Citation: R v Duke, 2024 MBCA 6
Date: 20240125

IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Freda M. Steel
Madam Justice Janice L. leMaistre
Madam Justice Karen I. Simonsen

Docket: AR20-30-09395	)	
B E T W E E N:	)	***W. Y. Martin White***
	)	*for the Appellant*
HIS MAJESTY THE KING	)	*R. L. Duke*
	)	
Respondent	)	
- and -	)	***Z. M. Jones***
	)	*for the Appellant*
RANDI LYNN DUKE	)	*M. M. Kon*
	)	
(Accused) Appellant	)	
	)	***A. Y. Kotler***
- and -	)	*for the Respondent*
	)	
Docket: AR20-30-09487	)	
B E T W E E N:	)	***J. A. Weinstein***
	)	*on a watching brief*
HIS MAJESTY THE KING	)	
	)	
Respondent	)	*Appeals heard:*
	)	***June 14, 2023***
- and -	)	
	)	
MAJAK MABIOR KON	)	*Judgment delivered:*
	)	***January 25, 2024***
(Accused) Appellant	)	

SIMONSEN JA

[1] The accused appeal their convictions by a jury for first degree murder of John Jok (the victim). They assert that, because there was insufficient evidence of planning and deliberation, the trial judge erred by dismissing their motions for a directed verdict of acquittal on the charge of

first degree murder and allowing that charge to be put to the jury. For the same reason, both accused say that the verdicts for first degree murder are unreasonable.

[2] The accused, Randi Lynn Duke (Ms Duke), further contends that her conviction is a miscarriage of justice because she received ineffective assistance from the three lawyers who represented her at trial (collectively, trial counsel). Two of the trial counsel are hereinafter referred to as "lead counsel" and "second counsel".

[3] Ms Duke says that trial counsel provided ineffective assistance in three areas: failing to adequately gather the case on her behalf and engage her in her defence; failing to adequately inform her and seek her instructions on key strategic decisions; and failing to take adequate steps to advance her defence, that were in her best interest or as she instructed. She seeks to tender fresh evidence in support of these allegations.

[4] Although a number of arguments are raised, Ms Duke's central submission is that trial counsel provided ineffective assistance by moving, successfully, to exclude the video-recorded statement she made to the police after her arrest (the police statement) and instead, relying on an identification-only defence—that is, the position that the Crown had not proven beyond a reasonable doubt that she was involved in the shooting of the victim (the identification defence). She says that the police statement afforded evidence that she was not at the scene of the shooting as well as evidence that there had been a home invasion on Victor Street approximately five months prior to the shooting (the home invasion). As I will explain more fully later, Ms Duke argues that evidence of the home invasion, in which she says the

victim caused serious bodily harm to the accused, Majak Mabior Kon (Mr. Kon), would have provided her with a defence of self-defence or defence of a third party or raised a reasonable doubt as to whether the Crown had proven that she had the requisite intention for murder. She also says that evidence of the home invasion would have provided a fruitful basis upon which to cross-examine Chandia Mombo, the girlfriend of the victim (the girlfriend), who was the Crown's key witness.

[5] For the reasons that follow, I would not admit the fresh evidence and would dismiss the appeals.

The Trial

The Evidence

[6] The Crown called a number of witnesses and asked the jury to conclude that both accused were guilty of first degree murder—Mr. Kon as the shooter and Ms Duke as a party to the offence. It asked the jury to find that Ms Duke had passed a gun to Mr. Kon, which he then used to kill the victim, and that Ms Duke was present when he did so, making statements of encouragement.

[7] Only the girlfriend testified to seeing Mr. Kon and Ms Duke in the hallway of the rooming house in Winnipeg (the rooming house) where the victim was killed on October 20, 2017.

[8] The girlfriend explained that the victim had just moved into a suite in the rooming house; Mr. Kon also lived in the rooming house on the same floor, in a different suite. The girlfriend testified that Mr. Kon is a cousin of the victim, and that one of the names he went by was "D.K.". She knew both

Mr. Kon and the victim because the three of them had been in a refugee camp together in Kenya many years earlier.

[9] The girlfriend further testified that she, the victim and two of his male friends moved the victim's possessions into his new suite, visited the caretaker and then returned to the suite. The men went to the store, and the girlfriend remained in the suite. The victim returned briefly to get the keys and, shortly after he left for the second time, the girlfriend heard a loud noise from the hallway. The victim began screaming and saying, "Why, D.K., why."

[10] The girlfriend peeked out the door of the suite and saw the victim lying on the floor in the hallway. No one else was present. He was trying to talk and asking her to call an ambulance. While she was with him, a man and a woman came into the hallway from one of the other suites. The man was "D.K.". Despite limitations in the girlfriend's evidence, she later selected, from police photo packs, both accused as the man and the woman in the hallway.

[11] According to the girlfriend, the man was holding a rifle in his hands and the woman was saying, "shoot him. He deserve[s] it." The man appeared to be trying to load the rifle and was pointing it at the victim. When he pointed it at the girlfriend as well, she ran inside the victim's suite and called 911. The people in the hallway began banging on the door of the suite. The girlfriend heard two shots. She opened a window, climbed out and jumped from the roof of the rooming house to a nearby playground to ask bystanders to call an ambulance. She then ran back to the rooming house to tell the caretaker that the victim had been shot.

[12] While she was on her way back to the rooming house, she saw the man and the woman from the hallway running through the alley behind the building, yelling “she called the cops” and fleeing.

[13] Two eyewitnesses (the eyewitnesses), who were in the playground near the rooming house, testified to seeing a woman fall from a house across the lane, come to the playground and ask them to call 911. They further said that two other people—a man and a woman—ran out the back door of the same house and that the woman shouted at the woman who had asked for help “this is what you fucking get, or this is what you fucking deserve” or words to that effect.

[14] The caretaker of the rooming house testified that, when he visited with the victim and his girlfriend earlier that day, Mr. Kon walked by and saw the victim. The caretaker described the encounter as tense. Sometime later, the caretaker heard loud arguing coming from upstairs. He then opened the entrance door of the rooming house to the girlfriend, who was hysterical. He went upstairs and saw the victim lying on the hallway floor.

