IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Freda M. Steel
Madam Justice Holly C. Beard
Madam Justice Jennifer A. Pfuetzner

B E T W E E N :

HER MAJESTY THE QUEEN	)	***C. R. Savage***
	)	*for the Appellant*
	)	
Appellant	)	***R. D. Harrison***
	)	*for the Respondent*
- and -	)	
	)	*Appeal heard and*
LEWIS MYLES MCKAY	)	*Decision pronounced:*
	)	***May 8, 2017***
	)	
(Accused) Respondent	)	*Written reasons:*
	)	***May 30, 2017***

BEARD JA (for the Court):

I. THE ISSUES

[1] The Crown seeks leave to appeal and appeals the accused's sentence. After hearing argument, leave was granted and the appeal was allowed with reasons to follow. These are those reasons.

[2] The accused pled guilty to the following offences, all under the *Criminal Code*: theft under $5,000 (section 334(b)); break and enter into a dwelling house (8th Street) and robbery while armed with an offensive weapon (the first robbery) (section 348(1)(d)); wearing a disguise with intent (section 351(2)); and robbery (6th Street) while armed with an offensive weapon (the second robbery) (section 343(d)).

[3] Following a contested sentence hearing, the accused was sentenced to a global sentence of 30 months' incarceration, as follows:

- theft—ten days "time served";

- break and enter and commit robbery (the first robbery)—30 months' incarceration less credit of 17 months' pre-sentence custody;

- wearing a disguise—12 months' incarceration, concurrent to the 30 months;

- robbery (the second robbery)—nine months' incarceration, concurrent to the 30 months.

[4] The accused was also sentenced to a period of probation of two years, to begin upon his release from custody, which was available because his sentence after credit for pre-sentence custody was less than two years (see section 731(1) of the *Criminal Code*; and *R v Mathieu*, 2008 SCC 21).

[5] The Crown has not appealed the sentence related to the theft.

[6] The grounds of appeal are as follows:

(i) the sentencing judge erred in his treatment of the aggravating and mitigating factors; and

(ii) the sentence that he imposed was unfit.

II. BACKGROUND

[7] On June 2, 2015, the accused stole DVDs with a value of $147.81

from the Superstore in Brandon. He was arrested, charged with theft and breaching a probation order imposed on February 19, 2015, and released on an undertaking.

[8] On July 16, 2015, at approximately 10:30 p.m., the occupants of a residence on 8th Street were at home watching TV when the accused, who was a stranger to them, entered through the unlocked door. The accused had rolled up his pant legs, was wearing a dark hoodie and a bandana over his nose and mouth, and was brandishing a canister of pepper spray.

[9] The accused demanded money and video games. The occupants said they had no video games but offered him money. He sprayed them with the pepper spray. The female occupant ran upstairs and, despite the accused's warning not to call the police or he would hurt them, she did so. The male occupant remained downstairs and got his wallet. The accused sprayed him again, after which he gave the accused approximately $40. The accused sprayed him a third time before leaving the residence.

[10] The police arrived, but they were not able to locate the accused. They did, however, take statements from the victims.

[11] The accused changed his clothing and was walking around. Later, at approximately 11:30 p.m., the accused approached a male in the garage of a residence on 6th Street and asked for a cigarette. The male refused, so the accused got out the pepper spray and threatened to use it. The male then gave the accused his cigarette and the accused left.

[12] Approximately 90 minutes later, the accused's grandmother, with whom the accused was living, called the police and reported that the accused

was causing a disturbance and had broken her glasses. The police attended and arrested the accused. While there, they noticed a bandana and clothing on the floor that matched the clothing worn in the first robbery. They got a search warrant, searched the accused's room and seized the clothing and a can of pepper spray.

[13] The accused was arrested, cautioned and advised of his right to counsel. He called a lawyer, after which he was left in the cell until he was sober. When questioned later, he gave a statement confessing to his involvement in the theft and the two robberies. He told the police that he had lost his job, that his girlfriend was pregnant and that he needed the money.

[14] A pre-sentence report, including a *Gladue* report (see *R v Gladue*, [1999] 1 SCR 688), was prepared. The accused was 20 years old at the time of the offences and 21 when he was sentenced.

