IN THE COURT OF APPEAL OF MANITOBA

Coram: Chief Justice Richard J. Chartier
Mr. Justice Marc M. Monnin
Madam Justice Karen I. Simonsen

B E T W E E N :

	)	***W. G. Marks***
HER MAJESTY THE QUEEN	)	*for the Appellant*
	)	*(via videoconference)*
	)	
Respondent	)	***S. L. Thomas*** *and*
	)	***C. G. Reimer***
	)	*for the Respondent*
- and -	)	*(via videoconference)*
	)	
	)	*Appeal heard and*
ADRIAN SHYMOUT VANEINDHOVEN	)	*Decision pronounced:*
	)	***December 4, 2020***
(Accused) Appellant	)	
	)	*Written reasons:*
	)	***December 15, 2020***

COVID-19 NOTICE: As a result of the COVID-19 pandemic and pursuant to r 37.2 of the MB, *Court of Appeal Rules*, MR 555/88R, this appeal was heard remotely by videoconference.

SIMONSEN JA (for the Court):

[1] The accused sought leave to appeal and, if granted, appeal his sentence of seven years for one count of assault causing bodily harm on his domestic partner (the victim) arising from two incident dates, six months consecutive for forcibly entering the victim's residence and one month consecutive for failing to report to probation services.

[2] The accused alleged that he received ineffective assistance from his counsel at the sentencing. He also asserted that the sentencing judge erred by: making a palpable and overriding error of fact in his assessment of the accused's conduct while on probation during the two years prior to, and the period between, the incidents of assault causing bodily harm; and failing to give adequate weight to *Gladue* (see *R v Gladue*, [1999] 1 SCR 688) principles. Although not specifically advanced as a ground of appeal, the accused also suggested that the sentence imposed for assault causing bodily harm is unfit.

[3] At the hearing, we denied the accused's motion for the admission of fresh evidence on the issue of ineffective assistance of counsel, and granted leave to appeal, but dismissed the appeal, with reasons to follow. These are those reasons.

[4] In the first incident, which occurred in June 2018, the accused, then 44 years of age and intoxicated, assaulted the victim, an approximately 60-year-old vulnerable Indigenous woman, at her residence. He also kicked her dog and threw a wooden box at her cat. Less than a week later, he failed to report to probation services. On July 10, 2018, he failed to attend his scheduled Addictions Foundation of Manitoba (AFM) assessment.

[5] In the second incident, which occurred in October 2018, the accused was again at the victim's residence and, while intoxicated, repeatedly punched her and came at her with a steak knife, lacerating her hand. He also used threatening words which she believed were a reference to his having fatally stabbed his previous domestic partner in 2004. The accused then left for a short period and, when he returned, the victim refused to let him in. He broke

the bedroom window, climbed through it and beat her some more. He threatened her, indicating that if she told anyone, he would kill her. Eventually he left and she called the police.

[6] As a result of this assault, the victim sustained significant injuries, including a concussion, a perforated eardrum, lacerations to her hand, thumb and ear, and bruising and swelling to her face. The sentencing judge found that the attack had "a long-lasting effect on the [victim] physically, financially and emotionally."

[7] The background with respect to the 2004 offence is that the accused was charged with murder for having stabbed and beaten his then domestic partner in Nunavut. Through two trials and appeals, he remained in custody. Ultimately, in 2016, he pled guilty to manslaughter and, on sentencing, the judge, after crediting him with 18 years and four months for the approximately 12 years he had spent in pre-sentencing custody, ordered 18 months of supervised probation and directed that he move to Winnipeg to be away from that victim's family and reside with his mother.

[8] The background for the offences presently before the Court is as follows. The accused began his relationship with the victim in April 2017 and, in July of that year, he was arrested on charges of domestic assault, breaches of his probation order and possession of cannabis. He was released on a recognizance prohibiting contact and requiring compliance with a curfew and abstention from the consumption of intoxicants. A warrant issued for failure to report to probation services on August 15, 2017. The warrant was executed on August 30, 2017, at which time the accused was arrested for contacting the victim, attending her residence, assaulting her, failing to obey

his curfew and failing to abstain. He remained in custody until October 2017 when he was again released on a recognizance prohibiting contact with the victim, imposing a stricter curfew, and requiring abstention, as well as attendance at AFM for assessment.