[15] First responders attended and located the victim lying in the second floor hallway of the rooming house. He was taken to the hospital where he was pronounced dead. The autopsy revealed that he had been shot three times, once in the neck, once in the chest and once in the back.

[16] William Dut (Mr. Dut), who is a relative of Mr. Kon, and Saymore Ndou (Mr. Ndou) both testified that they had attended Mr. Kon’s suite that evening. Both indicated that present in Mr. Kon’s suite were Mr. Kon, two other Black men who left after Mr. Dut and Mr. Ndou arrived, and three Indigenous women. Mr. Dut testified that one of the women was Mr. Kon’s

girlfriend, whom he had met previously. According to Mr. Ndou, one of the women appeared to be Mr. Kon's girlfriend because they were kissing several times.

[17] Mr. Ndou said that everyone was drinking. On cross-examination, Mr. Dut agreed that everybody in the suite was drunk and that people were smoking marihuana.

[18] Mr. Dut left Mr. Kon's suite, while Mr. Ndou stayed. Mr. Ndou testified that, after Mr. Dut had left, the woman who appeared to be Mr. Kon's girlfriend went to the closet, or different room, and retrieved something that was covered in cloth. She carried it in both hands, palms up, and turned it over to Mr. Kon. Shortly thereafter, she told the other women that they would have to leave for a short time because she wanted to discuss something with her boyfriend. The women left. Mr. Kon told Mr. Ndou to leave and said that he could return in about 30 minutes. Mr. Ndou finished his drink and left.

[19] After the shooting, police officers arrived and located a spent bullet casing and a spent bullet in the stairs and second floor hallway of the rooming house. Spent bullet casings were also found in Mr. Kon's suite, as were several live bullets, all .22 calibre, which were swabbed for DNA with a match to Mr. Kon. Some of the bullets were grouped on the floor and one was in a nearby plastic drawer container. A similar bullet was removed from the victim's body along with a bullet fragment. Mr. Dut testified that he had not seen any bullets in Mr. Kon's suite when he was there earlier in the evening.

[20] A firearms expert opined that the spent bullet casings located by the police had been fired by the same weapon. Although he could not say the same about the spent bullets, he could not rule it out. However, he could say

that the bullets and casings had all probably been fired by a .22 calibre firearm, likely a rifle.

[21] Police also found what appeared to be a self-taken photograph of a young woman attached to the wall above the door on the inside of Mr. Kon's suite. On the door, someone had written "Randi Duke . . . heart, DK".

[22] Headingley Correctional Institution staff introduced into evidence several recorded phone calls made using Mr. Kon's identification number. In these calls, the caller, who often referred to himself as "D.K.", made a number of attempts to get somebody to tell the girlfriend to retract her identification of him and Ms Duke, and to intimidate her and make sure that she did not come to court.

[23] Neither of the accused called evidence.

[24] At the close of the Crown's case, Mr. Kon brought a motion for a directed verdict of acquittal on the charge of first degree murder, and Ms Duke argued that she could only be convicted of manslaughter. Both motions were dismissed by the trial judge (see *R v Kon and Duke*, 2020 MBQB 18 [*Kon*]).

[25] In final addresses to the jury, the accused focussed heavily on the identification defence. Mr. Kon's counsel ((Mr. Kon's trial counsel) not the same as counsel on the appeal) accused the police of manipulating photographs while administering the girlfriend's photo pack. Lead counsel, for Ms Duke, maintained that the girlfriend had simply identified Ms Duke because she thought she was Mr. Kon's girlfriend—not because she was actually in the hallway when the victim was shot. Lead counsel also argued that the girlfriend's evidence was not reliable or credible. He further

submitted that the woman seen in the hallway and the lane was not necessarily the same person who had passed the object to Mr. Kon in the suite.

[26] During his final address, Mr. Kon's trial counsel suggested that the object passed from the woman to Mr. Kon could have been a "sex toy" and that the reason everyone was asked to leave was so that the two could have sex—or that the object could have been a bong. Lead counsel reiterated these comments during his final address.

[27] After receiving its instructions, the jury returned convictions for first degree murder for both accused.

The Police Statement

[28] As previously mentioned, following her arrest, Ms Duke provided the police statement in which she said that she was in the rooming house at the time of the shooting. She stated that she was in a bathroom downstairs when she heard noises that sounded like gunshots, and then went out the back door and fled. She also told the police that a woman she argued with in the back alley was the same woman who had nearly killed Mr. Kon on Victor Street earlier in the year.

[29] The Crown informed trial counsel that it intended to tender the police statement as part of its case. Trial counsel sought to exclude it at the outset of the trial; the trial judge agreed, finding that the Crown had not proven beyond a reasonable doubt that the police statement was voluntary (see *Kon*).

Denial of Motions for Directed Verdicts/Unreasonable Verdicts

[30] Although Mr. Kon concedes that there was ample evidence to support the jury finding him guilty of second degree murder, both accused argue that the charge of first degree murder should have been withdrawn from the jury because there was insufficient evidence of planning and deliberation to support a conviction. Likewise, the accused assert that the verdicts for first degree murder are unreasonable.

[31] The threshold for a directed verdict is high. A directed verdict is not available if there is any admissible evidence which, if believed by a properly instructed jury acting reasonably, justifies a conviction (see *R v Barros*, 2011 SCC 51 at para 48). Whether or not the facts meet this test is a question of law and no deference is to be given to the trial judge (*ibid*).

[32] The standard of review applicable to a claim of unreasonable verdict requires an appellant to establish that the verdict is one that a properly instructed trier of fact, acting judicially, could not reasonably have rendered (see *R v Yebes*, [1987] 2 SCR 168 at 186).

[33] The accused contend that the trial judge conflated evidence of intention to kill with evidence of planning and deliberation when she pointed to the following as evidence of planning and deliberation: the live bullets and spent bullet casings in Mr. Kon's suite matching those in or near the body of the victim; evidence that identified Mr. Kon as the shooter with Ms Duke present and encouraging him; and evidence that the victim was shot three times, including after he was lying on the floor already injured (see *Kon* at para 70).