[15] The accused had a lengthy criminal record with 34 convictions at the time of these offences. His youth record included convictions for two thefts, utter threats, carrying a concealed weapon and assault with a weapon (for which he received deferred custody), assaulting a peace officer, possession of drugs and a concealed weapon and numerous breaches of court orders. His adult record included two theft convictions, a mischief conviction, a further drug conviction and several breaches of court orders.

III. THE SENTENCING JUDGE'S DECISION

[16] The sentencing judge noted that the Crown's position was that this was a home invasion robbery which would, typically, attract a sentence in

the range of seven to ten years' incarceration. He stated that this was a guideline only and that each sentence had to be determined on its own facts and factors. He then stated:

> This, in my view, was not a well planned robbery. This is someone who was on the street desperate for cash and chose a house at random to enter with the misguided and obviously dangerous plan to try and get money. He collected $40.00. In the other robbery the accused asked for and ended up with a single cigarette. Although bear mace was used and then threatened, no one was injured.
>
> This was the desperate misguided act of a young drunken individual. I also have to recognize that although these actions were extremely serious walking into someone's home and using a weapon of any type should be treated by the courts in a harsh manner and obviously denunciation and deterrence have to be emphasized.
>
> I do however believe that the Crown's recommended sentence does not adequately address the mitigating and Gladue factors which are present in this case. This is a 21-year-old individual who seems to be remorseful and has appropriately and is appropriately addressing some of the issues resulting in his behaviour.

[17] Finally, the sentencing judge considered the aggravating and mitigating factors, which he explained as follows:

> There are obviously numerous aggravating factors relating to the incidents that I have to deal with today.
>
> Firstly, both of these offences involve violence or threats of violence by using or threatening the use of bear mace.
>
> The first incident involved some level of planning as the accused covered his face. Also the fact that his face was covered is in and of itself an aggravating factor and certainly that increases the degree of trauma which someone subjected to this conduct is going to experience. He obviously entered someone's

> house without knowing those individuals but assuming or knowing that there was someone home at that time.
>
> The accused was involved in two separate serious incidents in one night involving different victims.
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> The accused has a lengthy record engaging some related offences although those were as a youth.
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> He has an addictions issue which prior to his incarceration he had not dealt with effectively.
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> There are also some mitigating factors. The accused on the night in question was extremely intoxicated and has little recollection of the incidents which to my view is relevant when we are talking about the whole issue of home invasion robbery. While a weapon was used in these incidents bear mace is not something that would normally be considered capable of causing bodily harm. Nobody was injured although people were sprayed with bear mace. The accused was cooperative with police and provided a full confession. The accused pled guilty without the necessity of a trial and is deserved of consideration for that.
>
> The accused is a young aboriginal person with a less than ideal background and obviously the Gladue factors set out in the presentence report have to be considered.
>
> This will be the first time that the accused is being sentenced as an adult to a period of custody going forward.
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> The accused, while in custody, has worked on his addictions and is motivated to improve his education taking courses in custody.

IV. THE PARTIES' POSITIONS

[18] The Crown argues that the sentencing judge erred in his weighing of the mitigating factors by treating the lack of injuries to the victims and the accused's degree of intoxication as mitigating factors. Further, it argues that both of these errors had an impact on the sentence.

[19] The Crown's position is that the lack of injuries in a robbery is a neutral factor (see *R v Harper (J)*, 2016 MBCA 64 at para 51) and that the accused's intoxication is either a neutral or aggravating factor in relation to an offence involving the use of violence. It further argues that the sentencing judge erred in his assessment of the level of the accused's intoxication.

[20] Counsel for the Crown on the appeal, who was not counsel at the sentence hearing, concedes that, taking into account the accused's youth, his lower level of planning and the *Gladue* factors, the global sentence of eight years proposed at the sentence hearing is too long and not fit, and he argues that a sentence of five years, less credit for pre-sentence custody, is the appropriate sentence.

[21] Finally, the Crown states that, while it is not appealing the sentencing judge's decision to impose concurrent sentences for the second robbery and wearing a disguise, it argues that the sentence that was imposed does not take into account the multiple offences for which the accused has been convicted, with the result that he effectively received a "free ride" regarding the concurrent offences.

[22] The accused argues that the errors, if they were errors, did not have an impact on the sentence that was imposed. His position is that the sentencing judge correctly took into account the appropriate mitigating and aggravating factors and came to the conclusion, which was open to him, that this was not a well-planned, targeted home invasion, unlike those often seen in the drug world that attract a sentence of seven to ten years' incarceration, but, rather, the desperate and misguided act of a youthful offender. Counsel

for the accused notes that, while the accused has a significant record, he took steps while in custody to improve himself, including working on his addictions, and, further, that his disadvantaged background as an Aboriginal person, as explained in the pre-sentence and *Gladue* reports, must factor into the sentence.

