SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. W.F.*, 2023 NSSC 275

Date: 20201202
Docket: Halifax, No. 490540
Registry: Halifax

Between:

His Majesty The King

v.

W.F.

DECISION ON VOLUNTARINESS

Restriction on Publication: s.486.4, s.486.5, s.517(1), and s.539(1)

Judge:	The Honourable Justice John P. Bodurtha
Heard:	October 19 and 21, 2020, in Halifax, Nova Scotia
Oral Decision:	December 2, 2020
Written Decision:	August 31, 2023
Counsel:	William Mathers and Tiffany Thorne, Crown Counsel Laura McCarthy, Defence Counsel

By the Court (Orally):

Overview

[1] During the proceedings in court, W.F. has expressed a preference of being addressed by first and last name. For the purposes of this decision and, in keeping with the publication bans in place, I will use initials only and gender-neutral pronouns throughout.

[2] On February 14, 2018 Constables Jarrell Smith and Steve Rideout attended at the Nova Scotia Community College campus in Halifax, where W.F. was a student, and arrested W.F. for sexual assault and sexual interference.

[3] Following the arrest, W.F. was transported to the Halifax Police Headquarters where the Constables obtained a video-recorded statement from W.F. At the outset of the statement W.F. was provided with the police caution and also advised of their right to counsel.

[4] On January 22, 2020, the first voluntariness *voir dire* was before Justice Arnold. W.F. was represented by counsel, Laura McCarthy ("McCarthy"). At the outset of the hearing and before any evidence was called both W.F. and their counsel, admitted the voluntariness of the statement and waived the need for a *voir dire*.

[5] W.F. is no longer represented by counsel and wishes to challenge the voluntariness of their statement by first withdrawing the admission made before Justice Arnold on January 22, 2020.

Preliminary Issue

[6] A preliminary issue regarding the waiver of solicitor-client privilege needed to be addressed. W.F. expressly wanted to waive solicitor-client privilege. The ramifications of doing this were discussed with W.F. and they expressly stated they wanted to waive the privilege. Waiver of solicitor-client privilege was discussed in *R. v. Marriott*, 2013 NSCA 12, where the Nova Scotia Court of Appeal stated:

> 31 Mr. Marriott denies that he has waived solicitor client privilege. His position is that the Crown is not entitled to speak to Mr. Burke, or have Mr. Burke testify as to any of the events that culminated in the joint submission.

> 32 I respectfully disagree. Clearly there is no express waiver of solicitor client privilege. But Mr. Marriott seeks to repudiate a joint submission based on his allegations of what transpired between Mr. Marriott and Mr. Burke. The maintenance of solicitor client privilege would mean that Mr. Marriott's own evidence would monopolize any fact-finding on these allegations. In my view, Mr. Marriott's position on the appeal impliedly waives solicitor client privilege to the limited extent that is necessary to allow the Crown to explore and this Court, if Mr. Burke's evidence is offered, to make reliable findings, respecting those pivotal facts that Mr. Marriott has placed in issue.

[7] Similarly W.F. wishes to repudiate McCarthy's admission on their behalf at the hearing on January 22, 2020, by divulging discussions they had regarding the voluntariness of the statement.

[8] The Court of Appeal continued:

> 34 In *R. v. Hobbs*, 2009 NSCA 90 (N.S. C.A.) the appellant had been convicted of possession and transportation of the proceeds of the commission of an indictable offence, contrary to ss. 353(10 and 462.31(1)(a)) of the *Criminal Code*. He appealed. He said that he had instructed his trial counsel to make an argument, that had not been made. The Court held that Mr. Hobbs had impliedly waived solicitor client privilege respecting that topic. Justice Saunders said:
>
> > [14] A client who puts in issue the advice received from his or her solicitor risks being found to have waived the privilege with respect to those communications.
>
> Justice Saunders (paras 15-20) followed the decisions of appellate courts in *Harich v. Stamp* (1979), 27 O.R. (2d) 395 (Ont. C.A.), paras 6, 21 and 23, *R. v. Read* (1993), 36 B.C.A.C. 64 (B.C. C.A.) and *R. v. Li* (1993), 36 B.C.A.C. 181 (B.C. C.A.), paras 50-51. In the adopted passages from *Harish*[*sic*], Justices Lacourciere and Morden said:
>
> > 6. ... The defendant driver gave evidence about his lawyer's failure to discuss the defence or his lack of comprehension of it. In the circumstances of the plea the defendant had, in my view, effectively waived the solicitor-client privilege which could not be relied upon as a ground to object to this testimony. [Lacourciere, J.A.]
> >
> > 21. In my respectful view, having regard to the evidence which had already been given, the learned trial Judge erred in holding that there has been no waiver of the solicitor-client privilege. Reference may usefully be made to *McCormick on Evidence*, 2nd ed. (1972), p. 194:
> >
> > > Waiver includes, as Wigmore points out, not merely words or conduct expressing an intention to relinquish a known right but

