IN THE COURT OF APPEAL OF MANITOBA

B E T W E E N :

	)	***G. J. Hjorleifson***
	)	*on his own behalf*
HER MAJESTY THE QUEEN	)	*(via teleconference)*
	)	
(Respondent) Respondent	)	***C. R. Savage***
	)	*for the Respondent*
- and -	)	*(via teleconference)*
	)	
GRANT JONATHAN HJORLEIFSON	)	*Chambers motion heard:*
	)	***July 22, 2021***
(Accused) (Appellant) Applicant	)	
	)	*Decision pronounced:*
	)	***August 4, 2021***

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 motion was heard remotely by teleconference.

PFUETZNER JA

[1] The accused seeks leave to appeal a decision of the summary conviction appeal (SCA) judge dismissing his appeal from a conviction for one count of assault and one count of uttering threats.

Background

[2] At the time of the offences, the accused and the victim were separated spouses involved in divorce proceedings.

[3] The trial judge made the following findings. The accused attended at the victim's home to discuss the health of the family dog. An argument about financial and other contentious matters ensued. The accused punched

the victim several times in the stomach and she tried to block these blows, receiving injuries to her wrists which were apparent in photographs that she took in the days following. The accused also threatened the victim, saying words to the effect of "I will put you down" and "I should take you all out, you and your family".

[4] Before the SCA judge, the accused argued three grounds of appeal. First, that the trial judge erred in finding that the photographs corroborated the victim's testimony. Second, that the trial judge incorrectly shifted the burden of proof to the accused. Finally, that the trial judge improperly restricted defence counsel's cross-examination of the victim.

[5] The SCA judge found that the trial judge's assessment of the weight to be given to the photographs was entitled to deference and that she did not shift the burden of proof. Lastly, the SCA judge found that the trial judge properly exercised her discretion to limit cross-examination when she disallowed questions that related solely to the parties' family law proceedings on the basis of a lack of relevance to the key issues in the trial.

[6] The accused now seeks leave to appeal the decision of the SCA judge to this Court pursuant to section 839(1) of the *Criminal Code*, which permits leave to be granted on "any ground that involves a question of law alone".

Analysis

[7] As explained by Chartier JA (as he then was) in *R v Lenko*, 2010 MBCA 10, "the threshold for determining whether leave should be granted is very high. In addition to raising grounds involving questions of law alone, leave should only be granted if the matter raises an arguable case of substance

which is of sufficient importance to merit the attention of the full court" (at para 4). The accused bears the onus to meet this high threshold.

[8] The accused raises several grounds for his intended appeal.

[9] First, he asserts that the SCA judge made a "[c]lear error of law" in accepting how the trial judge dealt with the victim's evidence and the photographs. He says that the photographs show cuts or scratches on the victim's wrists and that, if caused by the assault, these would have been immediately apparent. However, the victim told police that she had no injuries immediately after the assault. He also argues that the victim's evidence was inconsistent and should not have been accepted by the trial judge. Moreover, he submits that the SCA judge failed to recognize multiple instances of misapplication of *R v W(D)*, [1991] 1 SCR 742 by the trial judge.

[10] In my view, this proposed ground of appeal does not raise an arguable question of law. The assessment of evidence and the weight to be given to it is an exercise in fact-finding that generally raises questions of fact—not law. Leave to appeal can only be granted on questions of law. Finally, the trial judge's reasons show that she did not err in applying *W(D)* and that the burden of proof remained on the Crown throughout.

[11] Second, the accused maintains that the SCA judge erred by failing to identify instances of "fabrication of evidence by the Crown" and "prosecutorial misconduct". This relates to counsel for the Crown (not the same counsel as on this motion) questioning the accused in cross-examination as to whether the incident occurred on a Monday or a Friday. The accused did not agree that it occurred on a Monday. Before the trial closed, Crown counsel conceded that the date in question was a Friday, corrected himself and

apologized to the accused and to the Court. The accused also raises an issue regarding Crown counsel's conduct at a pre-trial proceeding before another judge where the terms of the accused's release were discussed. While issues of fabrication of evidence and prosecutorial misconduct raise questions of trial fairness and are questions of law, there is no arguable merit to this ground of appeal. I have reviewed the transcripts and there is no chance that the accused could persuade a panel of this Court that Crown counsel conducted himself inappropriately or that his conduct affected the fairness of the trial.

[12] Next, the accused argues that the SCA judge erred in failing to find that the verdict was unreasonable. While the reasonableness of a verdict is a question of law, this ground of appeal has no real prospect of success. The verdict was reasonably supported by the evidence. As part of the accused's argument on this ground of appeal, remarkably he accuses both the SCA judge and the trial judge of bias, violating their oaths of office and criminal behaviour. There is no foundation whatsoever to these allegations.

[13] Finally, the accused argues that he received ineffective assistance of counsel, resulting in a miscarriage of justice and warranting a new trial. In support, he has filed his own affidavits, as well as transcripts of the proceedings in the trial Court and in the SCA Court.

[14] Whether a miscarriage of justice occurred raises a question of law. The threshold for an appellant to meet in order to successfully argue ineffective assistance of counsel is high. There is a presumption in favour of competence and appellate courts do not review the performance of defence counsel forensically or with the wisdom of hindsight. Rather, the court assesses whether the performance of defence counsel falls within a wide range

of reasonable professional assistance (see *R v Le (TD)*, 2011 MBCA 83 at paras 156-66).

[15] The accused was represented by the same lawyer at the trial and in the SCA Court (defence counsel). This was a straightforward trial involving two witnesses—the victim and the accused. Credibility was the key issue. I have carefully reviewed the trial transcripts, including the cross-examination of the victim and the transcript of proceedings in the SCA Court. The latter reveals certain areas of concern, such as defence counsel's statement, "My understanding of the criminal law is turning out to be mediocre at best. I practice family law" and the reasons offered to the SCA Court for his approach in cross-examination of the victim on the photographs. In his affidavit, the accused indicates that a complaint has been filed by the Crown's office with the Law Society of Manitoba regarding defence counsel's "conduct and professionalism."

[16] Based on the transcripts and on the potential fresh evidence available in the form of a formal complaint to the Law Society of Manitoba, I am persuaded that there is at least an arguable case to be made that defence counsel's performance fell below the standard of reasonable professional assistance, such that a miscarriage of justice may have occurred.

[17] However, I must still address whether this issue is of sufficient importance to warrant the attention of the full Court. In my view, this is not a case where the issues raised are of importance to the administration of justice or to the development of the law.

[18] Second-level appeals are sparingly granted, as the SCA Court has primary appellate jurisdiction. The question of ineffective assistance of

counsel was, for obvious reasons, not addressed by the SCA Court and is being raised in this Court for the first time. As a result, in respect of the issue of ineffective assistance of counsel, this is not a second-level appeal and I find that, in the circumstances of this case, the risk of an injustice warrants leave to appeal being granted.

Conclusion

[19] Therefore, I grant leave to appeal on the following question of law:

> Did the accused receive ineffective assistance of counsel, such that a miscarriage of justice occurred?

[20] The accused is directed to proceed with his appeal of the above question of law in accordance with the Court of Appeal, "Notice: Re: Directive Regarding Appeal Proceedings Involving Allegations of Ineffective Counsel in First Instance" (15 January 2016), online (pdf): *Manitoba Courts* <www.manitobacourts.mb.ca/site/assets/files/1139/notice_re_ineffective_counsel.pdf> (date accessed 27 July 2021).

[21] The accused's motion for leave to appeal is dismissed with respect to all of the remaining proposed grounds of appeal.

Pfuetzner JA