[34] However, I agree with the Crown that the trial judge was not suggesting that the evidence she identified was direct evidence of planning and deliberation, but rather that it supported the conclusion that the object passed to Mr. Kon was the gun described by the girlfriend.

[35] The accused also note that there was a lack of evidence about motive, animus or what occurred between the accused and the victim from the time the object was passed and leading up to the shooting. They say that the only evidence on the issue of planning and deliberation was the requests to leave the suite and the object Ms Duke passed to Mr. Kon, both of which "do not survive even a limited weighing."

[36] The accused identify discrepancies in the evidence about the object that was passed by Ms Duke to Mr. Kon. No witness saw a gun being passed. Mr. Ndou said that the object was about 30 centimetres long, while forensics indicated that a rifle was used in the shooting. The girlfriend described the gun she saw in Mr. Kon's hands in the hallway as being 30 to 36 inches long. However, I agree with the trial judge that the discrepancies about the length of the item passed could be explained by differences in witnesses' memory and perception and should be left to the jury to decide. Mr. Ndou's evidence was that "I'm not an English speaker", such that he may have intended to speak of inches rather than centimetres. As well, his testimony suggested that he was gesturing to the width of his shoulders when describing the length of the object. This is the sort of reconciliation of evidence that the trial judge recognized was within the domain of the jury. In my view, the jury could reasonably infer that the item passed by Ms Duke to Mr. Kon was the rifle used in the shooting shortly thereafter.

[37] With respect to the requests to leave Mr. Kon's suite, the accused argue that the shooting occurred at least half an hour after the guests were asked to vacate, at a time when they could have been returning. However, it would have been open to the jury to conclude that the shooting took longer than anticipated to carry out or that the accused had told the guests that they could come back in order to get them to leave, not actually expecting them to return. In fact, there was no evidence suggesting that any of the guests did return.

[38] Ultimately, there was evidence which, if accepted, could reasonably allow the jury to find that: Ms Duke retrieved a gun and gave it to Mr. Kon; they spoke briefly and told everyone to leave so that they could discuss something; following their discussion, they loaded the gun with bullets from the plastic container, leaving the extra ones on the floor; and they then located the victim and Mr. Kon shot him three times before they fled.

[39] Based on all of this, the trial judge did not err in concluding that there was some evidence upon which the jury could reasonably infer that the murder was planned and deliberate, and that Ms Duke, as a party to the murder, knew that it was planned and deliberate. There was admissible evidence which, if believed by a properly instructed jury acting reasonably, could justify a conviction of both accused of first degree murder.

[40] Moreover, as noted, there was evidence from the girlfriend that, after the victim was already on the floor, Mr. Kon approached him as Ms Duke yelled at Mr. Kon to shoot him, saying that he deserved it. The girlfriend further testified that she then heard two shots as she hid in the victim's suite. The act of shooting the victim after he was already on the ground, apparently

having been shot as he was in pain and asking for an ambulance, could, in itself, reasonably support an inference of planning and deliberation (see *R v Henderson (WE)*, 2012 MBCA 93 at para 134 [*Henderson*]). As this Court stated in *Henderson*, "planning and deliberation can be brief" (at para 134).

[41] Therefore, I am not persuaded that the trial judge erred in dismissing the motions for directed verdicts or that the verdicts are unreasonable.

Ineffective Assistance of Counsel

The Law

[42] The jurisprudence recognizes that there is a strong presumption in favour of competence of counsel (see *R v Rhodes (KHC)*, 2015 MBCA 100 at para 18).

[43] The law governing the requirements to prove a claim of ineffective assistance of counsel is well established and was recently summarized by this Court in *R v AAK*, 2023 MBCA 8 [*AAK*] (at para 17):

> Briefly, in order to succeed with a claim of ineffective assistance, three components must be established: (1) an appellant must establish a factual foundation for the claim (the factual component); (2) if the factual foundation has been made out, incompetence is assumed and an appellant must show that the assumed incompetence resulted in a miscarriage of justice (the prejudice component); and (3) an appellant must show that counsel's performance was actually incompetent (the performance component) (see *R v Le (TD)*, 2011 MBCA 83 at para 189; *R v Owens*, 2018 MBCA 94 at para 49; and *R v Mazhari-Ravesh*, 2022 MBCA 63 at para 26) [*Mazhari-Ravesh*].

[44] In order to demonstrate a miscarriage of justice due to the ineffective assistance provided by a lawyer at trial, an appellant must establish ineffective representation that compromises the reliability of the verdict or that results in an unfair trial. An unfair trial may be established where the ineffective representation affects the fairness of the trial process or undermines the fairness of the trial or the appearance of trial fairness (see *AAK* at para 18; and *Mazhari-Ravesh* at para 21).

[45] In *AAK*, this Court also summarized the five-part test for the admission of fresh evidence in support of a claim of ineffective assistance of counsel said to have affected the reliability of the verdict (at para 27):

> In *R v Zamrykut*, 2017 MBCA 24 [*Zamrykut*], this Court adopted the test set out in *R v Aulakh*, 2012 BCCA 340 [*Aulakh*] for the admission of fresh evidence in support of an allegation that the ineffective assistance of counsel affected the reliability of the verdict. This test requires that: (1) the fresh evidence must be admissible pursuant to the rules of evidence; (2) even if admissible, the fresh evidence will not be admitted if it could not reasonably have affected the result; (3) if this is not apparent and the fresh evidence is relevant and credible, it should be admitted for the limited purpose of determining the issue of ineffective assistance; (4) the court must then determine whether, in light of the fresh evidence, the performance component of the test for ineffective assistance has been established; and (5) if the performance component is met, the accused must establish the prejudice component. If the final component is met, the fresh evidence is admitted and the appeal allowed. If not, the fresh evidence motion should be dismissed (see *Zamrykut* at para 3; see also *R v Dyck*, 2019 MBCA 81 at para 54; and *Mazhari-Ravesh* at para 28).

