IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Holly C. Beard
Madam Justice Jennifer A. Pfuetzner
Madam Justice Janice L. leMaistre

B E T W E E N :

HER MAJESTY THE QUEEN	)	***G. G. Brodsky, Q.C.*** *and* ***Z. B. Kinahan*** *for the Appellant*
Respondent	)	***A. Y. Kotler*** *for the Respondent*
- and -	)	
JOELLE AMY BEAULIEU	)	*Appeal heard and Decision pronounced* ***September 11, 2018***
(Accused) Appellant	)	*Written reasons:* ***November 14, 2018***

BEARD JA (for the Court):

I. THE ISSUES

[1] The accused is appealing her conviction, following a trial by judge and jury, for second degree murder pursuant to section 235(1) of the *Criminal Code*. We dismissed the appeal at the hearing with reasons to follow. These are those reasons.

[2] The accused's grounds of appeal are as follows:

(i) that the trial judge erred by refusing to permit the accused to elicit her statement upon arrest through the arresting officer; and

(ii) that the trial judge erred by not explaining in sufficient detail the evidence that supported the wrongful act or insult in relation to provocation.

II. THE FACTS AND BACKGROUND

[3] The accused admitted to having stabbed the deceased. The issues to be determined by the jury were whether she was acting in self-defence, whether she had the necessary intent for murder and, if they found her guilty of murder, whether she was provoked into acting.

[4] Prior to the commencement of the trial, there was a *voir dire* to determine whether certain statements made by the accused to the police at the time of her arrest could be led in evidence. The Crown took the position that the statements were inadmissible because they constituted prior consistent statements which would only be admissible if the accused testified and was able to be cross-examined regarding the statements. The accused argued that they should be admitted, not as proof of the truth of the statements, but to show her physical state, her mental state and as spontaneous utterances. The trial judge ruled that the statements would only be admissible if the accused testified. The accused did not testify, so the statements were not admitted.

III. FIRST GROUND—STATEMENTS TO POLICE

[5] This ground of appeal relates to the trial judge's decision to refuse the accused's motion to admit her oral statements made to the police at the time of her arrest. The standard of review of a trial judge's ruling regarding the admissibility of evidence is that, provided that the trial judge applies the correct principles of law, the ruling on an admissibility motion will be entitled

to deference if it is reasonable and supported by the evidence. (See, for example, *R v Woodard*, 2009 MBCA 42 at para 45; *R v Cansanay (JH)*, 2012 MBCA 103 at para 10; *R v Youvarajah*, 2013 SCC 41 at para 31; *R v Desjarlais (DG)*, 2016 MBCA 69 at para 13; and *R v Johnston*, 2018 MBCA 8 at para 96; see also S Casey Hill, David M Tanovich & Louis P Strezos, *McWilliams' Canadian Criminal Evidence*, 5th ed (Toronto: Thomson Reuters, 2013) (loose-leaf updated 2018, release 3), pt VIII, ch 37 at para 37:100 (online: WLNext Can (date accessed 9 November 2018)).)

[6] The accused argues that the trial judge erred by not admitting, through the arresting police officer, two statements that she made to that officer at the time of her arrest. When the police officer arrested the accused, he explained to her the reason for the arrest, in compliance with section 10(*a*) of the *Canadian Charter of Rights and Freedoms* (the *Charter*), and asked her whether she understood. In reply, the accused stated, "No, because it was actually self-defence can't you see my face?" In reply to the next question, in compliance with section 10(*b*) of the *Charter*, regarding whether she wanted to contact a lawyer, the accused said no and stated "because this is self-defence I know." The accused did not testify, so she was not able to be cross-examined about these statements.

[7] The accused stated to the trial judge, and repeats on appeal, that she is not requesting that these statements be admitted for the truth of the contents; rather, she argues that these statements should be admitted to provide an accurate version of the interaction with the police and to show her state of mind and fear. Further, she argues that they are admissible as spontaneous utterances.

[8] Exculpatory statements made out of court by an accused to another person are generally inadmissible, both (i) because an accused cannot elicit his or her own prior self-serving statements from witnesses, and (ii) because a witness, whether a party or not, cannot repeat his or her own out-of-court statements made to other persons concerning a matter before the court and cannot call other persons to testify to those statements. If they are entered as proof of the truth of the statements, the first statements are inadmissible because they are hearsay statements and the second statements are inadmissible because they lack probative value. (See *R v Edgar*, 2010 ONCA 529 at paras 26-34, leave to appeal to SCC refused, 33984 (31 March 2011).)