> conduct, such as partial disclosure, which would make it unfair for the client to insist on the privilege thereafter. [Morden, J.A.]

[9] W.F. has put in issue the advice that they received from McCarthy and although they have expressly waived the privilege, I would also have found that W.F. has been deemed to waive solicitor-client privilege.

[10] The deemed waiver is quite clear in this situation. W.F. wants to expressly waive the privilege and I find W.F. has waived it to the limited extent of the admissions relating to the statement and its voluntariness for the hearing on January 22, 2020.

W.F.'s Testimony

[11] W.F. testified if McCarthy had gone over each and every one of the "Crown summary of police inquiries into W.F.'s well-being during the video statement" (the "pinpoint references") W.F. would have gone through with the hearing. W.F. says that the police officer did not ask them 14 times about their medication. W.F.'s position is that never happened.

[12] W.F. and McCarthy discussed the pinpoint references in cells just before their appearance with Justice Arnold. As to the 14 references to the video, W.F. told McCarthy that didn't happen. When asked what was McCarthy's response, W.F. could not remember. When McCarthy said it was voluntary, W.F. took her word for it. When asked what was discussed in cells with McCarthy prior to their court appearance, W.F.'s response was they forgot what they discussed in cells.

[13] W.F. now says, yes, I volunteered the information but I did not know any better until I learned the law, and now know it was not voluntary. W.F. says they were not provided with the actual sheet referring to the pinpoint references until this hearing before me.

[14] When W.F. was asked about the medication and told about the pinpoint references in the transcript of the video it was W.F.'s belief that the voices were dubbed over. W.F. does not recall McCarthy's response to that. The video is an ongoing issue for W.F. W.F. feels that the video needs to be looked at because it has been altered. W.F. believes they told McCarthy that day in the cells about the video being altered. According to W.F, it was probably 15 minutes that W.F. and McCarthy met in the cells that day.

[15] At the hearing before Justice Arnold, McCarthy and W.F. were asked about the voluntariness of the statement as follows:

> **MS. MCCARTHY:** The pinpoint list. So I ... I discussed the implications of that with [W.F.], in terms of [their] application. [W.F.]'s not going to deny that those statements were made on the video application. In reviewing the implications it has overall on voluntariness, [W.F.] has indicated [they] won't be proceeding with the voluntariness application moving forward. So, in that sense, the defence would be conceding that this statement was made voluntarily. [W.F.] understands that that would make the statement eligible to be considered ... or entered ... through this ... through the trial that's scheduled for April, which we'll confirm on ... on the record today as well, that it could be used in the purpose of cross-examination and [W.F.] also understands that it ... it can be considered by this Court as a voluntary statement being made.
>
> **THE COURT:** Okay. So, you're waiving the voluntariness *voir dire* today.
>
> **MS. MCCARTHY:** That's correct.
>
> **THE COURT:** You confirm that?
>
> **W.F.:** Yes.
>
> **THE COURT:** And the understanding is that now what ... with that waived ... the video could be used by the Crown, either on its case in chief ...
>
> **MS. MCCARTHY:** Yes.
>
> **THE COURT:** ... if they wish to enter it on its case in chief, or it could be held back for cross-examination, or it might not be used at all ... up to them how they want to use it ... but now it's ... it's admissible, should the Crown choose to rely on it.
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> **MS. MCCARTHY:** That's ... that's correct.
>
> **THE COURT:** And, [W.F.], you understand that?
>
> **W.F.:** Yeah, that's fine.

