IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Holly C. Beard
Madam Justice Diana M. Cameron
Mr. Justice Christopher J. Mainella

B E T W E E N :

HER MAJESTY THE QUEEN	)	***W. Y. Martin White*** *and*
	)	***M. R. Katsanos***
Respondent	)	*for the Appellant*
	)	
- and -	)	***N. M. Cutler***
	)	*for the Respondent*
JORDEN DANIEL FRIES	)	
	)	*Appeal heard and*
(Accused) Appellant	)	*Decision pronounced:*
	)	***June 2, 2017***

MAINELLA JA (for the Court):

Introduction

[1] The accused was convicted after trial by judge and jury of second degree murder. The allegation was that he stabbed the male victim at a house party they both attended, resulting in the victim dying shortly thereafter. The case against the accused was circumstantial. On appeal, he argued that the jury instructions on the issues of circumstantial evidence and assessment of the reliability of a key witness were inadequate and the verdict was unreasonable because the absence of evidence provided the alternative inference of someone else committing the murder.

[2] At the hearing of the appeal, it was dismissed with reasons to follow. These are those reasons.

Factual Background

[3] Approximately a dozen people were at a house party in St. Boniface sometime after 3:00 a.m. on the morning in question. As the accused left the party, he had an altercation at the front doorway with the victim; they were the only people fighting. Nobody who testified witnessed the fight from its beginning to its end. The accused's girlfriend testified that, once she became aware of the fight, she saw the accused punch the victim once in his middle area, which she described as a slow jab. The accused's friend testified that, once he began to watch the fight, the accused punched the victim two or three times in the area of the victim's chest, shoulders, arms and head. The accused's friend also observed, just after the altercation, that the accused had a metal object in his hand. He said it looked like a "blade" but he could not be sure. No other witness saw the accused with a weapon. The accused's friend was intoxicated during the events he witnessed and his view of the fight was partly obstructed.

[4] After the struggle, the victim exited the front door of the house and ran in the direction of the alley behind the house. The accused, the accused's girlfriend, the accused's friend and a girlfriend of the accused's girlfriend immediately left the house and got into a vehicle parked on the street in front of the house. Another group of unknown partygoers did the same. The accused's friend testified that, in the ensuing car ride, the accused said words to the effect of, "I hope he made it to the hospital". The victim was found dead in a parking lot off the alley near the house by a passerby several hours later, with a trail of his blood between the location of his body and the house. The autopsy revealed that he had several stab wounds and slash injuries likely caused by a knife. The murder weapon was

never identified by police. The fatal wound was a stab to the heart that would have caused him to become unconscious within a few minutes and then die a short time later. Before becoming unconscious, he could have been able to walk or run.

[5] While the police seized several pieces of evidence during their investigation, not every exhibit was sent to the RCMP lab for DNA analysis. There was no request to police by defence counsel to have other exhibits tested for DNA analysis, nor was there an application by the accused to have untested exhibits released for independent testing (see section 605 of the *Criminal Code* (the *Code*)).

Analysis and Decision

Adequacy of the Jury Instructions

[6] A draft of the judge's jury charge was provided to counsel for comment before it was given. In the charge, instructions were provided to the jury on the burden of proof in light of the case being based on circumstantial evidence. At three places in her charge, the judge instructed the jury that a reasonable doubt can arise from the evidence or "the lack of evidence." In the charge, the judge reviewed the frailties with the accused's friend's evidence but did not give any special caution on the jury's potential use of his evidence. At one point in the charge, the judge reminded the jury that the police investigation did not include DNA analysis of every seized item. The draft charge was modified slightly in light of counsel's suggestions.

[7] Defence counsel did not request changes to the instructions on circumstantial evidence, a special caution for the jury regarding reliance on

the accused's friend's observations due their frailties, or further comments on the adequacy of the police investigation. For the purposes of assessing the submission that the jury instructions were inadequate because of the lack of a special caution regarding the accused's friend's evidence or too little attention to the reasonableness of the police investigation, considerable weight needs to be given to the lack of objection by defence counsel that these issues were either not part of the charge or did not receive greater prominence (see *R v Pearce (ML)*, 2014 MBCA 70 at para 143).

[8] The judge took a break while delivering the jury charge. At the recess, despite being previously content with the wording of the jury instructions on circumstantial evidence and reasonable doubt, defence counsel requested that the instruction on reasonable doubt be changed to emphasize that a doubt can arise from the lack of evidence. The trial judge declined the request; she stated that "it's covered in the charge and no further instruction on that is needed to be added." The record indicates that the judge explained to the jury twice in her opening comments, twice again after the Crown's opening address and, as previously mentioned, three times in her jury charge that the law allowed for the jury to find reasonable doubt based on the absence of evidence.

[9] On a functional review of the charge, looking at the inadequacies alleged, we have not been persuaded that the jury was not properly instructed on the relevant law in light of the evidence and the positions of the parties (see *R v Jacquard*, [1997] 1 SCR 314 at para 32).