[9] There are, however, exceptions to these rules that, when applicable, permit the admission of these statements either as proof of the truth of the assertions in the statements or for other purposes. The accused has argued that there are applicable exceptions that should permit the admissions of her statements to the police for certain limited purposes.

Admissibility as a Reaction to Arrest by Police

[10] The first argument, and the main thrust of the accused's submissions, is that the trial judge should have admitted these statements as an exception to the general rule excluding prior consistent statements for the purpose of showing her reaction when first confronted with the accusation that she had stabbed the deceased. While such statements are generally inadmissible for this purpose, that inadmissibility was reviewed by the Ontario Court of Appeal in *Edgar*. After undertaking an exhaustive review of the jurisprudence on this issue in both England and Canada, Sharpe JA, for the Court, came to the following conclusion (at para 72):

> I conclude, therefore, that it is open to a trial judge to admit an accused's spontaneous out-of-court statements made upon arrest or when first confronted with an accusation as an exception to the general rule excluding prior consistent statements as evidence of the reaction of the accused to the accusation and as proof of consistency, provided the accused takes the stand and exposes himself or herself to cross-examination. As the English cases cited above hold, the statement of the accused is not strictly evidence of the truth of what was said (subject to being admissible under the principled approach to hearsay evidence) but is evidence of the reaction of the accused, which is relevant to the credibility of the accused and as circumstantial evidence that may have a bearing on guilt or innocence.

[11] While generally inadmissible, an accused's out-of-court statement is admissible under the *Edgar* exception only if the accused testifies. As the accused in the present case did not testify, the exception in *Edgar* does not apply to provide a basis for the admission of her statements to the police, and we would dismiss this ground of appeal on this basis.

[12] The accused argues that this Court should adopt the English law, based primarily on the decision of *R v McCarthy* (1980), 71 Cr App R 142 (CA (Eng)), and find that statements made to police officers at the time of arrest are admissible without the accused testifying, with the proviso that the trial judge can give a limiting instruction to the jury as to the weight of that evidence where the accused chooses not to testify. The Court in *Edgar* considered *McCarthy* and the related jurisprudence on this issue and, after detailed analysis, concluded that such evidence could only be admitted for this purpose if the accused testified, implicitly rejecting this argument. In our view, it would not be appropriate, in this case, to overturn the large and established body of Canadian law that determines that such statements are not admissible on the basis of the English jurisprudence.

[13] Further, the proposed limiting instruction would be contrary to section 4(6) of the *Canada Evidence Act*, RSC 1985, c C-5, which prohibits any comment by counsel for the prosecution or a judge on the failure of an accused to testify. Thus, it would not be open to a judge to give the proposed instruction to a jury.

[14] In oral argument at the appeal hearing, the Crown asked that this Court not adopt the exception that was accepted in *Edgar* but, rather, argued that we should follow the academic writing and certain jurisprudence that question, or at least have reservations about, the correctness of that decision. (See, for example, David M Paciocco, "The Perils and Potential of Prior Consistent Statements: Let's Get It Right" (2013) 17 Can Crim L Rev 181.) This argument was not made to, or considered by, the trial judge and, because it was raised in a significant way only in oral argument, the accused has not had an opportunity to respond; thus, the argument has not been fully litigated. For all of these reasons, and also because it is not necessary to deal with the substance of the decision in *Edgar* to dispose of this ground of appeal, we are of the view that this is not the appropriate case to consider whether to adopt or reject, in principle, that decision.

Spontaneous Utterance

[15] Although the accused maintains that the purpose of the evidence is not for proof of the truth of the statements, which is the usual purpose of the spontaneous utterance exception to the hearsay rule (see, for example, David M Paciocco & Lee Stuesser, *The Law of Evidence*, 7th ed (Toronto: Irwin Law, 2015) at 186-93), she argues that her statements are, nonetheless, admissible as spontaneous utterances. The trial judge dismissed this argument

on the basis that the statements do not meet the requirements of this exception, stating as follows:

> We do not have words spoken contemporaneous to a shocking, dramatic event. They were spoken at least 23 minutes afterwards to a police officer and, of course, that raises the very real difficulties with respect to fabrication. Once we have that real difficulty facing us, Edgar is very clear and very persuasive authority that the accused must submit herself to cross-examination to allow that statement to be entered.