[46] As for fresh evidence in support of a claim of ineffective assistance of counsel alleged to have rendered the trial unfair, the criteria in *Palmer v R* (1979), [1980] 1 SCR 759, do not apply. Rather, “the appellate court must

conduct ‘an examination of the grounds of appeal raised, the material tendered, and the remedy sought’ which may include ‘material extraneous to the trial record’” (*AAK* at para 38).

The Fresh Evidence

[47] Much of Ms Duke’s claim of ineffective assistance of counsel rests on the fresh evidence, which is voluminous; there is a plethora of material before this Court.

[48] The fresh evidence is comprised largely of an affidavit of Ms Duke and several affidavits sworn by an assistant employed by the lawyer representing Ms Duke on this appeal (appellate counsel). These affidavits attach, amongst other documents, the police statement, trial counsel’s file, including the disclosure received from the Crown, and the Crown disclosure regarding the home invasion, which was obtained by appellate counsel. In addition, an experienced criminal defence lawyer, Barry Sinder (Mr. Sinder), has sworn an affidavit describing his review of trial counsel’s file. Lead counsel and second counsel have both sworn affidavits in response to the fresh evidence motion. Finally, Ms Duke seeks to admit additional evidence intended to support her evidence and discredit that of lead counsel and second counsel, where it differs from hers.

[49] Ms Duke’s affidavit is the key part of the fresh evidence. In her affidavit, she describes her lack of understanding of her case and the lack of communication with trial counsel about her defences and right to testify. She also attests to what actually happened on October 20, 2017, which is different than what she told the police.

[50] In her affidavit, Ms Duke swears that she initially told lead counsel what she had said in her police statement, and she assumed that he would proceed on that basis. She states that, thereafter and prior to trial, trial counsel failed to review strategy or defences with her or discuss the possibility of her testifying. She also says that she called the police in the month after giving the police statement and wanted to provide a further statement explaining the home invasion. She was told by the police that they would not speak with her unless she first spoke with her lawyer. She called lead counsel who told her not to say anything; she states that he also refused to hear her revised version of events.

[51] Ms Duke also swears that she never reviewed any disclosure. In all, she says that she had very few meetings or discussions with trial counsel. While she acknowledges that lead counsel once told her in a phone conversation that there was only one witness, a woman, who would say that she had heard a female say "shoot him, shoot him, he deserved it", he told her that the woman did not see the shooting and could not identify the female. Ms Duke maintains that, prior to the trial, there was no further discussion about other evidence against her.

[52] In her affidavit, Ms Duke indicates that her lawyers did speak with her very briefly at the end of the Crown's case at trial, which was the first time there was a discussion about whether she should testify. She says she was told that she should not, but was not advised of the risks of not testifying. She also says that she spoke with lead counsel following his closing address and told him that Mr. Kon was not her boyfriend, that she had a boyfriend (who was later contacted by appellate counsel but declined to provide an affidavit), that she did not like that the Crown was painting a picture that she and

Mr. Kon were a couple, and that he had to tell the jury that Mr. Kon was not her boyfriend. However, in her affidavit, Ms Duke also states that, as of October 2017, she had been buying drugs from and sleeping with Mr. Kon for three months.

[53] Ms Duke swears that there was a discussion between her and trial counsel in early summer of 2019 in which she was told that the Crown had offered a plea to manslaughter, and she wanted to do the deal. She says that about two weeks later, she was told that Crown counsel had changed his mind. According to Ms Duke, that was the end of any discussions about a plea deal.

[54] Ms Duke further explains the difference between what she said in the police statement about what had occurred on the night of the shooting and what she says actually happened. Ms Duke swears that, when she was in Mr. Kon's suite prior to the shooting, she saw the girlfriend, the victim, another male and two additional males coming up the stairs. She says that she recognized the girlfriend, the victim and the first male as being part of the group that had perpetrated the home invasion. Ms Duke states that she was fearful of these people, and was afraid that they were going to kill Mr. Kon "for good this time." She closed the door to Mr. Kon's suite and he told her to get "his 'toy'", which she understood to be a gun. She went to the closet, found it and passed it to him. She heard a shot and saw Mr. Kon in the hallway with the gun. A male was on the ground, and Mr. Kon was walking toward him holding the gun and saying, "I'm going to fucking kill you". She yelled at him to stop but he shot the victim again. She never said "shoot him, shoot him, he deserves it". She went to Mr. Kon's suite to get her personal items and ran outside where she saw the girlfriend. Ms Duke said to her something

like “this is what happens”. She swears that she had no idea that Mr. Kon was going to do what he did.

[55] Mr. Sinder states in his affidavit that, based on his review of trial counsel’s file, there are no notes of discussions with Ms Duke about disclosure, severance of her charges from those of Mr. Kon, trial strategy and potential defences, excluding the police statement, the home invasion, her testifying or the merits of a reduced plea. According to Mr. Sinder’s affidavit, there is no file note of trial counsel having discussions with Ms Duke about her version of events other than at their first meeting the day after her arrest. There are no written instructions.

[56] As noted, lead counsel and second counsel have each sworn affidavits in response to the fresh evidence motion. Their evidence indicates that second counsel had previously represented Ms Duke and that, after being retained on this matter, she reached out to another lawyer, who became lead counsel. The third trial counsel joined the team approximately eight months prior to the trial.

[57] While lead counsel and second counsel acknowledge that their file should have better documented their discussions with Ms Duke and her instructions about testifying, they say that they discussed matters extensively with her. They discussed the disclosure that they brought when they met with her, the motion to seek exclusion of the police statement and the identification defence. As well, both lawyers are clear that Ms Duke told them repeatedly and unequivocally that she did not want to testify. Second counsel also swears that she understood Mr. Kon to be Ms Duke’s boyfriend at the time of the shooting and while representing her at the trial.