[16] W.F. was asked to confirm whether W.F. understood that they were waiving the voluntariness *voir dire* and what that meant by Justice Arnold. W.F. responded yes, multiple times. W.F. did not tell Justice Arnold that the statement was not voluntary, did not mention being released on a promise to appear, or coercion by one of the police officers, and did not tell Justice Arnold that they were denied their medication. W.F. just responded, "Yes". W.F. says this response was based on the knowledge they had and what voluntariness meant to them.

[17] W.F. testified they did not pipe up and say something because it was not their place. They had a lawyer and placed everything in her hands. If McCarthy

did not raise an issue, then it was not an issue. W.F. says they discussed voluntariness with McCarthy but did not get into why W.F.'s statement was voluntary. The conversation revolved around the pinpoint references.

[18] W.F. recalls telling McCarthy when reviewing the pinpoint references that what was in there did not happen, and therefore they must have dubbed the video so there was no point in doing the hearing because the video was altered. When asked whether it was possible that the pinpoint references were discussed during the interview, W.F.'s response was "I don't recall it happening."

[19] W.F. was questioned on the brief filed by McCarthy on January 10, 2020, whereby she addresses various positions on behalf of W.F. at paras. 3-4:

> It is anticipated that the Crown evidence from Cst. Rideout will reveal that [W.F.] was concerned regarding [their] medication and requests [they] [be] made to see a physician.
>
> It is anticipated that [W.F.] will testify regarding [their] type 2 diabetes and [their] prescription of Metformin which [they] w[ere] prescribed to take daily to regulate [their] sugars. [W.F.] was not permitted to take [their] medication causing ill effects to [them] during the very lengthy interview, which spanned from nearly 7 hours from 10:51 to 17:42.

[20] When the Crown suggested that W.F. would have had to have met prior to January 10, 2020, with McCarthy to enable her to put this information in her brief, W.F. couldn't recall the conversation.

[21] W.F. was pressed on cross-examination with respect to the following questions:

> Q. When you testified, for instance, that you discussed the promise issue during the statement, i.e., Jerrell Smith (Constable Jerrell Smith) making you a promise, you testified that you discussed that with Ms. McCarthy. When did you discuss that with her and in what format?
>
> A. No idea.
>
> Q. Okay. When you discussed feeling sick during your statement, with Ms. McCarthy, when did you discuss that with her and in what format?
>
> A. No idea.
>
> Q. When you discussed with Ms. McCarthy the lack of food during your interview, when did you discuss that with her and in what format?

A. I have no idea. It would have all been relatively within, I'm sure, the same. I have no idea.

Q. Okay. And when you discussed with Ms. McCarthy your ... your lack of medication (the effect upon you) during your statement, when did you talk about that with her and in what format?

A. Again, the format, I ... I have no clue.

Q. Okay, when?

A. In between being arrested and the hearing.. All I know, 100 per cent, is what we discussed in the cells on that day.

…

Q. As I understand it, one of the issues you`ve raised, at least in your voluntariness brief with the Court, is that you were extremely concerned on the day of your arrest to get back home because you needed to care for your disabled [common-law partner]. Is that correct?

A. Correct.

Q. And you were extremely ... particularly concerned because it was Valentine`s Day and it was important that you be with your disabled [common-law partner].

A. Correct.

Q. I'm going to suggest to you that you never raised either of those things with Ms. McCarthy.

A. I probably did.

Q. You probably did but you don't recall.

A. I don't recall much of anything.

…

Q. She discussed the video with you?

A. I can't recall.

[22] W.F. has been represented by a number of different counsel. W.F. had the opportunity to read their statement and watch the video prior to the court appearance on January 22, 2020. In fact, W.F. testified they have watched the video.

Laura McCarthy

[23] McCarthy is a practicing lawyer in Nova Scotia doing primarily criminal law. She represented W.F. from 2018 to the Spring of 2020. She had meetings and conversations with W.F. regarding the voluntariness of their statement. Early on

she identified that there was a statement and had some preliminary questions about the statement. She testified that W.F. contacted the office quite regularly and they talked by phone once every week or two.

[24] McCarthy wrote the brief filed on January 10, 2020. She obtained the information for the brief from W.F. They spoke about Type 2 diabetes and voluntariness. They discussed the content and context of the interview. They discussed W.F.'s conversations with the police. McCarthy watched the video but mainly relied on the transcript. She was looking for objective threats or promises in the transcript or video. She discussed with W.F. dropping issues that were not relevant. W.F. was comfortable with their statement because W.F. did nothing wrong. W.F. did not make any admissions.