[23] The accused's position is that the sentence that was imposed is not demonstrably unfit and is entitled to deference.

[24] The accused also argues that, if the sentence is unfit and a longer period of incarceration should have been imposed, that sentence should be stayed. The accused has already been released into the community, where he is living with his girlfriend and caring for their baby while she works. He argues that it would be a hardship to require him to return to jail to serve any further time in custody.

V. STANDARD OF REVIEW

[25] The standard of review on a sentence appeal was recently considered by the Supreme Court of Canada in *R v Lacasse*, 2015 SCC 64 at paras 36-55; see also *R v Lloyd*, 2016 SCC 13 at paras 52-53. This Court summarized those principles in *Harper* at paras 31-33.

[26] In summary, except where a sentencing judge makes an error of law or an error in principle that has an impact on the sentence, an appellate court may not vary the sentence unless it is demonstrably unfit. A sentence can be demonstrably unfit even if the sentencing judge has made no error in law or principle in imposing it. Demonstrably unfit has also been described as "clearly unreasonable", "clearly or manifestly excessive", "clearly

excessive or inadequate", or representing a "substantial and marked departure"—all of which reflect the very high threshold that applies to appellate courts when determining whether they should intervene after reviewing the fitness of a sentence (see *Lacasse* at para 52).

[27] Wagner J, for the majority in *Lacasse*, stated as follows regarding the application of the "demonstrably unfit" standard (at para 53):

> This inquiry must be focused on the fundamental principle of proportionality stated in s. 718.1 of the *Criminal Code*, which provides that a sentence must be "proportionate to the gravity of the offence and the degree of responsibility of the offender". A sentence will therefore be demonstrably unfit if it constitutes an unreasonable departure from this principle. Proportionality is determined both on an individual basis, that is, in relation to the accused him or herself and to the offence committed by the accused, and by comparison with sentences imposed for similar offences committed in similar circumstances. Individualization and parity of sentences must be reconciled for a sentence to be proportionate: s. 718.2(*a*) and (*b*) of the *Criminal Code*.

[28] One tool that assists in determining whether a sentence is fit is that of sentencing ranges. While *Lacasse* has stated, once again, that "a deviation from a sentencing range is not synonymous with an error of law or an error in principle" (at para 60), their use was explained in *R v Nasogaluak*, 2010 SCC 6 (at para 44):

> The wide discretion granted to sentencing judges has limits. It is fettered in part by the case law that has set down, in some circumstances, general ranges of sentences for particular offences, to encourage greater consistency between sentencing decisions in accordance with the principle of parity enshrined in the *Code*. . . .

[29] This use comes with the following limitation, similar to that set out

in *Lacasse* (*Nasogaluak* at para 44):

> . . . But it must be remembered that, while courts should pay heed to these ranges, they are guidelines rather than hard and fast rules. A judge can order a sentence outside that range as long as it is in accordance with the principles and objectives of sentencing. Thus, a sentence falling outside the regular range of appropriate sentences is not necessarily unfit. Regard must be had to all the circumstances of the offence and the offender, and to the needs of the community in which the offence occurred.

[30] Thus, the range of sentence for the offence must be considered in the context of the circumstances of the offence and the offender to determine whether the sentence is either unfit or demonstrably unfit.

VI. ANALYSIS

[31] We agree with the Crown that the sentencing judge erred in stating that the lack of injuries was a mitigating factor. As was stated in *Harper*, in a robbery, the lack of injuries is not a mitigating factor but, at best, is a neutral factor (see paras 49-51). We are also of the view, however, that this error did not have an impact on the sentence. The sentencing judge focussed on the accused's degree of intoxication, his young age and what he considered to be the low level of planning.

[32] We are of the view that the sentencing judge erred in principle in his treatment of the accused's degree of intoxication and that this error had an impact on the sentence that he imposed, requiring us to review the fitness of the sentence. We are also of the view that the sentence is demonstrably unfit. We recognize that this latter standard imports a high level of deference, and that we cannot intervene simply because we would have

weighed the relevant factors differently (see *Lacasse* at para 49).