[58] Lead counsel and second counsel agree that Ms Duke wanted to provide a further statement to the police and that lead counsel told her not to say anything. Second counsel also says that Ms Duke had raised the home invasion early in her representation of her on the murder charge; she had indicated that the shooting occurred because of what had happened on Victor Street. Second counsel already knew of the home invasion because she had acted for Ms Duke on her arrest on an outstanding warrant at the time of that incident. However, she and lead counsel were of the view that reference to the home invasion clearly would not have assisted in defence of the first degree murder charge. Rather, it would have provided strong evidence of motive and an explanation for the comments heard in the lane. They did not want to hear details about the home invasion from Ms Duke as it could present ethical concerns in their advancing the identification defence.

[59] Lead counsel and second counsel state that they determined that the issue of identification was to be at the forefront of the defence strategy. This was so because there was evidence of three Indigenous females being in Mr. Kon's suite (two plus Ms Duke), there were issues surrounding the girlfriend's identification of Ms Duke and there were weaknesses relating to witnesses actually seeing Ms Duke pass Mr. Kon a firearm. They say that all of this, as well as a strategy that included raising lack of proof of intention, were reviewed with Ms Duke.

[60] With respect to resolution discussions, lead counsel and second counsel swear that a formal offer was not made by the Crown. At one point, there were discussions with Ms Duke about her pleading guilty to manslaughter. According to lead counsel, she advised him that she was prepared to enter a guilty plea to that charge. He says that there were ongoing

discussions with the Crown. Both he and second counsel say, and their file confirms, that a formal offer to plead guilty to manslaughter was made on behalf of Ms Duke on November 13, 2019. This offer was rejected by the Crown the next morning on the basis that the Crown would not resolve the case unless Mr. Kon was also pleading guilty.

[61] With respect to evidence that Ms Duke seeks to tender to support her affidavit and discredit the evidence of lead counsel and second counsel, Ms Duke notes that appellate counsel contacted Margo Lee (Ms Lee), Superintendent of the Women's Correctional Centre (the institution), where she was housed in remand custody. Ms Lee advised appellate counsel by email that there is no record of disclosure being sent by mail or dropped off at the institution, nor is there any record of Ms Duke reviewing any disclosure, while she was in custody for approximately two years awaiting her trial.

[62] In order to challenge the credibility of lead counsel and second counsel, appellate counsel also sought information from Ms Lee regarding the frequency, duration and dates of live video interviews and in-person meetings with Ms Duke. Again, an email was provided in response, which identified meetings, but also indicated that Outlook only retains emails for requested meetings back to early 2019. Ms Lee did not respond to requests to swear an affidavit confirming the information provided. Because Ms Lee did not provide an affidavit and the Crown would not consent to the emails being admitted into evidence without cross-examination, Ms Duke brought a motion to have this Court accept her emails as hearsay, or to have her attend in court on the day of the appeal hearing to be cross-examined. While not formally abandoned, no argument was made on this motion.

[63] To further challenge the credibility of lead counsel and second counsel, Ms Duke seeks to tender the affidavit of Lucas Scott (Mr. Scott), Manager of Discipline and Disclosure, Correctional Services, Manitoba Justice, identifying a limited number of phone calls made by Ms Duke from the institution.

The Positions of the Parties

[64] Ms Duke alleges that trial counsel provided ineffective assistance that affected the reliability of the verdict and also rendered the trial unfair.

[65] Based on the trial record, she says that trial counsel provided ineffective assistance by:

- failing to move for severance of the charge against her from the charge against Mr. Kon;
- failing to conduct effective cross-examinations; and
- failing to object to—and instead repeating during closing argument—the comment made by Mr. Kon's trial counsel about the covered object passed to Mr. Kon possibly being a "sex toy"; and failing to seek a mistrial or at least insist on some sort of limiting instruction to the jury in connection with this submission.

[66] With respect to the "sex toy" comments, Ms Duke also takes the position that the trial judge erred by failing to ensure that proper procedures were used for the introduction of what she characterizes as "sexual history evidence and for limiting or containing [its] prejudicial impact".

[67] Based on the fresh evidence, Ms Duke alleges that trial counsel provided ineffective assistance by failing to: obtain disclosure regarding the home invasion; discuss any disclosure with her; speak with her about critical questions relating to her defence, including whether to testify or seek exclusion of the police statement; and pursue plea negotiations on a timely basis.

[68] Despite the aforementioned list, as noted earlier, Ms Duke's main argument on appeal is that trial counsel provided ineffective assistance by moving to exclude the police statement, and by failing to obtain Crown disclosure of the home invasion and effectively use evidence of that incident during the trial. This argument rests on the trial record and some of the non-controversial fresh evidence—namely the police statement (which, although not marked as an exhibit for identification, could be considered such) and Crown disclosure. Ms Duke says that the admission of the police statement and evidence of the home invasion would have provided her with a defence of self-defence or defence of a third party or raised a reasonable doubt as to whether the Crown had proven that she had the requisite intention for murder. She also says that evidence of the home invasion could have been used to cross-examine the girlfriend so that she would have presented as a "violent and ruthless home invader" with a motive to lie, instead of leaving the impression of being a "sympathetically rattled girlfriend".

[69] The Crown maintains that ineffective assistance has not been established. With respect to the fresh evidence, it argues that where Ms Duke's evidence conflicts with that of lead counsel and second counsel, it should be rejected as not credible—such that it should not be admitted. The Crown further submits that none of the other fresh evidence is admissible as

it is all related to or intended to support Ms Duke's version of events. The Crown's position is that the fresh evidence could not reasonably have affected the result or fairness of the trial, or demonstrate that trial counsel did not meet the standard of reasonable professional judgment.

[70] In response to Ms Duke's main argument on appeal, the Crown argues that admission of the police statement at trial and pursuit of a connection between the shooting of the victim and the home invasion (through admission of the police statement, cross-examination of the girlfriend or Ms Duke's testimony) could not reasonably have affected the outcome of the trial. It says that the approach taken by trial counsel was a reasonable one. The disclosure contained limited evidence of identification, which was essentially borne out by the trial evidence. According to the Crown, the serious risks associated with admission of the police statement and reference to the home invasion would have been disastrous to Ms Duke's defence.

