Citation: R v Morin, 2024 MBCA 85
Date: 20241104
Docket: AR23-30-10002

IN THE COURT OF APPEAL OF MANITOBA

Coram: Chief Justice Marianne Rivoalen
Mr. Justice Christopher J. Mainella
Madam Justice Janice L. leMaistre

B E T W E E N :

	)	***A. R. Hodge***
	)	*for the Appellant*
HIS MAJESTY THE KING	)	
	)	***M. Moorthy***
Respondent	)	*for the Respondent*
	)	
- and -	)	*Appeal heard and*
	)	*Decision pronounced:*
KRISTOPHER THOMAS BLAIR MORIN	)	***October 21, 2024***
	)	
(Accused) Appellant	)	*Written reasons:*
	)	***November 4, 2024***

MAINELLA JA (for the Court):

Introduction

[1] This is an identification case.

[2] After a trial in the Provincial Court, the accused was convicted of robbery and uttering threats arising from a violent shoplifting at a clothing store in Thompson, Manitoba. The accused appealed only the robbery conviction on the basis that the verdict was unreasonable due to frail identification evidence (see *Criminal Code*, RSC 1985, c C-46, s 686(1)(a)(i) [the *Code*]). After hearing the appeal, we announced that it was dismissed with reasons to follow, which now do.

Background

[3] The Crown's case consisted of admissions by the accused, the testimony of a sixteen-year-old sales associate (the sales associate), her supervisor (the supervisor) and video evidence from the store's internal security camera. The accused did not call evidence or testify.

[4] The facts are straightforward. On the afternoon of October 29, 2022, a male customer (later identified by the sales associate as the robber) approached the sales associate when she was at the checkout. He was carrying clothes that had not been paid for. The sales associate said he was wearing sunglasses, had a hood over his head and appeared intoxicated. According to the video evidence, the customer was an Indigenous male who was wearing a camouflage sweater with the hood up over his head and he had sunglasses on.

[5] The customer was previously unknown to the sales associate.

[6] The customer asked the sales associate "where the boots were." The sales associate pointed to an area of the store. The customer then ran out of the store.

[7] The sales associate followed the customer outside the store and told him he had to return the items and that she would be contacting security. The customer dropped the clothes and then pushed the sales associate with both of his hands. The push caused her to fall backwards into a concrete wall, which resulted in minor injuries.

[8] The customer picked up the clothes and then left the area with another male who had been standing outside the store; both men were laughing.

[9] The sales associate returned to the store and reported the incident to the supervisor, including a description of the customer.

[10] At trial, the sales associate could not recall the exact description she provided to the supervisor but she testified that her training was to provide a description of a shoplifting suspect's clothes, height, age and race. She said that is what she did in this case. The sales associate acknowledged in cross-examination that there was nothing unique about the facial features of the customer, such as a scar or tattoo.

[11] The sales associate said in her evidence that the store is in a busy area of Thompson and that there are often a large number of Indigenous males in the area.

[12] The supervisor dispatched the store's security staff. Sometime between thirty minutes to an hour later, the security staff detained the accused and brought him back to the store. He was the only person detained for the shoplifting incident.

[13] It was an agreed fact that, at the time of his detention, the accused was wearing a dark-coloured camouflage sweater and appeared intoxicated.

[14] When the security staff brought the accused back to the store, the supervisor asked the sales associate if the accused was the one who had pushed her and stole the clothes. The sales associate positively identified the

accused. The accused immediately said "you're a snitch" and asked "why did you snitch on me?" He then commented that "snitches get stitches." He called her "a bitch" and said " he was going to come find [her] next time he . . . saw [her]." The accused also made derogatory racial comments. The comments of the accused to the sales associate after he was identified as the robber formed the basis of the uttering threats allegation.

[15] In her evidence, the sales associate described the incident as "terrifying."

[16] The sales associate identified the accused as the customer at the trial. At the time of this identification, the accused was sitting between two sheriff's officers in the courtroom.

[17] The supervisor did not witness the robbery as she was in a different area of the store. In closing argument, the Crown conceded that, because the supervisor had been involved in multiple shoplifting incidents and did not give a statement to police about this one, there were reliability issues with her evidence save as to general uncontested matters.

[18] In her decision, the trial judge said the quality of the video evidence was not that "great" save that it confirmed some of the details of the sales associate's narrative. The trial judge said the sales associate was "credible" but the issue she had to decide was whether the identification evidence was sufficiently reliable.

[19] The trial judge said that, in identification cases, it is important for the Court to look at the whole of the evidence "to see if there is something

that can positively identify the accused to make sure that you're getting, you know, the right person."

[20] The trial judge was of the view that the video evidence alone was insufficient to establish the identity of the accused as the customer beyond a reasonable doubt. She said it was therefore necessary to look at other "different pieces of evidence." She identified two aspects of the evidence which, in her view, were "really important in this case".