[16] This Court recently considered the law related to spontaneous utterances in *R v Head*, 2014 MBCA 59 at paras 19-36. Mainella JA, for the Court, adopted the following test for the admissibility of spontaneous utterances (at para 29):

> The traditional common-law test for the admission of a spontaneous (or excited) utterance as an exception to the hearsay rule was stated as follows by Lord Wilberforce in *Ratten v The Queen*, [1972] A.C. 378 (P.C.) (at p. 391):
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> > … [H]earsay evidence may be admitted if the statement providing it is made in such conditions (always being those of approximate but not exact contemporaneity) of involvement or pressure as to exclude the possibility of concoction or distortion to the advantage of the maker or the disadvantage of the accused.

[17] In the present case, the facts are that the accused stabbed the deceased in their kitchen, in the presence of the accused's cousin Delaney Houle. The deceased and the accused, who were in a common-law relationship and had four children, had been arguing for some time because he was trying to leave her and she was trying to make him stay. Mr. Houle testified that the accused told the deceased that "she wasn't scared", and was

holding onto him with one arm. The other arm was cocked "like she was going to punch him." She extended her arm in front of her, at the deceased. The deceased said, "You're stabbing me," and then he dropped to the floor, holding his chest.

[18] Mr. Houle ran to the accused and picked him up. He and two other men who were present at the residence carried the deceased out to a vehicle and he was taken to the hospital. It was only after they arrived at the hospital and the deceased had been seen by medical staff that the police were called, which was at 10:14 p.m. The accused was arrested at 10:37 p.m., at which time she made the statements now at issue. Thus, while the time between the call to the police and the accused's statements was 23 minutes, the stabbing took place sometime before the call, so the time delay between the stabbing and the statements was longer than 23 minutes.

[19] This is different from the fact situation in *Head*. The accused in that case fired a shot and then he and others ran into a nearby apartment. There, the accused asked the others if the person he had shot had a gun, which is the statement that he wanted admitted as a spontaneous utterance. While the trial judge in that case excluded the statement as not being spontaneous, it was admitted on appeal. It is of note, however, that the statement was made a minute or two after the shooting with no intervening acts other than the accused firing a second shot and running into the apartment.

[20] In this case, the statements were made more than 23 minutes after the stabbing. Thus, the accused had a significant period of time to consider her position. Further, the statement was not spontaneous, but in reply to being arrested by the police—a situation in which an accused is often motivated to

be untruthful. In our view, the trial judge applied the correct principles and he did not err in finding that, in this case, the statement does not meet the test for admissibility as a spontaneous utterance. (See also *R v Hillis*, 2016 ONSC 450 at para 36.)

Admissibility as Evidence of the Accused's Mental Condition

[21] The accused argues that her statements that she was acting in self-defence should be admitted as evidence of her mental state, being her fear. The trial judge addressed that argument as follows:

> But as to whether the statements in any event would address the accused's mental state, they do not. They, they basically set up a defence, that is, I did this in self-defence. Any reference or any assistance that might be -- as to a mental state is -- would -- is far outweighed by the prejudice of putting, again, the accused's defence to the jury without the accused submitting to cross-examination.

[22] The standard of review is that set out at para 5 herein. We agree with the trial judge's conclusion that the statements are setting up a defence to the stabbing, rather than going to the accused's mental condition, especially in light of her statement to the deceased at the time of the stabbing that "she wasn't scared." We agree with the Crown's argument that it is a legal conclusion rather than a factual claim. Further, admitting the statement without the ability to cross-examine the accused to understand what she meant would invite speculation on the part of the jury and would be confusing.

[23] Thus, we find that the trial judge did not err in finding that the prejudicial effect of admitting these statements as evidence of the accused's mental condition would outweigh their limited probative value.

Necessity and Reliability Exception

[24] The accused argues that her statements to the police should be admitted under the principled exception of necessity and reliability. The standard of review is that set out in para 5 herein.