Analysis

Allegations Based on the Trial Record

[71] With respect to Ms Duke's allegations of ineffective assistance based on the trial record, I am not persuaded that she has met the second part of the test (the prejudice component) necessary to prove her claim.

[72] First, regarding severance, Ms Duke alleges that, although there was severance (on motion made by trial counsel) of an obstruction of justice charge against Mr. Kon arising from the communications described by Headingley Correctional Institution staff, it was highly prejudicial for her to be tried together with him on the first degree murder charge because of the

evidence of obstruction as well as evidence of their romantic relationship. Lead counsel and second counsel say that severance was discussed among trial counsel and was determined not to be viable.

[73] Usually co-accused are tried together. In this case, I cannot see why there would have been a departure from this general principle such that a motion for severance, if brought, would have been successful. When the obstruction charge was severed, the intercepts were edited to remove parts that could be prejudicial to Ms Duke. With this, I am not persuaded that the trial on the first degree murder charge would have unfolded any differently had she been tried separately. The Crown likely would have called the same evidence in a trial against her alone given that Mr. Kon's culpability was foundational for her liability as a party to his offence (the phone calls from the institution were led as evidence of his post-offence conduct) and her relationship with Mr. Kon was important on the issue of her identity. Ms Duke has not demonstrated that it was prejudicial to her to be tried together with Mr. Kon.

[74] Second, Ms Duke contends that cross-examinations should have been conducted more effectively. I am not convinced that this allegation constitutes any more than dissection of the examinations with the benefit of hindsight. Challenges were made on cross-examination to both the credibility and reliability of the girlfriend's evidence, and lead counsel's final address to the jury focussed on this.

[75] Finally, with respect to the comment about a "sex toy" made by Mr. Kon's trial counsel during final addresses, trial counsel did not object to this statement and lead counsel repeated it during his final address to the jury.

In connection with what the Crown alleged was a gun passed from Ms Duke to Mr. Kon, lead counsel stated:

> . . . There are reasonable alternatives that are equally consistent with something being held, covered in a cloth, and passed over to someone. Yeah, it could have been a glass bong, it could have been drugs, it could have been a sex toy. It could have been any of those things. Mr. Ndou can't describe it. He doesn't know, and neither do we. . . .

[76] Ms Duke says that counsel's submissions were inappropriate because they raised speculative and prejudicial inferences based on myths and stereotypes, including that:

(1) because she had consensual sex with Mr. Kon, "all activity between the two must have been consensual", including the murder, which took place shortly afterwards;

(2) because she was sexually active with a sex toy, she had "loose morals and virtues" and was therefore more likely to have committed premeditated murder; and

(3) because of "the unfair inferences that are drawn about sexually active women and racialized women, but particularly with a man who is violent and [B]lack, the jury could very easily have misused these comments as evidence that she got off on his violence, was aware of what he was going to do and helped plan it."

[77] Ms Duke submits that the trial judge should not have permitted Mr. Kon's trial counsel to refer to a sex toy. Furthermore, she argues that

once it was mentioned, trial counsel should have sought a mistrial in order to avoid the jury drawing inferences based on myths and stereotypes—or, at a minimum, the trial judge should have "cautioned [the jury] with limiting use instructions."

[78] As I understand it, Ms Duke is attempting to make two points. First, that reference to her purported sexual history was an improper statement about bad character; and, second, that her Indigenous heritage, and the myths and stereotypes that have historically been associated with that heritage, compounded the comment about her having bad character.

[79] Although Ms Duke does not specifically rely on section 276 of the *Criminal Code* [the *Code*], some of the themes underlying her submission seem to reflect the concerns addressed by that section. Section 276 addresses the improper introduction of evidence of sexual activity other than that which is the subject of a charge in cases involving certain enumerated sexual offences. However, that section is not applicable here. Apart from any other reason that it would not apply, murder is not one of the enumerated offences. While the section 276 regime applies to a proceeding in which an offence listed in section 276(1) has "some connection" to the offence charged (*R v Barton*, 2019 SCC 33 at paras 72-73 [*Barton*]; see also *R v NG*, 2023 ONSC 792 at para 17; and *R v AM*, 2019 ONSC 7293 at para 16), this is not such a proceeding. The test of "some connection" between a section 276(1) enumerated sexual offence and the first degree murder charge before the court is in no way met—in contrast to *Barton*, where section 276 was found to apply because the first degree murder charge was premised on sexual assault with a weapon contrary to section 272 of the *Code*, which is an offence listed in section 276(1).

[80] Like concerns about evidence of the sexual history of a complainant, evidence of an accused's sexual history cannot be used to draw questionable inferences (see *R v Grant*, 2019 BCCA 369 at paras 25-33). However, I fail to see how the statements about a sex toy raised an improper inference in this case. First, Mr. Ndou testified that he saw Mr. Kon and Ms Duke kissing, and that he thought they were boyfriend and girlfriend; in this context, I question whether the mention of a sex toy is a reference to disreputable behaviour on the part of Ms Duke. Furthermore, the submissions were not based on a stereotype. No inferences of the kind alleged by Ms Duke were suggested to the jury. Rather, the mention of a sex toy was directly relevant to the case and simply provided an alternate possibility for the object that had been passed. Not only was a sex toy mentioned but so too was a bong. In my view, there was no need for judicial intervention, or for trial counsel to request a mistrial or further or special jury instructions.

[81] In her instructions, the trial judge twice told the jury to consider each of the accused separately. She stated: "You must make your decision about each person charged on the basis of the evidence and legal principles that apply to him or her as I will explain them to you." Considered in the context of the trial as a whole, including counsel's comments about a "sex toy", these instructions clearly meet the standard of adequacy applicable on appellate review (see *R v Abdullahi*, 2023 SCC 19 at para 72; and *R v Soroush et al*, 2022 MBCA 84 at para 11, leave to appeal to SCC refused, 40488 (4 May 2023)).

