Citation: R v Mohamed, 2018 MBCA 130 Date: 20181127
Docket: AR17-30-08835

IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Diana M. Cameron
Mr. Justice William J. Burnett
Madam Justice Janice L. leMaistre

B E T W E E N :

HER MAJESTY THE QUEEN	)	***R. T. Amy***
	)	*for the Appellant*
Respondent	)	
	)	***A. Y. Kotler***
- and -	)	*for the Respondent*
	)	
MOWLID KORANE MOHAMED	)	*Appeal heard and*
	)	*Decision pronounced:*
(Accused) Appellant	)	***November 27, 2018***

On appeal from 2017 MBQB 64

LEMAISTRE JA (for the Court):

[1] The accused was convicted, after a trial by judge and jury, of second degree murder and attempted murder for stabbing two young men he had met at a party that night. The accused appeals his conviction and seeks a new trial.

[2] The accused advances three grounds of appeal: 1) the trial judge erred by excluding the evidence of the eyewitness identification expert; 2) the trial judge erred by allowing the jury to consider whether the accused had adopted a comment made by a witness; and 3) the trial judge erred by failing to instruct the jury that the movement of the parties at the time of the stabbing could be used to decide whether the accused had the requisite intention for murder.

[3] After considering the evidence of the eyewitness identification expert on the *voir dire*, the trial judge determined that the purpose of the expert evidence was "to remind the jury of the many frailties of eyewitness identification". He found that some of the evidence could be dealt with by instructions to the jury; some of the evidence would be superfluous; and some of the evidence could usurp the fact finding function of the jury. Accordingly, he concluded that the evidence of the eyewitness identification expert was neither necessary nor admissible.

[4] The trial judge's decision to exclude the evidence of the eyewitness identification expert was a discretionary decision and is entitled to deference (see *R v Woodard*, 2009 MBCA 42 at para 14; see also *R v Pearce (ML)*, 2014 MBCA 70 at para 74).

[5] We are not persuaded that the trial judge erred in refusing to admit the evidence of the eyewitness identification expert. He considered the law and properly applied it. Moreover, he gave detailed instructions to the jury about how to approach witness testimony generally and eyewitness testimony in particular, referring to areas of concern addressed by the expert (see *Woodard* at paras 28-41).

[6] Regarding the second ground of appeal, the trial judge found that the accused participated in the conversation during which a witness said he "only hit [the victim] twice" and that he did not deny what the witness said was true. The trial judge concluded that the jury might reasonably infer the accused agreed with the witness's suggestion and adopted the comment by his conduct and responses; and that the probative value outweighed any potential prejudice, particularly with a proper jury charge.

[7] We are not convinced the trial judge erred. He considered the test articulated in *R v Scott*, 2013 MBCA 7 at paras 20-24 and followed the proper procedure: he held a *voir dire* and then instructed the jury correctly on the law regarding adopted or implied admissions of guilt.

[8] Finally, there is no merit to the third ground of appeal.

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

leMaistre JA

Cameron JA

Burnett JA