Unreasonable Verdict—Section 686(1)(a)(i) of the Code

[10] The threshold for appellate intervention with the jury's verdict

under section 686(1)(a)(i) of the *Code* is a high one. A jury's verdict will not be disturbed merely because the appellate court takes a different view of the evidence and its effect; more is required (see *R v WH*, 2013 SCC 22 at paras 27-28). The appellate court must examine the sufficiency of the evidence and also decide whether proper judicial fact finding precludes the conclusion reached by the jury. Based on our review of the record, we are satisfied that a properly instructed jury acting judicially could reasonably have been satisfied that the accused's guilt was the only reasonable conclusion available on the totality of evidence (see *R v Villaroman*, 2016 SCC 33 at para 55).

[11] While the accused did not testify, he advanced the defence through counsel that someone else stabbed the victim to death after his fight with him and that the police had tunnel vision by focussing their investigation on the accused alone as they did not have DNA analysis done on all of the exhibits seized. Watt JA has described this argument as the "'defence' of inadequate investigation" (*R v Spackman*, 2012 ONCA 905 at para 123). In our view, the jury's rejection of this defence does not make the verdict unreasonable.

[12] Because the defence of inadequate investigation was prominent in this case, a few comments on it are necessary. The decision of the defence to attack the inadequacy and integrity of a police investigation in support of the theory that someone other than the accused committed a crime is an entirely appropriate strategy, but it is a "risky" one (*R v Mallory*, 2007 ONCA 46 at para 87). If advanced, the claim of an inadequate police investigation potentially opens the door to the Crown being able to lead otherwise inadmissible evidence, such as investigation hearsay, opinion and

bad character evidence regarding the accused, to rebut the allegation so that the jury does not have a distorted and incomplete picture. See *R v Dhillon* (2002), 166 CCC (3d) 262 at para 46 (Ont CA); *R v Lane*, 2008 ONCA 841 at para 41; *R v Jackson*, 2013 ONCA 445 at para 77; and *Spackman* at para 123. When such a defence is advanced, the trial judge must take great care after holding a *voir dire* to ensure that the otherwise inadmissible evidence that the Crown wishes to rely on is relevant and probative of the adequacy and integrity of the police investigation and that its prejudicial effect does not outweigh its probative value. A limiting instruction on the jury's use of any evidence admitted to explain what the police did and why they did it is required, except where the instruction would prejudice a "calculated defence strategy" (*R v Singh*, 2010 ONCA 808 at para 54; see also *R v Van*, 2009 SCC 22 at paras 26, 33).

[13] The difficulty with the defence's theory here that another person or persons stabbed the victim after he fled the house and that the police investigation was not adequate because it did not consider other suspects is that the inference the accused asked the jury to draw is not "reasonable"; it was wholly speculative and is not supported by the evidence or absence of evidence (see *Villaroman* at paras 30, 37-38).

[14] To begin, the accused concedes it could not be reasonably inferred that the victim died as a result of a random robbery gone bad in the alley because, when his body was found, he had on him a large sum of cash.

[15] Leaving aside the question of a random robbery in the alley, nobody other than the accused had the opportunity to inflict the injuries that the victim received before he fled the house as no one else had violent physical contact with him, according to all of the eyewitnesses. It is also

undisputed that nobody followed the victim after his fight with the accused. The unknown partygoers departed at the same time and in the same direction as the accused and his friends and did not return to the house, nor did the victim according to the homeowner. Because the blood trail ended at the location where the body was found, the alternative suspect(s) theory would have required the person or persons unknown to have been armed and waiting somewhere behind the house, in the middle of the night and at the exact time the victim fled the house and ran towards the alley, to allow for the opportunity to perpetrate the attack for reasons unknown. In our view, this highly improbable scenario is entirely in the realm of conjecture.

[16] Also, the challenge to the adequacy and objectivity of the police investigation is nothing but supposition, given the record. We have no doubt, as a general proposition, that competent defence counsel will vigorously pursue forensic analysis of any evidence if they have a true concern of the police having tunnel vision in their investigation and results of forensic testing of evidence may exonerate an accused. For defence counsel to fail to do otherwise would risk a wrongful conviction of their client.

[17] It is difficult to see how the police had tunnel vision here when the exhibit officer testified that, if the defence had asked that a particular exhibit seized be forensically examined by the RCMP lab, she saw no reason why the Winnipeg Police Service would not have made that request to the RCMP lab. Moreover, section 605 of the *Code* allowed the accused to obtain custody of any exhibit seized by the police for independent scientific testing if the police had been unable or unwilling to assist, or the defence did not want the police involved in any way in the testing process. It is noteworthy,

for the purposes of disposing of this appeal, that there is no suggestion by appellate counsel that the defence counsel at trial was incompetent by not pursuing forensic analysis of exhibits gathered in the police investigation that were not selected and sent to the RCMP lab for forensic analysis by the investigators.

Disposition

[18] In the result, the appeal is dismissed.

Mainella JA

Beard JA

Cameron JA