[25] After reviewing the statement with W.F., McCarthy had no impression that voluntariness was a viable argument. W.F. did not mention their common-law partner and McCarthy does not recall W.F. saying one of the reasons they provided the statement was because it was Valentine's Day and they had to get back to their common-law partner.

[26] McCarthy did go down and speak with W.F. the morning of the hearing. She addressed some of the pinpoint references in Appendix A with W.F. (see VD 2-3). The oppression argument was no longer possible because medication and health-related concerns were addressed on the list of pinpoint references. She stated that in her view this impacted the application and she discussed this impact with W.F. Based on the new information, McCarthy's explanation of the oppression guidelines, and the fact that W.F. would be subject to cross-examination, W.F. instructed her to withdraw the application.

[27] McCarthy discussed the aspects of voluntariness with W.F. at different points in time. She said she had more than one conversation with W.F. They talked about the oppression piece. They discussed the circumstances and context in which the statement was made. Medication was a focus with respect to the oppression piece, but W.F.'s general health and well-being was the primary focus. The argument was broader than just W.F.'s medication. She did not review all the pinpoint references with W.F., but she did review the themes from the pinpoint references. She confirmed the pinpoint references were not made up. They were in the transcript so W.F. could not deny it. As a result of that discussion, W.F. indicated to McCarthy they would forgo the voluntariness hearing.

[28] When questioned about W.F. volunteering the words, McCarthy said W.F. understood they were speaking to a police officer and said that their words came out voluntarily. When McCarthy asked W.F. about their recollection of events, she had concerns. W.F. had difficulty recalling when things were said by the police officers. McCarthy explained conditional and assertive statements to W.F., and said there was no basis to draw a conclusion that assertive statements were made. McCarthy could not rely on the reliability of the statement from W.F. because, given the context of the interview, it did not look like W.F. was being pressured or coerced to make the statement.

Issue

[29] Should W.F. be permitted to withdraw the admission before Justice Arnold on January 22, 2020?

Analysis

Is W.F. permitted to withdraw the admission?

[30] Formal or informal admissions in a criminal trial are characterized as admissions of fact, admissions of law, or admissions of mixed fact and law. Admissions purely of law are given less weight and more easily withdrawn. McWilliams' *Canadian Criminal Evidence*, 5th ed. (Toronto: Thomson Reuters Canada, 2013, loose-leaf), pt IV at ch 25. Online: WestlawNextCanada) summarizes admissions of law accordingly:

> Admissions are receivable to prove matters of law, or mixed fact and law, though ... these are generally of little weight, being necessarily founded on mere opinion.

[31] Factual admissions, however, once voluntarily made are not easily resiled from. McWilliams' *Canadian Criminal Evidence* summarizes the law on the withdrawal of factual admissions from *R. v. Montgomery*, 2014 BCSC 222:

> 11 As MacKenzie J. said in *R. v. Basi*, 2010 BCSC 738 (B.C. S.C.) at paragraphs 16 to 18:
>
> > [16] S. Casey Hill et al., eds., *McWilliams' Canadian Criminal Evidence*, 4th ed., (Aurora: Canada Law Book) Vol. 2 at pp. 22-16 — 22-17, contains a convenient summary of principles regarding the withdrawal of admissions:

> . . . once an admission is tendered and accepted by the court, it is an integral part of the record. An admission can of course be altered by "mutual consent" of the parties. Otherwise, an admission voluntarily made, ordinarily by or with the advice of counsel, is not easily disturbed.
>
> As to withdrawal of a factual admission: "The discretion of the Court ought to be warily exercised, normally, to defeat fiction, to help establish truth, and to relieve clients of fatal mistakes by lawyers." "If it is sought to resile from them [admissions], first, the permission of the judge is required; and secondly, the judge is unlikely to give such permission unless he [or she] receives cogent evidence from the accused and those advising him [or her] that the admission had been made by a matter of mistake or misunderstanding". The discretion to allow withdrawal of an admission once made "should be exercised sparingly and cautiously".
>
> Although a trial judge has a wide discretion to relive a party of the strictures of an express factual admission and to require the party benefiting from the admitted fact to call evidence on the matter, regrets about a tactical decision to make an admission, a strategic decision otherwise falling within the range of reasonably competent decision-making, will rarely result in an admission being backed out of the record of the proceeding. In other words, a factual admission, even if ill-advised or improvident, cannot be simply retracted at the will of a party.
>
> The trial court, however, retains a discretion to avoid the consequence of an admission. The court is empowered to control its own process and to prevent manifest injustice. "From time to time counsel may err in making admissions" and if no prejudice is occasioned to the other side by granting relief from the admission, a court may be inclined to permit withdrawal of the factual admission where satisfied the admission was "made inadvertently and was one which ought not to have been made" or was "made clearly without authority or by mistake".
>
> [Footnotes omitted]