[21] First was the evidence of the sales associate as confirmed by the video evidence and the admissions. Like the customer, the accused was an intoxicated male located in the vicinity of the store shortly after the robbery wearing the same unique sweater.

[22] However, according to the trial judge, what convinced her of the accused's guilt "beyond a reasonable doubt" was a second piece of evidence—the threats of the accused to the sales associate when he was detained by the store security. She said the comments would not be "how a person . . . wrongfully accused of something would typically react."

Discussion

[23] History teaches that mistaken identification is a cause of wrongful convictions. Many wrongful convictions are the product of "faulty but apparently persuasive eyewitness identification" (*R v Hibbert*, 2002 SCC 39 at para 51). Accordingly, identification evidence should not be casually accepted, even when it arises from a direct visual confrontation with an accused (see *R v Burke*, 1996 CanLII 229 at para 52 (SCC)). At trial, and on

appeal, judges and jurors must be alive to the danger of the honest but mistaken witness (see *R v Nikolovski*, 1996 CanLII 158 at para 19 (SCC)).

[24] In *R v Hay*, 2013 SCC 61 [*Hay*], the Supreme Court of Canada explained that "[t]he credibility and weight that should be given to eyewitness testimony is an issue committed to the ultimate trier of fact" (at para 40). Caution should be shown to eyewitness identification because of the well-recognized frailties of such evidence but a properly instructed trier of fact may convict on such evidence even when it arises from a single eyewitness.

[25] Rothstein J stated in *Hay* that "[a trier of fact] may convict on the basis of a single eyewitness' testimony, notwithstanding the frailties of eyewitness identifications, if the witness' testimony could support a finding of guilt beyond a reasonable doubt" (at para 51). However, "where the Crown's case consists solely of eyewitness testimony that would necessarily leave reasonable doubt in the mind of a reasonable [trier of fact], the trial judge must direct an acquittal upon a motion for directed verdict" (*ibid* at para 41).

[26] In *R v H (DR)*, 2007 MBCA 136 at para 28 [*H (DR)*], this Court agreed with the comments of Doherty JA in *R v Tat*, 1997 CarswellOnt 5434 (CA), 1997 CanLII 2234 (ONCA), that appellate review of a conviction in an identification case under section 686 of the *Code* turns on a cumulative assessment of four categories of factors: (1) whether the person identified was a stranger; (2) the circumstances surrounding the identification; (3) the pre-trial identification process; and (4) the existence of other evidence tending to confirm the identification.

[27] In our view, the first three of these factors suggest the robbery verdict was unreasonable.

[28] To begin, this was an identification case, not a recognition case. The customer was a stranger to the sales associate at the time of the shoplifting incident (see *H (DR)* at para 23).

[29] Next, while the lighting conditions inside and outside the store were excellent and the sales associate was in close proximity to the customer, the customer's face was partially covered by sunglasses and he had his hood on. He also had no distinguishing facial features. Much of what the sales associate testified to about the customer was generic. Importantly, the sales associate's opportunity to observe both inside the store and outside was fleeting. Her evidence, as confirmed by the video evidence, is that her entire interaction with the customer was about ten seconds. She also admitted the shoplifting incident was a very stressful situation. Several aspects of the circumstances surrounding the identification raise reliability concerns (see *R v Gough*, 2013 ONCA 137 at paras 36-37; *H (DR)* at paras 23-24).

[30] Finally, the pre-trial identification process was entirely inadequate. The accused was detained as he was in the vicinity of the store and he fit the description provided by the sales associate. His clothing and physical state were also consistent with the evidence the trial judge accepted. However, instead of turning the accused over to the police to conduct a proper investigation, including a fair and objectively controlled identification process, the accused was simply paraded alone before the sales associate. This was a flawed pre-trial identification process (see *H (DR)* at paras 20, 52;

R v Smierciak (1946), [1947] 2 DLR 156 at 157-58 (ONCA), 1946 CanLII 331 (ONCA)).

[31] In light of these concerns, the in-dock identification of the accused by the sales associate, standing alone, would have been insufficient to support the robbery verdict.

[32] However, what distinguishes the situation here from cases like *H (DR)* is that there was, as the trial judge noted in her decision, other evidence besides the in-dock identification of the accused tending to confirm identification. The key evidence that satisfied the trial judge on the criminal burden of proof was the accused's threat to the sales associate after being identified as the robber (i.e., after-the-fact conduct) (see *R v Calnen*, 2019 SCC 6).

[33] The starting point is that a sufficiently proximate threat to harm a witness of a crime can be circumstantial evidence of consciousness of guilt against the maker of the threat to prove the original crime (see *R v Panzevecchia*, 1997 CanLII 1280 at para 12 (ONCA)). In *R v Tran*, 2001 NSCA 2 at para 27, it was explained that this type of evidence can be relevant and admissible after-the-fact conduct evidence.