[25] To address this argument, it is helpful to recall the purpose of the exception. As this Court stated in *Woodard*, an out-of-court statement is hearsay if it is tendered to prove the truth of the contents, in which event it is presumptively inadmissible (see para 46). The necessity and reliability exception, if applicable, permits the evidence to be admitted and considered by the trier of fact as proof of the truth of the contents even though its maker is not being called to testify.

[26] Given that this exception is applicable for the purpose of admitting statements as proof of the truth of the statements and that the accused has insisted, both at trial and on appeal, that she is not offering them for that purpose, this exception is not applicable. Thus, we are dismissing this argument on this basis.

Conclusion

[27] For these reasons, we find that the trial judge did not err in holding that the evidence of the accused's oral statements to the police on being arrested was not admissible for any of the purposes now put forward.

Curative Proviso

[28] The Crown argues that, even if the trial judge erred in refusing to admit the accused's statements to the police, this ground of appeal should be

dismissed under section 686(1)(b)(iii) of the *Criminal Code*. The evidence of both the bruising and the defence of self-defence that make up the accused's statements was before the jury even without the admission of the accused's statements. The bruising was put before the jury in the form of the photographs of the accused taken at the time of her arrest that were filed as exhibits at the trial, and her position that she was fearful and acting in self-defence was fully argued as part of the trial.

[29] In our view, the exclusion of the accused's very short statements to the police regarding these two matters could not have affected the verdict. We are, therefore, of the view that, even if we are wrong, the exclusion of these statements did not result in any "substantial wrong or miscarriage of justice" (section 686(1)(b)(iii)), and this ground of appeal is dismissed on this basis, as well.

IV. SECOND GROUND—CHARGE ON PROVOCATION

[30] The accused argues that the trial judge erred in his charge on provocation by not explaining in sufficient detail the evidence that supported the wrongful act or insult. More particularly, she takes issue with the manner in which the trial judge explained and related the evidence to the objective test for provocation.

[31] The jurisprudence has set out a high standard for reviewing a jury charge, as was recently explained by this Court in *R v Ross*, 2018 MBCA 7 at paras 20-28. Regarding the need to relate the evidence to the issues, this Court stated (at para 21):

> In instructing a jury, a trial judge must relate the evidence to the issues in the trial. The duty of a trial judge was described by Lamer CJC in *Jacquard* [*R v Jacquard*, [1997] 1 SCR 314] (at p 326):
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> > In many cases, a trial judge need only review relevant evidence once and has no duty to review the evidence in a case in relation to every essential issue. See *John v. The Queen*, [1971] S.C.R. 781, *Cluett v. The Queen*, [1985] 2 S.C.R. 216. As long as an appellate court, when looking at the trial judge's charge to the jury as a whole, concludes that the jury was left with a sufficient understanding of the facts as they relate to the relevant issues, the charge is proper. See *Cluett*, *supra*, at p. 231.

[32] As the trial judge explained, the objective test has two parts: was there a wrongful act or insult, and was the wrongful act or insult sufficient to deprive an ordinary person of the power of self-control. Even though this is referred to as an objective test, it is clear that the ordinary person is someone in the accused's circumstances. This test was explained by the trial judge as follows, an explanation with which the accused has not taken any issue other than as to the review of the evidence:

> In answering this question [regarding the ordinary person], you do not consider any factors or features that are peculiar or unique to [the accused], for example, temperament, attitude or lack of sobriety. In this case, an ordinary person would be someone of the same age and sex as [the accused], who shares with her those other characteristics that would give the wrongful act or insult a special significance in the circumstances. The ordinary person would also be the one who has experienced the same series of acts or insults as [the accused] and shares the past history and relationship between [the accused] and [the deceased]. An ordinary person is not exceptionally excitable, or disposed to fight and has, and exercises those powers of self control that all of us expect our fellow citizens to exercise in our society today. The question for you to answer concerning the ordinary person is whether that ordinary person, with the characteristics I have described, would

> lose her self control because of [the deceased]'s wrongful act or insult. The question is not whether the ordinary person would have lost her self control and ended up doing exactly what [the accused] did in this case. In other words, what is important is the loss of self control, not the precise form it took. To answer this question, take into account everything that was said or done at the time, as well as the relationship and history between [the accused] and [the deceased], including any pervious exchanges that may have occurred between them. Ask yourselves whether an ordinary person, in these circumstances, with the characteristics I have described, confronted with the same wrongful act or insult, would have lost the power of self control, and in light of all the evidence, whether a reasonable person in [the accused]'s position would have lost her power of self control. It is for you to say. The evidence I would ask you to consider here is all of the evidence you previously reviewed. I have done my best to summarize some of the evidence given by the witnesses in my instructions on self-defence. You should look to that same evidence to determine this issue.