[82] Ms Duke also seems to make an argument that counsel's submissions involved negative myths and stereotypes about Indigenous women. I cannot see how any such stereotype was involved that required the

trial judge or trial counsel to have handled matters differently than they did. The law does not require limiting instructions in all cases involving an Indigenous accused. As stated in *R v Theodore*, 2020 SKCA 131 at para 70, leave to appeal to SCC refused, 39555 (6 May 2021):

> I also do not read *Barton* as imposing a requirement that, in every case involving an Indigenous accused, the trial judge must provide a special and focused instruction to jurors about setting aside racial bias, especially where counsel do not raise it as an issue. . . .

[83] In this case, the issue was first raised by Ms Duke on appeal.

[84] That being said, in *R v Chouhan*, 2021 SCC 26, Moldaver and Brown JJ, writing for the Court, noted that "*in appropriate cases*, trial judges should consider crafting jury charges and mid-trial instructions that caution against the risk that bias, racial or otherwise, will taint the integrity of the jury's deliberations" (at para 47) [emphasis added]. They indicated that there are two types of jury instructions that can address the risk of bias in appropriate cases: "(i) general instructions on biases and stereotypes; and (ii) instructions on specific biases and stereotypes that arise on the facts of the case" (*ibid* at para 52).

[85] In this case, the trial judge provided standard instructions. In her opening address to the jury, she noted that "[y]ou must make your decisions without sympathy, prejudice or fear." These words were repeated in her final instructions. Prejudice was also mentioned in her discussion of reasonable doubt. Again, the instructions meet the required standard.

[86] Therefore, the impugned comments were not improper and did not cause a substantial wrong or injustice (see *R v Clyke*, 2021 ONCA 810 at

paras 32-37; and *R v Williams*, 2008 ONCA 413 at paras 76-85). The trial judge made no reviewable error, nor is the prejudice component (or the performance component) of ineffective assistance of counsel established on the basis of the submissions about a "sex toy".

Allegations Based in Whole or in Part on the Fresh Evidence

[87] Turning to the fresh evidence, I would conclude, for the reasons set out below, that none of it is admissible because it does not meet the second part of the test in *Aulakh and Zamrykut*—that is, it could not reasonably have affected the result. And, even if the second part of the test could be met, the third part is not met, due to concerns about Ms Duke's credibility. Further, the fresh evidence is not admissible in the interests of justice to challenge the fairness of the trial. Therefore, Ms Duke is unable to prove ineffective assistance of counsel where her allegations rely in whole or in part on the fresh evidence.

[88] Dealing first with credibility, at the appeal hearing, appellate counsel did not press (but nor did she fully abandon) the claim of ineffective assistance that depended on a credibility contest as between Ms Duke on the one hand, and lead counsel and second counsel on the other. This recognized the challenges faced with respect to Ms Duke's credibility. I agree that the concerns about Ms Duke's credibility are significant.

[89] Her criminal record, which is attached to her affidavit, reveals over 40 convictions, including multiple convictions for identity fraud. Two of her convictions were for lying to authorities to escape punishment for crimes that she had committed. In her affidavit, she also acknowledges that she lied to the police when she first spoke with them after the shooting, in order to

improve her chances before the court. And despite Ms Duke's insistence that she knew nothing about the case against her or her trial strategy, she attended a bail hearing on July 19, 2018 at which the Crown set out its case and her lawyer raised issues with respect to identification. She says that the submissions "did not stay with [her]", and that she was very nervous and focussed on getting released. This explanation for not understanding or appreciating what was said is not compelling.

[90] Also due to concerns about Ms Duke's credibility, appellate counsel did not press the position that trial counsel should have recommended that she testify at trial. Again, appellate counsel's approach makes sense because there are many reasons that Ms Duke would not have been believed.

[91] In any event, Ms Duke has conceded that there were at least five lengthy in-person meetings with trial counsel prior to trial. It is difficult to accept that no matters of substance were discussed during these meetings.

[92] Moreover, I am not persuaded that there is any reason to disbelieve lead counsel and second counsel:

- both were unshaken during extensive and detailed cross-examination lasting four days;

- although trial counsel's file contains very few references to reviewing disclosure or discussing strategy with Ms Duke (the only note of a discussion regarding her version of events is at the first meeting after her arrest) and no written instructions, all of which is regrettable, this does not necessarily mean that matters were not comprehensively

discussed and instructions obtained. Second counsel explained that she had a long history with Ms Duke, having acted for her for many years, and she believed that requiring Ms Duke to sign written instructions would have damaged the lawyer and client relationship at a critical moment in the proceedings;

- although Ms Duke seeks to admit the transcript of a sentencing hearing on an unrelated matter in December 2015 to challenge what second counsel described as conduct on the part of Ms Duke that supported her view that it was unwise for her to testify, it is apparent from the transcript that Ms Duke interrupted the judge and that the judge took a recess until she "pull[ed] [her]self together". The transcript is not inconsistent with second counsel's testimony;

- the specific phone calls identified in Mr. Scott's affidavit are only outgoing calls made by Ms Duke to lead counsel; and

- the information provided by Ms Lee about dates Ms Duke met with trial counsel was not the subject of an affidavit upon which she could be cross-examined.

[93] With respect to Ms Duke's main argument for ineffective assistance, which concerns the exclusion of the police statement and the issue of the home invasion, she says that the police statement would have provided evidence for the jury to consider on a *W(D)* analysis (see *R v W(D)*, [1991] 1 SCR 742 [*W(D)*]), without her testifying, that she was in the bathroom of the rooming

house, and not the hallway, when the shots were fired. She also says that the mention of the home invasion in the police statement should have led trial counsel to seek disclosure with respect to that incident and at least refer to it in cross-examination of the girlfriend. According to Ms Duke, trial counsel should have pursued the home invasion when, in the disclosure and again at trial, the evidence of identification was strong against Mr. Kon, and there was also considerable such evidence against her. She contends that the identification defence should have been abandoned. In Ms Duke's submission, the home invasion and resulting fear could have raised viable defences or a reasonable doubt about her intention in passing the gun and everything else that happened.