[33] That said, this Court has stated on many occasions that the range of sentence for a home invasion robbery is from seven to ten years' incarceration (see *R v R(PS)*, 1999 CarswellMan 245 at para 14 (CA); *R v Pakoo*, 2004 MBCA 157 at paras 31-36; *R v Wozny*, 2010 MBCA 115 at para 96; and Clayton C Ruby et al, *Sentencing*, 9th ed (Toronto: LexisNexis Canada, 2017) at 1086.) We recognize that this range is not to be interpreted rigidly but as a guideline or starting point.

[34] We agree with the parties that there are factors which would justify a sentence that is lower than that range, being the accused's youthful age of 20 years old at the time of the offences, his significantly disadvantaged Aboriginal background, his almost immediate confession and early guilty plea and the low level of planning.

[35] The sentence imposed does not, however, give sufficient weight to the significant aggravating factors, including the accused's lengthy criminal record, the serious nature of the offences and the fact that he sprayed one of the victims with the pepper spray three times. Further, the sentencing judge erred in his treatment of the accused's degree of intoxication. While the accused was intoxicated, the first robbery was planned, including wearing a disguise and taking a weapon. A review of the police notes shows that the accused was clearly able to understand what was happening and to make decisions in his own best interest. For example, when the police entered the accused's room and picked up a bandana, the accused started yelling, "You gotta a warrant?" and asked for the officers' names and badge numbers. He claimed to have an alibi, telling the police that he had spent the evening with

Nicholas Howard and gave the police a street address. He understood and replied when read his rights, gave the police the name of his lawyer and was able to speak to duty counsel. When questioned a few hours later, he was able to provide the police with significant details of the robberies.

[36] Finally, while the Crown has not appealed the decision to impose concurrent sentences, we agree that the sentence must reflect the fact that this accused committed two separate robberies using a weapon within a short period of time. A global sentence of 30 months' incarceration does not hold the accused accountable for the multiple offences to which he pled guilty (see *Harper* at paras 65-66; and *Wozny* at para 70).

[37] It is of note that counsel for the accused argued for a two-year sentence at the sentence hearing, yet acknowledged to the sentencing judge that he was not able to find any cases to support that recommendation.

[38] Taking all of these factors into account, we are of the view that the sentence of 30 months (two and one-half years) is unfit and, in fact, constitutes a marked and substantial departure from a fit sentence. We are of the view that the sentence should be increased by two years, to a sentence of four and one-half years' incarceration. From this will be deducted 17 months as credit for time spent in pre-sentence custody. There should be an additional credit for the time served following the imposition of the sentence.

VII. STAY OF ADDITIONAL SENTENCE

[39] The accused argues that, if this Court were to increase his sentence, he should be granted a stay because he has already been released

from custody.

[40] This Court considered a similar application in *R v Anderson*, 2017 MBCA 31 at paras 31-35. Steel JA, for the Court, set out the factors to be considered, which include: the reasons for any delay in sentencing; the time that has elapsed since the imposition of the sentence; the gravity of the offence; any rehabilitative steps taken before or after sentencing and the effect of re-incarceration on those steps; and the length of the additional sentence being imposed.

[41] In this case, the accused has not satisfied us that a stay of the additional sentence now being imposed is justified. The original offences were extremely serious, and the additional period of incarceration, being two years, is significant. The accused has not taken any steps towards employment, further education or counselling since being released, so re-incarceration is not going to interfere with rehabilitative efforts. While he did take some steps towards rehabilitation while in custody, he can presumably continue upon his re-incarceration. While he is living with his girlfriend and babysitting, that is a recent development and, presumably, she had other babysitting arrangements in place before he was released last month.

[42] In our view, the seriousness of the offences militates against a stay, and there are no significant circumstances that support a stay. In the result, we are of the view that it is in the interests of justice that the request for a stay be dismissed.

VIII. DECISION

[43] Leave to appeal the sentence is granted, the appeal is allowed, the sentence imposed by the sentencing judge is set aside, and a global sentence of four and one-half years' incarceration is imposed, being as follows:

- break and enter and commit robbery—four and one-half years' incarceration less a credit of 17 months for pre-sentence custody;

- wearing a disguise—12 months' incarceration, concurrent to the four and one-half years;

- robbery—12 months' incarceration, concurrent to the four and one-half years.

Beard JA

Steel JA

Pfuetzner JA