here and boom, I seen you do this or somebody do this…come up and give a statement. It doesn't matter if you sign the statement on it…Hey, the bottom of it. But your name is still on it…Listen, your name is still on that, my dear, and you're whatever you're telling the officers or whatever. That's still on there. That still classes you a R-T…a rat, right? You know what I mean?

[252] Later in the appellant's police interrogation, D/Cst. Wagg takes over the questioning and plays a portion of George Jr.'s police statement in which he alleges the appellant administered the lethal beating of Mr. Miles. The appellant characterizes this as the work of "rats. They're scumbags". He goes on to explain what he means: "Trying to put it on somebody. You know what I mean?"

[253] The appellant subsequently tells D/Cst. Wagg:

> …whatever you do, you're down with the people, if you go down, you go down. You go down, take the heat. Don't put it on nobody else. You know what I mean?

[254] The appellant was invited by the police officers to tell them about his involvement in what happened at Derek Miles' apartment. They had a statement from George Jr. putting the appellant there. They played part of the statement for the appellant. Despite their concerted efforts to have the appellant accept that if he simply described events from his perspective he would not be a "rat", the appellant firmly resisted. He explained in explicit terms that talking about what someone else had done was "ratting". And providing his version of events necessarily would involve talking about George Jr. Even in the face of George, Jr.'s statement to police, the appellant steadfastly refused to say anything about any role George, Jr. may have played in Mr. Miles' apartment. There can be no doubt the appellant knew if he talked about George, Jr., he would be taking on the role of a "rat".

[255] I do not accept that the appellant at any time harboured a misunderstanding of what was involved in being a "rat". I find without reservation that his

understanding of what would make him a "rat" influenced his decision not to testify.

[256] The appellant has claimed before us that Mr. Hughes failed to explain to him,

> …what a rat was. He never told me that as the person charged, I would not be a rat if I testified on the stand in my own defence.[82]

[257] As I have explained, the appellant did not need an explanation of what qualifies a person as a "rat". It is apparent the appellant knew all along what being a "rat" involves. I reject his claim that he learned the true meaning of "rat" from Mr. Tibbo, as suggested in his affidavit of December 7, 2023:

> My appeal lawyer, Mr. Tibbo, explained to me that being a witness to defend myself at trial is not the same as me being a prosecution witness to tell on someone. I did not understand this until Mr. Tibbo explained it to me. He explained that I was not a prosecution witness. He said my testimony was not to maybe put any prosecution witnesses into prison, but for me to defend myself, which he explained to me was not being a rat.

[258] We do not have what would be regarded as conventional expert evidence on the meaning of "rat". Expert evidence is unnecessary: the meaning of "rat" in the criminal subculture is indisputable and notorious. I am satisfied the appellant had a long-standing and correct understanding of the term. With respect, I find it is Mr. Tibbo, not the appellant, who has a misunderstanding of what constitutes being a "rat".

[259] As the respondent notes, for the appellant to testify in his own defence he would have had to be prepared to be a "rat" just as George Jr. admitted he was by telling police the appellant was the perpetrator.[83] The appellant would have been testifying that he was not the perpetrator, George Jr. was. The appellant knew that would have made him a "rat".

[260] I find the appellant made an independent and informed choice not to testify in his own defence. Whatever the possible benefits, he calculated correctly it

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[82] Appellant's affidavit of December 7, 2023, at para. 7(4).

[83] George Purvis, Jr. was asked when giving his statement to police what being a "rat" meant to him. He responded by saying "this", meaning talking to police and fingering the appellant as the perpetrator. In his direct examination at trial, George Jr. was asked: "What is a rat"? and responded: "What I'm doing right now" (AB III, pp. 943-944).

would require him to “rat” on George Jr., something he was resolutely against doing and had never done. For the appellant, the risk of conviction was outweighed by the unacceptable status of being a “rat”. There is no basis for finding trial counsel had any role to play in the appellant’s decision not to testify beyond advising him of the options.

**Conclusion**

[261] The fresh evidence is admitted for the limited purpose of assessing the appellant’s ineffective assistance of counsel allegations. However it does not establish trial counsel was ineffective. I find there is no basis for the claim that trial counsel provided ineffective assistance to the appellant, causing him prejudice by (1) failing to advance evidence of a Severe Intellectual Development Disability, and (2) failing to equip him with a definition of “rat” that would have enabled him to testify in his own defence. The appellant has not made out any miscarriage of justice.

[262] I would dismiss the ineffective assistance of counsel ground of appeal.

**Disposition**

[263] In my respectful view, the trial judge committed reversible errors of law. I would allow the appeal on the grounds I have indicated and order a new trial on the charge of second degree murder.

Derrick, J.A.

Concurred in:

Farrar, J.A.

Beaton, J.A.