[94] However, if Ms Duke's police statement was admitted, it would have removed any doubt that she was present at the rooming house at the time of the shooting. In addition, she would have had to testify about the home invasion because reference to it in the police statement was vague and would not have provided much to assist her on a *W(D)* analysis. If testifying, she likely would not have been believed given the concerns I have already outlined about her credibility generally. Also, I question the strength of her identification of the people involved in the home invasion. On cross-examination on her affidavit, she stated that the home invasion had happened very quickly, with her slamming the door, running upstairs, and jumping out the window. The Crown disclosure about the home invasion does not identify any suspects. I also note that, when spoken to by the police following the home invasion, Ms Duke lied about her own identity because she was unlawfully at large at the time.

[95] Importantly, even if Ms Duke's version of events regarding the home invasion was accepted, it would not have provided a basis for a defence of self-defence or defence of a third party. There was no air of reality to these defences in light of her testimony, on cross-examination on her affidavit, that, although she was scared after she saw the people that had been involved in the home invasion in the hallway of the rooming house, she closed the door to Mr. Kon's suite and both of them were inside the suite. She testified that no one touched or threatened either of them, and that nobody was attacked that night other than the victim.

[96] With respect to Ms Duke's other arguments about how evidence of the home invasion would have assisted in her defence, it is not clear how the girlfriend could have been cross-examined about that incident. If used to challenge her credibility, that could be impermissible cross-examination on a collateral issue. As for Ms Duke's assertion that the home invasion could have afforded her a rolled-up charge in the jury instructions, this would have depended on her testimony about being fearful—and the evidence regarding her level of intoxication was limited.

[97] Furthermore and significantly, evidence of the home invasion would have provided evidence of animus and motive, which the Crown's case was lacking. As well, in the police statement, Ms Duke said that, when she ran into the back lane after hearing gunshots, she yelled to a woman, who she suggested had been involved in harming D.K. in the "Victor Street incident", calling her a "stupid bitch." This ties Ms Duke to a significant inculpatory statement as described by the eyewitnesses.

[98] The final point to be addressed is Ms Duke's allegation that there was ineffective assistance due to a failure to pursue plea negotiations in a timely manner. In her affidavit, Ms Duke says she advised trial counsel at the beginning of the summer of 2019 that she was prepared to plead guilty to manslaughter. She indicates that trial counsel waited until November 2019, just prior to the commencement of the trial, to convey this offer to the Crown. She concedes that the Crown rejected the offer because it wanted pleas from both accused and Mr. Kon wanted a trial, but suggests that the Crown might have felt differently had the offer been conveyed earlier. She points to an email sent by lead counsel to his co-counsel on February 21, 2019 in which he states, in connection with the pre-trial conference that he had attended that day, that the trial judge had "floated out if the Crown would even consider second degree murder or manslaughter in relation to Ms Duke, and [the Crown] said it's possible and did not reject it outright."

[99] While lead counsel and second counsel agree that they did not make a formal offer until November, they indicate that there were ongoing "hallway" discussions throughout the summer and fall of 2019, and that the Crown was consistent in its desire for a global resolution involving both accused. Mr. Kon was not prepared to resolve the matter.

[100] In my view, there is no reason to suspect that the Crown would have changed its approach based on the timing of Ms Duke's plea offer. She has not shown that an earlier attempt to resolve the matter could reasonably have affected the outcome.

Summary

[101] For the reasons outlined, Ms Duke has not established the prejudice component of the test for ineffective assistance with respect to the allegations that are based on the trial record; she has not proven that the alleged ineffective assistance of trial counsel had an impact on the outcome of the trial or undermined the fairness of the trial. There has been no miscarriage of justice. As for the fresh evidence, I would not admit it due to the credibility concerns outlined, and because Ms Duke has not demonstrated that it could reasonably have affected the result or that it should be admitted to challenge the fairness of the trial. Nonetheless, I will make a few comments about trial counsel's performance.

Performance of Trial Counsel

[102] As indicated, trial counsel focussed on the identification defence.

[103] There were limitations in the disclosure and the evidence about identification. Although the Crown had evidence placing Ms Duke in Mr. Kon's suite prior to the shooting, the girlfriend was the only witness who saw the woman in the hallway where the shooting took place. Despite the girlfriend identifying Ms Duke in a photo pack, she testified that she had never seen her before the day of the incident and there were inconsistencies in her testimony, including about whether she had seen the woman's face. In speaking with a police officer after the shooting, she said that she did not see the face of the female who was with the shooter. The girlfriend first identified Ms Duke when shown a photo lineup on October 23, 2017. As well, she acknowledged on cross-examination that she would say or do anything to make sure that two people were convicted of the victim's murder.

[104] Other witnesses described the woman that they had seen in only a general way, consistent with the description and photograph of Ms Duke contained in a Winnipeg Police Service (WPS) Media Release dated October 26, 2017, seeking the public's assistance in locating her and Mr. Kon in connection with this matter.

[105] With respect to photo pack identifications made by witnesses other than the girlfriend, one of the eyewitnesses selected Mr. Kon, but there was no evidence of the eyewitnesses making such an identification of Ms Duke. Mr. Ndou identified Mr. Kon from a photo pack, and he also identified Ms Duke as Mr. Kon's girlfriend; this was after the WPS media release. On cross-examination, he agreed he had seen photographs of them both in media reports before he met with the police. Mr. Dut selected Mr. Kon and Mr. Kon's girlfriend, Ms Duke, from a photo pack. He did not make the identification until he spoke with the police on October 27, 2019, after having spent three days with the victim's family.

[106] So, although the identification defence undoubtedly presented risks, when weighed against the risks of a defence tied to the home invasion, trial counsel did not make an unreasonable tactical choice. As explained, evidence of the home invasion would not have assisted—indeed, it would likely have seriously compromised—Ms Duke's defence.

Conclusion

[107] For the foregoing reasons, I would conclude that the trial judge did not err in dismissing the motion for directed verdicts and that the verdicts are not unreasonable. Regarding the claim of ineffective assistance of counsel, I

would not admit the fresh evidence and would conclude that ineffective assistance has not been established. Therefore, I would dismiss both appeals.

Simonsen JA

I agree: Steel JA

I agree: leMaistre JA