[34] On appeal, the accused raised several alternative explanations for his threat other than the conclusion reached by the trial judge. We see two problems with this submission.

[35] First, but for the accused being intoxicated, none of the alternative explanations advanced are grounded in the evidence. It would be entirely speculative for us to accept what the accused's intention was for threatening

the sales associate given he did not testify (see *R v Banayos and Banayos*, 2018 MBCA 86 at para 24; *R v Moose*, 2017 MBCA 112 at para 5; *R v Oddleifson (JN)*, 2010 MBCA 44 at para 27).

[36] Second, much of what the accused argued on appeal as to his state of mind are new arguments not advanced by trial counsel (not Mr. Hodge). An appeal is not the place to audition new submissions. It can only be in exceptional circumstances that new arguments can be entertained, such as where there is a reasonable risk of a miscarriage of justice and where the record properly can support the new submission (see *R v Peters*, 2023 MBCA 96 at paras 35-38). We are of the view that the new arguments as to the motive for the threat are largely conjecture.

[37] In terms of the accused's intoxication at the time he made the threat, that was an admitted fact. It is noteworthy that intoxication was not raised as a defence to the charge of utter threats although that offence is a specific intent crime for which intoxication is a defence (see *R v McCraw*, [1991] 3 SCR 72 at 82, 1991 CanLII 29 (SCC)). There is no evidence of material intoxication.

[38] The accused also says, by failing to specifically mention the analysis in *R v Villaroman*, 2016 SCC 33 [*Villaroman*] in her decision, the trial judge's analysis is suspect. We disagree. Judges are presumed to know the law, particularly law that a busy trial judge uses on a day-to-day basis (see *R v Burns*, [1994] 1 SCR 656 at 664, 1994 CanLII 127 (SCC)). The trial judge did not have a positive obligation to cite and discuss *Villaroman* before using the accused's after-the-fact conduct in the way that she did.

[39] We are also not persuaded by the accused's submission that the trial judge was not alive to the frailties of eyewitness testimony and her obligation

to review all of the evidence relating to identification with care. The issue of reliability of the identification evidence was argued by both trial counsel and was referred to by the trial judge in her decision when her reasons are read functionally. We see no merit to this submission.

[40] This is a case similar to *Hay*. A piece of circumstantial evidence was critical to confirm frail identification evidence. However, unlike in *Hay*, nothing in the appellate process has arisen to demonstrate an error in principle by the trial judge or new facts that take away from the inference drawn on the circumstantial evidence such that there is a risk of a miscarriage of justice.

[41] We are mindful of the comments in *Villaroman* that, in a reasonableness review of a verdict under section 686(1)(a)(i) of the *Code*, where the case turns on circumstantial evidence, our role is not to retry the case as to what inferences we would draw from all of the evidence. Rather, as Cromwell J explained, our mandate is to determine "whether the trier of fact, acting judicially, could reasonably be satisfied that the accused's guilt was the only reasonable conclusion available on the totality of the evidence" (*Villaroman* at para 55).

[42] Central to our role in a reasonableness review of a verdict that turns on circumstantial evidence is the question of deference. Our task is not to draw our own inferences but, rather, to consider whether the inferences drawn by the trial judge were reasonably open to her in light of the standard of proof. The line between speculative inferences and inferences that give rise to a reasonable doubt is for the trial judge, not us (see *R v Hall*, 2018 MBCA 122 at para 166).

[43] The accused's argument that his threat in reaction to being accused of the robbery should have been given no probative value is not persuasive (see *R v Chafe*, 2019 ONCA 113). The situation here was one of the evidentiary value of the accused's reaction to an accusation by his own words, not merely his demeanour or failure to deny when confronted with an allegation. Although the manner in which an innocent person should react to a false allegation is a delicate matter on which to draw an inference of guilt (see *R v Stark*, 2004 CanLII 39012 at para 16 (ONCA)), the situation here is unambiguous. The accused's spoken threat was readily open to the interpretation that he was indignant at having been apprehended for the robbery and he would take retribution against the sales associate "next time" he encountered her because she "snitch[ed]" on him. We are satisfied that such words, in the context in which they were uttered, could be seen as an implicit adoption by the accused of the accusation of him being the robber (see *R v Scott*, 2013 MBCA 7 at paras 10-15). In summary, the inference of consciousness of guilt drawn by the trial judge from the after-the-fact conduct of the accused was reasonably open to her.

[44] In our view, despite the frailties of the identification evidence in this case, based on a close scrutiny of the entire record, the confirmatory evidence arising from the cumulative effect of the accused being in the vicinity of the store when the robbery occurred, his attire, and his after-the-fact conduct when detained and accused of the robbery persuades us that the verdict is not unreasonable within the meaning of section 686(1)(a)(i) of the *Code* (see *R v Sinclair*, 2011 SCC 40 at para 69).

Disposition

[45] In the result, the appeal was dismissed.

Mainella JA

Rivoalen CJM

leMaistre JA