[9] Following a trial on March 20, 2018, the accused was convicted of failing to comply with a probation order, breaches of recognizance for communicating with the victim and failing to abide by a curfew, and possession of cannabis. He was acquitted of assaulting the victim and failing to abstain. On May 28, 2018, he was sentenced to a fine, 30 days of time in custody, a one-day court appearance and a one-year supervised probation order. It was less than one month later that he committed the first of the offences that are the subject of this appeal—all of which were later the subject of guilty pleas.

[10] Dealing first with the allegation of ineffective assistance of counsel, the requirements that must be met to establish such a claim were outlined by this Court in *R v Le (TD)*, 2011 MBCA 83 at para 189, and involve three components. First, the factual component requires an appellant to establish, on a balance of probabilities, the facts on which the claim of incompetency is based. If that is done, the Court is to consider the prejudice component and, then, the performance component (see also *R v DGM*, 2018 MBCA 88 at paras 4-7).

[11] In support of his allegation of ineffective assistance of counsel, the accused sought to tender as fresh evidence his affidavit in which he deals with the three areas that he says his lawyer provided ineffective assistance: by consenting to the admission of unfavourable hearsay evidence in some of his

Correctional Service Canada (CSC) records; by not objecting to the Crown tendering the 2013 sentencing decision (see 2013 NUCJ 30) (the 2013 decision) in connection with his killing of his domestic partner in 2004; and by failing to seek the recusal of the sentencing judge.

[12] The lawyer who represented the accused at the sentencing hearing has affirmed a comprehensive affidavit indicating that: she discussed the CSC records in some detail with the accused who raised no objection to them being admitted; she exercised her professional judgment in not opposing the filing of the 2013 decision which she viewed as relevant and likely of assistance to the sentencing judge; and she discussed with the accused a possible motion for recusal and he instructed her to proceed before the sentencing judge.

[13] As I will explain, we are not satisfied (without even relying on the lawyer's affidavit) that the test for admission of fresh evidence in support of an allegation of ineffective assistance of counsel, as outlined in *R v Zamrykut*, 2017 MBCA 24 at para 3, has been met. While the evidence sought to be introduced is admissible under the rules of evidence, the accused's motion fails at the second part of the test: it is not apparent from the trial record that the fresh evidence could reasonably have affected the result.

[14] The disputed CSC records are four redacted documents culled from 12 years of records—a psychological intake assessment, a criminal profile report, and two reports outlining the accused's participation in substance abuse and family violence counselling. In the proposed fresh evidence, the accused says that, although he spoke briefly with his lawyer at the sentencing hearing about admission of these records, she told him that the Crown was entitled to rely on them and did not advise him that the Crown must prove

aggravating factors beyond a reasonable doubt; the accused also says that, had he been so advised, he would have challenged the Crown to prove some of the facts in the records. However, the records also contain positive information about programming in which the accused had participated. In addition, hearsay evidence is clearly admissible on a sentencing under section 723(5) of the *Criminal Code* and pursuant to the principles enunciated in *R v Gardiner*, [1982] 2 SCR 368 at 414 (see also *R v Piche*, 2006 ABCA 220 at paras 9-20). In our view, the CSC records contain credible, trustworthy and relevant information that would have been admitted irrespective of any consent provided.