(See, for example, *R v Hill*, [1986] 1 SCR 313 at para 45; and *R v Oigg*, 2005 MBQB 275 at para 7, aff'd 2007 MBCA 34, leave to appeal to SCC refused, 32044 (23 August 2007).)

[33] The accused argues that, in regard to the objective test, the trial judge erred by not drawing the following to the jury's attention:

- her bruises and markings, presumably due to a beating and her explanation for how she came to have the markings on her face to the police;

- her hysteria, intoxication and fear;

- that she could not be presumed to be sane and sober because she was not;

- that the deceased was leaving her to raise her children alone indefinitely.

[34] The trial judge referred the jury back to his recitation of the evidence related to self-defence as evidence that would be relevant to the objective test for provocation.

[35] On the failure to refer to bruises and markings on the accused, the trial judge referred the jury to the police photographs that showed bruises and markings on her arms and face. He also referred to the testimony of both Mason Beaulieu regarding the deceased hitting the accused and of Germaine Beaulieu regarding the deceased having a bad temper and that the two had been arguing just before the stabbing.

[36] Other than the evidence of Mason Beaulieu, there was no evidence to explain how the accused came to have those bruises and markings or when she got them.

[37] On the failure to refer to evidence of hysteria and/or fear, there was no evidence of any hysteria or fear to put to the jury, apart from the evidence of Mason Beaulieu and Germaine Beaulieu regarding the family relationship. In fact, the evidence was that the accused stated, "I'm not scared" immediately before stabbing the deceased. In any event, the accused's individual, personal reaction to the events preceding the killing is more appropriately considered as part of the second part of the test for provocation, being the subjective test. (See *Hill* at paras 33, 38; and *Oigg* at para 7 (QB).)

[38] As regards the accused's intoxication, the law specifically directs that intoxication does not form part of the objective test; rather, at this stage,

the objective person is presumed to be sober. (See *Hill* para 34; and *Oigg* at para 11 (QB).) Again, this is an issue that would be addressed in the second part of the test for provocation, being the subjective element.

[39] On the final point, the trial judge did explain to the jury that it should consider the history of the relationship between the accused and the deceased. He had explained that history earlier in his charge as follows:

> By all of the evidence you've heard it seems clear that [the deceased] intended on leaving the relationship that day and moving to Brandon. We also note, we also know that [the accused] was intent on stopping him from doing so, that she was angry and upset was noted by many of the witnesses . . .. There is very little evidence that [the deceased] was cheating on [the accused], however, Dustin Houle stated that [the accused] told him that she thought [the deceased] was cheating on her. You may conclude that some or all of this may have effected [*sic*] [the accused's] state of mind.
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> . . .
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> You might wish to consider the evidence . . . that the accused . . . thought that [the deceased] was cheating on her. You've already come to some conclusions in your consideration of self-defence, as to whether or not [the deceased] assaulted [the accused]. These conclusions may assist you here. Finally, there is overwhelming evidence that [the deceased] wanted to leave [the accused] and go to Brandon.

[40] Thus, the evidence of the pending marital separation resulting from the deceased's decision to leave the relationship was drawn to the jury's attention for its consideration in relation to the objective test. In our view, when the charge is considered as a whole, the trial judge explained the evidence in sufficient detail so that the jury would have understood what

evidence supported the wrongful act or insult. Thus, we are dismissing this ground of appeal, as well.

[41] That said, we share the Crown's concern as to whether a marital separation could be a circumstance that could objectively lead an ordinary person to lose self control. This concern was expressed by Iacobucci and Major JJ in their dissenting reasons in *R v Thibert*, [1996] 1 SCR 37 at paras 64-65; and by Charron J for the Court in *R v Tran*, 2010 SCC 58 at paras 7, 29, 34. As it was left to the jury to consider in this case, however, the question of whether that was legally correct to do so is not at issue in this appeal.

V. DECISION

[42] For these reasons, we dismissed the appeal at the hearing.

Beard JA

Pfuetzner JA

leMaistre JA