[17] The Court clearly has a discretion to permit withdrawal of admissions, though it is one that ought to be exercised sparingly and cautiously. The admissions in question on this application are formal admissions made pursuant to s. 655 of the *Criminal Code*, not an admission made during an opening address, as was the case in Shalala.

[18] The only evidence before me on this application are the applicants' two affidavits. Mr. Basi's affidavit was set out in its entirety earlier in this

> ruling. Mr. Virk's is largely the same. Both applicants depose that they read and understood the proposed admissions prior to February 10. Both also depose that after February 10, they began to review the file materials intensively in preparation for trial, and became troubled by their admissions. They state that they no longer believe that most of the admissions are true with respect to the accuracy, authenticity and continuity of the wiretap recordings or exhibits, including emails. Neither applicant has provided any evidence whatsoever as to what has caused them to become troubled by their admissions; neither has provided any examples of inconsistencies between their admissions and the materials they have reviewed.

[32] The Court continued:

> 17 It is of great significance that these admissions were the culmination of a trial strategy adopted by previous counsel as early as the spring of 2011 and averred to by defence counsel on numerous occasions up until the time the admissions were filed. There is no suggestion that Mr. Ascencio-Chavez was not aware of the content of the admissions, that the facts admitted are not true, that counsel acted without authority, and as I said earlier, no issue has been raised before me of incompetent or ineffective representation.
>
> 18 I conclude that the foundation for the application is, in fact, a desire to change strategy and tactics or second thoughts about the strategies and the approach taken to the case by previous defence counsel.

[33] As to the relevant test, in *R. v. Montgomery, supra,* A.J. Beames J. cited McWilliams alongside *R. v. Basi*, 2010 BCSC 738 and said:

> ... the test to be applied on this application is whether the interests of justice require that Mr. Ascencio-Chavez be permitted to withdraw his admissions. Matters which might be relevant include when in the proceedings the application is made, whether the admissions were made as a tactic or part of a trial strategy and whether the accused received a benefit in exchange for the admissions, whether the admissions were made by mistake or as a result of a misunderstanding, and whether counsel had authority to make the admissions: *Montgomery*, para. 10.

[34] In both *Montgomery* and *Basi*, the accused filed affidavits setting out the evidentiary basis on which their applications were brought. In both cases the applications were denied. In *Montgomery*, the Court ruled that a "desire to change strategy and tactics or second thoughts about the strategies and approach taken to the case by previous counsel" will not be sufficient to ground the withdrawal of admissions (paras. 18-19).

[35] In *R. v. Lapps*, 2019 ONCA 1001, the Ontario Court of Appeal upheld the trial judge's decision to deny an application to resile from admissions. The trial judge correctly rejected the argument that the agreement had been made in haste or was the result of a mistake or misunderstanding: *Lapps*, para. 5.

[36] Two issues are raised by W.F. First, W.F. was not informed of the law with respect to voluntariness; and second, W.F. was confused regarding the nature of the hearing.

[37] McCarthy's testimony directly contradicts this. The Court is faced with conflicting testimony between two witnesses who each testified on the application, and must assess their credibility and reliability.

Credibility and Reliability

[38] There is a difference between credibility and reliability which has been succinctly explained by Doherty, JA and Watt, JA in *R. v. Morrissey* and *R. v. C.(H.)*. In *R. v. Morrissey* (1995), 22 O.R. (3d) 514 (Ont. C.A.), Doherty J.A. wrote (at p. 526):

> Testimonial evidence can raise veracity and accuracy concerns. The former relate to the witness's sincerity, that is, his or her willingness to speak the truth as the witness believes it to be. The latter concerns relate to the actual accuracy of the witness's testimony. The accuracy of a witness's testimony involves considerations of the witness's ability to accurately observe, recall and recount the events in issue. When one is concerned with a witness's veracity, one speaks of the witness's credibility. When one is concerned with the accuracy of a witness's testimony, one speaks of the reliability of that testimony. Obviously a witness whose evidence on a point is not credible cannot give reliable evidence on that point. The evidence of a credible, that is, honest witness, may, however, still be unreliable.
>
> . . .