[15] We come to the same determination with respect to the 2013 decision, which contains details about the background of the accused and his actions in the 2004 homicide. The accused says that the 2013 decision was not relevant and was prejudicial in that it was made in the context of a murder conviction which was ultimately overturned on appeal. He attests that, had he known that the use of the 2013 decision could be challenged, he would have done so on the basis of relevance. However, the sentencing judge was well aware that the murder conviction had been overturned. And, when the accused was eventually sentenced for manslaughter on the 2004 homicide, only concise reasons were provided (see 2016 NUCJ 19) in which the Court stated that the 2013 decision was "both comprehensive and poignant and again nothing further will be gained by repeating [it] here" (at para 3 of the supplementary reasons for decision). The 2013 decision was relevant to the present sentencing not only because it contained background information regarding the accused, but his prior criminal conduct may also have been of considerable importance on matters such as the prospect of rehabilitation and

risk to public safety (see *R v Wright*, 2010 MBCA 80 at paras 7-8; and *R v JCW*, 2020 MBCA 40 at para 13). Again, as in the case of the CSC records, regardless of the process or procedure for admission, the 2013 decision would have been before the sentencing judge.

[16] The accused also seeks to admit fresh evidence in support of his allegation that he received ineffective assistance because his lawyer failed to seek recusal of the sentencing judge who had also presided over his trial in March 2018 and sentencing in May 2018. The accused attests that, had he known that he could have sought removal of the judge, he would have made that application. He says that he "believe[s]" that the sentencing judge was "offended" because he had previously acquitted the accused of assault in connection with the same victim and afforded him leniency on sentence. However, the record shows otherwise. It establishes that the accused's lawyer raised the issue of possible recusal with the sentencing judge who indicated that he had no concern. The record also shows that the lawyer was then allowed an opportunity to speak with the accused, and the accused's affidavit states that he spoke with the lawyer regarding his recusal concerns. Finally, when the hearing resumed, the accused's lawyer advised the sentencing judge that "[we are] prepared to proceed." From all of this, we are not persuaded that the fresh evidence could reasonably support an allegation of ineffective assistance on the basis of failure to seek recusal of the sentencing judge.

[17] In all of the circumstances, the proposed fresh evidence could not, in our view, have reasonably affected the result. Therefore, the motion for admission of the fresh evidence was denied and the ground of appeal based on ineffective assistance of counsel fails.

[18] As for the other grounds of appeal, the applicable standard of review was set out set out in *R v Friesen*, 2020 SCC 9. An appellate court can only intervene if the sentence is demonstrably unfit, or the sentencing judge made an error in principle that had an impact on the sentence (see para 26).

[19] With respect to the allegation that the sentencing judge made a palpable and overriding error in his assessment of the accused's conduct while on probation, the sentencing judge commented that the accused had failed to take advantage of probation based on his two breaches and failure to attend his addictions assessment. The accused says that he otherwise reported without issue during the period of probation. However, given the history that I have described, the sentencing judge was entitled to infer that there had been issues with compliance during the period of probation which showed an unwillingness to abide by court orders.

[20] With respect to *Gladue* considerations, the accused is of mixed heritage, with his mother being Inuit. While he grew up in a somewhat stable environment, the sentencing judge also noted that: his mother attended residential school and has struggled with addiction; he was bullied in school due to his mixed heritage; he was sexually abused by a relative when he was young; he has issues with alcohol abuse; and he has a limited employment history. The sentencing judge dedicated many paragraphs of his decision to analysis of *Gladue* factors and their impact. He found that the factors were "not minor". In assessing their impact, he appropriately concluded that, "At some point [the accused's] background has to be given less weight and his actions have to be given more weight." We are not persuaded that the sentencing judge failed to adequately consider *Gladue* factors or afford them sufficient weight.

[21] Finally, the sentence for assault causing bodily harm, while high, is not unfit given the multiple aggravating factors. The accused has a frightening history of engaging in violence against domestic partners, and all indications are that he is neither rehabilitated nor deterred as a result of his prior lengthy incarceration and programming. He assaulted the vulnerable victim on multiple occasions in her home, including using a knife and making threats to kill her. His actions have had a long-lasting impact on the victim.

[22] For the foregoing reasons, the fresh evidence motion was denied and, while leave to appeal was granted, the appeal was dismissed.

"Simonsen JA"

"Chartier CJM"

"Monnin JA"