

IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Jennifer A. Pfuetzner
Madam Justice Janice L. leMaistre
Madam Justice Anne M. E. Turner

BETWEEN:

	)	<i>S. B. Simmonds, K.C. and</i>
	)	<i>S. Lozinski</i>
<i>HIS MAJESTY THE KING</i>	)	<i>for the Appellant</i>
)	
	)	<i>M. E. Lavitt</i>
	)	<i>for the Respondent</i>
<i>- and -</i>)	
	)	<i>Appeal heard and</i>
<i>ERRON TROY HOGG</i>	)	<i>Decision pronounced:</i>
	)	<i>May 25, 2026</i>
)	
<i>(Accused) Appellant</i>	)	<i>Written reasons:</i>
	)	<i>June 8, 2026</i>

NOTICE OF RESTRICTION ON PUBLICATION: An order has been made in accordance with section 486.5(1) of the *Criminal Code*, RSC 1985, c C-46, directing that any information that could identify a victim or witness in this proceeding shall not be published, broadcast or transmitted in any way.

LEMAISTRE JA (for the Court):

[1] The accused appealed his conviction, after a trial in the Provincial Court, for aggravated assault and brought a motion for the admission of fresh evidence.

[2] After the hearing, we denied the motion for fresh evidence and dismissed the appeal with reasons to follow. These are those reasons.

[3] The victim was alone at his girlfriend's (A.S.R.) residence (an apartment leased by the accused for A.S.R.'s use) when the accused entered, threatened to kill the victim and viciously attacked him. The victim suffered serious injuries to both sides of his head, including facial fracturing, significant bruising and swelling, and bleeding from the right ear.

[4] On appeal, the accused argued that the trial judge erred in law or breached procedural fairness by finding that he colluded with A.S.R., a defence witness, and misapprehended or failed to give legal effect to material evidence relevant to his claim of self-defence.

[5] The fresh evidence he sought to admit consists of an affidavit from a friend (the friend), who states that she observed the accused with injuries three days after the incident, and a photograph she took of those alleged injuries.

[6] We are not persuaded that the fresh evidence satisfies the *Palmer* test (see *Palmer v The Queen*, 1979 CanLII 8 at 775 (SCC)). Leaving aside any concern we have about whether the evidence could have been adduced at trial, in our view, it could not reasonably be expected to have affected the result.

[7] The accused testified that, as a result of the incident, he had scratch marks all over his neck, cuts on his neck and shoulder, welts on his head and face, bruising and swelling on his torso, and his back was "all [torn] up". The friend's description of the injuries she claims she observed and the photograph she took are inconsistent with the accused's description of his injuries.

[8] We are also not persuaded that the trial judge's reliance on collusion resulted in an unfair trial or that the trial judge's credibility assessments and application of *R v W(D)*, [1991] 1 SCR 742, 1991 CanLII 93 (SCC) [*W(D)*] were "tainted by a speculative and unproven allegation of collusion."

[9] Collusion may affect a witness' evidence in different ways. Intentional collusion may undermine credibility, while unintentional collusion may impact reliability (see *R v Ji*, 2025 MBCA 86 at para 21; *R v CG*, 2021 ONCA 809 at para 30). In either case, it is simply one factor within the broader credibility analysis. The concern is that hearing or discussing events with another witness can, consciously or unconsciously, colour and shape a witness' account. Where such a concern arises on the evidence, a trial judge is entitled to consider it in determining what weight, if any, to give the impugned testimony.

[10] On appellate review, different considerations apply. A *failure* to consider a live issue of collusion where it arises on the record may amount to a reversible error. However, the degree to which any risk of collusion affects a witness' evidence forms part of a trial judge's assessment of credibility and reliability, and is therefore entitled to significant deference (see *R v Clause*, 2016 ONCA 859 at paras 81-82).

[11] The trial judge's finding of collusion was not speculative nor was it arrived at through an unfair process. It was based on the defence evidence and the submissions of both defence counsel and the Crown.

[12] The accused and A.S.R. both testified that they discussed the incident during a telephone conversation immediately after the assault. The trial judge found that the conversation was "so identical as to be

unbelievable”. The trial judge also found that their testimony about the nature of the accused’s injuries “closely mirrored each other”. In our view, these findings were reasonable on the evidence.

[13] Defence counsel directly addressed the issue of collusion during submissions when he stated, “[T]here’s no collusion here.” He specifically argued that A.S.R. did not exaggerate or embellish her evidence, despite opportunities to do so.

[14] In its submission, the Crown argued that A.S.R.’s evidence was tainted due to discussions with the accused prior to trial. It argued that her testimony appeared shaped to benefit the accused by minimizing the severity of the assault, implying coordination or influence, rather than independent recollection.

[15] In our view, both parties invited the trial judge to consider the possibility, or lack, of collusion when assessing credibility.

[16] We are also of the view that the trial judge did not rest her finding of collusion on the mere fact that the accused and A.S.R. described the same incidents in similar terms. Rather, she focussed on the degree and nature of the similarity, finding that their accounts were “so identical as to be unbelievable” and, in material respects, expressed in “the exact same words and phrasing.” The trial judge identified a series of specific details that both witnesses reproduced in a highly particularized and coordinated way. Her concern was grounded in the precision and pattern of this alignment.

[17] Importantly, the trial judge also considered this evidence in context. She contrasted the detailed and closely aligned account of the conversation

between the accused and A.S.R. with A.S.R.'s limited and vague recollection of her conversation with the victim, which she could only describe in minimal terms. This selective congruence supported the inference that the similarity in the defence evidence was not simply the product of independent recollection. The trial judge also noted that A.S.R. "recited almost exactly the same injuries" as described by the accused, again pointing to a level of correspondence that went beyond what would ordinarily be expected.

[18] Further, it was undisputed that the accused and A.S.R. had spoken with one another about the events prior to testifying, providing an evidentiary basis for the possibility of mutual influence, and the finding of collusion did not stand alone. It formed part of a broader credibility assessment that included inconsistencies between the accused's version of events and the objective evidence.

[19] Viewed as a whole, the trial judge's reasoning demonstrates that the inference of collusion was grounded in more than mere similarity. It was based on the striking, detailed and selective alignment of the evidence, considered alongside the surrounding circumstances and the totality of the record. In these circumstances, there was a proper evidentiary foundation for the finding.

[20] The trial judge's credibility assessment rested not only on the impugned finding of collusion, but also on internal inconsistencies in the accused's evidence, contradictions with the surveillance footage, and the incompatibility between the accused's account and the medical and police evidence.

[21] Finally, we are not convinced that the trial judge erred by failing to find that the accused acted in self-defence. She considered the contextual evidence relied on by the accused, including the prior interactions and animosity between the parties, but assigned it limited weight. She rejected the claim of self-defence based primarily on the objective evidence, finding that the nature, severity and distribution of the victim's injuries were inconsistent with a brief, defensive struggle and were more consistent with the victim's description of the assault. This conclusion reflects a weighing of the evidence, rather than a failure to consider material evidence and does not disclose a misapprehension giving rise to reviewable error.

[22] Read as a whole, the trial judge's reasons disclose a careful credibility assessment grounded primarily in objective evidence. Moreover, the finding of collusion was not the sole or determinative basis for rejecting the accused's evidence. The trial judge properly instructed herself on, and applied, *W(D)*; considered the contextual evidence relevant to self-defence; and was entitled to conclude that the severity and distribution of the victim's injuries were incompatible with the accused's account and negated any claim of self-defence.

[23] In the result, the motion for fresh evidence was denied and the appeal was dismissed.

leMaistre JA

Pfuetzner JA

Turner JA