[39] In *R. v. C. (H.)*, 2009 ONCA 56, Watt J.A. described the difference between credibility and reliability at para. 41:

> Credibility and reliability are different. Credibility has to do with a witness's veracity, reliability with the accuracy of the witness's testimony. Accuracy engages consideration of the witness's ability to accurately
>
> (i) observe;
>
> (ii) recall; and

> (iii) recount
>
> events in issue. Any witness whose evidence on an issue is not credible cannot give reliable evidence on the same point. Credibility, on the other hand, is not a proxy for reliability: a credible witness may give unreliable evidence: *R v. Morrissey (R.J.)* (1995), 80 O.A.C. 161, 22 O.R. (3d) 514 (C.A.), at 526 [O.R.].

[40] W.F.'s testimony was not reliable. W.F. frequently stated they could not remember or recall. This lack of recall impacts the reliability of their testimony. Their answers were inconsistent. When under cross-examination, W.F.'s responses to questions would frequently result in W.F. eventually saying, "I can't recall."

[41] I found W.F. to be evasive in their answers. W.F. was unwilling to provide definite answers. I do not find W.F. credible regarding the admissions on voluntariness. W.F.'s answers were inconsistent and beyond belief. One minute a topic was discussed and then when explored further on cross-examination the answer would change to, "I can't recall". W.F. did not testify in a candid, forthright manner.

[42] Of major concern to the Court was the alleged fabrication of the video. W.F. believed the statement was dubbed. McCarthy testified that W.F. made a comment about that early on during their representation. She did not pursue it because she had concerns about that argument. One concern was whether Legal Aid would fund an expert, but of greater concern was that McCarthy saw nothing to suggest the statement was altered. She had reviewed the video and there were no distortions.

[43] In the cells before the hearing W.F. went over the pinpoint references with McCarthy. W.F. advised that the pinpoint references were not true. In their view, because the video was edited by the Crown, there was no point in contesting the voluntariness of the statement.

[44] At one point during W.F.'s testimony, W.F. said they reached the conclusion that the video was altered after the hearing with Justice Arnold. This does not make any sense. It defies logic on a balance of probabilities because W.F. was represented by counsel at the hearing. W.F. was able to speak to McCarthy prior to the application before Justice Arnold. At that time, correspondence from the Crown was discussed, including the pinpoint reference list (see VD-2-3). A position was taken by W.F.'s counsel on the pinpoint references after McCarthy discussed the overall themes of voluntariness with W.F., including some of the pinpoint references. W.F. advised McCarthy that their statement could not have

been voluntary because W.F. believed the video was altered/fabricated. W.F. felt this way prior to the hearing with Justice Arnold, yet on the day of the hearing, McCarthy and W.F., when asked if they agreed with admitting that the statement was voluntary, both responded, “yes”.

[45] I agree with the Crown’s position regarding W.F.’s statement about fabrication. How could W.F. possibly say the statement was voluntary yet, at the same time, say that the tape was dubbed, altered, or fabricated (i.e., that what was said on the tape, was never said)? W.F.’s response that it would not have been proper, or it was not their place to disagree with the voluntariness of the statement, is beyond belief given their previous statement to McCarthy that the video was fabricated and what was said on the tape never happened.

[46] W.F. is an educated person, who was represented by counsel. Why would W.F. voluntarily admit to a statement that W.F. believed to be fabricated or altered? It makes no sense. If W.F. felt there was something wrong with the video prior to the hearing it is implausible to believe that they would not have either told their counsel or the court on that day that they believed the video that they were going to voluntarily admit into evidence was tampered with.

[47] I should also state at this point that the Supreme Court of Canada in *Park v. R.*, [1981] 2 S.C.R. 64, has held that a determination of voluntariness is a question of fact:

> 15 I am of opinion that voluntariness, as a test of admissibility of a confessional statement, may be determined without the procedural necessity of a voir dire where the voir dire is waived by the accused or his counsel. Determination of voluntariness is essentially a question of fact, and waiver of a voir dire constitutes an admission of primary facts that the statement was not made in circumstances where the accused person was the subject of coercive conduct on the part of a person in authority. The question of admissibility of the statement is, of course, for the trial judge to decide, and he has a wide discretion either: (i) to accept the waiver and dispense with the holding of a voir dire; or (ii) to hold a voir dire; or (iii) to inquire directly of counsel for the accused as to, and his understanding of, the underlying factual admissions implicit in the waiver of the voir dire.
>
> [emphasis added]

[48] Therefore, by voluntarily agreeing to the admission of evidence that was tampered with, W.F. has essentially waived the *voir dire*, which constitutes an admission of primary facts that the statement was not made in circumstances where the accused person was the subject of coercive conduct on the part of a person in

authority. Justice Arnold explained the potential uses of the statement to W.F. now that it was voluntarily admitted. The statement could be used by the Crown in direct examination or held back for cross-examination.

[49] McCarthy testified in detail of their conversations with W.F. regarding the statement and brief of January 10, 2020. In order for McCarthy to have that knowledge, she would have had to have spoken to W.F. prior to the alleged 15 minutes in cells on January 22, 2020, about voluntariness and W.F.'s medication. The Court finds this is not a situation where the admissions were made by mistake or as a result of a misunderstanding, or without consideration of whether counsel had authority to make the admissions: *Montgomery*, para. 10.

[50] W.F., in their closing submissions, stated that they do not really disagree with what McCarthy said, although McCarthy directly contradicted much of W.F.'s testimony. McCarthy followed W.F.'s instructions and W.F. directed her to withdraw W.F.'s voluntariness argument after consulting with her on the law and the pinpoint references. McCarthy was not challenged on this point.

[51] W.F.'s second argument, that they were confused, does not persuade me either, because McCarthy testified that she explained the law around voluntariness and discussed W.F.'s statement. W.F. expressed the view that it had been electronically altered, but McCarthy felt W.F. was not reliable on this argument. In her view, W.F.'s best argument was oppression.

[52] The themes regarding the pinpoint references were discussed. W.F. had already viewed the video prior to receiving the list. McCarthy challenged W.F. when they said it didn't happen, by reviewing the transcript and confirming the pinpoint references were in the statement.

[53] W.F. did not provide McCarthy with instructions not to do this. McCarthy focussed on W.F.'s strongest arguments.

[54] The Court finds McCarthy provided competent representation, her decisions were in the range of competent decision-making, and she was instructed by W.F. to withdraw their application. There was no misunderstanding. In addition, McCarthy filed a brief prior to the hearing outlining W.F.'s argument. They clearly had discussions prior to the January 22, 2020 hearing and, indeed, prior to the filing of the brief.

[55] In conclusion, there is nothing before me to convince me that W.F. should be permitted to withdraw those admissions made before Justice Arnold. McCarthy's strategic decisions fell within the range of competent decision making: *Montgomery*, at para. 11.

Prejudice to the Crown

[56] If there is no prejudice to the other side by granting relief from the admission, a Court may be inclined to permit withdrawal of a factual admission where satisfied the admission was "made inadvertently and was one which ought not to have been made" or was "made clearly without authority or by mistake".

[57] In *Montgomery*, the Court speaks about prejudice to a party with respect to the withdrawal of an admission. This trial is not until mid-February, witnesses are still available, and it is not a situation where the evidence can no longer be obtained. However, witnesses will have to rearrange their schedules again as a result of the voluntariness *voir dire* being rescheduled, Crown resources will continue to be expended, significant time has passed since the alleged offences occurred, and memories of key witnesses are fading. It cannot be said that there is no prejudice to the Crown.

[58] Accordingly, it is the Court's conclusion that W.F. cannot withdraw from the admission because 1) it cannot be said that there is no prejudice to the Crown and 2) in my opinion, before I must consider prejudice, W.F. must establish that the factual admission was "made inadvertently and was one which ought not to have been made" or was "made clearly without authority or by mistake". W.F. has failed to do so. The discretion to allow withdrawal of an admission once made "should be exercised sparingly and cautiously" and I refuse to exercise mine in these circumstances.

[59] W.F.'s application to withdraw their admission is denied. The voluntariness *voir dire* remains waived.

Bodurtha, J.